

## Amendment works of the Korean civil code (Property Law)

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## **Amendment Works of the Korean Civil Code (Property Law)**

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The Korean Civil Code is currently in the process of amendment. The government expects to submit a proposal for amending the Civil Code to this year's regular session of the National Assembly. However, considering the extent to which the works for amending the Civil Code being in process by the Civil Code amendment committee have thus far advanced, submission of the proposal for Civil Code amendment within this year's regular session of the National Assembly can be considered not an easy task.

In this lecture it will be attempted to examine the details of the project for amending the Korean Civil Code and to present my personal interim evaluation of the amendment works. Especially this lecture will be limited to the discussion of the amendment of the property law under the Korean Civil Code. Therefore, the property law in this paper means the general part, law of real rights and law of obligations of the Korean Civil Code, which is consisted with 5 parts together with the family law and the law of inheritance.

### ***I. History of the Korean Civil Code***

The Korean Civil Code was enacted on February 22, 1958 as Act No. 471 and entered into force on January 1, 1960. Until today it had been amended seven times in total.

Our Civil Code follows the Pandects system in form and is compiled into five parts in total. Property law and family law are prescribed together within one civil code. At the time when the Korean Civil Code was being enacted, the legislators were strongly conscious of a desire to compile a civil code, that is different from the Japanese Civil Code, which had been in effect as the Civil Code of Korea from 1912. One reason for such a sentiment was that the Japanese Civil Code was extremely individualistic in its contents, because it was enacted with the French Civil Code and the first draft of the German Civil Code as its basis. Another reason was national wish to have our own civil code, which is different from that of Japan. Thus, the legislators wished to enact a civil code, which, although based on liberalism and individualism, could still embody the traditional spirit of community and achieve an aspect of originality for the Korean legal culture. The results were codification of customary law to a considerable extent, for example, legislating the Chonsegwon, that is, the right to registered lease on key money deposit basis, regulating the relationships of mutual land use between neighboring land occupants under customary law, and, for conveyance of real rights, adopting the doctrine of two conditions of juristic act (Rechtsgeschäft) and registration or transfer of possession rather than the doctrine of one condition of juristic act, which has been prevalent in Japan. The legislators compiled the current Civil Code with use of the civil codes of Germany and France as reference.

After the Civil Code was enacted, its amendment proceeded separately for property law and for family law. Such a separate management of the property law and family law was due to the fact that the family law, at the time when the Civil Code was enacted, had many contents that were especially patriarchal and was thus contrary to the constitutional spirit of gender equality. Moreover, there had been strong demands from women's organizations for amending the family law. Therefore, although the family law, under the Civil Code, was subject to extensive amendment, amendment of the property law proceeded only to a very limited extent. To put it concretely, property law was amended only once in 1984, whereas family law was amended in 1962, 1977, and 1990. Especially the amendments in 1977 and 1990 encompassed drastic changes to important details of the family law. Moreover, the addenda to the Civil Code were amended three times. Presently, works are in progress for a drastic amendment of the property law, as well as works for amendment of the family law. A proposal for an amendment of the family law is expected to be introduced at the regular session of the National Assembly which began in September of this year. However, the introduction of the proposal for the property law amendment is yet uncertain.

At the time when the Korean Civil Code was enacted, the Korean society had an agriculture-centered economic structure and maintained a traditional, patriarchal family system. However, as a result of the implementation of the plans for economic development, which began in the mid 1960's, the Korean society rapidly transformed itself from a society of agricultural economy into an industrialized, urbanized society, and the patriarchal family system was converted to a nuclear family system. At present, the industrialized society is rapidly transforming into an information-oriented society. Furthermore, the economic structure, which was under strong, government-initiated regulations, has changed into a private-initiated, self-regulating economic system, and the internationalization of the economy, the promotion of globalization, and the joining into the OECD have secured freedom in economic activities and led to an amazing growth of the economic scale. Liberalization of foreign trade has especially increased to a large degree.

In political aspects, the authoritarian military dictatorship has changed into a democratic civilian government, which improved the guarantee of human rights and allowed the citizens to freely engage themselves in activities in various spheres.

The rivalry between the North and South Koreas has eased, and there has been an amazing increase in the movement of personnel and the exchange of goods and materials between the two Koreas.

The Korean Government has dealt with such rapid changes to the Korean society, since the enactment and enforcement of the Civil Code, by legislating special laws. Thus it can be said that there was a failure to accommodate these changes under the Civil Code through amendments of the Civil Code. Special laws enacted to cope with these changes include: the Act on the Ownership and the Management of Aggregate Buildings in order to deal with the increased construction of apartments resulting from the process of urbanization, the Act on Provisional Registration Security in order to deal with the frequent practices of offering a security of an irregular form, such as security by transfer of ownership, provisional registration (*Vormerkung*) and redemption etc., the Housing Lease Protection Act in order to protect lessees of residential house against lessors, and the Act on Special Measures for Registration of Real Estates as well as the Act on the Registration of the Names of Real Title Holders in Respect of Real Estates in order to deal with the social problems, which arise from the increasing practices of speculative investment in real estates following industrialization and urbanization of

communities. Furthermore, the repeal of the Interest Limitation Act and the enactment of the Assets-backed Security Circulation Act and the Housing Mortgage Bonds Trading Company Act occurred in an attempt to overcome the foreign currency crisis of 1997. The details contained within these important special legislations should actually be included in the Civil Code, but the path of enacting special legislations was chosen over that of amending the Civil Code.

