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Q/R

QUATAR

REPUBLIC OF CHINA · REPUBLIC OF KOREA
REPUBLIC OF SOUTHVIET-NAM
REPUBLIC OF VIET-NAM · RUMANIA · RWANDA

J. C. B. MOHR (PAUL SIEBECK) · TÜBINGEN
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Contents

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Qatar

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On 2 Sept. 1971, Qatar was proclaimed by its Ruler as an independent sovereign state. Before this proclamation of its independence, Qatar was known as an independent government bound by a special treaty relationship with the Government of the United Kingdom. In legal parlance it was better known as a British protected state. On the same date of the proclamation of its independence the new State of Qatar signed a 15-year treaty of friendship with the United Kingdom. Consequently the Agreement of 3 Nov. 1916 with the British Government, which together with other supplementary agreements placed Qatar under British protection in the past, was terminated by means of exchange of notes between the Ruler of Qatar, who is now entitled as "*Amīr* of Qatar", and the British Political Resident in the Arabian Gulf, representing the British Government.

Already in September 1971, Qatar became a member of the League of Arab States and of the United Nations.

The Provisional Constitution of 1970 Part I art. 1 defines the characteristic traits of the state: "Qatar is an independent sovereign Arab state; its religion is Islam and the Islamic *sharī'a* is a principal source of its legislation; its system being democratic and its official language is Arabic. The people of Qatar are part of the Arab nation".

I. CONSTITUTIONAL SYSTEM

Before its independence, Qatar had no written constitution. Moreover, there existed no institutions such as a representative or an elective legislature of a kind normally associated with the operation of a non-autocrative government. The Ruler, together with the Deputy Ruler and Heir to the Throne, exercised absolute, albeit benevolent, rule.

At present, the State of Qatar is ruled by the *Amīr* of Qatar (the new title of the Head of the State). The *Amīr*'s powers and functions are fully described in a Provisional Constitution, which was proclaimed on 2 April 1970 (*al-djarīdat al-rasmiyya* no. 4 of 2 April 1970), but not implemented until the beginning of 1972. This Provisional Constitution was designed to be applied during a transitional period, pending the passing of a final constitution of a more permanent nature.

Parts II and III of the Provisional Constitution deal with the "general fundamental principles and aims guiding the state policy". In this connection the Provisional Constitution "guarantees free enterprise, within the limits of public interests, and free education and health". It respects the sanctity of homes and freedom of publication and of the press, in accordance with the provisions of law (art. 6, 7, 8, 12, 13). It provides that "all people are equal and they shall enjoy public rights and shall be subject to equal public duties without distinction on grounds of race, sex or religion". It lays down that "no act may be considered a criminal offence and no criminal penalty may be imposed except under a law previously enacted", and that an accused shall be "considered innocent until he is proven guilty, and has the right to be tried justly before a court of law" (art. 9, 10, 11).

1. Nationality

Qatari nationality is regulated by Law no. 2 of 1961 (*al-djarīdat al-rasmiyya* no. 2 of 3 April 1961) as amended by Law no. 19 of 1963 and Law no. 17 of 1966 (*al-djarīdat al-rasmiyya* no. 5 of 22 July 1963 and no. 5 of 19 Sept. 1966). According to these laws, there are three categories of Qatari Nationals, namely: Qataris by descent, Qataris by birth and Qataris by naturalization. Qataris by descent, or original Qataris, are those who resided in Qatar prior to 1930. As regards Qataris by birth, they are those born to a Qatari father, whether inside or outside Qatar. In order to acquire nationality by naturalization, the applicant must fulfill certain conditions which include the following: (1) He must have lawfully continued residence in Qatar for a period of not less than 20

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years, or 15 years in case of an Arab belonging to an Arab country, from the date of his application for naturalization; (2) he must have a lawful means of living and must be of a good conduct; (3) he must have a fair command of Arabic. – Qatari nationality acquired according to the above conditions can be withdrawn from a *bona fide* Qatari national by decree in certain cases which include the following: (1) If he joins the military service of a foreign country against the wishes of the Qatari government; (2) if he acquires a foreign nationality; (3) if he works for the interests of a foreign country which is in a state of war with Qatar.

2. Territorial Division

The state is divided into four main towns forming the principal districts in Qatar; namely, Doha, which is the political and commercial capital, Dukhan, Khor, and Umm Said which is the centre of Qatar Petroleum Company's Headquarters. Municipal affairs in these towns do not appear to be governed by any constituted municipal councils.

3. The State Organs

The government is composed of the *Amīr*, the Council of Ministers and the newly constituted Consultative Council. The functions of these Organs will be explained in turn:

a. *The Amīr and the Council of Ministers.* – The *Amīr* is the Supreme Head of the Government and through him state policies on both the internal and external planes are executed. At present the *Amīr* is also the Prime Minister of his country. Next in authority comes the Council of Ministers comprising, at present, 13 ministers. The powers and functions of the Council of Ministers are governed by the Provisional Constitution (*supra*) part IV ch. 3 and by Law no. 5 of 1970. The Council assists the *Amīr* in the performance of his functions and powers (Prov. Const. art. 29). The ministers are appointed and dismissed by the *Amīr* upon the recommendation of the Prime Minister (art. 30). The Council is collectively responsible before the *Amīr*. Moreover each minister is also personally responsible before the *Amīr* (the Prime Minister) for the performance of his functions.

b. *The legislature.* – In accordance with the provisions of the Provisional Constitution, the first Consultative Council (a semi-legislative body), in the history of the state was constituted by an *Amīri* Decree issued on 23 April 1972, nearly two years after the promulgation of the said Constitution. The Consultative Council comprises 20 elected Qatari members over the age of 24 years (Prov. Const. art. 43). For the purpose of electing the Consultative Council, Qatar Amirate is divided into 10 constituencies. Each constituency shall elect four members from whom the *Amīr* can choose two to represent the constituency concerned in the Consultative Council (art. 45).

