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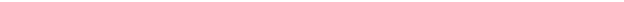
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The fate of Confucianism

焚書坑儒(fen shu keng ru; 213 BC)

- the burning of books and burying of Confucian scholars (fen shu keng ru) ‘annihilated the Confucian learning’. (秦始皇, 史記 57)
- Emperor Hui repealed Qin emperor's radical prohibition of possession of books containing Confucian teachings. (192 BC) 漢書, 史記 73 (漢書)
- Rulers of Han wished to resuscitate Confucian teachings, but suffered from lack of texts. 漢書, 史記 73 , 漢書
- Dong Zhong Shu (董仲舒 179BC – 104BC),
- Wu Ti 漢武帝 (reign 141BC – 87BC),
- Si Ma Qian (司馬遷 145BC – 86BC), author of 史記
- Jesus (c. 4BC – CE 30)
- Ban Gu (班固 CE 32 – 92, author of 史記) describes the cruel punishments practised during the short-lived Qin dynasty: “During the Warring States period, Han (漢) employed Shen Zi and Qin employed Shang Yang. They introduced collective punishments and execution of all related family members of a criminal. They increased bodily mutilation punishments such as boring of cranium, rib-removal and boiling. At the time of Qin Shi Huang (秦始皇), all Warring States were conquered and former king's laws have been destroyed and officials in charge of Li have been abolished. Governing was done entirely by punishments. The emperor personally scrutinised all the documents. During the day, he presided over trials. At night, he did the paperwork. ... However, crimes multiplied. Criminals in orange suit filled the streets. Prisons became crowded like busy markets. People all over the world had grievances and rebellions started. Han (漢) dynasty was thus born and prospered. When Gao Zu entered the palace for the first time, he promised three

chapters of law, that is, murderers shall be executed, those who cause injuries or commit theft shall be punished appropriately. The complicated and cruel punishments of Qin were thus abolished. Countless people were overjoyed."

- 亂世， 當時的社會亂世， 亂世的社會， 亂世的社會... 亂世的社會， 亂世的社會 (亂世， 亂世， 12-14)

1. Suppression of ‘false’ opinions

In my humble opinion, anything other than the six arts and Confucian subjects should be banned and not be presented. When false and extreme theories are annihilated, the opinions can be unified and the law shall become clear and people will know what to obey. 亂世的社會， 亂世的社會， 亂世的社會， 亂世的社會 (亂世， 亂世 39)

2. Genesis

‘Heaven, earth, and man: they are the root of everything. Heaven creates, the earth nourishes, and man completes. Heaven creates with filial piety (xiao) and fraternal love (ti), the earth nourishes with food and cloth, and man completes with ethics and music.

‘Failure to have filial piety and fraternal love is to lose what you are created with, failure to have food and cloth is to lose what you are to be reared with, failure to have ethics and music is to lose what you are to complete everything with.’ (亂世， 亂世 1)

- Superior position of **xiao** and **ti**
- They became an absolute, ineluctable code of human conduct made in heaven. They are ‘baked’ in all of us.
- Humans may be made by humans; but filial piety is made in heaven?

Being true (正) means to be true to what Heaven ordained as human nature. Heaven ordained humans to do 正 and to have shame – unlike the wild beasts. 人能正直，不若禽獸也。人能有耻，不若禽獸也。 (論語，卷 4)

3. 阳尊阴卑 (Yang is noble; Yin is base)

