

Yunsheng Liu

The History of the Contractual Thoughts in Ancient China

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Preface

This book is a pioneer for exploring the evolution of the ancient contractual theories in China. Prof. Kaiguo Li, one of the founders of civil law in China, commended that, “this book has filled the vacancy in the field”. At the same time, it adopts a new angle to demonstrate the concept of contracts ever since the Western Zhou Dynasty. With empirical researches and historical materials, it also rebuts the hypotheses and assumptions that the civil and criminal laws were an integrated system in ancient China. After its first publication in 2000, the book brought a group of scholars on the issue, and a substantial number of students have been inspired. The author and the press have received a good deal of correspondence for opinion exchanges. Thus, we found it necessary to translate the book so as to introduce it to more interested readers for further discussion and to promote cultural exchanges among different countries. Howsoever, it is not easy to even make the first step, because of too many ancient concepts and ideograms, as well as the characters in bone, bronze, bamboo, silk scripts in different dynasties which posed a big obstacle in front of us. Much work including consulting professors and doing literature review has been done to solve the difficulty and fathom the complexity of understanding those ancient Chinese expressions and the culture behind them. Additionally, as translators, though we have cooperated in several projects previously, still, we both are so fully engaged in our daily work that we usually feel pressed for time to complete such a great book’s translation this time. It took us more than three years to read and study the book itself and additional two for translation. Nevertheless, after more than five years’ work, it is finally done. We thought we would be excited at the final moment, except we were not, since the translation work has been a routine in these past years, now the ending of the work is just a wave goodbye to an old friend.

The translation of this book demanded not only English and Chinese language understanding, but ancient legal and archaeological knowledge. It will not be done without the assistance and help of the following people: Dr. Tian Lei and Dr. Chen Kun, who helped in verifying the meaning of ancient scripts and in discussing the proper translations of terms; Eli Zhang, Yaoyao Liu and Jane Shu, who helped in the primary study and format proofing during the process; Xinting Cai helped to

sort out the dynasties with the names, time and capitals in the appendix so as to make a clearer guide for those who are less familiar with Chinese dynasties.

The utmost gratitude we would like to express is to Prof. Yunsheng Liu, whose work has been a profound material for understanding and studying the ancient Chinese contractual concepts, and whose confidence in us has been a tremendous encouragement in the past five years and will always be an unforgettable memory in our life.

Chongqing, China

Sun Lin
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Chapter 1

Introduction: Freedom of Contract Under Ethical Justice



When it comes to researches on ancient Chinese contractual culture, ethical justice can be anything but ignored. Any organic society relies on related both inside and outside binding force. In Chinese traditional society, the most important binding bonds were ethics and contracts. Ethics comprises the internal motivation of contracts while contract is the external manifestation of ethics, which not only constituted the nature of Chinese traditional society but also served as the means to achieve its existence and development. In *The New Science of Giambattista Vico*, Giovanni Battista Vico, an Italian ideologist, visualizes the wane and wax between the nature and the means of human development through the conclusion of three phases in the history of human races, namely Age of Gods, Age of Heroes and Age of Civilians.¹ French sociologist Emile Durkheim focuses on the synchronic study of collectivist tradition in the social development and develops the theory of social connection (unity). The so-called social connection refers to the social bond that unifies individuals, which can be divided into mechanical ones and organic ones. Mechanical connection, as the primary form, is based on a strong collective consciousness and the supporting criminal law so as to unify homogeneous individuals into one society. While the organic connection, with social division of labor as a precondition for existence, is based on the interdependence of heterogeneity of social members. However, the function of social division of labor does not lie in the increase of individual utility or happiness as Hebert Spencer and Britain individualists have addressed, but in the forced establishment of moral order.²

In light of theories of Vico and Durkheim, this chapter intends to explore the internal connection and mutual impact between ethics and contracts.

¹See International Aesthetics [1].

²Mitchell [2].

Ethics: The Connection Means of Chinese Traditional Society

Focusing on human, some scholars claim that Chinese traditional society has experienced three stages, respectively being witchcraft (divinity)-connected in Xia (2100–1600 B.C.) and Shang (1600–1100 B.C.) Dynasties; ethics-connected from Western Zhou Dynasty (1100–771 B.C.) or the reign of Emperor Wu of Han Dynasty (156–87 B.C.) to the May Fourth Movement (1919 A.D.); contract-connected since May Fourth Movement, and that the three-stage change is a process in which people have kept breaking through restraints for emancipation.³ Though it is ignorant of the internal connection between ethics and contract in the diachronic development of traditional China, this three-stage division oriented in social development from the perspective of ethics and law, is more scientific and objective than the dynasty-oriented or social-structure-oriented division recognized by academic circle in recent years.

