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Chinese Judicial Culture: From Tradition to Modernity

*Speech by the Hon. Justice Shen Deyong
at Brigham Young University Law School*

October 21, 2009

The Chinese nation boasts a brilliant civilization of over 5,000 years. In the long river of history, China created one of the five legal systems in the world, the Chinese legal system, the origin of which can be traced back to the Xia Dynasty in the twenty-first century BC. It flourished in the Tang Dynasty and gradually disintegrated during the late Qing Dynasty. By absorbing the essence of various philosophical schools such as Confucianism, Legalism, Mohism and Taoism, especially Confucianism, the Chinese legal system developed side by side with the Chinese civilization. It adapted itself to the agricultural civilization and echoed with the natural economy, patriarchal society, and monarchy in ancient China. Compared with other legal systems, the Chinese legal system is not only time-honored and consistent, but also unique in its own way. During the millennium from the Tang Dynasty to the Qing Dynasty, as a mainstream culture, the Chinese legal system reached as far as the Southeast Asian countries beyond the domain of Indian civilization and even influenced the western legal culture to some extent, composing a significant chapter in the world's history of legal system development.

In any country, judicial culture is a core component of its legal civilization. Similarly, it was one of the fundamentals of the Chinese legal system and an essential achievement of the legal civilization in ancient China. Proceeding from the unique outlook on life, value orientation, morality and integrity of the Chinese nation, the Chinese judicial culture intertwined the law with ethics, and is thus of distinct Chinese characteristics.

Now, please allow me to brief you on the four basic features that I've tried to summarize of the Chinese traditional judicial culture:

First, "To Take Morality as Primary and Penalty as Supplementary, and Highlight Moral Enlightenment and Advocate Prudent Punishment." This was the basic principle of the Chinese

traditional judicial culture.

The ultimate principle of the Chinese traditional justice was the rule of virtue. It was stipulated in *The Code of the Tang Dynasty with Authoritative Annotations* that “moral integrity constitutes the foundation of ruling while criminal punishment serves as a tool.” It means that morality was the major instrument of social adjustment and laws were merely auxiliary measures. Since penalty was just a tool to achieve the goal of moral enlightenment, it must be based on moral education. Confucius, the founder of Confucianism and a great philosopher of ancient China, once remarked that “in governing, one should cleave to virtue.” He believed that the unique power of ethics and morality in influencing people’s minds could surpass laws and assume the function of governing the state. The Confucians disapproved of severe punishment and advocated that penalty must be immersed with morality. They argued that judicial administration was similar to the governing of a state, and moral enlightenment should be taken as the principal and penalty as the supplementary. Punishment was only a last tool to which one should resort and by no means a good one. As the Confucians view it, the rule of law was close to arbitrariness and inferior to the rule of virtue since it only exerted its power through people’s fear of punishment, who merely succumbed to compelling forces. The integration of the judicial system into the pervasive ethics and morality represented the most remarkable feature of the Chinese traditional judicial culture.

The emphasis on the rule of virtue proposed by the Confucians was started from the respect for people and trust in man’s nature. To build a harmonious society, the interpersonal relations should be regulated by morality instead of authorities or man-made rules. In the view of Confucians, men’s natures at birth were all kind, thus the external restraints of laws were redundant, and education and persuasion alone could realize social harmony. If a society failed to prioritize morality in the governing of the state, problems would crop up, the worst of which were the corruption of minds, loss of morality, shame in the process of utilitarian appraisal, and rational balancing of gains and losses. However, if people were educated with ethics, a favorable social atmosphere would be formed and any violation of social customs or ethos would be despised, and penalties imposed on this basis would be regarded as a stigma by the entire society. Thereby we may conclude that the intention of the rule of virtue was to establish inherent bonds among people through the cultivation of morality and gradually phase out or elbow out laws.

The doctrine of the rule of virtue stressed that the application of

penalties must be prudent and lenient, and people's lives should be valued. Gao Yao, the first judge in Chinese history, once suggested to Emperor Shun that an emperor should be kindhearted and tolerant, leave the inculpable out of the punishment, treat cases with doubts leniently, and let the suspect go rather than wrong an innocent person. Only by doing so can he gain people's support and trust, who in turn will voluntarily avoid offences and faults before the superiors. In order to guarantee the rule of virtue during the justice process, a series of systems were set up in many dynasties such as final review by the emperor, joint trial, prisoner interrogation and direct appealing. In terms of the substantive aspects of the criminal law, the doctrine advocated the concern for the old, the young, the female and the disabled; the protection of the vulnerable groups and the correction of wronged cases, which embodied the gist of prudent application of penalties.

