

The Rule of Law and Forms of Power :  
Theorizing the Social Foundations of the Rule of Law  
in Korea \*

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**Abstract**

*This study offers a theoretical outline for explaining the social foundations of the rule of law, with particular reference to South Korea. It proposes to explicate the conditions for the rule of law in terms of the play of power and to conceive the rule of law as a product of interplay between different forms of power instead of the withdrawal of power. In addition to the two forms of power identified in existing social theory—politico-judicial power and disciplinary power—the study advances a third notion of power, which the author terms “relational power.” It constructs the notion out of the amorphous force emanating from fluid personal relations and interpersonal commitment, which cultural studies of East Asia have discerned in terms of traditional affective ties or guanxi. The study maps permutations linking rule by law and the rule of law with each of the three kinds of power, and discusses how the three kinds of power complement and cancel out one another in strengthening or obstructing rule by law and the rule of law.*

**Keywords:** rule of law, rule by law, power, nepotism, Asian values, Confucianism

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## Introduction

In the run-up to the 2002 presidential election in South Korea, a series of corruption scandals broke out, in which members of President Kim Dae-jung's family were implicated. Asked about its potential consequences for his campaign, Roh Moo-hyun, then a contender for the ruling party nomination, answered confidently that bad publicity surrounding the ruling circle would not affect him at all. He explained that the scandals were not "structural irregularities caused by 'crooked ties between politics and business' (*jeonggyeong yuchak*) or products of the attributes of 'power' (*gwollyeok*) per se." He added that, thanks to the increasing transparency of financial transactions, stricter administrative control, and meticulous surveillance by the press, little room was left for "structural irregularities involving abuses of power" and that the scandals were no more than "products of a nepotism-prone culture."<sup>1</sup>

Roh's remarks are full of unclear terms, but it is not difficult to figure out what he intended to say: the current political scandals were different from those under the previous governments, particularly from the authoritarian government of the 1980s. Roh implied that, compared with corruption under the previous governments, the scandals under the Kim Dae-jung administration involved less collusion between political magnates and *chaebol* (*jaebeol*), and resorted less to threat and coercion in amassing illegal funds. Instead, he observed, the scandals were caused mainly by cronyism, favoritism, or nepotism, which he seem to have believed to be marginal or accidental.

Roh Moo-hyun distinguished two kinds of irregularities in Korean politics. The first is typified by either direct recourse to arm-twisting or behind-the-scene deals between *chaebol* and top politicians or bureaucrats. These practices are either dependent upon asymmetry of power under an authoritarian regime or generated by a structural cor-

poratist nexus between the government and the business world. The second type is characterized by ties of cronyism, favoritism, or nepotism, which do not involve coercion, but emanate from unstructured, fluid personal connections. Roh labelled the first kind as *gwollyeokhyeong* or "power type," and distinguished it from the second. Roh's use of the term "power" (*gwollyeok*) stimulates a critical re-examination of the notion of power in public discourses in Korea, which in turn provokes questions about power as an analytical term.

In Roh's vocabulary, the word *gwollyeok*, translated in English as "power" and pronounced as *quanli* in Chinese and *kenryoku* in Japanese, is equated with a stock of force owned and possessed by an identifiable person, who uses or abuses it by directing it against another person, driving him/her into some action or inaction. It is the standard concept of power in worldwide politico-juridical discourse, which is captured best in Weber's definition of power: "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests" (Weber 1968, 53). This notion of power is central to the dominant rule-of-law discourse: law is a product of power, but it should contain power within certain limits and keep it from being abused.

In this study, I critically re-examine the notion of power in Korean public discourses that is represented by Roh Moo-hyun's use of the term *gwollyeok*, which conforms with the conventional politico-juridical and social-scientific concept of power. This is followed by an attempt to broaden the concept of power to encompass various other forces influencing human action. I take issue with the narrow application of the term *gwollyeok* because it marginalizes a variety of practices that may not be regarded as infused with power or labelled as *gwollyeokhyeong*, but which nonetheless significantly affect the rule of law in post-authoritarian Korea. My strategy resembles and furthers that of Foucault, who remoulded the concept of power by juxtaposing another form—disciplinary power—against the standard politico-juridical notion. In addition to politico-juridical power and disciplinary power, I posit a third form—relational power—which con-

1. "The First Son's Scandal Does Not Damage My Popularity," *Chosun Ilbo*, April 20, 2002.

sists in noncoercive communicative practices that feed on affective interpersonal relations. This attempt runs the risk of inflating the concept of power, but I deliberately adopt it as a provisional strategy to sensitize our inquiry to features of the regulation of society and control of practice that have been slighted in the discussion of the rule of law in Korea.

