

A good description of this book is provided by its Introduction.<sup>26</sup> There is little point in repeating that material, suffice it to say for the interested browser that the self-description is accurate. The book itself is compendious and essential reading for those with a special interest in New Zealand political life — constitutional lawyers, political scientists, politicians and public servants alike. The editor and publishers are to be congratulated on another excellent<sup>27</sup> publication.

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## KOREAN LAW IN THE GLOBAL ECONOMY

*by Sang-Hyun Song (ed), Bak Young Sa Publishing Co, Seoul, 1996, 1500 + viii pages (including index), US\$197 (including airmail, tax and handling)*

*Reviewed by Luke Nottage\**

This book is a key reference text edited by a leading scholar, Professor Sang-Hyun Song of the Law Faculty of Seoul National University. It covers virtually all aspects of Korean law relevant to New Zealanders today. It belongs in every New Zealand library – not just law library – which may be called upon to answer questions on contemporary Korea. Although the book aims to provide an up-to-date and comprehensive introduction to Korean law, it also contains a wealth of information on institutional and socio-economic context. Adding the latter, however, gives rise to some interesting questions of interpretation, and what "line" to adopt in approaching Korean law in general.

Professor Song presented an excellent series of seminars on Korean law for the Centre for Asia-Pacific Law and Business at Victoria University of Wellington on 21-23 July 1994. Materials for those seminars were published.<sup>1</sup> They have been included, some in updated or slightly revised form, in Chapters 1-7 of this book.<sup>2</sup> Some materials have also

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26 Pages 1-27.

27 The reference to the "Untied Nations" on page 207 was undoubtedly made tongue in cheek.

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1 S H Song (ed) *The Law of Korea* (Centre for Asia/Pacific Law and Business, Wellington, 1994).

2 The CAPLAB materials are currently out of print. Sponsorship is currently being sought for a reprint, as such a shorter collection of Korean Law materials would retain its value, for instance as student materials for classes

been reprinted from Professor Song's earlier edited work, *Introduction to the Law and Legal System of Korea*.<sup>3</sup> However it is indicative of the growth of English language studies on Korean law that so much is new to this book. Many of those studies, however, have appeared in unlikely or inaccessible places - unpublished theses being a prime example. This book is invaluable in bringing them together in one volume. Further, where there remain gaps in the literature, Professor Song has added his own succinct commentaries.

The book itself provides useful background on the editor. In Chapter 4, James West's study of legal education in Korea reinforces the élite status of the Seoul National University Law Faculty.<sup>4</sup> However, the reader can deduce that Professor Song is unusual in several respects. Obviously, he was not dissuaded from the study of international and comparative law, unlike many Korean law students who continue to find it more rewarding to concentrate their efforts on domestic law topics in preparation for the difficult bar examination.<sup>5</sup> Nor, as can be seen by the law schools outside Korea at which he has subsequently taught, has Professor Song been dissuaded from developing an interest in common law legal systems, rather than civil law jurisdictions like Germany or Japan which were once more favoured.<sup>6</sup> Finally, as witnessed by the inclusion of his and others' affidavits sworn for an actual court case regarding jurisdiction and evidence-taking in transnational matters before Korean courts, Professor Song has retained an interest in the operation of law in practice, unlike other law professors in Korea whose focus on exegesis and conceptual arguments can seem so "formalist".<sup>7</sup> Professor Song is therefore eminently qualified to introduce Korean law to a wide international audience.

Four recent examples should suffice to show both the contemporary relevance of Korean law to a New Zealand audience, and the comprehensiveness and usefulness of this book.

First, on 9 May 1996, Seung-Jin Choi returned to Seoul, whereupon he was promptly arrested. Mr Choi, an attaché at the Republic of Korea's Embassy in New Zealand, had been accused of altering an official document and leaking it to Opposition politicians in

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on Korean law such as the Honours seminars on North Asian Law being taught at Victoria University in the second trimester of 1996.

3 Kyung Mun Sa, Seoul, 1983.

4 As West puts it, "A Seoul National University law professor is something of an Olympian in the public eye" (page 388).

5 Pages 393-394.

6 Pages (i), 395-396.

7 Pages 388-392. Although this is not evident from this book - paragraph 1 of his first affidavit having been discreetly excised (page 469) - Professor Song is exceptional among Korean law professors in having passed the bar examination.

