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Customary Law in Korean and World History

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Customary law is an issue that bears crucially on the dichotomy of tradition and modernity, a perennial question for scholars of East Asia. This paper aims to discuss customary law in Korea from the perspective of world history, in particular European history. Comparing East Asian and European legal history may strike one as an elusive, if not arbitrary, endeavor. An immediate problem is theperceived lack of common conceptual framework. East Asian and European legal traditions seem too different from each other,and their rules and legal systems too culture-specific, to be considered together, beyond juxtaposing them to highlightdifferences. On the other hand, the fact that East Asian countries—Japan, China, and Korea—derived their modern formal legal orders from Europe appears to dilute the potential poignancy of comparative investigation.

I argue that the concept of custom can serve as a rare analytical instrument that can bring different legal traditions and legal orders under common and overarching frameworks.In the following discussion, I will examine the nature and significance of customary law in Korea, from the Choson dynasty to the contemporary period. Through this discussion, I hope to emphasize the importance of a comparative approach in the study of law.

According to John Merryman, custom in civil law jurisdictions receives scholarly attention "far out of proportion to its actual importance as law," mainly because of "the need to justify treating as law something that is not created by the legislative power of the state" and also because of the significance it commands as a source of national pride and identity.[1]This observation has significant implications for the Korean situation. In the following discussion, I will examine how the concept of custom as the expression of indigenous culture and tradition has influenced historical writing as well as juristic doctrine of customary law in Korea. Custom—its concept, evolution, and relationship to law— can provide a key reference point for inquiries comparing different legal traditions and studying the distribution and reception of law in history. It has been pointed out that in civil law jurisdictions custom is regularly listed as a major source of law but routinely dismissed as being of slight practical importance.[2]Korea seems to present a unique case in which custom remains at the center of jurisprudential and doctrinal discussion in Korea.

Concept of Custom in European and East Asian History

A fundamental question in studying law and legal history iswhat normative orders constitute law. Custom commands universally historical legitimacy because of its claim as the embodiment of indigenous cultural values and tradition. But the relationship between custom and law in history is not always clear. Custom is commonly seen as the origin of law, emerging spontaneously in social existence. Recently, however, scholars in Europe have challenged this view, asking pointedly whether legal historians have tended to evade the question of how custom became legal norms. Their main argument is that the history of custom cannot be dissociated from political considerations. According to them, the rise of customary law in thirteenth-century France was less a spontaneous expression of popular will than a conscious construction

forged by the need to regulate society through state law.[3] The birth of customary law in late medieval France was an "innovation," not a process of natural emergence of something that was already there.

This insight can shed important light on legal history of not just Europe but East Asia. First of all, it is important to recall that the concept of customary law did not exist in traditional East Asia including feudal Japan; it was introduced for the first time when Meiji Japan received European theories of the sources of law.[4] The notion of custom, or customary law, was a distinctly European one. The introduction of the concept of custom into East Asia, first to Japan and subsequently to China, Taiwan, and Korea, coincided with the transplantation of civil law in the late nineteenth and early twentieth centuries. To be sure, East Asian society had a large number of indigenous customs which each community collectively practiced and observed. These customs did not have legal value, however, because they conveyed neither right nor duty, unable to substitute for or complement the state code.

When one postulates the change of custom (consuetudo)into customary law (jus consuetudinarium),that is, the passage from the realm of popular usages "representing" the behavior of people to the realm of law "regulating" the behavior of people, it is important to ask about the historical necessity and the forces behind this change.[5] When this process, that had taken place in Europe over several hundred years, was seized upon by the modernizing government of Japan that tried to achieve the same transformation within decades or less, how and why it happened deserves attention. The adoption of the notion of custom—fundamentally a European concept—had a clear purpose of facilitating the transformation of their law and legal systems in the framework of the civil law tradition. In 1875 Japan declared custom as an official source of law. Subsequently, "custom" played a remarkably efficient role in adapting the traditional legal order to the laws and legal systems imported from France and later Germany. In the name of custom, local practices and usages were interpreted and classified by the newly established courts according to new legal principles and categories. Basically the same process took place in colonial Korea.