The ethical characteristics of Chinese traditional society have raised increasingly polarized concern and comments. For instance, Hegel comments that Chinese, lacking individual consciousness, “simply counts on morals and objective filial piety of families’ features in their country. What they know and do is limited to their blood-line and natural obligation due to the lack of independent personality”. Meanwhile, Chinese administration and law of society are morals-oriented, far from poetic. In Chinese society, patriarchal political system gives rise to a religious consensus that favors simple virtues and good deeds; that is—“a consciousness of liberty, spirit and impartiality”.⁴ The German philosopher believes that Physics, metaphysics and ethics characterizes respectively in Greek, Indian and Chinese culture,⁵ which is shared by Huston Smith in *Accents of the Worlds Philosophies*. H Smith argues that western thinkers reflect on natural phenomena, Chinese philosophy studies interpersonal relationships and India focuses on introspection.⁶ Charles A More, a scholar in the University of Hawaii, also the writer of *Philosophy-East and West*, considers ethics fundamental in Chinese Philosophy. Contrary to individualism advocated by the West, he looks upon human society as a whole and holds that people’s self-realization is through the achievement of harmony. While the West attaches importance on the cultivation of individuality, the East values more of the individual instead of an individual.⁷ Hajime Nakamura, a Japanese professor, summarizes the importance of formality, ethics, identity order and family relations in terms of Chinese behaviors on the basis of western theories.⁸ It seems that Chinese scholars, absorbing the ideas of western scholars on a third-person perspective, start to reflect on their own

³Chen [3].

⁴Hegel [4].

⁵Hajime [5].

⁶See footnote 5.

⁷ibid.

⁸ibid.

culture. From Neo-Confucianism to new-generation scholars, it is widely deemed that Chinese traditional society is ethic-centered in nature.

The Confucian-ethics-oriented interpersonal relationships, which substantively cover ties of blood, patriarchal system and hierarchy, were family-centered based on blood relationship. Yu Ronggen, an expert in legal culture of Confucianism, once set forth the essence of “Lunli (伦理ethics)”. He said, “the term ‘Lunli’, AKA Lunchang (伦常), namely moral norms of human relations, refers to hierarchical order of human relations based on family and blood relationship in ancient patriarchal society. In a broad sense, it can refer to the rule of the universe and political order of human society”.⁹ The etiquette and rites system is the demonstration of such ethical order. Emperor Zhang of Han Dynasty had presided over the *White Tiger Temple* conference on studies of Confucian classics, whose minutes, the famous *Baihu General Sense* played the role of code at that time.¹⁰ And the centerpiece of the conference was to elaborate the functions of ethics, rites and music. “Etiquette and rites, as a harmonious result of Yin and Yang (the two models of energy whose interplay constitutes all things in Chinese philosophy), is used to show reverence to gods, hierarchy and morality”, “The propriety of the ruler is greeted with the righteousness of the minister, and it is the same with the father and the son. And four seasons thus keep in order, contributing to the growth of all things. ... There exist the distinctions of class, intimacy and seniority. In accordance with the etiquette at imperial court, lord does not give way to loon, thus giving precedence to nobility; In accordance with the etiquette of fellow villagers, the senior does not give way to the junior, thus giving precedence to seniority; In accordance with the etiquette in ancestral temple, kin does not give way to kith, thus giving precedence to intimacy. As all three realized, the Way of King is paved, leading to the development of all things, which will be greeted with national celebration”.¹¹ After extensive reading, we gain knowledge that in Chinese traditional society harmony of family and state and even of all things were logically based on blood ties. In other words, ethics, which gives precedence to seniority over juniority and lord over loon, both whose harmony are based on the clear distinction between each other, is norm inward supported by etiquette, the restraint outward.¹²

Ethics and Etiquette in traditional China both referred to a certain kind of value system for pragmatic uses, such as the concepts of “benevolence, righteousness, propriety, wisdom and faithfulness” and “gentleness, kindness, respect, frugality and forbearance”, which gradually developed through the summary by Confucianists of Han and Song Dynasty. And behind these concepts lies the abstract core, namely, “De (“德”, refers to morality)”. By tracing the development of Chinese philosophical “De”, we can have a clear knowledge of how Chinese society evolved into an ethics-centered one. At the beginning of this century Wang Guowei once said, “Shang and Zhou Dynasty have witnessed the greatest change in Chinese politics and culture”.

⁹Yu [6].

¹⁰See Hou et al. [7]. Or see [8].

¹¹See *Baihu General Sense* (Volume I(b): *Rites and Music*).

¹²Xu [9].

The Pre-Qin De was a kind of ethics that valued what Pre-Qin religion valued, namely unity of man and Heaven. The Shang Dynasty was a typical thearchy, focusing on worship of ancestor and god through witchcraft rites. However, Zhou Dynasty not only differentiated god, gnome, man and ghost but named a rational supreme god “Heaven” and its reincarnation “King”. It was deemed that ancestors had the power to communicate with “Heaven” (the Supreme Being), indicative of the early unity of religions. As a result, “Heaven” turned from the protector of clans and tribes to that of state. It depended on no longer blood ties but governance performance, namely in accordance with “De”, whether Heaven favored you as man’s king. No exercising De and protecting people, no Heaven’s favor. Hence, Chinese ethical values evolved from the hierarchy merely based on blood ties into the moral ideal advocating the unity of man and Heaven. Ba Xinsheng once drew a correct conclusion in his article that the development of Pre-Qi De has experienced four stages: totemism in primitive society, ancestor and god worship in Shang Dynasty, governance in accordance with De in Western Zhou Dynasty, and ethics and morals in Spring and Autumn Period.¹³ If it had not been for the national policy “Exercising De and Protecting people” of Western Zhou Dynasty, man would not be distinguished in the chaotic world, becoming the dominant driving force to society and history. It is more than a value judgment that “Man is lord of gods” for it gives the historical function of people unprecedented attention, regarding it as the only defining force to fate of state and king. While the West emphasizes on the value and interdependence of an individual, as seen from the sayings repeated such as “Know Thyself” (Socrates), and “Man is born as political animals”(Aristotle), etc., since Western Zhou Dynasty China has focused on the cultivation of the individual who obeys the kinship-oriented ethics and moral obligations taking “De”, the personality and humanity inward, and external etiquette system as the means and the target of moralization. The ethics China underlines is holistic and ethnic, namely other-centered in Liang Shuming’s explanation.¹⁴ This ethnic-group-centered ethical values, enriched by the Confucian “Tri-unity” (namely the unity of Heaven and man, unity of knowledge and practice, and unity of mood and scene), evolved into social ethics from a family one. And combined with law, it was externalized into an effective restraint mechanism and internalized as ethnic morals, gradually becoming one of the most important binding forces to Chinese families, society and even state.

