

In a Continuous Way

October 7, 2004.
Group Number 7.

[Preface]

Our Group thought that Individual Rights should be protected by the name of Predictability or Legal Stability in a continuous way, even though, in contemporary Social Welfare National System, Concrete Justice which is the most important justification of Government's Power to deprive a person of individual rights like as liberty, property or life.

First of all, we are going to understand the bourgeoisie's revolution to protect their liberty, which changed 'the rule of monarch' (what is called as unpredictable ruling) into 'the rule of law' (what is called as predictable ruling). Then, we need to know why the Predictability is fundamental in our society.

The next, we are going to pay attention to the substantial legalism rather than formal legalism. These days, the government stress on concrete justice like as public welfare but we need to control the arbitrary of government to increase Predictability and pursuit Concrete Justice spontaneously. Concrete justice is also important issue for the poor and the labor who needs more active and powerful government to control the rich and the bourgeoisie's predominant interest. We could think these issues by looking 1) due process of law in constitutional law, 2) the limitation of retroactive law, and 3) some technical method to increase predictability.

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By Changno Kwon

[Predictability – History]

Rational legal system means whether we adopt the most efficient ways to realize our aim or value from formalistic point of view. Codification is important as a general premise for formal rational law. We can take two driving forces toward the rationalization of law. One thing is capitalists' interests and the other is the interests of monarch and bureaucratic in Absolutism era.

Capitalists' interests are based on calculability and predictability. "The modern capitalist enterprise rests primarily on calculation and presupposes a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms, just like the expected performance of a machine."

In Absolutism, the interests of monarch and bureaucracy are based on the efficiency of handling extended administration works. Bureaucracy tries to devise rationally administrative ways owing to inner needs. Therefore they recognize the need of rational law. "Only bureaucracy has established the foundation for the administration of a rational law conceptually systematized on the basis of statutes."

In the end of Middle age, patrimonial monarch had an interest in rational law. They intended to overcome strengthening status group and confirm their political one. They tried to solve their problem by way of being allied with economic growing power and consolidating administrative and bureaucratic system.

Bourgeoisie also had an interest in rational law. They knew they could not be profitable via irrational patrimonial law. They tried to secure formal legal equity and calculability for their economical activity by objective and formal statutes. Therefore, they tried to increase their economic power by political power.

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By Kyungyoon Kim

[Why is predictability fundamental in society? * Socio-legal view*]

1. The rule of law and the predictability of law

The law should be clearly and publicly laid down so people can plan their lives accordingly. Specific laws must be guided by general rules to enhance the predictability of the law. The emphasis of the Rule of Law¹ is on being able to conduct one's life without being frustrated by arbitrariness or unpredictability of government. At the heart of this definition is a respect for the autonomy and dignity of the individual to be able to choose the options they wish. This definition sees the Rule of Law as a principle of institutional morality. There are two aspects of the Rule of Law that are important. First, the law should rule the people and the people should obey the law. Second, the law must be capable of being obeyed. Hence, the law must be capable of being ascertained and guiding people's behavior.

The first justification of the Rule of Law is it prevents the use of arbitrary power. It obliges government to rule only with laws. The second justification is it protects individual freedom. Law affects human behavior by affecting people's options. Disregard of the Rule of Law will affect people's ability to choose options and make it impossible for them to plan the future. Adherence to the Rule of Law allows law to influence people's behavior but it accepts people as autonomous and rational.

2. Weber's legal systems and predictability

a. Typologies of legal systems

¹ The difference between "rule by law" and "rule of law" is important. Under the rule "by" law, law is an instrument of the government, and the government is above the law. In contrast, under the rule "of" law, no one is above the law, not even the government. The core of "rule of law" is an autonomous legal order. Under rule of law, the authority of law does not depend so much on law's instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion. As an autonomous legal order, rule of law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.

