Road to Democratic State without Corruption

Sung-Soo Han
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Without Corruption

REPORT BASED ON THE SYNTHETIC ANALYSIS OF LAW, TAX AND ECONOMY

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Preface

It was not until liberation from Japan in 1948 that democracy was first introduced in Korea. For the past 55 years, Korea has developed democracy by trial and error. However, we still have a long way to go before achieving the true democracy. During the past century, Korea experienced 36 years of colonial rule by Japan, Korean War and the foreign currency crisis. In the meantime, she has also achieved the Miracle of Han River on the territory reduced to ashes due to Korean War, which was enough to attract the attention of the world.

The Korean government has emphasized only the external economic development and disregarded the development of an internal control system which is very important for the operation of a nation. As such, corruption budded in every corner of the Korean society and is in a dangerous level of shaking the nation. Nevertheless, there is a sign of change. The Korean society recently started to recognize the seriousness of corruption and is making efforts for eradication of corruption. Of course, everything cannot be changed for the better in a short time period. But what is clear is that the Korean society cannot undergo further development without eradication of corruption.

I had a privilege of learning about the U.S. society with precious taxpayers’ money from July 1995 to July 1997. For me, the period was both the hardest and the happiest time in my life. Above all, I consider this period my golden opportunity to learn the U.S. society. After passing the overseas study exam given to government officers, I went to the United States in July 1995, and acquired both the LLM degree in May 1996 and the LLM in Taxation degree in May 1997 at the Temple University.

I never even dreamed of studying overseas during my childhood due to economic reason. Had it not been for the government fellowship, I could not have had a chance to study in the bigger world. Thus, I gave my best efforts in understanding the true democracy and the new world. While studying there, I came to understand why it is so difficult for the Korean society to develop further. It was a good chance to study how the Americans have developed their democracy, what the merits of the American society are, and what we should learn from them.

This book has been already published in Korean in April this year. Since I believe that the core contents of this book can be commonly applied to each country, I felt that it would be useful to publish this book again in English for more people to share my idea. Developed countries and underdeveloped ones coexist in the global community. Peoples who made great efforts are in an advanced position in terms of development of democracy and economy while peoples who did not are in an inferior circumstance.

Just as Korea can never become a developed country without resolving its corruption problems, other countries which desire to become a developed country should also solve their corruption problem which is an impediment to the advance into a developed democratic country. Solving corruption problems is also necessary for the promotion of international transactions between developed and underdeveloped countries.

Since the problems of Korea are discussed through citing various cases in the United States, readers might feel that my writing is based on focusing on the United States. This is partly because I try to set forth my thought in short pages and partly since my knowledge is not the most profound. I think that there will be chances to further discuss the related problems by citing cases from various countries in the near future.

Although the Korea and the U.S. systems are compared and analyzed, I do not assert that we should simply take the U.S. system and incorporate it in Korea as is. What is important is for Korea to adopt aspects that not only work but are also applicable to Korea.
In order to set forth the principle of operation of a nation, the wide-ranging areas such as law, tax, and economics which are not normally handled in any single book are discussed in this book. While writing, I sometimes felt that explanation might not be sufficient. However, it is thought that there would be no great difficulty in understanding my writing since I tried to explain difficult situations in a comprehensible manner whenever needed.

It is difficult to understand or explain how a nation is run and developed on the basis of only one field of study, especially in the age of international competition. Although we can discuss national development based on economics, we cannot set forth the management of a nation and solve the problems of the Korean society based only on economics. Jurisprudence also, we cannot deny, has such limitation. Therefore, every field of study should be systematically combined, exerting synergy effect, in order to develop the Korean society. I developed my thought with this respect in mind.

We are living in the age of severe international competition. In order to survive the international competition, I believe it is necessary to study the science and system of more advanced countries with greater knowledge and develop them in a way suitable to each country. It is a base of competitiveness. When each citizen has the competitiveness, a nation also can have it.

This book presents a solution to problems which the Korean society faces by synthetically analyzing law, tax and economy, etc. which are the essentials to operation of a nation. Thus, I think that readers will be able to understand the operation of a nation to some extent by understanding this book. Democratic society cannot be developed by only the efforts of a few persons having political power. When the people have an active interest in the operation of a nation, logically expose its problems and present solutions, only then can democracy develop.

Although each sub-title of this book is independent from each other, the entire contents focus on anti-corruption. Thus, it is necessary to read the entire contents of this book in order to more clearly understand the anti-corruption theory. If we study developed countries, we could ascertain the difference between these countries and underdeveloped countries and also know what the underdeveloped countries should do.

Several staff members have been helpful with editing. I thank them all, and particularly, Un Sang Lee and Kwang-Duk Choi. Finally, with all my love, I dedicate this book to my wonderful wife, son and daughter.

Eun-Mi
Min-Young
Keum-Joo

Sung-Soo Han

Seoul Korea
July, 2003
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Chapter I. Reciprocity of Democracy and Economic Development

Development of Korean Democracy

After Korea was liberated from Japan following the end of World War II, democracy was introduced to Korea. It is a political system not inherently our own but which was developed in the West. And over the past 50 years, we have developed this system to some extent. However, we are presently facing many problems as a result of not fully adjusting ourselves to this system. Since the democratic political system was not originally ours, it is thought that it will take long time for us to fully get accustomed to this system.

Democracy introduced to Korea after our liberation was largely based on the laws of Japan. Persons having legal knowledge to some extent at that time were those who had studied the jurisprudence of Japan and the maintenance of the laws of Korea was placed into their hands. At the time of liberation, the important figures of the Korean Jurisprudence Society consisted of 5 to 6 persons of the Bo-Sung Technical School and 2 persons of the Yon-Hi and Hae-Hwa Technical Schools. The selection of professors to the Korean Jurisprudence Society was mostly performed by one person, Doctor Jin-Ho You.1

Since our laws were established under such circumstances, it could be said that it was inevitable for our law to imitate Japanese law. That is, there was not enough time to study and apply a more developed law, and also didn’t exist a circumstance that could judge whether or not such laws would be suitable to our own society.

Let's look at the United States which now has the common law system.2 The United States felt a necessity of law when people settled down on the New World. At that time there was no precedent since a new nation was in the course of being formed and therefore it quoted the precedents of the United Kingdom whenever necessary. However, to use the precedents of the United Kingdom was not easy because there were rarely specialists who studied the law of the United Kingdom. Since many people immigrated from several nations of the Europe, each group of immigrants used either a written law or a common law that they were accustomed to and felt comfortable with.

The reason why a civil law system was operated in the early state of settlement, especially in the field of criminal law, was that it was more convenient to apply written law than common law. In fact, it was not desirable to use a common law which largely consists of case laws in the new settlement area since it is reasonable, from the legal perspective, to punish persons who understand the existing law and knowingly violate it. That is, because it was easier to understand a written law than a common law, the utility of a written law was greater in the earlier stage of settlement.

However, as time went on and the society became more stabilized, there increased a necessity for a more developed law. Therefore, many people traveled to the United Kingdom to study law and came back to the United States as lawyers. As a result, the common law of the United Kingdom, such as the jury system which was developed in the United Kingdom, firmly rooted into the legal system of the United States. It seems that the Americans thought that a developed legal system, such as the jury system, was

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necessary for developing their society as one thoroughly based on democracy.

It is also understood that Japan, at the time when Western civilization was introduced in the past, accommodated a civil law which was more convenient to apply since common law was not easy to understand and difficult to apply. The law system that was introduced from Japan was used in the course of colonizing Korea and therefore included numerous undemocratic aspects. Such undemocratic aspects did not greatly change or develop after that. Thus, many of these undemocratic aspects presently remain unchanged. This is a reason why we should develop our present law system, which is presently outdated.

In the early 1990's, the Kim Young-Sam regime demolished the Central Government Building which Japan had built to rule Korea, a humiliating vestiges of history. Even though we demolished that building, it does not mean that we have really liquidated all the cultural vestiges of Japanese imperialism by demolishing the Central Government Building.

I believe that it is time to liquidate all the cultural vestiges of Japanese imperialism, which is not conspicuous. This work would be ten or hundred times more difficult than demolishing that building. This work cannot be easily done by a dismantling machine like demolishing a building, but can be done only by paying our sweat and effort as the price.

Persons who have been vested rights as a heritage of the old times must be able to give up those privileges for the overall good of our society. In addition, we must improve our current system so that they cannot but give up their privileges. By doing so, we should make such a circumstance where every person in our society can equally exercise his right and fulfill his responsibility as a democratic citizen.

Although the Korean Constitution established through our consensus does not award anyone a privilege, there still exist privileged classes in our society. Therefore, even if they violate a law, the law does not apply to them. Such a privilege is a heritage of the times when Japan ruled our nation.

If we compare a nation to a human being in terms of structure, the law is like a bone of a nation. A person having weak bones will have difficulty in living a healthy life. Although a baby is born with weak bones, his bones become stronger through nutrition and exercise. A person who has formed strong bones through enough nutrition and exercise when young can live a healthy life even when he becomes an adult. But, a person who did not cannot live a healthy life.

Our history of democracy started when Korea was liberated from Japan in 1945. Although we have over five thousand years of history, our history of democracy is at best approximately 50 years. Thus, from the viewpoint of democratic politics, Korea at the time of liberation was like a new born baby. Most of the people who had lived under the Chosun Dynasty and the Japanese imperialism hardly possessed any understanding of democracy. Under such circumstances, we chose democracy and have endeavored to develop the democratic system to this day.

Since there were only a few law specialists and most of people had no experience with the democratic system, democracy could not operate normally. As a result, our society has suffered from serious side effects. Because rapid economic development was necessary, the role of the executive was emphasized and the executive exerted much more power compared with other branches. As a result, the legislature did not properly perform its functions and the quality of the members of the legislature could
not improve, delaying the development of democracy. Such a stagnant phenomenon did not only take place in politics but also in the world of academia. Choi, Jong-Go, a professor of Seoul National University, says in his book the “History of Korean Law” that “the bait of small bread was a temptation too weak to make Korean scholars of law academically fatten”.

Even up to now, study books concerning jurisprudence are rarely published and there rarely exist any law journal that speaks for the Korean jurisprudence academic society. Even in Japan, our neighbor, a countless number of law journals that are of a high level are being published. Thus, it is humiliating that we have nothing to show but crude exam magazines.  

From the viewpoint of the development of democracy, we could say that Korea is now approaching its childhood phase, and getting out of infancy. Right now the most important thing for us is to strengthen a skeleton of democracy. If we do not do so, it will be very difficult for us to support our society.

Nowadays, a problem of our society is that many people believe that the development of Korean laws is limited to some extent because of a cultural difference between Eastern and Western regions, and as with other underdeveloped or developing nations, Korea cannot help but maintain a system which includes undemocratic factors instead of a system which is rational and reasonable.

If we understand the laws of a nation, we can understand that nation more easily. Law reflects the culture of a nation. A society whose culture does not develop is a dead society.

Superior races adjust themselves to different circumstances by developing their culture and there does not exist any culture which does not change. If there is any difference between cultures, it’s a velocity of change. We live under the circumstances where even the meaning of religion changes as time passes. Culture must not remain unchanged for a nation to develop. For development, a nation must further expand its own merits and dynamically advance by absorbing and developing the merits of other nations. Since we live in an age of internationalization, that necessity should be emphasized much more.

If a nation does not understand the culture of a highly developed nation and create its own new culture based on the developed culture in terms of development, the nation will not be able to compete with a more developed nation. We now live in a society where power governs and power emerges from an advanced culture that can harmonize with any circumstance.

Japan was under the influence of Confucianism as was Korea. However, Japan started to accept the Western culture and institutions earlier than Korea. By accelerating the acceptance of the Western culture after the Meiji Restoration in 1868, Japan was able to become a developed nation far before Korea.

We can know through the report of the “Shinsa Yuram Dan”, a group sent to Japan to study the country, how King Ko-jong and government officials responded to the swift change in Japan and how Japan was changing at that time. In 1881, the members of the Shinsa Yuram Dan came back to Korea and had a meeting with the king to report what they saw and heard.

3 Jong-Go, Choi, supra note 1, p.473.
At the place where they made their report, the king asked “How are the customs of Japan?” Park Jung-Yang answered “Since the character of the Japanese is like that of children and women, we can easily know whether they are happy or angry. And they are imitating the politics and law of the West without considering its merits and demerits and amending theirs every day. Thus, we can know what they like.”

The king then said, “It seems that the Japanese like the laws of other western nations without analyzing its contents. That’s why their appearance is so westernized and looks so unpresentable.” Again Park Jung-Yang said “Since the character of the Japanese is originally narrow-minded, they accept the laws of another nation without any change and do not analyze the contents. Therefore, their own way of dress has changed and moreover, they wear Western-style clothes in public. This is really a big mistake of Japan. However, when government officials are off duty, they use their traditional things.”

Cho Jun-Young said, “Your Majesty, what you say is truly correct. Japan should have set aside the bad and accepted only the good. However, since Japan has accepted everything that is western, today Japan no longer retains anything inherent except its land and people.”

After that, Yeum Se-Young said, on the basis of his observation experience of the Ministry of Justice, “The Japanese have the tendency to inherently try and imitate something strange when they see it. Even when it comes to law, they are trying to amend it by all means, throwing away their old law. Their code book is not of one volume. Last winter, they first established and made public their criminal law code, which consisted of two books. The criminal law is to be effective from January of next year and it imitates the law of other nations. They tried to accept the good aspects of other nations but the law is very complex since each article is only minutely enumerated and classified. In conclusion, the point of the criminal law is that torture is to be abolished and imprisonment system is to be enforced. The history of the criminal law is set forth in the book concerning the organization of the Ministry of Justice. They also use the solar calendar of the West instead of the lunar calendar that we use. After they opened their door to the West, they are discarding their old weights and measures system regardless of whether it is good or bad to accept those of the West. However, there now are persons who deplore it and especially men of intelligence deplore the change of dress.”

We can understand very well from the passage above an open-door policy atmosphere difference between Korea and Japan at that time. It is very clear that Korean leaders fell greatly behind the stream of the international society while the Japanese leaders actively accepted the culture and institutions of the West.

In conclusion, due to Korean leaders’ way of thinking and lack of effort, Korea became subject to the rule of Japan several decades after Japan opened its door to the West. The delayed development of its culture and institutions has had a great effect on Korea’s economy and society. As of 1995, approximately 100 years later, the GNP of Japan is more than 12 times that of Korea and the per capita national income of Japan amounts to $41,185. In contrast, our per capita national income is merely $10,037.
Democracy and Economy

In the early stages of establishing the Republic of Korea as a democratic nation, there was a necessity for the government to guide Korean enterprises since it was difficult for them to develop by themselves. This government-led policy had an effect upon the economic development to some extent and Korea was also able to attain a high economic development with the effort of all the people. However, when an enterprise was later on able to develop on its own, the government continued to regulate business activities, and as a result, government-business collusions, which deter national development, took place.

The preamble of our Constitution manifests our ideal of democracy with the expression, “To destroy all social vices and injustice, and to afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conductive to private initiative and public harmony, and to help each person discharge those duties and responsibilities concomitant to freedoms and rights...”

Also, Article 119 of the Constitution provides that the economic order of the Republic of Korea shall be based on respect for the freedom and creative initiative of enterprises and individuals in economics affairs. The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic subjects. Thus, our Constitution is in pursuit of a “market economy based upon democracy”.

In general, many people think that the “market economy based upon democracy” is the most ideal economic system because the “planned economy of communism”, that is directly the opposite of a market economy, has not satisfied the desire of the people and as a result, is now fast evanishing in the world. Under market economy, the interference of government is restrained to the minimum level that is necessary for maintaining the market economy, and each economic entity forms a free market, freely acting according to the principle of supply and demand under a well-prepared democratic system. Developed nations, such as the United States, have made countless efforts to maintain a market economy and accomplished a great success.

In general, under market economy, wealth is allocated according to the degree of effort. Thus, if there is no effort, it would be difficult to acquire wealth. Productivity increases with input of effort. The greater the increase in productivity, the greater the increase in the value of each economic entity.

If there were no competition, it would be difficult for the productivity of each economic entity to increase. Therefore, it is necessary to promote a circumstance where each economic entity can freely compete under the same condition. For example, if the social status of a person is predetermined from his birth and a society is operated based on such a system which rarely changes, the productivity of each individual would not increase. If social status and wealth were all predetermined, persons who are comparatively in an inferior position would not try to acquire a higher social status and wealth. On the contrary, since persons having superior status can maintain their social position and wealth without making much effort, their motive for competition will
decrease and as a result, their productivity will not increase.

In general, competition is more severe when four persons are competing against each other than when there are only two persons. That is, as the number of competitors increases, the more intense competition becomes. If an incentive could be continuously given to a person who wins in competition, competition would result in the improvement of productivity.

Let’s take an example of sportsmen. It would be needless to say that it is more difficult to become the best player in the world than in Korea alone since far more sportsmen compete with each other. Nevertheless, since Korean athletes are given a greater reward when they win a world-wide competition than a domestic competition, they will try to become a world-wide top player despite facing all kinds of difficulty.

Normally, irrespective of the kind of sport, the skills of players gradually improve as time passes and as a result of severe competition. Therefore, in order to become a world-wide top player, players now should make more efforts than the players of the past. Since the improvement of skill guarantees an enormous amount of prize, it leads to the improvement of productivity.

It is not difficult to explain why developing or underdeveloped nations economically fall behind developed nations. Developed nations have created the circumstance under which each economic entity has to compete freely against each other. If these entities can improve their productivity through competition, they can receive more reward. And such free competition will result in the improvement of national productivity as a whole while becoming a source of a wealthy nation.

In the case of an underdeveloped nation, the circumstance where economic entities can compete each other has not been formed well like that of a developed nation. Although they shout “democracy”, since their democracy is not substantial but only formal, there exist many privileged classes. Under such a structure, men of wealth and politicians are willing to collude with each other and monopolize social wealth. Thus, each economic entity has no motive to compete and it eventually leads to a decrease in productivity.

Sometimes, such vices have a bad effect on society as a whole and lead people to think that they cannot succeed by fair competition. Thus, abnormal illegality and corruption are deemed as normal. The principle of competition vanishes, economic entities conduct themselves abnormally, and it results in the nation’s decline.

The world is in the stage where a nation can not exist without engaging in trade with another nation. Therefore, we call the present age that of infinite competition. In conclusion, since nearly every nation competes with each other, if the productivity of a nation falls behind that of the other nation, the wealth of a nation with lower productivity is transferred to the other nation with higher productivity. Therefore, each nation now tries to deter the influx of goods of a nation with competitive power by means of tariffs or non-tariff barriers. However, such measures have limitations. Should a nation want to sell automobiles in the other nation, the nation should give that other nation a chance to sell automobiles in its territory. Otherwise it would be very difficult for the two nations to maintain cross-border transaction.

A nation or an enterprise with low competitiveness generally suffers in competition with other nations or enterprises. An enterprise that is close to bankruptcy will have difficulty in selling its assets, even at giveaway prices. On the other hand, the enterprise which buys the assets at the giveaway price will have its say.
The sole method that can survive the infinite competition age is to cultivate competitiveness. To strengthen the national economy, the government should, based on substantial democracy, deter the chance of illegality and corruption, such as business-government collusion, by developing our present system to the level of a developed nation and create a circumstance for each economic entity to be able to freely compete against each other. Enterprises also should improve its competitiveness to compete with other enterprises in the international community as well as in Korea.

**Law and Economy**

The economic subject is generally classified into a household, an enterprise, the government, and a foreign nation. Each economic subject consists of countless economic entities. A nation has countless households and each member of a household constitutes an economic entity. In this respect, an enterprise, the government and a foreign nation are the same.

Where each economic entity congregates, they constitute a national economy and furthermore the world economy. For national economy to become strong, an individual economic entity must be of strong health. When healthy power of each entity congregates, national economy can also have a strong power.

If an individual economic entity becomes ill, a nation which consists of individual economic entities will also become sick. If the symptom of each entity worsens, a nation may also face a ruin which can not be recovered again. Presently, Korea is suffering from a serious disease. If we do not cure the serious disease, Korea could fall into a ruin.

After liberation, Korean society has largely endeavored to attain external growth in order to break out of poverty. Along this process however, we have neglected to study how an individual economic entity, which is a basis of national economy, has an effect on the overall national economy and how such an individual economic entity can become of strong health.

Many people have thought that if the economic scale of a nation becomes larger and the level of income of people is improved, every problem could be solved. The government has neglected to recognize, study, and improve the serious illegality and corruption problems occurring in the course of economic development and, as a result, each economic entity has developed an internal disease due to the illegality and corruption. It is thought that such problems are a common phenomenon which many nations experience in the course of economic development.

Under the influence of military administration, a “display” administration spread into every corner of our society. Only results, rather than the process of work, were thought to be important. Thus, it was disregarded that a society was becoming internally sick. When a bridge or a building was constructed, if their appearance seemed specious, it did not matter whether or not safety rules related to construction were abided by at the time of construction or it was not considered how many persons could be sacrificed due to the collapse of a building. Accordingly, whenever a big accident has taken place, enormous repair expense and indemnity, which would not have occurred if the construction were normally done at the outset, have been paid.

Since only the external aspects were emphasized, the development of a system that is
the skeleton of a nation was disregarded. Even the system (law), with its many loopholes, didn’t perform its function properly. Persons with power and wealth have not been subject to discipline even though they have violated laws and as a result, our society has developed abnormally.

Our economy was largely developed under the active interference of the government. Thus, it could be said that the fundamental responsibility of our nation being placed in its present crisis lies upon the government rather than enterprises. The government-business collusion and corruption derive from the government rather than citizens.

If politicians and public officials do not receive bribes, it would be difficult for corruption to occur. Even if an enterprise tries to tempt politicians and public officials through family relations, regional relations, and school relations, where a thorough system that can deter them is prepared and executed, such corruption would be unable to spread like a poisonous mushroom.

To this date, the government has not taken any thorough or drastic measures against corruption cases. Thus, whenever the government is changed, corruption cases are disclosed to the public. This shows that we could never cure the disease of our society by a stereotyped method. Thus, it should be noted that the most important thing is to improve a system (law) that can serve as an automatic controller and prevent corruption.

Since the government has neglected the study and development of law and administrative system supporting democracy, we are now paying the price for it to the miserable extent. We cannot cure, within a short time, our disease which has become chronic for a long period of time, and it would be very unwise to think that we can cure it within a short time.

It would not be easy for Korea to attain an advanced system that other nations have developed over hundreds of years within several decades. However, thanks to the development of science, etc. it might be possible that we develop at a faster pace than these nations did in the past. We can reduce the time of attaining such system and economic development by correctly grasping what our problem is and by making a desperate effort to improve our situation.

Since there are many aspects that need surgery in our society, it is necessary to train as many adept doctors and nurses as possible. Here, training doctors and nurses refers to training men of ability who can study and improve our system. Unless we know what the problem is, we cannot properly operate on a patient.

If the system has a problem, we should find out the cause of the problem. If a doctor makes a wrong diagnosis, a patient could die after the operation. Thus, it is necessary to train such men of ability who can lead the development of every field including law and we should study and develop the system that is best suitable to us by studying the system of developed nations as soon as possible.

In the case of the United States, from 1789 to 1930, two thirds of the senators and about half of the members of the House of Representatives were lawyers; and this percentage seems to have stayed fairly stable. Lawyers were scattered about other government departments as well.

Before the French Revolution, there was an assembly of Estates-General made up of representatives of the three estates: clergy (first estate), nobility (second estate) and everybody else (the third estate). The vast majority of the men elected to the Estates-General were residents of cities and towns, two-thirds of whom had some training in the law - indeed, lawyers dominated the third estate. On June 17, the third estate
overwhelmingly approved a motion by Sieyes that declared the third estate to be the National Assembly and the true representative of national sovereignty. The third estate now claimed legitimate sovereignty and an authority parallel, if not superior, to that of the king of France. The first estate voted to join the third. This fact shows that the third estate, which consists of the common people, became the foundation of development of French democracy.4

What about Germany? In 1848, state, municipal, and judicial officials, lawyers, university professors and school teachers comprised about two-thirds of the Frankfurt Parliament. Since about a third of the delegates had some legal training, many people began to refer to the gathering as a “parliament of lawyers,” whose members debated far into the night.5

What about our reality? Our National Assembly has been just a branch that formally and simply passes bills made by the executive to date. The National Assembly has only been in pursuit of profit for each political party and busy in dissipating taxpayer's money through overseas travel, etc. rather than concentrating on activities for the people. Thus, the people can rarely see what is actually being done in the National Assembly.

Compared with developed nations, the quality of members of the National Assembly has been very low and there are too many members now who have even forgotten what their primary goal should be. Hence, it is very difficult to expect productivity from them.

The most important function of the legislature is to make a law that may serve as the skeleton of a nation. If members of the legislature have no basic knowledge about law, how can they perform any type of legislation activity? If they have no knowledge, they have to make an effort to obtain knowledge. However, since they are busy with overseas travel and dissipation, etc., their knowledge cannot improve. As a result, bills made by the executive are mostly passed without filtering.

To develop our nation, cultivating many able lawyers through the improvement of the education system is absolutely necessary. By doing so, more persons who have received such good education may enter into the National Assembly and serve the people by fully exerting their ability.

When many competent lawyers are cultivated and become members of the legislature, and when a solid system which most people can consent with and follow is established, the development of true democracy and economy will follow.

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Role of Government and Economic Theory

The government directly and indirectly performs an economic activities and the effect of these activities on the overall economy is great. The government is able to create the circumstance in which an enterprise can actively perform its economic activities, and when such circumstance is established, the economic activities of an enterprise can flourish. However, this does not mean that the government should actively participate and lead the economy. If the government abnormally mobilizes

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5 John Merriman, supra note 4, p.734.
financial and monetary policy that benefits a specific enterprise and regulates the activity of an individual enterprise by excessively intervening in an economic activity, such activities could disturb the order of a market economy.

“The best economic circumstance creating activity” of the government which I will set forth does not refer to the activities of regulating the business activity of an individual enterprise. On the contrary, it means that the government should furnish the enterprises with indirect economic supports such as the improvement of the system for them to perform an economic activity according to the well-established rules and the principle of competition without distorting economy.

When an enterprise becomes too enormous and there is a concern of the enterprise distorting a market, the government has to take proper measures to cure the problem. If it is suspected that an enterprise has accumulated wealth through collusion with politicians, the government should create an appropriate system that can prevent this from happening. That is, the government should concentrate its administrative power on creating the best economic circumstance rather than directly regulating the activities of enterprises.

The legislature, the judiciary and the executive should all together make the greatest effort to create the best economic circumstances. The legislature should do its best in making necessary rules to create the best economic circumstance, the executive should oversee whether such rules are being properly followed, and the judiciary should punish those who violate such rules. Only under this circumstance will a social and economic circumstance where everyone can abide by rules be formed. When this circumstance is formed, privileged classes would vanish, everyone would abide by rules, and the circumstance for a market economy to properly function would be created.

When we try to apply the economics of a developed nation to Korea, the reason why it does not work well is because our economic circumstance is quite different from that of a developed nation. In fact, since the government would not try to actively interfere under a market economy, the execution of an economic policy under market economy would become easier than where the government actively interferes in a market whenever possible.

Because an individual economic theory is deduced under an assumption that other terms are constant, economic theory itself is not perfect. Economics, like other sciences, is merely a study which pursues the best method to solve pending problems. What is more, since an economic phenomenon becomes complex with the development of civilization, an economic theory cannot accurately explain an ever-changing economic phenomenon. Thus, existing economic theories are subject to change with the appearance of new economic phenomena which were previously non-existent.

The following article was inserted in the Joong Ang Il Bo dated May 5, 1998.

“There is no eternally established economic theory. An established economic theory is wavering because of the economic boom of the United States, which has been continuing for 7 years. The problems with regard to the following theories are now being presented by the economics academia of the United States.

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6 Korean daily newspaper
[1] If financial deficit decreases, growth slows down.

The financial deficit of the federal government, which amounted to $200 billion in 1992, is now near to zero. Nevertheless, economic growth rate amounts to 3.8%. Especially, the growth rate of the last first quarter amounted to 4.2%. With regard to this, economists tend to think that the reduction of financial deficit can boost the economy by stimulating the capital expenditure together with low interest.


World economy has maintained growth of more than 2% since 1994 but international oil prices have maintained a low level. Recently the price of the Middle East oil is similar to the actual price ($3 per barrel as the price of the year 1973) when there was an embargo on the export of oil of the Arab states. The reason is that new oil wells were exploited and the expense of producing oil decreased.


From the latter half of the last year, unemployment rate remains approximately 4% which is the lowest since the early 1970s. However, the rate of price increase of the first quarter remained at 0.2%, which is the lowest since 1964. Robert Shimer, professor of the Princeton University, says that the cause is due to an aging society. He says that the reason is that the number of teen-age workers whose unemployment rate is 5 times more than that of other age groups has decreased and as a result, statistical unemployment rate decreased than in reality.


Friedman said that inflation is always a phenomenon related to currency. It means that excessive currency issuance of the government is a direct cause of inflation. This is not an incorrect theory, but the reciprocal relation gradually is collapsing. Even though the supply of currency has greatly increased since the mid-1990s, inflation phenomenon is not conspicuous yet.


The established theory is that if the price earning ratio (PER) is high, the stock price is excessively evaluated and is collapsing. Jeremy J. Siegel, the professor of the University of Pennsylvania, developed a theory that stock showed the investment profit rate 2 times more than a debenture. We can not say only by observing the PER without taking into consideration investment funds that there is an excessive boom of a stock market."

These economic theories will again change as time goes on. This shows that economics itself has no perfect theory and different theories could be applied depending upon the specific situation of each nation. Under a market economy, the necessity of the government directly regulating the activity of enterprises decreases and the role of the government narrows down to coordinating the flow of the nation-wide economy by properly using financial or monetary policies when necessary. Therefore, the government would be less compelled to mobilize a complex economic theory that is not perfect.

To maintain a market economy, the government should study and develop a system that necessitates an individual economic entity to actively compete against each other.
and create a circumstance where persons who use an abnormal method or do not make an effort cannot help but be weeded out, in accordance with a thorough competition principle. Where such a circumstance is created, the government can perform its economic policies with greater ease.
Chapter II. Efficiency of National Administration

Development of Constitution

The level of development of a constitution can become an important criterion to
gauge the developmental degree of democracy of a nation. In this respect, the Korean
Constitution also cannot be an exception. When we compare a nation to the body of a
person, since the constitution and laws of a nation come under its skeleton, we cannot
expect national development without the development of constitution and laws.
Constitution and laws are the system of a nation and the development of the system is
closely related to the efficiency of national management. In this respect, it is thought
very important to observe the transition of our constitution.

The Preamble of the first Constitution promulgated on July, 17, 1948 is as follows:

“We the people of Korea, proud of a resplendent history and traditions dating from
time immemorial, setting up the Republic of Korea with the March First Independence
Movement of 1919 and succeeding to the great independence spirit promulgated over
the world, and upon setting up the independent democratic state, having determined to
consolidate national unity with justice, humanitarianism and brotherly love, and to
destroy all social vices and injustice and to establish all democratic systems and to
afford equal opportunities to every person and provide for the fullest development of
individual capabilities in all fields, including political, economic, social and cultural
life by further strengthening the basic free and democratic order conductive to private
initiative and public harmony, and to help each person discharge those duties and
responsibilities concomitant to freedoms and rights, and to elevate the quality of life for
all citizens and contribute to lasting world peace and the common prosperity of
mankind and thereby to ensure security, liberty and happiness for ourselves and our
posterity forever, do hereby establish, at the National Assembly consisted of
representatives elected justly and freely by the people, this Constitution on the Twelfth
Day of July of Anno Domini Nineteenth hundred and forty-eight.”

The Preamble of the present Constitution promulgated on October 29, 1987 is as
follows:

“We the people of Korea, proud of a resplendent history and traditions dating from
time immemorial, upholding the cause of the Provisional Republic of Korea
Government born of the March First Independence Movement of 1919 and the
democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having
assumed the mission of democratic reform and peaceful unification of our homeland
and having determined to consolidate national unity with justice, humanitarianism and
brotherly love, and to destroy all social vices and injustice, and to afford equal
opportunities to every person and provide for the fullest development of individual
capabilities in all fields, including political, economic, social and cultural life by
further strengthening the free and democratic basic order on the basis of private
initiative and public harmony, and to help each person discharge those duties and
responsibilities concomitant to freedoms and rights, and to elevate the quality of life for
all citizens and contribute to lasting world peace and the common prosperity of
mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July of Anno Domini Nineteenth hundred and forty-eight, and amended eight times subsequently.”

After the establishment of the first Constitution, we came to our present Constitution having gone through eight amendments at the National Assembly which consists of representatives elected by the people.

The first Constitution consists of 103 Articles, whereas the present Constitution consists of 136 Articles including addenda. Therefore, the present Constitution has 33 more Articles than the first Constitution. Also, because the actual contents of the Constitution have been greatly changed, the present Constitution is approximately two times longer than that of the first Constitution in terms of contents. Thus, the present Constitution has more detailed provisions concerning the rights of the people and the system of a nation and it shows the Constitution’s development with the passage of time.

This fact can be also confirmed by comparing the Preambles of the two Constitutions. Whereas the Preamble of the first Constitution emphasized only the responsibility and duty of the people, the present Constitution secures the substantial freedom and rights by emphasizing the peoples’ responsibility and duty, as well as their freedom and rights.

As our Constitution manifests, when our society develops and becomes more complex, our system does so also. We can deduce this fact by studying the historical development courses of the laws and legal systems of developed nations. Since the development of a nation is closely related to that of the legal system, we need to exert our effort to develop our legal system. By doing so, we can obtain international competitiveness in all fields, such as politics, economy, society, culture, and so on.

As far as the success and failure of an enterprise are concerned, the efficiency of management cannot be emphasized enough. An enterprise must survive competition with other enterprises and cannot anticipate its development without the efficiency of management. Because a nation also carries out economic or administrative activities like an enterprise in a broad sense, if there is no efficiency of administration, a nation will also fall behind other nations in the severe international competition. Thus, if there is no efficiency of administration, we can not anticipate national development.

The efficiency of national administration improves when the efficiency of management, law, education and politics, etc. can be systematically integrated with each other. That is, since the efficiencies of management, law, education and politics are closely related to each other, they cannot be separately explained without considering their interrelationship. However, it would be very difficult to explain all of these at once and thus related issues will be set forth whenever necessary.

**Economic Sovereignty**

A nation consists of its citizens, a territory, and sovereignty. That is, for a nation to exist, there must be the people who are its members and a territory in which the people can live performing their production activities. Also a nation has to be able to exercise
its sovereignty, which is independent of other nations, in order to exist as a nation. If any one of these three factors does not exist, a nation cannot exist. Let's think about the times when Korea used to be under Japan’s imperialism. After Japan colonized Korea, we lost our sovereignty, which is the supreme, independent, and absolute right, as well as our territory. Moreover, we experienced the shame of losing even the concept of the people. A nation possesses real sovereignty when it can pursue its interest without being affected by other nations.

With the swift spread of internationalization, people now engage in business anywhere in the world as long as there is a profit. Thus, foreign enterprises will more actively engage in business in Korea and our enterprises also will advance and do business overseas more actively than now.

A nation with strong economic power will be able to exercise more power in the international market and thus, there will increase the possibility of the economic sovereignty of underdeveloped nations being greatly affected by the economic power of developed ones.

When underdeveloped nations receive a loan from developed nations, the developed nations will try to exercise their rights as creditors and the possibility of the developed nations having an effect on the economic sovereignty of underdeveloped ones will increase. Furthermore, when enterprises from developed nations engage more actively in business overseas than those of underdeveloped ones, the possibility of such enterprises directly or indirectly influencing the economic sovereignty of the underdeveloped ones will also increase.

If one nation gives the other nation a dollar of profit, the former should be able to take a dollar of profit from the latter in order to maintain economic equity. Otherwise, equity between nations cannot be maintained.

As developed nations are more advanced than developing or underdeveloped nations in almost every respect including economic power, developing or underdeveloped nations have to exert more effort than developed ones to maintain equity. Since we are now living in an age of high-tech, nations that possess a high-level of knowledge will be more competitive and thus, could have an effect on the economic sovereignty of the other nations. Therefore, underdeveloped or developing nations need to make every endeavor to keep the economic equity.

Administrative Efficiency

Now we are severely competing for survival in a highly-developed capitalism society. Many communist nations that had maintained the communist system for a long time including the old Soviet Union are removing the shell of communism and putting on capitalism clothes since they are now feeling the superiority of capitalism.

As long as a new ideology superior to the present ideology based on the democracy and capitalism does not come into existence, it seems that the capitalism economy system based on democracy would continue. Unlike planned economy under the communist ideology, economic subjects under capitalism economy are pursuing maximum profit in a free competition market. To create a maximum profit, each economic subject must achieve a maximum effect with a minimum sacrifice. Enterprises have introduced an accounting concept to clearly measure the efficiency and
compare their efficiency with that of the other enterprises.

Can a nation also introduce an accounting concept to measure its efficiency? Of course, it is not thought impossible to do so. Unlike an enterprise, a nation is performing various functions which cannot be accurately measured based on mere numbers. Thus, it wouldn’t be easy to measure a nation’s efficiency.

National administration comprises various fields such as foreign, domestic, financial and economic, and national defense administration, etc. As the outcome of these administrations cannot be shown by figures, it would be difficult to evaluate it like the outcome of management of an enterprise. However, we can physically feel the outcome of this national administration in our life even though it cannot be clearly shown by figures.

Let's reconsider our situation under IMF control. At that time, we could actually feel the effect of financial and economic administration lacking efficiency. Of course, it could not be said that the inefficiency of financial and economic administration was the sole reason which had placed us in such situation. This outcome came from various complex factors.

People could actually feel the devastating effect caused by the inefficiency of the administration even though the inefficiency could not be shown by clear figures. However, since the world is swiftly developing and everything is becoming ever more complex and diverse, we cannot live on evaluating what is occurring in our real life just by feeling. Accordingly, management and administration based on more scientific concept are required. When enterprises and nations can solve their problems by evaluating the outcome of management and administration and measuring its efficiency, such enterprises or nations will be able to improve its efficiency and productivity in a greater magnitude than other enterprises and nations which do not take such steps. Since the effect of the inefficiency of public administration on national economy is very important in terms of national economy, more understanding on it is necessary.

Just as we need to analyze the financial statement of an enterprise to understand the business situation of an enterprise, we should understand the financial statement of a home or a nation to understand its economic situation. If you can understand well the basic concept of the balance sheet and the profit and loss statement that are to be discussed in the following pages, you will be able to understand various issues to be discussed later and gain knowledge necessary for the better understanding of economy.

**Balance Sheet and P&L Statement of Home, Enterprise and Nation**

Any home has a property. This property is called an asset from the viewpoint of accounting. This asset is classified into human and material resources. Provided below is a table to facilitate your understanding. This table is the balance sheet used to show the financial position at a certain point of time. The financial position of a home can be shown using this table. Although the value of assets of a home cannot be manifested by precise figures due to the characteristic of a home, this table can be useful in understanding the financial position of a home.
As shown above, the financial position of Han family can be classified into assets, liabilities and capital from the viewpoint of accounting. Assets consist of tangible and intangible assets that have monetary value. Main assets are tangible assets such as savings, house, land, belongings, loan and human resources that can be converted into the monetary value.

Where a person has a unique knowledge or skill which is unfamiliar to others, that person can possess greater value than others in a labor market and his/her labor is subject to higher appraisal. Such knowledge and skill are obtained through his/her own endeavor. As a means to increase the value of labor in a market, people are endeavoring to obtain greater knowledge and skill.

If we lack assets, we can increase the value of tangible assets by borrowing money, etc. from others and can also increase the value of intangible assets through education. This is called an economic activity.

