

Paper No. 87

2009

Chinese Legal Tradition and its Modernization

Yi Gong Liu
liuyg@lzu.edu.cn

Link to published article: http://www.hkbu.edu.hk/~lewi/pub_work_info.html

APA Citation

Liu, Yi Gong. *Chinese Legal Tradition and its Modernization*. Hong Kong: David C. Lam Institute for East-West Studies, 2009. LEWI Working Paper Series no 87.

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林思齊東西學術交流研究所
David C. Lam Institute for East-West Studies (LEWI)

Working Paper Series 研究報告系列

Paper Number: 87
May 2009

Chinese Legal Tradition and its Modernization

Liu Yigong
Lanzhou University

The author welcome comments from readers.

Contact details:

Liu Yigong, law School, Lanzhou University
E-mail: liuyg@lzu.edu.cn

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Chinese Legal Tradition and its Modernization

LIU Yigong¹
Lanzhou University

Abstract

China has a long history of legal civilization. In ancient times, the Chinese legal system, as a model in East Asia, exerted significant influence on the neighboring countries and was an important part of the global legal civilization. Today, legal modernization should pay attention to our local legal resources and take into account our legal heritage. Though China should learn from the experience of the West, it is also necessary to consider the conditions and reality of China rather than following blindly. The spirit of traditional Chinese law can be summarized as (1) humanism; (2) moral enlightenment and prudent punishment (明德慎罰); (3) law of nature (the Tao follows nature); (4) the rule of law; and (5) avoidance of litigation (ADR). Such spirit does not conflict with modern legal concept, and it should be further developed and promoted by future generations.

I. Introduction

What is law?

Since ancient times, hundreds of definitions of the term “law” emerged and scholars all had different views. Yet law is generally constructed as the enforced rules or social norms that are based on justice. Law lays down the rules that define a person’s rights and obligations, and set the penalties for any contravention.

There are different types of social rules, including law, morality, religion and custom. Law is regarded as the bottom line of morality and those crossing the line will be punished.

In the book *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (1989), Japanese scholar Professor Masaji Chiba made a new approach to the definition

¹ Dr. LIU Yigong, Professor of law, Lanzhou University Law School, is the visiting scholar at David C. Lam Institute for East-West Studies (LEWI), Hong Kong Baptist University during Feb-March 2009. I would like to express my gratitude to Ms. Hidy Ng (David C. Lam Institute for East-West Studies, Hong Kong Baptist University) and Professor Chen Hongyi (Faculty of Law, Hong Kong University) for their kind assistance in writing this paper.

of law. According to Professor Chiba, law may have different forms and folk law is one of them, even if it is not enacted by the legislature.²

Actually, there is a dual structure of law in our society: national law, or state law, and customary law, or folk law. What is customary law? Is it law? Customary law is usually based on customs, and, unlike national law, it consists of folk rules that are not enacted by the legislature. National law and customary law function as the political state and civil society (市民社會與政治國家) respectively. They are closely related, but they also conflict occasionally.

What is the relationship between national law and customary law?

1. National law is developed from customary law. Both common law and civil law are originated from customary law.
2. Each country has its own set of customary law.
3. National law is rigid, whereas customary law is flexible.
4. National law is temporary, while customary law is long-lasting.
5. National law or state statutory law is imported, but folk law of a country originates in the country itself.

II. The origin of traditional Chinese law

A. The literal meaning of law

According to *Shuo Wen Jie Zi* (《說文解字》), a dictionary compiled by Xu Shen in the Eastern Han Dynasty (around AD 100-121)³, “law” (灋) means criminal punishment. The ancient Chinese character “法” was written as “灋”, which can be separated into three parts: “氵”, “廌” and “去”. “氵” originally means “water” but represents “equality” here. “廌” (Zhi), also called “解廌” or “解豸”, is a mythological animal that looks like a cattle or goat, and it represents “justice” here. Wang Chong (AD 27-97, Eastern Han) said that when Gao Yao (皋陶)⁴ heard a case, he would ask “Zhi” to hit the suspect with its horn.⁵

² See Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*, Tokai University Press, 1989.

