

CONFUCIANISM AND THE FUTURE OF THE LAW IN VIETNAM

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Whether Confucianism, which was like a beautiful house blown down by a storm due to lack of repair" and which seems to have been devastated by different Western schools of thought, plays any role in the construction of the Vietnamese law system keeps tormenting the contemporary and the next generations. This article touches upon some problems relating to the role and limitation of law in the way it influences people's behaviors and the interaction between Confucianism and the law's measures to adjust people's behavior. This article also raises some proposals to make contribution to bringing Vietnam's written law close to its people.

A Doctrine for Vietnamese Current Law

It is common knowledge that cultural and economic patterns in different societies from Primitive Communism, Feudalist, Capitalist to Socialist societies are widely introduced in the state general law textbooks. Sometimes, the reality of our nation is ignored so the model country fits in one ready made model. As such, there have been different perceptions of state and law. It is jurisdictional Western doctrines, not Vietnamese philosophy of life that universe, human beings and society that are often based on

to explain what the state and law are. According to the hackneyed cliché, "the law-based state" one of some newly-borrowed concepts, if not defined exactly, is often rashly reasoned as a type of state. Fortunately, the intellectual have been enlightened that law is not just a government's tool.

The questions raised here are 'What are the striking features in the history of Vietnamese state and law development and apart from the influence of Chinese culture'. 'What distinguished Vietnamese legal culture from others'. Both these questions need answering for every nation has its own characteristic, and customs which rule over its people's behaviors.

After the Cold War, ideology has no longer been a gap between nations. While legal harmonization is pushed up by global free trade, the importance of national cultural identity preservation including legal culture, has become extremely significant. This is similar to the freedom and independence protection of our country from colonialists' invasion in the nineteenth century. So, in order to preserve national characteristics and wash out the insult of being poor and backward, the very first thing that learners of law should do is to understand and honor the legal culture and jurisdictional philosophy of their country.

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To understand Vietnamese law and its social organization, it is a need to understand Vietnamese history of ideology development for people's way of thinking affects their behaviors. Only by that way can we explain what the Vietnamese respect, love, hate or fear as well as can understand the way they organize their own activities, which is so called culture. Vietnamese ideology can be divided into two categories: Common ideology- ideology of common people, descended from this generation to another by means of folklore and academic ideology- ideology of the intellectual. Such traditional ideologies should be studied thoroughly and handed down to the next generation before alien ones come up with.

Confucianism is one of the most fundamental elements in the foundation of the Vietnamese ideology. It is believed that Confucianism is one of the three religions (Confucianism, Taoism and Buddhism) which influence Vietnamese culture. In fact, Confucianism is not an ideology because it was not Confucius who created that kind of mentality. And Confucianism is not a religion of which Confucius is the head like the case of Catholicism and Jesus. Confucianism is a philosophy of life according to which people live a comfortable and peaceful life, with no difficulties in their household, their clan, their village and their national affairs. This kind of philosophy has been a foundation for Vietnamese society for thousands of years and penetrated into Vietnamese consciousness so deeply and

naturally that it leaves trace in every Vietnamese cultural vestige.

Throughout history, each age has its own understanding of Confucianism. There are different schools of Confucianism including Primitive Confucianism, Han Confucianism, Tang Confucianism, Song Confucianism, Neo-Confucianism, Traditional Confucianism, Scholastic Confucianism and Common Confucianism, Contemporary Neo-Confucianism, Korean Confucianism, Japanese Confucianism and Singapore Confucianism....Of the variants, there must be unchanged roots. Also, as a thought of life, Confucianism, Song Confucianism in particular, a thought based on a mixture of Buddhist and Taoist elements and indigenous beliefs gradually became ethnics of life. It is not that the Japanese, Korean and Chinese want to break this traditional philosophy of life while enriching their countries. A thought, once deep-rooted in people's consciousness, in spite of being denied, Confucianism does live permanently anyway it affects people's way of thinking and their behaviors. Thus, studying traditional philosophy to explain what state and law are means studying traditional way of thinking of our forefathers to explain some current phenomena. This is a key to bring with legal documents close to the interests of people in Vietnam. Only by that way can law live permanently in people's consciousness. Otherwise, all borrowed schools of thought will soon be forgotten in our thousand-yearlong history.

