

# Legal Exchanges between Yi Korea and Tokugawa Japan:

## In Search of East Asian Common Law

Chongko Choi

(Professor of Law, Seoul Nat. Univ.)

### Introduction

There have been quite a few researches into the cultural exchanges between Japan and Korea. Nevertheless, the legal exchanges of both countries have not drawn much academic attention, even though law is basically a typical phenomenon of culture. Due to this lack of interest in legal history even among legal scholars, and because of the imposition of the Western legal systems, East Asian legal history has remained in the shadow of academism.

Many people believe that East Asian peoples live under a form of Western law, especially the Roman–German law. This might be true if regarded from the viewpoint of legal institutions, but not true in terms of legal thinking and life. With the emergence of a new magnificent view of East Asian civilization on the world stage, the scholars are in a position to shed new light on East Asian law. Legal comparativists have begun to recognize an independent “East Asian Legal Family (System)”. In response to such an intellectual need, East Asian legal scholars are assuming responsibility in investigating the foundations of East Asian law. As far as law is concerned, the East Asian peoples have enjoyed the common language of “Law”, just pronouncing differently (chin. *fa*, jap., *ho*, kor., *pop*).

This presentation aims to reevaluate the East Asian legal tradition from these basic perspectives. It tries to excavate the “East Asian Common Law (*Jus Commune*)”, by focusing on the legal exchanges of Yi Korean law and Tokugawa Japanese law. Every legal research needs to be detailed, but this essay is basically a general overview, because it is probably the first introduction to the academism of Korean Studies. I believe that the East Asian studies of legal history should be clearly related to the dynamic diplomatic relationship among three countries. China, Japan and Korea.

### I. Universality and Particularity in East Asian Law

To understand the legal exchanges between Yi Korea and Tokugawa Japan, we should have some pre-understanding of the national legal histories of China, Korea, and Japan.

### 1. China

With the founding of Ming dynasty, there came some great codifications: *Ta Ming Ling* (Great Ming Commandment, 1367), *Huang Ming Zuxun* (August Ming Ancestral Instruction, 1397), *Ta Ming Lü* (Great Ming Code, 1397), and *Jiamin Bangwen* (Placard of People's Instruction, 1398). Through Edward Farmer's researches, we understand the legislative processes and the philosophical views of these codes. Later *Ta Ching Lüli* (Great Ching Code, 1740) also overtook the almost same contents of the Tang-Ming Codes.

### 2. Korea

The founding of the Yi dynasty in 1392 initiated a great period of the codification: *Cosun Kyungkukjeon* (Laws of Governing Korea, 1394) by Chong Tojon (1342–1398), *Kyongje Yukjeon* (six Codes for Governance, 1377) by Cho Chun (1346–1405), *Kyongkuk Taejeon* (Great Code for State Governance, 1485), *Taejeon Tongpyon* (Grand Code for Governance, 1785), *Sok Taejeon* (Supplementary Grand Code, 1746), and *Taejeon Hoetong* (Comprehensive Code of State Governance, 1866). As William Shaw pointed out, Yi Korea was ruled by law, not arbitrarily by man. That is the reason why the Japanese praised Korea as a “state of rites and laws” and were eager to learn from the Korean law.

### 3. Japan

The Tokugawa Shogunate tried to restore the destroyed *Ritsuryo* legal system. The *Kujikata Osadamekaki* (Written Rules of Procedure) was compiled in 1742 at the command of the 8<sup>th</sup> Shogun Tokugawa Yoshimune and was called as *Osadamekaki Hyakkajo* (Hundred Written Rules). Tokugawa's motto was, “Let the people know nothing, but make them obey”. Tokugawa Japan was eager to learn from China and Korea.

Legal historians are generally of the opinion that there has been a continuity in the codifications from the Tang to the Ching Codes. These codes have been influential on neighboring countries throughout East Asia including Vietnam. The fascination of the East Asian legal studies lies in

harmonizing this universality and the particularities among East Asian countries.

