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INTERNATIONAL CONFERENCE ON "MODERNITY AND CHINESE LEGAL CULTURE" HELD AT RENMIN UNIVERSITY OF CHINA LAW SCHOOL

The legal reform of the late Qing Dynasty that took place more than one hundred years ago has usually been considered as the starting point of the transformation and modernization of Chinese legal culture. Following that, both the Republic of China's legal system, and the Chinese legal system drawing on Western experience since the opening-up, have been (to a large extent) developed by the purpose of pursuing modernity. Hence, the relationship between modernity and Chinese legal culture is the crucial point in understanding the development of Chinese legal system in modern times, and also a point in comprehending the ongoing legal system construction in a global perspective.

On 26 May 2013, the international conference on *Modernity and Chinese Legal Culture*, sponsored by Renmin University of China Law School, and jointly undertaken by the Research Centre of Law and Globalization and Research Centre of Legal Culture, was held at Renmin University of China. Over fifty prominent Chinese and foreign scholars on relevant topics participated in this conference. During this conference, scholars from Chinese universities and research institutes including Renmin University of China, Peking University, Tsinghua University, Nanjing University, Jilin University, China University of Political Science and Law, East China University of Political Science and Law, Suzhou University, Yunnan University, Minzu University of China, Beijing Institute of Technology, Beijing Normal University, China Agricultural University, Capital University of Economics and Business, Hangzhou Normal University and Chinese Academy of Social Sciences, and also from other prominent universities including Hong Kong University, Chinese University of Hong Kong, University of Macau, National Chengchi University (Taiwan of China), University of Pennsylvania, University of Washington, Indiana University, University of London and Nagoya University, enjoyed an interdisciplinary and comprehensive discussion on various aspects.

The theme of the first unit was *The Comparison on Problems of Modernity*

Between Chinese and Western Legal Culture. Professor ZANG Dongsheng from University of Washington was the moderator and reviewer.

ZHANG Wenxian, a senior professor of philosophy and social science from Jilin University was the first speaker. The topic of his report was *The Modernization of Rule of Law and Litigious Society.* Professor Zhang deemed that litigious society is a necessary phase of the progress of modernization for the rule of law and society. By using statistics, he pointed out that China has already become a litigious society. From his point of view, this is a sign of modernization of the rule of law. He emphasized that litigious society demonstrates the rationality of citizens, rule of law and society, values and authority of modern judiciary, fairness and certainty of law. However, he also contended that litigious society not only represented the modernity of law, but also revealed the chaos of post-modern society.

The second speaker was Professor Jacques deLisle from University of Pennsylvania and the topic of his report was *Institutional Differences and Gaps Between Legal Cultures: Lessons from China-Related Litigation in the US Courts.* In his report, he used several typical cases involving spheres of state's responsibility and state's acts etc., to introduce the conflicts between China and the US's legal culture and system, which occurred to US law courts when they were handling relevant cases. Moreover, he sated his wish for further communication to consolidate the mutual understanding between China and the US.

The last speaker of this stage was Professor ZHU Jingwen from Renmin University of China Law School. His topic was *Another Thinking: Is Chinese Law Opposite to Western Law?* Professor Zhu took a new approach to pursue the traditional proposition that Chinese law is the opposite of Western law. He underlined the so-called respective characteristics of Chinese and Western legal cultures that in fact, are just different approaches that the two civilizations employed when they were facing relevant problems during their social development. For example, in the West, actually there is the problem of maintaining relations in acquaintance society, and Western states will centralize powers as well when they are facing major public crises.

After three speaker's reports, Professor Zang gave his comments. He thought that there were interesting connections among these three reports. If we say that the point of departure of Professor Zhu's report is to question the structure of resemblance theory on Chinese and Western legal culture from socio-legal

perspective, then, in Professor Zhang's report, by sufficient evidence, litigious society demonstrates the resemblances between China and the West in many aspects, and Professor Jacques deLisle used a number of specific cases to show that although there are some technological differences between China and the West, China and the West are similar to each other in many other aspects. Here the problems of modernity have a lot theoretical fiction, and only if we continue to deconstruct them, can we discuss consciously about China and the West with fewer cultural prejudices.

