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# South Korean Law and North Korean Law: Comparison and Reunification

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## Introduction

The most salient feature of Korean law is that it is divided into South and North. Which one of them is the “Korean law” in the true sense? To answer this question, we have to compare the South and North Korean laws and to think fundamentally about possibility of the legal reunification.<sup>1)</sup> In this paper, I will survey the common legal tradition of Korea, the characteristics of Southern and Northern legal systems and some guidelines of legal reunification in the new millenium Korea. The historical and comparative approaches shall be used from the general perspective.

## I. Common Legal Tradition of Korea

Before being divided into South and North, Korea had a common legal tradition until the end of the period of Japanese rule(1910-45). The traditional legal history of Korea is rather subtle and complex in terms of the East Asian legal traditions. Being located very near from the Chinese empire, traditional Korea has received inevitably a great deal of Chinese influences not only in law but also in many fields of social institutions and customs.<sup>2)</sup>

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1) As previous studies, Koochin Kang, Comparison of the Legal Systems between North and South Korea, *Seoul Law Journal*. vol. 13, 1971; Tscholsu Kim, Comparison of the Constitutions of South and North Korea, *Constitutional and Political Laws of the Republic of Korea*, ed. by Korean Branch of International Association of Constitutional Law, Seoul 1995, pp. 39-68.

2) About East Asian Common law, Chongko Choi, *The Development of East Asian*

Historically, looking into Korean legal history, reception of foreign laws have taken place on five stages. The Three Kingdoms of Koguryo, Paekchae and Silla(BC37-917) received the laws of Wei, Tsin and Tang; The Koryo Kingdom(918-1391) received the laws of Tang, Sung and Yüan; The Chosun Dynasty(1392-1896) received the comprehensive Grand Code of Ming(*Ta Ming Lü*, 大明律); The Taehan Empire(1897-1910) received the European-Continental law especially from Germany; and contemporary Korea after 1945 incorporated a legal system based on Capitalistic principles (partly American) law in the South and a Socialistic(or Communistic) legal system in the North.<sup>3)</sup>

It is undeniable that the Confucian legal culture assimilated from China throughout her long history exerted profound influence on Korean traditional law and her social development.<sup>4)</sup> Confucian scholar Chong Tojon(d. 1398) compiled, in 1394, a private Code named *Chosun Kyongukjeon* (Code of Governing Chosun, 朝鮮經國典) like the *Sachsenspiegel* authored by Eike von Repgow in 12th Germany.<sup>5)</sup> The *Kyongje Yukjeon*(Six Codes for Governance, 經濟六典) promulgated ed in December 1397 is known as the first general code of the Yi Kingdom, although it is not extant.

These codes were divided into six sections according to the governmental administration of tha time: Personnel, Revenue, Rites, Punishment, War and Public Works. A grand legislative proclamation took place again during the reign of King Sejo(r. 1455-68) and completed under King Songjong(r. 1469-94). This Grand Code for Governing the State(*Kyonguk Taejeon*, 經國大典) of 1485 was a comprehensive collection of indigenously modified legal norms in the 15th Century Korea.<sup>6)</sup>

The basic principle of legislation was "respecting the established enactment

*Law until the End of 18th Century*, Seoul 1999.

3) Chongko Choi, *Hanguk ui Soyangpop Suyongsa(Reception History of Western Law in Korea)*, Bakyongsa/Seoul 1981; Hahm Pyongchoon, Korea's Initial Encounter with the Western Law, *Korean Jurisprudence, Politics and Culture*, Yonsei Univ. Press, 1986, pp. 126-151.

4) Chaishik Chung, Chong Tojon: "Architect" of Yi Dynasty Government and Ideology, *The Rise of New-Confucianism in Korea*, Columbia Univ. Press, 1985, pp. 59-88.

5) Chongko Choi, Confucianism and Law in Korea, *Asian Jurisprudence in the World*, Seoul 1997, pp. 99-125.

