

LEGAL ANALYSIS OF TRADITIONAL LEASEHOLD IN KOREA (*CHONSEGWON*) FROM A COMPARATIVE LEGAL PERSPECTIVE

Youngjoon Kwon & Yong-Shik Lee*

I. INTRODUCTION

Korea¹ has long maintained a unique system of contractual leasehold that does not require periodic rent payments, called *Chonse* (the “e” is pronounced with a stress as “e” in “Edward”). Under this system, a lessee makes a one-time deposit of a large sum of money (*Chonsegeum*) with the lessor at the beginning of the lease, does not pay rent for the duration of the lease, and receives *Chonsegeum* back at the expiration of the lease. The lessor may invest or spend the *Chonsegeum* without any restriction, on the condition that it is refunded to the lessee at the end of the lease period. The lessor also may retain any interest or investment return from the *Chonsegeum* in lieu of rent. This unique system has been the most prevalent form of leasehold in Korea for decades and is not found outside Korea.²

Chonse created a unique housing culture in Korea, which induced a high rate of savings among the population.³ Often, parents would make *Chonsegeum* on behalf of their children as a wedding gift, allowing young people to save money they would have otherwise paid in rent. Unlike their counterparts in other

* Youngjoon Kwon is Associate Professor at Seoul National University School of Law. Professor Kwon is the chapter contributor of *Litigation in Korea* (Kuk Cho ed., Edward Elgar Publishing, 2010), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (E. Ann Black & Gary F. Bell eds., Cambridge University Press, 2011), *The Law in the Information and Risk Society* (Gunnar Duttege, Sang Won Lee Hg., Universitätsverlag Göttingen, 2011) in English, and an author or co-author of numerous books and articles in Korean. Correspondences to the author: youngjoon@snu.ac.kr.

Yong-Shik Lee is Professor in Law at the University of Manchester School of Law and Director of the Law and Development Institute. Professor Lee is the author of *Reclaiming Development in the World Trading System* (Cambridge University Press, 2006, reprint 2009), *Safeguard Measures in World Trade: The Legal Analysis* (Kluwer Law International, 2003, 2005, 2007), and a co-author and the head editor of *Law and Development Perspective on International Trade Law* (Cambridge University Press, 2011). Correspondences to the author: wtogeneva@hotmail.com.

The authors are grateful to Mr. Stephen Brown, a J.D. candidate at Seattle University School of Law, and Mr. Taegyung Ghang, a Ph.D. candidate at Seoul National University School of Law, for their research assistance.

1. Korea refers to the Republic of Korea, or more popularly known as “South Korea,” founded after the division of the Korean peninsula by the United States and Soviet Union in 1945.

2. YOONJIK KWAK, MOOLKWONBEOB [LAW OF PROPERTY] 253 (7th ed. 2002).

3. In 1988, Korea’s saving rate to income was as high as 25%. From 1988 to 1998, Korea’s saving rate remained the highest in the world. FIN. SUPERVISORY COMM’N BLOG, <http://blog.daum.net/blogfsc/881> (last visited Mar. 28, 2012).

countries, *Chonse* allowed young Koreans to save even more toward the purchase of their own houses. *Chonse* was indeed a unique leasehold system that fit the Korean culture of high savings during the ages of rapid economic development, which in turn induced more savings among the population.⁴

Chonse is sometimes protected as a property right unique to Korea—*Chonsegwon*.⁵ *Chonsegwon* refers to a registered *Chonse* arrangement, which creates a leasehold interest in property (a right in rem) for the *Chonse*-lessee.⁶ The utility and practicality of *Chonsegwon* has been diminished, however, with the enactment of legislation intended to protect unregistered *Chonse*-lessees and recent trends in the Korean economy.⁷

This article offers a discussion of *Chonsegwon* from a comparative legal perspective. The legal elements of *Chonsegwon* are discussed and compared with those of Anglo-American leasehold rights. The next Section introduces the origin of *Chonsegwon* and its historical development. Section III provides a comparative legal analysis of *Chonsegwon* by examining its legal elements in comparison with corresponding concepts of Anglo-American common law leaseholds. Section IV assesses the socio-economic implications of this unique leasehold system with a commentary on the future of *Chonse* and *Chonsegwon* in the changing socio-economic conditions of Korea.

II. HISTORICAL PERSPECTIVE

A. Origin

Chonsegwon, recognized as a form of property leasehold right in the Korean Civil Code (KCC),⁸ is a legal transformation of a longstanding custom referred to as *Chonse*. Although there is no single account of how *Chonse* first came into being in Korea, it appears that this custom began to form in the latter part of the nineteenth century.⁹ At this time, Korea, under the Joseon Dynasty (1392–1910),¹⁰ began to face housing issues in urban areas as a result of population increases around its capital city, Seoul, caused by the migration of farmers from rural areas in search of urban employment.¹¹ Those farmers, with

4. For the process of Korean economic development, see Jai Sheen Mah, *Export Promotion Policies, Export Composition and Economic Development of Korea*, 4 L. & DEV. REV., no. 2, 2011, at 3–27.

5. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, arts. 303–319 (S. Kor.).

6. *Id.*

7. See discussion *infra* Part IV.

8. Civil Act, Act No. 471, arts. 303–319.

9. DAESEONG YOON, HANKOOK CHONSEBEOB YEONGOO [RESEARCH ON KOREAN CHONSELAW] 100 (2009).

10. Those changes included the emergence of capitalist class and the process of urbanization. *Id.*

11. *Id.* at 41.

limited financial resources, could not afford to buy houses and required lease properties to meet their housing needs.¹² This trend accelerated as Korea began to open its ports to international trade in the late nineteenth century.¹³

Chonse was also used in the context of personal financing.¹⁴ The peculiar feature of *Chonse*, paying a large sum of *Chonsegeum* (deposit money) upfront with no requirement for rent, can be traced back to the custom of *Kasajeondang* (house pledge).¹⁵ *Kasajeondang*, which is believed to have originated in China, was a form of personal financing that required the owner of the house to offer it as collateral for a loan.¹⁶ Under this arrangement, the creditor attained the right to occupy the house for the duration of the loan as a guarantee for loan payment. If the debtor failed to pay back the loan, then the house was ultimately taken by the creditor.¹⁷ Under *Kasajeondang*, the loan served as a sort of *Chonsegeum*, effectively creating a *Chonse*-style lease arrangement. This peculiar personal financing feature of *Kasajeondang* was consolidated into *Chonse* as it appears now. *Chonse*, in this context, was a security device to guarantee loan repayment.

This history indicates that *Chonse*, as a traditional custom, had dual significances. *Chonse* was, on one hand, a form of homestead lease that allowed a lessee to reside in the house on paying *Chonsegeum* in lieu of rent payment. On the other hand, it was a financing device using a house as collateral. *Chonse*, as a combination of homestead lease and personal financing, slowly appeared as a distinctive housing culture in Korean urban areas.¹⁸

The function of tenancy as a personal financing device is also found outside Korea. For example, leasehold under Anglo-American law (or common law) has also served a personal financing function as well as provided housing: the tenancy, in order to avoid the biblically condemned usury, was essentially a way to loan money without having to charge interest.¹⁹ The land owner presumably would have wealth of land but be short on cash. A lease would turn her land into cash for the duration of tenancy but also allow the principal (the land) to be returned.²⁰ The unique nature of *Chonsegeum* is that the lessee is not required to make rent payments after paying refundable *Chonsegeum* at the beginning of the lease.²¹

12. *Id.*

13. *Id.*

14. Changsoo Yang, *Chonsegeum*, 421 GOSIGHE, Mar. 1992, at 90.

15. For more details, see YOON, *supra* note 9, at 101–08.

16. Jaeseon So, *Chonsegeumneui Byeoncheongwa Gineung [The Evolution and the Function of Chonsegeum]*, in 1 HANGOOKMINBEONBEUI ILONGWA BALJEON [THE DEVELOPMENT OF THE THEORY OF KOREAN CIVIL LAW] 396–97 (1999).

