〈논 문〉

ANCIENT AND NEW SOURCES OF LAW: AN EAST ASIAN PERSPECTIVE*

Chongko Choi**

Foreword

It is symbolic irony that here in Bologna, the "birthplace" of world jurisprudence, a discussion on the ancient and new sources of law would include a legal scholar from the "Far East". As we all know, Roman law as practiced in Bologna was founded on the dictates of *usus modernus pandectarum* (modern use of the pandect). The use of this legal treatise was in force for over three centuries in Europe, with its influence stretching as far as China, Korea, and Japan up to the 20th century. This phenomenon known as "reception", that is the integration of the Roman civil legal system by East Asian spheres of influence, is by no means a wonder to our legal professionals. The law, like water that flows from high to low or the evangelism that "must be witnessed from Samaria to the end of the world", displayed the dynamic movement of a developed system of law as it was spread and accepted in disparate places around the world. As a result of this legal Diaspora, the term "sources of law" takes on a more ambiguous meaning in this age of globalization. It is a term that presents a significant challenge to those of us examining the world map of legal history. In this discussion, I would like to use the concept of "sources of law" in a more flexible sense, thus avoiding the potential pitfalls of a rigid, technical interpretation.

As law is primarily a device for regulating and ordering relations in society, any system of law should be able to answer clearly the question of what the law means or where the interpretation of the law can be found. Thus, the issue of a "source" is fundamental to any system of law, be it municipal or international. This becomes even more important in modern times as a larger and more complex system of international relations requires a

* This paper was delivered as a plenary speech at the 17th world conference of IVR in Bologna(June 16~20, 1995).

** Professor of Law, Seoul National University

legal system both effective and expeditious for all. Because of this, the question of the "source" of law becomes the mother of great anxiety for international lawyers and their high-paying nation-state clientele.

Born in a country in the "Far East", educated in traditional liberal arts and modern Western jurisprudence, holding the academic title *doctor juris utrisque* from Germany, and having spent many years teaching the history of legal thoughts to the students in Korea, I pondered this assignment of how to share areas of common interest in the history of law between East and West. Considering my identity, I decided not to argue with existing Western "sources of law"theories (*Rechtsquellenlehre*), not because I am incapable of debate on the subject, but because I believe that other more prominent persons from the West would offer a more profound understanding of the topic. Instead, I would like to review how theories of sources of law are understood in East Asian nations, and how the countries of China, Korea, and Japan can contribute to the world academic community's ongoing intellectual dialogue by reevaluating their own traditions. It is my hope that this small contribution will lead to a broadening and deepening of understanding concerning world jurisprudence.(1)

I. Theories on "Sources of Law" from the West

First of all, I feel obliged to review how East Asian law students have learned about sources of law from their high schools and law colleges. We know that the term "sources of law" is a controversial one. It was my good fortune to have had opportunity to learn from Dr. Helen Silving during her stay at Seoul National University in the 1960's, because during this period she wrote a book entitled *Sources of Law* (1968) in which she defined the phrase in her way:

> "The term 'sources of law' is used either in a 'causative' sense, denoting the genetic foundations or origins of law, or in a normative sense, indicating the grounds of its justification, whether 'formal-legal', 'normatively sociological', ethical, religious or aesthetic. A 'causative' source of law affords an answer to the question of 'how law come to be', whereas a 'normative' one is set forth in response to the query as to 'why it ought to be.' Salmond, using the terms 'historical' and 'legal sources', suggests a narrow distinction. They contrast those sources which are recognized as such by the law itself with those sources which are in fact, the sum of substantive rules, principles or other materials from which legal norms are nourished. Defining 'formal or legal sources' as those which the law itself recognizes as such, presupposes a definition of 'law' in which the reasoning involved in this process of definition seems to

(1) For more details, see Chongko Choi, *Law in Korea* (Seoul, 1991).

be circuitous."(2)

What is it that "recognizes given sources as such?" Positivistic jurisprudence assumes "law" to be a contrast determined by certain "sources." One might say that law is these sources plus anything justified by them. If we carry this argument further, we reach the Kelsenian-Merkelian view of "law" as a hierarchical organization of authority composed of Janus-like "law-fact" phenomena marked by decreasing degrees of abstraction. In this organization, each phenomenon, excepting two, is both "law-derivate" and "law-sources", "fact" and "law."