Although the Civil Code should be the living law existing amongst the people and providing the basis for the legal lives of the people, instances, where the Korean Civil Code failed to respond to the social changes in a timely fashion, were not few. Therefore, the efforts are now set in motion to amend the Korean Civil Code in a relatively broad scope, that can accommodate the social changes thus far.

In addition, there are certain aspects, in which the current Korean Civil Code is not consistent with the Korean legal sentiment, the Korean legal mind, and the Korean legal life, because it is an adopted law which received and combined the civil codes of Germany and France. Overcoming the problems of an adopted law, which have become clear in the process of enforcing the Civil Code until now, and allowing its development into a law, that preserves the individuality of the nation, are other reasons for the current efforts to bring about amendment of the Civil Code.

## ***II. Background for Initiation of the Amendment of the Civil Code (Property Law) and its progress***

### ***1. Background for the Amendment of the Civil Code***

#### ***(1) Estrangement of Civil Code from Social Realities Caused by Changes in Korean Society and Negligent Management of Civil Code after its Enactment***

It was already explained that the Korean society has greatly changed from what it had been at the time of the enactment and the enforcement of the Civil Code. Further, it is a self-evident fact, that the Korean Civil Code, which was enacted with a family-centered community of agricultural economy in mind as the model of a society, failed to respond to the changes in the circumstances of the society as the Korean society went through rapid industrialization and developed into the current information-oriented society. Although responding to such changes in the circumstances of the society by promptly amending the Civil Code would have been the ideal legal measure, Korea has opted to deal with the changes in piecemeal through enactments of special legislations as aforementioned.

In doing so, it was resulted that special legislations have become the general rule and the Civil Code has become the exception, because the contents of the special legislations have been generally acknowledgments of exceptions to the Civil Code. There was actually an advantage of the enactment of special legislations in response to the changes in social circumstances, because such a method was the easier solution. The Civil Code, a body of general laws, is extremely difficult to be amended, because changes in a general law are often accompanied by changes in the general principles at work in civil affairs and the legal practice, and thus consent to such modifications of general legal principles is very difficult to induce. Therefore, the Korean government chose the easier method of enacting special legislations in order to deal with social changes. For these reasons, the property law under the Civil Code has been amended only once, to a very limited extent at that. In the mean time, numerous special legislations have been enacted since the enactment and enforcement of the Civil Code.

One other reason for the negligence in amending the Civil Code is the fact, that there is no government agency in charge of administration of the Civil Code. The Ministry of Justice, of course, is in charge of managing all legislations, but when there is a government agency in charge of enforcing a legislation at working level and such a government agency perceives a necessity for amendment and better administration of that legislation, such a legislation was relatively well administered. For example, because the Court Administration Office under the Supreme Court has been exclusively administering the Civil Procedure Act due to the Supreme Court's interest in seeking trial proceed in a speedy and fair manner, it has been relatively well managed. Because the various legislations dealing with real estate speculation are under the management of the Ministry of Finance and Economy, enactment of regulatory legislations for effective real estate economy has been possible. The Commercial Act has been under the management of the government agencies in charge of the economy, in order to cope with any sudden changes in the economic environment. However, although the Civil Code was under the care of the Ministry of Justice, it has been relatively neglected in comparison to other legislations. Because the Ministry of Justice is not an agency specifically applying the Civil Code, and instead, its application is under the charge of the courts, the need to amend the Civil Code in response to the change of times was hardly perceived.

The estrangement of the Civil Code from the realities of the society and the solutions for dealing with social changes in the form of special legislations reveal the problems, that impede the rule of law in everyday life, by causing the general legal principles to weaken and by causing a phenomenon, where the people are more interested in exceptional rules rather than in general legal principles. Thus, it can be said that the Civil Code has been converted to a norm for trials rather than functioning as a norm to conduct peoples in their daily lives.

*(2) Need to Convert the Adopted Law into Korea's Unique Law*

The Korean Civil Code was created by combining and adopting the German Civil Code and the French Civil Code, and there are certain aspects of it, that are not wholly consistent with the Korean legal sentiment, mind, and practice. Also, although the German and French civil codes were adopted as the basis of the Korean Civil Code, their reception happened without Korea's independent study and analysis of the two codes. The current Korean Civil Code was enacted by making use of the theories and judicial precedents involving the German Civil Code, that supplemented the deficiencies of the Japanese Civil Code in the process of enforcing the Japanese Civil Code before the enactment of the current Korean Civil Code. The Japanese Civil Code was enacted with the French Civil Code and the first draft of the German Civil Code as its model, and the contents, that were excessively individualistic in the process of enforcing the Japanese Civil Code, were supplemented with the German Civil Code. Against this historical background, the Korean Civil Code was legislated with the French and German civil codes as its basis. However, the fact remains that there was no sufficient, independent effort on Korea's part to adjust the contents of the German and French civil codes in order to make them more suitable for Korea.

Due to such a process of the enactment of the Korean Civil Code, the current Korean Civil Code contains details that do not coincide with the Korean legal tradition. Thus, the Korean Civil Code can be compared to an ill-fitting, borrowed shirt. Accordingly, I believe that there exists a need to continuously change this adopted Civil Code of ours into something that enduringly fits our legal mind and our legal sentiment. In order to do this, the problems, that were discovered in the process of enforcing the Civil Code, should have been continuously corrected in accordance with our legal tradition, but they were not.

The currently planned-for amendment of the Civil Code has this historic mission to form our current Civil Code, which had been adopted from abroad, into our own unique civil code, that is consistent with our legal mind and legal practice.

