

The Chinese Concept of the Individual and the Reception of Foreign Law

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I. INTRODUCTION

The topic of this lecture is "The Chinese Concept of the Individual and the Reception of Foreign Law"¹ I have based my discussion of this topic on the following presumptions.

First, "foreign law" referred to hereafter basically should be taken to mean modern Western law as found in democratic countries and based primarily upon the protection of the rights and freedoms of the individual, the concept of which was first highly developed in the seventeenth and eighteenth centuries. Second, I have assumed that China has had its own concept of the "individual" underlying its unique legal traditions, and that this concept is very different from that of the Western world. Third, this discussion is based on the assumption that while China turned to the West for the modernization of its laws around the turn of the twentieth century, the Chinese have not wholeheartedly adopted the Western concept of the individual, and as a result, have not been able to administer successfully their modern westernized laws.

I shall try to avoid dwelling solely upon the concept of the individual, for the simple reason that there are, in the West and East, so many theories about the nature and the status of the individual. I shall only attempt to compare the concept of the individual underlying modern foreign and Chinese law with that upheld by traditional Chinese law. I believe that such a comparison will reveal how poorly modern westernized Chinese law actually fares without a pertinent concept of the individual supporting it.

Let me begin with a more familiar topic, the concept of the individual as the basis of modern Western and Chinese law. I shall be very brief.

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1. This address was delivered at the Columbia University School of Law, September 13, 1995.

II. THE CONCEPT OF THE INDIVIDUAL IN MODERN WESTERN LEGAL CULTURE

On the concept of the individual in modern Western legal culture, I wish to say that of all Western legal schools of thought, natural law thinking probably gave the most attention to the individual human being. That school holds that every rational individual is endowed with the capacity of perceiving certain laws or principles of conduct which are the source of all the more specific rules of society and also constitute the standard by which all other rules are to be judged good or bad, just or unjust. By the seventeenth and eighteenth centuries, the doctrine of natural law had turned into a theory of natural rights. Hobbes, Locke, and Rousseau were often regarded as its leading exponents. Basically, they all agreed that in a state of nature, individuals are born with certain inalienable rights, for the protection of which they form, through social contracts, governments and the civil state in general.

The individual in the theory of natural rights, however, is an abstract individual, and the state of nature in which the abstract individual finds himself prior to moving into the civil state is only a basis for speculation. But such abstract and fictitious concepts and their implications in fact brought about revolutions in 1776 and 1789 which changed the face of the world. As an important by-product of these revolutions, the theory of natural rights established the fundamental principles for modern Western law and legal systems. Since then, the protection of individual rights and freedoms, and the respect for the dignity and worth of the person, as strengthened by Kant, have been widely incorporated into the new legislation of the nation-states in the West, such as the Code Napoleon of 1804, the German Civil Code of 1896, and the Swiss Civil Code of 1907. These have, in turn, served as models for many other countries in their lawmaking efforts. The individual in the West was thus given a new status in theory and practice as never known before.

III. THE CONCEPT OF THE INDIVIDUAL IN CHINESE LEGAL TRADITIONS

Now we move to the concept of the individual in Chinese legal traditions. I shall attempt to discuss this topic in more detail.

The concept of the individual upheld by traditional Chinese law was primarily molded by Confucianism, the teachings of Confucius (551 B.C.-479 B.C.) and his disciples. I shall deal with this concept of the

individual on the basis of the Four Books, the generally acknowledged classics of the Confucians. In the first of the Four Books, The Great Learning (*da xue*), it is written:

The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order well their States, they first regulated their families. Wishing to regulate their families, they first cultivated their persons.²

From the Son of Heaven down to the mass of the people, all must consider the cultivation of the person the root of everything besides.³

This text shows that, to the Confucians, human nature is good and the cultivation of a person's own virtue is the basis of regulating one's family, the state and even the whole world. The Confucians' list of virtues related to the cultivation of one's person is manifold, but "*ren*," which has been translated as "good," "benevolence," or "humanity," is generally regarded as the summation of all virtues. *Ren* and its derivatives originate from the individual person. Hence, in The Doctrine of the Mean, we find that *ren* (benevolence) "is the characteristic element of humanity"⁴ Also, in The Confucian Analects (*lun yu*), it is stated that *ren* is:

To subdue one's self and return to propriety is perfect virtue. To achieve *ren* depends entirely upon one's self.⁵

Is virtue [*ren*] a thing so remote? I wish to be virtuous, and lo! virtue is at hand.⁶

