

GREAT LEGAL TRADITIONS

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*Civil Law, Common Law, and Chinese Law
in Historical and Operational Perspective*

John W. Head

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Front Cover—The three images on the left represent the rich historical background of the three great legal traditions discussed in this book: Confucius contributed to the founding of the Chinese legal tradition with his use of the *Zhou li* to prescribe a form of social governance that would contribute to cosmic harmony; Constantine, in addition to facilitating the Christianization of the Roman Empire, also founded the eastern capital of the Empire—Constantinople—from which Justinian would issue his great *Corpus Juris Civilis* in the sixth century; Blackstone, with his *Commentaries on the Laws of England*, helped preserve the vitality of the common law by making it accessible to practitioners both in England and the United States. The large image on the right shows judges on the German Federal Constitutional Court in Karlsruhe announcing a decision in 2009—thus reflecting the book’s emphasis not only on the historical development but also on the contemporary operation of the legal traditions being examined here.

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Preface and Acknowledgments

Why This Book?

When I was a university student in the 1970s, I was fortunate enough to study law in England. Having been raised on a farm in an isolated and provincial corner of Missouri, in the heartland of the USA, I had not traveled outside North America before that. My two years in England were exhilarating for several reasons, but largely because they exposed me to a culture, including a legal culture, different from the one to which I had grown accustomed. I was permitted—indeed, obligated—to see my own culture from a different perspective, and to force my own cultural square pegs into round holes. In moving across the Atlantic, I moved across cultural “space.”

I made a similar cultural move in the 1980s, working in Asia for five years as a lawyer for an international organization. Then, in the 1990s, I moved into academics, where I was able to revive my interest in history, especially legal history. This represented another type of cultural move—into the dimension of time. I have studied the legal heritage of my home country as well as that of other countries where I have lived or worked.

Why do I tell this personal story? Because it explains why I wrote this book. I believe strongly that we all have much to learn from moving across cultures. Lawyers in particular have much to learn from moving across *legal* cultures. As my own experience illustrates, such a movement across legal cultures can take two forms: (i) it can be “spatial”, by which I mean a comparison of contemporary legal cultures in two or more geographical areas; and (ii) it can be temporal, by which I mean a study of earlier legal cultures. Put more simply, I believe both comparative law¹ and legal history are highly worthwhile subjects of study.²

This book represents my attempt to move in both directions—both “spatially” and temporally. I am writing both about comparative law and about legal history. This is my own comparison of the three greatest legal traditions in the world today—civil law, common law, and Chinese law—drawn from a historical perspective. It is a big task. How can any useful comparison be drawn between three rich and complex legal traditions that

1. As discussed in Chapter One, I find the term “comparative law” slightly disturbing. There is no type of law called “comparative law”, in the same way as there is a type of law called “criminal law” or “water law”. The more accurate term for what this book is about (in part) would be “comparison of laws” or “comparison of legal traditions”. For the sake of convenience, however, I shall often refer to “comparative law”.

2. Ken Pennington makes a compelling case for studying legal history and comparative law. Kenneth Pennington, *The Spirit of Legal History*, 64 UNIVERSITY OF CHICAGO LAW REVIEW 1097, 1112–15 (1997) (reviewing the first two volumes in a new series regarding Roman Law and Canon Law). For example, he points out that “[m]ost often law evolves under the sway of a myriad of influences” and that “[t]his truth is the best argument for studying legal history”. *Id.* at 1112. For a summary of reasons why comparative law is worth studying, see section II of Chapter One, below.

represent a combined total of over six thousand years of law? It would seem to be an almost impossible undertaking, even in a treatise of many volumes—not to mention within the covers of a relatively modest book of this size.

Yet I see value in making the effort, especially for those readers seeking a general survey that is both comparative in character and “digestible” in a single effort. Who are those readers? I have designed this book primarily for law students, for upper-level and graduate students focusing on history and politics (perhaps with special concentration in European or Asian studies) or on sociology or other disciplines within the humanities. However, I expect the book also to be useful for legal practitioners wanting to gain a general understanding of the major themes and influences at work in various national legal systems that might be of special interest to them, and for a wide range of other readers curious about the world’s rich diversity of views about law, rights, justice, government, and culture.

