

〈논 문〉

Ancient Foundations of East Asian Jurisprudence

— Confucianism, Legalism and Taoism —

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Foreword

In the age of “Globalization,” the most important factor in the world politics seems to be the civilizations, not the ideologies, as Samuel Huntington eloquently asserts. With the magnificent emergence of the Chinese civilization on the world stage, many people, including intellectuals, pay attention with great interest to East Asian civilization.¹⁾

If you read books on Chinese philosophy, you may find that almost all the books overwhelmingly discuss ancient philosophies like Confucianism, Taoism, Legalism and “Hundred Schools”. This fact shows the richness of ancient philosophy and how it played continuously an important role in Chinese history. It applies not only to China, but also to Korea and Japan, perhaps to the whole of East Asia.

I am currently trying to build up the concept of East Asian jurisprudence.²⁾

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1) As the recent publications, Gina Barnes, *China, Japan, Korea: The Rise of Civilization in East Asia*, London, 1993; Warren Cohen, *East Asia at the Center: Four Thousand Years of Engagement with the World*, Columbia Univ. Press, 2000; Charles Holcombe, *The Genesis of East Asia: 221BC-AD 907*, Uni. of Hawaii Press, 2001.

2) Chongko Choi, Foundations of East Asian Jurisprudence, *Seoul Law Journal*, Vol. 41. No. 1, 2000, pp.60-76; Chongko Choi, The Development of East Asian Law till the End of 18th Century, *Law in History*, Vol. 1, 2000, pp.21-55; Chongko Choi, Foundations of Law and Justice in East Asia, *Comparative Law*, Vol. 18, 2002, Nihon University, pp.1-17.

For this work, its ancient foundations are the most important and everlasting part. Nevertheless, there is still a limited amount of research in regard to East Asian jurisprudence written in Western languages. In this article I want to present a brief overview of ancient East Asian jurisprudence, especially from the point of Confucianism, Legalism and Taoism, because the relationships among these three philosophical mainstreams form the fundamental paradigms of East Asian jurisprudence.

I. Mythology of East Asia

Almost all worldly things go back ultimately to myths, because myths provide an archetype of the meaning of things. Therefore, every state has its founding mythology. A State founding mythology has a premordial legal meaning of transforming the chaos to the cosmos.

China has several myths, which are contained in the *Book of History (Shiking)*. The canons of Yao and Shun purport to relate the events and pronouncements of the sage-kings Yao and Shun who reigned around the 22nd century BC. Although there is little possibility they represent any such antiquity, they have, until recent times, been accepted by most Chinese as accurate accounts of these earliest times. Furthermore the virtue, wisdom, and humility which characterized these ancient rulers and their administration, and particularly their practice of passing over their own sons in selection of a successor from among the worthy men from among the people, have been held up as ideals to guide succeeding ages.³⁾

The Tan'gun mythology of Korea is an example of how the perception of the cosmos relates to totemism, taboos, and law. The myth follows:

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 among three great mountains to descend upon Taebaek Mountain

3) For details, Anne Birrell, *Chinese Mythology: An Introduction*, London, 1993.

and saw that mankind would greatly benefit over mankind. 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, the preservation of life, the curing of disease, punishments, 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 which lived together in a cave. They prayed incessantly of 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 if you do not see light for one hundred days, you will become men." At the end of three times seven days, the bear became a woman. The tiger, which could not endure, did not become a man.

As there was no one with whom the woman Ungnyo [Bear-woman] could marry, she went constantly to the base of the Sacred Sandlewood Tree to pray for a child. Hwanung changed his mind and married 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 or as Asadal. He governed [the nation] for 1,500 years.⁴⁾

This Tan'gun mythology provides the basis for the Korean ideal of giving benefit to mankind (*Hongik Ingan*) based on this. This ideal is designated into the first article of Education Law (1951) of Republic of Korea.

The Tan'gun myth must be compared to the foundation myth of the imperial house of Japan. An outline of the myth provided below is based upon the story contained in one of the two oldest surviving Japanese historical

4) Ilyon, *Samguk Yusa: Legends and History of the Three Kingdoms of the Ancient Korea*, tr. by Ha Tae-Hung, Yonsei Univ. Press, Seoul, 1972, pp.32-33.

works, the *Kojiki* [Records of Ancient Matters]. The narrative of the *Kojiki* is a compilation of various myths, legends, and historical notes which have been woven together into a single document to form an official record of Japan from its mythological roots until the time of its composition. Completed in 712 the *Kojiki* contains the earliest version of the Myth of Jinmu, the foundation myth of the imperial family. Like the Myth of Tan'gun, this myth explains the origins of the ruling house, the beginnings of the state, and how the various noble families were related or connected to the imperial family.

1. Decision of the Sun Goddess: The Sun Goddess has a discussion with her spouse and decides to send a son down to earth to establish his rule there.
2. Change of Descender: At the suggestion of the Sun Goddess's son, his second son, is designated to take his place in the descent to earth.
3. Spirit Offers Self as Attendant: Unexpectedly, a spirit offers to accompany the grandson of the Sun Goddess on his descent.
4. Gift of the Sacred Regalia and Selection of the Grandson's Retinue: Before her grandson descends to earth, the Sun Goddess gives him three sacred regalia representing his authority to rule, and selects the retinue of gods who will accompany him.⁵⁾
5. Descent to Earth: The grandson of the Sun Goddess descends to earth on the top of a mountain.
6. Union of Heaven and Earth: The grandson of the Sun Goddess sets off from his base on a long journey eventually encountering the daughter of an earth spirit whom he marries.
7. Birth of a Successor: The grandson's wife gives birth to a child who becomes the prime ancestor of Jinmu, founder of the Yamato state.⁶⁾

5) This is an important subject of legal symbolic in Japan, Chongko Choi, *Popsangjinhak iran Muot'in'ga(What is Legal Symbolics)*, Seoul, 2000; Iwatani Juro and Others, *Hoto Seigino Iconology(Iconology of Law and Justice)*, Tokyo, 1999.

6) *Kojiki*, kan 1, Parts 33-38, This condensed formulation is based on J. Grayson's articles mentioned below.