It is the former in relation to the act or event to which it owes its authority, and the latter in relation to the act or event which it in turn authorizes. Only the first generally qualifying as "legal" is not a "law-derivate" and only the last, an ultimate act of execution is not a "law-source." With the single exception of this last act of execution, all "legal acts" are thus "sources of law." Isolation of certain stages of such a dynamic process of law development such as the "sources of law" is jurisprudentially arbitrary. Meaning can be assigned to preference certain stages over others only on the basis of some definitive policy scheme; this meaning that the "nature of law" does not require any particular "source of law." Although the metaphor "source" has a certain static flavor, the real purpose of the concept of formed sources is, I believe, to define the "positive law process" or "the law-making process" leading to the emergence of rules of positive law.

East Asian law students have learned that "sources of law" consist of statutes, customary law, and things of nature (*Natur der Sache*). We learn that precedents and legal theories are somewhat flexible according to their legal cultures. Strictly speaking, the concept of "sources of law" differs according to the concept of law from which every legal culture is developed. French jurists exclaim "*Il ny a pas de loi en Amerique*" (There are no standards of legal judgment in America), because most of American law is judge-determined law. On the other hand, American lawyers indignantly assert that "there is no law in France" since the state decision is not fully accepted. The German *Rechtsstaat*, in ultimate analysis, is still conceived as essentially a *Gesetzesstaat*, or government based on statutory law. Such a government is, of course, a positivist ideal, which strangely conflicts with the supreme rule of natural law theoretically professed by the court. This is one of the paradoxes of natural law.(3) Isaiah Bendasan describes Japanese law as "law outside

(2) Helen Silving, *Sources of Law* (New York; William S. Hein Co., 1968), p. 1.

(3) H. Silving, "The Twilight Zone of Positive and Natural Law", in *Sources of Law*, p. 286.

law." However, I think that this is not the place to discuss how different these concepts of legal culture and sources of law really are. What is perhaps a more important point to focus on is, as Professor M. Marashinge clearly points out, the inadequacy of the traditional theories of law in response to the present needs of those nations that comprise the Third World.

> "The traditional theories of law took root in an era of expanding European influence both preceding and succeeding the era of colonialism. Those theories were cast within particular political and economic ideologies which the present day nations of the Third World are somewhat anxious to discard. Therefore, the argument is often made that the legal systems inherited by these nations at the point of independence are least suited for the satisfaction of their post-colonial needs."(4)

In sheer numbers, the Third World comprises over 130 nations spread across three continents—Asia, Africa, and Latin America. These nations have inherited a variety of legal cultures reflecting a colonial contact with Spain, France, Belgium, Italy and Great Britain, each of which influenced the institutional and normative systems of their Third World colonies. One of the most notable effects of the European presence was the significant changes made to the indigenous systems of laws and customs which were initially subject to strict control and finally replaced with the legal values of the ruling colonial power.(5) In many cases, an acceleration to change was promulgated to ensure a rapid end to indigenous rules of law. I am of the opinion that we do not need to reject Western theories of "sources of law in order to return to a colonized nation's indigenous legal system", but at the same time I believe that Western theories cannot be applied absolutely to the legal cultures of Asia and Africa. It is this issue of legal pluralism that I will later discuss in detail.

II. East Asian Tradition and "Sources of Law"

Law as practiced in East Asian countries has for a long period of time been seen to be rather insignificant in terms of its contributions to a world history of law. Friedrich Hegel, Karl Marx, and even Max Weber have recorded their negative views of East Asian legal

---

(4) M. L. Marashinge, "Third World Perspectives in Jurisprudence; The Need for a New Approach," in *Essays on Third World Perspectives in Jurisprudence*, edited by M. L. Marashinge and W. E. Conklin (Singapore, 1984), p. 25.

(5) A. E. W. Park, *The Source of Nigerian Law*, 1963, especially Chapter 5. See also Ernst Hirsch, *Rezeption als Sozialer Prozess* (Berlin, 1981).

traditions. This negativity can be attributed to a general misunderstanding of Confucian thought and its impact on the peoples of East Asia. Max Weber cites the apparent non-existence of Asian jurisprudence based on a lack of philosophy in the Greek sense, a lack of lawyer class (*Juristenstand*), and the presence of a deeply ingrained political patriarchy. He asserts that Confucian practices provide great respect for the gentleman trained in the liberal arts and displaying the highest standards of morality, yet despise professional skills such as law. Fortunately, a greater depth of understanding is present in today's critique of the East Asian legal tradition. Dr. William Shaw's *Legal Norms in a Confucian State* (Berkeley, 1984), and Brian E. McKnight's *Law and the State in Traditional East Asia; Six Studies on the Sources of East Asian Law* (Hawaii, 1987), are just two of the many new publications that are examining the East Asian legal tradition in a new light. An introduction to McKnight's compilation expresses the range of legal study now being discovered by Western researchers:

> "The six papers included in this volume touch on a wide variety of possible sources of law, and use a number of possible approaches to the study of legal history. They are, of course, first steps in a field which is still largely unexplored. Further studies of customary law, codification, legislation, legal procedure, and the role of key individuals in legal change will be necessary before we can understand adequately the ways in which traditional East Asian legal systems worked and changed."(6)

As an indication of how a traditional East Asian law system functioned, Dr. Shaw writes;

> "In the political context of fifteenth-century Korea, reform of royal amnesty practices, which depended principally upon persuasion of the king, took less time than did reforms like the household shrine, which depended upon changing the customs and even the religious values of an entire elite. In both areas, however, reformers made clear their commitment to the role of punitive law in government and society. In doing so, they not only provided a foundation for Yi dynasty (1392-1910) legal thought, but also provided later students of East Asian society with increased insight into the relationship between law and Confucian thought."(7)

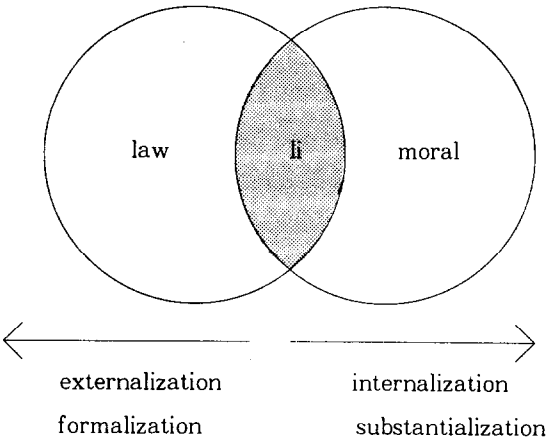
As a historian of legal thought, I have developed a view on the relationship between law and morality in traditional East Asia that is quite different from monism or the dualism of law and morality as practiced in the West.(8) As an example of this difference, I would

(6) Brian E. McKnight, ed., *Law and State in Traditional East Asia* (University of Hawaii Press, 1987), p. 1x.

(7) William Shaw, "The Neo-Confucian Revolution of Values in Early Yi Korea; Its Implications for Korean Legal Thought", *ibid.*, B. McKnight, ed., 1987. p. 165.

(8) For a more detailed examination, see Chongko Choi, "Traditional Korean Law and its Modernization", in *Transactions of Royal Asiatic Society of Korean Branch*, Vol. 64, 1990.

like to use the Chinese character *li*(禮), pronounced *ye* in Korea and *yi* in Japan. *Rei*, literally translated means "the rule of polite behavior", an externalization of morality and an internalization of law at the same time. Because the concept of *li* was developed over a long historical period, law and morality could not develop independent of one another. The historical evolution of this dependent concept is supported by the fact that we see many books on *li* doctrines (*Yehakso*) while there are few books written solely on law (*yulhakso*) in traditional Korean society.



As far as identifying sources of law is concerned, the problem is whether or not we should count the concept of *li* as a law. *Li* might be compared, roughly speaking, to the *Nomos* in the Greek world and *dharma* in the Hindu and Buddhist worlds. *Li* is a serious concept because not only was it an important definer of personal action and community law in traditional East Asia, but that it plays an important role even in present day East Asian society. In support of this claim to modernity, it is not likely that the Korean people as a whole notice a distinct difference between the concept of *li* and what they would consider acceptable moral behavior. However, in the century since the adoption of Western legal thinking, Koreans have been weakened by the tendency to exploit the law without regard to moral responsibility. The challenge that faces modern Korea today is the re-establishment of this concept of *li* as a moral and legal guideline for living. In an apparent move to reinitiate *li* in everyday life, many lawyers, medical doctors, and even members of parliament have adopted ethical codes based on the concept of *li*.

Despite these efforts to incorporate ancient interpretations of social responsibility, modern Korean society suffers from many of the afflictions that disrupt other developed

countries as violent crime due to rapid economic development leads to drastic social change. In order to curb such tendencies, the government urges harsh punishment for offenders, including speedy trials and rapid execution should the need arise. In order to combat this tendency toward the erosion of the Korean social fabric, socially aware policy makers in education seek to reintroduce courses teaching the concept of *li* as compulsory education for all college students.

