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The Tradition and Modern Transition of Chinese Law

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Chief translator
Zhang Lixin

Other translators
Yan Chen
Li Xing
Zhang Ye
Xu Hongfen

 Springer

Jinfan Zhang
China University of Political Science and Law
Beijing, People's Republic of China

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Preface

China is one of the world-known countries with ancient legal civilizations, and its legal history can be traced back to the period of 3000 B.C., during which, the Chinese law has been inherited and continued by twists and turns, but has never stopped changing and developing, and it has become one of the features and advantages that the ancient Egypt, Babylon, India, and Persia had not possessed. Thus, it has endowed the Chinese legal tradition with a long history with distinctive origins and peculiar features deeply rooted in Chinese cultural soil; meanwhile, it has also represented the wisdom and creativity of the Chinese nationality. Moreover, it is extremely rare in the world for its integrity, systematicness, and the vast amount of legal works, law codes, imperial regulations and the archival materials of the past dynasties left over in history. This has not only eloquently illustrated the great contributions which the Chinese nation has made to the treasure house of the world legal civilizations, but also explained why the Chinese legal system has won the respect of many other countries, and for a long time it has stood erect in the legal history of the world.

It goes without saying that the ancient Chinese law has always been developed with the development of the Chinese society. Especially, at the times of social transformation, great changes have also taken place in law, which has in turn accelerated the social transformation with its special function. Therefore, from the mutual relationship between law and society, we can grasp the periodicity and rules of the development of law and the typicality of the adaptability of the legal tradition to the Chinese national and social conditions.

China has always been a united and multi-national country since ancient times. In history, because of the differences in the cultural, economic, and political development, different nationalities had occupied different historical positions and had made different contributions to the formation and evolution of Chinese legal tradition at different times. But in whatever cases, the Chinese legal tradition has been commonly created by the peoples of all nationalities; therefore, it is both the reflection of people's legal wisdom of all ethnic groups and the fruits of the mutual exchanges and integration of the legal culture and experience. However, such pluralism has not influenced the dominant position and the integration of the legal

tradition of the Han nationality in the area of Central Plains, on the contrary, like the sea taking in all rivers, the law of Han nationality in the area of Central Plains, having absorbed the legal culture of different ethnic groups, has formed its bright and colorful legal tradition with the feature of diversified development.

As far as the cultural origin of the Chinese law is concerned, there has also existed the integration of diversity and domination. From the pre-Qin Dynasty (221 B.C.–206 B.C.), efforts had been made by different schools to dominate and influence the formation and evolution of ancient Chinese law and legal tradition with their principles, such as Confucianism, Mohism, Taoism, and Legalism. However, in this process, there had existed one basic tendency, namely, the predominant position of Confucianism. In fact, the philosophy of Confucianism, along with its administrative principles, had been guiding the process of legal construction and the establishment of the general judicial standards, which were determined by the moral idealism deeply-rooted in the patriarchal society and the cultural soil of the integration of law, reason, and human relationship. After Han Dynasty (206 B.C.–220 A.D.), the idea of “applying Confucianism in foreign policies, but legalism in domestic ones” had shown the integration of the thoughts of different schools with the dominance of Confucianism.

The connotation of the Chinese legal tradition is very wide. Although there are both merits and demerits, there have always existed democratic factors across time and space. For example, the legal inclination toward humanism, the value orientation of legal impartiality, the appeal for the harmonious unity of “Tian” (heaven) and “Ren” (Man), the moral support of “De” (virtue) and “Li” (rites), the judicial responsibility of imposing punishments in accordance with law, and the political strategy of ruling the country by law, etc., have all manifested the most valuable essence in Chinese legal tradition. Therefore, in order to discover historical truth and to offer exact historical references for the modern legal system construction at present, a multi-perspective, multi-level and multi-dimensional research is urgently needed to be carried out.

From above, it can be inferred that the Chinese legal tradition has by no means meant decadence and conservatism, and its national disposition is also not the “deeply-rooted wickedness”. Whether the traditional “goodness” or “wickedness”, they are all historical and cultural sediment which can only be renewed, but not be eradicated. The loss of tradition means the loss of the characteristics of national culture and the loss of historical and cultural foundation of the development.

The aim of studying the Chinese legal tradition is to have a proper understanding of how the continuous self-improvement has been made by the Chinese law during its long evolution, and what position and value it has had in the social development, at the same time, to generalize the achievements of the rational thinking that has nourished China for over 5,000 years from the native legal tradition. The more profound the introspection, the more complete the criticism is for the tradition, the more exact we are in rejecting the dross and absorbing the essence in order to have a better understanding of the rules of the evolution of law, to raise the sense of national pride and confidence, and to establish a Chinese legal system with Chinese characteristics in the great cause of reviving the Chinese nation.

After First Opium War in 1840, the closed door of Qing Empire to seclude the country from the outside world was opened by the gunfire of the invaders. Thereafter, like the commodity goods from the western countries, the western legal culture also was rushed into China through various channels. As a result, the traditional Chinese law had encountered an unprecedented crisis because of the shaking of its social foundations. With the further introduction of “Xi Xue” (the western studies), the Chinese legal culture was greatly impacted and seriously challenged by those of the western countries. In the constant conflict and integration, a transition was finally made in the native Chinese law to adapt to the laws of modern western bourgeoisie, hence, a new leaf was turned over in the modernization of Chinese law, which was a progressive and inevitable process of development in history.

Though the native Chinese law had experienced golden times of Han, Tang, Song and Ming dynasties, it had been merely inherited historically by just following a set routine, nevertheless, it had lacked horizontal comparison, absorption and fundamental change. Consequently, in the middle of the nineteenth century, such a severe crisis was faced in the native Chinese law that “changes must be made”, because the legalization of the national policies like “agriculture-orientation” and “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce) had severely hindered economic growth. After Opium War, shocked by the tide of commodities from the western countries, some liberal-minded officials, thinkers, and big merchants had all supported to launch a commercial war to fight against the economic invasion of the western countries; moreover, they had also demanded that laws should be made by the Qing government so as to compensate and protect businessmen. Therefore, it was the business laws that were firstly reformed in the legal reform in the late Qing Dynasty.

In addition, the autocratic law codes of Qing Dynasty had also hampered the initiative of the people who were often randomly punished. Gong Zizhen said, “The domestic affairs, no matter whether they are important or not, once they are restrained by the fixed regulations, it is just like forcing a man having scabies to lie on a log and getting his arms and legs banded with a long rope. With his limbs being fixed, even though he has the intolerable itch and pain on his skin, he cannot do anything but lie there, trying hard to calm down himself and paying scant attention to his problem”.¹ It was also pointed out by Feng Guifen that “there are various and miscellaneous cases in the world, which cannot be fully covered by law. Until today, when we are laboring over the millions of the complicated legal issues, we get to know how wise and far-sighted those sages are when they were against making penal codes.”² Hence, he had drawn the conclusion that the change of legal system and the revision of law was the only way out, which was also the hope expressed by the intellectual bureaucrats. However, the conservative rulers still kept clinging to the old idea that “if ‘Tian’ (heaven) does not change; nor does the ‘Dao’ (the way)”, and that “the laws made by ancestors are not to be changed”. Therefore, it can be

¹ “Ming Liang Lun Si” (The Theory of Ming Liang: Part 4) in *Gong Zi Zhen Quan Ji (The Complete Works of Gong Zizhen)*.

² “Preface” to *Jiao Bin Lu Kang Yi (Protest from Jiao Bin Lu)*.

seen that even if without Opium War, sooner or later, it is certain for Chinese law to begin its transition to modernization. Nevertheless, to some extent, Opium War had only acted as its catalyst.

The modernization of Chinese law has gone through the following stages:

1. From “Shi Yi Chang Ji Yi Zhi Yi” (learning the advanced technologies from ‘barbarians’ in order to subdue them) to “Shao Bian Cheng Fa” (making laws by slightly changing the western laws)

From the chauvinistic viewpoint of Han nationality, the rulers in ancient times had made great efforts to strengthen “Yi Xia Zhi Fang” (guarding against the barbarians or the foreigners), and they had insisted on “applying Chinese laws to punish the foreign invaders”. However, after Opium War, the Qing Empire had lost its national dignity and was humiliated by the western powers. Therefore, in order to “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival), the open-minded philosophers had suggested “Shi Yi Chang Ji Yi Zhi Yi” (learning the advanced technologies from ‘barbarians’ in order to subdue them), which meant that the learning of the modern technology from western countries would enable China to become a rich country with strong armed forces. Later on, the bureaucrats of the “Yang Wu Pai” (The Westernization Group), who had advocated “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) put forward the policy of “Shao Bian Cheng Fa” (making laws by slightly changing the western laws) and suggested introducing the laws in the western countries into China. Besides, they were also opposed to the conservative ethos in which the established practices had been upheld. William M. P. Martin, an American missionary (afterward became an interpreter of the Consulate General), had completely translated Henry Wheaton’s book about international law into Chinese, and when the book was presented to “Zong Li Ya Men” (Office in charge of Affairs of all Nations), both Prince Yi Xin and Prince Wen Xiang were absolutely delighted because it had perfectly met the urgent need at that time. Soon the book was revised, polished, and later named *Wan Guo Gong Fa (Elements of International Law)*. More than 300 copies of the book were issued and distributed to the open ports as the standard work of reference in dealing with foreign affairs. In fact, after Qing Dynasty was forced to open up to the outside world, the problem of how to deal with the various problems in negotiation with the western powers had become one of reasons to foster the Chinese legal transition.

2. From “the reform of monarchy” to “the establishment of legal system by modeling on the western ones”

From 1870s to the end of the nineteenth century, the thinkers of “Gai Liang Pai” (the early reformists) had already realized that “it is not just the solid ships and powerful weapons, but the parliaments, the concerted efforts made by the high and the low, and the proper education offered that has brought about the social stability and prosperity in the western countries”.³ So they had turned their eyes to the reform

³Zheng Guanying, *Sheng Shi Wei Yan (Crisis Awareness in Heyday)*, Vol. 5.

of the government of the autocratic monarchy and had advocated the establishment of parliaments so as to keep the rulers and the people informed. In 1898, when Kang Youwei and Liang Qichao started “Bai Ri Wei Xin” (hundred days’ reform), they had not only proposed the establishment of parliament, the opening of congress, the drafting of constitution, and the implementation of separation of the powers, but also put forward the idea of setting up the new legal systems by modeling on those of the western countries. In “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor), Kang Youwei had emphasized that:

Now Roman, British, American, German, French and Japanese laws should be adopted in order to have ours revised and re-enforced. ..., detailed rules have been stipulated in the civil laws, civil statutes, commercial laws, city regulations, ship regulations, litigation laws, military laws, and international laws by the westerners. And as is prescribed in the law, neither markets nor trade relations can be closed up or stopped randomly. If there were no laws, there would be no standards to regulate people’s behaviors; consequently, numerous problems would arise. Moreover, the laws like those in the western countries have never been made in our country; therefore, it is high time that they should be made to make up for what we have lacked. So, some special departments should be set up to have the western laws adopted and to work out new rules and regulations of our own.

But unfortunately, Kang Youwei’s proposals were abortive because of the failure of “Bai Ri Wei Xin” (hundred days’ reform).

3. From the preparation of constitutionalism to the overall law revision

After “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) and the signing of *Xin Chou Tiao Yue* (*The Peace Treaty of 1901*), it was impossible for the Qing government to rule the country in the same way as before, therefore, a complete new policy was proclaimed to be carried out to make a fresh start. After the Russo-Japanese War in 1905, under the pressure of the public opinion that “Japan has succeeded because of the implementation of constitutionalism but Russia has failed because of the dictatorship”, preparation for constitutionalism was promulgated by the Qing government. During this time, Shen Jiaben and Wu Tingfang were appointed the ministers in charge of law revision to have a complete revision of the law. Just within a couple of years, the revision of the departmental laws had been completed by the Qing government by modeling on the continental legal system, which was an important step forward in the modernization of Chinese law. Though the Qing government was beginning to go to decline, and many of the rules and regulations were not able to be put into practice, some of them were either adopted later by or had served very important foundations for the government of the Republic of China in making new laws. In a word, the law revision in the late Qing Dynasty was a proclamation to end the native Chinese legal history; in the end, the Chinese legal system was given way to the western legal civilization.

The modern transition of Chinese law was following the route of the western legal system, which was not designed by any authorities, nor was forced by any political power; instead, it was an inevitable choice under some certain historical conditions. Although, unavoidably, in this transition there were plagiarism and conflicts between both form and content and ideal and reality, what it had motivated was not

just the change in the layer of systems, but profound ideological connotations which it had contained. By centering on the historical main trend of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and regaining the sovereignty, it had not only greatly inspired and encouraged the people’s spirit of reform but also shown the improvement of the new cultural qualities and legal consciousness of the Chinese nation. Consequently, Qing Dynasty which had continued for 268 years was replaced by the Republic of China with the system of democratic republic.

If law revision in the late Qing Dynasty is regarded as an important beginning of modern Chinese legal transition, then the later periods, such as the Republic of China, the People’s Republic of China, and the current reform and open-up to the outside world, can all be regarded as the historical stages in which the Chinese law has experienced toward modernization. Because social development is constantly continuous, there is only periodicity but no ending for the modernization of law.

Because the modern transition of Chinese law was implemented in the background of national crisis, and a full-scale westernization was taken as its value orientation, in the process of transition, neither a rational consideration was given to the democratic factors in the Chinese legal tradition, nor a rational analysis was given to the suitability of western laws to the Chinese national conditions. Ultimately, although Chinese law had moved toward modernization, it had lost the autonomy and creativity of the Chinese legal system. If there was no time for our forefathers to have the necessary introspection, now it is for us to shoulder the historical task. At present, when there are more legal cultural exchanges between different countries, it needs to be seriously reflected and summarized how to go our own way by tactfully combining the tradition with the creation, the history with the reality, and China with the world in establishing a socialist legal system with Chinese characteristics.

The book was firstly published by Law Press in 1997, and when the second edition of the book was published in 2005, it had been greatly revised. This book, the third revision, is written on the basis of my research undertaken in the past years. I sincerely hope my readers will kindly put forward their criticisms and suggestions for further improvement.

Los Angeles
July, 2008

Jinfan Zhang

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Part I
The Tradition of Chinese Law

Chapter 1

To Introduce “Li” (Rites) into Law and to Integrate “Li” (Rites) with Law

1.1 The Origin of “Li” (Rites)

“Li” (rites) is a social phenomenon in ancient China, which can be dated far back to early times, and which had existed throughout the ancient history of China. The concepts and the principles of “Li” are now viewed as the core of Chinese traditional culture, which have been influencing people’s social lives in every aspect, and have been adjusting the relationships not only between individuals, but also between individuals and their families, individuals and their states, and even the relationship between the individual and the universe. The assimilation and integration of “Li” (rites) and law have constituted the most essential characteristics of Chinese legal system and the peculiar Chinese legal culture.

According to the ancient books, “the ceremonials of ‘Li’ (rites) started by Sui Huang (a legendary person who had invented making fire by drilling the wood), while the definition of ‘Li’ (rites) was given by ‘Huang Di’ (Yellow Emperor, a legendary ruler)”.¹ These words showed that “Li” (rites) had originated in the primitive society and was once a religious ceremony held for sacrifice and worship. Just as what was described: “‘Li’ is like a footwear supporting people’s feet, and is used in ceremonials for worshiping the Supernatural Beings in order to bring about good fortune.”² In the oracle bone scripts, there were different forms for the Chinese character “Li” (rites), which was written as “豐”, symbolizing a jade in a sacrificial utensil offered to the Supernatural Beings and ancestors. This was the traditional “Li” (rites) shown in the culture of Shang Dynasty (1600 B.C.–1046 B.C.). In the oracle bone scripts, the Chinese character of “Li” (rites) could be frequently seen. This was because the people in the Shang Dynasty had worshiped the Supernatural Beings and their ancestors, and they had wished their frequently-held solemn ceremonies could bring them blessings and protection from the Supernatural Beings.

¹ “Biao Ti Shu” (The Interpretation of Title) in *Li Ji (The Book of Rites)*.

² Xu Shen, *Shuo Wen Jie Zi (Origin of Chinese Characters)*.

As to the point mentioned that “Li” was made from the sacrificial ceremonies, “Li Yun” (The Rites in the Pre-Qin Dynasties) in *Li Ji (The Book of Rites)* had the following description:

At the beginning of ceremonies, they began with meat and drink. They roasted millet and pieces of pork; they excavated the ground in the form of a jar, and scooped the water from it with their two hands; they fashioned a handle of clay, and struck it with an earthen drum. (Simple as these arrangements were), they yet seemed to be able to express their reverence for Supernatural Beings through these activities.

Therefore, this old religious creed had become the origin of “Li” (rites).

Wang Guowei, a modern Chinese dramatist, also had conducted researches on the origins of “Li” (rites). In his *Jing An Wen Ji (The Collected Works of Jing An)*, he wrote that “at the beginning, ‘Li’ (rites) was the ritual vessels which contained jades to serve the Supernatural Beings; later, ‘Li’ (rites) was referred to as the drinking offered to the them, and finally, ‘Li’ (rites) had become the rituals in their service.”

Naturally, “Li” (rites) was closely connected with “Tian” (heaven), “Di” (earth), ghosts and spirits during the early stages of times, because at the end of the primitive society, the levels of production and technology were extremely low, and people were venerated and mystified by all natural phenomena and the events, such as birth, death, illness and old age. Especially, “Li” had made it mandatory for people to worship the spirits, which had provided ideological and historical foundations for “Li” (rites) to be changed into the mandatory rules of conducts in the later class society, though these two kinds of mandatory rules were quite different in nature.

Because “Li” (rites) was available to local customs and had acted as much of a spiritual deterrent, after entering the class society, it was given more weight by the rulers. In the Xia (2070 B.C.–1600 B.C.) and the Shang Dynasty (1600 B.C.–1046 B.C.), through the action of “displaying the utmost filial piety towards the spirits”,³ the rulers who had exalted the virtue of “Tian Ming” (the Mandate of Heaven) had successfully changed “Li” (rites) into a standard of behaviors that had reflected the will of the ruling class and had met the needs of government. Hence, from the reference to the ceremonials for worshipping spirits, “Li” (rites) was further “extended in meaning and finally was turned into a general term to include all ‘Li Yi’ (rites and etiquette)”.⁴ According to the rules of “Li” (rites) at this time, the ceremonies of “Ji” (making sacrifices to worship Supernatural Beings) and “Rong” (external plundering and looting by arms) were the most important national affairs as was shown by the words: “the great national issues are ‘Ji’ (making sacrifices to worship Supernatural Beings) and ‘Rong’ (external plundering and looting by arms)”.⁵ Moreover, in the Shang Dynasty (1600 B.C.–1046 B.C.), there appeared a religious belief in which the Supernatural Beings and ancestral spirits were integrated, which had linked altogether “Tian” (heaven) and “Di” (earth), the present and the future, and the emperor and the God and had made a close connection

³ “Tai Bo” in *Lun Yu (The Analects)*.

⁴ Xu Hao, *Shuo Wen Jie Zi Zhu Jian (Annotations to Origin of Chinese Characters)*.

⁵ “Cheng Gong Shi San Nian” (The 13th Year of the Duke of Cheng) in *Zuo Zhuan (The Chronicle of Zuo)*.

between “Li” (rites) and theocracy so as to provide a good service for the autocratic monarchy and aristocratic politics. Thus, “Li” (rites), which had “begun with meat and drink” and “had meant the sacrifice and worship”, was significantly changed, and its content was also changed from the simple conventional ceremonies into the standards for marriages, blood and relative relationships, social estates, and even for the behaviors of the rulers and ministers. These standards were gradually institutionalized and legalized in later times.

“Li” (rites) was a social phenomenon and it had rich cultural connotations. In its development, “Li” (rites) had continuously been used to remold the old conventions and to adapt to the new social order; therefore, the evolution of “Li” (rites) was full of conflicts between the old and the new, and the evolution itself was also a process of cultural and conventional development. Confucius once said, “The Shang Dynasty followed the regulations of the Xia; wherein it had taken from or added to them may be known. The Zhou Dynasty had followed the regulations of Shang; wherein it had taken from or added to them may be known.”⁶ In legend, “Li” (rites) in the Xia Dynasty was mainly to “serve ‘Tian’ (heaven) above, serve ‘Di’ (earth) underneath, honor the ancestors and show respect to the teachers and sovereigns”.⁷ Thus, “Li” (rites) had reflected the integration of the power of theocracy, the power of the clans and the power of the rulers. However, since the specific contents of “Li” in the Xia Dynasty had been lost and become unknown, Confucius said honestly that though he could describe the “Li” (rites) of the Xia Dynasty, he could not sufficiently “attest his words”, “because of the insufficiency of their records”.⁸

The systematization and standardization of “Li” (rites) were started in the Western Zhou Dynasty (1046 B.C.–771 B.C.) when “Li” was begun to be instituted by Zhou Gong (the Duke of Zhou). It was recorded in “the 18th year of the Duke of Wen” in *Zuo Zhuan (The Chronicle of Zuo)* that “the ‘Li’ (rites) of Zhou has been instituted by the previous Dukes”, which had provided a valuable historical evidence for that important incident. Zhou Gong (the Duke of Zhou) was a prominent politician and philosopher 3,000 years ago. After the Western Zhou Dynasty had replaced the Shang Dynasty (1600 B.C.–1046 B.C.), Zhou Gong (the Duke of Zhou) realized that the newly established kingdom of Zhou had been facing various problems, such as the complicated social relations, unstable politics, radical views on reforms, and violent cultural conflicts and so forth. Because of these problems, it was difficult for the original national concept of the Zhou society to be adapted to the new strategies of ruling the country by virtue and to the new demands for the establishment of the patriarchal clan system and the enfeoffment system. These problems had also made it difficult for the rulers of Zhou to adjust the relationship between rights and obligations in the society and to “unify” the modes of thinking and the behaviors of the peoples of the different races and tribes in the territory; therefore, when instituting “Li” (rites), Zhou Gong (the Duke of Zhou) had on the one hand inherited the old conventions which stressed the ceremonial usages of “Li”

⁶“Wei Zheng” (Handling Political Affairs) in *Lun Yu (The Analects)*.

⁷“Li Shu” (Treatises) in *Shi Ji (The Records of the Grand Historian)*.

⁸“Ba Yi” in *Lun Yu (The Analects)*.

(rites), on the other, he had reorganized, complemented and modified the principles of “Li” (rites) before he fully invested and attested to the principles and made them codified. After the establishment of “Li” (rites) by Zhou Gong (the Duke of Zhou), the criterion of “Li” (rites) was further systematized, standardized, and institutionalized, and finally became “a general term for moral standards”. The following was what was written in “Da Zhuan” (the Great Tradition of the Book of the Elder) in *Shang Shu (The Book of Historical Document)* about Zhou Gong (the Duke of Zhou):

When Zhou Gong (the Duke of Zhou) acted as the regent, in the first year, he crushed the rebellions; in the second year, he conquered the state of Shang; in the third year, he killed Xu An; in the fourth year, he established the system of enfeoffment; in the fifth year, he established the city of Cheng Zhou; in the sixth year, he established the ‘Li’ (rites) of Zhou; and in the seventh year, he became the king.

From this, it could be seen that Zhou Gong’s work on “Li” was a well-planned campaign, which was politically and culturally significant not only to the Zhou Dynasty, but also to the later dynasties.

The starting point and the ultimate goal of Zhou Gong’s establishment of “Li” (rites) were “Zun Zun” (showing respect to nobility represented by the emperor) and “Qin Qin” (showing respect to relatives represented by parents). The former, which was given a meaning of loyalty, was to maintain the monarchical power, i.e. “in a state there are only one sovereign”; the latter, which was given a meaning of filial piety, was to maintain the paternal power, i.e. “in a family there is only one who is equally honorable”. Such theories which had combined the political and ethical concepts had laid the ideological foundation for “Li” under the new circumstances.

The “Li” instituted by Zhou Gong (the Duke of Zhou) had embraced a wide range of ceremonies. In short, it had included the national institutions and the etiquette of “Wu Li” (the five rites), namely, the rites for the ancestral worship and the religious sacrifices, the funeral, the wedding and the military ceremonies, and the greeting of guests.

Essentially, “Zhou Li” (The Rites of Zhou Dynasty) was to set up a social hierarchy to mark the different degrees of social ranks, such as the high and the low, and the noble and the humble. What was written in “Li Shu” (Treatises) in *Shi Ji (The Records of the Grand Historian)* had clearly shown that the aim of “Li” was to seek a hierarchical order not only “for the social status of the emperors and the ministers, the noble and the humble”, but also “for their vehicles, clothing, houses, food, marriages, funerals, and sacrifices”, and that what were included in “Li” (rites) must be fully complied with, and any violation would be harshly punished. In fact, the different behavioral standards regulated in “Li” (rites) had been discussed by the ancients. Xunzi had said, “‘Li’ (rites) is used to differentiate the grades of ranks according to the noble and the humble, the old and the young, and the rich and the poor”.⁹ It was stated in *Li Ji (The Book of Rites)* that:

‘Li’ is the rule of propriety, which furnishes the means of determining (the observances towards) relatives as near and far; of settling doubts or suspects; of judging the similarities and differences; and of distinguishing what is right and what is wrong.

⁹“Fu Guo” (On Enriching the State) in *Xunzi*.

At the point of using “Li” (rites) to mark the degrees of social ranks, Confucianists and legalists had shared the same opinions. Han Feizi said, “‘Li’ (rites)... is concerned with the mutual relations of the ruler and minister and the father and son. It is the way whereby the high and low and the worthy and unworthy are differentiated.”¹⁰ In a word, after “Li” (rites) was instituted by Zhou Gong (the Duke of Zhou), the rules of the social hierarchy had become legitimated and institutionalized, according to which the social status of the rulers and the ministers, the noble and the humble, the superior and the inferior, and the elder and the young were clearly established. Therefore, Zhou Neishi said, “‘Li’ (rites) is the backbone of the country..., if ‘Li’ (rites) had not been carried out, there would be disorder in a society, so in a long run, it would be unable to maintain the law and the order in the country”.¹¹ Confucius also said, “‘Li’ (rites) is the first thing to be attended to in the practice of government, moreover, ‘Li’ (rites) is the essence of government.”¹² Historically speaking, “the Reign of Cheng Kang” (a period of stability and prosperity) in Zhou Dynasty would not have existed without the contribution of “Li” (rites).

The major function of “Li” was to “mark the distinctions between the noble and the humble, the superior and the inferior”, and to establish a hierarchical system of rites in which “the honor is paid to the honorable, affection is shown to the kin, the respect is paid to the aged, and the different status is given to the male and female”. Therefore, in tradition, the origin of “Li” was described as a means of making distinctions and preventing disputes. Xunzi had said,

Whence does ‘Li’ arise? The answer is that man is born with desires. When these desires are not satisfied, they cannot but pursue it. Then, if, in pursuing it, the people have no restraints or limits, then there cannot but be contention. Contention makes disorder, and disorder privation. The previous rulers hated such disorders, so they had established the regulations contained within rituals and moral principles in order to civilize people’s desires and grant what people demand. They ensured that desires did not need to be deprived of materials, and that materials did not need to be depleted by desires. In this way the two of them (desires and materials) sustained each other over the course of time. This is where ‘Li’ (rites) comes from.¹³

He also commented: “The proper ‘Ren Dao’ (the Way of Human) lies in no other than its ability to draw boundaries; of such boundaries, none is more important than that between different social classes; of the instruments for distinguishing social classes, none is more important than ‘Li’ (rites)”.¹⁴ Therefore, “accordingly, the ancient kings acted to control them with regulations, rituals, and moral principles in order to divide society into classes, creating the differences in status between the noble and the base, the disparities between the privileges of the old and youth, and the division of the wise from the stupid, the able from the unable. All of this had

¹⁰“Jie Lao” in *Han Feizi*.

¹¹“Xi Gong Shi Yi Nian” (the 11th Year of the Duke of Xi) in *Zuo Zhuan (The Chronicle of Zuo)*.

¹²“Ai Gong Wen” (The Questions of the Duke Ai) in *Li Ji (The Book of Rites)*.

¹³“Li Lun” (Discourse on Ritual Principles) in *Xunzi*.

¹⁴“Fei Xiang” (Contra Physiognomy) in *Xunzi*.

ensured people to perform their different duties in different social positions and each to receive his due”.¹⁵

In “Fu Guo” (On Enriching the State), Xunzi also had discussed the privileges “Li” had possessed. He said, “The senior officials must be moderated through ‘Li’ (rites) and ‘Yue’ (music), and the ordinary people must be controlled by law”. In “Qu Li” (The Summary of the Rules of Propriety) in *Li Ji (The Book of Rites)*, it was also recorded that “if the positions are different, the applications of ‘Li’ (rites) vary”. Obviously, this was an accurate interpretation of the principle that “‘Li’ does not go down to the common people, (and) the penal statutes do not go up to the senior officials”.

In ancient China, when the patriarchal hierarchy system predominated, the ruling class was made up of the rulers’ relatives and the noble, the state was closely related with the family, and the grades of ranks in clans paralleled to those of politics. In this case, when appointing government officials or offering nobility with hereditary titles territories or founding a country, the only criterion used was the lineage and patriarchal clan system. The primary purposes of Zhou Gong (the Duke of Zhou) for instituting “Li” (rites) was to set up an institutional patriarchal system in order to standardize the main activities of the nation, to achieve a goal of applying “proper ceremonial usages for all things”, to adjust people’s relationships and behaviors, and to make people abided by the rules of “Li” (rites). This was exactly expressed by the words: “‘Li’ (rites)... is to serve as the dykes for people”.¹⁶ For this reason, “Li” (rites) was supported by the state and was compulsorily protected by law.

In order to exaggerate the mysterious color of “Li” (rites) and to increase its deterrent effect, Confucianists had connected “Li” (rites) with the unfathomable “Tian Di” (heaven and earth) to explain the super-social emergence of “Li” and to defend that it was in compliance with “Tian Dao” (The Way of Heaven) to govern the country and to control the people under the guidance of the principles of “Li” (rites). In “Li Yun” ‘Li Yun’ (The Rites in the Pre-Qin Dynasties) in *Li Ji (The Book of Rites)*, the following words could be repeatedly found: “the rules of ‘Li’ (rites) are rooted in ‘Tian’ (heaven) and have their correspondences in ‘Di’ (Earth)...”, “it was by those rules that the ancient emperors had sought to represent ‘Tian Dao’ (The Way of Heaven) and to regulate the feelings of the people”, therefore, “‘Li’ represents ‘Tian Di’ (heaven and earth)”. In the preface of “Zheng Yi” (the annotations of Confucians’ classic and books of history in ancient times) in *Li Ji (The Book of Rites)*, Kong Yingda also pointed out: “‘Li’ (rites) provides an ability to rule the country.” Furthermore, “Li” had been characterized as the practical principles of universe by Confucianism. In “Sang Fu Si Zhi Bian” (The Four Principles Underlying the Dress of Mourning) in *Li Ji (The Book of Rites)*, it was said that “all the great characteristics of ‘Li’ embody (the ideas suggested by) ‘Tian Di’ (heaven and earth), take the laws from the changes of the four seasons, imitate the operation of contracting and developing movements in nature, and submit to the feelings of human beings. It is on this account that they are called ‘Li’”. So, “‘Li’ is the

¹⁵“Rong Ru” (Of Honor and Grace) in *Xunzi*.