Complementing and Fighting Against Each Other: Ethics and Contracts

The contract also plays a role as important maintenance of Chinese traditional society. That’s why ethics is said to merely be one of the most important binding forces to

¹³Ba [10].

¹⁴Zhang [11].

Chinese families, society and state. Ethics and contract both have been the engine of Chinese civilization development in the past thousand years.

It does not run counter to historical rationality that we study the relationship between ethics and contracts from its logical base. Generally speaking, the structure of Chinese ethical moral culture is logically based on the cultivation of man's goodness. In other words, with the good aspect of humanity motivated, a man thus subordinates and devotes himself to the development of family and state. And contract, logically with the intention to restrain the evilness, contributes to mutual reciprocity based on the balance of personal interests so that one does not enjoy too much benefit and the other will not suffer too much from the former's gain. In terms of means, ethics lays a basis on blood and family ties and requires compliance and obedience of an individual, for which his inborn goodness and bloodline-incurred natural obligation can account. And contract, limited to rights and obligations, focuses on mutual satisfaction and recognition between individuals or families. One's rights are reversed as the obligation of another which leads to a reciprocal relation between rights and obligations. As seen from the evolution of history, identity has been not only the precondition for existence of ethics but its base and pursuit. Without identity, ethics is an empty shell. As a result, an identity-oriented Chinese traditional society finally takes shape, where one performs his duty according to his identity. On the contrary, contract goes against identity privilege and for ultimate equality. Naturally, it is supposed to be impartial.

It thus seems that ethics and contracts are born incompatible. However, it is not the case in history and reality. Ethics goes hand in hand with contract throughout traditional and modern China, whose mutual complementation, interaction and infiltration give rise to a unique legal cultural style.

As mentioned above, ethics constitutes the essence of contracts while the contract is the physical expression of ethics. Commendably, contractual spirit is embedded in ethics. Although moral human relations are the ultimate pursuit of Chinese traditional society, if diachronically studied we can see that the early Confucianists, such as Confucius, Mencius and Hsün Tzu, attached importance to etiquette in order to keep human relations and king's governance in order. There existed primitive democracy in their views that right and obligation inter-infiltrated and complemented each other. Benevolent father, filial son; righteous husband, obedient wife; wise king, loyal minister; and vice versa. And taking identity-emphasis to an extreme, Confucian ethics in Han and Song Dynasty provided that one who was inferior or junior merely assumed the obligation without enjoying the rights, which not only failed to develop Confucianism but also blocked its sound development. Necessarily, in contract lies the adherence to basic morality and society-recognized ethics in the pursuit of interests. In essence, contracts can be anything but divorced from ethics, whose enrichment and judgment prevent man being subject to interest, efficacy and desire.¹⁵

It is noteworthy that there are many arguments regarding ethics in Chinese traditional society as the moral core and even direct connotation of contract but few about

¹⁵Jiang [12].

their relationship and the development rule and regulation function of contracts. As is known to all, ethics does exert an influence on the development of Chinese ancient contract, ranging from contractual spirit and system to customs, which can be concluded as follows: Firstly, ethical rules imposes identity limits; that is, contractual behavior is subject to the identity of the parties to the contract, and civil rights and civil obligations vary from party to party. In terms of property rights, it is expressly stated from Tang to Qing Dynasty that the inferior and the junior were forbidden from exercising the right to sell family property without authorization while the superior and the senior enjoyed broad authority. This will be detailed later. Secondly, ethical rules play a great part in the formation and development of contractual spirit. No matter satisfying their desire or winning benefits, the parties to the contract are subject to the obedience of ethics. Mutual assent, equality and integrity are not only the elements valued but the existence and development motivation of contract. And they all derive from ethics and morality. Thirdly, ethical rules bring about the unique system of integration in Chinese traditional society, which affects the contractual customs in depth. The control in Chinese traditional society was realized in three aspects. One was the “rule of law” of the government. The “law” here merely referred to “ruler’s decrees”,¹⁶ which is aimed to serve monarchy. The other was the “rule of etiquette” of the squire class in communities. Fei Hsiao-tung has defined “etiquette” as “civilized customs that voluntarily conform to tradition”.¹⁷ Etiquette has been the most important means for local elite, including squire and bureaucrat, to hold a stable and peaceful regional ruling and the direct inheritance of primitive Confucian spirit.¹⁸ The third was the “rule of morality” over people, namely the moral restraint mechanism gradually developed in folk life, which was good-deed-oriented and followed theory of retribution.¹⁹ Influenced by ethical culture, “law”, “etiquette” and “morality” are bound up with ethics and morals which can date back to Western Zhou Dynasty. They each impose a direct impact on the formation and development of Chinese contractual customs, especially the latter two.

