〈논 문〉

INFORMAL WAYS VERSUS THE FORMAL LAW IN KOREA*

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1.

"Informal" does not mean that it is not important. If "informal" ways significantly affect the ways how the formal law works, this fact should not only be acknowledged to account for the actual working of the law including possible "aberrations" but also taken into serious jurisprudential considerations perhaps as a powerful evidence for needs to devise another theory of rules of law and/or ethics. Our finding is that informal ways "significantly" affects the formal law ways.

"Deregulation" has been the catchphrase of the recent law reform movement in Korea (since 1993). The outcry that the deregulation movement has not attained a noticeable success has been heard loud, however, despite its avowed goal. As a matter of fact, deregulation is designed to eliminate unnecessarily proliferated legal rules resulting in inflexibility in the law that have formed bottlenecks everywhere in the legal-administrative processes. It is my contention that the proliferation of the legal rules and the inflexibility has among others a lot to do with the prevalent informal ways as well in the Korean context. Naturally our question includes what we should do or think about it.

The following will be addressed to the questions of how sure you are that informal ways significantly function through the formal law ways in Korean society and of what you mean by another theory of rules of law and/or ethics.

In our part of the world a dichotomy between the formal law whose basic ideas and concepts were derived from the West and the traditional social norms has been in vogue in

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understanding the law and society.[1] Our question naturally is "then what?". Consequently intellectual movement away from, or beyond the dichotomy has been as long sought but not necessarily successfully. It is our opinion that a promising scholarly effort to undertake such movement is to conduct a study on informal ways to see how they interact with the formal law ways.

Whether or not you like it and whether or not it was originally from the West, the formal law is now an integral part of our society. At this point of social development it is unimaginable for us to eliminate the formal law whose ideas and concepts were derived originally from the West. Then what? We believe that the dichotomy defintely still has a heuristic value. Our understanding should not stop there, however. Both the formal law and the traditional social norms interact with each other: they certainly conflict with each other in certain situations, but they reinforce each other in some other situations, and they do not affect each other in still other situations. It is our opinion that this kind of situational understanding of how the formal law and informal ways interact with each other is one of the promising ways to go beyond the dichotomy and to fruitfully undertake a sociological understanding of the law in society in our part of the world.

2.

Perhaps the human nature at least tempts and even dictates us to be disposed to treat friends or relatives favorably even in the formal-legal situation. And yet the formal law

(1) In many ways the values and presumptions behind the Western law have been noticed in our part of the world for long as being quite different from the prevailing cultural traits and values of East Asian societies. Recognition of the dualism, therefore, has been regarded as a starting point to understand the living law in society. It is probably true that to a great extent Western ideas and concepts of law are naturally Western value-laden as products of Western civilization. It is our contention, however, that certain supposedly Western value-laden presumptions of the formal law can not necessarily be Western culture-bound but in fact logically unavoidable, culture-neutral ingredients of the formal law(for example, the requirement of uniformity in the law). See Dai-Kwon Choi, "Western Law in A Traditional Society Korea," *Korean Journal of Comparative Law,* vol. 8, pp. 177-202(1980); Choi, Dai-Kwon, *Bopsahoehak*(Sociology of Law), (Seoul: Seoul National University Press, 1983), esp. Chapters 2(Urinara kongbopsaui han ihae: An Understanding of Public Law History of Korea) and 3(Hanjungilui sahoekyubomkwa ku byonhwa: Social Norms of Korea, China and Japan and Their Changes). In Japan such a dichotomous understanding of the law and society is attributed to Takeyoshi Kawashima. See Yoshiyuki Matsumura, "The Works of Takeyoshi Kawashima," *Law and Society Review,* vol. 22, pp. 1037-1041(1988); Kahei Rokumoto, "Cultural Factors in Comparative Socio-Legal Analyses," a paper presented at the 1995 Annual Meeting of Research Committee on Sociology of Law of International Sociological Association; Kahei Rokumoto, *Hoshakaigaku*(The Sociology of Law), (Tokyo: Yuhikaku, 1986), esp. pp. 206 ff.

presupposes that it works impersonally and universally whomever it deals with. Otherwise it is assumed that it will be relegated to an arbitrary or tyrannical exercise of the authority. Functionally an arbitrary exercise of the authority tends to lower even the effectiveness of the law on which the authority is based. Therefore the formal law is supposed to prevail over informal ways whenever the former finds itself conflicting with the latter. Then what happens when a law-giver or a law-applier fails to have the law prevail over informal ways in the formal-legal situation while he does not necessarily violate it outright, that is, when he sticks to the the letter of the formal law while in fact he yields to informal ways, usually by way of exercising his law-provided discretionary power? In the first place, is it possible for a legal official to serve both the law and informal ways?

