

Law and Custom in Korean Society: A Historical and Jurisprudential Approach *

Chongko Choi**

Preface

There is a famous legal maxim, “custom is the best law”. Oliver W. Holmes said, “the life of the law has not been logic: it has been experience”.¹ Helen Silving states; “The law has no juristic bases. Its bases may be historical, sociological, economic, psychological, religious, ethical, political or logical”.² Alfred Marshall noted, “Custom exerts a deep and controlling influence over the history of the world”.³ Certainly, law which is consistent with custom is secure in and of itself. On the other hand, law against custom is endangered with uncertainty. Generally speaking, custom is intimately related with law.⁴

How then is custom related with law in a society? It depends on the historical and socio-cultural context of the society.⁵

I try to explain in this article how custom and customary laws were treated in Korean legal history.

First, I try to define how custom and customary law were conceived by the Korean people.

Secondly, I will explain how traditional customary laws were investigated during

* 이 논문은 서울대학교 법학발전 재단 출연 법학연구소 기금의 2006학년도 학술연구비의 지원을 받았음.

** Professor of Law, Seoul National University

¹ Oliver Wendell Holmes, *The Common Law*, Boston, 1881, p.1.

² Helen Silving, “Customary Law: Continuity in Municipal and International Law”, in her *Sources of Law*, N.Y. 1968, p.129.

³ Alfred Marshall, *Principles of Economics*, London, 1890, p.465.cited from, Peter Orebeck and Fred Bosselman, “The linkage between sustainable development and customary law,” in; *The Role of Customary Law in Sustainable Development*, Cambridge, 2005, p.32.

⁴ For details, see Peter Karsten, *Between Law and Custom*, Cambridge University Press, 2002; David Callies and others, *The Role of Customary Law in Sustainable Development*, Cambridge, 2005

⁵ For details, Leopold Pospisil, *Anthropology of Law: A Comparative Theory*, New York, 1977, especially, pp. 107-115.

the period of modernization of Korean society. This will show how the traditional law met the received Western law.

Thirdly, I will point out some significant issues concerning customary law in contemporary Korean law. This will show that customary law is still meaningful and sometimes important in the legal practice of Korean people.

I. 'Custom' and 'Customary Law'

Before dealing with Korean custom and customary law, some conceptual elaborations are needed. In jurisprudence, it is generally accepted that custom is a factual concept, while law is fundamentally a normative concept. There is, however, a concept of customary law, as a sort of mixture of *de facto* custom and law.

How does customary law come about? This needs a complicated explanation from jurisprudential perspectives. It appears to differ depending on the historical and socio-cultural background of a society.

According to William Blackstone, customary law must meet the following criteria: immemoriality, continuity, peacefulness, reasonableness and certainty.⁶ Furthermore, we know many theories on the essence of the customary law: the usage theory by Ernst Zitelmann, the conviction theory by Karl Friedrich von Savigny, Georg Puchta and Otto von Gierke, and the recognition theory by Adolf Lasson and Karl Binding, etc.⁷ A recent book, *The Role of Customary Law in Sustainable Development* (2005), offers various definitions of customary law on jurisprudential bases. We see here the theories of David Hume, Jeremy Bentham, Henry Maine, John Reid, Lon Fuller and others.⁸ University of Pittsburg historian Peter Karsten observes, "Rules adopted by ordinary people 'work', those they don't accept, those forced upon them by 'pig-headed' legislators, often don't work".⁹

In its broadest sense, law is simply any recurring mode of interaction among individuals and groups, accompanied by the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal

⁶ For details, William Blackstone, *Commentaries on the Laws of England*, first edition 1765-69; on the explanation on this book, David Callies, "How custom becomes law in England", *ibid*, pp.158-213.

⁷ For details, see Chongko Choi, *Pophak Tongron(Introduction to Legal Sciences)*, 10.ed., 2003, Seoul, pp.79-81.

⁸ Jes Bjarup, "Social Interaction : the foundation of customary law," in: David Callies and others ed., *The Role of Customary Law in Sustainable Development*, Cambridge University Press, 2005, especially, pp. 89-150.

⁹ Peter Karsten, *Between Custom and Law*, 2002, p.539.

expectations of conduct that ought to be satisfied. This is generally called “customary law”. For customary law, the issue of what in fact happens can never be kept clearly separate from the question what ought to be done. There is a point at which deviations from the rule remake the rule itself. Thus, every fact leads a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined. Therefore, the distinction between the choice of rules and the making of decisions under the rules, like the contrast between habit and duty, remains ill defined in the world of customary law.¹⁰

Customary law is neither public nor positive. Its nonpublic quality means that it is common to the entire society rather than associated with a centralized group that stands apart from other social groups. It consists of the accepted practices on the basis of which all communication and exchange are carried on. Custom lacks the attribute of positiveness: it is made up of implicit standards of conduct rather than of formulated rules. These standards are tacit, though often highly precise, guidelines for how an individual of a certain rank ought to act toward one of different or similar rank in particular situations. Thus, for example, they determine what one should expect from one’s kinsmen in a variety of circumstances and what they in turn may and will demand of one. Customs are characteristically inarticulate rather than expressed. They apply to narrowly defined categories of persons and relationships rather than to very general classes. Also, they can not be reduced to a set of rules; to codify them is to change them. It is precisely because custom is not positive that it is foreign to the distinctions between regularity and norm, or between the choice and the application of rules. Custom can be found in every form of social life, but there are situations in which its dominion is almost exclusive. In such circumstances, there are neither formulated general rules nor a separation of government from society that would make it possible to characterize certain rules as state law.¹¹

An inquiry into the well-established definitions of “customary law” suggests that custom is composed of two essential elements; a factual and a psychological, the former consisting of a repetition of outward acts, the latter in a specific mental attitude of the persons performing such acts with regard to the place which these acts occupy or should occupy within the legal order, the so-called *opinio juris sive necessitatis*.¹²

¹⁰ Roberto M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, New York, 1976, p.49.

¹¹ Roberto M. Unger, *ibid.*, p.50.

¹² Helen Silving, *ibid.*, p.137.

II. Customary Law in Korean Tradition

How have Korean customs become Korean law?¹³ Were there any conflicts or discrepancies between customs and law in Korean history? Above all, how were Korean customs adjusted to the Chinese-style law of the traditional Korean government?

In 1989 I published a book called *Soyang Ini bon Hankuk Popsok (Korean Law and Custom viewed by Westerners)*. There I gathered the views of the Western observers of Korea on the legal practices at various times.¹⁴ In my recent book *Law and Justice in Korea: South and North* (Seoul National University Press, 2005), I surveyed Western jurists' views on Korean law from the historical perspective. These jurists included Joseph Kohler, Paul Georg von Moellendorff, Owen Nickerson Denny, Charles LeGendre, William Sands, Dwite Clarence Greathouse, Durham White Stevens, Laurent Cremazy, Francis Rey, William Shaw, Dieter Eikemeier, Gustav Radbruch, Alfred Oppler, Ernst Fraenkel, Hans Kelsen, Charles Lobingier, Robert Storey, Jerome Hall, Jay Murphy, Helen Silving-Ryu, Manfred Rehbinder, Edward J. Baker, James M. West, and Jon Van Dyke.¹⁵ Even though they described Korean law and customs from various perspectives, I pointed out that their

¹³ The *Handbook of Korea*(1978) published by the Ministry of Culture and Information contains a chapter "Custom and Folkways", which covers clothing, food, houses, life cycle, family life. 60th birthday, death, annual customs, national holidays. social mores, traditional games, etc.

¹⁴ The observations came out from the following materials; Hendrik Hamel, *Journal of the Unfortunate Voyage of the Yacht Sparwer*(Hansard & Sons, London, 1813); Charles Dallet, *Histoire de l'Eglise de Coree*,(Paris, 1874); Ernst Oppert, *Ein Verschlussenes Land: Reisen nach Korea*, (Leipzig, 1880); Joseph Kohler, *Über das Recht der Koreaner*(*Zeitschrift für die Vergleichende rechtswissenschaft*, Bd. 8, 1886.); Percival Lowell, *The Land of Morning Calm*(Boston, 1895); Homer Hulbert, *The Passing of Korea*(London, 1906); Horace N. Allen, *Things Korean: A Collection of Sketches and Anecdotes, Missionary and Diplomatic*(New York, 1908); William Sands, *Undiplomatic Memories*,(London, 1935); William Griffis, *Corea: The Hermit Nation*, N.Y. 1882; Maurice Courant, *Bibliographie Coreene*, Paris, 1894; Owen Denny, *China and Korea*, Shanghai, 1880; Paul G. von Moellendorff, *Die reorganization Koreas*, 1892; Laurent Cremazy, *Le Code Penal de al Coree*, Seoul, 1904; Durham White Stevens, "China and Japan in Korea," *The North American Review* 18, 1894; Francis Rey, "La situation Internationale de la Coree," *Revue Generale de Droit Internationale Public* 13, 1906; Charles Sumner Lobingier, *Proposed Civil Code for Korea*, 1946; Ernst Fraenkel, *Korea: Wendepunkt im Volkerrecht*, 1951; Jay Murphy, *Legal Education in Developing Nation: The Korean Experience*, Seoul, 1967; Dieter Eikemeier, *Rechtswirkungen von Heiligen Stangen, Pfeilergottheiten und Steihaufengottheiten*, *Oriens Extremus* vol. 21, 1974; Manfred Rehbinder, "Die Rezeption fremden Rechts in soziologischer Sicht," *Recht in Deutschland und Korea*, Seoul, 1982.

