

BOOK REVIEWS

Restructuring the GATT System

By John H. Jackson. New York: Council on Foreign Relations Press, 1990, pp. 121, \$14.95 (pb).

The GATT Legal System and World Trade Diplomacy

By Robert E. Hudec. Salem, New Hampshire: Butterworth Legal Publishers, 1990, pp. 376, \$85.00 (hc).

John Jackson's compact book on *Restructuring the GATT System* discusses GATT institutional issues, not substantive rules. Part I takes the reader through the unique constitutional structure of the GATT—born, as is well known, as a provisional arrangement that became permanent when the International Trade Organization (ITO) never came into existence. Part II addresses primarily the GATT dispute settlement process—as it now operates and as Jackson would modify it, modestly as it turns out. Part III, which in name (“A New Constitution for World Trade?”) seems adventurous, is at heart realistic and pragmatic. Jackson believes GATT needs an umbrella institution, a World Trade Organization, that would provide secretariat, dispute settlement, and other institutional functions for the GATT and the almost 200 GATT-related side agreements. The new organization would contain no rules of member state conduct in trade policy. That would be left to the GATT and GATT side agreements.

Part I covers ground that Jackson himself has written about elsewhere.¹ But this part of the book is important. The reader must have in mind the constitu-

1. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

tional structure of GATT (membership, voting, interpretation, and amendment power, and the ambiguous status of GATT-related side agreements) to understand the dispute settlement and organizational issues.

Part II focuses on dispute settlement. Jackson discusses the policy issues underlying whether GATT should be mainly a negotiating forum (like the OECD) or a rule-based international regulatory agency (like the IMF). Jackson prefers rules, and history seems to be on his side. As he points out, GATT practice has evolved gradually, from the late 1940s to today, toward a more rule-based, judicialized dispute settlement system. Jackson discusses the central dispute settlement provisions of GATT article XXIII and the key concepts of "nullification and impairment" and "prima facie nullification and impairment." He notes the major procedural shift in 1955 when GATT replaced "working parties" (made up essentially of government delegations subject to government instructions) with more arbitration-like panels of experts. He also calls attention to the increased judicialization implicit in the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

Dispute settlement is once again a major topic in the current Uruguay Round GATT negotiations, which as of this writing are still uncompleted. Indeed, it would seem that Jackson wrote this book to outline institutional changes he hoped the Uruguay Round would adopt. His ideas are clearly on target, but with hindsight, perhaps too modest. About the only significant change from existing procedure Jackson proposes is to remove the disputing parties' current power (under the traditional consensus, or unanimity, rule) to block GATT Council approval of a panel report.

The Uruguay Round negotiations to date appear to have accepted more judicialization than Jackson himself envisioned, as reflected in the draft negotiating text issued by the GATT Director General, Arthur Dunkel. Under the Dunkel draft, which apparently represents considerable consensus—at least concerning dispute settlement—GATT Council adoption of panel reports would be virtually automatic. The draft would require *consensus to reject a panel report*²—a decision rule that turns the previous veto rule on its head.

The draft includes several other significant provisions to strengthen the procedure and encourage a more judicial approach. The most innovative change is the creation of a Standing Appellate Body with the authority to review panel decisions for errors of law (but not fact).³ The draft sets time limits for various stages of the process so that in an ordinary case the period for issuance of a final panel report should be no longer than about ten months. The council should adopt the panel report within sixty days of receiving it,⁴ unless there is an appeal,

2. Dunkel Draft, Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, art. 14.4.

3. *Id.* arts. 15 and 15.3.

4. *Id.* art. 14.4.

or within thirty days of an appellate body report,⁵ which itself should be issued within sixty days of the appeal.⁶ Thus the entire process should not last longer than about thirteen months. The draft even provides for time limits on compliance by member governments with adopted panel decisions.⁷ To deal with the problem of competing dispute settlement provisions under the many GATT side-agreement codes, the Dunkel draft adopts an Integrated Dispute Settlement System that provides in general for the Dunkel draft procedure to apply even under the codes.

In part III concerning "A New Constitution for World Trade," Jackson strikes a note that has resonated with the Uruguay Round negotiators. He urges adoption of an agreement concerning only institutional and organizational matters (membership, voting, secretariat features, the dispute settlement process) that would create a World Trade Organization (WTO). The organization would of course function as the institutional framework for the GATT and its side agreements, but the substantive rules would remain in the existing agreements. Currently such an approach is under active negotiation in the Uruguay Round and seems likely to be adopted if the current stalemate over agricultural trade is broken and the Round is completed successfully.

