Recent Topics in Higher Education Law
In the Republic of Korea: The Studies on the
Universities Autonomy, on the Structures of the
University Council and on the Structure of the
Academic Affairs Committee
Under the Higher Education Act of Korea (South)

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Recent Topics in Higher Education Law in the Republic of Korea: The Studies on the Universities Autonomy, on the Structures of the University Council and on the Structure of the Academic Affairs Committee under the Higher Education Act of Korea (South)

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While the improvement measure with respect to the University Education System Act of Korea, which was viewed as a desirable alternative to the foregoing, discarded the Public Corporation Board System, but instead added provisions for the term limitation of temporary members of the board and also stipulated the legal ground for tenured faculty members in the universities (Article 53-2, paragraph 3 of the Private School Act of Korea); this totally ignored the stipulations laying legal ground for the Academic Affairs Council System. Nonetheless, government influence over the privately funded universities was strengthened, and on the other hand, faculty members’ participation in the system of policy-making process of the universities, which is meant to check the dictatorial nature of the private foundations of the universities, weakened. Thus it became retrogressive instead of showing improvement.

Originally, the proposal seeking to provide stipulation for legal ground for the Academic Affairs Council was prompted to prevent autocratic operation of the Academic Affairs Committee at the universities, pulling together the popular opinions of the faculty members who do not hold any position in the hierarchy of university administration. Thus the proposal was to create a mechanism by which to deliberate and operate academic affairs. The system of the University Council, as provided for in the Education Act of Korea of the past (Article 117) and current Private School Act of Korea (Article 26-2) or current Implementation Decree of the Higher Education Act of Korea (Article 4, paragraph 1, sub-paragraph 16), may be able to perform the function of the Academic Affairs Council, but originally the University Council is a system designed to deliberate all of the important matters. Therefore, it may be desirable to separate the Academic Affairs Council or School Affairs Council from the university council. This should be given a distinct legal status as distinguished from the other councils of the individual university, which operates in accordance with its own internal rules and regulations. The number of the members
of the Academic Affairs Council, which would be organized in accordance with the provisions of the statute, should be around 15-30. One half of the council members should be appointed from among the faculty. This half should be elected from those who do not hold any assigned administrative position and the remaining half should be filled with the professors with assigned administrative positions and/or recommended by the University President. And the purported function of the same was to deliberate such important matters as academic affairs, organization, personnel and budget.

However, during the course of deliberation of the legislative proposal, of which the Academic Affairs Council was the core agenda, the provision of legal status under the Higher Education Act of Korea was deleted from the legislation, saying “When the proposal becomes the law it may overlap the function of the University Personnel Committee under the Public Servant of Higher Education Act of Korea, and that of the Budget & Financial Reporting Council and also the Personnel Affairs of Faculty subservient to University Council as provided for in the Private School Act of Korea. Thus difficulties may arise impeding the operation and therefore, the item was deleted.”¹ These were the reasons given.

With respect to providing legal status to the Academic Affairs Council, a member of the Education Committee of the Congress expressed an opinion to the effect that “at this time we forego this item subjecting to further scrutiny and pending a revised proposal expected to be filed by the Education Department in the future and at that time, we will resolve the issue”. If we could take his opinion at its face value, we certainly are hopeful that the Higher Education Act of Korea and the Private School Act of Korea will be further studied and thoroughly discussed in order to realize the revision to the same in the way that we desire. I present hereunder the overview of

¹ Page 4 and 14, Volume No.2, the minutes of Education Committee of the 206th National Assembly of Korea.
Korean Higher Education Law and the theoretical ground in the laws as well as concrete methodology on how to constitute such important organizations as the University Council and Academic Council, under the Higher Education Act of Korea and Private School Act of Korea based upon the autonomy and self-rule of universities provided for in the Constitution (Korea).

II. Overview of Korean Higher Education Law

The Republic of Korea has the Continental Law System, and the Korean Higher Education Law comes from a variety of sources, some external to the higher education institution and some internal. The external law is created and enforced by bodies external to the higher education institution. The internal law is the law the higher education institution creates for itself in its own exercise of institutional governance. The internal law is at the core of the higher education institution's operations. But the external law circumscribes the internal law, thus limiting the institution's options in the creation of internal law. Therefore, the external law is more important than the internal law in the Republic of Korea.

As the major external sources of Korean Higher Education Law are there the Constitution of Korea, the Higher Education Act of Korea, the Fundamental Education Act of Korea, the Primary and Secondary Act of Korea and the Private School Act of Korea.

1. The Constitution of Korea

The Constitution of Korea is the fundamental law not only for determining the nature and extent of governmental powers, but also the fundamental law of the individual rights guarantees that limit the power of government and protect citizens generally, including the members of the academic community. The
Constitution of Korea has provisions that specifically refers to academic freedom and (higher) education:

**Article 22**

(1) All citizens shall enjoy academic freedom and freedom of the arts.
(2) The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.

**Article 31**

(1) All citizens shall have an equal right to receive an education corresponding to their abilities.
(2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.
(3) Compulsory education shall be free of charge.
(4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher education shall be guaranteed under the conditions as prescribed by Act.
(5) The State shall promote lifelong education.
(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.

The Constitution of Korea has also articles for human dignity and worth, equal protection, speech, press and religion are often litigated in the Constitutional Court cases of Korea involving higher education institutions:

**Article 10**

All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

**Article 11**

(1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life
on account of sex, religion or social status. (2) No privileged caste shall be recognized or ever established in any form. (3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue therefrom.

