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Freedom of Political Speech vs. National Security in Korea — A Historical Survey

Introduction

Regarded from a philosophical standpoint, freedom of speech is deduced as a right of free mental expression with intrinsic value.¹ On the other hand, it is an instrument of political expediency and is closely linked with self-improvement of a community in which democratic and egalitarian values prevail. Here the test of its substance is sometimes considered to be the right to differ as to things which touch the heart of the existing order.² Nevertheless, freedom of speech is not an unfettered liberty. There are no absolutes. A name has meaning only when associated with the considerations which gave birth to it.³

The goals sought by men in entering society are not purely individual freedoms. There are others such as the public welfare and social order. It is, therefore, natural for a democratic society to forbid as criminal any attempt to change the going system by force, violence or other illegal means. As a consequence, the doctrine of paramount necessity is often invoked as protection where the safety of the nation is involved.⁴ But the all-embracing power of self-preservation is not absolute either,⁵ and hence,

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¹To Mr. Berns, freedom would no longer have intrinsic values, and it is a mere process. See BERNs; FREEDOM, VIRTUE AND THE FIRST FREEDOM, chs. 2 & 7 (1951).

²West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

³Dennis v. United States, 341 U.S. 494, 508 (1951).

⁴Chief Justice Vinson of the Supreme Court of the United States remarked: The right of a government to maintain its existence is the ultimate value of any society. *Id.*, at 509. Justice Frankfurter of the same court eulogized: National unity is an interest inferior to none in the hierarchy of legal value, for if it is paralyzed, no subordinate values can be protected. *Id.*, at 520.

⁵*Id.*

in democratic society, serious injury to the state must be threatened before individual freedoms including freedom of speech can be curtailed.

The Constitution of Korea expressly provides limitations on freedom of speech, for the maintenance not only of order, but also of public welfare.⁶ Freedom of speech under the Constitution, therefore, connotes the two kinds of interests: an individual interest and a social interest. The basic problem confronting the makers of the Constitution seems to have been that of securing a just poise between liberty and order. As a result, the function of the Supreme Court of Korea, acting as a guarantor of individual rights and liberties, is to maintain the precarious balance between freedom and authority. If the Court balances freedom of speech against order or national security, the scales would be tipped for freedom, but if the Court balances order or national security against freedom of speech, the scales would be tipped against freedom.⁷ In this sense, the Supreme Court may be considered a "social engineer."⁸

In a practical sense, the question of freedom of speech in Korea is not merely an academic one. The North Korean government has launched a demolition policy: steady harassment of Republic of Korea troops along the Demilitarized Zone; sporadic attempts to slip infiltrators into South Korea in the hope of assassinating high-ranking governmental officials and stirring up peasant insurrection. In a sense, the nation has become a theater of war. Under these circumstances, heterodox ideas inimical to national security may not be protected. As a consequence, the concept of freedom of speech has been fraught with external difficulties. This is the atmosphere in which the Supreme Court is called upon to maintain the delicate balance between freedom and authority.

We then become concerned with a consideration of the meaning of freedom of speech, or a discourse on the philosophy of the freedom and the role of the Supreme Court, for the crucial issues in the constitutional debate can only be resolved by a proper understanding of the role of the Court in connection with the freedom.

The purpose of this article is to shed light on freedom of speech in political matters in connection with national security, not on freedom of expression in general.

⁶KOREAN CONST. art. 32, sec. 2.

⁷See HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* 174 (1963).

⁸It was not until 1963 that the courts were granted the power of judicial review, and since then, the Court has never decided a case in which it exercised the power, so far as is known.

I. Legacy of the Past

A. Introduction

No historical linkage with the past is to be found so far as individual freedoms and rights in Korea are concerned. As we shall see, the sharp turn of base in the area of individual freedoms and rights was brought about in 1948 when the Constitution, based on democratic and egalitarian values, was enacted. Hence, the Korean linguistic equivalents for such concepts as freedom, the government by the social compact and rule of law, are of new coinage. Nevertheless, the ancient ghost of laws and ordinances as to "sedition" often haunted the people of the country. Accordingly, studying briefly the legacy of the past in relation to freedom of speech and national security, cannot prove fruitless.

B. Legacy of Yi Dynasty

Yi (1392-1910) is the first dynasty to have undertaken a systematic compilation of law—law which had belonged to the hoary Chinese legal system. Nevertheless, no sphere of liberty was sanctioned. This derives from the King's attributes of superiority and the ethical foundation of the dynasty.⁹ The King was the fountainhead of justice and law, and therefore the King was beyond the pale of criticism. In connection with such a tenor, was the corollary that there had never been a concept of a higher law such as reason or human dignity in the Western sense.¹⁰ Admittedly, the goal of the state had been achieved at total surrender of human rights.

But the kingship dwindled through self-restraints and reactions. What happened in 1895 is one of the moving, triumphant pages of Korea's history. The King was forced to proclaim the "14-Article Hong Bom" (the Greater Charter) which declared, among other things, the security of personal liberty and property rights, although it contained no reference to

⁹Confucianism was adopted by the Yi Dynasty as the national teaching. The core of it is "piety" which underlies the highly personalized concept of social relationship. The relation between men and their government under the dynasty, therefore, had to be filled primarily by the father-son image. This bred paternalism in government, which was reflected in Korea by the absolute monarchy.

¹⁰"... All the acts of an individual were regulated, in old times, by these social relationships. Each term of the relationships, according to Confucianism, is a *ming* or name which represents a moral principle. Every individual must have some name in terms of the relationships, and it is his duty to behave according to the moral principle represented by that name. For instance, if an individual is a son in relation to his father, he must behave according to the moral principle represented by the name son; in other words, he must behave according to what a son ought to do." Fung, *The Philosophy at the Basis of Traditional Chinese Society*, in *IDEOLOGICAL DIFFERENCES AND WORLD ORDER* at 26 (Northrop ed. 19). This is why Chinese law has been a law of duties, but not of rights.

freedom of speech or of the press.¹¹ Thus, the kingship began to emerge as a juristic abortion—*corporation sole*, by subjecting itself to law. In 1899, an assembly of men who had a reverence for liberty put a bridle upon the King by forcing him to reform the administration. As a consequence, the King had to subscribe to its reform, and at the same time he introduced other items. One of them was “freedom of expression within the limits of law (ordinances).”¹² Accordingly, it is deemed a reasonable inference that freedom of speech, from the beginning, took the shape of an ordered liberty.