Structure and Approach of This Book

As should be clear from a brief survey of the table of contents, this book follows a two-step process of examining each of the three great legal traditions: in each case, one chapter is devoted to studying the legal tradition from a historical perspective and another chapter is devoted to studying that tradition from an operational perspective. This symmetry—in which Chapters Two, Four, and Six highlight history and Chapters Three, Five, and Seven offer an operational perspective—allows for multiple sorts of comparisons to emerge. One such comparison is between (i) the contemporary operation of a legal system in which a particular legal tradition prevails and (ii) the historical narrative that leads up to and informs the “law in action” in a country. A second comparison is across legal traditions—what I referred to above as a “spatial” comparison.

In the process of presenting these various perspectives and comparisons, I also try to create some forward motion, in the sense of identifying for the civil law and common law traditions certain features—for instance, the role of religion in law—that will prove especially useful in our survey of Chinese law. My goal has been to arrive at the end of the book not only with a general understanding of these three great legal traditions from a historical and operational perspective but also an appreciation for certain important deeper questions. What factors bear on the different roles that law plays in different societies? What will be the legal effects (or causes, for that matter) of a continuing globalization of the world? How will changing balances of power—and particularly the shifts in influence among Europe, the USA, and the People’s Republic of China—affect the future development of the civil, common, and Chinese legal traditions? While this book offers few specific answers for such questions, it aims to provide the reader with some of the background needed to contemplate them intelligently.

A couple of other comments are in order regarding the “approach” of this book. As will be evident, I have tried to balance professional objectivity with personal observation. By “*professional objectivity*”, I mean a careful and neutral presentation of material without personal bias. One reason I provide more footnote citations than might be expected in a text of this sort is to demonstrate my commitment to ensuring that the accounts offered here—despite their brevity because of the “survey” character of this book—are nevertheless firmly supported by credible authority. Facts matter.

On the other hand, facts can be dry without analysis and reflection. By incorporating into the book some degree of “*personal observation*”, I try to bring the facts to life by offering my own evaluation of important legal, political, and policy issues that a comparative study invites us to address. For example, in Chapter Three I make some evaluative comments about certain peculiarities of the civil law tradition; in Chapter Five I assert some of my views regarding the American myth that the US criminal justice system provides the best protections for persons accused of criminal behavior; and in Chapter Seven I provide my own speculations about the “rule of law” in China and about what lies at the center of contemporary China’s legal soul. In all such cases, I identify them as my own views; and frankly I am less interested in whether readers agree with *my* views than I am in encouraging readers to formulate *their own* views on important issues that are at play here.

Lastly, I have tried to be lively. I believe the subjects this book addresses—encompassing time and space, extraordinary persons and exploding populations, the rise and fall of empires, the control that governments have over life and death, and the perspectives that different societies have on the nature of law, fairness, progress, and culture—are unparalleled in their ability to arouse our curiosity. I have tried to reflect in my accounts of these subjects the fascination that they have held for me for many years.

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In writing this book I have benefitted greatly from the guidance, inspiration, and patience shown me by many people. This work, like most, is derivative in character, drawing liberally on the efforts of many others—including especially those whose books and articles are specifically cited in footnotes and in the Selected Bibliography near the end of this book. I thank them all collectively, along with my colleagues at the University of Kansas from whom I constantly draw great support, cheerfully given. As always, my wife Lucia Orth remains my most trusted and stalwart critic and conscience. In addition, I wish to add a note of gratitude to several research assistants who have provided such valuable help to me in the work that has culminated in this book. They include those who helped me compile several “generations” of teaching materials used in my Comparative Law course as well as the more recent contributors to my efforts: Marco Antonio Caporale, Enrico Greggi, Katie Lula, Maria Neal, Stefano Penasa, Jomana Qaddour, Aleks Schaefer, Erin Slinker Tomasic, Justin Waggoner, Wang Yanping, Dana Watts, and Xing Lijuan. In addition, I appreciate the generous guidance given to me by several colleagues at the University of Trento; these include in particular Roberto Toniatti, Jens Woelk, Rafaella Dimatteo, Luisa Antonielli, Carlo Casonato, Gabriella di Paolo, Sylvia Pelizzari, Elena Ioratti, Laura Baccaglioni, and Cinzia Picocchi. Support from the University of Kansas General Research Fund is also gratefully acknowledged.