This WTO or MTO (Multilateral Trade Organization) approach has wide implications and an important link to the more judicialized dispute settlement approach now in ascendancy. The linkage is as follows. If the GATT dispute settlement process is to become truly adjudicatory—with rules taken seriously—there is a festering legal problem inherent in the GATT side agreements that will rear its head over and over again. The side agreements extend only to the subset of GATT members who are parties to them and purport to grant favorable trade treatment only to those parties. At the same time, article I of the GATT imposes an unconditional Most Favored Nation (MFN) obligation on all GATT parties to the benefit of all other GATT parties. Thus, under the GATT MFN obligation, any trade benefits provided under a side agreement should be automatically extended to all GATT members, even those not party to the side agreement. But of course such an outcome would gut the side agreements of meaning. Thus far, parties to side agreements have more or less ignored their GATT MFN obligations, but could not readily do so under any system moving toward greater judicialization.

The solution that appears imminent in the Uruguay Round, if it is successful, will probably require all parties who join the new WTO to withdraw formally from the existing GATT. This will not mean the demise of the GATT. The WTO agreement itself will incorporate the substantive provisions of the current GATT and most of the existing side agreements. The new WTO will also contain an

5. *Id.* art. 15.14.

6. *Id.* art. 15.5.

7. *Id.* art. 19.

unconditional MFN provision, but it will run only to those countries that accept the WTO and the side agreements included under its umbrella. The new judicialized dispute settlement process will also be a part of the WTO. The upshot will be to put the GATT's legal house somewhat more in order before it embarks on a more judicialized process for taking its rules seriously.

The second edition of Robert Hudec's *The GATT Legal System and World Trade Diplomacy* is, as the author says in the preface, not a revised edition, but essentially a reprinting of the first edition with only the barest new information concerning GATT cases not completed at the time of the first printing. Nevertheless, the book is such a classic it deserves mention in this review. Hudec's book traces the origins of the GATT, the early successful workings of its dispute settlement system (1948-1963), and the decline of that system from 1963 to 1975, which Hudec calls the antilegalist period. Now that the GATT dispute settlement system has been reinvigorated and stands on the verge of a major leap forward, the second printing of Hudec's book is especially timely.

As Hudec notes in his second edition preface, the "subtle and elusive jurisprudence of the 1950's"—with which his book largely deals and which sought to camouflage what legalist nature the process then had—would not be appropriate for GATT dispute settlement in the 1990s. At the same time, adoption of a new WTO charter and the dispute settlement reforms of the Uruguay Round would not change the underlying substantive GATT concepts. As Hudec puts it in his preface: "A bridge to the history and background of these concepts is still an essential tool for any lawyer working on GATT legal issues." (p. xiii) His book provides that bridge with insight, penetrating analysis, and a lucid and appealing writing style.

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Regulation of Foreign Banks: United States and International

Edited by Michael Gruson and Ralph Reisner. Salem, New Hampshire, Butterworth Legal Publishers, 1991, pp. xxvi, 894, \$125.00.

Attorneys practicing in the bank regulatory area in the United States are constantly reminded, almost on a daily basis, of the difficult nature of this practice area. Regardless of their level of experience, all such attorneys will agree that the U.S. banking laws constitute an archaic collection of statutes,

regulations, and regulatory interpretations that are voluminous, complicated, and all too often inconsistent. As the foreword by Robert L. Clarke, the comptroller of the Currency, points out, this situation is complicated by the blurring of the banking, securities, and commodities markets in the United States and internationally, as financial institutions of all types struggle to meet new capital requirements and compete in increasingly crowded markets. Of course, the failure of the United States Congress to pass significant reform legislation during 1991 ensures that this situation will continue for the foreseeable future.

This regulatory environment is complicated enough for U.S. banks. Foreign banks have the additional burden of coordinating their home country's regulatory scheme and their non-U.S. activities with applicable U.S. law. For the attorney advising foreign banks on such matters, precious few research texts are available that present all the necessary information in a complete, yet usable, format. Because *Regulation of Foreign Banks: United States and International*, edited by Michael Gruson and Ralph Reisner, accomplishes that difficult feat, any attorney advising foreign banks on their U.S. activities should view this book as an essential reference text.

The obvious first step for any foreign bank seeking to establish a presence in the United States is the determination of the appropriate vehicle through which it can engage in the desired banking and nonbanking activities. In this regard, chapter 1, written by John L. Carr, Jr. and John H. More of Shaw, Pittman, Potts & Trowbridge, provides a brief explanation of the U.S. regulatory framework applicable to foreign banks followed by a much more detailed explanation of the various legal vehicles available under U.S. law as well as the limitations of each vehicle. Significantly, this chapter addresses the initial questions of whether to seek a federal or state license and whether to establish a branch or agency. (This topic is also covered in part in chapter 2 of the book.) Since the most obvious route (that is, establishment of a branch or agency) does not always present the optimum solution, this chapter also details the other legal vehicles available (Edge Act Corporations and New York State Article XII Investment Companies). Another often-asked question, whether federal deposit insurance is required or advisable, is adequately covered in chapter 6, written by Edward Bransilver and Christopher D. Dillon of Shearman & Sterling. The summary of the federal reporting requirements in chapter 1 is also useful.