If you subtract liabilities you borrowed to increase your assets from total assets, you have capital which is the net assets. Therefore, you can measure the value of your home by converting the capital of a home into cash.

\[
\begin{array}{c|c|c}
\text{Assets} & \text{Liabilities and Capital} \\
\hline
\text{savings} & \text{Bank loan} & \text{capital} \\
\text{house} & \text{Personal loan} & \text{Total} \\
\text{land} & \text{xxx} & \text{xxx} \\
\text{belongings} & \text{xxx} & \text{xxx} \\
\text{loan} & \text{xxx} & \text{xxx} \\
\text{personal asset} & \text{xxx} & \text{capital} \\
\hline
\text{Total} & \text{xx} & \text{xxx} \\
\end{array}
\]

\[
\text{Assets} = \text{Liability + Capital}
\]

\[
\text{Capital} = \text{Assets} - \text{Liability}
\]

This formula shows that when assets increase or liabilities decrease, capital increases. But the increase or decrease of liability does not change the capital. In other words, since the increase or decrease of liability results in the increase or decrease of the same amount of assets, the capital does not change.

For example, if you borrow KRW 20 million from a bank, it would increase the value of your assets (savings and cash, etc.) and also increase your liability by the same amount. But the capital would not change. Although you will eventually repay the
money to a bank, the capital will not change since both your assets and liabilities decrease.

However, the above explanation is correct only in the case that there is no interest on loan. If you pay interest to a bank, it will not change your liability but will decrease both assets and capital at the same time. On the contrary, if you have a balance after subtracting living expense, etc. from your wages, the balance does not change the liabilities but increases both assets and capital at the same time.

As shown above, the financial position of a home can be explained using a balance sheet. The balance sheet shows the financial position at a certain point of time. However, since the economic activity of a home is not static and each member continuously performs economic activities, the financial position changes continuously.

A profit and loss statement shows the outcome of management of an enterprise for a fixed period of time. The concept of a profit & loss statement also can be applied to a home to show the outcome of its economic activity during any given year.

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Receipts</th>
</tr>
</thead>
<tbody>
<tr>
<td>transportation</td>
<td>Salary</td>
</tr>
<tr>
<td>rent</td>
<td>Interest received</td>
</tr>
<tr>
<td>education</td>
<td>·</td>
</tr>
<tr>
<td>food</td>
<td>·</td>
</tr>
<tr>
<td>culture</td>
<td>·</td>
</tr>
<tr>
<td>·</td>
<td>·</td>
</tr>
<tr>
<td>·</td>
<td>others</td>
</tr>
<tr>
<td>Total</td>
<td>Total</td>
</tr>
</tbody>
</table>

The expense and revenue of each home are generally not the same. Where Han family earns a revenue of KRW 80 million, it would be unlikely that Han family would spend all revenue earned but would rather save a portion of the revenue or invest a portion on real estate and portfolio, etc. for the future.

For example, given that Han family earned KRW 80 million and spent KRW 50 million, the net profit of Han family is KRW 30 million (KRW 80 million – KRW 50 million). The KRW 30 million of net profit becomes assets such as cash or savings, etc. and increases capital by KRW 30 million.

<table>
<thead>
<tr>
<th>Revenue (80 million)</th>
<th>Expenses (50 million)</th>
<th>Net Profit (30 million)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Realization of Net Profit ⇒ Increase of Assets and Capital]

However, depending upon the situation, there can be cases where living expense
exceeds KRW 80 million of revenue.

For example, in the case where one member of Han family had an accident and paid KRW 50 million as medical expense, etc., Han family incurs KRW 50 million of additional expense. Therefore, if the living expense amounts to KRW 50 million in addition to KRW 50 million of medical expense, etc., Han family will have KRW 100 million of expense during the year. Accordingly, since revenue is KRW 80 million and expense is KRW 100 million, Han family suffers KRW 20 million of loss and therefore the assets and capital of Han family decrease by KRW 20 million.

<table>
<thead>
<tr>
<th>Expenses (100 million)</th>
<th>Revenue (80 million)</th>
<th>Net Loss (20 million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Loss = Expense – Revenue</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Accrual of Net Loss ⇒ Decrease of Assets and Capital]

Originally, the balance sheet and the profit & loss statement were invented to precisely show the financial position of an enterprise and its outcome of management as well as to measure the efficiency of an enterprise. However, since the activities of an enterprise become more complex as time passes, other financial statements besides the balance sheet and the profit & loss statement were developed which also show the financial position and management outcome of enterprises. As the financial position of an enterprise and a home can be understood in the same context, detailed explanation with regard to the balance sheet of an enterprise is omitted. The profit and loss statement of an enterprise is summarized as follows.

**Profit and Loss Statement**

xx Inc. (From Jan. 1 to Dec. 31, 2000)

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Receipts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost of goods xxx</td>
<td>Sales proceeds xxx</td>
</tr>
<tr>
<td>SG&amp;A xxx</td>
<td>Interest received xxx</td>
</tr>
<tr>
<td>· xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>· xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>Others xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>Total xxx</td>
<td>Others xxx</td>
</tr>
<tr>
<td></td>
<td>Total xxx</td>
</tr>
</tbody>
</table>

The above table shows the profit & loss statement of a company which manufactures goods. After subtracting cost of goods used to manufacture goods from sales proceeds, the company obtains sales profit which is the net balance between the cost of goods and sales proceeds. When all expenses accrued in the course of sale are subtracted from sales profit, net income which is the net balance between sales profit and all expenses is
obtained. That is, where the cost of goods is KRW 900,000 and the goods is sold at KRW 1 million, KRW 100,000 of sales profit is obtained. If KRW 50,000 of expense is paid in relation to the sale of the goods, the company can have KRW 50,000 (1,000,000 – 900,000 – 50,000) of net income.

Up to now, the financial position and management outcome of a home and an enterprise and how they can be numerically manifested have been discussed. Just as there are items which cannot be demonstrated by figures when explaining the financial situation of a home, there also exist items which cannot be converted into amounts when explaining the financial status of a nation. Of course, an enterprise also has intangible assets the value of which cannot be precisely measured. Then, how can we make a balance sheet for Korea?

Balance Sheet
Korea (Dec. 31, 2000)

<table>
<thead>
<tr>
<th>Assets</th>
<th>Liabilities and Capital</th>
</tr>
</thead>
<tbody>
<tr>
<td>people xxx</td>
<td>Overseas debts xxx</td>
</tr>
<tr>
<td>sovereignty xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>territory xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>other assets xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>overseas loan xxx</td>
<td>· xxx</td>
</tr>
<tr>
<td>· xxx</td>
<td></td>
</tr>
<tr>
<td>· xxx</td>
<td></td>
</tr>
<tr>
<td>Total xxx</td>
<td>capital xxx</td>
</tr>
<tr>
<td></td>
<td>Total xxx</td>
</tr>
</tbody>
</table>

A nation comprises the people, sovereignty and a territory. However, it would be very difficult to show the value of national assets by figures. Since a nation consists of numerous economic entities such as enterprises and households, a nation owns tremendous amount of the assets related to each enterprise and household as well as other assets such as social overhead capital, etc.

Today, with the development of commerce, it is very difficult for a nation to exist in isolation in the international community. With the increase of international transactions, each nation necessarily has overseas claims and liabilities just as individuals and enterprises have them. As with home and enterprises, the capital of a nation also is assets less liabilities. Therefore, the method to compute the capital is always the same irrespective of whether it is an individual or enterprise or nation.

Profit & Loss Statement
Korea (From Jan. 1 to Dec. 31, 2000)

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Revenue</th>
</tr>
</thead>
</table>

25
The profit and loss statement of a nation also can be classified into revenue and expense just as with individuals and enterprises. However, unlike individuals and enterprises, revenue largely consisting of taxes is obtained from taxpayers other than economic activities of a nation and is spent for the harmonious development of the society. Since a nation generally collects taxes anticipating expenditure, a nation is different from an enterprise which pursues the maximum profit. Unlike enterprises, a nation generally tries to make ends meet.

Management of Nation

The management of a nation must be also carried out according to the economic principle. In this respect, it is not different from the management of a home and an enterprise. To survive the severe international competition, the management activity must be more productive. For the future as well as the present, a nation has to maintain competitiveness by effectively managing the assets of a nation.

As shown in the above balance sheet, the people, sovereignty, a territory and overseas loan, etc. are the assets of Korea. Territory and the people are not infinite. Even though the population is continuously increasing, this increasing trend could cease in the future. Sovereignty has infinite value as an intangible asset which is difficult to be converted into the monetary value from the economic viewpoint.

A territory is very important as a source of natural resources. Because we do not have abundant natural resources, however, we are competing under a more difficult situation than numerous other nations with abundant natural resources from the viewpoint of economics.

There is overseas loan as an asset. The overseas loan means the money which Korea lent to other nation. It increases our assets if Korea can receive the principal and interest upon it. For economic activities, loans or debts are necessary. Where debts are used effectively, assets also can increase. But since debts cannot be infinitely borrowed and must be paid back sooner or later, it is limited.

Most of assets set forth above are limited in terms of creating a value. In other words, these assets themselves cannot infinitely create a value. Given that such assets are limited, we can easily know what we should do to increase our national wealth. Since we are now living in a high-tech age based on knowledge, it is needless to say that human resources is what we should emphatically cultivate.

Even until now, our people are remembering the pain under the rule of Japan and the agony of “dog eat dog” environment following Korean War. Nevertheless we are now proud of having accomplished the miracle of the Han River all together without giving up in spite of such difficulties. In spite of limited tangible assets, all the people have cooperated together to accomplish the myth of high-growth which was supported by the
cultivation of human resources through the passionate education and the earning of foreign currency through active export, etc.

To increase the productivity of a nation, we should invest more on human resources and increase the level of knowledge and technology. By doing so, we can increase the value of intangible and tangible assets including social overhead capital and secure an advantageous position in the international competition.

Our society is one of science, that is, a society dominated by knowledge. We live in a society where a single creative idea of a person can lead to many jobs and stronger national competitiveness. Therefore a nation should make the utmost effort to cultivate talented persons and it is a foundation of national management.

Regarding the increase of national wealth, let's think about what the desirable management is from the viewpoint of profit and loss. In 1996, revenue was approximately KRW 108 trillion, expenditure was KRW 102 trillion. Therefore the revenue exceeded the expenditure by approximately KRW 6 trillion. General accounting budget was approximately KRW 58 trillion, and special accounting budget was approximately KRW 45 trillion. Internal taxes held the largest portion approximating 72.3% of revenue. Then, to the larger order, customs duties, transportation tax, education tax, special tax for rural development, defense tax were 27.7% of revenue.

General accounting budget is as follows: 22.2% of defense expense, 18.9% of education expense, 8.6% of social development expense, 22.4% of economic development, 10.7% of general administration expense, 10.9% of local financial subsidies, and 6.3% of liability redemption and reserve expense. Special accounting budget consists of financing and investment, management of national estate, improvement of structure of fishing and agrarian villages, management of grain, transportation, railroad, communication, etc.7

Assets themselves, in some cases, create revenue. However, in most cases, expenses must be paid in order to utilize assets and increase the value of assets. Thus, depending on how effectively expenses are used, profit or loss accrues.

Large portion of expenditure is paid for human resources (people), social overhead capital and defense facilities, etc. Should the government effectively manage taxes collected from the people, it could increase the value of national assets including human resources and social overhead capital, etc.

Unlike an enterprise, national finance maintains the balance budget. Thus major portion of the revenue is spent toward increasing the value of national assets without securing a profit (revenue - expenditure). The success or failure of management of a nation depends upon the efficiency of finance activity. As with a home and an enterprise, the outcome of an effective management of a nation is ultimately manifested by the increase of total value of national assets including human resources.

**Example of New Zealand**

As discussed earlier, the success or failure of national management depends upon how effective the finance activity is. Just as it is very important for an enterprise to

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effectively manage and use its funds, it is also very important for a nation to effectively use its revenue.

An enterprise manages its funds through double-entry bookkeeping to effectively use the funds and measure the business outcome. Financial statements, such as the balance sheet and the profit and loss statement, etc. are prepared based on double-entry bookkeeping and the business outcome of the enterprise is measured using the financial data.

The Korean Budget Accounting Act provides that the business operated by government under “the special accounting” can be accounted by “the enterprise accounting principle” according to a separate law. “The accounting by the enterprise accounting principle” means recording by double-entry bookkeeping. Therefore, except for special occasions, the execution of budget is generally recorded and managed by single-entry bookkeeping. The single-entry bookkeeping can be easily understood since it simply records revenue and expenditure. However it is difficult to evaluate whether or not the budget was effectively managed and whether it accomplishes the purpose of internal control.

What about New Zealand? New Zealand manages the budget of government according to the generally accepted accounting principle and evaluates whether the budget is properly being executed based on the accounting principle. The management of budget is done under the concept of profit and loss, the national administration is classified into various factors, and each factor is evaluated from the viewpoint of productivity. Let's take tax administration as an example. National tax administration is classified into 15 fields and its productivity is evaluated as follows: policy advice, adjudication and rulings, taxpayer information services, revenue assessment and collection, management of overdue tax and returns, taxpayer audit, tax education office services, etc.

There are quantity, quality, timeliness and cost as the evaluation factors of administration and, on the basis of these factors, evaluation is made to determine whether or not the actual administration achieved an original target. These evaluation factors are further classified into smaller categories and individual evaluation is made at the end of the year to determine whether or not such a minute target was achieved.

At the end of the fiscal year, the business outcome for the year is recorded in various kinds of reports. The following financial report is one of such reports. The financial report of New Zealand Inland Revenue as of June, 30, 1997 is as follows:

<table>
<thead>
<tr>
<th></th>
<th>Departmental Forecast Report</th>
<th>Supplementary Estimates Changes</th>
<th>Final Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crown</td>
<td>336,233</td>
<td>(928)</td>
<td>335,305</td>
</tr>
<tr>
<td>Departments</td>
<td>1,328</td>
<td>0</td>
<td>1,328</td>
</tr>
<tr>
<td>Other</td>
<td>26,820</td>
<td>0</td>
<td>26,820</td>
</tr>
<tr>
<td>Interest</td>
<td>2,200</td>
<td>(1,200)</td>
<td>1,000</td>
</tr>
<tr>
<td>Total Revenue</td>
<td>366,581</td>
<td>(2,128)</td>
<td>364,453</td>
</tr>
</tbody>
</table>
Documents which the commissioner has to record, other than the above financial report, are the statement of financial performance, the statement of movements in taxpayer's funds, statement of financial position, statement of cash flows, statement of contingent liabilities, etc. including other 6 documents. Thus we can see that the administration of New Zealand is scientifically executed according to the accounting principle. The recorded financial reports are subject to audit by the audit office. The audit opinion with regard to the financial report as of June 30, 1997 is as follows:

“We have audited the financial statements on pages 19 to 109. The financial statements provide information about the past financial and service performance of the Inland Revenue Department and its financial position as at 30 June 1997. This information is stated in accordance with the accounting policies set out on pages 86 to 88.

The Public Finance Act 1989 requires the Chief Executive to prepare financial statements in accordance with generally accepted accounting practice which fairly reflect the financial position of the Inland Revenue Department as at 30 June 1997, the results of its operations and cash flows and the service performance achievements for the year ended 30 June 1997.

Section 38(1) of the Public Finance Act 1989 requires the Audit Office to audit the financial statements presented by the Chief Executive. It is the responsibility of the Audit Office to express an independent opinion on the financial statements and report its opinion to you. The Controller and Auditor-General has appointed A J Shaw, of Audit New Zealand to undertake the audit.

An audit includes examining, on a test basis, evidence relevant to the amounts and disclosures in the financial statements. It also includes assessing:

· the significant estimates and judgments made by the Chief Executive in the preparation of the financial statements and
· whether the accounting policies are appropriate to the Inland Revenue Department's circumstances, consistently applied and adequately disclosed.

We conducted our audit in accordance with generally accepted auditing standards in New Zealand. We planned and performed our audits so as to obtain all the information and explanations which we considered necessary in order to provide us with sufficient evidence to give reasonable assurance that the financial statements are free from material misstatements, whether caused by fraud or error.

In forming our opinion, we also evaluated the overall adequacy of the presentation of information in the financial statements and the Inland Revenue Department's compliance with significant legislative requirements. Other than in our capacity as
auditor acting on behalf of the Controller and Auditor-General, we have no relationship with or interests in the Inland Revenue Department.

We have obtained all the information and explanations we have required. In our opinion the financial statements of the Inland Revenue Department on pages 19 to 109:

· comply with generally accepted accounting practice and
· fairly reflect:
  - the financial position at 30 June 1997
  - the results of its operations and cash flows for the year ended on that date and
  - the service performance achievements in relation to the performance targets and other measures set out in the forecast financial statements for the year ended on that date. Our audit was completed on 30 September 1997 and our unqualified opinion is expressed as at that date.”

As set forth above, the administration of New Zealand is executed according to the generally accepted accounting principle. A fair audit opinion is secured by having a third party audit the outcome of the administration and the contents of administration are clearly disclosed to the people by publicizing the results of the audit.

The budget management of New Zealand in accordance with this accounting principle requires much effort and specialists who can handle the budget according to the accounting principle. Although it is likely that simple management method is convenient since its operation can be done relatively easily, there is a high possibility that it may lead to a bad management. Thus more scientific management method is required.

The more an administration management system develops, the more the ability of persons who handle the system improves. Since they cannot hold the ability to operate the system if they do not endeavor, they have to make an effort to maintain their position which would eventually lead to the development of a nation as well as an individual.

If the government is satisfied with the simplicity of the present system having various problems and does not undertake effort to improve the system, the persons who work under such a system will never be able to improve their abilities. Also, because social expenses under the simple system exceed the social benefits that can be generated, it is not desirable.

Generally, the laws of the developed nations are much more elaborate than our laws and the volume of laws is also more immense. The reason is because their laws have been developed over several hundred years and the people of developed nations have made more efforts than those of underdeveloped nations.
Chapter III. Social Problems Affecting the Efficiency of National Administration

Vice of Government-Business Collusion

We are troubled with the vice of irregularities and corruption. Nevertheless most of people do not provide satisfactory explanations as to why the government-business collusion is a chronic disease in our society. While I was discussing various topics with Korean students who were studying in the United States, I questioned a student regarding his thought on the vice of irregularities and corruption. He was studying in a MBA program but had difficulty answering my question. It is thought that since Korea was not under the foreign currency crisis at that time, he could not have a chance to seriously think about this matter and thus it was not easy for him to answer to my question.

People who do not seriously give consideration to and study these chronic problems generally cannot clearly explain what the term “government-business collusion” means. If I ask the same question now, more persons might be able to plausibly answer because the related topics have often been, even though abstract, discussed through the mass-communication media after occurrence of the foreign currency crisis.

Ordinary people do not precisely understand how the government-business collusion affects them even though they have a vague idea on the negative effect the collusion of politicians, etc. and businessmen has on the development of a nation. But after the foreign currency crisis, people are beginning to slowly recognize the vice of government-business collusion.

For example, “Big enterprises have given politicians a bribe which was made from their business funds for enjoying illegal benefits and the illegal use of the business funds led to bad management, eventually resulting in an insolvent condition. Therefore, government-business collusion has a vile effect on the national economy and deters healthy social development.” Perhaps, this would be the level of knowledge the ordinary people have regarding the vice of government-business collusion since the foreign currency crisis in 1997. We need to precisely recognize this social vice that deters national development and feel in our bones that this chronic vice must be eradicated as soon as possible.

As set forth earlier, a nation is largely run through the tax revenue. Generally once a budget is determined, taxes are collected on the basis of the budget. Therefore, at the end of year, we sometimes run into newspaper articles which read “How much tax does a single person have to pay?” Upon reading such article, we feel rather bitter about the heavier tax burden which increases every year. Once the scale of governmental expenditure is determined, necessary taxes should be collected without fail.
As a simple example, assume that the total expenditure of the government is KRW 10 million and there are total 100 taxpayers. Should all taxpayers bear the same tax, one taxpayer will have to pay KRW 100,000. If 10 persons evade taxes and the government fails to collect tax revenue of KRW 1 million, the remaining 90 persons have to bear KRW 1 million of additional tax burden. That is, 90 persons must bear more than KRW 110,000 of taxes and therefore pay additional taxes of over KRW 10,000; that is, more than 10%.

Before we were under the IMF control in December, 1997, several big enterprises filed for bankruptcy. Let's look at the well-known Han Bo case. At the time of the Han-Bo's bankruptcy, its liability was KRW 4.7 trillion. The press said that KRW 1.3 trillion out of that amount could not be clearly tracked and that most of the KRW 1.3 trillion was used as a bribe or misappropriated.

Let's discuss how this fact has an effect on our economy. How much tax can the government collect on KRW 1.3 trillion used as a bribe or misappropriated? For sake of simplicity, only both corporate income tax and individual income tax will be computed. If other taxes are included, the amount will be greater.

A manager who misappropriated enterprise funds will have KRW 1.3 trillion of income pursuant to the domestic tax law at the time of misappropriating funds. The enterprise can deduct KRW 1.3 trillion as an expense at the time of depreciation since it overestimated its facilities expenses by creating false expenses. That is, if KRW 4.7 trillion of the Han Bo Inc.'s liabilities is used as facilities funds, Han Bo may recover KRW 4.7 trillion as an expense through depreciation.

An enterprise normally invests its funds for the procurement of facilities. Since the value of facilities decreases when those facilities are used for production, an enterprise recovers its invested funds by recording expense as depreciation in order to match the value decrease of facilities with profit.

Since the above KRW 1.3 trillion was misappropriated or used as a bribe instead of being used as facilities funds, actual facilities funds is KRW 3.4 trillion (4.7 trillion - 1.3 trillion). However, Han Bo Inc. would depreciate KRW 4.7 trillion other than KRW 3.4 trillion as expense and file a tax return to the government after deducting KRW 1.3 trillion of false expense from its profit.

If the tax evasion is not detected, the CEO of Han Bo misappropriated constitutes his income. Where he is subject to individual income tax rate of 40%, he has to pay KRW 0.52 trillion (1.3 trillion x 40%) as income tax. In addition, as the company falsely increased the facilities funds, it has to pay KRW 0.39 trillion (1.3 trillion x 30%) of corporate income tax assuming that the corporate tax rate is 30% because the government will not acknowledge KRW 1.3 trillion of false expense as deductible expense.

If the tax evasion is not detected, the CEO and the company would evade KRW 0.91 trillion of tax and the tax that they evaded must be paid by other honest workers and entrepreneurs, etc.

For a long time, most of enterprises in Korea have customarily colluded with politicians and government officials committing this kind of corruption. Entrepreneurs, whenever necessary, have provided politicians and government officials, etc. with a bribe under the pretext of “cake money”. If we impose a tax on such a bribe when it becomes income of another person, the tax amount would become astronomical.
If an enterprise aggressively offers a bribe, it will try to be rewarded a gain several times higher than the bribe and its abnormal action damages the market that should be operated normally. Under such circumstance, persons who commit such illegal actions succeed but it is difficult for persons who run business in a legitimate way to succeed. If a nation becomes full of these corrupt economic entities, national efficiency and competitiveness will fall behind foreign nations and the possibility that an economic crisis will take place increases. Although the government must collect taxes evaded where an enterprise becomes bankrupt, it often cannot exercise its taxing rights since the enterprise will be unable to pay taxes. In that case, other honest taxpayers should bear the evaded taxes.

It is said that the liability of Han Bo Inc. was KRW 4.7 trillion. The banks which were unable to recover their loan from Han Bo treated the bad debt as loss and deducted the expense from their profit.

For the purpose of explanation, let’s assume that only KRW 2.7 trillion out of the funds loaned to Han Bo can be recovered. In this case, KRW 2 trillion out of KRW 4.7 trillion becomes a bad debt. When KRW 2 trillion is treated as expense of banks, how much is the related tax and who must bear the burden?

Banks which cannot recover the loan due to its bad debt nature will treat the loan as expense. As a result, the government will not be able to collect KRW 600 billion [2 trillion x 30% (corporate tax rate)] of taxes that would have been collected had there not been any bad debt. Instead, honest taxpayers will bear the taxes which the banks cannot pay. What is more, with bankruptcy of Han Bo, numerous medium and small enterprises which engaged in transactions with Han Bo also went bankrupt. Thus, the source of taxes was exhausted and the government suffered an enormous revenue loss.

In order to run a nation, the government should effectively secure tax revenue. Should the government decide to pay no heed to such illegal activities, national revenue will decrease and the burden of honest taxpayers will further increase. In addition to tax revenue problem, such illegal activities have an enormous effect on the national economy (e.g., foreign currency crisis, etc).

The problem does not end here. Along with the bankruptcy of enterprises, many employees will lose their jobs and countless number of persons will choose to commit suicide because of the unbearable circumstances. This “social expense” is too enormous to be converted into money. Therefore, all the people should understand that the vice of government-business collusion is the biggest impediment to the development of our society. If both the government and the people do not endeavor to eradicate this social vice, we couldn’t expect our nation to develop any further.

High Expense and Low Efficiency

The vice of government-business collusion causes our enterprises to fall behind those of other nations in the international competition and induces inequity among taxpayers. For example, assume that a corporation secures a construction project (e.g., bridge) which amounts to KRW 1 trillion from the government. The estimated profit of the corporation is KRW 0.1 trillion and normal construction cost is KRW 0.9 trillion in the
case where there is no bribery to politicians and government officials. If there is no bribe, the corporation would realize KRW 0.1 trillion of profit through normal construction.

Therefore, the corporation would pay KRW 30 billion (0.1 trillion x 30%) as the corporate tax and the remaining KRW 70 billion would be used for the business activities of the corporation or distributed as dividend. In the case of dividend, if the dividend tax rate is 15%, KRW 10.5 billion (70 billion x 15%) will be paid to the government as income tax. In the end, the government can get a strong bridge by the normal construction and collect KRW 40.5 billion of taxes from the corporation.

What if the corporation provides politicians and government officials with a bribe that amounts to 10% of the total construction amount? Since the basic purpose of an enterprise lies in the pursuit of profit, it will seek to achieve the originally targeted profit of KRW 0.1 trillion even though it should provide KRW 0.1 trillion of bribe which is 10% of KRW 1 trillion.

However, since the construction costing KRW 0.9 trillion must be performed at KRW 0.9 trillion, there will be no profit and therefore the corporation will attempt to generate the profit by decreasing the construction cost. In other words, the corporation will seek its profit goal of KRW 0.1 trillion by spending KRW 0.8 trillion of construction expense instead of KRW 0.9 trillion. As a result, the following problems take place.

1) KRW 0.1 trillion of bribe becomes an unearned income circumventing government’s tax system and promotes over-consumption.

2) The government is left with a badly built bridge costing KRW 0.8 trillion instead of a well-constructed bridge which could have been built with a cost of KRW 0.9 trillion.

3) The collapse of badly built bridge will accompany high repairing expense, traffic congestion and tax squandering. Moreover, it causes an enormous impediment to industrial activities that can in no way be converted into money.

4) If the corporation incurs KRW 0.1 trillion of repairing expense in the future to repair the badly constructed bridge, it can deduct the KRW 0.1 trillion as an expense. The government will not be able to collect any tax from that corporation since the government has to acknowledge additional KRW 0.1 trillion of repairing cost as deductible expense.

5) The corporation must also bear additional expenses and will suffer from high expense and low efficiency.

The following table depicts the above situation in a simplified manner.

<table>
<thead>
<tr>
<th></th>
<th>Normal Construction</th>
<th>Abnormal Construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Receipts</td>
<td>1 trillion</td>
<td>0.9 trillion</td>
</tr>
<tr>
<td>Expense</td>
<td>0.9 trillion</td>
<td>0.8 trillion</td>
</tr>
<tr>
<td>Net Profit</td>
<td>0.1 trillion</td>
<td>0.1 trillion</td>
</tr>
<tr>
<td>Corporate Tax</td>
<td>30 billion</td>
<td>30 billion</td>
</tr>
<tr>
<td>Income Tax (Dividend)</td>
<td>10.5 billion</td>
<td>10.5 billion</td>
</tr>
</tbody>
</table>
Problems

<table>
<thead>
<tr>
<th>Outcome</th>
<th>well-constructed bridge</th>
<th>weakly constructed bridge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems</td>
<td>no</td>
<td>Unearned income : 0.1 trillion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Repairing expense : 0.1 trillion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>tax refund effect : 40.5 billion</td>
</tr>
</tbody>
</table>

※ In the case of bad construction, tax payable is zero

**Equity of Taxation and Bribery**

The term “equity of taxation” is very often used by the government. However, the question we must ask is, “How many tax officers can truly understand what the equity of taxation really stands for and provide us with the clear answer?” Tax specialists say that individuals in the same economic situation are liable to pay the same tax. This is understood in the same context as the equity of law.

To state that a person is under the same situation as the other person implies that the former person has the same income as the latter person. Irrespective of whether they are a president or laborer, if they have the same income, they are liable to pay the same tax. This is equity. The equity of taxation can be achieved when taxable income can be clearly disclosed and when there is no irregularity in the tax administration.

As explained earlier, once a bribe evades the taxation net, the equity of taxation collapses. Salaried men who lack a chance to receive a bribe must pay taxes corresponding to the income they earn regardless of their intent. Thus, in reality, salaried men bear larger tax burden than others who receive a bribe.

What about professionals and individual proprietors who defraud much of their income? These taxpayers voluntarily report their income to the government. Thus, if they can find out a way to evade the taxation net, they will normally try to evade taxes through whatever means possible, thereby destroying the equity of taxation.

Since our income tax law is based on the enumeration principle, incomes which are not enumerated in the tax law cannot be taxed. This principle has a meaning in that taxpayers can know what types of income to be reported to the government. However, if taxpayers do not report enumerated incomes to the government, the original purport of the principle will be tarnished.

The income tax law classifies incomes into interest income, dividend income, real estate income, business income, wage and salary income, temporary property income, other incomes, retirement income and timber income. Therefore, taxpayers do not have the obligation to report income that is not enumerated in the income tax law and the government also cannot impose tax on those types of income. Since incomes except for other incomes could be easily understood by the term itself, it is thought that additional explanation concerning them is not necessary.

Then, pursuant to the Korean income tax law, what type of income does a bribe fall under? Since a bribe does not fall under any type of income enumerated above, if it does not fall under other incomes, it comes under a type of income that the government cannot tax. Article 21 of the Income Tax Law enumerates as other incomes many items, such as prize money rewards, money or goods received by winning a lottery prize, lecturer's fee, gratuity, etc.
Then, does a bribe come under a gratuity? The term “bribe” means illegal money, etc. which is given to a person who provides other persons with specific convenience using her/his official authority. A Korean language encyclopedia defines the term “gratuity” as money given for expressing gratitude. A bribe is generally given to a counterpart with illegal intention. Also it is mostly given under an unavoidable situation rather than from gratitude. Thus, we cannot say that the bribe comes under a gratuity.

The guideline 21-2 of the Income Tax Law provides “A gratuity includes the following items which do not come under the other income: 1) money, etc. that a person who has no duty to manage a business on behalf of other person receives as a consideration of management. However, the expense that a person having no duty actually paid on behalf of the other person is excepted; 2) money, etc. that an employee receives from a transaction counterpart, etc. of an employer in relation to his/her job. However, money, etc. on which gift tax is imposed according to the inheritance & gift tax law is excepted.”

Then, pursuant to the guideline of the Income Tax Law, does a bribe fall under money, etc. that an employee receives from a transaction counterpart in relation to his/her job? Since a transaction counterpart customarily means a transaction counterpart of an enterprise, the government does not fall under this category. What is more, since the guideline of the Income Tax Law is not a law or enforcement decree but merely a construction of an administrative agency, the guideline is not binding on the court and therefore the court can construe it differently from the construction of the administrative agency. Thus, if we construe according to the guideline of the Income Tax Law, the gratuity that an employee receives falls under income whereas the gratuity which a government official receives does not fall under income.

The court judged “guilty” against Kim, Hyun-Chul who is the son of President Kim, Young-Sam, applying the gift tax evasion crime of the Tax Evasion Punishment Law. It appears that, instead of the graft crime of the criminal law, the concept of gift of tax law was forcibly applied.

The term “gift” under the tax law means providing every kind of thing having economic value that can be converted into money and every kind of legal and actual right having the value of property without any consideration. Article 554 of the Civil Law provides that a gift shall have its effect when one party manifests its intention to provide the other party with something without a consideration in return and the other party accepts it. If there is a consideration involved, then it is not a gift any longer.

Did the court apply the gift tax evasion crime since Mr. Kim, Hyun-Chul received money from enterprises without any consideration? When enterprises provide politicians and government officials, etc. with a bribe, how do enterprises secure secret funds?

Unlike an individual proprietor, the representative of a corporation cannot freely misappropriate its funds. This is because a corporation is an entity separate from its representative. Therefore, where a representative of a corporation misappropriates its funds, he/she can be charged with misappropriation. The criminal law provides that where an agent handling others’ business obtains a profit through activities in violation of his/her duty or damages a principal by having a third party obtain a profit, he/she shall be charged with embezzlement. Here, the term “principal” means a corporation and the term “agent” means a representative of a corporation.
Enterprises secure secret funds to provide politicians and government officials with a bribe and such funds are obtained through an illegal accounting. That is, as set forth in the previous Han Bo Inc. case, representatives of corporations often secure secret funds by recording false expenses in accounting books and illegally misappropriating the secret funds. Where a representative of a corporation misappropriates its secret funds obtained through illegal accounting, the tax law treats the secret funds as income of the representative and imposes taxes upon it.

Let’s take a look at the law related to the business of a corporation representative. Under the present Commercial Law, shareholders who have more than 5% of outstanding stock of a corporation can bring a suit against a representative of a corporation. This is called a derivative suit, and, in the developed countries such as the United States, requirements needed to bring a suit before the court are not difficult to be met and the rights of minority shareholders are substantially protected through this system.

Where activities of directors inflict damages on a corporation, minority shareholders may bring a derivative suit on behalf of the corporation and require directors to compensate for the damages on the corporation. Since directors of a corporation are selected by shareholders, it is not uncommon to find large shareholders who significantly influence the directors of a corporation and substantially run a corporation. Therefore, there always exists a possibility that majority shareholders will violate the rights of minority shareholders.

When a representative of a corporation squanders assets of a corporation with bad management, minority shareholders will not be able to receive the dividend that could have been received had the corporation been run under normal conditions. This is because minority shareholders cannot participate in the management. In the meantime, majority shareholders will try to take advantage of such situation and seek to maximize their profit. Therefore, in order to protect the rights of minority shareholders, requirements for a derivative suit should be alleviated.

As shown in Han Bo Inc. case, abnormal management by majority shareholders and a representative can result in the bankruptcy of a corporation. If the rights of minority shareholders had been protected and they had been able to substantially exercise these rights, they would not have experienced the pain of having the value of their stock fall to zero.

Where a representative of a corporation misappropriates its funds without authority and provides them as a bribe, the funds are usually secured by false accounting. The representative, therefore, is guilty of the embezzlement and subject to criminal punishment.

The representatives of a corporation are well aware of such situations. Nevertheless they continue to engage in bribery with politician, etc. Thus, it is difficult to accept the assertion that a bribe was given without any consideration. Politicians know this fact very well also.

However, if bribe cases are disclosed to the public, they assert that it was not a bribe under the pretext of the “cake money.” The court has recognized this assertion to date. Their assertion is quite illogical and incomprehensible. Recently the Supreme Court has introduced the concept “comprehensive graft crime” but there still exists room for
controversy.
Honest persons without unearned or evaded income generally do not lead an extravagant life. They live a life suitable to their income. However, persons with large amounts of unearned income have a strong propensity to squander their money and make other persons feel a sense of hostility.

If people earn their living by a justifiable method and purchase expensive import boutiques, we cannot criticize them. In a capitalism society, people are entitled to enjoy as much consideration as they work. Persons who work hard and earn honest money do not corrupt our society. On the contrary, they can become a role model to the people who do not work hard. The consideration of their efforts is compensated by economic benefit. If there is no compensation for their efforts, the capitalism society cannot prosper.

The problem here is that there are too many people in our society who earned much money through an illegal method and they are exclusively enjoying economic benefits which otherwise they do not deserve. To solve this problem, both the government and the people must make an effort together and achieve the equity of taxation.

**Bribe in the United States**

Section 61 of the U.S. federal income tax law provides that except as otherwise provided in this subtitle, income means all income from whatever source derived, including (but not limited to) the following items*** That is, irrespective of whether a taxpayer gets income by whatever method, the income becomes a taxpayer's income as long as the federal income tax does not provide otherwise.

The items that the federal income tax law does not treat as income are as follows: (1) compensation for services, including fees, commissions, fringe benefits, and similar items; (2) gross income derived from business; (3) gains derived from dealings in property; (4) interest; (5) rents; (6) royalties; (7) dividends; (8) alimony and separate maintenance payments; (9) annuities; (10) income from life insurance and endowment contracts; (11) pensions; (12) income from discharge of indebtedness; (13) distributive share or partnership gross income; (14) income in respect of a decedent; and (15) income from an interest in an estate or trust. Therefore, bribe does naturally come under income and is subject to taxation.

Let's compare the U.S. tax law with Korean tax law. In the case of the United States, a taxpayer reports all incomes except those not provided in the income category under the federal income tax, whereas in Korea an individual taxpayer reports only the income items enumerated in the Korean tax law. One of main purposes of the comprehensive taxation principle of the United States is to maintain the equity of taxation by leaving a room for bribe, etc. to be taxed. However, this principle does not violate the “no taxation without representation principle”. There exists a difference between the tax laws of Korea and the U.S. only in terms of defining taxable income. Therefore there is no difference between two nations in that their tax laws are made in the congress consisting of representatives elected by the people under their respective jurisdiction.
For the purpose of explanation, the related U.S. precedent (Cesarini v. U.S.)\(^8\) is introduced below.

The plaintiffs purchased a used piano at an auction sale for approximately $15.00. In 1964, while cleaning the piano, plaintiffs discovered the sum of $4,467.00 in old currency. The plaintiffs exchanged the old currency for new at a bank, and reported the sum of $4,457.00 on their 1964 joint income tax return as ordinary income from other sources.

On October 18, 1965, plaintiffs filed an amended return with the District Tax Office and requested a refund of $836 asserting that since the return of the year 1964 was mistaken, $4,467 must be deducted from gross income. In conclusion, the court determined that since this amount constitutes income, plaintiffs cannot receive a refund.

Plaintiffs made three alternative contentions in support of their claim that the sum of $836.51 should be refunded to them. First, that the $4,467 found in the piano is not includible in gross income under Section 61 of the Internal Revenue Code. Secondly, even if the retention of the cash constitutes a realization of ordinary income under Section 61, it was due and owing in the year the piano was purchased, 1957, and by 1964, the statute of limitations had elapsed. And thirdly, that if the treasure trove money is gross income for the year 1964, it was entitled to capital gains treatment under Section 1221. Since the first item among three items is what we are going to handle, the remaining two items are not set forth.

Section 61 of the Internal Revenue Code provides that except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) compensation for services, including fees, commissions, fringe benefits and similar items; (2) gross income derived from business; (3) gains derived from dealings in property; (4) interest; (5) rents; (6) royalties; (7) dividends; (8) alimony and separate maintenance payments; (9) annuities; (10) income from life insurance and endowment contracts; (11) pensions; (12) income from discharge of indebtedness; (13) distributive share of partnership gross income; (14) income in respect of a decedent; and (15) income from an interest in an estate or trust.

