

An Analysis of “Emotion, Reason and Law” in Chinese Traditional Legal Culture

Boyang Li^{1*}

¹ China-EU School of Law, China University of Political Science and Law, Beijing, China

* Boyang Li, E-mail: 1402300226@cupl.edu.com

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Abstract

Characteristics of the ancient Chinese law could be well summarized by the three words of “Emotion (Qing), Reason (Li) and Law (Fa)” which have formed the core spirit of the traditional Chinese legal culture. This paper is intend to clarify the relationship between the three words and consider that concepts of emotion, reason, and law are not independent but a union, showing different sides of the same procedure. Meanwhile, the dynamics of these three concepts form a more generalized concept of “law” in which “emotion (Qing)” is the basis and reason; “reason (Li)” represents the actual social norms and “law (Fa)” is the method to maintain social order.

Keywords

Emotion (qing), reason (li), law (fa), traditional Chinese legal culture, social order

1. Introduction

As for the jurisprudence study in China, the contradiction and incompatibility between the local traditional legal theory and the imported legal theory from western countries has been a very thorny while unavoidable problem: On the one hand, we have no way to process the construction of modern legal civilization by abandoning our national characteristics and traditional legal culture. On the other hand, the traditional Chinese legal culture cannot be researched or discussed by concepts and theories completely taken from western countries. That is just like a delicious but indigestible delicacy for the jurisprudence study in China today. The way in which we can integrate traditional legal thoughts into modern legal theory is very important to the development of jurisprudence in China, because it would be the true soul under the flesh and blood of western legal theories. But how can such a process of integration be realized, and how can the barrier between Chinese and western legal cultures be broken? This essay believes that the key may lie in the construction of a local, proto genes is legal theory that born out of the present social reality of China which can channel traditional legal culture and western legal theories. This, of course, is what Chinese jurists have been always trying to do.

Then where are the opportunities or the possibilities for establishing such an ideal legal theory? This essay suggests that the emotion could be considered as a breakthrough point. In recent years, western legal academies are undergoing a gradual change in theory. Scholars from different regions of the world and in different disciplines are increasingly aware of the important role of emotion in the law, query the supremacy of reason and think that emotion is everywhere in the law. This kind of legal view is very cordial and easy to accept for Chinese people, which makes people think of the traditional legal culture which is based on “Emotion (Qing) Reason (Li) Law (Fa)” in ancient China. The traditional Chinese legal culture was basically established during the Spring and Autumn period when letting a hundred schools of thought contend, and the legal idea of “the principle of supporting punishment by virtue” was formed by combining Confucianism with legalism and adopting ideas of Taoism and Mohism on the basis of Confucian legal thought. The concept of law corresponding with such kind of legal thought is a generalized law which is the synthesis and generalization of the “Emotion (Qing), Reason (Li), and Law (Fa)”, or from the perspective of sociology of law, the Chinese traditional concept of law refers to the social order formed by the combined function of “emotion”, “reason”, and “law”. Therefore, this paper will first try to sort out the concepts of “emotion”, “reason” and “law”, then will summarize an emotion-based notion of law in Chinese traditional legal culture through the intrinsic connection between the three.

2. “Qing (Emotion)”—The Foundation

As for the actual meaning of “Qing”, academic opinions vary such as customs or habits (Zhang, 2010), human feelings or personal relationship (Huo, 2008), human nature or interpersonal relationship, body sensation or emotion, social common sense and so on (Cui, 2010). All these examples can be explained by words of ancient books. It is true that the word “Qing” has been used more or less to express above meanings. However, if we consider it from the ontological perspective of the law, these meanings seem to be slightly thinner.

Then, as an important traditional legal concept, what on earth is the meaning of “Qing”? This paper thinks that we should understand it from different aspects and in gradual process. First of all, “Qing” means human emotion. The *Book of Rites* notes that what is human emotion? The answer to this question should be happiness, anger, sorrow, fear, love, disgust and lust. “Qing” of this level is often considered to be an important factor of that whether the law could be implemented smoothly or not. Zhang Feng of North Song dynasty once said that why often the law cannot be implemented or even die during its making process? Because the legalization is not on the basis of human emotion. That means the punishment for behaviors all people hated is very light, and for those ones all people forgiven is very heavy (Note 1). Both hate and forgiveness are human emotions. Yet, how does the emotions of “all hated” or “all forgiven” arise? It must be that certain events or actions have touched a nerve which represents some sort of people’s common value judgment. Therefore, in this sense, “Qing”

also represents reasons of arousing emotions, a standard of value judgment that recognized by the public. or the value orientation of the whole society, the human nature.