However, running counter to this democratic tenor, a constitution¹³ eulogizing the boundless royal prerogative was proclaimed in 1899.¹⁴ This constitution came into being under the impact of the Meiji Constitution, the first Japanese constitution which was modelled after the Prussian Constitution.¹⁵ Keeping step with such circumstances, the Press and Newspaper Law was enacted for legal control of expression with licensing and censorship. The law was the first *Pandora's box* in the field of expression in Korea's history. Moreover, the Security Law was enacted for the preservation of the basic structure of organized society.¹⁶

In 1910 came the demise of the Helmit Kingdom, followed by Japanese rule which lasted until 1945.

C. The Colonial Rule (1910-1945)

With the beginning of the Japanese rule, a sudden change of the base of the Helmit Kingdom's legal system was made and, in return, the civil law was introduced. Most of the Japanese laws which had been in effect were to be applied to the Korean people, but all provisions regarding the rights and duties of citizens under the Meiji Constitution were interpreted not to be applied to them.¹⁷ Moreover, notwithstanding the abrogation of all the laws enacted under the Yi dynasty, the Press and Newspaper Law and Security Law were left intact for elaborately controlling discussions.¹⁸

¹¹C. YU, INTERPRETATION OF THE CONSTITUTION 10 (1953).

¹²*Id.* at 13.

¹³Its real name is the State System of Korea.

¹⁴C. YU, *supra*, note 11 at 14.

¹⁵*Id.*, at 15.

¹⁶Such laws were enacted under the impact of Japan. Japan, in fact, exercised strong influence on Korea at that time. For further discussion, see, C. KIM and H. KIM, KOREA AND POLITICS OF IMPERIALISM 1876-1910 at 181-188 (1967).

¹⁷“In any event, there was unquestionably discrimination against Koreans in many fields,” Lyman, *Notes on Japanese Law: The Administration of Justice in Korea*, 35 A.B.A.J. 303 (1949).

¹⁸K. PARK, GENERAL INTRODUCTION TO THE LEGAL HISTORY at 381 (1962).

Furthermore, the Peace Preservation Law, the Protection and Surveillance Law for Thought Offence and other anti-subversive laws placed excessive restrictions on words and publications. Any discussion of public questions, or advocacy of political doctrine inimical to the Colonial rule, was to be suppressed or at least controlled.¹⁹

The Japanese legal system as practiced in Korea made a mockery of the idea of the sanctity of laws,²⁰ and the Korean populace's hope of rights and liberties grew faint, for the laws placed only duties and responsibilities on them.

D. The U.S. Military Government (1945-1948) and Freedom of Speech

With the termination of World War II, the United States Military Government was inaugurated in Korea (South) on September 10, 1945. The Government went ahead with the arranging of pre-existing laws. Thus, Military Government Ordinance 11 was proclaimed to wipe out restrictions on political, civil and religious liberties which ran counter to the moral climate of the age and the evolving ethos of democratic society. Article 1 of the Ordinance abrogated the Peace Preservation Law, the Protection and Surveillance Law for Thought Offence, the Press and Newspaper Law, etc. Article 2 went on to abolish all laws or ordinances not based on democratic and egalitarian values.²¹

Meanwhile, the Soviet régime intensified its policies of communizing northern Korea. In an attempt to encourage democratization, the U. S. Military Government likewise took up a campaign against the Communists. The first step in this direction was enactment of Military Government Ordinance 88, which established the licensing of the press to protect the state against Communist subversive activities. The Ordinance had brought about many legal questions until it expired in 1960.²²

¹⁹Under the Colonial rule, "the legal system in Korea was but an additional arm of the Japanese colonial control." W. SOHN, *THE EROSION OF WESTERN DEMOCRACY* 32 (1961).

²⁰*Id.*

²¹K. PARK, *supra*, note 18 at 381-382.

²²The effect of the ordinance was maintained by the 1948 Constitution, which provided for a transitory provision recognizing the effect of pre-constitutional laws and ordinances not in conflict with the Constitution (art. 100).

II. The Making of the Constitution and Freedom of Speech

A. The Adoption of the Constitution and Freedom of Speech

On May 10, 1948, a free and democratic election was held in the area of the 38th Parallel in Korea.²³ One hundred and ninety eight chosen representatives came to Seoul and convened as the Constituent Assembly. The Assembly began to make plans for a sovereign democratic republic, and, as the first step for this, it set its hand to the making of a Constitution. After debating pro and con on the draft constitution²⁴ worked out by the Committee on Drafting, but without commendable debates on liberty, the Assembly adopted the Constitution on July 12, 1948.²⁵ It was proclaimed and went into effect on July 17 of the same year. By it, the Korean people thereupon started living "in accordance with law" and by "due process of law" under the Constitution, for the first time in Korea's 4000 years of recorded history.

In the Preamble to the Constitution, liberty, equality, justice and fraternity were enshrined as the cherished ideals. And a comprehensive declaration of libertarian freedoms and social rights was incorporated into the Constitution. As a consequence, freedom of speech and of the press was elevated to a constitutional right. The Constitution read:

Citizens shall not, except as specified by law, be subjected to any restriction on freedom of speech, press, assembly and association.²⁶

Further the Constitution guaranteed freedom of conscience,²⁷ which is inherently prerequisite to free opinion and belief. As a necessary corollary to freedom of speech, the Constitution provided for academic freedom.²⁸ Thus, freedom of speech acquired an intrinsic value.

It is necessary to discuss the postulates which limit and control the words of the Bill of Rights including freedom of speech. The historical

²³The election was held under the auspices of the United Nations. Soviet Russia refused to permit participation in the election of the people of the north. For further discussion, see GOODRICH, *KOREA—SURVEY OF U.S. POLICY IN THE UNITED NATIONS* chs. 1-3 (1956).

²⁴The draft constitution was based on the draft constitution of Chin-O Yu, the oracle of constitutional law at that time, and key member of ten specialists who were commissioned by the Committee on Drafting to collaborate in it. The draft constitution of Seung-Yol Kwon, one of the ten specialists, was also presented for reference. C. YU, *supra*, note 11 at 26; T. HAN, *THE NEW CONSTITUTION* 19 (1960).

²⁵During their debates, the primary issue was a contest for a governmental system, not for liberty. C. YU, *Id.* at 27-28.

²⁶1948 KOREAN CONST. art. 13.

²⁷"All citizens shall enjoy freedom of religion and freedom of conscience." 1948 KOREAN CONST. art. 12.

