South Korea: Implementation and Application of Human Rights Covenants

Suk Tae Lee
Harvard Law School

Follow this and additional works at: https://repository.law.umich.edu/mjil

Part of the Comparative and Foreign Law Commons, Courts Commons, and the Human Rights Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjil/vol14/iss4/3

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
SOUTH KOREA: IMPLEMENTATION AND APPLICATION OF HUMAN RIGHTS COVENANTS

Suk Tae Lee*

INTRODUCTION .................................................. 706

I. CIVIL AND POLITICAL RIGHTS: THE INITIAL REPORT
   SUBMITTED TO THE HUMAN RIGHTS COMMITTEE .......... 710
   A. Consideration of the Initial Report .................. 710
      1. General Status of Human Rights Protection ....... 710
      2. Relationship Between Domestic Law and the ICCPR 712
      3. Factors Affecting the Implementation of the ICCPR 714
      4. Future Program to Promote Human Rights .......... 716
   B. Consideration of Communications Under the Optional
      Protocol ............................................... 717

II. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: INEQUALITY AND
    OTHER DRAWBACKS TO SOUTH KOREAN
    ECONOMIC GROWTH ........................................... 720

III. RELATIONSHIP BETWEEN THE DOMESTIC LAWS AND
     THE COVENANTS: THEORIES AND APPLICATION .......... 723
     A. Direct Applicability ................................ 723
     B. Hierarchy ............................................ 726
     C. Laws Violating Fundamental Human Rights Norms 729
        1. National Security Law ............................. 729
        2. Security Observation Law ........................... 731
        3. Law on Assembly and Demonstration ............... 732
        4. Laws Prohibiting Interference by a Third Party .. 733

IV. THE COURTS AND THE COVENANTS ............................ 734
    A. Ordinary Court ....................................... 734
    B. Constitutional Court ................................ 735

CONCLUSION .................................................. 737

---

* Seoul National University College of Law, L.L.B. (1982); Harvard Law School Visiting Fellow, Human Rights Dept. (1992–93). The author would like to acknowledge Prof. Henry Steiner, director of the Human Rights Department at Harvard Law School, for his research guidance and the invitation to become a visiting fellow. The author would also like to thank Michael Wamutra, project director of the Harvard Human Rights Department, for his review and comments.
INTRODUCTION

In April 1990, South Korea ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Optional Protocol to the ICCPR (Protocol). The U.N. General Assembly had adopted these Covenants in December 1966 and they entered into force in 1976. These Covenants were drafted to embody the ideals enumerated in the U.N. Charter and the Universal Declaration of Human Rights. As core international norms and universal standards for the protection and promotion of human rights, these Covenants have significantly influenced the world community, along with other regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

South Korea's ratification of the Covenants and the Optional Protocol has profound implications. The Korean people may now be able to invoke human rights norms which the State cannot modify or ignore. Also, Korea has arrived at a turning point where it can reform its disgraceful image as a violator of human rights, and it can take this opportunity to enhance human rights protection according to the standards recognized in the Covenants.

The government of South Korea did not establish a new Constitution under the auspices of the United Nations until 1948. Although traditional Confucianism still dominated Korean society, and vestiges of Japanese colonial rule remained, the 1948 Constitution followed the basic concepts


of rights and political ideas enumerated in the constitutions of western countries such as the United States, France, and Germany. It sought democracy and equality of opportunity, resting "the sovereignty of the Republic of Korea . . . in the people" and "respecting and guaranteeing the liberty, equality, and initiative of each individual." The new Constitution embodied the ardent hope of the Korean people who had suffered under Japanese imperialism from 1910 to 1945.

In 1952, however, an amendment was made to the Constitution under declaration of martial law, involving a number of illegalities, designed to extend the tenure of the incumbent president. This amendment set an unfortunate precedent for future amendments which, up to the present Constitution of 1987, total nine. All of these constitutional amendments, except for those of 1960 and those in the present Constitution of 1987, extended the term of office for the incumbent president or provided ex post facto justifications for military coups d'état. This history of undemocratic amendments has transformed the Constitution of South Korea into a mere instrument to be wielded by the president or ruling party to maintain power.

Furthermore, in the international community, South Korea is viewed as a State which does not respect human rights. Prominent human rights experts and international non-governmental organizations such as Amnesty International, the International Commission of Jurists, and the International League for Human Rights, have expressed concern about human rights infringements in South Korea. They have reported that Korean citizens have experienced illegal arrests and detentions, tortures, imprisonments resulting from unfair trials, unexplained disappearances,

---

10. See id. at 99–108.
11. The background of the 1987 Constitution is summarized in ASIA WATCH, RETREAT FROM REFORM 1 (1990):
The tentative moves towards political openness came toward the end of the rule of President Chun Doo-Hwan, whose administration had been marked by human rights abuses, ranging from the Kwangju massacre in 1980 to imprisonment and torture of critics and opponents and heavy-handed repression of the press. Massive protests in the spring of 1987 attracted a wide cross-section of the South Korean population and led to government acceptance of an eight-point reform proposal issued by Roh Tae-Woo (then chairman of the ruling Democratic Justice Party) on June 29, 1987, calling for direct presidential elections and other reform measures. In October, a newly amended Constitution was approved in a national referendum.
12. LAWYERS FOR A DEMOCRATIC SOCIETY & NATIONAL COUNCIL OF CHURCHES IN KOREA, HUMAN RIGHTS IN SOUTH KOREA 5 (1992) [hereinafter COUNTER REPORT].
and deaths from unknown causes. These human rights violations reinforce the deeply-rooted Korean notion that the law is "an instrument at the State's disposal, not a device to regulate state power." In this sense, the law has failed to pave the road towards democracy in South Korea.

The fact that South Korea has become a State Party to human rights covenants, however, does not guarantee that the status of human rights in South Korea will improve immediately. Numerous countries have signed the Covenants, yet it is unclear whether ratification in many of these countries has resulted in greater respect for human rights. In fact, signatories may not be making the continual and adequate effort to extend fundamental freedoms and basic rights as required by their domestic laws and the Covenants. For some countries, ratification may simply be a pretense of performing the responsibilities required in the international community, while in reality their citizens may still be suffering from severe infringements of the human rights guaranteed by the Covenants. Therefore, a country's ratification of the Covenants does not guarantee human rights protection.


14. Yoon, supra note 9, at 200.

15. Id. at 201.

16. As of December 1991, there were 100 State Parties to the ICESCR and, as of July 1992, 111 State Parties to the ICCPR.

17. Many countries ratified the Covenant on Civil and Political Rights, but have failed to live up to its provisions. Ratification was a propaganda ploy which, to some extent, masked the large-scale fraud which the governments perpetrated among their peoples in giving lip service to human rights. See International Covenant on Civil and Political Rights: Hearing Before the Comm. on Foreign Relations of the United States Senate, 102d Cong., 1st Sess. 19 (1991) [hereinafter Hearing] (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).
In the case of South Korea, in July 1991 the government submitted its initial report\textsuperscript{18} to the Human Rights Committee (HRC)\textsuperscript{19} in accordance with article 40 of the ICCPR. The report was examined by the HRC in July 1992 and will be discussed in Part I of this article. While reviewing the issues discussed in the report, bear in mind that the initial report will become a model for all future reports submitted to international human rights bodies.

The ICESCR also requires State Parties to submit reports,\textsuperscript{20} but the initial report of the South Korean government has not yet been considered by the Committee on Economic, Social and Cultural Rights.\textsuperscript{21} Because the relevant government reports have not been reviewed, this paper will only discuss briefly, in Part II, the infringements of various economic, social, and cultural rights caused by the unbalanced growth-oriented economic policy of the past.

Meanwhile, questions remain as to whether, under Korean law, the Covenants are applicable to domestic human rights matters. These questions include: (1) Are individuals, whose human rights have been infringed by the State or other agency, able to claim protection for their rights and to claim relevant remedies before domestic courts simply on the basis of Covenant violations (i.e., direct application of the Covenants)?\textsuperscript{22} (2) If provisions of the Covenants conflict with those of domestic law, which law is controlling (i.e., hierarchy of the domestic laws and Covenants)? These questions will be addressed in Part III.