Korea. He had gone into hiding and applied for permanent residence in New Zealand on the grounds that he was a political refugee; but his appeal to the Refugee Appeal Authority was not upheld. This coincided with the visit of Prime Minister Bolger to Seoul on 10 May 1996. For government officials, legal advisors, and those with an interest in human rights or Asian politics, these events threw into sharp relief the broad question of whether the rule of law is now entrenched in Korea.<sup>8</sup> Chapter 4 of this book, on "Constitutional Reforms in Korea", show how constitutional upheaval and uncertainty have remained features of Korean society since the present reviewer lived in Seoul during the Third Republic (1969-72).<sup>9</sup> More specifically, questions arise as to the nature of criminal procedure in Korea; whether Mr Choi will be represented by lawyers versed in human rights and constitutional law; the role and discretion accorded to public prosecutors; and the role and independence of the judiciary.<sup>10</sup> Chapter 5, on "Korean Legal Institutions" again provides a starting point.<sup>11</sup>

The potential political ramifications of Mr Choi's case temporarily overshadowed the growing economic links between South Korea and New Zealand.<sup>12</sup> Assisted by a bilateral Air Services Agreement concluded in May 1993 (expanded in September 1994), South Korea has become New Zealand's fastest growing market for inbound tourists.<sup>13</sup> Similarly dramatic is the growth in immigration. From July 1993 to June 1995, 8357 residence visas

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- 8 Information on Mr Choi's case is now publically available from the Ministry of Foreign Affairs and Trade under the Official Information Act 1982, particularly in the form of the Briefing Paper prepared for the Prime Minister ("ROK: The Choi Case", May 1996). For a discussion of the relevant principles of New Zealand immigration law, see generally R Haines *The Legal Condition of Refugees in New Zealand* (Legal Research Foundation, Auckland, 1995).
- 9 Pages 197-284.
- 10 See especially pages 296-299, 330-332, 313-314, and 285-305 respectively.
- 11 Of course, that introduction cannot hope to provide an end-point. Cf D K Yoon *Law and Political Authority in South Korea* (Boulder/Seoul, Westview Press/Kyungnam University Press, 1990) especially at 79-83, 124-126, and 134-147, where Dr Yoon is more critical of both the historical role of public prosecutors and lack of judicial independence. However, even at the time of writing (1990), he expressed some hope for improvements in those areas. See also the review of the latter text by V Taylor (1992) 26 *Int Lawyer* 1131.
- 12 See also the report in *NZ Herald* (29 May 1996) that one of Korea's largest banks, Kookmin Bank, had just opened a representative office in Auckland. (Note, however, that the report is incorrect in stating that Korea is New Zealand's *fourth* largest export market and source of foreign tourists.)
- 13 For the year ending December 1995, tourist arrivals from Korea had reached 104,389. This represented an increase of 70% on 1994 and of 382% on 1993, and made Korea already the fifth largest source of tourists. See Ministry of Foreign Affairs and Trade, "Country Paper: Korea" (unpublished MFAT briefing paper, available from the North Asia Division, April 1996) 10, Appendix ("International Visitor Arrivals").

were issued to Koreans, and in 1994-5 New Zealand was the second most popular destination after the United States.<sup>14</sup>

However, people bring with them their own ways of doing things, and do not necessarily adjust quickly even to new legal norms. By way of second example, on 2 May 1996, Television New Zealand broadcast a documentary on a tendency for groups of Korean tourists, organised primarily by Koreans, to be directed to "tied" souvenir stores during their stay in New Zealand. The reporters questioned this way of doing business, including whether any percentage on sales made at such stores which might later be paid to tour operators could breach the Secret Commissions Act 1910.<sup>15</sup> However, another interesting question is whether such practices were common in Korea itself. Korean anti-competition laws and their enforcement are relevant. Chapter 14 of this book, on "Administrative and Economic Regulations", provides the general framework.<sup>16</sup>

