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Enemies of the Lineage:  
Widows and Customary Rights in Colonial Korea,  
1910-1945

By

Sungyun Lim

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

History

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Andrew E. Barshay, Chair  
Professor Irwin Scheiner  
Professor Wen-hsin Yeh  
Professor Alan Tansman

Fall 2011

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Widows and Customary Rights in Colonial Korea,  
1910-1945

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## Abstract

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by

Sungyun Lim

Doctor of Philosophy in History

University of California, Berkeley

Professor Andrew E. Barshay, Chair

My dissertation examines Korean widows and their legal rights during the Japanese colonial rule (1910-1945), focusing on widows and their lawsuits over property rights, inheritance and adoption. Utilizing civil case records from the Superior Court of Colonial Korea (*Chōsen Kōtō Hōin*), I argue that women's rights were diminished by the Korean customs adopted by the judicial system under the Japanese colonial state. By examining the production process of Korean customs in the colonial civil courts, I emphasize Korean agency in the transformation of family customs during the Japanese colonial period.

Women's property and inheritance rights developed in close relationship with the Japanese family policy, which aimed to disintegrate the lineages in Korea into nuclear households. The Japanese colonial state strengthened the household system by protecting customary rights that allowed widows to become house-heads. Protecting rights of widows that straddled the ambivalent position between the lineage and the nuclear family, the colonial civil court effectively solidified boundaries between households that cut through traditional ties of family. Therefore, civil cases that involved widow rights became the battleground where the conflict between the proponents of the Korean lineage system and the family nuclearization policy of the colonial state unfolded.

As colonial family policy developed into the 1920s and the 1930s, women's rights became increasingly subjected to the patriarchal constraints of the nuclear household. The Japanese colonial state moved its attention from widow rights (which, after all, was too closely linked to the agnate adoption custom of the lineage system) to daughters' rights by promoting son-in-law adoption (*muko-yōshi*) as a way to expand women's inheritance rights. Meanwhile, the colonial state denied women's demands for full inheritance rights that would infringe upon the rights the house-head of the nuclear household. The 1939 Civil Ordinances Reform, which implemented son-in-law adoption and household names (*sōshi kaimei*), therefore, was the culmination of the family nuclearization policy of the Japanese colonial state.

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Ironic considering the topic of my dissertation, I have drawn much support from my extended family during the years of completing this dissertation. I thank my husband, Kwangmin Kim, for his encouragement and companionship. My son, Seungjae has

accompanied me in the later stages of this dissertation. My mother, Jeung, has provided not only emotional support but also childcare at the critical stages of writing. Thank you. My father, Hyo-Sun Lim (1943-2011) who has been most supportive of my graduate studies, passed away as I was wrapping up this dissertation. I hope the completion of this dissertation brings him peace. To him, I dedicate this dissertation.

## Introduction

My dissertation examines Korean widows and their legal rights during the period of Japanese colonial rule (1910-1945), focusing on widows and their lawsuits over property rights, inheritance and adoption. Utilizing civil case records from the Superior Court of Colonial Korea (*Chōsen Kōtō Hōin*), I examine how the traditional rights of widows were contested and negotiated during the colonial period, and how eventually they were diminished. I argue that women's property rights diminished during the colonial period due to strengthened patriarchal claims of Korean society rather than Japanese customs that were imported into colonial Korea. I am thus contesting previous scholarship, which has argued that Korean women's status decreased during the colonial period due to assimilation policy, or Japanization (*ilbonhwa*) of Korean family customs.<sup>1</sup> Although certain aspects of Korean family law did assimilate to the Japanese counterpart, I argue that patrilineal claims within Korean society that challenged women's claim to property more significantly affected women's property rights during the Japanese colonial rule of Korea. In short, I emphasize the agency of Korean society in modifying family customs during the colonial period, rather than consider Koreans to be passive receptors of colonial legal policy. Korean litigators were active participants in the colonial civil court in forming the Korean customary laws. Family customs utilized in colonial courts were neither merely the product of preserving existing tradition, nor were they the result of unilateral enforcement onto Koreans by the Japanese colonial state. Colonized Koreans were indeed working within, and struggling against, the constraints of colonial family policy that the colonial state prescribed, but they were far from passive receptors of colonial legal policy.

The primary sources for my research were drawn from *Kōtō Hōin Hanketsuroku* (Decisions from the Superior Court of Colonial Korea), which was the compilation of legal records from the Superior Court of Colonial Korea, the highest and final level of court in Korea at the time. Among the 30 volumes of legal records, published annually by the Korean Government-General and distributed for reference to judges throughout colonial Korea, I focused on civil cases, and among them, cases concerning family matters that utilized Korean customary laws. Civil case records have been rarely utilized in previous studies.<sup>2</sup> Most previous studies of colonial customary law have drawn from legal inquiries, notices and decisions rather than court records. The very few studies that have utilized court records have focused on legal decisions themselves, highlighting the

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<sup>1</sup> Hong Yang-hee, "Chosŏn ch'ongdokpu ui kajok chŏngchek yŏngu: ka chedo wa kajŏng yideologi rŭl chungsim uro [The Family Policy of Japanese Colonialism in Korea: with the focus on family system and home ideology]" (Ph.D. Dissertation, Hanyang University 2004)., Kang Yŏng-sim, "Ilche kangjŏmgi chosŏn yŏsŏng ūi pŏpchŏk chiwi [Legal position of Korean women during the Japanese occupation period]" in *Ilche kangjŏmgi hangukin ūi insaeng gwa minjok undong* (2005).

<sup>2</sup> Yi Yong-mi agrees with this assessment. "Kankoku ni okeru minji kanshu no seibunka kateini kan suru saikin no kenkyu dokyo" *Toyo bunka kenkyu*, No. 7, March, 2005



procession of these decisions.<sup>3</sup> I instead focus on the arguments put forth by the Korean litigators. This approach has enabled me to consider customary laws as flexible and fluid, rather than fixed and immutable. Rather than remaining in the legal context, I have aimed to examine these legal records within the broader socio-cultural context of Japanese colonialism in Korea.

First I will provide a brief general description of the colonial legal system and then go on to demonstrate said system's impact on the lives of women. The legal system in colonial Korea was a hybrid one. By hybrid legal system, I mean that in colonial Korea, Japanese modern legal codes co-existed with Korean customary laws reserved for Korean family matters. Japan applied Japanese civil and penal laws to legal matters in colonial Korea, but applied Korean family customs for Korean family matters. But in contrast to British colonies, Japan maintained one civil court system in Korea that was directly controlled by the government-general for all residents in colonial Korea. Instead of setting up a separate court for family matters, a single system of colonial civil court dealt with all civil matters, and applied Korean customs when appropriate cases came up. In this sense, the Japanese colonial legal system was hybrid. There was a single judicial system, but the laws applied were a mixture of Japanese laws and Korean customs. Through this hybrid judicial system, the Japanese colonial state introduced a modern legal system to the Korean colony, while reinforcing existing patterns in family matters. The Japanese legal codes, written in the 1890s were modeled after the most up-to-date European codes at the time, and their importation into Korea meant a major overhaul of the Korean legal system. But exempting family matters from the new legal system meant that existing family practices in marriage, divorce, and inheritance were preserved and reinforced. The colonial court employed both Japanese and Korean judges. Among 220 judges in colonial Korea, 160 were Japanese and the rest were Koreans.<sup>4</sup> Many Korean judges were delegated to deal with family cases, which utilized Korean customs.

The hybrid legal system was further complicated by the fact that the family customs were not fixed. Because the customs were not codified, they were constantly in flux. Variations between locales and classes were commonplace, not to mention transformation over time. In order to identify Korean customs, the government-general commissioned nation-wide customs surveys between 1908 and 1911. These surveys, which were carried out in a hasty fashion, by a number of state-employed interviewers (both Japanese and Koreans) conducting interviews in local villages nation-wide, turned

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<sup>3</sup> Yi Yōng-mi, "Kankoku kindai rikon kanshūhō no teiritsu katei - kyōgijo no rikon wo chūshin ni [Establishment of the Customary Law Concerning Divorce in Modern Korea: Focusing on Divorce by Agreement]," *Tōyō bunka kenkyū* no. 8 (Mar. 2006). and Yang Hyun-ah, "Envisioning Feminist Jurisprudence in Korean Family Law at the Crossroads of Tradition/Modernity" (Ph.D. Dissertation, New School for Social Research, 1998).

<sup>4</sup> Yi Yōng-mi, "Chōsen tōkanfu ni okeru hōmu chōsakan seido to kanshū chōsa jigyo - Ume Kenjirō to Oda Kanjirō wo chūshin ni [Legal Survey Officials System and the Customs Survey under the Korean Residency: Focusing on Ume Kenjirō and Oda Kanjirō] (3)," *Hōgaku shirin* 99 (December 20, 2001, 2001)., p. 223. According to Yi, Japanese judges received three times the pay of Korean judges, and they also received a housing bonus of 200 yen per year.

out a brief survey covering 135 items of family and property customs, titled, *Customs Survey Report (Kanshū chōsa hōkokusho)*. For cases that did not fall under the parameter of this brief report, colonial judges or local administrators sent in inquiries to *Chūsūin*, the Korean advisory board for the government-general. The government-general also conducted additional customs surveys in various locales to survey additional matters, or to detect any changes in customs. The customs surveys were hasty and cursory, but they were enough to reveal local variances in customs. Since the Japanese colonial state was looking to implement a unified set of Korean customs, it picked customs practiced by majority of Koreans to be applied to all Koreans - in other words, the colonial state produced a nationalized version of Korean customs.<sup>5</sup> Thus, the customs surveyed by the Japanese colonial state, rather than being an accurate reflection of existing practices, were a colonial invention. To some Koreans, these customs, while they were labeled “Korean,” were as foreign as any Japanese code. Moreover, Korean customary laws were constantly changing. In order to complement the insufficient *Customs Survey Report*, additional surveys were carried out occasionally. In addition to the original *Customs Survey Report* and court decisions, these additional surveys became the source of reference for future legal decisions on family matters. The unstable nature of the legal sources added to the confusion the colonized Koreans felt regarding the colonial customary laws. In addition, Koreans themselves continuously presented their own version of Korean customs in litigation. A typical procession of family cases in court was two opposing parties each presenting different claims of Korean custom they believed (or claimed) to be authentic.

Relegating family and religious matters to local customs was not an unprecedented practice. In fact, Britain and France also utilized local customs for such matters in its colonies.<sup>6</sup> By the time Japan acquired its first colony in the late nineteenth century, Japan’s European counterparts were establishing separate legal spheres in one form or another. Although Japan established a single court system in colonial Korea (which is a major difference from the British and French colonies) cases from British and French colonies still provide many illuminating points of similarities in the utilization of customary laws. Britain maintained separate courts for locals in its colonial territories. Instead of installing courts themselves, British colonial authorities gave local chieftains authority to preside over local judicial matters. The primary reason for this arrangement was economical as well as practical. Britain did not want to disrupt local social order and it simply could not afford to maintain a directly controlled judicial system for its colonial subjects.<sup>7</sup> France also maintained multiple and segregated courts for its colonial subjects. Depending on the subjects’ nationality and religious affiliations, they would fall under the jurisdiction of native courts, French courts, or Muslim courts. While their goal was to civilize and assimilate colonial subjects, they also considered the colonized subjects as not civilized enough to be immediately assimilated. The French also felt that “it was their

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<sup>5</sup> Yang Hyun-ah, "Hanguk ui hoju chedo: sikminji yusan soge sumshinūn kajok chedo [The House-head System in Korea: A Family System Breathing in the Colonial Legacy] " *Yōsōng gwa sahoe* 10 (1999), p. 226-227

<sup>6</sup> Kristin Mann and Richard Roberts, ed., *Law in Colonial Africa*, Social History of Africa (1991).

<sup>7</sup> Ibid. “Introduction”

obligation to respect African customs and to encourage the peoples of the federation to evolve within their own African cultures.”<sup>8</sup> Segregated courts in British and French colonies for natives, which utilized customary laws, produced numerous problems that are also found in Japanese colonies. Most importantly, they invented new traditions for the natives.<sup>9</sup> Although, respecting (and therefore preserving) existing local custom was the main objective of segregated judicial system, colonial utilization of customary laws ended up producing newly invented customary laws. For one, there was no single, unchanging set of customary laws in place in colonial societies that the colonial legal authorities sought to employ. Therefore, colonial attempt to identify a single, uniform set of customs for the natives ended up distorting what were diverse sets of customs, mores, and beliefs.<sup>10</sup> Secondly, the colonized people themselves actively reshaped their customs it colonial courts with hopes to maximize their interest.<sup>11</sup> Martin Chanock, in his studies of British colonies of West Africa, has argued that native customs that were utilized in native courts were invented by the native people themselves.<sup>12</sup> They were far from being authentic or transparent representations of local customs. Transformative effects of colonial power destabilized political and economic situations of the native society, which, in turn, heavily influenced how the natives represented their customs to the colonial judges at court. Chanock, for example, has examined how abolition of slavery and increase of wage labor fundamentally transformed the family life structure of the East Africans under British rule.<sup>13</sup> Most importantly, Chanock showed that native customs and the native societies that these customs operated in, were not fixed, static entities, and that they were constantly changing in relation to, and in response to the colonial rule. The same could be said of the case of colonial Korea. In colonial Korea, likewise, private landownership implemented through the land survey of 1909-1918, deprived many families of their land, especially the lineage estate. Together with urbanization and more wage work opportunities for women, Korean family structure also underwent significant transformations through migration, divorce and the division of lineages. While previous research on colonial law in Korea (which I will discuss below) considered customary law as the authentic representation of tradition, attributing transformations of customs to malicious distortions by the Japanese colonial authority, Chanock’s scholarship inspires us to look instead to the transformative effects of the new political dynamics wrought by the colonial rule.

While European colonial policies provide interesting cases of similarities, they were also fundamentally different from Japanese colonial policy, and the most significant

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<sup>8</sup> Alice L. Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (1997), p. 74

<sup>9</sup> Kristin Mann and Richard Roberts, ed., *Law in Colonial Africa*, p. 4

<sup>10</sup> *Ibid.*, p. 4

<sup>11</sup> *Ibid.*, p. 22

<sup>12</sup> Martin Chanock, “Paradigms, Policies, and Property: A Review of the Customary Law of Land Tenure” in *Ibid.*

<sup>13</sup> Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth, NH, 1998).

difference was in their definition of assimilation. The French definition of assimilation (or later that of association) was predicated upon the notion of civilization. In other words, the natives, either subject to assimilating projects, or later kept apart via the doctrine of association, were defined in terms of their level of civilization. Three different types of courts were established – Muslim, non-Muslim native, and French. These courts were divided along religious, geographical (urban vs. rural) as well as ethnic lines. Separation of courts was based on presumptions of potential for progress (or the lack thereof), which in turn, justified barring African enfranchisement or complete assimilation into the French Republic.<sup>14</sup>

Japan, likewise, established separate legal spheres for the colonized population. And the separation was justified in terms of difference in family customs. In other words, the ultimate criterion for the potential to assimilate was the Japanese family system itself rather than any objective criteria of civilization. To a certain extent, different family customs between Japan and Korea were translated as evidence for the lack of civilization or backward nature of the Koreans. While French and British had the criteria of civilization for assimilation, and therefore, reformed primarily those customs that did not fit the civilization framework (slavery, concubinage – those that violated Christian morals and the ideals of the French Republic), the Japanese criteria for reform became its own family customs.<sup>15</sup> Concubinage and early marriage, for example, were major family customs that were criticized as markers of Korean backwardness. Asami Rintarō, a judge in colonial Korea, focused on the Korean lineage system and what he identified as communal inheritance (and in his opinion, lack of individual inheritance concept) as markers of Korean backwardness (Chapter 3). Yet, later targets of reform, such as adoption custom and household names, which did not violate any criterion of civilization, reflected that the Japanese government-general regarded Meiji family system as the ultimate goal of colonial reform. As such, family customs, while being respected as local tradition, were also subject to reform by the colonial state. They were simultaneously objects of preservation and reform.

### **Previous Scholarship**

Previous scholarship on the history of the Meiji Civil Code has largely ignored the effect it had on colonial territories. Postwar scholarship on Meiji Civil Code has focused on the Meiji political process through which the traditional family system was preserved in the Japanese modern civil code. The traditional family system, it has been argued, was preserved to maintain the authority of the family head, and was seen as the major culprit of wartime authoritarian family culture. (See Chapter 1) Such studies made a great contribution to exposing the effects of the family state ideology inherent in the Civil Code and in exploring concrete ways through which the state ideology impacted Japanese people. The evidence of just how significant Civil Code was in wartime

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<sup>14</sup> Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930*.

<sup>15</sup> The Japanese family custom that became the criterion for Korean assimilation was a version that was produced through reforms during the Meiji period.

mobilization is the speed with which it was eliminated under the allied occupation. In the words of the sociologist Kawashima Takeyoshi, the reform of the family system was a critical step towards building a democratic society in Japan.<sup>16</sup> The traditional family system preserved in the Meiji Civil Code was identified as the major culprit in cultivating and sustaining what some have identified as the fascist mentality in the Japanese citizenry. Maruyama Masao has famously identified the family state ideology as the central tenet of Japanese fascism. As he put it, state as one family had a more substantial meaning than a mere analogy; the Japanese state was “considered as an extension of the family,” and every Japanese household was considered a branch house of the Imperial Household. In other words, the idea of the Japanese family state is based on the idea of everyone being related to one another by blood.<sup>17</sup> Each Japanese subject of the Emperor, therefore, owed filial piety as well as loyalty to the Emperor in return for his benevolence as the father of the state. Yet, with all its attention to the role and function of the family system in wartime Japan, what the field of Japanese history has failed to appreciate was the impact the Japanese Civil Code had on its colonial territories.

Previous scholarship on colonial civil law in Korean history, by contrast, has been quite vigilant about the effect of the Meiji Civil Code on its civil laws. The dominant argument, moreover, has been that Korean family law and family custom was subjected to forced assimilation to the Japanese Civil Code and family system respectively.<sup>18</sup> This position was in accordance with previous studies on colonial policy on Korean language, history and culture at large; the dominant position of Korean scholars has been that the Japanese colonial state intended to forcefully assimilate Korean culture with the aim to annihilate or extinguish the Korean nation and its culture (*minjok malsal*). Referring to the colonial utilization of Korean family customs, Chŏng Kŭng-sik has argued that the main objective of the colonial court was to covertly implement Japanese law in Korea. Therefore, Chung has characterized the customary law under the colonial rule as government manufactured (*kwanje kwansŭp*).<sup>19</sup> Recognition of Korean customs in the

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<sup>16</sup> Kawashima Takeyoshi, "Nihon shakai no kazoku teki kōsei [The Familial Structure of Japanese Society]," (Tōkyō, 1950). p. 2; The family system in Kawashima's words included both the family law in the Civil Code and the family ideology. p. 3

<sup>17</sup> Maruyama Masao, "The Ideology and Dynamics of Japanese Fascism (1947) (translated by Andrew Fraser)," in *Modern Japanese Politics*, ed. Ivan Morris (London, 1963)., p. 36

<sup>18</sup> “Following the Japanese imperialistic annexation of Korea in 1910, the Confucian family system was further strengthened, supplemented, and readjusted in accordance with the Japanese ideology of an imperial family state. Thus, the traditional indigenous law was gradually eliminated by government-made customs and legal precedents.... This was designed to bring about the assimilation of the Korean legal system to the Japanese system by promoting the eldest son's exclusive inheritance through the introduction of the Japanese-style household head system.” - Pyong-ho Pak, “Family Law” in et. al. Pyŏng-ho Pak, *Modernization and Its Impact upon Korean Law*, Korea Research Monograph (1981).

<sup>19</sup> Pak Pyŏng-ho agrees with Chŏng in this regard. - Yi Yŏng-mi, "Kankoku kindai koseki kanren hōkyū no seitei oyobi kaisei katei - 'minsekihō' wo chūshin ni [The Establishment and Demise of the Laws Concerning Household Registers in Modern Korea: Focusing on the Household Registration Law]" *Toyo bunka kenkyū* (March, 2004, March, 2004). 351

colonial court, he argued, was a mere pretense that functioned to covertly import Japanese customs into Korean society. In this scheme, the legal precedents that the colonial civil court produced were invented so that what were purported to be Korean customs mirrored those of the Japanese family system.<sup>20</sup>

More recent scholarship has challenged the assimilation framework. Lee Seung-il has argued that instead of an assimilation policy, the Japanese government-general had a policy of “codification [of customs]” (*sōngmunhwa*) regarding Korean family customary laws. Lee argues that the Japanese government in the metropole and the colonial government in Korea had conflicting opinions regarding Korean customary laws; while the metropolitan government wanted to extend Japanese law to the colonies, the Korean government-general wanted to continue to use and eventually codify Korean customs in family matters and maintain the separation of the colonial legal sphere from that of the metropole. In other words, the colonial government wanted to codify Korean customs, the Japanese government supported Korean customs only in their un-codified and malleable form.<sup>21</sup> While Lee concedes that the government-general incrementally increased the number of Japanese codes implemented in Korea, he also argues that these reforms were based on the understanding that Korean customary practices had already changed to simulate the Japanese customs. In this sense, Lee argues that the colonial policy was not to forcefully assimilate Korean family customs to those of the Japanese, but merely to codify those customs that gradually came to resemble the Japanese codes. In Lee’s words, “assimilation to Japanese law was not a policy in itself but a principle in the codification of customs policy.”<sup>22</sup> In a nutshell, Lee argues that Korean custom was always part of the colonial legal framework: obliterating Korean customs was never the objective of the Japanese colonial state.

While I do not completely agree with Lee, his argument on the codification of Korean customs has opened up new ways to examine customary laws from the colonial period. For one, Lee broke the metropole-colony, or Japan-Korea binary; by exposing conflict between the Japanese government and the Korean government-general, he saw the legal policy as a three-way, rather than two-way, conflict. While Lee went no further than acknowledging complexity on the part of the Japanese, he inspires us to see the complex web of conflict among Koreans. Also, by pointing out that the Korean government-general had the intention of preserving certain Korean customs rather than completely obliterating them, he has raised the possibility of seeing the customary laws in colonial period as being politically produced - either through preservation or invention. This opens up the possibility of exploring the customary laws in colonial Korea as a

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<sup>20</sup> Chōng Kūng-sik, *Kwansūp chosa pogosō*

<sup>21</sup> Lee Seung-il, "Chosōn Chongdokpu ūi pōpche chōngchek e tehan yōngu [A Study on the legislative policy of the Joseon Government General; Focusing on Codification of Article 11 'Customs' of Joseon Civil General Act]" (Ph.D. Dissertation, Hanyang University, 2003 ). p.198

<sup>22</sup> Lee Seung-il, "1910, 20-nyōnde chosōn chongdokpu ui pōpche chōngchek: chosōn minsaryōng che 11cho-rūl chungsim ūro [Legal Policy of the Korean government-general from the 1910s and 1920s: Focusing on the Code No. 11 in the Civil Ordinances]," *Tongbang hakji (Yōnsei taehakkyo kukhak yōnguwon)* 126 (2004). p. 197

product of the political process among the numerous players involved (multiple interests among colonizers and the colonized), rather than pinning them down as either of Japanese origin or Korean.

Several scholars have expounded on the effects of colonial civil law on the legal rights of women in Korea. Yang Hyun-ah, who was among the first to trace gender bias in Korean civil law to the colonial period, has explored how the patriarchal bias of the Confucian family ideology came to be preserved and rigidified in the colonial legal system in Korea. Yang's argument is twofold. First, she holds that the origin of Confucian patriarchal family in the colonial civil law lay not in Korean tradition but in the Japanese family system. Second, the Japanese family system was imported into Korea through colonial fossilization of Confucian family custom in the name of recognizing Korean customs. Yang argues that the shared culture of Confucianism between Korea and Japan functioned to smoothly transfer the Meiji family system to Korea. Hong Yang-hee followed suit in her own research.<sup>23</sup> Broadening the scope of research from law to matters of ideology, Hong identifies the family policy in colonial Korea as a process of Japanization of Korean families, i.e. incorporating the Korean family (system as well as customs and culture) into the Japanese family system. Family customs were incrementally assimilated to those of Japan with this purpose in mind.

While these previous studies have been successful in exposing the role of colonial civil law in strengthening the patriarchal order in Korean society, their preoccupation with the metropole-colony binary has led them to overlook the gender conflict within Korean society. Most significantly, they have attributed the diminishment in women's legal status solely to the production of the Meiji Civil Code in the metropole and not to the struggle between genders within the colonized Korean society. For Yang Hyun-ah, the significance of probing into colonial family law lies in the fact that "colonial family law and system is one area where we can investigate how Japanese Confucian tradition at the time was translated into Korea."<sup>24</sup> Yang therefore considers the colonial family law in Korea primarily as a transplant from Japan. Where Yang attributes the gender bias of colonial customary laws to Korea, she does so in the pre-colonial past. Yang points out that colonial customary laws were ossified versions of family customs that were taken out of the context from the Chosŏn dynasty period. According to Yang, therefore, the patriarchal bias in colonial customary law had its origins in Chosŏn dynasty family customs, and they were preserved and ossified through colonial legal policy, which had its patriarchal bias deriving from the Japanese family system. What this formula leaves out, though, is the processes of reception, reproduction and retention of such ossified family customs in Korean society during the colonial period. In other words, Yang depicts colonial Korean society as a passive receptor of colonial legal policy and does not attribute significant agency to the colonial Korean society. If it was the patriarchal pull

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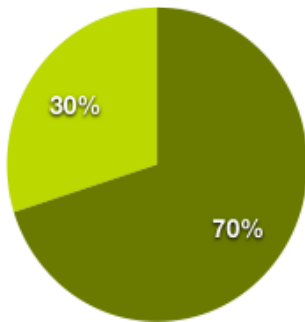
<sup>23</sup> Hong Yang-hee, "Chosŏn ch'ongdokpu ui kajok chŏngchek yŏngu: ka chedo wa kajŏng yideologi rŭl chungsim uro [The Family Policy of Japanese Colonialism in Korea: with the focus on family system and home ideology]".

<sup>24</sup> Yang Hyun-ah, "Envisioning Feminist Jurisprudence in Korean Family Law at the Crossroads of Tradition/Modernity", p. 345

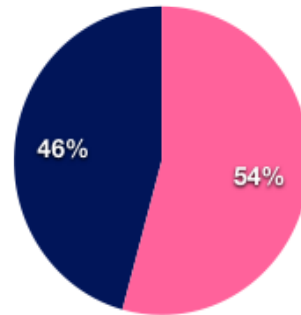
that created the gender biased family custom during the Chosŏn dynasty, then is it reasonable to believe that it was less inclined to do the same under the colonial rule? While I acknowledge the significance of investigating the impact of the Japanese family system on colonial family law in Korea, I would also argue that it is important not to lose sight of the gender dynamics within the Korean society during the colonial period.

### **The Widow Problem**

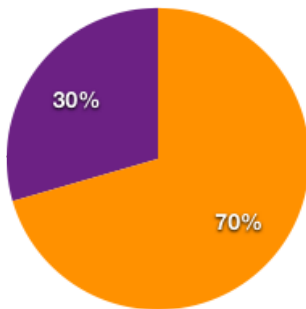
I chose widow related cases as my major object of inquiry because they feature prominently among family cases. Widows were especially at the center of conflict surrounding adoption choices. As we can see in the following charts, which I have made on the basis of the civil case records from the legal decisions records, adoption cases constituted 30% of all family related civil cases in colonial Korea. And widow-involved cases made up more than half (54%) of all adoption cases. The last chart shows the percentage of widow involved cases in family cases. These charts show that, i) there was a high representation of widows in family cases, and ii) widow representation was higher in adoption cases than in cases concerning other matters.



[Chart 1. Adoption cases among all family cases]



[Chart 2. Widows among all adoption cases]



[Chart 3. Widow involved cases among all family cases]

Why were widows so dominantly featured in Korean family cases? As I show below, they are predominant because the tension over the customary widow rights were inherited from the period before and persisted into the colonial period. Widows held



special customary rights in Korean tradition, which put them in an ambivalent position vis-à-vis the patriarchal power of lineage elders. The widow of a family head could become the family head when there wasn't an heir-apparent, as "*chongbu*," the eldest daughter-in-law, and become the purveyor of the family's ancestral worship. Widows were traditionally given such special rights to ensure the stability of the lineage. As the house-head, she was to protect and rear the future heir of the family (if there was one), or if there was no heir, to designate and adopt a suitable heir for her late husband. This traditional privilege placed widows in an ambivalent position that benefited lineage interest, but at the same time, threatened the patrilineal authority of a family elder. As Martina Deuchler, a Chosŏn dynasty historian, has documented, the customary widow rights were a major source of conflict between widows and their in-laws even before the onset of Japanese colonial rule.<sup>25</sup> Deuchler has examined several cases where family members brought suit against the widow to contest her choice of heir.<sup>26</sup> Continued acknowledgement of customary widow rights meant that the dynamic of family conflict continued into the colonial period. (Chapter 2)

More significantly, the Japanese colonial legal policy strengthened widows' rights as house-heads. The colonial state reinforced a new administrative boundary around the nuclear family that was meant to cut into old lineage ties. In the process of implementing the new household system, the colonial state strengthened the widows' rights that were threatened by lineage elders. Widows were time and again vindicated of their rights against threats from lineage elders who wanted to usurp them. Lineage elders, on the other hand, were, time and again, denied their influence over their daughter-in-laws across the household boundary. In other words, the prominence of widow cases in colonial Korea, was a case of existing patterns of conflict that were consequently strengthened under the new legal system brought in by the colonial power.

### **Layout of the Chapters**

My dissertation consists of four chapters. Chapter 1, "Building the Colonial Family State: The Meiji Civil Code and the Production of Nuclear Households" examines the process of Meiji Civil Code writing as the origin of colonial family law in Korea, and explores how the Japanese household system was imported into colonial Korea to restructure Korean lineage system. The Japanese household system, a modified version of the pre-modern family system (*ie-seido*), was preserved to protect family collectivism in the modern Civil Code as a compromise between the two opposing factions in the Meiji Civil Code Debate (1872-1892). I argue, however, that when the household system was imported into Korea, rather than protecting family collectivism, it functioned to break down larger Korean lineages. Records of family property disputes show that strengthened boundary of the nuclear

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<sup>25</sup> Martina Deuchler, *The Confucian transformation of Korea : a study of society and ideology*, Harvard-Yenching Institute monograph series (Cambridge, Mass. : Council on East Asian Studies, Harvard University, 1992). Choe Che-sŏk, *Hanguk kajok chedosa yŏngu [Study in the History of Korean Family System]* (1983). 1983 p. 669

<sup>26</sup> Deuchler, *The Confucian transformation of Korea : a study of society and ideology*. p. 144-145; 159-161

household weakened collective property claims previously settled in favor of lineage elders. In short, the household system functioned to weaken lineage power in the colonial society that was competing against the colonial state.

Each of the remaining chapters centers on the shifting focus of issues regarding widow rights during the colonial period. In Chapter 2, “The Widow Claims the Household: Widows and their Rights from Chosŏn to the Colonial Period,” I explore how widow rights were affected by the transition of the judicial system under the Chosŏn dynasty to that of the Japanese colonial state. Focusing on familial disputes over widow property rights, I show that the rights of widows as house-heads were protected by the colonial state in the early period of colonial rule for their utility in enforcing household boundaries in colonial Korea. While the protection of widow rights under the colonial state subjected widows to increased number of lawsuits, the outcomes of the civil cases show that widows did have an advantage in the new colonial legal system. Compared with widows in late Chosŏn dynasty, whose plight I examine through appeal letters to the Ministry of Legal Affairs (*pŏppu*), widows in the early colonial period had officially recognized legal recourses for their tribulations. The colonial courts consistently protected their rights as house-heads against ownership claims by relatives across household boundaries. Early colonial court decisions favorable to widows helped to consolidate customary widow rights as legal precedents, further protecting these rights later in the colonial period.

In Chapter 3, “Inheritance Rights for Daughters: Discourses of Family Law Reform in the 1920s and 1930s,” I examine how widow rights collided with the family reform policies of the colonial state in 1920s and 30s. The reform measures that the colonial state had in mind did not always align with what some of the widows demanded. While Korean widows wanted to expand their rights from temporary house-headship to full inheritance rights, the Japanese colonial state had a different goal in mind. The government-general in Korea wanted to implement the Japanese custom of adoption, which expanded adoptee candidates to sons-in-law and non-kin. Son-in-law adoption, in particular, where the son-in-law is adopted as the heir to the household, was favored by the colonial state for its potential to open up Korean lineages to Japanese heirs, and, therefore, facilitate merging of Korean and Japanese families, or the Unification of Metropole and Korea (*naisen ittai*). As early as the 1920s, the colonial state promoted the merits of son-in-law adoption in Korea. The state propaganda had it that son-in-law adoption was a way to expand women’s rights in Korea, by giving daughters heirship, albeit indirect, through their husbands. Korean adoption custom, which restricted adoptees to male agnates, was condemned as a backward custom, from which the colonial state was to liberate Koreans. Meanwhile, widows’ demands for full inheritance rights as permanent householders were ignored. Widow customary rights, which were the social safety net for widows since the pre-colonial period, became a shackle that inhibited them from obtaining legal rights fully equal to male members of their families. The colonial state, which presented itself as the emancipator of Korean women, in fact, bound them to the limitations of custom.