Judging from the development of Chinese ancient contracts, ethics and contracts complement each other and fight against each other as well. Imposing too much ethical restraint promises deprivation of contractual freedom, but no control imposed on contract will endanger society stability and state security. As a result, ethics and contract are mutually developed “in balance” on the basis of mutual promotion, infiltration and restriction, which impedes the development of the spirit of contractual freedom and leaves China short on the abstract and holy spirit of contract. However, it is undeniable that the “balance” not only becomes a unique feature of Chinese culture but lays the foundation of long-term stability of Chinese society.

We are not intended to glorify Chinese culture. But as L. A. White has put in *The Evolution of Culture*, the function and purpose of culture is to guarantee the stability

¹⁶See [13].

¹⁷Fei [14].

¹⁸See *Mencius: Lianghui Wang (Part II)* where Mencius once claimed propriety and righteous proposed by Sage.

¹⁹Ma [15].

of human life and continuation of human race.²⁰ And that is the part the peculiar relationship between ethics and contract plays in Chinese traditional society.

It seems that we have paid too much attention to ethics so far. But the point is that only in this way can we have a general idea of what Chinese ancient contracts are and how much they cover.

So, the question is, that what ethics and contracts, falling into different categories, rely on to keep their close connection. If not, we cannot have a profound understanding of the spiritual nature and historical evolution of Chinese ancient contracts.

The Medium: Abstract and Concrete Justice Concept

Talcott Parsons believes that society, marked by shared value orientation and a high level of self-sufficiency, is a system in which people interact with each other.²¹ But Hume differentiates capitalist society from socialist society. He holds that the same as their purposes are, namely accelerating economic growth and creating social wealth, the latter, whose development strategy is combined with such basic values as social justice and equality and so on, agrees with values favored by the majority including the intellectual elite and the former motivates wealth pursuit with the promise of more allocable material benefits in the future.²² It can be said that his theory of social development has got to the root. Why China follows nothing but socialism after the breakdown of thousand-year feudal regime? The argument in political textbook is weak or at least surface-scratched. A change of political system depends more than on military force. Communists' theory of "people" and "common prosperity" win the "popular support" from the perspective of values. As the prerequisite for assuming and consolidating power, "whether or not popular support is inclined", which has been underlined by political elites and political culture of different dynasties, is necessarily worth attention. He who wins the popular support will rule the world; He who loses the popular support will be ruled. Or he who follows "Tao" enjoys great support while one, if not, finds little. These are official expostulations examined by the intellectual history of Chinese political culture and Chinese political system. The foregoing "Tao" and "popular support" reflect the very value idea of justice and equality Hume has mentioned. And the abstract but concrete concept of justice is precisely the medium that connects ethics with contract.

It is necessary to first study the justice concept in eastern and western culture, from which we can see the historical factors shaping the close connection and mutual dependence between Chinese ancient contractual rules and ethical rules.

²⁰Cited in Zhang et al. [16].

²¹Hume [17].

²²Hume [18].

In *Institutions*, Justinian clearly defines “law” as “science concerning justice and injustice” and “justice” as “the permanent desire to guarantee everyone what he deserves”.²³ Comparing Greek legal concepts with Roman ones, M. T. Cicero gets the idea of the essence of law. He is convinced that the Greek word *nomos*, which derives from *Veuw*, means allocation, namely things are fundamentally intended to give every man his due. And the Latin word *lex* implies conception of selection, called a *legendo*. In Romans’ view, law means equality of selection. Meanwhile there exists distinction between *jus* and *lex* in Roman law. *Jus* is an art of goodness and justice. In other words, the essence of law is justice because *jus* originates from *Justitia* (justice).²⁴ Plato regards law as the means to defend justice. From his view, justice means to help friends fight against enemies²⁵ and thus “a ruler judges with the purpose to prohibit anyone from infringing on other’s property and to protect everyone’s property from infringement”; only in this way can fairness be guaranteed so that “everyone enjoys what belongs to him and does what he should have to do”.²⁶ Aristotle further classifies justice as distributive one and commutative one. Distributive justice refers to the distribution of right, power, obligation and duty among members of the city-state according to their social status, which is equal in distribution quota. Interests are equally shared among equal people and otherwise unequally shared.²⁷ At the same time, the distribution principle is compatible with political system. Wealth is shared on average in democracy while on the merits of competence and contribution in aristocracy.²⁸ Commutative justice is the code of conduct supposed to be followed in transactions. In *Leviathan*, Thomas Hobbes has detailed and developed Plato and Aristotle’s theories of justice. He believes commutative justice refers to the performance of contracts in purchase and sale, hire and employment, debita and credit, transaction, barter and other contractual deeds. But distributive justice, that of the arbitrator, involves the distribution of equivalent interest to people under equal conditions.²⁹ The classical contractualism in nineteenth century laid stress on the absolute validity of contract. Respecting the freedom of individual will, law merely defended the right of the contractor to contract, which can be positively proved by the claim that contract is justice. Schwartz, a scholar familiar with the intellectual history of American laws, holds that justice in contractual law is protective toward legal contracts in nature³⁰ and that the contractual spirit then gives rise to a clear logical judgment; that is, “Contract is justice” and “Justice is freedom”. Accordingly, it is concluded that “Contract is freedom”. The rise of neoclassical contractualism suggested the coming of the age of social restraint on

²³Justinian [19].

²⁴Cited in the note 14, 21, 20 of *On the Spirit of Western Law*. 1996. *Journal of Comparative Law*, (1).

