Introduction

This book sets forth the evolution of law in Korea from the Chosŏn dynasty through the colonial and postcolonial periods. Its overriding theme is the role of custom in the reception of modern private law in Korean history. Law and custom are issues that bear crucially on the dichotomy of tradition and modernity, a perennial question for scholars of East Asia. It is a topic of particular poignancy for Korea because of the country's colonial past. Following more than 500 years of indigenous rule under the Chosŏn dynasty (1392–1910), Korea became Japan's protectorate in 1905 and remained a Japanese colony from 1910 to 1945. Korea's passage from a legal system belonging to the Chinese legal tradition to the Romano-German civil law system took place mostly under Japanese rule.

The main thesis of this book is that the reception of European civil law in Korea was facilitated by the colonial authorities who conjured up a Korean customary law. The idea of custom as a source of law was nonexistent in traditional East Asia within the imperial Chinese legal sphere, which had predominantly penal state law systems. The concept of customary law was introduced to Japan in the wake of legal modernization in the second half of the nineteenth century. Japan subsequently brought the conceptual framework of customary law to colonial Korea. Through the customary law system constructed by the colonial regime, Korea's traditional law was reconciled with the imposed Japanese legal order. Colonial customary law served as an intermediary regime between tradition and the demands of modern civil law, as new and old laws were negotiated through colonial jurisprudence.

The transformation of Korean law by the brisk forces of Westernization under colonialism presents an intriguing case for investigating the spread of civil law in modern history. Korea's modern legal development was inexorably tied to that of Japan. In Korean scholarship, the view that legal changes that took place under Japanese influence were essentially geared to promote colonial interest has proved largely unyielding. Reluctant to challenge the validity of the prevailing nationalist framework, many historians have shied away from discussing the significance of legal reforms initiated by the Japanese in colonial Korea.

Customary law has of late sparked much discussion among Korean legal historians, stemming largely from the effort to discern elements in indigenous law that withstood foreign influence and continued into Korea's modern law. Korean historiography has often been tinged with a wistful longing for a lost world and infused with national sentiments aiming to underscore the unique nobility in native Korean law, not tainted by Japanese – that is, Western – law. 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. 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. There are conscious attempts to place an emphasis on custom in the Chosŏn dynasty as a possible means of proving its autonomous legal identity. Some have focused on the suppression and distortion of the Korean legal tradition and culture by the colonial authorities.

Idealization of custom as true national law, a symbol of indigenous cultural values and tradition, is far from unique to Korean scholarship. It was a dominant trend in European historiography in the nineteenth century. The tenets of the German Historical School – that law was the product of the history of the people and that popular practices were the living matter of law – had an immense impact on modern legal historiography. In the wake of national codification in the nineteenth and twentieth centuries, a number of countries enshrined custom as a source of law. The first Korean Civil Code after independence was enacted in 1958 and came into effect in 1960. It declared customary law to be an official source of law next to statutes. Legal modernization conferred on the notion of customary law a sort of historical legitimacy.

The irony for Korea is that invoking the authority of customary law in its traditional legal order had, in fact, a colonial origin. What Korean legal historians refer to as Korean customary law was a historical construct on the part of the Japanese jurists who were given the task of formulating a modern legal order in the colony. This means that the effort to expunge colonialism ended up relying on the colonial framework of law. What has been seen as the intentional distortion of Korean customs by the Japanese judges was in fact a familiar process in history of regulating customs by jurisprudential action. In the meantime, general indifference on the part of scholars to discussing colonial modernity has left unresolved the problem of explaining the transition from Korea's dynastic law to its modern law based on the civil law tradition. Colonial historiography tended to view indigenous Korean law as inferior and underdeveloped, and the significance of the effort to rescue Korean law from the unjust reputation cannot be exaggerated. But understanding the true nature of traditional Korean law may be impeded if such efforts are grounded on the faulty assumption that one can only demonstrate the maturity of Korea's legal tradition by finding in it the features of Western law.