There may be some underlying reasons for Confucianism's being devastated. Firstly, it may originate from the Western education movement in which culture and civilization were mixed meanwhile Confucians were bewildered about what to do next to catch up with Western civilization. Secondly, it may begin from revolutionists' movement of using Vietnamese transcript which unintentionally created the gap disabling the offspring to read their family annals. Furthermore, although there was no harsh anti-Confucianism movement like that in China after the Chinese revolution, Confucianism in Vietnam was no longer a leading doctrine in organizing society. It more or less lost its hold on the nation. People only used some old manner of speech of Confucianism to propagandize new political thoughts borrowed from the West. Not until recent time has Confucianism been studied again, which can be seen as the instinctive returning to the roots while Oriental culture has aroused interest among Western scholars. What a shame to us! That Confucianism research foundations have been mushrooming both in Europe and America indicates the amazing attractiveness of Oriental philosophy of life in the modern world.

2. Introspectiveness and Theory of Rectification of Names as Confucianism's Measures to Adjust People's Behaviors

Like other Eastern philosophies, Confucianism believes that the path to discover and conquer the outside world

originates from where one starts to find the harmony between individual and the universe introspectively.

According to the books of the Mean, Way of Nature is what is endowed by God over which people's behaviors are ruled. Because everyone has his own characters and inborn makings, one is too much while the other is not enough, he needs to be educated appropriately. Temperate person is the one who knows how to control his emotions, either happy or angry, everything is kept moderately. The medium is impartial behavior, a basis for the right. The harmonious is uncontradictory behavior - a common link between people. Therefore, Confucianism is a Doctrine of the Mean.[2, pg. 20]

Confucianism's philosophy of life is mostly based on five basic virtues including *benevolence, righteousness, civility, knowledge and loyalty*, of which benevolence is considered as the key to Confucian ethics. Like an energy storing seed giving life to buds, leaves and twigs, benevolence decides human appearance and characters. The concept of benevolence in Confucianism is considered a fulcrum to push a large part of human society into a stable, peaceful and kindness-oriented world. Benevolence carries in it a narrow meaning but also enjoys a broad sense at the same time. It fits all kinds of people. It may take a whole Confucian's life just to look for the values of the word.

The most general meaning of benevolence is love for all human beings. The Chinese character 'Jen' literally represents the relationship between "two persons," or co-humanity. People with benevolence are the ones who love their parents, siblings, spouse as well as their fellow countrymen, and who have no ill feelings for anyone. Benevolence is best expressed in the Confucian golden rule, "Do not do to others what you do not want done to yourself". These people always consider others as their dear, thinking of the universe as a unity, showing their natural not reluctant love. Thus, they surely enjoy a peaceful state of mind and security. In contrast, people without benevolence have none [14, pg 82-83].

Benevolence also means tolerance to others, a good understanding to have the right attitude under all circumstances, courage to assume responsibilities to be on one's guard within civility rules. In other words, benevolence helps people control their desires and resist all temptations.

Gentlemen always take benevolence into account in all his activities like eating, dressing and speaking... in hurries or difficulties. Confucianism is therefore practiced exactly like a religion. Such a belief and discipline formed ancient Confucians whom scholar Nguyen Khac Vien considered to be strange but respectable. The root of Western legal culture is Catholicism while that of the Orient is Confucianism.

Confucius of Autumn and Spring Annals thought highly of benevolence, Mencius of Warring the State gave prominence to righteousness which is what should be done by an individual to the community. People with righteousness know how to live sincerely, to hold back his sexual desire to keep things in order, to regret making mistakes, which keep them away from evils. They should neither be fond of richness nor ashamed of poverty. As a human, the two most valuable things are benevolence and righteousness without which a powerful king is not worth respecting.

In contrast to Mencius' supposition that human beings' innate nature should only be nourished, according to Hsŷn-tzu a person is born with an evil nature, therefore attention should be paid to civility. People with civility know how to suppress their sexual desire so that all thoughts, words and behaviors are in conformity with civility. Civility means respect to the noble, piety to the old, faith to the superior, modesty to the junior, tolerance to the coward. Civility also means cautiousness in speaking and dressing behaviors. According to Hsŷn-tzu, a nation where righteousness and civility are respected is in order, otherwise it gets into chaos. "Learn how to behave first and then to read and write" - the slogan commonly found in schools nowadays originates from Hsŷn-tzu's respect for civility.

Politically, Hsŷn-tzu's theory does not put a stress on legal punishment.

However, because it maintains that human beings are born with desires that, if not being guarded and restricted, would lead humans to conflict and strife, and that in this sense human nature is evil and goodness is only acquired from training, therefore, punishment is a major concern. For Hsŷn-tzu, everybody values righteousness and benefits yet he should use his knowledge to take things into consideration. Of his two disciples, Han Fei and Li Ssu, Han Fei was more extraordinarily talented and heavily influenced by Hsŷn-tzu's respect for civility. As a result, he extremized the thought into legal framework and used "fame formation" theory as a tool to govern the country.

