

Recent scholarship has witnessed an increasing interest in colonial customary law. Law has traditionally been seen in colonial history as an instrument of imperial domination, but the boundaries of investigations have expanded significantly as scholars examined how legal and social customs of the indigenous societies underwent changes under colonial rule.

Colonial courts and custom:

comparative reflections on customary law and colonial modernity in Korea

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The insight that colonial administrators in Africa attempted to consolidate their rule by inventing the notion of customary law has shed light on the relationship between imperial policy and the native systems of rules and practices.¹ At the same time, the theoretical framework of legal transplant has helped our understanding of how old customs were integrated into the legal structure of the colonial powers. The colonial powers were more or less in agreement that indigenous institutions should be recognised insofar as they were compatible with the dictates of natural law and morality and, of course, they did not impede colonial administration. Yet the actual course of implementing customary law in different areas was full of diversity and incongruity, intertwined with the changes in imperial policy swayed by both the complex ties between colonial and metropolitan cultures and tensions among bureaucrats. Colonial customary law presents fascinating material for comparative analysis.

A Japanised version of Western law

The case of colonial Korea (1910-1945; Korea became Japan's protectorate in 1905) is illuminating because its traditional legal system underwent a dramatic transformation into a modern Romano-German civil law system under Japan, which introduced to the colony modern laws that it had received from Europe only a few decades earlier. Shortly after Korea's annexation by Japan, the government general imposed Japan's Civil Code and Code of Civil Procedure as the general laws in Korea, but decreed that most private legal relations among the Koreans be governed by Korean customs (the Ordinance on Civil Matters of 1912). Because Chosŏn Korea (1392-1910) did not have a body of private law, except for some scattered provisions included in the criminal code, the Japanese needed to rely on the concept of custom. Colonial customary law was created with a specific goal of reshaping Korean laws and practices in line with modern legal concepts and principles in Japanese civil law. Colonial civil law in Korea was thus a Japanised version of Western law that was further adapted to the Korean situation through the legal machinery of custom.²

Many jurists in the 19th and early 20th centuries were influenced by the major tenet of the German Historical School that law was the spirit of the people. Some prominent legal scholars were drawn to the investigation of native customs of the colonies and took part in the debates over what kind of colonial legal system was to be established. Henry Sumner Maine (1822-1888) was convinced of the absence of the concepts of rights and duties in custom in British India. Cornelis van Vollenhoven (1874-1933), on the other hand, believed in the sufficiency of *adat* law in meeting the needs of Indonesian society. Japanese jurists' treatment of Korean customs seemed to be one of characteristic adaptation and adjustment. Ume Kenjirō (1860-1910) argued that Korea needed modern civil law to protect the individuals' rights but claimed that a blanket imposition of Japan's civil code on Korea would not work due to different cultural and social backgrounds. The colonial legal system in which Korean customs continued to regulate Korean family and succession matters, within the general principles of Japan's civil law and procedural rules, prepared the ground for reconciling Korean legal tradition with the demands of modern civil law.

The implementation of customary law in Korea was mainly entrusted to judges and legal scholars. It was through the jurisprudence of the Chōsen Kōtō Hōin, the colony's highest court, that old usages and practices in Korea were reviewed, redefined, and turned into legal custom. In colonial Korea, there were no separate native courts as in European colonies in Africa or Southeast Asia. There was only one system of courts, staffed mostly by Japanese jurists, with jurisdiction over both Korean and Japanese. This meant that Japanese judges enforced Korean 'customary law'. The colonial courts, thoroughly Westernised in their structure, administration, procedure, and terminology, were given the task of adjudicating cases in accordance with traditional Korean customs.

The problem was that there were no fixed customs or precedents that articulated rights of liberties of individuals. The colonial judges, of whom the majority had no personal familiarity with Korean customs, found themselves operating in a void without any written guidance that would inform them of the legal acceptability of a particular practice claimed by the parties. Where no solution had been prepared either by judicial decisions of local courts as in the Common Law of England or through the drafting of provincial *coutumes* (local customary laws) by the French jurists, the colonial judges were compelled to devise flexible interpretive principles of



Korean painting

custom. Colonial jurisprudence tended to mingle custom with reason, a process that has a long history in the West. Conflation of Korean custom with reason allowed the judges to recognise selectively indigenous practices that conformed to their notion of justice and equity. Under the broad rubric of customary law, the judges were thus essentially free to execute their jurisprudential assumptions.