¹⁶“Fang Ji” (*Record of Dykes*) in *Li Ji (The Book of Rites)*.

embodiment of the ideas of ‘Tian Di’ (heaven and earth), because it has recognized the feelings of human beings, and has laid down definite regulations for them”. Ban Gu said, “Therefore, while instituting (Li), the ancient emperors had imitated the brilliant luminaries of ‘Tian’ (heaven) and acted in accordance with the varying advantages afforded by ‘Di’ (earth).”¹⁷ Especially, in “the 25th year of the Duke of Zhao” in *Zuo Zhuan* (*The Chronicle of Zuo*), it was fully discussed that:

‘Li’ is the constant (method) of ‘Tian’ (heaven), the righteousness of ‘Di’ (earth), and the practical duty of human being. ‘Tian Di’ (heaven and earth) invariably pursues the course (that may be thus described), and the people take it as their pattern. The people used to imitate the brilliant luminaries of ‘Tian’ (heaven) and act in accordance with the advantages afforded by ‘Di’ (earth), and then they gained ‘Liu Qi’ (Six Cosmic Pneuma) from ‘Tian’ (heaven) and began to make use of ‘Wu Xing’ (the five elements, including metal, wood, water, fire and earth, held by the ancients to compose the physical universe)..., if they (‘Wu Xing’) are over-used, they will cause confusion, and people will lose their human nature. Therefore, ‘Li’ is instituted to guide it (Wu Xing) ...by intimating the righteousness of ‘Di’ (earth), ‘Li’ has set up the patterns of the relationships between ruler and minister ... by intimating the deterrence of nature and ‘Li’ has set up prisons and taken punitive measures to intimidate people not to commit crimes. By intimating the brilliant luminaries of ‘Tian’ (heaven) to grow and to reproduce, ‘Li’ has made unduly lenient rules and shown benevolence..., with grief and joy, to harmonize the nature of ‘Tian Di’ (heaven and earth) so that the world will be ever-existing.

Because “Tian” (heaven) was constant, “Li” (rites) which was produced by “Tian” (heaven) and which had functioned as the operation of the contracting and developing movements in “Tian Di” (heaven and earth) was also constant. Therefore, the violation of “Li” (rites) also meant the violation of “Tian” (heaven); once the law of “Tian” (heaven) was violated, severe punishments, namely, heavenly punishments should be imposed. This had obviously shown that the theory of “Li” (rites) was politically oriented.

In the Song (960 B.C.–1270 A.D.) and Ming Dynasty (1368 B.C.–1644 A.D.), the theories of Confucian philosophy and “Xin Xue” (the philosophy of mind) sprang up, which had related the concepts of “Tian Li” (heavenly principles), “Xin Xing” (disposition), and “Liang Zhi” (conscience) to “Li” (rites), and which had explained the origin of “Li” from the perspective of “Xing” (nature). Cheng Yi said, “‘Li’ embraces 3,000 rules of ceremony, and 3,000 rules of demeanor, all of which came from ‘Xing’ (nature)”. Further, Zhu Xi and Wang Yangming equated “Li” (rites) with “Li” (reason) and “Xing” (nature). Zhu Xi said, “‘Xing’ (nature) is ‘Li’ (reason)”.¹⁸ Wang Mingyang also said, “‘Li’(rites) is ‘Li’ (reason) and ‘Li’ (reason) is ‘Xing’ (nature)... When they all rest with human, they are named ‘Xing’ (nature), and when they are all clearly and properly arranged, they are named ‘Li’ (rites).”¹⁹ On the one hand, “Li” (rites) had been highly developed with the overtones

¹⁷“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*).

¹⁸“Xing Li Er” (On the Universal Order in the Human Character) in *Zhu Zi Yu Lei* (*Quotations of Master Zhu*), Vol. 5.

¹⁹“Li Ji Zhuan Yan Xu” in *Wang Wei Cheng Gong Quan Shu* (*The Completed Works of Master Wang Weicheng*), Vol. 7.

of speculative philosophy in the theoretical interpretations of those scholars; on the other hand, in order to make people keep “Li” (rites) in their inner minds, come to terms with their own poverty and fate through regular self-examinations, and control their behaviors without conducting wrongdoings, “Li” (rites) in fact had been changed into the poison to kill lives and suffocate souls. In the late Qing Dynasty, Dai Zhen, who was against the Confucian school of idealist philosophy, had strongly criticized that “the cruel officials have killed people with law, while the neo-confucianists (a Confucian school of idealist philosophy of the Song and Ming Dynasties) have killed people with “Tian Li” (heavenly principles). Now if we still take delight in talking about “Tian Li” (heavenly principles) but neglect laws, we are doom to die”, and that “people may sympathize with those who have been murdered by laws, but who will sympathize with those who have been killed by ‘Li’(rites)?”²⁰ These were the exact reasons why the publicizing and the execution of “Li” (rites) had been used as practical strategies to govern the countries in ancient China for 3,000 years, and why the rulers had always vigorously propagated to “exalt the ideas of ‘Li’ (rites)” when there were uprisings or when the rebellions had been suppressed.

In summary, from the religious and conventional ceremonies in the primitive societies, “Li”, which was backed up by the national power and mandated by law, had finally evolved into a standard for people’s conducts. “Li” was produced by the disintegration of primitive society as well as the formation of class society, and it had symbolized the development in the social civilization of mankind. Just as Laozi had said, “When ‘Da Dao’ (the social justice) ceased to be observed, ‘Ren Yi’ (benevolence and righteousness) came into being (meaning that only when the country was in turmoil, would the people with benevolence and righteousness appear to change the situation)”. So, the evolution of “Li” (rites) was in accordance with the real process of historical development. According to the Confucian theories, the principles of “Li” (rites) were firstly made to “restrain people’s desires” and “draw distinctions between people”, which had indicated that “Li”(rites) had been developed from the religious ceremonies into “a general term for all laws”. Thus, as the political functions of “Li” (rites) were strengthened, its primitive connotations were gradually lost. So, when discussing the functions of “Li”, the later generations would usually focus mainly on its functions of “governing the country and stabilizing the government”, “marking the distinctions between the noble and the humble”, and “establishing the hierarchical rites in patriarchal system”.

As the embodiment of primitive conventions and religious values in primitive society, “Li” (rites) was mandated and was allowed of no blasphemy or violation, but such mandate at that time was not national. “Li” (rites) had been changed from “the deification of the Supernatural Beings” into “the consecration of man (ruler)”, and had further been entitled to a national mandate, which had after all resulted from the formation of private ownership and the development of social productivity. Wang Chong, a philosopher in the Han Dynasty, once said, “When there is sufficient

²⁰ *Meng Zi Zi Yi Shu Zheng (Interpretations of the Meaning of Mencius’s Words).*

food, ‘Li’ (rites) will arise from the people’s inner hearts”.²¹ Wang Fu also said, “‘Li’ arises from prosperity”.²² These were all scientific summaries of plain materialism.

Furthermore, the emergence of “Li” (rites) was also closely related to the establishment of monogamy in the ancient patriarchal system. The changes in clan relationships or even social relations were influenced by the changes in family patterns. The important function of lineage and patriarch clan system in ancient China was to maintain the order of the society and to build the nation, so, patriarchy, together with the structure of agricultural economy, had laid a stable social foundation for the autocratic regime, in which the traditional culture centering on “Li” was formed. These elements were mutually promoted and integrated and finally developed into a “harmonious”, “constant and eternal” unit. In the Qing Dynasty, Gong Zizhen commented that:

‘Li’ (rites) did not come from clans, and the clans existed in the agricultural society. ... At the beginning of agricultural society, people were kind, filial and just. So, ‘Li’ (rites) was established so as to keep the moral principles and to maintain the system of clan.²³

According to Gong Zizhen, ‘Li’ (rites) was a method developed to maintain the clan system in the development of the agricultural production. Historically, what he had said was true.

The early form of “Li” (rites) was welcomed by the clan society and was used to serve the clan democracy. In the class society, the rulers, instead of continuing the old conventional rules, began to “take ‘Li’ (rites) and ‘Yi’ (morality) as the ruling principles”. Even the long-term strategy of employing and appointing the able and the virtuous for the state was finally replaced by the thought that “it is in accordance with ‘Li’ that the great men’s states should be succeeded by their own families”. All of these changes had shown a qualitative leap forward in social development, because the establishment of autocratic monarchy in the dynasties of Xian, Shang, and Zhou had created an indispensable condition for carrying out a unified ritual standard in class societies. Therefore, from then on, “Li” (rites) was highly valued for acting as an embodiment of the will of the state.

1.2 The Function of “Li” (Rites)

It was by no means incidental that “Li” (rites), in the class society, had been highly developed after going through the dynasties of Xia, Shang and Zhou. Actually, such development was inseparable from the changes in the views of “Tian Dao” (The Way of Heaven) and politics. In the Xia and Shang Dynasty, the rulers began to govern the state as the descendents of “Tian” (heaven); therefore, they had

²¹“Zhi Qi” in *Lun Heng (On Balance)*.

²²“Ai Ri” in *Qian Fu Lun (Comments of a Recluse)*.

²³“Nong Zong” in *Gong Zi Zhen Quan Ji (The Collected Works of Gong Zi Zhen)*.

actively given publicity to the notions of “Tian Ming” (the Mandate of Heaven) and Supernatural Beings. Especially, in the Shang Dynasty, the theocracy was pursued, and the people firmly believed in “Tian Ming” (the Mandate of Heaven). It was recorded in ancient books that “under the Yin (Shang) Dynasty, Supernatural Beings were honoured, and the people were made to serve them.”²⁴ Because much stress had been laid on theocracy in Shang dynasty, the development of “Li” (rites) were inevitably and severely hindered. After the Shang was annihilated by the Emperor Wu of Zhou (1046 B.C.–1043 B.C.), both the notions of “Tian Ming” (the Mandate of Heaven) and the theocracy were shaken to their foundations. The sovereigns of Zhou were self-warned and self-encouraged by “surveying the dynasties of Xia and Yin (Shang)”, and in historical introspection, they had realized that “‘Tian Ming’ ” (the Mandate of Heaven) is not unchanging”,²⁵ and that “the Heaven will satisfy people’s desires”.²⁶ Therefore, to some extent, although the rulers of Zhou had accepted the old idea that “‘Hao Tian’ (heaven) has made its determinate appointment”, they still emphasized that “‘Huang Tian’ (heaven) is fairminded, and it will only help those who are virtuous”. Under the banner of “cultivating the virtue of reverence” and “illustrating virtues”, they had shifted their attention from “Tian” (heaven) to the secular world and from showing reverence to “Tian” (heaven) to facing the real society, which had fostered the spreading of “Li” to all other aspects of social life. Furthermore, the political concept of “De” (virtue) was also put forward, which had introduced some new ideas and new contents for the development of “Li” (rites). Guo Moruo said, “‘Li’ (rites) is transformed from the objective rules of ‘De’ (virtue). The collection of virtuous people’s proper conducts in ancient times had provided the rules of ‘Li’ for the later generations.”²⁷ It was in such a historical background that Zhou Gong (the Duke of Zhou) had completed his work of establishing “Li”. From that time on, the social value and political function of “Li” (rites) were widely accepted by people and its standards were gradually enforced and finally made into a divine “net” which had covered almost everything. Therefore, “Li” (rites) was described as “the rules to maintain a proper relationship between the ruler and the subject, a sincere relationship between the father and the son, a harmonious relationship between the elder brother and the younger, and a peaceful relationship between the husband and the wife”.²⁸ Moreover, “... when the services in the ancestral temple are performed according to ‘Li’ (rites), there is reverence; when they are observed in the court, the noble and the humble have their proper positions; when the family is regulated by it, there is affection between the father and the son, and harmony among brothers; and when it is honored in the country districts and villages, there is the proper order between the old and the young. ... The rules of ‘Li’ (rites) at the court were intended to show the righteous

²⁴“Biao Ji” (The Record on Examples) in *Li Ji (The Book of Rites)*.

²⁵“Wen Wang” (King Wen) in “Da Ya” (Major Odes of the Kingdom) in *Shi Jing (The Book of Songs)*.

²⁶“Qin Shi” (The Speech of Qin) in *Shang Shu (The Book of Historical Document)*.

²⁷Guo Moruo, *Qi Tong Shi Dai (Bronze Age)*, China Renmin University Press, 2005, p. 16.

²⁸“Li Yun” (The Rites in the Pre-Qin Dynasties) in *Li Ji (The Book of Rites)*.

relations between the ruler and subject; those of friendly messages and inquiries were intended to secure the mutual honor and respect between the feudal princes; those of mourning and sacrifice were intended to show the kind feelings of minister and son; those of drinking at social meetings in the country districts were intended to show the order that should prevail between the young and the old; and those of marriage were intended to exhibit the differences between male and female. ... Thus, if the ‘Li’ (rites) of marriage was discontinued, the relationship between husband and wife would be embittered, and there would be many offences of licentiousness and depravity. If the ‘Li’ (rites) of drinking at country feasts was discontinued, the order between the elder and the young would be neglected, and quarrelsome litigations would be numerous. If the rules of mourning and sacrifice were discontinued, the kind feeling of the officials and the subjects would disappear, there would be numerous cases of revolt by those bravoos. If the rules of reverent court attendances were discontinued, the positions of the ruler and the subject would all fall into disuse, the conduct of the feudal princes would be evil, and the ruin wrought by rebellion, encroachment, and oppression would ensue. Therefore, ‘Li’ (rites) has moralized people through trifling matters. It stops wrongdoings before their occurrence and it leads men daily to move towards what is good, and keep themselves further away from guilt instinctively.”²⁹

From above, it can be inferred that the relations adjusted by “Li” (rites) had covered almost every area ranging from the individuals to the families and from the villages to the imperial court. “Li” (rites) was used as a dyke to dam up depravity before it had taken form. So, if “Li” (rites) was violated, punishment would be imposed. The instruction of “Li” (rites) was like the spring rain “moistening things silently” which had been exercising an invisible formative influence on the people and keeping people away from guilt.

Based on the statements of the ancient people and the historical evidence, the functions of “Li” (rites) can be summarized as the following.

1.2.1 To Distinguish Human Beings from Beasts, and the Civilized from the Barbarians

According to the people in ancient times, the reason why human beings could be clearly distinguished from animals was that they knew the rules of “Li”. Guan Zi said, “Man is able to recognize virtue and righteousness, but apes are not.”³⁰ Confucius also said, “The filial piety nowadays refers to the care for one’s parents. Dogs and horses likewise are able to do something in the same way, but without reverence, what is it to distinguish the one from the other?”³¹ Just because human

²⁹“Jing Jie” (Explanations of the Classics) in *Li Ji (The Book of Rites)*.

³⁰“Xing She Jie” (Explanation of the Conditions and Circumstances) in *Guan Zi (The Book of Master Guan)*.

³¹“Wei Zheng” (Handling Political Affairs) in *Lun Yu (The Analects)*.

beings knew the rules of “Li” (rites), the honorable and the base could be distinguished, the affection between the father and son could be secured, the orderly relationship between the old and the young could be illustrated, the difference between husband and wife could be achieved. Therefore, Xunzi had attached great importance to “the distinctions” and regarded them as the main characteristics “of differentiating Man from beasts”. Since beasts “do not know the distinctions”, though there were adult male animals and the cubs, they did not have the affection between fathers and sons as man did. Though there were male and female animals, they know nothing about the difference between them. Therefore, it was “Li” that had enabled human beings to make distinctions, just as what was illustrated in “Qu Li” (The Summary of the Rules of Propriety) in *Li Ji (The Book of Rites)*:

The parrot can speak, and yet it is nothing more than a bird; the ape can speak, yet it is nothing more than a beast. Now, if a man can speak, but he does not observe the rules of ‘Li’; isn’t his heart like that of a beast? But if a man is like a beast without following the rules of ‘Li’, the father and the son might have the same mate. Therefore, the sages have framed the rules of ‘Li’ in order to teach men to understand the rules of ‘Li’ and then to know the distinctions between beasts and themselves.

Since the ability of “knowing ‘Li’ (rites) and ‘Yi’ (morality)” was “Ren Dao” (the Way of Human), “Li” (rites) was also regarded as “the backbone of human beings. Without ‘Li’ (rites), Man is unable to stand on his own feet”.³²

With the development of legal culture, “Li” (rites), as the distinction of human beings and beasts, was also reflected in the stipulations of law. According to the laws in the Han dynasty, if the common people had committed adultery, they should be punished by “Gui Xin” or a 3-year penal servitude. However, in the case of “Qin Shu Xiang Jian” (adultery among relatives), especially, if a person from the lower social rank had affronted the one from the higher social rank, he or she should be harshly punished. It was recorded in the ancient books that in the Han Dynasty, the grandson of the Emperor of Langye named Ding Guo “...had committed adultery with his father’s concubine (the Emperor of Kang) and then had a son. The ministers in court discussed the issue by saying that Ding Guo’s behavior was like that of a beast, and his action was against the ethical principles and ‘Tian Dao’ (The Way of Heaven), therefore, he must be punished by the death penalty. Then the emperor agreed.”³³ After the establishment of Northern Qi (550 A.D.), the conducts, including the violation of the ethical principles, the abandonment of “Li” (rites) and morality, and the attainment of “Ming Jiao” (the famous doctrines), were all contained in “Shi E” (The Ten Abominations), which involved the “most abhorrent crimes”, including “E Ni” (abusing or murdering the elders), “Bu Xiao” (being unfilial), “Bu Yi” (Unrighteousness), “Bu Mu” (inharmonious), and “Nei Luan” (incest within the family). All of these were considered as the most hideous crimes that would never be pardoned, which had reflected the characteristics of Chinese legal system that

³²“Zhao Gong Qi Nian” (The 7th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

³³“Yan Wang Liu Ze Zhuan” (Biography of the Emperor Liu Ze) in *Han Shu (The History of Former Han Dynasty)*.

“where ‘Li’ (rites) is violated, penalty will be imposed, and the violation of ‘Li’ (rites) will be punished by penalties”.³⁴

Apart from the distinction of human beings and beasts, “Li” (rites) was also an important mark of the distinctions between civilization and barbarism and between “Hua Xia” (an ancient name for China) and “Yi Di” (barbarians, referring to ethnic minorities around old China). The Chinese people, who proudly named their country “Li Yi Zhi Bang” (the Nation of Etiquette known by its “complete and elegant regulations”),³⁵ had condemned those “Yi Di” who did not have the regulations for “Li” and morality as “birds and beasts”.³⁶ During the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.), because of the lack of social ranks in the building of the houses, the lack of distinctions in domestic and foreign affairs, and the lack of regulations of “Li” (rites) and morality, the powerful state of Qin which was dominating the western regions “was strongly condemned and despised by other states”. In the long history, the different policies adopted by the rulers at different times, such as “Yi Xia Bian Yi” [to change the culture of “Yi” (barbarians) by using that of “Xia” (China)] and “Yi Yi Bian Xia” (to change the culture of “Xia” by using that of “Yi”), were primarily determined by whether “Li” (rites) and morality would have been taken as the starting point or the focus. In 1644, after the Manchu noblemen entered Shan Hai Guan Pass, the literati and officialdom of Han nationality were united to fight back, not only for the great grief which they had for the annexation of their county, but also for the great disgrace and shame which the annexation had brought along, which was described in their own words as “Tian Beng Di Jie” (mountains collapsing and the earth cracking up). So, it was clear that the aims of the anti-Manchu struggles were not only to reestablish the state of Ming, but to reestablish the system of “Li” (rites) of the Han nationality. Just as Gu Yanwu had said, “Its motives were to clarify the confusions and bring things back to order, and to follow the old measures to govern ‘Xia’ (China)”.³⁷ Some philosophers at that time thought that the matters of “fighting the barbarians to save China” were much more important than the ruler-subject principle. Lv Yonghui had said, “It is true that the ruler-subject principle is important, but something is even more important. . . , that is, to fight the barbarians to save China from being annexed.”³⁸

In the late Qing Dynasty, in order to resist the impact of the western culture, the emperors of Qing had raised the banner of “marking the distinctions between ‘Yi’ (barbarians) and ‘Xia’ (China)” in order to show the determination to retain the traditional principles of “Li” (rites), which was viewed as the quintessence of culture with a history of thousands of years. Interestingly, in the revolution of

³⁴“Chen Kuan Zhuan” (The Biography of Chen Kuan) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

³⁵“Ba Yi” in *Lun Yu* (*The Analects*).

³⁶“Zhou Yu Zhong” (Discourses of Zhou) in *Guo Yu* (*The National Language*).

³⁷“Yu Yang Xuechen Shu” (Letters to Yang Xueche) in *Ting Lin Wen Ji* (*The Collected Works of Ting Lin*), Vol. 6.

³⁸*Lv Yonghui Wen Ji* (*The Collected Works of Lv Yonghui*).

overthrowing the government of the Qing Empire, “expelling the Tatar barbarians” was also used by the revolutionists of bourgeois democracy as a slogan. After the collapsing of the Qing Empire, Sun Yet-sen was elected the provisional president in Nanjing, and in an article issued for prohibiting the inquisition by torture, he still used the words like “the people of the ex-Manchu government were barbarians”, which had shown that the idea of “marking the distinctions between ‘Yi’ and ‘Xia’”, or “marking the distinctions between ‘Li’(rites) and ‘Fei Li’(not conforming to rites)” was very influential.

In a word, “Li” (rites) was not only regarded as the spiritual backbone of the Chinese people, but the embodiment of Chinese civilization and cultural development.

1.2.2 To Distinguish the Noble from the Humble, and the Superior from the Inferior

As was mentioned above, “Li” (rites) was connected with the principles “Tian Di” (heaven and earth), and the functions of “Li” (rites) that had marked the feudal social ranks had not only derived from but also were interpreted by the concept of “Tian” (heaven). In “Yue Ji” (Record of Music) in *Li Ji (The Book of Rites)*, it was said that “‘Li’ (rites) has reflected the orderly distinctions in the operations of ‘Tian Di’ (heaven and earth). . . ., and to those orderly distinctions they owe the differences between them”. In addition, it was also said that:

(The relation) between the ruler and the minister is determined by the consideration of ‘Tian’ (heaven) (conceived of as honorable) and ‘Di’ (earth) (conceived of as humble). The positions of the noble and the humble are fixed with a reference to the heights and depths displayed by the surface (of the earth). The regularity with which activity and inertia follow each other (in the course of nature) leads to the consideration of affairs as small and great. The things in all quarters of ‘Di’ (earth) are grouped together by their species, and the things (on Earth) are distinguished by their separate characteristics; and this has given rise to their different nature, attributes and functions. In ‘Tian’ (heaven), the images (of stars) are formed; and on ‘Di’ (earth), (the endless variety of) things are produced. Thus, it is ‘Li’ that marks the distinctions between the things in “Tian” (heaven) and on ‘Di’ (earth).

Xunzi also argued, “It is the general principle that the humble serves the honorable, the man of unworthiness serves the man of worth”.³⁹

Confucius, who had regarded “Zhou Li” (The Rites of Zhou Dynasty) as the ideal principle and had valued “Li” (rites) from the perspective of hierarchy, had emphasized that “it is necessary to rectify names and ranks. . . ., if names and ranks are not corrected, then, the language used would not be in accordance with the truth of things. If language is not in accordance with the truth of things, then the affairs concerned could not be completed successfully”.⁴⁰ The specific requirement and the

³⁹“Zhong Ni” (Zhongni is courtesy name of Confucius) in *Xunzi*.

⁴⁰“Zi Lu” (a disciple of Confucius) in *Lun Yu (The Analects)*.

standard for rectifying names and ranks were to set up a relationship where “the prince is prince, and the minister is minister; while the father is father, and the son is son.” Only when people’s different names and ranks were rigorously maintained, was it possible for the human society to move forward smoothly and orderly, and could the national institution and patriarchal system be established.

Since “Li” (rites) had laid stress on “distinctions”, “differences”, and “discrepancies”, consequently, “there are different rules of ‘Li’ (rites) for different social status”.⁴¹ In Zhou Dynasty, different rules of “Li” (rites) were made for the emperors, the senior officials, the noblemen, and commoners according to their different social status. Such differences were not only shown in the relationship between the rights and obligations, but in clothing and implements. The rules for the differences should be strictly abided by and the boundaries of the rules should not be overstepped; otherwise, the offenders should be severely punished. It was recorded that the head of the Ji family, a senior official of the State of Lu, had eight rows of pantomimes in his area and sacrificed to the Tai mountain, which were against the stipulations of “Li” (rites) in the Zhou Dynasty. Although it was already at the times of “Li Beng Yue Huai” (the disintegration of rites and the collapse of rituals), what Ji had done was criticized by Confucius, because he thought that “if this can be tolerated, whatelse cannot?”

According to the requirements of “Li” (rites), in the state, the hierarchical ranks of the ruler, the subject, the nobility, and the humbleness should be extremely rigid, and there should be legal restrictions for both the high and the low; in the family, the superior and the inferior positions of the father and the son, the elder and the younger brother, and the husband and the wife should be clearly established. As was recorded in “Li Yun” (The Rites in the Pre-Qin Dynasties) in *Li Ji (The Book of Rites)*, “using the rules of ‘Li’ as a standard” was not only shown in “the relation between ruler and minister”, but also “in the more generous respect between the father and the son, in the harmony between the elder brother and the younger, and in the peace between the husband and the wife” in order to establish the ruling positions of father and husband. In ancient China, ethical principles and blood lineage were greatly valued by people, and it was advocated that “those who are in high status should be sincere, honest and kind to their mother and father as well as their relatives”, however, behind the veil of the tender feelings, the ranks of ethical hierarchy were made parallel to that of the power, and the patriarchic positions were blended with the political status. Thus, in a family, there existed the father-son relationship, and in the imperial court, there existed the ruler-subject relationship, consequently, a favorable social order was established for the ruling class. Mencius said, “If each man would love his parents and show the due respect to his elders, the whole country would enjoy peace”.⁴² His words had not only reflected the political significance of the ethical principles that the ancient people had valued, but also had interpreted the interrelations between “Xiu Shen” (cultivating one’s morality and character), “Qi Jia”

⁴¹“Zhuang Gong Shi Ba Nian” (The 18th Year of the Duke of Zhuang) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁴²“Gao Lou Shang” in *Mencius (The Book of Mencius)*.

(managing one’s family), “Zhi Guo” (governing the state), and “Ping Tian Xia” (bringing peace and tranquility to the world)”. From this, the truth could be obviously seen from the words in *Li Ji (The Book of Rites)*: “of all the methods for the successful controlling of men, none is more urgent than the application of ‘Li’”.⁴³

In order to enable the people from all classes and different social status “to observe ‘Li’ (rites), to believe in ‘Li’ (rites), to perform ‘Li’ (rites)”, and to fulfill their own obligations without showing inordinate ambitions or conducting improper behaviors, the rulers had taken advantage of the principles of “Li” to restrict people’s desires and greediness, which was expressed as “Li Jie Min Xin” (restricting the people’s minds by applying “Li”). More words could be found about this:

... in the rules of ‘Li’ (rites), the feelings of human beings were recognized, and definite regulations had been laid down to serve as dykes for the people. Hence, the sages dealt with the riches and the honors, so that their riches should not make men proud, their poverty should not bring about the feeling of being pinched, and men in positions of honor should not be intractable to those above them. In this way, the root of chaos is sure to disappear.⁴⁴

Clearly, the other functions of ‘Li’ (rites) had been expressed by these words.

In Xunzi’s opinion, human nature was originally evil, and he believed that in ancient times “there were more human desires but insufficient material gains”. So, in order to stop the contention caused by this and to make “the two of them (desires and what people seek) sustain each other over the course of time, ‘Li’ (rites) arises”.⁴⁵ In other words, in order to cultivate people’s desires and grant people what they seek, “Li” (rites) was exercised to determine the material gains that people should obtain, or, “to measure and limit their gains”. Therefore, “Li” (rites) was also defined as “the cultivation of human beings”. However, the “cultivation” implied by “Li” (rites) was not an equalitarian, but a guiding principle of taking “Bie” (distinctions) as a practical measure. It was clearly stated in *Li Ji (The Book of Rites)*:

... What is meant by ‘Bie’ (distinctions)? I say that these refer to the gradations of ranks according to the nobility or the baseness, the differences between the treatment of the old and the young, and the modes of identification to match these with poverty, or wealth, or social importance.

From what was mentioned above we could see that whether “Li” (rites) was made for restricting or cultivating people’s desires, after all, it was definitely made for establishing a hierarchical pyramid for politics.

In summary, “Li” (rites) was the criterion for the underlying principles of the relations between the noble and the humble, the superior and the inferior, and the near and the distant relatives. The rules of “Li” varied from person to person according to their gradations of ranks and privileges; therefore, the functions of “Li” (rites) were to test the rationality of the gradations of ranks and their hierarchical structures, and in turn to make them constant and stabilized. Thereupon, the political and philosophical color of “Li” (rites) became stronger. Moreover, “Li” (rites),

⁴³“Ji Tong” (Summary of Sacrifices) in *Li Ji (The Book of Rite)*.

⁴⁴“Fang Ji” (Record of Dykes) in *Li Ji (The Book of Rites)*.

⁴⁵“Li Lun” (Discourse on Ritual Principles) in *Xunzi*.

which had derived from the patriarchic hierarchy, had fostered the formation of new moral principles and new father-son, husband-wife relationships. The ethical principles approved by “Li” (rites) had not only reflected the psychological state and the modes of thinking of the ancient Chinese people, but also become one of their ideal value orientations. However, “Li” (rites) had inevitably shackled people’s nature, and as a result, people were more willing to sacrifice themselves for it.

1.2.3 *To Administer the Government and to Stabilize the State*

In addition to adjusting the human relations, distinguishing the noble from the humble, and telling the right from the wrong, the most important function of “Li” (rites) was to administer the government and to stabilize the state. So, “Li” (rites) was the most basic guiding principle for bringing security to the superior, for controlling the common people, for managing the government and ruling the country. It was an ideological foundation upon which the social relations and national policies were adjusted, and it was also a theoretical doctrine which was used to maintain the autocratic monarchy. On this account, after the establishment of “Li” (rites) by Zhou Gong (the Duke of Zhou), “Li” (rites) had been regarded as “the backbone of state”,⁴⁶ “the constancy of state”,⁴⁷ and “the great rule for the kingdom”.⁴⁸ According to ancient philosophers and politicians, “Li” (rites) was the criterion for the state administration, thus, where “Li” (rites) existed, there was the right way for politics; where “Li” (rites) was absent, there would have lacked the guidelines for the administration, and there would be chaos. Confucius, who had announced that “I would follow Zhou”, had advocated that “‘Li’ (rites) is necessary for the management of a state”, and he believed that “where ‘Li’ (rites) prevails, the government will be in good order; where ‘Li’ (rites) is neglected, everything will fall into disorder and confusion”.⁴⁹ In Han Dynasty, Jia Yi had made a detailed statement about governing the country with the principles of “Li” (rites), and he said in *Xin Shu (New Writings)*:

Without the rules of ‘Li’ (rites), virtue, benevolence, and righteousness cannot be fully carried out, nor can the teachings and education for the rectification of manners be completed; nor can the quarrels and disputes be settled; nor can the relationship between the ruler and the minister, the high and the low, the father and the son, the elder and the younger brother be determined; nor can the students who learn to be officials have a much closer relationship with their masters; nor can the majesty and dignity be shown in assigning the different duties at court, in managing the armies and in appointing officials to execute the laws; nor can sincerity and gravity be shown in offering sacrifices to the Supernatural Beings on occasions of supplication and other various ceremonies.