Plaintiff asserts that money discovered in the piano is not income since the money does not fall under the above 15 items. The court held that while neither of these listings expressly includes the type of income which is at issue in the case at bar, this absence of express mention in any of the code sections necessitates a return to the “all income from whatever source” language of Section 61 of the code, and the express statement there that gross income is “not limited to” the following fifteen examples, and therefore plaintiffs should pay the related tax. In this case, plaintiffs tried to justify their assertion on the basis of Section 74 of the 1954 Code and Revenue Ruling 61 but the court did not accept it. Because explanation related to this is complex, it is omitted.

Through this precedent, it became clear that the gross income of Section 61 of the federal income tax law includes income from whatever source derived. Therefore, a bribe is also included in the gross income. Also Section 162(c) provides that no deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government... if the payment constitutes an

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illegal bribe or kickback. Therefore, even though a bribe is taxed as gross income, a person who provided a bribe cannot deduct the bribe as expense.

Regarding illegal income, another precedent (Collins v. Commissioner: 1993)\(^9\) is shown below. This precedent sets forth in greater detail the nature of the United States precedents. Although it may seem a bit technical, it is a good chance for one to observe the contents of the U.S. precedent, the thoughts of the U.S. judges and the transition of the precedents.

This case also is helpful in understanding the laws of the United States that will be set forth afterwards. The precedents of the United States sometimes amount to hundreds of pages and judges come to a conclusion upon analyzing individual facts and evidences in a very concrete and logical manner. It manifests the professionalism of the U.S. lawyers well.

Collins was employed as a ticket vendor and computer operator at an Off-Track Betting (OTB) parlor in Auburn, New York. OTB runs a network of 298 betting parlors in New York State that permit patrons to place legal wagers on horse races without actually going to the track. Operating as a cash business, OTB does not extend credit to those making bets at its parlors. It also has a strict policy against employee betting on horse races.

Collins, an apparently compulsive gambler, ignored these regulations and occasionally placed bets on his own behalf in his computer without paying for them. Until July 17, 1988 he had always managed to cover those bets without detection. On that date, appellant decided he “would like some money” and on credit punched up for himself a total of $80,280 in betting tickets. After betting on 10 races Collins was behind $38,105 for the day. At the close of the races Collins put his $42,175 in winning tickets in his OTB drawer and reported his bets and his losing ticket shortfall to his supervisor, who until then had not been aware of Collins' gambling activities. She called the police, and in policy custody Collins signed an affidavit admitting what he had done. On October 27, 1988 he pled guilty to one count of grand larceny. In relation to this case, the contents of judgment of the court is concisely introduced.

In addressing the argument Collins raises regarding the tax treatment of his illegal actions, we believe it useful to set out initially the basic principles underlying the definition of gross income. Internal Revenue Code § 61 defines gross income broadly as “all income from whatever source derived”. It then categorizes 15 common items that constitute gross income ***

Since Glenshaw Glass the term gross income has been read expansively to include all realized gains and forms of enrichment, that is, all gains except those specifically exempted. Under this broad definition, gross income does not include all moneys a taxpayer receives. It is quite plain, for instance, that gross income does not include money acquired from borrowings. Loans do not result in realized gains or enrichment because any increase in net worth from proceeds of a loan is offset by a corresponding obligation to repay it.

This well-established principle on borrowing initially gave rise to another nettlesome

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question on how embezzled funds were to be treated. The Supreme Court once believed that money illegally procured from another was not gross income for tax purposes when the acquirer was legally obligated, like a legitimate borrower, to return the funds.

In Rutkin v. United States, the Court partially and somewhat unsatisfactorily abandoned that view, holding that an extortionist, unlike an embezzler, was obligated to pay tax on his ill-gotten gains because he was unlikely to be asked to repay the money. Rutkin left the law on embezzlement in a murky state. This condition cleared in James v. United States. There the Court stated unequivocally that all unlawful gains are taxable. It reasoned that embezzlers, along with others who procure money illegally, should not be able to escape taxes while honest citizens pay taxes on every conceivable type of income.

Distinguishing loans from unlawful taxable gains has not usually proved difficult. Loans are identified by the mutual understanding between the borrower and lender of the obligation to repay and a bona fide intent on the borrower's part to repay the acquired funds. The embezzler's expressed consent to repay the loan and the mere act of signing such a contract could not be used to escape tax liability. It is important to note that though an embezzler must include as taxable income all amounts illegally acquired, the taxpayer may ordinarily claim a tax deduction for payments she makes in restitution. Such a deduction is available for the tax year in which the repayments are made.

With this outline of the relevant legal principles in mind, we have little difficulty in holding that Collins's illegal activities gave rise to gross income. Taxes may be assessed in the year which the taxpayer realizes an economic benefit from his actions. In this case, Collins admitted to stealing racing tickets from OTB on July 17, 1988. This larceny resulted in the taxpayer's enrichment. This illegally-appropriated benefit, as the tax court correctly concluded, constituted gross income to Collins in 1988.

The taxpayer raises a series of objections to this conclusion. He first insists that such a holding cannot be correct because at the end of the day he was in debt by $38,105. Although the bets gave rise to gambling losses, the taxpayer gained from the misappropriation of his employer's property without its knowledge or permission. The gambling loss is not relevant to and does not offset Collin's gain in the form of opportunities to gamble that he obtained by virtue of his embezzlement. Further, taxpayer would not be able to deduct gambling losses from theft income because the Internal Revenue Code only allows gambling losses to offset gambling winnings.

The taxpayer next contends his larceny resulted in no taxable gain because he recognized that he had an obligation to repay his employer for the stolen tickets. He posits that recognition of a repayment obligation transformed a wrongful appropriation into a nontaxable transaction. In effect, Collins tries to revive pre-James law under which an embezzler's gain could be found nontaxable due to the embezzler's duty to repay stolen funds. Yet, the Supreme Court has clearly abandoned the pre-James view and ruled instead that only a loan, with its attendant "consensual recognition" of the obligation to repay, is not taxable. There was no loan of funds, nor was there any "consensual recognition" here; OTB never gave Collins permission to use betting tickets. To the contrary, it has strict rules against employee betting, and Collins could not have reasonably believed that his supervisors would have approved of his transactions.

The taxpayer then avers this case is analogous to Gilbert v. Commissioner in which we found a consensual recognition of the obligation to repay despite the absence of a loan agreement. Taxpayer Edward Gilbert, as president and a director of E.L. Bruce
Company, acquired on margin a substantial personal stake in the stock of a rival company, Celotex Corporation. The stock market declined after Gilvert brought these shares, and he was required to meet several margin calls. Lacking personal funds to meet these obligation, Gilbert instructed the corporate secretary of E.L. Bruce to make $1.9 million in margin payments on his behalf.

A few days later, Gilbert signed secured promissory notes to repay the funds; but the corporation's board of directors refused to ratify Gilbert's unauthorized withdrawal, demanded his resignation, and called in his notes. The board also declined to merge with Celotex, and soon thereafter the Celotex stock that Gilbert owned became essentially worthless. Gilbert could not repay his obligations to E.L. Bruce, and he eventually pled guilty to federal and state charges of unlawfully withdrawing funds from the corporation.

The IRS claimed that Gilbert's unauthorized withdrawal of funds constituted income to the taxpayer. It asserted that there was no consensual recognition of a repayment obligation because E.L. Bruce Company's board of directors was unaware of and subsequently disapproved Gilbert's actions. Citing the highly atypical nature of the case, we held that Gilbert did not realize income under the James test because (1) he not only fully intended but also expected with reasonable certainty to repay the sums taken, (2) he believed his withdrawals would be approved by the corporate board, and (3) he made prompt assignment of assets (i.e., promissory notes) sufficient to secure the amount he owed. These facts evidence consensual recognition and distinguished Gilbert from the more typical embezzlement case where the embezzler plans right from the beginning to abscond with the embezzled funds.

Plainly, none of significant facts of Gilbert are present in the case at hand. Collins, unlike Gilbert, never expected to be able to repay the stolen funds. He was in no position to do so. The amount he owed OTB was three times his annual salary - a far cry from Gilbert, where the taxpayer assigned to the corporation enough assets to cover his unauthorized withdrawals. Also in contrast to Gilbert, Collins could not have believed that his employer would subsequently ratify his transactions. He knew that OTB had strict rules against employee betting. Moreover, while Gilbert was motivated by a desire to assist his corporation, Collins embezzled betting tickets because he wanted to make some money. Gilbert is therefore an inapposite precedent.

Finally, appellant complains of the root unfairness and harshness of the result, declaring that the imposition of a tax on his July 17 transaction is an attempt to use the income tax law to punish misconduct that has already been appropriately punished under the criminal law. Although we are not without some sympathy to the taxpayer's plight, we are unable to adopt his claim of unfairness and use it as a basis to negate the imposition of a tax on his income. The Supreme Court has repeatedly emphasized that taxing an embezzler on his illicit gains accords with the fair administration of the tax law because it removes the anomaly of having the income of an honest individual taxed while the similar gains of a criminal are not. Such is not an unduly harsh result because Internal Revenue Code §165 provides that once the taxpayer makes payments to OTB or its insurer, he will be able in that year to deduct the amount of those payments from his gross income.
Chapter V. Renovation of Administration

Efficiency of Administrative Organization

From the Kim, Young-Sam government it has been emphasized that the administrative organization of a nation should be slim and efficient. However, it seems that there has been no conspicuous outcome. If the government does not make an effort, it would be meaningless to emphasize that enterprises should be slim and efficient.

After the foreign currency crisis, enterprises have undergone radical changes to increase their efficiency and productivity. The government was no exception to such changes. The government has desperately endeavored to introduce the foreign capital to get over the foreign currency crisis. Although this measure is in no way perfect, it was the most secure measure by which we can reduce our foreign debts.

At that time, the possibility that we can repay the foreign debts through export was very low. We could improve a trade balance to some extent but it was very difficult to pay interest, which is increasing more than $10 billion per year, only through export. Therefore, we had to introduce the foreign capital which required no interest payment.

The national policy must not be established in a short-term perspective. The reason why we are continuously repeating the trial and error is because we are trying to solve every problem in a short-term period rather than long-term. A developed nation generally establishes a national policy in a long-term perspective and this is a difference between a developed nation and an underdeveloped nation. Since things are becoming more complex, if we do not consider various situations which can take place in the future, it would be difficult for us to prepare for the future. One of the reasons why we faced the foreign currency crisis stems from the inability of the government who could not foresee the future at all.

When foreign capital came into Korea, foreign investors required Korean government to create a circumstance where their investment funds can be firmly secured. Even though they invest enormous amount of funds in Korea, they have at their discretion the option to withdraw their funds from Korea at anytime where the conditions change.

The foreign currency crisis took place because foreign capitals went out of Korea at once when our economic situation became worse. Of course, the more fundamental cause of the foreign currency crisis is the illegality and corruption.

Although foreigners invest lots of dollars to build factories, etc. in Korea, the possibility that the same crisis will take place once again will always be there. Where economic situation in Korea gets worse and foreigners withdraw their investment funds from Korea, we will face the same crisis again.
For example, assume that 100 foreign enterprises respectively invest $1 billion in Korea and Korea uses it for repaying the foreign debts of $100 billion (100 x $1 billion). Also, to make it simple, assume that there are only 100 foreign investment enterprises in Korea. What if all of these foreign enterprises withdraw from Korea at the same time due to an unexpected situation in Korea? The unexpected situation may include various occasions such as the instability of domestic politics and general strike, etc.

Foreign investment enterprises can invest their funds on current assets including cash and securities, etc. or fixed assets such as plant and land, etc. Assume that they invested $50 billion on current assets and remaining $50 billion on fixed assets. And further assume that all of the investors withdraw from Korea after 5 years due to an unstable situation.

Because current assets are immediately disposable and can be converted into dollar, converted amount will leave Korea at once. If our banks have total of $50 billion, all dollars will flow out of Korea. In this case, we will face the same foreign currency crisis once again. Even though $50 billion of fixed assets cannot be immediately converted into cash, the result would be the same.

Then, what should we do for the next 5 years? Although we avoided an urgent situation with foreign funds, we should not feel comfortable. Where foreign enterprises come into Korea, it would be very difficult for our inefficient enterprises to compete with them under the present situation. Therefore, we should keep in mind that they can encroach on a domestic market.

A part of profit the foreign enterprises earned in Korea is paid to the Korean government in the form of taxes and the remaining profit flows out of Korea as dividend, etc. unless there is reinvestment.

Since many foreign investment enterprises are exempted from corporate taxes, etc. for 5 to 10 years, they will not pay taxes for that period. The enterprises also do not bear value added tax since the tax is paid by end-consumers. Therefore, the tax burden of our enterprises and workers increases. This means that foreign enterprises will engage in business under a very good condition while domestic enterprises will experience difficulty competing with foreign enterprises.

If the competitiveness of our enterprises decreases and greater budget is required due to decreased productivity of the government, our enterprises and people will have to endure the pain. As a result, national wealth will not increase and dollars held by Korea also will not increase. Therefore, when foreign capitals abruptly withdraw from Korea, we will not be able to secure sufficient amount of dollars to fill in the space and as a result a vicious circle will continue. Because of this problem, it is very difficult for an underdeveloped or developing nation to become a developed nation.

The sole method which can overcome such a problem is to improve the productivity of the government and enterprises. In order to export goods and earn dollar, enterprises must remain productive. In order to maintain a healthy market economy, the government must be also productive. When incompetent persons exist, it leads to unnecessary expenses. Only the most competent persons should exist in any organization. Where productivity of the government drops, it also leads to the decrease of productivity of enterprises.

Where unnecessary government officials exist, 1) the tax burden of the people increases and 2) unnecessary persons create unnecessary work to maintain their position.
Work produced unnecessarily, directly or through regulation, has an effect on the people.

Let's look at the central government departments. First, there are ministers or commissioners, and vice-ministers and deputy-commissioners under them, and assistant ministers, and then directors or acting directors. For an acting director to draft a policy and receive an approval, he must go through approximately five steps, that is, from a director to a minister or a commissioner.

An article was inserted in the Chosun Il Bo dated March 28, 1998 and its content was as follows: “Average 23 hours are necessary for approval of one document.” “Where persons who should approve the document are busy, 4 to 5 days on average are necessary for the approval (Results of research on the Seoul City by the Samsung Economy Research Institute).” “In the public offices of the United States, government officials do not carry documents for approval. Documents are approved through a mail boy or a computer.” This is a very interesting article.

The above analysis was made on the basis of only time. Where there are many persons who have the authority to make decisions, another problem arises. Where an acting director brings a document to a director for approval, the director corrects it as he pleases. After approval by the director, the document is transferred to an assistant minister and another correction takes place. After the assistant minister corrects it as he pleases, the document goes to a deputy-minister and then to a minister. During the entire process, much time is wasted and, whenever there are corrections, countless number of expensive papers are discarded.

Computers have been used in offices for more than 10 years. Nevertheless, if face-to-face approval is thought important and the efficiency of computer approval is not utilized, the efficiency of administration can not improve. In order to increase the efficiency of administration, the government should actively create the circumstance under which all government officers can utilize the efficiency of the computer system.

There are still government officers with feudal thoughts who still believe that hard work is not necessary once they are promoted to some extent. The higher their position become, the more insight they need. However, since they do not make an effort, their insight stays as it is. Persons who do not make an effort and thus lack insight should not be in the approval line. The main business of a manager must be the exact business management but not the role of a trouble-solving broker aloof from his intrinsic business.

Since there are too many managers between a minister and a director, it is necessary to decrease the number of managers to the extent possible in order to increase the efficiency of administration. Sometimes, assistant ministers with insight would be necessary but the number should be minimized. If the number of assistant ministers decreases, remaining assistant ministers must endeavor much more and grasp much more business. However, if the ability of directors is improved, the burden of an assistant minister can decrease. An assistant minister should handle only the important problems which a director does not handle.

It is necessary to clarify the items delegable to directors and have them handle much

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more business. The government can maintain the number of assistant ministers at a minimum by having a minister and an assistant minister handle only the core parts of the business.

If a person is not a specialist in that field, he should not be appointed to a higher position. It is generally possible to make a right policy when a person having the decision rights has an insight through years of experience, study and effort. If persons who have the decision rights are non-specialists, they cannot set up a right policy. Furthermore, the decision of a non-specialist will deter the development of administration.

In general, in order to become a director of the central government departments, at least 10 to 15 years of period is required although it may vary depending on the department. If a government officer is not an idle person, he can become a specialist in his field in 10 to 15 years. Moreover where our administration enters into a competition system, it would be possible that a government officer becomes a specialist within a shorter period.

A non-specialist must not be appointed to the director position of the government department. By studying and developing a personnel system, the government must have a governmental officer become a specialist before he becomes a director. In that case, even though the number of managers between a minister and a director decreases, it will rarely become a problem. If government officers are dissatisfied due to their chance for promotion, an alternative solution might be to pay compensation based on their ability and efforts.

**Administrative Rules**

When I was in the National Tax Service of Korea, my business was to resolve international taxation cases through mutual agreement procedure with foreign governments. While doing my job, I noticed that there is a substantial difference between Korea and the United States in terms of administration operation. Participants in the competent authority meeting of the United States are largely officers who come under the middle class officer of Korea but specialists in their field. Since they exercise authority to some extent, they can make decisions to the extent of the power granted to them.

I remember what I had experienced at the meeting with the United States IRS in the early 1990s. During that time, a representative of Korean participants was the assistant commissioner for international tax and the representative of U.S. participants was the director for tax treaty division.

The U.S. representative tried to immediately decide what is within her authority but the Korean assistant commissioner for international tax could not make a single decision on any of the issues raised during the meeting. At that time, the Korean assistant commissioner for international tax was a person who could be referred to as a specialist of international tax field in Korea.

In fact, where the assistant commissioner for international tax has such ability, it is thought that the NTS commissioner's approval would not be necessary unless the related issue is very important. Even though the related issue is reported to the commissioner, it would be difficult for the commissioner to clearly understand the
complex nature of the case. In that case, it just comes under a formal but unnecessary procedure.

Generally, international taxation cases are very complex. Thus, only an analyst who studied and analyzed the case from the inception has full understanding of the case. Therefore, it is thought that, in the case of the United States, an analyst who possess substantial knowledge on the contents of taxation cases decides what is within his authority. Of course, the delegation of authority would accompany a responsibility.

In the case of Korea, even though there can take place various problems in the course of business, there seems to be not a single person who is clearly responsible for it. Since there are several approval procedures and the extent of responsibility is unclear, no one takes the responsibility for the potential problems that may arise.

Terminal offices are the same. Execution agencies such as the National Tax Administration and the National Policy Agency, etc. have terminal offices and these terminal offices consist of an officer in charge, an acting director, a deputy director and a director.

Where there are too many things which must be approved by a seal, an acting director or a deputy director sometimes gives an officer in charge their seal. Therefore, sealing is just a formal procedure. If a problem takes place in relation to work done, they should be responsible for the problem since the work was approved by their seal.

Unnecessary approval procedure itself is a waste of administration. Authority to handle certain business items should be handled under the discretion of an officer in charge unless the officer in charge cannot handle them. And an officer in charge should be responsible for his actions if there arise problems in relation to his business.

If there are unnecessary approval procedures, the possibility that an illegality intervenes becomes greater. Koreans, when they face a problem, tend to resolve the problem through school relation, family relation or region relation rather than by law. The more approval procedures, the greater the chance that such a vice intervenes.

Where the business that an officer in charge can handle is also dealt by acting director, a deputy director and a director, persons having a problem can easily contact them through a person having acquaintance with them and will try to solve their affairs through them. Since an officer in charge cannot carry out his business without their approval, he cannot neglect them. This is one cause of illegality and corruption.

Let's compare the banks of Korea with those of the United States. In the case of U.S. banks, there is only a teller at the window and supervisors are rarely to be seen. What about Korean banks? There are a person in charge, an acting director, a director, and an assistant manager, etc. in the office and superiors approve what their inferior employees pass to them according to internal approval procedure. Is it necessary for so many people to be involved for the approval? Considering the simplicity of the check clearance process and handling money, etc., it utterly seems inefficient for related documents to travel back and forth among so many employees.

On the other hand, the unconditional delegation of authority could be very dangerous under the present administrative system. If an authority is delegated under a situation where an internal control system and the standard of managing business are not properly established, it is as if a fish was entrusted to a cat since a person who was delegated with the authority could arbitrarily execute administration.

Therefore, in order to limit the discretion of a person in charge, detailed and elaborate
administrative rules (administrative guidelines) are necessary. As the purpose of these administrative rules is to control the internal business of administrative agencies, the rules do not directly affect the people.

There are occasionally cases where administrative rules govern the right and duty of the people but this is not desirable. Rules governing the right and duty of the people should be included in law and regulations, etc. The main purpose of administrative guidelines should be to promote smooth administration and prevent the arbitrariness of officials in charge.

Then, some people might think that much more time will be necessary in handling business. However, such is an amateur way of thinking neglecting the future benefit. Persons who handle business should, first of all, fully understand how to handle their work; that is, an administrative guideline. If a person does not know the administrative guideline since he is a new employee, he should not handle an important business until he can fully understand the administrative guideline. If the administrative guidelines are detailed, it would take certain degree of time for a new employee to fully understand them. But once understood, everything could be smoothly managed according to the administrative guidelines.

No matter how detailed an administrative guideline is, not every issue can be covered by the administrative guideline. In this case, there could be a room for discretion of officers in charge. If the issues are important, superiors in charge should be responsible for making a right decision.

Also it is necessary to confirm, through an audit, etc. whether business was managed according to rules. The audit must not end in a form. Every step and procedure related to the audit inspection should be recorded in detailed writing. Outcome of the audit must be in a written report, a checklist or a flow chart, etc. Where an auditor neglected things which could have easily been detected, the auditor must be responsible for the problems that arise.

Let's take the United States as an example. Where a U.S. tax official performs a tax audit, there are related guidelines which they should follow at the time of audit. The administrative guidelines related to a tax audit consist of several hundreds of pages.

On the contrary, few guidelines related to a tax audit exist in Korea. There is a guideline related to a tax audit, but it is at most a single page in length. The tax audit guideline emphasizes largely on the ethical respect that an auditor must be kind, and has nothing to do with how to conduct audit and what to audit.

As long as the audit turns out well and an illegal incidence in relation to the audit does not take place, it would not matter whether the audit was thoroughly performed or not. That there is a tacit standard concerning audit outcome as in the past is also a big problem.

It would be very unreasonable if a tax officer merely focus on certain amount of tax to be collected from the taxpayer, whether or not the taxpayer is honest. If there is a tax evasion, it must be rooted up by a thorough tax investigation in order to attain the equity of taxation. If a tax audit could only be finalized upon achieving certain level of audit outcome, a tax audit official could use the loophole whenever possible and the possibility of wrongful collusion between a tax audit officer and a taxpayer would increase.

Moreover, the termination of tax audit should not completely rely on the judgment of
a person who finally approves the termination of the tax audit. This also could become a cause of corruption. A person who finally approves the termination of the tax audit should confirm whether a tax audit officer performed tax audit justly in accordance with the audit guideline, rather than audit outcome.

Every step must be taken according to transparent procedures. Once a rule has been made, even a person who made the rule must follow the rule. Regardless of whether he is the president or a member of the National Assembly, he should be subject to a punishment upon violating the rule. This is a democracy. As long as this rule is not maintained, democracy cannot develop, and the illegality and corruption which was the main cause of the foreign currency crisis cannot be rooted up in our society.

Although the government has strengthened their audit and inspection against government officers whenever political power was changed, everyone knows that the government did not achieve a satisfactory result to date.

The tax auditors of the United States have a tax audit guideline. During the tax audit, the U.S. tax auditors prepare reports on the details of audit procedure taken and whether they followed the tax audit guideline, etc during the audit. People might think it would be cumbersome. However, the efficiency of tax audit can be greatly increased by doing so. There is no necessity of reading every guideline whenever auditing. If a tax auditor performs tax audit according to the related guideline procedure after fully understanding the audit issues of the taxpayer, it is fine. If a tax auditor could exert his ability beyond what is provided in the guideline, it is to add luster to what is already brilliant. A proper compensation should be given to such tax auditor.

In the case of Korea, there could be an enormous difference among tax auditors in terms of tax audit outcome depending on their individual ability. This difference becomes larger since there is no guideline detailing the audit procedure and the outcome of tax audit largely depends on the ability of a tax auditor. Therefore, it is necessary to set up guidelines concerning how to perform tax audit by studying and developing the tax audit technique which has been accumulated for a long time.

If it is not checked whether the tax audit was performed in consistency with the guideline, there is a risk that the tax audit is performed under the sole discretion of a tax auditor. This can result in illegality and corruption.

Where a concrete procedure which must be followed at the time of tax audit is provided in the guideline and a tax auditor performs tax audit according to the guideline, it would be very helpful to tax auditor even if he turns out to be a novice in the field. Sometimes it is necessary to make a flow chart, have a tax auditor perform tax audit according to the flow chart and record what was audited, and confirm and inspect the contents of tax audit some time later. Where a tax auditor did not follow the guideline and made an audit report concealing any related facts, he should be subject to discipline.

Where tax audit is performed by this procedure, even if a superior tries to exert his power, it will not work since everything is recorded and a person in charge will be subject to discipline where a problem takes place. The tax audit that deviated from the guideline can be disclosed through an internal or external audit and the fact that the content of a tax audit report is false can also be discovered thanks to an accident occurring in relation to the tax audit afterwards. If a problem takes place, a tax auditor and a superior who checked a tax audit report must be subject to discipline according to
the degree of their responsibility.

The same procedure also can apply to each type of authorization given by the government as well as the criminal investigation by the police. First, guidelines with regard to investigation procedure and authorization procedure should be made in detail. Afterwards, it must be confirmed and checked whether the necessary items were reviewed and whether necessary evidence was attached, etc. Where the handling period of civil affairs is clearly fixed, cases where administration is delayed would not take place. A government officer who has no ability and does not make an effort to fully understand guidelines must be dismissed as an incompetent person.

The business of a bank comes under the same context. If a bank had detailed rules relating to lending and executed its business according to the rules, enormous bad debts would not have been incurred.

Assume there is a rule that a person in charge of lending shall abide by the rule and, if he does not follow it, he shall be subject to harsh discipline. Under this circumstance, illegal lending will not take place. Where a rule in detail provides that lending must be made under a specified standard and a person who violates the rule shall be subject to discipline, a person in charge of lending can avoid unjust lending by explaining the rule when a person having greater power will try to exert an unjust power.

If a person in charge does not abide by related rules in spite of there being a clear rule, the person should be, as a matter of course, subject to discipline and the person who exerted influence over the person in charge also should be subject to discipline. That the government makes the Model Lending Rules and leads banks to follow the Model Lending Rules can be one of the ways to solve our problems.

Effect of Policy, Non-Policy and Corruption Related to Regulation

There are many regulations in our society and the number of these regulations generally increases as our society develops. Although each individual law having an effect on the life of the people becomes a regulation as it restrains the activity of the people and thus causes inconvenience to the people, a regulation plays an essential and important role as a key part of the national policy from the standpoint of national administration.

What if there exists no criminal law which can punish the crimes of a criminal in our society? Perhaps everyone will try to solve problems by taking everything into their own power and thus causing a big disorder in our society. The law made by the government stipulates what each person should do and should not and regulates the life of the people to prevent the disorder of society. Thus, it is a key part of national policy.

Subparagraph 1, Paragraph 1, Article 2 of the Korean Basic Law for Administrative Regulation provides that the term “administrative regulation” refers to what is provided in laws, municipal ordinances, and rules to restrain the rights of the people and to impose responsibility upon the people in order that a nation or a local autonomous authority may achieve a specific administrative purpose. Thus, according to the above Article, everything that has an effect on the lives of the people comes under the term “regulation”.

For example, a person who wants to engage in the highway express bus transportation business should receive a license from the Minister of Transportation,
and a person who wants to engage in the other bus transportation businesses should receive a license from a governor according to Article 6 of the Automobile Transportation Business Law and Article 13 of the Enforcement Ordinance of the same Law.

The reason why the government placed such regulations on the passenger transportation business is to increase its effect on the national economy and to secure its level of safety. Since these regulations endowed an administrative agency with lots of discretion, however, they distorted a market economy and caused many problems.

Let’s take an example from the construction business. The government classifies construction as general construction, specific construction, and technical construction pursuant to Article 5 of the Construction Business Law and directly manages the licensing of the construction business. After 1975 and up to the latter half of 1989, granting new licenses in the general construction business was prohibited. After that, new licenses had been issued every 3 years removing the restraint on competition. The problem is that in order to avoid the bottom line of the construction contract limitation system, large construction companies set up related companies to receive a general construction license from the government and participate in a small scale construction which is below the limitation.11

When the government has rights to issue a license, a market does not maintain a perfectly competitive situation and as a result an imperfect competition comes into being. Also, the flow of a market can be distorted and many problems can take place.

Where there exists a perfect competition market, since each enterprise competes with each other and thus its competitiveness can be improved, consumers can purchase goods or services at a lower price. But the government’s intervention in a market could result in merits and demerits, that is, prevention of unnecessary excessive competition and creation of imperfect competition.

By comparing the economic benefits obtained by maintaining imperfect competition with the economic benefits obtained by maintaining perfect competition, the government could get the information necessary to the establishment of a policy. Where, as in the early stage of economic development, maintaining imperfect competition situation can be economically more beneficial than maintaining perfect competition, to set up an imperfect competition policy would be economically more effective.

The term “policy” is generally defined as a set of ideas or plans that is used as a basis for making decisions, especially in politics, economics, or business. Thus it is natural that a regulation made based on a policy has its effect as a policy.

For the purpose of discussion, a regulation which can produce social benefit or social expense or corruption is treated as having 3 kinds of effect as follows: First, a regulation has “policy effect” when it produces the social benefit. Second a regulation has “non-policy effect” when it incurs a social expense.12 Third, a regulation has “corruption effect” when it leads to a corruption.13

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12 This thesis evaluates “social expense” in terms of economic efficiency of a rule and distinguishes it from corruption in terms of connection to a bribe.
13 The discussion is made under the assumption that the three kinds of effect can be quantified from the economic perspective.
When the policy effect of a regulation is greater than the non-policy effect as in the above table, maintaining a regulation would result in an affirmative effect. When such a purpose can be attained, a regulation becomes a “good policy”. However, if the government tries to maintain a regulation even when social benefits from a regulation became smaller than social expense due to the change of economic situation, etc., a regulation becomes a “bad policy”.

In terms of economics, a bigger problem caused by a regulation is corruption taking place in the course of licensing. Since the right to issue a license is left to the discretion of an administrative agency, if there is no mechanism to control such discretion, it would inevitably cause many problems.

Where the standard of licensing becomes obscure, the possibility increases that the licensing leads to corruption since an administrative agency can exert more discretion. Actually, there are many cases of illegality and corruption which damaged the fundamental structure of national economy in the world history including Korea.

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<th>Effect of Regulation</th>
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<td>Policy Effect (30%)</td>
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<td>Non-policy Effect (40%)</td>
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<td>Corruption Effect (30%)</td>
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As seen above, where the non-policy effect is 10% bigger than the policy effect and 30% of the corruption effect is added, it would result in 40% (30% - 40% - 30%) of negative effect on the national economy.14

Although a regulation has the policy effect, if the non-policy and corruption effect of the regulation is greater than the policy effect, the regulation is not desirable since the non-policy and corruption effect completely offsets the policy effect.

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<td>Policy Effect (45%)</td>
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<td>Non-policy Effect (25%)</td>
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<td>Corruption Effect (30%)</td>
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As seen above, although the policy effect is 20% greater than the non-policy effect, where the corruption effect is 30%, this regulation has a negative effect on our society. In order to solve this problem, it is necessary to strengthen the policy effect and weaken the non-policy and corruption effects.

For that purpose, 1) the policy effect must be strengthened by thoroughly reviewing the content of a regulation and then removing factors that can cause non-policy effect and 2) the corruption effect must be weakened by strengthening the internal control system of an administrative agency.

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14 In reality it wouldn’t be easy to quantify each effect. However, for the purpose of discussion, each effect is stated in percentage.
As set forth above, after new licensing on general construction business was prohibited after 1975 in Korea, new license has been issued every three years after the latter half of 1989 and it resulted in the removal of restraint on competition. Since then, large construction companies have set up illegally related companies to avoid the bottom line of the construction contract limitation system and participated in a small scale construction below the limitation.

In this example, if the removal of restraint on competition produces the social benefits, such policy effect can be strengthened by removing “factors limiting competition” through the issuance of a license every three years. Also, if the illegal participation in a small scale construction by large construction companies increases the corruption effect, the corruption effect can be decreased by strictly supervising and checking corruption activities through the strengthening of internal control system.

Where a regulation has only policy effect or non-policy effect and has no corruption effect, a solution to this problem would be relatively simple. If a regulation has an adverse effect upon our society since its non-policy effect is greater than policy effect, the problem can be solved by reducing factors producing the non-policy effect and increasing factors producing the policy effect or by abolishing the regulation.

Then, what if a regulation related to licensing has policy, non-policy and corruption effects at the same time?

Even though a regulation contains some corruption effect, it wouldn’t desirable to abolish the regulation without considering policy effect. If a regulation has policy effect as well as corruption effect, we must strengthen the policy effect by removing the corruption effect. But when a regulation has only corruption effect, the regulation must be completely abolished. Where non-policy effect is greater than policy effect and there is corruption effect, the policy effect can be increased by removing the corruption and non-policy effects.

Then, how can we remove a corruption effect? Corruption relating to a regulation is divided into two types.

The first case is where an administrative agency has much discretion due to the obscurity of a regulation and thus it leads to corruption. In that case, the discretion must be reduced to the greatest extent possible through the establishment of detailed and elaborate administrative rules. The second case is where an administrative agency receives a bribe by conniving at the violation of a regulation. In that case, the internal control system under which administrative actions can be supervised and checked must be prepared.

When a person wants to carry on business at a specific place, he/her should meet the requirements of the Fire Service Law, the Public Health Law, and their related presidential decree and enforcement ordinances, which are applied to the business place. Since these rules become a prerequisite of business licensing, if the related rules are not satisfied, the business license cannot be obtained.

Because a business place is a frequent place of gathering by many people, its safety conditions can have a great effect upon the lives of the people using the business place. Where an administrative agency does not properly supervise and guide the economic activities of businessmen, the possibility increases that a dangerous situation such as a fire may take place and cause a danger to the lives of the people. Therefore, an administrative agency often actively intervenes in the economic activities of the people
in order to prevent such an accident.

In general, the government maintains a certain regulation since it thinks that a regulation can benefit the people. The problem is that where an administrative agency misuses a regulation, social expenses from the misuse of the regulation become larger than social benefits from the regulation. When social expenses become larger than social benefits, such regulation will lose its value.

Since meeting a licensing requirement of a splendid saloon is harder than meeting a licensing requirement of a general saloon in Korea, there were cases of doing business as a form of a splendid saloon after obtaining the license of a general saloon. Thus, in-charge officers often demanded a bribe to those businessmen that try to take advantage of such a weak point. This is a typical example of corruption.

Also, when a person who tries to obtain a business license does not meet the requirements provided in the law or other provisions, the person is tempted to collude with an in-charge officer resulting in corruption. In addition, there are cases where corruption occurs because the obscurity of related rules provides an in-charge officer with a lot of room to arbitrarily construe them and the in-charge officer misuses it. These are typical examples of structural corruption related to a regulation. Such structural corruption occurs since the related rules and the internal control system of an administrative agency have problems. Therefore, the systematic mechanism to prevent such problems is required.

**Education of Government Officers**

The development of a nation is closely related to education. When constituents of a society fully learn necessary knowledge and can apply it to their field, productivity improves and the improvement of productivity of each individual increases the productivity of a nation.

Like a household and an enterprise, when the knowledge level of constituents of the government improves and that knowledge can be effectively used, the productivity of the government will also improve.

First of all, for the development of administration, a standard under which a government officer can be promoted to a higher position must be established. Officers who are in a position of being able to decide a policy and have sufficient administrative experience should study the system of a developed nation and be able to apply what they studied in reality. Thus, such system must be prepared.

If those officers cannot acquire the targeted degree of a developed nation where they are studying, they should not be allowed for promotion to a higher position. That is, it is necessary that the government should introduce a perfectly competitive system regardless of the ranking of its officers to the extent possible.

The world is approaching the times of an infinite competition and we are now opening almost every market to foreign nations. Where persons who have no international sense hold key positions in the government, it would be very difficult for them to contribute to the development of a nation. If they do not understand what is happening around the world, they would be like a frog in a well. It means that they could not win in a serious competition.

One Chinese scholar said, “To read a book in his adolescence is like looking at the moon through a crack in the door, to read a book in his middle age is like looking at the
moon in the yard of his house, and to read a book in his old age is like looking at the moon in an open-air platform under a blue sky.” It is needless to say that endless study is a key to win competition.
Chapter V. Improvement of Korean Politics

Improvement of Korean Politics

- Separation of Three Powers -

The democratic government is generally divided into the legislature, the executive, and the judiciary according to the principle of check and balance. In order to maintain a substantial democracy, it is very important that the reciprocal check function of these three branches work properly.

However, unlike a developed nation, the power is generally concentrated on the executive in an underdeveloped nation because of the necessity of strong leadership. This logic might be appropriate at the time of an initial economic development. But where the consciousness level of people develops and they become accustomed to democracy, such unbalance of power can create many problems.

Where power among three departments is unbalanced, the head of the executive who has experienced the sweetness of power would try to continuously exert his/her power, and the legislature and the judiciary which must monitor the activities of the executive would conspire with the executive or play a role of the executive’s maid without any objection.

When the executive exerts a strong power and the legislature and the judiciary cannot properly play their role of checking it, the possibility of corruption using power becomes much greater. When the executive exerts a strong power and falls into the swamp of corruption, the possibility increases that the legislature and the judiciary will also play a role of its maid and fall into the swamp of corruption. No matter how strong the power of the executive might be, it is difficult for the executive to act alone without the cooperation of the legislature and the judiciary because certain legal procedures must be kept.

After the 1960s, Korea has accomplished a high economic development and the executive has operated a nation exercising almost every power. Although Korea has accomplished a high economic development, the strong power of the executive has resulted in many social problems such as corruption. Thus, the undeniable truth that absolute power will eventually lead to corruption also applied to the case of Korea.

After liberation from Japan, people who had never experienced democracy during the Chosun Dynasty and the time of Japanese imperialism gradually started to understand what democracy is. The number of learned people increased and the government that had been exerting absolute power faced strong defiance from its people. Our democracy has gradually developed under such circumstances.

In fact, the Korean government has achieved great development in the field of economy by exerting its strong executive power. However, the government also should have been interested in the development of a system to support the economic development. Although Korean society has achieved an external development, it has started to become internally ill. In the course of economic development, the government executed an economic policy largely for conglomerates and conspired with them, which led to serious corruption problems.
The same case can be found in Indonesia. The Segye Il Bo\textsuperscript{15} dated May 22, 1998 inserted an article entitled “From the father of development to corrupted dictator”. The principal content is as follows:

*Suharto is a typical dictator who has exerted omnipotent power and ruled Indonesia, a nation with the 4\textsuperscript{th} largest population in the world for the past 32 years. He is 76 years old and was elected president at the MPR conference on March 10, 1998. But despite strong support by the military, he faced economic crisis and an affair of bloodshed and then resigned his office because of domestic and international pressure under the control of the IMF.*

*In 1965, he grasped power in the course of suppressing a communist revolt and was respected as the father of development by achieving an average 7% of high economic growth per year using profits from the petroleum and gas industry until the foreign currency crisis took place last year. Especially in 1984, through an agricultural reform, he achieved the food self-sufficiency of Indonesia, which had been the largest rice importing nation in the world, and greatly contributed to having Indonesia join a line of Asian small dragons in the 1990s.*

*However, he denied political and economic reform that corresponded to the external developments and thus, faced the IMF. As a result, he retired with disgrace as a corrupted long-term ruler, enslaved by the viewpoint of an anachronistic cold war. His 6 children controlled such key industries as the automobile, petrochemistry and bank, and they became tycoons within a short time and tried to grasp political power, causing illegality and corruption problems. The illegality and corruption finally resulted in the nose-dive of Rupiah in July of last year and a crisis that required an urgent blood transfusion from the IMF.*

Along with the development of capitalism, it is necessary that the development of a system to solve the problems of capitalism should follow. But in fact, we have neglected the development of a necessary legal system thus far. The development of a system can become possible when the legislature and the judiciary can fully perform their roles. If the executive unilaterally makes bills while the legislature is just a branch that formally passes the bills and the judiciary does not properly exercise its power of reviewing their unconstitutionality, a properly established law cannot exist.