6) Park Pyongho, *Hanguk Popchesa-Go(Studies in Korean Legal History)*, Seoul 1974, pp. 419-421.

of the royal ancestors”(*Chojong Songhon*, 祖宗成憲).<sup>7)</sup> This principle of respecting laws enacted by forefathers played the role of a protector for the original laws. On the other hand, it acted in such a way as to hinder the innovation into new laws. The ideal of good laws and beautiful customs(*Yangpop Miui*, 良法美意), just like the ideal of *gutes altes Recht* in European legal history, was carefully retained when the following legislation of *Taejon Tongpyon*(Comprehensive Compile of Grand Code, 大典通編, 1785) and *Taejeon Hoetong*(Comprehensive Code of State Governance, 大典會通, 1866) were compiled and effectuated.

Despite the fact that the Yi Kingdom was devoted to realizing the Confucian ideals in politics, economic and social life, culture and all other fields, the original code of laws which was based on the traditional social order persisted throughout the 500-plus years of its existence in contrast to the Chinese sovereignty, thereby forming Korea's unique social order. So far, Korean law was basically the will and command of the kings. We can enumerate the basic three elements of traditional Korean law; 1) Command of the Sovereign, 2) Respecting the old order 3) Confucian ideology state.<sup>8)</sup>

As aptly pointed out by Max Weber, the dominance of the cultural literati prevented the formation of lawyer class(*Juristenstand*) in East Asia and thus made it impossible for jurisprudence to develop as a popular discipline. The traditional jurisprudence, *Yulhak*(律學), existed throughout the Three Kingdoms, Koryo and Yi Dynasties, but was always regarded as one branch of technical learning or miscellaneous learning, like medicine, arithmetic, or divination, and as such was regarded as inferior to Confucian canonical learning. *Yulhak* was taught not at *Sunggyunkwan*(the National Academy, 成均館), but at the Ministry of Punishment as a technical subject in order to train its officials on a small scale.<sup>9)</sup> The executive and judicial branches of government were not

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7) Pak Pyongho, *Hanguk Popchesa-Go*(Studies in Korean Legal History), Seoul 1974, pp. 419-421; William Shaw, Traditional Korean Law and its Relation to China, *China's Legal Tradition*, ed. by Jerome Cohen/R. Edwards/Fumei Chen, Princeton 1980.

8) Chongko Choi, Traditional Korean Law and its Modernization, *Transactions of Royal Asiatic Society*, vol. 64, 1989, also in: *Law in Korea*, Seoul 1995, pp. 1-17.

9) Chongko Choi, *Hanguk Pophaksa*(History of Korean Jurisprudence), Bakyongsa/Seoul, 1986.

separated from each other; as a result, administrators such as governors and county chiefs were empowered to administer justice, while jurisprudence graduates merely assisted in the process of trial. The law was always utilized by the ruling *Yangban*(nobility, 兩班) class as a tool of political rule. Even though there was some technical development of the criminal code, the civil and commercial laws were not treated as academic subjects. Thus, daily life and transactions came to be formed by the customary laws.<sup>10)</sup> Since the law was regarded as the established enactment of the royal ancestors, the result was a newly proposed code quite unlike those in the West. Korean legal culture thus remained stagnant until the latter half of the 19th century. As Maurice Courant, a French scholarly diplomat who investigated the traditional Korean books, aptly pointed out, there were few books of legal science despite frequent legal codes in the long Korean history.<sup>11)</sup>

In the latter half of the 19th Century, Korea made voluntary contacts with Western law. Even though Korea had a preference for America, Anglo-American 'case law' system was not easily received. After a short inclination toward French law, Korea turned to German law and legal dogmatics, especially through the "unpleasant mediator", Japan.<sup>12)</sup> This pro-German "Continental Law" system still exists in contemporary South Korea.