The pursuit of moral enlightenment, tolerance, beneficence and prudent penalty in ancient China demonstrated the intensive humanistic sentiments of the Chinese traditional judicial culture. It is still of great reference to the building of a modern society of the rule of law. Law is by no means omnipotent, and on many occasions, the gap should be filled by morality. Therefore, the rule of virtue is indispensable in the national building of the rule of law. Actually, the development of the rule of law requires not only improvement of systems and establishments, but also progress of ideology and morality. Without the cultivation of morality, the rule of law would not prosper. In the march towards goals at higher levels, morality must be strengthened. If moral civilization prevails and everyone may voluntarily restrain, check and guide his own conducts, the society would bathe in the warm sunlight of the rule of law forever.

Second, "To Embed Rites in Laws and Combine These Two." This was the kernel of the Chinese traditional judicial culture.

Rites and laws were two systems of rules with profound influences on ancient China. Rites were regarded by the Confucians as the way to govern a country while laws were deemed by the Legalists as the tool to rule the society. Confucius once remarked that people should be led with virtue, and order should be kept by rites. From the spring and autumn and Warring States Periods, to the Western Han Dynasty, China experienced the shift from confrontation between rites and laws to the integration of these two. During the Western Han Dynasty, the initiative of Dong Zhongshu, a representative of Confucianism, to pay supreme tribute to Confucianism and ban all other schools of thoughts was endorsed by Emperor Wu. Since then, laws in ancient China

started to be influenced and dominated by the Confucian rituals. The integration of rites and laws was completed during the Tang Dynasty and became a remarkable feature of the Chinese legal system. Justice with the rule of rites pitched the basic profile of the Chinese traditional judicial culture.

The purpose of rites was to maintain a hierarchical order in the society and families, such as the relations between the close and the distant, the noble and the humble, as well as the superior and the inferior. Rites had already become the general principle in social relations and the fundamental guideline in judicial decisions as early as the Western Zhou Dynasty. Though the officials appeared to depend on laws when dealing with judicial affairs, their minds and behaviors were actually dominated by Confucianism. One major manifestation of the rule of rites in the Chinese traditional judicial culture was case-deciding by classics, or, in other words, application of classics in the handling of cases. This means that when specific stipulations of the law were lacking, the Confucian classic thoughts would be referred to in the settling of the case. Since the classics cited back then were majorly *The Spring and Autumn Annals*, this manner of case-handling is also known as judgment by *The Spring and Autumn Annals*.

When traditional judicial principles were applied to trials, the results were usually more humanized, acceptable and identical to the mainstream values of the society. In this way, justice may satisfy people's wishes and win their hearts. Hai Rui, a renowned judge in the Ming Dynasty, once said, "Whenever there is any reasonable doubt with a case, we'd rather wrong the younger brother than the elder one; rather the nephews and nieces than the uncles; rather the rich than the poor; rather the unruly than the obedient. If the case involves properties, we'd rather wrong the officials and gentries than the average people so as to save ills from happening. If the case is about quarrels and dignity, we'd rather wrong the humble than the noble in order to preserve social normality." Generally speaking, law is no more than social relations, but a written form of the latter. When conflicts occurred between the rigid laws and the Confucian ethics and morality, laws should concede to social relations and customs.

Nowadays in China, the integration of legal and social effects is also stressed in judicial activities. The law is the foremost rules that Chinese judges observe in trials, and to decide a case according to law is the most important judicial concept. However, if judges disregard the practical situation of the society, ignore the social effect and try cases in an absolutely isolated and inflexible manner, even if the judgment is based on law and the judge is convinced of the justice and

fairness of the trial, it may perhaps still be hard to be accepted and acknowledged by the parties to the case as well as the public. For example, if the judgment might lead to bankruptcy of a large enterprise, causing a large scale of job losses and even provoke a local riot, then the judge will have to think over the possible social consequences before passing on the judgment, and in this context, the idealistic pursuit of justice may have to yield to realistic solutions of the disputes.

Third, "To Put People First and Adopt Benevolent Policies." This was the practice of the Chinese traditional judicial culture.

The traditional Chinese legal thought considered people as the foundation of a nation, and this is the underlying meaning of the rule of virtue. The status of people was parallel to that of heaven and gods, superior to that of the rulers. The attention to people was an important part of the Confucian humanism. In other words, people-orientation represented a major feature of Confucianism. People stood in awe in front of heaven, and sovereignty was never eternal. The attitude of heaven towards the governing of the ruler can be reflected by people's attitudes. Only by following providence and tendering the people can the country flourish and the people live in peace. In the Zhou Dynasty of over 3,000 years ago, Jidan, the Duke of Zhou, required Monarch Kangshu to highlight the rule of virtue as well as education, implement benevolent policies, care for people's sufferings as if they were his own and protect them like babies.

