Max Weber's Definition: Predictability

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Ⅰ.Predictability in Criminal Law

Predictability in Law can be found in the principle of "*Nullum crimen, nulla poena sine lege*" meaning 'no crime without a law'. Compared to other fields of Law, the protection of Predictability is strictly enforced in Criminal Law due to its close relation to the Fundamental Rights. The principle that conduct does not constitute crime unless it has previously been declared to be so by the law; it is sometimes known as the principle of legality. Some serious offences are well-defined common-law offences (although the details relating to their definition may often be unclear until ruled upon by the judges); many regulatory offences (e.g. those involving road traffic and the manufacture of products) are constantly being created by statute. The principle is violated by the power occasionally attributed to judges to create new offences in order to punish morally harmful conduct (such as conspiracy to outrage public decency).

The principle of the prohibition of criminal statutes having retrospective effect is generally described, in continental jurisdiction, by the maxim "nullum crimen, nulla poena sine lege (scripta et praevia)"; in Anglo-American jurisdictions, it is customary to call it: prohibition of "ex-post-facto legislation". The principle of "nullum crimen" includes, in addition to the **prohibition of legislation having retrospective effect**, also **the principle of certainty**, i.e., the requirement of a distinct definition of the facts constituting an offence.

Ⅱ. The Principle of "nulla poena sine lege" in Korean Criminal Law

1. Principle of written provision *(Lex Scripta)*
2. Prohibition of Retroactivity *(Lex Praevia)*
3. Principle of Certainty *(Lex Certa)*

4. Prohibition of Analogical Interpretation *(Lex Stricta)*

5. Principle if Righteousness

Ⅲ.The principle of "nulla poena sine lege" in continental-European jurisdictions

1. Germany

The catchwordlike formulation of the principle has its origin with Paul Johann Anselm Feuerbach who, in his "Lehrbuch des gemeinen in Deutschland gueltigen peinlichen Rechts" (1st ed. 1801), coined the following dictum:

"Nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali."

At the time of the Weimar Republic, this principle has been entrenched constitutionally as a basic right in art. 116 of the Constitution of the Reich. The Bonn Basic Law for the Federal Republic of Germany, dated 1949, has likewise established the prohibition of legislation with retrospective effect as a basic right, in art. 103 (II). The retrospective effect of the criminal statute, as well as its construction by way of analogy to the detriment of the Accused, has been - or is - prohibited in both cases by virtue of constitutional provision.

2. France

The prohibition of construction by way of analogy and of legislation with retrospective effect had already been one of the demands of the French revolution. This demand had been expressed in art. 8 of the Declaration of Human Rights, dated 26 August 1789, as follows:

"Nul ne peut etre puni qu'en vertu d'une loi etablie et promulgee anterieurement au delit et legalement appliquee."

The result of the foregoing is that France, too, has established the prohibition of legislation with retroactive effect and of the construction of statutes by way of analogy. It has to be admitted that French jurisprudence has claimed the power of elastic interpretation to a wider extent than e.g. German jurisprudence; in these instances it has frequently at least verged upon analogy as a means of construction.[4] Moreover, there have been in France criminal statutes with retrospective effect; however, these statutes always provided only for the increase of penalties but not for the creation of new offences.[5]

Ⅳ. The principle of "nulla poena sine lege" in Anglo- American jurisdictions

As to interpretation by way of analogy and the creation of new offences, Anglo-American law has always conferred upon the courts wider powers than those vested in the continental courts. This difference is based, in the last analysis, upon the principles of the common law which, by its very nature, is prevented from excluding the creation of criminal customary law. An important example is provided by the decision in Rex v. Manley[8] - which has met with some vehement criticism[9] - where the court practically created a new offence, although relying upon precedents (their relevance in the case in question has been strongly disputed). On the whole it may, however, be concluded that in England the practice of judge-made law within the framework of the Common Law, has been recognized, as a matter of principle, also as far as criminal law is concerned, but that this practice has been exercised with the greatest caution.[10] This is also confirmed by Radbruch:

"The English judges have exercised their power to create new criminal law by way of precedent, only with judicious caution: `In all periods of English history it has been far more difficult to enlarge the scope of criminal law by way of judicial precedent than any other branch of the law' (Holdsworth)."[11]

For the sake of completeness, however, two statements from more recent times ought to be mentioned where - in connection with the trials of war criminals - the existence of the law-making function of judges has been denied generally. In this sense, it has been stated by the

American Judge Leon W. Power:[12]

"One thing which should be made unmistakably clear at the outset is that the Tribunal is not a law-making institution. I violently disagree with the opinion that we are engaged in enforcing international law which has not been codified, and that we have an obligation to lay down rules of conduct for the guidance of nations in future. Such a conception entirely misconstrues our function and our power, and must inevitably lead to error of the grossest sort."

Predictability in Max Weber's Rationalization

To: Korean Legal Systems

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Rationalization as an ideal type and as an historical force appears in much of Weber's writings. He regards the development of rational forms to be one of the most important characteristics of the development of Western society and capitalism. Weber views traditional and charismatic forms as irrational, or at least non-rational. The latter may rely on religion, magic, or the supernatural as a way of explaining the social world and authority may also derive from these. These may have no systematic form of development, but may rely on personal insight, revelation, emotions and feelings, features that are non-rational in form.

In contrast, rationality consists of a set of social actions governed by reason or reasoning, calculation, plus rational pursuit of one's interests. Rationality forms a large part of rational-legal authority and there are several characteristics that Weber considers as aspects of rationality. Actions in the economic sphere or in formal organizations such as universities have most of these characteristics and many of these can be taken as examples of rationality.

- **Calculability**. Results can be calculated or estimated by adopting assumptions and considering the methods by which results will be achieved. This is especially the case in formal institutions or in businesses.

- **Efficiency**. Actors have various ends and attempt to find the best means to achieving these ends.

- **Predictability.** Organizations have rules and regulations, and actors are subject to structures and authority. This, along with established procedures and ends, mean that the results of social action can often be predicted, perhaps not precisely, but certainly probabilities attached to the outcomes.

- **Non-Human Technology**. Technologies such as tools, machinery, and information technologies make predictability greater. That is, these technologies are constructed with certain purposes, and so long as they assist in achieving the desired ends, the results are generally predictable.

- **Control over Uncertainties**. This can never be complete, but rules and methods are adopted that deal with many possible contingencies. Rules are set up not so much to deal with specific people or personalities, but attempt to be generic, dealing with a variety of possibilities. These allow outcomes to be constrained within certain limits, thereby educing uncertainties about outcomes.

These principles of rationality can be applied to many activities and actions in the economic sphere, and have become highly developed and visible there. In modern society similar principles emerge in most areas of the social world, even including religion, politics, administration, sports, and music. Organizations and actions governed by rationality may produce an overall rationality for the system as a whole, but this is not a necessary result. For example, studies of economics show how many producers each acting rationally to maximize their own profits, may produce too many products. As a result, the consequences for people involved in formally rational systems may not always be desirable. Weber considered rationality to be necessary for organizations to operate efficiently, and he felt that the trend was that rationality would may take over more and more spheres of society. At the same time, Weber feared that this could result in increased control over individual action, stifling charisma and tradition, and allowing few alternatives for creative human action.

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The most fateful force in modern life is capitalism. The impulse to acquisition has existed always and everywhere and has in itself nothing to do with capitalism. Capitalism is the pursuit of profit, and forever renewed profit, by means of continuous, rational, capitalistic enterprise. This enterprise must be continuous, because in a capitalistic society, anyone who did not take advantage of opportunities for profit making would be doomed to extinction.

