

Constitutional Populism in Korea

A Curious Dream Of Realizing
Democratic and Constitutional Ideal
through the Military Dictatorship

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Abstract

This article examines Constitutional populism in Korea focusing on Han Taeyeon's constitutional theory. Han is one of the most eminent constitutional theorists in Korea whose works have dealt with political issues within the boundaries of public law. He also took part in the Park Junghee regime as an ideologue to legally legitimize the regime. His main theme concerned how the people could be established as the protector of sovereignty in undeveloped Korea, which was a critical and urgent agenda for constitutional theory. He criticized the political situation and legal system in the 1950s in this respect, and advocated, by the concepts and languages of public law, the May 16 coup d'état in 1961 as a decisive step to redeem people's sovereignty and the legal system. Since then to the Yushin regime in 1971, Park's populist regime was legitimated under the ideal of people's sovereignty by Han.

Keywords

Constitutional populism, people's sovereignty, Han Taeyeon, democracy

The Portrait of a Constitutionalist

There exists a familiar scenario of being born in colonial Korea, receiving college education in Japan, and settling at the center of political, business, or academic circles after liberation. In particular, it is impossible to comprehend without the protagonists of this scenario how Korean society from the 1950s to the 1970s established its national framework. Their importance becomes all the more prominent if the scope is narrowed down to the realm of intellectual history. The influence of those who studied in the Japanese empire on the early period of academia cannot be overemphasized, even if one turns to humanities and social sciences or even natural science. Among them, constitutional scholar Han Taeyeon holds an unrivaled position. This is true in terms of his vigorous writing activities and outstanding achievements from the 1950s to the end of the 1990s, but also true in terms of his deep involvement in the formation of a legal system as an engaged intellectual amid the tumult of modern history. Han participated in the enactment of the Constitution of the Second Republic, the Third Republic, and the Yushin Constitution. He also became a politician during Park Junghee regime, and later served as the chief editor of a newspaper company, exercising vast influence across the society. In this sense, Han's life can be said to provide a unique example of how knowledge and politics are implicated in Korea after its liberation from Japanese colonial rule in 1945.

Of course, like Han Taeyeon, there are many intellectuals who form close relations with the regime and “engage” in real politics. However, the reason why this article pays close attention to Han Taeyeon, in particular, is to gain a historical view of populism in modern Korea. As will be discussed in the coming pages, populism is a concept that refers to the phenomenon of developing politics or governance through appeals to and mobilization of people by dissolving parliamentary-centered institutional democracy. Populism has appeared in various forms in the political history of the twentieth century at a global level, including Nazism and Italian fascism in the 1930s, the development of popular democracy in Latin America, the recent Trump phenomenon, Brexit, refugee aversion in Europe and the advancement of the extreme right. Korea, of course, is no exception. The establishment of

the Rhee Seungman regime was made possible by a thoroughly populist mass mobilization, and the military regime since Park Junghhee formed its governance in a direct combination of the president and the people by neutralizing the power of parliament. From this context, it appears that the governing paradigm of modern Korea has been government-manufactured populism.

Han Taeyeon's intellectual pursuit took place in the middle of a trend towards constitutional populism. He tried to demonstrate the development of government-manufactured populism through the concept and category of Constitutional theory, and also designed a legal system for such a governing paradigm. The following scene, reminisced by Han himself, is an example that dramatically exhibits his intellectual pursuit.

This gentleman [Lieutenant colonel Lee Seokjae: citator] came in his uniform, armed with a pistol. He told me to make a revolutionary Constitution. [When I replied that it wasn't possible: citator] he asked what could be done. So I said I'd study it the next time as an alternative and sent him back. After sending him back, no ideas came to mind. Then, one idea was hitting me, that is, the process Hitler encroached upon the Weimar Constitution after he took power: it was so called "the enabling law" which was to remove the authority of the people and the state. This law, so to speak, is known among scholars as the Weimar Republic having enacted a law by which Nazi demolished the Constitution. With this, Hitler began to complete the dictatorship. That law was my hint, and I started to work alone for a week at a small hotel in Hyewoondong, which is now gone. [. . .] The law of emergency for state restoration is what was created from this (Han T., "Retrospect" 34-35)

This scene may be regarded as a shameless retrospection of a government-patronized scholar who collaborated in a coup d'état. However, the scene also stimulates a strong imagination set in the modern and intellectual history of Korea; that is, how populism, constitutionalism, and democracy have been muddled under the military regime, and how Han Taeyeon attempted to present the reasons for the making of a Revolutionary constitution. This is beyond an intellectual scandal, rather a desperate effort by the intellectual to establish stable political and social order for his undeveloped country that had suffered under colonial rule. Of course, justifying the

reasons for making a Revolutionary constitution should not be acknowledged. But, at the same time, it could not be simply blamed for collaboration with the dictatorship because Han was participating in the military regime to realize his ideal as a sincere democrat and constitutionalist. The following parts discuss the tangled involvement between populism and constitutional theory in modern Korea by tracking down Han Taeyeon's intellectual pursuit. First of all, let us review Carl Schmitt's discussion on people's sovereignty and populism, which had a profound impact on Han's constitutional theory.

People's Sovereignty and Populism

"All power comes from the people" (Article 1 of the Constitution of the Republic of Korea). Although constitutional expressions vary from country to country, this principle of people's sovereignty is the first principle shared by all democratic countries. The problem is the people. No need to quote Rousseau because it is well known that the people are not a simple sum of individuals. The people must be a single entity with one will, and it must know no division or part. However, people's sovereignty is always institutionalized and functionally divided in spite of its unity. Because the people as unity can never exercise direct power, they must always execute power through persons or institutions. This is why the legal system, as best enshrined in the constitution, is the basis of governance in a democratic system. People's sovereignty is only exercised indirectly through the closely organized division of functions through the legal system.