Even though Japan was considered as an "unpleasant mediator" by Korean people, it is not deniable that many laws and institutions like criminal law and judicial system were reformed and modernized during the Japanese ruling period(1910-45).<sup>13)</sup> The influences of the Japanese ruling are not overcome even after the liberation, positively and negatively, forming a serious

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10) Park Pyongho, Characteristics of Traditional Korean Law, *Korea Journal*, Vol. 16, No. 7, 1976, pp. 4-16; Hahm Pyong-choon, *Korean Political Tradition and Law*, Hollym, Berkeley 1967; Chun Bong-duck/William Shaw/Choi Dai-kwon, *Traditional Korean Legal Attitudes*, Berkely, 1981; Chun Sin-yong(ed.), *Legal System of Korea*, Seoul 1975.

11) Maurice Courant, *Bibliographie Coréene*, 1894, pp. 19-189.

12) For details, Chongko Choi, On the Reception of Western Law in Korea, *Korea Journal of Comparative Law*, vol. 9, 1981, pp. 141-167.

13) For details, Edward Baker, The Role of Legal Reforms in the Japanese Annexation and Rule of Korea 1905-1919, *Studies on Korea in Transition*, Center for Korean Studies, Univ. of Hawaii 1977, pp. 17-42.

'post-colonial phenomenon' yet to be investigated. Many scholarly researches reveal that the authoritarian and undemocratic features of Korean law and politics stem from the Japanese ruling period.<sup>14)</sup> Here is not the place to evaluate the Japanese legal achievements in Korea. By the way, the traditional legal history including the Japanese ruling period is explained more critically by the North Koreans due to their socialistic and anti-imperialistic ideology.<sup>15)</sup>

## II. South Korean Law

The Republic of Korea(ROK) claims to manifest a democracy based on "rule of law". Nevertheless, the way to this ideal has been long and complicated. The unstable political and socio-economic situation of Korea must be considered as the main cause of difficulty in establishing a law-based democracy.

Currently by the time we meet the new millenium, South Korea has proximately 4000 current laws and regulations. Legal sociologists call this phenomenon "flood of laws" or "inflation of laws".

The supreme and basic law, i. e. Consitutional Law was first promulgated on July 17, 1948. Thereafter, till now, that Constitution has been revised nine times. This fact vividly demonstrates the hard political course we have followed hitherto. The Constitution of the First Republic under President Syngman Rhee pursued the America-oriented Presidential system. The Second Republic of 1960 under Premier Myon Chang tried to realize the merits of the Cabinet System. This attempt was resisted by the early military coup d'état just after one year. The Third Republic under President Chunghee Park resumed again the presidential power to realize a "developmental dictatorship". After the assassination of President Park, the succeeding governments under Presidents Doohwan Chun and Taewoo Roh stood basically on the same line, while the demands of "democratization" were being made by the people's

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14) See the essays in the *Kwago Chongsan*(Clearing of the Past) for the Commemoration of 50th Anniversary of Liberation, Seoul 1995.

15) Chongko Choi, Pukhan ui Chontong Popsakwan(North Korea's View on Traditional Legal History), *Seoul Law Journal*, vol. 33, NO. 1, 2, 1990 and in his book *Pukhanpop*(North Korean Law), Bakyounghsa, Seoul 1996(revised edition), pp. 21-26.

voices. A civilian government was finally established 1993 with President Youngsam Kim. But the Y. S. Kim's government was also the continuation of the ruling party established by the former military regimes. The "real" change of political power took place in 1997, when Daejung Kim, former leader of the opposition party, was elected as the current president.

With the changes in use of political power, constitutional revisions have been continuously discussed. President Daejung Kim leads the government as a coalition with Premier Chongpil Kim, making a promise to adopt the cabinet system again in due process. This issue is crucial to the political development in future and is connected with national reunification also. There have been discussions on the possible constitution of a unified Korea of the future.<sup>16)</sup>

The area of administrative law is broad. Currently in Korea, we hear of the "almightiness of administration", meaning the weakness of "rule of law" through the judiciary. The so-called administrative guidances(*Haengjong Jido*, 行政指導) or government's order(*Chongbu chisi*, 政府指示), somewhat like *Gyosei Shido* in Japan, play an important role before a matter becomes a legal action.<sup>17)</sup>

Civil and Commercial Laws were adopted in the early 1960's and have regulated the private life of the Korean people. With the changes in the system of ownership in housing, financing and insurances, these private laws also have been revised. Even family law, as a part of the Civil Code, underwent a comprehensive revision in 1989.<sup>18)</sup>

Labour law was originally drafted rather idealistically according to the standard of American labour laws. But the process of Korean industrial development prevented the labourers from full enjoyment of their rights in many ways. As the results of such "dictatorial developments" in economy and industry, uncountably complicated economic and industrial laws have been produced. This is also evidence that law just seems to be a faithful servant to

16) For the national security, these drafts are not allowed to distribute openly.