Because the effectiveness of the supervisory procedure under the Covenants is influenced by the degree of good faith cooperation of the signatory States, and despite the fact that the discussions in such supervisory procedures are in the nature of "constructive dialogues"\textsuperscript{23}


\textsuperscript{19} Established under the ICCPR, supra note 2, art. 28.

\textsuperscript{20} "The State Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." ICESCR, supra note 1, art. 16(1).

\textsuperscript{21} The Committee on Economic, Social and Cultural Rights began its work in 1987. It works under the aegis of the United Nations Economic and Social Council which is formally entrusted with evaluating reports submitted under the ICESCR.

\textsuperscript{22} The term "direct application" is very similar to the term "self-executing," but "direct application" will be used throughout this article, because it seems to express more effectively the notion that the Covenants will be a part of the domestic legal system. See John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int'l L. 310 n.1 (1992).

which have no binding effect on State Parties, direct application of the Covenants may provide prompt and effective relief measures to victims of human rights violations. After discussing the validity of several domestic laws which appear to violate the Covenants, Part IV will review a recent Constitutional Court decision which referred to the ICCPR.

I. CIVIL AND POLITICAL RIGHTS: THE INITIAL REPORT SUBMITTED TO THE HUMAN RIGHTS COMMITTEE

A. Consideration of the Initial Report

Under article 40 of the ICCPR, the State Party undertakes to submit reports on the measures it has adopted which give effect to the rights recognized in the ICCPR and demonstrate the progress it has made in granting its citizens the enjoyment of those rights. The reports should indicate the factors and difficulties affecting the implementation of the ICCPR. The State Party is required to submit an initial report within one year of ratifying the ICCPR and subsequent reports every five years thereafter. The HRC reviews the reports and transmits appropriate comments to the State Party.

The rules of procedure and practice of the HRC provide that the Committee review takes place in a public meeting with the representatives of the State Party. The following is a summary of statements provided by the South Korean government in response to questions posed by members of the HRC during the Committee review, followed by comments on the government’s position.

1. General Status of Human Rights Protection

In response to questions regarding the general status of human rights, the South Korean representative replied: “The people of the Republic were now living under the rule of law in a democracy, completely free from the authoritarian tinges of the past. Human rights and fundamental freedoms, including freedom of the press, were guaranteed and

24. Id. at 80–81.
25. Id. at 80.
26. Id. at 121–22. In its review of State reports, the Human Rights Committee is neither a judicial nor a quasi-judicial body. Its role is not to pass judgment on the implementation of the provisions of the ICCPR in any given State. The main function of the HRC is to assist State Parties in fulfilling their obligations under the ICCPR, to make available to them the experience the HRC has acquired in its examination of other reports, and to discuss with them any issue related to the enjoyment of rights enshrined in the ICCPR in a particular country.
South Korea: Human Rights Covenants

Discrepancies, however, exist between the claims of the South Korean government and observations made by those outside the country. The South Korean government stressed that "[u]nder the Constitution, as revised on 29 October 1987, institutional measures had been strengthened to embody genuinely democratic principles, and to enhance the protection of human rights and fundamental freedoms." Amnest International, however, issued a document in June 1992 which states:

The strengthening of human rights guarantees in the Constitution of the Republic of Korea (South Korea) which came into force in February 1988 and the subsequent legislative changes were welcomed by Amnesty International. There is still concern, however, that some political prisoners have been denied the right to a fair trial, that the government has failed to take effective steps to end torture and ill-treatment, that current legislation restricts some essential aspects of the rights of freedom of expression and association, and that the death penalty has not yet been abolished.

In addition, the Country Reports on Human Rights Practices published by the U.S. Department of State in February 1991, gives a negative impression of the status of human rights in South Korea in 1990: The Republic of Korea continued a transition from authoritarianism towards democracy and openness begun in 1987; however, elements of its authoritarian past remained. Power remained highly centralized, though less so than in previous years. Surveillance of political opponents by security forces continued, as well as detentions under sweeping national security laws.... The authorities also detained a large number of such people who held views the Government considered dangerous, often failing to present warrants as required by law.

These two statements exemplify the common view that a number of undemocratic and authoritarian elements remain in Korean society which hinder the Korean people's full enjoyment of fundamental freedoms. Thus, the Amnesty International and U.S. State Department reports substantiate the charge that the Korean government must make greater efforts to abolish obstacles to human rights reform.

28. Id. at 2.
29. AMNESTY INTERNATIONAL, AI INDEX: ASA 25/14/92, SOUTH KOREA: AMNESTY INTERNATIONAL'S CONCERNS 1 (1992) [hereinafter AMNESTY INTERNATIONAL'S CONCERNS].
2. Relationship Between Domestic Law and the ICCPR

With respect to inquiries made by the HRC aimed at delimiting the relationship between domestic law and the ICCPR, the Korean government stated:

Since Article 6(1) of the Constitution of South Korea provides that "[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea," the Covenant, which was ratified and promulgated by the Government with the consent of the National Assembly, has the same effect as domestic laws without the enactment of separate domestic regulation. The Korean government has concluded that the Constitution does not conflict with the Covenant.

The South Korean government's confirmation that, under the Constitution the ICCPR has the same effect as domestic laws and does not require enabling legislation, implies that the ICCPR applies directly to domestic cases. The South Korean government's apparent acceptance of the ICCPR's direct applicability contrasts with the U.S. position that the provisions of articles 1 through 27 of the Covenant are not self-executing.

31. Initial Report, supra note 18, at 2. By the same token, the government delegate stated that Korea had acceded to the ICESCR and ICCPR in order to solidify the protection of human rights in Korea and to join the international effort to promote human rights. "All the rights provided for in the Covenant were guaranteed by the Constitution, which stipulated that all treaties duly concluded and promulgated should have the same effect as domestic laws. Together, the two instruments formed the centerpiece of human rights law of the Republic." CCPR/C/SR.1150, supra note 27, at 2-4.

32. COUNTER REPORT, supra note 12, at 7.

33. A U.S. representative has stated:

At this time, I would like to stress [that] the substantive provisions of the Covenant should be declared to be nonself-executing—this would mean that the Covenant provisions, when ratified, will not, by themselves, create private rights enforceable in U.S. courts, it could only be done by legislation adopted by the Congress. Since existing U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation. Hearing, supra note 17, at 9, 15 (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

In opposition to this view, the Association of the Bar of the City of New York argues:

A declaration that the covenant is not self-executing, and would require separate legislation specifically implementing its provisions, would severely undermine the significance of ratification by further postponing the practical effectiveness of the Covenant until after another series of legislative actions. The Covenant does not require that treaties be implemented by legislation before they become U.S. law. The question of whether the parties to a treaty intended specific provisions to be self-executing has long been treated as a question for judicial interpretation and has turned largely on the specificity of the treaty language and its amenability to self-execution. The interpretive question of which provisions of the covenant are intended to be self-executing should be left to the courts, as in the case of other treaties, and should not be the occasion for yet
Looking only at the application of the ICCPR, the South Korean government's interpretation seems more positive than that of the United States, given that there is little difference between the contents of the relevant articles in the two countries' Constitutions.34 When asked as part of the HRC review whether the ICCPR could be nullified by subsequent domestic legislation, the South Korean government delegate answered that:

[M]any members had asked about the relationship between the Constitution of the Republic of Korea and the Covenant. Under [Article 6(1) of the Constitution, the Covenant had the same effect as domestic law. He [the delegate] could not accept the claim that the guarantees contained in the Covenant might be overturned by subsequent domestic legislation, since such a suspicion underestimated the Republic of Korea's commitment to human rights and the increasing public awareness of the rights enshrined in the Covenant, thanks to the Government's public awareness campaign.35

It is unlikely, however, that a government delegate's commitment to uphold the ICCPR has any legal meaning or binding effect on government authorities or the courts. Rather, this statement suggests that the ICCPR is not superior to domestic legislation (laws enacted by the National Assembly or administrative agencies). In principle, subsequent domestic legislation may supersede the ICCPR where there is a conflict.36

If such is the case, the significance of South Korea's ratification of the ICCPR will diminish markedly.

With respect to an individual's access to domestic courts on the basis of the ICCPR, the South Korean government delegate commented: "[I]f an individual claimed that his rights under the Covenant had been

another delay in making those parts of the Covenant which are obviously intended to be self-executing immediately binding on courts and government officials.