But the "people" are a "temptation" for a direct intervention in a democratic government system. Even though the protocol of modern political principles stipulates an indirect rule that presupposes the impossibility of direct democracy, history shows that democracy has not quelled the desire for direct rule by the people. The numerous people's uprisings in history have been regarded as the manifestation of direct democracy, and for those who dream of revolution, the directness of a single, unified people have been a strong basis for overthrowing the regime. Those who accept the temptation within themselves depict the presence of people in a way that would be called "political phenomenology." This was true for the general strike of

George Sorell, who tried to prove the people's existence by stopping the world in an instant, and Walter Benjamin, who cited Sorell and configured the directness of the people in the form of the divine violence, and V. I. Lenin, who led a unified revolution by overlaying the last human figure of the proletariat by steel. Similarly, Carl Schmitt also opposed the manifestation of the people to counter the liberal democratic constitutional state. But for Schmitt, this was not for a revolution; rather, it was an attempt to defend the power of the constitution from liberalism:

“People” is a concept that becomes present only in the public sphere. The people appear only in the public, and they first produce the public generally. People and public exist together: no people without public and no public without the people. Only the present, truly assembled people are the people and produce the people. The correct idea that supports Rousseau's famous thesis that the people cannot be represented rests on this truth. They cannot be represented, because they must be present, and only something absent, not something present, may be represented. As a present, genuinely assembled people, they exist in the pure democracy with the greatest possible degree of identity. (*Constitutional Theory* 272)

Schmitt defines the gathering of the people in the public square as the people themselves and the public themselves and states that people who have manifested this way perform their own unique activities. It is called “acclamation.” Through cheers or silence in the public square, people decide for and against the leader or a certain proposal. In other words, ‘people = the public = acclamation’ is the present state in which people's sovereignty, which is the basis of democracy, exists. As a result, “to Schmitt, acclamation is the pure and direct expression of the people as a constituent democratic power” (Agamben 171). Agamben evaluates Schmitt's strategy of reconstructing the genealogy of acclamation as follows:

Schmitt's strategy is clear. He acted as the theorist of pure direct democracy by borrowing from Erik Peterson the constructive function of the liturgical acclamation. Through direct democracy, he aimed to counter the liberal democracy of the Weimar Republic. [. . .] The acclamation of the people

who are directly present is the opposition to the liberal practice of secret voting. (172).

To summon the genealogy of acclamation, therefore, is to confront direct democracy to the liberal practice or system of democratic republics. Carl Schmitt tried to overcome the political turmoil of the Weimar Regime through this strategy. For him, the political turmoil of the Weimar Regime was equated to the chaos of the liberal parliament. The incompetence of parliament, marked by “eternal chatter” (*ewigen Gesprache*) rather than political determination, was unlikely to overcome the disintegration from the defeat. Carl Schmitt’s works in the 1920s, ranging from *The Dictatorship* (*Die Diktatur*, 1921) to *Political Theory* (*Politische Theorie*, 1922) to *Constitutional Theory* (*Verfassungslehre*, 1928), were all interventions to this situation. He demanded the president’s dictatorship based on Article 48 of the Weimar Constitution as a way to overcome the parliament’s incompetence; here, dictatorship refers to a provisional state of rule in which the constituent power, from which the constitution originates, remains valid while the constitutional law as a written statement is suspended from effect (Schmitt, *Dictatorship*). The acclamation of the people is requested here. He seeks the justification for the president’s dictatorship from the stark manifestation of people’s sovereignty, or the acclamation of the people.

Recent research overlaps with such context in that populism is not simply an anti-democratic pathological phenomenon, but a challenge or an appropriation to democracy in the form of a shadow/periphery/ghost (Canovan; Akkerman; Arditì, “Populism, or Politics”; Arditì, “Populism as a Spectre”; Taggart; Mudde). From the standpoint of institutional democracy with the constitution as its highest standard, populism is clearly a pathological phenomenon that destroys democracy. This is because populism radicalizes and disintegrates norm/debate/compromise/agreement as the political process of determination/shouts/antagonism/confrontation. However, recent research deviates from this structure and regards populism as a “constant” of democracy. Although normative positions vary, most recent research places populism at the critical point of democracy; this suggests that

the situation in which direct governance/movement appears at the forefront by bypassing various institutions of democracy, including parliament, is a conventional mechanism rather than a pathology. In other words, the temptation of the people mentioned above is already embedded in democracy in the wake of populism.¹

If we move this back into the context of Schmitt's constitutional theory, democracy and populism can be understood as the relationship between the constitutional system and constituent power. This relationship is one of "the state of exception" in which the "people's acclamation" appears naked and the "normal state" under the legal system based on the Constitution is suspended. Of course, not all populism results in exceptions such as revolution, unrest, and war. The important fact, however, is that populism's phenomenal feature always emphasizes the crisis of the current system, abhors external enemies, and asserts the unity of the people. Populism also crystalizes all of this as a single personality, manifesting the people's acclamation with the charisma of the leader. As such, populism always uses the rhetoric of exception and dictatorship and accuses the current system of serving the interests of certain groups and not the people. Thus, the people's acclamation, which makes the Constitution and the system possible, is summoned in populism. In this context, Carl Schmitt had theorized the dynamic relationship between populism and public law.

Since the enactment of the Constitution in 1948, the constitutional history of Korea experienced several constitutional revisions. In this process, especially in the process of amending the Constitution in the 1950s and 1970s, populism has always been at the center of political dynamics over revisions. This was the case with so-called the Busan political turmoil in 1951 and the discussions around April 19, 1960 and May 16, 1961), and this paradigm reached its peak with the Yushin Constitution of 1972. It was typically entered into public law mainly through discussions on the executive power system, namely over the cabinet system or presidential system. In this context, Korea's populism from the 1950s to the 1970s can be seen to have developed in a way that exceeded the governing method, hegemony strategy, rhetoric, and political movements. As will be discussed below, the

rulers of the time have attempted to reshape the power structure through constitutional revision, and showed a typical aspect of government-manufactured populism that summoned the people as sovereigns. In this sense, what is characteristic in modern Korea is that populism develops in line with the discussion of constitutional amendment. In that process, a prominent constitutional scholar named Han Taeyeon always made an appearance. Perhaps it is no coincidence. Han Taeyeon, who had repeatedly made intellectual reflections under Carl Schmitt's great influence, captured Korea's situation at the time in the frame of Schmitt's theory of sovereignty.² It is now time to turn to Han Taeyeon's intellectual pursuit.