However, the analysis is not over yet, and if we continue to ask, how does the value judgment recognized by the public come into being? We may first answer, in general, in the social interaction between the subjects, and then to think about how the broad consensus can be generated by the social interaction between the subjects.

3. “Li (Reason)”—The Actual Regulation of Social Order

Similar to the “Qing”, scholars have different understanding of “Li” which is usually considered to be the natural justice. In the Confucian theory, “heaven” has very rich meanings. Confucius once said, heaven is a mysterious force that can create all varieties of life and all things on earth as well as the four seasons, that manifests itself as an unexplainable order arrangement and an unmanageable rule (Note 2). Furthermore, DONG Zhongshu’s understanding of heaven has three meanings: “heaven of nature”, “heaven of god” and “heaven of natural principle”. First of all, heaven is a natural thing with its own regularity which is also natural (Note 3). DONG Zhongshu’s second meaning of “heaven” is “heaven of god”. “Heaven is the leader of all fairies and most respected by all kings (Note 4)”. That is the most direct argument of DONG Zhongshu’s “heaven of the god”. On top of that, DONG Zhongshu also mentioned many times that the king was under the orders of the heaven, and claimed that the heaven is not only the material world’s heaven of nature, but also the greatest heaven of god. The curse of man is determined by heaven, which is called “destiny” (Note 5). Another important meaning of the heaven is “heaven of natural principle” which means the natural bonds and ethical relationships between people (Note 6). He took heaven into human relations according to feudal ethics of human society including the heaven and earth, male and female, four seasons and five elements. Here heaven becomes a kind of kindheartedness and perfect state of consciousness. DONG Zhongshu corresponded the relationship between father-son and heaven-earth to strongly support the inter-promoting rank relationship. As he said that the heaven and earth is the heart of all things and where our ancestors lived their life. It is boundless with highest virtue and long life without old age. As for the brightest heaven, all living things rank themselves according to its orders. As for the darkest earth, both stars and the sun dare not be lightless because of its intention. If only such kind of rules were taken by the emperor and courtier, the father and son, the husband and wife, the ultimate goal of the biggest rite would be achieved (Note 7).

Above mentioned Confucian’s rich and profound understanding of the heaven embodies the Chinese philosophic concept of “natural law” which claims to advocating and conforming to the nature. In this sense, heaven of natural principle means objective laws of the world and represents a kind of abstract, sacred and noble justice or regulation. On the other hand, from the argument of Dong Zhongshu’s “heaven of natural principle” we can see that the specific content of the natural law is just “the three

cardinal guides” (ruler guides subject, father guides son, and husband guides wife). At this point, Zhu Xi also mentioned explicitly that the rite means just natural principle of the heaven.

So, what is the “Li (reason)” represented by “rites”? *Books of Rites • Music* states: “Rites are the orders of everything in the world and the society regulations”. The nature of the rites is commonly considered to be the total of ethics, legal norms, religion, customs and so on by academic circles. But some scholars disagree with that. It is not accurate for the “total theory” to simplify the general concept of rites into parts combined simply. There is not even one piece of pure legal norm or ethics in the sense of modern jurisprudence in the rites. On the contrary, rites are just a chaotic whole (FAN, 1992). According to the form of the Rites, rites embody the complicated etiquette system in order to maintain a series of spiritual principles and behavior standards of the genealogical relation and patriarchal caste system. The core of the rites is to maintain the hierarchical orders of high and low levels, status and ages, differences between males and females through many complicated institutions, regulations, rules, ceremonies and so on. The rites stipulates the order and scale of every aspect of the social life as stated in the *Book of Rites*, “Without rites, all disputes can not be settled; relationships between all people cannot be determined; duties or study cannot be done; political or military affairs cannot be handled with commanding appearance; sacrifices to gods or ancestors cannot be solemnly completed”. The rites actually define the boundary of measurement that is called “Ming Fen”. “Ming” refers to the identity while “Fen” refers to the corresponding benefits of rights. From this point of view, “rites” actually takes part of the functions of the law in the modern sense.