This theoretical strategy is expected to help overcome what Dezalay and Garth (2007, 82-83) criticizes as the “promotionalism” prevalent in Korean law and society studies, the conception in which the rule of law is enthroned as a universal goal and progress toward it is conceived as desirable or even required. Promotionalist accounts of socio-legal life in Korea tend to assume that the rule of law is achieved in proportion to the withdrawal of power, which is equated with a shift away from authoritarian rule, and to the removal of pre-modern and culturally idiosyncratic obstacles such as nepotism, which are not explained in terms of power. My theoretical framework, with multiple models of power employed as analytical concepts devoid of normative connotations, leads to a reconsideration of the notion of the rule of law and its relationship with power. The rule of law should not be identified simply with the withdrawal or circumscription of power, but should be considered as a product of play between different kinds of power.

In this study I offer an outline of the workings of different types of power in creating conditions for the rule of law. I come up with this theoretical schema mainly in an effort to make sense of the changing situation of the rule of law in South Korea, although I develop it in reference to some other East Asian experiences as well. However, the conceptual tools I introduce are ideal types that can be employed in explaining the conditions of other culturally diverse societies, which can be explicated in terms of differing permutations of the forms of power that this study discerns.

## Forms of Power

I begin with the notion of power as a stock of force owned and possessed by an identifiable person, who uses or abuses it by directing it against another, driving him/her into some action or inaction. Power of this kind is possessed in quantity; one may have a greater amount of power than another. It can be distributed, augmented, reduced, and removed. Since this power is coercive and entails deprivations, discourse is focused on how to justify its possession and exertion on the one hand, and how to prevent it from being abused on the other. In conventional politico-juridical discourse, or in what Foucault typifies as the “juridical and liberal conception of political power,” power “obeys the model of a legal transaction involving a contractual type of exchange” (1980, 88). Such a contractual notion of power may not be found everywhere, but its underlying supposition that power is imposed by one upon another against his/her will is familiar to most cultures, along with discursive efforts to justify and delimit it. While Confucian thought denigrates uninhibited use of power and regards rule by power as an inferior mode of domination to “rule by ritual,” the legalists of ancient China tried to maximize the efficiency of power by enhancing public awareness of the conditions for its exercise.<sup>2</sup>

The above conception assumes that power has a subject, an owner or possessor, and its size and strength rest on the position of the subject. The holder of power finds him/herself in more or less institutionalized relations, and the institutionalization of relations between power holders and their hierarchical positioning economize the management of power, as the probability of exercising power without an actual realization of the holder’s will is sufficient to motivate the targeted actor to act in a certain way. While institutionaliza-

2. I translate *li* 禮 as ritual, following Chaihark Hahm (2009), who discovers a tradition of constitutionalism in Confucian government in traditional Korea which manifested itself by way of the supremacy of ritual as the single most authoritative ground for both legitimating and checking monarchical power.

tion is far broader than incorporation into a bureaucratic system, bureaucracy is the best example of institutionalization of power and the most effective strategy for the economy of power. The Chinese word *quanli* connotes force coupled with an institutionalized position. Li Zhang defined *quanli* as “bureaucratic power determined by one’s officially appointed position” and contrasts it with *shili*, a more amorphous form of power, better interpreted as “social and political influence . . . determined by one’s wealth, social networks, and personal ties” (Zhang 2001, 10, 218). Roh Moo-hyun’s use of the term *gwollyeok* is close to this definition of *quanli*, although Roh uses the term mainly in a negative way, as if abuse were an intrinsic attribute.