- Ancient tradition: Harmony between Yin and Yang
 - Now Yin, now Yang. This is called Dao. Continuing this is good. Completing this is the nature. A man of integrity would call it integrity. A man of wisdom would call it wisdom. 道，天地之大德也，昭然無朕，萬物之靈也，昭然無朕。 (周易，卷 5)
 - Dao brings forth one, one brings forth two, two bring forth three, three bring forth everything. Everything is equipped with yin and contains yang. Mixture of these two energies makes harmony.' 陰陽者，萬物之母也。母者，生之本也。故曰，萬物生焉，皆有陰焉，皆有陽焉，陽生陰，陰生陽。陰陽生焉，皆有氣焉。氣生焉，皆有形焉。形生焉，皆有神焉。 (周易，卷 42)
 - 'How great is yang! With yang begins everything. How vast and permeating is yin! With yin is created everything.'
 - Thus, Yin Yang and four seasons are the end and the beginning of everything and the root of death and life. If you go against them, disasters will appear. If you obey them, terrible diseases will not arise. This is called enlightenment. 陰陽者，萬物之母也。母者，生之本也。故曰，萬物生焉，皆有陰焉，皆有陽焉，陽生陰，陰生陽。陰陽生焉，皆有氣焉。氣生焉，皆有形焉。形生焉，皆有神焉。 (周易，卷 3)
- However, Dong Zhong Shu advanced a completely new vision: Cosmic struggle between Yang and Yin and Yang's suppression of Yin (陽尊陰卑):
 - Yang is the virtue of the almighty Heaven; Yin is the punishment of the almighty Heaven. 天子之尊，莫尚於此。 (周易，卷 3)
 - Everything bad belongs to Yin. Everything good belongs to Yang. Yang is virtue. Yin is punishment. 陰陽者，萬物之母也。母者，生之本也。故曰，萬物生焉，皆有陰焉，皆有陽焉，陽生陰，陰生陽。陰陽生焉，皆有氣焉。氣生焉，皆有形焉。形生焉，皆有神焉。 (周易，卷 3)

- To control all evils which reside within and to forbid them from manifesting themselves without, that is our mind (xin). That is why mind is called the ‘thin branch’ (纤枝). Just as Heaven forbids yin, so in our body too, emotions and desires must be forbidden. As the dim light of moon (yin) is permanently suppressed by the brilliant light of sun (yang), all that the moon can do is to become full only to lose its fullness. The almighty Heaven thus forbids yin. Likewise, we should forbid desires and stifle emotions. That is to be in tune with Heaven. (天地以自然之理，人以自然之理，人以天地之理，故能无往而不合。) What the almighty Heaven forbids, human body forbids too. That is why it is said that human body is just like Heaven. To forbid what Heaven forbids is not forbidden by Heaven. 人以天地之理，故能无往而不合。(天地，人也)
- Dong’s “explanation” for the supremacy of Yang:
 - Days are counted on the basis of daylight rather than night. (日出而作，日入而息)
 - Years are counted on the basis of Yang, rather than Yin. (阳历)
 - Men, though they may be base, are nevertheless Yang. Women, though they may be noble, are nevertheless Yin. (天地以自然之理，人以自然之理，人以天地之理，故能无往而不合。)
 - The Yang force comes out of the earth in the first month (the ‘correct’ month); makes all things live and grow; and completes its work in 10 months. Humans also are completed in 10 months. This is in accord with the heavenly number. (天地以自然之理，人以自然之理，人以天地之理，故能无往而不合。)
 - Therefore, Yang force comes out from North East and returns into North West. It blossoms in early spring and it ends in

early winter. (早冬之氣)

- When Yang force begins to come out, things also begin to come out. When Yang force is lush, things are also lush. When Yang force begins to wither, things also begin to wither. Things follow the Yang force's coming and going. Numbers also follow the Yang force's beginning and ending. (陽氣之來去，萬物之生滅，皆隨其後。數亦然也)

- **Supression of cruel punishments**

- The air of yang is warm but the air of yin is cold. Yang gives but yin takes away. Yang is benevolent, yin is perverse. Yang is generous, yin is harsh. Yang is love, yin is hatred. Yang is life, yin is death. 陽氣溫暖，陰氣寒冷。陽氣生，陰氣死。陽氣仁慈，陰氣凶惡。陽氣寬厚，陰氣刻薄。陽氣愛，陰氣恨。陽氣生，陰氣死。 ... For these reasons, the method of Heaven is that yang is kept close and yin is kept remote. Virtue must be emphasised, punishment should not be emphasised. Successful accomplishment of the world may not be achieved by relying on punishments. This is just like you may not leave the task of completing the year to yin. Governing through punishments may be called as going against Heaven. That is not the kingly way. 陽氣溫暖，陰氣寒冷。陽氣生，陰氣死。陽氣仁慈，陰氣凶惡。陽氣寬厚，陰氣刻薄。陽氣愛，陰氣恨。陽氣生，陰氣死。 ... 因此，天之道，陽氣為近，陰氣為遠。德為重，刑為輕。成功於世，非以刑為主。猶如歲之終，不以陰為主。以刑為主，則反天道矣。非天子之為也。
- Yin is the air of punishment. Yang is the air of virtue. ... Spring (春) means happiness (喜). Autumn (秋) means sadness (悲). ... Death is sad. Life is happy. Spring grows to be summer. Autumn diminishes into winter. ... Therefore, love should be offered first before meting out stern punishment. The obvious truth of Heaven is that life should be celebrated and death should be mourned. (刑為喜，德為悲)