This situation causes a hard question that Koreans face in every day life. Our question will be a simple one if following informal ways constitutes a violation of the law. It will be an illegal way no matter what. It will constitute a criminally punishable act, that is, a bribery if an official accepts a thing of value for his official action or if money is somehow involved in his official action even if his action otherwise perfectly legal and proper. It is for sure, however, that atmosphere in legal-administrative process where informal ways are prevailing makes a rule-applying official an easy prey to bribery temptation. Quite another question will be raised if one appears to be within the four corners of the law although perhaps he may act in violation of its spirit or properness. This situation may give rise to a disciplinary problem for him.

There is a grey area between a perfectly legal and ethically impeccable action and an outright illegal and improper action, in which an official's action cannot be termed illegal and it also cannot be classified as so seriously improper that it deserves an official disciplinary action for that. It is a grey area because his action cannot be termed as perfectly OK legally and/or in its propriety either. As a matter of fact no question will be raised if following informal ways does not constitute an illegal act at all. It is a grey area because following informal ways may be legally and in its propriety dubious and yet gives to an official a sense of culture-bound rightfulness or a sense of culturally expected responsibility on the part of the official. A legal action shades imperceptibly into such a grey area which in turn shades into an illegal action. Informal ways touch upon perfectly legal actions, grey areas and outright illegal actions. It is our contention that such a grey area is relatively narrow in the Western practice of law than in Korean society. In the Western world such a grey area is simply a borderline rather than an area so that one's action is either legal or illegal and rarely an in-between. Our next contention is that if such grey

areas are broad and culturally acceptible so as to be widely practised we need a theory of navigation in such areas. Relegation of such areas to a simple status of "imformal ways" which do not have any theory to guide actions would mean neglecting intellectual discourses.

Sociologically meaningful informal ways seem to be of two kinds: one is an action demanded out of a personal tie which is actually a group tie consisting in such primary-group-like, long-lasting relations as family, school, and home town relations that have been of a born nature or cultivated in his formative age; and the other also demanded out of a personal/group tie that have been developed in a later point of one's life after his formative age like one formed in his job site. These two kinds of relations overlap each other in many situations. There is a hierarchy of closeness and friendliness within the both kinds of relations. Therefore a personal tie that was developed in a later time of one's life can be more powerful than a primary-group-relation-like-personal tie of the first kind in some situations. But a relation of the first kind is usually more forceful than that of the second kind in eliciting a favorable official decision out of an official. Both they function in a more or less similar way in affecting official decisions.

A personal tie with an official can be of the primary-group-like tie and/or naturally formed or cultivated consciously on the part of his clientele(including practising lawyers vis-a-vis judges or public prosecutors) for example with frequent offers of socially acceptable gifts and treatments. Quite a different situation arises when an official favor is elicited with an one-time offer of gifts which cannot be regarded as a socially acceptable gift, that is, a bribery situation. Of course, there do exist bribery situations. But many official favors are handed out without being necessarily turned into a bribery stituation. Many more official decisions are likely to be socially tainted as practices of favoritism because of a supposedly personal tie that exists between an official and his clientele even though they are made indeed innocently. In a closely knit social fabric woven with prevalent primary-group-like personal ties it is hard for an official to act absolutely above expectations derived from personal ties which he belongs to unless he decides to live a monk-like socially isolated ascetic life. There have been quite a number of legendary monk-like judges(for example, Judge Kim Hong-sop 金洪燮: 1915-1965)(2) and officials. If an offi-

(2) For his biographic information, see Choi, Chong-ko, *Kundae sabop 100nyoni nahun hankukui bopyulka sang*(Profiles of the Korean Lawyers Produced during the 100 Years of the Modern Legal System), (Seoul: Kilsansa, 1995); Choi, Chong-ko, *Sado bopkwan Kim Hong-sop* (Priest-Like Judge Kim Hong-sop), (Seoul: Yukbopsa, 1985).

cial decides to be loyal both to the spirits of the law and the social demands from personal ties, he has to acquire quite an art and strain to do so. The majority of officials including judges probably are located in-between ranging from a monk-like posture to an official who readily practises favoritism and takes bribes.

