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Comparative Study on Administrative Legal Culture: Between China and Europe

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Abstract: *There are three important factors, such as the ideology, the economic system and political system, which manifest different characteristics along the historical track and influence the model selection on APL between the West and China. The most important factor is the ideology, i.e. the traditional legal culture embedded in the ethos of a nation, which does not change with the vicissitudes of time, the change of government, the change of political system. There is no doubt that the analysis of the traditional legal culture still influences the modern legal system.*

Keywords: *Legal culture; Confucian legal thinking; Theology and Divine in Western legal ideology*

1. Introduction

Understanding the different legal culture and legal traditions in law in different countries might distinctively explore the characteristics in administrative law, in institutions and in solving the obstacles in legal innovation and administrative reform. In order to explore the prospects of administrative law in the contest of modernisation and good administration and the rule of law, it was necessary to conduct comparative research on Chinese and European legal culture.

2. The Legal Culture in Ancient Time: Comparative Study on the Greco-Roman Legal System and absent-right-sense Confucian law in ancient China

The different legal culture was the source of the specific legal family within which different legal attitudes and legal thoughts were expressed with the development of the society. What were the essential elements were expressed that the different legal culture resulted in the different legal theory, and the different legal theory influenced the different regulations as well as the doctrines for practice and legal implementation. Legal culture was defined as:“a way of interpreting relatively stable patterns of social behaviour and attitudes related to legal issues.” [1] The detailed exploration concerning legal culture on customs, the attitudes, the opinions, ways of doing and thinking, [2] took effectiveness on the innovation of law as well as the construction of the legal system. Understanding the different legal culture and traditions in law in different countries could clearly explore the characteristics of the legal system, the institutions and the solution of the obstacles in legal innovation and administrative reform. It was necessary to conduct comparative research works on the Chinese and the European legal culture. The traditional explanation for the emergence of red tape lies in the influence of institutional inertia and fixed patterns of thought . For example, in the traditional bureaucratic system, documents became the main carrier of power operation and responsibility allocation, making red tape a manifestation of institutional inertia. In addition, some Party members and cadres have a mindset that emphasises the formal legal culture in administration as well as the impact on the modern and future improvement and prospects of administrative procedural law in China.

There was no doubt that Western legal theory was based on the Hellenic and Roman philosophy and law. Before the eighteenth century, the European countries were divided into the common law system in England and the civil law system in Germany and France, which were in the stage of feudal society described in the works of scholars. The Western legal culture had nothing in common with the traditional Chinese Confucian legal thinking. The comparative study should show the different development path between the Greco-Roman and ancient Chinese administrative legal theories and legal culture. How did the essential elements of legal culture in administrative rules bring about the reasonableness and justice as well as legitimacy in application? How did the constitutionalism crystallise in the administrative law in European countries such as in France, Germany and Finland? How have the traditional theories influence current and modern administrative procedural law in East

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and West? We should trace back to the sources of the specific characteristics—legal culture.

It was widely accepted that the European legal culture had its root in civil law, which protected private rights in the Greco-Roman legal system. As for the comparative scope between the European and Chinese traditional legal thinking, it referred especially to the same period until the end of the old regime in 1789, [3] similar imperial authority before the modern age. The assertion and comparative regime on the European legal culture concerned the Roman jus commune and the neo-Roman law as well as the canon law investigated by the glossators and commentators in Bologna after the 11th century. [4] Roman law was derived from the Twelve Tables, which compromised the civil law enforced for the Roman citizens except for emphasis on ritual. The detailed contents were described in the Twelve Tables, and most of the provisions concerned the civil rights and civil rules from the proportion of the whole regulation. Moreover, the Roman law developed its ius gentium, which concerned the rules for all Roman people, with the ius natural, which described the principles for the all creatures. The Digest of Justinian was divided into five sections: law of persons, law of things, law of inheritance, law of obligations, and law of procedure. [5] Most of the contents regulated the inheritance and private rights, while the criminal law was occasionally regulated as an appended at the end. [6]