*(3) Supplementation of Deficiencies in Korean Civil Code*

The Korean Civil Code has many deficiencies. Deficiencies of provisions, that can respond accordingly to the society changes, are found to be especially numerous. For example, because there is only a single provision that concerns floating sum mortgage (H?hsthypothek) (Art. 357 Civil Code), the reality of the use of floating sum mortgage is not sufficiently prescribed. It is another deficiency in the Civil Code, that there are no provisions concerning the claim on a real right (dinglicher Anspruch), that arises from the right of pledge. Because such deficiencies of the Civil Code are discovered everywhere, supplementation of these deficiencies through amendment of the Civil Code is another important reason for amending the Civil Code.

In addition, since the provisions of the old Civil Code, which are from an intent-oriented foundation, are left intact in the formalistic new Civil Code, amendment of these provisions, which do not fit the formalistic frame, is becoming another major reason for amending the Civil Code. Examples include the Civil Code provisions, that prescribe a pledge contract as a contract for delivery (Art. 330 and 347 Civil Code), although a pledge contract is not a deliverable contract, and a provision, that preserves an old Civil Code term “derivative possession” (Art. 332 Civil Code), which refers to “agreement on possession”.

*(4) Increased Necessity for Codification of Customary Law and Judicial Precedents*

As new civil institutions, that are created by the customary law and judicial precedents, accumulate, the necessity to codify these institutions have increased. Because certain parts of the legal institutions created by customary law present possibilities of abuse or misuse, a need to eliminate these possibilities of abuse or misuse through codification was recognized and led to understanding of a need to legislate these matters. For instance, statutory regulation is needed to superficies for security, which is customarily used in the financing practice; because legal superficies under customary law is too broadly recognized, limitation of it is needed on permission therefor.

Legal institutions, which are created through judicial precedents and of which codification is recognized as necessary, are: a system allowing limitation of the right of employer to obtain reimbursement to employee in regard of employer’s liability for damages (Art. 756 Civil Code) and precedents recognizing liability of the legal supervisor over the incompetent person, who is in possession of intelligence to understand his liability.

*(5) Necessity for Turning Provisions of Special Legislations into General Law*

Since the time, when the Civil Code first entered into force, many special civil legislations have been enacted and the necessity to codify the contents of such special civil legislations, that came to be seen as general legal concepts, has increased as abovementioned. As an example, in case a part of legal act is null, the entirety of that legal act is nullified under the Civil Code (Art. 137 Civil Code). But the Regulation of Standardized Contracts Act provides that the remaining parts of a contract are valid in general, notwithstanding the partial nullity (main sentence of Art. 16 of the said Act).

The need is recognized to rather turn these provisions of the special legislations, that are contrary to the general principles of the Civil Code, into general law. In order to incorporate these provisions of the special legislations into the body of general law, amendment of the Civil Code is being pursued.

*(6) Necessity to Accommodate Liberalization, Internationalization, and Globalization*

With flourishing international transactions in goods and services, exchanges of personnel and materials between nations have become more active. In order to facilitate liberalization and globalization of these personnel and material trades, uniformity of laws governing them is necessary. In Korea as well, the need to receive this shift of liberalization and globalization into domestic law has greatly increased.

To facilitate internationalization and liberalization, certain items are already legislated partially in the form of special laws. In the field of laws of civil affairs, the Assets-backed Securities Circulation Act and the Housing Mortgage Bonds Trading Company Act were enacted in order to aid circulation of assets-backed securities, the Interest Limitation Act was repealed, and foreigners, who in the past were required to obtain permission of the Minister of Government Administration for acquisition of land within Korea, are now able to acquire land within the Republic of Korea merely by reporting to the head of *Shi* (city), *Kun* (county), or *Ku* (district) through amendment of the Foreigner's Land Acquisition Act.

It is necessary to amend provisions relating to mortgage of the Civil Code, which would allow liquidity of mortgage notes to accommodate this trend of internationalization in the Korean Civil Code. Furthermore, a need to newly establish provisions concerning foreigner's capacity to enjoy their rights, and a need to have general provisions in the Civil Code regarding foreign corporations has increased.

*(7) Advancement of Studies by Juristic Academia on Amendment of Civil Code and Progressive Stance of New Government toward Amendment of Civil Code*

Amendment of the Korean Civil Code was initiated by the academia, rather than initiated by the government. The academia, especially the Korea Private Civil Law Association, advocated the need for amending the Civil Code and took the center position in the commencement of the research about the amendment of the Civil Code. Naturally, the Korea Private Civil Law Association began its studies on amendment of the Civil Code, because private civil law scholars recognized the need to amend the Korean Civil Code in tune with these changes more than anyone else. They saw the social and economic changes that have taken place in Korea since its enactment, the studies that were begun in Germany on revision to its law of obligations, and the amendment of the Dutch civil code.

Furthermore, because the Korea Private Civil Law Association was founded, as its historical root, on the deep involvement with the enactment of the current Civil Code, it has had a particular interest in the administration of the Civil Code. Therefore, the Korea Private Civil Law Association was at the forefront in the efforts to consolidate the academic activities involving amendment of the Civil Code for several years.

The military government, that had been in place before the entry of the democratic government, had not been much interested in amending or administrating the Civil Code. However, after a democratic government was established, the need to amend the Civil Code, was understood by the government, and thus amendment of the Civil Code came to be initiated.

As seen above, not until studies were conducted in the academia and a democratic government recognized the need to amend the Civil Code, the process of amending the Civil Code could be begun.

