

PHILOSOPHICAL INFLUENCES ON CONTEMPORARY CHINESE LAW

Weng Li*

INTRODUCTION

Those unfamiliar with China's legal system frequently raise two questions: whether "Chinese law" is a meaningful concept¹ and whether there is value in discussing the philosophical influences on China's legal traditions? I offer an affirmative reply to both questions. China today has a developed legal system which includes such mainstays as Constitutional Law, Criminal Law, Civil Law, Procedural Law, Economic Law, and the like. The Chinese legal system, however, is not only socialist but retains the unique vestiges of China's philosophical heritage. Whether one agrees or disagrees with the proposition that the rule of law is a meaningful concept in China or with the view that it is valuable to discuss the Chinese legal tradition, it is worthwhile for Westerners to study the new Chinese legal system if they want to develop a relationship with China. To develop a clear understanding of the Chinese legal system and the law which it embodies, one must study it within the context of Chinese social, cultural, political and legal history. Only through the comparative method may an objective conclusion be reached.

I. OVERVIEW OF LEGAL DEVELOPMENT IN CHINA

A. *Establishment of the Socialist Legal System*

This essay challenges the naive view that there is no legal system as such in the People's Republic of China (PRC). In February of 1949, the Chinese Communist Party (CCP) swept away the Guomindang Government, including its judicial organs and the entire body of laws. The CCP issued the Directive Regarding the Abolition of the Guomindang's Complete Book of

* Assistant Professor, Department of Law, Hangzhou University, P.R. China. LL.M. 1988, Southwest Political & Legal Science Institute (Chongqing, P.R. China). Professor Weng Li has published nearly 20 articles dealing with Chinese and Western legal problems. He was a visiting Scholar-in-Residence, Valparaiso University School of Law in 1990-91. The author gratefully acknowledges the assistance of Dean and Professor Edward Gaffney, Professor Richard Stith, and Professor Jack Hiller of Valparaiso University School of Law.

1. For example, in light of the "Tien'an men Square Event" on June 4, 1989, some have questioned whether China's current government takes the rule of law seriously.

Six Codes² and the Affirmation of the Legal Principles in the Liberated Areas. In September, 1949 the CCP directive was incorporated into the Common Program of the Chinese People's Consultative Conference, which was the temporary basic law of the country until 1954. Article 17 of the Common Program states that "[a]ll laws, decrees, and judicial systems of the Guomindang reactionary government which oppress the people shall [no longer] be enacted and the people's judicial system shall be set up." Two commentators have noted that "[h]aving done away with the Nationalist legal institutions, the new government began experimenting with the establishment of formal, Soviet style judicial organs, such as people's courts and people's procuracies."³

This was a period of revolutionary euphoria manifested by swift policy changes and the implementation of communist political philosophy. Law, however, was used as a political tool to empower the working class. In 1952 and 1953, Soviet legal scholars came to China to teach and Chinese students went to the Soviet Union to study law. Under the influence of Soviet legal concepts and models, the period from 1954 to mid-1957 has been referred to as the golden age of legal development in the PRC because of the considerable progress made in the creation of a formal legal system. The framework for the system was established in 1954 with the promulgation of the first PRC Constitution. The Constitution was later supplemented by organic laws for the courts and the procuracy based on Stalin's 1936 Constitution.

Soviet legal code and principles were readily accepted as models for codification of Chinese laws until 1957 when a most dramatic shift in Chinese politics took place. Led by Mao Zedong, the Soviet-Chinese alliance shattered, and China's leaders abandoned the Soviet legal model. In the wake of the political fallout, some Chinese jurists, legal scholars, and legal authorities urged modernization of the legal system. They even sought to establish such Western legal concepts as judicial independence, equal justice before the law, and due process of law. Unfortunately, their reform movement came to a sudden halt in 1959 when these reformers were condemned as rightist intellectuals with anti-socialist views attempting to use law against the Party and to negate the class nature of law.

Chairman Mao's Cultural Revolution began in 1966, and this destroyed any possibility of China adopting either a totally Soviet-style legal system based on Communist principles or a totally Western-style legal system. From 1966 to 1976, the Ministry of Justice was disbanded, law schools were closed, and legal research was halted. The legal profession disappeared, with almost no laws enacted and no law books or journals published. Revolutionary

2. This term is used to refer to the whole body of Guomindang's laws, including the Constitution, Commercial Law, Civil Code, Criminal Code, Civil Code of Procedure, and Criminal Code of Procedure, which are modeled on European legal codes.