³ 《說文解字》解釋古法字“灋”說：“刑也。平之如水，從水。廌，所以觸不直者去之，從去。”

⁴ A legendary judge lived in Shun and Yu period (21th century BC).

“去” means “to remove” and here it represents “punishment”.

Pictures: “Unicorn” (廌) in different forms



Unicorn: Gansu Provincial Museum (獨角獸：甘肅省博物館(蘭州)，西漢，206 BC - AD 5，武威出土)



Unicorn: Beijing Ming Tombs (北京十三陵)

⁵ 王充 (AD27-97) 《論衡·是應第篇》說：“皋陶治獄，其罪疑者，令羊觸之。有罪則觸，無罪則不觸”。



Unicorn in the West

In the West, the term “law” has a narrow sense and a broad sense. In the narrow sense, “law” is equal to “lex”, “loi” and “gasetz”, implying that “law” is made by the legislature. In the broader sense, its synonyms “jus”, “droit” and “recht” refer to “law”, “right” and “justice”.

Both China and the West have a divine justice of their own. In China it is the “Zhi” (Unicorn), while in the West it is the “goddess of law”. The Western goddess of law, also known as the goddess of justice, is often portrayed as a blindfolded young lady holding a scale with one hand and a sword with another. Being blindfolded means that everyone is equal before the goddess of justice (justice is impartial). The scale means fairness and impartiality. The sword means that anyone breaking the law will be punished. Therefore, the image of the goddess of justice represents equality, justice and punishment.

The modern goddess of law in the West can be traced back to ancient Rome. The Roman goddess of justice Justitia was often portrayed as a blindfolded woman balancing a scale and holding a sword. She sometimes holds the fasces (a bundle of rods around an ax symbolizing judicial authority) and a torch (symbolizing truth).⁶

⁶ <http://lib.law.washington.edu/ref/themis.html>



Picture: Goddess of justice

When comparing the literal meanings of “law” in the East and the West, we can see that both China and the West interpret the term “law” (fa (法)) as equality, justice and punishment. But the Chinese term “fa” focuses more on punishment while the Western expression “law” focuses on rights and justice.

B. Basic theories of the origin of law

There have been various theories regarding the origin of law since ancient times, including:

- (1) Creationism: law is made by God.
- (2) Violence: law is the result of violence.
- (3) Social contract: people sign a social contract and give up some rights to form a government in order to maintain social stability and development. This theory was supported by the classical natural law school in the 18th century and French scholar Jean Jacque Rousseau was a key representative of this school.
- (4) The national spirit (volksgeist). Friedrich Karl von Savigny (1779-1861), German jurist and legal historian, and founder of the historical school of jurisprudence, began to

use the term “national spirit” in the 19th century. He stated that law, like a language, is an expression of the “common consciousness of the people”, and is driven by “internal, silently operating powers”.

(5) According to Marxism, law is developed along with the productive forces, social and economic development, and the emergence of private ownership and class.

C. The origin of law in China

There are many stories regarding the origin of law and the most notable one is that of Gao Yao, a person believed to be the first judge in China. During the Shun and Yu period, whenever Gao Yao came across some difficult cases, he would ask “Zhi” (a mythological animal) to use its horn to hit the suspect.

Law originated from military conquest (刑起於兵)

The Western law is originated in the ancient Greece. In Greek mythology, Theseus was the first lawgiver in Athens. The hero of Attica was believed to have united the states under a constitutional government in Athens. With the aid of Ariadne, he also killed the monstrous Minotaur.

In reality, however, Draco was the first lawgiver in Athens. In 621 BC, Draco became the archon of Athens and enacted the first set of written laws, which were very harsh. Plutarch once said, “Draco’s law is not written with ink, but with blood.” Besides, democracy was also advocated by the Greek. In Greek, “*dēmokratia*” means “rule of the people” (“*dēmos*” means “people” and “*kratos*” means “rule”).