The narrative describes the primal ancestors of various clans, and discusses the origin of various local cultic activities and the relationship of members of the imperial descent retinue with these cults. Thus, the Myth of Jinmu and the Myth of Tan'gun are remarkably similar both in structure and use of narrative motifs. In particular, two diagnostic motifs of the Myth of Tan'gun are shared in common: the motif of the three sacred regalia, and the divine ruler as being a second, secondary or younger son. This would suggest that there must have been a very close relationship between the ruling house of Ancient Choson, which traced its descent to a figure called Tan'gun and to the ruling family of the state which claimed Jinmu as its progenitor.⁷⁾

II. Origin of Law

In Western jurisprudence also, the concept of law is an important part of legal philosophy. As Immanuel Kant said, legal philosophers seem to be still flying to seek the concept of law. The concept of law seems to have some delicate variation in European and Anglo-American jurisprudence. The concept of *Recht* seems rather to be inclined to the *Richtigkeit*, i.e. the internal quality of a right law. The Anglo-American *law*, which is developed from the old Germanic word *lag*, seems to indicate a status that is rightly located.

East Asian people all use the same letter for law; that is 法.⁸⁾ The Chinese pronounce 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), 廌(unicorn) and 去(going). A mystical animal, *hsieh*(unicorn), was used in ancient Chinese ordeals to strike the guilty party with a single horn. According to the *Lun Heng*, written in the first century,

7) James H. Grayson, Three Structural Patterns of Korean Foundation Myths, *Acta Koreana*, Vol. 5, No. 2, 2002, pp.1-24.

8) Luke T. Lee and Whalen W. Lai, The Chinese Conception of Law: Confucian, Legalist and Buddhist, in: Csaba Varga (ed.), *Comparative Legal Cultures*, NYU Press, 1972, pp.1307-1329; Chongko Choi, Concept and Symbol of Law in East Asia, a paper read at IVR-Congress in Amsterdam, June 19-25, 2001.

the *hsieh* is a sheep with a single horn. So, this supernatural animal is the symbol of justice. According to recent research of the philologists, the original letter was pronounced in ancient Northern Chinese as *piwap* → *fwaf* → *fa* in China. Korea seems to have preserved the most original pronunciation. It is known that the Japanese alphabet pronounced *h* same as *f* till the 17th century.⁹⁾ These factors indicate that this Chinese letter for law was accepted by both Korea and Japan. The reception of Chinese law in Korea, Vietnam and Japan provides the basis for a great research task for East Asian legal scholars. In this context, I have emphasized the concept of East Asian Common Law(*Ostaisatisches Jus Commune*).¹⁰⁾

We may ask; was there any word for law in Japan and Korea before the reception of Chinese law (*fa*)?

Koreans did use the word *bon* for that purpose but it is less clear how precisely this word was used for law and just when it disappeared. A Korean legal historian maintains that the word *bon* was spoken during the Silla dynasty(BC 57-AD 935).¹¹⁾ 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 *nori*. This word is a noun form of a verb *noru*, which refers to the behaviors of the Shamans. The other important word for the religious behavior of the old Shinto clergy is *hahuri*. As indicated above, the old Japanese *fafuri* was same as *hahuri*, as Roy Miller maintains in his interesting research book. According to him, *fa* is an old word for law, and *furi*(←*puri*) is the ritual of the Shamans in the Korean language. So, *hahuri* means originally a ritual of law.¹²⁾

9) Roy Miller, Chinese 法 in Altaic: A Further Note, *Journal of the American Oriental Studies*, Vol. 118, No. 2, 1998, pp.268-273.

10) Chongko Choi, Foundations of Law and Justice in East Asia, *Comparative Law*, Vol. 18, Nihon University, Tokyo, pp.1-17.

11) Bong Duck Chun, Wesen und Struktur des Koreanischen Rechts, *Koreanica: Festschrift für Andre Eckardt zum 75. Geburtstag*, Baden-Baden, 1960.

12) Roy Miller & N. Nauman, *Altjapanisch Fafuri; Zur Priestertum und*

Western scholars have asserted that the East Asian concept of law is secular and so without relationship to any religion. They seem to have a fixed “secular” image of Confucianism or East Asian wisdom in their minds. There is no evidence for a god-made law in China, such as the law of Hammurabi, Manu, or Moses. But the above-mentioned facts indicate that the origin of law in East Asia also has some religious character, even though East Asian religions are different from the Western Christianity. This Shamanistic law has become “secular” in its historical development in contact with Confucianism (“Confucianization of law”).¹³⁾

III. Confucianism

When we talk about East Asian law, the spiritual or moral background is usually connected with Confucianism. There are two generally accepted usages of the term Confucianism: Firstly, Confucianism is the name given to the political philosophy first espoused by the rulers of China in the early Han period, and the theoretical basis of imperial government until its rejection as outmoded in the early twentieth century. It was interpreted and crystallized by scholars and officials such as Mencius, Xunzi, Tung Chungshu as principles and ideas attributed to Confucius emphasizing the ruler's duty to set a moral example and govern in the interests of the populace.

In practice, and as time went by, it developed characteristics going far beyond anything conceived by the Master himself. It defended the right of the people to rebel against an unjust ruler and continually recognized the imperative of high moral standards in government. But in its accommodation with legal codes and harsh punishments, it revealed that imperial Confucianism

Schamanismus im vorbuddhistischen Japan, Mitteilungen der Gesellschaft für Natur- u. Volkerkunde Ostasiens, Vol. 116, Hamburg, 1991; 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.

13) Derk Bodde & Clarence Morris, *Law in Imperial China*, Harvard Uni Press, 1967, pp.27-29.

had learned many lessons from Legalism. In particular, it overlooked Confucius' dictum that the moral and political implications of names and titles should be understood and practiced and that rites and ceremonies should be simplified for the sake of economy and to draw attention to their underlying meaning. On the contrary, they became complex, costly, and self-justifying. Under the Han emperor Wudi Confucian books were selected as the basis of the education and selection system aimed at producing government officials, so that the political fortunes of Confucianism seemed to be guaranteed. The state cult of offering sacrifices to Confucius was first begun under Emperor Han Guangwu in AD 37. However, it failed to produce any original thinkers in the Later Han and proved weak at countering Buddhist ideas, and politically it was undermined by the eunuchs and the clans belonging to senior court women in the second century AD. During the Northern and Southern Dynasties it was rivaled by Taoism and Buddhism, until its revival was begun in the Tang by Li Ao and Han Yu and completed in the guise of Neo-Confucianism during the Sung.