17. *Id.* at 397.

18. JOSEON CHONGDOCKBU, GWANSEUPJOSA-BOGOSEO [REPORT ON CUSTOM INVESTIGATION] 243 (1913).

19. THEODORE PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 570–74 (5th ed. 1956).

20. *Id.*

21. KWAK, *supra* note 2, at 256.

B. Legal Recognition of *Chonse* During the Colonial Period

Upon its annexation of Korea in 1910, the Japanese government undertook an extensive investigation into existing Korean customs, including *Chonse*, as part of its colonization endeavor. The result of this investigation was made available in December 1910 and published in 1913.²² According to this report, *Chonse* was the most prevalent form of homestead lease in Korea at the time.²³ A lessee paid between 70% and 80% of the value of the house as *Chonsegeum* at the beginning of the leasing period.²⁴ *Chonse* was not merely a lease. As discussed above, it also worked as a security device to guarantee loan repayment, using a house as collateral. This explains the high ratio of *Chonsegeum* to the actual value of the house, which was equivalent to the amount of the loan. The leasing period was usually one year,²⁵ but some *Chonse* contracts did not expressly stipulate the period of lease, in which case parties assumed the period to be 100 days.²⁶ The termination of *Chonse* was allowed by notice if no specific term had been agreed upon.²⁷

There were local differences as to the manner of securing the lessee's right to *Chonsegeum*. For instance, in Seoul, the parties would submit relevant documents to *Hanseongboo*, the Seoul administrative office, and have these documents notarized by relevant authorities.²⁸ This documentation was called *Gagehyunrok*.²⁹ In some other local areas, the lessor confirmed the *Chonse* leasehold by handing over another document, called *Chonsemoongi* (confirmation of *Chonse* by the lessor in writing), to the lessee.³⁰ These procedures were not required to create valid *Chonse* between the parties, but were necessary to claim the right against a third party.³¹ *Chonse*, otherwise valid between the lessor and the lessee, took effect against a third party by delivering *Chonsemoongi* or *Gagehyunrok*.³²

In 1912, the Japanese colonial government promulgated the Decree on Civil Matters on Joseon and declared the enforcement of Japanese law concerning civil matters in Korea. By virtue of the Decree, the Japanese Civil Code became the applicable law in Korea concerning private legal relationships, including property matters.³³ The Decree also stipulated that Korean customary law, including *Chonse*, should be applied to private legal matters not covered by the

22. CHONGDOCKBU, *supra* note 18.

23. *Id.* at 243.

24. *Id.*

25. *Id.*

26. *Id.*

27. CHONGDOCKBU, *supra* note 18, at 243.

28. YOON, *supra* note 9, at 116.

29. *Id.*

30. *Id.* at 118.

31. *Id.*

32. *Id.*

33. CHONGDOCKBU, *supra* note 18, at 19.

Japanese Civil Code.³⁴ Colonial judges carried out the task of identifying customary law based on the investigation report published by the Japanese colonial government.³⁵ The recognition of *Chonse* as Korean custom at the judicial level took place on March 8, 1912, by the *Joseon* High Court.³⁶ *Chonsegwon*, which is a legal recognition of *Chonse* as a property right, was not created at this point.

C. Incorporation of *Chonsegwon* in the Korean Civil Code

The Japanese colonial rule over Korea ended when Japan was defeated in World War II. The Republic of Korea was established on August 15, 1948, after a period of mandated rule by the Allies.³⁷ Building a modern legal system was an urgent task for the new Korean Republic. Drafting the KCC was an important part of this task. The outbreak of the Korean War (1950–1953) delayed this process, and the KCC was finally completed and approved by the Korean legislature in 1958; it took effect on January 1, 1960.³⁸ Despite several amendments, the basic structure of the 1960 KCC still governs all areas of private legal affairs, including contracts, property rights, family relations, testament, and probate.³⁹

The KCC includes seventeen provisions on *Chonsegwon*.⁴⁰ It stipulates *Chonsegwon* as a right in rem, or a property right, rather than a right in personam, or a contractual right.⁴¹ According to the Korean customs as recognized by the Japanese colonial investigation report, *Chonse* was a form of a homestead lease contract.⁴² Thus a *Chonse* lessee possessed only a contractual right against a lessor, not a right in property itself, and could not claim the right against a third party (such as a subsequent purchaser of the property) unless the third party assumed the existing lease contract.⁴³ The drafters of the KCC restated

34. *Id.*

35. The colonial construction of customary law has significantly influenced modern Korean civil law and jurisprudence. Marie Seong-Hak Kim, *Customary Law and Colonial Jurisprudence in Korea*, 57 AM. J. COMP. L. 205, 244 (2009).

36. Joseon High Court, Minsang 15, Mar. 8, 1912 (S. Kor.).

37. Youngjoon Kwon, *Korea: Bridging the Gap Between Korean Substance and Western Form*, in LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS 151, 156 (E. Ann Black & Gary F. Bell eds., 2011).

38. *Id.*

39. The first comprehensive amendment of the KCC, after its first enactment in 1960, was being drafted as of September 2012. In early 2009, the Ministry of Justice announced a four-year plan for the comprehensive amendment of the KCC. To facilitate this process, the committee for the amendment of the KCC has been formed and has been working on the draft.

40. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, arts. 303–319 (S. Kor.).

41. *Id.*

42. CHONGDOCKBU, *supra* note 18, at 269.

43. *Id.*

Chonsegwon as a property right, which is stronger than a contractual right and effective against a third party who may take over the property from the lessor without having necessarily assumed the original lease contract.⁴⁴

This approach, which strengthened the right of *Chonse* lessees, met substantial criticism.⁴⁵ The critics argued that *Chonse* was a merely distinctive form of a lease contract.⁴⁶ Thus, they argued, it would be sufficient to regulate it as one of the contractual forms under the KCC.⁴⁷ According to them, other measures could be devised to protect lessees without converting *Chonse* to a right in rem.⁴⁸ An argument also was advanced that because a right in rem requires registration,⁴⁹ which is costly and time-consuming, the lessor may simply keep the arrangement contractual in order to avoid creating *Chonsegwon* for the lessee.⁵⁰ Critics also pointed out that *Chonse* was mainly used in urban areas, in particular the capital city of Seoul, and was not frequently used in rural areas.⁵¹ As such, the time was not ripe for *Chonse*, with limited geographical practice, to be regulated by the KCC, which applies throughout Korea.⁵²

Despite the critiques, *Chonsegwon* was finally incorporated in the KCC;⁵³ however, much of this criticism proved to be valid. *Chonse* lessors indeed felt that the process of creating *Chonsegwon* was cumbersome⁵⁴ and that the strengthened lessee rights created by *Chonsegwon* did not serve their own interest. The lessors also were not pleased to see the *Chonsegwon* entry on their own property registration; they were concerned that a prospective purchaser or a financial lender might not prefer to see it on the registration of the property as it would be incumbent on their rights as the subsequent purchaser or the creditor with collateral. Thus, many lessors preferred to keep the arrangement contractual, without creating *Chonsegwon* as stipulated in the KCC, and new laws had to be enacted to protect *Chonse* lessees who did not have the protection of *Chonsegwon*.

44. Civil Act, Act No. 471, arts. 303–319.

45. MINSABEOBHACKHOE [CIVIL LAW ASS'N], MINBEOBAHN EUIGYUNSEO [COMMENT ON THE DRAFT OF THE CIVIL CODE] 183–84 (1957).

46. *Id.*

47. *Id.*

48. *Id.*

49. Civil Act, Act No. 471, art. 312.

50. MINSABEOBHACKHOE, *supra* note 45, at 184.

51. *Id.*

52. *Id.*

53. Civil Act, Act No. 471, arts. 303–319.

54. According to a 2008 survey, only 8% of the commercial *Chonse* (with more than 0.24 billion won of *Chonsegeum*, approximately 20,000 U.S. dollars) were registered as *Chonsegwon*. See JOONGSO GIUPCHEONG [SMALL AND MEDIUM ENTERPRISE ADMINISTRATION], SANGGA IMDAECHA SILTAEJOSABOGOSEO [SURVEY ON COMMERCIAL LEASE] (2008).

