

〈논 문〉

The Foundations of East Asian Jurisprudence

Chongko Choi*

Introduction

Participating in the 3rd International Symposium on Asian Philosophy of Law and Social Philosophy here in a historical city, Nanjing, I am honored to deliver this keynote speech on the topic of East Asian jurisprudence. For the emerging concept of East Asian Jurisprudence, I will investigate two-sides foundations of East Asian Jurisprudence: one is the historical and the other the philosophical. My position in this presentation is that the legal and social philosophers of China, Japan and Korea should strive for reconstruction of East Asian Jurisprudence in this 'post-modern' era. Avoiding the 'clash of civilizations'(S. Huntington), we should endeavor to present East Asian legal philosophy in the global community.

I. Historical Foundations of East Asian Law

East Asia was originally no more than a geographical term referring to the eastern part of Asia. Recently many people consider it as a regional order with certain orientations rather than merely a geographical or historical term. This is due to the tendency to view the historical experiences of various states in this region in relation to their successful social and economic developments. Usually included in this region are China, Japan, Korea, Mongolia, Tibet and Vietnam.

Politically and culturally, East Asia has established a central order(中心秩序) with a power dominating the continental China in the center. This may be

* Professor of Law, Seoul National University.

called as a *Zhonghua* order(中華秩序) or tributary order(朝貢秩序) or investitive order(冊封秩序), although these concepts are hardly explained in the Western concept of international law.¹⁾ Nevertheless, according to Prof. Min Tuki, a Korean scholar of sinology at the Seoul National University, the international relationship of East Asia have been maintained by the diplomacy based on the little central order thought with a “misunderstanding by expediency”. The China-centered central order was maintained with a multiplicity of expedient little central orders within.²⁾ There had always been a continually a centripetal force(求心力) and a centrifugal forces(遠心力) in the East Asian history, as was so around Rome in the European history.

In recent years, I myself have emphasized the concept of East Asian Common Law(東亞細亞普通法) for the further study of East Asian legal history and legal culture.³⁾

1. Codification

The East Asian legal historians are almost all of the same opinion that the great codifications in China, Korea, Vietnam and Japan have contained some continuity. The *Tang Code*(唐律) of China has been served as a model for the later legislations in other East Asian countries.⁴⁾

The Chinese law was originally called *Lüling*(律令, kor. *yulyong*, jap. *Ritsuryo*). It has a strong moral character, closely linked to the Confucian doctrine. Korea adopted this *Lüling* in 372 by Koguryo(高句麗) and it was

1) Owen Denny, *China and Korea*, Shanghai 1888 and the debate of P. G. von Möllendorff, A Reply to Mr. O. N. Denny's pamphlet entitled *China and Korea*, Rosalie Möllendorff, *P. G. von Möllendorff: Ein Lebensbild*, Leipzig 1930, S. 124-136; M. Frederick Nelson, *Korea and the Old Orders in Eastern Asia*, Louisiana State Univ. Press, 1946, Reprint, Seoul 1975.

2) Min Tuki, The Identity and Prospects of East Asia: A Historical Approach, paper read at the 1996 International Symposium “East Asia and the University in the 21th Century”, commemorating the 50th Anniversary of Seoul National University, Oct. 16-17, 1996, p. 6.

3) Chongko Choi, The Development of East Asian Law until the End of 18th Century: In Search of East Asian Common Law, paper read at the University of Lublin, Poland 1999. and From Comparative Law to East Asian Common Law(Jap.), in: *Modernization and Law in East Asia*(Jap.) ed. by Imai Hiroshi, Sapporo 2000.

4) Wallace Johnson, *The Tang Code I, II*, Princeton Univ. Press, 1979, 1995; K. Büniger, *Quellen zur Rechtsgeschichte der Tang-Zeit*, Beijing 1946.

strengthened in 520 by the Silla(新羅) Kingdom. Japan also promulgated the *Taiho Ritsuryo*(大寶律令) in the first year of the Taiho era(AD 701). Based on their incorporation of Chinese law, the East Asian countries have established themselves as centrally administered sovereign states basically, even though there were some modifications.⁵⁾

The *Kyongkuk Taejeon*(經國大典, Grand Code for Governance, 1485) of Korea manifestly prescribed that the Chinese Ming Code shall be applied as the common penal law. The *Le Code*(黎朝刑律) of Vietnamese Le Dynasty (1428-1788) also was a faithful reproduction of the Tang and Ming Codes.⁶⁾

It can be concluded that the East Asian countries until the end of the 18th Century have referred to the laws of neighboring countries in their codification process. The common philosophy of the codifications was the presenting of Confucian values, which the present legal philosophers call as legal enforcement of dominant morals.⁷⁾