Id. at 76.

The government of South Korea made reservations regarding self-execution of the ICCPR under articles 14(5), 14(7), and 22. See ICCPR, supra note 2. In opposition to this, the Korean Bar Association submitted an opinion calling for the withdrawal of those reservations. See Hyun-Suk Yoo, Kukje Inkwon Kyuyak-kwa Popyool Samu [International Human Rights Covenants and Legal Affairs], 169 INKWON-KWA JUNGUI [HUM. RTS. & JUST.] 98 (1990).

34. "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." KOREA CONST. ch. I, art. 6(1). Cf. U.S. CONST. art. 6, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."


36. This is similar to the view that the domestic effect of the ICCPR is the same as laws enacted by the National Assembly. See infra part III.B.
infringed, the court would normally rule on the basis of domestic legislation; in the rare cases where that was not possible, the Covenant could be invoked directly by the courts.37 There are, however, some questions left unanswered by this statement: (1) If the Covenant has been duly incorporated into the domestic legal system without the enactment of separate domestic regulation, and it has the same effect as domestic law, why are courts generally unable to invoke the ICCPR directly, especially given that its language is not always identical to that of domestic legislation? (2) Who determines whether or not the case in question is the “rare case” where, on the basis of domestic legislation only, a court ruling is impossible? (3) In a “rare case,” must the individual, who claims that his rights under the ICCPR have been violated, invoke both the Covenant and other relevant domestic legislation so that the court can choose between the two at its discretion? Parts III and IV of this article will address these questions.

3. Factors Affecting the Implementation of the ICCPR

In explaining difficulties affecting the implementation of the ICCPR, the government delegate stated:

One of the most important factors affecting the implementation of the Covenant was the tense situation resulting from the division of the Korean peninsula. . . . Armed forces totalling 1.5 million were in a military stand-off along the 38th parallel, and, despite the end of the cold war, the Armistice Agreement had still not been replaced by a peace settlement. . . . Accordingly, the National Security Law adopted by the Republic to protect its security and the integrity of the system still had its raison d'être.38

It is unclear, however, what concrete effects the relationship between North and South Korea has had on the daily lives of Korean people. The term “affect” does not permit the objective evaluation of the history of human rights abuses in modern Korean society. For example, the following is a description of the 1974 trial of the “People’s Revolutionary Party”:

The trial was held not before a regular court but before a military tribunal established by the 1974 emergency decrees. Hearings were closed, with only one member of each defendant’s family allowed to attend. The “confessions” were admitted into evidence, even though they were extracted under hideous forms of torture. Moreover, forty-two prosecution witnesses testified in the absence of defense lawyers, who

37. CCPR/C/SR.1154, supra note 35, at 3.
38. CCPR/C/SR.1150, supra note 27, at 4 (emphasis added).
were apparently under house arrest at the time. In any event the defense was not permitted to question prosecution witnesses and statements. No defense witnesses were allowed. Government-controlled media proclaimed the guilt of the accused before judgment was rendered. No foreign journalists were permitted at the trial because, according to the prime minister, ‘[t]here was too great a risk they misunderstand and misrepresent what happened in court.’ In April 1975, after the Supreme Court upheld the eight death sentences and all but two of the prison sentences meted out — but before the accused could exercise their rights to petition the Supreme Court for retrial and petition the president for mercy — the eight condemned to death were unlawfully hanged, despite assurances from the Public Prosecutor’s Department that no executions would take place until the accused had an opportunity to exhaust their rights. The government cremated the bodies of a number of those executed, thereby preventing any examination for signs of physical torture.39

It is unclear how this trial could be blamed on the “relations between the two Koreas.” Even if a country is divided in two, human rights abuses should not be expected. Neither should trials involving political dissidents be unfair. This abuse occurred because South Korea has not practiced democracy, not simply because the Korean peninsula was divided. In sum, the relationship between the two Koreas has not “affected” the human rights situation; instead it has been an ideological pretext used to oppress individuals and to maintain the masked legitimacy of dictatorship.

Improved relations between North and South Korea may ease implementation of the ICCPR. The government of South Korea has declared on several occasions that it would cease hostilities toward North Korea.40 In September 1991, South Korea and North Korea were admitted to the membership of the United Nations. On February 19, 1992, the two Korean governments achieved their first official agreement. The Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between the South and the North (South-North Agreement)41 was signed by the prime ministers of each country and became effective after ratification by the presidents of the South and North Korean governments.42 On March 20, 1992, both governments jointly registered

40. COUNTER REPORT, supra note 12, at 3.
42. According to the South-North Agreement, South Korea and North Korea pledge to exert joint efforts to achieve peaceful unification, to respect each other’s political and social system (art. 1), to refrain from slander and vilification of each other (art. 3), and to abstain
the South-North Agreement with the Secretariat of the United Nations. These changes between the two Koreas should remove any military obstacles in the way of ICCPR implementation.

4. Future Program to Promote Human Rights

In response to questions regarding the future of human rights in South Korea, the representative stated:

As part of its future program to promote universal human rights, [the government planned to] accede to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was also finalizing amendments to the Penal Code and the Code of Penal Procedure to reinforce the principle of nullum crimen sine lege, and to introduce measures for more effective review of warrants. . . . [I]t had set up a working group . . . to streamline labor-related domestic law. The group was also considering an amendment to the Labour Union Act to allow multiple unions in a single workplace, which was at present prohibited. The Republic would thus continue its endeavors to improve its institutions and practices relevant to human rights and to incorporate the spirit and principles of the Constitution and the Covenant into the daily life of the people.43

The South Korean government should immediately follow through with its plans and sign the Torture Convention. For much of human history, torture has been a symbol of evil, devastating the integrity and dignity of a human being. Torture cannot be justified for any reason or under any circumstance. Nevertheless, torture has been used frequently in South Korea not only to force accused persons to confess, but also to repress political opponents and dissidents. No evidence indicates that the practice of torture has disappeared from the interrogation process, although no recent reports testify of brutal battery, water, or electric torture.

Furthermore, a number of laws should be amended or repealed in the context of implementing the ICCPR.44 The present package of govern-

from armed aggression along the Military Demarcation Line specified in the Military Armistice Agreement of July 27, 1953, an agreement that was signed after the Korean War (arts. 9, 11). Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between the South and the North, Dec. 13, 1991, South Korea-North Korea.

43. Initial Report, supra note 18, at 5.

44. See infra part III.C. Strengthening the functions of the two Committees under the Covenants may induce the government to be more active in implementing the provisions of the Covenants. For an analysis of the efficiency of the supervisory function of the Human Rights Committee, see Dana D. Fischer, Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, 76 AM. J. INT’L L. 142 (1982). He concludes:
ment reform programs, however, includes no such plans. According to the HRC, the South Korean government should intensify its efforts to bring its law more into line with the provisions of the ICCPR. The HRC recommended that the government make a serious attempt to phase out the National Security Law which it characterized as a major obstacle to the full realization of the rights enshrined in the ICCPR. In the meantime, the HRC cautioned the South Korean government not to derogate from certain basic rights.43

While the initial report indicates improvement in the protection of human rights in South Korea, more improvement is needed before the experience of Korean citizens mirrors that of the report.

B. Consideration of Communications Under the Optional Protocol

Under the Protocol, individuals who claim that their rights under the ICCPR have been violated, and who have exhausted all available domestic remedies, may submit written communications of their cases to the HRC for consideration. The HRC examines a communication only if certain prerequisites are satisfied. For example, the HRC must ascertain: (1) that the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State Party to the Protocol; (2) that the communication is submitted by the individual himself or by his representative; and (3) that the same matters are not being examined under another procedure of international investigation or settlement.46

If a case meets the HRC prerequisites, both the individual and the

In its first 5 years of practice, the Committee has achieved an impressive momentum, but it can be derailed in the future at any one of several points: the state parties could cease cooperating; tighter structures could be placed on the use of sources of information other than the reports; the state parties could ensure an ineffective Committee through the electoral process; and finally, the willingness to seek a middle ground between opposing positions might stop short of finding a way to move from "general" comments to specific recommendations on the law and practice of individual state parties. Id. at 153.

