LAW AND SOCIETY STUDIES IN KOREA: BEYOND THE HAHM THESES

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I. INTRODUCTION

The history of law and society studies in Korea is rather short. Although there were some precursors like Chong Yag-yong (1762–1836),[1] who conducted pioneering legal studies on the basis of empirical methodology, the sociological perspective he pioneered unfortunately failed to flourish. As the momentum of spontaneous modernization, including the law in the late Yi dynasty (1392–1910), was frustrated by Japanese colonial rule, it was only after the liberation of the nation in 1945 that jurisprudence emerged as a subject of academic interest.

As with Korean legal scholarship in general, modern Korean law and society studies were imported from the outside. The introduction of law and society studies in the West by Korean scholars themselves first came in the 1950s, with the translation of such classical figures as Max Weber, Eugen Ehrlich, and Georges Gurvitch (see Ehrlich, trans. Chang, 1955; Gurvitch, trans. Lee *et al.*, 1959; Weber, trans. Choi, 1959).

It was only from the 1960s on that Korean scholars began to publish results of their research. They have been chiefly legal scholars rather than sociologists or other social scientists. In this respect, there is some resemblance to the case of Japan. Most legal scholars have warmly embraced the sociological perspective, in large measure because of their appreciation of the gap between law in books and law in action. Nonlegal scholars, however, have been inclined to neglect the importance of law.

The major subjects in law and society studies can be grouped into three areas: the legal consciousness[2] of Koreans; the historical analysis of law and society in the traditional period, especially

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[1] Chong Yag-yong was a leading scholar of the school of practical learning (*silhak*), which was formed in the seventeenth century in Korea. Most of the scholars of the school, including Chong, were deeply influenced by Western books in Chinese translation that were brought from Peking to Korea by Korean envoys to China.

Chong's broad academic interest covered various fields. Particularly on law, he pigeonholed criminal cases systematically and also stressed the principle of *nulla poena sine lege* on the basis of humanitarian thought. On Chong's legal thought, see Park (1985).

[2] For a discussion of the meaning of legal consciousness, see Miyazawa (1987: 219, 221–23).

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in the Yi dynasty; and the reception of foreign law. Third-world countries have often confronted significant trouble in importing the modern legal system from the West, and Korea has been no exception. Although the gap between law and reality is surely not peculiar to third-world countries (see, e.g., Trubek, 1977: 542–43), Korean scholars have understood the question as peculiar to Korea. That is, there is the problem of incongruence between westernized, official legal norms and traditional, premodern legal culture.

These three research subjects are bound together by one common theme. The starting point has been the recognition that the basic problem of law in Korea is the gap between the law and the reality incident to the reception of foreign law. It has been assumed that the premodern legal culture of Korea has caused that gap, thereby making research on the present state of the people's legal consciousness especially important. Moreover, on the assumption that the present state of legal consciousness has its roots in traditional society, scholars have searched for the historical source thereof.

What requires special attention here is that researchers have usually approached the question of a gap between the law and reality primarily from a cultural perspective, and identified traditional legal consciousness as the most important variable. On the other hand, the fact that most researchers in law and society studies have been legal scholars has led to a serious weakness in their research methodology. Legal education in Korea, unlike that in the United States, begins at the undergraduate level, and law students usually do not learn much about nonlegal fields. Unfortunately, law professors, who are products of the same educational system, also usually lack knowledge of the social sciences.

The problem is that there is little difference in the methodology of researchers who have an interest in law and society. Consequently, most researchers, despite their seemingly deep interest, have undertaken research without the tools to explore their topics fruitfully. Thus their research often appears anecdotal and amateurish, especially on the matter of legal consciousness.

Since the 1970s, however, some sociologists have begun to show interest in the sociology of law. Most of them have educational backgrounds in the United States that have equipped them with a firm foundation in social scientific methods. Unfortunately, they usually lack knowledge of positive law, and too often only specific topics with no direct relation to positive law, such as a survey of legal consciousness, have been adopted.