⁴⁶“Xi Gong Shi Yi Nian” (the 11th Year of the Duke of Xi) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁴⁷“Jin Yu Si” (Discourses of Jin: Part 4) in *Guo Yu (The National Language)*.

⁴⁸“Zhao Gong Shi Wu Nian” (The 15th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁴⁹ “Zhong Ni Yan Ju” (Confucius at Home at Ease) in *Li Ji (The Book of Rites)*.

“Li” (rites) was not only the administrative principles of the state, but the power to keep the spirit together so that the state would not lose its people, the rulers would not lose their ministers, the noble would not lose the humble, the superior would not lose the inferior. In this sense, “Li” (rites) was fundamental not only for administering the government and stabilizing the state, but also for maintaining an eternal peaceful reigning. Since governing the people by applying “Li” (rites) could make people obedient, self-respecting, and contented with their own lot and resigned to adversity, Confucius said, “When the rulers have adopted ‘Li’ (rites), it is much easier to make people respond to their calls for service.”⁵⁰ So, it had already been convincingly proved by the long Chinese history that the rise and fall of nations and the settlement of the chaos were closely related to the applications of “Li” (rites).

The establishment of “Li” (rites) by Zhou Gong (the Duke of Zhou) was a great contribution to the setting up of aristocracy and enfeoffment system at that time. After Zhou dynasty, because of the special conditions of ancient China, “Li” (rites) had played a very important role throughout the long Chinese history. However, it needed to be pointed out that what “Li” (rites) had set up was not only just a complete and strict system that included “Li” (rites), “Yue” (music), “Zheng” (government) and “Xing” (punishment), but also the superstructure of the state in which different parts were closely inter-connected, interdependent and mutually promoted under the guidance of “Li” (rites). As to the relationship between “Li” (rites) and “Yue” (music), “Li” (rites) focused on distinguishing the differences in the society, such as those between the noble and the humble; while “Yue” (music) focused on seeking the similarities. In other words, through “Yue” (music), an internal harmony would be achieved and the conflicts would be resolved. When coordinating together, “Li” (rites) and “Yue” (music) could not only strengthen the affections between the father and the son, but also show the orderly relationship between the old and the young, and establish the different social status of the high and the low. So hopefully, they could ensure that “the mobs would be stamped out; the dukes and princes would show obedience submissively; there would be no wars for arms and weapons to be used, no employment of ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment), no worries for the common people, and no reasons for ‘Tian Zi’ (the son of Heaven or the emperor) to be angry, ...”.⁵¹

“Li” (rites) and “Xing” (punishment) were two measures taken by the rulers to govern the countries. In the establishment of “Li” (rites) by Zhou Gong (the Duke of Zhou), the importance of enhancing moral instructions and reducing punishment of the subjects were stressed, which had intricately combined the instructional function of “Li” (rites) and the compulsory function of “Xing” (punishment) together. “Li” (rites) was defined as the positive rules, which could “prevent the crimes before they have been committed”; while “Xing” (punishment) was the negative, which

⁵⁰“Xian Wen” (The Questions of Xian) in *Lun Yu (The Analects)*.

⁵¹“Yue Ji” (The Record of Music) in *Li Ji (The Book of Rites)*.

could “prohibit the crimes after they have been committed”.⁵² “De Zhu Xing Fu” (Employing moral teaching as the primary means, and the punishment as the supplementary) was the basic state policy for administering the government and stabilizing the country in ancient China.

As for the relationship between “Li” (rites) and “Zheng” (government), just as was mentioned in the previous chapters, “Li” “is the essence of government”.⁵³ From the Zhou Dynasty when “Li” (rites) was instituted to the Qing Dynasty which was the last feudal dynasty, “Li” (rites) had been regarded as the important classics as well as the laws of the state. In other words, “Li” (rites) had been taken as the guideline for establishing the government, laying down the rules for the succession of the thrones, and setting the guiding principles for the imperial court. Consequently, the dynasties in which “Li” (rites) was fully applied were always praised as the times of peace and prosperity; on the contrary, the dynasties in which severe punishments were frequently enforced were always condemned as the period of decadence. Therefore, “Li”(rites) was regarded as the basic guiding principles in administering the government. In “Jing Jie” (Explanations of the Classics) in the book *Li Ji (The Book of Rites)*, it was explained that:

... in the government of a state, ‘Li’ serves the same purpose as the steelyard in determining the weight (the order of priority); or as the carpenter’s line in determining the right and wrong; or as ‘Gui Ju’ (the tool to measure circle and square) in determining the circumference. Hence, if the weights of the steel-yard are correct, there can be no imposition in the matter of weight; if the line is truly applied, there can be no imposition in the evenness of a surface; if the square and compass are truly employed, there can be no imposition in determining the circumference; if ‘Li’ (rites) has been observed by gentleman, there can be no imposition of fraudulence. Hence, he who has an exalted idea of the rules and has guided his conduct by them is called a gentleman, and he who has no such exalted idea and has not guided his conduct by the rules is called unmannered people ...

In summary, the full functions “Li” (rites) not only depended on the standards set up by “Li” (rites) itself, but also on the coordination and inter-connection with other measures of government, such as “Yue” (music)—spiritual level, “Xing” (punishment)—law, and “Zheng” (government)—political power. In “Yue Ji” (Records of Music) in *Li Ji (The Book of Rites)*, it was well expressed that:

And so (they instituted) ‘Li’ (rites) to guide man’s will, ‘Yue’ (music) to bring harmony to their voices, ‘Zheng’ (government) to unify their conducts; and ‘Xing’ (punishment) to guard against their tendencies to evil doings. Therefore, the purposes of ‘Li’ (rites), ‘Yue’ (music), ‘Xing’ (punishment), and ‘Zheng’ (government) are the same; so they are the instruments by which the minds of the people are unified, and the suitable ways of administration are achieved.

These words had not only illustrated the system set up by Zhou Gong (the Duke of Zhou) and pointed out the connotation of *Zhou Li (The Rites of Zhou Dynasty)*, but also had shown the reasons why “Zhou Li” (The Rites of Zhou Dynasty) had been continuously applied for thousands of years. The thoughts in later times like

⁵²“Jia Yi Zhuan” (Biography of Jia Yi) in *Han Shu (The History of Former Han Dynasty)*.

⁵³“Ai Gong Wen” (The Questions of the Duke Ai) in *Li Ji (The Book of Rites)*.

“De Zhu Xing Fu” (employing moral teaching as the primary means and punishment as the supplement) and “understanding and exalting ‘Li’ (rites)” were all derived from *Zhou Li* (*The Rites of Zhou Dynasty*). So, in this sense, Zhou Gong (the Duke of Zhou) was a great man, and his theory of “Li” (rites) was of great significance.

1.2.4 To Be the Guideline for Proper Conducts and to Be the Criterion for the Right and the Wrong

“Li” (rites) had not only established the highest standards for human conducts and morality, such as the standards for the affection between the father and the son, the righteousness between the ruler and the minister, the social ranks between the noble and the mean, and the proper order between the old and the young, it had also established the general standards for conducts and the criterion for the right and the wrong for all social classes and ranks. For example, although the behaviors of “avoiding mentioning the names of the honorable”, or “concealing the misconducts done by the father and the son” were against law, they were not only in accordance with the rules of “Li” (rites), but also were even exalted as virtues by “Li” (rites). During the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.), Confucius gave publicity to his idea of “Ke Ji Fu Li” (subduing one’s self and recovering the rites) and honestly expressed himself by saying that “if anyone has employed me, may I not make an eastern Zhou (to return to the rites of Zhou)?”⁵⁴ Here, recovering “Zhou Li” (*The Rites of Zhou Dynasty*) meant reviving all the social systems stipulated in the “Li” (rites). Confucius proposed that people should not get their riches and honors and change their low and humble positions by violating “Li”. He advised people “not to look at what is contrary to ‘Li’; not to listen to what is contrary to ‘Li’ (rites); not to speak what is contrary to ‘Li’ (rites); not to make any movement which is contrary to ‘Li’ (rites).”⁵⁵ In “the 29th year of the Duke of Zhao” in *Zuo Zhuan* (*The Chronicle of Zuo*), it was recorded that in the State of Jin a bronze caldron on which the statute law was engraved had been casted. However, it was strongly opposed by Confucius, because he thought such action had destroyed the “degree” of “the good order in the noble and the humble”. In other words, by showing the statute law to the public, the traditional rules of “Li” (rites) had been broken, and “the social hierarchy of the noble and the humble had been violated”, therefore, it was bitterly hated by Confucius. From this, a rough idea of the innate character of “Li” (rites) could be seen.

In its long process of continuous evolution, “Li” (rites) had become a part of the intrinsic national spirit, and had dominated people’s speeches and behaviors and people were made to believe that it was sinful to conduct wrongdoings and to break the rules of “Li” (rites), and what was worse, they even believed that it was

⁵⁴“Yang Huo” in *Lun Yu* (*The Analects*).

⁵⁵“Yan Yuan” (Yan Hui, common name Zi Yuan, was a favorite among the Disciples of Confucius) in *Lun Yu* (*The Analects*).

inappropriate to have an idea of doing such things. Liang Qichao once commented on this by saying that:

... if we have doubts about the literal meaning of the classics, when we are reading, then we will be overwhelmed by the feeling that we are calumniating what the sages have said and flouting the rules. We are disturbed by such troubled conscience not because we are frightened by the laws, but feared by ‘Qing Yi’ (the theories based on Confucianism).⁵⁶

According to the ancient Chinese morality and political values cultivated by “Li”, the rise and fall of a nation always had a connection with the purity of spirit, the social morality and tranquility of people’s minds. After Zhou Gong (the Duke of Zhou) put forward his theory that “‘Tian’ (heaven) only helps the virtuous”, the louder the cry for “illustrating virtue”, “showing respect to virtue” and “perfecting virtue”, the stronger its political color. Therefore, Confucius said, “He who has administered the government by means of his virtue may be compared to ‘Bei Chen’ (the north polar star), which stays in its place with all other stars attracted towards it.”⁵⁷ Mencius had further combined the moral teachings with the benevolent administration, and in this way, he had distinguished the benevolent and the virtuous rulers from the brutal and the despotic ones. However, because the moral teaching was over-emphasized, to some extent, law was neglected. This was proved by what Confucius said:

... If we administer the country by law and get consensus by punishment, people will try to avoid the punishment, but in the end, they will have no sense of shame; if we administer the country by virtues, and get consensus by ‘Li’ (rites), they will have a sense of shame, and moreover will become decent.

The state policies of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) and “Da De Xiao Xing” (employing virtues as the major means, punishment as the minor ones) which were adopted by later dynasties were all derived from the traditional moral values.

After modifications were made by the Confucianists in the Song Dynasty, the theory of applying “Li” (rites) to restrict people’s desires was further developed, and it had become a theory about the conflicts between people’s desires and “Tian Li” (heavenly principles), in the end, it had simply denied the rationality of people’s pursuit of material things, and advocated that only when “desires are eradicated”, “can ‘Li’ (rites) be thrived” and “‘Tian Li’ (heavenly principles) be reestablished”. Under such circumstances, the theory of “Yi Li” (Etiquette and Ceremonials) was stressed, thus, the industrial and commercial activities were condemned as vulgar, while the disdaining of profits was regarded as elegant. Such theory, to some extent, had exerted certain influences on the long-time industrial and commercial stagnation and economic seclusion in ancient China.

In addition, because of the long-time domination of “Li” (rites), Chinese people, who “honored the old times and worshiped the ancestors”, were made to be conservative. Consequently, the culture of “Li Zhi” (the system of “Li”) had become a

⁵⁶Liang Qichao, *Qing Dai Xue Shu Gai Lun (An Outline of the Academics in Qing Dynasty)*.

⁵⁷“Wei Zheng” (Handling Political Affairs) in *Lun Yu (The Analects)*.

historical inertia, which had seriously hindered the social reforms. In history, even the bravest and the most daring reformers had to carry out their reforms in the name of the ancestors or of the previous rulers in order to reduce the resistance of reforms. Kang Youwei was one of them, who had carried out the reform under the cover of “Tuo Gu Gai Zhi” (carrying out reforms by imitating the ancients). During the revision of the legal codes in the late Qing Dynasty, those who were in favor of ruling the country by “Li”(rites) still regarded “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) of Confucianism which had been dominating China for thousands of years as “the quintessence of culture passed down from ancestors and the cornerstone of administration” in order to resist the western legal values and to fight against those who had actively participated in the revision of Chinese legal codes.

In a word, it was “Li” (rites) that had brought about the ancient Chinese civilization and formed the unique cultural tradition in the history of world civilization. “Li” (rites) had contained both the essence of democracy and the dross of feudalism. On this account, “Li” (rites) had not only influenced the ancient society, but will continuously influence the modern society as well as the modern life. Although “Li” (rites) belonged to the past, some part of it surely belongs to the present and the future of China.

1.3 The Introduction of “Li” (Rites) into Law

Although “Li” (rites) and law were independent of each other, the special functions of “Li” that had regulated the rules of human behaviors and social order had made it necessary and possible to introduce “Li” (rites) into law. However, such introduction was done step by step in the development of history, and not made at one go.

First, from the opposition of Confucianism and legalism to their amalgamation.

Confucius, Mencius and Xunzi, who were representatives of the pre-Qin Confucian scholars, had greatly celebrated the rule of “Li” (rites) and the administrative method of “‘Ming De Shen Fa’ (promoting virtue and being prudent in the infliction of punishment). Although Confucius had lived in a turbulent age of “Li Beng Yue Huai” (the disintegration of rites and the collapse of rituals) and great revolution, he still encouraged “to govern the state by ‘Li’ (rites)” and “to administer the state by virtue” and regarded “the recovery of rites” as a goal of his life. Because “Li” (rites) was featured by discriminating the high from the low and the noble from the humble, Confucius also insisted on the “rectification of names”, namely, the rules of hierarchical system should be strictly complied with in order to establish a world where “the prince is prince, and the minister is minister, the father is father, and the son is son”, and where the boundary of the rules would not be overstepped. Mencius also viewed this hierarchical system as the major moral principle that everyone must observe. In addition, the rules of distinguishing the noble from the humble, the high from the low were even thought by Xunzi to be the everlasting phenomena which had “shared the same organic principle with ‘Tian Di’ (heaven and earth) and would endure through eternity”. Since “Li Zhi” (the ruling of “Li”), “De Zhi” (the ruling of virtue) and “Ren Zhi” (the ruling of man) were emphasized by the pre-Qin Confucian scholars in governing the state, “Fa Zhi”

(the ruling of law) was surely neglected, because they thought that “the proper administration of government lies in getting the proper men”, moreover, “there are always the men who can run the state, but there is no law that is unchangeable”. They were against the legal theories that “no distinctions should be made between the near and the distant and the noble and the humble, and everything should be settled according to law”, because they thought that these theories were not only opposite to the principles of “Li” (rites), but also “rigid and merciless”, and might bring an end to “the benevolence of ‘Zun Zun Qin Qin’” (showing respect to nobility represented by the emperor and showing respect to relatives represented by parents); therefore, they were just “temporary measures, but can not be applied in a long run”.⁵⁸

From above, it could be seen that the confrontation between Confucianism and legalism was also the confrontation between the clarification of the distinctions of “Li” and the impartial implementation of law. However, after the Warring States, in the dynasties of Qin and Han, “Li” (rites), as a discriminatory rule for people’s conducts, started to integrate, and even to amalgamate with law which was a fair and equitable rule for everyone. Such integration and amalgamation had profound social reasons: first, it had met the need of establishing a unified feudal state, because after the establishment of the East and the West Han Dynasty which had a strongly centralized absolute monarchy, a unified theory was needed to be used as the guiding ideology to unite people’s thoughts and conducts and to end the coexistence of various sects and schools of thoughts that appeared in the Warring States. Therefore, policies were carried out by Emperor Wu of the Han Dynasty to “reject the hundred schools of thoughts except Confucianism”, which had shown his great courage and insight in manipulating the historical trend. Second, the feudal ruling which had lasted for more than 1,000 years had made it possible for the rulers to seriously summarize the historical experience by keeping a foothold in reality. The policy of “applying legalism outside and Confucianism inside” was a splendid summary of the rulers by combining the advantages of Confucianism and legalism in the early Han Dynasty. As was mentioned above, the central points of Confucianism were “Li” (rites), “De” (virtue), “Ren Zheng” (Benevolent Administration) and “Ai Ren” (Loving People), while the main feature of legalism was the stress of the impartiality of law, the both tactics of ruling and power had been emphasized by the absolute monarchy. “Legalism outside” meant using legalism as an outward decoration, because the Confucian theories were suitable to Chinese national conditions, they had great cultural depth, such decoration could not only win people’s hearts and get praise for the rulers’ benevolent administration, but also stabilize the society and benefit their ruling; “legalism inside” meant that legalism was used as a connotative guidance so that the absolute ruling of the monarchy and the performance of the administrative function of law would get quick success and instant benefits. So, the theory of “Confucianism outside and Legalism inside” had reflected the combination of leniency and the severity, namely, the ostensible leniency of Confucianism and the internal severity of the law. Third, Confucianism and legalism had not only shared the same origin, but also had a common political goal: to provide services for the

⁵⁸“Tai Shi Gong Zi Xu” (Preface by Tai Shigong himself) in *Shi Ji (The Records of the Grand Historian)*.

incumbent government. For example, in Confucianism, the theory of “Zun Zun” (showing respect to nobility represented by the emperor) and “Qin Qin” (showing respect to relatives represented by parents) was aimed to ensure the ruler’s superior authority; to some extent, legalism not only shared this point with Confucianism, but also was the advocator for the extreme despotism, because it proposed that the rulers should have mysterious and unfathomable administrative strategies which should be kept away from both the public and the officials. Sima Qian argued in “Tai Shi Gong Zi Xu” (Autobiography of Tai Shi Gong) in *Shi Ji (The Records of the Grand Historian)* that the “Confucian scholars . . . , should follow the rites for ruler and subject, father and son, and should be fully aware of the distinctions between husband and wife, the elder and the young. These rites can not be changed, even though there are hundreds of schools of thoughts”. He also said, “Legalists . . . , should show respect to the ruler and humbleness to the ministers, and should perform their own duties without violating the rules. These rites can not be changed, even though there are hundreds of schools of thoughts.” From the analysis of the relationship between Confucianism and legalism, we could see that the two schools had shared the same ideas in the light of maintaining the hierarchical system. Although Confucianism valued “Li Zhi” (the ruling of “Li”), it had also agreed to punish the evil-doers by law. Guan Zi’s view that “law is made out of ‘Li’ (rites)” was just put forward on the basis of the integration of the functions of the two schools.

From what was mentioned above, we could learn that the change from the opposition of Confucianism and legalism to their amalgamation had not only the historical inevitability but also subjective as well as objective bases. After the obstacles of the confrontation between Confucianism and Legalism were eliminated, the door of introducing “Li” (rites) into law was naturally opened.

Second, the methods of introducing “Li” into law.

The introduction of “Li” into law was made gradually. The Confucian classics had gone through a process in which they were applied first as the guidelines on legislation as well as the interpretations of law, and then the Confucian classic, *Chun Qiu (Spring and Autumn Annals)*, was especially used as a basis for the legal judgments. In such a long process, “Li” was continuously legalized, at the same time, law was continuously moralized. Especially, the establishment of “San Gang” (the three cardinal guides—ruler guides subject, father guides son, and husband guides wife) had enhanced the position of “Li” (rites) and provided law with the most basic contents.

1.3.1 Drawing a Lesson from the Extinction of Qin Dynasty and Creating Public Opinions for Bringing “Li” (Rites) into Law

In the early Han Dynasty, in view of the malpractices of law and punishment in the Qin Dynasty, a famous thinker named Jia Yi commented that it was “Li” (rites) that was the only foundation for “consolidating the country, stabilizing the society, and

winning the hearts of people.”⁵⁹ On the other hand, Jia Yi also thought that law should not be neglected, because it had “provided the ways for people to pursue truth”⁶⁰; otherwise, there would be no rules for the government, the administration and the controlling of the people. According to Jia Yi, particular emphasis should be attached to “Li” and law. He said, “‘Li’ prevents evil doings from happening, while law gives punishment after the evil doings have happened. For this reason, what law has achieved can be easily seen, but what ‘Li’ has achieved can not”⁶¹; therefore, only when “Li” (rites) and law were integrated, could they be used as “the perfect ruling system” to maintain the long term peace and stability. Jia Yi was the first person who had put forward the opinion of “regarding ‘Li’ (rites) as the essence but law as the practical measure in ruling” after the downfall of Qin Dynasty in which punishment and power were greatly advocated but “Li” (rites) was strongly distained. Jia Yi’s idea had initiated the first public opinion on introducing “Li” into law.

In Liu Xiang’s *Shuo Yuan (Forum)*, the importance of moralization and the relationship between “De” (virtue) and “Xing” (punishment) were fully discussed. He said:

There are two mechanisms in governing the state: ‘De’ (virtue) and ‘Xing’ (punishment). The wise rulers always celebrate virtue and proclaim punishments; the despotic rulers just simply combine these two; the autocratic rulers always put punishment first but virtue second. Both ‘De’ (virtue) and ‘Xing’ are for moralization—the former teaches people to be good and to correct their errors, the latter punishes the evil and prevents the others from doing the bad things. Therefore, the one who values virtue favors rewards, but the one who values punishment favors death penalty.

By applying the theory of “Yin Yang” (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive) and “Wu Xing” (the Five Elements), Dong Zhongshu had further argued that “punishment is a supplementary instrument to virtue”, therefore, “we should value virtue and reduce punishment”, and “virtue must be cultivated and punishment must be lessened.”⁶²

The theories mentioned above were put forward by Confucianists when arguing about how to establish a peaceful and stable new empire. However, those Confucian theories did not come into focus until Emperor Gaozu of the Han Dynasty began to change his attitude toward Confucianism after he had accepted the idea from a Confucian student named Lu Jia, who had raised a question about whether “a country can be founded by force, or governed by force.”⁶³ In his theory of “Great Unified Country of Chun Qiu”, Dong Zhongshu had vigorously advocated that “‘Tian Zi’ (the son of Heaven or the emperor) should only follow the instructions of ‘Tian’ (heaven), and the people under ‘Tian’ (heaven) should only follow the instructions of ‘Tian Zi’ (the son of Heaven or the emperor)”, which was perfectly in step with

⁵⁹“Li” in *Xin Shu (New Writings)*.

⁶⁰“Dao Shu” (The Practice of Daoist Rules) in *Xin Shu (New Writings)*.

⁶¹“Jia Yi Zhuan” (Biography of Jia Yi) in *Han Shu (The History of Former Han Dynasty)*.

⁶²“Ji Yi” (Basic Morals) in *Chun Qiu Fan Lu (The Luxuriant Dew of Spring and Autumn Annals)*.

⁶³“Li Sheng Lu Jia Lie Zhuan” (Biography of Li Sheng, Lu Jia et al) in *Shi Ji (The Records of the Grand Historian)*.

the political ambition of Emperor Wu of the Han Dynasty in establishing a great unified country with absolute monarchy. Dong Zhongshu’s theory had made the emperor realize the value of Confucianism; as a result, Emperor Wu made the decision of “rejecting the hundred schools of thoughts except Confucianism”. Consequently, Confucianism was accepted as the dominating ideology for the imperial government by the supreme authority of the country, with the result that legalism, which was once the predominant ideology, began to be reduced to a subordinate position.

Through his theories of “Tian Di” (heaven and earth) and “Yin Yang” (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive), Dong Zhongshu had demonstrated the subsidiary position of minister to ruler, son to father, and wife to husband. He also thought that “‘San Gang’ (three cardinal guides) of the royal government can be achieved from ‘Tian’ (heaven)”, so had made it sanctified and mystified. Now that “San Gang” could be achieved from “Tian” (heaven), its violation would also be condemned by “Tian” (heaven). Since then, “San Gang”, which had centered on maintaining the monarchical power, became the most essential part of “Li” (rites) and the indispensable legislative principle of the country. Besides, it was further explained in “San Gang Liu Ji” (Three Cardinal Guides and Six Disciplines) in *Bai Hu Tong Yi (The Virtuous Discussions in White Tiger Hall)*: “What is ‘San Gang’? It refers to the theory that ruler guides minister, father guides son, and husband guides wife”. According to “Yue Ji” (Records of Music) in *Li Ji (The Book of Rites)*, when Kong Yinda interpreted the meaning of the sentence that “then, the hierarchical system of the father and son and the ruler and minister was regarded as legal institutions by the sages”, he gave the definition of “San Gang” by quoting the words from “Han Wen Jia” in *Li Wei (On Etiquette)*: “‘San Gang’ refers to ‘ruler guides minister, father guides son, and husband guides wife’”.

1.3.2 Introducing the Spirit of “Li” into Law Through Legislation and the Interpretations of the Current Law

Xiao He, “Cheng Xiang” (the prime minister) of the early Han Dynasty, had “taken the useful parts from the laws of the Qin Dynasty and made them into *Jiu Zhang Lv (The Code in Nine Chapters)*”.⁶⁴ Although *Jiu Zhang Lv (The Code in Nine Chapters)* had included many other laws, basically, it was a penal code aiming to punish the evil doings. With the increase of state affairs and the expansion of imperial power, it became urgent to make laws on administration and etiquette. For this reason, a Confucian scholar named Shu Suntong was appointed by Emperor Gaozu to draw up a particular law on the rites of court—the 18 chapters of *Bang Zhang Lv (Law of Rites)*. It was recorded in “Xing Fa Zhi” (The Record of the Criminal Law)

⁶⁴“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)*.

in *Jin Shu (The History of Jin Dynasty)* that “in addition to the current law, Shu Sunotong drafted the 18 chapters of *Bang Zhang Lv (Law of Rites)*, namely, the rites of Han.” Besides, in “Li Yue Zhi” (Records of ‘Li’ and ‘Music’) in *Han Shu (The History of Former Han Dynasty)*, words can be found that “the rites drawn up by Shu Sunotong have been recorded in books with other laws and orders and stored up by “Li Guan” (the prison officials). So, it is named ‘Bang Zhang’ (alongside other chapters)”. During the reign of Emperor Hui, Shu Sunotong was once again appointed to draft the law of rituals in ancestral temples. Clearly, the purpose of appointing Shu Sunotong to make *Bang Zhang Lv (Law of Rites)* was to establish a ritual system so as to “rectify the proper relationship between the ruler and minister”. Since Shu Sunotong was a Confucian scholar who believed in “Li”, the law of etiquette he had drafted must have had the spirit of “Li” in Confucianism. *Bang Zhang Lv (Law of Rites)* was both a code of etiquette and an administrative code implemented in court, and it was a product of the introduction of “Li” into law in the early Han Dynasty.

After Confucianism was established as the guiding ideology of the imperial government by Emperor Wu of the Han Dynasty, Confucianism started to develop rapidly. Meanwhile, based on the national policy of “Confucianism outside and Legalism inside”, much attention was also attached to legislation. Especially, after the tradition of “studying in schools run solely by the government, and learning laws only from the judges and judicial officials” was broken, great progress was made in “Lv Xue” (the study of statutory laws), with the result that it had become prevalent to pass on the knowledge of law from father to son and from teacher to the assembled students. For example, Du Zhou was born in a family of amanuensis, but he was promoted to the position of “San Gong” (the Three Councilors: heads of the three important organizations in ancient China: ‘Tai Wei’: the minister of defense; ‘Si Tu’: the minister of civil affairs and ‘Si Kong’: the minister of public work, the three together functioning as the prime minister of the state) just because he had had a good mastery of the knowledge of the laws and statutes, and his son Du Yannian was also famous for his learning of laws and statutes, so, Du Zhou and his son were called “Da Xiao Du” (Du the Junior and Du the Senior). Moreover, it was recorded that in the Eastern Han Dynasty, the three generations of a certain Guo family in Yinchuan had a very good knowledge of law, and the other three generations of Chen’s family in Pei State and Wu’s family in Henan were all engaged in laws, thus in this regard, “Lv Xue” (the study of statutory laws) had become a specialized branch of study.

It was worth noticing that during the Han Dynasty, Confucianism and legalism permeated with each other, therefore, some scholars were both Confucian and legalistic and they held the ideas of the two schools simultaneously. For example, the two brothers, Zheng Hong and Zheng Chang, “had a good knowledge of Confucianism, law and political affairs.”⁶⁵ Especially in the Eastern Han, some great Confucian scholars had devoted themselves to the annotations of the current laws and published a

⁶⁵“Zheng Hong Zhuan” (Biography of Zheng Hong) in *Han Shu (The History of Former Han Dynasty)*.

great many legal works. It was recorded in “Xing Fa Zhi (The Record of the Criminal Law)” in *Jin Shu (The History of Jin Dynasty)* that “many scholars had published their legal works which varied in quality. Among them, there were more than ten who were the most famous, namely, Shu Sunxuan, Guo Lingqing, Ma Rong and Zheng Xuan, and their published works amounted to more than 100,000. There were about 26,272 articles of the useful items for adjudication and totally about 7,732,200 words.” In the note of chapter six of *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, it was also recorded that “up to the latter Han dynasty, more than ten Confucian scholars, such as Ma Rong and Zheng Xuan, had worked out more than hundreds and thousands of items about law. Among them, more than 26,000 articles were applicable to adjudication.” However, in the later times, because “the more interpretations there were about the law, the more difficult the application was”, a decree was issued by “Tian Zi” (the son of Heaven or the emperor): “only the ‘Zhang Ju’ (interpretations of laws) compiled by Zheng Xuan should be applied, and those compiled by other people should be discarded”.⁶⁶ Here, “Zhang Ju” referred to the interpretations of the current statute laws. The co-existence of “Zhang Ju” (interpretations of laws) provided by the different schools of scholars had shown the prevalence of the private annotations and the value of its application. Inevitably, those interpretations made by the Confucian masters had been saturated with the spirit and principles of “Li”. In the Han Dynasty, the acknowledgement of the legality and practical effects of those legal interpretations was undoubtedly an admission of Confucianism and an encouragement of the activity of introducing “Li” (rites) into law. For example, the private suing in *Zhou Li (The Rites of Zhou Dynasty)* was annotated by Zheng Xuan as “a lawsuit that could be withdrawn if the two parties possessed some ‘Quan Shu’ (a kind of contract)”, so in this regard; lawsuits in the Han Dynasty could probably have been divided into two categories: the public and the private.