In short, Confucianism is a foundation of self-adjustment, self-correction and shame preservation and it is a traditional thought to govern a nation. Confucianism considers morality as a basis of politics [7, pg 53]. Although Confucianism does not deny the role of law in keeping the society in order, it heads to the root of security rather than the punishment used for those who commit crimes. A good point of civility is that it prevents the evil even when there is no sign of it in order to bring people close to the good, stay away from the evil without their consciousness. Thus, civility has an educational role, preventing insecure seeds while law is an imposing and dominating tool of the ruler. Confucius once said "If the state affairs are used to orientate people, punishments are used to implement the equality, people surely try

to avoid punishments without being ashamed. However, it is not the case if they are oriented by morality"(Analects, chapter II)

Apart from introspectiveness, theory of policy is also a tool of Confucianism to educate people. This theory was discreetly implicated in the Autumn and Spring Annals prayers and note-takings in the Analects of Confucius. According to the Analects of Confucius, Confucius said that irratified names lead to inconsistent words, incomplete work, merciless chorus and wrong punishment which, in turn resulted in people's confusion. So, for a virtuous man with ratified name, words and deeds accompanied each other.

Another Confucian thought is maintaining an orderly society of ranks and classes. Confucius said: "There was Tao (a way or road of righteousness) only when fathers were fathers, when sons were sons, when Rulers were Rulers and when ministers were ministers." Every society is based on family of which a virtuous man is the ruler literally. This one should be educated carefully. Knowledge and civility should be considered as two mottoes. Civility is morality, knowledge is understanding[12, pg225]. Managing one's household means keeping one's family in harmony. All family members are emotional and faithful, the inferior submits to the superior, the superiors take care of the inferior. So, that fathers should be fathers means parents when alive should have sense of purpose and when dead should be

a good example for children to follow. Father's propriety is clemency, children's propriety is piety. From then, people's behaviors are ruled over by what people call "ratified names."

Regretfully, after having become an official doctrine of Han dynasty, Confucianism was continually distorted to assert the rulers' authority. Han Confucianism seemed to forget the interaction between the superior and the inferior. It only focused on the duties of being obedient of the inferior. The concept of three moral bonds may be shaped by Tung Chung-shu at that time[11, pg185]. The notion of loyalty, piety, a woman's three obediences and four virtues were sometimes abnormally understood. For example, a female, before marriage, was considered as to obey all her parents' orders, for example marry the one that her parents had selected for her without freedom in love and marriage. After being married, she should obey all her husband's orders and when her spouse is dead, she must obey her son. Since Han dynasty opened an examination session in 14 BC, learners only focused on learning by heart for examinations. They more or less lost the original creativeness in learning. Consequently, Confucianism gradually became conservative, complacent and anti-innovative in both political and economic terms. In parallel with golden rules keeping the society in order, some rules of Confucianism were like hindrances keeping the country behind the rest of the world. The key point here is that we

should realize such non-motives and limit their negative impacts. Only then can Confucianism be useful to our present day life.

3. Inner Confucianism and Outer Legislation as a Unique Oriental Legal Culture

Chinese History says in 536 BC Ching dynasty's King introduced the Book of law. In 513 BC, under Tan dynasty's King order, a huge cauldron on which the legislation was carved was used for criminals. As time went by, a school in favor of rule by law emerged. Rules by morality and law were two most popular schools in the Autumn and Spring Annals and Warring The states period. Debates between scholars of those two schools contributed to the shaping of legal forms of the Eastern countries under the influence of Chinese culture. Chi'in dynasty followed the school of thought in favor of rule by law. From 350 BC, land privatization was implemented, the monopoly by the aristocrat was abolished. All people both worked and fought, which resulted in the prosperity and power of Chi'in dynasty 120 years later (227 BCE), when the first emperor of Chi-in dynasty unified the whole country.

On reading the works of Han Fei (280-233 BC)- the most typical representative of the rule-by-law school which were written in prison with mental sufferings, more than two thousands years later, one is amazed at the sharp-witted thought of which the intact values are remained at present time. Han Fei's views are as follows:

◆ Law must be transparent. Only transparent law can bring prosperous and peaceful times [4, pg 73].

◆ Law must be strictly followed. Law is what is used for the public, punishment is used to direct one's behaviors, so that people follow rules without uncertainty. Those who obey such rules are rewarded while those who do not are punished.