Article 20
(1) All citizens shall enjoy freedom of religion. (2) No state religion shall be recognized, and church and state shall be separated.

Article 21
(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association. (2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized. (3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act. (4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

The Constitution of Korea is the highest legal authority that exists in the Republic of Korea. No other law may conflict with its provisions. Therefore, all statutes and other laws must be consistent with it, any of its provisions that conflict with the Constitution of Korea will be subject to invalidation by the Constitutional Court of Korea.

2. Major Statutes

Korean statutes are enacted by the National Assembly that is legislative body. The major statute that refers to higher
education, is the Higher Education Act of Korea. There are also statutes that refer to both primary and secondary, and postsecondary education. The important examples of such legislation are the Fundamental Education Act of Korea, the Primary and Secondary Education Act of Korea and the Private School Act of Korea. Here I make a overview of the Higher Education Act of Korea.

2.1. The Higher Education Act of Korea

The Higher Education Act of Korea consists of 4 titles 64 clauses:
Title I — General Provisions (Articles 1~11)
Title II — Student, Faculty and Staff (Articles 12~17)
Title III — School (Articles 18~59)
Title IV — Supplementary and Penal Regulations (Articles 60~64)

Title I prescribes purpose of the Higher Education Act of Korea(Article 1), school types(Article 2), classification of national, public and private school(Article 3), establishment of school(Article 4), direction and control(Article 5), school rules and regulations(Article 6), finance of education(Article 7), expenses for experimentation and practice(Article 8), aid of cooperation between schools(Article 9), school conference(Article 10) and school tuition(Article 11).

Title II prescribes autonomous student activities(Article 12), disciplinary punishment of student(Article 13), classification of faculty and staff(Article 14), function of faculty and staff(Article 15), qualification of faculty and assistant(Article 16) and faculty as a additional job(Article 17).

Title III prescribes name of school(Article 18), organization od school(Article 19), school year(Article 20), curriculum(Article 21), school lessons(Article 22), credit(Article 23), transfer(Article 23-2), branch school(Article 24), research
facilities (Article 25), open courses (Article 26), notice of doctoral degrees at foreign colleges (Article 27), purpose of university (Article 28), graduate school (Article 29), graduate school university (Article 30), limit of school year (Article 31), fixed number of students (Article 32), qualification of admission (Article 33), selection of student (Article 34), degrees (Article 35), part time registration (Article 36), polytechnic college (Articles 37–40), teachers' college (Articles 41–46), junior college (Articles 47–51), air and correspondence college (Articles 52–54), technicians' college (Articles 55–58) and occupation school of various kinds (Article 59).

Title IV prescribes correction (Article 60), suspension and temporary closure of school (Article 61), closing of school (Article 62), hearing (Article 63) and penal regulation (Article 64).

III. The Constitution (Korea) and the Autonomy of Universities

There is bound to be a doubt as to what is generally represented by the concept of "autonomy of the universities "and/or "self-rule of the universities," as one reads the laws pertaining to the universities. For the sake of an argument, had we interpreted it as meaning "the universities are free from influence or interference of the government and/or any outsiders," it would appear that such freedom of universities does not exist. On the contrary, if it looks as if there exists such freedom, the impression would be that it is latently implied rather than patently been stipulated in the law.

Article 22, paragraph 1 provides that "All citizens shall enjoy academic freedom and freedom of the arts." Thus guaranties the freedom in scholastic pursuit. According to the prevalent and up-to-date arguments on how to interpret the freedom of universities, even without the qualifying word "university", still the freedom of universities is guarantied. The specific provisions are found as to the self-rule of universities nowhere in the Fundamental Law of Education, the Higher Education Act of
Korea and the Private School Act of Korea. The closest thing we find is in the Fundamental Law of Education. Article 5, paragraph 3 provides “autonomy in the operation of schools shall be respected as permitting faculty and administrative staffs, students, parents and local residents to participate in the operation of school in accordance with the rules and regulations.” In it reference is made to “autonomy in the school operation,” but its application is limited only to the system to operate committees in three primary, secondary and high schools and cannot be interpreted as applicable to autonomy or self-rule of universities. The reasons being, since the students of primary, secondary and high schools are minors, parents’ participation is natural, while students of universities are adults. The Higher Education Act of Korea (Article 12) provides for self-rule of students. There are no provisions found at all with respect to autonomy and/or self-rule of universities as well as autonomy of faculty members. In view of the reality, where legal principles and fundamental provisions are not applied adequately, it makes us wonder if the existence and significance of the current Higher Education Act of Korea in the sphere of the law are adequate. The Constitution (Korea) has not unequivocally used such terminology as self-rule of university, but Article 22, paragraph 1 provides for “academic freedom” and in the article 31, paragraph 4 provides for “Independence, professionalism and political impartiality of education and the autonomy of institutions of higher education shall be guaranteed under the conditions as prescribed by Act.” Thus the term “autonomy of institutions of higher education” is used only in this one provision. The terminology “autonomy of institutions of higher education” in the Constitution (Korea), “autonomy of school operation” in the Fundamental Education Act, and “autonomy of universities” or “freedom of universities” in general, are so loosely defined and interchangeable. And this usage of the vaguely defined terminology in itself may well constitute the proof of turbidity of the concept.
Each one of these terminologies, when defined articulately, may find different connotations. Accordingly presented hereunder is the critical review of autonomy and self-rule as defined in the Constitution (Korea).