1.3.3 Settling Lawsuits with Chun Qiu (Spring and Autumn Annals)

In the Han Dynasty, lawsuit settling was not only based on “Lv” (criminal law), “Ling” (order or ordinance), “Ke” (rule), “Bi” (analogy), and “Zhang Ju” (interpretations of laws), but also on the descriptions in the book *Chun Qiu (Spring and Autumn Annals)* which had provided the methods for preventing “Li Beng Yue Huai” (the disintegration of rites and the collapse of rituals) so as to maintain the feudal ethics between ruler and minister, father and son, and husband and wife. Dong Zhongshu was the first person who had made use of *Chun Qiu (Spring and Autumn Annals)* to interpret the current laws and to give a guidance to the adjudication and punishment. Since the spirit of *Chun Qiu (Spring and Autumn Annals)* was

⁶⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)*.

in conformity with the legal sense accepted by the state and had reflected the demand of maintaining the “Sang Gang” (three Cardinal Guides), it was affirmed and advocated by the emperors, thereby becoming the practical de facto measurement for trials and being widely accepted. *Chun Qiu Jue Shi* (*The Records of Convictions during Spring and Autumn Period*) written by Dong Zhongshu was warmly welcomed by the law enforcement officials. Even after Dong Zhongshu’s retirement due to his illness, the imperial court had still “sent Zhang Tang, the “Ting Wei” (the supreme official in charge of judicature) at the time, to visit Dong Zhongshu’s humble living place several times to inquire about his experiences. Under this circumstance, Dong Zhongshu wrote down 232 episodes about the application of *Chun Qiu* (*Spring and Autumn Annals*) in the judgment of the legal cases. The episodes were in great detail, full of viewpoints from the Confucian classics.”⁶⁷ Influenced by Dong Zhongshu, the people like Ni Kuan and Jun Buyi all had “started to hear the doubtful cases by using the ancient laws.”⁶⁸ After settling a major case by applying *Chun Qiu*, Jun Buyi was highly praised by Emperor Zhao: “Confucian classics should be consulted by all the ministers and officials to show the righteousness.”⁶⁹

Although the most part of *Chun Qiu Jue Shi* (*The Records of Convictions during Spring and Autumn Period*) had been lost, in the remaining three or four chapters, the significant influence of “Li” on law could still be clearly seen. For instance, the legal principle of “giving punishment according to the motives of the offender” was established on the basis of *Chun Qiu* (*Spring and Autumn Annals*), namely, “punishments are enforced in the light of the concrete conditions, and the guilty could be pardoned but the ill-intentioned should be punished”. Therefore, according to this principle, “the offenders who are good-intentioned should be pardoned; the offenders who are ill-intentioned should be punished,”⁷⁰ but it had also brought about a problem in trials that the judgment may be inappropriate and may be given without following the law.

According to the spirit of “Li Zhi” (the system of “Li”) which advocated “Zun Zun” (showing respect to nobility represented by the emperor) and “Qin Qin” (showing respect to relatives represented by parents), “the mutual concealment of crimes by the respected” and “mutual concealment of crimes by the relatives” were allowed in laws, so, the respected and the relatives should be pardoned if they were not involved in the serious cases like treason and rebellion.

The actions of applying *Chun Qiu* (*Spring and Autumn Annals*) to settle lawsuits had brought the spirit and principles of “Li” (rites) into the judicial field, for this reason, *Chun Qiu* (*Spring and Autumn Annals*) had provided a basis for legal judgments, which had shown that “Li” (rites) not only had been introduced into law, but had taken the place of law, and consequently, Confucian classics had been codified.

⁶⁷“Ying Shao Zhuan” (Biography of Ying Shao) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

⁶⁸“Er Kuan Zhuan” (Biography of Er Kuan) in *Han Shu* (*The History of Former Han Dynasty*).

⁶⁹“Juan Buyi Zhuan” (Biography of Juan Buyi) in *Han Shu* (*The History of Former Han Dynasty*).

⁷⁰“Xing De” (The Penal Morality) in *Yan Tie Lun* (*Discussions on Salt and Iron*).

The method of employing the Confucian classics in settling legal cases had been used for more than 700 years since the Western and the Eastern Han Dynasty, but it was gradually abandoned in the Tang Dynasty, because this method was possible to be applied only when Confucianism was accepted as the dominant ideology of administration and the legal system was still imperfect. Nevertheless, the application of the method had reflected the process of the introduction of “Li” (rites) into law. In practice, if no relevant stipulations could be found in law, the principles of “Li” (rites) were applied to settle the conflicts, and if laws were in conflict with “Li” (rites), “Li” (rites) should be applied instead. However, with the gradual completion of legal system and the legalization of the basic principles of “Li”, the method of using *Chun Qiu* (*Spring and Autumn Annals*) to settle legal cases was finally brought to an end.

1.4 The Combination of “Li” (Rites) and Law

The multiple channels of introducing “Li” (rites) into law created by the Western and the Eastern Han dynasties had provided very favorable conditions for the combination of “Li” and law. After going through the Wei and the Jin dynasties, their historical combination was finally completed in the Tang Dynasty, which had indicated that the legal history of China was pushed forward to an epoch-making stage.

During the Wei, Jin, Southern and Northern dynasties, China was split into several parts and was ruled by different emperors. In order to get self-protection and to achieve social progress, the emperors all began to enhance legislation and to focus on employing law in ruling the state. It could be learned from the remaining fragments of the legal works that some legalists at that time were focusing on studying the legislation techniques, extracting the principles and concepts of penal codes, and summarizing the principles of judgments and punishments. However, as far as the guiding principle was concerned, “employing moral teaching as the primary means and punishment as the supplement” was still adhered to, and the Confucianization of law was accelerated. For instance, Chen Qun and Liu Shao, the law-makers of *Wei Lv* (*Wei Code*), had all regarded Confucianism as the guiding principle and proposed ruling the state by “Li” (rites). They had introduced the spirit of “Li” (rites) into the drafts of the new laws. For example, based on the principle of “Zun Zun” (showing respect to nobility represented by the emperor) and “Qin Qin” (showing respect to relatives represented by parents), it was regulated in the new law that “if those who have committed the crimes of rebellion and great seditions are arrested on the spot, they and their three generations (father, son and grandson) shall be drowned in dirty water, or be decapitated or chopped to death. Although such punishments are not included in the law, they are practically applied so as to eliminate evil doings.”⁷¹

⁷¹“Xing Fa Zhi”(The Record of the Criminal Law) in *Jin Shu* (The History of Jin Dynasty), quoted from “Wei Lv Xu” (The preface to Wei Code).

In the new law, it was stipulated that the “sons should not live apart from their father, and should not have their own private properties when their father are still living. Moreover, those who have attacked their own elder brothers or sisters shall be punished by imprisonment for five years in order to show moralization”.⁷² Besides, “Ba Bi” (the eight conditions for mitigating punishments) in *Zhou Li* (*The Rites of Zhou Dynasty*) was codified, which had legalized the hierarchical privileges stressed by “Li” (rites). In order to unify the people’s thoughts and let them accept the orthodox views of Confucianism, a decree was issued by Emperor Weiwen stating that “only Zheng Xuan’s interpretations on law are applicable, and the interpretations of other schools are not to be applied.”⁷³

Jin Dynasty was established by a family named Si Ma, which was a large Confucian clan of the late Eastern Han. Therefore, the Confucianization of the legal system construction was especially stressed by the clan. Du Yu and Zhang Fei, who had drafted and interpreted *Jin Lv* (*Jin Code*), were both masters of Confucianism and legalism. In *Lv Biao* (*Standards of Law*), Du Yu stated that the basic spirit of *Jin Lv* (*Jin Code*) was to “clarify people’s social status”.⁷⁴ He also emphasized that “(the law) is to follow the principles of ancient rites and to comply with the contemporary rules”.⁷⁵ As for the stylistic rules and the layout of *Jin Lv* (*Jin Code*), which began with “the Names of Punishment” and ended with “the Dukes and Princes”, Zhang Fei explained: “the rules of the emperor shall be given the top priority, while those of the princes and the dukes shall be put at the end, and ‘Li’ (rites) and ‘Yue’ (music) shall be put in the middle.”⁷⁶ Some concepts were also explained by Zhang Fei in “*Jin Lv*” (*Jin Code*), such as “Man” (Deception), “Bu Jing” (Irreverence), “Bu Dao” (Depravity) and “E Ni” (abusing or murdering the elders) in the light of “Li” (rites).

Another combination of “Li” (rites) and law in the Jin Dynasty was manifested in the system of “enforcing punishments in accordance with the rules of ‘Wu Fu’ (relatives within the five degrees of mourning)”, namely, the kinship and the punishment could be judged by the clothes which one wore in order to “reinforce the feudal ethical codes”.⁷⁷ The regulations of “enforcing punishments in accordance with the rules of ‘Wu Fu’” were initiated in “*Jin Lv*” (*Jin Code*) and were abolished in the late Qing Dynasty. Besides, “Ba Bi” (the eight conditions for mitigating punishments) of Zhou was revised into “Ba Yi” (The Eight Deliberations: the system about the privileges enjoyed by eight groups of people in feudal China which ensured “different punishments for the same crimes”) and was included in “*Jin Lv*” (*Jin Code*). It was stipulated that “the princes and dukes and those who are above ‘Ba Yi’ (The Eight Deliberations) are allowed to pay redemption without being

⁷²“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*), quoted from “Wei Lv Xu” (The Preface to Wei Code).

⁷³“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

⁷⁴“Du Yu Zhuan” (The Biography of Du Yu) in *Jin Shu* (*The History of Jin Dynasty*).

⁷⁵“Li Zhi Zhong” (The Record of “Li”, Part 2) in *Jin Shu* (*The History of Jin Dynasty*).

⁷⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

⁷⁷Ibid.

penalized by “Kun” (shaving their heads), “Qian” (wearing iron collars) and “Chi” (flogging with light sticks).⁷⁸ Although the punishments for some behaviors were not included in laws, they were punished by the application of “Li” (rites). For example, “it is not allowed for the parents to adopt children from other clans according to ‘Li’ (rites),”⁷⁹ and “‘Li’ (rites) and law shall firstly be consulted in judging whether the accused is guilty or not.”⁸⁰

Although the imperial government of the Northern Dynasty primarily consisted of ethnic minorities, after entering into the central areas of ancient China, it was so influenced by the advanced culture of the Han nationality that its legal system also followed the trend towards the combination of “Li” (rites) and law. For example, the regulation of “Liu Yang” (remaining at home to care for relatives) in the law of the Northern Wei Dynasty was in fact the codified Confucian concept of the filial duty. And “Bu Dao” (Depravity) was considered as one of the ten felonies in the law of Northern Qi Dynasty.

After going through Wei, Jin, Southern and Northern dynasties, the feudal society of China reached a golden age in the Tang Dynasty. The structure and content of *Tang Lv* (*Tang Code*) were greatly enriched, and the combination of “Li” (rites) and law in this period was also growing more matured and established. Until this period of time, “Li” (rites), which was acting as the embodiment of the whole hierarchical ideology and system, had been completely codified. For this reason, the comment that the later generations made on *Tang Lv* was that “all regulations are made by ‘Li’ (rites)”. From *Tang Lv* (*Tang Code*), one could not only see the interrelationship between “Li” (rites) and law, but also see how “Li” (rites) was integrated into “Fa” (law) and learn that “Li” (rites) was the soul of *Tang Lv* (*Tang Code*), and *Tang Lv* (*Tang Code*) was the legal embodiment of “Li” (rites). Therefore, “Li” (rites) and *Tang Lv* were inseparable and complementary with each other. Just as what was stated in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that “‘De’ (virtue) and ‘Li’ (rites) are the essence of politics and moralization, while penalty the practical application. Like night and day forming one day, spring and autumn forming one year, ‘De’ (virtue), ‘Li’ (rites) and penalty correlate with each other.” *Tang Lv* (*Tang Code*) was a good example of the combination of “Li” (rites) and law in ancient China, a detailed analysis on *Tang Lv* (*Tang Code*) would be very helpful for us to learn the ancient people and to understand the current affairs.

The obvious features of the combination of “Li” (rites) with law reflected by *Tang Lv* and its great influence to the legislations of the neighborhood countries had become the most important elements in the establishment of Chinese legal system.

The relationship between “Li” (rites) and law in *Tang Lv* (*Tang Code*) are summarized as the following:

⁷⁸ Ibid.

⁷⁹ “Ying Zhongkan Zhuan” (Biography of Ying Zhongkan) in *Jin Shu* (*The History of Jin Dynasty*).

⁸⁰ “Yu Chun Zhuan” (Biography of Yu Chun) in *Jin Shu* (*The History of Jin Dynasty*).

1.4.1 Laws Made Under the Guidance of “Li” (Rites)

For instance, “Gang Chang” (the Chinese ethical tradition) advocated by “Li” (rites) was the most basic content in *Tang Lv (Tang Code)*. The crimes of “Shi E” (The Ten Abominations) were considered to be “the felonies that shall never be pardoned”, because those offensive conducts were against “San Gang” (three cardinal guides) which included “ruler guides minister, father guides son, and husband guides wife”. *Tang Lv (Tang Code)* was made in the period of Wu De in the Tang Dynasty, and it went through the periods of Zhen Guan and Yong Hui, and finally was fixed in the period of Kai Yuan. In this process, many legal articles were revised in the light of “Li” (rites). For example, before Zhen Guan period, it was regulated in the article of “Mou Fan Da Ni” (Plotting Rebellion and Great Sedition) in *Zei Dao Lv (Statute on Banditry and Theft)* that if an offender had committed the crimes of rebellion and treason, his father, sons, and bothers should all be punished by the death penalty, and his grandsons should be punished by exile. After the revision in Zhen Guan period, this regulation was changed, so, the offender and his father should be punished by strangulation, and his brothers and grandsons should be punished by exile. Such changes in execution were made based on the blood lineage and the distant and near relationships between grandfather and grandson, and between brothers. It was regulated in “Ji Tong” (Summary of Sacrifice) in *Li Ji (The Book of Rites)* that “a grandson can act as the representative of his dead grandfather (in ceremonies)”, meaning that the grandson was allowed to participate in the ceremonies of worshipping the ancestors, which had indicated that the kinship between grandfather and grandson was more important than that between brothers. Therefore, if the offender’s grandfather and grandson were punished by exile, but the brothers were punished by strangulation, it would have been against the family affection. For this reason, Fang Xuanling made the aforementioned revisions in the light of “Li” (rites) in Zhen Guan period.

Another example could be found in the article “Tong Xing Bu De Wei Hun” (Prohibitions of Marrying Persons with the Same Surnames) in *Hu Hun Lv (Laws on Marriage, Taxes and Household Registration)*, which had only prohibited the marriages between the superior and the inferior relatives with the same surnames within “Wu Fu” (relatives within the five degrees of mourning), but had not regulated the marriages between the superior and the inferior relatives outside the five degrees of mourning. During Yong Hui Period, some other prohibitions were added:

... the marriages to the following relatives are prohibited: daughters of parents’ aunts’ or uncles’, daughters of mother’s sisters, aunts, mother’s aunts, daughters of mother’s aunt, daughters of mother’s uncle, daughters of grandfather’s brother, daughters of father’s brother’s daughters, and the sisters of the sons-in-law. Any violations, in each case, shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes, and the marriage shall be dissolved.

According to “Li” (rites), there were distinctions of the superiority and inferiority for the daughters of grandfather’s brothers, the daughters of grandmother’s brothers because they belonged to father’s clan and mother’s clan respectively. If the

marriages between those people were allowed, it would have violated “Ming Jiao” (the famous doctrines) and shown despise to human ethics and morality, therefore, such marriages were forbidden. For this reason, it was pointed out by Wei Zheng that “‘Li’ (rites) is the guidance and discipline ..., while punishment is the supplementary means.”⁸¹ Now that the purpose of executing punishment was to supplement the principles of “Li” (rites), the enactment and revision of *Tang Lv* (*Tang Code*) was naturally guided by it.

When Manchu people were outside of Shan Hai Guan Pass, the marriages between the different generations of the same clan were allowed, however, when Emperor Huang Taiji was on the throne, decrees were issued to forbid such marriages: “from today on, marriages to the following relatives within the same clan are prohibited: father’s concubines, uncle’s wives, aunts, sisters-in-law or daughter-in-laws...; if violations occur and the marriages between people in the same clan are arranged, people involved shall be punished with fornication.”⁸² It was also recorded in *Ming Ji Ji Lue* (*A Brief Outline of the Disciplines*) written by Zhu Lin that a decree was issued in the third year of Tiancong that “marriages to stepmothers, aunts, sisters-in-law, or the wives of nephews shall be forbidden forever. ..., if men or women married the people in the same clan, they shall be punished with fornication”. Such decree had clearly shown the great influence of “Li” (rites) on the legislation of the Qing Empire where the majority of people were Manchu nationality.

1.4.2 *The Code and Doctrines of Rites Directly Included in Law*

Generally, the making of *Tang Lv* (*Tang Code*) was guided by the principles of “Li” (rites), and in fact, some articles in *Tang Lv* (*Tang Code*) were almost the reprints of the code of rites. For example, “Ba Yi” (The Eight Deliberations) in *Ming Li Lv* (*Statutes and Terms*) was an exact copy of “Ba Bi” (the eight conditions for mitigating punishments) in “Xiao Si Kou” (the junior minister of justice) in the chapter of “Qiu Guan” (Ministry of Penalty) in *Zhou Li* (*The Rites of Zhou Dynasty*). The provisions about “Qi Qu San Bu Qu” (Seven Permissions of Divorces and Three Prohibitions) in *Hu Hun Lv* (*Laws on Marriage, Taxes and Household Registration*) were transplanted from “Ben Ming” (Records of Rites for Dresses: the Nature) in *Da Dai Li Ji* (*Collections of Classic Rites by Da Dai*). Moreover, some other regulations were just deduced from the principles of “Li” (rites). For example, the stipulations about “Jin Lao Xiao Ji Ji” (Redeeming Punishment by Those who are Aged, Juvenile or Disabled) in *Ming Li Lv* (*Statutes and Terms*) were as the following:

In all cases in which those who are 70 years of age or older, or 15 years of age or younger or disabled have committed crimes punishable by life exile or lighter, they may redeem their punishment. If those who are 80 years of old or older or 10 years of old or younger or

⁸¹ “Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu* (*The History of Sui Dynasty*).

⁸² *Qing Taizong Shi Lu Gao Ben* (*Recorded Manuscript of Taizong in Qing Dynasty*), pp. 6–7.

‘Du Ji’ (the incapacitated) have committed crimes involving homicides or other actions punishable by death penalty, they can present a petitioning to the emperor for remitting. If they have robbed or injured people, they can also redeem their punishments, but for all other crimes, they should not be punished. As for those who are 90 years of old or older or 7 years of old or younger, even though they have committed crimes punishable by the death penalty, they shall not be executed.

Apparently, the above regulations were copied from “San She Zhi Fa” (the Three Conditions of Pardoning) in *Zhou Li (The Rites of Zhou Dynasty)*, in which it was ruled that “the first, ‘You’ (the juvenile) and ‘Ruo’ (the feeble) shall be pardoned; second, ‘Lao’ (the old) and ‘Mao’ (those who are very old) shall be pardoned; third, ‘Chun’ (the slow-witted) and ‘Yu’ (the stupid) shall be pardoned”. In addition, the regulations were also borrowed from *Li Ji (The Book of Rites)* in which it was ruled that “‘Dao’ and ‘Mao’ shall be free from punishments” and “when one is at eighty or ninety, we say that ‘he is Mao’, when one is seven, we say he is Dao. Such a young child or such an old man, though punishable with crime, shall not be subjected to punishment”.

Additionally, one of the crimes of “Bu Xiao” (being unfilial) in *Tang Lv (Tang Code)* was that “if the paternal grandparents or parents are living, and sons or grandsons have establish household register or divided the family property, they shall be punished by penal servitude for three years”, and that “any son or grandson who have violated the regulation and do not perform his filial duty shall be punished by penal servitude for two years”. These stipulations were the legalized rules that could be found in “Nei Ze” (The Pattern of the Family) in *Li Ji (The Book of Rites)*: “a filial son, in nourishing his aged, (seeks to) make them happy, and not to run counter to their wishes; to make them comfortable in their bed-chambers and the whole house; and to supply them with their food and drink”, but “if one has violated the moral ethics and provided less support for his grandparents or parents, he shall be punished to serve in prison for two years”. In addition, they could also be found in “Qu Li” (The Summary of the Rules of Propriety)” in *Li Ji (The Book of Rites)*: “while his parents are still alive, he will not have his private properties”. In a word, other similar examples could be easily found in *Tang Lv (Tang Code)*.

1.4.3 Trial and Punishment Guided by the Principles of “Li” (Rites)

This was the major view that people had on *Tang Lv (Tang Code)* after the Tang Dynasty and it could also be proved by the regulations and the trial practices in *Tang Lv (Tang Code)*. Take the stipulations about affray as an example, the ordinary people “involved in affrays and fighting shall be punished by ‘Chi’ (flogging with light sticks)” for 40 strokes. However, “if one attacks his elder brothers or sisters of ‘Si Ma’ (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree), he shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes; if one attacks ‘Xiao Gong’ (the person wearing the mourning

apparel of soft sackcloth in the fourth mourning degree) or ‘Da Gong’ (the person wearing the mourning apparel of soft sackcloth in the third mourning degree), his punishment shall be one degree severer; if one attacks anyone more honorable, his punishment shall be even one more degree severer. In all cases in which one attacks his own elder sisters or brothers, he shall be punished by penal servitude for two years; if one attacks his uncles, or aunts, or maternal grandparents, his punishment shall be one more degree severer; in all the cases in which one attacks his own paternal grandparents, or parents, he shall be punished by decapitation.”⁸³

Because the kinships were different in intimacy and hierarchy, if the inferior had offended the superior, the punishment would be varied according to the intimacy of the kinships. For this reason, even if the people had committed the same crime, the punishment imposed on them would be different, which was what “Li” (rites) had required.

From the trial practices, we could also find that in some cases the punishments were changed according to the rules of “Li” (rites) or the stipulations of law were even replaced by its principles. For instance, during the Chang Qing period, a woman who had whipped her daughter-in-law to death was punished by death penalty by “Jing Zhao Fu” (Jing Zhao Prefecture, an institution in Ancient China directly under the jurisdiction of the central government), however, the legal decision was changed by Liu Gongzhuo, who was the “Xing Bu Shang Shu” (the minister of the Board of Punishments) in the light of the principles of “Li” (rites). It was recorded in *Ce Fu Yuan Gui* (Records of the Great Events) that “When Liu Gongzhuo was ‘Xing Bu Shang Shu’ (the minister of the Board of Punishments), a woman had whipped her daughter-in-law to death for trivial matters. After the case was presented to “Jing Zhao Fu” (Jing Zhao Prefecture, an institution in Ancient China directly under the jurisdiction of the central government), death penalty was given by an official named Dou, Liu Gongzhuo then said, ‘This is a case where the senior whipped the junior, so this is not included in ‘Dou Ou’ (affray). Besides, his son is still alive, so it is immoral to punish the mother just because of her daughter-in-law’. So the decision was changed according to Liu Gongzhou’s suggestion.”⁸⁴

Another example was recorded in No. 2593 of *Juan Zi Bo of Dun Huang* (*Records of Dun Huang*) that when Feng Jia was in mourning for his parents, he showed his mourning in the day, but listened to music and sang songs at night, so his behaviors were regarded as misconducts against “Li” (rites). The judgment was given as the following:

A son should mourn his parents’ death for three years, because such filial duty would move people and make people feel more sorrowful. However, (he) shows mourning in the day, but enjoys music and songs at night, and his behavior has blasphemed ‘Li’. If he had stopped listening to music and weeped for his parents, it would have shown that he had affections. Hence, he shall be punished in accordance with relevant laws.

⁸³The above quoted from “Dou Song Lv” (Laws on Affrays) in *Tang Lv* (*Tang Code*).

⁸⁴“Yi Yan San” (Discussion on Conviction: Part 3) in “Xing Fa Bu” (The Section of Penal Law) in *Ce Fu Yuan Gui* (*Records of Great Events*), Vol. 616.

From above, it could be seen that any offences against “Li” (rites) would be punished severely. Since the measure of “employing ‘Li’ (rites) as a guidance” was regarded as a publicly-acknowledged judicial principle, and it was even protected by the state, it had indicated that morality was superior to law, consequently, the judicial officials would rather observe the principles of “Li” (rites) than comply with the stipulations of law. In their opinion, it was their duty to observe law, but it was their dignity to observe “Li” (rites). Because the major contents of the imperial examinations in the Tang Dynasty were the Confucianism classics, most officials had a better knowledge of “Li” (rites) than that of the law. So, it was not strange for them to judge legal cases by applying “Li” (rites).

1.4.4 “Li” (Rites) and Law Complementary to Each Other to Maintain Social Stability and the Long-Lasting Prosperity of the State

The relationship between the two was specified as the following: first, “Li” (rites) focused on the prevention of crimes, aiming to guide people to do decent things, which was called “taking precautions before the crimes”, while law focused on the punishment of crimes, aiming to restrain people from doing evil things, which was called “enforcing punishments after the crime”.⁸⁵ Second, the principles of “Li” (rites) were used as the supplementary regulations to the insufficiency of law. Apart from the examples mentioned before, it needed to be pointed out that the interpretations of law also played the role of supplementing the regulations in law and to guide the judicial activities. During the Tang Dynasty, when no written articles could be found in law, the judgments could also be made by referring to the interpretations. Because the interpretations of law were based on the theories of “Li” (rites), the substitution of the interpretations for law were in fact the substitution of “Li” (rites) for law. When the interpretations of law were made, they were either written “in accordance with ‘Li’ (rites)” or “with the assistance of ‘Li’ (rites)”, which had helped “Li” (rites) to be more integrated with law. The interpretations of law had epitomized the idea of jurisprudence, criminal law, and procedure laws in ancient China, and were the crystallization of the combination between “Li” (rites) and law. Third, law had been used as the primary means, while “Li” (rites) as the supplementary, and the two had coordinated in governing the state. Sharing the common social origin, both “Li” (rites) and law had represented the will and the interests of the ruling class. However, “Li” had been disguised as the feudal code of ethics and the teachings of morality because of its more extensive contents, its greater social adjustment, and its stricter spiritual bondage for the common people. Moreover, “Li” (rites) was combined with the national conditions of the state where the patriarchal clan system and morality were greatly valued; therefore, “Li” (rites)

⁸⁵“Jia Yi Zhuan” (Biography of Jia Yi) in *Han Shu (The History of Former Han Dynasty)*.

was relatively much more acceptable. In history, the rulers who had only stressed punishments were considered as “the trouble makers”, but the rulers who had celebrated the idea of using punishment as the supplementary means of “Li” (rites) were honored as “the good examples of peace and prosperity”. In the early Ming Dynasty, although Emperor Zhu was able to govern the country with severe punishments and strict laws, he only achieved momentary effect and had failed to put an end to the crimes. After 30 years of ruling, until the completion of *Da Ming Lv* (*The Great Ming Code*) in Hongwu period, he finally realized that “I should follow the ways which the previous emperors have used in governing the country so as to illustrate the principles of ‘Li’ (rites), to guide people, and to make laws for the evils to be punished”.⁸⁶ Besides, he emphasized that “‘Li’ (rites) and ‘Yue’ (music) are just like fat meat and fine grain, which can provide nourishments to a stable society, while punishments are just like the medicine to cure maladies”, and that the stability of the country can be assured only when the policies of “ruling with ‘De’ (virtue)” and “ruling with punishments” were combined together.⁸⁷

In a word, the distinctions maintained by “Li” (rites) were corresponding to the special privileges provided by law. “Li” (rites) and law were complementary to each other, “Li” (rites) was the predominant, while law was the yardstick; “Li” (rites) was the interior, while law the exterior; “Li” (rites) had moralized people unnoticeably, while law had extolled the good and punished the evil noticeably; “Li” (rites) had exaggerated the benevolent administration, while “Fa” (law) had publicized the fair ruling; “Li” (rites) had been used in carrying out law so as to reduce the resistance of law enforcement, while law had been used to illustrate “Li” (rites) to make the deterrent effect of “Li” (rites) more powerful. Bringing “Li” (rites) into law had led to the moralization of law, with the result that the function of law was changed from a measure for preventing evil misconducts to a measure for encouraging good behaviors. Making law in accordance with the principles of “Li” (rites) had legalized the morality, with the result that the violations of “Li” (rites) could be punished by law. All of this had indicated that the complementing of law and “Li” could make the state apparatus operate more effectively. The complementing of law and “Li” (rites) was not only a most important part of the legal tradition in ancient China, but also one of the most distinctive features of Chinese legal system.

⁸⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*).

⁸⁷*Ming Tai Zu Shi Lu* (*Records of Ming Tai Zu*), Vol. 162.

Chapter 2

To Regard Human Being as a Standard, to Promote Morality and to Inflict Penalty with Prudence

2.1 The Formation and Development of Ancient Chinese Humanistic Ideas

Humanism was the philosophic foundation of the ancient Chinese legal system and legal culture.

As early as the Xia (2070 B. C.–1600 B.C.) and the Shang Dynasty (1600 B.C.–1046 B.C.), the dominant ideology was the view of “Tian Dao” (The Way of Heaven), whose chief connotation was the belief in “Tian Di” (heaven and earth), therefore, “Tian Ming” (the Mandate of Heaven) was regarded as the origin of the imperial power, which was shown in the words: “the Yin (Shang) Dynasty was favored by ‘Tian Ming’ (the Mandate of Heaven)”.¹ Before the downfall of the kingdom, without reflecting on his own behaviors, the King of Zhou in the Shang dynasty resentfully exclaimed, “Was not my birth in accordance with the appointment of ‘Tian’ (heaven)?”² Influenced by “Tian Dao” (The Way of Heaven), the Ying people had regarded honoring and serving the Supernatural Beings and the ghosts as ways to receive blessings and protections from “Tian Ming” (the Mandate of Heaven). It was recorded in the books that “in Yin (Shang) Dynasty, people honored Supernatural Beings, and the people were led to serve them; they first served the ghost and then the ‘Li’ (rites)”.³ However, the protection of “Tian Di” (heaven and earth) and the blessing of “Tian Ming” had by no means ensured the continuous ruling of the Shang Dynasty, on the contrary, the imperial government of Shang was finally overthrown by the Zhou State, a Vassal State, because the people who had suffered from the brutal oppression had escaped to other states and then turned their guns round in the battlefields. Such historical facts had significantly changed the outlooks of the subsequent rulers of the Western Zhou Dynasty (1046 B.C.–771 B.C.)

¹“Zhao Gao” (The Announcement of Duke Zhao) in *Shang Shu (The Book of Historical Document)*.

²“Xi Bo Kan Li” (The Conquest of the Li People by the Chief of the West) in *Shang Shu (The Book of Historical Document)*.

³“Biao Ji” (The Record on Examples) in *Li Ji (The Book of Rites)*.

headed by the Duke of Zhou, who had felt that “‘Tian Ming’ is not unchanging”,⁴ and “‘Tian’ (heaven) is not to be trusted”.⁵ They had discovered that “awful though Heaven be, yet it helps the sincere, which can be predicted by the conditions of the people”,⁶ and that “man should not use water but should use people as mirrors”.⁷ In other words, these rulers had recognized that the people’s support and their separation and reunion had played a crucial role in maintaining the ruling of the regime. Consequently, in order to maintain the ruling of Zhou, the guiding ideologies, such as “Yi De Pei Tian” (matching heaven with virtue), “Jing De” (honoring virtue), and “Bao Min” (protecting the people), were put forward to substitute for the mysterious and the elusive idea of “Tian Ming Lun” (the idea of the Mandate of Heaven).

