

INTRODUCTION TO THE LEGAL SYSTEM OF KOREA

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MALAYSIA

Traditional Korean Society and Law

Law and Society in the Yi Dynasty - Byting Ho Park

At the founding of the dynasty, Yi Son(-oye, who became King T'aejo, declared in his inaugural speech that in order to conduct government by law he would enact a code, is the basic government law and that this legislation would be carried out by adopting the law which had been in force since the preceding Koryu Dynasty without radical change. Among those laws and decrees which had been in force in the time of King T'aejo's assumption of power those which were still in effect and worth continuing were compiled into a code. This code the "*Kjongje Yuljon*" was promulgated and put into effect in December of the 6th year of King T'aejo's reign (1397). It is a compilation of effective and reasonable laws. Among these laws and decrees were not only laws enacted to fill the needs of government but also legal precedents and customary laws. Even, when a new law was enacted, its essentials were based on social reality, i.e., customary usage. Therefore, its enactment was intrinsically a revision of existing law. The basic code of the Yi Dynasty was also a collection of indigenous laws.]WS

compiled by collection and recording the Kyongje Yuk-jon, its appendix and the various laws and decrees promulgated between the foundation of the dynasty and the compilation of this code.

Even after the Kyongje Yukjon was put in force, efforts had been made to discover and reoccur laws and there had been an increasing necessity to enact new laws conforming to new social circumstances. Since some laws were in conflict with others, a principle for the resolution of these conflicts was established. It was called the "**Principle of Respect for the Royal Ancestor's Constitution**" and also played a decisive role in the inheritance of indigenous laws. Which conflicted with those of the original code, and where amendment was unavoidable, use of footnotes while maintaining the provisions of the original code as they were. Since the text of the Kyongje Yukjon was enacted by King T'aejo, the founder of the dynasty, it was the royal ancestor's constitution and as such it had to be respected, and amendments, new laws or decrees were not permitted. Under this principle, the Kyongguk Taejo's as the royal ancestor's permanently immutable constitution came to be considered absolute. Which the principle of respecting the royal ancestor's constitution thus played the role of a break-water safeguarding indigenous law, it also restricted the enactment of new laws. Looked upon the old, traditional law as "**good / (iv tind, f@fir sense**" underlying that conviction was the consciousness that codification was the recording of discovered law. However, even this permanently immutable "**good / (I, and fair sense**" became unstable when confronted with changeable new political, economic, social and cultural circumstances. Although the "**Ta Ming La**" was adopted totally as far as criminal law was concerned, the order of traditional society was ruled by an indigenous code, compiled from indigenous law, which were considered permanently immutable. Thus, though the Yi Dynasty tried to realize Confucian ideology in all fields-political, economic, social, and cultural-the relationship of tension between the indigenous laws based on the traditional social order and the Confucian ideology established Korea's social order during the 500 years of the dynasty.

The Yi Dynasty had the basic characteristics of a patriarchal family system. However, the code and customary law stipulated most decisive factors which obstructed the complete realization of the system. These were equal distribution of an inheritance between the all male and the female heirs as stipulated in the chapter on criminal law in the code and the custom of matrilocal marriage. Under this custom the wedding ceremony is held in the bride's house and the marital life is led in the wife's home until any children born grow up. As time passed, however, the period of stay at the wife's home grew shorter and nowadays in rural districts after the wedding and so-called "**three days stay**" the couple returns to the husband's home. Particularly in the Yi Dynasty period a campaign arose to convert the custom of matrilocal marriage into the custom of receiving the bride into the bridegroom's home in the Chinese manner. In the Yi Dynasty, the elder son who was the head of the household, tentatively inherited the legacy on a package basis and the second and other younger sons could claim their share of it when they established a branch family. Therefore, in case the eldest son, who had the right to concur in the establishment of a branch family, refused to consent to the establishment of a branch family, the second and other younger sons could not legally take their share of the legacy. In the Yi Dynasty, there was no concept of "**rights**" in the sense of today's legal concepts. Nevertheless, the enjoyment of exclusive interests by certain persons was guaranteed by various concrete legal provisions.

