Under Its Internal Order

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I. Modern Concept of Law

Until the modern days, law did not exist as a central system of regulation. Every body had their own way of coping with every day matter. Such reactions became traditions and habits. But many came together in an effort to protect themselves and their belongings, from such threats as animals, weather and other humans. This grouping also made it easier to find food and satisfy their need for socialization. This grouping also made it easier to find food and satisfy their need for socialization. They donned weapons, erected walls, built barriers, and made laws. This is the basis of law. However, it is far from the modern law.

Modern law is law settled constitutional form. Through constitution people's right is guaranteed and power is separated. Basic principle for modern law are as followed.

- Sovereignty lies with the people
- Guarantee of basic rights such as freedom, private property
- Rule of law
- Separation of powers
- Documentation of constitution, in a civil law system

1. Rule of Law

1) Rule by Person

As far as human beings have existed there have been rulers. I will discuss some examples of rulers and how they ruled. From the heads of the ancient tribes to Louis14 and to Hitler rule by person, at certain era, has been absolute and so powerful that it was unquestionable. First of all, in the ancient times tribesmen usually obeyed their rulers with not much doubt and whatever the ruler had said or ordered were taken literally as law.

Then came feudalism in which people obeyed their superiors unconditionally: peasantries-knights, knights-feudal lords, feudal lords-kings. In this chain of command- of course it was the kings who had the most power- the words of the kings became, virtually, the law. The most notable ruler was Louis 14 who was known variously as The Grand Monarch (Louis le Grand Monarque), Louis the Great, and the Sun King (Le Roi du Soleil) for the power he had. Today Louis is often used as an example of the absolute monarch, reigning supreme in grand fashion and living by his statement- "L'etat c'est moi"-'I am the state'- which, again, shows the amount of influence he had over the people.

Though it's impossible to measure and compare the power that such ruler like Louis 14 had, there were several more rulers like Hitler who also had power that was rather absolute. Hitler worked himself up to the point where he could control the people almost any way he wanted to.

He reigned over people with such great amount of influence that he controlled them like puppets which turned out to be such horrible insanity.

Rule by person could be good for the people(as it was in the time of Louis 14 who made France flourish) however, if it is used in an appropriate manner or abused, it would be disastrous as it was during the World War 2 when Hitler misled his people. Rule by person definitely requires clear conscience, reasons and morality along with right decisions-the decision-making should be democratic and open to the public- for the good of both the people under the rule and the ruler.

2) Common Law

In Definition, rule of law is a system of governmental behaviour and authority that is constrained by law and the respect for law, in contrast to despotic rule. States respecting the rule of law typically divide the powers of government among separate branches and provide for the orderly transfer of political power through fair elections. All versions of political liberalism stress the importance of the rule of law and it is exercised though out the world in every nations in some kind of form. Such idea is as old as Pericles' Funeral Oration (431BC). As a modern technical term, 'rule of law' was brought to prominence by A. V. Dicey in An Introduction to the Study of the Law of the Constitution (London, 1885).

John Locke

Before there can be the rule of law there has to be sovereign public authority, what the Declaration of Independence of USA refers to as the "just powers" of government. The "just powers" of government derive from the consent of the governed. When sovereign individuals in the State of Nature consent to be governed, enter into political community, and create sovereign public authority they surrender up natural rights to the political community. Locke argued men enter into political community out of the State of Nature for three reasons: 1. there is no common agreement on what natural rights are which makes the State of Nature "full of fears and continual dangers," 2. there is no "known and indifferent judge with authority to determine all differences according to the established law", and 3. there is no "power [sovereign public authority] to back and support the Sentence when right, and to give it due execution." These reasons are why we have the rule of law.

Locke described the process and the outcome of forming political community:

§ 89. Where-ever therefore any number of men are so united into one society, as to quit every one his Executive power of the Law of Nature, and to resign it to the publick, there and there only is a Political, or Civil Society. And this is done where-ever any number of Men, in the state of Nature, enter into Society to make one People, one Body Politick under one

Supreme Government, or else when any one joins himself to, and incorporates with any Government already made. For hereby he authorizes the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require; to the Execution whereof, his own assistance (as to his own Decrees) is due. And this puts Men out of a State of Nature into that of a Commonwealth, by setting up a Judge on Earth, with Authority to determine all the controversies, and redress the Injuries, that may happen to any Member of the Commonwealth; which Judge is the Legislative, or Magistrates appointed by it. And where-ever there are any number of men, however associated, that have not such decisive power to appeal to, there they are still in the state of Nature.

Monopoly of Violence

Sovereign public authority means, as has been universally recognized as the defining principle of modern states, that the monopoly on coercive power over a given jurisdiction is maintained by the state. Modern states are legal entities. Concerning such entities Max Weber states the monopoly of violence. It means, the exercise of armed force and the maintenance of the capacity to exercise armed force are authorized or permitted by the state which means by law and only by law. In other words, a state maintains its internal sovereignty. It does not mean that an authoritarian absolutist state disarms and oppresses a disarmed citizenry. Constitutional government is somewhere in between tyranny and anarchy. Government is the mechanism by which law is made. Agreement on the fundamental law of a constitution, when it operates, creates a civic culture of public trust. Public authority also means that to be viable the institutions of government, for good or ill, have to have a stature that transcends the private faults of individual office holders.

3) Civil Law

In a civil law system, rule of law(죄형법정주의) very much means the same thing as discussed above. However, its approach is very different. Since civil law system have a documented form of law, rule of law is very much discussed during legislative actions and interpretation of concerned statements. Specifically, it consists of,

1. law above all powers
2. guarantee of basic rights
3. separation of powers
4. legitimacy of the administration
5. right to judge unconstitutionality
6. predictability of the administration
7. due process of law

8. prohibition of broad delegation of legislative power

2. Principle of Legality

1) What are the Principles of Legality and Why are they Important?

