
Basic Problems in East Asian Feminist Jurisprudence: A Korean Perspective

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Abstract

This article conducts a brief overview of the basic problems and perspectives of East Asian feminist jurisprudence. In the West, feminist jurisprudence, which began its life as a field of legal scholarship in the 1960s, is understood as a philosophy of law based on the political, economic, and social equality of sexes. It now holds a significant place in U.S. law and legal thought and influences many debates on sexual and domestic violence, inequality in the workplace, and gender based discrimination. Through various approaches, feminists have identified gendered implications of seemingly neutral laws and practices, contributing a great deal to the discussion of legal issues such as employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefited from the analysis and insights of feminist jurisprudence.

From our viewpoint, the question is how we can develop East Asian feminist jurisprudence. A particularly pertinent question is whether it should take a different approach from that of the Western feminist jurisprudence. The question is best answered with yes and no. The law is both regional and universal. On the one hand, East Asian legal scholars must be conscious of the cultural and political context of East Asia when developing feminist jurisprudence. On the other hand, the traditional East Asian philosophy must embrace the Western and global theories, to allow the successful development of East Asian feminist jurisprudence.

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Problem Context

During the past few decades, jurisprudence has been enriched by the contributions of feminist jurists. Feminist jurisprudence has raised various comments and critiques against the traditional “male-centered” jurisprudence. Perhaps this is a reason why feminist jurisprudence is often categorized with liberalism or radicalism.

However, there are huge ranges of assertions and theories within feminist jurisprudence. I was able to learn of various assertions made in feminist jurisprudence through my attendance at the World Congress of Legal Philosophy and Social Philosophy (IVR). I have enjoyed learning about the developing works on feminist jurisprudence throughout the past twenty years.¹⁾

I am not in a position to offer an authentic answer to what kind of jurisprudential feminism is right or desirable. However, my main objective is to share the academic concern of jurisprudential feminism from the perspective reflecting the East Asian legal philosophy.²⁾ Although I do not offer any solutions or prescriptions, I would like to emphasize the significance in envisioning the problems of feminist jurisprudence from a broader fundamental viewpoint. I see legal feminism having two dimensions: a philosophical one and a practical one. While East Asian civilization appears to be quite homogeneous to the eyes of Westerners, there are many diverse characteristics that distinguish the various East Asian cultures. However, as a Korean jurist and for the purposes of this paper, I will slightly oversimplify the East Asian jurisprudence with a Korean perspective.³⁾

I was fortunate to have the opportunity to express my ideas at the Ninth Interdisciplinary Congress on Women in Seoul in 2005. The fact that an independent session for East Asian feminist jurisprudence was offered among other women studies signified and affirmed the growing significance of this topic. The following is the revised version of the paper used at the event.

1) At the World Congress of IVR in Granada/Spain, a keynote speech on feminist jurisprudence was offered in addition to feminist jurisprudence group discussions.

2) A view on East Asian jurisprudence is explained in Chongko Choi, *Asian Jurisprudence: Its History and Theory*, forthcoming.

3) For details, see Chongko Choi, *Law and Justice in Korea: South and North*, Seoul National University Press, 2005.

I. Justice and Care

Many lawyers and legal scholars are enthusiasts or fanatics towards justice. John Rawls has eloquently argued that justice is the most important and highest value in social life.⁴⁾ His theory has been, however, reviewed and criticized by communitarians and feminists. In critical theory, feminist jurisprudence responds to the current dominant understanding of legal thought, which is usually identified with the liberal Anglo-American tradition. This traditional understanding is represented by such authors such as H.L.A. Hart and R. Dworkin. The two major branches of this tradition have been occupied by positivists on one hand and natural law theorists on the other. Feminist jurisprudence responds to both branches of the Western legal tradition by raising basic questions regarding its assumptions about law.

