Western Jurists on Korean Law: A Historical Survey

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Abstract

Regrettably and understandably, Korean law has received no much academic attention from the Western scholars and lawyers. Neverthless, there have been quite a number pioneers who have written on Korean law through their direct or indirect contacts with Korea. This historical survey overviews these Western concerns on the traditional and contemporary Korean laws. It covers J. Kohler, P. von Möllendorff, O. Denny, C. LeGendre, W. Sands, J. Wigmore, L. Crémazy, F. Rey, W. Shaw, D. Eikemeier on traditional Korean law, and G. Radbruch, A. Oppler, E. Fraenkel, H. Kelsen, C. Lobingier, R. Storey, J. Hall, J. Murphy, H. Silving-Ryu, M. Rehbinder, E. Baker, J.West, J.Van Dyke and some legal comparativists on contemporary Korean law. This essay suggests the importance of the research of Korean law from the perspective of comparative jurisprudence, citing Radbruch's expression that Korean law is typically an interesting object of historical and sociological researches.

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I. Introduction

What does Korean law mean to the jurists of the world? Is it enough if Korean law is mentioned in some passages or pages as a branch or a stepson of Chinese or Japanese law? What do Western jurists know about Korean law specifically? How have they had contact with Korean law?

These general questions have significance not only for a better understanding of the history of world legal cultures but also for strengthening comparative legal science. Korea is not a land of always noisy politics as frequently reported in the Western mass media. Rather, Korea is a state with a long and independent culture and law. Nevertheless, many Western jurists seem to have a strong interest and an accurate understanding of Korean law and its legal sciences.

Here, I intend to investigate the process and the methods of the Western approach toward Korean law. I will examine how Koreans have received the influences of Western jurists as well. As a part of East Asian law [1], Korean law, though divided into North and South now, is an integral part of the world legal system.[2]

II. On Traditional Korean Law

The earliest mentions of Korean law are seen in the travel descriptions of some Westerners in the late 19th Century.[3] They are not the academic articles authored by jurists but general and informative sketches of the travellers. Until 1876 when Korea concluded a diplomatic and commercial treaty with Japan, she has been a secluded "Hermit Kingdom," as usually called "Land of Morning Calm."

1) Stanley B. Lubman, Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges, in: John Oldham (ed.), China's Legal Development, N.Y., 1983. pp. 83-100.

2) Sang-Hyun Song (ed.), Korean Law in Global Economy, (Seoul: Bakyoungsa, 1999); Dae Kyu Yoon(ed.), Recent Transformations in Korean Law Society, Seoul Nat. Univ. Press, 2000; Chongko Choi, Law in Korea, Seoul, 1996; Further, Chongko Choi, Asian Jurisprudence in the World, Seoul, 1999.

3) For example, Hendrick Hamel, Journal of the Unfortunate Voyage of the Yacht Sparraw, London, 1813; Percival Lowell, Land of Morning Calm, Boston, 1895; Homer Hulbert, The Passing of Korea, London, 1906.

A. Joseph Kohler

Joseph Kohler (1849-1919), a German "Universal jurist", seems to be the first Western scholar who wrote on Korean law. He published an article, "Über das Recht der Koreaner" in the *Zeitschrift für vergleichende Rechtswissenschaft* (1886) which he himself founded and edited.[4] He described curiously how the Koreans' legal life was: on the census registration, family system, succession and ancestor worship, etc. Since he himself had never been in Korea, he learned mainly from two reliable books: *Ein Verschlossenes Land Korea* (1880) by Ernst Oppert,[5] and *Histoire de l'eglise de Corée* (1874) by Charles Dallet.[6] E. Oppert, a German tradesman and traveller, wrote this book based on his personal experiences with Korean people. Although C. Dallet, a French missionary, had not been in Korea, he could gather abundant materials from his colleagues of Mission Estranger de Paris, who have been working in Korea with severe persecutions. Due to the indirect sources of the materials which he based his conclusions upon, Kohler's explanation of Korean law could not help being partial and biased. Considering that Korea had just opened her door to the Western world when he wrote this article in 1886, it is understandable how difficult it might be to access Korean legal literature. At that time, Korea had no legal scholarship at all in the modern sense. Since Korea remained as a traditional Confucian state, it might not be exaggerating to say that there existed only codes and cases without jurisprudence or legal reasoning.[7] Therefore, the interest which Kohler paid in Korean law deserves the attention and thanks of contemporary legal scholars.

B. Paul G. von Möllendorff

Paul Georg von Möllendorff (1847-1901) was the first Westerner who entered Korea "legally". Born in Zedenick near from Brandenburg in Germany, he studied law and Orientalistics at the University of Halle. After serving as a customs officer in

4) Korean translation is done by Chongko Choi in 1984. First printed in Chongko Choi, Joseph Kohler, in Great Jurists of the World (kor.), Vol. II, Seoul, 1984, pp. 300-315. Chongko Choi, Korean Law and Custom Seen by Westerners [Soyangin-i Bon Hankuk Popsok], 1989, pp. 114-119.

5) Korean translation was done by Wookeun Han in 1974.

6) Korean translation was done by Andreas S. Choi and Eungyul Ahn in 1987.

7) Chongko Choi, *The Traditional jurisprudence Yulhak in Korea,* 26 Seoul Law Journal, 186 (1985).

Shanghai, he came to Korea as a legal advisor for tax and foreign affairs. With the confidence of the Monarch Kojong, he exerted a powerful influence on domestic and diplomatic policies of Korean Kingdom. He served at some high posts in the Korean Government such as Vice Minister of Industry and Minister of Army. However, amid the severe rivalries of Western powers in the newly opened Korea, the personal affection of the King was not enough to enable him to hold strong power in Korea.[8] Thus, he had to return to China and wrote a memorandum, "*Die Reorganization Koreas* (1897)," with a nostalgic sentiment. In this booklet, he commented on the Korean legal system as follows:

> ... Korea is not yet rife enough to divide the judiciary from the executive. The Korean law must be changed from the barbarous Ming code (13.-16. C) into newly enlightened law. The new code of Korea must not be written in Chinese character but in Korean alphabet, *Hangul*.[9]

Moreover, Möllendorff mentioned Korean family law quite frequently in his "*Das Chinesische Familienrecht* (Shanghai, 1895)."[10] He explains Korean family legal systems in relationship with ancestor worship.

Despite his intellectual background rooted in legal science, he could not write much on Korean law, since he spent most of his time as a statesman in Korea. However, he was a pioneer in the modernization period of Korean law. It should be noted that he tried to abolish torture in the Korean criminal procedure of that time.[11]

8) For detail activities of von Möllendorff in Korea, *see*, Rosalie von Möllendorff(ed.), Paul Georg von Möllendorff: Ein Lebensbild, Leipzig, 1930; Water Leifer, P. G. von Möllendorff, Seoul, 1984.

9) P. G. Mollendorff, *ibid.*

10) Chongko Choi, *Möllendorff über das koreanische Recht* in: Recht in Deutschland und Korea [Handok Pophak], Vol. 1, 1980; Chongko Choi, P. G. Möllendorff and Korean Family Law(kor.): Festschrift for Prof. Chusu Kim, Seoul, 1988, pp. 73-89.

11) Chongko Choi, G. von Mollendorff aus Gesicht von heutigen Korea, paper read at the P.G. von Möllendorff's 100 Year Anniversary Symposium, Seoul, May 2001.

C. Owen N. Denny

Owen Nickerson Denny (1838-1900), a former judge and attorney of the United States, replaced von Möllendorff as a legal adviser to Korean Ministry of Justice. He stayed for four years in Seoul, beginning in May 1886.[12] He was the first Westerner who asserted that Korean law must be treated independently as a sovereign state from the point of international law. In his booklet, *China and Korea* (1888), he argued that Korea had not been a dependent or vassal state toward China but an independent and tributary state.[13] His assertion, announced by Senator Mitchel in the US Senate, became provocative in the East Asian international politics. Möllendorff in China quickly refuted Denny's thesis.[14] The debate between the German and the American lawyer became the first discussion on the China-Korea relationship viewed from the perspective of international law.

As a well-trained lawyer, Denny contributed to the development of the Korean judiciary system. Moreover, he participated in making the treaty between Korea and France in 1886. He gave some reasonable guidance for the diplomatic negotiation. In particular, his advice on the guarantee of French Catholic missionary activities in Korea, which became the foundation of freedom of religion in Korea, must be credited as a significant contribution to the Korean society.[15]

D. LeGendre, Sands and Stevens

Charles W. LeGendre (1830-1899) served the Korean Government after Denny as an American legal adviser. He worked as a consultant to Ministry of Home Affairs from 1890 until his death in 1899 in Seoul. When he served the Japanese Government

12) For more details about him, *see* R. Swartout, Mandarin, Gunboats and Power Politics, University of Hawaii Press, 1982; Chongko Choi, The Reception of Western Law in Korea [Hanguk ui Soyangpop Suyongsa], Bakyoungsa, Seoul, 1981.

13) O. N. Denny, China and Korea, Shanghai, 1888. Korean translation in Chongko Choi, *ibid.* pp. 126-148.

14) P. G. Möllendorff, A Reply to Mr. Denny's Pamphlet Entitled China and Korea, in: Rosalie, *supra* note 8, at 125-37.

15) For details on religious freedom in Korea, Chongko Choi, Staat und Religion in Korea: Zur Grundlegung eines koreanischen Religionsrechts, Freiburg, 1979; Chongko Choi, The Process of Legal Guarantee of Religious Freedom in Korea (Kor.), State and Religion, Seoul, 1983.

before, he maintained that Japan had the right to govern Korea and Taiwan. He changed his attitude in Korea, but made no significant contribution to the development of Korean law.[16)]

William Sands (1875-?), the successor of LeGendre, wrote his autobiographical *"Undiplomatic Memories"* (London, 1930). Therein, it is shown how he tried diplomatically to make Korea a state of neutrality. The efforts for a neutral state were a fascinating but unrealizable program. He wrote some articles including "The Actual Situation of Korea."[17)]

Clarence Ridgeby Greathouse (1845-1899), a former judge of the United States, worked as a legal consultant for Ministry of Home Affairs in Korea from 1890 to his death in 1899. He taught "Foreign Laws" at the Judicial Officer Training Institute when it was founded in 1895. This Institute has been changed into the present College of Law, Seoul National University. Although he seemed to be an able lawyer, it can hardly be said that he made a significant contribution to the development of Korean law.[18)]

The worst American lawyer who became a legal adviser to the Korean government was Durham White Stevens (1853-1908). Despite his high position as an adviser to Korean Ministry of Foreign Affairs, he has secretly acted as a Japanese agent. After his pro-Japanese interview with the American journalists, he was assassinated by two Korean patriots in San Francisco.[19)]

The numbers of Western legal advisers in Korea were fewer than in Japan. In terms of ability, they also seemed to be inferior to those in Japan.[20)] In addition, due to certain complications, the Korean government could not fully accept the helpful recommendations

16) For more detail, *see* Chongko Choi, *supra* note 12, at 160-186.

