

Corrective Justice in the Confucian Legal Tradition: A Nonexistent Concept^{*}

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Abstract:

The understanding, legal reasoning and interpretation of liability rule by the judges heavily depend on the concept of corrective justice. The idea of corrective justice, proposed in contrast with distributive justice by Aristotle, acts as a formula for legal adjustment for private disputes. For distributive, reciprocal and criminal justice can almost be found in any civilization, whether expressed explicitly or derivable from legal institution or practice. Constituted by these elements, the structure of justice, or the similar ones, can build the legal infrastructure. And legal systems or institutions based on them can be learned or transplanted from some experienced countries by those longing for a certain kind of legal order. In contemporary China, the ideology of private autonomy is rising. To improve our imported legal system, when comparing, picking out and copying rules from different legal regimes, do we need to reconsider the underlying infrastructure of corrective justice? Do we have an embedded corrective justice which can support our legal adjustment in private disputes? And, have we already, according to some civil lawyers' description, embraced a continental legal system? If not yet, do we have a chance to? Can we get rid of the long-standing Confucian ideas of justice and hug ourselves for joining the German legal family after the 1908's legal reform? Corrective justice is a key to comprehend civil legal institutions, especially contracts and torts.

In this paper, I explore the so-called Confucian ideas of justice, and point out that such ideas

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have never existed in the Confucian legal tradition. In the long history of Confucian society, the rules of law always took a distributive way to solve disputes between private litigants, especially in torts. And the Confucian ideas of law didn't have any legal principle or doctrine ex post to handle conflicts of private injury. All the legal adjustments of disputes follow property rule instead of liability rule.

The missing of corrective justice has deeply influenced the transitional justice since the 1908's legal reform. Even by now, the common people, lawyers, judges, politicians and scholars, when making a judgment of private dispute, are inclined to apply the concept of property right or regulated interest rather than a person's due or well-being in market or his "natural status" as the benchmark of legal protection.

This paper is divided into five parts. Firstly, I introduce the Greco-Roman idea of justice formalized by Aristotle and embedded in the western style of civilization. Secondly, I point out that a certain kind of justice can be replaced by another, and the boundaries of different justices are easy to be blurred. Thirdly, I explore how the traditional Confucian idea of justice handles private disputes. Fourthly, I testify my proposition through the examination of traditional legal practice in tort cases, and then criticize the analysis method of Hai Rui's theorem proposed by Prof. Suli Zhu. Finally, I point out that the missing concept's influence poses a path-dependence constraint on contemporary China's private legal adjustment .

Keywords: Confucian Legal Tradition, Corrective Justice, Legal History, Tort Law

For any moral community, justice is a benchmark of human life and a linkage of the people, whether it forges a dominant value or trades off different kinds, like fairness, efficiency, equality and freedom. In our world today, most societies are composed of complexities of justice. Ideas of justice imply an assumption of human nature as the startpoint of legal reasoning, and exert great influence, abstractly, on legal cultures and doctrines, and concretely, on legal institutions and rules. So, through the structures, outspreads and branches of justice, we can understand the evolution of different legal systems.

The Confucian legal tradition, in most existing studies, is associated with a stereotyped imagination of mingling morality and law, ignoring distinction of public and private areas, and dominated by criminal rules.¹ Focusing on the law-as-rule oriented comparison,² they seldom take systematic or theoretical approach to answer why such kind of legal system emerged and how the ideas and norms interacted on each other. In this paper, I want to explore the idea of justice underlying the Confucian legal institution, and further more, how the private adjustment of this institution in history was practiced in accordance with the idea of justice. On this perspective, law is a system of rules with the infrastructure of the idea of justice.

Since 1908, China has been deliberately carrying out transplantation and adapting itself to the civil law system.³ Right now, under the ideology of socialism, China takes a strategy in legal reform to copy rules and institutions from advanced and experienced countries. When legal reform, no matter as a slogan or a real common understanding, has become such a hot issue, authorities of legislation, judges in the People's Court, and scholars in law schools, always raise the question about applicable choices in discussions and arguments, "What's the situation in Germany?" or "What're the rules in the U.S.?" Foreign law, as a source of strong legitimacy, is a typical way to solve the debate in the forming of rules.

¹ See Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China*, Greenwood Press, 1997; see also T'ung-tsu Ch'u, *Law and Society in Traditional China*, Mouton & Co., 1965. See also R. P. Peerenboom, *Law and Morality in Ancient China*, State University of New York Press, 1993.

² For example, Wu Shu-Chen, *Confucian Legal Tradition*, Beijing: Legal Press, 2003. (武树臣: 儒家法律传统, 法律出版社, 2003)

³ See Douglas R. Reynolds, *China, 1898 – 1912: The Xincheng Revolution and Japan*, Harvard University Press, 1993, P181.

Of course, copying rules from experienced countries is a good and simple way to learn from others and improve ourselves. But, can we succeed by just mimicing a giant's behavior without reaching her thoughts and her way of thinking, and without introspecting our own? Catering to the slogan of "civil and commercial law is the fundamental law in socialist market economy", the legislative launches a "great leap forward" in civil and commercial lawmaking, by codifying legal rules from different sources, especially from Germany and France. However, without a careful self-examination of our tradition, especially the ideas of justice, the transplanted rules, compared to the foreign ones, are likely to be similar in form and different in essence. The existing rules of torts and contract are good examples.

This paper is divided into five parts. The first part reviews the idea of justice in Greco-Roman legal tradition, which is the source of modern legal rules and adopted by China from the beginning of the twentieth century. It is composed of two kinds of justice---- distributive justice and corrective justice. The dualistic structure of justice has a far-reaching impact on the separation of public and private sectors, the autonomy of civil society, and the principles of judicial remedies. The second part examines the boundary of corrective justice. In history of human society, in a descriptive perspective, four kinds of justice can be found, reciprocal justice, retributive justice, distributive justice and corrective justice. They are corresponding roughly with different social backgrounds and conditions, and may lead to different outcomes when they function in a certain field. The separation of distributive and corrective justice in the Greco-Roman legal culture determines many features of the modern legal world. However, the boundary of these two kinds of justice is blurred and mutable in torts, contract and property. The domain of corrective justice shrinks with development of social movements in the modern society. The third part explores the doctrine, in the context of Confucian legal tradition, to solve private damage ex post. The only principle similar to Aristotle's way is "repay a good turn with a good turn, repay a Yuan with *Zhi*" expressed in the Analects. "*Zhi*" is an important but vague idea in the Analects, thus its meaning is very diverse in the following texts of Confucian scholars. This part makes a summary of those explanations and concludes that in the Analects the principle for private damage is actually in a

distributive way. The fourth part testifies the conclusion by materials of traditional tort cases. And it also argues that the Hai Rui Theorem proposed by Suli is a modern approach, especially a law and economic one, to analyze the traditional cases based on corrective justice. The fifth part points out that our infrastructure, under the Confucian tradition and without the idea of corrective justice, makes civil law a highly-regulated way of private dispute adjustment. Since corrective justice is in correspondence with civil society, market or natural status, without these conditions, the judge can not determine an individual's welfare and his due in private dispute adjustment.

1. Structure of Justice in Greco-Roman Tradition

“Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim”⁴, So does law. As a norm system to define and induce right incentive and behavior, rules in a certain society should be organized in a compatible or integrated way for its aim---some good as Aristotle said. Behind its aim, there are certain kinds of value, whether in a singular form, like “enhance the power of the country and military” by the Legalist school in ancient China, or in a complex form, like “Freedom, equality and fraternity.” proposed in the French Revolution. Singular value or aim is inclined to form monopoly, while a complicated society or community should adopt a complexity of value.⁵ The value marks the boundaries of rules, and acts as a superior standard to correct their deviation.

A certain kind of value, or idea of justice, depends on the assumption of human nature. At the beginning of any rule or institution, some kind of premise about the nature of man is needed. Economists favor homo economicus, although some of them try to reorient to the resource-evaluation-maximizer assumption⁶. According to Bentham, all

⁴ Aristotle, *Nicomachean Ethics*, Book I.

⁵ See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books Inc., 1983, Pp17–19.

⁶ See Michael C. Jensen and William H. Meckling, The Nature of Man, *Journal of Applied Corporate Finance*, Vol. 7, 1994, Pp4–19. Even for social sciences of organizational behavior analysis also needed a certain kind of human nature premise. See James L. Gibson, Organization Theory and the Nature of Man, *Academy of Management Journal*, Vol. 9, 1966, Pp233–245; See also William G. Scott and David K. Hart, The Moral Nature in Organization: A Comparative Analysis, *Academy of Management Journal*, Vol.

men are agents of public goods in politics.⁷ And a representative assumption of psychology and management is Maslow's hierarchical needs theory. Value is the end of a legal system, while the assumption of human nature is the starting point of rules. A systematic, whole-organized and integrated family of rules lies between these two poles.

A unified legal system depends on the value and assumption, which means a specific rule is embedded in a certain kind of legal system, cooperating with other rules serving for the aim and conditioned by the value and assumption. If we conduct a comparative legal analysis, which is a dominant method in contemporary legal studies in China, and try to learn from others, we should not limit our vision in the comparison of rules.

The comparative method of legal analysis relies greatly on our understanding of law. The functional approach, a more effective method than the comparison of rules, has been prominently advocated by Zweigert and Kotz. It is based on the idea of "law as a system" rather than "law as rules". The institutional approach, also named "new comparative economics", advocated by North, Greif, Weingast, LLSV, etc. takes "law as institutions" and analyzes legal systems in a historical evolutionary approach based on empirical economic data.⁸ And some other scholars advocate a more comprehensive method, which focus on legal culture, paradigm and doctrine.⁹ As John Bell proposed, law is, more than a mere set of rules or concepts, "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts".¹⁰ This method takes "law as culture". These new approaches imply that comparatists should make sense of diverse modes of thought and ideology, legal sources and institutions of different legal regimes in history. Such approaches also mean that comparative legal analysis can be taken into account in different levels of a certain legal system. Currently, on the contrary, most existing studies

14, 1971, Pp241 – 255.