The initial report of the South Korean government states that numerous private organizations exist in the Republic of Korea to ensure the protection of human rights, the Korean Federal Bar Association being the most prominent. Initial Report, supra note 18, at 3. If the chance to serve as a member of the Human Rights Committee is offered to South Korea, it will be desirable to nominate a representative from one of these organizations.

45. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. GAOR, Hum. Rts. Comm., at 1-3, U.N. Doc. CCPR/C/79/Add.6 (1992). Rosalyn Higgins, a member of the Human Rights Committee, pointed out that the next task of the South Korean government should be to check systematically existing and pending laws not only for constitutionality but for compliance with the ICCPR. She added that the Constitution of South Korea alone does not cover all the rights enshrined in the ICCPR. CCPR/C/SR.1154, supra note 35, at 11-12.

Michigan Journal of International Law

State Party are asked to make further presentations on the merits. When these submissions are received, the HRC is in a position to make a substantive decision. This determination is called the HRC’s “views”.\textsuperscript{47} Since the HRC started working during its second session in 1977 up to the thirty-second session in 1988, 288 communications relating to alleged violations by twenty-six State Parties were placed before it for consideration. During that period, 146 formal decisions were adopted. Among those, eighty-three communications were concluded by adoption of views, and twenty communications were declared admissible.\textsuperscript{48}

The following are two communications which, had the Korean people been aware of an opportunity, could have been submitted to the HRC under the Protocol. In February 1990, Ms. Lim Soo-Kyung and Father Moon Kyu-Hyun, who had been imprisoned for visiting North Korea without authorization from the South Korean government, submitted a communication to UNESCO.\textsuperscript{49} On June 30, 1989, Ms. Lim had traveled to Pyongyang, North Korea via Japan and the former West Germany to participate in the thirteenth World Festival for Youth and Students as a representative of the National Council of Student Representatives of South Korea. While in North Korea, she advocated the peaceful reunification of Korea and participated in the International March for Peace and Korean Reunification. On July 11 and 27, she requested permission from the United Nations Command to cross the Demilitarized Zone (DMZ) that divides Korea in two in order to return to South Korea, but her request was denied. On July 26, 1989, Father Moon Kyu-Hyun, a representative of the Catholic Priests Association for Justice in South

\textsuperscript{47} Rosalyn Higgins, \textit{The United Nations Human Rights Committee, in Human Rights for the 1990s: Legal, Political and Ethical Issues} 67, 73 (Robert Blackburn & John Taylor eds., 1991). In addition, it has been noted that:

[T]he Committee applies the provisions of the Covenant and of the Optional Protocol in a judicial spirit and, performs functions similar to those of the European Commission of Human Rights, in as much as the consideration of applications from individuals is concerned. Its decisions on the merits (of a communication) are, in principle, comparable to the reports of the European Commission, non-binding recommendations. The two systems differ, however, in that the Optional Protocol does not provide explicitly for friendly settlement between the parties, and, more importantly, in that the Committee has no power to hand down binding decisions as does the European Court of Human Rights. State parties to the Optional Protocol endeavor to observe the Committee’s views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism or for sanctions.


\textsuperscript{48} Selected Decisions, supra note 47, at 1.

\textsuperscript{49} Communication No. 826/89. See Cho Yong-Whan, \textit{Kukjejuk Inkwon Boho Jedo-wa Iyong Kanungssung [Use of International Human Rights Instruments], in 5 Pop-kwa Sahoe [Law & Society] 88, 113 (1990).}
Korea, arrived in Pyongyang to accompany Ms. Lim in returning to South Korea. On August 15, 1989, they crossed the DMZ.

After crossing the DMZ, they were immediately arrested by the United Nations Command and turned over to the secret police of South Korea. They were each sentenced to five years of imprisonment. A South Korean court held that they were guilty not only for visiting North Korea, but also for their speeches and discussions which the court characterized as praise, encouragement, or siding with North Korea in violation of the National Security Law. Ms. Lim and Father Moon argued that the South Korean government violated the freedoms of thought, conscience, expression, and assembly as protected under the Universal Declaration of Human Rights and the ICCPR.

The second communication was submitted directly to the HRC by Mr. Sohn Jong-Kyu in July 1992, after being imprisoned for violating the Labor Dispute Adjustment Law by engaging in a third party’s labor dispute. Mr. Sohn has been the president of the Kumho Company Trade Union since September 1990. In the Autumn of 1990, the leaders of a number of trade unions of large companies, including Mr. Sohn, formed the Solidarity Forum of Large Company Trade Unions. In February 1991, they held a meeting to promote the solidarity of the organization in the northern district of Seoul. At this meeting, they adopted a statement of the Solidarity Forum and a joint statement with other labor organizations, proclaiming that they would support the strike of the Daewoo Shipyard Trade Union previously started on Guhjae Island. Consequently, over 60 officers of the Solidarity Forum, including Mr. Sohn, were apprehended by the police as they left the meeting.

Mr. Sohn was indicted and sentenced to one and a half years of imprisonment for violation of article 13-2 of the Labor Dispute Adjustment Law, which prohibits a third party from participating in a labor dispute. Mr. Sohn argued that punishment under article 13-2 of the Labor Dispute Adjustment Law violated freedom of expression under the ICCPR.

Few Koreans submit communications to the HRC under the Protocol. Currently, the communication procedure under the Protocol is unfamiliar to the Korean people, but it is expected that eventually they will learn to use it when the occasion demands.

50. Ms. Lim Soo-Kyung and Father Moon Kyu-Hyun were released on December 24, 1992, shortly after Kim Young-Sam, the ruling party’s candidate, won the presidential election.
52. Id. art. 13-2. See infra part III.C.4.
53. While consideration of reports submitted by State Parties under the ICCPR is open to
II. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: INEQUALITY AND OTHER DRAWBACKS TO SOUTH KOREAN ECONOMIC GROWTH

Since the 1960s, South Korea has experienced rapid economic growth and industrialization. While economic growth increased the gross income of the country, the process of transforming an agrarian society into an industrialized one created numerous problems. Due to the primary emphasis on growth and export, complaints about human rights infringements could not surface until recently.4 Previously, those with grievances were silenced or punished in the name of law and order. The following are some brief illustrations of the most compelling problems whose solutions will be sought in the context of the ICESCR.

The first problem is that rural communities have been impoverished. As rural communities became main sources of labor for industry, their population and income decreased markedly. Since the latter half of the 1960s, about 500,000–600,000 rural people have migrated to the cities each year. According to government records, in 1988 the gross income per household in rural communities increased approximately 24.4 percent from the previous year, but debt also increased by over 31 percent during that same period.5 As a result, the rural communities of South Korea have been alienated from economic development, social welfare, and cultural benefits.6

...
Second, in the process of industrialization, people who migrated from rural areas became the urban poor. Because most of them were uneducated and had no special skills, they held low income jobs and accumulated no savings. Their housing situation remains very unstable and unsafe; while parents are out working, young children are often alone.

From the early 1980s until recently, the principal government housing program has been the city redevelopment program. The government has designated about 200 areas in Seoul, housing two to three million people, for this program. The areas are generally inhabited by lower income people, with three families to a house. The program has been described as joint redevelopment, because responsibility is shared by the cooperative of home owners and the construction company.57

Renters, however, are not eligible to join the cooperative or to rent apartments in new buildings erected under the redevelopment programs. Furthermore, they can no longer own homes or rent rooms in the redeveloped areas where their workshops are often located because of the dramatic increase in rents since the completion of the redevelopment plan. As a result, the urban poor are forced to the outskirts of the city, making it more difficult for them to find jobs and nearly impossible for them to escape from absolute poverty. Yet the government has no effective plans to supply them with adequate housing, better job opportunities, or health care facilities.

