

Analysis of the Controversy of “Typology” Method in the Study of Legal History - On Several Research Methods of Legal History

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Abstract: *The book “Chinese Law and Chinese Society” by Mr. Qu Tongzu introduced the “functional theory” research method in the field of sociology into the study of Chinese legal history, innovatively choosing five parts of Confucianism and Taoist thought, i.e., family, marriage, class, witchcraft and religion, to complete the study of Chinese traditional legal society. We call it “typology” in the study of Chinese law. On the one hand, this type of research abstracts the common problems in the traditional Chinese society and law for the past two thousand years, so it has some reasonable and creative points; on the other hand, it also ignores some changing factors in the historical development.*

Keywords: *“Typology” Research Methods, “Chinese Law and Chinese Society”, Weber*

1. Introduction

China has a history of 5,000 years of civilization and a history of 3,000 years of political civilization. Therefore, if we are committed to constructing a panoramic atlas of Chinese legal history, there are two ways to choose. One is to introduce the legal content of each dynasty one by one according to the trend of time. Yang Honglie’s “History of the Development of Chinese Law” falls into this category. The second adopts a biographical style similar to historiography, proposes certain categories, and longitudinally summarizes or analyzes the history of Chinese legal system under this category, such as Qu Tongzu’s typified model in “Chinese Law and Chinese Society” (hereinafter referred to as “Law Society”). The former is a general idea followed in the study of legal history; the latter breaks the limitation of time, introduces the research method of “functional theory” in the field of sociology, and extends the research thinking of legal history to new fields.

However, compared with the former’s modest and proper thinking, the latter’s thinking has inevitably caused a lot of controversy while refreshing the academic world. After reading the book repeatedly and referring to several other works by Qu Tongzu based on the same idea, the author tried to put forward his own views on the controversy [1].

2. Cause of Dispute

The book “Legal Society” is divided into five parts: family, marriage, class, witchcraft and religion, Confucianism and Taoism. The book focuses on the interaction between social elements and law, especially the influence of social systems, social order, and social thoughts on shaping the face of law. In other words, the research focus of this book falls on “what kind of social system Chinese law is built on” and the role of law in the traditional Chinese social structure, rather than a pure study of legal provisions and legal systems themselves. Therefore, as the author himself mentioned, the book “combines legal history with social history... It is not only a history of the legal system, but also a book of social history [2].”

The innovation of this book lies in selectively categorizing the content of Chinese legal history into five different social history categories set in advance, forming five parts of the book, thereby re-deconstructing the history of Chinese legal system and trying to “find out the basic spirit and main characteristics of ancient Chinese law [3].” This line of thinking originates from the research method of “functional theory” commonly used in sociology, that is, “first regard the community as a whole. This book examines all social life in this entire standpoint and considers the various aspects of this social life which are closely related parts of a unified system. To get a proper understanding, we must explore

the relationship between this aspect and all other aspects [4].” Looking further, the author’s research thinking comes directly from the “ideal type” of Weber’s sociological methodology [5]. “This method emphasizes understanding the objective meaning of social actions through the subjective construction of ideal types [6].” Regardless of whether it is the “community as the whole” or the “ideal type” in the “Functional Theory”, as mentioned in the preface of “Legal Society”, it is necessary to “take the law from the Han Dynasty to the Qing Dynasty more than two thousand years as a whole for analysis [7].”

Interestingly, the author expected to use this overall analysis to discuss “whether there were any major changes in ancient Chinese law from the Han Dynasty to the Qing Dynasty”, and the doubts about this book came from this. Some people attentive people have discovered that Mr. Qu said in the introduction of an earlier edition: “This attitude of melting the historical facts from the Qin and Han Dynasties to the late Qing Dynasty over two thousand years before the reform is based on a basic belief. They believe that this long period of time. Like the entire socio-political economy, China’s laws have always remained stagnant in the same basic form and remain unchanged.” This passage was deleted in all editions that were later republished, but the content of the book was not deleted. It can be seen that the version we are reading is still based on this belief. In response to this point, Taiwan scholar Lin Duan mentioned: “Mr. Qu applied this view to the study of the history of Chinese legal development and constructed his ‘Chinese Legal Social History’. It is inevitable that he will encounter someone who is good at structural analysis. The functional viewpoint faces the limitations of historical and social changes. He is also aware of this problem, and his solution strategy is similar to that of Weber’s description of traditional Chinese society: the law and society of the Chinese empire from the Qin and Han Dynasties to the Ming and Qing Dynasties are regarded as a historical fact that lacks changes. Then he outlines the territory and masters its basic forms and characteristics [8].” Chen Jingliang, a domestic scholar, commented: “Both China and the West have condensed the characteristics of ancient Chinese law into an unchanging basic form. Although this is conducive to highlighting a certain characteristic of Dhamma, it is very easy to overlook the vivid personality of Dhamma as the wisdom of life [9].”