Thus, by utilizing modern academic institutions to reincorporate the ideology of *li* into Korean society, it is hoped that it will turn an individual away from evil before he or she has the chance to commit socially unacceptable acts. In contrast, law is a punitive restraint in that it only comes into action to punish a socially deviant act already committed by an individual. In this sense, East Asian people generally believe that a preventive legal/moral ideology is superior to that of punishment for an unlawful deed already committed.

III. Internationalization of the "Source of the Law"

In this age of globalization, I believe it is not enough to discuss the sources of law solely at the domestic level. Because I am not a specialist in international law, I do not want to argue about the sources of international law on a theoretical level. I would, however, like to introduce two books which have made a great impact on my understanding of the subject at hand. These include, *Rethinking the Source of International Law* (1983) by J. J. van Hoof and *Law-Making in the International Community* (1993) by G. M. Danilenko.

International law as a Western concept was introduced to East Asia at the end of 19th century through the Chinese language editions of American missionary William A. P. Martin's translations of Henry Wheaton, T. Woolsey and Johann C. Bluntschli. International law at this time was known as *Mankukkongpop*, "public law common to ten thousand nations." China, Japan, and Korea were very eager to adopt the legal ideologies of the Western powers which were seen as "international law and technology." But this enthusiasm was soon to change as *Mankukkongpop* came to be seen as morally corrupt, being simply the power of unbridled imperialism.

Despite this historical abhorrence for Western legal values, East Asian countries have, to date, made a diligent effort to carry out their legal responsibilities as a member of the international community. My country, for example, a victim of international power poli-

tics, has made a concerted effort to overcome national division using the body politic of international law. Claims of this sort are supported by the fact that both South and North Korea became members of the United Nations in 1992. Today, East Asian law students are required to study international law as a compulsory subject. Thus, we are exposed to a veritable plethora of sources of international law, not only according to the H. Kelsen's pure theory of law based on *Grundnorm*, but also according to H. L. A. Hart's "Rules of Recognition Theory." However, as I am not a specialist in international law, I do not want to delve further into theoretical examination at this time.(9)

Traditional historical sources do not entirely cover the territory of new phenomena which constitute binding international law. The changes in our global society have given rise to new elements in the international law-making process which cannot be identified as either binding or non-binding rules based on the criteria provided by the traditional sources of international law. This state of affairs has provoked various responses from the legal community. One line of reasoning has tried to expand the concept of the traditional sources in an effort to place the new phenomena. Not infrequently, this entails the risk of stretching the concept of those sources to the point where the latter become virtually meaningless, and consequently, cannot provide the required certainty and clarity required in this field.

Another school of thought takes what was called the "other source" approach. To be more succinct, it proclaims a new type of source every time a new type of political publication arises to claim its place on the political stage. A good example of this is seen in the declarations or resolutions submitted to the United Nations General Assembly. The disadvantages discovered in this approach are twofold. First, the proclaimed new sources are not always consistent with the consensual basis of international law which underlies the traditional sources. Secondly, it has a strong *ad hoc* character and does not provide a solution for further development which might take place in real practice. What is needed, in short, would seem to be a more integrated approach consistent with the original sources, while at the same time being capable of explaining new developments in a more structural way. Finally, a so-called "soft-law" approach has come into being. Its main theme is that there exists a "grey area" between the areas of law and non-law.

---

(9) Chongko Choi, "Über die Rezeption westlichen Rechts in Korea", in *Zur Rezeption des Deutschen Rechts in Korea*, hrsg. von M. Rehbinder/Ju-chan Sonn (Baden-Baden, 1990); Zentaro Kitagawa, *Rezeption und Fortbildung des Europäischen Zivilrechts in Japan* (Frankfurt, 1970).

Responding to the demands of new tendencies in state practice in recent years, there has emerged an apologetics doctrinal concept that states that the dividing line between law and non-law, between *lex lata* and *lege ferenda*, should not be exaggerated. The proponents of such an approach often label politically and ethically desirable norms which have received certain preliminary support in the form of non-binding resolutions of international bodies as a "soft law." The idea of "soft law" and its conceptual foundations have joined such a wide currency that even documents approved at the highest levels of the United Nations contain assertions that "the boundaries of positive law (or that between "law" and "pre-law" or "soft-law") cannot always be clearly defined. It is clear, however, that the endorsement of "soft law" results in an unprecedented expansion of the concept of law into areas of normative regulation which have never been considered as belonging to the law proper.(10)

This "soft law" approach has played an important role in supporting the doctrine of sources of international law, particularly because it has acted as itself in elaborating the relationship between the grey and the white areas just mentioned. Most of the proponents of the "soft law" approach, however, do not directly address the problem which is the focus of the present speech, i. e. the limitations found between the grey and the white area.(11) In my view, the effective functioning of international law requires a narrowing of the grey area to the greatest possible extent.

