

# Comparison of the Differences between Chinese and Western Legal Tradition

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**Abstract:** Legal tradition is an organic continuation of the characteristics of the legal aspects of the law. At present, our country is still difficult to completely get rid of the Chinese legal tradition and legal modernization of the tangle. From the differences of historical and traditional law on Chinese and Western China will have more differences in the legal form, legal technology and legal content. From the perspective of the judicial system and judicial process, there are obvious differences. In addition, in the West in the legal tradition of closed and open and the differences in the concept of litigation is also more obvious. Through the deep analysis of the causes of these differences, it can have a clear understanding of the Chinese legal tradition.

**Keywords:** Legal tradition; China and the West; Differences; Comparison

## 1. Introduction

Legal tradition is a hot word in recent years. Under the background of the construction of rule of law, it is hard for us to get rid of the entanglements between the tradition of Chinese law and legal modernization, which the traditional legal science localization hindered, so the traditional legal fate or choice of naturally become the urgent need to explore the problem, then what should we take what kind of state of this change? The author believes that the method of comparative study of Chinese and western legal tradition is no doubt effectively. As Harold J. Berman said in his masterpiece, "law and revolution", to "get rid of the current predicament". "I had to from a historical perspective, in-depth study of law and the rule of law, order and justice of Western tradition." [1] Therefore, this paper tries to let us more clearly understand their own legal traditions through the comparative study of Chinese and western legal traditions of, which can accurately grasp the rule of law and the construction of the "danger" and "machine, for the construction of the rule of law further to remove obstacles in understanding or ideas.

## 2. The Meaning of Legal Tradition

Before comparing the Chinese and western legal traditions, we might as well understand the traditional meaning of the law. Some scholars believe that the so-called legal tradition, is refers to the human in the historical process to summarize the phenomenon of legal thought, emotion, value judgment and behavior. This change on later social and legal development plays an important effect. [ 2 ]Some scholars believe that the legal tradition refers to the generation of the generation of the concept of the law, the sum of the system. [3] and scholar thinks, "it is a kind of serving as a link between the past and the

future and in the continuous development of historical inertia, it is the historical starting point of the new social and legal development, it not only affects the current each field of the society, but also restricts the long-term development and the process of social legal culture, it has shaped or invisibly affects the future development of social law." [4] on the basis of the above analysis, we can see that legal tradition is a by the product of history, it has independent and complexity, originated in the human history, and affects human's thoughts, spirit, behavior and habits.

Therefore, the author believes that the legal tradition as a kind of historical tradition, it has a great impact on people's freedom of logical thinking. If from a historical point of view to look at legal tradition, it mainly consists of a national, regional or national law in thinking and understanding, it specifically towards the legal social attitudes, cultural thought, belief in the concept and system of traditional and so on. In historical heritage in the process, the historical and legal tradition of a national, regional or national may will be affected by the impact of foreign culture, or the influence of other cultures, such social culture presents the trend of diversified development. Therefore, the study of a country, region or nation's historical and legal traditions, needs from the perspective of comparative analysis. Although our country has been impacted and influenced by foreign culture in a certain historical period, it basically keeps the traditional thinking of the Chinese nation. From the historical effects of traditional Chinese and western legal differences will be found that China and the West in the legal form, legal techniques, legal content has a major differences; starting from the perspective of judicial system and judicial procedure, we can found there was a significant difference; in addition to this, in the West in the legal tradition of

closed, open and litigation idea difference is also more obvious. Through the deep analysis of the causes of these differences, it can have a clear understanding of China's legal tradition, so as to give some enlightenment to the modernization of the rule of law and the construction of the rule of law in China.

### **3. Comparison of the External Forms of Legal Tradition**

#### **3.1. Legal form, legal technology and the difference of the content of the law**

From the perspective of legal form, China's legal tradition has a long history. According to historical records, as early as the Western Zhou Dynasty, has a legal, which also reflects on the rites of Zhou, but with content remains unclear. To the Tang Dynasty, the ancient Chinese feudal law more perfect, "tanglvshuyi" become the sign of the mature legal, it is the legal representative, the in writing style, the main contents, legal terminology and legal interpretation and so on, is the development of ancient statute of crystallization, and went on to become model to follow the law in future generations, and exert a certain influence development of legal system of neighboring countries, such as Korea and Japan. However, because human reason is limited, so these laws exist and inherent defects, so people in the law enforcement process had to comment or explain these laws. And the legal tradition of the western countries is mainly the tradition of case law. This is based on the combination of non grammar and grammar as a supplement. Western legal tradition has made up the deficiency of case law to a certain extent, thus further consolidating the inherent tradition of case law.

