

Development of Security Rights Law since the Codification of the Civil Code of Korea*

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Abstract

The Civil Code of Korea (hereafter "Civil Code" or "Code") came into effect as of January 1, 1960. It would be meaningful to review changes taken place in a certain area of civil law since the codification. I would confine the scope of discussion to security rights law, especially, keun-mortgage and the Act on Security over Movable Property, Claims, etc. and the changes taken place in that area of the law since the codification of the Civil Code. I would like to explain how security rights law impacted the transactions system in Korea and how that, in turn,

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Kim Jae Hyung, *Damboebobui hyeonjaewa milae - minbeob sihaeng 50 junyeoneul majihayeo* [*The Present and Future of the Security Rights Law in Korea*], 52 MINSABEOBHAK [THE KOREAN JOURNAL OF CIVIL LAW] 329-359 (Dec. 2010) (S. Kor.), which addresses, in addition to the discussions herein, the revision efforts pertaining to "retention rights", currently a major issue in Korea. This paper mainly addresses keun-mortgage and Dongsan-Chaegwondeungui Damboegwanhan beoblyul [Act on Security over Movable Property, Claims, etc.], Act No. 10366, June 10, 2010, amended by Act No. 10629, May 19, 2011 (S. Kor.), which are topics of particular interest to domestic and foreign scholars alike. Whereas the term "security interest" is most often used in the U.S., the term "security right" is often used in Europe to refer to security interest as property rights; therefore, I choose to use the latter throughout this paper. In the UNCITRAL Legislative Guide on Secured Transactions (2007), a concept of "security right" includes all types of right in movable property created by agreement to secure payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, as well as on a public registry that provides notice of a security right to third parties.

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prompted the amendment of the Civil Code and the enactment of a number of special acts.

The security rights law is basically modeled after the European civil codes, but it has diverged from its model and undergone some changes. Such changes have been achieved sometimes through the development of case law or legal theories, and other times by the enactment of new acts. The Act on Security over Movable Property, Claims, etc. has incorporated some elements of the American legal system, thereby attaching a new meaning and perspective to our history of reception of foreign legal systems.

KEY WORDS: Civil Code, Security Rights, Mortgage, Keun-mortgage, Pledge, Transfer of Ownership for Security Purposes, *the Act on Security over Movable Property, Claims, etc.*, Civil Code Amendment Committee

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I. Introduction

The Civil Code¹⁾ of Korea (hereafter “Civil Code”) came into effect as of January 1, 1960 and the year 2010 marked the meaningful 50th anniversary of the birth of the nation’s civil law system. Now half a century after its codification, I believe that the Korean civil law academia has a duty to revisit the significance of the Civil Code.

For this international symposium, I have been asked to explain the implications of adopting a western legal framework in Korea from a historical point of view. I believe it would be meaningful to review changes taken place in a certain area of civil law since the codification of Korea’s civil law. The civil law system of Korea, not unlike those of most East Asian countries, is modeled after the modern civil codes of the western world. Unfortunately, the adoption of the western legal framework in Korea was an involuntary and indirect process, as the colonial government of Japan forced Korea into adopting the Japanese system, which itself had been built upon the western legal foundations.²⁾ In 1912, soon after the colonization,

1) This is often translated as the “Civil Act.”

2) There were attempts to enact Korea’s own civil code towards the end of the Choseon Dynasty. The term “civil code” was first used in the *Hongbeom 14jo* (literally translated as “fourteen articles of exemplary rules”) published during the Gabo Reform of 1894. Article 13 stipulates “we hereby declare our resolution to protect the lives and properties of the people, by establishing definite and specific civil and criminal codes so that people will not be

the Choseon Civil Affairs Order was declared, thereby subjecting Koreans to the Japanese civil code for their civil transactions.³⁾ Following the liberation in 1945, Korea as a new independent nation began efforts to draft its own civil code.⁴⁾ Lawmakers at that time were not entirely free from the influence of the Japanese civil code, but they nevertheless aspired to create a civil code distinct from that of Japan by including some of Korea's own traditional conventions and by referring to European civil laws, particularly that of Germany as a viable point of reference. Such efforts ultimately bore fruit in the form of the current Civil Code. Since its enactment, the Civil Code has been revised several times but remains in effect to date.

As European laws contained elements not reflective of Korea's traditional legal system and conventions, the introduction of the western framework has had a profound transforming impact on the lives of Korean people, though initially it resulted in frequent disputes and conflicts. Take as an example the registration requirement for transferring the property rights of immovable properties, one of the most disputed issues in Korean civil law. Article 186 of the Civil Code stipulates that "any alteration in a property right by a juristic act over an immovable property takes effect upon its registration."⁵⁾ In other words, a purchasing party cannot acquire

detained or punished without reasonable grounds." Subsequent efforts to codify Korea's civil code were thwarted due to Japan's colonization of Korea.

3) Article 1 of Choseon Minsalyeong [Choseon Civil Affairs Order], Choseonchongdogbujelyeong Je7ho [Japanese Government General of Korea Decree No.7], Mar.18, 1912, stipulates "matters related to civil affairs of the Korean people, if not specified otherwise in other provisions of this Order, shall be governed by the following laws" and names the Japanese civil code on top of the list of laws that shall apply to Koreans. Article 11, as an exception, provides that matters related to family and inheritance shall be governed by Korea's traditional conventions.

4) Following the liberation on August 15, 1945, the Korean government tried to codify a civil code. A group of scholars led by the first Supreme Court Chief Justice Kim Byung Ro formed "the Civil Code Drafting Guidelines" and accordingly created a draft of civil code.

5) Regarding the "Creation and Transfer of Property Rights", article 176 of the Japanese Civil Code, which was imposed on Koreans before Korea adopted its own Civil Code, stipulates that "The creation and transfer of property rights shall take effect solely by the manifestations of intention of the relevant parties," in effect adopting the "will theory" which takes the position that the alteration in property rights is fully effectuated solely by the agreement of the contracting parties. In comparison, article 186 of the Korean Civil Code departed from its initial position and adopted the "formalist theory," which makes registration a requirement in the case of alteration of property rights. This change was

ownership of real property until she registers such a transfer. This is something not mandated under the Japanese civil code. As a result, during the early days of the law's enforcement, buyers often failed to register the transfer of ownership for immovable property, because, before the introduction of the Civil Code, transactions of real properties were complete without registration. In fact, even with the enactment of the Civil Code, unregistered transactions of immovable properties remained dominant for decades, giving rise to numerous legal disputes. Over time, however, people came to have a better understanding of the requirements of the Civil Code and came to embrace the principle that registration is essential for transfer of property rights with regard to the trade of immovable properties.

It is indeed meaningful, albeit highly challenging, to probe the impact the western legal framework embodied in the Civil Code, has had on the lives of the Korean people. In this paper, I would confine the scope of discussion to security rights law and the changes that have taken place in that area of the law since the codification of the Civil Code.⁶⁾ I chose the security rights law because it is an area with an immense influence on the lives of the Korean people following Korea's adoption of the western legal system and also because it is an area currently undergoing substantial changes in response to the rapidly-evolving financial market. I believe that probing this topic will shed light on how Korean legal scholars and practitioners have dealt with the western legal system and values incorporated into the Korean legal system.

In February 2009, the Korean Ministry of Justice launched the Civil Code Amendment Committee to review the Civil Code in its entirety and to draft amendments to the Code. If the project should come to a successful completion in due course, the Civil Code will take a vastly different form.

brought about by adopting the stance of the German Civil Law, making it one of the most meaningful legal developments at the time the Civil Code was drafted. In the following years, many disputes arose in the civil law academia concerning the interpretation of this Article. See KWAK YOON CHIK, MOOLKWONBEOB [PROPERTY LAW] 46 ff. (7th ed. 2002) (S. Kor.).

6) I have publicized a number of theses on security rights law and, as a member of the Civil Code Amendment Committee, participated in efforts to revise the nation's security rights law. In the course of writing this paper, I referred to some of my own theses on security rights and also drew on my experience with the revision work at the Committee.