17) For the role of *Gyosei Shido*, H. Coing(ed.), *Die Japanisierung des Westlichen Rechts: Japanisch-deutsches Symposium in Tübingen von 26. bis 28. 1988*, Tübingen 1990, pp. 83-102

18) For details, Kay C. Lee, Confucian Ethics, Judges and Women: Divorce under the Revised Korean Family Law, *Pacific Rim Law and Policy Journal*, vol. 4, No. 2, 1995, pp. 479-504.

the political power.

Criminal law is basically an *ultima ratio* (final resort) in each country. In a "free society", the role of criminal law must be lessened according to the ideological and moral "neutrality". Nonetheless, in a divided country like Korea, criminal law plays a crucial role not only for national security but also in regard to influencing the behavior of individuals. The Criminal Code adopted during the Korean War(1953) has regulated South Korean people's life for half a century. Even though it was partly revised in 1996, it contains still some articles of severe punishments. Additionally, the National Security Law adopted in 1953 is still in action. There are some strong voices crying to abolish or alter this "obstacle" to the national reunification. Of course, there are conspicuous conflicts of opinions between 'conservative' proponents of national security and the 'progressive' abolitionists.

Through the 3 years American military government 1945-48, the reality of Korean society has been much "americanized". The contemporary social sciences like political science, economics and sociology are so much America-oriented. Speaking rather extremely, South Korean society is composed of the 'backbone' of the Pro-German legal system and the 'flesh' of the pro-American social reality. This phenomenon produces an inhibiting effect on the active development of an indigenous Korea legal culture.<sup>19)</sup> In summary, South Korean legal culture could be characterized as a heterogeneous, pluralistic "mixed legal culture".<sup>20)</sup>

### III. North Korean Law

In contrast to the South, the Democratic People's Republic of Korea (DPRK) in North is fundamentally a socialistic state, based on the *Juche* ideology. The first Constitution of DPRK was enacted on Sept. 9, 1948. It consists of 104

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19) For understanding of Korean legal culture, Chulwoo Lee, Talking about Korean Legal Culture, *Korea Journal*, vol. 38, No. 3, 1998, pp. 45-76.

20) Chongko Choi, Traditional Legal Culture and Contemporary Legal Consciousness in Korea, paper presented at the World Conference on Sociology of Law at Tokyo University on Aug. 1-4, 1995, in *Legal Culture: Encounters and Transformations*, Japan Commission for RCSL 95, 1995, pp. 123-130; also Chongko Choi, *Asian Jurisprudence in the World*, Seoul 1997, pp. 75-85.

articles in 10 chapters. Thereafter, it underwent several revisions till the current Constitution. North Korea is one of the most isolated state in the world, which does not provide easy access to its national legal code. It seems skeptical that it has a national legal code.<sup>21)</sup>

The 50th Supreme People's Assembly on Sept. 5, 1998 elected Kim Jong Il as Chairman of the National Defense Commission and revised the Constitution. This Constitution consisting of 166 articles is equipped with a new preamble, which did not exist at the previous constitutions. We see here some striking "Confucian" expressions, which could be hardly understood from the "socialistic" ideology.