The development of customary law in Europe can be seen as part of "legal imperialism" that started with the expansion of Roman law and continued with colonization in the nineteenth and the early twentieth centuries. An essential problem with the position that views custom as an expression of popular conscience is that it disregards the question of power in the development of law. By treating custom as autonomous from the state power, one risks explaining the evolution of law in dissociation from political circumstances.

The customary law order was created in Meiji Japan by the administrative and bureaucratic state that tried to unify legal sources and centralize the realm. The same process took place in colonial Korea. Through the customary law system established by the colonial regime, Korea's traditional law was reconciled with the imposed Japanese legal order. The concept of custom played the role of important machinery in history in different areas of the world, reconciling the pre-existing legal order with a new legal system from outside. Here I argue that the "construction" of customary law in the late nineteenth century and early twentieth-century East Asian countries, and during the colonial period in Korea, faithfully followed the medieval theories and practices of customary law in the twelfth century and onward in Europe.

The crucial link between custom and alien law should not be overlooked. Custom was often pitted against the influence of alien law. In both Europe and East Asia, however, heightened attention to custom—the movement to record customs for instance—took place in the backdrop of stimulus from non-indigenous law. Historians largely agree on the role of the Canon-Roman tradition of law which civilized the Germanic or barbarian customs; customary law in turn fostered the sedimentation of Roman law in national laws in Europe. In Europe, the emergence of "customary law" was the result of acculturation on the model of the "learned law." Jurists reduced customs into writing and systematized them, resorting to the received civil law principles as written reason (la raison écrite, ratio scripta). It eased the melange of French law with the ius commune. Several hundred years later, the French Civil Code played the role of

written reason in the modernization of Japanese law. In colonial Korea, it was the Japanese Civil Code that played the same role.

In Europe, custom played the role of an important instrument in the process of adopting a new legal system from outside. In late medieval France, in the wake of the reception of Roman law, jurists put into writing and systematized French customs, resorting to the imported civil law principles as written reason. Newly redacted and systematized customary law eased the transition of French law to a new legal order that fully incorporated the "civilized" and "learned" Roman law.From this synthesis French civil law was born. Custom quickly became a learned concept. In late fifteenth- and sixteenth-century France, the massive campaigns took place to record and reform local customs. They were accompanied by deliberate and coherent efforts by professional jurists to create a common customary law in France by incorporating the elements from Roman law. The redaction and reformation of customs, in which lawyers played a preponderant role, provided a vivid example of how popular custom came to be withdrawn from popular control and custom was turned into a coherent and learned law. The momentum unleashed in the Ancienrégime to reform customary law led to the codification of civil law in 1804. This development of customary law did not occur in East Asia before the late nineteenth century.

"Custom" in Traditional Korea

The belief in current scholarship in the existence of "customary law" in Chosŏn Korea risks serious misrepresentation of traditional Korean law. It has been argued that Chosŏn Korea was ruled by legal precedents and customary law, and that state codes were compiled on the basis of traditional custom. This view, widely shared among Korean scholars, reveals a lack of conceptual precision and the attendant interpretive pitfalls concerning custom. Law-making in Korea involved piecemeal accumulation of royal edicts, called sugyo, which were periodically incorporated into the state codes. Because state codes were indisputably penal in nature, some historians highlighted the royal edicts as examples of civil law. Sugyo supposedly included examples of customary practices that were given formal legal sanction and, it has been argued, the "people's will" was reflected in royal edicts. Certainly Sugyo presents an important subject in Korean legal history. Its nature and function, and whether and custom was acknowledged and inserted in the royal laws need to be studied. But the proposition that a living rule of "customary law" was acknowledged and inserted into the royal laws lacks so far concreteempirical evidence. The assertion that the Chosŏn government codified rules that belonged to "customary law" emanating from social reality is yet to be verified.