II. THE CONTRIBUTIONS OF HAHM PYONG-CHOON

A representative example of research provides an in-depth understanding of law and society studies in Korea. There are several reasons for examining the contributions of Hahm Pyong-choon

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(1932–83)[3] as a representative scholar in Korean law and society studies in the 1960s and 1970s. First, Hahm's work ranged over various subjects covering all the major topics of law and society studies in Korea. Moreover, he was probably the first figure to rise above the amateurish level of research in law and society studies in Korea. Second, and perhaps more important, his basic perspective on law and society, while not without problems, is representative of the field. And, third, he is relatively well-known to foreign scholars.

Hahm's basic theoretical framework involves three theses. According to the first thesis, the Korean legal system is composed of the superstructure (prescriptive postulates and organizational structures) and the infrastructure (cultural milieu). The main cause of problems in the legal system can be traced to the discord between the advanced superstructure and the backward infrastructure (Hahm, 1986: 118). While the superstructure of the Korean legal system has been modeled after the German system with Japanese modifications, the Korean legal culture still remains traditional and premodern. Koreans are averse to litigation (ibid.: 97ff.). Thus the Korean legal culture can be characterized as an alegalistic one in which law was a set of punishments based on an appeal to human decency, in which mediation and compromise were preferred to adjudication, and in which justice was thoroughly "substantive oriented" and "irrational" in the Weberian sense. Such a perspective is quite opposite to the "formal rationality" of law in occidental capitalism (ibid.: 95–97). The westernized, formal superstructure of the Korean legal system still remains fundamentally at odds with the indigenous legal culture, and "the two are based upon two fundamentally different outlooks on life and on hierarchy of values" (ibid.: 118).

The second thesis of Hahm is that the tension between the foreign superstructure and native infrastructure should be reduced by adapting the imported formal system to the indigenous legal culture (ibid.: 119):

> The ever-increasing international interdependence renders any argument in favor of ridding modern Korea of the imported system and restoring the traditional style most unrealistic. It would be much more practical for Koreans to find a way to adapt the imported system creatively to the indigenous cultural milieu. (Hahm, 1986: 251–52)

Hahm's third thesis concerns the problem of law and development. According to him, the function of law, especially for eco-

[3] Hahm received his B.A. in economics from Northwestern University in 1956, his J.D. from Harvard Law School in 1959. He taught at Yonsei University in Seoul, Korea, after 1959. He was also in the government service as special assistant to the president for political affairs and as ambassador to the United States. He died in a North Korean terrorist bombing in Rangoon, Burma, while accompanying the president on a state visit as his secretary-general.

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nomic development, is limited and rather negative. "Law may be more effective," he has written, "as the expression of the civic conscience than as an instrument of economic development and social welfare. It can be more useful as an instrument of rooting out social injustice than as a means for the realization of social welfare" (1967: 145). Lawyers in an underdeveloped country should understand that there are many things the law cannot do (ibid.: 186). Attempts to modernize law in underdeveloped Asian countries with an authoritarian heritage, despite their modern features in institutional aspects, have resulted in the "medievalization" of law. For example, "If we adopt a welfare legislation, it is most likely to turn into something very similar to the Elizabethan Poor Laws" (ibid.: 162). Thus, "In a pre-modern economic milieu, any institution that is too far advanced can never function effectively" (ibid.: 164). At the premodern stage of economic development, "laissez-faire will do us more good than welfare statism" (ibid.: 165). In conclusion, Hahm stresses that "more law can only hurt us. What we need today is not more law but less law" (ibid.: 166).

III. THE PROBLEMS OF THE HAHM THESES

Several characteristics and some problems related thereto can be noted with regard to Hahm's theses. First, his basic perspective on law and society is too narrowly confined to a culture view. Hahm regarded legal culture as the infrastructure of the Korean legal system. Admittedly, it is a widely accepted view that legal culture is an essential element of a legal system (see, e.g., Friedman, 1977: 7). No one would deny that a legal culture—that is, social attitudes and values about law—has a vital role in the functioning of the structure and substance of a legal system. The problem is, however, that Hahm and other Korean scholars have taken into consideration chiefly cultural elements among various factors affecting the functioning of the legal system, almost to the exclusion of other important, noncultural factors.

Although legal culture may constitute the infrastructure of the legal system, it goes without saying that the legal system is only one part of a society. Viewed broadly, characteristics of a specific legal system are basically determined by social hierarchy and the dominant consciousness of society. These two, of course, interact reciprocally. In the words of Roberto M. Unger, the two major factors that determine the type of law are "features of social organization" and "elements of culture or consciousness" (1976: 58). In other words, socioeconomic relation is a key variable in the functioning of law (Podgorecki, 1974: 87, 225).