Chapter 2, by Edward Bransilver of Shearman & Sterling and Ralph Reisner, provides a general overview of the law governing subsequent expansion of a foreign bank outside its "home state." In this regard, the summary of each state's interstate banking statute is particularly useful as a reference tool, although any conclusions should be checked with a reporting service. Because it is increasingly likely that more foreign banks will seek to enter, or expand within, the United States through the acquisition of a U.S. banking institution, the detailed coverage of this topic in chapter 3, written by Robert Tortoriello of Cleary, Gottlieb, Steen & Hamilton, completes the book's treatment of this

topic. The usefulness of this chapter is enhanced by the clear presentation of the various banking, securities, and corporate law considerations involved in any acquisition, as well as the description of the reporting requirements resulting from any such acquisition.

To address the important topics of risk-based capital and reserve requirements, Gruson and Reisner turned to prominent U.S. regulators. William Taylor and Frederick M. Struble of the Federal Reserve Board (Mr. Taylor has since been appointed to head the Federal Deposit Insurance Corporation) wrote chapter 4, which covers international capital standards for banking institutions. As any practitioner in banking knows, capital requirements increasingly affect the short- and long-term goals of individual banking organizations. While the description of the risk-based standards is important, the authors' views on the rationale behind the standards and the effect of the U.S. standards on foreign banks are particularly useful.

Likewise, the views expressed by Ernest T. Patrikis and Bradley K. Sabel of the Federal Reserve Bank of New York on the reserve requirements applicable to branches and agencies of foreign banks are required reading. Because the application of reserves to a particular banking product or transaction can often alter its ultimate economic success, the thorough explanation of Regulation D and its application to foreign banks will no doubt provide practitioners with a useful reference point.

For long-time practitioners in the area, perhaps the most welcome portions of the book are found in chapters 7 and 8. These chapters, written by the Shearman & Sterling trio of Michael Gruson, Jonathan M. Weld, and Lawrence Brandman, cover the intricate application of the U.S. securities laws to the U.S. operations of foreign banks. If for no other reason, the clear descriptions of Regulation S and Rule 144A contained in chapter 7 are worth the price of the book. As many practitioners know, these topics are important not only to the issuance of securities by foreign banks in the United States, but also for their investment banking areas seeking to introduce home country clients to the U.S. markets. Numerous other topics, such as "ADRs," exchange listing requirements, and Investment Company Act of 1940 compliance are also covered. In reviewing this section, readers should note that on November 4, 1991, the SEC rescinded Rule 6c-9, which made available an exemption from the registration requirements of the Investment Company Act to foreign banks that offer and sell their securities in the United States, and replaced it with Rule 3a-6. Finally, the coverage of permissible securities activities set forth in chapter 8 is useful because it separately handles banking, securities, and commodities law considerations.

In chapter 9, Gruson addresses the nonbanking activities of foreign banks operating in the United States. Although the Federal Reserve Board issued a substantially revised version of Regulation K after the book went to press, the regulation, as proposed prior to adoption, is described in this chapter. These revisions generally expand the ability of U.S. banking organizations to engage in

banking and nonbanking activities abroad and also relax the requirements that foreign banks must satisfy in order to engage in banking activities in the United States. Fortunately, there are very few differences between the proposed Regulation K and the regulation finally adopted. Nevertheless, prudence dictates that the final regulation be checked after referencing the relevant sections of the book.

Finally, the surprisingly detailed descriptions of banking regulations in France, Germany, the United Kingdom, Canada, and Japan are very useful.

In sum, this book is one of the best reference tools in this area currently available in the market. As such, it is a necessary addition for the libraries of attorneys advising foreign banks on their U.S. activities. Of course, given the rapidly changing nature of the subject matter, any conclusions of law drawn from the book should be checked to ensure that they are current prior to implementing any proposal based thereon.

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Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec

By Allen Buchanan. Boulder, Colorado: Westview Press, 1991, pp. xviii, 162, \$38.50 (hc), \$14.95 (pb).

The Bosnians are currently fighting to secede from Yugoslavia. In doing so, they join a long list of groups that have sought to secede in the last two years. Professor Buchanan's book could not, therefore, be more timely. In it he argues that groups have a limited, moral right to secede as a basic tenet of the political philosophy of liberalism. The book adds to the evidence provided by recent world events that we should rethink the international law governing secession, which until now has not encompassed a right of secession outside the colonial context.