*(8) Influence from Civil Code Amendment in Other Countries*

In commencing the process of amending the Korean Civil Code, amendment instances of the civil codes of other countries and the studies thereon had a great influence. The Japanese Civil Code was already amended to a great extent in 1971, especially in that it now has detailed provisions regarding floating sum mortgage. Studies on revising the law of obligations have been advanced in Germany since 1976, and the law of obligations was extensively rewritten in Holland in 1992. At the international level, United Nations Convention on Contracts for the International Sale of Goods (CISG) was concluded at the United Nations Commission on International Trade Law in 1980, the Principles of International Commercial Contracts were established at the International Institute for the Unification of Private Law (Unidroit) in 1994, and the Principles of European Contract Law were established in Europe in 1998.

Not only did these international instances of establishment, amendment and studies of amendment of private civil law lead us to realize the need to amend our own Civil Code, they also provided us with ample materials for the amendment of our Civil Code. On the strength of the international changes, the process of amending the Korean Civil Code could be begun.

*2. Progress of the Amendment of the Civil Code (Property Law)*

*(1) Commencement of Studies by Academia on the Amendment of the Civil Code (Property Law)*

Before that specific works were begun by the government in order to amend the Civil Code, the Korea Private Civil Law Association had already perceived the epochal need to amend the Civil Code and set studies on the amendment of the Civil Code in motion at the academic level. Beginning in 1995, studies on the amendment of the Civil Code were commenced and presented at the Association, and the results thereof were published in the Association's journal. Such efforts brought the need to amend the Civil Code to people's attention, and moreover, presented a direction and the contents for the amendment of the Civil Code.

The reason for this early involvement of the Korea Private Civil Law Association in the studies on amendment of the Civil Code was that the Korea Private Civil Law Association was founded on the initial form of association for the study of private civil law, where professors of private civil law, who formed the academia, at the time when our current Civil Code was being enacted, gathered together and submitted legislative suggestions regarding the enactment of the Civil Code. It is the longest academic association in Korea and is mainly composed of professors of private civil law.

As demonstrated above, the Korea Private Civil Law Association is an academic association, that made a great contribution to the enactment of the current Civil Code and has had a particular interest in and devotion to the administration of the Korean Civil Code. The Korea Private Civil Law Association was the principal axis at the time of the amendment of the Civil Code in 1984 as well, and provided the stimulus that led to the commencement of the current works on the amendment of the Civil Code.

Furthermore, all of the current members of the Civil Code amendment committee are also members of the Korea Private Civil Law Association, and it continues to provide association-level support for amendment works by the said Civil Code amendment committee.

*(2) Formation of Civil Code (Property Law) Amendment Committee and Studies by Committee*

The government recognized the need for the amendment of the Civil Code and formed the “Special Subcommittee for Amendment of Civil Code (Property Law)” under the Legal Affairs Advisory Committee within the Ministry of Justice on February 5th, 1999. A committee chairman and ten members were commissioned at that time. Since then, two more members were added. Therefore, the amendment committee has been formed with one chairman and twelve members, who undertook works on the Civil Code amendment in a more concrete manner.

The said committee is composed of eleven professors of civil law and two judges.

The civil code amendment committee at first discussed the direction and method of the amendment of the Civil Code for approximately three months, and thereafter, selected the specific target provisions for amendment, and examined the details to be included in the amendment of the targeted provisions for approximately one year. The first draft of the amended Civil Code is expected to be prepared thereafter.

A full committee meeting, where all of the committee members attended, was convened for discussing the direction of the Civil Code amendment, but the discussions on the target provisions for amendment and on the details of amendment were held separately by dividing the committee into subcommittee I and subcommittee II. Subcommittee I was in charge of the general provisions of the Civil Code and the law of real rights, and subcommittee II was in charge of the law of obligations. All members convened together for a full committee meeting for discussions on targets for amendment in the areas of general provisions of the Civil Code, law of real rights and law of obligations.

Thus far, target provisions for amendment have been selected, and the committee is now in the phase of completing the decision on the details to be included in the revisions of the targeted provisions. The official activities of the committee will be completed with preparation of the first draft of amendment and submission thereof to the Ministry of Justice.

*(3) Integration of Opinions on Amendment of Civil Code (Property Law) from Various Fields*

Although the Civil Code amendment committee makes the decision on the target provisions for amendment and on the details to be included in the amendment by itself, it has decided to extensively listen to the suggestions and opinions of various fields. For this reason, various circles have been requested in the name of the Minister of Justice for submission of their opinions on the amendment of the Civil Code. Many suggestions have been gathered from various circles. Especially the Court Administration Office, Korea Bar Association, Korea Judicial Scrivener Association and Korea Notaries Association, etc. have been active in submitting their opinions on this amendment.

These opinions and suggestions from various circles were transmitted to the Civil Code amendment committee and have been subject to careful examination by the said committee.

*(4) Continued Criticisms of and Submission of Suggestions on the Amendment of the Civil Code (Property Law) by Academia*

At the same time as the civil code amendment committee was working on amending the Civil Code, the Korea Private Civil Law Association actively provided support at the association's level through academic presentations on the amendment of the Civil Code. A suggestion for amendment would be stated through the presentation of a paper at the Association. Naturally, criticisms to the initiated amendments and a new more detailed proposal would be presented by announcing at the Association.

The Civil Code amendment committee of the Ministry of Justice and the Korea Private Civil Law Association could cooperate with each other in the course of working toward amending the Civil Code, because the chairman of the Civil Code amendment committee and the previous president of the Korea Private Civil Law Association are the same person and all members of the amendment committee are also members of the Korea Private Civil Law Association, although there are some historical reasons as well.

