
The Spirit of Korean Law: Korean Legal History in Context

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The struggle to understand Korean legal history is like a battle on two-fronts. On one front, the field is underdeveloped in terms of content, and there is still a dire need for historical facts to be uncovered and woven into comprehensible narratives. On the other front, there is a search for appropriate historiographical, comparative, or sociological approaches to interpreting the facts of Korean legal history. The overall result of this two-sided struggle has been a paucity of facts on premodern or modern-era developments and widely varying interpretative frameworks in the few studies that do exist. Many of the major works have had perplexing aims that make little sense without understanding the authors' backgrounds.

For example, to Hahm Pyong-Choon (1971), aspects of premodern Korean legal history created an inherited legal consciousness that explained the unsuitability of democracy for Korean society. To William Shaw (1981), it could be proven that the Joseon law on capital punishment possessed sufficient Weberian rationality such that one Japanese justification for colonizing Korea, the need to civilize its backwards legal system, could be rebutted. Both men were brilliant scholars whose outlooks were affected by their times. Hahm was a Harvard-educated law professor who went on to be a senior presidential advisor to both Presidents Park Chung-hee and Chun Doo-hwan. His work defended the political status quo. Shaw, the son of US missionaries, was born and raised in South Korea. A contemporary of

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his, Professor Han In-Seop of Seoul National University, once told me that “he looked like an American, spoke like a Korean, and wrote like he was Chinese.” His work represented an upgrade to the anti-Japanese postwar Korean historiography that had argued for the merits of precolonial law in less sophisticated terms. Both scholars’ lives were tragically cut short: Shaw died of a heart attack in 1993, aged 48, and Hahm was assassinated in 1983 in a North Korean bomb attack in Myanmar, aged 50.

Few have written on Korean legal history in English as seriously as Hahm and Shaw. In the Korean language, the major scholars have been Chongko Choi and Byeong-ho Park. Park (1985) has written an essential monograph overview of basic areas of Joseon law, while Choi’s work reflects his German training by focusing on the lives of modern legal scholars (2007) and utilizing the European idea of *ius commune* to interpret premodern Korean legal history (2009). More recently, a wave of English-language social history scholarship—notably by Sun Joo Kim, Jungwon Kim (2014), and Jisoo Kim (2015)—has used Joseon legal history as a window onto wider historical issues, such as women’s roles in society.

The above summary of the state of the field illustrates how relatively little has been written on Korean legal history and that there has been a lack of historiographical direction. But into our factual impoverishment and historiographical anarchy has stepped Marie Seong-Hak Kim. Kim trained as a European legal historian and has brought the methods and approaches of that field into Korean legal history. Her earlier monograph represented the first major introduction of the European legal historical concept of customary law to Korean legal historiography (Kim 2012). The book demonstrated how the Japanese colonial authorities researched Korean legal customs, reworked them into customary law that could influence adjudication in courts run according to Japanese law, and finally how customary law affected postwar legal thought. The book’s approach was not only new and sensible, but iconoclastic for its deviation from the nationalistic historiography’s blanket condemnation of Japan’s imposition of its version of Continental law. Korean jurists have argued that rather than contributing to Korea’s legal modernization, Japan rudely interrupted it. For

example, Chongko Choi has referred to Japan as “the unwanted mediator” of Continental law. But the nationalistic historiographical drive to deny any possible “good” legacy of Japanese colonialization has left it unwilling to evaluate the historical reality of Japan’s imposition of the Germanic-style legal system that South Korea maintains to this day. Thus, Korean legal historical scholarship on the colonial period had long remained underdeveloped.

By contrast, in Taiwan, also a former Japanese colony, legal historian Wang Tay-Sheng (2000) has written numerous books and articles on the colonial period, explicitly arguing that Japan laid a positive foundation for the island’s modern legal system. The historiographical politics differ in Taiwan: Wang’s argument is motivated by distaste for the postcolonial arrival of the Republic of China regime in Taiwan. At conferences where they have met, Korean law professors have reportedly been scandalized to hear Wang’s radically different evaluation of Japanese colonial law. His detailed studies have had no parallel in Korean legal historical scholarship, until Marie Kim’s *Law and Custom in Korea* (2012).

Having thus made a splash in Korean legal history, Kim continues to press the advantage with *The Spirit of Korean Law*. This edited volume ambitiously continues to assert the value of European legal historical approaches to studying Korean law, and its scope captures developments from the early Joseon to contemporary South Korea. The combined force of Kim’s adoption of European legal historiographical approaches and delivery of facts and narratives where hitherto there have been little, may not only breathe new life into Korean legal history but steer it in a new direction. It is a tour de force on both the historical and historiographical fronts in the struggle to understand Korean legal history. However, Kim and her contributors’ arguments must be carefully assessed and sometimes qualified.