Third, in May 1996, the son of the first Korean Ambassador to New Zealand announced that he was assisting in bringing together a consortium of Korean investors to bid for Forestry Corporation. This consortium is centred on Hansol, the twenty-second largest company in Korea. In February, Mr Park had also been instrumental in concluding a \$50 million investment by Hansol, to plant and manage a pine plantation on 10,000 ha of Ngati Porou land.<sup>17</sup> Korean investment in New Zealand had previously been confined to relatively small holdings in fisheries ventures and the processing of hides and skins.<sup>18</sup> The current trend is related to broad economic developments in both countries. On the one hand, economic restructuring in New Zealand continues to provide opportunities for foreign investment. On the other, Korean investment overseas has increased overall, in the context of more relaxed foreign exchange regulation described in Chapter 8 of this book.<sup>19</sup> To advise Korean investors, New Zealand advisors will also need a basic understanding of

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14 Above n 13, 11.

15 TVNZ "Assignment" (2 May 1996).

16 Especially pages 1284-1285 and 1249-1251.

17 *National Business Review* (10 May 1996). Further, the *NZ Herald* (11 April 1996) reported that Daewoo Corporation will provide design and construction services, and finance, for Pacific Development and Investment Corporation's \$54-71 million proposal to the Auckland Regional Trust for development of the Auckland waterfront, in preparation for the next America's Cup challenge. According to the latest Bank of Korea data (unpublished, as at May 1996), Korean investment into New Zealand since 1990 had been approved totalling US\$12,818,527 (excluding the Daewoo transaction), of which US\$3,695,000 had already been committed. Ironically, fuller data on Korean investment in New Zealand is available from the Bank of Korea, rather than the Overseas Investment Commission in Wellington, which only deals with investments involving over NZ\$10 million or certain interests in land.

18 Above n 13, 11.

19 Especially at pages 809-810.

Korean corporate law and corporate governance; practices and institutions involved in banking law; differences in securities regulation; and the tax system, including interpretation and practices regarding double tax treaties such as the one in force between Korea and New Zealand from 1 April 1981.<sup>20</sup> These areas are outlined in Chapters 7, 9, 10, and 11 respectively.

The outstanding growth in bilateral trade remains the most tangible evidence of increasing contact. New Zealand exports exceeded \$1 billion in 1995, over 5% of total exports, making Korea its fifth largest market. Imports have grown to over \$360 million.<sup>21</sup> Maintaining smooth trade flows will require a basic understanding of Korean contract law and, to a lesser extent, security interests. This is provided in Chapter 13, on "Domestic Commercial Law". Thus, by way of fourth example, the tantalisingly brief reference to the Consumer Protection Act (as amended on 31 December 1986) could be very significant for New Zealand exporters. The Act requires a manufacturer, distributor or importer of certain products, including food products, to attach a warranty to the products which will hold for at least six months from the day of purchase by the consumer. The goods must be exchanged, refunded or repaired, and the consumer's medical expenses paid in the event of personal injury, if the goods are found to be defective during the warranty period. Cautious Korean importers, potentially caught by this law, may well seek to pass on the extra risk to New Zealand exporters by seeking a corresponding indemnity. Whether New Zealand exporters give such an indemnity, or instead reduce their price to some extent, must ultimately be decided "in the shadow" of the full set of potentially applicable legal rules. However, even the brief summary of the Act and other relevant parts of this book at least provide some of the parameters for further investigation and negotiations in this regard.<sup>22</sup>

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20 Double Taxation Relief (Republic of Korea) Order 1983 (1983/5), s 2.

21 Above n 13, Appendix.

22 A similar issue arises from the more comprehensive product liability legislation in force in Japan since July 1995. See L Nottage *Law in Japan Today: A Changing Interface with Business and Government* (VUW Press for CAPLAB, Wellington, 1995) 12-14.

A question which then springs to mind is whether Korea will develop similar legislation. Another important question for New Zealanders is whether Korea will soon accede to the UN Convention on Contracts for the International Sale of Goods, in force in this country since 1 October 1995. In his Preface (page ii), Professor Song notes that the book is directed more to "the constitutional or fundamental aspects" of Korean law, rather than detailed implementing rules and regulations for business which change so rapidly, to avoid "rapid obsolescence" of the book. However, by not addressing certain global developments such as the trend towards strict liability product liability or uniform sales law - even if the short prognosis by such an informed observer is that there will be no development along such lines in Korea in the immediate future - he may inadvertently have destined parts of the book to some obsolescence. At the least, this works against the book's goal of understanding "the impact of rapid globalization, international economic interdependence and the struggle of Korean legal institutions to cope with that" (*idem*).