There were some special significance in the European legal culture which became the traditional character in the West and had an impact on the modern Chinese legal ideology and practice. The first outstanding significance from Europe was that the neo-Roman legal thought manifested civil rights and the civil compensation for the violated rights within the civilisation. The law and administration stipulated the promotion of the foundation in the contractual relationship based on the equality of the two parties in the business activities. The imperial authority in most of the European countries had scrambled for power and profit with the church and aristocratic power, within which the imperial totalitarian appeared less vigorous and less robust. The corresponding legal system demonstrated that natural law and natural rights were not violated in civil society, which was the origin for the promotion of rights and equality among free men. Since the personalised individual subject was approved with the free bourgeois state in ancient Europe, the interrelationship between persons was ordered as a legal relationship in accordance with freedom and self-determination, responsibility and ability, as well as accountability. [7]

The second indication from the regulatory model expressed that the concept of equality from contractual activities dominated the main legal ideology in ancient Europe, not only in Greek but also in Roman. The statute law of the legislature indicated that the individual was born as a freeman by nature, which all citizens were naturally equal . [8] The responsibilities of freemen , the natural rights, the equality were at the heart of European legal traditions, which demonstrated that the subject of the legal norms and rules was the individual but not a clan or a family. Secular law was supposed to maintain consistency with natural law, so that everyone was protected equally by rules in accordance with natural rights. The distinguished regulation was the Magna Carta in British in 1215 that every man had the right to be justice and fair trial. [9] It was the cornerstone of British constitutional texts that everyone including the king behaves according to the law and against arbitrariness. It was also the landmark in Europe that from then on the right to equality before law was guaranteed.

The third factor was that the Roman legal thought on the civil law emphasised the rights of the individual both in property and in the human body. It was the predominance of traditional regulations that Roman law demonstrated the reasonableness, consistency and flexibility for the individual-oriented mechanism as ius commune in Europe as well as improvement for many generations. [10] The theory on the classification between the public law and the private law made in Justinian’s rules, which clearly expressed that the private law referred to the interests of individuals and gave to everyone his natural property rights. The Roman law of Justinian financed a system of protection of private rights in civil proceedings based on state enforcement. Although the Roman law also concerned the rights of the family or the head of a family, it emphasised the status of the individual, for instance, citizenship, freedom and family membership, [11] which was completely different from the Chinese clan or family with the blood as an indispensable prerequisite. The paterfamilias, the head of family, possessed the power of his entire family number as the basis of all rights concerning the family in Roman law. The successive improvement of Roman law had promoted the expression of rights, individual and equal, as well as family, while preserving the preliminary interpretation of the rights of the individual. National rights were the crystallisation of justice in the legal process. Subsequently, the directive effect on the thinking of the modern government formulated the rules for controlling the arbitrary power of the administration for the purpose of promoting the system of individual rights .

Confucian law,on the other hand, focused on the clan and family for the legal relationship, so that the rights, the responsibilities, capabilities and accountability were attributed to the head of a clan or a

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family but not to the individual. Legal thinking had not recognised the personalism and equality of contractual relationships. It was distinctive that the Chinese statutes were criminalisation, which showed the public law oriented in private matter, while the Western legal norms, on the contrary, showed the powerful and consistent development on civil law theory. The interpretation of criminal-oriented system in the Chinese tradition emphasised public interests, family or clan status and the responsibility of the head . In addition, the clan and family in ancient times were the unificationof blood ties so the legal system promoted the head's power and responsibility for the whole family, and promoted the duties to the state, while the members of a family or a clan had no rights or status in the society or in politics. The clan-oriented legal system had an impact on modern administrative law in China in that it emphasized the public interests or the interests of the state by restricting the executive power in the governing process.

However, the rulers in the Roman states dealt with the conflicts between the emperor, the aristocrats and the plebeians in the process of rapidly growing private economy. The political oligarchy claimed to monopolise the power to punish and the principles of dealing with the conflicts. The development routine differed from the Chinese improvement, consequently that the legal thoughts that manifested the private rights or individual interests played an essential role both in the ancient Greek and in the Roman states. Roman law also concentrated on the private economy and contracts, where civil law was undoubtedly more flourishing than the public law. The inalienable rights of the individual remained the dominant principle in modern countries, which were developed for the purpose of public or collective establishment. [12] The prerogative human rights in both secular law and divine orders inspired the establishment of public law in line with the guaranteeing system. It was distinctive significance that the human rights was anterior and superior to the public or state in modern administrative legal system in Roman law successors.

