Rule by law, not rule by person
Presented by Changno Kwon, 9/14/04

1. According to Weber, how does he think ‘Rule by Law’?

A. Definition of law:

An order will be called law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.

He stressed a staff of people, coercive apparatus, in his definition of law. Coercive apparatus is a decisive factor by which law is distinguished from other social regulation, convention. There is one more thing that we pay attention to. It is a legitimate order. Weber recognizes the definition of law as a kind of legitimate order.

B. Idealtypus of law

Weber explores idealtypus of law based on an idea that both lawmaking and lawfinding may be either rational or irrational. They are formally irrational when one applies in lawmaking or lawfining means, which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefore. Lawmaking and lawfinding are substantially irrational on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms. Rational lawmaking and lawfinding may be rational in a formal or a substantive way. Formalism can, again, be of two different kinds. Adherence to external characteristics of the facts, or instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning, represents the most rigorous type of legal formalism. The other type of formalistic law is found where the legality relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitively fixed legal concepts in the form of highly abstract rules are formulated and applied. Substantive rationality means that the decision of legal problems is influenced by norms different from those obtained through logical generalization of abstract interpretations of meaning. The norms to which substantive rationality accords predominance include ethical imperatives, utilitarian and other expediential rules, and

political maxims.
In those four idealtypus of law, the definition of formality and rationality is the dividing factor. Formality can be interpreted as independent autonomy of legal system. Rationality can be interpreted as a generalization of legal applicability. The rationality connotes substantially what is rational is more high-leveled and more prosperous thing.

Weber's idealtypus of law is related to the development toward rationality, a kind of legal evolution. About specific proceed of legal development, he diagrammed by way of modes of lawmaking, formalistic character of law, and trial types. First, charismatic legal revolution through law prophets; second, empirical creation and finding of law by legal honoratiores,i.e., law creation through jurisprudence and adherence to precedent; third, imposition of law by secular or theocratic powers; fourth and finally, systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner.

2. The disintegration of the 'Rule of Law' in postliberal society

R. M. Unger is an overwhelming effective scholar in latest American legal theory. In Knowledge and Politics (1975), he tries to criticize traditional social theory and present an alternative. Based on this general theory, in Law in Modern Society (1976), he explores comprehensive theoretical system about the relationships between law and society.

In Law in Modern Society, he mainly tries to find out the substantiality and change of Rule of Law in modern western society.

An understanding of liberal society illuminates, and is illuminated by, an awareness of that society's legal order and legal ideals foe the rule of law has been truly said to be the soul of the modern state. But idea of 'Rule of Law' is disintegrated gradually in the basic rearrangements from liberal society to postliberal society.
The characteristics of postliberal society undermine the rule of law and they strengthen tendencies in belief and organization that ultimately discourage reliance on public and positive rules as bases of social order. The first group of features refers to the overt intervention of government in areas previously regarded as beyond the proper reach of state action. We call it 'welfare state'. The other notable set of attributes of postliberal society is but the reverse side of the events just enumerated: the gradual approximation

of state and society, of the public and private sphere. We call it ‘corporate state’.

A. Type of welfare state effect

The first type is the rapid expansion of the use of open-ended standards and general clauses in legislation, administration, and justification. The second major impact is the turn from formalistic to purposive or policy-oriented styles of legal reasoning and from concerns with formal justice to an interest in procedural and substantive justice.

B. Corporatist tendencies of postliberal society

If the welfare states trends contribute to the disintegration of the rule of law, the corporatist tendencies ultimately challenge the more universal and elementary phenomenon of bureaucratic law, law that is public and positive.

Corporatism’s most obvious influence on the law is its contribution to the growth of a body of rules that break down the traditional distinction between public and private law. Thus, administrative, corporate, and labor law merge into a body of social law that is more applicable to the structure of private-public organizations that to official conduct or private transactions.

The deepest and least understood impact of coporatism is the one it has on the very distinction between the law of the state and the spontaneously produced normative order of nonstate institutions. As private organizations become bureaucraticized in response to the same search for impersonal power that attracts government to the rule of law principle, they begin to acquire the features, and to suffer the problems, of the state. At the same time, the increasing recognition of the power these organizations exercise, in a quasi-public manner, over the lives of their members makes it even harder to maintain the distinction between state action and private conduct.

There is an issue that overpowers and encompasses all others in the history of the modern western rule of law. It is the problem of formality in law. In the most general sense, formality means simply the marks that distinguish a legal system: the striving for a law that is general, autonomous, public, and positive.

For the trends, which distinguish the development of law in postliberal society, may be interpreted as transmutation or disintegration of formality and seen as aspects of a possible movement toward equity and solidarity. The polar opposite to justification by

rules is equity, the intrusive sense of justice in the particular sense. The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share their fate. Solidarity is the social face of love.