Some historians have tried to find in "living law" in Chosŏn Korea the elements of modern law such as contractual liberty and private rights; they have

also disputed the view that traditional Korean law codes were of predominantly penal nature. Yet these assertions pose a problem because they seem to be grounded less in evidence than in a desire to show the advanced state of Korean traditional law by demonstrating that Korea had a tradition of civil law comparable to Euro-American legal traditions. It is important to discuss the development of Korean law without succumbing to the temptations either to show that Korean law followed a trajectory similar to the evolution of European law or to show that Korean law and custom were inherently unique and thereby incommensurable.

It has been argued that legal scholars support the notion of incommensurability of different legal traditions because "incommensurability provides a means of defence – a kind of philosophical Great Wall – against what have been described as 'monistic theories.'"[1] Embracing the incommensurability of legal traditions spares one from the risk of ill-conceived value judgments. But legitimate efforts to avert the rigid viewpoint of a linear development of law may expose historians to a different kind of danger, namely provincialism in the writing of legal history. This book aims to examine the development of Korean law and custom from comparative perspective, mindful of the need to avoid these pitfalls.

Discussion of customary law must start with a definition of terminology. What is custom? What is law? How does custom differ from customs? When do customs become customary law? Generations of scholars – jurists, historians, philosophers, sociologists, and anthropologists – have debated these questions, but there has been little agreement. Essentially the issues can be restated as what qualifies as "legal" to be included in law, and whether state law represents the quintessence of law. Modern debates over the concept of law revolve around two contrasting theories.[2] Legal anthropologists and sociologists tend to argue that all sorts of social control, including social habits and customs, are law. According to them, all forms of normative orders not attached to the state are nevertheless law. It is a theory that harkens back to the maxim, "where there is society there is law" (*ubi societas ibi ius*), or "no society is without law." In contrast, the second theory limits law to state law. In this formula, in the legal positivist tradition, law is narrowly defined as rules and standards recognized by actors with governmental authority and attendant enforcement power.

It is instructive to note that the first theory with its expansive concept of law was prompted by colonization. Colonial powers presented law as the mark of a civilized society and the "civilizing mission" provided a powerful justification for the colonial imposition of legal regimes on the colonized.

[1] H. Patrick Glenn, "Are Legal Traditions Incommensurable?" *The American Journal of Comparative Law* 49 (1991), 137.

[2] See Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217; Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27 (2000): 296–321.

In reaction to this ethnocentric legal centrism, some scholars – mostly legal anthropologists – asserted that indigenous societies without a state still had law, consisting of various native customs and institutions. Recalling that this idea of legal pluralism was a product of colonial circumstances suggests, then, how problematic it would be to apply this loose concept of law to the Korean case. Unlike most European colonies, Korea had a highly advanced and comprehensive codified legal system and a thriving statecraft culture at the time of the arrival of the colonizers. Its state codes were replete with elaborate penal proscriptions and administrative regulations. Legal norms included in the codes of the Chosŏn dynasty were "laws" of Korea and these laws were "rule-bound." Chosŏn Korea embodied the standard state law model. If one starts talking about non-state law and includes all aspects of social life in the realm of law, one may be effectively negating the existence of the whole legal system of traditional Korea.

In the Western legal tradition, law was primarily a system of civil law rules enforced through adjudication. In East Asia, in contrast, legal systems consisted of penal and administrative law, and the notion of private law as judicially enforceable norms governing relations among individuals was absent. In a project concerned with explaining how private law came into existence in East Asia, which is the focus of this book, the overly inclusive concept of law is of limited utility. The broad concepts of law and custom regard customs as the universal origin of law, supposedly emerging spontaneously in social existence. Customs are seen as living law or self-produced legal order. This view embraces the belief that the legitimacy of law can only emanate from the agreement of the people, in the form of social convention. But law as a spontaneous expression of popular will obviously had no place in traditional Korea. Law was the work of the administrative and bureaucratic state, created and imposed by the king to govern the realm. Custom in the legal meaning of the term did not exist in the Chosŏn dynasty. In Korean history, resorting to the narrow definition of law seems unavoidable.

