

# **From Henry Maine to Tung-tsu Chu:**

## **An Early Interpretation of Historical-sociological Jurisprudence**

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### **Introduction**

This article intends to explore the theoretical relationship between Henry Maine (1822-1888), an influential British legal theorist in 19<sup>th</sup> century, and Tung-tsu Chu (1910-2008), an important Chinese legal historian in 20<sup>th</sup> century. At first appearance, no obvious relationship between them exists, but Chu acknowledges that some of his achievement in the field of Chinese legal history have been influenced by Maine's works on legal histories.

As we know, Maine's famous dichotomy on progressive and stationary society, which he adduced a plenty of ancient codes from Roman, British and India in support of his dichotomy, points out the legal and social evolution in different societies. The core idea is that there is no obvious change in stationary society, while the movement, from status to contract, is happening in progressive society. However, in discussing Chinese ancient law, he didn't explain the phenomenon in question by his historical method, i.e. using codes in support his opinion, which leads the 'stationary china' is only an unproven hypothesis.

As for Chu, he is committed to discuss the basic character and structure of Chinese ancient law and society on the basic of strong conviction that law reflects the social structure and thus cannot be separate from the society. In addition, he tries to figure out the process, dynamic and manifestation of Chinese ancient law, which can be ascribed to the Confucianization of law.

Comparing Maine and Chu, we may find many similarities and differences in their theories. Firstly, they agreed substantially—though obviously not completely—on the idea of law reflecting society and on the historical methodology mainly based on ancient codes. Secondly, they share the basic structure of family in the ancient society and law, but Chu realizes that class is as important as family. Thirdly, three phrase Chu uses to describe the Confucianization of law, which can also be divided into Fiction, Equity and Legislation in progressive society. Lastly, the Confucianization of law reflects legal particularism, which should be distinguished from the process of getting rid of status in progressive society. Chu believes that the Confucian school denied uniformity and equality and emphasized the difference, which led to theoretical legal particularism, while the legal evolution in progressive society is getting rid of status and adhering to universalism.

In my opinion, Chu's discussion of Chinese legal history of society is to some extent an outgrowth and a kind of reflection of Maine's theory of legal evolution.

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1. Chinese Ancient Evolution: Particularism
2. Comparison: "The Confucianization of Law" and "From Status to Contract"
3. Reflection on "Stationary" and "Progressive" of Chinese Ancient Law

## Conclusion

## Main References

1. Henry Maine, *Ancient Law: the connection to the history of early history*, John Murray, 1861.
2. Henry Maine, *Dissertations on Early Law and Custom*, John Murray, 1883.
3. Tung-tsu Chu, *Law and Society in Traditional China*, The Commercial Press, 2011.
4. Henry Maine, *Lecture on the Early History Institutions*, John Murray, 1875.
4. 瞿同祖:《中国法律与中国社会》,商务印书馆1947年版。
5. 瞿同祖:《瞿同祖法学论著集》,中国政法大学1998年版。
6. 林端:《儒家伦理与法律文化:社会学观点的探索》,中国政法大学出版社2002年版。