From the point of view of legal technology, China on the law applicable to technical or logic thinking method is mainly adopt the mode of "syllogism" type. From the big mention of the premise to the conclusion of the logic application, which does have the efficiency of justice, but also tend to cause the injustice of the judicial decision. In the process of law application, the main use of analogical reasoning, which is a kind of horizontal and vertical multi-dimensional comparison, the objective is more able to achieve the justice of the judicial decision.

From the point of view of legal content, the laws of the people's Republic of China from the point of view of its content more involved is the nature of public law, its maintenance is the welfare of the public interests and the collective, and rarely thoroughly involved to the individual and the private power stressed and protect. In accordance with the legal department to divide words and Chinese legal content more is placed on the use of criminal law and private law often shrouded in the severe haze, so traditional severe punishment has become the one of the features in Chinese ancient legal system. In compari-

son, western law more prominent the protection of individual rights, adjust more and the rights and obligations between the equal main body, and the private sector in the architecture of the whole legal system undoubtedly occupies important component.

#### **3.2. The difference between the judicial system and the judicial procedure**

From the judicial system, the implementation of the ancient China is the integration of judicial administration. Under the influence of administration, the administration of justice seems to be a subsidiary, and its independence is not guaranteed. Although in different dynasties was the establishment of the such as punishment, Dali temple, Dou Chanyuan etc. special judicial organs, but in the final analysis judicial cases in the final decision is not in the hands of these departments, and the monarch has the highest judicial power and administrative power. Is the point of view of the new era, although China began to explicitly declared the independence of the judiciary and in the form of the constitution cited. However, in fact, between them there are still lingering. In the form of decentralization, but in essence it is difficult to truly achieve the balance of power, especially for the limit of the highest power. In contrast, the western system of justice, law they have is essentially independent, their third in discrete system and power balance principle is in a great extent guarantee the judicial independence and the judicial authority, there will not be further explore the reason and the background of the formation.

From the point of view of the judicial procedure, our judicial process is often accompanied by a strong administrative color, lack of their own unique program design and strict procedure consciousness and follow the customary, and judicial procedures are an inherent habits. Is judicial operation, if indeed being compliance program, orderly behavior, so it is difficult to form a big impact, so judicial procedure is difficult to become a compliance with a universal rules. In addition, it is often uncertain characteristics change, which leads to the vulnerability of awareness program. And in the western judicial operation, the importance of the program even more than the legal entity attention. Therefore, the West has the legal tradition of "light weight program entity, the legal tradition of China" heavy entity light procedure "and the formation of contrast. As Webb put forward in the form of rational legal concept, which made clear requirements on the law itself, but also on the process of the application of the law to give a clear interpretation of the procedures. This is reflected from the other side of a common rule between China and the west. The difference between Chinese and western in the judicial process is also reflected in the other mode, that is, the dominant mode of the judge and the judge's neutral mode or the judge intervention mode. In China in the administration of justice, the judge in the

promotion of the judicial process plays a pivotal role, all follow the judge's orders, so the judges tend to really determine the effect of the atmosphere and judgment of the court; and in Western court trial, the judge often plays a debate evidence legal fact a confirmatory role, and both cases when talent is a judicial decision of the real movers, so judges loyal also only the law only. In the deep sense, it reflects the differences between Chinese and western judicial philosophy and humanistic spirit.