The second unit was *Abroad Perspective on Legal Modernity.* The moderator and reviewer was Professor MO Shijian from University of Macau Law School.

The first speaker was Professor Morigiwa Yasutomo from Nagoya University Law School, and his topic was *The Crisis of Legal Reform in Japan: Whichever System of Legal Education Best Secures Quality Legal Service?* He pointed out that the Japanese high education of law is facing challenges and reform. As a response to the discussion of modernity of law, his emphasis laid upon the difficulties in maintaining balance among pretest, bar exam, and universities' legal education.

The second speaker was Professor Michael Palmer from University of London. In his report *From Social Problem to Rights and Interests Protection: Changing Socio-Legal Aspects of Disability*, he introduced that, in Western states, the mode of legislation regarding protecting disabled people has changed. Contemporary legislation underlines that disability is a concept constructed by society other than a natural medical concept in traditional understanding. Hence, society has the obligation to take measures to protect disabled people and ensure their rights for remedy. On the other hand, in his opinion, China has some degree of improvement on relevant legislation, but that further effort is still needed.

In the review stage, Professor Mo pointed out that the topic of Professor Morigiwa Yasutomo's report is very interesting, but that legal education itself has a definition and expectation. What is more, there is a problem of balancing conflict of interests; universities are part of society and law schools are part of universities. Then, how should we balance all the interests in the society? What is the implication of improving the quality of education? These are the questions that should be considered. Professor Mo also shared his experience in Australia more than twenty years earlier and discussed with Professor Palmer the protection of the rights of disabled people.

The theme of the third stage was *Reflection of the Problems of Modernity from the Perspective of Legal Science.* Professor SHU Guoying was moderator and reviewer. The first two speakers were Professor XU Zhangrun from Tsinghua University Law School and Professor YU Zhong from the Law School of the Capital University of Economics and Business.

The topic of Professor XU Zhangrun was *The Historical Awareness of the Transformation Times.* Professor Xu, from a grand historical point of view, reviewed the most influential political reform of China and analyzed the historical development of China's approaches for answering the crisis of modernity. Additionally, he compared the problems of modernity in China and Germany from ten perspectives. Lastly, he advocated the significance of legal historicism.

Professor YU Zhong criticized the concept of "modernity" itself. This position was clearly revealed in his topic — *Modernity of Law: A Theoretical Fiction.* He thought that, from modern times, God was replaced by modernity, and that modernity has become a spiritual home for scholars. Modernity, as a fictitious concept, has been alienated into an icon, which means modernity became a replacement — a new god in a godless era. From this aspect, lives of modern people are still in the Middle Ages. The reliance on divine authority has few connections with Chinese law, in that people should be critical of modernity. However, Professor Yu also pointed out that although modernity, as a popular concept, has become an icon totem, its fictitious characters do not indicate the concept itself is meaningless. Just like the concept of god, it was fictitious, but significant. The values and meaning of modernity are that, as an artificial relic, it can render meaning for people when the concept of God ceases to function. Modernity can be treated as a reflection of the Western classes since the seventeenth century. Hence, the meaning of modernity cannot be denied.

In the review stage, Professor SHU Guoying pointed out the internal conflicts between the two speaker's academic positions. When Professor XU Zhangrun advocated the historicism, he was trying to understand and analyze the historical trend of China — he concluded that as a historicism's trend. In Professor Xu's analysis, we can see compassion, hope, and optimistic expectation. But in Professor Yu's report, we can see his effort on disassembling the reliance on modernity for China's future. If the concept of modernity is fictitious, how should China proceed in the future? These are the questions we should consider

seriously.

The theme of the fourth stage was *Chinese Legal Tradition and Problems of Modernity.* The moderator and reviewer was Professor LI Xiuqing from East China University of Political Science and Law.

