Law and the Chinese in Southeast Asia

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M. Barry Hooker

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PREFACE

This collection of essays emanate from a conference held at the Australian National University in 1998 on the subject of "Law and the Chinese Outside China." As it happened, the majority of the papers were concerned with the Southeast Asian diaspora Chinese, particularly in French Indochina and Vietnam, Malaysia, Singapore, and Indonesia; these areas are the main foci of this collection.

Two things very quickly became apparent from the material. First, from the legal perspective, it falls into one of three classes. These are: (i) Chinese legal thought outside China, (ii) laws *of* the diaspora Chinese and (iii) laws *for* the diaspora Chinese. In chapter 1, I attempt a detailed description of this classification.

Secondly, the idea of "Confucian" or "neo-Confucian" appears in a number of guises. It may be that a more purely analytic rather than merely descriptive study of diaspora Chinese law could usefully concentrate on this usage.

The authors and I are well aware that this collection is a preliminary contribution to this subject and that much remains to be done, especially in the West and South Pacific. Do our initial three classes hold up, and what of "Confucian" in these areas?

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LAW AND THE CHINESE OUTSIDE CHINA

A Preliminary Survey of the Issues and the Literature

M. B. Hooker

INTRODUCTION

"Law and the Chinese outside China" was the subject of a conference[1] held at the Australian National University on 1–4 July 1998. The focus was the laws relating to those of Chinese descent who live outside China, now often called the "diaspora Chinese". We have avoided the term "Overseas Chinese" which implies residence (longer or shorter) outside China. It is misleading because the great majority of the 20 million or so diaspora Chinese are, in fact, long-term citizens of the Southeast Asian and Western Pacific states in which they are concentrated. They are not citizens of China, and it is not uncommon to find many families who have resided for hundreds of years in Southeast Asia, and are loyal to those states.

For this volume a number of revised papers have been selected for publication.[2] The selection has been difficult because of the complexity of the subject. This introductory chapter will give a brief overview of the issues discussed in the following chapters. The study does not pretend to be

exhaustive; as far as is known, law and the Chinese outside China has never before been approached as a single subject for extensive discussion.

The Geographical Area

In this volume we are concerned with that geographical area in which Chinese law, in one of its forms, has become a vital part of the legal heritage. Broadly speaking, there are two areas. The first consists of Japan, Korea and Annam (Vietnam). These are the modern states in which, historically, the Chinese legal legacy has played a determining intellectual role. Each state has taken elements of Ming and Qing legal thought and adapted them for its own use (see below).

The second comprises the states of what is now called Southeast Asia, where the vast majority of the diaspora Chinese now live and have lived for several hundreds of years. From west to east, the states are: Burma (Myanmar), Thailand, Laos, Cambodia, Vietnam, Philippines, Malaysia, Singapore, Brunei, and Indonesia.

The West and South Pacific (the United States and Canada, Australia and New Zealand, and the Pacific Islands) are excluded because at this stage this area probably replicates the trends already experienced in colonial and post-colonial Southeast Asia. The South and West Pacific Chinese legal diaspora may of course become a field for further study but for the time being, they are excluded here.

Law and Society

Much, if not most, of the material on the diaspora Chinese is to be found in the disciplines of history, sociology, and economics. These are valuable sources.[3] They often mention, explain, and to some extent summarize legal materials[4] but not in a systematic way. In addition, they tend to concentrate on the politics and economics of the diaspora Chinese, especially for the post-World War II period. Nevertheless, these studies are essential.

Concepts of Law: The Chinese Contribution

When we speak of the laws of China outside China, or the laws of the Chinese — Chinese law and custom, or laws applied to the Chinese — we are talking about hybrid or mixed systems. There is no one source for any of these laws. Instead, we have different sources, different ways of thinking about law, and different forms in which it has come to be expressed over six hundred years and in ten languages!