2. Confucius, The Great Learning, sec. 4, in James Legge, The Chinese Classics (Volume 1) 357 (1970).

3. Confucius, The Great Learning, sec. 6, in James Legge, The Chinese Classics (Volume 1) 359 (1970).

4. Confucius, The Doctrine of the Mean, ch. 20, sec. 5, in James Legge, The Chinese Classics (Volume 1) 405 (1970).

5. Confucius, Confucian Analects, bk. 12, ch. 1, sec. 1, in James Legge, The Chinese Classics (Volume 1) 250 (1970).

6. Confucius, Confucian Analects, bk. 7, ch. 29, in James Legge, The Chinese Classics (Volume 1) 204 (1970).

Similarly, Mencius (372 B.C.-289 B.C.) taught that every person can become a sage such as Emperor Yao or Shun, if only he exerts himself.⁷ In other words, the cultivation of the person or the development of *ren* provides the way to fulfill one's self. These statements and teachings clearly attest to the Confucians' affirmation of the potential and worth of the individual person.

It must be pointed out that the concept of the individual established by the Confucians is an ethical one. They believed that every individual is entitled to realize himself by cultivating his virtue. His status in society is defined by his inner sense of personal integrity and dignity, not by external circumstances. This is, of course, different from the Western concept of the individual, which is based on personal rights and freedoms.

Nonetheless, the cultivation of the person, though primarily dependent upon one's self, is not to be achieved by one's self alone. As stated in *The Doctrine of the Mean*, "the great exercise of [*ren*] is in loving relatives."⁸ In other words, to practice *ren* is first to feel natural affection for those who are related to us. One central theme of Confucianism is the importance of human relationships, the five major ones being ruler and subordinate, father and son, husband and wife, elder and younger brother, and friend and friend. In each human relationship, both of the concerned parties must mutually fulfill their responsibilities and duties. Hence, Confucius said, let the prince be a prince, and the minister a minister. Let the father be a father, and the son a son.⁹ By extension, let the husband be a husband, and the wife a wife. Let the elder brother be an elder brother, and the younger brother a younger brother. In addition, for each human relationship an ideal goal exists that the two parties must jointly achieve. Mencius articulated these goals as follows: "[T]here should be affection; between sovereign and minister, righteousness; between husband and wife, attention to their separate functions; between old and young, a proper order; and between friends, fidelity."¹⁰ As for the three stipulated human relationships among family

7. Mencius, *The Works of Mencius*, bk. 6, pt. 2, ch. 2, sec. 3, in James Legge, *The Chinese Classics* (Volume 2) 424-25 (1970).

8. Confucius, *The Doctrine of the Mean*, ch. 20, sec. 5, in James Legge, *The Chinese Classics* (Volume 1) 405 (1970).

9. Confucius, *Confucian Analects*, bk. 12, ch. 11, sec. 2, in James Legge, *The Chinese Classics* (Volume 1) 256 (1970).

10. Mencius, *The Works of Mencius*, bk. 3, pt. 1, ch. 4, sec. 8, in James Legge, *The Chinese Classics* (Volume 2) 251-52 (1970).

members, to nourish affection, to maintain separate functions, and to observe proper order are their respective ideals. However, the ideal of each relationship may be realized only if both parties to the relationship fully perform their duties.

From the above, we know that the cultivation of individual virtues, so emphasized by the Confucians, is to be achieved by an individual doing his or her duties as required by the specific relationships in which he or she is involved. In other words, it is in the fulfillment of these reciprocal obligations and responsibilities that the individual realizes his or her own personal fulfillment. For this reason, it is difficult to extract from Confucianism a concept of the individual in the abstract, entirely separate from other individuals.

It is pertinent to mention here that the rules each individual must follow in a particular relationship are called "*li*," often interpreted as "rites," "good customs," "mores" or "propriety." Because of the dominating role of *li* in maintaining the duty-oriented social structure, the Confucians devoted much effort to the development of the theory and practice of *li*. Since it is not the focus of this lecture, however, I shall not deal with this important aspect of Confucius's teachings any further.

Confucianism and its concept of the individual, as understood above, were however, not without rivals. Legalism, in particular, regarded human nature as evil and was strongly antagonistic to the teaching that social order could be maintained by cultivating individual virtue. To the Legalists, the only reliable tool for government is *fā* or *hsing*. *Fa*, meaning law, is absolutely compulsory. *Hsing*, meaning punishment, should be severe. To be effective, both should apply equally to all regardless of personal relationships.