In fact, part of problem seems to arise from the tendency of scholars to use an excessively broad definition of the terms "custom" and "civil law." It may be due, in part, to the fact that the concept of customs derives from anthropology, loosely referring to local habits and practices. But custom in law must be distinguished from mere social practices. As one scholar aptly put it, there is the lawyer's customary law and there is the sociologist's—or the anthropologist's—customary law. Civil law has nothing to do with popular sentiment. The legitimacy of law, or the legality of the government's initiative, does not depend on the conformity to the popular sentiments. The popular notion of "living law" may gratify democratic sensibilities or modern pluralistic sensitivities, but it has no place in Korean law.

To be sure, some of the royal edicts or other laws originated in case decisions. Unlike courts in the West, however, courts in Korea did not establish a body of case law that served as rules for deciding rights and liabilities. If "precedents" existed in premodern Korea, they were administrative precedents, not judicial precedents. What was incorporated into statutes dealing with civil matters was not custom, not to mention precedents, but practices that had become an administrative routine, necessary to fill the needs of the government. In Chosŏn, there was no definite set of rules outside state codes that could have

prevented adjudication from becoming arbitrary decisions. The idea of a body of pre-established laws abstracted from private relations remained unknown.

The establishment of legal norms requires the activities of jurists. A crucial factor that distinguishes the development of law in Chosŏn Korea from Europe is the absence of independent legal professionals. Without jurists, there was no jurisprudential foundation for develop binding rules from customs. Chosŏn had so-called litigation masters, but their practices were officially prohibited by the state. Incidentally, it is interesting to note that the repression of the litigation masters in Chosŏn was much more fierce and thorough than in China, at least in the Ming dynasty. Also, it appears that there was markedly less diffusion of legal learning among the public in Chosŏn Korea. One can conjecture that this harsh attitude of the state against litigation in general was due to the belief that any lawsuits disrupted social hierarchy. Studies have shown that Korean law codes, while using the Chinese penal law, provided special rules that punished crime allegedly disrupting the existing hierarchy much more severely. Crimes against kin and status superiors are the examples.

Unlike in Europe where the jurists remained instrumental in the making of customs, extracting rules from practices and systematizing them, the absence of the independent judicial courts and lawyers in Korea prevented the rise of customary law and civil law. Custom does not result from spontaneous social rules but develops from the rules jurists compiled and enforced. Lacking jurisprudential activities, the habits of people in a particular area had no chance of becoming a local custom. The absence of legal professionals meant that a trial was not a contest based on legal reasoning, but a series of moral appeals to adjudicators. With no legal professionals, there was no judicial adoption of customs as rules to be enforced by the state.

The birth of the "myth of custom" in Europe can be dated to the nineteenthcentury. It has since been powerfully sustained and inculcated as part of the historiographical agenda in reaction to legal positivism and the legicentrist dogma. Subsequently, customary law as an instrument for precipitating legal development saw a dramatic revival in the colonial context. European colonial customary law policy in the nineteenth century was based on the ideology in European history that civil law originated from customary law. In Africa and Southeast Asia, European imperial powers introduced European laws to colonial territories but allowed the continuance of indigenous legal practices and local institutions. Legal pluralism was inherent to European colonial order. The vast majority of disputes were heard in native courts, in which "customary law" was interpreted and implemented by native chiefs. Faithful to the ideology of custom, the French ordered the collection of local customs in the French West Africa. But these efforts to "find" customary law were in reality nothing more than selecting social norms and usages and turning them into binding rules by fitting them in the vocabularies and concepts of the transplanted European law. From late medieval France to French West Africa to colonial Korea, the notion of "custom" played a key role in creating the legal hierarchy of norms controlled by the state.