..... Comrade Kim Ilsung regarded "believing in the people as in heaven(*Imin Wichon*, 以民爲天)" as his motto, was always with the people, devoted his whole life to them, took care of and guided them with a noble politics of benevolence(*Indok Jongchi*, 仁德政治), and turned the whole society into one big and united family. ....Comrade Kim Ilsung was a genius ideological theoretician and a genius art leader, an ever-victorious, iron-willed brilliant commander, a greater revolutionary and politician, and a great human being. The DPRK and the entire Korean people will uphold the great leader Comrade Kim Ilsung as the eternal President of the Republic, defend and carry forward his ideas and exploits and complete the *Juche* revolution under the leadership of the Worker's Party of Korea. The DPRK Socialist Constitution is a Kim Ilsung which legally embodies Comrade Kim Ilsung's *Juche* state construction ideology and achievements.<sup>22)</sup>

*Juche*(主體) ideology has been explained in the meanwhile as a significant break with the Confucian past. But we see a new combination of Confucianism and *Juche* again in North Korea.<sup>23)</sup>

The national economy of North Korea is a strictly planned economy. The

21) It is interesting and ironical that the North Korean laws were gathered and published in Seoul. See *Pukhan Popryongjip*(North Korean Statutes) in five volumes, *Taeryuk Yonguso*, Seoul 1990; Chongko Choi, *Pukhan Pop*(North Korean Law), Bakyoungsa, Seoul 1966 (revised edition).

22) The text of this new Constitution is published "unofficially" at the Newspaper *The People's Korea* of Sept. 19, 1998, p. 4-7.

23) For Confucianism and Law, Chongko Choi, Confucianism and Law in Korea, *Asian Jurisprudence in the World*, Seoul 1997, pp. 99-125.



basic economic units are the state enterprises. It is interesting that this extremely socialistic state adopted the Civil Code(*Minpop*, 民法) on Sept. 5, 1990. It constitutes of 271 articles, which is compared to the Civil Code of South Korea with 1118 articles. North Korean civil law is explained to be based on the Soviet Civil Code of 1964.<sup>24)</sup> Family law is therefore excluded from this Code and treated separately. The Civil Law recognizes three kinds ownership: state ownership, cooperative property, and private property. Private property is for personal consumption by the working people. It is primarily "the products from the inhabitant's supplementary husbandry, including those from the small plots of cooperative farmers". This property is derived mainly from Socialistic distribution according to work done and from additional benefits accorded by the state.

Since DPRK has been confronted with economic crises, it has produced many new laws concerning foreign investment. It has recognized that foreign capital and technology are essential to help develop its flagging economy. While maintaining its ideological commitment to the autarkic, defiantly self-reliant *Juche* ideology, North Korea has in the past ten years revised existing laws and regulations, and issued new ones. The principal new laws are Foreign Investment Law(1992), the Free Economic and Trade Zone Law(1993), the Foreign Enterprises Law(1992), the Equity Joint Venture Law(1994) and the Contractional Joint Venture Law(1995). This legislative structure constitutes an ambitious attempt to facilitate foreign investment in a relatively flexible manner. Sometimes these seem to be overlapped and contradictory each other. By the way, we have not heard that there are active investments from foreign countries following enactment of these new North Korean laws.

The present judicial system of DPRK is essentially that established under the first Constitution of 1948, which outlined the tasks, functions, and structure of the courts and procuracy under the Court Organization Law, Criminal Code, and the Code of Criminal Procedure of 1950. But unfortunately we can not get any judicial decisions and comments on them. We don't know even who are acting as judges, prosecutors, attorneys and legal scholars. Our analysis

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24) Dalkon Choi, *Pukhan Minpop ui Yongu*(A Study on North Korean Civil Law), Seoul 1997.

suffers from the inability to obtain any actual legal information from North Korea.<sup>25)</sup>

Since 1970's North Korean government has campaigned strongly the Socialistic Law-Abiding Life Movement(*Sahoejuui Popmusengwhal Undong*, 사회주의 법무생활운동), and State Arbitration(*Kukga Jungje*, 국가중재) of the enterprises on legal disputes. Through such a state-initiated legal life, the human rights of the North Korean people have been seriously damaged and critically reported by the foreign observers. But here is not the place to go into this problem.<sup>26)</sup>

In summary, North Korean law could be characterized as "law as teacher and parents" as expressed by Professor Harold Berman of Harvard Law School. He characterizes the "pseudo-religious" Communist law as following: 1) love of fatherland, 2) international solidarity through the world's workers, 3) hatred for class enemy, 4) absolute support of communist party policy, 5) self-sacrifice for social interest, 6) socialistic humanism, 7) socialistic ownership, 8) noble sense of duty to state, 9) respect to citizen's neighbor, 11) love of sacred labour.<sup>27)</sup> All of these characteristics seem to be fitting into North Korean law.

