法律文化研究

第五辑 (2009)

曾宪义 主编



FALU WENHUA YANJIU

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从传统中寻找力量

——《法律文化研究》(年刊)卷首语

曾宪义

出版发行《法律文化研究》(年刊)酝酿已久，我们办刊的宗旨当然与如今许多已经面世的法学学术刊物是一致的，这就是繁荣法学的教育和研究、为现实中的法治实践提供历史的借鉴和理论的依据。说到“宗旨”两字，我想借用晋人杜预《春秋左氏传序》中的一段话来说明：**“其微显阐幽，裁成义类者，皆据旧例而发义，指行事以正褒贬。”**即通过对历史上“旧例”、“行事”的考察，阐明社会发展的道理、端正人生的态度；记述历史、研究传统的宗旨就在于彰显复杂的历史表象背后所蕴含的深刻的“大义”。就法律文化研究而言，这个“大义”就是发掘、弘扬传统法文化的优秀精神，并代代相传。

然而，一部学术著作和学术刊物的生命力和影响力并不只决定于它的宗旨，在很大程度上，它是需要特色来立足的，需要用自身的特色力争最好地体现出宗旨。我们将本书定名为《法律文化研究》(年刊)有这样几点考虑：第一，我们研究的对象是宽阔的，不只局限于“法律史”，从文化的角度，我们要探讨的

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甚至也不仅仅是“法”或“法律”。我们的研究对象包括法的本身与产生出不同模式的法的社会环境两个方面。因此，我们在考察法律的同时，要通过法律观察社会；在考察社会时，要体悟出不同国家和地区的法律特色之所在，以及这些特色形成的“所以然”。第二，在人类的历史长河中，传统文化的传承、不同文化间的交流与融合，构成了人类文明不断发展的主旋律。一个民族和国家的传统往往是文化的标志，“法律文化”研究的重点是研究不同民族和国家的不同法律传统及这些传统的传承；研究不同法律文化间的相同、相通、相异之处，以及法律文化的融合、发展规律。

因此，我们的特色在于发掘传统，利导传统，从传统中寻找力量。

在此，我们不能不对近代以来人们对中国传统法律文化的误解作一辩白。

与其他学科相比，法学界在传统文化方面的研究显得比较薄弱，其原因是复杂的。

首先，近代以来，学界在比较中西法律文化传统时对中国传统法律文化基本持否定的态度，“发明西人法律之学，以文明我中国”是当时学界的主流观点。对传统法律文化的反思、批判，一方面促进了中国法律的近代化进程，另一方面也造成了人们的误解，使许多人认为中国古代是“只有刑，没有法”的社会。

其次，近代以来人们习惯了以国力强弱为标准来评价文化的所谓“优劣”。有一些学者将西方的法律模式作为“文明”、“进步”的标尺，来评判不同国家和地区的法律。这种理论上的偏见，不仅阻碍了不同法律文化间的沟通与融合，而且造成了不同法律文化间的对抗和相互毁坏。在抛弃了中国古代法律制度体系后，人们对中国传统法律的理念也产生了史无前例的怀疑和否定。

最后，受社会思潮的影响，一些人过分注重法学研究的所谓“现实”性，而忽视研究的理论意义和学术价值，导致传统法律文化虚无主义的泛滥。

对一个民族和国家来说，历史和传统是不能抹掉的印记，更是不能被中断或被抛弃的标志。如果不带有偏见，我们可以发现中国传统法律文化中凝聚着人类共同的精神追求，凝聚着有利于人类发展的巨大智慧，因此在现实中我们不难寻找到传统法律文化与现代法律文明的契合点，也不难发现传统法律文化对我们的积极影响。

就法的理念而言，中西传统是不谋而合的。东西方法治文明都承认“正义”是法律的灵魂，“公正”是法律追求的目标。只不过古今中外不同的文化对正

义、公正的理解以及实现正义和公正的途径不尽相同。法国启蒙思想家伏尔泰说：“在别的国家法律用以治罪，而在中国其作用更大，用以褒奖善行”。西方文化传统侧重于强调法律对人之“恶性”的遏制，强调通过完善的制度设计和运行来实现社会公正与和谐。中国传统法律文化的主流更侧重于强调人们“善性”的弘扬、自觉的修养和在团体中的谦让，通过自律达到和谐的境界。在和谐中，正义、公正不只是理想，而成为可望也可即的现实。