It is well known that Japan closely followed and imitated the European model of colonial law. As a colonizer, Japan undertook a deliberate legal transplantation of Japanized Western law in its colonies in Taiwan and Korea. Japan allowed the continuation of Korean "customary law." But in fact the colonial customary law order was a framework which the Japanese used in order to acculturate imposed civil laws to selected Korean custom, while rejecting the legal force of other customs as in conflict with public order.

This short discussion above reveals how perilous it is to postulate "custom" in traditional Korea. Assertion of the presence of "customary law" and "civil law" in Chosŏn Korea seems to be grounded on the desire to show that Korean traditional law was as advanced as European law because it had modern notions of civil justice, private law, property rights, etc. But trying to prove the importance of contracts and property rights in Chosŏn may be a fundamentally ill-placed emphasis, because it amounts to arguing that Korean law deserves attention only because it was not different from Western law. The existence of contracts in premodern Korea does not mean that the magistrates decided cases according to legal norms.

Contracts are important proofs in the disputes between parties. But proofs answer only questions of fact; civil justice still requires legal norms, according to which the judge constructs the contractual language to resolve questions of law before he or she determines each party's rights and liabilities.

Of course it would be a complete misrepresentation to argue that before the introduction of modern law Korea had no notion of law or justice. Chosŏn Korea had a clear notion of justice and its legal system functioned efficiently; simply they were different from Western law and legal systems. Korean traditional law functioned on the basis of penal sanctions that were articulated under clearly defined categories of crimes and punishments in the state codes. The main concern of the state in maintaining the legal system was to make sure that judicial practice does not contravene the strict application of the provisions in the state code. As one scholar put it, conformity to a uniform law, restricting the arbitrary decisions of the judges, underlay the East Asian notion of justice.The legality of the penalties was the key issue in East Asian law. When the goal of the legal system was to provide uniformity and simplicity in penal law and its execution, however, certain notions and practices which could have promoted the development of the concepts and principles of "rights" in civil law were subsumed into the framework of prohibitions and punishments.

The absence of legal doctrines or legal thought in civil law explains the strong influence of Confucian civil morality in the legal system. When there were no concrete legal principles to apply, the magistrate sought a reasonable outcome in the disputes by resorting to Confucian precepts. With the state's general indifference to regulating legal relations among private individuals, the consideration of morality, responsibility, or harmony did have pervasive presence in resolving private disputes. The consideration of equity in Korean law, grounded in fundamental ethical and moral principles, can be distinguished from equity in European private law. The latter involved interpretations of rules, either customary law or royal legislation, through the process of establishing judicial precedents. Without judicial precedents, the magistrates in Korea lacked the principal technical instrument of rendering justice in equity. In the absence of the jurisprudential tradition, the notion of equity embraced by the Korean judges remained insulated from the possibilities of developing the principles of private rights and individual liberty.

Some historians of Korean law have attempted to find in Confucian civic virtue the antecedents of modern constitutional norms. For example, it has been argued that the Confucian concept of li, ritual propriety, functioned in premodern East Asia as a public political norm that restrained political rulers.Sophisticated arguments have been set forth regarding the implicit liberal elements in Confucianism and premodern Korean legal culture. If one wanted to find the prototype of constitutionalism and the rule of law in traditional Korea, however, a more pertinent approach would be to point to the state codes. Korea and East Asia had "law" formalized by the state; simply its notion was not the same as the Western notion of law. East Asian legal culture emphasized regularity and specificity of law and punishment. Judges were ordered to mete out punishment strictly according to the degrees of gravity of offenses as explicitly and minutely provided in the law code. The state ensured that the judges did just that, without attempting any arbitrary exercise of power. These characteristics made the justice systems in East Asia relatively certain, regular, and predictable, the elements that are idealized in modern times in a system of the rule of law. This way of looking at Korean traditional law may prove more profitable than projecting certain liberal and democratic ideals onto the Korean legal past.