17) W. Sands, The Actual Situation of Korea, The Messenger, Vol. XLI, May 1904, pp. 491-496. Korean translation was done by Chongko Choi, *supra* note 12, at 214-18.

18) Chongko Choi, *supra* note 7, at 187-202.

19) For this accident, *see* the San Francisco Chronicle of May 25, 1908 and Andrew Nahm, D. U. Stevens and the Japanese Annexation of Korea, in The United States and Korea, 1979; Bong Yoon Choy, Koreans in America, Chicago, 1979, pp. 146-49, 297-98; Chongko Choi, A Study on the Stevens Case, in: FS. for Paul K. Ryu, Seoul, 1988.

20) For Oyatoi-Studies, *see* the bibliography in Chongko Choi, The History of Korean Legal Thoughts[Hanguk Popsangsa], Seoul Nat. Univ. Press, 2001, p. 261; Spence, To Change China: Western Advisers in China 1620-1960, Boston, 1969; Ardath W. Burks (ed.), The Modernizers: Overseas Students, Foreign Employees, and Meiji Japan, Westview Press, Boulder, 1985.

provided by them. Korea was entering an unstable period of history. In September 1904, with the takeover of the important positions of all Korean ministries by Japanese consultants, Korea gradually lost her diplomatic and judicial sovereignty to Japan. The initial efforts by the Korean government to adopt western law was replaced by her obligation to follow Japanese law until her liberation in 1945.

E. John Henry Wigmore

John Henry Wigmore (1863-1943) was well recognized as a Japanese law specialist through his 8 volume books, *Law and Justice in Tokugawa Japan* (1969-1975).[21] He taught at Keio University in Tokyo from October 1889 through December 1892 and researched the Tokugawa laws.[22] Because he enthusiastically gathered and analyzed the exciting legal documents of that time, he seems not to have paid attention to the relationship with Korean law. In his 3 volume book, *A Panorama of the World's Legal Systems* (1928), Wigmore explains Japanese laws in 75 pages including 26 pictures of Japanese legal institutions and practices. He views Korean law as a mixture of Romanesque law and Japanese law.[23] Another book authored by him, *Kaleidoscope of Justice* (1941) includes some episodes of Korean legal practices, which are cited from the above-mentioned book of W. Sands, *Undiplomatic Memories* (1930).

F. Laurent Crémazy

A former judge in France and Vietnam, Laurent Crémazy (1837-1910) came to Korea as a legal adviser to the Ministry of Justice. He arrived in Seoul in 1900 with the recommendation of his teacher, Gustav Emil Boissonade (1825-1910), who was a former professor at University of Paris and the legal adviser to the Meiji Government of Japan. Crémazy served the Korean Government for five years until 1905, when the Japanese took power. He participated in the legislation of the first modern Korean

21) For his life Takayanagi Kenzo, John Henry Wigmore, in: J. H. Wigmore, Law and Justice in Tokugawa Japan, Part I, Univ. of Tokyo Press, 1969, pp. xvii-xxiv; William R. Roalfe, John Henry Wigmore: Scholar and Reformer, Northwestern University Press, Evanston, 1977, especially on Japanese law, pp. 21-36, 267-271.

22) John H. Wigmore wrote an article, The legal system of old Japan, Green Bag, Vol. 4, 1892, pp. 403-478.

23) John H. Wigmore, A Panorama of the World's Legal Systems, 1928.

Penal Code, *Grand Penal Code* [*Hyongpop Daejeon*] and translated it into French (*Code penal de la Corée*) in 1904. This was the first publication of Korean law in a European language.

He taught "Foreign Laws" at the Judicial Officer Training Institute (*Popkwan Yangsongso*), founded as the first modern institution for legal education in Korea. Furthermore, he taught some students from the Governmental School for French Language (*Kwanrip Pop Hakkyo*) at his home. Five of those students later became the lecturers at the Judicial Officer Training Institute. As Crémazy initiated those significant activities for Korea, the growing Japanese power in Korea must have considered him as a barrier against their colonization policy. Due to Japanese pressure, Crémazy had to reluctantly leave Korea. Later in Paris, he published *Texte Complementaire du Code Pénal de la Corée* (1905) and *Coutum, Croyances, Moeure en Chine, dans 1'Annam et en Corée* (1907) with his nostalgic memories.

In a word, Crémazy was an unforgettable Western jurist in modern Korean legal history.[24)]

G. Francis Rey

Francis Rey, a professor of international law at the University of Paris, wrote two articles about Korea, in particular, about the Japanese seizure of Korea. His article, *La situation internationale de la Corée*,[25)] in *Revue Générale de Droit Internationale Public* (Vol. 13, 1906). He asserted the illegality and nullity of Japanese-Korean Protectorate Treaty of 1905, which was signed under the physical threat of Japanese imperialistic power.

In the current debate on "legality" of the Japanese-Korean Protectorate Treaty, Rey's article is often cited by the Korean historian and legal scholars. Nevertheless, the biodata of him, the background of his activities stay still as a future research.

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24) For details about him, Chongko Choi, *The 100 Years of Korean-French Legal Relations[Hanpul Kyoryu Baeknyeonsa]*, Seoul Law Journal, Vol. 27, No. 1, 1986, pp. 117-148.

25) Francis Rey, La Situation Internationale de la Córee, Revue Générale de Droit Internationale Public, Tome XIII, 1906, Paris, pp. 40-58. Korean translation was done by Chongko Choi and Sanghee Han in Seoul Law Journal, Vol. 27, No. 3, 1986. Reprinted in Chongko Choi (ed.), Korean Law and Custom Seen by Westerners[Soyangin-i-Bon Hankuk Popsok], Seoul, 1989, pp. 175-204.

H. William Shaw

William Shaw (1944-1993), a Harvard J.S.D and a lecturer at Seoul National University was a specialist of Korean legal history. A descendant of a missionary in Korea, Shaw wrote an excellent book, *Legal Norms in a Confucian State* (Berkeley, 1981). The book, which was based on his Ph.D. dissertation of Harvard University, analyzed the characteristics of Korean legal history. The author translated the criminal cases during the 18th century from the Records of Criminal Cases (*Simnirok*) of the Ministry of Punishment. He tried through these materials to find the rationality in Korea legal reasoning and criticized the Weberian thesis of "Western (formal) rationality versus Asian (formal) irrationality." In some other articles on Korean legal history,[26] he endeavors to ground the identity of Korean legal history from Chinese legal history. He seems to be the only Western scholar who had specific interest in Korean legal history. Unfortunately, he died young in 1993.

I. Dieter Eikemeier

A Professor at Tübingen University, Dieter Eikemeier studied law at Zürich University. He paid attention to Korean customary law and village compacts (*Hyangyak*) as his tutor Karl S. Bader researched on German *Dorfrecht.* He published his research on *Changjwari* village compact and the customary laws of Korean society.[27] His approach is significant and important for research on Korean legal anthropology and sociology.

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26) William Shaw, Social and Intellectual Aspects of Traditional Korean Law 1392-1910, in: Traditional Korean Legal Attitudes, ed. by Chun Bong Duck & et., Institute of East Asian Studies, UC Berkeley, 1980; Traditional Korean Law: A New Look, Korea Journal, Vol. 13, No. 9, 1973, pp. 40-53; Traditional Korean Law and Its Relations to China, in: Essays on China's Legal Tradition, ed. by Jerome A. Cohen, Princeton University Press, 1980, pp. 302-326. The Neo-Confucian Revolutions of values in Early Yi Korea; its Implications for Korean Legal Thought, in: Law and the State in Traditional East Asia; Six Studies on the sources of East Asian Law, ed. by Brian E. McKnight, University of Hawaii Press, 1987, pp. 149-172.

27) Dieter Eikemeier, Elemente in politischen Denken desYonam Pak Chi Won, Wiesbaden, 1980; Documents from Changjwari: A Further Approach to the Analysis of Korean Village, 1975; Rechtswirkungen von Heiligen Stangen, Pfeitergottheiten und Stein-haufengottheiten, Oriens Extremus, vol. 21, No. 2, 1974; Law on the Fringes of Korean Society: Agreement between Shamans and Local Government (unpublished paper), 1985; Law, Contract, and Covenant: Aspects of a Korean Mutual Insurance Venture, in: Anthropology of Law in the Netherlands, ed. by Keebet von Benda-Beckmann, Dordrecht, 1986, pp. 260-287.

J. Jon Van Dyke

Jon Van Dyke, a Harvard J.D. and professor at Hawaii University Law School has interest on the Korean and East Asian law from the perspective of international law. [28] Because he has a special interest on the Status of native Hawaiians, he wrote an interesting article on "Comparing the Annexation of Korea by Japan to the Annexation of Hawaii by the United States." [29]

He argues as follows:

> The central issue is that a stronger power imposed its will a weaker people, in both the annexation of Hawaii and that of Korea, and that a wrong thereby occurred. The international community has reached a consensus that all violations of human rights must be investigated and documented, that the perpetrators of human rights abuses must be punished, and that the victims of human rights violations have a right to compensation. The obligation to investigate, punish and provide compensation continues forward in time, and thus a new enlightened government that replaces a bad authoritarian government has a duty to punish the human rights abusers from the previous government and to compensate its victims. All of these principles have been established and accepted, but challenging questions still remain about applying them to specific situations.[30]

III. On Current Korean Law

Korea began to build up her own legal system and legal science as soon as with liberation from Japan in 1945. During the 35-year Japanese ruling, Korea could hardly

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28) Jon Van Dyke, Northeast Asian Seas--Conflicts, Accomplishments, and the Role of the United States, research undertaken with resource assistance from POSCO visiting Fellowship program NorthEast Asian Development at East-West Center, Honolulu, Hawaii. I thank Prof. Van Dyke for giving me this article.

29) This article was presented to Harvard--Seoul Symposium on Nov. 16-17, 2001, on "A Reconsideration of the Japanese Annexation of Korea from the Historical and International Law Perspectives."

30) Jon Van Dyke, Comparing the Annexation of Korea by Japan to the Annexation of Hawaii by the United States, 2001, pp. 33-34.

have contact with European and American law and lawyers. Even after independence, Korea had to suffer the absence of well-trained jurists not only in legal science but in practical judiciary. Korean legal culture during Japanese ruling was heavily influenced by Roman-German continental law and jurisprudence. However, with the birth of a new Republic in 1948, it became more open to Anglo-American law as well. Korea had to experience rule by the American Military Government for three years. It should be pointed out that the American Military Government has drawn the attention from many Western lawyers on contemporary Korea and her laws.

A. Gustav Radbruch

It is rather surprising that Gustav Radbruch (1878-1949), the famous German legal philosopher and criminal law professor paid attention to Korean law. Very interestingly, he mentioned Korean situation in his well-known book,*Vorschule der Rechtsphilosophie* (1948).