The Provisional Constitution (art. 55) lays down the functions and jurisdiction of the Consultative Council. It states, *inter alia*, that the said Council shall discuss draft laws proposed by the Cabinet, before their presentation to the *Amīr* for ratification. The Council can also discuss the proposed budget of the principal general projects of the state and make the necessary recommendations with respect to these matters as well as other certain matters connected with the general policy of the state. The Consultative Council expresses his opinion in the form of recommendations (art. 42). The *Amīr* promulgates the laws upon the recommendation of the Council of Ministers and after seeking the advice of the Consultative Council (art. 17).

As the above mentioned provisions show, the Consultative Council does not constitute a legislative body in the Western sense of the expression; it is, in effect, no more than a convenient advisory body, the opinion of which is sought by the *Amīr* on matters connected with legislation. Accordingly, members of this Council give their opinions in the form of recommendations which lack the force of Western-styled parliamentary decisions. Legislative power still appears to lie, as in the past, with the *Amīr*, in his capacity as the absolute Head of the State. He can promulgate, with or without the advice of the Consultative Council, such laws and regulations as are necessary for the peace and good government of the state.

4. The Judiciary

The Judiciary in Qatar is much less organized than the Executive. Before the promulgation of the Provisional Constitution on 2 April 1970, there was seldom a clear-cut distinction between the legislative and judicial powers of the *Amīr* who had the dual capacity of promulgating laws by decrees and of personally adjudicating disputes in his own courts. Organized civil courts in the modern sense were non-existent. The impact of the Muslim *ḳādīs* and their *Sharīʿa* Courts, which entertained both civil and criminal cases, was predominant. At present, the Provisional Constitution appears to have, to some extent, renovated the judicial system by expressly providing for the independence of the Judiciary and its separation from the Executive. Thus, art. 72 of the Constitution, which deals with the Judiciary, states that "judges shall be independent in the exercise of their powers" and that there shall be "no interference in the administration of justice by anyone". However, the judicial system still lacks organization. In recent years three types of courts evolved in Qatar:

a. *The Qatar Civil Courts.* – Before 1971 these courts used to entertain certain miscellaneous summary disputes "on the traditional basis of justice, equity and good conscience" in cases where such disputes are not governed by any applicable law. Now after the enactment in August 1971 of a Civil Code, a Criminal Code and a Code of Procedure, the jurisdiction of these courts has been extended to cover all civil and criminal matters.

b. *The Traffic and Labour Court.* – This is the most organized court in Qatar, established in 1962 (Persian Gulf Gazette – P.G.Gaz. – no. 37–38, 1962). It is staffed by a legally qualified judge and it entertains disputes in traffic and labour matters.

c. *The Sharī'a Court of Justice.* – Originally, this was the only court of law in Qatar which had full jurisdiction, in all civil and criminal disputes, over Qatari nationals and other Muslim nationals from foreign countries. However, since 1962, the increasing number of civil enactments in Qatar has gradually amounted to restricting the general jurisdiction of the *Sharī'a* Court, because these enactments have often expressly provided for the settlement of disputes by either arbitration procedure or before specially constituted tribunals. The *Sharī'a* Court, based on the *Ḥanbalī* school of Islam, used to retain, also, some general jurisdiction in criminal matters. But since August 1971, such jurisdiction has been transferred to the Civil Courts, as explained above. At present, the *Sharī'a* Court deals, essentially, with all matters of family and personal status. The *ḳāḍī*s (judges) of this court issue their judgments in accordance with the precepts of the Holy *Ḳur'ān*, the *Ḥadīth* (the Prophet's expressed opinions) and, generally, the principles of Islamic jurisprudence.

In addition to the above tribunals, the Qatari Chamber of Commerce and Industry also takes an active role in the amicable settlement of certain commercial disputes referred to it by the courts which, in turn, enforce the decisions of the Chamber in these matters.

Termination of British Extraterritorial Jurisdiction. – By agreement with the *Amīr* of Qatar, dating back to the first quarter of this century, the British Government had retained extraterritorial jurisdiction in the territory of Qatar. This British foreign jurisdiction, based upon the authority of the Foreign Jurisdiction Acts, 1890 and 1913 (53 & 54 Vict., c. 37; 3 & 4 Geo. 5, c. 16), was first exercised in Qatar by virtue of the Qatar Order in Council of 1939. Originally, British extraterritorial jurisdiction in Qatar extended to all persons except Qataris. But during the last ten years the British Government adopted a gradual process of transferring jurisdiction to the Qatari judicial authorities in respect of certain categories of foreigners, including nationals of Arab and Muslim countries. In addition, jurisdiction to the Qatari courts was latterly transferred in respect of certain Subject Matters irrespective of the nationalities of persons involved. This process of progressive transfer of jurisdiction to the Qatari courts in respect of foreigners gradually increased the jurisdiction of these courts during the period preceding the independence of Qatar on 2 Sept. 1971. However, the final step towards the total relinquishment of British extraterritorial jurisdiction was taken on 31 Aug. 1971. On that date, both the British Government and the *Amīr* of Qatar signed an agreement which, in effect, terminated the powers conferred by the Qatars 1959 to 1969 in respect of British exercise of jurisdiction over British subjects and non-Arab and non-Muslim foreigners in Qatar.[1] Consequently, the Qatari courts now retain full jurisdiction, in all civil and criminal matters, over all foreigners residing in Qatar.