During Solon’s period, the Greek democracy began to take shape. After Clisthenes’ political reform, democracy in Athens reached its peak at the time of Pericles. Therefore, the Western law is originated from conflicts, arguments and compromises between civilians and aristocrats.

III. The spirit of traditional Chinese law

China has a long history of legal civilization. In ancient times, the Chinese legal system, as a model in East Asia, exerted significant influence on the neighboring countries and was an important part of the global legal civilization. Today, legal modernization should

pay attention to our local legal resources and take into account our legal heritage. Though China should learn from the experience of the West, it is also necessary to consider the conditions and reality of China rather than following blindly.

The spirit of traditional Chinese law can be summarized as (1) humanism; (2) moral enlightenment and prudent punishment; (3) law of nature (the Tao follows nature); (4) the rule of law; and (5) avoidance of litigation (ADR). Such spirit does not conflict with modern legal concept, and it should be further developed and promoted by future generations.

(1) Humanism

The Confucian concepts of law are humanistic. Confucianism, the representatives of which are Confucius and Mencius, advocates “benevolence, righteousness, ritual, wisdom and trust” (仁義禮智信), in which “benevolence” (仁) is the core value. Benevolence can be interpreted as “love” (仁者愛人) and is based on “loyalty and forgiveness” (忠恕). The Confucian sayings go that “do not do to others what you don’t want to be done to you”.(己所不欲，勿施於人) and “a benevolent man establishes for others what he wishes for himself, and helps others to reach where he wishes to reach himself” (仁者，己欲立而立人，己欲達而達人。).

Mencius focused on “benevolent governance” (仁政) and “people-oriented” (民本). He pointed out that “for a country, people are more important than the state and the king”. (民為貴，社稷次之，君為輕). Concerning economy, Mencius believed that “persons with immovable property are persons of perseverance” (有恆產者有恒心). It means that a person with a certain amount of property will tend to abide by morality while those extremely poor people will tend to break the law.

(2) Moral enlightenment and prudent punishment (明德慎罰)

Mencius once said, “Virtue alone is not sufficient for the exercise of government; laws alone cannot carry themselves into practice.”(徒善不足以為政，徒法不能以自行)

Most ancient Chinese thinkers stressed the importance of moral education. However, Confucianism emphasizes on “moral enlightenment and prudent punishment (明德慎罰)”, a notion developed by Confucius in the Western Zhou Dynasty(16th century- 770 BC). Confucius thought that “moral enlightenment is primary while penalty is supplementary” (德主刑輔). In Confucianism, penalty would work only when moral enlightenment does not. For two thousand years, “ritual” (禮) and “punishment” (刑) had been the cores of the feudal law in feudal China. The law of imperial China is described as being a legalist in form and a predominantly Confucian in spirit.⁷

(3) Law of nature (the Tao follows nature)

In the West, the concept of natural law came from ancient Greece where Zeno (the Stoic school) was the key advocator of this idea. Even today, the natural law school is still an important part of the western legal philosophy.

China also has natural law, such as Taoism and Confucianism.

“Tao follows nature” (道法自然) is a Taoist principle developed in the Spring and Autumn period. “Tao” (the way) is the core thinking of Lao Zi and refers to the origin and regulation of everything in the universe. Lao Zi once said, “Man models himself after Earth. Earth models itself after Heaven. Heaven models itself after Tao. Tao models itself after nature.” (人法地，地法天，天法道，道法自然) And added, “The net of Heaven has large meshes, but it lets nothing through.” (天網恢恢，疏而不漏)

Another important Taoist concept is “the harmony between man and nature (天人合一)”. After industrialization, humans began to exploit nature in an unprecedented scale. The damage done to the environment is more serious than ever before, leading to depletion of resources and extinction of a large number of plants and animals. We are now facing serious environmental problems like soil erosion, desertification, water shortage, pollution and global warming. As human beings act against the law of nature, they are bound to be punished by nature in the end. Mankind is part of nature and we should live with nature in peace instead of conquering it.