²⁵Plato [20].

²⁶Cited in [21].

²⁷Bodenheimer [22].

²⁸Aristotle [23].

²⁹Hobbes [24].

³⁰Schwartz [25].

individual freedom. Although classical contractualism recognized the equality in rights, it however lead to actual inequality³¹ due to the ignorance of “unequal relations between contractors”.³² With the increasing spread of the theory of reliance interest, contractual rules started to lean towards humanity, gradually embraced social customs and moral code and upgraded good faith as the general clause of contract, all of which implied that the development of contract law in twentieth century “turns law into potential morality”³³ instead of a “bargain” in which both parties shared interest at the same time.

As seen from above, justice concept in western philosophy of law develops as follows: each gets his due, individual freedom or state (social) restraint, of which the key is to take law as the means to realize justice so as to protect everyone’s rights and guarantee his interests. It is inevitable that social restraint be included in contractual rules under such a circumstance. And finally comes into being two types of justice concept. One is that contracting parties are free to contract under bona fides and another is that society or state, when trusted to adjudicate, is supposed to impartially deal with allocating one what he deserves.³⁴ Briefly, justice is freedom of contract for contracting parties, impartial adjudication for social ruling parties³⁵ and the equal realization of interests of both parties as a consequence of contracting deed.

The development of justice concept in Chinese traditional society followed the people’s will and kept compliance with Tao, namely people’s feelings, rationality and law all taken into account. The Confucian concept of justice aims that people all over the world benefit from the grace of the emperor to obtain what they want. In terms of its realization, it bears a stamp of gift as people’s contracting deeds, required as it is, do not matter as much as imperial kindness and official concern about people’s feelings. In the absence of western awareness of man’s natural rights, individuals in Chinese traditional society were subject to “privilege” of family and class, devoid of the awareness of seeking profits individually. Profit-seeking was subject to both the external restraint from family customary law and state law and the internal examination and assessment of traditional ethical culture. That is not only the real reason why merchant class had difficulty in shaping in China but the root of the absence of contractual freedom and independence. Take Huizhou merchants as an example. The hundreds of years, during which Huizhou merchants rose and reached its peak, have seen the establishment of pro-wealth value ideal and the popularity of Confucianism-binding practice among merchants. It was said that he who was too ineloquent to do business would turn to be a Confucianist, thus ranking

³¹A *Source Book in Foreign Civil Law* (p. 83). 1983. Law Press. p. 83.

³²Atiyah [26].

³³Bodenheimer [27].

³⁴Hobbes [28].

³⁵The *Wealth of Nations*, wirtten by Adam Smith, has dealt with the main points of economic liberalism, putting that the government is the “protector and watcher” of free competition, and that law can only provide convenience for parties to contract though universal norms.

merchants high over Confucianists.³⁶ However, the traditional Confucianism brought about the very decline of Huizhou merchants. In terms of ethical tradition, Huizhou merchants were obedient regardless of being the richest one; they kept their behaviors in accordance with Confucian ethics. In *Guide to scholarly merchants* written by Cheng Chunyu in Ming Dynasty, it is encouraged that hardworking and thrifty be given priority to by discreetness-oriented businessmen, which can be seen from such statements as “hardworking promises rich future and greed is born of laziness”; “subdue oneself and be selfless”; “be sincere and kind, and be honest and upright”. And it is discouraged that “one takes advantage of his power, wealth or talent to bully others”. In the book such statements are beyond count.³⁷ From the perspective of system and custom, the rise of Huizhou merchants was attributed to joint effort of family. Adjustment of capital lied with family, causing the expansion of merchants and consumption of capital as well. In the meantime, merchants were protected in family-centered rural social structure while the accumulation of commercial capital was hindered due to the idea of doing good and righteous deeds and appropriately accumulating or spending money. Some scholar insightfully holds that since there was no commercial law in ancient China, state compulsory law especially Confucian familism constituted the internal restraint on commercial capital and commercial spirit.³⁸

It was double-edged that Confucian ethics imposed impact and restraint on commercial activities. On one hand, it regulated business conduct and introduced morals into business which made up for legal deficiency, gave rise to good commercial spirit. On the other hand, it did limit the mental motivation of merchants, the main contracting party, to pursue wealth accumulation and placed barriers in their way to accumulate capital in the name of family system.

Confucian-ethics-oriented value did not impose negative impact on the rapid development of Chinese ancient contracts. On the contrary, contractual justice such as equality, freedom and fairness took deep root in Chinese traditional society. To put it simple, ethics does not block but provides moral compass for the advance of contract. Only aware of this can we explain the true nature and evolution of Chinese ancient contract.

As mentioned above, subjection to Tao has constituted the majority of regulation on contract from ethics. Though it can be perceived by every person, the so-called “Tao” is too vague to be defined clearly. If required, Tao can be explained as people’s feelings, rationality and law. It seems that accordance with law does not matter much to Chinese, but “accordance with people’s feelings and rationality” is required in everything. It has been a rule for Chinese officials or businessmen and a vague but concrete criterion for social measurement and appraisal. People’s feelings, rationality

³⁶Wang Daokun. *Taihan Collection (Vol. 54): Epitaph for Mr. Wu, a late prominent personage in Xiyang in Ming dynasty*.

³⁷Cited in *The Business Principles of Huizhou Merchants in Ming Dynasty Observed from Guide to Scholarly Merchants*. 1994. *Academics in China*, (6).