### **3.3. The difference between the closed and open law tradition**

From the perspective of development, the development of China's law has been in a relatively closed state. The pursuit of national formation for one of the main line, a reason, which is conducive to the development of national culture, the legal tradition. But on the other hand, the negative impact is closed a "indulge in self-admiration". By contrast, the development of the western law, has always followed the open state and always pay attention to keep law on foreign exchange and fusion, and in this process continue to achieve self update and improve, sublimation and developed, also provide an inexhaustible source of power for realization of this objective. Is to Roman law. The reason in the 11th century revived and become the source of the European continent, said from some kind of meaning. This is because Roman law has always maintained an open attitude, the internal and external exchange and eclectic, so successfully processing the dialectical relationship between the law of open and closed, nationalization and internationalization. Although the medieval Europe in the early development of a certain degree of closure, but with the gradual development of the capitalist economy, the closure of the obstacles are gradually being broken. In addition, the peoples of Europe is also good at in the law making process from each other, so European countries often pay more attention to the variety of absorbing the essence of alien or foreign legal culture. As can be seen from the history of the development and impact of the law of Rome, the influence of the nation, the country and the region is very much. On the mutual fusion of continental law system and common law can be seen, the difference between the two is gradually reduced, and tradition of case law in the statute law began to develop, and play an important role, which further illustrates the western law has the open.

### **3.4. Differences between Chinese and Western procedural ideas**

The concept of litigation is an important part of the legal culture of a country, a nation or a region. It has a close relationship with the development of the legal system and the degree of development. It mainly refers to the people's perception of the litigation system and the litigation phenomenon, as well as the use of litigation to re-

solve disputes in the desired value or trust. From this perspective, China's traditional concept of litigation is "tired of litigation", "shame sues" tradition, this and Chinese ancient administrative power first, people to obey to the obligations of traditional has important links and therefore can be defined as "tired of litigation"; and Western countries with as many of the productivity acceleration, the liberation of thought and the enlightenment, leading to rising awareness of rights, so esteemed by people in a civilized manner to resolve the conflict, so the traditional western concept of litigation is more biased is "inclined to litigation. Such as the famous Japanese jurists Gashige Susan that "throughout the history of the world, can say the European legal culture is very unique.[5] But it needs to be noted that the "good" and "dislike" is not an absolute final word, but a tendency.

## **4. The Reason of the Difference of Law Tradition**

### **4.1. Human nature and good and evil angle**

"Whether in China or in the western scholars have tried to from humanity seek to understand all phenomenon of the key, and on the assumption of human nature, launched their own research and development of his theory. [6]This article also may wish to make the analysis from this angle, in order to explore the human nature to the Chinese and western legal tradition influence. From the human nature assumption, the traditional law is mainly Chinese adhere to human goodness, we believe that human nature is good, and is a world of beauty and good crystallization, although the survival needs of human resources and social disharmony between, which tend to produce order confusion, but in moral education and the adjustment of the sage system specification, we believe that sin and chaos can be eradicated, so people will eventually be perfect, although there are some people insist on the evil of human nature or humanity and views, such as Xunzi, Dong Zhongshu, Zhu Xi et al., but it has not been dominated by traditional and Western influence; the religion of "original sin", the main tone of the theory of human nature is more inclined to adhere to the evil of human nature -- such as Hobbes in the "Levitan" that the evil of human nature, he thinks everyone Be a self serving. As the ancient Rome jurist Searl Su Shi said: "the law is good and just the technique", but this idea is not the main. Based on this also directly affect the understanding of the relevant issues in the law and understanding, especially on the causes of crime, the origin of the law and the role of the law, etc.. The good and evil of human nature theory and the western "original sin" is standing in a different perspective to explain the root causes of crime, which leads to different results. And Western countries, there is a supreme judge of God, while China's trial is one of their own, this is invariably

related to the west of religion and the development of different understanding, but which also affects the both Chinese and western in the belief of law and the power check and balance.

Based on assumption of the human nature of good and evil in western theory to examine the legal role, in Chinese legal idea, the original law is generally considered to be saints to public welfare and created tools to prevent riots, and the saint is representative of the perfection of the human nature, and independent position and value of the individual is often impossible to reflect, individual more should be subordinated to the overall, obedience to the sovereign and the royal power. We cannot emphasize individual rights, which also affects the later one lawsuit idea; and in the western legal conception, who is as the independent existence of the individual, society, and an important part of the organization. The main purpose of the law is to ensure the orderly social life and scientific to meet as a person's individual needs, in order to construct "rights based" social and restriction of public power and the protection of people's freedom and rights. This can be seen from the legal content, judicial process, judicial system and so on, which can be seen in the impact of the judicial effect and even the social effects of different. China's main emphasis or sage rule, while the west is considered no feelings of law is the most excellent rulers, the result as Max Weber know, Chinese legal tradition in mixed with strong personality color, and with the western legal tradition that the pursuit of for the program, rational, science, order, personal dignity and freedom and rights of the supremacy of the thinking form produced contrasting.