For the year 2009, the Ministry of Justice's initial plan was to focus only on revising the "General Parts of the Civil Code," (as this introductory part sets the overall groundwork for and provides the nuts and bolts for the rest of the Code), but they subsequently chose to add the revision of security rights law as part of the agenda for the year, despite the fact that security rights law technically falls under the category of property law, rather than the General Parts.⁷⁾ The Ministry of Justice was responding to an urgent call for improving the existing security rights law. Meanwhile, a particularly noteworthy step taken in the civil law area was the enactment of *the Act on Security over Movable Property, Claims, etc.* (hereinafter Act).⁸⁾ This particular legislation is truly groundbreaking in that it authorizes the registration of security rights where movable properties or receivables are provided as collateral. The adoption of the Act also attests to the fact that Korea, a nation with continental civil law traditions, has begun to take up the elements of the U.S. legal system.

In what follows, I will first address the security rights set forth in the Civil Code and then examine two topics that best illustrate the most noteworthy changes taken place since its enactment: i) *keun-mortgage*,⁹⁾ which is the most important form of immovable security rights in Korea, and ii) use of movable property and receivables as collateral. The two security right schemes best represent the most notable aspects of the Korean security rights law. In particular, I will explain how the security rights law has impacted the transactions system of Korea and how that, in

7) As a member of the Civil Code Amendment Committee, I have been drafting a revised version of the security rights law in the 5th Subcommittee (Security Rights System Subcommittee).

8) As a member of the Special Subcommittee to Legislate Security System of Movables and Receivables launched by the Ministry of Justice in March 2008, I served to prepare a draft bill of *the Act on Security over Movable Property, Claims, etc.*

9) "*Keun-mortgage*" is similar to the maximum amount mortgage (*Höchstbetragshypothek*) in the German system. This is a Korean counterpart for Germany's "maximum amount mortgage". However, as the original Korean term in itself does not use the expression "maximum amount", it seemed appropriate to translate as "*keun-mortgage*" and not as "maximum amount mortgage". The "Statutes of the Republic of Korea," too, translates the term as "*keun-mortgage*." On the other hand, the Civil Code of Korea has no provisions dealing with "*Grundschild*," which is commonly used for secured transactions in Germany. For more information, see *infra* III.2.

turn, prompted the amendment of the Civil Code and the enactment of a number of special statutes.

II. An Overview of Korea's Security Rights Law

The Civil Code provides for the following three "security rights": namely, mortgage, pledge, and retention right. Among these, "mortgage" represents a mortgagee's right to obtain satisfaction of a claim in preference to other creditors, in relation to an immovable property furnished by the debtor-mortgagor or by a third party as collateral without transferring its possession to the mortgagee (Civil Code article 356). In other words, it is a right attached to immovables, as opposed to movables. The Civil Code contains a total of seventeen articles that define and regulate the instrument of mortgage, out of which provisions only one specifically deals with the instrument of "*keun*-mortgage." In practice, however, the mortgage is rarely put to use while the *keun*-mortgage is more frequently utilized.

Pledge consists of two types: movable property pledge and pledge of rights. The "movable property pledge" allows a pledgee to hold possession of the movable(s) received from the debtor or a third party as collateral for its claim, and to obtain satisfaction of such claim in preference to other creditors (Civil Code article 329). Providing a pledge is a typical means of furnishing a movable property as collateral, but the movable property pledge is not commonly used in practice it requires transfer of possession. On some occasions, obtaining a property right can constitute the object of arranging a pledge (Civil Code article 345) and, in such cases, the pledge is called "pledge of rights." Receivables and stocks can be the object of a "pledge of rights."

When a person possessing a property or a valuable instrument belonging to another person has any claim against the owner in respect of such property or instrument and if payment of the claim is due, the possessor may have a "retention right"¹⁰⁾ to retain its possession until the claim is satisfied (Civil Code article 320). The right of retention is able to be

10) It is noted that, in the context of most common law jurisdictions, such possessory right is referred to as "lien".

exercised on both immovable and movable properties.

As the aforesaid provisions of the Civil Code failed to adequately address the ever-increasing complexity of demands pertaining to the institution of security rights, alternative forms such as transfer of ownership for security purposes and provisional registration security have emerged and prospered in practice. Special acts have also been introduced including the *Factory and Mining Foundations Mortgages Act*¹¹⁾ and the *Provisional Registration Security Act*.¹²⁾ Especially, the *Act on Security over Movable Property, Claims, etc.* was enacted in June 2010.

Collaterals may be classified into three types: immovable property, movable property, and rights. Movable properties and rights tend to be less frequently furnished as collateral than immovable properties. [Table 1] illustrates that immovable properties account for the overwhelming majority of security in Korea. Of the total KRW 537,419.4 billion collateral-backed loans extended by all banks, KRW 500,079.3 billion or over 90% was granted on immovable properties, while only KRW 88.6 billion or less than 0.1% of the loans was backed by movable properties and KRW 37,251.4

Table 1. Loans Extended by Financial Institutions for Each Security Type¹³⁾
(Billion KRW)

							On-Guarantee	On-Credit	Total
	Collateral-Backed	Im-movable property	Movable property	Valuable Instruments	Deposit	Others			
Commercial Banks	405,058.1	378,323.6	45.3	6,393.86	13,335.4	6,960.2	49,116.6	289,511.1	743,685.8
Special Banks	132,361.31 12,659.9	121,755.7	43.3	3,117.9	3,698.3	3,746.1	29,878.4	165,674.1	327,913.8
Total	537,419.4	500,079.3	88.6	9,511.5	17,033.6	10,706.3	78,995.0	455,185.1	1,071,599.5

11) Gongjang mich Gwangeob Jaedan Jeodangbeob [Factory and Mining Foundations Mortgages Act], Act No.11297, Feb. 10, 2012 (S. Kor.).

12) Gadeunggi Dambodeunge gwanhan beoblyul [Provisional Registration Security Act], Act No. 3681, Dec. 30, 1983, amended by Act No. 8919, Mar. 21, 2008 (S. Kor.).

13) These data are current as of the end of 2011. As of the end of June 2008, immovable collaterals backed over 90% of all collateral-backed loans. See the financial statistics of the Financial Statistics Information System of the Financial Supervisory Service, available at <http://fisis.fss.or.kr>.

billion for valuable instruments, deposits, and others collectively, as collateral.

Since the Civil Code contains only one article regarding the *keun*-mortgage, which is the most frequently utilized form of security instrument in actual commercial transactions, criticisms have arisen about the law's inability to keep up with real-world situations. Movable properties and receivables, on the other hand, are exploited as collateral very rarely, prompting legislators to explore ways to promote their use.

III. Changes in Legal Regulations on *Keun*-Mortgage

1. Before the Enforcement of the Civil Code

The old civil code was the Japanese civil code directly transplanted in Korea, with no provision relating to the *keun*-mortgage. However, the Choseon High Court recognized the validity of the *keun*-mortgage¹⁴⁾ as Japanese courts traditionally did.¹⁵⁾ Likewise, Korea's Supreme Court, in the post-liberation era, acknowledged the *keun*-mortgage as a valid right.¹⁶⁾ For instance, in 4289Min-Sang401 delivered on January 10, 1957, the Supreme Court of Korea ruled that "in cases where parties set a certain limit with regard to *keun*-mortgage, the collateral is effective only to the extent that the collective sum of the principal, interest, and default interest does not exceed such limit. Therefore, the provisions of article 374 of the (Old) Civil Code shall not apply."

The same rang true in the academic circles. Apparently no legal scholars questioned or disputed the validity of *keun*-mortgage even far before the

14) Choseon Godeungbeobwon [Choseon High Court] Dec. 1, 1931, 18 Chosun Godeungbeobwon Panyullok 183.

15) Daishin'in [Japanese Great Court of Judicature] Nov. 1, 1938, 17 DAISHIN'IN MINJI HANREISHU [DAIHAN MINSHU] 2165 (Japan).

