

## Traditional Legal Thoughts in Korea

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### Abstract

*In spite of the scarcity of research related to traditional Korean law, this article attempts to offer a general overview of traditional Korean legal concepts for Western readers. It surveys the legal history of Korea, from ancient times to the reception of Western law in the 19th Century. Due to Korea's geographic location—between China and Japan—Korean law holds many similarities to that of “East Asian Common Law.” However, Korea has continuously endeavoured to indigenize imported foreign laws. The Tangun mythology offers the archetype of the Korean concept of law and justice. On the subject of medieval legal concepts influenced by Buddhism, Wonhyo, Choe Chiwon and Chong Mongju are mainly analysed. In regard to early modern legal concepts, the Neo-Confucianists Chong Tojon, Yi Hwang (Toegye) are discussed. When discussing the legal concepts of the late modern period, the Sirhak School, namely Yi I (Yulgok), Yi Ik (Songho), Chong Yakyong (Tasan) are analysed. Kang Hang, Yi Chinyoung and Yi Maegye are included due to their contribution towards “East Asian Common Law”. Each period had dominant morals and values that were enforced by the law. Whilst analysing the dominant legal values during the different periods, the article tries to offer a philosophical foundation of traditional Korean law and East Asian jurisprudence.*

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## I. Introduction

Many people, including intellectuals, believe that current Korean law is imported from the West, and draws particular influence from Continental-European law. Therefore, the general consensus remains that Korean traditional law and legal concepts are of no practical use. This might be true, if we understand that there is a discontinuity between traditional and current laws. But the situation is not so simple. Law has two faces: On one side, the institutional dimension, and on the other, the spiritual or philosophical dimension. When we observe Korean law from the point of the latter perspective, the discontinuity between traditional and contemporary law becomes hard to recognize. As will be seen below, traditional Korean law and legal thoughts contained many elements and values that can be applied positively to contemporary legislation.

Nevertheless, almost all Korean lawyers and legal scholars have been active in learning Western law and jurisprudence. They have had little mental leisure to review Korean traditional law and jurisprudence. This is quite understandable in light of Korea's eagerness to modernize, as Korea became a part of the world community.

As East Asian civilization emerges on the world stage, the situation is reversing again. Whilst East Asian culture is continuing to open up to globalization, the people are taking time to reflect upon their traditions and identity. They look at their rich traditions with pride and try to re-evaluate them. In the field of legal science, legal comparativists recognize the existence of the "East Asian legal family (*ostasiatische Rechtsfamilie*)" or "East Asian legal culture (*Ostasien-Rechtskultur*)".

As a Korean legal scholar who specializes in the history of legal thoughts, this author feels a responsibility to describe traditional legal thoughts within this new context. There is still a distinct scarcity of research in this field. Many people continue to believe, mistakenly, that there are no useful elements in traditional law and legal philosophy. This research will explain traditional legal thoughts according to their periodical development.

Let me explain a little bit about the terms "tradition" and "traditional legal thoughts." Korea first came into contact with Western law in the 1880s. This research is limited to the period before the reception of Western law. Therefore, this paper deals with the traditional legal thoughts that occurred during the ancient, medieval, and modern periods.

As Henry Maine exposed eloquently in his *Ancient Law* (1861), the legal thoughts of traditional Korea grew from spiritual and religious foundations. Korean religious history is very dynamic and synchronistic.<sup>1)</sup> Korean legal history has to be described in relationship to cultural and religious history.<sup>2)</sup> Because institutional legal history is rather different from the history of legal thoughts, this article deals mainly with legal thoughts in relation to its philosophical and religious foundations. “Legal thinkers” represented legal thought. Traditional Korean society had no professional jurists and legal scholars in the modern sense. Therefore, the “legal thoughts” are the illumination of the legal aspects of the general philosophers and scholars. The time span of the “traditional legal thoughts” of Korea covers, (counting Korean history since the time of the mythological *Tan’gun*) over 4000 years. It is therefore necessary to condense the analysis of each topic and person. This is the first overview of such a history, especially with the foreign reader in mind.

## II. Ancient Thought of Law

### A. National Founding Mythology

Almost every nation has its own founding mythology. The Korean myth of *Tan’gun* shows how the cosmos and law are related to primitive religious concepts like totemism and taboo.

In ancient times, Hwanung, the son of Hwanin, desired to descend from Heaven and to live amongst men. His father, realizing his son’s intention, chose Taebaek Mountain among three great mountains on which to descend, and saw that mankind would greatly benefit.

Taking with him three thousand of his followers, Hwanung descended upon the peak of Taebaek beneath the Sacred Sandalwood Tree. That area was called the land of God and he was known as Hwanung Chonwang [Heavenly King]. Together with his ministers of wind, rain, and cloud, Hwanung instructed mankind about agriculture, preservation

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1) For a detailed discussion, see JAMES HUNTLY GRAYSON, *KOREA: A RELIGIOUS HISTORY* (1989).

2) See HAHM PYONGCHOON, *RELIGION AND LAW IN KOREA, KOREAN JURISPRUDENCE, POLITICS AND CULTURE* 152-79 (Yonsei Univ.Press, 1986); Chongko Choi, *Confucianism and Law in Korea*, 37 *SEOUL LAW JOURNAL* 2, 115-38 (1996).

of life, curing of disease, punishment, and the difference between right and wrong, in all some three hundred and sixty kinds of work.

At that time, there was a bear and a tiger that lived together in a cave. They prayed incessantly to Hwanung saying, "Please transform us into men." Then Hwanung gave them some mugwort and twenty pieces of garlic and said, "If you eat this and do not expose yourself to daylight for one hundred days, you will become a human being." At the end of twenty-one days, the bear became a woman. The tiger, unable to endure the trial, did not become a man.

As there was no one with whom the woman Ungnyo [Bear-woman] could marry, she constantly visited the base of the Sacred Sandalwood Tree to pray for a child. Hwanung gave into to her prayers and decided to marry her. A son was born who was called Tan'gun Wang'gom. In the fiftieth year of the Emperor Yao, Tan'gun established a city at Pyongyang and called the nation Choson. He later moved this city to Asadal on Paeg'ak Mountain, which was also known as Kunghol Mountain. He governed [the nation] for 1,500 years.<sup>3)</sup>

Based on this myth, the ideal Korean is explained as a person who is beneficial to his fellow men (*Hongik Ingan*). This ideal is incorporated into the second article of the Education Law (1951) of The Republic of Korea, as will be explained below.

### B. Origin of Law

In Western jurisprudence, the concept of law is an important part of legal philosophy. The concept of law seems to be delicately various in the European and Anglo-American jurisprudences. The German concept of *Recht* seems rather to be inclined to the *Richtigkeit*, i. e. the internal quality of the right law. Anglo-American law, which is developed from the old Germanic word *lag*, seems to indicate a status that is rightly located.<sup>4)</sup>

East Asian people use the same letter for law; that is 法.<sup>5)</sup> The Chinese pronounce

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3) ILYON, SAMGUK YUSA: LEGENDS AND HISTORY OF THE THREE KINGDOMS OF ANCIENT KOREA 31-32 (Tae-Hung Ha and Grafton Mintz trans., Yonsei Univ. Press 1997).

4) See CHONGKO CHOI, POPSASANGSA (HISTORY OF LEGAL THOUGHTS) 53-55 (2000).

5) See Luke T. Lee and Whalen W. Lai, *The Chinese Conception of Law: Confucian, Legalist and Buddhist*, in COMPARATIVE LEGAL CULTURES 1307-29, (Csaba Varga ed., NYU Press 1972); See Chongko Choi, *Concept and Symbol of Law in East Asia* (a paper read at IVR-Congress in Amsterdam, June 19-25, 2001) (on file with author).

it as *fa*, the Koreans as *pop*, and the Japanese as *ho*. This letter 法 is an abbreviation of the original letter 灋, which is composed of three parts, i. e. , 水(water), 犴(unicorn) and 去(going). A mystical animal *hsieh* (unicorn) was used in an ancient Chinese ordeal to strike the guilty party with a single horn. According to the *Lun Heng*, writing in the first century, the *hsieh* was a sheep with a single horn. So, this supernatural animal called *Hsieh-chai* in Chinese, *Haetae* in Korean and *Komainu* in Japanese is the symbol of justice.<sup>6)</sup> According to a recent philological study, the original letter was pronounced in ancient Altaic. This letter has developed from *piwap* → *fwaf* → *fa* in China. The Koreans seem to have preserved the most original pronunciation. It is a known fact that the Japanese pronounced *h* and *f* in the same way until the 17th century.<sup>7)</sup> These factors indicate that this Chinese letter for law was exported to Korea and Japan. The integration of Chinese law in Korea, Vietnam and Japan is a colossal research task for East Asian legal scholars. In this context, I have emphasized the concept of East Asian Common Law (*Ostaisatisches Jus Commune*).<sup>8)</sup>

Roger Ames of the University of Hawaii explains that the concept of *fa* in ancient China had developed from the original menage of “standard or model” to “punishment”.<sup>9)</sup> To explain how this concept developed into its current meaning is the task of intellectual history or the history of philosophy. But, if we see just the word of *fa* itself, it shows that the scene of the trial consisted of water, man’s going, and a supernatural animal. It is understandable that during ancient times many concepts were identical to myths and symbols.