Now, law or punishment as an effective means for maintaining order and administering justice was generally recognized by the rulers of the Han Dynasty (206 B.C.-220 A.D.). Consequently, although Emperor Wu (140 B.C.-87 B.C.) of the Han Dynasty made Confucianism the official state teaching, the early Han Confucianists had to give Legalism its proper sphere of application, even to accommodate certain Legalist ideas. More importantly, the early Han Confucianists also adopted from the Ying-Yang School of thought the theory that a close interconnection exists between nature and man. That is to say, because man is a part of nature, the justification of human behavior must be found in the behavior of nature. Thus, the Han Dynasty incorporated Legalist and Ying-Yang Schools of thought to create its own Confucianism, which it established as the orthodox doctrine.

The Confucian scholars' adoption of the Yin-Yang school of thought was best represented by Dong Zhong Shu (ca. 179 B.C.-104 B.C.). He taught that things and events are explained by the operation of the "*yin*" and the "*yang*," particularly in human relationships. The idea that *yang* is superior and *yin* is inferior dominates this school of thought. Hence, the ruler is *yang*, the subordinate is *yin*; the father is *yang*, the son *yin*; the husband is *yang*, the wife *yin*. Therefore, it follows that the ruler is superior, the subject inferior; the father is superior, the son inferior; and the husband is superior, the wife inferior. As a result, the son submits to the father, the subject submits to the ruler, and the wife submits to the husband. Upon these presumptions, the son, the wife, and the younger should be wholly beneath the father, the husband, and the elder, just as earth is beneath heaven.¹¹ This subjugation of one party to the other in human relationships greatly changed the original teachings of Confucius, which, as discussed above, were based instead on a reciprocity and interdependence among individuals.

IV THE INDIVIDUAL IN TRADITIONAL CHINESE LAW

Next, let us see how the individual fared in traditional Chinese law. Well-codified traditional Chinese law has existed since the Han Dynasty (206 B.C.-220 A.D.). Because both the Han emperors and the Han Confucianists themselves recognized the role of law or punishment, the latter sought to turn these devices to their advantage. The Legalists' insistence on using law or punishment as the most effective instrument of government actually only emphasized the "form" of government and not necessarily its content. The Confucianists, on the other hand, always had clear and definite purposes for government. Therefore, it was not difficult theoretically to make Confucianism the content and law or punishment the form. Moreover, Confucianism, after being amalgamated with Legalist and Yin-Yang ideas, helped to uphold the superiority of the emperor, which greatly pleased him. Thus, Confucian doctrines not surprisingly became the content of law, and the criminal code became the instrument for executing such content. This development has been termed the "Legalization of Confucianism."¹² It is important to note that this

11. For an introduction to the Yin Yang school of thought, see Fung Yu-Lan, *A Short History of Chinese Philosophy* 138, 192, 196-97 (D. Bodde trans., 1948).

12. John C.H. Wu, *The Individual in Chinese Political Tradition, in the Status of the Individual in East and West* 394 (A. Moore ed., 1968).

enforcement of Confucian doctrines by means of law or punishment obviously differed from Confucius's original teachings, which advocated moral persuasion based on the cultivation of personal virtue.

Han Dynasty Confucianism, which emphasized the close connection between nature and man and was strongly supported by law, had a tremendous impact on the concept and status of the individual. Above all, the law sanctioned the doctrine of superiority of the father, the husband and the senior over the son, the wife and the junior, respectively. For instance, in its stipulations concerning family relationships, the Code of the Tang Dynasty (618 A.D.-905 A.D.) provided that criminal acts committed by senior relations against the body of junior relations were either to go unpunished or be punished less severely. The same acts committed by junior relations against the body of senior relations, however, were always punished and often more severely.¹³ In other words, in traditional Chinese law, even equality in the administration of criminal punishment, as advocated by the Legalists, was not practiced. Additionally, in the highly ethically oriented system of law of that time, what would generally be regarded as civil matters today were subject to criminal liability and corporal punishment. For instance, breaking a promise of betrothal or adopting a son with a different surname were acts subject to criminal penalties. Similarly, the article in the Code citing "to do what should not be done" as a ground of criminality and punishment made protection of the individual person extremely difficult.¹⁴ Nonetheless, this system of law remained essentially unchanged through the succeeding dynasties until the end of the nineteenth century and the commencement of the law reform movement in China.

V THE TRADITIONAL CHINESE CONCEPT OF THE INDIVIDUAL AND ITS IMPACT ON THE RECEPTION OF FOREIGN LAW

Finally, I shall attempt to deal with the influence of the traditional Chinese concept of the individual on the reception of modern foreign law. I shall do it in three parts: first, the early law reform efforts; second, the modernization of Chinese law based on foreign models; and third, the difficulties in implementing modern Westernized Chinese law.

