Confucianism and Law in Korea

Chongko Choi*

Foreword

Although Confucianism originated in China, it may be argued that Koreans are now the most typically Confucian people in the world. In her familiar relationship with China, both geographically and historically, Korea has developed into a radically Confucian country. Primarily a moral teaching in China, Confucianism has been transformed into a virtual religion in Korea. After the fourteenth century, when the new Chosun Dynasty received Neo-Confucianism as the ruling ideology, Korean society considered “Confucianization” to be synonymous with civilization.\(^1\) Therefore, an understanding of Neo-Confucianism is essential in order to understand Korean tradition and society.\(^2\) Indeed on November 28, 1995, the National Confucian Academy Songgyunkwan proclaimed a Constitution(Chonghon), which affirms that the administration and rituals of Confucianism constitute a legally established religion.

Law is the backbone of every society and it is evident that Korean law has established a strong connection with Confucianism. Confucianism has played different roles during the process of its naturalization in China, Japan and Korea. This paper aims to analyze the process by which Korean Confucianism influenced both the

\* Professor of Law, Seoul National University


traditional and the contemporary laws of Korea. Even though present day Korea is divided into North and South, it is noticeable that the legal systems in both parts have in common a number of implicit Confucian characteristics.

I. Traditional Korean Law and Confucianism

1. The Legacy of Korean Confucianism

It is not clear exactly when Confucianism was introduced into Korea, but has been speculated that it was at some time during the period of the Three Kingdoms. The Kingdom of Koguryo established a Confucian educational system, Taehak, in 372 A.D., and Paekche was successful in obtaining the Five Doctoral Canons (Okhyong Paksa) of Confucianism. During the Silla period the Confucian ethical creed in its fused form with Buddhism and Taoism became the guiding philosophy for the training of the Hwarangdo youth group. During the United Silla the State [Confucian] Academy, Kukhak, was established in 682 A.D., and knowledge of Confucianism became a requirement for entry into the civil service from 788.

In the Koryo Dynasty, after the national civil service examination, Kwago, was introduced in 958, the study of the Confucian classics was strongly emphasized. Responding to the appeal of Minister Seungro Choi (927-989), King Seunjong prohibited Buddhistic rituals and founded the State Directorate of Education (Kukchagam), where the teaching of the Confucian classics was pursued.

During the Chosun Dynasty, the repression of Buddhism and promotion of Confucianism was carried out as public policy to such an extent that confucianism rose to the position of being the state ideology, strongly ritualistic and religious in character. King Sejong established the Hall for the Learned Assembly (Chipyonchon), and proclaimed the importance of living according to the principles of the “Three Mainstays and Five Moral Relations” (Samgang-Oryun) of Confucianism.

(3) As the studies about the traditional Korean law; Bong-Duck Chun, Pyongho Park, William Shaw, Traditional Korean Legal Attitudes, Berkeley, 1980; Pyongho Park, Hankuk Popsasangsa (Studies in Korea Legal History), Seoul: Popmunsa, 1974; Chongko Choi, Hankuk Popsasangsa (History of Korean Legal Thoughts), Seoul National University Press, 1989; Chongko Choi, Traditional Korean Law and its Modernization, Transactions of Royal Asiatic Society, Vol. 64, 1989, pp. 1-17; Kyohun Chi, Chusunjo Yugaui Popsasang (Legal Thoughts of Confucianism during Yi Dynasty), Chongshin Munhwa Yon'gu (The Academy Review of Korean Studies), Vol. 13, No. 4, 1990, pp. 71-95.
After Neo-Confucianism was introduced from China, Korean scholars gradually concentrated their studies on problems of human nature. Suh Kyongduk (Huadam), Yi Hwang (Toegye) and Yi Yi (Yulgok) rank among the many great Korean Confucians. Their human-centered Confucianism of the Chosun Dynasty gradually became the social norm, and in the process Confucianism also became known as the Learning of Rites (Yehak) in the sixteenth century, based on the Family Ritual of Master Chu (Chuja Karae). From this time, Korean Confucian scholarship increasingly became the battleground of partisan politics and lawsuits concerning rites (Yesong). Against this, a new school of Practical Learning (Silhak) emerged among Neo-Confucians during the eighteenth century. However, this rather progressive philosophy was criticized by orthodox Confucians as “barbaric” learning imported from the West through Ch’ing China, and consequently the development of Confucianism and the “enlightenment” of the country was retarded until the early twentieth century.

Nevertheless, one may characterize the spiritual and ethical basis of Korean Confucianism as reverence for Heaven, which was seen as the source of human life and the ruler of all people.

2. Law and Rites

In order to understand the Korean Confucian legal culture, a correct understanding of the relationship between law and rites is necessary. Although Li originally had a religious character in ancient China, it gradually developed into a set of secular norms dictating the requirements for desirable human behavior. From this, it

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adapted differently to the respective cultural environments in Korea, Japan and China. From a jurisprudential point of view, the rites occupy a middle ground between law and morality. The basis of morality is internality and substantiality. Accordingly, rites are a kind of externalized, formalized morality. From a legal viewpoint, rites are purely moral, but also as much connected with law, as with morality.\(^8\) The degree to which morals became legalized was very high in Korea, probably the highest among all East Asian countries, to such an extent that Koreans proudly called themselves the "Eastern country of Rites" (Tongbang Yeuichiguk). Upon critical examination, however, it is clear that because Rites, as a combination of law and morality, developed extensively, law and morality in themselves could not develop independently. This is evident from the fact that the study of law (Yulhak) did not develop, whereas the Learning of Rites (Yehak) was highly developed. Furthermore, legal studies were always known as "technical learning" or "heterogenous learning," inferior to Confucian classical learning.