就法律制度而言，中国古代法律制度所体现出的一些符合人类社会发展、符合现代法治原则的精华也应该引起我们的关注。比如，尊老恤弱精神是传统法律的一个优秀之处。历代法律强调官府对穷苦民众的冤屈要格外关心，为他们“做主”。自汉文帝时开始，中国古代“养老”（或敬老）制度逐渐完善，国家对达到一定岁数的老者给予税役减免，官衙还赐予米、布、肉以示敬重。竞争中以强凌弱、以众暴寡在中国传统文化中被视为大恶，也是法律严惩的对象。这种对困难群体的体恤和关怀，不仅有利于社会矛盾的缓和，而且体现了法律的公正精神，与现代法律文明完全一致。再比如，中国古代法律中对环境开发利用的限制也值得我们借鉴。《礼记》中记载，人们应顺应季节的变化从事不同的工作和劳动，春天不得入山狩猎，不得下湖捕捞，不得进山林砍伐，以免毁坏山林和影响动植物生长。这一思想在“秦简”和其他王朝的法律典籍中被制度化、法律化。这种保护自然、保护环境的法律法规，反映的是“天人合一”的观念、对自然“敬畏”的观念及保护和善待一切生命的理念等等，而这些观念与现代法治中的环境保护、可持续发展精神也是吻合的。

在现代法治的形成过程中，从理念到制度，我们并不缺乏可利用的本土资源，我们理应对中国源远流长的传统法律文化充满信心。我们进行研究的目的，也是希望能够充分发掘传统法律文化的价值，从中找到发展现代法治文明的内在力量。

我们也应该切忌将研究和弘扬传统法律文化理解为固守传统。任何一种传统的更新都不可能在故步自封中完成。只有在与现实社会相联系的淘汰与吸收中，传统才能充满活力，完成转型。传统法律文化也是如此，古今中外，概莫能外。

就中国法律而言，现代社会已经大不同于古代社会，我们的政治、经济环境和生活方式已经发生了巨大的变化，古代的一些法律制度和理念在确立和形

成的当时虽然有其合理性，但随着时代的变迁，这些制度和理念有些已经失去了效用，有些甚至走向发展的反面，成为制约社会进步的阻力。在对传统法律文化进行改造和更新时，我们要注意积极地、有意识地淘汰这样的制度和理念，注意学习和引进外国的一些先进的法律文化，并不断总结引进外国法律文化的经验教训。近代以来，我们在引进和学习西方法律文化方面有过成功，也有过失败。比如，罪刑法定主义的确立就值得肯定。1764 年，意大利法学家贝卡利亚发表了《论犯罪与刑罚》一书，对欧洲封建刑事法律制度的野蛮性和随意性提出了谴责，从理论上提出了一些进步的刑法学说，其中罪刑法定的原则影响最大。罪刑法定，即犯罪和刑罚应由法律明文规定，不能类推适用。近代以来，这一原则逐渐为各国刑法承认和贯彻。1948 年联合国通过的《世界人权宣言》和 1966 年的《公民权利和政治权利国际公约》都规定了罪刑法定原则。罪刑法定主义的学说在清末传入中国，此后，在颁行的一些刑法中也得到原则上的承认。然而，由于种种原因，这一原则在司法实践中，或难以贯彻实行，或类推适用一直被允许。直到 1997 年修订刑法时，我国才明确规定了“法律明文规定为犯罪行为的，依照法律定罪处刑；法律没有明文规定为犯罪行为的，不得定罪处罚。”类推适用在立法上被彻底废止，司法实践则在努力的贯彻之中。罪刑法定原则的确立，对促进中国法律的发展和提升中国的国际形象有着重要的意义。

世界文明兴衰史雄辩地证明，一个民族、一种文明文化唯有在保持其文化的主体性的同时，以开放的胸襟吸收其他文明的优秀成果，不断吐故纳新，方能保持其旺盛的生命力，保持其永续发展的势头，并创造出更辉煌的文明成果。其实，近代西方法律传统转型时也经历过一个反思传统——淘汰旧制——融合东西——形成新的传统并加以弘扬的过程。在许多启蒙思想家的法学经典著作中，我们可以看到西方法学家对中国法律的赞扬和批判、分析和评价。孟德斯鸠《论法的精神》、伏尔泰《风俗论》、魁奈《中华帝国的专制制度》、梅因《古代法》、黑格尔《历史哲学》等等都对中国的法律有着精湛的论述。即使现代，西方的法治传统仍然处在变化“扩容”之中，中国的一些理念不断地融入到西方法治中。一些现代欧美法学家或研究者更是将中国法律制度作为专门的领域精心地进行研究，比如费正清《中国：传统与变迁》、C. 布迪等《中华帝国的法律》、高道蕴《中国早期的法律思想》，以及欧中坦《千方百计上京城：清朝的京控》、史景迁《王氏之死》等等。一些中国传统法律的理念，比如顺应而不