We may ask; was there any word for law in Japan and Korea before the reception of Chinese law (*fa*)? Koreans had used the word *bon* for that. But they don’t know precisely how this word was used for law and when it disappeared. A Korean legal

6) See Chongko Choi, East Asian Images of Law and Justice: Toward Comparative Legal Symbolics, in RECHT IM WANDEL SEINES SOZIALEN UND TECHNOLOGISCHEN UMFELDES: FS.F. MANFRED REHBINDER 463-48 (Munich, 2002). There are two different theories about the interpretation of the meaning of *Komainu* literally meaning ‘Korean Dog’. One theory is that this animal figure came to Japan from China through Korea, ENCYCLOPEDIA OF SHINTOISM58 (Tokyo, 1992)., the other theory is that this comes from Middle East Asia as an expression of a lion culture. See NEJU TETSUYA, A STUDY OF KOMAINU (Kyoto, 1994). Cf. JOANE COVEL, KOREAN IMPACT ON JAPANESE CULTURE 27 (Seoul, 1984); For a detailed discussion, see CHONGKO CHOI, POPSANGJINGHAK IRAN MUOTINGA (WHAT IS LEGAL SYMBOLICS ?) (Seoul, 2000).

7) Roy Miller, Chinese 法 in Altaic: A Further Note, 118 JOURNAL OF THE AMERICAN ORENTAL STUDIES, 268-73(1998).

8) See Chongko Choi, *Foundations of Law and Justice in East Asia*, 18 COMPARATIVE LAW 1-17(Nihon University, 2001).

9) See ROGER T. AMES, THE ART OF RULERSHIP: A STUDY OF ANCIENT CHINESE POLITICAL THOUGHT 108-52 (SUNY, 1994).

historian maintains that the word *bon* was spoken during the *Silla* dynasty (BC 57-AD 935).<sup>10)</sup> Nowadays, this word is used for an ideal, which exists in reality. It could be explained as *Seiendes Sollen*, *Sollendes Sein* or as an *Idealtypus*.

In ancient Japan, there was the word *noru*. This word is a noun form of the verb *noru*, which refers to Shamanistic behavior. The other important word for the religious behaviour of the old Shinto clergy is *hahuri*. The old Japanese *hahuri* was the same as *fafuri*, as Roy Miller maintains in his interesting research book. According to him, *fa* is an old word for law, and *furi* (– *puri*) means Shamans ritual in the Korean language. So, *hahuri* means originally a ritual of law.<sup>11)</sup>

Western scholars have asserted that the East Asian concept of law is secular and completely uninfluenced by religion. They seem to have a fixed “secular” image of Confucianism or East Asian wisdom. There is no evidence for a god-made law in China, such as the law of Hammurabi, Manu, or Moses. But the above-mentioned fact indicates that the origin of law in East Asia also has some religious character, even though the East Asian religions are different from Western Christianity. This Shamanistic law became “secular” during its historical development when it came into contact with Confucianism (“Confucianization of law”).<sup>12)</sup>

### C. Elements of Legal Thoughts

#### 1. Idea of *Hongik Ingan*

The idea of *Hongik Ingan*, which means the man who gives benefit to human kind, was conceived in Tan’gun mythology. The ideal type of Korean existence is to be beneficial towards others as opposed to egoistic. This idea is incorporated in the second article of the Education Law of the Republic of Korea (1951), which provides; “Education shall aim to enable every citizen to lead a life worthy of humankind and contribute to the development of a democratic state and the realization of an ideal of human co-prosperity by ensuring that one builds character and is equipped with independent abilities for living and necessary qualities as a democratic citizen under

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10) See Bong Duck Chun, *Wesen und Struktur des Koreanischen Rechts*, KOREANICA: FESTSCHRIFT FÜR ANDRE ECKARDT ZUM 75 (Geburtstag, Baden-Baden, 1960).

11) See Roy Miller & N. Nauman, *Altjapanisch Fafuri; Zur Priestertum und Schamanismus im vorbuddhistischen Japan*, 116 MITTEILUNGEN DER GESELLSCHAFT FÜR NATUR- U. VÖLKERKUNDE OSTASIENS (Hamburg, 1991); See also Chongko Choi, *Legal Exchanges between Yi Korea and Tokugawa Japan* (a paper read at the 1st World Conference on Korean Studies, Academy of Korean Studies, Songnam, 2002) (on file with author).

12) See DERK BODDE & MORRIS, *LAW IN IMPERIAL CHINA* (Harvard, 1957).

the humanitarian ideal.”

## 2. Idea of *Jaehwa Sobok*

The idea of *Jaehwa Sobok*, meaning putting away evil and calling in the blessing, is a sort of primitive life style or way of thinking of the Korean people. Scholars explain it as a kind of Shamanistic way of thinking.<sup>13)</sup> It is related with the this-worldliness of East Asian spirituality.

## 3. Idea of *Sonri Akhwa*

The idea of *Sonri Akhwa*, meaning that good deeds lead to benefits and that evil deeds lead to catastrophe, was also found in the *Tan’gun* myth. The Korean ideal of life is geared towards realizing a good life. The concept of “Goodness” is broader than “Justice”<sup>14)</sup>; so a Korean law is not merely a just law, but a good law.

## 4. Idea of *Jaese Lihwa*

The idea of *Jaese Lihwa*, meaning that the world should be a reasonable and orderly place, was also a lesson of the *Tan’gun* myth. This world should not stay in chaos and disorder. The concept of reason and rationality in East and West might be different, as Filmer Northrop’s East-West paradigm tells.<sup>15)</sup> Nevertheless, East Asians, including Koreans, also have a rational or reasonable basis within their civilization.<sup>16)</sup>

# III. Medieval Thought of Law

## A. *Buddhistic Thoughts of Law*

Buddhism is a religion that emphasizes the importance of law. The Buddhists understand life and this world through law: *dharma and karma*. The Buddhist concept of law is a sort of natural law (*lex naturae*) or eternal law (*lex aeternae*). From the

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13) See Paul K. Ryu, *Korean Culture and Criminal Responsibility: An Application of Scientific Approach to Law* (1958) (unpublished JSD dissertation, Yale University) (on file with author).

14) See JOHN C.H. WU, *FOUNTAIN OF JUSTICE: A STUDY OF NATURAL LAW* (New York, 1951).

15) See FILMER S.C. NORTHROP, *THE MEETING OF EAST AND WEST* 312-74 (N.Y. 1966).

16) See Chongko Choi, *Foundation of Law and Justice in East Asia*, 18 *COMPARATIVE LAW* 1-18, (Nihon University, 2001).



perspective of natural law, Buddhism endlessly relativizes the absoluteness of the existing positive laws. As a kind of egalitarianism, Buddhism encourages human rights and dignity. Korean Buddhism is a kind of Mahayana Buddhism. It does not concern the salvation of an individual but the salvation of a people as a whole. Sometimes, Korean Buddhism is proud of being a “patriotic religion” (*Hoguk Pulkyo*).

The dates for reception of Buddhism at the courts of the Three Kingdoms are AD 372 for *Koguryo*, 384 in *Paekche* and 527-35 in *Silla*, where it had to overcome the strongest resistance. No doubt the encouragement received in north China during the *Toba Wei* dynasty (386-535) assisted the spread of its teachings and cultural forms across the peninsula where royal families and the aristocracy patronized it in the hope of benefiting their states. In turn, Buddhism disseminated eastwards to Japan from the early 6th century onwards, initially from *Paekche*, then also from *Silla* and *Koguryo*. In United *Silla* Buddhism flourished, dominating culture and society at all levels. Rich land-owning monasteries dominated the countryside and engaged in commerce. Monks became political advisers and were sent to China in search of instruction. Ennin found a community of Korean Buddhists in Shantung<sup>17)</sup> Powerful intellectual traditions developed, as well as meditative *son* (*zen*), usually based on particular sutras. Though these traditions originated in China, all came to acquire distinct Korean characteristics. Korea indigenized the Chinese concept of holy mountains: The five peaks of *Odae* in *Kangwon* province were specially worshipped as dwelling places of Bodhisattvas.

The *Koryo* court maintained a strong link between the state and Buddhism. Members of the royal family became monks and were important in developing the intellectual and political role of the dharma, while Buddhist rites and ceremonies were widely observed. The official printing of the Tripitaka failed to save the nation from attacks by the *Khitan* and Mongols. However, the survival of so many pagodas and splendidly inscribed sutras to this day, illustrates the real cultural strength of Buddhism.<sup>18)</sup>

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17) See Ennin/tr. EDWIN O. REISCHAUER, ENINN'S DIARY: THE RECORD OF A PILGRIMAGE TO CHINA IN SEARCH OF THE LAW 5-10 (New York, 1955).

18) For a detailed discussion, see, ED., BUDDHIST ASSIMILATION IN KOREA (Berkeley: Asian Humanities Press, 1991). See also LEWIS LANCASTER & C.S.YU, BUDDHISM IN KORYO: A ROYAL RELIGION (Berkeley, 1996).