In spite of many requests for codification, the study of law was hindered by the highly developed doctrine of Rites, which dictated desirable and undesirable human behavior. It was only late in the development of the School of Practical Learning that the great Confucian Scholar Yakyong Chung (Tasan) emphasized the importance of Rites as public way of life.\(^9\)

3. The Constitutionalism of Chong Tojon

Although G. F. Hegel alleged that there was no concept of "constitution" (Verfassung) in China,\(^10\) it is significant that the notion of constitutionalism had already been conceived in the fourteenth century Korea by the great Confucian scholar, Chong Tojon (1337–98), who assisted in founding the new Chosun Dynasty, and drafted the Chosun Codex of State Administration (Chosun Kyongkukjon).\(^11\) At

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the beginning of his Codex, Chong defined the source of sovereignty, the significance of the dynasty’s name, and the form of royal decrees—in short, the constitutional basis of the Yi dynasty. Therein, he asserted that the people were the foundation of the state and represented Heaven to the King. On the basis of such a people-centered theory, he maintained the rights of deposing the king and even of rebellion. He asserted that tyrannical rulers must be removed, even, if necessary, by removing the whole royal family (Yoksong Hyokmyong). According to his theory, the power of the king should always be limited by the power of the prime minister and the cabinet, and such notions as freedom of expression and the right to appeal should always be available. Such a theory was not fully realized during the history of the Chosun Dynasty, but this concept of Confucian constitutionalism is highly significant both within and outside Korea.

4. Legal Regulations

Korean Law which emerged as a written law after the “Age of Codification” in the fourteenth century, consisted mainly of administrative and criminal regulations. According to the traditional six divisions of governmental administration, the legal code was divided into six legal area. In the Code of Rites (Yejeon) Confucian ethics and rites were legalized. In particular, the entire Criminal Code was based upon Confucian values. The most serious social crimes were called the Ten Cardinal Evils (Sibak), of which disloyalty and lack of filial piety were the most important. Both of these crimes were punishable by death, and it was difficult to obtain a more lenient sentence.

5. The Community Compact (Hyangyak)

The Chosun government utilized the notion of Community Compact, Hyangyak, to educate the people in Confucian politics. Hyangyak was originally invented in China,
but underwent a distinct development in Korea. The highly acclaimed Confucian scholar, Yi Hwang(Toegye) personally authored the Yean community compact (Yean Hyangyak) which was characterized by the refined codification of moral norms in the form of local community practices.

Yi Yi(Yulgok) drafted the Haeju Community Compact under rather different social circumstances, with the aim of supplementing positive legal norms that had been lost. Such a Korean community compact based on Confucian postulates seems rather like a kind of living law(lebendes Recht), as the legal sociologist Eugen Ehrlich expressed it.(15) The Korean Hyangyak was the key to the success of Korean Confucian politics.

In sum, Korean traditional law was so deeply rooted in Confucianism ethics that one might say law in Korean traditional society was simply an instrumentality implementing Confucian values. Of course, to substantiate this claim in detail would require further research in Korean legal history.

II. Modern Korean Law and Confucianism

According to the Constitution(1948) of the Republic of Korea, freedom of religion is guaranteed, and the establishment of a state religion is prohibited.(16) Confucianism cannot enjoy the privileged status that it knew in the Chosun Dynasty. According to statistical data, furthermore, the number of people observing Confucianism is fewer than that of those following Buddhism or Christianity. This probably reflects the view of many present-day Koreans that Confucianism is more a set of ethical norms, or reasonable way of thinking, than a religion. To counter this, the Grand Assembly of the Korean Confucians proclaimed on November 28, 1995, that Confucianism is a religion(a matter to be discussed further later). However, an analysis of the status of Confucianism under the modern laws of Korea should precede a study of its role in modern Korean society.

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1. Family Law and Confucianism

Family law in Korea is contained in the Civil Code, according to the European system of Pandekten Code. When the Civil Code began to be drafted in 1945 with the liberation from Japanese rule, the Korean legislative fathers were senior persons, mostly educated in Confucianism from their youth. The most significant person in this codification was Pyongro Kim (1886–1964), the chairman of the Legislative Committee, who later became the first chief justice of the Republic of Korea. (17) Although he had studied modern jurisprudence at the Meiji University in Japan, his early formation was in Confucian ethics, which he had studied under the famous Confucian scholar Woo Chun (Kanje, 1841–1922). In his youth he had joined the Confucian Righteous Army in resistance to the Japanese takeover. According to the record concerning the process of codification in 1945, there was of course some conflicts of opinion, but almost all problems were resolved in favor of the prevailing Confucian (conservative) views. (18)

Korean family law, which contains some peculiarly Korean characteristics, has been subject to the influence of Confucianism, as shown in the followings. (19)

(1) Relatives and Chon—Concept

Article 777 of the Korean Civil Code (1960) defines Chinjok (relatives) in the following terms: “spouses, relatives on the father’s side, and relatives on the mother’s side.” This definition encompasses relatives within eight degrees (Chon) on the father’s side, four degrees on the mother’s side and their spouses, respectively. The concept of Chinjok is based upon the system of degrees, originating from Confucianism, and it differs from the concept of relatives in Western society. The Chon in Korea is calculated according to the following formula: the relationship between parents and children is one Chon, while the relationship between spouses is zero Chon. Thus, for instance, the relationship between cousins is four Chon. This system of calculating relatives is quite different from its Chinese counterpart.