Since “Tian Ming” (the Mandate of Heaven) was connected with “Min Xin” (popular support) by the rulers of Zhou who had propagated that “what the people desire will be satisfied by ‘Tian’ (heaven)”,⁸ the winning of “Tian Ming”, which had heavily relied on the will of the Supernatural Beings and the ghosts in the Yin-Shang Dynasty, had been completely changed to following the will of people. As a result, “Tian Ming” (the Mandate of Heaven) was changed from a mysterious and abstruse dominator to a rational and real political power which could observe the people’s feelings and respect the people’s will. Hence, the people’s status was literally raised, but the status of “Tian” (heaven) was downgraded; at the same time, the value of the people’s will was stressed, but value of the Supernatural Beings and the ghosts were belittled. It was in the Western Zhou Dynasty that human affairs and people’s popular feelings were begun to be emphasized in the ancient Chinese humanistic ideas, which had gradually become matured in the continuous process of approving the actions and the value of Man. So, the ancient Chinese humanistic ideas were of long standing.

The social transformation of “Li Beng Yue Huai” (the disintegration of rites and the collapse of rituals) in the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.) had further demonstrated the decisive role which the public support played in the vicissitudes of a nation. The ideas that “the prosperity of the nation depends on its people and the extinction of the nation depends on the Supernatural Beings”⁹ had shown that the position of the Supernatural Beings in people’s minds was even more declined. In 706 B.C., when talking about the worship of the Supernatural Beings, a man named Ji Liang in the Sui State said, “The common people are the masters of the Supernatural Beings, therefore, the

⁴“Wen Wang” (King Wen) in “Da Ya” (Major Odes of the Kingdom)” in *Shi Jing (The Book of Songs)*.

⁵“Jun Shi” (Lord Shi) in *Shang Shu (The Book of Historical Document)*.

⁶“Kang Gao” (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*.

⁷“Jiu Gao” (The Announcement about Drunkenness) in *Shang Shu (The Book of Historical Document)*.

⁸“Tai Shi” (The Great Declaration) in *Shang Shu (The Book of Historical Document)*.

⁹“Zhuang Gong San Shi Er Nian” (The 32nd Year of the Duke of Zhuang) in *Zuo Zhuan (The Chronicle of Zuo)*.

benevolent kings may put people's affairs first before making his effort to honor them."¹⁰ Therefore, as to the relationship between the people and the Supernatural Beings, he had regarded the common people as the primary and the Supernatural Beings the subordinate, the common people the first while the Supernatural Beings the second. According to him, the Supernatural Beings depended on the people and the people were the hopes of the Supernatural Beings, in addition, the will of the Supernatural Beings was the extension of the will of people. In fact, such views were fairly representative at that time. During the reign of King Chan, "Ren Dao" (the Way of Human) and "Tian Dao" (The Way of Heaven) were completely separated. Thus, there came the famous theory in history: "'Tian Dao' is far away from us, but 'Ren Dao' is very close to us. Since 'Tian Dao' is untouchable, how can we possibly know it?"¹¹ This theory had further freed people from their modes of thinking like "matching heaven with virtue" and had raised the people's consciousness of rationality and subjective initiative.

Having been modified and distilled by the Confucianists, the idea of "stressing people" put forth in the pre-Qin Dynasty was finally developed into a valuable human-oriented theory, whose well-developed form and symbol was the establishment of "Ren Xue" (the doctrine of benevolence) in the ideological system of Confucianism, which was not only a milestone that had marked the transition from spirit-orientation to human-orientation in traditional Chinese culture, but also an important feature of the early-maturing of the Chinese legal civilization.

After the Han Dynasty, the Confucian philosophy became predominant in ancient Chinese culture, and after being developed and promoted by the various philosophers of each generation, the Confucian humanistic theory was gradually established as a humanistic tradition, which had finally formed the national character of the Chinese people with Chinese characteristics.

Firstly, the Confucian humanistic theory was human-oriented, which had attached importance to the value and the dignity of human beings. According to the Confucianists, of all the creatures in nature, human being was the most honorable, just as what was said in the sentence: "of all creatures, human being is the most highly intelligent",¹² and "of all (creatures with their different) natures produced by 'Tian Di' (heaven and earth), human being is the noblest".¹³ Especially, by inheriting and developing the humanistic ideas conceived in the early Zhou Dynasty, a doctrine was established by Confucius that "the benevolent man loves others", which had highly stressed the standing, value and dignity of Man and regarded "being benevolent" as a basic standard for adjusting the interpersonal relationship. Confucius' theory of "Ren Xue" (the doctrine of benevolence) was not only a humanistic philosophy with special historical significance, but also a basic humanistic principle for administration, judiciary, and the ruling of the country. Mencius,

¹⁰"Heng Gong Liu Nian" (The 6th Year of the Duke of Heng) in *Zuo Zhuan* (*The Chronicle of Zuo*).

¹¹"Zhao Gong Shi Ba Nian" (The 18th Year of Lu Zhao Gong) in *Zuo Zhuan* (*The Chronicle of Zuo*).

¹²"Tai Shi" (The Great Declaration) in *Shang Shu* (*The Book of Historical Document*).

¹³"Sheng Zhi" (The Government of the Sages) in *Xiao Jing* (*The Classic of Filial Piety*).

who had fully inherited and developed Confucius' theory of benevolence, specified the idea of "loving others" as a practically political opinion based on the epistemology of "Man's innate goodness". He said, "(a man of noble character) is affectionate to his parents and benevolent to people. He is benevolent to people and kind to creatures".¹⁴ Mencius had further developed the humanistic idea into a systematic doctrine of "Ren Zheng" (Benevolent Administration). The core of this doctrine was "valuing people", in which it was advocated that "'Tian' (heaven) sees what people see, and 'Tian' (heaven) hears what people hear",¹⁵ and that "the people are the most important in a nation; the state is the next; the sovereign the least important".¹⁶

In the Western Han Dynasty, Dong Zhongshu, by considering "the close relationship between state and family", further raised the standing of human being by emphasizing the importance of strengthening the feudal ethical relationships. He said:

Man's fate has been determined by 'Tian Ming' (the Mandate of Heaven). So, Man is not only different from other creatures, but superior to them. There is affection between father and son at homes, and the friendship between ruler and subject out of homes. In daily life, when man gets together or has chance meetings, there are different appellations for the elder, the old and the young. When man is cheerful, there are music and dance, through which his feelings are expressed; when man is in a happy mood, he may do others a favor to make people intimate and friendly with each other. These have shown that human being is honorable.¹⁷

In view of the importance of man's state to the social stability, the neo-Confucianists (a Confucian school of idealist philosophy of the Song and Ming Dynasties) in the Song Dynasty propagated that "'Tian Li'" (heavenly principle) should be upheld, but Man's desires should be restrained". In the meantime, they had demonstrated philosophically the values that Man was superior to all other creatures in the world. Zhou Dunyi, one of the neo-Confucianists had said,

When the two kinds of 'Qi' (Yin and Yang) intermixed, the various things were created. The various things continued to reproduce endlessly with countless changes. However, only Man who is given the essence of 'Ying' and 'Yang' is the wisest among the myriad beings.¹⁸

Secondly, the Confucian humanistic theory had gained a foothold in the secular world, and shown concern to Man's life with positive and down-to-earth attitude. Because the importance of Man was stressed, Man's priority over the Supernatural Beings was advocated, and the theory that the rulers could win "Tian Ming" through people's will was promoted in the humanistic ideas in ancient China, the Confucian humanistic theory had established its foothold in the practical world. They held that Man may actively participate in the social life and they took an avoidance or skeptical attitude towards Supernatural Beings, therefore, Confucius "had never commented on those things which were grotesques, monstrous,

¹⁴"Jin Xin" (Exhausting All His Heart) (Book 1) in *Mencius*.

¹⁵"Tai Shi" (The Great Declaration) in *Mencius*.

¹⁶"Jin Xin" (Exhausting All His Heart) (Book 3) in *Mencius*.

¹⁷"Dong Zhongshu Zhuan" (The Biography of Dong Zhongshu) in *Han Shu (The History of Former Han Dynasty)*.

¹⁸*Tai Ji Tu Shuo (An Explanation of the Diagram of the Great Ultimate)*.

disorderly and mysterious”,¹⁹ and had also explicitly stated that “(Man) may stay at a respectful distance from the Supernatural Beings”,²⁰ because “while you do not know life, how can you know about death” and “while you are not able to serve men, how can you serve their spirits”.²¹ Mozi also held the idea that Supernatural Beings were “like the compasses to the wheelwright and the square to the carpenter”,²² and he thought that they were the tools used by man.²³ So, the above ideas had shown that in the Spring & Autumn Period and the Warring States Period when there were wars and annexations, Man’s role was greatly highlighted so that people’s real life was valued by all of the schools of thought and the affairs of human life were stressed with down-to-earth attitudes. However, as to the mysticism of afterlife, it was excluded from consideration, though its existence was fully realized. As a result, the development of humanistic ideas was actively promoted, which had become a lightspot of “Bai Jia Zheng Ming” (the contention of a hundred schools of thought).

According to the Confucian humanists, the great distinction between Man and animals lay in the aspects that Man was a highly intelligent animal with a sense of morality. Confucius said, “Benevolence is the nature of humanity”, which had indicated the moral nature of benevolence possessed by Man. Therefore, only when the moral cultivation of man himself was paid attention to, could the value of Man be represented. Mencius had fully developed Confucius’ ideological thoughts and created the theory of “Si Duan” (four cardinal virtues): “Ren” (benevolence), “Yi” (justice), “Li” (rites), and “Zhi” (wisdom), which had clearly distinguished Man from beasts. In his view, since “Ren” (benevolence), “Yi” (justice), “Li” (rites), and “Zhi” (wisdom) were deeply rooted in Man’s mind, Man had possessed innate goodness. So, what was the so-called moral cultivation could be achieved by cultivating Man’s innate good nature. Mencius’ ideas were also shared by Xunzi, who had explicitly expressed that:

Fire and water possess ‘Qi’ (pneuma) but have no life. Plants and trees possess life but lack senses. Birds and beasts have senses but lack a sense of morality and justice. Human beings not only possess ‘Qi’ (pneuma), life, senses, but also a sense of morality and justice, so it is for this reason that they are the noblest beings in the world.²⁴

Here, Xunzi had distinguished Man from animals by the concept of “Yi” (justice), which was also shared by the Confucianists. Mencius said, “He would not commit a single act contradictory to the requirements of justice, nor execute one innocent man, even though he might thereby obtain the empire, he would not do it”.²⁵ In view of the fact that “the nature is the principle”, Zhu Xi, a neo-Confucianist in the

¹⁹ “Shu Er” (Transmitting) in *Lun Yu (The Analects)*.

²⁰ “Yong Ye” (a chapter in *Lun Yu*) in *Lun Yu (The Analects)*.

²¹ “Xian Jin” (Men of Former Times) in *Lun Yu (The Analects)*.

²² *Ibid.*

²³ “Tian Zhi” (The Will of Heaven) (Book 2) in *Mozi*.

²⁴ “Wang Zhi” (The Royal Regulations) in *Xunzi*.

²⁵ “Gong Sunchou” (a disciple of Mencius) (Book 1) in *Mencius*.

Song Dynasty, had argued that “Heaven gives birth to all men and teaches them the truth of “Ren” (benevolence), “Yi” (justice), “Li” (rites), and “Zhi” (wisdom)”.²⁶

From above, it could be inferred that in the Confucian philosophy, “Ren” (benevolence), “Yi” (justice), “Li” (rites), and “Zhi” (wisdom) were believed to be naturally born and they were the fundamental differences between Man and animals. The aim of human life was to achieve the moral standard that could make Man to be a true Man, and the main process of the struggle in human life was that Man kept trying to be the moral models of the society through self-cultivation and then he could spread his own thoughts to the society so that an ideal world in which “everyone is loved” and “everyone will be devoted to benevolence” would be established. Confucius had said, “Treat others as you want to be treated”;²⁷ and that “the benevolent man helps others to make the achievements which he wishes to achieve for himself; he helps others to reach goals which he wishes to reach for himself.”²⁸ And Mencius also said, “Honor the aged of other people as we honor our own, take care of the young of other people as we take care of our own”.²⁹ What the two masters had said implied that what Man needed was not only the self-cultivation, but the responsibility to popularize the self-cultivation that had acted as a standard to adjust the interpersonal relationships. Besides, their words not only had reflected the idea that “benevolence embodies love”, but also had shown their purposes of making “the whole world devoted to benevolence”.

Lastly, in the relationship of the integrity of “Tian Ren” (Heaven and Man), the playing of Man’s subjective initiative was greatly valued. The thought of the integrity of “Tian Ren” (Heaven and Man) had originated from the pre-Qin Dynasty, but it was not explicitly expressed until the Song Dynasty when Zhang Zai, a neo-Confucianist put forward his own concept:

Confucian scholars attain sincerity from honesty, and attain honesty from sincerity so as to achieve the integrity of ‘Tian Ren’ (Heaven and Man). Greatest accomplishment of learning could make a person a sage, and ‘Tian (Heaven) could be obtained with no loss of (the Way of) Humanity.³⁰

Although “Tian” (heaven) was opposed to Man, “Tian” (heaven) and Man were closely interwoven. As an individual, Man was closely linked to nature which had continuous reproduction and bred in an endless succession. It was “Tian” (heaven) that gave birth to the countless varieties of lives on Earth, which was described as “‘Da De’ (the great morality) of ‘Tian Di’ (heaven and earth) is giving birth to life”,³¹ and that “giving birth to life is the way of ‘Tian Di’ (heaven and earth)”.³²

²⁶Zhu Xi, *Yu Shan Jiang Yi (Lecture Notes in Yu Shan Mountain)*.

²⁷“Yan Yuan” (Yan Hui, common name Zi Yuan, was a favorite among the Disciples of Confucius) in *Lun Yu (The Analects)*.

²⁸“Yong Ye” (a chapter in *Lun Yu*) in *Lun Yu (The Analects)*.

²⁹“Liang Hui Wang” (The King of Liang Hui) (Book 1) in *Mencius*.

³⁰“Qian Cheng” (A chapter in *Zheng Meng*) in *Zheng Meng* (A book by Zhang Zai in Song Dynasty).

³¹“Ji Ci Zhuan” (The Biography of Ji Ci) in *Zhou Yi* (or named *Yi Jing: The Book of Change*).

³²“Er Cheng Ji” (The Collection of Cheng Brothers) in *Yi Shu (The Posthumous Papers)* (Book 1), Vol. 2.

According to those ideas, even the ethical and moral standards were created by “imitating the brilliant luminaries of ‘Tian’ (heaven) and absorbing the nature of ‘Di’ (Earth)”, which was further explained by the following:

There were ruler and minister, high and low, in imitation of the distinctive characteristics of ‘Di’ (earth); there were husband and wife, with the outdoor and indoor spheres as their respective duties; there were father and son, elder and younger brother, aunt and sister, maternal uncles and aunts, father-in-law and connections of one’s children with other members of their mother’s family, and brothers-in-law so as to resemble the bright luminaries of ‘Tian’ (heaven).³³

The Confucianists believed that “‘Tian’ (heaven) also had an extremely perfect moral value. In Mencius’ view, “sincerity is ‘Tian Dao’ (The Way of Heaven)”, and “to think how to be sincere is ‘Ren Dao’ (the Way of Human).”³⁴ Zhang Zai said, “If ‘Tian Ren’ (Heaven and Man) are separated from each other, sincerity can not be attained; if ‘Tian Ren’ (Heaven and Man) are understood as different issues, honesty can not be attained. A sincere and honest Man is the person whose nature was closely integrated with ‘Tian Dao’ (The Way of Heaven).” He also said, “The integrity of Man’s nature and ‘Tian Dao’ (The Way of Heaven) lies in sincerity.”³⁵ Here, Zhang Zai had not only pointed out the integrity of “knowing ‘Tian’ (heaven) and knowing Man”, but also the identity of “‘Tian Dao’ (The Way of Heaven) and ‘Ren Dao’ (the Way of Human), which was a significant development of Mencius’ thoughts on the question as well as his viewpoint that “he who has exhausted all his mental constitution knows his nature, and knowing his nature, he knows ‘Tian’ (heaven).”³⁶ Therefore, in the Confucianists’ view, only when Man had raised his consciousness of mind and his wisdom, and had promoted his internal nature of morality, could he communicate effectively with ‘Tian’ (heaven). Hence, to know ‘Tian’ (heaven), what Man needed to do was to depend on himself rather than on the outside world, which was so expressed that “all things are already prepared in us. There is no greater delight than to be conscious of the sincerity on self-examination”.³⁷

As the performer of the “‘Tian De’ (heavenly virtue), Man should not passively accept what was given by Nature, but should actively and positively bring his own subjective initiative to a full play. Both of Xunzi’s view of “regulating ‘Tian Ming’ (the Mandate of Heaven) and applying it” and Zhang Zai’s “studying the relationship between ‘Tian’ (heaven) and ‘Ren’ (Man) and exploring the changes of the ancient and present times” meant to establish a harmonious relationship where the virtue of “‘Tian (heaven) and ‘Ren’ (Man) could integrate through Man’s active activities. In this sense, Man was referred to as the performer of “‘Tian De’

³³“Zhao Gong Er Shi Wu Nian” (The 25th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

³⁴“Li Lou” (Book 1) in *Mencius*.

³⁵“Cheng Ming” (Sincerity and Brightness) in *Zheng Meng (A Book by Zhang Zai in the Song Dynasty)*.

³⁶“Jin Xin” (Exhausting All His Heart) (Book 1) in *Mencius*.

³⁷*Ibid.*

(heavenly virtue), and “Ren Dao” (the Way of Human) was identical with “Tian Dao” (The Way of Heaven). In the interrelationship between Man and Nature, in order to harmonize and balance this relationship and to follow the life order in nature, what Man needed to do was not only to establish “a harmonious world under ‘Tian’ (heaven) with his humanity”, but also to “praise ‘Tian Di’ (heaven and earth) for the nourishment of Man” and to “establish principles for ‘Tian’ (heaven) and ‘Di’ (Earth)”.³⁸

2.2 Traditional Chinese Law Influenced by Humanistic Ideas

Humanism, as the philosophical foundation of ancient Chinese legal culture, had a profound influence on Chinese traditional law. In other words, Chinese traditional law had strong humanistic overtones.

2.2.1 “*De Zhu Xing Fu*” (Employing Moral Teaching as the Primary Means, Punishment as the Supplement) and Laying Stress on Moralization

The ethnical relationships and man’s morality greatly valued by Humanism and shown in Chinese traditional law had formed the legal mode of “*De Zhu Xing Fu*” (employing moral teaching as the primary means, punishment as the supplement) which had been applied since the Western Zhou Dynasty. The rulers of the Western Zhou, after learning a lesson from the previous Shang Dynasty which had “lost the blessings and fortune in its early stage due to the deprivation of the reverence for morality”³⁹ adopted the strategy of “‘Ming De Shen Fa’ (promoting virtue and being prudent in the infliction of punishment), not daring even to mistreat widowers and widows”.⁴⁰ Here, “Ming De” meant to advocate and to show respect to virtue and to value the importance of people; “Shen Fa” meant to execute punishment appropriately and to avoid “imposing the punishment or the death penalty on the innocent carelessly”. So, “Ming De” was viewed as the spiritual discipline of “Shen Fa” (prudent infliction of punishment); while “Shen Fa” was the embodiment of virtue in law. The humanistic idea of “Ming De” and “Shen Fa” shown in the early Zhou Dynasty had laid stress on the affairs of personnel and the lives of people. On the basis of this idea, a set of legal principles of “inflicting punishment prudently”, and “carrying out punishment with mercy” were established, such as “having different

³⁸Zhang Zai, “Xi Ming” (A part of “Qian Cheng” in *Zheng Meng*).

³⁹“Zhao Gao” (The Announcement of Duke Shao) in *Shang Shu (The Book of Historical Document)*.

⁴⁰“Kang Gao” (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*.

in inflictions of punishments”, “no punishment in doubtful cases”, and “inflicting no punishments on the people over seventy-year-old”, and so forth.

Because in the Qin Dynasty, the rulers had “burned old and classic books, carried out severe punishments, put craftiness and power prior to benevolence, morality, honesty and justice, and had regarded devilry and brutality as the ways to govern the state”,⁴¹ the empire collapsed soon after the second emperor ascended the throne. From this historical tragedy, the rulers of the Western Zhou Dynasty had learned some experience and drawn a conclusion: “if the people are led by virtue, virtue will be widely spread and the people will be friendly and happy; if the people are intimidated by punishments, the punishments will be severer and there will be a decline in people’s morality”⁴²; “if punishments are accumulated, people will complain and rebel and if ‘Li’ (rites) and ‘Yi’ (justice) are accumulated, people will be in peace”. They had also realized that if “Li” (rites) and “Yi” (justice) were employed to govern the state, “the throne will be passed down from one generation to another”; and that if punishment was mainly employed to govern the state, “the ruler will not only bring trouble to himself, but also bring death to his descendants”.⁴³ Based on such thoughts, the legal system of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) was more completely established, with the result that moral teaching was taken as the primary value orientation between the two strategies of governing state: penalty and morality. In the reigns of Wendi and Jingdi (two emperors of Han Dynasty, 180 B.C.–141 B.C.), the corporal punishments were completely abolished, which had shown the attention paid to the bodies and the lives of people. Such humanistic spirit was highly praised in history books.

If the advocating of the legal mode of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) was viewed as an experiential summary of the previous dynasties by the rulers in the Western Dynasty and Pre-Han Dynasty, Dong Zhongshu’s statements about “De Zhu Xing Fu” in the middle of the Western Han Dynasty could undoubtedly be viewed as a theoretical argumentation.

With his theory of “interactions between ‘Tian’ (heaven) and ‘Ren’ (man)” and the theory that “‘Yin’ and ‘Yang’ (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive) are inseparably interconnected in the world”, Dong Zhongshu argued that the legal system of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) was in accordance with “Tian Dao” (The Way of Heaven). He said:

The Greatness of ‘Tian Dao’ (The Way of Heaven) is ‘Yin’ and ‘Yang’. ‘Yang’, which acts as ‘De’ (virtue), provides, while ‘Yin’, which acts as ‘Xing’ (punishment), deprives. Therefore, ‘Yang’ always exists in summer when it produces and nurtures all the things; ‘Yin’ always exists in winter when it is kept and is of no use. This has demonstrated that ‘Tian’ (heaven) employs ‘De’ (virtue) but not ‘Xing’ (punishment). ..., the ruler is blessed

⁴¹ Jia Yi, “Guo Qin Lun” in *Xin Shu (New Writings)*.

⁴² “Jia Yi Zhuan” (The Biography of Jia Yi) in *Han Shu (The History of Former Han Dynasty)*.

⁴³ Ibid.

by 'Tian' (heaven) to deal with the affairs, so he should employ 'De' (virtue) instead of 'Xing' (punishment). ..., thus, employing punishment to govern the state is against 'Tian Yi' (the will of Heaven), therefore, none of the previous rulers would like to do so.⁴⁴

Dong Zhongshu's theories had provided a theoretical framework for the sovereigns in the later times to establish a much more completed legal mode of "De Zhu Xing Fu" (employing moral teaching as the primary means, punishment as the supplement).

As to the complementary relationship between "De" (virtue) and "Xing" (punishment), it was clearly pointed out by Zhou Gong (the Duke of Zhou) when he gave a warning to Kang Shu: "I tell you the rules about 'De' (virtue) in the use of 'Xing' (punishment)".⁴⁵ In other words, what he meant was to use "De" (virtue) in the infliction of "Xing" (punishment) for the purpose of reducing the pressure in employing punishment. In the meanwhile, he advised that through "righteous punishments and death penalty", the effect of punishment should be enhanced and the reverence for "De" (virtue) should be built up. Just as what Zhou Gong (the Duke of Zhou) had said, "Only when people show reverence to 'Wu Xing' (the five forms of punishments in ancient China, i.e. "Mo": tattooing on the face or forehead of the offenders with indelible ink, "Yi": cutting off the nose, "Fei": cutting off the left or right foot or both feet, "Gong": castration, and "Da Bi": the capital punishment) should 'San De' (the Three Virtues: "De": intelligence; "Ren": benevolence; "Yong": courage which was put forward by Confucius) be fully exhibited", and that "the criminal officials should exercise the punishment among the people in exact adaptation to each offence in order to teach people to show reverence to 'De' (virtue)".⁴⁶ A classical expression about the complementary relationship between "De" (virtue) and "Xing" (punishment) could be found in "Ming Li" (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*):

'De' (virtue) and 'Li' (rites) are the essence of politics and moralization, while 'Xing' (punishment) is the practical application. Like night and day forming one day, spring and autumn forming one year, and only when 'De' (virtue), 'Li' (rites) and 'Xing' (punishment) correlate with each other, will they form a complete unity.

Zhu Yuanzhang, the first emperor of the Ming Dynasty, who had learned that "'Li' (rites) and 'Yue' (music) in peaceful time are comparable in function to the luxuriant and delicious food, and the punishment for preventing evil doings is to the herbal remedies",⁴⁷ had declared that the national strategies should be made in order to "moralize 'Li' (rites) to give guidance to the people and to make up regulations to have the wickedness punished".

⁴⁴"Dong Zhongshu Zhuan" (The Biography of Dong Zhongshu) in *Han Shu* (*The History of Former Han Dynasty*).

⁴⁵"Kang Gao" (The Orders of Duke Zhou to Kang Shu) in *Shang Shu* (*The Book of Historical Document*).

⁴⁶"Lv Xing" (The Penal Code of Lv) in *Shang Shu* (*The Book of Historical Document*).

⁴⁷*Ming Tai Zu Shi Lu* (*Records of Ming Tai Zu*), Vol. 162.

From the above, it could be inferred that the legal mode of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) had been widely shared by the ancient rulers. But in practical application, on the one hand, the rulers had striven to nip the attempt of committing crimes in the bud through publicizing “De” (virtue) and “Li” (rites), which was reflected in what Su Zhuo’s had said in Northern Zhou Dynasty:

Teaching people filial piety and fraternal duty will enable them to be kind; teaching people the virtues of benevolence and obedience will enable them to live in harmony; teaching people the principles of rites and righteousness will enable them to respect each other. ... the ruler will be successful if people are enabled to do all these three things.⁴⁸

On the other hand, great importance was attached by the rulers to performing the educational function of the law itself, which was named “Ming Xing Bi Jiao” (integrating punishment with moral teachings). Either the system of “Jia Shi” (a penal servitude) in the Western Dynasty, or the promulgation of *Lv Ling Zhi Jie* (*Interpretations of Laws and Regulations*), or the publication of the fourth edition of *Da Gao* (*The Great Announcement*), or the establishment of “Shen Ming Ting” (an office set up to mediate the civil disputes) in the early Ming Dynasty, they were all the typical demonstrations of “Ming Xing Bi Jiao” (integrating punishment with moral teachings). “Ming Xing Bi Jiao” and “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) were closely interrelated and furthermore, “Ming Xing Bi Jiao” was a further development of “De Zhu Xing Fu”.

2.2.2 *Rejecting the Adjudication of the Supernatural Beings and Stressing Evidence in Court*

In ancient China, court trials were once made according to the will of the Supernatural Beings on account of the underdeveloped science and technology and the people’s limited knowledge. For example, in the oracle inscriptions of the Shang Dynasty on tortoise shells or animal bones, there were words of divination: “the divination (shows) the decision which the king has made is not right” and “the divination (shows) the decision which the king has made is right”⁴⁹; “this oracle is to divine whether this man shall be punished”⁵⁰; “this oracle is to divine whether this man shall be punished by ‘Yue Xing’ (cutting his foot or hand), and “this oracle is to divine whether this group of men shall be punished by ‘Yue Xing’ (cutting his foot or hand)”⁵¹. These oracle inscriptions showed that in order to get the support from the religious authority for the practical legislation and judicial application, the rulers

⁴⁸ “Su Zhuo Zhuan” (The Biography of Su Zhuo) in *Zhou Shu* (*The Book of Zhou Dynasty*).

⁴⁹ *Yin Xu Wen Zi Yi Bian* (*A Collection of the Characters of Yin Xu*), p. 4604

⁵⁰ *Yin Qi Yi Cun* (Collections of Contracts in Qin Dynasty), p. 850.

⁵¹ *Kao Gu* (*Archeology*), Vol. 3, 1973, p. 114.

had instilled the idea of respecting the will of the Supernatural Beings into the thoughts of the people. However, when humanism germinated at the time of the Western Zhou Dynasty, the decisions of court trials began to break away from the shadow of the Supernatural Beings, meanwhile, great importance was attached to the evidence in court, and gradually the rules of adjudication named “Shi Ting Wu Ci” (judging the statements of plaintiff and defendant by five ways) were used. In the article of “Xiao Si Kou” (the junior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*, it was described that “in order to understand the feelings of the people, five methods shall be adopted when dealing with the criminal charges and litigations: first, “Ci Ting” (judging the statements of plaintiff and defendant through their uses of words); second, “Se Ting” (through their facial expressions); third, “Qi Ting” (through their breathing); fourth, “Er Ting” (through their immediate responses); fifth, “Mu Ting” (through the look in their eyes).”⁵² Especially, in the civil actions, much attention was paid to the importance of physical evidence for legal liabilities: “in all civil cases, decisions shall be made according to the testimonies of “Di Bi” (neighbors); in all cases where there are disputes over housing estates, decisions shall be made according to the evidence of the “Tu” (maps) of the houses”⁵³; and “in all cases where there are disputes over properties, decisions shall be made according to “Fu Bie” (contracts of loan) and “Yue Ji” (contracts in the Western Zhou Dynasty) that have been signed”.⁵⁴ In these descriptions, the words “Di Bi” (neighbors), “Tu” (maps), “Fu Bie”(contracts of loan) and “Yue Ji” (contracts in the Western Zhou Dynasty)” all referred to the documentary evidence. Later on, with more application of evidence, some regulations were laid down, which had required that any facts that had not been verified could not be used as the evidence for court judgments, and it was called “Wu Jian Bu Ting” (if there were no relevant stipulations, the cases shall not be accepted and heard).⁵⁵ These stipulations had attached much importance to the value of human beings, which had reflected the scientific development and progress of ancient Chinese legal civilization.

In the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.), with the formation of the system of humanistic ideology, the strong overtones of secularization that had shown much care for the value of human beings and the issues in secular world were shown in the legal culture. For instance, during these periods, laws were considered as the man-made regulations but not the representation of the will of the Supernatural Beings. Besides, the philosophers began to explain the origin of law from a realistic point of view. In Shang Yang’s opinion, “in the days of antiquity, before there were kings and ministers, superiors and inferiors, the people were in disorder and were not well

⁵²“Xiao Si Kou” (the junior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

⁵³“Xiao Si Tu” (the assistant of ‘Si Tu’) in “Di Guan” in *Zhou Li (The Rites of Zhou Dynasty)*.

⁵⁴“Qiu Guan” (Ministry of Penalty) in “Shi Shi” (the official in charge of criminal affairs) in *Zhou Li (The Rites of Zhou Dynasty)*.

⁵⁵“Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)*.

administered, so the sages had made a division between the noble and the humble, had regulated ranks and positions, and established titles and appellations in order to distinguish the status of kings and ministers, of the superior and the inferior . . . , as there were more and more people, wickedness and depravity appeared, so laws and regulations were established and weights and measures were created in order to get rid of them.”⁵⁶

Similarly, Xunzi also said, “When the material goods are inadequate to satisfy everyone, contention is certain to emerge, which is bound to produce civil disorder and lead to poverty. Because such disorders were abhorred by the ancient kings, regulations, ritual practices, and moral principles were instituted in order to create proper social class divisions.”⁵⁷ In those philosophers’ opinions, the sages and ancient kings were the first law-makers. Even though such ideas were not scientific, they undoubtedly had embodied a historic progress, because they had shown their efforts to move out of the shadow of the Supernatural Beings. In fact, in the process of the implementation of laws, the dominant position of the Supernatural Beings in the judicature of the western countries had never existed in the legislation of ancient China.

