

# The Discord between the Rule of Law and Justice\*

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## Abstract

*Modern legal philosophy is caught in a frame where it is forced to accept the discord between the rule of law and justice. The return of justice in legal philosophy is unachievable without reconciliation with the Rule of Law. Keeping 'legal philosophy of reconciliation' in mind, this paper provides an overview how we can reduce the tension between the rule of law and justice.*

*Through the introspective reflection on the weak and impoverished state modern legal philosophy finds itself in, this paper attempts to characterize the tendency of the question of justice being marginalized in the environment of legal positivism which is the product of the combination of scientific rationality and legal knowledge. Firstly, the autonomy of the actor as the subject being replaced by the autonomy of the legal system resulting in a kind of mechanism design, secondly, legal perception of form being contrasted to substance, thirdly, the problem of legal professionalism in which all views from outsiders are discounted, fourthly, by separating legal knowledge from political and social power encroaching upon law's potential emancipatory ability, fifthly, the clash between the Rule of Law and democracy.*

KEY WORDS: The Rule of Law, Legal Philosophy, Justice, Autonomy of Law, Legal Form and Legal Substance, Normativity

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## I. Introduction

In the Supreme Court of Korea above the entrance to the Grand Courtroom one can find the Statue of the Goddess of Justice sitting quietly. It is a beautiful work of art symbolic of equality and rationality. In comparison, outside there are other forms of these goddesses. For example, <Der Henker und die Gerechtigkeit><sup>1)</sup> by John Heartfield, <Survival of the Fattest><sup>2)</sup> by Jens Galschiot, <Scale of Justice> by Myanmar installation artist Htein Lin 2010, <Maze of Justice> by Mexican cartoon artist Angel Boligand etc..... Goddesses of justice, heartbroken... These pieces all reflect a feeling of injustice, people unaware of where and what justice is and angered by this situation.

Our generation is one in which the Rule of Law and justice are in discord. The question of justice is above all, a substantive problem involving real issues. However in the discourse of law today debate on substantive, real current affairs issues are being shunned. Also more than anything, the prerequisite of the question of justice are people who really care about what justice is. However only few scholars make the link between justice and the law. Should they happen to have the interest in this matter, they do not talk about **what**, rather they focus on **how** and theorize on this procedural justice.

In human history the law has been considered a realization of justice, however today this tradition has truly lost its real color. In today's world, most legal theorists and legal practitioners believe law and justice stem from different source. The average citizen is interested in the substance (content) of law, and naturally discusses the right and wrong of the legal issue at hand. In comparison legal profession discuss the authority of the source or origin of the law. Therefore the average citizen consider the code 'a document of justice' while legal practitioners understand it to be a technical document.

On the other hand, interest in the Rule of Law is steadily increasing.

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1) It is an artwork in 1933 by the sculptor whose work was banned and forced into exile by the Nazis. It was relisted into his collection in 2012 and received much attention.

2) It was displayed at the Copenhagen Climate Summit in 2009.

Especially in this century not only scholars but political leaders and head of international organizations, NGO activists are mentioning the importance of the rule of law. Former Korean President Lee Myung Bak stated several times that only if the rule of law was properly upheld our national GDP would increase by 1%. Politicians coin the slogan 'law and order.' If one thinks about the symbol of justice in the court, the very name 'Ministry of Justice,' and Justice in the supreme court, it would seem natural that the deference politicians have towards law should be expressed by teaming the two words 'law and justice,' but in fact they demonstrate a great deal of self-restraint in coining these two words together.

Since the last century, under the name of the Rule of Law, Rechtsstaat, legal science, and methodology of law, the theory and practice of law have neglected the question of justice. German legal philosopher Johann Braun pointed out the trend in 20<sup>th</sup> century legal philosophy, that of the backward retreat of legal ideals and marginalization of the question of justice.<sup>3)</sup> I agree with his diagnosis. However, he adds that the question of justice which in the 20<sup>th</sup> century was marginalized by the dominance of legal positivism was making a comeback in the early 21<sup>st</sup> century, today.

Standing here in the beginning of the 21<sup>st</sup> century today, I would ask, is the question of justice making a comeback in legal philosophy as suggested by Braun? To this I would be hesitant to agree. From below, the civil society, the call for justice is louder than ever before. However the question of justice is not yet returned to the table of legal philosophy.

I believe that modern legal philosophy is caught in a frame where it is forced to accept the discord between the rule of law and justice. The return of justice in legal philosophy is unachievable without reconciliation with the Rule of Law. Today, I wish to discuss how we can reduce the tension between the Rule of Law and justice. At the same time this is also an introspective reflection on the weak and impoverished state modern legal philosophy finds itself in.