Foucault (1980) describes power in this conventional conception as organized on the basis of sovereignty. Foucault juxtaposes disciplinary power to this politico-juridical form of power. Disciplinary power differs from politico-juridical power in that it does not “deploy the ostentatious signs of sovereignty” but is simply power to “observe” (Foucault 1979, 220, 224). It is not located in the iron fist of a magnate or state apparatuses. It is subjectless and is not possessed by identifiable individuals. It cannot be measured, nor is it divided, added to, increased, or reduced. It is spread across the whole of society in the form of scientific knowledge and omnipresent surveillance, through which practices of human beings as social bodies are normalized and regularized (Foucault 1979, 1980). The relationship between politico-juridical power and disciplinary power is subtle. “The disciplinization of society is not a project deliberately orchestrated by the state but the unfolding of authorless programs across the society through which social behavior is normalized without the presence of a unidirectional command” (Lee 1999, 36). Despite the difference in logic and nature, however, the two species of power are complementary: “Sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society” (Foucault 1980, 108). While disciplinary power is not fixed to particular institutions and apparatuses, disciplines may take on various institutional forms. Instead of replacing other mechanisms of control, the disciplinary modality of power

serves “as an intermediary between them, linking them together, extending them and above all making it possible to bring the effects of power to the most minute and distant elements” (Foucault 1979, 216). It is natural that the state appropriates disciplinary techniques and that disciplinary power permeates the working of the state. This occurs at the initiative of the state which Giddens (1985, chap. 7) terms “internal pacification,” where disciplinary power becomes “a subtype of administrative power” and is enmeshed with coercive forms of state power and direct sanctions.

If Foucault has expanded the conceptual terrain of power, I wonder whether we cannot further expand it by positing another form of power and subsume under the rubric of power many features of domination that slip out of the existing conceptual grid of power, including those regarded as peculiar to the ordering of social relations in East Asian societies. Hahm Pyong-choon, who sees the “threat of sanction” as the essence of power, points out that power occupies only a minor place in the traditional Korean social order (1986, 283). Much of the traditional order was devoid of power, and the vacuum was filled by “affection,” which consists of interpersonal commitment and emotions.<sup>3</sup> Hahm characterizes Korean society as an affective society in contrast to the West, where he finds power and wealth to be the most important values. According to Hahm,

Koreans pursue affection as the most important value; their demand is the maximization of affection. As such their identity tends to be non-individualistic inasmuch as affection presupposes the exchange of emotions with non-egos . . . . Koreans demanded from life the feeling of being alive in the exchange network of deep affection and emotion with other human beings (Hahm 1986, 287-289).

3. According to Hahm (1986, 291), “affection includes not only such euphonic interpersonal emotions as love, loyalty, friendship, or intimacy, but also such ‘negative’ ones as hate, anger, and even jealousy.” “What is involved here is the entire spectrum of interpersonal emotions from the most negative and destructive to the most positive and constructive.”

Because of the ascendancy of affection, Hahm argues, power was distrusted and recourse to power was kept to a minimum in traditional Korea. Hahm says, "It is the peculiarity of the Korean heritage of symbols . . . that we must experience a significant amount of reluctance in accepting the importance of power as a dominant value even in the arena of power itself" (1986, 7-8).

Hahm finds the family to be the principal locus of affection and notes that "the concept of a nation was understood as an extended family" (1986, 293). The conflation of the family and the nation manifests the diminution of "the distinction between the power process and affection process" (Hahm 1986, 311). Hahm points to the persistence of the affective tradition and talks of its impacts upon the socio-legal situation of Korea.

The carryover of the traditional perspective which had endeavored to inject as much affection into the power process as possible still continues. The result has been the confusion in the cultural norms concerning the power process. In other words the two sets of different rules of the game have been mingled together to create confusion. Instead of proceeding on the basis of rational individualism, Koreans are still liable to proceed on the basis of interpersonal feeling and particularistic notion of decency and affection. The notion of abstract rational legality has not yet gained full acceptance by the people as legitimate. Nor has the traditional valuation of affection as the legitimate measure of humanness and decency retained its full vitality. The result is that neither set of cultural norms specialized to power process enjoys a full degree of legitimacy in Korea (Hahm 1986, 312-313).

Critics take issue with Hahm's sweeping generalizations about Korean culture, the way he compares it with so-called Occidental culture, and his assumption about how culture matters in society (Yang 1989; Lee 1998). However, Hahm's reference to affection as a principle of human relationship and a source of motivation can be developed into an analytical model for delineating certain aspects of social order and domination.