It seems impressive that feminist Carol Gilligan argues for the primacy of care over justice.⁵⁾ Feminist jurisprudence reflects this new idea in jurisprudential academism from various perspectives.⁶⁾

East Asian philosophy finds some resonance with care ethics, because it falls in line with other virtues like benevolence, tolerance and reconciliation. Building up an East Asian theory of justice is a future task, but it must be developed with the idea of care and benevolence. Confucian ren (Kor. *Yin*) seems to be comparable to care in affinity. A similarity between Confucianism and care ethics is illustrated by the intimate connection between emotion and morality. According to both perspectives, empathy, compassion, sensitivity, and caring are prerequisites for morality. In addition, a truly moral person is not someone who controls his/her emotions with rationality, but is someone who fully develops his/her positive emotions. According to Mencius, four perpetual virtues—*ren*, *yi* (righteousness), *li* (propriety), and *zhi* (wisdom)—spring from the feelings of commiseration (*ceyin*, Kor. *Chokon*), shame and dislike (*xiuwu*, Kor. *Suo*), modesty and yielding (*cirang*, Kor. *Sayang*), and the sense of right and wrong (*shifei*, Kor. *Sibi*), respectively. These “four beginnings” constitute the very elements of innate human nature. As of today, Confucianism tries

4) John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

5) Carol Gilligan, *In a Different Voice: Psychological Theories and Women Development*, Harvard University Press, 1982.

6) For further details, see Virginia Held, *Feminist Morality: Transforming Culture, Society, and Sex*, University of Chicago Press, 1993.

to encompass care ethics to become the East Asian feminism.⁷⁾

At the lobby of the Supreme Court of Japan in Tokyo stands a bronze statue of *justitia*. She looks quite different from the Western *justitia*. The East Asian *justitia* symbolizes both justice and charity, bearing a contemplative smiling.⁸⁾ I believe justice with love can be explained through East Asian philosophy.

II. Rights, Human Rights and Responsibility

Much has been taught and learned about rights-based legal theory from Western jurisprudence. Ronald Dworkin argues that the concept of rights in Western jurisprudence must be taken seriously.⁹⁾ Western jurisprudence seems to revolve heavily on those rights.¹⁰⁾

Many consider the idea of human rights axiomatic. For example, the rights outlined in the American Declaration of Independence are self-evident. The idea of human rights, however, is a specific idea grounded in moral, legal, and political philosophy. Human rights is a particular political ideology. Notably, human rights differ from other ideologies, which are often based on duties. The Bible, for example, represents an ideology of duties: “thou shalt love thy neighbor as thyself.” This phrase from the Bible does not give the neighbor a “right” to be loved, but instead creates a duty for the person following God’s commandment. The neighbor, one might say, can most accurately be described as the third party beneficiary of a person’s duty to God to obey his commandments.

The idea of human rights grew in direct opposition to historic forms of authoritarianism such as the divine right of kings and, more recently, totalitarian ideologies such as National Socialism (Nazism) and other forms of absolutist state socialism (Stalinism). Although these regimes sometimes conferred benefits on the

7) As a critical viewpoint, Ranjoo Seodu Herr, *Is Confucianism Compatible with Care Ethics: A Critique*, *Philosophy East and West*, Vol.53, No.4, 2003, pp.471-489.

8) For details, Iwatani Juro, *The Supreme Court as a Repository of Legal Symbolics: Images of Law and Justice in Modern Japan*, *Keio Law Review*, No. 8, 1995, pp. 8ff.; Chongko Choi, *Korean Image of Law and Justice*, in his *Law and Justice in Korea*, Seoul National University Press, 2005, pp.33-54.

9) Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978.

10) For a representative scholarly piece, see Carl Wellman, *Real Rights*, Oxford University Press, 1995.

individual, the benefits were not seen as belonging to the individual by right.