Secondly, Confucianism means the social philosophy and system that has shaped the outlook and behavior of the Chinese people from the Warring States period to the present day. Based on concepts of the family and state which predate Confucius, the Confucian Classics defined exact details of social behavior and particularly exalted filial piety, stressing the mutual obligations of superior: inferior enshrined in the Five Relationships of father: son, ruler: minister, elder brother: younger brother, husband: wife and friend: friend. These were also extended to the traditional system of inter-state relations. Concepts such as male superiority, respect for generational seniority, and mutual responsibility underlay the development of the clan system in the Sung period. Confucianism was not a religion and had no priesthood or liturgy. The statues to be found in its temples were dedicated to a variety of deities, especially those of local heroes, and Confucius himself was not treated as a god. The spiritual side of Confucianism was in the hands of the clan or family head, whose responsibility was to worship before the memorial tablets

of deceased ancestors and to maintain appropriate sacrifices to them. Towards the end of the twentieth century, the adjective Confucian has been used in a vague and general way to describe the traditional societies in those parts of East Asia which have been influenced over the centuries by Chinese thought, including Japan, Korea, Vietnam and Singapore. Korean historian Koh Byong-Ik said, "All Koreans are Confucians", citing a theologian who confesses that "Our Christians are Confucians dressed in Christian robes."¹⁴ E. Reischauer said, "Almost no one considers himself a Confucianist today, but in a sense almost all Japanese are."¹⁵

Confucianism contains many values, principles, especially many "practical reasons". The ancient philosophers like Confucius and Mencius did not develop the sophisticated theoretical reasons and theories existing today. Theorising and philosophizing is always the tasks of the later scholars and philosophers, even in Western civilization. Below are descriptions of some basic Confucian principles and values, which are relevant to the jurisprudential considerations.

1. Humanity(*jen*) and Righteousness(*yi*)

The most important and salient value in Confucianism is perhaps humanity or benevolence called *jen*(Kor. *In*, Jap. *ren*). Confucian jurisprudence might be called basically as a humanistic jurisprudence. Taking an optimistic view of human nature, East Asian thinkers thought that all human institutions, including law, should be humanistic and benevolent as possible. This basic view was in some sense dangerous for the development of the social institutions. They did not ignore the necessity and the importance of the institutions, but believed that the institutions must be controlled by the good human nature and will.

Righteousness (*yi*) means the "oughtness" in a situation. It is a categorical

14) Koh Byong-Ik, *Confucianism in Contemporary Korea*, Tu Wei-Ming, ed, *Confucian Traditions in the East Asian Modernity*, Harvard Univ. Press, 1996, pp.191-201.

15) E. Reischauer, *The Japanese Today*, Harvard, 1955, p.204.

imperative. *Yi* (righteousness) and *li* (profit) are in Confucianism diametrically opposed terms. The idea of *jen* is more concrete, but that of *yi* is rather formal. The formal essence of the duties of man in society is their “oughtness”, because all these duties are what he ought to do.¹⁶⁾

2. Rites or Propriety(*li*)

The purpose of both the Confucian and the Legalist Schools was the maintenance of the social order. The Confucian school denied that uniformity and equality were inherent in any society. They emphasized that differences were in the very nature of things and that only through the harmonious operation of these differences could a fair social order be achieved. The fair relationship of these differences is called as *li* [propriety or rites]. The *li*, which may be defined as the rules of behavior varying in accordance with one's status defined in the various forms of social relationships, were formulated by the Confucianists. The Confucianists trusted that such differentiations would finally lead to a realization of their ideal society based upon the principle of “human relationship”. Confucius laid the greatest emphasis upon the fine human relationships. Manifestly the so-called *wu-lun*, the five human relationships, are but concrete types of reciprocal relationships decried from the more general categories of “noble and humble”, “superior and inferior”, “elder and younger”, “near and remote”.

The *li*, originally meaning the desirable behavior of human kinds, has changed its meaning according to the historical development of the society. It has played the role of a middle axiom between law and morality. It became gradually more legalized, so could be called as a “legalized [formalized] morality”.¹⁷⁾

16) Tu Weiming, *Li as Process of Humanization; The Creative Tension between Jen and Li*; Bothe articles are contained in his book, *Humanity and Self-Cultivation*, Berkeley, 1979, Boston 1998.

17) In detail, Chongko Choi, *Hanguk Popsasangsa(History of Korean Legal Thoughts)*, Seoul Nat. Univ. Press, 2002, pp.107-110.

3. The Doctrine of Mean(*Chung Yung*)

The *Chung Yung* is composed of the elements “centrality” (*chung*) and “normality”(yung). The translation “The Mean” suggests the fundamental moral idea of moderation, balance, and suitability. But in this the concept goes much deeper, denoting a basic norm of human action that, if comprehended and complied with, will bring man and his actions into harmony with the whole universe.

The second important concept is that of *chung*, sincerity or faith. In one sense *chung* represents the fullness of virtue corresponding to Confucius' concept of humanity(*jen*), sincerity being that moral integrity whereby the individual becomes a genuine or real man. The purpose of *The Mean*, however, is precisely to relate what is most essential and real in man to the underlying reality or truth of the universe. Human virtue does not exist or act in a sphere all its own, the ‘ethical’ sphere, which is distinct from the metaphysical. The moral order and the cosmic order are one, and through ethical cultivation of the individual not only achieves human perfection but also realizes himself in a mystic unity with Heaven and Earth. In this way sincerity, as an active and dynamic force, works for the realization not only of man but also of all things. It is the underlying metaphysical principle, corresponding to the ‘Way’ of the Taoists.

4. Ractification of Names(*Ching-ming*)

In regard to society, Confucius held that in order to have a well-ordered one, the most important thing is to carry out what he called the rectification of names(*Ching-ming*). That is, things in actual fact should be made to accord with the implication attached to them by names. Once a disciple asked him what he would do first if he were to rule a state, whereupon Confucius replied: “The one thing needed first is the rectification of names”(Analects, X III, 3). On another occasion one of the dukes of the time asked Confucius the right principle of government, to which he answered: “Let the ruler be ruler, the minister minister, the father father, and the son son”(Analects, XII, 11).

In other words, every name contains certain implications that constitute the essence of that class of things to which this name applies. Such things, therefore, should agree with this ideal essence. The essence of a ruler is what the ruler ideally ought to be, or what, in Chinese, is called ‘The way of the ruler’. If a ruler acts according to this way of the ruler, he is then truly a ruler, in fact as well as is name. There is an agreement between name and actuality. But if he does not, he is no ruler, even though he may popularly be regarded as such. Every name in the social relationships implies certain responsibilities and duties. Ruler, minister, father, and son are all the names of such social relationships, and the individuals bearing these names must fulfill their responsibilities and duties accordingly.

5. Tolerance and Reciprocity(*shu*)

In the *Analects* we find the passage: “When Chung Kung asked the meaning of *jen*, the Master said: ‘...Do not do to others what you do not wish yourself...’”(XII, 2). Again, Confucius is reported in the *Analects* as saying: “The man of *jen* is one who, desiring to sustain himself, sustains others, and desiring to develop himself, develops others. To be able from one's own self to draw a parallel for the treatment of others; that may be called the way to practice *jen*”(VI, 28).

