

Law and Society in the Yi Dynasty

Article: Traditional Korean Society and Law

Written by Byung Ho Park

A. Issues Raised

- 1) Korea's inherited traditional legal system based on its history and philosophy
- 2) The reception of modernized legal system by Japanese

B. The Relationship between the Reception of Foreign Law and the Traditional Law

- 1) Before the period of Great Empire of Korea, only Chinese law had been received and assimilated to our culture
- 2) King T'aejo who was first one of Yi Dynasty declared a government conducted by Law
- 3) In December of the 6th year of King T'aejo's reign, the code of "Kyongje Yukjon" was promulgated and came into effect. The code did not create legal norms but rather declared the legal norms already in effect which had emanated from the social reality of Korea
- 4) During 500 years of Yi Dynasty, this law was treated Principle of Respect for the Royal Ancestor's Constitution.
- 5) Also Confucian ideology which is summarized "legislation entails evils" and "good law and fair sense" made Stability of the law and restricted creative legislation.

C. Family

- 1) Ideologically the Confucian family system based on clan rules is patriarchal family system which was based on the worship of ancestors, which was represented and controlled by powerful patriarchal head and which discriminate between high and low, older and younger and male and female by him
- 2) But in the family system of Korea, the custom of matrilocal marriage and the system of equal inheritance were the most essential factors. And these traditions distorted during Japanese imperialistic annexation period.

D. Legal Capacity

- 1) 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.
- 2) In principle, the capacity to hold property rights, engage in transactions and undertake lawsuits was acknowledged and guaranteed for all classes, even to despised class. But that was not almost meaningless to humble people

[.Property Ownership

- 1) When the possibility of enjoying the exclusive interests guaranteed by appropriation could be inherited, we call it "ownership", and if ownership was transferable, we call it "free-ownership" (Max Weber)
- 2) Legal system in Yi dynasty provided that land could be inherited and alienated freely. And ownership was protected by title which settled disputes with the fact of control itself
- 3) Even though ownership during Yi Dynasty had a pre-modern nature, it bore characteristics similar to those of modern ownership. So the traditional concept remained underlying the new modern legal system as a consciousness of rights or a consciousness of ownership rooted in the past

F. Conclusion

- 1) In legal science the process of historical development in Western Europe has been emphasized and ours ignored.
- 2) But the concept of governing by law in Yi dynasty has limitation compared with European ones

Article 2. Social and Intellectual Aspects of Traditional Korean Law **Written by William R. Shaw**

JL Traditional Law In the Yi Dynasty

- 1) There were lots of Korean scholars who have been busily finding signs of an "early modern" economy in the "capital accumulation of every peasant entrepreneur and wealthy peddler.
- 2) The role played by Yi-dynasty though and social structure give a different evaluation that traditional law was devoid of positive elements for the development of "modern" legal institutions and legal consciousness in Korea.

B. Legal Values and Legal thought In Traditional Korea

- 1) Law in Korean Political Theory
 - The Western concept implied by the phrase "rule by law" would have signified to Chinese or Korean thinkers simply a virtually immoral use of naked force in punishing,
 - a. Law and Confucianism
 - Confucian scholars believed that Institution and laws and transformation are not separate entities. Rather ethical transformation is the "end" of good government, and institution and law the "means"
 - This kinds of belief had blueprinted by "Chong do-ton" and have maintained during Yi-Dynasty
- 2) Korean legal Thought in Action
 - "through punishment there may come to be no more punishments", "killing the criminal so others can live"
 - a. Requit for a life
 - A religious element was involved because the victim's personality was deemed to continue after death and to share in the desire for requital as a "grieved ghost". So if the government failed to prosecute and punish the culprit, the grievance of deceased would ascend to heaven and heaven would visit disturbance of nature like drought or upon the state
 - b. "Law" and "circumstances"
 - The concept of "circumstances" which means "determining intent and the state of mind" was generally used to subjectively manipulate judgments, although some instances of manipulation can be found
 - c. conclusion
 - In Yi-dynasty, law was not devalued but was highly regarded. And law was as indispensable as morality in good government. There was a manifest concern in case records for factual accuracy, substantive legal precision, and procedural niceties.