> Due to the lack of outspoken political characteristics and emphasized national identity and the far driven abstraction, the German Civil Code (*Bürgerliches Gesetzbuch: BGB*) became capable as law in culturally very different East Asia. A former German lawyer wrote recently to the author from Korea: "My work is especially fascinating for the following reason. Korea lives under Japanese law after it had been annexed 35 years ago by Japan. Japan had received more or less the German law. And I now sit as an American occupation officer in Korea and have the good reliable Bensheimers' legal texts on my desk and the BGB, the German Commercial Code (*Handelsgesetzbuch: HGB*) and the German Code of Civil Procedure (*Zivilprozeßordnung: ZPO*) and its supplementary laws, and would serve as a type of juristic connection-officer between Korean and American. Because I am educated in both legal systems, the civil law and the common law, I have the task to explain the American occupation law to Korean lawyers and to explain the Korean law(German law) to American occupation officers. The identification of German with Korean-Japanese laws is correct only with large restrictions. The large codifications became widely spread according to East Asian needs of

> adaptation. Family law and succession law remained in Korea as customary law and has itself in the use of law forming a sort of *usus modernus*. I am surprised to find that the German Romanists, who studied the process of the reception of the Roman law in Germany with endless care, never came obviously on the idea that the reception process of German law in East Asia is to be investigated scientifically. That would be an interesting task from the standpoint of legal sociology!"[31]

The letter mentioned above was written undoubtedly by Ernst Fraenkel (1898-1975), who was acting as a legal officer for the American Military Government of Korea. Radbruch was not able to have any personal contact with Koreans. However, it seems highly probable that he might have heard about Korea through Japanese scholars like Tokiwa Toshita (1899-1978), who lived for seven years at his house in Heidelberg. Radbruch's interest in Korean law was on reception of Roman-German law in the East Asia.[32] Additionally it might be mentioned that Radbruch's legal philosophy has gained great echoes in Korea as in Japan.[33]

B. Alfred C. Oppler

Alfred Christian Oppler(1893-) was born in German Alsace-Lorraine and studied law at Munich, Freiburg, Berlin and Strassburg Universities.[34] To escape Nazi persecution he immigrated to Boston and worked in various positions at Harvard

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31) Gustav Radbruch, Vorschule der Rechtsphilosophie, Heidelberg, 1948, pp. 51-52. English translation here is done by me.

32) Chongko Choi, Gustav Radbruch und Ostasien, Verfassung-Philosophie-Kirche: Festschrift für Alexander Hollerbach, Berlin, 2001, pp.485-500. Further, Koichi Miyazawa, Gustav Radbruch und die japanische Rechtswissenschaft, in: Gedächtnisschrift für G. Radbruch, Göttingen, 1968, pp. 266-276.

33) For detail, *see* Chongko Choi, *Die Rezeption der Radbruch Rechtsphilosophie in Japan and Korea*, Pophak Nonchong(Sungsil Univ.), Bd. I, 1985, reprinted in his book, G. Radbruch-Studien, Bakyoungsa, Seoul, 1995, pp. 139-162; Arthur Kaufmann, G. Radbruch und die koreanische Rechtsphilosophie: Eine Skizze anhande dreier Dissertationen, in Gedächtnisschrift für Prof. Zong Uk Tjong, Tokyo, 1985, pp. 112-117.

34) I enjoyed talking with prof. Kurt Steiner at Stanford University, when I was teaching at Santa Clara University Law School during the Spring Semester 2002. Even though Steiner, the former Colleague at the General Headquarters(GHQ) in Tokyo and the prosecutor at the Tokyo War Criminal Trial, showed me many valuable materials on Oppler, it could not identify the date of Oppler's death.

University, where he could be supported by Professor Carl J. Friedrich. In 1944, he entered Federal Government Service with the Foreign Economic Administration in Washington, D.C. He came to the Government Section of the Tokyo General Headquarters(GHQ) and engaged in various legal reforms in Post-World War Japan.

Oppler visited Korea on May 1, 1952 and had some contacts with the legal advisers of American Military Government in Seoul. He wrote his memories of that time in his autobiographical book, *Legal Reform in Occupied Japan* (1976).[35] There were some

35) The principal United States mission with regard to Korea was the development and supervision of an integrated program of economic aid as a basis for relief, rehabilitation, and stabilization. This responsibility was in the hands of the economic coordinator, who had his residence in Seoul. My own activity was rather connected with the political element, vaguely defined as "to create conditions favorable to the success of the military mission." I had to observe and analyze what was going on within South Korea, the constitutional developments, governmental policies, party politics, and opposition movements. With Syngman Rhee presiding over that nation, this was an exciting preoccupation. There is general agreement that he was an indomitable pioneer of Korea's independence and an irreconcilable enemy of communism as well as of Japan. He belongs among those rare historical figures whose seemingly chimerical dreams came true-at least half true. Neither of the great powers had cared much about the independence of the "Kingdom of the Morning Calm." When, after her war with Russia in 1904-1905, Japan made Korea a protectorate, and five years later annexed it, there was no attempt to interfere. Nobody in the foreign offices took seriously the odd little fellow who with fanatical zeal urged supports for the liberation of his country from foreign rule. It was only when, during the war with Japan, the Allied statesman who met in Cairo in November 1943, established the principle that a defeated Japan must give up the possessions that she had acquired by force, that Rhee could see the silver lining. Even then the independence of Korea was visualized only "in due course." Out of the American and Russian occupation zones, divided by the 38th parallel, developed two antagonistic Koreas after the United Nations' reunification attempts had failed. The southern Republic of Korea (ROK) was "our baby," the nothern Democratic People's Republic," that of the Soviets. Syngman Rhee did not see things as did the cautions Truman government, which always remained aware of the danger of a third world war. He hated the idea of limited war, a feeling he shared with MacArthur, and aimed at reunification of the two halves of Korea, by force if necessary. We would have liked a regime in the ROK that bore no resemblance to its communist brother beyond the 38th parallel, and in which the citizen enjoyed certain rights. Unfortunately, this was the American rather than Rhee's dream. To our disappointment, we watched him apply the same dictatorial and authoritarian methods as did his northern antipode Kim Il Sung. It is the dilemma that repeated itself in South Vietnam. The liberal doubts the wisdom of supporting an anticommunist regime that is as bad as its communist enemy, while the rulers of that regime are convinced that not only are its people not yet ripe for our advanced form of democracy, but also that individual freedoms cannot be allowed in view of the threat under which their nation lives. In light of the prevailing danger any opposition is considered as communist, or at least as giving aid and comfort to the enemy. As long as the cold was icy, of course, as along as we looked at communism as a monolithic power determined to destroy us and our way of life, the policy of aiding any nation that fights or is assailed by a communist state inevitably overrode the embarrassing irritation about its system of government. Although the ROK had under American influence, adopted a democratic Constitution with safeguards for

civil rights, President Syngman Rhee ruthlessly oppressed his political opponents. In my reports, which were used for informing Washington, I had continuously to tell stories of his high handed and obnoxious machinations. According to the Constitution, the president was to be elected by the unicameral legislature, the National Assembly. In spite of his charisma as the outstanding freedom fighter of the nation, his police-state methods and an increasing corruption in his government had made him so unpopular with the more liberal representatives of the assembly that he became truly anxious lest it would not reelect him in 1952. He therefore conceived the idea of having the Constitution amended to provide for the popular election of the president, and had those members arrested who opposed this plan. He was reelected twice, in 1952 and in 1956, but apparently things got worse. In his very old age he did not mellow; the traits that had characterized his regime-authoritarianism, corruption, and inefficiency-reached such a high degree that he lost his popularity. In 1960 he was accused of having rigged his third reelection, and he fell victim to student riots, which he had tried to repress with utmost police brutality. The United States, having lost patience with his methods, had expressed disapproval, and that may have convinced him that he had to resign. A tragic end in exile without the hopes and fervor of his young years followed. He was an excellent example of the type of leader who cannot withdraw in time from the theater of history. I distinguish the rebel who strove for independence from the ruler who achieved it and then led his people only from the unfree condition to another. For the United Nations Command, Rhee was a hard and troublesome man to deal with, and that was true because of his undemocratic attitude not only in domestic affairs, but also in international and military fields. Even General Ridgway, who had a great admiration for Rhee's patriotism, criticized his insistence that there was tremendous pool of Korean man-power that could be fighting for us if only we would give them arms. Rigway's comment on this was that we knew only too well how many hundreds of thousands of dollars worth of equipment had been abandoned in flight by certain units of the ROK army during every Chinese offensive. As a matter of course, our negotiations of the armistice met with great difficulty from this man, who could not reconcile himself with the status quo, but aimed at reunification under his rule. I can, from my own observation, only confirm Rigway's concluding characterization that "in the course of the negotiations, and before they began, his Rhee's intransigence, and the lusty, sometimes self-serving cries of his supporters in the United States put many thorns in our path...and prompted many of us privately to wish him far, far away." President Truman and his secretary of state, Dean Acheson, would have suffered even stronger vilification had they proposed the armistice on which the warring parties at long last agreed. It seems to me that in this atmosphere of incrimination, only a war hero of the prestige of General Eisenhower could have ended the Korean War on a status quo basis, just as only a De Gaulle could liquidate the Algerian conflict. On May 1, 1952, a group of J-5 men, among them Williams and me, made an information trip to Korea. Our first stop was Pusan, the harbor town at the Southern tip of the peninsula, where our Korean Military Advisory Group (KMAG) gave us a thorough briefing. That unit was headed by another General Caraway, the brother of Paul Caraway, subsequently my chief of staff in USFJ-apparently as tough as his brother, but also as efficient. Interestingly enough, both parents of these two prominent soldiers were United Senators from the state of Alabama. Before the Korean armistice, Swedish representatives, mostly officers, arrived in Tokyo on their way to Korea as members of what was to function as the noncommunist element of the Armistice Commission. A delay in the conclusion of the armistice prolonged the stay of this group, and this left to the idea of keeping them entertained and offering then some information. They were invited to listen to lectures by members of our headquarters. After the first one, the attendants confessed that they had great difficulty in understanding the "American English" and asked whether they could not have lectures in German. As a matter of course, this question resulted in my lecturing to them in German on subjects such as the South Korean Constitution. Strangely enough, although this is my mother language, I found it must more difficult to lecture in it than in English, which by then I was accustomed to use in the area of my work (Alfred C. Oppler, Legal Reform in Occupied Japan: A Participant Looks Back, Princeton University Press, 1976, pp. 305- 308).

other American legal advisers like Charles Pergler, John Connelly. But we do not know about their biodates and activities except Ernest Fraenkel.[36)]

C. Ernst Fraenkel

Ernst Fraenkel (1898-1975) was a German lawyer who studied at the University of Frankfurt a. M. and had special contacts with Hugo Sinzheimer and Franz Neumann. Being a Jew, he had to leave Germany for the USA in 1938.[37)] Having studied American legal science at Chicago Law School, he came to Korea as a legal consultant of the American Military Government. He had served from 1945 until just before Korean War in 1950. Fraenkel wrote an interesting booklet, *Korea*: *Ein Wendepunkt des Völkerrechts?* (1950). His letter to Professor G. Radbruch, mentioned above, reveals how he was acting in Korea and how the Korean legal culture was working[38)].