*Since law, which is generally drafted by the executive, has a great effect on the social life of the people, if law is drafted for the convenience of administration and passed in the legislature without any filtering, the rights of people cannot be protected. Where the checking function of the legislature and the judiciary does not properly work, the executive can unilaterally exercise its administrative power and collude with tycoons causing serious corruption problems.*

- The Importance of Model Political Activity -

Water flows downstream. Where parents are role models at home, children will generally resemble their parents. If parents do not show the right attitude toward life to their children, it would be useless for parents to try to educate their children to maintain

\textsuperscript{15} Korean daily newspaper
a good life attitude. They simply will not follow what their parents say. The same principle also applies to politics. If politicians are corrupt, no matter how they may try to persuade the people to live righteously, it will be useless. Whenever political power changes, politicians say that they will perform audits and inspections against illegality and corruption. However, the victims of the audit and inspection are normally low-level officers. Since the persons who should be subject to the audit and inspection against illegality and corruption themselves boisterously shout out “audit and inspection against illegality and corruption”, the people show a bitter smile.

Although men of power and men of wealth are caught in the net of audits and inspections, they are not afraid. They are released under the pretext that they have contributed to social development and easily receive an indulgence of pardon.

If the upstream water is purified, the water downstream can also be purified. Thus, if a high ranking officer is purified, the necessity of audits and inspections against a low ranking officer will greatly decrease. Look at a society that is both culturally and economically developed! In that society, the higher their position, the cleaner their life. Of course, every society has corruption problems, but there is a big difference between developed nations and underdeveloped nations in terms of the degree of corruption. In general, high ranking officers of a more developed society has less propensity to corruption.

I had heard of vices of policemen who were in charge of drug traffickers on TV while I was in the United States for two years. Unlike in Korea, however, such cases are very rare. I have hardly ever heard of news that high ranking officers colluded with businessmen for the purpose of bribes although there have been minor political cases where politicians were suspected of raising political funds using the telephones and bedrooms in the White House.

Since the life of such politicians is normally clean, the media tries to exploit even such small things. In our society, cases related to illegality and corruption are reported almost every day. Thus, we cannot help worrying about the serious problems of our society.

Shamefully, some years ago, our two former presidents were incarcerated because they received bribes worth tens of billions Korean Won while they were in office and it was reported as a top news all over the world. Seeing that, it is clear that we still have a long way to go before our society truly develops.

In general, it is not easy for only one person to commit a corruption using power. It is not generally easy for an officer to commit unless he/she cooperates with other officers. This is especially true under the hierarchy system like ours where the line of approval is straightforward. Therefore, all officers coexist through cooperation with each other.

Considering the fact that the life of a high ranking official is generally clean in the United States, we can easily understand why the vice of a low ranking policeman is often reported.

Even when the life of a high ranking policeman is clean, it may be difficult to control every activity of low ranking policemen. Such a vice would not be committed through internal collusion with a superior but rather largely committed through a face-to-face contact with a drug trafficker because of monetary temptation. Since this kind of vice seldom, if ever, leaves any kind of trace unless the other party snitches, policemen are tempted to commit an illegality.

The consciousness level of the people is proportionate to that of the persons who lead
the nation. If politicians have clear consciousness, it will be natural for the people to have clear consciousness. The life attitude of each citizen has an effect on the development of a nation but the life attitude of politicians has a greater effect on the destiny of a nation.

Politicians take part in the operations of a nation through the legislature and the executive, and are placed in the position of laying out long-term policies of a nation. Law that politicians make in the legislature has an effect on the operations of a nation until the law loses its effect. The long-term policy of a nation is performed by law or by administrative action based upon law. When politicians effectively operate the National Assembly, a nation can also be effectively operated.

In fact, although the executive, the legislature and the judiciary all play an important role in operating a nation, the function of the legislature is especially important. If the legislature fully plays its role, it can influence the executive and the judiciary and result in the development of a nation.

The National Assembly largely consists of representatives directly elected by the people. Therefore, it can be said that it is an agency upon which the intent of the people is reflected very well. On the other hand, in the case of the executive, with the exception of the president who is elected by the people, almost all of the officers are appointed according to procedures prescribed by law. Even though the law is established by the National Assembly which is organized by the people, officers of the executive are not directly elected by the people. In this respect, the judiciary is the same.

Members of the National Assembly elected by the people should be able to reflect the mind of the people. That is, unlike general government officers who hold a lifetime job once they are appointed, members of the National Assembly are elected every four years. Thus they should clearly grasp the people’s intentions and make a great effort to reflect it in setting up a national policy.

Up to now, the members of the National Assembly could not adjust themselves to the changing times and thus they were unable to greatly contribute to the development of a nation. They have been busy pursuing their own profits rather than contributing to a nation through the cultivation of competency and have thus spent much time on events that have nothing to do with the duty of a member of the National Assembly.

If the National Assembly faithfully plays its role, it will directly affect the executive and the judiciary. The National Assembly has the right to inspect or audit the executive. Also, if high ranking officers commit an illegality, it can impeach them. However, the problem is that these systems do not work well in Korea.

If the National Assembly wants to inspect the business of the executive, it must be able to thoroughly grasp what is going on in the executive. By doing so, it can accomplish its purpose of inspection. Where its members do not prepare in advance and clearly have an understanding of what they are going to inspect, the inspection will end in form only.

To prepare for inspection by the National Assembly, the executive must invest a lot of time and expense. However, if the legislature inspects the business of the executive by investing a great deal of time but does not achieve its inspection purpose, the time and expense invested in the inspection become a loss of an opportunity expense. These expenses are paid from the taxpayer's money.

Also, such an insincere inspection against the executive becomes an opportunity for officers of the executive to evaluate the ability of the members of the National
Assembly. If the inspection ends in form only, officers of the executive would think that the members of the National Assembly are incompetent and that no problems will arise even if they roughly prepare for an inspection against the executive.

Many politicians have said that the executive was solely responsible for our foreign currency crisis. In fact, however, it must be said that the foreign currency crisis was a joint product of the executive and the legislature. If its members had fulfilled their duty during the legislature’s annual inspection against the executive, they could have foreseen such a foreign currency crisis. If the legislature does not carry out its legislation function properly, there is no reason for the legislature to exist. However, we need to recognize that the people are in part responsible for the incompetence of the National Assembly. In fact, it is the people that have chosen the members of the National Assembly. Thus, the people cannot blame anybody but themselves.

- Election and the Substantial Chance of Selection -

In the past, whenever there was an election, rubber shoes, wheat flour, money, etc. were scattered to voters. Since the level of voter’s consciousness concerning democracy was very low at that time, such things had a great effect on the outcome of an election. However, as the education level of voters and the consciousness level concerning democracy improved, this phenomenon is gradually disappearing.

In the past, voters were very naive. Thus, they generally cast a vote for a candidate who furnished them with money, etc. However, as time passed by, our society has become a society in which money alone cannot control the outcome of an election and this indicates that our society continues to develop. Of course there are people who still sell their consciousness for money.

In the past, voters did not have any substantial opportunity to select a good candidate. The reason is that the same candidates almost always run for election and voters rarely have a chance to choose fresh candidates. Thus, taking into consideration that any candidate tends to get corrupted, the people have thought that it would not matter whomever they cast a vote to.

The government says that all the people must participate in an election but the people feel burdened whenever they hear it. Thus, voters sometimes cast a vote for a candidate who furnished them with money without any serious consideration. Accordingly, it is difficult to say that voters had any substantial opportunity for selection. They just got a formal chance of selection.

Among present members of the National Assembly, there are persons who make us doubt whether they possess a basic qualification to be a representatives of the people. Now, we can still see representatives who have been indicted and incarcerated on charges of receiving hundreds of millions or billions Korea Won, and then are released with pardon, etc. and again participating in politics. Who selected these representatives? The voters did. Therefore, we cannot blame anyone except ourselves even if we were to suffer from economic crisis once again.

The reason why such persons could be elected sometimes is because of regional emotions that damage national harmony. Politicians use demagogic words instigating regional emotion and voters cast an emotional vote losing reason, abetted by these demagogic words. Thus, although everyone is aware of a candidate having many problems, the candidate is elected a representative of the people. That is, voters give up
reasonably exercising their voting right given to them.

If voters cast votes under the premise that there are no candidates in our society without flaws and therefore there is rarely a difference between the candidates in light of corruption, they cannot have a substantial opportunity for selection but merely a formal chance of selection. Under such circumstance, even if voters do not participate in an election, it would be very difficult to criticize voters for giving up their precious voting rights.

Then, what is a substantial opportunity for selection? Modern society is continuously becoming complex and specialized, and population also is increasing. Under this social structure, it is impossible for the opinions of all individuals to be reflected in the operation of a nation. However, although reflecting the opinion of every person is impossible, if the intention of the people is disregarded, there cannot be a true democracy.

Every person wants our nation to develop and hopes that he/she may have a chance to select a politician who is able and clean for the development of our nation. If the people cannot obtain such an opportunity, there would be no room of the true intentions of the people being reflected in the operation of a nation. This is directly against a democratic principle that a nation must be operated according to the intention of the people.

In Korea, an election is performed without substantial screening to ascertain whether a candidate is fully qualified to be a representative of the people. There is a problem that voters cannot help selecting a candidate who is publicly recommended by a political party although a candidate who is not recommended by a political party is often elected and they are instigated by regional emotion under the influence of demagogic politicians. Therefore, the substantial opportunity for selection by voters decreases.

What if the people directly cultivate politicians instead of solely relying upon a political party? Then, it is likely that a substantial opportunity for selection would increase.

- Problems of Korean Politics -

First of all, let’s look at some problems of our politics that we are well aware of.

1) Voters have no interest in the cultivation of honest politicians. Thus, politicians are largely cultivated by “under-the-table” funds and thus there is no possibility of political development.

2) Since regional emotions run deep, each party cannot breakaway from its regionalism and naturally consists of persons of the same region. A regional political party is created by the instigation of politicians rather than voters.

3) Because the operation of a political party is not transparent and funds are largely secured by an “under-the-table” method, whenever there is an election, each party makes a great effort to obtain money from a person who wants to run in the election through a public nomination. As a result, a person who has lots of money rather than a person with competence can easily receive a public nomination from each political party.

4) Each political party tends to be operated by an antidemocratic method, rather than through a democratic method, pursuant to the intentions of a single individual who has a
substantial power. Thus, a problem occurs that a person who works based on his/her beliefs is shunned and a person who sees how the wind blows succeeds.

How can we solve these problems? Can we obtain the best answer to this question? Let's examine an actual case before discussing a solution. The following article was inserted in the Joong Ang Il Bo16 published in the United States on April 19, 1997.

One member of the National Assembly disclosed the details of his political fund's revenue and expenses for the past 3 years. He said that he had received KRW 50 million from the Han Bo Inc., but he did not personally misappropriate it or use it to accumulate his own wealth. It seems that he spent KRW 3 billion during the most recent 3 years.

He said, “While I worked for 3 circumstance organizations, such as the circumstance forum of the National Assembly, etc., I spent KRW 0.95 billion for the inspection of water quality of five rivers, and its related legislation and policy planning activities from 1994 to 1996.”

Also he said, “At the time of the election of the members of the National Assembly on April 11, 1996, I gave 167 candidates money ranging from KRW one million to KRW tens of million per person. At the time of the election on June 27, I gave respectively KRW 0.1 billion to 11 candidates of the same party for the chief of a local government, KRW 0.5 million to 200 candidates for the chief of a basic local government, and KRW 0.3 million to candidates for a local assembly.”

That is, he spent at least KRW 2 billion during two elections... How did he obtain this money? According to a person in charge, money spent on circumstance organizations came from related enterprises. Therefore, it is clear that the remaining money came from entrepreneurs or politicians... He said, “In addition to the help received from entrepreneurs, I sold my 10 folding screens worth KRW 150 million and pictures obtained from relatives for free and used them for political activities.”

If the member of the National Assembly spent more than KRW 3 billion for 3 years, it means that he spent more than KRW 1 billion per year and around KRW 0.1 billion per month. Since this amount might not include other expenses including expenses for congratulations and condolences, if those expenses were to be included, the total amount would greatly increase when taking into consideration the reality of our politics.

The reason why I reinserted this article is because I wanted to emphasize that people should correctly recognize the reality of Korean politics. If a politician must spend more than KRW 1 billion for politics per year, it comes to the conclusion that anyone cannot perform clean political activities unless he/she is wealthy enough to spend the amount of money necessary for political activity.

There were U.S. politicians who run for presidential election using their own money. Considering the political circumstance of the United States in which the accumulation of wealth using a power is very difficult, it is thought that they were willing to sacrifice themselves for their nation spending their own money.

Unfortunately, however, we have rarely heard of a Korean politician who is willing to sacrifice him/herself for our nation by spending his own money. On the contrary, there

16 Korean daily newspaper
are only reports that politicians accumulated their wealth while in power.

Under our present circumstance, it is difficult for us to expect our politicians to be like the politicians of the United States. However, we cannot deny that members of the National Assembly need significant amount of money for political activity. Can we criticize these members on the ground that they spend excessive money for political activity?

Let's realistically think about this situation. Have residents ever given donations to their representatives wholeheartedly? If a person makes a donation asking his/her representative to work hard for his/her region and residents, he/she is a person that knows what democracy is. However, if he/she gives his/her representative illegal money to satisfy his/her desire, the situation is quite different.

In fact, regardless of whether it’s before or after an election, representatives of the National Assembly have to spend significant amount of money for various events, including personal ones. Also, there are often voters who demand money, etc. from their candidate or representative under every kind of pretext. Representatives cannot disregard their demand because they must take into consideration the next election. As set forth above, in addition to various types of events, representatives have to expend money on many things.

Where residents do not support their representatives and the representatives cannot pay for their expenses with their allowance received from the government, they cannot help but try to obtain illegal funds by using their power since they need money to maintain their position. Thus, if that is the case, we cannot criticize only our representatives.

Let’s assume that the projected expense of a certain construction is KRW 10 billion. If we require a constructor to perform the construction at KRW 5 billion, the construction is not possible.

Our politics has a structure that requires a high level of expenditure. Nevertheless, we ask our representatives to perform political activities at a low expense. Thus, under the present circumstance, no representative can satisfy our demands. Despite the fact that lots of money is required for politics, if we ask our representatives to conduct political activities at a low expense, it would be very unreasonable.

- Improvement -

The answer is simple. We should create a good circumstance to improve our political system so that our representatives are able to conduct political activities at a low expense. If money is necessary to some extent, we should furnish them with clean political funds. To improve the political system is the role of the National Assembly. Therefore, solving this problem should be left to the members.

If our representatives need money to some extent, we should furnish them with clean political funds. Then, how can we secure such clean political funds? The answer can be obtained from local residents rather than politicians. If local residents were to show interest in politics and also save their living expense a little more, it would not be impossible to solve the problem.

Let's take No-won Gu of Seoul for example. It is said that the population of No-won Gu is approximately 600,000. If each resident makes a contribution of KRW 10,000 to a
party, the total amount would be KRW 6 billion (600,000 x KRW 10,000). Assuming that 4 persons live in one household, if a head of a household gives up drinking just once and uses the money as a donation, how many able politicians can the residents of No-won Gu cultivate?

If we assume that one representative uses KRW 1 billion per year, KRW 6 billion can be used as the expenses of 6 representatives. Of course, since there is also a government subsidy, the expenses of more than 6 representatives can be covered. Also, where corporations, etc. make a donation, that number would increase.

In the case above, one representative of the National Assembly said that he gave approximately KRW 2 billion to candidates for a chief of a local government. This expense of KRW 2 billion would be not necessary if our political circumstance is improved. Therefore, if this amount had not been incurred, the representative would have spent KRW 1 billion (3 billion - 2 billion) for 3 years and his annual expense would have been approximately KRW 0.3 billion. Thus, the KRW 6 billion that the residents of No-won Gu donate can be used as the expense of 20 representatives.

Impatient readers might ask “Why do we have to bear such expenses?” I fully set forth the problems of our politics. As we well know, many voters have unintentionally received money from candidates whenever there was an election. It often amounts to KRW 10,000 or KRW 20,000 or KRW 100,000 and they now are paying back a thousand or ten thousand times what they received.

Elected candidates colluded with entrepreneurs to retrieve what they had invested and it led to a serious government-business collusion that finally resulted in foreign currency crisis.

The government has since liquidated the bad debts of banks, which amounted to tens of trillion Korean Won, from the taxpayer's money. In addition, the bankruptcy of countless enterprises resulted in an unprecedented unemployment rate. Moreover, some people who had lost their jobs chose the worst method of escape, such as family suicide, etc. and countless heads of households became vagabonds. Thus, voters paid back hundreds of thousands times more for what they had received.

Who is responsible for this? It is the responsibility of the people who produced corrupt politicians. We cannot blame anyone but us. If we had developed a system for cultivating able politicians, we would not have faced such an economic crisis. If a political donation is treated as natural, shameless persons that demand offerings of congratulations and condolences from representatives would disappear, and the representatives would not be burdened by it. Of course, enterprises can also make donations and enjoy tax benefits by way of a donation credit as do individuals.

Under such circumstances, representatives will be able to be free from unnecessary expense. And able persons, even though they have no money, will be able to more easily participate in politics. What is more, a political party can admit an able person as its member and politicians will endeavor to improve their ability since they will have to adjust themselves to the competition system.

Under such circumstances, voters can receive the best service from the government and pass on a Great Korea to descendants from generation to generation. If representatives possess a right way of thinking and are equipped with a necessary ability, they can check the arbitrariness and inefficiency of the executive. The legislature will do its best for the people, and illegality and corruption will gradually vanish. Also the efficiency of the government will be improved and the people can receive a better
service from the government paying less tax than now.

We should not forget that the astronomical amount of money that should be collected as taxes is going into the pocket of an individual because of illegality and corruption. If such illegality and corruption were to vanish, tax revenues also would astronomically increase.

With increased tax revenues, the government can pay competent and hard working government officers a salary corresponding to their ability to turn them away from the temptation of corruption. It can also invest more money on the development of a nation and the welfare of the people, and the people can stately exercise their rights after paying their taxes.

Under this atmosphere, the government can take a strong measure against politicians receiving illegal political funds from enterprises, etc. Since enterprises can be relieved of the fear of confidential funds, the problem of the high expense and low efficiency can be naturally solved. Since 1), 2), and 3) among the 4 problems related to Korean politics as set forth above can be naturally resolved, more explanation on them would not be necessary.

Although the character of problem 2) is a little bit different, the situation would also be improved. Where the participation spirit of voters becomes strong and competent politicians are cultivated, out-of-date politicians who instigate regional emotions will lose the place where they stand. Because politicians must do political activities under the support of residents, once residents trust a politician, he/she can accomplish his/her job without feeling the burden of “going with the wind.”

Also, since residents cultivate politicians with their own money, incompetent politicians would be shunned by residents. Also, elected politicians would actively work for residents based on their own beliefs and the term “regional party” based upon instigation and unreasonableness would gradually vanish.

It is very natural that a person from Kyung Sang Nam Do Province who understands well the situation of the Province and the emotion of its residents becomes its representative. Likewise, it cannot be a problem that a person from Chul La Nam Do Province becomes a representative of the Province and a person from the Kyung Sang Buk Do Province becomes a representative of the Province. The problem is that a specific political party consists mostly of persons from a specific region and the representatives of a specific region consist almost entirely of politicians of a specific party.

If they could not perform political activities without the contribution from its residents, such an abnormal situation would not take place. If representatives try to unreasonably seek only a profit of their own party rather than voters, voters would not contribute their own money to such incompetent representatives.

Recently, many people have said that shirking representatives must be recalled. However, it would not be as easy as the general public might think. On the other hand, it would be important that the people have active interest in politics lest a politician could succeed in politics but for the support of the people. The government should also lead the people to actively participate in politics through P.R., etc. and make an effective system under which the donation of the people could be used effectively for the development of our politics.

Where our political system starts to change under the interest of the people, there would be no necessity of the people worrying about the misuse of their donation since
law would not forgive a person who violates rules. If there are politicians who try to pursue solely their own desire and money even under such a good political circumstance, there shouldn’t be a room of extenuation for them.

Whenever our nation has faced crises, we have overcome them with the unified power of all the people. Under the foreign currency crisis, all the people showed unified power by participating in the Gold-Gathering Drive once again.

From now on, however, we need to change our life attitude. We mush develop our ability to be able to cope with a crisis before we face a crisis rather than shouting patriotism at the moment of crisis. In order to do so, it is necessary to cultivate the ability of all the people. Taking into consideration our high passion for education, if every field of our society makes an effort all together, we will be able to achieve such ability before long.
Chapter XI. Anti-Corruption Theory

Anti-Corruption Theory

Up to now, the problems of our system and how they should be solved have been discussed. Corruption, in general, is in inverse proportion to the degree of development of democracy. The degree of corruption in the developed nations is normally low whereas the degree of corruption in the underdeveloped nations is normally high.

As long as Utopia does not exist, it would be impossible to have a perfect system without any corruption in the world. Even so, we should not let our society become corrupted.

Just as rules are necessary to religious life, they are also necessary to social life. Religion requires human beings to become ever closer to state of holiness but it would be very difficult for human beings to approach the state of holiness. If everyone reaches the state of holiness, our society will not need lots of rules. However, since this is not possible, human beings want to set up rules as a second best policy and, within the scope of the rules, live without violating the rights of each other.

Since ethic education cannot achieve its purpose only through the abstract religion and school education, a society tries to achieve the effect of education by disciplining a person who violated social rules through criminal punishment. Criminal punishment becomes the means of education to a person who violated rules and also has an effect to prevent the general people from violating rules by showing the examples of criminal punishment.

It might be very difficult to seek a means to prevent corruption without the law (system) regulating the activities of human beings in our society. The meaning of corruption could be construed a little differently, in terms of the public opinion, depending upon the custom and religion of each nation and the public opinion can be changed according to the degree of development of each nation. However, the accumulation of wealth using power and illegal money is, in general, thought to be a sinful act in any nation regardless of religion and custom.

When power and money are closely connected to each other and wealth is accumulated through an abnormal method, it has an enormous effect on the society. Such corruption cannot be prevented only by relying upon the ethic of human beings. Human history shows us that absolute power will eventually lead to corruption. Therefore, in order to prevent corruption, we should try to eliminate any chances that would lead to the abuse of power.

As time passes, our social life is subject to many changes. The world is becoming a one-day-life zone and, with the development of communication, we can easily watch the life situation of a neighboring nation through a TV, etc. Generally, if we see others take certain actions, we also tend to closely follow them, and if we see others have something, we also want to have it. Thus, enduring the relative poverty in the society which is not isolated from an outside world could be more difficult than enduring the absolute poverty in the society which is isolated from an outside world.

With the development of civilization, a society becomes more complex and human beings also become smarter. Thus, as a society becomes complex, more elaborate system which can support it would be necessary. If there were no development of system corresponding to the development of a society, wise human beings would try to
satisfy their desire by making bad use of the present problematic system.

When human beings violate a system (rule), the violation of rights takes place and corruption grows. Where a society develops, the loopholes of an existing system become conspicuous and human beings try to increase their profit using the existing system. If such activities are disregarded, since the possibility increases that the whole society would be polluted, it is necessary to create a more thorough system and strengthen ethics education.

Even if developed rules are made, there will always be persons who violate them. Where the system gets developed, since a person who violates rules is easily disclosed to the public and is subject to discipline, the number of persons violating the rules would be much lower than the cases where there is no developed system.

If a person who violates a rule is immediately subject to a discipline, people would not want to violate a rule because of the discipline.

Corruption through the bad use of power which damages the whole society and sometimes collapses even the foundation for existence of society is generally a joint production of persons holding power and persons holding wealth. Normal persons who have no deep knowledge on a system can rarely intervene in such corruption using power. Persons holding power and wealth who may use the loophole of a system largely commit a corrupted activity.

Since they come under a leading class in their society, their corruption has an enormous effect on the normal people and national destiny. In order to prevent such a corruption, more elaborate rules must be established and the government should show the public that discipline will immediately follow violation of a rule. By doing so, the government can prevent corruption.

I am not saying that corruption can be prevented merely through any single specific method. In order to prevent corruption, synergy effect must be created by combining various methods just as national economic problems cannot be solved by one specific economics theory.

Even though the cultural differences and custom of each nation are taken into consideration, the principles enumerated below could be applied in common to every nation and can play an important role in solving many types of corruption. Thus, these principles must be, with the first top priority, implemented for the prevention of corruption.

First, elaborate “rules” are necessary in order to prevent corruption using power. The term “rules” is a concept including all rules such as law, presidential decree, ministerial ordinance, each kind of administrative rule, etc. The more elaborate the rules are, the less the chances of exercising a discretion and the risk of corruption through the use of power.

Australia had at most 120 pages of tax law code at the time of its establishment. But now, the tax law code amounts to more than 7000 pages. That is, the tax law increased more than 60 times and became more elaborate and complex as time elapsed, which supports the fact that the development of a nation necessarily accompanies the development of its system. There can be a concern that elaborate rules might result in the delay of administration. But, where a person in charge fully understands the related rules, such delay would not occur. The delay of administration could be prevented by clearly stating the handling period and having an administrative agency thoroughly abide by it. The fairness of administration can be secured through a fair execution of
elaborate laws and regulations rather than arbitrary judgment.

![Graph showing the relationship between Elaborateness of rule and Corruption]

The above graph shows that the more elaborate rules decrease the corruption level while the less elaborate rules lead to greater corruption. However, since the knowledge level of members of the legislature and their fidelity to business, etc. are quite different depending upon the development degree of democracy of each nation, there would be a difference in curing corruption problems according to the degree of development of democracy.

In the case of underdeveloped or developing nations, the knowledge held by members of the legislature and their fidelity to business are generally low. It would thus be very difficult to expect them to establish elaborate rules which become a cornerstone of development of democracy. Because, the executive normally has a strong power in these nations, it could be effective that the executive leads the reform work. Although the executive does not establish statutes, it has authority to establish each kind of presidential decree, ministerial ordinance, administrative rule, etc. and these rules play a role of complementing the loophole of statutes.

Therefore, when the function of the legislature is weak, it is necessary for the executive to eradicate its corruption to the extent possible through the elaborate administration system. Such efforts of the executive will greatly affect the judiciary and the legislature and then, with the effort of the three branches of the government, the corruption problems could be resolved.

Second, there should be a sufficient number of lawyers to maintain such a system. Large number of lawyers should be produced and trained for the judiciary, the legislature, the executive and the protection of rights of the people.

For democracy to develop, lawyers who have the required knowledge and experience should be able to exercise their ability in every field of society. When the government infringes upon the rights of the people, lawyers who can correct it must always stand by the people. It is not necessary for every people to become a law specialist. Thus, if the circumstance is created where the people can easily obtain lawyer's assistance whenever needed, it will be adequate.

In the case of Korea, the number of people to whom one lawyer should provide legal service amounts to more than 6 to 30 times that of developed countries. Since the number of lawyers is absolutely scant, the Korean people cannot expect good service from lawyers. What is more, to strengthen the field education which is more important than school education, the principle of competition in a legal society must be introduced. A competent lawyer can never be produced under the present system which guarantees
a lawyer high income for life once he/she passes bar exam. The circumstance must be created where an effortless lawyer will be weeded out. A lawyer who is shunned from others because they do not make an effort and try to earn money with ease must be ostracized from a legal society. Therefore, it is very important to train more lawyers and have them compete each other.

Finally, to develop law and increase the effect of legal education, there must not be a gap between school education and reality. If a student who has received school education cannot apply what he learned to the actuality, such education is useless.

By adopting an empirical legal education emphasizing an ability to solve problems rather than the memorization of a simple theory, development-pursuing knowledge which can foresee the future should be educated for students.

The above graph shows that corruption decreases when lawyers of a proper number are secured, the system of competition in a legal society is introduced and the quality of legal education is improved.

Third, the government should clearly show the people that a discipline immediately follows violation of rules. In a truly democratic society, anyone should be subject to discipline against his or her illegal activity. The government should continuously educate the people to abide by rules. To maximize the effect of education, the government should strengthen ethical consciousness through lifetime education and create a condition for the people to well adjust themselves to such social system.

The above graph shows that corruption decreases when discipline and ethics education are strengthened.
Fourth, the spirit of reporting and participation of a citizen becomes a motive to prevent corruption. In order to discipline a person who breaks a system, the spirit of sound reporting of a citizen is necessary. And, for training honest politicians as already set forth before, it is crucial for citizens to voluntarily support politicians. Since democracy means politics by the general public, democracy will never grow unless they have interest in politics. To cultivate the spirit of sound reporting of citizens and induce them to voluntarily participate in politics, the government also should make its best efforts.

![Graph showing the decrease in corruption with increased spirit of reporting and participation]

The above graph shows that corruption decreases when the spirit of reporting and participation of citizens is strengthened.

Fifth, it is necessary to collect taxes in a fair manner to maintain the equity of taxation. If the government could thoroughly collect taxes which are being evaded or avoided, tax revenues will greatly increase. Through fair tax administration, the government could deter the corruption taking place due to the low salary of government officers and improve the welfare of the people with the increased tax revenues.

Further, if the government raises the morale of government officers by determining the level of salary according to their effort and ability, their ability could be maximized and the government could achieve a high productivity as well as the prevention of corruption. Since the equity of taxation is also closely related to the vice of government-business collusion and high expense & low efficiency, it is very important to maintain the equity of taxation.

![Graph showing the decrease in corruption with increased equity of taxation]

Until now, the government has grudged raising the salary of government officers under the pretext of price stabilization. However, because the government officers’ salary is rather low, they tend to succumb to temptation of corruption more easily. What is more, since money obtained so causes a strong propensity to consume, it could cause a negative economic effect.
Where the government thwarts obtaining black money through an illegal method and can prevent tax evasion through a thorough tax audit, etc, a part of tax revenues secured can be used to raise the morale of government officers through higher salary. In this case, since the productivity of government officers increases, it becomes possible for the government to efficiently operate its organization. Also, raising the salary of government officers based on their ability and effort will result in the automatic increase of income tax revenues. Thus, the government can enjoy the benefit of catching two birds with one stone.

Then, how much expense should we bear to improve our system in such a manner? In order to make elaborate rules and train men of ability, time and effort are necessary. Although social expense is necessary to some extent, we should train enough lawyers, introduce the principle of competition in a legal society and increase the quality of legal education. Since the time and effort wouldn’t be costly compared to the social expense which we incurred due to the foreign currency crisis, it is worth doing so.

Also, strengthening a discipline and cultivating the reporting and participation spirit of citizen would not incur much social expense since the government can achieve the targeted goal by systematically using the present human resources and inducing citizens to voluntarily participate in politics. By doing so, Korea could maintain an excellent system and get a maximum effect with a minimum social expense.
Chapter XII. Improvement of Tax System

Equity of Taxation

Equity of taxation means that persons under the same economic situation must pay the same tax. Therefore, a person under the same economic situation must not bear tax at a substantially different level from the other person under the same economic situation. When a person having the same income pays the same tax, we call it horizontal equity. When a person having more income pays more tax, we call it vertical equity.

It is very important that the people feel that a taxation system is just. Otherwise, there exists a possibility that a serious tax resistance will take place. Article 38 of the Korean Constitution provides that all citizens shall have a duty to pay taxes under the conditions as prescribed by law, and Article 59 of the Constitution provides that types and rates of taxes shall be determined by law. Thus, the reason why a duty to pay taxes and types of taxes are provided in the Constitution is because taxes play a very important role in the operation of a nation.

When some persons pay an accurate amount of taxes against what they earned while other persons do not pay an accurate amount of taxes through illegal evasion, the equity of taxation is broken. When the equity of taxation is broken, the dissatisfaction of persons who pay relatively more taxes will be greatly increased.

In our society, persons having high income such as a doctor and a lawyer, etc. have tendency to evade taxes, which is true in reality. On the other hand, since salaried men with low income are subject to withholding tax at the time wages are paid, there is rarely an opportunity for them to evade taxes. As a result, equity of taxation cannot be attained. If this problem is disregarded, it can deepen a serious gap of income between the rich and the poor. One of the most important means to tackle “the rich become richer and the poor become poorer,” a negative phenomenon in the capitalism, is tax.

In general, a nation collects more taxes from persons having more income. With the taxes collected, a nation performs a financial activity and tries to cure various social problems taking place because of the income gap between the haves and have-nots in order to achieve national development and social harmony. Therefore, for smooth execution of such policy, the equity of taxation is absolutely necessary.

Now, let's discuss the equity of taxation in detail. Assume that a child A was born between wealthy parents, has grown up under a satisfactory circumstance and inherited KRW 1 billion (excluding inheritance tax) of property from his parents. In comparison, let us assume that a child B was born under a poor environment, and has grown up under a difficult circumstance and inherited nothing from his parents.

Since A has wealthy parents, has grown up under good circumstance, and could receive good education, it is more likely that he will succeed in the society. Moreover, he inherited KRW 1 billion of property and therefore could lead his life without economic difficulty.

Assume that A engages in proprietorship in early forties and earns business income of KRW 0.1 billion per year, and since he can earn KRW 0.1 billion using the inherited property of KRW 1 billion, he also has 0.2 KRW billion of income in total. Then, the income tax which A should pay is KRW 60 million [0.2 billion x 30% (presumptive
income tax rate). On the other hand, assume that B in the early forties, who was born poor, cannot help but find a job after graduation from a high school, earns income of KRW 20 million per year and pays KRW 200,000 of income tax [KRW 20 million x 10% (presumptive income tax rate)].

A should pay tax of KRW 60 million which corresponds to 30% of his income. But, where A omits KRW 0.1 billion out of total income and reports only KRW 0.1 billion as taxable income to the government, A will have, after paying KRW 0.025 billion of tax, the income of KRW 0.175 billion (0.2 billion - 0.025 billion). On the other hand, B will have the income of KRW 19.8 million (20 million - 0.2 million) after paying KRW 0.2 million of tax.

Now let's assume that both A and B have two children. Since B has an absolutely scant income, it will not be easy for B to maintain a good living condition and educate his children. But, since A has enough income, it would not be difficult for A to maintain a good living condition and educate his children.

If the government disregards this undesirable situation, an economic gap between the haves and have-nots would become larger and a few rich men would occupy most of national wealth. Where the wealth of parents of A and B directly affect both A and B and the property which A and B accumulated is transferred to their descendants, the gap between the rich and the poor would not be narrowed. In the case of underdeveloped and developing nations, since a few rich men generally occupy most of national wealth through an illegal method, it causes more serious social problems.

A should have paid as tax KRW 60 million which is 30% of KRW 0.2 billion. But, A actually paid only KRW 25 million of tax which is 12.5% of KRW 0.2 billion and as a result evaded 17.5% (30% - 12.5%) of tax. On the other hand, B paid KRW 200,000 of tax which is 10% of his income. Since the income gap between A and B is very big, A should have paid 30% of tax other than 12.5% in terms of vertical equity. However, because A had paid 12.5% of tax on his income, A actually paid only 2.5% (12.5% - 10%) more than B and as a result the vertical equity is broken.

We need to think about why A should pay more tax than B. Although A evaded 17.5% of tax, A paid KRW 24.8 million (25 million - 0.2 million) more tax than B. In this situation, why should we criticize A's tax evasion activity? A paid much more tax than B in terms of absolute tax amount. Thus, it is likely that he will not consider his tax evasion activity unjust and will not suffer from a guilty conscience.

Assume that A is a taxpayer who runs transportation business. In order to run the transportation business, A requires lots of human and material resources such as drivers, managers, vehicles etc. Drivers and managers etc. who come under human resources receive wages in consideration of their efforts and, when A pays wages to them, A withdraws taxes from their wages and pays the taxes to the government. Therefore, it would be generally difficult for A's staff members to evade taxes.

However, A could reduce his income by intentionally reducing his sales amount or recording false expenses. For example, where A received KRW 1 million in consideration of transportation, it is possible that A will not record the amount in his accounting book in order to reduce his business income.

The other method is to reduce his net profit by recording false expenses in the accounting book. For example, assume that the total sales amount is KRW 1 billion this year. If the actual expense is KRW 0.8 billion, A's net profit is KRW 0.2 billion (1
If A records a false expense of KRW 0.1 billion in his accounting book, A's net profit is reduced to KRW 0.1 billion (1 billion - 0.8 billion - 0.1 billion) from KRW 0.2 billion.

Let's observe why A's such activity must be criticized. In order to run transportation business, A should use roads, railroads, and ports, etc. Roads, railroads, and ports, etc. which are social overhead capital are generally built by the government with taxpayers' money.

If the government does not invest taxpayers' money on the social overhead capital, it would be difficult for A to run transportation business. Of course, A is not the only person benefiting from such investment. A's employees likewise benefit from investment on social overhead capital when they personally use roads, etc. However, since A also benefits when he personally uses roads, etc., there would be no difference between A and his employees when it comes to using the roads, etc. Rather, it is likely that A will have greater chances than his employees in using such facilities, etc. as he is wealthier.

A's employees receive a salary in consideration of their labor. That is, they obtain their income in consideration of their labor rather than in consideration of using social overhead capital such as roads, railroads, and ports, etc. On the contrary, A who runs transportation business can never obtain income without the use of the social overhead capital. Thus, A more directly benefits from social overhead capital.

The more business activity A does, the more social overhead capital A should use. Even if there is no significant difference between A and A's employees in terms of working hours, A could earn more income using social overhead capital invested by the government.

A does not only benefit from the social overhead capital but also from the important activities of the government including national defense and public security, etc. Such governmental activities have a direct effect on A's economic activity.

We cannot not think about A's business activity without such governmental activities. Although every people benefits from such governmental activities, A enjoys more benefits through business activities which other people do not perform. The bigger the scope of his business activity, the more benefit he will receive from the activities of the government. Thus, to maintain equity of taxation, A must pay more taxes than his employees having less income according to the principle of the burden of a beneficiary.

The above example was based on a proprietary business but the same principle also applies to a corporation. The more actively a corporation does business, the more benefit from social overhead capital the corporation can enjoy.

Assume that we can manifest in amount the benefit which the government provides to the people through the social overhead capital, public security, and national defense, etc. and that the total benefit which businessmen receive from those governmental activities is 0.1 billion units and the number of businessmen is 50 million.

In that case, one businessman will be able to enjoy the benefit of 2 units on average. However, every businessman cannot enjoy the same benefit from the governmental activity. Since some businessmen who perform more extensive business activities can obtain more benefit, it would be possible that they would enjoy the benefit of 10 units exceeding the average 2 units. On the other hand, the other businessmen whose business activities are less active could receive the benefit of 1 unit less than the average 2 units.

Therefore, if each businessman pays his or her taxes consistent with the benefit
which they received, it would be the most reasonable method for allocating the national expenses. That is, a person who obtains more benefit from the governmental activity should pay more taxes in order for the vertical equity of taxation to hold true. Of course, a person who enjoys the same benefit should pay the same taxes in order to be consistent with the horizontal equity of taxation.