From Eastern Han Dynasty (25 A.D.–220 A.D.), the native Taoism kept flourishing and finally became a national religion, at the same time, Buddhism also reached China via the overland routes of the Silk Road. However, because either Taoism or Buddhism was merely used as the important means of enforcing the autocratic ruling, once the power of such religions had extended and threatened the stability of the government, they would surely be cracked down immediately and forcefully. During the reigns of Emperor Jing Zong (824 A.D.–826 A.D.) and Emperor Wen Zong (827 A.D.–840 A.D.) in the Tang Dynasty, a plan to eliminate Buddhism was fermented when the temples of Buddhism took the advantage of the rebellion of An Lushan and Shi Siming to extend their manors, evade taxes, and bring harm to the national interest. Finally, in the reign of Emperor Wu Zong (840 A.D.–846 A.D.), “more than 4,600 monasteries . . . , 40,000 temples and shrines were destroyed, thousands of hectares of temple lands were confiscated, and more than 150,000 “Nu Bi” (the slave girls and maidservants) were officially changed into tax-payers to pay summer and autumn taxes”.⁵⁸ Soon afterwards, Buddhism began to decline in China.

During the reign of Emperor Kangxi in the Qing Dynasty (1735 A.D.–1796 A.D.), the Roman Pope asked Kangxi to forbid Chinese Christians to worship Confucius, but he was flatly refused. Afterwards, the emperor even issued instructions to order the Christians to stop their missionary work. He said:

Those foreigners are all villains, how can they understand our principles? Besides, none of those foreigners have a good knowledge of Chinese books. So, what they say and what they comment are ridiculous. Today I met the envoys who came to convey the information, but they turned out to be monks and Taoist priests. Undoubtedly, they are the same with the

⁵⁶“Jun Chen” (Kings and Ministers) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁵⁷“Wang Zhi” (The Royal Regulations) in *Xunzi*.

⁵⁸“Wu Zong Ben Ji” (The Biography of Emperor Wu Zong) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*), Vol. 18.

heresies of small religions, and what they talk about is no more than rubbish. From this day on, the foreigners are forbidden to do their missionary work in China in order to avoid more troubles.⁵⁹

In short, although both Taoism and Buddhism had influenced the emperors' administrative strategies at different times, they had never entered the legislation areas. The canon laws and the Inquisitions, which had existed in the feudal period of western countries, had not existed in ancient China. Therefore, in ancient China, the great wisdom and the rational thinking of human beings were accurately reflected either in the legislations or in the judicial applications.

2.2.3 Being Benevolent and Prudent in the Use of Punishment and Cherishing Human Life

After Confucius had created the doctrine of “Ren Xue” (the doctrine of benevolence) that centered on the idea of “Ai Ren” (Loving People), Mencius brought the essence of “Ren” (benevolence) into the areas of political and ideological field and formed the systematic theory of “Ren Zheng” (Benevolent Administration), which had become a guiding principle and an ideal aim for the administration of the rulers in later generations. In history, the enlightened rulers had all boasted that their rulings “are of benevolence; therefore, they have loved the people and paid great attention to customs”.⁶⁰ In Han Dynasty (180 B.C.–157 B.C.), the corporal punishments were abolished by Emperor Wen, and in Northern Wei Dynasty (471 A.D. – 499 A.D.), “‘Men Fang Zhi Zhu’ (the penalty of killing the whole clan) was abolished by Emperor Xiaowen”. The purpose of abolishing those severe punishments was to show the “importance of people’s lives”⁶¹ and to make clear to all that their governments were benevolent and prudent in the use of punishments.

It was pointed out by Wei Zheng, a well-known minister in the early period of the Tang Dynasty, that “‘Ren Yi’ (benevolence and righteousness) are the essentials of ‘Li Xue’ (Neo-Confucianism); while punishments are the non-essentials”; therefore, “the sages had always shown respect to virtue and rites but shown despise to punishments”.⁶² Learning from the lessons in history, Emperor Taizong of the Tang Dynasty (626 A.D.–649 A.D.) had concluded that “historically, when benevolent

⁵⁹*The Documents about the Relationship between Emperor Kangxi and Roman Envoys*, photocopy, compiled by The Palace Museum, Quoted from Xie Xuanjun, “Christianity and Chinese Culture – An Analysis of Religion, Science, and Political Culture” in *Sheng Jing Xin Yu* (Book 2), Zhuo Yue Publishing Company of China, 1989.

⁶⁰“Xing Fa Zhi” (The Record of the Criminal Law) in *Xin Tang Shu* (The History of New Tang Dynasty).

⁶¹“Gaozu Ji” (The Biography of Emperor Gaozu) in *Wei Shu* (The History of Northern Wei Dynasty).

⁶²“Gong Ping” (Impartiality) in *Zhen Guan Zheng Yao* (Essentials about Politics from Zhen Guan Reign).

strategies were adopted by the emperors to govern their countries, their regimes would last long; but when punitive measures were adopted by them, though they could help the empires to stay out of trouble temporarily, their regimes would soon be overthrown.”⁶³ So, guided by the principles of “Ren Yi” (benevolence and righteousness), punishments and death penalties were carried out by the emperors of the Tang Dynasty with much prudence. Compared with *Sui Lv* (*Sui Code*), ninety two items of the death penalty were abolished, seventy one items of the punishments of exile were changed into penal servitude, and the stipulation that “if one has committed an offence, both the offender himself and his brother will be given the death penalty” was completely abolished from *Zhen Guan Code* (in the Tang Dynasty). In the first year of “Zhen Guan” (626 A.D.), Emperor Taizong of the Tang Dynasty had also initiated a system of “Jiu Qing Yi Zhi” (nine-minister tribunal), and a decree was issued by him which ordered that “from this day forward, the cases involving ‘Da Bi’ (the capital punishment) shall be discussed by the officials of ‘Zhong Shu Men Xia’ (the supreme organization in charge of the state affairs in ancient China) who were above the fourth rank and the nine ministers of ‘Shang Shu’ (the Department of Secretary)”.⁶⁴ It could be seen that such strict working procedure of investigation and reviewing had influenced the feudal legal system for thousands of years after the Tang Dynasty.

In order to get rid of the malpractices existed since “Wu Dai” (the Five Dynasties (907 A.D.–960 A.D.) that the army men usually abused their legal powers to make court decisions, it was stipulated in the early years of the Song Dynasty (960 A.D.–1279 A.D.) that “the judicial officials must be the learned men of Confucianism and must be benevolent”.⁶⁵ In addition, it was also stipulated that the measure called “Zhe Zhang Method” should be put into practice, according to which “those punishable by exile shall be exempted from a long journey, those punishable by penal servitude shall be exempted from laborious work, and those punishable by “Chi” (flogging with light sticks) and “Zhang” (flogging with heavy sticks) shall be given fewer strokes of beating.”⁶⁶ It was shown in the historical development that the benevolent administration had played an important role in easing the social crisis and stabilizing the imperial governments.

The ancient humanistic principles which had advocated benevolence and prudence in punishment and stressed the value of people’s lives were also shown in the following aspects:

1. Showing pity to the old, the orphan, the female and the disabled. In the Western Zhou Dynasty, a criminal policy which was succeeded by the later generations was made like the following:

⁶³“Ren Yi” (Benevolence and Righteousness) in *Zhen Guan Zheng Yao* (*Essentials about Politics from Zhen Guan Reign*).

⁶⁴“Xing Fa” (The Criminal Law) in *Zhen Guan Zheng Yao* (*Essentials about Politics from Zhen Guan Reign*).

⁶⁵“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu* (*The History of Sui Dynasty*).

⁶⁶Shen Jiaben, *Xing Fa Fen Kao* (*Separate Textual Research on Penal Law*).

When one is at eighty or ninety, he is called 'Mao' (very old) and when one is seven, he is called 'Dao' (an object of pitying love). If such an old man or such a child has committed crimes, they are not subjected to punishments.⁶⁷

In the reign of Emperor Hui of the Han Dynasty (195 B.C.–183 B.C.), a decree was issued by the emperor: "men who are 80 of age or older, or children who are 10 years of age or younger shall not be subject to punishments, even though they are guilty or punishable with crimes".⁶⁸ In the reign of Emperor Jing of Han (157 B.C.–147 B.C.), it was instituted that "those who are 80 years of age or older, or who are 8 years of age or younger, or who are pregnant..., if they are punishable with imprisonments, they shall be imprisoned without cangues".⁶⁹ In the reign of Emperor Xuan of Han (74 B.C.–49 B.C.), it was stipulated that "those who are 80 years of age or older, unless they have committed the crimes of defamation or murder, shall not be punishable with any crimes".⁷⁰ It was instituted in the reign of Emperor Ping of Han (1 B.C.–5 A.D.) that "females who are pregnant, males who are 80 years of age or older, or 7 years of age or younger should not be punished unless their families are charged with monstrous crimes, or unless the order of the arresting is given by the imperial court".⁷¹

The above mentioned legal stipulations, which showed pity on the old, the orphan, the female and the disabled, became established in the Tang Dynasty after they were induced and summarized by the law-makers in Wei and Jin dynasties. It was stipulated in *Tang Lv (Tang Code)* that "those who are 70 years of age or older, or 15 years of age or younger, or who are 'Fei Ji' (the crippled) ..., can redeem their punishments", and that "if those who are 80 years of age or older, or 10 years of age or younger or disabled have committed crimes involving rebellion, sedition, or homicide punishable by the death penalty, they can present petitions to the emperor for remitting. If they have robbed or injured people, they can also redeem their punishments."

It was also stipulated in *Tang Lv (Tang Code)* that "those who are 90 years of age or older, or 7 years of age or younger shall not be punished, even though they are punishable by the death penalty,"⁷² and that "the females shall not be sent to exiles even though they are punishable. However, the females who have used magical inscriptions and magical incantations to curse or poison others or animals are punishable by life exile to a distance of 2,000 *li* plus the punishment of 'Zhang' (flogging with heavy sticks) for 60 times according to law. They shall have 20 more stokes of beating and 3 years of forced labor when their punishments are one degree severer." According to the stipulations, "those who are 70 years of

⁶⁷"Qu Li" (The Summary of the Rules of Propriety) (Book 1) in *Li Ji (The Book of Rites)*.

⁶⁸"Hui Di Ji" (The Biography of Emperor Hui) in *Han Shu (The History of Former Han Dynasty)*.

⁶⁹"Xing Fa Zhi" (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)*.

⁷⁰"Xuan Di Ji" (The Biography of Emperor Xuan) in *Han Shu (The History of Former Han Dynasty)*.

⁷¹"Ping Di Ji" (The Biography of Emperor Ping) in *Han Shu (The History of Former Han Dynasty)*.

⁷²"Lao Xiao Ji Ji You Fan" (Crimes Committed by the Aged, Juvenile or Disabled) in "Ming Li" (Statutes and Terms) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

age or older, or 15 years of age or younger, or disabled, and who are punishable by exile shall be exiled to the place without being forced to do the forced labor”,⁷³ and that “if pregnant females are punishable by the capital punishment, they shall be executed one hundred days after they have given birth to their babies.”⁷⁴

As to the disabled, they were divided into three categories according to *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*:

The person who has one blind eye, or two deaf ears, or the person who has lost two fingers, or three toes, or thumbs and big toes, or the person who is bald with scalp favus, or who has serious, persistent fistula, or goiter in the neck and the like, is called ‘Can Ji’ (the handicapped). The person who is unintelligent, or dwarf, or hump-backed, or who has one damaged limb or the like, is called ‘Fei Ji’ (the crippled). The person who is nastily diseased, or demented, or who has lost two limbs, or his eyesight or the like, is called ‘Du Ji’ (the incapacitated).⁷⁵

The legal cases involving ‘Fei Ji’ (the crippled) or ‘Du Ji’ (the incapacitated) should be either settled with redemption or be reported to the emperor for the final decision. Take *Da Qing Lv Li (The Laws and Precedents of Great Qing)* as an example:

If those who are 70 years of age or older or 15 years of age or younger or ‘Fei Ji’ (the crippled) have committed crimes punishable by life exile or lighter punishments, they may redeem their punishments. If those who are 80 years of age or older or 10 years of age or younger or ‘Du Ji’ (the incapacitated) have committed crimes involving homicides or other actions punishable by death penalty, they can present petitions to the emperor for remitting. If they have robbed or injured people, they can also redeem their punishments. For all other crimes, they shall not be punished. As for those who are 90 years of age or older, or 7 years of age or younger, even though they have committed crimes punishable by death penalty, they shall not be punished.” It was also stipulated that “those who are aged, or who are the juvenile, or disabled, or who can redeem their punishments in accordance with regulations, shall be exempted from being cangued (cangue: a wooden collar like stocks used to restrain and punish criminals), or shall redeem their punishments if they are punishable by the punishment of ‘Zhang’ (flogging with heavy sticks)”, and that “if those who are healthy and young when they committed the crimes but have become aged and sick after the crimes are discovered, they shall be judged according to the provisions on the aged or the sick.”⁷⁶

The stipulations mentioned above had shown that those categorized in ‘Fei Ji’ (the crippled) and ‘Du Ji’ (the incapacitated) were allowed to pay redemptions if they had committed the crimes punishable by exile, and these stipulations had become traditions since the Tang Dynasty and had been continuously developed

⁷³“Lao Xiao Ji Ji You Fan” (Crimes Committed by the Aged, Juvenile or Disabled) in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

⁷⁴“Fu Ren Huai Yun Fan Si Zui” (Crimes punishable by Death Penalty Committed by Pregnant Women) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

⁷⁵Noboru Niida, *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing, et al, Chang Chun Publishing House, 1989, p. 136.

⁷⁶“Lao Xiao Fei Ji Shou Shu” (Redeeming Punishments by the Aged, Juvenile or Crippled) and “Fan Zui Shi Wei Lao Ji” (Committing Crimes before Being Aged or Sick) in “Ming Li Lv” (Statutes and Terms) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

and perfected. In ancient China, the legal regulations of lenient and prudent punishments upon the vulnerable groups, such as the old, the young, the female, and the disabled remained unchangeable and were passed down from one dynasty to another, which had not only shown the national spirit of helping the old, the young, the female, and the disabled, but also reflected the humanistic care and embodied “Ren Zheng” (Benevolent Administration) and the humanistic principles in the criminal law. These traditional and long-existing stipulations are rare in world legal history; therefore, they can be viewed as one of the characteristics of Chinese legal system.

2. Limiting inquisition by torture. In ancient China, due to the backward techniques of investigation, in the process of litigation, the testimony was usually obtained by the means of torture in making court decisions. However, influenced by the humanistic principles that had given favorable publicity to “valuing the human life”, some limitations on torture had been imposed in laws. For example, it was regulated in *Kai Huang Lv* (*The Code Made in the Year of Kai Huang*) in the Sui Dynasty that “the strokes of ‘Zhang’ (flogging with heavy sticks) for the prisoners should not exceed more than two hundred times. The length and the width of the stick and the size of cangues are fixed and the executor of the beating shall not be changed halfway during the inquisition.”⁷⁷ Besides, there were more provisions in *Tang Lv* (*Tang Code*). For example, “when interrogating the prisoner, the official shall investigate the case according to the concrete situation. He shall carefully compare and verify the confessions given by the prisoner. If doubts still remain and further investigation is still needed, the case shall be on file for the joint adjudication before an inquisition was undertaken.” Moreover, the prisoner should not be inquired more than three times by torture, and there must be 20 days of interval between each inquisition. The total strokes of beating should not exceed 200 times. Those who were 70 years of age or older, or 15 years of age or younger, or disabled, or pregnant should not be punished by torture. In the fourth year of Zhen Guan, a decree was issued by Emperor Taizong: “the prisoner shall not be beaten on the back”, but on the buttocks.⁷⁸ In “No Torture on the Old and the Young” in the section of “the Judgment and Imprisonment” in the chapter of “The Penal Law” in *Da Ming Lv* (*The Great Ming Code*), it was regulated that “those who are 70 years of age or older, or 15 years of age or younger, or disabled shall not be punished by torture and their cases shall be decided by the testimonies provided. If this regulation is violated, the judges shall be charged with intentional exonerating the guilty or implicating the innocent.”
3. Limiting the power of making decisions of death penalty. In the reign of Emperor Wen of the Sui Dynasty (581 A.D.–604 A.D.), in view of the intensified social contradictions caused by the abuse of power in making decisions of death penalty in “Zhou” (subprefecture) “Jun” (prefecture) and “Xian” (county), the following stipulations were made: “those charged with the death penalty in the

⁷⁷“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu* (*The History of Sui Dynasty*).

⁷⁸“Taizong Ben Ji” (The Biography of Emperor Taizong) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*).

court of ‘Zhou’ (subprefecture) shall not be executed immediately”, moreover, “those charged with death penalty should not be executed by the local courts in ‘Zhou’ (subprefecture) or ‘Xian’ (county), and all the cases shall be transferred to ‘Da Li’ (The Supreme Court) to be reviewed. Afterwards, the cases shall be further reported to the emperor for the final decisions”; and “those charged with the death penalty shall not be executed until three memorials have been presented to the emperor for the final decisions”.⁷⁹ Through such stipulations, the power of making the death penalty was controlled in the hands of the emperor. Additionally, in order to make it clear that human life should be highly valued, rules were strictly set to regulate the procedures for presenting memorials to the emperor consecutively for the reviews of the cases. It was regulated in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that “the cases charged with death penalty shall all be reported to the emperor by three consecutive memorials and shall be decided by the emperor himself”; “those who carry out the death penalty without presenting memorials to the emperor shall be punished by life exile to a distance of 2,000 *li*”. In Tang Dynasty, the number of the memorials presented consecutively was changed from three to five by Emperor Taizong, and a decree was issued by him: “from this day forward, after reviewed by ‘Men Xia’ (the subordinates of the local magistrates), if anyone is punishable by the death penalty in accordance with the provisions of law, but can be forgiven under extenuating circumstances, the case should be put on file and reported to the emperor”. Because a series of measures like valuing human life, imposing punishment with prudence, and ruling the state by law had been taken in the early periods of Tang Dynasty, a flourishing age of “Zhen Guan Zhi Zhi” (Excellent Governance during Zhen Guan Reign) appeared. After Tang Dynasty, the dynasties of Song, Yuan, Ming and Qing retained the reviewing system of death penalty, and especially in the Qing Dynasty, the “Qiu Shen”(Autumn Assizes)system was established for the carrying out of the death penalty, which had significantly protected people’s lives and rectified the misjudged cases.

4. Giving a lenient punishment to the doubtful cases and judging cases in accordance with law. As early as the Xia Dynasty (2033 B.C.–1562 B.C.), the adjudicatory principle that “it is better to release a felon than execute an innocent person” was summarized,⁸⁰ which was the earliest expression of the idea of “giving a lenient punishment to the doubtful cases”, and which could be regarded as the origin of the principle of innocence presumption in China. Since Xia Dynasty existed long time ago in history, and there were few historical materials about that period, it was difficult to do textual researches about the adjudicatory principle in that period from many aspects, however, when it came to the early period of the Western Zhou Dynasty (1046 B.C.–771 B.C.), such principles had become specified in legislations. It was regulated in “Lv Xing” (The Penal

⁷⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu* (*The History of Sui Dynasty*).

⁸⁰“Xiang Gong Er Shi Liu Nian” (The 26th Year of the Duke of Xiang) in *Zuo Zhuan* (*The Chronicle of Zuo*).

Code of Lv) in *Shang Shu (The Book of Historical Document)* that “if a case is doubtful according to the principles of ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment), the person involved shall be pardoned; if a case is doubtful according to the principles of ‘Wu Fa’ (the five penalties: the five punishments lighter than ‘Wu Xing’, which could be redeemed by ransom money), the person involved shall be pardoned”, and “if a case is doubtful, it should be leniently punished; if a crime is intentionally judged as a felony, the punishment should be changed”. So, these regulations had clearly shown that human life was greatly valued. It should also be pointed out that the idea of innocent presumption which had emerged as early as the eleventh century before Jesus Christ and which was quite similar to the modern one was rather rare in the word legal history. Additionally, based on this idea, from the Jin Dynasty (265 A.D.–420 A.D.), the system of making judgments in accordance with statute laws and enforcing punishments in accordance with statutory penal codes began to be developed. Liu Song in the Jin Dynasty had proposed that “punishments should be given in accordance with the provisions in laws..., while the conducts which are not covered by the provisions should not be punished” and his proposal was widely accepted. In *Tang Lv (Tang Code)*, more stipulations were added: “The punishments must be given in accordance with the formal provisions in laws, and the judges who have violated the rules shall be punished by ‘Chi’ (flogging with light sticks) for thirty strokes.” Such stipulations had concisely and accurately epitomized the principle of giving punishment in accordance with law in the feudal times of China. However, in the feudal times, “Yin Lv Bi Fu” (legal analogy: to refer to the ex-regulations and make the similar sentence at trials) had not only destroyed the legal system in which the punishments were given in accordance with law, but also negated the principle of innocent presumption in penal law.

5. Carrying out the death penalty in particular seasons and granting amnesty in compliance with “Tian Yi” (the will of Heaven). Dong Zhongshu had formulated the theories “Tian Ren Gan Ying” (interactions between Heaven and Mankind) and had put forward the proposal of “Ze Tian Xing Xing” (carrying out death penalty in particular days), which had shown great respect to human and human life. He said:

There are four seasons in a year, and the ruler has four ways of governance. . . ., which are shared by ‘Tian’ (heaven) and ‘Ren’ (Man). Celebration is held in spring, appreciation in summer, punishment is enforced in autumn, and execution in winter. In spring, all living things are produced by ‘Tian’ (heaven), which is also what a benevolent king loves to do. In summer, all living things are growing with the help of ‘Tian’ (heaven), which is also what a virtuous king loves to do. In frosty days, all living things are killed by ‘Tian’ (heaven), and that is why a king takes execution as a punishment. These ways are shared both by ‘Tian’ (heaven) and ‘Ren’ (Man) and applied in the ancient and present times.⁸¹

⁸¹“Dong Zhongshu Zhuan” (The Biography of Dong Zhongshu) in *Han Shu (The History of Former Han Dynasty)*.

The principle that “a king may follow the seasons of the year to exercise his power of punishing or pardoning people”⁸² was clearly elaborated by Dong Zhongshu. In the principle, the reverence of “Tian” (heaven) was made use of to reduce the obstruction of killing people by the rulers, and it had also positively shown the rulers’ respect to human life, which was in compliance with the will of people. Therefore, his advocacy for carrying out execution in autumn and winter was widely accepted by the rulers in later dynasties. In Han Dynasty, Zhuge Feng, who had suggested that “executions may be carried out in the seasons of spring and summer”, was strongly criticized by the emperor because he was considered as “a man who had chosen harsh punishments and tyranny for the false reverence, with ignorance of the conformity to the seasons and the principles of law”.⁸³ At that time, even the brutal officials did not dare to violate the rules or to carry out an execution against the public opinions. In Han Dynasty, in the September of the fourth year of Empire Wu, Wang Wenshu, a “Du Wei” (a military officer below the general) of Guang Ping, was appointed to be the “Tai Shou” (the prefecture chief) in Hanoi. Soon after he arrived, he started to arrest and imprison the bullies and the unruly people, and then held trials and carried out executions. Consequently, “the people who had committed serious crimes, their relatives and the people who had committed minor crimes were all executed”. However, when the spring of the next year came, he had to suspend all the executions because of the established rules. Consequently, he regretted and exclaimed by stamping his feet, “Alas! If only the winter had lasted one more month, I would have finished killing all the bullies here!”⁸⁴ In Eastern Han Dynasty (25 A.D.–220 A.D.), in order to ease the increasingly social contradictions, the period allowing for execution was shortened to 1 month by Emperor Zhang, and then the month of October was particularly chosen. For this reason, a decree was issued by Emperor Zhang which stated that:

In ‘Yue Ling’ (Monthly Orders), there are regulations about the fostering of the birth of new lives by obeying the natural laws after the Winter Solstice, but not about punishments or executions. All the information I have got from the scholars and ancient books is that the wise kings should govern the country in accordance with the pattern of seasons. Therefore, from today on, it should be ruled in law that all executions are suspended in November and December.⁸⁵

In Tang Dynasty, the system of “carrying out the death penalty in autumn and winter” was systematized and written into laws. According to *Tang Lv Shu Yi* (*The Comments on Tang Code*), “the official who has carried out execution between spring and autumn shall be imprisoned for one year.” In Qing Dynasty, it was

⁸²“Zhang Di Ji” (The Biography of Emperor Zhang) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

⁸³“Zhuge Feng Zhuan” (The Biography of Zhuge Feng) in *Han Shu* (*The History of Former Han Dynasty*).

⁸⁴“Wang Weishu Zhuan” (The Biography of Wang Wenshu) in “Ku Li Zhuan” (The Biographies of Brutal Officials) in *Han Shu* (*The History of Former Han Dynasty*).

⁸⁵“Zhang Di Ji” (The Biography of Emperor Zhang) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

provided that “every year during the time of January, June, ten days before the Winter Solstice and five days before the Summer Solstice, all immediate executions or executions in ‘Qiu Shen’ (autumn assizes) or in ‘Chao Shen’ (palace assizes) shall be suspended.”⁸⁶

In addition to “carrying out death penalty in particular days”, another rule of “granting amnesty in compliance with ‘Tian Yi’ (the will of Heaven)” had also been adopted since the Han Dynasty. Whenever the natural phenomena or disasters occurred, such as earthquake, solar eclipse, comets and so on, they were all regarded as the warning from “Tian” (heaven) for the failure of government, the injustice in legal punishments or the conducts against people’s will. If the natural disasters did occur, the prisoners should be re-interrogated and amnesty should be granted in order to comply with “Tian Yi” (the will of Heaven). Such action of “granting amnesty in compliance with ‘Tian’ (heaven)” had not only provided a way for the rulers to publicly show their great awe to “Tian” (heaven) and their conformation to the will of “Tian” (heaven), but also to win the honor of “Ren Zheng” (Benevolent Administration). It was a method which the rulers adopted to deal with the crisis and to maintain the public morale during their rulings, but it had also substantially destroyed the legal system in the feudal society.

2.3 Reflections on Humanistic Ideas in the Traditional Chinese Law

The traditional humanistic ideas in China started to burgeon in 1,000 B.C. and to take shape gradually after the belief of “Tian Dao” (The Way of Heaven) was beginning to be doubted in the Shang Dynasty. As far as the time was concerned, compared with the emergence of humanistic ideas in European countries, Chinese humanistic ideas appeared more than 2000 years earlier. Furthermore, in the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.), after being expounded by Confucianists and other schools of thoughts, man’s status in the universe and his social value of were acknowledged, the his moral nature and the relationship between “Tian” (Heaven) and “Ren” (Man) were fully discussed, and some legal principles for protecting human lives and maintaining human dignities were formed. The humanism during the time, with a wide scope of vision and rich connotations, had clearly shown that China, as an ancient civilization, was far advanced in legal culture. After Han Dynasty, the humanistic legal culture with Chinese characteristics was not only fully grown and reflected in many aspects such as the legislative and judicial systems, but also became one of the symbols of the Chinese legal system. In addition, the humanistic ideas, to some extent, had deepened the understanding of the self-value of the people and also stirred up people’s initiative in production and social lives, thereby, avoided the social

⁸⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*).

conflicts and improved the relationship between the people and the state. In this sense, humanism was one of the essential factors for the appearance of the times of peace and prosperity.

The traditional humanism in China, however, was a feudal one and its positive effects were very limited under the historical conditions where much value was placed upon the public rights instead of private rights, upon state, patriarchal clan system and families instead of individuals, and upon obligations instead of rights. On the other hand, in the Confucian humanistic theories, there were also some negative elements which were contradictory to humanism itself.

Firstly, although the Confucianists had gained a foothold in the secular world and refused to believe in the other world, restricted religions and theology to be created, grown and developed in ancient China and prevented the western canon law from playing suppressive roles in the ancient society, they did not, and even could not, completely shake off the yoke of “Tian” (heaven). On the contrary, they had taken advantage of the deterrent effects of “Tian” (heaven) to serve the practical politics and laws, and to especially speak in defense of the monarchical power. For instance, the Confucianists had advocated that “the gentleman is the triadic partner of ‘Tian Di’ (heaven and earth), the summation of the myriad of things, and the parents of the people”,⁸⁷ and that “the sages made music in response to ‘Tian’ (heaven), and framed ceremonies to match ‘Di’ (Earth)”.⁸⁸ In Confucian classics, “gentlemen” and “sages” were synonyms of “monarchs”, so, Ban Gu had explicitly expressed that “the emperor is the son of ‘Tian Di’ (heaven and earth)”.⁸⁹ As the core of “San Gang” (three cardinal guides), the idea that “emperor guides subjects” was always exaggerated as a “Tian Li” (heavenly principle) after Han Dynasty; therefore, those who were against this principle were considered to be against “Tian” (heaven) and they must be punished severely. Consequently, the autocratic monarchy was consolidated and strengthened by such public opinions, which had led to the absence of restrictions on the monarchical powers. Hence, it was easy to understand why it was difficult to lay a foundation of democratic politics needed in the modern times in China.

Secondly, the Confucianists had advocated that “the foundation of all under ‘Tian’ (heaven) is the state, and the foundation of the state is the family”. The purpose of these words was to make a defense for the family-oriented system. For this reason, in the Confucian humanistic ideological system, human beings existed in different “categories”, and their value was represented by their identities of family members, so there was no significance for the existence of any independent individuals. The Confucianists had claimed that people should “serve the senior ministers and nobles outside the homes, and the father and elder brothers at home”,⁹⁰ which was the basic requirement for people in ancient China. In the field of law, the patriarchal clan organizations or patriarchs were the principal parts in legal relation, and the

⁸⁷“Wang Zhi” (The Royal Regulations) in *Xunzi*.

⁸⁸“Yue Ji” (The Record of Music) in *Li Ji (The Book of Rites)*.

⁸⁹Ban Gu, *Bai Hu Tong (The Introduction of Bai Hu)*.

⁹⁰“Zi Han” (an official in Song State) in *Lun Yu (The Analects)*.

individuals in families could not be involved in the various legal relationships as independent subjects. For example, it was stipulated in *Song Xing Tong* (*The Penal Code of Song Dynasty*) that “when the patriarchs are alive, their sons, grandsons, brothers and nephews are not allowed..., to sell their land and houses.” Obviously, in the traditionally family-oriented society, the individuals could scarcely obtain their independent legal status.

Thirdly, according to the theory of Confucian humanism, in order to have a harmonious relationship between man and nature and between man and society, the basic requirement made for a decent person was to eradicate his desires for material possession through moral self-examination and self-cultivation. In the society with the strong humanistic moral atmosphere, the primary value orientation of an individual was the maintenance of the state and social order, the loyalty and filial piety to his ruler and father, and the duties of his family. As for the individual interests, it was not respected at all under the pressure of the public opinions of “stressing the public while showing contempt for the private”. Especially, in the doctrine of “Wu Wo” (non-self or Anatman) preached in the Confucian philosophy in the Song (960 A.D.–1279 A.D.) and the Ming Dynasty (1368 A.D.–1644 A.D.), the legality of individual interests was further denied, which had made it difficult for the view of authority centering on the individual interests to be formed in the particular social surroundings where “the distinctions between the superior and the inferior, the noble and the humble” were rigidly maintained. Of course, there were many reasons for the duty-orientation of ancient Chinese law, but the negative influence of Confucian humanism should not be underestimated.