[1] See also Qatar Termination of Jurisdiction Regula tion 1972, Queen's Regulation no. 2 of 1972 (Persian Gulf Gazette vol. 20 no. 1).

II./IX. SOURCES AND CONTENTS OF LAW

Since 1961, the *Amīr* has issued a substantive number of Western-inspired laws regulating such matters as administration, finance, labour, trade and commercial business. The following include some of the most important legislation passed in Qatar in recent years:

(1) Law no. 1 of 1962 on Organization of the Supreme Administration of Government and Law no. 2 of 1962 on Finance; Law no. 13 of 1971 on the Judiciary; Law no. 14 of 1971, the Penal Code, and Law no. 15 of 1971 on Criminal Procedure.

(2) Law no. 16 of 1971, the Civil and Commercial Code; Law no. 11 of 1964 on Contractors; Law no. 14 of 1964 on Real Property Registration; Law no. 3 of 1961 on Marketable Share Companies; Law no. 11 of 1962 on the Commercial Register (amended by Laws no. 2 of 1964 and no. 1 of 1968); Law no. 12 of 1964 on Commercial Agencies (amended by Law no. 25 of 1966); Cheques Law, no. 9 of 1962; Labour Law, no. 3 of 1962 (amended by Laws no. 5 of 1964 and no. 4 of 1967).

(3) Law no. 20 of 1963 on Foreigners' Participation in Commerce and Industry (amended by Laws no. 9 of 1964 and no. 22 of 1967); Law no. 10 of 1964 on Importing (amended by Law no. 24 of 1966). The main effect of these laws, issued piecemeal, is that they have, *inter alia*, restricted foreigners' participation in trade and other enterprises of commercial and industrial nature. Moreover, all foreign individuals or firms engaged in industry in Qatar are now required to have as their partners Qatari nationals who should hold not less than 51 per cent of the capital. New commercial firms established during the three years ending on 23 Oct. 1967, must entirely be owned by Qataris. Foreign firms had, until 1966, to convert to full Qatari participation. Non-Qatari nationals were not allowed to act as agents or contractors. Furthermore, participation by foreigners in development projects must also be based on a Qatari partnership and financial control.

Since 1961, legislation is published, regularly, in the Qatari Official Gazette (*al-djarīdat al-rasmlyya*) (in Arabic), as established by Law no. 1 of 1961.

X. SELECTIVE BIBLIOGRAPHY

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(Completed in May 1972)

Republic of China

After the national report for this country had been written, revised and accepted for publication, the resolution of the United Nations concerning the "Restoration of the lawful rights of the People's Republic of China in the United Nations" of 25 October 1971 (A/Res/2758 (XXVI)) caused the Chief Editor and the Advisors of volume I to refuse publication of the report. The Responsible Editor was of a contrary opinion because in fact a legal system has existed for more than 20 years on the island of Taiwan, which is very different from that of the People's Republic of China.

Since the Responsible Editor does not wish to insist upon his view in light of the very considerable body of contrary opinion, a report on the Republic of China will not be published in the Encyclopedia.

Readers interested in information on this legal system are referred to RabelsZ 37 (1973) 101–110, where the original report will appear.

The Responsible Editor

Republic of Korea

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With the surrender of the Japanese Empire on 15 Aug. 1945, Korea was liberated after 35 years of annexation by Japan. Thereafter, for three years the Southern part of Korea was administered by the United States Military Government. A National Assembly constituted by general elections held in South Korea pursuant to a United Nations Resolution of 14 Nov. 1947, adopted a Constitution which was promulgated on 17 July 1948. The Republic of Korea (*Taehan minkuk*) was inaugurated on 15 Aug. 1948, and on the same day the US Military Government ended.

I. CONSTITUTIONAL SYSTEM

Art. 1 of the Constitution declares Korea** to be "a democratic republic", the People being the sovereign and the source of authority. However, absent a legal tradition or effective legal profession, the nature of the "democratic" structure of the republic has been controversial and varying. In the course of two decades the Constitution has been amended six times, and there have been three different "Republics". The principal issue has been choice between a "cabinet system" and a "presidential system". Political leaders and legal scholars have felt the former to be more democratic, while the latter system proved to be better adapted to given conditions. Thus, the First Republic under the leadership of *Syngman Rhee* (Constitution of 17 July 1948) adhered to the presidential system, the Second Republic (Constitution of 15 June 1960), following overthrow of *Rhee*'s rule by a student uprising, changed over to the cabinet system, and the Third Republic, inaugurated as a result of the Military Coup of 16 May 1961, reverted to the presidential system (Constitution of 26 Dec. 1962). Other constitutional amendments – two under the First, one under the Second, and one under the Third Republic – are generally believed to have been motivated by a need to preserve the continuity of administration. A presidential proclamation of 17 Oct. 1972 initiated a process of disruption of constitutional continuity, in effect amounting to a revolution. By this "coup in office" there was introduced the "Fourth Republic of Korea". Its Constitution subjected to a referendum held on 21 Nov. 1972, was promulgated on 27 Dec. 1972.