1. The significance of self-rule of the university as defined in Article 22, paragraph 1 of the Constitution (Korea).

Article 22, paragraph 1 of the Constitution of Korea provides that "all citizens shall enjoy academic freedom and freedom of the arts," which guaranties the freedom of scholastic pursuit.

Accordingly, the theory of freedom of scholastic pursuit as the fundamental right, the provision embodied in this particular article, provides the basis of guarantying university self-rule even though there is no specific reference made to "university."2

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2 With regard to the Constitution (Korea) al ground for University Autonomy, Paragraph 4, Article 31 of the Constitution (Korea) provides only for guarantying the right to education in the formal system and there are a diversity of theories as to where the Constitution (Korea) al ground lies with respect to Article 22, paragraph 1 and Article 31, paragraph 4. The main objective of the Primary, Secondary and High school education is in transfer of knowledge and that of the universities is to pursue the truth through scholastic pursuit and teaching in its process. Therefore, making references of the former in relation to Article 31 and that of the latter in relation to Article 22, paragraph 1 would be valid from the standpoint of the Constitution (Korea) al theory as well as the historical development process of the universities, which is in the center of major institutions for scholarship. In support of this theory, refer to page 246, the Principles of the Constitution (Korea) by Yeong-Seong Kwon; page 397, the Study on the Korean Constitution (Korea) by Young Huh; page 787, the Collection of the Commemorative thesis for his 60th birthday of Professor, Seong Doo Yang (Gyoon Jae) by Kwang Seok Jeong 1994. The opposing view, which places the Constitution (Korea) al ground to Article 31, paragraph 4, refer to page 521, The Outline of the Korean Constitution (Korea) by Cheol Soo Kim. There is also a theory that Article 22, paragraph 1 refers to university autonomy as a traditional and basic right to freedom (the right to defend passively), while Article 31, paragraph 4 provides for necessary support and grants by the State (the basic cultural right) to guaranty and ensure the university autonomy. Refer to the The thesis by Yeong Soo Jahng titled "Contemporary Significance and Scope of its Protection of Scholastic Freedom in corporated in the Collection () of the Commemorative Thesis for his 60th birthday of Professor, Seong Doo Yang (Gyoon Jae), 1994, pages 764 and 764 and following. A precedent established by the Court of Constitution (Korea) says "the University Autonomy provided for in Article 31, paragraph 4 of the Constitution (Korea), is a necessary means to provide definite assurance for the freedom in scholastic pursuit, which is the Constitution (Korea) and fundamental right accorded to the university". Thus it makes it rather ambiguous, but it
In general view, “freedom of university” refers to the freedom enjoyed by the university in maintaining as well as achieving its objectives through its own system of operation at its own responsibility without having any obligation to obey the instruction from the state or other outsiders. Therefore, when we consider freedom of scholastic pursuit as the fundamental right when it is viewed in direct relation with the university, which is an institution where scholastic study and faculty activity are performed, we see that its prerequisites are naturally self-rule and autonomous administration of the university. In other words, self-rule and autonomy are symbol of scholastic freedom exercised at the institutions. For this reason, self-rule of university should be developed in such manner as guarantying and promoting the institutional system, under which scholastic endeavor and faculty Activity are performed. From the historical perspective, general agreement is that the Constitution (Korea) guaranties self-rule of universities.

When the process of scholastic freedom development is viewed from the historical perspective it began from the stage where guarantying freedom of scholastic pursuit as an individual right to defend him or her self from government and evolved to the direction in so far as to guarantying learning and the realm of character in an academic system objectively and systematically. Therefore, it is inevitable to guarantying the self-rule of universities, which have met the demands for freedom of scholastic pursuit as well as community formation of faculty members.

Thus the recognition of subjective and systematic point of view with reference to the freedom of scholastic pursuit has

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may be a position accommodating the two theories. Refer the Case Law Reports of the Constitutional Court of Korea, volume 4, 1992, page 659 and following (focus on page 670).

3 As to dual character of freedom of learning, refer to the Study on the Constitution (Korea) by Huh Young (from page 389). As to the view in co-existence of characters for individual right and system guaranty, refer to Principles of the Constitution (Korea) by Kwon Yeong Seong (page 471) and the outline of the Constitution (Korea) Study by Kim Cheol Soo (page 516).
already been developed and presented and emphasized by R. Smend⁴ and also by A. Kotttgen.⁵

Through the understanding for the freedom of scholastic pursuit from the standpoint of the Constitution (Korea), the provisions found in the Constitution (Korea), with respect to the freedom of scholastic pursuit, do not guaranty the universities outright in their traditional organizational form but rather in the form of unhindered manifestation of universities as the institutions that meet the needs for freedom in learning and scholastic pursuit by faculty as a community engaged in scholastic activities.

2. Concept of University Autonomy

It is true that there is a variety of form in a self-rule system. When the various systems of self-rule in the Nation are examined, it would be easy to recognize that each individual self-rule system may has been adapted to its own function while there are so many variations in self-rule systems.

For example, Article 117, paragraph 1 of the Constitution (Korea) provides for autonomy of local governments that “handle the matters related to welfare of the residents, manage the properties and may enact the regulations for self-rule within the scope of the law and ordinance.”

Also, with respect to the private professional organizations, it may be interpreted that generally they are allowed to conduct their own business without being subjected to any state instruction.

At the same token, guaranty of autonomy and self-rule of universities provided for in Article 22, paragraph 1 of the Constitution (Korea) should be reformed in such manner as to reflect guarantying effective development of the university as the institutions where freedom of scholastic pursuit and teaching

⁴ R. Smend, Das Recht der freien Meinungsaeusserung, VVDStRL 4(1927), S.56ff.
are practiced, the right of which has been delegated by the state and society in general.