On the one hand, the people-oriented ideology of Confucianism emphasized attention to the people and protection of the people; on the other hand, it required that rulers should acquire both morality and accomplishment and pursue the rule of virtue and benevolent policies. In terms of justice, on the one hand, it advocated tolerance, cautious punishment and protection of the vulnerable groups, such as the old, the young, the female and the disabled; on the other hand, it called for harmony between heaven and man and required that judiciaries should obey providence, seek substantive fairness and guarantee justice for the people. To achieve this, the judicial officials must be cultivated and well-educated. In the eyes of the average public, upright officials were always almighty, all with lofty character and great intelligence, perspective of the slightest and capable of reasonable and legitimate judgments. In this sense, the moral integrity of the judges was almost equivalent to the legitimacy of the decision. People always pray for righteous judges like Hai Rui, Bao Zheng and Di Renjie to uphold justice for the general public. In their imagination, these elites were omnipotent, like superman in the movies. They are investigators,

procurators and judges in one, in charge of the investigation of cases as well as the trial.

These days the Chinese judges are totally different from ancient times. Like the American and British judges, they are only responsible for the trial of cases. However, the ideology of people-orientation has been carried on. The traditional judicial culture attached extreme importance to people's livelihood and cared for their sufferings, and the status and role of the people in society were fully recognized. This is of great reference to today's legal building. The law is not only a tool to rule the country and govern the society, but also a bible to be concerned for and safeguard people's rights and interests. Only by putting people first, relying on the people, serving the people, assuming power for the people and seeking profits for the people, can the justice process live up to people's wishes and win their hearts. In order to gain more public trust for the Chinese judicial system, the guideline of "fair justice, whole-hearted for the people" was set up for the Chinese courts, and more attention has been attached to cases concerning people's livelihood, access to justice and protection of legitimate rights and interests of the vulnerable groups.

Fourth, "To Keep Harmony and Zero Litigation and Handle Disputes by Mediation." This was the highest ideal of the Chinese traditional judicial culture.

John Henry Wigmore, a renowned American jurist, once said that the Chinese nation was of unique character and was the most peace-loving nation in the world. Apparently, these words were based on his deep understanding of the Chinese culture. The Chinese traditional legal culture took the pursuit of order and harmony as its target value, emphasizing harmonious coexistence between man and nature, man and society, and among human beings. Here emerged the idea that "nothing is more valuable than peace." As a result, no litigation became the highest ideal of the Chinese justice, and the Chinese people long held the mentality of "eliminating and avoiding lawsuits" because they believed that it would be shameful to get involved in a lawsuit. By contrast, Americans do not feel uncomfortable about litigation. The designing of the American justice system seems to encourage lawsuits. What's more, the American lawyer per capita ratio is the highest in the world, and thus launching a lawsuit is nothing difficult in the United States. American lawyer payment arrangements can require a recovery of attorney's fees from the losing party, and sometimes punitive damages may be awarded to the winning party. Therefore, it seems that Americans prefer to resort to litigation.

As is known to all, Confucius was a great philosopher, educator and thinker of China. More importantly he was an outstanding legislator and justice administrator. No wonder his portrait is showcased in The Hague Tribunal and Capitol Hill, as well as in the inscription on the wall of the Federal Supreme Court of the United States. He is honored as a great legislator and justice administrator of mankind. Once when asked by his disciple about his highest political ideal, Confucius said that if given a chance to run a state, he would aspire for the ideal of “no litigation.” In his political career, Confucius used to be Sikou of Lu, equivalent to the Chief Judge of a state in the U.S. Confucius was not only the father of Confucianism, but also an expert on law. His ideal was well-contemplated political and legal conclusion, which is consistent with his political ideology. This is the very reason why his ideal has exerted far-reaching impact on the Chinese judicial and legal culture. According to his ideal, society can only oblige people to abide by laws and rites by means of fostering morality and thus solving disputes peacefully. That is to say, it is hard to improve social normality and people’s mentality or even end disputes only by exercising regulation through law.