In this book, a basic distinction is drawn between customs (popular practices, habits, or social facts) and custom (a common usage that has acquired the force or validity of law). This divide emphasizes the juridical nature of custom. When custom is written down and recognized as a source of law, one can call it customary law, but in reality the difference between custom and customary law is insignificant. The postulation of custom (or customary law) as a judicial artifact, complete with judicial decisions and doctrinal activities by professional jurists, is essential in laying out a precise criterion for private law or civil law. Custom supposes a certain degree of legal constraint. Practices and usages are distinct from law because there are no legal sanctions for a failure to follow them. Customary rules as a form of private ordering, enforced informally by means of social disapproval, do not have the attributes of law. Living law, de facto law, or practical law is not law because it lacks legal authority. The loose construction of law and custom results in a situation in which law loses any distinctive meaning.

In the traditional view, custom as the embodiment of indigenous cultural values and tradition was often pitted against the influence of alien law. Heightened attention to custom – the movement to record customs for instance – usually took place in the backdrop of stimulus, or perceived threat, from nonindigenous law. But it is worth recalling the dictum of Roscoe Pound that the "[h]istory of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law."[3] Here, the concept of "legal transplantation" as a major vehicle of legal change can serve as a useful theoretical framework for explaining the development of custom and civil law.[4] According to Alan Watson, legal transplantation constitutes a process in which lawmaking elites are engaged throughout history, reshaping existing legal order with rules and concepts originating in other legal systems. He asserts that "borrowing from a different jurisdiction has been the principal way in which law has developed."[5] Among the most controversial in Watson's thesis is the claim that there is little correlation between society and legal change.[6] He argued that "legal rules are not peculiarly devised for the particular society in which they now operate."[7] This assertion seems to contradict not only the time-honored observation of Montesquieu that geographical and sociological factors influenced legal changes but also Friedrich Karl von Savigny's *volksgeist* theory that law was properly "custom," the "spirit of the people."

Watson's view stressing the autonomy of law has been subject to round criticisms. Otto Kahn-Freund stated that legal institutions were deeply embedded in a nation's life.[8] Lawrence Friedman has argued that law is a mirror of society and that law changes in response to the internal demands of the people.[9]

[3] Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938), 94. The reception of common law in America began at a time of "political hostility to things English after the American Revolution." Roscoe Pound, "The Development of American Law and Its Deviation from English Law," *Law Quarterly Review* 67 (1951), 66.

[4] Alan Watson, *The Evolution of Western Private Law*, exp. ed. (Baltimore and London: The Johns Hopkins University Press, 2000); Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens: University of Georgia Press, 1993).

[5] Alan Watson, *Society and Legal Change*, 2nd ed. (Philadelphia: Temple University Press, 2001), 98. For discussions of Watson's legal transplant theories, see Michael H. Hoeflich, "Law, Society and Reception: The Vision of Alan Watson," *Michigan Law Review* 85 (1987): 1083–1094. In European legal history few codes "are original in the sense that they have been made fresh for the territory in which they operate without a great dependence on foreign law." Edward M. Wise, "The Transplant of Legal Patterns," *American Journal of Comparative Law* 38 (Supplement) (1990), 5. A scholar argued that it happened "twice only that the customs of European peoples were worked up into intellectual systems of law," that is, through the Roman system and the common law. See S. F. C. Milsom, *Historical Foundation of the Common Law*, 2nd ed. (London: Butterworths, 1981, 1969), 1.

[6] Watson, *Legal Transplants*, 109.

[7] Ibid., 97.

[8] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *Modern Law Review* 37 (1972): 1–27.

[9] Lawrence M. Friedman, "Review of *Society and Legal Change* by Alan Watson," *British Journal of Law and Society* 6, no. 1 (1979): 127–129. For a synopsis of the debate surrounding Watson's

Whether there is a direct relationship between people and the law operating in their community and whether the law of any society is a reflection of the common consciousness of the community are questions that evoke the basic difference between the two kinds of customary law discussed earlier. One arises from accepted practices and one is created by the courts; the former is "sociologists' customary law" and the latter "lawyers' customary law."[10] This difference reverts back to the disagreement on what "law" means. If one focuses attention on the state's legal rules, institutions, and systems, the autonomous nature of law and the social utility of legal reception seem hardly disputable. When one turns attention to legal cultures and social traditions, however, the mere demonstration of the existence of a custom may suffice in order to consider it as a source of law, and the importance of legal reception becomes minimized.