Nevertheless, Korean scholars have neglected to take account of noncultural aspects such as the politicosocial hierarchy, thereby rendering their research somewhat prejudiced and even deficient. As an example, in his study on contemporary Korean legal con-

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sciousness, Hahm conducted a survey in 1964 asking, "When you are involved in a quarrel or a dispute with another person and he declares to you, 'I am going to settle this legally,' how would you feel?" Fifty-six percent of the respondents said that they would feel "bad," 14 percent answered they would feel "indifferent," and 18 percent responded that they would feel "good" (1986: 100). These results led Hahm to conclude that Koreans prefer nonlegal settlement of disputes. Moreover, Hahm stresses the lack of "claim-consciousness" of Koreans by invoking the survey result to the question: "The driver of a bus or a truck wrongfully injures you severely. What would you do?" In this survey, 34 percent of the respondents said they would "go to the law," 41 percent answered they would "negotiate and compromise," and 12 percent said, "It is up to him to do whatever is necessary and right" (ibid.: 102).

It seems superficial, however, to conclude that nonlitigious attitudes of contemporary Koreans are mainly due to the traditional preference for nonlegal settlement. Such a conclusion seems unsound without taking into account the low level of differentiation between social subsystems resulting from the low stage of industrialization, as well as such other noncultural factors as the people's strong distrust of the judiciary under the authoritarian Park regime during the 1960s and 1970s, an extreme differential in income distribution in the process of rapid economic growth under the principle of "growth first, distribution later," and high legal fees caused by the monopoly of a small number of lawyers. Indeed, in a 1980 survey of judges in Korea, 67.3 percent of the respondents said that the independence of the judiciary had not been guaranteed under the Park regime (Lee, 1980: 13). Further, in 1987 the ratio of the number of lawyers to the general population still remains as high as 1:27,813.

Even apart from other methodological or technical problems involved in Hahm's study, the fact that questionnaires in his survey are largely concentrated on matters in civil law rather than criminal law seems the result of Hahm's disregard for politicosocial conditions. For a survey of legal consciousness such conditions are of fundamental importance. The questions are as important as the scientific methods of testing them.

In this regard, Hy-sop Lim's survey of legal consciousness (1974) deserves closer attention. Lim's study, based on the distinction of cognitive, affective, and behavioral dimensions of people's attitudes toward law, made much of issues such as legal identification and legal alienation, as well as issues like legal knowledge and legal competence. His findings indicate that

> the Korean's attitude toward law is changing from an emphasis on law's morality and politicality to its social function and that, due to an extensive skepticism over the present legal validity, Koreans feel they are legally alienated,

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> and that the manipulative, subject, observant and avoidance types in legal behavior are almost equally distributed among Koreans without any one of these types being predominant. (Lim, 1974: 81)

Research centered on culture continues strong today. Daikwon Choi, for instance, has shown particular interest in the study of "living law" in the sense of people's norm consciousness contrasted with official, positive law (1983: Chs. 3, 4, 5).

Indulgence in this culture-centric position merely brings about, in the words of Alan Hunt, "sociology *in* law" (1978: 112, 113). The true "sociology *of* law," as compared to the sociology *in* law, requires an analysis of the relationship between law and other components of the social system. As yet, law and society studies in Korea continue to suffer from very few researchers tackling issues of the structural relationship of law with politics or economy. One can probably attribute this narrow perspective to the authoritarian rule in the 1960s and 1970s, particularly that since the *Yushin* reform in 1972 that excluded even basic principles of constitutional democracy. The fact that German sociology of law had to experience a complete breakdown during the Nazi era (see Rueschemeyer, 1970: 227) might help to explain the situation in Korea.

On the other hand, scholars with the culture-centric view like Hahm have shown some inclination toward a biased understanding of traditional society. Hahm, after characterizing the Korean traditional society as alegalistic, concluded, "There was little in our political and legal tradition that might contribute positively to our modern political life" (1967: 83).