Among Korean scholars, there is no consensus as to the origin of the Chon

system in Korea. However, it seems to date back to the twelfth century of the Koryo Dynasty. In any event, it is clear that such a system originated from Confucianism.

Historically, it is an important Korean social tradition to observe ceremonies honoring family ancestors. Accordingly, Chon seems to have been calculated on the basis of the degree of devotion for observing these ceremonies. Until recently, the calculation of Chon, or the concept of Chinjok, was under the influence of the Confucian family system, which is led by the most senior male member. This consequently leads to more emphasis being placed on the relationship with the father's relatives.\(^{20}\) Nevertheless, such a bias was partly eliminated under the 1990 amendment of the Civil Code. This amendment reflected new ways of thinking in Korean society, such as the belief in equality between men and women, and the resultant social development and growth of women's rights.

(2) The Hoju system

Article 778 of the Civil Code provides that a person who inherits the family line, separates himself from the already existing family, or establishes or revives a family for other reasons, shall be eligible to become Hoju, i.e., the head of the family. The purpose of the Hoju system is to authorize a particular person to inherit the position of Family Head in order to permanently maintain the family. In the eyes of Westerners, the Hoju system may be seen as an out-of-date remnant of an old system, since it imposes the burden of maintaining a family on a single person, who should be allowed the right to manage his own life free from any social restraint. Nevertheless, Koreans, for the most part, have accepted without resistance, the concept of Family Head as a kind of public moral law, although feminists in Korea are of course opposed to the idea. Needless to say, the Family Head system is based upon the traditional family system under the leadership of the patriarch of the family. According to traditional laws and customs, women were excluded from becoming heads of the family. Nowadays however, this concept has been reformed.

Article 789 prescribes: “Any member of a family shall automatically become separated from his family to create his own family when he gets married.” However the eldest son may not become separated from his family.

Article 529 prohibits the execution or seizure by the judicial authorities of images and other objects used for the purpose of ancestor worship, as well as genealogical records (Chokpo).

Article 992 disqualifies a successor to the headship of family, who has intentionally killed or attempted to kill a lineal ascendent, the person succeeded to, his spouse or any person with priority of succession to the headship of the family. This article also applies to those who have intentionally injured and brought to death a lineal ascendent, the person succeeded to or his spouse.

This provision in the Civil Code is parallel with the Criminal Code, which decrees punishments in relation to the (Confucian) crimes against humanity. (21)

(3) Marriage and Divorce

Confucianism had an impact on the marriage system in Korea in several different ways. The most significant of these may be found in the context of the prohibition of marriage between persons with the same surname and family origin (Dong-song Dongbon), the restriction placed on the remarriage of women, and the relationship between the criteria for adulthood and marriage.

The prohibition on marriage between persons with the same surname and origin is the most Confucian in character, and has attracted significant controversy. Article 809 (1) of the Civil Code provides that "No persons having the same surname and family origin may marry each other." Such a prohibition seems quite unreasonable and inhuman in light of the fact that, as a result, a man is not permitted to marry a woman simply because she has the same surname and ancestors. For this reason, many people, including feminists, in Korea have proposed the amendment to the Civil Code repealing this unreasonable prohibition. This proposition, however, has faced continued resistance from those people still observing Confucian traditions. Confucian groups called Yurim argue that this prohibition is essential in order to preserve the high moral standard of Korean society. Interestingly enough,

such a prohibition did not exist in the ancient and medieval ages of the Silla and Koryo dynasties. Rather, marriage between persons within the same family, known as “internal marriage” (*Nehon*) was permitted at that time. The prohibition against such a marriage was introduced into Korean society with Confucianism for the first time in the Chosun Dynasty in the fifteenth century.

Of course, this principle cannot be found in Western legislation. Even in China, where Confucian culture was dominant, though it was established in the Han dynasty, it gradually became weaker and was eventually abolished by the Ch'ing dynasty.

The reason why Korea is excessively attached to this principle may perhaps be explained by the family system and reverence for “face” (*Chemyon*) or Korea's traditional family system. Further, this idea was supported by the Soktajejon (Amended Grand Code, 1746) which provided for the prohibition against marriage between persons with the same surname but not with the same origin due to a fear of China's misunderstanding that Korea would allow marriage between persons of the same surname and origin. This principle, prohibiting marriage between people with the same ancestors, is an extension of the philosophy of the patriarchal family system, and originated from the traditional rural agricultural community on which Confucian ethics were based. The concept of a prohibition of marriage among kin was inevitable when considered in the context of a religious system fixed by Confucian ethics, and its influence extended into an industrial pluralistic society. Many married persons, guilty of violating this prohibition, suffered severely, so that special decrees with time limits were issued by the government in 1978, 1988 and 1996 to deal with these problems.