Let’s take another example. C has KRW 1 billion of property and D has KRW 10 million of property. Assume that C and D lose their all property one day because of flood which could have been avoided had the government properly managed waterways, etc. by effectively investing taxpayers' money. When the flood takes place, C will suffer 100 times of economic loss than D.

However, if the government had prevented such an accident by properly managing waterways, etc., C and D would not have suffered such a loss. In this case, since C enjoys more benefit through the investment activity of the government, it would be reasonable for C to bear more governmental expense. On the contrary, if C and D suffer a loss because of the poor management by the government, it would be reasonable, based on the same logic, for the government to provide more compensation to C who suffered greater loss.

Then, in the cases of taxpayers who earn significant sum of money largely by using their own knowledge, such as lawyer and patent attorney, etc., how could we explain the equity of taxation? What benefit do they receive from the government?

The income activities of professionals such as a lawyer and a patent attorney are closely related to the activities of governmental agencies. They handle the difficult problems of normal people and receive a fee in consideration of their service. They obtain income by making the most of the function of governmental agencies.

The more a nation develops, the more complex a national function becomes. Therefore, if a nation develops and its function becomes more complex, normal people would not be able to easily solve their own problems, without the help of a specialist, occurring in relation to the administrative action of governmental agencies since they are not a specialist in that field.

That the function of a nation becomes complex, in some respect, means that the government invests more taxes on related fields. In this case, since specialists can enjoy both a reflective profit which can be obtained by the normal people who are not a specialist and a reflective profit which can be obtained only by a specialist, it would be reasonable for them to pay a part of their income as taxes in terms of burden of national expense in consideration of the reflective profit by a specialist.

In addition to the type of tax evasion by A in the above example, the accumulation of wealth via abuse of power is one of the principal causes which distorts the equity of taxation.

Assume that B in the above example is a salaried man who works for a powerful governmental agency. Since B has less income than A who is a businessman, B could feel less wealthy and as a result think about the additional accumulation of wealth via illegal means in order to reduce the income gap.

One of methods that B with less wealth than A can consider is to accumulate additional wealth using the power granted to B. It cannot be denied that the status of a governmental officer has been sometimes used as a means to accomplish such a purpose in our society.

If B finds a chance to accumulate wealth through an illegal method and such an
illegal income cannot be tracked and taxed by taxation authority, the equity of taxation is broken again.

Where this problem is disregarded by the government, salaried men, who receive the same wages as B and correctly pay taxes according to tax law, can feel the relative poverty and betrayal, leading to a serious social problem. When persons having wealth and power evade taxes through these methods, it causes an enormous loss in terms of tax revenue. If the tax revenue is increased by preventing such illegal tax evasion activity, the government can pay more wages to government officers according to their ability and effort and achieve the equity of taxation and the improvement of productivity at the same time.

### Improvement of Value Added Tax System

Under the Korean tax law, persons doing business are classified into two categories, that is, persons who have a duty to pay the Value Added Tax (VAT) and persons who have no duty to do so. Banks and doctors have no duty to pay the VAT but most of persons doing business have a duty to pay the VAT. Starting 1999, the government included lawyers and CPAs, etc. in the category liable to pay the VAT.

Whether or not including these types of taxpayers in the category liable for paying VAT is a very difficult problem. Some people say that if VAT is imposed upon them, their entire income will be clearly disclosed, but such line of thought is based on only one respect. Policy always has two respects - a merit and a demerit. If a merit is greater than a demerit, setting up the policy would be desirable. But if a demerit is greater than a merit, such policy should not be set up.

When VAT is imposed upon a lawyer or a doctor, a person who pays VAT is the final consumer, not a lawyer or a doctor. Lawyers and doctors only collect VAT from a final consumer and pay it to the government. When such indirect taxes increase, tax burden of persons in the low-income brackets increases and attainment of the equity of taxation becomes more difficult.

Also, considering the fact that Korean tax system and tax administration are not advanced, complex problems which were not expected in relation to a transaction can take place. For example, assume that a client who is involved in a criminal case retains a lawyer. It is well-known in Korea that a lawyer will generally try to receive a fee exceeding the limitation stipulated in the regulation and sometimes a client cannot help but pay the amount the lawyer demands.

If a fee is KR₩ 5 million, a client should bear KR₩ 5.5 million (5 million + 5 million x 10%) including VAT since the final consumer should pay 10% of VAT. And where the lawyer demands a fee of KR₩ 10 million, a client should pay KR₩ 11 million including 10% of VAT.

Then, is every person willing to pay VAT according to the tax law? If a lawyer is not liable to pay VAT to the government, a client is liable to pay only KR₩ 10 million of the fee. However, a client should pay KR₩ 1 million of VAT in addition to the fee. Thus, a client can think about collusion with a lawyer. If the collusion is possible, a client could save KR₩ 0.5 million of VAT if he client receives a receipt of KR₩ 5.5 million while paying KR₩ 10.5 million to the lawyer instead of paying KR₩ 11 million.
In other words, if the client receives a receipt that shows he only paid KRW 5 million even though the actual service fee amount was KRW 10 million, he will pay VAT only on the amount stated on the receipt; that is, KRW 0.5 million (5 million x 10%). However, since the client actually promised to pay KRW 10 million of fee, he will pay KRW 10.5 million (KRW 10 million of fee plus KRW 0.5 million of VAT). In fact, the client must pay KRW 11 million including VAT of KRW 1 million. But, the client can save KRW 0.5 million (11 million - 10.5 million) through collusion with the lawyer.

If this situation would take place, pursuing the exact income of the lawyer would become more difficult. Since the client also saved KRW 0.5 million through this transaction, it would be more difficult for him to clearly disclose this transaction to the tax authorities.

Where the government imposes VAT upon a lawyer, it will become more difficult to seek lawyer’s assistance because of VAT burden, and tax audit upon a lawyer can become more difficult. Increased VAT burden is not also desirable in terms of the equity of taxation. In the case of VAT, since everyone should pay 10% tax regardless of his or her level of income, it damages the vertical equity of taxation which requires a person with more income to pay more taxes. Generally, the burden of indirect taxes is greater in an underdeveloped nation than a developed nation.

The reason why the burden of indirect taxes in an underdeveloped nation is bigger than that of direct taxes is that, in the case of indirect taxes including VAT, tax resistance of taxpayers is weaker and collecting taxes is easier. Since indirect taxes have a regressive effect which relatively increases the tax burden of people in the low-income bracket, developed nations are trying to reduce the burden of indirect taxes. Increasing the burden of indirect taxes due to the convenience of tax collection is not helpful for the harmonious development of a nation.

Because a lawyer can omit KRW 5 million of income through the above transaction, his income tax burden decreases accordingly. In order to accurately grasp the revenue of a lawyer, etc., the government should use a better scientific management and audit method. If the government can systemically manage invoices issued by “a trader without VAT payment duty”, it would not be difficult to grasp the accurate revenue of a lawyer, etc.

If a person who has no duty to pay VAT does not issue or submit an invoice because of lack of harsh penalty provision under the present tax law, the government can introduce a harsh penalty provision such as the VAT invoice penalty provision.

Policy which is a mere desk theory and ignores reality must not be executed. Incorrect policy usually appears when a person in charge of policy does not exactly grasp the reality and drafts policy based on his superficial knowledge. The income of professionals such as lawyers and certified public accountants, etc. should be grasped through a more scientific method and the government should take a measure lest their income is omitted in terms of the equity of taxation.

The Value Added Tax is literally a tax on the added value. As a simple example, where a person who has a duty to pay VAT purchases KRW 100 of raw material and sells it at KRW 150 after processing it, he obtains KRW 50 of added value. Since the present VAT rate is 10%, the person should pay KRW 5 (50 x 10%) of VAT to the government which will ultimately be borne by a final consumer.

If the person is a taxpayer who runs a restaurant, when he sells food to a customer at KRW 150, he should receive KRW 165 [KRW 150 + KRW 15 of VAT (150 x 10%)].
from the customer. When this taxpayer purchases KRW 100 of raw material from a seller, he pays KRW 10 of input VAT to the seller. However, in the case of a restaurant, etc., since most of raw materials are not subject to VAT, he does not pay VAT when he purchases the raw materials which are not subject to VAT.

Since a restaurant owner does not bear less input VAT, he pays more VAT (output VAT - input VAT) to the government than other types of taxpayers who are liable to pay more input VAT. However, a restaurant owner does not ultimately bear any VAT since a final consumer bears VAT.

Anyway, in the example above, the taxpayer should pay KRW 5 of VAT to the government after deducting KRW 10 of VAT paid to the seller from KRW 15 of VAT received from his customer. That is, the restaurant owner merely pays KRW 5 of VAT to the government on behalf of his customer (final consumer) and does not bear any VAT.

Then, does every businessman know that he himself does not bear any VAT but that a final consumer will bear VAT?

The problem is that this is not so in reality. Many businessmen in actuality do not differentiate the price of goods from VAT at the time of sales. Some businessmen even believe that they are liable for bearing VAT. As a result, many businessmen are worried about VAT problems whenever reporting VAT to the government. These problems sometimes take place due to the lack of legal knowledge but largely result from the erroneous operation of the present VAT system.

A businessman who has a duty to pay VAT should always give and take a tax invoice. For example, if A is a businessman who engages in manufacturing and supplying consumables, A incurs expenses such as raw material cost and labor cost, and other costs to produce consumables.

Assume that A incurred KRW 0.2 billion of raw material cost and KRW 0.2 billion of labor cost so that the total cost incurred is KRW 0.4 billion. In this case, since A should pay KRW 20 million of input VAT to a seller at the time of purchasing the raw material, A pays KRW 0.22 billion including VAT in relation the purchase of the raw material.

When A manufactures 100,000 boxes of consumables with a cost of KRW 5,000 per box and supplies them to a market, A should issue KRW 0.5 billion (100,000 boxes x 5,000) of tax invoices. At the time of issuing a tax invoice, A should issue a tax invoice including KRW 50 million (KRW 0.5 billion x 10%) of VAT. The tax invoice is issued to a person who purchases the consumables.

According to our VAT law, if a person who buys goods differs from a person who receives the tax invoice of goods, the government imposes penalty upon them. Where A sells 1,000 boxes respectively to 100 businessmen, they will receive a tax invoice showing the supply price of KRW 5,000,000 (KRW 5,000 x 1,000) and VAT of KRW 500,000. That is, businessmen who purchase consumables should pay KRW 5,500,000 including VAT. Such a normal transaction would take place if businessmen engage in purchase transaction in accordance with the tax law. However, our reality is different from that which we would expect.

Even though businessmen are supplied with 1,000 boxes of consumables, most businessmen do not receive a tax invoice or receive a tax invoice only on a part of transaction amount in order to intentionally reduce their income. The reason is that if a businessman receives a tax invoice on 1,000 boxes, the businessman should report more
than KRW 5,500,000 as sales revenue to the government unless a specific reason exists. Otherwise, the businessman will have no income after deducting KRW 5,500,000 of expense from the sales revenue.

Assume that businessman (B) who purchased goods from A sells the goods at KRW 6,000,000 to other businessmen. Since B should receive 10% VAT when selling goods, B will receive KRW 6,600,000 including KRW 600,000 of VAT from a person who purchases the goods. Then, B’s sales amount will be KRW 6,000,000 excluding VAT, and purchase cost will be KRW 5,000,000.

If there is no other expense, the income which B should report to the government is KRW 1,000,000 (6,000,000 - 5,000,000).

Since B paid KRW 500,000 of VAT when he purchased goods and received KRW 600,000 of VAT from other parties when he sold the goods, B should pay KRW 100,000 (600,000 - 500,000) of VAT to the government. In conclusion, out of total KRW 600,000 of VAT, KRW 200,000 of VAT is paid to the government by a seller who sold the raw material to A, KRW 300,000 paid to the government by A and the remaining KRW 100,000 of VAT is paid to the government by B.

### Transaction Outcome of A and B

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sales amount</strong></td>
<td>① 500,000,000</td>
<td>① 6,000,000</td>
</tr>
<tr>
<td><strong>Output VAT</strong></td>
<td>② 50,000,000</td>
<td>② 600,000</td>
</tr>
<tr>
<td><strong>Purchase amount</strong></td>
<td>③ 200,000,000</td>
<td>③ 5,000,000</td>
</tr>
<tr>
<td><strong>Input VAT</strong></td>
<td>④ 20,000,000</td>
<td>④ 500,000</td>
</tr>
<tr>
<td><strong>Labor cost, etc.</strong></td>
<td>⑤ 200,000,000</td>
<td>0</td>
</tr>
<tr>
<td><strong>Taxable Income</strong></td>
<td>100,000,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td></td>
<td>① - ③ - ⑤</td>
<td>① - ③</td>
</tr>
<tr>
<td><strong>VAT paid</strong></td>
<td>30,000,000</td>
<td>100,000</td>
</tr>
<tr>
<td></td>
<td>② - ④</td>
<td>② - ④</td>
</tr>
</tbody>
</table>

# Example of businessmen who pay 10% of VAT

However, businessmen often do not try to receive a tax invoice since they do not want their income to be disclosed. Once they receive a tax invoice, their transaction content is recorded in the computer system of the tax authority. Thus, when they do not report the sales revenue exceeding the purchase cost, it can become a problem. Therefore, they do not like receiving a tax invoice.

What if B, in the above example, receives a tax invoice of only a half of the purchase amount, that is, KRW 2,500,000? In that case, B receives a tax invoice only on KRW 2,500,000 when purchasing KRW 5,000,000 of consumables. However, A should issue a tax invoice of KRW 5,000,000 for the consumables. Since B denies a true tax invoice which A must issue, A has to issue a tax invoice of KRW 2,500,000 to other businessmen other than B. Therefore, A has no choice but to issue a tax invoice to C or D who has no actual transaction with A. In general, since businessmen should report the sales revenue exceeding their purchase cost unless there is a specific reason, they
cannot artificially reduce their sales revenue.

If A sells his goods at the price of cost plus 20% margin, the price of goods costing KRW 4,000,000 is KRW 4,800,000 (KRW 4,000,000 + KRW 4,000,000 x 20%). Therefore, if A does not issue a sales tax invoice of more than KRW 4,800,000, he can be subject to tax audit. As set forth above, however, sometimes it is not possible to artificially reduce the sales revenue. If artificial reduction of the sales revenue is not possible, A should issue a false tax invoice to a third party. A chronic problem related to a tax invoice starts here and such an abnormal issuance of a tax invoice distorts most of transactions occurring in Korea.

Assume that A sells goods to X, a wholesaler, and X resells the goods to retailers. When A issues a tax invoice to X and X resells the goods to 100 retailers including B, the same problem occurs if B tries to avoid receiving a tax invoice from X. Where B does not receive a tax invoice from X for the purpose of reducing his income, X must issue the tax invoices that B did not receive to a third party having no transaction with X. The flow chart is used for your understanding. Assume that A directly sells goods to B.

[Form of Transaction]

\[
\begin{align*}
\text{A} & \rightarrow \text{B} \\
\text{Goods: KRW 5,000,000} & \text{Tax invoice: KRW 2,500,000} \\
\downarrow & \\
\text{C (Tax invoice: KRW 2,500,000)} &
\end{align*}
\]

As seen above, when A sells KRW 5,000,000 of goods to B, A should issue a tax invoice of KRW 5,000,000. But, since B tries to receive a tax invoice of only KRW 2,500,000 from A, A should issue another tax invoice of KRW 2,500,000 to C, a businessman having a duty to pay VAT who is a party unrelated to this transaction. If C who has no relation to this goods transaction receives a tax invoice of KRW 2,500,000 from A, C can deduct input VAT of KRW 250,000 (KRW 2,500,000 x 10%) from his output VAT.

Thus, C can receive a tax refund of KRW 250,000 from the government although he is not a party to this goods transaction. But C cannot receive this illegal tax invoice for nothing. If A had normally issued a tax invoice to B, A would have received KRW 500,000 of VAT which is 10% of KRW 5,000,000 and would have paid the amount to the government. However, since A received only KRW 250,000 of VAT which is 10% of KRW 2,500,000, A should receive KRW 250,000 (500,000 - 250,000) of remaining VAT from C.

Since B can deduct KRW 250,000 of VAT from his output VAT using this illegal tax invoice, A will want to sell this tax invoice to B at KRW 250,000. However, since such tax invoice transaction is illegal, A will be willing to sell it at a loss and C will purchase the illegal tax invoice at the price of less than KRW 250,000. If such a transaction is disclosed to the tax authority, A should pay penalty and C cannot deduct KRW 250,000.
Then, why does C perform such a transaction? Assume that C is a company which purchases consumables to manufacture goods. C should purchase such consumables in a market but some persons who sell those consumables at times will try to avoid issuing a tax invoice in order to evade their income. Therefore, C who transacts with such persons cannot receive a tax invoice. However, since C should issue a tax invoice at the time of selling his manufactured goods, it is necessary for him to obtain tax invoices on consumables used for manufacture in order to file his VAT return to a district tax office.

For example, assume that C purchases KRW 0.1 billion of raw material from D in order to manufacture the goods and sells the manufactured goods at KRW 0.2 billion. Then, if C cannot receive a tax invoice when he purchases KRW 0.1 billion of raw material, C cannot file his VAT return to the government.

When C sells KRW 0.2 billion of goods, C should receive KRW 20 million of VAT from a person who purchases the goods and pay it to the government. However, since C has no purchase tax invoice, C should pay the government all VAT (KRW 20 million) which he received from a person who purchased his goods.

On the other hand, if C paid KRW 10 million of VAT which is 10% of the purchase price to D at the time of purchasing raw material, he would pay KRW 10 million of VAT to the government after deducting KRW 10 million of input VAT from KRW 20 million of output VAT.

**[Form of Transaction]**

<table>
<thead>
<tr>
<th>C</th>
<th>←</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchase of goods: KRW 0.1 billion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax invoice: no issuance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

↑

Third parties who have no transaction
(issuance of illegal tax invoices of KRW 0.1 billion)

The problem is that where C has no purchase tax invoice, C cannot file a VAT return with a district tax office. C issues a tax invoice including KRW 20 million of VAT at the time of selling KRW 0.2 billion of goods. However, if C files a VAT return to a district tax office with zero input VAT, the district tax office will not connive at it.

Reporting to the district tax office that there is no input VAT is to confess that C had transactions with businessmen who do not issue a tax invoice. Therefore, C cannot avoid a tax audit by the tax authority. As a result, by whatever method, C should obtain tax invoices. Therefore, C is willing to purchase tax invoices at a low price from a third party who has no actual goods transaction with C.

If this illegal tax invoice transaction is disclosed to a tax office, the tax office will impose harsh penalty upon C and the third party. Thus, they cannot disclose this illegal transaction. Thus, under this situation, persons who buy and sell tax invoices without an actual goods transaction appear. Their role is only to buy and sell tax invoices without an actual goods transaction for businessmen who need these tax invoices.

The government often conducts an investigation against persons who buy and sell tax
invoices without an actual goods transaction. Nevertheless, the tax invoice problem does not improve in spite of the continuous investigation by the government. Without eradication of illegal tax invoice transactions, the equity of taxation cannot be achieved. However, the attitude of the government is very lukewarm.

Unless there is an illegal tax invoice transaction, goods and tax invoices in principle move in the same direction. That is, a person who is furnished with goods receives a tax invoice.

Let's assume that A is a fabric manufacturer. A purchases yarn and processes it to make fabric. Also, a businessman who manufactures yarn purchases the raw material for yarn from other businessmen. After manufacturing fabric, A sells it to persons who manufacture clothing or fabric wholesalers.

[Flow of Transaction]

| Seller of raw material of yarn | Manufacturer of yarn (3 persons) | Manufacturer of fabric (5 persons) | Manufacturer of clothing (10 persons) | Clothing wholesalers (50 persons) | Clothing retailers (200 persons) | Consumers (10,000 persons) |

Transaction flows downward as seen above. The number of manufacturers and wholesalers is hypothetical and merely indicates that the number of businessmen increases at the lower transaction level. This is merely an example which shows that a transaction starts with the purchase of raw material. In general, goods made by a manufacturer are made available to a final consumer through a wholesaler and a retailer. If there are many intermediary transaction steps, the number of distributors increases. How can the government secure the transaction order of tax invoices?

Until now, the government has been conducting tax audit largely against small-scale second-level distributors or retailers but this approach is not without a problem. As seen in the above flow of transaction, there are 50 wholesalers. If the government investigates only 5 persons among 50 wholesalers, it would be very difficult to grasp all illegal transactions arising from this transaction. Sometimes, the government imposes penalty only on tax invoices without an actual goods transaction and the tax audit fizzles out. Since it takes much time to trace the origin of goods purchased without a tax invoice, there are cases where a detailed investigation is omitted.

Goods and tax invoices should move in the same direction as in the above transaction.
flow. Therefore, if the government investigates wholesalers which are larger in number and harder to investigate than factories, it would be very difficult to obtain a satisfactory investigation outcome. Water flows from top to bottom. If the water above is not clean, it would be impossible to obtain clean water below. This principle also applies to the investigation of tax invoices.

Assume that alcohol manufactured by an alcohol factory is being illegally circulated. In this case, the government, first of all, should investigate whether the alcohol factory appropriately issued the tax invoices. Nevertheless, if the government conducts a routine investigation only against small-scale wholesalers, etc., the problem cannot be solved.

If the government starts investigation from an alcohol factory, the point from which alcohol is first shipped, it is easier to confirm whether goods and a tax invoice are delivered to the same persons. If an alcohol factory or a first level distributor issues a tax invoice based on tax law, it is difficult for alcohol without a tax invoice to be circulated. The origin of a problem is an alcohol factory where alcohol is sent out or a first level distributor. If the government investigates an alcohol factory but finds no problem, then the government should investigate a first level distributor. If there is no problem with the first level distributor, the government must investigate a second-level distributor and then a retailer.

Therefore, if the government were to conduct a continuous investigation from top to bottom of the transaction flow, it would become very difficult to circulate alcohol without a tax invoice. Where the government does not take an active measure against the illegal transactions of big enterprises and largely investigates small-scale enterprises, the tax invoice transaction order cannot be improved.

According to the Value Added Tax law, traders (businessmen) are classified into those subject to general taxation and those subject to specific taxation. The government treats traders of small-scale as traders subject to specific taxation and manages them separately. The traders subject to specific taxation do not need to issue a tax invoice but pay 2% or 3.5% of sales amount as VAT according to a business type. From the year 1996, the government newly created a trader subject to simple taxation between a trader subject to general taxation and a trader subject to specific taxation and since required the simple taxation trader to pay more VAT than a trader subject to specific taxation.

One of the causes which distort the tax invoice transaction order is this specific taxation system. Since traders subject to specific taxation do not issue a tax invoice, although they receive a tax invoice, they are not eligible for the input VAT credit unlike traders subject to general taxation. Since they do not issue a tax invoice, traders who purchase goods from them cannot receive a tax invoice and therefore the input VAT credit is not available. Therefore, traders who purchase goods from traders subject to specific taxation should obtain tax invoices through an abnormal method set forth above and report them to the government.

Sometimes traders who should be classified as a trader subject to general taxation

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17 The specific taxation system was abolished and merged with the simple taxation system on December 28, 1999.
18 VAT of a trader subject to simple taxation is computed as follows: supply price during the taxable period at hand times value added ratio decided by the presidential decree within the scope of 10% to 50% x 10%
disguise themselves as a trader subject to specific taxation. Their sales revenue per year greatly exceeds the limitation that is a standard to distinguish a trader subject to general taxation from a trader subject to specific taxation. Nevertheless, since they do not issue a tax invoice, traders who purchase raw material from them cannot receive a tax invoice and accordingly illegal tax invoice transactions set forth above take place.

Let's take a closer look at a trader subject to specific taxation. For example, if a trader is subject to specific taxation and his sales revenue per year is KRW 30 million, this trader pays KRW 600,000 (30,000,000 x 2%) of VAT. If he reports a sales revenue of KRW 30 million per year to the government, their sales amount per day is approximately KRW 82,000. What is more, if we assume that gross profit is 20% of the sales revenue, his gross profit before deduction of expenses is KRW 16,400 (KRW 82,000 x 20%) per day. Further, his monthly gross profit before deducting expenses is KRW 492,000 (KRW 16,400 x 30 days) which is less than the wages of low-income workers. Taking into account the rent, electricity charges and water charges, etc., it would be very unreasonable that his gross profit is KRW 16,400 per day. Nevertheless, this is our reality. Let's look at our national tax statistics.

As of 1995, the number of traders who have a duty to pay VAT amounts to 2,526,198 in total. Out of this number, the number of corporations is 150,023, the number of traders subject to general taxation is 1,103,567 and the number of traders subject to specific taxation is 1,272,608. Therefore, approximately 50% of total traders is subject to specific taxation. However, out of 1,272,608 traders, 869,746 traders were not subject to VAT since they reported that their sales revenue was less than certain limitation.

The tax base of VAT reported to the government is as follows: the tax base of corporations is KRW 6.6 trillion; the tax base of traders subject to general taxation is KRW 1.6 trillion; the tax base of traders subject to specific taxation is KRW 130 billion. That is, it leads to a conclusion that a single trader subject to specific taxation reported on average KRW 102,152 of sales revenue per year.

Even though we exclude 869,746 traders who reported their sales revenue to be below certain limitation, one trader subject to specific taxation reported on average KRW 322,691 (KRW 130 billion / 402,862 traders) of sales revenue.19

If we divide their sales revenue by 365 days, their sales revenue is KRW 882 a day. What do you think about this figure? Even though a person having no special skills works at a construction site, he/she can receive at least KRW 30,000 a day. Nevertheless, if the average sales revenue of a businessman incurring rent, electricity charges, water charges, etc. is KRW 882 a day, it is very absurd. If 869,746 traders eligible for VAT exemption are included, their average daily sales revenue would become KRW 287.

Twenty years have passed since our value added tax system was introduced in 1977 but there has been no conspicuous development. Abnormal transactions have not reduced and because of such instances, there is no equity of taxation. What is more, it seems that there is no effort by the government to improve the VAT system.

Business-government collusion and corruption are the fundamental causes which distort the equity of taxation. Politicians and high level government officials distort the equity of taxation through business-government collusion, and low level government officials also distort the equity of taxation through collusion with small and medium traders, etc. Corrupt money is not reported to the government and is a principal cause

19 The National Tax Service of Korea, Statistical Yearbook of National Taxes, 1997.
which brought about the foreign currency crisis.

To anticipate national development while disregarding such an abnormal phenomenon is like seeking a fish from a tree. There are many traders who do not understand the VAT system well in our society. The government which has neglected public relations is basically responsible for it. Many traders do not issue receipts and traders who honestly issue receipts suffer a loss. The government which has performed a merciful administration for winning an election, etc. is to blame.

Traders cannot help being afraid of governmental officers. Since they cannot report honestly, they are always afraid of them. Sometimes however they may abide by the tax law, they cannot. Nevertheless, the government is always demanding only the honest VAT filing. If tax administration remains as it is, it would be futile for the government to expect such honest filing.

Traders say “Even though they want to abide by tax laws, they cannot do so since reality does not allow it.” What is the reason? Should the traders be the only ones responsible for it? The government also cannot be exempt from that responsibility. The government operates a nation using the taxes of the people. If the people cannot avoid violating the law due to abnormal tax circumstance, the government should make its efforts to create a tax circumstance where every person can abide by law.

The government has a duty to enlighten and lead the people for the development of a nation. Since it is very difficult to establish law order only with the effort of an individual citizen, the government should create a good tax circumstance to help those citizens that are trying to abide by the law order.

Many restaurants with the exception of a hotel and few others do not generally issue a receipt which clearly distinguishes a meal price from VAT. Also, it is difficult for us to find a restaurant that issues a receipt unless we demand a receipt. Many traders have a misconception that VAT is borne by them rather than a final consumer and thus show tax resistance.

Under this situation, economic policy cannot be properly carried out. Many persons who studied economics in the United States attempt to apply what they studied in the United States to Korea. However, it should be noted that such attempt does not work since economic entities of Korea behave differently from those of the United States.

It seems to me that where the U.S. government drafts and executes an economic policy, the effect of the economic policy is bigger than that of Korea since most of U.S. economic entities function within well-established system. The reason why the Korean government cannot effectively carry out an economic policy using the VAT system is because our VAT system is not operating in the manner originally intended by the tax law.

Therefore, this problem should be resolved through the improvement of the system and continuous education on the people. Also, it is very important to train many tax agents to furnish taxpayers with low-price service. If a tax agent is always close to a taxpayer, the necessity that taxpayers themselves should understand the complex tax law will decrease. Once the number of tax agents increases, they should compete against each other more severely and taxpayers can receive service of better quality with the same price. If this circumstance is created, more taxpayers will try to solve their tax problems through a legal method rather than an illegal method. Finally, what is as important as training many tax agents is to create a circumstance where everyone can abide by law by fairly and strongly carrying out the tax administration.
Tax Law Loopholes

Our tax system greatly falls behind that of developed nations. A reason for this can be explained by our short history of democracy. However, a bigger reason can be attributed to the fact that we have not made efforts for the improvement of the tax system itself. As set forth several times before, if tax laws have many loopholes, persons who have knowledge of those loopholes will try to use them to their advantage. Even persons who execute the law, as well as persons who are subject to the restraint of the law, can use these loopholes of the law.

If one person takes advantage of a loophole of the law whereas another person does not, equity will be broken. As an example, assume that there is a person of vast wealth, “A”, and a person of little wealth, “B”. A is planning to transfer his property to his descendants before his death. A will consult this problem with a tax specialist since he can afford to do so. If there is a loophole in the tax law, people can devise a method to avoid taxes with the help of a tax specialist. Korean enterprisers who run large companies tend to transfer their property to their children using loopholes in the tax law and thus, their activities sometimes are criticized by the public.

On the other hand, B does not have enough money to retain a tax specialist and also little wealth to pass on to his descendants. Therefore, B does not show a big concern with regard to making a bequest of his properties. He pays taxes according to the tax law since he cannot use the loophole of tax law. Persons who have vast wealth should pay more taxes according to vertical equity. But if there is a loophole in the tax law, equity is broken.

Let’s discuss the equity of taxation using an example from the U.S. tax law. This shows that the tax law of the United States is more complex and developed than that of Korea. Although this example is comparatively simple, it may be difficult for a person without knowledge of tax laws to understand it.

The following example is related to deferred payment sales. Assume that a person sells property worth $7,462 today in exchange for a note with a face value of $10,000 to be paid in three years. A seller, of course, will demand more for his property than its current market value because he will be receiving the money in the future.

If, however, a seller and a buyer were permitted simply to characterize the sales price as $10,000, the sales price would be overstated, and income would be measured incorrectly in several ways. In effect, the seller has both sold an asset of $7,462 and made a loan of $10,000 to the buyer, and the buyer is compensating the seller for the use of the purchase price for three years. In other words, if the buyer purchases the property in cash, he has to pay in cash. However, since he is paying by issuing a note instead of cash, he is making use of $7,462 of cash.

If the property was a capital asset, characterizing the full $10,000 as the sales price is beneficial to the seller since he can treat ordinary interest income as capital gain. By treating the difference between $10,000 and $7,462 as capital gain rather than interest income, the seller may benefit from such transaction as a lower tax rate is applied to capital gain according to the federal income tax law.

The buyer might also benefit if the property was eligible for depreciation deductions because depreciation would be calculated based on overstated value ($10,000). Since depreciation is often accelerated, the buyer may save taxes by substituting depreciation deductions for the interest deductions that is otherwise available. Therefore, the U.S. tax
law applies the original issue discount rules to deferred payment sales to prevent these sorts of machinations. The original issue discount (OID) rule of the Federal Income Tax Law of the United States is explained through the following example.

[Example]
B issues a bond for $7,462 with a redemption price of $10,000 on the three-year maturity date. The difference between the issue price of $7,462 and the redemption price of $10,000 is OID of $2,538. A, who purchases the bond, must include the daily portions of OID in income for each six-month accrual period. As the yield to maturity on this instrument is computed at 10% of compound interest semiannually, interest for each six-month period is as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>Adjusted Issue Price</th>
<th>Yield</th>
<th>Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>$7,462</td>
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<td>$373</td>
</tr>
<tr>
<td>2.</td>
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<td>.05</td>
<td>$392</td>
</tr>
<tr>
<td>3.</td>
<td>$8,227</td>
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<tr>
<td>4.</td>
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<td>6.</td>
<td>$9,524</td>
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<tr>
<td>Redemption</td>
<td>$10,000</td>
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</table>

Thus, in the first year, A should report $765 (373 + 392) of interest income. The above rules are applied not only to a bond but also to the following transaction in order to prevent a taxpayer's tax avoidance.

<Example>
[1] Assume that there is no “special rules for bonds and other debt instruments” (Sections 1274 to 1288) in the Internal Revenue Code and a seller A bought a property “X” for $5,000 in January 1, 1994. Value of “X” is $7,462 as of January 1, 1995 and A sells “X” to a buyer B for $10,000 and A receives a note with a face value of $10,000 to be paid in three years. The seller and the buyer characterize the sales price as $10,000. The property is a capital asset. In this case, A's capital gain is $5,000, B's basis is $10,000 and therefore B can depreciate the property of $10,000.

What if A receives $7,462 in cash instead of a note with a face value of $10,000? In this case, A's capital gain is $2,426 ($7,462 - $5,000), B's basis is $7,462 and therefore B can depreciate the basis of $7,462.

[2] Assume that all facts are the same, except that there is “special rules for bonds and other debt instruments” (sections 1274 to 1288) in the Internal Revenue Code. In the present case, A has a capital gain of $2,462 ($7,462 - $5,000) and ordinary interest income of $2,538. Buyer's basis is $7,462 and therefore B can depreciate the basis of $7,462.

What if the seller receives cash of $7,462 instead of a note of $10,000? In this case, A's capital gain is $2,426 ($7,462 - $5,000), B's basis is $7,462 and B can depreciate the basis of $7,462. Also, since there will be $2,538 of interest income assuming that A saved cash of $7,462 in a bank, there is no difference between two methods. Therefore, where “special rules for bonds and other debt instruments” (sections 1274 to 1288) are
applied, there is no difference between two methods regardless of whether payment is a note or cash. As a result a taxpayer cannot avoid taxes.

Let's again review the difference between [1] and [2]. As set forth above, where the seller receives cash, there is no difference between [1] and [2]. However, where the seller receives a note and not cash, under the assumption [1], the seller has a capital gain of $5,000 and the buyer can depreciate the basis of $10,000. On the other hand, under the assumption [2], the seller has a capital gain of $2,462 and an ordinary interest income of $2,538 and the buyer can depreciate the basis of $7,462 but not the basis of $10,000. Therefore, depending upon which method is used, tax avoidance is possible. Therefore, if there were no “special rules for bonds and other debt instruments” (sections 1274 to 1288) in the Internal Revenue Code, a taxpayer who is aware of such a loophole will try to avoid taxes by taking advantage of the loophole. However, a taxpayer who does not know of that loophole cannot use it and as a result, the equity in taxation can be broken.

This example from the Federal Income Tax Law of the United States shows very well the U.S. government’s efforts to maintain the equity of taxation. Since Korea has no such tax law provisions, Korean taxpayers are not familiar with this concept. Nevertheless, such transactions can also take place between Korean taxpayers.

Assume that a U.S. businessman who is familiar with such a tax system does business in Korea. Even in this case, the equity of taxation between a Korean businessman and a U.S. businessman can be broken since the Korean businessman unaware of this loophole cannot use it whereas the U.S. businessman can enjoy the benefit of this loophole.

The following is the case which I actually handled approximately 13 years ago. Since I was with the corporate tax division, I often had to perform a desk audit based on tax returns and related documents which were submitted by taxpayers. Desk audit is reviewing the appropriateness of a tax filing on the basis of a tax return and complementary data that are submitted by a taxpayer, and plays a role to complement a field tax audit. At that time, the Korean source income of a foreign airline company became an issue in the course of a desk audit. It is thought that explaining this case would be helpful in setting forth “loopholes of a tax law” and “domestic source income”.

Each nation concludes a tax treaty for both the encouragement of international trade and commerce and the prevention of double taxation. Tax treaties normally have a provision that reciprocally exempts from taxes the income derived from the airline business. Korea also has such a provision in the tax treaties concluded with other nations.

However, an airline company of a nation which did not conclude a tax treaty with Korea shall file its tax return with the Korean government by calculating the Korean source income pursuant to Article 59-220 of Enforcement Ordinance of the Corporate Tax Law.

20 Article 59-2 was changed into Article 66.
Where a foreign enterprise does business in Korea, how much income should be attributed to Korea becomes an important issue, often resulting in a tax dispute.

Let’s assume that the Korean government denies the amount of income reported by a foreign enterprise and allocates more income to Korea. Since the enterprise has already paid taxes in both Korea and the nation in which its headquarters is located, where the nation in which its headquarters is located does not refund the additional tax amount imposed by the Korean government, the enterprise will be subject to double taxation. Therefore, each nation is trying to solve such a double taxation problem by concluding a tax treaty.

As of December 1, 2002, Korean has concluded tax treaties with 56 nations. Also, there are many nations that have not concluded a tax treaty with Korea. Since an enterprise of a nation which did not conclude a tax treaty with Korea cannot resolve its international tax dispute case through the mutual agreement procedure provided in a tax treaty, it sometimes faces double taxation.

Let’s observe how the taxes are paid in Korea by an airline company of a nation which does not have a tax treaty with Korea. Since the airplanes of a foreign airline company perform their business activities in several nations and all accounting documents are maintained in a foreign nation, it is not easy to confirm whether or not the company’s source income in Korea has been correctly calculated.

The income earned in Korea by a foreign company doing business in Korea is called Korean source income. Because the above foreign company earns income from several nations including Korea, how much income is to be attributed to Korea becomes an important problem. Pursuant to the Korean Corporate Tax Law, a foreign airline company that furnishes air transportation services in Korea should pay taxes by calculating the source income in Korea using the following formula.

1) A foreign airline company shall calculate “the profit derived from international airline transportation” by deducting “the total expenses accrued to international airline transportation” from “the total turnover derived from international airline transportation”.

2) Once the profit derived from international airline transportation has been determined, Korean source income shall be calculated based on that amount.

3) In order to calculate Korean source income, there shall be evaluated the extent to which Korea has contributed to the profit derived from international airline transportation.

4) The Korean source income is computed by multiplying the profit derived from international airline transportation by “the extent of that contribution”. The following three factors determine “the extent of contribution” by Korea.
In the case of the first factor, the extent of contribution by Korea is determined taking into consideration its turnover. The second factor determines the extent of contribution by Korea taking into consideration the book value of fixed assets. The third factor determines the extent of contribution by Korea taking into consideration the wages of the crew. The total extent of contribution by Korea is computed by averaging these three factors. If the ratio of 1, 2 and 3 is respectively 0.1, 0.2 and 0.3, the extent of contribution by Korea is 0.2 \([(0.1 + 0.2 + 0.3 / 3)]. Thus, if the total turnover derived from the international airline transportation is KRW 500 billion and the total expense is KRW 400 billion, the profit derived from international airline transportation would be KRW 100 billion (500 billion - 400 billion) and the Korean source income KRW 20 billion (100 billion \times 0.2).

However, since the foreign airline company at issue recorded a book value of airplanes as "0" and did not include the price of airplanes in the book value of total fixed assets, the extent of contribution in the second factor decreased resulting in a decrease of Korean source income.

The main issue of this case is a book value of the airplanes related to international transportation. Only after tax assessment, did that company submit the related data to the National Tax Tribunal and asserted that some airplanes were purchased as “finance lease” and the other airplanes were purchased as “operating lease”.

The National Tax Tribunal decided that the airplanes that were purchased as finance lease should be included in the book value but airplanes that were purchased as operating lease should not be included in the book value. As a result approximately 10% of the tax assessment amount was refunded to that company.