#### IV. Possibility of Legal Reunification

Before explaining the possibility of legal reunification, we must remember that Korean people don't like the legalistic approach of South-North dialogues also. It is quite different from the German experience in the East-West reunification.<sup>28)</sup> This difference might be generalized as a characteristic of East

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25) Sungyoon Cho, *Law and Legal Literature in North Korea*, Library of Congress, Washington D. C. 1989.

26) On human rights in South and North Korea, see William Shaw(ed.), *Human Rights in Korea*, Harvard Univ. Press, 1991; Chin-Tai Kim, North-South Divergence on Human Rights, Justice and Well Being and its possible Supersession, a presentation at the Millenium Conference on Korean Studies, Feb. 20, 2000 in Honolulu; and Chongko Choi, Asian Jurisprudence on Human Rights and Responsibilities, paper read at Lawasia Conference in Seoul on Sept. 8, 1999.

27) Harold J. Berman, *Justice in the USSR*, Harvard Univ. Press, 1963.

28) There are many comparative studies on German and Korean reunifications. For example, Myongkyu Kang/Helmut Wagner(ed.), *Germany and Korea: Lessons in*

Asian mentality. Because of both South and North Korean regimes are dominantly polemicized each other; each has tried to confront the other merely politically.

Nevertheless there have been several confrontations and dialogues between North and South. The South Korea has proposed a four-stage reunification process based on the great community of Korean nation(*Hanminjok kongdongche*, 한민족공동체). North Korea has proposed the unification through a "Democratic Confederal Republic of Koryo"(*Koryo Yonbangche*, 고려연방제) since 1980, based on Kim Il-sung's speech on "Five Policy Lines for Independent and Peaceful Unification".<sup>29)</sup> As preconditions to the implementation of this proposal, Kim Il-sung advocated 1) the withdrawal of the present South Korean Government, 2) the abolishment of the Anti-Communist Law and the National Security Law of South Korea, and 3) the withdrawal of U. S. troops from South Korea and the signing of a peace treaty between the U. S. and North Korea.

On Dec. 13, 1991, South and North Korea concluded an "Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation between South and North Korea". According to this agreement, South and North Korea shall recognize and respect each other's political systems (Art. 1). South and North Korea shall not slander or defame each other(Art. 3). South and North Korea shall resolve peacefully, through dialogue and negotiation, any differences of views and disputes arising between them(Art. 10). South and North Korea shall carry out exchanges and promote cooperation in various fields such as science and technology, education, literature and the arts, health, sports, the environment, journalism and media including newspapers, radio, television broadcast, and other publications.(Art. 16).

This Agreement has gone into effect since Feb. 19, 1992, but unfortunately

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*Unification*, Seoul National Univ. Press, 1995, especially the article of Dai-kwon Choi, Legal Aspects of the Present South-North Korea Relations and Beyond, *ibid.* pp. 208-234. South Korean government declares officially that it would not absorb the North Korea like in Germany. Nevertheless, the North Korea seems to be afraid of "absorption"(*Beitritt*) by the South.

29) For details, Jae Kyu Park, North Korea's Democratic Confederal Republic of Koryo: A Critique, *Korean Reunification: New Perspectives and Approaches*, ed. by Tae-Hwan Kwak etc., Kyungnam Univ. Press, 1984, pp. 69-83.

nothing has been really improved. The situation is even worse than at the time of the agreement. Both sides did not show any sincere efforts to carry out this agreement.