III. LEGAL ANALYSIS

As the concept of *Chonsegwon* is unique, a comparative legal analysis would be helpful to understand the legal nature of *Chonsegwon*. This Section provides a legal analysis of *Chonsegwon* in comparison to the corresponding common law leasehold concepts. The legal requirements of *Chonsegwon* also affect the usage of *Chonse* and *Chonsegwon* in the Korean society and thus need to be understood before assessing its socio-economic impact.

A. Preliminary Considerations

Chonsegwon is a right in rem on real estate created by contract and registration.⁵⁵ As a preliminary analysis, the four key concepts of *Chonsegwon* are: 1) right in rem, 2) real estate, 3) contract, and 4) registration, need to be clarified in comparison to the corresponding concepts in the common law. Further discussion of the legal elements of *Chonsegwon* is provided in the subsequent subsections.

1. Right in Rem

The right in rem associated with *Chonsegwon* is a concept that originated in Continental European law, particularly German law.⁵⁶ The right in rem in the Civil Law system⁵⁷ refers to a legal right directly exercised on a physical object, and it is valid and effective against all persons.⁵⁸ The absolute and monopolistic aspect of the right makes it clearly different from the right in personam.⁵⁹ The right in rem is most notably different from the right in personam in that by having a right in rem, the holder of *Chonsegwon* can claim her right against a new owner of the real estate even if the new owner does not assume the original lease contract

55. KWAK, *supra* note 2, at 253.

56. For more details on the comparative analysis, see Sjef Van Erp, *Comparative Property Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1043, 1051–57 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

57. The Civil Law system of the Continental Europe refers to the legal systems and traditions developed in the Continental European countries, such as Germany and France, based on the comprehensive statutory systems including the Civil Code. The Civil Law system is in contrast to the Common Law system developed in England and subsequently spread out to North America, Australia, and the other former British colonies, which is originated in non-statutory bodies of law, such as Contract Law and Tort Law, based on judicial precedents. The Civil Law system has been adopted by the East Asian countries, such as Korea and Japan, and laid foundation for their modern legal systems.

58. CHANGSOO YANG & YOUNGJOON KWON, KWONRIEUI BYONDONGGWA GOOJE [THE TRANSFORMATION AND THE REMEDY OF THE RIGHT] 14 (2011).

59. Van Erp, *supra* note 56, at 1051–52.

that has created *Chonsegwon*.⁶⁰ It also provides that the *Chonsegwon*-holder can repel anybody who interferes with her right, including the owner of the property.⁶¹ The strength and stability of *Chonsegwon* is substantially enhanced because it is recognized as a right in rem.

Chonsegwon as a right in rem is analogous to the right of leasehold under the common law. The common law distinguishes two types of estates: freehold and nonfreehold (otherwise known as leasehold),⁶² and both are recognized as rights in rem.⁶³ The leasehold relationship is created under the common law when a lessor transfers a nonperpetual possessory interest in land or a building to a lessee.⁶⁴ As the leasehold right is recognized as a right in rem, it is also distinguished from contractual rights in the common law, which are in principle valid only between the parties to the contract.⁶⁵ Conversely, a leasehold right is effective against any other person with respect to the leased property.⁶⁶

2. Real Estate

Chonsegwon is a right to real estate.⁶⁷ Real estate refers to immovables, comprised of land (ground) and permanent attachments to the land, including buildings.⁶⁸ The KCC, with respect to the right in rem, distinguishes and separates land from permanent attachments to the land, such as buildings.⁶⁹ This can create separate property interests in land and the building that stands on it, in which case the owner of the building may have to lease the land to secure her property interest in the building. As further discussed below, registration is required to create, maintain, and terminate a property interest in Korea, and thus the separate property rights have separate entries on the registry.⁷⁰ The KCC's recognition of separate property interests is in contrast to the common law treatment of real estate, which extends a property right in land to any permanent attachment thereon, including buildings and other physical objects.⁷¹

60. Yang, *supra* note 14, at 94.

61. *Id.*

62. CORNELIUS MOYNIHAN & SHELDON F. KURTZ, *MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY* 78 (4th ed. 2005).

63. *Id.* at 78–80.

64. A leasehold estate under the common law can be classified as tenancy for years, periodic tenancy, tenancy at will, or tenancy at sufferance. *Id.*

65. *Id.*

66. *Id.*

67. KWAK, *supra* note 2, at 255.

68. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 99, ¶ 1 (S. Kor.).

69. YANG & KWON, *supra* note 58, at 40.

70. Civil Act, Act No. 471, art. 186.

71. BRUCE ZIFF, *PRINCIPLES OF PROPERTY LAW* 102 (4th ed. 2006).

3. The *Chonsegwon* Contract

A contract, as an affirmation of the intent of the parties to create the lease, is required to create *Chonsegwon*.⁷² This contract is made between the owner of the real estate and the party who wishes to acquire *Chonsegwon*.⁷³ The contract in the Korean law is a right in personam and is not effective against a third party who does not assume the contract. Thus a *Chonsegwon* contract is not in principle binding on a third party; further action, including registration, is required to create a leasehold as a property right that is valid and effective against a third party.⁷⁴ The contract need not be evidenced in writing, although most *Chonsegwon* contracts are in writing for practical evidentiary reasons. By contrast, the common law requires all contracts pertaining to an interest in land, including leasehold contracts, to be in a signed writing for enforcement.⁷⁵

4. Registration

Korean property law requires valid registration to complete an acquisition or transfer of a property right in real estate.⁷⁶ Thus registration, in addition to the contract, is required to create *Chonsegwon*.⁷⁷ Real estate registry offices are maintained in each district court, and the registries are open to the public and accessible online.⁷⁸ The party who acquires a right through registration and the other party, who loses a right or bears a burden of encumbrance, must apply for the registration at the same time.⁷⁹ This means that the prospective *Chonsegwon* holder and the property owner need to agree to register and appear,⁸⁰ in principle, in the registration office to complete the registration.⁸¹

72. KWAK, *supra* note 2, at 258.

73. *Id.*

74. Civil Act, Act No. 471, art. 186.

75. The common law Statute of Frauds requires all contracts pertaining to a transaction in land must be in writing and signed. For further discussions on the Statute of Frauds, see CAUSTEN BROWNE, A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS, AS IN FORCE IN ENGLAND AND THE UNITED STATES (Gaunt, 1997).

76. Civil Act, Act No. 471, art. 186.

77. *Id.*

78. Boodongsandeunggibeob [Real Estate Registration Act, or RERA], Act No. 8922, Mar. 21, 2008, art. 7 (S. Kor.). See also SUPREME COURT OF KOREA, http://eng.scourt.go.kr/eng/proceedings/non_litigation_case.jsp#01 (last visited Mar. 28, 2012) (providing a brief explanation on Korean registry system).