The Korean Corporate Tax Law provides that in the case of finance lease, the lessee shall record the leased asset as its own asset in its accounting book and depreciate it, and in the case of operating lease, the lessor shall record the leased asset as its own asset and depreciate it. However, regardless of whether it is a finance lease or an operating lease, the amount a lessee records as expense is the same from the standpoint of accounting. That is, there is no substantial difference in terms of total expense between a company that, using an operating lease method, treats as an expense its lease...
payments and a company that, using a finance lease method, treats interest and depreciation as an expense. Only difference is that, unlike operating lease, a lessee of a finance lease bears risk and leaseback is possible. Even though the lessee of a finance lease bears the risk, an insurance company will usually ultimately bear the risk. Thus, there is hardly any difference in terms of expense.

What if only the book value\(^{21}\) of the airplanes used in international transportation services were, literally construing, included in the price of airplanes? Where an airline company of a nation that does not have a tax treaty with Korea is planning to do its business in Korea, the airline company might use an operating lease in order to reduce its tax burden. In that case, since the book price of airplanes becomes zero and the ratio of Korean source income decreases, the total Korean source income will decrease.

Because fixed assets normally consist mostly of airplanes in the case of an airline business, whether or not the price of airplanes is included in the above formula makes a significant difference in calculating Korean source income.

Thus, when an airline company that does not have the knowledge of loopholes in the Korean tax law uses a finance lease instead of an operating lease, the airline company will have to pay more taxes in Korea. On the other hand, where an airplane transportation company, which is planning to set up business in Korea, has the knowledge of loopholes in the Korean tax law, it will never treat its airplanes as a finance lease. Therefore, the Korean tax law cannot play a role of reasonably allocating its source income to Korea and the Korean government’s taxing rights can be impeached upon.

If the world-wide income of the aforementioned airline company is KRW 100 billion, the tax payable to the nation in which the company is a resident is KRW 30 billion and the tax payable to Korea by a Korean branch is KRW 3 billion, it would be possible for the company to receive KRW 3 billion of tax credit from its resident nation. Thus, it pays KRW 27 billion (30 billion - 3 billion) in taxes in its resident nation and in other nations except Korea. If Korea does not exercise its taxing rights because of the loopholes in the tax law and as a result the company pays only KRW 1 billion in taxes in Korea, the company will pay KRW 29 billion (30 billion - 1 billion) in taxes in its resident nation and in other nations.

The above formula measures the extent of contribution by Korea. If a foreign company can easily reduce Korean source income using this loophole, the Korean government will lose its taxing rights and also cannot achieve the equity between taxpayers. The extent of contribution should not be decided based on whether or not an airplane is recorded in an account book as a finance lease or operating lease. Rather, the landing or taking off of a foreign airplane in Korea should be an important factor in deciding the extent of contribution.

The foreign airplane obtains source income in Korea through its business activities,

\(^{21}\) The term “book value” means the price of airplanes recorded in an accounting book by an enterprise. However, according to Korean tax law, even though airplanes are not recorded as assets in the accounting book, where they are purchased as finance lease, the enterprise can treat these airplanes as its assets.
that is, landing and taking off in Korea. The foreign airplane receives protection from the Korean government while it passes through Korean airspace and while it stays in Korea. Also, passengers who arrive in and depart from Korea are under the protection of the Korean government.

If there was no protection by the Korean government, the airplane would not be able to earn income in Korea. In addition to the protection activities of Korean government, since foreign airplanes and passengers use social overhead capital in Korea and incur social expense such as noise and pollution, etc. in Korea, it would be very reasonable for the Korean government to exercise its taxing rights over their source income in Korea.

Thus, it is not reasonable for the Korean government to exercise its taxing rights based on whether an airplane is treated as a finance or operating lease. How an airplane is recorded in an account book actually has nothing to do with the extent of contribution. In order for our tax laws to become more reasonable, the phrase “the book value of airplanes used for international transportation service” should be revised into the phrase “the price or value of the airplanes used for international transportation service” and the value of all airplanes should be included in the formula regardless of whether it is a finance or operating lease.

Now, we cannot help but open our market gates to foreign nations and compete with them. If we do not open our gate, other nations will not open up their gates to us. What if we completely open our gates to foreign nations? Where the Korean government opens its gates completely, the reasonable exercising of taxing rights by the Korean government is very important in terms of its economic sovereignty.

As long as foreign enterprises earn income under the protection of the Korean government, it can exercise its taxation sovereignty on them. However, if foreign enterprises can freely avoid Korean tax laws due to the loopholes, the Korean government will not be able to carry out its taxing rights properly. Therefore, along with swift internationalization, the government should do its best lest our taxation sovereignty is lost and make an effort for the improvement of the system. What is more, the government should cultivate men of ability who are necessary for reasonable exercising of its taxing rights.

For your understanding, one more case is explained. Subparagraph 1, Paragraph 1, Article 26 of the Value Added Tax Law provides that goods and service, supplied to a non-resident or a foreign corporation that has no place of business, of which the consideration is received in Korean Won in a foreign currency bank, shall be subject to zero-rating. The term “zero-rating” simply means that the value added tax rate is zero.

Assume that a foreign corporation (A) sets up a Korean subsidiary (B) according to Korean laws. The Korean subsidiary performs the function of a distributor and sells the new goods of high quality. A is a multi-national enterprise which engages in world-wide business and supports B’s business activity in Korea. A can support B’s business activity in Korea in various ways. Let’s think about the following method as an example.

Assume that A sells its goods to B at KRW 100 and B resells the goods to Korean consumers at KRW 120. In this case, B’s gross profit is KRW 20 (120 - 100). If B incurs operating expense of KRW 15 in relation to Korea sales, B’s operating profit is KRW 5 (20 - 15).
Again, assume that A sells its goods to B at KRW 105 rather than at KRW 100 and B sells it to Korean consumers at KRW 120. In this case, B's gross profit is KRW 15 (200 - 105). Moreover, while B still incurs operating expense of KRW 15, B only pays KRW 10 out of its own pocket with the remaining amount of KRW 5 paid by A on behalf of B. As a result, B's operating profit becomes KRW 5 (15 - 10) and the operating profit results of the above two cases are the same.

In the first case, B pays KRW 15 of operating expense. In the second case, B pays KRW 10 of operating expense and A pays KRW 5 of operating expense on behalf of B. As a result, the operating expense paid by both A and B in Korea and the operating profit achieved by B in Korea is the same in either case. That is, there is no difference in terms of profit of the parent company A and subsidiary B.

A can get an additional KRW 5 in gross profit by increasing the sales price to Korea by as much as KRW 5. However, since A directly incurs KRW 5 to support the B's business activity in Korea, A's operating profit does not change. That is, where the operating expense of KRW 5 directly paid by A in Korea is deducted from A's additional sales profit of KRW 5, A cannot get additional operating profit.

Since B also purchases goods from A by paying additional KRW 5, B's cost of sales increases by KRW 5 and its gross profit decreases by KRW 5. However, since A pays KRW 5 in order to support B's business activity in Korea, B's operating expense decreases by as much as KRW 5 and as a result, B's operating profit does not change.

Then, we need to know how such a transaction affects Value Added Tax (VAT). When B pays KRW 15 as operating expense and this expense is paid to an independent service company C which furnishes advertising and other services, B should pay VAT of KRW 1.5 [KRW 15 x 10%(VAT rate)] to C and C has to pay the VAT received from B to the government. If B pays KRW 10 of operating expense and A directly pays KRW 5 of operating expense to C, since KRW 10 which B pays is subject to VAT and KRW 5 which A pays is not subject to VAT, A can save KRW 0.5 in VAT.

Subparagraph 1, Paragraph 1, Article 26 of the Value Added Tax Law provides that goods and service, supplied to a non-resident or a foreign corporation that has no place of business, of which the consideration is received in Korean Won in a foreign currency bank, shall be subject to zero-rating. Since A comes under a foreign corporation which has no place of business in Korea, A is subject to zero-rating and pays no VAT.

Therefore, the VAT that the Korean government can collect is only KRW 1 (KRW 10 x 10%) paid by B. That is, VAT decreases by KRW 0.5 more than the case where B pays KRW 15 of operating expense.

### Difference between Case 1 and Case 2

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<td>Gross profit</td>
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<tr>
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<tr>
<td>Op. profit</td>
<td>5</td>
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<td></td>
</tr>
</tbody>
</table>

Unit: KRW
This table shows the operating profit and VAT of B.

In case 2, A pays KRW 5 of operating expense on behalf of B.

Since such an international transaction amounts to an astronomical figure, unless the government takes appropriate measures to prevent such a loophole, the government will lose a substantial amount of VAT. If A pays KRW 30 billion on behalf of B, the Korean government will suffer a loss of KRW 3 billion per year since related VAT amounts to KRW 3 billion.

This expense must be paid in Korea as long as a multi-national enterprise conducts business in Korea regardless of whether or not it is subject to VAT. The problem is that Korean enterprises pay VAT on such operating expense while foreign enterprises do not. Thus Korean enterprises must perform its business operations under less favorable conditions than foreign enterprises unless there is an improvement of such an unreasonable circumstance. If A can obtain a profit by using the loophole of a system but Korean enterprises cannot, it will break the equity of taxation between Korean enterprises and foreign enterprises.

This transaction can cause another problem. When the foreign company A pays service fees directly to Korean service providers, it is difficult for this transaction to be noticed by the Korean government. As a result, a Korean taxpayer easily succumbs to the temptation of tax evasion and it can also lead to the inequity of taxation.

Since the character of the above-mentioned transaction can be changed according to its real contents, it is not impossible for the government to tax the transaction in issue depending upon its character. However, because a multi-national enterprise will do its best to avoid the taxation net of the Korean tax laws and as such a transaction results in a complex legal issue, it would not be easy to tax such a transaction unless tax officers have a high-level of legal knowledge.

Along with swift internationalization, international transactions continue to become complex. Thus, it is important to complement the loopholes of tax laws and train men of ability who can handle these complex international transactions well.

Developed nations have achieved great developments in the fields of social science as well as natural science. Especially, the taxation technique of developed nations, including the United States, is advanced to the amazing extent.

Since there are no barriers between countries as far as economy and commerce are concerned, we cannot avoid competition with the people of developed nations. Thus, if we are not equipped with the in-depth knowledge, it would be very difficult for us to catch up with them.

Therefore, we must know and endeavor to know. If we do not endeavor with blood and sweat, we couldn’t understand their world. What is more, if we don't understand their world, we cannot get ahead of them forever.
Chapter XIII. For Development of Nation

Education of Citizens

Democracy has the following meaning. The term “demo” means the public, and the term “cracy” means politics. That is, we call “politics by the public” democracy. However, since all citizens cannot directly participate in politics, they elect representatives to run a nation.

For the operation of a nation to be effective, the ability of citizens should be improved and become more productive as time goes on. Such ability includes the basic knowledge each citizen should possess as a member of a democratic society as well as the knowledge of the field in which they work. As a democratic nation should be operated by the will of its citizens, there is a necessity that they should have at least the minimum knowledge of democracy for the smooth operation of a nation. Rather than an abstract concept of democracy, they should understand concretely how to conduct in real life for the development of democracy. Although such a behavior guideline is in part taught in the curriculum of school, such an education should not end merely as school education.

The education period of human beings in school is very short when assuming that the average life span of human beings is 70 years. If they want to graduate from a high school, they should generally study for 12 years. If they want to graduate from a university, they generally study for 16 years. As we well know, since what we study does not remain with us forever, there is a necessity for human beings to study for a lifetime. Otherwise, they cannot catch up with the transition of times.

A nation generally develops with the passage of time. Likewise, democracy generally develops as time passes. The democracy of the past, which our seniors had learned at school, is different from the present democracy we are experiencing today. Therefore, the democracy that our descendents will study in the future also would be different from the present democracy.

As history shows, the democracy of the West has developed as time has passed. If you compare the democracy of Korea after liberation from Japan with the present democracy, you can ascertain a substantial difference between them. Democracy, which we studied in school 20 or 30 years ago, is quite different from the democracy which we are facing today. Therefore, the government should educate its citizen to adjust themselves to today's democracy. Times are continuously changing. Nevertheless, if we insist upon past customs and knowledge, we cannot expect development.

In order to promote the sound development of a nation, the government should provide its citizen with democratic education corresponding to the development of the times. If such education is ignored, the development of democracy will be greatly delayed. With today’s development of communication, the effect of public relations can be maximized with even a little effort compared to the past. Therefore, the government can achieve an education effect of better quality through active public relations.

Let's look at the United States. The U.S. society is trying to strengthen the effect of its citizen's education by introducing a historic figure and a historic event during the intermission of broadcasting. In the case of historic figures, persons from various classes, including persons who have held high positions in the U.S. society, are
introduced for public relations. Not only the heroic acts of private soldiers and generals but also the volunteer activities of regular citizens are introduced to the public.

The U.S. society teaches the people that the patriotism of all people is necessary for the development of a nation regardless of their position in their society. Thus, most of the people believe volunteering is something to be very proud of and the volunteering is an immense power which supports the U.S. society. Since the U.S. society is actively educating the people through public relations, etc., volunteering is thought to be very natural in the U.S. society.

Human beings mentally grow up to the extent that they are educated. We cannot even think of intellectual growth without education. The education ardor of the Korean is strong to the extent that it does not fall behind the people of any nation in the world. However, our education is largely based on egoism rather than the development of a democratic society. Parents are only interested in their children’s success. Accordingly, whether or not other children are sacrificed because of their own children is not their concern.

Most people want their children to become a well respected person in a society. If their children do not become such a person, they think that their children have not achieved success in the society. When people build an embankment, they need various types of stones such as a big stone, a small stone, a square stone and a triangular stone, etc. Also, we need soil and cement. Nevertheless, if they think that they can build an embankment only with big stones, which are conspicuous, it is a very foolish thought.

The government administration consists of many fields such as education and national defense, etc., and the government has the responsibility to set up a good educational policy. Since education should not end only as school education, the government should do its best to provide for a lifetime education of the people, as well as school education.

Democracy can develop when all constituents of society make an effort. If they think that only politicians or a few social elites can develop democracy, it is a very wrong thought. For democracy to develop, all people should make an effort since democracy is politics by the public. Therefore, the government should do its best to create such a circumstance and teach the people through public relations.

**Equal Opportunity**

The defects of capitalism have appeared together with the development of capitalism, and many nations all over the world have modified the capitalism in order to complement its defects. Each nation is regulating the economic activities of an enterprise through fair trade law, etc. in order to prevent the extreme monopolization of a market whenever necessary. Also many nations are trying to reduce the difference in income level between the haves and the have-nots by collecting more taxes from a person who has higher income through a progressive tax rate. These nations are also making great efforts to create a system which can help the have-nots rise to the position of the haves through their efforts.

When the haves try to accumulate riches using their superior power, the have-nots become poorer since national wealth is not infinite but finite. National wealth can increase with the development of science and the improvement of productivity.
However, its value is fixed at a certain point of time like the balance sheet of an enterprise. The constituents of a nation share its national wealth with each other. Assuming that national wealth is 100 units, and there are a total of 100 people in a nation that equally share in its national wealth, each person can hold a unit of national wealth. However, everyone cannot equally share in national wealth in any society. If everyone could equally share in national wealth regardless of his or her effort, there would be no incentive to exert a greater effort and improve productivity. Communists have asserted that everyone should equally share in national wealth but such absurd ideal is already vanishing. Even nations that have asserted such ideology are now in the pursuit of capitalism.

Human beings are generally in the pursuit of profit. Our world is not a utopia consisting of individuals holding anything sacred. Therefore, it is essentially necessary to develop a system which can well reflect the nature of human beings and improve the productivity of society. If profit-seeking activity using power is disregarded, it would lead to the unbalance and downfall of society. World history shows that when the common people face hardships in their living conditions and the government executes a policy that makes those conditions even harsher, riot by the common people and social retrogression followed. Therefore, unless a system that can prevent this vicious circle is studied and developed, it is difficult for a nation to develop.

Since society cannot be maintained only by the effort of the haves, in order to make a good society, the harmonious effort of everyone is absolutely necessary. When the haves and the have-nots harmoniously maintain their society, the society can develop. Because everyone cannot become a leader of a society, it is necessary for each individual to maintain his or her position according to the extent of his or her effort and for the haves to take care of persons who live in the shadow to attain social harmony. Every human being is born with empty hands and dies with empty hands. However, since some people are born as children of the haves and the others are born as children of the have-nots, there exists, after birth, a social and economic gap between them. Where such social and economic gap is neglected, people born as children of the have-nots will not be able to fully exert their ability no matter how great their ability may be and as a result, national productivity does not increase. If the government does not help them, it would be very difficult for them to overcome the difficulty.

On the other hand, since people born as children of the haves can enjoy their life dissipating national wealth even if they do not have any innate ability, it could result in the decrease of national productivity. When this situation becomes serious, social balance is broken.

The United States consists of many races. Nevertheless, one of the reasons why the United States became a developed nation today, I think, may be due to the equality of opportunity. The Americans proudly say that the United States is the land of opportunity since anyone has the possibility of succeeding in the U.S. society as long as he or she makes an effort.

Although many persons say that minorities experience an invisible restriction on their success, it might be that such statement is not an exact expression. Even if intangible power sometimes comes into play, a person who makes an effort could have the
possibility to succeed in the society. Once students enter a university, they usually become independent from their parents. They study by getting a loan from a bank and then repay the loan after graduation. Since the government carries out a policy of actively fostering science, many students can receive scholarships and can succeed to the extent that they make an effort.

It is thought that an invisible restraint which minorities feel is gradually evanishing with the passage of time. Blacks could not ride a bus and enter a restaurant together with whites tens of years ago. Now there are many social elites among minorities and the number will gradually increase in the future. The merit of the U.S. society is that it continuously tries to correct its demerits.

There are cases where regulations essentially are necessary in order to correct unbalance between classes. For minorities to share in things monopolized by whites, it is necessary to reduce factors of monopoly and to make regulations to reduce rights that have been already vested to whites.

U.S. universities allow fixed percentage of admission to minorities. For example, assume that the number of students which U.S. universities can accept is 100,000 and all white applicants are within 100,000th in the order of academic grade. In this case, it would be natural that all white applicants are admitted into universities, but it’s not possible because of regulation. Therefore, even though minorities have a bit lower academic grade, a fixed percentage of admission is allowed to them.

Of course, I took this example only to explain the situation in an easy way. I certainly am not saying that all white students are superior to minority students. Koreans also come under minorities but there are lots of excellent Koreans in the U.S. society. In fact, because whites have ruled the U.S. society for a long time, minorities did not have the same opportunity to study and greatly contribute to the society. Thus, it means that ability of minorities does not fall behind that of whites.

Anyway, there were many minority movements, including blacks, from the 1950s and many compromising measures have been taken in order to prevent discriminatory practices. For your better understanding, I would like to introduce the U.S. precedent related to equality of education, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. *** In each of the cases, minors of the Negro race seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis.

In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in Plessy. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools. *** Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment22 in 1868. It covered exhaustively consideration of the

22 *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***
Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced.

At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among all persons born or naturalized in the United States. Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups.

Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world.

It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of separate but equal did not make its appearance in this Court until 1896 in Plessy, involving not education but transportation. In this Court, there have been six cases involving the separate but equal doctrine in the field of public education.

In Cumming v. Board of Education, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.

Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208, Sipuel v. Oklahoma, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247, Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 851, 94 L.Ed. 1114; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweat, the Court expressly reserved decision on the question whether Plessy should be inapplicable to public education.

In the instant cases, that question is directly presented. There are findings below that
the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other tangible factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweat, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on those qualities which are incapable of objective measurement but which make for greatness in a law school. In McLaurin, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted intangible considerations: his ability to study, to engage in profession. Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: Segregation of colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Whatever may have been the extent of psychological knowledge at the time of Plessy, this finding is amply supported by modern authority. Any language in Plessy contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal”
has no place. Separate educational facilities are inherently unequal. Therefore, we hold that plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of equal protection.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question - the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws.

In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorney General of the states requiring or permitting segregation in public education will also be permitted to appear ***.

Ethic of Enterprisers

Households, enterprises, the government are economic subjects which lead national economy. There is no economic subject among three economic subjects which is not important for the development of national economy. Households and enterprises must be healthy for the development of a nation and so must the government.

After the foreign currency crisis, we had a chance to once again think about the role of an enterprise. The unhealthiness of an enterprise has a great effect on national economy. If the chronic problem is not cured, we cannot expect the Korean economy to develop.

The unhealthiness of enterprises is closely related to the ethic of entrepreneurs. When the ethic of an entrepreneur backslides, an enterprise also backslides. If we look at the internal system of a bankrupt enterprise, we can know the importance of ethic of an entrepreneur. These enterprises have done business mobilizing every means without taking into consideration the legality of the action taken as long as it results in profit. The offensive bribe of enterprisers has enervated politicians and government officials.

The rights of minority shareholders have been completely ignored and serious problems accumulated inward finally exploded outward. If a systematic mechanism had been set up that can deter the tyranny of majority shareholders and such problems had been properly managed, countless number of enterprises would not have gone bankrupt. Now, the government is trying to protect the rights of minority shareholders. For that, it would be necessary to prepare a proper systemic mechanism to fight against the tyranny of majority shareholders.


Henry Ford had established and operated the Ford Motor Company since 1903. Dodge brothers brought the following case before the court to assert their rights as minority shareholders. The following is a portion of the precedent.
Although the principal issue in this famous case was whether the corporation could be compelled to pay a dividend, the case is best remembered for its discussion of the role of a corporation in society, a discussion that was elicited by Henry Ford's insistence in describing his motives for business decisions in terms of social rather than economic values.

This action was brought by the Dodge brothers, two minority shareholders, against the Ford Motor Company, Henry Ford, and other members of the board of directors, 1) to compel the payment of a dividend, 2) to enjoin construction of the River Rouge plant, and for other relief. The lower court granted all relief requested by plaintiffs.

Ford Motor Company was organized in 1903 with an initial capital of $150,000. Henry Ford took 225 of the 1,500 shares authorized, the Dodge brothers took 50 shares each, and several others subscribed to a few shares each. At the time the suit was brought, the company's capital was $2,000,000, the plaintiffs owned 10% of the outstanding stock, and Ford owned 58% and completely dominated the company. The company paid regular quarterly dividends amounting to $1,200,000 per year and, in addition, had paid during the years 1911 through 1915 a total of $41 million in special dividends. The plaintiffs alleged that Ford had declared it to be the settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company other than the regular dividend***.

The defendants appealed from a lower court order directing the corporation to pay a dividend of $19 million, enjoining it from building a smelter at the River Rouge plant and restraining it from increasing of the fixed capital assets, or holding of liquid assets *** in excess of such as may be reasonably required in the proper conduct and carrying on of the business and operation of the corporation.

*** To develop the points now discussed, and to a considerable extent they may be developed together as a single point, it is necessary to refer with some particularity to the facts. When plaintiffs made their complaint and demand for further dividends, the Ford Motor Company had concluded its most prosperous year of business. The demand for its cars at the price of the preceding year continued. It could make and could market in the year beginning August 1, 1916, more than 500,000 cars. Sales of parts and repairs would necessarily increase. The cost of materials was likely to advance, and perhaps the price of labor; but it reasonably might have expected a profit for the year of upwards of $60,000,000 ***.

In justification of their dividend policy and business plan, the defendants have offered testimony tending to prove, which does prove, the following facts: It had been the policy of the corporation for a considerable time to annually reduce the selling price of cars, while keeping up, or improving their quality.

As early as in June, 1915, a general plan for the expansion of the productive capacity of the concern by a practical duplication of its plant had been talked over by the executive officers and directors and agreed upon; not all of the details having been settled, and no formal action of directors having been taken. The erection of a smelter was considered, and engineering and other data in connection therewith secured.

In consequence, it was determined not to reduce the selling price of cars for the year beginning August 1, 1915, but to maintain the price and to accumulate a large surplus to pay for the proposed expansion of plant and equipment, and perhaps to build a plant for smelting ore. It is hoped, by Mr. Ford, that eventually 1,000,000 cars will be annually produced. The contemplated changes will permit the increased output.
The plan, as affecting the profits of the business for the year beginning August 1, 1916, and thereafter, calls for a reduction in the selling price of the cars. It is true that this price might be at any time increased, but the plan called for the reduction in price of $80 a car. The capacity of the plant, without the additions thereto voted to be made (without a part of them at least), would produce more than 600,000 cars annually. This number, and more, could have been sold for $440 instead of $360($440-$80), a difference in the return for capital, labor, and materials employed of at least $48,000,000(600,000x$80).

In short, the plan does not call for and is not intended to produce immediately a more profitable business, but a less profitable one; not only less profitable than formerly, but less profitable than it is admitted it might be made. The apparent immediate effect will be to diminish the value of shares and the return to shareholders.

It is the contention of plaintiffs that the apparent effect of the plan is intended to be the continued and continuing effect of it, and that it is deliberately proposed, not of record and not by official corporate declaration, but nevertheless proposed, to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution. In support of this contention, they point to the attitude and to the expressions of Mr. Henry Ford.

Mr. Henry Ford is the dominant force in the business of the Ford Motor Company. No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favor. One of the directors of the company has no stock. One share was assigned to him to qualify him for the position, but it is not claimed that he owns it. A business, one of the largest in the world, and one of the most profitable, has been built up. It employs many men, at good pay.

“"My ambition, said Mr. Ford, “is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business."” “With regard to dividends, the company paid sixty per cent on its capitalization of two million dollars, or $1,200,000, leaving $58,000,000 to reinvest for the growth of the company. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan.”

He had made up his mind in the summer of 1916 that no dividends other than the regular dividends should be paid, for the present.

Q. For how long? Had you fixed in your mind any time in the future, when you were going to pay? "
A. “No.”

Q. “That was indefinite in the future? ”
A. “That was indefinite; yes, sir ”

The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might
be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken.

We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company - the policy which has been herein referred to. It is said by his counsel "Although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation. And again: As the expenditures complained of are being made in an expansion of the business which the company is organized to carry on, and for purposes within the powers of the corporation as hereinbefore shown, the question is as to whether such expenditures are rendered illegal because influenced to some extent by humanitarian motives and purposes on the part of the members of the board of directors."

*** The cases referred to by counsel, after all, like all others in which the subject is treated, turn finally upon the point, the question, whether it appears that the directors were not acting for the best interests of the corporation. We do not draw in question, nor do counsel for the plaintiffs do so, the validity of the general proposition stated by counsel nor the soundness of the opinions delivered in the cases cited.

The case presented here is not like any of them. The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious.

There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors own to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, including the wages which shall be paid to employees, the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public. It is said by appellants that the motives of the board members are not material and will not be inquired into by the court so long as their acts are within their lawful powers.

As we pointed out, and the proposition does not require argument to sustain it, it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of courts to interfere.

We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company. In view of the fact that the selling price of products may be increased at any time, the ultimate results of the larger business cannot
be certainly estimated. The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its affairs. It may be noticed, incidentally, that it took from the public the money required for the execution of its plan, and that the very considerable salaries paid to Mr. Ford and to certain executive officers and employees were not diminished.

We are not satisfied that the alleged motives of the directors, in so far as they are reflected in the conduct of the business, menace the interests of shareholders. It is enough to say, perhaps, that the court of equity is at all times open to complaining shareholders having a just grievance. *** The decree of the court below fixing and determining the specific amount to be distributed to stockholders is affirmed. In other respect, *** the said decree is reversed.

Thus, this case recognized the rights on dividend of minority shareholders. Henry Ford asserted on numerous occasions that he wanted only a small profit from his venture:

“I hold this view because it enables a large number of people to buy and enjoy the use of a car and because I give a large number of men employment at good wages. Those are the two aims I have in life. But I would not be counted a success *** if I could not accomplish that and at the same time make a fair amount of profit for myself and the men associated with me in the business. And let me say right here, that I do not believe that we should make such an awful profit on our cars. A reasonable profit is right, but not too much. So it has been my policy to force the price of the car down as fast as production would permit, and give the benefits to users and laborers, with resulting surprisingly enormous benefits to ourselves.”23

The above case was decided in 1919, approximately 80 years ago. Through this case, we can see the philanthropic and altruistic spirit of an American entrepreneur. This precedent suggests that the United States had established the law 80 years ago that protected the rights of minority shareholders more thoroughly than the present Korean law. The Korean commercial law also has a provision which protects the rights of minority shareholders, but, in fact, this provision has not played a role of substantially protecting the rights of minority shareholders. It shows that that the law of the United States 80 years ago was more advanced than the present law of Korea.

The Korean government is trying to improve the related law, etc. in order to protect the rights of minority shareholders after the foreign currency crisis. I think that it is very desirable. In the modern society, it is very difficult to expect the development of a nation without the development of an individual legal system.

It might be said that the United States became a world power today since there were many great entrepreneurs with righteous entrepreneur spirit like Henry Ford. But the more fundamental reason would be that the U.S. society has established social systems under which entrepreneurs can succeed only by reasonably doing business and most of constituents of the U.S. society respect this system.

If the court had ignored the rights of minority shareholders paying regard to only Henry Ford's philanthropic spirit, the enterprises in the United States could not have grown up soundly as that seen today. Even though the representative of a corporation who is a majority shareholder sets up a policy based on a very good motive, if the rights of minority shareholders are ignored, it violates directly the principle of rule of law.

One of reasons why our enterprises suffer pain today is due to the very fact that the enterprises are being operated under the arbitrariness of a majority shareholder. Such a management method is directly against a democratic management method and becomes a cause that diseases enterprises. In the case of Korean enterprises, majority shareholders have generally exercised their arbitrary power for their own profit rather than for social profit. Thus, in order for our nation to develop, there must be the development of legal system by the government and enterprisers should be equipped with the ethic.

Concord between East and West & Reconciliation between South and North

If I was asked, as a citizen, to list two requests to the present Participatory Government, I would ask the government to achieve 1) concord between East and West (elimination of regionalism) and 2) reconciliation between North and South. In terms of manpower composition within the Administration, the present Government is in the most favorable position for dissolving the confrontation between East and West. Thus, it is expected that the present Government could make a significant contribution towards development of our nation, if the existing confrontation between East and West can be completely eliminated by the hands of the present Government.

Moreover, the present Government attempts to maintain a cooperative North Korea policy in order to get over the confrontation between South and North. I believe this moderate North Korea policy will become a driving force for gradually encouraging North Korea to open up its doors to the outside world. Consequently, it is expected that it will increase the possibility for reconciliation between South and North Korea; and thus increase the possibility for South Korea to escape from the current difficult situation.

If North Korea unfolds a gradual open-door foreign policy, it will progressively dissolve a danger of a war. This would be also the best solution for helping our nation to escape from the current economic difficulties. South Korea could escape from the 1997 foreign currency crisis by introducing foreign funds to South Korea. However, if we look at South Korea as one company in the world market, the foreign funds introduced to South Korea are equivalent to the debts that South Korea should repay to its creditors in the future.

There are two ways for a company to acquire funds; 1) bonds; and 2) capital. Thus, in case where the Korean government or a company acquires funds by issuing bonds, the interest that the Korean government should bear will be the amount of the London Inter-Bank Offered Rate (LIBOR) plus spread. Thus, the Korean government only bears a relatively low level of interest.

However, in case where the Korean government acquires funds by introducing foreign capital, it is possible that the amount of profits, which will return to the owners of foreign capital (i.e., return on capital), can be significantly higher than that arising
from issuing bonds. As a result, if the foreign capital invested in Korea is not effectively utilized by the government, it is possible that South Korea will face a more severe economic crisis.

After the foreign currency crisis, the former government made significant efforts to stimulate domestic demands in order to strengthen the economy. This very economic policy consequently led the people go into bankruptcy by inducing the people to excessively use their credit cards.

Basically, foreign capital should be used to increase the productivity, that is, increase the wealth of the nation. However, an enormous amount of foreign capital has been wasted, and the national debt continues to increase as a result of intemperate lavishness and waste. In order to overcome a situation like this, which is our hope, we must strongly cooperate with North Korea, which has an inexhaustible potential for productivity, in order for them to maintain an open-door foreign policy. That is the reason why we should seek the reconciliation between South and North Korea.

It is already a well-known fact that an enormous amount of foreign capital invested in China plays an important role for development of China which has a great productivity potential (especially, labor productivity) and such a development will continue.

By the same token, where North Korea which has an enormous productivity potential opens up its doors to the outside world, it can be anticipated that North Korea will have a greater productivity potential than South Korea. Thus if North and South Korea engage in an active trade, it will place South Korea to an advantageous position compared to other countries in utilizing the North’s productivity potential. What is more, where South and North Korea cooperate with each other, it can help both South and North Korea escape from the economic crisis.

From the market economy’s perspective, North Korea is a new and uncultivated world. I believe, therefore, that if, through a detailed and long-term plan, both South and North Korea closely cooperate with each other for systematically developing North Korea, Korea will be able to have a basis for rising to a powerful country in the global community.

**Preparation for Future**

Most people probably saw the motion picture “Titanic,” a movie based on real story. What impressed me the most about the movie was the crews’ efforts to maintain order and passengers’ attitude to calmly follow crews’ instructions in the middle of chaos that ensued from the big passenger ship’s collision with a big iceberg.

Children and women first boarded life boats and men waited at the end of the line to be seated. Even in such a crisis, performers played music to the end to appease people, and a captain and crews tried to save passengers from the crisis. Their highly professional spirit was enough to move the hearts of viewers. It seems that there was a consideration for the weak in their hearts to protect women and children and they behaved the way they did believing that children are their future and hope.

Should human beings live solely according to their desire without thinking about their future, human beings would be no different from animals. Peoples who live with future in their mind will have the possibility of endless development. Such attitude of living with future in mind is obtained through education and habit.
There is an estate planning in the tax courses of the United States law schools. Through this course, students can learn how to manage estate and how to distribute estate among heirs, etc. This estate planning is to prepare for various situations which can occur in the present as well as the future. Since it is difficult to explain this subject to persons without knowledge of the U.S. tax laws, only key topics are introduced without detailed explanation.

At death (or disability), no asset tends to deteriorate as quickly or as totally as a business. Usually, the precipitous drop in value is staggering! If your best friend owned a car or a home or almost any other tangible asset, one month after that friend died, the value of that car or home would be relatively the same. But if your friend owned a restaurant that didn't reopen for a month or was a doctor whose practice was closed for a month or owned a manufacturing plant which produced no goods for month, what would the business be worth? What measure should the friend have taken to cope with this situation?24

Meyer ran the business with the help of a long-time manager, Eddie and two part time employees. The business provided a good living for both Meyer and his wife, Miriam and their two daughters as well as Eddie and his growing family. Meyer was from the old school; he worked night and day in his business but never took the time to make sure it would survive him. When Meyer had a heart attack and died within three days, not only was his family hit with the immediate emotional trauma of his death, but they were also hit with economic problems - problems that seemed insurmountable. Miriam tried to run the business but unfortunately she had never been involved in its operation while Meyer was alive. When she realized she needed help, she offered Eddie a significant raise in pay to keep the business going. But when she had to take out most of the firm's working capital to pay Meyer's medical expenses, business inventories dropped and then sales plummeted. Eddie, figuring it was only a matter of time until his job would be lost, quickly accepted a position with one of Meyer's former competitors. Miriam had to sell the remaining inventory for less than 30 cents on the dollar. What measure should Meyer have taken to cope with this situation?25

Joe and Paul are siblings and could not have been closer. They had been in business for almost 30 years. Business responsibilities were divided down the middle; Joe ran the day-to-day operation of the business while Paul, the younger brother, was a super salesman and worked night and day to build up company profits. Even though the business enjoyed several million in sales and was highly profitable, Joe was conservative and lived with his wife and four children in a small home. Paul, a bachelor, lived in a downtown apartment on much higher scale.

Joe died at age 53 after six month battle with cancer. Paul was more than a little shocked when he was invited to the office of his late brother's wife's attorney. The attorney said that since Joe had owned half the business, Mary, his widow, was entitled to the same income Joe had been bringing home before his death. Mary insisted that it was urgent that she receive at least that much since the twins had just started college and the other two children were only a few years from graduating high school.

Paul, of course, feels a deep moral obligation to his brother's wife and children and wanted to do as much as he could. But he knew he's have to hire at least one and

25 Stephan R. Leimberg Et Al., supra note 22.
probably two people to do the work that Joe had done. He also knew it would put quite a strain on the business to pay in essence three salaries.

Paul's accountant cautioned that even Paul's salary might have to be cut back until a competent replacement for Joe was found and properly trained. But Mary became distraught. At this point, Paul's accountant told Mary that if the pressure was too much for Paul and his health suffered, the entire value of the business would be jeopardized. He suggested that she should try to find a job to provide for her children's education.

The physical and emotional drain that occurs when the surviving owner tries to do the right thing often ruins that person's health. Regardless of the solution, it will be unsatisfactory to some and probably all of the parties. What measure should Joe have taken to cope with this situation?26

Although there are several methods to cope with this situation, people can generally cope with such an unexpected situation by making the buy-sell agreement during their lives. By this agreement, if one party should die, the other party or a corporation could buy the shares or rights of the decedent, and a partnership also can use the same method. Since explanation on this is very technical, it is omitted. Nevertheless, we can appreciate the lifestyles of the Americans preparing for the future through these examples.

The knowledge level of each nation is different from each other. Since the knowledge level of a developed nation is advanced compared to that of an underdeveloped nation, a nation with a higher level of knowledge can have a priority and take more riches in the competition. The knowledge level of a nation is in proportion to that of its people and accordingly a nation with competent people can be in a better position in the international competition.

Korean education is largely based on memorizing. Education system based on memorization is not very effective in the present age which is marked by high competition. To win a competition, we should gain new knowledge as well as new technology and be able to apply the knowledge to the actual world. If one person has an old car and another person has a new high-tech automobile, it is needless to ask who will win in a car race.

Over several centuries, the world has undergone tremendous development owing largely to the radical advances of Western science. Thus, it has been considered natural for the West to play a leadership role in further developing the international community. During World War I and II, almost all Asia nations except Japan were under the control of the West. This clearly supports the fact that Western nations have much more advanced system and science than Asian nations. Japan actively accepted the Western culture and institutions since the 1850s to overcome the limitation of scarce resources, and in approximately 50 years acquired a position of a strong nation controlling various Asian nations including Korea.

A war between nations is an unavoidable tragedy instigated by human beings. In the future, however, it is expected that a war will take on a different look – an economic war. In fact, the main purposes of past wars were to seek the profits of each nation. However, unlike the past, the boundary of a nation is losing its meaning in terms of commerce, and since each nation can secure its profit through an economic war that

26 Stephan R. Leimberg Et Al., supra note 22.
does not require physical power as in the past, an economic war would be more accelerated.

Like a physical war, only means to survive an economic war is knowledge. The development of knowledge results in the development of science and system. Also, it leads to the improvement of productivity and becomes a motive to win a competition.

We should understand the knowledge of developed nations and cultivate our power to further develop the knowledge of those nations. By doing so, we can have ability to change the flow of world civilization developed by the West to this day, and it complies with the principle of “give and take”. When we cultivate such power and share our knowledge with other nations, our descendants will be proud of being born on this land. Creating such a circumstance is our ethical duty.
Appendix. Development of Law and Comparative Analysis of Korea Law and the United States Law

Ethic and Law

From the past, ethic of government officials has been emphasized as a very important element in our society and significant efforts have been made to teach the ethics. Nevertheless, many government officers have been criticized because of their unethical behaviors, and there were many unfortunate historic cases where the lack of morality of leading celebrities resulted in the pain of the people.

In Korea, there recently occurred humiliating cases that were unprecedented; two former presidents were incarcerated with a bribe crime and sons of the former presidents also were incarcerated with the same crime. People who watched these cases could not help but feel betrayed. To which side is the attribute of a human being tilted? Evil or good? Regardless of which side is right, we have understood ethics education to be the core education from the past and even now nobody would contradict that ethics education can never be overemphasized.