2. Community Law

The Community Compact(鄉約, ch. *Hsiangyüeh*, kor. *Hyangyak*, jap. *Kouyaku*) was a locally organized association aiming at mutual encouragement to practice socially desirable behavior. These compacts began to appear in Northern Sung(916-1234), and from then until the time of the Republic (1911), the formation of such association was encouraged at intervals by Confucian scholars.⁸⁾ The first known compact was the *Lu Family Community Compact*(呂氏鄉約, *Lüshih Hsiangyüeh*) of 1077 and it was versed by Chu Hsi. This Chu Hsi's amended Community Compact was introduced to Korea. In 1792, the *Combined Compendium on Community Ritual*(鄉禮合編, *Hyangrae*

5) See Yoshiyuki Noda, *Introduction to Japanese Law*, Tokyo Univ. Press, 1976, Inoue Mitsusada, *The Ritsuryo System in Japan*, *Acta Asiatica*, No. 31, 1977; John C. Hall, *Japanese Feudal Law*, Greenwood 1979.

6) Insun Yu, *Law and Society in 17th and 18th Century Vietnam*, Asiatic Research Center, Korea University, Seoul 1990, p. 38f.

7) Patrick Devlin, *The Enforcement of Morals*, 1952.

8) Monika Übelhor, *The Community Compact of the Sung and its Educational Significance*, *Neo-Confucian Education: The Five Stages*, ed. by De Bary & J. Chaffee, Berkeley 1989, pp. 371-388; Kandice Hauf, *The Community Covenant in 16th Century Jian Prefecture, Jiangxi*, *Late Imperial China*, vol. 17, No. 2, 1996, pp. 11-50.

Happyon) was edited, printed and distributed by royal order under the direction of the Confucianist Song Siyol(宋時烈), a disciple of Yi Yulgok(李栗谷). Yi Toegye(李退溪) drafted the *Yean Community Compact*(禮安鄉約), and Yi Yulgok the *Haeju Community Compact*(海州鄉約).⁹⁾

In Japan, there was no such influence of the Lu Family Compact or that of Chu Hsi, as contrasted to the developments in Korea. The communal granary system was practiced in Japan independently from the Compact. It was introduced to Japan with the publication of *Master Chu's Communal Granary System*(朱子社會法, *Shushi Shosoho*) by Yamazaki Ansai(山崎闇齋, 1618-82), at the end of the 17th century. In 18th Century Japan, such feudal domains as Aizu, Okayama and Hiroshima adopted it. The Chinese civil service examination(*Kwago*, 科擧) was introduced into Korea, but not in Japan. This fact resulted in many differences between Korea and Japan later, even though the both were confucian states virtually. The Chinese *pao-chia*(保甲) security system was not introduced to Korea and Japan. But Korea maintained social stability through *Five-House-Unit Law*(五家作統法, *Ogajaktongpop*), Japan through *Five-Family Neighborhood Unit*(五人組, *Gonin Gumi*) and village rules(*muraokite*, 村掟).¹⁰⁾ The social institutions and rules were rather different in the three countries, but we can see already a sort of communality among them. From these communal laws, East Asian people have lived in the spirit of 'communitarianism' and social solidarity.

3. Jurisprudence

Traditional jurisprudence in China and Korea were called as *Yulhak*(律學), in Japan *Myobodo*(明法道). It has been preserved as a sort of secret learning sustained by some powerful families.¹¹⁾

According to Dan Henderson, Tokugawa Japan made a "mini-reception" of Chinese law again in the 18th Century. The new Tokugawa jurisprudence began with the importation of the Ming and Ching codes and commentaries

9) Sakai Tadao, Yi Yulgok and the Community Compact, *The Rise of Neo-Confucianism in Korea*, ed. W. De Bary & Jaehyun Kim-Haboush, Columbia Univ. Press, 1985.

10) John H. Wigmore, *Law and Justice in Tokugawa Japan*, Tokyo 1975; Dan F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern*, I, II, 1996.

11) Fuse Yaheiji, *Myobodo no Kenkyu*(jap.), Tokyo 1966.

and a parallel revival of the Tang law studies.¹²⁾

In this introduction of Chinese and Korean jurisprudence, the Chinese scholars like Chu Shunshui(朱舜之) and Wu Jenshien(吳仁顯) and Korean scholars like Kang Hang(姜沆, 1567-1618), Yi Chinyong(李眞榮, 1571-1682) and his son Yi Maegye(李梅溪, 1617-1682) played significant roles.¹³⁾ We see here an interesting cooperation of legal studies in traditional East Asia, reminding us of the European studies of the common law(*ius commune, das gemeine Recht*).¹⁴⁾ The prominent Japanese legal scholars were Sakakibara Koshu(榊原篁洲, 1656-1706), Takase Kiboku(高瀬喜朴, 1668-1749), Arai Hakuseki(新井白石, 1657-1725), Maeda Tsunanori(前田綱己, 1643-1724) etc. Ogyu Sorai(荻生徂徠, 1666-1728) and his brother Hokkei(北溪, 1673-1759) were especially significant for their publications of *Ming Code: Kyoho Recession*(明律享保刊行, *Min-ritsu Kyoho Kanko*, 1723) and *Ming Code with a Commentary in Our Script*(明律國字解, *Min-ritsu Kokujikai*, 1725).¹⁵⁾ The Chinese *Tang Code Commentary*(唐律疏議, *Tanglü Shui*) and Korean *Grand Code for Governance*(經國大典, *Kyongkuk Taejon*) and *Direct Commentary of Ming Code*(大明律直解, *Taemyongyul Chikhae*) were the important source books for the legal researches of the Japanese scholars. Ito Dokai(伊藤東涯), son of the prominent Confucian scholar Ito Jinsai(伊藤仁齋) authored two books called *Korean Officialdom System*(朝鮮官職考) and *Compendium of Institutions*(制度通).¹⁶⁾