The form and expression of Chinese law is relative to time and place. There is no such thing as *a* diaspora Chinese law. Failure to recognize this has led to some confusion in the past, and nowhere more so than in the *forms* of law. From the fourteenth century to the end of the twentieth century, there have been much misunderstanding about Chinese law and legal thought. It is important to be specific as to time and place. Here, the more general questions will be examined. These include the subject of hybrid laws, of legal borrowing, and of the complex expressions of "right", "obligation", "wrong", and "duty". All of the Chinese diaspora laws are concerned with this and related issues, as will be shown later.

Hybrid Laws/Legal Pluralism.

The "laws of China" and the "laws of the Chinese" have existed outside China for the past millennium, if not earlier. They have not remained unchanged in their new homes in Southeast and East Asia. They have, instead, become "localized". To quote Professor Oliver Wolters:[5]

> The materials, be they words, sounds of words, books, or artifacts, had to be localised in different ways before they could fit into various local complexes of religious, social and political systems, and belong to new cultural "wholes".

Professor Wolters was actually speaking of Indian historical materials, but the proposition is equally true for law, including Chinese law.

The study of hybrid laws and legal pluralism has for the past twenty years or so become an important subject in its own right. It has today become central in the field of economic development in the newly developing countries and in the area of human rights. This is quite obvious to the legal observer. In their modern laws, the genesis of legal pluralism lies in the high imperialism of the nineteenth century when European powers reigned supreme. Not only were they supreme in politics, economics, and militarily but also intellectually, and this last is particularly clear in law. European laws were imposed directly (as in imperial possessions) or indirectly (as in demands made through treaties of extra-territoriality). The result was more or less the same in both cases; it was the subjection of the Asian law to European selection, validation, and indeed a new definition of law.[6]

There is a related issue which should also be mentioned here. This is extra-territoriality, the device by which European laws were imposed in Asia from the mid-nineteenth century onto ostensibly independent states. The examples are China, Japan, and Siam. The issue is one of sovereignty. There is no general history for the area.[7]

Legal Orientalism

This is a term used to describe the problems one faces in understanding "Asian law". As such, it begs the question: what (is) "Asian Law"? Various attempts have been made to answer this question in recent years, including the radical response which says that "Asian law" is merely a construct in the mind of a Western observer and so is subjective to a degree, which renders it without meaning. This issue has been discussed in detail elsewhere.[8] For now, we must recognize that the East and West have been in legal contact for the last two hundred years or more. There is no longer a "pure Eastern" or "pure Western" legal thought. To suppose otherwise is to fly in the face of the evidence. It is a fantasy to suppose that an "Asian" and a "European" legal system can be distinguished. We can, of course, point to cultural *elements* or culturally defined *forms* of law(s) but at the end of the twentieth century, there is now a common discourse about law.

Secondly, we must recognize the existence of legal and cultural pluralities. We have three for China and Chinese law, and these will be discussed now. First, let us list out some key terms: culture, historiography, re-definition of law, diffusion of law, sovereignty, and legal pluralism. These constitute "legal orientalism" and also serve as its antidote.

Chinese Diaspora Law(s)

These laws appear to fall into three groups, or approaches to the subject.

1. The law(s) of China outside China. This means the influence and effect of classical Chinese legal thought in Japan, Korea, and Annam. There is a secondary reference in the nineteenth century to Western imperial powers in which the British, French, and Dutch considered whether or not the laws of China had a part in the imperial possessions. In the event, the decision was that they did not and could not be relevant for nineteenth century imperial mercantilism.

2. Chinese law(s). This means Chinese "custom", "manners", "religion". "way of life", and other related terms. Essentially, it means those customs to which the Western powers were prepared to allow a legal effect as a law "personal" to the ethnic Chinese.

3. Laws applied to the Chinese. These are the regulations directed at the ethnic Chinese, which are mostly concerned with taxation, restrictions on immigration, travel, occupation, education, publications, and culture. In short, they include all of those matters which have a financial or

political aspect where the Chinese have been (and still are) seen to be a threat or competition to the established order.

