

**The heavenly principle(天理), the state law (国法) and empathy (人情)
as the common political ideal in the East Asia**

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Rule of law is the most frequently quoted concept in the recent political agenda and statements in the East Asia and although its interpretations differ by authors and in contexts, the fundamental elements of the conception of rule of law has been thoroughly examined and articulated in detail by prominent scholars including Brian Z. Tamanata and Joseph Raz, following Albert Venn Dicey's classic work, *Introduction to the Study of the Law of the Constitution* (1885).

In short, there are two types of the conception of rule of law, one is thin or procedural and the other is thick or substantive. The former demands that states must govern by the laws and the latter usually includes other political ideals such as democracy, justice and respect for human rights in addition to the rule by the law.

My propositions are as follows;

- 1) The rule of law is one of major political doctrines, but needs to be complemented by the other political and legal ideals,
- 2) The rule of law could be properly interpreted and implemented only in a society with matured democratic culture sustained by certain political, economic and social conditions,
- 3) Respect for human rights is such a political and legal ideal for the proper interpretation and application of the rule of law, because it presupposes the views of human as agent with free will and intentionality and of society/community as indispensable means for human wellbeing, the essential elements for democratic culture,
- 4) Each society has its own social moral order with a certain conception of humans and society, historically developed in that society.
- 5) The ideals of the rule of law, democracy and human rights must find appropriate philosophical justifications in order to be incorporated into non-Western societies and such justifications must be attractive and inspiring for ordinary citizens in those

societies and be based on their own intellectual resources, including local languages¹.

- 6) In the East Asia, the traditional political ideal, “the heavenly principle, the state law and the empathy (天理、国法、人情)” should be utilized for this enterprise.

1. Rule of law

Rule of law is a political and legal doctrine which politicians, diplomats and business people are advocating so enthusiastically nowadays in the East Asia, as if it could deter almost all arbitrary deviations from the universally accepted code of conduct and pave the way to sustainable development at home.

I basically support their commitment to the rule of law, assuming that the strong political commitment will eventually give birth to cultural conditions required for the rule of law to be interpreted and applied properly.

Theoretically speaking, however, the concept of the rule of law has varied meanings and for the sake of scholarship, we must begin with categorization.

There are two types of the conception of rule of law, one is thin or procedural and the other is thick or substantive.

In Tamanaha’s account, the procedural conception of the rule of law is divided to the three subcategories²;

- 1) Rule by law: government must act by law,
- 2) Formal legality: government must act by law which must be prospective, general, clear, public and relatively stable with necessary mechanisms including an independent judiciary, open and fair hearings without bias, review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law,
- 3) Democracy + formal legality: government must act by law authorized by the consent of the people(governed) in addition to the requirements mentioned in 2).

Tamanaha referred to Jurgen Habermas, who held that given the loss of faith in natural law and the fact of the moral pluralism, liberal democracy is the only legitimate arrangement, and responded that democratic mechanism in a society without democratic tradition might be utilized for claiming the legitimacy for advancing a particular agenda of subgroups and that democratic system can greatly swing in public mood and attitude and may be less

¹ Akihiko Morita, A neo-communitarian approach on human rights as a cosmopolitan imperative in East Asia, *Filosofi a Unisinos*, 13(3), Sep/Dec 2012(Dec,2012).

² Brian Z. Tamanaha, *On the Rule of Law-History, Politics, Theory*, Cambridge University Press, 2004, pp.91-101.

certain and predictable and more tyrannical than a stable authoritarian regime without the rule of law.

Tamanaha, then, presented the three substantive versions of the rule of law³;

- 4) Individual rights: in addition to the elements of the formal rule of law, individual rights are added,
- 5) Right of dignity and/or Justice: in addition to 4), it assumes that individual rights should be preserved beyond the reach of the legislature and the right of dignity could be even beyond the constitutional amendment,
- 6) Social Welfare: social welfare rights are added to formal legality, individual rights and democracy.

Tamanaha, referring to Ronald Dworkin as a proponent of the substantive version 4), pointed out its defect that what individual rights entail could not be determined without controversy and consideration of such disputes by the judiciary may undermine the democracy as the self-rule, one of the elements of the substantive version of the rule of law. Tamanaha thus concluded⁴;

The rule of law cannot be about everything good that people desire from government, The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.

I think, as Joseph Raz stated⁵, we should not consider the rule of law not as a universal moral imperative, but one of doctrines which can be useful and good under certain circumstances. Overburdening one concept may cause theoretical and practical discrepancies whereas understanding the rule of law narrowly that government should act only by the law could contribute much more universally and practically to the development of democracies as demonstrated in the recent case of China.

