Preface

While the law has seldom been a central object of analysis in the sociological study of South Korea, its importance has grown steadily. In the context of planned economic development during the 1960s and 1970s, with the sacrifice of human rights causes and the rule of military authoritarianism lasting until 1987, the rule of law in South Korean society at that time was questionable. Diverse social movements seeking political freedom, class and gender equality, and the restoration of justice from historical wrongdoings, blossomed in the 1990s after the removal of the authoritarian regime provided a highly conducive environment for socio-legal studies. Law and Society in Korea will introduce panoramic views of law and society studies in this postcolonial war-ridden society that operated under the conditions of truce, and yet was both economically and politically relatively successful. The ten chapters in this volume examine these societal and historical conditions reflected in the law – or that were shaped by the law – in various terms: law and development, law and politics, colonialism and gender, past wrongdoings and legal culture, public interest lawyering and judicial reform, particularly of legal education. In dismantling the historical specificity of Korean and, perhaps, East Asian societies and the universal frames of the field, these chapters will provide novel views, theorisation and information about South Korean law and society.

Dai-kwon Choi’s chapter reviews the Korean experience via a law and development approach in response to the puzzle of how and why authoritarianism is counter to the rule of law. He attempts to trace the link between Korean economic development and that of the law. During its authoritarian period, Korea (the Republic of Korea) might be characterised as having a dual legal structure consisting of a series of instrumental special legislations (e.g., presidential decrees, The Foreign Capital Inducement Act 1966) to support the government-led economic development policy along with the authoritarianism that was a deviation from the fully-fledged rule of law and of a limited rule of law. It is generally known that authoritarianism tends to respect autonomies in areas other than politics for the sake of its image unless its power base is threatened. In this respect, the kind of legal stability that allowed for future planning
in Korea which would be favourable for business enterprises (savings and investment) may well have been fostered, even under authoritarianism. It was the administrative officials, armed with instrumental special legislation – administrative guidance, for instance, to support the government-led, import-substituting, export-orientated heavy chemical industry – and other government-led development policies, rather than lawyers, who actually led Korea’s rapid industrialisation and economic development. Today, following democratisation, the gap between the written liberal democratic constitution and authoritarian political practices has been erased and a fully-fledged substantive rule of law is finally in place in Korea.

Chulwoo Lee’s chapter offers a theoretical outline for explaining the social foundations of the rule of law in South Korea and East Asia. It proposes to explicate the conditions for the rule of law in terms of the play of power, and to conceive the rule of law as a product of the interplay between different forms of power instead of being as a result of the withdrawal of power. In addition to the two forms of power that have been identified in existing social theory (politico-juridical power and disciplinary power), the study advances a third notion of power, which the author terms ‘relational power’. The notion is constructed to signify the amorphous force emanating from fluid personal relations and interpersonal commitment, a force that operates beneath various forms of traditional affective ties in East Asia, such as guanxi in China. The study maps permutations linking rule by law and the rule of law with each of the three kinds of power, and shows how these different kinds of power complement and cancel out one another in strengthening or obstructing rule by law and the rule of law.

In the third chapter, I attempt to shed light on the historical condition of the law in Korea from a different angle. Thematising the system of the family-head (hoju) instituted in the former Civil Code and Family Registration Act, this chapter interprets the system of the family-head as the mutated product of colonial legal imposition and the domestic (as well as Japanese) patriarchy. Although the legal institution with family registration itself was imposed during Japanese colonialism (1910–45), it is ironic to see how forcefully and persistently this system was purported to be the ‘tradition’ of Korea. It was indeed the postcolonial legislature in Korea that passed the statutes of the family-head. The vague notion of ‘tradition’, which was not compatible with the Constitution in its protection of gender equality and human dignity, has prevailed until as recently as 2005, when the Constitutional Court in Korea made a decision. The family-head system systematically discriminates against women in its modes of succession and bestowing of the family-headship,
which occur in conjunction with marriage and divorce. In this light, the ‘invention of tradition’ in Korea seems political in multiple senses: when tradition was claimed, the colonial legacy seems to have been forgotten, yet this amnesia seems half-intentional since the state took advantage of male-centred family and registration systems, which many ordinary citizens would have accepted as ones based on Korean culture such as Confucianism.