Today is a time where the market, state, employment, growth, welfare, production and consumption, income and distribution, law, culture, education, science, environment etc, all areas are undergoing a paradigm

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3) JOHANN BRAUN, RECHTSPHILOSOPHIE IM 20. JAHRHUNDERT: DIE RÜCKKEHR DER GERECHTIGKEIT (C.H. Beck 2001); JOHANN BRAUN, EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE (2. Aufl. 2011).

shift. In this turmoil of change where the boundary and standards of publicness is unclear, we legal philosophers have the task of reexamining the limitations and potential of law

The 20<sup>th</sup> century was an age where brief explanations, analysis and concise evidence were dominant. An age where mathematic calculation sent people to the moon! During this age it was only natural that legal positivism was prevalent as 'science of law.' Legal theorists were absorbed in finding the inherent rule of the law in order to place law in the ranks of theoretical science. jurisprudence has inherent social and practical correlations and is a field with a mixture of theory, experience, and positivity. But it was during this period jurisprudence started to move excessively toward obtaining a theoretical pattern. Of course jurisprudence too is grounded in scientific knowledge and generalized theory that has been developed over several generations. However when a field of study which is a mix of theory and experience is lured into excessive systemization and theorization, the situations of people living in the real world adding meaning to experience become marginalized or ignored in the stream of theoretical discussions.

Here I attempt to characterize into five things, the tendency of the question of justice being marginalized in the environment of legal positivism which is the product of the combination of scientific rationality and legal knowledge. All these things are, in the spirit of legal philosophy of reconciliation and legal philosophy of hope, elements to be overcome. Firstly, the autonomy of the actor as the subject being replaced by the autonomy of the legal system resulting in a kind of mechanism design theory where there is no place for people, secondly, legal perception of form being contrasted to substance, thirdly, the problem of legal professionalism in which all views from outsiders are discounted, fourthly, by separating legal knowledge from political and social power encroaching upon law's potential emancipatory ability, fifthly, the clash between the Rule of Law and democracy.

## II. The Marginalization of the Question of Justice in the Environment of Legal Positivism

### 1. *Autonomy of the Subject vs. Autonomy of the Law*

The field of legal positivism is characterized by separation thesis. That is the law has its own window through which it sees the world. The leader in this area is Kelsen's *Reine Rechtslehre*.<sup>4)</sup> Kelsen's life work was to put the study of law in the ranks of science.<sup>5)</sup> Kelsen's Grundnorm, which he places on top of the independent pyramid of law, is in order to protect the autonomy of law.<sup>6)</sup> Grundnorm, instead of telling us what to aim for when legislating, only points to the procedural starting point of the creation of legal order which establishes a coercive act. Therefore it is self-evident that Grundnorm cannot make any substantive contribution to the law. In 1995 the Prosecution of the Republic of Korea, cited Kelsen's Grundnorm in its decision to not indict the two former Presidents including others charged with rebellion and murder in relation to the May 18<sup>th</sup> affair. At the time the Prosecution asserted that "when a major political upheaval succeeds and a new order becomes effective the new order becomes the legal order, this is seen to be a change in Grundnorm and the new government is recognized as the law establishing authority" and thereby approved the violation of the constitutional order in the name of the law.<sup>7)</sup>

H.L.A. Hart, who viewed the law as a combined system of the primary

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4) HANS KELSEN, *REINE RECHTSLEHRE* (Franz Deuticke 1960).

5) Kelsen's interest in making law a science went to the extent of studying and writing on law to meet the scientific standards in natural science, and there is suggestion that the concept of 'Grundnorm' adopts a similar approach to the hypothesis approach used in natural science in the process of theorization. See Honorary Professor Shim Hun-Sup, *Kelsen's Life and Work*, Presentation at the Legal Philosophy Discussion held by the Korean Association of Legal Philosophy (Oct. 30, 2009), available at [http://www.kalp.re.kr/bbs/board.php?bo\\_table=sub5\\_2&wr\\_id=46](http://www.kalp.re.kr/bbs/board.php?bo_table=sub5_2&wr_id=46) (S. Kor.).

6) Hans Kelsen, *Die Selbstbestimmung des Rechts*, in 2 *DIE WIENER RECHTSTHEORETISCHE SCHULE* 1445-1453 (1968).