The contribution of the Korea Private Civil Law Association in the process of amending the Civil Code is possible even without any contract between the Ministry of Justice and the Association, because of their *de facto* cooperative relationship.

*(5) Functional Division between Government and Academia in Amendment of Civil Code*

In developing the project of amending the Civil Code further, the government is in charge of the procedural aspect of the amendment, and the Civil Code amendment committee is in full charge of the contents of the amendment. The Korea Private Civil Law Association contributes to the activities of the Civil Code amendment committee.

Thus, the material aspect of the process of amending the Civil Code is carried out by legal scholars.

*(6) Expected Progress in Future*

When the Civil Code amendment committee prepares a committee-level draft of amendment and submits it to the Ministry of Justice, the Ministry of Justice prepares a government-level draft based on the draft of the committee. Then a public hearing will be held to discuss the draft of the government, where the draft of government will be confirmed with the suggestions of various circles yet again, and that draft will be transmitted to the National Assembly. Also the National Assembly will seek again suggestions of various circles through such a venue as a public hearing. Afterwards it will pass the draft at a plenary session.

The Ministry of Justice has set the goal of submitting the government draft to the regular session of the National Assembly that already started in September of year 2000, but, considering the extent that the works on amending the Civil Code have progressed thus far, submission of the government draft to this year's regular session of the National Assembly seems to be difficult to be achieved.

### ***III. Fundamental Direction of the Amendment of the Civil Code (Property Law)***

#### ***1. Preservation of Current Basic Frame and Basic System***

It has been decided that the current Pandects system and the form of the current Civil Code will be preserved, and that the locations of the provisions will not be changed. No radical

change will be pursued. Also, although the law of inheritance has a strong characteristic of property law, it will be kept under the organization of the family law as it is currently.

The reason for maintaining the organization of the Civil Code is to maintain a continuity of the Civil Code. Because civil law has a historical nature, maintenance of the historical continuity was determined to be proper for the sake of maintenance of a continuity of the civil and legal life.

One of the areas, concerning which a change of location of the Civil Code provisions was specifically discussed, was the law of obligations. The provisions on the formation of contract (Art. 527 through 534 Civil Code) under the law of obligations would be more properly grouped with the provisions on juristic act under the general principles of the Civil Code, but such a change was excluded from this amendment of the Civil Code.

## *2. Foundation of Practical Civil Code and Living Civil Code*

Because provisions of the current Civil Code are mostly written in technical legal terms, it is convenient for the legal professionals, but the general public has difficulties in understanding the provisions. Notwithstanding the fact that the Civil Code is the standard law that should be the basic rule to conduct the people in their everyday legal life, most of its contents has been removed from general legal life of the people. For this reason, the Civil Code has functioned less as the basic rule for conducting the people in general legal life, but more as the standard law for trials by giving the basis for civil proceedings.

Therefore, the Civil Code has to be amended to become the living standard to conduct peoples in their every day life, by changing the provisions of the Civil Code into easier, more practical terms.

On the other hand, certain parts are frequently utilized by the people in their general legal life, but insufficient in their legal provisions. Convenience to the people in their civil and legal life is sought by supplementing these deficient parts. As a specific example, by supplementing the system of surety obligation and of floating sum mortgage, it is hoped that the inconvenience to the people will be removed.

In these ways, the Civil Code will be enabled to exist and to function among the lives of the people.

## *3. Formation of Our Own Unique Civil Code*

The current Civil Code, which was adopted from abroad, is amended to suit our current situation and to develop into our own unique Civil Code. The currently effective Civil Code has certain aspects, that have excessively inclined to individualism. For example, relationship of obligation between multiple parties is prescribed to be that of divisible obligations (Art. 408 Civil Code), but should be changed to joint and several obligation, which better corresponds to our spirit of community.

In such a manner, a project of creating our own law out of the adopted law, is to be pursued in the current process of amending the Civil Code. Thus, the Korean Civil Code will become our own unique Civil Code, which befits our legal sentiment, legal mind and legal life.

## *4. Accommodation of Liberalization, Globalization, Internationalization in Civil Code*

The epochal trends of liberalization, globalization and internationalization are to be reflected in the Civil Code. As a concrete example, the new establishment of provisions in the Civil

Code concerning foreigner's capacity to enjoy rights and provisions concerning foreign juristic persons is judged to be reflecting the epochal trends of internationalization and globalization. Reduction of the age of majority is also a reflection of the international trend of reducing the age of legal majority.

Discussion about inclusion of the "principle of change of circumstance" (*clausula rebus sic stantibus*), which is provided in internationally unified contract law such as Unidroit's Principles of International Commercial Contracts and Principles of European Contract Law, in the Civil Code, is another matter for the amendment of the Civil Code that is considered in accordance with the international trends.

In addition, legislation in the Civil Code is considered in the direction of facilitating liberalization in private transactions, by considering the trend of economic liberalization which has been expanded since 1997.

#### *5. Supplementation of Deficient Provisions*

There are many deficient provisions in the Korean Civil Code. Deficiency of the Civil Code in the form of its inability to adapt itself flexibly to the change of times has been mainly met with enactment of special laws thus far. Examples of such special laws are: "Act on Provisional Registration Security," "Act on the Ownership and the Management of Aggregate Buildings," "Housing Lease Protection Act," "Assets-backed Securities Circulation Act," and "Regulation of Standardized Contracts Act."