Rites were a set of customs at the very first stage. They originated from sacrifice and contained rules to be followed by sacred procedures or ceremonies. The nature of the customary law has been established in the clan society and the Xia, Shang and Western Zhou periods. After that, rites contained not only customary laws but also some contents which had been gradually changed into official legal clauses. This is not only reflected in the state formulates and enacted laws at that time, many corresponding regulations to traditional Chinese legal systems such as the lawsuit, marriage, family, clan, inheritance and identity could also be found in the rites (JIANG, 2004). During the Western Zhou period, the main standards of ensuring normal operation of social orders were the rites which were actually playing a legal regulatory role for the whole society. Rites of that time included all nature of the law, meanwhile they didn't limited to the law, because the country's administration, justice, military, religion, education and even ethics were all regulated and ruled by the rites. At the same time, the success or failure of the state's administration, right or wrong and guilty or not of people's behaviors were determined according to the rites. It should be said that rites of that time is a comprehensive embodiment of various norms such as law, ethics, religion, customs and so on. Law is an integral part of the rites. However, after Qin and Han dynasties, especially after the middle of Han dynasty, as the behavior standards, rites were not only an integral part of the law but also the highest guiding principles of the legal system in the whole feudal society. From the Han dynasty, the rites were taken into the laws. Confucian scholars

in Han dynasty explained laws according to Confucianism until the “making judgement by citing ancient books and records” period. After the development of Wei Jin dynasty, the legislative guiding principle of “the base of politics and education is ethics and rites, and punishment is a tool of the politics and education” till Tang dynasty when the combination of rites and laws were not only completed but also reached the peak of China’s feudal society. Until the end of the Qing dynasty, the rules of rites for maintaining a hierarchical society were an integral part of Chinese feudal law.

We can get a more profound understanding of the “Li” through above series of concept analysis about the heaven, natural principles and rites. First of all, no matter explained from which aspect, the basic meaning of “Li” is the orders or rules. Such kind of orders or rules are not (or are not supposed to be) created by human beings but contained in the nature itself. Although they are grand and mysterious, people can get to know them through their own sensations and solidify them into our social life to become what we call the “rites”. The “rites” is the sum of social orders which comes from the “heaven principle”, so the implementation of these orders is guaranteed by a mysterious power represented by the “heaven”. Therefore, the “rites” has an exuberant vitality as a kind of system. It’s hard to say that this is a strategy for Confucianism to sanctify the “heaven”, and put it in a supreme position, render its mysterious power and root the rites into the heavenly principles. Then, the rites gained the supreme authority to achieve the goal of maintaining the hierarchical orders.

4. Fa (Law)—Methods of Maintaining Social Order

The concept of “Fa” from “Qing Li Fa” originated from torture and experienced three stage of development: “torture”, “law”, “code”. Generally speaking, the Xia, Shang, Zhou period was in the “torture” stage, the “law” stage started from the end of Spring and Autumn period, and the “code” stage started from the reforms of Shang Yang. This could be proven by the brief statement about the change and development course of the concept of law in Commentaries on the Codes of Tan (Qian, 2007). In the ancient Chinese mind, law is mainly about some compulsory regulations or rules and playing a role or function of encouragement, licensing, recognition, forbidden, punishment as well as the corresponding tools or methods (Fan, 1992). Therefore, in the eyes of the ancient Chinese, the law was reward and punishment, and mainly a punishment. Take Legalists for example, HAN Feizi states that, law is written by the government and must be admired from the heart of the common people (Note 8); the way for a wise emperor to control his subjects is the use of just two handles: penalty and mercy. Penalty means killing while mercy means giving (Note 9). The purpose of the penalty and mercy is mainly to maintain good social orders. Zhong Guan once said that it is enough for you to teach a people the wisdom and rites ... then explain him the laws, persuade him with rewards, and fascinate him with penalty. So all common people would say that what you have done is right (Note 10). Therefore, using law as a supporting tool for the ethics mainly means to force people being good with penalty as a threat. Gu Ban had made a clear statement about this, law displays all people the forbidden behaviors and

consequences resulted from violating it, and establishes majestic and moral integrity through a threatening way (Note 11).