Recently a practice called *jonkwanyeu*(前官禮遇) of various preferential treatments given to the former judge-prosecutor turned attorneys in the judicial process was put into question as a part of the judicial reform movement. Preferential treatments include all different kinds of favorable decisions imperceptibly practised by the judge within his discretionary powers in favor of their former colleagues in the sense that criminal cases, claims and applications are disposed in favor of the parties represented by them in subtle ways like a decision of release in a *habeas corpus* proceeding or on bail, a light sentence, and probation. As a matter of fact a sociological research on the practice is extremely difficult to conduct since judicial independence is involved and precise inquiries concerning "improper" practices are frowned upon and even socially inhibited among law practitioners. Nobody knows for sure the extent of the practice. Probably it is not a prevalent practice at all. Most likely it is a popular impression that it exists. It is significant, however, that such a practice is popularly believed as widely practiced even if judicial favoritism is not involved at all. To a great extent such a belief is caused by the closely knit personal ties that exist among law practitioners as well as others.

3.

Then how do personal relations affect the way the formal law functions? First of all it is socially hard to have the disciplinary proceeding really get started precisely because of the workings of personal relations unless the disciplinary matter of an official impropriety was indeed an outrageous one or amounted to a clearcut violation of the law. It is in disciplinary matters that more informal ways prevails than precise rules of conduct in a decision making. Propriety of conducts does not usually give rise to a disciplinary measure in the official contexts unless it is laid down to a precise writing sanctioned by the law or the equivalent compulsory measures. It is the way personal ties are.

A closely related phenomenon is one that a work evaluation system in which a promotion in an official hierarchy or an awarding of prize is made on the basis of evaluation of one's ability or performances does not function well. Instead a work evaluation system

usually results either in an equalized grading to everybody to the effect that a superior who is in an evaluating position gives the same grade to everyone who is on the same level socially because he does not want to be accused of favoritism or in the laying down of the precise rules of grading based even on frivolous standards that have nothing to do with one's ability or quality of performance such as the year of service and age. The third possiblity is that the superior gives a better grade to one who is closer to him in informal ways than to other equally qualified cadidates with the risk of being accused of favoritism. He is still likely to run the same risk even if he thinks he was fair in grading one better than others. Usually he does not want to run the kind of risk however he will be fair so that he is likely to rely on an equal treatment to everybody or on a rule-making to that effect.

Competition in entrance to a college or university, especially to a prestigious one, is extremely keen. So is competition to an official position, particularly in a prestigious popular examination like the national bar examination and the high governmental officials examinations. In the competition the result of written examination is relied upon far more than that of interviews and recommendations. Gradings based on interviews and recommendation are rich grounds for favoritism or at least accusation for it which is practiced along the lines of personal ties. If you want to avoid an accusation of favoritism for admission or passage, you are likely to give less weights on the likely "subjective" results of interviews and recommendations than on the "objective" results of written examinations for which nobody can be accused of favoritism.

Thus there abound written tests more than other methods of tests including oral tests, interviews and paper evaluations in admissions and in promotions wherever competition is keen. In this situation you may end up with having several identical "objective" written test scores for a position or a slot once in a while. For this contingency you are likely to lay down in advance a few "objective" standards to select one for the slot. Those standards include quite frivolous ones that have nothing to do with one's ability or performance in a strict sense such as one's birthday (e.g., the youger is admitted when every other things are equal possibly because he is presumed to excell in performance in consideration of his young age).

The kind of "objective" uniformity is treated as equality. As a matter of fact objective uniformities are not the foolproof method to select one for an admission or promotion on the basis of one's ability. You are rewarded or punished disproportionally for a written

test alone. You can otherwise be an able person even if you earned a relative poor written test score. With a good written test result you may have shown only your skill to score high marks in written tests, for example, by drilling and memorizing. Thus there abound extracurricula learnings and learning institutions called *Kwaoe*(課外) and *Hakwon*(學院). For that kinds of drilling services called "Arbeit" college students, particularly those of prestigious universities, are highly demanded. They can be a role model and a transmitter of the necessary test skills for aspiring college students. And usually families with financial means can afford to provide to their sons and daughters the kinds of drilling sevices that are expensive.