People's Sovereignty Without the People

"There was one formula in our country in the era of the Liberal Party government. The presidential system was dictatorship, and the cabinet system was liberal. That was the formula. Regardless of whether the parliamentary system was suitable for the nation's reality, the free political system was common practice in Korea at that time." (Han T., "Retrospect" 26). That was how Han recalled the situation around April 19, 1960. It was not a mere arbitrary judgment. For example, another public law scholar said the following shortly after May 16, 1961, one year after April 19, 1960. "Of course, the logic cannot be established that the presidential system must flow to dictatorship and that only the cabinet system is democratic, but it was an undeniable fact that the presidential system had helped the dictatorship of the Rhee Seungman regime in Korea's reality, so it was a fact that anyone could predict that the presidential system would be subjected to change along with the end of the Rhee Seungman regime." (Kim N. 204). It was, thus, a matter of course that the transition from the presidential system to the cabinet system was the natural consequence of democratization after April 19. That is why the constitutional amendment after April 19 naturally adopted a parliamentary cabinet system, the process of which Han Taeyeon deeply intervened in. Let us entertain the recollection of the time.

After the April 19 Revolution, the National Assembly Constitution Establishment Committee was formed, and Professor Park In-hwan and I went out as expert members. I worked on the constitution for weeks in a quiet villa over at Mapo, and the parliamentary cabinet system was one of the opposition party's party policies at that time. What surprised me, however, was that, although these people have a great opportunity, they don't know what the party policy of a parliamentary system is. [. . .] I did it, but I felt it didn't fit our reality. [. . .] The Constitutional Court system of the Second Republic was something we insisted on. It is no exaggeration to say that the expert members were in control of the parliamentary cabinet system at that time because members of the National Assembly were not familiar with it. The result was a failure. We faced failure because it didn't fit our reality. (Han T., "Retrospect" 26)

According to Han Taeyeon, the parliamentary system at that time was a fancy dress that did not fit the Korean people. This is not simple consequentialism. Han Taeyeon had already repeatedly stated in his writings in the 1950s that the parliamentary-politics-centered parliamentary system does not fit the situation in Korea, raising issues of democracy, parliament, and political power in Korea. To begin with, he said the following about parliamentary politics: the reason why parliamentary politics "is regarded as an indispensable system in the democracy of reality is that the owner of a conflicting intent forms a social agenda in a public place in the course of a compromise through discussion and refutation. Therefore, there is no doubt that it is an institutional expression of relativism, which is the basis of democracy. This is especially true when the politics of reality, especially in the context of this parliamentary system, are dominated by the majority party of the parliament." (Han T., "Democracy" 15)

Parliamentary politics with openness and relativism as physical and spiritual principles embody the will of the people through debate, refutation, and compromise. Therefore, Han Taeyeon had already asserted at the time that "deliberate democracy" was the key to parliamentary politics. However, in the article cited above, he is pessimistic about the possibility of parliamentary politics settling in Korea. This was very natural. At the time, even ordinary rule, let alone parliamentary politics, was incomplete amid the ravages

of war in the Korean Peninsula. In particular, the series of disturbances, referred to as the “Busan political turmoil,” was enough to imprint that a deliberative democracy consisting of openness, relativism, and debate-refutation-compromise was an illusion that Korea could not even imagine. Han must have witnessed this chaos and observed the collapse of institutional democracy, which has the constitution at its peak, even before it was settled. The experience of the “Busan political turmoil” in 1951 made him sure that parliamentary politics was a fancy dress for Korean People.

On February 9, 1951, Rhee Seungman mentioned the amendment of the direct presidential election system at a press conference. He expressed his willingness to push for a revision of the Constitution that prescribed the president election in parliament. To that end, Rhee Seungman and the “Jokcheong (Korean National Youth Association)” faction launched operations and campaigns to promote the constitutional amendment in and outside the parliament. At this time, Rhee mobilized young people from the Jokcheong to organize a government-inspired demonstration for the constitutional revision of the direct presidential election system. Their slogans included “Let’s overthrow members of the National Assembly who are scheming for a dictatorship of the parliament,” “Sovereignty lies not in the National Assembly but in the people,” and “Direct presidential election is the people’s right.” Based on such anti-parliamentarism, Rhee launched a campaign to summon members of the National Assembly, which was not in the law. He confidently justified the suspension of the National Assembly by stating that “There is no condition in the Constitution to summon members of the National Assembly, but there is no condition not to summon them, so there is no one to stop voters, who are the owners of a democratic state, both theoretically and legally from summoning their representatives. In a democratic country, the country is created by the people and the Constitution is created by the people, so if the people want it, they can correct anything, be it the Constitution, government, or National Assembly.” The National Assembly responded by saying that “There is a fear of tilting in the direction of dictatorship,” and that they are “denying the current Constitution and current laws, which are the basic conditions of a democratic constitu-

tional state.” This confrontation was the primary cause of the Busan political turmoil (Fujii 335–46).