Therefore, autonomy and self-rule should mean, in compliance with the purpose to protect the system of norms, the constitutional guaranty of fundamental right and its mission. In this sense, autonomy of local government and that of the university may be distinguishable from each other.

Today, considering the intrinsic nature of prerogative granted to scholastic endeavor by the State, its goal is no longer to achieve in the form that depends upon endeavor or contribution of individuals but mainly will have to be performed by the organization or system and facilities, which contribute to the need of scholastic pursuit. If this premise is true, in the realm of scholastic pursuit, the guaranty shall be extended to the organizations in the forms that are helpful to realizing the fundamental right to freedom, rather than guarantying right to individuals.

Therefore, the state should not treat universities as a sort of welfare facility by providing guaranty toward freedom of scholastic pursuit, but rather shall maintain some distance and confirm that it would not exercise any function as a direct adjuster to the sphere of scholastic endeavor.

Accordingly, universities should be able to claim not only freedom from state interference but also that subject itself to the protection and fostering by the state. Regarding freedom of scholastic pursuit and the obligation of the state to protect.\(^6\)

Thus in view of the distinct function and significance of the universities, a broader sense of self-rule concept becomes more effective. Included in this broader sense of the concept are functions not only to the rule making power but also to research and to every administrative disposition to be carried out through its own distinct system at its own responsibility and without being subjected to outside instructions.

\(^6\) Refer to SeeWoo Lee, Verfassungsrechtliche Grundprobleme des Privathochschulwesens, Diss.(Tuebingen), 1993, S.52ff.
IV. Substance of university autonomy

1. Rule making power of universities

Universities shall have to perform and regulate its tasks such as teaching and matters related to research by the rules (Satzungen). In other words, universities shall have the rule making power (Satzungsgewalt), with which formulate its distinct and basic order of the system. When general state administrations are separate from the sphere of university function, the rule making power of universities is basically the task of the universities, which extends to the realm related to research and teaching. When universities attempt to regulate its operation by its rules, which would be tantamount to performing the state business, in a broad sense, then there should be a delegation of specific authority by law.

Article 6, paragraph 1 of the Higher Education Act of Korea provides that “The principal of the school may set or revise the rules and regulations of the school (hereinafter called “School rules and regulations”). Thus it declares clearly that rule making power is delegated to the principal of the school.

Nonetheless, the problem associated with this article would be that the rule making power is delegated to the principal of the school. I am of the opinion that it is desirable to prepare the fundamental rules, which would read “the Higher Educational Institutions shall have the school rule-making power within the scope allowed by the law, where the principal of the university is seldom elected by participating faculty and other elements of the institutions.

In concrete terms, either let the University Council have the power to set up the rules and regulations of the school as is discussed below or leave the door open for each individual school to set up its own rules and regulations of the school at its own discretion. Also, statutory provision of the items to be
included in the rules and regulations of the school may be in conformity with the doctrine of statutory regulation of educational systems found in Article 31, paragraph 6 of the Constitution (Korea), in my view.

In addition it would be natural to recognize that there shall never be an absolute freedom from the State with regard to the rule-making power of university.

The autonomy of the university is brought about by government power decentralization and therefore self-rule and autonomy of the university are validated within the law derived from our Constitution (Korea) based on democratic sovereignty. This point is emphasized in Article 31, paragraph 4 of the Constitution (Korea), which reads “...the autonomy of institutions of higher education shall be guaranteed under the conditions as prescribed by Act.”

Therefore, rule making power of the university is also guarantied within the scope of the applicable law. However, the law shall respect the freedom of scholastic pursuit or subjectivity of autonomy which is guarantied by the Constitution (Korea) as is provided for in Article 22, paragraph 1 of the Constitution (Korea). It also should contain substantive feature of freedom of scholastic pursuit as a fundamental right of individuals as well.

2. Autonomouse administration of the university

Autonomouse administration of the university is also within the realm of autonomy of the university. Nonetheless, the provision for autonomous administration of the university is found nowhere in the Higher Education Act(Korea).7

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7 With regard to this point, Article 16–5, section 2, relative to the constituent elements in Higher Education System as defined in the Proposal for the Higher Education Act of Korea drafted by the Higher Education Reform committee in 1996, had a significant clause, which read “the constituent elements shall have the right and responsibility with regard to participate in administration autonomy in compliance with the rules and regulations and the school rules.”
Paragraph 5, Article 16, of Chapter 2 of the Tentative Draft of Education Reform Committee of 1996 to be integrated to the Higher Education Act of Korea with regard to the member composition, belatedly, I find it significant because of the wording, which reads "the constituent elements shall have the right and obligation to participate in autonomous administration as provided for in the laws and ordinances and in accordance with the school rules and regulations".

If we are to regard the nature of university autonomy and or self-rule as self-ruling power to maintain and achieve its own objectives through its system or organization at its own responsibility and yet not subject to strict adherence to the instructions of the State, it would be a logical consequence to claim that the university administration is an embodiment of intrinsic substance of self-rule and/or autonomy of the university.

The autonomous administration signifies the ability to maintain such individual matters as having a close relationship with scholastic endeavor or with the realm in specific provisions provided for in Article 22, paragraph 1 of the Constitution (Korea), not to be subjected to strict adherence of the State instructions. In this sense, administration of the university and that of the State will have to be distinguished from each other.  

