LEGAL CULTURE IN CHINA: A COMPARISON TO WESTERN LAW

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This paper briefly describes Chinese legal history, analyses the influence of Confucianism on the Chinese legal culture, compares the legal culture in ancient China with the Western legal culture, and discusses the binary framework of Chinese law.

Cet article décrit brièvement les principales étapes de l'histoire du droit en Chine et rappelle l'influence du confucianisme sur la culture juridique chinoise. L'auteur procède également à une rapide comparaison entre les principes fondamentaux du système légal Chinois et ceux en vigueur dans les systèmes occidentaux. Enfin, l'auteur souligne le rôle central des règles informelles dans le système légal chinois actuel.

I BRIEF LEGAL HISTORY OF CHINA

A Chinese Law's Origin

China is a country with a long history. In about the 21st century BC, the first state *Xia* (夏) Dynasty arose in China; the first law *Yu Xing* (禹刑) arose at the same time. The *Yu Xing* was a customary law; it was unwritten and unpublished.

B Chinese Written Law

In 536 BC, during *chunqiu* (春秋), known as the "spring and autumn period", China had its first statutory law, *xing ding* (刑鼎). It was written and published through casting on bronze vessels. Comparatively, the first statutory law of ancient Rome, the Twelve Tablets, was enacted around the 4th century BC, many years later than the first Chinese statute, *xing ding*.

C Chinese Legal Family

Chinese legal thought transmitted since the "spring and autumn period" had a great influence not only on the laws in later Chinese dynasties, such as *Qin*, *Han*, *Sui*, *Tang*, *Song*, *Yuan*, *Ming*, and *Qing* dynasties, but also on other East Asian countries, such as Japan, Korea, Vietnam, and East, middle and South-East Asian countries which had close relations with China through trade and cultural

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exchange. The laws in these countries are structured after the pattern of Far Eastern Law or the Chinese Legal Family.

D Chinese Legal Family's Disintegration

After the Opium War between China and Britain in 1840, China gradually fell into a colonial status through imperialist encroachment. Meanwhile the traditional law in ancient China was broken through contact with Western powers, and the government in the Qing Dynasty, the last feudal dynasty, was forced to begin legal reform following the Western model of law. This was especially so in the civil law system in the late 19th century and the early 20th century.

During the period of the Republic of China (1911-1949) the Nationalist (*Kuomintang*) government continued legal reform, making a series of laws, including constitutional law, laws of government organisation, criminal law, civil and commercial law, and civil and criminal procedure, which still apply in the Taiwan province of China.

E Modern Chinese Law

In 1949 the People's Republic of China was founded. Since then, especially after the end of Cultural Revolution, the construction of the legal system in the People's Republic of China has entered a new period. Since 1979, Western legal systems, especially the Civil Law systems, have influenced the main legal system, which is becoming increasingly modernised.

II THE INFLUENCE OF CONFUCIANISM ON THE LEGAL CULTURE

A From Moral Behaviour to the Law: Morality First and Legal Code Second

Confucianists believe that the governance of a nation cannot depend on strict laws and harsh punishments, but that the criminal law must be based on moral conventions. They believe that legislation, administration, and adjudication of law must be analysed through the lens of moral principles. Social order is best preserved through moral persuasion as the primary method, assisted by laws and punishments.

Confucianism emphasises social relationships, in particular the relationships between the king and official, the father and son, the husband and wife, the elder and younger brother, and between friends. Every role in each relationship has its own moral requirements and ethical standards.

B Confucian Adjudication Prized Harmony above all Else

Harmony is the highest value of Chinese culture. Through the thousands of years of Chinese history, Chinese society has held harmony as the highest ideal in dispute resolution. When adjudicating disputes, ancient officials focused on avoiding lawsuits and settling arguments through mediation. They strove to achieve the Confucian utopia of "a society without lawsuits."

C Natural Law Concepts

The ancient Chinese legal system placed importance on combining the three factors of the "heavenly order" (the ways of nature), "legal code of the nation" (the law), and "human relations" (human emotions and social values).

D Role Models

Impartial and morally upright judges and government officials were held up as role models and paragons, especially in later generations and dynasties, even though they might not have enjoyed the favour of a corrupt emperor or government during their lifetime.

E Liberalizing the Legal System with Humanizing Aspects

There are a number of features of the ancient legal regime that have their corollary in the modern law. For example, from the regime *Sanzong* (三纵), *Sanyou* (三宥) in the *Han* Dynasty (2000 years ago), comes the concept of leniency towards those without legal capacity or who are of limited capacity, such as the very young or mentally disabled. From the regime *Luqiu* (录囚) comes the concept that there must be multiple reviews prior to the execution of the death penalty. *Zhuzifushen*(逐级复审) provides for multiple appeals at multiple levels. The regime *Xuqiu Shenxing* (恤囚慎刑) allows for leniency towards women; towards those who surrender and cooperate with law enforcement; or towards those who redeem themselves through action. *Dengwengu* (登闻鼓), *Jingkong* (京控) has a corollary in the form of letters and visits. *Qiushen Qiujue*, (秋审秋决) meant that death penalties may only be carried out in the fall: this is because in the natural order, the fall is the only suitable season – things come to life in the spring, reach full vibrancy in the summer, wilt in the fall, and preserve their strength in the winter in order to begin the cycle again.