Customary Law in Colonial and Postcolonial Korea

Idealization of custom as true national law, a symbol of indigenous cultural values and tradition, is far from unique to Korean scholarship. It was a dominant trend in European historiography in the nineteenth century**.** The tenets of the German Historical School – that law was the product of the history of the

people and that popular practices were the living matter of law – had an immense impact on modern legal historiography. In the wake of national codification in the nineteenth and twentieth centuries, a number of countries enshrined custom as a source of law.This is how customary law became an official source of law next to statutes in Korean law.

The Korean Civil Code of 1960, the first Korean code after independence from Japanese colonial rule (1910-1945), recognizes customary law and reason (chori; jōri in Japanese) as official sources of law. Article 1 provides: "In civil trials, those matters for which there is no written law are governed by customary law, and those matters for which there is no customary law shall be adjudicated by inference from reason." It is the same language that is found in the Chinese Civil Code of 1929-1930 (currently in force in Taiwan) and the Civil Code of Manchukuo of 1937. Most textbooks explain that this provision was adopted from the famous Article 1 of the Swiss Civil Code, which provides: "Where no provision is applicable, the judge shall decide according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. In so doing he must follow the recognized doctrine and practice." The Swiss code of 1907 served as the prototype of a number of civil codes in the world, and its hierarchy of legal sources inspired the legislators around the world including East Asia.But the direct origin of the aforementioned provision in the East Asian codes wasan article in a Japanese law, issued over thirty years earlier than the Swiss code.

In June 1875, the Great Council of State (Dajōkan) of the Meiji government promulgatedthe Rules for the Conduct of Judicial Affairs (Law No. 103). Its Article 3 provided the precise language that was later duplicated in other East Asian laws. The 1875 law represented an early milestone in the remarkable process of the reception of European law into Japan. Before the codification of the modern civil code in Meiji Japan, express provisions of the law were few and inadequate to deal with mounting civil disputes. The law of 1875 declaring custom as a source of law provided an important respite to this situation by allowing considerable latitude to judges in deciding cases. Japanese legislators and scholars were notoriously oblivious of the distinction between custom and conventional usages, and initially tended to regard all indigenous practices and also all the Tokugawa bakufu government's laws as "custom."[6]

In the name of applying legal custom under the 1875 law, the Meiji judges evaluated old customs and practices and selectively applied as law what they regarded as reasonable custom; in the name of reason and justice, they applied general principles drawn from imported European law, in particular the French code.[7] The declaration of custom and reason to be the legal sources thus amounted to providing the courts a means to apply Western legal rules and doctrines while avoiding a drastic break from the Japanese traditional legal order. The result was a rapid and solid transplantation of Western law in late nineteenth-century Japan. The imported notion of customary law served as an intermediary regime between tradition and the demands of modern civil law, reconciling old and new laws, negotiated through jurisprudence.

The same development spread to China and Korea. The Chosŏn Ordinance of Civil Matters (ChōsenMinjirei) issued in 1913 imposed Japan's Civil Code and Code of Civil Procedure as the general laws in Korea, but decreed that most private legal relations among the Koreans be governed by Korean custom. Under thiscustomary law framework, Korean custom obtained legal force through court decisions. The colonial High Court effectively engaged in creating law based on precedents. Colonial Korea thus witnessed an effective process of legal transplantation through judicial lawmaking, with much of private legal relations among Koreans redefined and reconfigured through the operation of "customary law." Following Korea's independence in 1945, a substantial part of colonial customary law precedents continued to be recognized as law in postcolonial Korea.