Later, the National Assembly passed a constitutional amendment bill with the parliamentary system as the framework, which led Rhee to mobilize organizations from below to stage anti-parliamentary demonstrations and declare martial law to arrest a number of members of the National Assembly. This is the so-called Busan political turmoil. It goes without saying that this Busan political turmoil was the epitome of populist political terrorism. This was the case behind Han Taeyeon’s claim that the parliamentary system was a fancy dress that did not fit the Korean people. In his view, parliamentary politics was the product of bourgeois liberalism born in Western historical experience. “Parliamentarism has been a political stage of the citizen class with sophistication and property in terms of intellectual history” and it has been established “to ensure the political freedom of citizens who are at odds with state power” and developed into a political norm, namely the constitution, that “sets the limits of power execution by the basic rights” of citizens (Han T., “Protection” 6). However, among the discussion of the Korean Constitution, the discussion on the executive power structure (namely the discussion between the cabinet system and the presidential system) was not made in this context. That was because it had been “degenerated” as a discussion for the reinforcement of the president and administrative power.

It should be noted that the principle of separation of powers in our Constitution is not for the “political freedom” of the individual, as in the U.S. Constitution, but for the strengthening of the presidential system and administrative power. Needless to point out, the principle of the separation of power in modern constitutional law does not work as a principle of power structure, but rather it has an institutional mission to serve the basic right to guarantee an individual’s “political freedom.” On the contrary, the principle of the separation of power in our Constitution does not act as a “principle of freedom” serving the basic rights of individuals, but rather as a “principle of power” to strengthen the presidential system and administrative power. This is the spiritual distinctiveness of our Constitution. (Han T., *Law* 18)

Since the enactment of the 1948 Constitution, including the Busan political turmoil, the Korean Constitution experiences five proposals of constitutional amendment and two major constitutional amendments. In the process, the power structure changed in a way that reinforced the executive power of the president: “The Constitution does not mean an objective ideology or value that can sum up the people as the greatest common factor, but rather it means a mere personal tool for the political convenience of the real-life politicians.” As a result, this led to “a consequence in which the president of our constitution possessed more authority than a monarch of a constitutional monarchy,” and thereby created an “an unimaginable concentration of power in the modern liberal democratic constitution” (Han T., *Law* 19). As such, he strongly criticizes the ‘process of constitutional degeneration’ that weakens the parliament and maximizes the president’s power. What should be noted here is where Han Taeyeon is looking for the cause of such degeneration: it is the “absence of the people”:

In this way, the Constitution means “promised ideology.” In spite of that, in order for it to be enhanced as the highest norm that governs the order of state in reality, it needs the existence of a political force behind it, one that guarantees the value and normality of the Constitution. It goes without saying that in a modern nation, such political force is the general public with a democratic consciousness. [. . .] However, in a politically backward country like Korea, even though the Constitution is a civil constitution enacted by the people, it in fact lacks a democratic people who can guarantee the value and normality of the constitution. So it is an immovable fact that the process of constitutional alteration is not slowly created according to the people’s democratic sentiment, but rather arbitrarily transformed according to the convenience of politicians at that time. (*Law* 16)

This diagnosis should not be understood as the elite’s crude public hatred since Han Taeyeon, in all respects, is writing as a constitutional scholar. The “general public” or “democratic people,” therefore, do not consist of individuals who walk the streets of reality. Instead, as mentioned in the opening remarks, it is people as a single unity: that is, the presence of people as the public itself. Han Taeyeon defines it as “the people as an ideal unity”: “It is

considered that people who can never exist in reality exist only when the concept of people in people's sovereignty is understood as an ideal unity, and people who can never be unified in reality are defined as unified" (Han T., "Myth" 10) The reason why the Constitution was degenerated to concentrating power to the president was that the people as the protector of sovereignty were absent. In other words, Han Taeyeon developed a radical criticism that although the Korean Constitution at the time bears the appearance of modern liberal democracy, it cannot be regarded as a constitution because it lacks the people as an ideal unity.

However, Han Taeyeon's criticism does not stop here. While Han standardizes people as an ideal unity that is a single entity that holds sovereignty, he points out that it also functions as a "mythology" that justifies the ruling power:

There is no doubt that the theory of people's sovereignty, which veils parties that pursue profit in each part with totality, is a fiction that plays a magic-like role. In that sense, the modern theory of people's sovereignty [...] conceals a kind of mystique that is theoretically inexplicable. Therefore, although the social governing process is always dominated by minorities and is about the majority, the principle of people's sovereignty in modern democratic ideologies will always remain as a "mask of totem" that symbolizes the fate of political men, unless the falsehood and superficiality of people that assert the ideology of totality as a pretext is dispelled. (Han T., "Myth" 11).

This is why the ideal unity of the people can serve not only for democracy but also for dictatorship. As long as the actual rule, whether it is democracy or dictatorship, is by a minority of people for the majority, the constitution will be willing to side with the ruler as long as it acquires the justification that the interests of a majority equate the people on the whole. In Han's view, this was the situation that the Korean Constitution was placed in during the 1950s. As was evident in the process of the Busan political turmoil, the people were both a strong ground for the expansion of Rhee's authority and also an ornament. The people were a kind of floating sign that the National Assembly and the president fought for, and it was degraded to an ideology that demonstrated the transformation into dictatorship through the presi-

dent's mobilization of the people and political terrorism. Through the political turmoil, which can be evaluated as typical populism, Han Taeyeon saw the people as the sidekick of governing power and did not see the people as an ideal unity. This is what he meant by the absence of the people.

As such, Han Taeyeon questioned the populism of the Rhee Seungman regime in the context of constitutional theory. As a constitutional researcher, he captured the political situation of the 1950s as when the sovereignty of modern liberal democracy faced a crisis, rather than as a confrontation between democracy and dictatorship. Rhee Seungman's populism and terrorism did not simply devalue democracy. It was because it exploited the myth of the people's sovereignty, which could make democracy exist. When the myth of the people's sovereignty is rooted in reality in a way that justifies the various systems of democracy, all matters of the state, including governing power, are determined through discussion-confrontation-agreement in open places and takes the guarantee of people's basic rights and freedom as the final goal. However, when the myth of the people's sovereignty remains a mere justification for dictatorship, the dictator exercises power in the name of the people according to his own arbitrary judgment and interests. To quote Schmitt, the acclamation of the people is not a manifestation of the people, but rather a decoration for the dictator. Therefore, the task of Han Taeyeon was not to make the people's acclamation a decoration but to turn it into a true manifestation of the people. For him, the May 16 coup was an event that created an opportunity for that.