A copy of the *Great Ching Code*(大清會典, *Dai-Ching hui-tien*) was imported by Arai Hakuseki in 1712 and translated into Japanese by Fukami Shinuemon Gendai(深見吉有隣) and his son in 1723. The forensic medicine also became

12) Dan Henderson, Chinese Legal Studies in Early 18th Century Japan: Scholars and Sources, *Journal of Asian Studies*, vol. 30, No. 1, 1970, pp. 21-56.

13) Dan Henderson, Chinese Influence on 18th Century Tokugawa Codes, *Essays on Chinese Legal Tradition*, Princeton 1980; Osamu Oba, Edo Period Studies on Tang, Ming and Ching Law, in: *Law and the State in Traditional East Asia: Six Studies on the Sources of East Asian Law*, ed. by B. McKnight, Univ. of Hawaii Press, 1987; Chongko Choi, Legal Exchanges between Korea and Japan, paper read at Ritsumeikan University Conference on July 31, 2000.

14) Helmut Coing, The Roman Law as *Ius Commune* on the Continent, *Law Quarterly Review*, vol. 89, 1973, p. 505f. cited from R. Schlesinger, *Comparative Law*, 1988, pp. 255-265.

15) Maruyama Masao, *Studies in the Intellectual History of Tokugawa Japan*, Tokyo 1974.

16) Taejin Lee, Distribution of Korean *Kyongkuk Taejeon* in Tokugawa Bakufu(kor.), *FS. for Prof. Wonryong Kim*, Seoul 1987.

common through the introduction of the Chinese book *The Washing Away of Wrongs*(洗冤錄, *Hsi Yüan lu*, 1249) by Sung Chi(宋慈, 1181-1249). This book was translated into Korean in 1393 by Chiun Choi(崔致雲) and revised in 1796. The Japanese translation was done by Kawai Chinbe Naohisa(河合甚兵衛尙久) in 1768.¹⁷⁾

This brief survey of Chinese and Korean legal studies in Tokugawa Bakufu(徳川幕府) shows that a new jurisprudence absorbing new uses and ideas of law from the Asian continent emerged in the dynamics of East Asian diplomacy. There is not enough time enough to go into a thorough investigation of pre-modern East Asian legal institutions and jurisprudence. I do want to briefly mention some prominent legal thinkers in the traditional East Asian jurisprudence.

We know that the original Confucianism taught by Confucius, Mencius and Xunzi was transformed into Neo-Confucianism and that it broadly represents cosmology, Weltanschauung and way of thinking among East Asian people.¹⁸⁾ It became influential as an orthodox ideologies in other East Asian countries like Korea, Vietnam and Japan. Yi Toegye exerted great influence over Japan by illuminating the Confucian thought of Chu Hsi. The Koreans and the Japanese, however, did not follow the Chinese culture as the whole, but modified it to suit their purposes. Fujiwara Seika(藤原惺窩, 1561-1617), Hayashi Rasan(林羅山, 1583-1657) and Yamzaki Ansai were the representative Neo-Confucians in the Tokugawa period.¹⁹⁾ Ogyu Sorai was deeply interested in the study of law. His investigations were crystallized in his famous book *Minritsu Kokuji-kai*(明律國字解, *Ming Code with a Commentary in Our Script*).

Ando Shoeki(安藤昌益, 1703-1762) wrote *Hosei Monogatari*(法世物語, *Tales of the World Law*), which reveals the unique understanding of human law(and rights) and natural law(and rights). This book was a critique of the philosophies and religions, dogmas and 'isms' of that time. He believed that

17) Brian E. McKnight(tr.), *The Washing Away of Wrongs*, 1981.

18) Many scholars point that Neo-Confucianism is a mixture of Confucianism and Buddhism.