The first speaker was Professor FANG Xiao from Kenneth Wang School of Law, Soochow University. His topic was *Modernity or Chineseness: the Legal Destiny of Calendar since Late Ming Dynasty.* He started his analysis with the relationship between calendar and modernity since the late Ming Dynasty. He thought that, due to the expansive nature of capitalism, modernity acquired the tendency of globalization. However, many places maintain their cultural originality. In the context of the legal modernity of China, the most outstanding manifestation is the destiny and changes of calendar. And from the perspective of the late Ming Dynasty's development, modernity was only in its technological sense. In nature, it is Chineseness.

The next speaker was Professor QIU Pengsheng from Chinese University of Hong Kong. His topic was *The Constitution and Evolution of the Adjudication of Merchant Lawsuits in Suzhou, 1644–1911.* Through problems of the adjudication of merchant lawsuits in Suzhou, he wanted to discuss whether the modernity implicates the fragmentation of tradition or furthers the connection between tradition and development. By reviewing the merchant group of Suzhou, Professor Qiu pointed out that, based on the social reform and development of Chinese society, the factors of modernity entered China.

The last speaker was Associate Professor CHEN Xinyu from Tsinghua University Law School. His topic was *Distinguishing Bifu* (比附) *and Analogy* (类推). In his report, he analyzed the problems of criminal law in Chinese modern reform by introducing the legal technology of *biyin lütiao* (比引律条). Professor Chen thought that *bifu* is a necessary legal technology to settle particular cases. It has sophisticated logical foundation and rule of reasoning in ancient Chinese legal study. In modern times, China abandoned *bifu* and transplanted the Japanese criminal law, which gave judges a far greater power of discretion of penalty. In this situation, many relevant problems emerged. The ancient technology on discretion of penalty — *bifu* — is more cautious, for it ensures appropriate outcome by a review system (覆审制). Hence, there were *Regulations of Penalty* (科刑条例) in modern China.

After lunch, at 1:30 pm, the conference proceeded to its fifth stage: *Legal Reform of Modern China and Modernity*. Professor FAN Zhongxin from Hangzhou Normal University was the moderator and reviewer.

The first speaker was Associate Professor LI Qicheng from Peking University Law School. In his report, *Okada Asataro and Abolishing Analogy in Late Qing Dynasty: Discussion on the Influence about the Evolutionary Theory of Law in Modern China*, he shared his discussion with Okada Asataro's relevant opinions. He pointed out that the abolishing of an analogy system was not the result of accepting the Western legal system passively. On the contrary, it was required initiatively by SHEN Jiaben (沈家本) after his sophisticated reflection on relevant issues. The scholars of the late Qing Dynasty were influenced by the theory of evolution and did not insist on the distinction between China and the West regarding this issue.

The next speaker was Professor DENG Jianpeng from Minzu University of China. In his report, *Transplant, Effectiveness, and Causes of Modern Chinese Legal System*, he focused his study on procedural law and extended his research to the problem of legal transplant of modern China. He pointed out that the Chinese litigation fee regulations were transplanted from Japanese law and German law. After that, legislators adjusted these regulations according to the practical situation, especially the financial predicament. In the end, a system with Chinese characteristics emerged. The process of legislation and constitution is, to some extent, the same story.

Assistant Professor Michael Ng was the third speaker. His topic was *From Order to Orphans — Policing Re-invented in Republican Beijing.* His report focused on the differences of police functions between the late Qing Dynasty/Republic of China and the West. He thought that, in the late Qing Dynasty and Republic of China, police undertook many social tasks. Hence, it would be inappropriate if we examine the police system of that phase solely with the Western modern criterion. This requires us to reconsider the criterion — if the concept of police affairs is narrowly defined, then its function will be easier for it to only remain as a social control mechanism.

The last speaker was Professor ZHANG Renshan from Nanjing University Law School. The topic of his report was *Three Obstacles of Applying Legal Transplant in Modern China*. He thought that three obstacles — the contradiction between the motivation and result of legal transplantation, the distance between

legal text and practice, the distance between the ideal of legal elites and less-developed society — constituted the problems of legal transplant in modern China. He also emphasized that the foundation of laws is the history and culture of the nation, without which the legal transplant is difficult to accomplish.