Obviously, the skepticism about the book is centered on its neglect of historical changes and the subjective view of ancient Chinese society as an unchanging whole.

3. The Rationality of “Typology” Research - Attempts to Explain the Dispute

(One) Weber’s “Ideal Type”

To make a reasonable explanation for the above questioning, we must first clarify the origin of the “typology” research. Weber believes that the “ideal type” in all situations, whether rational or irrational, departs from reality and serves to understand reality. Its form is to show how close a historical phenomenon is to one or several of these concepts, so that it can be summarized. [10]” Moreover, only through this clear ideal construction to analyze social reality or social action, can sociologists come up with clues from the often conflicting and chaotic empirical materials, so that they can accurately show the most critical level of facts [11]. Regarding the concept of being chosen as a type, he said, “It is not a panacea to explain the chosen term: the term recommended here is to create some useful marks for a certain purpose. These marks have a certain conceptuality and can discern the direction instead of mechanically distorting the infinite historical diversity terminology. [12]”

We can conclude that the ideal type is not the fact itself, but an inductive and abstract ideal construction made by observing the empirical society. In addition, these words used to express types cannot cover all aspects of society. It can only aggregate social elements with one or several characteristics in the field of self-concept. In some cases, this aggregation spans a predetermined period of time.

If the above conclusion can be established, it can at least lead to the following understandings: 1. The construction of the ideal type comes from the researcher’s active observation and screening. It is bound to be affected by uncertain factors such as personal research purpose, research ability, research interest and habits. 2. Based on the abstraction of the ideal type, it must be filtered and summarized by the facts of existence. This process can only be completed by discovering and refining the unchanging things in a certain fixed object. 3. Since these types only serve as markers in certain areas, they cannot be forced to achieve comprehensive effects.

(Two) The Rationality of “Typology” Research in “Legal Society”

3.1 The necessity of adopting “typology” research

After the above analysis, if we want to choose the “typology” method to study “Chinese Law and Chinese Society”, it is necessary to regard ancient Chinese society as a whole. This is the most basic requirement of this research method. Judging from various disputes, this is not the focus. People focus on the research premise that denies “the law and society of the Chinese Empire from the Qin and Han Dynasties to the Ming and Qing Dynasties as a historical fact lacking change”. To explain these disputes, we need to discuss the rationality of this “unchanged” premise.

First of all, as mentioned above, since ideal types are abstract concepts, refining these concepts must be based on the analysis of a stable object. Sociologically speaking, “community” actually refers to the research object, that is, the magnificent ancient Chinese history in this book. Although it is recognized that things change and develop all the time, it is recognized as a universal truth, but in typological research, if these changes are exaggerated, then the extraction of almost all concepts will be inaccurate. Even if it is familiar and detailed, such as “feudal society” (even if the meaning of the word itself is still controversial, it will not be discussed here. It can only be interpreted from the general application of the understanding), and in the last three thousand years, it can be seen that it has shown different states under the influence of many factors such as the stage of social and economic development, the changes in the strength of centralized power, and the continuous changes in people's ideology. The separatist state of the Warring States period, the unified state after the Qin Dynasty, the prosperity and development of the commodity economy after the Song Dynasty, and the modernization of the semi-colonies in the late Qing Dynasty. These great changes in history have shaped the content of “feudal society” in various stages in different ways. The reason why we can still use “feudalism” to summarize a certain period of society today is based on a comprehensive understanding of factors such as the unchanging land system, the stable small-scale peasant economy, and the rule of one person by the emperor. If you insist on paying attention to the changes of these factors in different historical periods, it may be difficult to come up with a concept to describe a long historical period. This will cause great inconvenience in description. Moreover, these meticulous and accidental changes fundamentally do not negate the macroscopically stable connotation of the term “feudal”.