19) For details, Peter Nosco(ed.), *Confucianism and Tokugawa Culture*, 1984; Minamoto Ryoen, The Acceptance of Chinese Neo-Confucianism in Japan in the Early Tokugawa Period, *Meeting of Minds: Intellectual and Religious Interaction in East Asian Traditions of Thought*, ed. Irene Bloom and J. Fogel, N. Y. 1997, pp. 238-277.

the entire cosmos is alive, and lives by its own subtly inherent Law, which he called the Living Truth and the Way of Heaven. His natural philosophy cannot be separated from his political and legal philosophy.²⁰⁾

The Korean *Silhak*(實學, Practical Learning) scholar Chong Yakyong(丁若鏞, penname Tasan 茶山, 1762-1836) made best use of the Evidential Scholarship (考證學) of the Ching “Han Learning” movement and the “Ancient Learning”(古學, *Kogaku*) of Tokugawa Japan. Tasan was one of the rare Korean scholars who not only read the Japanese scholarship but also admitted to his admiration for some of it, namely, the work of the three great scholars of “Ancient Learning”, Ito Jinsai(伊藤仁齋, 1627-1705), Ogyu Sorai and Dazai Shundai(大宰春台, 1680-1747). Tasan wrote *Mokmin Simso*(牧民心書, *Guidance for Officials*) and *Humhum Sinso*(欽欽新書, *Forensic Studies*), and is evaluated as the most significant thinker in the modern Korean intellectual history.²¹⁾

II. Philosophical Foundations of East Asian Law

With the above-mentioned tradition of East Asian jurisprudence, we are confronted with the new ‘post-modern’ task now. What is the task and contents of the contemporary East Asian jurisprudence? Of course, this are huge topics. I want to choose some basic ones to offer for our common consideration.

1. Concept of Law

The East Asian character for of law is 法, which is pronounced differently than it is commonly written. According to the recent philological research, even though this letter is pronounced as *fa* in Chinese, *bob* in Korean, *ho* in Japanese, all these came from the original North-Chinese pronunciation, following the process of differentiation like piwap → fwap → fat → fa. It is suggested that the concept of law is related to the religious meaning

20) English Translation by Jeffrey Hunter, *The Animal Court: A Political Fable from Old Japan*, N. Y. 1992; Masao Maruyama, *Studies in the Intellectual History of Tokugawa Japan*, Univ. of Tokyo Press, 1974.

21) For details, Mark Setton, *Chong Yagyong: Korea's Challenge to Orthodox Neo-Confucianism*, SUNY, 1997, pp. 123-138.

(Shamanism).²²⁾ Generally, the meaning of 法 is known as model and standard. It reminds us of the Western legal philosophy of *Sein-Sollen*, especially of G. Radbruch's thought of *Natur der Sache* and A. Kaufmann's *Sollendes Sein* or *Seiendes Sollen*. By the way, the East Asian jurisprudence tries to define the law on the basis of indigenous semantics in regard to jurisprudence for the common people.

2. Justice and Goodness

Frankly speaking, most Asian jurists do not feel satisfied with the theories of justice arising from the Western jurisprudence. The western theories seem to be too logical, argue-oriented and unharmonious. The Asian philosophers of law try to build up a more integrative and harmonious theory of justice. The Chinese legal philosopher Chingshung Wu(吳經熊, John C. H. Wu) explains justice in harmony with truth, goodness and beauty in East Asian senses.²³⁾ Furthermore, the theory or the relationship between law and morality could be reestablished in terms of East Asian languages.²⁴⁾

3. Law and Ideology

A hot debate in the contemporary jurisprudence is in regard to liberalism and communitarianism.²⁵⁾ If we look back the East Asian intellectual traditions, I think, we can build up a "liberal-communitarian" philosophy of law based on Confucianism.²⁶⁾ That would be the philosophical basis of East

22) Roy Andrew Miller, Chinese 法(fa) in Altaic: A Further Note, *Journal of the American Oriental Studies*, vol. 118, No. 2, 1998, pp. 268-273; R. A. Miller & N. Naumann, *Altjapanisch Fafuri: Zur Priestertum und Schamanismus in vorbuddhistischen Japan*, Mitteilungen der Gesellschaft für Natur- und Völkerkunde Ostasiens, vol. 116, Hamburg 1991.

23) John C. H. Wu, *The Fountain of Justice*, N. Y. 1965 and his autobiography *Beyond East and West*, N. Y. 1951.

24) Herbert H. P. Mao, Law and Morality: Some Reflections on the Chinese Experience Past and Present, *Philosophy East & West*, 1977.

25) Stephen Muchall & Adam Swift, *Liberals and Communitarians*, 2nd, ed. 1996.

26) For details, William T. De Bary(ed.), *Confucianism and Human Rights*, Columbia Univ. Press, 1998; W. De Bary, *The Liberal Tradition in China*, 1983; Seunghwan Lee, Virtues and Rights: Reconstruction of Confucianism as a Rational Communitarianism, Ph. D. Dissertation, Hawaii, 1991; Chongko Choi, "Confucianism and Law in Korea", *Seoul Law Journal*, vol. 37, No. 2, 1996, pp. 115-138.