¹⁵ On these jurists' lives and achievements, Chongko Choi, *Law and Justice in Korea: South and North*, Seoul National University Press, 2005, pp.15-33.

descriptions are sometimes incorrect and not sufficient. I argued that Korean law and customs needed to be understood from a fundamentally proper understanding of Korean law and custom in the historical and jurisprudential context.

The term ‘custom’ which is currently called *kwansop* in Korean, was originally called *pungsok*. It represented the basic moral energy of the state. The term *pungsok* denoted the interdependence of the ruler and his subjects: *pung* was interpreted as the civilizing influence of the ruler, whereas *sok* meant the people’s habits by the rectitude and integrity of her or his own mind. The people’s compliance thus was intimately linked to the ruler’s moral leadership. Nurturing *pungsok* into becoming “good and rich” was the state’s most urgent task.¹⁶

The essence of *pungsok* was contained in the three cardinal human relationships (*samgang*) that provided human society with a fundamental and unchangeable structure: the relationships between ruler and subject, father and son, and husband and wife. They were reinforced by the five moral imperatives (*Inryun* or *oryun*) that guided interpersonal relationships: righteousness (*ui*) between sovereign and subject, proper rapport (*chin*) between father and son, separation of functions (*byul*) between husband and wife; proper recognition of sequence of birth (*seo*) between elder and younger brothers; and faithfulness (*sin*) between friends.

These relationships were maintained by the concept of rites (*rye*), proper ritual behavior, which was at the very core of the educative process; its cultivation made the people’s minds firm and receptive to order. There were four rites by which the development of *rye* was fostered: capping, wedding, mourning, and ancestor worship. The four rites (*sarye*) were instituted by the sage-kings of antiquity to bring human passions under control and make the people amenable to proper government. The four rites, as the norms of social behavior, stabilized the order of government functions.¹⁷

III. Custom and Rites (Rye)

In East Asian tradition, the rites (Ch. *Li*, Kor. *ye* or *rye*) played an important role. Rites are defined as a middle axiom of law and morality,¹⁸ and are closely related

¹⁶ *Taejong sillok* 19: 33b; Yang Seongji, *Nuljejip* 1, 24b; 4: 26a-b; Lee Onjeok, *Hoeje Jeonseo*, 7: 7. cited from Martina Deuchler, *Confucian Transformation of Korea: A Study of Society and Ideology*, Harvard University Press, 1992, p.110.

¹⁷ Jeong Dojeon, “Joseon Gyunggukjeon”, *Sambongjip*, p.232; Martina Deuchler, *ibid*, p.111.

¹⁸ For detail, Chongko Choi, *Law and Justice in Korea*, Seoul National University, 2005,

with custom. Typical rites are those of maturity (*kwanrye*), marriage (*honrye*), burial (*sangrye*) and ancestor worship (*jerye*).¹⁹ Koreans proudly called themselves the “Eastern Country of Rites”(Dongbang Yeui Jikuk).

These four typical rituals of life were codified by Chu Hsi during the Sung Dynasty of China in the 13th century. With the introduction of Chu Hsi’s Neo-Confucianism, *Chu Hsi’s Family Ritual* (Ch. *Zuxi Chiali*, Kor. *Chuja Karye*) was propagated during the Koryo dynasty by Ahn Hyang in 1290 and became dominant in Korean society since the 14th century.²⁰ On the founding of the Joseon Dynasty in 1392, the founder and the first king Taejo proclaimed that four family rituals were the national fundamental law and the edifying morality and right custom. Dojeon Jeong (1342-1398) also prescribed in his book *Joseon Gyunggukjeon* (*Josen Governance Code*) that four family rituals were the most fundamental in all customs. During the reign of the third king Taejo copies of *Chu Hsi’s Family Ritual* were printed and distributed to the rural districts to enforce its contents among the common people. The family ritual was codified into a chapter of the *Gyungguk Daejeon* (*Grand Code for State Governance*) and was adopted as a subject of the civil service examination. Family rituals were ultimately rooted in ancestor worship.²¹ Yi Ik (penname Songho, 1681-1763) said, “devil is the spirit of yin, god is the spirit of yang”.²² Koreans believed that the living and the dead are basically the same.

In 1410, the *Uiryae Sangjeongso* (Office for the Establishment of Ceremonies) was created with Ha Yun, Pyon Gyeryang, and Yi Cho as its first directors. King Taejong let it function as an ad hoc advisory office, usually in cooperation with other government agencies, most notably the Department of Rites. After drafting most of the ritual programs of the young dynasty, it had fulfilled its purpose and was abolished in 1435. All these rites refinements were codified in the first comprehensive legal code, the *Gyungguk Daejeon*. The chapter of Rites Code

pp.167-168.

¹⁹ Kyongsoo Chun, “Rites of Passages in Traditional Korea”(Kor.), in: *East Asian Culture and Law*, Oct.15-16, 2001, College of Law, Seoul National University in cooperation with Nihon University, pp.48-60.

²⁰ The *Chuja Karae* is translated by Minhyok Im into Korean and published in 1999 at Yemun Sowon Publishing Company in Seoul. This book contains a illuminating introduction on the Korean development of family rituals and the Confucian custom scholarship.(*ibid.*, pp.11-24)

²¹ See, Kwang-Kyu Lee, *Ancestor Worship and Kinship Structure in Korea*, in: *Religion And Ritual in Korean Society*, ed. By L. Kendall and Griffin Dix, Berkeley, 1987, pp.56-70.

²² Yi Ik, *Songho Saesol*(*Dissertations of Songho*); On Yi Ik’s legal thoughts, see Chongko Choi, “Traditional Legal Thoughts in Korea,” in his; *Law and Justice in Korea*, 2005, pp.102-104.

(*Ryejeon*) covers the matters of national service examination (*Kwago*), official costume (*Uijang*), rituals of passage (*Tongkwa Uirye*), festivities, royal audience, diplomacy, royal ancestor worship, marriage, adoption, royal seal, royal library, etc. Numerous moral and customary things became standardized through this legal codification. For example, there was the rule that the number of generations of ancestors to be worshiped should be determined by the highest official rank.

Korean people were regulated by these Confucian legal norms of Chinese origin. There were often conflicts between these Chinese rules and Korean indigenous customs. So, King Sejong ordered the scholar officials like Cho Huh, Huimeng Kang, Sukju Shin and Suk Chung to edit the *Five National Rites Code* (*Kukjo Oryeui*) and published it in 1474. This code was composed of 56 articles on ancestral rites (*Kilrye*), 50 on marriage rites (*Karye*), 6 on diplomatic rites (*Binrye*), 7 on military rites (*Kunrye*), and 91 on funerary rites (*Hyungrye*). In the process of enforcing the Confucian family rules and cultivating the Korean indigenous customs, the rites learning (*Yehak*) became very popular among Korean Confucian scholars. These might be called the most salient characteristics of Korean scholarship during the Joseon Dynasty (1392-1910).²³ We see some representative works such as *Exegesis of Family Rites* (*Karye Gojeong*) by Hoik Cho, *Compendium of Family Rituals* (*Karye Jipram*) by Jangseng Kim, *Origin of Family Rites* (*Karye Wonryu*) by Kae Ryu, *Revised Explanations of Family Rites* (*Karye Jeonghae*) by Uijo Lee, *Manual of Four Rites* (*Sarye Pyonram*, 1844) by Jae Lee (1680-1746). The *Gyungguk Daejeon* prescribes that all national ceremonies should follow the *Five National Rites Code* (*Kukjo Oryeui*).²⁴

Through such an acculturated development of family rites, Korean society became transformed into a Confucian society in detail. I do not want to elaborate more, because Martina Deuchler eloquently analyses this process in her excellent book *Confucian Transformation of Korea* (Harvard University Press, 1992).²⁵ One thing should be mentioned here. Yakyong Chung (penname Dasan, 1762-1836) was so intelligent and critical as to indicate the overemphasis of the family rituals by the Korean Confucian scholars. He argued for the importance of the public rites (*gongrye*), not the private rites (*sarye*), explaining that the rites originally prescribed

²³ For details, Chongko Choi, *History of Korean Legal Thoughts*(Kor.), Seoul National University Press, 2001, revised edition, pp.107-110.

²⁴ *Gyungguk Daejeon*, modern translation, Korean Legislative Research Institute, 2001. p.255.