Small Peoples' Fancy Clothes

Han Taeyeon took it as a given fact that there were no real "people" in Korea, which was essential to the survival of democracy at the time. This is why the debate on the constitutional amendment was biased toward the reorganization of the power structure, which is why the basic right to guarantee the freedom of the people itself was not even a subject of discussion. The Liberal Party led by Rhee Seungman submitted a revision to the National Security Law to the National Assembly in August 1958, which strengthened civilian inspections and media control, and Han Taeyeon expressed a concern that

it could excessively control the people's right to freedom. It is reasonable to legislate a national policy such as anti-communism as the National Security Law, which is a quasi-constitutional law, but it cannot be abused in a way that violates daily freedom (Han T., "Freedom"). However, his analysis here suggests the root cause of this situation is Korea's immature freedom, not the abuse of administrative power.

This national liberation movement called the March 1st Independence Movement had a groundbreaking meaning in the history of our society in many ways. [. . .] In the wake of the March 1st Movement, nationalism in the modern sense of self-determination began to dominate our society as the main trend. [. . .] But the March 1st Movement was aimed only at the liberation of the people as a whole and their self-determination, not at the liberation of the individual who had lost his or her autonomy thus far (Han Taeyeon 1958, 342).

For Han Taeyeon, the March 1st Independence Movement in 1919 was the self-determination and liberation of the people, not of individuals. In this context, the 'Declaration of Independence' was criticized for having a "pre-democratic nature." However, if Han Taeyeon considered his own theory of people's sovereignty, such judgment could be seen as self-contradictory. He argued that the theory of people's sovereignty, which "controlled the spirit of modern people at will in political life, does not regard the subject of sovereignty as an individual, but rather as the 'people as a whole'" (Han T., "Freedom"). Given that the spirit of the March 1st Independence Movement was written in the preamble of the 1948 Constitution and established as a symbol of constituent power, it was a logical conclusion that the "people as a whole," that achieved self-determination through the March 1st Movement, was the protector of sovereignty. Therefore, Han Taeyeon's logic, that Korea's democracy was flawed because only national liberation and self-determination were the goals and that individual freedom was flawed, could be seen as a judgment that betrays his own theory of sovereignty.

But to understand his judgment, one should not only pay attention to the dimensions of constitutional, as his judgment was based on the context of the so-called "Asian stagnation." Let us cite a passage from his paper

that reflects this: “There is something called the Jokcheong faction which is different from the Korea Independence Party³ that is the most influential conservative force in the liberated Korea. [. . .] In fact, any member of the Jokcheong reminds us of terrifying slogans on nationalism and national supremacy [. . .] The conservatives connote the possibility of one-party dictatorship like the Nazis and fascists” (Han Taeyeon 1961, 94). The Jokcheong (Korean National Youth Association) is a large movement organization that was organized by Lee Beomseok as a leader just after the liberation and during the early Rhee Seungman regime. Under the slogan of nationalism and national supremacy, they developed radical populism modeled after the People’s Party of China (Fujii). For Han Taeyeon, they were a political organization that was at the opposite point of liberal democracy, just like the Korea Independent Party of the provisional government genealogy. This was because unlike the ideology of liberal democracy that advocated people’s sovereignty for the sake of the guarantee and expansion of individual freedom, the Jokcheong, and the Korea Independence Party were determined to move towards dictatorship by asserting the superiority of the whole (people/state) over individual freedom.

In Han Taeyeon’s view, such property implied the possibility of easily combining with communism, no matter how much they asserted anti-Communism. “In the June 25 Incident in 1950, part of the Jokcheong faction blindly followed the North Korean puppet” (Han T., “Genealogy” 95). What matters here is that, to Han, communism meant the totalitarian regime of a one-party dictatorship. He identified the Stalinist ruling system that exists in reality as the inner workings of communism, rather than a revolutionary theory or ideology based on the Marxist theory of historical materialism. He could, therefore, claim that the vague expectations of communism in South Korean society during the liberation years were shattered by North Korea’s occupation of Seoul in the early days of the Korean War. “In fact, for the people of underdeveloped countries, direct experiences were more effective than wisdoms in judging objects” (Han T., “Intellectual Class” 310). Thus, the lack of individual freedom is defined as the manifestation of Asian back-

wardness under the situation of national division and anti-Communitistic campaigns:

For Koreans who have no conscious awareness of freedom, the 38th parallel itself represents not only a material division of the land but also a spiritual division of minds, and even in the acceptance of communism, our people are already becoming Soviets before they become Koreans. [...] In fact, for an Asian society without the conscious awareness of freedom, the nationalistic sentiment gained so far from its experience as a European colony and the universalization of poverty resulting from its primitive agricultural economy are the biggest hotbeds for the propaganda of Communists who promise innovation in economic conditions. In fact, in an Asian society that has not lived for individual freedom but only for the maintenance of its animal life, the Communists' promise of the distribution of bread is a little more specific and attractive than the concept of democratic individual freedom and equality (Han T., "Freedom" 343).

Considering such awareness in the background, the self-determination of the March 1st Independence Movement is a target of criticism. The spirit of the March 1st Movement, which was written in the preamble of the constitution as a symbol of constituent power, was the foundation of the formation of a modern state centered on people's sovereignty, and at the same time, it was also evidence that they were still caught in Asian backwardness due to the omission of individual liberation and self-determination. Thus, for Han, independence of the people as a whole declared in March 1st movement was evidence of people's sovereignty in terms of constitutional theory, but, at the same time, a proof of Asian backwardness which made it impossible for Korean nation to accomplish liberal democratic regime that was the ultimate end of the people's sovereignty.

