

Integration of Chinese State Law and Folk Law

L'INTÉGRATION DU DROIT DE L'ETAT CHINOIS ET LE DROIT POPULAIRE

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Abstract: Folk law has been playing an important role in Chinese thousands of years history and culture. In the process of the rule of law in China, China pays too much attention to western legal culture rather than China's national conditions, which results in the fact that it is difficult for state law to go to the countryside and folk law can not play its due role in building the rule of law effectively. This paper analyzes why state law system in rural areas is difficult to be carried out in-depth from theory aspect and practical aspect. And then proposes approaches of integration for state law and folk law, so as to better facilitate the process of the rule of law.

Key Word: Folk Law; Rural Society; State Law

Resumé Le droit populaire a joué un rôle important dans l'histoire et la culture chinoises. Dans le processus de la construction du règne de la loi en Chine, la Chine accorde trop d'attention à la culture juridique occidentale plutôt qu'aux conditions nationales de la Chine, ce qui résulte dans le fait qu'il est difficile d'appliquer le droit de l'Etat à la campagne et que le droit populaire ne peut pas jouer son rôle dans la construction d'un règne de droit efficace. Cet article analyse pourquoi le système de loi de l'Etat dans les zones rurales est difficile à être réalisé en profondeur à partir des aspects théoriques et pratiques. Il propose ensuite des approches de l'intégration pour le droit de l'état et le droit populaire, afin de mieux faciliter le processus de l'élaboration du règne de la loi.

Mots-clés: Droit Populaire; Société Rurale; Droit De L'état

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In a very long period of time, Chinese law circle basically applies "city", "western" and other upper or so-called mainstream of academic discourse for research. In the process of modernization, cultural and academic colonial transplantation makes the public unknowingly use western-oriented vision to look at, analyze and evaluate the problems of Chinese law, while ignores the practical condition in China. As a result, legal research in the rural areas is a neglected piece of ground.

However, China has nine hundred million peasants, with still 80% of the population still living in rural areas, which is the reality in China that cannot be denied. In rural areas, the same villagers, mode of production, lifestyles, behavior patterns and customs produced a sense of community interaction and community identity and therefore form a specific cohesion and solidarity, which is the reason why folk law is inveterately established. Folk rules in rural society rooted in local community and has been playing a huge role, to a certain extent, in affecting the actual operation of the modern state and effect of law. But in reality, state law in the rural community does not get very good effects because it's content entirely out of people's expectations and cannot be understood, agreed, and even accepted. In the process of building the

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rule of law, we should give full attention to the rural community and consider the communication of state law and folk law so as to achieve each other's healthy development and full effects in society.

1. THE DEFINITION AND VALUE OF FOLK LAW

1.1 The Definition of the Folk Law

Zhiping Liang holds that Folk law is concerned relative to state law, which mainly refers to a knowledge tradition. It was born in folk, and used by villagers in long life, work, as well as in communication and conflict of interest that cannot be wiped out, which has a spontaneous and rich local color (1997, p. 435).

Suli Zhu put forward theory of local resources. In his view, local resources, including Chinese historical tradition, which means "informal system in millions of Chinese people's living that will impact their behavior, which is a variety of embryonic development such as local custom, usage and so on" (1996, p. 14).

Yongliu zheng thinks that folk law exist in a society outside the country, the formation of which is spontaneous or default, and is ensured by the external coercive power to implemented (2002, p. 26).

However, I believe that folk law refers to the norms of civil society, namely, folk customs, manners, ethics, and regulations and so on. Folk law has diverse forms, which can be family, can be the nation, can be seen in literature, and can be by word of mouth. Folk law may either be artificially created or naturally occurred; it may have clear rules, or may be manifest in flexible specification. Folk law may be implemented by a specific person in charge; may also rely on public opinion or a subtle psychological mechanism to carry out.

Folk law results from social organizations and social sub-groups and it is according to facts and experience, based on some kind of social authority and organization to be established and turned out by a series of norms that adjust the rights and obligations between people within a limited area.

1.2 The Value of Folk Law

State law running from top to bottom, emphasizes centralized and unified. In contrast, folk law takes on a distributed system, with bottom-up development of endogenous expression. Because folk law is more concerned with the daily life and closely related to the labors' life and individuals in groups. In contemporary society, folk law has the following value.