是“征服”自然，弱者应该得到或享有社会公正，以和睦而不是对立为最终目标的调解等等在吸纳现代社会气息的基础上，在西方法治体系中被光大。如同历史上的佛教在印度本土式微而在中国的文化中被发扬一样，这些具有价值的思想和理念在中国却常常因为其是“传统”而受到漠视或批判。

因此，我们应该发扬兼容并蓄、与时俱进的精神，在融合中西、博采古今中改造和更新传统法律文化，完成传统法律文化的现代转型。

近代以来，中国传统法律文化的断裂是一个不争的事实，但是，另外一个不争的事实是，近年以来，中国传统文化越来越受到社会的广泛重视。不仅政府致力于保护各种文化遗产，学界也从哲学、史学、社会学等各个方面对传统文化进行研究。中国人民大学首创全国第一所具有教学、科研实体性质的“国学院”，招收了本科学生和硕士研究生、博士研究生，受到国人的广泛关注；此前，武汉大学在哲学院建立了“国学班”，其后，北京大学建立了“国学研究院”和“国学教室”，中山大学设立了“国学研修班”，国家图书馆开办了“部级干部历史文化讲座”。鉴于各国人民对中国传统文化的热爱和兴趣，我国在世界许多国家和地区设立了近百所“孔子学院”。2005 年年底，教育部哲学社会科学重大攻关项目《中国传统法律文化研究》（十卷）正式启动，这个项目也得到国家新闻出版总署的重视，批准该项目为国家重大图书出版项目，从而为传统法律文化的研究工作注入了新的推动力。我作为项目的首席专家深感责任重大。孔子曾言：“人能弘道，非道弘人。”我们希望能从传统中寻找到力量，在异质文化中汲取到法治营养，并为《中国传统法律文化研究》（十卷）这个项目的顺利进行营造学术环境，努力将这一项目做成不负时代的学术精品。

《法律文化研究》是学术年刊，每年出版一辑，每辑约 50 万字，这是我们献给学人的一块学术园地，祈望得到方家与广大读者的关爱和赐教。

Zeng Xianyi

Looking for Strength from Traditions

—Preface of "Studies on Legal Culture"

We have brewed the publication and emission of "Studies on Legal Culture" for a long time. Our aims of originating this publication is to prosper legal education and study and supply history reference and theory basis for law practice in true-life, which is certainly consistent with many other academic publications issued. However, the life and force of one academic composition and publication is determined not only by his aims. In a great extent, it needs to base itself upon its feature and endeavor to embody its aims best by the feature.

Naming this publication "Studies on Legal Culture" mainly base on accounts hereinafter. Firstly, our object of study is broad and not confined to "legal history". From the point of view of culture, what we want to discuss is not limited to "law" or "statute". The object of our study contains law itself and the society circumstances which produce law of different modes. Therefore, while we review the law, we should observe the society through the law. And while observing the society, we should perceive the legal features of different countries and regions and the reasons why the features formed. Secondly, in the long river of the history of human being, the communication and amalgamation of different civilizations and cultures make up the main stream of the unceasing development of the civilization of human being. The tradition of one people or one country is always the symbol of its civilization. Study of "Legal Culture" lays a strong emphasis on the study of different legal traditions of different peoples and nations and the transfer among them, the study of the similarity, connection and dissimilarity of them and the rule of legal cultures' amalgamation and development.

So, exploiting and channeling of traditions and looking for strength from traditions

is our feature.

Hereon, we have to plead against misapprehensions of Chinese traditional legal culture since latter-days.

Compared with other subjects, the legal academic circle's study on traditional culture seems relatively weak. The reason is complicated.

Firstly, since latter-days, the academic circle basically holds negative attitudes to Chinese traditional legal culture, "Carrying forwards the western jurisprudence to civilize our China" is the prevailing view of the academic circle of that time. Rethinking and criticizing of the traditional legal culture accelerate the course of modernization of law of China on one side, and causing the misapprehension of people, made them think that there are "only penalty" but law in ancient China.

Secondly, in latter-days, peoples used to evaluating the cultures by the standards of state power, some scholars set the western mode of law as the standard to evaluate the laws of different countries and districts to see whether or not they are "civilized" or "advanced" . The prejudice in academy not only prevents the communication and amalgamation of different legal cultures, but also causes the antagonizing and demolishing situation between different legal cultures. People hold a unprecedented suspicion and disbelief towards the Chinese traditional legal ideas after abandoning the legal system of ancient China.