For this reason, autonomous administration of the university is a direct and logical consequence of systematic, organizational and fundamental function, which is derived from the university autonomy or self-rule and ultimately freedom of scholastic endeavor.  

Ultimately, freedom of scholastic pursuit, as provided for in Article 22, paragraph 1 of the Constitution (Korea), guaranties

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the character inherent in the specific provisions in the Constitution (Korea), which is called freedom of scholastic endeavor.

Consequently, what is meant by guarantying autonomy in the university administration will have to be such that would include all of the personnel involved in scholastic research and teaching with a sort of decision making power of his own and related administrative activity in all of the important and relative to scholastic endeavor within the university.

Therefore, there is no room for the law or administration to interfere with regards to planning and development of research, teaching, development and execution of scholastic programs and curriculum.

In reality, it would be difficult to organize and handle autonomous administration inherent in the university, and the matters may be delegated by State Administration separately by dual systems, especially in the cases of State University. Therefore, I am of the opinion that it is desirable to operate in compliance with the principle of integrated administration or unitary systems, like in Germany.9

Accordingly, to realize substantial security of the autonomy of the university, it is necessary to delegate to the President of the university the authority to handle personnel matters related to the administrative staff. As a matter of fact, in the cases of the State university, the President of the University has no room for participating in the process of nominating the secretary general of the university administration and also in the cases of grade 3 and 5 civil servants, who are designated by the

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9 Article 58, paragraph 3 of the German Fundamental Law of the University declares the principles of integrated administration with respect to autonomy of university administration. On this subject, refer to See Woo Lee, Autonomy and the Right to Participation by the Constituent Elements of the University, Public Law study, the 25th edition, volume 3, page 203, footnote 14, 1997.
Department of Education of the National Government, and the only thing that the university does is to assign them to the respective and specific positions. In view of this reality, it is recommended that the university should have more say in the personnel affairs in order to help realize the real autonomy of the university.

In addition the overall responsibility should rest on the president of the university or on the Supreme Decision Making Body and in case of the matters that university handles on behalf of the State, which is in fact performing the State function within the scope of delegation and naturally in that sphere, subject to State Control. Nevertheless, the university administration is a body of autonomous and integrated organization as well as an administratively functional and consolidated body as far as its relationship with the State is concerned.

I am of the opinion that this is a logical representation of the realistic image of autonomous administration of university from the standpoint of the Constitution (Korea) and guaranty for freedom of scholastic pursuit and systematic-organizational function in securing university autonomy or self-rule of the university.

V. The problems associated with organizing University Council and Education Committee under the Higher Education Act and the Private School Act of Korea.

1. The basic aim of legislation of education related laws.

The fundamental and legal relationship in the State run primary, secondary and high schools is threefold; namely, the State-school-parents. But in the case of the private schools, that is fourfold and includes the founder or the Foundation in addition to the above three.

The fundamental and legal relationship in the State University is two fold; namely, the State and the university. On
the other hand the fundamental and legal relationship in the private university is three fold; namely, the State, the university and the founder or Foundation.

This is the very point of cause for the mandatory requirement of conceptual and standardized difference with respect to autonomous education and legal obligation/responsibility between the state and private schools.

This provides an ample justification for treating primary, secondary and high schools and university separately in the law, and each of them should be covered in the separate statute. Likewise, the State and private schools at the level of primary, secondary and high school and university should be treated separately and covered by separate statute.

In this sense, it would be worthwhile to consider dichotomizing current Private School Act of Korea into the Private School Act of Korea and the Private University Act of Korea as the current Primary and Secondary School Act of Korea and Higher Education Act of Korea, regulating public schools. Otherwise, the suggestion would be to treat private schools and private universities distinctively even within the Private School Act of Korea.

The university is an institution comprised of the bodies of professors, assistant professors, students and the administrative staffs. This is meaningful when the legal character of university is viewed as a juridical person under the public law. On the other hand, in cases in which the legal character of the private universities are regarded as a chartered enterprise and when the charter or approval is granted, there should be a legal requirement as prerequisite to incorporate the provision, which allows the private university personnel the right to participate, in its articles of incorporation like in the case of State universities. In this manner the Constitution (Korea) autonomy of private universities may become reality.
However, the substance and scope of the right to participate by the private university personnel will have to be materialized in harmony with the freedom of private universities.

After all, with regards to the matters closely related to the task of scholastic research and teaching in the universities, most are performed by the body of professors. It may be possible to place some degree of limits on the participation of other group(s) of personnel, or it may be excluded. With regards to the other matters, the degree of participation by the university constituent elements is a matter of policy, which boils down to the question of legislation and revising school regulations.

Though the freedom of instituting and operating private schools do not mean the freedom allowed in the Constitution (Korea), the provision in regards to the existence of private school system may be presumed in Article 31 of the Constitution (Korea).

However, unlike private schools, the existence of private the university system is warranted clearly by the provisions of Article 22, paragraph 1 and Article 31, paragraph 4 of the Constitution (Korea). Therefore, all of the state, public and private schools and state, public and private universities should not be placed quantitatively or qualitatively, under the direction and supervision of the State or autonomous organizations, but as has been indicated above, the related rules and regulations should be interpreted and applied in such manner as to comply with the intention of the Constitution (Korea) as well as the character of legal relationship for each system.

The substance of the freedom of the private university is also the freedom of establishment and operation of the institutions.