This book is not, however, directly concerned with international law. Rather, it is part of the new debate between liberals and communitarians over the type of rights domestic societies should embrace. Buchanan is a liberal who believes that group rights, such as the right of secession, can be encompassed within liberalism, despite liberalism's traditional focus on individualism. Buchanan aims to show that communitarianism is not the only philosophy of group rights: "More specifically, the views on secession advanced in this book will both illuminate the

foundations of liberalism in surprising ways and provide a strong case for revising liberal doctrine's apparent refusal to recognize group rights as fundamental moral or constitutional rights.'" (p. 7)

Buchanan's argument may be important for contemporary political philosophy and may be a useful contribution to the liberal/communitarian debate. The book is less likely to be important for international lawyers, but could provide some direction to writers who will, no doubt, begin to reconsider the right of secession in light of recent events.¹

These events, which have occurred and are occurring in the Soviet Union, Ethiopia, Iraq, Yugoslavia, Somalia, and elsewhere, have moved the subject of secession to center stage for international law. Governments appear to be changing their approach to secession from just a few years ago.² The law may therefore be in flux, and policymakers and international lawyers could use a thoughtful treatment of the moral issues of secession to guide them in rethinking the law. Buchanan's book is a beginning in this regard, but has limitations for international lawyers. Buchanan does not show that his moral theory is suited to international law and the international community, or that it takes into account the real complexity of secession. He barely considers the most important moral question for international law in this area—when is it moral to use force during secession?³

The book is probably more concerned with liberalism than secession. The preface and parts of chapters 1 and 2 criticize the failure of liberalism to take group rights, like the right of secession, into account, arguing that liberalism should encompass such rights. Buchanan acknowledges that liberalism is usually concerned with the individual's relationship to government, and that liberalism holds that individuals have rights protecting them from the power of government. But he argues that groups have rights protecting them from government, too, and these can equally be considered liberal rights (pp. 74–81). Groups have, in his view, the right to secede when governments go too far in actions against the group, and, therefore, such a right protects people from government just as do the rights of free speech, religious freedom, free assembly, and other protective liberal rights.

1. Buchanan himself does not claim to be doing any more with the book than starting debate: "I console myself with the hope that this volume will be classified—and judged—as an early work on the moral theory of secession" (p. ix).

2. Until recently governments generally did not recognize break-away groups until they had achieved *de facto* independence. The German Government recently recognized, and convinced EC members to recognize, Croatia before Croatia had established *de facto* independence. The United States resisted recognizing Croatia for some time after EC recognition, but in the end probably recognized Croatia earlier than has been typical in recent years.

3. International law has an extensive literature on secession and related topics such as self-determination and civil war. *See, e.g.*, LEE BUCHHEIT, *SECESSION, THE LEGITIMACY OF SELF-DETERMINATION* (1978); HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (1990).

Buchanan believes groups have a moral right to secede in the following circumstances:

Among the strongest arguments and most widely applicable arguments for a right to secede are the argument from rectificatory justice and the argument from discriminatory redistribution. Under extreme conditions, secession may also be justified on grounds of self-defense and, perhaps more controversially, in some cases where it is necessary for the preservation of a culture. (p. 74)

By rectificatory justice, Buchanan is referring to such cases as the Baltics, where groups were forcibly annexed (p. 67). Discriminatory redistribution can refer to a variety of economic measures, including, he believes, unfair tax policies (p. 40). Self-defense refers to defense against genocide and other human rights abuse (p. 66). From an international lawyer's perspective, it is very hard to understand how unfair taxes could lead to a stronger moral right to secede than abuse of human rights. Indeed, the book's consistent emphasis and concern with personal property rights moves it away from the central concerns of international law.

Rather, international lawyers will be most sympathetic to the arguments that people who are suffering human rights abuse or who have been forcibly annexed should have the right to secede. International law is arguably based not on liberalism, but on the legal/political philosophy of positivism with an overlay of moral norms probably adopted from the most commonly held norms of the members of the international community. Buchanan does not relate liberalism and its moral hierarchy to international law's normative hierarchy, nor does he help resolve the difficult question confronting international law today: When should the norm of peace in international law be preserved at the expense of international law's human rights norms?⁴

This is very much the central normative issue in the secession context. Should groups have the right to take up arms to achieve secession? Should outside parties have the right to forcibly intervene to help them secede? International lawyers are interested in these questions. Whether people have the moral right to peaceably agitate to secede because they are being taxed unfairly is far from our current concerns.