²⁸"All citizens shall enjoy freedom of science and arts . . ." *Id.* art. 14.

evidence, as we have seen, demonstrates that the Korean people did not have a heritage of legality at the time that the Constitution was written.²⁹ And they did not have social customs which grow from individual rights.³⁰ Nevertheless, regarded from a psycho-historical standpoint, the post-war period was an age of rationalism, for natural law was revived.³¹ Therefore, even if the objective order of Korean society did not come to be the "sum total of all of the subjective rights of the individual"³² the spirit of the Constitution of Korea could be said to have followed from the base of higher law—reason, the greatest stream of natural law. This is apparent from the effusion of Chin-O Yu, the draftsman of the Constitution, that its spirit was not the creature of the makers of the Constitution, but relied on the main lines of philosophic doctrines.³³ True, the Constitution embodied universal precepts underlying all such libertarian instruments.

Since natural law, which is an endless expression of a civilization, played an important role in the assertion of human rights in the Constitution,³⁴ and the force of reason was to divert the unreflective cause of events into beneficial channels, natural law approximated positive law, and hence the sovereignty of the people³⁵ and the conception of a consolidated government³⁶ were firmly established. In this sense, the Constitution was not the source, but the consequence, of the rights of the individual.

Nevertheless, the individual was not left free to follow his selfish interests in competition with other individuals, without interference from the government, because man envisaged by the Constitution was not man in the abstract, but social man. Responding to the significance of the public interest, the Constitution provided limitations on all human rights, and thus on freedom of speech.³⁷ A loophole, "except as specified by law" was, as already seen, left in the guarantee of free speech.

²⁹So far as "legality is concerned, the Anglo-Americans are proud of a heritage of legality. See KIRALFY, PORTER'S OUTLINE OF ENGLISH LEGAL HISTORY 4-5 (1958).

³⁰Human rights based on democratic and egalitarian values were for the first time stipulated during the American-Government rule.

³¹See Harding, *A Reviving Natural Law*, NATURAL LAW & NATURAL RIGHTS 68 (A. Harding ed. 1955).

³²Kern, *Kingship and Law in the Middle Ages* xx-xxi (S. Chrimes trans. with Introd. 1939), quoted in F. LESAR, TREASON IN ROMAN AND GERMANIC LAW 225 (1965).

³³C. YU, *supra*, note 11 at 28.

³⁴T. HAN, *supra*, note 24 at 160 and 164.

³⁵"The sovereignty of the Republic of Korea shall reside in the people." 1948 CONST. art. 2. This is the same as Article 2 of the present Constitution.

³⁶"All State authority shall emanate from the people." (*Id.*); "The Republic of Korea shall be a democratic and republican State." *Id.*, art. 1. This article has not been amended.

³⁷"Laws imposing restrictions upon the liberties and rights of citizens shall be enacted only when necessary for the maintenance of public order or the welfare of the community." *Id.*, art. 28, sec. 2.

B. Amendments to the Constitution and Freedom of Speech

During the 23-year period of its existence, the Constitution has been amended six times. For the "establishment of a new Democratic Republic, on the basis of ideals manifested in the April 19th Righteous Uprising" against the corrupt election of March 15, 1960, the Constitution was amended on June 15, 1960.³⁸ Article 13 of the amended Constitution Article read:

No citizen shall be subjected to any restrictions on the freedom of speech and press, and the freedom of assembly and association . . .

The "Ideals manifested in the April 19th Righteous Uprising" were based on the will of the people. The people were one homogeneous mass demanding liberty, whence the libertarian feeling of the people began to permeate the political leaders. As a result, the amended Constitution was more liberal than that of 1948. Except as noted below restrictions on freedom of speech and press were not permitted. Nothing could be provided by law with regard to license or censorship over speech or press, nor any license for assembly or association.³⁹

However, the Bill of Rights in the Constitution could not be converted by any doctrinaire logic into a suicide pact.⁴⁰ Freedom of speech was to be limited by Article 28 which read: "All freedom and rights of the people may be restricted by law only when it is necessary for the maintenance of order and public welfare" on condition that "such restriction shall not impair the *substance* of freedoms and rights."⁴¹

The Constitution was again forced to undergo an ordeal when the Military Revolution erupted at dawn on May 16, 1961. By Article 3 of the "Law Concerning Extraordinary Measures for National Reconstruction" proclaimed by the Supreme Council for National Reconstruction, the fundamental rights of the people provided in the Constitution were guaranteed to such extent as was not inconsistent with the fulfillment of the Revolutionary Tasks. Such *de facto* suspension continued until the Constitution

³⁸The Preamble to the 1960 Constitution. The Uprising resulted in the demise of the Syngman Rhee régime. On April 26, 1960 Rhee was forced to step down from his presidency.

³⁹On July 4, 1952, the Constitution was amended for the first time to provide for direct election of the President, and for the creation of an upper house (House of Councilors) in the legislature. On November 27, 1954, the Constitution was amended again. The most important amendment provided that any question involving the security of the Republic, or the safety of its democratic form of government, should be decided by a two-thirds referendum vote of the people. See, HAN, *supra*, note 24 at 24-28.

⁴⁰1960 KOREAN CONST. art. 28.

⁴¹See *Terminiello v. Chicago*, 337 U.S. 1. 37 (1948).

was almost entirely amended and put into force on December 17, 1963.⁴² The Constitution, as amended and put into force on that day, is the basic law of the land. Article 18 provides:

All citizens shall enjoy freedom of speech and press, freedom of assembly and association.

Licensing or censorship in regard to speech and press and permit of assembly and association shall not be recognized. However, censorship in regard to motion pictures and dramatic plays may be authorized for the maintenance of public morality and social ethics.

The publication standard and facilities of a newspaper or press may be prescribed by law.

Control of the time and place of outdoor assembly may be determined in accordance with the provisions of law.

Neither the press nor any other publications shall impugn the personal honor or rights of an individual, nor shall either infringe upon public morality.

It is important to observe that Article 8 provides for the ideological basis of liberties and freedoms. It stipulates: "All citizens shall have dignity and value as human beings, and it shall be the duty of the State to guarantee fundamental rights of the people to the utmost." The basic norm of the Constitution is the constellation of human interest. Accordingly, freedom of speech is derived from the nature of mankind.

On the other hand, since the Constitution seeks a just poise between the interests of the individual and social interests, freedom of expression is limited by public "order" or "public welfare."⁴³

As stated, the Supreme Court of Korea is the final interpreter of the law of the land and guardian of the Constitution. The very purpose of the Bill of Rights was to establish liberties and freedoms as legal principles to be applied by the courts.⁴⁴ As a consequence, the essence of legal right certainly consists in the right of every individual to claim the protection of the Constitution and laws before the courts.