III ANCIENT CHINESE LEGAL CULTURE AND WESTERN LEGAL CULTURE

A Monal Law versus Plural Law

1 Emperor's power

Since the *Qin* Dynasty (221 BC) China has become a state with a centralised and autocratic monarchy in which the Emperor had the highest authority and no other powers, whether secular or religious, could restrict the Emperor's power. The law was only a tool to serve and preserve the Emperor's power. This situation did not change for over 2000 years. Supreme legislative, judicial and executive powers were vested in the Emperor, not only theory but also in practice. The Emperor was the legislature; he was also the highest judicial authority. The Emperor was above law: he made laws, the laws were binding on all subjects but not binding on him; he could alter the laws by decree at any time. He could also issue a decree to pronounce the guilt of an accused, to determine the sentence, or to alter judgments or orders given by other judicial authorities.

2 No separation of powers

Even at levels of government below the Emperor, there was no formal separation of the judicial power from other powers. There was no division between the executive and the judiciary. For example, the county magistrate was both the chief administrator and the judge for the region. There was no division between the judicial system and the administrative supervisory system. Higher officials were responsible for supervising the conduct of local officials and also hearing appeal cases in law. There was no division between the judiciary and police, and the same officials could exercise both functions at the same time.

3 Plural law in the West

Comparatively, the autocratic monarchy in the Western Europe, whether in England (between the 12th and 16th centuries), France (between the 13th and 16th centuries) or Germany (after 1800), only existed for a relatively short time of several hundred years. The feudal society in the West had diverse power centres for a long time. Along with the different political powers, the law in Western Europe was not integrated, but divided into secular law and the canon law. The secular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and merchants' law. In that case, no power existed in a vacuum, but it was restricted by others. In the course of the industrial revolution Western countries gradually formed the so-called "separation of powers".

B Differentiated Law versus Non-Discriminatory Law

Generally speaking, Western law, especially modern Western law, is non-discriminatory law: everybody, no matter the age, race, gender, class, rank, or education, is equal before the law. But the law in ancient China was differentiated law. Persons of different ranks were treated differently. This is the basic principle of law in ancient China, which regulates the relationship between the monarch and his ministers, the higher and lower officials, the husband and the wife, the parents and the children, the elder and younger.

The law in ancient China was divided into two categories, that is, *xing* (刑) and *li* (礼). The persons at the lower ranks, *xiao ren* (小人) were treated by *xing*, and the persons at the higher ranks, *jun zi* (君子) or *dai fu* (大夫), were treated by *li*. The differentiated law also reinforced the hierarchies and divisions in traditional society. For example, an offence committed by a person against his senior or superior would be punished more severely than if the offender and victim were equal in social rank. However, if the same offence was committed by a person against his junior or inferior, he would be punished less severely or might not be punished at all.

The legal system also recognised the privileged position of eight special groups referred to as *bayi* (meaning "eight groups qualified for consideration") in Tang Law. They included members of Imperial family, descendants of former Imperial houses, persons of great merit, high officials, and their immediate family members. Persons falling within the eight categories could only be prosecuted in accordance with special procedures and usually enjoyed lenient treatment during judicial proceedings and reduction of punishment if convicted.

In terms of criminal law and criminal procedure, some features of traditional Chinese law and practice contrast sharply with modern notions of the rule of law. First, there was no accepted theory that the criminal law should define offences clearly and precisely. In the administration of justice statutory provisions were not always adhered to strictly; the provisions could also be applied by analogy so that persons could be punished for acts not expressly prohibited by the written law.

Second, there was no division between prosecution and adjudication. The judges were also prosecutors. Third, since there was no subpoena procedure, potential witnesses in a case could be arrested and imprisoned pending the trial to ensure that they could be brought before the court.

Fourth, torture was extensively practised in connection with judicial proceedings. The system of trial emphasised the importance of confessions by the accused and so torture was used to extort it. It was also used against witnesses who

were considered not to have given evidence satisfactorily. Furthermore, persons who invoked the appeal procedure usually had to endure beatings before their case would be heard.

C Harmony versus Lawsuit (Confucius versus Aristotle)

The highest ideal for Confucius was to reach harmony between different persons and between nature and society. He said that his final purpose was not to distinguish wrong from right by lawsuit but to reach a world without lawsuits. Mediation was an important way to reach harmony.

A monarch who only depended on the law or punishment to govern the people was not smart. For an Emperor, keeping harmony in society through influencing his ministers and people is a higher skill than through using strict laws. Where the people were governed by *li*, disputes would be easily resolved through friendly negotiation, mediation and mutual compromise. People would not assert their self-interest to the fullest degree but would instead adopt an attitude of self-criticism, giving concessions so as to arrive at a common understanding with the other party. In this way, the idea of social harmony would be achieved. Litigation would be avoided.