In short, the Confucian humanistic ideology was formed in an enclosed agricultural society, so, its rationality and limitations were inseparable from the traditional conditions of the nation. After Opium War, Confucianism was greatly impacted by the economic development of the national capitalism and the demands for “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival). From safeguarding “San Gang” (three cardinal guides) to its criticism, from the sacredness of “autocratic monarchy” to “democratic republic”, from “duty-orientation” to “right-orientation”, the traditional and human-oriented humanism in which the principle of “promoting virtue and being prudent in the infliction of punishments” was adhered was inevitably to be replaced by a new trend of thoughts in which the divinity of human rights, democracy and “Fa Zhi” (the ruling of law) were greatly valued.

Chapter 3

Rights Differentiated, Duty as a Standard

The traditional law in ancient China, characterized by being a protection for the unequal social relationships, was a prerogative law determined by the hierarchical class system. The privileges entitled by the traditional law were in conflict with the requirement for the impartiality of law which was a measure of value for the general evaluation of law, but it had limitations in times and social classes. Although the stipulations about the scope of privileges in the traditional law were limited, they were legal. The two opposite parties in this conflict were consistent under given conditions: the traditional law was inseparable from impartiality, while the law of impartiality was maintained by the power of the privileged. For this reason, the law, on the one hand, was a regulator for the whole society, on the other hand, was a guarantee for the privileged.

3.1 Differentiated Legislation

The social relations in the feudal times of China were composed of different social hierarchies, and such hierarchies with publicly admitted unfairness were also reflected in law and were referred to as “Liang Jian Yi Zhi” (different rules for the noble and the humble), which meant that the punishments imposed upon people varied according to their different social status, though those people had committed the same crime. Clearly, the requirement for impartiality in the traditional Chinese law was very limited in scope. Take the Tang Dynasty as an example, the emperor, who was at the top of the hierarchy, was a ruler predominant over any laws and “was mandated by ‘Tian’ (heaven) to govern the land on earth”. He could make or change the laws at any time when he thought it was necessary, or simply settle the cases through his own instructions. In order to maintain the overwhelming authority of the emperor, strict countermeasures against the behaviors of overstepping the status of the ruler and the ministers had been provided by law: the ministers should fully comply with the ritual and administrative regulations and should not violate them;

otherwise, they were subject to the punishment by “Zhang” (flogging with heavy sticks) for 100 strokes; the ministers were not allowed to borrow or to use the objects belonging to the emperor, the violators should be punishable by penal servitude for 3 years; the ministers should not domineer over the military or political matters: “those who have not presented memorials to the emperor about the affairs that ought to be presented, or who have presented memorials to the emperor about the affairs that ought not to be presented, shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes”.¹ Moreover, “if the death penalty is executed before a reply for the petition is received from the emperor, the judge shall be punished by life exile to a distance of 2,000 *li*”,² and “if more than ten soldiers are dispatched without authorization, the offenders shall be punished by penal servitude for one year; if less than one hundred, the offenders shall be punished by penal servitude for one year and a half; if more than one hundred, the offenders shall be punished one degree severer; if ten hundred, the offenders shall be punished by strangulation”.³ The ministers should pay respect for the emperor and should not violate the rules of etiquette. If the officials had accidentally broken the taboo against the reference to the imperial ancestors when issuing reports or presenting memorials to the emperor, they should be punished by “Zhang” (flogging with heavy sticks) for eighty strokes; if the officials had refused to follow the orders of the emperor, they should be punished by strangulation; if the ministers had concealed his relative’s crimes of offending the emperor, they shall be punished by life exile or death penalty. Besides, within the crimes of “Shi E” (The Ten Abominations) prescribed in the law codes, four were about the crimes against the emperor, and in the feudal times, the violation of filial duty was a serious felony, but the offending the emperor was a even more serious crime. According to *Tang Lv* (*Tang Code*), the sons and grandsons were prohibited from suing their grandparents or parents; “Bu Qu” (the private army) and “Nu Bi” (the slave girls and maidservants) were prohibited from suing their masters; otherwise, the offenders would be hanged. However, if these people had sued their relatives or masters for plotting rebellion, great sedition, or treason, they would be pardoned. Such regulations were made to tell people that the emperor was more important than the relatives of the common people and that the state was more important than the individual family.

Below the emperor, there was another ruling class composed of aristocrats and the bureaucrats who had enjoyed the legal privileges of tax and corvee exemption, the inheritance of the official titles and the sheltering of their relatives. If the privileged had committed crimes, they were not punished in practice, and their

¹“Without Memorializing Matters that ought to be Memorialized, or Memorializing Matters that ought not to be Memorialized” in “Zhi Zhi” (The State Office System) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

²“Si Qiu Fu Zou Bao Jue” (Memorials to the Emperor about Convicts Sentenced to Death) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

³“Zhu Shan Fa Bing” (Dispatching Military Troops without Authorization) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

punishments could be mitigated or exempted through various methods, such as “Yi” (deliberation: cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (petition: cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree), “Jian” (mitigation: except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree), “Shu” (redemption) or “Guan Dang” (redeeming one’s official position for the atonement for a crime), etc.

The “deliberation” mentioned above were the so-called “Ba Yi” (The Eight Deliberations): the cases which involved “Huang Qin” (Relatives of the Emperor), “Yi Gu” (the Old Retainers of the Emperor: including those who had been in the emperor’s service for a long period of time), “Yi Xian” (the Morally Worthy: including worthy men or superior men whose speech and conduct were greatly virtuous and may be taken as a model for the country), “Yi Neng” (the Great Ability: including people of great talent), “Yi Gong” (Great Achievement: including those of great achievement and glory), “Yi Gui” (the High Position: including all active duty officials of the third rank and above), “Yi Qing” (the Diligence: including military and civil officials who have displayed great diligence in their work through thorough occupation of public affairs), and “Yi Bin” (the Guests of the State: to treat the descendants of previous dynasties as guests of the state who could enjoy a legal privilege). If the aristocrats and bureaucrats enjoying the privilege of “Ba Yi” (The Eight Deliberations) had committed crimes (except the crimes of “Shi E”: The Ten Abominations) and if the crimes were punishable by the penalties rating lighter than life exile, they might have their penalties reduced one degree from that for the common people; if the crimes were punishable by capital punishment, their mitigation should be discussed by the groups of officials in accordance with their status and the crimes which they had committed, and then the cases should be reported to the emperor for decisions. The system of “Ba Yi” (The Eight Deliberations) had originated from *Zhou Li* (*The Rites of Zhou Dynasty*), but as far as the legal regulations were concerned, they could be seen in the codes of the Wei and the Jin dynasties. In *Tang Lv Shu Yi* (*The Comments on Tang Code*), the detailed interpretations for the “Ba Yi” (The Eight Deliberations) were given:

What we call the ‘Ba Yi’ (The Eight Deliberations) today is referred to as ‘Ba Bi’ (the eight conditions for mitigating punishments) in the Zhou Dynasty. It is regulated in *Zhou Li* (*The Rites of Zhou Dynasty*) that ‘criminal law does not apply to senior officials’. If the senior officials have committed crimes, the cases shall be discussed according to the rules of ‘Ba Yi’ (The Eight Deliberations) and shall be presented to the emperor for final judgment. In this case, no matter how serious the punishments are given, they are not enforced by the penal law. The people enjoying the privilege of ‘Ba Yi’ (The Eight Deliberations) are the relatives of the emperor, or the people who have been in the emperor’s service for a long period of time, or who are of great talents, or who are of great achievement and glory, or who are favored by the emperor, or who have made great contributions to the glory of the emperor’s family. If these people have committed the capital offence, their cases shall be deliberated and reported in memorials before the final decisions are made by the emperor

himself. The judicial organs and officials dare not carry out the punishments without authorization. Such regulations are made by the emperor to pay respects to his relatives and the people of great virtue, to express his admiration for the honored guests of the state, and to show the high praise to the people of great talents.⁴

The people who had enjoyed the privilege of “Qing” (petition: cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) included the relatives of “Da Gong” (the person wearing the mourning apparel of soft sackcloth in the third mourning degree) of the crown prince’s dauphines or the relatives above that mourning degree, the people enjoying the “deliberations” and their grandchildren, and all active “Wu Pin” (the fifth rank) officials and above. If these people had committed crimes punishable by life exile or below, their punishments could be reduced one degree. If they had committed crimes punishable by the capital offence, their cases should be presented in memorials to the emperor for the final decision. The people who had enjoyed the privilege of “Jian” (mitigation) included the “Qi Pin” (the seventh rank) officials and above and the relatives of those who had been given the privilege of “Qing” (petition: cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree). If these people had committed crimes punishable by life exile or below, their punishments could be reduced one degree. The people who had enjoyed the privilege of “Shu” (redemptions) included the “Jiu Pin” (the ninth rank) officials and above and the relatives of the “Qi Pin” (the seventh rank) officials. If these people had committed crimes punishable by life exile or below, their punishments could be redeemed. In fact, even the death penalty could also be redeemed, and in *Tang Lv (Tang Code)*, the amount of ransom money for the redemption of each crime was clearly stipulated. The privilege of “Guan Dang” (redeeming one’s official position for the atonement for a crime) was given to the ordinary officials, according to which, the officials could give up their titles to atone for their crimes. For instance, an official could use his official title of “Wu Pin” (the fifth rank) to atone for his “private crime” punishable by penal servitude for two years, or to atone for his “public crime” punishable by penal servitude for three years. If this official had a concurrent post, he should firstly use his higher title to atone for the crime, and then the lower; if the official in a high rank had committed a minor offence, he could keep the position but should pay the redemption; if the official in a lower rank had committed a serious felony, he should give his title up and pay the redemption and if a person had lost his title because of the atonement, he could be employed as an official again 1 year later, but with a title one rank lower. In *Tang Lv (Tang Code)*, there were stipulations about the officials being dismissed from their posts: “the officials dismissed from their posts can atone for their crimes punishable by penal servitude for two years, the officials dismissed from their (current) posts can atone for their crimes punishable by penal servitude

⁴“Ba Yi” (The Eight Deliberations) in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

for one year”,⁵ and the officials dismissed from their posts could be employed as officials with the titles of one rank lower. Xue Yunsheng in the Qing Dynasty (1644 A.D.–1912 A.D.) had stated that “it (*Tang Lv*) has been made meticulously to show great respects to the subjects”.⁶ Clearly, *Tang Lv* (*Tang Code*), which had included the rules of “Yi” (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) and “Jian” (except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree) and “Mian Guan” (dismissing from official position), was a law made for the protection of the privileged aristocrats and the bureaucrats. Thus, under the protection of those stipulations, the aristocrats and the bureaucrats could possibly evade the punishment of death penalty, penal servitude and life exile.

Additionally, according to *Tang Lv* (*Tang Code*), if “Jiu Pin” (the ninth rank) officials and above had committed the crimes punishable by life exile, they were not subject to “laborious work”, though they should “be sent into life exile in accordance with law”; if “Qi Pin” (the seventh rank) officials and above had committed crimes, they were not subject to shackles and tortures, and their cases should be adjudicated according to the obtained testimonies and if “Wu Pin” (the fifth rank) officials and above had committed the crimes (not involving the commission of any of the Ten Abominations) punishable by the capital penalty, they might be enforced an order to have a permission to “commit suicide at home” instead of being put to death on the execution ground. Obviously, *Tang Lv* (*Tang Code*) was instituted in order to protect the special legal status and rights of the officials and to clearly distinguish the officials with the common people.

The common citizens in *Tang Lv* (*Tang Code*) were also called “Liang Ren”, “Fan Fen”, “Chang Ren”, “Bai Xing” and “Bai Ding”, and they were the major agents of social production mostly composed of land-holding farmers. Apart from the farmers, there were still large numbers of handicraftsmen and small businessmen, who had independent legal entities and legal rights, and who were under the obligation to pay taxes, to enlist in the army, and to defend against military aggression, but who were not entitled to any legal privileges.

In *Tang Lv* (*Tang Code*), “Jian Min” (rabbls or people of lower social status) mainly referred to “Nu Bi” (the slave girls and maidservants) in government offices and private homes. Besides “Nu Bi” (the slave girls and maidservants), “Guan Jian” (official slaves) also included “Guan Hu” (criminals and their relatives registered as slaves in official households), “Gong Yue Hu” (criminals and their families

⁵“Dismissing, Exemption, and Penal Servitude” in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁶Xue Yunsheng, *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*), China Law Press, 1999, p. 24.

registered as musicians), “Za Hu” (families registered as workers) and “Tai Chang Yin Sheng” (musicians serving in Tai Chang Bureau). These people, all belonging to the government offices, had served in different governmental departments. Besides “Nu Bi” (the slave girls and maidservants) in private homes, “Si Jian” (private slaves) also included “Bu Qu” (the private army) who was in the possessions of their masters. The social status of “Nu Bi” (the slave girls and maidservants) both in government offices and the private homes were the lowest, and legally, they were considered as the possessions the same as “the properties” and “the animals” with no independent human entities. Moreover, “Guan Hu” and “Gong Yue Hu” which were included in “Guan Jian” (official slaves) and “Bu Qu” which was included in “Si Jian” (private slaves) had slightly higher social statuses than “Nu Bi” (the slave girls and maidservants), because they could not be disposed of randomly like “the properties” by their masters. Both “Zai Hu” and “Tai Chang Yin Sheng Ren”, like “Liang Ren” (the decent people), had enjoyed similar rights to the common people. For example, they were entitled to the ownership of farmlands in accordance with the numbers of people in their families; nevertheless, they should return the farmlands to the government before they became old.

According to *Tang Lv* (*Tang Code*), “Jian Min” (rabble or people of lower social status) was not allowed to be promoted to be officials even through examinations. In marriage, they could only marry some other “Jian Min” with equal social status and marriages with “Liang Ren” (the decent people) were forbidden. If fighting between “Jian Min” and “Liang Ren” occurred, different punishments would be imposed upon them: if “Jian Min” was offended by “Liang Ren”, “Liang Ren” would be given a lighter punishment, while if “Liang Ren” was offended by “Jian Min”, “Jian Min” would be given a more severe punishment. Even if “Bu Qu” (the private army) and “Nu Bi” (the slave girls and maidservants) were freed by their masters and became common people, they were still “Jian Min” (rabble or people of lower social status) in the eyes of their ex-masters. It was stipulated in the article of “‘Bu Qu’ (the private army) and ‘Nu Bi’ (the slave girls and maidservants) Cursing Their Masters” in “Dou Song Lv” (Laws on Affrays) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that:

In all cases in which the ex-masters have been cursed and offended by ‘Bu Qu’ (the private army) or ‘Nu Bi’ (the slave girls and maidservants), they are subject to penal servitude for two years; if they have beaten their ex-masters, they are subject to life exile to a distance of 2,000 *li*; if they have injured their ex-masters, they are subject to death penalty by strangulation; if they have killed their ex-masters, they are subject to decapitation; if they have injured or killed their ex-masters negligently, they are subject to the same penalty as that for the common people. However, if the ex-masters have beaten and injured their former ‘Bu Qu’ (the private army), their penalty shall be reduced by two degrees than that for the common people; if the ex-masters have beaten and injured their ‘Nu Bi’ (the slave girls and maidservants), their penalty shall be reduced by two more degrees; if the ex-masters have injured or killed their former ‘Bu Qu’ (the private army) or former ‘Nu Bi’ (the slave girls and maidservants) negligently, they are not exempted from death penalty.

The different penalties imposed upon “Liang Min” (the decent people) and “Jian Min” (rabble or people of lower social status) had existed not only between

the masters and the servants, but also between the distant relatives (excluded in “Wu Fu”: people within the five degrees of mourning) of the masters and the masters’ servants. The difference in penalties had shown the different legal status of “Liang Min” (the decent people) and “Jian Min” (rabblies or people of lower social status). As to the disputes over property between “Liang Min” and “Jian Min”, which had nothing to do with personality, the penalties would be carried out in accordance with the rules for common people.

Take Qing Dynasty (1644 A.D.–1912 A.D.) as an example, the Qing dynasty was the time when absolutism was highly developed, and the emperor was not only the only representative of the nation, but also the ruler, the father and the master of people. In this sense, the decrees, regulations, and important affairs of the state were all made and decided by the emperor himself, and everyone was ruled by him, which was called “Qian Gang Du Duan” (emperor’s arbitrary and dictatorial decisions). So, the royalties and aristocrats, who had blood tie with the emperor, shared the statutory privileges with him. According to *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, if the common people had attacked each other but caused no injury, they were subject to the punishment by “Chi” (flogging with light sticks) for 20 strokes; if they had caused injuries, they were subject to the punishment by “Chi” (flogging with light sticks) for 30 strokes; however, if a common people had attacked a nobleman, though no injuries had been caused, the common people was subject to the punishment by “Zhang” (flogging with heavy sticks) for 60 strokes before serving penal servitude for 1 year; if injuries had been caused, the common people was subject to the punishment by “Zhang” (flogging with heavy sticks) for 80 strokes before serving penal servitude for 2 years. In addition to the legal rights, there was almost no limitation for the rights of the noblemen beyond law. For this reason, the noblemen had felt reassured and emboldened to “violate the rules of rites, to break the laws and to run counter to the disciplines”, and in the end “their behaviors are as disgraceful as those of scoundrels in the marketplaces”.⁷

The regulations with regards to “Ba Yi” (The Eight Deliberations) were more detailed in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* than in *Tang Lv (Tang Code)*:

In all cases in which those entitled to ‘Ba Yi’ (The Eight Deliberations) have committed crimes, the cases shall be reported to the emperor in a sealed memorial petitioning an imperial script. Their cases shall not be tried without authorization. If the interrogation is conducted according to an imperial decree, the crimes that are committed should be stated, the circumstances shall be deliberated, and it should be memorialized for permission to deliberate. After the deliberation, memorials of petitioning should be presented for the emperor to be decided. This provision is not applicable to the cases involving atoning for any of the crimes of ‘Shi E’ (The Ten Abominations) (the facts shall be reported to the emperor in a sealed memorial petitioning an imperial script, and the cases shall be deliberated). (Ten Abominations, including Rebellion, Sedition and Treason, etc., are the most abhorrent.

⁷“Discussions of the Cases of Princes, Dukes and Generals who are Subject to Executions or Punishments”, in *Da Qing Hui Dian (The Collected Statutes of Great Qing)*, Vol. 1, Zhong Hua Book Company, 1991. p. 6.

What the criminals have done are not only against morality and ‘Tian Li’ (heavenly principles), but also against ‘Lun Li’ (the rites and rituals of Confucianism). People who have committed the crimes shall be executed in accordance with the imperial law. This is especially stated in order to prohibit such serious criminal activities).⁸

Rules for officials who have committed crimes were also included in the code:

If the junior or senior officials in the capital or in the provinces have committed public or private crimes, reasons for the committed crimes should be listed and reported to the emperor in a sealed memorial. The cases shall not be interrogated without authorization (this provision is applicable to cases involving serious commissions, but not applicable to cases involving light commissions). If interrogation is permitted to be conducted, the settlement for the cases should be put forward according to the law and memorials be presented again, and the judgments and the punishments are not to be carried out until they have been approved by the emperor.⁹

Whether the civil officials and military officers had committed the public crimes or private crimes, they might be punished by “Fa Feng” (a suspension of their salaries as a fine) or the demotions instead of penal punishments.

Since the state of the Qing Dynasty was a regime whose main ruling body was Manchu nationality, the Manchus were entitled to some statutory privileges after they had committed offences. For example, they had the privileges of changing the punishment of “Chi” (flogging with light sticks) to the punishment of whipping, and changing the punishment of military exile to the imprisonment with cangues, etc.

In order to prohibit the common people from defying their superiors and plotting rebellion, other cruel penalties were also administered for the offensive behaviors of the officials in addition to the severe penalties for the abominations of rebellion and sedition. For example, if the local people had beaten “Zhi Fu” (magistrate of a prefecture), or “Zhi Zhou” (subprefectural magistrates), or “Zhi Xian” (magistrate of a county), though no injuries were caused, they shall be punished by “Zhang” (flogging with heavy sticks) for 100 strokes plus penal servitude for 3 years. If injuries were caused, they would be punished by life exile to a distance of 2,000 *li* plus the punishment by “Zhang” (flogging with heavy sticks) for 100 strokes, which was 13 degrees severer than that for the common people. If the local people had cursed and offended the “Zhi Fu” (magistrate of a prefecture), or “Zhi Zhou” (subprefectural magistrates), or “Zhi Xian” (magistrate of a county), they should be punished by “Zhang” (flogging with heavy sticks) for 100 strokes, which was nine degrees severer than that for the common people. These different penalties were carried out for maintaining the status of the officials, with the result that the people were seriously persecuted.

In Qing Dynasty (1644 A.D.–1912 A.D.), there were already clear concepts in law about the distinctions between “Liang Min” (the decent people) and “Jian Min”

⁸“Ying Yi Zhe Fan Zui” (Committing Crimes by Those Who were Entitled to “Ba Yi” (The Eight Deliberations) in “Ming Li” (Statutes and Terms) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

⁹“Zhi Guan You Fa” (Committing Crimes by Officials) in “Ming Li” (Statutes and Terms) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

(rabblés or people of lower social status). It was stipulated in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*) that “the common people are composed of four categories”, namely, “Min” (citizens), “Jun” (military), “Shang” (businessmen) and “Zao” (salt producers). Specifically, the “Min” (citizens) referred to the registered residence; “Jun” (military) referred to the registered military families; “Shang” (businessmen) referred to merchants and their children; “Zao” (salt producers) referred to those who produced salt. In *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), the definition of “Jian Min” was as the following:

“‘Jian Min’ refers to the slaves, servants, prostitutes, actors, actresses and ‘Ya Men’ runners (a government-employed laborer, messenger, etc. in ancient times)”, and “the servants in Ya Men... ‘Zao li’ (Yamen runners: a government-employed laborer, messenger, etc. in ancient times), ‘Ma Kuai’, ‘Bu Kuai’, ‘Xiao Ma’ (these are constables for catching criminals), ‘Jin Zu’ (prison guards) ‘Men Zi’ (doormen), ‘Gong Bing’ (archers), ‘Wu Zuo’ (post-mortem examiners), ‘Liang Chai’ (man-servants in charge of grain) and servants in local government are all included in the category of ‘Jian Min’. The status of ‘Chang Sui’ (servants in governmental departments) is the same as slaves and servants”.¹⁰

And among them, “Nu Bi” (the slave girls and maidservants) was the main component of “Jian Min”.

The unequal legal status of “Liang Min” and “Jian Min” was not only reflected in the different punishments imposed upon them when they committed the same crimes, but also in the prohibitions on intermarriages. If a slave married a woman from a “Jiang Min” family, he would be punished by “Zhang” (flogging with heavy sticks) for 80 strokes and the marriage should be dissolved. If the master of the slave had presided over the marriage, the master would also be punished. In addition, “Jian Min” and their sons and grandsons were not allowed to take the imperial examinations or to buy a diploma, if they had changed their names so as to conceal their identities and to take the imperial examinations or to buy a diploma, they would be expelled from school and “be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred times in accordance with the law”.¹¹ If one had concealed the crime, he would be punished, and the person who was in charge of the imperial examinations at school would also be discharged from his position and be punished.¹²

According to the regulations in *Qin Ban Fu Se Tiao Li* (*Imperial Ordinance on Dress and Personal Adornment*) and *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), “Jan Min” must wear clothes in accordance with their social status so as to have them clearly distinguished from “Liang Min”, and the offenders would be punished.

It could be clearly seen from above that the legal status of different social classes, the relationship between their rights and obligations, and the different applications of the law were stipulated in detail in Qing Dynasty. Obviously, the differences in

¹⁰“Rules for Household Registration in the State” in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), Vol. 17, Zhong Hua Book Company, 1991, p. 142.

¹¹“Rules for Household Registration” in “Rules Made in the 53rd Year of Emperor Qian Long” in *Du Li Cun Yi* (*Questions about the Precedents of Qing Dynasty*), Vol. 1.

¹²“Guang Xu” in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), Vol. 22.

legislation and the impartiality of law had been in conflicts with each other in practice; however, under the particularly political, economic and cultural background in history, those different regulations were not only accepted but also abided by the whole society. As a matter of fact, the people who were endowed with legal privileges and the people who were deprived of legal rights were only the minorities in the society, and the inequality existed between them was the particular “impartiality” which the ruling classes had pursued. In order to exaggerate the authority of such “impartiality”, the ruling classes had made people believe that it was granted by “Tian” (heaven). Even though there was a saying among the people that “even if a prince has broken the law, the punishment he is given should be the same as that given to a common citizen”, however, it turned out to be just a naïve illusion of the people, and it had never been realized in legislations or in judicial practices. For example, once, in the Southern Qi Dynasty (479 A.D.–502 A.D.), after the prince of Badong had killed Liaozuo, a minister named Dai Zengjing spoke in defense of him by saying that “he is the son of the emperor, besides; he has killed that man involuntarily. So, the crime he has committed is nothing serious”.¹³ This was the true records of that time.

3.2 Judicial Privileges

There were many stipulations about the prerogative privileges in judiciary in the ancient Chinese laws, which were succeeded throughout the whole history with changes and modifications. It was regulated the article of “Xiao Si Kou” (the junior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that: “‘Ming Fu’ (male) and ‘Ming Fu’ (female) may not come to court for lawsuits, and their cases may be dealt with by their children or subordinates acting as procurators”. Here, “Ming Fu” (male) referred to “men with titles”, and such stipulations which were viewed as the earliest stipulation for judicial privileges in China were made for “preventing the judicial officials from showing disrespect to the respectable”. In addition, according to records in ancient books, in Western Zhou Dynasty (1122 B.C.–771 B.C.), the applications of laws varied according to the different social status of the parties involved: “the lawsuits of dukes and princes shall be settled in accordance with ‘Bang Dian’ (the state code); the lawsuits which involved ministers and senior officials shall be settled in accordance with ‘Bang Fa’ (the state law); the lawsuits which involved citizens shall be settled in accordance with ‘Bang Cheng’ (the state regulations)”.¹⁴ Here, “Bang Dian”, “Bang Fa”, and “Bang Cheng” referred to three different categories of laws. “Ba Yi” (The Eight Deliberations),

¹³“Dai Zengjing Zhuan” (The Biography of Dai Zengjing) in *Nan Qi Shu (The History of Southern Qi)*.

¹⁴“Da Si Kou” (the senior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

which was instituted in the feudal times and continued to be applied in various dynasties, had originated from “Ba Bi” (the eight conditions for mitigating punishments) in the Zhou Dynasty when the campaign for “enriching the laws with the eight conditions” was promoted so as to make the nobles, the ministers and the senior officials exempted from guilt and punishments.

Additionally, in order to guarantee the men of property exemption from prosecution and punishment, a punitive system of redemption was also established in ancient China, under which the men of property “are able to be exempted from punishments by paying redemption”.¹⁵ “Lv Xing” (The Penal Code of Lv) was a legislation primarily used to deal with redemption, and those specific regulations, though falsified by later generations, had not only established the principles and the measures of redemption, but also reflected the actual historical situation of the Western Zhou Dynasty (1122 B.C.–771 B.C.).

In Zhou Dynasty, if the noblemen had committed crimes punishable by death penalty, the sites for their execution were different from those for the common people. It was recorded in “Zhang Lu” in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that “the corpses of the executed murderers shall be laid out in busy downtown areas for three days, and the thieves and burglars shall be executed in busy streets, and other convicts punishable by the death penalty shall be executed in the same place”. In *Li Ji (The Book of Rites)*, Kong Yingda said, “Those who have the titles of nobility, or who are the relatives of the royal family, or who are senior officials, shall be executed in wilderness far from the downtowns, and their executions shall not be seen by the common people. This is what the sentence ‘the criminal law does not apply to senior officials’ means”.

The principles and the system of judicial prerogative privileges established in the Western Zhou Dynasty (1122 B.C.–771 B.C.) had great influence on the legislation in the later times and had undergone continuous change and development ever since they were instituted. For instance, in Tang Dynasty (599 A.D.–649 A.D.), except for the crimes of rebellion, sedition and treason, etc., the young people were forbidden to sue their elders, and “Nu Bi” (the slave girls and maidservants) were forbidden to sue their masters. If they had insisted doing so, they would be severely punished. It was stated in an imperial edict issued in the second year of Zhen Guan that “from this day forward, if any slave or servant sues his master, he shall be decapitated”. In “Dou Song Lv” (Laws on Affrays) in *Tang Lv (Tang Code)*, it was regulated that “if ‘Bu Qu’ (the private army) and ‘Nu Bi’ (the slaves and maidservants) have sued their masters for the crimes other than rebellion or sedition, they shall be strangulated”. With the establishment of the system of “Ba Yi” (The Eight Deliberations), a special judicial procedure was set for the aristocrat and the bureaucratic, which stressed that such cases would be documented and be presented to the emperor for the final decision, and that no interrogation should be carried out before the final decision was given by the emperor.

¹⁵ “Shun Dian Xiang Xing Shuo” in *Hui’an Xian Sheng Wen Ji (The Collected Works of Master Zhu)*.

In the Song Dynasty (960 A.D.–1279 A.D.), when absolutism became more consolidated, the emperors began to have more legislative power to make decisions. They not only had the power to make decisions on the matters reported to them or on the legal cases of imperial families, but also had the power to mitigate the punishments of the convicts who were charged by the judicial institutions by showing “pity” or forgiving them.

In Qing Dynasty (1644 A.D.–1912 A.D.), the tradition that “‘Ming Fu’ (male) and ‘Ming Fu’ (female) shall not come to court for lawsuits” was continued and further specified: “if officials have disputes over marriages, loans or lands, their cases shall be dealt with by their families acting as procurators, and they are forbidden to submit petitions or go to the court themselves. The offenders shall be punished by ‘Chi’ (flogging with light sticks) for forty strokes”.¹⁶ At the beginning of the Qing Dynasty (1644 A.D.–1912 A.D.) when the Manchu people were outside of Shan Hai Guan Pass, the judicial procedure for the cases of “Zong Shi Jue Luo” (royal families and the emperor’s near relatives) was almost the same as that for the cases of the common people, though the abatement from the penalty was always involved. After Manchus coming into Shan Hai Guan Pass, the old judicial system was gradually changed. Until the ninth year of Emperor Shunzhi, “Zong Ren Fu” (The Imperial Clan Court) was established to be in charge of the legal cases of “Zong Shi Jue Luo” (royal families and the emperor’s near relatives). During the reigns of Emperor Shunzhi and Emperor Kangxi, it was stipulated that “if the princes or their subordinates or other members of the royal clan have committed crimes, they shall be punished by cutting down the number of their servants, or by imposing fines, but not by whipping. They shall not be sentenced to death or imprisoned in ‘Xing Bu’ (Board of Punishment) unless they have been found guilty of rebellion or sedition”.¹⁷ According to *Zong Ren Fu Ze Li* (*The Regulations of the Imperial Clan Court*), all the civil or criminal cases involving members of the clan of “Jue Luo” (the emperor’s near relatives) should be heard by the judicial institutions:

If the cases of marriage or farmland involve the members of imperial clan, the cases shall be heard by ‘Fu’ (referred to ‘Zong Ren Fu’: The Imperial Clan Court) with a joint trial of ‘Hu Bu’ (Board of Revenues). If the cases involve members of ‘Jue Luo’ clan, they shall be heard by ‘Hu Bu’ (Board of Revenues) with a joint trial of ‘Fu’ (the Imperial Clan Court). If the cases of affrays and attacks or killing involve the members of imperial clan, the cases shall be heard by ‘Fu’ (the Imperial Clan Court) with a joint trial of ‘Xing Bu’ (Board of Punishment). If the cases of affrays and attacks or killing involve members of the clan of ‘Jue Luo’ (the emperor’s near relatives), the cases shall be heard by ‘Xing Bu’ (Board of Punishment) with a joint trial of Fu (the Imperial Clan Court).