In Raz's account, there are two approaches to the justification of the rule of law, 'justice on a bureaucratic model argument for the rule of law' and the tradition-oriented approach. The former stresses predictability of the law which makes possible for the people to conduct their life without arbitrary intervention by government. Raz pointed out the two shortcomings, expensive justice and alienation of justice from the ordinary people because it requires a

³ B. Z. Tamanaha, *On the Rule of Law-History, Politics, Theory*, pp.102-113.

⁴ B. Z. Tamanaha, *On the Rule of Law-History, Politics, Theory*, p113.

⁵ Joseph Raz, the Politics of the Rule of Law, *Ethics in the Public Domain*, revised edition, Clarendon Press, 2001, 370-378, p.379.

growing number of highly qualified legal profession which makes the law financially inaccessible and technically remote for the lay people. The latter, the ideal of community law, is relied on the common understanding and knowledge about their law among the community members and hence does not need many highly skilled bureaucrats for its enforcement and adjudication. Raz is also critical for the community law approach as it is not fit in the modern industrial societies with high mobility of labor and moral plurality.

Raz's own view of the rule of law is, in my account, a bureaucratic model with much stronger emphasis on the publicly promulgated, prospective, principled legislation. In his account, publicly promulgated legislation would be principled and reasoned and hence promote a common understanding of the legal culture based on which judges make faithful and principled decisions⁶.

Raz admitted that his approach to the rule of law is valid only in the countries suitable for democratic government in the sense that it requires a culture of restraint and the spirit of compromise for the minority being subject to the policies against their intent and benefits and for the majority to refrain from disregarding the minority's interests and beliefs⁷.

One natural question about Raz's argument is whether one-party-system country with no prospective of the regime change could be democratic in his sense. My answer is that whether one-party-system could be democratic is depend on its political culture and hence a priori judgement could not be made. As demonstrated by the single-party dominance for more than 60 years in Japan, democracy may function even without the regime change through general election under certain conditions.

I also wonder if the rule of law could be interpreted and justified differently as a valid and good doctrine at different times in different countries.

As Daniel A. Bell arguably elaborated, the China model, a combination of economic freedom and incremental democratization which carries democracy at the bottom, experimentation in the middle and political meritocracy at the top suffices to embrace the doctrine of the rule of law although the current model may change as it did in the past⁸.

Moreover, I would stress that the doctrine of the rule of law is not the sole political and legal doctrine and that, in my account, it must be complemented by the respect for human rights, the universal and supreme moral principle.

2. The rule of law, democracy and human rights in the East Asia

⁶ J. Raz, *the Politics of the Rule of Law*, pp.373-376.

⁷ J. Raz, *the Politics of the Rule of Law*, p.377.

⁸ Daniel A. Bell, *The China Model*, Princeton University Press, 2015.

As Yu Keping stressed, democracy is a good thing in the East Asia as a substantive prerequisite for the rule of law⁹.

In my account, the ideal of democracy entails the ideal of human rights because the ideal of human rights presupposes and embraces the views of human as agent with free will and intentionality and of society/community as indispensable means for human well-being, both of which are essential elements of democracy.

As Allan Gewirth elaborated, human action possesses voluntariness or freedom and purposiveness or intentionality as the generic features which assumes that human agent can control his behavior by their unforced choice and aims at achieving goals, which presuppose the conditions for attaining the goals, called as well-being. In his account, one of the important components of such well-being is community because community is a means toward the fulfillment of self-interest as human is a social animal¹⁰. Of course, the community which Gewirth bears in mind must have matured democracy, which the ideal of human rights presupposes.

In short, any society which ensures every member basic human rights equally must embrace the above-mentioned views of human and society and hence could be democratic.

In this connection, we should keep our eyes open for diverse, non-conventional institutional arrangements which has been emerging in the East Asia.

As José E Alvarez arguably elaborated¹¹ and demonstrated by the recent development of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Rights of Women and Children (AIWC), the widely accepted myth that the “Asia-Pacific region” is relatively under-legalized does not reflect the rapidly changing political and legal landscape and particularly misses a wide range of non-traditional legal formulas emerging in the region.

Alvarez emphasized¹²;

International legal sources are no longer confined to treaty, custom, or general principles but include a welter of “soft law” whose content and legal effects very much involve the discourse of law. Relevant law-making actors are no longer just states but international civil servant,

⁹ Yu Keping, *Democracy is a Good Thing*, the Brookings Institution, 2009.

¹⁰ Allan Gewirth, *The Community of Rights*, The University of Chicago Press, 1996, pp.13-15.

¹¹ José E Alvarez, Institutionalised legalization and the Asia-Pacific “Region”, *New Zealand journal of public and international law*, vol.5, 2007, 9-28.