²⁵ See also her article, "Neo-Confucianism in Action: Agnation and Ancestor Worship in Early Yi Korea," in: Laurel Kendall and Griffin Dix ed., *Religion and Ritual in Korean Society*, Berkeley, 1987, pp.26-55.

the desirable behavior of all people.²⁶

On the other hand, Hesung Chun-Koh, an anthropologist and the director of the East-Rock Institute in New Haven, argues for the following theses:

- 1) The Koreans did not adopt Chinese law and customs in the area of crimes affecting kin relations to the extent previously believed. Despite the adoption of *obokche*, the “five degrees of mourning”, as the official system of measuring the degrees of kin, in many cases punishments were meted out according to *chonsu*, the indigenous Korean way of calculating kinship degrees.
- 2) Despite the early belief that Confucianism began to take a strong hold in Korea in the mid-seventeenth century, one can observe through this study that even in the 1750s norms governing family and kin relations among the family and kin were very much Korean, distinguishable from Confucian-dominated Chinese law.
- 3) There was a considerable degree of gender equality in punishing crimes among members of the family and other kin. First, a mother’s relatives were treated no differently than those of the father. Second, there was no discriminatory punishment for the wife’s kin compared with those of the husband. Third, age and generation were two important bases of differentiation and ranking of family and kin members in Korea, while gender differences were apparent only in certain types of cases.
- 4) Although concubines were common to China, Korea, and Japan, only Korean law discriminated the children of concubines and remarried women. Thus, the legitimacy of the parent’s union became an important basis for an offspring’s kinship status.
- 5) *Injong*, human feeling, was an extraneous but significant factor that entered into the seemingly logical application of legal norms. Despite the importance attached to the degree of kinship, Korean judges had a considerable degree of flexibility in determining the appropriate punishment. Different persons in the same position in the family or kin group committing the same crime could be treated differently, depending upon the type of norm violation, and especially in light of the human emotions (*injong*), circumstances, and motives of the offender.
- 6) A woman’s status in Joseon dynasty cannot be discussed categorically without reference to her kinship role. We see that a woman as a legal mother, birth

²⁶ For details, see Mark Setton, *Chung Yakyong: Korea’s Challenge to Orthodox Neo-Confucianism*, SUNY, 1997; Chongko Choi, *Goethe and Dasan*(Kor.), Seoul, 2006.

mother, stepmother, adoptive mother, or father's concubine who raised a child in the absence of its birth mother was given definite respect and power within the family. A woman who was a grandmother enjoyed the greatest power and privilege of all.²⁷

We see here the uniformity and the diversity of Korean society in the Confucian civilization of East Asia. Generally speaking, Confucian customary law harmoniously regulated traditional Korean society from the top down to the grass roots. I will explain the process with an example; the community compact. Even today, the learning of rites (*Yeron*) is taught at the university level.²⁸

IV. Community Compact (Hyangyak)

Community Compact (*Hyangyak*)²⁹ promoted a good harmony between Confucian custom and legal regulation. It was a mechanism by which the Neo-Confucian literati solidified their position in the countryside. It constituted a strong social norm system in East Asia including Vietnam.³⁰ The spirit of the community compact was embodied in the four principles: mutual encouragement of morality, mutual supervision of wrong conduct, mutual decorum in social relationships, and mutual succor in time of disaster or hardship. Gwangjo Cho (1482-1519) sought to widen the field of application of the community compact in 1519, but his personal downfall brought failure to this effort. Thereafter the community compact was put into practice on an ad hoc basis in a number of places, but it was only in Seonjo's time that it was instituted broadly throughout the country. Powerful figures among the local Neo-Confucian literati normally administered the

²⁷ Hesung Chun-Koh, "Korean Family Norms as Reflected in Criminal Law in a Confucian State", a paper read at the Symposium on *East Asian Culture and Law*, Oct.15-16, 2001, Seoul National University, *Paper Collection*, Nihon University, 2002, pp.106-107.

²⁸ For example as a textbook, Kyungja Park, *Yeron(Lessons of Rites)*, Sungsin Womens University Press, 1988

²⁹ The *Hyangyak* is sometimes translated as the village code as well. I have emphasized the value of the community compact as an element of the East Asian Common Law(*jus commune*). Chongko Choi, "Possibility of East Asian Common Law(*jus commune*)," in: *Cultural Transformation of East Asia* (Symposium Papers of Nov. 12-13, 2002), Nihon University, 2003, pp.167-184.

³⁰ There was an international symposium on *Comparative Studies on Community Compact in East Asia* at Nagoya University in 2002. There were two presentations by Wonwoo Suh, Chongko Choi from Korean side. For details on community compact in general, William T. de Bary, "Community Compact," in his book, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Harvard University Press, 1998, pp.58-89.

community compact, but the general farming population also automatically was included automatically. Consequently, the Neo-Confucian literati actually held a position of greater authority vis-à-vis the peasantry than did the magistrate and other local officials appointed by the central government, and this further solidified the status of the Neo-Confucian literati in local community.

Yi Hwang (penname Toegye, 1501-1570) drafted a community compact in Yean (Andong), which is called *Yean Hyangyak*.³¹ Yi I (penname Yulgok, 1536-1584) created two community compacts, one for *Sowon* (now *Chongju*) and the other for *Haeju* in *Hwanghae* Province.³² He envisioned an extended organization encompassing many aspects of rural life, including education and a community granary. Although Chu Hsi's revised version of the *Lu Family Community Compact* is included as a part of the *Haeju* compact, he extensively revised it to adapt it to the Korean situation.³³ The Community Compact basically consisted of four principles: 1) mutual encouragement of virtue and virtuous acts; 2) mutual corrections of wrongful conduct; 3) association with one another according to the rules of decorum and customs; and 4) mutual aid in illness and disaster. Yulgok wrote the following preamble on the Community Compact of *Sowon* County:

The Community Compact is an ancient institution whereby people in the same community rendered aid to one another in keeping watch and ward, helped one another in sickness, and sustained one another in their comings and goings. Children also received their education in school at various levels in order to enhance their filial piety and nurture harmony among brothers. Good government and healthy mores were able to prevail during the Three Dynasties entirely because of this institution. Since then, however, morality has declined, the Way has become obscure, and the people have lost their sense of direction, while decorum and customs have deteriorated at all levels. It is indeed lamentable. Being inexperienced, I have many flaws as the magistrate of this county. Nevertheless I am determined to help transform the morality of the people. When I consulted with the community leaders to find a good way to achieve this goal, they all said that there is no better way than to promulgate the community compact. Yi Chungyong, a former magistrate of this country, has already drawn up a community

³¹ Further on his legal thoughts, Chongko Choi, *Traditional Legal Thoughts in Korea*, in his, *Law and Justice in Korea*, 2005, pp.91-95.

³² For details on his thoughts, Chongko Choi, *Law and Justice in Korea*, Seoul, 2005, pp.97-101.

³³ The text is translated by Choe Yongho in *Sources of Korean Tradition*, II, pp. 145-57. See also SAKAI TADAO, "YI YULGOK AND THE COMMUNITY COMPACT," IN *THE RISE OF NEO-CONFUCIANISM IN KOREA*, De Bary ed., N.Y.1985, pp.323-348.

compact, and this was later revised by Yi In, another magistrate, to suit the local conditions. Regrettably, however, Yi In was recalled by the court, and the community people became discouraged as the compact was never put into practice. Continuing in the footsteps of these two former magistrates, I have drawn up a new compact, taking the earlier compact as well as that of the Lü family of Sung China into consideration, by simplifying the complicated and supplementing the undefined. Although I cannot claim that my version is perfect, it includes almost all the elements that encourage good deeds and discourage evil acts. I believe that unless the magistrate exerts his utmost effort in his duties, he cannot demand anything from the director of the community compact, and that unless the director is a man of probity, he cannot exhort the village members to do good deeds. Whether the village members turn to good or to evil will depend upon the compact director, and whether the director is moved to urge his people to behave properly will depend upon the magistrate. I therefore should seek good advice and work more diligently so that the director and his staff will follow my wishes, will abide by the regulation, and will exhort the village members. If the village members do not disagree and bend like grass in the wind of virtue, the mores of *Sowon* county will surely be transformed. We should remember this always.³⁴

A Japanese philosopher, Sakai Tadao, recognizes that Korean proponents of the community compact are exponents of a distinct Neo-Confucian tradition, expressed in terms of the same textual discourse and generic practices, which in the process also making their own original adaptations to local and temporal circumstances.³⁵ The community compact as the mediator of social dynamics and autonomous norms is a fascinating topic to develop further. We will come across it again in the chapter on the contemporary Korean society.

In conclusion, the characteristics of the traditional Korean custom and customary law might be summarized as following;

- 1) Due to the small size of the territory, the customs of Korean people were relatively ‘homogeneous’ compared to those of China and Japan. That could be the reason why central government could handle the ‘standardization’ of custom and law.³⁶

³⁴ Yi I, Preamble of Community Compact for Sowon County, *Yulgok Jeonseo*, 16: 2a-b; the English translation of the aforesaid is found in *SOURCES OF KOREAN TRADITION II*, Yongho Choe trans., Columbia Univ. Press, 2000, pp. 145-146.

³⁵ Sakai Tadao, “Yi Yulgok and Community Compact,” in: William T. De Bary and Kim-Haboush ed., *The Rise of Neo-Confucianism in Korea*, Columbia University Press, 1985, pp.328-348.