During the Yi Dynasty, between individuals and the state lay no community capable of categorically grasping and controlling the member's individuality and outside the community's restricted domain, individuals were free. The universal and **dominant** form of family existing in the Yi Dynasty period was a conjugal family, the family of direct lineage coming second. The eldest son lived together with his parents even if he was married and, therefore, in the case alone, a family of direct lineage composed of grandparents, parents, couples and children was formed. The nature of the family, as a community was weak, regardless of whether it was a conjugal family or a family of direct lineage. In the first place, the property of every

family was the property of the individual members depending on how it was originally acquired. When the head of the family obtained property by inheritance, this was his individual property and owned in his name. The same system was applied to the wife side. Unmarried children, especially young children, had little chance of having their own property. Next, we must consider legal capacity a prerequisite to the enjoyment of rights. It is a well-known fact that Yi Dynasty society was a class society from beginning to end. If we consider the process of historical development in other countries, we can see that the rise or fall of legal capacity in Korea had its own characteristics. **First, the capacity to hold political rights, second the capacity to enter legally approved (Hill protected family relationships, third the capacity to acquire and hold property, rights, and fourth the capacity to receive legal protection of personality, life and body.** The capacity to hold rights is not a single phenomenon.

Viewed in the light of historical research, the problems of ownership, which is a central subject in the study of society and culture, is very confused and in the case of the Yi Dynasty though it is now asserted that there was "**Direct ownership**" of land, this assertion is still not firmly established. The formal legal system provided that **land** could be inherited and alienated freely. The general ban on the sale of land was lifted in the 3rd month of the 6th year of King Sejong's reign (1424) and when a sale was

unavoidable it could be conducted by making a relevant report to the authorities concerned, and receiving permission, called an "**ib-an**", from them. While in the initial stage the "ib-an" procedure's was to examine the reason for the sale, it soon became a procedure to examine the legality of the sale and, from the middle of the Yi Dynasty onward, free allowed without an "ib-an". Ownership during the Yi Dynasty had characteristics similar to those of modern ownership. However, it was difficult for it still a legal concept to function fully and thus ownership had a premodern nature. However, the concept of ownership of the formal legal system of the Yi Dynasty was not simply replaced by a modern concept of ownership created in its place when the modern legal system was introduced. On the contrary, the traditional concept underlying the new modern legal system as a consciousness of rights, a consciousness of ownership rooted in the past.

William R. Shaw, *Social and Intellectual Aspects of Tradition

Korean Law, 1392-1910.

Traditional Korean political philosophy, in both its institutional and theoretical aspects, was based on "**Confucian**" precepts, and hence law and legal institutions were undervalued and despised. The primary mechanism for government at all levels was presumed to be the force of the moral example of those in authority. The nature of traditional Korean law also has important implications for the study of Korean economic history. The nature of traditional Korean legal thought and institutions has an important bearing on the study of Korean legal development in the twentieth century. Some understanding of Yi-dynasty law is also important for the study of the impact of Japanese colonial legal institutions on Korean legal development, because it was against the traditional legacy that Japanese law and policy had to contend, just as postwar Korean society and government have had to come to terms with the colonial legacy. Some writers who have most strongly suggested that traditional law was devoid of positive elements for the development of "**modern**" legal institutions and legal consciousness in Korea have stressed the role played by Yi-dynasty thought and social structure, this study will discuss these two subjects.

Recent studies of the Chinese intellectual and legal tradition have suggested that the early twentieth-century Western portrait of Chinese law and legal thought is overdrawn, even for the classical period of Confucian thought, sixth to third centuries B.C. Moreover, it must be remembered that the form of Confucian thought which eventually prevailed in Yi-dynasty Korea was not that of the ancient Chou period. For example, the commentaries of Chu Hsi on the works of the classical period make it clear that he did not reject penal law in favor of the power of moral example, but that he regarded the two as complementary aspects of an integrated whole; neither aspect could be unilaterally discarded. These ideas were introduced in Korea in their most developed form in the writing of Chong To-jon, particularly in his law code, the *Yi Song-gye*. Chong viewed punitive or disciplinary law

as an indispensable tool of government. Legal sanctions were seen as a vital aspect of all branches of administration, for example tax and revenue administration. Thought of the later Yi dynasty also emphasized the use of law in government, a circumstance reflected in several provisions of Chong To-jon's work. Moral instruction was generally to punishment, and magistrates had a duty to keep the populace informed about provisions of the **criminal**

law, and he urged strict punishment of heterodox religious practices at the village level. In this respect, although by the later Yi period many of the specific issues and problems facing Korean society and Government had changed, there is little to distinguish Korean Legal values of the seventeenth and eighteenth centuries from those expressed by Chong To-jon as part of his blueprint for the Yi-dynasty in the late fourteenth century. For more insight into Korean legal thought, we must turn to the records generated by the *simni* review process. This process was established to provide high-level reviews of problematic cases involving the death penalty. About one thousand of these case records are contained in a late eighteenth-century book. Some students of the Korean legal tradition have cited the ancient Chinese aphorism *"through punishment there naturally comes to be no more punishment"*, with its implication that law is a temporary expedient; in other words, as civilization advances, crime and punishment will fade away. More frequent are phrases such as *"If I fill in, then, criminal so others can live"* which have no classical pedigree but which reflect utilitarian conception that protection of society is a valid function of criminal law.