The book is divided into three sections, covering the Joseon period, colonial era, and South Korea after independence, each with three chapters. Its broad theme is a search for the “spirit” of Korean law, and this search involves evaluating legal transplants and their indigenization.

In the introductory chapter, Kim proposes several new approaches, based on European legal history. Kim notes similarities between the European reception of Roman law and the Joseon dynasty's importation of Chinese law. This she likens to the *ius commune* in medieval Europe, suggesting that the Korean case is part of a "pattern" (p. 4). Kim also asserts the existence of a strong tradition of "positivistic ideology" (p. 6) and suggests that the major legislative activity in early Joseon (involving the *Gyeongguk daejeon* and *Daemyeongnyuljikaek*) was part of a process of "codification" (p. 9). Analogies to the European concepts of the reception of Roman law, legal positivism, and codification have merit, but they cannot be taken too far. There are key differences: the *ius commune* did not come into force in the same ways and for the same reasons as Chinese law in Joseon; Joseon's ideology of adjudication was not quite legal positivism, as judges often referred to authoritative case books (as chapters show); and the codification processes in the eighteenth- and nineteenth-century France and Germany were motivated by ideals (including rationalization and the promotion of commerce) that differed greatly from the motivations in the fifteenth-century Korea. The historiographical trap is to treat Korean legal history as offering case studies of patterns from European legal history that hypothetically exist universally. A more critical comparison would note differences as well as similarities. Indeed, it is in these differences that the unique spirit of Korean law may best be found.

It can also be noted in passing that Kim's introduction at times implies that legal importation to Korea may be a source of embarrassment that can be reversed by legal exportation. At the end of the chapter, after celebrating Korea's developmental progress, Kim writes, "Korea can become a powerful center of legal diffusion in a newly configured Asian order" (p. 14). Korea certainly has valuable comparative legal lessons not just for its neighbors but for the whole world. However, Kim's language here, and elsewhere, suggests a new nationalism for Korean legal historiography, reminiscent of the old nationalism she rightly challenges. The key problem with this new nationalism is the same as that of the old: it hampers the historical mission of assessing past problems in Korean legal history. For example, when Kim

refers to South Korea's "remarkable absence of judicial corruption" (p. 14), the reader may think of *jeon-gwanyeu* (honorable treatment for ex-officials), the until-recently widespread practice of judges and prosecutors retiring to private practice work involving illegal lobbying of their ex-colleagues. Thankfully, the book does not press this new nationalism too far.

The section on Joseon law starts with a contribution by Jérôme Bourgon and Pierre-Emmanuel Roux on Joseon law's place in the East Asian comparative context. The authors explore how Joseon adopted elements from the Chinese legal systems of the Tang to Qing eras. Their chapter is a rich exploration of Chinese and Joseon judicial reasoning, major treatises, and how the judicial system developed over time. Their overall aim is to situate Joseon and Chinese law in a regional context, in which laws and legal ideologies circulated and were localized. One may quibble with their direct analogizing to the European *ius commune*, systematization, or English *ratio decidendi* (p. 38), for reasons involving substantial differences in their comparative conceptions. Yet the authors succeed in clearly situating Joseon's legal system in the East Asian context, and their original discussion of legal developments in Joseon make it an invaluable reference point for further research.

Chapter 3, by Frédéric Constant, builds on the discussion of the role of case law in the Joseon legal system in the previous chapter with a study on the comparative treatment of homicide in Joseon and China. Constant explores how and why the Joseon judiciary diverged from the Chinese model it had borrowed. He finds that the Qing government created a large number of statutes to the criminal code in order to control lower magistrates' decision-making, whereas much of the creative interpretation in Joseon was channeled into the official compilation of authoritative case books. Constant's discussion of the rules and principles governing homicide adjudication also explores the views of Jeong Yak-yong (1762–1836), a key Joseon jurist. Like the previous chapter, this piece constitutes a major factual and analytical contribution to the scholarship on Joseon law.

In Chapter 4, Anders Karlsson advances the historiographical insight that studies of the Joseon legal system must move beyond emphasis on

Confucianism. Here he argues that it is also important to consider practical considerations of statecraft. Karlsson convincingly shows that practicality has a significant influence on Joseon legal development, particularly with regard to the enhanced harshness of some punishments as compared with Chinese law. He emphasizes that we must move beyond the Confucian dichotomy of rule by virtue versus rule by law. Elements of both existed. In addition to its historiographical discussion, Chapter 4 traces the development of several Joseon legal texts, allowing the reader to follow the author's meticulous archival work. This major contribution to the study of premodern Korean law concludes the first section of the book.