The Chinese term *qing* 情 (*jeong* in Korean) can be translated as "affection."<sup>4</sup> Defined by Hahm (1986, 291) as "the entire spectrum of interpersonal emotions," affection permeates a variety of relationships and practices—which range from love between romantic partners or members of the same family to exchanges in a mutual aid networks, paternalistic concern for another, long-term transactions based on personal trust, and conforming with the behavior of others based on the sense of belonging to the same group—where there is apparently little coercion and command. Indeed, such relationships are infused with power (in a conventional sense), calculation of interest, and many other forces and motivations. But, further than noting the coexistence of power and affection in real practice, I suggest that we develop a notion of power that covers at least some elements of the variety of motivating forces which Hahm associates with affection. In the many instances where there appears to be a contest of power *versus* affection, we can see a competition between different kinds of power. I would tentatively term this third form of power "relational power."

My postulation of a notion of power that is centered on neither coercion nor discipline (in the Foucauldian sense) is not so out of touch with existing discussions of power. Bertrand Russell (1986) defined power as the "production of intended effects" and included in his catalogue of power "influence on opinion" and "traditional power," which musters respect on the basis of habit and custom. According to Hannah Arendt (1986, 64), power "corresponds to the human ability not just to act but to act in concert." Arendt was wary of conceiving power in terms only of command and obedience and thus equating it with violence. Some scholars talk about ideological/normative power and religious power, which, in their pure form, contain little coercion.<sup>5</sup> The types of power these studies have identified are not of the same nature, and share only a few attributes with

4. *Qing* is loosely translated as "appeal to other's feeling, emotions, and sense of humanity or common decency" (Sin and Chu 1998, 152).

5. See Poggi (2001, chaps. 3-4).

what I term relational power. The discussions, nonetheless, highlight the need to expand the concept of power to various motivating factors lurking in relations not governed by command, coercion, and the threat of sanctions.

While the concept of relational power accounts for at least some elements of the various motivating forces which Hahm Pyong-choon associated with affection, it is not equated with and does not replace affection entirely. Not all elements of affection have bearing on the distribution of resources in society, nor is relational power composed only of emotional elements, although the overlap between relational power and affection is still substantial as long as various forms of “interpersonal commitment” are subsumed under the rubric of affection. The term relational power is aimed at delineating variegated non-coercive communicative factors that are mobilized in social networks. It echoes Li Zhang’s search for “a more nuanced understanding of power that takes into account cultural specificities” in the Chinese context. According to Zhang (2001, 10), power is “a relational process rather than a thing possessed only by the dominant class” and “operates through both discursive and non-discursive everyday practices, and through both visible, formal state apparatuses and social institutions and informal, diffused social networks.”

The attributes and modes of operation of relational power can be summed up as follows.

(1) The ideal fuel for generating relational power is primordial feelings, and to that extent, it overlaps with affection. However, an actual appeal to sentiment is not a necessary condition. An expectation of primordial sentiment or a normative imperative calling for such sentiment can also motivate a person in the same way. Hence, although relational power is amorphous and does not take on a formal institutional framework, contexts in which it is generated can be inscribed into norms and even codified. Such values as loyalty, filial piety, and trust between friends have been constantly inculcated by way of official and everyday instructions on behavior, and people are motivated to act in line with those teachings regardless of whether they actually entertain any emo-

tional commitment.

- (2) Relational power resides in more or less informal, noninstitutionalized, or diffused networks.<sup>6</sup> This does not mean that it cannot exist in a formal apparatus or legally institutionalized relationship. Even when it does, however, it operates mainly outside of, or cuts across, formal boundaries of rights, obligations, and responsibilities. Of course it may exist between individuals in a legally structured relationship, such as parties to a contract or bureaucrats cooperating in an official mission. In such a situation, relational power works alongside politico-judicial power and complements it.
- (3) Relationships in which relational power arises can take on varied scales and sizes, from a tie between siblings to connections between participants in an alumni network or an association of people from the same region. While face-to-face acquaintance is effective in mobilizing relational power, abstract membership in a large group also forms ground for laying claim to it. The group does not have to be a communal group; it can be a *Gesellschaft*. However, if an action is to be regarded as governed by relational power, the motivation has to derive from a sense of commitment based on shared identity rather than a threat of sanction or sense of legal obligation. Such a huge group as an *ethnie* can be a locus of relational power insofar as its members share “a common myth of descent” and appeal to “a definite sense of identity and solidarity which often finds institutional philanthropic expression” (Smith 1986, 22-31), although the adjective “relational” may not fit well in such a situation. To the extent that relational power emanates from a relationship between people sharing an identity, symbols, and representations, it often overlaps with social capital, “the aggregate of the actual or potential resources which are linked to . . . membership in a group, which provides its members with the backing of the collectivity-owned capital, a

6. The meaning of institutionalization in this study is close to what Bohannan (1967) terms “double institutionalization.”