## II. East Asian Common Law

References to “Common Law” do not mean that the law becomes entirely uniform throughout all the hundreds of principalities and municipalities. It means, to use the insightful expression coined by Prof. Sacco, that some of the “Formats”, or formative elements of the laws were shared by most or all of the jurisdictions. These shared elements are extremely important. The “East Asian Common Law” could be approached from at least the following five perspectives.

### 1. Codification

Yi Korea's *Kyongkuk Taejeon* Code manifestly recognized the application of the Ming Code as a common law. Tokugawa legislation made references to the Chinese and Korean legal codes. The Vietnamese Le code was a faithful replica of the Ming code. In this manner, East Asian countries recognized the Tang and Ming Codes as the

authoritative texts. Even though it is hard to say whether the way of thinking among East Asian people is inductive or deductive, they were eager to establish the legal codes and to interpret legal principals in the light of occurring cases.

### 2. Confucianization

The validity of the legal code was secured not merely by the State power and technicalities of its enforcement, but through the convincing moral values therein. Confucianism was the most common intellectual, moral and cultural heritage of East Asia. Thus, Confucianism was a driving force of “legal enforcement of dominant moral” (Patrick Devlin), as Charles Holcombe named it as “*Ritsuryo* Confucianism”, and as JaHyon Kim-Haboush calls it, a “Confucian normative society”. Filial piety was enforced by the statutes. Unfilial offspring were punished on the same basis as those committing the Ten Cardinal Abominations, when they were amusing themselves with music and dance or becoming pregnant during the period of

mourning of their parents' death. In Japan, Buddhism and Shintoism also have played an important role, but the official and legal matters were generally related to Confucianism.

### 3. Community Compact

Originated from the 12 Century Sung China, the community Compacts (*Hsyangyueh*) were modified and implemented widely in Korea (*Hyangyak*) and Japan (*Kouyaku*). Confucian scholars played leading roles initiating the community compacts and the village laws: The good examples are Chu His(1130–1200) and Wang Yang– ming (1472–1529) in China, Yi Toegye (1501–1570), Yi Yulgok (1536–1584) in Korea. The Japanese Confucian Yamasaki Ansai (1618–1682) introduced the Chinese granary system to Japan. The community compacts stood on basic of common principles with some modifications according to the current situations.

### 4. Jurisprudence

Korean traditional jurisprudence *Yulhak* and the Japanese Jurisprudence *Myobodo* have been developed independently. Nevertheless, through the common knowledge of Chinese language and classics, the East Asian intellectuals could exchange their ideas. Chinese scholars Chu Shunshui, Huang Pochung and Wu Yenshen and Korean scholars Kang Hang (1567–1618), Yi Chinyoung (1571–1682) and his son Yi Maegye who were kidnapped during the Toyotomi's invasion contributed to the formation of Tokugawa jurisprudence. As Dan Henderson called this phenomenon as a "Mini-reception", we see here a vivid interaction of the East Asian legal academism during the 17<sup>th</sup> and 18<sup>th</sup> centuries. Within the seabed of legal scholarship, the entire East Asian countries became a single realm.

### 5. Reconciliation and Mediation

Many Western scholars have been fascinated by the strong tradition of reconciliation and mediation in East Asian legal life.

These “customary laws” are somewhat different depending on place and the cultural contexts. But the underlying principles and methods were quite similar in their accordance with the Confucian way of life. These traditions could be compared with the European *Weistümer* customs. The contemporary China, Japan and Korea, which have been “destroyed” by the Western law, try to restore this “good old” tradition of mediation and arbitration.

### III. Korean Contribution to Japanese Jurisprudence

Toyotomi Hideyoshi’s successor as suzerain and founder of the Tokugawa shogunate(1603–1867), Tokugawa Ieyasu, who wished to resume trade, initiated negotiations with Korea on a basis of equality. In 1607 formal relations were restored and a mission of several hundred Koreans was received and feted at Edo. A total of eleven such embassies (kor., Tongsinsa, Jap., Tsushinshi) arrived in Edo during the Edo Period(1600–1868), providing an important diplomatic contact during this era of national seclusion(Sakoku). In 1618 the So family of Tsushima reopened the trade station.