Turning to the colonial period, Chapter 5 by Noriko Kokubun examines aspects of the origins of Korean constitutional thought. After the introduction to Korea of Western political theories of state formation, Japanese debates on the relationship between human rights and the state impacted Korean thinkers. By the late nineteenth century, with the notable exception of the US-trained Philip Jaisohn, few Korean intellectuals accepted the theory that the state arises out of a social contract. The majority report was a view of the state as a legal person, based on German legal positivism. This view was essentially learned of via Japan and reflected Korean intellectuals' prioritization of state-building over government by consent of the governed and the protection of individual rights. Intellectual models later shifted to China. In 1919, when the Provisional Government in exile in Shanghai wrote the first Korean constitution, it was influenced by Sun Yat-sen's "Three Principles of the People" (these being nationalism, democracy, and welfare). Cho So-ang's theory of *Samgyunjuui* (Three Principles of Equality) emphasized equality among individuals, ethnic groups, and states, and was meant to infuse the constitution with an ideology that was both modern and supportive of ethnic nationalism. The constitution also had a provision allowing the state to reserve individual rights, which demonstrated the continuing precedence of state-building over rights jurisprudence. Kokobun concludes by suggesting an ongoing influence of early twentieth-century constitutionalism on the postwar authoritarian governments. A better interpretation may be that the same nationalistic and

modernizing impulses that influenced *Samgyunjuui* ideology and associated constitutionalism continued to influence later military and even democratic governments, long after the old ideas had lost their prominence. Overall, Chapter 5 provides helpful insights into early Korean constitutionalism.

In Chapter 6, Marie Seong-Hak Kim continues her historiographical revolution with a chapter titled “Can There Be a Good Colonial Law?” The chapter gently attacks the nationalistic view that the Japanese colonial authorities’ imposition of a Continental-style legal system was unreservedly negative and even “irrelevant” (p. 154) to Korean legal development. Kim notes that the legal system was meant to serve the interests of the Japanese colonial authorities, but also points out that it brought modern, efficient adjudication to Korea. Additionally, the colonial construction of customary law created some room for compromise between Japanese law and Korean local practice. Additionally, Kim contrasts the Japanese use of customary law, which aimed at modernization and social transformation, with the more conscientious Dutch policy in Indonesia of legal pluralism that purported to preserve native institutions.

Kim also argues that the judicial system, despite its shortcomings, made efforts to uphold justice in some situations. She notes how, in 1919, the Joseon High Court ruled that defendants involved in protest activities around the March First Independence Movement were not guilty of treasonous insurrection. The disagreement between the High Court and the Japanese Government General’s suppressive prosecution demonstrates that the colonial judiciary possessed some degree of independence and commitment to legal reasoning. Korean nationalist historiography must reckon with facts such as these if it is to come to maturity. However, it must be remembered that scholars in Korea can suffer the highly damaging accusation of being “pro-Japanese” if they make nuanced interpretations of such facts.

Chapter 6 closes by noting that the colonial court system expanded access to justice, led to the rise of a local legal community, and created a degree of judicial professionalism. It is clear to this reviewer that the thrust of Kim’s attacks on nationalist historiography are influenced by the scholarship

of Wang Tay-Sheng, whom she discusses. Kim rejects the applicability to Korea of Wang's interpretation that Japanese colonialism laid the "foundation for a nation-state in Taiwan." Such a view would be heresy for Korean historians. She asserts that, first, Korea had a state long before colonization and, secondly, that it had a "highly advanced and comprehensive codified legal system before colonization . . . unlike Taiwan and European colonies" (p. 153). While the former assertion is true and the latter is questionable (and contradicted on p. 200, "Before 1958, Korean people never had their own civil codes."), Kim's evaluation of Wang's view is understandable. Her repudiation of Wang's interpretation of colonial legal history may also be a strategically-necessary concession to nationalist historiography: it enhances the overall acceptability of her historiographical argument to Korean historians. In any case, this chapter is another pioneering addition to Korean legal historical scholarship.

Chapter 7, by Samuel Geux, reviews the historical controversy over the legality and legitimacy of the treaties that annexed Korea to Japan. Geux offers a helpful review of the history of the debate. The main legal issues are that the treaties involved coercion and procedural irregularities and may therefore be considered void. Japanese scholars often claim the treaties were valid and insist on a separation of legal and moral responsibility, which they are more willing to accept. Geux suggests that the debate may be unproductive since colonization was once legal under international law, instead proposing a greater focus on apologies and compensation.