Ⅳ. Legal Pluralism and "Sources of Law"

Legal pluralism is the existence of distinct legal systems or cultures within a single political community. Pluralism comes in many forms. It can be horizontal, that is, the subcultures or subsystems that have equal status or legitimacy ("cultural federalism" as found in the classic Ottoman Empire and modern Israel or "structural federalism" such as is practiced in the United States), or vertical, that is, they are hierarchically arranged with a "higher" and a "lower" legal system or culture ("colonial legal systems" with both modern, western law and customary, indigenous law or a "hierarchical legal systems" as epitomized by law in the United States). And yet another is a pluralistic form that can be cul-

(10) G. M. Danilenko, *Law-Making in the International Community* (Boston, 1993), p. 20.

(11) G. J. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, Antwerp, 1983).

tural, political and socio-economic.[12] Plural legal systems in the contemporary world have resulted from the transfer of whole legal systems across cultural boundaries. The result has been that large portions of the globe are subject to laws and principles which are drawn from a number of widely differing cultures.

These principles do not usually combine easily with each other, and more often than not they coexist uneasily or conflict in a variety of ways.[13] A legal culture preserves its identity in a configuration with all minor internal inconsistencies and changes caused by external stimuli. A certain basic standard which identifies it as a legal culture may be presupposed as functioning or worth exploring to confirm its function. Its concrete factors and forms are too diverse to be examined here. It is possible, however, to specify a basic legal postulate for the cultural identity of a socio-legal identity. Professor Masaji Chiba calls it the "identity postulate" of a legal culture.[14]

Legal pluralism is first to respect every legal culture as a cultural configuration centering on its own identity postulates. Legal pluralism is then the inward struggle and determination of each socio-legal identity to maintain and reformulate its legal culture under an integrated national law. Another legal pluralism based on legal culture is revealed in the relationship between national law and international legal culture, in which national law is understood to be expanded to national legal culture. There are many proposals, I know, suggested by specialists in international law in regard to the desired "social norms" or international legal culture. I am not qualified to go into detailed discussion on the topic, but I would like to mention as ardent advocates of world law, Ernst Zitelmann and the late Japanese judge of the International Court of Justice, Kotaro Tanaka.

Although human beings live in different legal cultures, they will not have to give up longing for a higher ideal or a world body of law because of the gradual appearance of comparative law, union codification and other basic legal institutions being adopted. If we attempt to locate law in civilization and to present certain concepts that have resulted from a study of the various theories concerning the nature of law, we will reveal the cultural location of the theories, their epistemological incompatibilities, the levels of conflicts

---

(12) L. M. Friedmann, *The Legal System; Social Science Perspective* (New York, 1975), p. 196.

(13) M. B. Hooker, "Legal Pluralism; An Introduction to Colonial and Neo-Colonial Laws", (1975), p. 1 and Masaji Chiba, "Cultural Universality and Particularity of Jurisprudence", in *Essays on Third World Perspectives in Jurisprudence* (1984), pp. 315~316.

(14) M. Chiba, "Legal Pluralism and Access to Legal Culture", in *Plenary Papers*, at the IVR-Conference in Kobe, 1987, p. 162.

among them, and the values defined in many of them. But I believe, each different legal system could be developed more and more with the efforts for an idea of "universal world law".

It must be pointed out that although East Asian countries belong to the "continental" civil law system, the judiciary in the law-making process plays an active role. It does not suffice for Third World judges (and law teachers) to appeal to precedents or to statutory provisions as ultimate authority for their decisions. Unlike their counterparts in both the common law and civilian system, much more is demanded of the Third World judge in terms of intellectual tasks, moral sensitiveness, social foresight, and the philosophic rigor required of him. An active judiciary is a vehicle for implementing a just social order. The Third World jurist must face the sorts of equality issues that a Western legal theorist might well push aside simply because it is seen as a "moral" as opposed to "legal" matter.