Title : The traditional concept of “internal order” in Korean legal system
Course : GSIL
Name : Lee Manho (2002685026)
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Max Weber defined rights as the state of mutual social relationships in which the possibility of the members of a social group enjoying exclusive spiritual and material interests under its internal order in a continuous way is guaranteed.

Before thinking about the traditional concept of the above-mentioned internal order in Korean legal system, it is necessary to understand the relationship between politics and law. Politics and law are much related because they both aim to organize human relations and allocate resources in a manner that promotes and stability and predictability. Especially when it comes to early Korean legal system, it is very difficult to distinguish legal procedure from political procedure.

Until Korea became a Japanese colony in 1910, there had been, in a curate meaning, no separate legal system in Korea. From the beginning of what we called Old Choson Kingdom (3BC) through the three contending kingdoms (Koguryo, Paekche, Silla) and Koryo to Choson dynasty, law was instruments for repression and control of the ruling people. Legal system was, therefore, only a method of sustaining their monarchical hegemony to the ruled and decided by their political choice.

“Internal order” is a procedural concept in law rather than substantial one. Unlike to the concept of “due process” in the Common Law, kings of Korean peninsula could make and enforce law. Though their regime was not unlimited, the process itself could be changed by the kings’ will. For example, the kings of Choson dynasty were not able to change basic rules of Confucianism- it was the highest concept of law like God’s order at that time-that people have to stay around their parents’ tomb after parents’ death, but

kings could choose that they would do it for 1 year or 3 years.

“Internal order” can be interpreted by two meanings; one is a narrow concept that any enforcement of law must have its own procedure. The other is a broader concept that the enforcement of law must not only have proceeding system, but also protect individual rights like due process.

A course of legal proceedings according to rules and principles in Korean traditional legal system is nothing to do with due process in Common Law. Therefore the concept of internal order, at least by a broader meaning, did not exist in Korea.

Comparison between the traditional concepts of law under Civil and Anglo-American Legal System (김창곤, Chang-ghone,kim)

Background

Korean Legal System is a civil law system, and the modern korean legal system originally followed the European Civil law system, especially German one, as transferred from Japanese legal system. During the Japanese rule of Korea from 1910 to 1945, the Japanese legal system was directly applied to Korea, and when the Republic of Korea was inaugurated in 1948, many law from Japan were carried over. Legislation introduced during the U.S. military occupation of 1945-1948 was influenced by the American legal system. The legislative activity during the 1950s and 1960s tried to eliminate most of the Japanese legislation, and to amend or enact basic laws following much of the American legal system because of Korea's strong political and economic relations with the United States. Since 1970s and the 1980s, many laws has been amended or enacted to reflect administrative changes, economic growth, and social development.

Comparison --- (by John Henry Merryman, *The Civil Law Tradition* )
the source of law
civil law - recognize only statutes, regulations, and custom as sources of law. It is also arranged in descending order of authority.

common law - an systematic accretion of statutes, judicial decisions and customary practice, thought of as the major source of law. There is no systematic, hierarchical theory of sources of law.

Code and codification

civil law - codified statutory systems

common law - uncodified and is based on large part on judicial decision.

Judges

civil law - a civil servant who performs important but essentially uncreative functions. Judicial service is a bureaucratic career; judicial function is narrow, mechanical, and uncreative.

The Interpretation of Statutes

civil law - authoritative interpretation by the lawmaker was the only permissible kind of interpretation. The most difficult problem of interpretation to solve in a manner consistent with legislative supremacy and the separation of powers is that of evolutive interpretation. No court is bound by the decision of any other court.

Certainty and Equity

civil law - Great emphasis on the importance of certainty in the law.

Judges are prohibited from making law in the interest of certainty. Legislation should be clear, complete, and coherent in the interest of certainty.

the civil law judge lacks inherent equitable power.

Scholars

civil law- The role of the civil law judge is generally thought to be much more restricted and modest than that of the common law judge.

-the protagonist of the legal process in the civil law tradition is the legislator.

common law - law is still a law of the judges.

Legal Science

The concept of legal science rests on the assumption that the materials of the law (statutes, regulations, customary rules, etc. ) can be seen as naturally occurring phenomena, or data, from whose study the legal scientist can discover inherent principles and relationships, just as the physical scientist discovers natural laws from the

study of physical data. legal science is highly systematic.

-common law judges are problem solvers rather than theoreticians, and the civil law emphasis on scientism, system-building, formalism, and the like

The General Part

civil law -This superstructure of derived concepts and principles typically appears to be *allgemeiner Teil*.

-the positive law is a good deal less "scientific,"

- Nowhere in the general part is there a discussion of specific subjective rights or specific legal institutions.

The Legal Process

One commonly finds judges referred to as "operators of the law."