Asian democracy and “rule of law”.²⁷⁾

4. Ecological Rationality

I argue that rationality, when rightly redefined as ‘ecological’, is far from being dead but alive permanently and universally in the heart of humanity. I argue also that although Asian philosophy is not a panacea of all intellectual and social ills, its underlying metaphysics is essentially ‘ecological’ and thus can serve as an intellectual inspiration, provide a metaphysical foundation in constructing a theory of ecological Jurisprudence.²⁸⁾ East Asians are proud of their long and rich traditions of nature-loving philosophy and way of living.

5. Legal Aesthetics

It is natural and interesting that East Asian legal philosophers pay special attention to G. Radbruch’s legal philosophy, especially from the perspective of legal aesthetics.²⁹⁾ Legal aesthetics is an emerging favorite branch of East Asian jurisprudence.³⁰⁾ The aesthetic conception of reason and rationality requires us to see everything not anatomically but holistically, not analytically but synthetically and not partially but comprehensively from a meta-perspective which transcends diverse particular and relative perspectives.

6. Human Rights and Responsibility

I think, the biggest task of human rights theory is to harmonize the “universality” and culture-boundedness of human rights.³¹⁾ From this perspec-

27) Hahm Chaibong(ed.), *Confucian Democracy*, Chontong kwa Hyundai/Seoul 2000. The Harvard philosopher Weiming Tu tries to build up a Confucian theory of democracy.

28) For detail, Ynhui Park, Ecological rationality and Asian philosophy, in his book, *Reality, Rationality and Value*, Seoul National Univ. Press, 1998, pp. 134-168.

29) Chongko Choi, G. Radbruch und Ostasien, *Festschrift für Alexander Hollerbach zum 70. Geburtstag*, 2000.

30) Chongko Choi, *Law and Art*(kor.), Sigongsa/Seoul 1995, Iwatani Juro & Mori Seiichi(ed.), *Iconology of Law and Justice*(jap.), Tokyo 1997; Chongko Choi, *Legal Symbolics*(kor.), Seoul 2000.

31) Many books and reports has been published, including Federico Mayer(ed.), *Taking Action for Human Rights in the Twenty-First Century*, UNESCO Publishing, 1998; Morigiwa Yasutomo(ed.), *Law in a Changing World: Asian Alternatives*, ARSP Beiheft Nr. 72, 1998; Nicholas Wheeler(ed.), *Human Rights*

tive, I would like to point the some recent intellectual efforts of the East Asian scholars to build up a relevant theory of human rights.

A symposium was held in 1995 at the East-West Center, Honolulu, and the result was published as a book *Confucianism and Human Rights*(1998).³²⁾ This book confirms that Confucianism is not incompatible with human rights even though it has no matching term for the Western word 'human rights' and 'human responsibility'. It held that Asian values of Confucianism need not reject any of the prescriptions of the Universal Declaration of Human Rights as stated in 1948. There is no intrinsic tension between Confucianism and human rights.³³⁾ I appreciate Wejen Chang(張偉仁)'s efforts to build up the Confucian theory of norms and human rights. He concludes that Western and Confucian ideas are conceptually compatible but practically different. He suggests a two-step approach for a good human life that people first learn the Confucian norms and become compassionate and respectful towards one another and then be assured that they have certain "rights".³⁴⁾

Chungying Cheng(成中英) of Hawaii University also tries to transform theoretic Confucian virtues into human rights in five ways. According to him, the modern West, in developing the notion of rights and duties, comes out of the Aristotelian tradition of virtue ethics, which A. MacIntyre hopes to reclaim. The point would be how to preserve the Confucian virtues while at the same time extrapolating from them an ethics of rights for modern society. Cheng argues the possible transformation of Confucian virtues into rights in the cultivation of virtue by individuals in a community with a view to awaking an individual sense of consciousness of duty to the community, which in turn should call forth an awareness of the individual's legitimate potential to participate in public affairs.³⁵⁾

in *Global Politics*, Cambridge Univ. Press, 1998; James C. Hsiung(ed.), *Human Rights in an East Asian Perspective*, N. Y. 1985.

32) Bookreview by Chongko Choi, in: *Philosophy East and West*, vol. 49, No. 3, 1999.

33) W. De Bary/Tu Weiming(ed.), *Confucianism and Human Rights*, Columbia Univ. Press, 1998, p. 313.

34) Wejen Chang, The Confucian Theory of Norms and Human Rights, in: *Confucianism and Human Rights*, 1998, p. 134.

35) Chungying Cheng, Transforming Confucian Virtues into Human Rights, *Confucianism and Human Rights*, 1998, p. 151.