- **Permanent submission to the king, to the father and to**

the husband

4. 仇, Love thy neighbour

- Love, love, love. Don't fight! No need to fight, no reason to fight.
 - What is □? □ is to have the aching and sad

feelings of love, to have the utmost intent to achieve harmony without fighting, to regulate your likes and dislikes in accordance with the code of conduct, not to have the intent to hurt or to hate, not to harbour ill feelings, not to have jealousy, not to have sad desires, not to have sinister schemes and not to do any deviant or evasive action. Therefore, your mind is at ease, your will is serene, your energy is harmonious, your desire is under control, your affairs are effortlessly done, your conduct is in line with the Way. In this way, you achieve peace, ease, harmony and reason and thus have no reason to fight. This is called 仁. (仁義 2)

- First take the plank out of your own eye; don't judge your neighbour
 - 仁 (ren) means to give comfort to others (仁 ren). Rightness (義 yi) means to correct myself (義 wo). This is why 仁 sounds like 仁 and 義 sounds like 義. You must realise that 仁 is about others; 義 is about correcting myself. ... The method of 仁 consists in loving others; it does not consist in loving oneself. The method of 義 consists in correcting myself; it does not consist in correcting others.
 - Be not judges of others, and you will not be judged; do not condemn others and you will not be condemned. Seek instead to correct yourself and keep yourself from sin (zheng wo 純). (仁義)

5. Dong Zhong Shu's theory of Omen

- Small scale disasters are the cautions of Heaven. Major catastrophes are the threats sent by Heaven. When the caution does not work, Heaven terrifies men with threats. The root of all disasters and catastrophes lies in misgovernment. When things in government begin to go

wrong, Heaven brings forth small scale disasters to issue the caution. When people are thus cautioned, and nevertheless fail to reform, Heaven shows major catastrophes to shock people. If, even after this shock treatment, people still do not fear the wrath of Heaven, serious disasters will strike really hard. So, we may understand that Heaven's will is benevolent [He loves us]. He does not mean to trap us in hardship (囚禁). 4

- cf. The Master did not talk about strange events, natural disasters, disruptions or gods. 《論語》卷7第21章(Lunyu 7.21)

6. Heaven's love is limitless, boundless and endless

- Heaven is 天. Heaven oversees and raises everything. Heaven creates, raises and completes. Heaven's work is never ending. When it ceases, it begins again. Everything it does redounds to serving people. If you carefully observe Heaven's intent, you will realise that Heaven's 天 is limitless, boundless and endless (wu qiong ji 无窮極). ... Heaven always have the intent to love and to give benefit to people. (《論語》)
- I know Heaven's love (天) for people is great. This is because he laid out the sun, the moon and the stars and guides them brilliantly; he created the four seasons and leads them in order; he makes the snow, frost, rain and dews fall so that five grains and hemp can grow; he lets the people harvest them so that these materials can benefit them; he made the mountains, rivers and valleys; and he disposes and propagates all things therein. He superintends the people's conducts good and bad. He installs the kings, dukes, counts, viscounts to rule the people. He rewards the talented; punishes the violent. He provides the metal, wood, birds and animals in abundance. He tends five grains and hemp so that people

can have them as food and clothes. Of old until now, it has always been like this. Now, imagine a person dearly loved his son and did everything to benefit him. If the son grows and does not reciprocate the father's love, all noble men of the world will say that it is immoral and blasphemous. Heaven loves everything on earth and shower benefits on us by providing all these things. Look at even the smallest tip of a hair. There is nothing which is not the work of Heaven. 仁 , 仁 6

仁 : 仁 仁 仁 ? 仁 仁 , 仁 仁 , 仁 仁 ? (仁 17.19)

The Mater said, "Does Heaven say anything? Four seasons come and go. All sorts of things are born. Does Heaven say anything?"