3. Hsia Tao-tai & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HAR. INT'L L.J. 251 (1987).

morality dominated political ideology, and the Party, the mass organization of the people, ruled the state. Members of the Chinese legal profession had to seek new nonlegal careers.

With the death of Mao and the fall of the "Gang of Four" in 1976, a new China began to emerge, one that emphasized "social legality" and noticed the protection of individual rights. The Ministry of Justice was revived, and today it oversees lawyers and notaries. This organ's responsibilities also extend to collecting laws and decrees, conducting legal research in cooperation with scholarly institutions, and coordinating legal publication activities. Furthermore, the "People's Lawyer System" was restored, and since 1986, the Ministry of Justice has held the Chinese National Bar Examination every other year, providing a continuous flow of thousands of qualified new attorneys to renew the staff of the judicial system.

B. *Legal Training and Education*

With the reestablishment of the legal and judicial systems in China, formal legal education achieved new prominence. The Ministry of Justice is in charge of five political and legal science institutes, which are scattered across China in the cities of Chongqing, Beijing, Shanghai, Xi'an, and Wuhan. The sheer variety of sources for legal education represents the general direction of higher legal education in present-day China. In addition, major Chinese national and provincial universities also train undergraduate and postgraduate law students. Undergraduates are required to receive both a theoretical and a practical legal education for four years; postgraduates must complete the further requirement of a dissertation during an additional two or three years of study. Finally, the central and provincial governments in China now run about thirty "legal cadre" training schools.

In the process of re-establishing the Chinese legal and judicial system, over one hundred law periodicals and newspapers, such as *Law Science Research* and the *Fazhi Ribao*, have become available to the public. Moreover, a special encyclopedic volume on law was published in 1984. This volume includes sections on law in general, specific fields of domestic law, foreign and international law, legal history, and biographical sketches of jurists.

In 1983, China's leader Deng Xiaoping stated that it was necessary to formulate a series of laws, decrees, and regulations to put democracy "in writing."⁴ On November 22, 1985 the National People's Congress Standing Committee decided to initiate a five-year public education program on China's laws and legal system.⁵ This program lasted from 1986 to 1990 and was aimed at eliminating "legal illiteracy" and educating all Chinese citizens, including government officials, regarding the importance of the legal system

4. See THE SELECTED WORKS OF DENG XIAOPING 319 (1980).

5. *Legal Studies: A Nationwide Assignment*, BEIJING REVIEW, Dec. 23, 1985.

and the purpose which it serves. In addition, newspapers published articles explaining the new legal system. Law-related personnel attended lectures on law, some of which were broadcast on television and radio. Law schools prepared materials of a popular nature for distribution. Perhaps most importantly, public trials and articles about trials were also used as educational tools. In sum, the legal education program has brought about gratifying results.

C. *Chinese Socialist Democracy and Legislation*

At the heart of China's concept of a socialist democracy are the constitutional ideas that "[a]ll citizens of the People's Republic of China are equal before the law" and that "[a]ll power in the People's Republic of China belongs to the people."⁶ Deng Xiaoping elaborated on these ideas when he observed that "[d]emocracy has to be institutionalized and written into laws so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention." The CCP's idea of reshaping the personality to acquire the correct proletarian attitudes, according to one scholar, stretches back to "the Confucian emphasis on self-cultivation and molding of the personality as the basis for moral and political life."⁷

Some Western jurists think that the current Chinese leadership uses the law to inculcate its citizens through the five-year legal education program, viewing the legal education program as an attempt to indoctrinate socialist ideology into the minds of Chinese citizens. The term "democracy" in the Western sense refers to a group of individuals being governed voluntarily by those whom they have chosen to lead them. But in China, "democracy" appears to stand for the idea that the CCP is governing in the best interests of the people. Even though the citizens have no significant role in determining the Party's policies, which remain somewhat different from those of the legal system, the CCP members are all considered outstanding representatives of the people who are able to rule in the best interest of the PRC. In Western countries the legislature as the law-making body and the judiciary as the law-interpreting body are two distinct entities, while in China, the two institutions are still inseparably linked. This may help explain why in June 1989, the "Tien'anmen Square Event" was labeled a "Counterrevolutionary Rebellion" and finally suppressed by force.⁸ According to Marxist legal theory, the law equals the rules imposed by those who govern and are enforced by the will of the ruling class. In June 1989, martial law was again used as a political tool to keep Chinese society in order.