In the remainder of chapter 1, Buchanan seeks to clarify what secession is. He does so by listing abstract categories of secession, rather than describing actual secessions. This approach diverts the author from some of the most serious issues of secession for international law. For example, the book contains a section entitled "Group Versus Individual Secession" (p. 13). This is not a topic of interest to international lawyers since there has probably never been a seriously regarded attempt at individual secession (p. 13). The author also includes a

4. Ironically, Buchanan mentions that international lawyers working on the law of secession have failed to knit together moral arguments with legal analysis (p. xi). Buchanan does not do this either.

section titled "Secession by the Better Off Versus Secession by the Worse Off" (p. 16). This section includes, as examples of "better offs" seeking secession, the Katangese, Biafrans, and Basques. None of these people, however, sought secession simply because they were better off. Far more importantly, they have a different sense of identity from the larger state. Their different sense of identity may coincide with concerns over how they and their resources are treated by the larger state. However, mere enhanced wealth in an otherwise homogenous state has probably never led to a secessionist movement. Indeed, one of Buchanan's odder examples involves an argument that the Home Counties of England might secede from the rest of the United Kingdom because they are better off (p. 20). He argues that better offs may in some cases have the moral right to secede. But this abstract possibility is not one international lawyers are ever likely to encounter.

In chapters 2 and 3, Buchanan reviews the arguments for and against a right of secession. As with the typology of secession, these chapters tend to focus on abstract rather than real reasons groups offer for attempting secession or opposing it. Buchanan includes such arguments as "furthering diversity" and "preserving liberal purity" as possibly establishing moral justifications to secede. He gives no actual examples of these two arguments in particular and surely they have never been made.

Buchanan does include a brief discussion of the argument international lawyers give for the right of secession: to fulfill the right of self-determination. Buchanan says that international law has arbitrarily limited self-determination to the colonial context (p. 20). Yet governments have actually struggled with the concept of self-determination and the need both to support that right and to limit secession. As Doswald-Beck argues, at least until recently, governments have concluded that the right of self-determination in most cases means groups should have the right to have a voice in the government that rules them, not that groups are free to secede.⁵ Nevertheless, international law also holds that when secession succeeds, third states are free to recognize the newly independent state. In a sense, therefore, international law has had an inchoate right of secession that becomes an actual right upon success.

Now, however, with the breakup of the Soviet Union, the community of states seems willing to recognize secessionist groups even before de facto independence, as long as the new government is democratic and promises to protect human rights. These developments may result in a new legal right of secession. The content of the right, however, will need refinement in light of various practical and moral considerations. For example, the traditional rules were developed to protect states that emerged out of colonialism. The leaders of these newly independent countries took the view that they had achieved self-determination by freeing themselves from colonial domination. To allow unlim-

5. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 251 (1985).

ited secession could undermine the self-determination they had won. It is not surprising that the clearest codification of the rule against secession is found in article III of the Charter of the Organization of African Unity.

Buchanan, however, focuses on the self-determination of the break-away group. He does not consider the sense of identity of the larger state, which arguably is what really compels governments to resist secession. He acknowledges that the North fought the South in the U.S. Civil War in order to keep America's experiment in democracy going (p. 97), but he decides this was not a morally appropriate justification for war. He believes that the larger group can resist secession where, for example, the smaller group would deprive the larger one of wealth (pp. 115–24). But this example again distinguishes international law from Buchanan's liberalism. International law rules regarding secession seek to preserve self-determination and self-identity, not necessarily wealth. The rules may change, but are likely to continue to reflect the desire for self-determination, both by the existing state community and by groups seeking to break away. Perhaps Buchanan's focus on the break-away groups rather than on the state as a whole is due to the fact that liberalism is a philosophy of rights against the government. Communitarians might have more to say about when communities should be preserved and, therefore, the rights of the smaller community should give way to those of the larger one. The book's final chapter, chapter 4, discusses constitutional provisions to protect the right of secession. In international law such provisions have, again, limited importance, because whether or not people have a constitutionally guaranteed right to secede, they may still have the right to secede under international law.

Buchanan writes that this is an early work on the subject, and as such it has merit. Those with both an understanding of international law and philosophy will hopefully build on Buchanan's beginning and provide the basis for a revised law of secession, incorporating an examination of international law's normative principles.

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Law and Political Authority in South Korea

By Dae-Kyu Yoon. Boulder, Colorado, and Seoul, Korea: Westview Press and Kyungnam University Press, 1991, pp. xiii, 247, \$40.00.

Despite the upswing of interest in Asian law among Western legal scholars and practitioners in the last decade, there is still a dearth of Korean legal scholarship

published in English. In *Law and Political Authority in South Korea*, Professor Yoon makes an important contribution to this select body of literature.