We should remember, however, that recent findings largely conflict with those of Hahm and scholars of similar views (see, e.g., Chun, 1981). The studies by Byong-ho Park (1974a; 1974b; 1985) are representative of the new arguments. William Shaw (1980), an American scholar in Korean studies, also has joined Park.

According to their arguments,[4] law in the Yi dynasty, including criminal law, was not devalued but was highly regarded. General accounts of the litigation-avoidance attitudes in traditional oriental society with Confucian ideology are true for Korea only with important qualifications. Finally, traditional law was not totally devoid of "rational" elements in the Weberian sense; some positive elements, such as equality in law, were present in traditional law.

The gist of arguments made by Park and Shaw is that some modern elements may be found in traditional law under the Yi dynasty, especially in its later years. These studies have shown at least two basic weaknesses in Hahm's arguments. One is that Hahm mainly based his work on secondary English-language

[4] See, generally, Park (1974a) and Shaw (1980).

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sources, thus rendering his arguments less persuasive. The other is that his study failed to distinguish law in action from law in theory.

Furthermore, it seems to me that careful attention to law and society under Japanese rule may be more revealing than in the Yi dynasty. The period of Japanese colonial rule has exerted a more potent influence on present Korean legal development than has the more remote legacy of the Yi dynasty. Especially in the field of public law and criminal law, the legacy from the Japanese rule persists even today, although residual influences from the period of the Yi dynasty may also be discerned, particularly in the area of private law.

The Western legal system imposed on Korea through Japanese rule was deflected three times from its original form. The perverted, Prussian version of the modern Western legal system was distorted by imperial Japan under pseudo-constitutionalism, and it was once again contorted by the Japanese colonial legal system in Korea. The essence of this colonial legal system persisted, with some exceptions, even during the period of American military government (1945–48).

To make the matter worse, even after the First Republic of Korea was established in 1948, the colonial legal system under Japanese rule was maintained in considerable parts, including the Criminal Code and the Civil Code, for a fairly long time until the late 1950s, when new laws were promulgated.

Even today the vestiges of repressive laws under Japanese imperialism remain alive, particularly in the area of laws of politicosocial control. For example, some remarkable resemblance can be seen between the Law for the Maintenance of Public Order from the period of Japanese rule and the National Security Act of today.

Thus the elements of a repressive colonial legal system have continued through the successive authoritarian regimes since 1948. Not surprisingly, popular attitudes of distrust toward law have gradually deepened.

Despite this situation, there have hitherto been few studies of law and society covering the period of Japanese rule. Scholars have concentrated instead on the Yi dynasty law, usually from a narrow, biased perspective that treats all legal phenomena today as linked to the premodern Yi dynasty law. These scholars seem bound by the so-called "colonial view" of Korean history that originated with Japanese colonialists.

Finally, problems exist with Hahm's study of law and development. Hahm recommended the adaptation of certain structural aspects as a way of solving the dissonance between the superstructure and the infrastructure of the Korean legal system. In this respect, his position is quite different from the ethnocentric per-

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spective of Western scholars, often called the liberal legalism paradigm (see Trubek and Galanter, 1974), which were dominant in the United States in the 1960s. Nevertheless, Hahm's alternatives were at least partly incoherent.

He believed that developing countries had to go through a stage of laissez-faire, just as Western capitalism had. In other words, the positive function of law for economic development in the third world cannot imitate the socialization of law in the twentieth-century West. Less rather than more is desirable. This evolutionary point of view is modeled after the Western developmental process, which appears to conflict with Hahm's emphasis on indigenization of the Western system. This dissonance can be understood as elite frustration with the experience of socialization of law in Korea. He also fails to take account of the obstacles faced by developing countries in the periphery of the world capitalistic system.

As in all such matters, the basic issue is theoretical perspective. The law and development studies which once pervaded the United States were, in a word, ethnocentric. Modern Western law was assumed to be both a necessary element in development and a useful instrument to achieve it (Trubek, 1972: 6–10). However, legal reform programs (such as legal education or codification on the model of Western laws) in third-world countries based on their assumption proved to be futile because of their ethnocentric characteristics.