³⁸Gao [29].

and law jointly constitute the unique justice concept, which was the very means to connect ethics with contract, in Chinese traditional society.

The justice concept has been dually influenced by ethics and contract, be they Chinese ancient one or western one. Ethics motivates man's "goodness" from the perspective of morality while contracts restrain the deluge of man's "evilness" in the mutual satisfaction of interests, thus reaching a balance between "goodness" and "evilness", the ideal existence order. It is noteworthy that ethics, freed of the favor from Heaven, gods and witchcraft, has borne a stamp of humanity since Western Zhou Dynasty.³⁹ It is also since Western Zhou Dynasty that Chinese ancient contract system has come into gradual maturity, playing the role of regulating the entire social life, especially the daily economic life of people and complementing the development of traditional Chinese ethics and vice versa. And the bond is the justice concept mentioned above, whose ultimate pursuit is the Mean (Impartiality) and equilibrium and harmony, certain life wisdom and life attitude. The concept of "Music (Yue in Chinese)" introduced into ethical philosophy by Confucianists and combined with "Rites (Li in Chinese)", the "rites and music culture" took shape which had been intrinsic to Chinese culture. The Chapter *Music* of *The Book of Rites* dwells on the importance of Li and Yue to social restraint. "Ancestors created Li and Yue not for sensual enjoyment but to educate people on the discrimination between goodness and badness and thus put them back on the right way. Men are born to be quiet-favored in nature but become active under instinct for the perception of things. When perceiving things, man shows preference or abhorrence. Failing to control their preference or abhorrence and to perceive and properly treat the outside temptation, they will totally lose their nature. The outside world has been imposing impact on man. Under this circumstance, if they do not control their preference and abhorrence in the perceiving of things man will be assimilated by things. In other words, man's nature has got lost while their desire has run out of control. The intention of disobedience and dishonesty as well as the behavior of debauchery and rebellion is incurred. The powerful thus oppress the weak; the majority bully the minority; the crafty defraud the fool; the bold torment the coward; and the sick, the old, the young and the childless are not taken care of, all of which lead to world disorder. As a result, ancestors created Li and Yue, a restraint made by man". Both Li and Yue were made for balancing and controlling man's desire so as to keep society stable and people civilized. Confucian doctrine is consistent with Aristotle's political theory; that is, state is meant for providing a moral environment. And it is not because of philosophical cognition of human frailties but assumption of disorderly competition resulting from resource shortage that the claims of Han Fei and Shang Yang (two representatives of legalist school) were cruel and severe. Therefore, legalists control people's behavior through rewards and punishments while Confucianists control people's mind through the system of rites and music.⁴⁰ Above is an insightful viewpoint from Gao Daoyun. And Xu Fuguan, a representative of Neo-Confucianism, incisively elaborates the relationship of "Li"

³⁹Zhang [30].

⁴⁰Karen [31].

and “Yue”. In Confucianism, “Yue” can be called fine only in the existence of equilibrium and harmony, behind which lies “kindness” because “Yue”, if appropriately adequate, can “motivate people’s kindness”. The unity of benevolence (whose physical expression is Li) and Yue is underlined by Confucianists. Benevolence belongs to moral category and Yue is a kind of art. The primitive Confucianists believe that morality and art, if both as good as it gets, jointly mark the high level of life.⁴¹ And Ban Gu, a historian of Han Dynasty, materializes the function of Yue in respect of the order of human relations. “Yue advocates harmony. Having taken shape through tuning instruments to coordinate the rhythm, a tune is used to keep in harmony the father-son and king-minister relationship and win people’s trust and attachment. That is why ancestors create Yue”.⁴² It is worth noting that Confucius claims “Yue” to be a kind of mental-influencing force which makes people subdue their desire and conform to Li. However, Confucianism in Eastern Han Dynasty regarded Yue as the means to coordinate human relations, which underlined the extrinsic utility of Yue but ignored the intrinsic moral influence, serving as the prelude to the claim of exterminating the desire proposed by Neo-Confucianists of Song Dynasty. It ran counter to the mode-racy of Confucian claim “subdue one’s self and return to propriety”.

Under primitive Confucian culture of rites and music, ethical morality norms highlighted class harmony rather than class oppression which has been criticized by many scholars. Racial as Hsün Tzu, he lays stress on the balance between “desire” and “rationality” as much as Confucius and Mencius. “If recognized to be rational, desire, much as it is, will do no harm to state governance; few as it is, desire, if recognized irrational, will do no good to ending the unrest”.⁴³ From the development of Chinese ancient contract, we can know that contract is entered into on the basis of “He (mental harmony)”. Although named diversely, Chinese ancient contracts all called for that parties voluntarily entered into them and enjoyed equality in benefiting. Agreements were called “he Tong (和同)” in Tang Dynasty and universally called “He Tong (合同)” in Qing Dynasty. It is entered into voluntarily (with free will) and under good faith rather than force (mental harmony), that is, so-called “contracting on the meet of minds”, be they “he tong” or “He tong”. The unnatural coincidence above resulted from subtle connection and mutual infiltration between ethics and contract under the influence of Confucianism.

Reasons for Absence Of Complete Written Contract Law in Traditional China

L. H. White has made two presumptions, which seems to be somehow lacking of reasonable grounds yet however thought-provoking. One is that “man can be said to live under ethics”, with a social instinct for seeking goodness and avoiding evilness.

⁴¹Xu [32].