³⁶ Bongduck Chun, “Wesen und Struktur des Koreanischen Rechts,” *Koreanica: Festschrift*

- 2) The Confucian rites and ethics helped to popularize of the custom among the common people. Despite of the clashes between the customs of the *yangban* noble class and those of the people at the grassroots, the social dynamics worked quite peacefully and harmoniously.
- 3) As often cited as *Yangpop miui* (good law and beautiful custom) or *Sunpung misok* (pure custom and beautiful usage), customs were positively recognized as comprising all tradition with good contents. It reminds us the famous phrase of Fritz Kern's *altes gutes Recht* describing German law tradition.³⁷

V. Modernization and Customary Law

1. Custom Investigation Project

The modernization of Korean law was achieved through the interference of Japan, the “unpleasant mediator”.³⁸ Under the Resident-General Ito Hirobumi (1841-1909) there was a considerable effort to collect and codify the customary civil and commercial law. The work was carried on in practice under the leadership of Ume Kenjiro (1869-1910), professor of civil law at Tokyo University and a leading drafter of the Japanese Civil Code. Two Korean lawyers, Siyoung Lee (1869-1953) and Jinhyong Sok (1877-1946) were the members of the project.³⁹ The procedure was to compile records of customary usages by interviewing groups of elders and various officials. However, it is not clear how much was gathered from Korean sources and how much was created by the Japanese codifiers. The official Japanese view of traditional Korean civil law was that “The Koreans had little or no concept of private rights as these were understood elsewhere in the Orient.... Civil law guaranteeing private rights had practically no existence. This was undoubtedly one of the main causes of the people’s impoverishment”. This led to the conclusion that there was a need to codify “the Korean law so that it should become competent to protect life and property”.⁴⁰ Because usage in fact covered many civil-law areas, in addition to many

für Andre Eckardt zum 75. Geburtstag, Munchen, 1960, pp. 130ff.

³⁷ Byoung-ho Park, *Legal Thoughts of Modern Korea*(Kor.), Seoul, 2001: About F. Kern’s thesis, Chongko Choi, “Legal idea and Law Finding in Middle Age Germany,” in his, *Legal History and Legal Thoughts*, Seoul, 1980, pp. 199-231.

³⁸ Chongko Choi, “Reception of Western Law in Korea,” in his: *Law and Justice in Korea*, SNU Press, 2005, p.157.

³⁹ On their activities, Chongko Choi, *Lawyers and Legal Scholars in Korea*(Kor.), Seoul National University Press, 2006.

⁴⁰ Government-General of Korea ed., *Annual Report*, 1907, p.25.

provisions of a civil nature in the traditional codes, this statement reveals a Japanese intention simply to write the law as they thought it ought to be, using Korean custom only when it was acceptable to them.⁴¹

The first area the codifiers turned to was the law of real property, because landownership was “very ambiguous and of primary importance”. The Land and Housing Certification Regulation (*Toji Gaok Jeongmyong Gyuchik*) in October, 1906, stated:

The fundamental object of this law is to guarantee to natives as well as foreigners, legitimate rights of ownership of real estate, on certifying, at a local magistracy, or a Japanese Residency (if one of the parties is a foreigner), contracts for the transfer of lands and buildings by sale, exchange, gift, or mortgage, and also to prevent any fraudulent transactions in matters of this kind.⁴²

Even if the definitions of property rights used in this regulation were customary ones, the procedure was so alien to Korean practice that Ito asked the advisers to help teach the Korean magistrates how to administer the law.⁴³ It is quite possible that Ume regarded this as a disinterested reform for the good of all, but Ito clearly saw it as a way to protect Japanese interests.⁴⁴

The codification project was put on a more permanent basis in December 1907, when the Immovables Investigation Bureau (*Budongsan Josahoe*) was disassembled and the Code Investigation Bureau (*Bopjeon Josakuk*) was set up with the vice-minister of the Department of Justice as *ex officio* head. Vice-minister Kuratomi Yuzaburo, an expert in criminal law led the criminal law and criminal procedure projects. These apparently resulted only in the revised *Hyongpop Daejeon* (*Grand Criminal Code*) and civil and criminal procedural regulations. The gathering of materials continued until the work of the bureau came to a stop with the delegation of the judicial power to Japan in 1909. Although the Code Investigation Bureau was abolished, the collection of materials resumed after annexation. The investigations of

⁴¹ Edward J. Baker, “The Role of Legal Reforms in the Japanese Annexation and Rule of Korea, 1905-1919,” in: David R. McCann, John Middleton, Edward J. Shultz, *Studies on Korea in Transition*, Center for Korean Studies, University of Hawaii, 1979, p.34.

⁴² Government-General of Korea ed., *Annual Report*, 1907, p.26.

⁴³ Yuho Kyokai ed., *Traces of the Modernization of the Judicial System in Korea*(Jap.), Tokyo, 1966, 14. This book is the transcription of a roundtable discussion held in 1940 by a group of Japanese legal professionals with experience in Korea.

⁴⁴ On Ito’s legal thoughts and his view on Korea, Song-Il Chung, *Ito Hirobumi: A Biography*(Kor.), Seoul, 2004; Chongko Choi, *Asian Jurisprudence: It’s History and Theory*, Forthcoming.

legal capacity, family relations, and inheritance were completed by 1913, and all investigations by 1915.

Almost all civil cases that were covered by traditional law must have been greatly modified in the processes of collection and application. Since most of the officials interpreting it had been trained in different disciplines, they resolved doubtful points in ways consistent with their background. Moreover, Ito specifically instructed the judicial officials to make judgments according to their consciences when the law seemed unclear.

The customary law materials collected were presumably the source of some of the distinctions between new laws made for Japan and Korea; they were never used to draft a Korean civil code, which was no longer required by Japanese policy in Korea. There was a shift to the use of Japanese laws. When it was reported in 1912 that a committee had been formed to revise the civil law with respect to legal capacity, family law and inheritance, these were among the few areas still governed by Korean traditional law. These two sources of law never become identical, but the distinctions were more related to the needs of colonial management than to respect for Korean custom. Only family and inheritance law remained substantially Korean and even they were altered.⁴⁵ It has been argued that “since these did not conflict with the demands of colonial management whether they were regulated according to custom or according to Japanese law, they were preserved in order to be able to speak of preserving tradition.”⁴⁶ The same author credited all of the post-annexation “investigation of old usages” to the same motive. He also pointed out that, in general, Korean law was only preserved when it was repressive and that many of the laws preserved were, in fact, restrictive ones enacted during the Residency-General.⁴⁷

Japanese colonialists had believed that Koreans had only a vague notion of private rights. The results of the investigation, however, did not confirm this belief. Korea was found to have customs that conformed to the legal categories provided for the Japanese civil code. This had a significant bearing on the question of how much uniformity in civil law was necessary between Korea and Japan. Ume envisioned a single code of civil and commercial law separated from the Japanese civil and commercial codes. This idea was supported by Resident-General Ito. Opponents of

⁴⁵ Further on this issue, Pyongho Park and others, *Modernization and Its Impact upon Korean Law*, Berkeley, 1981; and the current discussions among legal historians in Korea. Korean Society for Legal History held a special seminar on this issue on April 29, 2006, at Seoul National University.

⁴⁶ Kajimura Hideki and Kang Toksang, “Nittei ka Chosen no horitsu seido ni tusid, Nihon ho to Asia,” ed. Fukushima Masao, *Festschrift for Niida Noboru III*, Tokyo, 1974, p.332.

⁴⁷ Edward J. Baker, *ibid.*, p.36.

this idea argued that lack of uniformity in civil law between Korea and Japan would cause trouble for investors. In the end, the idea of drafting a separate code lost momentum with Ito's death in 1909 and completely disappeared with Ume's death in 1910.⁴⁸ Ironically, Ume's research was invoked by radical assimilationists in arguing against Koreans having rules different from those in the Japanese civil code.⁴⁹

Although Japanese laws were imposed on Koreans, the Ordinance on Civil Matters in Korea (*Joseon Minsaryong*), not the Japanese Civil Code, was the official civil law, and the Ordinance on Penal Matters in Korea (*Joseon Hyongsaryong*), not the Japanese Criminal Code, was the official criminal law of Korea. The Japanese Civil Code and Criminal Code came into effect only by way of the ordinances of the governor-general. The ordinances contained substantive and procedural rules that prevailed over the rules in codes. Although the idea of independent codes was abandoned, full assimilation did not take place. Indeed, many laws continued from the past. Laws made during the protectorate period for controlling speech and political activity, such as the Security Law, the Publication Law, and the Newspaper Law, continued to be in force until the end of Japanese rule in 1945. The *Hyongpop Daejeon*, amended in 1908 to eliminate 270 provisions, lost its force when the Japanese Criminal Code was introduced, except with regard to cases of homicide and armed robbery, to which the *Hyongpop Daejeon* applied with heavier penalties. As for civil law, the Ordinance on Civil Matters in Korea left room for Korean customs, to apply to a wide range of practices. To Koreans, customs were given priority over statutory rules; the Japanese Civil Code's rules on capacity, kinship, and succession did not apply to Koreans. The Ordinance on Civil Matters in Korea recognized customary property rights. This policy met with criticism from Japanese jurists who argued that the Ordinance on Civil Matters in Korea left too much room for Korean customs to survive, that it gave the Korean legal system excessive independence, and that it caused confusion in economic transactions.⁵⁰

The judiciary was very careful not to recognize Korean customs too generously. Also, as the colonial administration stepped up its efforts for assimilation, particularly during the 1930s under the slogan of "Japan and Korea as one body" (*Jap. Naisen ittai*, Kor. *Neson ilche*), the Ordinance on Civil Matters in Korea was amended several times. These changes introduced Japanese practices into even the

⁴⁸ Further, Youngmi Lee, *Korean Judicial System and Ume Kenjiro* (Jap.), Hosei University Press, 2005.