Two other lawyers came to me from the Occupation of Korea, where my old friend and colleague from the FEA period in Washington, D.C., Dr. Ernst Fraenkel, worked as a kind of advisor to President Syngman Rhee. When they were on leave in Tokyo, they visited me, having been told by Fraenkel about the opportunities in my organization. They both had been reserve officers: Walter E. Monagan, Jr., a major (later lieutenant colonel and colonel), and Richard B. Appleton, a captain. Otherwise, the two could not have been more different in temperament and character. Monagan was somewhat the type of a general staff officer: levelheaded, self-confident, discreet, and reserved, devout Roman Catholic, and more in the conservative side than the rest of us. He subsequently served in the Department of Defense. Appleton, on the other hand, was tremendously extroverted, vociferous, and outspoken. Due to his intense energy, he was an indefatigable worker. Both men proved to be jurists far above average, and became efficient members of the team. Monagan was especially competent in the difficult area in which economic and legal problems intermingle. Appleton did excellent work in the filed of criminal procedure and in the preparation of exchange of persons programs, which will be described later. (Alfred C. Oppler, ibid. p. 70).

36) In his article, *The Influence of U.S. Constitutional Doctrines on the Development of Korea's Governmental Structure*, in: Chan-jin Kim (ed.), Business Laws in Korea, Seoul, 2nd Ed., 1988, pp. 31-54, Prof. Sang-Don Lee of Chung-Ang University does not mention the roles of the American legal advisers.

37) His book, *The Dual State* became famous for a good analysis of Nazi German state. About him, see Klassenjustiz und Pluralismus: Festschrift für Ernst Fraenkel zum 75. Geburtstag, Berlin, 1973.

38) I quote some highly interesting spots of his letters: "I was assigned to the General Affairs Section which corresponds to the General Council Office in a regular agency. The section is headed by a colonel and is composed of 10 officers, two Koreans and me. The colonel invited by to his home for tomorrow (Sunday). I was introduced to two generals and innumerable colonels, majors, captains, etc. The General Affairs Section has to draft the various ordinances and regulations. In addition, the section is concerned with the basic problems of civil, commercial and criminal law. I am supposed to collaborate closely with the chief of the section and to inform him about the basic problems of the Korean, *i.e.* German code system. The colonel almost embraced me when I told him that I brought with

When the Constitution of Korea was drafted, he gave comments on the draft, in particular on the economic provisions.[39] In addition, he is the first translator of Korean constitution into English.[40] He taught International law at the College of Law, Seoul

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me the various German codes."(Gesammelte Schriften, 1999, p. 381). "The staff is composed of seven officers, one major, four captains and two first lieutenants. In addition we have several Korean translators and Korean lawyers. The colonel dominates completely the show. He is about 55 years old, full of plans and ideas and a really interesting person. He likes to lecture and the first thing, which I have to learn (impossible as it may seem to you) is-to listen. The colonel is undoubtedly a very well educated man. He took his Ph. D. in international law at Yale and studied comparative law. And here begin the difficulties. On the basis of his studies he came to the conclusion that continental law is far superior to American law. He believes in the codification of laws. In more than thirty years of practical work as a lawyer he realized that the American law as it is practiced in courts and administrative agencies has certain definite deficiencies. Entrusted with the task to reorganize Korean Law he tries to introduce all his pet ideas to this poor country. Since codification is one of his basic ideas, he decided to codify the Korean law. Unfortunately, vast parts of the civil law have been codified in this country. A translation of the three first books of the BGB is the law of the land. Family relations and inheritance law are customary laws. Redrafting of the customary law appears to him as one of the most urgent problems of Korean military occupation. He asked some members of his staff to work in this field. The younger officers tried to convince him that codification problems are not the business of a military occupant. Some of the staff members are very bright boys. Although they do not equal the boss as far as imagination and initiative are concerned, they are concerned, they are much more realistic than he is. Mentally the colonel is the youngest of the whole gang. He has a sort of naivety which so frequently characterizes the thinking of extremely gifted men. (Sinzheimer was an outstanding illustration of that type of man). Well-my colleagues realizing that the codification business was impossible and superfluous-pointed out that they were exclusively trained in common law and were unable to do the job. Whereupon the boss wrote a letter the War Department (or induced the general to do it) that he urgently needed an outstanding lawyer trained in European law. And here I am. My next task will be to convince the colonel that his plan is fantastic. In about three weeks we have a conference of all legal officers of MGK her in Seoul. I accepted an offer to lecture on the Code system. This gives me a wonderful opportunity to inform my audience about how modern codes were drafted. It took 24 years to draft the BGB!" (*ibid.* p. 385). "I went today downtown and visited various bookshops. Aside from Japanese and Korean books they offer a lot of English, French and especially German books. I found a famous German historical book: Brunner, Deutsche Rechtsgeschitchte, which has been out of print for mane decades, and bought it for 20 yen ($1.25). I was accompanied by a Korean who did the bargain for me. In addition I bought a pamphlet of Gottfried Salomon for 3 yen (20 cents) and a Japanese edition of the Kritik für politischen Okonomie for 25 cents. We found also certain English and American law books, which we bought for the office. If someone is interested in Stein-Jonas, ZPO, Staub-Stranz, Wechselordnung, and similar junk-I am only too glad to buy it for him. It was certainly fun to find all that stuff-of all places in the world-in Seoul(*ibid.* p. 387).

39) E. Fraenkel, Legal Analysis of the Proposed Amendment to the Constitution of the Republic of Korea (1950), in: Gesammelte Schriften, Bd. 3, Baden-Baden, 1999, pp. 447-455; Yu Chin-O, A Way to Democratic Politics[Minju Chongchi-eui Kil], Seoul, 1963, pp. 175-176.

40) His translation is shown in the Appendix of Yu Chin-O, Commentaries of Constitution[Honpop Haeui], Seoul, 1958, p. 2.

National University.[41] When he acted afterwards as a professor of political science at the Free University of Berlin, he was a nice scholar who paid practical and academic attention to the development of Korea.[42] In his *Gesammelte Schriften*, recently published in four volumes in Germany, the third volume is called *Neubau der Demokratie in Deutschland und Korea*, which contains some articles on Korean law and politics.[43]

D. Hans Kelsen

An Austrian-German and American professor of law, Hans Kelsen (1881-1973), who is well known as the founder of the pure theory of law (*Reine Rechtslehre*), had a trailing contact with Korea. When he was yet in Europe, he had special contacts with a Japanese professor of jurisprudence, Otaka Tomoo (1899-1956) who was teaching at the Keijo Imperialistic University, the forerunner of the present Seoul National University. It is said that Professor Otaka tried to invite Kelsen as a guest professor to his university in Seoul. However, he could not realize the plan because he himself had to leave Korea upon the liberation from Japan. After Kelsen came to the USA and taught at Harvard Law School and at the University of California, Berkeley, he had some Korean students. One of his students, Bongyoun Choy, recollects Kelsen in his autobiography and reveals an episode: Kelsen said he would draft an "ideal" Korean constitution, if Korea would be re-unified.[44]

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41) The 100 Year History of College of Law at Seoul National University[Seoul Popdae 100 Nyonsa], Seoul, 2001.

42) In his memoir, *Legal Reform in Occupied Japan*, Princeton University Press, 1976, Alfred Oppler mentions his friendship with E. Fraenkel during his stay in Japan.

43) Ernst Fraenkel, Gesammelte Schriften, Bd. 3, hrsg. von Gerhard Gohler u. Ludiger Schuman, Nomos Verlag/Baden-Baden, 1999. This volume contains his articles like: 1) Civil Law and Codes (1946), 2) Aufzeichnungen vom 15. bis 30. Januar 1946 uber Fraenkels Ankunftszeit in Korea (1946), 3) Brief vom 23. Martz 1946 an Familie Suhr (1946), 4) Legal Opinions of Military Government of Korea, 5) Letter of E. Faenkel to Ernst Loewenthal of 21. Januar 1948, 6) Korean Law on Arrest (1948), 7) Structure of US Army Military Government in Korea (1948), 8) Recommendation for Meritorious Civilian Service Award (1948), 9) Views on the Recognition of the Republic of Korea (1948), 10) Legal Analysis of the Proposed Amendment to the Constitution of the Republic of Korea (1950), 11) Evacuation from Seoul (1950), 12) The Effect of a UN-Chinese "Cease-Fire" on the Future of Korea (1950/51), 13) Korea-ein Wendepunkt im Volkerrecht (1951), 14) Prasident Dr. Rhee hat den Ausnahmezustand in Fusan verhangt (1952), 15) Report on Activities 10 Sept. 1951 to 22 March 1952 (1952), 16) Kampfen Sie fur Syngman Rhee? (1960).

44) Bongyoun Choy, A Song of a Wandering Soul (Kor.), Seoul, 1986. Additionally, to be mentioned that one of

Kelsen had not taught at Law School, but at the Department of Political Science at Berkeley, and he knew quite well about what was going on in Korea. In his book, *The Law of the United Nations* (1951), he deals with "The Action in Korea" of the UN in detail (pp. 927-49). He writes:

> On June 27, 1950, the President of the United States "ordered United States air and sea forces to give the Korean government troops cover and support"; this action was justified as an assistance to the United Nations in the execution of the Security Council's Resolution of June 25, 1950. Only after this order was issued by the United States President, the Security Council adopted a resolution by which an armed intervention by a member of the United Nations against North Korea could indeed be justified.[45]

It is natural that his legal theories have gained great resonance in the new Republic of Korea. Many Korean scholars pretended to be "Kelsenians" in the 1950's. Although this mode has already passed, law school students in Korea still hear his name quite frequently.[46]

E. Charles Lobingier

The well-known jurist of comparative law, Charles Sumner Lobingier (1866-1956) paid attention to Korean law.[47] With his personal experience as a judge of the United States Court in China and the drafting of the Philippine Civil Code, he visited Korea in 1946. On November 30, 1946, he delivered a lecture at the Korean-American Lawyers Association in Seoul and proposed some guidelines for drafting the new civil code.[48]

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two daughters is married a Korean, Chunghun Lee, professor of economics at University of Hawaii.

45) Hans Kelsen, The Law of the United Nations, London, 1951, p. 931. This passage is cited in Bongyoun Choy, A History of the Korean Reunification Movement: Its Issues and Prospects, Illinois, 1984, p. 68.

46) Chongko Choi, Great Jurists of the World[Widaehan Popsasanggadul], Hakyonsa, 1988.