Especially, the bases of the freedom of the private university are found in Article 22, paragraph 1 and Article 31, paragraph 4 of the Constitution (Korea). Since the management of universities is similar to a sort of control of scholastic pursuits, it would be improper to assume that unlimited management power granted to
the private university foundations or to the founders, which are the legal subjects of Private Universities.

The warranty provided for in the Constitution (Korea) with respect to freedom in scholastic activity – especially in the area of scholastic pursuit and teaching – is granted to the faculty of private university, which is with the proviso that such freedom should neither be violated nor limited unduly.

Establishment and management of the private university are in the form of conjoining in the public education system through the charter or the sanction of the State. Therefore, it is mandatory for the private university foundation or founder to ensure that the system is adequate to scholastic pursuit, in the process of establishment and management.

The limited State control, within the scope of achieving its objective, is exercised through such administrative actions as granting permission or licensing to establish and manage the private universities so that a minimum standard of educational quality is maintained in the private institutions.

These supervisory functions of the State are performed to that extent. The Constitution (Korea) should not stipulate a complete exclusion of the possibility of exerting influence over the operation of the schools by the Foundation.

In view of the freedom of scholastic pursuit, warranty of an autonomous system of the universities, the statutory obligation of the State to protect the fundamental interest and the Constitutional (Korea) significance, which is derived from the principles of cultured nation, do not necessarily mean to make the model of the private university system confirm to that of the State University.

But in principle, the legal obligation to adopt the model of the system adequate to scholastic pursuit is imposed on to the private universities.

From the standing point of warranting the freedom in establishing and managing the Foundation, there are considerably ample provisions in the current Private School Act. On the other
hand, the provisions with respect to warranting freedoms of scholastic pursuit, autonomy of university and right to participation by the university personnel are almost non-existent in private universities. It is not considered an exaggeration.

Accordingly, to warrant the right to participate by Private University personnel in commensurate with their quality, function, responsibility and mutual relations, setting up the fair review standard and procedure in appointment and dismissal of Private University professors in such manner as would not impair the intrinsic value of the freedom of scholastic pursuit or in the private university also such provisions of principle as to warranting professors rights to participate in university operation through University Council, Faculty Meeting or Faculty Conference and School Affairs Committee, should be clearly set forth in the Private School Act of Korea and or in the Higher Education Act of Korea.

2. The Problems related to the legal character of the University.

As was mentioned above, the University system is comprised of professors, assistant professors, students and other administrative staffs. It is significant when the legal character of universities is understood as the institutions under the Public Laws.

Though the character of university is sort of an embodiment of both the character of the institutions under the Public Laws and the character of physical facility, over which the former character is dominant. This view displays the basis of classifying the right to participate by the university personnel groups according to their respective quality and to regulate the group corresponding to the group’s quality of scholarship, function, responsibility and the degree of relationship.

To the contrary, the legal character of the private university is viewed as a chartered enterprise and the intended aim of the
Private University Autonomy as provided for in the Constitution (Korea) may be realized by making the right to participate by the university constituent elements a condition to licensing and approval. This should be recognized and incorporated in the articles of incorporation of the private university foundation, following the model of the state university.

However, the substance and scope of the right to participate by the private university constituent elements should be materialized in harmony with the freedom of the private university.

When the autonomy of the university and the freedom of the university are differentiated from each other in the private university, the freedom in the private university may be understood as the one that includes the autonomy of the university in the private university.

Accordingly, the autonomy of the university in private university, unlike that of the university in the state or public university system, each individual university may formulate its own form and structure of autonomy, which conforms to its situation, in such a manner as to warrant the freedom of the private university as well as the basic right of the Private University personnel provided for in the Constitution (Korea).

Based on the discussion above, relative to the significance of university autonomy provided for in the Constitution (Korea) and the basic aim of the related statutes, the following recommendations are made with respect to structuring the University Council and School Affairs Committee.

3. The aim for structuring the University Council and School Affairs Committee under the Higher Education Act of Korea and the Private School Act of Korea.

1) The problems in establishment and management of University Council.
It is recommended that the existing rules and regulations relating to the University Council should be revised in more concrete terms, which allows the constituent elements of the university education system to deliberate and resolve the important matters pertaining to education and to lay the ground rules of the Professors Conference.

It is also recommended that the Professors' Conference, to which all professors are eligible to participate, elects the delegates to be sent to and participate in the University Council as well as the School Affairs committee, Faculty Personnel Committee, etc., filling one half of the seats of each organization at maximum.

As has been discussed above, based on the intention of the Constitution (Korea) with respect to University Autonomy or self-rule, it would be a valid proposal for the university council to assume the function of formulation and revision of the rules and regulations of the school, provided that the basic substance of University Autonomy is interpreted as the power to formulate rules and regulations as well as autonomous administration of the University as far as the function of University Council is concerned.

The responsibility of final approval of the budget and financial statement is vested with the State or private university foundation. My suggestion is to allow the university council to perform the function of reviewing them among others. In addition, the final appointment of the president of the university is made by the State or private university foundation. I suggest to let the University Council select or nominate the candidate for the post, and when it becomes necessary, the University Council receives a report or counsel of the item on the agenda introduced by the president. Thus it is desirable to make the University Council literally as the supreme counsel within the university system.

The matters on participation in the university council by the representative of such elements as administrative staff, students and assistant professors, other than the professors, according to
their respective role, function and responsibility also deserves prudent consideration. It also may be possible to have the representatives of the alumni association and those of the parents association involved in the selection of the candidate(s) of President or Dean.