⁷ See Bruce Douglass, The Common Good and the Public Interest, *Political Theory*, Vol. 8, No. 1, 1980, Pp103 – 117.

⁸ E.g. See R. La Porta, F. Lopez-de-Silanes and Andrei Sheifer, The Economics Consequences of Legal Origins, *Journal of Economic Literature*, forthcoming, 2008.

⁹ See Mark Van Hoecke and Mark Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, *International and Comparative Law Quarterly*, Vol. 47, 1998, Pp495 – 536.

¹⁰ J. Bell, English Law and French Law-Not So Different? , *Current Legal Problems*, Vol. 1995, P70.

on Confucian legal tradition, and institutions in Chinese context are limited by a narrow vision of “law as rules”.

In a comprehensive approach, the Confucian legal institution was an organic and compatible system dominated by the Confucian school’s idea of justice, which laid the foundations of the legal system and supported it with other governance mechanisms during the empire time. Specific rules can be changed quickly, but social norms, underlying idea of justice and mode of thoughts can not. While China is heading to westernization through copying rules, the Confucian thoughts and ideas passed down from generation to generation may be a limitation to the forming of transitional justice and a foundation of legal transformation.

Just as Luhmann said, “..... the idea of justice can be understood as a formula for contingency of the legal system. Thus, and without the need to talk about values, this formula can be put on a level at which it can be compared with the formulae for contingency of other functioning systems, such as the principle of limitation (via negations) in the science system, the principle of scarcity in the economic system, the idea of the existence of only one god in the system of religion, or ideas on education or learning ability in the education system”.¹¹ We can grasp the essence of a legal system by exploring its idea of justice.

For the Greco-Roman legal system, although institutions varied dramatically in history, the idea of dualistic justice was a regulator in the historical evolution from ancient law to modern law. We can find very similar expressions of different jurists in history. “There is therefore a certain complexity in the structure of the idea of justice. We may say that it consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different ”.¹² This expression made by H. L. A. Hart, a leading scholar in jurisprudence of our time, is a modern restatement of Aristotle’s distributive and corrective justice, “justice is equality for equals and inequality

¹¹ See Niklas Luhmann, *Law as a Social System*, translated by Klaus A. Ziegert, Oxford University Press, 2004, P214.

¹² H. L. A. Hart, *The Concept of Law*, Oxford University Press, 1965, P156.

for those who are unequal".¹³

The dualistic justice emerged incipiently in Plato's thought. ¹⁴Plato pointed out that distribution should be right and just. A just distribution in a society should follow two kinds of rules, numerically equal and proportionately equal. The first rule treats people anonymously and indifferently, *per capita*. The second rule was based on the individual's due and treats people differently.¹⁵ In Plato's opinion, proportionate equality is normative while numerical equality is contingent. Numerical equality is a special case of proportionate equality so that it can not be long-standing. Those two kinds of justice could be expressed in one formula. Let B = the status of beginning (worth, effort, contributions) of person x or y; let E = the status of end (distribution of gains, earnings, rewards) of person x or y. Then an allocation is fair according to distributive justice when

$$\frac{E_x - B_x}{x} = \frac{E_y - B_y}{y}. \text{ }^{16}\text{If person x and y are treated indiscriminately, we then can get a}$$

corrective justice equation.

Based on this distinction, Aristotle put forward his famous idea of dualistic justice, distributive and corrective. In public area, distribution should follow the principle of proportionate equality according to merit, while in private area, whether voluntary interaction (contract) or involuntary interaction (tort), should follow the principle of numerical equality *per capita*, although a slight difference between torts and contract lies in how to determine the damage. The dualistic justice is a key to understand Aristotle's thought of politics, law, and morality.

"Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that

¹³ Aristotle, *Politics*, Book 3, Chapter 9.

¹⁴ See Plato, *Laws*, Available online at <http://classics.mit.edu/Plato/laws.html>.

¹⁵ See Plato, *Phaedo*, Available online at <http://classics.mit.edu/Plato/phaedo.html>.

¹⁶ See James Q. Wilson, *The Moral Sense*, Free Press Paperback, 1997, P61, modified. See also Peter Western, *Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Doctrine*, Princeton: Princeton University Press, 1990, P42.

which plays a rectifying part in transactions between man and man".¹⁷

The complexity of Aristotle's idea of justice, political regimes and categories of equality, and those criteria are shown in chart I. (see appendix). Of course, like any other academic idea, Aristotle's idea, rooted in Hellenic political tradition, was some kind of rationalization of the social practice. Moreover, Plato and Aristotle's viewpoints, obviously were influenced by the Hellenic politician Pericles. In his famous speech 100 years prior to Aristotle's time, Pericles said,

"Our constitution does not copy the laws of neighboring states; we are rather a pattern to others than imitators ourselves. Its administration favors the many instead of the few; this is why it is called a democracy. If we look to the laws, they afford equal justice to all in their private differences; if to social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition".¹⁸

The above expression contains most elements of Aristotle's idea of justice and equality. There should be a separation of public and private fields. In public field, justice is related to merit, ability and contribution, while in private field, justice is *per capita*. The dualistic justice laid an invisible foundation to the tradition, culture and habit of thinking of the Greco-Roman civilization.

2. Boundary of Corrective Justice

Although the idea of justice has various faces, when acts as the rule of rules, it is yet quite stable in history. From the descriptive perspective, four kinds of justice can be found, reciprocal justice, retributive justice, distributive justice and corrective justice.

Reciprocal justice is a fundamental rule for interpersonal relationship, such as "quid pro quo", "equivalent exchange", etc. This idea of justice, state-power-independent and a necessary outcome of rational people's interaction in the long-term evolution¹⁹, is related

¹⁷ Aristotle, *Nicomachean Ethics*, Book V.

¹⁸ Thucydides, *The Peloponnesian War*, (translated by Richard Crawley, 1951), pp.104-106.

¹⁹ E.g. Ken G. Binmore, *The Evolution of Fairness Norms*, *Rationality and Society*, Vol. 10, 1998, Pp275–301.

with Nature Law. It may exist in and between steady communities, or happen occasionally between two strangers, without any mandatory rules. It is, in nature, coherent with Nash bargaining solution, or follow Coase Theorem. That is, rational individuals are able to distribute fairly and share benefits of the surplus through mutual bargaining, cooperation or agreement. We can find reciprocal justice in almost any society.

To some extent, retributive justice is a corresponding concept of reciprocal justice, and when it takes the form of equal retaliation, these two are homogenous but in the opposite directions. One is about positive interest, the other negative interest. As such, retributive justice relies on the community rather than the state. After the state takes over criminal law, distributive justice expands its influence.

Distributive justice is the principle for social integration in the vertical dimension.²⁰It is some kind of adhesive for the organization of individuals to form a state. No matter the standard is merits, worth, virtue, effort, contribution or vote, this justice works on the organization, management and distribution of both administrative power and civil society. In the perspective of function, it exists in any social community and legal system, from the Islamic legal system, the Christian legal system to the Confucian legal system, and even in the non-state communities.

Corrective justice, however, works in a different way to allocate private personal liabilities in a dispute.²¹With the presumption of *per capita*, it adopts interpersonal relationship as criterion to determine the duty one party owes the other. "Corrective and distributive justice embody categorically different structures of justification. Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions. Distributive justice, on the other hand, deals with the sharing of a benefit or burden; it involves comparing the potential parties to the distribution in terms of a distributive criterion. Instead of linking one party to another as doer and sufferer, distributive justice

²⁰ For distributive communities of earlier people without a political regime, See Bruce L. Benson, *The Enterprise of Law: Justice without the State*, Pacific Research Institute for Public Policy, 1990.

²¹ See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*, Forth Series, Oxford University Press, 2000, Pp237 – 263.

links all parties through the benefit or burden they all share".²² In most occasions, corrective justice is applied in private law these days. ²³The dichotomy of distributive justice and corrective justice is rooted in the Greco-Roman legal system, which was built on the division of public and private areas. And with the overspread of Greco-Roman civilization, especially by legal transplantations, it stretched to become the dominant principle for governance almost through out the whole world.

The borderline may be altered from time to time, when this dualistic structure is applied. For example, Aristotle considered family to be the boundary of private area, which means everything beyond family belongs to public area. While the modern Greco-Roman legal system, especially the Continental legal system, takes the state as the boundary and sort whatever besides the state to private sector. Consequently, distributive justice is usually linked with affairs of public administration and social distribution.

Corrective justice, in the opposite, finds its way in torts, contracts and the related "quasi-contract" in Common Law, *negotiorum gestio* (voluntary service) and *condictio sine causa* (unjust enrichment) in Continental Law. Let's have a look into the most typical field, torts. ²⁴In the perspective *ex ante*, to judge whether one party has a duty for the other's loss, the standard is not what kind of right she has, but her duty of care. In this sense, it establishes the norms for interpersonal relationship, the standard of a reasonable man, and the golden rule for society to organize in the horizontal dimension – what we owe each other. While in the perspective *ex post*, corrective justice shapes the liability rule and produces two standards for compensation, the injurer's gain and the victim's loss compared to their "original positions" – Aristotle advocated the balance of these two. The modern private law sets the rule that punishment equals compensation. For instance, "you should not gain from other's fault", and the prohibition of "unforeseeable damage" and "penalty beyond loss" of contract law in Common Law's tradition.

Moreover, it is necessary to distinguish property rule from liability rule, two judicial

²² Ernest J. Weinrib, Corrective Justice in Nutshell, *University of Toronto Law Journal*, Vol. 52, 2002, Pp349–356, at P351.

²³ See Ernest J. Weinrib, *The Idea of Private Law*, Harvard University Press, 1995, P86.