Similarly, in constructing his “Chinese Legal Social History”, Mr. Qu focused his “focus on family, social stratification (Mr. Qu’s “class”), and social ideology (including witchcraft, religion, and political law, and schools of thought). [13]” These types of choices are not the author deliberately avoiding historical changes, but “what he pays attention to are major changes, not those cumbersome differences.” This comes from his wish to “try to find common ground in order to explain the law.” The basic spirit and its main characteristics” [14]. It should be said that based on this research purpose, Mr. Qu has chosen an ideal type of research thinking. Through the inspection of the chapter “Marriage” in the book [15], the author chooses the taboos of marriage, the conclusion and contact of marriage, and the status of spouses and concubines to elaborate on the provisions of the Chinese legal system related to marriage relations. These refined and abstract types are the “common points” that we hope to find at the beginning of the research. At the same time, the accusation of “ignoring the process of historical change” cannot be established. The author used a large number of cases and code clauses from different dynasties to explain these common points in the book. The rich historical materials cited have attracted attention in the field of legal history research. This just shows that the author is in order to achieve the purpose of the research. Although the reasoning process of the writing did not emphasize the changes of the minor content in the process of dynasty change, these cases and laws have not only verified the comprehensiveness of the author’s investigation of Chinese society. At the same time, they also confirmed that these ideal types can accurately describe a certain social factor, which is appropriate and logical.

Weber’s research thinking in the book “Confucianism and Taoism” takes the chapter “The Way of Confucianism” as an example. He uses a lot of time-fuzzy words such as “in China”, “emperor”, and “country” [16]. We need to base our understanding of the content on the basis of determining that it exists in the entire ancient Chinese society. In contrast, the views of this chapter, whether it is the emperor’s mythological status, Confucian understanding of “gentlemen”, the ancient system of selecting officials and employing personnel, etc., are generally in line with the basic situation of ancient China. The research thinking of “Legal Society” is in the same line with this.

3.2 Possibility of using “typology” research

The next thing to discuss is whether it is possible to “take the laws of ancient China from the Han to

the Qing 2,000 years as a whole” to dilute the influence of those changing factors. “Legal Society” has already given a positive answer, but here is just an analysis of the reasons.

Since Emperor Wu of the Han Dynasty adopted the principle “to dethrone all other schools of thought and uphold Confucianism”, Confucian culture represented by Confucius and Mencius has been improved and gradually constitutes the core value of Chinese culture, that is, “people should go beyond the enjoyment of material wealth and the instinctive happiness of the senses [17].” This kind of value requires people to regard dignity and enlightenment higher than objective material property—this concept still dominates the direction of Chinese spiritual culture. From this, Chinese culture has formed an internal rationale centered on the concepts of “morality” and “goodness” in ethics education as the ultimate standard. In the powerful ancient society constructed on the basis of ethics, the most important aspects must be reflected in the ordinary order of social life and the legal norms of the country. In other words, the characteristics of ethics and education in ancient Chinese society made it a society with standards at that time, and this standard was reflected in the law and embodied in the specific legal requirements transformed from various ethics and morals.

The Chinese legal system based on this not only carries the various moral standards required by ethics and education, but at the same time, as an individual of law, it still undertakes the pursuit of the legal and cultural connotations of order, fairness, and safety for all people. Due to the consistency of the guiding ideology, after the Han established the general principle of Confucianization of law, it formulated the “Nine Chapters Law” after inheriting the content and style of the “Fa Jing”. Later dynasties adopted the Han law, the Tang learned the Northern Qi, and the Tang Dynasty. After studying the Tang Dynasty, although the Ming Dynasty revised its style, the guiding ideology and specific content did not change significantly compared with the previous ones. After the Qing Dynasty entered the customs, the Ming law was imitated. Under the guidance of Confucian ethics and the function of the law itself, Chinese law has formed a common legal wisdom for resolving interpersonal disputes. “Therefore, a certain kind of legal wisdom can transcend nations and times and be accepted by another nation in different times. Therefore, legal wisdom must have its universality and commonality [18].”