The observations and experiences of Korean envoys, deployed to Edo from 1607 to 1811, were written and published in the series of *Haeheng Chongje (Collection of Japan Travel Writings)* in 12 volumes. These documents reveal the fact that Korea envoys did not intend to learn the Japanese law and legal systems. On the contrary, they underestimated and despised the Japanese customs and institutions.

During the Toyotomi Hideyoshi’s invasion (1592–97), many Koreans were kidnapped and taken to Japan. Kang Hang (1567–1618), the former official of Justice Ministry, and Yi Chinyoung (1571–1682) and his son Yi Maegye(1617–1682) played a significant role for interpreting the Ming and Yi codes to the Japanese intellectuals. Yokoi Shonan(1809–1869), the reformist Neo-Confucian scholar, who drafted the the National Edict of Education, was influenced much by Yi Toegye’s ethical theory. It is interesting to see the coincidence between the introductions of Confucian intellectualism and legal academism.

Tokugawa Yoshimune (1684–1751), Tsunanori Maeda (1643–1724) and Hakuseki Arai (1657–1725) were enthusiastic to study the Chinese and Korean laws. Togai Ito (1670–1738), the son of the famous Neo-Confucianist Jinsai Ito (1627–1705) wrote a book *Choson Kwanjikgo* (*Korean Official Institutions*, 1711) on the basis of Korean national code *Kyongkuk Taejeon* (*Code for State Governance*, 1518). Hoshu Amenomori (1668–1755) wrote two books concerning Korea: *Chosen Fusokugo* (*On Korean Customs*, 1722) and *Korin Teisei* (*Diplomatic Manual*, 1723). He emphasized the importance of the mutual sincerity (*Songsin*) in Korean–Japanese diplomatic relations.

A Korean scholar of The Practical Learning (*Silhak*), Yakyong Chong (1762–1836) knew the book written by Jinsai Ito (1627–1705), Sorai Ogyu (1666–1728) and Shundai Dazai (1680–1747). He wrote that Koreans did not have to continue to worry about Japan any more, because the Japanese also seemed to be rightly enlightened by the Confucian learning.

The Korean National Code *Kyongkuk Taejeon* (1518) was introduced to Japan and studied and partly published by Togai Ito (1670–1738) in his book *Chosen Kwanjikgo*.

The Commentaries of *Ming Code* were published in Korea with the name of *Tae Myongyul Chikhae* (*Direct Commentary of Great Ming Code*) and *Tae Myongyul Kanghae* (*Exegesis of Great Ming Code*) were these also entered Japan. Sorai Ogyu authored a book *Minritsu Kokujikai* (*Ming Code in Japanese Tongue*). When we compare these commentaries we find many similarities arising out of East Asian common law.

Some Korean books concerning the judicial procedure were imported and preserved till now here and there in Japan. They are the *Cheungsong Jegang* (*Hearing Procedure*) in the Hosa Archives in Nagoya, The *Sasong Ryuchi* (*Procedural Manuals*) in the Naigaku Archives in Tokyo, the *Taejeon Sasong Ryuchi* (*Procedural Manuals from the Code*) in the Tsukuba University Library and the *Kyolsong Jinam* (*Guidance for Procedure*) and the *Sasongrok* (*Procedural Records*) in the Parliamentary Library in Tokyo. These books were recently found by the Korean legal scholars and were reprinted in a collective book named as *16 Seki Sasongpopso Jipsong* (*A Collection of the 16<sup>th</sup> Century Procedural Books*, 1999). Prof. Tagawa Kozo mentioned another book of such kind named as *Sangpi* (*Mutual Avoidance*) in his research article, but this book is not yet found in Japan and Korea.

The China-originated book *Hsi Yüan Lü* (*The Washing Away the Wrongs*, 1247) written by Song Chi (1181–1249) was translated into Korean with the title of *Muwonrokju* (1392) by Ciun Choi. This book was introduced into Japan and translated by Kawai Chinbe Naohisa into *Muwonroksu* (1768). This book played big roles in the areas of forensic medicine and detection science in East Asia.