The third problem is caused by industry’s ready access to cheap labor, which was one of the most important elements in enabling the rapid growth of the South Korean economy.58 Because the government’s priority has been to maximize factory output, labor conditions in the factory has been long neglected. The establishment and activity of labor unions have been seriously restricted. Thus, while South Korea’s labor productivity has increased, laborers have been suffering under excessive overtime demands and very poor working conditions,59 resulting in one

57. Asian Coalition for Housing Rights, supra note 54, at 27.
59. See the following table:

<table>
<thead>
<tr>
<th>Country</th>
<th>Average Workweek (hrs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>47.0</td>
</tr>
<tr>
<td>Argentina</td>
<td>45.6</td>
</tr>
</tbody>
</table>
of the highest industrial accident rates in the world.\textsuperscript{60}

Fourth, as in the Confucian tradition, Korean women have a different social position than men. Confucian philosophy granted men all of society's privileges. The role of women was confined to household affairs and social activities, and the participation of women in other activities was virtually disregarded. As Korean society became industrialized, however, the demand for women in the labor force increased. In an earlier stage of industrialization, women were engaged mainly in jobs men avoided because of low pay or the nature of the work, but due to industrial expansion, the job market for women diversified. However, discrimination in such areas as wages, working conditions, and the retirement age has not improved. The demand for equal treatment of women increased in various sectors,\textsuperscript{61} and, as a result, in 1987 the Gender-Equal Opportunity Employment Act was enacted.\textsuperscript{62} Additionally, the Constitution was revised in 1987 to provide specifically for the protection of working women.\textsuperscript{63} Under the revised Constitution, any kind

\begin{center}
\begin{tabular}{l|c}
\textbf{Mexico} & 46.0 \\
\textbf{Puerto Rico} & 38.0 \\
\textbf{United States} & 40.1 \\
\textbf{Hong Kong} & 47.1 \\
\textbf{Israel} & 38.7 \\
\textbf{Japan} & 46.0 \\
\textbf{Korea} & 53.3 \\
\textbf{Malaysia} & 48.4 \\
\textbf{Belgium} & 34.3 \\
\textbf{France} & 40.1 \\
\textbf{Germany} & 41.2 \\
\textbf{Norway} & 38.1 \\
\textbf{Sweden} & 37.8 \\
\textbf{United Kingdom} & 41.5 \\
\end{tabular}
\end{center}


60. See the following table:

\begin{center}
\begin{tabular}{l|c}
\textbf{Country} & \textbf{Number of Accidents per hour} \\
\hline
Korea & 12.128 \\
Japan & 1.19 \\
Singapore & 5.4 \\
Taiwan & 7.0 \\
\end{tabular}
\end{center}

South Korea, Ministry of Labor Report, \textit{reprinted in} Kap-Bae Kim, supra note 58, at 194.


63. "Special protection shall be given to labor of women, and women shall not be discriminated [against] in employment, wage [or] labor conditions." \textit{Korea Const.} ch. II, art.
of discrimination against women in hiring, wage levels, and working conditions is strictly prohibited. Furthermore, by virtue of the efforts of prominent feminist groups, the Family Law was amended in 1990 to guarantee equality in marriage⁶⁴ and inheritance.⁶⁵ Despite these developments, certain laws, regulations, customs, and practices still prevent women from fully enjoying their economic and social rights.

As shown above, Korean society suffers from numerous problems directly or indirectly caused by rapid industrialization. Accession to the ICESCR is expected to contribute greatly to redressing this distorted social structure.

III. RELATIONSHIP BETWEEN THE DOMESTIC LAWS AND THE COVENANTS: THEORIES AND APPLICATION

A. Direct Applicability

Because the two Covenants have been duly concluded and promulgated with the consent of the National Assembly as required by the Constitution,⁶⁶ under Article 6(1) they “have the same effect as the domestic laws of the Republic of Korea.” There is no dispute that the ICCPR directly applies to domestic cases involving human rights violations.⁶⁷ Thus, as mentioned in the government’s initial report, the ICCPR has been effectively incorporated into the domestic legal arena without the enactment of separate domestic legislation. Anyone whose rights under the ICCPR have been violated may directly invoke the ICCPR before a domestic court for damages or for cancellation or nullification of the State organ’s acts.⁶⁸

32(4). “The State shall endeavor to promote the welfare and rights of women.” Korea Const. ch. II, art. 34(3).

64. Korea Civil Code pt. IV, ch. III.
65. Korea Civil Code pt. V.
66. Article 60 provides:
The National Assembly shall have power to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace [treaties]; [treaties] which will burden the State or people with an important financial obligation; or treaties related to legislative affairs. Korea Const. ch. III, art. 60(1).
68. Cf. supra note 38 and accompanying text. Using this reasoning, the government delegate’s statement has no legal support.
On the other hand, Korean scholars generally believe that the ICESCR is not directly applicable to domestic cases. They distinguish between the obligations of the government under the two Covenants: while the obligations of the government under the ICCPR must be carried out immediately after accession, those under the ICESCR are to be progressively realized within the limitations of State Parties' situations and circumstances.

Scholars note that article 2(1) of the ICESCR provides that: [each State Party ... undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Pursuant to this article, Korean scholars contend that one cannot invoke the ICESCR before the domestic court until the appropriate domestic laws or regulations are enacted. For example, individuals are not entitled to demand the passage of a certain law by the National Assembly before a court. The Code of Administrative Litigation does not allow individuals to demand government action before a court unless the action is

69. Baek, supra note 67, at 8; Yoo, supra note 33, at 100.
70. Cf. ICCPR, supra note 2, art. 2(2):
(2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
71. Japanese courts also seem to hold the view that the ICESCR does not apply directly to the domestic cases. See, e.g., the following excerpt from a ruling in the recent "Shiomi" case:

This Covenant ... is not a kind of treaties [sic] whose contents hold good as they are like domestic law, but a kind of treaties [sic] which require legislative procedures for [its] contents to be implemented. Thus, it cannot directly become a judgment norm, and does not immediately affect validity of law. Accordingly, it does not make illegal the decision [of the Osaka Prefectural Government refusing a handicapped welfare pension to a Korean lady, Mrs. Shiomi] made in accordance with law.

It is apparent [from Article 2(1) of the Covenant] that the Covenant is premised on the assumption that the State Parties will use all appropriate means including particularly the adoption of legislative measures ... for the full realization of the rights recognized in the Covenant (including of course the right stipulated in Article 9), and that the Covenant expects the full realization of these rights to be achieved progressively. Accordingly, for the realization of the rights recognized in the Covenant, legislative measures ... should be taken within the State Parties to the Covenant.


72. According to the Petition Law, people can file a petition requesting the enactment of laws by the National Assembly, but the petition is not legally binding. Law No. 1283 of Feb. 26, 1963 (Korea).
stipulated to be a specific legal or regulatory government obligation. It is doubtful that a clear distinction can be made between civil and political rights on the one hand, and economic, social, and cultural rights on the other;\textsuperscript{73} both categories of human rights are interdependent.\textsuperscript{74} Nonetheless, rights under the ICESCR which shall be "progressively realized" are distinguishable from rights under the ICCPR which require "immediate" relief. The ICCPR rights were specifically developed to protect against direct intervention and oppression by state power.\textsuperscript{75} It is uncertain how a court, in interpreting the term "progressive," will consider factors, such as time, resources, and social circumstances, which affect the enjoyment of rights.\textsuperscript{76}

Turning to the ICESCR, direct application of the ICESCR before domestic courts is not always denied. For example, article 2(2),\textsuperscript{77} which forbids discrimination of any kind on the basis of race, sex, religion, or the like, should be applied directly.\textsuperscript{78} An individual whose rights under the ICESCR have been unfairly denied will be able to request immediate elimination of such discrimination before the court on the basis of ICESCR violations.\textsuperscript{79} In addition, ICESCR articles concerning the freedom of scientific research and creative activity,\textsuperscript{80} and special protection of working mothers, children, and young persons\textsuperscript{81} should also

\textsuperscript{73.} Manual on Reporting, supra note 23, at 4.


\textsuperscript{75.} See Henry J. Steiner, Political Participation as a Human Right, 1 Harv. Hum. Rs. Y.B. 77, 130–32 (1988).

\textsuperscript{76.} Similarly, direct applicability of the Social Charter, which parallels the ICESCR at the European Community level, is hardly recognized among the European countries. See A.Ph. C.M. Jaspers & L. Betten, 25 Years: European Social Charter (1988).

\textsuperscript{77.} "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICESCR, supra note 1, art. 2(2).

\textsuperscript{78.} See Iwasawa, supra note 71, at 143; Yoo, supra note 33, at 100.

\textsuperscript{79.} Equality before the law is also protected under the Korean Constitution. "All citizens shall be equal before the law, and there shall be no discrimination in all fields of political, economic, social or cultural life on account of sex, religion or social status." Korea Const. ch. II, art. 11(1).