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Weber's typologies of legal systems and legal thoughts related to the predictability of law are as follows:

- **Substantively irrational** : Each concrete situation determines the decision. Authority isn't bound by any particular rules. An external principle can come into play. There are no systematic rules that justify particular decisions. Litigants are seldom able to anticipate the outcome of their case.
- **Formally irrational** : It is formal in the sense that distinct legal procedures are used to reach a decision and a decision-making rests on magic, the oracle, or revelation. This type of procedure is irrational because no general rules guide the decision. The outcomes in most instances are unpredictable and inexplicable.
- **Substantively rational** : Particular external principle or criterion is employed (outside of dominant and state-supported body of laws). That is, the principles of a decision may be based on political, economic, social, religious, or ethical standpoint. Legal decisions show gaps between the rules employed and the situation encountered.
- **Formally rational** : Rules are clearly stated and applied to all similarly situated cases in an identical manner. There is high predictability and law is rational to the extent that decisions are based on existing and unambiguous rules. Law is formal to the degree that the criteria, the standard used for arriving at a decision is totally internal to the legal system.

b. Features of formal rationality

Formal Rationality exists as a manifestation of the human capacity for instrumentally rational action, and as such is characterized by the degree to which the pattern of conduct is organized according to the rational calculation of means and ends. The paradigmatic examples for Weber are modern capitalism and bureaucracy.

Both are characterized by the following four features:

- **Calculability** (counting and quantifying);
- **Efficiency** (best means to given end);
- **Predictability** (things operate in the same way from time to time and place to place); and related to predictability,
- **Control of Uncertainty** (especially the uncertainty posed by human error).

Modern machine technology epitomizes these four principles and thus tends to replace human technology whenever possible. Also, rules, laws, and regulations universally applied "without regard to persons" are concrete manifestations of formal rationality. We can say that rationalization is the process by which rational action

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becomes predominant in the social action of individuals and rationality becomes predominant in the patterns of action that are institutionalized in groups, organizations, and other collectivities. Weber was particularly interested in the rise of instrumentally rational action among individuals and formal rationality in organizations in the modern west.

3. Legitimate domination and predictability

Weber introduces three ideal types of legitimate domination and their characteristics in terms of predictability are follows:

- **Traditional domination** : Obedience due to the belief in the validity of the order coming from habit, custom and tradition. The system is typically less predictable and decision-maker has greater independence (either substantive rationality or formal irrationality).
- **Charismatic domination** : Exceptional qualities of the leader are seen as superhuman, supernatural, or exceptional qualities of powers. The system is typically less predictable and decision-maker has greater independence (either substantive irrationality or formal irrationality).
- **Legal domination** : Belief in legitimacy of rules themselves exists. Legitimate domination is rationally constructed and law legitimate is within its self. The system has greater predictability and decision-maker's independence is low (formal rationality).

By "the rule of law" is characterized, in the words of Max Weber, by "legal domination." Weber, only a formally rational legal system can achieve "legal domination" (rule of law) through consistent application of general rules, because only a formally rational legal system can maintain a "consistent system of abstract rules" that is necessary for rule of law. That is, Weber emphasizes the necessity of procedural justice that results in consistency, predictability and calculability which is desirable aspects of economic and social life.

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By Sukmin Kim

[Predictability & Concrete Justice – Due Process in the United States]

Introduction

The Fifth Amendment contains a guarantee of basic **Due Process** applicable only to actions of the federal government--"*No person shall be...deprived of life, liberty, or property, without **Due Process** of law...*" The 14th Amendment contains the same wordings expressly applied to the States. The Supreme Court has interpreted the two clauses identically, so under the U.S. Constitution, there is no substantial difference in protection from federal or State action. The **Due Process** Clause of the U.S. Constitution is descended from a similar clause of the **Magna Carta** in which the King of England agreed (in the year 1215 A.D.) that "*No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his peers, or by the Law of the Land.*" Thus, the core historical meaning of the **Due Process** Clause is that the government cannot deprive anyone of his or her life, liberty, or property if the Law of the Land forbids it **Due Process** under the federal Constitution has additionally been interpreted as a restraint on the ways that legislatures may alter the law, although some judges over the years have objected to stretching the **Due Process** Clause beyond what was intended by Magna Carta. As a limitation on Congress, the **Due Process** Clause has been interpreted by the majority of the Supreme Court to have both procedural and substantive components, meaning that it imposes restrictions on legal procedures--the ways in which laws may operate--and also on legal substance--what laws may attempt to do or prohibit. The distinction between substance and procedure is difficult in both theory and practice to establish. Moreover, the substantive component of **Due Process** has proven to be very controversial, because it gives the U.S. Supreme Court considerable power to strike down state and federal statutes

Procedural Due Process

Procedural **Due Process** is essentially based on the concept of procedural fairness. As a bare minimum, it includes an individual's right to be adequately notified of charges or

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proceedings involving him, and the opportunity to be heard at these proceedings. In criminal cases, fair procedures help to ensure that an accused person will not be subjected to cruel and unusual punishment, which occurs when an innocent person is wrongly convicted.