16) Supreme Court, 4290Min-Sang75, June 12, 1958 (S. Kor.); Supreme Court, 4290Min-Jae-Hang120, Dec. 13, 1958 (S. Kor.). See Supreme Court, 60Da893, Dec. 14, 1961 (S. Kor.), which was rendered closely subsequent to the enforcement of the current Civil Code, is also based on the premise that *keun*-mortgage is valid. The issue disputed in the case dates back to the old civil code era.

codification of the current Civil Code.¹⁷⁾ The *keun*-mortgage was acknowledged as an effective mechanism of security because it was customarily accepted. Besides, neither did it pose a challenge to the general frame work of the Civil Code nor a threat to the security of transactions as long as it could protect a third party by means of registration.¹⁸⁾

2. Codification into the Current Civil Code

The Civil Code has introduced article 357 paragraph 1, which stipulates that “a mortgage can be created by settling only the maximum amount of the debt to be secured and reserving the determination of the debt in the future. In such case the extinction or transfer of the debt which occurred before the debt is determined cannot be effective against the mortgage,” and article 357 paragraph 2, which stipulates that “in the case of the preceding paragraph the interest of the debt shall be considered to be included in the maximum amount of the debt.”

The historical background of the above-mentioned provisions is as follows: The Codification Committee established in 1948 produced the *Civil Code Codification Guidelines*¹⁹⁾ and the paragraph 12.3 in the property rights section of the Guidelines indicated that the new Civil Code should include provisions relating to the *keun*-mortgage. As a result, the first draft of the Civil Code announced in 1954 contained a provision on *keun*-mortgage (Civil Code article 346). When the first draft was submitted to the National Assembly, the Legislation and Judiciary Committee of the then Lower House deliberated on the draft through its Civil Law Deliberations Subcommittee and revised some of the provisions. The Subcommittee members have purportedly referred to the legislative precedents of other

17) KWACK YOON CHIK, MOOLKWONBEOB [PROPERTY LAW] 464 (1963) (S. Kor.); KIM CHEUNG HAN, MOOLKWONBEOB (2) [PROPERTY LAW (2)] 252 (1970) (S. Kor.).

18) KIM CHEUNG HAN, *supra* note 17, at 252; BANG SOON WON, SHINMOOLKWONBEOB [NEW PROPERTY LAW] 272 (1960) (S.Kor.); LEE YOUNG JUNE, JUSEOK MOOLKWONBEOB [COMMENTARY ON THE LAW OF PROPERTY](HA) 406 (1993) (S. Kor.).

19) CHANG HOO YOUNG, HYUNDAE MINBEOBCHONGRON [GENERAL PROVISIONS OF CIVIL LAW IN RECENT YEARS] 297 (1955) (S.Kor.); Yang Chang Soo, *Minbeobanui Seonglibgwajeonge gwanhan Sogo* [Brief Review on the Enactment of Civil Law], in MINBEOBYEONGU I [STUDIES ON CIVIL LAW I] 104 (1991) (S. Kor.).

countries including article 1190 of the German civil code²⁰⁾ and article 356 of the Manchurian civil code.²¹⁾

The legal academia of that time welcomed the first draft that encapsulated the *keun*-mortgage in article 346, commenting that “although the current Civil Code (i.e. the Old Civil Code) does not have applicable provisions, the *keun*-mortgage has been established through case law, and therefore it is highly appropriate to codify it.”²²⁾ Some scholars went on to praise the creation of the *keun*-mortgage provisions as a “socio-legal achievement accomplished in the process of enacting the current Civil Code.”²³⁾

3. Changes since Codification of the Civil Code

1) From Mortgage to Keun-mortgage

As indicated above, the Civil Code contains, in its Chapter IX of Part II, seventeen articles stipulating matters related to mortgage, although only one of them concerns *keun*-mortgage.²⁴⁾ Meanwhile, real-world conventions

20) German Civil Code article 1190 stipulates maximum amount mortgage (*Höchstbetragshypothek*).

- (1) A mortgage may be created in such a way that only the maximum amount to which the plot of land is to be liable is determined, and apart from this the stipulation of the claim is reserved. The maximum amount must be entered in the Land Register.
- (2) If the claim bears interest, the interest is included in the maximum amount.
- (3) The mortgage is deemed to be a debt-securing mortgage, even if it is not described as such in the Land Register.
- (4) The claim may be transferred in accordance with the general provisions applying to the transfer of claims. If it is transferred under these provisions, the passing of the mortgage is excluded.

See also Swiss Civil Code art.794 para. 2, which stipulates maximum amount mortgage.

If the amount of the debt is unspecified, a maximum amount must be indicated up to which the property is liable for all claims of the creditor.

21) MINUIWON BEOBESABEOWIWOHNOE MINBEOBAN SIMUISOWIWOHNOE [CIVIL LAW DELIBERATIONS SUBCOMMITTEE IN THE LEGISLATION AND JUDICIARY COMMITTEE OF THE LOWER HOUSE], MINBEOBAN SIMUILOG (SANG) [MINUTES ON DRAFT CIVIL LAW (SANG)] 213 (1957) (S. Kor.).

22) MINSABEOW YEONGUHOE [CIVIL LAW RESEARCH SOCIETY], MINBEOBAN UIGYEONSEO [MEMORANDUM ON DRAFT CIVIL LAW 12, 129 (1957) (parts written by Kim Cheung Han) (S. Kor.).

23) CHANG KYUNG HAK, SHINMOOLKWOONBEOBKAKRON [DETAILS OF NEW PROPERTY LAW] 752 (1960) (S. Kor.).

24) The German Civil Code contains as many as 79 mortgage articles while “*Grundschild*”

have diverged from legal provisions, making the *keun*-mortgage a more common means of providing security.²⁵⁾

Currently, *keun*-mortgage is, without a doubt, the type of security most frequently used in financial transactions. In 1959, before the current Civil Code came into effect, neither mortgage nor *keun*-mortgage was used often. In 1975, however, the number of registered mortgages and *keun*-mortgages on immovable properties stood at 618,065,²⁶⁾ and by 1995, it reached 3,168,329.²⁷⁾ People increasingly counted on mortgage and *keun*-mortgage as the financial markets grew. What is equally noteworthy is that more and more Koreans preferred *keun*-mortgage over mortgage. By 1995, mortgage was rarely used, while, in most cases, it was *keun*-mortgage that was utilized as a means of security.²⁸⁾

Considering that *keun*-mortgage was used in financial transactions even in the absence of relevant provisions under the Old Civil Code, it is evident that people's preference over the mode of security has changed very rapidly. *Keun*-mortgage was devised for the purpose of providing security against possible changes in the values of receivables subject to a certain cap. Therefore, it is a convenient security provision tool for multiple accounts of debts generated in ongoing transactions. In fact, even parties without such transactional relations tend to choose *keun*-mortgage, whereas the popularity of mortgage has plummeted over the years. Therefore, in today's Korea, it would be not imprudent to state that the law of *keun*-mortgage is failing to catch up with the evolving transactional reality.

is regulated in merely 8 articles. In real-world transactions, however, only "*Grundschild*" is used.

25) Kim Cheung Han wrote in the introduction of his book on property law, "[T]here is a misunderstanding that mortgage is an extraordinary instrument not commonly used, which is not true. Mortgage is in fact frequently used." See KIM CHEUNG HAN, *supra* note 17.

26) BEOBWON HAENGJEONGCHEO [NATIONAL COURT ADMINISTRATION], 1976 SABEOB YEONGAM [JUDICIAL STATISTICS] 444 (1976) (S. Kor.).

27) BEOBWON HAENGJEONGCHEO [NATIONAL COURT ADMINISTRATION], 1996 SABEOB YEONGAM [JUDICIAL STATISTICS] 1068 (1996) (S. Kor.).

28) KIM JAE HYUNG, KEUN-JEODANGGWONYEONGU [RESEARCH ON KEUN-MORTGAGE] 1 (2000) (S. Kor.).