The rest of New Zealand's "invisibles" trade is also important, for instance in the form of technology transfer, treated in Chapter 12 together with intellectual property law more generally. Furthermore, as New Zealand's economic relations overseas continue to expand and diversify, it is worth bearing in mind that aspects of Korean law can arise in a transaction involving primarily New Zealand and a third country. In a recent case, a New Zealand manufacturer had established a distributorship in Japan. The former suspected that the distributor had passed on trade secrets in the products to a Korean competitor. The dispute was primarily one between the New Zealand manufacturer and the Japanese distributor, under Japanese law. But further issues were whether the Korean competitor with a presence in Japan could be sued there for breach of the Japanese Unfair Competition Prevention Law (as amended in 1990), and the judgment then enforced in Korea, and what alternative dispute resolution procedures could be put to the Korean party. Chapter 6, on "Dispute Resolution", addresses the relevant Korean law issues in considerable detail.

Other chapters covering specific areas of Korean law deal with telecommunications law, labour law, women's status and family law, and environment law (Chapters 15, 16, 17 and 18 respectively).

It remains, however, to consider the first three chapters, which effectively serve as a general introduction to Korean law in its historical and socio-economic context. These chapters are perhaps the most challenging part of the book, in setting the stage for the more detailed exposition of specific topics in Chapters 4-18. In particular, in approaching any issue touching on the law - whether as a legal advisor, researcher, or a government official - all, to varying degrees, must develop a "line" of thinking, a means of classifying more specific data. Although that may need to be rethought in the light of ongoing experience, it is clearly advisable to get it more right than wrong from the outset. Even given the self-imposed limitations of this book as an introduction - indeed, perhaps for that very reason - it would have assisted readers if Professor Song had made his own "line" clearer and more consistent, relating it to the materials included.

In Chapter 2 on "The History, and Social and Moral Backdrop" Professor Song includes his translation of a fascinating survey carried out in 1991 on "The Korean People's Attitude to Law". The results are important, both in gaining a further practical perspective on aspects of the four examples of the contemporary relevance of Korean Law for New Zealanders given above; and then in considering more generally what "line" on Korean law might be extracted from this further information.

First, it is surely relevant for the purposes of constitutional law and the opportunity for a fair trial that 82% of Koreans believe that the law is not well observed, primarily because they perceive legal procedures as complicated and too changeable (33% of that

82%) or that law is not strictly enforced (24%), responses interpreted in the survey as indicating widespread distrust of both the legislature and the executive.<sup>23</sup> So too, is a perception still held by some 94% of Koreans that power and wealth affect the outcome of Court judgments.<sup>24</sup> Secondly, regarding anti-competitive practices, the perception that the law is generally not strictly enforced must also raise doubts about the qualitative impact of the formal legal rules in this area in Korea, and hence the attitudes Koreans may bring with them - at least initially - to transactions in New Zealand. Consistently with this perception, 31% of Koreans still acclaim as someone "of ability" the person who breaks the law but who leads a successful life, although this proportion has decreased from 53% in 1972.<sup>25</sup> Thirdly, following on from that, 16% of Koreans see tax laws as "impractical", an attitude that may or may not carry over into transnational transactions affecting New Zealand.<sup>26</sup> Fourthly, and more concretely, it would be unwise for New Zealand exporters or their advisors to ignore that 49% of Koreans who purchase consumer goods like groceries which turn out defective would now demand for them to be exchanged; that 30% would resort to a Consumer Protection Center set up by statute; and that this attitude is particularly prevalent among the young, the educated, affluent, or politically liberal. Consistently, if "tried in court for money matters", 50% would be comfortable in being there to protect their rights, or justice and order.<sup>27</sup>

More generally, the "line" taken in this Survey is clear: "historically, there has been a lack of both law-abiding spirit and consciousness of rights among the Korean people, coupled with routine avoidance of legal procedures"; but modernisation has strongly promoted the rule of law.<sup>28</sup> Professor Song's line, on the whole, is similar. In Chapter 3, entitled "The Structure and Approach of Korean Legal Scholarship" but subtitled "Special Problems in Studying Korean Law", he points to the complex "double structure" of modern Korean society: a largely Confucian tradition of social ordering, on which a modern legal system was superimposed, and an advanced capitalist economic system erected.<sup>29</sup> As in the Survey, Professor Song goes on to stress the breaking down of the old ideas, particularly among the younger generation. He also argues that Korea, with its "successful political and economic developments, offers an excellent example for law and development studies".