Thus the practice of *jen* consists in consideration for others. “Desiring to sustain oneself, one sustains others; desiring to develop oneself, one develops others”. In other words: “Do to others what you wish yourself”. This is the positive aspect of the practice, which was called by Confucius *chung* or ‘conscientiousness to others’. And the negative aspect, which was called by Confucius *shu* or ‘altruism’, is: “Do not do to others what you do not wish yourself”. The practice as a whole is called the principle of *chung* and *shu*, which is ‘the way to practice *jen*’.

This principle was known by some of the later Confucianists as the ‘principle of applying a measuring square’. That is to say, it is a principle by which one uses oneself as a standard to regulate one's conduct.

(1) Confucius(550-479 BC)

Many are the stories told of Confucius; few are the facts. The life of Confucius is peculiarly human and undramatic.¹⁸⁾ He was born in 551 BC in the small state of Lu in Shantung peninsula. His ancestry is uncertain; some say he was of noble birth, a scion of the ruling Sung house. His family name was K'ung, his personal name Ch'iu, "Confucius" is the Latinized name of "K'ung Fu-tzu" or "Master K'ung." With energy and utter selflessness, Confucius set about to bring order and peace to his age. He believed that his place was in the world of politics and with almost pathetic persistence he sought through the states of China for a ruler who would be willing to employ him and his ideas in the government. He managed to find employment for a while in his native state of Lu and, according to tradition, rose to a fairly high position. But his success was short-lived; on the whole his political career was a failure, and more and more he turned his attention to the teaching of young men who, he hoped, might succeed in public life where he had failed. Judging from all accounts he was a teacher of rare enthusiasm and art; he was said to have had some three thousand students, of whom seventy-two were close personal disciples or known for their virtue. He must have been married. In his old age he retired to devote himself, so tradition says, to the editing of the texts of the Classics.

Confucius criticized the government practiced by its court, which he regarded as usurping the rightful authority of the Zhou dynasty. He sought a political career with a view to rectifying corrupt institutions but (despite later stories which credit him with holding professional appointments) achieved no prominence in his lifetime, and made his living as a private tutor. By training gentlemen (*junzi*) he hoped that his ideas would permeate court circles and influence the ruler. His teaching materials included the current editions of the *Shijing*, the *Shujing* and the *Yijing*, which he interpreted and may have indirectly edited, though he was not responsible for writing either these or the

18) H. G. Creel, *Confucius: The Man and the Myth*, New York, 1949: I omit many biographies of Confucius.

Spring and Autumn Annals as was later claimed by his apologists. His professed aim was to recreate what he believed to have been the golden age of the early Zhou, ruled by the sage Kings Wen, Wu and the Duke of Zhou, but the subjects on which he concentrated inevitably stemmed from and reflected the concerns of his own day, and contributed to the profound social and bureaucratic changes affecting the central states in the fifth century BC. A handful of his disciples are known by name, and it may be they who began the compilation of the book of sayings, the “Analects” later attributed to him. The emphasis of his teaching lay on the responsibility of the king and ruling elite to set a high moral example which would be followed by their subjects, enabling men of any background to realize their full potential as members of a peaceful and just society. It did not comprise a systematic statement of a comprehensive ethical or political philosophy, and by its refusal to be dogmatic was open to wide variation in interpretation by later generations. Its chief concern was with the following of the Way (*tao*) and the pursuit of Goodness or Humanity (*jen*).

Tzu Kung asked: “Is there any one word that can serve as a principle for the conduct of life?” Confucius said: “Perhaps the word ‘reciprocity’: Do not do to others what you would not want others to do to you.”[*Analects XV: 28*].¹⁹⁾

Confucius said: “Perfect indeed is the virtue which is according to the Mean. For long people have seldom had the capacity for it”.[VI: 27]

Confucius said: “It is man that can make the Way great, not the Way that can make man great”.[XV: 28]

Tzu Chang asked Confucius about humanity. Confucius said: “To be able to practice five virtues everywhere in the world constitutes humanity”. Tzu Chang begged to know what these were. Confucius said: “Courtesy, magnanimity, good faith, diligence, and kindness. He who is courteous is not humiliated, he who is magnanimous wins the multitude, he who is of good faith is trusted by the people, he who is diligent attains his objective, and he who is kind

19) Arthur Waley, *The Analects of Confucius*, London, 1938: D. C. Lau, *Confucius: The Analects*, Penguin, 1979.

can get service from the people”.[XVII: 6]

Chi K'ang Tzu asked Confucius about government. Confucius said: “To govern (*cheng*) is to set things right (*cheng*). If you begin by setting yourself right, who will dare to deviate from the right?”[XII: 17]

Confucius said: “Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum, and the people will have a sense of shame, and moreover will become good”.[II: 3]

Chi K'ang Tzu asked Confucius about government, saying: “Suppose I were to kill the lawless for the good of the law-abiding, how would that do?” Confucius answered: “Sir, why should it be necessary to employ capital punishment in your government? Just so you genuinely desire the good, the people will be good. The virtue of the gentleman may be compared to the wind and that of the commoner to weeds. The weeds under the force of the wind cannot but bend”.[XII: 19]

Max Weber pointed once that the logic of Confucius seems like that of the Indian tribe chief.²⁰⁾ The logic might sound so, but the meaning and instructions of Confucius give still the deep relevance to the East Asian people.

(2) Mencius(371-289 BC)

Mencius was a philosopher who offered advice to the Kings of Wei and Qi in pursuit of peace and unification. He saw himself as a defender of Zhou traditions and the inheritor of the mantle of Confucius, but his ideas were more systematic and went beyond those of his master. He described the humanitarian attitudes and measures that he believed to be typical of ideal kingship in the tradition of the Former Kings, and condemned the policies of the hegemon who acted in the interests of self-aggrandizement. As a pacifist, he tried unsuccessfully to persuade Warring States leaders that measures dedicated to economic and cultural development would bring them more

20) Max Weber, *The Religion of China: Confucianism and Taoism*, ed. By Hans H. Gerth, London, 1964.

success than military expenditure. He raised filial piety to an unprecedented level of significance, and his aim was that all men should be sufficiently educated and have enough spare time to care for their parents in their lifetime and their spirits after death. The possession of a mind distinguished man from animals, and Mencius saw filial piety as the ultimate manifestation of the four natural “germs” - the powers of commiseration, shame, deference, and discrimination. When nurtured, they would produce the four distinguishing human characteristics, *jen*(sympathy or benevolence), *yi*(righteousness), *li* (propriety) and *zhi*(wisdom). He believed that man was instinctively good, though his innate potential was veiled and only with education could man realize his *benxing*(original nature).²¹⁾