The idea of human rights is related to, but different from “democracy,” “the rule of law”, and “constitutionalism.” Contrary to typical assumptions regarding the relationship of democracy and human rights, the two can also be in tension with each other. The ideology of rights must to be understood in relation to contemporary criticism. Communitarianism does not reject the idea of human rights, but emphasizes individualistic rights and applications of the law that give individual rights absolute (or near-absolute) preference in relation to community and communal interests. “Cultural relativism” and “Asian values” do not reject the idea of human rights, but insist that their interpretation, content and application, and relation to the public interest may differ with the time, place, and local culture.¹¹⁾

In 2001, I presented a paper at the World Congress of IVR in New York on “Human Rights and Human Responsibilities: An East Asian Perspective”. I compared the contents of the Universal Declaration of Human Rights (1948) and the Universal Declaration of Human Responsibility (1997) drafted by the “communitarian” intellectuals of the world.¹²⁾

III. Feminism and Ideology

It can be assumed that almost all theories and philosophies could possibly be determined according to ideologies. The debate between liberalists and communitarians is ongoing and is likely to continue. A core focus of the debate should be to determine whether East Asian philosophy could be identified with either one of these ideologies. Many East Asian philosophers assert that East Asian philosophy falls within Communitarianism. However, Asian scholars reject the liberal-collective dichotomy and advocate a ‘third’ alternative. “The Asian Way” is a combination of a capitalist economy and so-called “Asian values,” which are embodied in traditional Asian culture and are incompatible with the core of a liberal democracy.

Confucianism emphasizes a particular form of human respect, personal

11) Louis Henkin and others, *Human Rights*, N.Y. 1999, p.1.

12) Chongko Choi, Human Rights and Human Responsibilities: An East Asian Perspective, in Burt Leiser and Tom Campbell ed., *Human Rights in Philosophy and Practice*, Ashgate, 2001, pp.515-523.

responsibility, and mutual support that could supplement modern legalistic definitions of human rights and assist in dealing with social problems that cannot be resolved using the legal system alone. Learning from the experiences of the Confucians does not mean surrendering individual rights to the community or state, but gaining a deeper awareness of human interdependence and social responsibilities.

“Individualism”, “personalism”, “communitarianism”, and “constitutionalism” have their own meanings in the West and are usually thought of as improbable aspects of a tradition, which some define as the “other”. Confucianism is in some ways deemed the “other,” but one must consider the historical and cultural differences and not simply look for human commonalities.

In conclusion, we could safely assert that Asian scholars are attempting to combine the principles of the rule of law with Confucianism, meaning that Asian law should represent the harmony between liberalism and communitarianism. This concept is called “liberal communitarianism” or “communitarian liberalism.” However, the name is immaterial, because the concept is the product of Western jurisprudence and political philosophy.

IV. Tradition and Globalization

As noted above, feminism is often considered to be a part of a progressive or revolutionary jurisprudence. On the other hand, feminism must also establish its roots in historical foundations. With the significant impact associated with the surfacing of the East Asian civilization in world politics, legal philosophers and scholars are eager to discover the East Asian foundations to incorporate them in their theory development. Currently, the discoveries of foundations in the East Asian civilization have affected localization and regionalism. However, the current trend of the world toward globalization is a factor that also must be accounted for. The question then is: what would be the global feminist jurisprudence? The following passage suggests where feminist jurisprudence stands in East Asian jurisprudence.

The choice between individualism and collectivism significantly depends on how one feels about social convention. Confucius believed social convention was important. He associated it with what he called the Tao, or ‘the way’. Other philosophers have come up with differing attitudes toward the issue of whether

social convention is helpful or harmful?

Confucius-Follow it for the sake of a harmonious society.

Descartes and the Rationalists-Disregard it and obey reason.

Locke and the Empiricists-Agree to follow it in order to avoid trouble.

Kant and the Idealists-Obey the one true convention, namely, treat others as you want to be treated.

Kierkegaard and the Existentialists-Look through it to the real you.

Marx-Figure out how it promotes the forces of production and rebel against it.

Foucault and the Post-Structuralists-Keep struggling with it; there is no way to escape its power.

