25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 048 / 2012
Series B
Human Rights, Democracy; Internet / intellectual property, Globalization

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Japan's Influence on Korea's Judicial Modernization: Examining the Reality of Judicial Modernization by Analyzing Legal Cases in the Late Nineteenth Century

URN: urn:nbn:de:hebis:30:3-249068

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Keywords: Judicial Modernization, Confucianism legal system, Judiciary Reform, Premodern Trial, Japanese annexation

I. Introduction

From the point of nationalism, Korean scholars have asserted that the modern judicial system was adopted through the Gabo Reform, which was implemented to modernize the administration and the judiciary in the late nineteenth century. While this reform had time and political limitations, it is believed that Korean bureaucrats participated in a self-judiciary reform. The scholars asserted that Japan's Residency General (which was the governing organization established before Japanese annexation of Korea as a protectorate) and Japan's resulting occupation of Korea deprived Korea of the opportunity to establish western judiciary modernization.

However, the modernization (the Gabo Reform) of political and administrative legislation in Korea was undeniably led by Japan. While it is said that Korean bureaucrats who supported the reform had participated because of Japan's influence, the reform was actually planned and executed solely by Japan. I will demonstrate that the Act of Court System, a modern legislation, is not something to be proud of but that it was based on a political scheme to convert Korea into a western constitutional country in order to make it more feasible to colonize.

Furthermore, I will prove that this legislation, which was considered a symbol of judiciary reform, was not even executed properly. Korean nationalism scholars cannot deny the influence of Japan on the Gabo Reform. Further, the limit of the legislation of the Act of Court System is also viewed sympathetically. However, this chapter is not concerned with the limits or adverse effects of judiciary reform, but the improper execution of the Gabo Reform and the legislation of the Act of Court System. The Japanese government, which

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planned the reform, was able to predict the reform's failure, on which it based its justification of direct occupation by establishing the Residency General.

I will critically review previous studies on the reform by presenting the content of the legislation of the Act of Court System. It is impossible to study the proper execution of the law or the accomplishment of legislative reform by merely reviewing the content of the legislation. These studies are self-contradictory, as the fundamental human rights of some Asian and African countries that gained independence after World War II—and that were dictatorships—were ignored while they tried to establish the western legal system and democracy. While the constitutions of dictatorship countries include fundamental human rights, these constitutions do not necessarily actually protect fundamental human rights.[1]

The content of their legislation may be "rhetoric" that is unrelated to the reality. By reviewing and analyzing actual cases, I will prove that the legislation of the Act of Court System that was considered Korea's modern judiciary was actually not a properly executed law or legislation despite it being introduced as a Japanese diplomatic and political scheme. Further, I will assert that the premodern Korean legal system was similar to the common law system, which focuses on case law; the adoption of the civil law system was based solely on Japan's influence.

II. Korea's premodern Confucianism legal system

1. Korea's premodern legislation and law

Premodern Korea (Chosun Dynasty) adopted the Grand Ming code from China and applied its law. Basically, the enactment of a law during the Chosun Dynasty came from a royal command. Orders issued by the king, lieges, or bureaucrats were organized and analyzed by high-ranking bureaucrats and conveyed to each department as a royal command, by means of "Ha Gyo," "Gyo Ji," or "Jun Gyo." The receipt of the royal command by each department was called the "Seung Jun," and the accepted command was called the "Su Gyo." To become legally binding, the royal command had to go through a procedure called "Seo Gyung." After this procedure, Su Gyo was legally effectuated in practice.[2]

"Su Gyo" is a kind of case law. Because the Chosun Dynasty did not have separate administrative and judiciary systems, an administrative committee consisting of the king and high-ranking bureaucrats made decisions on certain issues or matters that would become laws.

[1] Ito Takao and Joon Young Moon take such wrongful approach. Ito Takao, Initiation of Judicial Reform of Residency General, Korea and Ito Hirobumi, Seonin, 2009; Joon Young Moon, Birth of Court and Prosecution, Yuksa Bipyong

[2] Korea History Research Organization Code Research Team, Su Gyo Collection, 2001, 7

When a number of such "Su Gyo" was passed, a legal code called "Rok," which contained important Su Gyo, was published. Similarly, "Jeon" was published as a selection of the important rules of Rok. "Gyung Gook Dae Jeon" was published as a symbolic legal code of the Chosun Dynasty.[3]

The Chosun Dynasty's legal codes, such as the Grand Ming Code and the Gyung Gook Dae Jeon, had different characteristics from western civil law. Korean scholars identified Grand Ming Code as general criminal law and Gyung Gook Dae Jeon as special criminal law[4], although this theory is also based on the influence of Japanese jurisprudence. This is because we evaluate the premodern Chosun Dynasty's legal code from the perspective of civil law jurisprudence and, as a result, identify Grand Ming Cord as general criminal law and Gyung Gook Dae Jeon as special criminal law.