Legalist ideas of law, human nature and statecraft

Reading:

Burton Watson, *Han Feizi: Basic Writings* (New York, 2003) PP. 97-130

0. Confucianism v Legalism

- rule by virtue (de 仁), relying on human being's ethical integrity (ren 仁), rightness (yi 义), ethical code of conduct (li 礼) and wisdom (zhi 知)
- rule by law (fa 法), relying on a well-designed system of punishments (xing 刑) and rewards (shang 嘉)

1. Criticism directed to Confucian “chaos” and “亂”

- Thus, what saves a country is not 仁(ren) or 義(yi). A loving person (仁者) is compassionate, generous and spends money easily. A violent person (暴者) has a heart full of anger (怒) and easily carries out executions. If you are compassionate and generous, you won't bear to see hardship. You spend money easily, you would love to donate. If you have a heart full of anger, your hatred will appear to people below you. You easily carry out executions and people will be wasted. If you cannot bear to see hardship, pardons will be liberally given. If you love to donate, rewards will be showered where there is no achievement. If your hatred shows itself, those below you would have grievances against their superiors. If you easily execute people, people will eventually rebel. ... Therefore, it is said, “Both benevolent men and violent men are the ones ruining a country.” 仁者與暴者... 亂者與暴者... (論語, 卷 6)
- Followers of Confucius disrupt law with their erudition. The brave ones break the prohibition with their martial valor. And yet, kings treat them with courtesy and ceremony. This is why there is chaos. ... Thus, those who practise 學 should not be given honours. Honouring them means that other people's achievements will be harmed. People with erudition and learning should not be employed. Employing them would mean that the law will be disrupted. 學者與勇者... 亂者與學者... (論語, 卷 8)
- If you abandon the compass and ruler and instead rely on your arbitrary feel, even Xie Zhong [a legendary master carpenter] cannot finish a wheel. If you throw away the meter and try to guess the length, even Wang Ni [a legendary craftsman] cannot divide a stick in halves. (論語, 卷 2) (But compare what Xun Zi says about Li at 卷 9)

and 15)

- Five vermins

- 學者誦古文以取寵于君 (Learned persons cite the ways of the ancient kings and invoke ren yi (仁義). With impressive appearance and attire and with eloquence, they question the present day's law and make the king's mind torn between the two)
- 古董商誦古文以取寵于君 (Antiquarians talk about the ancient time but in fact they tell lies. Borrowing foreign nations' power, they achieve their private gain and abandon the government's interests.)
- 武士誦古文以取寵于君 (Militia will gather together and boast about their unbending spirit. And they become famous and violate all sorts of rules.)
- 廉吏誦古文以取寵于君 (Courtiers and lobbyists will emerge from influential families. They spend lots of money to bribe important people and evade the burdensome military duties.)
- 商人誦古文以取寵于君 (Merchants and craftsmen make useless items. They buy up things cheap, bide their time and rob farmers of their income.)
- 孔子, 15.9
- 子罕言利 (Lunyu 4.8)
- 子罕言利 (Lunyu 6.24)
- 子罕言利 (Lunyu 4.10)
- Having explained the choices made by Bo Yi, Shu Qi, Yu Zhong, Yi Yi, Zhu Zhang, Hui of Liu Xia, and Shao Lian, Confucius says, 子罕言利 (Lunyu, 18.8)

2. Thoroughly “rational” approach

- Bright ruler's way of governing is that even the base may challenge the noble on matters of virtue and

- In order to rule the world, you need to rely on human nature. To like and to dislike is part of human nature and this is why reward and punishment can work. Reward and punishment working, prohibitions and commands can have effect. This is all there is to the true method of governance. 仁政 , 仁政 仁政 , 仁政 , 仁政 ; 仁政仁政仁政 仁政 (仁政 , 仁政 1)
- When people pursue self interest, things will work out fine. ... Suppose you hire a labourer to plough and sow your field. If you spend money to prepare nice food and pay him good wage, that is not because you love him. That is because, if you do that, your employee will plough more deeply and sow more carefully. If your labourer puts in a great deal of effort to plough and sow your field, that is not because he loves you. That is because, if he does that, he will get nice food and decent wage. ... What moves our mind is ultimately our self-interest. (仁政 , 仁政仁政 3 , 30)

3. Promoting “uniformity” by eliminating

dissension

- ‘profits and emoluments, office and rank should be based exclusively on military merit, and there should be no other reasons for distributing them.’