⁴⁹ Chonghyu Chong, *A Comparative Study of Korean Civil Code* (Jap.), Tokyo, 1989, pp.89-92.

⁵⁰ Youngmi Lee, *ibid.*, pp. 100ff.

most indigenous fields of social life, the most striking example being the 1939 amendment regarding the adoption of Japanese name patterns (*Changssi Gemyong*). However, at least in theory, Korea had a separate legal system and Japanese laws did not simply “extend” to Korea. Korea differed from Taiwan in this respect.⁵¹ Customary law was the last resort for preserving the identity of Korean law in spite of political and legal deprivations till the national liberation in 1945.

2. Contents of Custom Investigation

The Custom Investigation Bureau published four reports as the result of their investigations; 1) *Custom on Korean Immovables* (March, 1907), 2) *Custom on Korean Immobile* (June, 1907), 3) *Rights in General on Land in Korea* (June, 1907), and 4) *Sources on Korean Land Ownership* (1907).

The first report, *Custom on Korean Immovables*, was the result of the investigation from July 29, 1906 to August 10, 1907. The regions of the investigation were Seoul, Incheon, Pyongyang, Suwon, Daegu, Busan and Masan. Ume himself drafted the questionnaires which were used during the surveys with the governors and district chiefs.

The Code Investigation Bureau (*Bobjeon Josaguk*) carried out its activities from May, 1908 to September, 1910. The results were published in the *Customs Survey Report (Kanshu chosa hokokusho, Kwansup Josabogoseo)* in 1910, 1912, and 1913. The Bureau investigated the old legal codes such as the *Grand Code for State Governance (Gyongguk Daejeon)*, *Amended Grand Code (Sokdaejeon)*, *Compendium of Grand Code (Daejeon Tongpyon)*, *Grand Code of Administration (Daejeon Hoetong)*, *The Grand Ming Code (Dae-Myongyul)*, *Exegisis of Ming Code (Dae-Myongyul Burae)*, *Commentaries of Tang Code (Dangyul Soui)*, *Grand Ching Code (Dae-Chungyul)*, *Forensic Medicine (Muwonrok)*.

The Bureau investigated old written documents of 71 kinds.⁵² However, Japanese

⁵¹ Chulwoo Lee, Modernity, “Legality, and Power in Korea under Japanese Rule,” in: Gi-Wook Shin and Michael Robinson ed., *Colonial Modernity in Korea*, Harvard University Press, 1999, p.27. A recent book, *Japan’s Colonization of Korea*(University of Hawaii Press, 2005) by Alexis Dudden shows how Japanese leaders quickly mastered Western international law in the late nineteenth century, and how they used the new legal norms to legitimize themselves and their colonial project in the eyes of Western powers. See, especially, pp.100-129.

⁵² The names of these documents are indicated in *The Report on Custom Investigation*, cited from Chung Geungshik, *ibid*, p.28.

judge and legal historian Asami Rintaro (1869-1943)⁵³ commented that the scope of this investigation was not wide enough, because it was mainly concentrated on the ritual code and exegesis.⁵⁴

Ume, the chairman, gathered the investigation members and explained the method they should follow in field investigations. The investigators visited the designated districts and conducted interviews with the district chiefs, mayors, and old Confucian scholars (*Yurim*).

In the area of private law, the researchers collected information on 189 civil-law issues and 48 commercial-law issues, selected in accordance with the concepts and structures of the Japanese civil and commercial codes. Underlying the customs, survey was a question that Japanese decision makers confronted in almost every administration issue throughout the colonial period: namely, how much Korea resembled Japan, which was crucial in determining the balance of assimilation and discrimination in colonial policy. Japanese colonialists had believed that Koreans had only a vague notion of private rights. The findings of the researchers, however, did not confirm this belief. Korea was found to have customs that corresponded with the legal categories of the Japanese civil code.⁵⁵

After annexation of Korea in 1910, the Japanese seizure of Korean land was further accelerated through the mechanism of a comprehensive cadastral survey. It began to be carried out in earnest with the establishment of the Land Survey Bureau in 1910. The Land Survey Ordinance (*Toji Josaryong*) was promulgated in 1912 and required that a land-holder, in order to have his ownership rights recognized, report his name, address, and the name under which his land was registered- as well the type of land use, the size, and other pertinent data. This report was to be made to the director of the Land Investigation Bureau within a relatively short period.

Koreans, however, felt very uneasy about reporting their landholdings to the Japanese Government-General. Moreover, the registration procedures were not adequately made known to the general farming population and many peasants negligently delayed registration of their farms. Ultimately, all those who failed to register their land had it confiscated by the Government-General. In addition, all land that formerly had been allocated to state authorities, such as the Department of the Royal Household or the various government offices or even the post offices,

⁵³ On him, Elisabeth Huff(1912-1987), *The Asami Library*, Berkeley, 1969; Also, Chongko Choi, *Harvard Story*(Kor.), Seoul, 1989, pp.42-44.

⁵⁴ Asami Rintaro, "A Historical Study on the Korean Legal System(Jap.)," *Bobhak Hyophoe Japji*(*Journal of Legal Science Association*), Vol.39, No.8. pp.33-34.

⁵⁵ Chulwoo Lee, *ibid.*, p.28.

automatically became the property of the Government-General.⁵⁶

In 1933, the Privy Council(*Jungchuwon*) published the *Collection of the Interpretations on Civil Customs(Minsa Kwansop Hoedap Whijip)*, which contains 324 answers to the questions on the civil customs raised by various officials.⁵⁷

Modernity in the law under Japanese colonialism left many serious problems even after the colonial period in Korea.⁵⁸

VI. Custom in A Changing Society

1. Changing Communality

Korean society since liberation in 1945 has been gradually transformed into a modernized mass society. It has experienced drastic social mobility through the Korean War (1950-1953), student revolution (1960), military Coup d'Etat (1961), *Saemaul* (New Village) movement, continuing massive urbanization and current policy of 'globalization', etc. Korean law also has had to encounter great social upheavals and transformation.

Many scholars point out that the (too) rapid social changes have brought the social instability and a dynamic mentality to Korean people. A serious problem of generational justice became apparent. In many instances the young generation does not appreciate the lessons of the fathers' and grandfathers' way of life and the wisdoms accumulated through their lives. The reform policy of the current government seems to make best use of the 'quick-quick' (*Pali-pali*) mentality of the young people.

The communal societies quickly degenerate toward an anonymous mass society. With social change, the legal consciousness of the Korean people is said to be changing also. The National Investigation on Legal Consciousness (*Kukmin Bopuisik Josa*) was carried out by the Korean Legislative Research Institute in 1992. The result was translated into English also and published as *A Survey on the Korean*

⁵⁶ Ki-baik Lee, trs. By Edward Wagner and Edward J. Shultz, *A New History of Korea*, Harvard University Press, 1984, p.319

⁵⁷ For details, see Kwanghyun Chong, *Hanguk Chinjok Sangsokpop Yongu(Studies on Korean Family and Inheritance Law)*, Seoul National University Press, 1967, p. 159; Keungsik Jeong, *Kukyok Kwasop Josabogoseo(Custom Investigation Report in Korean Translation)*, Seoul, 1992, pp.24-30.

⁵⁸For details, see Gi-Wook Shin and Michael Robinson ed., *Colonial Modernity in Korea*, Harvard University Press, 1999, especially pp. 21-51; Furthermore, Ramon H. Meyers and Mark R. Peattie(eds.), *The Japanese Colonial Empire 1895-1945*, Princeton University Press, 1984.

People's Attitude Towards Law: How Can the Principles of the Rule of Law Be Defined in Korean Society?(1992).⁵⁹ According to this book, when posed with the question "If you are involved in a dispute, and hear the statement 'Let's solve it through legal methods', what would your reaction be?", 49.1% replied "desirable" or "reasonable", whereas 50.8% replied "inhuman" or "unpleasant". This is to say, negative attitudes toward resolving disputes through law have been gradually replaced by positive ones.⁶⁰

2. Revival of Filial Piety (*Hyo*)

On the other hand, the Korean government of the 1960s and 1970s sought to promote filial piety, much as the Joseon dynasty did, as a model of loyalty to the state. As late as the 1970s the government of Park Chung Hee (1917-1979) issued sumptuary regulations for civil servants and simplified standard family ceremonies (*Gajeong Uirye Junchik*) for all to discourage wasteful material display. In the offices of a major company, for example, the owners and senior managers attempted to evoke moral norms in their efforts to legitimize what lower-ranking white-collar often regarded as a distasteful authoritarian system of control.⁶¹

Filial piety has long been regarded as a fundamental ethical norm by Korean people. Even during the Buddhist Koryo dynasty (918-1392), the *Sutra of Parental Grace* (*Bumo Eunjungkyung*) was popular, but it was the Confucianizing reforms introduced at the beginning of the Joseon dynasty (1392-1910) that made Confucian family ethics central to Korean elite culture. Not only did the Joseon state banish Buddhism from the capital and establish Confucian examinations as the basis for recruitment into the state bureaucracy, but in 1419 it made the Confucian family ritual as outlined in *Chu Hsi Family Ritual* compulsory for the ruling elite. From this time until the introduction of modern education in the late nineteenth century, education in Korea consisted of memorization of snippets of edifying Chinese-language texts as collected in such works such as *Precious Mirror for Enlightening the Mind* (*Myongsim Bogam*) followed by study of such standard Confucian texts as the Great Learning.