However, by interpreting a certain clause in the Grand Ming Code, the committee of the king and high-ranking bureaucrats could alter the physical and mental elements of an offense (in German Tatbestand) and enact a form of case law through Su Gyo. Explaining Grand Ming Code as general criminal law or as civil law with fixed elements has resulted in Korean scholars who are familiar with the concept of civil law making mistakes.

Korea also adopted German criminal-law-based elements as a result of Japan's influence. In other words, Korea became a modern civil law state through judiciary modernization "by Japan." Japan's adoption of the Prussian Model in its modern legislation enactment and reform of the legal system had a decisive influence on Korea.[5] Specifically, the great influence of German jurisprudence resulted from Japanese influence. Until today, Korea and Japan's courts and prosecution systems remain similar to each other.

2. "Li(禮)" and Confucianism Legal System

In Europe, there were two types of medieval law. The first was the natural law and divine law that was based on the Catholic tradition. The second was the customary law that was based on the continuity of community life. From the perspective of modern legislation, positive law existed and embodied the already existing immanent law.[6] In the nineteenth century, a

[3] Kim, Ji Soo, Legal characteristics and ideology of Su Gyo, Korea Judicial Journal, 1991, 135; Geung Sik Jung, Review of status of Sok Dae Jun, Jurisprudence, vol 46, part 1 (2005), 332

[4] Jo, Ji Man, Criminal Law of Chosun: Grand Ming Cord and Code, Kyungin Moon Hwa Sa, 2007; Sim, Jae Woo, System of criminal of and status of Grand Ming Cord at the end of Chosun, History and Reality, vol 65, 2007, 129; Jung, Geung Sik, Principle of Grand Ming Cord's Criminal Justice System, Jurisprudence, vol 49, part 1(2008), 111

[5] Carl F. Goodman, The Rule of Law in Japan : A Comparative Analysis (The Netherlands : Wolters Kluwer Law & Business, 2008), 21-25

[6] Brian Z. Tamamaha, Law as a means to an End : Theat to the rule of law (Cambridge Univ. Press, 2006), 11-12

systematic legislation theory was postulated by reformers to support social reform through legislation.[7]

East Asia's legal tradition of Confucianism can be understood from the perspective of catholic natural legal theory. *Li* is the origin of the Confucian legal principle. In Confucianism, *li* is a natural norm that all humans must obey. In other words, the fundamental principle of the Confucianism legal system is to consistently promote ethical rules that are based on higher, immanent law regardless of the existence of man-made positive laws. The Confucian legal principle is a theory of natural law that seeks the core of *li* from godly principles, the nature of human beings, and concurring courtesy and ethics.[8] Traditional natural law theory contends that there is an ethical norm that exists as the base of a higher law and that this standard is inferred from inviolable religion or the nature of humans.[9] However, the meaning of god in Confucianism is not similar to that in Christianity.

The Chosun Dynasty tried to organize a positive law system based on Confucianism natural law (*li*), and positive law that was contrary to this natural law was discarded. The distinction between aristocrat and commoner was based on the Confucian legal principle. The effectuation of Su Gyo, which was an important part of the positive law system, was also based on *li*. Until Korea experienced western judiciary reform by Japan, it maintained its premodern Confucianism legal system, which did not have a separate administration and judiciary. In this system, local bureaucracy handled first instance trials and the king and central high-ranking bureaucracy managed latter course trials.

III. The Reality of Legislation and Judiciary Reform at the End of the Nineteenth Century

1. Necessity of Judiciary Reform

The question that always arises in debates on the Gabo Reform, is regarding the subject of the reform. Ito Takao asserted that the reform would have been carried out even during the Residency General because Koreans had already acknowledged the drawbacks of traditional judiciary and the Gabo Reform, which was a demonstration of the desire for modernization. In addition, Japanese judiciary reform during the course of justice struggle in 1896 was based on the premise of protecting Japanese lives, bodies, and property and prohibiting anti-

[7] See Brian Z. Tamamaha (note 6), 17
[8] Lee, Seung Hwan, Reinvention of Confucianism, 2001, 179
[9] Brian Bix, Natural law theory, Philosophy of Law (USA : Wadsworth), ed. Joel Feinberg/Jules Coleman, 2000, 7