7) In relation to this refer to Pak UN JONG & HAN IN SUP, *MAY 18TH BEOBJEONG CHAEGIMGWA YEOGSAJEONG CHAEGIM* [May 18<sup>th</sup> Legal Responsibility and Historical Responsibility] (Ewha Womans University Press 1995) (S. Kor.).

rules and secondary rules, in his analytical jurisprudence, mentions 'rule of recognition' which is a rule that plants the "the germ of the idea of legal validity."<sup>8)</sup> According to Hart, in identifying whether a certain rule is ultimately a law an internal standpoint is important, and in terms of this internal standpoint that is among the people who are adopting a participatory standpoint the most important are legal public officials. In other words, where there is doubt what is law, legal officials need only to follow the custom that the decision made in relation to that rule is officially approved. This is no different to Kelsen's autonomy of the law, only that it has been converted to the **autonomy of the legal profession**. At this rate the law may fall to the level of 'a report submitted to a higher authority.' This is because this stance pressures the decision makers that they must satisfy the expectations of the superior court so that the decision can be approved.<sup>9)</sup>

Luhmann style system theory has the most abstract and sophisticated contention. Here the concept that the system theory depends on is autopoiesis. Autopoiesis goes beyond traditional legal positivism's argument, and the law itself adopts the ability to 'think.' As the principle of constituent unit each system operates on its own code or program.<sup>10)</sup> As interaction among the systems occurs and is reproduced and divided, people disappear from the picture! The law has its own law/non-law code and declares what is law. Therefore here, people do not talk about the law but law talks about law. The autonomy of the subject is now reduced to the **autonomy of the system**.

All these theories mentioned above are all legal positivism theories that have affected Korea, Japan, China and Taiwan all to a significant degree. In these theories people are only worthy of note in terms of function. That is humans appear as legal practitioners, the party directly involved, citizen, prisoner, etc, and is never noted as just humans themselves. This is why the

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8) H.L.A. HART, *THE CONCEPT OF LAW* (CLARENDON LAW SERIES) 93 (1961).

9) NIGEL SIMMONDS, *LAW AS A MORAL IDEA* 135 (Oxford University Press 2007).

10) NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 22-49 (1985); Niklas Luhmann, *Communication about Law in Interaction Systems*, in *ADVANCES IN SOCIAL THEORY AND METHODOLOGY: TOWARD AN INTEGRATION OF MICRO- AND MACRO-SOCIOLOGIES* 234 (K. Knorr-Cetina & V. Cicourel eds., 1981).

autonomy of the actor is easily given way to the autonomy of the legal system. When we are hung up on formal systemization or functional organization, the human touch which is indispensable to law disappears from the scene, and law may emerge as some kind of authority **outside** or **above** humans.

## *2. Legal Form vs. Legal Substance*

To be sure, it is in the form rather than the content of it that legal order has its power. Legal work typically requires respecting and abiding by form. Form is obtained by abstracting the objects of inquiry, thereby giving an order and unity to the elements of law. Form also distinguishes law from other types of norms. Content alone cannot distinguish legal norms from moral norms. The autonomy of law can be obtained mostly through form.

Since Neo-Kantianism, it is widely accepted among legal philosophers that the certainty of knowledge about substance rather than form can hardly be achieved. Worse, today in the surging trend of value relativism or multiculturalism, a person deeply involved in judging content might look intellectually naïve.

Form and substance might be conceptually and analytically distinct from each other, but this is not true of an investigation into the nature of things. The task of legal philosophy to capture the nature of law becomes complete when **content corresponds with form**, that is, when content is filled in the concept involved. From the standpoint of contemplating norms through its form and not its content, the law is usually reviewed in terms of the source of its enactment (order of the sovereign, legislation by the state) or it is usually reviewed in terms of its application method (coercion, recognition of the citizen). The problem with the theory which contemplates the law through its form is that, in order to actualize form, non-legal criteria which does not fit in well in the unique character of the law such as coercion must be applied. Also when this happens new criteria must be applied in order to regulate legal form so that these non-legal criteria fit in with the unique character of the law.

On the other hand, theories which explain the nature of law from the standpoint of its content, usually connect law with its moral value or social

profit and evaluates its functional application. However here we must be wary of one thing, that is, content regarding moral value or socio-economical profit does not in itself become law. These values and profits only become law after filtering through form. Therefore to make law to be lawlike, it is not enough that the moral value criterion is satisfied. When we declare a law that is blatantly immoral to be 'not law,' this judgment on its extreme immorality is based on a moral judgment and not based on the law. After all, to reveal the unique character of the law a criterion based on a judgment of the content is not sufficient. A formal criteria that is able to distinguish law from non-law needs to be applied together.