¹² J. E Alvarez, Institutionalised legalization and the Asia-Pacific “Region”, p.26.

private parties, non-governmental organizations, business groups, and experts. International law's interpreters are, most often, not judges, even in this age of proliferating international tribunals. International legal mechanisms now deploy many other interpreters, including private parties and municipal officials. Its enforcers include "the market" as well as a welter of bureaucrats, national and international.

In my account, in increasingly interconnected world, multilayered governance system is emerging together with several non-traditional mechanisms for human rights protection and multiple channels for much wider participation of people in decision-making process. For instance, Asian Development Bank has developed the Safeguard Policy Statement (SPS) and Accountability Mechanism which aims at protecting human rights of the people affected by ADB funding and providing them with channels for filing complaints against recipient states as well as ADB.

Many codes of conduct in different sectors, a great number of memorandums of understanding (MOUs) signed by multi-stakeholders and even de-facto standards in new technologies established by private companies constitute the regional human rights protection arrangements in addition to numerous NGO networks in the region.

It is also observed that Asian states do not refrain from engaging in legal disputes if deems necessary as demonstrated in the recent case of the South China Sea Arbitration and many cases of WTO dispute settlement procedures.

As Hisashi Owada submitted, aversion to formal legal procedures on specific issues seems to be the consequence of strategic calculation of governments in the region^{1 3}.

I hold, however, that institutional arrangements need underlying justification in addition to the practical policy objectives.

As elaborated by Charles Taylor^{1 4}, we need not only practical policies and institutional blue prints but also the commonly shared grand narratives which constitutes the underlying philosophy so that the ideal of the rule of law, democracy and human rights would be accepted by the people and function properly in the region.

3. The heavenly principle(天理), the state law (国法) and empathy (人情)

Confucianism is one of the major political and moral heritage commonly shared in the

^{1 3} Hisashi Owada, The Rule of Law in a Globalizing World-An Asian Perspective, Washington University Global Studies Law Review, vol.8, Issue.2, 2009, 187-204, p.203.

^{1 4} Charles Taylor, Interculturalism or multiculturalism, *Philosophy and Social Criticism*, Vol.38, No.4-5, May/June, 2012, 412-423.

East Asia and should be utilized for making philosophical foundations of the ideals of the rule of law, democracy and respect for human rights.

I once insisted that the Neo-Confucian conception of self, articulated by Tu-Weiming as a center of relationship and as a dynamic process of spiritual development^{1 5}, is compatible with the modern conception of self as subject of human rights in the West.

In Taylor's account, in the West, the ideas of modern society were articulated as the theory of natural law in the 17th century mainly by Grotius and Locke. This theory is based on a certain conception of human being and society, which is that individuals, on their own judgments, voluntarily come to an agreement with each other and form society in order to promote their mutual benefit. Individuals are supposed to be endowed with natural rights as subjects of rights. This modern self, as an autonomous and rational agent, is supposed to take a disengaged stance toward the world, including themselves, and to be able to act as sovereign people, formulating a commonly elaborated opinion in the public sphere while managing to make a living as an independent agent in the market economy^{1 6}. Hence, the concept of human being, of self as the subject of rights, is the key concept of the modern social imaginaries in the West, including human rights.

In my account, respect for personhood and reciprocity based on empathy are common features of both Western and Confucian moral traditions. For Instance, Samuel Moyn elaborated that personalism widely accepted in the 1930's Europe was meant to repudiate both liberalism and communism as materialism and strongly rejected individualism and that this Christianity-based communitarian view of human made possible for the European society to embrace the concept of human rights^{1 7} in the 1940's. In this connection, it should be recalled that Wm. Theodore deBary prefers the term "personalism" instead of "Confucian individualism" which denotes the person who are socially responsible and morally

^{1 5} Tu Wei-Ming, *Confucian Thought : Selfhood As Creative Transformation*, State University of New York, 1985,p.113. Akihiko Morita, Difference in the Conceptions of Self as subject of human rights between the West and Japan - Can Confucian Self be strong enough to exercise the positive liberty in the authoritarian society ? in Thomas Bustamante and Oche Onazi eds., *Rights, Language and Law* (ARSP-Beihefte, volume 131), Franz Steiner Verlag, 2012, 23-34, p.24.

^{1 6} Charles Taylor, *A Secular Age*, The Belknap Press of Harvard University Press, 2007, pp. 159-211.

^{1 7} Samuel Moyn, Personalism, Community, and the Origins of Human Rights, in Stefan-Ludwig Hoffman ed., *Human Rights In the Twentieth Century*, Cambridge University Press, 2011, 85-106.

committed to self-cultivation because “personalism”, in his account, shares some common ground with forms of personalism in Western tradition as distinct from modern liberalist “individualism”¹⁸.

Solidarity or fraternity has always been one of major virtues both in the Europe and in the East Asia and in this context, the political principle in the Confucian heritage, “heavenly principle(天理), state law (国法) and empathy (人情)”, is worth examining.