Aristotle thought that rule by law was better than rule by man. This was because the rule by law was a stable way to govern the state, but rule by man was unstable as it was dependent upon the discretion of the monarch, and the state would fall to disorder when the monarch died or was corrupt. Accordingly, the lawsuit as a process to settle disputes had some merit that the other ways did not, that is, law was an impartial rule that informed people on who had the right or duty in a certain situation, and rule by law avoided the monarchy's arbitrariness.

D Collectivism versus Individualism

Another feature of the traditional Chinese legal culture is the emphasis on the priority of the interests of the group, such as the family, the clan, and the community. The individual was not an independent or self-sufficient entity, but was always thought of as a member of a group and dependent on the harmony and strength of the group. Accordingly, the traditional legal system was based on people's duties and obligations (to the group) rather than their individual rights and interests.

E Morality versus Penalty

The Confucians argued against excessive use of legal coercion and stressed the merits of government by education, persuasion and moral example. The people should be taught what was wrong and right and inculcated with the *li*, or the moral

or social rule of conduct, so that they would behave properly according to their conscience and not merely because of the threat of punishment. The rulers themselves should also try to behave virtuously, so as to set a good example for their subjects to follow. In this way, the Confucian approach explained that the government would be able to win the hearts of the people, instead of just securing their outward submission through the use of force.

Following the Confucian approach, government policy was to promote moral teaching as a primary means of social control and to rely on penal law only as the last resort. The role of law was considered secondary and supplementary to morality. In certain periods of Chinese legal history, the practice of deciding cases in accordance with the Confucian classics was advocated. This means that the principles embodied in the Confucian canon may be applied in priority to, or even in disregard of, relevant statutory provisions in the course of adjudication. This was justified by the idea that Confucian doctrines constituted the essence and spirit of the legal system as a whole.

F Informal Law versus Formal Law

Civil disputes, such as those relating to the land and to family matters were usually resolved informally through mediation, conducted by respective leaders or elders of clans, villages and guilds in accordance with customary rules and prevailing notions of morality. These methods stressed harmony and giving of concessions, and discouraged litigation and pursuit of self-interest.

IV BINARY FRAMEWORK OF CHINESE LAW

A Formal and Informal Systems in the Different Legal Fields

The difference between the formal and informal systems exists in different legal fields. First, in the field of law-making, the following categories can be found: the officially promulgated law, the official law as it is actually applied (the living law), the customary law of tradition, and usages that have been practically recognised and adopted.

Second, in the field of law enforcement, there are the categories of adjudication through the courts and mediation through neighbourhood committees. Third, in the legal profession, there are lawyers who received formal legal education and passed the bar examination, and different types of semi-lawyers or mediators or advisors who have very little legal knowledge or even completely lack legal training. Furthermore, in the field of legal education, there are law schools as well as different kinds of part-time or night-schools or public campaigns publicising legal knowledge.

B Merits and Weakness of Formal and Informal Law

Formal and informal systems in each legal field have merits. Generally speaking, the formal system is suitable to deal with social relations in which there is little intimacy between the participants; but the informal system is suitable to regulate the relations between participants who have close relations. For example, disputes between the family members, relatives, friends, or neighbors, more often than not, may be settled by mediation. On the other hand, disputes between strangers may be more commonly settled by trial in courts.

Generally speaking, along with the development of modern society the informal system may become weaker and the formal system may become stronger and stronger. Modern society seems to have a tendency for more laws, more litigation, more lawyers, and more law students. Some functions of the informal system in society are transferred to the formal system, in the same way that some functions of families and clan-communities are transferred to the government or the courts.

On the other hand, even in the modern market economy the informal system still plays an important role in regulating relationships between business partners, corporations, and enterprises with long-term continuing business relationships. When disputes arise between parties, informal methods are usually chosen, such as conciliation, bargaining and mediation, and formal court trials are avoided because the parties understand that it is more important to retain a long term cooperative relation than assign liability to a particular party through litigation.

C The Choice of Dispute Resolution

A number of factors impact on the choice between the formal or informal way of resolving disputes. These include the time, money, spiritual and material costs; the relationship between the parties – whether they are intimates or strangers; whether the society is modern or ancient; whether the culture is Eastern or Western; whether the dispute is of important core interest or value, or unimportant and of marginal interest or value; and consideration of the balance between different interests.

V CONCLUSION

This paper draws a simple and general picture of the Chinese law: Chinese legal history; the influence of Confucianism on the legal culture; the characteristics of legal culture as different from Western law; monistic law versus plural law; differentiated law versus equal law; harmony versus lawsuit; morality versus penalty; collectivism versus individualism; and informal law versus formal law. It also analyses the framework of Chinese law, including the formal and informal

systems in the different legal fields – law-making, law-enforcing, the legal profession and legal education.

China has a good legal tradition, but some of its characteristics appear backward in the face of social and economic modernisation. The Western legal tradition has its advantages, but also some disadvantages. Our mission is to develop the advantages and overcome the disadvantages in both Chinese and Western legal traditions so as to create a new type of legal culture to suit the social and economic development in China.