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Law and Custom under the Chosŏn Dynasty and Colonial Korea: A Comparative Perspective

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A number of Korean legal historians have argued that Chosŏn Korea had a tradition of customary law and that it was suppressed and distorted by the Japanese during the colonial period. But a comparison of Korean "custom" with that in late medieval France, where the legal concept of customary law developed, reveals that custom as a judicial norm was absent in premodern Korea. The Korean "customary law" that has been postulated as a true source of private law in Korean historiography was the invention of the Japanese colonial jurists. The Japanese collected Korea's popular usages that were supposed to serve as an antecedent for a modern civil law, and colonial judges employed the legal instrument of custom in reordering Korean practices into a modern civil legal framework. In colonial Korea, custom played the role of an intermediary regime between tradition and the demands of modern civil law.

COLONIAL CUSTOMARY LAW HAS of late sparked much discussion among legal historians in Korea. It is part of the prevailing trend in Korean scholarship that places an increasing emphasis on custom in the Chosŏn dynasty (1392–1910) as a possible means of proving its autonomous legal identity. It has been argued that Korea had its own system of civil law and procedures that grew out of customary practices for settling disputes between individuals (Chŏng Kŭngsik 2002; Im 2000; Pak 1974). Korea's colonial past has added poignancy to the question of custom, as some scholars have stressed that Korea's tradition of customary law was distorted by the Japanese during the colonial period (1910–45). In an attempt to reclaim their legal tradition, which was denied by an alien power in the name of modern law, Korean historians have turned to the notion of popular custom, a sort of a spontaneous legal coherence. Korean legal historiography has thus focused on probing the extent to which indigenous Korean custom was suppressed and altered by the Japanese authorities as part of colonial policy (Chŏng Chonghyu 1989; Pak 1992; Yi Sangwuk 1986, 1988, 1991; Yun 1991).[1]

It is striking, however, that Korean legal scholarship has paid relatively little attention to conceptual definitions of private law or customary law. In particular,

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[1]See the special issue, "Ilche kangjŏm ch'ogi ŭi p'allye wa pŏphak" [Judicial Precedents and Legal Science in Early Japanese Occupation], in *Pŏpsahak yŏngu*, vol. 28 (2003).

the distinction between customs (popular practices, habits, or rites) and custom (a common usage that has the force or validity of law) is conspicuously deficient in many studies. The need to give prominence to indigenous Korean legal order seems to have prompted Korean historians to dub "custom" any premodern popular practices and to argue that the Chosŏn dynasty was governed by customary law. The opinion of the eminent Korean legal historian Pak Pyŏngho—that Chosŏn Korea was ruled by "legal precedents and customary laws" and that "when a law took the form of a new legislation, its essential elements were those which had taken root in the social system, namely in traditional custom"—is widely shared among Korean scholars (Pak 1976, 5; 1977, 4). One scholar wrote, "It is not essential to distinguish between customs and custom; what is more important is to investigate what kind of custom existed in the past and what kind of custom exists in today's Korea" (Sim 1997, 36–37). The conflation of the terms "customs" and "custom" in Korean legal history cannot be simply overlooked as an unfortunate muddling of terminology because postulating customary law in Chosŏn amounts to arguing that Korean society sustained a legal order of private law.

Recent discussions in East Asian historiography about whether custom and civil law existed in premodern East Asia have left Korean legal historiography largely untouched. Critical of approaching law in non-Western countries with a Western frame of reference, a number of studies have scrutinized the traditional view that law in East Asian countries before their modernization in the late nineteenth and the early twentieth centuries remained static and the legal process underdeveloped. Attempts to revise the view of a China that remained in an earlier stage of European legal history have spurred, in particular, studies looking for civil practices and cases that might prove that Chinese law included material recognition of private rights, a principal concept of Western legal traditions. Even if "civil law" was absent from the Qing Code, some historians have argued, it was present in local judicial procedures and in "custom," the true source of private law in East Asia before modernization (Bernhardt and Huang 1994; Huang 1996, 2001).[2]

The French legal historian Jérôme Bourgon has claimed, however, that custom and civil law are Western categories that did not exist in Qing China (Bourgon 1999, 2001, 2002, 2004). According to him, the notion of customary law spread from Europe to Japan, and from Japan to China, springing up in each country only when the redaction of a Western-style civil code was envisaged. Historians, in their effort to avoid viewing East Asian law with Western models in mind, contends Bourgon, have nonetheless continued using the very Western constructs from which they have tried to distance themselves. Whether recognizing the existence of customary law in premodern East Asia amounts to the presupposition of analogy with European legal history presents an important issue in

[2]Huang's study sharply contradicted works by the Japanese legal historian Shiga Shūzō (1984). For the ensuing debate, see Karasawa et al. (1998).

studying Korea's legal past. Although many scholars have tried to highlight the historical nature of Chosŏn dynasty law, scant attention has been paid to the risk of methodological flaws of imposing imported Western concepts on Korea.

Korean legal historians' general indifference to the distinction between customs and customary law seems, in large part, to be a colonial legacy. It was after Korea became Japan's protectorate in 1905 that Japan collected, for the first time in Korean history, Korea's old laws, rites, and popular habits. Following Korea's annexation by Japan in 1910, the colonial authorities decreed that certain areas of private law among Koreans should be governed by "custom." Since there was no written law in Korea to govern civil law matters, except for a few provisions included in criminal codes, colonial officials needed to rely on Korea's "custom" to control legal relations among the natives. A system of customary law was established in which Japanese jurists reworked old Korean laws and popular practices and declared them custom as an official source of law. The establishment of customary law under Japanese rule was a fundamentally bureaucratic enterprise. Indeed, the traditional "customary law" whose existence some legal historians of Korea claim as proof of the advanced state of premodern Korean law was, rather, the invention of the Japanese colonial jurists.

There is a certain truth in the view that indigenous law was seriously misrepresented and suppressed in the process of creating customary law in colonial Korea. It has been argued that modern Korean civil law suffers from elements of Japanese customary law that were injected by the colonial jurists in their effort to "Japanize" Korean law. The dominant tendency in the postcolonial historical writings in Korea has been to remove the stigma of colonial Japanese historiography, which saw little legal development in Korea throughout the dynastic period. The nationalist legal historians of Korea have thus devoted their concerted efforts to ascertaining that the existence of Korean customary law predated the reception of Westernized law under Japanese colonial rule and that Japanese imperialism effectively hijacked the momentum for autonomous reform initiated by Korean elites in the late nineteenth century to modernize Korea's law and legal system. In doing so, however, they seem to use the very legal category that was devised by colonial law and unwittingly commit the mistake of approaching Korean legal tradition from a European vantage point.

This article observes that customary law provides an important point of reference in studying Korean legal history from a comparative perspective. It will attempt a comparison of custom in medieval Europe, where the legal concept of customary law developed, and that in Korea. Indeed, an interesting parallel can be made between the codification of French customary law in the fifteenth and sixteenth centuries and the recording of Korean "custom" in the early twentieth century. One may fret that any comparison of Korea's legal past with that of France would be meaningless because whatever traits they might have in common would be culture- and time-specific and that such a comparison would contain no useful conceptual framework for understanding each country's

historical development. However, it is precisely this latter point that justifies a comparative approach. It can reveal the differences in legal categories and models and bring to light the danger of the methodological faux pas of applying foreign models to explain a country's legal development.

In recent years, a number of scholars in both Korea and the West have begun to challenge the simplistic view of nationalist historiography, arguing for the need to go beyond the obsession with overcoming the colonial past (Shin and Robinson 1999). In the context of the emerging postnationalist approach, this article intends to examine the development of law and custom during the Chosŏn dynasty and under Japanese rule. Specifically, it will discuss how "custom" was created and used in colonial jurisprudence. In most nationalist literature, the courts were invariably depicted as if they were a faithful piece of machinery, churning out decisions for the benefit of the colonial government. But evidence shows that the colonial judges were engaged in jurisprudential activities to rework Korean customs largely free from governmental influence. A careful study of the court decisions and juristic writings will shed light on the nature of the making and remaking of Korean law in the colonial period. In studying colonial law, focusing on the subject of civil law can be particularly profitable because it was less tightly bound to colonial exigencies than criminal law. A more critical and dispassionate discussion of customary law can lead to a more accurate understanding of Korea's legal past.