Japanese movements. The Japanese changed the judiciary, which did not function adequately, to secure Japanese interests.[10]

Further, Ito Takao criticized Moriyama Sigemori's emphasis on the independence of the legislature as the ideology of reform and as a property of the unique political scheme in Korea. Ito Takao contended that the issue of the modernization of the judiciary encompasses the separation of administration and judiciary, although the level of efficacy and thoroughness may differ; the legislation of the Act of Court System during the Gabo Reform (March 1895) claimed to have separation of judiciary.[11]

However, I hold that Ito Takao's criticism of Moriyama is too strong. Moriyama stated that Ito Hirobumi insisted on the separation of judicial power to protect citizens' lives and property, and spoke of Japan's necessity to establish a legal system that would allow foreigners to file suit in Korea.[12] While Ito uses the political metaphor of "citizens" to refer to Koreans, the necessity of judicial modernization is obvious.

Further, the necessity of additional reform can be demonstrated by pointing out the problem of "foreigner's suit." After the enactment of the Act of Court System, open port courts managed foreigners' claims against Koreans. However, Japanese bureaucrats at the time seem to have had pessimistic views on whether the court practically protected the rights of foreigners, especially the Japanese.

In the "Chi Ha Po Incident," which will be discussed later in this chapter, the safety of the Japanese on the Korean peninsula was threatened. Because of the limitations of the Gabo Reform, additional reform was necessary.[13] A person's life, body, and property rights cannot be ignored merely because he is a foreigner, and modern judiciary promotes personal fundamental rights. Further, considering the political conditions at the time, whether the presence of strong political power in Korea helped enforce consistent and powerful reform is uncertain.

When Russia held more political power in Korea than Japan, a reform called "Gwang Mu Reform" was implemented, which regressed the existing reforms. The reforms that were adversely affected were the strengthening of legal power, conversion of government finance

[10] See Ito Dakao(note 1), 137-139

[11] See Ito Takao(note 1), 134, footnote 3.

[12] 森山茂德, 保護政治下韓國における司法制度改革の理念と現實, 植民地帝國日本の法的構造, 2004, 281-288; While Moriyama expressed that foreigners cannot bring a suit against Korea, under the legislation of the court of justice, it needs to be viewed as bringing a suit at the open port court. However, due to numerous cases of problems during trial, it is reasonable to agree with Moriyama that the right of foreigners were not protected.

[13] This problem will be discussed in later chapter. However, Japan was able to foresee the failure of the Gabo reform and such failure provide a justice of direct occupation.

to imperial finance, and promotion of exclusive prerogative merchants. Further, Russia tried to hinder the reform by emphasizing a rank system and reviving the involvement system in the criminal justice system. This regression, which was intended to damage the reform carried out by Japan, was called radical foreign power.[14]

Under the Act of Court System, power was not concentrated in the judiciary but in the administrative branch. This early Japanese judicial modernization was intended to unify the court system in the early stages of legal modernization.[15] However, in the late nineteenth century, Korea's judiciary reform faced limits and struggles, which will be discussed when explaining the Act of Court System and the execution process.

Chulwoo Lee stated that Korean legal scholars overlooked the important changes of power attribution and domination mode that came with colonial changes of judiciary-administration. These scholars have instead obsessed over the premodern and distorted procedure of judiciary-administration that existed under Japan's occupation. Despite Japan's occupation being described as "brutal" and "arbitrary," it lacked the effort to acknowledge the logic of power and domination during the occupation. If Japan's occupation was oppressive, a thorough review of Japan's oppressive ways, characteristics, and differences from previous oppression is necessary.[16]

I will talk about epochal legal modernization and the necessity of modern judiciary reform in regard to securing formal judicial procedure, through Kim Gu's "Chi Ha Po Incident" and "the reality of local court." I will also discuss the necessity of organizing modern courts. The legal ideology of "legal stability" is meaningless, and the norm of legal standard does not exist because of corrupted "power."