2) *From Keun-mortgage to "Comprehensive Keun-mortgage"*

In real-world business settings, parties engaging in recurring and ongoing transactions use a "comprehensive *keun*-mortgage" in order to avoid the inconvenience of creating *keun*-mortgage each and every time. Comprehensive *keun*-mortgages vary greatly in form, but they essentially involve "comprehensive" or catch-all specification or descriptions of receivables. For example, an underlying agreement may provide in this regard "any and all receivables currently existing and/or to be created in the future," or list agreements on overdraft or bill discount and add to them a clause stating "or receivables generating out of such agreements and any and all other receivables."²⁹⁾ The following is an excerpt from a comprehensive *keun*-mortgage agreement template used by business concerns in actual practice. With regard to the scope of receivables backed by the collateral, it provides:

"[A]ny and all obligations, debts and liabilities of the Debtor to the Creditor, presently existing or to be incurred hereinafter, arising out of, connected with or related to following transactions; loans against bills, loans by deed, overdrafts, payment guarantees (including debenture payment guarantees), sales of bonds, mutual savings transactions, lending of instruments and securities, foreign exchange transactions and all other credit transactions, guarantee obligations, obligations under promissory notes or checks, interest, penalty interest, any and all expenses payable by debtor/mortgagee, other additional obligations such as insurance expenses, and any and all obligations related to credit transactions."

The boiler-plate provisions in *keun*-mortgage agreements as exemplified above have evolved to a certain extent; nevertheless, these provisions are typically very inclusive in their content and expression. These provisions mirror such clauses as are termed "dagnet cause" or "anaconda clause" under U.S. law.³⁰⁾

Whether or not such comprehensive *keun*-mortgage is valid is one of the

29) For more information, see *id.* at 98 ff.

30) GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 1025 ff (4th ed. 2001).

most critical issues in the field of *keun*-mortgage law. There are basically three differing views. The first group of scholars believes that “any and all receivables” with no preset limitations should be recognized effective.³¹⁾ They are willing to acknowledge the validity of comprehensive *keun*-mortgage as long as the receivables can be “determined” subject to the preset maximum at a certain point in the future, pursuant to the text of article 357 paragraph 1 of the Civil Code. The second group takes the view that the comprehensive *keun*-mortgage is valid but not without limitations.³²⁾ They conceive that an overly broad scope of receivables such as “any and all receivables between the parties” is invalid, while the scope of receivables defined in the standard *keun*-mortgage template typically used by commercial banks in their practice is deemed appropriate. The last camp categorically denies the validity of the comprehensive *keun*-mortgage on the basis that it is against the mortgage rules of the Civil Code³³⁾ and the *Regulation of Adhesion Contract Act*.³⁴⁾

The pertinent rulings of the Court in this regard are based on the premise that the comprehensive *keun*-mortgage is valid. However, while the Court definitely endorses the comprehensive *keun*-mortgage created for debts arising from credit transactions,³⁵⁾ it is not clear whether it is willing to acknowledge the validity of the comprehensive *keun*-mortgage without any limitations. Under Korea’s registration system, creating a no-strings attached *keun*-mortgage is possible indeed.³⁶⁾ In the context of court auction

31) KIM CHEUNG HAN & KIM HAK DONG, MOOLKWONBEOB [PROPERTY LAW] 569 (9th ed. 1997) (S. Kor.); CHANG KYUNG HAK, MOOLKWONBEOB [PROPERTY LAW] 852 (1990) (S. Kor.); See also Kim Seok Woo, *Geunjeodanggwone gwanhan yeongu* [A Study on the Maximum Amount Mortgage] 62 (1973) (Ph.D. dissertation, Hanyang University) (S. Kor.).

32) KWAK YOON CHIK, MOOLKWONBEOB [PROPERTY LAW] 373 (7th ed. 2002) (S. Kor.); KIM SANG YONG, MOOLKWONBEOB [PROPERTY LAW] 741 (2d ed. 2013) (S. Kor.).

33) Lee Soon Chul, *Mulsang-bojeunginui chaegim* [Duty of Person Who Pledged One's Property to Secure Another's Obligation], in HYEONDAE-JAESANBEOBUI JEMUNJE [PROBLEMS ON MODERN PROPERTY LAW - ARTICLES IN HONOR OF DR. KIM KI SUN FOR HIS 70TH BIRTHDAY-] 183 (1987) (S. Kor.).

34) LEE EUN YOUNG, MOOLKWONBEOB [PROPERTY LAW] 836 (4th ed. 2006) (S. Kor.).

35) See generally Supreme Court, 94Da20242, Sept. 30, 1994, (S. Kor.); Supreme Court, 90Da-Ka10077, Nov. 27, 1990 (S. Kor.).

36) *Keun-mortgageae gwanhan deungki samu cheori jichim* [Guidelines for Keun-mortgage Registration Management], Supreme Court Rule No. 880, Sept. 9, 1997, amended by Supreme Court Rule No. 1471, June 29, 2012 (S. Kor.).

and bankruptcy processes, too, comprehensive *keun*-mortgage is generally presumed valid.

Not unlike the Court, I also support the position that the validity of comprehensive *keun*-mortgage should be duly recognized. As I once detailed elsewhere,³⁷⁾ the first and foremost ground in this respect is that the Civil Code is devoid of any provisions that may be put forward as a ground for negating the validity of the comprehensive *keun*-mortgage. From the perspective of legal textualism, therefore, the concept of comprehensive *keun*-mortgage cannot be considered invalid. In addition, comprehensive *keun*-mortgage brings about the effect of reducing transaction costs. Were the validity of the comprehensive *keun*-mortgage to be rendered void, one would have to go through the cumbersome process of recreating *keun*-mortgage and registering the *keun*-mortgage each time where more than one receivable comes into existence; this is time-consuming as well as costly. Recognizing the validity of comprehensive *keun*-mortgage, on the other hand, would ensure that a single catch-all *keun*-mortgage would comprehensively secure multiple receivables, therefore reducing the time and cost to be incurred in the process. Accordingly, comprehensive *keun*-mortgage is a useful system to deploy in financial transactions; from this, it would be a rational conclusion to uphold the validity of the system. In other words, the system of comprehensive *keun*-mortgage is valid from a textual reading of the statute, and it also holds true from the standpoint of teleological statutory interpretation.

The existing legal theories in Korea concerning the comprehensive *keun*-mortgage were influenced by the prevailing theories among Japanese scholars. There was once a theoretical debate in Japan but it dates back to the pre-amendment era when there was no *keun*-mortgage provision. The revised Civil Code of Japan specifically rejects the comprehensive *keun*-mortgage, based on policy considerations, as opposed to any theoretical grounds. Therefore, the premise undergirding the Japanese *keun*-mortgage theories is different from that of Korea's. In fact, the Korean *keun*-mortgage provisions are highly similar to the "maximum amount mortgage" set forth in paragraph 1190 of the German Civil Code. As the maximum amount

37) KIM JAE HYUNG, *supra* note 28, at 114 ff.

mortgage can be created for comprehensive debts, the same logic may equally apply in the Korean context.

4. Discussions to Revise the Civil Code

1) Revised Draft of 2004

The Ministry of Justice organized a Civil Code Amendment Committee in 1999 to draft revision of the Civil Code, which included new *keun*-mortgage provisions, and submitted the final draft to the 2004 parliamentary session for consideration. In the 2004 version, the Committee kept article 357 intact and newly created eleven additional articles. In particular, article 357, paragraph 2 of the draft concerning “receivables of *keun*-mortgage” stipulated that “the receivables secured by *keun*-mortgage shall be limited to those arising from specific continued transaction agreements and certain other types of transactions or those continuously arising from specific reasons.” This is a slightly modified version of articles 398-2, paragraph 2 and 398-2, paragraph 3 of the Japanese Civil Code, which ban comprehensive *keun*-mortgage. According to the 2004 draft, debtors and creditors are barred from setting all the debts arising from their transactions as the receivables of *keun*-mortgage. The 2004 draft also contained new provisions concerning transfer of *keun*-mortgage and determination of receivables of *keun*-mortgage,³⁸⁾ but it was ultimately abrogated upon expiry of the parliamentary session.