²⁴ See Richard A. Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, *Journal of Legal Studies*, Vol. 10, 1981, Pp187–206.

methods influenced by the idea of justice. Property rule, the distribution of rights *ex ante*, can realize in terms of distributive justice. Damage to these rights leads to the victim's "reliance interest", which is not supposed to be lost in civil law. So, reliance interest may come forth through distributive justice. On the contrary, corrective justice adheres to the premise of equality, and assumes legal adjustment to be passive and compensatory, thus it produces the "expectation interest", which ought to be gained in civil law. In other words, under the property right established by distributive justice, what the plaintiff can get is interest already stated by law; while under corrective justice, the plaintiff can recover his loss in natural status or in market either *ex ante* (reliance interest), or *ex post* through a valid contract and the interest he is supposed to gain (reliance interest). Or, in law and economics, the plaintiff can recover his whole welfare loss in a free and competitive market.²⁵

When we try to recover the litigant's interest, which standard should be abided by, the legal rule set by the state, the "natural status" of the litigant, or the gainable interest from market? What if the litigant only has a probability to but not yet possess the interest, say the interest from contract, where is the boundary? To answer these questions, the two kinds of justice adopt different approaches.

Under distributive justice, first and foremost, we should consider whether the plaintiff has the right to get compensation, which is decided by legal rules based on the "property system". So the penalty the defendant receives for his violation is separated from the compensation for the plaintiff. While under corrective justice, the first consideration is whether the defendant should take the duty of care for the plaintiff, which depends on her "natural status" or the interpersonal relationship in the market. Ignorance of this relationship means negligence or fault. And to determine negligence, the judge has to take several factors into account – legal rules, social norms, traditions, the defendant's foreseeability, the causality of his behavior and the outcome, etc.. Since the defendant has to take responsibility for the decrease of the plaintiff's gross welfare, recovery becomes a mean of punishment. For example, in contract, the compensation for

²⁵ See M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, Seventh edition, Sweet & Maxwell, Ltd., 2001, P564.

damage is decided by the two parties' agreements, their "natural status" or status in market. The judge has to evaluate the legitimacy of the plaintiff's claims, and whether they could coexist with other kinds of rights. If the contract is invalid, no interest is to be gained from the contract. Both of the parties should go back to their "natural status" or "market status" before the contract, that's the ideal of reliance interest. Contrarily, if the contract is valid, they should be in the positions of "natural status" or "market status" after the contract, that's the ideal of expectation interest. According to the above comparison, we may draw a conclusion that there is no place for expectation interest under distributive justice, for everything has already been set by law; and the liability rule, which is free from property rule or interests allocated by the state power, emerges only under corrective justice.²⁶

Corrective justice can live on without distributive institutions maintained by state power, so judgments of courts can be enforced outside a certain sovereign territory. In other words, courts under different regimes may enforce one another's judgments. As what Lawrence Friedman has pointed out, if the defendant owes the plaintiff 100 dollars, no matter where they are, the liability is the same; while in different regimes, the violation of the criminal law may induce different penalties.²⁷ This idea also means that civil judgments can be made by non-judicial institutions, say arbitral institutions.

By adopting a standard of the litigants' "natural status" or "market status", corrective justice makes the law tend to be passive and formalistic. ²⁸Obviously, the private nature of corrective justice imposes a strong constraint on distributive justice, the state sovereignty and the discretion of judges, and therefore lines out a domain for autonomy. That could account for the Scottish enlightenment movement, whose emphasis on notions of property rights and natural law turned to be an endeavor to blaze a new trail for autonomy free from the public power. Such ideas as the private area, autonomic and passive judicatory, "all man are created equal", "property is a sacred and

²⁶ Distributive justice don't insist on that injurer should restore the victim's *Status quo ante*. See M. D. A. Freeman, ed., *Lloyd's Introduction to Jurisprudence*, Seventh Edition, London: Sweet & Maxell, Ltd., 2001, P564.

²⁷ See Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New York: Russell Sage Foundation, 1975, at P.

²⁸ See Peter Benson, *Corrective Justice and Formalism: The Care One Owes One's Neighbors: The Basis of Corrective Justice and Its Relation to Distributive Justice*, *Iowa Law Review*, Vol. 77, 1992, P515—624.

inviolable right”, “self responsibility”, etc., have become prominent and dominant notions of the *laissez-faire* capitalism’s ideology.

In modern society, with the evolution of progressive law and the swelling of administrative power, corrective justice’s domain is dwindling. To look into specific private legal institutions, corrective justice is not always playing a monopolistic part. “while rights and duties in distributive justice are agent-general, in corrective justice, by contrast, they are agent-specific. This is the flip-side of the fact that corrective justice is, as Aristotle put it, justice in transactions. ‘Transaction’ here means ‘private transaction’; ‘private gestures toward private law. I say ‘gestures’ because it might be argued both that some areas of public law are governed by corrective justice and some area of private law are governed by distributive justice. Thus, for example, some philosophers argue that punishment can be understood as administering a kind of corrective justice, and some form of taxation might be so reckoned on some accounts. On the other hand, a case could be made that the constitutive doctrines of contract law are a part of distributive justice, if we think of these doctrines as giving content to a property owner’s right to transfer and of property rights as subject to distribution. The least controversial domain is tort”.²⁹ Even in torts, there are competitions between the two modes: reciprocity and reasonableness.³⁰ The former, similar to Aristotle’s idea, emphasizes the injurer’s compensation to the victim; While the latter, based on social values, lays stress on risk, fault and distribution of social welfare. In modern tort law, “punitive compensation” against “malice” is adopted more and more. Corrective justice is facing challenge when punishment overwhelms compensation. In legal techniques, it appears to be the complexity of causality and the difficulty to estimate foreseeability. Thus, some scholars try to embed distributive justice into torts, and separate punishment for the injurer from compensation for the victim.³¹

²⁹ Dennis Klimchuk, On the Autonomy of Corrective Justice, *Oxford Journal of Legal Studies*, Vol. 23, 2003, Pp49–64, at P50–51.

³⁰ See George P. Fletcher, Fairness and Utility in Tort Theory, *Harvard Law Review*, Vol. 85, 1972, Pp537–573.

³¹ See S. Sugarman, Doing Away with Personal Injury Law, 1989, Pp127–152. See also Hanoch Dagan, The Distributive Foundation of Corrective Justice, *Michigan Law Review*, Vol. 98, 1999, Pp138–166.

3. Confucian Ideas of Corrective Justice: An Exploration of Legal Thoughts

Bearing the glasses of Greco-Roman dualistic justice, many scholars criticize the Confucian legal system for its lack of civil society, individual autonomy, private rights and civil law. Indeed, in the national level, an advanced and sophisticated administration could easily be found in ancient China. Prof. Unger labels “bureaucratic law” on Confucian legal tradition.³²In such a hierarchical society, we certainly could observe notions similar to distributive justice.

Law, in the Confucian thought, is merely a tool of punishments and rewards to carry out the state or emperor’s will. In our 2000-year history dominated by Confucian doctrines, we can hardly find ideas of law of western style in ancient China. Does the Confucian tradition contain ideas similar to western corrective justice, even only in functional perspective? Where can we find principles of how people should treat each other, or what do we owe each other? To answer these questions, we have to turn to the idea of Li (rites), only in which interpersonal relationship was defined.

I don’t think any Confucian intellectual would deny the importance and necessity of law. Prof. Chen DengYuan pointed out that in the pre-Chin time, every school, including the Confucianism, the Daoism, the Legalism, and the Mohism, considered law as part of the mechanism for social control.³³However, no Confucian intellectual would admit that law should be the priority, either. Li rather than law was more fundamental. Li was the constitution of the state while law just for public enforcement of the state or emperor’s will. Li was the linkage of people while law just a linkage of people and the public authority. That the mixture of morality and law is a typical feature of Chinese ancient law, which can also be expressed as “explaining the legal rules on the principle of Li”, is confirmed by most scholars of this field. Obviously, the Confucian idea of justice was reflected more by Li than law.

According to the bible of the Confucian school, Li Ki (*Li Ji*, 礼记), Li was emphasized as, “In the right government of a state, the Li (Rules of Propriety) serve the same purpose

³² See R. M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, New York: Free Press, 1976, at Pp48–58.

³³ See Chen Deng-Yuan, *Chronological National History*, Zhong Hua Books Corp., 2000, Vol. 1, Pp289–291. (陈登原:《国史旧闻》, 中华书局)

as the steelyard in determining what is light and what is heavy; or as the carpenter's line in determining what is crooked and what is straight; or as the circle and square in determining what is square and what is round. Hence, if the weights of the steel-yard be true, there can be no imposition in the matter of weight; if the line be truly applied, there can be no imposition in the evenness of a surface; if the square and compass be truly employed, there can be no imposition in the shape of a figure. When a superior man (conducts, the government of his state) with a discriminating attention to these rules, he cannot be imposed on by traitors and impostors. Hence he who has an exalted idea of the rules, and guides his conduct by them, is called by us a mannerly gentleman, and he who has no such exalted idea and does not guide his conduct by the rules, is called by us one of the unmannerly people. These rules (set forth) the way of reverence and courtesy; and therefore when the services in the ancestral temple are performed according to them, there is reverence; when they are observed in the court, the noble and the mean have their proper positions; when the family is regulated by them, there is affection between father and son, and harmony among brothers; and when they are honored in the country districts and villages, there is the proper order between old and young. There is the verification of what was said by Confucius, 'For giving security to superiors and good government Of the people, there is nothing more excellent than the Li (Rules of Propriety).'³⁴

Except for Li Ki, we can find a lot of similar words in Confucius' works to prescribe the principle and criterion of interpersonal relationship. For Confucius, Li is a better mechanism than law, "Lead the people by means of regulations and keep them orderly with punishments, and they will avoid punishments but will be without a sense of shame. Lead them with moral power and keep them orderly by means of rituals and they will develop a sense of shame as well as correct themselves" (道之以政, 齐之以刑, 民免而无耻; 道之以德, 齐之以礼, 有耻且格)³⁵. Li offers the yardstick for everybody in society (the ruler and minister, father and son, brothers, husband and wife, the elder and the younger, friends) to hold his position, fulfill his duties and function properly. In this way,

³⁴ THE BOOK OF RITES, Translated by James Legge, The Sacred Books of China vol. 5, BOOK XXIII. KING KIEH, 5, 6.