Concepts of Custom

In late medieval Europe, private relations were largely governed by unwritten popular custom. Each local community developed and applied its own customary usages, which formed a set of rules operating next to the general law of the land (Hilaire 1994; Watson 2001). But custom was less a sociological than a judicial artifact, distinguished from popular practice in that it had legal significance as a norm validated by jurisprudence. In European history, custom refers to the normative rules of behavior and institutions that were given legal recognition by courts and were not only followed as a matter of practice but also enforced as a matter of law. European jurists from early on tended to cling to the distinction—often difficult—between usages, of which the prescriptive character did not have obligatory juridical force, and custom, which was recognized by tribunals or mentioned in law texts. The thirteenth-century French legal scholar Philippe de Beaumanoir wrote, "The difference between custom and usage is that, while all customs are to be observed, there are usages such that if anyone wished to deny them and carry his claim to judgment they would become invalid" (Beaumanoir 1899–1900, no. 684).

There were two elements required for custom to obtain the force of law: first, the repetition by people of similar acts, anchored in time immemorial, and second,

opinio juris seu necessitatis, or popular consent that transformed a habit into an imperative norm. According to François Gény, usages, even when they reflected the psychological element of will, did not constitute legal custom without *opinio necessitatis*, which was "truly specific of customary law" (Gény 1932, 1:320, ch. 110). Many acts, such as "the habits of daily life, what we call the mores of the people or of certain social classes, the commercial and other economic usages, the rules of civil behavior, the social conventions, or even moral or religious practices," remained "outside the positive legal order" (320). Customary law was far from having a universal character, as it was necessarily limited only to the community where it originated (323). To become legal custom, the usage had to amount to the exercise of a right of those who practiced it.

Custom was inseparable from the proof in justice. The party had to establish his custom before the seigneurial court or royal court by proving that it had existed uninterrupted for a long time and that there was a general consent among people that they were bound to observe it (Chénon 1926–29, 1:492; Watson 1984, 42–43). This local inquest, *enquête par turbe*, involved calling on local persons possessing special knowledge of the customary practices to express their opinion as to the existence of the custom at issue. Their reply was to be in writing and sealed. After the inquiry was made, the judge considered the custom's obligatory character and decided to adopt or reject it on a case-by-case basis. Once judgment was rendered, the decision itself manifested the custom. Representing the rights and liberties of a local community, custom constituted a system of rules that was distinct from the general law of the realm, standing either beside law (*praeter legem*) or against it (*contra legem*). The role of the courts in the statement of customary law was essential (Watson 2001, 105).

Defined as such, custom is crucially different from what is said to have regulated the everyday lives of the people in premodern Korea. It seems to be a fair assessment that the term "custom" has often been used in Korean legal historiography with indifference to the difficulties its usages implies. The words "usage," "custom," and "customary law" are used interchangeably in Korean scholarship. Custom, as it is commonly ascertained by Korean legal historians, is habits and norms to which the recognition and force of law were not accorded. Most "custom" of Korea was neither immemorial nor confined to a particular locality. The diversity of customs rarely mattered, as they reflected the cultural homogeneity of the country. What is routinely referred to as "custom" (*kwansŭp*) tends to be either elusive social habits and patterns of behavior (*t'osok* or *p'ungsok*) or traditional laws that existed before the Japanese occupation and thus were not tainted by Japanese law. These indigenous practices and laws were different, however, from binding local rules that were independent from, and susceptible to oppose, state law.

Indiscriminate use of the term "custom" inevitably leads to confusion. Bourgon provides an interesting explanation on how the word custom (*guanxi*

in Chinese; *kanshū* in Japanese; *kwansŭp* in Korean) came into existence in the East Asian legal glossary (Bourgon 1999, 1091–92; 2001, 126–28). The Japanese often composed new vocabularies by regrouping the Chinese characters and thereby giving old Chinese terms new meanings. This was the case with the term "custom," a lexical hijacking committed by the Japanese for the needs of legal modernization in the course of the last two decades of the nineteenth century (Bourgon 2001, 127). *Shūkan* (*xiguan* in Chinese; *sŭpkwan* in Korean) was a word meaning a habit or practice; a new term, *kanshū*—the same characters in reverse order—was created to designate custom, with additional legal notions. The Meiji jurists themselves were notorious for using the terms "custom" (*kanshū*), "practices" (*kanko*), and "ancient usages" (*kyūkan*) interchangeably without distinguishing among them (Seizelet 2001, 109). As pointed out by Bourgon, the legal glossary composed by the Japanese in order to translate the Western terms that had no equivalents in Sino-Japanese civilization still remains the basis of modern legal nomenclature in East Asia.

The problem with using the term "custom" in Korean legal history becomes clear when one takes into consideration the fact that the whole idea of the state rendering judgment in private disputes according to fixed legal principles was alien to Korea's legal tradition. In Korea, as in China, laws existed not as a means of regulating private economic activity or resolving disputes between individuals but as an instrument of administrative power and public order, equated with the command of the sovereign. In his handbook for magistrates, Chŏng Yagyong (1762–1836), a leading scholar of the "Practical Learning" (*Sirhak*) school, wrote that the law was an order of the king and that one who did not follow the law was like one who did not obey an order of his king (Chŏng Yagyong 1969).

The role of the state in private conflicts reveals a fundamental difference between Europe and East Asia. In medieval France, the crown was, above all, a judge. The popular image of King Saint Louis meting out justice under an oak tree sums up the mythical notion of royal justice. As a vicar of God on earth, the king was responsible for resolving disputes in an impartial and equitable way. From the notion of royal justice emerged the judicial corp. The new rising legal elites, trained in the medieval universities and recruited to the service of the emerging administrative monarchy, played a crucial role in the framing of a new body of rules called "customary law." This process was nowhere to be found in Korea, China, Japan, and that part of Vietnam belonging to the sphere of Chinese civilization. The notion of *roi justicier* bound by fundamental law was absent. In the Sinicized world, the state was responsible for maintaining social order but not for providing justice in private relations. The Board of Punishment was a ministry of order, not of justice (Jacob 2001, 151).

Customary law in Europe required the doctrinal work of jurists who extracted rules from customs. In sixteenth-century France, the activities of doctrinal writers, many of whom were practitioners of private law, were in symbiotic

relations with the jurisprudence of the courts, the former progressively compiling and systematizing customs that the latter enforced. Lawyers' pleading in litigations at the Parlement of Paris, for instance, over the interpretation of custom greatly contributed to the articulation of Parisian customary provisions. French customary law owed its development to legal humanists who attempted a rational ordering of local customs and found common principles by reconciling diverse customs. In the course of the selection and reworking of customary rules by professional jurists, custom became a learned concept, homologated by royal authority and enmeshed in all the complications of elaborate legal techniques (Kelley 1990; Olivier-Martin 1925).