2) Revised Draft of 2009

The Ministry of Justice launched another Civil Code Amendment Committee in 2009. This time the Committee decided to create ten new *keun*-mortgage articles to address the real-world demand for *keun*-mortgage and to clarify the legal interests of various interested parties concerning *keun*-mortgage.³⁹⁾ The ten new articles cover the following matters: i) maximum amount of debt, scope of receivables, and change of debtor, ii) joint ownership of *keun*-mortgage, iii) transfer of receivables and acquisition

38) See also KIM JAE HYUNG, *Keun-jeodanggwone gwanhan gaejeongbangan* [Reform Proposal of *Keun*-mortgage], in MINBEOLON I [CIVIL LAW I] 287 (2004) (S. Kor.).

39) As a member of the 5th Subcommittee, I drafted the rules regarding *keun*-mortgage.

of debt and *keun*-mortgage, iv) inheritance and *keun*-mortgage, v) merger of legal persons and *keun*-mortgage, vi) split of legal person and *keun*-mortgage, vii) request for determination of secured debts, viii) grounds for determination of secured debts, ix) request for reduction of the maximum amount of *keun*-mortgage, and x) the right of “the person who pledged his or her property to secure another’s obligation” to request extinguishment of *keun*-mortgage. As for transfer of *keun*-mortgage, the 5th Subcommittee suggested two options – either to create provisions concerning transfer of *keun*-mortgage or to leave it to the court to decide according to judicial precedents. Since the Committee opted for the latter alternative, the 2009 draft does not contain provisions governing transfer of *keun*-mortgage.

The 2009 version is mostly identical to the 2004 draft but does have some modified or newly-added provisions. The biggest difference from the 2004 draft is that the latest version does not ban comprehensive *keun*-mortgage. The Committee accepted opinions supporting the validity of comprehensive *keun*-mortgage⁴⁰⁾ after a close examination of legal theories, case law, and real-world business customs as well as careful research of the security rights laws of other countries including the maximum amount security rule of Germany. Comparative studies led to the conclusion that very few countries prohibit security rights from covering comprehensive receivables.⁴¹⁾ Japan banned comprehensive *keun*-mortgage based on policy considerations when it revised its Civil Code some 40 years ago, but given the ever-growing financial market, I believe such prohibition is clearly outdated.

40) Meanwhile, it can be disputed whether only non-specified claims shall be backed by *keun*-mortgage. Article 398.2.1 of the Japanese Civil Code amended in 1971 provides “non-specified claims within a certain scope” with regard to claims secured by *keun*-mortgage. In contrast, Korea’s Civil Code, as article 1190 of the German Civil Code does, stipulates that a *keun*-mortgage can be created by reserving the determination of the debt in the future. We opted against the change allowing *keun*-mortgage to back non-specified claims.

41) NELSON & WHITMAN, *supra* note 30, at 1027; CLEMENS CLEMENTE, DIE SICHERUNGSGRUNDSCULD IN DER BANKPRAXIS S.8 (1985) (Ger.); *See also* KIM JAE HYUNG, *supra* note 28 at 32, 99, 111 (2000) (S. Kor.).

IV. Changes in Legal Regulations on Security of Movables and Receivables

1. Pledge Provisions in the Civil Code

In order to furnish movables or rights as collateral, transacting parties can create a pledge. The Civil Code specifies two types of pledge: movable property pledge and pledge of rights.

1) Movable Property Pledge

A pledge becomes effective upon the pledger's delivery of the object of the pledge to the pledgee (Civil Code article 330), who cannot let the pledger hold possession of the pledged article on his or her behalf (Civil Code article 332). As the means of publicizing changes in property rights, the Civil Code envisages actual delivery, summary assignment, agreement on possession, and assignment of claim for return of object (Civil Code articles 188 through 190), but in case of movable property pledges, agreement on possession is not accepted as a valid means of delivery. For that reason, a pledge may not be an effective mode of security for a corporate debtor who wants to secure funds by putting up a movable as collateral while continuing to possess and use the movable.

2) Pledge of Rights

One can take advantage of a "pledge of rights" under the Civil Code as a way of furnishing rights such as receivables as collateral. If a pledge is created on a nominative claim, setting it up against a third party requires "notice or consent put in writing with a certified fixed date" (Civil Code article 349). Thus in cases where one hopes to create pledges on several accounts of claims, it is both costly and time-consuming to set them properly against third parties.

2. Transfer of Ownership for Security Purposes

1) Transfer of Ownership for Security Purposes

Although the Civil Code does not contain any applicable provisions, people do turn to "transfer of ownership for security purposes." Both

movables and immovables may constitute the object here, and sometimes receivables and stocks are used as well. In and of themselves, individual movables or receivables, unlike immovable properties, may not be valuable enough to be collateral, but a group of movables or receivables can serve as a single pool of collateral. Because transferring ownership for security purposes lets the debtor continue to possess the articles, in the form of agreement on retention of possession, it entails smaller maintenance burdens and risks, and the debtor may even put up production facilities and off-the-shelf products as collateral. Furnishing multiple movables as a single pool of collaterals for such ownership transfer is referred to as “transfer of ownership of collective movables for security purposes” and in case the object is a group of receivables, it is called “transfer of ownership of collective receivables for security purposes.” Both instruments are frequently utilized in Korea.

2) *Transfer of Ownership of Collective Movables for Security Purposes*

The court affirms transfer of ownership of multiple movables for security purposes and, as the ground of such affirmation, generally considers a group of articles as a single object. That is to say, a group of articles whose quantity and values may fluctuate, such as products at a certain store, can nevertheless function as a single object of property rights and also the collateral for “transfer of ownership of collective movables for security purposes” as long as they can be specified by type, location, quantity, etc.⁴²⁾

Legal academics are divided over the Court’s adoption of such logic to explain the validity of transfer of ownership of collective movables for

42) Supreme Court, 85Nu941, Oct. 25, 1988 (S. Kor.) stipulates: “in the so-called ‘transfer of ownership of collective movables for security purpose’ agreement, where the steelmaker desired to use as collateral the raw materials that it purchased for production for a certain continuous period, the group of raw material items can be collectively regarded as an object of property rights and thus can be used as a collateral for security rights, as long as the scope of their type and quantity are specified. In that case, once the transferee gains, by means of agreement on possession, the possession of the raw materials that existed at the time of creating the security, he/she can claim priority against third parties as to the ownership (security rights) of the movables and does not have to declare an agreement on possession each time a new item of raw materials is added to the inventory. See also Supreme Court, 87Nu1043, Dec. 27, 1988 (S. Kor.).

security purposes. Some scholars agree with the Court. Their proposition is that, although individual movables may vary in terms of quantity and value, the aggregation of such movables as a whole should be accorded a separate status from its constituent elements and be perceived as an independent object of rights that can constitute collateral.⁴³⁾ Others disagree⁴⁴⁾ on the ground that the Civil Code does not acknowledge “collective articles” and that courts, in effect, need not depend on such a concept because the concept of prior agreement on retention of possession (“*antezipiertes Besitzkonstitut*” in German) can offer a sufficient explanation. Both theories may work in terms of confirming the validity of “transfer of ownership of collective movables for security purposes” but determining the right theoretical basis would be an issue of theoretical significance. Because the former theory renders in effect, a single article into the object of two different sets of right, I believe it cannot be the proper theoretical ground under the current Civil Code.⁴⁵⁾

Agreement on retention of possession is the method of publication used for “transfer of ownership of collective movables for security purposes,”

43) KIM CHEUNG HAN & KIM HAK DONG, MINBEOBCHONGCHIK [GENERAL PROVISIONS OF CIVIL LAW] 236 (9th ed. 1995) (S. Kor.); Lee Jae Hong, Jibhab-dongsanui yangdodambo [*Transfer of Ownership of Collective Movables for Security Purposes*], 177 PANRYEWOLBO [MONTHLY REP. ON JUD. CASES] 34 (June 1985) (S. Kor.); Kim Jae Hyub, Jibhab-dongsan yangdodambo [*Transfer of Ownership of Collective Movables for Security Purposes*], 16 SABUBYEONGUJARYO [MATERIALS FOR JUD. RES.] 84-85 (1989) (S. Kor.); Lee Jung Gu, Jibhab-mule daehan yangdodambo [*Transfer of Ownership of Collective Articles for Security Purposes*], 398 BUP Jo [KOR. LAW. ASS'N J.] 85-86 (Nov. 1989) (S. Kor.); LEE JUN SANG, GEUMYUNG PANLYEYONGU (1982-1991) [STUDIES ON FINANCIAL LAW CASES (1982-1991)] 468 (1992) (S. Kor.).