'credential' which entitles them to credit" (Bourdieu 1986, 248-249).

- (4) As relational power arises in networks and groupings of different scales and sizes, people move in and out of differing networks to make the most of their multifarious and interwoven connections. One can invoke friendship with one's neighbor, alumni ties, a place in a network of people from the same region, membership in a social club, and so forth, depending on what one seeks in that particular context. Often multiple networks are brought into play in pursuit of the same goal, in the face of the danger of conflict between them. Cultures differ as to which kinds of networks are more powerful than others and how fixed one's attachment to a network is.
- (5) In what forms is relational power exercised or activated? Relational power resides in governance based on moral and emotional appeals of paternalism. It consists in the mobilization of concerted action of members of a group by invoking common symbols and representations. It is found in the factional appropriation of influence, or the act of benefiting from the influence of another person belonging to the same group. Relational power is thus mobilized amongst the members of a collectivity, driving their action in a certain direction. But it matters more in an inter-individual nexus. It takes on the form of an exchange of favors between people in a dyadic relationship. It resides in patron-client ties. Brokerage frequently draws on relational power. Perhaps the most prominent manifestation of relational power can be found in *guanxi* in China: informal connections which are ego-centered rather than group-oriented and therefore highly susceptible to instrumentally rational engineering.<sup>7</sup> Korean society is also known for a proliferation of *yeonjul*, meaning personal connections. While relational power is a spring of motivation for cooperative efforts and mutual aid and thus contributes to social integration, it engenders practices inimical to the rule of law, such as

7. See King (1991).

cronyism, favoritism, and nepotism.

- (6) Unlike disciplinary power, relational power is not subjectless. It resembles politico-judicial power in that someone may have more of it than others. Relational power can be mobilized by someone for a particular purpose. Yet it has unclear boundaries and cannot be transferred to another as freely as politico-judicial power. It is subject-bound, inasmuch as who is connected to whom is decisive. As Mayfair Yang (1994) has pointed out in her much credited study of *guanxi*, the personal identity of the subject is an integral part of the transaction in the *guanxi*-based gift economy. Relational power is generated from a concrete nexus rather than the subject's abstract position. This subject-boundedness or concrete subjectivity can be expressed in terms of a fusion of subjectivity and relationality, but one may ask whether there is subjectivity here in the proper sense of the term.
- (7) Relational power does not always flow from a higher person to a lower person, but can be directed against anyone in the network. All participants in the network have real or assumed commitment to one another. Setting up a barrier is regarded as contrary to the moral principles governing the network. A favor offered by one to another, whether it is a material interest or symbolic benefits such as deference and loyalty, has to be repaid by the recipient. However, as the favor is taken as an expression of heart, the recipient should not reciprocate in the same way he/she might repay a money debt. Repayment has to be a reproduction, rather than liquidation, of the transaction. Hence, a person superior in the politico-judicial system often comes to be in the position of an obligor and is impelled by moral pressure to make him/herself amenable to the wishes of an inferior person. Yang's discussion of *guanxi* as a form of gift economy is illuminating:

[T]he donor becomes the moral and symbolic superior of the recipient and can thus subject the latter to his or her will. The creation of this asymmetrical microrelationship is a crucial step in the mechanisms of the gift economy. It obtains regardless of the status positions of the two participants in the larger society,

but this microantagonism of status within the art of *guanxi* takes on special significance when the recipient has a higher status in society than the donor. This is perhaps why the higher the social status of the guest, the greater the generosity that is unleashed to subdue him or her, and why it is usually the case that those who give are lower in social status and influence than those who receive. Through the tactical movement of moral subordination in the art of *guanxi*, donors are able to effect a symbolic reversal of the larger social hierarchy, a reversal with material consequences (Yang 1994, 197).

Yang never conceives the moral pressure that obtains in *guanxi* as a kind of power. Instead, she interprets *guanxi* as a form of “subversion” against power. However, I suggest that it is the activation of another form of power.