1. Nationality

Nationality of the Republic of Korea is governed by the Nationality Act, enacted 20 Dec. 1948, no. 16, last amended on 30 Sept. 1963, no. 1409. Acquisition of nationality is determined by the principles of *jus sanguinis* and male priority. Nationality is acquired at birth (art. 1), if the father is a Korean national or, being dead, was at death a Korean national. Where the father is unknown or stateless, the child acquires Korean nationality by descent from a Korean mother, and where both parents are unknown or stateless, birth within the territory of Korea confers Korean nationality. A deserted child found in Korea is presumed to have been born in Korea. An alien acquires nationality (art. 3–6), provided that he is stateless or will lose his nationality within six months by virtue of acquiring Korean nationality, under one of the following conditions: (1) a woman's marriage to a Korean national; (2) a minor's (not the wife of an alien) first recognition (as a child) by a Korean national, the father's Korean nationality being determinative in the event of simultaneous recognition; (3) naturalization. The latter requires permission of the Minister of Justice and is conditioned upon (1) a five years' continuous residence in Korea, (2) minimum age of 20 years and legal capacity according to the law of the country of origin, (3) good moral character, (4) means of sustenance or skill assuring sustenance. The residence requirements are reduced to three years in the case of birth from a Korean parent, marriage to a Korean woman, or birth in Korea from a

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** It seems desirable to point out that the general expressions "Korea", "Korean", *etc.* as they are frequently used herein for the sake of conciseness refer merely to the Republic of Korea (Southern Korea) except where a historical context is involved.

parent also born there. Korean nationality is lost (art. 12) (1) by acquisition of an alien nationality of the spouse or of the adoptive parent; (2) by annulment or divorce where nationality was acquired by marriage; (3) by voluntary acquisition of an alien nationality; (4) by a dual citizen's cancellation of his Korean nationality with permission of the Minister of Justice; (5) by a minor's acquisition of an alien nationality upon being recognized (as a child) by an alien; (6) by failure to lose an alien nationality.

2. Territorial Division of the State

The Republic of Korea is divided into provinces (*Do*) and "special cities" (Seoul and Pusan). These units are under the direct jurisdiction of the Executive.

3. State Organs

Chapter 3 of the Constitution, dealing with the Organs of Government, divides state authority into the Legislative (art. 35–62), the Executive (art. 63–95) and the Judicial Power (art. 96–106). As indicated earlier, the relation of these powers to each other as in force under the present version of the Constitution, may be characterized as conforming to a presidential system. The President, elected by universal, equal, direct and secret ballot of the people (art. 64), represents the state *vis-à-vis* foreign states and heads the Executive Branch (art. 63). In the latter capacity, he is normally (except as stated in art. 64 par. 1 proviso, art. 66, art. 75 par. 4, 5, art. 79) independent from the Legislative Branch. However, the relationship between the Executive and the Legislative Power is closer than in any other presidential system (*e.g.*, that obtaining under the US Constitution). The Legislature has power not only to make laws (art. 48, 49) and pass budgets (art. 50), but also to investigate the conditions of the administration of the state (art. 57) and to recommend to the President the removal of the Prime Minister or any other member of the State Council (Cabinet) (art. 59). The Legislature is thus not merely a lawmaking body but also a guardian of the state administration.

4. The Judiciary

a. *Constitutional judiciary*. – The Constitution (art. 102) confers upon the Supreme Court authority to decide with finality upon the constitutionality of legislative acts, when such decision is necessary to disposition of a case. A determination that a statute is unconstitutional is interpreted in practice as limited to situations comparable to those in issue in such case. The requisite of constitutionality is implicit in every law, and the Supreme Court is believed to be a guardian of such constitutionality. It is also in a sense the guardian of the purity of the electoral system. Election Committees are charged with the function of assuring fair management of elections, and the Justices Council of the Supreme Court elects a majority of the members of the Central Election Committee (Const. art. 107).

b. *Ordinary courts*. – Chapter 4 (art. 26–31) of the Court Organization Act of 26 Sept. 1949, no. 51, last amended on 7 Aug. 1970, no. 2222 recognizes District Courts, Family Courts and their Branch Courts as Courts of first instance, Appellate Courts as those of second instance and the Supreme Court as a court of last resort. The Court Jurisdiction Act of 13 Dec. 1963, no. 1497, last amended on 18 June 1970, no. 2202 provides that there are ten District Courts, two in Seoul and eight in the provincial capitals. They have Civil Law and Criminal Law Divisions, except that in Seoul there are a separate Seoul Civil District Court and a Seoul Criminal District Court. Chapter 4-b of the Court Organization Act, as amended, and the Court Jurisdiction Act, as amended (art. 4), establish the Seoul Family Court which is to hear cases concerning family affairs (see *infra* IV 2). According to the above two Acts, there are three Appellate Courts, located in three major cities (Seoul, Taegu and Kwangju). They are organized into Civil, Criminal and Special Divisions. A Special Division deals with administrative cases. The highest court in the nation is the Supreme Court, which sits in Seoul and is composed of a Chief Justice and 15 Associate Justices (art. 5 of the Court Organization Act, as amended on 20 Jan. 1969, no 2084). The Supreme Court hears appeals as a court of last resort.

c. *Administrative courts*. – During the Japanese era there existed an Administrative Court patterned after the French *tribunal administratif;* it was a seaparate tribunal, independent from the general court system. The Constitution abolished the independence of the administration and subjected administrative decision-making to the jurisdiction of general courts. Pursuant to this constitutional mandate, the Administrative Litigation Act of 24 Aug. 1951, no. 213 as amended on 2 May 1963, no. 1339 conferred exclusive jurisdiction over administrative litigation to the Appellate Court with authority over the place where the defendant is located. As a prerequisite of commencing administrative litigation, a person deprived of his rights by an illegal or unjust action of an administrative agency, must normally file with the latter a petition for cancellation or correction of such action. That agency, in turn, must forward the petition to the next higher administrative office, and only after such higher office determines the issue adversely to the petitioner, can he bring suit in court pursuant to the provisions of the Administrative Litigation Act. Exemption from such requisite is accorded to the person concerned where the agency delays transmission of the petition for more than two months or where exhausting administrative remedies will cause a grave detriment to him (art. 2).