In Korea, there were no independent legally trained judges, jurists, or lawyers in the European sense. The study of law, *yurhak*, existed but was regarded as a branch of mere technical learning, inferior to Confucian scriptural learning. *Yurhak* was not studied at the National Confucian Academy (Sŏnggyun'gwan) but was taught and examined as one of the miscellaneous examinations (*chapkwa*); successful examination passers assisted at trial procedures as legal experts. Litigation experts who prepared the necessary documents for suits and trials, the functional equivalents of Western attorneys, did exist in the early years of the Chosŏn dynasty. But their activities were proscribed by the last quarter of the fifteenth century, as they were blamed for instigating litigations, thereby harming "justice" (Shaw 1973, 50). In the absence of legal professionals, there could be no jurisprudential or doctrinal activities delineating rules from customs and no legal reordering of these rules into customary law. There was no civil or private law that developed in the form of independent, judge-made customs and precedents that articulated rights or liberties that other persons would enjoy thereafter. In East Asia, private law matters lay in the privileged field of Confucian *li*, a tradition of "persuasion" (Glenn 2000, 618). Methods for settling disputes between private individuals did not develop outside the realm of the Confucian informal normativity. According to Patrick Glenn, the "capture" and "reconstruction" of custom was unique to the historical development of Western thought, which placed emphasis on the present individual (Glenn 1997, 618).

A custom cannot acquire the necessary generality without having given rise to a number of disputes and having been approved by jurisprudence (Lambert 1903, 799). It would certainly be a grave misrepresentation to deny the existence of disputes over private interests in Chosŏn Korea. Evidence shows that Koreans were eager to have their grievances heard in court and filed a flood of suits and appeals over landownership, slave ownership, inheritance, and disputes over gravesite plots (Shaw 1980, 312). The law code contained rules that could be categorized as civil matters. In *Taejŏn hoet'ong* (Grand Code for Ruling the State), statutes governing inheritance were listed under the heading "private slaves" (*sachŏn*) in its section on punishment (*hyŏngjŏn*) and the heading "land" in the section on finance (*hojŏn*). Adoption and marriage were regulated

in the section on rites (*yejŏn*), and family registry was governed by the section on personnel (*ijŏn*). The *hojŏn* section further included litigations over land and houses, the collection of private debts, and statutes of limitation for various matters.

These laws were expressed, however, mainly as proscriptions or commands specifying the scale of penalties, and violations were punished as crimes. Cases involving ownership or inheritance disputes rarely approximated civil law cases in the Western model because they were not assertions of private rights or liberty recognized by the community but rather supplications to the state officials to hear their particular sufferings and the unfairness of the situations. Litigation commonly started with a complaint that the other party had violated his or her moral obligations, as exemplified in Confucian texts, and urged that the opponent be charged with a criminal offense. Most civil complaints were appeals to the individual moral insights of the judge and his sense of equity and reason, and the enforcement of obligations largely remained within the discretion of the magistrate. The magistrates at times considered local practices, but they did not form binding legal basis in decisions. In this situation, local customs did not include a concept of legal rights as developed in Western civil law, in which a citizen was entitled to the enforcement of obligations.

One observes that the premodern Korean legal system was grounded in universally valid ethical principles. The main goal of adjudication was to straighten moral attitudes, and the merit of the individual parties' claims was regarded as less important than the need to propagate virtuous conducts and punish the undisciplined. Private disputes and social ills were to be remedied by exhortation and persuasion rather than legalistic argumentation. Disputes among family members were viewed with particular aversion, as they disrupted social harmony and hierarchy, and wrangling between the legitimate and illegitimate branches of a family was a priori decided in the legitimate branch's favor (Cho 2002, 156–57). In theory, slaves could file suits against masters, but the magistrates reviewed such claims only after duly punishing the slaves for violating the existing social order by challenging their masters (Cho 2002, 219–20).

The sixteenth century saw the appearance of a number of handbooks of civil procedure, including *Sasong yuch'wi* (Classification of Legal Proceedings) written by Kim Paekkan (Chŏng and Im 1999). But they were written mainly to instruct magistrates on how to achieve efficient disposal of lawsuits and were not private law discourses providing uniform and consistent legal standards. The state compiled penal law handbooks and added new chapters in civil procedure in the code *Sok taejŏn* (Supplementary Grand Code), promulgated in 1746. The fundamental purpose of procedural law was "stopping suits" (*tansong*) through quick disposition, with the ultimate goals of achieving an ideal society without litigation and restoring original perfection. Tansong dogma, an institution for summary resolutions of suits, was established in the

fifteenth century when cases filed over slave ownership disputes climbed to an unprecedented level.[3] Filing legal complaints was not prohibited, but it was to be deterred and discouraged as much as possible. Creating harmony in society with no legal wrangling was intended to clear a stream at its source, whereas disposing of disputes was meant merely to improve the flow temporarily.[4]

Chosŏn Korea's community compact (*hyangyak*), popularized by elite Confucian scholars in the seventeenth and eighteenth centuries, resembled custom in Europe in the sense that it governed intracommunal relationships according to rites, manners, and practices. The community compact, however, was an instrument that was fundamentally geared to correct and transform the moral behavior of its members, rewarding good behavior and punishing wrongdoing (Deuchler 2002; Sakai 1985). The compact's moral and penal prescriptions were thus different from the notion of custom in European history as a judicially enforceable norm governing private relations among all the local inhabitants, no matter whether they be *gentilshommes* or *roturiers* (commoners).

The study of customary law in French history illustrates that custom is particular to the European legal tradition because it was inseparable from the feudal fragmentation of political powers. In East Asia, administrative centralization preceded similar attempts in Europe by almost ten centuries. Whereas royal courts in Europe competed with seigneurial courts over jurisdictional claims, Chinese provinces were ruled by functionaries controlled by the central government under a body of codified rules, uniform throughout the empire. The T'ang dynasty launched in the eighth century a systematic codification of criminal laws and diverse rules, usages, and formulas of administration. Korea, along with Japan before the onset of decentralizing tendencies in the late twelfth century, was heavily influenced by the T'ang legal codes, a process analogous to the "reception" of Roman law in the European countries in the late Middle Ages. The medieval European states, lacking a unified legal system, had to control local usages by conferring regularity on them. Whereas local customary rules in Europe were confirmed by judicial decisions to enjoy normative authority, local practices in East Asian countries were only selectively sanctioned by their incorporation into a substatute in the code (Bourgon 1999, 1075, 1083).

In France, legists made a sharp distinction between the realms of public law (royal edicts and ordinances) and private law (custom). According to them, royal ordinances were mere regulatory power, and the monarchy was to intervene in fields directly related to private law only with limited measures, such as the regulation of evidence and procedure. As the king increasingly behaved as the legislator, not merely the judge, the lines between ordinance and custom blurred, but the prevailing idea was that the domain of custom was beyond the power of the

[3] *Chosŏn wangjo sillok*, year 12 of the reign of King Sŏngjong (January 12).
[4] *Sŭngjŏngwŏn ilgi*, year 3 of the reign of King Sukjong (August 19).

king (Church 1941, 112; Olivier-Martin 1997, 110–19). In contrast, having early on achieved administrative centralization and codification of law, and enjoying the plenitude of legislative power, neither the Chinese empires nor the Korean kingdoms needed to confer on private usages the status of local custom insulated from the codes. The comprehensiveness of the Chosŏn legal system allowed for uniform rule over diverse regions. The most important source of tension in Korea was not between central law and local law but between central law and no law (Shaw 1980, 309).

Late medieval Europe witnessed the rise of administrative monarchy with an impressive consolidation of royal power. In the absence of a unified private law, these "new monarchies" promoted the official codifications of local customary law. The French recording of customs in the late fifteenth and sixteenth centuries, which formed the basis of its civil code of 1804, took place in the context of political centralization by the crown and the weakening of seigneurial rights (Filhol 1937; Kim 2004a). The initial call for the codification of customs was made in the ordinance of Montil-les-Tours of 1454, and the letters patent issued at Amboise in 1497 effectively inaugurated the waves of recording customs in much of the kingdom. The codification and systematization of customary law in Europe can be seen in terms of progression and reformation, initiated by the state for the needs of regulating society in its making of a modern centralized nation (Scott 1998; Strauss 1986).