2. Contents of Judiciary Reform

a) Problems of the Criminal Justice System

The problems of the criminal justice system before the Gabo Reform can be summarized as follows: a corrupt governor, who also acted as a lower court judge; torture and punishment during the trial process; long imprisonment; lack of judgment confirmation; reiteration of the execution of the right of punishment and executive organization; and execution of private punishment by proprietor or noble class.[17] Many people died in prison because of infectious

[14] 李英美, **韓國司法制度と梅謙次郎**, 2005, 10; Do, Myung Hee, Procedure of Enacting Modern Laws after the Gabo Reform, Korean Culture, 27, 332-333

[15] See Moon, Joon Young(note 1), 175

[16] Lee, Chul Woo, Korea's modern, jurisdiction, authority, Colonization Modernity of Korea, 2007, 67

[17] Do, Myun Hee, Research of criminal trials between 1894 and 1905, doctorate thesis of Seoul National University, 1998, 71-74

diseases from long periods of imprisonment under unsanitary condition or even as a result of assault by officers.[18] These problems even existed after the Gabo reform, which will be discussed in later chapters. The effect of the reform was insignificant. In the early nineteenth century, Mok Min Sim Seo stated that is was customary for a village to be devastated by the exploitation and tyranny of corrupted low rank officials during the course of murder investigations.[19] There was not much change before the establishment of the Japanese Residency General and the actual reforms at the end of nineteenth century and the beginning of the twentieth century. The Gabo Reform failed completely.

Specifically, I assert that fatal crises of law and order resulted from the loss of legal stability. Even if the king passed a judgment, local officials frequently did not execute the judgment. Moreover, exile orders by the king (a punishment that restricted a convict's freedom by dispatching him to an island or to border areas) were frequently overturned by the king because of bureaucrats' appeals. Even for judgments made by local officials, there were numerous cases of appealing to undercover or appointed officials or to central agency (Jik Su Ah Moon).[20] The uncertainty of the effect of excluding further litigation destroys the legal ideology of "legal stability." This phenomenon represents the material crisis of law and order, rather than the necessity of simple legislative reform.

b) Contents of Reform of Criminal Law

The Gabo Reform, in a narrow sense, refers to the era of reform after June of 1894, which was led by Nation Security Command (Goon Gook Gi Moo Cheo, government office established for a reform). In a broader sense, it includes the second reform after the appointment of the Japanese Foreign Minister, Inoue, the murder of Empress Myung Sung, and Korean royal refuge at the Russian embassy (the king of Korea escaped to the Russian embassy after the murder of the empress) in December 1895.[21]

The civilists who gained control of the government through Japanese support established Nation Security Command and executed judiciary reforms by passing a bill. First, the Nation Security Command abolished the involvement system and prohibited the administrative from executing and prosecuting citizens with sole discretion. Further, it prohibited the imposition of penalties without prior trial, ordered compliance with Dae Jeon Hyung Tong when

[18] Felix Clair Ridel/ translated by Yoo, So Yeon, My Imprisonment at Seoul 1878: Experience of 19th century Chosun by French Missionary, 2009; this book describes the brutal reality of 19th century Chosun's prison and trial.

[19] Jung, Yak Yong / Revised Jung, Hae Ryum, 牧民心書精選 下, 2004, 720

[20] See Do, Myun Hee(note 17), 73

[21] Wang, Hyun Jong, Formation of Modern Korea and the Gabo Reform, 2003, 24

interrogating convicts, and revoked torture without any reasonable grounds. Bub Moo Ah Moon managed legislative-administration, policy, and amnesty tasks and supervised local courts under the High Court.[22]

<Hong Bum 14>, which was established by adopting the <Maladministration Reform> of Fellow Peasant Account of Battle in 1894, a bill of Nation Security Command, and the reform proposal by Inoue, also shows the contents of the reform. It enacted laws that established jurisdiction, various courts, and a training institution for the judiciary; created new positions such as judge and prosecutor; separated civil and criminal trials; abolished cruel punishment; replaced severe punishments by imprisonment; disclosing the trial under the theory of reckless imprisonment and punishment by each organization.[23]

However, the Chosun Dynasty's reformation bureaucrats did not create the Gabo government. The Gabo government was created through Japanese military force and Japan's political influence.[24] Woo Chul Shin criticized Young Sung Kwon's opinion of <Hong Bum 14> as an authorized constitution and Jong Seob Jung's perspective of constitutionalism. Documents show that <Hong Bum 14> was the result of 7 articles of <Chosun Domestic Reform Order> by Foreign Affairs Minister Mutsu Munemits, 5 articles of <Domestic Affairs Reform Doctrine> by Otori Geisuke, 26 articles of <Domestic Affairs Reform Proposal Outline>, 20 articles of <Domestic Affairs Reform Syllabus> by Minister Inoue Kaoru, and consistent pressure and coercion from Japan. A summarized document of 20 articles of Domestic Affair Reform Syllabus was a product of Inoue's "Code Political Scheme."[25]

c) Legislated by not properly executed the legislation of "the Act of Court System"

The "Act of Court System" was the first legislation announced under modern law, on March 25, 1895. Since 2003, the execution date of this Act, April 25, has been celebrated as "Date of Law" in Korea.[26] However, this Act was not properly executed. It is unseemly to celebrate "Date of Law" when the law was not properly executed because this represents the malformation of Korean modern and legal history.