47) He is the author of the famous book, The Evolution of the Civil Law (1915), Ancient and Accepted Scottisch Rites of Freemasonry, Civil law Editor of Corpus Juris and Professor of Law of Nebraska. At the Law School of George Washington University, there is an endowed chair named Charles Lobingier Professor of Jurisprudence and Comparative Law(currently Prof. Thomas Buergenthal).

48) The original of his "Proposed Civil Code of Korea" is available in the Library of Congress in Washington, D.C.;

He argued for the mixture of civil and commercial codes, even though his assertion was not realized. By the way, he maintained that Korean civil law should preserve the traditional Korean customary laws as much as possible instead of focusing on adopting western law uncritically.[49]

F. Robert G. Storey and Jerome Hall

Robert Gerald Storey (1893-1981), former Dean of Southern Methodist University Law School (1947-59) and President of American Bar Association (1952-53), and Jerome Hall (1901-1992), Professor of Indiana University, visited Korea in June-July, 1954 to help found the Korean Legal Center. For six weeks, they gave many lectures on American law for Korean lawyers. Afterwards, based on his experience in Korea, Storey published an article, "Korean Law and Lawyers: The New Korean Legal Center" in *the American Bar Association Journal* (Vol. 41, 1955). He reports therein:

> The standards of legal education are very low. High school graduates are admitted into the law schools immediately. The curriculum in most law school is divided into three divisions: law, political science and economics. The actual content of the law school curriculum relating to legal subjects only would be not more than our first year course in accredited law schools in the United States. Institution is almost entirely through the lecture method... The effect of legal education in Korea is that the law students major in legal subjects, but the entire curriculum is generally a mixture of the social sciences and a small amount of law. The result of this system of legal education and the very strict bar examination is that most of the law graduates are denied admissions to the Bar and finally become disappointed and disillusioned.

The President of Korea, Syngman Rhee (1875-1965) requested the Storey and Hall suggest a plan for incorporating the principles of Anglo-American common law into the Korean legal system. Storey responded as follows:

Chongko Choi, *Charles S. Lobingier*, Lawyer's Newspaper [Popnyul Shinmun], 1989.

49) Charles S. Lobingier, Law and Politics [Popjeong], Vol. 2, No. 2, 1946.

> After much careful consideration, conferences with leaders of government, education and the legal profession, we recommended the criterion of a legal Center, objectives to include the following:
> (a) Continuing study of Anglo-American constitutional law
> (b) The improvement of legal education
> (c) The creation of a library of US law books
> (d) An exchange program of US and Korean judges, lawyers and law professors
> ... It is not an effort to "sell" our legal systems to another nation but, on the contrary, is an effort to meet the request of the government and legal officials of friendly nation.[50]

The Korean Legal Center has not been very active as the founders had expected, but it is doing several programs today. The reason for that should be investigated further in the context of the changes in Korean legal culture.

When I visited Jerome Hall at Hastings Law School, San Francisco in 1987, he told many personal stories with Korea. My impression was that he had a firm conviction to democratize Korea through rule of law.[51]

G. Jay Murphy

A Professor at Alabama University, Jay Murphy (1911-1994) visited Korea three times during 1963-1966. He published his book, *Legal Education in a Developing Nation: The Korean Experience* (Seoul National University Press,

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50) Robert G. Storey, Korean Law and Lawyers, in American Bar Association Journal, Vol. 46, 1955, p. 641. R. Storey founded The Southwestern Legal Foundation, and was a Chairman of Board of Foreign Scholarship(Fulbright Commission). In 1969 the World Peace through Law Center presented him its World Lawyer Award in Bangkok, Thailand. There is *the Robert G. Storey International Award for Leadership* since 1990. The award winner of 2001 is Kunio Hamada, the first president of the Asia Pacific Bar Association and a new associate Justice of the Supreme Court of Japan.

51) J. Hall had a good friendship with a Korean criminal law professor, Paul K. Ryu and gave a contribution to Festschrift for him. J. Hall, Some Unresolved Problems, Festschrift for Paul K. Ryu, Seoul, 1988, pp. 3-13. *Cf.* J. Hall, *Biblical Atonement and Modern Criminal Law*, Contemporary Problems in Criminal Justice: Essays in Honor of Professor Shigemitsu Dando, Tokyo, Yuhikaku, 1983(reprinted in: Journal of Law and Religion 279 (1983) and 65

1965).[52] As an American scholar, he thoroughly investigated Korean legal education and suggested some guidelines for its development. He surveyed the Korean Para-lawyers also and published *The Legal Professions in Korea: The Judicial Scrivener and Others* (Seoul Law Research Institute, 1967). In America, he published an article, "Legal Education and Development of Law in Traditional Culture: Learning from the Korean Experience" in *Journal of Legal Education* (Vol. 21, 1975).

H. Helen Silving-Ryu

The Austrian-American criminologist Helen Silving-Ryu (1906-1993) stayed from time to time in Korea in 1967-1970. As a student of Hans Kelsen at Vienna University, she came to America as an "immigrant scholar" and became a professor of criminal law at the University of Puerto Rico.[53] Since 1957, when she married the Korean criminal lawyer, Professor Paul Kichon Ryu (1915-1998),[54] she also worked on Korean law and legal science. She taught at the College of Law, Seoul National University and at the Graduate School of the Judiciary in 1967-1970. She wrote some

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Washington Univ. Law Quarterly 694 (1987)). "In 1954 President Rhee asked the U.S. State Department to send two lawyers to Korea to give lectures to his newly appointed judges and prosecutors and to make suggestion regarding the newly established legal system. It was my understanding that all judges, prosecutors and other officials were Japanese during thirty years of Japanese control. After independence, Koreans were appointed to these offices, and the need for help was obvious. The State Department selected Robert Storey, a well-known lawyer, past President of the American Bar Association, and a writer to respond to President Rhee's request. It was in these circumstances that I met Professor Paul Ryu, and whatever success my mission had was due in large part to his help and cooperation. More than thirty years have passed since that historic mission, and in the interim, Paul Ryu has had a brilliant career. He has contributed to the solution of the most difficult problems of criminal law, *e.g.* attempt, legality-*nulla poena sine lege*-, ignorance and mistake, and many others. Indeed, he has mastered the criminal law systems of the West and has served as Dean of the Law School and President of Seoul National University. This article is an expression of thanks for the service he rendered me in the summer of 1954 and of appreciation of his distinguished career" (J. Hall, in FS for Paul K. Ryu Seouuuul, 1988, pp. 3-4). *Cf.* The Life and time of Jerome Hall: An oral History, The Sixty-Five Club Archives, 1987. I express my thanks to Librarian Mary Glennon of U.C. Hastings Law School for her kind material assistance.

52) This book was translated into Korean: Hangukui Pophak Kyoyuk(Korean Law Research Institute, 1967) translated by Seungkyu Yang and Kiljun Park.

53) Helen Silving, Helen Silving Memoirs, Vantage Press, 1988.

54) Paul K. Ryu, The World Revolution, San Diego, 1997; Chongko Choi, *The Life of Paul K. Ryu (Kor.)*, Human Rights and Justice[Inkwon-gwa Chongui], June, 1999; Chongko Choi, *Legal Thoughts of Paul K. Ryu (Kor.)*, Seoul Law Journal, Vol. 40, No. 1, 1999.

articles related to Korea with her husband.[55]

I. Manfred Rehbinder

Manfred Rehbinder(1935-), a professor at the University of Zürich, has been interested in Korean law and society. As a sociologist of law, he paid attention to the reception of Western law in Korea. Rehbinder has visited Korea several times since 1980, and attended several conferences including the International Symposium on *the 100 Years of Reception of German Law in Korea*. He delivered a lecture, "Die Rezeption als Sozialer Prozess".[56] His well-known textbook, *Rechtssoziologie* (1977) has been translated into Korean by me. He co-edited the book, *Zur Rezeption des Deutschen Rechts in Korea* (1990), which is the first wholesome analysis of Korean legal culture in German language.[57]

J. Edward J. Baker

An Associate-director of the Harvard-Yenching Institute, Edward J. Baker (1942-) is a legal historian who did his research on the modernization of Korean law during the Japanese ruling period (1910-45).[58] Baker's interest in Korea began with Peace Corps service as an English teacher at the College of Education of Seoul National University from 1966 through 1968. He lived in Korea for more than 5 years. He has a J.D. from Yale Law School and an M.A. from Harvard University. He was a staff member of the Subcommittee on International Organizations of the US House of Representatives Committee on International Relations during its Investigation of Korean-American

55) Paul K. Ryu and Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, University of Pennsylvania Law Review, Vol. 103, p. 350; Criminal Justice, 1971; Rule of Law, 1961; *Reminiscences on my Law School Days*, Fides, Seoul National University College of Law, Vol. 14, 1968; *Methodological Inquiry into the Problem of Protest,* Rivista Juridica de la Universidad de Puerto Rico, Vol. XLIII, No. 1, 1974, pp. 9-40. Further her autobiography, Helen Silving Memoirs, New York, 1988.

56) This article was published in Recht in Deutschland und Korea[Handok Pophak], Vol. 3, 1982.

57) M. Rehbinder & Juchan Sonn, Zur Rezeption des Deutschen Rechts in Korea, Baden-Baden, 1990.

58) Edward J. Baker, *The Role of Legal Reforms in the Japanese Annexation and Rules of Korea in 1905-1919*, in Studies on Korea in Transition (*Edward J. Shultz ed.*, 1979), pp.17-42(reprinted in Korea Law in the Global Economy (Sang-Hyun Song ed., Bakyoungsa, 1996), pp.75-98).

Relations in 1977-1988. He frequently writes and speaks on Korean affairs, particularly politics and human rights. Due to his administrative work, he has not published new research on Korean legal history. He visits Korea frequently and pays attention to the development of Korean law and human rights.[59]

K. James M. West

Another Harvard legal scholar, James M. West (1955-1998), was a promising specialist of Korean law. He lived in Korea as a legal practitioner and experienced many legal issues. He wrote a book, *Education of Legal Professor in Korea* (1991). From 1996 through 1998 he taught courses entitled "Korean Business Law" and "Legal Problems of Newly Industrializing Nations. The Korean Example" with Prof. Kon Sik Kim of Seoul National University at Harvard Law School. His works include articles on Korean labor law, the trials of former presidents Chun Doo-hwan and Roh Tae-Woo, international legal aspects of Korean internet regulation, Korean constitutional law, and Korea's possible accession to the UN Convention on the International Sale of Goods. He also died young in 1998.[60]

L. Legal Comparativists

Most scholars of comparative law have treated Korean law as a branch of either Chinese law or Japanese law. Rene David's *Major Legal Systems of the World* (1978) touches on Laws of the Far East, but explains only about Chinese law and Japanese law.[61] *Einführung in die Rechtsvergleichung* (1971) of Konrad Zweigert (1911-1996) and Heinz Kotz made some progress in dividing the world legal cultures, they omit mentioning Korean law in the chapter 'The Far Eastern Legal Family.'[62] Wolfgang

59) He has delivered two memorial speeches on the late Professor Chongkil Choi (1931-1973), who was victimized during the Park Chunghee Regime.