If we theorize power in this way, much of what Hahm Pyongchoon has described in terms of affection and thus regarded as devoid of power will be reconsidered as power phenomena. Many practices that Roh Moo-hyun refused to label as *gwollyeokhyeong* will also be subsumed under the rubric of power. This reformulation of the concept of power calls for the development of a new conceptual scheme regarding the politics of the rule of law.

### The Rule of Law and the Constellation of Power

The rule of law has two meanings. In its broad sense, it is expressed by the axiom that “people should obey the law and be ruled by it.” In its narrow sense, and in its usage in political and legal theory, it denotes the principle that “the government shall be ruled by the law and subject to it” (Raz 1979, 212). The rule of law, when broadly construed, is not different from what scholars of law and society in East Asia often term “rule by law.”

Rule by law may be defined as rule by known rules rather than mere fiat or arbitrary dictates (Clark 1999, 35-36). However, that people should be ruled by law presupposes the condition that the politi-

cally organized society is capable of subjecting a substantial portion, if not all, of the life of its members to the legal rules it enacts. From this angle, I take rule by law to mean general subjection of social life to legal rules. It has much in common with the law-and-order version of the rule of law. Although this notion contains no literal reference to whether governmental power is boundless or bounded, those who use the concept, regardless of how they judge the idea, highlight the failure, reluctance, or refusal to subject governmental action to legal rules (Yoon 1990, 23, 70, 87; Jones 1994). Borrowing Unger’s nomenclature, Carol Jones (1994) distinguishes interactional law, bureaucratic/regulatory law, and full legal order, and correlates bureaucratic/regulatory law and full legal order to rule by law and rule of law respectively.

Cynicism towards the law and order projects of governments, colonial and authoritarian ones in particular, produces a portrayal of rule by law as antithetical to the rule of law. Yet the rule of law does not arise out of nothing. The subjection of governmental action to legal rules would hardly be possible were it not for a general subjection of social life to law. On the other hand, the deficiency of rule of law erodes the legitimacy of the law and reduces the breadth and effectiveness of the rule-by-law enterprise. Hence, the rule of law and the rule by law condition each other.

How do the two dimensions of the rule of law relate to power? We may think of the following permutations: To begin with, rule by law, by its very definition, involves the concentration, political organization, and juridification of violence. At the same time, the progress of rule by law entails an increase in the amount of politico-judicial power that the state possesses. Rule by law is a result of struggle between the state and organizations, groups, or individuals outside of the state.

Disciplinary power assists the general subjection of social life to politico-judicial power and rule by law, as mechanisms of disciplinary normalization turn the targets of power into “docile bodies.” The disciplines constitute an “infra-law” in that they “extend the general forms defined by law to the infinitesimal level of individual lives;

or they appear as methods of training that enable individuals to become integrated into these general demands” (Foucault 1979, 222). As the state’s campaign to subject the population to law calls for greater knowledge of the population, the state appropriates various techniques of discipline and surveillance, marking a convergence of *pouvoir* and *savoir*. This is coupled with the conception that the state of the society, which manifests itself in demography, territory, and material well-being, is to be observed, accounted for, and acted on as a totality—the type of rationality which Foucault (1991) calls “governmentality.” The governmentalization of the state and the disciplinarization of society integrate the targets of power, who are constituted simultaneously as subjects, into a single population. At the same time, they dissolve the population into individuals and thereby facilitate the downward penetration of politico-juridical power into the minutest details of social life. In other words, the subjects/targets of power are constituted simultaneously as *omnes et singulatim* (Foucault 1981).

The juridification of social practice under rule by law increases system trust and reduces chances for personal networks and relational power. Relational power, for its part, both obstructs and serves rule by law. Informal ties and networks, and factionalism and familism, may corrode loyalty to the politico-legal community. In southern China, traditional lineage ties functioned as shields against the power of the state, namely the power to tax. On the other hand, relational power enhances social integration by way of feelings of solidarity and a sense of interpersonal commitment, and helps to reduce the cost of social control.<sup>8</sup> This does not necessarily mean a strengthening of rule by law and politico-juridical power, because social integration can be achieved without recourse to law. Scholars refer to many East Asian experiences to argue that order can be achieved without law, let alone power. In fact, that which might appear to be “authority without power,” in Haley’s terms (1991), is not devoid of power, but