Criminal prosecutions and civil cases are governed by explicit guarantees of rights under the Bill of Rights and as incorporated under the Fourteenth Amendment to the States. However, when the Constitution has not laid out the specific procedures that must be followed in other government proceedings, **Due Process** provides a minimum floor of protection to the individual that statutes, regulations, and enforcement actions must at least meet (but can exceed), in order to ensure that no one is deprived of life, liberty, or property arbitrarily and without opportunity to affect the judgment or result. This minimum protection extends to all government proceedings that can result in an individual's deprivation, whether civil or criminal in nature, from parole violation hearings to full-blown criminal trials. In criminal cases, many of these **Due Process** protections overlap with procedural protections provided by the Eighth Amendment to the United States Constitution, which guarantees reliable procedures that protect innocent people from being punished, which would be tantamount to cruel and unusual punishment.

Substantive Due Process

Though on its face, the idea that **Due Process** is not only procedural but substantive seems paradoxical and the boundary between procedure and substance is blurry, the Court has endorsed that view. The Supreme Court has held for much of its history that **Due Process** must include limits not only on how people are put on trial (procedures), but also limits on what kind of control majorities can have over minorities and individuals (substance). The court has viewed the **Due Process** clause as embracing those fundamental rights that are "implicit in ordered liberty." Just what these rights are is not always clear. Substantive **Due Process** has protected such rights as marriage and raising children, and the extension of much of the Bill of Rights over the States. However, what are seen as past abuses and present excesses of this doctrine continue to spur debate over its use.

The idea of substantive **Due Process** was developed in the nineteenth century, rather than being part of the legacy of Magna Carta. James Madison explained as follows, when he proposed the Bill of Rights to Congress in 1789: "Magna Carta does not contain any one provision for the security of those rights, respecting which the people of

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America are most alarmed." Magna Carta forbade the King from disobeying Parliament, and the framers of the Bill of Rights (including Madison) understood that Magna Carta did not forbid Parliament from doing anything.

Since it was first applied by the Supreme Court in the *Dred Scott v. Sandford*, in which the Court held that **Due Process** protections of property restricted certain types of laws that would take away property, not merely the procedure by which it was taken, **Due Process** has evolved towards recognizing individual rights considered to be fundamental liberty interests. This has included the Incorporation of most of the Bill of Rights under the Fourteenth Amendment to apply to the laws and actions of States, as well as the recognition of rights concerning family and privacy not elsewhere in the text of the Constitution. Substantive **Due Process** has notably been invoked to invalidate laws in such areas as abortion in *Roe v. Wade*, and most recently in *Lawrence v. Texas* regarding the rights of homosexuals to sexual intimacy.

The same criticisms of the doctrine continue as in the past: that justices are reading their personal views into the Constitution instead of interpreting it. However, the disagreements are much more concerned with what should be embraced under such protections of fundamental liberty rather than whether there are such unspoken guarantees in the Constitution in the first place. In other words, the main debate in recent decades within the Court over substantive **Due Process** has been more about where to apply it, and less about whether it should be applied at all.

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By Sungtae Oh

[Predictability & Concrete Justice – Is it permitted to make a Retroactive law?]

According to the Constitutional Law, “No bill of attainder or ex post facto law shall be passed.” (Article 1, Section 9 [3]) and “No state shall enter into ex post facto law.” (Article 1, Section 10 [1]). The above ‘ex post facto law’ means only criminal matters or criminal punishment. In *Calder v. Ball*, 3 U.S. 3 Dall. 386 (1798), the Supreme Court interpreted such this. Therefore, ex post facto law is different from retroactive or retrospective law.

Retroactive law and retrospective law is similar concept, which both regulates the past fact or commission by new law which was not existed at the time such fact or commission occurred. But we can discriminate strictly both, because, while retroactive law regulates only the past, retrospective law regulates the past and the future simultaneously.

In Criminal Law, it is fundamental principle that there can be no punishment of crime without a pre-existing law. In Declaration of the Rights of Man and of the Citizen (1789), France also declared such principle. According to this Declaration, “The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.”(Article 8th).