Notes on Spellings, Usages, Citations, and Other Conventions

In this book I have followed certain conventions on spelling, punctuation, and usage that might be unfamiliar to some readers. These conventions include the following:

- Citations to books, articles, and other legal materials appear in a less abbreviated style than that used by many US law journals and books. I believe the heavily abbreviated style used in US legal texts can be so unfamiliar to a general audience as to create confusion or uncertainty. In addition, in the case of books, I have departed from the practice of putting the authors' names in all capital letters. Instead, authors' names for all works—books and articles and other items—appear in regular upper case and lower case letters; then titles of books appear in large and small capitals and titles of other works appear in italics or, in a few cases depending on the nature of the work, in regular font with quotation marks.
- In the case of citations to sources found on the internet, I have not included details of “last updated” and “last visited”, on grounds that such information is likely to be of little use. Most of the citations to such sources were operational as of August 2010. However, it is not uncommon for a document on a website to change from one location to another within the website, so a reader wishing to retrieve such a document might wish to use the “search” function within that website in order to find the new location—bearing in mind that sometimes documents are in fact removed from the internet entirely.
- Many of the passages that I have quoted from other authors included, in their original publication, citations to authority in the form of footnotes or endnotes. Throughout this book, unless noted otherwise, I have omitted these citations without expressly indicating “(citations omitted)” or “(footnote omitted)”.
- I also have omitted (in nearly all cases) citation to the authorities that support the factual accounts and explanations that I have occasionally drawn from Wikipedia. Although I am fully aware of the shortcomings of relying on Wikipedia for many types of research and analysis, I have felt comfortable drawing on such accounts and explanations if (i) they cite sources that, in my judgment, warrant confidence and (ii) they relate to general information that I am confident can easily be substantiated elsewhere if curiosity prompts someone to pursue the issue further.
- Throughout this book, the term “state” typically carries the meaning it has in international law—that is, as a nation-state and not as a subsidiary political unit such as the individual domestic states that make up federal nation-states such as India or the USA or Mexico.

- In most references to the People's Republic of China, I have used the abbreviation "PRC", rather than using the name "China". This facilitates separate reference, when necessary, to (i) the Republic of China ("ROC") on Taiwan or to (ii) China as a single social and political entity, especially in the years before 1949.
- The acronym noun "USA" is often used in this book in preference to the commonly-used noun "United States", inasmuch as there are other countries (such as Mexico) with the title "United States" in their official names. However, the term "US" has been retained for use as an adjective referring to something of or from the USA, such as "US legislation" or "US states".
- I have opted for the use of "US" and "USA" without periods, as this seems to be the more modern trend and also follows the usage found in acronyms for other political entities such as the United Nations (UN) and the People's Republic of China (PRC). Naturally, I have not changed "U.S." to "US" in any quoted material or official citations.
- The possessive form of words that end in the letter "s" have not had another letter "s" added to them—hence I have cited Thomas Hobbes' writings, not Thomas Hobbes's writings.
- I have used the abbreviation "CE", for Common Era (or Current Era), to carry the same meaning as the more outdated abbreviation "AD", for *Anno Domini*; and I have used the corresponding abbreviation "BCE", for "before Current Era", instead of "BC", for Before Christ.
- I have followed the less-used but more logical convention of placing quotation marks inside all punctuation (unless of course the punctuation itself is included in the original material being quoted). Doing so allows the text to reflect more faithfully how the original material reads.³
- I have used italicization in four circumstances: (i) where I wish to add emphasis (or where emphasis was already inserted in material being quoted from other authors); (ii) in textual references to titles of books (this explains italicization in the case of Justinian's *Institutes* and Justinian's *Digest*); (iii) to signify words or terms from languages other than English (mainly Latin, French, Italian, German, and Chinese); (iv) in certain "levels" of subsection headings, as a navigational aid to the reader. I assume the context will allow easy distinction between (i), (ii), and (iii).

3. In defense of my decision to use this approach, I would refer readers to H. W. Fowler, *A DICTIONARY OF MODERN ENGLISH USAGE* 591–92 (2d ed., 1965):

Questions of order between inverted commas [quotation marks] and stops [periods] are much debated. . . . There are two schools of thought, which might be called the conventional and the logical. The conventional prefers to put stops within the inverted commas, if it can be done without ambiguity, on the ground that this has a more pleasing appearance. The logical punctuates according to sense, and puts them outside except when they actually form part of the quotation. . . . The conventional system is more favored by editors' and publishers' rules. But there are important exceptions, and it is to be hoped that these will make their influence felt. The conventional system flouts common sense, and it is not easy for the plain man to see what merit it is supposed to have to outweigh that defect; even the more pleasing appearance claimed for it is not likely to go unquestioned.