\textsuperscript{80.} "The State Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity." ICESCR, supra note 1, art. 15(3). "All citizens shall enjoy freedom of learning and the arts." Korea Const. ch. II, art. 22(1).

\textsuperscript{81.} Article 10 provides that:

(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons
be applied directly.  

Aside from the uncertainty about direct applicability, the ICESCR is law, not merely exhortation or aspiration. The rights it recognizes are as human, universal, and fundamental as those in the ICCPR. The limitations on obligations, such as the progressive realization of rights under the ICESCR, do not detract from the legal character of the obligations. By the same token, the Korean government's undertaking of the obligations should be followed by good faith reports prepared in accordance with the ICESCR.

B. Hierarchy

Where there are conflicts between domestic laws and the Covenants, which prevails? Three main views delineate the opinions concerning the proper scope of domestic laws under Article 6(1) of the Constitution which provides that "treaties . . . shall have the same effect as the domestic laws."

Under the first view, "domestic laws" in Article 6(1) merely refers to laws enacted by the National Assembly. According to this view, because the domestic force of international laws (including treaties) is derived from the Constitution, they are inherently inferior to the Constitution. The status of treaties is identical to that of domestic laws enacted by the National Assembly. Thus, if domestic laws and treaties come into conflict with each other, the principle of *lex posterior derogat priori* applies.

---

82. See Yoo, supra note 33, at 100. If provisions in the existing laws or regulations are contrary to the ICESCR, the ICESCR may supersede them. Since Yoo gives no concrete example, however, the meaning of direct applicability under these circumstances is unclear.


85. KOREA CONST. ch. I, art. 6(1).


South Korea: Human Rights Covenants

The second view distinguishes international norms, such as the Charter of the United Nations, from other treaties. The rank of the latter is the same as that of domestic laws enacted by the National Assembly. According to this view, because international norms are generally approved and respected in the international community, for domestic purposes they should rank below the Constitution but above other domestic laws.

According to the third view, if subsequent domestic laws come into conflict with the Covenants, the conflicting provisions of the domestic laws become invalid. This occurs not only because the provisions for the protection and promotion of human rights set forth in the Covenants are in accord with the Constitution, but also because the State Parties undertook the obligation to carry out the necessary legislative measures to protect the rights recognized in the Covenants. An infringement of the rights enshrined in the Covenants is regarded as a violation of the Constitution.

The first view does not distinguish the Covenants from ordinary laws. Therefore, the application of the Covenants may be replaced by subsequent domestic laws. Even in this case, as the third view points out, obligations of the government under the Covenants should remain. For example, the government should take steps to adopt legislative or other measures as may be necessary to give effect to the rights recognized in the ICCPR as required by article 2(2). Moreover, the government must also submit reports to the HRC or the Committee of Economic, Social and Cultural Rights on the measures it has adopted which give effect to the rights recognized or the progress made in the enjoyment of those rights. The first view does not reconcile the gap between the theoretical and actual obligations under the Covenants. This view also lessens the significance of accession to the Covenants in the prevention of human rights abuses by State Parties.

In the case of the second view, it is unclear whether the Covenants are within the scope of generally approved and respected international norms. Even if such is the case, according to this view the Covenants still rank below the Constitution. However, there are some rights under

88. See Myung-Bong Chang, Chong-gang [General Principles], in Kommental Honpop [Commentary of the Constitution] 61, 80-82 (Chol-Su Kim ed., 1988). The first and second views existed before South Korea's ratification of the Covenants, and in theory, ratification is unlikely to affect them.

89. See Chun, supra note 67, at 76; Yoo, supra note 33, at 100.

90. See Chun, supra note 67, at 76; Yoo, supra note 33, at 100.
the Covenants, such as the inherent right to life,91 and special protection of working mothers92 and juvenile offenders,93 which are not specifically addressed in the Constitution. Because South Korea has expressed its commitment to such rights, the government should take necessary measures to protect them even if they are not mentioned in the Constitution. Therefore, at least as far as such rights are concerned, the Covenants supplement the Constitution and, for these rights, there are no grounds with which to argue that the Covenants rank below the Constitution. Furthermore, the obligations of the government under the Covenants listed in the first view still apply under the second view.

From the foregoing commentary, one may conclude that Article 6(1) of the Constitution simply provides that international laws are, upon their ratification and promulgation under the Constitution, effectively incorporated into the domestic legal system without separate legislation,94 and that the Article does not stipulate a hierarchy between domestic laws and the Covenants.95 In other words, “domestic laws” in Article 6(1) of the Constitution is a general term meaning “laws of South Korea,” referring to the Constitution as well as to laws passed by the National Assembly. Thus, the Covenants cannot be superseded by subsequent domestic laws or other legislation.

With regard to the relationship between the Constitution and the Covenants, attention should be directed to the special characteristics of the Covenants. Whereas ordinary international laws and treaties usually deal with conflicts between different States, the Covenants endeavor to protect and promote the human rights of individuals and minorities96

91. “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” ICCPR, supra note 2, art. 6(1).
92. See supra note 81 and accompanying text.
93. The ICCPR’s provision for juvenile offenders reads:
   (2)(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.
   ICCPR, supra note 2, arts. 10(2)(b), 10(3).
94. In this sense, it may be said that South Korea belongs to the group of “monist” countries which do not need a separate legislation or transformation procedure for the application of international law. See THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS (Mireille Delmas-Marty ed., 1992).
95. See Baek, supra note 67, at 10; Chun, supra note 67, at 76.
96. “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” ICCPR, supra note 2, art. 27.
regardless of citizenship.\textsuperscript{97} The Covenants are the products not of negotiation between countries concerned about their national interests, but of universal ideals and common sense aimed at extending fundamental freedoms to people oppressed by state power. In this respect, the Covenants are distinguishable from other international treaties. Instead of the government of each State Party performing its obligations to governments of other State Parties, the Covenants create government obligations toward individuals.

The obligations of the States under the Covenants are basically to individuals within their borders, rather than to counterpart governments, although reports concerning the observance of the Covenants are submitted to international human rights bodies. Accordingly, with regard to the protection and promotion of human rights, the Constitution and Covenants are not positioned to conflict with each other. The Covenants simply complement the interpretation and implementation of the Constitution towards a more complete protection of human rights, and they provide international standards and precedents. Nevertheless, if under unpredicted circumstances a constitutional provision is interpreted so that it no longer protects human rights, the Covenants should be used to challenge that interpretation.

\section*{C. Laws Violating Fundamental Human Rights Norms}

This part reviews some important laws which have caused serious human rights abuses in Korean society, particularly in the context of ICCPR violations.

\subsection*{1. National Security Law}

The National Security Law (NSL) restricts basic rights of Korean citizens in order to maintain national security.\textsuperscript{98} This law was created in 1948 during a period of hostility between the two Koreas, immediately after the establishment of two separate governments in South and North Korea.\textsuperscript{99} After the NSL was amended several times, it was changed to the Anti-Communist Law of 1961, and after that, the newly reinforced

\textsuperscript{97} See Henry J. Steiner & Detlev F. Vagts, Transnational Legal Problems 453 (2d ed. 1986).

\textsuperscript{98} For a comprehensive analysis of the NSL, see Won-Son Pak, Kukka Poanpop Yongu [Study of the National Security Law] (1992) (three volume set).

