

ASIA 1410 ISSUES IN CHINESE CULTURE

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Compare and contrast the evolution of legal consciousness in China with that experienced in Australia.

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First it must be established that Australia never really evolved a legal consciousness in the way that China did and continues to do. While the bulk of its five thousand year history was dominated by Confucian values, the last hundred years has also seen China ruled by the short lived Kuomintang attempt at codification, periods of near anarchy during the Cultural Revolution, Socialist ideology and now a system that partially incorporates the Western concepts such as "the rule of law". In comparison Australia has never undergone any major legal unrest in its two hundred years of English settlement - it received the common law system from England in 1788 as a stable ready-made system that had already undergone approximately seven hundred years of use, testing and refinement. In identifying evolutionary aspects of legal consciousness in Australia one might point to the journey from a de-facto autocracy of England to full constitutional independence in 1901, or the adjustment of native title laws to accommodate new modern attitudes towards indigenous peoples. However these legal fine-tunings are dwarfed in comparison to the constant upheaval of entire legal systems brought about by the mass movements and revolutions in recent Chinese history. This essay will canvass the recent developments in Chinese law and identify the differences between the Australian and Chinese legal consciousness. It will also show how Confucian values are still dominant in a Chinese system that purports to be moving towards the "rule of law".

One of the fundamental tenets of the Australian common law system is the preservation of individual rights and equality for all under the law. The doctrine of the separation of powers, whereby judicial, legislative and executive powers are never held by a single body, preserves this right and prevents abuse of power by restraining the arbitrary actions of the power-holders. The equal treatment of each power and society in general along with the legislative impotence of the church suggests a universal body of law that embodies the community sense of right and wrong. This stems from the English power struggles between the king, nobility, landowners, church and merchants during the Middle Ages which were resolved by rights-guaranteeing documents like the Magna Carta 1215. This plurality was never matched in Chinese history with the result being a diminished emphasis individual rights.

As Chen describes, the Confucian system of li, which remained virtually unchallenged from 206BC till the start of the 20th century, was based on people's duties and obligations defined by their position in society at the expense of individual rights to achieve social harmony. To insist on individual rights was entirely contrary to the spirit of li - when faced with conflicts the proper attitude was a predisposition to yield rather than insist. This submissive attitude fostered a system of dispute resolution by mediation and compromise that was more flexible than a system of explicit rules. However injustice could easily occur where disputes arose between members of two different levels of society as the party with lower status would feel compelled to yield to the higher's interests. Written laws in the Western sense (fa) existed as a last resort for dispute resolution but almost always embodied li principles and therefore served to reinforce group interests rather than individual ones.

In such a distinctly structured society equality was also relatively unimportant. The Emperor reigned as supreme legislature and judicial authority with the absolute power to make and change laws, determine guilt, alter judgments or orders of lesser authorities and yet remain completely unbound by any laws. The early dual system of li (for plebs) and xing (for nobles) created a tradition of unequal punishment that continued for the entire span of traditional Chinese law and within this was ba yi - a system of varying criminal exemption for eight specific categories of people. This traditional of inequality has persisted even to modern times. In a recent bribery case, it was necessary to seek approval from a higher authority before investigating and prosecuting Chen Xitong, a former Party Secretary in Beijing.

Individual rights and equality in China fared no better during the rise of Socialism, though for different reasons. The embryonic Western style legal system of the Nationalist Kuomintang (KMT) was based on German, Swiss and Japanese models and consisted of codes that embodied those democratic rights. However these efforts failed in the face of the Communist Party of China (CPC) drive towards socialism. The move against a Western legal system was driven by the Marxist idea that law was a tool of the bourgeoisie used to ensure their class domination over the proletariat. However it seems peculiar that the Marxist ideology based on classlessness resulted in the same disregard for individual rights and equality of the Confucian class system that it sought to purge. Examples of CPC inequality were seen in the differential treatment according to 'class background', and the violence and terror aroused by 'class hatred' of people termed 'enemies, reactionaries or counter-revolutionary' by the CPC. These people were also subject to mass trials with no assured individual rights - they had no right to defend themselves and were subject to cruel and inhuman treatment and usually sentenced to death or 'reform through labour'. These mass campaigns against the perceived bourgeoisie continued up till Mao Zedong's death in 1976. After the radical leftism of the Cultural Revolution, the CPC began to embrace the notion of a codified legal system as necessary for administrative stability and economic growth and this included measures (at least on paper) to "guarantee the equality of all people before the people's laws and permit no one to have the privilege of being above the law" To this effect China has now enacted hundreds of new laws, set up a court

structure, encouraged economic reform and allowed invigorating public legal debates.