This process bore a certain similarity to the recording of customary laws in Africa and Asia some four hundred years later, when the local elites or the colonial powers took up the campaign of collecting customs as part of their efforts to transform the country, or colony, into a modern political entity. In East Asia, the first attempt to codify customary law took place during 1870–80 in Japan and 1900–1930 in China, when Japanese and Chinese officials, respectively, attempted the redaction of a modern civil code with a view toward creating a modern state. Bourgon argues that custom was "created" from practices, habits, and rites as preparation for the codification of modern civil law at the time of each country's mutation into a modern nation-state, and that collecting popular usages and considering them as a source of law were essentially bureaucratic efforts to devise a legal system equivalent to Western legal systems (1999; 2001, 125–26). Since, as suggested by European legal history, a codified civil law was to replace preexisting customary law, the Japanese and the Chinese first had to find and collect local customs. In Japan, the writing of the civil code involved a significant conceptual effort to appropriate the doctrinal bases of the European systems. The German Historical School's tenet that law was the product, or spirit, of the history of the people had an immense impact on Japanese legal scholars. Western ideas had a serious impact on how Japanese and Chinese reformers undertook to reconsider their legal traditions (Bourgon 1998, 407; 1999, 1081). Law was customary by essence, and this was to become the basis of modern civil codification. This doctrine inspired the Japanese ordinance of

1875 that made custom a subsidiary source of law.[5] Legal modernization thus conferred on the notion of customary law a sort of historical legitimacy. The redaction of a civil code meant inserting indigenous customs into a Western legal framework so that the content of the code could be domesticated through custom.

The process in East Asia resonates of the "invention of tradition" in colonial Africa. Scholars have shown that what imperialist powers in Africa termed "customary law" was often anything but customary. According to Terence Ranger, "What were called customary law, customary land-rights, customary political structure and so on, were in fact *all* invented by colonial codification" (1983, 250). Once precolonial flexible and unwritten "traditions" were "written down in court records and exposed to the criteria of the invented customary model, a new and unchanging body of tradition had been created" (251). To be sure, the processes of creating custom in Africa and Asia reveal significant differences. At least, however, custom as the anteriorized colonial category, produced by the state with the specific purpose of acclimating the people to a new state culture, appears to be a common denominator in colonial history.

The codification of customs as a conscious bureaucratic campaign to facilitate the establishment of a modern legal order found its full expression in Taiwan and Korea in the late nineteenth and early twentieth centuries. The Japanese showed a keen interest in customs in their colonies as they searched for them as a temporary substitute for civil law to rule the natives (Wang 2000). Shortly after the annexation of Taiwan in 1895, the Japanese began collecting Taiwanese laws and practices, and the survey reports were compiled in 1902 by Okamatsu Santarō (1971). The notion of custom emerged in Korea when the Japanese collected popular practices and usages and turned them into customary law with legal force. What was, then, the nature of those practices that were collected as "Korean custom" by the protectorate and colonial government and subsequently declared to govern the private legal relations of the natives? The question of colonial Korean customary law crucially bears on the nature of colonial legal order.

Conjuring Customary Law

The collection of old customs in Korea was initiated by the Japanese with the specific purpose of redacting a modern civil code. Under Itō Hirobumi, the first resident-general, the Japanese mounted a considerable effort to establish a modern legal system in Korea in order to abolish consular jurisdiction and extraterritorial privilege. Itō was particularly driven by the desire to create a private law system and to write Korean codes of civil law and civil procedure. The immediate

[5]The Great Council of State (Dajōkan) issued a decree (no. 103) stipulating that in civil trials, matters for which there was no written law were to be governed by custom.

task was to implement modern landownership and transactions law (Baker 1979; Gragert 1994; Yi Ch'ŏlwu 1991). In 1906, Ume Kenjirō of Tokyo University, a renowned jurist and one of the three drafters of the Japanese Civil Code of 1898, was personally invited by Itō to lead the legislation efforts in Korea (Oka 1991; Yi Yŏngmi 2005; Kim, forthcoming). The government-sponsored campaign to collect materials for the proposed codes began immediately. In European codifications of customs, the primary responsibility of gathering and consenting to customary practices was assumed by the population in local representative assemblies. In Korea, by contrast, the collection process had little element of popular consent and was undertaken instead by centrally dispatched investigators performing surveys of Korean law provisions and usages in selected parts of the country.

The survey campaign was conducted by gathering answers to some two hundred questions written by Ume and organized according to the Japanese Civil Code categories, following the *Pandekten* system, of "civil matters" and "commercial matters," with the former subdivided under "general principles," "properties," "obligations," "family," and "successions." The collected customs, fully redacted in Japanese, were first published in 1910.[6] It was a combination of the compilation of old Korean law and ritual books and field survey. Various administrative texts, containing articles from the codes (*Kyŏngguk taejŏn*, *Sok taejŏn*, *Taejŏn hoet'ong*, *Ta Ming lü*, *Ta Ming lü commentaries*, *Ta Qing lü*), Confucian texts (*Chuja karye*, *Yegi taejŏn*, *Sarye p'yŏllam*), and new laws proclaimed since the Kabo Reforms of 1894 were compiled. The collection included private documents and legal forms, such as sale contracts, land deeds, mortgage transactions, receipts, or tenancy contracts. A large part of the survey report also concerned ethnological subjects, such as marriage ceremonies and mourning and funeral rites (Chŏng Kŭngsik 2002, 205–57). A quick glance at these diverse materials makes it evident that they were not rules forming an integral part of customary law; rather, they were either paraphrased prescriptions of written codes or descriptions of isolated social habits with community consensus but no legal force. It is likely that Ume, a French civil law specialist, was mindful of the fact that the absence of learned doctrinal elaboration and jurisprudential activity had prevented the rise of customary law in Korea and that the collected materials did not constitute binding customary rules of particular communities. What Ume tried to do appears, in fact, to amount to an effort to accomplish, within a matter of a few years, what legal development in Europe had achieved over several hundred years, extracting rules from local usages that could be incorporated into the proposed civil code. The conception of custom as a major source of law, championed by the German schools, was closely appropriated by the Japanese scholars in their treatment of Korean "customs."[7]

[6] *Kanshū chōsa hōkokusho* 1910. For a Korean translation, see Chŏng Kŭngsik (2000).

[7] For a view that the making of the Korean Civil Code of 1960 was crucially influenced by the works of Japanese jurists trained in the tradition of the German schools, see Chŏng Chonghyu (1989, 89–92).

The collection of old Korean rules and practices began during the protectorate, prompted by the need for the redaction of civil law. Materials showing indigenous practices different from Japanese customs were further expected to justify the writing of a separate civil code in Korea. But Itō's proposal of writing a Korean civil code was met with substantial criticisms in Japan that a separate legal system would result in excessive independence in Korea. Many Japanese scholars expressed concerns that the lack of uniformity in civil law between Korea and Japan would cause confusion in economic transactions and create difficulties for investors (Chŏng Chonghyu 1989, 103–10). Itō's death in 1909 marked the virtual demise of the Korean civil code idea. The collection of Korean usages continued during the colonial period, but it now represented a bureaucratic campaign to gather administrative information or material in Korean law and tradition that could be useful in creating a new colonial order.

The annexation of Korea in 1910 led to a fundamental reconfiguration of Japan's legal policy in the new colony. Plans to compile independent laws in Korea were abandoned, and the Japanese colonial authorities proceeded instead to impose the Japanese law codes on the Korean people. The Chosŏn Ordinance on Civil Matters (*Chosŏn minsaryŏng* or *Chōsen minjirei*, hereafter referred to as the Chosŏn Civil Ordinance) of 1912 declared that the Japanese Civil Code, patterned after the first draft of the German Civil Code, would govern the Korean peninsula. The ordinance decreed, however, that certain legal relations among the Koreans be governed by Korean customary rules. A civil matter involving Koreans only was to be regulated by Korean custom, even if a specific custom was different from law, as long as the law was not related to public order (article 10). In matters of capacity, family, and succession among Koreans, Korean custom was to be followed (article 11). The ordinance also recognized customary property rights, departing from the Japanese Civil Code rule that property rights could be created and enjoyed only in accordance with statutory rules (article 12). Under these provisions, a significant part of private law matters covered by traditional usages were to be governed by Korean custom. While Japan actively regulated land relations in the colony, the decision to apply native custom in private relations among Koreans only was, in all likelihood, prompted by the consideration that it was not politically sensible for the colonial government to interfere immediately with such matters in the colony (Chŏng Kŭngsik 2002, 210).