d. *Judges.* – The Constitution (art. 98) proclaims the principle of judicial independence. To assure actual independence of judicial decision-making, the above mentioned Court Organization Act (*supra* b) bars judges from holding any other public office, from becoming involved in politics, from engaging in any business which aims at profit or in any income yielding activity (except in the last mentioned situation with authorization of an administrative superior) (art. 43). However, the limited tenure of judges (ten years in the case of all judges, including Associate Justices of the Supreme Court, and six years, not renewable, in that of the Chief Justice) may be said adversely to affect judicial independence.

e. *Prosecution.* – The law governing public prosecution resembles that of Germany. The principle of so-called unity and indivisibility of the prosecution is prevailing in the practice of public prosecution. The Prosecutor-General (next in rank and authority to the Minister of Justice) is in charge of public prosecutions; his function is different from that of Solicitor General in the Anglo-American law.

II. SOURCES OF LAW

The principle of judicial review of the constitutionality of statutes (*supra* I 4a) implies recognition of the Constitution as a paramount source of Law. Next in the hierarchy of norms are legislative acts. Among these, the basic codes (so-called *Yukpob* – six codes) play a role similar to that ascribed to the codes in countries of the Roman-Civil Law tradition. These codes are: Constitution; Civil Code of 22 Feb. 1958, as amended; Commercial Code of 20 Jan. 1962, as amended; Code of Civil Procedure of 4 April 1960, as amended; Criminal Code of 18 Sept. 1953; Code of Criminal Procedure of 23 Sept. 1954, as amended. There is, in addition, a separate Administrative Litigation Act of 24 Aug. 1951, as amended (*cf. supra* I 4c).

Customary law and case law present in Korean law problems of the same type. These sources generally raise in countries of Roman-Civil Law tradition. The Civil Code (art. 1) provides that in the absence of a statute customary law shall be determinative and that lacking customary law, reason is to serve as a source of decision making. On the other hand, the constitutional principle of *nulla poena sine lege* (Const. art. 10 and 11) bars adoption of a similar provision in the Criminal Code. But while thus customary law cannot be a direct source of a penal provision, it may well serve as such source indirectly, *via* incorporation of Civil Law concepts (*e.g.*, property concept) in criminal legislation.[1] Customary law presents a *sui generis* issue in Korea because of the historical fact that it was a primary source of law under the Japanese occupation in most areas of family relations and succession (see *infra* III) and that many of its rules were incorporated into the Civil Code (for details see *infra* IV). The issue of intertemporal conflict between the Civil Code and prior customary law was resolved by two supplementary provisions of the Civil Code: "Unless otherwise provided, this Code shall be applied to matters which occurred before its effective date, but it shall not affect a fait accompli" (art. 2); "as regards successions which took place prior to the effective date of this Code, the old law shall be applied even after such date" (art. 25). The latter provision, indeed, makes customary law *pro tanto* prevail over statutory law. Even in criminal law customary

[1] The Supreme Court of Japan in a decision rendered 3 June 1929, Keiji-hanreishu (Supreme Court Law Reports) vol. 8 p. 302 ss., held that when A violates B's right to use natural water which B had acquired by virtue of customary law, A has committed the crime of "obstruction of water utilization" (Japanese Criminal Code art. 123). This Japanese decision is considered in Korea a persuasive authority in interpreting a similar provision of the Korean Criminal Code (art. 184).

law may override statutory law. Such is the case where it abrogates a statutory crime (Criminal Code art. 20).

The "authority" of "case law" in Korea also presents a unique, complex and diversified problem. It is necessary to differentiate the issues of the authority to be ascribed to decisions of the following tribunals: the Highest Court in Korea in the era of the Japanese occupation; the Supreme Court of Japan in the same era; the Highest Court of Korea in the era of the American Military Government, 1945–1948; the Supreme Court of Korea functioning since the end of the American Military Government, 1948. What exactly is the authority of decisions of each of these tribunals is not resolved by any express pronouncement. However, certain propositions may be advanced with a fair amount of assurance. (1) There is no reason to differentiate between decisions of the Highest Court in Korea and those of the Japanese Supreme Court during the era of Japanese occupation, since the latter court was at that time superior to the former. (2) Korea belongs to the group of countries adhering to the Roman-Civil Law system, in which judicial decisions are not generally regarded as binding authority. Only where there has developed a line of consistent decisions (*ständige Rechtsprechung, jurisprudence constante*), is a decisional rule admitted to be a source of law. In such case the rule is deemed to be one of "customary law".[2] (3) Since the decisions of the Supreme Court of Korea are not fully accessible to the public at the present time, considerable difficulties are encountered in identifying a *ständige Rechtsprechung.* (4) In Korea, as in other countries adhering to Roman-Civil Law patterns, adoption of a statute from a foreign jurisdiction does not import incorporation of the judicial decisions interpreting such statute rendered before adoption. Thus, decisions of the Japanese Supreme Court interpreting Japanese statutes are not authoritative sources in construing Korean law patterned after these statutes, even though they were rendered prior to the Korean enactment. They are considered persuasive authority (see *supra* n. 1).

Statutes are published by the Office of Legislation under the Prime Minister (see Government Organization Act of 2 Oct. 1961, no. 734, art. 21, last amended on 3 Aug. 1970). The title of the statute collection is *Hyunhaeng-Pobryungzip* (17 vol.) which is cited by the page number of the section and the volume. There are some commercial "case books" which reproduce selected decisions of the Supreme Court of Korea. Apart from them, there is an official highly selective collection of decisions of the Supreme Court of Korea which are distributed among lawyers and legal scholars upon request. This collection is called *Taepobwon-Pankyulzip*; so far 18 volumes were published since 1956. The only comprehensive Law Reports published so far are those of the *Korea Law Research Institute of Seoul National University* (*Chusuk-Hankuk-Panrezip*): four volumes in Civil Law since 1965, three in Criminal Law since 1965 and one volume in Public Law since 1970.