#### 4.2 An analysis of the humanism and Humanism

Humanism and humanism can be said as the philosophical basis of the legal system in ancient China and the western modern times. Two kinds of philosophy while the respect and affirm the value of priority, human centered social value theory and other aspects of the performance of the Chinese and Western culture in the pursuit of common, but the ideological tendency, basic connotation, essence, the basic attributes of human, and criticizing the idea of there are still differences. So it leads to the difference between Chinese and western legal tradition, such as political foundation, social foundation, basic value, basic category and so on. On the humanistic ideas, people of this lies in its moral, this time even get rid of God worship down in history, but rather focus on the strength of the people, and even pay attention to the role of education ethics of the people, especially the monarch's reverence and worship, but also pay attention to abide by the feudal etiquette and feudal hierarchy the maintenance of order, therefore, the Confucian humanism also known as moral humanism or humanistic ethics, these ideas are from China Confucianism tradition, family tradition, highly authoritarian bureaucracy, severe pu-

nishment statute, the traditional judicial system, people can view etc. v. tired see; humanism although also noted that the reason in the role of the perfect human nature, but it is mainly based on the human nature of the rationality of recognition basis, such as he claimed, "all Natural things are sacred, we should be sincere in the embrace of the sacred law, so that we will be happy." [7] the although they also criticized everything God to dominate the concept, but the opposition between the secular feudal system, its upholding independence and equality, respect the personality and dignity of the people, pay attention to individual existence and individuality of the protection, especially of freedom and equality in the pursuit and personality liberation, oppose any from the religious and secular of independent personality and free the shackles of. As the historian of Italy has concluded: "humanism is the salvation of men, and the praise of freedom." [8] here's humanism and without humanity once again from the liberation movement, three in division checks and balances bureaucracy, health v. tradition, against the doctrine of judicial system, the program is higher than the real idea reflected.

#### 4.3. Point of view of natural conditions

Chinese and western legal traditions, whether from the external performance, or in the ideological content, these differences must have a reason for its existence, and even many reasons the results. This article will explore the reasons behind the differences between Chinese and western legal traditions from the other angle of view. We first sketch the geographical location of China: as some scholars have said: "China is located in the East Asian continent, the natural environment, since ancient times, is a relatively independent geographical unit on the earth. The east to the Pacific Ocean, West meets the Gobi desert, wasteland and permafrost in the north, the southern mountains, within such a around the natural barrier, of course, is a relatively independent cultural growth environment."

Here first talked about the unification of China and has closed side, and the law of China also focused on an inner self evolution, reflect is a national colors, the lack of an open and international thought and mind. Secondly, China is self-sufficient small-scale peasant economy, section four distinct natural conditions, so people often pursue a law-abiding, stable and orderly life, of existing things often keep a single adaptation of willpower, lack of change and create the passion, so also affected the Chinese legal tradition tend to be conservative, is a kind of continuity of the pursuit of the rule of law, without reflection of tradition. Again, China is still a frequent floods and droughts and the country, in order to maintain the stability of the whole society, consolidate the achievements of the unity of society, this is invariably totalitarianism inoculation provided a hotbed for the ap-

appropriate, to better mobilize social resources to handle natural disasters caused by the unrest. Finally, from the ancient Chinese lack of exchanges and communication between the South and North conditions analysis, waterway was east-west, land is winding twists and turns north and south two hope, hinder the ancient Chinese north and south between commodity exchange and the business developed in a large extent, thus gradually caused developed public law and private law lack of legal tradition, also inhibited the respect for private rights and personal independent personality and dignity.