Like Confucius, Mencius based his teachings upon the principle of *jen* or humanity, to which he added a second concept, *yi*(righteousness) and *li* (propriety). Mencius' rival, Mo Tzu, had insisted that equal love should be shown to all men. Mencius argued, however, that in practice one's love for others could not help but be expressed in varying measure according to the degree of personal relationship; that is, according to what is proper and suitable in view of the other person's position and the extent of one's obligation to him. *I*, however, implies a much stronger sense of duty and commitment than our rather mild term ‘propriety’. On the other hand, when using ‘righteousness’ for *yi*, we should keep in mind that we are dealing with a sense of obligation intimately abound up with social relations, not an adherence to universal or Divine moral law such as the word ‘righteousness’ tends to connote in the Western tradition.²²⁾

Mencius was even more insistent than Confucius that it was these moral qualities of humanity and a sense of duty that mark the true ruler. The governor exists for the sake of the governed, to give the people peace and

21) Irene Bloom, Mencian Arguments on Human Nature(*Jen-hsing*), *Philosophy East and West*, Vol. 44, 1994, pp.19-53.

22) Vincent Y.C. Shih, Metaphysical Tendencies in Mencius, *Philosophy East and West*, Vol. 12, 1963, pp.319-341.

sufficiency, and to lead them by education and example to the life of virtue. The ruler who neglects this responsibility, or worse, who misuses and oppresses the people, is no true ruler and the people are hence absolved of their fealty to him. It is this championship of the common people and their right of revolution that has caused *Mengzi*(Book of Mencius) to be regarded by some rulers as a dangerous book.

(3) Xunzi(c. 298-238 BC)

Xunzi was a Confucian philosopher from the state of Zhao called Xun Qing. Popular during the Han, he was later eclipsed by Mencius. Xunzi represents a more rationalist approach than the idealist Mencius and was influential in the development of legalist thinking in the third century BC (Han Feizi and Li Ssu were both his students).²³⁾ Xunzi is best known for his rejection of Mencius' assertion that human nature *xing* is good, arguing that our inherent tendency is towards evil and any goodness is externally imposed. Although he and Mencius may appear as polar opposites, in this respect what they advocated was very similar. Both believed in the perfectibility of man through education, emphasizing the role of the traditional Confucian virtues and supporting the same paternalistic, hierarchical social structure. However, Xunzi's rationalism emerges in his greater emphasis on the virtue of *zhi* (wisdom) and his more naturalistic concept of Heaven. This rejects even the limited role of a purposeful supreme force envisaged in Mencius' 'mandate of Heaven' and is consistent with Xunzi's affirmation of the badness of human nature. This badness of human nature is not, as in the Christian tradition, the result of the existence of a force for evil, but rather that blindly satisfying the desires of our sense organs leads to social conflict. Xunzi's view of Heaven has parallels with that of the Taoists but his view on man and society puts him firmly in the Confucian camp. Xunzi's writings are much admired and mark a considerable advance on the dialogue form of earlier works. Although

23) Barton Watson, *Hsun Tzu: Basic Writings*, Columbia University Press, 1963, 1996.

Xunzi was very influential in the Han, he was not regarded by later scholars, especially the Neo-Confucians, as part of the orthodox line of transmission of Confucian thought, and the text remained in relative obscurity until the nineteenth century when a reappraisal began to take place.

Xunzi emphasized the role of *li* in the human society. He asserts: “The young serve the old; the inferior serve the noble, the degenerate serve the worthy. — This is the pervading rule of the universe”.²⁴⁾ He maintains further, “Wherein is it that man is truly man? Because he makes distinctions. ... Hence the way [*tao*] of human life cannot be without its distinctions: no distinction is greater than social divisions: no social division is greater than the rule of proper conduct [*li*].”²⁵⁾

(4) Tung Chungshu(c.179 — c.104 BC)

Though never achieving a high government post, Tung is closely associated with the establishment of Confucianism as the state cult during the Former Han dynasty. In practical terms, he it was who together with Gongsun Hong is said to have been behind the foundation of the Imperial Academy in 124 BC. Yet his ‘Confucianism’ was neither that of the Confucius or Mencius themselves, nor of Xunzi. It is for his ideas on the nature and functioning of government as a part of the natural order of yin-yang and the Five Elements, and the mutual interaction of Heaven and earth that his reputation has survived the strongest. As a New Text scholar his name is linked with the authorship of the *Chunshu Fanlu*, though three of his memorials recorded in the *Hanshu* may give a more precise indication of his political views.

He believed that the ruler was an intermediary in relations between Heaven and earth, that omens and portents were a warning of Heaven's displeasure with the government, and that it was possible to influence Heaven - and thereby, for example, the weather by the performance of proper rites. In common with other early Han political theorists he regarded the connection

24) H. H. Dubs, *The Works of Hsuntze*, London, 1928, p.89.

25) H. H. Dubs, *ibid.*, pp.71-72.

between ritual music, good government and the proper balance between Heaven, earth and man as axiomatic. He opposed the unlimited accumulation of large private estates at the expense of the poor. He openly criticized the Qin regime and his own Emperor Han Wudi.

Whereas Confucius delves deeply into the human situation and all but ignores the physical world, and whereas Laotzu wishes to return to nature and withdraw from society, Tung Chungshu formulates a theory of the unity of nature and man, of the cosmic and the human order — a theory that serves as a Jacob's ladder conflicting the starry heavens above and the mortal beings below. The social and political philosophy of Tung is metaphysical in the sense that it constitutes an integral part of the philosophy of things. In Tung's system, human beings and things are treated in like manner, and the fabric of the state and society is considered analogous to the structure of the universe. Man is a microcosm, the shape and form of which corresponds to the frame of the macrocosm, and the human world is a replica of the physical universe.²⁶⁾

The universe, according to Tung, is a grand unity, which manifests itself through the duality of positive and negative ether, which in turn expresses itself through the quaternity of spring, summer, autumn, and winter. The positive ether begins to swell in spring and reaches its maximum quantum in summer; the negative ether begins to swell in autumn and reaches its maximum quantum in winter. When the positive swells, the negative shrinks; when the negative swells, the positive shrinks. As the positive and the negative thus wax and wane, the seasons of the year rotate accordingly.