The Supreme Court will draw the concrete line between speech which is free and that which may constitutionally be suppressed. In other words, the warp and woof of such undesirable modes and manners of expression as the "seditious," the "subversive," the "obscene" and the "libelous" will be spelled out by the Court.

⁴²1960 KOREAN CONST., art. 28 (Emphasis added).

⁴³On November 29, 1960, the Constitution had been amended to provide a basis on which to punish persons who had violated the Constitution and Law Concerning Presidential Elections in 1960, and those who had fired at the people who took part in the April 19th Righteous Uprising, because those punishments were covered by an exception to the constitutional provision against *ex post facto* laws. See, Mun, The Korean Constitution, at 101-102 (1964). On October 17, 1969, the Constitution was amended again by a referendum to permit a President to seek three consecutive four-year terms. (Art. 69(3)).

⁴⁴KOREAN CONST., art. 32.

III. The Judicial Definition of Freedom of Speech and the Birth of Judicial Formula

A. Introduction

Before undertaking a discussion of the role of the courts in connection with freedom of speech, a brief survey of judicial review may be of interest. Under the original Constitution of 1948, the Constitution Committee was granted the power of judicial review under a theory of direct review as distinct from the American type of judicial review. This was a result of the strong influence of the German Constitutional Court.

The Committee consisted of the Vice President of Korea as Chairman, five judges of the Supreme Court, three members of House of Representatives and two members of the House of Councilors. The appointments of the judges of the Committee, except in the case of judges taken from both Houses, were for a term of four years. Judges from the Houses served during their tenure of office in each House. All judges were to lose their judgeships when they left their principal posts.

The Committee had jurisdiction to pass on the validity of a statute when a proceeding was brought before it by the court.⁴⁵ If reliance was placed on a statute as an element of a concrete case, it was the court's function to interpret the statute, but not to determine whether it was consistent with the Constitution. If a question of constitutional validity of the statute arose, the function of the court was to refer such question to the Constitution Committee, which was the sole agency charged with the power to review legislative enactments.⁴⁶ Any six of eleven judges constituted a quorum, and a decision holding a statute unconstitutional required a two thirds majority vote of the Committee. The function of the Constitution Committee penetrated only into the area of legal concern, although the Committee was something more than a regular court.

In 1960 came the demise of the Constitution Committee, substituted for the Constitutional Court which continued to exist until 1963. The amended Constitution of 1960 set up the Constitutional Court as the sole agency charged with the power of judicial review. The Court was made up of nine judges. Three judges were to be appointed by the President, three by the Supreme Court and three by the House of Councilors. The terms of the judges were six years, the appointments being staggered so that three new judges were appointed every two years.

⁴⁵See *West Virginia Board of Education v. Barnette*, 391 U.S. 624, 642 (1943).

⁴⁶"When the judgment in any case is dependent on the constitutionality of a law, the court shall refer such question to the Constitution Committee, and shall render judgment in accordance with the decision thereof." 1948 CONST., art. 81, sec. 2.

The Court had jurisdiction to pass on the constitutional validity of legislative enactments via one of three proceedings. First, the Constitutional Court had jurisdiction to decide the constitutionality of a statute whenever any court referred the question to it in case the court deemed the statute repugnant to the Constitution. Second, it had jurisdiction to pass on the validity of a statute when a proceeding was instituted by public authority for the sole purpose of deciding whether the statute was constitutional. Lastly, it had original jurisdiction in a "constitutional complaint" brought by a person who could not agree upon his constitutional rights under a statute.

In the last two, there was no true adversary proceeding to determine the rights of antagonistic parties. Besides these jurisdictions, the Constitutional Court had some jurisdiction over matters of "vital political concern."⁴⁷ Manifestly, the function of the Constitutional Court was to maintain the integrity of the constitutional order, and thus it felt a special responsibility as the chief guardian of constitutionality. As in the case of the Constitution Committee, any six of nine judges constituted a quorum, and a decision on the constitutionality of a statute required concurrence of not less than six judges of the Court. The judges of the Court were not permitted to join any political party nor to participate in politics, even though some of them were to be elected by political organs. This concept was based on the principle of neutrality. In 1963, with the demise of the German style of judicial review,⁴⁸ the American style was adopted. With this, the Korean rule of law shifted from the traditional "*Rechtsstaat*" to government under law.

Under the present system of judicial review, in the essence of things, either of two judicial techniques, one called "judicial modesty" or "judicial self-restraint," the other "judicial activism,"⁴⁹ can be introduced into the Supreme Court of Korea. The power of judicial review is *expressly* granted

⁴⁷If a party in a concrete case petitions the court to refer the question of the constitutionality of a statute relied on as an element of the case, or if the presiding judge does so, a three-judge court decides whether the statute be referred. Thus, the court primarily decides whether the statute squares with the Constitution. If the statute is held to be unconstitutional, the statute is referred to the Committee, but if the statute is held to be constitutional, then the statute is not referred to the Committee.

⁴⁸Besides the power of judicial review, the Constitutional Court had jurisdiction over the following: Disputes on authorities arising between the State organs or agencies; disbandment of a political party; trials on impeachment; Litigation related to the election of the President, Chief Justice and Justices. 1960 CONST., art. 83 (3).

⁴⁹The Constitutional Court of Korea differed from that of West Germany in that the Korean Constitutional Court had jurisdiction to pass on the validity only of laws (legislative enactments), while the West German Constitutional Court had competence to pass on the validity of both laws and actions of some governmental agencies.

to the courts,⁵⁰ and therefore the judges can make policy decisions, although the form of judicial review is the same as the power to decide a concrete case. On the other hand, since freedom of speech is qualified on its face, some judges may regard "judicial activism" as judicial interference with legislative decision, and hence they may take the position of "judicial modesty."

B. Concord and Discord

The jaws of power during the reign of Syngman Rhee repressed freedom of speech and of the press inimical to the régime. *The Kyonghyang Shinmun Case*,⁵¹ which was in part assailed as a violation of freedom of speech and press under the Constitution of 1948, illustrates a phase of such situations.

On April 30, 1959, the Ministry of Public Information of Korea withdrew a publication license from *The Kyonghyang Shinmun*, one of the leading newspapers published in Seoul, in pursuance of its plenary power to license as granted by Military Government Ordinance 88 proclaimed during the American Military régime. The Ministry published a set of facts as grounds for the withdrawal: (1) On January 11, 1959, *The Kyonghyang Shinmun*, in its editorial entitled "the incoherent phase between the government and the government party," reported false facts, and thus brought about political chaos; (2) On February 4 of the same year, in its article on a majoritarian tyranny, it incited the people to revolt against Rhee's reign, denying the elective system prescribed by the Constitution, etc.