79. RERA, Act No. 8922, art. 23-1.

80. Most of the time, this procedure is undertaken by paralegals who represent both parties.

81. It is not clear whether registration of cancellation is required to extinguish *Chonsegwon*. There is no clear judicial precedent, and academic opinions are diverse on this issue. According to the basic principle stipulated in Act No. 471, art. 186, the acquisition, transfer, and extinction of the right in rem by a juridical act (legally effective

By comparison, the common law does not require registration in order for a leasehold to be effective against a third party. However, certain common law jurisdictions, including some U.S. states, incorporate recording statutes that are comparable to the KCC provision for registration.⁸² Recording statutes are designed to give security to the parties involved in property transactions and/or third parties. Recording statutes vary from state to state but typically include a recording requirement for all leases of certain duration (i.e., one year, three years, etc.).⁸³ An unrecorded lease is not necessarily invalid but simply unenforceable against a subsequent transferee if no notice is given. Additionally, if either of the parties to the lease desires that the lease information be kept confidential for business or other reasons, a “notice of lease,” along with other pertinent information such as the identification of the parties, the date of commencement, and the duration of the lease, can be recorded in lieu of the entire lease document, which can sometimes contain hundreds of pages.⁸⁴

B. Duration of *Chonsegwon*

The parties may set any period for the duration of a *Chonsegwon* arrangement, subject to the ten-year maximum period stipulated by the KCC.⁸⁵ If the object of *Chonsegwon* is a building, there is also a mandatory minimum period of one year.⁸⁶ The rationale for mandating the maximum period is that a long duration of *Chonsegwon* may in fact undermine the lessor’s property ownership. Thus an extension of *Chonsegwon* beyond the first ten years must be affirmed by the lessor (property owner) in the form of an agreement to renew.⁸⁷ The rationale for the mandatory minimum period for a building is to ensure the economic feasibility of a *Chonse* lease for the benefit of the lessee.⁸⁸ If *Chonsegwon* is set for a duration that exceeds the maximum period or falls short of the minimum, it is still valid, but the term is automatically reset by law to the mandatory maximum or minimum duration.⁸⁹ *Chonsegwon* with no fixed duration can be terminated at

“purposeful act” by the parties as opposed to operation of law) needs to be registered to be effective. The wording of the relevant Korean Civil Code provisions seems to indicate that the extinction of *Chonsegwon* takes place by operation of law, not by juridical act. Thus, arguably, the extinction can take place without registration. YOUNGJOON LEE, HANKOOK MINBEOBRON [KOREAN CIVIL CODE, LAW OF PROPERTY] 698–99 (2d ed. 2004).

82. *Id.* For a full list of U.S. recording statutes by state, see RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 2.1, statutory n. (1977).

83. MOYNIHAN & KURTZ, *supra* note 62, at 88.

84. *See, e.g.*, CONN. GEN. STAT. § 47-19 (2011); MASS. GEN. LAWS ch. 183, § 4 (West 2012); N.Y. REAL PROP. LAW § 291-C (McKinney 2012).

85. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 312, ¶ 1 (S. Kor.).

86. *Id.* ¶ 2.

87. *Id.* art. 312, ¶ 3.

88. KWAK, *supra* note 2, at 259.

89. Civil Act, Act No. 471, art. 312, ¶¶ 1–2.

any time by notification of either party; termination takes effect six months from such notice.⁹⁰

Chonsegwon may be renewed by an agreement between the parties for a period that does not exceed ten years, and in the case of a building, for a period that is not shorter than one year.⁹¹ *Chonsegwon* involving a lease of a building may also be renewed by operation of law; i.e., under the KCC, *Chonsegwon* is renewed automatically if within one to six months before the arrangement's expiration, the owner of a building fails to notify the *Chonsegwon*-holder that *Chonsegwon* will not be renewed.⁹² This requirement imposes on the property owner an affirmative duty to inform the lessee of the renewal decision if she does not wish to renew it. In this case, the duration of the renewed *Chonsegwon* shall be deemed not to have been determined by the parties.⁹³ This renewal, as effected by operation of law, does not require registration.⁹⁴

By contrast, the common law does not prescribe either a maximum or minimum period of duration for a leasehold. If there is no state statute to the contrary, there appears to be no limit on the permissible duration of a lease. The leading case on the subject states: "There being no statute in this state to the contrary, the law permitted the lease notwithstanding its length of two thousand years."⁹⁵ Several U.S. states, however, have ninety-nine-year limitations. For example, Alabama limits all leases to a maximum duration of ninety-nine years, and Nevada provides the same limit for all leases other than agricultural leases, which cannot exceed twenty-five years.⁹⁶ A number of other states have time limits for certain kinds of leases. For example, California has a statute that stipulates a period of no more than fifty-one years for an agricultural lease.⁹⁷

C. Rights and Obligations of a *Chonsegwon*-holder

1. *Chonsegwon*-holder as a Lessee

A *Chonsegwon*-holder may rightfully use and benefit from real estate owned by another person.⁹⁸ The detailed scope and method of using and benefiting from the real estate is determined by contract. If the contract does not

90. *Id.* art. 313.

91. *Id.* art. 312, ¶ 3.

92. *Id.* art. 312, ¶ 4.

93. *Id.*

94. Supreme Court [S. Ct.], 2009da35743, Mar. 25, 2010 (S. Kor.).

95. *Monbar, Inc. v. Monaghan*, 162 A. 50, 52 (1932).

96. ALA. CODE § 35-4-6 (West 2012); NEV. REV. STAT. § 111.200 (2012).

97. CAL. CIV. CODE § 717 (West 2012).

98. For this reason, it is essential that the owner deliver the real estate to the *Chonsegwon*-holder. However, the delivery itself is not the prerequisite for the validity of *Chonsegwon* so long as the owner does not completely exclude the *Chonsegwon*-holder from using the real estate in future. S. Ct., 94da18508, Feb. 10, 1995 (S. Kor.).

clearly stipulate it, the use of the real estate will be in accordance with the purpose and character of the real estate.⁹⁹ For example, a *Chonsegwon*-holder may not use real estate as a liquor bar when its purpose and character raise a reasonable expectation that it should be used as a residential place. If a *Chonsegwon*-holder violates the terms of use either stipulated by contract or derived from the purpose and character of the real estate, the owner may demand that the *Chonsegwon* arrangement be terminated¹⁰⁰ and either request that the *Chonsegwon*-holder restore the real estate to its original condition or demand compensation for any loss resulting from use.¹⁰¹

Absent an agreement otherwise, a *Chonsegwon*-holder as a lessee is responsible for maintaining the condition of the real estate as it existed prior to the settlement of *Chonsegwon* and is responsible for repairs in the ordinary course of management.¹⁰² The lessee assumes the cost of repair but will be entitled to reimbursement from the lessor if the repair resulted in the increase of the value of the real estate.¹⁰³ At the option of the owner, the measure of reimbursement will be either the amount spent on the repair or the amount by which the real estate's value increased.¹⁰⁴

The rights of a *Chonsegwon*-holder are analogous to those of a common law leaseholder. Under the common law, the lessor has a duty to deliver possession of the property.¹⁰⁵ Correspondingly, the lessee, like the *Chonsegwon*-holder, is entitled to use the property at the exclusion of any other person, including the owner of the property.¹⁰⁶ Also, while the common law lessor is generally entitled to recover the cost of damage to the property, the terms of the lease determine which party is responsible for maintenance and repair.¹⁰⁷ The common law rights of the lessor and the lessee are quite extensive. Generally, the list of duties and rights follow common law contract law, and there is no general statutory provision such as the KCC assigning the rights and duties of the lessee.¹⁰⁸

99. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 311, ¶ 1 (S. Kor.).

100. *Id.* ¶ 1.

101. *Id.* ¶ 2.

102. *Id.* art. 309.

103. *Id.* art. 310, ¶ 1.

104. Civil Act, Act No. 471, art. 310, ¶ 1.

105. JOHN SPRANKLING, UNDERSTANDING PROPERTY LAW § 16.03–16.04 (2d ed. 2008).

106. *Id.*

107. *Id.*

108. *Id.*

2. Chonsegwon-holder as a Creditor

As discussed in the preceding sections, *Chonsegwon* also functions as a security right in rem.¹⁰⁹ When the lessor does not return *Chonsegeum* at the expiration of the *Chonse* period, the *Chonsegwon*-holder, as a creditor with priority, may file for an auction to retrieve *Chonsegeum*.¹¹⁰ Although the lessee can secure a lessor's obligation to return the deposit by acquiring other security rights, such as a mortgage, lessees have more frequently turned to *Chonsegwon* because it is less costly.¹¹¹

Chonsegwon as a security right is widely used not only in the context of a lease arrangement, but also in the context of securing receivables.¹¹² For instance, a construction company may secure payment for the construction of a building by acquiring *Chonsegwon* on the building in accordance with the construction contract. If no payment is made, the construction company may file for an auction to satisfy its claim. The validity of this type of *Chonsegwon* has, however, been disputed.¹¹³ As noted above, *Chonsegwon* is a right in rem to use and benefit from the real estate; however, when *Chonsegwon* is employed merely as a means of securing payment for construction services, the *Chonsegwon*-holder does not exercise any such right. *Chonsegwon* has been judicially challenged on this ground.¹¹⁴ The Supreme Court of Korea ruled, however, that *Chonsegwon* for the purpose of securing a construction claim without actually using the real estate is still valid as long as the creditor maintains the possibility of using the real estate in future.¹¹⁵ This decision affirmed the use of *Chonsegwon* primarily as a security right.

