

THEORIES OF ASIAN LAW

1. INTRODUCTION

(1) Outline of today:

A point of the Asian Human Rights controversy is the claim that there are particular Asian concepts of culture, tradition and society different from the West, and law with such particular background must be different from the Western one. At first, lecture today discuss about what is the theoretical relation between law and particular culture. Then, we will consider about the "legal pluralism" in a nation state (the concept and existence of "nation state" itself is imported one from the West). "Legal pluralism" is supported by many analysts of non-European law as a cognitive framework for law, culture and society in non-European countries. Especially, we will focus on Prof. Yasuda's hypothesis, namely the trichotomy of law (three types of law in a legal system) composing of indigenous law, imported law and development law.

(2) Questions for today

- What are theoretical explanations on the relation among law, society and culture?
- What elements mainly influence the existence of law in Asian societies?
- Whether the law is transplantable from one society to others? Or what kind of law is more transplantable than other one?
- What are the validity and limitation of the claim that law is defined by particular culture (usually, contended as inherent and traditional ones)?
- Try describing legal system of your own country from the standpoints above mentioned.

2. Theories on law and society --> for longtime, attracting law scholars.

(1) **Charles-Louis de Montesquieu (1689-1755)** -- *L'esprit des lois*, 1748

(2) **Henry Maine (1822-88)** -- *Ancient law* (1861)

Evolution of law --> how ancient law evolves to mature modern legal system.

--> "status to contract", "judgment to custom to codification"

--> Influence to *Meiji* Japan: skepticism to rapid codification

(3) **F.C. von Savigny (1779-1861)** -- historic school (1814--)

Law -- "*volksgeist*" (folk or national spirit)

Law is not made, but historically evolves with folks (like as folks language)

--> In practice, commitment to Roman law (adapted in German states since 15th century)

(4) **K.H. Marx (1818-1883)** --

considering law and class (law as ideology of ruling class)

(5) **Eugen Ehrlich (1862-1922)** -- *Fundamental Principles of the Sociology of Law* (1913)

Subject of jurisprudence -- "law in action" <-> "law in book"

Judge --> discover and create law --> catch up to social development (free law movement)

(6) **H.L.A. Hart (1907-92)** -- *Concept of Law* (1961)

primary rule: rule of obligation (conduct) (uncertainty, static, ineffective)

secondary rule: rule of the recognition, alternation and application of primary rules (certain, changable, enforcable)

(7) **D. North** -- *Institutions, Institutional Change and Economic Performance* (1990)

institutionalist economics --> formal institution & informal institution

institution --> enhancing predictability

There are far more informal institutions than formal institutions

2. LAW IN NON-EUROPEAN SOCIETY

(1) Legal pluralism

Co-existence of different laws in one society (applied according to group, place, and subject)

e.g. Sri Lanka (researched by Prof. Chiba)

** Even several European countries had experienced friction of law (e.g. German society importing French codes and Roman law, Dutch society importing French Codes, etc.), not to mention Asian countries which have totally different legal history from western European countries.

(2) Prof. Yasuda's framework -- Three types of law

- indigenous law - legal principle of community
- imported law - legal principle of market
- development law - legal principle of government (command)

(3) function of law in society

law as norm

law as institution (institution and enforcement)

law as culture

Law as norm & Law as institution (technical aspects of law)

---- modern law

- >> usually written ones (except: common law)
- transplantable
- object of legal technical assistance
- universality in application
- secularity in its origin

(in modern state, man-made law applies to all citizens equally and universally within its territorial limits)

Law as culture (cultural aspects of law)

--- traditional law

- >> usually unwritten ones
- inherent in certain society (not transplantable)
- difficult to change by outer pressure (e.g. legal assistance)
- particularity in application (group, religion, etc.)
- close connection to religion and traditional belief

(in traditional society, people will obey to various kind of law and different groups of people will obey different laws. Validity of certain law in different place to place within society.)

(4) Legal policy and legal pluralism

- indigenous law as the tool to legitimate development law (Asian authoritarian states)
- (According to Yasuda, "law as enactment" change "law as culture" to "law as norm". However, in some case, power holders refer to traditional value in order to legitimize their modern law. For example "Asian value", "harmony", "leadership", "Confucianism", "Adat" etc.)
- Penetration of modern law into indigenous law (legal assistance utilizing indigenous law)
- Using western legal theory in recognizing indigenous law (colonial legal policy, e.g. Dutch East Indie)
- Arbitrary use of indigenous law (excuse for human rights violation, discrimination or social gap)