1.2.1 Practical value

Because of historical, natural, cultural differences and other factors, there exists distance and difficulty in state law's regulating of local rural areas. The operation of state law is too costly, combined its complicated procedures and judicial corruption, state law has seriously impediment in its recognition by peasants. While folk law derived directly from the villagers and their specific living traditions; it is compatible with peasants' common knowledge and the logic of life rooted in their hearts. Therefore, the villagers follow and apply the folk law, not just by the interests of rational choice from their traditional habit and behavior, but also by emotional closeness and the actual effect and efficiency.

1.2.2 Supplement value

Undeniable, China's current reality is that the development of politics economy and culture is unbalanced, so it is extravagant to expect state law to be performed in all aspects of social life, to adjust all manner of behaviors. Such notion is not only impossible, but also unpractical. Therefore, folk law becomes an important supplement in legal "vacuum" region.

1.2.3 Conversion value

It is no denying the fact that folk law actually becomes more common in rural society, more acceptable to villagers. Such factors are the foundation for folk law to rule rural society. Thus, by certain means folk law can be absorbed, conversed, upgrade, translated into state law, which is bound to play a promote role in state laws' successful implementation.

2. THE REASON WHY STATE LAW IS DIFFICULT TO GO TO THE COUNTRYSIDE

In reality, when peasants have disputes they do not immediately resort to the law, because the law's useless in the countryside is the greatest embarrassment faced by promoting the rule of law in countryside. Why state law cannot be applied in rural area? In my opinion, this phenomenon has the following reasons.

2.1 System Defect

As we all know, Chinese law learns from, absorbs and transfers from west society. Since reform and opening, our legislation has been greatly impacted by western culture; unavoidably our law endured the baptism of European and American legal thought. As a consequence, China's rule of law seems more and more westernized, even the framework and paradigm we used are unknowingly westernized. In history, China have had horned Chinese legal system; but now China's law has lost its own independent feature, which is a thought-provoking question. So what urgent is to retrieve the feature of Chinese law system, and local resources is the foothold we should concerned.

2.2 The Reality of Helplessness

Due to historical limitations, people living in border villages cannot frequently contacts outside world. The peasants cannot meet new culture and legal system. From the view of legal point in all aspects of law operation, the peasants have the following obstacles in applying the state law.

2.2.1 High costs of litigation

The cost of litigation includes prosecution costs paid to the court, fees paid for lawyer agency, fees paid for the conduct of litigation activity and other expenses, such as for the sake of collecting evidence and so on .On order to conduct it, one has to spend transportation fees , communication fees, accommodation fees, catering fees and so on. Costly litigation proceedings seriously restricted state law's role of relief for peasants because "compensation got from litigation is not enough for the fees has spent, let alone whether the judgment can be executed.

2.2.2 Litigation cycle is too long

Litigation cycle refers to the time elapsed in total process, including the prosecution of the parties, the courts' accepting of the case and the trial, and the execution phase of the time spent together. According to "Chinese Civil Procedure Law", the ordinary trial proceedings should be completed within six months, the president of the court may approve an extension of six months, if the case still needs an extension, the higher people's court will approval corresponding period. For thousands of peasants, most time they are busy with working because food is their first need in life. They do not have much time or too much effort to participate in such a time-consuming litigation.

2.2.3 Difficulties of proof

Peasants are lack of legal knowledge and they have financial difficulties in hiring lawyers to help them. In litigation once encountered powerful opponents, they definitely lose the equality and defensive weapon of litigation with the other offensive. Peasants have knowledge neither on the proof Limitation nor on litigation proceedings. Such adverse conditions devote to the fact that it is hard for peasants to come up with evidence to defend their rights.

All the above considered,we can draw the conclusion that the realities of our country must be taken into account in the practice of state law. If state law excessively depared from reality, it may become impractical "vase. "So it is urgent for us to explore ways for state law going into countryside.

3. INTEGRATION OF STATE LAW AND FOLK LAW

To promoting the rule of law in China, we must pay attention to studying of Chinese people, especially peasants' thinking, behavior, mentality, their habits preferences, as well as social background behind these acts. To establish the rule of law in China, our government must attach importance to the excavation of the folk law and order.