Under Article 811 of the Civil Code, “a woman may not remarry unless 6 months have elapsed from the date of her previous matrimonial relation. However, this shall not apply when she has given birth after the termination of her previous matrimonial relation.” This prohibition can be explained by Confucian ethics and is currently the subject of strong criticism on the basis of human equality.\(^{(22)}\)

According to Article 826(2) of the Civil Code, “If a minor gets married, he/she

shall be deemed to have the full age." This provision also can be explained as a remnant of the traditional celebration *Kwanrae* of a boy's coming of age.\(^{(23)}\)

(4) Family Council

Article 960 of the Civil Code prescribes that "A family council shall be organized when any circumstances exist which require a resolution of the family council in accordance with the provisions of this law and any other law." The establishment of such a council may also be explained as a reflection and extension of the traditional Confucian clan meeting.\(^{(24)}\)

(5) Parental Authority

Article 909 of Civil Code prescribes that "Both parents shall jointly exercise parental authority over a child who does not attain the age of maturity. However in the case of difference between the parents, the Family Court shall decide the person who exercise parental authority." According to Article 913, a person with parental authority has rights and duties to protect and educate his or her child. A child should reside at a place as designated by a person with parental authority. The person with parental authority may, in order to protect or educate his or her child, personally chastise his or her child, and may entrust such a child to a reformatory or correctional institution with the permission of the court.(article 915). Article 913–923 guarantee and regulate the parental authority from various aspects. These provisions indicate the fact that Korean society is strongly based on the (Confucian) parent-child relationship.\(^{(25)}\)

(6) Duty to support

According to Article 974, "relatives falling under one of the following items shall be under an obligation to support each other:

1. Between lineal relatives by blood and their spouses;
2. Deleted; and
3. Between any other relatives (limited only to the case when livelihood is shared)."

This duty of support is based originally on the confucian ethic of filial piety. The fundamental issue here is the support of financially poor parents. In ancient China,

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there were ten cardinal evils (Sibak) which were introduced into the Chosun law. The seventh of these evils was that of being unfilial (Pulhyo), i.e., the crime of not supporting one’s parents.

Recently in Taiwan, there was legislation introduced which outlined punishment for children who failed to support their parents, and there has been some support for similar legislation in Korea. This effort to revive the virtue of filial piety cannot be explained simply as an anachronistic custom or conservative way of thinking. Rather, it should be explained as an attempt to reconstruct social solidarity based on loyalty towards parents.

(7) Succession

Article 1007 states that “Each co-successor succeeds to the rights and duties of the person succeeded to in proportion to his share in the succession.”

Under Article 1009(1), “if there exist two or more successors of the same rank, they inherit in equal portions. However, if a successor to property succeeds concurrently to the head of a family, his shares in the succession of the property shall be his inherent portion plus fifty percent thereof.” (1977 amendment) This article can be explained on the basis of Neo-Confucian tradition in China which generally provided for equal division, but gave some preference to the eldest son as a means of upholding the family line.

The explanation for this principle of succession in equal division which was influenced by Confucian ethics in China, may seem a little unusual, but Koreans have maintained such a principle from historical times until the end of the Chosun Dynasty. During the period of Japanese occupation, however, a system of succession giving preference to the eldest son was introduced from Japanese law, and then became misconceived as an indigenous Korean tradition. However, current discussion and legislation (1990 amendment) urge a return of the family law to the original system of equal division between male and female successors, including the eldest son.

Article 1008 of the Civil Code prescribes that “if any of the co-successors have received from the person to be succeeded to, a gift or a testamentary gift, and the value of the gifted property is short of his share in the succession, he shall be entitled to shares in the succession within the limit of such shortage.” This guarantee of the inheritance share of a special beneficiary may be explained as being in indirect support of the Confucian notion of filial piety.
2. Criminal Law and Confucianism

The criminal law in every society is tinted with ethical and cultural characteristics which permit or prohibit certain kinds of crimes. This is called, jurisprudentially, the legal enforcement of morals. Accordingly, in Korea as well, sound Confucian ethics are enforced legally through Korean criminal law. (26)

Pyongro Kim, the chairman of the Legislative Committee exerted his spiritual influence and authority not only in the codification of the Civil Law, but also in that of the Criminal Law. Because the Criminal Law had to be codified during the Korean War Emergency (1950–53), there was insufficient time for discussion, and it had to be translated and modified by reference to the Japanese and German criminal codes. An interesting example is the article prescribing the duty to rescue persons in trouble, generally called the Good Samaritan clause. The duty to rescue persons in danger was probably based on Christian humanitarian sentiments, so the Parliament refused to adopt this article on the ground that during the war it was impossible to punish people who failed to care for the beggars on their doorstep. Indeed, even to this day this article has not yet been adopted in Korea—a fact that might be attributed to the Confucian way of thinking among the parliamentarians, namely the prevalence of a Confucian ethic giving priority to family obligations and the care of relatives.

(1) Adultery

Under Article 241 of the Criminal Code (1953), "a married person who commits adultery shall be punished by penal servitude for not more than two years. The same shall apply to the other participant."

Adultery is, of course, the decisive menace to marriage within a family system, and as such is censured by most societies. However, in the Western world, adultery is not prescribed in the criminal code, but is treated rather as a matter of conscience. Even in China and Japan, there is no provision relating to adultery in the criminal law. However, according to Korean Confucianism the status of a married couple was highly respected and protected.

There has been strong criticism of this article by several specialists in criminal law, but many women's movements in Korea support the continuance of this provision. It is, therefore, interesting to note that both the feminist movement and Confucian scholars are in accord in respect of this matter, even though they have continually been at loggerheads regarding the revision of the family law in many other respects.

