試探傳統中國法之總體像

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要　目

摘　要

我們已習於將判決視為是根據一般法規進行個別案件審判的判決結果，而把法律視為是法官用來作為審判案件的規則。根據這樣的定義，傳統中國法律，從民法的角度來看，常常被描繪成是發展不完全的；相對於民法而言，刑法卻又成了高度發展的法。這篇文章便是企圖透過對於「法」的再定義，向這樣的描述進行挑戰。

關鍵字：法、規則（rule）、正義、公論、情理、情法之平

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Another Concept Concerning Traditional Chinese Law: a Rough Sketch

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Abstract

We are accustomed to regard adjudication as the judging of individual cases according to general rules, and law as the rules which the judges apply to cases being adjudicated. Based on this definition, traditional Chinese law has been characterized as being underdeveloped in terms of civil law, and relatively highly developed in terms of criminal law. This paper attempts to challenge this characterization by re-defining "law" itself.

In the first part, I discuss the characteristics of civil justice. This is "individualistic" because the judgments might vary according to the individual situation. However, it is also "universalistic" because each individual judgment is not assumed to vary according to the judge, but to be what whoever handles the case would judge in a similar fashion. It was the ideal that all individual cases had their own individual judgement, that each judegement is shared by all the public, and that the judge represents *gonglun* 公論 (public and impartial opinion). *Qingli* 情理 (situations and reasons) is the term representing these judgements. In other words, there existed only a single principle, *qingli*, with many cases representing that principle; not the medium between them, that is, the concrete "rules". The courts were not deemed to be where established rules to individual cases were applied, or where those rules might be "realised"; rather they were the place where individual judgements were made directly from the principle of *qingli*. The judges were expected to have *du*

德 (virtue), in order to show the parties concerned a public and impartial opinion.

In the second part, I look at the adjudication system which backed up such "individualistic / universalistic" justice. Because it was not always easy for the individual judge to persuade the parties concerned that his judgment was nothing but public opinion or that he was a man of virtue, the legal system had to allow contending parties to challenge the impartiality of the judge or the judgment by appealing to a higher court, thought of as being more representative of public opinion, and let them confirm its "universality" for themselves. If the appeal system, which stretched up to the Emperor, was able to absorb the anxiety of the parties, the authority of the state would be recognized by the people; if it could not, however, even the authority of the Emperor might be questioned. Those who represented public opinion were men of virtue, while what a man of virtue declares was public opinion. These two arguments are always circular. However this was an unavoidable consequence. There could not be a functional classification between the making of rules and the application of rules as long as there was no concept of "rule".

In the third part, I investigate the nature of positive law in China, that is, the criminal code. Hitherto, the Chinese code has been assumed to be the "rules" applied to cases by officials during criminal adjudication, I assert, however, that Chinese criminal justice too was not legitimized by the criminal code, but by the principle of *qingfa zhi ping* 情法之平, the balance between the crime and its punishment, in the same way as civil justice was directly legitimized by the principle of *qingli*. It was not required that the accused be told by what article of the code he would be punished. When the particular situation of a case differed slightly from the text of the code, officials were not given the authority to interpret the articles for themselves, but were obliged to bring the case to the Emperor. The code was a set of broad guidelines made

by the Emperor to direct the judgments of officials, not the grounds upon which officials make their judgments, that is, rules for criminal adjudication.

There were not any "rules" in traditional Chinese adjudication that individual judgments could rely on and must abide by, and it was not assumed to be the duty of the authorities to realize established rules through adjudication. Conversely, the Chinese public authorities were assigned the role of finding the best solution fitting *qingli* or *qingfa zhi ping* for each case, and the adjudication system was designed to accomplish this duty in an impartial and public way. Here, we could of course still restrict the concept of law to something like "rules", and completely exclude traditional China from world legal history. However, it would be better for those who wish to know the nature of law to admit that there existed a "law" without "rules" in world history.

Keywords: law without rules, justice, *gonglun* (public and impartial opinion), *qingli* (situations and reasons), *qingfa zhi ping* (the balance between the crime and its punishment)