As a South Korean law professor, I must express a great regret for that and say that we should return to the spirit of this agreement. I would like to draw a special attention to one point. According to the Protocol on the Implementation and Observance of Chapter 1. of this Agreement, South and North Korea shall establish and operate the South-North Joint Reconciliation Commission(Art. 25). This Commission shall have a Consultative Working Group on Law, a Consultative Working Group on the Cessation of Slander and Defamation, and such other consultative working groups are considered necessary by the two sides. Agreements concerning the organization and operation of the consultative working groups shall be adopted separately by the South-North Joint Reconciliation Commission(Art. 26). We should establish this Consultative Working Group on Law(*Popyul Silmu Hyopuihoe*, 法律實務協議會) as soon as possible. Through the meetings of South and North Korean lawyers and legal scholars, we could find out the sameness and differences of both legal systems and institutions. Lawyers might be sometimes the defender of their own political order, but they are basically intelligent persons who believe in the rationality and the common goodness. I believe, a key to reopen the reunification dialogue is whether Korean people could establish this dialogue of South-North lawyers and legal scholars.

As this moment of the dialogue, I would like to propose a significant moment. As we saw, North Korea has produced many new laws concerning foreign investment. North Korean lawyers could be invited to explain these complicate laws directly to South Korean lawyers. Through discussion of such a concrete topics, the lawyers of both sides can increase their mutual understanding and credibility.

Some Scholars assert that North Korea is more Confucianistic than South Korea.<sup>30)</sup> The succession procedure of Kim Ilsung's political power by his son Kim Jongil has shown some Confucian features. South Korean politics and 'rule of law' also is described as not a mere imitation of Western patterns.

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30) Mizoguchi Yuzo, *Thinking about Renaissance of Confucianism*(Jap.), Tokyo, 1991.

The political behavior of the Presidents from Syngman Rhee through Chunghee Park strongly appeared Confucian. Currently, the Confucian "Asian values" are seriously discussed in many fields of South Korean society and academism.<sup>31)</sup> I have a vague anticipation that South and North Korea could reassure each other of their homogeneity or sameness through Confucianism.

## Conclusion

If we compare the South and North Korean laws, the quantity and quality are both quite different. So, it is not easy to compare simply on the same level. The North Korean laws are expressed purely in Korean *Hangul*(한글), whereas the South Korean laws are still mixed with Chinese letters. The "academic" legal literature of North Korea contains no footnotes, but express the says of Kim Ilsung and Kim Jongil in expository form with bigger letters. This isolated and deteriorated North Korean laws and legal culture could not be the ground of a justification of the South Korean law. Each system has its own characteristics and problems.

I can not foretell when and how the reunification would occur on the Korean peninsular. But I could say that the unification not only through politics but also through law would take a longer way. The unification of extremely Capitalistic South Korean law and the extremely Socialistic North Korean law would be a enormous task for the "true" Korean law in the future. Nonetheless, if the Korean people accomplish a desirable legal unification, it would be a great contribution to the world legal history.

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31) A good example is Seoul Conference of UNESCO, held on Oct. 4-6, 1999 with the title "Universal Ethics and Asian Value". The Korean Association of Public Administration also held a Conference on "Asian Values and Government Reforms" on Oct. 21-22, 1999 at Seoul National University. The Quarterly *Jontong kwa Hyundai*(Tradition and Modernity) sponsored an international conference on *Confucian Democracy* on March, 13-17, 2000, in Andong.

## 〈요 약〉

## 남한법과 북한법: 비교와 통일

최 중 고\*

이 논문은 ‘한국법’(Korean Law)의 시각에서 공통적 전통, 남북한법의 비교, 통일법의 가능성을 검토해본다.

## I. 공통적 전통

남북한법으로 분단되기 전까지 한국법은 공통적 전통을 가지고 있었다. 전통법시대에 5차례 외국법의 수용이 있었고, 중국법, 일본법과의 동아시아법적 전통 속에서 한국법의 독자성을 이해하기 위하여는 다소 주의를 요한다. 「조선경국전」(1394)에서부터 「경국대전」(1485), 「대전회통」(1866)에 이르기까지 법전편찬이 있었지만 학문으로서의 율학(律學)은 발달되지 못하였다. 이러한 전통법에 대하여 북한에서는 사회주의 이데올로기에 근거하여 보다 비판적 사관을 갖고 있다. 개화기에 친독일적 대륙법의 수용은 남한에서 오늘날까지 계속되고 있고, 일제시대의 유산도 극복해야 할 과제로 남아있다.