In implementing in preference to 'bourgeoisie' laws his policies that could quickly and arbitrarily include as enemies those who rebelled from them, it could be argued that Mao Zedong and the CPC wielded as much power as the Emperor during Confucian times. They were both closed and centralised totalitarian power structures that excluded the possibility of law as a supreme entity independent of the ruling body as seen in Australia, otherwise known as "the rule of law". Therefore it can be seen that Mao-era socialism in China extended the lack of equality and individual rights of Confucian times well into the 20th century, while most developed countries including Australia had been practicing them unchallenged for at least a few centuries. This temporal handicap accounts for many of the administrative, structural and implementive problems observed when comparing China's new legal system to Australia's.

China's problems are generally caused by the novelty of its legal system. The complex and ambiguous division of legislative powers between regional and national congresses and branches of government creates inconsistent and complex laws. Conversely some fields have no adequate rules whatsoever. The rapidity of social reform and political change has also left some legal rules out of touch with social reality. Legal material publication is not organised in any systematic way which makes authoritative rule-finding impossible. Furthermore although a constitution has been enacted it cannot be quoted in a legal argument. The shortage of legal expertise exacerbates the confusion - the 'Hundred Flowers Movement' of 1957 in which hundreds of thousands of jurists, lawyers and judges were removed for criticising the CPC left a deficit in the legal profession which is only just starting to recover.

The Australian common law system is comparatively certain -jurisdictions are clearly defined between state and federal statutes, courts of first instance, appeals courts and other tribunals; where the judge-made common law prevails there are centuries of systematically published cases to draw authority from; and the constitution and doctrine of separation of powers provide a stable base for administration without ideological baggage.

China's other main problem is in overcoming an ingrained distrust for the legal system. The problem is multifactorial. Traditional Confucian practices characterise the law as unjust and cruel - trials were conducted with the judge as both prosecutor and adjudicator, torture was commonly used to extract confession from the accused and beatings had to be endured by the complainant before a case would be heard. The sentences such as the 'Five Punishments' were particularly gruesome and corruption among officials was common. Currently Socialist suspicion of the law as described above remains, the adoption of Western methods is branded "rule by law" or "rule according to law" never "rule of law". The ability of the CPC to override any decision to suit its politics removes the possibility of independent "rule of law" and therefore diminishes the people's faith in the law. The confusion described above also contributes to distrust and leads people to turn to independent mediation or use of connections to resolve everyday disputes rather than rely on an uncertain legal system. As Keith puts it, the people prefer to da guanxi rather than da guansi.

Australian citizens however enjoy the comfort of knowing the legal system will almost always achieve justice (at least when compared to China) and will operate independent of the wishes of the currently ruling political party. Australians generally feel certain that the adversarial system of litigation, jury determinations and the process of legislating are the best methods available to affect the law as they have already seen them work for decades. Chinese citizens are yet to find confidence in a established systematic, predicable legal system - a problem which can only be fixed by time.

In conclusion, the main differences in the evolution of legal consciousnesses of Australia and China are of stability - Australia benefited by the reception of the English common law as a ready-made system, China has had to learn by trial and error how to effect a democratic codified law that is compatible with Socialist ideology and goals. The Socialist need to maintain control is in direct conflict with the freedom and certainty of Western style laws required for economic growth. This conflict compounds the problems of a only decades old legal system by adding confusion, inconsistency and resulting potential for injustice and general distrust of the system. Australia's stability and longer Western legal history allows its citizens to fully rely on the legal rules as the absolute power.

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