Law is distinct from other types of social order in its form. This distinction, however, does not mean any break-off between them; rather, it means that legal norms and other types of social norm converge as the content of the latter takes a new form of the former. When this role works well, law contributes to the communication and humanization of the society and flourishes as such. On the contrary, when that role fails, the rule of law falls in danger.

### 3. 'Common Image' vs. Professionalism

At the base of legal positivism is a diagram of division between legal professions and laypersons. This is revealed in the assertion by legal scholar such as Joseph Raz that 'common image' that the Rule of Law is a concept that is founded on the essence of law is actually incorrect.<sup>11)</sup> According to him, to the legal practitioner, the law becomes law through satisfying certain requisites in order to become valid in the jurisdiction system, while on the other hand, to outsiders the law is 'open' and they randomly conjure up regulative principles that can fill this void.

Legal scholars or legal professions usually have their colleagues law students in mind when they write and talk about law. Because of this, it seems natural that they, unconsciously or consciously, stand from the perspective of the legal profession. This is probably why Ronald Dworkin expanded the judicial (judgment) theory without any demonstrative proof

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11) JOSEPH RAZ, *Formalism and the Rule of Law*, in NATURAL LAW THEORY 309 (Robert P. George ed., 1992).

to legal theory as a whole. When Kelsen said he was analyzing the structure of positive law but instead chose a theory separate from social reality outside court which is the basis of positive law, the same kind of intuition was probably at play. We can understand Hart at the same way when he accepts the decisions from practice by legal practitioners as valid law.

The work of career lawyer and the judicial institution are immensely important. However it seems much too arbitrary to start off from the perspective of the jurist and the court in order to reveal the essence of law and the institution of law. To explore the nature of law, the researcher needs to stand back from the perspective of the jurist. This is not in disregard of the perspective of the jurist, rather in order to understand the position of the jurist and the court in the larger sense of the sociopolitical institutional perspective in general. Needless to say again the expert can continue to remain a specialist under the condition that he/she does not harmonize his/her special knowledge with the knowledge of the human being as a whole,.

Historically the law has not always been the turf of specialists only. The victory of the professional jurisprudence against the common sense jurisprudence was a result of the request for making the study of law a science meeting the needs of the times.<sup>12)</sup> The gap between legal professionalism and the law as common sense today is at a level that we should be worried about. The professionals ignore the perspective of the user. Professionalism goes further to sometimes even egg on a stance which looks at the law cynically from a 'bad person' perspective.

The law is a field we are all involved in. And a field which involves everyone requires consensus of everyone in principle. Therefore, even though the knowledge of the expert is something to be heard, the decisions involving fundamental agenda is not to be decided by legal professionals alone but by 'great amateurs.' Today legal professionals are increasingly parting from society, to be immersed in the jungle of tangled clauses of law. In relation to law, professionalism is and always will be under the close guard of common sense. But as long as professionals are dragged around by this notion of complexity, there will be limitations to common sense

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12) On this refer to PAK UN JONG, JAYEONBEOBUI MUNJEDEUL [PROBLEMS OF NATURAL LAW] 196 (Sechang Publications 2007) (S. Kor.).

keeping watch over professionalism.

#### *4. Political Pessimism vs. Normative Optimism*

The Rule of Law is a product of the combination of political pessimism and normative optimism developed especially throughout modern history. That is to say, legalism comes from the disenchantment over misuse of political power and corruption, and in order to overcome this sprung the idea that ideal division of power can make the human field of activity more rational.

However the stance between political pessimism vs. normative optimism put the politics and law in a position of appearing to be in conflict more than necessary. In truth historically the law did not develop through a separate inference pattern which is opposed to politics but through a long history of struggling with the problem of political power and the prejudice of judges. Also to suggest that the law is simply a product of a game of power also goes against the historical complexity of our experiences. In short the law is a **special form of political discourse**. The normative aspect of the law is not simply an imperative command of 'what ought to be' but something much more, an appeal to value that goes hand in hand with what politics strives to achieve. This is also the reason for why even those in power disguise their law as an appeal to justice.

For quite a long time the academia saw the politics and the law as being separate. However today with the constitutional court in an active state, the notion that judges participate in the formation of law through interpretation of the law and therefore is a part of the political system is widespread. Of course, the jurisdiction operates under the statutes constitution and within procedural restrictions, and therefore there is a separate and unique working judicial function. However the court entrusted with the duty of interpreting the fundamental rights, in its act of interpretation does not transgress against politics but rather develops a **more rational form** of political discourse.<sup>13)</sup>

The stance between political pessimism vs. normative optimism is not

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13) MARTIN LOUGHLIN, *SWORD AND SCALES. AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 233 (Hart Publishing 2000).

totally unrelated to the strategy of positivism. The strategy of positivism is to divide legal knowledge from social power. This is in order to subordinate the theoretical requisites of legal knowledge under the reality of the state's interests at the cost of acquiring the autonomy/universality/generality of law. South American progressive social philosopher Boaventura de Sousa Santos explains how the **emancipatory potential of modern law** toward freedom/equality/democracy became impaired in the process of the scientization of law.<sup>14</sup> He sees the development of the history of law as a state of tension between a form of social control and a form of emancipation, and goes on to explain that this tension is broken in the process of scientization of law.