6. Constitution of the People's Republic of China, arts. 33 and 2.

7. RAYMOND DAWSON, *CONFUCIUS* 86 (1981).

8. According to Chinese Criminal Law, counter-revolution is one of the most serious crimes.

On November 29, 1979, the NPC Standing Committee adopted a resolution declaring that all laws enacted during the 1950s and 1960s were to remain in effect if they did not conflict with the Constitution or more recently enacted legislation.⁹ The passage of new legislation in China involves a four-step procedure: bill proposal and submission; examination and discussion; adoption; and promulgation. The legislative procedure is initiated when the State Counsel, the NPC, or any other high-level body outlines the need for a particular type of legislation or an amendment to existing law. The appropriate governmental organization will be mobilized to submit the bill or amendment.

Contrary to the opinion of some commentators, the CCP does not initiate this legislative process. The CCP is not involved as an organization in drafting legislation, although individual lawmakers are members of the CCP. Normally, Chinese legislation also provides foreigners with access to the people's courts despite the preference for conciliation between the parties. Attention should be paid both to the nature and to the scope of the new socialist legal system. This system can be viewed as encompassing all legislation in China, whether for foreigners or for domestic implementation. Thus it is reasonably regarded as a single system with two threads. Chinese laws are best understood by focussing on the domestic context while viewing the legislation relating to foreign investment as an outgrowth of internal concerns. For example, the Bankruptcy Law fits this pattern.¹⁰

Perhaps the complexity of explaining the intricacies of merging socialism with Western legal concepts deters Western jurists from understanding the process of the Chinese socialist legal system. Just as democratic forms of government in Western countries provide the intellectual impetus for an independent judiciary, Marxist-Leninist-Maoist thought in China is the root of the ideological framework for all institutions, including the legal system. The ideological foundation of the new socialist legal system is revealed most clearly in the 1954 PRC Constitution: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."¹¹

Although the theory of legislation in today's China certainly differs from the philosophies of Taoism, Confucianism, and Legalism, these philosophies remain the underpinning of Chinese political and legal theory. To completely

9. On July 1, 1979, the second session of the fifth NPC promulgated seven new laws: the Organic Law of the Local People's Congresses and Local People's Governments, the Electoral Law for the National People's Congress and Local People's Congresses of all Levels, the Organic Law of People's Courts, the Organic Law of People's Procuratorates, the Criminal Code, the Code of Criminal Procedure, and the Law on Joint Ventures.

10. For further examples of the interconnectedness of China's domestic and foreign laws, see Zhao Youg Qing, *The Company Law of China*, 6 Ind. Int'l. & Comp. Law Rev. 461 (1995) and John D. Osgathorpe, Note, *A Critical Survey of the People's Republic of China's New Company Law*, 6 Ind. Int'l. & Comp. Law Rev. 493 (1995).

11. Constitution of the People's Republic of China, art. 1.

understand the intricacies of the Chinese legal system, it is necessary, especially for Western jurists, to examine the philosophical foundations of China's legal system.

II. TRADITIONAL SOURCES OF CHINESE LEGAL THEORY

China's long history, extending over more than three thousand years, has produced numerous philosophical ideas. China, like classical Greece, saw a heightened period of philosophical thought between the sixth and third centuries B.C., with the golden era of Chinese thought known as the Periods of Springs and Autumns (772-481 B.C.). Although there was no lack of highly original doctrines in Chinese legal philosophy, those ideas can be regarded as detailed developments and enrichments of ideas from earlier periods. Si Ma-qian (?145-86 B.C.) in his monumental historical work *Shiji*, The Records of the Historian, mentions six schools: Yin and Yang, Confucianism, Moism, Nominalism, Legalism, and Taoism. Of the six, only Taoism, Confucianism, and Legalism are traditionally viewed as main planks in the foundation of the Chinese conception of law. While the Legalists and the Confucianists influenced Chinese legal theory much more than the Taoists, each of these three schools of philosophy must be examined in further detail.

A. *Taoism*

The school of thought and the spirituality known as Taoism is represented by the two great philosophers Lao Zi and Zhuang Zi, whose works sufficiently express the authentic Taoist ideas for purposes of this essay. Taoism holds that the universe is dominated by a fundamental principle known as *Tao*, which translates as the Way. According to this tradition, if one follows this great Way, without interference from an arbitrary act of will, all is well. Like water flowing over rocks, *wu wei* or inaction will let you follow the Way. As contrary in logic as it seems to Western minds, the Taoists advocated inaction, whereby "[i]f we study, our knowledge increases day by day. If we follow the *Tao*, our desire decreases day by day. Thus we can arrive at the state of inaction, by desiring less and less. Doing nothing, we do everything."¹² Equally, the principle of inaction is the essence of government. Thus, Taoism considers all human action as a disturbance of the natural order.