\textsuperscript{99} Counter Report, supra note 12, at 36.
NSL was promulgated in 1980. The NSL was most recently amended in 1991.\textsuperscript{100}

The NSL has long been criticized for violating the principle of legality, \textit{nullum crimen nulla poena sine lege}, because its articles are vague and abstract in their essence as well as in their application.\textsuperscript{101} For example, article 4 of the NSL punishes acts of treason, espionage, or sabotage carried out under instruction from an anti-State organization (North Korea).\textsuperscript{102} Article 7 of the NSL punishes acts that benefit North Korea by praising it, encouraging it, siding with it, or conspiring to commit such an offence.\textsuperscript{103} In addition, it prohibits the importing, disseminating, buying, or selling of documents, drawings, or other means of expression which benefit or support an anti-State organization. Such language under the NSL has been abused to restrict the freedoms of thought, conscience, and expression, as well as the right to know protected by articles 18 and 19 of the ICCPR.\textsuperscript{104} Furthermore, under article 10 of the NSL, anyone with knowledge of another person’s criminal act as defined by the NSL who has failed to inform an investigative or intelligence agency is subject to fines and imprisonment for up to five years.\textsuperscript{105} This provision violates freedom of conscience, i.e., the freedom to be silent.\textsuperscript{106}

\begin{footnotes}
\item[100] Id. at 37.
\item[101] The South Korean government has used the NSL to condemn a variety of actions: Over the years, the National Security Law (NSL) has been widely used to imprison people who, according to the government, visited North Korea, met North Koreans or alleged North Korean agents abroad, expressed support for North Korea or views similar to North Korean positions, listened to North Korean broadcasting, or possessed North Korean or other Marxist books. Conviction under the NSL can result in long prison sentences or the death penalty. Despite the fact that all the political parties have agreed since 1988 that it should be revised, the NSL remains the most frequently used instrument of repression against government dissidents in South Korea. Thirty-three percent of the political prisoners as of June 1990 were detained under the National Security Law. \textit{Asia Watch}, supra note 11, at 8.
\item[102] Law No. 2769 of July 16, 1975, amended by Law No. 3318 of Dec. 31, 1980, art. 4 (Korea) [hereinafter NSL].
\item[103] Id. art. 7.
\item[104] “Everyone shall have the right to freedom of thought, conscience and religion.” ICCPR, supra note 2, art. 18(1). “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Id. art. 19(2).
\item[105] NSL, supra note 102, art. 10.
\end{footnotes}
2. Security Observation Law

The Security Observation Law\textsuperscript{107} was introduced as an amended version of the notorious NSL.\textsuperscript{108} Article 1 of the Law defines its purpose as follows:

The purpose of this Law is to take security observation measure[s] upon such persons who have committed specific crimes in order to prevent the danger of their recommitting crime and promote their return to normal, sound social life, and thereby to maintain national security and social peace.\textsuperscript{109}

People who have been imprisoned for violations of certain articles of the NSL and other laws related to national security and who are "deemed to require observation [to prevent the repetition of crimes] because there [are] sufficient ground[s] to [believe there is] the danger of recommitting the crime[s]" may be placed under security observation for two years.\textsuperscript{110}

The decision to impose security observation is made by the Minister of Justice on the resolution of the Security Observation Committee, upon the request of a public prosecutor. The period of observation may be extended using the same procedures for two years without limit on the number of such extensions.\textsuperscript{111}

A person under security observation must report within seven days, to the chief of the police station concerned, various personal information including information about friends and relatives, the status of personal and family property, religious and other organizational memberships, and work and emergency contact addresses.\textsuperscript{112} Moreover, he must make a report every three months, giving details of major activities, meetings, trips, and other matters as deemed appropriate by the chief of the police station.\textsuperscript{113} If he takes refuge or escapes to avoid security observation, or fails to make the above reports, he may be fined or imprisoned for up to three years.\textsuperscript{114}

In sum, the Security Observation Law subjects persons who have already served their sentences to administrative measures which impose

\textsuperscript{107} Law No. 4132 of June 16, 1989, amended by Law No. 4396 of Nov. 22, 1991 (Korea) [hereinafter Security Observation Law].
\textsuperscript{108} NSL, supra note 102.
\textsuperscript{109} Security Observation Law, supra note 107, art. 1.
\textsuperscript{110} Id. art. 4.
\textsuperscript{111} Id. arts. 5, 7, 10–15; COUNTER REPORT, supra note 12, at 55.
\textsuperscript{112} Security Observation Law, supra note 107, art. 18(1).
\textsuperscript{113} Id. art. 18(2).
\textsuperscript{114} Id. art. 27.
reporting requirements in violation of freedom of conscience. This law also infringes the freedom to determine and move residences, the right to privacy (including the right to associate or communicate), and the rights of family and friends. This law clearly violates articles 12, 17, and 18 of the ICCPR.115

3. Law on Assembly and Demonstration

The Law on Assembly and Demonstration was enacted in 1989.116 Although this law declares that its purpose is to guarantee the right of assembly and demonstration which are the essence of freedom of expression in a democratic society,117 it has been misused to control and restrict various opinions expressed in the form of assemblies or demonstrations.118 For example, article 5 of the Law defines the types of assemblies and demonstrations which are prohibited: assemblies or demonstrations which would clearly cause a direct threat to the public safety and order by collective violence, threat, damage, or arson.119 Article 6 of the Law requires persons or organizations organizing or sponsoring an outdoor assembly or demonstration to give forty-eight hour prior notice to police authorities specifying the purpose, date, place, and sponsors of the assembly or demonstration.120 Then, police authorities can prohibit the assembly or demonstration for disruption of traffic flow.

115. See COUNTER REPORT, supra note 12, at 56. "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." ICCPR, supra note 2, art. 12(1). "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Id. art. 17(1).

To date, Suh Jun-shik is the only person to have been charged with violation of the [Security Observation Law]. Suh Jun-shik was imprisoned in 1971 for alleged espionage activities and when his sentence expired in 1978 he remained in detention under the Public Security Law until his release in 1988 because he refused to 'convert to anti-communism'. After his release in 1988, Suh Jun-shik was required to report under the terms of the [Security Observation Law]. He was re-arrested in June 1991 on several charges, including a charge under the [Security Observation Law] for failure to make a regular report of his activities. Amnesty International adopted Suh Jun-shik as a prisoner of conscience during his imprisonment from 1971 to 1988 and considered the charges under the [Security Observation Law] to be a violation of his rights to freedom of expression and association.

AMNESTY INTERNATIONAL'S CONCERNS, supra note 29, at 18.

116. Law No. 4095 of March 29, 1989, amended by Law No. 4408 of Nov. 30, 1991 (Korea) [hereinafter Law on Assembly and Demonstration].

117. Id. art. 1.


119. Law on Assembly and Demonstration, supra note 116, art. 5.

120. Id. art. 6.
or other reasons, in addition to the reasons listed in article 5. Using these articles, the government can effectively ban any assembly or demonstration at its discretion.

These restrictions, such as requiring prior notice (which in substance is equivalent to requiring prior authorization of an assembly or demonstration) and granting broad discretionary power to the police to prohibit an assembly or demonstration, appear to violate the freedom of expression guaranteed under the ICCPR.

4. Laws Prohibiting Interference by a Third Party

Article 12-2 of the Labor Union Law and article 13-2 of the Labor Dispute Adjustment Law provide as follows:

Persons other than a worker who has actual relations with the employer, or concerned trade union, or other persons having legitimate authority under law shall not engage in an act of interference for the purpose of manipulating, instigat[ing], obstructing, or any other act to influence the concerned parties in an establishment or dissolution of a trade union, joining or not joining a trade union, or in collective bargaining with the employer.

These provisions against third party interference in both the Labor Union Law and the Labor Dispute Adjustment Law were enacted in 1980 during a period of severe labor oppression in order to prevent two church-related organizations, the Urban Industrial Mission and the Catholic Workers Movement, from educating and organizing workers.

Since then, these laws have been used repeatedly to suppress the burgeoning labor movement, typically to prohibit non-laborers from supporting the labor movement. With regard to the abuse of these provisions, the Lawyers for a Democratic Society and the National Council of Churches in Korea jointly reported as follows:

These provisions have served a double purpose: by punishing the people

121. See id. arts. 8, 10–12.
122. Law No. 1329 of Apr. 17, 1963, amended by Law No. 3966 of Nov. 28, 1987 (Korea).
124. ASIA WATCH, supra note 11, at 33.
125. The Constitutional Court held that the provisions were constitutional and justifiably restrict action interfering with political objectives that are “irrelevant to the improvement of salary and other working conditions,” and that they were not so vague as to create unacceptable difficulties in determining their proper interpretation in the context of criminal prosecutions. 89 Honka 103 (Jan. 15, 1990). See James M. West & Dae-Kyu Yoon, The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex? 40 AM. J. COMP. L. 73, 109 (1992).
who supported the labor movement, [the government] has also isolated the workers. Furthermore, these provisions have never been used to punish the ‘third parties’ who took the side of the management. In these provisions, crime is very vaguely and abstractly defined as ‘an act of interference for the purpose of manipulating, instigating, obstructing or any other act to influence the concerned parties.’ The abstractness and vagueness of the provisions make it impossible to have a reasonable extrapolation of the types of actions that are actually prohibited, and have thus been used for the violation of human rights.126

These third party interference provisions are unique to the Korean legal system. They also appear to violate the freedom of expression under the ICCPR.