In Chapter 4, “Old Customs Die Hard: Colonial Customary Law after the 1939 Reform and Beyond,” I examine how widow rights were impacted by the Civil

Ordinances reform in 1939, which accelerated the assimilation of the household system in Korea by implementing Japanese style surnames and son-in-law adoption. Challenging previous scholarship that has focused on the reform's impact on national identity, I argue in this chapter that the most significant impact of the reform was on the legal rights of Korean widows. The 1939 reform not only diminished widow rights, but also failed to deliver the promised expansion of inheritance rights to daughters in its stead. Neither did it achieve complete assimilation between the Japanese metropole and the Korean colony. Korean and Japanese household registers were still kept separate, and adoption of Japanese into Korean families after the 1939 reform was negligible. Furthermore, weakened property rights of women had a lasting effect on civil law in postwar Korea, as colonial civil law was carried over to the postwar civil code in mostly intact form. The property rights of women were not expanded to full equal capacity with men until 2005, when the household system was abolished.

In some sense, each of the chapters tells a story of defeat; colonized Korean women did indeed lose many of their customary rights through the colonial period. But a story of victimization is not what I aim to convey in this dissertation. More than anything, the following chapters tell stories of Korean women who struggled to protect and maximize their legal rights. These women struggled not against something new to Korea but against a by then constant and continuing expansion of the forces of patriarchy. Although some have argued that Korean women were victimized by Japanese family law under the colonial rule, others have shown that patriarchal family order had been strengthening since the late Chosŏn dynasty in Korea, and women's rights were shrinking accordingly. As I show in the following chapters, Korean litigants presented to colonial civil courts claims of Korean customs that were far more restrictive of women's property rights than the Japanese Civil Code. Nor are these stories of the colonial power uplifting the colonized women in order to justify their colonial rule. Although some widows benefited under the colonial legal system, extending women's rights was not the ultimate goal of the Japanese government-general. More importantly, the Japanese state shared with Koreans an interest in preserving and strengthening the patriarchal family order. The Meiji Civil Code was precisely a compromise of modern individualism with family collectivity buttressed by the patriarchal power of the house-head. In other words, the Japanese colonial state and the Korean society were competing against each other, with each its own brand of patriarchy, the former based on the nuclear household system and the latter, on the lineage system. Cultural affinity between Korea and Japan, which some have pointed to as the uniqueness of Japanese colonialism,<sup>27</sup> produced a peculiar preoccupation on the part of the Japanese to produce difference in the precise area where they had affinities – that of family custom. Production of difference in the Japanese colony of Korea was disproportionately focused on the areas of family and family custom. Family customs became the essence of Korean cultural identity, the extent of whose transformation was the index of Korean assimilation to the Japanese metropole.

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<sup>27</sup> Peter Duus, *The Abacus and the Sword : the Japanese Penetration of Korea, 1895-1910*, Twentieth-century Japan (Berkeley, 1995). and Mark R. Peattie, "Introduction," in *The Japanese Colonial Empire, 1895-1945*, ed. Ramon H. Myers and Mark R. Peattie (Princeton, N.J., 1984).

Under these circumstances, personal struggles of Korean widows for property rights became an area where the cultural identity of colonized Koreans as well as the Japanese colonial policy was most intricately articulated in colonial Korea.

## Chapter 1

### **Building the Colonial Family State: The Meiji Civil Code and the Production of Nuclear Households**

#### **Introduction**

The centrality of family in the imagining of the Japanese nation in the wake of the Meiji Restoration is well known. The sociologist, Ronald Dore, for one, has described the nation in Meiji Japan as “one vast lineage group.”<sup>28</sup> Summarizing the ideas of Hozumi Yatsuka, the famous Japanese legal scholar and the engineer of the family state ideology, Richard H. Minear has similarly stated: “The [Japanese] family state has basically one meaning; it is that one family forms one state, and one state forms the family.”<sup>29</sup> In Hozumi’s thinking, family and consanguine relations (real or imagined) between the members of the nation formed the basis of Japan’s vision of the state and its constituent members. However, for Hozumi, the seemingly abstract national family of the nation-state was neither an illusion nor an allegory: it was written in the very blood of its members. They *were* all descendants of the imperial family and therefore a family. In short, in the Meiji legal ideology, family was more than the traditional religious faith in ancestors or the ideological basis of social hierarchy: it was the very substance the new nation.

As soon as Japan began to acquire colonies, however, this rather straightforward definition of the family state ran into complications. If Japan was both a family and a state, who were the colonial people? The 1890s was a period of a high stakes debate over the new family state ideology with the great debate over the Meiji Civil Code. It was also a period when Japan’s engagement with Korea, its first foreign interest, developed into a war with China between 1894-1895. By 1898, Japan emerged with a new civil code based on the family state ideology, victory over China, and, most importantly, its first colony, Taiwan. What place would the new colonies and their people come to occupy in the Japanese family state? Was each colony to form its own family state? Or were they to be incorporated into the Japanese state as part of the Japanese family? The following disagreement between two Japanese colonial officials in Korea demonstrates the centrality of the family in the Japanese ideology of colonial management. The two Japanese colonial officials are Oda Kanjirō and Tateishi Shuichi, both colonial legalists engaged in preparing civil law for colonial Korea.

At the time, I [Tateishi] planned to take the so-called assimilationist policy position that Korea was better off ‘becoming Japan (*naichika*)’ as soon as possible. So I wanted to write a law for Korea that resembled the Japanese law as closely as possible. Around this time, I often met with Oda Kanjirō, an authority in Korean customs. We always engaged in heated arguments about the existence of this old

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<sup>28</sup> Ronald Dore, *City Life in Japan: A Study of a Tokyo Ward* (1958), p. 94

<sup>29</sup> Richard Minear, *Japanese Tradition and Western Law* (Cambridge, 1970), p. 80

custom or that. One day, Mr. Oda asked me, ‘Do you know why the British Empire was so successful in its colonial policy? It was because it respected the natives’ customs and mores. In order to retain Korea as an eternal colony, we should respect their customs and retain their mores as they exist today.’” To that, I replied, “If we are content to keep Korea as an eternal colony (*shokuminchi*), I agree. But I don’t think Korea should be left a mere colony; I think that it should be ‘made into Japan (*naichika*)’ as soon as possible.” With our inability to compromise, the legal plan for a civil law for colonial Korea hit an impasse.<sup>30</sup>

As colonial authorities prepared for the revision of the Household Registration Law in 1918, the Ministry of Justice of the Korean Government-General called on Tateishi, a former judge at the Pyongyang Local Court in Korea, in 1915 to help with the revision. However, Tateishi soon found himself in profound disagreement with Oda. While Tateishi pushed for an assimilationist version of the law, Oda argued for the preservation of local ways. In other words, while they both shared the objective of securing Korea for Japan, they differed in their vision of how the Korean colony would fit into the Japanese empire as a whole. Was Korea to remain a colony or become an indistinguishable part of Japan? Of course, put in another way, this was a rephrasing of the Japanese family-state puzzle: What was the place of the new colonial territories in the Japanese family state? In Tateishi’s argument, we are told that institutionalizing the Japanese family law in the colonies is equivalent to them “becoming Japan.” In contrast, if colonized Korea were to retain its own family customs, it would remain a Japanese “colony”—an entity forever separate from the Japanese family-state. This was how Tateishi imagined the role of the family law, in trying to create a family-state out of the Korean colony: an attitude that aptly illustrated the potent role of family law in colonial management.

The centrality of family law in colonial bureaucratic arrangement was belied by the highly insular postwar debates over the Meiji Civil Code in Japan. These debates generally tended to focus on the effects of the family law only within Japan proper (the former metropole), ignoring its effects on the colonies. The following passage by postwar legal historian, Watanabe Yōzō in 1963 represents a typical criticism of the prewar civil law.

Why did twentieth-century Japan maintain the nondemocratic family system based on the inequality principle? Why did the state show such a strong interest in its preservation? In explanation Japanese scholars have pointed out the following main points. The political system established after the Meiji Restoration was not democratic but authoritarian and demanded that the people be uncritically obedient and docile. Consequently, the government spared no effort to develop such traits through moral education, religious inculcation, and legal sanctions. The

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<sup>30</sup> *Chōsen ni okeru shihō seido kindai no sokuseki : Chōsen shihōkai no ōji o kataru zadankai [Footsteps of Legal Modernization in Korea: Roundtable to Discuss the Past by Korean Law Society]* Yūhō shirizu (Tokyo, 1966). p. 83

discipline a man undergoes within his family from infancy informs his character and his morals, and the government largely relied upon family discipline to bring up citizens who would submit to governmental authority. It is not surprising that a man or a woman is, without misgiving, blindly obedient to authoritarian government once he has been taught to obey the orders of the House head and his parents unconditionally and made firmly to believe that unquestioning obedience is the supreme virtue.<sup>31</sup>

Above, Watanabe Yōzō describes the Meiji family law as a major factor responsible for inculcating a blind sense of loyalty and fanatical patriotism among Japanese citizens during the wartime. In doing so, however, he not only treats the family system as a relic from the past—thereby erasing its construction during the Meiji period—he also ignores the effects of this civil law on the colonies. There is, instead, much navel-gazing about how Japanese society came to lose all its power to resist the authoritarian government. The answer, it appears, lies in the family system, which groomed the Japanese citizens from infancy to become docile subjects.

The problem with views such as Watanabe's, however, lies in their insularity. By insularity I mean that the postwar scholars have treated the civil law problem as an exclusively domestic issue, thereby erasing both the effects of the Meiji Civil Code on the colonies and influence of colonial conditions on the domestic Japanese affairs at the time. Also a problem is the insular perspective of the family in evaluating the effect of the Civil Code. They were myopically focused on examining the unequal power distributions within the household and lost sight of the effect of the Civil Code on the society as a whole. A hasty denunciation of the role of the Meiji Civil Code therefore, hides more than it illuminates. How did it affect the families in the colonies? What was its effect on the society as a whole? Were these effects the same as those in the metropole? To address the above questions I will examine the writing of the Meiji Civil Code and its implementation in the Korean colony. By utilizing some civil court cases involving family property, I will compare the social effects of the Civil Code upon the Japanese metropole to those in the Korean colony. Through these cases, I will show that the most significant effect of the Meiji Civil Code in both Japan proper and the Korean colony was not the cultivation of a sense of loyalty but the production of nuclear families.

### **The Writing of the Meiji Civil Code**

Family law emerged as a key piece of reform in the Japanese post-war legal reform project. Under the legal reform led by U.S. occupational forces in Japan after the Second World War, the Japanese law of the prewar years was deemed the pathological source of the absolute state power of the wartime regime. A legal reform was thus proposed to steer Japanese society onto a more democratic path. The new Constitution was promulgated in

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<sup>31</sup> Watanabe Yozo, "The Family and the Law: The Individualistic Premise and Modern Japanese Family," in *Law in Japan: The Legal Order in Changing Society*, ed. Arthur von Mehren (Cambridge, 1963), p. 369

1947 and a new Civil Code in 1948. Reform of the civil law was deemed especially critical to casting aside autocratic family headship and fostering democratic relations in Japanese families. The codified family mores and customs of the family system that purportedly survived the Tokugawa-Meiji transition soon became the central target of reform efforts. In the immediate post-war period, Kawashima Takeyoshi, criticized the Japanese family system as inherently un-democratic. "Democratic revolution," Kawashima commented, "cannot leave any traces of our family system, which has been this nation's absolute object of (religious) faith."<sup>32</sup> The Japanese family system was thus deemed to be absolutely incompatible with democracy because it was inherently hierarchical and thus contravened the democratic principle of equality. In 1948, a new Civil Code was drafted in accordance with the Article 24 of the new Constitution. Promoting the two central principles of "individual dignity and the essential equality of the sexes,"<sup>33</sup> it became quickly lauded for decisively expurgating the conservative family system from Japanese family law.<sup>34</sup>

According to some accounts, the new Civil Code of 1948 was a victory of the progressive legalists over the conservatives in the historical struggle that stretched back to the pre-war period.<sup>35</sup> This reform inspired many Japanese scholars to begin examining the history of modern Japanese law, especially the writing process of the Meiji Civil Code. In the field of legal studies, scholars began to re-examine the famous Civil Code Debate, declaring it to be the critical point when Japan turned towards absolutist doom. The Civil Code Debate involved a debate among Meiji legalists over a draft of the Civil Code prepared by the Ministry of Justice in 1890. The draft was based on the very first draft of civil code produced in 1872 by Etō Shimpei (1834-1874). This draft, which was based on a hasty translation of the French Civil Code has been lauded as the most progressive draft of civil code in Japan.<sup>36</sup> The foreign origin of the Civil Code draft and the introduction of Western principle of individual rights that threatened traditional authority of family patriarchs alarmed some legal scholars. Those legalists, later referred to as the "Deferment Faction" (*enki-ha*), argued that the draft needed major revisions and that Japan needed to defer the enactment of the Civil Code. They argued that the Old Civil Code was a coarse translation of foreign laws and

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<sup>32</sup> Kawashima Takeyoshi, "Nihon shakai no kazoku teki kōsei [The Familial Structure of Japanese Society]." p. 2

<sup>33</sup> Kurt Steiner, "The Occupation and the Reform of the Japanese Civil Code," in *Democratizing Japan - The Allied Occupation*, ed. Rober E. Ward and Sakamoto Yoshikazu (Honolulu, 1987). p. 188

<sup>34</sup> The validity of this claim is challenged by many feminist scholars in Japan, but this goes beyond the scope of this chapter. For this, see, Ueno Chizuko, *Kindai kazoku no seiritsu to shuen [The Establishment and the Demise of the Modern Family]* (Tokyo, 1994).

<sup>35</sup> Dore, *City Life in Japan: A Study of a Tokyo Ward*.

<sup>36</sup> Tezuka Yutaka, "Meiji shonen no minpō hensen - Etō Shimpei no hensen jigyō to sono sōan [Compilation of the Meiji Civil Code in Early Meiji Period- Compilation Project of Etō Shimpei and His Draft] (1947) " in *Meiji minpōshi no kenkyū 1*, Tezuka Yutaka chosakushu (1991). About the process of Meiji Civil Code writing, please refer to the following.

Ronald Frank, "Civil Code: General Provisions," in *History of Law in Japan Since 1868* ed. Wilhelm Roehl (Leiden, Boston, 2005), Ito Masami, *Gaikokuhō to nihonhō [Foregin Law and Japanese Law]*, Iwanami Koza - Gendaihō (1966).



therefore inappropriate for Japanese society. An opposing group of legalists, referred to as the “Enactment Faction” (*dankō-ha*), argued for the code’s immediate implementation, stating that a speedy implementation of a modern civil code was critical to abolishing unequal treaties. The debate ended with the victory of the Deferment Faction. In 1892, the Diet passed a deferment bill and installed the Legal Investigation Committee, composed of three legalists to work on the code’s revision. They were Hozumi Yatsuka and Fukui Masaaki from the Deferment Faction and Ume Kenjirō from the Enactment Faction. The newly revised Civil Code, later to be referred as the Meiji Civil Code, was promulgated in 1898.

The 1890 draft was based on a new principle put forth in 1878 that the family law section of the civil code be based on Japanese customs. The new plan for the civil code writing was laid down by the Council of Elder Statesmen (*genrōin*); the property law was to be written by the French legalist Boissonade<sup>37</sup>; and the sections on Personal Status (*mibunpō*) and Inheritance were to be written by Japanese legalists, Isobe Jirō and Kumano Binzō<sup>38</sup>, based on Japanese customs. This plan was to address the concern that the draft civil code did not respect Japanese customs. In 1889, the Society of Legal Scholars (*Hōgakushi kai*) published the first critique of the Old Code in a paper entitled, “Views of the Society of Legal Scholars on the Compilation of Legal Codes (*Hōten hensan ni kansuru hōgakushi kai no iken*).” Within it, the Society criticized the draft civil code for ignoring local Japanese customs and for simply trying to import foreign codes. European laws, they pointed out, were compiled from codes already practiced in the community. Arguing against the modeling of Japanese law after the European system, they wrote, “Drafting the code for a nation is different from writing textbooks or academic papers. No matter how systematic and logical it is, if it does not fit people’s sentiments and customs (*minjō fūzoku*), we cannot call it a good law.”<sup>39</sup>

Yet, legalists disagreed as to how to incorporate Japanese customs into the new civil code. They disagreed on whether to codify customs currently in practice that could be collected through surveys, or to extrapolate an ideal set of customs from upper class family practices. After Etō Shimpei was executed for his involvement in the Saga Rebellion (1874), the civil code project was placed under the supervision of the new Minister of Justice (*shihōkei*), Ōki Takatō (1832-1899). Ōki was adamantly supportive of incorporating Japanese customs into the Japanese civil code, especially those laws concerning inheritance or status (*jinji*). The American legal advisor, George H. Hill, also supported this stance, and suggested a custom survey for this purpose. Basing his stance on the common law tradition and citing works by those no less luminous than Emperor Justinian the Great (483-565 A.D.) of the Eastern Roman Empire in the sixth century, he argued that Japan needed to survey local

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<sup>37</sup> Boissonade consulted mostly the French law but also the recent Italian law, which had been promulgated in 1865.

<sup>38</sup> Ito Masami, *Gaikokuhō to nihonhō [Foreign Law and Japanese Law]*. Ronald Franks mentions Kurokawa Seiichiro instead of Kumano Binzo. Frank, "Civil Code: General Provisions."

<sup>39</sup> Hoshino Tōru, *Minpōten ronsō shiryōshū [Collection of Sources on the Civil Code Debate]* (Tokyo, 1969). p. 15

customary laws before writing the civil code.<sup>40</sup> However, many legalists opposed him, saying that Japan did not have time for a nation-wide custom survey; preparing a modern Western-style civil code and rewriting the unequal treaties were too urgent to put off for a custom survey. Others thought that as long as one of the main objectives of the modern code was to impress the Westerners with their modernization, it was inevitable that old Japanese customs and sentiments (*kanshū ninjo*)<sup>41</sup> would be abandoned and they pleaded for a quick fix, which meant imitating the French civil code, as Etō Shimpei had originally planned.

The two surveys, carried out in 1876 and 1877 by the Council of the Elder Statesmen, were, in the end, discarded with their opponents pointing out several problems and limitations in the surveys. Many customs were too old or simply unfit for a modern code. With great local variation, the customs were also inconsistent. Finally, the legalists educated in Europe tended to be contemptuous of Japanese customs. The original reports of the surveys are lost and we are only left with the final edited versions of the two surveys, along with a memoir of the survey project by Ikuta Sei, *Diary of the Tour around the Capital Region (Kido junkai nikki)*. This diary shows how the custom surveys were carried out using idiosyncratic guidelines set by the individual surveyors themselves, according to their own personal ideas of what customs were supposed to be. In principle, Ikuta Sei focused on the less developed, although not necessarily rural, areas. The survey sites were mostly old castle towns, administrative centers (*daikan dokoro*), or port-towns. Yet, if any of these places had become prosperous after the Meiji Restoration, they were ruled out as survey targets.<sup>42</sup> For example, after finding “no old examples or customs that can be recorded” in Yokohama, Ikuta Sei moved onto Kamakura instead.<sup>43</sup> To Ikuta, custom meant only practices from the pre-Tokugawa period: a serious limitation in the custom survey.

With the results of the custom surveys eventually discarded, what made it into the final draft of the Civil Code was a set of family customs that were extrapolated from the family practices of marriage and inheritance of the samurai class. The family system, as articulated in the Meiji Civil Code, treated the household as the basic unit of society. Each family was headed by the household head (*koshu*) who, in return for having the authority to consent to their marriages, legal transactions, and places of residence, was obligated to support the family members. The household head was, in principle, male and its succession followed the strict rule of primogeniture.

The household system based on the pre-modern family system posed many problems for the modern principles of individual rights that the Meiji Civil Code also had to incorporate. Scholars of the Enforcement Faction believed that protection of the family system could not coexist with the principles of modern law. Ume Kenjirō argued that individual rights were not only the desired principle of modern social relations but also critical in ensuring the smooth development of the industrial economy. Furthermore, Ume argued, Confucian family morals were already in decline and the civil code regulating family

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<sup>40</sup> ed. Mitsuo Riko, *Minji kanrei ruishu : fu kido junkai nikki (sho) [Collection of Civil Customs]* Keio Gijuku Daigaku Hogaku Kenkyukai soshō (Tokyo, 1969). p. 11-12

<sup>41</sup> Ibid. p. 12-13

<sup>42</sup> Ibid. p. 61

<sup>43</sup> Ibid. p. 62

relationships should be forward-looking rather than try to reinstate old norms that were already in decline.<sup>44</sup>

Those espousing the protection of the family system, namely those in the Deferment Faction, argued that this system was the last moral building block of the new Japanese empire. To these scholars, the family system ensured not only that Japan preserved what was essential to the national polity (*kokutai*) but also that it maintained its traditional social order. With the abolishment of the status system in the aftermath of the Meiji Restoration; the ensuing industrialization and labor unrest; the beginning of women's entrance into the work force; and imperial expansion and its potential of unrest and "contamination," there was a heightened sense of anxiety about social order during this period. To some, the family system and the "beautiful customs" that it embodied provided a measure of insurance against the total destruction of morality and social order.

Legal scholars, Hozumi Yatsuka and Hozumi Nobushige, argued that the family system that put the household under the authority and control of the house-head was a better fit for the Japanese economy, which was heavily agricultural and dependent on collective family labor. In order to preserve and support the continuation of the family, they suggested that the new Civil Code employ the principle of primogeniture, which would, in turn, ensure the continued practice of ancestor worship. In *Ancestor Worship and the Japanese Law*, Hozumi Nobushige (older brother to Hozumi Yatsuka, the engineer of the family state ideology), argued that the essence of all Japanese social groups was ancestor worship and that Japanese law should be formulated to ensure the continuity of this institution.<sup>45</sup> This aptly reflected the opinion of Deferment Faction scholars such as Hozumi Yatsuka. Hozumi Yatsuka argued that the household (*ie*) had to be defended as the founding block of society; and, in order to do so, the primogeniture principle had to be upheld. Hozumi also argued that the family system was the foundation of the Japanese national polity. With Japanese social order maintained by ancestor worship, all members of the Japanese nation were encouraged to worship the imperial family—the main branch of all Japanese families.<sup>46</sup>

The prerogatives of the house-head were the biggest source of controversy regarding principles of the codes. Many codes that were proposed to protect the family system became topics of heated debate. They included: the principle of primogeniture in the succession of the household headship and the inheritance of household property; acknowledgment of concubines and *shoshi* (recognized sons born out of wedlock); and the protection of the household head's authority over that of parental authority. Primogeniture, the traditional principle of inheritance since the Tokugawa period among the ruling class of the samurai, was considered the major means to ensure the continuity and security of the household system. Considered contrary to the principle of equality, however, this principle faced major challenges from the beginning. Bousquet, the legal advisor for the compilation of the Civil Code, opposed this principle and advocated its abolishment, pushing instead for an equal

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<sup>44</sup> Wagatsuma Sakae, "Kazokuseido hōritsuron no henshen," in *Minpō kenkyū* 7 (1969).

<sup>45</sup> Hozumi Nobushige, *Ancestor Worship and the Japanese Law* (1901).

<sup>46</sup> Hozumi Yatsuka, "Minpō idete, chūkō horobu [The Civil Code Will Destroy the Loyalty and Filial Piety] (1891)," in *Minpōten ronsō shiryōshū*, ed. Hoshino Tōru (Tokyo, 1969).

distribution of inheritance among the sons.<sup>47</sup> The recognition of *shoshi* posed a more vexing question. Ume adamantly refused the recognition of *shoshi*, as this meant recognizing the concubine, who was in the process of being outlawed—or rather, being ousted from the legal realm. Already in 1878, the draft Penal Code excluded the term “concubine,” thereby implicitly denying the existence of such a category of person. In 1880, the Council of Elder Statesmen discussed whether to include the category of “concubine” in the legal codes. While some supported its inclusion on the grounds that without concubines the imperial court would have a difficult time ensuring primogeniture, others argued that concubinage was against the principle of equality between the sexes. In the end, support for concubinage won even though many of the supporters missed the meeting for the vote, allowing the proposal for revision of the draft to be defeated.<sup>48</sup>

In short, the debate over the family law played itself out between the two opposing principles of collectivity and individuality. As examined above, while the Japanese legalists were motivated to write a modern civil code based on the universally accepted principle of individual rights, they could not ignore the public’s call to preserve the collectivity of the family. The resulting Meiji Civil Code had a household system that granted significant rights and authority to the head of the household. Previous scholarship has invariably problematized this compromise. Possibly colored by post-war concerns about ensuring individual rights, previous criticism of the Meiji Civil Code was focused on the compromised rights of the individuals within the family. Such effect was indeed substantial. But as I will show below, strengthening of house-head rights had a totally opposite effect on the society as a whole.

### **Social Effects of the Meiji Family System**

The general consensus remains that the new Meiji Civil Code and its family system represents a sharply conservative turn from the supposedly progressive Old Civil Code. The Civil Code Debate is generally framed as a debate between bourgeois liberalism and semi-feudalistic absolutism, where the victory of the absolutism gave birth to the Meiji family system, which strengthened the rights of the house-head and devalued women’s status. Such framing of the Civil Code Debate originated in a famous argument by Hirano Yoshitaro, who argued that the Debate was a clash of the two opposing forces of bourgeois liberals, represented by legal officials, and reactionaries trying to reestablish feudalism.<sup>49</sup> To these scholars, the 1892 victory of the Deferment Faction and the revised Meiji Civil Code of 1898 marked the genesis of the Japanese absolutist state. In a less critical tone, echoing Hozumi Nobushige’s statement, Hoshino Tōru, the jurist and a major player in the Deferment Faction, argued that the debate represented a clash between the French school of universal law and the English school of historical law. In the immediate aftermath of the debate, Hozumi also

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<sup>47</sup> Hayakawa Noriyo, *Kindai tennosei to kokumin kokka : ryosei kankei o jiku to shite [Modern Emperor System and the Nation-state: Focusing on Gender Relations]* (Tokyo, 2005). Chapter 5

<sup>48</sup> Tezuka Yutaka, "Genrōin no mekake rongi [Debate over Concubinage in the Council of Elders] (1957) " in *Meiji minpōshi no kenkyū 2*, Tezuka Yutaka chosakushu (1991 ).

<sup>49</sup> Nakamura Kikuo, *Kindai nihon no hōteki keisei [The Development of Law in Modern Japan]* (1963).

likened it to the Sauvigny Debate in Germany, a legal debate between the historical and universal schools of law. The former argued that the German civil code should be based on the “organic logic of local custom” while the latter argued that it should be based on the universal principles of society. All seemed to agree that the Meiji Civil Code Debate was a significant juncture where the great compromise of the individualist principle happened through the installment of the Meiji family system.

Meanwhile, Tōyama Shigeki presented an alternative view of the Meiji Civil Code Debate, which analyzed the Civil Code Debate in the context of contemporary politics. Tōyama argued that the revised Civil Code of the 1898 represented a final product of a long trend towards conservatism beginning in the 1880s. For one, the French Civil Code that the Old Civil Code translated and imported into Japan was chosen not for its progressive or democratic potential, but in order to protect the absolutist monarchy and resist English-style liberalism and constitutional monarchy. According to Tōyama, concerns for the agrarian sector in the process of industrialization prompted the Meiji state to curb individualizing effects of the modern Civil Code. The collectivity principle was supported, then, not only by the conservative legalists who were concerned with the authority of the emperor and the house-head, but also those from the People’s Rights Movement, who had been considered to be the liberal sector of Meiji society. Far from being the protectors of democratic ideals, the People’s Rights Movement had taken on many statist characteristics. This united front between the People’s Rights faction and the government’s conservative faction was prompted by the extreme hardship of the Japanese rural population caused by the rapid industrialization and deflation policy under the finance minister, Matsukata Masayoshi. Those in the People’s Rights Movement were especially concerned with the individual property rights in the draft Civil Code, which denied many customary rights in the countryside, such as tenancy rights and use rights of the communal forest (*iri’aiken*). This position, in turn, gained great support in the aftermath of the Crisis of 1881, where the Meiji oligarchs and its aggressive industrialization policies lost political trust in the rising conservatism.<sup>50</sup>

In *Kazoku shisō to kazokuhō no rekishi* (The History of Family Ideology and Family Law), Yoda Sei’ichi analyzed the Meiji Civil Code Debate within the larger context of the Meiji legal debate as a whole, including debates on the commercial code, and arrived at a similar conclusion as Toyama.<sup>51</sup> Yoda suggests that incorporation of Japanese customs into the Civil Code was a remedy to ease Japan’s incorporation into the world capitalist system rather than being an expression of its feudal absolutism. In other words, using the language of custom to reinforce the collectivity of household economy, the state strengthened the household system to temper the individualizing effects of the new modern laws, including the Commercial Code, and more importantly, the reformed land tax law.

The 1873 land tax reform revolutionized the tax system in Japan by making all tax

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<sup>50</sup> Toyama Shigeki, "Minpōten ronsō no seijishi teki kosatsu [Considering the Civil Code Debate from a Political Perspective](1951) " in *Toyama Shigeki Chosakushū dai yon ken Nihon kindai shiron* (1992). p. 78

<sup>51</sup> Yoda Sei’ichi, *Kazoku shisō to kazokuhō no rekishi [History of Family Ideology and Family Law]* (Tokyo, 2004).

monetary and by mandating that all land tax be levied—not on the cultivators—but on the land itself and its market value. In order to enforce this system, people who were previously listed in the Land Register (*kenchichō*) were registered in the Household Register (*koseki*). In turn, the land was declared “free”—free to be bought, sold and privately owned by anyone regardless of class. Before the 1873 Reform, only by the daimyō could officially own land. While the peasants enjoyed various customary use-rights, they were forbidden to leave the land that they cultivated; the *bushi* class, meanwhile, were forbidden to own land outright. With implications far beyond the tax system, the Land Tax Reform foreshadowed great transformations for all strata of Japanese society. For peasants, it meant being deprived of the security of customary rights and being thrown into tenancy or, sometimes, being totally excluded from the land. For the upper class with means, it meant a potential disruption of the familial order, with the equal right to land ownership infringing upon the exclusive rights of the household head. At the same time, it meant the freedom of all Japanese subjects from feudal relations and class restrictions as the Household Registers included not only agricultural commoners, but all classes of people. While these two reform measures—viewed by some as the two most fundamental reforms of Meiji Japan<sup>52</sup>—were seen as necessary in order to stabilize the tax base of the newly modernizing Japanese state, they were ultimately contradictory policies. While the Land Tax Reform declared everyone equal, the Household Registration System supported the exclusive rights and authority of household heads. This contradiction, in turn, could be traced to a conflict between the Department of State (*daijōkan*) and the Ministry of Justice (*Shihōshō*). Those anxious about the disruptive effects of the Land Tax Reform called for the strengthening of the Household System and the preservation of the house-head’s rights—to which the Meiji state conceded. Even though the Department of State and the Division of Judicial Matters (*Hōseikyoku*) were both more interested in the success of the Land Tax Reform than the strengthening of the Household System, they could not ignore the loud voices of concern about the rural economy. Indeed, the stability of rural economy and society eventually became critical in the success of the new tax system. Strengthening the Household System, meanwhile, emerged as the quickest and most effective means to revive the rural economy.<sup>53</sup> In his famous opinion letter, the Vice Minister of Agriculture and Commerce, Maeda Masana, argued that Japan needed to re-establish the Household System in order to revive the agricultural economy. Straddling the two contradictory principles of social formation, the Meiji state produced makeshift compromise after compromise over the next thirty years.<sup>54</sup>

Strengthened house-head rights in the household system enabled the state to place itself in a more direct relationship with nuclear households. While various patriarchal provisions concerning primogeniture and *shoshi* suggest a simple continuation of pre-modern family ideals, a closer examination of the civil cases from the early Meiji period show that the household system did much more than maintain old mores. Rather than simply reinstating the old mores of the family, the Meiji household system redeployed the old customs in a

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<sup>52</sup> Fukushima Masao, *Nihon shihon shugi to "ie" seido [Capitalism and Family System in Japan]*, *Todai shakai kagaku kenkyu sosho* (Tokyo, 1967).