Although Confucianism has a great difference with the legalist ideology, the concept of law is basically consistent. LIANG Zhipping once stated that differences between Confucianism and Legalist in Chinese history is often overemphasized by posterity, in fact they have very limited meaning ... If comes to more fundamental questions about the nature and function of law, everybody's understanding is exactly the same (Liang, 2002). Confucius believed that if rulers ruled people with heavy-handed approach of legalist's "law", although people dare not commit crimes, their inner hearts are full of contempt (Fan, 1992). However, Mencius thinks that if high ranked people had no virtuous guiding ideology or violated the holy principles, common people had no law to follow or failed to comply the existing law, the country may possibly perish (Note 12). At the same time, it confirms again the legal view that law of the Confucianism is penalty. However, during this period, it is not the confucianism who hate the laws most but the Taoist in whose hearts the law is also penalty (FAN, 1992). Zhuang Zi said that law is something too rude to be stated (Note 13). *Shenzi • Lost Article* also mentioned that law is so miserable but cannot be violated. Here mentioned law also means penalty because only penalty can be called "rude" and "miserable".

As can be seen from above, such a method of maintaining orders was not popular to ancient people. There were a common saying that penalty is a darkly thing (Note 14). Because people thought that law or penalty was not essential in peaceful and prosperous society. Only when the society fallen into decay and disruption the law or penalty was used to save the society's decline. The prosperity of the law indicates that the current society is in a state of disruption. The real ideal society should be "the power is great but not sounded out, the penalty is ready but not used" (Note 15), "the reward gives no people, the law has no addition" (Note 16), it was "no lawsuit" and "no punishment". This is also a reflection of the ideology of "the principle of supporting punishment by virtue" in traditional Chinese legal culture. Starting from this ideology, in the following part, this paper will analyze the underlying deep relationships of the "Emotion (Qing), Reason (Li) and Law (Fa)".

5. The Relationship between "Emotion (Qing) Reason (Li) Law (Fa)" and "the Principle of Supporting Punishment by Virtue"

As mentioned above, "the principle of supporting punishment by virtue" is the core ideology of the traditional Chinese legal culture. The so-called virtue actually represents the internalization of the thought of "rites". Virtue is the ideological core of the rites of the system (Zhang, 2008). It was DONG Zhongshu of West Han dynasty who proposed "the principle of supporting punishment by virtue" as a principle of administration. He thought that the emperor should control the country according to the natural law. First of all, the morally civilized way should be used to persuade and sensify people. Only if this way did not work, it was necessary to add the supplementary penalty as a threat. That is so stated

that as for the good and evil, the evil means the feminine or negative principle in nature, the good means the masculine or positive principle in nature, the good is virtue, the evil is penalty, the penalty violates virtue and complies virtue (Note 17).

This theory of statecraft is in fact weakening the function and responsibility of the country in maintaining social orders, and pushing the society to control itself. The process of such a legal operation embodies the function of “Qing Li Fa” as a whole. As previously discussed, the specific content of social norms is actually reflected in the part of the “Li” whose entity is “the rites”, and “the rites” are the expression and embodiment of orders in the world through apprehending the natural law. The way of life in Chinese traditional agricultural society has created a philosophy in awe to the heaven and the nature. This kind of awe to the heaven and nature had also provided sources of authority to put “rites” into effect—Confucianism made the “rites” to become the expression and embodiment of the “natural law” with ingenious use of people’s awe to the heaven so as to establish the authority of the “rites” and strengthen its effect on people’s social life regulations. In addition, the production mode based on family in the traditional agricultural society made the man of a family (especially an older man) having a higher authority naturally. Status order made in the “rites” is in harmony with such a living reality. Meanwhile, the higher authority of the father or husband in a family also promoted the abidance of the “rites” and becomes the source of the authority of the “rites”. Therefore, people’s awe to the “heaven” and awe among their family members were playing a role of “penalty” which might possibly lead to negative emotions; The concept of “virtue” developed from the “rites” was a kind of encouragement and playing a role of “appreciation” which could arouse positive emotions. That made the “rites” themselves be able to maintain a relatively stable social order, and this social order itself also partially protected people’s natural emotions, and its operation was also based on people’s emotions. However, it is essential for the “Fa” to be a guard of the social orders. Meanwhile, the authority and stability of the country as well as its possibly used violent means provided stronger guarantee for the stability of social orders. So, China’s “Qing Li Fa” is unified and of trinity. The concept of law it embodies is a kind of social order which internalized in life and taking the “Qing” as the base, the “Li” as the content, and the “Fa” as the guarantee.