The political turmoil before April 19, 1960, led Han Taeyeon to grasp the premodern authoritarianism of Rhee Seungman's regime as the imperfections of the "people." This was enough to add to the agony of constitutional scholars as it meant that liberal democracy based on people's sovereignty could not take root in the legal system and governance. It was in this context that the April 19 uprising was bound to be a major turnaround for Han Taeyeon because the constitutional amendment of the parliamen-

tary system after the uprising was carried out in an atmosphere in which democracy could settle down only by a parliamentary cabinet system which could alter the dictatorship based on the presidential system. In other words, whether the constitution of the parliamentary system led by him after the uprising would work smoothly in reality would be a watershed on whether liberal democracy would settle in Korea. So, Han Taeyeon regarded the Chang Myon cabinet with concern:

The parliamentary system in our society is a task for the Second Republic, and is definitely not a reality (...) In fact, although the modern state's parliamentary system is considered as an ideal form of democratic politics in the sense that it enables collective leadership and accountability, its successful operation requires the same complex and expert techniques as those required by the craftsmen of precise machinery. Therefore, for politicians in our country who do not even know the concept of politics, the parliamentary system in this sense is an excessive burden on their operation ("Theory" 155).

As he later recalled, Han Taeyeon saw the politicians of the time as immature individuals who were not even aware of what politics was, let alone the cabinet system. Shortly after April 19, the conditions were such that they were expected "complex and skilled skills required by the craftsmen of precise machinery." The reality, as expected, fell short of expectations. The political strife and confusion in the ruling Democratic Party was not only unable to establish liberal democratic rule through debate-confrontation-agreement, but it also revealed the incompetence of parliamentarism that was unable to determine anything and that only added to confusion (as Carl Schmitt said): "It seems that Dr. Chang only repeated failure in less than half a month since he organized the cabinet. A series of incidents began to take place: there were various opinions in a cabinet meeting, opinions from the prime minister and the minister clashed, there were no principles in the personnel administration that should be swift and effective, and the younger faction protested against the new faction." (Han T., "Theory" 160).

Han Taeyeon's judgment was not unique. In 1961, Yu Jinoh, one of the founders of the Constitution and one of the most prominent intellectuals

since the colonial period, identified the situation as one in which “both left and right sides expect dictatorship due to the desperation that democracy is impossible” (qtd. in Heo 15). In addition, Yoo Dalyeong, who served as the second chief of the state restoration movement following Yu Jinhoh, criticized the Chang Myon administration in a more radical language in 1963. He described it as “a feud between rotten politicians” and a regime in which “the extreme selfishness of the insensible people and the abuse of freedom made the sparks of revolution disappear” (Yoo 236 qtd. in Heo 15). It was the judgment of the intellectuals of the time that the post-April 19 cabinet system betrayed what philosopher Park Jonghong called “absolute determination” and “creative intelligence” (188) of the uprising. In their view, the cabinet system, which was established through April 19, was a fancy dress that did not suit the small people. The May 16 coup took place under these circumstances. Now it is time to look at Han Taeyeon’s acrobatic intellectual practice that rationalizes the May 16 coup with consistent logic.

People’s Acclamation and the Glory of the Leader

Intellectuals such as Yu Jinhoh, Yoo Dalyeong, and Park Jonghong, who led the state restoration movement under the banner of enlightenment and defeating communism since before the April 19 uprising, immediately welcomed the coup and participated in the Central Committee of the State Restoration Movement, which became an organization under the Supreme Council for State Restoration following the coup. As can be seen from the fact that figures like Ham Seokhun and Jang Junha, who later became fierce critics of the Park Junghee regime, are listed,⁴ this committee included intellectuals from almost all fields in academy and journalism (Heo 49). In other words, intellectuals in all fields had high hopes for the May 16 coup. In fact, right after the coup, most professors in Seoul were appointed as advisors to the planning committee and chairman of the Supreme Council for State Restoration (Han Y. 267) and Han Taeyeon was no exception. As we saw in the beginning, he participated as a main player who created the base of the law of emergency for state restoration.

As revealed in his own memoir, Han Taeyeon was involved in the military coup by adopting a law in the Nazi regime for the legitimization of an exceptional governmental system after the coup. The law from which he took hints is the Enabling Act (*Ermächtigungsgesetz*), which Hitler used to encroach on the Weimar Constitution, in enacting the law of emergency for state restoration. The core of the Enabling Act is to delegate the legislative power of parliament to the administration. Through this, the Nazis suspended the Weimar Constitution and legally monopolized the ruling power. In other words, the Nazis took the nation legally by suspending the constitution through constitutional legislative procedures. He referred to this in legalizing the coup power's seizing of the regime. Thus, the Supreme Council for State Restoration, with Vice-Chairman Park Junghee as the de facto commander-in-chief, was legally formed through the law of emergency for state restoration:

Article 1 Establishment of the Supreme Council for State Restoration

The Supreme Council for State Restoration will be established as an emergency measure to protect the Republic of Korea from communist aggression and to help the nation and people overcome the crisis and rebuild it as a true democratic republic.

Article 2 Status of the Supreme Council for State Restoration

The Supreme Council for State Restoration shall hold its position as the highest governing body of the Republic of Korea until the National Assembly is formed and the government is established by a general election to be implemented after the completion of the task of the May 16th Military Revolution.

Article 3 Basic Rights of the People

The fundamental rights of the people as stipulated in the Constitution are guaranteed to the extent that they do not violate the performance of their revolutionary work.