<sup>53</sup> *Ibid.* p. 163

<sup>54</sup> Ito Masami, *Gaikokuhō to nihonhō [Foregin Law and Japanese Law]*. p. 33

whole new way to strengthen the role of the state within the reinforced framework of the household.

One 1878 case suggests that the family law and the household principle actually curtailed the collectivity of the larger family in Japan. This case that occurred on July 27th, 1878 involved a civil suit between Arabe Ryūji and his father, Arabe Heizaemon, over the issue of household inheritance.<sup>55</sup> In 1858, Ryūji divided his household as an older son; in 1878, Heizaemon retired as the household head and passed the household onto his younger son, Heijū. A year later, however, Heijū passed away without a son, leaving the family scrambling to find an heir for the household. When Heizaemon passed on the inheritance of the household to Heijū's sister, Kama, who was also his daughter, Ryūji objected, saying that his son, Koji, was the rightful heir. Ryūji argued that only sons could be household heads; daughters could be made heiresses only when there were no suitable sons. The court (*Daishinin*), however, backed Heizaemon, ruling that Ryūji, as a member of another household, had no right to meddle in Heijū household's business of deciding the heir. Neither could Ryūji send Koji, his proper son (*chakushi*) and an eligible heir to his own household, to another household.

This case touched on many issues of central concern within the contemporary debate over family law (i.e., issues of daughter inheritances, household boundaries, and divisions of household). While the principle of inheritance was formulated to support the prerogatives of the household head, its enforcement in practice did not necessarily result in the strengthening of the collectivity principle. Instead, by strengthening the enforcement of the household boundary (i.e., when the boundary of such family violated the boundary of the household), it could have the opposite effect. This was partly related to the state's desire to prevent the hasty division of households by families to avoid military conscription. But when everything is said and done, the most striking aspect of this case is the state's desire to implement its own version of the family boundary, as recorded in the household registers (*koseki*), rather than allow the more nebulous boundaries of the family being claimed by the litigants. This way, the Meiji state ensured that the principle of household collectivity and the authority of the household head could bolster its own authority. Thus, the family law and the household system can be seen to be modern inventions, rather than vestiges of tradition or absolutism. Below, we will see how this new technology of organizing the citizens into households was translated on Korean soil.

### **Effects of Meiji Civil Code Application in Korea**

Even before two decades had passed since the promulgation of the Meiji Civil Code, Japan had an opportunity to expand it into the colonies. The establishment of Japan's protectorate status over Korea marked the beginning of its legal reforms in Korea. As was the case in Japan, reforming the judicial system and implementing modern (Western) law were crucial in terminating Choson Korea's unequal treaties with Western imperialist countries.<sup>56</sup>

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<sup>55</sup> *Meiji zenki Daishinin minji hanketsuroku [Verdicts of the Superior Court from Early Meiji Period]* ed. Sakae Wagatsuma, 12 vols. (1957). vol. 1, p. 193-194

<sup>56</sup> Yi Yōng-mi, "Chōsen tōkanfu ni okeru hōmu chōsakan seido to kanshū chōsa jigyō - Ume Kenjirō to Oda Kanjirō wo chūshin ni [Legal Survey Officials System and the Customs Survey

Rescinding the unequal treaties and thus severing the Western countries' ties to Korea was crucial for the monopolization of Japanese interests in Korea—a fact that the Japanese Resident-General was acutely aware of. As the first measure of legal reform, the Resident-General, Itō Hirobumi, formed a system of legal advisors; judges and lawyers from Japan were invited to local regions in Korea to “advise and assist” the Korean administrator-judges in legal matters. Korea had reformed its judicial system in 1895 during the Kabo Reform—the reform efforts initiated by the court following and in resistance to the Kapshin Coup in 1884—by implementing new judicial procedures. Yet, compared to the Japanese legal system, there was still much left to be desired. The civil cases and criminal cases were still undivided and the local administrators doubled as judges. Without any legal or administrative authority, however, the Japanese legal advisors had limited means to enforce reform in the local courts.

In the chaotic Korean legal system, Itō Hirobumi saw an immediate need for a proper system of civil law. With a background in law and having himself been a significant contributor to the writing of the Japanese Constitution, Itō envisioned a civil law for Korea, separate from the Japanese Civil Code. In order to write such civil law, however, the Koreans would have to carry out their own local customs survey so Itō invited Ume Kenjiro, a prominent civil law scholar who had participated in the writing of the Japanese Civil Code, to Korea in 1906. In Japan, Ume had been a member of the Enactment Faction and had supported a Civil Code based on the universal principle. In Korea, he supported a civil code that was more agreeable to local customs. Ume's original plan was to produce a separate commercial law for Korea and implement the Japanese family law in Korea.<sup>57</sup> The new legal scheme would extend the Japanese Civil Code to all but family matters.<sup>58</sup> In accordance with Itō's plan, Ume first concentrated on customs concerning land (i.e., ownership, transactions, land tenure, and the rent system). This project was carried out by the “Real Estate Law Survey Association” (*Fudōsanhō Chōsakai*) under the supervision of Pak Chesun, the Legislative Minister of the Korean government. Under Ume's supervision, local surveys were carried out on matters of civil and commercial customs in Pyōngyang, Suwon, Taegu, Pusan, and Inchōn. Meanwhile, later surveys conducted after 1909 focused on family

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under the Korean Residency: Focusing on Ume Kenjirō and Oda Kanjirō] (1),” *Hōgaku shirin* 98 (January 9, 2001, 2001). p. 203

<sup>57</sup> Ibid. p. 158. Why did Ume, who was a “enactment faction (*dankōha*)” in the Meiji Civil Code Debate, suddenly take this pro-custom direction for Korea is an interesting question. Ume's position was somewhat ambivalent in 1892 concerning the Japanese custom; he thought customs should not be changed abruptly, but that change is needed (“preserve the good customs, reform the bad ones”) to “advance the society.” (“Ideally, you would change the customs according to ethics, then reform the laws. But for the specially evil customs, it is not unnecessary to first reform the law, and then reforming the customs with it, and thereby sustaining the ethics. We think this civil code will be out-of-date in ten years. But it will produce the need to continue to wash away the old customs.” - Ume Kenjiro in Hoshino, *Minpoten Ronso Shiryoshu*. p.240) Yi suggests that Ume had learned his lesson in the Japan case, that one has to respect the customs until the society is advanced enough to embrace the Western law. Anyhow, this plan was abandoned when Itō was removed from Korea and eventually assassinated in 1909.

<sup>58</sup> Lee Seung-il, “Chosōn Chongdokpu ūi pōpche chōngchek e tehan yōngu [A Study on the legislative policy of the Joseon Government General; Focusing on Codification of Article 11 'Customs' of Joseon Civil General Act]”.



matters. However, with the Consignment of Judicial Power to Japan in November 1909, which nullified the need to write new civil laws for Korea, all of Ume's efforts came to naught. Shortly after in August 1910, Ume died from typhoid fever. Itō, himself, was assassinated in 1909 and the Korean civil law project subsequently unraveled. Once Japan took over judicial power in Korea in 1909 and plans for being a protectorate were replaced by outright colonization, a different opinion of Korean civil law began to take hold. Rather than codifying Korean customs, this new opinion called for a direct importation of the Japanese Civil Code. In 1912, the Government-General promulgated the Ordinance on Civil Matters (*minjirei*) and implemented the Japanese Civil Code in its entirety in Korea, with the important exceptions of family and inheritance matters. As such, family custom became an even more prominent issue in the colonial civil law regime.

With the exception of family and inheritance matters to be governed by Korean customs, the overall framework for Korean civil law was nearly identical to the Japanese Civil Code. Among the framework, the household system was most consequential. Therefore, when the Japanese surveyed Korean family customs to use in the colonial civil court, it was those customs that concerned the house-head and household that they were most interested in. This focus is illustrated by the topics that the Japanese investigated regarding Korean custom. Even in later surveys, the metropolitan concerns continued to dictate the focus of investigation. In 1915, a survey was conducted with special attention to the “retirement of the household head (*koshu inkyo*)” and “woman household head (*onna koshu*).” As was the case with the Meiji Civil Code, the issue of household head was a central one to the colonial civil law regime.

Since the pre-Meiji period, the household head in Japan could “retire” from the household, hand over the headship to his eldest son, and move into a separate house near the original house. “Female household head” was also a custom since the pre-Meiji period, in which daughters could inherit the household headship when there were no male alternatives. Whether or not Korea shared such customs was critical in evaluating the degree to which the colony's civil law could be assimilated into that of the metropole. When household registers turned up records of a “retired household head” and a “women household head,” the police conducted an investigation of all the families concerned and checked the relevant registers. This investigation resulted in a report, which concluded that while “retired household heads” did not exist in Korea, “women household heads” did. In 1923,<sup>59</sup> custom surveys in five different locales once again investigated the possibility of the “retired household head” custom in Korea. And, once again, these reports concluded that Korea does not possess the custom of a “retired household head.” instead, it pointed to the practice of an alternative custom called *chōn'ga*, where the household head relinquished his household management to an heir. However, even though this heir assumed the role of the household head, he still had to ask his father for his opinion and permission on important matters. In such a way, Japanese concerns and not the colonial conditions shaped the selection of family custom. Through

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<sup>59</sup> Chōng Pyōngjo, Ogun ui kwansūp chosa pogosō (Custom survey report from five counties), 1923, manuscript. The five counties are, Talsōng and Kimchōn from Northern Kyōngsang Province, Taejōn and Ch'ōngju from Northern Ch'ungch'ōng Province, and Ch'ungju from Northern Ch'ungch'ōng Province.

these surveys, subtle differences between the metropole and the colony were continuously noted and reinforced by the family customs.

What impact did these measures have on the Korean family? Did implementing the Japanese civil law result in the importation of the Japanese family system into Korea, and thereby establish a Japanese-style family state in the Korean colony? Did it end up strengthening the household in the Korean colony as well? Or did the provision that Korean customs be applied to Korean family matters preserve the Korean family system, preventing its assimilation into the Japanese family system? A close examination of the actual civil cases proves that it was not a question of either/or. The following two cases illustrate how Korean families could not continue as they had been nor were they Japanized. The examination of these cases shows how, even though the family was exempted from the Japanese Civil Code, the boundary of families set in the household register had a major impact on redefining the Korean family under the Japanese colonial state. This effect was similar to what we have seen in the metropole. A similar effort at creating a stronger state presence was initiated and accomplished in the Korean family policy as well.

The following case shows how the new civil law regime in colonial Korea utilized Korean customs to pit the interests of the lineage against those of the nuclear family. It also shows how women—especially as widowed household heads—functioned as a frequent source of conflict between these two interests. On December 4, 1911, the Superior Court of colonial Korea (*Chōsen Kōtō Hōin*) ruled on a civil suit between Cho Ki-hui and Kim Yong-jip, where a concubine was sued by her in-laws to give up her property management rights. Her son—still a minor—was the only heir to her dead husband. After the death of her husband, the concubine had assumed the management of the property (which probably consisted of farming the land, paying the taxes, and collecting rent if the land was rented out), in lieu of her young son. Unhappy with this arrangement, Cho Ki-hui, her in-law, sued; he considered it improper for a woman to exercise any right over the family property. Cho had already lost once in the appeals court (*Keijo Kōsoin*), which ruled that even though Cho was related to the heir, he was not in his household; therefore, he was ineligible to become his property manager. In its ruling, the Keijo Appeals Court stated, “In Korea, the custom is that even if the mother is a concubine, she can still manage the property and engage in other legal transactions for her minor son.” In appealing to the Superior Court, Cho argued,

There is no such custom as stipulated by the Appeals Court. Generally, in Korea, the principle is that women do not have any legal capacity over property, especially when there is another adult relative. And when the deceased has designated the relative as the property manager, the legal action carried out by the mother then has no legal effect.

The Superior Court decided to uphold the decision of the Appeals Court: “No one from a separate household register and a separate household (economy) (*besseki izai*) should be allowed to automatically assume the position of property manager.” In this case, Cho argued that he, as an adult (male, which is implied) relative of the heir, had the right to become the heir’s property manager. The Superior Court responded that though Cho may be related to the heir, he was not part of the household: “Inheriting from another household is unheard of

in Korean custom. According to Korean custom, when a household head dies without an heir, he or she can designate an heir to inherit his or her property and the duty to carry out the ancestral rites.”

This case aptly illustrates how property inheritance cases in colonial Korea hinged upon a contested definition of the family. As was often the case in early Meiji period (see the previous section), the family boundary was a decisive factor in inheritance cases. The boundary of the family, however, was what the state defined, not the one defined by Korean customs. Maintaining the boundary of the household register as the boundary of the family, the colonial civil court ruled that there were no inheritance rights outside of the family—a decision that acknowledged the household unit as a substantive legal category.<sup>60</sup> The family system of the Meiji Civil Code imported into Korea through the Household Registration Law (*Minsekiho*, 1909) thus clashed with the traditional family system in Korea, which had strong attachment to consanguine ties. In other words, although both family systems strongly espoused patriarchy, there were crucial differences in their definition, especially in terms of family boundaries, giving rise to strong conflicts between the two systems. Therefore, the critical impact of the Japanese Civil Code in colonial Korea was not that it strengthened or weakened the patriarchal ideology, but that it enabled the colonial state to define the boundary of the family. The provision of the Ordinance on Civil Matters that family matters in Korea were to be dealt with by following Korean customs did not stop the colonial state from imposing this new boundary of the family in Korea.

Redrawing the family boundaries did more than reorganize the family system and the social order. It also meant drastically restructuring the property relations within the Korean context, from one of communal ownership to another of nuclear families. Ancestral burial grounds of old and prominent families, not to mention agricultural lands, were traditionally owned by the lineage, the managerial rights to which were granted to the heir of the main family. When the colonial land survey compelled the landowners to register their land with the colonial administration, it assumed individual ownership, causing great confusion and distress to tenants who had enjoyed customary rights of tenancy and cultivation over the land. Because this new colonial definition of property meant that there was only one owner per land, many families were thrown into chaos, having to delineate the prerogatives of the lineage heir. Once this heir of the core family was declared to be the land’s sole owner, traditional restraints on his ownership (especially in terms of selling or mortgaging the land) also became ineffective. In this context, where the familial ownership of land was being disrupted by the new colonial land policy, the traditional power of the family patriarch was also being curtailed. As will be shown in the following case of Chong In-su, the family patriarch became no longer able to claim the rights to property owned by members of his family who lived outside of his household, even if the traditional norms had prescribed otherwise.

Posing a grave challenge to the new land ownership system implemented by the colonial government were the issues of graveyard and ritual estate (*wito*), the land owned by

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<sup>60</sup> Yang Hyun-ah, "Shikminjigi hanguk kajokpöp ui kwansŭp munjae I- shigan ūsik ūi siljong ūl chungsim ūro [The Problem of Custom in the Colonial Family Law in Korea, I - Focusing on the Missing Time Consciousness] " *Sahoe wa Yöksa* 58 (2002).

the lineage to service ancestral worship. While the colonial government acknowledged the communal ownership of such land by the lineage, this opinion sat awkwardly within the overall structure of individual ownership that forbade any customary rights or restrictions. Among the six earliest cases in the Chōsen Superior Court concerning property ownership, five of the six concerned burial sites and another three of the six concerned the customary boundary around burial sites that forbade the burying of persons from a different lineage. Of the latter, all three cases concerned the question of whether the customary boundary of one burial site affected the ownership of another's land. Customarily, one's burial site had around it a space where no other people could be buried. The higher the status of the person, the larger was this space. The problem arose when the owner of the burial site did not own all the extra space. When another person who owned this extra space buried his own relative in it, this met with protests from the owner of the first burial site who protested that the second person was violating his customary rights. In a nutshell, it showed a conflict between customary rights and personal ownership. Invariably, the colonial court ruled in favor of the latter. If the owner of the first burial site did not own all the customary land around the burial site, he could not protest another person's use of this land.

Due to similar complications, more cases concerning communal ownership were presented in front of the courts in 1915 and 1916, including two cases of lineage members who had sold their communal land without the consent of other lineage members. In both cases, the lineage members had registered the communal land under their names as individual property and conducted the sales with proper seals and documents. Although the colonial court acknowledged the communal status of both pieces of land, there was little that they could do to prevent these individuals from claiming the communal lands as their own. All the court could do was to rebuke the individuals for foregoing the customary process of consulting the other members of the lineage before the sale.

In 1911, the court saw an even messier case concerning a gravesite. This case between two family members shows how traditional familial propriety or customary rights had lost ground to the claims of individual ownership instituted by the new colonial regime. More pointedly, it shows how the new focus on exclusive ownership functioned to curtail the customary claims of lineage that had spanned family boundaries. Within the framework of exclusive ownership of property, the customary rights of the core lineage family over other families based on ritualistic grounds were no longer sanctioned. This case involved the plaintiff—a second nephew of the accused—burying his father on land that the accused claimed as his. The accused went to the police claiming that there was an “unidentified body” in his land. Failing to find the person who had buried it, the police exhumed the body. The plaintiff was suing to have the body re-buried at the site. As it turned out, the burial site was part of a larger patch of land that the plaintiff's great-grandfather had given to his younger brother, the accused's grandfather. While agreeing that the land was given to the ancestor of the accused, the plaintiff argued that the burial site itself was a “shamanistic ground (*ũmsaji*)” and, therefore, excluded from the gift. Arguing that the injunction that had forbade anyone from owning this shamanistic ground was now lifted, he stated that it should be returned to its rightful heir—himself—as he was the great-grandson of the original owner. The accused, meanwhile, denied any such customary restrictions on the land. One can assume that before the institutionalization of registered ownership, customary propriety

binding these two relatives would have prevented the accused from exhuming the body of his second cousin buried on his land. After all, the deceased second cousin was of the core family would have had a ritualistically higher position. Stating that there were no such customary restrictions from being a “shamanistic ground,” the colonial court upheld the accused’s right of ownership. Since the accused had the right to decide whom to bury in his land and since he had done all he could to find the person who had buried the unidentified body, his decision to exhume it was entirely justified.

What does this all mean? In some sense, the implementation of the Meiji Civil code theoretically strengthened the authority of the household head in the colonial family law. In practice, however, it sometimes had the opposite effect. In some cases, women like Cho Ki-hui in the case cited above benefited. Still, this did not mean that the rights of all women were extended. More accurately, the colonial state showed a marked preference for upholding the household boundary and protecting the nuclear family against the extended reaches of the lineage. The women triumphed in court only when the loss of their cases would have meant a threat to the boundary of the household unit. The same can be said of the land ownership cases. The new household unit, which more or less corresponded to the nuclear or stem family, had dual functions; curtailing the authority of the patriarch over the larger family unit and enforcing a certain sense of collectivism in the colonial subjects. In terms of the latter, while preserving a certain sense of collective order, it also significantly and effectively disrupted the older order of collectivism. In this way, the Japanese colonial family law shaped a new relationship between Korean families and the colonial state. The state thus effectively got rid of a competing object of loyalty, the lineage. With the new family law, the lineage power weakened, making the resultant nuclear families much more directly accountable to the state.

## **Conclusion**

This chapter began with the question of how the Japanese family state ideology affected the colonies. Previous studies have treated the family state ideology as an insular problem confined to the Japanese metropole and have thus focused their attention on its ideological effects on the Japanese family culture. This study shows how the effects of this ideology were not confined to the metropole but, in fact, spilled out onto the colonies.

The household system, which was a new Meiji legal unit not only within the colonies but also within the metropole, ensured that the society maintained a certain collective cohesion while the Meiji state effectively inserted itself into society against the traditional claims of the lineage. Meanwhile, the effects of the household system were felt most keenly in the civil courts, where claims of familial rights across household boundaries were adamantly denied in cases concerning inheritance. The state-sanctioned boundary of families prevailed in the courts time and again against the familial claims defined by consanguine ties or patriarchal authority. This effect was shared across the metropole-colony divide. The result was the maintenance of familial collectivity that dispelled traditional lineage ties inherited from the previous era. The effect of the Japanese family state was thus more tangibly felt in the severance of traditional ties than their restoration. The importing of the Meiji Civil Code into Korea functioned to incorporate the colony into the metropole, not by

instilling traditional values or mores of family collectivism but by enabling the colonial state to cut into the economic basis of such family ties. This, in turn, shows why the family state in Japan and the relationship of ideology with family law should be reexamined to move the focus away from ideological to sociological and economical effects.

In this way, the Meiji Civil Code reinvented the family system: rather than being predicated upon the relationship between the household head and the subservient family members (as these have been so far understood), the new family system placed families in a new relationship with the state. That is, each nuclear or stem family came to be defined by and directly held accountable to the state. In this way, the Japanese empire effectively incorporated its subjects, both in the metropole and in the colonies, into units of nuclear households.

## Chapter 2

### **The Widow Claims the Household: Widows and their Rights from the Chosŏn to the Colonial Period**

#### **Introduction**

On September 26, 1913, the Chōsen Superior Court saw the conclusion of a long and complicated civil case involving three plaintiffs and one defendant. The defendant, a widow named Madam Kwak, had initially sued the three plaintiffs for illegally occupying property that she had inherited from her late husband. The three plaintiffs claimed that they had each acquired the property through legitimate means. Kim Chin-chōl, one of the plaintiffs who claimed to be Madam Kwak's adopted heir, asserted that he had inherited the property from Madam Kwak. The other plaintiffs argued that they had received their share of the property from Chin-chōl as repayment for a loan. Denying any such relations with Chin-chōl, Madam Kwak claimed that she had never adopted him as her husband's heir.<sup>61</sup>

As the case progressed, the adoption contract between Kwak and Kim turned out to be a forgery by Paek, one of the plaintiffs. Even after it was discovered that he had used a fake chop to stamp Kwak's name on the contract, Paek still maintained that this did not change anything. Madam Kwak, he argued, could not be the owner of the property because Korean customs did not allow widows to inherit property:

According to Korean custom, when a household head dies and there is no male heir, the [widowed] wife succeeds him briefly as the property holder. But when she adopts a legitimate heir or when a son is born after the husband's death, the property ownership moves onto the adoptee or the son. There is nothing the wife can say to prevent this movement of ownership. ...The household head's wife, therefore, can be considered to inherit only the temporary management capacity of the property, not become the permanent owner.

However, the Superior Court disagreed with Paek, stating: "It is Korean custom for the wife to inherit the household head's property when he dies without a male heir and the household is then left only with the wife and the daughters. Therefore, the court's original decision to recognize the defendant [Madam Kwak]'s right to inherit her deceased husband's property is within legal rights." Eventually, Madam Kwak won the case and reclaimed her property.

Who was right about the Korean custom regarding widows and property? Did a widow have the customary right to inherit property from her deceased husband as the Japanese colonial court had ruled? Or did she not have that right, as Paek claimed? Was the colonial court

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<sup>61</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) Kōtō Hōin Hanketsuroku [*Verdicts from the (Chōsen) Superior Court*]

protecting the existing rights of the socially weak or extending women's rights by importing new ideas and reforming Korean families in the name of Korean customs? This case aptly illustrates how Korean customs were utilized within the colonial civil court in Korea to settle conflicts involving family matters. By way of the 1912 Ordinance on Civil Matters, Korean customs were the substantive law in family matters. But the ambiguity of the customs often led to argument over their contents in the courts. In a nutshell, this case also illustrates typical areas of familial conflicts presented before the civil courts in the early years of colonization: the boundary of family, verification of Korean customs, and women's rights. Where does one family end and another begin? Did the relatives of a lineage patriarch have any right to extend their claims across family boundaries as had customarily been done? What were the recognized customs among Koreans on various issues, and who had the authority to decide what they were? And what kind of rights did women have in Korea? Repeatedly brought up in the colonial court, these questions expressed the deep anxiety felt by Koreans about the new colonial family law.

Among the three common areas of conflict, the issue of widows' rights was central. A widow's right to inherit property was often defined in opposition to that of her brother-in-law or her father-in-law. Being part of the family yet having the potential to become an outsider upon remarriage, widows represented a particularly volatile point of conflict within the family unit—a point where the interests of the (widow's) nuclear family clashed with those of the lineage. The lawsuits thus often involved drawing a limit to the in-law's power over the widow's household, which oftentimes coincided with the boundary of her nuclear family. Historically in Korea, widows had special customary rights. Widows without a grown son could either become the proprietress of the household until her son reached adulthood or, if she did not have a son, she herself could become the house-head.<sup>62</sup> She also had the exclusive right to designate and adopt a suitable heir for the household. However, these long-standing rights also were subject to long-standing opposition, making their status as customary law vulnerable. In what follows, I will trace how the widow's rights were challenged starting from the late Chosŏn period, and how and why they came to be established as a customary law in the early colonial period.

Under the new colonial law, which, as we have examined in the previous chapter, strived to establish a new household system, the widows and their special rights became the bulwark through which the nuclear family was to be defined and defended against the reaches of lineage power. As was the case in the above lawsuit, acknowledging the customary rights of the widows often meant wrestling the nuclear household from the clutches of lineage power. Although conflict between widows and their in-laws over family property was as old as widow rights in Korea, the objective of the state was different in the colonial period. Through the traditional and customary rights of the widows in Korea, the Japanese colonial state aimed to enforce a new boundary around the nuclear family while limiting the reaches of lineage power. With strong lineage power within families posing a challenge to the colonial state's own power, the Japanese

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<sup>62</sup> Jung Jee-young finds that even widows with grown, even married sons were registered as the house-head in the seventeenth century household registers. Jung Jee-Young, "Chosŏn hugi ūi yŏsŏng hoju yŏngu - Kyŏngsangdo tansŏnghyŏn hojŏk taejangŭi punsŏk ūl chungsim ūro [Women Householders in the Seventeenth- and Eighteenth-Century Korea: Analysis of Dansung Hojuk (The Census Registers of Dansung County, Kyongsang Province) from 1678 to 1789]" (Ph.D. Dissertation, Sogang University 2001). p. 40-43



colonial state had an interest in limiting this power. Breaking up the lineage into individual nuclear families meant that the state could have a more direct route for its power to access the individual subjects, rather than have that power be relayed through the lineage patriarch.<sup>63</sup> Widows and their customary rights, which were unique to the Korean colony and did not exist in Japan, were a convenient means for the colonial state to achieve this aim. In what follows, I will examine the civil cases concerning widows' rights from the late Chosŏn dynasty comparing them with those from the early colonial period in order to demonstrate the changing strategies of both the widows in dealing with familial conflict over household property and the colonial state in newly colonized Korean subjects.

### **Widows' Rights in Korea – A Historical Overview**

Examining the history of widows' rights in the Chosŏn period reveals that widows in Korea had, in fact, many more rights to property and heir selection than the plaintiffs claimed in the above case. In her study of the history of Korean lineage practices from Koryŏ to the Chosŏn dynasty, Martina Deuchler has examined the exceptional number of rights retained by chaste widows in Chosŏn Korea. However, compared to the Koryŏ dynasty, women's rights to property inheritance became diminished during the Chosŏn dynasty. Women in the Koryŏ dynasty had enjoyed uxorilocal marriages, which enabled them to retain a close connection to their natal families. They had also enjoyed equal inheritance rights alongside their brothers as well as equal rights to ritual participation.<sup>64</sup> With the growing influence of the Confucian family ideology of lineal succession, these family customs became gradually phased out. Women in the early Chosŏn dynasty still enjoyed fairly strong inheritance rights as well as ritual proprieties. The custom of *ch'ongbu*, "eldest daughter-in-law," and her rights show the wide extent of special rights enjoyed by widows in the early Chosŏn dynasty. *Ch'ongbu* were not only able to succeed as ritual heirs of the family line, they were also able to designate their husbands as heirs. As *ch'ongbu*, the widows could move into the lineage's main house and take over possession of the land and slaves set aside for the support of ancestral rituals. In terms of ritual succession, widows had precedence over their husband's brother's sons. These special rights were probably justified by the fact that it prevented the need to select a collateral agnate as heir, and thus could prevent the dispersion of family property.<sup>65</sup> As Confucian ideology became stronger in the Chosŏn dynasty, widow remarriage was strongly discouraged and measures were devised to suppress it. These measures included formulating other rights that could act as incentives for the widows to remain single. If she remained chaste and did not remarry, the primary wife of a high ranking official who became widowed could receive part of her husband's rank land (*kwajŏn*) as "land to preserve her faithfulness (*susinjŏn*)."<sup>66</sup> Widows also enjoyed usufructuary rights over her

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<sup>63</sup> Hong Yang-hee, "Chosŏn ch'ongdokpu ui kajok chŏngchek yŏngu: ka chedo wa kajŏng yideologi rŭl chungsim uro [The Family Policy of Japanese Colonialism in Korea: with the focus on family system and home ideology] ". p. 39-43

<sup>64</sup> Deuchler, *The Confucian transformation of Korea : a study of society and ideology*. p. 66-69

<sup>65</sup> Ibid. p. 157-158

<sup>66</sup> Ibid. p. 278

husband's estate and had the prerogative to select an heir if she did not have a son of her own.<sup>67</sup> Although this right was forever under challenge by the male elite in the Chosŏn society because of the threat that it posed to the male patriarchal order, it was retained or condoned because it supported the status of chaste widowhood, keeping the widows from remarrying into a new family. These usufructuary rights were thus critical, not only in upholding the Confucian ideal of chaste widowhood but also in maintaining the integrity of family property and ensuring the family's genealogical survival, especially if the widow had young sons to rear.

Jung Jee-Young has also detected special status of the widows in the late Chosŏn dynasty. Through household registers of Dansŏng County in Kyŏngsang Province, Jung examined the records of widows who served as household heads (or householders) in the seventeenth and eighteenth centuries.<sup>68</sup> Contrary to general perception, household heads in Chosŏn Korea were not exclusively male and many widows registered as household heads even when they lived with their sons, were married or unmarried, and, in rare cases, even when they lived with their new husbands. In the eighteenth century, Jung detects a declining trend in women household heads and attributes this decline to two reasons. First, more families were following state recommendations to register the male members of the families as the household head. An eighteenth century (either from 1714, or 1774) reference for household registration recommends that "should there be a grown son, he should be registered as the household head even if the widow manages household matters."<sup>69</sup> Second, since the role of the household head involved various duties (of tax payment) to the state rather than rights and authority over the family, a son's inheritance of the household headship could have been interpreted as an act of filial piety.<sup>70</sup> After the turn of the eighteenth century, the neo-Confucian ideology of filial piety and chastity gained great strength in Korea—a fact corroborated by the erection of numerous monuments to commemorate filial sons and chaste widows. With these changes strengthening the patrilineal line of the family in the beginning of the eighteenth century, the status of the household head increasingly came to be passed on directly to the sons rather than to the widowed wives. This did not necessarily mean that the status of the widows declined in the family because they still often retained the authority to manage the household property. However, it did mean that they increasingly lost their capacity to represent the family in the public realm.<sup>71</sup>

The male elites in the Chosŏn court did not welcome these widow rights. Deuchler relates a court debate that tried to curtail these widow rights during King Chungjong's reign. The rights of *ch'ongbu* often caused family conflicts. The widows sometimes squandered and even sold the family property, alarming the husband's brothers. Often and especially when the widow only had daughters, she became reluctant to secure and adopt an heir, which became a source of tension with her mother-in-law who was more interested in securing an heir for the family line. In some

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<sup>67</sup> Ibid. p. 221, p. 265

<sup>68</sup> Jung Jee-Young, "Chosŏn hugi ūi yŏsŏng hoju yŏngu - Kyŏngsangdo tansŏnghyŏn hojŏk taejangŭi punsŏk ūl chungsim ūro [Women Householders in the Seventeenth- and Eighteenth-Century Korea: Analysis of Dansung Hojuk (The Census Registers of Dansung County, Kyongsang Province) from 1678 to 1789)]."