It has to be said that such a system arrangement is very delicate and ingenious. First of all, the content of “rites” was not invented but refined from daily life, and the hierarchical relationship was also determined naturally during the process of farming. Members who could better solve the subsistence problem received more respect, the elder family member mastered more materials of life and accordingly had more say in the family. Therefore, differences of the labor division or roles of a family made the family members respect or look down on each other. Personal authority in family life was reflected in its own emotional influence. And the respected members would reinforce others’ respect by establishing some behavior rules. Therefore, it can be said that the maintenance and consolidation of the hierarchy system is not only for the sake of material benefit, but also for the emotional benefit. So

the concept of “Qing” is internalized in the “rites” of family ethics, and it is also an important element of forming and maintaining the dynamic family order. However, if scope of the discussed problem was extended to a village or the whole country, affections formed between family members would be no longer enough to support the operation of the whole hierarchy. As a result, the Confucianism gave two strategies. First of all, to mystify the “heaven” and to put it in a supreme position so as to have a powerful and mysterious force which is resulted from people’s awe to the heaven and nature. Such kind of awe does not vary due to different family circumstances or geographical environments, and is a common or universal emotion which has been used to implement the rites and establish a hierarchical order throughout the country by linking the rites and the natural law. The success of this approach relies on firstly the use of already formed family hierarchy, and secondly the use of people’s common awe to the “heaven”. That has created a native but universal order from the family to the country. But only use of awe is not not enough to maintain such a large hierarchical system, so the Confucian gives the second strategy of promoting the “virtue”. Virtue is the embodiment of the inner spirit of the rites. The ruler commends people who act in accordance with the requirements of the rites so as to take shape a “advocating virtue” ethos throughout the society. The praise comes from the society can not only arouse the praised people themselves’s positive emotions such as proudness and gladness, but also reinforce their loyalty to the whole society community and the recognition to their own views of the value. As a result, the cohesive force of the society has been strengthened, and the order of the rites throughout the society has been enhanced. Under these two strategies, the whole social order has been very stable, so the importance of law as a means of punishment is not very significant.

6. Conclusion

To sum up, in Chinese traditional legal theory, “reason (Li)” is the center while the foundation is emotion. “Emotion (Qing)” is the basis and reason; “reason (Li)” represents the actual social norms and “law (Fa)” is the method to maintain social order. Perhaps the above analysis lacks persuasive power, but this article hopes that scholars can attach importance to the role and status of emotion in the law, and those who are interested in this essay can continue to deepen the role of emotion in ancient Chinese law as well as in the existing law. I hope this can be breakthrough point for the communication between the traditional Chinese legal culture and the Western legal culture.

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Notes

Note 1. Zhang You Shi Wen Ji • Min Xing Lun Xia.

Note 2. Lun Yu • Yang Huo.

Note 3. Chun Qiu Fan Lu • Tian Rong.

Note 4. Chun Qiu Fan Lu • Jiao Yi.

Note 5. Han Shu • Dong Zhong Shu Zhuan.

Note 6. Chun Qiu Fan Lu • Wang Dao Tong.

Note 7. Chun Qiu Fan Lu • Guan De.

Note 8. Han Fei Zi • Ding Fa.

Note 9. Han Fei Zi • ErBing.

Note 10. Guan Zi • Xiu Quan.

Note 11. Han Shu • Xing Fa Zhi.

Note 12. Meng Zi • Li Lou Shang.

Note 13. Zhuang Zi • Zai You.

Note 14. Chun Qiu Fan Lu • Tian Rong.

Note 15. Xun Zi • Yi Bing.

Note 16. Yan Tie Lun • Zhao Sheng.

Note 17. Chun Qiu Fan Lu • Yin Yang Zun Bei.