Ilhyung Lee’s chapter examines the Korean perception(s) of equality (pyungdeung) through empirical research. As pointed out in previous work by Choi, Korea has been a constitutional democracy for just 25 years, after decades of authoritarian rule, therefore ‘equality’ is a relatively new concept to the average Korean citizen. Perceptions of equality and equal protection are often shaped by societal culture. Two competing forces affect the Korean setting. First, Korea is a society with a long social history, with deeply embedded Confucian norms that shape and guide contemporary attitudes and practices. Second, Korea has recently undergone a radical social transformation, resulting in changing norms. Aiming to reach a more informed understanding of how Koreans perceive equality and equality rights, this chapter reports the results of a survey of Korean reactions to a hypothetical case that suggests disparate treatment by a commercial airline. The survey assesses whether participants view the airline’s action as (1) discriminatory and (2) unlawful, and (3) what actions they would take. The vast majority saw the action as discriminatory; a significantly smaller majority viewed it as illegal. Respondents offered various actions they would take in response to the given scenario. In explaining the results, this chapter takes account of cultural norms attributed to Korea, the society in transformation and changes in Korea’s legal institutions during democratisation.

The next chapter also employs the empirical method in analysing the normative phenomenon of the public sector. Unlike the previous chapter by Ilhyung Lee which embarks on empirical research in a hypothetical setting, Jeong-Oh Kim utilises the pre-existing statistics on crime. For the last 50 years, Korean society has experienced tremendous changes in its economic, political and social arenas, which influence people’s legal consciousness and behaviour, and the legal culture at a fundamental level. Kim investigates criminal instances and basic social order, and also people’s attitude towards public officers. From his study, we can see how rapidly crimes have increased and the remarkable characteristics in the pattern of the growth of criminal instances in society. For example, Kim shows that the number of criminal cases has increased almost five times, from 5.02 per 1,000 citizens in 1965 to 24.26 per 1,000 in 2010. His findings confirm the explicit relationship between the social changes and
normative phenomenon. His study will be a starting point to extend the social scientific approach to the changing normative phenomenon in Korea and to compare it with those of other countries.

Mainly based on the theories of Habermas and Teubner, the chapter by Sangdon Yi and Sung Soo Hong examines whether Western theories can be simply applied to Korean legal development. Their observations are that because of the reception of modern law through Japanese Imperialism and the Korean cultural tradition, the Korean legal system has the ‘dual structure’ of the liberal and welfare paradigms: on the one hand, the liberal paradigm is not yet fully developed, but on the other hand, Koreans have to suffer from the original problems of the juridification of the welfare state. This dual structure inevitably leads to a worsening of the problems brought about by juridification in Korea. As a strategy to solve these problems in Korea, the authors suggest that proceduralisation, which was put forward as an alternative for regulatory dilemmas in Western countries, can be useful in the Korean context. More importantly, because of the rapid industrialisation and modernisation of Korean society, it is no longer justifiable to say that ‘Koreans needs more liberalism’, which is the statement frequently quoted to prescribe the status quo of Korean society. This means that debates on juridification in Western countries should be considered in order to approach regulatory problems arising from juridification in Korea.

Patricia Goedde’s work introduces the main activities of public lawyering in South Korea such as Minbyun, People’s Solidarity for Participatory Democracy (PSPD) and Gonggam. This chapter charts the development of public interest law in South Korea by following shifts in discourse and activities through several legal advocacy organisations: Lawyers for a Democratic Society (Minbyun), the PSPD and the public interest lawyers’ group, Gonggam. It poses several questions: What is meant by ‘public interest law’? What particular institutional forms has public interest law taken? Why does public interest law discourse emerge more earnestly in the 1990s? The chapter finds that public interest law in South Korea emerges as a concept with Minbyun but develops as an explicit discourse in the 1990s with the creation of PSPD, as it increasingly employed legal measures on behalf of ‘the public interest’ for social reform issues. Since then, the concept continues to mature under Gonggam’s prerogative to focus on minority rights by providing direct legal aid, alongside calls for a deeper commitment to pro bono service by the legal profession.