3.1 Theoretical Foundation of the Integration

3.1.1 China's folk law has high degree of stability, continuity and group identity

The folk rules evolved from rural areas have irreplaceable basis of public recognition. As the proverb goes, the power of law is not the reason or logic, but rather deeply rooted in people's social experiences. Only by abiding this philosophy, can people support and recognize the law from the bottoms of their hearts; can the feature of folk law be prominent in its integration with state law.

3.1.2 To arouse and maintain people's belief to state law , full account of the role of local law resources can not be ignored

Any law should reflect general social situation that built on the common life. If state law deviates from economic demands and public recognized habits, it cannot achieve objective and fair nor can the rule of law be achieved. So full account of local law resources should be taken into consideration, which is the premise of integration of state law and folk law.

3.1.3 If society resorts all dispute to court, it may lead to "litigation explosion " crisis

In the rural society, law is not the most effective regulatory tools, while regulatory tools such as persuasive implied, imitation, criticism, praise, reactions are often more effective than law. Therefore, only by integration can State law and folk law complement each other; learn from each other so as to achieve the best effect of social control.

3.2 The Approach for the Integration

Whether state law and folk law, either of them represents a certain amount of intellectual traditions and cultural patterns. The best way to eliminate conflicts between them is to make folk law be clear and be systematic, and therefore make it into national legal systems. Throughout the operation of law, the integration of the state law and folk law requires the following conditions.

3.2.1 In concept, we must have pluralistic, pragmatic normal state of mind.

China is still a typical agricultural country and the "three rural "issue is very prominent. To promote the rule of law we cannot avoid the local social background; cannot ignore the profound social nature of the "local community"; cannot underestimated, or avoid the difficulty and complexity in constructing modern law and order in rural areas. The current circumstances is that state law and national judicial system have not really entered into the villages as well as into every villagers' life. There is no need to establish state authority as the center or expand judicial system to each township. But by changing the authority and role of folk law can we eventually complete the task of achieving unified legal order.

3.2.2 Take the advantages of folk law into legislation.

There are two ways in producing law, the first is formulated, and the second is recognized. In practice, we tend to have over-emphasis on state statute while the actually existed effectively folk law are consciously or unconsciously neglected in legislation. It is such Ignored or circumvented "folk law" that regulates social life and adjusts various contradictions and conflicts in rural area. We should not forget that "The law that cannot solve real problems is only a piece of paper."So in the future legislation, we should put emphasize on creative legislation, automatic legislation and enact regulations with local characteristics and operability.

3.2.3 Regard fair and convenience as the main target in the implementation of law

Western legal system is built on the base of expensive running costs. To the rural areas, such system cannot be effectively operated. To majority of people of grass-roots in China, high professional technical proceedings are very strange because what they are familiar with is daily life and folk customs in common life. For the peasants, all through whose life only go to court once, the legal system is highly unpredictable and insecurity. In such a panic condition, they cannot effectively claim their rights. As a result, the peasants will lose trust in state law, even more, they turn to other means to resolve disputes. Such circumstances seriously hinder the rule of law in China. To wipe of such deficiency, fair and convenience should be regarded as main target for implementation of law ,and therefore more effective means and a set of law that adapt to rural society should be explored.

In order to achieve the integration, to achieve the unity of legal effect and social effect, the judge in the application of the law should give appropriate assistance to different parties, using expedient to apply folk law rather than state law. It should be noted that in resolving disputes, as long as the goal achieved, the state law and folk law perform the same role.

Only be the above target can the integration be smoothly progressed; can we achieve the unity of legal effect and social effect ,so as to construct the rule of law with Chinese characteristics.

REFERENCES

- Bryan A. Garner. (2004). *Black's law dictionary*. West Group.
- Gardner, A. (1980). *Legal Imperialism*. Wisconsin: The University of Wisconsin.
- Rawls, John, A. (1971). *Theory of justice*. Massachusetts: The Belknap Press of Harvard University
- Dworkin, Ronald. (1977). *Taking Rights Seriously*. Cambridge, MA: Harvard University.
- Zhiping Liang. (1997). *Folk law, custom, customary law*. Beijing: University of Chinese Political Science and Law.
- Suli Zhu. (1996). *Rule of law and local community resources*. Beijing: University of Chinese Political Science and Law.
- Harold J. Berman. (1993). *Law and revolution*. Beijing: Encyclopaedia of China Publishing House.
- Yongliu Zheng. (2002). The effect of law and effective law. *Law and Social Development*, 2, 24-26.