However, the superstructure of the ancient Chinese legal system was constructed in the institutional management, the management mechanism both in the central and local government, the official management on examination and supervision system, which was an instrument to strengthen the centralisation. [13] While the Roman law mainly regulated the civil affairs, such as the content of marriage, of the power of a head of a family, of divorce, of inheritance, and also some topic about the administration. [14] In the Roman legal system, civil law was so dominant that the criminal law and administrative law played complementary roles in the whole legal system. This was not the case in China. Of course, criminal law was derived from the law of wrongs but not from the law of crimes. [15] The civil law dominance status in the Greco-Roman legal system was all generated by the administration and the procedures in the judiciary, which still influence in the modern legal mechanism, even now in China .

3. The Ethical Principles in the Confucian Chinese Law Comparing with the Theology and Divine in Western Law

As mentioned in the previous sections on Confucianism and law in traditional China, the ethical doctrines originated in rituals that were applied as a guiding ideology in judicial and legislative processes and in the establishment of precise rules. Confucianism, rooted in the culture, was assimilated into the fields of education, communication, clan or organizational management, and executive governance under the authority of the emperor. The focus of Confucianism in the administration was the three relationships: the monarch-official's relationship, where the ruler guided the subject; the father-son relationship, where the head of a family or a clan guided the rights of the children; the man-woman relationship, where the husband guided the rights of the wives in accordance with the hierarchical mechanism in the traditional patriarchal and imperial society. The legal ideology in the Chinese tradition blended with the Confucianism, the ethical description, the emotional-ethical thoughts not only in the enforcement of regulations but also in the legislative process. [16] Confucian ethics and rites were regarded as the unquestionable moral truth, the highest standard for officials and individuals instructed by national culture and promoted by the rulers. The basic ethics were that officials should be faithful and loyal to the emperor in administration. In addition, private citizens should be filial to their parents and grandparents and to the head of the clan. Furthermore, the clan chief hould be honest and respectful to the governors and the emperor.

In addition, another remarkable feature on ethical law in China was demonstrated in the economic relationship that the pursuit of ethical regulations was preferred to the righteousness, justice (the authorities' justice), or morality but not the profits or benefits in the commercial activities. The righteousness exceeded the rights or poverty, consequently the authority enforced the national statutes

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to impose restriction on the development of the commodity economy and market economy, to despise the merchant, and to strict the contractual relationship originated in the commercial rules. There was no concrete and distinctive notion of equality or consciousness under the righteousness anterior the benefit economic atmosphere. In addition, the government advanced the ethics-oriented legal thoughts for the sake of strengthening the controlling power to the society which was described in the Confucianism, the guiding authorities for the head of the family, the father, the husband as well as the ruler of the country. Statutes were used as a complement to moral norms, which were practised as an instrument for the realisation of moral ideals but not for the protection of the rights. In particular, it was an ethical adjustment for conflicts between persons in rural areas, which prevailed in eighty per cent of all countries.

Confucian ethics were enforced and observed from the lower to the upper elites and officials, which promoted the sense of inferiority among ordinary people (from the peasants to craftsmen, from merchants to the landlords) as well as the nobility of civil officials at various levels. The consequence of the ethical ideology within the administrative theories and regulations displayed that the top—down relationship between the people and the executive authority was an indigenous and stationary characteristic for generations and successions. It was ingrained in the common life that the people had the self-awareness to comply with the policies, rules and orders stipulated by the authority. Undoubtedly, this unequal relationship strengthened the centralisation of the government from the imperial authority to the party-state politics. The executive officers were of higher status so that the good scholars should apply themselves as civil officials after studying the classical Confucian, the history and literature. [17]

And moreover, the officials realised that the unequal position strengthened the priority of the public or state interests over individual rights. From the superior clan interests to the priority of the public interests and the state profits, the administrative authority strived to realise of the rules and regulations as well as the decrees, so that the basic theory of the modern administrative law followed the ethics that the controlling power was the infrastructure but the safeguarding of human rights was the subordination. The traditional ethics in China manifested the absence of public morality (or social morality) in the ordinary people, which contained the ethical system to promote collective cohesion. [18] Clanism concentrated on the family and clan’s benefits on the basis of consanguinity, the moral standards of which concerned the relationship between the family and the imperial state but ignored that the relationship between the individual and society. The individual’s responsibilitiy to the society was absent for ordinary people, while the head of the family had royal duties to the imperial government. There was no fundamental space for the growth of social morality within the clanism due to the lack of individual independence and rights.