## B. Development of Legal Thoughts

### 1. Wonhyo (617-686)

Wonhyo, one of the great formulators of Buddhist thoughts, was born to the Sol family in *Kyongsang* Province of Korea. His Buddhist name Wonhyo means Breaking Dawn which seems to have been a good portent for a man who was to author some 180 volumes on a wide range of topics. Our first knowledge of him is as a wandering monk who attempted to accompany the monk Uisang on a journey to China. The travelers were halted by a severe storm, during which a religious experience convinced him to abandon the journey to China and return to *Silla*.

In the process of synthesizing the thoughts of the various Buddhist schools into a unified system, he wrote the *Simmuan Hwajaeng-non* (Ten Approaches to the Reconciliation of Doctrinal Controversy).<sup>19)</sup> It is in this work that one finds an approach to political and legal thoughts. Using Buddhist soteriological strategies, Won Hyo was determined to create a system by which a reader could find the “single taste” of the hundreds of streams that had flown from the original teachings.

His methodology was to ascertain truth through the application of hermeneutical principles of analysis and synthesis derived from thematic essentials. His work is particularly applicable to political science and legal philosophy. His approach posited that identity is present even within difference, and that difference is present within identity. Advocating a monistic principle, which argues for the ultimate constituent of all phenomena (‘suchness’), he moves beyond Buddhist thoughts itself to show that while all statements can be shown to be identical, there is also a conventional point of view that establishes relative hierarchies of truth. Logic, then, must be a transcendent point of view and should avoid both the taking of extreme positions and merging of different views. Instead, it must allow interfusion of two contrary positions without obscuring the independence of these positions. Thus, various translations of a specific term can be equally correct, and all philosophical positions have some validity, and because they are valid, none of them can be totally rejected. The ultimate objective of such logic is the resolution of controversy.

Wonhyo’s reasoning and way of thinking is very logical, legalistic and casuistic. According to his exegesis of Buddhistic rules, even the case of manslaughter could be justified as not guilty due to the context of the deeds. If Korea had continued to be a Buddhist society from the *Silla* period onwards, then Wonhyo’s ethical and

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19) See Chong-hong Pak, *Won Hyo’s Philosophical Thought*, in *BUDDHIST ASSIMILATION IN KOREA* (Lewis Lancaster and C.S.YU ed., 1991).

jurisprudential theories would have been the rule of life for all Koreans.

The main concepts of Wonhyo are *ilsim*, *hwajaeng* and *muae*. *Ilsim*, literally “one-mind”, is an inclusive concept explaining all beings and their interconnection in a single system. *Ilsim* indicates both human subjectivity of mind and the world that is reflected through it. *Hwajaeng*, the “reconciliation of disputes”, is a method to reconcile different views. *Muae*, “not being bound”, indicates a state and act of liberty not bound by any fixed thought or convention.

These three virtues are interconnected. These can be understood in relation to the three fundamental ideals of human rights; liberty, equality, and compassion.<sup>20)</sup> Conclusively, Wonhyo’s thought offers a great basis for Buddhistic jurisprudence.

## 2. Choe Chiwon (857-910 )

Choe Chiwon, whose pen name was Koun, was from the *Saryang* district of the capital of the *Silla* Kingdom. Since historical records have been destroyed, we cannot know his accurate genealogy. From his youth, he established himself as an astute learner. At the age of 12 in 868, he went to study in *Tang* China. In 874, the Ministry of Rites passed Choe on his first attempt, and Choe was appointed Chief of Personnel in *Liao-shui* country. After a periodic review of his work, he was made secretary and censor in attendance.

At the age of twenty-eight, Choe wished to return home. Learning of his desire, Emperor *Hui-Tsung* (873-888) sent him to Korea as an envoy with an imperial edict in 885. He attained a high position in the *Silla* government. He had a firm grasp of the problems plaguing the government bureaucracy and had some definite notions on how to resolve them. Choe had benefited greatly from his study in China. Upon returning to Korea he wished to realize his ideas, but these were decadent times, and, as an object of suspicion and envy, he was not accepted. He then became magistrate of the *Taesan* prefecture.

Choe Chiwon wrote the works *Kyewon Pilgyong* and *Kyonghak Taejang*.<sup>21)</sup> He wrote in the latter book as following :

To keep justice and law is called Tao, to keep law in the adversary situation is called power. The wise man accomplishes according to the reason, the foolish man perishes according to the absurdity. Heaven

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20) See An Ok-sun, *The Fundamental Ideas of Human Rights in the Thought of Wonhyo*, 42-4 KOREA JOURNAL 137-157 (2002).

21) See Choe Chiwon, *KYONGHAK TAEJANG* (trans. KIM CHOLHEE, Taegu, 1988).

blesses the reasonable men and condemns the evil people. The sun and stars broaden the cleverness of the people, wind and thunder make the law and politics austere. Wind, frost, rain all these are the revelations of the *chi* (energy), the changes of Spring, Summer, Autumn and Winter help the realization of *ren* (benevolence) and *yi* (justice). Heaven lies not only on the above but also in the mind.<sup>22)</sup>

Choe Chiwon pointed out the syncretism of Confucianism, Buddhism and Taoism in Korean context.

### 3. Chong Mongju(1337-1392)

A loyal statesman and Neo-Confucian scholar of the *Koryo* dynasty, Chong Mongju (P'oun by penname) rose to high office in the late *Koryo* period. Chong passed his civil service examinations at the age of twenty-three and became an instructor in Neo-Confucianism at *Songgyungwan* in 1367. Along with other famous scholars such as Yi Saek, Chong taught at *Songgyungwan* while holding a government position. Chong and others helped establish the Chinese classics as the core curriculum, and emphasized the interpretations of Chu Hsi. His writings and other scholarly efforts brought him great respect in the *Koryo* court. The *Koryo* dynasty was experiencing severe turbulence in the late fourteenth century and would come to rely on Chong who performed some British diplomatic moves which temporarily helped the ailing dynasty.

The new *Ming* dynasty had driven out the Mongol *Yuan* dynasty in China in 1368. While the Mongols had been displaced, they were not powerless and still maintained some significant forces that were large enough to attempt a comeback. This caused severe division in the *Koryo* court between pro-Mongol and pro-Ming factions.

The anti-*Ming* attitude of *Koryo* was already creating serious problems between the two countries. The situation deteriorated when a *Ming* emissary was killed on his way back to China. *Koryo* sent a delegation to try and smooth out this serious incident. However, the delegation was treated rudely and rebuked by the *Ming* court. *Koryo* ultimately called upon Chong to travel to China to attempt reconciliation and he was very successful. Soon after, the Mongols began demanding *Koryo* assistance against the *Ming* and Mongol forces that had begun to posture in the north. *Koryo* sent forces to counter them in 1376. However at the same time, *Koryo* was experiencing

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22) CHONGKO CHOI, HANGUK POPSASANGSA (HISTORY OF KOREAN LEGAL THOUGHTS) 52 (Seoul, 2002ed.) quoting CHOE CHIWON, KYONGHAK TAEJANG.

extreme difficulties dealing with Japanese pirates who had advanced inland to capture the city of Kongju. Chong was again called on to approach the Japanese Shogun and ask for assistance in eliminating the pirates. Again P'oun succeeded where no one else could, traveling to Japan, making a favorable impression on the Japanese and receiving a promise of assistance.

The *Ming* emperor viewed the *Koryo* situation with great disfavor and began demanding more tribute from *Koryo* than it could afford. In 1385, P'oun again traveled to China with a peace offering and was able to win some favor from the emperor. Later, in 1386, the *Ming* emperor finally formally recognized the *Koryo* king. *Koryo* adopted *Ming* dress and customs and continued good relations until 1388 when the *Ming* moved to acquire some northern *Koryo* territories. The *Koryo* king ordered an expedition against the *Ming* but General Yi Song-Gye, who had started out on the expedition, decided to turn his forces around and use them to take control of his own government.

Although Yi removed the old government he did not ascend the throne right away, even though the common people were in favor of it. The leader of the opposition to Yi was Chong himself, who was fiercely loyal to the displaced *Koryo* dynasty. Chong was revered by many in Korea, including Yi, but he had become an obstacle to progression and had to be removed for the *Yi* dynasty to consolidate and prosper. Yi held a party for Chong and, on his way home, Chong was murdered.

Thus ended the life of one of the most loyal and respected *Koryo* officials of his era. He was the personification of Confucian loyalty. He was honored in 1517, 125 years after his death, when he was canonized into the national academy with other Korean sages. He is referred to as one of the fathers of Neo-Confucianism in Korea.

As a jurist, Chong drafted a *New Legal Code (Shinyul)* and dedicated it to the last king of the *Koryo* dynasty. Unfortunately, with the decline of *Koryo*, this Code could not be in force. Even though the legal text is non-existent, one can guess that this was strongly based on Confucian ethics.

Chong's response to the proposed alliance for the new *Yi* dynasty was unequivocal:

Though my body die and die again  
Though it die a hundred deaths,  
My skeleton turn to dust, my soul exist or not,  
Could the heart change  
That's red-blooded in undivided loyalty to its lord.<sup>23)</sup>

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23) THE BOOK OF KOREAN SHIJO 31 (Kevin O'Rourke trans. and ed., Harvard Univ. Press, 2002).