◆ People of any position and rank are treated equally before law. Law does not side with the rich. Once law is implemented, the tolerant dare not tolerate, the brave dare not compete with law. Punishment and rewards are not only for any given subjects. Even an aristocrat can be punished and a boor can be rewarded [3, pg 43].

◆ Unlike "ratified name" theory of Confucianism which was used to assure the relationship between classes, Han Fei's "name formation" theory accidentally or purposefully aimed at eliminating social classes. Achievements should be assessed according to work types. If achievements fit deeds and deeds fit words, there should be awards. Otherwise, there should be punishments.

Although Han Fei's books were highly appreciated in Chi'in Dynasty, after the eclipse of this dynasty, school favor of rule by law was overshadowed by Confucianism's school favor of rule by morality. Han Emperor Wu had to use legislation to deal with domestic affairs and use Confucianism for diplomatic ones in order to keep society in order. From that

time on, a trend to combine both Confucianism and legislation to rule the country came into existence. Also from then on Confucianism has been deeply imbued in Oriental legislation. Confucianism does not deny and criticize but makes light of harsh punishments. The society should be by morality organized and should be based on rule. Self-education with the five basic virtues-benevolence, righteousness, civility, knowledge and loyalty should be used as a principle to correct oneself, to manage one's household, to rule the country and pacify the world. Moral rules of Confucianism which have been adjusted for centuries now replace a major part of the functions of law.

4. Six Proposals to Bring Written Law Closer to People's Interests

The primary objective of legislation is to serve people's benefits, not the constitution. In that spirit, the following six proposals should be taken into consideration.

Firstly, law is closer to people and is more effective when people willingly follow rules. But it is the case when law is close to their needs, their demand as well as their wants. On the contrary, when law is against nature, against people's wish, it will be boycotted no matter how harsh, forceful and threatening punishments are used. Then the illegal is common, the legal is exceptional. Therefore, making law stricter and more effective means better presenting people's views and interests.

The insufficiency, overlapping and contradiction of legal documents or the lack of legal staff are just only temporary and superficial reasons for the ineffectiveness. The key is to bring the soul of law nearer to people's consciousness and interests. It is necessary to rally 80 million Vietnamese people in organizations representing their various interests. There should be unions, associations, religions and parties to promote people's will – a supreme will which conquers all forces of the state.

Secondly, law and law measures should be redefined if people are viewed as root, the state is viewed as tool not the other way round. Law is not just a set of rules set by the state but a reflection of people's desires which are converted into laws. The bodies who speak those desires and present a lot of unions should not be just legislative but also juridical organizations. In modern time, rigid laws have been gradually replaced by soft laws set up by lots of institutions. Once realized by public bodies of power such kinds of rules and regulations become law. Thus, establishing and implementing law is no longer the sole business of the state, it should be the common business of all people in the country. The state's function is to ensure proper law establishment and implementation.

Thirdly, a variety of people's interests in community principles of life, family and villages' rules as well as official legal documents of the locality should be well presented by social institutions and

organizations such as party organizations and trade union. As the ruling party, the Vietnamese Communist Party plays a key role in establishing and implementing law procedures. That people are rich or poor and the country is powerful or not is mainly attributed to the Party's policies. The Party's political documents and resolutions are based on to form legislation, and other socio-economic policies respectively. At the same time, the government and other state bodies issue official legal directives to realize those guidelines. In other words, Vietnamese law is mostly based on Party's ideology. However, due to some technical concerns in legislation, the transmission from ideas into written legal documents is so imperfect that the misunderstanding between political orientation and legal norms still exists.

Fourthly, when businessmen are given more freedom to trade, they surely will become a powerful force in the society who tries to gain control over economic, cultural, and social life and of course control politics and legislation soon. This is inevitable because businessmen are also citizens, even some of them are in the lead of creating nation's prosperity. Though trade-union and interest-oriented organizations' activities, businessmen lay pressure on government and legislatures publicly or discreetly, they even try to control law. A typical example of this is that Chinese local courts had to suffer from a great pressure caused by regional rulers as their feud. In addition,

businessmen are getting better understanding of setting rules as their own right and use it as a tool to respond to market changes and law adjustments. This phenomenon is not adequately mentioned in Vietnamese law studies.

Not only law but also economic transactions in the market are affected by the right to set rules and regulations of businessmen. The state is not always a commander but sometimes a counterpart of businessmen. There has no longer been submissiveness but competitiveness between legal norms and businessmen's independent norms. This factor is worth considering when law reform is implemented. Although the state is not supposed to help businessmen to realize, access and allocate business risks, it should have effective intervention to protect the public's interests against abuses of unequal information and competitive advantages.