⁴²Ban [33].

⁴³*Hsun Tzu On Names.*

The other is that men are the carrier of culture rather the primary driving force, the creator or the defining factor of culture. Individuals under certain culture turn the interaction of cultural advance into a potential catalyst and are the media in which cultural advance are expressed.⁴⁴ Presuming as above, he intends to elaborate that ethics being the internal binding force of social restraint, whether contract—the corresponding object—is also a social means to regulate human behavior; and that since man cannot create culture (this viewpoint temporarily accepted), what is the motivation of contractual existence?

The former has aroused broad discussion and agreement. As White has put, ethics does form a kind of internal control throughout the development and civilization of society and human being. As social instinct, ethics is to produce social emotions such as shame, empathy and justice which are not innate physiological instinct but cultural product and educational achievement. White has quoted Radcliffe Brown as saying that the so-called conscience is an inward reflection of social approval. And one acts out of conscience for such a long time that he mistakes conscience for an inward reflection of god's will or of instinct, which is post hoc. Therefore, White believes that conscience is the means and medium of ethical behaviors instead of the cause.⁴⁵ It seemly can be concluded that sense of shame, goodness and evilness, empathy and justice is a kind of human social instinct generating in the cultural development, intended to restrain human physiological instinct so as to maintain the existing order or achieve the ideal order of peaceful coexistence. So what are the characteristics or the mechanism of contractual system, the contrast of ethics? Having been mentioned above, contract is directly intended to guarantee the interests of both parties without detriment to that of others and society and further to establish and maintain a peaceful and mutually beneficial living environment, of which the later achieves the same end as ethics. But in terms of human nature, both goodness supporters and evilness supporters acknowledge that man tend to be selfish due to instinct (goodness supporters believe) or environment (evilness supporters believe), trying to maximize or optimize their own interests. And thus comes into being a conflict of interest seeking for a solution. It is not man themselves but culture White has referred to that voluntarily adjusts the interests between humans. In other words, in order to protect and gain his own benefits one has to admit and protect interests of others, which respectively belong to the right and obligation of contract. It is in the interaction between right and obligation that man enjoy (not create) a mutually recognized contractual relationship that restrains themselves and others. As some scholars has put, contract is interchange of interests in nature, with the core lying in the "effectiveness of benefiting oneself rather than complementation to benefiting others".⁴⁶ Hence ethics belongs to social instinct to seek goodness and avoid evilness while contract is a natural instinct to pursue profits. Leaning towards benefiting oneself, contract enables both parties to pursue the largest profits they consider to be on the basis of mutual recognition. The clan, tribe, and even the state superior to

⁴⁴White [34].

⁴⁵White [35].

⁴⁶Jiang [36].

both parties merely are witnesses and protectors of the contract, and play the role of a neutral arbitrator. And thus market relations, of which the majority can be attributed to contractual relationship, embody interest and wealth rather than ethics. Market is not the moral practicer that shows kindness but the profit seeker asking for the lowest degree of goodness. Above is the general clue to the development of western contract and there is a slight difference from that to Chinese ancient contract, which will be further explained later.

As for the later one, we can argue in the respective of the discussion of a specific question; that is, why there hasn't been any written contract law in traditional China? And is this consequent on human being (traditional system) or a selection of culture?

Ancient China did not see the existence of contract. Actually, by Han Dynasty at the latest, forms of Chinese contract had been totally unified into a national standard.⁴⁷ And by Qin Dynasty contract had developed into pretty mature, as developed as ancient Roman law in terms of contract system, contractual spirit and contract management, etc. However, traditional China has seen the enactment of *Market Transaction* (“市易” in Chinese) *Law, Middlemen and Guarantor* (“牙保” in Chinese) *Law* and *Trading law* except a complete and systematic set of modern contract rules. The British scholar P. S. Atiyah believes that British contract can date back earlier to the Middle Ages.⁴⁸ The course of British law history and civil law history lags behind the development of Chinese contractual culture, but a complete contract code has failed to come out in traditional China. In terms of the root, the viewpoint of Professor Lawrence Friedman makes some sense. He holds that as a kind of “law” that guarantees the free will of parties, contract is resistant to the intervention of state force. Therefore, contract law is “disinclined to codification (of the contract)”.⁴⁹ After studying the development history of Chinese ancient contract, we can find that is the truth. The traditional contractual spirit and contract system were mainly embedded in folk secular society and took the form of civil customary law, on which the authority exerted more unrevealing recognition than restraint. Two factors, many scholars suppose, can account for the underdevelopment of Chinese contract law; which are the model of economic life (family-livelihood-oriented rather than profit-oriented) and the official policy of restraining commerce in ancient China. It seems that the failure of a written contract law is man-made. Given all that, Professor Friedman has pierced the veiling at least and located the delay of contract law in the development of contract itself. But the key is that he merely scratches the surface due to his ignorance of the great impact on traditional contractual culture imposed by contract and ethics which were complementary to each other and fought against each other. In other words, it was difficult and unnecessary for contract law to come into being due to the powerful integration function of Chinese traditional ethical culture and thus ancient China failed to see the existence of a complete written contact law.

⁴⁷Hugh [37].

⁴⁸See [38]. Also see [39]. It is deemed that the contract law was not attached importance to in the early stage and developed slowly from the seventeenth to eighteenth century. The nineteenth century saw its unprecedented development.

⁴⁹ibid, p. 203.

