

# The Internal Order

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## 1. **Historical background**

### 1) Political background

(1) The absolute state

-the preparation for the modern state

CZ) Revolutions

ex) the French revolution- the typical civil revolution

a) The Declaration of the Rights of Man and Citizen

b) Enactment of constitution

c) Victory of bourgeois

03 The liberal constitutional state

### 2) Economic background Capitalism

Development of cities

Accumulation of capital

The emergence of the third class, bourgeois

### 3) Cultural background

01 Philosophy- emphasis on reason

a) Empiricism

b) Rationalism

c) the Enlightenment

(2D Science- the symbol of human progress

a) the establishment of modern science frame

b) Isaac Newton- the law of gravitation

## 2. **Theories about 'rule by law'**

### 1) The 18th century philosophers

Hume

Montesquieu

Rousseau

### 2) The legal theory of Max Weber

01 Weber's four classes of legal processes

a) Formal irrationality

b) Substantial irrationality

c) Substantive rationality

d) Formal rationality

### 2 Rationalization of law

Shift from substantive rationality to formal rationality

Rule and law

a) 3 types of rule

b) Rule by law and bureaucratic administrative system

3. **Legality and justice**

**Weimar republic and Hitler**

# Opinions about Legal Mind in Chosun Dynasty

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## 1. Max Weber's kadi justice

-- Substantial irrationality of China and Islam

--Oriental despotism and Justice of substantive irrationality

Where modern European legal systems were held to be secular, impersonal, and rational, Chinese law was said to remain subordinated to the individual moral insights of the judge and his desire to administer law by taking people and circumstances into account in a particularistic fashion. Confucian thought made the matter worse, it was argued, by making the use of moral suasion the paramount tool of monarchical leadership and calling a pall of Legitimacy over the use of laws and punishments

### #Opinion against Weber

#### 1 Joyce S. Sterling and Wilbert L Moore

"Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification," Sociological Forum 2, 1987

They indicate that Weber's mode of rationality is so vague, conservative, and strict that it is hard to adapt to any specific situation. Thus they tried to change that concept

#### 2 Professor Park, bung-ho's opinion

In the Chosun Dynasty, there was no concept of "rights" in the sense of today's legal concepts. Nevertheless, various concrete legal provisions guaranteed the enjoyment of exclusive interests by certain persons. Though the sociologists or the scholars of sociological jurisprudence try to understand the real society or law, an objective comprehension is impossible if historical conditions are ignored,

- 1) The historical characteristics of the family system was resulted from the custom of matrilocal marriage and the system of equal inheritance by sons and daughters
- 2) Private ownership and the consciousness of ownership fundamentally nurtured through powerful legal protection and actualization of the system of equal inheritance
- 3) the provisions of the immutable code in the form of the royal ancestor's constitution which supported such institutions, and corresponding legal consciousness.
- 4) King's regime was not unlimited violence. There was The duty of king - increasing of people's welfare (ex

#### 2. Hahm Pyong-choon's opinion within Weber's concept of rationality

Traditional Korean political philosophy, in both its institutional and theoretical aspects, was based on "Confucian" precepts, and hence law and legal institutions were undervalued and despised. The primary mechanism for government at all levels was presumed to be the force of the moral example of those in authority. Moreover, the hierarchical structure of Korean society undermined the growth of law, as particularistic distinctions of social status and official position and the force of social convention precluded the possibility of predictability in judicial decision-making.

#### **opinion against Hahm**

1. According to Anthony T. Kronman, Max Weber, Stanford: Stanford University Press 1982 : Weber's concept of rationalism can be categorized 5 different ways. but P. Hahm did not mention which one did he use

2. The different understanding of Confucian

: Korea's inherited traditional legal system based on his history and philosophy. Confucian scholars believed that Institution and laws and transformation are not separate entities. Rather ethical transformation is the "end-" of good government, and institution and laws are the "means". This kinds of belief had blueprinted by "Chong do-ton" and have maintained during Chosun-Dynasty. Confucian ideology which is summarized "legislation entails evils" and "good law and fair sense" made Stability of the law. The concept of "circumstances" which means "determining intent and the state of mind" was generally used to subjectively manipulate judgments. If neighbors were involved a certain crime, people usually made a false statement because they thought family value was more important than justice. Most people sought to avoid involvement with the courts and with the legal process at all costs. Also Confucian propriety and statutory law encouraged the cultivation of a spirit of vengeance, not reconciliation. The Western concept implied by the phrase "rule by law" would have signified to Chinese or Korean thinkers simply a virtually immoral use of naked force in punishing.