The Third World perspective of jurisprudence must concern itself with access to justice. A just legal order is a hollow shell if the minority or an individual is denied access to that just legal order-access in the sense of understanding law and its procedures, access in the sense of being capable of effectively utilizing the law, access in the sense of participating in the rule-making process, and access in the sense of experiencing positively the benefits of his or her society. The judiciary in East Asian countries use their own logic to gain access to a justice not always coherent with Western legal logic. Their logic seems like a triangle of the nature of things (reason), the nature of mankind (humanity) and harmony (substantial justice). This triangle is discovered and defined from the many traditional sources of judicial decisions. I believe, the "logic" or mentality of the East Asian people cannot be changed radically even in the present day. This unique judicial way of thinking is believed to be a strong trait of the East Asian legal interpretation.

Conclusion

In summation, I have reviewed the theory of sources of law rather critically from the East Asian point of view, and tried to reevaluate Asian customary law according to the process of enlightenment and modernization at work in Asian countries, leading finally to a short discussion on the phenomenon of the internationalization of the sources of law. As an end point, we observed the relationship between legal pluralism and sources of law. I am afraid that perhaps I have viewed too great a problem through the small window of

East Asian law, and interpreted meaning in my own interest. I confess I cannot offer an alternative to Western theories on the sources of law and that I have not attempted to do. Rather, I wanted to broaden the horizon of debate concerning sources of law.

As globalization of law is universally asserted, lawyers and legal scholars should build up the idea of introduced law as an indigenous adaptation. As East Asians mature and begin to appreciate legal theory introduced from the West, it will give us an opportunity to include the rule of law as defined by our own rich history of philosophy and jurisprudence.

In this sense, legal philosophy should become more and more a kind of comparative legal philosophy (*Vergleichende Rechtsphilosophie*). Professor Arthur Kaufmann, the honorary president of our IVR, has written prophetically a meaningful article entitled *Vergleichende Rechtsphilosophie*, in which he acknowledges the equal value of the ancient East Asian legal philosophy and Greco-Roman jurisprudence. He uses the expression that the legal philosophy of the future should be a legal philosophy on a journey(*Rechtsphilosophie auf der Reise*).[15] Coexistence of positive and "natural law" is inherent in "law." But the frequently seen coexistence of a two legal system is not dictated by logical necessity. It is rather an explanation by inconsistency in the approach of those who ultimately make and suffer laws, namely, mankind. This inconsistency is the result of mankind's unresolved conflicts of desire. It is reflected most clearly in those cases where ethically significant legal rules do not conform to the dominant legal philosophy. The passage of time and the process of evolution are likely to witness the progressive adaptation of a world law into all cultures. Thus, it seems to me, that in order to find the source of law, whether it be ancient or new, we legal philosophers should join in on the journey with keen intellectual interest and the courage to explore all possibilities.

References

Bodde, Derk and Carence Morris. 1967. *Law in Imperial China.* Harvard University Press.

Chiba, Masaji. 1989. *Legal Pluralism; Toward a General Theory through Japanese Legal Culture.* Tokai University Press.

_____, ed. 1988. *Asian Indigenous Law; An Interaction with Received Law.* KPI Limited,

(15) Arthur Kaufmann, Vergleichende Rechtsphilosophie, *Festschrift für Werner Lorenz,* Munchen, 1990.

London.

_____. 1987. "Legal Pluralism and Access to Legal Culture." *Plenary paper*, at the IVR-Conference in Kobe, 1987, pp. 142~177.

_____. 1984. "Cultural Universality and Particularity of Jurisprudence." *Essays on Third World Perspectives in Jurisprudence.*

Choi, Chongko. 1991. *Law in Korea.* Seoul.

_____. 1990. "Traditional Korean Law and its Modernization", in *Transactions of Royal Asiatic Society of Korean Branch*, Vol. 64.

_____. 1990. "Uber die Rezeption Westlichen Rechts in Korea", in *Zur Rezeption des Deutschen Rechts in Korea*, hrsg. von M. Rehbinder/Ju-chan Sonn. Baden-Baden.

Danilenko, G. M. 1993. *Law-Making in the International Community.* Dordrecht/Boston.

Dreier, Ralf. 1973. "Probleme der Rechtsquellenlehre", in *Festschrift für Hans J. Wolff*, München.

Foster, Nigel. 1993. *German Law and Legal System.* London.

Friedmann, L. M. 1975. *The Legal System; Social Science Perspective.* New York.

Gray, John C. 1921. *The Nature and Sources of the Law.*

Hahm, Pyongchoon. 1967. *The Korean Political Tradition and Law.* Hollym, Seoul.

Hanson, Chad. 1994. "*Fa* (Standards, Law) and Meaning Changes in Chinese Philosophy", *Philosophy East and West*, Vol. 44. No. 3. 1994. pp. 435~488.

Hirsch, Ernst. 1981. *Rezeption als Sozialer Prozess.* Berlin.