When a case comes before a judge for decision, he extracts the relevant facts from the raw problem, characterizes the legal question that these facts present, finds the appropriate legislative provision, and applies it to the problem.

-Judges are restricted to interpretation and application of "the law" in the interest of certainty, and prior judical decisions are not "law."

The Division of Jurisdiction

civil law -- There it is usual to find two or more separate sets of courts, each with its own jurisdiction, its own hierarchy of tribunals, its own judiciary, and its own procedure, all existing within the same nation.

common law - has a unified court system that might be represented as a pyramid with a single supreme court at the apex. Regardless of the number of different kinds of courts and of the way jurisdiction is divided among them in lower parts of the pyramid, every case is at lest potentially subject to final scrutiny by a supreme court.

Legal Categories

civil law -One of the most characteristic aspects of dividing law is the measurably greater degree of emphasis on, and confidence in, the validity and utility of formal definitions and distinctions.

common law - tends to think of the division of the law as conventional, i.e. as the products of some mixture of history, convenience, and habit, the influence of scholars, and particularly of legal science, has led civil lawyers to treat the matter of division of the law in more normative terms.

The Legal Profession

civil law -things are different in civil law jurisdictions. A choice among a variety of distinct professional careers faces the young law graduate.

Consequently the average young lawyer soon finds himself locked into a career from which escape is likely to be too costly to contemplate.

-American usually think of the legal profession, of a single entity.

Civil Procedure

In a civil law jurisdiction - a typical civil proceeding is divided into three separate stages. There is a brief preliminary stage, in which the pleadings are submitted and a hearing judge (usually called the instructing judge) appointed; an evidence-taking, in which the hearing judge takes the evidence and prepares a summary written record; and a decision-making stage, in which the judges who will decide the case consider the record transmitted to them by the hearing judge, receive council's briefs, hear their arguments, and render decisions. The word "trial" is missing from his description.

- questions are put to witness by the judge rather than by counsel for the parties.

civil law talks about an "inquisitorial" system of proof-taking, as contrasted with the 'adversary" system of the common law

- in the civil law nation, where there is no tradition of civil trial by jury, an entirely different approach has developed.

- common lawyers think of as a trial in civil proceedings does not exist in the civil law world. The reason is that the right to a jury in civil actions, traditional in the common law world, has never taken hold in the civil law world. I

-the "concentration" of the trial in common law countries and the lack of such concentration in civil law countries.

- in the common law system by which the evidence is heard and seen directly and immediately by the judge and the jury who are to be to decide the case. Accordingly, it has become common to speak of the "immediacy" of the common law trial, as distinguished from the "mediacy" of the civil law proceeding.

-Such rules do not exist in civil law jurisdiction because of the absence of a jury in civil actions.

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Criminal Procedure

civil law - every crime and every penalty shall be embodied in a statute enacted by the legislature.

Common law courts seem to violate this principle everyday when they award penal damages, multiple damages or general damages in civil actions, when they convict people of "common law" crimes, and when they summarily punish people for contempt.

-the criminal procedure in the civil law tradition is "inquisitorial." while that in the common law tradition is 'accusatorial"

-inquisitorial proceedings have tended to be secret and written rather than public and oral.

The typical criminal proceeding in the civil world can be thought of as divided into three basic parts: the investigative phase, the examining phase(the instruction), and the trial.

As in civil proceeding, there is no developed system of cross-examination comparable to ours.

-The common has a system of plea bargaining.

Article : The traditional concept of law in Korea

- Korean Society and law" by Myungjun Hwang

A. Issues Raised

1) Korea's inherited traditional legal system based on his history and philosophy

**B. The Relationship between the Reception of Foreign Law and the Traditional Law**

1) Before the period of Great Empire of Korea, only Chinese law had been received and

assimilated to our culture

2) King T'aejo who was first one of Yi Dynasty declared a government conducted by Law
3) In December of the 6th year of King T'aejo reign, the code of " Kyongje Yukjon" was promulgated and came into effect. The code did not create legal norms but rather declared the legal norms already in effort which had emanated from the social reality of Korea
4) During 500 years of Yi Dynasty, this law was treated Principle of Respect for the Royal Ancestor's Constitution.
5) Also Confucian ideology which is summarized "legislation entails evils" and "good law and fair sense" made Stability of the law and restricted creative legislation.