### C. *Elements of Legal Thoughts*

#### a) Idea of *Hahwa Jungsaeng*

The idea of *Hahwa Jungsaeng*, meaning that all common people should be savored, is originally based on Buddhistic doctrine. Buddhism is a sort of egalitarianism. The idea of equality is essential in Korean legal thoughts.

#### b) Idea of *Kyomson*

The idea or attitude of *Kyomson*, that is humility or yielding, is also a sort of Buddhistic (and Confucian) virtue. Because all human beings are transient, on the one hand, they have ultimately no substance to claim their rights. However, on the other, all human beings have the potential to be enlightened to Buddhahood. *Kyomson* means reserving one's own rights and yielding to others, even though one has one's own rights.

#### c) Idea of *Baeryo*

The idea of *Baeryo*, meaning that one should take care of others, is also an essential virtue to Buddhistic ethics. As in feminist jurisprudence, the value of care is often discussed in current Western ethics and legal thoughts. *Baeryo* is the basic life style and mentality of the Korean people.

## IV. Early Modern Thoughts of Law

### A. *Neo-Confucian View of Law*

As Christianity colored Western civilization in the middle ages, East Asian civilizations became spiritually dominated by Neo-Confucianism. Neo-Confucianism means the renewed Confucianism initiated by Chu Hsi in the *Sung* China of the 12th Century. Korea received this philosophy during the *Koryo* dynasty. During the following *Choson* dynasty, Neo-Confucianism became the ruling state ideology for 500 years. Therefore, Neo-Confucianism is essential when attempting to understand the law and politics of the *Choson* dynasty.<sup>24)</sup> Here is not the place to explain what

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24) For a detailed discussion, see WILLIAM SHAW, *LEGAL NORMS IN A CONFUCIAN STATE* (Berkeley, 1980).

Neo-Confucianism is. In the following, I will describe how Neo-Confucianism has been developed according to those representing scholars with a keen interest in law.

## *B. Development of Legal Thoughts*

### 1. Chong Tojon (1342-1398)

Chong Tojon, a statesman, scholar, and official under both the Koryo and Choson dynasties, was a native of *Ponghwa*, *Kyongsang* Province. Chong took his first official examination in 1362. His fame as a Confucianist and essayist in Chinese brought him many students. In the winter of 1383 he joined the camp of General Yi Song-Gye who later became the first King *Taejo* of the new Yi dynasty.

In the autumn of 1384 he served under Chong Mongju on the mission to *Nanking* for the celebration of the Ming emperor's birthday. In 1385, upon his return from *Nanking*, he became head of the National Academy (*Songgyunkwan*). In 1390 he was again sent on a mission to *Nanking*, returning to *Kaesong* later that year.

Chong Tojon was the most influential scholar-statesman of his day, enjoying the complete trust of King *Taejo*. In late 1392, he was again sent to China on a mission and was well received in *Nanking*. It was he who gave names to the palaces and halls, wards and gates of the new capital Seoul (1395). He also established the institutions, and formulated the national policy of the New Kingdom. He compiled such handbooks as the *Choson Kyongguk chon* (Code for National Governance, 1394), *Kyongje Mun'gam* (Essays on National Policy, 1395), and *Kyongje Mun'gam Pyolchip* (Additional Essays on National Policy, 1397),<sup>25</sup> which served as the basic references in the new government organization and administration.

"Democratic" constitutionalism underlies the whole system of his thought. As people are the principals of the country, he asserted, all problems should be solved from the standpoint of people, and the government should strive to promote their welfare, love them, respect them, safeguard them, nurture them, and make them at ease. The democratic spirit as such was the basis of his reform ideology, as well as its starting point. How much importance did he attach to people? He explained the varying degrees of importance among people, the state, and the king as follows:

Generally speaking, the King relies on the state, which in turn relies on the people. Therefore, people are the basis of the state and the heaven of

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25) These works are gathered in *SAMBONGJIP* in 13 volumes (Seoul, 1971).

the king. It is said in *Chou Li* that the king received a census register with a bow when it was submitted to him. This was because he ought to hold his heaven in high esteem. Realizing this truth, the king should be sincere in his affection for his people.<sup>26)</sup>

As people are so precious, Chong asserted, all acts of the ruler, all facilities of government, all laws, and all ordinances should be aimed at promoting their welfare and dictated by popular wishes. He further explained:

People are the principals of the state... In ancient times, the king, governing the whole country, installed office and rank and paid fiefs; this was not for the benefit of his courtiers but in the interests of people. All acts of the sage-king, all of his facilities, his orders, and laws were based on the people without fail. He appointed wise officials in order to nurture the people, made their responsibility heavier in order to make their duty to the people heavier, delegated authority to them to enable them to safeguard the interests of the people, and gave them abundant fiefs so that they could cherish the people and promote their welfare. The king held officials responsible for the benefit of the people, and officials returned the regal grace with people in mind. People were respected in this manner.<sup>27)</sup>

It is clear in the above passages that the author believes that a ruler and government exist only for the people, and that they can be justified only when they function for the benefit of people. It is apparent that Chong saw the king and his courtiers not as rulers who sway their authority over people, but as servants who work for the latter's well being. He called officials "shepherds of the people" and "parents of the people." The relation between the officials and the people is not different from that of parents and children.

As people are the principals of the state, it is the moral norm required of rulers that they protect and respect the people. What is the remedy if the ruler breaches the norm and torments the people with maladministration? It is a revolution, according to Chong. The prerogative of ruling people is given by Heaven's Will, Chong believed.

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26) CHONG TOJONN, CHOSUN KYONGGUK-CHON, IN *SAMBONGJIP*, Minjok Munhwa Chujinhoe (Committee for National Culture Promotion) trans., Seoul, 1982).

27) CHONG TOJONN, *KYONGJAE MUNGAM*, Minjok Munhwa Chujinhoe (Committee for National Culture Promotion) trans., Seoul, 1982).



If Heaven's Will takes its leave of a ruler, it means that his prerogative has expired. Heaven's Will then finds another virtuous person and bestows the prerogative on him. The shift of Heaven's Will from one ruler to another is a revolution, according to Chong. His theory reminds us of the French Monarchomachism of Jean Bodin and the social contract theories of J. Locke and T. Hobbes.

However, a revolution is carried out not entirely by Heaven's Will. As Heaven's Will is a reflection of popular wishes, the leading force in a revolution is not heaven but people. The subjective will of the people can justify the prerogative of a ruler or reject it. Then why is Heaven's Will called in to interfere in human affairs? It is because naturalistic Neo-Confucianism believes that man and nature are governed by the same rule that permeates the universe. Chong never denied the subjective will of the people.

According to Chong, there are two methods in transferring the reins of power. One is that the ruler, having lost popular support, admits his lack of virtue and his maladministration and abdicates the throne in favor of a virtuous person. The other is that a virtuous person who has won popular support dethrones the ruler and accedes to the throne himself. The former is doubtlessly a more peaceful and desirable method, but the latter is necessitated if the former is hard to achieve.

## 2. Yi Hwang(1501-1570)

Yi Hwang (Toegye by penname) was born in *Ongye-ri, Yean-hyun, Kyongsang* Province, on November 25, 1501. At the age of 12, he learned the *Analects* of Confucius from his uncle. He came to Seoul when he was 23 years old and resumed his study at the National Academy (*Sunggyunkwan*). Even though he was several times in the official posts, he remained basically a Confucian scholar. Tosan School in Andong, his native place, became the center of training for young Confucian scholars.

Toegye's scholarship, viewed from the angle of philosophy, is surprising in its minuteness and profundity. No doubt Toegye is the philosopher who conducted the most sincere philosophical speculation among Korean Confucianists. Although it is true that Chu-Hsi's philosophy constituted the main body of Toegye's scholarship, he was not like many Confucianists who were satisfied with the interpretation of phrases and words, or with committing them to memory.<sup>28)</sup>

According to Toegye, philosophical reasoning has many methods, and no one should be confined to one method. Among the four methods mentioned in the *Book of the Mean*, that is, erudition inquiry, prudent thinking, and clear vindication, Toegye

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28) See Pak Chong-hong, *Toegye and His Thought*, in MAIN CURRENTS OF KOREAN THOUGHT 82-93 (Seoul, 1983).

considered prudent thinking most indispensable. He argues that one achieves if one thinks prudently and one fails to achieve without prudent thinking. What is thinking? According to him, it is that which leads one to the acquisition of a solution to a question. It concerns not an interpretation of words, but meditation and experience. Those who have great doubt will reach great realization. Those who do not think and act cannot have doubts, and therefore they cannot experience realization. What is necessary is not recitation but self-experience of the Heavenly Way by thinking over what one learned from books at night when one's mind recovers serenity. As taught in Zen Buddhism, truth cannot be comprehended all of a sudden, but only after devotion to learning for a long period of time.<sup>29)</sup>

At the age of 53, Toegye happened to examine *Chonmyong Toseol (Exposition of the Heavenly Mandate)*, authored by Chong Chuman. The two soon became friends. Toegye revised one passage of the original text, "The four beginnings spring from *li*, while the seven emotions spring from *chi*." Ki Taesung (Kobong by pen name) later wrote to Toegye expressing his view that his theory was too dualistic. This marked the start of the Four-Seven-Debate, a famous debate between both scholars, concerning the Four Beginnings and the Seven Emotions.<sup>30)</sup>

*Li* represents Reason while *chi* represents Sensation. The Four Beginnings, or buds of human nature, expounded first by Mencius, are sympathy, shame, concession and criticism. The Seven Emotions, pointed out in the *Book of Rites*, are joy, anger, sorrow, fear, love, hatred, and desire. Concerning the relations between the two, Ko-bong stated that the Four Beginnings cannot reside outside the Seven Emotions and that *li*, likewise, cannot exist away from *chi*. Toegye explained that there exists in human beings an intrinsic nature that is pure good and an emotional nature that cannot be considered either good or bad. It is proper rather to distinguish emotions that are more closely connected with *li* from those that are related more closely to *chi*.