#### IV. Korean–Japanese Dispute Resolutions

So long as there are the sovereign states, the tensions and conflicts may be, in a sense, unavoidable. Every (international) legal dispute is complicated and must be scrutinized in detail. Due to space limitations I will restrict my discussion to major issues in a brief overview.

##### 1. The Punishment of the Criminals who destroyed the Royal Tombs (1606)

As a prerequisite to reconciliation with the Tokugawa government, the Choson government required the sending of the criminals who destroyed the royal tombs of the late King Seungjong's wife and of the late King Jungjong in Seoul during the Japanese Invasions in 1592 and in 1597. Two remanded criminals from the Tsushima Island in 1606 were discovered not to be the real destroyers of the tombs but the prisoners in Tsushima. Nevertheless, after a long court discussion at the royal court, they were subjected to the death penalty. Korea preferred the peace and nominal values to the substantial justice and truth.

##### 2. Forgery of Diplomatic Documents (1620)

During 1607–1635, the Korean royal documents sent to the Tokugawa Shogunate were forged ten times by the Zushima politicians. Yanagawa Shigenobu and the following three generations have disguised the title of Japanese Shogunate with the name of “Japanese King” (*Nihon Gokuo*). These intrigues were revealed by the conflicts of their inner politics and were referred to the Shogunal court for decision. The involved officials were punished by the Shogun, but not severely. After this event, the monks in Kyoto were sent to watch on the royal documents. The Japanese Shogun came to be called as “Japanese Great Ruler” (*Nihongoku Taikun*). This

became the reason that Arai Hakuseki in 1711 asserted to call the Japanese Shogun as “Japanese King” again. But after Hakuseki’s removal from influence, the original title of *Taikun* was restored. This is generally known as the Title Incident (*Shugo Jiken*) or Title Restoration Controversy (*Pokho Nonjeng*).

### 3. Punishment of the Prostitutes in the Japanese Legislation (1690)

At the Japan House (*Waegwan*) in Pusan, there were two sensational events of prostitution between Japanese men and Korean women in 1690 and in 1708.

In 1690, Ide Sozaemon, a dweller in the Waegwan, discovered a Korean woman who said that she came to meet someone but that they had not come and now that the dawn was breaking, she could not leave. She prevailed on Sozaemon to hide her until the following night fell. Night came and she did not leave. They were eventually discovered. Some months before, there had been cases of prostitution around the Waegwan. The Magistrate of Tongnae requested that the criminals be handed over, but the Head of the Waegwan continuously deferred taking action. After a long disputes, three Korean women (Aekeum, Buni, Chowol) and two Korean men (So Busang, Kwon Sang) were captured and decapitated. Their heads were exposed outside the gate of the Waegwan. However, the Korean authority could not prosecute the Japanese men involved, since they were never extradited.

### 4. Disputes on Dokto Island and the Role of Yongbok Ahn (1693)

Yongbok Ahn was kidnapped in 1693 and taken to Japan during his fight against the Japanese fishermen around the Dokto Island. He argued in Japan that the Dokto Island belongs to the Korean territory. He was released back to Korea after a half-year in custody, and Japan unsuccessfully tried to occupy the Island in vein.

### 5. Disputes on Weights and Measures (1709)

In 1709, two Korean officials Sangjip Choi and Jungdok Han appealed to the Tsushima lord that the rice measured by the Korean weights was less than sum measured by the Japanese weights. The Japanese diplomat Amenomori Hoshu personally went over to Pusan and investigated the Korean weights and

measures. By such a rational investigation and research, the disputes in regard to rice importation became settled through a process of applied reason.