**C. Legal Capacity**

1) In the Yi Dynasty, there was no concept of " rights" in the sense of today's legal concepts. Nevertheless, the enjoyment of exclusive interests by certain by certain persons was guaranteed by various concrete legal provisions.
2) In principle, the capacity to hold property rights, engage in transactions and undertake lawsuits was acknowledged and guaranteed for all classes, even to despised class. But that was not almost meaningless to humble people

**D. Property Ownership**

1) When the possibility of enjoying the exclusive interests guaranteed by appropriation could be inherited, we call it "ownership", and if ownership was transferable, we call it "free ownership"(Max Webber)
2) Legal system in Yi Dynasty provided that land could be inherited and alienated freely. And ownership was protected by title which settled disputes with the fact of control itself
3) Even though ownership during Yi Dynasty had a pre-modem nature, it bore characteristics similar to those of modern ownership. So the traditional concept remained underlying the new modern legal system as a consciousness of rights or a consciousness of ownership tooted in the past

**E. Conclusion**

1) In legal science the process of historical development in Western Europe has been emphasized and ours ignored

2) But the concept of governing by law in Yi Dynasty has limitation compared with European ones

**Article 2. Social and Intellectual Aspects of Traditional Korean Law**

**A. Traditional Law In the Yi Dynasty**

1) There were lots of Korean scholars who have been busily finding signs of an “early modern” economy in the capital accumulation of every peasant entrepreneur and wealthy peddler
2) The role played by Yi-dynasty though and social structure give a different evaluation that traditional law was devoid of positive elements for the development of “modern” legal institutions and legal consciousness in Korea

**B. Legal Values and Legal thought In Traditional Korea**

1) Law in Korean Political Theory

– 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,

a. Law and Confucianism

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 law the “ means”. This kinds of belief had blueprinted by “Chong do-jon” and have maintained during Yi Dynasty

2) Korean legal Though in Action

– “through punishment there may come to be no more punishments”, “killing the criminal so others can live”

a. Requital for a life

A religious element was involved because the victim’s personality was deemed to continue after death and to share in the desire for requital as a “grieved ghost”. So if the government failed to prosecute and punish the culprit, the grievance of deceased would ascend to heaven and heaven would visit disturbance of nature like drought or upon the state

b. “Law” and “circumstances”

The concept of “ circumstances” which means “ determining intent and the state of

mind" was generally used to subjectively manipulate judgments, although some instances of manipulation can be found

c. conclusion

In Yi-dynasty, law was not devalued but was highly regarded. And law was as indispensable as morality in good government. There was a manifest concern in case records for factual accuracy, substantive legal precision, and procedural niceties.

## C. Sources of law and Legislative Process in Yi Dynasty

1) The role of Chinese Law

The Ming Code not only provided a basic foundation for criminal law during the Yi period, but also served as the basic foundation for a comprehensive social reform along neo-Confucian lines.

3) Law and the Sovereign

In principle, all new were supposed to undergo "ratification" by the censorate and "certification" by the board of Rites

1) The law making process

Edicts could originate at the spontaneous initiative if king, but more often they represented the king's response to a legal case or administrative proposal brought to his attention by a government agency or official.

2) Rationality in Legislation

It was recognized in Yi period that piecemeal lawmaking in the manner presented problems for regularity in law enforcement and rational administration. Especially late Yi-dynasty, government used various methods to reduce the adverse impact of the traditional ad hoc approach to lawmaking.

## D. The interaction of law and Society In Traditional Korea

1) Inequality

- there were four classes in Yi dynasty. Yang-ban(noble people), yang-in(good people), sang-in(ordinary people), ch'on-min(despised people). In principle, there three board social categories were hereditary, a traditional which had economic and ideological implications. But the social categories of various types of Korean law

were not entirely consistent in their details, because Korean law was a simple reflection of either the culture or the social prejudices of members of the official class. And in later Yi period, the board social distinctions between elite and non-elite levels of society were collapsing.

i. Women and the law
    1. Given the unequal position of woman in Confucian thought, in Korean culture, and in the law

ii. Law and social change
    1. The sense that the traditional system of status distinction was eroding was partly the results of social and economic changes taking place in the seventeenth and eighteenth centuries. Also other changes were taking place at the lower edge of village society. As many commoners fled tax burdens by purchasing titles, by surreptitiously registering as slaves. So these raised significant questions for legal administration and social policy.

2) Conclusion
- Although the social ethos of Yi dynasty elite society held it to be committed upward than downward, the law successfully imposed limited punishment and did not permit crimes against social inferiors with impurity.

## E. **Conclusion**

Reviewing the activities of traditional Korean law(Yi Dynasty) and social and intellectual role of traditional Korean law, we recognize that there have been a concept of traditional Korean law.

Moreover, we must tell that much systematic and comprehensive research has not been about Korean traditional law.
The salient feature of this phenomenon is that the most articles are fragmentary, unsystematic and unhistorical.
Korean law was historically formed with rich influences from Chinese and Japanese law, along with continental European and Anglo-American law. North Korean law shows

extremely socialistic traits. The current laws of Republic of Korea are mostly translated into English.

As Radbruch aptly pointed out, Korean law is typically an interesting object of historical and sociological research.

Globalization of law is currently one of hot discussion in Korea also. Such dynamic Korean law awaits more academic attention from Western jurists.