Under this new civil law regime, which declared Korean custom a source of law, the colonial court judges were given the mission to decide private law matters according to custom. The immediate problem was that no definition of Korean "custom" was provided. Article 10 of the Chosŏn Civil Ordinance, which stipulated that custom prevailed over any law not related to public policy, recognized an extremely broad scope of custom in all juristic acts among Koreans, whether civil law or commercial law matters, taking precedence over nonmandatory statutory provisions. Yet the provision did not explain what

constituted "custom." The language of article 11, which held that, in matters of family and succession among Koreans, the Korean custom rather than Japanese civil law was to be followed, left unanswered the question of what Korean family and succession custom was. With the absence of any Korean collection of customs, the best available source remained the survey reports compiled by the Japanese a few years earlier. The Korean rules and usages regarding private relations had originally been collected for the purpose of codifying a civil law. They were raw materials from which legal principles and rules were to be extracted. Because there was no other source judges could consult, however, the collected materials, which presumably enjoyed certain antiquity and stability, were regarded as a rebuttable source of law, and "old Korean custom" came to be seen as synonymous with what was included in the report.[8] In this process, "custom" came to be defined extremely loosely. The contemporary Japanese jurist Asami Rintarō pointed out that the content of the surveys was often contradictory and irrational and that it seemingly came merely from piecemeal information from the law codes or *Chuja karye*, Zhu Xi's Confucian ritual text (Asami 1921, 35). The custom to be enforced in law seemed to be remarkably nebulous.

A variety of systems were set up to instruct the judges in customary rules, on which they were supposed to base their decisions. When the judges were in doubt about the legal relations in old customs, they sent inquiries to the executive authorities of the colonial government. The judiciary director and the civil administrator in the Government-General issued "notices" or "replies" to those inquiries from the courts or local administrative offices (*Minji kanshū kaitō ishū* 1933). In most cases, they were regarded as definitive declarations of custom. Special commissions were also established—the Old Custom Review Committee, for instance—composed of judges and the legal officials in the Government-General, "in order to review the customs and decide whether or not to adopt them" (Chōsen Sōtokufu Chūsūin 1938, 74). An independent association of jurists, *Chōsen Shihō kyōkai*, established in 1921, discussed and reviewed customs and published the results, confirming or rejecting certain practices, in its journal *Chōsen Shihō kyōkai zasshi.* The *Chōsen Shihō kyōkai zasshi*, published monthly between 1922 and 1945, functioned as both the official bulletin of the Government General's legal policy and a research journal for jurists in Japan and in Korea, playing an enormously important role in the shaping of colonial jurisprudence and doctrine (Chŏng and Chang 2004). In addition, a judicial

[8]*Hyŏngpŏp taejŏn*, promulgated in 1905, included certain regulations on family relations, mainly repeating those in earlier codes, such as *Kyŏngguk taejŏn.* For example, article 62 made a stipulation of family relation degrees; articles 572–74 prohibited marriage between those of the same surname; and articles 578–81 stipulated that a wife cannot demand divorce. See Yi Pyŏngsu (1977). These provisions were reported in *Kanshū chōsa hōkokusho*, no. 105, 130, and 134. The civil matter provisions were deleted from *Hyŏngpŏp taejŏn* in 1908.

decision review committee studied court decisions based on custom and tried to reconcile them.

The study of custom by these various groups represented efforts to systematize Korean customary law. In reality, however, contradictory responses were frequent, and this situation inevitably granted the judges of colonial courts wide latitude for determining the scope of specific customs in cases before them. The method of establishing the existence of a custom was exclusively by judicial notice. In Japanese law, the court, of its own power, investigated and applied law regardless of statutory law or customary law (Tanabe 1963). In Korea, since "custom" in the Chosŏn Civil Ordinance (articles 10–12) was interpreted as equivalent to "customary law," not just "custom in fact," the litigants did not need to plead or prove custom.[9] The colonial judges had the authority and duty to investigate custom and apply it to the case with the goal of pursuing objective and reasonable application of law.

Where there was no definition of custom, the judges were practically free to choose or reject old code provisions and practices depending on whether they were consistent with their notions of justice and equity. The courts, headed by the Chōsen Kōtō Hōin (Chosŏn Kodŭng Pŏpwŏn), did not hesitate in certain cases to distance themselves from the official instructions. Legal rules, if necessary, were amended to agree with their vision of the law. The judges naturally selected elements that were compatible with Japanese legal principles derived from French and German law. Judge Kitō Heiichi at the Chosŏn High Court acknowledged that certain expansive interpretations were inevitable in order to explain them in terms of the Japanese law (Kitō 1936, 2). The situation seemed similar to that in Taiwan, where some substantive contents of old Taiwanese practices were flatly modified to conform to Japanese civil law. A Japanese judge in Taiwan stated that a judge should not merely discover local custom but should be mindful of "improvement" when he applied Taiwanese custom to make decisions, so that such custom might not be contrary to public order or good morals (Wang 2000, 143).

In sixteenth-century France, the *parlements*, the sovereign law courts, had been instrumental in reforming "hard, iniquitous and unreasonable" custom and creating a unified system of law (Kim 2007). In Korea, similar efforts were pursued by the colonial courts. Trained in Roman law jurisprudence, both French judges and Japanese judges (and a few Korean judges sitting at the colonial courts), over three hundred years apart, saw it as their mission to reform irrational practices from the traditional legal order.[10] In both situations, the

[9]For analyses by colonial judges of the relationship between the Chosŏn Civil Ordinance, article 10, and the Japanese Civil Code, article 92, from which the "public order" language of article 10 was drawn, see Yoshida (1923) and Choi (1938).

[10]For most of the colonial period, the number of Korean judges was less than a quarter of Japanese judges. See Chōsen Sōtokufu (1935).

courts oversaw the evolution of popular, empirical, and collective practices in a living community to a body of learned, reasonable, and equitable judicial rules. The difference was, of course, that in Chosŏn Korea, there was no custom as paralegal norm with binding force. In Korea, therefore, customary law as it emerged during the colonial period was by far a more comprehensive artificial creation of the courts, largely indistinguishable from the general principles of civil law. In this course, the customary law in Korea was gradually assimilated with the civil law in Japan.

The Neo-Confucian Heritage

The matters that demanded the most serious attention from the colonial judges were those customs based on Confucian rituals. Confucian ritual practices, covering the vast area of succession and family relations in Chosŏn Korea, were most explicitly at variance with the legal concept of rights in the Roman law tradition. Japanese judges often deemed them to be irrational and impractical in terms of the social and economic realities of the new colonial Korea. Confronted with the problems of incongruities and conflicts between the Confucian worldview and Japanese law, the colonial judges moved to relax the rigid observance of various Confucian rituals and to abolish oppressive elements in them through their reworking of Korean customs. In fact, what many Korean historians claim as the traditional Korean custom that suffered suppression and distortion at the hands of the colonists was, rather, neo-Confucian ritual practice.

It has been well established that the institution of family in Korea underwent a significant change during the Chosŏn period because of the influence of neo-Confucian philosophy that entered Korea in the late fourteenth century (Deuchler 1992; Peterson 1996). From the seventeenth century, the dominance of orthodox neo-Confucian ideology, which emphasized ancestor worship, led to the Confucianization of Korean lineage culture and organization, resulting in a dramatic transformation from native traditions to imported Confucian traditions. Ancestor worship became a major agent of change in the family system. In the Koryŏ dynasty (918–1392) and in the early Chosŏn dynasty, daughters had been on equal footing with sons with regard to their right to inherit property. *Kyŏngguk taejŏn*, Chosŏn's first comprehensive law code, stipulated the equal distribution of inheritance among all heirs, male and female (Kim Ilmi 1973). But the Confucian doctrine of ancestor ceremonies, which favored the eldest son who was to perform the rituals, gradually substituted equal inheritance with unequal divisions of property and made the eldest son the principal heir. Ritual recognition of the eldest son caused the establishment of economic primogeniture.