⁷ Geoffrey MacCormack, *The spirit of traditional Chinese Law*, The University of Georgia Press, 1996, p1.

(4) The rule of law

“The rule of law” is a commonly used legal expression nowadays. However, it actually dates back to the ancient times. In the 5th century BC, Greek philosopher Aristotle began to use the expression “rule of law” and thought that the rule of law was superior to the rule of man. In the Spring and Autumn period (770-453BC) in China, legalists also proposed the idea of “rule of law” (依法治國). They believed that the primary function of law was to determine ownership and settle disputes, and that the nobility should not enjoy more legal privileges than others. Everyone should be equal before the law no matter regardless of his wealth and power. In short, there should be “no hierarchical difference before the law” (刑無等級).

However, we must be aware that the “rule of law” advocated by legalists is different from the “rule of law” in modern sense. The former was used under despotic regimes where the legalists wished to use punitive measures and heavy punishment to prevent crime and govern the country. Even a minor offense would be subject to heavy penalty. This eventually led to the collapse of the Qing Dynasty.

(5) Avoidance of litigation (ADR)

Contradictions and conflicts occur frequently in our society. How could they be resolved?

Non-litigation and harmony are the core values of Chinese legal tradition. At present, alternative dispute resolution (ADR), a concept originated from the United States, is gaining popularity around the world. It proposes three methods: consultation, mediation and arbitration.

VI. The modernization of traditional Chinese law

A. Where did modern Chinese legal system come from?

Here are the historical sources of law in modern China:

(1) Civil law

The civil-law system is primarily based on statutes. The majority of civil-law countries have assembled their statutes into one or more carefully organized collections called

codes. Most modern law codes are based on the famous code commissioned by the Roman Emperor Justinian I around AD 500. Justinian's code, the *Corpus Juris Civilis* (Body of Civil Law), updated and summarized the Roman law. Therefore, legal systems based on the Roman system of statute and code law are known as civil-law systems.

Chinese legal tradition has some similarities with the civil law tradition too. In ancient China, almost every dynasty had an exclusive set of codes, such as the "Jiuzhanglv" (九章律) of the Han Dynasty and the "Tanglvshuyi" (唐律疏議) of the Tang Dynasty. Thus, it is relatively easier for China to adopt civil law tradition in modern time.

(2) Common law

The common-law system is largely based on case law, i.e. on court decisions. The common-law system began in England hundreds of years ago. The English called their system the common law because it was applied nationally.

The English common law was developed from rules and principles that judges usually followed in deciding court cases. While judges based their decisions on legal precedents, or the previous court rulings for similar cases, they could extend any precedent to suit to a particular case. They could also overrule any precedents that they considered to be in error or outdated. In this way, many laws were amended by judges over the years. The common law thus came to be law made by judges.

At the beginning, Chinese people were not familiar with the case law, so the modernization of traditional Chinese law did not propel China to adopt common law. But since the 1980s, the open door policy of the Chinese government enabled many Chinese students to study common law in North America. When they returned to China, they also brought with them the American legal concepts. The American adversary system and legal education system were also introduced into China in recent years.

(3) Soviet law

The development of law in Russia started after the Communist came to power in 1917. The system was imposed on the entire Soviet Union in the 1920s, and was also imposed on Soviet-dominated regimes in eastern and central Europe after World War II. Later, the ruling Communist parties in China, Cuba, North Korea and Vietnam adopted variations of the Soviet law. Soviet law, which went through some radical changes after more than

70 years of development in the Soviet Union, maintained certain features of the earlier tsarist law, shared some key elements with the law of other dictatorships, and introduced public ownership of the means of production and subordination of the legal system to the Soviet Communist Party.⁸

The Soviet legal system had influenced China for several decades and its imprint on the Chinese law can still be seen today. In the early 1990s, law in the Soviet Union underwent significant transformation and Soviet law disappeared as the Soviet Union collapsed.