The postwar South Korean legal history section of the book opens with Joon-Young Moon's piece on the drawing up of the constitution and compilation of the civil code after 1945. Moon (2010), famous for his massive tome on the history of the modern judiciary, examines a crucial episode in Korean political history as well as the ideas that informed the making of the constitution and civil code. Nationalism and executive supremacy over the judiciary shaped the 1948 constitution, while collective equality was emphasized over individual rights. Moon echoes the findings of Chapter 5, that Republic of China ideology influenced the constitution, especially regarding economic policy. As for Moon's discussion of the history

of the civil code, it is technical and will mainly be of interest to the legally-trained. One point of interest is his explanation of how *jeonse*, known to English-speaking residents of Korea as “key money,” came to be adopted as a novel usufruct right. Expatriates may be delighted to learn the history of the customary legal concept often frustrates their apartment-hunting. Overall, this chapter is an invaluable English-language resource on modern Korean constitutional and civil law history.

Chapter 9, by Justine Guichard, explores the role of the Constitutional Court in the post-democratization era. After explaining the history of the development of the Court, she examines its jurisprudence on the National Security Act, which curtails rights of expression owing to the threat posed by North Korea. While the Court’s review power has reined in some government excesses, notably prosecutorial charging decisions, it has also upheld repressive elements of national security legislation on the grounds of preserving the “basic order of free democracy,” a Germanic constitutional conception. Guichard concludes by suggesting that the Court is inherently limited in how far it can alter the constitutional order it purports to protect.

Tom Ginsburg’s Chapter 10 examines how judicial and administrative law reform in Japan, Korea, and Taiwan represent a milestone in Korean and Northeast Asian legal history. These reforms, he argues, represent a shift from performance-based political legitimacy, which lasted from the Meiji era to the postwar developmental state, towards “participation legitimacy” (p. 234). Furthermore, he argues that Americanization or globalization do not sufficiently explain the reforms, since the rest of the world is not moving in the same direction. Ginsburg goes on to consider how Korea adopted graduate-level law schools, lay participation in criminal trials, and reforms to administrative litigation. He finds that there is a general trend toward opening institutions to citizen involvement and increased transparency.

Ginsburg’s chapter is an important interpretation of post-democratization East Asian legal history. It is a remarkable examination of Korean judicial reforms properly placed in East Asian context. Yet one may take issue with his suggestion that legal diffusion was a less-important causal factor than the modernizing pull that led to the abandonment of

old policies. A careful examination of contemporary processes of Korean legal importation may indicate the opposite conclusion. If one looks closely at Korean judicial reforms, it becomes clear that reformist leaders often advocated adopting American over Germanic ideas. For example, a jury system with US-style characteristics was favored over the German model of lay participation. American-style law schools were advocated as a replacement for the Germanic-Japanese-derived judicial examination. Judicial reform also involved a criminal procedural revolution, adoption of sentencing guidelines, and enhancement of oral proceedings in procedure: all significantly inspired by US law. Looming in the background of these Korean reforms is a generational shift from Germanic-Japanese-oriented legal actors to American-educated jurists. Furthermore, differing outcomes to judicial reforms across Japan, Korea, and Taiwan may be explained by varying internal mechanisms of legal importation and receptivity to diffused law in these jurisdictions. In any case, Ginsburg's arguments warrant serious consideration by scholars of contemporary Korean and Northeast Asian law and politics.

Overall, the book offers a great range of important contributions to the study of Korean law. The main problematic area for the book is the direct analogizing of European legal historical concepts to East Asian legal history. Europe's systematization, codification, legal positivism, and *ius commune*, differ significantly from their purported counterparts in the Joseon dynasty because they involve essentially localized intellectual developments. However, customary law and legal transplants are more useful concepts for analysis of Korean legal history. Customary law was an element of colonialism that Japan learned of from Europe and applied in Korea. Legal transplantation is straightforwardly common across world history and not peculiarly European, such that it is an analytical concept that is easily adaptable to any particular legal system.

In sum, Marie Seong-Hak Kim's edited volume contributes to both fronts of the struggle to comprehend Korean legal history by offering new factual narratives and new historiographical and comparative approaches. The book supplies the reader with valuable materials and sources for further

research. Its overall emphasis on legal transplants as a window onto Korean legal history is also welcome. The book will be useful for scholars and students of East Asian law or Korean political history.

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