There is a certain truth in the observation that Koreans were far more orthodox in their interpretation of Confucian precepts than the Chinese. By the seventeenth century, the Korean family system had attained its full patrilineal structure, adapting to the new Confucian order. The requirement in the Confucian classics that ancestors enjoy a sacrifice only when it is offered by an agnatic

descendant led to the prohibition of nonagnatic adoption. The Confucian model also demanded change in Korean wedding rites (Deuchler 1977, 15–17). During the Koryŏ dynasty, uxorilocal marriage prevailed in Korea. Uxorilocal marriage refers to a practice in which the wedding ceremony was held in the bride's house and the newlywed couple set up a household in the wife's parents' house. The couple stayed there until their children were born, usually a few years, before going to live with the husband's family (Pak 1974, 323–32). The Confucian ritual texts required that the wedding take place in the groom's house, yet in Korea, it continued to take place in the bride's house. However, the length of the couple's sojourn with the wife's parents was shortened significantly over time as the Korean wedding rites became permeated with the characteristics of virilocal marriage.

Uxorilocal marriage and the equal distribution of inheritance between all male and female heirs have been seen by researchers as key examples of the indigenous Korean custom that was lost in history. For many Korean historians, the main culprit was the Japanese-style household head system, forcibly imposed on Korea during the colonial period, which solidified the eldest son's exclusive inheritance of family status (Pak 1977, 16; 1992, 1–3; Yi Sangwuk 1986, 1988, 1991). As a consequence, they argue, Koreans have come to mistake primogeniture for Korea's traditional succession rule. As seen earlier, however, equilateral inheritance grounded on the uxorilocal marriage practice had already been seriously assailed by Confucian ritual practice by the seventeenth century. The unequal distribution practice in Korea was taken up by the colonial authorities, who saw a ready ground for the transplant of the Japanese household head system, which confirmed the eldest son's status as the principal heir. If there was an inheritance "custom" in the Chosŏn dynasty, it was the practice of excluding women and disadvantaging younger sons. It was based on a popular consensus—first predominantly among the elite segment but spreading to the rest of society as Confucian values and norms were filtered down to the lower classes—yet it apparently escaped the proscriptions by the government. Even this transformation of practice did not amount to the establishment of custom (*contra legem*), however, because there was no judicial approval of the practice. On the other hand, uxorilocal marriage was not a usage particular to a locality but instead was widespread all over Korea, lacking a definitional element of custom as a rule for a restricted community.

Here it becomes clear that the failure to distinguish clearly indigenous Korean practice from Confucian ritual practice fuddles the understanding of custom and law in Korea. Historians are certainly justified in trying to correct the misunderstanding that Korean society was always patrilineal and patrilocal, but ascribing this misconception to colonial law obscures the question. The Japanese imposition of the senior male household head system on Korea, an institution similar to the Roman paterfamilias, expedited women's loss of status and independence in Korea. It was, however, a development that had already begun a few hundred years earlier. Under Japanese rule, what the colonial

judges mainly had to tackle in family and succession matters was Confucian rituals rather than indigenous Korean custom. Instead of denouncing the colonial attempts to distort Korean custom, then, attention should be redirected to examining the process and the essential nature of the judicial enterprise of creating a new Korean customary law. Whether the Japanese misrepresented Korean customs by failing to mention uxorilocal marriage in the surveys conducted under the protectorate government is secondary in importance. Rather, it has to be asked whether the judicial makeover of customs was not part of a larger effort to weaken Confucianism and to make a modern state in a radically different ideological and intellectual context.

Adoption

An examination of the impact of colonial jurisprudence on Korean adoption practice can shed light on how the Japanese courts reordered Korean practices into a modern civil legal framework. Under the Chosŏn dynasty, adoption was practiced to secure the perpetuation of the descent line whose direct heir was in charge of the ancestral ceremonies. Ritual succession was a pivotal feature of the Korean succession system, but its legal status was questioned by the colonial jurists such as Nomura Chōtarō (1927, 103), the Chosŏn High Court judge and the Keijō Imperial University professor, who was one of the most eminent authorities on Korean family and succession laws and a frequent contributor to *Shihō kyōkai zasshi.* Under ritual succession, couched in Confucian lineage ideology, only a lineal male, usually the child of a brother or cousin, was suitable for adoption so as to offer proper sacrifices. The resulting prohibition of nonagnatic adoption was responsible for highly complex, convoluted, and perplexing adoption rules in the Chosŏn dynasty. Adoption was practiced either during the lifetime of the person to be succeeded or after his death. The nineteenth-century German jurist Joseph Kohler found posthumous adoption immensely intriguing. As he explained in 1886, when a person had a son who was married but died without a son, the former adopted a child, not for himself but for the soul of his deceased son, and the adopted person became his grandson, not his son (Kohler 1886, 403).

Adoption was given the status of law in Korean law codes as an institution to establish an heir. The law permitted establishing a jural-ritual heir only if both the primary and the secondary wives did not have sons. There was widespread practice among elite families, however, of adopting a son even when there was a son from the secondary wife. The colonial court initially confirmed such a practice as Korean custom without distinguishing between lifetime and posthumous cases.[11]

[11]*Chosēn kōtō hōin anketsuroku*, hereafter referred to as *Anketsuroku*, 1:426–29 (decision of January 24, 1912); 2:200 (May 20, 1912). The High Court decisions are summarized in *Chōsen kōtō hōin hanrei yōshi ruishū* (1937). See the earlier reply from the head of the Investigation Department (May 10, 1911) recognizing the validity of adoption with the presence of a secondary son in *Minji kanshū kaitō ishū* (1933, 55–57).

In 1914, the civil administrator of the Government-General confirmed the existence of adoption and went on to declare that the adopted child preceded the secondary son (*sŏja*) in succession (*Minji kanshū kaitō ishū* 1933, 179–181, 215–16). The Chosŏn High Court duly rendered a decision the same year in favor of the child adopted inter vivos (*Anketsuroku*, 3:9, January 29, 1915).

In 1917, an illegitimate son sued a party who had been established as an heir after the death of the father. The lower court decided that adoption after death, regardless of whether there was a son from the secondary wife, was a Korean custom. The high court reversed this decision, however, distinguishing between inter vivos and postmortem practices. The court declared that the adoption of an heir when there was already a son from the secondary wife was "valid only when the arrangement was made during the lifetime or in will. Postmortem adoption despite the presence of a secondary son is not an established custom, and remains an individual, and exceptional, practice among the powerful. It is hence invalid" (*Anketsuroku*, 4:1018–29, November 7, 1917).[12] The significance of this decision is that the court distinguished mere practice from customary law. Later, the court reasoned that the recognition of postmortem adoption should be disallowed because it would create the effect of delaying the beginning of succession, thereby creating confusion and disruptions in society (*Anketsuroku*, 14:33–34, February 15, 1927). In more practical terms, the effect of the adoption practice that had put secondary sons at a disadvantage was limited. What the court was doing, in fact, was loosening the rigid observance of the lineage system based on Confucian kinship organization. Jurisprudential streamlining of customary law under the impulsion of colonial legal system was fully at work.