There can be no doubt that there will be a gap between the expectations of the members of society toward freedom/equality/democracy and the actual experience. Today the law as a political link between the expectations of the members of society and their actual experience is facing a serious impasse. At the same time the emancipatory potential of modern law becomes dimmer, and the law only feels like a form of social control.

##### *5. The Rule of Laws. Democracy*

Our society has already entered the stage of 'judiciary-orientated society.' That is to say, most important conflicts in society today are being resolved in court. Judicialization or the expansion of judicial power is a global trend. This is connected to the expansion of the list of rights and the introduction of the system of judicial review. As judicial decisions are made on pending political, social issues recently the problem of 'judicialization of politics' has been made a subject of discussion.<sup>15</sup> Representative issues of 'judicialization of politics' in Korea include the impeachment judgment of President Roh Mu-Hyeon by the Constitutional Court where the scope of the President's exercise of authority in regard to the President's political activity was reduced through interpretation of the Constitution, and Act on

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14) BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 5, 62 (Butterworths 2d ed. 2002).

15) On this refer to PAK UN JONG, WAE BEOBUI JIBAEINGA [WHY THE RULE OF LAW] 263-274 (Dolbegae 2010) (S. Kor.).

the construction of the new administrative capital was decided upon as being unconstitutional based on unwritten 'customary constitution.'

In Korea, the opinion that the trend of 'judicialization of politics' is acting as a stumbling block to the development of democracy is being raised persistently. That is, issues that should be dealt with in the political and democratic public arena are being decided by the elite judiciary and therefore acting as a hindrance to the development of democracy. Especially in the case of judges, since they are not elected by vote and therefore have no direct responsibility toward the people and so lack democratic legitimacy, if they undermine an act of legislation by the majority of the National Assembly, a representative organ, through a decision as unconstitutional, it is only natural that there will be doubt that the judges may be acting as another type of legislator or supra-legislator as a matter-of-fact.

Even if we do not adopt Carl Schmitt's radical theory of law of the division between the rule of law and democracy, there is, within mainstream law culture, some atmosphere of being uneasy with the idea of democracy. In Korea lawyers who have a critical social awareness go by the name of 'Lawyers Association for a Democratic Society.' Whether the judiciary has the ability to carry out its duties in the face of the expansion of its role in democratic society is an important problem. Increasing judicial intervention without the judiciary being properly prepared may resolve social issues but also lead to other problems. The Korean Judiciary is being tested of its abilities at a stage where it has not completely settled all the institutions and customs in relation to its history of being a substructure of a former authoritative governmental system and then going onto being rapidly exposed to an environment of autonomy after the democratization of 1987. At present dissatisfaction with **judicial justice** is an issue under fire.

In the past under the authoritative regime the independence of the jurisdiction was a gleaming hope for many people of the nation. In today's Korea the jurisdiction certainly exercises much more autonomy than in its past. It is without interference from political powers, scholars, and public opinion, but at the same time it is sensitive to support and coverage from the press. Therefore it is becoming increasingly difficult to understand the interest or privilege of the jurisdiction and the judges that now exercise

autonomy. In this situation our society is turning into a conflicting stance between conservatives waving the flag of the rule of law, against the progressives waving the flag of democracy. The task of combining the rule of law with democracy, that is to say, the very difficult task of planning **constitutionalism in a democratic manner** is ahead of us.

### III. The Rule of Law as a Form of Governing and the Rule of Law as a Form of Life

A commonly spoken epigram in Korean society is “first born the people then the law, not the law before people.” This expression shows antipathy toward an assumption of an independent legal system or a radically self-complete legal system, and experiential truth that the binding force of law comes from principles such as mutuality.

The concept of the rule of law is an ‘amalgam of standards, expectations and desire’<sup>16)</sup> which lend a integrity and continuity to the order of law. Many legal theorists understand formal legality as a main component of the rule of law, however, common understanding and also the historical development of the rule of law has moved on to include material components such as the protection of rights, democracy, and realization of justice. Historical development of the rule of law has moved in a way that approaches the idea of law by supplementations through democratization, humanization, materialization of the law under the principle of formal legality. In the 1990s the Rule of Law in Korean society is facing to answer to the request for actualization of the law together with the request for universal welfare and a fair society.

