The impact of Neo-Confucianism on Chinese intellectual property practice

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Overview

- Contrasting roles of Law in Roman and Chinese empires
- Development of Neo-Confucianism
- Noblesse du rôbe and 士: Law vs. ethics as a vehicle for centralization
- Knowledge as rediscovery of the way of the ancient sages
- Knowledge as a social good
- Profit as a characteristic of inferior person (小人)
- Implications
Contrasting roles of Law in Roman and Chinese empires 1

- Rome: ideal of law as embodiment of civilization
- Rome: rational law as superior to human arbitrariness and irrationality
- Rome: law as defense against tyranny
Contrasting roles of Law in Roman and Chinese empires 2

- China: ideal of ancient custom as embodiment of civilization
- China: Confucianism as repository of ancient custom
- China: Confucian ethics as summary of teachings of the ancient sages
- China: Law as vehicle of tyranny (Qin Shi Huangdi)
- China: Han synthesis: law subordinate to (Confucian) ethics
Development of Neo-Confucianism

- Response to post-Han disillusionment with Confucianism
  - Dominance of “dark learning”
  - Buddhism as unifying ideology in Sui/Tang
- Integrated world view
  - political and personal ethics
  - self-development
  - World-affirming philosophical system
- Educational reforms
- Political ideology (via civil service)
Noblesse du Rôbe vs wen-ren: law vs. ethics as vehicle for centralization

- 12-18\textsuperscript{th} century context (China and Europe)
  - Political and geographical fragmentation
  - Desire to reimpose central control
  - Opposition from traditional local elites
  - Lack of administrative structure
  - Lack of financial means

- European solution: replacement of feudal nobility with lawyers ("Noblesse du Rôbe")

- Chinese solution: civil service of Confucian scholars (士)
Noblesse du Rôbe: law as vehicle for centralization

- Development of legal class as administrators
- Resurrection of Roman Law in education
  - Implicit ideology of centralization
  - Class of administrators dependent on the state
  - Transnational ideal
- Gradual removal of local rights and peculiarities
- Culmination in Napoleonic code
- Main rival: English Common Law
  - Same results; different vehicle
Wen-ren: ethics as vehicle for centralization

- Limited role of legal codes
- Common ideology for resolution of disputes
  - Mostly local non-government responsibility
  - Control of decisions via education
  - Flexibility in face of changing events
- Hierarchical social system
  - Scholars (士)
  - Farmers
  - Artisans
  - Merchants
Knowledge as rediscovery of the way of the ancient sages

- Backward looking nature of Chinese thought
  - Confucius as “transmitter”
  - “Proof” via historical forgery
  - Innovation concealed as rediscovery
  - Importance of imitation
  - Disparaging of originality

- New ideas viewed as rediscovery

- Art as imitation, copying, and commentary
Knowledge as a social good

- Knowledge improves society
- Art promotes socially-useful knowledge or behavior
- Duty of the Confucian scholar to contribute to the overall social good
- Duty to promote useful knowledge as the common property of civilized mankind
- Artistic production as a scholarly recreation; personally beneficial and socially useful
Profit as a characteristic of inferior person (小人)

- Disparaging of “the inferior person” who acts out of self interest
  - basic theme in Mencius (one of the basic Neoconfucian texts)
  - integrated into merchants' social status

- Profit as a goal is unethical
- Doing something for profit is low-class
Implications

- Law codes as criminal law only
- Civil law replaced by Confucian ethics
- Need for control of education
  - limits on publication
  - via civil service examinations
- Knowledge cannot be owned
- Copying is a virtue in artistic production
- Profiting from knowledge and artistic production is immoral
Conclusions 1

- Traditional Chinese views on intellectual property are not to be found in legal codes.
- In traditional Chinese thought, there is no such thing as intellectual property.
- In traditional Chinese thought, to profit from artistic production is both immoral and low-class.
Conclusions 2

- Given the traditional Chinese view that ethics trump law, it is not surprising that importing Western views of IP into Chinese law has little effect.

- The basic problem with enforcing intellectual property rights in China is not legal or based on stages in economic development, but arises from intellectual and cultural dissonance.