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23 Page 153.

24 40% think it "affects absolutely; 54% think it "affects somewhat" (pages 136, 168-9).

25 Pages 135, 141.

26 Page 170.

27 Pages 160-162; 148-149.

28 Page 129.

29 Page 179.

However, he then explicitly relates these developments to "the blurring of traditional boundaries and political alliances, a new global economy, and revolutionary changes in transport and communications technology".<sup>30</sup>

Yet Professor Song's "line" then begins to waver. Pointing out the problems involved in Westerners studying the Korean language – no doubt, so – he asserts that "European languages are, in general terms, more logical and more ordered than Korean". Professor Song then speculates that "if it is true that human thought is determined structurally by the language which is used to represent it, there must be an inseparable relationship between law and language".<sup>31</sup> Yet, presumably, changes in the Korean language have not been as dramatic as the legal developments that Professor Song is at pains to explain. His speculation may appear to bolster his more general – and perfectly commonsensical – observation that "without an adequate knowledge of the Korean language, a knowledge of Korean law in its *true* form is *almost* unattainable".<sup>32</sup> However, as a theory of legal development, it is certainly inconsistent with his own thesis, and – no matter how well intentioned – it smacks somewhat of "essentialism".<sup>33</sup>

Further, the materials reproduced in Chapter 1 of this book themselves raise doubts as to the traditional non-litigiousness seemingly taken for granted by both the Survey authors and Professor Song. The essay by William Shaw, for instance, points out that "available records for the early part of the Yi period on through the seventeenth and eighteenth centuries suggest that where land, slave ownership or gravesite plots in particular were at stake, *Koreans of all classes possessed a strong sense of entitlement and in fact 'loved to litigate'...*".<sup>34</sup> Further, Pyong-choon Hahm mentions in passing that even after Japan annexed Korea in 1910, and increasingly used at least criminal law as a raw instrument of social control – creating, in his view, antipathy to the concept of modern law – civil cases at first

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30 Page 180. Cf F Upham "Speculations on Legal Informality" (1994) 28 LSR 233. Commenting on persistent informality in the modern Taiwanese legal system, Upham expresses doubts as to whether a formal legal system based on the "rule of law" contributes to economic development, and hence as to "globalisation" or "convergence" on such a basis.

31 Page 181.

32 Pages 181-2 (emphasis added).

33 See generally E Said *Culture and Imperialism* (New York, Random House, 1993).

Further, Y Noda (A Angelo, trans) *Introduction to Japanese Law* (University of Tokyo Press, Tokyo, 1976) 9-18, develops a remarkably similar line when discussing "Difficulties in the Study of Japanese Law". Specifically, he also suggests the possibility of "an inseparable relationship between law and language". However Noda explicitly refers to treatises on linguistics and social psychology; he also relates language to the character type of the Japanese, which he later examines in detail (13; 159-183).

34 Page 42 (emphasis added).

instance increased from 34,737 cases in 1912 to 56,991 in 1924.<sup>35</sup> Even though it is unclear what proportion of these cases involved only Korean parties, and other variables such as population growth would have to be accounted for, this trend also suggests that the tradition of non-litigiousness may not have been as uniform as was previously believed.<sup>36</sup>

What alternative "line" might then be adopted on these early, and subsequent, developments in Korean law? One might be to consider whether in Korea, as in Taiwan prior to its occupation by Japan, the use of a variety of contract forms had already developed, to provide some commercial certainty, and whether the provisions of such contracts allowed for "self-enforcement" rather than external coercion through a formal court system we have come to expect in the West.<sup>37</sup> A second line might be to consider the institutional incentives affecting the invocation of court adjudication after the Japanese imposed a "modern" legal system in Korea, such as changing court costs and delays, or statutory intervention diverting cases to compulsory mediation proceedings.<sup>38</sup> This line, in particular, argues for a fairly strong instrumental rationality amongst Koreans, when they decide whether or not to bring suit through the courts.<sup>39</sup> But it receives some support from the Survey itself, as where 37% associated appearing in court for "money matters" with litigation being "expensive and time consuming".<sup>40</sup> A third line, not readily derivable even from the Survey but which this reviewer would be inclined to favour, could then take the "interpretive turn" in social sciences, and look closely at the process by which Koreans'