60) Some young Korean lawyers published a book titled Recent Transformations in Korean Law and Society edited by Dae-kyu Yoon, Seoul Nat. Univ. Press, 2000. This book is dedicated to James West.

61) Rene David & Brierly, Major Legal Systems of the World, p. 477-504.

62) Zweigert & Kotz, Introduction to Comparative Law, Oxford, 1987, The Word 'Korea' comes up as introductory sentence to Japan: "Like Korea and Indo-China, Japan came under the influence of the highly developed Chinese civilization at an early stage." This sentence leads to a danger of understanding, as if Korean law were either a branch of Chinese law or that of Japanese law.

Fikentscher (1928-), Professor at the University of Munich, improperly categorized Korean Law to "the buddhistic law".[63] In his famous book, *Comparative Law* (5th ed. 1987), American comparative scholar Professor Rudolf Schlesinger (1909-1996) does not mention Korean law at all.[64] Professor Richard M. Buxbaum(1930-), the editor of *American Journal of Comparative Law*, visited Korea and delivered some lectures on economic laws related to the U.S. and Korea. He is currently responsible for the Korean law program at U.C. Berkeley.

In his book *Jurisprudence* (1994), Surya P. Sinha (1937-), a professor of law at Pace University Law School mentions various civilizations as an introduction to "non-universality" of law. As a small nutshell book, the author pays enormously broad concern on pluralistic legal cultures. Nevertheless, although he explains about Chinese and Japanese civilizations, Indian and African civilizations some too in detail, he does not pay attention to Korean law.[65]

In his book *Comparative Law in a Changing World* (1995), Peter de Cruz, a law professor at University of Keele, deals with "Other Types of Law." He uses the word "types" not "system" or "legal family" as usually used by legal comparativists, and explains interestingly "a new world order," arguing for convergence theory of law and the *jus commune* theory.[66] Nevertheless, he mentions only Chinese and Japanese conceptions of law in the name of "Eastern legal conceptions" as "other types of law."

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63) Wolfgang Fikentscher, Methoden des Rechts I, München, 1973. *Cf.* Jerome Hall, *Comment on Fikentscher's Papers-Modes of Thought in Law and Justice-A preliminary Report on a Study in Legal Anthropology*, U.C. Davis Law Review, Vol. 21, 1988, p.1001.

64) Nevertheless, I would like to add my thankful memory. When he invited me at U.C. Hastings Law School in 1998, he asked me about Korean law and presented his *Comparative Law* (5th Ed., 1988). *Cf.* Richard Buxbaum, *Rudolf B. Schlesinger (1909-1996)*, American Journal of Comparative Law. Vol. 45, 1997, pp.1-4.

65) Surya P. Sinha, Jurisprudence, West Publishing Co. St. Paul, 1993. The word "Korea" comes up only once in this book. "Since China had come to considered Korea its dependent Kingdom, it intervened in it in 1894-1895. It was defeated by Japan. Not only did it have to withdraw from Korea, it was made to transfer Formosa and other islands to Japan, as well, and concede a base to Japan on the mainland Liatung Peninsular. In addition, it had to pay and indemnity." I am wondering what image of Korean law would deliver such a mentioning to the (American) law students. Considering the practical importance of this book, some additional explanation on Korean law must be supplemented urgently. *Cf.* Alan Watson, *The Importance of "Nutshells,"* American Journal of Comparative Law, Vol. 42, 1994, pp. 1-24.

66) Peter de Cruz, Comparative Law in a Changing World, Cavendish Publishing Co., 1995, pp. 201-210, and pp. 471- 492. I think his approach is fresh and necessary to get a proper understanding of the comparative law.

Korea is mentioned merely as a marginal example of North Korea.[67]

IV. Conclusion

Reviewing the Western jurists and their academic activities about Korea, we recognize that there have been only a small number of scholars who have paid attention to Korean law. Moreover, we must tell that much systematic and comprehensive research has not been done about Korean law.[68]

The salient feature of this phenomenon is that the most articles are fragmentary, unsystematic and unhistorical. We understand the difficulties for Westerners to access Korean law in its reality. There have not been many foreign scholars and lawyers who want to go into deep understanding of Korean law, unlike Chinese and Japanese law.[69] Thus, Korean legal scholars feel a double duty to be active in personal research and publication in Western languages.

Korean law was historically formed with rich influences from Chinese and Japanese law, along with continental European and Anglo-American law. North Korean law shows extremely Socialistic traits.[70] The current laws of Republic of Korea are mostly translated into English.[71] As Radbruch aptly pointed out, Korean law is

67) Peter de Cruz, Comparative Law in a Changing World, 1995, p. 484. Introducing "Global Convergence and the Fukuyama Thesis," the author mentions as follows: "Whether one agrees with Fukuyama's ideas, and it should be noted that he does not, in fact, believe that history has 'ended' in any sense, he has highlighted a 'worldwide liberal revolution' while noting the exceptions-China, which will no longer serve as a model for revolutionaries around the world; Cuba, North Korea and Vietnam, Ethiopia, Angola and Mozambique. Authoritarian rulers have been forced to promise free elections in a host of other African countries."

68) This paper does not include the research of Korean jurists who wrote in Western languages, such as Chin Kim (1926-), Pyongchoon Hahm (1932-1983) and Zong Uk Tjong (1933-1982). For details, *see* Chongko Choi, History of Korean Legal Thoughts[Hanguk Popsasangsa], Seoul Nat. Univ. Press, 2001, pp. 404-407.

69) There have been many researchers on Japanese law such as John H. Wigmore, John Gadsby, John N. Hazard, Thomas L. Blackemore, Alfred Oppler, Henry T. Terry, Ben Bruce Blakeney, Nathaniel L. Nathanson, Arthur von Mehren, Robert Braucher, Walter Gelkorn, Dan F. Henderson, Richard W. Rabinowitz, B. J. George, John O. Haley, Frank Upham, Lawrence Beer, Michael Young, Cornelius Kiley, Charles Stevens, Eugene Danaher, Walter L. Ames, *etc*. For details, Tanaka Hideo, Japanese Law Studies in America (*Japanese*), in his Anglo-American Law and Japanese Law (*Japanese*), Tokyo Univ. Press, 1988, pp. 422-446. With the arising of the Chinese power in the world politics, many western scholars begin to pay attention anew to Chinese law.

70) Sungyoon Cho, Law and Legal Literature in North Korea, Library of Congress, Washington, D.C.,1988.

71) Laws of Republic of Korea, Institute for Legislative Research, 2000 are published in 20 volumes.

typically an interesting object of historical and sociological research. Globalization of law is currently one of hot discussions in Korea also. Such dynamic Korean law awaits more academic attention from Western jurists. Of course, comparative studies on Chinese, Japanese and Korean law, are unavoidably needed in accordance with the brilliantly rising of East Asian civilization.[72)]

72) I have emphasized the concept of East Asian Common Law. Chongko Choi, *Development of East Asian Law until the End of 18th Century*, Law in History, Vol.1, Lublin, 2000, pp. 21-56; Chongko Choi, *Foundations of East Asian Jurisprudence*, paper read in Nanjing Conference on Asian Jurisprudence in 2000; Chogko Choi, *Foundation of Law and Justice in East Asia*, Comparative Law, Vol.18, Nihon University, Tokyo, 2002, pp.1-18. I am currently teaching at Santa Clara University Law School as a "Distinguished Visiting Professor" on "East Asian Law" and "Comparative Jurisprudence" for Spring Semester 2002.

Journal of Korean Law, Vol.2, No.1, 2002

Public and Private Securities Offerings in Korea: An Overview of Public and Private Offering Classification Rules and Related Registration Statement and Other Requirements

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Abstract

Due to registration filing requirements and other regulations imposed on public offerings of securities in Korea, it is important for parties who intend to offer or sell securities to Korean residents to be aware of the factors that determine whether an offering is likely to be classified as a public offering or a private offering. This article is intended to provide a helpful overview of the key factors that are prescribed by Korean laws and regulations for distinguishing whether an offering will be treated as a public offering. In addition to introducing the principal statutory and regulatory sources relevant to the subject of public offering and private offering classification, the article discusses the concept of "deemed public offering" which refers to offerings that, while initially having the essential characteristics of a private offering, have the potential to take on the characteristics of a public offering within a specified period of time and may, therefore, be treated as a public offering. This article also briefly discusses the closely related matters pertaining to the regulatory treatment in Korea of (i) securities issued overseas by Korean companies, and (ii) foreign securities marketed or sold to Korean residents by foreign entities.

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I. Public Offerings vs. Private Offerings

In Korea, securities offerings are classified as either public offerings or private offerings pursuant to the definition of public offering provided in the Securities and Exchange Act (the "SEA").

A. Public Offerings

An offering will be classified as a public offering if solicitations [1] regarding the offered securities have been received by 50 or more persons (not including institutional investors) within any given six-month period.[2] For a securities offering classified as a public offering, the issuer must first register with the Financial Supervisory Commission (the "FSC") and then file a registration statement (along with a prospectus) with the FSC, if the aggregate value of the type of securities offered by the issuer within a one-year period is twenty (20) billion Won or more. In determining whether the aggregate twenty (20) billion Won threshold has been crossed, only the securities for which a registration statement has not been filed with the FSC are counted.[3]

The issuer and/or placing agent will be exposed to liability imposed in accordance with the provisions of the SEA for any materially misleading information negligently stated in or omitted from the prospectus. This liability would be in the form of potential civil liability for damages incurred by the investors as a result of their reliance on such misleading information,[4] or in the form of potential criminal penalties of imprisonment of up to five years or a fine of up to 30 million Won.[5]

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1) Solicitation for an offer refers to the activities that inform the solicited persons of the fact of issue or the sale of securities, or to inform the solicited persons of the procedures to be followed for the acquisition of the securities, by means of (i) any advertisement(s) in newspapers, broadcasting, magazines, etc., (ii) distribution of printed materials such as pamphlets, promotional booklets, etc., (iii) company/promotional presentations, or (iv) electronic communications, all as may tend to encourage purchase of the relevant securities. *See* Section 2-4(5) of the Enforcement Decree of the SEA.

2) *See* Section 2-4(1) through (3) of the Enforcement Decree of the SEA.

3) *See* Sections 6 and 8 of the SEA and Section 2 of the Enforcement Decree of SEA.

4) *See* Section 14 of the SEA.

5) *See* Section 207-3 of the SEA.