The debate, which started when Toegye was 60 years old, lasted for seven years before a conclusion was reached. As correspondence between the two grew in volume, Toegye softened his dualistic view a little: Although the Four Beginnings are not different from the Seven Emotions in that they, too, are stimulated to function by Matter, as are the Seven Emotions, the former are manifestations of *li*, with *chi* exerting a lesser influence while the latter are the manifestations of *chi*, with *li* exerting a lesser influence. Kobong finally confessed his shortcoming and expressed his general support of Toegye's theory.

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29) See MICHAEL KALTON, *TO BECOME A SAGE: THE TEN DIAGRAMS ON SAGE LEARNING BY YI TOEGYE* (N.Y., 1988).

30) See EDWARD CHUNG, *KOREAN NEO-CONFUCIANISM OF YI TOEGYE AND YI YULGOK* (SUNY, 1995).

Toegye's theory on the Four Beginnings and the Seven Emotions won great admiration from Japanese Confucianists, who praised it as a clarification of what his predecessors had failed to recognize. The debate on the Four Beginnings and the Seven Emotions attracted the attention of Korean Confucianists, becoming the central theme of philosophical meditation. Their views differed according to which school they supported and the debate came to be viewed in connection with partisan strife. The most salient characteristics of Korean Confucianism can be found in the theory concerning the Four Beginnings and the Seven Emotions. The problem is that the theory was utilized for partisan feuding and therefore, from a scholarly point of view, the theory should be regarded as a task for modern philosophers to further develop in the light of modern philosophy.<sup>31)</sup>

*Li* is generally considered reasonableness, and therefore it may sound strange to say that *li* acts upon something. The general tendency may be that Yi Yulgok's monistic theory is superior in stating that *chi* operates alongside *Li*. However, *li* is limited to reasonableness and, as Western philosophy regards Reason and Understanding as things that are positive and Sensation as something that, being passive, operates only when stimulated by outside causes, *li* is something positive that can operate by itself. As knowledge is possible when Understanding and Sensation are combined into one, not only *li* operates but *chi* rides on it. In this manner, Toegye viewed the world as a whole.

It is generally thought that Toegye faithfully followed Chu-Hsi's philosophy, and therefore his theory lacks originality. However, the fact remains that Toegye explored his theory of the Four Beginnings and the Seven Emotions through his own meditation, and only later found a similar expression in Chu-Hsi's work, thereby confirming his conviction further.

The true greatness of Toegye does not lie in his theoretical depth. The fundamental task Toegye assigned to himself was to find reasonableness in theories. It was his unshakable conviction that reasonableness exists in our daily life. We see the beautiful harmony of theoretical reason and human practicality in Toegye's philosophy.

From the point of law, Toegye must be remembered as a drafter of the Yean Community Compact (*Hyangyak*). It is significant that the Confucian scholar played a leading role in keeping and developing the social order of the community under Confucian virtues.

The compact consists of four general principles: 1) Admonish each other to virtuous behavior and the undertaking of virtuous activities; 2) correct each other's

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31) See SASOON YOON, CRITICAL ISSUES IN NEO-CONFUCIAN THOUGHT: THE PHILOSOPHY OF YI TOEGYE (Korea Univ.Press, 1990).

wrong actions; 3) associate with one another according to the rules of decorum and customs; 4) offer assistance to each other in cases of illness and calamities.<sup>32)</sup>

In his *Asian Values and Human Rights* (1998), De Bary comments on the Korean community compacts as follows:

Heirs to the Neo-Confucian tradition in the Yi dynasty Korea, though in somewhat different circumstances, express themselves in much the same fashion. I shall refrain from undue repetition of the point by quoting writings on this subject of the great Neo-Confucian scholars, Yi Hwang (Toegye) (1501-1570) and Yi I (Yulgok) (1536-1584), but I believe any reader who consults the discussion of the matter by Sakai Tadao will recognize that the Korean proponents of the community compact are exponents of a distinct Neo-Confucian tradition, expressed in terms of the same textual discourse and generic practices, while in the process also making their own original adaptations to local and temporal circumstances.<sup>33)</sup>

### *C. Elements of Legal Thoughts*

#### *1. Idea of Chojong Songhon*

The idea of *Chojong Songhon*, meaning respect for the ancestor's achievements, was the primary principle of legislation in the Yi dynasty. The kings believed that they should keep principally the achievements and the policies of the forerunning kings. This principle ensured that a standard of stability was kept when making and enforcing laws. Thus, the new legal codes kept the old articles without erasing and added the new articles in small letters as supplementary. This principle, on the other hand, hindered legal renovation.<sup>34)</sup>

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32) For details see, Monika Ubelhor, *The Community Compact of the Sung and its Educational Significance*, NEO-CONFUCIAN EDUCATION: THE FORMATIVE STAGE 371-88 (De Bary & J. Chaffee ed., Berkeley, 1989).

33) THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* 85 (Harvard Univ. Press, 1998). Cf. Sakai Dadao, Yi Yulgok and the community Compact, in BARY AND HABOUSH, *THE RISE OF NEO-CONFUCIANISM IN KOREA* 323-48 (1985).

34) See BONGDUCK CHUN ET AL, *KOREAN TRADITIONAL LEGAL ATTITUDES* (Berkeley, 1980).

## 2. Idea of *Yeju Popjong*

The idea of *Yeju Popjong*, which means that propriety (*li*) is primary and law is subsidiary, is an essential principle of Confucianism. *Li* is a middle axiom between law and morality. There were many theorizers of propriety during the *Choson* dynasty period. Almost all the Confucian scholars in *Yi* Korea were *Li* theoreticians. *Yeju Popjong* is an everlasting principle of refreshing the morality of law.

## 3. Idea of *Yangpop Miui*

The idea of *Yangpop Miui*, meaning the good laws on the basis of the beautiful customs, is also the core of the legal thinking. This idea reminds us of the German legal thought of *altes gutes Recht*, as Fritz Kern eloquently explained.<sup>35)</sup> The Koreans respected custom as the basis of legislation.

## 4. Idea of *Kwasil Sangkyu*

The idea of *Kwasil Sangkyu*, meaning the mutual regulation of wrong doing, is one of the four principles from the Community Compacts.<sup>36)</sup> The Confucian scholars emphasized the role of morality and education, but they did not starve the social order of legal regulations, as Toegye exemplifies.

# V. Late Modern Thoughts of Law

## A. *Rise of Practical School*

There was an expansion of scholarly interest in the second half of the *Choson* dynasty, with scholars not only continuing to discuss Neo-Confucian philosophy and ritual but also turning their attention to Korean history, geography, society, economics, and culture. This trend is often labeled “practical learning” (*Sirhak*) because often these scholars, writing in classical Chinese for their fellow literati, were looking for concrete answers to the practical problems Korea faced in the wake of the Japanese and Manchu invasions. They studied patterns of land ownership and distribution to see if

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35) See FRITZ KERN, *RECHT UND VERFASSUNG IM MITTELALTER 1-5* (Wiesbaden, 1952).

36) See THEODORE DE BARY, *COMMUNITY COMPACT, IN HIS ASIAN VALUES AND HUMAN RIGHTS* 83 (Harvard Univ. Press, 1998).

they could discover ways to alleviate the poverty afflicting Korea's villages. Some of them began to develop a wider perspective and look beyond Korea and traditional Confucian civilization for solutions to Korea's problems. A few overcame their disdain for the Manchu's barbarian past and argued that Korea should swallow its pride and learn from the advances that occurred in China under the Manchu rule, particularly in technology. Others looked even further afield and adopted the teachings of European missionaries in China as their guide to solving what they saw as a moral crisis in Korean civilization. The last group, the eighteenth-century founders of the Korean Catholic Church, stepped beyond the boundaries of what classical Korean civilization could accept.

### *B. Development of Legal Thoughts*

#### 1. Yi I (1536-1584)

Yi I (Yulgok by penname) was a social reformist in the midst of the *Choson* dynasty who tried to remove evils in his time institutionally and consolidate the foundation for the realization of righteous government by harmonizing "self-cultivation" with "governing the people rightly," two supreme aims in the Confucian ideology of politics.<sup>37)</sup> He was gripped with passion for the realization of a righteous ruler outwardly living up to the ideal of governing the people after becoming a sage inwardly through self-cultivation. However, he did not give priority either to self-cultivation or to governing the people rightly. He thought that self-cultivation and governing the people were rightly the obverse and reverse sides of the same coin and that they were one though they were two and they were two though they were one.