C. Sources of Law and Legislative Process in Yi Dynasty

- 1) The Role of Chinese Law
 - The Ming Code not only provided a basic foundation for criminal law during the Yi period, but also served as the basic foundation for a comprehensive social reform along neo-Confucian lines.
- 2) Law and the Sovereign

In principle, all new laws were supposed to undergo "ratification" by the censorate and "certification" by the board of Rites

3) The law making process

Edicts could originate at the spontaneous initiative of king, but more often they represented the king's response to a legal case or administrative proposal brought to his attention by a government agency or official.

4) Rationality in Legislation

It was recognized in Yi period that piecemeal lawmaking in the manner presented problems for regularity in law enforcement and rational administration. Especially late Yi dynasty, government used various methods to reduce the adverse impact of the traditional ad hoc approach to lawmaking.

D. The interaction of law and Society In Traditional Korea

1) Inequality

- there were four classes in Yi dynasty. Yang-ban(noble people), yang-in(good people), sang-min(ordinary people), ch'on-min(despised people) In principle, there three board social categories were hereditary, a traditional which had economic and ideological implications. But the social categories of various types of Korean law were not entirely consistent in their details, because Korean law was a simple reflection of either the culture or the social prejudices of members of the official class. And in later Yi period, the board social distinctions between elite and non-elite levels of society were collapsing.

a. Women and the law

-Given the unequal position of woman in Confucian thought, in Korean culture, and in the law

b. Law and social change

-The sense that the traditional system of status distinction was eroding was partly the result of social and economic changes taking place in the seventeenth and eighteenth centuries. Also other changes were taking place at the lower edge of village society, As many commoners fled tax burdens by purchasing titles, by surreptitiously registering as slaves. So these raised significant questions for legal administration and social policy.

2) Conclusion

-Although the social ethos of Yi dynasty elite society held it to be committed upward than downward, the law successfully imposed limited punishment and did not permit crimes against social inferiors with impunity.

E. local Society and Government in Eighteenth Century Korea

1) Violence

-Despite legal disincentives and Confucian moralizing, violence against near relatives or in-laws was even more common. Also sexual misconduct, theft, debts, self help to avenge were major elements of rural violence.

2) Attitudes Toward involvement with the law

-Some accounts of traditional Chinese law suggest that most people sought to avoid involvement with the courts and with the legal process at all costs. Also Confucian propriety and statutory law encouraged the cultivation of a spirit of vengeance, not reconciliation. If neighbors were involved a certain crime, people usually made a false statement because they thought family value was more important than justice.

3) The Quality of local Government.

-Local administration of justice sometimes fell below the desired standard, willful corruption by manipulation of the laws and malfeasance brought about by ignorance or incompetence.

4) Corruption

-According to contemporary citigues willful corruption was an ever-present problem in Korean local government. For the more, central government did not much care about it.

5) Legal Competency at the local level

-In some cases, local officials were disciplined for in competent conduct of the inquest investigation.

6) Conclusion

-Society it would seem that Korean rural society was not fully self-administrating. Also institutions of conflict mediation may have been weak and ineffective in traditional Korea

Reception and Modernization of Korea law

Article "Korea's-INITIAL Encounter with the Western Law 1866-1910 A.D"

Written by Pyong-choon Hahm

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A. Initial Contact With International Law

The traditional pattern of authoritative symbols of Korea contained very little attempting to extend their political ideology beyond the national boundaries.

- 2) But there were forces operating throughout the world in the middle of the nineteenth century that scarcely countenanced the self-imposed isolation of the Korean system.
- 3) The incident in Kanghwa provided a convenient pretext for the Japanese to open Korea as Commodore Perry had done with Japan in 1853.
- 4) The treaty of Kanghwa, the first one as a meaning of modern international law to Korea, gave an interesting fact of world history that "international law" had been destined to play such an important and often decisive role in channeling the imperialistic energy of the West upon the East.
- 5) To the Korean, the essence of Western civilization seemed to lie in military and industrial technology and international law as the rule of game. So Koreans struggled to learn and make use of international law and achieve fundamental reform of legal system which were increasingly passed into service in dealing with the constantly growing imperialistic encroachment from its neighbors
- 6) But sweeping reform was coerced upon the Korean government by Japanese army that a Westernized judicial system was finally established

B. Reforms and Westernization

The first Westernized legal system was established in Korea as a part of the "reform" coerced upon the Korean government by Japanese while the Japanese army held the royal family captive in the palace and occupied the capital city

- 2) So Japanese-style government structure was established. The result was the facilitation of Japanese domination of Korea
- 3) Minister of justice rather than traditional minister of punishment was entrusted with Courts, police and prisons

Article: "Korea's Initial Encounter with the Western law 1910-1948 A.D."