Subject to more intensive study in the matter of structuring University Council, the following recommendations are made: The number of Council members should be somewhere around 15–50, depending on the size of the institutions; the professors’ representatives elected by the Professor Conference, to which all professors are eligible to attend, should fill one half of the seats for a two year term and the remaining half by the president, professor with an administrative position (Dean, department chief, superintendent, operations’ team manager), who’s membership is inherent in their respective position, one or two from each group depending upon the size of the university for a term of one to two years.\(^{10}\)

With respect to the selection and recommendation of the candidates for the presidency of the universities, as has been discussed above, one representative each from the Alumni Association and Parents Association may participate only with the right to vote; and deliberation is desirable, in the opinion of the author. The chair and deputy chair of the University Council should be elected from among its members. And in the case of the private university council, one of the directors of the Juridical Person will be the chair, the position of which is inherent in the directorship.

The general meeting of the University Council should be held regularly at least once a year or may be called by the president of the University or one quarter or more of the

\(^{10}\) There have already been some concrete suggestions made by academia in regards to structuring University Council. Refer to especially re-establishment of the images of Board of Directors of Juridical Person and University Council, University Education, by Hyeon Jik Shin, Volume No.75 (1995) page 23 and below, and Education Department Study Reports by Sung Ho Lee, Jae Yoon Park, Seok Hoon Cho, Yong Shik Yoo titled Current Status and task of revising the Private School Act of Korea by the Private School Act of Korea Study Committee (1998).
members of School Affairs Committee or that of University Council. The University Council shall have the sub-committee for election and/or nomination of the presidential candidate(s) and the sub-committee to perform the function enforcing the school rules and regulations.

3) The problems associated with establishment and management of the School Affairs Committee.

The majority of the universities operate the School Affairs Committee (in some Universities, the Deans and Department Directors Conference or the School Affairs Conference), which is supposed to be a deliberation entity, but in reality they operate and function as a counseling entity.

And the core of the School Affairs Committee is comprised of Deans and Department Directors, who are appointed by the president of the University in a majority of the universities. In view of this practice, as a matter of fact, they function more like an executive hand of the president rather than being a deliberation and decision-making entity.\textsuperscript{11}

Consequently, it is desirable to recognize in the Higher Education Act the significance of the systematic protection of the right to participate in University Autonomy by the professors without holding an administrative position and the role of the School Affairs Committee as a tool to prevent arbitrary operation of the school affairs.

With respect to the structuring of the School Affairs Committee, which is assumed to be subjected to further studies and scrutiny, it is suggested that the number of members should be from 10 to 30, depending on the size of the school and the representatives of the professors to be elected at the professor’s

\textsuperscript{11} Refer to pages 192, No.3 of the Volume 25, the Public Law, Heon Jik Shin, “Reformation of the Education Law of Korea, the problems associated with decision making structure of schools”, 1997.
conference, and that they fill one half of the seats for a two year term and the remainder should be filled by the President and the professors with administrative positions, the membership of which is inherent in their respective position and other professor(s) recommended by the president.

The president of the University should chair the Committee. It would be compatible with the intention of the Constitution (Korea) to leave the doors open for one representative from each of from the bodies of students, assistant professors and administrative staffs to participate in the committee meeting to express their opinion on the matter, in which they do not have a conflict of interests, even without the voting right.

The function of the School Affairs Committee, which is an organ within the University, should be engaged in deliberation and decision making in such important matters involved in school affairs as admission of students, appointment of professors, awarding academic degree, initiating a proposal to revise school regulations, formulation and revision of all other regulations except the school regulations, student counseling, rewarding and disciplinary action, preparation and execution of the budget. The School Affairs Committee shall have a diversity of sub-committees to handle each area of interest such as Faculty Personnel Sub-Committee.

4) Regarding the Power of Appointing Faculty Members

The current Private School Act of Korea basically empowers the Board of Directors of the Private School, which was established by a School Juridical Person, to nominate the principal and other teaching staff after deliberation and makes decisions in the matter (Article 16, paragraph 1-5). Article 15 and the following articles of the same Act of Korea reveals the substance in more concrete and specific terms with respect to appointing private school teaching staff.
Especially, taking into account of the difference in the character of the Private Schools and that of the private universities, the separate provisions have been made with respect to appointing the president and the teaching staff of the private university in the revision of the Private School Act since April of 1990.

The School Juridical Person (Corporation) holds the power of appointing the University President (Article 53, paragraph 1) and that of the teaching staff, which are to be nominated by the resolution of the Board of Directors upon recommendation by the president (Article 53, paragraph 2-1).

But the appointment of faculty members of the universities may be delegated to the president and the Deans in accordance with the relative provisions in the articles of incorporation (Article 53, paragraph 2-2). However, the Private School Act of Korea provides only for the appointment of president or dean by the school juridical person, but there is no provision whatsoever as to the substance or manner in which the constituent elements of the school system participate in the school autonomy. This may be problematic in relation to Article 22, paragraph 1 and Article 31, paragraph 4 of the Constitution (Korea).

In other words, among the constituent elements of the school system, especially the participation of the faculty in the appointment process of the University President or members of faculty, is nonexistent. This does not conform to the intention of the Constitution (Korea), which has the provisions to warrant the freedom of scholastic pursuit along with autonomy of the university but not in concrete terms for the specifics were left to be provided for by the subordinate laws.

It is proposed that they add the provisions relative to the right to participate in university autonomy by the university constituent elements in the article 10, paragraph 1 of the Private School Act which enumerates the mandatory items to be listed in
the articles of incorporation of the private foundation (namely add "In case of a school juridical person, which is in the process of establishing University level educational institute the provisions with respect to the right and obligation of participation in university autonomy by them according to their respective qualification, function, responsibility and relativity") as a condition to approval for the institution.