Korea is pivotal to an understanding of how legal institutions developed in Northeast Asia. In the premodern period, Korea was the foremost interpreter of the Chinese legal tradition. Later, with Taiwan, it became the site of Japan's colonial experimentation with a fusion of Japanese legal concepts and codes newly enacted along European lines. In the postwar period, Korea's legal system retains those European and Japanese influences. Like Japan and Taiwan, it has been influenced by Anglo-American models of law, principally in the commercial and consumer law areas. Rapid economic growth, changing societal norms, and popular expectations of legally enforceable rights have fuelled the growth of postwar legislation in South Korea.

This is the first book in English that describes and analyzes the development of public law in South Korea. Its specific focus is constitutional reform and judicial review of administrative decisions. Professor Yoon also describes how the bureaucracy and legal professions have shaped public law in Korea.

The central thesis of *Law and Political Authority in South Korea* is that, although South Korea professes to be a democracy, it has not yet achieved the rule of law. "Rule of law" is used to mean law that legitimates government by justifying its authority and by controlling its political power. Law used in this way must be autonomous, the product of an effective balance between all branches of government—executive, legislative, and judicial.¹

Professor Yoon argues that Korea has failed to maintain a separation of powers. In his view, the executive branch has used law to extend and bolster its rule, while deflecting restraints on its power that should be exercised by the legislature and the judiciary. In particular, he charges the courts with not exercising their powers to give effect to the ideals of the Korean Constitution.

These observations will be familiar to readers with some knowledge of Korea, but Professor Yoon's illustrations introduce new information for an English-language audience. The first chapter deals with the historical and cultural underpinnings of Korean law. During the Yi dynasty (1392-1910), neo-Confucianism became the state ideology and both monarchical rule and the administration were highly centralized. Law was a body of criminal and administrative measures used by bureaucrats to enforce Confucian norms. Neither a merchant class nor rival clans emerged to disturb the social order, which remained fairly static until the Japanese Occupation in 1910. Although Japan contributed its own newly modernized legal system to Korea, law during this period was widely perceived as alien and an incident of colonial interests—not a vehicle for justice or individual rights.

Authoritarian administration, the importance of familial ties and social status, and popular distrust of law, are some features of the contemporary legal system

1. For a discussion of this in the Japanese context, see JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1992).

that Yoon traces to these periods. All are reflected in the nature of the Korean bureaucracy, discussed in chapter 2.

Chapter 3 describes how bureaucrats enforce law in Korea. The author argues that the values internalized by bureaucrats result in efficiency and administrative convenience being favored over procedural fairness or individual entitlement. Similarly, the exercise of wide discretion leads to discriminatory enforcement. He cites, as examples, arbitrary arrest and administrative agencies that deliberately ignore or circumvent judicial decisions not in their favor.

In the second part of the chapter he describes how law is used in Korea to further political objectives: through martial law, political pressure on prosecutors, and censorship. The stormy passage of the budget and the tax exemption and relief bill in 1986 is a telling illustration (p. 80). In the face of opposition resistance to the bills, government members retired to their caucus room and passed the laws without debate. Outraged opposition members and staff broke down the door, whereupon prosecutors indicted ten assemblymen for obstructing official duties and assault. Prosecutors had up until this point avoided any involvement in Assembly matters, so the decision to formally prosecute opposition members was perceived as politically motivated.

Chapter 4 details the way in which ruling party control of the legislature has stifled debate and allowed Korean presidents to dictate legislative and constitutional change. The eight constitutional amendments prior to 1987 were largely designed to entrench each new regime. Following widespread public protest in 1987, the ninth amendment—approved by referendum—introduced a number of significant reforms. Among these are: a five-year single-term presidency; presidential election by direct vote; and a new constitutional court. *Law and Political Authority in South Korea* does not cover the implementation of these reforms, but the signs are that Koreans' confidence in the Constitution has increased markedly.

Chapter 5 surveys the legal professions and judicial independence. Yoon lists a number of institutional limitations affecting access to justice in Korea: an acute shortage of lawyers, prosecutors, and judges; insufficient legal training; public distrust of the impartiality of criminal proceedings; and inadequate relief in civil proceedings.² The major problem Yoon identifies, however, is political interference in court proceedings and a lack of judicial independence. The presidential prerogative to appoint new Supreme Court Justices with each new constitutional amendment has been a contributing factor. Nor do lower level judges have secure tenure; refusals to reappoint and postings to the provinces have been used as sanctions against judges whose decisions were politically inconvenient.³

Judicial review of legislation, discussed in chapter 6, has had a checkered history in modern Korea. A system for reviewing the constitutionality of legislation has

2. Haley's work on institutional barriers to private litigation in Japan is also relevant to Korea. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

3. Although the Japanese Supreme Court has also been accused of conservative attitudes to constitutional challenges, it has not been the subject of overt political influence. See, e.g., ITOH HIROSHI, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* (1989).

existed since 1948. While all courts were empowered to review the scope of “lower laws”—decrees, ordinances, regulations, and dispositions—typically the constitutionality of legislation (*pomnyul*) has come under the jurisdiction of a special agency, either a Constitution Committee or Constitutional Court.