As Wang Hui argued, it is said that the heavenly principle as a universal set of values for a moral-political community was taken over by the modern universal principle (公理) since its embodied worldview, cultural identity and political legitimacy turned out to be lost after China encountered the modern West¹⁹.

Wang held²⁰;

It is worth noting that one of the main characteristics of the worldview of Universal Principle is to use science and its empiricist methodology to expose the fictional essence of such naturalist categories as Heaven, the Way of Heaven, the Mandate of Heaven, and Heavenly Principle and to place Nature into objective reality, thus changing the ontological (and originary) significance of the word “Nature”(ziran).

The modern worldview of Universal Principle views Nature as an object that can be known and controlled, and argues that the process of the control of Nature in itself is a demonstration of the freedom of the subject.

Likewise, in Wang’s account, the heavenly principle was established as the ultimate standard for moral judgement when a sense of historical continuity based on imagined coherent combination of “rite and music(礼乐) of the Three Dynasties“ and the institutions broke down during the Song Dynasty²¹.

However, Wang stressed that both the heavenly principle and the universal principle share the same concept “principle(理)“, which means a universal rule or law that transcends and immanent simultaneously in “things(物)”²².

¹⁸ Wm. Theodore deBary, *Asian Values and Human Rights*, Harvard University Press, 1998, p.25.

¹⁹ Wang Hui, translated by Michael Gibbs Hill, *China from empire to nation-state*, Harvard University Press, 2014, p.61.

²⁰ Wang Hui, *China from empire to nation-state*, p.98.

²¹ Wang Hui, *China from empire to nation-state*, pp.72-73.

²² Wang Hui, *China from empire to nation-state*, p.70.

Wang also pointed out that the universal principle must be deuniversalized and denaturalized in order to re-examine the modernization process critically.

In my account, in order to deconstruct and reconstruct “the Principle(理)” as a plausible and viable contemporary political principle in the East Asia, we should also reexamine the heavenly principle, focusing on its nature as the political ideal, separated from its original ontology.

It seems to me that given the transcendental and immanent nature of “the Principle(理)” in relation to the society, as embodied in the political ideal, “heavenly principle(天理), state law (国法) and empathy (人情)”, “the Principle” still embraces promising normative power and could function as the core value of underlying justification of the ideals of rule of law, democracy and human rights in the East Asia.

Appendix: Human rights as the ideal and the moral rights

Human rights could be distinguished as the political/legal ideal and the moral rights. In my account, human rights as the ideal is the normative concept which directs the people, mainly the state officials, to review legislation, administration and judiciary constantly and repeatedly from the viewpoint of human wellbeing of every individual under its jurisdiction and reminds the people of their dignity as equal human whereas the moral rights are individual and collective rights existing even before the statutes and the constitutions recognize them.

It is common that human rights have two dimensions, the underlying foundation/justification and legal/moral norms as highlighted in the drafting process of the Universal Declaration of Human Rights. In this connection, the following passage by Jacques Maritain is illuminating^{2 3}.

I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is equally the only way founded upon truth.

Charles Taylor also proposed a tripartite distinction of human rights^{2 4}.

What we are looking for, in the end, is a world consensus on certain norms of conduct enforceable on governments. To be accepted in any given society, these would in each case have to repose on some widely acknowledged philosophical justifications, and to be enforced, they would have to find expression in legal mechanisms.

My proposition aims at making their dual or tripartite distinction more practical and applicable in legislation, implementation and monitoring of human rights in the international human rights regime.

Human rights are considered universal, inalienable, indivisible, interdependent and

^{2 3} Jacques Maritain, Introduction, in *Human Rights-A Symposium edited by UNESCO*, Columbia University Press, 1949, 9-17, pp.10-11.

^{2 4} Charles Taylor, Conditions of an unforced consensus on human rights in Joanne R.Bauer and Daniel A. Bell eds., *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999,124-144, p.129

interrelated as elaborated in the UNFPA commentary^{2 5};

They (human rights) are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people's rights can never be taken away. Indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards.

On the other hand, distinction between non-derogable rights and the other derogable rights has steadily developed in scholarship and in practice and it is often argued and agreed that children, elders and the ones with disability needs some special rights more than human rights, which is, strictly speaking, in contradiction with equality and indivisibility of human rights. This paradox could be settled by distinguishing human rights as the ideal, which possess the above-mentioned characteristics as the universal and supreme normative concept, from the individual and collective moral rights which could be in conflict with each other and should be subject to restraint based on the other ideals such as the public welfare or public moral order.

^{2 5} UNFPA, Human Rights Principles, 2005.< <http://www.unfpa.org/resources/human-rights-principles>> finally confirmed on Sept. 29th 2016.