The High Court confirmed the existence of the practice of fostering a child with a different surname (*suyanja*) (*Anketsuroku* 9:170, May 5, 1922). *Suyanja*'s legal effect was to be distinguished from adoption for the performance of ancestor ceremonies, which prohibited nonagnatic adoption, but the court's sympathy for nonagnatic adoption, justifiable in terms of human activity, could not be mistaken. The Korean ritual succession, which was incompatible with Japan's civil law that recognized household headship succession and property succession only, was set aside by the court in 1933. The court declared that ritual succession was a mere practice of acquiring an "ethical status" to perform ancestor ceremonies without implicating legal rights (*Anketsuroku* 20:154, March 3, 1933; *Shihō kyōkai zasshi* 12(8): 154–62).

As seen in these cases, Korean "customs"—more precisely, Confucian ritual practices that were in conflict with Japanese Civil Code provisions—were progressively transformed through jurisprudence. Subsequent statutes soon turned case law into legislation, effectively steering Korean legal practices in

[12]For an analysis of the case, see Yi (1999, 187–18) and Sim (2004, 18–22). The Old Custom and System Investigation Committee voted in 1920 against adoption when there was an illegitimate son. See *Minji kanshū kaitō ishū* (1933, appendices, 23–24).

line with Japanese law. The 1912 Chosŏn Civil Ordinance was periodically revised to extend the application of the Japanese Civil Code as opposed to Korean customs. The first revision in November 1921 adopted the Japanese law of legal capacity; the revision of December 1922 allowed divorce by consent and divorce by trial. In 1939, the last revision of the Chosŏn Civil Ordinance before 1945, the Government-General officially imposed the Japanese law of marriage and adoption on the colony, abolishing the prohibitions on adoption between different surnames and the adoption of sons-in-law. The prohibition on marriage between the same surnames was also abolished.

Colonial Jurisprudence and the Making of Civil Law

Some recent studies on Japanese legal policy in Korea have rather boldly proposed the need to look at colonial law from a perspective detached from the usual national sentiments (Sim 2004). Certain Korean historians have also pointed out that Japanese legal policy in Korea hinged on the relationship and conflicts between the colonial government in Seoul and the Japanese cabinet in Tokyo. The Government-General supposedly attempted to pursue an autonomous legislative order justified by "the peculiarity of Korean society," and the colonial officials only reluctantly shifted their policy to a full adoption of Japanese civil law after the late 1930s because of growing pressure from Tokyo (Yi Sŭngil 2003, 266). The legal policy of the Government-General was thus predicated not so much on the goal of assimilation as on the need to accommodate evolving practices in Korea that emerged during the rapidly changing modernization period (266). Japan's legislative policy in Korea was far too complex to be understood through the exclusive standpoint of assimilation policy.

It is unfortunate, however, that most contemporary studies on colonial civil law lack a rigorous conceptual definition of custom, relying instead on the notion of a colonial-era Japanese invention. An examination of divorce during the colonial period presents a good example. The Chosŏn High Court had early on recognized the spouse's right to file for divorce (*Anketsuroku*. 2:84, December 13, 1911). In 1915, the wife's right to seek judicial divorce was affirmed (*Anketsuroku* 4:215, July 6, 1915). After that, divorce filing increased rapidly. The number of judicial divorces was 6.5 times higher during the period 1917–21 compared with the period 1908–16 (Yi Sŭngil 2003, 172–73). Yi saw this development as evidence that divorce emerged as a new custom, subsequently receiving a legislative approval (173). But was divorce a custom naturally rising from a changing legal spirit among the populations? His view that the colonial government obligingly implemented new customs overlooks the fact that there were no customs of autonomous local consensus that evolved during the colonial rule, except for the ones that the government created, declaring their existence to be a source of law. To be sure, there

emerged changes in certain usages reflecting new situations of facts created by social evolution, but they certainly did not amount to the rise of new customs. Instead of being a "new" custom, judicial divorce was, rather, the result of the availability of the system put in place by judicial lawmaking that provided Korean wives with the framework and the vocabulary with which to exert their right of divorce. This question, in fact, suggests that colonial jurisprudence frequently resorted to the notion of custom in devising colonial family law. Many decisions providing for new measures demanded by civil law principles were often carefully enveloped by the fiction of custom.

The legal instrument of custom proved powerfully useful in molding Korean practices and procedures in accordance with Japanese law, all the while claiming continuity with the Korean past. The colonial government repeatedly stressed its willingness to respect Korean custom, and the judges, legally bound to decide family law cases according to custom, made the most of it. In 1935, the High Court reviewed the statute of limitation on the recovery of succession rights. The court had found in 1920 that "Chosŏn does not have a fixed custom" to deny a legitimate successor's claim for the recovery of succession rights (*Anketsuroku* 7:287, June 23, 1920). In case the unqualified had already succeeded, the legitimate successor could exercise—without time limit—his right to reclaim succession and to demand the return of the inherited property (*Anketsuroku* 7:88, March 12, 1920). Fifteen years later, however, the court reversed itself under the claim of the authority of Korean custom. The judges wrote, "Claims for recovering succession rights to family headship and property can be made only within a certain time limit, either upon the knowledge of the successor or his legal representative of his right's violation or upon the beginning of succession; after this period such rights expire. This is Chosŏn's custom" (*Anketsuroku* 22:302, July 30, 1935).

The decision, rationalized by the court's "discovery" of custom, was favorably received by jurists that the statute of limitation would ensure the validity of succession transactions. However, Keijō Imperial University professor Yasuda Kanta pointedly criticized the court's ruling on the grounds that the court had abused the legal concept of custom (Yasuda 1936, 18–19). Yasuda refuted the court's claim that the right of recovery and its statute of limitation had existed as custom in Korea. According to him, the rule that stipulated a time limit for the legitimate successor's claim was both necessary and desirable. Both Korean legal consciousness and the principle of law required it. Nevertheless, he argued, it was wrong for the court to say that "custom" to that effect governed in Korea. In reality, the court's decision was merely responding to the demands of reason while appropriating the name of custom. The court should have justified its decision in terms of reason, Yasuda castigated, rather than taking refuge behind custom.

This case, similar to the adoption case cited earlier, in which the court reversed itself upon *finding* a different custom, evinces the mutable and pliant

nature of judge-made customary law during the colonial period. To some scholars, the court was clearly abusing the notion of "custom" in efforts to steer the Korean legal system in a new direction. The concept of custom provided the legal machinery with which Korean practices could be fashioned and revised to agree with modern legal principles.

The various statements made by the colonial officials suggest that they were aware of the danger of relying on coercion in shaping Korean customary law and that they were inclined to move toward the accommodation of existing practices when they departed from the Japanese Civil Code. This flexible approach was possible, of course, because family law was not directly related to political control. The goal of unifying Korean and Japanese laws was pursued fundamentally through jurisprudential activities. Where there were no juridically established customs in Chosŏn Korea, colonial courts enjoyed wide discretion in selecting certain Korean usages that satisfied their reasoning and converting them into customary law. The courts, predominantly manned by Japanese judges, applied their own principles in deciding customary law issues. The attitude of the colonial judges toward Korean custom was not that of ignoring it as a useless thing, which should be immediately abrogated and replaced by Japanese norms. Rather, the treatment by the High Court demonstrated a patient jurisprudential activity, cast in a pattern of adaptation, to rework custom as a means of creating a legal system that they deemed desirable. The colonial jurists undertook a doctrinal formulation of specific customs in Korea to reconcile them with the Japanese Civil Code, often engaging in a sort of casuistic construction of law. The result was a judicial legislation, a customary law without *opinio necessitatis.*

In colonial jurisprudence, custom played the role of an essential intermediary regime between tradition and the demands of modern civil law.[13] The Japanese jurists, given the task of formulating a legal structure based on customary law for the newly colonized Korea, struggled to implement a system that they themselves found confusing and contradictory. Their use of the term "customary law" was often strikingly incongruous and uneven. The picture of colonial law that emerges is less one of a systematic, collusive machination than one of a volatile, bumpy patchwork. This fact did not deter the colonial officials from crediting their jurisprudential activities for successfully remaking colonial private law in line with the Japanese law. In 1939, the judiciary director and former High Court judge Miyamoto Gen applauded the fact that genuine Japanese legal scholarship was firmly taking root in Korea in the family customary law area. The same year, when the assimilation policy reached its pinnacle with the application of the Japanese Relatives Act to Korea, the Ministry of Overseas Affairs in Tokyo summed up Japan's customary law policy in Korea in the following terms:

[13]For a similar process taking place in Japan, see Seizelet (2001).