Although deficiencies in the Civil Code provisions have been supplemented by these special laws, the continued existence of the deficiencies in the Civil Code still cannot be denied. Especially, provisions on relationships of mutual land use between neighboring land occupants need to be further supplemented, and the need to supplement the provisions on floating sum mortgage and floating sum surety obligation is urgent.

Also there are certain provisions that are included in the Civil Code, but have in reality become dead law. For example, provisions on advertisement for prize contest (Art. 675 through 679 Civil Code) and on the contract of life annuity (Art. 725 through 730 Civil Code) are in reality almost never utilized. Rearrangement of these provisions that have become dead law is become another major task in the amendment of the Civil Code.

Unification of the provisions, that are mutually inconsistent even within the Civil Code, is another objective of amending the Civil Code. For example, although assets of partnership belong to all partners jointly (Art. 704 Civil Code) and disposition of partnership-owned assets requires consent of all partnership-owners (main sentence of Art. 272 Civil Code), provisions on partnership require decision by only a majority of the managers, in case there are managers (Art. 706 (2) Civil Code). There are other additional provisions, that are theoretically inconsistent. Independent obligation is imposed on a surety who guarantees an obligation with the awareness of a ground for avoidance, but the obligation should not independently imposed on the surety, unless the principal obligation is revoked. The Civil Code provision, that imposes on a surety an obligation independent from the principal obligation, merely because of the fact that a ground for avoidance was known to him, is theoretically inconsistent in itself.

#### *6. Harmonization of General Law and Special Law*

There is no lack of instances, where provisions of the Civil Code, which is a compilation of general laws, and provisions of special private civil laws are mutually at variance with each other. Harmonizing these opposing differences is also an important aim of the amendment of

the Civil Code. For example, in regard to the effect of partial nullity, although nullity in entirety is generally called for under the Civil Code (Art. 137 Civil Code), remaining parts are valid in general under the Regulation of Standardized Contracts Act (Art. 16 of the said Act). There exists a need to enable the people to conduct their civil and legal affairs in a normal manner by harmonizing these mutually opposing legal provisions.

In relation to the Act on Provisional Registration Security as well, it is difficult to say that Article 607 of the Civil Code and Article 3 of the Act on Provisional Registration Security are not mutually opposing to each other. Namely, the value of an object, for which a promise to return by substitute is given, is to be determined for the time of the promise, if the promise is valid (Art. 607 Civil Code), and, if it is invalid, the value is to be determined on the basis of the time of notice of liquidation under the provisions of Article 3 of the Act on Provisional Registration Security.

#### *7. Efforts for Codification of Steadily Followed Judicial Precedents and Customary Law*

It has been decided, that the contents of judicial precedents, that have been firmly accepted as legal concepts, shall be legislated as provisions of the Civil Code. Also, judicial precedents that are not in accord with the general principles of law and not reasonable have to be amended in accordance with the real character of the matters.

More specifically, the judicial precedent to a Civil Code provision, stating that a director's power of representation may not be set up against a third party unless it is registered (Art. 60 Civil Code), interprets that the power may not be set up against a third party acting in good faith as well as any third party acting in bad faith. Appropriate revision would be that the power may not be set up only against the third party acting in good faith.

Items, that have become settled as customary law are also to be legislated. Furthermore, the Civil Code has to be amended in the direction of limiting the customary law which is against protection of obligors. A model example therefor is the adoption of restrictive provisions on the customarily used superficies for security.

#### *8. Exclusion of Items Subject to Extreme Theoretical Disputes from Matters to be Amended*

It has been decided, that certain institutions of the Civil Code, which are subjects of extreme disputes of theories, are not to be legislated, until the theoretical disputes are settled. Such a decision was made, because legislation of these institutions according to any one theory will become an obstacle to the desirable settlement of the Civil Code.

### ***IV. Major Foreign Statutes Used as Reference for the Amendment of the Civil Code (Property Law)***

In enacting our current Civil Code, the old Civil Code was the foundation, while the civil codes of Germany and Switzerland were used for references. Although it is said that the civil codes of Germany and Switzerland were used for references, that does not mean that we studied and analyzed them for ourselves and used the results thereof for reference. The German Civil Code was referred to through the method of referring to the theories and judicial precedents, that made use of certain contents of the German Civil Code in the process of implementing the Japanese Civil Code in order to supplement the parts of the Japanese Civil Code that were not appropriate for emperor-ruled Japan, because of their excessively individualistic nature. Thus, the current Civil Code was enacted by indirectly referring to the German Civil Code.

In the current process of amending the Civil Code, civil codes of Germany, Japan, France and Switzerland were mainly used for reference. Additionally, United Nations Convention on Contracts for the International Sale of Goods, Unidroit Principles of International Commercial Contracts, Principles of European Contract Law, and the Dutch Civil Code were used as reference materials. For certain parts, the Civil Code of the Republic of China and the Spanish Civil Code were also used for reference as the need arose.

Thus, Japanese, German, and French civil codes, which belong to the continental law, in which the Korean Civil Code is rooted, were principally referred to, and the Anglo-American law was indirectly used through reference to the contents thereof appearing as international agreements.

## ***V. Major Details of the Amendment of the Civil Code (Property Law)***

### *1. Part on General Principles of Civil Code*

Provisions on foreigner's capacity to enjoy rights will be newly established, and the age of legal majority will be reduced to around nineteen. The time period necessary before declaration of a judicial disappearance of a vessel will be shortened from one year to six months (Art. 27(2) Civil Code), and the presumption of simultaneous death will not be limited to only same peril, but will be recognized in case of independent, different perils as well, if the perils would nearly simultaneous occurred (Art. 30 Civil Code).