One Chinese scholar said “The real nature of human beings is neither evil nor good. “Evil” or “good” is determined by education and habit just as water flows to the east when we open a waterway to the east and flows to the west when we open it to the west”.

Now, it is time to determine whether we will insist upon the present system full of old customs relying only on the ethic of human beings or pursue a developed nation by educating the people and further developing our present system through the introduction of the logical and reasonable system.

Where civilization develops and the number of human beings increases, social life becomes more complex. Therefore, we need more various and detailed rules to solve complex problems in order to maintain the order of the society, not to mention ethics education. Democracy cannot exist without the rule of law. If a society is not operated by laws, personification of democracy is difficult and the society will abnormally grow with chaos and corruption.

If ethic is kept and we can trust ethic of each other, necessity of laws would decrease as much. If we can do so, our world could be a Utopia where all of us will live satisfactory lives. But we can learn from history that there is rarely a chance that human beings can set up a Utopia. Under the recognition that the harmony of society cannot be achieved only by relying upon the ethic of human beings, laws have developed in the West rather than in the East for the purposes of controlling behaviors of human beings.

Culture of each nation is different from each other and the standard of ethic is also different. Asian nations such as Korea, China and Japan have been under the influence of Buddhism and Confucianism, and emphasized ethic based on these religions, whereas the West has been under the influence of Christianity and emphasized ethic based on that religion. Of course, since many nations are under the influence of Islamism, Islamism also affected greatly many nations.

Religion plays an important role in determining the standard of ethic of human beings. Together with development of civilization, religion does not remain in a specific region.
but spreads into other regions. Our ethics education was performed based on Confucianism in the past, but now the consciousness of ethic is greatly changing under the influence of the western civilization. Thus, it can be said that the new consciousness of ethic is budding with these mixed.

Presently nations that have developed under the culture of Christianity are playing a leading role in the various fields such as economy, military power, science, etc. Also, it is needless to say that democracy which has been developed by them has had a great effect on the world. These nations have been greatly affected by Christianity culture and the effect of Christianity culture on the development of democracy cannot be disregarded.

The characteristic these nations have in common is that their democracy (i.e., rule of law) is highly developed and the development of laws (i.e., system) has been accelerated. For example, the United States, a country considered to be a superpower of the world in economy, military power, science, etc. has a very developed law and democracy system. The reason why the United States could develop such a complex system is because it seems that the people of the United States have been living on the basis of rationalism. They seek to prevent the abuse of power according to the principle of thorough democracy. Also, they obtain the maximum effect by having every economic entity organically move according to a rule (law) made by the consensus of the people.

What makes every economic entity move so is a system (law) which controls its behavior. These nations are developing the system to prevent constituents of society from deviating from a right track rather than merely relying upon the ethic of human beings. However, if we would think that they are trying to control themselves by detailed laws because they are inferior to us in terms of consciousness of ethics, it would be a big mistake in judgment.

When I was in the United States, my wife and I had to visit a school to see teachers of our children twice a year. Whenever I met them, I felt that they could not be more kind. Therefore, seeing teachers did not become a burden to us.

In the case of United States, where there is no signal at a cross street, a car that first arrives at the cross street generally departs first. No matter how slow you drive, there is rarely a person who openly rebukes you. Of course, I agree that since the road situation of the United States is better than ours, it would not be necessary to become anxious and drive in a hurry. However, it seems to me that they get accustomed to the courtesy.

Then, why does the United States have more detailed and complex rules than us in spite of high ethic consciousness of her people?

Professional responsibility rule of the United States is what the judges, prosecutors and attorneys should abide by and the rules are very detailed compared to ours. That is, since the rule is concrete and enumerates in detail the items that lawyers should abide by, the rule comprises numerous items. Where a rule is concretely and minutely stipulated, behaviors of persons who should abide by the rule are restricted as much since they have to abide by all lines of provisions.

Unlike the United States, Korea’s rule is very simple. Before reviewing the Korean Lawyer Act, let's look at the National Public Officer Act. Article 7 of the National Public Officer Act is a rule related to the work duty of government officers and the following items outline all of them: duty of sincerity, duty of loyalty, duty of being on duty, duty of kindness and fairness, duty of keeping secrets, duty of integrity, duty in the
case of receiving an honor from foreign government, duty of keeping dignity, duty of not participating in a profit-making business and having another occupation, duty of not doing political activity and duty of being not in group action.

Of these duties, the duty that is set forth in detail to some extent is “duty of not doing political activity”. The concrete contents are as follows: “Public officers shall not participate in and join the organization of a political party and other political associations.” “Public officers shall not engage in the following activities in order to support or object to a specific political party or a specific person: 1. persuade other persons to vote or not to vote; 2. attempt or lead a signing drive, or persuade other persons to do; 3. post documents or books on public facilities or have other persons do so; 4. collect a contribution or have other persons do so, or use public funds or have other persons do so; 5. persuade other persons to participate in a political party or other political associations or not to do.” “Public officers shall not require other public officers to engage in the above activities, or promise to give advantage or disadvantage as a compensation or retaliation of political activity.”

Since the remaining duties are very abstract, where public officers violate their duty, the individual opinion on whether they actually violated their duty can be different from person to person.

Some years ago, one government officer was subject to disciplinary punishment because he cheated in an exam. He moved to quash the disciplinary punishment and finally petitioned the appellate court. The appellate court sentenced “not guilty” on him. But the Supreme Court sentenced “guilty” on him under its judgment that he violated the duty of keeping dignity. Then, what is the standard for duty of keeping dignity? Each person can take very different position on the standard because of the abstract nature of the term “duty of keeping dignity”. This kind of term is one which was used during Chosun Dynasty when people lived their lives emphasizing largely on human ethics rather than laws.

Duty of sincerity, duty of loyalty, duty of kindness and fairness, duty of keeping secrets, duty of integrity are also very obscure. Therefore, where a dispute related to these duties take place, litigation will undoubtedly follow, and then a judge will determine whether or not there was a violation of the duties. Even in the case where a judge comes to a conclusion, there always exist uncertainty since the opinion of each judge can be different. Thus, if a rule is uncertain, a side effect due to the uncertainty can become very substantial.

Taking into consideration this fact, the professional responsibility rule of the United States in detail enumerates each duty that lawyers should obey. This detailed rule plays a role of an internal control mechanism of a nation as well as preventing the discretionary judgment of judges from impinging on the rights of the people.

Several years ago, the entire nation has been troubled with the corruption cases of judges of the Eujungbu court. Attorneys regularly furnished them with a bribe through bank wiring and this fact was disclosed to the public. The court and the prosecution all were busy calming this case.

Finally, first in our judiciary history, 5 judges charged with serious degree of corruption were subject to high-degree disciplinary punishment. They were subject to 6 to 10 months of suspension from office. Also, 7 judges whose corruption degree was considered slight were subject to low-degree disciplinary punishment- reprimand or warning. If they were public officers who were not judges, they would have been
dismissed. This breaks the equity.

Why do these cases occur? Won't these cases occur again even after punishment was given? Since Korean judges and prosecutors have too much discretion at present, this kind of case will continuously occur. If they have no such discretion, attorneys have no reason to cringe before them.

Then, where does such discretion come from? As set forth above, the looser the rules are, the more discretion persons handling the rules will have. As can be implied from the above judgment of the Supreme Court, if duty of keeping dignity were manifested in detail in the National Public Officer Law, it would have been unnecessary for the parties to have gone to the court and there would not have been waste of time and money. Also, taxpayer's money could be saved by decreasing the number of litigation.

Power of the government is derived from the people. When power becomes corrupt, the people have rights to retrieve power from corrupted government officers. Since corrupted power comes from too much discretion, the people have to retrieve the discretion. If one party could have an effect on a judge or a prosecutor using money, the other party would become a victim of the money. Therefore, the popular saying “Money is not guilty, no money is guilty” exists in our society.

We have seen many celebrities being punished due to their entanglement in various kinds of corruption. Thus, it is not a pride in our society to possess a lot of fortune. Nevertheless such vice does not cease and is becoming a bigger problem in our society. Watching these corruption cases, we can understand that absolute trust cannot be placed upon human ethic. We have to improve our systems so that persons having power will become disinclined to accept such a temptation. Where these problems are disregarded and not solved, the side-effect will continue forever.

Cultural and Technical Aspects of Laws

The contents of law of a democratic nation can be classified into “cultural aspect” and “technical aspect”. The term “technical aspect of law” refers to a mechanism for maintaining a democratic system itself in a democratic society, and the term “cultural aspect of law” means distinctive features of law resulting from cultural differences between nations.

Roughly, it is thought that the cultural aspect of law comprises 20 to 30% and the technical aspect of law represents 70 to 80%. However, this classification is not exact. With the development of civilization, the world became a one-day-life sphere and the culture of each nation is changing into something different through combining with cultures of various countries.

When I was young, the terms “rights of women” and “divorce” were never accepted by adults who were accustomed to Confucianism concept and related laws also were not developed.

However, as society and democracy develop, women continued to gain greater rights and now related laws are being amended and developed under the influence of foreign laws. In this respect, it can be said that the cultural aspect of law is decreasing and its technical aspect is increasing.

The reason why I distinguish the cultural aspect of law from its technical aspect is
because I wanted to compare and analyze Korea and the United States in terms of how the democracy was developed. Democracy is politics by the people and we can ascertain how much our democracy falls behind that of the United States by observing the system of the United States in which the democracy is firmly established.

Irrespective of whether one’s social position is low or high, a person who commits a crime is punished according to law and therefore it can be said that law is very much alive in the U.S. The fact that ex-president Nixon withdrew from presidency because of the Watergate Affair and ex-president Clinton was troubled with a sex scandal supports it. We might think such incidents could rarely become a problem in our society but they do in the United States.

Since Bill Clinton was a president, the problem was more serious. Did he harass her using his power while he was in power? Did he abet her to perjure? No doubt he was in a dilemma with various problems on his hand. Even though Bill Clinton was a president, his presidency does not pardon him from being judged by the court when accused of crime. This shows us what a real democracy is. The more our democracy develops, the less the gap will be between the law of Korea and the law of United States.

### Comparison of Professional Ethic Rules of Korea and the U.S.

According to the Lawyer Act of Korea\(^{27}\), lawyers must abide by the following.

**Article 20 (Duty to Maintain Dignity)** provides that lawyers shall not perform acts damaging their dignity and lawyers shall not conceal the truth or make false statements in performance of their duties; **Article 21 (Duty to Observe Regulations)** provides that lawyers shall observe the regulations of their local bar association and of the Korean Federal Bar Association;

**Article 22 (Duty to Keep Matters Confidential)** provides that lawyers and former lawyers shall not divulge confidential matters learned in the course of performing their services, unless otherwise prescribed by law.

**Article 23 (Duty to Perform Designated Work)** provides that lawyers shall perform matters designated by government agencies, the Korean Federal Bar Association or local bar associations pursuant to provisions of laws and regulations, unless there is any justifiable reason;

**Article 24 (Restriction on Referral)** provides that a lawyer shall not perform services in the following cases, except cases under Subparagraph 2 below in which his client consents: 1. Cases requested by a party who is an adversary of an existing client. 2. Other case requested by a party who is an adversary of an existing client; and 3. Cases officially handled by the lawyer as a public officer, mediator or arbitrator.

**Article 25 (Prohibition of Taking Assignment of Claims)** provides that no lawyer

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\(^{27}\) With its amendment on December 28, 1999, “duty to abide by rules of bar association”, “duty not to advertise relationship”, “duty not to visit the purpose of attracting a case” and “prohibition of introduction of a case by public officers related to litigation” were added.
shall become an assignee to rights in dispute.

Article 26 (Prohibition of Bribery) provides that no lawyer shall receive, demand or agree to receive benefits from an adversary party in a case in which he is representing a client;

Article 27 (Prohibition, etc. of Association with Non-lawyer) provides that (1) No person shall introduce, mediate or induce a party and other interested person to a specified lawyer in connection with a referral of legal case or affairs, and receive or demand any money, entertainment or other benefits in compensation for it. (2) No lawyer shall knowingly receive a referral of legal case or affairs from a person as prescribed in Subparagraph 1 and 2 of Article 90 or Subparagraph 1 of Article 91, or allow him to use his title. (3) No person who is not a lawyer shall establish and manage a law firm employing lawyers. (4) No person who is not a lawyer shall receive a remuneration and other gains which are distributed through exclusive business of lawyers;

Article 28 (Prohibition of Holding Concurrent Offices) provides that (1) No lawyer shall concurrently hold a public office with remuneration. However, this provision shall not apply to members of the National Assembly, members of local councils, or to services performed at the request of government agencies. (2) No lawyer shall operate a commercial or other business for the purpose of earning profits, or become an employee of a businessman in such a business, or an executive partner, director or employer of a juristic person seeking profits (other than a law firm), unless permission is obtained from the local bar association with which he is affiliated. (3) The provisions of Paragraph (1) and (2) shall not apply when a lawyer is temporarily suspending his practice.

Items enumerated above are the Duties that lawyers shall abide by according to the Korean Lawyer Act. They are broadly classified into Duty to Maintain Dignity, Duty to Observe Regulation, Duty to Keep Matters Confidential, Duty to Perform Designated Work, Restriction on Referral, Prohibition of Taking Assignment of Claims, Prohibition of Bribery, Prohibition of Association with Non-lawyers, Prohibition of Holding Concurrent Offices.

As set forth before, public officers must abide by the rules of the National Public Officer Law and the rules are as follows: duty of fidelity, duty of obedience, duty of not walking out, duty of kindness and fairness, duty of keeping secrets, duty of integrity, duty in the case of receiving an honor from foreign government, duty of keeping dignity, duty of not participating in a profit-making business and having another occupation, duty of not doing political activity, and duty of prohibition of collective act.

Two laws are simple and most of their contents are abstract. Now, let's compare the contents of ethic rules that lawyers of the United States should abide by with ours and observe what the problem is.

In the United States, there are several sources of rules that govern the conduct of lawyers. These are statute of each state, case law, rules of court, federal practice, and ethic rules. Each state has ethic rule made according to the Model Ethics Rule of the American Bar Association. The American Bar Association consists of approximately
370,000 members and one of the ABA's many projects is to establish model ethic rules for lawyers and judges. The ABA Model Code of Professional Responsibility was promulgated by the American Bar Association in 1969, the ABA Model Rules of Professional Conduct - a document designated to replace the ABA Code - was approved in 1983, and the ABA Code of Judicial Conduct was promulgated in 1990.\(^2\) A large majority of the states have now adopted the ABA Model Rules.

Let's compare the contents of these ethic rules with ours. Since these rules are tremendous in number, all rules cannot be set forth. Rather, a part of the rules will be set forth for review and comparison.

“A lawyer is subject to discipline for incompetence.” Neglecting a matter can amount to incompetence. For example, failing to file the necessary papers, failing to do the necessary factual investigation, or failing to do the necessary legal research may subject a lawyer to discipline.

“A lawyer is subject to discipline for trying to handle a legal matter without the necessary preparation.” For example, trying to represent an indigent criminal defendant on the spur of the moment without having time to prepare may subject a lawyer to discipline.

“If a client asks a lawyer to handle a matter in a field in which the lawyer has inadequate experience, the lawyer may handle it if the lawyer: 1) puts in the necessary time to become competent in the field through study and investigation; or 2) gets the client's consent to associate a lawyer who is competent in the field, otherwise a lawyer is subject to discipline for incompetence.”

“In an emergency, a lawyer may assist a client, even if the lawyer does not have the skill ordinarily required in the field in question. However, the assistance should not exceed what is reasonably necessary to meet the emergency.”

“A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and unless the client is independently represented in making the agreement.”

“A lawyer must not settle a malpractice claim with an unre presented client or former client without first advising that person, in writing, to seek advice from an independent lawyer about the settlement.”

“Once a lawyer agrees to handle a matter for a client, the lawyer must see the matter through to completion unless, of course, the lawyer is fired or is required or permitted to withdraw.”

“A lawyer must keep the client reasonably informed and must respond promptly to reasonable requests for information about the matter.”

\(^2\) Richard C. Wydick, Professional Responsibility, 1996.
“A lawyer should furnish the client with all the information that is necessary to allow the client to participate intelligently in making decisions about the matter.”
“If the client is young or suffers a mental handicap, the lawyer may have to do more explaining and assisting than if the client is an ordinary adult.”

“A lawyer must settle the fee question early in the relationship, except where the attorney has regularly represented the client in the past.”

“A lawyer must disclose the basis on which a client will be charged for legal services and expenses, and the attorney's bill should clearly show how the amount due has been computed.”

“A lawyer should not make a fee agreement that could curtail services in the middle of the relationship and thus put the client at a bargaining disadvantage.”

“A lawyer is subject to discipline for using a contingent fee arrangement when defending a person in a criminal case.”

“A lawyer may reveal or use confidential information if the client consents after consultation.”

“A client must not be asked to consent if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.”

“Since the lawyers within a firm are usually treated as a single unit for conflict of interest purposes, different lawyers in the same firm must not represent opposing parties in a civil case.”

“Absent consent consultation, a lawyer must not represent a client in one case and oppose that same client in a simultaneously pending case, even when the two cases are unrelated to each other.”

“A lawyer must not enter into a business transaction with a client, nor knowingly acquire an ownership, or possessory, or security, or other pecuniary interest adverse to the client unless: (i) the transaction is reasonably and fair to the client; (ii) the terms are fully disclosed to the client; (iii) the disclosure is in writing, expressed in a manner that the client can reasonably understand; (iv) the client is given a reasonable chance to seek advice from an outside lawyer about the transaction; and (v) the client consents in writing.”

“A lawyer must not prepare a legal instrument in which the client gives the lawyer a substantial gift (including a gift by will), except where the client is a relative of the lawyer.”

“A lawyer must not represent a private client in a matter in which the lawyer has earlier participated personally and substantially while serving as a judge, unless all parties to the proceedings consent after disclosure.”
“When the interests of the organization and the interestes of the human beings who make up the organization come into conflict, the lawyer for the organization should remind the person in question that the attorney represents the organization, not the person.”

“A lawyer is subject to discipline for commingling the client's money or property with the lawyer's own personal or business funds or property.”

“An attorney must withdraw if the attorney's mental or physical condition materially impairs the attorney's ability to continue representing the client.”

“A lawyer must not knowingly violate a rule of procedure, a rule of evidence, a rule of court, or an order made by the court - but a lawyer may openly refuse to obey such a rule or order for the purpose of making a good faith challenge to the validity of the rule or order.”

“Except as provided below, a lawyer must not share her legal fee with a nonlawyer.”

“A lawyer must not allow a person who recommends, employs, or pays her for serving a client to direct or regulate the lawyer's professional judgment.”

“A lawyer is subject to discipline for assisting a nonlawyer to engage in the unauthorized practice of law.”

“A lawyer must not seek fee-paying work by initiating a personal or live telephone contact with a prospective client with whom the lawyer has no family or prior professional relationship.”

“A lawyer is subject to discipline for failing to report a disciplinary violation committed by another lawyer.”

“A lawyer is subject to discipline for failing to report a disciplinary violation committed by judges.”

“A prosecutor must assure that the defendant is tried by fair procedures and that guilt is decided on proper and sufficient evidence.”

“A prosecutor must not prosecute a charge that she knows is not supported by probable cause.”

“A prosecutor must make reasonable efforts to assure that the accused is: (i) advised of the right to counsel; (ii) advised of the procedure for obtaining counsel; and (iii) given a reasonable opportunity to obtain counsel.”

“A prosecutor must not seek to obtain from an unrepresented accused a waive of important pretrial rights, such as the right to a preliminary hearing.”

“A prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate the guilt of the accused or to mitigate the
“A prosecutor must not make extra-judicial comments that have a substantial likelihood of heightening public condemnation of the accused.”

“To preserve the public's confidence in an honest, independent judiciary, a judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards.”

“A judge shall not allow family, social, political, or other relationship to interfere with the judge's conduct or judgments.”

“A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”

“A judge can be disciplined for membership in or use of a discriminatory organization or for publicly manifesting a knowing approval of an invidious discrimination.”

“Even if a judge is not a member of an organization that invidiously discriminates based on race, sex, religion or national origin, the judge can be disciplined for using such an organization.”

“A judge shall be faithful to the law and maintain professional competence in it.”

“A judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity, including litigants, lawyers, jurors, and witnesses.”

“Judges shall discharge their administrative duties diligently without bias or prejudice, shall maintain their competence in judicial administration, and cooperate with others in administrative matters. Judges shall require those under their direction and control to do likewise.”

“A judge must not independently investigate the facts in a case and must consider only the evidence presented.”

The above ethic rules are just a part of the whole rules. Since there are too many rules, all of the rules cannot be enumerated in this book. Only parts of the contents are introduced to help readers understand. By reviewing the items enumerated above, we can easily understand differences between ethic rules of Korea and those of the United States.

Establishing ethic rules in detail can prevent abuse of power and reduce a potential conflict that arises in relation to the construction of law. Of course there is a possibility of a conflict no matter how detailed the rules are. Despite the potential conflict, however, establishing rules in a concrete and detailed manner can prevent any arbitrary construction of the enumerated rules.
**Difference between the US and Korean Laws and their Transition**

In general, Korea is called a civil law nation and the United States is called a common law nation. They say that Korea, which has succeeded to the tradition of the continental law, seeks legal stability by codifying written laws that the people must abide by, whereas the United States seeks a legal system that is suitable for the changing circumstance rather than legal stability, based on the tradition of common law of the United Kingdom.

Then, as ordinary persons may think, do the laws of the United States consist of only the case laws? It has been already set forth that the ethic rules of the United States are codified in more detail and are much more developed than ours.

The other fields are also the same. Their codified laws are highly developed than our codified laws. Should precedents be included, applicable laws might amount to at least 50 times more than ours in terms of the amount of rules.

Why does the United States develop written laws? The development of economy-related codified laws such as tax law, commercial transaction law, etc. is very conspicuous. Especially, the tax laws of the United States are of the highest level in the world, and are very elaborate and complex in nature.

The reason why the U.S. develops codified laws might be that it is not easy to maintain “legal stability” and “foreseeability” with only its case laws. For example, in the case of tax law, where the government does not codify how taxpayers have to file a return, it would be very difficult for them to file a tax return.

We can see the reasonableness of the Americans through their life attitude of improving problems and pursuing new things. However, the unreasonable people, even though they are aware of problems, do not try to improve them. Since they persist in only their own things and do not improve problems, they cannot develop.

After President Kim, Young-Sam took over the presidency in the early 1990s, there was an active discussion with regard to the introduction of law school system of the United States. At that time, some people objected to the introduction of law school system stating, “Why do we have to introduce a law school system? Korea has a civil law system.”

Our present law has mostly succeeded to the laws of Japan without substantial filtering. Then, where did the laws of Japan derive from? Did they make it by themselves? It is well-known that the laws of Japan were established based on the laws of Germany.

There are no nations in the world that have maintained its own inherent laws without change. Should we study history of law, we can know that, regardless of whether it is the West or the East, the law of every nation has been developed under the influence of the laws of other nations.

Law is changed by various factors, and especially, we cannot disregard the effect that a war has on the change of law. Where one nation governs the other nation through a war, a governed nation is ruled by a governing nation and laws of the governing nation are naturally transplanted to the governed nation. This shows one aspect of the transition of laws and in this respect Korea is the same.

Of course, laws are also transplanted by means other than a war. There are many
cases where the existing laws are complemented by introducing the laws of other nations. Where international transactions increase and complex and difficult problems related to these transactions occur, the necessity of studying laws of developed nations gradually increases. Especially, study on laws related to economy becomes more necessary.

**Jury System**

The conspicuous characteristics of the law of the United States are manifested in a jury system, the burden of proof, and the role of a judge, etc. First of all, the jury system with which we are not familiar is set forth.

O.J. Simpson, who was a very famous football player in the United States, was prosecuted on a suspicion of murdering his wife, Nicole. Afterwards, the whole nation became vociferous over that case. Although the case became famous since he was a famous football player, the more probable reason why the case became so famous is that the case was related to a racial problem, which is deeply embedded in the U.S. society.

I vividly remember that I listened to the final verdict through a car radio with a palpitating heart when I was in the United States. Since many African-Americans live around Temple University, which I attended at the time, I was more concerned about the final verdict. Most of people thought that if the jury determined O.J. Simpson to be guilty, a riot might take place.

That day, the United States government and all people of the United States were very nervous about the final judgment. In the courtroom, the person in charge read the verdict of the jury. The result was “not guilty”. The whole nation was vociferous even after the trial ended. Many whites asserted that the jury system must be changed.

Then, people who do not understand the law of the United States could have the following doubts: Why did such outcome materialize in spite of the fact that at that time many people thought that Simpson was probably guilty? Does their jury system actually have a problem?

Personally I think that the United States has a very good system. In the case of O.J. Simpson’s case, even though I do not know what is true, it would be more proper to say that such outcome occurred because of a racial problem rather than flaws of the jury system itself.

In fact, jurors of the Simpson case mostly consisted of minorities and they determined that Simpson was not guilty. In the United States, judges do not determine whether a suspect is “guilty” or not in important cases. The final verdict is made by jurors who are selected randomly from the public. The number of jurors generally comprises of 12 persons in a criminal case but is different depending upon situations. In some cases, the jury consists of 6 persons. Where the jury consists of more than 12 jurors, it is called the Grand Jury. Jurors are randomly selected from citizens based on such data as tax returns, a driver's license, and a poll book, etc.

The prosecution and the defense ask the randomly selected persons about their occupation, living conditions, place of residence, etc. and confirm whether or not they qualify for a juror. Although the jury is impaneled by the court, a party has the right to challenge a juror by providing a satisfactory reason why such a juror should not be
seated.

In the Simpson case, the opinion of the defense was mostly reflected and as a result jurors largely consisted of minorities such as blacks, etc. It might be that since the prosecution was confident of its victory in court, it mostly accepted the opinion of the defense. However, the result was the defeat of the prosecution. This case again led to a civil litigation resulting in a queer outcome where Simpson was defeated in civil litigation.

In the Korean society, there is a popular saying “Money-Not Guilty; No money-Guilty” This saying speaks for the mind of the ordinary people who are isolated from their rights to receive a fair trial according to the constitution and laws. It might be correct to say that the outcome of Simpson case, unlike cases sometimes occurring in Korea, was not affected by money but was related to the racial problem of the American society.

Simpson might have obtained a favorable outcome because of his popularity among the blacks as a hero, minorities’ keen awareness of their discriminatory position in the American society and the firm confidence held by the prosecution toward its victory.

In some cases, the trial judge can isolate jurors from the public (e.g. confined to a hotel area while trial is not in session) for the duration of the trial since their verdict could be affected by contact with the public. Thus, jurors are under the custody of the court. The jurors of the Simpson case were not allowed to meet the public or lawyers. According to the ethic rule of the United States, where a lawyer contacts with a juror, the lawyer is subject to discipline even when the juror is not under the supervision of the court.

Whether the accused is “guilty” or “not guilty” is determined by the jury, rather than a judge, in accordance to the jury instructions given by a judge after hearing a full explanation from the prosecution and the defense.

A judge fully explains the laws applicable to the present case and has jurors determine “guilty” or “not guilty”. Attorneys for both sides normally furnish a judge with suggested instructions, and on the basis of this submitted jury instructions, the judge determines the contents of the jury instructions that the jury must follow at the time of verdict.

**Beyond a Reasonable Doubt**

In a criminal case, the prosecution must establish the guilt of the accused by presenting full evidence and logic to the jury. Where the prosecution does not present full evidence and logic and persuade the jury that the accused is guilty, the jury gives the verdict of not guilty.

In this case, the standard of determining “guilty” or “not guilty” is based on “beyond a reasonable doubt”. Reasonable doubt is a doubt that would cause a prudent person to hesitate before acting in matters of importance to themselves. Therefore, the prosecution must establish the guilt of the accused with evidence and logic for the jury not to have any doubt about the guilt of the accused.

In other words, since a prudent person reserves a decision where she has any doubt in determining an important problem, the prosecution has to present full evidence and logic for the jury not to have any doubt in determining a guilty verdict. Since every
juror must not have any doubt, the unanimous verdict of guilty is necessary.

**Preponderance of Evidence**

Unlike criminal cases, civil cases apply the standard of the preponderance of evidence instead of the standard of “beyond a reasonable doubt”. This standard means that when the jury takes into consideration the factual evidences, they must be certain that the relevant facts are true. For example, if the facts to be used as evidences have a 51% possibility of being the truth and a 49% possibility of not being the truth, truth has preponderance over the untruth and therefore, the jury determines that the facts to be evidenced are true.

When the Simpson case ended in the defeat of the prosecution, this case again led to a wrongful death action by the father of Simpson's deceased wife. The term “wrongful death action” refers to a lawsuit brought on behalf of a deceased person's beneficiaries that allege that the death was attributable to the willful or negligent act of another. In this civil litigation, Simpson was defeated and he paid an astronomical amount of money as compensation.

While a criminal case requires the burden of proof beyond a reasonable doubt, the standard of verdict of the jury in a civil case is the preponderance of evidence. The jury reviewed, pursuant to the standard of preponderance of evidence, whether or not Simpson killed his wife and rendered a verdict of Simpson’s guilt.

We learned something very interesting while comparing the two cases: Not guilty in a criminal case but guilty in a civil case. This case is a little difficult to understand from the viewpoint of Korean people.

Anyway, this case shows that the United States is making a great effort to guarantee human rights. Since criminal cases involve imprisonment of a human being upon finding the person to be guilty, heavier burden of proof lies with the government. On the other hand, since a guilty verdict in the case of a civil litigation would result in economic loss rather than an imprisonment of a human being, the parties of litigation bears the lighter burden of proof.

**Right to Decide Unconstitutionality**

Before explaining the role of a judge in the US court, the background of the right to determine unconstitutionality awarded to the court in the United States is set forth. The main function of the Congress is to make laws. A court performs the function of applying those laws made by Congress and determining each lawsuit based on those laws.

According to the Korean Constitution, if whether or not a law is in violation of the Constitution becomes a precondition of trial, the court presents the case to the Constitutional Court and performs a trial according to that judgment. However, where the unconstitutionality of regulation, ruling or administrative measure of administrative agencies becomes a precondition of trial, the Supreme Court has authority to make a final ruling.

In the case of Korea, since the Constitutional Court determines the unconstitutionality of laws made by the National Assembly, it can be said that the
Constitutional Court checks and balances the National Assembly. In contrast, in the case of the United States, the court has authority to determine whether a law is unconstitutional and substantially plays a role of checking and balancing the Congress. The court also makes a law by the judge, that is, case law.

The right to decide unconstitutionality by the US court is not provided in the Constitution but was established by the famous case law: Marbury v. Madison.

Thomas Jefferson, an Anti-Federalist (of Republican), who defeated John Adams, a Federalist, in the residential election of 1800, was to take office on March 4, 1801. On January 20, 1801, Adams, the defeated incumbent, nominated John Marshall, Adams' Secretary of State, as fourth Chief Justice of the United States. During February, the Federalist Congress passed (1) the Circuit Court Act, which doubled the number of federal judges.

Senate confirmation of Adams' midnight appointees, virtually Federalists, was completed on March 3. But due to time pressures, several commissions for the justices-of-the-peace (including that of William Mabury) remained undelivered when Jefferson assumed the presidency the next day. Jefferson ordered his new Secretary of State, James Madison, to withhold delivery.

Marbury and several others sought a writ of mandamus in the Supreme Court to compel Madison to deliver the commissions.

The new Republican Congress moved to repeal the Circuit Court Act. Federalist congressmen argued that repeal would be unconstitutional as violative of Article 3's assurance of judicial tenure during good behavior. In order to counteract the Federalist argument that the Repeal Bill was unconstitutional and would be so held by the Court, Republican advanced the proposition that the Court did not possess the power.

In the present case, Chief Justice John Marshall delivered the decision of the Supreme Court. "Section 13 of the Judiciary Act of 1789 is unconstitutional. The section gives the Supreme Court original jurisdiction to issue writs of mandamus. The Constitution, on the other hand, limits the Court's original jurisdiction to only designated cases (i.e., affecting ambassadors, other public ministers and consuls and those in which a state shall be a party); in all other cases, the Supreme Court has only appellate jurisdiction *** The question whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particulars, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principles, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged."

In other words, the opinion of the Court is as follows: Since the Supreme Court possesses the power of reviewing the acts of Congress, the Court can decide that the Section 13 of the Judiciary Act of 1789 is unconstitutional. As set forth above, since the Court lacks the authority under the Constitution to issue a writ of mandamus in this case, the Judiciary Act of 1789 is unconstitutional and therefore the Court cannot accept the
requirement that the Court is to issue a writ of mandamus. After this case was decided, the United States courts were delegated with the right to decide unconstitutionality according to this case law. One interesting fact is that the midnight bill passing activity that took place approximately 200 years ago is very similar to today’s Korean politics.

**Role of Judge**

The court of the United States checks the Congress through exercising the right to review its unconstitutionality and has powerful authority to make “case laws through judges” (e.g., the rights to review unconstitutionality set forth above).

In the case of Korea, Article 8 of the Court Organization Act (Binding Force of Judgment of Higher Court) provides that any decision made by a judgment of a higher court shall bind a lower court with respect to that case. However, opinions concerning whether or not a case law can be a precedent in solving concrete cases differ depending upon scholars.

Where there is a decision of the Supreme Court, administrative agencies generally amend regulation and rulings, etc. that violate the decision. That is, since the decision of the Supreme Court is binding on administrative agencies with regard to the same case, the decision of the Supreme Court can be a precedent. Therefore, except the fact that the Constitutional Court has the right to review the unconstitutionality of law, there is not much difference between Korea and the United States.

Then, do judges of the United States really hold powerful authority? Let’s discuss how much authority they possess and what their role is. Judges of the United States have powerful authority to check Congress and are able to make case laws, but it seems that they do not have as powerful an authority as we might think.

The Simpson case has been already set forth. What was the role of a judge in the Simpson case? The defense and the prosecution took offense and defense by mobilizing all evidence and logic and the jury decided “not guilty” based on them.

In a trial court, a judge generally plays a role like an umpire in athletic sports. That is, a judge plays a role of an umpire observing whether the defense and the prosecution move according to rules. In this respect, the role of the judges of the United States is greatly different from the role of Korean judges.

The defense and the prosecution severely take the offensive and defensive position by mobilizing all laws, evidence and logic, and a judge supervises whether they are taking the offense and defense according to the law and through fair evidence and reasonable logic.

What about the discretion of a judge and a prosecutor? In fact, they can exercise discretion depending upon the situation but their discretion is very limited since the law related to their respective role is very detailed thanks to the development of law. Conditions that a judge can exercise discretion are provided for and, where a judge violates them, each party can appeal based on the abuse of such discretion.

We have already compared the ethic rules of Korea with the ethic rules of the United States. The ethic rules of the United States elaborately and specifically regulate the conduct of a lawyer and by doing so, guide every lawyer to behave according to law. If these rules are loose, that is, if there are many loopholes, their discretion becomes extensive and the possibility of the loophole leading to illegality increases.
Logic

While litigation is in progress in the US court, logic and evidence play an important role to persuade jurors. In the case of a criminal case, convincing logic of the defense and the prosecution has a great effect on the outcome of the litigation. So, the importance of logic cannot be emphasized enough.

In the United States, law education is given in a law school which is a graduate school, and the grade received during the first year of the JD course plays an important role in determining the future of students. Because every student studies the same required subjects, superiority or inferiority of students is generally determined by the grade received during the first year of law school.

Exams consist of concrete and complex facts and professors ask how law should be applied and what logics should be used in solving specific cases. Since examination is mostly an open book, students can take an exam referring to their textbook and outlines, etc. However, since a textbook consists of only precedents, it is hardly helpful to just look up a textbook to get an answer. Thus, if students do not study hard to make their outlines during a semester, they will encounter great difficulty during the exam period.

Persons who have not gone to the American law schools might think that the exam is very easy since it is an open book exam. But the exam is never easy. Exam hours are generally four hours; two hours are normally spent on grasping the intent of a problem and planning how to write up an answer, and the remaining two hours are spent on writing up the answer. A professor’s evaluation is largely based on how well students develop a logic and apply legal principles to given facts. There is no fixed answer. Thus, students who do not read a lot of precedents and create a solid logic cannot obtain a good grade.

Sometimes certain professor decides to give a take-home exam. Once a professor gives students 24 hours for a take-home exam, all students have to draw up an answer within 24 hours, that is, under the same condition.

Students spend the first year of a law school competing against each other in the same circumstance. The superiority or inferiority of students is determined by the outcome of the first-year exam and famous law firms select their personnel among these students through interviews. Students selected by a law firm can comfortably study until graduation since their job and salary are determined in advance. Students who study in the JD course pass the bar exam after finishing 3 year study and therefore it can be said that their occupation is determined independently from the bar exam, which is unlike Korea.

Students receiving good grades through well applying their logics in school exams can earn high income, and law firms normally prefer the students who have the ability to establish outstanding logic since logic is essential to a successful lawsuit.

For your better understanding, it is thought necessary to set forth the reason why such logic is essential. Whatever event that may occur, there is no same event in the sense of time, place, person, motive and other situation, etc. just as the appearance of all people living in our world is different from each other.

Let's take an example. The following case is a part of a problem made for the Multistate Performance Test which is executed in several states including Washington
A premarital agreement is common in the US society. This agreement is concluded between parties who are planning to get married and plays a role of solving support problems and property division problems, etc. according to its terms at the time of a death or a divorce after marriage. People with significant amount of property often use this premarital agreement for the purpose of protecting their property.

In the Matter of the Marriage of Robert T. Watson and Jane A. Watson, Supreme Court of Franklin (1986).

Petitioner Robert Watson challenges a decision voiding his premarital agreement with respondent Jane Watson. We affirm.

Jane Watson, then Jane Dilts, worked for Robert Watson as a secretary during the 1969 legislative session when he was a member of the Franklin State Senate. She subsequently filed for divorce from her first husband in July 1969. In the early part of 1970, Robert and Jane became engaged to marry. During this same period, around February, Robert began discussing his desire for a premarital agreement with Jane. He told her he wanted to protect the interests of his three sons by his previous marriage. Robert did not communicate to Jane his specific intent to make certain everything obtained in the future would be separate and go to his sons.

In early March 1970, Robert asked his attorney to prepare a premarital agreement for the upcoming marriage; the attorney testified he was representing Robert in this transaction but that he had never informed Jane of that fact.

Shortly after, in the week before their marriage, the couple met with the attorney on two occasions to discuss premarital agreements. The first meeting on March 17, 1970 (four days before the wedding), was to discuss the nature of the premarital agreement, the need for it, the effect of it, and the property involved.

The attorney and the couple reviewed, paragraph by paragraph, a sample premarital agreement. The attorney then drafted a premarital agreement that provided all income and earnings derived from Robert's separate property would remain separate, as would any increases in value to that property.

The attorney gave the parties separate copies of the agreement, including itemized lists of property, to read through before meeting with the attorney again. On the eve of the wedding, the couple met to execute the premarital agreement. The attorney had never advised Jane to seek independent counsel but did say to both parties, “If you want somebody else to look at this, fine”.

In addition, paragraph 15 of the agreement stated (just above the couple's signatures): “This agreement is being signed only after having been read completely by each party, and after each has had an opportunity to seek advice and counsel of his or her own choosing.”

After being advised of the nature of value of the other's property, each party signed the premarital agreement. Robert testified that if Jane had objected to signing the agreement on the eve of the wedding, the wedding would have been delayed until an unobjectionable agreement could have been prepared.