- Principles of Legality are a set of rules dealing with the way in which law is to be exercised.
- The Principles of Legality are most often cited as the principles upholding the idea that one has the right to be tried and punished only in accordance with an existing law (or regulation). A person can only be punished for a criminal offence if his/her action was clearly a crime at the time the action was committed. But, the Principles of Legality are of course not limited to criminal law but to the laws, rules, and regulations of society.
- No legal system based on respect for the law can be exempt from the Principles of Legality **they are needed to provide for a functioning society, social order, and the practical requirement for legal order**.
    - Law's essential function is to "achieve social order through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior" (Fuller).
- The principles of legality are generally anchored in the following:
    - (1) <u>access to the law</u> the law/rules must be made known to the people; they cannot be changed without notice; they cannot be applied retroactively.
    - (2) <u>precision / clarity</u> the rules should be unambiguous and easy to understand.
    - (3) <u>predictability</u> the rules (laws) must be administered in a predictable way so as to make clear the likely outcome of infringement of the rules.

  [More detail below in Fullers 8 Principles of Legality]

2) Lon Fuller and his 8 Principles of Legality (in 빛he Morality of Law , 1964)

- Natural law theory asserts that there must be a relationship between the concepts of law and morality - the concept of law cannot be fully articulated without some reference to moral notions. Two notions lie at the center of this theory (1) standards (laws) that conflict with natural law are invalid; (2) valid laws derive force and authority from natural law.
    - "This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their

authority, mediately or immediately, from this original" (Blackstone, 1979).

- o 뱲n unjust law is no law at all. (Augustine, paraphrased).

· Neo-naturalism (Finnis, 1980) states that the essential function of law is to provide a justification for state coercion. Therefore, an unjust law can be legally valid, but cannot provide an adequate justification for use of the state coercive power and is therefore not fully obligatory. An unjust law fails to realize the morals implicit in the concept of law - it is legally binding, but not fully law.

· Fuller (1964) does not accept the idea that there are necessary moral constraints on the content of law. Rather, according to Fuller, law is necessarily subject to a procedural morality consisting of eight Principles of Legality:

(1) the rules must be expressed in general terms;

(2) the rules must be publicly promulgated;
(3) the rules must be prospective in effect;
(4) the rules must be expressed in understandable terms;
(5) the rules must be consistent with one another;
(6) the rules must not require conduct beyond the powers of the affected parties;
(7) the rules must not be changed so frequently that the subject cannot rely on them; and
(8) the rules must be administered in a manner consistent with their wording.

· To Fuller, **no system of rules or laws that fails to satisfy on minimal level these principles of legality can achieve law's essential purpose of achieving social order through the use of rules that guide behavior**.

- o Example: rules that dont satisfy (2) or (4), above, cannot guide citizens behavior because people will not know what is required.
- o "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. (the system of law could not pass the test of what Fuller calls 뱲nternal morality - a procedural version of natural law concerned with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be (not concerned with the substantive content of laws).

3. Justice

1) Two common divisions of justice:
   - Commutative justice: Correcting the violation of pre-existing rights.
   - Distributive justice: Wealth according to egalitarian schemes.
2) Three facets of the concept of justice in the rule of law:
   - Interpersonal Adjudication:
     Based upon the rights and duties of the individual.
     Resolution of conflicts between individuals.
   - Law based on standards and fault:
     A person should not be disadvantaged or punished except for fault.
   - Due process:
     The emphasis on procedures.
3) John Rawls Theory of Justice
   - Theory of Justice = Fairness Principle
     - Equal Liberty Principle:
     - Difference Principle:

“ Veil of Ignorance”

II. Traditional Concept in Korean Legal System

1. Modern Legal System Foundation Process

1910~1945: japanese legal system was directly applied.
1945~1948: influenced by the american legal system.
1950s and 1960s: to eliminate most of the japanese legislation and to enact basic law following the american legal system.
1970s and 1980s: reflection of administrative changes, economic growth, social development.
1980s: changes to the constitution - the democratization movement by the korean public.
1993:first civilian government- adopt a more democratic reform and improve the legal system

2. Reason Why To Consider Traditional Korean Legal System

There is the variation between the positive law based on western legal system and the traditional concept based on confucianism.

The compulsory introduction of western legal system not by compromising with national legal consciousness.

3. Traditional Law Viewed By Historical Fact

1) the old Chosun

law code consisting of eight articles

2) the age of three kingdoms

The unfolding of relations with foreign states - significance of territorial expansion and foreign policy.

The influence of china in legal system: Silla legal system is similar to Tang's and Koguryo is Han's.

3) Koryo

Koryo is the period influenced Tang and Won. Koryo legal system was made by copying Tang's. the 대명률 introduced at the end of Koryo was received in itself.

4) Chosun

The powerful influence of 성리학(human nature and natural laws philosophy) as chinese thought.- also having an effect on legal system.

Traditional korean legal system and culture was established and improved being influenced by china, we can find out the community of legal culture. it is the characteristic of regulation by morality, patriarchy and common law. Korean traditional law had developed with chinese law and the ordinary legal consciousness was continued.

4. Traditional Concept in Korean Legal System.

Traditional Korean political philosophy was based on "confucianism." So, law and legal institutions were undervalued and despised. in addition, people's tendency of that resorting to law represented a failure of moral leadership on the part of the sovereign and could never become a desirable political goal. Hierarchical distinctions of social status and official position and the force of social convention precluded the possibility of predictability in judical decision-making.

confucianism = the use of moral suasion