³⁵ Analects, 2.3.

under ritual restrictions, interpersonal relationship would develop in a well-coordinated manner and social order would follow a benevolent cycle.

Compared with the concept of law, which in ancient China was as an incentive mechanism by punishments and rewards from the state, Li was a more fruitful resource for social relationship and organization. “They are the Li, that furnish the means of determining (the observances towards) relatives, as near and remote; of settling points which may cause suspicion or doubt; of distinguishing where there should be agreement, and where difference; and of making clear what is right and what is wrong” (夫礼者，所以定亲疏，决嫌疑，别同异，明是非也。).³⁶ Without Li, the governance mechanism and system of rules would collapse. “The course (of duty), virtue, benevolence, and righteousness cannot be fully carried out without the rules of propriety; nor are training and oral lessons for the rectification of manners complete; nor can the clearing up of quarrels and discriminating in disputes be accomplished; nor can (the duties between) ruler and minister, high and low, father and son, elder brother and younger, be determined; nor can students for office and (other) learners, in serving their masters, have an attachment for them; nor can majesty and dignity be shown in assigning the different places at court, in the government of the armies, and in discharging the duties of office so as to secure the operation of the laws; nor can there be the (proper) sincerity and gravity in presenting the offerings to spiritual Beings on occasions of supplication, thanksgiving, and the various sacrifices”.(道德仁義，非禮不成，教訓正俗，非禮不備。分爭辨訟，非禮不決。君臣上下父子兄弟，非禮不定。宦學事師，非禮不親。班朝治軍，蒞官行法，非禮威嚴不行。禱祠祭祀，供給鬼神，非禮不誠不莊)³⁷

As some scholar pointed out, Li acts as the constitution of the Confucian legal tradition. In the codified legislation of the state, rarely could we find explicit expression of idea or principle of justice. But notions similar to the western-style distributive justice is very common in statements of the Confucian school. “Li relies on valuables and goods to make offerings, use distinctions between noble and base to create forms, vary the

³⁶ THE BOOK OF RITES, Translated by James Legge, The Sacred Books of China vol. 5, BOOK XXIII. Kuh Li, 5.8

³⁷ THE BOOK OF RITES, Translated by James Legge, The Sacred Books of China vol. 5, BOOK XXIII. Kuh Li, 5.13–19.

quantity to make distinctions, and elaborate or simplify to render each its due(礼者，以财物为用，以贵贱为文，以多少为异，以隆杀为要)”³⁸. “The exemplary person has been civilized by these things, and he will also be fond of ritual distinctions. What is meant by “distinctions”? I say that these refer to the gradations of rank according to nobility or baseness, differences between the treatment of old and young, and modes of identification to match these with poverty or wealth and relative (social) importance)³⁹(君子既得其养，又好其别。曷谓别？曰：贵贱有等，长幼有差，贫富轻重皆又称者也)”. We can also find a hierarchical distributive scheme in ZhongYong, “so a great mind shall get the seat that is his, shall get the wage that is his, shall get the name that is his, shall get the years that is his” (大德必得其位，必得其禄，必得其名，必得其寿)⁴⁰. Of course, the Confucian school’s idea and its legal practice showed that the proportional distribution was based on social status or identity, rather than a person’s moral merit, although the latter was their ideal. We may conclude that the Confucian idea of distribution constitutes part of Aristotle’s.

Li served as the dominant social governance mechanism, “making clear what is right and what is wrong”, in which principles or standards of personal interaction were promulgated or embodied. Many Confucian scholars provided plenty of terms, examples and explanation for private interaction, especially Confucius himself.

Ren (humanity), which means the relationship of two persons, is considered to be the core concept of Confucius’ whole thought.⁴¹ Although the understanding and interpretation of Ren are controversial with the discovery of new unearthed texts, we can be sure that Confucius took private personal relationship very seriously. The unity of “shu”(kind-heartedness, also forgiveness) and “zhong”(loyalty)”, ideas of interpersonal care and love, was compared with Kant’s idea of golden rule by some scholars.⁴² All these notions describe positive duty *ex ante* for personal interaction, but they didn’t tell

³⁸ Hsun Tzu, 19.9; Translated by John Knoblock, Hsun Tzu: A Translation and Study of the Complete Works, 3 Vols., Stanford University Press, 1988-1994, modified.

³⁹ Hsun Tzu, 19.3; Knoblock, modified.

⁴⁰ *The Chung Yung*, translated by Leonard A. Lyall and King Chien-Kun, London: Longmans, Green and Co. Ltd., 1927, P8.

⁴¹ E.g. See Kuang Ya-Ming, *Critical Biography of Confucius*, Ch’i Lu Books Ltd., 1985, Pp181 – 183. (匡亚明：《孔子评传》，齐鲁书社)

⁴² See Qingjie James Wang, *The Golden Rule and Interpersonal Care: From a Confucian Perspective*, *Philosophy East and West*, Vol. 49, 1999, Pp415 – 438.

us how to handle the damage caused by one party to the other.

In the *Analects*, some words involving the distribution of positive and negative interest in personal interaction could be found. In the chapter of Xian Wen (宪问), which mainly focuses on personal moral accomplishments, Confucius said, “What, then, do you repay a good turn with? You repay a Yuan (injury, or discontent, even hate) with Zhi (straightness, or righteousness), but you repay a good turn with a good turn”.⁴³ It seems that we can apply this criterion to be a practical standard of justice---- “repaying a good turn with a good turn” could be the principle of reciprocal justice the same as in other civilizations, and “repaying a Yuan with Zhi” the principle of corrective justice in the meaning as Aristotle’s.

Unfortunately, the concepts of “Yuan” and “Zhi” didn’t form any practical judicial doctrine for private torts. Partially for the vagueness and abstractness of classical Chinese, their meanings were very ambiguous and controversial in the explanative texts of the Confucian school in history. Most existing studies just compare them with the Christian, the Buddhist and the Taoist’s “repay a Yuan with a good turn”.⁴⁴

I’ve looked through all the notes and commentaries on this statement in the “Complete Library in Four Branches of Literature”(《文渊阁四库全书》), which is an encyclopedia proposed by Emperor Chi’an Long and completed in 1782. Nearly every commenter, living in different dynasties and times, had his own interpretation. I arrange the commentaries into three categories:

Firstly, repaying a Yuan with a Yuan. He Yan (何晏, A.D. 190-249) in the North Wei Dynasty explained Zhi as “a way of straightness”, which is similar to a contemporary Buddhist preacher Nan Huaijin’s explanation.⁴⁵ If you give me a hit, as a revenge, I’ll give you a hit equally. Obviously this understanding is incorrect, for it’s in fact a standard like “repaying a Yuan with a Yuan”. If Confucius thought this way, he might

⁴³ The *Analects of Confucius: A Philosophical Translation*, translated by Roger T. Ames and Henry Rosemont, Jr., New York: Ballantine, 1998, P129.

⁴⁴ See Nan Huai-Jin, *Prelection on the Analects of Confucius*, Fudan University Press, 2005, (南怀瑾:《论语别裁》, 复旦大学出版社), at P.

⁴⁵ See He Yan, *Lun Yu Ji Jie Yi Shu*, “Collective Explanations and Argumentation of Analects of Confucius”, in “Complete Library in Four Branches of Literature”, electronic version, Shanghai Renmin Press and Dizhi Cultural Publisher, 1999, (何晏:《论语集解义疏》, 据《文渊阁四库全书·史部·正史类》电子版, 上海人民出版社、迪志文化出版有限公司 1999 年版); See also Nan Huai-Jin, *Prelection on the Analects of Confucius*, Pp385–386.

use a plainer statement.

Secondly, repaying a Yuan with righteousness. This is a classical and authorized version from Zhu Xi (朱熹, A.D. 1130 -1200), who lived in the North Song Dynasty. He said, "What is Zhi? Whether you love or hate, prefer to accept or reject, you should always take righteousness without any selfishness (or private interests) to the person you have a Yuan with"⁴⁶ (于其所怨者, 爱憎取舍, 一以至公而无私, 所谓直也). Zhu Xi's note is correct, but it is tautological. What we want to figure out is a practical benchmark for what is just and right in private injury, yet Zhu Xi's note brings us to the original position.