<sup>69</sup> Ibid. p. 85

<sup>70</sup> Ibid. p. 89-91

<sup>71</sup> Ibid. p. 93

cases, the younger brothers-in-law resented the widow and expelled her from the family. In the first year of King Chungjong's reign, when King Sejong's twelfth son, who was also Musangun's eldest son, died without an heir and his younger brother usurped the ritual heirship bypassing his older brother's widow, the issue of widow rights came to the court's attention. Although the court reprimanded the younger brother for his inappropriate action, it also ruled that the prerogatives of the widow were too strong and contradicted the patrilineal principle of the inheritance practice. The court eventually decided that the widow could not succeed to the ritual heirship unless her husband had already succeeded as a ritual heir. Instead, the brother would succeed as the ritual heirship and would inherit the main house, which could not be sold.<sup>72</sup> A restriction was also placed on whom the widow could adopt as her husband's heir. Utilizing the stipulation that a non-agnatic child under three years of age could become an "adopted son (*suyangja*)"—eventually becoming the legitimate heir—some widows adopted nephews from their natal families as the heir. This compelled the legislators to ban this practice, which threatened a proper patrilineal succession, by the time *Taejŏn chuhae* (an annotation to *Kyŏng'guk taejŏn*) was published in 1554.<sup>73</sup>

Under the strengthened ideology of patriarchy in the Chosŏn dynasty legal culture, the widow's rights to inheritance met with more challenges. Widows repeatedly came forward to claim their property rights against their in-laws—an action that was frowned upon during the Chosŏn dynasty, when single mothers of heirs to the lineage were expected to be the pillar of patriarchal order. Yet the continued legal scuffles revealed how the widows' property rights were continuously challenged rather than protected by the in-laws as compensation for their service to the lineage.<sup>74</sup>

### Changes in Widow Rights in the Colonial Period

Customary rights of Korean widows survived into the colonial period. But perhaps due to resistance to widows' rights in Chosŏn dynasty, their rights appeared less than clearly defined in custom surveys carried out by the colonial state. Item number 164 ("What Happens When there is No Legally Assumed or Designated Heir to the House-head?") in the 1913 Customs Survey Report defines widow rights in the following manner,

When a household head dies without an heir to conduct ancestor worship, an heir needs to be chosen, which amounts to nothing less than the action of adopting a son after the death of the adoptive father. The person to decide the adoption is the wife (that is, the widow). If there is no wife, then this responsibility falls upon the mother [of the deceased household head]. If neither of these persons is alive, then the lineage association is to decide the adoption.<sup>75</sup>

<sup>72</sup> Deuchler, *The Confucian transformation of Korea : a study of society and ideology*. p. 161

<sup>73</sup> Ibid. p. 221

<sup>74</sup> Cho Yun-sŏn, *Chosŏn hugi sosong yŏngu [Study in Lawsuits in Late Chosŏn Dynasty]* (2002). p. 160-161

<sup>75</sup> Chōsen sōtokufu, *Kanshū chōsa hōkokusho [Customs Surveys Report]* (1913) Kankoku heigōshi kenkyū shiryō (Tokyo, 1995). p. 352

Another item, 168, “Who Can Become the Property Heir?” states,

When a household head dies, the property heir is the heir to the ancestor worship, others who can perform the ancestor worship, or the deceased’s brother. Women cannot become an heir to property. The heir has to be someone within the household; those living in another household cannot become a property heir. ...When there is no son, either the wife receives the property or an adoptee is chosen and is given the adoptive father’s portion of the property, but the custom is inconsistent on this point. Also, when a family member [who is not the household head] dies while already married, his eldest son inherits both the ancestor worship and property, ... But if the deceased family member does not have a son and he is the eldest son, his property is passed on to his father. If he is a younger son, his wife inherits the property. If the family member is not married or is a daughter, the father inherits the property.<sup>76</sup>

In other words, when a household head dies without an heir, the widowed wife had the prerogative to choose and adopt a suitable heir. In terms of property, the widow could inherit property only when there was no other suitable heir: that is, a household head (usually the father-in-law), a natural son, or an adopted son. In both cases, the widow’s rights had precedence over those of her mother-in-law. The widow rights described here, albeit some obscurity, are very similar to those in the Chosŏn dynasty described above.

As the initial results of a custom survey and not codified laws, however, these customary rights were not only expected to change over time, they were, in some cases, also contradictory to other survey results. Given this fact, the colonial civil courts did not blindly follow the content of the survey reports; they picked and chose what they recognized; at times, they even commissioned additional surveys or questionnaires to further investigate certain customs.<sup>77</sup> Therefore, legal precedents produced by the colonial courts had a stronger bearing rather than the custom survey reports on determining how the customs were utilized in the courts. Before I examine the actual cases, I will briefly examine how the colonial legal system was set up and what role the customary laws played within this system.

Colonial law in Korea was a mixture of the Japanese and Korean codes and customs. As soon as the Annexation was announced, the Government-General announced Law 30, the Law Concerning Laws and Regulations to be Enforced in Korea, which provisionally maintained the codes from the Chosŏn dynasty.<sup>78</sup> In 1912, the Government-General promulgated the penal and civil laws in Korea, respectively called Ordinance on Penal Matters (*keijirei*) and Ordinance on

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<sup>76</sup> Ibid. p. 356-357

<sup>77</sup> Answers to these questionnaires were published as “*Kaitō* (Response)” and “*Tsūtō* (Notice)” in the *Shihō kyokai zasshi*.

<sup>78</sup> For more information on the initial arrangement of the colonial legal system in Korea, please see, Chulwoo Lee, “Modernity, Legality, and Power in Korea Under Japanese Rule,” in *Colonial Modernity in Korea*, ed. Gi-Wook Shin and Michael Robinson, Harvard-Hallyum Series on Korean Studies (Cambridge (Massachusetts) and London, 1999).

Civil Matters (*minjirei*). The Ordinance on Penal Matters implemented a mixture of the Japanese Penal Code and Chosŏn dynasty penal codes in Korea. The Ordinance on Civil Matters implemented Japanese Civil Code on all matters except for family matters and cases concerning Koreans that were not a matter of social order. The likes of widow cases that I examined above were therefore judged not by the Japanese code but by the Korean custom. Choosing to apply Korean customs to family matters reflected how the Japanese defined the difference between Koreans and the Japanese. Such arrangement was opposite to what Itō Hirobumi and Ume Kenjirō had envisioned when they first blueprinted a civil law for Korea. They had originally planned to write a family law that was more assimilated into the Japanese code, and a separate law for commercial matters. As it turned out, the difference between the Japanese metropole and the Korean colony came to be defined by the different family laws and an emphasis on family matters. Matters concerning marriage, adoption, and inheritance became the prominent features of Korean social life to be scrutinized by the colonial state. Muffled were other aspects of customary rules, such as rights over property, tenancy, and mortgage. As a result, issues like widow rights carried a different and perhaps stronger weight than they had during the Chosŏn dynasty. If before, widow rights were more an issue of protecting widow chastity and lineage, now it became an issue of defining the ethnic characteristics of the colonial society. As such, it became an object of intense study in the colonial state.

As shown in the above case, all cases utilizing family customs quickly became an anthropological exercise of defining authentic Korean family practices from inauthentic ones. Rather than faithfully collecting existing customs, however, the colonial state inadvertently invented new customs for Koreans. The customs survey ended up throwing all the existing legal codes, including all Chosŏn dynasty codes regarding family matters, into a fluid mixture with non-codified locally practiced customs.<sup>79</sup> This gave new customs the chance to be nationally recognized but it also made previously recognized laws such as widow rights (which involved distinguishing the proper customary laws from morally ideal rules and rules that were merely tolerated) more vulnerable. Family customs were first surveyed under the auspices of the Protectorate government between 1908~1910; and the results were first published in 1912.<sup>80</sup> As was the case in Meiji Japan, the survey takers found it difficult to discern morally charged ideals from customary laws. They also struggled to figure out how to treat local variants. Korean customs were not nationally homogenous; even a cursory survey of customary practices in 1908-1910 revealed a great diversity of local practices. In the process of compiling the Customs Survey Report, local variations were erased. In institutionalizing a set of customary practices known as “the Korean custom,” some customary practices had to be inevitably excluded and ignored. If certain customs were found to be in conflict with certain principles of the colonial law, they were not incorporated into the colonial legal system even if they fit a broad definition of national custom. For instance, all customs related to concubines were not acknowledged as part of the customary law. This was because concubinage was being slowly subjected to a ban

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<sup>79</sup> Chōsen sōtokufu chūsūin, *Chōsen kyūkan seido chōsa jigyo gaiyō* [Overview of the Customs Survey Project in Korea] (Keijo, 1938).

<sup>80</sup> A second edition was published a year later (September 30, 1913) with minor adjustments. The order of the custom items were the same, but four items were cut to total of 404 items. Ibid. p. 17-19

until it was fully outlawed in 1915. The colonial court thus had to not only pick and choose among the diverse customs, it also had to exclude those Korean customs that did not fit into the colonial legal scheme, replacing them with alternatives (which were usually comparable articles from the Japanese Civil Code). The end product was a nationalized version of customs that was both new and alien to many Koreans.

### **Appeals of Widows from the End of the Chosŏn Period**

A number of appeal letters that survive from the last years of the Chosŏn dynasty (1895-1905) gives us a glimpse of the state of widow rights on the eve of colonial rule. An examination of these letters gives us a useful point to gauge the nature and degree of transformation that took place between the late years of the Chosŏn dynasty up to the early years of colonization. These letters are especially valuable considering how many works on colonial civil judicature rely on the colonial customs surveys themselves to understand the customs in the early years of the colonial period. Utilization of the custom surveys is legitimate in the absence of alternatives, but it is also vulnerable to the biases of the source itself, especially since the colonial surveys do not expose the ways in which the local varieties of customs were selected and omitted. These appeal letters provide an imperfect but valuable alternative to colonial surveys of the pre-colonial Korean customs.

Appeal letters from the late Chosŏn dynasty reveal the precarious status of widows in the last years of the Chosŏn period. Perhaps because they had special rights, many widows were perceived as burdens and even threats to the family. Accordingly, they were subject to extortion, threats of expulsion from the family, and/or pressure to remarry for monetary compensation. Although, widows had the customary right to assume the household headship of a branch family, they were often subject to lineage pressure in the ways mentioned above. As a result, as we see in the appeal letters, many ended up committing suicide.

The appeal letters that I examine in this section date from the last decade of the Chosŏn dynasty (1895 to 1905) and were published by the Kyujang'gak of Seoul National University under the title, *Pŏppu sojang*. Pŏppu amun (the Ministry of Legal Affairs) was a judicial institution established by the new Kabo cabinet as part of its government reform between 1894~1896. Serving as a kind of an appeals court, the Head of the Ministry of Legal Affairs received letters requesting him to revoke the decisions handed down in the local courts administered by local magistrates. Faced with foreign threats of imperial expansion, domestic discontent, and Japanese reform pressure, the Chosŏn court carried out various reform measures to modernize the government. The establishment of the Ministry of Legal Affairs (*pŏppu*) was part of a massive legal reform carried out by the Kojong's Kabo Reform Cabinet. Beginning in 1893, the court established the Ministry of Legal Affairs as the sole administrative apparatus for legal matters. Judicial matters were now to be handled by the Provisional Court of the Department of Justice (*Pŏpmu amun kwonsŏl chepanso*). This was the beginning of the division of administrative and judicial matters in Chosŏn Korea. In 1894, the Law of the Constitution of Courts (*Chepanso kusŏngbŏp*) was promulgated, signaling the beginning of a modern court system.<sup>81</sup> According to this law, first trials were handled in the local courts; appeals and cases

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<sup>81</sup> Pak Pyŏng-ho, *Hanguk pŏbchesa go - kŭnse ūi pŏp kwa sahoe [Research in Korean Legal System - Law and Society in Early Modern Period]* (Seoul, 1974). p. 311

concerning high level officials (*Chigimgwan* and *Chuingwan*) were to be handled in the occasional circuit courts (*sunhoe chepanso*); and the third and final trials were to be handled at the Superior Court (*Kodŭng chepanso*, later *Pyŏngriwon*). A Special Court for members of the royal family was also to be established. But in reality, only the Hangsong Court (for first trials in the capital region) and *Pyŏngriwon* were established, and local courts were placed within prisons or local administrative houses while trials were presided over by local administrators. In other words, little, in fact, had changed from the previous Chosŏn dynasty legal system; there was no division between administrative and judicial matters, and judicial matters were handled as they had previously been handled in the pre-reform period.

The legal culture that was modeled after the Chinese tradition still had a significant influence on the judicial culture in which these letters were produced. In this culture, the ideal of the legal principle was to follow *li*, or propriety. The legal codes, therefore, made allowance for different treatments of crimes depending on the status and gender of the person. Certain crimes, if committed by a lower status person against a higher status person, warranted a more severe punishment, while other crimes, such as adultery or rape, received a harsher punishment if committed by a higher status person. Lodging lawsuits against one's elders or superior were discouraged and could warrant the death penalty regardless of who was at fault.<sup>82</sup> No clear division existed between the penal and civil cases. The legal codes of Chosŏn were focused on penal codes, and there was no separate codified civil law. Instead, civil matters were cited case-by-case using the numerous (penal) codes scattered throughout the Code. Cases that were not previously mentioned were decided based on legal principles deduced from other codes or by custom.<sup>83</sup> Also, there was only a skeleton of civil procedural law, the purpose of which was not to protect individual rights in the procedure but to hasten the settlement of civil cases and eventually reduce their number (this was done through setting a time limit for the duration of the trial or for the period that a decision was effective).<sup>84</sup> Under the Confucian state of the Chosŏn dynasty, the legal system concentrated on penal codes and civil lawsuits were discouraged; the latter were perceived as indications of selfish and disharmonious relationships. In terms of its legal culture, the ideal of the Confucian state was to have no lawsuits ("*musong*").<sup>85</sup> Within these circumstances, the majority of civil cases concentrated on issues of arable land (i.e., boundary disputes and cultivation rights), slaves (especially those who had run away), and gravesites. All these issues were considered important in the maintenance of a Confucian social order. Less likely to appear in the courts were familial conflicts over property, including those involving widows, particularly because it was considered inappropriate for family members to lodge lawsuits against each other. One of the major concerns of the state was the breach of propriety. For example, when a grandson became entangled in a lawsuit for selling a family property without the permission of his grandmother, he lost the case not because he was not the legitimate owner but because he had breached propriety by instigating a lawsuit in the first place. It was also considered inappropriate for a widow to sue her in-laws, yet many widows still came

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<sup>82</sup> Cho Yun-sŏn, *Chosŏn hugi sosong yŏngu [Study in Lawsuits in Late Chosŏn Dynasty]*. p. 158

<sup>83</sup> Kim Pyŏng-hwa, *Han'guk sabŏpsa [History of Korean Judicial System]*, 3 vols., vol. 2 (Seoul, 1980). p. 212

<sup>84</sup> *Ibid.* p. 212-216

<sup>85</sup> Cho Yun-sŏn, *Chosŏn hugi sosong yŏngu [Study in Lawsuits in Late Chosŏn Dynasty]*.

forward with cases accusing their in-laws of taking away property that they had inherited from their late husbands. In some cases, the widows even sued their natal families for property.<sup>86</sup> Still, given cultural expectations to respect propriety, it was difficult for these widows to win their cases even when they had a rightful ownership of the property. Due to these circumstances, conflicts between widows and their in-laws erupted more often as penal cases rather than civil cases.<sup>87</sup>

Most of the cases concerning widows that were mentioned in the appeal letters to the Ministry of Legal Affairs (*pöppu sojang*) involved attempts, or actual incidents of rape or abduction, both of which were considered serious crimes in Chosŏn dynasty. According to the Chosŏn dynasty codes, Taejŏn Hoetong (1865), all rape cases were punishable with a death sentence. What is interesting about the sexual crimes in the appeal letters from the late nineteenth century are how often they began as monetary conflicts. On the surface, many of these cases seemed to be simple acts of “abducting and raping (*kŏpgwa*)” a widow—with the cases often filed by the in-laws on behalf of their widowed daughters-in-law, who, more often than not, had already committed suicide out of shame. Upon closer examination, however, they often held complex dimensions other than the moral prescription of female chastity and the immoral outburst of male desire. Accused men often pleaded their innocence by saying they had entered into marital relations with a widow with her mutual consent or sometimes with the assistance of a matchmaker. These men rebutted the charges of rape with accusations that the in-laws were trying to sell off their widowed relative to another bidder. In other cases, the in-laws were more forthright with their intention to sacrifice the widow to further the economic interests of the family. In one letter, a widow charged her daughter’s in-laws for trying to extort money from her; they threatened to have their son divorce her daughter if she did not give them money.<sup>88</sup> The widow charged that when she refused to bow to their extortion threat, her brother-in-law attempted to rape her daughter. Rather than focusing on the victimhood of the widows

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<sup>86</sup> Ibid. p. 158-160

<sup>87</sup> It is difficult to consider civil cases in the East Asian legal tradition since civil codes did not exist separate from penal codes, which dominated the judicial system. There is a famous debate about whether China possessed civil law tradition before the impact of Western legal tradition. See Jerome Bourgon, "Rights, Customs, and Civil Law under the Late Qing and Early Republic (1900-1936)," in *Realms of Freedom in Modern China*, ed. William C. Kirby (Stanford, 2002). and Civil Law under the Late Qing and Early Republic (1900-1936)," in William C. Kirby, ed. *Realms of Freedom in Modern China*, (Stanford University Press, 2002), Jerome Bourgon, "Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing," *Late Imperial China* 23 (June, 2002, 2002). no. 1 (June, 2002): 50-90 and Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (1996). 1996. Huang has argued that China did have civil law tradition, although it was not codified or compiled as such. Bourgon denies that these were civil laws; these were merely condoned as abnormalities, or local eccentricities, which is far from a norm building nature of a set of laws. Similar issues could be raised regarding the Korean case, but this is beyond the scope of this dissertation. In this chapter I will focus on the widow and in-law conflict, and how this illuminates the position of widows in the family. Whether or not the cases were civil or penal in nature is less important to this objective.

<sup>88</sup> *Pöppu sochang [Appeal Letters to the Ministry of Legal Affairs]*, Kyujanggak charyo ch'ongsö.; Kumho siriju sosongan p'yon; ([Seoul], 2000). vol. 7, p. 523



represented in these letters, however, I would like to focus on the volatile, precarious, and marginal position of the widows in the Korean family system that enabled such crimes to occur. While the special rights of widows, examined by Deuchler and Jung, may have protected them in some cases, in the cases that were discussed in the appeal letters collection, these rights may have simply made their situation worse.

In the above cases, “*kōpgwa*” or raping of widows was far more than a simple case of sexual offense. In many instances, the sexual offense was either a mask or the end result of what was essentially an economic conflict. Those accused of raping a widow were often men who had gotten on the wrong side of the in-laws by providing an insufficient amount of money for the widow. In one of the above cases, a daughter-in-law was threatened with rape by her brother-in-law when she refused to give him money. All these cases paint a very different picture of widows from the popular image of chaste widowhood under Confucianism.

The following case from 1898 is a typical example of “a widow rape.” It clearly illustrates the precarious position of widows who were subject to both forced remarriages by their in-laws as well as threats of being labeled unchaste.<sup>89</sup> Too poor to get a proper daughter-in-law, the plaintiff, Chōng Tongil, paid 100 coins to a widow’s father-in-law to marry off his son, Sōk-hyōn, to the widow, Chang Un-bong. Soon after, the widow’s relatives severely reprimanded the father-in-law for the marriage and demanded the widow back. But when the widow returned to her natal family, she was subjected to harsh treatment for having defiled her chastity; “unable to bear the shame,” she eventually committed suicide. The Chang family, in turn, accused the plaintiff’s son of “raping the widow” and he was imprisoned. In the letter, Chōng, the father, pleaded that his son was innocent, and that his son should not be charged with rape when the widow had come willingly to the wedding site.

The above case contained many typical elements of an appeals letter for a widow rape. First, the letter writer alluded to the extreme hardship of himself or the imprisoned in order to justify the special attention of the Head of the Ministry of Legal Affairs. Second, it tried to prove the complicity of the widow in willingly giving up her chastity. In this case, this complicity was expressed through the actions of her relatives. In other cases, it was often demonstrated by the history of a widow’s multiple remarriages. Third, it tried to prove that the widow’s relatives (at least according to the plaintiff) had a monetary incentive to marry her off, that the plaintiff had either paid the relatives for the widow’s hand in marriage, or that he was later extorted by the relatives for a greater monetary compensation. Such motives of monetary compensation strengthened the plaintiff’s claim that the marriage was consensual and not a case of rape or abduction. Whether or not we believe the plaintiff, we can assume that widows were often driven to suicide due to these moral and economic pressures.

The following case, meanwhile, which would fall into a civil case category, illuminates the marginal position of widows in their marital families as well as the familial dynamics behind such rape cases.<sup>90</sup> Cases like this show how even when rape or re-marriage were not an issue,

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<sup>89</sup> Ibid. vol. 1, p. 403

<sup>90</sup> There were two exceptions, in one case, a widow accused her in-laws of taking away her land, house and clothes. - Ibid. v. 5, p. 94. In another case, a brother sued his cousin for inappropriately using the land documents, that his widowed sister-in-law entrusted to him. - *Pōppu sochang* [Appeal Letters to the Ministry of Legal Affairs]. v. 7, p. 593

tensions over family property still ran high between the widow and her in-laws. A case from 1906 involved a widow's cousin-in-law stealing a land document that the widow had inherited from her husband.<sup>91</sup> The cousin-in-law had persuaded the widow to entrust the household's harvest document (*chusu mungŏn*) to him. Since the widow's son was still young and the document needed safe-keeping, the widow agreed. Seven years later, when her cousin-in-law had not given her or her household any of the harvest, the widow realized that she had been deceived and appealed to her brother-in-law for help. When the brother-in-law sued the cousin-in-law,<sup>92</sup> the latter claimed he was the original owner of the document and that the brother and widow were both lying.

These cases show that while the widows had rights of inheritance and the prerogative to either choose an heir or act as the guarantor of the heir, they were still vulnerable to the deceitful actions of their in-laws who coveted her property. When the widows lived within a legal system where civil laws focused on reducing legal conflicts and did not clearly define the parameters of people's rights, they had limited recourse to claiming their rights. Other cases of widow and in-law conflict that continued to emerge into the colonial period (one of which we have examined in the beginning of this chapter) show that similar family tensions continued across the late Chosŏn and colonial divide. This not only shows that such family dynamics were slow to change, it also dispels the popular perception that colonial rule dramatically changed (for better or for worse) Korean families and the lives of women.

What is perhaps more significant, these cases show how similar family conflicts were dealt with very differently under the two different legal systems. While the widows in the nineteenth century letters were invariably depicted as victims of moral crime or loss of propriety, the widow of the 1913 case was a bearer of certain rights that she demanded to be recognized. Also, while innocence of the widows in the nineteenth century letters were contingent upon their moral authority (that is, their chastity or propriety that derived from being reputable members of their families), the rights of the widows in the colonial period cases were independent of any moral qualities. Rather than reflecting any drastic change in consciousness (in what was after all, a short ten year span), these changes reflected the different culture of judicial process within which the widows operated. They also show how flexible these widows were in responding to these changes.

### **The Concubine and Her “Separate Property”**

The two cases I will examine next show a sharp contrast from the above cases from the late Chosŏn dynasty. While the following cases concern a similar type of conflict between the widow and her in-laws, the litigants who feature in the colonial cases present markedly different attitudes and arguments. Previous consideration of propriety was abandoned. The widows

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<sup>91</sup> *Pöppu sochang [Appeal Letters to the Ministry of Legal Affairs]*. vol. 7, 593

<sup>92</sup> The lawsuit was first brought to the Japanese consulate. He had heard that the Japanese court would be fairer in judgment. This was in Changwon. The area (Masan/Changwon) was designated a Japanese concession in 1902, in addition to three more cities, Pusan (1877), Wonsan (1879), and Inchon (1883). The letter alludes to the fact that his decision to bring the case to the Japanese court first not only complicated the issue but also disadvantaged his case to the Ministry of Legal Affairs. - Ibid. vol. 7, p. 593

involved in these cases no longer needed to appeal to their moral value to bolster their claims. These cases show how some widows were able to make the new household system and the strengthened house-head rights benefit their property rights. Both cases involved a woman named Yi Po'gwang'hwa and large parcels of land. I will show how Yi devised a perfect discursive strategy to maximize her rights within the parameters of the colonial household system.

As the concubine of the late Han Che-uk, Yi ran a successful bar-restaurant (*chumak*) and accumulated great wealth. The problem arose when, after 40 years of cohabitation, her husband died. Upon his death, Han's son, Han Kyu-yong, claimed all of the couple's property. When Han sold off a piece of the land, Yi sued to reclaim the 400 *majigi* of land.<sup>93</sup>

Yi argued that the land was her "Separate Property." "Separate Property" was a Japanese Civil Code term for property owned by the wife or the adopted son-in-law (*muko yōshi*).<sup>94</sup> This term was used to protect a designated property from the household head. While the household head retained the management rights of the property, the wife of the adoptee could reclaim the property in case of a divorce or severance of adoption ties (*p'ayang*). Thus, the assumption was that a household head held exclusive ownership of a household's property unless it was specially designated as "Separate."

Yi argued, since it was her business, the money she earned from it was hers and so was the land that she had bought with this money. To support her case, she provided two witnesses who testified that they had indeed sold the land to her. The defendants did not deny that it was Yi who had bought the land. But, they argued that she had been merely acting on behalf of her husband who had been sick for many years. They had many witnesses testify that Han Che-uk had, indeed, been ill for many years and thus incapable of handling the legal transactions of business.

From the local to the Superior Court, all the courts acknowledged the defendants' argument. The Superior Court stated that "it was rare for Korean women to have a 'Separate Property (*tokuyū zaisan*) between 1898 and 1902.'"<sup>95</sup> Since it was assumed that "Separate Property" was a rare designation in Korea, the burden fell on Yi to prove otherwise. Ultimately, the fact that Han was sick, and probably needed a proxy to carry out his legal transactions tipped the scale against her. Ironically, for the reason that her husband was too weak to carry out his own business, Yi Pogwanghwa was denied all ownership of the property.

In the Superior Court trial, Yi used two points to protest this ruling. One was that even though Han Che-uk was ill, he was still strong enough to take care of family matters, implying that she did not need to act as his proxy in purchasing the land. Another directly critiqued the court's interpretation of the Korean custom on "Separate Property." Yi argued that it was not true

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<sup>93</sup> 400 *majigi* is 198348 square meters, 49 acres.

<sup>94</sup> Meiji Civil Code Article 807: "When the wife or the married-in husband brings property into the household upon marriage, or acquires it in her/his name during marriage, it is called "Separate Property (*tokuyu zaisan*)". If there is property that is unclear whether it belongs to the wife or the husband, it is assumed that it belongs to the husband or the female head of the household."

<sup>95</sup> The Custom Survey Report states that although separate property is recognized, its rights are severely limited by the power of the house-head, older family members, or the husband. - Chōsen sōtokufu, *Kanshū chōsa hōkokusho [Customs Surveys Report] (1913)* p. 292-293

that “Separate Property” was rare in Korea. It was both common among upper class women to have separate property, and not uncommon among middle or lower class wives and concubines. The Superior Court still denied the latter point, maintaining that “Separate Property” was a rarity in pre-colonial Korea and Yi eventually lost the case.<sup>96</sup>

A few years later, Yi came back before the courts with another case. In the second set of lawsuits, which came to the floor of the Superior Court floor on February 16, 1917, Yi was once again entangled in a dispute over the ownership of a piece of unquantified land. The defendants, headed by Han Kyu-yong, the son, had won a case at the Appeals Court (*fukushin hōin*), arguing that all of the couple’s wealth was generated from the initial capital provided by Han, the husband to Yi’s business. Therefore, the land belonged solely to Han, which, in turn, made Han Kyu-yong the sole legitimate inheritor. In an effort to tarnish Yi’s reputation, Han Kyu-yong and the other defendants provided seedy details of Yi’s life. Before meeting Han Che-uk, she had been married to three other men (Yi, Pak, and Kim), and before coming to live with Han Che-uk, she had been poor and working as a laborer in an oil factory.

In response, Yi questioned how profits from her business efforts should be automatically considered her husband’s ownership. In addition, Yi argued that it was Korean custom for a concubine to keep the profits from her business as “Separate Property.” After examining the evidence, the Superior Court concluded that Yi’s contribution to the business alone made her eligible to become the owner of the land.

In Korea, when a wife or a concubine<sup>97</sup> cohabits with the husband, any non-designated [i.e., separate] property should be presumed to be the husband’s.<sup>98</sup> But this is only a presumption, [reserved] only [for cases] when the ownership is unclear. When a wife or concubine, while cohabiting with the husband, purchases a property with the profit earned from her own business, she should be given ownership of this property. The previous decision [of the Superior Court, referring to the case discussed above] only states that it is rare for women in Korea between 1898~1902 to have “Separate Property”; it does not deny [the possibility] for a wife or concubine to have “Separate Property.”

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<sup>96</sup> Another important custom cited in Yi’s argument was about the title deed. Yi, in her first point of appeals, claimed that since she had the title deed, she had the ownership of the land. According to “long-standing Korean customs”, Yi argued, whoever has the title deed is the owner of the listed land. Yet, the court denied such custom. “The title deed verifies the ownership when the owner of the title deed confirms the ownership of the land. When the ownership is questioned, the title deed alone cannot verify the owner of the land.”

<sup>97</sup> While the litigants all seem to believe that wives and concubines customarily had different rights, the Superior Court seems to be inserting its intention to treat wives and concubines the same way in terms of rights to own “Separate Property (*tokuyu zaisan*).”

<sup>98</sup> This is an exact translation of the Meiji Civil Code Article 807. “When the wife or the married-in husband brings property into the household upon marriage, or acquires it in her/his name during marriage, it is called “Separate Property.” If there is property about which it is unclear whether it belongs to the wife or the husband, it is assumed that it belongs to the husband or the female head of the household.”

Based on evidence from the previous case, the Superior Court went on to say, that it was clear from Han's acknowledgment that it was Yi's single-handed management of the business which led to the accumulation of wealth necessary to buy the land at issue. The fact that Han Che-uk was sick and unable to contribute to the business now became the basis for legitimizing Yi's ownership to the property and wealth. The Superior Court also dismissed the Appeals Court's argument that cohabitating with her husband automatically gave the husband ownership of Yi's profits and wealth. That is, cohabitation did not automatically rule out the possibility of "Separate Property."

This decision was the first in Korean history to acknowledge the wife's right to own "Separate Property." The introduction of the Separate Property concept was important in establishing and stabilizing the household system. The concept involved the assumption that the household head had an exclusive right to the ownership of household property unless designated otherwise. The importance of the concept is evident from the number of times that the custom was surveyed from an early period. Such surveys were carried out as early as 1913 in a number of locales along with other issues. Three reports that survive from the cities of Chŏnju, Keijō (Seoul), and Ch'ōngju all acknowledged that the sons had the right to own property separate from the household head.<sup>99</sup> Accounts on wives were equivocal. All acknowledged that women traditionally had the right to own Separate Property, but they differed as to what was to be included in the Separate Property and also the extent to which the husband could exercise rights over it. In either case, it is clear from the custom survey reports that whatever property rights the Korean women had, or were believed to have had (by the male interviewees), they were not neatly contained within the Japanese "Separate Property" concept. The interviewees seemed to say that all family members<sup>100</sup> had the right to their own property regardless of their status in the family (i.e., whether or not they were heir and whether or not they were dependent on the family economy). Even women were deemed to possess such a right. But they also acknowledged that the household head had much control over the usage and disposal of such property. They seemed to believe that this fact did not infringe upon the ownership of Special Property, and thus it appears as if the infringement on the property rights of the family members was culturally acceptable but not legally substantive. The above decision in 1917 introduced the Japanese concept of Separate Property into Korea to override the local and substantive varieties of its Korean counterpart. Even though it constituted an importation of a Japanese code into Korea, it was done in the name of Korean customs. As such certain customary prerogatives that the household heads may have had were deemed cultural and thus legally unsubstantial. Along with the processes of editing and compiling the custom surveys, legal decisions like these created a new set of customs that felt more foreign to many Koreans, even though they were presented as their own customs.

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<sup>99</sup> Ando Shizuka, "Shinzoku ni kansuru jikō [Items Concerning Family] - Chŏngju," (1913). Ando Shizuka, "Shinzoku ni kansuru jikō [Items Concerning Family] - Chŏnju," (1913). O Yun-jŏk, "Shinzoku ni kansuru jikō - Keijō [Items Concerning Family - Seoul]," (1913). The content of these surveys were similar to the results in the Customs Survey Report. - Chōsen sōtokufu, *Kanshū chōsa hōkokusho [Customs Surveys Report] (1913)*

<sup>100</sup> "Family members" is a translation of "kazoku". But they refer only to male family members, i.e. sons or brothers: wives are dealt as a separate category.

In the above two cases, Yi Pogwanghwa also challenged the definition of concubine that the colonial state and the plaintiffs were trying to impose on her. She resisted the plaintiffs' strategy to use her status as a concubine to slight her moral character. And even though the colonial court tried to suppress her identity as a concubine and treat her as a wife, Yi proactively reinterpreted the meaning of concubinage and portrayed herself as an ambiguous part of the family. Meanwhile, in its decision, the Superior Court acknowledged that the property was bought using the money that she had saved through her own labor; however, it still refused to acknowledge special customary rights for concubines, which it was trying to phase out in Korea. Therefore, rather than treating Yi as a concubine with an ambiguous position in the family, it treated her as Han Che-uk's wife with a right to Separate Property that can only exist within the context of a closed, intact household dominated by a household head.