##### a) Philosophic Method

Yulgok and Toegye mark the two great peaks in Korea's Neo-Confucianism. While Toegye devoted himself to self-cultivation, Yulgok poured all his passion into realizing the ideals of creating union between heaven and man and becoming a sage inwardly, and a righteous ruler outwardly by harmonizing self-cultivation and governing the people rightly. His thoughts on social reform supplemented the defects of Neo-Confucianism. He saw that self-cultivation without actual effect was not true self-cultivation and that it could not realize benevolence and righteousness.

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37) See KEUM JANGTAE, *CONFUCIANISM AND KOREAN THOUGHTS* 99-112 (Seoul, 2000).

Required for the realization of benevolence and righteousness was determination to accomplish ones' aim in life and retain one's sincerity when reaping substantial results. He knew that the practice of benevolence and righteousness required a realistic philosophy of government. Such a philosophy of government would result in social reform and the social reform should be effected in such a manner as to suit the times. Yulgok recognized that social reform together with moral enlightenment formed the basis of government. The social thought based on humanism and service for the people became the basic ideology of Confucian government in the Choson dynasty. Yulgok sought the basis for the social development of these ideals in the reform of the institution.

#### b) Social Reform

Yulgok was not a traditional conservative. Scholars even at that time were seized with the erroneous notion that to retire in the countryside and devote themselves to moral training while residing in reverence and sitting in quietude constituted the essence of learning and to strive to ease people and govern the country after advancing to the court was not true. Furthermore, they regarded amendment of laws handed down by the ancestors as an act that would destroy the sacred and inviolable royal lineage and as a challenge to the guardian deities of the state. They considered the laws handed down by the ancestors as an absolute legal code that no one was allowed to touch with an intention to amend even one part. However, Yulgok was opposed to such traditional conservative closed mindedness and developed a relatively open-minded outlook. He said:

Generally speaking, laws, when growing old, are apt to give birth to evils, and, when evils arise, the laws should be amended. It is said in the *Book of Changes* that 'when things are driven to a difficult situation, they change, and, when they change, they find a breakthrough', King T'aejo founded our dynasty and King Sejong defended it... All these were legislated in accordance with the demand of the times and they did not amend the laws of our ancestors at will.<sup>38)</sup>

Developing his theory of adaptation and amendment of laws, Yulgok asserted that institutions that gave rise to social evils at that time should be reformed. Laws and institutions are not things that should be regarded as sacred, inviolable and absolute.

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38) YII, TONGHO MUNDAP, IN; HANGUK UI SASANG TAEGYE (COMPENDIUM OF KOREAN THOUGHTS) (Song Nakhun trans., Seoul, 1972).

The basis of Yulgok's social thought was a relative definition of the situation, according to what he asserted, laws and institutions, when they lost effect in satisfying the demand of the times, should be amended. On the basis of this thought, he emphasized that the people's living be improved by reforming laws that caused many evils. This can be regarded as a principle of amendment and reform for old laws.

Second, we should cite his economy-first principle. It is likely that we, at a glance, understand that efforts to realize morality or benevolent and righteous government neglect economy and try to establish a spiritual moral law alone. In fact, scholars who, having received a gentlemen's education, engaged in the profession of writing were placed in an estate above those who engaged in occupations that were related to technical or economic production in the *Choson* dynasty. Even though Yulgok, needless to say did not class scholars with commoners or menials in estates, he considered economy as the basic requirement at least in the field of policies for easing people.

### c) Community Compact

Yulgok created two community compacts, one for *Sowon* (now *Chongju*) and the other for *Haeju*, in *Hwanghae* Province. He envisioned an extended organization encompassing many aspects of rule life, including education and a community granary. Although Chu Hsi's revised version of the Lu Family Community Compact is included as a part of the *Haeju* compact, he extensively revised it to adapt it to the Korean situation.<sup>39)</sup> The Community Compact basically consisted of four principles: 1) Mutual encouragement of virtue and virtuous acts; 2) mutual corrections of wrongful conduct; 3) associate with one another according to the rules of decorum and customs; 4) mutual aid in illness and disaster. Yulgok wrote this preamble on the Community Compact of Sowon County;

The community compact is an ancient institution whereby people in the same community rendered aid to one another in keeping watch and ward, helped one another in sickness, and sustained one another in their comings and goings. Children also received their education in school at various levels in order to enhance their filial piety and nurture harmoniousness among brothers. Good government and healthy mores

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39) The text is translated by Choe Yongho in SOURCES OF KOREAN TRADITION, II, pp. 145-57. See also SAKAI TADAO, *Yi Yulgok and the Community Compact*, IN THE RISE OF NEO-CONFUCIANISM IN KOREA 323-48 (De Bary ed., N.Y.1985).



were able to prevail during the Three Dynasties entirely because of this institution. Since then, however, morality has declined, the Way has become obscure, and the people have lost their sense of direction, while decorum and customs have deteriorated at all levels. It is indeed lamentable.

Being inexperienced, I have many flaws as the magistrate of this county. Nevertheless I am determined to help transform the morality of the people. When I consulted with the community leaders to find a good way to achieve this goal, they all said that there is no better way than to promulgate the community compact. Yi Chungyong, a former magistrate of this country, has already drawn up a community compact, and this was later revised by Yi In, another magistrate, to suit the local conditions. Regrettably, however, Yi In was recalled by the court, and the community people became discouraged as the compact was never put into practice. Continuing in the footsteps of these two former magistrates, I have drawn up a new compact, taking the earlier compact as well as that of the Lu family of Sung China into consideration, by simplifying the complicated and supplementing the undefined. Although I cannot claim that my version is perfect, it includes almost all the elements that encourage good deeds and discourage evil acts. I believe that unless the magistrate exerts his utmost effort in his duties, he cannot demand anything from the director of the community compact, and that unless the director is a man of probity, he cannot exhort the village members to do good deeds. Whether the village members turn to good or to evil will depend upon the compact director, and whether the director is moved to urge his people to behave properly will depend upon the magistrate. I therefore should seek good advice and work more diligently so that the director and his staff will follow my wishes, will abide by the regulation, and will exhort the village members. If the village members do not disagree and bend like grass in the wind of virtue, the mores of *Sowon* county will surely be transformed. We should remember this always.<sup>40)</sup>

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40) Yi I, *Preamble of Community Compact for Sowon County*, in YULGOK CHONSO 16:2a-b; the English translation of the aforesaid is found in SOURCES OF KOREAN TRADITION II 145-146 (Yongho Choe trans., Columbia Univ. Press, 2000).

## 2. Kang Hang (1567-1618) and Yi Chinyoung (1571-1633)

The official of Justice Ministry Kang Hang (1593-1618) was kidnapped and taken to Japan during the Hideyoshi's invasion of Korea in 1597. After experiencing many hardships, he became friendly with the Japanese scholar Fujiwara Seika(1561-1619) and introduced Neo-Confucianism to him.<sup>41)</sup> This event is explained as the beginning of Neo-Confucian studies in Japan. He returned to Korea after four years and wrote his book *Kanyangrok (On Japanese Things)*.<sup>42)</sup>

Yi Chinyoung is not well known even among the Korean people, but he is a significant scholar in East Asian jurisprudence.<sup>43)</sup> He was born in *Youngsan, Kyongsang* province in 1571. Well-read in Confucian classics, he fought against the Japanese invasion of 1592. He was kidnapped and taken to Osaka where he served as a monk at a Buddhist temple. After becoming recognized as an experienced scholar, he was summoned to tutor the *daimyo* Tokugawa Yoshimune in *Wakayama*. He played a leading role in the studies of Ming-Ching and Korean laws. When Japanese scholars could not understand the Chinese legal terms, they asked him for authoritative interpretations of the legal codes.<sup>44)</sup> He worked in *Tsushima* Island during the trades with Korea in 1626-27. After his death in 1633, he was praised as the pioneer responsible for enlightening the *Wakayama* domain.<sup>45)</sup> His son Yi Maegye also became a good scholar and authored many books including *Advice to Filial Piety* (1660).

The migration of several learned Ming loyalists to Japan after the final defeat of the *Ming* dynasty may account for the marked progress of Japanese scholars in Chinese law and language soon after 1700. The most important were the Zen priest Huang Po-Tsung, who taught Ogyu Sorai(1666-1728); Chu Shunshui(1600-1682), supported by Tokagawa Mitsukuni Shogun; Wu Jen-Hsien, supported by the *Nagoya* domain.

The thoughts of Yi Chinyoung were strongly based on Confucian ethics. He provided guidelines for the politics of the Shogun Tokugawa. The guidelines were composed of principles referring to respect for the people, the rule of virtue,

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41) See Ha Tai Kim, *Transmission of Neo-Confucianism to Japan by Kang Hang*, FS F. GEORGE L. PAIK FOR HIS 60<sup>th</sup> BIRTHDAY (1955), ABE YOSHIO, NIHON CHUSHIGAKU TO CHOSEN (JAPANESE NEO-CONFUCIANISM AND KOREA) (Univ. of Tokyo Press, 1965).

42) This book was translated into Japanese during his lifetime. For detail, see the Ha Tai Kim's article in fn 41.