Naturally there develops socially a dividing line between those who can afford to use the kind of expensive extracurricula drilling services and those who cannot. And yet as the other side of the same coin a successful competition in a written test for college entrance, bar examination, or promotion in a bureaucratic hierarchy is highly regarded in the popular sentiment. This in turn reinforces the social importance of written test as a best testing method since one who is socially an underdog can have a fair chance to compete in equal terms even with those from an affluent family. In contrast it is socially quite possible and also popularly believed that those from an affluent family and/or from a family with social "connections" have a far better chance than others from a lower rung of the social ladder in competition with other methods of tests like interviews and recommendations than a written test. In other methods of competitive tests informal ways seamlessly enter into the working of evaluation and grading to affect their result.

Uniformity prevails also in the salaries of employees in work places regardless of the nature of their employment including business firms, public agencies, schools, and universities. Salaries are uniform depending upon employees' job classification, rank, years of service, the number of dependents, and other objective standards. An incentive system like differentiated payments on the basis of their ability or performance where a "subjective" evaluation can easily enter the picture are hard to be installed except in a highly competitive areas of businesses such as salesmenship.

To a certain degree uniformity is the born nature of the formal law. In its application the law has to be uniform as regards things and persons in the same classification. As a matter of fact exceptions have to be installed in the uniform law in order to achieve equity in concrete situations. Exceptions have to be again uniform in their application giving rise to inflexiblity and inequity in themselves. In order to avoid the inflexibility and in-

equity thus produced the formal law may have to have exceptions to the exceptions thus increasing complexities and complications. Another way to achieve flexibility and equity is to provide for discretionary powers given to officials applying the law in concrete situations so that they can apply it equitably. Discretionary powers given to officials may easily turn into their arbitrary excercise thus producing injustice in themselves unless the officials are indeed fair-minded. How do you make officials always fair-minded in their excercise of the discretionary powers when social pressures coming alongside with close personal ties are strong in a different direction?

Openness of the decision-making process to the public or the watching eyes prevents arbitrariness from taking place in the excercise of the discretionary powers to some extents. Openness, however, helps to increase uniformity by promoting equal treatments to everybody applicable regardless of one's deserts with the result of another kind of inequity simply because everybody closely watches an official excercise his discretionary power, as seen in a work performance evaluation situation by a superior.

In many cases his exercise of the discretionary power is in fact "guided" by the standards, instructions or guidelines handed down by his own superior. These standards, instructions or guidelines are desinged for a fair and proper excercise of the discretionary powers by an official who actually applies the law. Sociologically speaking, however, these standards, guidelines or instructions turn into the rules of the *de fact* law whose force is stronger than the formal law that provided for the discretionary power. The official has to follow his superior's standards, instructions or guidelines for the excercise of his statutorily provided discretionary power more than anything else because otherwise he would be likely to be severely disciplined for his failure to follow his superior's instructions unless he has the strong reasons to decide differently from the instructions and a strong willpower to go to a great length to convince his superior of the reasons for his decision.

It is not unusual that you have "too" many complicated regulations at the application level of the formal law process.[3] Those complicated regulations are actually the ministerial instructions, guidelines, and standards designed for the fair and proper excercise of the statutorily provided discretionary powers wielded practically by an official of the lower level at the front desk.

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(3) See also Choi Dai-Kwon, "Pyongdung-ku silhyonui dodokjok mit sahoejok kicho"(Equality-The Moral and Social Bases of Its Realization), in *Pyongdung munjaewa urisahoe*(Problems of Equality in Korean Society), (Seoul: Hyonsangkwa insik, 1989), pp. 114-132.

Beyond that borderline uniformity in the law seems to increase inflexibility in it in the sense that it disregards one's merits, deserts, ability, excellence and other things to be taken into legal consideration and thus to cause injustice in itself. Informal ways tend to give rise to unreasonable uniformity in the law by being led to proliferation of detailed rules to guide excercise of descretionary power and to prevent arbitrariness, which in turn causes inflexibility and inequity on one hand and proliferation of detailed rules instead of discretions on the other.