Watson has argued that custom became law only when it was officially recognized or accepted by judges, regardless of whether there actually was an existing custom, and that this recognition was signaled by court decisions.[11] From this, he has asserted that custom matters only "for those who believe that there is a very close correlation between the law of a society and the life of the society."[12] For Watson, most Western societies persist in the myth that customary law emerges from past popular behavior because the belief that a judge is just making up a rule deprives the system of customary law of its authority.[13] But in reality, he argued, the development of private law was primarily the work of jurists. Watson's view downplaying the relation between a society and its law should not be exaggerated. The reception of alien law is certainly propelled by social needs. But the point is that these social needs are largely ascertained and acted on by legal elites.

The postulation of legal transplantation in Europe as a process that was largely independent of, or at most indirectly dependent on, society appears to find an equally remarkable articulation in the context of modern East Asian history. The emergence of custom as a source of law was the result of acculturation on the model of the "learned law," as witnessed in medieval Europe with the reception of Roman law. In fact, the development of customary law in history can be seen in terms of legal imperialism that started with the expansion of Roman law in antiquity. It represented the ruler's effort, supported by legal elites, to unify legal sources and centralize the realm. The same process continued with colonization in the early modern period and in the nineteenth and early twentieth centuries. The cases of Korea, China, and Japan can be seen as part of this general pattern that was witnessed throughout the world.

thesis, see William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants," *American Journal of Comparative Law* 43 (1995): 489–510.

[10] Gordon R. Woodman, "How State Courts Create Customary Law in Ghana and Nigeria," in *Indigenous Law and the State*, eds. B.W. Morse and G.R. Woodman (Dordrecht: Foris Publications, 1988), 181–220.

[11] Watson, *Legal Transplants*, 75–78.

[12] Alan Watson, "The Evolution of Law: Continued." *Law & History Review* 5 (1987), 550.

[13] Ibid., 537, 548–549.

In East Asia, the first attempts to codify customary law took place during 1870–1880 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. After Korea became Japan's protectorate, Japan started collecting Korea's old laws, rites, and popular usages. The postulation of customary law in Korea's legal past was a colonial legacy. Following annexation, Japan imposed its civil law as the general law of the colony but allowed Korean customs to govern most private relations among Koreans. Custom was thus declared to be the official source of law and a system of customary law was established. Because Chosŏn Korea did not have a body of written private law, except for some provisions scattered in the criminal code, colonial officials needed to rely on Korea's "custom" in regulating legal relations among the natives. Old customs of Korea were thus redefined and became legal rules.

Recent scholarship in European colonial history has shown that much of colonial customary law was a creation at the hands of the colonial power.[14] In European colonies, all indigenous practices and institutions that governed the natives were subsumed under the comprehensive term "custom," which basically referred to anything that was not law of European origin. The less than scrupulous colonial usage of the term custom became even more problematic in the Japanese colonies. In Korea, anything that was distinguished from Japanese law was dubbed "Korean custom," a category that comprised Korean codes, Confucian texts, popular practices, mores, and so on. The indiscriminate usage of the terms "customs," "custom," and "customary law" that seems to befuddle Korean historiography thus had a colonial provenance. The customary law system allowed colonial officials to control the conditions of the recognition of customary rules and modify or improve their contents. It was mainly through the interpretation of Korean customs that Japan attempted to incorporate the native practices and institutions into the Japanese cultural and legal sphere. Korean customary law was elaborated through colonial jurisprudence on the basis of the Japanese Civil Code.