In the natural order, says Tung, all things are paired or coupled. The positive and the negative are complementary; they reveal themselves in such polar entities and ideas as heaven and earth, the sun and the moon, day and night, heat and cold, the high and the low, the right and the left, the male and the female. So in the human order are sovereign and subject, father and

26) For details, Yao Shan-yu, *The Cosmological and Anthropological Philosophy of Tung Chungshu*, *Journal of the North China Branch of the Royal Asiatic Society*, Vol. 73, 1948, pp.10-25.

son, husband and wife complementary to each other. The sovereign is positive, the subject negative; the father is positive, the son negative; the husband is positive, the wife negative. These three relationships constitute the tri-ordinate axes of the human order. Even though sovereign and subject, father and son, husband and wife, are correlative and reciprocal, they are not on an equal basis. The sovereign is the overlord of the subject; the father is the master of the son; the husband is the owner of the wife.

Of the tri-ordinate axes, the sovereign-subject axis is the most fundamental in the human order. The sovereign-subject axis is the central axis, to which the father-son and husband-wife axes are sub-ordinate. Without the central axis, the entire human order will crumble.

The cosmos, says Tung, is divided into three main parts: heaven, earth, and man. The sovereign is the person who spans heaven and earth and governs the human race. The Chinese character for sovereign is ‘wang’, which consists of three horizontal lines representing heaven, earth, and man, and one vertical line that goes through the horizontal lines in the center. It is the duty of the sovereign to follow the first principles or laws of the cosmos.²⁷⁾

IV. Legalism

Chinese legalism has been sometimes referred to as ‘realism’ and sometimes less flatteringly as Machiavellism, which stood at the opposite end of the ideological spectrum from the individualism of Taoism in the late Zhou era of the Hundred Schools. It eschewed what it regarded as the reactionary, constraining effect of past tradition admired by the Confucians, and urged that leadership must keep abreast of changing circumstances and retain political control through the use of force(*shi*), modern statecraft(*shu*), and law(*fa*). Believing that human nature is basically evil, it stressed the need for the ruler

27) For the importance of such understanding for the intellectual history of East Asia, Maruyama Masao, *Studies in The Intellectual History of Tokogawa Japan*, Univ. of Tokyo Press, 1974, pp.19-68.

to implement both harsh punishments and effective rewards (through which the selfishness of individuals could be exploited) to achieve his subjects' observance of an amoral system of detailed laws. Its object was a smooth-running society in which every person would work and behave precisely according to the implications and limitations of his or her name, rank or occupation, in which everyone — the ruler included — was subject to the law, no one would dare to think or act in an independent manner, and in which fear of the law would cow opposition into acquiescence. Members of groups, both civil and military, were to be responsible for each other's behavior and for ensuring they kept the law, or were brought to justice if they did not. When this kind of society was achieved the ruler's prime ambition would be realized, that of being able to sit back and do nothing (*wu wei*) other than enjoy the pleasures of his supremacy. Human emotions, as a reflection of individual feelings and thought, were to be suppressed, and study was to be strictly confined within state interests.

Written legal codes were known to some of the feudal states by the eighth century BC, and the concept of centralized authoritarianism was elaborated by Guan Zhong in the seventh century BC. As political theorists moved around from court to court through the later Zhou period, so did the discussion of radical new political measures spread across the country. It was Qin that first implemented Legalism on a comprehensive scale from the fourth century onwards, but it drew upon the ideas of men from Qi (Guan Zhong), Zhao (Shen Dao), Han (Shen Buhai, Han Feizi), Wei (Shang Yang), and Qin (Li Ssu). It was Emperor Qin Shi who showed how effective Legalism could be in imposing order on the confused political and ideological situation of the late third century, but the fate of his successor the Second Emperor also shows how impractical it was to try and maintain rigid totalitarianism in an age that lacked the sophisticated aids of modern despots. It was the shrewd appreciation of the early Han leaders that Legalism could work if tempered by the more humanitarian approach of Confucianism. They thus established a syncretic political system that underpinned imperial government for centuries to come.²⁸⁾

1. Shang Yang(d. 338 BC)

Shang Yang(also called Wei Yang or Kung-Sun Yang) was one of the descendants of the family of Wei. In his youth, he was fond of reading criminal law. He went to the state of Qin and was appointed to the office of the tenth rank. He enacted an ordinance to alter the institutions.²⁹⁾ He ordered the people to be organized into groups of fives and tens, mutually to control one another and to share in one another's punishments.

The *Book of Lord Shang Yang* is composed of twenty-five or more brief sections, some of which are lost. Mostly in essay form, simple and straightforward, it is often grim and gripping in its harshness.

If in a country there are the following ten things: rites, music, odes, history, virtue, moral culture, filial piety, brotherly duty, integrity, and sophistry, the ruler cannot make the people fight and dismemberment is inevitable, and this brings extinction in its train. If the country has not these ten things and the ruler can make the people fight, he will be so prosperous that he will attain supremacy. A country where the virtuous govern the wicked will suffer from disorder, so that it will be dismembered; but a country where the wicked govern the virtuous will be orderly, so that it will become strong.

A country which is administered by the aid of odes, history, rites, music, filial piety, brotherly duty, virtue, and moral culture, will, as soon as the enemy approaches, be dismembered; if he does not approach, the country will be poor. But if a country is administered without these eight, the enemy dares not approach, and even if he should, he would certainly be driven off; when it mobilizes its army and attacks, it will capture its objective, and having captured it, it will be able to hold it; when it holds its army in reserve, and makes no attack, it will be rich.³⁰⁾

28) For details on Legalist thoughts, Ryuichi Nagao, *Notes on Ancient Chinese Thoughts*(Jap.), Tokyo, 1999, pp.141-190.

29) For details, Y.N. Li, *Shang Yang's Reforms and State Control of the Chinese*, N.Y. 1977.

30) For detail, Kung-chuan Hsiao, *A History of Chineses Political Thought*, I, tr. by F.W. Mote, Princeton Uni. Press, 1999, pp.368-424.