Article 244 provides that "a person who ... manufactures, possesses, imports or exports obscene goods shall be punished by penal servitude for not more than one year, or by a fine ..." In addition, Article 245 states that "a person who publicly commits an indecent act shall be punished by penal servitude for not more than one year, or a fine ...."

These two articles are sometimes criticized as suppressing freedom of expression, but the ultima ratio of these provisions is the desirability of preventing indecent social customs in Korea, as compared to the European and American situations, where pornography and obscenity are tacitly permitted, despite relevant legislation against them.

(2) Murder

In the words of Article 250, "(1) A person who kills another shall be punished by death, penal servitude for life, or for not less than five years. (2) A person who kills his own or his spouse's lineal ascendant shall be punished by death or penal servitude for life."

This provision demonstrates the fact that Confucian culture places great emphasis on respect for one's elders, and on a child's moral duty towards his ascendants. There has been criticism of this provision as being contrary to the spirit of the constitution Article 11, which states that "all citizens are equal before the law." However, in light of frequent inhumane crimes by the younger generation, the dominant opinion is still that this provision in the Criminal Code must be maintained.(27)

In contrast to the above, according to Article 251, "a lineal ascendant who kills a baby while being delivered or after delivery in order to avoid disgrace or for fear of the impossibility of bringing the baby up or for some other extenuating motive shall be punished by penal servitude for not more than ten years." This provision may be

(27) In Japan, this provision was abolished according to the judicial decision of the Japanese Supreme Court in 1973.
explained on the basis of Confucian ethics which pays less respect to infants and children. In the extreme analogy of this provision, it may be possible to justify murder of an unwanted baby on the basis that the chastity of the woman was so highly valued under patriarchal family ethics. The children were regarded as being not independent persons, but belongings of the parents. This concept stems from the fundamental concept of filial piety, by which a father and a son are the same entity.

(3) Defamation of a Dead Person

Pursuant to Article 308, "a person who defames a dead person by publicly alleging false facts shall be punished by penal servitude or imprisonment for not more than two years, or by a fine...." Reverence for the dead is common in societies throughout the world, but the Korean custom of an exceptionally strong worship of souls and spirits is based on the Confucian principle of ancestor worship. Persons who made great contributions to the State received a high official rank after their death in the Chosun Dynasty, and similarly nowadays police and soldiers who die during public duty are honored by the government. In contrast, those persons who committed crimes against the State were stripped of their official ranking—and in extreme cases, decapitation of the dead corpse took place. All these phenomena demonstrate the degree to which Koreans respect their traditions even in the present-day life.

(4) Criminal Responsibility

Article 151(2) of the Criminal Code prescribes that "if a relative, head of the house or a family living with the said person commits the crime of harboring a criminal for the benefit of the criminal, he shall not be punishable."

Article 155 also guarantees exemption from punishment for the crimes of suppression of evidence, concealment and forgery or alteration of the evidence in criminal cases if such acts were committed by a relative, head of the house, or a family living with the said person, for the benefit of the criminal. These provisions are to be explained as remnants of the concept of Family Mutual Protection (Chinsok sangyongeun), which was exercised customarily and legally in old China and Korea. Those institutionalized principles also reveal the negative aspect of the Crime of Ascendant Accusation (Kochinjoe). The action, under which a child accuses his parents of a crime, was itself prohibited as being a crime of un-filiality, and the action, which concealed the crime of the parents, was tolerated by the law in the spirit of
the Confucian theory of human feelings (*Chinjong*). This traditional Confucian principle of law was incorporated into the first modern Criminal Codes (*Hyongpop Taejeon*) of 1905.\(^{(28)}\) Article 285 of the Code of Civil Procedure guarantees the right to refuse to testify on the part of relatives, family heads or family members of the witness, or a person who was in any of the aforesaid relationship with the witness. These rights of current procedural laws may be explainable as a means of securing a fair trial, but they could also be explained as a remnant of Confucian family ethics which protected the intimacy of family relations.

3. Social Laws and Confucianism

Social laws including labor laws, social security laws, etc. may be the best expression of a society’s ethos. But because it always needs financial provision for its realization, Korean social legislation has not been fully codified, even though Koreans still long to implement the social values expressed in Confucian and other religious-humanitarian ideals.

Article 3 of the Law for the Elder Welfare (1989) prescribes that “the State and Nation should make efforts for the maintenance of the good old customs of reverence for elders and of filial piety.” This provision of reverence for elder and filial piety (*Kyongro Hyochin*) is the legal expression of traditional Confucian moral sentiments.

Article 65 of the Income Tax Law prescribes the reduction of taxes of persons over the age of 55. Articles 4 and 11 of the Succession Tax Law (1974) prescribe also the exemption from taxation of funeral costs and of houses which were inherited after common residence of over five years or succession over three generations. There are other articles about the exemption from taxation to preserve the good old lifestyle based on the traditional (Confucian) virtues.\(^{(29)}\)

III. The Reality of Confucianism in Korea

As it has been pointed out above, Confucianism has taken on some of the charac-

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\(^{(28)}\) This Code was translated into French as the first translation of Korean law into a Western language. Laurent Crémazy, *Le Code Pénal de la Corée*, Seoul, 1904.