The Kyonghyang Shinmun brought an action before the Seoul Higher

⁵⁰"Judicial modesty" is equivalent to positive responsibilities, while "judicial activism" is directed to advance policy conceptions and protect values which are explicitly or impliedly enshrined in the constitutional order. From the standpoint of judicial modesty or judicial self-restraint, the court is not to interpret a constitution according to the judges conception of current political and social philosophies. Therefore, a strict and literal interpretation dominates judicial review. Fundamental rights are not interpreted beyond their express terms. The legacy of Justices Holmes and Brandeis of the Supreme Court of the United States is one of judicial modesty, so far as economic rights and theories are concerned. Their judicial posture shifts to judicial activism, as to civil liberties. In contrast to judicial modesty, "judicial activism" is governed less by canons of construction than by philosophic moods. It interprets the text of a constitution according to the intellectual and moral climate of the age. The main thrust of judicial activism is directed to protection of the values and objectives of a free and open society. The activists' concern for certain basic ideals, such as free speech and press and freedom of religion, evidences a resolution to employ the judicial power in a bold and aggressive way, to mould the constitutional order in accordance with the evolving ethos of a democratic society. Thus, the judicial activists are alert to making political decisions. See Kauper, *The Supreme Court: Hybrid Organ of State* ANNUAL REPORT G. STOREY LECTURE (1967); Freund, *The Supreme Court in Contemporary Life*, 19 S.W. L.J. 439 (1965).

⁵¹"The Supreme Court shall have the power to decide with finality the constitutionality of a law, when a determination of its constitutionality is pre-requisite to a trial." KOREAN CONST., art. 102 (1).

Court to revoke the administrative act of the Ministry of Public Information. At the same time, the plaintiff sought a preliminary injunction in order to avoid the excessive damages to be incurred from the administrative act.⁵² On June 26, 1959, the Seoul Higher Court issued the preliminary injunction sought by the plaintiff against the Ministry, to refrain from continuing its act of suppression.⁵³

At the moment that the preliminary injunction was issued, the employees of the newspaper returned to their work for publication of the evening edition of the same day. But the Ministry of Public Information, revoking its original act, shifted its hard blow to the daily newspaper to an indefinite suspension of its publication pursuant to the provisions of Military Government Ordinance 88. In this instance, the Ministry appended a few words to the acts which it had charged that the daily newspaper had committed: "These acts constitute a violation of law, for they are to subvert the national constitution and destroy public order . . ." ⁵⁴

The publisher again brought an administrative suit before the same court to revoke the later administrative act.⁵⁵ The plaintiff contended in its brief, that Military Government Ordinance 88 was unconstitutional, for it provided for licensing the press, withdrawing a publication license and suspending publication in violation of the constitutional provisions of freedom of speech and of the press, and accordingly petitioned to refer its contention to the Constitution Committee.⁵⁶ Rejecting such contention, the Seoul Higher Court dismissed the suit.

The Court stated that freedom of speech and of the press took the form of an ordered liberty, with such limitations as "except specified by law"⁵⁷ and "restrictions . . . only when necessary for the maintenance of public order or the welfare of the community,"⁵⁸ as stipulated by the Constitution. The Court continued to state that, in the light of such loopholes, licensing was not incompatible with the intent and meaning of the constitutional provision of freedom of speech and of the press.⁵⁹ By analogy to licensing, the Court held that revoking a license or suspending publication did not

⁵²No case book or report as to the Constitution has as yet been published in Korea.

⁵³The ADMINISTRATIVE PROCEDURAL LAW art. 10.

⁵⁴Cited in Um, *Freedom of Expression and Administrative Discretion*, 1 SEOUL L.J. 464 (No. 2, 1959).

⁵⁵*Id.*, at 465.

⁵⁶Cited in Um, *Id.*; K. Lee, *Jurisdiction of the Court on the Constitutionality of Military Government Ordinances*, 1 SEOUL L.J. 441-442 (No. 2, 1959).

⁵⁷See *supra*, note 46.

⁵⁸"Citizens shall not, except as specified by law, be subjected to any restrictions on the freedom of speech, press, assembly and association," 1948 CONST., art. 13.

⁵⁹*Id.*, art. 28, sec. 2.

depreciate freedom of speech and of the press.⁶⁰ Thus, the Court brought itself to conclude that Military Government Ordinance 88 was still in effect⁶¹ by virtue of Article 100 of the Constitution which affirmed the effect of existing laws and administrative ordinances prior to the adoption of the Constitution when deemed constitutional.⁶²

Turning to plaintiff's petition to refer the question of the constitutionality of the Ordinance to the Constitution Committee, the Court ruled that, since the Ordinance was an administrative order and not a law, under Article 81 of the Constitution considered as an element of the jurisdiction of the Constitution Committee,⁶³ the Ordinance did not come under the control of that Committee.⁶⁴ Consequently, in accordance with the provisions of Article 81, sec. 1 of the Constitution, granting the courts the power of reviewing administrative orders,⁶⁵ the matter was decided to be solely within the competent jurisdiction of the Seoul Higher Court.⁶⁶

Manifestly, the Seoul Higher Court did nothing to give heed to the deterrent effect of the statutory provision on freedom of speech and of the press. The Court's holding simply characterized the whole issue as an exercise of power. Further, it may be pointed out that the Court contradicted itself, for, notwithstanding its characterization of Military Government Ordinance 88 as an administrative order, it connived at the fact that freedom of speech and of the press were simply curtailed by an administrative order—Ordinance 88—in contravention of the constitutional mandate reading: "*Laws imposing restrictions upon the liberties and rights of the citizens shall be enacted only when necessary for the maintenance of public order or the welfare of the community.*"⁶⁷ Admittedly, "laws" mean "legislative enactments."

The case was taken to the Supreme Court. Despite the earnest appeal of the publisher, the Court did nothing to decide the case until after demise of the régime of Syngman Rhee.⁶⁸ The Court's self-abnegation allowed the speech right to be eroded to the point at which its restoration became impossible.

⁶⁰Um, *supra*, note 52 at 468.

⁶¹*Id.*

⁶²*Id.*

⁶³"Existing laws and administrative orders shall be in effect to the extent that they do not conflict with the Constitution." 1948 CONST., art. 100.