It is worth while to observe how the Chinese legal scholars are trying to build up human rights theories based on traditional Confucian philosophy and ethics. In a book named *Human Rights and Chinese Values*(1995), the Chinese scholar Du Gangjian(杜綱建) tries to relate human rights to Chinese culture, naming the four paths of the Confucian *Analects* and the four principles of a New Theory of Benevolence.³⁶⁾ According to Du, the four principles derived from the *Analects* for the human rights are 1) human rights, 2) tolerance, 3) resistance, 4) constitutionalism. All together these comprise what he calls a “new benevolence theory”(新仁論), to compare with the classical Confucian theory. The classical components of the benevolence theory in the *Analects* include the paths of benevolence, tolerance, justice and government. Du argues the compatibility of Classical Chinese Confucian philosophy and modern principles of human rights. He emphasizes that the modern concept of human rights is not alien to Chinese soil. What strikes me is his earnest intellectual efforts to combine his thesis with G. Radbruch’s relativistic legal philosophy. He maintains, “G. Radbruch’s juristic theory has had a significant effect upon the development of legal culture and socio-economic reforms in modern East Asia”.³⁷⁾ It is very interesting that Radbruch’s relativistic jurisprudence is introduced as a progressive, liberal theory supporting human rights in the Socialistic People’s Republic of China.³⁸⁾

Korean legal scholars also are engaging actively in the discussion of human rights and practices. South Korea established a Constitutional Court in 1988 according to the German and Austrian model of *Verfassungsgericht* and is

36) Du Gangjian/Song Gang, Relating Human Rights to Chinese Culture: The four paths of the Confucian *Analects* and the Four Principles of a New Theory of Benevolence, in: Michael C. Davis(ed.), *Human Rights and Chinese Values: Legal, Philosophical and Political Perspectives*, Oxford Univ. Press 1995, pp. 35-55.

37) Du Gangjian, op. cit, p. 39; For discussion, Keifu Suzuki, *Human Rights and Relativism in China(Japanese)*, Tokyo, 1997; Joanne R. Bauer/Daniel A. Bell(ed.), *The East Asian Challenge for Human Rights*, Cambridge Univ. Press, 1999.

38) Koichi Miyazawa, G. Radbruch und die japanische Rechtswissenschaft, *Gedächtnisschrift für G. Radbruch*, Göttingen 1968; Arthur Kaufmann, G. Radbruch und die Koreanische Rechtsphilosophie, *Gedächtnisschrift für Zong Uk Tjong*, Tokyo, 1985; Chongko Choi, G. Radbruch und Ostasien, *Festschrift für Alexander Hollerbach zum 70. Geburtstag*, 2001 (Forthcoming).

preparing a Governmental Committee on Human Rights. As a divided nation, North Korea is still suffering severe damages in the reality of human rights. Nevertheless, human rights and dignity is considered to be the most important concept of Korean jurisprudence.³⁹⁾

We see here that East Asian legal philosophers are eager to reevaluate their cultural tradition positively, combining the rights and duties on the new level. They feel proud that they have a rich tradition out of which to propose theories of human rights and human duties.⁴⁰⁾ They try to suggest a new virtue-ethics and rights-responsibilities jurisprudence in their own tongue. Politically, it is understandable that Chinese and Korean jurists are trying to establish the human rights theories rather than theories of human responsibilities. The intellectuals are inclined by nature to resist the "dictatorial" political powers which ignore the human rights. Notwithstanding the current attention on human rights, I believe, they are basically acknowledging the primacy of human responsibility. It is known that East Asian scholars are actively engaged in drafting of a Universal Declaration of Human Responsibility 1998.⁴¹⁾

Conclusion

Frankly speaking, the East Asians of China, Korea and Japan have tried to find the differences rather than similarities and commonalities among themselves. Each of them has survived despite the struggles with other neighbor nations. Politically thinking, the mentality of these three nations are not comfortable and still uneasy. But if we consider from the broader perspective in comparison with European-American hemisphere, the East Asia is apparently a kinship-like "homeogenous" civilization based on rich spirit of Confucianism. The psychology of three brethren is competitive and full of

39) William Shaw(ed.), *Human Rights in Korea*, Harvard Univ. Press, 1991.

40) Suzuki Keifu(ed.), *Basic Rights Theories in Contemporary Korea*, Seibundo/Tokyo 1985; Chongko Choi, Asian Jurisprudence on Human Rights and Responsibilities, paper read at Lawasia Conference in Seoul 1999.

41) For details, see Chongko Choi, Human Rights and Human Responsibilities: An East Asian Perspective, paper read at IVR-Conference in New York 1999; Helmut Schmidt, *Allgemeine Erklärung der Menschenpflichten*, München 1997.

jealousy each other. If one see the half-filled glass of water, one may say “it is not yet half-filled”. But if he changes his viewpoint, he can safely say that it is already half-filled. At least the conscientious intellectuals should think and behave not politically but academically, and should reevaluate the common tradition of East Asian legal culture.⁴²⁾

This East Asian section of IVR is, I firmly believe, a good platform of dialogue for the East Asian jurisprudence. We can continue the regular dialogue meetings and extend to the dialogue with western jurists also through various programs. We should carry out the research program of legal languages, which can be shared commonly among three East Asian countries. Thus, we East Asian jurists could respond to the academic request from our Western colleagues.