Nowadays, the central assumptions underlying the early dominant perspective have come to be treated as inherently problematic. Some scholars argue that previous assertions about the goodness and potency of law must be transformed into critical standards purified of descriptive assertion (see, e.g., Trubek and Galanter, 1974: 1099). Others, stressing the necessity of learning through doing in the circumstance of the third world, have insisted that researchers must examine real problems of real people (see, e.g., Seidman, 1978). A third group of scholars, those of the so-called dependency perspective, have rejected the dominant paradigm altogether (see, e.g., Snyder, 1980). Largely relying on the framework of Marxist political economy, they have called for a fundamental revision of the units of analysis, in consideration of the limits of social and legal transformation within the world economy. They have also indicated, among other things, the importance of analyzing the role of the state and law in relation to classes.

It is hard to say conclusively which perspective will prevail. What is important, of course, is to adopt a critical position toward dogmatisms of all kinds (see Yang, 1987).

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IV. FUTURE DIRECTION FOR LAW AND SOCIETY STUDIES IN KOREA

What would be a desirable direction for law and society studies in Korea, a developing country?

As suggested already, the future of law and society studies in Korea should include the following. First, a more expanded perspective should be taken, freed from the culture-centric approach. The holistic understanding of law and society will be possible only through inquiry into the relationship between law and other subsystems of society. One of the striking features of the recent Korean intellectual climate is an unprecedented degree of progressive and sometimes even radical views, particularly in the field of social sciences. Hitherto restricted zones for research and discussion are gradually disappearing, particularly among young generations. However, law as a field has not yet been removed from conservative, closed inclinations.

Korean law and society studies should, above all, be based on diverse theoretical perspectives and at the same time, should be careful to avoid any ideological dogma. David M. Trubek once suggested that "law and society research should be critical without being cynical, empirical but not positivistic, normative but not subjective, detached yet not disinterested" (1977: 529). This statement would be entirely true for Korea, too, where scholars, particularly those of a new generation, have recently been seeking to move beyond the primitive stage of law and society studies.

Second, in inquiring into the historical characteristics of Korean law, greater attention should be given to the periods of Japanese colonial rule and American military government. This is by no means to deny the significance of the Yi dynasty law, but simply to transcend the colonialistic bias in the Korean history.

Third, we need to pay greater attention to the positive role of lawyers in the developmental process. Under authoritarian regimes, there are usually two modalities of law: law as instrument of repression, and law as political manifesto of no real effect. However, there is a third possibility. Law might constrain the ruling power (Yang, 1987: 9). As Edward P. Thompson suggested, law is a complex and contradictory being (1975: 264). It can "mediate" political, social, and economic relations both ways, for and against the ruling power. In this sense, the role of lawyers has to be reappraised. Lawyers are a significant and peculiar group. As Weber indicated, they are a status group organized around the ideals of an autonomous legal order, and these ideals formed the basis for the lawyers' social and material position in society (Weber, 1968: 853–55). Loose in organization and diverse in political orientation as today's lawyers may be, lawyers still offer the potential for the advancement of liberating ideals. In addition, justice as a universal legal ideal is inseparable from lawyers, although the

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ideal of justice may vary with time and place. Lawyers as a group, though often said to be inclined to conservatism, may perform a positive, liberating role (see Yang, 1987: 10).

In the process of the Korean democratization movement of recent years, the contribution of the so-called "human rights lawyers" has been crucial. They have done *pro bono* work on behalf of political offenders, and as core members of the Human Rights Committee of the Korean Bar Association, they have taken the lead in activities such as issuing critical statements on almost every occasion of human rights infringement by the government, making annual reports on human rights in Korea, and doing research on human rights reform measures. Moreover, some lawyers have been engaged in public interest activities like consumer protection, reflecting the influence of the public interest law movement in the United States (see Marks *et al.*, 1972; Rabin, 1976).

Perhaps the most hopeful sign for law and society studies in Korea is that a young group of scholars have already started to make progress in each of these areas.[5] In contrast to Hahm, who may be said to have viewed law from the ruler's perspective, the new generation of scholars are characterized by their populistic, critical perspective on law. As long as they continue to be careful not to fall into any kind of dogma, the future of this small but new academic movement seems assured.

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[5] These scholars have recently organized a study group named the Association of Law and Society Studies. In August, 1989, they published the first issue of their journal entitled "Law and Society," featuring the symposium on the reform of "bad laws" in Korea.

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