III. HISTORICAL EVOLUTION OF PRIVATE (CIVIL) AND COMMERCIAL LAW

Until Korea's annexation by Japan in 1910, Korea's private laws were patterned after Chinese models. The modernization of Korean law began with the introduction of Japanese laws after the annexation. By virtue of a statute passed by the Japanese Diet, "Concerning the Law to be Applied in Korea", delegating legislative power over Korea to the Governor General of Korea, the latter, in March 1912, made the Japanese Codes relating to civil matters applicable in Korea. Laws regarding personal capacity, family and successions were excluded. In the 35 years of their domination of Korea, the Japanese occupants introduced a number of changes. However, they did not succeed in affecting those institutions which constitute the core of Korean family law. The laws in force at the time of Korea's liberation remained effective (Ordinance no. 21 of the American Military Government of 2 Nov. 1945) in the area South of the 38th Parallel until new legislation was introduced by the Republic of Korea. The "six codes" then introduced are enumerated above (see *supra* II).

[2] *Cf. Helen Silving*, "Stare Decisis" in the Civil and in the Common Law: The Seoul Law Journal – Seoul National University Law Journal 1964, 15–50.

IV. PRIVATE (CIVIL) LAW

The present Civil Code of 22 Feb. 1958, effective since 1 Jan. 1960, last amended on 31 Dec. 1964, substantially incorporates the rules and principles of the former Civil Code, introduced by the Japanese (*cf. supra* III). The classification of the Code into five divisions – General Provisions, Property Law, the Law of Obligations, Family, and Successions – and the most important notions are the same as those of the present Japanese Civil Code. There are some major differences that require special notice.

1. Property Law

The Korean property law bears two distinctive features. To the seven traditional species[3] of "real rights", the Korean Civil Code adds an eigth one, while eliminating two obsolete species of the Japanese pattern (emphyteusis – *Eikosakken*, and commonage – *Iriaiken*). A leasehold, according to conventional modern civil law is a right *in personam*. But by custom developed from Korean tradition and the necessities of a growing urban society, the *Chunsekwon* has become a right *in rem* that, when registered in accordance with the Estate Registration Act, can be invoked by the leaseholder against any third party (CC art. 303–319). Art. 303 defines the *Chunsekwon* as a right which entitles the holder "by virtue of paying rent, to occupy the immovable property of another and to exercise thereon the rights of use and benefit depending on the nature of its utility". By custom, in Korea, there is substituted for periodical rent payments a deposit of "key money" (*Chunsekum*), restorable upon termination of the contract. Another distinctive feature of the present Korean law of immovable property is the requirement of registration. Under Japanese law (CC art. 177) that follows the "French system" of transfer by mere convention, registration is not necessary to transfer real rights in immovables, except for the protection of the transferee against subsequent *bona fide* purchasers. In Korean law, following in this respect the German model, registration is a necessary condition for the transfer of real rights in immovables (CC art. 186; *cf.* German CC § 873). The present Korean system excludes the possibility of selling the same property twice.

2. Family Law

Korean family law is one of the legal branches which resisted the impact of Western influence (*via* Japanese law) and in which Korean culture patterns have remained most purely reflected. It bears four main features that distinguish it from the laws of the Western World. Firstly, the concept of "family" is different. It consists of persons of common remote origin identified by a common family name (CC art. 778–799). "Kinship" is thus a much wider concept than is the usual Western concept of "blood relationship". Nor does the legal meaning of "family" always correspond to a social unit as reflected in life reality. Secondly, under no circumstances can the family name of a person be changed, and this explains the fact that a Korean woman preserves her family name despite of marriage (CC art. 781, 826).[4] Thirdly, "[m]arriage is not admissible between blood relatives who bear the same name and are of the same origin" (CC art. 809). These traditional rules, of course, do not coincide with modern trends in Korea. A means of evading their impact is afforded by the legal rules on annulment of consanguineous marriages. Such marriage may be annulled only upon a lawsuit brought by the party concerned or one of his (or her) relatives. But if a child is born out of such "illegal" union, the action is barred (CC art. 817). A fourth principle, closely connected with those mentioned above, has been modified by the new Civil Code. According to tradition, a man could not adopt a child whose family name was different from his own, since adoption was recognized only as a means of continuing the adoptive parent's family. The new Civil Code admits other purposes of adoption. Nevertheless, according to it (art. 877 par. 2), where the family names of an adoptive parent and child differ, the child may succeed to the parent's estate but cannot obtain the status of a "head of family" (for details see *infra* 3).

For the resolution of problems arising out of "family affairs" and "juvenile delinquency" ("juveniles" are persons under the age of 20 years), there has been created in Seoul a Family Court, in operation since 1 Oct. 1963.[5] Most cases within the jurisdiction of this Court are referred to me-

[3] They are ownership, possession, superficies, easement, lien, pledge, and mortgage.

[4] Apparently similar phenomena obtaining both in China and in many Latin countries are not so strict as in Korea.