42) For the discussion of East Asian community, see, Morishima Michio, Asian Economic Community, *Hallim Journal of Japanese Studies*, vol. 1, 1996, pp. 20-33; Kim Yongwoon, *Talking about the Past and Future of China-Korea-Japan Relations*(kor.), Seoul 2000.

<Abstract>

東아시아 法哲學의 基礎

崔 鍾 庫*

서 론

역사적 도시 南京에서 열리는 제3차 東아시아 法哲學會 모임에서 필자는 이 논문을 통해 東아시아 法哲學(East Asian Jurisprudence)의 기초를 두 가지 방향으로 설명하기로 한다. 첫째는 역사적 기초이요 둘째는 철학적 기초이다. 헌팅턴(S. Huntington)의 지적처럼 문명이 점점 중요한 역할을 하는 '이데올로기 이후' 시대에 이 '문명의 충돌'을 피하기 위하여는 東아시아도 global 혹은 glocal시대에 걸맞는 법철학을 정립하는 일이 중요하다.

I. 東아시아법의 역사적 기초

동아시아라 하면 과거에는 단지 지역적 개념으로 일반적으로 중국, 일본, 한국, 몽골, 티베트, 베트남을 가리켜 왔다. 그러나 근자에는 단순한 지역적 개념 이상으로 어떤 의미가 담긴 문명권으로 지칭되는데, 그것은 말할 필요도 없이 이 지역의 현저한 경제적, 사회적 발전과 관련된 것이다. 동아시아는 전통적으로 발달된 중국을 중심으로 中華秩序, 朝貢秩序 내지 冊封秩序를 이루어 왔고, 법도 중국법의 영향력이 강하였다. 대체로 동아시아법은 儒敎의 가치를 실현하기 위한 규범체계로서 필자는 동아시아 보통법(East Asian Common Law)이란 개념을 사용하면서 그 공통점을 추적하고 있다. 그 중요한 요소를 몇 가지 지적한다면;

1. 법전화(Codification)

중국의 唐律은 다른 동아시아 국가들에게도 수용되어 律令體制를 이루었다. 조선의 「經國大典」과 월남의 「黎朝刑律」 등 중요한 입법은 공통적으로 유교적 '지배도덕의 법적 강제'를 실천하고 있었다.

* 서울大學校 法科大學 敎授

2. 鄉約法

鄉約이란 1077년에 중국에서 呂氏 兄弟가 만든 것을 朱熹가 증보한 것인데, 조선에도 크게 영향을 주어 李退溪, 李栗谷같은 유학자들이 숭현하여 제정하였다. 일본에는 朱子社倉法이 소개되었고, 조선의 五家作統法, 일본의 五人組와 村掟 등 자치법들이 생겨 독특한 아시아적 사회연대성을 발전시키는 규범적 기초가 되었다.

3. 律 學

전통적으로 중국, 조선에서는 법학을 律學이라 불렀고, 일본에서는 明法道라 불렀다. 유교 經學에 비해 劣勢에 있었지만 나름대로 한 학문분야를 형성하고 있었다. 헨더슨(Dan Henderson)교수는 18세기 일본의 토쿠가와 막부(德川幕府)가 중국법과 조선법을 연구하려고 일종의 小繼受(mini-reception)를 이루었다고 분석한 바 있다. 여기에 중국인 朱舜之, 吳仁顯, 조선인 姜沆, 李眞榮, 李梅溪 같은 학자들이 기여하였다. 일본학자로는 사카키바라 코슈우(榊原篁洲), 다카세 기보쿠(高瀬喜朴), 아라이 하쿠세키(新井白石), 마에다 쓰나노리(前田綱己) 등이 유명하고, 특히 오규 소라이(荻生徂徠)가 「明律國字解」(1725)를 내어서 중국법을 일본에 이식하는 데에 큰 기여를 하였다. 거기에는 조선의 「大明律直解」와 「經國大典」이 참고되기도 하였다. 이토오 도오카이(伊藤東涯)가 「朝鮮官職考」와 「制度通」을 저술한 것도 그 증거이다. 중국에서 처음으로 「洗冤錄」(1249)이 조선과 일본에 공통적으로 法醫學書로서 재판의 과학적 기초를 제공해주었다.