2. Han Feizi(c. 280–233 BC)

Han Feizi was one of the most influential legal thinkers whose ideas played a prominent part in the drive of Qin towards unification. He was a former associate of Li Ssu, whose Legalist convictions he shared after they had both studied under Xun Qing. The book that bears his name, said to have been written for the ruler of the state of Han, is the most complete exposition of Legalist doctrine, and develops the ruthless efficiency of Shang Yang's reliance on the impersonal practical laws. In 234 he was sent as an envoy to Qin and seems to have considered staying there out of admiration for the ruthless policies of King Zheng, but he was induced to take poison by Li Ssu, who perhaps saw him as a potential rival.³¹⁾

“Doing nothing, yet there is nothing that is not gone.” This is the Taoist idea of *wu wei*, having-no-activity or non-action, but it is also a Legalist idea. According to Han Fei zi, the one great virtue required of a ruler is that he follow the course of non-action. He should do nothing himself but should merely let others do everything for him. Han said;

Just as the sun and moon shine forth, the four season's progress, the clouds spread, and the wind blows, so does the ruler not encumber his mind with knowledge, or himself with selfishness. He relies for good government or disorder upon laws and methods(shu); leaves right and wrong to be dealt with through rewards and punishments and refers lightness and heaviness to the balance of the scale.³²⁾

3. Li Ssu(c. 280–208 BC)

Li Ssu was the Chancellor to Emperor Qin Shi and principal architect of the policies that brought success to the state of Qin in its drive towards unification.³³⁾ A native of Chu, Li had been a student of Xun Qing, but

31) W. K. Liao, *The Complete Works of Han Fei Tzu: A Classic of Chinese Legalism*, 2 Vols. London, 1939.

32) Han Fei, *Han Feizi*, Chapter. 29.

foreseeing greater scope for his radical ideas of statecraft in Qin, had entered the service of Lu Buwei and King Zheng in 247. He then followed a successful career as Minister for Aliens and Chief Justice before becoming Chief Minister after the unification of China in 221. Through his skilful manipulation of espionage, control over intellectual activity(Burning of Books), compulsory removal of surviving aristocratic families into the metropolitan region, reform of regional government, standardization of weights, measures, coinage and the writing system, his exaltation of economically useful activity and condemnation of the potentially subversive business of travel and trade, and above all his emphasis on the strict and impartial application of laws and heavy punishments, he proved the perfect foil to the despotic ambitions of his monarch. He helped plan the Emperor's regional tours and his successful campaigns against the northern barbarians, though he did not share the Emperor's superstitious beliefs that prompted his visits to regional altars. Li Ssu was implicated in the plot that set Huhai on the throne and incited him to apply the laws even more harshly than before. But the Second Emperor lacked his father's political acumen and was manipulated by. When Li Ssu warned him against the eunuch he was imprisoned, and despite a famous self-defense was executed by being cut in two in the market place.

How radical Li's assertion was is shown well by his *Memorial on the Burning of Books*:

Your servant suggests that all books in the imperial archives, save the memoirs of Qin, be burned. All persons in the empire, except members of the Academy of Learned Scholars, in possession of the *Book of Odes*, the *Book of History* should be executed and their bodies exposed in the market place. Anyone referring to the past to criticize the present should, together with all members of his family, be put to death. Officials who fail to report cases that have come under their attention are equally guilty. After thirty days from the time of issuing the decree, those who

33) Derk Bodde, *China's First Unifier: A Study of the Chin Dynasty as Seen in the Life of Li Ssu*, Leiden, 1938.

have not destroyed their books are to be branded and sent to build the Great Wall. Books not to be destroyed will be those on medicine and pharmacy, divination by the tortoise and milfoil, and agriculture and arboriculture. People wishing to pursue learning should take the officials as their teachers.³⁴⁾

For a while it seemed that Legalism as the ruling ideology had achieved incontrovertible success. But with the death of this dictatorial emperor the weakness in the Legalist system became apparent. The emperor had ruled from behind the scenes, remaining aloof from his people and ministers. This placed enormous power in the hands of a few trusted officials and eunuchs who were allowed access to him. On his death a struggle for power broke out. Li Ssu and the powerful eunuch, Chao Kao, by concealing the death of the emperor and forging orders in his name, succeeded in destroying their rivals and seizing actual control of the government. The second Emperor became a helpless puppet, cut off in the depths of the palace from all contact with or information of the outside world. Then Chao Kao turned on Li Ssu and destroyed him and his family, using against him the very Legalist methods that Li Ssu had employed. Popular revolts broke out all over the nation, as the people grew increasingly restless under the burden of taxation and oppression. But all news of the seriousness of the situation was kept from the court by officials who had learned to fear the consequences of speaking out. The government was paralyzed by the force of its own autocratic laws. In the end the Second Emperor was forced to commit suicide, Chao Kao was murdered, and the last ruler of the Qin submitted meekly to the leader of a popular revolt. In 207, less than fifteen years after its glorious establishment, the new dynasty had come to a violent and ignoble end.

The Qin, though short-lived, had a profound effect upon the course of Chinese history. The measures for unification, standardization, and

34) Li Ssu, *Shih chi*, 87:6b-7a. Cited from De Bary(ed.), *Sources of Chinese Tradition*, I, Columbia Univ. Press, 1960, p.141.

centralization of power, coercive though they were, destroyed for all time the old feudal system and gave to the Chinese people a new sense of unity and national identity. The destruction of the old feudal states, the shifts of population, and the wars and uprisings which accompanied the downfall of the dynasty, wiped out the old aristocracy of Chou times and opened the way for new leader and new families to rise to power. Nevertheless, the spectacular failure of the Legalists to stamp out rival schools of thought, to suppress criticism by police control, and to rule the people by exacting laws and harsh penalties, discredited Legalist policies for centuries to come. Later regimes might in fact make use of Legalist ideas and methods in their administrations, but never again did they dare openly to espouse the hated philosophy of the Qin. The First Emperor and his advisers became the symbols of evil and oppression in Chinese history, and the dynasty and example to all later rulers of what happens when the people are exploited and oppressed to the breaking point, when force and tyranny replace humanity and justice as the guiding principles of government.

V. Taoism

The starting point of Taoism is the preservation of life and avoiding of injury. This is the method of the ordinary recluse who flees from society and hides himself in the mountains and forests. By doing this he thinks he can avoid the evils of the human world. Lin Yutang said, Chinese are the Confucians in the office, but they are Taoists after their officialdom.³⁵⁾

The idea expressed in the greater part of the *Laotzu* represent an attempt to reveal the laws underlying the changes of things in the universe. Things changes, but the laws underlying the changes remain unchanging. If one

35) Lin Yutang, *My Country and My People*, New York, 1937; For Taoism, H. Creel, *What is Taoism? And Other Studies in Chinese Cultural History*, Chicago Uni. Press, 1970, and A. C. Graham, *Disputers of the Tao: Philosophical Argument in Ancient China*, La Salle, 1989.

understands these laws and regulates one's actions in conformity with them, one can then turn everything to one's advantage. This is the second phase in the development of Taoism. Even so, however, there is no absolute guarantee. In the changes of things, both in the world of nature and of man, there are always unseen elements. So despite every care, the possibility remains that one will suffer injury. This is why the *Laotzu* says with still deeper insight: "The reason that I have great disaster is that I have a body. If there were no body, what disaster could there be?"(Ch. 13.) These words of greater understanding are developed in much of the *Chuangtzu*, in which occur the concepts of the equalization of life with death, and the identity of self with others. This means to see life and death, self and others, from a higher point of view. By seeing things from this higher point of view, one can transcend the existing world. This is also a form of "escape"; not one, however, from society to mountains and forests, but rather from this world to another world. Here is the third and last phase of development in the Taoism of ancient times.