But Justinian’s interpretation of the law was that the maxims were to live honestly, to do no harm, to give everyone their inalienable rights. Jurisprudence was described as the knowledge concerning both divine and human matters. [19] It was no exaggeration to say that the Roman law and the canon law prescribed the same basic theories of natural law and the function of law, the same analytical methodology onf law, in which many legal concepts and interpretations were effectively transferred from the Roman law to canon law. [20] Thus, the "Romano-canonical" legal system was used to describe the relationship between Roman law and canon law in European countries.

There were the two main strands of the European cultural heritage: the ideas of personal morality rooted in the Christian religion, and the ideas of politics, rooted in the Greco-Roman concept of the state. [21] In early ancient Greece, there was no marked separation between canonical regulation and secular law enforcement , which the process for clerical ceremony integrated into the legislative and judicial process. Maine’s statement shows that the law blended the religious and moral ordinances, while the separation of law from morality and religion from law appeared clearly in later times. [22]

It was the canon law that influenced the juridical spirit of the temporal law by means of the exercise of the clerical staffs in the Christianity countries. [23] It was indispensable significant that the legal thoughts and theology all described the policy and the responsibilities on religion inevitably confused with the legal duties and rights. The power of the Church was regarded as an substantial assistance to the imperial authority. The canon law took the repercussion on the European legal culture that the basic theory underlined the morality and fundamental grounds in the ecclesiastical regulations supported the secular regulations for the public and governance, for instance the punishment to the crimes such as the murder, the theft, and the adultery. In addition, the ecclesiastical rules rules influenced the sense of value in accordance with the humanitarianism, including the value of the individual, the responsibility for the family, the protection of the interests and rights of children, the protection of the sanctity of

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human life. .

Moreover, the ecclesiastical rules guaranteed the moral standard, the idea of honesty, good faith, justice and other public orthodox beliefs. The divine thought with the canon law had a deep impact on the people, so that it directed the thinking for public ethical standards in the society and the state. The state and government, as well as the Christian Church had duties to safeguard the rights of the individual, so that the individual had responsibilities to the society and the state. Subsequently, both legal theory and ecclesiastical thought in Western countries had many beneficial factors for the construction of public morality to promote the collective cohesion. The divine and natural law were integrated into the secular law in Europe, which exhibited that the rights of the individual were equal to the interests of the sated from the point of view of administrative law theory.

4. The Criminalization in Ancient China different from the Civil-law Oriented Legal System in European Legal Writings

In continental Europe, there was also an innovative tendency to sanction criminal cases by means of civial compensation. The two conflicting parties preferred to the economic sanction instead of the prison sentence in Western European countries. The Twelve Tables regulated that the economic compensation was implemented for the conviction of the injured issues, that if a person broke a bone of a freeman with his hand or with a cudgel, then he was forfeited three hundred coins, and the same injured for a slave forfeit 150 coins. In the Roman law, the similar financial compensation was applied to the conviction on the bodily harm. There were different types of punishment for the infliction on the illegal actions, which included fines, bonds, stripes, retaliation, infamy, banishment, slavery and death. The civil sanction for administrative offences demonstrated the foreshadowing of the distinctive classification of the civil compensation and the criminal punishment for maladministration in the wake of the different scope of civil law and public law in Roman law.

However the main punishments in ancient China, for example in the Tang dynasty, were classified as follows: flogging, whipping, imprisonment, banishment and death. Even the illegal actions concerning commerce, the marriage, the debt and the safekeeping could be condemned to criminal punishment. [24] The sanction for maladministration in the Tang Dynasty also tended to be imprisonment, banishment, except for removal which were applied as the administrative punishment. It went without saying that the officials had the right to use the ransom replacement of the punishment because of the hierarchical system. [25] It was a specific demonstration for the clanism that the most severe punishment was the extermination of the whole clan or the execution of nine relatives for treason. “One honours all, one destroys all”was the impressive illustration for Chinese high-ranking officers under clanism. A higher administrator would benefit his family and clan, while a serious offender would destroy his family and the clan of his nine kinsmen or relatives. The method punishment for the administration involved his family or clan, which implied that the interests of the clan overrode the rights of the individual. The thoughts of the administration concerned the relationship between the holder of the office (usually a senior officical in the administration) in a family and the imperial government, but not the relationship between the individual and the government. The harsh punishment of the extermination clan strengthened the administrative totalitarianism and the privileges of the most senior officials.

