

China's Legal Soul: The Modern Chinese Legal Identity in Historical Context, John W. Head, [Durham, North Carolina: Carolina Academic Press, 2009, 234+xxviii pp, paperback, HK\$248, US\$32] ISBN 1594606366

This is an ambitious book covering the whole of the Chinese legal history from the formational days of Confucianism to contemporary Chinese legal debate. The objective of the book is not to conduct a survey of Chinese legal history in broad strokes – it is more ambitious than that. The author uses history as a tool to uncover the ethos, spirit, or soul of Chinese law, which is vaguely defined as “the set of fundamental and animating legal principles or values that give a society, particularly the legal system of that society, its unique spirit and character” (p xiv). This is an unconventional book in its alternative style to traditional academic publication. The book has many direct quotations, which could be regarded as excessive, and many tables, which provide useful and concise timeline of Chinese legal development. This is also an interesting, and very readable, book written by a serious scholar who is keen to ask fundamental and provocative questions.

The soul of traditional Chinese law is, not surprisingly, Confucianism as taught by Confucius himself and as interpreted / distorted by his disciples. The essence of the Confucian teaching, according to the author, is that “people can be educated; a king should therefore rule by virtue, setting a moral example by his behaviour; and that such behaviour should rest on (*li*)”. Compared with *li*, law was relegated to a minor role in governance, and “the cohesion and well-being of society are to be secured not through legal rules but through the observance of proper rituals of *li*” (p 14). Most importantly, Confucius extended the application of *li* from politics and governance to the general social relations and assigned *li* a predominant role in the conduct of government (p 13).

The egalitarian Confucian teaching was interpreted and reinterpreted by his disciples to become more hierarchical, rigid and punitive, morphing into a more institutionalised Neo-Confucianism and a sort of state religion. The most significant aspect of the institutionalisation was perhaps the examination system for the imperial bureaucracy in which bureaucrats were recruited according to their ability to understand Confucian doctrines. Because of the examination system, according to the author, Confucianism “anchored itself more and more deeply into the system of governance...” (p 65).

Confucianisation of law took place at two levels. The first is at the legislative level, representing a top-down process in which core Confucian doctrines were incorporated into law which would subsequently be applied by the magistrates and enforced by harsh punishment. This “imperial Con-

fucianism”, according to the author, provided legitimacy to the hierarchical order in dynasties and proved a resilient and durable state ideology.

At a more societal level, “people’s Confucianism”, if I may use this term to refer to the Confucian doctrines understood, followed and practiced by the ordinary people in their daily life, created a version of Confucian doctrine which may or may not be consistent with imperial Confucianism. Given the penal nature of the dynasty codes, their reach into civil society was inherently limited and what shaped people’s behavior were not the codified legal rules but traditional practice of the ordinary people and the self-regulation of civil society organisations. This bottom up approach was not to deny the influence of Confucianism on Chinese law, but to reaffirm the internalisation and socialisation of the Confucian ethos. What appeared as a spontaneous social order was actually “heavily influenced by Confucianist values that had matured and infiltrated Chinese culture” (p 43).

Having characterising traditional law in some detail, the author dismisses its relevance to contemporary Chinese law. While Confucianism has witnessed a return and even becomes fashionable in certain circles, its influence is largely limited to an ivory tower discussion and has had little impact on legislation or legal practice on the ground. As concluded by the author, Confucianism “lacks both the theoretical heft and the popular acceptance *today*” that would allow it to reshape the development of Chinese law (p 178). So Chinese law is no longer traditional and can probably never be traditional again after the turmoil in the past one hundred years since the end of the dynastic era in China.

What the author is referring to is, of course, the Imperial Confucianism. Without state sponsorship (it is unlikely for the current Party-state to sponsor Confucianism), Confucianism is unlikely to be highly relevant to contemporary legislative and judicial development. What requires further study is the fate of people’s Confucianism at a more societal level and its potential in shaping the legal culture of ordinary people, and in turn the impact of popular legal culture on the legal system.

Then what is the soul of contemporary Chinese law given the inability of Confucianism to pose any impact on legislative and judicial arenas? The author identifies a few alternative sources but dismisses them quickly, forcing himself to accede, with some reluctance, that contemporary Chinese law is extremely fragile, if not soulless, despite his effort to develop a hotch-potch of a Chinese legal soul.

The author, for example, turns to the rule of law and constitutionalism to locate the soul of Chinese law. China has made certain genuine efforts to develop a thin version of the rule of law and achieved visible progresses. But after a thorough survey of the rule of law debate in China and elsewhere, the author is only cautiously optimistic about the possibility

of developing a thin rule of law in China (in the sense that China's legal system does not fall fatally short of meeting its standard) (p 146). As to the future for a thick version of the rule of law and constitutionalism in China that are grounded in a liberal tradition, he believes that they are "entirely up in the air" (p 188).

An alternative source for locating the Chinese legal soul is authoritarianism, or what the author refers to as the Party Line. However, the author asserts that the political ideology of the Chinese Communist Party has marginalised law to such a degree that it can never be hospitable to legal development. In addition, the Party Line is insufficient to be the source because socialism is such a hollow concept in China that it cannot sustain any legal development. Finally, the Party Line is internally inconsistent and it may not be possible to make much sense out of it after the drastic political changes over the decades.

Whether current Chinese law has a soul largely depends on what a soul is to be defined; without a clear definition, there is no clear benchmark for measurement. But it seems that legal characteristics that the author discussed and dismissed may at least have good potentials to re-define Chinese law and become integral parts of Chinese legal soul. Imperial Confucianism has died but people's Confucianism may still be alive and well, and the bottom up Confucianism as a social practice is more resilient than the state has expected.

The rule of law and constitutionalism, as fragile as they are, also have greater potential in China than the author is willing to give credit for. There is a broad consensus that the rule of law is indispensable for China's socio-economic development, and it is hard to imagine the rule of law, once it is started, will not get thicker over the course of its development.

Socialism with Chinese characteristics is an abused concept but this does not necessarily mean that it can never develop certain unique concepts of law. The recent promotion of people-based law and people-friendly procedures that are responsive to societal need and greater public good are consistent with China's socialist tradition and part of the Confucian values. In this sense, the soul of Chinese law is already there as a mixture of elements that are embedded in historic and cultural milieu, seriously taking into account China's political reality and borrowing aggressively the best practice that have been developed elsewhere.

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