- Mozi 墨子, 素问 1:

In the beginning, when people started to appear, punishment and governance were not yet in place. Everybody had his own standard of what is right and what is wrong ... The whole world was in a chaos just like the animal world. (动物们的世界是混乱的，没有统一的标准，每个人都有自己的判断。)

[The Heaven, therefore, installed the Son of Heaven, who then installed three grand dukes, who then installed the feudal rulers (kings), who then installed regional governors, who then installed village chiefs. There came into existence the intelligence gathering, reporting and promulgating the uniform standard of what is right and what is wrong. The whole world was properly governed once there is a uniform standard of what is right and what is wrong.]

- Thomas Hobbes, *Leviathan* (1651), ch. 13:

[In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

- Also see Jean Bodin, *Les Six Livres de la République* (1576), I.111-112

4. Clear Notice

- ‘Law must be compiled and written down in books, be made available in public offices and be widely promulgated to people.’
- If the potential loss from a conduct is set sufficiently higher than the potential gain from the conduct, and if this situation is well publicised, people will ‘voluntarily’ refrain from doing the conduct in question (ni er bu wei: though they don’t like it, they would not fail to do it).
- Qin Codification

5. Updating the Law

- ‘Earlier ages had different ideology. How can you rely on their law? The legendary saints will never come back. How can you follow their principles?’
- ‘Thus the [real] saint never tried to practise the old stuff. How can there be a permanent law? You need to analyse the things of this world and equip yourself accordingly.’
- “A farmer in the State of Song one day saw a rabbit bumping into a stump to death in the middle of his farm. From that day one, he sat by the stump in the hope of getting many more rabbits that way. Those who insist on going back to the good old days are just like this farmer.”
- 《論語》卷三 (Lunyu 3.14)

6. Perfect “techniques” of social engineering?

- no room for ethical integrity
- no room for criticising the legitimacy of the law and exercise of governmental power.
- Superior *technique* (*shu*) which exploits human psychology of love and hate, likes and dislikes, fear and desire
- “Free”, borderless competition for techniques of

governance

- 'Those who rule a country must choose [a technique] which works for many and discard the ones which work for fewer people.'

7. **Ren(仁), yi(义) and wu wei (无为)**

- 'Thus, we do not fear the accusations that we undermine the ruler's interest. We do not mind the sufferings which would follow such accusations. Our determined quest for material resources to bring all the people to their fulfilment is an act of moral fortitude and wisdom. To fear the accusations about harming the ruler's interest and to shun the risk of death following from such accusations is to know how to look after yourself and to ignore the comfort and well-being of all the people. It is a base conduct.' (《周易》卷之二，无妄卦，无妄卦象； 2)
- 'to rule without ruling (wu wei er zhi; 无为)' – everything must be driven by pursuit of self-interest.
- 《周易》卷之二，无妄卦，无妄卦象； 2 (4 . 16)

Shang – Zhou: transformation of ancient Chinese society

[King Wen \(文王\)](#) (Founder of Zhou 周)

[Shu Jing, \(Kang Gao \(trans.\)\)](#)

[Feudal states of Zhou](#)

[Spring and Autumn Period](#)

1. Zhou's conquest of Shang

- Relocation of Shang clans to Qishan
- Setting up a new capital Cheng Zhou (Luo Yang) (after suppressing the rebellion of King Wu's two brothers)
- Sending out family members to govern new territories (e.g. Kangshu, younger brother of Duke of Zhou, given a territory and 7 clans of Yin to rule)
- Living together with the “conquered” Yin clans
- Yin clans allowed to live by their customary law as long as it does not threaten Zhou rule: See Kang Gao, Jiu Gao

2. Conflict of laws, personal principle of law – from *Shu Jing*

- waishi – affairs involving ‘foreigners’ [Yin people viewed by Zhou rulers]
- niesi – ‘peregrine praetor’?