The fact that the introduction of the Separate Property rights was more about establishing a firm household system than about protecting the rights of women or wives becomes clear when one considers a more typical case of conflict between widows and their in-laws. We can find a representative example in the case of Yi Se-sŏn, which came before the Superior Court on January 16, 1917. Yi Se-sŏn had the misfortune of losing both her husband and her infant son in 1914. When her husband passed away in the first lunar month of 1914, she was less than twenty years old. Claiming that Korean custom did not acknowledge a women's legal capacity as a property manager, her brother-in-law, Ko Seung-hwan, usurped the management of her husband's land and refused to give her harvest from that land, prompting her to sue him. Se-sŏn consequently won the case in both the local and appeals courts, but her brother-in-law then took the case to the Superior Court where he argued, "Because women are dependents they cannot act upon property. While it is Korean custom to have a close relative in the lineage to manage the property, because the appeals court has failed to investigate such an important custom, the previous decisions are illegal." However, the Appeals Court had denied such a custom. "Even though the plaintiff argues that there were customary rights *for a household head* to manage the property for a widow when her husband dies without an heir, the husband in question died after he had divided his household from the plaintiff's household, and therefore the plaintiff has no such rights to claim" [emphasis added]. To this, Ko responded, "The Appeals Court decision acts as if the plaintiff and the defendant are not of the same household but that is absurd. In Korean custom, brothers are of one body and they are one family regardless of whether or not they live together. Also beyond question is the fact that a brother's wife is also part of the family. That the Appeals Court does not recognize us as one family, based solely on the division of the household recorded in the household registers, which is against Korean custom."

This clashing interpretation of family by Ko and the colonial court reveals a wide disjuncture between the colonial law and the local customs of the colonized. Even though these familial matters were to be dealt with through reference to Korean customs, they became interpreted through the terms of the Japanese code. So when Ko spoke of "close relatives in the lineage," the court interpreted it as the "household head"; and when Ko spoke of his brothers as members of an inseparable family (probably meaning that family ties cannot be severed), the court substituted the concept of "household" as defined in the Household Registers. But for the colonial court, this "miscommunication" strategically served the purpose of upholding the integrity of the household. Once again, the Superior Court denied Ko's claims and upheld the widow's right to inherit her husband's property in the absence of a male heir. Also important was

how this decision upheld the boundary of the household. No matter how close the brothers, Ko could not extend his power to the property of his brother who already lived in a separate household. The widow's right to inherit her dead husband's property and the brother's failure to extend his power over his sister-in-law's property worked hand-in-hand to protect the boundary of the household. In other words, upholding the widow's right to inherit her husband's property worked directly to protect the boundary of the household. In short, the protection of the widow's right to her deceased husband's property was one of the most striking ways in which the Koreans learned about what household meant.

In this colonial context, widows quickly learned to take advantage of the new rights that they gained under the colonial law. While Yi Po'gwanghwa had inadvertently gained the upper hand by utilizing a novel strategy not recognized by the colonial court, other widows in later cases looked to preceding cases like this one to forcefully claim their right as widows and become the proprietors of the household. In other words, the widows of the colonial period worked hand in hand with the colonial state's objective to establish a strong household system in colonial Korea to protect their own long-standing right to inheritance and household proprietorship.

## **Conclusion**

Civil cases concerning widow rights provide an exceptionally useful vantage point into the lives of women under the colonial period. They also constitute a useful area of investigation to see where and how the colonial family policy impacted the Korean family. Widow cases are a convenient venue for this investigation because the widows represented a point of conflict between the interests of the nuclear family and the interests of the lineage. As the holder of special prerogatives to inherit the household as well as designate an heir, widows were the protectors of the nuclear family interests against the reaches of the lineage patriarch, who sometimes tried to usurp their household property. Widow prerogatives had been customarily recognized at least since the early Chosŏn dynasty, yet they have been continually under siege. The widow rape cases from the late nineteenth century demonstrate that widows fell to the fringes of families once their husbands died, forced into remarriage for monetary compensation or driven to suicide upon suspicion of illicit liaisons. Rarely were they able to assert their customary rights under the abusive power of their marital family. Things changed for the better for some widows in the early colonial period as evident in certain civil cases when they were able to have their customary rights publicly recognized in the colonial courts. Originally a device to ensure the integrity of the lineage succession and uphold the virtue of widow chastity, the widows' special rights to inherit the household and designate an heir became, under the colonial state, a critical device to ensure the integrity of the household that often suffered unwelcome pressure from lineage elders. As we have seen in Chapter 1, establishing a strong household system was how the Japanese colonial state inserted itself into the colonial society as well as incorporated the colonial families into the imperial fold. Upholding widow's rights was, therefore, an indispensable way to ensure the entrenchment of the household system in colonial Korea.

Previous studies have indicated that as the colonial family law was assimilated into the metropolitan law and thus "Japanized," Korean women lost their customary rights and fell victim

to a strengthened patriarchal system.<sup>101</sup> What I have examined above shows how Korean widows in the early colonial period were challenged not by the Japanese law but by members of their own marital family who refused to respect the rights they traditionally held. Yet, widows were not passive victims in this scheme. They actively invented and utilized new strategies to protect their rights. By a stroke of luck, their interests coincided with the interest of the colonial state, and their customary rights were protected despite strong and adamant protests from their opponents.

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<sup>101</sup> Kang Yǒng-sim, "Ilche kangjǒmgi chosǒn yǒsǒng ūi pǒpchǒk chiwi [Legal position of Korean women during the Japanese occupation period]".



## Chapter 3

### **Inheritance Rights for Daughters: Discourses on Family Law Reform in the 1920s and 1930s**

#### **Introduction**

Korean custom prescribed the following customary rights to a widow who did not have a son or a proper heir to succeed her husband as the house-head. When a house-head died without a suitable heir, his widow temporarily occupied the position of the house-head until a proper heir was adopted. These widow rights were based on her status as the *ch'ongbu*, eldest daughter-in-law and the primary officiator of ancestor worship rituals. She was obligated to protect and ensure the continuation of ancestor worship. She had the right and obligation to choose a suitable heir among her husband's agnatic kin. While her rights to choose that heir were sacrosanct, at no point in time was she a de facto inheritor of the household. The *Customs Survey Report (kanshū chōsa hōkokusho)* explicitly stated the temporary nature of the widow's inheritance in the following way: "when there is no heir to the ancestor worship, the mother or the wife of the inheritor can temporarily inherit the [household] property."<sup>102</sup> Therefore, while the customary right to choose the heir was a rare customary privilege that the Korean widows enjoyed, it was far from optimal; they still lacked secure and stable access to the household property. The fact that they had the right to choose the heir meant that they themselves were not the heir, and the temporary nature of their property rights oftentimes put them in a precarious position.

In October 31, 1933, an adoption case reached the Chosen Superior Court.<sup>103</sup> Yi Taeksu, a widow, sued Cho Ik-baek, the head of the family council that arranged an adoption for her. The widow argued that she did not acknowledge the adoption and therefore the adoption was invalid. Moreover, the widow argued, her deceased husband left her a testament telling her specifically not to adopt. Cho, on the other hand, argued that "according to Korean custom" it must be a male heir who inherits ancestor veneration, and the husband's testament prohibiting adoption was, therefore, invalid. The widow, in fact, he argued, was at fault in having believed that the testament was valid. The defendant further argued that since the widow "was not willing to adopt," she relinquished her right to adopt an heir, and the family council had the right to arrange an adoption.

After losing the first two lawsuits, the widow returned with a new argument. This was that the alleged adopted heir, Yu Yun-chan, who was a distant nephew of her husband, was a frivolous spender, who was bound to ruin the family business. If the family business is ruined and the family is turned out into the streets, how will the ancestor veneration be continued? This is precisely why her husband left the will, she

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<sup>102</sup> Chōsen sōtokufu, *Kanshū chōsa hōkokusho [Customs Surveys Report] (1913)* p. 343

<sup>103</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) *Kōtō Hōin Hanketsuroku [Verdicts from the (Chōsen) Superior Court]* v. 20, p. 396

emphasized, warning her not to adopt an heir. The reason Koreans cherish ancestor veneration, she noted, was that they respect the ancestors; it was not simply a blind submission to the principle of patrilineal succession. If adopting an heir could harm the ancestor veneration, then is it not correct not to adopt, rather than to adopt any eligible male?

Should the widow have respected the Korean custom that required a male heir for ancestor veneration, or was she correct to have followed her husband's will not to adopt? Did a Korean widow have a choice not to adopt an heir on grounds of practical consideration? Yi Taeksu's was the first case to question the legal status of Korean custom. Why should Koreans follow a certain custom? How permanent were the Korean customary laws? Benign as it sounded, the widow's inquiry was questioning the very basis of widows' rights in colonial Korea. Widows' rights were protected by the colonial court, only because the widows were expected to exercise their rights to designate a male heir from the lineage. Yi Taeksu was asking that she be made the de facto heir to the household property, independent of a future heir.

Yi Taek-su was expressing a critical view about Korean family custom that was increasingly gaining grounds in Korean society at the time. Questions and doubts about male-centric inheritance customs had been brewing for a decade at that point. The colonial state had been proposing that Korea should import the Japanese custom of son-in-law adoption (*muko yōshi*) as a way to grant daughters rights to household inheritances. What was significant about this case was that the widow, Yi Taek-su, suggested an alternative way of expanding women's (or widow's) rights that was independent of the family law policy of the Japanese colonial government. While the colonial government wanted to grant indirect inheritance rights to women through the adopted-son-in-law system, Yi wanted an outright inheritance rights for widows.

In the end, the widow won the case, and she was able to dissolve the unwanted adoption, but her demand for permanent inheritance rights was not granted. The court merely concluded that the widow's refusal to adopt following her husband's testament cannot be translated as a "willful refusal to adopt"; therefore, the family council was presumptuous in arranging the adoption.

The case revealed that the widow's rights as female house-heads were as precarious as their temporary tenure in that position. Their rights were also vulnerable to lineage pressure, as the eligible heir eventually had to be chosen among the members of the lineage. The new strategy on the part of the widow was to make her access to family property permanent, but it eventually failed. This case exposed how far the colonial state was willing to go to protect widows' rights against the interest of the lineage. The colonial court had stood on the side of the widow when she was defending her rights as house-head against arbitrary transgression of household boundary by lineage elders, but it was not ready to defend widows' demand that shook the basis of the lineage system, that is the customs regarding the inheritance of ancestor worship. Adoption custom was the pillar of ancestor worship tradition, and it was a central mechanism for the continuation of the lineage system. Also, the goal of the colonial state was to destabilize the lineage system and not the patriarchy itself. The colonial household system, after all, had at its core the patriarchal hierarchy. Throughout the 1920s and 1930s, the colonial state

engaged in careful discussion of family reforms to undermine the lineage power and the so-called “familism” of Korean society. But as widows’ demand for full inheritance rights clashed with the course of reform that the colonial state was devising, widows’ rights were increasingly pushed to the back burner. Women’s rights, however, continued to play a prominent role in state propaganda for family law reform. Colonial reform measures were advertised as expanding women’s rights, but as we saw in the above case, they were mere instruments to the ultimate end: the complete dissolution of the Korean lineage system.

This chapter examines the various reform discourses about the Korean family custom in the 1920s and 1930s, both in and out of the civil courts, to sketch out the progressions of reform discourse that preceded the 1939 Minjirei Reform. The 1939 Reform was the penultimate reform of colonial family law, which ordered Koreans to adopt Japanese style household names (*sōshi kaimei*) as well as the Japanese custom of son-in-law adoption (*muko yōshi*). Discourse about family law reform in the 1920s and 30s centered on the issue of “familism” in Korean society, that is, the strong lineage system that competed against the colonial state authority. Reform efforts in civil law that eventually produced the 1939 Reform were, in essence, to undermine and dissolve the lineage system in Korean society. Adoption emerged as the key to this issue. Changing the principle of agnatic adoption was to shake the core of the Korean lineage system. Containing adoption within the lineage, that is, the ban on non-agnatic adoption (*visōng puryang*) was what ensured the preservation of lineage property within the lineage. When Civil Ordinances were reformed in 1939, women who were at the center of the reform discourse since the 1920s bore the brunt of the consequences. Married women became more dependent upon house-heads as house-head rights became more clearly defined. This affected the widows whose status became more vulnerable to the future heir. Widows’ rights were exchanged for daughter’s rights to inheritance when the 1939 Civil Ordinances Reform implemented son-in-law adoption.

Previous studies of the 1939 Civil Ordinances Reform focused on the Name Change Policy and its impact on national identity and have largely ignored its impact on the Korean family system. I argue, however, that the 1939 Reform was less about suppressing Korean language and Korean surnames than about disintegrating the Korean lineage system. Furthermore, the 1939 Minjirei Reform has its origin in reform discourses dating to the beginning of the colonial rule, and was not abruptly introduced, as a product of the militarization of the late 1930s. This chapter aims to reposition the 1939 Reform within the context of the reform discourse of the 1920s and 30s. In doing so, the chapter will re-examine the impact of the family reforms on Korean family and women that has been overshadowed by the nationalistic narrative.

### **Asami Rintarō (1869-1943) and the Problem of “Familism” in Korean Society**

The 1912 *Minjirei* (Civil Ordinances) and its provision to withhold the Meiji Civil Code from Korean family matters was based on the belief that the difference between the colony and metropole was so great that applying the Meiji Civil Code was impossible. Among the many differences between the colony and the metropole that the colonial state used to explain Korean’s backwardness, the most critical was the Korean lineage system.

Such was a thought shared by Asami Rintaro, a legal scholar who worked as a judge in colonial Korea between 1906 and 1918. Asami argued for a complete assimilation of the civil code in colonial Korea except for the family law. He argued that Korean family law was too alien from that of Japan to have the Meiji Civil Code implemented.

In his doctoral dissertation, “A Treatise on the History of Korean Legal System (*Chōsen hōseishi kō*)” (1922), Asami discussed the Korean law in the context of world legal history from an evolutionary perspective. Taking examples from various societies, from ancient Greece, India, various periods of Korea to Japan, Asami assessed Korean laws from an evolutionary perspective. According to Asami, property ownership evolved from communal ownership via lineage to individual ownership. This reflected the evolution of the family system; the human family evolved from matrilineal society to patrilineal society, from a strictly hierarchical family where the patriarch relied on corporal power for his authority to a more egalitarian family. Whereas the patriarch had exclusive ownership of the household property in the hierarchical family, later families evolved to acknowledge separate property rights for each family member.<sup>104</sup> Women’s status evolved from being totally subservient to male relatives to a more independent status.<sup>105</sup> In terms of inheritance, people in ancient society did not have any concept of individual inheritance; all property was inherited by the lineage as a group, and elders of the lineage also managed succession of each family property. At this stage of inheritance only members of the lineage, either by birth or by adoption, could participate in inheritance.<sup>106</sup>

Where did Korea stand in this evolutionary framework? Korea, according to Asami, “did not progress at all since they barely advanced from hunter and gatherer stage to the early agricultural stage.”<sup>107</sup> This, Asami argued, was because Korea still had not fully developed the concept of individual ownership of land. Asami acknowledged, tongue in cheek, that there was no right or wrong ownership system, but only one that is most harmonious with the level of advancement of a certain society. Yet, communal ownership, he pointed out, was “practiced by people who are poor, without culture, without progress, and living in a simple nomadic state, or those who only have simple and primitive agricultural knowledge.” As society progresses and population grows, Asami reminded his readers, the land is inevitably divided according to each one’s share in agriculture and various forms of industrial production. People in the Korean peninsula did not progress at all in inheritance customs from the time of the Han and Wei dynasties, and retained the primitive system of communal ownership until very recently. Such backwardness was only remedied by the land survey carried out by the Japanese, which he claimed, “transformed the age-old system of group ownership of land into a system of

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<sup>104</sup> Asami Rintarō, *Chōsen hōseishi ko [Research in History of Law in Korea]* (Tokyo, 1922). p. 5

<sup>105</sup> *Ibid.* p. 13-15

<sup>106</sup> *Ibid.* p. 25

<sup>107</sup> *Ibid.* p. 34

private ownership of land, practiced by other modern nations, and it will clearly advance the happiness of the people in the peninsula.”<sup>108</sup>

To Asami, the greatest and most significant difference between Japan and Korea in family custom was the difference in property ownership. Asami argued that property in Korea continued to be communally owned by kin groups before the Japanese carried out the land survey (1908-1919). Korean inheritance customs were a clear indication of this communal ownership and showed Asami that Koreans did not have “inheritance customs” in the strictest sense, where property ownership was transferred from one individual to another individual. To Asami, it was a “faux-inheritance” that functioned only to continue communal ownership of the kin. Instead of inheritance, Asami argued, Koreans merely “received [*keishō*]” property and “occupied [*senyū*]” it until handing it on to the next generation.<sup>109</sup> This was because a Korean inheritor of family property did not have complete freedom to sell the property. (Asami seems to have believed, mistakenly, that inheritance rules for lineage estates applied to all types of land inheritance.) Therefore, Asami was critical of the 1913 *Customs Survey Report*, which considered that Koreans had customs of inheritance. Its analysis of Korean inheritance custom into three categories--the inheritance of household headship, inheritance of property, and inheritance of ancestor worship--was inherently flawed, because these “transactions” could not strictly be called “inheritance.” The only inheritance in Korea that could warrant identification as inheritance was inheritance by an (non-kin) adoptee (*suyangja*), Asami argued. *Suyangja* was the only kind of adoption where property left the possession of one family for another. Korean custom, following Chinese tradition, only allowed abandoned children younger than three years of age to be adopted. Any children over the age of three, and capable of remembering his or her original family was banned from being adopted into a family of different lineage. Still these adoptions were exceptional and many were daughters, who were irrelevant to inheritance.<sup>110</sup>

Regular adoption in Korea, on the other hand, was not real adoption in the strictest sense, Asami argued. Adoption in Korea was, in fact, a faux-adoption, where a lineage member was chosen as a way to continue communal ownership of the lineage property. Also, the adopted heir was not necessarily treated as the real son of the family. The adoptee often remained in his birth family, until his adoptive father died. In this sense, Korean adoption was totally different from Japanese adoption, where the adoptee was inherently treated the same as a birth son, where he was required to have emotional ties as well as the legal ties of adoption to the adoptive family.

Although the two seemed similar, the Korean lineage system and the Japanese family system were inherently different, Asami argued. Koreans did not have the same concept of the household or the house-head. Traditional household in Korea were

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<sup>108</sup> Ibid. 35-36. p. 35-36

<sup>109</sup> Ibid. p. 391

<sup>110</sup> Mark A. Peterson, *Korean Adoption and Inheritance - Case Studies in the Creation of a Classic Confucian Society*, vol. 80, Cornell East Asia Series (Ithaca, 1996)., p. 22; Kim Tu-hōn, *Han'guk kajok chedo yōngu [Study of Korean Family System]*, 2nd (1st edition, 1948) ed. (Seoul 1968 )., p. 222

arbitrarily drawn divisions that were used for administrative purposes, whereas Japanese households had a strict concept of main and branch families (*honke-bunke*), with a concept of household succession.

Inheritance custom, therefore, was a critical element in how Japanese colonialists imagined the difference between the Korean colony and the Japanese metropole. The Korean custom of inheritance was a symptom of primitive “familism,” a disease of backwardness that the colonial state aimed to cure. The Japanese custom of inheritance was considered as an evidence of an individual ownership system, and, hence, the sign of a more advanced society. The inheritance practices of the two nations were each a sign of their place in the evolutionary framework; Japan more advanced, and Korea backwards. But Asami’s analysis did more than justify the unequal relationship between Korea and Japan. It also defined the area of reform that Japan needed to focus in Korea. As an indicator of backwardness, it was paramount for the Japanese to reform the lineage system in Korea.

### **Defending Traditional Rights: Widows and Their Lawsuits Over Adoption**

The colonial agenda to reform the lineage system put Korean widows in an ambivalent position against the colonial state. While, as I have shown in Chapter 2, the colonial state protected widows’ rights as a way to strengthen the household system, its plan to ultimately dismantle the lineage system would eventually undermine widows’ status. Special rights of widows were predicated upon the Korean lineage system and agnatic adoption custom. Also, the very same Japanese colonial legal regime, which sanctioned these customs, did away with the security of communal ownership that buttressed widow rights. Under the colonial household system, which strengthened individual rights of the house-head, the widows became more dependent on the potential male heir. The double bind of widows’ rights was aptly illustrated in the civil lawsuits, in which the widows were involved over their adoption choices. These cases show that as the colonial reforms unfolded, widows found their position increasingly vulnerable. As the household system became more securely established, moreover, the Korean customs became inconsequential in the civil lawsuits.

Under the new colonial legal system, widows without an heir found it difficult to maintain their access to the household property after they have adopted an heir. As house-head right was strengthened, it was more difficult to cancel an adoption. Also, personal influence over the adopted son, which was previously culturally acceptable, became defunct. A case in 1912 attested to the precarious status of the widow under the colonial household system. On May 28th, 1912, a lawsuit erupted over a property sale a widow had made. The plaintiff, Pak Chi-yang, was the adopted heir of the household and claimed that the property that had been sold was his. The accused, Choe Chong-go, claimed that he obtained the property from the widow of the household, Madam Chu. Choe argued although Pak had been adopted as the heir, the widow later disinherited (*i'en*) him, so he had no rights to inheritance. In the first trial, Choe won. The local court acknowledged the fact that Madam Chu disinherited Pak: therefore he had no rights to said property. In his appeal, Pak argued that according to Korean custom, once he had become the house-head, the elders of the household could not disinherit him. The

inheritance was legitimate according to the Korean custom, and the decision of the local court was mistaken. Moreover, he added, “Madam Chu was merely a concubine (*hwachōp* - literally, flower concubine, i.e. a young concubine of an older man), and does not have the authority of a household elder to disinherit the adopted heir.” The Superior Court accepted Pak’s argument. It ignored the accusation that Madam Chu was a concubine -- she was probably a second wife-- but conceded that even if she was a proper household elder, she had no rights to disinherit Pak once he had succeeded to the house-head-ship. Therefore, the Superior Court repealed the Appeals Court’s decision and acknowledged Pak’s, the adopted heir’s, ownership.

This case demonstrated two facts. First, even though the widow’s right to designate the heir was a powerful one, once the heir was chosen, she had no power over the heir or the household property. Second, and more importantly, this meant that even in this early period of the colonial rule, inheritance in Korea, which, on the surface, was decided by Korean custom, was treated within the framework of Japanese family law. Here, the inheritance of the household headship and the adoption of the heir were treated exactly as their Japanese counterparts. First of all, the ban on disinheriting an adopted heir once he succeeded as house-head, was not an established custom at the time. In 1912 the Superior Court permitted a family to disinherit an adoptee that had succeeded to the house-head-ship, on the grounds that the adoptee was chosen from the wrong generation of agnatic kin. Although Korean custom stipulated that the adoptee has to be from one generation below the inheritor, the family chose an adoptee from the same generation.<sup>111</sup> The Superior Court stated that there was no clear custom in Korea that stipulated that an adoptee that became the house-head cannot be disinherited in any circumstances. Also, to acknowledge an exclusive right for the house-head, where even the household elder had no influence over it, was definitely a transformation of Korean custom. It was also very different from what Asami described as Korean inheritance custom. According to Asami, a Korean heir was only an “occupier” of property and not an owner with exclusive rights over the property. The court had not only acknowledged that the house-head shared his ownership with no one, he also had the full legal authority over this household property without having to answer to any other authority in the family. This, in fact, was a covert assimilation of the Korean inheritance custom to the Japanese custom. And as a result, the property rights of the house-head were strengthened. More importantly, widows and other elders of the household were further estranged from exercising power over the household property. Unlike her Chosŏn dynasty counterparts, who exercised moral authority over the house-head, whether he was her descendent or adopted, in his decision regarding the household property, the widow of the colonial period had no such recourse; she was cut off from the household property once she selected the heir and passed the house-head position on to him.

Despite the fact that the house-head right was strengthened through the covert assimilation of Korean custom to Japanese custom, the colonial policy on family matters was still recognition of Korean customs. Although Korean widows were put into a further

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<sup>111</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) *Kōtō Hōin Hanketsuroku* [*Verdicts from the (Chōsen) Superior Court*] v. 1, p. 475

predicament through the strengthened house-head rights under the colonial state, they continued to rely on Korean family customs to defend their rights in civil courts. But as the following case demonstrates, while adoption and inheritances customs continued to be legitimate legal sources in colonial courts on paper, they were powerless in influencing the outcome of a trial. In other words, while details of the Korean custom were presented and debated in court, they seldom affected the real outcome of the dispute. The household boundary and the rights of the house-head, already assimilated to their Japanese counterparts, were already firmly defined and not to be negated or modified by Korean custom. So while the colonial state alleged to recognize Korean family custom, traditional ties of Korean lineage system were continually severed through these civil cases.

A case from January 27, 1920 aptly captured how inconsequential Korean customs were. It was a case over the legitimacy of an adoption between two widows, the grandmother-in-law and the daughter-in-law of a household.<sup>112</sup> The daughter-in-law, Kim Sŏng-mo, had been adopted into the household through her husband, who was the cousin of the mother-in-law, Sin Yu-kwan's late son. Because there was no suitable candidate for an adoptee, they had adopted the cousin to become a *cha-yangja*, a brother-adoptee. Brother-adoptee was an adoptee chosen from agnatic kin in the same generation as the inheritor to succeed to the position of ancestor worship officiator. Custom prescribed that when the brother-adoptee has a son, this son becomes the proper adopted heir and takes over the status of ritual officiator. When the brother-adoptee passed away without a son, Sin, the grandmother-in-law, attempted to choose another heir for her household only to be countered by Kim, who claimed that as the widow of the late house-head, she now had the prerogative to choose the heir. The case quickly became an elaborate discussion of how Korean custom defined the capacity of the *cha-yangja*, and how it was different from a regular adoptee. Sin argued that *cha-yangja* was not a real adoptee, only a substitution for a future proper heir. The Superior Court concurred, but this did not help Sin win her case. *Cha-yangja*, although a temporary adoptee and not a real heir to the ancestor worship, still had full authority and rights over the household, the Superior Court decided.

Cha-yangja, unlike a regular yangja only temporarily succeeds to the house-headship and the [household] property rights, but in ancestor worship he is only a substitute [for future heir]. This is why a cousin can become *cha-yangja*, [without violating the rules of Korean ancestor worship customs.] Moreover, when the cha-yangja dies without heir and only his wife is left in the household without a parent, the wife should become the house-head until she adopts another heir in the Korean custom. [...] The plaintiff's appeal mistakenly argues that the Appeals Court had confused cha-yangja with regular yangja; this accusation is ungrounded.

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<sup>112</sup> Ibid.



In other words, the brother-adoptee's widow had the same capacity of a regular adoptee in the choice of heir selection. Even though the Superior Court demonstrated its knowledge of the details of the Korean adoption custom, the difference of cha-yangja from regular yangja made little, if any, difference in the treatment of the two. In other words, the Superior Court treated the cha-yangja just as it would a regular yangja in regards to his rights over the household. With this decision, the Superior Court, while acknowledging Korean custom, in effect, made it irrelevant by ignoring the critical difference between various adoption customs, and treating the Korean custom of inheritance within the framework of Japanese house-headship inheritance (*katoku sozoku*). While the trial argument centered on parsing the details of the Korean custom on heir adoption and ancestor worship inheritance, the court decision by-passed this whole discussion.

In the end, the Superior Court treated the cha-yangja as any other house-head; whether or not he was adopted, or adopted as a regular adoptee or cha-yangja did not have any influence on the outcome of the case. What was important was that the cha-yangja became the house-head, and his right to the house-headship and to the household property was not to be denied or modified because of what Korean custom ascribed to him regarding ancestor worship. In other words, unless the adoption itself violated some regulations prescribed by Korean custom, Korean adoption custom could not and did not affect civil suits regarding rights of adopted heirs. The widows' attempt to disinherit the adopted heir with arguments utilizing and appealing to knowledge of Korean customs was bound to fail. This way, the rights of the house-head were protected from any customary claims that threatened it. In this way, Korean family customs were modified unnoticed. Strengthened house-head rights weakened the traditional influence widows had over the adopted heir, which in turn, weakened their status in the family.

### **Inheritance Rights to Daughters? 1920s Debates on Reforming the Korean Family**

In the colonial effort to implement the household system, widows in Korea were dealt an ambiguous lot; while their customary rights were acknowledged and protected by the colonial state against sustained threat from their in-laws to curb them, their access to the household property continued to remain indirect. Their rights were further threatened by strengthening of house-head rights, which completely excluded widows from exercising authority over family property once she passed it onto the heir.

Discourses such as Asami's, despite their failure to capture the realities of the Korean widows represented in the civil courts, nevertheless played a critical role in shaping the colonial reform discourse of Korean society. In the growing frustration of widows, the colonial state found a ready and fertile angle to drive its own agenda of family law reform. From the 1920s on, the colonial reform efforts on family law were couched in the language of emancipating Korean women from the oppressive custom of Korean families. The discourse on reform focused on how to expand women's rights to inheritance beyond the widow's rights of adoption. By the 1920s, granting daughters the right to inheritance emerged as a viable option. How exactly this was to be achieved, was open to debate. While women's columns in newspapers proposed rights for daughters to become outright heirs, the colonial state's idea was to import the Japanese custom of

“muko-yōshi,” the son-in-law adoption. The colonial state advertised this custom as a modern custom that expanded women’s access to inheritance in Korea. In the process, alternative measures that called for advancement of women’s rights were ignored by the colonial state. In the following, I will describe how adoption of the “muko-yōshi” custom was contemplated, advertised and then dropped in the 1920s.

In the mid-1920s, what seemed to be a revolutionary reform measure was entertained in Korean public discourse. It was a debate on reforming the inheritance law to allow daughters to become heirs. Such a measure would fundamentally transform the male-centric adoption practices in Korean families. A Tonga-ilbo article, titled “If There is No Son, Daughters Could Also Inherit” (*chasigi opsumyōn, yosikdo sangsogin*), from November 12, 1925, reported on a possible Civil Ordinances (*minjirei*) reform that would enable Koreans to bequeath their household to daughters. Until now, as also the article pointed out, daughters did not have any inheritance rights; so, if a couple did not have a son, they had to adopt a “total stranger” as the heir. “Due to this backward custom”, the article quipped, they had to bequeath their life’s work and savings to the adopted son, and send off their own flesh and blood (*hyōryuk*, i.e. the daughter) to another household in marriage. A new *Minjirei* reform would remedy this problem, the article reported.

The reform measure that the article was referring to, was in fact an assimilatory measure to expand the application of the Japanese civil code to Korean adoption matters. The *muko-yōshi* system, as the Japanese custom of son-in-law adoption was called, enabled daughters to become the heir of the household if there was no other eligible male. When she married, she could bring the husband into her household. In other words, the son-in-law could be adopted into the household, as the heir. If implemented, this law would “enable” Koreans to adopt a son-in-law as their heir, thereby keeping their daughters in their family.

In fact, the reform measure had first been introduced in the *Chūsū’in*, the Korean advisory committee meeting a year before in 1924. At the meeting, the Government-General Legal Division Chief (*hōmu kyokuchō*), Matsudera Takeo proposed the adopted son-in-law (*muko-yōshi*) system, and promoted it as a way to respect Korean parents’ love for their daughters. The rhetoric that Matsudera employed at the time was strikingly similar to the Tonga ilbo article above. Matsudera presented the adopted son-in-law system as a way of granting daughters inheritance rights. Bypassing one’s own daughter and adopting a “stranger,” as the Korean custom prescribed, he said, was “against the human feelings [*ninjō*].” If Koreans also adopted sons-in-law, such a problem will be resolved, he argued. He further argued that allowing son-in-law adoption was “adapting to the flow of the times” and also promoting “the beautiful custom (*biten*) of the East,” of “mutual love and respect between parents and the child.” Since love and respect does not distinguish between a daughter and a son, they should allow the daughter to inherit the household from her parents.

Although Matsudera made the measure sound like a major expansion of women’s rights, accurately speaking, son-in-law adoption fell short of granting daughters full inheritance rights. After marriage, daughters would cede their household headship to the husband. The daughter only had a temporary tenure as the house-head, which ended when she got married. Nonetheless, another article in the “Women [*puin*]” column in the

Tonga Ilbo a few days later<sup>113</sup> chimed in with its approval of the reform. Titled, “Daughters Are Given Inheritance Rights in Korea, Too [*Chosŏn esŏdo ddal ege sangsokkwon ūl chunda*]” the column also interpreted the son-in-law adoption as inheritance rights for daughters and criticized Korean custom which denied daughters such rights. Because of this age-old custom “we women [*uri yojadŭl*] have been gravely mistreated,” the author argued. She went on to say that the custom of excluding daughters from inheritance was responsible not only for sexual discrimination but also the evil custom of concubinage. Taking a concubine was an option or excuse for men who did not have sons from their primary wife. All such backward customs of the Korean family, she seemed to say, originated from the male-centric inheritance practice. The column writer also interpreted the *muko-yōshi* custom to mean full inheritance rights for daughters. In so doing, she was able to criticize the old Korean family customs that were being protected in the colony. The *muko-yōshi* system, as such, was received by the writer as a step of progress toward gender equality rather than a policy of assimilation to the Japanese customs.