8. According to a journalist, *guanxi* helps explain “how a nation of one billion people coheres” (quoted in King 1991, 64).

demonstrates a substitution of relational power for politico-juridical power. In any case, even when the state appears to be relying on relational power in securing order, it never purports to supplant politico-juridical power and rule by law. Lee Kuan Yew, the chief proponent of “Asian Values,” parades his belief that family solidarity is essential to the order of the political community and society by quoting the Confucian maxim of *xiushen qijia zhiguo pingtianxia*.<sup>9</sup> It is part and parcel of Singapore’s well-known law and order strategy.

The relationship between relational power and disciplinary power is subtler. Relational power promotes discipline in society, with discipline used in its loosest sense. The family and family-like relations are used to promote thrift, hard work, reticence, and humility, but this is not disciplinary in the Foucauldian notion. In another vein, when relational power appeals to common symbols, it serves disciplinarization, since the sharing of common symbols facilitates the flow of information. On the other hand, disciplinary power, which is appropriated by the state and thus turned into a subtype of administrative power, comes in conflict with relational power when the state interjects its gaze into practices of uninstitutionalized interpersonal ties, such as the rearing of children. The governmentalized state seeks to expand its control of information and to refine the storage of information by conducting censuses and surveys and by implementing schemes of registration, auditing, and licensing, which often have inimical consequences on practices based on informal networks and help to curtail relational power. Relational power often resists encroachment by disciplinary power. When Mayfair Yang (1994) discussed *guanxi* as subversion to power, she found in *guanxi* a moment of subversion not only of formal bureaucratic power but also of bio-power spread through disciplinary techniques appropriated by the communist regime.

Much of what has been inferred from the relations between rule

9. “*Xiushen* means to look after yourself, cultivate yourself, do everything to make yourself useful; *Qijia*, to look after the family; *Zhiguo*, to look after your country; *Pingtianxia*, all is peaceful under heaven” (Zakaria 1994, 113-114).

by law and these three kinds of power is relevant to the implications of power in its relation to the rule of law. The rule of law, in the sense of subjecting governmental action to legal rules, calls for additional considerations. It is an outcome of struggle between different sets of politico-juridical power, as well as a framework for such struggle. The idea of rule of law presupposes a single origin of politico-juridical power—the people, who collectively constitute the sovereign. From this *power* of the sovereign derive the *powers* of the branches of government, which check one another.

The relationship between rule of law and disciplinary power is double-edged. Genealogically, disciplinary power and the rule of law emerged alongside each other. According to Foucault (1979, 222), “the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by . . . the disciplines.” “The real, corporeal disciplines constituted the foundation of the formal, juridical liberties.” “The ‘Enlightenment,’ which discovered the liberties, also invented the disciplines.” It is through disciplinary normalization that the people, who are targets of power, are moulded into subjects, and the democratic control of the disciplinary mechanism by the collectivity of subjects creates the best condition for the anonymous working of power.

Disciplinary power contributes to the rule of law, as disciplinary techniques and devices are used to check and oversee the working of the government and politics. In a disciplinary society, panoptic surveillance takes on multiple directions, and governmental action is not exempt from observation. The expansion of *savoir* on the part of civil society increases *pouvoir* against “structural irregularities involving abuses of power” (*gwollyeokhyeong gujojeok biri*).

On the other hand, disciplinary power can disturb the rule of law, as disciplinary normalization entails discretionary exercises of power. Disciplinary power characterizes and classifies individuals, and puts them in different places on a scale of treatment. Discretion and flexibility emerge through the interstices of the formalism that characterizes juridical liberties. In this sense, the disciplinary mechanism can be regarded as a “counter-law.” According to Foucault

(1979, 223), “although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law.” This does not mean that the disciplinary mechanism is at loggerheads with the rule of law. Disciplinary normalization may occur while the rule of law is perfectly in place. It is, however, possible that disciplinary power combine with violence of the state and endanger the rule of law. Increased discretion in crime control, armed with scientific knowledge, has the danger of upsetting the principle of *nulla poena sine lege*.