The permission-based system for incorporation of juristic persons (Art. 32 Civil Code) will be converted to an approval-based system, and provisions concerning foreign juristic persons will be newly established. A juristic person will be required to bear responsibility for any unlawful acts of a *de facto* director, and new provisions will be inserted that stipulate application of provisions on juristic persons for unincorporated associations and unincorporated foundations. In regard to reversion of a property endowed in an incorporated foundation (Art. 48 Civil Code), current provisions will be amended to obligate the founder to contribute that endowed property to the incorporated foundation, if that incorporated foundation is established. Appointment of provisional directors and temporary injunction against directors to suspend the power of representation are to be registered for the purpose of public notice. The capacity of a juristic person to assume responsibility for unlawful act of director (Heading of Art. 35 Civil Code) will be changed to an obligation of juristic person to assume responsibility for an unlawful act of the director and prohibit the assertion of restriction on a director's power of representation against a third person acting in good faith, unless the restriction is registered.

There will be provisions on explanation of a juristic act. In the provisions on conditions of unfair juristic act, the term "rashness" will be changed to "want of judgment" (Art. 104 Civil Code). New provisions concerning mistakes of motive as to the nature of the parties or objects will be established. Persons with right to void will include parties under mistake, and the liability of a negligent voider to compensate the other party for the loss of reliance will be recognized.

Provisions concerning apparent representations (Art. 125, 126 and 129 Civil Code) will be integrated and the effect of partial nullity will be changed from nullification in entirety (Art. 137 Civil Code) to validity for the remaining parts. New provisions concerning the validity of disposition taken by an unauthorized person through ratification of that disposition by the rightful person will be established.

Effect of extinctive prescription will be changed from absolute extinguishment, which is currently in effect, to relative extinguishment. Moreover, answering to a legal suit will be added to initiation of a legal suit as a ground for suspension of prescription, and an order of payment will be added to the grounds for suspension of prescription. Rejection of a suit will be excluded from the grounds, that do not have the effect of suspending extinctive prescription.

## *2. Part on Law of Real Rights*

The effect of relative invalidation will be given to provisional registration of preservation of a claim.

The effect of possession, which presumes that the possessor has the thing with the intention of holdings as its owner, will be denied in case of squatting, and new provisions recognizing the presumption of rights with registration of a real property will be established. When a person's own object stands on another person's real property, a right of the possessor to claim for removal of that object will be newly established. An obligation to acknowledge usual nuisance (Immission) will be placed on land possessors as well, and the right to claim access through surrounding land will be recognized also for any special successor in division or partial transfer of land. Difficult legal terms such as "Pyesaek" (blockading) (Art. 223 Civil Code), "Eon" (dam) (Art. 230(1) Civil Code), "Daean" (opposite bank) (Art. 230(2) Civil Code), and "Koogeo" (structure for reservoiring of water) (Art. 239 Civil Code) will be changed to more practical language.

Good faith and lack of negligence on the part of the possessor will be added to the conditions of acquisition of a real property by adverse possession.

Application of provisions protecting superficies will be denied in case of superficies, that is not for the purpose of ownership of a new building. Namely, in case of superficies for security, and the scope of recognition of legal superficies under customary law will be scaled-down.

New provisions concerning the claim on a real right, that arises from the right of pledge, will be established, and detailed provisions concerning floating sum mortgage are planned for. Floating sum mortgage right will be subordinate to the base contract, under which the secured claim arises. Therefore, a blanket floating sum mortgage right will be denied. Accordingly, continuous transactional relationships, out of which a secured claim of a floating sum mortgage right arises, will be limited to specified continuous contracts, continuous contracts belonging to a uniform category, and uniform grounds for development of continuous obligation.

Provisions concerning changes in the scope of claim secured by a floating sum mortgage, provision concerning the change of the maximum amount of claim secured, provisions on complete transfers, partial transfers and installment transfers of floating sum mortgage, provisions concerning whether a floating sum mortgage shall be settled or continued in case of the merger or the inheritance, and provisions concerning claims for settlement of a floating sum mortgage and the grounds for settlement will be included in the amendment.

In case individual claims secured by a floating sum mortgage are transferred or individual obligations are assumed, a provision that stipulates that those individual claims or individual obligations are not secured by a floating sum mortgage will be included in the amendment.

### 3. Part on Law of Obligations

Although the general method of damage compensation is monetary compensation, a more inclusive provision will enable an order of natural restoration, when such a measure is deemed appropriate as a method of damage compensation. The method for a contract of suretyship will be changed to a written basis, and the provisions concerning floating sum surety obligation will become more detailed.

Warranty liabilities for defective goods will be deemed to include price reduction claims and repair claims.

With regard to the time of formation of a contract *inter absentes*, the current dispatch basis(Art. 531 Civil Code) will be changed to the arrival basis. Conditions giving rise to a right of lawful rescission are currently under separate provisions on delay of performance(Art. 544 and 545 Civil Code) and impossibility of performance(Art. 546 Civil Code), but these provisions will be integrated into one general provision on the right of lawful rescission.

A provision that stipulates, that the buyer or the subsequent buyers in a repurchase return to the seller any beneficial and necessary expenditures for the object of repurchase, will be added to the Civil Code.

Regarding the law of legal obligations, a provision limiting the right of employer to obtain reimbursement to employees, and a new provision concerning the liability of the legal supervisor over the incompetent person, who is in possession of intelligence to understand his liability, will be established.