B. *Confucianism*

Confucianism is diametrically opposed to Taoism in that it denounces the principle of *wu wei* or inaction. The followers of Confucius believe in a more active form of governance and a more rigid social order. According to

12. LAO ZI, TAO DE JING, Book II, 48.

them the world of man is radically different from the world of nature. The latter is dominated by an eternal hierarchy after whose example the world of man must be constructed. The Confucianists call the natural laws which govern this physical world *Tao* or *Tian Dao*, meaning "heavenly way." Although these laws govern the world of nature, they do not directly govern the world of man. Therefore, it is necessary for man to establish rules in his world. These rules are known as *Li* or "rites" and they imitate the natural laws. The Taoists' "Way" seems to have in it an animation and a mystery which gives life the whole universe. But for the Confucianists, the "Way" is only a basic impersonal principle. It is true that Confucius and his followers often invoked Heaven and the divinity, but their religiosity is hardly passionate. In the *Lun Yu*,¹³ where Confucius' sayings are collected, one can read that "Confucius spoke neither of marvels, nor of extraordinary force, not of disorder, nor of divinity."¹⁴ When Zi Lu, a disciple of Confucius, asked the master if one should serve the gods, Confucius replied "if I cannot yet serve men well, how shall I serve the gods?"¹⁵ Thus Confucius was clearly preoccupied with the world of man. Likewise, one of the most illustrious Confucianists Xun Zi wondered if "it better to know the divine cause why things came into being or the reasons why human things happen? Reality gets out of sight if you admire Heaven without paying any attention to the world of man."¹⁶ At the beginning of the Han period (206 B.C. - 220 A.D.) Dong Zhong-shu, another most illustrious Confucianist, advanced the theory that man and Heaven influence one another, Heaven sending scourges to warn the sovereign that his government does not please the gods. There is some mysticism in this theory, which reigned in the minds of all Chinese princes until the nineteenth century, but its main purpose is not so much to exact the religiosity of the prince as to encourage good government.

C. *Legalism*

The third philosophical pillar in the foundation of the Chinese legal system today is Legalism, a remarkable school of thought that merits much more attention than I can give it in this short essay. The Legalists assert that the social life of man must be strictly governed by positive law. The Confucianist wants the world of mankind, which he sees essentially in hierarchical terms, to be dominated by the rules of *Li*, the Rite. In contrast, the laws envisaged by the Legalists are social rules, applicable to all with equal effect.¹⁷ Like weights and measures, legal rules must be standard and stable. Many Legalists have treated positive laws like weights and measures. Han

13. CONFUCIUS, LUN YU [THE ANALECTS].

14. *Id.*

15. *Id.*

16. HSUN-TZU, XUN ZI, Book II, ch. 17.

17. For detailed discussion of the difference, see T'UNG-TSU CHU 226.

Fei-zi, the most illustrious Legalist, provides us with a good example when he posits that although a good carpenter can measure accurately by eye, he still uses a rule for measuring. A wise man can make a wise decision on the spur of the moment, but he always consults the opinions of the ancients. Thus one can cut crooked wood straight, if the ruler is accurate; one can level the ground if one's level is flat; one can weigh accurately and properly if there are scales; one can measure capacity correctly if one has the right measure. If a sovereign wants to govern a country according to the law, mere promulgation and application of it will do. The law does not favor nobles, as the ruler does not bend to measure bent things. In the application of the law, the wise cannot make excuses, nor can the brave oppose it. Guilty ministers do not escape punishment. Rewards for the kindnesses of little men are not forgotten.¹⁸

For the Legalists, laws must have a clear meaning and be known to all. The current leadership of China adopted this point of view to launch the movement to educate all citizens on law. But the Confucianists' rules of the Rite do not descend to the common man, and the penal rules do not rise to affect the nobles. The Legalists do not wish to leave the world to govern itself spontaneously, and it would appear that the Legalists reject the Taoist principle of inaction.

The Legalists are concerned with constructing a well-ordered world, and in this sense their ideas do not seem so different from those of the Confucianists. But in reality there is a stronger contrast between Legalism and Confucianism than between Legalism and Taoism. The Legalists seem to be partisans of Taoism, as Han Fei-zi devotes two chapters of his famous book on the law to a commentary on the *Dao de Jing*. Given the superficial differences between the Legalists and the Taoists, many Chinese scholars have suspected that these two chapters were interpolated. However, even if they were interpolated, it could only have been done by the Legalists, rendering irrelevant for this analysis the ultimate authenticity of the work.