During the First Republic (1948-1960) the Constitution Committee comprised representatives from the executive, legislative, and judicial branches of government. This was a departure from the first draft of the Constitution, which had contemplated American-style judicial review. The compromise was forced by distrust of judges, stemming from the colonial period. Review was limited to actual cases in which the determination of the constitutionality of a law was a “prerequisite to a trial”; seven cases were decided during this period (p. 152). The Constitution Committee was succeeded by a permanent, politically neutral Constitutional Court during the Second Republic (1960-62).

With the military coup that established the Third Republic (1962-1972), constitutional review power was vested in the Supreme Court. Judicial review during the period was modeled on American principles. Professor Yoon evaluates this as the most active period of judicial review, notwithstanding a Supreme Court that overturned lower court findings of unconstitutionality and invoked the “political question” doctrine to dismiss other cases. In fact, the Supreme Court found only one law to be unconstitutional during the period.

In the Fourth Republic (1972-1980), review power was returned to a Constitutional Committee, but the Supreme Court found all legislation in issue to be constitutional and declined to refer any cases to the committee during the period. The Constitution Committee was retained during the Fifth Republic (1980-87), when it reviewed no legislation.

Professor Yoon reads this postwar pattern as being one of self-restraint by the courts, inspired by fears of political threats to the judicial system. He argues that the result has been not only passivity toward judicial review, but the absence of any effective checks on government lawmaking. Erosion of judicial power has also meant that the courts in Korea have been unable to render decisions that facilitate social change.

The year 1987 marked a major shift in the political and judicial landscape when widespread popular protest culminated in significant constitutional amendments. Among the changes was the reestablishment of a Constitutional Court. Like its 1962 predecessor, this court is composed solely of judges who are required to be politically neutral. The initial appointees were judges with considerable distance from the Supreme Court and prior review structures. The Constitutional Court has jurisdiction over: (a) the constitutionality of legislation, upon request of the courts; (b) impeachment; (c) dissolution of a political party; (d) disputes over jurisdiction among state agencies and local government; and (e) petitions relating to the Constitution as prescribed by legislation.⁴

4. Article 111, Constitution (1987).

The Constitution Committees of the two previous eras were designed to be passive recipients of court-referred cases, but the new Constitutional Court is able to accept petitions for review directly from citizens. Reviews of constitutionality of legislation must still be requested by the courts, but only the Constitutional Court has authority to review and render a binding decision on the case. Time will tell whether the Constitutional Court will fully exercise its institutional powers. It has the potential to be the most active body in the history of the system of judicial review in Korea.

In the balance of the chapter, Professor Yoon gives an extended and absorbing description of some of the reported cases considered between 1962 and 1972. Many of the cases he cites are, by his own admission, extreme examples of governmental abuse of the legal system; the value for the reader is that here these well-known political incidents are recast in their legal context.

Although the text does not fully describe the 1987 constitutional reforms in South Korea, the contextual information provided is essential in order to understand why the changes are significant. The discussion also provokes questions about why public law has developed so differently in Japan and South Korea, and what similarities or differences there might be in the Korean and Taiwanese experiences.

Chapter 7 is a short list of suggested legal reforms through which rule of law might be realized in South Korea: (i) increasing participation in the political process; (ii) decentralization of politics and growth in local autonomy; (iii) protection for freedom of expression; (iv) freeing the legislature from executive control; (v) enhancing judicial independence and expanding the legal profession; and (vi) active application of constitutional principles in cases. Despite an essentially negative history, the author remains optimistic about the prospects for the rule of law taking permanent root in Korea. This optimism prevents *Law and Political Authority in South Korea* from merely cataloging the failures of the Korean legal and political systems. However, this part of Professor Yoon's thesis is the least persuasive. His preference is clearly for a rule-of-law system and the use of law to advance individual rights. He does not address the question of how this might be achieved in practice, given the Korean context that he outlines so carefully in the early chapters.