The main goal of the judges was to effect reasonable restructuring of social practices through juridical abstraction so that they did not contradict legal principles in the Japanese Civil Code. They were cautious not to dispel the fiction of a customary law regime and adhered to the theory that they simply discovered and applied preexisting custom that had regulated legal relations in Chosŏn Korea. Understandably, they were reluctant to admit that (Korean) customary law was declared by (Japanese) judicial decision. In reality, however, the instrument of custom, interpreted through a judicial mechanism that approximated case law, proved extremely useful in moulding Korean practices and procedures in line with modern private law. Colonial jurisprudence of customary law served in this way as a nexus between the concepts of Western law and well-formed social practices. The judicial reworking of customs proceeded with the goal to make a modern state in a radically different ideological and intellectual context.

Customary law and colonial policy

It has been generally argued that the main goal of the colonial legal policy was to bring about the unification of Korean and Japanese laws, as a step towards the assimilation of the two people. Yet scholars have also pointed out the existence of a considerable ambivalence and inconsistency in the Japanese legal and cultural policies about whether their colonial subjects could, or indeed should, become Japanese citizens. Japanese colonial administration was remarkably centralised compared with its European equivalents, but the ideal of building an integrated empire, governed directly from Tokyo, remained largely unattained, as the Japanese decided early on that the legal status of the colonial subjects was different from that of the Japanese. The powerful governor general of Korea enjoyed considerable autonomy, forming a virtual state within a state. Colonial courts in Korea remained outside the Japanese judicial structure and the Supreme Court of Japan had no jurisdiction over them. Indeed the continued existence of the customary law system can be seen as part of the colonial administrators' strategies to carve out autonomous legal jurisdiction.

Constant negotiations between the government general in Seoul and the Japanese government in Tokyo over Korean customary law reveal interesting and significant aspects of colonial policy. The colonial officials stressed the uniqueness of Korean society and hence the need for maintaining a legal system based on custom, which supposedly they, and not the politicians in Tokyo, knew best. The emphasis on custom was a result of less cultural respect for Korean traditions than political consideration of safeguarding the government general's legislative authority. In Korea, many judicial decisions implementing the principles in Japanese civil law were

carefully enveloped with the cover of 'custom'. Under the framework of the colonial customary law regime, upheld by the colonial administrators, the blunt of the clash between traditional and modern legal orders could be avoided. This is how a more thorough transformation of traditional law into a modern law took place in Korea than in most European colonies. Modern civil law rules permeated into Korean society with remarkable speed and effectiveness.

Tradition and modernity

The colonial construction of customary law left a significant impact on modern Korean civil law. A substantial part of postcolonial Korean law is grounded in colonial customary law. The heavy influence of Japanese law is understandable because the first generation of judges and lawyers in independent Korea, including the drafters of the first Civil Code of 1958, had been educated and trained during the colonial period. Was colonial customary law a good thing? Did it contribute to the modernisation of law, or did it rather serve colonial interests and distort the indigenous legal tradition? Many legal historians around the world have struggled to grapple with similar questions. For instance, did the *adat*rechtspolitik (the colonial attempt to preserve the native custom or *adat*) in the Dutch East Indies, pursued apparently out of genuine respect for indigenous cultures, help Indonesians, or did it instead render them more vulnerable to outside manipulations?³ The question of colonial modernity continues to shape the discourses of customary law. A rounded and comparatively conceived study of colonial customary law can contribute to our understanding of the role of law in modern history.

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Notes

- 1 Ranger, Terence. 1983. 'The Invention of Tradition in Colonial Africa'. Eric Hobsbaum and Terence Ranger, eds. *The Invention of Tradition*. Cambridge: Cambridge University Press.
- 2 Kim, Marie Seong-Hak. 2007. 'Law and Custom in the Chosŏn Dynasty and Colonial Korea: A Comparative Perspective'. *The Journal of Asian Studies* 66-4.
- 3 Lev, Daniel S. 2000. 'Colonial Law and the Genesis of the Indonesian State'. *Legal Evolution and Political Authority in Indonesia, Selected Essays*. The Hague: Kluwer Law International.