Hooker, M. B. 1975. *Legal Pluralism; An Introduction to Colonial and Neo-Colonial Laws.*

Kitagawa, Zentaro. 1970. *Rezeption und Fortbildung des Europäischen Zivilrechts in Japan.* Frankfurt.

Lever, Peter. 1972. "Der Begriff der Rechtsquelle", in *Privatrechtliche Abhandlungen*, Bern.

Luhmann, Niklaus. 1973. "Die juristische Rechtsquellenlehre aus soziologischer Sicht", in *F. S. für Konig*, Opladen.

Marashinge, M. L. and W. E. Conklin. 1984. *Essays on Third World Perspectives in Jurisprudence.* Singapore.

McKnight, Brian E. (Ed.). 1987. *Law and the State in Traditional East Asia; Six Studies on Sources of East Asian Law.* University of Hawaii Press.

Ross, Alf. 1929. *Theorie der Rechtsquellen*, Leipzig.

Shaw, William (ed.). 1991. *Human Rights in Korea; Historical and Policy Perspectives.* Harvard University Press.

_____. 1987. "The Neo-Confucian Revolution of Values in Early Yi Korea; Its Implications for Korean Legal Thought", in *Law and the State in Traditional East Asia; Six Studies on Sources of East Asian Law.* B. McKnight, ed. University of Hawaii Press.

_____. 1984. *Legal Norms in a Confucian State.* Berkeley University Press.

Silving, Helen. 1968. *Sources of Law.* William S. Hein Co., N. Y.

Tamamaha, Brian. 1993. "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *Journal of Law Society,* Vol. 20.

_____. 1989. "A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia", *Hastings International and Comparative Law Review,* Vol. 13.

van Hoof, G. J. H. 1983. *Rethinking the Sources of International Law.* Kluwer Law & Taxation Publishers, Antwerp.

〈국문초록〉

法源에 관한 東아시아的 理解*

崔　　鍾　　庫**

I. 서구로부터 배운 法源論

'法源'(Sources of law, Rechtsquelle)이란 다소 은유적 개념은 서양의 법학에서 중요한 개념이지만 중국·일본·한국의 東아시아 국가들에서도 중요하게 가르쳐진다. 필자가 1960년대에 서울법대에서 공부할 때 청강한 헬렌 실빙(Helen Silving)은 「법의 원천」(*Sources of Law,* 1968)이란 저서를 당시에 출간하였다. 法源으로 성문법·관습법·倫理 등이 있음을 아시아 법학도들도 배워 알고 있다. 그러나 非서구적 법학은 오늘날 자기들의 법전통을 재해석하면서 法源, 즉 무엇이 법이고 무엇이 법이 아닌가에 대해 근본적인 검토를 하고 있다.

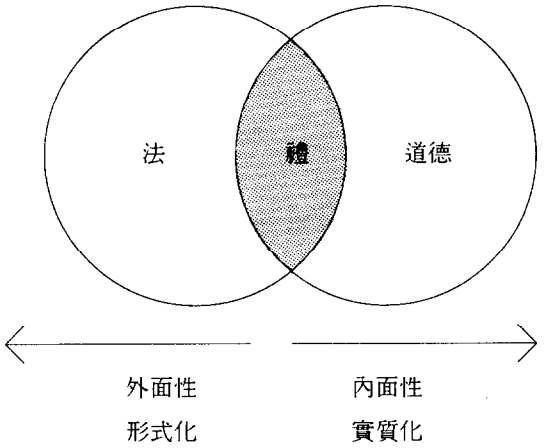
II. 東아시아의 전통과 法源

헤겔, 마르크스, 막스 베버 같은 학자들은 아시아의 법전통을 낮게 평가하였지만, 최근 아시아 국가들의 발전과 함께 법전통을 적극적으로 평가하려는 연구들이 속출하고 있다. 윌리엄 쇼(William Shaw)의 「유교국가의 법규범」(*Legal Norms in a Confucian State,* 1984), 맥라이트(Brian E. McKnight)가 편집한 「전통적 동아시아의 법과 국가」(*Law and the State in Traditional East Asia; Six Studies on the Sources of East Asian Law,* 1987)가 그 예이다. 동아시아에는 옛날부터 禮(li)의 규범이 발달하였는데, 특히 한국에서는 禮가 법과 도덕의 중간영역 내지 中間公理(middle axiom)같이 중요한 역할을 하였다. 그것을 도식화하면 대체로 다음과 같다.