Thirdly, repaying a Yuan with truthfulness, which was advocated by Liu Baonan (刘宝楠, A.D. 1791-1855) living in the Ch'ing Dynasty. The way of Zhi is contrary to the way of deceptiveness. Liu Baonan said, " Man always prefers to be straight, which is his nature. If he has a Yuan (hate), he will hide it and do not revenge. But the Yuan will not disappear, and he is just waiting for the right time and opportunity to revenge. If he waits for a long time, the Yuan may burst out suddenly and be out of control, or it may disappear finally. He will disguise his true feelings and apply the way of deceptiveness when in public area, which makes the real feelings useless. Does that provide any good for him?"⁴⁷ (人之性情, 未有不乐其直者。至于有怨, 则欲使之含忍而不报。夫含忍而不报, 则其怨之本, 故未尝去, 将待其时之可报而报之耳。至于蓄之久而一发, 将至于不可御, 或终于不报。是其人之于市, 必以浮道相与。一无所用其情者, 亦何所取哉?). According to the way of truthfulness, that with what should a Yuan be repaid depends on the personality and moral status of the victim. If the victim can not forget the Yuan, he could revenge straightly. If he is a gentleman, he may not care that much about the damage caused by others. So the extent of revenge is decided by how much Yuan the victim has. If we force a mean man to repay a Yuan with a good turn, he will keep the Yuan in his heart, which is to foster deceptiveness and hypocrisy and against human nature.⁴⁸

⁴⁶ The Analects, Xian Wen, the 14th., in Zhu Xi, Annotations of the Four Books, Zhong Hua Books Ltd.,1983, P157. (《论语·卷七·宪问第十四》, 朱熹注《四书章句集注》, 中华书局)。

⁴⁷ Liu Baonan, Interpretation of Analects, in "A Collection of Corpus of Ancient Chinese Philosophers", Vol. 1, He Bei Renmin Press, 1992, P321. 刘宝楠:《论语正义》,《诸子集成》第一册, 河北人民出版社。

⁴⁸ The statement of Chinese version is "凡直之道非一, 视吾心何如耳。吾心不能忘怨, 报之直也; 既报则可以忘己直, 欲其心之无余怨也。报德者曰以德, 欲其心之有余德也。其心不能忘怨, 而以理胜之者, 亦

Zhu Xi's explanation refers to a social or objective criterion, while Liu Baonan's one is personal or subjective. But these two can be seen as reference for each other. As Liu Zongzhou 刘宗周 (A.D.1578–1645) noted, "Repay a Yuan with Zhi, and repay a good turn with a good turn. Then one can weigh an object impartially, and perfectly abide by heaven's rule and human feelings. With Zhi, one can forget Yuan without complaint, and he will not crook *Tao* to express his feelings, or take credit by hiding his feelings. With a good turn, one will repay all good turns he gets, which suits heaven's rule and human feelings and expresses human feelings in a perfect way. Both of them are routines for dealing with affairs, without any private intent emerging in the mind. So this is the way of a sage."⁴⁹ (以直抱怨，以德报德。自是称物平，施天理人情之至。直则忘怨不较，不枉道以申情，亦不匿情以市德。德则无德不报，于天理人情之中，申人情之至。两者皆物来顺应之常，而不萌一毫私意于其间，所以为圣人之道也。)

Zhi was a very important idea in Confucius' time, the Spring and Autumn Period. In the *Analects*, Zhi presents itself 18 times, with different meanings including (1) unselfishness; (2) honesty and modesty; (3) intolerance and asperity. For example, "To love Zhi in word without loving learning is liable to lead to harmful behavior"⁵⁰ (好直不好学，其弊也绞); "Unless a man has the spirit of the rites,..... and in being Zhi he will become intolerant"(直而无礼则绞).⁵¹

Therefore, generally speaking, Zhi is related with morality. In the Confucian thought, a gentleman or a superior man should follow the instruction of heaven's rule and human nature to cultivate his morality. To a sage, the two criteria, the subjective – heaven's rule and the objective – human feelings, are coherent and harmonious. So, the Confucian moral system, like the Li system, is hierarchical, just as Daniel A. Bell said. The ideas of Zhi, Yuan and justice are also hierarchical.⁵²

The hierarchical structure, or "diversity – orderly structure" as Fei Xiaotong

以直以其心之能自胜也。直之反为伪。必若教人以德报怨，是教人使为伪也，乌乎可？”，*Ibid*, P321.

⁴⁹ Liu Zong-Zhou, *Academic Case of the Analects*, in "Complete Library in Four Branches of Literature", electronic version, Shanghai Renmin Press and Dizhi Cultural Publisher, 1999.

⁵⁰ *The Analects of Confucius*, Translated and annotated by Arthur Waley, London: G. Allen & Unwin Ltd., 1938, P144, modified.

⁵¹ *Ibid*, P92, modified.

⁵² See Daniel A. Bell, *Hierarchical Rituals for Egalitarian Societies*, Tsinghua University Workingpaper, 2008.

proposed, or “concentric governance” advocated by Philip Kuhn,⁵³ is a dominant feature for almost all of the Confucian thoughts and social mechanisms. As we mentioned above, although the formal standard in practice is social status and identity, the substantive or ideal one for the Confucian school is morality and self-cultivation. The Confucian scholars advocated that everyone, despite of his identity and gift, could be a sage, if only he keeps on self-disciplining and internalizing *Tao* to make it a voluntary standard or a habit for his behavior. In this system, a natural tendency is to integrate all men and their behavior to the hierarchy, and to eliminate any feeling and behavior that are against the standard. Thus, there are some subtle conflicts between this system and individualistic interest, autonomy, etc., which are exactly the social elements necessary for corrective justice. In fact, if the Confucian ideal comes true, everyone is in position and behaves well, distributive justice itself is quite enough for the system.

Based on the above analysis, we may draw the conclusion that Aristotle’s corrective justice didn’t exist in the Confucian thought of social governance. Only *ex ante* rules or principles (principles of distributive justice) could be found for private interaction. Only positive interest of interaction, say with what to repay a good turn (principles of reciprocal justice), and only positive duty are defined clearly. If someone was damaged by others, no explicitly tort rule in *Li* could be applied.

Compared with Greco-Roman’s dualistic justice, the most important feature of the Confucian idea of justice may be its lack of corrective justice. Consequently, the Confucian legal tradition was influenced. “For these reasons, the official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals. If a dispute involved two individuals, individual A did not bring a suit directly against individual B. Rather he lodged his complaint with the authorities, who then decided whether or not to prosecute individual B. No private legal profession existed to help individuals plead their cases. and even in the government itself, because law was only the last of several corrective agencies, officials exclusively concerned with the law operated only on the higher administrative

⁵³ See Philip Kuhn, *Rebellion and Its Enemies in Late Imperial China*, Harvard University Press, 1980, Ppvi-vii.

levels”.⁵⁴ Moreover, although the Legalist school’s statements and theories are deemed to be one of the major sources of the traditional legal system of ancient China, they didn’t have any idea of corrective justice either. “Their insistence on law, therefore, was motivated by no concern for ‘human rights’, but simply by the realization that law was essential for effectively controlling the growing populations under their jurisdiction. In thinking and techniques they were genuine totalitarians, concerned with men in the mass, in contrast to the Confucians, for whom individual, family, or local community were of paramount importance.”⁵⁵

We may continue to ask why neither the Confucian school nor the Legalist school proposed notions similar to corrective justice to solve private dispute *ex post*. Prof. Bodde believed the reasons came from the origins of law. Based on comparative analysis of ancient law, he pointed out two factors which made Chinese law special, religion and economics. The idea “law is the primal and ultimate mind of God” could be found in Egypt, Mesopotamia, Hellene and Rome. However, in China, nobody at any time ever hinted that law, especially written law, could have a divine origin. Moreover, “When this law appeared, however, it was used neither to uphold traditional religious values nor to protect private property. Rather, its primary purpose was political :that of imposing tighter political controls upon a society which was then losing its old cultural values and being drawn by inexorable new forces along the long road leading eventually to universal empire”.⁵⁶ Bodde’s explanation is goodish, but not exactly true for he paid too much attention to the codified or written law.

That Chinese ancient law was unreligious and independent of the divine origin of God’s will is a common misunderstanding. The idea of heaven or God, in shamanistic forms, existed in ancient China even earlier than the state was built. Prof. Chen Lai pointed out that in the “three ancient Chinese dynasties – Hsia, Shang and Chou” it was altered into a Chinese democratic form. Because the ruler of Chou, after rebelling from Shang as a local lord, had to make a new explanation for heaven to strengthen his

⁵⁴ See Derk Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, *Proceedings of the American Philosophical Society*, Vol. 107, 1963, Pp375 – 398, at P376. Hereinafter cited as “*Basic Concepts of Chinese Law*”.

⁵⁵ *Ibid*, P382.

⁵⁶ *Ibid*, P379.

legitimacy.⁵⁷ The declaration that “Heaven sees according as my people see; Heaven hears according as my people hear”⁵⁸ (天视自我民视, 天听自我民听) was such an attempt. This idea, ardently supported by Mencius and Hsun Tzu, didn’t exclude heaven or God out of Li or law, but only handed its power to the people as a whole. In ancient China, a strong linkage between law and heaven was established in different ways, but not in a western way or in a way Bodde was talking about. Likewise, the Confucian school also highly encouraged the notion of private property, whose meaning was quite different from the western one. And just as Prof. Zhu Suli said, much of private property had a “culture asset” form rather than the *Rem* form.⁵⁹

I would like to mention two factors which I think are important and interesting to understand the characteristics of ancient China. (1) The formation of the state greatly determined its functions and the boundary of society (Li) and state (Hsien). Ancient China was formed by the unification of tribes through alliance and conquest. So “the most important things for a country are sacrificial rites and military affairs” (国之大事, 在祀与戎). Sacrificial rites were applied to confirm the regime’s legitimacy, while military affairs could secure the country. On the contrary, Greece was formed within a city-state, which means the state should provide more public goods. (2) Maybe Confucius had a profound insight like Plato, believing that distributive justice is eternal while corrective justice is contingent. Corrective justice has an inherent flaw, trying to accomplish two goals – compensation for victim and punishment for injurer by one transfer of private interest.⁶⁰ With the development of law and economics, a paradox in torts has been discovered that, by private compensation, it’s impossible to realize the bilateral incentive for both of the perfect deterrence and perfect compensation.⁶¹

Under a tradition like this, it’s easy to be understood no civic rules in ancient China,

⁵⁷ See Chen Lai, *Ancient Religious and Ethics: Sources of the Confucian Thought*, SDX Joint Publishing Company, 1996. (陈来:《古代宗教与伦理--儒家思想的根源》, 三联书店)

⁵⁸ James Legge, "Sacred Books of the East", volume 3, 1861, Shang Shu (The Classic of History), Great Declaration II, 2.3.

⁵⁹ See Suli, A Economic Explanation for Hai Rui’s Theorem, *Social Science in China*, Vol. 2006, Issue 6, Pp116–132. (苏力:《“海瑞定理”的经济学解读》,《中国社会科学》)

⁶⁰ See Peter Benson, The Basis of Corrective Justice and Its Relation to Distributive Justice, *Iowa Law Review*, Vol. 77, 1992, Pp515–624.