In *Kansas v. Hendricks*, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), Justice Kennedy joined the opinion of the Court in full and added the following additional comments.

“As the case has matured it turns on whether Kansas statute is an ex post-facto law. A law enacted after commission of the offense and which punishes the offense by extending the term of confinement is a textbook example of an ex post-facto law. My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.”

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“As all Members of the Court seem to agree, then, the power of the state to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has been serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish.”

“If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.”

“If civil confinement were become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”

In Criminal Law, the prohibition against ex post facto legislation forbids the state from imposing a higher penalty for a criminal act than was available at the time the crime occurred. This prohibition has been relied on to invalidate application of a **statutory change** that would have made mandatory a maximum penalty that was not required at the time the crime has committed, *Lindsey v. Washington*, 301 U.S. 397 (1937), or that would have imposed a higher ‘guideline’ sentence for the underlying criminal conduct than was in force at the time the crime was committed, *Miller v. Florida*, 482 U.S. 423 (1987), or that would eliminate prison credit for good behavior, *Weaver v. Graham*, 450 U.S. 24 (1981).

In *Thompson v. Utah*, 170 U.S. 343 (1898), the Supreme Court has invalidated the retroactive application of certain **procedural changes**, such as a law requiring fewer jurors in a state criminal trial, under the ex post facto clause.

Changes in trial or post-trial procedures or in the rules governing admission of evidence, for example, may apply to prosecutions for offenses that occur before the statutory or rule changes; retroactive application does not trigger ex post facto concerns. We can get more information from E.g., *Collins v. Youngblood*, supra (change in

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procedure allowing reformation of an improper jury verdict); *Splawn v. California*, 431 U.S. 595 (1977) (change in jury instructions); *Thompson v. Missouri*, 171 U.S. 380 (1898) (change in evidentiary rules).

While the Constitution prohibits imposition of punishment upon an offender that was statutorily unavailable at the time he committed the offense, the Constitution **does not require** that offenders **benefit** from less onerous laws passed after the commission of the crime. As the Supreme Court explained, “for a law to be ex post facto it must be more onerous than the prior law.”, in *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). In other word, new laws that are less onerous do not raise ex post facto concerns. State and federal courts permit the retroactive application of more lenient statues but do not require it.

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By Sungwoo Kim

[Some technical method to increase predictability in legislative, executive and judicial branch.]

○ We live in the world that is compounded with modernization, globalization, democratic and the information revolution. Under these circumstances, we have to bring multiculturalism into good harmony to avoid a clash of civilization.

- In the course of pursuing this, the function of law acts for maintaining predictability of many issues that are facing the world.
- For instance, concerning the international trade that is increasing importance in the modern multilateral business society, the laws governing trade are numerous and complex. Hence, technical method to increase predictability is essential.

○ The legislation that implemented the agreements reached under the Uruguay Round of multilateral trade negotiations established the World Trade Organization. It required substantial changes in many trade laws of the member countries. These changes will go into effect over a number of years.

- However, changes need to increase predictability and as a part of such endeavor, the multilateral negotiations under the DDA(Doha Development Agenda) declaration are ongoing for setting our new rules on many related subjects.

○ For an instance, the approach process can be implemented as follows:

Stage 1: Background and analytical approach

- an overview of the global economy and individual situation;
- an overview of the current economic relationship between the members including a discussion of the important industry sectors;
- an inventory and analysis of the main tariff and nontariff barriers to trade between the members;
- to the extent that data are available, the estimated effects of eliminating all quantifiable tariff and non-tariff trade barriers on the volume of trade in goods and services;
- a qualitative assessment of the economic effects of removing non-quantifiable trade barriers.

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Stage 2: negotiations and rule-making

- an exchange of information and views to increase understanding the situation facing every participant in the negotiations;
- narrowing of discrepancies between the diverse positions;
- making a compromise and reaching the agreements including the implementation of the regulations.

○ Finally, concerning the uncertainty that may arise out of the perceived or unforeseen threat of the laws, complaints are raised for trade remedy measures.

- In the pursuit of the remedy, there can happen a conflict between the interested parties, filing an appeal for settlement before the international judiciary mechanism, i.e. dispute settlement body under the WTO. – The End -