Written by Pyong-choon Hahm

A. Japanese Law under Government -General

- 1) General was placed under the direct control of the Emperor, receiving the imperial direction through the Prime Minister, and becoming an army general or a navy admiral.
- 2) In the spring of 1912, the Japanese government put the new colonial administration structure and consolidated the operations of the judicial organs in Korea
- 3) There were two different legal systems, one for the Korean and the other for the Japanese. The reason is that Korean criminal law provided for more severe punishment. And extremely high percentage of conviction for Koreans.

- 4) Chiefs of police station had a summary jurisdiction.
- 5) In 1923, there were 162 Japanese and 37 Korean judges, 67 J. and 10 K. public prosecutors, 4 J and No K. chief clerks.
- 6) In 1940, we find less of the traditional laws and customs of Korea like Korean language, names being applied in Korea. Only 18 Korean judges and no Korean prosecutor.
- 7) Because of oppressive or ruthless colonial justice system and embodied the legal system that guaranteed the colonial rule rather than securing justice and providing just remedies to the litigants, Korean people stayed away from legal systems.
- 7) It was very unfortunate for the legal development of Korea that the Westernized legal system had to be identified from the beginning with national humiliation and colonial degradation

B. The United States Military Government in Korea

- 1) When the instrument of surrender was signed by the Japanese on September 2, 1945, the Supreme Commander for the Allied Powers(SCAP) placed the residents of Korea in the territory below the 38th parallel under his jurisdiction by the Proclamation.
- 2) Due to the unexpected quick surrender of Japan, the United States Army was inadequately prepared for the test of equipping in due course the Korean people with " a democratic, representative machinery of government.
- 3) First of All, it was relatively simple to remove all the Japanese from the courts and the procuracy. But the difficulty is that the occupation authorities was the lack of trained Koreans who had stayed away from the Japanese system far enough to avoid the label of being a pro-Japanese collaborator. So the Japanese laws governing the organization of the Government-General were continued.
- 4) But not all Japanese laws were continued. For example, special judicial officer system and Provost Courts for the purpose of trying civilian offender against military government ordinances and proclamations were established.
- 5) The existence of two parallel court systems by a lack of confidence in the Korean court on the part of the American military government gave rise to misunderstanding and ill-will between the Americans and the Koreans.
- 6) Despite these and the other difficulties, the Military Government did make serious efforts like The Child Labor Act(June 1947), Labor Department Orders(September 1947) and abolition of Japanese promulgated Public Prostitution Law(November 1947) to "modernize and democratize" the Korean legal system
- 7) The Military Government finally capped its three-year rule with the "Proclamation of the Rights of the Korean People" on April 1948 in the name of the commanding general of the U.S. Forces in Korea.
- 8) Conclusion : With the exception of changes in the criminal procedures introduced in March 1948, the legal system remained basically Japanese. And as a whole, the impact of the American legal system was slight.

Article: "The Role of Legal Reforms In the Japanese Annexation and Rules of Korea, 1905-1919" written by Edward J. Baker.

A. Introduction (omitted!)

B. The Judicial System

- 1) A series of major changes was made in the judicial system while Ito was resident-general from 1906 to 1909
- 2) Ito was not planning to annex Korea but rather to establish a triangular balances
- 3) among the resident-general, the Korean court, and the Korean reform ministry through which to reform and modernize Korea and thus make Japan secure from

any threat launched via Korea(?) If Ito want to annex Korea, the course of reform described below would have been a most inefficient way to go about it.

- 4) Ito's reform: a. bringing about separation of the judicial and administration powers.
b. reform judicial administration in order to clarify the property rights of both Koreans and foreigners. (?) c. the need for advisors to be understanding, to be ready for difficulty based on cultural difference and to work hard to create a good impression.
- 5) Koreans were habitually secretive as well as suspicious and jealous of Ito's officials and ignored their "good advice" (oh my god!!!)
- 6) The advisors also made a number of complaints based on their professional view of the way a just, modern legal system should work.
- 7) Just after the Korean emperor created a furor by dispatching emissaries to the Hague, Ito decided extensive reform
- 8) The reforms in the judicial system between 1910 and 1919 were for the most part minor and directed toward increased efficiency.
- 9) Governor-General Terauchi's instructions to judicial officials are full of exhortation in order to maintain the honor and prestige of officials, to give benefits to the Korean people and to preserve peace and order