In addition, the criminal punishment to the administrative misconduct showed the imperial authoritarianism that the exercises of administration were effectively operated on the basis of agricultural economy in China. The ethical education to the ordinary people and officials aimed at the self-restraint for cultivation the personality morality, reassurance and benefit of people, correction and cultivation of values, friendly and social harmony. However, the strict and cruel punishment was intended to complement the disadvantage of moral education for officials and the society. The scholars in the Legalism of Chinese philosophy claimed that punishment was the yardstick for officials but little consideration of the virtue, which stressed the administration by regulations based on the state or imperial interest.

However, it was distinctly different from the Confucian theory that human virtue was the standard for administration in ancient China and still influenced the modern moral value in the legal system. The ideal legalist focused on the administration by law, regardless of kinship and the distinction between the noble and the base. The severe punishment of the administrators affected the legal system for generations, so that there was a thought among intellectuals in China to describe the imperial traditional Chinese legal system as “outside Confucian and inside legalist”. [26] The essence of Confucian theory

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and legalist thought demonstrated the similar meaning that the imperial interests were the primary elements to be protected and the purpose of punishment was to strengthen the monarch's authority.

Although the legalist thought strengthened the ruling by law, and intended to limit the equality between the higher officials and the common people before the punishment regulations, the intensified function was to protect the ruler or the emperor's power and rights. The concept of equality originated in the contract society before the commodity exchange, which conveyed that the two would participate equally in the reasonable and legitimate commercial activities.

Moreover, criminalisation in the ancient Chinese legal system did not leave any room for individual or family rights in the legitimate protection mechanism. The administrative measures depended on the punishment of both the executors and the ordinary people, which undoubtedly did not take into account the rights of individuals and put much intensity to protect the emperor's power and profit in accordance with the Confucian ethical hierarchy, which is harmonious and respectful. Confucian ethical standards emphasised harmony, deontology, intimacy, honesty and loyalty, while the punishment for administrative misconduct emphasised top-down intimidation,, authoritarianism and the privileges of the high-ranking administrators and the emperor. The over-reliance on administrative punishment resulted in the supremacy of the national interest, the supremacy of clan or public interests, and the subordination of individual rights. It was undeniable that the cruel punishment and the ethical indoctrination were the common measure of authoritarian rule.

The sanction in the civil law was interpreted as the compensation or reprisals for the damage but not the penalization or condemnation, while the criminal law was described as the framework for punitive purposes to admonish or educate not only the crimes but also the common people. [27] In the Greco-Roman legal system, the criminal law was not the law of crimes, but the law of wrongs or torts in the English expression, for the reason that the compensation for the injured civil actions was the money or recovery. The free market economy accelerated the contract, the civil rights and the economic sanction to the condemned illegal actions.

Research in the structures of the two different legal systems has exemplified that Roman law was rigorous and protective of civil rights. However, in the ancient Chinese legal system, which developed in its closed social environment., the administration was tighter and stricter. The cruel punishment of the administrators without the concept of individual rights was implemented to promote the imperial authority, while the moral standards were indoctrinated and tested for the national examination for the selecting officers. The administration and the civil officers were educated with honesty, loyalty, decency affection, fidelity, frugality under the social hierarchy and imperial majesty. And the common people were educated with honesty to the state, respect to the elders and governors, with loyalty to the emperor, and kindness to the neighbors. The stability of the society was protected by persons with good moral and good behaviour and by the deterrent of cruel penal sanctions. Roman law, however, provided civil sanctions in administration and separation of civil law and public law, which strengthened individual rights, equality and the rule by law.

5. Conclusion

The differences in legal culture can influence the legislative system, the legal thinking, the ideology and legal system. In order to promote the rule of law in administration and governance in China. It is essential to study the differences in different regions. The comparative study of legal culture between China and European countries would promote the legal thinking in administration and ideology in system in both regions. It is inevitable to do the comparative research so that the doctrine of the rule of law would take root in the Chinese legal system.

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