This historical background about the introduction of the concept of custom helps understand the importance of customary law in contemporary Korean law. The authority of custom as enshrined in the

Civil Code of independent Korea marks simultaneously the prolongation and rejection of the colonial legal tradition. The Japanese Civil Code, promulgated between in 1896 and 1898, did not to include a separate provision declaring the official sources of law. This was in line with the French Civil Code of 1804 which, with its emphasis on legislative supremacy and universal ideals of natural law principles, eschewed a specific reference to custom as a legal source. In Germany, despite the powerful argument of Friedrich von Savigny and his followers, the Civil Code of 1900 made no mention of customary law, mainly due to the consideration that custom was vague and varied in different parts of Germany. Yet in Korea, a country of the civilian tradition where all laws are written and judicial precedent is not law, custom not only occupies a prominent place in the Civil Code but remains at the center of jurisprudential and doctrinal discussion. While the notion of customary law itself had derived from colonial law, the crowning of custom with binding force in Korean Civil Code represented a clear expression of nationalistic legislative will.

In Korea, native custom was viewed as the embodiment of Korean cultural values and tradition, which transcend the boundaries of regulation and enforcement by statutes within the realm of legislative policy. The result was a heightened attention to tradition,viewed as "indigenous custom" not tainted by colonial influence. The deference to custom as a sort of "volksgeist" of the Korean people is powerfully supported by the language of the Constitution, in which Article 9 declares: "The State shall strive to sustain and develop cultural heritage and to enhance national culture."Recognition of custom as a source of law was clearly prompted by the desire to preserve the historical continuity of Korean law and to declare the independent legal tradition of Korea.

The discussion reverts, then, to the similar yet different trajectories of the development of law in Europe and East Asia.In the aftermath of the French Revolution of 1789, custom was denied force of law. The French Civil Code of 1804, with its emphasis on legislative supremacy and ideals of natural law principles, eschewed a reference to custom as a legal source. The abrupt negation of custom—which had been the major source of private law in ancien régime France and in European ius commune—was by and large a product of political development. **C**ustom,"an old taboo for two centuries," has seen resurgence in doctrine. In general, contemporary scholarly opinion does not deny that custom is a source of French law, although there is little agreement over its kinds or legal scope. Debate continues in France whether judicial decisions finding custom should be recognized as persuasive authorities if not precedents. Even in the countries inspired by the Swiss Civil Code of 1907, which put forward with precision the nature and the hierarchy of sources of law, scholars ask whether the more recent customary law should abrogate the earlier statute. In many civil law countries, including modern Korea and Japan, discussion continues on the power of the judges to make customary law.

Jurisprudence of Customary Law in Contemporary Korea

A series of recent landmark decisions involving custom rendered by the Constitutional Court and the Supreme Court clearly reveal the significance of custom as the expression of the traditional cultural heritage and the representation of national identity. But they also display the continuing debate in Korean law over the place of customary law in the modern democratic society.Emphasis on custom can be ascribed to the strong Confucian morality in pre-colonial Korea that was equated with Korean indigenous tradition. Many old customary practices influenced by the Confucian tradition, with its worldview emphasizing a family order based on strict agnatic succession, were incorporated into the codification of law and found expression in the statutes. There were a number of statutes in the civil code in 1960 that governed legal relations in family and succession matters according to Confucian practices. These laws had been consciously inserted into the code as representation of indigenous tradition and culture, insulated from the perceived onslaught of alien influences. These custom-based statutes have been at the

center of jurisprudential debate as many of them came to be challenged on the grounds of constitutionality. Korean courts have been grappling with these laws in addition to unwritten customary law itself.

During the last twenty years or so, the courts found unconstitutional many of these provisions in family and succession law as they violated fundamental principles of equality, property rights, or individual rights to pursue happiness. At the same time, however, the courts refused to strike other statutes down even when they were equally suspect of violating the constitutional principles and had no clear justification other than the fact they were based on old customary practices. It seemed that in some cases there was an instinctive reaction against the moves supposedly to threaten the core elements of traditional culture and good morals. The recent decisionsby the Constitutional Court and the Supreme Court upholdingthe ritual property succession law provide clear examples of this development. Ritual property succession sits in the grey area between law and custom. Another example of jurisprudential conservatism concerns the so-called grave superficies. It is a property right, created by court precedents and recognized in customary law, to occupy someone else's land for the purpose of setting up and maintaining an ancestral grave. The courts have recognized this controversial right, closely related to traditional ritual practices. Jurisprudence of the grave superficies exhibits a singular nature of Korean customary law.