In June 23, 1926, Maeil Sinbo and the Japanese newspaper, Keijo Nippo both reported on the reform measure of family law, confirming previous articles of Korean newspapers. According to these newspapers, Korean women now had to take their husband’s surnames when they got married. This was admittedly a drastic change to Korean custom, but “customs could change according to changes of times.” This was to import the concept of the Japanese household name, that all household members share the same surname, while retaining Korean custom on the surface.<sup>114</sup>

In the end, the reform in question did not happen. It is unclear why the colonial government did not go through with the reform,<sup>115</sup> but, possibly, it was worried that the measure would antagonize too much of the Korean public. It turns out that the excitement for the measure was not unanimous. Typical Korean resentment towards this reform was voiced in the following Tonga-ilbo article. Under the title, “No Surname Change When Married”, the article refuted the rumor that the *Minjirei* will be reformed. In an interesting twist of rhetoric, this article focused on the other part of the reform measure, the adoption of Japanese household names; under this measure married women would have to adopt their husbands’ surnames, and adopted sons-in-law would adopt their wives’ surnames. Such changes in age-long customs would disrupt Korean family tradition, the article argued. With an explicit tone of irritation the article retorted, “I have

<sup>113</sup> *Tonga ilbo*, November 15, 1925

<sup>114</sup> Lee Seung-il, "Chosŏn Chongdokpu ūi pŏpche chŏngchek e tehan yŏngu [A Study on the legislative policy of the Joseon Government General; Focusing on Codification of Article 11 'Customs' of Joseon Civil General Act]" .p. 207

<sup>115</sup> Lee Seung-il (dissertation, p.215) the reform measure that was contemplated in mid-1920s had the following measures- son-in-law adoption and adopting Korean surname (*sŏng*) as household names (*uji*). This was a compromise between the customary law codification stance of the sotokufu and the extension policy (*ichigenka*) of the Japanese metropolitan government. They could not go through with the reform because of budgetary reasons - and when they actually went through with the *Minjirei* reform in 1931, measures concerning family matters were omitted, for unknown reasons.

no idea why people are jabbering like this, [eager to] emulate not even a good thing, especially when [the authorities] have confirmed that no such reform in the family law would happen.”

The reform measure was not implemented. Although widespread discontentment about gender inequality produced exuberant support for the reform measure, the women’s rights issue proved to be dangerous territory for the colonial government. The *Chūsūin* adamantly objected to the proposal, while some women demanded rights that the colonial state was unwilling to grant. Meanwhile, the colonial government devised a new way to tackle the Korean lineage system -- the reform of family rituals.

### **The Guidelines for Rituals (*girei junsoku*): 1930s Discourse on Reforming the Korean Lineage**

The family law reform project was picked up again by the colonial government in 1932, with the establishment of the “Committee for Surveying Family and Inheritance Laws and Regulations” (*shinzoku sōzoku ni kansuru hōki chōsakai*) in the Chosen Superior Court. With the family law reform in the Japanese metropole in 1937, the colonial government was again motivated to push forward with the codification process with the reform of the *Minjirei*.<sup>116</sup> The committee sent out questionnaires around Korea to each head of local and appeals courts asking for their opinions about the reform. The questions, forty-two in all, asked whether the direct application of the Japanese code was possible in certain cases, or if separate provisions for Korean exceptions were needed. The format of the questionnaire showed that the policy of extending the Japanese Civil Code to Korea was now firm, and the colonial government was going to make provisions for those cases that needed exceptional treatment in Korea.<sup>117</sup> Opinions from the heads of the courts varied, but many of them argued for the complete elimination of Korean customary laws, and the adoption of the Japanese Civil Code. Some of them supported the use of Korean customary laws, but stressed that these exceptional laws should be codified.<sup>118</sup> They were unanimous in their discontent with the state of the customary laws as it stood.

As the reform discourse continued into the 1930s, women’s inheritance rights issue appeared to have taken a back seat in the state agenda. Although the colonial state did not relent in its efforts to enforce a reform of the inheritance law in Korea, it chose to target the two pillars of the lineage system: the ritual and the succession of ancestor worship. Compared to the 1920s reform proposal by Matsudera Takeo that took the family law reform head on, the strategy in the 1930s was to take a more oblique approach. Nomura Shōtaro, who masterminded the family law reform in the 1930s, tried to relegate the reform discourse from the realm of legal reform to that of social reform. In 1934, Nomura authored the Guidelines for Rituals, which aimed to reform the classic

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<sup>116</sup> Lee Seung-il, "Chosŏn Chongdokpu ūi pŏpche chŏngchek e tehan yŏngu [A Study on the legislative policy of the Joseon Government General; Focusing on Codification of Article 11 'Customs' of Joseon Civil General Act]" p. 215

<sup>117</sup> Ibid.p. 217

<sup>118</sup> Ibid.p. 223

problem of Korean “familism” through reforming the family rituals. Nomura argued that Korean rituals were too elaborate and wasteful. Therefore, Nomura proposed in the Guidelines to simplify family rituals, that is to scale down the rituals from lineage-wide celebrations to something that was household scale. The 1934 *Guideline for Rituals (girei junsoku)* put forth regulations on Korean family rituals including weddings, funerals and ancestor worship. For all the rituals, the *Guideline* advised simplification. The ancestor worship ritual should be carried out only for two generations: one’s father and grandfather. Rituals for higher generations were discouraged.<sup>119</sup> Also discouraged (or banned) were the distribution of ceremonial foods and the invitation of non-family members to the ritual. Ceremonial foods were to be simple. Lest anyone be nervous about slighting the ancestors with simple ceremonial food, the Korean translator kindly quoted “the sage (sŏnhyŏn),” Confucius, who exhorted that sincerity (*cheng*) is the most important part of ancestor worship preparation.

Although the *Guideline* did not have legal authority, the state carefully laid out a way to disseminate the idea and implement the guidelines. In an official note circulated to provincial governors around Korea (*dō-chiji*) on November 10, 1934, the Minister of Education (*Gakubu kyokuchō*) laid out some rules for implementing the guideline. They are to make examples of themselves by following the guidelines; they are to open roundtables and lectures (*junkai kogen, ido-zadankai*) to explain the objectives of the guidelines to the local people; they should encourage communities to buy ritual tools as a group and share them; while they can keep local variations of rituals as long as they do not harm the simplifying objectives of the guidelines, those parts that go against its goals are to be strictly forbidden.

Members of the *Chūsū’in*, the Korean advisory committee to the Government-General, supported the new regulations. In 1938 the Governor-General asked opinions of the *Chūsū’in* members on measures to improve rural society, and the majority of the members proposed that family rituals should be simplified.<sup>120</sup> Some even proposed that Korean rituals should be further assimilated to the Japanese rituals and customs. Why did the elite members of colonial Korean society support simplification of rituals proposed in the *Guideline*? Ancestor worship rituals for two generations had been advised for commoners in the Chosŏn dynasty. The higher one’s status, the more generations for which one was required and privileged to carry out rituals. Rituals for earlier generations meant that one was capable of gathering larger reaches of one’s relatives for the occasion.<sup>121</sup> Curtailing the ritual regulations for two generations, therefore, meant that the *Guideline* effectively shrunk the reaches of the lineage to the limits of the household.<sup>122</sup>

<sup>119</sup> “Girei junsoku seitei ni kansuru ken” Shisei No. 261- <http://db.history.go.kr/url.jsp> p. 21-22. This copy was translated and circulated by South Kyŏng-sang Province. Copy of Kuksa pyŏnchan wiwonhoe.

<sup>120</sup> Chōsen sōtokufu chūsūin, *Dai jūkyū kai chūsūin kaigi sangi toshinsho [Answers Sent by Chūsūin Members to the 19th Chūsūin Meeting]* vol. 19 (1938).

<sup>121</sup> Roger and Janelli Janelli, Dawnhee, *Ancestor Worship and Korean Society* (1992).

<sup>122</sup> Aono Masa'aki, "Chōsen sōtokufu no dai sosen saishi seisaku ni kansuru kisōteki kenkyū - 1930 nendai wo chūshin ni [A Preliminary Study of Korean Government-General's Policy

In scaling down elaborate ancestor worship rituals the *Guideline* was, in some sense, returning to the basics of the Confucian guidelines for rituals as proposed in the *Zhu Xi Jiali*.<sup>123</sup> It reinstated Confucian rationalism, which appealed to some Korean yangban elites. The *Guideline* gave state support to rural yangban elite who wanted to dominate social reform efforts in rural society. The *Guideline* suppressed rural variations of family rituals and communal rituals of the rural society. It also dissolved the communal bonds of the rural community that were buttressed by communal rituals. The state did not lose out either. Aono Masa'aki, argues that the *Guideline* produced a space in the rural community for the state to insert itself. Until the colonial state estranged the yangban elite with its implementation of the Household Name Policy (or the Name Change Policy) [*sōshi kaimei*] in 1939,<sup>124</sup> they were partners in reforming the rural society.

Nomura Shōtarō's reform efforts were not exhausted in the *Guideline*. The *Guideline* did not have legal effects, and the proposals did not amount to legal reform. In the legal sphere, Nomura pushed for further and more complete assimilation to the Japanese Civil Code. Nomura argued that differences between Korean and Japanese inheritance were a major obstacle in creating a fully assimilated legal sphere in colonial Korea. The difference in ancestor worship inheritance was particularly a problem. The problem, according to Nomura, was that the adoption custom in Korea was based on "familism." This meant that only couples without a son could adopt and only agnatic kin could be adopted. In an essay about Korean adoption, Nomura explained that this exclusivity of Korean adoption was due to the primitive nature of Korean ancestor worship religiosity; "In a society where such primitive religion is worshipped, it is natural to believe that the spirit of the ancestor will not smell the sacrifice offered by a non-relation."<sup>125</sup> The Korean concept of ancestor worship inheritance was, in this sense, incommensurable with the Japanese concept of inheritance, which was more focused on passing on the status and the property ownership of the house-head.

Yet, Nomura also argued that such a difference in ancestor worship customs does not hinder legal assimilation of colonial Korea to the metropole. He was in favor of the colonial state's objectives in strengthening the household system in Korea. Nomura's argument was that the peculiarity of the Korean custom of ancestor worship inheritance was outside the realm of legal matters. From the perspective of legal conflicts, conflicts over the rightful heir to ancestor worship was in fact, conflict over property inheritance or the status of the house-head. Therefore there was no need to treat the ancestor worship inheritance as a separate legal matter from other matters of inheritance.<sup>126</sup> In other words,

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Towards Ancestor Worship Ritual - Focusing on the 1930s] " *Momoyama gakuin dagaku ningen kagaku* (July, 2003, 2003).

<sup>123</sup> Roger Janelli says that Zhu Xi Jiali suggestion is for four-generation. This rule was continued into 1970s when Janelli did his ethnographic field work in Suwon, Korea. Janelli, *Ancestor Worship and Korean Society*, p. 99.

<sup>124</sup> Yang Taeho in et. al Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]* (Tokyo, 1992).

<sup>125</sup> Nomura Shōtarō, "Chōsen ni okeru genkōno yōshi seido [Current Adoption System in Korea]," *Shihō kyōkai zasshi* 6 (1927).no. 6, p. 2 (136)

<sup>126</sup> *Ibid.*no. 4, p. 22 (104)

in Nomura's understanding, the unique custom in ancestor worship inheritance was not a legal matter and did not merit separate legal treatment. A number of years later, in 1937, when the colonial government collected opinions on revising the Ordinance on Civil Matters, Nomura expressed a similar opinion. "The basic concept of inheritance in Korea should be divided into two categories - inheritance of house-head-ship and inheritance of property - just as in the [Japanese] Civil Code."<sup>127</sup> By writing out ancestor worship custom as irrelevant, Nomura understood the Korean inheritance custom to be essentially in harmony with that of the Japanese Civil Code. Whatever incongruent element there was, which he indeed delineated a few years earlier, he decided, could be ignored or left to the Korean society to work out; it was unnecessary for the legal sphere to meddle with it, nor did it require writing of a separate code.<sup>128</sup>

Nomura's strategy, the seemingly benign distillation of legal matters from socio-cultural matters, was to ignore and therefore mute the peculiarities of the Korean inheritance custom. In Nomura's formulation, Korean inheritance custom saw a major and significant modification that eliminated the role of the lineage and replaced it with that of the household. This was most apparent in Nomura's treatment of the Korean custom on gravesite ownership, which was extremely obscure. According to Nomura, gravesite ownership was with the household of the heir (*chong'ga*), and the heir to the ancestor worship succeeded to its ownership as part of the privileges attached to the heir to the ancestor worship.<sup>129</sup> This was a direct transplantation of house-head inheritance from the Japanese Civil Code. In Item 987, the Japanese Civil Code states, "In inheriting the ownership to lineage register, the tools of ancestor worship and gravesite are included in the privileges of inheriting the house-head status." This, in turn, meant that the gravesite was now separated from the influence of the lineage, and was subject to sole ownership of the house-head.<sup>130</sup> The same applied for the ownership of the grave mountains (*myosan*) or *wito*, the lineage estate set aside to fund ancestor worship. Although cultural norms required that the heir consult the lineage representatives before selling such lineage property, it was not a legal requirement. In the legal sense, the ownership of such property as lineage burial land solely resided with the heir himself. Nomura's opinion on Korean adoption and inheritance custom indicated that the reform measures contemplated by the colonial state in the 1930s de-emphasized the lineage and strengthened the household unit.

Such modification of ancestor worship in colonial Korea was reflective of how ancestor worship was modified by family state ideology in the metropole. In the Meiji period, Japanese ancestor worship went through a similar reformulation. Hozumi Yatsuka, the legal scholar, had also emphasized the household level of ancestor worship, while de-emphasizing communal and social rituals of the ancestors and spirits. This was

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<sup>127</sup> Aono Masa'aki, "Chōsen sōtokufu no dai soson saishi seisaku ni kansuru kisōteki kenkyū - 1930 nendai wo chūshin ni [A Preliminary Study of Korean Government-General's Policy Towards Ancestor Worship Ritual - Focusing on the 1930s] ".p. 140

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.p. 142

<sup>130</sup> Ibid.

to move away from emphasizing the universal world of “spirits [*seishin*]” in Confucianism and instead to emphasize the “spirit of the ancestors [*sorei*]” in ancestor worship, which in turn reinforced the family over community in ancestor worship practice. In other words, the framework of Hozumi’s theory on ancestor worship was to theoretically thread three different kinds of worship rituals - ancestor worship of the family, communal worship, and the national worship - into a single system of ancestor worship in the household.<sup>131</sup> This adequately explains why the ancestor worship custom was so eagerly preserved by the Japanese in colonial Korea. Ancestor worship of Korea was already very much steeped in the reverence for familial spirits. Now, with the new *Guideline*, the ancestor worship custom that was condoned and preserved in the 1920s was once more transformed to better fit the agenda of the colonial state; to shrink the boundary of worshippers from that of the community and lineage to the nuclear household.

This was an important preparation for what was to come in the revision of family law in Korea. The 1939 Minjirei Reform, among other things, repealed the requirement in Korean custom of limiting adoption within the same lineage, i.e. among those with the same surname. This signaled the abolishment of what Asami Rintaro identified as the single most prominent character of Korean inheritance: group inheritance, which aimed to retain family property within the lineage. On a more concrete level, this meant two things for Korean society at large. First, the traditional ties of the lineage that continued to be a competition for the colonial state was weakened. And secondly, cultural influence over lineage property in transaction and inheritance was weakened which in turn made more property in Korea more readily available in the marketplace, more readily available to Japanese buyers. The fact that the ownership of the gravesite and ritual estate (*wito*) resided in the individual heir denied the influence of the lineage over that property; on the other hand, it gave the heir full power over the property and greatly strengthened his freedom over that property. It specifically meant that the heir was free to sell or mortgage the property, thereby making the lineage property into a liquid asset.

### **The 1939 Civil Ordinances Reform and Consequences on Women’s Property Rights**

The 1939 Civil Ordinances Reform, especially its Name Change Policy (*sōshi kaimēi*), may be one of the most notorious colonial policies of the Japanese occupation period in Korea. Together with the language policy that suppressed use of Korean language in primary schools, the Name Change Policy epitomized the brutality of the so-called “national extinction [*minjok malsal*]” policy of the Japanese colonial rule in Korea. In the public memories of formerly colonized Koreans, the 1939 Reform was an attempt to force Koreans into being Japanese through eliminating markers of Korean identity: surnames and language. In this dominant popular understanding of the policy, the focus of the 1939 Minjirei Reform was on oppressing national identity. Yet, as the following discussion will show, more significant and consequential objective of the 1939 Reform was to dismantle the Korean lineage system.

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<sup>131</sup> Ibid.p. 138



1939 Reform implemented the Name Change Policy, where Koreans were required to take a new household name, together with the son-in-law adoption. Propaganda literature on the Name Change Policy emphasized that Koreans needed new surnames because Korean surnames designated the lineage, whereas the new household name would designate the household. It claimed this was the essential difference between the Japanese household name (*uji/ssi*) and the Korean surnames (*sei/sǒng*).<sup>132</sup> This difference was expressed in the names of the married women in the family. While Japanese women took the husband's surname when they married, marking their new membership in the household, Korean women kept their surnames when they married. Members of Korean households, therefore, each had different surnames depending on which lineage they were from; Korean households did not have a household name that marked membership of the family members. The propaganda literature said, it was time Korean households also had legal names that designated the household.<sup>133</sup> This, of course, was far from the complete picture. It was true that all members of the Japanese household took the household name, everyone from married women to adopted sons. But each household did not, and was not allowed to, take household names of its choosing; they were to take the name of the main branch family (*honke*) from which they branched out (*bunke*). In other words, *uji*, the Japanese household name and its difference from the Korean surname was exaggerated in the colony to emphasize the demarcation of households from the lineage and the new reformed Civil Ordinances encouraged Koreans to make visible in their names the independence of their nuclear households from their lineage. More so than the Japanese language of the surnames, division of the lineage system was the point of the reform. This strategy did not see much success, as many lineages in Korea chose a new Japanese style name together.<sup>134</sup> Ironically, this new tactic on the part of Korean lineages accounted for a quicker climb in the numbers of households that adopted Japanese style names.

It was the married women in Korean families who would experience the reform in the most tangible and visible way, through changing their names. Taking a household name meant that all members of the household would share the same household name, i.e., family name. If the family did not choose a Japanese surname, then it would only be the woman who married into the family who would have to change her surname to her husband's. Traditionally, Korean women retained their maiden names. Since many women did not have formal given names, they used their maiden names as personal references after they married. Some have argued that such a naming practice excluded married women from being fully accepted in their marital household, giving support to requiring married women to take the surname of the married household. Yet, to have the married women take their husband's surnames was a change with which neither party

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<sup>132</sup> Kim Yong-dal in Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*.p. 49

<sup>133</sup> Chōng Kwang-hyōn, *Sōngssi nongo [Treatise on Surnames and Household Names]* (Keijō [Seoul], 1940).p. 92. Chong also thought that *sōshi kaimei* will eventually lead to division of lineage. He thought that this was in line with general transformation of family. p.98

<sup>134</sup> Yang Tae-ho, “*Sōshi kaimei no shisō-teki haikai*” in Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*.p. 138

was comfortable. The marital household did not want to fully erase the demarcation of the women who were married into the family, and the married women did not want to fully erase the marking of their natal household.<sup>135</sup>

Korean women also experienced the 1939 Reform with diminished inheritance rights. The 1939 Reform allowed son-in-laws to be adopted as heirs to the household, but daughters were still banned from becoming heirs themselves. This was because the 1939 Reform implemented son-in-law adoption as an adjustment to the Civil Ordinances and did not import the system in its entirety. Instead of giving daughters inheritance rights, and allowing a husband to be adopted, as was the case in the Japanese Civil Code, the Korean adaptation of it merely expanded the candidates for adoptee to sons-in-law. In this Korean adaptation, daughters and their access to heirship were bypassed. In this sense, son-in-law adoptions in Korea and in Japan were significantly different.<sup>136</sup> In 1941, the Government-General asked Chūsū'in if the time was finally ripe for further revision of the custom. "When there is no presumptive heir [*hōtei suitei katoku sōzokunin*] to the house-head-ship, should a woman (*joshi*) be allowed to inherit the house-head?" asked the inquiry to Chūsū'in. Opinions varied. Other Chūsū'in members agreed to the idea of female heirship, saying that Korea was advanced enough to embrace the idea. They argued that the Korean custom of banning the daughters from becoming the heir was backward, growing out of the Confucian way of "revering the men, and despising the women [*namjon yōbi*]," and the thought that women were not capable enough. But now that women received education, they gained the capacity to take care of a household.<sup>137</sup> Another opinion agreed with this evolutionist framework. Kanemitsu Soeomi (Kim Kwan-hyōn)<sup>138</sup> said, since women's status in Korea had advanced, it was now suitable for Korea to incorporate matrilineality.<sup>139</sup> Kinoshita Toei (Pak Tu-yōng) pointed out that Korean family conflicts originate from despising the daughters and adopting from other families.<sup>140</sup> Some answered that granting daughters the heirship would be beneficial to preserving the bloodline of the family, or more suitable in terms of "human sentiments [*ninjō*]."

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<sup>135</sup> This may have been the vestiges of matrilineal family system from Koryō dynasty. See Martina Deuchler.

<sup>136</sup> Lee Seung-il, dissertation, p. 242

<sup>137</sup> Chōsen sōtokufu chūsū'in, *Dai nijūnikai chūsū'in kaigi sangi toshinsho [Answers Sent by Chūsū'in Members to the 22nd Chūsū'in Meeting]* vol. 22 (1941).p. 64 **Kaneyama Sonūng**

<sup>138</sup> Japanese style names taken by Koreans were read by variety of ways. Depending on personal preference the names were pronounced in Korean or Japanese. If pronounced in Japanese, the household name was usually read in *kunyomi* and the given name in *onyomi*. The pronunciation of Kanemitsu Soeomi and Kinoshita Toei was taken from Nakamura Kentarō hen, *Sōshi kinen meishi kōkan meibu [List of Exchanged Name Cards Commemorating the New Names]* (Keijō, 1940). I thank Professor Mizuno Naoki (Institute for Research in Humanities, Kyoto University, Japan) for this information and also for the pronunciations of the remaining Japanese style names of Koreans cited here.

<sup>139</sup> Chōsen sōtokufu chūsū'in, *Dai nijūnikai chūsū'in kaigi sangi toshinsho [Answers Sent by Chūsū'in Members to the 22nd Chūsū'in Meeting]* p. 75.

<sup>140</sup> Ibid.p. 38

Others disagreed. Suddenly importing such a custom would be too violent for Korean sentiments. While Japan had the tradition of having daughters as heirs, Korea did not have such a tradition. One argued, this was even more drastic than the *muko-yōshi* custom, for which Koreans had at least a comparable custom (*teril sawi*).<sup>141</sup> Others were stronger in their opposition. Jokawa Sōkun (Sō Sang-kūn), who apparently had not quite grasped the concept of son-in-law adoption, argued that giving daughters rights to household inheritances would be impossible considering Korean custom. If daughters became heirs, the household would be “discontinued,” which would mean a “cruel conclusion” (*janhokhan kyōlgwa*) for the family.<sup>142</sup> He meant that if the daughter marries a man from another family, the descendants would be of the son-in-law’s descent, thereby discontinuing the family line. Many years of effort to convince the Koreans to think in terms of household name before patrilineal succession of the lineage did not seem to have succeeded with these Chūsū’in members after all.

Some Chūsū’in members were concerned that daughter rights could be confused with widow rights, and that the new measure would strengthen widow rights. They thought this would endanger the purity of the patrilineal lines. Nanjō Chigyō (Hong Chi-ōp) argued that heirship and son-in-law adoption-marriage (*nyūfu konnin*) should only be granted to the daughter of the household and not the widowed house-head, because this would totally change the family relations of the household.<sup>143</sup> Nachiyama Heitoku (Min Pyōng-dōk) echoed the wariness about widow house-heads. Even when daughters were not given the heirship, if the widow, who is also the mother, became the house-head and first passed on part of the household property to her daughter before she arranged adoption for an heir, the adoptee’s property inheritance was all but in the name. Therefore some measure to limit such treachery of widows should first be implemented.<sup>144</sup> Another argued that since the woman house-head could hide the household property and then marry, any important legal transaction by the woman house-head regarding household property should be done with the approval of the court and the supervision of the family council.<sup>145</sup> In short, the long tradition of patrilineal succession painted women as forever the outsider despite the drastic legal reforms that tried to convince Koreans otherwise. In this sense, the 1939 Reform was not entirely successful in dismantling the lineage system in Korea. While the colonial state was able to legally dismantle the lineage system, it fell short of dismantling the lineage system in the minds of Koreans.

## Conclusion

Colonial family reforms from the 1920s to 1930s were focused on disintegrating the Korean lineage system. The Japanese colonial state continuously attempted to implement the Japanese son-in-law adoption and then tried to reform the Korean family ritual. Eventually in 1939, the colonial state carried out a major reform of the Civil

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<sup>141</sup> Ibid.p. 105

<sup>142</sup> Ibid.p. 26

<sup>143</sup> Ibid.p. 163

<sup>144</sup> Ibid.p. 114-115

<sup>145</sup> Ibid.p. 146

Ordinances to enforce a new household name and implement the son-in-law adoption. The reform measures were designed to weaken the Korean lineage system by disrupting the strict ban on non-agnatic adoption and restricting lineage-wide gatherings. When it implemented the Name Change Policy the colonial government recommended Koreans to choose a surname for each household that was different from other households of their lineage, which showed that one of the main objectives of this policy was to weaken the collectivity of the lineage. The policy to require married women to share the household name with their husbands also furthered this agenda. Suppressing natal names of the married women meant erasing the markers of their natal families.

As the colonial policy on establishing the household system in Korea progressed through the 1920s and 1930s, the vision of the colonial state diverged from the interest of the widows. Weakening of lineage and strengthening of the household eventually turned out to be disadvantageous for the widows. Married women overall were more closely subjected to the house-head authority as the household became more established. While the household was protected from outside pressures of the lineage, at the same time, the married women were cut off from potential protection of the natal families. As independence of the household grew under the colonial rule, widows, with their volatile status, were perceived as a greater threat to the Korean lineage. Such sentiments made it more difficult for the widows to obtain full inheritance rights. Widows gained full inheritance rights only in 1960, fifteen years after Korea gained independence from Japan. When the 1939 Reform was announced, the colonial government recycled the old rhetoric that this new policy would advance women's rights, but widow rights were diminished overall. Daughters gained some priority over their widowed mothers, through the new possibility of inheriting the household through her husband. But daughters themselves never gained full inheritance rights. This was hardly the expansion of the women's rights that some had hoped this reform would bring

## Chapter 4

### Old Customs Die Hard: Colonial Customary Law after 1939 Reform and Beyond

#### Introduction

In the early 1950s, a novel was published in Japan that captured the tragic experience of Koreans under Japanese colonial rule. Based on a true story,<sup>146</sup> Kajiyama Toshiyuki's "Family Genealogy (*zokufu*)" (1952) tells of Sŏl Chin-yŏng, a Korean *yangban* elite, driven to committing suicide in despair that taking a Japanese name would extinguish the family genealogy of his eminent lineage.<sup>147</sup> Pressed by his grandson who was persuaded by his grade school teacher, Sŏl Chin-yŏng agreed to take a Japanese household name for the family. Yet, fearing that this decision would threaten the continuation of his lineage, he apologizes to the ancestors at the family shrine the next morning and commits suicide by jumping into the household well.<sup>148</sup>

The Name Change Policy (*sōshi kaimei*), which was enforced in 1940, has dominated the memory of Japanese colonial rule in Korea. In the popular memory of the colonial rule in Korea, the 1939 Reform was reduced to loss of Korean names, which in turn symbolized the loss of national identity. For those who experienced it, the name change policy epitomized the brutality of the colonial rule, and to those who did not experience it firsthand, brought home in most haptic terms what it meant to be colonized. In the postwar period, the Name Change Policy was the ultimate representation of the tragic and despairing sense of loss of national identity. In postwar Japan, as resident Koreans were compelled to use Japanese names (*tsūmei*) to avoid discrimination, the Name Change Policy of the colonial era was marshaled to condemn contemporary practice of discrimination against resident Koreans.

The Name Change Policy was part of the 1939 Reform of Minjirei, or the Ordinance on Civil Matters. The reform implemented two new Japanese customs in Korea: Japanese style household names and son-in-law adoption. The first revision, more famously known as the Name Change Policy (*sōshi kaimei*), stipulated that all Koreans add household names (*uji*) to their names. Although it was never explicitly prescribed that the new household names be in Japanese -- in pronunciation and form, that is, to use

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<sup>146</sup> Collected from "Chosen shinwa", 1950, Kim Yong-dal in Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*, p.72

<sup>147</sup> Yang Tae-ho, in *Ibid.*, p. 132

<sup>148</sup> Also see Mizuno's account in Mizuno Naoki, *Sōshi kaimei - Nihon no Chōsen shihai no nakade [The Name Change Policy; From the Midst of Japanese Rule of Korea]* (Tokyo, 2008), p. 180-182: according to police report, Sŏl Chin-yŏng (his actual name was Chin-chang) was not a pro-Japanese but a Confucian scholar, who killed himself in protest to changing his name, after his lineage decided on a new name, Tamagawa. In his will, Sol asked that "Jumped in water swearing not to change surname" written on the flags adorning his funeral parade, but the police banned such display.

two Chinese characters instead of a single Chinese character, -- it was alluded to, and the implication was well understood among the Koreans. The new Minjirei would take effect on February 11, 1940. The date was *Kigensetsu*, or the Foundation Day celebrated for the enthronement of the first mythical emperor of Japan, Jimmu, chosen to symbolize a new beginning for Koreans as Japanese imperial subjects. Koreans had six months to report their new household names.<sup>149</sup> By the end of the six months, about 3,000,000 households, approximately 80% of the total number of households reported new names. The rest of the Koreans was given their original surnames as their new household names. Under the new household name system, all members of the household shared the same surname. This most severely affected married women, who traditionally had kept their maiden names. In other words, whether or not one chose to take a new name, all Koreans were given new household names. This was the major difference from the Name Change Policy (*kaiseimei: gǎixingmíng*) of Taiwan, where obtaining Japanese style names was allowed only with the state permit, which was given only to model imperial subjects.<sup>150</sup>

The second part of the revision, namely, the son-in-law adoption, revised the age-long tradition in Korea that forbade adopting from outside of the agnatic group. This reform was meant to speed up the process of assimilation between the peoples of Korea and Japan. Governor-General Minami, in the Government-General pamphlet, *Explanation of the Household Name System (Uji seido no kaisetsu)*, evaluated the significance of the new policy as the last step in realizing the Japan-Korea Unity (*naisen ittai*). As the state propaganda had it, the advantage of having an assimilated family law was that it would facilitate formation of family ties across the metropole-colony divide, through marriage and adoption. In the same pamphlet Minami declared that these reforms were “revolutionary reform in the family law, on the journey to Korea-Japan assimilation.”<sup>151</sup> Minami also asserted that the new Minjirei reform would be the last area of judicial reform that would realize Korea-Japan assimilation. Minjirei would facilitate forming family relations across metropole-colony border through marriage and adoption. Inter-marriage was something both the Koreans and Japanese seemed to have agreed would be the most expedient way to foster the spirit of assimilation (*naisen ittai no seishin*) in subjects’ everyday life. One member of *Chūsūin*, the Korean advisory committee to the Government-General, suggested that a legal reform to facilitate Japanese-Korean marriage was desirable for Japan-Korea Unity.<sup>152</sup> Marriage and adoption across the metropole-colony border had been going on since the beginning of the colonial period, but until now, Korean custom banning different surname adoption obstructed Japanese being adopted into a Korean family. Different surname adoption

<sup>149</sup> Kim Yǒng-dal, *Sōshi kaimei no kenkyū [Study of the Name Change Policy]*, Chōsen kindaiishi kenkyū shōsho (Tōkyō, 1997). p. 58

<sup>150</sup> Yang Tae-ho, “Soshi kaimei no shisoteki haikai” in Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*. p. 162

<sup>151</sup> Minami Jiro, “Shiho jo ni okeru naisen ittai no kugen- naichijin shiki uji no settei ni tsuite” *Uji seido no kaisetsu - uji towa nanika, ikani site kimeruka*, Chosen sotokufu homukyoku, Feb. 1940. p. 4-6

<sup>152</sup> Chōsen sōtokufu chūsūin, *Dai jūkyū kai chūsūin kaigi sangi toshinsho [Answers Sent by Chūsūin Members to the 19th Chūsūin Meeting]* Sangi Hyon Jun-ho, p. 72

would, more than anything else, enable Japanese to be adopted into Korean families as sons or son-in-laws.

