CHAPTER 1

Introduction: Searching for the Spirit of Korean Law

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The chapters in this volume approach Korean legal history from the perspective of comparative legal traditions. The contributors’ shared premise is that the evolution of Korean law can be best understood when viewed in terms of its interactions with outside laws. Of course, this is not an idea unique to Korea. Scholars have shown borrowing is a major vehicle of legal change. Roscoe Pound wrote that the “history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.”1 Alan Watson stated “borrowing from a different jurisdiction has been the principal way in which law has developed.”2 State building draws legitimacy from law which, as a supposed symbol of rationality and universal principles, is amenable for diffusion and reception. Both Pound and Watson had Western law in mind—laws originating from Roman law—when they made the observations above, but their views are universally applicable to law, including that of East Asia.

Law remains one of the least understood aspects of East Asian tradition, even in the case of Chinese law. Premodern Chinese law, along with the laws of Korea, Japan, and Vietnam, had long been regarded as little more than a recitation of Confucian moral injunctions, with its penal legal system functioning as an apparatus for a sort of Oriental despotism. The conventional view that traditional East Asia did not have a law worthy of its name was a result of an ill-informed cultural bias of Western jurists in the nineteenth century. This outdated opinion has been effectively disputed by scholars who showed that features of European codes of the eighteenth century had existed in Chinese codes dating from the Tang (618–907) and Ming (1368–1644) empires.3 It is now broadly accepted that the development of East Asian law was different from

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that of European law and this difference had nothing to do with whether one was less, or more, advanced than the other. Still, study of East Asian legal history lags, and Korean law, in particular, is regularly treated by Western scholars as an afterthought in the shadows of Chinese and Japanese law. This volume aims to help correct this state of scholarship.

The Chosŏn dynasty (1392–1910) established a sophisticated codified legal system under the influence of Chinese law by the early fifteenth century. Having remained in the Chinese legal sphere for centuries, Korean law underwent a sweeping transformation from the turn of the twentieth century and especially during Japanese rule (1910–1945). Its metamorphose from a Sinicized law to a full-fledged Romano-German civil law under colonial aegis was drastic and thorough. Following independence, the Korean republic embraced dynamic constitutionalism with impetus from the US and German constitutions. These remarkable trajectories of Korean legal history provide a uniquely fecund ground in which one can study the panoramic and interlocking evolution of the world’s legal systems in national, regional, and global contexts.

This book is divided into three parts: the Chosŏn, colonial, and modern periods. The chapters in each part deal with the developments of codified laws, legal theories and practices, and jurisprudence, against the backdrop of political and institutional mutations. Together they show that Korean legal history bears powerful imprints of foreign laws but reveals a distinctive force of acculturation at work, reflecting original and creative contributions by lawmakers, legal scholars, and judges. With the passage of time, Korean laws and legal systems engendered a distinct identity. The contributors to this volume search for the nature and significance of this entangled and evolutionary process, namely, the spirit of Korean law. We explore how and to what extent Korean law modified and departed from the foreign models it accepted, and what those convergences and divergences in lawmaking and interpretive trends meant for contemporary law.

Confucianism, Colonialism, and Constitutionalism

The broad theme that cuts across this volume is the intertwining forces of Confucianism, colonialism, and constitutionalism in Korea’s legal past. It is approached through three specific issues: first, the influence of Confucianism as a global ideology in East Asia on Chosŏn law; second, the replacement of