During the Japanese colonial period (1910-1945), the Confucian norms of loyalty

⁵⁹ This report was translated into English by Sang-Hyun Song, the professor of law, Seoul National University and the current judge at the International Court of Criminal Law.

⁶⁰ For detail, Chongko Choi, "Traditional Legal Culture and Contemporary Legal Consciousness in Korea," In his, *Law and Justice in Korea*, SNU Press, 2005, pp. 296-306.

⁶¹ For details, Roger Janelli and Dawnhee Yim, "The Transformation of Filial Piety in Contemporary South Korea," in: Charlotte Ikels ed., *Filial Piety: Practice and Discourse in Contemporary East Asia*, Stanford University Press, 2004, p. 144.

and filial piety continued to be taught in schools. Members of the Confucian nobility were to the extent possible co-opted by government controlled institutions, such as the revived Sunggyunkwan Confucian Academy, and the norms of the patriarchal stem family with a male house head were written into the Civil Code. Household registration records used to enforce these norms also served to aid the colonial authorities in social control.

After liberation, some Koreans reacted to this co-optation by rejecting Confucianism as both anti-national and anti-modern. Filial piety, however, continued to be taught in ethics education classes that reached virtually the entire population with the expansion of public education that followed liberation, and has not been seriously challenged.⁶²

Many Korean people say that “Buddhism is no problem, because it also makes filial piety a fundamental principle”. They further argue that “Filial piety is a foundation of Christianity”. A Christian educational institution, the Sungsan University Graduate School of Filial Piety, with programs to M.A. and Ph.D. degrees, has opened its doors to the public. When its websites is accessed, an animated banner reads “The nation lives only if filial piety lives” (*Hyoga saraya Naraga sanda*).⁶³ This attitude of Korean Christians would be explained as a reason for the success of Korean Christianity.⁶⁴

3. New Customary Law Investigation

In 1990, the Korean Legislative Research Institute (*Hanguk Popje Yonguwon*) launched a new project for preliminary research of Korean customary law. Recognizing the changes in customary laws as a result of the great social changes since the 1960s, this governmental institution attempted to survey the preserved customary law that was preserved in contemporary Korean society. On the advice of scholars like Sanghyun Song, Seungdu Yang, Chongko Choi, Sangyong Kim, Huiki Shim, Kwangok Kim, Hyungbae Kim, the research group members such as Jaekyung Chun, Geungsik Chung, and Seunghee Bae visited several places over the South Korean territory. The result was published in *Kwansoppop Josabogoseo I (Preliminary Research of Korean Customary Law I)* in 1992. This 391 page report contains the regional reports on Cheju Island, Ulchin, Youngduk, Sangju, Andong,

⁶² Clark Sorensen and Sung-Kuk Kim, “Filial Piety in Contemporary Southeast Korea: Practices and Discourse,” in: Charlotte Ikels ed., *ibid*, p. 156.

⁶³ See www.hyo.ac.kr

⁶⁴ Robert E. Buswell Jr. and Timothy S. Lee ed., *Christianity in Korea*, University of Hawaii Press, 2006, pp.31-32, 286-287.

Bonghwa in Northern Kyungsang Province, Gyesan, Yeomseong in the Northern Chungchung Province, and Yesan in Southern Chungchong Province. This report contains surveys of markets, financial organizations, insurances, exports and transactions, as well as surveys of cooperative guilds for the research of commercial customs.

In my view, this report shows that some community compacts have been preserved. It indicates that community compacts survived the 'drastic' modernization of law and social life. The *Kwangyoungri Hyangyak* of Aewol, Chejudo Island was drafted in 1962 and consists of 81 articles.⁶⁵

The *Seongopri Community Compact (Seongopri Hyangyak)* of Pyoseon, Cheju is composed of 27 articles.⁶⁶ Article 26 of this Compact prescribes that the costume for the rite of passage rituals must be simple. The gifts presented at marriage and funeral ceremonies should be done in cash and gifts to reward people should not be given.

The *Geoil Village Compact (Dong Jachi Gyuyak)* of Pyonghae, Kyungsang Province was drafted in 1984 and is composed of 46 articles.⁶⁷ Article 41 of this compact prescribes that rewards should be given to those who show special filial piety to parents, make a big contribution to the community, and has achieved a socially desirable goal. On the other hand, Article 42 prescribes the 17 categories of behavior in the community which should be punished.

The *Song-I Gye Compact (Gyechik)* of Sansong village and Sangri village was originally declared about 200 years ago, but renewed in 1972. The 12 article compact deals specifically with the management of the collective fund (*gye*) of the community people.⁶⁸

The *Onjeong Village Compact (Onjeong Dongkyu)* of Sari, Chungchung Province was made in 1872. It is strongly based on Confucian ethics. With a general instruction of desirable behavior, it prescribes nine categories of punishment for improper acts on the part of village people.⁶⁹

The *Yangchon Village Meeting Compact (Yangchon Yeonban Hoechik)* in Yesan, Chungchong Province was adopted in 1972. The 13 article compact regulates the procedures for the village meetings in detail.⁷⁰

⁶⁵ The text in Korean is recorded; Korean Legislative Research Institute, *Preliminary Research of Korean Customary Law I*, Seoul, 1992, pp.105-113.

⁶⁶ The text is located, *ibid.*, pp.123-127.

⁶⁷ The text is located, *ibid.*, pp.148-158.

⁶⁸ The text is located, *ibid.*, pp. 183-185.

⁶⁹ The text is located, *ibid.*, pp.252-255.

⁷⁰ The text is located, *ibid.*, pp. 269-272.

VII. Custom and Customary Law in Contemporary Korea

The positive laws in Korea contains numerous expressions which are related to custom and customary law. Two typical expressions are *Gongseo Yangsok* (Right Order and Good Custom) and *Sahoe Sanggyu* (Social Usage).

1. Constitutional Law

Article 9 of the Constitution declares that the State shall strive to sustain and develop the cultural heritage and to enhance national culture.⁷¹

On October 21, 2004, the Constitutional Court decided that the Special Act for Construction of a New Capital (2003) was unconstitutional on the ground that the location of Seoul city as the capital was the customary constitution (*Kwansop honpop*). Although there was a heated discussion for and against this decision, it became clear that the basic constitutional element can be changed only through the procedure of the national vote.

According to the Framework Act on Education (*Kyoyuk Kibonpop*, 1947), “Education shall aim to enable every citizen to lead a humane life and contribute to the development of a democratic state and the realization of the ideal of human co-prosperity (*hongik ingan*) by ensuring that one builds character and is equipped with independent abilities for living and necessary qualities as a democratic citizen under the humanitarian ideal.”(Art. 1).

2. Administrative Law

There are two possible types of customs in this field: custom on the basis of civilian acts, and custom on the administrative level. On the civilian level, a sort of regional custom can be formed, especially in terms with land regulations. The best example is the conflict between the land development (or construction) and the customary law (rights). Nowadays, sustainable development is discussed with respect to the possible application of customary law.⁷²

On the level of administration, administrative precedents have emerged. This is usually called the principle of self-binding (*Selbstbindung*). Such customary administration is for the protection of sincerity and security.

The Public Service Ethics Act (*Gongjikka Yunripop*, 1981) has as its purpose to

⁷¹ The English text of the Constitution(1987) is contained as an appendix in, Chongko Choi, *Law and Justice in Korea*, 2005, pp.439-468.

⁷² On the fields where the customary laws are related, see Korea Legislative Research Institute ed., *ibid.*, pp.65-66.

prescribe matters including, but not limited to, the institutionalized registration and disclosure of the public officials and candidates for public offices, the regulation of property acquisition, reporting of gifts by public officials who take advantage of their public office, and restriction of employment of retired public officials (Art. 1).

The Welfare of the Aged Act (*Noin Bokjipop*, 1997) composed of 61 articles prescribes the following regulations: The aged shall be respected as they have contributed to the upbringing of descendants and the development of the state and society, and therefore their sound and stable lives shall be secured (Art. 2). The state and people shall make efforts to support and promote the sound family system on the basis of the good morals and manners of respecting the aged and loving their parents (Art.3). For enhancement of filial piety, Parents day shall be observed on May 8 every year (Art.6)

3. Civil Law

The Civil Code contains some articles which are deeply related to customary law. Article 1 of the Civil Act (*Minpop*, 1958) prescribes: "If there is no provision in the Acts applicable to certain civil affairs, customary law shall apply, and if there is no applicable customary law, sound reasoning (*jori*) shall apply". Article 2 prescribes: "The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith (*sinui songsil*). No abuse of rights (*Kwonri namyong*) shall be permitted."