The fact that the two last reforms to complete the assimilation between the Japanese metropole and the Korean colony were the surname system and the adoption custom shows how central family law was to the concept of assimilation in the Japanese empire. As examples of European colonialism show, the concept of assimilation was varied in different colonies. In French colonialism, for example, an important condition for assimilation was the presumed level of civilization in the colony or among the colonized people. A. C. Conklin, for example, has characterized the uniqueness of the French concept of assimilation as its “specific commitment to the principles of freedom” and its “greater commitment to carrying out its humanitarian agenda.”<sup>153</sup> Clearly every country’s assimilation policy was multi-faceted. However, family law or custom was never part of any assimilation policy in European colonialisms. The centrality of the family system in assimilation policy was indeed a unique element of Japanese colonialism.

Understanding the centrality of the family system in the Japanese concept of assimilation is important to understanding the full impact of family policy in colonial Korea. The unique nature of Japanese assimilation led to completely disparate views of the 1939 reform in Korea and Japan, each skewed in its own way. In Korea, the reform was understood strictly and simply as an effort to restructure Korean family custom, and therefore was perceived as an affront to national identity. The assimilation policy was referred to as “national annihilation policy [*minjok malsal chǒngchek*].” In Japan, on the other hand, the reform was perceived as a failure to abolish discrimination through dissolving differentiation between Koreans and Japanese. In other words, while in Korea the assimilation policy was perceived as negative in and of itself, in Japan, assimilation was perceived as having the potential to be something good. Indeed, if successful Korean assimilation had included the promise of equal rights for the colonized Koreans as the French assimilation had, then, at least in the post-colonial Korean understanding, it was totally lost. Such a negative view could be due to the nationalistic perspective strengthened in the postcolonial hindsight. A more convincing reason, however, would be that, despite the propaganda, the Koreans felt the policy to be an attack on their cultural identity. Either way, we need to de-naturalize the perception of this peculiar aspect of Japanese colonialism.

Stories like “Zokufu” captured, perhaps oversimplistically, the experience of being colonized. To the Japanese audience, such stories spelled out in an accessible narrative, what the Koreans must have felt by being colonized. To the Korean audience, such story articulated in sentimental terms the experience of colonialism. While effective in translating the experience into manageable terms and producing legitimately negative views of the colonial experience in the minds of post-colonial audience, the story ended up shadowing more complex and subtle workings of colonial power. It subsumed the experience of colonialism under the rubric of nationalism, and effectively hid intra-

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<sup>153</sup> Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930*. p. 102-103

national conflicts among Koreans under the colonial rule. Gender conflict was one of them. Nationalistic narrativisation of the colonial experience in the postwar era did nothing to illuminate the experience of women (such as we have examined in the previous chapters) under the colonial period.

In this chapter, I will examine a variety of responses to the 1939 Minjirei Reform, from negative (like that of the above-mentioned desperate suicide) to positive ones. In the latter half of the chapter, I will examine post-colonial processes of civil law revisions through the 1945 and 1960 divides and explore the legacy of the colonial civil law. I will argue that the 1939 Reform was an expression of the unique concept of Japanese assimilation policy, which was to disseminate the Meiji family system. The 1939 Reform was the last and final attempt by the Japanese colonial state to reform the Korean lineage system that the Japanese colonial state had been mounting since the beginning of the colonial period. Although Japanese assimilation policies were multi-faceted in the formative period of the 1910s and 20s, they were pretty much reduced to the dissemination of Japanese family system by the late 1930s. By then, the Japanese colonial state had managed to fully convince itself of the Meiji family state ideology, and came to believe that the surest way to mobilize the colonized Koreans as its imperial subjects was to replace Korean family customs with those of the Japanese. Changing surnames and revising adoption customs therefore emerged as the most imminent tasks that the Japanese colonial state had to tackle in the eve of the all-consuming Pacific War. Many colonized Koreans were fully aware of the potential impact of these reforms. This is why some responded with desperate measures such as suicide. Yet, responses from those who did not share interest with the lineage system, also strengthen the fact that the 1939 reform most acutely affected the lineage system more than anything else.

### **The Fundamental Objective of the 1939 Reform**

Many accounts, including contemporary ones, described the 1939 Minjirei reform as the apex of Korean assimilation to the Japanese metropole. In post-liberation Korea, the 1939 Reform was presented as the representative of a series of forceful measures to annihilate Korean cultural identity. The change of names marked, in the most visible form, the assimilation of the Korean colony to the Japanese metropole. Its reversal in the wake of Korean Liberation was seen as a reclamation of national identity.

Yet the reform's impact on Korean society was neither as groundbreaking nor fundamental as it was described to be. Although all colonial Koreans were affected (either explicitly and implicitly) by the Name Change Policy, the affect it had on Japan-Korea Unity is difficult to gauge. As for the adoption custom reform, its impact on metropole-colonial marriages proved to be minimal. By the end of the Japanese colonial rule in 1945, there was only one case of Japanese son-in-law who was adopted into a Korean family.<sup>154</sup> The effect of different surname adoption was, therefore, more or less

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<sup>154</sup> Hong Yang-hee, "Chosŏn ch'ongdokpu ui kajok chŏngchek yŏngu: ka chedo wa kajŏng yideologi rŭl chungsim uro [The Family Policy of Japanese Colonialism in Korea: with the focus on family system and home ideology] ". p. 101



contained within Korean society. Adoption across lineage lines posed a major affront to the Korean lineage system, which had carefully guarded its patrilineal succession by keeping adoptions within the limits of agnatic kin. This aspect of the Minjirei reform had the potential to undermine the very basis of the Korean lineage system, and indeed, this was one of the objectives of the 1939 Reform. The impact and objective of the 1939 Reform was a product of complex maneuvering of assimilation and differentiation, rather than a straightforward process of forced Japanization.

Several previous researchers have emphasized that the objective of the 1939 Reform was forced Japanization of Koreans in order to complete Japan-Korea unity (*naisen ittai*). Miyata Setsuko has emphasized the objective of the 1939 reform as forced Japanization of Koreans. She analyzed the 1939 reform in terms of the “*kōminka seisaku*,” the forced assimilation policy, which aimed to make Koreans into imperial subjects in order to eventually conscript them into the Japanese Imperial Army. Japanese style names were considered necessary before Japan could accept Koreans as imperial soldiers. The reasoning was that having Japanese style names would perhaps make detecting and discriminating Korean soldiers more difficult. Yang Tae-ho analyzed the Name Change policy in the context of the history of surname policy in Japan, and pointed out that surnames have been important tools in incorporating new subjects into the imperial political structure throughout Japanese history. Conferring Japanese style surnames to foreign immigrants has been done since the era of the Yamato court to the Meiji period, when the court conferred new surnames to the peoples of Ainu and Okinawa.<sup>155</sup>

Other research illuminated the politics of differentiation as part of the 1939 Reform, rather than the simplistic image of forced assimilation thitherto dominating the evaluation of the reform. Kim Yong-dal pointed out that, contrary to popular myth, the family genealogical record, or *chokpo*, was never abolished by the 1939 Reform. The objective of the 1939 Reform was to add a Japanese household name to the Korean surname, not to replace it. Preservation of Korean names in the household registers was part of the policy design, in order to preserve the distinction, and thus, discrimination, between the metropole and the colony. Mizuno Naoki, in his most recent research on the topic, argued that the 1939 reform was in fact a differentiation policy, rather than an assimilation policy.<sup>156</sup> In other words, the colonial state claimed that the Name Change policy would produce imperial subjects out of Koreans, but it took care to retain differences between the Koreans and the Japanese. Mizuno also argued that the colonial policy of the 1930s represented by the Name Change Policy was not an abrupt departure from previous colonial policies, but was part of the policy continuing since the beginning of the Japanese colonial rule in 1910. Even the new surnames that the Koreans were forced to adopt were not simply to be replicas of Japanese surnames. Although many Koreans assumed that they were to choose Japanese surnames, the official stance was that the new name did not have to be in Japanese. In fact, officials at the Government-General

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<sup>155</sup> Yang Tae-ho in Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*.p.150-160

<sup>156</sup> Mizuno Naoki, *Sōshi kaimei - Nihon no Chōsen shihai no nakade [The Name Change Policy; From the Midst of Japanese Rule of Korea]* , 2008

were divided amongst themselves as to whether they should encourage Koreans to take Japanese names. Government-General pamphlets recommended Koreans not to take Japanese names that already existed, but to invent their own based on the names of their hometown or lineage seat.<sup>157</sup>

A more significant guideline for the new surname was that the new name be a signifier for the household and not the lineage. The colonial state emphasized that the main difference between Japanese household names and Korean surnames was that the latter was a denomination of patrilineal line while the former was that of the household.<sup>158</sup> This was why, the head of the Legal Division explained, Korean women did not change their names when they married and also why they did not take adoptees from outside of lineage. As times advanced, he explained, it was more fit for members of Korean households to have names to designate their household.

The new surname implemented in 1939 Minjirei, therefore, was different from its metropolitan counterpart in a very significant aspect. Unlike in Japan, each household in Korea was encouraged to choose their own name, possibly and preferably different even from that of the main branch of their family. Under the new household name policy, all members of a household in Korea were now to share the same household name, as they did in Japan. But while the Japanese had to keep their main family's household name when they divided households (*bunke*), Koreans in 1940 were encouraged to take different names from their main branch family. This, first and foremost, was to facilitate lineage division in Korea. Yang Taeho, a resident-Korean, or *zainichi* historian, pointed out, that the fear of genealogy extinction felt by some Koreans about the 1939 Reform (as recounted in fictional stories and oral historical accounts) were inaccurate about the policy itself (as pointed out by Kim Yong-dal in the same edited volume). Though inaccurate, they were insightful about the potential harm the Reform would have on the lineage.<sup>159</sup> The Name Change policy was the most fundamental aspect of the transformation. It was therefore much more than an issue of names, it was in fact an attempt to transform Korean family system itself.<sup>160</sup>

### **Response From the Margins**

The impact of the 1939 Reform neither reached all Koreans in the same way, nor to the same degree. Cases that I will examine below show that for some Koreans, surnames or adoption custom were not coupled with cultural identity. Stories like “*Zokufu*” in the introduction make it seem like the 1939 Reform was, first and foremost, a blow to Korean cultural identity. Such negative response, of course, was very much part of Korean response to the Name Change Policy. But a detailed inspection of civil cases post-1940 also unearths different kinds of responses. Korean custom meant different things to different people. It also held different levels of gravity for each. For people like Söl Chin-yŏng, the reform threatened the core of his identity, so much so that he was

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<sup>157</sup> Ibid. p. 43

<sup>158</sup> Miyata Setsuko, *Sōshi kaimei [The Name Change Policy]*. p. 49

<sup>159</sup> Yang Tae-ho, in Ibid. p. 131

<sup>160</sup> Ibid. p. 51

pressed to make a choice between life and death. For others that we will examine below, the reform meant little in terms of identity crisis. In other words, the experience of the 1939 Reform cannot be neatly contained in the nationalistic narrative. To some Korean women, the 1939 Reform may have meant something entirely different from loss of national identity. Mizuno Naoki relays in his book the story of Helen Kim, the famous New Woman of Korea, and how she chose her new Japanese surname. Although, members of her lineage decided to all take “Kaneumi” (K: Kimhae) as their household name, the namesake of their lineage seat, (which, by the way, was discouraged by the colonial state, and regarded by Koreans as a way of resistance,) Helen Kim decided to take a different name. The name she chose, Amagi, was more appealing to her, because the Chinese characters meant “heaven,” a meaningful representation of her Christian identity. The 1939 Reform allowed each house-head to choose a separate household name, independent of larger lineage. This enabled Helen Kim and her mother, who was the widowed house-head, to choose a different name from her father’s lineage. Such a move was not part of the intended outcome of the 1939 Reform, and in fact, women more commonly lost a piece of their identity as they were forced to replace their maiden names with their husbands’. They were forced to take their husband’s household name, which was a drastic move away from the Korean tradition where women always retained her paternal surname, regardless of marital status. Nonetheless, the case of Helen Kim shows that some women were able to turn the reform into a way to express their independence from patriarchal family order.

Likewise, readings of the Chōsen Superior Court decisions of civil cases show that colonized Koreans experienced the 1939 Reform in diverse ways. A case that I examine below features a eunuch family that espoused an exceptional adoption custom that was ignored for the most duration of the colonial period, until the 1939 Reform of the Civil Ordinances.

Yi Sun-bung was born to a poor family.<sup>161</sup> He probably did not have much of a prospect in life. But when he was three years old, his life took a serendipitous turn. A man named Choe Ki-hyōn decided to take Yi into his family. Choe wanted to adopt Sun-bung as his grandson. Choe was a eunuch at the palace, as were his grandfather, father, and his son. Adoption was how eunuch families continued their ancestor worship. As they could not procreate themselves, they would adopt young boys from poor families to pass on their occupation as well as the responsibility of ancestor worship. Choe’s father and the family elder, Oh Kūng’hwa concurred his choice of the boy. The adoption was decided, but the family soon found out that this adoption could not be made official. The year was 1913, three years after the onset of Japanese colonial rule and a year after the colonial state promulgated colonial civil law, the Civil Ordinances. According to the Civil Ordinances, family matters of Koreans were to be decided according to Korean custom. The problem was that the Korean custom was defined by the colonial state, and it was unified to those practiced by the majority. Variations, local or otherwise, were suppressed. Although different surname adoption used to be allowed for those who did

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<sup>161</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) Kōtō Hōin Hanketsuroku [*Verdicts from the (Chōsen) Superior Court*] v. 29 p. 113-119

not have a son or a suitable eligible adoptee in the extended family and was quite common in the Koryŏ dynasty (918-1392), it was severely restricted and slowly decreased throughout the Chosŏn dynasty (1392-1910).<sup>162</sup> By the time the Japanese colonial state surveyed Korean customs on adoption, the majority of Koreans had banned different surname adoption. The colonial government applied the custom of majority to all Koreans without exception. No provisions were made for exceptions such as adoption customs for eunuchs. Same surname adoption, it was decided, was the only recognized norm for Koreans. By way of this unification of customs by the colonial regime, the eunuch family could not act upon their adoption. Nonetheless, Sun-bung grew up in the eunuch family, just as though he was their child. The family sent him to school, and he grew up to be a filial son. When he was in fourth grade, he quit school to take care of his great-grandfather, Oh Kŭng'hwa, who was growing ill in old age.

Many years later, in 1939, when the colonial state finally announced a major revision in the Civil Ordinances to lift the ban on different surname adoption, the eunuch family jumped at the opportunity. This was an opportunity to return to the old ways for this eunuch family. It might have even been the only opportunity for this family to pass on the ancestor worship, as it is unlikely that the eunuch family had kin members to arrange a same-surname adoption. Oh Kŭng'hwa ordered his son to hire someone to arrange a formal adoption of Sun-bung, to make the adoption official by reporting it to the authorities. But just as the arrangement was underway, Sun-bung's adoptive father to be, Hong Pong-gŭn died unexpectedly on March 29, 1940. Even with the 1939 reform, different surname adoption was not allowed for posthumous adoption (*sahu yangja*). Regardless, Kŭng'hwa, now of the Japanese household name of Harashiro, went ahead with the adoption and registered it with the local office on October 30, 1940. Upon adoption, Sun-bung also took the Japanese household name of the eunuch family, Harashiro, and also changed his given name to Nagayoshi.

Kŭng'hwa's widowed daughter-in-law, Pok-dong was not happy with this arrangement. If it weren't for Nagayoshi, she would have been next in line for house-head succession as the *ch'ongbu*, eldest daughter-in-law of the family. Pok-dong could not sit and watch as the privilege of being the house-head slipped out of her hands. Pok-dong seized on the fact that Nagayoshi's adoption did not happen before the untimely death of Hong, and sued to annul the adoption. When Kŭng'hwa died, and Nagayoshi succeeded to the house-headship, she sued Nagayoshi and his adoptive mother and her daughter-in-law, Sun-dong for arranging an illegitimate adoption. Pok-dong argued that since Nagayoshi was of a different surname, he could not be an adoptee for her (adopted) son, Hong Pong-gun, as different surname adoption was not proper Korean custom. Although different surname adoption was allowed after 1940, Pok-dong rightfully pointed out, posthumous adoption, as was the case with Nagayoshi, still had to follow Korean custom. Oddly, for a daughter-in-law of a eunuch family, Pok-dong seemed to have whole-heartedly embraced the custom of same-surname adoption. "As the widow of Choe Ki-hyŏn," her lawyer stated, "the plaintiff has the obligation to protect the Harashiro family and continue the household name." Nagayoshi and other defendants

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<sup>162</sup> Kim Tu-hŏn, *Han'guk kajok chedo yŏngu [Study of Korean Family System]*, p. 221-223

protested. It was nonsense to annul the adoption on grounds of different surnames. In fact, all heirs of the family (even Choe Ki-hyŏn, the deceased adoptive father) were adoptees of different surnames for generations.

In the end, the Chōsen Superior Court ruled in favor of Nagayoshi. The logic of the ruling was that since Nagayoshi had the same surname as the great-grandfather of the Harashiro family, the adoption was legitimate. Since the Harashiros were an exception with the history of different-surname adoption, legitimate adoption would mean that they would have to adopt from any of the families that shared surnames with any of the adopted ancestors. This logic was extremely far-fetched and convoluted. The Harashiros certainly, were not aware of this exceptional rule for adoption when they were trying to adopt Nagayoshi years before. One suspects that it was convoluted logic that the judge at the Appeals Court worked out to accommodate this extremely unusual case, and to protect the adoption from what he considered an arbitrary accusation of the adoptive grandmother, Pok-dong.

There still was diversity and fluidity in family customs in Korea. For this eunuch family, the 1912 Minjirei which claimed to respect the “Korean custom” was more of a challenge to their custom than the 1939 Reform that supposedly assimilated Korean civil laws to the Japanese Civil Code. The 1939 Reform, in fact, gave the eunuch family an opportunity to return to their old ways of life. That the Koreans uniformly shared one set of family customs was very much a myth that was created by the Japanese colonial state. If there was any uniformity in Korean family custom by late 1930s, it was produced by the colonial state itself, through its use of customary laws in the colonial courts. Because not all Koreans shared the same family customs nor interest in the lineage system, the 1939 Reform that aimed to dismantle the lineage system affected people in different ways and to different degrees. To people in the margins like Yi Sun-bung and his adoptive family, the 1939 reform was more of an opportunity than a crisis.

### **Is Concubinage a Grave Insult (*jūdaina bujoku*) to Korean Wives? Managing Korean Customs**

Japanese family policy’s attack on the Korean lineage system did not translate into gains for women or others who were in the margins of the lineage. While the fundamental objective of the Japanese family policy was to disseminate the Meiji family system and reorganize the Korean lineage system, the Japanese colonial state was not willing to do this too explicitly. Since the Meiji family system shared with Korean lineage systems the ideology of patriarchy, it was willing to preserve such ideology, rather than entirely overthrow it. In other words, while the Japanese colonial state tried to dismantle the lineage system in Korea, it also tried to preserve as much of patriarchal order and ideology as possible. The method that the colonial government utilized was to preserve customs that buttressed the authority of the house-head, while significantly reducing the power of lineage elders. The biggest victims in this strategy were the women. As I will examine in the next section, Korean women’s disadvantage continued into the post-colonial period because the family custom that was modified by the colonial state ended being preserved as tradition.

In order to alleviate the shock of family custom reforms, the Government-General used various strategies. Sometimes, the reforms were packaged as a way to bring progress to Korean society. Reform in the adoption custom, for example, was advertised as a way to abolish what the colonial government claimed as inhumane inheritance custom, which barred daughters from inheriting the household. Son-in-law adoption would enable Koreans to pass on their property to their daughters if they did not have a son; they no longer had to give their daughter away and adopt a “stranger” in their place.<sup>163</sup> Likewise, the Government-General claimed that it was advancing women’s status in Korea through legal reforms, such as abolishing child marriage and outlawing concubinage. Yet progress was not something the Japanese colonial state considered as its major goal in Korea. As it imported “advanced” and “progressive” laws into Korea, through numerous reforms in the Civil Ordinances, it took care not to enforce them to full extent lest it would confront the Korean society to an unnecessary degree. Women suffered the most in these calculated setbacks. For example in 1923, when the Minjirei was reformed to apply the Japanese Civil Code to divorce matters, the colonial courts in Korea refused to apply it to actual divorce suits. They believed allowing Korean women same divorce rights as Japanese women would be disrespecting Korean family custom, which, the judges believed, traditionally allowed them no such rights.

Another way to ease the shock of reforms was to ignore reforms in the Minjirei bills in the name of respecting local customs. Politics of differentiation came in very handy in such management of legal reforms. Enforcement of reformed civil laws lagged behind the actual reform of the Minjirei. On the other hand, the Minjirei reform sometimes only confirmed the changes that had already happened in decisions of the Superior Court. Following an internal agreement, with the sanction of the colonial state, the Superior Court made decisions based not on customary laws but on Japanese Civil Code before certain codes were formally introduced to the colony through reform of the Minjirei. At other times, even when certain codes were introduced through the Minjirei Reform, the colonial court was reluctant to implement them, lest it should offend the Koreans. Therefore, many legal changes pertaining to women’s rights did not come in the form of formal legal reform (like that of the 1939 Reform, or any of the official reforms of Minjirei leading up to that reform), but outside of it, in courtrooms, in the form of legal decisions.

The Korean custom, which the colonial court seemed to be so deferential to, was not so fixed or fervently adhered to by the Koreans, as the colonial court made it out to be. Neither did the colonial court itself adhere to it religiously. The customary laws were not codified, and the colonial court itself constantly redefined it through court decisions. In other words, customary laws were always subject to arbitrary adjustment by the colonial court itself. Amidst continual reforms of the Minjirei, and constant redefinition of the Korean custom in the colonial courts themselves, the Korean litigants were unsure which custom they were held against.

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<sup>163</sup> Minami Jiro, “Shiho jo ni okeru naisen ittai no kugen- naichijin shiki uji no settei ni tsuite” Uji seido no kaisetsu - uji towa nanika, ikani site kimeruka, Chosen sotokufu homukyoku, Feb. 1940.

Judicial divorce was a typical legal matter where the colonial court resisted enforcing the Japanese Civil Code in deference, it claimed, to Korean custom. Divorce in colonial Korea was introduced with great reluctance on the part of the colonial state. In the beginning of colonial rule, the colonial court assumed that there was no custom of divorce at all in Korea.<sup>164</sup> Until Minjirei was reformed in 1923, only the old custom of “Seven grounds for the expulsion of wives” (*chilgŏ chi’ak*)<sup>165</sup> was acknowledged in Korea.<sup>166</sup>

But even then the Japanese Civil Code was not fully applied to Korean divorce cases. The issue came to fore when Korean women began to demand divorce on grounds of concubinage by their husbands.<sup>167</sup> Korean wives tried to expand this law, by claiming that this was a grave insult to them, which should be sufficient grounds for divorce according to the Japanese Civil Code Article 813. Concubinage was banned since 1915 through Official Circular No. 240, which denied registration of concubines. This however, did not influence divorce cases, that were ruled according to Korean customs at the time. And concubinage, although banned, was considered a Korean custom. The 1922 Minjirei reform, which stipulated that judicial divorce in Korea would be governed by Japanese Civil Code, was supposed to have changed this. Japanese Civil Code Article 813 laid out grounds for judicial divorce, and “grave insult” was one of them. Yet, concubinage was considered too prevalent among Koreans to be grave enough marital insult for Korean wives to dissolve a marriage. With the pretext of respecting local customs, the colonial court of Korea, refused to grant Korean women divorce on grounds of concubinage, or act upon the colonial law which outlawed concubines. In 1928, a wife sued her husband up to Superior Court, with an appeal for divorce on grounds of her husband’s concubinage. The wife returned to her natal family after her husband physically assaulted her. When she returned the husband already was living with a concubine, and she was suing for divorce on grounds of insult and malicious abandonment. The husband was arguing the concubine was a necessity to take care of household matters and to care for his mother. If the wife would return, he would immediately expel the concubine. The Appeals Court sided with the husband and said living with a concubine was not enough reason to assume that the husband maliciously abandoned the wife or gravely insulted her. The wife did not relent and argued that such a

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<sup>164</sup> Chōsen sōtokufu, *Kanshū chōsa hōkokusho [Customs Surveys Report] (1913)* Question #134

<sup>165</sup> The seven grounds are, 1) childlessness, 2) licentious indulgence, 3) negligence in taking care of her parents-in-law, 4) loquacity, 5) larceny, 6) jealousy, and 7) malignant disease. Pyōng-ho Pak, *Modernization and Its Impact upon Korean Law.*, p. 21

<sup>166</sup> Hong Yang-hee, "Chosŏn ch'ongdokpu ui kajok chŏngchek yŏngu: ka chedo wa kajŏng yideologi rŭl chungsim uro [The Family Policy of Japanese Colonialism in Korea: with the focus on family system and home ideology] ", p. 80

Divorce by consent was introduced through a legal decision of the Keijo Appeals Court in April 11, 1918. - Kim Chu-su, “The Legal Position of Korean Women,” in Pyōng-ho Pak, *Modernization and Its Impact upon Korean Law.*, p.25

<sup>167</sup> Husband’s adultery was not ground for divorce even for Japanese wives, unless the husband was punished for the act under the Criminal Law. Kim Chu-su, “The Legal Position of Korean Women,” in Pyōng-ho Pak, *Modernization and Its Impact upon Korean Law.*

decision was discriminating against women, violated the Japanese Civil Code Article 813, and condoned the bad custom of concubinage. She was, in the end, however, not successful and the Superior Court denied her request.<sup>168</sup> Concubinage was so common among Koreans, the argument went, that it could not be considered to be enough of an insult to the wives to warrant dissolution of marriage.<sup>169</sup>

Things changed suddenly, however in 1938 when concubinage became sufficient marital offense for divorce. This did not come in the form of legal reform or public announcement but through a Superior Court Decision. The case between Pak In-nyō and Han Chang-ho<sup>170</sup> reveals much about the politics of customary law and its management.

Pak In-nyō was suing her husband, Han Chang-ho for divorce on grounds of grave insult. Pak argued that after Han moved away from the family for a job, he not only took in a concubine, but also maliciously abandoned her, rarely returning to his hometown, and never writing her. Moreover, she argued, Han and his family harassed and physically assaulted her, pressing her to move out saying that she was “useless to the family.” Pak argued that all of this amounted to grave insult (*jūdaina bujoku*) and malicious abandonment, which were grounds for divorce according to Japanese Civil Code Article 813. Han, on the other hand, claimed that concubinage was “based on Korean custom, and this did not amount to grave insult.”<sup>171</sup>

The local and appeals courts all agreed with the husband. Cohabitation with a concubine was difficult to be categorized as grave insult in light of Korean custom.<sup>172</sup> This was not a surprising conclusion. It was in line with previous Superior Court decision ten years earlier in 1928, when it declared, “in current social conditions among Koreans, concubinage alone is not enough reason to ask for a divorce.”<sup>173</sup>

Pak, however, fought back. She did not agree that the custom of concubinage was as ingrained in Korean custom, as her husband and the court made it out to be. Pak stated that “monogamy is the backbone of our nation (*wagakuni*)’s family system.” Concubinage was a bad custom that was harmful to monogamy, and this was the consensus in both the metropole and Korea (*naisen ichinyo*). Just because part of Korean society still practiced the evil custom of concubinage did not mean that it should be generously condoned. The Superior Court accepted her argument, and delivered the following decision.

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<sup>168</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) Kōtō Hōin Hanketsuroku [*Verdicts from the (Chōsen) Superior Court*], v. 15, p. 313

<sup>169</sup> Wives must have sued husbands on ground of concubines in vain, again and again. Another one of such cases reached the Superior Court in 1931 (*Ibid.*, v.18-76), when the wife was granted divorce but not on grounds of concubinage. (She sued for abuse and concubinage, and the husband sued her for malicious abandonment. The Superior Court case was about the malicious abandonment account, which was denied.)

<sup>170</sup> *Ibid.*, v. 25, p. 533

<sup>171</sup> *Ibid.*, v. 25, p. 557

<sup>172</sup> *Ibid.* p. 558

<sup>173</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) Kōtō Hōin Hanketsuroku [*Verdicts from the (Chōsen) Superior Court*], v. 15, p. 313



Husband and Wife have the obligation to faithfully maintain the communal living arrangement, which is the objective of marriage. Therefore, if the husband, against the wife's wish, has intercourse with another woman, has children with her, continues to live with her, and forces the wife to live separately, this is a breach of the obligation to be faithful and causing the wife grave psychological (*seishinteki*) pain, and it amounts to so-called grave insult in the [Japanese] Civil Code Article 813. The fact that some parts of Korean society still practiced the evil custom of concubinage should not mean that the misconduct of the husband described above should be condoned.

Thus, Pak's success in obtaining a divorce and securing alimony on grounds of her husband's concubinage, was a significant expansion of divorce rights for Korean women. But notably, this change came to Korea only through a Superior Court decision, and some fifteen years after it was promised to Koreans through the 1922 Minjirei reform, and more significantly before the alleged ground breaking reform of 1939. The above case also exposed the double binds that the colonial state put itself in; it promised progress to women, but it also had to appease the male elites of the colonial society by buttressing its patriarchal order. As I will examine below, the pro-patriarchy policy left an enduring mark in Korean civil law after Korea's independence from Japanese rule. Strengthened legal authority of the house-head, which was a modified (if not entirely invented,) tradition came to be understood as an essential part of Korean family culture. It was the belief in the authenticity of the family customs modified by the Japanese colonial state that enabled the enduring longevity of the customs in post-colonial Korea.

### **Vestiges of Colonial Customary Law; 1945 and Beyond**

In 1959, a widow's right to designate the adoptee was again challenged.<sup>174</sup> The narrative of the litigation is now too familiar to us; a male relative of a widow forced himself into an adoption agreement backed by the family council (*chinjokhoe*), arguing that the widow refused to choose a posthumous heir for her deceased husband, thereby relinquished her obligation. In this case, the widow had registered some of the household property under the name of her son from a previous marriage. The widow refused the adoption agreement, and argued that only she had the customary right to choose the heir. The Supreme Court (*taepöbwon*) of the Republic of Korea confirmed that the widow indeed had the right to choose the heir and just because she did not exercise her rights was not enough proof that she did not have the intention to choose an heir, and therefore the family council could not designate an adoptee and force the choice on her. This case, even to the very details of the litigants' arguments, was strikingly similar to other numerous cases that involved widows' adoption rights from the colonial period. (See

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<sup>174</sup> Taeböpwon pöpwuhoe, *Taeböpwon Minsa Panrejip [Collection of Civil Case Precedents from Supreme Court] v. 2 (1958-1962)* (Seoul 1963). Taeböpwon pöpwuhoe, *Taeböpwon Minsa Panrejip [Collection of Civil Case Precedents from Supreme Court] v. 3-1 (1962-1968)* (Seoul 1969).1963. - p.154 Pong Ha-hyöng vs. Hwang Kyu-yong

Chapter 3) What is more striking was the similarity of the format and argument of the decision made by the post-liberation Supreme Court to that of the colonial Superior Court. What happened, or rather, what failed to happen in the post-colonial transition in Korea that allowed such continuity?

The end of Japanese colonial rule was supposed to have brought great change to Korea. When Japan, after its surrender, relinquished all of its former colonies, the U.S. and the Soviet Union took over Korea and began repealing Japan's former colonial laws, replacing them with new laws. On the northern side, the Soviet Union annulled all of Japanese colonial laws. On the southern side, on the other hand, the U.S. annulled only part of the Japanese laws. In October, 23, 1946, the 1939 Minjirei was repealed with U.S. Military Government Ordinance No. 122. Japanese style names that came into effect by the Name Change Policy were nullified,<sup>175</sup> and all Korean names were changed back to their original forms. Those who wanted to retain their Japanese names needed to make a special request to the authorities within sixteen days. Kim Tu-hön, in his *Hanguk kajok chedo yöngu (Research in Korean Family System)* (1969) criticized the U.S. policy on repealing the 1939 Minjirei. Kim argued that the repeal also did away with the positive side of the law. "The Name Change Policy was not just implementing Japanese style names, but it also had an aspect of modernizing Korean family system itself. But the [U.S. policy to repeal the law] did not consider this aspect at all."<sup>176</sup> Kim analyzed throughout the book how Korean families have modernized during the colonial period, through a process of lineage divisions into smaller nuclear families. A spike in divorce rates and the expansion of women's rights (which also propelled the divorce rate upwards) were major and important factors that sped up the process. The 1939 Minjirei and its policy of household names, Kim pointed out, was another factor that divided the lineage into small families and strengthened the nuclear households.