When the ‘external affairs (waishi)’ are presented to you, let the appropriate legal officer (niesi) deal with them according to the punishments of Yin which stand to reason. – Shu Jing, ([Kang Gao \(trans.\)](#))

[Duke of Zhou’s advice to Kangshu about alcoholic drinks]

I tell you, you must definitely warn the ministers [Zhou people] sent out to Yin, all lords of the surrounding areas, our great officers, our administrative staff, all officers sent over there, all kinds of ceremonial staff, and certainly the ones who are in charge of ancestral ceremonies, and a fortiori, those officers who supervise agriculture and public order, that alcoholic drinks are strictly regulated. If you nevertheless receive reports of drinking parties, you must arrest them all and send them back to Zhou. I shall put them to death.

If, however, various ministers and officers of Yin origin are

found intoxicated, you may not put them to death. You must instead warn and rehabilitate them so that this point becomes clear to them. – Shu Jing, Jiu Gao

3. Fengjian and disintegration of zu

- Economic growth, technological advancement
- Forced relocation, co-habitation of different clans
- Waning of the powers of clan head
- Emergence of ‘family (jia, 家)’ as the base unit (rather than the clan 族)
- Zhou Li: Clan rite, family rite

4. Feudalism in medieval Europe

- `*Homagium est iuris vinculum* [Homage is a bond of law]’
– Bracton (c. 1220-1230) trans. Thorne, ii.228.
- `The bond of trust [*fidelitatis connexio*] arising from lordship and homage should be mutual, so that the lord owes as much to the man on account of lordship as the man owes to the lord on account of homage, save only reverance’ – Glanvill (c. 1190), 9.4.
- *Obligatio est vinculum iuris (Inst. 3.13.pr)*

5. Zongfa-feudal system of Zhou and the significance of Li (礼)

- Blood tie, Family, ancestry, sacrifice
- Ceremonial re-affirmation of family hierarchy
- `Dealing with the ancestors consists in respecting the respectable; dealing with the descendants consists in loving the lovable. Dealing with the brothers and collaterals consists in uniting the family members and relations through festive occasions, clearly defining

their order and distinct positions according to *Li* and rightness. This is all there is to the way of human-beings.' – *Li Ji*, *Da Zhuan*

- *Li* in the context of ancestral sacrifice, court visits, diplomatic encounters, marriage, capping and funeral.
- Politeness? Etiquette? Good manners?

8. Family ethics (礼, 禮) in the zongfa feudal political arrangement

Those who commit the crime of robbing, stealing, treachery, killing, laying hands on other's goods or committing violence without fearing one's life, are to be abhorred. But the greatest evil to be abhorred all the more is lack of filial piety and brotherly love. The son who does not serve his father with respect, but greatly hurts his father's heart; the father who does not love his son, but hates him; the younger brother who does not think of Heaven's brightness, and does not respect his elder brother; the elder brother who does not have compassion for his tender younger brother, and treats him coldly and suppress him: if we do not deal with the people who commit these crimes, the law which our people have received from the Heaven will be greatly annihilated and disturbed. I say, this is why these conducts need to be constrained. They must have the punishment or execution as set down by the king Wen without pardon. – *Shu Jing*, *Kang Gao*

Rebellion of the Three Guards: Guanshu Xian (管叔鲜), Caishu Du (蔡叔度), and Huoshu Chu (霍叔处) together with Wu Geng (吴庚) of Yin

Kang Shu Feng was the Duke of Wei

European Legal History and Roman Law

The course aims to offer an overview of the Roman law and Roman legal institution, which form the basis of European legal system. The students will have an opportunity to have a glimpse of legal argument structure and the sophisticated legal analysis discernible from Roman legal sources. It is hoped that a comparative outlook one can have as a result of the study of Roman law will help deepen one's understanding of the modern Korean law.