(4) Traditional Chinese law

With history of thousands of years, the Chinese law is one of the oldest legal traditions in the world. In ancient China, the legal system was based on the Confucian philosophy of social control through moral education, as well as the legalist emphasis on codified law and criminal sanction. Following the 1911 Revolution, the Republic of China adopted a largely Western-style legal code under the civil law tradition. The establishment of the People's Republic of China in 1949 brought with it a more Soviet-influenced system of socialist law. However, the Chinese legal history became a legacy that has been exerting its influence even now.⁹

B. Modernization of traditional Chinese law

(1) What is modernization?

The idea of modernization came from the view of societies as having a standard evolutionary pattern, as described in the social evolutionism theories. According to these theories, each society would evolve inexorably from barbarism to a greater level of development and civilization.

Modernization vs Westernization

China's legal modernization is westernization to a certain extent, but it is not a successful story. The legal concepts, principles and theories we are using today are all taken from the West. However, when we learnt from the Western legal civilization, not only did we

⁸ Britannica online encyclopedia 2009

⁹ Wikipedia 2009

fail in learning the spirit of the Western legal system, but also the legal tradition of our own is lost.

The two Chinese idioms that best describe the legal modernization of China are “learning the Handan style of walking” (邯鄲學步) and “different environment giving rise to different oranges” (南橘北枳).

(a) Learning the Handan style of walking (邯鄲學步) is a story from the classical Chinese work *Zhuangzi*. During the Warring States Period, a person of the Yan State went to Handan, the capital of Zhao State. He found the walking style of the local people very elegant and tried to imitate. In the end, not only did he fail to learn their style, he also forgot how to walk and had to crawl home.

It is a metaphor to describe people imitating others without success and losing one’s own skills instead. China’s legal modernization is indeed such a case.

(b) Different environment giving rise to different oranges (南橘北枳)

Yan Ying¹⁰ once said that oranges grown in the south is called “Ju” and those grown in the north is called “Zhi”. They have similar leaves but taste different. Why? It is because the soils are different.¹¹ Orange trees grow well in the south with big and sweet oranges. However, when the trees are transplanted to the north, the oranges become small and sour. It shows that things of the same species may vary with different environment.

It is also true for legal transplantation. If there is no suitable soil and climate, the transplantation will not be successful. The Western legal system operates well in the West, but it may not work in China if we copy it blindly.

(2) Three ways of realizing modernization

(a) Inheritance of law

The unique legal system of China has existed for thousands of years and contributed greatly to the legal civilization of East Asia. When we promote the rule of law and pursue legal modernization, we should also consider our local legal resources and heritage. We

¹⁰晏嬰，? —前 500 年，字平仲，夷維（今山東高密）人。為春秋時期齊國正卿。曆仕靈、莊、景三朝，執政五十餘年。以節儉力行、謙恭下士著稱于時。注意政治改革，關心民事，反對祈福禳災等迷信。

¹¹出處：《晏子春秋·雜下之十》：“嬰聞之：橘生淮南則為橘，生於淮北則為枳，葉徒相似，其實味不同。所以然者何？水土異也。

should promote the spirit of traditional Chinese law on one hand, and get rid of its demerits, such as dictatorship, official orientation and hierarchy, on the other.

(b) Transplantation of law

Western legal civilization plays an important role in the civilization of the mankind and we should not ignore it. In particular, Western nations have extensive experience in the legal system of market economy (for instance, the setting up of IP protection policies and WTO regulations). When developing our own market economy, we could learn from the West but adaptation should be made according to the specific conditions of China. Also, we should try to make use of local legal resources.

(3) Legal reform

The legal reform of China should focus on:

1. The construction of legal philosophy of East Asia.
2. Political reform and legal reform.
3. Anti-corruption.
4. Judicial reform.
5. International perspective on legal education.

V. Conclusion

The unique legal civilization and culture of China have been evolving for thousands of years. Legal modernization should take into account our local legal resources and heritage. As we learn from the West, we should also consider the conditions and reality of China rather than copying blindly.

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