In the review stage, Professor FAN Zhongxin emphasized that the problems of modernity should be more concrete, either microscopically or macroscopically. He also reserved his opinions for those radical critiques of modernity in former stages. He thought that the idea of modernity is to pursue the enrichment of human society, human dignity, and virtuousness. In the times of Confucius and Mencius had its own modernity, but each time's modernity would not be contradictory to human happiness. Modernity shares some aspects with today's common values.

The sixth stage was *Modern Chinese Laws and Modernity*. The moderator and reviewer was Professor XIE Hui from Beijing Institute of Technology Law School.

The first speaker of this stage was Professor ZHENG Yongliu from China-EU Law School of China University of Political Science and Law. The topic of his report was *Chinese Legal Circle: Cross-Cultural Contemporary Chinese Law & Its Future Trend*. He mentioned that, in modern China, Mainland, Hong Kong, Macau, and Taiwan have self-contained legal systems. Hence, the legal systems of these four places can be concluded as *Chinese Legal Circle*. Moreover, although there are some differences in each place's laws, some basic values, such as human rights and due process, are commonly respected. This phenomenon can be treated as reflecting the unity and the tension between modernity and nationality.

The next speaker was Associate Professor WANG Xiaodan from National Chengchi University (Taiwan of China). In her report, *Oppressiveness and Creativity of Law,* she mentioned the twofold features — oppressiveness and creativity — of law by focusing her research on the victims of human smuggling in Taiwan. She used these two concepts to describe two different tasks of law, which are social regulation and social liberation. In her opinion, the process of China's absorbing the Western legal civilization did not have the feature of social liberation, and the Chinese traditional legal culture had an intensive connection with oppressiveness.

The third speaker was Professor WANG Qiliang from Yunnan University. In

his report, *Social and Legal Consequences of Emergence of Individualization: Liberation, Breakdown, and Plural Challenges*, he pointed out that if legal modernization is only a development with one dimension, which is solely pursuing the wealth of state and economic development, then it will cause fragmentation of values of individuals' living. This one-dimension legal development will not only be incapable of containing plural values and cultures, but also be easy to trigger social instability.

The last speaker was Ph.D candidate ZHOU Enyu from China Agricultural University. His topic was *The State as "Outsiders" — The Role of State during the Identity Boundary and Dispute Resolution of a Southwest of China Mountain Ethnic*. Though his field investigation of the Miao ethnic in Guizhou Province, he demonstrated the difficulty for state's power in entering domestic life. He pointed out that citizens treat the state, to a large extent, as an outsider. In other words, it is the opposite of domestic traditional custom.

In the review stage, Professor XIE Hui concluded that what four speakers' thought of this stage, generally speaking, was united. What he meant was that all speakers were discussing the tradition while they were discussing modern China. Additionally, they were all using the sociological method and their purposes were exploring the choices of China when it is facing modernity. On the other hand, they are plural, which means the subjects, objects (some of them focus themselves on grand traditions and others on minor traditions) and opinions of their research, are plural.

The seventh stage's theme was *Modernity of Laws in Comparison between Ancient and Modern China*. The moderator and reviewer was Professor FAN Yu from Renmin University of China Law School.

The first speaker was Associate Professor GAO Yangguan. The topic of his report was *Re-interpreting the Ancient Law's Reliability and Effectiveness for Modern Law*. In his report, he contended that the ancient Chinese believed that there was universality in human society and that this is the foundation of *He* 和. If we treat characteristic as primary, then we are actually thinking in a contrary way. The practice of Chinese ancient theories shows that, in a long time, Chinese people pursued the harmony and opposed abruption. However, the state of harmony but not uniformity (和而不同) has been reached.