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35 Page 64. J H Jeong *Kankoku Minpo Hoten no Hikakuhoteki Kenkyu* [Comparative Research into the Korean Civil Code] (Sobunsha, Tokyo, 1989) 49-87, has argued convincingly that modern legal norms from Japan were introduced to Korea well before annexation, through a new training institution for judges, legal education generally, implementation of a system of representation by lawyers, and so on. This longer history may have contributed to the identified increase in the use of the formal court system.

36 However, accurate comparisons of a "propensity to sue" are impossible without an index to determine the number of disputes from which court cases are selected for suit. Cf C Wollschläger "Civil Litigation in Japan, Sweden, and the USA since the 19th Century: Japanese Legal Culture in the Light of Historical Judicial Statistics" in *Proceedings of the 1995 Annual Meeting of the Research Committee on Sociology of Law (International Sociological Association)*, *Legal Culture: Encounters and Transformations* (Japan Committee for the RCSL95, Tokyo, 1995) Papers - Section Meetings III, 2.

37 See R Brockman "Commercial Contract Law in Late Nineteenth Century Taiwan" in J Cohen, R Edwards and F Chen (eds) *Essays on China's Legal Tradition* (Princeton University Press, 1980) 76.

38 In Japan, see J Haley "The Myth of the Reluctant Litigant" (1978) 4 *Journal of Japanese Studies* 359. For Koreans, a particular disincentive to invoking the formal legal system would have been its increasing "Japanisation". See Jeong, above n 35, especially 59-65, 103-139.

39 In Japan, this assumption is taken even further eg by M Ramseyer and M Nakazato "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan" (1989) 18 *Journal of Legal Studies* 263.

40 Pages 148, 305.

initial perceptions regarding "disputes" come to be transformed as both formal and informal aspects of particular dispute resolution processes evolve.<sup>41</sup>

The possibility of adopting such differing lines, alternative readings of the materials in this book, should be seen as confirmation of its breadth and depth. However, it could have been capitalised on by a clearer initial exposition of the editor's own line and certainly, for instance, by including discussion questions after each reading or series of readings.<sup>42</sup> Professor Song, with his success and experience in teaching Korean law all over the world, is eminently suited to suggesting a range of promising avenues of future inquiry. It is hoped that this will emerge in his next compendium of Korean law materials.

In this book, Professor Song has undoubtedly succeeded in his aim of offering "the student, professor, scholar, current practitioner or government official *the means* to achieve a basic understanding of the Korean law and legal system as they operate in the real world".<sup>43</sup> As an excellent resource, it does however deserve one combined index, rather than a separate and cumbersome index for each individual chapter. Typographical errors are sometimes distracting; all the more so are the main font (unfamiliar to New Zealand readers), and sometimes the sheer variety of fonts used in this book.<sup>44</sup> However these are trifles, for a splendid 1500-page reference tool. If US\$197 seems fully priced, remember that this includes airmail postage, and that Korean publishers – just like Korean law – are now part of the global economy.<sup>45</sup>

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41 See eg Y Wada "Rethinking Formality and Informality in Dispute Resolution", unpublished paper presented to the NZ Institute for Dispute Research and Resolution, and the NZ Society for Legal and Social Philosophy (Wellington, 12 June 1996).

42 Cf eg Y Yanagida et al *Law and Investment in Japan: Cases and Materials* (Cambridge MA, Harvard University Press, 1994).

43 Page i (emphasis added).

44 Page 831, for instance, uses six variations.

45 The book can be ordered directly from: Bak Young Sa Publishing Co, 13-31 Pyung-Dong, Chongro-ku, Seoul, Korea 110-102 (fax: +82 2 736-4818). ISBN 89-10-50335-1.