44) See HWANG SEOK IN, HYUNDAE MINBEOBRON II [CIVIL LAW IN RECENT YEARS II] 382 (newly revised ed. 1987) (S. Kor.); Hwang Seok In, *Jibhabmuldambowa Gieobdambo* [*Collective Articles or Companies as Collateral (Floating Charge)*], in MINBEOB GYEONGJEBEONONJIB [CIVIL LAW & ECONOMIC LAW JOURNAL - ARTICLES IN HONOR OF PROFESSOR HWANG SEOK IN'S RETIREMENT] 327 (1995) (S. Kor.); Yang Chang Soo, Naeyongi byeondonghaneun jibhabjeog dongsanui yangdodambowa geu sanchulmule daehan hyolyeog [*Transfer of Ownership of Collective Movables with Fluctuating Character for Security Purposes and its Effect on the Products of the Aforementioned Movables*] (*Sicherungsübereignung der Sachgesamtheit und ihre Wirkung auf die Erzeugnisse*), 30-1 THE JUSTICE 115 (Mar. 1997) (S. Kor.); HANGUG SANEUBEUNHAENG JOSABU [KOREA DEVELOPMENT BANK RESEARCH DEPARTMENT], TEUGSU DAMBOJEDO [SPECIAL SYSTEMS OF SECURITY RIGHTS] 228 ff. (1984) (S. Kor.).

45) KIM JAE HYUNG, *Dambobeobeseoui dambomogjeogmului hwagjangmunje - gongjangjeodanggwajibhabmulyangdodambleul jungsimulo* [*Problem of Extending Objects of Security Rights in Security Rights Law*], in MINBEOBLON I [CIVIL LAW I] 397 (2004) (S. Kor.).

which means transfer of possession must be by prior consent or agreement in order for the transfer of ownership to be validly effected. Delivery by way of such agreement is, however, a highly ineffective method to publicize a change of ownership. For example, a debtor reeling on the verge of bankruptcy may take advantage of the incomplete nature of the publication by pretending as if (s)he had transferred ownership for security purposes, consequently harming innocent creditors. Also a number of cases have been reported where more than one transfer security was created on a single piece of movable.⁴⁶⁾ Disputes have also arisen over the scope of the effects of security due to lack of clarity surrounding the scope. As a result, there have been attempts to search for security methods not entailing change of possession, while, at the same time, enabling more effective publication of the change of ownership.

3) *Transfer of Ownership of Collective Receivables for Security Purposes*

In recent years, transfer of ownership of collective receivables has been used for security purposes, and the Court has continued to render rulings with regard to such practices.⁴⁷⁾ However, it is not very frequently used because transfer of receivables, even when it is carried out for security purposes, only requires notification by the transferor, not the transferee, or consent of the debtor to acquire priority against third parties. In other words, there are considerable legal restrictions on using receivables as collateral of security rights. This led many scholars to look for ways to make it easier to furnish receivables as collateral and to meet requirements for acquiring priority against third parties.

46) The court has ruled that, in cases where more than one transfer security was created on the same group of movables, the one created later shall be made invalid. *See generally* Supreme Court, 87Nu1043, Dec. 27, 1988 (S. Kor.); Supreme Court, 88Do1586, Apr. 11, 1989 (S. Kor.); Supreme Court, 89Do1931, Feb. 13, 1990 (S. Kor.); Supreme Court, 99Da65066, June 23, 2000 (S. Kor.); Supreme Court, 2004Da45943, Dec. 24, 2004 (S. Kor.); Supreme Court, 2004Da37430, Feb. 18, 2005 (S. Kor.); Supreme Court, 2006Do8649, Feb. 22, 2007 (S. Kor.).

47) Supreme Court, 2001Da46761, July 9, 2002 (S. Kor.); Supreme Court, 2002Da40456, Sept. 5, 2003 (S. Kor.); Supreme Court, 2003Da534978, Feb. 12, 2004 (S. Kor.).

3. Act on Security over Movable Property, Claims, etc.

Following the 1997/1998 East Asian financial crisis, Koreans began to pay more attention to using movables and receivables as collateral and a growing number of people came to think that a proper legal system is in order to simplify use of properties, other than immovables, for security purposes. Many legal scholars including myself voiced the need to reform the security rights system of movables and receivables.⁴⁸⁾ Such an idea gained momentum through comparative studies on foreign legislative solutions such as article 9 (Secured Transactions) of the United States Uniform Commercial Code (UCC).⁴⁹⁾ Finally in 2005, the Ministry of Justice, the National Court Administration, and the Ministry of Finance and Economy respectively announced their plans to overhaul the movables and receivables security rights system. Particularly in November 2007, the Special Registration Research Team of the Supreme Court completed a draft bill titled “Special Act on Transfer Registration of Movables and Receivables.”⁵⁰⁾

48) See generally KIM JAE HYUNG, *supra* note 45, at 405; KIM JAE HYUNG, *Dongsandambojedoui gaeseonbangan - deunglogjedoui doibe gwanhan silon* [Reform Proposals on the System of Security of Movable Property – Studies on the Introduction of Filing Systems], in MINBEOLN III [CIVIL LAW III] 264 (2007) (S. Kor.); Kim Jae Hyung, *UNCITRALui dambogeolae gwanhan ibbeobjichim choan nonui* [Discussion on the UNCITRAL’s Draft Legislative Guide on Secured Transactions], 13-4 BIGYOSABEOB [J. COMP. PRIVATE L.] 336 (Dec. 2006) (S. Kor.). See also Nam Yoon Sam, *Ullinala dongsandambojedoui gaeseonbanghyang(ha) - bigyobeobjeog gochaleul jungsimeulo* [Reform Trend of Security of Movable Property in Korea (Ha)], 40-3 SABEOBHAENGJEONG [JUD. & PUB. ADMIN.] 34 (Mar. 1999) (S. Kor.); Ko Jun Seok, *Migug Injeogjaesan Dambogwonui wanseong* [Perfection of Security Rights of Personal Property in America], 7-1 BIGYOSABEOB [J. COMP. PRIVATE L.] 317 (June 2000) (S. Kor.).

49) The UCC was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to standardize commercial laws of different states. Efforts to draft Article 9 began in the 1940s, and after the drafting was completed in 1962, it was vastly amended in 1972 and 1999. The UCC, among the world’s many uniform commercial laws, is highly valued for its innovativeness. For more information, see JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 1 (5th ed. 2000); JOHN O. HONNOLD, STEVEN L. HARRIS & CHARLES W. MOONEY, JR., *SECURITY INTERESTS IN PERSONAL PROPERTY* 4 (3d ed. 2001).

50) DAEBEOBWN TEUGSUDEUNGGI YEONGUBAN [SPECIAL REGISTRATION RESEARCH TEAM OF THE SUPREME COURT], *DONGSAN MICH CHAEGWONUI YANGDODEUNGGIJEDO DOIBEUL WIHAN IBBEOBJALYO* [LEGISLATION MATERIALS FOR THE INTRODUCTION OF TRANSFER REGISTRATION OF MOVABLES AND

Subsequently on March 5, 2008, the Ministry of Justice launched the Special Subcommittee to Legislate Security System of Movable and Receivables. The Subcommittee had drafted a bill over a period of one year and finally submitted the draft, entitled *the Act on Security over Movable Property, Claims, etc.* to the Ministry of Justice on March 18, 2009.⁵¹⁾ It was turned in to the National Assembly as a government-sponsored bill, passed the parliamentary vote in May 2010, and was announced publicly on June 11, 2010 and came into effect on June 12, 2012.

