Chapter 6

Can There Be Good Colonial Law? Korean Law and Jurisprudence under Japanese Rule Revisited

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Colonial law is full of potentials and pitfalls. History has witnessed the spread of law around the world through imperial expansion, starting with Roman law in antiquity. Law, a key apparatus for the construction of the state, is a driving force and also one of the most durable effects of colonialism. It served as an instrument of colonial domination and exploitation, yet in many postcolonial societies there was relatively little effort to undo the legal institutions bequeathed from colonial rule. The main objectives of colonial legal policy—establishing a competent legal system and maintaining efficient colonial control—often coincided, though not always. This multifaceted character of colonial law saw full expression in Korea. The fact that the transformation of Korea's law and legal system took place under Japanese colonial rule (1910–1945) continues to pose thorny questions. But the fact that much of law and the legal structure established during the colonial period remained intact after the Japanese were long gone suggests that colonial law is an essential part of Korean legal history.

This chapter examines the structure and operation of the colonial legal order and its impact on modern Korean law, with emphasis on colonial jurisprudence. The governor-general of Korea ruled by administrative orders with the force of law and controlled the courts as part of his executive function. But colonial courts performed their tasks largely independently from political power and judges were free to engage in jurisprudential activities. Japan brought to Korea laws and a legal system that had already been adapted to Japanese normativity and hence to the conditions in East Asia. The intense process of the Japanization of laws, which itself benefited from the preexisting common cultural elements of the Sinicized legal civilization, facilitated the course of legal dissemination in East Asia. Colonial policy of customary law was further intended to attenuate the harshness of modern positive law imposed on indigenous society. Recognition of custom as a supplemental source of law was a Meiji innovation. Along with the notions of reason (jōri in Japanese; chori in Korean) in private law and general social norms in penal law, custom played an important role in bringing traditional laws to conform to modern legal principles as well as the colony's changing social reality. How the
imported concept of customary law took root in Japan, China, Taiwan, and Korea deserves attention as it allows comparative investigation of the evolution of law in East Asia.

Japanese colonial customary law policy is of particular interest because it epitomized how Japanese colonialism diverged from the dominant path followed in European colonies. As the only non-Western imperial power, Japan’s policy in its colonies in East Asia revealed distinct characteristics. Comparison of Dutch adat law policy, grounded on legal pluralism, with Japanese policy in Korea can shed light on the nature of the Japanese venture and offer an occasion to reflect on East Asian legal premises and postulates in the context of global colonial history.

The nationalist conception of Korean law emerged as a reaction to colonial law. As colonial authorities and judges strived to systematize—and in the process sometimes stigmatized—traditional Korean laws and practices, such as those based on Confucian rituals, deep resentment and resistance on the part of Koreans were inevitable. The nationalist framework prevailed in postcolonial years. Reluctant to challenge its validity, many historians have focused on how the Korean legal order was destroyed by the colonizer in the name of modernization. But colonial law was the critical arena where traditional law and modern law collided and were negotiated, and where much of the reality of Korea’s legal development was played out. In order to understand the evolution of Korean law in continuum, a more engaged look at colonial law is needed.

The Colonial Legal System

The opening of modern Korean courts took place in 1908 when Korea was under Japan’s protectorate rule (1905–1910). Under Itō Hirobumi (1841–1909), the first resident-general, the Japanese mounted considerable efforts to reform the legal system in Korea. The Japanese government was aware that legal modernization was a major justification for its domination in the long-time neighbor. The “entrustment” of the Korean judiciary to Japan in July 1909 resulted in the replacement of Korean courts by Japanese courts. Following

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