The relationship between the rule of law and relational power is for the most part negative. Relational power manifests itself in cronyism, favoritism, or nepotism, which wears down the rule of law. Korea’s political scandals are illustrations of the corrosion of the rule of law by practices of corruption conducted through informal nexuses of power, in which office holders collude with people outside the government linked to them through regional ties, alumni ties, or other personal connections. The law not only punishes profiteering by officials, namely bribery, but also brokers outside of the government who mediate business interests and politico-juridical power, using their relational power in exchange for economic profits. The Act on Aggravated Punishment of Specific Crimes punishes the act of *alseon sujae* (brokerage in return for material gain) committed by a private middleman between a private person and public functionary (Article 3). The Attorney-at-Law Act also punishes the act of brokering favorable decisions by high-level employees of public corporations (Article 111). Abuse of relational power in the market is treated similarly, although it is not directly related to the rule of law in the strictest sense. The Act on Aggravated Punishment of Specific Economic Crimes extends penalties to *alseon sujae* committed in connection with the service of an employee of a financial company (Article

10. The texts of all Korean laws are available at <http://www.law.go.kr>.

7).<sup>10</sup>

Perpetrators of *alseon sujae* have diverse backgrounds and exploit many kinds of relational resources. Some have institutionalized power, *gwollyeok*, while others have great amounts of informal social influence, which Li Zhang categorizes as *shili*. Regardless of what place they occupy in the social hierarchy, they evoke interpersonal commitments and the informal norms that justify and encourage the responsiveness of officials to emotional appeals. Their motivation to embark on the act of brokerage arises from the same nexus of affection. In such an action situation, it is often difficult to tell an *alseon sujae* from an informal consultation based on friendship and personal trust, and to distinguish a material interest offered in exchange for brokerage from a gift as a token of friendship or courtesy. The Korean courts have gradually expanded the scope of punishing this kind of profiteering, but still accept certain excuses as valid defences.<sup>11</sup> As for China, scholars point to the difference between *guanxi* and bribery (Yang 1994, chap. 5). Because of these subtle nuances of meaning, legal sanctions against bribery and illegal brokerage in Korea often generate controversy. While public resentment against high-level corruption runs high and investigations and criminal proceedings against high-profile perpetrators provide exciting spectacles for the public, those who are punished perceive themselves as unlucky and represent themselves as victims of political plots, which often wins them some amount of sympathy. Indeed, rules against such practices tend to be instrumentally mobilized in political battles. But the fact that such rules can be used as effective weapons testifies to relational power being circumscribed by an institutionalized social consensus. The democratization of politico-juridical power and the spread of disciplinary power across the state and civil society are sources of pressure against the proliferation of relational power in public processes.

11. See Kim and Kim (1997, 561-571).

## Conclusion

I have identified three different kinds of power, including relational power, which accounts for a variety of practices and relations that have not been explained previously in terms of power. I have offered an outline of permutations linking rule by law and the rule of law respectively with each of the three kinds of power, and discussed how the three species of power complement and cancel out one another in strengthening and obstructing rule by law and the rule of law. As envisioned in the beginning, the theoretical schema that I have developed in this study has general applicability. It may inspire and be further animated by discussions of the adequacy and political implications of the rule of law in other Asian politico-cultural settings (Jones 1997; Sin and Chu 1998, 2000) and by studies of the effects of the rule of law and the rule of relationships in capitalist economic development in East Asia (Jones 1994, 1997; Dezalay and Garth 1997; Chen 1999).

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**GLOSSARY**

<i>alseon sujae</i>	斡旋收財	<i>jeonggyeong yuchak</i>	政經癒着
<i>chaebol</i>	<i>jaebeol</i>	<i>kenryoku</i> (J.)	<i>gwollyeok</i>
<i>guanxi</i> (Ch.)	關係	<i>li</i> (Ch.)	禮
<i>gwollyeok</i>	權力	<i>qing</i> (Ch.)	<i>jeong</i>
<i>gwollyeokhyeong</i>	權力型	<i>quanli</i> (Ch.)	<i>gwollyeok</i>
<i>gujojeok biri</i>	構造的 非理	<i>shili</i> (Ch.)	勢力
<i>gwollyeokhyeong</i>	權力型	<i>xiushen qijia zhiguo</i>	修身齊家治國
<i>jaebeol</i>	財閥	<i>pingtianxia</i> (Ch.)	平天下
<i>jeong</i>	情		

(Ch.: Chinese; J.: Japanese)