A capitalistic economic action rests on the expectation of profit by the utilization of opportunities for exchange, on (formally) peaceful chances for profit. Where this is rationally pursued, calculations in terms of money are made, whether by modern bookkeeping or more primitive means. Everything is done in terms of balances of money income and money expenses. Whether the calculations are accurate, or whether the calculation method is traditional or by guesswork affects only the degree of the rationality of capitalistic acquisition.

Characteristics of modern Western capitalism: rational industrial organization (that is, attuned to a regular profit and not to political nor irrational speculative opportunities for profit); separation of business from the household; rational bookkeeping. Capitalistic adventurers (in search of booty, whether by war or exploitation) have existed everywhere, but only in the modern West has developed... the rational capitalistic organization of (formally) free labor.

The rationality of MWC is dependent on the calculation of technical factors, and so is dependent on the development in science of the exact and rational experiment. Capitalism did not cause this development: but, the continuing development of this type of science is still supported by capitalistic interests in practical economic applications.

The peculiar rationalism of Western culture extends to many fields -- science, mystical contemplation, military training, law and administration. Each of theses fields may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another. The development of economic rationalism is partly dependent on rational technique and law, but it also requires people to have a favorable disposition toward adopting certain types of practical rational conduct.

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Prediction is used in all branches of studies we call science. In natural sciences, prediction has to do with a hypothesis, derived from observation of nature itself. Through repeated manipulated experiments using possible variants, this hypothesis becomes a law or principle. This makes it possible for a prediction to become a general fact. This characterizes the ultimate goal of science.

In sociology, a branch of social science, prediction takes on a more distinct role, because it is almost impossible to carry out manipulated experiments. Therefore, it is much harder to find a set law in human behavior or social phenomenon. This means prediction is all we have to rely on before we reach a conclusion during the course of time that events actually occur.

Legal predictability also starts from social sciences. Legislation in one sense can be a hypothesis, and subsequent judicial process can be seen as repeated experiments which creates a legal fact. This in turn is reflected in legislation and through this process people get to trust the legal system.

Predictability makes people put a certain trust in the legal system and so people can act accordingly to it. This means they will abide by the law. Because the law has effect on the people, they act by the legal statements and not infringe other's rights. Another thing is that predictability confines the behavior pattern of the government. As we see it as a principle of the constitution and other laws, it guides the government to act uniformly. So people will know exactly what to expect from the government. This means people can monitor government actions and point out wrongs, requesting correction.

However, change of an outside factor such as natural disasters, economic crisis, wars, can make predictability an impossible thing. In such cases predictability is not utilized and legislation is needed to cover the gap between legislation and reality so as to enhance predictability.

Bureaucracy- One Kind of Means to make a society Predictable.

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A bureaucracy is a large-scale organization composed of a hierarchy of offices. In these offices, people have certain responsibilities and must act in accord with rules, written regulations, and means of compulsion exercised by those who occupy higher-level positions. The bureaucracy is largely a creation of the modem Western world. Though earlier societies had organizational structures, they were not nearly as effective as the bureaucracy. For example, in traditional societies, officials performed their tasks on the basis of a personal loyalty to their leader. These officials were subject to personal whim rather than impersonal rules. Their offices lacked clearly defined spheres of competence, there was no clear hierarchy of positions, and officials did not

have to obtain technical training to gain a position.

Ultimately, the bureaucracy differs from earlier methods of organizing work because it has a **formal structure** that, among other things, allows for greater efficiency. Institutionalized rules and regulations lead, even force, those employed in the bureaucracy to choose the best means to arrive at their ends. A given task is broken up into a variety of components, with each office responsible for a distinct portion of the larger task. Incumbents of each office handle their part of the task (usually following preset rules and regulations), often in a predetermined sequence. When each of the incumbents has, in order, handled the required part, the task is completed. Furthermore, in handling the task in this way, the bureaucracy has used what its past history has shown to be the optimum means to the desired end.