Chonsegeum,¹¹⁶ which is the object of the security right, has the following three functions. First, it is a unique form of rent payment. The owner may dispose of *Chonsegeum* in any way that she deems fit and may retain any profit arising from its use in lieu of rent, subject to returning *Chonsegeum* to the

109. KWAK, *supra* note 2, at 257.

110. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 318 (S. Kor.).

111. Robert Wachter & Youn Nam Lee, *Real Estate Law, in KOREAN BUSINESS LAW – THE LEGAL LANDSCAPE AND BEYOND* 259 (Jasper Kim ed., 2010).

112. S. Ct., 94da18508, Feb. 10, 1995 (S. Kor.).

113. See Miseon Lee, *Cheonsegwonjeodangwonjaeui Jiwiwa Ganryundoen Jaengjeome Gwanhan Geomto*, [A Thought on the Legal Position of *Cheonsegwonjeodangwonja*], 4 DAEJEONJIBANGBYONHOSAHOE [DAEJONG B. ASS'N J.] 224 (2007).

114. S. Ct., 94da18508, Feb. 10, 1995 (S. Kor.).

115. *Id.*

116. Whether *Chonsegeum* is a mandatory requirement for *Chonsegwon* has been debated by scholars. The majority of the scholars affirm that it is a key element. See, e.g., Hyosoon Nam, *Chonsegeumgwa Chonsegwonui Gwanghe – Chonsegwon Yosoui Beobjeock Euimiwa Chonsegwonui Beobjeock Seongjil* [The Relationship Between *Chonsegeum* and *Chonsegwon* – the Legal Significance of the Element of *Chonsegwon* and the Legal Characteristic of *Chonsegwon*], 49 SEOULDAEHACKGYO BEOBHACK [SEOUL NAT'L UNIV. L.J.], no. 3, 2008, at 183–84.

lessee at the expiration of the *Chonsegwon* period.¹¹⁷ Second, it functions as a security deposit for the property. This is an advance payment to protect the owner against possible property damage. The owner reserves the right to deduct a relevant amount from the security deposit should there be any damage to the property for the duration of the *Chonsegwon* period.¹¹⁸ Third, it functions as a loan. This is the money paid to the owner by the *Chonsegwon*-holder for a financing purpose. The money should be paid back to the *Chonsegwon*-holder on the expiration of the *Chonsegwon* term.¹¹⁹ In this context, the *Chonsegwon*-holder is a creditor and holds the real estate as collateral for the loan.¹²⁰

If the owner fails to return *Chonsegeum*, the *Chonsegwon*-holder, unlike an unsecured creditor, is entitled to file for an auction of the real estate without having to litigate to obtain a judgment.¹²¹ In the auction process, the *Chonsegwon*-holder has priority over unsecured creditors with respect to the real estate subject to the *Chonsegeum*.¹²² Among secured creditors, the priority is, in principle, determined by the order of registration.¹²³ For instance, the *Chonsegwon*-holder has priority over a mortgagee who has registered the mortgage after the *Chonsegwon* arrangement was registered. This is true even when a creditor other than the *Chonsegwon*-holder initiates the auction process. When the judicial disposition of the real estate is completed, the *Chonsegwon*-holder receives the proceeds in satisfaction of the *Chonsegeum*.¹²⁴

The terms of common law lease do not include anything like *Chonsegeum*. A refundable security deposit, which may be required by a property lease contract, is probably closest to *Chonsegeum*. As with *Chonsegeum*, the lessor may dispose of the security deposit for her own gain, subject to relevant statutory requirements¹²⁵ and her obligation to refund the deposit upon expiration of the lease. The security deposit also covers the lessor from possible property damage caused by the tenant and non-payment of rent. However, the refundable

117. S. Ct., 4290minsang867, Apr. 24, 1958 (S. Kor.).

118. Civil Act, Act No. 471, art. 315. ¶ 2.

119. *Id.*

120. Lee, *supra* note 82, at 681.

121. Civil Act, Act No. 471, art. 318.

122. *Id.* art. 303, ¶ 1.

123. RERA, Act No. 8922, art. 4. ¶ 1.

124. Minsajiphaengbeob [Civil Execution Act], Act No. 10376, July 23, 2010, arts. 88, ¶ 1; 91, ¶ 3; 148 (S. Kor.).

125. During the 1970s, over two-thirds of the states in the United States enacted statutes regulating security deposits for residential leaseholds. The purpose was to standardize security deposits and facilitate the tenant in recovering the deposit. A typical state statute: 1) limits the deposit amount to one or two month's rent; 2) requires the landlord to keep the deposit in a trust account without commingling, pay interest, and provide list of deductions that may be taken from the deposit; and 3) outlines the penalty for failure to fulfill obligations on the part of the landlord. Although none of the state statutes grants property rights in rem if the security deposit is not returned, the courts typically favor the tenant in litigation over security deposits. *See, e.g., Garcia v. Thong*, 895 P.2d 226 (1995).

security deposit does not serve as a loan. The lessee's right to the deposit is only contractual and is not normally attached to the property.

D. Transfer and Termination of *Chonsegwon*

A *Chonsegwon*-holder is free to transfer her rights to a third party.¹²⁶ The *Chonsegwon*-holder also may offer *Chonsegwon* as collateral for her own debt, and the court can order that the *Chonsegwon* be attached and transferred to her creditor in an enforcement procedure.¹²⁷ Frequently, *Chonsegwon* becomes the object of a mortgage.¹²⁸ The *Chonsegwon*-holder also may create sub-*Chonsegwon* with a third party.¹²⁹ A claim for *Chonsegeum* transfers with the transfer of *Chonsegwon* and cannot, in principle, be separated from *Chonsegwon*.¹³⁰ However, when *Chonsegeum* is not refunded, either after the *Chonsegwon* period expires or upon mutual agreement to rescind the contract, the claim can be transferred to a third party without *Chonsegwon*.

Chonsegwon extinguishes on several grounds. First, *Chonsegwon* extinguishes upon the expiration of the *Chonsegwon* period as agreed by the parties. If the duration is not fixed, either party may notify the other party of the termination of the *Chonsegwon*, which takes effect after a period of six months has elapsed.¹³¹ *Chonsegwon* also extinguishes with the destruction of the underlying real estate.¹³² If part of the real estate is destroyed, then the *Chonsegwon* that corresponds to the destroyed portion extinguishes.¹³³ If the purpose of *Chonsegwon* cannot be achieved with the remaining part, the *Chonsegwon*-holder can notify the property owner of her intention to terminate the entire *Chonsegwon* and may demand refund of *Chonsegeum*.¹³⁴ In either case, the party responsible for the destruction of the real estate is required to compensate for the loss,¹³⁵ and the property owner reserves the right to deduct from *Chonsegeum* the due amount for the property damage.¹³⁶

Additional grounds for *Chonsegwon* extinction are: use of the real estate not in accordance with the terms of the lease or purpose and character of the real estate,¹³⁷ voluntary relinquishment of *Chonsegwon* by a *Chonsegwon*-holder, and

126. Civil Act, Act No. 471, art. 306.

127. *Id.*

128. *Id.* art. 371, ¶ 1.

129. *Id.* art. 306.