As can be seen in Article 1, the law of emergency for state restoration already mobilized rhetoric of “the state of exception” from its basis of existence, including “enemy,” “crisis,” “resurrection,” and “emergency measures,”

etc. Generally, martial law, according to the Constitution, is a temporary measure to deal with an emergency, and it can be legalized only with the consent of declaration from the National Assembly, and it must quickly return to normalcy after the situation has terminated. However, the law, similar to martial law, created a “permanent exception” by not setting a deadline for the Supreme Council for State Restoration. In addition, it stipulated the following to legally neutralize the separation of powers: Article 9 stipulates that “the power of the National Assembly as stipulated in the Constitution shall be executed by the Supreme Council for State Restoration,” Article 17 stipulates that “the substance of administrative power concerning jurisdiction shall be directed and controlled by the Supreme Council for State Restoration,” and Article 18 states that “the Chief Justice of the Supreme Court and the Supreme Court judge shall be appointed by the president at the recommendation of the Supreme Council for State Restoration.” Han Taeyeon’s long-cherished plan for liberal democracy met with such extreme self-betrayal. However, he does not see it as a so-called “conversion.” That is because for him, the crossroads between liberal democracy and dictatorship always depended on how “people’s acclamation” manifested itself.

In the guide of this law, Han Taeyeon criticizes that “the poverty of the people has become more and more average while the Constitution is violated, fraudulent elections become formalized, foreign aid becomes used as political funds, and the number of illegal funders increase” as a result of the Rhee Seungman administration’s “corruption, injustice and toxicity of dictatorship.” He reproaches that the April 19 uprising, which was an inevitable means of healing the pathology, gave birth to the Second Republic but it was helpless against the “end-of-the-term phenomenon,” such as being “powerless and corrupt” and having “deterioration of economic conditions” and the spread of “pro-communist tendencies.” Thus the “May 16 Revolution” took place and the “law of emergency was enacted” and “the effects of some provisions of the Constitution were suspended.” But the May 16 coup was never about destroying the Constitution, as “the May 16 revolution was a revolution that was aimed at maintaining the constitutional order from communist aggression from the beginning” (Han T., *Law*).

This logic is strictly dependent on Carl Schmitt's constitutional theory. On the premise of the 'absolute constitution' which is the basic framework of the Constitution and on which the 'relative constitution' is established as in concrete sentences (Han T., "Retrospect" 24), Han Taeyeon could claim that the May 16 coup upheld the absolute constitution by suspending the relative constitution. At this time, the absolute constitution must be the "sovereignty" itself: namely 'the manifestation of the people.' On this basis, he expounds the law of emergency, referring to the coup forces as "the last guardian."

For any country, when the existence of the nation or its people is in question, emergency measures to overcome the crisis are called forth. Thus, the theory to legally explain the emergency measures in these cases is the theory of the national emergency right (*Staatsnotrecht*). [. . .] In a narrow sense, national emergency rights refers to extreme emergency situations that are completely unpredictable, where a competent state agency comes to the rescue of the nation beyond constitutional provisions or in violation of constitutional regulations, only when it is impossible to overcome by all legal means under the constitutional order. [. . .] The May 16 Military Revolution has its theoretical basis on the combination of the right to revolution and national emergency right: revolutionary national emergency rights, so to speak (Han T., *Law* 35–37).

This is the logic of Han Taeyeon in providing legal grounds for the May 16 coup. In particular, he said that the May 16 coup could be seen as the invocation of the right to revolution (*Recht zur Revolution*) as it was not the invocation of the presidential emergency power. However, it can be also understood as the issuance of the national emergency right because it was an act to protect the constitutional order.⁵ In this way, Han Taeyeon stressed that the coup was aimed at protecting the sovereignty rather than extorting it. He therefore argued that "the power of the revolutionary government is constitutionally and directly based on the principle of people's sovereignty, and therefore the absolutist of that power invokes the so-called commissarial dictatorship (*Kommissarische Diktatur*) of Carl Schmitt" (Han T., *Law* 40). Schmitt's concept of constitutional submission (*Verfassungsbeitigung*)

can be seen as a compressed version of this argument because for him “the submission of the constitution refers to the case where the power to enact the constitution remains intact and the basic political decision based on it is replaced by a new political decision replaces” (45). Through this logic, the military coup was ultimately interpreted as a situation in which state power was delegated to protect sovereignty, not to take over sovereignty.

From a historical perspective, this may seem like sophistry. However, Han Taeyeon’s intellectual pursuit, ranging from Rhee Seungman’s regime to the May 16 coup, remained unshakable. What mattered most to him was not the question of the presidential or cabinet system, liberal democracy or dictatorship, revolution or coup d’état. The question was superficial. What really mattered was the idea of the people as the protector of sovereignty. A system built without the people’s sovereign determination is all the same as anarchy, regardless of whether it is a democracy or dictatorship. As a constitutional scholar, Han Taeyeon’s key point was whether the constitution could be established as a fundamental norm for realizing the basic freedom of the people.

In his eyes, however, the Korean people were never determined for sovereign freedom. This was due to the Asian backwardness that was marked by the colonial experience and poverty. Both Rhee Seungman’s populist dictatorship and the chaos right after April 19, 1960, originated from just that, and the May 16 coup d’état broke out in a crisis in which the people without decision were about to be swallowed up by waves of communism. In this sense, the May 16, 1961, coup and the subsequent military regime were not populist dictatorships like the Rhee Seungman regime to Han Taeyeon. They were the people’s “guardians” that allowed for the manifestation of true acclamation, rather than a usurpation of the people’s acclamation. It was also because many welcomed the coup. Most of all, it was because he considered the coup itself as an uprising from below. That is why he was able to “legalize” the coup, all by himself. Han Taeyeon’s intellectual pursuit thus proved that the military coup was a concept and category of constitutional theory, which led to the “difficult” practice of the constitution maintained throughout Park Junghee’s reign in the 1960s. During this period, he served the Park Junghee

regime as a scholar and politician and sought out the true acclamation of the people. His attitude toward the Yushin Constitution can also be understood in this context. The true manifestation of the people's sovereignty came to be identified entirely with the character of the president:

In a society like ours that is always dominated by the notion of crisis, the characterization of that power means the only form of government in times of crisis. That's why the concentration of power in the Yushin Constitution to the president, who is the head of state, is shaping the characterization of the leader in charge of it, as well as the characterization of power in our Constitution. As a result, the president possesses legitimacy of power according to the principle of people's sovereignty that represents the entire people, and performs his duties by trust from the people in his political leadership and determination and by his responsibility to the people. In addition, the characterization of power in our constitution is also asking for direct links with the president and the people. (Han T., *Constitutional Theory* 58)