But the 1946 repeal of the 1939 Minjirei was less transformative than Kim apprehended. Apart from the Minjirei, all of the colonial civil laws were kept intact by the U.S. Military Government. The Military Government Ordinance No. 21 in 1945 (Nov. 2), which ordered all Japanese laws to be retained, was passed for the practical purpose of sustaining stability, but it had an unanticipated lasting effect. The effect of the Japanese Civil Code which was retained in the immediate postwar, was meant to be a temporary measure, but its use was prolonged because compilation of the new Civil Code was delayed due to the Korean War (1950-1953). The new Civil Code was not written until 1958, and then came into effect only in 1960. Since Japan replaced the prewar Civil Code with a new Civil Code in 1948, the prewar Civil Code had a longer life in Korea than at home.

While Japanese Civil Code was utilized as Borrowed Civil Code (*üiyong minpöpp*), the colonial law of Minjirei was still effective, which meant that family matters were still decided according to Korean custom. This meant that customary laws as defined and acknowledged in colonial courts were still effective in post-colonial Korea. The civil

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<sup>175</sup> *Migunjöng Pöpyöngjip [Collection of Codes Under the U.S. Military Occupation]* (1983). p. 358.

<sup>176</sup> Kim Tu-hön, *Han'guk kajok chedo yöngu [Study of Korean Family System]*., p. 614

court scene in post-colonial Korea therefore showed surprising consistency with those of the colonial civil courts. Judicially, in family cases, nothing much changed after Korea was decolonized.<sup>177</sup>

For example, when the legitimacy of a burial site was under dispute in a case from 1956, the litigants searched far and wide for legal precedents and it did not shy away from precedents from the colonial period.<sup>178</sup> The defendant did not hesitate to cite laws from the colonial period, Regulations on Burial Grounds, Cremation Sites, Burial, and Cremation (*bochi kasōba maisō kasō torishimari kisoku*) to argue their case. The plaintiff, Pyōn Kwangyong, sued Kim Chong-gwan, for infringing upon his surface rights by burying his great grandfather five feet away from his great grandmother's tomb. The land, where the burial was then located was owned by Kim. Pyōn's father had sold it to his father, with his mother's burial mound already on site. Pyōn argued that, though he did not own the land, Kim still had to respect the ritually designated boundary around his grandmother's tomb when making new burial mounds on the land. The Supreme Court decided that Kim has in fact infringed upon the Pyōn's rights regarding the burial site.

It is our country's custom that if one has peacefully and openly occupied the burial site on a land owned by another person for more than twenty years, the owner of the burial site acquires a right to the burial site and its surroundings, which is similar to surface rights. When someone who has established a burial site on his land and sold that land to another without relinquishing his ownership of the burial site, and has occupied the burial site peacefully and openly for twenty years, then he still acquires the above rights [to the land.]<sup>179</sup>

"The custom of our country," the Superior Court was referring to, was in fact the custom of colonial Korea (*Chōsen no kanshu*) that the Japanese colonial court acknowledged and enforced during the colonial period. As Korea still lacked a codified family law, the colonial Civil Ordinances (*Minjirei*) was still enforced.

The effect of enduring colonial customary law and claims of its denial was more glaringly represented in a case from 1955.<sup>180</sup> Yi Ki-man sued Kim Hak-sul, over a sales transaction of a house. The defendant, Kim had canceled the transaction, claiming that as a partial owner, it was improper of him to sell the house on his own. The plaintiff, Yi claimed that Kim was only backing out of the transaction because the price of the property had sharply increased in the postwar inflation. In the end, the Supreme Court denied Yi's suit. Kim's claim that he was only a partial owner of the house turned out to be true. According to Korean custom, Kim had to share the ownership with his sisters

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<sup>177</sup> Minor change did happen, despite Military Government Ordinance No. 14, through Supreme Court decisions, such as the one in 1947, that nullified Japanese Civil Code No. 14, that said women had limited legal capacity. - Kim Chu-su in Pyōng-ho Pak, *Modernization and Its Impact upon Korean Law.*, p. 27

<sup>178</sup> Taebōpwon pōpwuhoe, *Taebōpwon Minsa Panrejip [Collection of Civil Case Precedents from Supreme Court] v. 1 (1947-1957)* (Seoul, 1958).p. 713

<sup>179</sup> Ibid. v. 1 (1947-1957), Ōmungak-gan, 1963. p. 717

<sup>180</sup> Ibid. v. 1, p. 441

because since his father had not died as a house-head. His inheritance was to be equally divided amongst his children yet in this case, Kim and his four sisters. The plaintiff denied that daughters had such inheritance rights in Korea. “According to the custom of our country (*aguk kwansŭp*), there is no instance where sons and daughters of the household equally divide inheritance when a non-house-head dies [emphasis added],” he argued. He claimed that if daughters had equal inheritance rights then the daughters-in-laws should also be given equal rights to inheritance; which will mean that women received double inheritance, both from their natal families and married families. “If we acknowledge such inheritance rights, their [i.e. women’s] rights will be doubled, and it would be giving women superior property rights when, as stated before, they are legally not allowed to inherit the household.” The Supreme Court did not acknowledge this argument. Following precedents from the colonial period and using colonial customary law, the Supreme Court repeated and confirmed the following decision delivered by the Taegu Appeals Court (*Taegu kodŭng pŏbwon*); “When a male member of the household, who is not a house-head dies, *it is the custom of our country* for the direct descendants in the same household to equally inherit the property.” [Emphasis added] This particular “custom of our country” was later denied in 1960 Korean Civil Law. The share of the daughters in inheritance was made always half of her brothers in the 1960 law.

As we trace similar legal precedents in the colonial cases, we find that the above decision was in fact based on the household concept and the concept of household property, *kazan* [K: *kasan*]. In a 1932 case over property inheritance between a widow and a posthumous adoptee, it was specifically stipulated that while the widow may keep what is considered her separate property, all property that is to be considered “household property (*kazan*)” should be relinquished to the adoptee upon adoption.<sup>181</sup> The idea was that there was household property that belonged to the household, which was only to be owned, or passed onto whoever held the household headship. A similar concept of household property was confirmed in other cases from 1933.<sup>182</sup> If the property was not *kazan*, then there was no regulation against either dividing it, or passing it only to the household heir.<sup>183</sup> In these cases from 1933, it was decided that the property of a mother who was not a house-head should be equally divided by her descendants regardless of sex. Even daughters who had already married out were due equal share. This decision was based on the idea that property owned by the house-head belonged to the household, whereas non-house-head’s property was separate property, and the inheritance of it could freely cross household boundaries.

In 1960, South Korea came to have a new Civil Code. A new Civil Law was promulgated in 1959 and came into effect in 1960, thus marking the beginning of the codified family law in Korea. In accordance to the 1948 Constitution, the new civil law

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<sup>181</sup> Chōsen Kōtō Hōin shokika, (*Chōsen*) Kōtō Hōin Hanketsuroku [*Verdicts from the (Chōsen) Superior Court*] v. 19, p. 73

<sup>182</sup> Ibid. v. 20, pages 440 and 461

<sup>183</sup> Chōsen sōtokufu, *Kanshū chōsa hōkokusho* [*Customs Surveys Report*] (1913), p. 360. If the property had been owned by house-head, it is considered undividable among multiple heirs. See also in Kim Tu-hōn, *Han'guk kajok chedo yōngu* [*Study of Korean Family System*].

made provisions for equality between individuals and sexes (Article 8, and 20). The new Civil Code also ended the use of the Japanese Civil Code. However, this did not mean the colonial customary law was no longer effective. Customary law from the colonial period was still applied to cases that involved events that happened before 1960, that is, during the period where Japanese Civil Code and the colonial family law were effective (Bylaw Article 25). In this way, colonial family law was kept alive. It was found to be in use in the Korean civil courts as late as 2007.<sup>184</sup>

The longevity of the colonial family law was exemplified as early as 1962 in a case that involved the inheritance rights of a female house-head. Choe Suk-ja had inherited the house-head-ship as an only child, when her father had been missing and was presumed dead in 1957. Soon after, she got married. A year after her marriage, a posthumous adoptee was chosen for her father. When the adoptee, Choe Sŏng-chan, realized that he did not receive the full amount of inheritance that he was due, he sued Suk-ja for selling off the inheritance before he was adopted. According to the old customary law, Choe pointed out, Suk-ja was not allowed to sell *kasan*, the household property as a female house-head. The old law stipulated that the household property (*kasan*) be relinquished when the woman house-head “married out”. The case was tricky because depending on which law was to be applied, the colonial customary law or the new 1960 civil law, both parties could claim ownership of the property. If the colonial customary law was applied, then the property was due to the adoptee. On the other hand, if the new civil law was to be applied, then Suk-ja could keep her inheritance, because the new civil law did not force a woman house-head to relinquish her property upon marriage. According to the new civil law, inheritance only occurred upon death of the property holder. The Supreme Court decided that when Suk-ja got married in 1959 and according to the civil law at that time (which was the colonial customary law) the inheritance [to the future adoptee] was initiated, and therefore the property was to be given to the adoptee. The decision, in the end, was a technical one, involving a legal interpretation about when a certain legal relation was established, and which law was to be applied. What is significant was that the colonial customary law inevitably lived on in postcolonial Korea.

Some of the colonial customary laws lived on in post-colonial Korea through codification into the 1960 Civil Law. If the continuation of the colonial customary law in civil suits concerning events that happened during the colonial period was inevitable, the codification of the colonial laws was more problematic and demonstrated a definite influence of the patriarchal slant of the colonial laws on the post-colonial law. This was because the jurists who wrote the new Civil Code and the assemblymen who passed the Code were concerned about protecting patriarchal family traditions. The new Civil Code, according to some evaluation, was “a conciliatory law modeled on the basic principles of the old-fashioned clan code system [i.e., house-head system] but with an effort to eliminate as much as possible those undemocratic aspects of family life that hampered

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<sup>184</sup> Myŏng Sun-gu, "Ajikdo saraitnun pŏp, chosŏn minsaryŏng [A Law Still Surviving: The Civil Ordinances]" *Jusutisu* 103 (March 28, 2008, 2008). vol. 103, [DATE] p. 233

individual freedoms and the development of individuality.”<sup>185</sup> Most of the laws that were kept from the colonial code, had to do with the household system. As the household system, or the “house-head system (*hojujae*)” as it was now called, was retained, certain inequality between men and women was unavoidable. While the 1960 Civil Law declared that it implemented the principle of equality of sexes, many codes fell short of this promise. The 1960 Civil Law did advance women’s rights on some fronts. Wives now had separate and independent property rights from their husbands, they could sue for divorce on grounds of infidelity (just as their husbands could), and had full legal capacity on household affairs. Inheritance rights for widows were strengthened; widows now had full inheritance rights if there was no one else eligible for inheritance (thus, the temporary provision was eliminated), and their share of inheritance was increased from half to equal amount to the inheritance direct ascendants were due. Yet there were other stipulations that preserved the conservative slant that customary laws had in the colonial period. Wives could be divorced for disharmony with parents-in-law (Article 840). Although wives had separate property rights, any property whose ownership was unclear, was assumed to be the husband’s. (Article 830, No. 2) Wives were required to live at the husband’s household upon marriage (Article 826, No. 2), and husbands still had the right of guardianship over wife and children (*hugyŏnjŏk poho ūmu*) (Article 934). A husband did not need to obtain their wife’s permission to register a child born out of wedlock in their household register (Article 782), while the wife did. Wives were further disadvantaged in times of divorce under the 1960 Civil Code. Upon divorce, husbands had precedence over wives to have parental rights over children (Article 909). Mothers lost parental authority over her children upon divorce and they did not have the rights to ask for division of household property, nor were they guaranteed alimony.<sup>186</sup> These stipulations were codification of the patriarchal slant from the previous customary laws that strengthened house-head rights, and fell short of the promise that it would fulfill the principles of equality between individuals and sexes.

A number of codes were even more conservative than the new Japanese Civil Code. For example, while the Japanese Civil Code assumed common ownership of married couple for any property that had unclear ownership, the 1960 Korean Civil Law attributed such property to the husband’s ownership. Also, while the Japanese Civil Code stipulated that the husband and the wife had shared responsibility to provide for the married economy, the new Korean civil law assumed that the husband provided living expenses for the married couple.

Other parts of the law stipulated even less rights to women than during the colonial period. While during the colonial period, as the case we have examined above about the non-house-head’s inheritance, the daughters had equal share with her brothers, under the 1960 Civil Law, daughters were always due half the share of inheritance of her brothers. Her share would be one third that of her eldest brother, the heir to the house-head. If she had already married out of the household, her share shrunk to one fourth of her brothers’ share. This showed that 1960 Civil Law did not merely inherit the

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<sup>185</sup> Kim Chu-su in Pyŏng-ho Pak, *Modernization and Its Impact upon Korean Law.*, 1958, p. 28

<sup>186</sup> *Ibid.*, p. 32

household system of the colonial period, but it was further modified by the strong male-centricity of the Korean *chongbŏp* system, where all male members of the lineage was considered equally valuable in continuing the family line. In contrast, the Japanese household system privileged the main branch of the household and the eldest son who was to inherit the main branch of the household. Therefore, separate property of the non-house-head was not protected as *kazan*, the household property, and was thus equally distributed amongst all children, daughters as well as sons. But in the post-colonial Civil Law, all property held by male members of the household was considered household property, and sons were privileged over daughters in all property inheritance. Such male-centricity had been expressed again and again in arguments presented in colonial courts, where women's property rights were often fully negated. In some sense, the 1960 Civil Law in Korea expanded the household property concept, while the colonial court suppressed it by privileging the main line of household over branch families. As a result, the inequality between the sexes was, in some sense, strengthened in the post-colonial "house-head system (*hojujae*)" in Korea compared to its colonial household system.

After the conservative family law was codified into the 1960 Civil Law, efforts to revise it have seen limited success over the decades. It was not until 2005 (enacted in 2008) that the household system itself was abolished from the Korean Civil Code,<sup>187</sup> and this was only possible through many years of ingenious discursive work on the part of liberal legal scholars and people in the feminist movement. The first organized effort to revise the family law was launched in 1973, as sixty-one women's organizations in Korea formed a "Pan-Women's Committee for the Expedition of the Amendment of the Family Law" and fought for ten reforms, including the abolition of the family head system, more equal inheritance and property rights for women, and better parental rights for divorced mothers.<sup>188</sup> Their efforts eventually succeeded and the revised Family Law was passed in the National Assembly in 1977. The women's rights movement was able to pull off a major revision in 1977, which was heralded as "epoch-making" by one Korean legal scholar.<sup>189</sup> The new Family Law came into effect in 1979. The revision implemented joint property ownership for married couples, increased inheritance shares for widows and unmarried daughters, and allowed equal parental authority for both parents. But it still denied divorced mothers parental rights to their children and birth mothers' rights to her child born out of wedlock (if the child was registered in the father's household.) Needless to say, even if the inheritance portion was increased for daughters and widows, it fell short of reaching inheritance amounts equal to those of the male descendants. And most importantly, this revision could not do away with the household system, which was the main culprit for various kinds sexual discrimination.<sup>190</sup>

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<sup>187</sup> , *Hangyore*, March 1, 2005 , Mar. 1, 2005. It followed the decision of the Constitutional Court (*hŏnpŏp chepanso*) that the house-head system was against the sexual equality provision of the Constitution.

<sup>188</sup> Pyŏng-ho Pak, "Family Law" in Pyŏng-ho Pak, *Modernization and Its Impact upon Korean Law*. p. 8

<sup>189</sup> Kim Chu-su, in *Ibid.*, p. 20

<sup>190</sup> Pyong-ho Pak, "Family Law" in *Ibid.*. "[T]he most problematic part of the bill was dropped..." probably refers to the PWC (Pan-Women's Committee for the Expedition of the Amendment of

Such gender inequality in Korean family law, the feminists argued, was the culprit for the age-long tradition of favoring sons over daughters in Korean society. As the national campaign for birth control took off in the 1970s and 80s, the feminist movement argued that it was the unequal gender rights written into the family system that was to blame for the high birth rate in Korea. People simply had baby after baby until they had a son.<sup>191</sup> When President Roh Taewoo was elected in 1989, the women's rights movement pressured him to follow through with his promise to revise the family law.<sup>192</sup> 1989 thus saw another revision of the family law, which increased both parental rights to divorced mothers, and women's inheritance rights. Posthumous adoption was also abolished.<sup>193</sup> This revision met great backlash from the traditionalists, namely the Yurim, the association for Confucian scholars. They argued that the 1989 revision abolished the house-head system, so vital to the preservation of ancestor worship tradition, all but in name.<sup>194</sup> The 1990s saw the beginning of another movement from the feminist groups to achieve the full abolishment of the house-head system.<sup>195</sup>

The inequality still remaining in the family law was continually pointed out in public campaigns and through media coverage, but a move towards a major legal revision did not quite gain momentum until the 2000s, when a new discursive strategy took hold; that the house-head system was not a tradition, but in fact, a colonial legacy.<sup>196</sup> The early 2000s was a time when anti-colonial sentiment was high in Korea. Nationalistic sentiment that was rekindled in the aftermath of the IMF takeover of the Korean financial reform was kept alive in the Cleaning of Colonial Legacy campaign led under the Kim Dae-jung government and the following Roh Moo-Hyun government.<sup>197</sup> In 2004, Special Law to Investigate Anti-national Acts under Japanese Colonial Rule (*Ilche kangjŏmha panminjok haengwi chinsang kyumyŏng e kwanhan tŭkpyŏlpŏp*) was passed in the National Assembly to install a special investigations committee to investigate pro-Japanese collaborators; their collaboration with the colonial government. In 2006, a

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the Family Law)'s demand to abolish the family head system. Their demand to allow same surname marriage was briefly allowed - p.8.

<sup>191</sup> , *Choson ilbo.*, Feb. 22, 1973, "Kajok kehoek gua pŏbŭi pyŏk- hojujedo itnŭn han adŭl ddal kubyŏl anhalsu ŏpsŏ" ., Dec. 28, 1982 "Ingu ŏkche e 'hyŏnsil ui pyŏk'" (Population Control Hits 'Wall of Reality')

<sup>192</sup> *Choson Ilbo*, Nov. 11, 1989, "Rho daetongryŏng e kongge chilŭisŏ - yŏsŏng tancheryŏn hojuje peji dŭng kongyak chikildde" (Open Inquiry to President Rho - Women's Group Federation says it is time to keep election promises)

<sup>193</sup> *Choson Ilbo*, Dec. 20, 1989 "Kukhoe tonggua pŏban - minbŏp kejŏngan"

<sup>194</sup> *Choson Ilbo*, Feb. 22, 1990, "Kejŏng minpŏp chŏntong yunri shibi" Sep. 19, 1990 "Chŏn'guk yurim kajokpŏp chekejŏng yogu"

<sup>195</sup> *Choson Ilbo*, Apr. 15, 1993. "Kajokpŏp kejŏng- hojuje peji dŭng nonŭi chege"

<sup>196</sup> *Choson Ilbo*, May 7, 2003 "Hojuje peji chujin - ihon chanyŏ kajŏng ŏmŏni sŏng kanŭng", "Hojuje ppuri nŭn ilje?"

<sup>197</sup> "National shame" (*kukchi*) was the term Kim Daejung used to call the IMF takeover, during his presidential campaign in 1997. *Choson ilbo*, December 7, 1997. "Kukchi" was usually used to refer to the Japanese Annexation of Korea in 1910, as in "Kyŏngsul kukchi," National Shame in the Year of Kyŏngsul.



special presidential committee (*chinil panminjok haeng'wija chesan chosa wiwonhoe*: Committee to Investigate Property of Pro-Japanese Anti-national Collaborators) was set up to track down and confiscate property owned by those who collaborated with the Japanese colonial government during the colonial period. Under this atmosphere, the new anti-colonial strategy on the part of the revisionists proved to be very effective in rekindling public debate over the house-head system. Also helpful was the demographic transformation of the Korean society that was already taking place. Continuing decrease in birth-rate and shrinking family size could no longer sustain the demands of the family head system, where sons were required to continue the family lineage.<sup>198</sup> Beginning in 2003, public hearing sessions were held for the legal committee of the National Assembly; a new family law that did away with the house-head system was drawn up, and it was passed in the National Assembly in 2005. The house-head system that formed the basis of the civil administration since the colonial period finally saw its demise.

## Conclusion

Above, I have aimed to reframe the 1939 Civil Ordinances Reform from the perspective of family and gender. This was to challenge the nationalistic framework with which the reform has been dominantly examined. As shown in the cases examined above, the purpose of the Reform was to restructure the Korean lineage and disseminate the Japanese family system. Contrary to state propaganda, the 1939 Reform neither abolished discrimination nor granted equal rights to colonized Koreans. Instead, it effectively dismantled the Korean lineage system and replaced it with the Japanese-style household system.

Seen from the perspective of women and family issues, what is remarkable about the 1939 Reform was not in its conspicuous break from the past as a drastic assimilatory measure, but its continued policy of differentiation in family law policy despite its ostensible slogan of assimilation. The colonial legal practice, which maintained the Korean colony as a repository of backwards customs and thus sustained legal conservatism regarding women's rights, left a lasting legacy in Korea. Examination of civil cases after the 1945 independence and the 1960 new Civil Code shows that the legacy of the colonial customary laws strongly lived on in the post-colonial period in Korea. Even though the post-colonial period brought broad abolishment of Japanese legacies, the household system and its strong patriarchal rights was slow to be detected as such. Although the purpose of strengthening the rights of the house-head supposedly was to dismantle the Korean lineage system, rather ironically, house-head rights came to be accepted as a Korean tradition rather than a Japanese import.

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<sup>198</sup> Yang Hyun-ah, "Hoju chedo wihön sosong e kwanhan pöpsahoehakjök kochal - kajok ui pyönhwa rül chungsim ũro [Considering the Legal Accusation of the Unconstitutionality of the House-head System from the Legal Sociological Perspective: Focusing on the Changing Family]" *Hanguk sahoehak* 36 (2002). no. 5, 2002

## Conclusion

In this dissertation, I have discussed how widows' rights were transformed in Korea under the colonial family law during the Japanese colonial period. Through readings of court case records, newspaper articles, state propaganda materials and fiction, I have shown that widows' rights developed in intricate relationship with the larger transformation that was taking place during the colonial period of Korea, namely the nuclearization of families. Creating nuclear households and thereby weakening the Korean lineage system was one of the major objectives of the Japanese colonial policy. Widows came to be highlighted in this reform process, as their ambivalent position between the lineage and the nuclear family made them the most effective entities that could visualize the boundary of the household against the traditional ties of the lineage. As the protector of the future heir of the family as well as the head of the household, the widow represented both the interest of the lineage and the interest of the nuclear family. By protecting widow house-heads, the colonial state effectively solidified boundaries between households that cut through traditional families ties. It is significant that the protection of widows' rights did not coincide with expansion of women's rights. The goal of the Japanese colonial state, after all, was to implement the household system that was thoroughly structured based on patriarchal order. Other women's rights, such as equal inheritance rights or divorce rights that threatened the patriarchal order of the household, therefore, did not receive state protection as did widows' rights. Widows' rights, likewise, were never expanded to permanent inheritance rights though their privileged status under the colonial state did expose them to a greater number of lawsuits. As colonial family policy was articulated through the 1920s and the 1930s along the lines of disseminating Japanese adoption custom, expanding rights of another group of women (namely, daughters) was presented by the colonial state to justify the reform. As the assimilation policy was rigidified in the 1939 Reform of the Civil Ordinances, expanding women's rights was dropped as part of the colonial agenda. In addition, the colonial state used Korean customs to delay expanding women's rights. Fearing local resistance, the Japanese colonial court acted conservatively in enforcing legal reforms regarding women's rights. In short, the existence of customary widows' rights and the colonial household system enjoyed a brief moment of harmony in the beginning of the colonial period, but their agendas caused them to diverge as colonial rule progressed. Korean family customs, in this process, were utilized by the Japanese as an integral part of colonial family law and played a significant role in shaping the legal culture of colonial Korea.

In Chapter 1, I investigated the politics of writing the Meiji Civil Code as the origin of the colonial household system. Political concerns for social cohesion influenced the writing of the Meiji Civil Code, which hybridized the traditional family system with elements of modern Western civil codes. The Meiji family system was a modified version of the elite samurai family structure of the Tokugawa period, which was characterized by strong patriarchal authority and a strict principle of primogeniture. While previous scholarship was mostly focused on the family collectivity promoted by the Meiji family

system, I have found that the most significant effect of Meiji family system was the nuclearization of families in modern Japan. Similar effect was experienced in colonial Korea in the form of the division of lineages. With the enforcement of the household registration, rights of the house-head and the boundary around the household became the only legally recognized unit of families. Some property cases I examined in Chapter 1 show that the colonial household system functioned to legally mute property claims across household boundaries, which to many Koreans meant violating family ties that they viewed as sacrosanct.

In Chapter 2, I explored how the colonial household system affected widows' rights in colonial Korea. In examining numerous civil lawsuits that involved widows and widowed concubines, I found that many widows benefited from the newly strengthened rights of the house-head under colonial rule. Especially in comparison to widows who are featured in appeal letters from the late Chosŏn dynasty, widows in the colonial period found better support for their rights in the colonial judicial system. But this privilege was only granted when their rights coincided with the objectives of the colonial state. For example, widows who tried to push the colonial judicial system to recognize special customs for concubines did not find much support from the colonial court.

In Chapter 3, I showed how the colonial policy on family law reform in the 1920s and 1930s diverged from widows' agenda to expand their rights in colonial Korea. In order to further the efforts to disintegrate Korean lineages, the Japanese entertained reform plans on Korean adoption customs and family rituals. The colonial state attempted to abolish the ban on different surname adoption to open access to lineage property to non-agnatic kin. Family rituals were reformed to suppress lineage-wide gatherings. While these reforms were advertised as ways to bring progress and more rights to Korean women, especially daughters, demands for full inheritance rights brought to court by women themselves were denied.

In Chapter 4, I discussed the effects and legacies of the 1939 Reform on Korean society. The 1939 Reform was the last effort of the colonial state to disintegrate the lineage system with the Name Change Policy and the adoption custom reform. Both reforms were geared towards disintegrating the lineage system. The colonial state encouraged each household to choose a different name from the main branch of their lineage, and the new adoption law opened adoption to non-agnatic kin. The effects of the reform were unevenly felt. Some women and others on the margins of the lineage system gained freedom from the restrictions of the previous customs. However, most women were negatively affected by the reform, as they were forced to drop their natal names and share their husbands' new household name. More significantly, the colonial household system left a long legacy in post-colonial Korea. Colonial utilization of Korean customs led Koreans to accept the colonial household system as its tradition and the road towards its abolition (which was achieved as late as 2005) was long and laborious.

Seen as a whole, widows' rights and colonial customary law have developed in interaction with three different undercurrents of Korean history. First is the expansion and intensification of patriarchal order. The story of widows' rights transformation is also a story of their struggle against two grand forces of patriarchy: the Korean lineage system and the Japanese colonial state. In the Chosŏn dynasty, widows' rights were protected to

benefit the continuation of the lineage. During the colonial period, widows' rights were utilized to enforce and strengthen the household. Widows' rights, in other words, were utilized by two patriarchal forces as tools to benefit themselves, rather than the rights of the widows themselves. When some widows in the 1930s tried to expand their rights for their own sake, they were unsuccessful.

Records from colonial civil courts show that Korean patriarchal forces played a significant role in shaping women's rights during the colonial period. Above, I have examined various claims of Korean customs presented to the colonial court that argued that Korean custom absolutely denied women's property rights. These claims were many times much more severe than what the Meiji Civil Code allowed. Contrary to dominant argument which has blamed the Japanese family system for the diminishment of women's status during the colonial period, I have argued that rather than the Japanese family system, it was the patriarchal customs (or claims of such) from the Korean society that most negatively affected women's status in Korea. Gender conflict among Koreans during the colonial period has of late, received minimal scholarly attention. Acknowledgment of intra-national conflict during the colonial period has been suppressed in the previous historiography. Since debate over the abolition of the so-called house-head system was heightened in the 1990s, the focus of the debate was on the colonial origin of the house-head system. During the debate, the house-head system and its sexually discriminatory provisions were understood as solely being a result of Japanese influence. This however, was actually a distortion of Korean tradition that people assumed to have allowed for more rights for women. While such an argument was successful in repealing the house-head system and achieving an important legal reform, it was inaccurate in that it concealed gender conflict within Korean society that not only produced, but also maintained the gender inequality written in the said house-head system. I have shown in this dissertation that such a view of the colonial Korean society (that without foreign intervention, would have been a harmonious society with little, if any, gender conflict) is not only naïve but gravely inaccurate.

The second undercurrent of this story is the articulation of the Japanese assimilation policy. The development of colonial family policy in Korea is also the story of how Japanese assimilation policy came to be defined by incrementally smaller number of Japanese family customs. First, the colonial household system only emphasized strong house-head rights and principles of primogeniture. As is evidenced in my discussion of widow cases, Korean family customs were widely incorporated into the colonial household system in the early years of Japanese colonial rule. Colonial reforms in the early years also incorporated a variety of reform policies that fell under the rubrics of a civilizing mission, such as abolishing concubinage and enforcing marriage age. But as the attack on the Korean lineage system became more focused in the later years, assimilation increasingly took on the narrow definition of duplicating the Meiji family system in the colony. Later reforms were more focused on incorporating unique elements of the Japanese family custom – son-in-law adoption and surname style, as was ultimately realized in the 1939 Reform. In short, the Japanese assimilation policy developed from a more diverse and universal policy to a more self-referential one. While all assimilation policies have elements of self-reference, it is notable that the Japanese empire chose its

family system as the core of its identity to be disseminated into its colonial territories. Thus, the Japanese family system, which played a critical role in the state-building process of modern Japan, also fundamentally shaped the families of colonized territories.

The third undercurrent is the nuclearization of families in colonial Korea. I have analyzed above the colonial household system and colonial family law reforms as attempts on the part of the colonial state to dismantle the Korean lineage system. While these efforts were not successful in fully disintegrating the lineage, it certainly resulted in nuclear (or stem) families being the only legally recognized unit of family. Nuclear families, thus produced, had clearly attributed legal rights and boundaries that were easily legible to the colonial state. The colonial household system also regularized and formalized the relationship between the family and the state. The new household ruled out alternative claims of rights on the family or its property other than those acknowledged by the colonial state. Strengthened legal rights of the house-head muted familial influences from outside of the household boundary, thereby voiding claims over property by fathers or older brothers who were not part of the household. The 1939 Reform and its surname regulations that encouraged each household to have its own surname to designate its independence, therefore, signaled in some sense, the completion of the nuclearization of Korean families.

Abolition of the household system in 2005 meant much more than abolishing the household and the house-head rights. It was also the beginning of the abolition of the patrilineal family system inherited from the pre-colonial eras and maintained by the colonial state. Allowing citizens to change their surnames and even choose to take maternal surnames, albeit with great restriction, meant that patrilineal principles were significantly weakened. A series of recent lawsuits over lineage property show that perhaps the 2005 abolition is larger than the issue of the house-head system. In the early 2000s, numerous groups of daughters sued their lineage organizations for equal distribution of profits from disposing of lineage property. Some lineages excluded daughters who had married; other lineages distributed more money to heads of households.<sup>199</sup> They accused the lineage system of perpetuating sexual discrimination, which violated the Korean Constitution. As the title of one of the newspaper articles (“War of the Daughters” [Daldül ūi jŏnjeng]) aptly captured, these cases signaled the fact that these were a new kind of attack on the lineage system. By asking for equal inheritance as their brothers, these women were challenging the very basis of lineage organization, namely the principle of patrilineality. Although the daughters had once been co-opted in the colonial household system to justify the son-in-law adoption, they were now waging a war of their own. Although both groups of women lost their cases,<sup>200</sup> the Korean lineage system might be on its last legs.

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<sup>199</sup> Tonga Ilbo, October 24, 2001; Tonga Ilbo, December 6, 2006. “Chongjung chesan namnyŏ chadŭng punbe, sŏng chabyŏl anida” [Unequal Distribution of Lineage Property Not Sexual Discrimination]

<sup>200</sup> The Korean court’s explanation was that since lineages are organized along patrilineal principle, it is difficult to see it as sexual discrimination, nor could the government ask the lineages to equally distribute their property to women who have married or will marry out to

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other lineages. - Tonga Ilbo, October, 3, 2010. “Teböp ‘chongjung chesan punbe söng chabyöl hamyön muhyo.’”[Superior Court Says, ‘If Lineages Commit Sexual Discrimination in Property Distribution, It Will Be Ineffective’]

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