For the purposes of the above-described rule, "solicitation" refers to: (i) solicitations of offers for the subscription of securities that are to be newly issued; (ii) solicitations of offers to sell existing securities; and/or (iii) solicitations of offers to buy existing securities. As indicated, solicitations vis-a-vis institutional investors are not included in calculating whether the above-referenced fifty-person threshold has been crossed [6] (What constitutes an "institutional investor" for these purposes is discussed in some detail in I. *D.* below).

B. Deemed Public Offerings

If the issuer (and placing agent, as the case may be) intend to make a private offering to institutional investors only, and thereby avoid the need to prepare a prospectus, it is possible to enter into restrictive covenants with the relevant institutional investors to prevent such investors from reselling the securities to ordinary investors. However, if the securities in question are shares issued by a Korea Stock Exchange ("KSE")-listed or KOSDAQ-registered company or the same class of shares have been sold in a public offering (regardless of whether the issuer is KSE-listed or KOSDAQ-registered), even an offering with institutional investors will be deemed to be a public offering ("deemed public offering"), unless additional arrangements are made to deposit the securities with the Korea Securities Depository ("KSD") for a period of one year.[7] If the securities in question are notes, an offering to institutional investors will also be deemed to be a public offering, unless additional arrangements are made to eliminate the possibility that such securities will be subsequently transferred or offered to 50 or more non-institutional investors.[8] This is due to the fact that Korean securities laws adopt a test of "transferability" in deciding whether an issuance of securities should be treated as a public offering or a private placement (to be discussed further in II). In any event, if there is even a remote chance that the securities will be offered to ordinary investors (*i.e.*, non-institutional investors), it is advisable to file a registration statement/prospectus with the FSC at the time of the initial offering.

6) *See* Section 2-4(3) of the Enforcement Decree of the SEA.

7) *See* Section 12(1) of the Regulation on the Issuance of Securities and Disclosure.

8) *Id.*

C. Private Offerings

In the absence of factors that would trigger a public offering classification in accordance with the general rules described above, an offering will be classified as a private offering. If an offering is classified as a private offering, there is no legal requirement to file a registration statement with the FSC or otherwise prepare a prospectus. For example, if the offering is to be restricted to institutional investors only, and there is no chance that the offered securities will be resold to ordinary investors as considered by the test of "transferability",[9] the issuer and placing agent (or lead manager, as the case may be) will be under no legal obligation to prepare a registration statement or prospectus. The institutional investors may request a prospectus for their reference in evaluating the offering. Whether a prospectus is provided in response to such request would be entirely a matter of private negotiation between the issuer/placing agents and the relevant institutional investors. It is important to note, however, that if the issuer and/or placing agent provide a prospectus under such circumstances, they will be exposed to liability for any materially misleading information, negligently stated in or omitted from the prospectus. This liability would be in the form of potential civil liability for damages incurred by the institutional investors in reliance on such misleading information.[10]

D. Institutional Investors

As discussed above, marketing and offering of securities that is strictly limited to institutional investors will be classified as a private offering.[11]

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9) *See* II for the test of transferability.

10) Unlike the liability in the case of a public offering, this liability for damages will be imposed in accordance with the provisions of the Civil Code.

11) In addition to institutional investors, persons falling under any of the following categories shall be excluded in calculating the number of persons solicited with respect to determining whether any securities offering constitutes a public offering: (i) the shareholder of the issuer who (with specially related persons, as defined in Section 10-3(2) of the Enforcement Decree of the SEA) owns the largest block of the total issued stock of the issuer and any shareholder who owns 5/100 or more of the total issued stock; (ii) officers of the issuer; (iii) any affiliated company of the issuer and officers thereof; (iv) in cases where the issuer is not a stock-listed company, the shareholders and members of the Employee's Stock Ownership Association of the issuer; (v) employees of a korean subsidiary of a foreign company,

In this regard, it should be noted that the term "institutional investor" covers a wide range of entities defined generally as institutions whose principal business involves substantial investment activity. Some prominent examples of institutional investors include:[12]

(i) Financial institutions established and licensed as such under Korea's Banking Act;
(ii) The Korea Development Bank;
(iii) The Industrial Bank of Korea;
(iv) The Export-Import Bank of Korea;
(v) The Agricultural Cooperatives Federation;
(vi) The Fisheries Cooperatives Federation;
(vii) Securities companies (as defined in the SEA);
(viii) Merchant banks;
(ix) Mutual savings depositories; and
(xi) Insurance companies.

As indicated above, the securities can be offered to any number of institutional investors. However, since securities are transferable, the offering may constitute a deemed public offering, if the securities can potentially be transferred by the institutional investors to fifty (50) or more ordinary investors within any six-month period.[13] This form of "deemed public offering" can be avoided in the manner described in II below.

E. Permissible Solicitation Activities in Private Offerings

In order to ensure that the offering can support classification as a private offering, it

where such employees purchase or otherwise receive shares of the foreign parent company as part of a program (such as an employee stock option plan) intended to promote employee welfare; (vi) in cases where the issuer is a company which is in the process of incorporation, promoters of the issuer; and (vii) persons stipulated by the FSC among the persons having a special relationship with the issuer, or professionals who are in position to be well informed of the financial status or business affairs of the issuer.

12) *See* Section 17(1) of the Enforcement Decree of the Corporate Income Tax Act.

13) *See* Section 2-4(1) - (3) of the Enforcement Decree of the SEA and Section 12(1) of the Regulation on the Issuance of Securities and Disclosure.

is important to restrict all solicitation to institutional investors only. Accordingly, promotional or other visits to potential investors by employees of an issuer or lead manager will not cause any problems, so long as such visits are made to institutional investors only.

Conducting roadshows may be problematic because there is less control over who receives information regarding the offered securities and this could be seen as a back door for developing a secondary market among ordinary investors (*i.e.*, non-institutional investors). As a result, conducting roadshows increases the risk that the offering will be characterized as a public offering.

Mass media advertising and Internet advertising should both be avoided if private offering classification is to be maintained. In using mass media or the Internet, there is no control over who receives information and numerous non-institutional investors will inevitably be exposed to the offering. Mass media advertising and Internet publication of offering information make it highly likely that the relevant offering will be classified and treated as a public offering.

Disclaimers and warnings to unqualified purchasers (*i.e.*, non-institutional investors) may be used in connection with mass media and Internet advertising. In private offerings, the securities being offered typically contain selling restriction language, which generally states that the securities may not be offered or sold or, in the case of bearer notes, delivered within Korea or to, or for the benefit of, Korean residents, and that any sale of such securities to non-institutional investors, including secondary sales by qualified institutional investors may constitute a violation of the SEA and related regulations. However, it should be noted that while such disclaimers/warnings may help the issuer and/or placing agent avoid liability for any sale of the securities conducted in violation of the SEA, they will not provide 100% protection against potential liability. The relevant regulators retain discretion to look at the totality of circumstances in assessing liability in any given case, regardless of whether or not the issuer/placing agents have used appropriate disclaimers/warnings in their publications. The use of disclaimer language is only one of numerous factors that may be considered by the regulators.

As for other forms of marketing, it should be noted that brochures distributed (preferably in person) in limited numbers to specific institutional investors might not conflict with a private offering classification. On the other hand, if the brochures are distributed widely and in large numbers, there is an increased likelihood that numerous

non-institutional investors will be exposed to the offering information and, as a result, that the offering will be characterized as a public offering.

II. Test of "Transferability"

No filings, reports, registration or other formal steps need to be taken for an offering to be classified as a private offering. However, if challenged, the private offering must be found to be in conformance with the rules described for distinguishing public offerings (or deemed public offerings) and private offerings. In this regard, certain measures may be required to be taken in order to ensure that a private offering will not be treated as a deemed public offering (as defined above). In particular, since securities in a private offering may potentially be transferable to fifty persons or more in some circumstances, potential transferability of the securities in question can be a deciding factor in determining whether an offering is strictly a private offering or may constitute a deemed public offering.[14)]

A. Transferability of Shares

As indicated above, if the securities in question are shares issued by a KSE-listed or a KOSDAQ-registered company or the same class of shares have been sold by the issuer in a public offering(regardless of whether the issuer is KSE-listed or KOSDAQ-registered), the shares may be deemed sufficiently transferable as to constitute the offering as a deemed public offering, unless the shares in question are deposited with the KSD for a period of one (1) year or more pursuant to entering into an agreement with the KSD stipulating that the deposited shares will not be transferred at any time during said one-year period.[15)]

B. Transferability of Notes

If the securities in a private offering are notes in bearer form, they may be deemed

14) It should be noted that the test of transferability applies to offerings of newly issued securities and not to cases of secondary distribution of securities.

15) *See* Section 12(1)a of the Regulation on the Issuance of Securities and Disclosure.

sufficiently transferable as to constitute a deemed public offering, unless the notes are represented by fewer than fifty (50) certificates and each certificate bears a legend stating that the certificate cannot be split into smaller denominations (*i.e.*, there can be no possibility of increasing the total number of certificates).[16] Alternatively, a deemed public offering of notes can also be avoided if the notes are deposited with the KSD for a period of one (1) year or more pursuant to entering into an agreement with the KSD stipulating that the deposited notes will be "locked up", *i.e.*, will not be transferred at any time during said one-year period.[17] (If the deposit of the notes is made with the KSD in accordance with the foregoing, neither the numerical restriction on the number of certificates nor the legend requirement will apply.)

If the notes being offered are in registered (*i.e.*, non-bearer) form: (i) either of the alternatives stated above for bearer-form notes can be employed; or (ii) the certificate(s) representing the notes can bear a legend to the effect that within the one-year period following issuance the series of notes may only be transferred collectively and only to one (1) person/transferee (in which case, it will not be necessary to deposit the notes with the KSD).[18]

If the securities being offered are convertible bonds, bonds with warrants or exchangeable bonds, and the shares relevant to such conversion rights, warrant exercise rights or exchange rights would be shares of the sort referred to in II. *A* immediately above, the above-described measures for notes in bearer form and registered form would apply, as appropriate. In addition, if each bond certificate contains a legend to the effect that such conversion rights, warrant exercise rights or exchange rights may not be exercised for one year or more from the issuance date, it will not be necessary to deposit the bonds with the KSD.[19]

C. Effectiveness of Disclaimers

Disclaimers may serve to limit liability, but their effectiveness will greatly vary on a case-by-case basis, as discussed in I. *E* above.

16) *See* Section 12(1)b3 of the Regulation on the Issuance of Securities and Disclosure.

17) *See* Section 12(1) of the Regulation on the Issuance of Securities and Disclosure.

18) *See* Section 12(1)b2 of the Regulation on the Issuance of Securities and Disclosure.

19) *See* Section 12(1)b1 of the Regulation on the Issuance of Securities and Disclosure.

III. Treatment of Securities Issued Overseas by Korean Companies ("Overseas Securities")

Closely connected to the above discussion of formal registration statement requirements being triggered by a public offering or deemed public offering classification, is the issue of how securities issued overseas by a Korean company are to be treated in terms of filing a registration statement with the FSC.