⁶¹ See Steven Shavell, A Model of the Optimal Use of Liability and Safety Regulation, *Rand Journal of Economics*, Vol. 15, 1984, Pp271–280.

based on the assumption of equal human nature, individualistic, *ex post* judicial adjustment, focused on the comparison of injurer's gain and victim's loss. Modern tort law scholars try to find out the western similar style's rule in traditional Chinese society, must be a work fruitlessly. The most of criticisms and even condemnations to the Confucian law, for lack of civil law, nonexistence of individual rights, absence of idea of civil society, replacing "hsien" (crimina law's punishment) as "fa" (law), without division of sections of law, etc., are concluded biased or unfairly with a glasses of dualistic justice borrowing from the Greco-Roman tradition. ⁶²

4. Empirical Examination of Ancient Legal Practice and Verification of the Hai Rui Theorem

With only "in like cases the judgment is the same" advocated by the Legalist school and without corrective justice, when it comes to torts or breaches of contract, what kind of criterion should the Confucian legal system adopt to solve disputes? Naturally, distributive justice became the core standard in judicial adjustment.

The existing studies on Confucian legal institutions, especially those of the recent years on ancient civil and commercial law, concentrate mostly on disputes about property, including property crimes, family-breaking, property inheritance, and sometimes marriage. Therefore, the lawsuits were mainly about distribution of property, such as the allocation, transfer and joint ownership of property, which was basically related with distributive justice. However, even in tort cases, the traditional domain of corrective justice in West, distributive standards were dominant. ⁶³

In a comparative perspective, scholars of torts have studied relevant codes and their functions, and have found some ancient legal institutions related to modern tort law. According to the viewpoint of a specialist in torts, there were totally 17 kinds of liabilities for torts in Confucian legal system, and they were applied from time to time in history.

⁶² See Joseph Needham, *Human Laws and Laws of Nature in China and the West (1)*, *Journal of the History Ideas*, Vol. 12, 1951, Pp3–30, at P17.

⁶³ E.g. See Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State and Social Control in China*, Greenwood Press, 1997. See also Phillip C. C. Huang, *Code, Custom and Legal Practice in China*, Stanford: Stanford University Press, 2001.

⁶⁴ Generally speaking, some major liabilities for property infringement included: (1) Bei Chang (备偿, restitution or compensation for losing or ruining property negligently), ⁶⁵ which is considered the basic and commonest compensation carried out in almost all dynasties. For example, “Tang code: Miscellaneousness” (a chapter of Tang Code) has a clear expression in mandatory codification, the defendant should make a compensation (Bei Chang) if he throws away, demolishes, loses, or negligently damages public and private utensil or implements (诸弃毁亡失及误毁官私器物者, 各备偿); (2) compensation for diminished value, mainly used for damage of productive livestock, say cattle, horses, etc. (偿所减价); (3) half compensation for diminished value, mainly used for mutual injury of domestic animals, except for dogs; (4) punitive damages (倍备), occasionally used for stealing and counterfeiting money, abolished since the Song Dynasty. These tort liabilities related to property demonstrate that the benchmark for measuring damage and compensation was determined by property itself, or in a mandatory way.

As to personal damage, maybe the most representative realm. the commonest form of liability was criminal penalties, which means distributive justice, again, took the place of corrective justice. In western legal tradition, to trigger criminal procedure, a threshold between civil personal damage and criminal offence is necessary. But the codified acts of ancient China didn't make such a distinction. Any injurer of personal damage, no matter to what extent, was punishable with criminal penalties, although the degree of punishment was different. ⁶⁶ Thus, to deter private personal damage, punishment was imposed by the state, which was a tax on the injurer's welfare in modern view, rather than realized through an interest transfer from the injurer to the victim.

But in legal practice, some judges, magistrates, and officials, with a wide range of jurisdiction for the moralized and vaguely expressed rules., showed an attitude of judicial abstention and tried to avoid the abuse of criminal penalties in civil matters. . Here is evidence from the handbooks of a magistrate, Wang Youhuai,

⁶⁴ See Li-xin Yang, On the Hundred Year History of Tort Law of China and Development in the 21st Century, *The Supreme People's Procuratorate*, (杨立新: 《中国侵权行为法的百年历史及其在新世纪的发展》, 《国家检察官学院学报》), Vol. 2001, Issue 1, Pp3–16.

⁶⁵ See Liming Wang, ed., “Civil law: Torts”, Renmin University Press, (王利明 主编: 《民法·侵权行为法》, 中国人民大学出版社), 1993, Pp70–72.

⁶⁶ See Philip C. C. Huang, *supra* note __, at P219.

“Cases that fall into the overlapping area between punishment and tax [刑钱交涉事件] are often difficult to separate out, leading to disputes and competition [among the different yamen (government) offices]. The way to separate them is to look at the intentions of the plaintiff. If the dispute concerns land and house, the repayment of debts, exchange, taxes, deeds, and so on, even if there are a couple of references to assault and battery but without injury, or to gambling but without proof, or to other illegal matters, and involve burial grounds, disputes over inheritance or succession, they should go to Tax office. If the complaints are about assault and battery, fraud, burial grounds, inheritance, marriage and all other major matters related to crucial moral obligations [纲常] and [Confucian] teaching [名教], even if they contain references to debts and land and house, they should go to the Punishment office”.⁶⁷

In fact, studies on legal institutions have revealed several categories of legal liabilities as substitutions for punishment in private personal damage, including: (1) money expiation to the victim’s family to counterbalance criminal penalties. In certain situations defined by the code, with government officials’ authorization, the injurer could compensate for the victim’s damage to mitigate his crime and reduce the penalty. The money of a fixed amount was levied by the government. (2) confiscating the injurer’s property for the victim’s family. It was used mainly in very serious criminal cases. Otherwise, the victim’s dependents would be in a terrible and helpless situation. (3) pursuing burial fee of a fixed amount as an additional/separate punishment in homicide cases. It was adopted mainly in negligent homicide of an independent person or homicide of a bond servant. (4) secured medical treatment (保辜). A limit was set based on the specific conditions of the case. Within this limit, the injurer could expiate his crime by paying for the victim’s medical treatment. If the victim recovered, the injurer got a reduced penalty. If the medical treatment didn’t work and the victim became disabled or dead, the injurer must be punished according to the code.

Scholars of civil law have figured out some characteristics of the ancient tort liabilities, such as the lack of rules about civil rights, the lack of highly abstract rules, the excessive complexity and detailedness, and the lack of distinct or uniform standard---

⁶⁷ Wang Youhuai, quoted from Philip C. C. Huang, *Supra* note __, at P218, modified.

standards could be the property itself, the diminished value of the property, a fixed amount, or somewhat of restitution. Indeed, from the examples mentioned above, we may generalize that: (1) On most occasions, the public administrative office separated punishment for the injurer and compensation for the victim. The injurer had to hand in a certain amount to the government, who then determined a compensation for the victim. It means “confiscated by the government” first and “compensating the owner” second. (2) The amount of compensation was decided by what the victim should not have lost, rather than what the injurer should not have gained. Both (1) and (2) were based on property rule and promulgated by the codes *ex ante*, no matter in the form of the injurer’s property, expense for medical treatment, or expense for funeral and interment. Obviously, these principles were different from those according to corrective justice: the injurer should transfer an interest to the victim for his gross loss of welfare in “natural status” or “market status”.

Similar phenomena also appeared in ancient China’s contract law, which seemed to be dominated by property rule. Based on the ancient literature of Dun Huang (敦煌), Hansen has studied contracts of ancient China and considered the importance of contract had been greatly underestimated. In most cases, contracts served for transfers of houses or lands, buying and selling goods or human beings. Except for contracts of usury, buying and selling slaves or persons, which were restricted or prohibited in some periods of history, others were free to and from, although the government would provide official formats and levy taxes for contracts. So, what was the standard to judge the gainable interest from contract? In fact, according to the records we could find, it was still the property rule. If only the contract was legal, it would be carried out as what the judge had conclude, “ In debt cases,... if they are clearly supported by documents and contracts [juan yue], then the magistrate should of course act according to the code and enforce payment”.⁶⁸

Therefore, the so-called liability rules of ancient China, with the methods of restitution, prohibition of damage or some others, functioned to “determine the

⁶⁸ Philip C. C. Huang, *Civil Justice in China: Representation and Practice in Qing*, Stanford University Press, 1996, P206.

ownership and settle the dispute” and failed to produce the reasonable person standard, which takes negligence and interpersonal duty of care as its core. When the function of law was dominated by distributive justice, the litigants’ interests were hardly to judge if they were beyond the existing rules (including legal rules, Li, commercial practice and social customs), and common value would prevailed against interests which had not been defined clearly.

Now, we may review the “Hai Rui Theorem” proposed by Pro. Zhu Suli. Hai Rui (A.D. 1514–1587), an eminent official in the Ming Dynasty, had said “ I think, when it comes to indeterminable arguments, we should be partial to the elder brother rather than the younger, the uncle rather than the nephew, the poor rather than the rich, the simple rather than the tricky. And if the disputes are about property, we should be partial to the ordinary villagers rather than the village gentries, so as to eliminate the flaw. (The village gentries maneuver to deprive the villagers’ lands, estates, bonds and carts, to encroach their possessions and bully them in the name of contract, and to commit all manners of crimes. There are the rich but cruel everywhere. So I say it is to eliminate the flaw.) If the disputes are about status, we should be partial to the village gentries rather than the ordinary villagers, so as to maintain the system.(The village gentries are noble while the villagers are humble. So I say it is to maintain the system. However, if the gentries lord it over the villagers and beat them, it is unnecessary to consider maintaining the system.)”.⁶⁹In Suli’s opinion, these words constitute the theorem of fairness and the theorem of difference. He then applies economic utility analysis to the concept of culture asset, and draws the conclusion that different rules for judicial adjustment are decided by different marginal harm to the two parties of litigants.