⁶⁴See *supra*, note 45.

⁶⁵K. Lee, *supra* note 54, at 442-443.

⁶⁶"The Supreme Court shall have jurisdiction finally to decide whether administrative orders, regulations and administrative acts are consistent with the Constitution and law." 1948 CONST., art. 81 sec. 1.

⁶⁷K. Lee, *supra*, note 54 at 443.

⁶⁸1948 CONST., art. 28, sec. 2 (Emphasis added).

The function of courts to refer questions of the constitutionality of legislative enactments to the Constitution Committee implied the power of judicial review, for only when they held a statute to be unconstitutional, did they refer the matter to the Committee.⁶⁹ Thus, according to law, the courts could concern themselves, as a practical matter, with deciding whether a statute squared with the Constitution. Rendition of such decisions was treading on unfamiliar ground for the judges of Korea. They did not have such a legal heritage. The line of the growth of individual liberties and right could not be gathered from their experience. Hence, their self-abnegation allowed freedom of speech to be eroded, and also drew the speech right into the vicissitudes of political controversy.

Consequently, the courts seem to have been governed only by personal idiosyncrasy, not by fusion of a sense of history, of a logical faculty, or of the practical ends to be achieved. We may assume that the civil-law judges are governed only by canons of construction, not by philosophic moods. A strict and literal interpretation dominates their judicial technique in the field of constitutional law. Here, the judges may adhere closely to a concept of legal positivism—"in accordance with law." Their judicial posture tends to characterize the main issue of a case before them as an exercise of power, even when they are granted the power of judicial review.

C. The Concept of a Basic Freedom in Democracy and A Judicial Formula

1. Introduction

In the case of *Kyonghyang Shinmun*, no concrete judicial formula evolved. In that case, the judges did not seek to shape a usable test to secure freedom of speech and of the press. And so far judicial formula like, for example, the clear-and-present-danger test espoused by the Supreme Court of the United States,⁷⁰ has never been worked out. The Constitution contains in itself the phrases for making tentative decisions necessary to secure, and at the same time to limit, individual rights. The Constitution provides: "Liberties and rights of the citizens may be restricted only in cases deemed necessary for the maintenance of order and public welfare."⁷¹ No distinction is made in this provision between restrictions on economic rights and those on civil liberties, but consideration of values in

⁶⁹By judgment in its favor, the *Kyonghyang Shinmun* resumed its publication.

⁷⁰See *supra* note 46.

⁷¹Most constitutional law professors in Korea take the position that the clear-and-present-danger test expounded by the Supreme Court of the United States should be applied to the interpretation of the constitutional provision of freedom of speech or of the press in Korea. But it has not been adopted by the courts.

the realm of civil liberties leads to the conclusion that the courts have a constitutional mandate to apply a "double standard" between economic rights and civil liberties, and hence freedom of speech. Without a double standard, freedom of speech can be curtailed on slender grounds, for "order" and "public welfare" are too broad to define, and it is therefore necessary to create a precarious "double standard."

2. Preferred-Position

Free men talk about their government, not in terms of its *favor* but in terms of their *rights*. Indeed, freedom of public discussion is the rock on which a democratic government stands.⁷² Freedom to think as we will, and freedom to speak as we think, are means indispensable to the discovery and spread of political truth. In other words, free speech about public questions is as important as is the heart to the human body.⁷³ As a consequence, the test of legislation which collides with freedom of speech must be much more definite than the test when economic rights are involved.

A good case can be made for the viability of the preferred position of freedom of speech from the language of individual rights and liberties. The economic proprietarian safeguards are couched in the most general terms:

The rights of property shall be guaranteed. Its *contents* and restrictions of property shall be determined by law.

*The exercise of property rights shall conform to the public welfare . . .*⁷⁴

The right of private property implies the social reservation in itself, and a fundamental social doctrine by which the use of property is subject to the needs of the community is connoted. Hence, the right of private property is subjected to public regulation when the public needs require.⁷⁵ Further, its exercise, whether affected with a public interest or not, is morally bound to conform to the public welfare.

On the other hand, the terminology governing freedom of speech and of the press is precise, as stated.⁷⁶ Even if freedom of speech implies a social interest, the language in which the guaranty is phrased is much more explicit than that of the right of private property.

The Constitution provides for the "right to live" which is closely related to the right of private property. Article 30 of the Constitution provides:

⁷²KOREAN CONST., art. 32, sec. 2.

⁷³See MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 91 (1948).

⁷⁴Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 301-302 (1941) per Justice Black, dissenting.

⁷⁵KOREAN CONST., art. 20.

⁷⁶For its American vision see *Nebbia v. New York*, 291 U.S. 502, 523 (1934).

"All citizens shall be entitled to a decent human life." Thus, the State is under a political obligation to enact laws, so far as possible, to enable people to enjoy a decent standard of living. Although, being not mandatory,⁷⁷ it may not be enforceable judicially, its vitality is encouraged by various social fictions or the tautologies for social justice in constitutional provisions.⁷⁸ With this, the State is bound to let each individual have the portion of property necessary for a decent life. For this purpose, the content of property is determined by law for the economic life of all people. As a result, it may be said that property is dehumanized to some extent, in that property is socially limited by the constitutional contexts. Of course, the ideal of a decent human life is not confined to the economic sphere. It is also extended to the cultural sphere.

As a philosophical grounding of speech, the Constitution, as stated, secures "dignity and value for human beings."⁷⁹ The dignity and value of the individual, as the important substantive values, must give coherence to the interpretation of the Constitution. They are the nucleus of individual rights and liberties which are accredited with super-positive validity.⁸⁰ As a consequence, a logical consideration of freedom of speech in connection with such dignity and value reveals that freedom of speech in and of itself connotes freedom to think as the individual wills, and freedom to speak as he thinks. The crest of the wave of the individual interest is always moving. Here, freedom of speech is essential to the security of the demands and feelings of the individual. And freedom of speech is the matrix for the flourishing of other freedoms.

In addition, restrictions on freedom of speech tend to clog the very political processes normally relied on for peaceful change, and freedom of speech offers a democratic alternative to the judicial veto of legislation.⁸¹ As a matter of fact, the Seoul Higher Court in the case of *Kyonghyang*

⁷⁷KOREAN CONST., art. 18.

⁷⁸In the answer to the first of the questions of judicial enforcement, attention should be paid to judicial determinations as to what constitutional provisions are mandatory and what directory. The term "mandatory" is used to include only those provisions of a constitution which are enforceable against a department of government by some means outside of the department itself. On the other hand, The term "directory" is used to include those not so enforceable. For further discussion see Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54 (1931).