The Civil Code contains some unique private law institutions based on Korean customs. Article 192 prescribes: "Anyone who has de facto control over an article has a possessory right (*jomyukwon*) to that article. The possessory right is lost if the possessor loses de facto control over the article." Articles 222-224 prescribe that in the cases of natural flow of water and drainage works, when any custom exists as to who shall bear the expense, such custom shall prevail. Articles 262-278 guarantee the co-ownership (*Gongyu*), partnership-ownership (*hapyu*) and collective ownership (*chongyu*) based on the traditional customary law.⁷³

Articles 303-310 codify a unique Korean customary law. Articles 303-304 provide: "Any person having *chonsegwon* (right over a house deposit) is entitled to use it in conformity with its purpose and to take the profits from it, by paying the deposit money and possessing the real property owned by another person. Farming land shall

⁷³ Concerning this legislation, Chunghan Kim(1920-1988), the late professor of law, Seoul National University is highly evaluated for his research on Otto von Gierke's *Genossenschaftsrecht*. Chongko Choi, *Lawyers and Legal Scholars in Korea*, Seoul National University Press, 2006.

not be made the subject matter of *chonsegwon*. Whereas a contract of *chonsegwon* is created over a building on the land owned by another person, the effect thereof shall apply to the superficies created for the purpose of owning the building on lease”. Codification of superficies under customary law (*Kwansop popsang Popjeong Jisangkwon*) is still controversial.⁷⁴

4. Family Law

Family law is contained in the Civil Code (1958) in South Korea, while North Korea has an independent Family Law Code (1990).⁷⁵

As expected, Korean family law contains a considerable number of customary elements, which preserve the traditional values.⁷⁶

In marriage law, the old family law prohibited marriage between a man and a woman having the same surname and same family seat. The new law stipulated that this kind of marriage should be left to the discretion of custom. However, because of strong opposition against this, a compromise was temporarily enacted that resulted in a Special Law for Marriage. This law transformed many illegal marriages into lawful ones. This problem, along with the family head system, was a telling example characterizing the traditional aspect of Korean society. The Constitutional Court decided finally that this prohibition was unconstitutional.

Until the 1989 revisions of the Civil Code, male house heads (*hoju*) had the legal rights to determine the place of residence of all family members, including adult sons and their wives and children.

The Family Rites Standard (*Kajeong Uirye Junchik*) was promulgated by the Government in 1973. Its effect was not salient, because it was merely a ethical recommendation without legal sanction.

The Act on Family Rites Establishment and Related Assistance (*Geonjeon Gajonguiryeyui Jeongchak mit Jiwone kwanhan Popyul*, 1998) was promulgated “to eradicate vanity and empty forms and stimulate sound social morale through the rationalization of family rites procedures and assistance in programs and activities

⁷⁴ For details, Jaihyung Kim, *Minpopron(Civil Law Treaties)* I, Seoul, 2004, pp.347-352.

⁷⁵ For details, see Chongko Choi, “Formation and System of North Korean Law,” in his: *Law and Justice in Korea: South and North*, SNU Press, 2005, pp.333-350.

⁷⁶ For details, Hyunah Yang, *Envisioning Feminist Jurisprudence in Korean Family Law at the Crossroad of Tradition/ Modernity*, Ph.D. Dissertation, The New School for Social Research, 1998; Kay C. Lee, “Cofucian Ethics, Judges and Women: Divorce under the Revised Korean Family Law,” *Pacific Rim Law and Policy Journal*, vol.4, no.2, 1995, pp.479-504.; ; Chongko Choi, “Confucianism and Law in Korea,” in *Law and Justice in Korea; South and North*, SNU Press, 2005, pp.165-190.

carried out to propagate and establish sound family rites”(Art. 1). Here, “family rites” means coming-of-age rites, wedding rites, funeral services, memorial services for ancestors and a 60th-birthday banquet, etc. (Art.2). To review the family rites matters, the Family Rites Deliberative Committee shall be established under the Minister of Health and Welfare (Art.4).

The Supreme Court ruled in 2005 that daughters also could be members of the kinship council (*jongjung*). This decision gave a significant impetus for the improvement of women’s rights in Korea. There are still many issues related with customary laws in this field of kinship organizations.

5. Commercial Law

Article 1 of the Commercial Act (1962) provides: “When there is no provision in this Act as to a commercial matter, the commercial customary law shall apply; and if there is no such law, the provisions of the Civil Act shall apply”. Won-Son Park(1907-1986), professor of commercial law at Yonsei University, conducted a wide research of customary commercial laws.⁷⁷

In the survey report of customary law compiled by the Korean Legislative Research Institute (1992), there are vast lists of the customary commercial practices which are adhered to nowadays.⁷⁸ They are, for example, commercial acts like financial loans, anonymous guilds and cooperatives, commercial guarantees, stock company management, stock interest allocation, check paper discounts, check confirmation, bank accounts, insurance contracts, marine law practices, etc. It is noteworthy to observe that the rapidly changing commercial law practices produce many customary rules in Korean socio-commercial life.

6. Criminal Law

Article 20 of Korean Criminal Code (1953) prescribes: An act which is conducted in accordance with Acts and subordinate statutes, or in pursuance of accepted business practices, or other action which does not violate the social rules shall not be punishable. The ‘social rules’ here means the *sahoe sanggyu* which is better translated as ‘social usage’. Paul Kichyun Ryu (1915-1998) translated this word into

⁷⁷ Won-Son Park, *Gaekdschu: Koreanische Kommisar*, Korean National Academy of Science, 1981; and his, “The Merchant System Peculiar to Korea,” *Journal of Social Sciences and Humanities*, vol. 26, 1967; “Korean Factors,” the same journal, vol.35, 1973.; Chongko Choi, Won-Son Park(1907-1986), in his, *Lawyers and Legal Scholars in Korea*, Seoul National University Press, 2006.

⁷⁸ For details, Korea Legislative Research Institute ed., *Preliminary Report of Korean Customary Law*, 1992, pp.61-66.

German as *sozial obwaltende Sitte* and *die guten Sitte*, which means a ‘sound moral sentiment of the common people’.⁷⁹ The acts which are not believed as *contra bonos mores* cannot be punishable. So far, the amendment of the criminal law by custom is approved in Korea.⁸⁰ From the point of the strict principle of *nulla poena sine lege*, this provision would seem to be quite awful and dangerous. However, if we place criminal responsibility within the cultural context, we may appreciate such a flexible regulation in Korean criminal law.

Conclusion

This paper started by surveying the meaning of custom and customary law from a jurisprudential point of view. Although it is not easy to clarify how custom is transformed into law, it is generally accepted that custom is supportive in many cases of legal enforcement. In traditional Korea also, the possible conflict between the indigenous custom and the China-originated legal system could be mitigated and harmonized by the role of rites. The rites were basically motivated by Confucian ethics and values. This would be the unique paradigm of the traditional Korean norm culture.

The customary laws were investigated by the Japanese colonialists for the purpose of the colonization policy in the 1900s. Korean customary laws survived Japanese colonialism mainly in the field of family law and inheritance law.

After liberation in 1945, along with the Korean transformation into mass society, customary law seemed to have weakened and to have become less influential. Although customary law only plays a supplementary role in the interpretation of the positive legal statutes it still persists in the social life of the Korean people. This is shown in the survey of the legal consciousness of Korean people (1992) and in the survey on the customary laws (1992) led by the Korean Legislative Research Institute. This project reveals that the community compacts are alive and well in Kyungsang Province and in Cheju Island.

Along with the Korean transformation into a mass society, communality is severely changed and endangered. Many people deplore the destruction of social solidarity. The legal enforcement of Confucian morality must be reviewed critically, causing

⁷⁹ Paul K. Ryu trans. and ed., *Das Koreanische Strafgesetzbuch*, Berlin, 1968 : On Ryu’s life and achievements, Chongko Choi, *Life and Thoughts of a Korean Legal Scholar: Paul K. Ryu*, in his, *Law and Justice in Korea*, Seoul, 2005, pp.350-375.

⁸⁰ Kichyun Ryu, *Hyungpophak(Criminal Law Textbook)*, General Part, Seoul, 24 ed., 1984, p.195.

some revisions of legal texts.

However, as far as the content and enforcement of the contemporary Korean legal system is concerned, the role of customary law is maintained in constitutional law, civil law, commercial law, and criminal law, as analyzed above.

Korean society currently undergoes severe changes. Many people are embarrassed by the moral degeneration and the non-obeyance of traditional customs at the moral and customary discontinuities. The Korean judges should try to gather as much knowledge as possible of customary laws while they serve in the districts at the beginning of their careers. The generational justice must become a source of serious discussion. For this phenomenon tells us that on the one hand the discourse on law and custom is out of date while on the other hand it emphasizes the importance of such a discourse. My hope is that this paper has sufficiently described the problematic situation that exists in Korea and that it would evoke further constructive discussion.