The celebrated decisions such as abolishing the household headship system had emphasized gender equality and liberal democracy. They represented willingness—or eagerness—of the Constitutional Court and the Supreme Court to break free from the overwhelming influence of the past in Korean civil law. But jurisprudential progressive spirit witnessed in these cases seems stalled by the ancestral death rites that constitute a sort of national conscience.

Ambivalence abounds in Korea's customary jurisprudence. Often the meaning of "custom" has remained volatile and contested. There exist two separate questions of "what is custom" in Korean law and "what is Korean custom." Korean jurists have tended to be preoccupied with the latter question with scant attention to the former, and, even worse, often confounded the two. The insistence on the discovery and establishment of "true custom" in recent jurisprudence has caused an unsettling influence on the relationship between custom and statutes, with the consequence of obscuring the hierarchy of the sources of law. Further, the courts' frequent resort to law-finding through custom or reason has tended to lead to the imposition of judicial will beyond the sphere of the interpretation of law. The result is a sort of jurisprudential quandary with looming uncertainty in adjudication. The two highest courts of Korea, the Supreme Court and the Constitutional Court, have not always been in agreement in their interpretations of customary law, which some observers say reveals the growing jurisdictional rivalry between the two institutions.

Some scholars have claimed that the series of decisions by the Supreme Court requiring that custombereasonable and not against the overall constitutional legal order went beyond the requirement of "not violating public order"as required in Civil Code Article 105. It has thus been argued that the court's claim that it has the power both to recognize (make) and abolish (unmake) customary law on the basis of the test of conformity to the "general legal order as provided in the constitution as the supreme law"was tantamount to constitutional review. Judicial recognition of customary law takes place in the form of precedents, or repeated decisions. Yet, if one follows the reasoning above that customary law is "law," ordinary courts' determination of the validity of proffered customary evidence and its sanction of the practice as a custom with legal force can be viewed as amounting to the prohibited lawmaking activity. Further, once customary law is confirmed by precedents, ordinary courts may not abrogate it at will. Some scholars have even argued that any abrogation of existing customary law must be decided by the Supreme Courten banc, the procedure required for changing existing decisions.

Challenges have also been made that custom, as a formal source of law in Article 1 of the Civil Code, must be reviewed by the Constitutional Court only and that the Supreme Court's review of statutes based on custom is an encroachment into the power of the Constitutional Court. If custom is declared "customary law" that can even trump legislation, the argument goes, the Supreme Court's interpretation of custom can be construed as a usurpation of the authority of the Constitutional Court. Under current law, customary law does not become the subject of request for constitutional review, although the constitutional court can by itself decide whether a customary law is against the constitution. As seen above, Article 68, sec. 1, of the Constitutional Court Act excludes court decisions from constitutional review. But it has been argued that this provision is a violation of the constitutional right to demand trial guaranteed in Article 27, sec. 1, of the Constitution.The criticism of the Supreme Court's alleged usurpation of constitutional review power in reality represents the view that the ordinary courts' decisions should be subject to constitutional review. But what about the determination of the constitutionality of customary law where the question underlies the result of the trial? The potential complications seem boundless.