In what sense, then, can it be said that the Legalists agree with the Taoists? Is the recommendation of laws compatible with the principle of inaction? The apparent contradiction disappears when we observe that the Legalists are trying to attain, by means of positive laws, the ideal world of the Taoists. Unlike the Confucianists, the Legalists do not consider the world of mankind as running parallel with the world of nature. Law for the Legalists is only a means of realizing their final goal. They consider that the *Tao* is impartial: it favors no one and it rejects no one. He who follows the *Tao* of his own will is filled with eternal life, but the number of people who reach this moral and intellectual level is very limited. Confucianists are mistaken in believing that if such intelligent persons behave honestly and according to the Rite, ordinary men would become honest by following their example, for the truly wise man appears only very rarely in this world, and ordinary men do not necessarily emulate them when they do. The aim of positive law, according

18. See HAN FEI-ZI, Ch. 6.

to the Legalists, is to ensure the maintenance of an ideal world through the use of punishment and reward. With the aid of law, people will realize that each individual is a morally autonomous being, i.e., that each has a soul with a moral self-regulating mechanism. They will be able to follow the principle of non-action without any disadvantage, with no obstacle to the functioning of that mechanism, and as hitherto by-passed by superfluous human efforts.

One might simplify the analysis by saying that the Legalists tend to be realists and the Confucianists tend to be idealists. To idealists, the law is the reflection of the idea of justice that a particular community accepts or must accept under religious precept. Stability is the traditional Chinese conception of law. It has, of course, undergone various changes in detail, but it is nonetheless true that it has changed little, and that it will be a long time before it changes in its essentials. For the mentality of a people, as determined by ecological and characterological factors which are difficult to alter, inevitably influences its conception of the law.

No one doubts that the vast revolution presently taking place will radically transform China's social, political and economical organization. But China remains China through out all these changes. As the great Yellow River has run since time immemorial and will run for centuries to come, although its waters change ceaselessly, so it will be long before that basic conception of the law, which is typically Chinese, will lose its unique character, even if its outward manifestations are sometimes hardly recognizable.

III. CONCLUSION

I have urged that understanding Chinese law is facilitated by adopting a Sinocentric approach. So this essay has provided some objective responses to the two questions frequently directed toward the Chinese legal system and its tradition.

First, there is law in China. The question "Is there Chinese law?" reveals more about the questioner than about modern China's nascent legal framework. The development of law in the PRC may be divided into five periods: (1) 1949-1953, when the groundwork was laid for the establishment of a socialist legal system; (2) 1954 to mid-1957, when a system of legal institutions was inaugurated; (3) 1957-1965, when the "Maoist" policies of mobilizing the country for a rapid transition to full Communism seriously undermined the policy of developing further the formal legal apparatus; (4) 1966-1976, when the triumph of radical policies resulted in the virtual destruction of the formal legal system; and (5) 1976 to the present, a period of restoration and development of the legal system along lines established from 1954 through 1956. In short, the Chinese socialist legal system with some typical characteristics does exist but its relevancy will depend upon a host of reasonable factors. In order to understand the role of the legal system in China, foreigners must refer to the historical, political and sociological elements in Chinese culture and tradition.

Second, the theory of Chinese law, more or less, has been under the influence of Legalism and Confucianism until now. As we know, Confucian philosophy is a personal and social morality which defines the natural order of things. For over two thousand years the natural law of Confucian philosophy was adopted by many of China's governments, but the current government of the Mainland prefers the Legalist philosophy. Taoism, comparatively, effects the law less because religion does not play as important a role in Chinese political society as it does in that of many Western countries. China's long history of feudal rule left it without a Western-style democratic or legal tradition, and the Communist takeover in 1949 was completed only after a long period of armed struggle.

At present, there are several legal problems to be solved by the leadership of China. Will the current Chinese legal system be stable after the old revolutionary leaders disappear from the state political theater? Is Chinese law just on paper, nonexistent in practice? Obviously, the PRC has still not overcome many serious obstacles to its program of strengthening the legal system, but there are several factors that bode well for future legal development in China. One positive sign is that shifts in political orientation are likely to be less dramatic. For citizens, it may be difficult to distinguish between the merits of the old approach to law and the new socialist legal system. It seems only when the legal system becomes part of the fabric of Chinese society and is seen as relevant to individuals that its permanency will be more assured, rather than when relying upon the continuity of political personality for leadership. But in a country so vast and so populous, with such a low level of education and such limited experience with modern legal and economic systems, it will be a long time before new attitudes toward Chinese law can firmly take hold.