⁷⁹Besides the constitutional provision as to the right of private property, the Constitution provides for restrictions on farm land: "Agricultural tenancy shall be prohibited in accordance with the provisions of law;" (KOREAN CONST., art. 113). "The state may impose restrictions or obligations necessary for the efficient utilization of the farm and forest land in accordance with the provisions of law." *Id.*, art. 114.

⁸⁰*Id.*, art. 8.

⁸¹See Abe, *A Problem Concerning the Interpretation of a Constitution*, 76 HOGAKU-RONSO (KYOTO L. REV. in Japan) 194 (Nos. 1 & 2, 1964).

Shinmun did not hesitate to define freedom of speech and of the press as basic freedoms in a democratic society, despite the fact that it allowed the right to be eroded. Also, the Constitution provides for the "initiative and referendum" with regard to amendments.⁸² The initiative and referendum presuppose freedom of speech and of the press. Indeed, freedom of speech is the "multilation of the thinking process of the community,"⁸³ and basic to the process of political flux.

Here we can conclude that the Supreme Court has a constitutional mandate to apply the preferred-position test.⁸⁴ This is the minimum requirement reasonably implied in the Constitution.

IV. A Witch Hunt of Subversive Activities

A. Ideological Reaction to Communism

Regarded from a geo-political view, anti-subversive laws are aimed at protection of the country from Communist subversive activities or the like. The most stringent of Communist control laws came into being in 1961 with the enactment of the Anti-Communist Law which was designed to outlaw individual Communist activities. In the previous year, just after the downfall of Syngman Rhee, the legislature had enacted the National Security Law⁸⁵ which was directed at outlawing a subversive activity or activities of a subversive group.

Aside from such legislative controls of subversive activities, looking toward the preservation of the "basic democratic order," the Constitution itself renders the existence of a Communist party illegal, regardless of its aims. The Constitution provides:

The establishment of political parties shall be free and the plural party system shall be guaranteed.

Organization and activities of a political party shall be *democratic*, and political parties shall have all such necessary organizational arrangements as will enable the people to participate in the formation of political ideas.

Political parties shall enjoy the protection of the State. However, if the purposes or activities of a political party are contrary to the *basic democratic*

⁸²See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, *n.* 4 (1938), per Justice Stone.

⁸³"A motion to amend the constitution shall be introduced . . . by the concurrence of five hundred thousand or more of the voters eligible to vote for the members of the National Assembly." KOREAN CONST., art. 119 (1). "After an amendment to the Constitution has been adopted, it shall be submitted to a national referendum within sixty days, and shall receive the affirmative votes of more than one half of votes cast by more than one half of all voters eligible to vote for the election of the members of the National Assembly." *Id.*, art. 121.

⁸⁴See Meiklejohn, *supra*, note 71 at 26-27.

⁸⁵The presumption of unconstitutionality of a law restricting freedom of speech may exist, and the burden of proof is cast on the person upholding the constitutionality of the law. See *supra*, note 80.

order, the Government shall bring an action against it in the Supreme Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Supreme Court.⁸⁶

In libertarian democracy, general political parties are effective agents of the democratic process only when they present unfettered ideas.⁸⁷ In keeping with that tenor, the Korean Constitution contrives a special measure for protecting political parties from the jaws of government power.⁸⁸ However, the Constitution makes efforts to restrict human rights in such a way as to make them unavailable to the enemies of the *basic democratic order*. The basic democratic order means the basic libertarian-democratic order of the Constitution, which enshrines the sovereignty of the people and individual liberties and rights.⁸⁹ The demolition of the basic democratic order results from bringing about destruction of the identity of the Constitution which may expose the security of the nation to danger. The basic democratic order is aimed at preventing the emergence of totalitarian methods which might in turn result from constitutional stress on social goals and their implementation through socialization⁹⁰ and the rising of Communism. But the Constitution seems to insist on an ideological reaction to Communism rather than to totalitarian methods. As a consequence, the Constitution attempts to devise a witch-hunt against Communism.

When the purposes of a political party are in contravention of the basic democratic order, the government may bring an action before the Supreme Court for the dissolution of the political party.⁹¹ The purposes of a political party are not only embodied in the Constitution of the political party, but are also deduced from contexts of the party's organ, or the activities of its components.⁹² When the activities of its components are contrary to the basic democratic order, the nexus between the party and its components can stand, and here party subversive activity may be allowed to stand.⁹³ In

⁸⁶The first National Security Law had been enacted in 1958, but the Law was entirely revised in its structures in 1960.

⁸⁷KOREAN CONST., art. 7.

⁸⁸Cohen and Fuchs, *Communist Challenges and the Constitution*, 34 CORNELL L. Q. 352 (1949).

⁸⁹KOREAN CONST., art. 7. 88 Mun, *supra*, note 42 at 341.

⁹⁰See Friedlich, *Political Theory of New Democratic Constitution*, in *Constitutions and Constitutional Trends Since World War II* (Aurcher ed. 1951) 18.

⁹¹KOREAN CONST., art. 7.

⁹²Mun, *supra*, note 42 at 342.

⁹³The government can use all available legal sanctions provided by anti-subversive laws against political offenders. And if the political offenders belong to a political party, party subversive activity will be allowed to stand, and the political party may be dissolved by the decision of the Supreme Court in accordance with Article 7 of the Constitution. In this case, the political party will be considered to be a subversive organization.

this connection, the Constitution takes preventive measures against the rising of anti-democratic parties.⁹⁴

B. Forensic Approach

Truly, the enormity of the difficulty of any attempt to establish a judicial formula in the area of freedom of speech is apparent. The courts' approach is simply to interpret anti-subversive laws in accordance with the general rule of criminality. Thus, at the present, the protection of freedom of speech comes about from a strict interpretation of anti-subversive laws and through ensuring procedural safeguards. By so doing, the courts can cast their weight on the side of modernizing anti-subversive laws.

