

敬弔 陳故教授文政先生

陳 隆 修*

文政兄於民國二十八年九月十四日生於台灣宜蘭縣，父炎崑公逝世時，先生適小學五年級，慈母兼負養育九個子女，個個受高等教育，為闔閭所羨，並被選為宜蘭市模範母親。先生年幼聰穎，小學五年級即直升初中部，雖無赫赫家世、優渥環境，仍能刻苦自勵，自民國四十七年起就讀台灣大學法律學系時，即對法理學發生興趣。服完軍法官役後，五十二年曾於家鄉頭城中學任職教師，旋即負笈日本國立東京大學深造，在該校碧海純一教授指導下，專攻法理學碩士、博士學位。六十九年獲東京大學法學博士，即整裝返國，至本法律學系任教迄今。文政兄深受同學喜愛，極得同仁敬重，對法治人才之培育，法學教育之推廣，不遺餘力。曾於七十四、五年擔任系主任，對中部法律資料中心之擴展亦嘉惠學子與工商企業人士。文政兄法學素養精湛，獲聘為台灣省選舉委員會委員，對法學教育、社會之貢獻，可謂多矣！

文政兄公餘，勤於著作，治學嚴謹，先後在國內及日本法學刊物上發表論文：「海外研究邊沁立法理論的動向」、「近代法典編纂的理論與意義」、「中共婚姻立法原則之研究」、「家父長權和政治權力——洛克批判費爾瑪家父長論的意義」等，其後輯成「立法理論與法典編纂」一書，列為東海法學叢書，其就法治之基礎及自由、民主之原理，分析透徹，並多所闡發，對法理學之研究提供極為重要之參考資料，文政兄因此在法理學上立有一席之地。

文政兄耿介誠懇、懷抱理想，平日身體並無大礙，豈知造化弄人，竟使身罹肝癌惡疾，八十二年九月二日清晨病發，即住進台中榮民總醫院，雖暑假期間，學生聞訊，紛相前往醫院慰問看護，臨終時東海師生幾聚集百人，場面極為悲痛哀悼，慟於九月四日，春秋五十有五。本系同仁有感於文政兄之英年早逝，故於系務會議中一致同意，特以本期「法學研究」作為紀念文政兄之專刊，藉以哀悼法理學界之痛失英才。

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「何妨舉世嫌迂闊？ 固有斯人慰寂寥！」

——緬懷本系 陳教授文政博士

林 騰 鶴^{*}

陳文政教授的遽然仙逝，是東海法律學系的一大損失！繼往開來，是任何學術與教育機構最重要的人文基礎。爲此，主持早期本系系務的張東亮主任與陳文政主任，不僅勞苦功高，更是德劭望重，然而兩位皆以英年早逝，壯志未酬，殊爲可嘆！

今日吾人緬懷陳教授，當記取陳教授終身表現之風骨與理想。一爲寬闊的學術視野，二爲高尙的敬業精神，三爲坦蕩的處世胸襟，四爲平淡的生活風範。敬謹表述於下，用茲懷念。

首先，寬闊的學術視野。東海大學法律學系成立十餘載，法學思想與法理研究，前後一貫，可謂獨樹一格。陳教授超越當前台灣「考試領導學術」的風氣，夙夜匪懈，埋首於古今中外法學群籍之中。進則留意世界法學之潮流，退則盡力期刊議論之整理。既不以知己難尋爲苦，更是以書生本色自許。

其次，高尙的敬業精神。敬業精神是陳教授對東海學生最大的身教。在當前浮華不實的社會風氣中，吾人當不忘陳教授一絲不苟、兢兢業業的教學與研究精神。回顧十餘載中，陳教授代理系主任其間，窗明几淨，圖書井然，學風樸實，較諸歐美日高等學府不遑多讓。陳教授所著「立法理論與法典編纂」一書，更爲此一敬業精神之筆耕成果。

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再者，坦蕩的處世胸襟。作為一位法律思想研究者，陳教授自有其生命視野與人生哲學，然而，最可貴者在於陳教授的劍及履及、實踐思想之精神。嚴以律己，寬以待人。水酒言歡時，可謂「換得千顰為一笑，春風吹柳萬黃金」，自有儒者風範矣。