The new Act consists of 64 articles in 6 chapters and 4 addenda articles. The titles of the chapters are as follows: Chapter I (General Provisions), Chapter II (Security Rights of Movable), Chapter III (Security Rights of Receivables), Chapter IV (Registration of Security), Chapter V (Special Cases of Intellectual Property Rights), and Chapter VI (Supplementary Rules).

2) Creation of New Security Rights

In the process of introducing a new system of security rights over movables and receivables, one of the first issues that reached the discussion table was whether its legal nature should be security rights, just like pledges, or ownership rights, as in the case of transfer of ownership for security purposes.⁵²⁾

RECEIVABLES] (Beobwon Haengjeongcheo [National Court Administration], Nov. 2007) (S. Kor.); Yoon Sung Keun et al., *Hangugeseoui dongsan mich chaegwondamboebob ibbeobbanghyang* [Guidelines for the Enactment of Security over Movable and Receivables], 16-2 GUGJEGOLAEBEOPYEONGU [KOR. F. ON INT'L. TRADE & BUS. L.] 213 ff. (Dec. 2007) (S. Kor.). In the early stage of the drafting by the Special Registration Research Team, I made presentations twice in the capacity of an observer but I neither took part in the actual drafting nor met their request for my opinion.

51) For more information, see Kim Jae Hyung, *Dongsan, chaegwon deungui damboe gwanhan beoblyul jejeonganui guseonggwa naeyong* [The Organization and Contents of the Bill to enact the Act on Security over Movable Property, Receivables, etc.], 638 BUF JO [KOR. LAW. ASS'N J.] 5 (Nov. 2009) (S. Kor.). Provided in the following paragraphs is the summary of the thesis, part of which has been modified in accordance with the latest version approved by the National Assembly.

52) As to the legal nature of transferring ownership of movables for security purpose, the court has perceived it as a form of trust. See generally Supreme Court, 86Da-Ka315, Aug. 19, 1986 (S. Kor.); Supreme Court, 93Da44739, Aug. 26, 1994 (S. Kor.); Supreme Court, 93Da61338, July 28, 1995 (S. Kor.). The same is true with transfer of collective movables for security purpose. See Supreme Court, 2003Da30463, Oct. 28, 2004 (S. Kor.). Exceptionally in the

UCC article 9 defines secured transactions in a comprehensive manner. The article governs the system of security over both movables and receivables, and takes a comprehensive and uniform approach toward security rights, thereby including various systems such as the traditionally-used pledge, conditional sale, and transfer of ownership for security purposes. It regards as security interests any instrument that bears the nature or substance of security, such as financial lease and purchase money security interests, regardless of its form.⁵³⁾ This has had an influence on the Model Law on Secured Transactions of the European Bank for Reconstruction and Development⁵⁴⁾ and the Canadian Personal Property Security Act, etc. Recently the Working Group VI⁵⁵⁾ of the United Nations Commission on International Trade Law (UNCITRAL)⁵⁶⁾ has prepared legislative guideline and model law to modernize the secured transaction regulations that cover both security of movables and receivables on the premise that it will adopt some form of registration system.⁵⁷⁾ The draft of

bankruptcy procedure, it is regarded as a security right. See Chaemuja hoesaeng mit pasanae gwanhan beobyul [Debtor Rehabilitation and Bankruptcy Act], Act. No. 11828, May 28, 2013, art. 141, art. 579, No. 1, GaMok (S. Kor.).

53) WHITE & SUMMERS, *supra* note 49, at 713 (“Substance governs form”); See also KIM JAE HYUNG, *Reform Proposals on the System of Security of Movable Property is, part of whie Introduction of Filing System*, *supra* note 48, at 270.

54) The Model Law, introducing the concept of security rights (particularly art. 1.1), has had a critical influence in the process of many East European countries’ enactment of secured transactions law. For more information, see European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (1994), <http://www.ebrd.com/downloads/research/guides/secured.pdf>; See also Frederique Dahan & John Simpson, *The European Bank for Reconstruction and Development’s Secured Transactions Project*, in SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 102 (Kieninger ed., 2004).

55) Since its first round of meetings which was held in New York for four days from May 20, 2002, the Working Group VI has met twice each year, alternately in New York and in Vienna. For more information, see http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

56) Since its establishment by the United Nations General Assembly in 1966, UNCITRAL has produced international trade agreements, model laws, legislative guidelines, etc. The Commission consists of 60 member nations elected at the General Assembly and Korea is one of the members.

57) Working Group on Security Interests, *Draft Legislative Guide on Secured Transactions terminology and recommendations*, U.N. Doc. A/CN.9/WG.VI/WP.29, para. 33 (Dec. 8, 2006); See also Working Group on Security Interests, *Draft Model Law on Secured Transactions*, U.N. Doc. A/CN.9/WG.VI/WP.59 (Apr. 4, 2009).

the guidelines allows each country to make a choice between the unitary approach and the non-unitary approach toward security rights. The former is to create a single concept of security rights while the latter is to refuse any such concept. The non-unitary approach is to exclude quasi-security rights such as the retention of title and the transfer of ownership for security purposes from security rights but to regulate them in a similar manner with the way security rights are dealt with.⁵⁸⁾ By contrast, although Japan has accepted the registration system with regard to transfer of movables and receivables, it has kept the traditional security system of movables and receivables, namely pledge and transfer of ownership, for security purposes.⁵⁹⁾ The bill drafted by the Supreme Court Special Registration Research Team in Korea followed the similar direction that was almost the same as that of its Japanese counterpart.

In *the Act on Security over Movable Property, Claims, etc.*, new types of security rights are created regarding movables and receivables.⁶⁰⁾ Establishing them as ownership rights means that they should take the form of transferring the ownership for the purpose of arranging security. Since it is obviously a transfer of too much right compared to the purpose, the form and the substance inevitably go off balance. Therefore establishing it as security rights better reflects and suits the actual intentions and reasonable interests of relevant parties. Likewise, on the register, it would be more suitable to publicize the fact that movables or receivables are being used for security. To record as if the ownership was transferred, when the

58) Kim Jae Hyung, *Discussion on the UNCITRAL's Draft Legislative Guide on Secured Transactions*, *supra* note 48, at 312.

59) With the enactment of *the Act on Special Cases of the Civil Code Relating to Priority Requirements of Claim Transfer, etc.* on June 12, 1998, Japan introduced the registration system of claim transfer. By partial amendment of the law on December 1, 2004, through which registration of movable transfer was introduced, the title of the law was changed to *the Act on Special Cases of the Civil Code Relating to Transfer of Movables and Claims*. It was with this piece of legislation that Japan introduced a new registration system to work side by side with its priority requirement rules of movable/claim transfer.

60) Transfer security has been acknowledged valid by court precedents but there were clashes between such practice and Civil Code article 185 that prohibits arbitrary creation of property rights. Now this *Act on Security over Movable Property, Claims, etc.* introduces a new legally-sound type of security rights by regulating security rights of movables and receivables.

movables or receivables are merely furnished as collateral, would certainly be an overstatement of transferred rights.⁶¹⁾

The new Act keeps intact the existing security rights system of movables and receivables such as pledge and transfer of ownership for security purposes, so that the new solution will exist side by side with the old ones. Abolishing and replacing the old security rights system with a new uniform solution, as UCC article 9 did, will result in very abrupt changes to the nation's security rights law system. It is not easy to accurately predict the magnitude of chaos and expenditure that such changes would usher in, or to fully prepare the nation against all possible disruptions. Therefore it was agreed that the existing security rights system, namely the pledge specified in the Civil Code as well as transfer of ownership for security purposes, financial lease, and retention of title that have been traditionally acknowledged by jurisprudence, will remain effective along with the new devices.