LAWS OF CHINA[9] OUTSIDE CHINA

This is a large and complex subject area and I have divided it into two parts which are related but which must be kept separate for now. These are, firstly, on Chinese claims to suzerainty and its legal expression, and secondly, the adoption of Ming and Qing codes outside China.

Suzerainty

Imperial China's claim to suzerainty over its neighbours has been a consistent feature of Chinese history. It remains alive today well into the twenty-first century; the Chinese government's claims in the South China Sea are a current example. It is a complicated question in international law. While this is not a primary concern here, the Chinese official view, through history, of the legality of Chinese claims is also relevant because it indicates the Chinese view of law.

The literature in the European languages on this matter is rather sparse. The main evidence is in the Chinese sources. Perhaps a word of caution: the question of suzerainty, historical or contemporary, is always one of politics, and the literature is always interpreted in this light. Motives range from national prestige to calculated economics. The typical form in which this was expressed was through "tribute" and its commonest manifestation was in the receiving of a tribute mission by the Imperial Government. The mission would bring presents of varying value and, in return, would receive presents *and* an acknowledgment that the polity it represented was a legitimate one. From the point of view of the embassy, this served one purpose: legitimation by a highly formal and legalistic ceremonial. The best short general introduction is in Professor Wolfgang Franke's seminal paper,[10] published in 1989.

In this paper, Professor Franke makes two points. First, the acceptance of a barbarian (that is, non-Chinese) embassy was a confirmation of the superiority of China and a general suzerainty of the Emperor of China. This did not necessarily translate into actual rule over the embassy-giving states; indeed it was rather rare that this occurred. The objective was to overawe the border peoples and to attract them to the higher (Chinese) culture and, thus, neutralize any threat on the borders. The success of this policy varied from time to time. Secondly, the cultural superiority, even arrogance,

historically shown by Imperial China, while quite understandable in a number of respects, also had its drawbacks. The most important, from our point of view, was the belief that Chinese legal thought, and legal forms could and should be transplanted in their pure forms to neighbouring cultures, especially in Korea, Japan, and Annam.

Serious attempts to do this were made from the thirteenth century until the early nineteenth century. It was never completely successful (see the section below on the classical texts outside China). However, suzerainty was from time to time a viable system for the control of the border areas.[11]

The contemporary version of suzerainty is to be found in modern international relations. This is outside the scope of this chapter but one should be aware of it. The example which comes to one's mind is the Chinese claim to the South China Sea and its islands and resources. The merits and demerits of these claims are secondary for us. The primary issue, and one around which an extensive and mutual miscomprehension arises, is the nature of international law itself.[12]

The Classical Texts Outside China

The reference here is to the Ming and Qing texts. The illustrious civilization of China had and still has a deep and abiding effect on the neighbouring civilizations of East and Southeast Asia.

Korea

The law, legal thought, and legal practice of pre-modern Korea are often described as "neo-Confucianism". The adjective obscures more than it explains but it appears to have an identifiable set of referents.

First, it is taken in the context of the adaptation of Ming codes based on the legislative and judicial records of the fourteenth to eighteenth centuries. These illustrate the status of the élite in society, the sovereign, and the law and duties of the population in rendering services — in short, analyses of the traditional polity and social structure.[13] Secondly, the adaptation of Chinese laws has become a feature of Korean legal-historical scholarship.[14] Finally, the issue of the "great" versus the "little" traditions has become an important topic in Korean legal studies. The debate over traditions first began in the 1960s, and has remained important in East and Southeast Asian studies generally.[15] The view that it is the "Great Tradition" which essentially determines the expression of the intellect, including the legal intellect, is still commonly held. The relationship

between this position and the originality of the so-called "provincial" legal cultures is still much debated.[16]