## II. 남한법

1948년에 헌법을 제정한 이래 법치주의에 입각한 민주정치를 지향해오지만 정치적, 사회·경제적 불안정으로 그 노정이 순탄치 않다. 각종 법률의 증가로 4000개에 이르는 현행법령이 있지만, 법이 정치의 시녀로 보이는 면도 크다. 형법의 역할이 크고, 국가보안법 등 ‘통일장애’의 극복이 논의 중에 있지만 쉽지 아니하다. 한 마디로 남한법은 미국적 사회현실의 살(肉)에 대륙법적 뼈대(骨)를 가진 복합적 법문화를 이루고 있다.

## III. 북한법

북한법은 주체사상에 입각한 극단적 사회주의 법인데, 법전이 존재하지 않는다. 1998년 9월 5일 개정된 새 헌법에 비로소 등장한 전문(前文)에는 이민위천(以民爲天), 인덕정치(仁德政治)라는 유교식 표현이 등장하고, ‘김일성헌법’이 공식화되고 있다. 여기에 등장한 유교적 색채가 어찌면 남한법과의 매개점이 될 가능성도 없지

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않다. 1990년 9월 5일에는 민법이 제정되어 최소한의 사유재산이 보장되고 있다. 근년에는 경제위기를 극복하기 위하여 외화유치를 위한 특별법들이 중첩적으로 보일 만큼 다수 제정되고 있다. 북한에도 사법제도가 있지만 판례를 입수하기 어렵고, 사회주의 법무생활, 국가중재를 강력히 실시하고 있는 것만 알 수 있다. 버만(H. Berman)교수가 지적한 사회주의법의 특성이 북한법에 모두 적용된다.

#### IV. 법통일의 가능성

남북통일에 대한 여러 논의가 있지만 남북한이 어찌면 동아시아인의 사고방식 때문인지 법률적 접근을 기피하고 항상 정치적으로 담보하는 경향이 있다. 남한은 한민족공동체에 의한 4단계식 통일정책을 추진하고, 북한은 고려연방제식 통일방안을 주장하고 있다.

1991년 12월 13일에 채택된 남북한 기본합의서에 따르면 남북한이 상호 체제를 존중하고 차이를 협의하기 위하여 법률실무협의회를 구성하기로 하였다.(남북화해부문 부속합의서). 남북대화가 성사되느냐 여부는 이 법률실무협의회가 어떻게 가동되느냐에 달려 있다고 본다. 법률가는 때로는 자국체제의 변호인이지만 근본적인 합리성과 공동선(共同善)을 추구하는 지식인이므로 남북법률가가 만나서 상호신뢰를 축적할 필요가 있다. 하나의 제안은, 북한법률가들이 그들의 대외 경제법, 외자유치법 등의 최근 법률들을 남한에 와서 직접 설명할 수 있는 기회를 갖게 하는 것이다.

#### 결론

남북한법을 비교하면 그 양과 질에 있어서 많이 다르다. 그래서 평면적 비교란 불가능하다. 그러나 고립되고 파괴된 북한법이 남한법을 정당화해주는 근거는 되지 못한다. 남북한법이 모두 각각의 특징과 문제들을 안고 있다. 필자는 언제, 어떻게 통일이 이루어질지 알지 못한다. 그러나 정치적 통일만이 아니라 법적 통일은 더욱 오랜 시일을 요한다는 것만은 확실하다. 남한정부는 독일과는 달리 흡수식 통일은 하기 않겠다는 것이 공식 입장이다. 어쨌든 극단적으로 자본주의적 남한법과 극단적인 사회주의적 북한법이 통일될 수 있다면 세계법의 역사에서 큰 공헌을 하게 될 것이다.