At the time of the agreement, Robert owned stock and real estate worth about $330,000. Jane, on the other hand, owned only her personal effects. In June 1983, Robert petitioned for dissolution of the couple's marriage. He requested the court divide their property in accordance with the premarital agreement. His net worth, as of the trial date, was approximately $830,000.

We have long recognized the right of the members of a prospective marriage to contract between them regarding their property. If fair and fairly made, we have held premarital agreements between competent parties to be valid and binding.

During the past 30 years, we have developed a two-pronged analysis for evaluating the validity of a premarital agreement. Under the first prong, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated.

If the agreement is not fair, the court must invoke the second prong and decide: (A) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and (B) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights.

Here, the premarital agreement was grossly disproportionate in favor of petitioner. In fact, after over 13 years of marriage, the agreement would serve to deny respondent any of her common law and statutory rights for a just and equitable distribution of property and prevent her from making any claim against or seeking any rights in Robert's separate property. Since the agreement fails the test of fairness, we turn to the second prong of our analysis.

We find that part A of the second prong of the premarital agreement test was satisfied. The record reveals that Robert disclosed to Jane the nature and extent of his assets. Jane, in turn, communicated how limited were her resources. Thus, the parties made full disclosure of the amount, character, and value of the property involved in the premarital agreement.

In part B of the second prong of the premarital agreement test, the circumstances surrounding and the procedure followed in the execution of the agreement are the crucial factors. The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing.

The status of the relationship between the two parties entering into the agreement requires procedural fairness to allow both parties the knowledge and sufficient opportunity to act voluntarily and intelligently.

The question of whether enforcement of the agreement is dependent upon each party's being represented by independent counsel can be considered only on a case-by-case basis.

For example, in In re Marriage of Knoll (Oregon Supreme Court, 1983), the wife challenged the validity of the premarital agreement. The court found the agreement valid, judged in light of the circumstances in the case and the wife's range of experience. Important facts in the court's decision were: (1) the wife was advised of the necessity of a premarital agreement at least nine months before the wedding and knew and understood the purpose of the agreement; (2) she had been given a copy of the
agreement at least seven months before the wedding; (3) she was advised on numerous occasions by her husband’s attorney to seek independent counsel; and (4) she had an excellent understanding of her husband’s assets, because she handled the bookkeeping and payroll for her husband’s businesses and was in charge of ten of his business checking accounts.

The court decided that the failure to provide the wife with a detailed explanation of the agreement and her failure to follow advice and seek independent counsel were offset by her advance knowledge of the agreement, her receiving subsequent advice to seek independent counsel, and her extensive understanding of her husband’s assets. These circumstances put her in a fair position to sign agreement freely and intelligently.

Parties to a premarital agreement do not deal at arm’s length with one another. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement. The beneficial aspects of a premarital agreement must be obtained without abuse, and, in particular, without any overreaching on the part of the spouse initiating the agreement.

Here, the agreement is void for several reasons (all involving the circumstances leading up to the execution of the agreement): (1) the attorney never advised Jane that he was representing only Robert; (2) the attorney never advised Jane that the practical effect of the agreement was to eliminate any rights she might have in the accumulation of property; (3) the disparity between the parties in business experience and assets mandated a more vigorous urging by the attorney that Jane seek independent advice; and (4) the timing of the agreement negated any inclination respondent may have had to secure independent advice.

Jane had an extremely short period of time in which to consider the premarital agreement; she received no specific verbal encouragement to seek independent advice; and from the record it is not apparent she had even a minimal understanding of the legal consequences of the rights she was signing away. We find the circumstances surrounding her signing of the agreement did not afford her with sufficient opportunity to sign the agreement intelligently and voluntarily.

There is no absolute requirement of independent counsel. If the agreement had been fair and reasonable, and had there been no showing of fraud or overreaching, there would be no such requirement. Here the agreement was patently unreasonable. Independent counsel was required. A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship.

Where it is plainly shown that a transaction was fair and free from objectionable influence, and especially where the person supposed to have been at a disadvantage is shown to have been of strong and independent mind and in a position to form an intelligent judgment, a requirement that, in addition, he or she must have had independent advice would seem to be arbitrary and unnecessary.

Although we strongly urge both parties to seek advice from independent counsel before signing a premarital agreement, we hold that it is not an indispensable prerequisite where it is otherwise shown that the agreement makes fair and reasonable provision for the party against whom enforcement is sought or that full disclosure was
made and that each party entered into the premarital agreement intelligently and voluntarily.

The absence of independence counsel is a factor to consider in deciding whether there has been full disclosure and intelligent and voluntary waiver of statutory and common law rights. In light of the circumstances in the present case, we find respondent Jane Watson did not intelligently and voluntarily sign the premarital agreement and affirm the decision voiding the agreement.

The court minutely set forth the reason why the premarital agreement of Robert and Jane is void. In the present case, one of the important points is that a lawyer cannot represent two parties at the same time according to the ethic rule since there is a conflict of interests of the two parties. That is, the attorney never advised Jane that 1) he was representing only Robert and 2) Jane was receiving the advice of other independent lawyer.

Plaintiff and defendant develop their logic on the basis of case law, statute, and evidence favorable to them to assert that they are right, and the court states its logic and opinion after hearing all assertions of the parties.

In the present case, Robert’s side asserts by quoting the “In re Marriage of Knoll” case that once parties have signed the agreement, it is valid. However, the court distinguishes the two cases by noting that even though parties signed the agreement, since parties in the Knoll case freely and intelligently signed the agreement and the wife was advised on numerous occasions by her husband’s attorney to seek independent counsel, the Knoll case is different from the present case.

The Knoll case and present case are the same in that two parties signed the agreement, but as the court asserts, since the circumstances at the time of the agreement in the two cases are different, the two cases cannot be handled equally. By distinguishing the two cases like this, the court comes to a conclusion. And the court uses evidence submitted by both parties for developing its logic.

I took the above case as an example to set forth how case law is formed. However, actual cases usually consist of more complex facts and logic. Even though there may be a case which is similar to a case that a lawyer represents but is unfavorable to the client, an able lawyer must attempt to obtain a favorable result for his client by distinguishing the existing case law from the present case, securing evidences most favorable to his client with supporting logic. Thus, a lawyer who has no logic and ability to gather evidence to support the logic cannot survive competition. Therefore, a law firm wants to select an able lawyer who has the ability to develop excellent logic.

Then, assume that the above case law is enforceable in the state in which you reside. Assuming that you are a lawyer, think about how you will advise your client should the following situation take place. The following is also a part of the examination.

Hank Hayworth is your longtime client who has asked you to prepare a premarital agreement that he and Wendy Wexler, the woman he intends to marry, can sign. Both of them have previously been married and divorced. Hank is a 45-year-old real estate developer who specializes in buying distressed residential property and studied M.B.A.

Wendy, who is 41, studied nursing. She has both a B.S. and M.S. degree in nursing and has enjoyed a successful career as a hospital nurse. She has worked since college
and was promoted to the position of Director of Nursing Education. Hank says that Wendy does not want to get her own lawyer to advise her regarding the premarital agreement. When she had a car accident two years ago, you had been retained by her.

Hank wants an agreement that all of the property and assets he now owns, any increase in their value, as well as all he later acquires, will remain his separate property both during the marriage and in the event of divorce. He wants Wendy to have the same right. He says that they will acquire some things jointly, for example their residence, and that each will pay an equal share of their living expenses from his or her separate earnings.

He also wants her to waive any rights she has to alimony or to his separate property at the time of property distribution in case of divorce, although he is not seeking a waiver of child support should they have any children.

Under Franklin law, absent such an agreement, Wendy would be entitled to an equitable share of all property acquired during the marriage, including the increase in the value of the property brought into the marriage. She might also be entitled to alimony or maintenance because of the disparity in their incomes.

Hank brought you a financial statement that shows he has a net worth of more than $1.5 million and last year had income in the amount of $275,000. He says that Wendy's assets consist mainly of the equity in her house of approximately $50,000, a vested pension worth approximately $125,000, and a small savings account with less than $500 in it.

You made the following premarital agreement draft according to the demands of the two parties: 1. All of the separate property of Han Hayworth, including, but not limited to, the real property described in Schedule A, which is attached, and the personal property described in Schedule B, which is attached, shall, after the contemplated marriage, remain the separate property of Hank Hayworth, free and clear of any interest on the part of Wendy Wexler or any creditor or other person claiming any interest through Wendy Wexler. Wendy Wexler disclaims any interest in and to the separate property of Hank Hayworth, both now and after the contemplated marriage.

2. The parties agree that any accumulations of income or property that might be construed under the laws of any state as the acquisition of marital property shall for all purposes of this Agreement and their marriage be the separate property of the party responsible for such acquisition.

3. Each party agrees that, in the event of termination of the marriage by any means other than death, each shall retain his or her separate property and shall make no claim against the other for maintenance, alimony, or any other type of financial settlement, except as hereinafter specifically provided.

Once the above situation has been given, the following question follows.

*Where they divorce after marriage and Wendy presents a doubt as to the
enforceability of the premarital agreement, how will the court decide? Where they divorce after marriage under the above circumstance, since the case law and statute of state in which Wendy resides might award her more favorable rights and benefit than the premarital agreement already written, there is a high possibility that she will bring the case before the court. In this situation, will you write a premarital agreement out for Hank?

The answer to the question should be written taking into consideration the following items. As the above case law shows, two problems could take place.

[1] How do Wendy's rights and interests affect the enforceability of the agreement as it is now drafted?

[2] What particular problems does Wendy's being unrepresented present for Hank and you, and how should you resolve those problems?

In relation to the question 1, whether the agreement is fair and reasonable must be reviewed. Here, the agreement is not fair. First, Wendy's right to a fair and equitable distribution of property would be violated. Hank's assets and income are much greater than Wendy's. Under the agreement, Wendy is required to give up her rights to an equitable share of all increases in the value of the property acquired during the marriage including that from Hank's separate property. This is a substantial amount. Hank does not give up an interest in Wendy's separate property according to the agreement.

Second, Wendy is required to waive her right to alimony. Therefore, the agreement fails the fairness prong. However, the agreement will still be valid if it meets the requirements of the second prong. The second prong requires that the court decide (A) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and (B) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights.

Therefore, in solving this problem, 1) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and 2) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights become an important issue. In handling these issues, you should take into consideration bargaining strength, the sophistication of parties, the presence of independent counsel, understanding of legal consequence, and the timing of agreement with wedding date, etc.

In relation to question 2, what you should take into consideration is as follows: If the agreement is invalidated because it is not fairly executed, Hank will have to share his separate property with Wendy and possibly provide alimony at dissolution of marriage. Here, Wendy might think you are representing both her and Hank, particularly since you represented Wendy in a previous matter. Thus, under Rule 4.3, you should encourage her to seek the advice of an independent attorney.

If a litigation would occur in relation to this agreement in the future, parties would assert their merits in the court mobilizing all kinds of case law, statute, and evidence and logic, etc. Therefore, you should consider the future litigation in drafting a premarital agreement.
As already set forth, the above contents are a part of the Multistate Performance Exam executed in several states including Washington D.C. and is set forth to help readers' understanding. In the actual exam, two or three case laws, related statutes, evidence and other situations, etc. are presented and applicants are to set forth how to solve the given problems as a lawyer. In the exam, examiners largely evaluate the quick ability to judge the situation and the logic of applicants.

One more case law is introduced to explain logic. As we are well aware of through the press, a dispute between anti-abortionists and pro-abortionists is very serious in the United States and there was a case where an anti-abortionist killed a doctor who performed abortion. Anti-abortionists assert that a fetus is a person and has the same rights as a human being.

It would be interesting to observe the position of the Supreme Court and its logic. A related case law [Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)]\(^\text{30}\) is introduced.

\[\text{Oral Arguments in the Abortion Cases}\]

THE COURT: Is it critical to your case that the fetus not be a person under the due process clause? Would you lose your case if the fetus was a person?

SARAH WEDDINGTON[on behalf of appellant Roe]: Then you would have a balancing of interests.

THE COURT: Well you say you have that anyway, don't you?

THE COURT: If it were established that an unborn fetus is a person, protected by the Fourteenth Amendment, you would have almost an impossible case here, would you not?

WEDDINGTON: I would have a very difficult case.

THE COURT: Could Texas constitutionally, in you view, declare by statute that the fetus is a person, for all constitutional purposes, after the third month of gestation?

WEDDINGTON: I do not believe that the State legislature can determine the meaning of the Federal Constitution. It is up to this Court to make that determination.

ROBERT FLOWERS[on behalf of appellee]: It is position of the State of Texas that, upon conception, we have a human being; a person, within the concept of the Constitution of the United States, and that of Texas, also.


FLOWERS: We feel that it could be best decided by a legislature, in view of the fact

that they can bring before it the medical testimony.

THE COURT: So then it's basically a medical testimony.

FLOWERS: From a constitutional standpoint, no, sir.

THE COURT: Of course, if you're right about the fetus being a person within the meaning of the Constitution, you can sit down, you've won you case.*** Except insofar as, maybe, the Texas abortion law presently goes too far in allowing abortions.

FLOWERS: Yes, sir. That's exactly right.

THE COURT: Do you think you have lost your case, then, if the fetus or the embryo is not a person? Is that it?

FLOWERS: Yes, sir; I would say so.

THE COURT: Under State law there are some rights given to the fetus?

FLOWERS: Yes, sir.

THE COURT: And are asserting these rights against the right of the mother. And that's wholly aside from whether the fetus is a person under the Federal Constitution.

***

FLOWERS: Yes, sir. ***

THE COURT: I want you to give me a medical writing of any kind that says that at the time of conception the fetus is a person.

FLOWERS: I find no way that any court or any legislature or any doctor anywhere can say that here is the dividing line. Here is not a life; and here is a life, after conception. Perhaps it would be better left to that legislature. ***

THE COURT: Well, if you're right that an unborn fetus is a person, then you can't leave it to the legislature to play fast and loose dealing with that person. If you're correct, in your basic submission that an unborn fetus is a person, then abortion laws such as that which New York has are grossly unconstitutional, isn't it?

FLOWERS: That's right, yes.

THE COURT: Allowing the killing of people.

FLOWERS: Yes, sir. ***

[Rebuttal argument of Weddington]

THE COURT: I gather you argument is that a state may not protect the life of the fetus or prevent an abortion at any time during pregnancy? Right up until the moment of birth? ***

WEDDINGTON: There is no indication that the Constitution would give any protection prior to birth. That is not before the Court. ***

THE COURT: Well, I don't know whether it is or isn't. ***

Justice Blackmun delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, present constitutional challenges to state criminal abortion legislation. The Texas statutes are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking.

The Texas statutes make procuring an abortion a crime except by medical advice for the purpose of saving the life of the mother. Jane Roe alleged that she was unmarried and pregnant and that she was unable to get a legal abortion in Texas because her life
did not appear to be threatened by the continuation of her pregnancy. The district court held the Texas abortion statutes unconstitutional, but denied the injunctive relief requested. Roe appealed.

Restrictive criminal abortion laws like Texas in effect in a majority of States today derive from statutory changes effected, for the most part, in the latter half of the 19th century. The Court then reviewed, in some detail, ancient attitudes, the Hippocratic Oath which forbids abortion, the common law, the English statutory law, and the American law. Subsequently, it described the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. Thus, at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.

Three reasons have been occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification and it appears that no court or commentator has taken the argument seriously.

A second reason is that when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. But medical data indicates that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe.

The third reason is the State's interest - some phrase it in terms of duty - in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone. It is with these interests, and the weight to be attached to them, that this case is concerned.

The Constitution does not explicitly mention any right of privacy. But the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, Stanley v. Georgia; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, Griswold; in the Ninth Amendment, id. (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer.

These decisions make it clear that only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving; procreation, Skinner; contraception, Eisenstadt; family relationships, Prince v. Massachusetts; and child rearing and education, Pierce. This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty as we feel it is, or in the Ninth Amendment, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Psychological harm may be imminent. Mental and
physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate.

A state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.

Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

Appellee argues that the fetus is a person within the language and meaning of the Fourteenth Amendment. If so, appellant's case, of course, collapses, for the fetus's right to life is then guaranteed specifically by the Amendment. The Constitution does not define "person" in so many words. The Court then listed each provision in which the word appears. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than today, persuades us that the word "person", as used in the Fourteenth Amendment, does not include the unborn. Thus, we pass on to other considerations.

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce, and Meyer were concerned.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

We do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantially as the woman approaches term and, at a point during pregnancy, each
becomes compelling.

With respect to the interest in the health of the mother, the compelling point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact that until the end of the first trimester mortality in abortion is less than in normal childbirth.

It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the facility in which the procedure is to be performed, and the like. This means, on the other hand, that, for the period of pregnancy prior to this compelling point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the interest in potential life, compelling point is at viability which is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. This is so because the fetus then presumably has the capability of meaningful life outside of the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

If the State is interested in protecting fetal life after viability, it may go as far as proscribe abortion during that period except when it is necessary to preserve the life or health of the mother. Measured against these standards, the Texas statute sweeps too broadly and therefore, cannot survive the constitutional attack made upon it here.

In Doe, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one are to be read together.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Evidence

Logic without evidence would be no more than a worthless and hollow logic. If a party cannot secure favorable evidence and develop logic on its basis, it cannot win against the other party who has more favorable evidence to develop logic.
Since the prosecution could not persuade the jury in the above Simpson case, the jury rendered a verdict in favor of the defense. If the prosecution had secured the persuasive evidence to convince the jury, the outcome might have turned out otherwise. At that time, the prosecution presented circumstantial evidence and did not convince the jury of “guilty” beyond a reasonable doubt. Thus, if the prosecution could have secured direct evidence rather than circumstantial evidence, the outcome might have been different.

In the United States, all evidence presented to the court is controlled by the evidence rule. Therefore, evidence that violates the evidence rule is not effective as evidence. First the evidence system in Korea will be reviewed and then the difference between the evidence rules of Korea and the United States will be discussed based on concrete cases.

The principal contents with regard to the search, seizure and evidence of the Criminal Procedure Act of Korea are as follows:

[Seizure and Search]: “A court, when necessary, may seize any articles which, it believes, may be used as evidence, or liable to confiscation except as otherwise provided in this or other Acts.”

“A person who is, or was, a licensed advocate, patent attorney, notary public, certified public accountant, licensed tax accountant... or a religious functionary may resist seizure of articles held in his custody or possession in the course of his business and which relates to secrets of other persons. However, this shall not apply if the principal has consented to such seizure, or if it is necessary for important public interests."

“Before sunrise and after sunset, the dwelling of a person, or premises, a building, airplane, or vessel or vehicle under guard shall not be entered for the purpose of the execution of a warrant unless the warrant includes a statement that it is to be executed at night.”

[Expert Evidence]: “A court may order a person of learning or experience to present his expert evidence to the court.”

[Investigation]: “When a prosecutor or judicial police officer wants to urgently arrest and detain a suspect, the prosecutor shall request a warrant of detention from a judge of the competent district court within 48 hours from the time of arrest, and the judicial police officer shall request a warrant of detention to be issued by a judge of the competent district court upon request by a prosecutor who is requested for the warrant by the judicial police officers.”

[Prosecution]: “A prosecutor may decide not to prosecute after considering the following items: age, character and conduct, intelligence and environment of an offender; offender's relation to the injured party; a motive of crime, means and result; and circumstances after crime.

[Evidence]: “Acknowledgement of facts shall be based on evidence. “The probative value of evidence shall be left to the discretion of judges.” “Confession of an accused by torture, violence, threat or prolonged arrest or detention, or which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admitted as evidence of guilt.”
“A written statement prepared by an accused or any other person, or documents, which are made by handwriting of maker or stater or have his signature or seal, may be introduced into evidence if it is proven to be genuine by the testimony of the maker or stater at a preliminary hearing or during a trial.”

“Oral testimony made by an accused at a preliminary hearing or during a trial of a person other than the accused may be admitted into evidence only when such testimony was made under the credible circumstances.”

Enumerated above are the core contents of the Criminal Procedure Act of Korea covering the evidence and the rights of an accused. As set forth earlier, the ethic rules of the United States restrict, to the extent possible, the discretion of a person who construes a law by detailing the ethic rules by which a lawyer should abide. The United States' effort to reduce the discretion has been also made to the other laws.

In the United States, criminal procedure provisions for protecting the right of an accused have been developed through an individual case law in terms of the protection of rights of the people guaranteed by the Constitution.

The following example is one of problems of a sham bar exam published by the BarBri.

Alert police officers noticed that a late model “Belchfire 500” automobile was being driven at an excessive rate of speed. The car, driven by Doofus, was pulled over to the curb. As Officer Smith issued a speeding citation to Doofus, her partner, Jones, fed the license plate numbers into the police computer. It turned out that the Belchfire had been very recently reported as stolen. Doofus was unable to produce satisfactory registration papers and was arrested for car theft.

At the police station, Smith gave Doofus the standard Miranda warnings, and Doofus agreed to answer Smith's questions regarding a local “chop-shop” network, which arranged for the theft of expensive automobiles so that they could be cut up for parts. After a while, Jones suggested, “Let's break for lunch.” He and Smith escorted Doofus to a nearby cafeteria.

During the course of their lunch, which lasted about an hour, Smith noticed that Doofus, who was otherwise rather shabbily dressed, was wearing an obviously expensive “Xelor” watch. Upon their return to the station, and without giving any new Miranda warnings, Smith resumed interrogation of Doofus. She asked Doofus about a recent home invasion in the swank “Notting Hi” neighborhood, where a quantity of valuable jewelry, including a “Xelor” watch, was taken. Doofus thereupon confessed to the home invasion, and was indicted on the home invasion charge, a felony under the jurisdiction's modern criminal code.

If Doofus files an appropriate motion to prevent the confession from being admitted at his trial, Doofus will probably:

(A) Succeed, because the police did not repeat the Miranda warnings before questioning Doofus about another crime.
(B) Succeed, because the police acted in a custodial setting.

31 The BarBri is the name of an institute teaching applicants for the US bar exam.
(C) Fail, because Doofus was not in custody on a home invasion charge.
(D) Fail, because the original Miranda warnings given Doofus were sufficient under the circumstances.

The correct answer is “D”.

Before explaining the correct answer, the term “Miranda warning,” which the readers may be unfamiliar with, will be briefly explained. Miranda warning (or rights) is the rights of a criminal suspect established by Miranda v. Arizona. Where the police detain and interrogate a suspect, Miranda warning require that 1) a person in custody be informed of his right to remain silent and 2) his right to the presence of an attorney during questioning.

However, a suspect may then waive his Miranda rights by answering an interrogator's questions as long as a waiver was knowing, voluntary, and intelligent. A suspect need not be informed of all potential subjects of an interrogation to effect a valid waiver.

If a suspect has waived his rights, there is generally no need to repeat the warnings because of a break in the interrogation unless the time lapse has been so long that a failure to do so would seem like an attempt to take advantage of the suspect's ignorance of his rights.

Here, Doofus was given his Miranda warnings and apparently made a knowing, voluntary, and intelligent waiver of his rights by agreeing to answer Smith's questions. The one-hour break for lunch does not invalidate the waiver, nor does the fact that the subsequent questioning involved a different crime. Hence, Doofus probably will fail to prevent the confession from being admitted at his trial.

We saw a part of criminal procedure rules of the United States in the above question and can know that the United States has very detailed criminal procedure rules unlike Korea. By detailing the criminal procedure, the U.S. society protects the rights of the people and restricts the discretion of public officers.

Also the court cannot recognize the evidence secured in violation of procedure rules according to the principle of the fruit of the poisonous tree doctrine. On the contrary, since the probative value of evidence is left to the discretion of judges in the case of Korea, it is noteworthy that judges have enormous discretion.

More explanations follow. Assume that a U.S. police stops a car being driven without a traffic violation and opens a trunk to discover illegal drugs.

Police may not randomly stop an automobile to check the license and registration. They must reasonably believe that a car has violated a traffic law. However, the Supreme Court upheld the use of checkpoints to check driver’s sobriety or the citizenship of occupants where cars are stopped according to certain neutral standard (e.g., every third car) rather than on reasonable suspicion.

Thus, since the police stopped the car without having suspected a traffic violation and obtained illegal drugs, even if the police try to present the evidence of illegal drugs to the court, that evidence will not be admissible in the court. However, if the police have probable cause to believe that the car contains fruits, instrumentalities, or evidence of a crime, they may search the entire car and any container that might reasonably contain the item for which they had probable cause to search.

That is, should the police discover an injector and a bag of illegal drugs, etc. in the
car which can be discerned by plain view when they stopped the car, the police could open a trunk, etc. to confirm whether or not the car contains illegal drugs, etc.

The exclusionary rule is a judge-made doctrine that prohibits introduction of evidence obtained in violation of a defendant's Fourth, Fifth, and Sixth Amendment rights. Under the rule, illegally obtained evidence is inadmissible at trial, and all fruit of the poisonous tree (i.e., evidence obtained from exploitation of the illegally obtained evidence) must also be excluded.

Exceptions of fruit of the poisonous tree doctrine are as follows: (i) Evidence obtained from a source independent of the original illegality; (ii) An intervening act of free will by the defendant (e.g., defendant is illegally arrested but is released and later returns to the station to confess); (iii) Inevitable discovery. That is, the prosecution can show that the police would have discovered the evidence whether or not the police acted unconstitutionally.\(^{32}\)

Even though the above explanation is only a part of criminal procedure of the United States, we can know that their laws are very detailed. Likewise, provisions related to the issuance of warrants, seizure and search, warrantless search, confession and litigation procedure, etc are very detailed beyond what we can imagine.

Certain persons might say that since the culture of Korea is different from that of the United States, there must be necessarily differences in the development of law between two nations. However, it would be right to say that the United States has more detailed rules concerning procedures restraining the rights of the people in terms of “the technical aspect of law” rather than cultural difference.

Articles 261\(^{33}\) to 354 of the Civil Procedure Act of Korea are related to evidence.

[General Rules]: “The facts confessed by the other party in the court and those which are obvious need not be proved. However, confession contrary to the truth may be revoked when it is proved that the confession was made due to mistake.”

“The court may, if it is unable to get confidence by evidence offered by parties, or if it deems necessary, conduct investigation of evidence upon its own authority.”

[Examination of Witness]: “Except as otherwise provided, the court may examine any person as a witness.” “A witness cannot testify by written statement. However, this shall not apply to cases where permission of a presiding judge has been obtained.”

[Expert Testimony]: “Any person who is possessed of erudition and/or experience necessary for giving expert testimony shall bear the obligation to give such testimony.”

[Documentary Evidence]: “Offering of documentary evidence shall be made by presenting the document or by applying for an order of production addressed to the person holding the document.”

[Inspection]: “A commissioned judge or an entrusted judge may, when it deems necessary, order an expert testimony or examine witnesses.”


\(^{33}\) Following the amendment on December 6, 2001, Article 261 was changed into Article 288 without substantial change of contents.
[Examination of Parties]: “The court may, upon its own authority or on motion of parties, examine parties themselves, if it is unable to get a conviction by examination of other evidence.”

In the case of the United States, there are three sources of evidence law: (i) state common law and miscellaneous state statutes, (ii) comprehensive state evidence codes, and (iii) the Federal Rules of Evidence.


Let's take another Barbri question for comparison of evidence rules of two nations.

*Devlin is being tried for murder in the bludgeoning death of Vandross. Devlin denies any involvement in the crime. He calls Westin to the stand. Westin testifies that, in his opinion, Devlin is a nonviolent, peaceable man.*

Which of the following, if offered by the prosecution, would mostly likely be admissible?

(A) A neighbor's testimony that Westin has beaten his wife on several occasions.
(B) A police officer's testimony that Devlin has a general reputation in the community as a violent person.
(C) A neighbor's testimony that Devlin has a general reputation in the community as a violent person.
(D) Evidence that Devlin has a conviction for aggravated battery.

The correct answer is (B). Testimony of Devlin's reputation as a violent person is admissible to rebut the defendant's character evidence. The general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that he is more likely to have committed the crime of which he is accused.

However, if the defendant puts his character in issue by having a character witness testify as to his opinion of the defendant, the prosecution may rebut with evidence of the defendant's bad character.

One means of rebutting defendant's character evidence is by calling qualified witnesses to testify to the defendant's bad reputation for the particular trait involved in the case. The prosecution, assuming that it can show that the police officer has knowledge of Devlin's reputation in the community, can have the officer testify that Devlin has a reputation as a violent person.
(A) is incorrect because Westin's credibility cannot be attacked by extrinsic evidence of specific instances of misconduct. While any matter that tends to prove or disprove the credibility of a witness is relevant for purposes of impeachment, extrinsic evidence of witness's bad acts is not permitted, even if it impairs his credibility.

Unless the misconduct was the basis for a criminal conviction, for which a record of the judgment may be offered, bad acts may only be inquired about during cross-examination. Thus, a neighbor's testimony of Westin's specific instances of misconduct would not be admissible.

(C) is incorrect. While Devlin has "opened the door" to evidence of his bad character by presenting testimony of his good character, the evidence must pertain to the particular trait involved in the case. Here, the defendant's capacity for violence has been placed in issue by defendant, but his reputation for truthfulness is not relevant to whether he has committed the crime for which he is charged. (And because Devlin has not placed his credibility in issue by taking the stand as a witness, his reputation for truthfulness cannot be offered for impeachment purposes.)

If irrelevant evidence were to be presented, it could affect a trial by confusing the triers of facts. That is, if evidence is presented to the court that a defendant is untruthful, there is a high possibility that it could have an effect on the triers of facts and as a result disturb a fair trial by having a negative effect on the defendant.

(D) is incorrect because the basic rule is that when a person is charged with one crime, extrinsic evidence of his other crimes or misconduct is inadmissible if offered solely to establish a criminal disposition, regardless of whether defendant has placed his character in issue.

While evidence of other crimes is admissible if it is independently relevant to some other issue (e.g., motive, intent, or identity), Devlin's battery conviction in this case appears to have no relevance other than as evidence of his violent disposition. It is therefore inadmissible.

The above legal principles consist of the very detailed rules, and even though the above question is very short, we can know that it is very difficult to answer the question. Since the evidence rule is highly sophisticated, and its contents are enormous and difficult to understand, questions are also very difficult. Therefore, applicants for a bar exam generally obtain the lowest score in the evidence exam.

However, since evidence has a direct and significant influence on the outcome of a trial, it is very important. It is thought that the United States has studied and developed the system related to evidence under such recognition and as a result holds the present developed system. Therefore, persons who want to become a competent lawyer should not neglect this field; that is, evidence law.

Let's take one more example.

On an icy day, a vehicle driven by Doug struck Peter's car in the rear, smashing a taillight and denting Peter's bumper. Before Peter could say anything, Doug rushed out of his car and told Peter, "Look, if you'll take $500 for the damage, I'm sure my insurance company will pay for it." Peter refused and sued Doug for damage to his car and minor personal injuries. Peter wishes to testify as to Doug's statement at the time of the accident. Doug objects.
Should the court allow Doug's statement to be admitted?

(A) Yes, because it is an admission of a party-opponent.
(B) Yes, because it is hearsay within the declaration against interest exception.
(C) No, because the statement took the form of a settlement negotiation.
(D) No, because the statement is hearsay, not within any recognized exception to the hearsay rule.

The correct answer is (A). The statement by Doug, who is one of the parties to the action, is admissible as an admission of a party-opponent. Federal Rule 801(d)(2) provides that a statement offered against a party that is the party's own statement is not hearsay and therefore cannot be excluded by the rule against hearsay. Assuming that it is relevant and not barred by other rules, the statement is admissible.

Here, Doug's statement is being offered against him at trial. It is relevant because it can be interpreted as a prior acknowledgement by Doug that he was not totally blameless in the accident, which is undoubtedly inconsistent with his contentions at trial. The statement does not violate Federal Rule 408, which makes offers to compromise a disputed claim inadmissible to prove liability for the claim, because it was made by Doug before Peter made any claim; i.e., there was not yet an actual dispute between the parties. Public policy favors settlement between parties rather than litigation. However, in the present case, since Doug made the statement before Peter made any claim, it does not violate the Federal Rule and therefore Doug's statement is admissible as evidence.

Evidence of insurance against liability is not admissible to show negligence. Under public policy, one party cannot assert that the other party is negligent by solely showing the fact that he has insurance against liability.

Nor does the statement violate Rule 411, which bars evidence that a person has liability insurance when offered to show fault or ability to pay, because Doug's reference to his insurance was an intrinsic part of his admission and could not be readily severed from it. No other rules barring relevant evidence apply, so the statement should be admitted.

(B) is incorrect because the declaration against interest exception to the hearsay rule requires the declarant to be unavailable as witness, which is not indicated here. More importantly, whenever the statement being offered is by a party, it will almost always be admissible as an admission of a party-opponent even though it does not qualify as a declaration against interest, because an admission has none of the restrictions that a declaration against interest has.

(C) is wrong because, as previously noted, Doug's statement was made before the existence of a disputed claim between the parties. The public policy rationale for Rule 408, which is to encourage settlement of disputes without litigation, does not come into play until litigation is at least threatened.

(D) is incorrect because the statement is an admission by a party, which is treated as nonhearsay under the Federal Rules.

Can we apply Korean evidence rule to the above situation? Since there are no detailed provisions in relation to this type of situation in the Korean Civil Procedure Act, a judge is able to exercise much discretion. The provision which reads “The probative
value of evidence shall be left to the discretion of judges” is one representative example. Thus, if a situation takes place for which there exists no detailed rule which can be concretely applied, how the case will be treated will depend upon the discretion of a person who applies rules and it will go against “the principle of rule of law”.

Peripheral Circumstance of Korean Law

If we review the legislation procedure of Korea to date, we can find that most laws and regulations have been made within a very short period of time rather than through a long period of study and careful review, whenever necessary. Laws should be complemented and developed in such a way that they maintain a pace with the development of a society but in reality, this is not so. Our system consists of a number of laws but the actual content is poor. As a result of development-centered policy of the executive, laws and regulations have been made with administrative convenience in mind by government officials of the executive rather than law specialists, and the legislature has played a role of the branch which merely passes on bills drafted by the executive. Moreover, our society absolutely lacks competent law specialists who can cope with the changing age because of failure of education policy. Legislation is very often done without first analyzing what would happen in the future. Also since the actual world and the academic world are not closely connected to each other, it is difficult to expect a development through their reciprocal cooperation. Reality is reality and a university is just a university. As a result, they are not systematically connected to each other and a vicious cycle continues.

Through public hearing, we can have an opportunity to observe the inability of members of the National Assembly. However, it is difficult to see its members cast a logical and sharp question. Rather, they are more interested in finding faults and in an ineffective wordy warfare. A very few members often show their acuteness, but people still feel dullness since most of members do not make an effort and have no ability to do so. If you turn on a TV in the United States, you can easily see congressional hearings. This shows that Congress of the United States is alive. Sometimes they spend time on finding out the past faults, but you can know that they spend most of their time on discussing productive things. To review each bill, specialists of each field participate in the discussion to study and analyze issues related to legislation. Because members of Congress participating in legislation consist of specialists, they can get the best result by cooperating with each other. The people can watch the activities of members through the press and discern whether or not a member is incompetent. Thus, it is not easy for incompetent members to survive in the political world. United States universities, on the basis of the empirical principle, teach students concrete things rather than abstract ones and thus students can more easily adjust themselves to the actual world. When I was in the United States, the Joong Ang Il Bo dated December 31, 1996 published in the United States carried an article with the topic “Memorizing-centered bar exam spoils university education” written by Choi, Dae Kwon, a professor of the Seoul University. The article reads as follows:
“After the contents of my thesis was reported, many friends called me. They said to me that the thesis frankly disclosed the problems of jurisprudence education of Korea. Some friends were concerned about my well being for I was criticizing the university at which I was teaching the students. However, there was no person who rebuked me in the Seoul University. Most of persons already know such problems well. Legal circles also did not show a reaction. But it seems to me that I excessively criticized my university. I wonder if other persons think that my behavior is a kind of heroism.”

“In fact, students who go to the law department of the Seoul University are the most superior in Korea. What about their study attitude in the school?”

“They try to study only subjects related to the bar exam. Even though other subjects are important in cultivating a legal thinking power, students study these subjects only to the extent necessary for acquiring the minimum credits. Since textbooks which students study are largely for the bar exam, etc., they are helpful to exams rather than the study of jurisprudence. Students spend most of time in a library memorizing books for the bar exam.

Nevertheless the Seoul University is better than other universities. Many law departments of domestic universities open a special lecture for the bar exam and have students take a sham exam to increase the number of students passing bar exams. Therefore it is natural that universities should be called an institute for the bar exam rather than a place for studying law.

Once students are admitted into the law school of the Seoul University, friends or relatives say you will soon become a judge or a prosecutor. Also professors of other departments, such as an engineering department and an education department, etc. often say that our education is being spoiled because of the law department.

If students graduate from the law school of the Seoul University, pass the bar exam and get a job in a famous firm after finishing the education of the Judicial Training Institution, they receive a very high salary. Thus, it is natural that ants look for honey. Unless the bar exam system and the social system are changed, it would be difficult to improve the present problems.

Exam questions must be changed. In the case of constitutional questions, the following questions are given to applicants: “Discuss the freedom of speech.” “Discuss the physical freedom.” In this kind of question, applicants can get a good score if they memorize textbooks well even though they have no logic.

Through this kind of exam, students only learn a knack of drafting answers but not creativity to think about and analyze the questions. In the United States and Germany, school exams as well as bar exams ask students to answer questions of the following form: While going along a road, A collided with B and B died of cerebral concussion. Is A guilty of murder? They have students solve a complex problem and estimate the analysis ability of students. Unless the bar exam problem is changed, university education will never be improved.”

“How should the education of law school be improved?”

“The education of law school must train law experts. There are two kinds of experts.
One is a professional, and the other is a specialist. Universities train a professional who studies jurisprudence and can apply it to the reality. If professionals work for several years in the field such as circumstance, labor, commerce, etc., they become a specialist. In Korea, there are many lawyers who work for clients in the court but few specialists who can develop a legal theory.***"

"They say that there are judicial experts but no legislation experts."

"Have you heard the term 'legislation by officers of the executive'? The term 'legislation by officers of the executive' means that 5th grade officers of the executive make bills. Even in the National Assembly, there are few expert members who have a lawyer qualification. This means that lawyers rarely participate in legislation which rules our life.***"

We know very well that every exam in Korea including the bar exam is that which requires pure memorization. Therefore, even though applicants passed the bar exam, the government should train applicants who passed the bar exam with taxpayers' money for two years to help them get accustomed to practical business and then appoints them as a judge or a prosecutor. Persons who are not appointed as a judge or a prosecutor become an attorney. Attorneys do not directly contribute to the government. They are merely a professional who earns money depending on their efforts. Nevertheless the government trains them with taxpayers' money unlike other professionals. It is against equity.

We parents generally work hard to earn money to educate our children, and hope that in the future, our children will receive good education, increase their quality of life and contribute to the society. But our education is moving in a completely opposite direction, wasting taxpayers' money.

If students receive legal education in a normal manner, although they do not become a judge, a prosecutor or a lawyer, they can find their niche in the society. They can apply what they learned in the real world and contribute to development of a nation by doing so.

When the people can logically and stately assert their rights, democracy can flourish. When people gain ability to logically cope with the faulty administration of the government, people will gradually reduce their reliance upon unreasonable means such as family relation, regionalism, school relation, etc.

These days, citizens' campaigns are becoming very active and it is thought very desirable. For a nation to become strong, there must be citizen groups which can assert their rights with confidence. When there are groups that can keenly criticize the maladministration of the government through evidence and logic, the government can become stronger. A person who does not make an effort because there is no competitor can never become strong. The problem is that the true democracy cannot be achieved in a day. To achieve the true democracy, we need a thorough plan as well as a great deal of time and endeavor.