Japan

The Japanese debt to Chinese legal thought is of course immense, and there is a huge literature in the Japanese language.[17] From the point of view of comparative law, a number of interesting topics have come to dominate the issue from the late 1980s. The first is the proposition that a major function of the imported thought was to provide stability through adopting the Chinese bureaucratic method. Perhaps the implication here is the precarious nature of government in pre-modern Japan. At the same time, Japanese practices and customs were not abandoned so that a complex set of rules developed from the interplay between Chinese and Japanese principles regarding the state, the individual, and the law.[18]

Secondly, modern scholarship is increasingly devoting attention to the vexed question of precisely what did Japanese scholars know of the laws of China in the pre-modern period(s). While the issue can be viewed[19] as simply an access to information, it is more likely to involve an investigation into how and why the Japanese authorities *chose* from the available Chinese materials. Professor Dan F. Henderson provides an especially valuable account[20] because it demonstrates three points, which can often be overlooked in the whole question of diffusion/borrowing from one legal tradition and settling its principles of reasoning into another. The first is that "Tokugawa borrowing was eclectic and subject to Japanese adaptation". This is now an obvious proposition but the complexity of the diffusion certainly went unrecognized for a considerable period of time. The consequences of this lack of recognition have been unfortunate. Secondly, borrowing from specific Chinese laws was not wholesale but rather narrow (penal laws), and even then it was confined to specific geographical areas rather than being Japan-wide. Finally, there are problems in dating the reception/diffusion/borrowing. These difficulties are real because they determined that which was translated. A result was that later developments, or reformulations in China, did not necessarily come through to Japan in the eighteenth century. Whether this is of any significance is yet to be determined.

Annam (in Vietnamese, Dai Viêt)

For many years, the study of Chinese legal thought in Vietnamese texts was conditioned by nineteenth century French colonial work.[21] Plainly, the

assumption was that the historical materials — the Lê Code of the fifteenth century and the Gia-Long Code of 1813 — were "Chinese". This way of putting it is now known to be very misleading because it assumes the primacy of the "Great Tradition". However, the Annam case against this position is much weaker than the (now) contemporary Indian and Islamic histories.[22] For the 1813 Gia-Long Code, the written text is a plain copy of the Chinese. The fourteenth century Lê appears to have some indigenous features but one has to search hard for them.[23] Essentially it, too, is "Chinese".

LAWS OF THE CHINESE

The reference here is to the laws, practices, customary laws, and personal laws which the Chinese applied to themselves or were applied to them. The British and Dutch Chinese-customary laws are the best known. The immigrant Chinese took with them their customary practices, and these have both historical and contemporary significance. In the past, it was normal to treat these customs as only a part of colonial law, or as examples of the colonial legal policy. This is too narrow a view. My belief is that Chinese customary law, both within the Chinese community and as an aspect of the integration of the Chinese into the wider East and Southeast Asian world, is an essential part of diaspora history. In this respect, it has been quite neglected. In addition, it should be remembered that Chinese customary law persists (in concepts such as Li) despite attempts by various states to "reform" or limit its effects. There seems to have been a consistent movement in post-war Southeast Asia to really eliminate Chinese customary laws. These are mainly in the area of family law and charitable trusts, but also trusts involving "Chinese religion" about which there is no agreed certainty. The question is why the modern states, even those such as Singapore which have a Chinese majority population, wish to do this. If there is a new morality abroad, then this has yet to be explained. What about the much vaunted "Confucian values", or are these, whatever they are, inappropriate for Chinese customary law and the new nation states? Before we can answer this question, we have to know what these laws are.

It is the customs of the diaspora Chinese which have attained legal recognition in territories which, until recently, were the preserves of the British, Dutch, and French imperialisms in Southeast Asia and in Hong Kong. After the end of Empire and independence, these laws continued to be used in some places. However, the histories are varied. We can take the earliest date at about 1700 (in the Netherlands East Indies) and our latest in Malaysia