The notion of requital for a life is especially important for its contributions to Korean attitudes and evidence, because requital was a two-edged concept. To be effective, requital had to be true requital: only the actual murder would suffice, and in Sino-Korean theory he had to be fully culpable. Wrongful punishment was an act of misgovernment with cosmic implications. The case records also clarify the Korean usage of a major conceptual distinction, that between *and "circumstances"*. The king sometimes made statements to the effect that *"the law required the death penalty, but the circumstances require clemency."* This would seem to have been a highly subjective form of reasoning. The term *"circumstances"* was used to introduce extralegal considerations and to give a lighter sentence than the law or material evidence would seem to dictate. As important as Chinese law was in the Yi-dynasty, then it would be misleading to slight the significance of domestic codification and other forms of lawmaking. Korean law developed to regulate positive programs of administrations, including tax and population policies, ritual matters, and military organization. Korean criminal law never departed significantly from the fundamental theoretical categories of

Chinese criminal law. Many Korean code provisions remained keyed to the Ming Code, either explicitly or by analogy. The categories of Ming law remained fundamental for generations of subsequent jurists. The fiction of new laws being the result of spontaneous royal initiative, but in fact the position of Korean kings was institutionally weak. The position of the Korean king was reflected in the broad power of royal lecturers, secretaries, and high officials to comment critically on state affairs and royal decisions, and the stress of the censorate organs on remonstrance rather than surveillance.

The lawmaking process in the Yi period was essentially similar to that of Ming and Ch'ing China. The edicts were kept on file in the appropriate administrative agency or the government and were treated as binding precedents. Periodically such edicts were edited and published for the benefits of other central-government agencies and provincial and country-level officials. Rationality in legislation was recognized in the later Yi period that piecemeal lawmaking in the manner described presented problems for law enforcement and rational administration. Edicts resolving difficult cases often clarified critical questions and made future judgments easier. Late Yi-dynasty governments used various methods to reduce the adverse impact of the traditional

ad hoc approach to lawmaking. One important technique was to assign a particular administrative agency of the government the task of producing a legislative package containing interrelated provisions dealing with given problems in some detail. These systematically drafted laws, were included together with ad hoc "received edicts" in collections and codes from this time onwards. Women appeared only rarely as defendants in serious criminal cases. The violence of a husband against his wife was not a criminal matter under the Code unless broken bones or more serious injuries resulted, even then, the wife bore the burden of filing a formal complaint. A preliminary survey of these cases indicated that although most charges of wife-killers were reduced to manslaughter and the husbands given a reduced sentence, most wives charged with killing husbands were given death penalty. This would seem to be an area where a double standard of judgments clearly existed in traditional Korea, and where inequality in judgment went beyond the already unequal provisions of the criminal code.

Most people were not so eager to become involved in a criminal case, however, even as witnesses. Torture of witnesses as well as suspects was a common feature of criminal investigations, and did not always proceed according to regulation. In the early part of the Yi period, officials called *sininisa* were dispatched to the provinces on the suspicion, no doubt justified, that local administration of justice sometimes fell below the desired standard. According to contemporary critiques willful corruption was an ever-present problem in Korea local government. About 5 percent of the *simni* cases concerned the forgery of state seals by petty officials. Central government concern over this kind of problems undoubtedly accounts for the haste with which forgery cases were handled in comparison with other death-penalty offenses. A major purpose of the *simni* hearings was to reexamine the investigative records to ascertain whether grounds for clemency might be found. In some cases, however, the king or high officials taking part in the *simni* hearing found fault with the level of expertise and overturned the findings of the inquest investigation. In some cases, these officials were disciplined for incompetent conduct of the inquest investigation.

Conclusion

It would seem that Korean rural society was not fully self administrating. There appears to have been constant legal interaction between the central government and the county level, dictated both by the occurrence of sporadic interpersonal violence and by more systematic efforts of locally influential persons or corrupt yalliell underlings to abuse their power at the expense of weaker members of the community. County-level administrators freely and directly entered village communities to conduct inquest and other investigative hearing, and peasants often brought village-level to tile attention of the central government through the establishment lines of appeal.