130. S. Ct., 66da850, July 5, 1966 (S. Kor.).

131. Civil Act, Act No. 471, art. 313.

132. *Id.* art. 314, ¶ 1.

133. *Id.*

134. *Id.* art. 314, ¶ 2.

135. *Id.* art. 315, ¶ 1.

136. Civil Act, Act No. 471, art. 315, ¶ 2.

137. *Id.* art. 311.

fulfillment of the terms of extinction set out in the contract.¹³⁸ *Chonsegeum* is to be refunded to the *Chonsegwon*-holder upon the extinction of *Chonsegwon*.

Under the common law, a leasehold is transferable unless the terms of the lease restrict the lessee's ability to transfer it.¹³⁹ Extinction of the leasehold depends on the type of leasehold.¹⁴⁰ If the duration of the lease is fixed, it automatically expires when the lease ends unless the lessee breaches any of her duties by, for instance, failing to pay rent, committing waste, or illegally using the premises. If the duration is not fixed, it is terminated upon notice by either party.¹⁴¹ The refund of a security deposit is treated as a separate contractual issue and does not affect the extinction of the leasehold.¹⁴²

IV. SOCIO-ECONOMIC PERSPECTIVE

A. Preference for *Chonse* Without *Chonsegwon*

Chonse is the most prevalent form of leasehold in Korea.¹⁴³ According to the 2010 statistics provided by the Ministry of Land, Transport and Maritime Affairs, people in 54.25% of households reside in the homes they own, 21.66% reside in homes under a *Chonse* arrangement, 1.97% reside in homes under a *Wolse* arrangement (monthly rent), and 18.16% reside in homes under a *Wolse* arrangement with a refundable deposit (a sort of hybrid between *Chonse* and *Wolse*).¹⁴⁴ The percentage of *Chonse* living arrangements goes up to 29.44% in Seoul and the surrounding Gyunggi province.¹⁴⁵ While *Chonse* is the most prevalent form of leasehold, the *Chonsegwon* registration rate is fairly low: only 8% of commercial *Chonse* arrangements¹⁴⁶ and an even lower percentage (1.45%) of household *Chonse* agreements¹⁴⁷ are registered as *Chonsegwon*. *Chonse* is a

138. KWAK, *supra* note 2, at 267.

139. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 782–85 (3d ed. 2002).

140. Sprankling, *supra* note 105, at 220–26.

141. *Id.*

142. Civil Execution Act, Act No. 10376, arts. 88, ¶ 1; 91, ¶ 3; 148.

143. The dominant share of *Chonse* in the Korean leasehold market, however, is declining. See discussion *infra* Part IV.C.

144. MINISTRY OF LAND, TRANSPORT AND MARITIME AFFAIRS, <http://stat.mltm.go.kr/portal/cate/statView.do> (S. Kor.) (last visited Mar. 28, 2012).

145. This is a reflection of overpopulation and shortage of housing supply in these areas.

146. MINISTRY OF LAND, TRANSPORT AND MARITIME AFFAIRS, *supra* note 144.

147. It is estimated that 1.45% of the lease households in Korea register *Chonsegwon*. HANGOOKBEOBJE YEONGOOWON [KOREA LEGISLATION RESEARCH INST.], JOOTAEKIMDAECHASILTAEAE GWANHAN YEONGOO [EMPIRICAL RESEARCH ON HOUSE LEASE] 51–52 (1993). There is no other empirical research or relevant data found with respect to the *Chonsegwon/Chonse* ratio for the house lease.

preferred form of leasehold, but most do not register *Chonsewon*,¹⁴⁸ thus confirming critics' predictions at the time the KCC was drafted decades ago that lessors would sidestep registration to avoid giving *Chonse*-holders a property right over their leaseholds.¹⁴⁹

A survey undertaken by the Small and Medium Business Administration of Korea indicates why *Chonsewon* is not widely used.¹⁵⁰ Although the survey targeted commercial lessees, the reasoning is also applicable to homestead *Chonse* lessees. Most respondents replied that they did not register because the amount of *Chonsegeum* was not large enough to warrant the cost and time required for the *Chonsewon* registration.¹⁵¹ From the perspective of the lessee, the necessity for *Chonsewon* registration is ever more diminished because special statutes, as further discussed below, are in place to protect the lessee's right on *Chonsegeum* when the lessee does not register *Chonsewon* and thus only has a contractual right for the refund of *Chonsegeum*.¹⁵²

Another important reason reported for the infrequent use of *Chonsewon* was the difficulty of obtaining consent to register from the property owner.¹⁵³ Property owners view *Chonsewon* registration as a burdensome encumbrance on the property when obtaining a loan or negotiating a sale of the property and choose to avoid giving *Chonsewon*-holders the right to auction the property upon failure to refund *Chonsegeum*.¹⁵⁴ Most lessees are not in a position to demand *Chonsewon* registration because the decades-long housing shortage¹⁵⁵ has made the real estate market a lessor's market.

B. Socio-economic Need for the Protection of Unregistered *Chonse*-holders

The aforementioned market forces, which heavily favor the lessor, rendered the vast majority of *Chonse* leaseholds unregistered.¹⁵⁶ This created a particular vulnerability on the part of the lessee when the ownership of the real

148. *Chonsewon* registration tends to be higher when the amount of *Chonsegeum* is also larger. KWAK, *supra* note 2, at 253–54.

149. See discussion *supra* Part II.C.

150. 2008 Survey, STAT. KOREA, http://kosis.kr/metadata/main.jsp?c_id=2003039 (S. Kor.) (last visited Mar. 28, 2012).

151. *Id.*

152. The Jootaekimdaecha Bohobeob [Housing Lease Protection Act] and the Sanggagaeonmulimdaecha Bohobeob [Commercial Building Lease Protection Act] provide residential and commercial lessees with the status of secured creditors merely by going through a simple administrative certification procedure without registration. See further discussion *infra* Part IV.B.

153. See 2008 Survey, *supra* note 150.

154. KWAK, *supra* note 2, at 253.

155. The housing supply met only 69.2% to 72.4% of demand from 1979 to 1990 and rose to 86% in 1995. KB KOOKMIN BANK, SURVEY OF MONTHLY NATIONWIDE HOME PRICE TREND 100 (2011).

156. See discussion *supra* Section IV.A.

estate passed to a third party by sale, auction, or other legal means. With only a contractual right against the original property owner, the lessee could not claim her rights over the real estate or *Chonsegeum* against the new property owner.

After transferring the property, failure by the original property owner to refund *Chonsegeum*, equivalent to as much as 60% of the home price, was often financially devastating to the lessee.¹⁵⁷ Further, the new owner could then demand that the lessee either leave the premises or make a new leasehold arrangement, preferably in the form of *Chonse*. The lessee who could not afford to make another payment of *Chonsegeum* would subsequently lose her place to live. Even with a contractual right against the previous owner, the lessee could still only resort to a time-consuming and costly lawsuit, which would be rendered even more problematic if the owner could not be located. This created serious socio-economic ramifications, which brought up the need to redress and protect the rights of unregistered *Chonse*-holders.¹⁵⁸

The government responded in 1981 with the Jootaekimdaecha Bohobeob (Housing Lease Protection Act, HLPAct), a statute to protect homestead lessees.¹⁵⁹ The HLPAct provides the lessee with long-demanded protections by mandating a minimum lease term,¹⁶⁰ placing restrictions on rent increases,¹⁶¹ and ensuring the refund of *Chonsegeum*.¹⁶² As a result of the HLPAct, lessees are able to secure *Chonsegeum* without *Chonsegwon* registration.¹⁶³

As for the minimum lease term, the law mandates a minimum period of two years regardless of whether the lease is silent on the term or stipulates otherwise.¹⁶⁴ It is noteworthy that this mandate can be invoked only by the lessee and not by the lessor.¹⁶⁵ Thus the lessee may agree on a period of less than two years as the term of her lease and may demand a *Chonsegeum* refund when the agreed term expires.¹⁶⁶ This is a reflection of the desire to protect lessees who are perceived as being in a disadvantaged socio-economic position vis-à-vis lessors in a stronger bargaining position. By contrast, this protection is not found in the common law, which emphasizes freedom of contract. Further, the HLPAct also protects the lessee with respect to renewing the lease. If, within one to six months before the lease expires, the lessor fails to notify the lessee of a refusal to extend

157. KB KOOKMIN BANK, *supra* note 155, at 82–83.

158. See Eunyong Lee, *Jootaekimdaechabohobeobeui Gaejeungaegwanhan Yeongoo [Study on the Revision of the House Lease Protection Act]* 31 BEOBJO [BENCH & BAR] 12–13 (1982) (providing the legislative background to this effect).