IV. THE COURTS AND THE COVENANTS

A. Ordinary Court

Since the ratification of the Covenants, no Korean court, including the Supreme Court, has decided a case on the basis of the Covenants. In several criminal cases, defendants indicted under the NSL or other laws mentioned in Part III.C. argued that they were not guilty because such laws conflicted with the Covenants and were invalid, but the courts did not accept their arguments. The courts found the defendants guilty, but the courts did not indicate whether the laws at issue were contrary to the Covenants.127 Under Korean law, if a trial court refuses to rule on the basis of the Covenants despite the argument of the accused, no procedure is available to appeal and obtain an adjudication on the basis of the Covenants. The defendant can only file a petition with the Constitutional Court insisting that the law in question is unconstitutional.128 Currently, the courts’ view of the relationship between the domestic laws and the

126. COUNTER REPORT, supra note 12, at 59.
127. See id. at 7–8.
128. The jurisdiction of the Constitutional Court encompasses five categories of actions:
1. Questions of the constitutionality of laws upon request of the courts;
2. Impeachment;
3. Dissolution of political parties;
4. Jurisdictional disputes between state agencies; and
5. Constitutional petitions.
KOREA CONST. ch. VI, art. 111.
For a detailed analysis of adjudications and developments in the Constitutional Court, see West & Yoon, supra note 125. See also Joo-Won Kim, Honpop Jaepan Anpak-ui Inkwon Sanghwang [Human Rights and the Constitutional Court], 4 INKWON BOGOSU [HUM. RTS. REP.] 275 (1990). In this article, Kim argues that even the adjudications of ordinary courts should fall under the jurisdiction of the Constitutional Court.
Covenants is unclear. It seems that the courts are reluctant to admit the Covenants as a source of law in domestic cases, probably due to their ignorance of international human rights law.  

B. Constitutional Court

The Constitutional Court of South Korea (the Court) rules on the constitutionality of laws, regulations, and other administrative actions of government authorities upon petition by individuals or ordinary courts. In 1990, the Dong-A Ilbo, a defendant in a damage suit, was ordered by a civil district court to publish a notice of apology and pay damages to the plaintiff, whose reputation was damaged by an article appearing in a monthly magazine owned by the Dong-A Ilbo. In April 1991, the Court held that if article 764 of the Civil Code is interpreted so that the Dong-A Ilbo must acknowledge its transgressions in a newspaper, such a provision would unconstitutionally conflict with the freedom of conscience protected by Article 19 of the Constitution.

The Court ruled that, although the monthly magazine’s article published by the petitioner injured another person’s reputation, the petitioner is not required to publish an apology against its conscience in addition to paying damages. Deciding the unconstitutionality of the compulsory apology on the basis of Article 19 of the Constitution, the Court referred to article 18(2) of the ICCPR as follows:

Since the Constitution provides that all citizens shall enjoy the freedom of conscience, the freedom of conscience is protected as one of the fundamental rights. ... The conscience that the Constitution stipulates covers not only the freedom of thought that does not allow for the state power to intervene in the ethical matters of the individuals such as the act of deciding between the right and wrong, or virtue and vice, but also the freedom of silence that is protected against coercion to express one’s thoughts or ethical determinations. ... This is derived from the will to protect more perfectly the freedom of spiritual activities which has become the root of democracy and has played a significant role in the development and improvement of human beings. ... Furthermore, Article 18(2) of the International Covenant on Civil and Political Rights which our country ratified in 1990 also provides that no one shall be subject to coercion which would impair his freedom to have or to adopt

---

129. Cf. precedents of Japanese courts which implicitly acknowledged the direct applicability of many articles of the ICCPR. Iwasawa, supra note 71, at 142 n.54.

130. “The court may, on the application of the injured party, order the person who has impaired another’s fame to take suitable measures to restore the injured party’s reputation, either in lieu of or together with compensation for damages.” KOREA CIVIL CODE art. 764.

a religion or belief of his choice. . . . Therefore, the coerced apology, as it distorts and perverts one's conscience, is an unconstitutional restriction of the freedom of conscience which is one of the fundamental spiritual rights to be protected under the Constitution.\textsuperscript{132}

This is the first ruling of the Court that referred to the ICCPR while ruling on the constitutionality of a domestic law. The \textit{Dong-A Ilbo} case indicates that the Court can and should refer to the Covenants in all domestic cases which substantively involve infringements of human rights, even if the Court rules only on the basis of the Constitution.\textsuperscript{133}

On the other hand, in the \textit{Yoo Sang-Duk} case,\textsuperscript{134} the Court did not refer to the ICCPR. The petitioner, who was arrested for the violation of the NSL, argued: (1) during communications between the petitioner and his counsel, the officers of the National Security Planning Agency recorded the contents of their communications and took pictures; (2) the petitioner requested respect for the confidentiality of the communications with his attorney, but they did not stop recording; and (3) as a result, the petitioner's right to communicate with counsel guaranteed in Article 12(4) of the Constitution\textsuperscript{135} and article 14(3)(b) of the ICCPR\textsuperscript{136} was violated.

The Court held that the recording and photographing by the officers of the National Security Planning Agency violated the petitioner's right under the Constitution to be assisted by counsel, but the Court was silent as to whether the ICCPR also prohibits such acts. As in the situation of the lower courts, this appears to be an example of the Court's unfamiliarity with the significance, effect, and contents of the Covenants. In this respect, it may be hasty to conclude that the \textit{Dong-A Ilbo} case is a landmark decision that will be followed in the future.

\textsuperscript{132} This ruling might indicate that the Covenants are superior to domestic laws legislated by the National Assembly.

\textsuperscript{133} This is very similar to the decision of the Federal Constitutional Court of the former Federal Republic of Germany. Under German law, a law can be declared void solely on the basis of the Federal Constitution. The fundamental rights set forth in the Federal Constitution, however, must be interpreted with regard to the case law of the European Court of Human Rights. \textit{See} \textsc{The European Convention for the Protection of Human Rights}, supra note 93, at 121-29.

\textsuperscript{134} 91 Honma 111 (June 14, 1991).

\textsuperscript{135} "Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by law." \textsc{Korea Const.} ch. II, art. 12(4).

\textsuperscript{136} "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." ICCPR, supra note 2, art. 14(3)(b).
CONCLUSION

Despite the ambiguity in the understanding and implementation of the Covenants, South Korea's ratification of the Covenants was a historic moment in the enhancement of human rights for a Korean people who continually yearn for a democratic society. Given the Covenant's significant contribution to world peace and the improvement of fundamental rights, powerful instruments are now available to help the Korean people bring their cases to the attention of the international community. Moreover, an independent source of law now exists which can be directly applied in the domestic arena as a supplement to the Constitution and domestic laws.

This article began with the premise that the Covenants were drafted for the protection and promotion of human rights regardless of nationality, gender, religion, language, and the like. Each country, however, must start by resolving human rights violations within its own territory. Article 10 of the Constitution of South Korea provides that "[a]ll citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

Man is a universal being. Human rights should be respected, enjoyed, and shared at any time and at any place, not smothered within the confines of a limited territory. Although the Covenants have some intrinsic limitations, this premise remains valid.

Therefore, the role of international human rights bodies such as the HRC under the ICCPR, and the Committee on Economic, Social and Cultural Rights under the ICESCR should be strengthened in order to monitor governments more effectively and to enforce the Covenants. This will encourage the government of South Korea, as well as other State Parties, to perform its responsibilities under the Covenants in good faith, and to prepare reports for Committees with the sincerity and credibility required under the Covenants.

Under Korean law, the Covenants are duly incorporated into the domestic legal arena. The Covenants, therefore, should rank as a supreme norm on the same level as the Constitution and be directly applied to domestic cases with the fewest limitations possible. As far as the protection and promotion of human rights is concerned, domestic laws enacted by the legislature or other government authorities should not be obstacles. They should be invalid, regardless of the time of enactment,
to the extent they contradict the Covenants. The principles, experience, and wisdom embodied in the Covenants, however, are not well known to the Korean people. In this sense, accession to the Covenants is yet to come.