It is desirable to revise the relative rules and regulations (for example; Article 53, paragraphs 1 and paragraph 2–1) in compliances with the process and manner (for example, the selection of the presidential candidate to be made by the university council or by the decision of the school affairs committee or personnel committee) and that the president and deans and teaching staff are to be appointed by the educational juridical person. (If the resolution of the school juridical person and that of the competent committee are not in agreement relative to the selection, the issue should be reviewed and resolved by the competent committee's aggravated resolution).

Since the system of tenured professorship has been introduced (Article 53, paragraph 2–3), the necessity of systematic participation in the selection process of the president by the component elements of the university system is more acute and is also necessary to introduce the university council system, which makes it a reality for the systematic participation of the university constituent elements in university autonomy, which enjoys less freedom relative to private schools of private school juridical person.

VI. Conclusion

The provisions in the Constitution, relating to the freedom of scholastic pursuit, warrant the free development of university as the organizational system, which meets the communal need in such activities as freedom of research and teaching, and the
subjective right of the fundamental right should also be respected within the university.

Therefore, in a broad sense, the concept of university autonomy should include the function, not only the rule making power, but also all the measures closely related to research and teaching, which are to be carried out through its system at its own responsibility with discretions in administering or executing the instructions from the State or outsiders.

In concrete form, the rule making power within the scope of the pertinent law, the power of self administration and the law referred hereto should be in conformity with the intention of the Constitution (Korea).

The bodies of professors, part-time lecturers, students and the other administrative staffs constitute the university system. Though it embodies the character of the institutions under the public law and that of the education facilities or a sort of the mixture of both, in which the former is more prominent. This provides the basis for regulating the right to participate by these constituent elements in accordance with the degree of their respective scholastic quality, function, responsibility and relativity upon clear distinction is made quality wise among the constituent elements.

On the other hand, in case of the private universities, the legal character of which is a chartered enterprise. The intention of the Constitution (Korea) may be realized when the law makes it mandatory to have the right to participate by the private university constituent elements stipulated in the Articles of Incorporation in the process of licensing or approval. The participation right should be similar to that of the state university.

However, the substance and scope of the participation right of the constituent elements of the Private Universities should be exercised in harmony with the freedom accorded to the Private Universities.

After all, with respect to scholastic pursuit and the matters closely related to teaching, autonomy of the faculty plays a major
role and the participation by other elements may be either limited or eliminated. The degree of participation in other matters by the constituent elements is a matter of policy, which leads up to the subject relating to rule making and revision of the school rules and regulations within the scope of the Constitution (Korea).

With these premises, it would be in the right direction and desirable to make the University Council and the School Affairs Committee system as decision making body of the Universities in principal agenda, which should be provided for in the law, in my opinion.

In this sense, it is hoped that the substance of the suggestions made in this thesis to be adopted in future legislation for improvement. And from the standpoint of legislative policy, it would be necessary to engage in long term and constant study and scrutiny at a practical level, to streamlining systems of the Basic Education Act of Korea, the Higher Education Act of Korea and the Private School Act of Korea.

As a matter of legal system, the Private School Act of Korea should be dichotomized: The Private School Act of Korea and the Private University Act of Korea are clear and separate, and distinct provisions should be made each for the substance relating to the private schools and that of the private universities within the current Private School Act of Korea.

The lack of such substantive elements as provisions of principles for the system of university autonomy and participation in the autonomy by the component groups of the universities in the Higher Education Act of Korea should be definitely remedied.

Nevertheless, the university autonomy and the provisions for the freedom of scholastic pursuit, which is the source of university autonomy, have no direct bearing to the development in the area of scholarship, the nature of which is to distinguish the truth from the false.
In other words, university structure and scholastic pursuit (development) are not directly connected. Because the university autonomy as it relates to the university structure, which is derived from the freedom of scholastic pursuit belong to the realm of legal system, which adjudicates whether they are legally valid or invalid. And the realm of scholastic pursuit in which to recognize and distinguish the truth/un-truth is not in a legal system but in a system of scholastic pursuit.

For example: consider the relationship between the system of college and scholastic development. Nonetheless, the provisions for the freedom of scholastic pursuit and university autonomy in the Constitution (Korea) are the major documentation reflecting the importance of scholastic pursuit and that of the universities. And universities receive investments from the society and return output to them. In this fashion the universities and the society reciprocate each other and become the facilities for forum. This reciprocity should not be construed as being limited. This is how the freedom of scholastic pursuit and university autonomy should be guaranteed and nurtured.

In conclusion, the task of legislation, revising the legal system of Education laws in the 21st Century, is to improve the legal system in harmony and for mutual benefit. As far as the education related legal entities are concerned, so far the relative importance of the State and Private Education Foundation has been greater. Assuming the development of our education system has been realized in that fashion, the development of the education system of the new century will have to aim at reasonably assuring the right to participate in autonomy by the bodies of such education related organizations as students, teaching staff, professors, lecturers, parents, administrative staffs and assistant teaching staffs.

Now is the time for the private foundation and principals of the schools along with these organizations to assiduously pursue and undertake an independent role and function in promoting and nurturing school operation technique and mind. When the aim is
attained, more functional division in the area of autonomy with regard to education and university operation in the realm of scholastic community may be realized and thus contributing to the pure functional development in the society.