最後，平淡的生活風範。東海法律師生，當會緬懷陳教授的不忤不求、淡薄寧靜的個性。台灣社會風氣敗壞中，陳教授生活風範可謂清流。東海學人宿舍區中，其府上庭院花草青翠，蔚為美景，無非其平淡生活的體現。總之，吾人懷念陳教授，「隨月出山去，尋雲相伴歸」是其坦蕩開闊，「春晨花上露，芳氣著人衣」是其溫文儒雅。

哲人遠矣！東海法律學系的發展，過去既是筭路藍縷，未來將是後士景從！今日緬懷陳文政教授，願其魂魄安息。大肚山清，月明風和，願東海法律系所前景光明！是所謹誌。為禱。

追懷 陳文政教授

黃宗樂*

生離死別固然是人生不可避的自然現象，但當遇到生離死別時，總是難抑感喟悲傷！畏友陳文政教授溘然與世長辭，尤令人驚愕哀痛！

去年（一九九三年）九月二日深夜，我接到東海大學法律學系主任陳隆修教授從台中打來的電話說：「陳文政教授今早肝癌病發，住進台中榮民總醫院，目前幾乎已呈昏迷狀態……」，不禁百感交集，當晚輾轉不能入眠。由於另有要事，不克立即前往探望，迨九月四日中午才驅車南下，不意抵達台中榮民總醫院時，即被告知陳文政教授已於是日下午一時五分去世，我實在無法接受。在張麗卿博士的引導下，我和內子王阿蘭趕到設在醫院內的靈堂拜祭，終不得不相信果已人天永隔，令人悲慟不已。

拜祭後，逗留片刻，即趨往東海大學宿舍慰唁夫人——田中更女士。進了大門，就看到客廳、餐廳擠滿著親友，每個人都面露哀傷，悼念故人。書房的桌上，放置著文政教授入院前閱讀的書籍。我發現他入院前正在閱讀日治時代的文獻，讓我猛然發覺他已在準備他所答應撰寫的論文。原來，比較法學會鑑於一九九五年是台灣被日本帝國殖民統治五十年，繼而被中華民國接收統治五十年，恰巧屆滿一百年的關鍵年，同時也該是台灣歷盡滄桑、否極泰來的轉捩年，乃本著建立台灣主體性的理念，特發起在一九九五年十月刊行《台灣法制一百年論文集》，文政教授欣然應允撰寫一篇。他一向重然諾，治學又嚴謹，故已開始在準備。

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文政教授是我所敬畏的益友。我每次到東海大學，必定造第拜望。他見到我，都笑容滿面，非常愉快；夫人也和祥親切，起人起客。我很喜歡在他家聊天唱歌。我們聚餐時，也會暢飲幾杯，高談濶論。他過世二個月前的六月二十二日，我到東海大學法律學研究所參加數位研究生的碩士論文口試，口試完後，陳所長隆修、郭振恭教授及溫豐文教授邀請他共進晚餐，他在電話中告訴我說：他今天很累，失陪了。我也了解他學期末特別忙，該休息，因此晚餐後也就未趨訪，沒想到却失去了最後一次見面暢談的機會。十月二日下午文政教授告別式，適民法研究會也在當天下午假最高法院召開成立大會，我是承辦人，必須出席，以致不克前往台中參加，洵遺憾之至！

文政教授，台灣大學法律學系早我五年畢業，一九八〇年榮獲日本東京大學法學博士學位返國至東海大學法律學系任教後，我才認識的。我們一見如故，此後在法學教育及學術研究上，經常相互勉勵，彼此交換心得。我擔任輔仁大學法律學系主任時，曾延請他兼任《法學方法論》課程，他每次上課，都神完氣足，傾囊相授，因而深得學生愛戴！一九八四年八月至一九八六年七月他擔任東海大學法律學系主任，廢寢忘餐，戮力推展系務，致系務蒸蒸日上，八方欽服，我亦與有榮焉。

文政教授專攻法理學，與楊日然教授、林文雄教授，同是日本著名法哲學教授碧海純一先生的高足。我專攻民法，但對法理學亦深感興趣，文政教授每篇論文，我都詳加拜讀。〈海外研究邊沁立法理論的動向〉〈近代法典編纂的理論與意義〉、〈中共婚姻法立法原則之研究〉、〈家父長權和政治權力——J.洛克批判R.費爾瑪家父長論的意義——〉、〈J.ベンサム立法理論の一考察——自由と法との限界について——〉、〈碧海純一教授『法哲學概論』の一断面——その哲學的立場と法哲學の課題について——〉等，篇篇佳構，字字珠璣；立論精闢，見解獨到，允推不朽，其後輯成《立法理論與法典編纂》一書，列為東海大學法學叢書，將傳之於永遠。