13. See, e.g., Tang Code, Tou-sung, art. 28.

14. See Tang Code, Cha-lü, art. 62.

A. The Early Law Reform Efforts

Law reform based on existing foreign legal institutions followed the forced opening of China's gate by Western powers during the late period of the Qing Dynasty near the end of the nineteenth century. It is significant to point out that such law reforms were prompted largely by China's desire to recover the judicial sovereignty lost to Western powers as a result of the Unequal Treaties. In fact, major Western powers made it clear that they would give up consular jurisdiction and other forms of extraterritoriality on the condition that China changed its laws and legal system to meet Western standards.¹⁵

Western moral standards for legal norms during the seventeenth, eighteenth and nineteenth centuries had been founded primarily on individual rights and equal protection for all before the law. However, as I have noted above, the traditional Chinese social structure based on human relationships demanded that each person behaved in a certain manner as became his or her status in the family or society. Thus, it was primarily a duty-oriented society maintained and strengthened by law. To do one's duty was not only to be virtuous but also to be lawful. Consequently, the early efforts of legal reform in China gave rise to strong objections from old forces who defended the traditional duty-oriented legal system. In family and succession law, the influence of the traditional concepts was particularly strong. For instance, women's capacities were restricted in a detailed way and succession was limited to direct male descendants. As a result, the first attempts toward formulating an independent foreign-style civil code were not entirely successful.

B. The Modernization of Chinese Law based on Foreign Models

Law reform efforts were generally accelerated after the establishment of the Republic of China in 1912. It is pertinent to mention here that when the Chinese became determined to modernize their laws, they turned not only to Western countries, but also to Japan, since Japan was both geographically close and many years ahead of China in modernizing her laws based on European models. Thus, Japanese legal scholars were also brought in to help with lawmaking. One particular influence of these scholars was their translations of foreign legal terms

15. See M.J. Meyer, *The Introduction of Modern Criminal Law in China* 164 (2d ed. 1967).

into Chinese characters, which the Japanese also used in their ordinary written language.

It was under such direct and indirect European guidance that modern Chinese legal codes were finally formulated in the late 1920's and early 1930's. The Civil Code made much use of the German and Swiss Civil Codes,¹⁶ and the Criminal Code was formulated primarily using the Polish Criminal Code of 1932, the amended Criminal Code of Japan of 1931, the Italian Criminal Code of 1930 and the German Criminal Code draft of 1927 as references.¹⁷ Consequently, Confucian ethical doctrines and the traditional Chinese concept of the individual were almost completely expelled from the law

The Book of General Principles of the modern Chinese Civil Code begins in its substantive part with a chapter entitled "Persons" and declares proudly that, "the legal capacity of a person begins from the moment of birth and terminates at the moment of death."¹⁸ A person's "legal capacity" means an individual's capacity to enjoy rights. With the concept of an independent person established, the equality of the sexes and a law of family based on the individual, both of which involve the modern law of inheritance, followed logically. To give specific examples from the Civil Code, marriage is defined as the union of two individuals, and either husband or wife may be the head of the family.¹⁹ In addition, parental power in principle may be jointly exercised by husband and wife.²⁰ Property arrangements between husband and wife, unheard of in the past, are also provided in many forms and in detail.²¹ The right of succession to property is similarly expanded to include spouse, parents, brothers, sisters, and grandparents.²² Finally, contract law is stipulated as the governing law of property relations between two independent persons,²³ and, in criminal law, liability in principle is limited to the person who commits the act.²⁴ These are just a few examples of how the concept of the individual is respected and codified

16. See *The History of Legislation of the Republic of China* 902-76 (Hsieh Cheng-min ed. 1948).

17. See *id.* at 1128-48.

18. Civil Code, Book of General Principles, art. 6.

19. Civil Code, Book of Family, arts. 972, 1124.

20. *Id.* art. 1089.

21. *Id.* arts. 1004-48.

22. Civil Code, Book of Succession, art. 1138.

23. Civil Code, Book of Obligation, art. 153.

24. Criminal Code, Book of General Principles, arts. 12-24.

in the modern legal codes of the Republic of China in mainland China until 1949 and since 1949 until today in Taiwan.

An introduction to the modernization of Chinese law, no matter how brief, would not be complete without mentioning China's efforts at constitution making. Actually, China started her legal reforms by drafting a constitution based on foreign models in the late nineteenth century. A number of drafts were made without success. A permanent constitution was not promulgated until 1947 in Mainland China, and it now serves as the fundamental law of the Republic of China in Taiwan.