Conclusion

Modern Korean law fully embraces the values of democracy and liberalism, and the general principles of gender equality and human rights. The efforts to find the historical continuity of Korean law have prompted historians to search for the elements of contemporary concepts, such as the rule of law or law as a product of popular agreement, in "reason." However, such an attempt, no matter how gratifying it may be for modern democratic sensibility, risks distorting historical truth and confounding the sources of law. Recalling the fact custom and reason became sources of law in Korea as a historical accident, when the memory of colonial rule was still raw, may help understanding Korean law more accurately. The Courts must take a hard look to statutes based on custom and resist the temptation to impose judicial will by resorting to custom and reason. This will help the courts' tasks to interpret law and, on a more practical level, may also help attenuating the awkward standoff between the two highest courts in the Korean legal system.

The role of custom as an instrument of legal change in history is hard to dismiss. Debates on the national origin of law are a familiar happening in legal historiography. The preceding discussion has shown that the assertion of the existence of autonomous customary law in traditional society is not a problem unique in Korean or East Asian historiography but rather a universal problem that can be found in European historiography as well. The history of customary law seems to confirm that learning from other legal systems is the main instrument for the development of law. It is worth recalling the dictum of Roscoe Pound that the "[h]istory 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."[8] The formulation of the hierarchy of legal norms in Korean law bore powerful imprints of European laws but also revealed a distinctive force of acculturation at work. History has witnessed repeatedly the spread and distribution of law around the world. It represented the state's effortto centralize the realm. Consideration of custom as an anteriorized category, produced by the state with the specific purpose of acclimating the people to a new state culture, may provide a nuanced framework for an attempt to gain a more accurate understanding of the evolution of law across the legal traditions.

[1] John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (Stanford: Stanford University Press, 1969), 12 and 23.
[2] Mary Ann Glendon, Comparative Legal Traditions in a Nutshell, 2nd ed. (St. Paul: West Group, 1999, 129.
[3]Robert Jacob, "Les coutumiers du XIIIe siècle ont-ils connu la coutume?" in La coutume au village dans l'Europe médiévale et moderne, eds. Mireille Mousnier and Jacques Poumarède (Toulouse : Presses Universitaires du Mirail 2001), 103-119; Jacques Krynen, "Entre science juridique et dirigisme: le glas medièval de la coutume,"Droits et pouvoirs**7** (2000): 170–187.
[4]Marie Seong-Hak Kim, Law and Custom in Korea: Comparative LegalHistory (Cambridge: Cambridge University Press, 2012); JérômeBourgon, "Le droit coutumier comme phénomène d'acculturation bureaucratique au Japon et en Chine," in La coutume et la norme en Chine et au Japon, ed. Jérôme Bourgon (Saint-Denis: Presses universitaires de Vincennes, 2001), 125–142.
[5]Jean Marie Carbasse, "Contribution à l'étude du processus coutumier: la coutume de droit privé jusqu'à la Révolution, " *Droits*3 (1986): 25–37; Donald R. Kelley, "'Second Nature': The Idea of Custom in European Law, Society, and Culture," in Transmission of Culture in Early Modern Europe, eds. Anthony Grafton and Ann Blair (Philadelphia: University of Pennsylvania Press, 1990), 131–72.
[6] This was in line with the European colonial usage of "native custom," the term which referred to any indigenous local practices and institutions that were distinguished from European law. According to Terence Ranger,오류! 본문만 있습니다. "What were called customary law, customary land-rights, customary political structure and so on, were in fact *all* invented by colonial codification." Once flexible and unwritten "traditions" of the precolonial period were "written down in court records and exposed to the criteria of the invented customary model, a new and unchanging body of tradition had been created." Terence Ranger, "The Invention of Tradition in Colonial Africa," inThe Invention of Tradition, eds. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 251.
[7]The Meiji jurists viewed French law as the embodiment of civilized justice. See Marie Seong-Hak Kim, Law and Custom in Korea, Chapter 3.
[8] Roscoe Pound, The Formative Era of American Law (Boston: Little, Brown, 1938), 94. The reception of the common law in America began at a time of "political hostility to things English after the American Revolution." Roscoe Pound, "The Development of American Law and Its Deviation from English Law," Law Quarterly Review 67 (1951), 66.