The following chapter by Dohyun Kim discusses the recent reforms in legal professions and education in Korea. This study describes the background and history of judicial reform in Korean society since the mid-1990s until the late-2000s, especially focusing on the introduction of
the graduate-level law school system, which was set in motion in 2009 at 25 universities and which produced the first graduates in 2012. The author analyses the shift of key players in the legal education reform debate with the change of times. In the 1990s, elite law professors initiated the debate and proposed the introduction of a law school system in Korea, which then failed due to a counterblow from legal professionals. In the first half of the 2000s however, legal professionals (and especially elite judges) took over the leading role and submitted a draft bill for a law school system to the National Assembly. Blocked by the bottleneck of the legislative process for about two years, the bill led to civil society actively participating in the debate from 2005 under the banner of ‘justice for the people’, successfully amending and passing the law school bill through the National Assembly. The author expects that this activism of civil society will eventually bring about the dismantling or weakening of the judicial monopoly held by legal professionals in Korea.

Kuk-Woon Lee’s chapter enlightens the readership on the law and society in Korea from yet another angle – the law or the judiciary in terms of politics. In following the author’s lead, a type of ‘constitutionalisation of politics’ has been taking place in Korea since her dramatic transition from military dictatorship towards democracy in 1987. As an indication of this, the Korean Constitutional Court functioned significantly to stop many unconstitutional political regulations of the past and to encourage institutional reform efforts for the future. This chapter takes a look at some Korean Constitutional Court decisions related to the reform of the representative political system in order to sketch out Korean constitutional politics. Those decisions represent a tremendous political achievement for the Korean Constitutional Court over the past 20 years. Nevertheless, they are also tokens representing the characteristics and limits of the original design of Korean constitutional democracy. In this regard, the constitutionalisation of Korean politics after 1987 was the effort to return and/or restore the normal government that was established before the Korean War. This is a key reason why the constitutionalisation of politics in Korea has faced a legitimacy problem of judicial guardianship in recent years.

Kuk Cho’s work concerns transitional justice in Korea. For more than a decade, Korean society has taken legal steps to rectify past wrongs under the authoritarian-military regime. A cleansing campaign has developed since the ‘Civilian Government’ was launched in 1993. With strong pressure from civil society, the legislature, the judiciary and several committees and commissions have played their own unique roles in attempting to rectify past wrongs and re-evaluate the past. The Korean
way of dealing with past wrongs may be summarised as follows: (1) retroactive criminal sanctions are limited to the core perpetrators who acted under the authoritarian regime; (2) retroactive civil sanctions are given broadly to the victims of the authoritarian rule; (3) the contribution by past activists for the democratisation of Korea is officially recognised; (4) counter-violence by them is leniently examined; (5) even home-grown leftist movements are embraced, despite the current ideological and military tension between the two Koreas; and (6) uncovering past wrongs without criminal sanction is extended beyond the period of the authoritarian regime to include the Japanese Occupation and the Korean War. This process has certainly not been free from political struggle in the current political terrain. Ultimately, facing the past wrongdoings and the efforts for resolving them will continuously redefine the present time and space.

NOTE

1. A note on the romanization:
This book contains various Korean words, which had to be romanized for those readers who are not familiar with the Korean language. Romanization of Korean words in this book followed the McCune-Reischauer system in principle. There were, however, certain types of words for which we had to make the following exceptions: (1) names of provinces, cities and other local districts follow the names officialised by Korean government as of 2012 (e.g. Seoul, Incheon, Busan); (2) names of organizations with their own romanization are respected (e.g. Minbyeon, Gonggam); (3) names of politicians and academics are based on their own usages or, if not available, the most common romanization for each name (e.g. Rhee Syngman, Park Chung Hee, Roh Moo-hyun); (4) the authors’ own romanization for certain key words are respected (e.g. pyungdeung).