\(^{(29)}\) For details see Tai-Ro Lee, *Chosepop* (Taxation Law), Seoul: Chose Tongramsas, 1994, especially, pp. 150–170.
teristics of an organized religion in Korea. Korean Confucianism is not merely a theory, an ethic or a way of thinking, but also a social organization. At present, there is the Songgyunkwan (National Confucian Academy), and 231 Hyangkyo (local Confucian schools), along with 2200 Sowon (Confucian private schools), and various associations of young Confucians consisting of 23500 members, known as yurim (Confucian forest), yuja (Confucian gentlemen) and yusa (Confucian scholars). These Confucian organizations are legally known along with Buddhist temples and Christian churches as associations without legal capacity (Verein ohne Rechtsfähigkeit). This is natural in a society where the establishment of a guaranteed state religion is not permitted and where politics and religion are kept strictly separate. Nevertheless, it is not easy to judge whether Korean Confucian organizations may not carry on certain positive activities of a public king. A grand ceremony is held every February and August according to the lunar calendar, with the presence of Korean Confucians. In the main temple of Songgyunkwan, Confucius is honored in the center, and is flanked to the right and left by 94 Chinese Confucian sages and 18 Korean Confucian scholars.

In Western texts introducing the "great religions of the World," Confucianism is sometimes explained and accompanied by a picture taken from the Songgyunkwan ceremony. It was also a symbolic event when Korean Confucian scholars visited Taiwan some years ago in order to restore such ceremonies there.

Accordingly, Korean Confucianism continues to maintain a strong ritual tradition and religious flavor. At the end of the Chosun Dynasty, the Confucian scholar Byonghon Lee (1870–1940) tried to establish a Confucian Religion (Kongjakyo), but his efforts failed because of his fixed notion of religion in terms of Protestant Christianity.\(^{(30)}\)

Nowadays, Korean Confucianism is seen by the common people as a living code of ethics and custom, rather than as a religion. Probably for these reasons, Korean Confucianism seems rather weak in carrying out any kind of social activity. It is, moreover, sometimes seen as a conservative or reactionary organization, especially in respect to its resistance to the progressive revision of family law. In a rapidly

changing society, where the rights of women and people in general are strongly emphasized, the effort to preserve traditional Korean ethics and customs appears difficult and out of date. It forms a striking contrast to the manner in which Christianity and Buddhism actively deal with such social problems as human rights, the environment, the labour movement and the issue of national reunification. However, whenever socio-pathological problems appear in the rapidly changing Korean society, it is strongly argued that a social and ethical reconstruction on the basis of traditional Confucian values is necessary, especially in the light of rising juvenile delinquency and frequent inhuman crimes.

At a conference at the National Confucian Academy (*Songgyunkwan*) on August 29, 1973, a “Declaration of Ethics” was adopted, wherein it was declared that “we call for the restoration of human dignity and the continued development of sound traditional manners and morals on the basis of filial piety and loyalty.”(31) In 1990, a “Confucian Forest Hall” (*Yurim Hoekwan*) was erected in front of *Songgyunkwan* University, and various social programs are now carried out there, supported by a central administration.

In 1990, a *Confucian Encyclopedia* (*Yukyo Taesajon*), contributing greatly to the dissemination and academic recognition of Confucianism, was published.(32)

However, in comparison with the earlier tradition of Confucianism in Korea today seems somewhat lacking in religious character. Further, it has been thrown into confusion by the strong influence of other religions on ceremonial occasions and in the people's everyday way of life. In order to play a new central role in this challenging situation, Confucian organizations must first overcome their apparent inability to break free from a limitation in human and financial resources.

At the same time, Koreans still maintain a strong inclination towards lineage and kinship, and there appear to be many new family clans even in large cities such as Seoul. Some strong clans even establish special education programs to pass on their concept of dignity to younger family clan members. Very recently, Korea University, a leading private university in Seoul, published a traditional book of moral in-

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(32) Seoul: Bakyongsa Publishing Company, 1990. This encyclopedia consists of two volumes. One is a general encyclopedia of Confucianism and the other presents statistical evidence and situation with pictures (2706 pages).
struction, the *Myongsim Pogam* (Precious Mirror of the Clear Mind)\(^{(33)}\) in order to reform the academia of Korean universities that is intellectually oriented towards purely Western knowledge. This will be made a compulsory subject for students in that university.

The present writer also teaches legal ethics to students at Seoul National University and in so doing frequently refers to Confucian ethics.\(^{(34)}\)

IV. Confucianism and Human Rights in Korea

The concept of human rights goes back, in Europe, to Greek and Roman legal philosophers, including the Sophists and Stoics like Cicero. These ideas of human rights arose from the idea of human equality, which can be construed as human nature before the formation of state power.\(^{(35)}\) As Professor Arthur Kaufmann has aptly pointed out, East Asian peoples also had such notions from ancient times,\(^{(36)}\) but while the concept of human rights in the Western world has been translated into legal terms, the Asian concept of human rights has remained at the ethical and customary level. In this sense, the Asian culture is to be characterized as an "a-legal culture," in contrast to a supposedly "legal" Western culture.\(^{(37)}\) There is a long history of human rights struggles against abusive political power, social evils including war, false beliefs etc. all over the world. As a legal historian, the present writer would pay special attention to the "legalization" of human rights against the

\(^{(33)}\) This Confucian classic was compiled by the Korean scholar Chu Chok (*Nodang*) at the end of the thirteenth century. Much admired as a primer in Korea down into modern times, its diffusion throughout East Asia and the high regard in which it was held for summing up the wisdom of the East even led to its translation into Spanish and introduction to Europe in the seventeenth century. Wm. Theodore de Bary, *op. cit.*, p. 1 and see also his article, "Confucianism and the Contemporary Educational Crisis." in The Universal and Particular Natures of Confucianism, Proceedings of the 8th International Conference on Korean Studies, The Academy of Korean Studies, 1994, pp. 45-64.