Legal positivism denies a philosophical ideal of the human being. However it is difficult to deny the tradition of the human touch in the law. Subjectivity cannot exist without a sense of what is right and what is wrong. Going beyond the positivistic dimension that accept law as it is and generalizes scientific knowledge, humans are philosophical existences who need a theory of what is right and need to conceptualize this too. In

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16) T.R.S. ALLAN, *LAW, LIBERTY AND JUSTICE: THE LEGAL FOUNDATION OF BRITISH CONSTITUTIONALISM* 21-22 (Oxford University Press 1993).

response to this the law holds a **social and yet transcendental** level of conception. This is also why the law cannot be defined without the help of the normative concept and the autonomy concept. The law is in some ways something unfamiliar, something threatening (difficult terminology, procedures that daunt us, mistrust of the experts...), but at the same time undoubtedly the fundamentals of what makes us tick when we think and act – and thereby make up a part of our lives. That decisions and actions on the essential content of law coincide means that there is agreement over the way we live. In that sense the law is a form of our lives, a **basis of self-dignity** wherein lies the value of self-worth we humans have.

When we ask what is just or not, there is nothing more appropriate than the system of the law. That the law has an aptness for justice does not mean that the law loses distinction in relation to other forms of social norms. The law is also not always just. However we can ask whether the law is really just, and we must ask this always. The act of asking whether it is just is the basic precondition for the rule of law to be possible. The rule of law as a way of life is a **mutual** principle of order. In this order the state which is deemed to be legal is not the **state of the nation** but the **state of the citizens**. Also here likened to the unilateral principle of order the prospects projected by outsiders are not discounted.

Western or Islamic civilizations mostly considered the law to be a command of a transcendental being, while East Asian civilizations beginning with ancient China did not entrust the law to a transcendental being and saw the law as a work of the human being or as a result of politics. Therefore legal thought did not set up any objective of uniformity or a singular system that can be reduced singularly to the order by God or a single command.

Confucian expression that the “law is a branch while morals are the roots,” also emphasis the fact that rather the law is not important or secondary to morals, but rather that the binding force of law has the same roots as the command or act of rationality. The tension between ‘law as rationality’ and ‘law as will’ that reveals itself in the Western thought does not occur as often in us.

The law should not be understood as a one way project by authority, but a mutual order created by the cooperation of the constituents. The law is not a matter of a higher authority indicating to a lower authority, but a

problem of providing a safe and sound frame for the interaction between citizens. Therefore the system of law is possible through a certain cooperative effort between the governing authority and the citizen. As Lon Fuller rightly pointed out, the law is not just a system of rules, but purposeful project which strives to put human activity under rules.<sup>17)</sup> Therefore in all systems of law – including one under a sinister governmental system – human effort in working to maintain the system is indispensable. The importance of legal philosophy on this point is in its role in guiding this effort toward a clear and definite direction.

Today most circumstances in society is understood as being characteristically legal and the core issues are converted to legal issues, however, the concept of legality is absurdly narrow. The law is a living system which has both fixed structural aspects as well as fluid aspects. However scholars' academic interest in the law, usually appear in the form of interest in the structure and system of the law. This kind of interest tacitly results in the pursuit maintenance of the organization/conformation to the rules, defense of the system, justification of the organization etc. When we only seek to understand the structure of law and in the sense of maintenance of the law the concept of law is limited to a professional understanding of the law by legal professionals, and other people's understanding of the law is only considered to be a 'so-called' understanding of law. However as long as the law continues to be a realm that concerns all of us, this kind of monopolistic authority toward the legal perception cannot be acceptable.

#### **IV. The Order-Destructive Power of Law**

Before, I mentioned that the law is understood in the relationship between the fixed structure and the fluid adaptive aspect of law. In another sense the law is a power that calls for order and at the same time a power that disrupts the order. Even in history, the discourse of law was strong when the law was undergoing change or transformation. Think of the

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17) LON L. FULLER, *THE MORALITY OF LAW* 74 (Yale University Press rev. ed. 1969).

meeting between the realities of law coming face to face with innovation that propounds a new value. The warring states period of ancient China was unified by the School of Law (法家). Roman law acted as an intellectual weapon against western medieval feudalism. The new modern states without exception armed itself with legalism. Whether it was Prussia, China, or other late-starting nations, they all introduced an advanced system of legislation and established the social system. Under the regime of Park Jung-Hee the Korean modernization model used the law to concentrate capital and establish a social control system. At the time the Highest National Reconstruction Council which was an emergency legislative body made approximately 1,008 regulations in a short span of 2 and a half years. When we adopt 1963 as the standard, this made up about over 60% of the total of existing regulations, which was a lot.<sup>18)</sup> Today in the early 21<sup>st</sup> century, the phenomenon of post- or supra-nationalization of regulation occurring with the spread of globalization is causing legal experts to cross the date line at a frantic pace.