The roots of modern thinking on bureaucracy lie in the work of the turn-of-the-century German sociologist Max Weber. His ideas on bureaucracy are embedded in his broader theory of the rationalization process. In the latter, Weber described how the Occident [the countries of Europe and the Western Hemisphere] managed to become increasingly rational -- that is, dominated by efficiency, predictability, calculability, and nonhuman technologies that control people. He also examined why the rest of the world largely failed to rationalize.

Weber demonstrated in his research that the modern Western world had produced a distinctive kind of rationality. Various types of rationality had existed in all societies at one time or another, but none had produced the type that Weber called formal rationality.

What is formal rationality? According to Weber, formal rationality means that the search by people for the optimum means to a given end is shaped by rules, regulations, and larger social structures. Individuals are not left to their own devices in searching for the best means of attaining a given objective. Weber identified this as a major development in the history of the world: Previously, people had been left to discover such mechanisms on their own or with vague and general guidance from larger value systems (religion, for example). After the development of formal rationality, they could use rules to help them decide what to do. More strongly, people existed in social structures that dictated what they should do. In effect, people no longer had to discover for themselves the optimum means to an end; rather, optimum means had already been discovered and were institutionalized in rules, regulations, and structures. People simply had to follow them. important aspect of formal rationality, then, is that it allows individuals little choice of means to ends.

Weber praised the bureaucracy, his paradigm of formal rationality, for its many advantages over other mechanisms that help people discover and implement optimum means to ends. The most

important advantages are the four basic dimensions of rationalization.

First, Weber viewed the bureaucracy as the most efficient structure for handling large numbers of tasks requiring a great deal of paperwork. As an example, Weber might have used the Internal Revenue Service, for no other structure could handle millions of tax returns so well.

Second, bureaucracies emphasize calculability, or the quantification of as many things as possible. Reducing performance to a series of quantifiable tasks helps people gauge success. Handling less than the required number of cases is unsatisfactory performance; handling more is excellence.

The quantitative approach presents a problem: little or no concern for the actual quality of work. Employees are expected to finish a task with little attention paid to how well it is handled. Yet they may actually handle the cases poorly, costing the government thousands, or even millions, of dollars in uncollected revenue. Or, the agents may handle cases so quickly that taxpayers may be angered by the way the agents treat them.

Third, because of their well-entrenched rules and regulations, bureaucracies also operate in a highly predictable manner. Incumbents of a given office know with great assurance how the incumbents of other offices will behave. They know what they will be provided with and when they will receive it. Outsiders who receive the services the bureaucracies dispense know with a high degree of confidence what they will receive and when they will receive it.

Finally, bureaucracies emphasize control over people through the replacement of human with nonhuman technology. As you will recall, nonhuman technologies (machines and rules, for example) tend to control people, while human technologies (hammers and pens, for example) tend to be controlled by people. Indeed, the bureaucracy itself may be seen as one huge nonhuman technology. Its nearly automatic functioning may be seen as an effort to replace human judgment with the dictates of rules, regulations, and structures. Employees are controlled by the division of labor, which allocates to each office a limited number of well-defined tasks. Incumbents must do those tasks, and no others, in the manner prescribed by the organization. They may not, in most cases, devise idiosyncratic ways of doing those tasks. Furthermore, by making few, if any, judgments, people begin to resemble human robots or computers. Having reduced people to this status, it is then possible to think about actually replacing human beings with machines. This has already occurred to some extent: in many settings, computers have taken over bureaucratic tasks once performed by humans. One can imagine that once the

technology has been developed and priced reasonably, robots will begin replacing humans in the office.

Similarly -- the bureaucracy's clients are also controlled. They may receive only certain services and not others from the organization. For example, the Internal Revenue Service can offer people advice on their tax returns, but not on their marriages. People may receive those services in a certain way only. For example, people can only receive welfare payments by check, not cash.

Thus, the bureaucracy is well-defined by four basic components of formal rationality: efficiency, predictability, quantification, and control through the substitution of nonhuman for human technology.