159. Jootaekimdaecha Bohobeob [Housing Lease Protection Act, HLPAct], Act No. 3379, Mar. 5, 1981, art. 1 (S. Kor.).

160. *Id.* art. 4.

161. *Id.* art. 7.

162. *Id.* arts. 3-2, 8.

163. One may consider that this contributes to the decline of *Chonsegwon*. However, because the rate of *Chonsegwon* registration was already so low, the “decline,” if any, would likely be minute and inconsequential. See discussion *supra* Part IV.A.

164. HLPAct, Act No. 3379, art. 4, ¶ 1.

165. *Id.*

166. *Id.*

the lease or any change in the terms and conditions of the lease, the lease is deemed to have been renewed under the same terms as the original.¹⁶⁷

As for the stability of the rent, the HPLA allows the parties to request an increase or reduction of rent when the stipulated amount becomes unreasonable due to a change of economic circumstances.¹⁶⁸ At the same time, the Act controls any increase in rent, including *Chonsegeum*, by imposing a maximum rate prescribed by Presidential Decree, which is currently 5%.¹⁶⁹ This is again a socio-economic consideration to protect lessees from unreasonable rent increases. By comparison, the common law, in emphasizing freedom of contract, does not offer this type of protection to lessees, although certain localities in the United States employ rent control measures that are analogous.¹⁷⁰

The final, most important protection implemented by the HPLA concerns the refund of *Chonsegeum*. Under the HPLA, a simple administrative process creates a statutory lien on the real estate.¹⁷¹ Lessees who have moved onto the premises and completed a resident registration form at a local administrative bureau have a statutory lien on the property for the refund of *Chonsegeum*.¹⁷² According to the Sanggajeonmoolimdaecha Bohobeob (Commercial Building Lease Protection Act, CBLPA), the same protection is available to lessees of commercial buildings where the lease contract is certified by a tax office.¹⁷³ Again, this is a unique protection not provided by the common law for unregistered lessees in a weaker socio-economic position than lessors.

C. The Future of *Chonse* and *Chonsegwon*

As discussed above, *Chonse* is the most prevalent form of lease in Korea, under which the lessee pays a substantial amount as *Chonsegeum*,¹⁷⁴ and is a leasehold system not found outside Korea.¹⁷⁵ Why would the lessee and the lessor agree to such an arrangement, involving a large, refundable lump sum deposit in lieu of rent payments? The analysis reveals that the system of *Chonse* proliferated under a unique set of socio-economic conditions that existed in Korea until recently. Given Korea's extended housing shortage,¹⁷⁶ which rendered the

167. *Id.* art. 6, ¶ 1.

168. *Id.* art. 7.

169. Presidential Decree to HPLA art. 2, ¶ 1.

170. For a recent review of rent control measures, see Cristina McDonough, *Rent Control and Rent Stabilization as Forms of Regulatory and Physical Taking*, 34 B.C. ENV'TL AFF. L. REV. 361, 361–85 (2007).

171. Jootaekimdaecha Bohobeob [Housing Lease Protection Act, HPLA], Act No. 3379, Mar. 5, 1981, art. 3-2, ¶ 2 (S. Kor.).

172. *Id.* art. 3, ¶ 1.

173. Sanggajeonmulimdaecha Bohobeob [Commercial Building Lease Protection Act, CBLPA], Act 6542, Dec. 29, 2001, art. 5, ¶ 1 (S. Kor.).

174. KB KOOKMIN BANK, *supra* note 155, at 82–83.

175. KWAK, *supra* note 2, at 263.

176. KB KOOKMIN BANK, *supra* note 155, at 82–83.

housing lease market a lessor's market, it makes sense to consider the issue from the lessor's perspective first.

From the lessor's perspective, *Chonsegeum*, as a refundable deposit, had certain advantages over periodic rent payment. From the 1960s through the 1990s, the interest rate in Korea remained high;¹⁷⁷ thus, a sizeable *Chonsegeum* was capable of yielding stable income for the lessor even if simply deposited in a term savings account. In the absence of any credit evaluation system,¹⁷⁸ *Chonsegeum* ensured that the lessor would receive income from her property without the trouble of periodic rent collection. *Chonse* was also an excellent financing device for homeowners at a time when home mortgage financing for individuals was not readily available in Korea.¹⁷⁹ Between the 1970s and the 2000s, real estate prices rapidly rose in Korea,¹⁸⁰ and *Chonse* was an excellent way for new homeowners to finance the purchase of a new home and reap large profits after a few years.

From the lessee's perspective, *Chonse* was a way to live in a respectable home for those who could not afford to buy. Most good homes available for lease were offered for *Chonse* rather than *Wolse* (monthly rent), and *Chonse* was considered a step before full homeownership. *Chonse* was also a way to move into a larger home without paying the full price and was important for those who appreciate the social perception that the size of one's home is a reflection of one's status. In many cases, parents would try to support their children, particularly those soon to be married, by providing *Chonsegeum* for their new homes as a wedding gift. Once *Chonsegeum* was paid, young people did not have to worry about rent and could save a substantial portion of their incomes for full home ownership. This custom contributed to high saving rates in Korean society.¹⁸¹

With the recent change of the socio-economic conditions in Korea, *Chonse* is likely to diminish.¹⁸² The availability of personal financing reduces the

177. The interest rate of term savings (less than two to three years) remained over 10% per annum until the late 1990s. BANK OF KOREA, <http://ecos.bok.or.kr> (last visited Mar. 22, 2012).

178. The first credit evaluation system was not set up in Korea until the mid-1980s. Segyung Oh, *The Status and the Task for the Domestic Credit Evaluation Industry*, Nov. 3, 2006, at 5, available at www.krila.re.kr/common/filedown.asp?ix=7169.

179. Korean banking and financial industries were under the control of the government until the 1980s, and they were directed to provide loans to the industries with productive capacities, rather than consumers, to promote economic development of Korea. Mah, *supra* note 4, at 14.

180. From 1986 to 2010, the home price rose on average 138.4% nationwide in Korea, 178.6% in Seoul, 279.9% for apartment units in Korea, and 368.7% for apartment units in the Kangnam area of Seoul, which is considered the most prime residential area in Korea. CONSTR. INDUS. STRATEGY RESEARCH INST., ANALYSIS OF CIRCULAR LONG-TERM REAL PRICES OF REAL ESTATE, 1 (2011) (S. Kor.) [hereinafter ANALYSIS OF LONG-TERM PRICES].

181. FIN. SUPERVISORY COMM'N BLOG, *supra* note 3.

182. Haeseung Kim, *Chonseui Wolsejeonhwanchoosewa Daeungbanghyang [The Trend of Converting Chonse to Wolse and How We Can Respond]*, 253 GOOKTO 16, 16–24 (2002) (offering statistics showing the decrease of *Chonse*).

need for *Chonse* as a substitute.¹⁸³ Moreover, the security function that *Chonsegeum* plays for lessors, which covers the risk of lessee-default on periodic rent payments, can be fulfilled by a *Wolse* deposit. The recent stagnation and decline of real estate prices¹⁸⁴ is another factor cutting against *Chonse*. It may no longer be very profitable to purchase a home with the help of *Chonsegeum* due to stagnant or even declining home prices. Further, recent decreasing interest rates¹⁸⁵ have discouraged lessors from entering *Chonse* arrangements because they no longer can obtain adequate income from the interest *Chonsegeum* would generate.