43) For detail, see CHONGKO CHOI, HANGUK POPSASANGSA (HISTORY OF KOREAN LEGAL THOUGHTS) 139-143, (Seoul, 2001) ; See also Chongko Choi, Legal Exchanges between Yi Korea and Tokugawa Japan (paper read at the 1st International Conference on Korean Studies, Academy of Korean Studies, 2002) (on file with author).

44) For detail, see Dan Henderson, *Chinese Legal Studies in the 18th Century Japan*, 30-1 JOURNAL OF ASIAN STUDIES 21-56 (1970).

45) YI SANGHEE, PASHIN UI NUNMUL (TEARS OF AN ABANDONED SUBJECT), (Seoul, 1997)

benevolence, harmony, and peace. Yi Maegye appealed to the Shogun to proclaim the ethics of filial piety as the highest principle of ruling. Such Confucian values embodied in the legal codes are the foundation of East Asian Common Law (*Jus Commune*).<sup>46)</sup> It is significant that Korean scholars contributed to the foundation of East Asian Jurisprudence.<sup>47)</sup> It means that Korean traditional legal concepts had an international potentiality to be developed further.

### 3. Yi Ik(1681-1763)

Yi Ik (Songho by penname) seems to have drawn most heavily of any Yi dynasty thinker on China's legalist tradition. In a discussion on penal law, he quoted a later Han dynasty thinker, Tusk Shi, to the effect that penalties and punishments are like medicine for civil disorder, whereas moral instruction is like staple food to be used in times of flourishing peace. Using moral instruction to suppress violence is like setting the medicine aside and feeding a sick patient staple grains and meat. He preferred the tougher formulation of Han Fei, however, that no sovereign could expect to abandon rewards and punishments and simply expect the people to be good of their own accord.

I have experienced this myself, even when the people are good, with no evil intentions, they can err accidentally, then by their actions sink further into the mire until all of a sudden they are a thousand li removed from good behavior. In their journey they will inevitably end up according to the true nature of things. For honoring the good, virtue and rites are best; for extinguishing evil, there is nothing like institutions and punishments.<sup>48)</sup>

Thus Yi Ik seems to have been closer to the "realistic" wing of Confucian thinking in his analysis of human motivation, seeing punishments and "profit", pleasure and pain, in a reciprocal and balancing relationship. He also echoed Hsun Tzu in his skepticism concerning the relationship between natural phenomena and human affairs. "When profit is relatively great and the law is relatively lenient, the one must retreat and the other advance with irresistible force."<sup>49)</sup> Like Thomas Hobbes a century earlier,

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46) See Chongko Choi, *Foundations of Law and Justice in East Asia*, 18 COMPARATIVE LAW 1-18, (Nihon Univ., 2001).

47) For a detailed discussion, see CHONGKO CHOI, *HISTORY OF EAST ASIAN JURISPRUDENCE* (forthcoming 2003).

48) Yi Ik, *Songho saesol yuson (Digest of the Collectanea of Songho)*, in 1 CHOSEN KANKOKAI 393 (An Chongbok ed., Seoul, 1915).

49) Yi Ik, *Songho saesol(Colleteana of Songho)*, in 1 Kyongin munhwasa 266b (Seoul, 1970).

Yi seemed to have little confidence that men left to their own devices could avoid the irresistible slide into a mutually hostile, warring barbarism. “If one man is able to go on living in unrighteousness, ten others will take note and begin to model themselves on him. Just as with the beasts of the mountains or the fish of the lakes, what takes precedence is simple strength; without punishments and prohibitions, they will all devour one another, and in this fashion good will deteriorate and become evil in a matter of days.”<sup>50)</sup> Yi’s solution was to revise the calculus of profit by reemphasizing penalties, “turning gain into loss in order to fix the people’s minds and rectify their customs.”<sup>51)</sup> Inasmuch as Yao and Shun had in antiquity “delineated the penalties” and had not seen fit to abolish punishments, how much less could punishments be abandoned in this “latter age when customs are steadily deteriorating?”<sup>52)</sup>

Yi Ik did not entirely rule out the use of moral suasion and instruction: “virtues and rites” might still have a proper, if somewhat restricted, role to play in structuring and honoring, if not eliciting, good behavior. Men were, after all, capable of some good behavior, although Yi saw such spontaneous goodness as inherently unstable and in need of constant hedging in with punitive sanctions.

Moreover, from Yi’s essay on some cruel tortures, which were formally abolished during his lifetime, it is clear that he did not advocate unnecessary harshness in punishment or interrogation. Given the general tenor of his remarks on punishments and his stated preference for Han Fei, however, it is perhaps remarkable that he left any role at all for ethical measures. Without further study of his writings it is difficult to determine whether Yi shared Hsun Tzu’s optimism about man’s educability as well as his realism concerning human motivation. In his approach to penal law, at least, Yi seems to have been temperamentally closer to Han Fei than Hsun Tzu.<sup>53)</sup>

#### 4. Chong Yakyong(1762-1836)

Chong Yakyong was born in *Mahyon* in the vicinity of Seoul (presently *Nungnae-ri, Wabumyon, Yangju-gun, Kyonggi Province*) in 1762.<sup>54)</sup> He was brought to Seoul at the age of 14 when his father was appointed by the government. By the time he had reached the age of 16, he had already become engrossed in Practical Learning (Sirhak)

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50) *Id.*

51) *Id.* at 266c.

52) *Id.* at 266a.

53) See WILLIAM SHAW, *LEGAL NORMS IN A CONFUCIAN STATE* 23 (Berkeley, 1981).

54) For a short survey of his life and thought, see Gregory Henderson, *Chong Tasan: A study of Korea’s Intellectual History*, 16 *JOURNAL OF ASIAN STUDIES* (1957).

by reading the works of Yi Ik (1681-1763). He was first introduced to Catholic doctrine and thought by Yi Pyok, who also introduced the Western world to Chong. Later Chong had opportunities to read and examine books on Christianity, modern European astronomy, mathematics, maps, clocks, telescopes, books on European customs, and European utensils.<sup>55)</sup>

These experiences enabled Tasan to realize an evil effect of Chu Hsi's Neo-Confucianism on the grounds that it indulged in empty theories and talk. He could also revise his hitherto narrow China-centered view of the world, shifting his interest to new scientific and technological knowledge. This conversion provided an important momentum for enriching the content of his progressive thought and elevating it to a higher level. Though he first believed in Catholicism, he soon abandoned it after realizing the falsity of its tenets. It seems that the intrigue plotted against him by his political opponents further prompted his decision to digress from Catholicism.

Passing the Civil Service Examination in 1780 at the age of 28, Chong started his government service. Fully displaying the scientific knowledge he had already acquired, as well as his great endowment, Chong made notable achievements in projects aimed at promoting national interest and public welfare. Chong was appointed as a secret inspector for *Kyonggi* Province when he turned 33 years of age. The appointment enabled him to witness the distress of the extremely impoverished farmers, and the corruption and disorder of local administration, by inspecting every corner of the province. The theoretical foundation was laid firmly at that time for the progressive political and economic reform measures Chong later made public with a view toward improving rural life.

A man of upright character, Chong brought strict punishment to all the corrupt officials he discovered, regardless of their rank. This won him affection and respect from the people, but he also incurred jealousy and complaints from his political foes.

In 1801 King Chongjo, who favored Chong Yakyong, died, and his son, King Sunjo, acceded to the throne. Upon this opportunity, Chong's political opponents (the Old Faction) accused the officials belonging to the Southern Faction of believing in an evil religion, and they were suppressed and persecuted in the so-called *Sinyu* Catholic Persecution of 1801. Chong was arrested and banished to *Changgi*, *Kyongsang* Province, and later removed to *Kangjin*, *Cholla* Province. In *Kangjin*, Chong lived in a hut on the slope of Mount *Tasan* (presently in *Kyultong*, *Tosam-myon*, *Kangjin* County), devoting himself to reading and writing. His 19 years of exile until 1818, when he was released at the age of 57 enabled him to emerge as an all-embracing

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55) See Keum Jangtae, *Tasan on Western Learning and Confucianism*, 26-2 KOREA JOURNAL 4-16 (1987). See also KEUM JANGTAE, *CONFUCIANISM AND KOREAN THOUGHTS* 181-204 (Seoul, 2000).

authority of Practical Learning.

Although his long, secluded life in a remote mountain village was really an unfortunate one, it nevertheless was a good opportunity for him to deepen and develop his scholarship and thought. He authored immortal works despite unfortunate circumstances. Refusing to compromise with political power, he poured all of his zeal and effort into completing Practical Learning. At that time he conducted historical research on the voluminous Confucian classics from the angle of Practical Learning, and attached new and rational annotations to these classics.<sup>56)</sup>

Chong was always sympathetic to farmers who were experiencing difficulties, while analyzing and criticizing the feudal system under which corrupt officials could exploit farmers to the marrow. He formulated reform measures covering the land, taxation, government personnel, legal, educational, military, and political systems. The most prominent essays embodying these ideals were *Wonmok* (Expounding the Rightful Posture of Rulers), *Tangnon* (Essay on King T'ang of the Chinese Yin Dynasty), and *Kamsaron* (Explaining the Duty of Governors).