A. Brief History

The SEA is the principal body of legislation governing the issuance of securities by companies incorporated in Korea.[20] Pursuant to authority granted under the SEA, the FSC has promulgated many regulations regarding the issuance and trading of securities issued by Korean companies. One set of such regulations was the Regulations Regarding Issuance of Overseas Securities (no longer in force), which was specifically applicable to issuance of overseas securities. Another, the Regulations on Financial Management of Listed Companies (incorporated into the Regulation on the Issuance of Securities and Disclosure in 2000, along with other secondary regulations under the SEA), which contained provisions apparently applicable, was nonetheless deemed not to be applicable to securities issued overseas. However, the existence of such separate regulations in respect of issuance of overseas securities has not precluded the application of the more general provisions of the SEA to securities issued overseas by Korean companies.

After the Regulations regarding Issuance of Overseas Securities was abolished in early 1998 in the wake of the foreign exchange crisis in Korea, the common view among securities-related businesses and regulatory authorities was that the Regulations on Financial Management of Listed Companies (which contain restrictive provisions over the share issuance price or the conversion price of convertible bonds, etc.) would still not be applicable to issuance of overseas securities in order to facilitate further foreign investment. However, the FSC announced in 1999 that regulations applicable to issuance of domestic securities (including the Regulations on Financial Management of Listed Companies) would be also applicable regarding the issuance of

20) *See* Sections 6 and 192 of the SEA.

overseas securities. Such interpretation by the FSC mainly was intended to address the relatively low conversion prices being received by Korean companies for their shares in connection with overseas convertible bond issues.

B. Current Position of the FSC

For some time it was unclear as to what extent the FSC would in practice apply the Regulation on the Issuance of Securities and Disclosure and other regulations with respect to securities of Korean companies issued overseas. However, in July 2000, the Financial Supervisory Service (the "FSS"), the enforcement authority under the FSC, promulgated the Guidelines Regarding Disclosure Review (the "Guidelines"). The Guidelines state that they are to be applied with respect to adjustment/re-fixing of (i) the conversion price of convertible bonds or (ii) the warrant exercise price of bonds with warrants in connection with convertible bonds or bonds with warrants issued overseas by Korean companies. Therefore, it is commonly understood in the Korean securities market that the Korean regulations governing the price of shares or other equity related securities, such as convertible bonds, apply to overseas securities issued by Korean companies.

In addition, it should be noted that the FSC has recently imposed sanctions against issuers and placing agents for failure to file a registration statement with the FSC upon the issuance of overseas securities in cases where such overseas securities were initially offered to institutional investors, but subsequently acquired by ordinary investors in Korea. Accordingly, it is reasonable to conclude that the issuance/public offering of overseas securities by Korean companies requires the filing of a registration statement with the FSC if overseas issued securities of a Korean company are offered to 50 or more ordinary investors in Korea.[21] Conversely, however, it is not clear whether such registration statement requirement would apply in any cases where overseas securities are offered only to non-residents of Korea, notwithstanding any unrealised potential for acquisition by Korean residents.

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21) This applies to cases where the limited transferability test is met. If the limited transferability test is not met, the offering of overseas securities to one ordinary investor only may result in triggering public offering requirements in light of substantial potential for subsequent transfer of the securities to additional ordinary investors.

IV. Offerings in Korea of Securities Issued by Foreign Companies ("Foreign Securities")

A. General

In general, an offering of securities in Korea, regardless of whether the particular securities are issued overseas or in Korea, falls under the jurisdiction of the FSC, pursuant to the SEA and the Presidential Decree, and regulations promulgated pursuant thereto, because the SEA does not specifically exclude securities issued overseas from the application of its provisions.

The term "securities" in the SEA (Chapter 1, Section 2(1)) includes: (i) government bonds; (ii) municipal bonds; (iii) bonds issued by a corporation established under a special law; (iv) corporate bonds; (v) certificates of capital contribution issued by a corporation established under a special law; (vi) stocks or certificates representing preemptive rights; (vii) certificates or instruments issued by a foreign corporation which are of the same nature as those referred to in (i) through (vi); (viii) depositary receipts that a person designated by the Presidential Decree issues based on underlying certificates or instruments issued by a foreign corporation, etc.; and (ix) other certificates or instruments designated by the Presidential Decree that are similar or related to those referred to in (i) through (viii). Accordingly, shares or bonds issued by a foreign corporation are securities under the SEA.

If securities are offered by a foreign entity to residents in Korea (or, in fact, simply purchased through a foreign entity by individual residents in Korea), such securities may be deemed to be publicly offered to Korean residents, depending on the particular circumstances of the sale and purchase of such securities. If such securities are deemed to be publicly offered to Korean residents, the issuer should first register with the FSC and then file a registration statement with the FSC prior to offering the securities in question to Korean purchasers. These measures are to be taken in accordance with the provisions of the Regulation on the Issuance of Securities and Disclosure.[22)]

In addition, if securities are offered (or marketed) by a foreign broker/agent to residents in Korea (or, in fact, simply purchased through a foreign broker/agent by

22) *See* Sections 36 through 41 of the Regulation on the Issuance of Securities and Disclosure.

individual residents in Korea), such foreign broker/agent would be considered to be dealing in securities, i.e., engaged in the "securities business," as defined in the SEA,[23] regardless of the form of communication used (including Internet portal sites as discussed below).[24] Accordingly, the offering/marketing entity would need to obtain approval from the FSC in order to carry out the offering/marketing of foreign securities in Korea-even if the offering/marketing entity is not physically present or engaged in marketing within Korea's borders. Additionally, while institutional investors in Korea are more or less free to purchase foreign securities under the Korean Foreign Exchange Transaction Act (the "FETA"),[25] and related provisions of the SEA regulations,[26] ordinary investors who are residents of Korea may only purchase foreign securities that are listed or to-be-listed on a foreign exchange, and may complete such purchases only through a securities company duly licensed and registered as such in Korea.

B. Offerings/Marketing Through Internet Portal Sites

In recent years, securities offerings in many markets are increasingly taking advantage of Internet portal sites to promote and distribute information on the securities being offered. Accordingly, it is important to review what regulations apply to the offering of securities conducted through Internet portal sites.

Although there are no regulatory requirements specifically established to govern the use of Internet portal sites in connection with marketing of securities, such activities will be deemed to constitute a form of securities business, which is generally subject to supervision by the FSC/FSS.[27]

Also, as a non-Korean business entity, the foreign broker/agent may be deemed a "foreign securities company" if it is engaged in the securities business in its home jurisdiction (relying on the legal definition of "securities business" in its home jurisdiction).[28] In order to carry out its business vis-a-vis Korean residents, such foreign broker/agent would need to maintain a Korean presence, i.e., a branch office

23) *See* Sections 2(8) and 28 of the SEA.

24) *See* Section 28-2 of the SEA.

25) *See* Section 3(1)h of the FETA and Section 7-36 of the Regulation on Foreign Exchange Transactions.

26) *See* Section 5-72(2) of the Regulation on the Supervision of Securities Business.

27) *See* Sections 2(8) and 28 of the SEA.

28) *See* Section 28-2(1) of the SEA.

or business office in Korea.[29] It would actually be such branch office or business office that would be approved by the FSC in connection with the securities offered to Korean residents.[30]

An Internet portal itself would not be subject to registration requirements. Only the branch or business office of the foreign securities business that markets securities through the portal would have to be approved by the FSC.

V. Consequences of Failure to File a Registration Statement Required in Connection with a Public Offering

If an issuer does not file the required registration statement with the FSC in the case of a public offering (or deemed public offering), such failure would not nullify or void the issuance of the securities, unless the terms and conditions of such securities violate the Articles of Incorporation of the issuer.[31] However, the FSC could impose sanctions upon the issuer, such as ordering the dismissal of the directors of the Issuer, imposing restrictions against further issuing of securities, and publicising the Issuer's violation of the registration statement filing requirements.

In connection with the above, issuers and investors should be aware of the following relevant provisions of Korean law in addition to the liabilities referred to in I. *A* and *C* above.

A. Liability of Subscribers of Securities

Sections 424-2, 516 and 516-10 of the Korean Commercial Code provide that in a case where there is an agreement between a subscriber of shares (or convertible bonds or bonds with warrants, as the case may be) and the directors of the issuer to issue such shares at a substantially unfair price, the subscriber/holder of such shares may be held liable for payment to the issuer of the difference between the artificially low

29) *See* Section 28-2(3) of the SEA.

30) *See* Section 28-2(4) of the SEA.

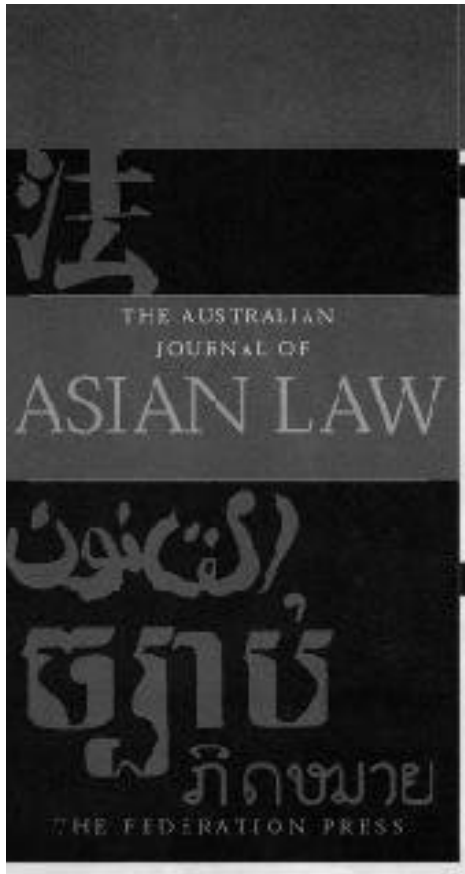
31) This is due to the fact that provisions prescribing the registration statement and related requirements are understood to relate to the procedure and processes to be followed in carrying out the issuance and sale of securities, but do not relate to the validity of the securities themselves.

subscription price paid for the shares and the fair (market) price which should have been determined at the time of issuance of shares.

B. Liability of Directors

Under Section 399 of the Korean Commercial Code, the directors of the issuer would be liable for any damages to the issuer and its shareholders, if any, caused by issuing securities at substantially detrimental terms and conditions in light of market circumstances at the time of issuance.

This essentially means that both subscribers of shares and the directors of the issuer thereof potentially can be held jointly and severally liable for damages to injured parties if found to be in breach of the SEA and regulations thereunder, including the Regulation on the Issuance of Securities and Disclosure.



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One volume is published each year in two parts of approximately 120 pages each. Volume 1 (1999) is published. Volume 2 (2000) Part 1 will be published August 2000. Volume 2 Part 2 will be published in November 2000.

Asian Law's ISSN is 1442-0728.

Abstracts of published and forthcoming articles are published on the Federation Press Web site: http://www.fedpress.aust.com

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