[5] The Family Court was established only in Seoul. It is independent of the Seoul Civil District Court and the Seoul Criminal District Court.

diators who are selected from among psychiatrists, public welfare workers, psychologists, and civic leaders. Only if a case cannot be settled through the efforts of the mediators, is it tried by a judge or judges of the Family Court. Even when so tried, the proceedings are in many ways different from normal court proceedings. For instance, they are not open to the public. One of the most significant functions of the Family Court is confirmation of *de facto* marriages. According to the conventional – customary – law, a marriage is constituted by a marriage ceremony. But the Civil Code (art. 812 par. I) provides that a marriage becomes effective by registration. The gap thus arising between the living and the positive law is eliminated by judicial decision. Such decision entitles the plaintiff to register his marriage against the wish of the other spouse. A special law (enacted 31 Dec. 1968, no. 2067) enables the spouse of a person employed by the Armed Forces in times of war or warlike incident to obtain such udicial decision and secure registration even after the death of the latter.

3. Succession

The law of succession is closely connected with the notion of family. As indicated above, there are two types of succession, succession to status within the family, as "head of the family" (CC art. 980–996), and succession to property (art. 997–1059). The former is mandatory, meaning that it cannot be renounced, and is exclusive, whereas the latter is subject to waiver and can be shared by more than one successor. A peculiar feature of the Korean law of succession is admissibility of succession during lifetime (CC art. 980). Succession during lifetime occurs when a head of family is either an adopted child or a female and loses his (or her) family status as such. In such a case, succession to status as a head of family is followed by succession to property.

V. COMMERCIAL (ECONOMIC) LAW

The most important sources of commercial law are the Commercial Code of 20 Jan. 1962, as amended on 12 Dec. 1962, the Law on Bills of Exchange and Promissory Notes and the Law on Checks, all in effect since 1 Jan. 1963. The Commercial Code consists of five divisions entitled 1. General Provisions; 2. Commercial Transactions; 3. Companies; 4. Insurance; 5. Maritime Law. The concepts and rules of Korean commercial law are patterned after those of Japanese law which, in turn, are modeled after those of the German Commercial Code. The Korean law deviates from this pattern in several respects. Art. 1 of the Commercial Code declares that in the absence of provisions of that code, a "commercial matter" is governed by "commercial customary law", and lacking customary law, by the Civil Code. On the question of what is a "commercial matter", the Korean Commercial Code adopted the so-called eclectic approach, meaning, in part an objective and in part a subjective standard. On the one hand, art. 46 enumerates 18 types of transactions which it declares to be "commercial transactions" if engaged in for gain, exempting the manufacture of articles or the rendering of services for wages. On the other hand, art. 47 qualifies as such transactions those of a merchant engaged in for the purpose of gain. A special type of partnership defined by the Code (art. 78–86) is the so-called "anonymous partnership". It is constituted by a contract whereby the parties agree that one of them will make a financial contribution to the business of the other and share in its profits. Commercial companies in Korea, *Hapmyung-Hoesa* (commercial partnership), *Hapcha-Hoesa* (limited partnership), *Chusik-Hoesa* (marketable share company) and *Yuhan-Hoesa* (limited liability company), correspond respectively to the Japanese *Gomei-Kaisha, Goshi-Kaisha, Kabushiki-Kaisha* and *Yugen-Kaisha.*

The Korean Bills of Exchange and Promissory Notes Act and the Checks Act conform to the corresponding Geneva uniform laws of 1930 and 1931. These laws as well as the Bankruptcy and Composition Act are similar to the corresponding laws of Japan.

VI. STATE DIRECTION OF TRADE

Art. 111 of the Constitution of 1962 declares in Section 1 that "[t]he economic order of the Republic of Korea shall be based on the principle of respect for the individual's economic freedom and initiative". In Section 2 it provides that "[t]he State shall regulate and coordinate economic affairs to the extent that this is necessary to bring about social justice and development of a balanced national economy that would meet the basic living demands of all citizens". Actually, at the present stage of Korean economy, planning is essential. Shortly after inauguration of the Third Republic there was created an Economic Planning Board (Government Organization Act, as amended on 18 June 1962) (the Board is hereinafter referred to as EPB), endowed with broad powers. Effectuation of a sound economic plan contemplating industrialization requires capital investment. To induce foreign investment, Korea passed in 1966 the so-called Foreign Capital Inducement Law (hereinafter referred to as FCIL). This law provides that foreign investment requires authorization by the EPB. Once such authorization is secured, the investors enjoy a variety of privileges. According to the FCIL, the investment of foreign capital in Korea is classified into three categories: (1) direct investment; (2) cash loan, investment of capital goods and technology; and (3) special investment category in which the government guarantees the repayment of the overseas obligations (FCIL art. 22 par. 2). The government guarantees repayment of overseas obligations incurred by cash loan contracts or capital goods investment contracts when the projects are deemed to contribute greatly to improvement of the balance of payments, to development of key industries or public enterprise, or are included in the Economic Development Plan. Various tax privileges are accorded to investors depending on the investment category. Customs duties and commodity taxes are not assessed on the imported capital goods.