The second speaker was Professor LI Yongjun from Jilin University. The topic of his report was *The Problem of Xiao* (孝) *in Rule of Law and Its*

Theoretical Solution. He thought that the traditional idea of *Xiao* is very different from the modern one. By entering into the modern rule of law society, the idea of *Xiao* faces three theoretical problems: conflicts between identity-type *Xiao* and law; conflicts between the internality of *Xiao* and externality of law; conflicts between the differentiation of *Xiao* and the universalism of law. Hence, only after reconstruction of the idea of *Xiao* can we ensure the peace between *Xiao* and rule of law

The third speaker was associate Professor GAO Hancheng from the Chinese Academy of Social Sciences. In his report, he pointed out that the practice of principle of legitimacy has not been very solid since the legal reform of the late Qing Dynasty. From the system of *Bifu* to the principle of legitimacy, the legal system has denied *Bifu*. But *Bifu* was reserved as a basic method. He emphasized that, in more than 100 years, the principle of legitimacy did not have a good performance in criminal law interpretation. By this kind of interpretation, contents that are contrary to the principle of legitimacy were contained in the principle.

The last speaker of this stage was Assistant Professor YOU Chenjun from Renmin University of China Law School. His topic was *How to Cope with the Situation of "Increasing Cases vs. Judge Shortage": Qing Dynasty, Republic of China, and Modern China Compared*. By researching the historical trend of the problem regarding "increasing Cases vs. Judge Shortage" in Qing Dynasty, Republic of China, and modern China, he conclude several methods and pointed the problem had existed since ancient times. It is not enough to rely on institutional resources to tackle this problem. More emphasis should be placed on using relevant discoursive resources.

Professor FAN Yu reviewed each speaker briefly. The theme of eighth stage was *Problems of Modernity in Chinese Legal Research*. The moderator and reviewer of this stage was Professor XU Aiguo from Peking University.

The first speaker was Associate Professor ZHANG Yan and the topic of his report was "*Searching for the Proportional Construction of Populist View*." In his speech, he pointed out that the populist view played a significant role in Chinese traditional thought and culture and also had various faces. Populist view usually can be treated as *tianyi* (天意) and *minqing* (民情), *minxin* (民心) as well. The task of modern China is to reflect the multifold meanings of the concept — *minyi* (民意) by legal construction and system design reasonably. For example, *minyi* as

tianyi can be expressed by modern language as human rights, and *minqing/minxin* can be expressed as the basic needs of people.

The second speaker was Assistant Professor MA Jianyin from Beijing Normal University. By his report, *Getting Out of the Dilemma of Legal Transplant*, he pointed out that, since the opening-up, the motivation of every reform was by pragmatism or utilitarianism. That means the purposes of every reform were furthering the existence of society, including legal transplant. However, if the disputes cannot be solved fundamentally, the conflicts of values will eventually emerge.

In the review stage, Professor XU Aiguo indicated that Associate Professor ZHANG Yan described Rousseau as the libertarian. However, many people usually treat Rousseau as nationalist. These two views are quite contradictory. Hence, should Rousseau be concluded as libertarian or nationalist? This remains a question. Besides, Associate Professor ZHANG Yan tried to use the form and logic of Rousseau's theory to conduct a research on Chinese problems, which has a potential of omitting the peculiarity of relevant problems. Assistant Professor MA Jianyin's essay is ambiguous on modernity and post-modernity, construction and deconstruction, rationality and irrationality. Assistant Professor Ma should spend more efforts on these questions.

After these eight stages' discussion, Professor MA Xiaohong, who is the director of Research Centre of Legal Culture, delivered a summary speech. She pointed out that the relationship of Chinese laws and modernity is a frontier issue of contemporary academic and also is a fundamental problem of Chinese legal study. Hence, it is significant to discuss this proposition. About the distinction of China and the West, Professor Ma thought that, on one hand, modernity is open and plural, and, on the other hand, Chinese laws have a strong and rich history. Hence, Chinese laws and modernity consolidate each other. Modernity can make the elements of Chinese laws be more diverse and Chinese laws can be more profound due to modernity.

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