With respect to this legislation, Joon Young Moon stated, "unlike the first reform, the second reform announced reformed legislations regarding the construction of the court of justice. The second reform was significant in terms of separation of administration and

[22] See Moon, Joon Young(note 1), 169
[23] See Do, Myun Hee(note 17), 100
[24] See Wang, Hyung Jong(note 21), 148
[25] Shin, Woo Chul, Comparative Constitution: Origin of Korean Constitutionalism, 2008, 63-64
[26] See Moon, Joon Young(note 1), 166

jurisdiction and the establishment of courts."[27] Further, he contended, "the legislation of the Act of Court System is similar in meaning to the Japanese 'Jurisdiction Duty Refinement' (1872) by separating judicial tasks from administrative tasks and unifying jurisdiction to courts." However, things that were planned to be executed were not executed, resulting in the loss of the meaning of reform. The limits and lack of thoroughness of the reform were criticized. For example, although the court was established, the independence of jurisdiction was not thorough, power was concentrated in the jurisdiction, and the court and the litigation system were not properly organized. However, the concentration of the administration and system abbreviation were used to overcome the crisis of early legal modernization, especially through reorganization of trial organization, which was a common characteristic of both Japan and the Lee.[28]

What is the legislation of the court of justice that is often used as evidence for the potential of Korea's voluntary modernization? This legislation is evidence of Korea losing the opportunity to achieve judicial modernization through Japan's imperialism, and it should be viewed as legislation that was introduced but improperly executed. Unlike Moon's contention, the courts were not even established. Apart from the adverse effects of a merged administration and jurisdiction, the courts mentioned in the legislation of the Act of Court System were not established except in the capital Hansung (Seoul) and in harbor cities where most foreigners resided. I will present Ulsan as an example. Further, the jurisdictional authority of open port courts did not allow them to execute properly without complaints from Japanese consuls.

The research trend of Korean history scholars of using "if" is not a normal practice. The fatal flaw of research on judicial reform in the Gabo Reform is that scholars base their conclusions on nationalism and arrange records to that end, even before beginning objective empirical research. Further, the research creates confusion about the stated laws actually being executed because they also list the provisions of the law.

The problems of the execution of the Act of Court System are not limited to lack of thoroughness, adverse effects, or limitations of the reform. Further, it is not enough to compare Korea's case with that of Japan, which showed limitations in the course of enforcement. To reemphasize, this legislation should be viewed as an improperly executed law. First, I will discuss Kim Gu's "Chi Ha Po incident," which transpired after the announcement of the legislation of the Act of Court System and the reality of local judgment that appeared in Japanese literature. By reviewing the actual judgment procedure, I will prove

[27] See Moon, Joon Young(note 1), 167
[28] See Moon, Joon Young(note 1), 165-168

that all judicial reforms mentioned above, including the legislation of the court of justice, were not properly executed.

IV. Kim Gu's Chi Ha Po Incident and the Reality of Premodern Trial

1. Summary of Kim Gu's Incident

After the Chi Ha Po incident, Kim Gu became a representative leader of the anti-Japan Independence Movement. After liberation, he remained an influential political leader until his assassination. "Baek Bum Journal" (Kim Gu's diary) delineated the fact that the people who opposed the ordinance prohibiting topknots killed numerous Japanese and destroyed houses.[29] Kim Gu murdered a Japanese to avenge the murder of Empress Myung Sung, who was murdered by Japanese assassins.

Kim Gu stayed at the house of a ferry owner on his way to Anak-gun "Chi Ha Po" from Younggang-gun. He suspected that the Japanese whom he had come across was Miura, who had led the murder of Empress Myung Sung. Even if the Japanese had not been Miura, Kim Gu suspected him of being an accomplice to the murder, and brutally murdered him with a sword.[30] Kim Gu used this incident to start a "movement," and incited people to "murder Japanese to avenge the murder of Empress Myung Sung."[31] Kim Gu stated that the murdered Japanese was a lieutenant in the Japanese army; however, the Japanese police identified him as a merchant who had come to Korea to conduct business.[32]

Despite there being no difficulty in investigating the incident because the suspect had disclosed his identity, the investigation was delayed due to the royal refuge at the Russian embassy and the resignation of the governor.[33] Kim Gu was arrested on June 21, three months after the incident. Thus, the lack of faith in the Korean judicial system by Japanese bureaucrats, including Ito Hirobumi, was not groundless.