Those many complicated regulations consisting mostly in ministerial instructions, guidelines, and standards turn out to be *de facto* the law of the stronger force than the statutory law itself because they are enforced at the pain of severe disciplinary measures meted out to officials who fail to follow. Naturally the officials with statutorily provided discretionary powers are personally more interested in possible disciplinary punishments and other disadvantages resulting from failing to follow immediate regulations and instructions than in what the statutory provisions or their natures are and how they affect citizens with what effects as such. Consequently, the statutory provisions are enforced more for the sake of bureaucratic conveniences than the interests of the citizens. This state of the statutory law again reinforces the inflexibility and the inequity in the law.

4.

As we have seen, conscious efforts to deal properly with informal ways affecting the way the formal law works tend to lead to the proliferation of detailed rules which in turn lead to inflexibility and inequity in the formal law. Discretionary powers given to an official who applies the formal law are integral parts of the law to a certain extent. Discretionary powers, however, are readily exercised to serve "informal" social expectations derived from personal ties unless an outstanding illegality is involved.

How do we solve the dilemma caused by the incompatibilty of prolific detailed formal rules and necessary discretionary powers given to an official in the law? What do we do with informal ways that affect the way the formal law works? Besides, prevailing informal ways make an official succumb easily to bribery temptation. Certainly we cannot conveniently ignore the legal significance of informal ways by simply relegating them to the

status of "informal" alone. We feel we need a theory of guidance in solving the question we raise.[4]

The openness of official decision making process to scrutinizing eyes of the public alone was not the solution. Learning process by the public might expand informal ways rather than reduce them. Discretionary powers that are necessary in the formal law presupposes a considerable degree of fair-mindedness on the part of the official who exercises the powers. What guarantees the official his fair-mindedness in the exercise of his discretioary powers and how? One obvious solution is the canon of professional responsibilities and ethics modelled after Western examples. A difficulty with the solution is that it may become a declaration of unenforceable principles among legal practitioners that are closely interwoven with various personal ties. And its learning in a classroom setting as a part of law school curriculum alone does not guarantee its internalization in persons.

By now we are very much tempted to indulge in going back to our intellectual tradition of Confucian teachings. We do have a special affinity to Confucian teachings that are ingrained in our culture although we do not learn and teach them in the formal school education any more presently. Confucian teachings are more of proper human relations than Western rules and law that are directed to individuals for their observance. At this point we are reminded of *mokminsimso*(牧民心書: 1818) which is the rendering by a famous Korea Confucian scholar Jong Yak-yong(丁若鏞: 1762-1836) of Confucian teachings to meet the needs of an official for his decision makings. We believe the book has ample relevancy and implications to even today's official decision making settings. We are strongly tempted to say that the book should be included in the list of compulsory subjects in law school curriculum. Interesting enough, we learned that Ho Chi-min kept *mokminsimso* everyday near his hand to read when he was still alive.

One might wonder what relevancy the book has to the business of today's democratic law particularly since it was designed for the royal officials during the dynastic period. In the book he teaches the officials Confucian based serene fair-mindedness and the spirit of

(4) The same primary group-like personal relations tend to underlie social divisiveness represented often in the forms of wide spread violent confrontations, conflicts, and disputes between various groups, interests, regions, ideologies, and generations. Nationalism is prescribed as a medicine to treat and to overcome the disease of such personal group-based social divisiveness in my other paper cited earlier, "Pyongdung-ku silhyonui dodokjok mit sohoejok kicho," *ibid.* Nationalism teaches parocialism on an international plane but community-wide fraternity and universal values above personal or primary group ties.

ruling "for the people" in their official decision making settings. In the book he states that a half of the learning of the governor consists in his self-discipline(修身) and the other half in tending the people(牧民). These aspects of his teachings, that is, the official's self-discipline, the resulting fair-mindedness, and the spirits of ruling "for the people" are no doubt relevant to today's officials who may otherwise be concerned more with meeting informal expectations derived from their personal ties and with their personal security and bureaucratic convenience in their official decision making settings.

The teachings of the book certainly will help to instill the Confucian based fair-mindedness and the spirit of ruling "for the people" into the personality of aspiring officials and lawyers. No doubt, however, they will not be a foolproof tool to meet the challenges resulting from the informal ways to the formal law ways. And yet they will be at least a small but serious attempt to solve the problems involved. The prevailing informal ways may change to an insignificant proportion in the very, very long term. Within a relatively short period of time, however, we suspect that perhaps they may vary but will remain permanent features of society in the formal law ways.