Unlike existing works on Korean law, *Law and Political Authority in South Korea* is a jurisprudential discussion, not a descriptive or practitioner-oriented text.⁵ Evident in its style and structure, it has been adapted from Professor Yoon's doctoral thesis at the University of Washington. The careful construction of the theory dominates the illustrations. The summaries of reported cases and survey data leave the reader asking for more detail. Nevertheless, it

5. Examples of the latter include INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA (Song Sang-Hyun ed., 1983); BUSINESS LAWS OF KOREA (Kim Chan-Jin ed., 1982); V.L. Taylor, *Korea, in DOING BUSINESS IN ASIA* (Malcolm Smith ed., 1991).

makes an important contribution to existing literature and it is to be hoped that more Korean legal scholarship of this quality will find its way into translation.

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East-West Trade: Changing Patterns in Chinese Foreign Trade Law and Institutions

By Cheng Yuan. Dobbs Ferry, New York: Oceana Publications, Inc., 1991 pp. xxvi, 357, \$65.00.

Those who would write for an audience of both practitioners and scholars about East-West trade these days must navigate their way through a most perilous channel. If they focus their work too narrowly on current laws and practices, they may well find themselves overtaken by rapidly changing and oft unpredictable events. Conversely, if they take a markedly more abstracted approach, they run the risk of seeming to be irrelevant to at least one of their principal audiences, while not necessarily escaping the problem of timeliness.

Cheng Yuan's substantial tome does a good job of seeking to transverse these difficult shoals, although ultimately it cannot wholly elude the dangers identified above. *East-West Trade* basically is an effort to cast the development of the contemporary law and practice of the People's Republic of China regarding foreign trade in its appropriate historical, institutional, and economic contexts. Although not so identified by the author, this monograph, in essence, addresses three principal topics—the building by the PRC prior to 1979 of a centrally directed foreign trade monopoly modeled on that of the Soviet Union; the partial reform of that structure between 1979 and 1989; and the type of further reforms that appeared in the offing prior to the Chinese Government's suppression of the Beijing Spring movement in June of 1989.

East-West Trade is at its best as it seeks to portray the Soviet roots of the PRC's early structure for international trade and in its later discussion of the impact of the reform efforts of the 1980s on that structure. The book provides a thorough and readable overview of a bureaucracy and mode of operation, that even after the aforementioned reform, remain complicated and, in many key respects, obscure for most outsiders and even many inside the system. Cheng, who was trained at Beijing University prior to taking a doctorate at London under the

well-known scholar of Russian law, William Butler, not only has an evident feel for the way in which China is organized, but has also done very extensive research in both Chinese and Western sources.

Although valuable for the background it provides about the origins and growth through 1989 of the Chinese foreign trade system, *East-West Trade* is less useful for persons whose interests direct them chiefly to the period since that time. It would be unfair to expect anyone to have foreseen the Party's partial retreat from its reform program in late 1988, the student and worker activism of spring 1989, the government suppression thereof, the immediate post-June 1989 efforts of the central government to consolidate political and economic control, the subsequent struggle at high levels as to the direction of the national economy, and the move toward greater economic liberalization evident during the first half of 1992. Still, one cannot help but observe that Cheng Yuan's book fails to provide us with an explanatory framework in which to consider these changes or otherwise to think about the future. For while the specific course of change since 1988 has been in many respects unforeseeable, the likelihood that tensions embedded in the very structures and practices described by Cheng Yuan would necessitate massive additional change was not. One wishes that Cheng Yuan had been bolder in identifying those tensions and in discussing directly such matters as the difficulties inherent in the Communist Party's attempts to devolve its monopoly on foreign trade while retaining its monopoly on political power. That might well have provided a vitality to the book that would warrant more persons beyond those of us in the academy purchasing it.

At a less lofty level, it should be noted that Cheng Yuan has defined trade narrowly. As a consequence, the book does not touch in any meaningful degree upon the PRC's undertakings with respect to technology transfer or investment. As each of these is both important in its own right and frequently interwoven with trade issues, their omission is a serious one. The book would also have been enhanced had it contained more in the way of actual examples set in a broader theoretical context, in the manner of recent works by Randall Stross (*Bulls in the China Shop and Other Sino-American Business Encounters*) and Margaret Pearson (*Joint Ventures in the People's Republic of China: The Control of Foreign Direct Investment Under Socialism*).

East-West Trade also suffers from a number of editorial shortcomings. It contains a glossary of trade terms, but as these are rendered only in pinyin romanization and Chinese characters, it is of no use whatsoever to persons unable to read Chinese. It would have been quite simple to have added the English. Similarly, there is no index, which is a glaring oversight in a book that, in part, aspires to reach an audience of practitioners and that carries a commensurate price tag.

With the changes that have transpired in the former Soviet Union, Eastern Europe, China, and other Communist states (such as Mongolia and Vietnam)

since this book was written, one can only hope that its capable and industrious author will again turn his eye to this interesting and important subject.

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