Key words: custom, customary law, tradition, community compact, legal modernization, custom investigation, filialpiety, customary constitution

Glossary

- Bopjeon josaguk 法典調查局
Budongsan Josahoe 不動産調查會
Bumo Eunjunggyung 父母恩重經
Byul 別
Changssi Gemyong 創氏改名
Chin 親
Chongyu 總有
Chuja Karye 朱子家禮
Daechungyul 大清律
Daejeon Hoetong 大典會通
Daejeon Tongpyon 大典通編
Daemyungyul 大明律
Daemyungyul Burae 大明律附例
Dangyul Soui 唐律疏議
dongbang Yeui Jikuk 東方禮儀之國
Gajeong Uirye Junchik 家庭儀禮準則
Geunjeon Gajeong Uiryuei Jeongchak mit Jiwone kwanhan Bopyul 健全家庭儀禮
의 定着 및 支援에 관한 法律
Geoldong Jachi Gyuyak 巨一洞自治規約
Gongjikja Yunribop 公職者倫理法
Gongseo yangsok 公序良俗
Gyechik 契則
Haeju Hyangyak 海州鄉約
Hanguk Popje Yonguwon 韓國法制研究院
Hoju 戶主
Hongik Ingan 弘益人間
Honrye 婚禮
Hyangyak 鄉約
Hyoga saraya naraga sanda 孝가 살아야 나라가 산다
Hyongpop Daejeon 刑法大全
Inryun 人倫

Jerye 祭禮
 Joseon Gyunggukjeon 朝鮮經國典
 Joseon Hyungsaryong 朝鮮刑事令
 Joseon Minsaryong 朝鮮民事令
 Josene Sihaenghal Popryong e kwanhan Popyul 朝鮮에 施行할 法令에 관한 法律
 Kanshu Chosa Hokokusho 慣習法調査報告書
 Karye Gojeong 家禮考證
 Karye Jipram 家禮輯覽
 Karye Wonryu 家禮源流
 Karye Jeonghae 家禮正解
 Kukmin Popuisik Josa 國民法意識調査
 Kwago 科擧
 Kwansoppop Josabogoseo 慣習法調査報告書
 Kwansoppopsang Popjeong Jisangkwon 慣習法上 法定地上權
 Kukjo oryeui 國朝五禮儀
 Kwanye 冠禮
 Kyoyuk Gibonbop 教育基本法
 Minbop 民法
 Minsa Kwansop Hoedap Whijip 民事慣習回答彙輯
 Muwollok 無冤錄
 Myungsim Bogam 明心寶鑑
 Naisen ittai, Neson Ilche 內鮮一體
 Noin Bokjibop 老人福祉法
 Onjeong Dongkyu 溫井洞規
 Orye 五禮
 Oryun 五倫
 Pali-Pali 빨리빨리
 Pungsok 風俗
 Rye 禮
 Saemaul 새마을
 Sahoe sangkyu 社會常規

Samgang 三綱

Sarye 四禮

Sarye Pyonram 四禮便覽

Seo 序

Seongopri Hyangyak 城邑里鄉約

Sin 信

Sinui Songsil 信義誠實

Sokdaejeon 續大典

Song-I Gye Gyuchik 松耳契規則

Sowon Hyangyak 西原鄉約

Soyang Ini Bon Hanguk Popsok 西洋人이 본 韓國法俗

Toji Gaok Jeongmyong Gyuchik 土地家屋證明規則

Toji Josaryong 土地調查令

Tongkwa Uirye 通過儀禮

ui 義

Uirye sangjeongso 儀禮祥定所

Yangchon Yeonban Hoechik 陽村連班會則

Yean Hyangyak 禮安鄉約

Yehak 禮學

Yeron 禮論

Yurim 儒林

<국문초록>

한국사회에서의 법과 관습

— 역사적 및 법학적 접근 —

최종고*

1)

“관습은 최량의 법”이란 말처럼, 법, 관습, 관습법은 밀접한 관계를 갖는다. 본 논문은 이러한 관계가 한국의 역사와 현대사회에서 어떻게 전개되어 왔는지를 규명하는 데에 목적이 있다.

I. 관습과 관습법

관습과 관습법의 개념에 대하여 블랙스톤(Blackstone) 이래 벤담(Bentham), 레이드(Reid), 풀러(Fuller) 등의 여러 이론이 있다. 실빙(Helen Silving)은 관습법을 사실적 측면과 심리적 측면으로 설명한다.

II. 한국전통에서의 관습법

저자 「서양인이 본 한국법속」(1989)과 「*Law and Justice in Korea*」(2005)에서 서양인이 본 한국법과 관습에 대한 관찰들을 소개하였다. 한국에서 원래 풍속이라 부른 관습은 오륜(五倫)과 예(禮)에 기초하고 있었다. 근본적으로 조상숭배에 근거하고 있다.

III. 관습과 예

중국에서 기원한 법과 주자가례(朱子家禮)와 한국의 관습 사이에 괴리가 있어 1474년에 「국조오례의(國朝五禮儀)」와 1844년에 「사례편람(四 便覽)」이 발간되었다. 도이힐러(M.Deuchler)는 한국사회의 유교화(Confucianization)를 분석하였고, 전혜성은 조선형법의 시행에서 중국과 달리 관습이 중요한 역할을 하였음을 검증하였다.

IV. 향약

향약(鄉約)은 동아시아보통법(East Asian Common Law)의 일부를 이루는데, 조선조에 이퇴계와 이율곡에 의하여 모범적으로 실시되었다. 일반적으로 한국의 지형적 협소성으로 인하여 관습법은 비교적 동질적이었고 중앙정부에서 표준화 할 수 있었다.

유교적 예와 윤리, 일반인의 관습 사이의 긴장은 향약 등의 자치 규범으로 조화될 수 있었다. 양법미의(良法美意)와 순풍미속(淳風美俗)은 긍정적으로 평가되었다.

V. 근대화와 관습법

관습과 관습법의 조사사업은 1906년부터 일본식민주의에 의해 실시되었다는 데에 복잡성이 있다. 우메 겐지로(梅謙次郎)의 지휘 아래 수년간 실시한 결과가 「관습조사보고서」로 발간되었다. 문제는 일본민법의 개념에 맞추어 ‘관제관습화(官製慣習化)’한 사실인데, 그럼에도 불구하고 한국인은 강한 관습법적 권리의식을 가졌음이 확인되었다. 그런 점에서 대만의 관습법과 사정이 달랐다.

1908년부터 1910년 사이 법전조사국은 71개 항목에 관해 조사하였다. 일본통치하에서 법과 관습의 근대화는 지금까지 ‘식민 후 근대성’(post-colonial modernity)의 문제를 심각히 야기시키고 있다.

VI. 변화하는 사회의 관습법

해방 후 한국사회는 전쟁, 혁명, 새마을운동, 도시화, ‘세계화’로 ‘빨리빨리’의 극심한 사회변화를 겪고, 공동체성(communality)과 사회연대성에 동요가 오고 있다.

한편, 1960년대와 1970년대에 박정희 정권에 의해 효의 부활이 장려되었다. 유교뿐 아니라 불교와 그리스도교도 효(孝)를 긍정적으로 보고, 입법에서도 효의 장려를 지원하고 있다.

1992년 한국법제연구원에서 한국관습법조사를 실시하였는데, 여기에는 경상도, 충청도, 제주도에서의 향약, 동규(洞規), 계칙(契則) 등 관습법적 유산이 확인된다.

VII. 현대한국에서의 관습법

1. 헌법: 국가는 전통문화를 계승해야할 의무를 지고 있고, 2004년 헌법재판소는 ‘관습헌법’의 존재를 확인하였다.

2. 행정법: 공직자윤리법, 노인복지법 등에서 전통윤리와 접촉이 보이고, 지속 가능한 개발(sustainable development)과 관련하여 관습법과 연결된다.

3. 민법: 전세권, 공동소유형태, 관습법상 법정 지상권(地上權) 등이 논의된다. 신의성실의 원칙도 관습과 연결된다.

4. 가족법: 가정의례준칙, 건전가정의례의 정착 및 지원에 관한 법률, 종중(宗中)과 관련되어 관습법이 중요시된다.

5. 상법: 박원선 교수의 수집연구에 따르면 상관습의 전통에 따라 현재도 각지에서 상관습법이 통용되고 있다.

6. 형법: 사회상규에 위배되지 않는 행위는 처벌되지 않는다.

결론

한국은 관습과 관습법의 전통을 강하게 갖고 있지만, 서양법을 수용하여 근대화한 후 1 세기 동안 격심한 사회변화로 그 위상이 현저히 위축되고 있다. 세대간 정의(generational justice)가 심각히 논의되고 있다. 한편으로 관습법은 시대착오적인 것처럼 보이면서도, 다른 한편 올바른 법문화의 정착을 위하여 진지하게 논의해야 할 과제로 의식되고 있다.

주제어: 관습, 관습법, 전통, 예(禮), 향약, 법근대화, 관습구사, 효(孝), 관습헌법

* 서울대학교 법과대학 교수