文政教授自一九八一年起任教於東海大學法律學系，擔任《法理學》及其他基礎法學課程，鐘點不少，負擔頗重，「平日時間幾全部忙於準備教學」，而兼系主任期間，更全心投入系務，研究幾告廢弛，但仍有上述諸多著作問世，實屬難得。他曾表示：在未來十五年間將集中火力，努力著述。豈料壯志未酬已撒手塵寰！造化弄人，何等無奈！

文政教授公餘，亦積極參與社團活動。他是比較法學會資深會員，去年十一月

七日，比較法學會召開第二十三屆會員大會時，全體與會會員特別爲他起立默哀一分鐘。文政教授也是身分法研究會創會會員，每次研討會，他都從台中趕來台北參加，一九九二年四月十一日研討會，由陳文政教授主持；郭振恭教授報告，當時情景，猶歷歷在目。此外，文政教授又參加台灣教授協會，以實際行動關心台灣前途，致力台灣民主運動。

文政教授於一九八二年與田中更女士結婚。夫人，日本國新瀉縣人，相夫教子，賢慧有德；女幸慈，尙就讀國小，聰穎可愛。詎知原本幸福美滿的家庭，竟遭此鉅變而頓然陷入慘霧愁雲之中。所幸，夫人相當堅強，毅然承擔家計，偕幼女勇敢地留在台灣生活下去。

嗚呼！昔之顏回，敏而好學，聞一知十，不遷怒，不貳過，簞食瓢飲，在陋巷，不改其樂，年僅三十二而卒；今之文政教授，刻苦自勵，力爭上游；淡泊清虛，安貧樂道；沉潛學術，獻身教育；醉心民主，弘揚法治；燃燒自己，照亮別人，年五十五而逝，天妒英才乎？天道無眼乎？抑天運使然乎？令人不勝悲歎、疑惑！

PROFESSOR WEN ZHEN AND JEREMY BENTHAM

by Yutaka Tajima *

The late Professor Wen Zheng Chen was a classmate of mine at the Graduate School of the Faculty of Law, the University of Tokyo. He invited me many times to visit his law school at Dong Hai Da Shui (Tohkai University), Taij-jiong and I promised him that I would do so when I had completed my book in English on jurisprudence. It is the greatest of pities that when I made my visit, with my book still incomplete, it was for the purpose of attending his funerals. He passed away on 4 September 1993 without giving me the prior notice.

We were indeed good friends, but despite this, I had great difficulty in understanding his theory of jurisprudence. Now I feel a strong obligation to review his work. It is not too difficult to do this, because in 1991 he published a book entitled *Theory of Legislation and Codification*, which contains the essence of all his major studies. The book is composed of six articles: comparative studies of the theory of legislation, the significance of condification in the modern age, a study of Chinese family law, a consideration of primogeniture, J.Bentham's theory of legislation, and a reappraisal of Professor Jun'ichi Aomi's *General Theory of Legal Philosophy*. I have read all these articles very carefully, and with our friendship in mind, I shall try and make a brief comment on them.

Professor Chen relied heavily on Jeremy Bentham, but not directly on the whole theory of Jeremy Bentham's works. The particular focus of his study was how Bentham's theory of legislation had influenced the process of modernisation in Japan. In order to do this, he made a precise survey on the works on Bentham in

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Japan, tracing from the time of the Meiji Restoration onwards (see Chapters 1 and 2). He also quoted, though to a lesser extent, A.V.Dicey, John Stuart Mill, Francis Bacon, John Locke, Filmer, Sir Henry Maine, and others, all familiar to a specialist of English law and English legal history like myself.

One point about which I wondered was why Professor Chen excluded Dicey's works on the law of constitution, while on the other hand he so greatly admired Dicey's *Law and Public Opinion*. If he had followed the logical reasoning of this English philosopher, academic, and historian, he should have dealt with the matter of "rule of law" and "human rights". Thinking in this way, I frequently raised with him questions about his studies, but he never answered my questions explicitly. Occasionally, I felt that his treatment of British lawyers was somewhat biased and that some descriptions in his book were less than entirely fair. It was for this reason that I advised him to visit and study in England, but he seemed to be satisfied with his own study of English law through the medium of Japanese works.