The most representative judicial means of the idea of harmony is mediation, dubbed as “oriental experience.” In the past, ancient China was an agrarian country with low mobility where population was concentrated to form the so-called “rural society.” As the Chinese people tended to think that resorting to justice might harm their mutual harmonious relations and, moreover, as the legal knowledge of the general public was limited, the Chinese people at that time tried very hard to avoid litigation. If a dispute occurred, they might prefer mediation to litigation to end the conflict. Generally speaking, mediation was conducted by government officials who would discourage disputing parties from pursuing a lawsuit and help them to reach an agreement through moral persuasion. Such mediation was targeted at civil or petty criminal cases. Apart from official mediation, civil mediation was also used frequently. It was conducted in accordance with village conventions by social elites, such as squires and village leaders. It could be either a voluntary choice or official authorization. In the Qing and the Ming Dynasties, special provisions were made for mediation. In the Ming Dynasty, every Li (village) had its own conventions and regulations that were interpreted and disseminated by its village leader on a regular basis. In every village, a declaration pavilion was set up to have names of those who committed mistakes or crimes, such as being not filial to parents, inscribed on it as a warning sign. Once the person with wrongdoings

corrected his mistake, his name would be removed. For married couples' quarrels and villagers' land disputes, village leaders had the right to mediate the case in this pavilion.

Compared with litigation, the merits of mediation are self-evident. More often than not, litigation takes more time and money. Despite its great costs, litigation does not mean success. Consequently, after careful comparison, the majority of people preferred negotiation and mediation to litigation. Furthermore, negotiation and mediation would not hurt the feelings of the people concerned. They could still live and work in harmony side by side. The following story is a case in point.

During the reign of Jiaqing in the Qing Dynasty, a land dispute happened in Baodi County in Shuntianfu (now known as Beijing). Ms. Zhang, the plaintiff, launched a lawsuit against Sun Wenxiang, the cousin of her late husband, for annexing her husband's land. Before the county official heard the case, six family members of both parties took initiative in mediation since they did not want their family reputation undermined by lawsuit. Upon the official's approval, these mediators invited both parties to sit down together at the table of negotiation. After examining the land title, they found out that the plaintiff's husband pawned the 8-mu land to his cousin and failed to redeem it until his death. According to the laws and the village regulations, the plaintiff had no right to reclaim it any more. Through the mediators' instruction, an integral part and phase of mediation, Ms. Sun realized that her claim did not hold water at all and thus withdrew the lawsuit. Usually the story would end there, but the mediators persuaded the respondent into returning the land to Ms. Sun because she and her little son had nothing to live on. Furthermore, the respondent wrote a legally binding document to show his determination to return the land, live in harmony with Ms. Sun and protect the family unity. Upon the government's approval, thanks to the instruction and persuasion of the mediators who were the relatives of both parties, this dispute ended in harmony and happiness.

At the moment, China is devoted to building a socialist harmonious society featuring democracy and the rule of law, equity and justice, integrity and fraternity, vitality, stability and order, and harmony between man and nature. Judicial organs in China are widening the coverage of mediation in order to bring it into full play and promote the building of "harmonious justice." "Harmonious justice" aims at properly addressing the interests of all stakeholders involved, solving disputes, upholding social equity and justice, building peaceful and harmonious social relations, and maintaining the comprehensive, coordinated and sustainable development among man,

nature and society in times of rapid development in China.

Ladies and Gentlemen, just now, I briefed you on the basic features of the Chinese traditional judicial culture as well as its impact on the modern Chinese justice. Next I will elaborate on the modern turn of the Chinese judicial culture.

Towards the end of the Qing Dynasty, the Chinese feudal autocracy began to decline, and so did the Chinese legal system. Since the Reform Movement of 1898, a number of modern legal notions and systems in the West, especially the legal systems of civil law countries such as Germany and Japan, have flowed into China. After China's reform and opening-up in 1978, while accelerating the development of democracy and the rule of law, China has kicked off a large-scale judicial reform and is undergoing the transition from the traditional judicial culture. In this process, China has made good use of its own economic, political, cultural, and social resources. While preserving the essence of the traditional justice, China has also learned from the beneficial experience of other countries, including Common Law countries. As a result, China has gradually made innovative achievements in building the Chinese modern judicial culture, which can be summarized into the following five shifts.

First, the Shift from Obligations-centralism to Rights-centralism. The Chinese traditional judicial culture aimed at maintaining autocratic monarchy and the patriarch system. Therefore, under country- and family-centered law, justice neither confirmed nor protected "individual rights," and it was a mere tool to maintain social order. Individuals passively fulfilled their obligations to the state and their family with little awareness of enjoying rights. At that time, the personal value, dignity and freedom of individuals were ignored. With the development of the society of the rule of law, the awareness of rights has been reinforced. The modern Chinese justice has established its orientation towards individuals' rights. Greater importance has been attached to protecting human rights and ensuring individual freedom. Citizens' rights to life, freedom and property have been strongly safeguarded. Meanwhile people's spiritual rights and interests, such as the right of personality and the right of privacy have also been confirmed by law and upheld in judicial practice.