Thirdly, affecting by the ethos, some scholars pay too much attention to the "reality" of the jurisprudential study and ignore the theoretical significance and academic value of their researches, and this lead to the prevailing of the nihilism of the traditional legal culture.

For any nation and country, history and tradition are the signs can't be erased, and can not be suspended or abandoned even more, if without bias, we can see that there are collective immaterial aspiration of human beings and huge amounts of wisdoms that is good for the development of human beings which agglomerated in Chinese traditional legal culture, so it is not hard for us to find the jointing point between traditional legal culture and modern legal civilization, and also it is not hard for us to find the positive affection of traditional legal culture on us.

Regarding the ideas of the law, eastern tradition and western tradition happened to have the same view, both the eastern and western civilization of law recognize "justice" as the soul and the aim of the law, but the different cultures of China and the foreign

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countries comprehend justice, fairness and the way to realize justice and fairness differently. Faute, French enlightening idealist said that, "Law was used to punish penalties, but it played a greater role in China by praising and honoring the good deeds". Western cultural traditions pay more attentions to controlling "bad merits" of people, and emphasize realizing social justice and harmony by perfect system designing and function. The prevailing aspect of the Chinese traditional legal culture lies in that it pay more attention to carrying forwarding "goodwill" of people, cultivating consciousness and the humility in organizations, achieve harmony by self-discipline. In harmony, justice and fairness are not only the ideal but the reality which can be imagined and realized.

Concerning legal system, the distillates in Chinese traditional legal system, which accord with the development of human society and the principles of modern rule of law should call attention from us. For example, one of the distillates of traditional law is respecting the aged and protecting the weak. Laws in differently dynasties emphasizing the feudal officials pay special attention to the grievances of the civilians and "find justice" for them. "Providing for the aged" (or respecting the aged) system have been becoming perfect gradually since Emperor Wen of Han, the state decrease or exempt their duty of tax and service, the government organ grant rice, cloth and meat to the aged to show their respecting. Riding roughshod over the weak by the strong and riding over the minority by the majority was treated as flagrant crime and are the objects the law punished rigorously. The solicitude and care for the disadvantaged groups is not only good for alleviating the social conflicts but also reflects the justice spirit of the law, and is in accord with modern legal civilization. Another example, which is worthy of our studies, is the limitation of exploitation of the environments in Chinese ancient law. It is recorded in the〈Liji (Book of Rites)〉that people should engage in different kinds of works according to the variation of seasons, going into the mountains for hunting, going to the lakes for fishing and going to the forests for cutting are prohibited during spring in order not to affecting the mountains, the forests and the growing of the plants. This idea had been institutionalized and codified in "bamboo slips used in the Qin Dynasty" and ancient books and records in other dynasties, this legal provisions to protect the nature and the environment reflect the "God and man are one" idea of the legal philosophy, the "reverence of the nature" idea in etiquette and custom, and the idea of protecting and being kind to all lives, etc. And such ideas are in accordance with the environment protecting and sustainable development in modern rule of law.

During the forming course of the modern rule of law, we do not lack local resources which can be used by us from ideas to systems, we should have confidence of China's long-living traditional legal culture. The aim of our study also hope to exploiting fully the value of the traditional legal culture and finding the inside impetus for developing modern civilization of rule of law.

Of course, we should avoid from apprehending the study and carrying forward traditional legal culture as keeping to traditions. Renovation of any tradition can not be accomplished in isolation, only in eliminating through selection and absorbing connected with real-life could the tradition throb and accomplish the renovation. Without exception, traditional legal culture is in the same way at all times and in all over the world.

For Chinese law, the modern society is already much different from the ancient society, our political and economic circumstances and life style also have changed hugely. Some ancient legal systems and ideas had rationality in times they were established and formed, but with the vicissitude of times, some of them have lost their usefulness and even gone to the contrary side of development, which became resistance to the progress of society. While the traditional legal culture is altering and renovating, we should regard eliminating such system and idea, learning and importing some western advanced legal culture and summarizing the social effect, experience and lesson after the importation of western legal culture. In latter-days, we have both success and defeat in the aspect of importing and learning western legal culture. For example, the establishment of the principle of Criminal and Punishments are all Stipulated by Law is worthy of affirmation. In 1764, Beccaria, an Italy jurist, published the book of *On Crimes and Penalties* which condemned the wildness and arbitrariness of European feudal penal legal system. This book brought forward some advanced penal theory, thereinto, the principle of Criminal and Punishments are all Stipulated by Law had the most influence. Criminal and Punishments are all Stipulated by Law, that is, crimes and punishments all should be stipulated in writing by the law and can not be applied by analogy. Later on, this principle has been acknowledged and carried out. This principle was written into both the "World Declaration of Human Rights" passed by U. N. in 1948 and the "International Covenant on the Civil and Political Rights" passed in1966. Theory of Criminal and Punishments are all Stipulated by Law was introduced into China at the end of Qing Dynasty, and after this, was acknowledged by many editions of criminal law in principle. However, for various reasons, this principle was difficult to be implemented,