According to anti-subversive laws, anyone who instigates or propagates with intention, under instructions from an anti-state group, or as a member thereof, to organize a subversive group or association for the purpose of having it teach and advocate the overthrow of the government by force and violence, is subject to punishment.⁹⁵ And anyone who praises or encourages the activities of an anti-state organization or its components or world Communist movements is also punishable.⁹⁶ Words and intention are punishable for their own sake in accordance with the rule of criminality.⁹⁷ Moreover, the membership clause of the Anti-Communist Law makes punishable active, knowing membership in any organization which praises the activities of an anti-state organization or its components or world Communist movements.⁹⁸

As the history of judicial policies indicates, "it is procedure that spells much of the difference between rule by law and rule by whim or caprice."⁹⁹ Steadfast adherence to strict procedural safeguards may be the main assurance that there is equal justice under law.¹⁰⁰ And strict interpretation of such anti-subversive laws is very important. Nevertheless, this is not enough: "Statutory interpretation may cloak a policy of stubborn judicial negativism."¹⁰¹ Statutory interpretation at best means that every interest with regard to which the legislature is competent to make laws, is to prevail over the interests of free speech, and thus freedom of speech may lose its

⁹⁴Mun, *supra*, note 42 at 342.

⁹⁵NATIONAL SECURITY LAW art. 4.

⁹⁶ANTI-COMMUNIST LAW art. 4 (1).

⁹⁷Acts done intentionally are punishable. KOREAN CRIMINAL CODE art. 13.

⁹⁸ANTI-COMMUNIST LAW art. 4.

⁹⁹Joint Anti-Fascist Refugees Committee v. McGrath, 341 U.S. 123, 179 (1951), per Justice Douglas, *concurring*.

¹⁰⁰*Id.*

¹⁰¹McKloskey, *The Supreme Court Finds a Role: Civil Liberties in the 1955 Term*, 42 VA. L. REV. 735, 756-757 (1956).

virility. Here substantive bars in the subversive field are required to be erected in accordance with the provisions of the Constitution.

Individual liberties and rights may be restricted only in cases deemed necessary for the maintenance of order and public welfare.¹⁰² In this context, the meanings of the maintenance of order and public welfare are closely linked to protecting individual liberties and rights. Many¹⁰³ have subscribed to the meaning of the "maintenance of order." It comprises the constitutional order and the social order. Since the Constitution does not envisage the individual being left free to follow his selfish interests in competition with other individuals, without interference from the government, individual liberties and rights may be limited when the exercise of individual liberties and rights runs afoul of the constitutional order and/or the social order. Subversive activities are in contravention of the constitutional order, and hence they may constitutionally be repressed. But since the Constitution is not the source but the consequence of individual rights, the scales must be tipped to the interests of the individual.

Let us turn to examine the maintenance of public welfare. "Public welfare" is really incapable of definition. Indeed, "since Bentham's greatest happiness of the greatest number and Karl Marx's universal satisfaction of needs in accordance with universal wants, both obsolete in their vagueness and the latter also in its sole means of realization, there has been no attempt to transpose the concept of public welfare into the contemporary context."¹⁰⁴ The essence of public welfare is the individual responsibility to one's community. But the stable core of public welfare is still regarded as being aimed at the individual interest, for the Constitution does not seek the glory of the state or of society. The Constitution of Korea provides: "It shall be the duty of the State to guarantee the fundamental rights of the people to the utmost."¹⁰⁵ Furthermore, the Constitution emphasizes this concept: "In case of . . . restriction, the essential substances of liberties and rights shall not be infringed."¹⁰⁶ Again, in connection with the maintenance of public welfare, the scales must be tipped toward the individual interest in freedom of speech.

The courts are called upon to decide whether the state has a "compelling

¹⁰²KOREAN CONST., art. 32, sec. 2.

¹⁰³Kim, *Guaranty and Limitation of Fundamental Rights*, 7 SEOUL L.J. 60-61 (No. 1, 1965).

¹⁰⁴Volar, *The Concept of Public Welfare—An Historical-Comparative Essay*, 8 AM. J. COMP. L. 44 (1959).

¹⁰⁵Art. 8.

¹⁰⁶Art. 32, sec. 2.

interest" deemed *necessary* for the maintenance of order and public welfare in limiting freedom of speech. In other words, interests in freedom of speech are to be weighed against "competing interests" in national security.¹⁰⁷ If an overriding and compelling state interest is not found in limiting freedom of speech, the plain constitutional mandate of freedom of speech would be paralyzed.¹⁰⁸

Be that it may, "order" and "public welfare" may give a great amplitude of discretion to the judiciary. Thus, the issue of reasonableness can be made a justiciable one. It is for the Supreme Court, in its discretion, to apply the standard of reasonableness and of the restraint thereunder.

Conclusion

In Korea, as was pointed out in the Introduction, the Supreme Court was granted the power of judicial review in 1963. Thus, a seed has been sown. Even in a country which does not have a legal tradition, it is the court which can best protect the rights of minorities which tend, in turn, to become submerged in the political processes of government. As a matter of fact, the other branches of government, precisely because they are political, may and do find it difficult at times to withstand the pressure of majority opinion.¹⁰⁹ "Judicial oligarchy" is different from the tyranny of the majority.

If the Supreme Court of Korea continues merely to apply broad tests—the order test and public-welfare test, freedom of speech may lose its vitality, and is subject to the power of the legislature to make con-

¹⁰⁷Theoretically speaking, the balancing-of-interests test puts the whole interest in national security on one side of the scale, and the particular interest of the particular individual on the other; and hence it is difficult to see how the impartiality of such judgments can be assured, unless the courts abandon *ad hoc* balancing. For further discussion, see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1966).

¹⁰⁸In the United States, Justice Frankfurter attempted to turn the Supreme Court toward his initial balancing manifesto instead of the clear and present danger test and the preferred-position test. The Justice did so not only in political-speech cases but also in association cases. The balancing-of-interests test has never been adopted by the majority of the Supreme Court of the United States in speech cases, but the Court has applied the test to freedom-of-association cases. Since "association" presupposes "organization," freedom of association connotes the concept of some sort of physical act. Therefore, the advocacy of violence may be more dangerous when it comes out from members of an efficient, purposeful, and semi-clandestine organization than when it is spoken by an isolated soap-box orator. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Gibson v. Florida*, 83 S. Ct. 889 (1963); *N.A.A.C.P. v. Butten*, 83 S. Ct. 328 (1963); *Konisberg v. State Bar of California*, 366 U.S. 36 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959).

¹⁰⁹*Miller and Howell, The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 694 (1960).

travening laws. This is particularly true with speech in political matters when such factors as pressures, passions and fears about Communism arising from the international political climates exist. If "the calmer times" of which Justice Black of the Supreme Court of the United States spoke in the *Dennis* dissent¹¹⁰ prevail, freedom of speech must be given a preferred place as against national security.

¹¹⁰*Dennis v. United States*, 341 U.S. 494, 581 (1951).