이러한 전통적 律學 내지 明法道는 儒學이 기초를 이루고 있었는데, 중국은 차치하고 조선의 李退溪에서 丁茶山에 이르는 儒學 내지 實學은 상당한 법적 관심을 나타내준다. 또 일본의 오규 소라이는 유교를 經世學으로 발전시켜 反朱子的 경향을 보여 주었음을 마루야마 마사오(丸山眞男)교수는 잘 분석해 주었다. 안도오 쇼에키(安藤昌益)의 「法世物語」 역시 독특한 人間法과 自然法의 사상을 동물의 세계를 통하여 비판적으로 흥미있게 전해주고 있다. 丁茶山이 오규 소라이와 이토오 진사이(伊藤仁齋), 다자이 슌다이(太宰春台) 같은 일본학자들의 책을 읽고 “이제 일본을 걱정하지 않아도 된다”고 까지 말한 것은 이러한 동아시아적 儒學의 共感에서 나온 것이라 하겠다.

II. 법철학적 기초

그렇다면 이러한 역사적 기초 위에 형성된 동아시아법이 법철학적으로 어떤 방향으로 나아가야 할 것인가? 이것이 ‘포스트모던 시대’의 동아시아 법철학의 존재의의

와 과제라 할 것이다.

1. 법의 개념

동아시아에서는 법(law)을 法이라는 글자로 쓰는데, 이것은 원래●자의 略字이고, 그 의미는 고대 중국의 재판제도와 관련된다. 언어학자들의 연구에 따르면, 같은 法字를 두고 중국인은 fa, 한국인은 bob, 일본인은 ho라고 발음하는데, 원래는 piwap→fwap→fat→fa(bop, ho) 등으로 발음이 변해왔다는 것이다(한국의 bob이 가장 오랜 중국어 발음에 가깝다고 보여진다). 아무튼 이 말은 기준, 모범, 본이란 뜻을 갖는데, 서양법철학에서도 법은 Sein과 Sollen의 합치(A. Kaufmann) 내지 사물의 본성(Natur der Sache)으로 설명하듯이, 동아시아의 원래의 법개념도 존재에 기반을 둔 당위로 설명되어질 수 있다.

2. 正法과 善法

동양인의 眞善美觀은 서양과는 다르며, 正義觀 역시 이러한 동양적 가치관에 기초하여 재검토되어야 할 것이다. 그런 면에서 동아시아 법철학은 正法을 넘어서 善法の 이념까지 내다본다고 하겠다.

3. 法과 이데올로기

서양의 법철학, 정치철학, 사회철학에서 자유주의(Liberalism) 대(對) 공동체주의(Communitarianism)의 논쟁이 활발한데 동양의 유교적 전통은 이 중 어느 이데올로기 내지 세계관과도 동일시 할 수 없고 자유주의적-공동체주의를 기초로 하여 바람직한 법철학의 방향을 모색해나갈 수 있을 것이다. 이것이 동아시아적 민주주의와 법치주의의 정신적 기초가 되어야 할 것이다.

4. 환경적 합리성

아시아의 사상적 전통은 환경친화적임은 다 아는 사실이거니와 이러한 환경적 합리성(ecological rationality)을 기초로 법이론과 법철학을 재구성해야 할 필요가 있다.

5. 法美學

법이 단순히 논리와 개념 조작이 아니라 미학적 합리성(aesthetical rationality)도 떼어놓을 수 없는 측면이다. 라드브루흐(G. Radbruch) 법철학이 동아시아에서 크게 공명을 얻는 것도 범미학적 측면을 통해서이며, 법의 미학적 측면은 분명히

동아시아법 철학을 통하여 더욱 발전될 수 있을 것이다.

6. 인권과 인간책임

과거부터 유교는 인권을 부정적으로 평가했다고 보고, 서양은 동아시아의 인권관을 비판하여 왔다. 그러나 근년의 논의를 보면 유교와 인권을 결코 모순되는 것이 아니다. 유교적 인권론은 창웨옌(張偉仁), 첩충잉(成中英), 두강잔(杜綱建) 같은 학자들에 의해 재구성되어 동아시아 인권법사상을 보여주고 있다. 한국에서도 인권론이 법철학의 중요논제가 되어 있다. 그런데 동아시아 법철학은 인간의 권리만이 아니라 책임과 의무를 동시에 중요시하기 때문에 권리와 책임이 적절히 연결되는 법철학을 개발하고 있다.

결 론

지금까지 절반이 찬 물컵을 보고 절반이 아직 안 찼다고만 보고 절반이나 찬 모습을 보려고 하지않은 것이 동아시아법학의 현실이다. 절반이나 찼다고 긍정적으로 보아야 점점 더 차게 될 것이다. 동아시아는 정치적으로 침략과 전쟁의 아픔도 포함한 역사를 갖고 있기 때문에 정치적으로 생각하면 매우 복잡하고 어려운 관계이다. 그러나 이제부터는 문명사의 전개를 보다 넓은 시각에서 바라보며 동아시아 문명에 대한 자긍심을 살려 나가야 한다. 전통에 대한 긍정적 재해석은 중요한 과제이다. IVR 동아시아학회는 그 중 중요한 대화의 광장으로, 서양학자들이 궁금해하면서도 할 수 없는 역할과 몫을 이제부터라도 제대로 감당해야 할 것이다.