The role of Japanese civil law in colonial jurisprudence was redolent of the role of French civil law in early Meiji Japan, from 1868 to around 1890. The courts adjudicated customary law disputes according to the general principles of law deriving from the French Civil Code. In turn, the role of the French code in Japan was analogous to the role of the *Corpus iuris civilis* in late medieval and early modern Europe. The Code of Justinian served as "written reason" (*la raison écrite*) to systemize and rationalize French law on the model of Roman law which was the common law (*ius commune*) in Europe. Profoundly influenced by the French Civil Code, and later the German codes and legal science, Japanese law in the late nineteenth century rapidly left the family of Sinicized law to enter the family of civil law. The Japanese Civil Code, completed in

[14] See, among others, Eric Hobsbawm and Terence Ranger, eds. *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

1898, was used as the source of the embodiment of civilized justice by the colonial jurists in Korea in the first half of the twentieth century.

This study revises dominant views in Korean legal historiography in several important aspects. Asserting the existence of custom in premodern Korea as a spontaneous legal order is the result of a misplaced emphasis, largely propelled by a nationalistic paradigm.[15] It amounts to postulating indigenous law in order to show that it was distinct from the formal legal regimes imported either from China during the dynastic period or from the West under Japanese rule. An essential problem with this view is that it disregards the question of power in the development of law. By treating law as independent of the state power, one risks explaining the evolution of Korean law in dissociation from political circumstances. On the other hand, supposing the presence of customary law in Chosŏn Korea seems to be grounded in the desire to show that Korean traditional law had the genesis of modern notions of civil justice. But this is tantamount to arguing that Korean law deserves consideration only because it was not different from Western law.

It would, of course, be a complete misrepresentation that before the introduction of modern law Korea had no notion of law or sense of justice. Chosŏn Korea had a legal system that worked efficiently, but it operated in a way different from Western legal systems. Korean traditional law functioned on the basis of penal sanctions that were articulated in the state codes under clearly defined categories of crimes and punishments. The legality of the penalties was a major concern of East Asian law. When the goal of the legal system was to provide uniformity and simplicity in the administration of law, certain notions and practices that could have promoted the development of the concepts and principles of "rights" in civil law were subsumed under the framework of prohibitions and punishments.

Once one acknowledges that custom as a source of private law did not exist in Chosŏn Korea, the assertion that its customary law was destroyed by the Japanese colonizers loses much of its relevancy. Attention then duly focuses on the centrality of law in colonial rule. There is no doubt that law often served as a tool for colonial domination. Law was the key instrument for the construction of the colonial state, which attempted to restructure colonial society comprehensively. But the legitimate effort to defend Korean legal tradition does not need to obscure the significance of legal developments during the colonial period. To date, too much emphasis in Korean historiography has been placed on the issue of cultural assimilation on a policy level, without sufficient attention to how traditional customs were systematized and modified by the colonial courts. The process was not a unilateral or wholesale imposition of Japan's civil law and its legal principles in Korea.

[15] Marie Seong-Hak Kim, "Law and Custom under the Chosŏn Dynasty and Colonial Korea: A Comparative Perspective," *Journal of Asian Studies* 66 (2007): 1067–1097; Marie Seong-Hak Kim, "Customary Law and Colonial Jurisprudence in Korea," *American Journal of Comparative Law* 57 (2009): 205–247.

The Japanese jurists, given the task of deciding cases according to customary law, struggled to make sense of the legal order they themselves found confusing and contradictory. Their use of the term "customary law" was often incongruous and uneven. Overall, the fact that the colonizers and the colonized belonged to the same cultural sphere of Sinicized civilization, sharing common writing systems and values, naturally entailed the formulation of a policy distinct from Western colonialism. The important question to be answered, then, is not whether Korean custom was intentionally distorted as part of Japan's imperial policy but how closely the Japanese chose to engage in reconciling the premodern Korean legal tradition with modern civil law principles, and how these choices influenced the way modern Korean law today addresses essential issues in private law relations.