Yet I would like to understand the Hai Rui Theorem in another way. I think it only indicates that the rule for judicial adjustment *ex post* had to obey the property rule *ex ante*,

⁶⁹ Ray Huang in his “1587: A Year No Significance” gave a translation, “I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.” Ray Huang, *1587: A Year of No Significance: The Ming Dynasty in Decline*, Yale University. Press, 1981, at P_.

and when the rule was unclear, the common value, here is to maintain the hierarchical system, overwhelmed the specific interests. Suli's marginal utility analysis after all is based on liability rule of torts, which together with his conclusion, is a typical case of applying western thought way to Chinese history. But corrective justice was nonexistent in ancient China, either was the liability rule which weighs negligence and damage to determine liability.

The two concepts in Hai Rui's words I think are more interesting, "to eliminate the flaw" and "to maintain the system", which manifested the conflict between formal justice and substantive justice. In a hierarchical allocation of property right, the standard is defined by form, for example, the social status. Village gentries, in such an allocation, were supposed to be "gentlemen" (Junzi). When their behaviors didn't match up to the criteria set for gentlemen, a conflict between formal and substantive distributions emerged. "To eliminate the flaw" means to carry out distributive justice by essential standard, and the so-called "system" is exactly the ideal standard for distribution in the Confucian tradition. In this perspective, Hai Rui, under the formal property rule which distinguished the noble and the humble, tried to make judicial adjustments according to the essential standard, which had demonstrated his ideal and his respect to the authoritative hierarchy. There are yet many other similar expressions. For example, Wang Youhuai in Qianlong Period advocated that "in commenting on plaits, [the legal secretary] needs to be able to surmise the feelings and facts of people [ren qing], and the reason of things [wuli], to discern false pretenses, understand big principles [ming dayi], and be familiar with the code. The words should be simple but the meaning encompassing, and the text clear and fluid. Only then can the comments hit the mark and be appropriate for the particular case".⁷⁰ Big principles had the same meaning as "to maintain the system". Both of them were to allocate the hierarchical property rights (including the cultural asset) according to distributive justice. Sometimes, to maintain the system or big principles, should be at costs of tolerating "minor conflicts or loss" in the law's enforcing. Just like Tu Yu (A.D. 221-284) 杜预, a great jurist in the West Jin Dynasty, said "law are major demarcation lines rather than books exhausting various

⁷⁰ Wang Youhuai, Quoted from supra note __, P211

nuances in reasoning. Therefore, laws are concise and precise, and the hearing are brief. The regulations are clear and transparent, serving as deterrence against potential violator, and people will try not to violate the laws, and thus the punishment is seldom rendered as few people break the law...The explanatory notes herein all deal with the purposes and intents of the law in an effort to identify them with a view to enable the law enforcers to follow the principles of the law without bothering about the details". "Without bothering about the details" (法者，盖绳墨之断例，非穷理尽性之书也。故文约而例直，听省而禁简。例直易见，禁简难犯。易见则人知所避，难犯则几于刑厝。刑之本在于简直，故必审名分。审名分者，必忍小理)。⁷¹ In my viewpion, Tu Yu's word refers to the minor conflicts and disputes beyond property rules should be neglected by judges according to the Confucian distributive justice.

Suli's understanding of the Hai Rui Theorem and weighing of cultural asset are an attempt to measure the gross utility of the litigants. However, in the lack of market and an assumption of equality, it doesn't work. Distributive justice doesn't take the gross utility into account, but judges in terms of rights in the explicit rules. The mode of "confiscated by the government" first and "compensating the owner" second is a typical instance which shows that tort law of modern meaning didn't exist.

Corrective justice is built essentially on the measurement of individual's gross utility, which decides that the standard for loss usually is the plaintiff's "due gain". But how do we measure it? It depends on an utility function measurement free from hierarchical or proportional distribution and social control of the state. Therefore, it is necessary to have assumptions of market and civil society – the former enables the exchange of interests while the latter works as the domain for autonomy. In this perspective, the nonexistence of corrective justice in ancient China is quite natural. When the ancient Chinese legal institution began to form, it was probable that the idea of corrective justice didn't exist. But in the long history of evolution, the legal rules didn't acknowledge the gainable interest all along. Since the standard of reciprocal justice in commercial exchange conflicted with the dominant governance mode of ancient China. The population

⁷¹ The Book of Jin (晋书 本传), quoted from Ji Weidong, *Space of Choice and Judicial Discretion in China: A perspective of Comparative Legal Culture*, Center for Legal Dynamics of Advanced Market Societies, Kobe University working paper, 2004.

migration and social mobility for commercial reasons would decrease the control imposed by government, when land was the main instrument for population control. Philip A. Kuhn has pointed out two modes: the nested-concentric mode (which means the ethical circles with oneself as the center) favored by the state and the tinker-peddler mode limited the by state, which well present the repression of commerce in social control by the empire. ⁷²

In fact, market's separation from state could be derived from reciprocal justice, which had been testified by the Japanese history. The Sorai school (lead by Ogyu Sorai, who is considered as the first modern thinker in Japan) 徂徠学派 before Meiji Reform found a philosophical basis from Hsun Tzu's 荀子 (about B.C. 313-238) theory of human feelings. They justified selfish desires and supported individual "things" instead of universal moral principles. "The great sage kings of the past taught by means of 'things' and not by means of 'principles'. Those who teach by means of 'things' always have work to which they devote themselves; those who teach by means of 'principles' merely expatiate with words. In 'things', all 'principles' are bought together; hence, all who have long devoted themselves to work come to have a genuine intuitive understanding of them. Why should they appeal to words?"⁷³ The emphasis on "things" and interest in personal relationship induced the importance of business and merchants. Ogyu Sorai was also a pioneer in Japan to advocate the separation of public and private domains in a hierarchical way.⁷⁴ His followers introduced the principles of exchange into the public domain and exploited a way for the Japanese modernism. ⁷⁵

Some scholars argue that the social structures, and even the ethics of Japan before the Meiji Reform were quite different form those of ancient China. ⁷⁶ Commercial groups and market had already existed in Japan, and that's the reason why reciprocal

⁷² See Philip Kuhn, *Rebellion and Its Enemies in Late Imperial China*, Harvard University Press, 1980, Ppvi-vii.

⁷³ Tomosho (Questions and answers), quoted from Hajime Nakamura, *Consciousness of the Individual and the Universal among the Japanese*, *Philosophy East and West*, Vol. 14, 1964, Pp333–51, at P341.

⁷⁴ See Bob Tadashi Wakabayashi, Kato Hiroyuki and Confucian Natural Rights, 1861–1870, *Harvard Journal of Asiatic Studies*, Vol. 44, No. 2, 1984, Pp469–492.

⁷⁵ See Han Dong-Yu, The School of Ogiyuu Sorai and the Enlightenment for the Early Modernization in Japan, *Historical Studies*, Vol. 2002, Issue 5, Pp113---125. 韩东育:《徂徠学与日本早期近代化的思想启蒙》,《历史研究》。

⁷⁶ See Tokiwo Yokoi, The Ethical Life and Conceptions of the Japanese, *International Journal of Ethics*, Vol. 6, No. 2, 1896, Pp182–204.

justice could expand to the public domain and impact distributive justice. Such a possibility also germinated in the development of later Confucianism in the Ch'ing Dynasty, when scholars like Li Zhi 李贽 emphasized the incentive effect of private property and individual freedom from family and clan.⁷⁷ But their voices were submerged by the torrential social turbulence and constrained by the mighty power of distributive justice.

Nevertheless, it deserves to be highlighted that with the rise of mass torts, the remoteness of cause and effect, and the difficulty in collecting information to decide fault, strict liability based on property rule has risen in modern society, and corrective justice under the Greco-Roman tradition is facing the challenge. After all, it took only hundreds of years for corrective justice to begin its history, with the establishment of capitalism, and spread to such a wide range to become the dominant governance mode. When we apply it to measure the Confucian legal tradition, which has a history of more than 2000 years, we'd better keep alert, at least in logic.

5. Path-dependence for Transitional Justice after 1908

Corrective justice is related to the division of private and public domains, the idea and existence of market, individual's gross welfare and the passive judicial system, etc.. Does the nonexistence of this concept in ancient China, after the westernization for nearly 100 years, have influence on China's modern legal institutions?

From the legal reform at the end of the Ch'ing Dynasty (in 1908), to the one launched by the Kuomintang Government to remove "Li" from law, till the amendments in these days, no matter in which phase, Chinese legal institution has been changing in accord with the western pattern, more specifically, the continental legal system. Rules, especially the written ones, are easy to be cleaned out or brought in, but the underlying ideas of justice is not - the ideas underlying the western legal institution could hardly be copied simultaneously,⁷⁸ and the Confucian notions could hardly be

⁷⁷ See Ray Huang, *1587: A Year of No Significance: The Ming Dynasty in Decline*, Yale University Press, 1981.

⁷⁸ See M. H. Van Der Valk, *The Revolution in Chinese Legal Thought*, *Pacific Affairs*, Vol. 11, 1938, Pp66-80.

eradicated either. "There is little overt evidence of a direct link between China's imperial legal order and the one more recently established under the People's Republic of China. Apart from a few conceptual and organizational terms preserved in contemporary legislation, the past seems to have largely disappeared. However, the influence of China's once dominant Confucian ethos is readily apparent in the variant strains of modern Chinese legal culture. In the Confucian conception of state and society, law was far more than a mere instrument of imperial will. Law represented a body of coercive rules deeply embedded within broader philosophical and moral norms concerning proper personal and social conduct. Consequently the doctrinal coherence of the law and its consistency in application was derived more from this philosophical and moral context than from a formalist interpretation of legislative texts. Chinese society has in many respects held to this contextualist approach to law. There continues to be a widely held belief that the application of positive law should be subject to extra legal considerations, such as the relationship and circumstances of the parties and the demands of commonly held standards of justice."⁷⁹ Although the transition of law has realized to some extent, there is still a far fetch to build up the new idea of justice. And corrective justice is a typical case.