\(^{(34)}\) His textbook published for his class is, Chongko Choi, *Popkwa Yunri* (Law and Ethics), Seoul: Kyongsewon, 1992.


state since the signing of the *Magna Carta* and adoption of *Habeas Corpus* during the sixteenth century in Europe. The contemporary world, subsequent to the United Nations Declaration of Human Rights of 1948 has pursued the internationalization of human rights through international conventions and contracts.\(^{(38)}\) In a word, while the concept of human rights has become internationalized, it still needs to be more strongly grounded through the process of naturalization to indigenous cultures.

The degree of commonality and difference as between the concept of human rights (*Menschenrechte*) and the concept of human dignity (*Menschenwürde*) is rather subtle. But if we assume that human rights are a more legalized concept than is human dignity, Korean history and culture may be considered relatively “under-developed” as compared to Western countries. Since the Korean people have been suppressed by foreign and domestic political powers even after liberation from Japanese rule, they have developed a strong desire for the protections of human rights. This has been expressed by such political upheavals as the student revolution of 1960, and the Democratization movement of 1989.

Korea has tried to develop democratic politics based on the “rule of law,” setting up whole codes in several legal areas and in the judicial system. Nevertheless, Korea seems to have reached an impasse as between institutional westernization and mental acculturation. Sociological surveys indicate that the Korean people still have strongly mixed “pre-modern” and “modern” legal consciousnesses.\(^{(39)}\)

In such a historical situation, what role may Confucianism play in the development of human rights among the Korean people? One may ask, whether Korean Confucianism was supportive of human rights of whether human rights have been in any way restricted by Confucianism. To answer these questions, this writer believes that we should differentiate between the concept of human right (or human dignity) in the ethical sense and the concept of human rights in the legal sense. In spite of the strong basis of human rights (dignity) tradition, rooted in Confucianism, Korea could not develop fully the “rule of law” based on human rights in the legal sense, mainly because of political repression and instability. In a word, Korean Confuciannism has not been strong enough to establish a comprehensive legal system.

\(^{(38)}\) Gerd Kleinbeyer, *op. cit.*, p. 487.

fucianism was not able to develop and fulfill its ideals into an effective human rights movement.

One might argue that Confucianism has basically no idea of the separation, or "invisible wall," between state and religion as in the Western world. The Confucian ideal of education might only be pursued for the sake of a political career. Moreover, as we have already seen above, Korean law has incorporated strong elements of Confucianism, and Korean politics has been conducted Confucian style, as G. Henderson analyzed impressively in his book Korea: The Politics of the Vortex(1968). Accordingly, the legal implementation of Confucian morals could be a strong support for human rights(dignity). The present writer believes that Kocans should develop such a strong self-consciousness of human rights on a Confucian basis.

Conclusion

It has been observed that both traditional law and current law have been strongly influenced by Confucianism in Korea. The Confucian contribution to the establishment of the rule of law and of democracy, has not always been fully appreciated but contemporary Confucianism has nevertheless played a positive role in contributing to the establishment of social order and ethics in Korean history.

Contemporary Korean society is confronted with many unexpected social problems. Yet, Confucianism may offer remedies to help solve these legal and institutional questions. In order to do so, however, Confucians will have to overcome its traditional ways of thinking and reinterpret Confucianism so as to make it complementary with modern science.

On November 28, 1995, Korean Confucians held an Emergency General Assembly and proclaimed the Constitution(Chonghon), which defined Confucianism as a religion. This must be the most significant event in the history of Korean Confucianism which was introduced sixteen hundred years ago during the period of the Three Kingdoms. Korean Confucians called themselves officially "The Songgyung-kwan Confucian Church"(Songgyunkwan Yukyohoe). The Constitution, which was drafted by the Special Committee of Confucian Institutional Reform(Yukyo Chedo Gehyok Tokbyol Wiwonghoe) consists of a preamble and 69 Articles in 11 chapters, prescribing General principles, the General Assembly(Yurim Chonghoe), Elders
assembly (Wonrowon), General Council (Pyonguiwon), Chief in General (Chongjeon), National Confucian Academy (Songgyunkwan), Local Temples (Hyangkyo), Confucian Associations (Yudohoe), rewards and punishments, etc. The Constitution names Confucius as Master of the religion, the Four Books and the Five Classics (Saso Okjyong) as the Canon (Kyongjeon), and prescribes seven ranks (Pumgye) of Confucian clergymen. The Chongjeon is elected in the General Assembly, which is the highest policymaking institution. The present chief-director of Songgyunkwan, Keun-Duck Choi, said in his address to the press: “The proclamation of the Constitution means the recognition of Confucianism as a religion both in and outside of Korea. To produce Confucian clergymen, a special educational institution called the Confucian Seminary (Yukyo Kyohakwon) shall be built starting next year, and 235 Local Schools (Hyangkyo) shall be used for Confucian education.”