Under the employment contract, the obligation of an employer to care for the safety of his workers will be newly provided.

### **VI. Concluding Remarks: Evaluation**

The commencement of this historical project of amending the Civil Code was made possible by studies of civil law scholars on amending the Civil Code, democratization of the society, and the birth of a democratic government more than anything else. The Civil Code is a compilation of laws to be practiced and observed amidst the lives of the people. In order to do that, effective transformation of the more or less adopted Civil Code into our own Civil Code is the most important task.

There have been some problems in furthering this historic project of amending the Civil Code. The first thereof is an insufficient preparation and an insufficient support. Studies on amending the Civil Code were initiated by civil law scholars, centering around academic societies. However, the length of time, since the academic societies began their studies toward amending the Civil Code, has not been that long. In commencing the project of amending the Civil Code, it has been more desirable to establish a preparatory committee, which would have set the direction for the amendment and determined a basic frame of the amendment plan. However, the government merely formed an amendment committee and delegated practically all matters of the Civil Code amendment project to that amendment committee. Even the Civil Code amendment committee has in some aspects attempted the amendment process merely by orienting itself toward the deficiencies of the Civil Code, that appeared in textbooks and academic papers. It seems that the amendment project was proceeded without previous thorough examinations of the problems closer to the root.

The Civil Code should be practiced amidst the everyday life of the people, so that it could become part of their life. But, in a sense, this was not the case. The fact that the system of nota-

rizing documents providing a cause for registrations, was excluded from provisions targeted for amendment, despite the fact that it is an important institution that can put the rule of law in practice in real life, it could be said to be a deficiency in setting the direction for amendment of the Civil Code.

Moreover, the government formed the Civil Code amendment committee without any plan for supporting the Civil Code amendment process. Although there should have been prior preparations in terms of personnel and material support to enable the activities of the Civil Code amendment committee in this very important project of amending the Civil Code, there was no sufficient preparation of and no sufficient help from the government. To put it extremely, reliance was on the academic passion of the Civil Code amendment committee members, on the pride that they derive from participating in the Civil Code amendment process, and on their deep sense of patriotism.

Further, there was a lack of legislative theories and historical consciousness for amendment of the Civil Code. The Civil Code should have been amended at its root with the turn of the century, but this doesn't seem to have been the case. There should have been a reexamination of the fundamental institutions under the Civil Code and the consciousness of a more fundamental amendment for the sake of transformation of the adopted law into our unique Civil Code. The government has taken the position that it will opt for the method of attaching its suggestions, when the Civil Code amendment committee prepares an amendment proposal. Therefore, there has been a limit for the furtherance of a historical amendment at the root of the Civil Code. Legislation of the system of notarizing documents, that provide a cause for registration mentioned before, was already attempted in the amendment in 1984. Therefore, there should have been a fundamental decision at this time. The attempt to normalize real estate transactions through public regulations without legislating the system of notarizing documents, that provide cause for registration, is a lack of understanding of the operation of the Civil Code. There should have been also a fundamental decision about the landownership on the question of reversion of unearned income arising from land.

The third problem is the government's time frame. The government attempts to complete the process of amending the Civil Code in a very short time period until the end of this year. Although it would be more normal to advance the Civil Code amendment process with sufficient allowance of time, the government was of the mind to complete this process within a short time period. The government's idea was to only amend the parts that require especially urgent amendment without sufficient examination of the issue and continuously thereafter to make amendments to the Civil Code. Although such method can be one method amending the Civil Code, the same could be said about the method of making extensive and comprehensive amendments after conducting an investigation for amendment at its root. As always, the attempt to amend the massive Civil Code in a short time period can only be said to stem from a lack of historical consciousness.

The fourth point is that there have been insufficient studies on the changes in our society and on our history. Since the Civil Code is historical law as well as it is the law for the living people, we should have had more extensive basic understanding for the circumstances of our society and the development of our history by extensively listening to the suggestions from expert scholars of related faculties such as historians, sociologists, etc. in addition to the civil law scholars' knowledges of the Civil Code. The participation of only civil law scholars in the process of amending the Civil Code could result in the amended Civil Code, of which contents are removed from the background of our society, on which the Civil Code was based.

Additionally, membership of the Civil Code amendment committee is composed mainly of civil law scholars based in Seoul. There was a need to reflect the regional understandings of the Civil Code by participation of regional civil law scholars, and a personnel organization, that could allow hearing of the suggestions of not only civil law scholars but also of historians and sociologists, should have been attempted. A more balanced amendment of the Civil Code could have been achieved in such a manner. There is not a single member of the Civil Code amendment committee, whose area of specialty is the Anglo-American law; most members specialized in German Law and made interpretative-theory-emphasized studies of the civil law. If a more diverse personnel organization had been attempted, the problems of and the direction for the development of the Korean Civil Code could have been explored in a more balanced manner.

On the other hand, I believe that the studies in comparative law are indispensable for amending the Civil Code. Of course, it was necessary for the amendment of the Korean Civil Code, that we should closely examine civil codes of various countries, and get informations to how the civil code provisions of various countries specifically operate in those countries. But, it could not be said, that comparative studies have been sufficiently prepared for the amendment of our Civil Code.

In conclusion, I am sure that the amendment proposal, that the Civil Code amendment Committee has prepared thus far, despite these factors limiting the project of Civil Code amendment, will be an important foundation for the achievement of Korea's own unique Civil Code in the future.