VII. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

The types of industrial property known in Korea are the patent, the utility model, the trademark and the design. Major sources of law are the Trademark Act of 28 Nov. 1949, no. 71, the Unfair Competition Prevention Act of 30 Dec. 1962, no. 911, the Patent Act of 31 Dec. 1961, no. 950, the Utility Model Act of 31 Dec. 1961, no. 952, and the Design Act of 31 Dec. 1961, no. 951. Distinctive features of Korean industrial property laws are the following: (I) Upon application for industrial property protection, the Patent Bureau of the Ministry of Commerce carries out a substantive examination. This is in contrast to the situation in most countries of the world which adopt a non-examination system. (2) The right of trademark comes into existence not, as is customary in other countries, by use, but by registration, effectuated after examination. Trademarks may be registered regardless of actual use. (3) The interest in a trademark is deemed a property right, which however is transferable only together with the business. It comprises an exclusive right of use and prohibitive rights. A trademark cannot be pledged. (4) By contrast to the situation obtaining in most countries, the utility model and the service mark in Korea are afforded statutory protection. (5) Korea is not a party either to the Convention of the Paris Union or to the Agreement of Madrid. Except where treaties or agreements between Korea and a foreign country afford protection or the law of such country guarantees reciprocity to Korean nationals, industrial property of aliens is protected only where they have their residence or place of business in Korea. (6) Korea is not a party to the Bern Convention on Copyright or to the Universal Copyright Convention. Nor does Korea have any treaty or agreement with any foreign country regarding copyright. The Copyright Act of 28 Jan. 1957, no. 432, in general resembles that of Japan. One of the unique provisions of that act is art. 63, providing that when an illegal publication is made without consent of the copyright owner, the number of copies published is presumed to be 3 000.

VIII. PRINCIPLES OF JUDICIAL PROCEDURE IN CIVIL AND COMMERCIAL CASES

The Code of Civil Procedure of 4 April 1960, last amended on 13 Dec. 1963, is similar to that of Japan. In Korea the judicial system follows the Roman-Civil Law pattern. This means that both in civil and in criminal trials judges assume a leading role in the proceedings and direct the taking of evidence. There are very few rules of evidence as known in countries which adhere strictly to the adversary system. Nor did Korea adopt the jury system. Nevertheless, Anglo-American influence is noticeable, particularly in procedural law. To it, for instance, may be referable introduction of the principle of cross-examination in civil procedure, though that principle in Korean law is attended by certain distinctive practices: "confrontation" under judicial guidance between witnesses giving contradictory testimony (CC Proc. art. 301); between opposing parties and between parties and adverse witnesses (art. 340); in these practices the witnesses and parties respectively are allowed to cross-examine each other. Some rules of Anglo-American imprint have been introduced by "judicial legislation", *e.g.*, the parole evidence rule. A new Code of Criminal Procedure, enacted on 23 Sept. 1954, as amended on 1 Sept. 1961, introduced important safeguards of civil liberties, such as the requirement of a warrant for arrest and search or seizure (art. 73 ss., 113–115); an accused person's right to assistance of counsel (art. 90) and to bail (art. 94–100). On the other hand, protection is afforded to the victim of crime against arbitrary exercise of power by the prosecution: the informer or complainant may appeal from the latter's decision not to prosecute to the High Court (art. 260–262). Greater efficiency of courts is secured by substitution for the old practice of trial *de novo* of a system of appeal in which the evidence adduced at trial may be used (art. 361).

Korea did not adopt a system of special commercial tribunals, so that disputes concerning commercial matters are subject to the general jurisdiction of civil courts of first instance, as are all civil disputes. Arbitration, as practiced in most foreign countries, is not in use in Korea, although the Code of Civil Procedure (art. 355–359) provides for a procedure of mediation. Since arbitration was abolished in 1960, there is no practical method whereby a foreign arbitration award could be enforced in Korea. Nor is there in Korea an international arbitration court.

IX. PRIVATE INTERNATIONAL LAW AND INTERNATIONAL LAW OF PROCEDURE

1. The basic source of the law of conflict of laws in Korea is the International Private Law Act of 15 Jan. 1962, no. 966 (hereinafter Act). This Act consists of three chapters: General Provisions; Provisions on Matters of Civil Law; and Provisions on Matters of Commercial Law.

a. *General provisions.* – Where a party's national law governs and he is a dual national, Korean law refers to the law of the country whose nationality he acquired last, except where the older nationality is Korean. In the case of stateless persons, Korean law refers to the law of their domicile and if the domicile is unknown, to that of their actual residence. Where a party is a national of a country in which there are plural laws, Korean law refers to the law of the region to which he belongs (art. 9). Korean law recognizes renvoi (art. 4). It refuses application of a foreign law which it regards as *contra bonos mores* (art. 5).

b. *Provisions on matters of civil law.* – Capacity to engage in legal transactions is determined by the law of the country of which the party is a national. However, where he is a resident of Korea, he is deemed to be an adult when he is one according to Korean law even if he is still a minor according to his own national law (art. 6). The party concerned may choose the law that is to govern the creation and effect of a legal transaction. If no clear intention is expressed, the *lex loci actus* is applicable. Sufficiency of a notice to a party present in a country in which the law is different from that of the country from which the notice was sent, is governed by the law of the latter country. The same principle applies as regards the conclusion and effect of a contract: the governing law is that of the place from which the offer was sent (art. 11). Rights *in rem* and other rights which are required to be registered are determined by the law where the property is located (*lex situs*) (art. 12). The creation and effect of a right *in personam* arising from a *negotiorum gestio*, an unjust enrichment or a tort are determined by the law of the place where the facts which gave rise to the cause of action occurred (art. 13). Marriage and divorce are determined by the law of the husband's nationality. Succession is determined by the law of the decedent's nationality.[6]

[6] The term "decedent" may be too narrow. In Korea one may inherit from a living person. *Cf. supra* IV 3.

c. *Provisions on commercial matters.* – Art. 28 of the Act states that in the absence of its provisions, a "commercial matter" is governed by "commercial customary law", and lacking customary law, by the Act's provisions on civil matters. The legal capacity of a commercial company is governed by the law of the place where its office is located (art. 29). Matters involving the business of banking are governed by the national law of the bank (art. 30).

2. Korea has no system of accepting foreign judgments for entry in the records. One seeking enforcement of a foreign judgment must bring action upon it in a District Court of the general forum of the debtor.

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