My visit to Taiwan clarified many of my doubts about his work. Taiwan is a beautiful and peaceful country and is undergoing a process of industrial development. A new society is being formed, and a new law is required. A theory of utilitarianism is needed, hence it is probably a natural consequence that Professor Chen focused on legislative theory and codification in the 19th century England and he tried to learn legal (or rather, political) wisdom by means of a comparison between England and Japan. It goes without saying that Japan is an Asian state which successfully utilised Bentham's theory for the purpose of creating a modern industrial society.

Although he did not discuss the problems of "human liberty", Professor Chen did examine the concept of "liberty" in Bentham's theory of legislation (see particularly Chapter 5). Jeremy Bentham thought that "life, personal security, property, and equality" were the main essential values that should be protected by the ultimate law. Referring to this, Professor Chen defined the "liberty" as a state where there was lack of coercion and in which those essential values would be greatly secured. The element of "equality", he says, is less important, because it is preserved in order to enhance other essential values. He also considered when "imposing coercion by law" could be justified, and in this connection, relied heavily on the book *Introduction to the Principles of Morals and Legislation*, which I gave him as a souvenir of one of my

trips overseas.

Professor Chen explains the relationship between law and morality as follows:

“In accordance with Bentham, law and morality are in accord in that both are aimed at the greatest happiness of the greatest number. However, law is not always able to intervene or sanction where morality admires or prohibits. This is because legal sanction essentially has the nature of criminal punishment, while morality respects the voluntary nature of each individual.” The criminal punishment can be justified only when a greater evil is removed by its being inflicted. If, however, the same evil can be removed by less suppressive means (e.g. education), punishment is not justified.

Another point I wonder about was why he did not look into the Devlin-Hart Debate. As is well known, Jeremy Bentham was bitterly criticised by Sir Fitzgerald Stephen in his book *Liberty, Equality, Fraternity* (1873). Professor Chen was of course aware of this fact and it was open to him to develop his arguments more vividly in the context of the modern version of the controversy between Bentham and Sir Fitzgerald. However, he chose not to do so, and if we ask why, we can see the influence of his supervisor at the University of Tokyo, Jun'ichi Aomi (see Chapter 6). Professor Aomi's position has been one keeping himself away from value-judgments. This point deserves a little more explanation.

For Professor Chen, the matter of value judgments is one that is to be left to the field of legislation, which is an area of the relativistic truth. Any group of individuals involved in the creation of society must make day-to-day value judgments in the course of their daily lives. In order to make a realistic solution in the matter of value judgments which would be acceptable to the greatest number in any society, he considered that it was particularly important that election law should be democratic. He hated “misbehaviour” or “cheating” in the election process which might still exist in the procedures for local elections in Taiwan.

He had an idealistic view of legislation and codification. He visited me once in Osaka, where I was lecturing at the time, stayed for a few days in Japan. It was on that occasion that we discussed family law reform. “Family law” is an area of law where we can see a large difference between one country and another. He wanted to introduce a new modern family law system into Taiwan on the basis of an examination of the traditional family system of Chinese society. In the course of his

researches, he occasionally referred to Filmore, but the latter's work is essentially nationalistic. The results of Professor Chen's studies are also included in his book (Chapters 3 and 4).

I know very little about Taiwan and I do not claim any special knowledge relating to the validity of Professor Chen's arguments in the light of present state of Taiwan. I hope, however, people of Taiwan will know how he devoted his whole life to the betterment of Taiwan, and that one of his main endeavours was to "open" Taiwanese society. His ideas of an open society have a lot of resemblance to those of Karl Popper, and when I visited Dong Hai Da Shui, I saw that his ideas had already been realised there. I met many students, young ladies and gentlemen, who had been educated by him. They were well educated and nicely disciplined, and their eyes sparkled with aspiration to learn more and to create a better society of Taiwan.

When we were both graduate students at the University of Tokyo, we read together Karl Popper's book *the Open Society and Its Enemies*. Coincidentally, I recently translated another book by Karl Popper, his most recent publication, *A World of Propensities* (1990), and the first proof was sent to me on the same day on which I heard of Professor Chen's death. I therefore decided to dedicate this translation to him. I sincerely believe that his tremendous efforts to create a good society should be rewarded, and I think it is entirely appropriate that his name should be associated with this work.