Fifthly, not only elected bodies but also judiciary organizations at all level, either national or local ones have big power to set up rules. Sometimes, governmental or ministerial letters or circulars or decisions by People's Committee of all level are of high practicality and have better effects on every individual rather than any Acts which mainly contain general principles. This is an inevitable and unchangeable fact. The thing is we should supervise the rights to set up rules to prevent corruption. This gives rise to establishing the institutions to protect the law which is

supposed to abolish such constitution violating rules. There is a need to set up administrative bodies to treat violations of institutions of power. There is nothing new in this because more than two hundred years ago, the West realized that government was not God. Much longer before the East they know such institutions to limit and balance power should be set up. Regretfully, two centuries later, Vietnamese is still at pains to find the way to set up and use such institutions effectively.

Sixthly, it is high time the right to create rules of the judge was discussed. The legal system in Vietnam has followed the legal thought of the Former Soviet Union. By now, the National Assembly has the right to constitute laws and the right to explain laws, in theory, is held by The Standing Committee of National Assembly, yet in reality, it is in the hand of the government and administrative institutions. Vietnamese courts only have the right to apply and implement rules, but not to create or explain them. The practice to view legal procedures came into being when the country was under French rule, according to which Inferior Court should consider the Inferior Court's decisions as one kind of law. Scholars also base themselves on legal procedures to build up theoretical studies. These practices were abolished in Vietnam in the late 1950s. Vietnamese courts now only base themselves on legal documents, they do not correlate the judgment of previous cases.

Nevertheless, the Supreme Court's guidelines which have been summed up from experience are more or less worth referring to in judging procedures. In that sense, to a certain extent, it has some impacts. If the Courts which judge independently are realized, that judges should be given more power to set up rules, apply, comment as well as explain laws to adjust some particular cases should be considered. It is reasonable if the function to explain law is granted to the Court, because only jurisdictional institutions can judge what deeds are legal or illegal. Besides, outside the Court, the judge should consider justice and theoretical studies as a subsidiary source of his job. When there are no rules and regulations concerned, he should judge a case basing on justice and the right, not respectfully submit the record to his senior and wait for the judgment. This kind of thought stemmed from the concept that law does not only contain written documents, there do exist law of the right and law of conscience. The judge with his judgment is not like the official and his administrative decision. He should bring law of conscience and the right close to life creating law. (Latin root: juris-law; dicta-announce).

5. Conclusion

People's awareness of civic rights has led to jurisdictional reforms, which can bring changes to old schools of the state and legislation. A state of people, by people and for people is on the way to replace the

state of proletariat dictatorship. Judging for objective truth procedures has been replaced by equal institute proceedings between the prosecutor and the lawyer. Among innovational thoughts which have been swept away by globalization storm there appears familiar Confucianism. Confucianism which has secured a firm hold on Vietnamese's consciousness certainly will lead us to peace and deliberation to well organize a civil service system and legislation to serve its people better. Westerners have taken a lot of measures to make authorities submit to people's will. Such measures should be soon learned like the way we should soon learn how to master all IT instruments. Nevertheless, no matter how good such measures are, nothing can replace the living thought and ideology. We can not use what the Westerners respect, hate or dread to replace national consciousness. Learning the superficial will just increase people's xenophilia, widen the gap between generations, the sense of nationalism will fall into decadence, thus weaken the country. The state and legislation of the Vietnamese should be established and explained on the basis of Vietnamese ideology. That Western civilization is borrowed is to complement our shortcomings, to encourage Vietnamese people to promote their national quintessence. Vietnamese civil service system and legislation can not start with a borrowed Western school of thought but proceed what we have had for thousands of years.

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NHO GIÁO TRONG TƯƠNG LAI PHÁP LUẬT VIỆT NAM

TS. Phạm Duy Nghĩa

Khoa Luật, Đại học Quốc gia Hà Nội

Bài viết dự định định nghĩa lại giá trị của Đạo Khổng trong sự phát triển của khái niệm pháp luật Việt Nam. Là một tập hợp các quy tắc đạo đức chi phối những hành vi của con người, Đạo Khổng thay thế và trợ giúp các quy chuẩn pháp luật trong việc duy trì trật tự xã hội. Dựa vào công trình nghiên cứu này, bài báo đưa ra sáu vấn đề và đề xuất giúp đưa văn bản pháp luật của Việt Nam gắn với quyền lợi của người dân.