Released in 1818, Chong returned to his home in *Yangju*. For 18 years until his death in 1836 at the age of 75, he refused government appointments and devoted himself to research and writing with a view to improving national life.

*Mongmin Simso* (48 volumes) which he completed in 1818 when he was paroled from exile and *Kyongse Yup'yo* (40 volumes), which he made public in the preceding year in unfinished form, are his two greatest works, representing Chong's thoughts. Whereas the former advocates the reform of local administration that is closely connected with the living of farmers, ethical awakening of provincial officials, and the stabilization of the agricultural economy, the latter presents his own plans for the reform of the central administrative structure.<sup>57)</sup>

Chong compiled a book named *Humhum Shinso* (*New Writings on Circumspection in Judicial Decisions*), which gives analysis on many criminal cases in China and Korea.<sup>58)</sup> This is a wonderful comparative study of criminal cases. He gives critical comments on the legal reasoning of Chinese scholars and expresses his own view on the cases. He emphasized the importance of jurisprudence especially for public officers.<sup>59)</sup>

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56) See MARK SETTON, *CHONG YAKYONG: KOREA'S CHALLENGE TO ORTHODOX NEO-CONFUCIANISM* (SUNY, 1997).

57) See Michael Kalton, *Chong Tasan's View of Man: A Radical Critique of the Neo-Confucian World View*, 3 JOURNAL OF KOREAN STUDIES 3-37 (1991).

58) See CHONG YAKYONG, *HUMHUM SIN*, (Kwangmunsa, 1901).

59) For details, see CHONGKO CHOI, *HANGUK POPSASANGSA (HISTORY OF KOREAN JURISPRUDENCE) 180-187* (Seoul Nat. Univ. Press, 2001).

### C. *Elements of Legal Thought*

#### 1. Idea of *Silsa Kusi*

The idea of *Silsa Kusi* is seeking interest through concrete things. This thought was a reaction to the vagueness of metaphysical Neo-Confucianism. Emphasizing the role of many kinds of li, Confucian ethics became very formalistic and empty. The Sirhak scholars argued for a reform on the principle of interest through endeavor of things.

#### 2. Idea of *Sungop Kwangdok*

The idea of *Sungop Kwangdok* means broadening virtues through the appreciation of work. Traditionally working was not highly evaluated in Confucianism. The Sirhak scholars showed a new interest in work ethics.

#### 3. Idea of *Pyonpop*

The idea of *Pyonpop* means renewing the old laws. As seen above, the traditional way of legal thinking was respecting the achievements of the ancestor kings. Therefore, reforming the old laws was hardly recommended. Despite this conservative ideology, social changes occurring in the late 17th Century lead to a legal reform. The most eloquent asserter was Yi I.

#### 4. Idea of *Pop-Li-Chong*

Legal reasoning in Western legal science is usually based on syllogism. It matches the legal premise and the factual case to be concluded in the judicial decision. Logic always plays a decisive role. In East Asian legal practices, not only logic but also circumstance and human emotion play their roles simultaneously.<sup>60)</sup> In the consideration of the circumstances, the nature of things (*Samulji Li*) and the common sense of man (*Inji Sangjong*) need to be accounted for in the judgement of a case. Such a broad sense of legal judgement in East Asia could be interpreted as a hindrance

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60) For a detailed discussion, see FAN CHUNGSHIN/CHUNG DING/ZAN HSIEH NONG, CHUNGGUK POPYUL MUNHWA TAMGU (QUEST FOR CHINESE LEGAL CULTURE) (Lee Inchol trans., Seoul, 1996); KIM JISOO, CHUNGGUK CHONTONG POPESOU CHONG-LI-POP EKWANHAN YONGU (A STUDY ON THE CONG-LI-POP IN THE TRADITIONAL CHINESE LAW) (Seoul National University LL.D. Dissertation, 1994).

or an under-developed argumentation, but the East Asian jurists are trying to develop this triangle paradigm as a deeper and better legal argumentation than that of the West.<sup>61)</sup>

When trying to understand Korean traditional legal reasoning, it is necessary to familiarize one's self with the basic analytical categories used in the handling of case under review. Those who reviewed cases and recommended or prescribed sentences often thought in terms of a major conceptual distinction between the more purely legal aspects of a case (*pop*, "law") and the situational (*chong*, "circumstances") aspects. A good decision was supposed to take both into consideration, attempting to both "follow the law" (*inpop*) and "take account of circumstances" (*chamjong*). Other common and comparable pairs were: "circumstances and evidence" (*chong/chok*), "circumstances and crime" (*chong/choe*), "state of mind" (intent) and evidence" (*sim/chok*).<sup>62)</sup>

## VI. Conclusion

In this article, I have surveyed traditional legal concepts according to the periods in which they were conceptualised and simultaneously have tried to construe the legal values of the corresponding times.

Korea's geographical location in the middle of East Asia, meant that Korean law not only drew influence from Chinese law, but it also influenced Japanese law as well. Notwithstanding these facts, Korea has developed its unique legal thoughts and system. And Korea was thus seen as "the land of good laws and customs" by the Japanese people of the Tokugawa period.<sup>63)</sup>

Korean law was deeply affected by the religions such as Confucianism, Buddhism and Shamanism. This is natural when we consider that foreign laws were also influenced by ethical values.

Until now, Korean legal historians have witnessed somewhat different views on Korean traditional law. Bong-duck Chun and Pyongchoon Hahm had rather critical and negative views on Korean traditional law.<sup>64)</sup> Pyongho Park views it rather

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61) For details, see CHONGKO CHOI, EAST ASIAN JURISPRUDENCE IN THE WORLD (Seoul, 1997); CHONGKO CHOI, HISTORY OF EAST ASIAN JURISPRUDENCE (forthcoming 2003).

62) See SHAW, *supra* note 53, at 132.

63) See ITO TOGAI, CHOSEN KWANJIKGO (ON KOREAN OFFICIALDOM) (1711). His book CHAEDOTONG (ON INSTITUTIONS (1724) is also partly related with Korean law and institutions.

64) See BONGDUCK CHUN, HANGULK POPCHESA YONGU (STUDIES ON KOREAN LEGAL HISTORY) (Seoul Nat. Univ. Press, 1968); HAHM PYONGCHOON, KOREAN POLITICAL TRADITION AND LAW (Seoul, 1967); see also HAHM PYONGCHOON, KOREAN JURISPRUDENCE, POLITICS AND CULTURE (Yonsei Univ. Press, 1986).



positively.<sup>65)</sup> William Shaw tried to reverse Max Weber's thesis that East Asian law was not developed from the point of rationality.<sup>66)</sup> Because legal history has many aspects, it is not easy to evaluate it in a paper of this length. Generally acknowledged, the institutional history of law and the history of legal thoughts are quite different in viewing the "law". I think this is not the place to conclusively evaluate the "law" in traditional society of Korea. Nevertheless, I am of the opinion that Korea has developed a rich Gedankengut around the legal thoughts as observed above.

### Glossary

Tangun	檀君
Hwanung	桓雄
Asadal	아사달
Ungnyo	熊女
Hsieh-chai	獬豸
Haetae	해태
Hahuri	하부리
Hongik Ingan	弘益人間
Jaehwa Sobok	除禍召福
Sonri Akhwa	善利惡禍
Jaese Lihwa	在世理化
Hoguk Pulkyo	護國佛教
Son(zen)	禪
Simmuan Hwajaengron	心無眼和諍論
Ilsim	一心
Hwajaeng	和諍
Muae	無碍
Kyewon Pilkyong	桂園筆耕
Kyonghak Taejang	經學隊仗
Shinyul	新律
Hahwa Jungsaeng	下和衆生

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65) See PYONGHO PARK, HANGUK POPCHESA GO(RESEARCHES ON KOREAN LEGAL HISTORY), (Seoul, 1974); PYONGHO PARK, KEUNSEUI POPKWA POPSASANG (Law and Legal Thoughts in Modern Korea) (Seoul, 1996).

66) See WILLIAM SHAW, LEGAL NORMS IN A CONFUCIAN STATE (Berkeley, 1981).

Kyomson 謙遜  
Baeryo 配慮  
Songgyunkwan 成均館  
Choson Kyongjuk chon 朝鮮經國典  
Kyongje Mungam Pyolchip 經濟文鑑別集  
Chou Li 周禮  
Chonmyong Toseol 天命圖說  
Li 禮, 理  
Chi 氣  
Hyangyak 鄉約  
Chojong Songhon 祖宗成憲  
Yeju Popjong 禮主法從  
Yangpop Muii 良法美意  
Kwasil Sangkyu 過失相規  
Sirhak 實學  
Kanyangrok 看羊錄  
Songho saesol 星潮雜說  
Sinyu 新酉  
Wonmok 原牧  
Kamsaron 監事論  
Tangron 湯論  
Mongmin simso 牧民心書  
Humhum Sinso 欽欽新書  
Silsa Kusi 實事求是  
Sungop Kwangdok 崇業廣德  
Pyonpop 變法  
Pop-Li-Chong 法, 理, 情  
Samulji Li 事物之理  
Inji Sangjong 人之常情  
Inpop 引法  
Chamjong 參情  
Chong/chok 情 / 的  
Chong/choe 情 / 罪  
Sim/chok 心 / 的