2. Trial of Kim Gu

Kim Gu was imprisoned at Hae Ju prison. Under the Act of Court System, Kim Gu should have been tried at the open port court that handled cases of damage to foreigners. However, Korean bureaucrats did not execute this law. After complaints from Japanese consuls, the

[29] Kim Gu / Revised Do, Jin Soon, Baek Bum Journal, 2010, 91.
[30] Regarding this case, Son, Se Ill, Lee, Seung Man and Kim Gu 1-1, 2008, 276-283; See Kim Gu(note 29), 90-97
[31] See Son, Se Ill(note 30), 282
[32] See Son, Se Ill(note 30), 311
[33] See Son, Se Ill(note 30), 286-87

case was transferred to Incheon open port court. Historical research emphasizes only the complaints from the Japanese consuls and does not mention the lack of compliance with the announced legislation.[34]

At that time, prompt and modern trials in criminal cases involving foreigners could not be expected. The supervisor of the open port managed administration, public order, and jurisdiction protected the lives and property of foreigners who resided in the port, and was authorized to review cases involving foreigners and Koreans with each country's consuls.[35] Jurisdiction was not separated from administration. Unless Japanese consuls complained, the announced law was not executed.

The relationship between the Act of Court System and imperial order is not clear. This paper posits the view that bureaucrats did not sincerely consider the relationship between imperial order and the legislation because they were familiar with positive law based on the Su Gyo (case laws based on king's order) and because they did not acknowledge modernized general law. It is likely that bureaucrats who were familiar with Su Gyo applied imperial order first and used codified legislation in reference to the imperial order. Until Japan executed the judicial reform by direct occupation, the leaders of Korea did not acknowledge the western civil law code. Therefore, researchers' contentions that Grand Ming Cord was general criminal law are faulty.

As reviewed above, the lack of procedure and system that protected the lives and rights of foreigners was probably a serious problem to foreigners residing in Korea.[36] Contrary to Ito Takao's views, the Gabo Reform did not have any accomplishments.[37] Although Ito Takao criticized Moriyama and emphasized the subjectivity of the Gabo Reform, the reality of jurisdiction was far from reformation.

Kim Gu was subjected to severe torture at Hae Ju prison. He recalled that he had severe wounds like bone exposure and deadly suffering.[38] Torture was prohibited by the Gabo Reform but was consistently carried out because of the tradition of criminal trial from the Chosun Dynasty, which valued "confession." During the trial, Kim Gu was suffering from typhoid.[39] The prisons at the time were unsanitary, and many people had died from officers' assaults. The most severe problem was confining prisoners who were on trial, leading to death

[34] Yang, Yoon Mo, Review of Baek Bum Kim Gu's Chi Ha Po incident records, Old literature research, 22 (2003); See Son, Se Ill(note 30), 295

[35] 勅令 50, Information of Korea Modern Law II, 1971, 141-145

[36] See 森山茂德(note 12), 281-288, Moriyama's contention of problems of protecting foreigner's rights.

[37] See Ito Dakao,(note 1), 134, footnote 3

[38] See Kim Gu,(note 29), 107

[39] See Son, Se Ill(note 30), 298

by abuse and infectious disease. The diary of Felix Clair Ridel, which narrates the reality of Hansung Prison in 1878, shows that prisoners died due to brutal torture, delay of trial of misdemeanors, and infectious diseases. The diary also stated that assault by officers was not resolved even after the Gabo Reform.[40]

At that time, suspects were confined without reasonable evidence or witnesses to prove criminal activity, and these suspects were subjected to torture to make them confess. Suspects who ought to have been sentenced to one month in prison were confined for several months as prisoners on trial.[41] In August 1898, a study on people in prison conducted by the judicial ministry showed that 10 people had been confined for more than one year without being informed of the charges.[42] Paradoxically, Kim Gu went through several trial procedures at Japan's request.

Hagiwara Shuichi, Japanese consul, requested Supervisor Jae Jung Lee to suggest to the judicial ministry that the decapitation of Kim Gu under "In Murder" was an excessive punishment.[43] Until the end of the nineteenth century, Grand Ming Cord was an important criminal legal source. However, Kim Gu read an article while he was imprisoned about himself being hanged. Baek Bum Journal states that the execution of death penalty was stopped consequent to GoJong's imperial order.[44] The incident only resulted in an interrogation record, not a judgment, and ended with Kim Gu's escape from prison after the case was halted by Gojong's imperial order.[45] After his jailbreak, Kim Gu devoted himself to social activities like domestic education programs. The thoroughness of the judicial system is evident in an escaped prisoner taking part in social activities without any problems.