I understand that it is not easy to respect the social conventions in a rapidly changing global society.¹³⁾ Nevertheless, as our legal reasoning matures, traditions, customary law, and minority rights can be positively evaluated and preserved.¹⁴⁾

V. Legal Aesthetics

It is interesting that East Asian philosophers pay special attention to G. Radbruch's legal philosophy, especially from the perspective of legal aesthetics. Legal aesthetics is a favorite as an emerging branch of East Asian jurisprudence.¹⁵⁾ The aesthetic conception of reason and rationality requires people to see everything not anatomically, but holistically; not analytically, but synthetically; and not partially, but comprehensively from a meta-perspective, which transcends diverse and relative perspectives.

As explained above, East Asians do not have a clear distinction between rationality and emotion, which could merit and demerit East Asian legal reasoning. In any case, the overlap produces both benefits and repercussions in East Asian legal reasoning, which attempts to encompass the harmony of law, social circumstances

13) For details, Chongko Choi, *Globalization and Korean Law*, in his *Law and Justice in Korea*, Seoul National University Press, 2005, pp.260-270.

14) David Callies and others, *The Role of Customary Law in Sustaining Development*, Oxford University Press, 2005. This book offers the profound jurisprudential considerations of customary law and illustrates significant cases from Hawaii, Norway and Greenland.

15) For further details, Chongko Choi, *Law and Art*, Seoul, 1995; Chongko Choi, *What is Legal Symbolics?*, Seoul, 2001; Iwatani Juro, *Iconography of Law and Justice*, Tokyo, 1997.

and human mind. I believe there is a possibility of developing East Asian legal aesthetics. The contributions of East Asian feminist jurists would significantly contribute to the development of world jurisprudential academism.

VI. Sexual Equality

With the historical background in place, let us shift our concern to the reality and practice within the East Asian jurisprudence. East Asians have traditionally regarded sex not for its pleasurable function, but primarily as a means to an end. For the Confucians, sex was one of the seven desires every cultured person needed to control. Indulging in such desires was to be done only in moderation, so that sexual thoughts would not interfere with important business issues that affected the running of the empire. In addition, for the leading families in the social hierarchy, the act of sex was strictly controlled by law, custom, and ritual to maximize the chances of producing male descendants.

In theory, women, as human representatives of the Yin principle, were the equal complements to their Yang counterparts, men. In line with this theory, Confucian teaching called for husbands and wives to be mutually respectful to each other. In practice, however, many women were considered inferior to their husbands. The hard life of women reflected the importance of maintaining the ancestral male line. Women in well-off families were closely monitored to prevent unwanted pregnancies. Women in poorer families were often less controlled, but were often married off against their will or obliged to make a living through prostitution. For many women, the only available form of protest against intolerable treatment was suicide.

Marriages for the young were typically arranged by parents of the couple. After a costly wedding ceremony, the bride would go to live with her husband's family. The bride could only return to her family as a guest or in the disastrous case of divorce, where women who were disobedient to their husbands were sent back to their parents.

Adultery committed by a woman was punishable by death. In stark contrast, men were only required to answer to the person who was responsible for the women they slept with. A man could be killed for committing adultery with the wife of an important man or forced to marry the unwed daughter of a respectable father.

The social relations in East Asia were not exactly based on the idea of equality. People did not have civil rights, but instead, had different responsibilities and privileges based on their position in society. In general, women were said to be *samjong* (Chinese, *santsung*), or “three times obedient.” Female children were expected to obey their parents; as married women, they were expected to obey their husbands; and as older women, they were expected to obey their grown sons.