In private law, among the elements related to corrective justice, those already existent in the Confucian notions are easier to be recognized, complied with and emphasized. For example, the ideas of property, freedom of contract, and strict implement of rules, etc.. On the contrary, ideas, such as duty of care in interpersonal relationship and individual's gross welfare as standard of loss, which were nonexistent in history, are still weak even after the legal institution transition. These phenomena are visible in Chinese legal implementation these days.

The first example is the idea of negligence and duty of care. They are quite filmy no matter in legislation, judicial adjustment or legal thinking. What kind of obligation should an individual possess in her context? To what extent should she care about others? And how do the judicial system and the legal rules implement the assumption of

⁷⁹ Perry Keller, *Sources of Order in Chinese Law*, *American Journal of Comparative Law*, Vol. 42, 1994, Pp711 – 759, at Pp714 – 715.

reasonable man? Although terms like negligence, reasonable man and duty of care are widely used in private law, when it comes to a practical case, lacking the philosophical assumption of “reasonableness” or “rationality”, ethical judgment is likely to overwhelm inference, and legislators or the executive will try to figure out a so-called “objective standard”. The result is that duty of care is replaced by legal duty or ethical duty.

For instance, “bona fide third party” is very common in Chinese law, but its standard “due informed or informed”, when we don’t have the duty of care for “due informed”, has become “informed”. Moreover, the late legislation has ignored the difference. An example is the Article 57 of Partnership Enterprise Law of People’s Republic of China, which says “A partner or several partners shall bear unlimited liabilities or unlimited joint and several liabilities for the debts incurred to the partnership enterprise because of his (their) intentional or serious wrongful act. All partners shall bear joint and several liabilities for the debts incurred by any partner(s) to the partnership enterprise because of his (their) intentional or serious wrongful act, and for other debts of the partnership enterprise”. It’s a copy of Texas limited liability partnership, also named “the first generation or partial shield LLP”. If a partner or partners commit an intentional or grossly wrongful act, then only he himself/they themselves shall bear unlimited joint or several liabilities, and other partner(s) will be liable solely within the amount of their capital contributions to the partnership enterprise. But, it seems that the legislators have forgotten a basic principle – if other partner(s) know or should know the actor’s wrongful act *ex ante* without taking any action to stop him/them or giving a notice or alert for all partners, he/they should not enjoy the protection of partial shield. Why was such an important incentive mechanism for the unity of partnership ignored after the participation and review of so many scholars and specialists? I think the dim ideas of duty or care and corrective justice could be a reason.

How much care is an organization or web operator, as the infringer, required to give so as to be exempt from liability? To what extent should a third party be aware of a corporation’s internal affairs when they are going to sign a contract? In practice, the standard has been taken by the objective fact of “know” or “not know”. A worse example is article 33 of Corporate Law, which says if the identity of a shareholder has not been

registered at the official bureau in charge, it then may not work as evidence against the third party. This *jus-in-rem*-style expression seems professional but rather absurd. Why isn't registration at the corporate enough to work against the third party? Another typical example is the compulsory registration of transferring houses, which emphasizes the independence of *jus in rem* behavior. It is deemed to be a good solution to the situation of one house sold for twice or more. But we seldom ask questions like these: why is the compulsory registration exclusively powerful? Isn't the buyer unreasonable if she doesn't go to the spot to have a look at the house she is going to buy? If somebody is already living there, isn't she unreasonable if she doesn't ask why? To become a legal mechanism, the "may not be against the third party" has to be built on the basis of negligence and duty of care. However, it has become an all-purpose instrument related only with registration. It is the result of applying a simple and determinate method to slip away from the complicated and specific duty of care in interpersonal relationship.

A second example is the determining of loss, which is approaching a legal or regulatory standard and usually leads to under-compensation. Although the "expected interest" (the counterpart in Continental Law is "positive interest (*Lucrum Cessans*)", but some scholars consider the two concepts different.⁸⁰) and "reliance interest" are definite in legal theory, and Article 113 of Contract Law has explicitly prescribed "positive interest" and "foreseeability", in practice, the plaintiff seldom get his "due gain". The substitutes are "loan rate at the same term" and "deposit rate at the same term" which are regulated by the central bank. Moreover, these two rates, which are different in nature, are often mixed up and misused. Not to mention the judicial interpretation by the Supreme Court, which is inclined to the mandatory penalty interest rate set by the central bank.

Other typical examples are the calculation standard for loss in torts, say the expense of medical treatment and nursing.⁸¹ Likewise, the regulatory and uniform formula to calculate the loss has replaced the individual petition. The public opinion has been

⁸⁰ See Robert Cooter and Thomas Ulen, *Law and Economics*, Fourth Edition, Pearson Education, Inc., P239, Pp243--247.

⁸¹ See Wang Cheng, *Economic Analysis of Compensation for Torts*, Renmin University Press, 2002, P179–182. (王成:《侵权损害赔偿的经济分析》, 中国人民大学出版社)

focusing on these issues and arisen large-scale discussion in society, which well reflect the indigence of the idea of corrective justice. When people are asking why “the same life, different prices”, ideas like “substantive equality” are preponderant. Little attention has been paid to the individual welfare, thus seldom do people care about the calculation of “lifetime loss”.

Indeed, under-compensation is a general phenomenon in most countries.⁸² “Perfect compensation”, an idea of corrective justice, is not so effective and seldom realized. However, applying mandatory standards to those ambiguous problems is obviously an evidence of the constraints imposed by the nonexistence of corrective justice on Chinese modern legal practice.

In legal transplanted, copying and scrupulously enforcing the rules are easier to achieved. Nevertheless, running a legal system effectively and making it self-sustainable is very hard. A profound restriction is, of course, that the idea of justice is not as easily to be transplanted as a legal system’s infrastructure, which is also a result of the knowledge-based path-dependence. ⁸³The transitional justice in China is a typical case.

6. Conclusions

The existing studies of legal history of ancient China, especially those in the perspective of a certain field of law, sometimes make simple comparisons based on texts, which leads to much criticism of the legal thought and texts of ancient China. This paper tries to argue that such criticism is at least unfair and superficial. It should be fairly uncontroversial to say that institutions and rules should be supported by the idea of justice. This should be quite elementary for anyone who have thought seriously about transplanting legal institutions from one context to another.⁸⁴

The Confucian state laid stress on the hierarchical property distribution *ex ante*,

⁸² See Alan Schwartz, *The Case for Specific Performance*, *Yale Law Journal*, Vol. 89, 1979, Pp271–306.

⁸³ See Lucian Ayre Bebchuk and Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, *Stanford Law Review*, Vol. 52, 1999, Pp128–170. See also Stephen E. Gargolis and S. J. Liebowitz, *Path Dependence*, in Peter Newman, ed., *The New Palgrave Dictionary of Economics and the Law*, Macmillan Reference Limited, 1998, Vol. P–Z, P17. See also S. J. Liebowitz and Stephen E. Margolis, *Path Dependence, Lock-in, and History*, *Journal of Law, Economics, & Organization*, Vol. 11, No. 1, 1995, Pp205–226.

⁸⁴ See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, *University of Pennsylvania Law Review*, Vol. 131, 1983, Pp1121–1157.

based on social status, and thus strongly restricted the judicial adjustment *ex post*. The institution designers and players, under the constraint of this tradition, do not have an idea of corrective justice based on the distinction of public and private domains, the assumption of formal equality of status in litigation, the personal gross welfare or natural status, and the combination of compensation and punishment. And they are hardly aware of the limitation to transitional justice. Just like Douglas North said, “ideas and ideologies shape the subjective mental constructs that individuals use to interpret the world around them and make choices”.⁸⁵ A matured culture can’t quickly adopt its missing elements or ideas compared with another one. Instead, it tends to enlarge or expand its original parts or norms to fill the gap. That’s the destiny of the idea of corrective justice in modern China.

As a cultural, law could be seen as a relatively stable system of shared signs, symbols, beliefs, assumptions, habits and norms which allow people to make sense of the world, make value judgments, and communicate with each other. It’s a system of meaning of justice, but it is also a normative enterprise. Culture is a human construct, and as such it is always undergoing change and adjustments brought about through the agency of individuals in that culture. Culture constantly reproduces itself by cultivating the next generation who grow up internalizing the same beliefs and norms, and so it may seem at times irresistible and oppressive.⁸⁶ Yet, culture is never a fully integrated, coherent, static, totalizing and seamless whole. The Confucian legal tradition was based on a diversified enforcing mechanism, especially on the interpersonal adjustment, with a transnormal timeliness of practice in human history. It’s quite fair for modern people to have difficulty in accepting that some kind of idea of justice doesn’t exist in history, especially when we are proud of our long tradition. I can not deny that it is possible to discover similar ideas to Aristotle’s in some words or some books of ancient people. But if we could accept that law is itself a culture system and an integrated whole to some extent, then we may admit that within a certain cultural system some ideas are serving as

⁸⁵ Douglas C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University press 1990, P111.

⁸⁶ See Hahm Charhark, *Constitutionalism, Confucian Civic Virtue, and Ritual Propriety*, in Daniel A. Bell and Hahm Chaibong, eds., *Confucianism for the Modern World*, Cambridge University Press, 2003, Pp31 – 53, at P40.

the domain source of norms and rules. It is easy to recognize that the idea of corrective justice is quite a remote idea of the Confucian legal thoughts and practice. Therefore, we could understand the underlying meaning of Confucius' words, "in the application of Li, peace is most valuable"(礼之用，和为贵).

Appendix

Chart I: Aristotle's idea of equality, justice and states