Historians have long debated the relationship between colonial institutional modification and postcolonial appropriation. In establishing a new independent legal system, many countries necessarily had to confront the legacy of colonial law. The colonial legal system in Korea formed the foundation of the new independent legal system. Custom in modern Korean law, acclaimed as an expression of national identity in the Civil Code, was both the product of colonial and postcolonial exigencies. The notion of custom and its jurisprudential framework derived from colonial law, but it was nationalistic legislative will that led to the recognition of custom with binding force, alongside written law. During the past few years, both the Supreme Court and the Constitutional Court of Korea have been caught up in discussion of "tradition" and "custom" as they grappled with the judicial and constitutional ramifications of those terms. Colonial customary law has thus become a subject of not merely historical inquiry but also critical constitutional consideration. A substantial part of colonial customary law decisions is still recognized as law in postcolonial jurisprudence. Either invoking the authority of custom or rejecting the burden of tradition, the courts seem to continue the maximalist conception of the mission of the judicial power to reform society, which can be seen as a legacy of colonial jurisprudence.

The following chapters proceed through the Chosŏn dynasty (Chapters 1 and 2), Japanese rule (Chapters 3 through 7), and modern Korea (Chapter 8). Chapter 1 provides a theoretical discussion of custom and its relation to law in a comparative perspective. Theories of custom in Roman law and the development of customary law in medieval France will be examined. These discussions will help explain why speaking of custom as informal law in Chosŏn obscures characteristics and priorities underlying the Korean legal tradition and culture. Chosŏn Korea's community compact (*hyangyak*), the topic of Chapter 2, resembled custom in Europe in the sense that it concerned intra-communal self-regulation. But it was an instrument that was essentially geared to correct and transform mores and habits of its members through moral and penal prescriptions. The community compact illustrates the way the state dealt with local practices, by enlisting neo-Confucian *yangban* elites who were mostly interested in maintaining social hierarchy. In such a system, there was no

development of the conception of legal rights enforced through an adjudicatory process.

The fundamental metamorphosis of Korea's law and legal system took place from around the turn of the twentieth century. Chapters 3 and 4 examine legal changes in protectorate Korea against the backdrop of legal reforms that had just taken place in Japan. Japanese colonial legal policy cannot be adequately addressed without an understanding of Japan's own domestic experience. In 1875 Japan declared custom an official source of law. Subsequently, the jurists in the early Meiji years proceeded to discover customary law that was to be inserted in the civil code. One individual that emerges prominently throughout this book is Ume Kenjirō. A renowned professor of civil law, Ume was a drafter of Japan's civil code. From 1906 to his death in 1910, he served as legal advisor to the Korean empire, then Japan's protectorate. Under the protection of Itō Hirobumi, the first resident general of Korea, Ume oversaw the modernization of the Korean legal system and undertook the writing of Korea's civil code. He embodied a crucial conduit through which modern European civil law and the legal system were introduced to Japan and subsequently to Korea.[16]

The next two chapters discuss colonial law after annexation. Chapter 5 examines the construction of the colonial law system and the customary law order in Korea in comparison with the precedent in colonial Taiwan. The colonial governors claimed and enjoyed extra-constitutional prerogatives, deemed necessary for efficient colonial management. There was ongoing tension and conflict between Tokyo and Seoul which centered on, among others, colonial judicial affairs including the implementation of custom. Under the customary law regime, Japanese judges resorted to equity-oriented judicial reasoning without being restrained by the requirements of legal formalism. The notion of "custom" served as a powerfully effective legal instrument in reconstructing fluid and shifting Korean principles and procedures into a fixed, written set of rules that could still claim continuity with the Korean past. Chapter 6 examines the colonial courts' interpretation of custom through an analysis of appellate decisions. Little attention has hitherto been paid to how the colonial courts implemented modern legal theories and reconciled them with the indigenous laws. Analysis of jurisprudence will give specific examples of how old usages and practices in Korea were institutionalized as customary law.

Each colonial power's vision of the law and the operation of the legal system encapsulates how it conceived its enterprise and mission in colonial legal history. Comparison of the Japanese colonial customary law policy with European patterns in Chapter 7 is expected to shed light on the nature of Japanese colonialism. The last chapter, Chapter 8, discusses the legacy of colonial customary law in contemporary Korea by examining a series of landmark decisions by the Constitutional Court and the Supreme Court.

[16] Marie Seong-Hak Kim, "Ume Kenjirō and the Making of Korean Civil Law, 1906–1910," *The Journal of Japanese Studies* 34, no. 1 (2008): 1–31.