It is true that the law is stable, but this is irrelevant to the idea that once something is stable, it will stay stable forever. The stability of law is **relative stability**. The law has a fixed, closed system through having fixed content but at the same has an open aspect through which it can interact with the outside world. In the sense that the law is closed, the law is a form of order, but in the sense that it **reacts and adopts** parts of the alien outside world, the law destructs the order itself. When order is at risk, the law turns to defection. We have seen over and over cases throughout history where legitimate governments have been overthrown in the name of the law. That the law is fixed, and that it accepts readily alien components and readily changes, are not two different understandings on what the law is, but two different aspects inherent in the law.

Here I recollect Michel Foucault's concept of the law.<sup>19)</sup> Foucault's law places itself precariously in between '**the determinate law**' and '**the**

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18) Park Byong-Ho, *Beobchijuui Silhyeoneui Yeogsajeog Gyohun* [Historical Lessons for Actualization of the Rule of Law], 1 BEOBJEYONGU [LEGISLATION RESEARCH] 27 (1991) (S. Kor.).

19) Michel Foucault, *The Ethics of the Concern of the Self as a Practice of Freedom*, in *ESSENTIAL WORKS OF FOUCAULT*, VOL. 1: ETHICS 290 (1997).

**responsive law.**<sup>20)</sup> According to Foucault the law is not just a universal truth that is made up of purely legitimacy, nor is it a suppressive ideological device, it is simply an order of discursive within which authority is always acting. So to speak, the law is **porous**. Though fixed, it can be flexible enough to adopt different things. The law distinguishes itself from what is not law, but it may be “part of the destiny of the law to absorb little by little elements that are alien to it.”<sup>21)</sup> Due to its attribute that it must continually rise up to meet new things the law can never be completely be dominated even by authority!

Because of this porous attribute the law and order cannot go hand in hand. Rather, the concept of law and the concept of order are in conflict. This is why Foucault asserted that it is incorrect to use the expression ‘law **and** order,’ and that the expression ‘law **or** order’ should be used instead.<sup>22)</sup>

It seems that Foucault is implying that the law as a ‘condition of togetherness’ should not be narrowly defined but should always be the mean of continual unsettled exchange. Here I do not wish to rely solely on Foucault’s concept of the law. However he denied the reduction of the law into a simple existing rule within society. He charged us with every power which restricts expectations of another way of living. And in doing so he sends out to us an impressionable message that in order to create an unforeseeable future for ourselves the law must remain open, and therefore the law will always remain an unsolved task for us.

## V. Normativity and Practicability

When reading books relating to law, one often comes across the terms ‘norm,’ ‘normative,’ ‘normativity’: legal science as normative science, normativism, normative validity, normative concept, normative thinking, normative approach, norm-harmonious interpretation, normative

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20) I received help on this interpretation of Foucault’s law from BEN GOLDER & PETER FITZPATRICK, *FOUCAULT’S LAW* 71 (Routledge 2009).

21) MICHEL FOUCAULT, *Truth and Juridical Forms*, in *ESSENTIAL WORKS OF FOUCAULT*, VOL. 3: *POWER* 23 (2000).

22) *Id.* at 42.

Tatbestand, normative responsibility, normative power of the reality, normative transformation, normative principles, normative order and so on...

Among legal scholars the term 'normative' is overwhelmingly favored. However what does 'norm' or 'normative' actually mean? When we look at the examples outlined above it does not seem that it has a singular meaning.<sup>23)</sup> According to a language philosophy classification, the term **normative** is distinguished from **analytical** usage and **descriptive** usage. Behind this kind of classification is an academia of theorists who separates normative statement from statement of actual facts. In legal philosophy this is described as a gap between 'what is' and 'what ought to be.' Although I cannot divulge further into this issue, the question of what is and what ought to be which was initially understood by David Hume as a language classification, after being discussed in the legal philosophy arena is now oddly being understood as a kind of ontological classification. After unnecessarily emphasizing the ontological aspect of the different language terminology there seems to be a useless argument regarding this. When we use a certain term there is gain in receiving help from classification in order to understand the terminology better. However to overstep this purposeful object and to establish classification in areas where such classification is unnecessary is dangerous.