Second, the Shift from the Superiority of Criminal Law over Civil Law to the Balanced Use of All Laws. In ancient China, law meant nothing more than criminal law and punishment. In fact, the application of criminal laws and regulations was extended from criminal cases to civil and economic cases. In a word, criminal law-centralism was a pronounced feature in the traditional Chinese justice.

With economic and social development, the Chinese legal system witnessed a sea of changes. It has encompassed all legal departments such as civil, commercial, administrative, economic and social laws as well as procedural laws. Justice does not put criminal law first anymore, but puts people first. As a matter of fact, civil and commercial cases take up 90% of all cases in China.

Third, the Shift from the Superiority of Substantive Law over Procedural Law to a Balance between Substantive Law and Procedural Law. In terms of judicial operational mechanism, traditional Chinese justice was a blend of justice and administration and of substantive and procedural laws. That is to say, administrative officials were also in charge of justice. In ancient China, the written substantive code was quite advanced, whereas no independent procedural code was produced. In terms of case trial, there were no fixed principles to follow. In this context, judges could start or terminate trial procedure whenever they wanted; judicial officials could make random choice over trial investigation; and the people emphasized real results while ignoring procedure. Now the idea of procedural justice is becoming increasingly popular in China. Judicial judgments and verdicts should be based on both relevant substantive law and procedural law. In a word, the distinct value of procedure has been widely recognized. Many people believe that substance and procedure are equally important. Without proper procedure, a judicial judgment or verdict, even if it is impartial, can hardly be deemed as fair by litigants. On the contrary, with proper procedure, a judicial judgment or order, even if it is not perfect in terms of substance, can still be accepted by litigants.

Fourth, the Shift from Closure to Eclecticism. The Chinese legal system originated from ancient China, collapsed towards the end of the Qing Dynasty and peaked in the Tang Dynasty. The Chinese legal system combined morality with law and spread into neighboring countries and regions, even exerting influence on western countries. The closed patriarch circle and unified political culture of the traditional Chinese society resulted in the shutting up and exclusiveness of the Chinese traditional legal system. Mankind's history of the rule of law also embodies the integration and mutual promotion of various legal cultures. Mutual cultural exchanges and learning among countries are in line with the general rule and the requirement of the development of human society. It is thanks to the inspiration of the Western judicial culture that the modern Chinese justice developed in a number of aspects. For example, the modern Chinese lawyers system, the assessors system, the evidentiary system

and the court trial system have been established with reference to the relevant Western judicial systems. Of course, we are fully aware that each nation or country has its own idiosyncratic history and culture, and therefore, a cure-all solution does not exist. While learning from others to build its own legal system, China must proceed from its own economic and historical reality and abstain from blind copy.

Fifth, the Shift from the Rule of Man to the Rule of Law. In ancient China, the characteristic of the will-based rule of man could be easily perceived, which featured proceeding from family to the state as home, and the state was actually a home in a loftier sense. The state in this sense possessed both the patriarchal character and the political nature. The essence of paternalism was to replicate the mode of the patriarchal rule to the state rule characterized by both affection and absolute authority, and thus gave rise to the system of the rule of man in the operation of social control. Since the founding of New China in 1949, especially since China's reform and opening-up in 1978, China has made great strides towards a society of the rule of law. For instance, a comprehensive socialist legal system with Chinese characteristics has been in place since the beginning. At present, there are around 200,000 judges, 140,000 procurators and over 100,000 lawyers in China, which has laid a solid foundation for protecting citizens' rights. The general public has a stronger legal awareness than before. The ideas that law plays a dominant role in society, everyone enjoys equal rights and one needs to act in accordance with law have been well received among the public. Now the cause of governing the country in accordance with law, and building a social country of rule of law advocated by the Chinese government, is being pushed forward.

Ladies and Gentlemen, just now, I introduced to you the major features of the Chinese traditional judicial culture and the judicial evolution from tradition to modernity. I hope it can help to shed some light on your understanding of the history and the status quo of the Chinese justice. However, as an old Chinese saying goes, one eyewitness is better than hundred hearsays. I hope all of you can visit China, especially to pay a field visit to the Chinese judicial practice and offer us your valuable suggestions. In the meantime, you are invited to have a closer look at China's famous mountains and great rivers, places of historic interests, the social and ethnic customs, as well as the achievements of reform and opening-up and the modernization drive.

Thank you for your attention.