3) Registration of Security Rights

A key element of the reform of the movable and receivable security rights law lies in introducing a new publication method. As indicated earlier, the means of publicizing a movable property pledge is delivery (Civil Code article 330), and the publication method for pledge of rights and transfer of receivables is notification to the debtor⁶²⁾ or consent of the debtor (Civil Code articles 346 and 450). The new Act stipulates that security rights created on movables or receivables shall be registered as "security rights."⁶³⁾ In Japan, regardless of whether a movable or receivable is merely used as collateral, the parties register the "transfer" of such object. In the early stage of discussions, opinions were divided between registration of "security rights" and registration of "transfer", but we reached an agreement that the former is the more reasonable option when

61) KIM JAE HYUNG, *Dambojedoui gaehyeoghangan — dongsan mich chaegwon damboleul jungsimeulo* [A Proposal for Reform of Secured Transactions Law — Focused on Movable Property and Receivables], in MINBEOLON 4 [CIVIL LAW 4] 220 ff. (2011) (S. Kor.).

62) "Debtor" refers to a third party debtor in case of pledge created on nominative claims. See Civil Code, art. 349 (S. Kor.).

63) Act on Security over Movable Property, Claims, etc., art. 2, no. 7 (S. Kor.).

movables or receivables are merely an object of security rights.

Under the new system, as for registration of security rights created on movables or receivables, a public register will be created for each debtor.⁶⁴ Immovable properties can be identified by addresses and therefore their register is formed for each article.⁶⁵ By contrast, it is impossible to create register for each item of movables or receivables because there can be numerous articles of the same specifications or receivables of the same content.

4) Availability by Types of Person

Under the Japanese system, only legal persons are capable of transferring movables or receivables.⁶⁶ I object to such restriction on the availability of transfer.⁶⁷ The Civil Code, whether it is a pledge or a mortgage, does not limit the type of persons that can utilize such devices. Creating a new security rights system and restricting its use to legal persons only not only contravenes the equality principle of the nation's Constitution, but also constitutes an unreasonably disproportionate form of regulation.⁶⁸ If only legal persons were permitted to use and benefit from the new system, the logical corollary would be that natural persons, who are thereby excluded from the ambit of the system, would suffer the inconvenience and unwarranted cost of, for example, paying high interest. Under the new Act, the system is made available to "legal persons or those who have registered a trade name." In other words, qualifications for creating security rights on movables or receivables are bestowed on legal persons (corporations as defined in the Commercial Act, etc., legal persons as specified in the Civil Code, legal personality established under special acts, and foreign corporations) and on any natural person with registered

64) *Id.*, art. 2, no. 8, para. 1.

65) It is evidenced by Budongsandeunggibeob [Registration of Real Estate Act], Act No. 9401, Jan. 30, 2009, art. 15 (S. Kor.), which stipulates that, in the real estate registry, one form shall be used for one lot of land or one building.

66) Japanese Act on Special Cases of the Civil Code Relating to Transfer of Movables and Claims art. 3 and art. 4.

67) See also KIM JAE HYUNG, *Reform Proposals on the System of Security of Movable Property – Studies on the Introduction of Filing Systems*, *supra* note 48, at 293.

68) For more specific reasons, see KIM JAE HYUNG, *supra* note 61, at 207 ff.

trade names in compliance with *the Commercial Registration Act*.⁶⁹⁾

5) *Sub-conclusion*

The Act on Security over Movable Property, Claims, etc. contains such groundbreaking contents that it is no hyperbole to say that this piece of legislation marks a landmark and a new launch pad in the development of security rights law in Korea.

Since the enforcement of the Act, the number of secured transactions using movables and receivables as collateral has increased rapidly. From June 11, 2012 to December 31, 2012, the total number of applications for registration of security rights amounted to 1,802. For the period from August 8, 2012 to December 31, 2012, during which the banking sector launched mortgage lending based on the Act, a total of 1,369 business entities received mortgage loans in the total amount of 348.5 billion won.⁷⁰⁾

It was only about a decade ago that legal scholars first suggested a reform of the security rights law of movables and receivables, and the fact that the law has been already enacted in 2010 is a testimony to the dynamism and rapid advancement of the Korean society. The law itself represents a significant change in the nation's security rights law system and it will also serve as a momentum to provoke discussions over security rights rules in general provided in the Civil Code.

Its legislation process was characterized by efforts to strike a balance among competing interests in the context of financial transactions. The registration system of security rights of movables and receivables originated from the United States, but unadulterated acceptance of such system is neither possible nor desirable. In order to ensure that the new system takes roots within the Korean legal environment, adjustments were made by, for example, differentiating effectiveness of registration for each type of security rights. Provisions that are thought to be sufficiently rational but possibly inconsistent with the Civil Code were opted against this time,

69) Act on Security over Movable Property, Claims, etc., art. 2, No. 5, art. 3 (1), art. 34 (1) (S. Kor.). See also Sangeob Deunggibeob [Commercial Registration Act], Act No. 10221, Mar. 31, 2010 (S.Kor.).

70) Kim Jae Hyung, *Dongsandambogwonui beoblyulgwangye* [Legal Issues of Security Rights on Movable Property], 137 THE JUSTICE 8 ff. (Aug. 2013) (S. Kor.).

hoping that they may be included in the next round of amendment to the Civil Code. It was a decision to introduce a positive solution to satisfy the demand for security rights on movables and receivables while making sure that the new system stays consistent with the Civil Code and other related laws.

V. Conclusion

The reform of the Korean security rights law has been driven by both intrinsic and extrinsic motivations. On the one hand, the legislators faced a task to address the inability of the current statutes and case law to satisfy the real market's demand for security rights and to protect interests of relevant parties (i.e. the internal motivation). On the other hand, they have grown aware of the need to introduce a more advanced security rights system from the developed world in the process of comparative study about security rights system of other countries (i.e. the external motivation). Through interaction of the two sets of motivations, the nation's security rights law system has made steady progress.⁷¹⁾

It is true that the Civil Code is basically modeled after European civil codes, particularly the German civil code, but it has diverged from its model and undergone some changes. Such changes have taken place sometimes through the development of case law or legal theories, and other times by the enactment of new acts. Although the single article covering *keun*-mortgage was included at the time of the enactment of the current Civil Code in 1958, the provisions of the *keun*-mortgage contained in the 1971-amended Japanese Civil Code have had an influence on it. However, it is noteworthy that the rules of the comprehensive *keun*-mortgage have diverged in the two countries.

Meanwhile, *the Act on Security over Movable Property, Claims, etc.* has incorporated some elements of the American legal system, thereby attaching a new meaning and perspective to our history of reception of foreign legal systems. The Act introduces new types of security rights for

71) KIM JAE HYUNG, *supra* note 61, at 227.

movables and receivables. Under the Act, security rights on movables or receivables shall be registered as “security rights.” It is revolutionary to introduce a new publication method for security of movables and receivables in the civil law system. The Act, however, does not deny the security rights acknowledged in the civil law system.⁷²⁾

This Act was modeled after article 9 of the UCC and UNCITRAL, but also distinguishes itself from the two precedents in that it retains the existing system of security rights. The Act intends to adopt elements of foreign legal systems in ways that conform to the Korean domestic legal system.

The study of *keun*-mortgage and the security of movable property and receivables reflect the transition of financial transactions in Korea and the corresponding legal developments. It can be said that the Korean security rights law has made breakthroughs through such developments.

Some may doubt if Korea, which belongs to the civil law system, should really adopt American elements. While being based on different legal traditions may make the adoption process more complicated, it cannot be a reason to refuse such adoption altogether. Regardless of legal traditions, the legal system that regulates legal affairs in a more reasonable manner will ultimately prevail. It is almost impossible for a system less competitive in terms of rationality to take the upper hand in any country’s voluntary adoption of legal system based on rational discussions. Of course we should note that introducing a foreign system solely based on its rational excellence can be dangerous if it is not preceded by sufficient discussions. Thus, we should closely examine whether certain foreign systems can take roots in our own legal system and environment, and whether there are no better alternatives, before deciding whether and how to adopt those systems.

72) Kim Jae Hyung, *Dongsan, chaegwon deungui danboe gwanhan beoblyului juyojaengjeom - jejeongan jageonggwajeongui nonuileul todaelo* - [The Main Issues in the Act on Security of Movable Property, Receivables, etc. - A Discussion on the Legislative Process -], 61 MINSABEOBHAG [THE KOREAN JOURNAL OF CIVIL LAW] 34f. (Dec. 2012) (S. Kor.).