Comparison of the differences between Chinese and western natural conditions, while the West has shown a great difference in this, and even the formation of a strong contrast. Western France, it is the sea - land staggered, the multinational everywhere, they have no unified China situation and western all countries by natural conditions of the restrictions, only through each other's material exchange and relief can realize the coexistence, well-developed water and land transportation therefore provides guarantee, to Western business generally developed, private exchanges more frequent, the respect and protection of private rights, the pursuit of personality independence and equality of status is a strong voice, and field of private law in the west is more developed, western natural law thoughts for mouthpiece in plays a more far-reaching impact. Also the mutual exchange and communication enable western is more open to ideas and international perspective, focusing on external expansion and exchange, pioneering and innovation, developed by western legal tradition is not in absorbing can be created and sublimation results, but by no means closed repairer.

#### **4.4. Analysis of the reasons behind the differences in the concept of litigation**

Between Chinese and Western Differences of the litigation idea is indeed great, which brought about the situation of the rule of law is also very different, here will not be liable for any resulting from the specific social effect of in-depth study, but we might as well just behind the differences of the litigation idea be in-depth study. Chinese hate litigation complex, first of all in the ancient society to traditional litigation ideas, especially when "no litigation" of Confucius, the founder of Confucianism was identified as China's feudal orthodox community guiding ideology, Confucian harmonious universe is promoting "no litigation" concept of deepening. "No litigation" slowly has become the pursuit of ancient Chinese political system construction goal, especially official is around this goal in the process of ruling the touted "litigation disgraceful", "exempt from litigation" philosophy, and repression and the fight against normal "action". This creates a social atmosphere of "no litigation" from the macro view, in order to better safeguard the interests of the ruling class and consolidate the power and status of

the power. This situation may also be required for the state of the. A large country, the troubles of the state does not allow any unrest and chaos. From the point of view of the law itself, it is more than a kind of "democracy", which is not a true reflection of the social needs and expression, but the naked rule of the people of the tool. Secondly, people hate litigation complex but also exists in the judicial practice in the reality of the problem or litigation bottleneck, are summarized as the following three points: one is degrading and inhuman procedure; the second is due to the lawsuit often leads to the enemies of blame "adverse consequences; litigation vulnerable to extortion of litigation and other people, so people have to ask sweetly. [10] also there are other factors to consider: the social structure of the home country of various family, and become main place of general internal transaction disputes, or even a lynching, which severely depressed people court, which in another level and reflects the official proceedings channels is not smooth; a self-sufficient natural economy also limits the range of people's activities, and in a certain extent also reduced the frequency of disputes, it would be no action; [11] people and litigation cost considerations.

Why does the West like the lawsuit? 1967 the Japanese jurists Kawashima takeyoshi in the Japanese consciousness of the law, "a book holds this view, he believed that Westerners" specialize in litigation ", and they went to court. This has a great relationship with the influence of individual culture. Rock, a British philosopher, said: "the individual is the basic unit of nature, since people are equal and independent, no one is allowed to infringe upon other people's life, health, freedom or property." [12] in the eyes of the western people, the value of personal freedom and rights is even higher than life. As Jelling tells everyone the rights struggle ", not only value is now the material interests of gains and losses, more important is to human dignity. In addition, the west is good at the traditional legal system and perfect judicial system and perfect the judicial system has a very close relationship. Any person who is in the right to be infringed will actively use the litigation, the key is whether a society can provide institutional guarantee for the national use of litigation. Japanese scholars Ooki Masao also believes that both the East and the west, the sense of right is not fundamentally different. If possible, anyone will actively use the court to solve the problem. And the history of Japan has not been perfect the status of the judiciary is the real reason why the Japanese are accustomed to taking a negative attitude to the proceedings[13].

#### **5. Conclusion**

Through the comparison of Chinese and western legal tradition can be seen, there are many differences between Chinese and western in many aspects, and there are many reasons for the difference. Through the comparison of

these differences also allows us to China's own legal tradition has a more clear understanding, so as to provide some new ideas for the modernization of the rule of law to give inspiration and provide some new ideas. Here do not want to add the merits of both the following conclusions, because it tends to be unfair, but also meaningless. Due to historical reasons, we pay close attention to the actual impact of the ancient legal tradition. So from this perspective, both in terms of thinking or technical level, they can learn from each other. The author of this is not how to learn specific recommendations, but only to remind the biggest problem that should be paid attention to and how to deal with such different attitude: that is to give personal respect and protection; differences in the western legal tradition, after all, is the objective representation, and differences in the bridge and split -- which is why we will focus on the object or direction.

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