or application of analogy was always permitted. "One behavior should be given sentence and punishment according to the law only when the law stipulates it as a crime definitely; otherwise, it should not be given sentence and punishment" had not been stipulated definitely in law until 1997 when Criminal Law was amended. Thus, application of analogy was abolished thoroughly by legislation and judicial practice also strived to carry it out. Establishment of this principle attached great significance to promoting the development of Chinese law and advancing Chinese international image.

History of prosperity and decline of the world civilization proved eloquently that a people or a civilization could hold its hearty life, keep the tendency of perpetual development only if it absorbs excellent fruits of other civilizations and get rid of stale and take in the fresh unceasingly while keeping subjective initiative of itself civilization.

In fact, the eastern legal culture and the western legal culture both experienced a process of rethinking of traditions—eliminating old systems—amalgamation of the eastern and the western-forming and carrying forward new traditions. From many legal classical works written by enlightening thinkers, we can find praise, animadverting, analysis and evaluation of Chinese law made by western jurists. There is splendid discussion about Chinese law in *The Spirit of Laws* written by Montesquieu, *On the Custom* by Faute, *The Autocratic System of Chinese Empire* written by Quesnay, *The Ancient Law* written by Mein, *Philosophy of History* written by Hegel and so on. Even in latter-days, western legal traditions are still changing and the content is still enlarging, and some Chinese ideas are being melted into western laws continually. Some occident jurists and investigators even regard Chinese legal system as special field and study earnestly, for instance, *China: Traditions and Vicissitude* written by Fei Zhengqing, *The Law of China Empire* written by C. Buddy, etc., *Legal Thoughts of Early China* written by Gao Daoyun, *Leave No Stone Unturned to Go to Beijing: the Accusation in the Capital in Qing Dynasty* written by Ou Zhongtan, *The Death of Wang* written by Shi Jingqian. Taking in breath of modern times, some Chinese traditional legal ideas such as the idea of not "conquering" the nature but acclimation, the idea of the feeble deserving and taking social justness, the intermediation which aims at harmony rather than opposition and so on are carried forward western legal system. However, like Buddhism which declines in India but is carried forward in Chinese culture, these valuable thoughts and ideas are often disregarded and animadverted because they are "traditions".

So, we should develop the spirit of incorporating things of diverse nature and ad-

vancing with times, rebuild and renovate traditional legal culture in not only the amalgamation of Chinese culture but also western culture and the blend of ancient culture and modern culture, and accomplish the modern transfer of traditional legal culture.

In recent years, the rupture of Chinese traditional legal culture is a fact without doubt. But another fact is that Chinese traditional culture has been calling for more and more attention from different areas of society in recent years. Not only the government set their mind on protecting all kinds of cultural heritages, the academe also pay their attention to researching on the cultural heritages from philosophic, historical and sociological aspects. Renmin University of China established its "Guoxue school", and Peking University and Zhongshan University established "Guoxue Schoolroom" and "Guoxue researching and cultivating class". Nowadays, the central government set up "history culture lectures for ministerial officials". And many "Confucius College" have been established in many foreign countries by our state. By the end of 2005, "Research on Chinese Traditional Legal Culture" (ten volumes), which is the "project of states' key book publication" of the ministry of communication of the Central Committee of the Communist Party of China together with the General Administration of Press and Publication, also "the important project to tackle the key problems of philosophy social science" of the ministry of education, formally started, and this inject new impetus to the researching work of traditional legal culture.

As the chief expert of this project, I realize the magnitude of responsibility deeply. Confucius ever said: "The human can carry forward the rule, other than the rule can carry forward the human." It is expected to find strength from traditions and absorb legal nutrition from heterogeneous culture. We also hope we could build academic atmosphere for the project of "Research on Chinese Traditional Legal Culture" to go on wheels and strive out academic extract through this project. We set up the "Studies on Legal Culture" in order to offer an academic garden plot to academicians and look forward to concern and instruction from academicians and readers.

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