The case, which was eventually recorded as a robbery, the murder of a Japanese man, and a movement to avenge the murder of Empress Myung Sung, is astonishing to legal scholars, as is the process. While the Japanese consul attempted to have this case tried as a robbery and murder case, studies state that the actual story of the case, which was revealed during interrogation, was to save the country. This relation to nationalism compulsion was a shock to legal scholars.

3. Local official's trial, which appeared on Japanese Travel Essay

[40] See Felix Clair Ridel(note 18)
[41] See Do, Myun Hee(note 17), 158
[42] See Son, Se Ill(note 30), 427, Reiteraing Je Gook Newspaper August 11, 1989
[43] See Son, Se Ill(note 30), 425
[44] See Kim Gu(note 29), 120-21
[45] See Kim Gu(note 29), 122-132; escape process was explained in detail.

In the early twentieth century, a Japanese travel essay realistically described Korean social culture through a trial in the Ulsan area in 1906.

Since it was unreasonable to stop for the day because we were there, we allowed the interpreter to interpret, "Do not mind us and go back to your work," before calling the plaintiffs to the court. Images of six or seven people waiting in the yard reminded us of a play, Sakurasogo.[46] There was a huge pillory and Tae (punishment tool to strike). There was a rack. It does not seem like the twentieth century when looking at the low rank officer with a red face. We were received well, by a geisha serving us drinks, who worked in the government office, and the governor approved each complaint with drinks in his hand. It was awkward to us, but it seems like it was nothing special in Chosun. During the interrogation, the following incident was narrated. A man had borrowed money from someone. When the due date approached, he was not able to pay it back. His parents were ill and he was not able to do anything because he had to take care of them. All the village people attested to this. They claimed that the man was a good son. After the trial, two geisha, Han Nok Ju and Lee Gye Wol, danced a sword dance. The low-ranking official at the government office who scolded offenders was also a musician who was experienced at playing a big drum and a pipe.[47]

Although the author exaggerated certain things, the actual description by Moon of the legislation of the Act of Court System does not appear in the journal. In the early twentieth century, the premodern trial was maintained before the establishment of Japan's Residency General, and there was no distinction between civil and criminal cases.

From the end of the nineteenth century to the early twentieth century, the Korean judicial reality provided a reason for Inoue's Code Political Scheme and the necessity for establishing Residency General and Ito Hirobumi's judicial and political reform. We can objectively see that modern judicial reform was initiated after the establishment of Japan's Residency General in February 1906.

4. The Truth of the Legislation of the Act of Court System

[46] 佐倉宗吾 : 下総国佐倉藩の名主, 佐倉宗吾（さくらそうご）様

佐倉宗吾（本名・木内惣五郎）様は、承応２年12月に４代将軍家綱公に直訴を行いました: There was a brutal tyranny like heavy taxation even in famine. Due to accusation of citizens, 4th Dokugawa Shogun saved citizens and exempted taxes for 3 years. However, citizens who accused the governor was executed.

[47] 江見水蔭, <<捕鯨船>>, (東京) 博文館, 1907, 107-109 : This book is a rare edition of travel journal that Professor Hur, Young Ran in Ulsan University found at National Assembly Library that factually narrates the social culture of Chosun in the early 20th century. Appreciate Professor Hur's tireless effort.

Under the legislation of the Act of Court System, the first instance courts are local courts: Hansung court, Incheon court, and other open port courts. Local courts are courthouses established by administrative districts. After the announcement of legislation, local systems were changed from an 8-do system to a 23-town system. Local courts tried civil and criminal cases that were within their jurisdictions. There was a singly seated judge in the local court; if there were two or more judges, they were either singly or jointly seated to review cases. In cases of more than two jointly seated judges, the head judge announced the judgment, and when there was disagreement among judges, the head judge's opinion became the basis for the judgment.

Moon explained the governor's trial as follows: "The legislation of the court of justice failed to state anything regarding the jurisdiction of the local officials. Perhaps it was expected to abolish the jurisdiction of the local officials when establishing local courts and local trial courts in major cities." While Moon's research assumes actual trial conditions to be in keeping with the content of the legislation of the Act of Court System, based on the examples reviewed above, the governor trial was maintained until the early twentieth century. Further, Moon pointed out that "in the case of the open port court that deals with the legal disputes of foreigners, full-time judges and prosecutors with qualifications to practice justice should be appointed." However, as seen in the Chi Ha Po incident, Jae Jung Lee, who tried Kim Gu, was an administrative bureaucrat who did not have legal knowledge. Japan abolished the system of local officials being judges in 1875.[48]

After the establishment of Residency General, the new legislation of the Act of Court System was enacted on January 1, 1908 and created confusion for more than six months due to delay in appointing new judges in Japan and delay of dispatch.[49] Based on delay in recruiting and appointing legal experts, we can infer that the judicial reform propelled by Japan made it impossible to execute modern trials or to establish the jurisdiction of an independent judicial branch.