On the surface, the development of Chinese traditional contract has always been in the dual control of self-discipline and heteronomy, but the most fundamental driving force for the control of contract development is ethics. From the perspective of self-discipline, Confucian economic ethics has always been a moral judge of the economic behaviors of both parties to the contract. The ethical motivation of economic behavior, whether intended or not, has always been a lion in the pursuit of profit. Confucian concept of “Rites” is superficially to discriminate hierarchy and restrain human desire but actually to balance and bring to order the distribution of social wealth so that the gap between the rich and the poor, and between lord and loon will not get wider too much. However, it is far from the real objective of Confucianists. What they really want is the average distribution of social wealth and the permanent stability of society (imperial power, be they Confucius, Mencius or Hsün Tzu). But such average, the same as distributive justice proposed by Aristotle, is confined to those who are equal under the system of imperial power and only in this way can society stability be achieved. Above embodies the true essence of Confucian ethics, namely “Lun (伦)”. Lun means sequence or family hierarchy in Chinese. “The way of Lun (lunli (伦理) in Chinese)” refers to that people of the same social status (sequence) enjoy equal rights, assume equal obligations and accordingly do their part. “The emperor is the emperor, the minister is the minister, the father is the father, and the son is the son.” Such claim is loaded with the thought of democracy rather than privileged status that Confucianists of Han and Song Dynasty have proclaimed. Confucius once expounded his claim in a sensible way. He said, “I have heard that those in power worry about not the shortage but the uneven distribution of wealth and care about society instability rather than poverty because equal distribution promises no poverty and social harmony and social stability respectively rid them of the worry of manpower shortage and state overturn”.⁵⁰ Hsün Tzu supposes that the thought of propriety and righteousness is proposed to “make everyone do his own part and win benefits commensurate to his status and contribution, which is the way to keep people live in harmony”. And he advocates “distribution according to the thought of propriety, that is, a even one without impartiality”.⁵¹ It is a matter concerning the fate of state that benefits are distributed in a fair manner. Paying a little attention to the Chinese history, we can find that peasant uprisings have left great marks on feudal society, reminding rulers of balancing the interests between different classes. The army of Huang Jin Uprising advocated “the Way of Great Peace” and that “Man are born equal and inferior to Heaven”⁵² who is fair and impartial. Wang Xiaobo and Li Shun, the leaders of a uprising in Northern Song Dynasty, proposed the idea of average wealth. Zhong Xiang and Yang Yao, the leaders of an uprising in Southern Song Dynasty, further proposed the idea of “eliminating hierarchy and balancing wealth” demanding the equality both in status and in wealth.⁵³ And Li

⁵⁰*The Analects of Confucius Eight Rows and Eight Lines.*

⁵¹*Hsün Tzu: Honor and Dishonor; Hsün Tzu: Da Lue.*

⁵²*Canon of heavenly peace (Tai Ping Jing)* Vol. 112.

⁵³*Compilation on the Alliances between the Song and King of three dynasties (San Chao Bei Meng Hui Bian)* Vol 137.

Zicheng put forward the slogan: “Equal field without tax grain” which attracted a lot of followers.⁵⁴ The majority of peasant uprising armies were the great unwashed, uneducated, but it seemed that they knew the truth that Heaven is fair and impartial and that man are born equal. There was not the theory of natural rights in China. In such a political and cultural context, it was not easy to equip illiterate peasants with ideas above. It can be explained only in the way that economic ethics concerning fairness and justice is a kind of “social contract” entered into between peasants and rulers or the rich. Once a breach of contract or damage to their interests occurred, peasants would together rise up in arms. If Chen Sheng and Wu Guang are said to challenge the ruler from the perspective of identity authority (“Is there anyone born to be a king, a duke, a general or a minister?”), uprisings after Tang Dynasty (including the current political power of workers and peasants) have turned the focus on equality and fairness in economic rights. Such ethical spirit hand in hand with the equality (consensus of both parties) and fairness (no damages to both parties) of private contract, ethics and contract thus achieve harmony of spirit and mutual infiltration in practice. But in comparison, ethical spirit, especially the concept of equality and justice, is in chief and embraces the justice concept of contractual concept. As a result, ethics and contract are mutually enriched and developed, imposing great impact on history. On the one hand, as mentioned above, it makes both sides of the transaction ethics-abiding, value honesty and righteousness, and keeps their promise. By virtue of the Buddhist theory of retribution, it developed self-disciplined economic ethical order and trading rules with Chinese characteristics, which contributed to the stable and sound development of economic life. On the other hand, Confucian ethical economic rules took root so deep that they were recognized by both the authority and the people, widely practiced in judicial trials, expressly stated in community pacts and clan regulations and repeated in rules of (business) guild, which left no room for and blocked the development of a written contract law in traditional China. It can be said to have been offset by the premature ethical economic model as well as its core concept of justice, be they the historical motivation for the existence of written contract law or the historical role of written contract law. Explained from the perspective of ethical restraint, the absence of Chinese written contract law is consistent with both historical rationality and historical facts.

The core thoughts of ethical economy, exposed and spread, have influenced the development of Chinese economy from all sides and turned Chinese economy into a premature ethical one instead of a commodity economy or a market economy. However, it cannot be ignored that factors which affect the development of Chinese contract are rationally selected by Chinese culture rather than determined by man as many scholars have supposed.

⁵⁴A Record Causing Blame on Me (*Zui Wei Lu*) Vol. 31: Li Zicheng.