C. The Difficulties in the Implementation of Modern Westernized Chinese Law

We finally come to the difficulties encountered in the implementation of modern Westernized Chinese law. I begin by saying that the existence of modern codes of law does not necessarily mean that there is a rule of law in the Western sense. The legal institutions introduced into the modern Chinese codes are indeed protective of the individual. However, they will not mean much unless the Western concept of the individual, with all its worth and unworthiness, is distinctly pronounced and generally accepted. It has been well observed that the operation of these codes from their inception until 1949 on Mainland China and since 1949 until fairly recently on Taiwan has been unsuccessful. This is because there has not been a general acceptance of a pertinent concept of the individual and its immediate derivatives — individual rights and freedoms. I shall use the basic idea of rights to illustrate briefly the difficulties.

To begin with, in the traditional duty-oriented Chinese society, there had never been developed the idea of rights. Such ideas as an individual's rights and freedoms were never heard of until the importation of foreign ideology into China in the middle of the nineteenth century.

Since the turn of the century, social, political and economic developments in the Western world have given rise to a new collective consciousness and social responsibility which have slowly but steadily found expression in its laws and legal institutions. This sense of social duty sprang from a fully developed individualism and served to mitigate and transform the latter to meet the new needs of social life. China, however, has not gone through the same process, and the persistent duty-oriented mentality of her people is not in happy agreement with the

emergence of a new social discipline in the West. In other words, the Western sense of social duty is deeply embedded in individual rights and freedoms. It is difficult for the Chinese people to understand properly and live up to this new concept of social duty without a full understanding and appreciation of the rights and freedoms of the individual.

What makes things more difficult is the Chinese translation for the word "right," which is "*quan li*." This term, first used by the Japanese, literally means "power and profit," which unfortunately are the two things that Chinese people are taught by the Confucians to despise and avoid. The connotation of a "right" as being also something which is right and just, as expressed by such Western terms as the German subjective "*recht*" (*Recht im subjectiven Sinne*),²⁵ or the French "*droit*," is neither expressed nor implied by the Chinese term. As a result, the Chinese people are generally reluctant to talk about rights or to exercise their rights.

However, things began to change in the Chinese society on Taiwan in the 1950's. A successful land reform program from 1953 to 1963 paved the way for economic development, bringing in more and more foreign investment and international trade. As a result, in the past two decades, the society has been moving rapidly toward industrialization and urbanization. This has contributed to a waning of the role of the traditional family, and hence the modification and adaptation of family relationships. There have also been necessary transformations in the types of business organizations and in their modes of operation (i.e. from personal and subjective to impersonal and objective relations). As a result of these social and economic changes, foreign law and legal institutions as adopted by the modern Chinese codes have been made to apply in a more realistic sense, since they are more pertinently formulated to the conditions of industrial and urban societies. In addition, major legal codes governing civil and criminal matters have repeatedly been amended with the aim of better safeguarding individual rights and freedoms. In particular, equality of the sexes has been further promoted²⁶ and criminal procedure increasingly improved.²⁷

However, more recent political, economic and social developments in Chinese society in Taiwan have presented a rather complex and

25. Subjective right.

26. Civil Code, Book of Family, arts. 1013, 1016-19, 1021, 1024.

27. Code of Criminal Procedure, arts. 308, 310, 451.

sometimes disturbing situation. There have been increasing numbers of incidents of misuse or abuse of individual rights and freedoms in the name of democracy at the expense of the rights and freedoms of others. This is obviously detrimental to the people's nascent and budding trust in the law

VI. CONCLUSION

In conclusion, we may well raise the questions of whether the concept of the individual is not uniquely Western, and whether the concept of the "Western individual" can ever be developed in Chinese thought and practice. While most Chinese scholars seem to speak affirmatively of the importance of the individual in traditional Chinese society, they all agree that it is the family rather than the individual that is its basic unit. A person exists not as an isolated entity, but as a father to his son, a son to his father, a younger brother to his elder brother, or a husband to his wife. It is in this network of family relationships that the individual person finds his or her place. Indeed, this network of human relationships based on the original teachings of Confucius and his disciples does have its lasting value in society. But, inasmuch as modern Chinese law, following its foreign archetypes, aims basically at the protection of individual rights and freedoms and seeks to delimit them in terms of the common good, it seems only logical that two things must develop if the law-abiding habit is to be instituted in the life of the Chinese people. First, there must be a deeper consciousness of the individual's rights and freedoms; and second, on the basis of such consciousness, a keener sense of the common good must be nurtured by resorting to law as the standard means of balancing the interests, rights, and freedoms of the individual with those of his fellow individuals. In this way, the traditional Chinese teaching of human relationships based on a reciprocity and interdependence among individuals can still play a significant role.