The following topics will be covered:

1. Expansion of Rome: Political and legal institutions of the Roman Republic
2. Sources of the Roman law
3. Overview of the Roman litigation
4. Division of Personal status
 - liberi / servi
 - sui iuris / alieni iuris
 - Roman citizenship
5. Tutorship, Guardianship, Marriage, adoption
6. Acquisition of things
7. Iura in re aliena
8. Obligations
 - ex contractu (sale, lease, mandate, partnership)
 - ex maleficio (lex Aquilia, iniuria)
9. Roman law in medieval Europe

Law of Obligations I End Term Exam Comments

[Exam questions are here.](#)

Question 1

The fruit producer/seller (Lucky) should be held liable for damages resulting from infected fruits – to the extent that such damages are foreseeable. The question, therefore, is whether wholesaler (Joy)'s liabilities to the retailers are foreseeable for the fruit producer/seller.

There is little doubt that if a tiny portion of fruits supplied are infected with lethal virus, the entirety of the delivered stock would be unfit for human consumption. Reasonable costs of treating the affected customers would also be within the range of foreseeable loss to the wholesaler.

It is irrelevant whether Lucky had 'actual knowledge' that the fruits they sell were already infected or likely to be infected. (If Lucky nevertheless sold the fruit with such a knowledge, then it would amount to a criminal offence!). Civil damages are claimable not only against deliberate wrongdoers but also against a party who had every good intention and who had no clue that his own fruits could ever be infected. If the fruits turn out to be infected, then the seller shall be deemed to be "negligent". Negligence, in this context, is a very technical and artificial concept.

Question 2

The seller of the building (Mr Y) gave an undertaking that he would obtain all regulatory permits necessary to run a cafe or

a restaurant as from 1 May 2009. It seems that the seller did carry out the undertaking. The seller should not be indefinitely responsible for subsequent revocation or cancellation. Even if the seller should be viewed as having failed to fulfill this undertaking, this would simply be an issue of breach of contract under Korean contract law. It is not an issue of mistake.

Mistake is about a fact, not about a promise. In this case, we are dealing with the seller's promise to obtain the necessary permits. Broken promises give rise to a breach of contract. It has nothing to do with mistake.

If Lessee suffered loss due to Lessor's breach of contract, Lessee may "set off" the portion of the rent corresponding to the loss sustained by the Lessee. This has nothing to do with Defence of Simultaneous Performance. The Defence, as its name indicates, provides a ground to "refuse to perform". In the case of a Lessee who purports to "set off" the portion of the rent corresponding to his alleged loss, the Lessee is not at all "refusing to perform". Rather, the lessee's assertion is that the rent has indeed been paid (by setting off against the corresponding amount of loss to the lessee).

In this example, the plumbing issues may have caused "some" loss to Mr X. But it cannot be "100 every month"! It is equally unclear how much of 100 mil. KRW is actually the rent (rather than the purchase price). Until 1 Feb 2010, Mr X had no defence of simultaneous performance whether it was on the ground of lease or on the ground of sale.

After 1 Feb 2010, however, neither parties are in mora. But Mr X would have to pay the already accrued late performance damages (corresponding to the period until 1 Feb 2010).

As it is clear the Mr X is unwilling to perform the contract, there would be little point in requiring Mr Y to "tender" the performance as a prerequisite for terminating the contract. The termination, therefore, is duly made. The contract is

terminated by Mr Y and Mr X must pay the agreed amount of late payment interests (plus statutory rate of interest on that amount from the date of termination until he actually pays). Mr X's purported "rescission" of the sale contract is groundless. Mr X made no mistake.

Question 3

There is no doubt that C Co believed that it was entering into a contract with Mr Lee. C Co merely thought that that very person was called "Mr Kim". C Co also believed that that person owned the property in question. Mr Lee also knew that this was how C Co understood this contract. So both parties all agreed about the parties to the contract.

Therefore the "true" Mr Kim was never a party to this contract.

You should always go by the real and substantive entity, rather than the names or the government-held records. In short, ignore what is written on the ID Card. Focus, instead, on the real person. Whether "that person" is called Mr Lee, Mr Chun, Mr Kim, Mr Ma, etc. is of little significance.

Moreover, Mr Lee never invoked the institution of agency. He never indicated that he was "acting as Mr Kim's agent". Therefore, there is no room for applying Arts. 125, 126 or 129.

The only exception, recognised by Supreme Court rulings, is where the impersonator DID actually have some power to represent the person he impersonates. But in the case of Question 3, Mr Lee did not have any authority to represent Mr Kim.