Why is it that the term normative is being used to such an extent in the field of legal study? The attribute that distinguishes a normative approach from an analytical/descriptive approach is 1) that it is related to actual practice, 2) it requires a judgment, and 3) a final conclusive decision is made. When something is said to be normative, one is approached with the question of what should do, and must reach the right decision in as much as it is possible, and in this process is faced with finding conclusive evidence, justification, evaluation and expression of opinion on individual action, activity and the situation. As long as the law cannot be considered

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23) German scholar Eric Hilgendorf pointed out that especially in German Criminal Law academic circles, the term 'normative' was being overused without its meaning being passed on accurately. See Eric Hilgendorf, *Was heist 'normativ' - Zu einigen Bedeutungsnuancen einer Modevokabel*, in *GESELLSCHAFT UND GERECHTIGKEIT: FESTSCHRIFT FÜR HUBERT ROTTLEUTHNER 45* (Mattias Mahlmann ed., Nomos 2011). On the many examples of the use of the expression 'normative,' see *id.* at 59.

something that requires enforceable unconditional obedience in a situation where its reason for legislation is unknown, the binding force provided by the law comes from ethical insight guaranteed by practical reason. Normativity shares with (practical) reason the roots of fundamental practicality.

Jurisprudence is made up of a duet of two patterns – a **theoretical pattern of knowledge** based on general rules and principles, and a **practical pattern of knowledge** that adopts a certain situation as its starting point. Argumentation that is needed in order to make a legal judgment is not required as proof of evidence but to solve a case. In the law the ‘position’ of judgment is a place where certain cases and circumstances, specific problems that make up a legal dispute are all collectively in one place. This is the reason why no theory can claim superiority over all problems in all circumstances. In this sense before we consider legal philosophical theories to be in conflict with each other, we need to reconsider them in their complementary relationship.

In these complex and confusing world theory is a kind of navigator to guide us. But, in fact, it is almost impossible to solve problematic issue by implying theory. Rather, theory is **confronting problems instead of solving them**. Theory is unstable and undisciplined concept. We cannot reach consensus of opinion on the theories. Ethical dissatisfaction and existential dilemma make us always to pursue another new way of life. If theory tends to fix our lives, philosophy resist against that and **shake our lives**.

## VI. What Remains

Legal philosophy embraces the concept **analytical** aspect, **factual** aspect and **evaluative** aspect all together. At the same time legal philosophy shares the general aspect of philosophy (generalization / analysis of the concept / criticism), seeks the unique aspects of the law itself (authority / coercion / institution), and shares practical philosophical interest with political and moral philosophy (the relationship between law and morals).<sup>24)</sup> But we need to ask ourselves whether we continued to be hung

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24) Robert Alexy also emphasizes this comprehensive character of legal philosophy. See

up over one single big theory in our analyses, in our search to find the characteristics of law whether we were in pursuit of a single characteristic (for example coercion), and more than anything else whether we turned a blind eye to practical philosophical interest. As a result legal philosophy today shows a penury of philosophy.

Legal philosophy needs to recover the tradition and scale of the past which encompassed everything under the title of 'law and justice.' Legality must touch the 'art of living' as a whole. If we only deal with legal text in the narrow sense of legality as we do now, legal philosophy will dormant and not be worth teaching, let alone learning.

We need to look back on whether in our search for one right view point, or because of the desire to gain immense insight into the law we excluded and marginalized aspects that did not fit in with unity or the system in the name of rationality and science. Especially at a point where 'Global Living Law' is on the rise, we need to look at law in a more progressive or imaginative way. We need to reflect on whether by simplifying things into central/periphery, strong/weak, observatory/participatory formula, we did not properly consider the circumstantial aspects of human needs and action. In summary we need to remove an artificial human model such as this Leviathan and focus more on the properties and actions of the humans that make up the body of Leviathan.

Whether we like it or not, we are already at the advent of a new generation of interlegality and legal plurality. I am not saying that pluralism is good and unity is bad. Not at all, rather, what I wish to emphasize is that we are now in an era where justice is once again the biggest issue on hand. We need to be able to explain, interpret, supplement and imagine the law in a much bigger sense. As I mentioned before our generation is now at the brink of a major transformation. While the entire frame and meaning of the society is changing, it seems to me that the division of law, politics and ethics is now becoming more relativized. If we remain stuck in the intellectual fantasy of the law's autonomy and satisfy with the 'restrictive jurisprudence,' we will surely fail to recognize and approach new forms of social inequality through the language of law.