A transition from *Chonse* to *Wolse* leasehold already has begun.¹⁸⁶ According to a recent report, the percentage of *Wolse* leaseholds rose from 42% of housing lease contracts in 2009 to 45.8% in 2011.¹⁸⁷ *Wolse* is increasingly prevalent in provinces outside Seoul and the surrounding area.¹⁸⁸ Relatively lower rents and a high demand for job-related temporary housing contributes to the dominance of *Wolse* in the provinces.¹⁸⁹ Including a deposit in a *Wolse* arrangement is becoming increasingly popular, particularly in the metropolitan areas, where monthly rents tend to be higher. Under this type of leasehold, as with *Chonse*, the lessee pays a refundable deposit to the lessor. The deposit amount is not as large as *Chonsegeum* but substantial enough to give the lessor a sense of security and the opportunity to generate income. Under this arrangement, the amount of monthly rent also tends to be less than under pure *Wolse*, due to the deposit paid.¹⁹⁰ This form of *Wolse* is more prevalent in commercial leases.¹⁹¹

183. In 2002, the total amount of personal loans made available by financial institutions in Korea was 416,728,000,000,000 Korean won (approximately US\$359 billion), while it almost doubled to 797,491,800,000,000 Korean won in 2010 (approximately US\$687 billion). BANK OF KOREA, *supra* note 177.

184. Such is the case particularly in Seoul. ANALYSIS OF LONG-TERM PRICES, *supra* note 180, at 6–7.

185. For example, the average annual interest rate on time deposits for a term of less than six months in 1998 was 13.42%, and then decreased to 5.21% in 2001, 3.17% in 2005, and 2.78% in 2010. BANK OF KOREA, *supra* note 177.

186. Hun-chul Shin, *Wolse Contracts Take Up 46 Percent in Housing Rental Contracts*, MAEIL ECONOMY, Nov. 25, 2011, <http://news.mk.co.kr/newsRead.php?rss=Y&sc=30800006&year=2011&no=764467&sID=308>; Wachter & Lee, *supra* note 111, at 260 (noting that the trend in recent years has been to shift toward the *Wolse* system).

187. *Id.*

188. In 2005, only two provinces outside Seoul and the vicinity saw *Wolse* taking up 60% of the leases. In 2010, seven provinces joined the club: Jeju (83.72%), North Jeolla (64.26%), North Gyeongsang (63.97%), South Gyeongsang (61.68%), Gangwon (61.59%), Gwangju (60.81%), and Ulsan (60.28%). See Yang Sung-jin, *Jeonse Giving Way to Monthly Rent*, KOREA HERALD, Oct. 17, 2011, <http://www.koreaherald.com/business/Detail.jsp?newsMLId=20111017000686>.

189. *Id.*

190. Youngbae Kim, *Mooneojineun chonsejedo* [Collapsing *Chonse* System], AJOU GYUNGJE, http://www.ajnews.co.kr/view_v2.jsp?newsId=20110704000385 (last visited Mar. 28, 2012) (S. Kor.).

191. Kim, *supra* note 182.

As for *Chonsegwon*, whose use always has been low due to the reasons discussed above, there is no indication that it is likely to increase. Lessors' reluctance to create a potentially burdensome *Chonsegwon* entry on the property registry remains unchanged.¹⁹² At the same time, a lessee has no incentive to pursue costly *Chonsegwon* registration against a reluctant lessor given the HLPAs. Further, the utility of *Chonsegwon* as a means to secure a loan also has diminished. With the availability of home mortgages and numerous other forms of financing in recent decades,¹⁹³ there is no strong need to resort to *Chonsegwon* for personal financing. *Chonsegwon*, which protects rights arising from *Chonse* contracts as rights in rem, was indeed a progressive move at the time that the KCC was enacted.¹⁹⁴ In the end, however, this move did not take root in Korean society.

V. CONCLUSION

Chonse proliferated under a set of unique socio-economic conditions that existed in Korea during its rapid economic development. The vulnerability of unregistered *Chonse*-holders ultimately led to serious social issues that were remedied by legislation reinforcing the rights of unregistered *Chonse*-holders. This, in addition to recent trends in the Korean economy, such as the stagnation of real estate prices, decreasing interest rates, the development of a credit evaluation system, and the provision of home mortgage lending, is resulting in the decline of *Chonse*. Meanwhile, other forms of lease arrangements, such as *Wolse*, are becoming more prevalent. *Chonsegwon*, with historically very low usage, is likely to remain little-used in the foreseeable future.¹⁹⁵

Chonse remains a unique leasehold system that cannot be found outside Korea. Anglo-American common law leaseholds, despite some similarities in the legal features,¹⁹⁶ do not include the key feature of *Chonse*: the payment of refundable *Chonsegeum* at the beginning of the lease in lieu of rent payment. None of the leaseholds defined in the civil law system, including that of Asian countries, seems to share similar features with *Chonse*.¹⁹⁷ Accordingly,

192. See discussion *supra* Part IV.A.

193. The government control of Korean banking and financial industries began to be lifted in the late 1980s, and the banks started to provide consumer loans, including home mortgages and other types of financing. Mah, *supra* note 4, at 15.

194. The legislators deliberating on the Korean Civil Code draft realized that the new *Chonsegwon* would run a risk of not being used frequently because it required a registration. Minbeoban Simeuirok Sanggwon [Civil Code Draft Deliberation Minute, vol. 1], 1957, at 183.

195. *Chonsegwon*, although infrequently used, is unlikely to disappear completely, either. *Chonsegwon*, as a right in rem, has unique advantages, such as transferability, and lessees with an economic leverage against lessors may still wish to enjoy the full proprietary rights that *Chonsegwon* offers.

196. See discussion *supra* Part III.

197. For the civil law system, see *supra* note 57.

Chonsegwon, the proprietary legal embodiment of *Chonse*, is also unique and not found outside Korea.

Despite this uniqueness, *Chonse* might be useful in other developing countries undergoing rapid economic growth where home prices are sharply increasing and personal loans are difficult to obtain.¹⁹⁸ The economic incentives for the proliferation of *Chonse* in Korea¹⁹⁹ also would exist in this economic circumstance. As discussed above, *Chonse* also tends to induce savings, particularly among people who value homeownership.²⁰⁰ This high savings rate might, in turn, contribute to economic development, as it did in Korea.²⁰¹ However, in the absence of personal loans for *Chonsegeum*, *Chonse* may require culturally strong family ties, which caused many parents in Korea to provide *Chonsegeum* on behalf of their children. It would indeed be difficult for many young adults to come up with enough money for *Chonsegeum* on their own.²⁰²

Does this unique system of *Chonse* have any applicability in economically developed countries such as United States? With the availability of home mortgages and the deeply rooted practice of periodic (mostly monthly) rent payment for home leases, it is difficult to imagine that anyone would have any incentive to pay a large amount of *Chonsegeum* for a home lease. However, a colleague of the author has made an informal suggestion that a commercial entity may have an incentive to consider this type of leasehold arrangement, where the amount of *Chonsegeum* might be tax-deductible as a business expense in lieu of rent. It is not entirely clear whether the tax authority would consider *Chonsegeum* as a deductible business expense, but if it did, *Chonse* might have a new use in developed countries primarily for tax purposes.



198. Rapid home price increases have been observed in other developing countries undergoing rapid economic development, such as China and Vietnam, as well as Korea in the 1970s through 2000s. CONSTR. INDUS. STRATEGY RESEARCH INST., *supra* note 180.

199. See discussion *supra* Part IV.C.

200. *Id.*

201. See Mah, *supra* note 4.

202. Thus, many young adults in Korea who could not afford to pay *Chonsegeum* even with the help of their parents started with the less prestigious *Wolse*. In recent decades, Korean banks started to provide loans for *Chonsegeum*, but such loans may not be available in developing countries with limited financial resources.