## 6. Prostitution Prevention Treaty (1711)

In January, 1708, a Korean village woman named Kam-Ok had an affair with a Japanese resident named Izumi Kenshichi in Waegwan. On April 13, 1709, the Korean court heard a report to the effect that Tsushima had refused to accept the letter demanding Izumi's extradition. Tsushima pleaded that Izumi had been banished, and moreover, if they were to accept the letter, Edo Bakufu would rebuke it. The 1690 case was smoothly settled from the Japanese view and the 1708 case was also thought settled when Tsushima informed the Koreans that Izumi had been punished by banishment. At least, that was what Tsushima assumed until the 1711 envoy to Edo brought up the matter again, this time insisting on a firm agreement setting forth specific punishments for such activity and insisting on discussing the matter with the Shogun. Although the Tsushima lord and his retainers were caught off guard by the Korean envoys' tactics, Amenomori Hoshu, in his book *Korin Teisei*, a 1728-29 memorandum to his lord, the Tsushima daimyo, provides us with a critical explanation of the links between the 1690 case and the 1708 case. The Koreans had not forgotten their frustration with the Japanese. Returning to the Korean Embassy's intention to broach this matter of illegal sexual liaison with the Shogun himself, Im Su-kan's *Dongsa Ilgi (1711)* reports on the negotiations in Edo which finally resulted in an agreement specifically in regard to rape, prostitution, and co-habitation. The provisions of the agreement were broken down into three types of cases. If a Japanese man left the Japanese Legation and raped a Korean woman, that is a capital case. If a Japanese man enticed a Korean woman without using force or if the crime was attempted rape, then the criminal was to be banished for life. If a Korean woman entered the Japan House of her own violation intending to conduct relations with a Japanese, and he did not report her presence, then the Japanese man was to be banished. The lord of Tongnae carved these provisions on a monument and erected it in the yard of the Japanese Legation. The provisions covered only the actions of the

Japanese men. The new Agreement, however, seemed to ameliorate matters somewhat. In a 1716 case, the heads of the Korean procurer and his Japanese client were taken, but the woman involved was banished. In 1726 and 1738, the Korean procurers were beheaded, the women and the Japanese banished. In 1786, we even see a mention of the Ming statutes:” she should receive 100 lashes and banishment according to the [Ming] statutes, if she prostituted herself”, but in determining that the woman had actually been enticed into crimes, she was spared the lashes, banished, and her enticer was beheaded. Perhaps since the Korean side had finally extracted a law to govern the Japanese, the victim needed no longer to be sacrificed on the alter of national security and state morality.

In summary, the puritanistic Choson Confucian government punished the prostitutes by beheading to death, but failed to arrest the Japanese ‘criminals.’ These events show interestingly how different the Korean and Japanese views were on prostitution and adultery and moral and legal responsibilities.

#### 7. Assassination of Envoy Chunjong Choi(1763)

On the way from Edo, in Osaka, a member of the Korean envoy Chunjong Choi was assassinated secretly. The envoy demanded that the criminal be brought to justice. The criminal was arrested by the Bakufu policemen and executed to death. Some Kabuki musicals were produced based on this detective story.

#### V. Conclusion

In Europe it is now generally recognized that the emergence of the European Union or we might even say, European Republic has made it imperative to engage in integrative comparison of the Union members’ laws and legal systems, and thus to build up the scholarly foundation for a new *ius commune* (Max Planck Institut für Europäische Rechtsgeschichte, Cornell Common Core Project).

On the contrary to that, East Asians are still scattered like grains of sand. They struggle against each other like competing brethren. We understand the tragic, complicate histories of these nations. Nowadays, East Asians also are seeking for a “East Asian Economic Community” to survive the international competitions. To build up the common prosperity, we should find a mutual understanding in East Asian traditions and sense of value. East Asian scholars have been too eager to consider the differences between their countries and have consequently failed to find and respect what is common. Sociologists or and national historians might build up their sophisticated theories and paradigms from the differences. I believe, however, that the primary task of East Asian legal historians lies in explaining what is common between the different nations. Of course, this task is not the task of a legal historians one but is, rather, a task common to all East Asian legal scholars.

Goethe said once, “*Wo das gelehrte beginnt, hoert das politische auf*” (Where the academic begins, the political ceases). The divergences may well create certain obstacles to multinational integrative laws and legal systems. Nevertheless, the obstacles could be overcome by legal scholars who are aware of their existence.

In this paper, we have surveyed the historical development of the legal exchanges between Yi Korea and Tokugawa Japan. These two countries have not always existed in peace and harmony, but they have tried to use wisdom in overcoming problems and conflicts.

We can hope that our common historical background may provide us with some wisdom in development of mutual understanding that will enhance regional community–building in East Asia in this age of globalization.