The Yushin Constitution was enacted in a referendum on November 21, 1972 with a turnout of 91.9 percent and an approval rating of 91.5 percent (Gal 9). According to Gal Bonggeun, who was involved in the enactment of the Yushin Constitution with Han Taeyeon, "the essence of the Yushin Constitution" is none other than "seeing state power as a principle of political life" (10). In addition, as long as "the president can order or control other agencies as the advocate of national interests" (11), the Yushin Constitution is a constitution that implies the president's authority can be exercised indefinitely. What is important here is that the president's enormous authority is explained by the "direct realization of the people's sovereignty:

In the traditional Korean constitution, there was no clear representative body of people's sovereignty. Rather, the president elected by the people and also members of the National Assembly elected by the people asserted to be the people's representatives. It's the so-called dual representation theory. [. . .] Even so, the "people" in this case are the aggregate of individual profits that exercise the right to vote through political parties and other social groups as the medium. The president and members of the National Assembly also started as members of political parties and were elected with

a political party background. It was not the embodiment of the indivisible will of the people.

However, this Yushin Constitution “realized” the concept of people’s sovereignty, which was sublimated into the overall general interest by excluding individual interests, thereby establishing a de-party organization. It organized the National Council for Unification so that the president could be elected solely by the “inseparable will of the people.” (15)

Here we can see that the indivisibility and totality of people’s sovereignty clearly overlap with the president. In other words, the people are understood to be exercising direct rule through the assumed fusion of the president and the people in which the president’s power is itself an embodiment of the people’s rule. This is clearly different from the Rhee Seungman regime. If the Rhee Seungman regime was a dictatorship that took the name of the people, the Yushin system was the reality of direct democracy in which the people and the leader became one. Now the acclamation of the people is indistinguishably united with the glory of the leader. At this point, populism no longer appears as a pathology or shadow of democracy, but as the most ideal reality of democracy. Just as Schmitt argued that dictatorship is a manifestation of the fundamental normalization of the Constitution (Schmitt 2003), Han Taeyeon claimed that the Yushin Constitution is an ideal realization rather than a destruction of democracy. Thus, the indirect rule of modern democracy, characterized by the division of power in legislation, administration, and justice, disappears off-stage. But there is no problem. There is no need for an indirect rule that corrupts or gives the enemy a chance when the people’s acclamation is wrapped up in the glory of the leader without a single error. The Yushin Constitution was thus proven to be an ideal system in which the national composition based on individual liberation and self-determination, namely the acclamation of true people, that Han Taeyeon so longingly desired for was realized.

Modern Democracy and Populism

In the 1950s and the 1960s, when most countries were within the sphere of influence of either United States and the Soviet Union, the so-called developmental dictatorship had become a leading ruling paradigm of the “third world,” regardless of capitalism or communism. Given that paradigm, the leaders of many countries that incorporated themselves into the West ruled by suspending liberal democracy as a system in the name of the people. This is what Han Taeyeon saw in Korea from the 1950s to the 1970s. He looked critically at the ruling system at that time from the perspective of liberal democracy, and as a constitutional scholar, he tried to thoroughly maintain people’s sovereignty as the basis for the legitimacy of the system. However, he eventually chose the emergency situation over the ideology of liberal democracy. What was important is that this “decision” was never a conversion. By mobilizing the logic of constitutional theory, he was single-minded in his intellectual pursuit. In this way, he justified the May 16 coup and the Yushin Constitution in the context of emergency without any self-contradiction (Han T., “Retrospect” 28–29).

The intellectual pursuit of Han Taeyeon offers great implications for how modern democracy is viewed. “Modern democracy is a democracy based entirely on glory,” and “it is a democracy based on the power of acclamation amplified and spread beyond all imagination through media” (Agamben 256). In other words, if one acknowledges that democracy is based on populism, populism is no longer a pathology of democracy, an extreme, ghost, or shadow, but a ‘rule.’ It is rather a powerful grammar of modern democracy that emerged amid institutionalization of the developmental dictatorship during the 1950s–70s. Thus, it is an urgent task in the future to rewrite the history of democracy in the twentieth century in this respect to see precisely what will happen in the name of democracy in the twenty-first century.

Notes

1. This is why Mouffe's "left-wing populism" based on Laclau's argument could be a hegemony strategy for post-democracy, which is centered on de-politicization (redification) (Laclau; Mouffe). Mouffe's populist theory with Schmitt clearly in mind was an attempt to revive the momentum of politics in the ruling paradigm of the neo-liberalistic era dominated by de-politicization and consensus. This is in line with Carl Schmitt's liberal criticism that attempted to confront the antagonistic paradigm with the liberal rule dominated by compromise and consensus, as Mouffe herself admits (Mouffe).
2. Han Taeyeon was greatly influenced by Japanese Constitutional scholar Kuroda Satoru when he studied in Japan in the 1930s (Han T., "Retrospect" 21). In particular, Han confessed in post-liberation lectures to have relied heavily on the constitutional textbooks of Kuroda, who had created his own constitutional theory by being baptized by Carl Schmitt's decisionist law after commencing with Hans Kelsen's legal positivism.
3. The party, led by the leaders of independence movements in 1930s Shanghai, is one of the most influential conservative forces in the nation-building process just after liberation.
4. There is a difference in the positions of Jang Junha and Ham Seokhun right after the May 16, 1961, coup. While Jang Junha regarded the coup as a revolution and expressed full, positive expectations, Ham Seokhun emphasized the transitionality of the coup and insisted on the swift transfer of power to civil government for the true revolution in which the people become the main entity.
5. This was not only the position of Han Taeyeon, but it was an established theory of the interpretation of the law of emergency for state restoration by constitutional scholars at the time (Moon).

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