Japan nominally allowed Chosun to declare itself as an independent country and end its subordinate relationship with Chung (China). Japan sought the expansion of influence in Chosun without interference from America, European countries, or Russia. Chosun's political reform, especially its strategy to shift to a modern constitutional state, was intended to demonstrate that Japan was helping Chosun become a modern, international state. Based on

[48] 菊山正明, 明治國家の形成と司法制度, 1993, 250

[49] 李英美, 韓國司法制度と梅謙次郎, 2005, 103

Unno Hukuju's research, all judicial reform strategy and policy was intended to make Korea a protectorate.[50]

Through the treaty revision with western countries, Japan realized that possessing a form of modern constitutional state was an important factor of approval from western countries. In order to make Chosun a protectorate, Japan needed to end Chosun's subordinate relationship with China and seek approval of Chosun as an independent state. Japan used the strategy of support of Chosun to hide its intended colonization from western countries. One such political and diplomatic strategy was the Code Political Scheme.[51] The studies of Unno Hukuju and Moriyama support the contention that the judicial reform of the Gabo Reform was a part of the Code Political Scheme.

Through actual trials, I analyze the failure of establishing local courts and the execution of reforms while maintaining trial by local officials. From 1876 onwards, Japan executed the judicial reform of establishing local courts and offices. Japan acknowledged the adverse effects of reform and listed its political and economic factors.[52] As a result, based on the judicial reform, Korea expected the political and economic reform to fail. At the time, Chosun did not have any social or political grounds to carry out the reform. The failure of the Gabo Reform provided Ito Hirobumi with a political background of protecting Korean rights while contending the necessity of the Residency General.[53] The legislation of the Act of Court System and the Gabo Reform cannot be symbols of Korea's modern judicial reform. Rather, they were the result of the Code Political Scheme, which was promoted by Japan to make Korea a protectorate. "Spontaneous reform by Korea while there were limits," or "heteronomous reform by Japan but Korea's trial of reform because of participation of Korean bureaucrats" is a meaningless contention.

V. Conclusion

As stated above, this paper holds that the legislation of the Act of Court System is not the first modern law to be legislated in Korea. Rather, it was one of Japan's political and diplomatic strategies under the Code Political Scheme to make Korea a protectorate. Frankly, the debate

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[50] Unno Hufuju (海野福壽)/ Translated by Yun, Jung Eun, Japan's Merger of Korea, 2010, 193, Unno Hufuju, translated by Jung, Jae Jung, Research of Korea Merger, 2008, 362-382

[51] Moriyama Shigenori (森山茂德)/ Translated by Kim, Se Min, Research of Modern Relationship of Korea and Japan, 1994, 18-72: this book states the diplomatic and political condition regarding the relationship between Korea and Japan. See森山茂德(note 12), 植民地帝國日本の法的構造, 282

[52] 前山亮吉, 近代日本の行政改革と裁判所, 1996, 7-88

[53] See 森山茂德(note 12), 288

on whether the Gabo Reform was spontaneous or heteronomous is meaningless. As stated, it was a calculated reform by Japan under its strategy.

Korea's premodern judicial system consisted of case law called Su Gyo, so Grand Ming Cord and Gyung Gook Dae Jun was significantly different from civil law. Therefore, we can affirm that Korea's judicial modernization was led by the Gabo Reform, which was initiated by Japan for control of the government. This study, however, does not investigate the characteristics of the judicial modernization by Japan or the quality of this reform. Whether this reform had negative or a positive effect on Korea's modern judicial reform, Japan's influence is a historical fact.

As discussed above, while Korea's premodern judicial system was not identical to common law, it was more similar to common law than to civil law. Japan influenced Korea to adopt civil law in the course of western judicial modernization. Until recently, the court and prosecution systems were very similar. We need to accurately analyze the historical facts of Korea's judicial modernization by Japan from a value neutral perspective. If we fail to objectively narrate the facts due to nationalistic compulsions, we will not be able to understand the problems of the judicial system and its origins. To understand Korea's legal history, we need to empirically study the growth of the modern judicial system, from that which was based on Confucianism to the current western modern jurisdiction.

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