In addition, the politicians of the past dynasties have consciously maintained the formation and stability of rituals for various purposes, and the integration of Chinese law, etiquette and law, has also led to the relative stability of the law, at least in the formulation of the This provides the possibility for constructing an “unchanged” Chinese society and conducting typological research on legal culture. “Legal Society” found this kind of stability. The marriage and family, Confucianism, and class concepts studied in the book happen to be social factors built on the core values of ethics. This coincidence is due to Mr. Qu's full understanding of ancient Chinese society and profound academic knowledge, which enables the book “Legal Society” to overcome the unfavorable impression caused by variable factors in typological research. In addition, this book has successfully investigated the relationship between the ancient Chinese social system and the law, showing a remarkable holistic research approach.

4. Other controversies about typological research

Some scholars have also suggested that the “Legal Society” omits “the interaction between economic production methods and society, law, and politics [19].” They think this is an indispensable part of structuralist sociological analysis. Moreover, they cited Mr. Fei Xiaotong's analysis of the socio-economics introduced in Earthbound China, which is more complete and pertinent. This type of accusation is persuasive. It addresses the issue of rational choice when constructing an ideal type. The process of subjective construction actually requires the selection of all materials, and only the parts that are relevant to the theme are retained. This largely depends on the researcher's own research interests and goals. “Legal Society” does not construct the type of economic production mode. Whether the expression and reasoning cause regrets is a question that needs to be explored in depth. The precious enlightenment that can be drawn from this is actually to remind later people that they need to be more cautious and fully consider when choosing a type.

Regardless of the importance of economic production methods, there may be a point of view that the several types described by Mr. Qu in the book cannot summarize the entire relationship between Chinese society and law. This view must be objectively correct. Subjective construction means abandonment. Although the research object is regarded as a whole, the pursuit of type research is not to show this whole in an encyclopedic style. As Fei Xiaotong explained about the structure of “Earthbound China”, “It is not a description of a specific society, but some concepts extracted from a

specific society. The Earthbound China mentioned here is not a sketch of a specific Chinese society, but a specific system contained in the specific traditional Chinese society at the grass-roots level, dominating all aspects of social life. It does not exclude other systems that also affect Chinese society, and those influences can also work in China's grassroots society [20]." Another example is Zhang Zhongqiu's talk about the structure of "Comparison of Chinese and Western Legal Cultures", "Do people say that there are eight differences between Chinese and Western legal cultures? Of course not. I only caught the eight aspects that I think are more important.... To be precise, it is more appropriate to use 'Comparison of Eight Major Differences between Chinese and Western Legal Cultures' in my book [21]." It needs to be reiterated that the choice of type comes from scholars' grasp of the importance of materials. Eight differences or five types are not up to the standard of full blame, and the proposal of a basic-level living system does not affect the effectiveness of the other system. Perhaps this kind of research by scholars can be regarded as an introduction to provide a way of thinking and a method for later researchers.

5. The New Development of "Typology" Research Method

Since Weber initiated the "typology" research method, in China, in addition to Mr. Qu, there have been Fei Xiaotong's "Earthbound China", Liang Zhiping's "Seeking Harmony in the Natural Order: A Study of Traditional Chinese Legal Culture", and "Customary Law of the Qing Dynasty": Society and the State, Zhang Zhongqiu's Comparative Study of Chinese and Western Legal Cultures, etc. used this method to conduct academic research. It goes without saying that Mr. Fei Xiaotong has made great achievements. The works of the latter two by adopting this research method have also achieved their respective positions in the research field.

In spite of the numerous achievements made by predecessors, we must also pay attention to the difficulty of "typology" research. After all, compared to the study of a specific problem, this pictorial academic depiction is constructed on the grasp of the macro scene. This not only requires scholars to have a solid academic background, but also requires a high-level academic vision to extract the essence of the waste. This provided the later scholars with a high standard and attractive direction for their efforts.

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