The Grand Ceremony honoring Confucius is to be held on May 10, in Spring, and on September 18 in Autumn. The Spring Ceremony will be held at Songgyunkwan and Hyangkyes nationwide, and the Autumn Ceremony at Songgyunkwan only. By this proclamation, the discussion as to whether Confucianism is a religion or not, is ended (at least officially). Confucianism is the religion, which believes in Confucius who taught the construction of an ideal society based on humanity and ethics. It will be curious to see what Korean Confucianism will offer as a new program to the people now that it is established as an organized religion.

The above discussion was limited mainly to an examination of South Korean law, but North Korean law does not seem to differ greatly from this perspective. Although North Korean law belongs to the “Socialist” legal family, the Confucian characteristic of “law as a teacher and parent” is hidden under the title of Juche ideology. Accordingly, we Koreans may anticipate the possible reunification of North and South Korean laws through the medium of Confucianism.

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(41) About the historical usages of the term religion (Chongkyo) in Korea, Sukman Chang, Gehangki Hanguk Sahoeui “Chongkyo” Kenyom Hyongsong kwanhan Yongu (A Study of the Formation of “Religion” Concept in Enlightenment Period of Korea), Ph. D. Seoul National University, 1992, p. 38ff.
In order for Korean Confucianism to have a progressive development in relation to human rights, this writer would like to propose the following:

First, Confucianism in Korea should think of itself not only as a religion or as a system of ethics, but as both. An exclusive dogmatic, fundamentalist Confucian religion would not be desirable for a pluralistic Korean society. Articles 65, 66 of the Confucian Constitution (1995) which prohibit any commitment to or support of activities for other religions, must either be interpreted flexibly, or modified, or abolished altogether, for the sake of mutual understanding of and peaceful coexistence with other religions in Korean society.

Second, the Confucian Church (Yukyohoe) should organize Movements for human rights among the Korean people as the Christian churches and Buddhism do in Korea. Korean Confucianism today should pay more attention to human rights for women, children and laborers. As the present writer sees it, Korean Confucianism, in spite of its magnificent potentialities, seems to be inclined toward rigid formality and self-restraint. With its Universal Declaration as a religion in 1995, the Korean Confucian organization is going to make a new effort to survive in the contemporary secular world. To make this effort successfully, some absurd out-of-date regulations should be reconsidered as to their applicability in an open society.

Third, Confucianism, pursuing the rationality with which it is well-equipped, should carry out intellectual inquiry and discussion all over the diverse fields of Korean life. In politics, Confucianism could suggest the everlasting vision of government by gentlemen (Kunja). In economics, a "Confucian capitalism" could be proposed which showed a concern with the human rights of laborers.\(^{(43)}\) In culture, Confucianism could further develop its fine traditions in literature, music and art.

Finally, Korean Confucianism should pay attention to the human rights of the North Korean people also. Despite the division of South and North, human rights must be emphasized and discussed openly because they have a universal implication. Of course, the Western concepts of human rights must not be used simply as a pretext for a new imperialism, or as a kind of superficial ornament. But for Koreans, human rights must be observed on the international level, with Koreans, both

North and South, having a mutual right and duty to make suggestions for each other's improvement of human rights. In this way Confucianism could become the best bridge for dialogue and mutual cooperation in achieving the final reunification of the Korean peninsula.

Glossary

Chemyon  | 體面  | Pulhyo  | 不孝
Chinjok  | 親族  | Pyonghuiwon  | 評議院
Chinjong  | 親情  | Samgang Oryun  | 三綱五倫
Chinsoksangyongeun  | 親屬相容隱  | Sibak  | 十惡
Chiiphunjeun  | 集賢殿  | Silhak  | 實學
Chon  | 寸  | Soktaejeon  | 續大典
Chonghon  | 宗憲  | Songgyunkwan  | 成均館
Chongjeon  | 總典  | Taehak  | 太學
Chosun Kyongkukjon  | 朝鮮經國典  | Tongbang Yeuichikuk  | 東方禮儀之國
Chuja Karae  | 朱子家體  | Wonrowon  | 元老院
Donsong Dongbon  | 同性同本  | Yean Hyangyak  | 禮安鄉約
Hoju  | 戶主  | Yehak  | 禮學
Hwarangdo  | 花郞道  | Yejeon  | 禮典
Hyangyak  | 鄉約  | Yesong  | 禮詮
Hyongpop Taejeon  | 刑法大典  | Yoksong Hyokmyong  | 易姓革命
Juche  | 主體  | Yudohoe  | 儒道會
Kochinjoe  | 告親罪  | Yuja  | 儒子
Kongjakyo  | 孔子教  | Yukyo Chedo Kaehyok  | 儒教制度改革
Kukchagam  | 國子監  | Tokpyul Wiwonhoe  | 特別委員會
Kukhak  | 國學  | Yukyohoe  | 儒教會
Kwago  | 科學  | Yukyo Kyohakwon  | 儒教教學院
Kwanrae  | 冠禮  | Yukyo Taesajeon  | 儒教大事典
Kyongjeon  | 經典  | Yulhak  | 律學
Kyongro Hyochin  | 敬老孝親  | Yurim  | 儒林
Myongshim Bogam  | 明心寶鑑  | Yurim Chonghoe  | 儒林總會
Nehon  | 內婚  | Yurim Hoekwan  | 儒林會館
Okyong Paksa  | 五經博士  | Yusa  | 儒士