---

* 이 논문은 1995년 6월 16~21일 이태리 볼로냐에서 개최된 제17차 세계 법철학 및 사회철학(IVR) 대회에서 행한 주제강연이다.

** 서울대학교 법과대학 교수



禮는 과거에만 중요했던 것이 아니라 오늘날에도 제도적 法治主義(rule of law)만으로는 부족하기 때문에 새로운 禮治主義(rule of li)의 분위기가 고조되고 있는 현상이 나타나고 있다. 한국에서는 의사, 변호사, 국회의원 등의 倫理綱領 내지 倫理章典(ethical code)들이 많이 만들어지고, 갑작스런 풍요사회의 산물로 발생하는 청소년 범죄현상에 대해 儒敎古典을 대학에서 필수과목으로 가르치려는 움직임이 일고 있다. 동양인은 행해진 행위에 事後에 처벌을 주는 法보다도 事前에 바르게 행동하도록 가르치고 禮를 중요시하는 思考가 오늘날 재해석되어 활성화하려 한다.

III. 세계화와 '法源'

이른바 세계화(globalization)의 시대에 法源은 단지 國內法의 차원에서만 논의될 수는 없고 국제법과 관련하여 생각해야 한다. 이에 대해 상론할 수는 없고, 반 후프(J. J. van Hoof)의 「국제법의 法源의 再考」(*Rethinking the Source of International Law*, 1983)와 다닐렌코(G. M. Danilenko)의 「국제사회에서의 立法」(*Law-Making in the International Community*, 1993)을 읽기 바란다.

국제법은 중국, 일본, 한국에는 19세기 말에 "萬國公法"이란 이름으로 기대를 받으며 도입되었으나. 서구 帝國主義의 도래와 함께 실망을 주기도한 思想財이다. 그 중 대표적인 나라가 한국인데, 20세기에 들어와서야 국제사회의 일원으로 출발했으나 일본 제국주의의 침략을 받았고, 해방후 국제세력에 의해 분단국가가 되었다. 그래도 국제법의 정신을 준수하여 1992년에는 남북이 UN에 동시 가입하였다. 그래서 국제법의 여러가지 法源과 원칙이 한국의 국내법에도 여러가지로 영향을 주고 있다. 이 방면의 전문가는 아니지만 "소프

트 로"(soft law)라고 불려지는 국제법의 새로운 法源에 관한 논의로 알고 있다.

Ⅳ. 法多元主義와 法源

法多元主義(legal pluralism)란 여러 의미가 있지만, 지바 마사지(千葉正士) 교수가 '법문화의 아이덴티티 원리'(identity postulate of a legal culture)라고 표현한 것을 주목한다. 법다원주의는 각 아이덴티티 원리를 존중해주는 것이요, 각 법문화마다 法의 존재형태의 다양성을 인정해주는 것이다. 우리는 법다원주의를 현대세계에서 부정할 수 없다. 그렇지만 동시에 우리는 찌텔만(E. Zitelmann)이나 다나카 고타로(田中耕太郎)처럼 보편적 世界法(universal world law)의 가능성을 미리부터 포기할 필요는 없다고 본다. 비교법의 발달, 통일입법, 국제적 법기구의 확대 등으로 인류는 과거보다 훨씬 세계법에로 접근해 나가고 있다.

非서구적 아시아 국가들은 어느 면에서는 서구의 법률가들이 법치주의를 구가하면서 '도덕'에 불과한 것이라고 제쳐버리는 것까지도 고려하면서, 더욱 명민한 성찰로 法治主義와 法哲學을 수립하려고 애쓰고 있다. 재판에서도 서구적 논리로서가 아니라 사물의 본성(理), 인간의 본성(情), 조화(실질적 정의)의 3중구조의 법추론(legal reasoning)을 구성하고 있다. 아직 이런 논리구조가 이론으로, 철학으로 형성되기에는 시간을 요한다고 본다.

Ⅴ. 결 론

한편으로 아시아의 법적 전통을 재해석하고 한편으로 세계화의 시대를 접하면서 뮌헨대학의 아르투어 카우프만(Arthur Kaufmann) 교수의 "비교법철학(Vergleichende Rechtsphilosophie)"이란 논문을 상기한다. 그는 미래의 법철학은 비교법철학, '여행하는 법철학'(Rechtsphilosophie auf der Reise)이 되어야 한다고 했다. 우리는 이 시대의 法의 정당한 존재형태를 찾기 위하여 지적 용기를 가지고 모든 가능성을 모색해 나가야 할 것이다.