> Under the Chosŏn Civil Ordinance, family and succession matters are governed in accordance with Korean old customs. But … there are customs that do not conform to the changes of times. From early on the judiciary has attempted through precedents to render family and succession customs consistent with the family and succession laws in [Japan's] civil law, and the Civil Ordinance has seen its regular revisions to conform to the civil code. Through many years of the court's efforts, now there is demand among Korean people for the unification of the legal systems.[14]

Aside from the apparent self-congratulatory exuberance in justification of the assimilation of Korean law to Japanese law, this statement appears to be rather accurate a synopsis of Japan's legal policy in Korea.

Conclusion

The notion of "custom" during the Chosŏn dynasty has figured prominently in Korean scholarship in efforts to prove the disastrous effect of colonialism on the Korean legal tradition. Since there was no customary law in Korea, however, there was not much the colonial judges could distort. The Japanese collected Korea's popular practices, which were supposed to serve as an antecedent for a modern civil law, but ancient usages in Korea did not have any appearance of legal norms except under colonial rule. Just as there is a difference between "sociologists' customary law" and "lawyers' customary law" (Woodman 1983), there is a distinction between customary law arising from accepted practices and that created by the colonial authorities. Devoid of the spontaneity of expression of local consensus that characterized customary redactions in Europe, the entire process of making customary law in colonial Korea proved to be far more focused, punctilious, and efficient. The understanding that government-created customary law was dictated to a Korean population with no customary legal past is important because it explains the relative facility and thoroughness by which Korean usages were replaced with Japanese rules. A "custom" was named, created, and assigned by the colonial power to a precise function in the legal order. Korean custom, which colonial officials professed to preserve, was in effect consciously fashioned, carefully modified, and thoroughly transformed. What emerged during the colonial period was bureaucratically constructed customary law.

The fiction of customary law was powerfully sustained in the peninsula throughout the colonial period. An essential defect in this kind of customary

[14] *Kōbun Ruishu*, 63rd compilation, vol. 36 (1939): Government-General of Korea, no. 5: "Amending the ordinance for installation of temporary employees within the Government General of Korea," August 22, 1939, A02030104500 (11/121).

law is evident. The Korean social reality was neglected by the colonial courts through their judicial dispositions. In the course of molding customary law to fit the foreign legal system and its standards, there inevitably occurred cases of alteration and underrepresentation of practices followed by a community. In this process, "tradition became traditionalism" (Fitzpatrick 1984, 24). Professor Pak Pyŏngho was fully justified when he declared that "it is necessary to revisit fundamentally the outcomes of studies during the colonial period and liberate Korean legal historiography from the dogma that views the Korean traditional past as the sum of negativity, corruption, and unlawfulness" (Pak 1974, preface). Yet the legitimate need to correct the misinterpretation and confusion arising from the mischief of the colonial regime does not warrant the infusion of nationalistic instincts into Korean legal tradition. Imperialism, seeking efficient control of the natives, might indeed have led to important legal developments. So far, too much emphasis in Korean historiography has been placed on the issue of cultural assimilation on a policy level, without sufficient attention to how custom was systematized and modified by the colonial courts. It seems less than accurate to state that the Chosŏn High Court merely followed the political directive of the Government-General. The decisions of the court confirming or denying a custom were the consequence of individual judges' reasoning and consideration rather than the comprehensive policy at the Government-General. Along with doctrinal activities, which in many cases were conducted by Japanese law professors in Korea, jurisprudence played a significant role in promoting legal modernization in colonial Korea.

A critical look at colonial customary law points to certain important implications for Korean legal historiography. Any sign of questioning the idealistic nature of premodern Korea's legal development tends to raise a strong reaction in Korea.[15] For instance, the famous characterization by Pyong-choon Hahm of traditional Korean law as marked by a relative lack of rights consciousness, a heavy emphasis on informal settlement, and the negative perception of lawsuits has been the subject of severe criticisms among many Korean historians (Hahm 1967, 1986). Those who disagree with the "Hahm thesis" that traditional Korean law codes were of predominantly penal nature contend that Korea did have a tradition of civil law (Im 2000, 35–36; Pak 1974, 235; Yang 1989, 891–901). Hahm's portrayal of Korean legal culture as alegalistic and lacking private rights consciousness should not, however, be monolithically perceived as a challenge to the quality of Korea's legal past. To the contrary, the unique characteristics of the traditional Korean legal culture–solicitous, conciliatory, and flexible,

[15]See Carter Eckert's essay, "Epilogue: Exorcising Hegel's Ghosts: Toward a Postnationalist Historiography of Korea," in Shin and Robinson (1999, 363–78): "Any interpretation that lies outside the nationalist framework, let alone one that dares to challenge the relevance or validity of the framework itself, is often ignored as unimportant or castigated as morally deficient, regardless of the evidence" (366).

emphasizing moral persuasion and social harmony–can be favorably contrasted with the legalistic, contentious, litigious, and rigid judicial culture in the West.

The general lack of interest in the West in Korean law can be ascribed, at least in part, to the common belief that Korean law during the Chosŏn dynasty was dominated by, and hardly distinct from, Chinese law, whereas its modernization in the twentieth century was fastidiously modeled after German law modified by the Japanese, rendering modern Korean law rarely distinguishable from Japanese law. In Korea, the attention of many historians has centered on the juxtaposition of premodern Korean law and colonial law, aiming to prove that Korea had its own system of private law but was cut off from its legal tradition by Japanese coercion. Yet admitting that the civil laws that Korea inherited at independence were crucially shaped by the colonial experience is far from belittling premodern Korean law. Instead, such an acknowledgment can lead to a constructive step forward in the direction of Korean legal scholarship, shifting away from justifying and defending Korea's tradition by using the very colonial discourse it purports to criticize to showing the extent to which indigenous Korean law was distinct from both Chinese law and the modern Western tradition. Strong administrative consolidation in Korean dynasties promoted the development of centralized law instead of localized customary law. The absence of custom and civil law in Chosŏn Korea does not make its legal past incomplete; Korean law was complete in its own unique way.

The American legal historian John Merryman observed years ago that the amount of writing on custom as law in civil law jurisdictions was immense, far out of proportion to its actual importance, mainly because of the need to justify treating as law something that is not created by the legislative power of the state and, more important, because of the significance of custom as a source of national pride and identity (Merryman 1969, 12, 23). Modern Korea is not an exception. In addition, the vast amount of writing on customary law in current Korean scholarship appears to be grounded on yet another reason of the need to justify the continuing jurisprudential adherence to the customary law as constructed by the colonial courts. The Supreme Court of Korea has largely tended to follow the Chosŏn High Court's customary law decisions for the sake of the stability of legal relations. The recent revisions of Korean family law have represented conscious efforts to shed the remnants of the colonial past, yet the influence of the Japanese legal order on modern Korea is still ubiquitous. A balanced look at the development of civil law under Japanese rule may help in reconfiguring the prolific discussions over custom as a source of law in Korea.[16]

Correcting the distorted pictures of Korean history painted by colonial historiography has been an overriding task for many Korean historians. But there is

[16]For one recent example of this heated debate—with certain political overtones—over customary law, see Kim (2004b).

now an urgent need to go beyond rehashing the theme of the Japanese marring Korean law. Consideration of the Korean experience from a broader perspective of comparative analysis can yield its significance. Above all, the all-too-restrictive mold of nationalist historiography should give way to a more nuanced and pluralistic view of the past. It is time that Korean legal history be freed from the emotional baggage of its own past.

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