VII. A Korean Example: Yi Taeyoung (1914-1998)

Yi Taeyoung grew up in a loving family with strong Christian values. After studying home economics at Ehwa Women’s University in 1936, Yi married Dr. Chong Ilhyung, a Methodist pastor and later politician and Minister for Foreign Affairs. After the end of World War II, Chong encouraged his wife to pursue her childhood dream of being a lawyer. At the age of 32, she became the first female student at Seoul National University College of Law. She graduated in 1949 and passed the national judicial examination in 1952. She became a practicing attorney because her nomination for a judgeship was rejected because she was a woman. In 1956, Yi founded the Women’s Legal Counseling Center, which became the Korean Legal Aid Center for Family Relations in 1966. Yi was also the Dean of Ehwa Women’s College of Law from 1963 to 1971. As dean, she earned a doctorate in law from Seoul National University in 1969 with a dissertation on *A Study of Divorce in Korea*. Yi became the champion of women’s legal rights in Korea. Yi earned the Ramon Magsaysay Award for Community Leadership, as well as numerous other international awards for her work. Yi and her legal aid centers in 29 Korean and 12 United States branches helped countless women. Her advocacy helped effective revisions of Korean family law in the areas of divorce, custody, and inheritance. As a legal scholar, Yi was strongly inclined to the sociological approaches, perhaps by the influences of her academic adviser Max Rheinstein. She was prolific in her wide-ranging concern and philosophy, allowing interested individuals to easily access and learn from her work. Her strong convictions on human rights can be explained as a combination of Confucian virtue ethics and Christian belief. Having spiritual harmony, Yi could be considered liberal and conservative, or at least a “communitarian.” In this sense, Yi’s feminist jurisprudence is unique and quite different from Western feminism. It is significant that Korea has an ideal example of

East Asian feminist jurisprudence. Yi once stated:

The past 30 years have taught me patience, humility, silence and kindness. A counsel must listen to a person being counseled, without talking, just listening, all day long, 365 days of the year. This is very difficult. But, through this process, I have developed patience. It is not easy to be humble instead of proud; it is not easy to endure instead of rising up in anger. I can give no price to the learning I have received through counseling. I have acquired self-knowledge and I have learned that real dialogue is possible only in self-giving. Thus, I had to grow even more humble, kind, sympathetic, by smiling and being trustworthy of secrets, so that not one of the confidentiality of our some 230,000 cases will ever be leaked to the public.¹⁶⁾

If we observe Yi Taeyoung's life and thoughts, we can identify almost every ideal existing in East Asian jurisprudence, which I mentioned above. There was philosophy and practice in her. I do not want to glorify or mystify her life, but if the goal is to develop East Asian feminist jurisprudence, Yi's life and thoughts must be taken seriously. She proved the possibility and realization of what can be achieved as a woman in East Asia, despite the challenges and adversities in both the social and political context of simply being a woman.

VIII. Conclusion

The discussion above provides a brief overview of the basic problems and perspectives of East Asian feminist jurisprudence. By no means do I even attempt to cover all problems and the tasks associated with them.

If we observe the Western jurisprudence, feminist jurisprudence is understood as a philosophy of law based on the political, economic, and social equality of the sexes. As a field of legal scholarship, feminist jurisprudence began in 1960s. It now holds a significant place in U.S. law and legal thought and influences many debates on sexual and domestic violence, inequality in the workplace, and gender based

16) Yi Taeyoung, *Where there is No Path*, Seoul, 1988, pp.223-224.

discrimination. Through various approaches, feminists have identified gendered components and gendered implications of seemingly neutral laws and practices. Law affecting employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefit from the analysis and insights of feminist jurisprudence.

How can we develop East Asian jurisprudence? Is it necessarily independent from Western feminist jurisprudence? The question is best answered with a yes and a no. The law is regional and universal. East Asians live according to East Asian law, which differs from Western law. East Asian men and women are not the same as Westerners. The application of Western feminist jurisprudence will be confronted by the East Asian people. Therefore, East Asian legal scholars must be particularly conscious of the cultural and political context of East Asia when developing feminist jurisprudence. Feminist jurisprudence can contribute to the improvement of the unjust and biased tradition or status quo.

East Asian jurisprudence is still very much in the developing stages, if I dare to say so. It bears a great potential to transform society and is a huge task to tackle in the context of world jurisprudence. The traditional East Asian philosophy must embrace the Western and global theories, to allow the successful development of East Asian feminist jurisprudence.

KEYWORDS :feminist jurisprudence, justice, East Asian philosophy, communitarianism, tradition, legal aesthetics, Yi Taeyoung