Taoism and Legalism represent the two extremes of Chinese thought. The Taoists maintained that man originally is completely innocent; the Legalists, on the other hand, that he is completely evil. The Taoists stood for absolute individual freedom; the Legalists for absolute social control. Yet in the idea of non-action, the two extremes meet. That is to say, they had some common ground.³⁶⁾ I think, here is the broad horizontal of the future development of the East Asian jurisprudence.

Conclusion

In the above, we have tried to the foundations for East Asian jurisprudence in the ancient sources. These range from prehistoric mythologies to philosophies like Confucianism, Legalism and Taoism. There were other philosophers and thinkers who are not dealt here. From this perspective we

36) Fung Yulan, *ibid.*, p.163.

can then say that jurisprudence in East Asia is deep and rich as it arises from its ancient origins. Ancient East Asian jurisprudence can be compared with the ancient Greek-Roman jurisprudence, as Arthur Kaufmann once did.³⁷⁾ We might say that the civilization of East Asia is as highly developed classical civilization as that of Greece and Rome.

There is a theory of history in Chinese studies, which asserts that Chinese history must be understood as a struggle between Confucianism and Legalism. Some scholars maintain that the Chinese history has exerted Confucianism outwardly but has retained Legalism inwardly. They point out that the only philosophy accomplishing the unification of Chinese territory was Legalism, not Confucianism.

Legalism could hardly be understood as a sort of legal positivism as the jurists argue.³⁸⁾ Nevertheless, the legalist tradition still appears in contemporary Chinese politics and law enforcement. This is the reason why Confucianism and Legalism have to be harmonized in theory and in practice, as the Western jurisprudence pursues the “the third way” beyond the natural law theory and legal positivism.³⁹⁾

In this context I believe that Taoism has a special significance in that it can act to modify or soften rigid legal reasoning. Based on these ancient legal and political philosophies, the jurists in China, Japan and Korea should strive for the further development of concepts within East Asian jurisprudence, which are relevant for the contemporary world.

37) Arthur Kaufmann, *Vergleichende Rechtsphilosophie, am Beispiel der klassischen chinesischen und der klassischen-abendländischen Rechtsphilosophie*, in: *Festschrift für Werner Lorenz zum 60. Geburtstag*, 1991, SS. 635-548. Korean translation by Chongko Choi, in: *Legal Philosophy and Social Philosophy*, Vol. 2, 1992, pp.114-134.

38) According to Jean Escarra who understands Chinese Legalism as legal positivism, Tanaka Kotaro differentiates the natural law theory of Confucianism and the legal positivism of Legalists. This is in contrast to Fung Yulan who argues; “It is wrong to associate the thoughts of Legalist school with jurisprudence. In modern times, what this school taught was the theory and method of organization and leadership.” Fung Yulan, *A Short History of Chinese Philosophy*, N.Y., 1948, p.157.

39) For details, Chongko Choi, *Popchollhak(Jurisprudence)*, Seoul, 2002, pp.186-199.

〈요 약〉

東아시아 法哲學의 古代的 基礎

— 儒敎, 法家 그리고 道敎 —

崔 鍾 庫*

‘세계화’와 함께 ‘문명의 공존’이 강조되고 있는 21세기에 東아시아法은 새롭게 장구한 전통을 재해석하여 法文化的 獨自性を 정비할 요청을 받고 있다. 본 논문은 그런 취지에서 東아시아법의 정신적 기초가 고대부터 어떻게 형성되었는가를 추적하려는 연구이다.

I. 東아시아의 神話

세상 만사의 기원은 신화에로 거슬러 올라가듯, 東아시아법의 법관념도 고대 신화와 연결된다. 중국, 고조선, 일본의 건국신화는 카오스에서 코스모스(질서)로의 전환을 보여주는 법관념을 내포하고 있다.

II. 法의 기원

東아시아 3국은 ‘法’이라는 한자어를 공용하고 있는데, 이 말은 원래 灋이란 古字에서 나왔다. 이 말은 원래 고대 중국에서 piwap이라 발음했는데, 오늘날 중국에서는 fa, 일본에서는 ho, 한국에서는 pop이라 불러 한국어가 가장 고대 원음발음에 가깝다. 한국의 ‘본’, 일본의 ‘노리(のり)’라는 말은 오늘날 적어도 법과 관련되어서는 사용되지 않고 있다.

III. 儒敎

東아시아법의 유교적 법으로 알려져 있기도 하고 유교와 법은 상호배치한다는 견해도 있다. 본고에서는 유교의 특징을 이루는 仁과 義, 禮, 中庸, 正名, 恕의 의미를 분석하고, 이어서 孔子(550-479 BC), 孟子(371-289 BD), 荀子(218-238 BC), 董仲舒(179-104 BC)의 법사상을 설명하였다. 유교도 법을 부정

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적으로 보지 아니 하였음을 설명하였다.

IV. 法家

법가사상은 종종 마키아벨리즘 같은 통치술로 설명된다. 본고에서는 商鞅(338 BC 사망), 韓非(280-233 BC), 李斯(280-208 BC)의 사상을 분석하여 秦나라의 통일과 통치에 기여하였는가를 설명하였다.

V. 道教

林語堂이 중국인은 公적으로는 儒教的이나 私적으로는 道教的이라 하였는데, 道家는 法家와도 정신적 맥락을 같이 하고 있다. 道家는 개인의 절대적 자유를 인정하고, 法家는 절대 국가의 통제를 인정하지만, ‘無爲’(non-action)의 사상에서 일치된다.

결론

카우프만(Arthur Kaufmann)이 중국의 고대 법사상을 그리스-로마법사상에 비견할 것으로 높이 평가하였듯이, 동아시아 법학자들은 이러한 풍부한 고대 법사상을 적극적으로 평가하여 동아시아법의 정체성(identity)의 확립에 활용하여야 한다. 서양 법철학에서는 자연법론과 법실증주의의 대립을 극복하여 ‘제3의 길’을 이론화하고 있는데, 동아시아 법사상에서도 유교, 법가, 도교와 같은 훌륭한 思想材들을 법철학적으로 잘 이론화해 발전을 모색해야 할 것이다.