However, “all the cases shall be documented and presented to the emperor for the final decision, and no interrogation shall be carried out before the final decision is given by the emperor”. This regulation was changed in the 13th year of Emperor Jiaqing, according to which only the cases which were more serious than those involved the crimes punishable by life exile should be presented to the emperor

¹⁶“Xing Lv” (The Criminal Law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

¹⁷*Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), Vol. 10, p. 1.

at any time. If the cases involved crimes punishable by penal servitude, they “shall be transferred to ‘Zong Ren Fu’ (The Imperial Clan Court) and shall be settled by a joint trial of ‘Zong Ren Fu’ (The Imperial Clan Court) and ‘Xing Bu’ (Board of Punishment) in accordance with regulations”, or, they “shall be transferred to ‘Xing Bu’ (Board of Punishment) and then shall be heard in the trial seasons”. And if the cases involved crimes punishable by “Zhang” (flogging with heavy sticks) and “Chi” (flogging with light sticks), they “should be heard and solved in accordance with the regulations without bothering to be presented to the emperor”. Before the 24th year of Emperor Jiaqing, the members of the royal clan did not have to kneel on the floor of the court during the trials, but later on, because the members of the royal clan had become presumptuous and unlawful, the following stipulation was added: “when summoned to attend court hearings, no matter what official ranks the judge holds, (the members of the royal clan) shall kneel on the floor with other common people after having their official caps (which showed their ranks by the precious stones on top) taken off. If they are found innocent after the judgment, they shall take back their official caps”.¹⁸

At the beginning of Qing Dynasty, if the members of the clan of “Jue Luo” (the emperor’s near relatives) or imperial clan had committed crimes, “fines shall be imposed if the crimes are minor, but punishments and imprisonments shall be imposed if the crimes are serious”.¹⁹ In the middle of the Qing Dynasty, “if a nobleman have committed a crime punishable by “Zhang” (flogging with heavy sticks) and “Chi” (flogging with light sticks), or by military exile, or penal servitude, and if he is not law-abiding when attending the court hearing, he shall be cangued and punished in accordance with the law; if he has committed the crime of murder, he shall be removed from the imperial family before being strangled or decapitated in accordance with the regulations for the common people, and his execution shall be suspended temporarily or carried out immediately according to the concrete situation”.²⁰ It was thus clear that, with the development of social relations and the changes of political situation, the last vestiges of the judicial privileges of the noblemen were lost, and they were given the same punishments as the common people.

As to the cases involving “Zong Shi Jue Luo” (royal families and the emperor’s near relatives) which had to be judged by the emperor, the suggestions given by the judicial offices were usually followed, but sometimes some changes would be made. For example, in the 45th year of Emperor Kangxi, “a judgment was made by ‘Zong Ren Fu’ (The Imperial Clan Court) on an idler of the imperial clan named Ru Fu who had killed one of his family members named Kuang Er. According to the decision, Ru Fu should be punished by 100 slashes of beating with whips and should be cangued and kept in custody at home for three months”, however, Emperor Kangxi further commuted the already lenient sentence: “Ru Fu’s crime is punishable, but,

¹⁸“Discussions of the Cases of Princes, Dukes and Generals who are Subject to Execution or Punishment” in *Da Qing Hui Dian (The Collected Statutes of Great Qing)*, Vol. 1, Zhong Hua Book Company, 1991, p. 7.

¹⁹*Da Qing Hui Dian (The Collected Statutes of Great Qing)*, Vol. 1, p. 14.

²⁰*Da Qing Hui Dian Shi Li (The Precedents of the Collected Statutes of Great Qing)*, Vol. 10, p. 16.

if we think rationally, we may see that Kuang Er is a slave of Ru family and that he has lodged a false accusation against Ru Fu's father. Thus, he is killed by Ru Fu just because he is indignantly resented, which has proved that Ru Fu was a brave man. For this reason, the sentence of Ru Fu should be commuted."²¹

In Qing Dynasty, if the civil officials with the ranks of "Dao" (the magistrate of the administration district below the province), "Fu" (the magistrate of a prefecture) and above, or, the military officers with a rank of vice general had committed crimes, their cases should be reported to the emperor in accordance with the regulations, and they should not be interrogated before the final decision was made by the emperor. As to the cases of other civil and military officials, the interrogation should be held and report be made simultaneously without the need to wait for the decisions of the emperor. When brought to trials, if the defendants were "San Pin" (the third rank) officials or above, they should not be cangued, and "if interrogations should be held, it shall be reported to the emperor for decisions".²² After the interrogation, punishments should be enforced, but it should not be carried out until the memorial petitioning for the decision was replied by the emperor.

Because of the historical background of Qing Dynasty, there were some special regulations on the trials of "Qi Ren" (the members of Eight Banners, the emperor's clan). For example, no matter whether the "Qi Ren" (the members of Eight Banners, the emperor's clan) was from the capital or other provinces, if their crimes were punishable by penal servitudes, the final judgments of their cases should be reported to the emperor for approval.

In a word, the judicial procedure was a national activity undertaken to settle the criminal suits and civil actions with the applications of law. Through the judicial procedures, the functions of law in adjusting the social relationships and maintaining the government of the state were well performed, the social destabilizing factors were eliminated, and the long term peace and stability were ensured. For such reasons, the judicial procedures were always greatly valued by the rulers in different periods, and the judicial officials were also carefully elected, with the result that equal stress was laid on both the management of officials and the enactment of laws. In order to well perform the function of law to govern the state, usually, the wise rulers had advocated judicial impartiality and encouraged "Bing Gong Duan An" (to handle the cases impartially), and "Ming Jing Gao Xuan" (a bright mirror hung high: to be an honest official or to make a just trial by an honest official). Moreover, the judicial procedures were sanctified, which had reflected the long-term interests and social effects which the rulers had pursued. In ancient China, in the social relationships which were basically established by hierarchies and under the autocratic system in which the rulers had supreme powers, the request for judicial impartiality, however, was in great contrast with the practical judicial privileges.

²¹ *Kang Xi Qi Ju Zhu (The Record of the Daily Life of Kangxi)*, Dec. 15, in the 45th year of Emperor Kangxi, Yi Hai (1695).

²² "Ying Yi Zhe Fan Zui Fu Li" (Supplementary Precedents for Committing Crimes by Those Who were Entitled to "Ba Yi": The Eight Deliberations) in "Ming Li Lv" (Statutes and Terms) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

Therefore, the concept of judicial impartiality of the feudal rulers was not inconsistent with the open unfair regulations in laws, because the fair procedures were only applicable to certain social classes, and special procedures were especially made for the privileged. For this reason, the prerogative privileges for the privileged in the law were impartial to the minority, but not to the whole society, but they both belonged to normal legal procedures in the feudal society. Hence, it had made people see more clearly that the so-called impartiality was only relative, and it was neither beyond class nor history. The distinctions in judicial procedures were legal, but not reasonable in the Chinese feudal society, because those distinctions had shown the irrationality of the feudal social systems and the state institutions.

Under the precondition of the differentiation in legislation, the judicial prerogative privileges were statutory and inevitable, therefore, the impartiality protected by law was just the impartiality tolerable to the feudal society; otherwise, it was not the feudal legal system anymore.

But what needed to be pointed out was that in ancient China, some crimes, such as the crimes of “Shi E” (The Ten Abominations), were punished impartially without caring about any distinctions of social individuality, because they were harmful to the basic national interests. However, as to the ways of carrying out the punishments, it was still determined by the social status of the people involved.

Moreover, in judicial practices, although the statutory rights of the privileged were protected, their customary rights were restricted in order to prevent the privileged from indulging themselves in wanton massacres or persecutions and to give the common people some opportunities to survive. As a result, certain kind of impartiality was shown in the partial judicial procedures, which was exactly what the feudal states wanted to have so as to pursue the long-term peace and stability. Zhu Yuanzhang, Ming Tai Zu (the first emperor of the Ming Dynasty) once warned his people, “From this day forward, I am your emperor. Now the legislations have been enacted to ensure that the wealthy could keep their fortunes and the poor could live a better life. You should observe disciplines and obey the laws, because if you are law-abiding, you can be protected.”²³

3.3 Duty as a Standard

In the ancient Chinese laws, the regulations about the rights and the obligations of the common people were wholly unbalanced. Although the common people were entitled to the rights of production, business and working within the scope of law, they were not worth mentioning compared with the statutory obligations required to be fulfilled by the state.

Since the time of its making, law had been regarded as an instrument to prevent people from engaging in illegal activities and to enslave people to serve their rulers.

²³ *Ming Tai Zu Shi Lu (Records of Ming Tai Zu)*, Vol. 49.

What the rulers required to the common people was to exploit their financial resources, to exhaust their energy and to make use of their lives, which was truly described in the sentence that “people are not only the human, but also the financial resources”.²⁴ In order to achieve the goal, requirements were legislated as statutory obligations that people must fulfill. However, the stipulations about the statutory rights of the common people could not or could rarely be found in laws. Take the *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty) as an example, it contained the detailed descriptions of the obligations that the common people were supposed to perform towards their country, such as corvee, military service, law-abiding, farm labor, “Lian Zuo” (punished for being related to or friendly with somebody who has committed an offence) and “Gao Jian” (informing the evil-doing), etc., which were statutory, concrete and compelling, and those who had not performed the obligations would be punished harshly. For example, according to rules recorded in “Qin Jian” (bamboo writing slips in Qin Dynasty), if anyone had evaded the responsibility of military services, he should still be punished, even though he was captured 1 year later. As to the obligations of “Gao Jian” (informing the evil-doing), it was backed up by severe punishments. The people who had informed the others’ evil-doings would be rewarded in the same way as those who had killed an enemy, while the people who had refused to inform the others’ evil-doings would be punished in the same way as those who had surrendered to the enemy, and they would be punished by the death penalty.

As for the rights of the common people, those that were recorded in “Qin Jian” (bamboo writing slips in Qin Dynasty) only contained the rights for people to be engaged in some legal civil activities. Such unbalanced relationship between the rights and the obligations had never been changed since the Qin Dynasty, with the result that the cases with regard to the civil disputes, the economic rights and the interests of the common people were all considered as “trivial matters” by the state, which would be mediated as far as possible, and even if the cases were fined in lawsuits, they would be settled in the first instance. In ancient China, one of the reasons for the underdevelopment of the civil law was that importance was not attached to the individual rights of the common people by the state. Of course, the lack of “individual equality” in law was another reason.

In Han Dynasty (202 B.C.–220 A.D.), the dominant position of Confucian ideology was established, and “San Gang” (three cardinal guides) put forward by Dong Zhongshu, namely, “ruler guides subject, father guides son and husband guides wife”, had become the guiding principles of the state as well as the supreme principles of legislation. The doctrine of “San Gang” was based on a rigidly hierarchical system in the feudal society, and it was the concentrated reflection of the monarchical power, the patriarchal authority and the authority of the husband. What “San Gang” had emphasized was that the ruler, the subjects, the father, the son, the husband and the wife may comply with the regulations of “Li” (rites) so

²⁴“Lu Xun Zhuan” (The Biography of Lu Xun) in “Wu Shu” (The Book of Wu) in *Sang Guo Zhi* (*The History of the Three Kingdoms*).

that the superior was distinguished from the inferior and the noble from the humble with the result that “there are different degrees of the ranks for the noble and the humble, different systems for people’s dresses, different positions at court and different order of priority in the country to encourage the people to contribute and sacrifice rather than plunder”.²⁵ In order to expand the authority of “San Gang”, Dong Zhongshu had vigorously preached that “the principles of ‘San Gang’ of the benevolent government are established by ‘Tian’ (heaven)”, thus, the doctrine of “San Gang” was painted with a layer of of mysterious color.

In Han Dynasty, “San Gang” (three cardinal guides) was not only the supreme moral standard, but also the basic principles of legislation, which had both guided the modification of *Han Lv* (*Han Code*), and reflected its the basic contents. For instance, in *Han Lv* (*Han Code*), all the crimes mentioned, such as “Da Bu Jing” (being greatly irreverent), “Bu Xiao”(being unfilial), “Bu Dao” (Depravity), and “Qin Shou Xing” (Beastly Conducts), etc., and the applications of the principles, such as “Qin Qin De Xiang Shou Ni” (a law in Han Dynasty which ruled that crimes committed among the kinsfolks should be concealed and not reported to the government), “Yuan Xing Ding Zui” (punishment given in accordance with the convict’s motive for the crime), “Yi” (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) and so forth, were the implementations of the principles of “San Gang” in legislation. Therefore, the legalization of “San Gang” was also the legalization of the duty-oriented regulations, according to which the common people, in the first place, were required to perform their obligations towards their state and their sovereigns. Secondly, on the basis of the spirits and principles of the patriarchal system, it was also provided in the law that the young people at home should perform the obligations of being filial to their parents, being respectful to the elders, being polite to the ancestors and being abided by the regulations; otherwise, the offenders would be harshly punished, which was the so-called “Chu Li Ru Xing” (a violation of rites punishable by a penalty). Nevertheless, it needed to be pointed out that the rights of the young people were greatly neglected, because either their economic rights or their marital rights were decided according to their parents’ will. Even worse, their personal rights were not protected by laws, and specifically, the parents could lodge a lawsuit against their children, and often the government offices would settle the case and carry out punishments in obedience to the parents’ will, consequently, sometimes, even death penalty might be executed.

As an important part of society, women had to follow the Confucian doctrine and legalized regulation of “San Cong” (The Three Cases of Obedience), namely, obeying their father before getting married, obeying their husband after getting married,

²⁵“Du Zhi” (On the Systems) in *Chun Qiu Fan Lu* (*The Luxuriant Dew of Spring and Autumn Annals*).

and obeying their sons in widowhood. Except for the obligations of supporting their husband and teaching their children and showing filial respect to their parents-in-law, the rights that women could enjoy, such as the rights of inheriting, signing a contract, and educating their children and son on, were all conditional. Therefore, the dominant position of those women was not complete in law.

As to the social class of “Nu Bi” (the slave girls and maidservants) who were registered as “Jian Min” (rabble or people of lower social status) and were regarded as a part of legalized properties like “animals”, they were just the objects of the rights who did not have independent human entities and legal positions. Moreover, their rights to live were deprived by their masters and the strict stipulations in law had made them accept that the purpose of their lives was just for fulfilling their duties towards their masters.

It was not accidental for the formation of the viewpoint of “duty-orientation”. In the first place, it was determined by the political system of absolutism. Since China entered the class society, the autocratic administration was beginning to be formed, and it was then developed and continuously consolidated. Under such a political system, the so called principles that “the state should be people-oriented” and that “people should be state-oriented” were in fact just obligations which should be fulfilled by all the people in the society towards their country, but there were no legal premises in which the legality of the rights were proposed. In the eyes of the feudal rulers, the autocratic state was the general incarnation of the rights of the common people, no wonder, and the theory of “respecting the justice and getting rid of selfishness” had always been advocated by law. Just as what Han Feizi had once said, “Indeed, the purpose of enacting laws and decrees is to abolish selfishness, because once laws and decrees have been implemented, the ways of selfishness would disappear. In addition, selfishness has thrown the laws into confusion. ...”²⁶ Therefore, if the common people had claimed their rights from the country, it would be considered as a threatening to the ruling order of the state; thereafter, it would be rejected.

In the second place, it was determined by the social structure of the patriarchal system. The social relationship established by blood lineage was formed as early as the clan society in China. Later on, in the class society, under the social condition where the relationship by blood ties was retained, it was further developed into the patriarchal system, which had acted as an important intermediary that had played the role of legal adjustment. Since the whole state would be in good order if the individual family was regulated first, the patriarchs were given the rights to regulate their families, and moreover, they were the general representatives of the rights of the young and the humble in the families. So the young and the humble should perform their obligations towards the whole family, while the patriarchs or chiefs of the clans should do theirs towards their state. If any family member could not pay taxes in time, or had done harmful things to the state, the patriarch would be severely punished in order to show the dominant positions of the rights which the patriarch

²⁶“Gui Ji” (Cunning Schemes) in *Han Feizi*.

had in the family. Under this condition, it was hard for an individual to have qualifications to be dominant in law, and it was even impossible for the concept of rights centered on individual interests to take shape. The idea that rights were given accordingly by people's "Ming Fen" (social status) was considered to be in compliance with "Tian Li" (heavenly principles) and the popular will, therefore, the patriarchal principles were consciously introduced into the political areas by the rulers, with the idea that the emperor was the father of subjects, the subjects were children of the emperor, and that subjects should perform their obligations instead of claiming their rights from the emperor. Enveloped by such a legal culture, the common people could only regard the performance of the obligations to the emperor as their bounden duty, while the claiming for the rights as presumptuous. For this reason, it was impossible to produce the strong consciousness of rights like that in the western society.

Thirdly, it was greatly influenced by the Confucian ideology. "Li" (rites) was highly valued in Confucian ideology, and the major function of "Li" (rites) was to "distinguish the noble from the humble", "the superior from the inferior" and to establish a patriarchal and hierarchical system of "Zun Zun" (showing respect to nobility represented by the emperor), "Qin Qin" (showing respect to relatives represented by parents), "Zhang Zhang" (showing respect to the seniors) and "Nan Nv You Bie" (giving different treatments to males and females). According to "Li", in the imperial country, there were distinctions between the ruler and the subjects, the noble and the humble; at home, there were gradations of ranks between the father and the son, between brothers, and between the husband and the wife, therefore, it was clear that "Li" had not only provided the supreme principles for conducts and moral standards in which there should be affection between father and son; there should be righteousness between ruler and minister; there should be distinctions between the noble and the humble and there should be a proper order between the old and the young. What was more, it had also provided a general standard of conducts and a concept of right and wrong for the people of all ranks and classes. Under this patriarchal system, the son should fulfill his obligations to the father, the wife to her husband, the subjects to their emperor, the humble to the noble, and the young to the old without claiming for their own rights. One important aspect of the theory of "Ke Ji Fu Li" (subduing one's self and recovering the rites) proposed by Confucius was to perform the obligations regulated by "Li", and to have personal needs and desires for rights suppressed in order to achieve this goal. In Southern Song Dynasty, what the philosophers had advocated was "Cun Tian Li" (retaining the heavenly principles) and "Mie Ren Yu" (subduing human desires), which had instructed people to sacrifice their legal and reasonable rights to get harmonious social relationships. As a result of cultivating people's unselfish, dutiful but distorted character, people's natural desires for rights and self-satisfaction were suffocated. After the establishment of the legal mode in which "Li" and law were integrated, the interrelationships of people began to be regulated by law from the perspective of the performance of obligations other than that of claiming for rights. And the consistency between the individual's duty to the state and their duty to the family began to be emphasized. So, from then on, the law, which was

duty-oriented and Confucianized, was passed down unchanged from one generation to another till the revision of law at the end of the Qing Dynasty.

Lastly, the people were compelled to fulfill their obligations in the name of law. In fact, the reasonable desires of individuals had not been completely eliminated or restrained by the “duty-oriented” laws or by the relevant discussions held by the Confucian scholars. Consequently, the conflicts between rights and interests frequently occurred. When the conflicts destroyed the ways which the Confucianists had used in moralizing, enabled people to cultivate the idealism to perform their obligations conscientiously and endangered the fulfillment of their statutory obligations, laws and harsh punishments would be used by the state to stress the obligations that individuals should undertake. The ideas of “Chu Li Ru Xing” (a violation of rites punishable by a penalty) and “Ming Xing Bi Jiao” (integrating punishment with moral teachings) were all the reflections of the Confucian ideology like “Xian Jiao Hou Fa” (moral teaching first, punishments second) and “Yi Fa Fu Jiao” (moral teaching as the primary, punishment as the supplement) in law. When people could perform the obligations conscientiously, it was the “Shan” (perfectness) that was highly praised by the Confucianists, so the criminal law was merely the instrument to help people to achieve the “Shan” (perfectness), as was written in books:

The people should be governed by punishments, because it is a way to teach people to show respect to virtue. So, by integrating punishment with moral teaching, people may have great reverence for punishments to stay away from crimes. Moreover, it is a way to lead people to perfectness. Even at the times of peace and property, punishments are not eliminated, nevertheless, ‘Li’ (rites) is taken as a safeguard against the crimes, and only when ‘Li’ has failed to prevent the crimes, would punishments be carried out as supplementary methods.²⁷

Therefore, the law and the punishment in ancient China were interlinked, and they had played the role of “restraining the wicked, eliminating the cruelty, punishing the greedy and removing the evil”. From the legal system, what people felt were just the requirements for fulfilling their obligations with a list of “what they are forbidden to do” and “what they should do”, but not the regulations of rights with a list of “what they may do”. Thus, in the end, the law had become a suppressive force and it was a book in which the obligations were recorded, but not a manifesto of people’s rights.

²⁷“Xing Fa Zhi Xu” (Preface to the Record of the Criminal Law) in *Song Shi* (*The History of Song Dynasty*).

Chapter 4

Advocating Impartiality, Emphasizing Criminal Law and Neglecting Civil Law

4.1 The Discussions on Legal Impartiality

In China, the ancient form of the character “Fa” (law, punishment) was “灋”. According to a record in *Shuo Wen Jie Zi (Origin of Chinese Characters)* written by Xu Shen, “‘Fa’ (灋) means punishment, which seemed as even as the surface of water. The right part of the character is composed of ‘廌’ (an animal in Chinese legend, which can tell right from wrong) and ‘去’ (to remove), which means to remove the things that are not right”; the left part of the character was “氵”, which symbolizes “water” and means that punishments should be as even as the surface of water, or in other words, punishments should be carried out impartially. Therefore, it had not only shown the expectations that the people in the ancient times had about law, but also the value that the law itself was supposed to have, and the standard of self-discipline for the ancient judicial officials. In Western Han Dynasty, Huan Tan said, “The administration of prison is like the administration of water”, and the law should be enforced by justice and impartiality.¹ In Chinese, the character “Fa” (law) was composed of “廌” and “去”, which had implied both justice and righteousness. So, it could be seen from the origin of the Chinese character that “law” had carried a connotation of impartiality and justice by itself.

In ancient documents, the expressions of “Xing Fa De Zhong” (giving the punishment appropriately) and “Zhong Fa” (appropriate punishment) were usually used to express the impartiality and the justice in the execution of law. Besides, the word “Zhong” was interpreted in *Zhong Yong (The Doctrine of Mean)* as “being erected in the middle, without inclining to either side”. In the article of “Li Zheng” (On the Proper Government of a State) in *Shang Shu (The Book of Historical Document)*, the Duke of Zhou had proposed that the Duke of Su who was the “Si Kou” (the minister of justice) should be set as an example of “Xing Fa De Zhong” (giving the punishment appropriately):

... the duke of Su, as ‘Si Kou’ (the minister of justice), had dealt reverently with all the criminal matters that he was in charge of, and thereby was greatly beneficial to our country.

¹ *Bei Tang Shu Chao (Manuscripts Written in the Northern Hall)*, Vol. 44.

Here was an example of being cautious and prudent, whereby it should be listed as appropriate punishments.

Confucius said, “When ‘Li’ (rites) and ‘Yue’ (music) are not encouraged, punishments will not be properly implemented; when punishments are not properly implemented, the people do not know what to do”.² In Han Dynasty, by using the theories of “Yin Yang” (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive) and “Wu Xing” (the Five Elements), Dong Zhongshu had discussed the consequence which the inappropriate punishments might bring about:

If punishments are inappropriate and unjust, there will be ‘Xie Qi’ (evil influence) and when ‘Xie Qi’ is accumulated among the people of the lower class, so the feelings of resentment and grudge among the people of the upper class will increase; and when the lower and the upper classes do not get along well with each other, ‘Yin Yang’ will be in disorder, and the evil and misfortune matters will occur. These are exactly the reasons for the arising of the disasters.³

What Do Zhongshu said had indicated the importance of the impartiality in law enforcement.

During the Spring & Autumn Period (722 B.C.–481 B.C.) and the Warring States Period (403 B.C.–221 B.C.), under the impact of the trend of social transformation, the situation of “Bai Jia Zheng Ming” (the contention of a hundred schools of thought) emerged. The legalists, as the mouthpiece of the new landowners, had made a thorough exploration of the concepts, characteristics, tasks and the roles of law to prove the necessity and the advantages of replacing the theory of ruling the state by “Li with that of ruling the state by law”, which had led to the climax of the study of jurisprudence that rarely was seen in the history of Chinese law. In the doctrines of those schools of thoughts, impartiality was regarded as a primary standard for evaluating law and as an important precondition for the total enforcement of law. Shen Zi said, “Laws are the systems to administer the people and to ensure the stability of the country. Therefore, wise men should not break the laws to make plans; advisors should not break the laws to offer advices; gentlemen should not break the laws to achieve their fames, and subjects should not break the laws to get their merits. I can restrain my happiness, and I can control my anger, but the laws can not be broken. My family can be imprisoned, and my relatives can be executed, but the laws can not be damaged.”⁴ And Han Fei also believed that “only when the rulers get rid of the private interests and follow the public laws is it possible to achieve the effect of ‘bring peace to the people and bring order to the state’”.⁵

When discussing the roles that the laws were playing, the philosophers in the pre-Qin Dynasty had always compared the law to the instruments for measuring length

²“Zi Lu” in *Lun Yu (The Analects)*.

³“Dong Zhongshu Zhuan” (the Biography of Dong Zhongshu) in *Han Shu (The History of Former Han Dynasty)*.

⁴“Yi Wen” (The Lost and Scattered Articles) in *Shen Zi (Master Shen)*.

⁵“You Du” (Being Lawful) in *Han Feizi*.

and weight so as to indicate the impartiality of law. Guan Zi said, “‘Chi Cun’ (the sizes), ‘Sheng Mo’ (the carpenter’s line marker), ‘Gui Ju’ (the compass and square), ‘Heng Shi’ (the scales), ‘Dou Hu’ (measuring vessel), and ‘Jiao Liang’ (measurements) are all called ‘Fa’ (law);”⁶ “Laws, administrative statutes, and the official orders, are like the ‘Sheng Mo’ (the carpenter’s line marker) and ‘Gui Ju’ (the compass and square) which are used to administer the people.”⁷ Shen Zi said, “If there are standards and measures, there can be no cheats in the matter of weights; if there are measurements of the sizes, there can be no cheats in the measurement of length, and if there are laws and regulations, there can be no fraud and falsehood.”⁸ Han Feizi also said, “Casting law and tact aside and trusting to personal judgments, even Emperor Yao could not rule a state. Discarding ‘Gui Ju’ (the compass and square) and trusting to only subjective judgements, even Xi Chong could not make a single wheel.”⁹ “Du Liang Heng Qi” (instruments for measuring weights and sizes) had been the statutory standards for measuring the length and weight, and it was recorded in the article of “Xun Dian” (Canon of Shun) in *Shang Shu (The Book of Historical Document)* that “he (Emperor Shun) had regarded ‘Du Liang Heng’ (weights and measures) as laws”, which was explained by Zheng Xuan in a note as the following: “‘Du’ (the measurement of length) refers to the ruler; ‘Liang’ (a unit of measurement for angles, temperature) refers to ‘Dou Hu’ (measuring vessel); ‘Heng’ (weighing up of weight) refers to scales.” In “He Fang Shi” in the chapter of “Xia Guan” in *Zhou Li (The Rites of Zhou Dynasty)*, it was also recorded that “various instruments were made identical, and the weights and measurements were made unified”. Because “Du Liang Heng Qi” (instruments for measuring weights and sizes) had the feature of impartiality, objectivity, and accuracy, it was compared to law, which meant that law, like “Du Liang Heng Qi” (instruments for measuring weights and sizes), should be impartial, objective, and accurate in judging certain behaviors, examining whether they had broken the law and preventing other deceptive and wrong doings. Although such legal concepts were greatly different in principle from the concept of ruling by “Li” (rites) which had much valued the rigid social hierarchies, since laws were instituted by state and they were the most important measurements used to administer the country, they (such legal concepts) were still regarded as “the standard weights of state”¹⁰ by Shang Yang and were used to judge whether people’s behaviors were right or wrong. This was the exact role that the law had played in acting as “the instrument of ruling the country”.

The application and development of “Du Liang Heng” (weights and measures) were inseparable from the development of the social economy; therefore, it was the product of the market economy. For this reason, the comparison between “Du Liang Heng Qi” (instruments for measuring weights and sizes) and the law was possible only in the Warring States Period (403 B.C.–221 B.C.) when the landowner

⁶ “Qi Fa” (Seven Standards) in *Guan Zi (The Book of Master Guan)*.

⁷ “Qi Chen Qi Zhu” (Seven Ministers and Seven Rulers) in *Guan Zi (The Book of Master Guan)*.

⁸ “Yi Wen” (The Lost and Scattered Articles) in *Shen Zi (Master Shen)*.

⁹ “Yong Ren” (On Choosing People) in *Han Feizi*.

¹⁰ “Xiu Quan” (On the Usage of Power) in *Shang Jun Shu (Book of Lord Shang)*.

economy sprang up. Since the end of the Spring and Autumn Period (770 B.C.–476 B.C.), the newly rising forces of landowners were becoming stronger than ever before, so in order to get the political power and to develop new economic relationships, those landowners held opposite opinions on the tradition of statutory privileges established in the slave society, where the idea that “if law is kept secret, its power is unfathomable” was strongly held. They had urged the imperial court to publicize the statute law and to execute the law impartially so as to protect the political and the economic interests of the newly rising landowners. In order to meet the requirements, the mouthpiece of the landowners began to create public opinion about the importance of the justice and the impartiality of law and to vigorously preach that impartiality was the nature and the core value of law. However, in the legal practice, their views on the impartiality of laws were inevitably just the impartiality for a small number of people in a narrow sense.

In the feudal times of China, in order to maintain the long-term peace, to keep the stability for autocracy and to guarantee the general interests of the landowners, not only the peasants were forced to observe laws to accept the exploitation of the minority, the members of the ruling class were also moderately restrained from overstepping the boundary of their statutory rights. Dong Zhongshu once said:

The extreme wealth will bring about conceitedness and the extreme poverty the worries; if there are worries, there will be robbery, and if there is conceitedness, there will be violence, which is the nature of ordinary people. Wise sages know people’s nature and also know the reasons for chaos, therefore, they had restrained people’s desires so as to distinguish the superior from the inferior, to ensure that the rich may have enough wealth without conceitedness, and the poor may have enough to cultivate themselves without worries. If this has been adopted as a standard to coordinate and share out the wealth equally, the wealth will not be insufficient, the superior and the inferior will live together peacefully, and the whole country will be easily ruled.¹¹

Moreover, the principles of impartiality that “no law should be unfairly partial to the noble” and “no distinctions should be made in punishments” advocated by the ancient Chinese philosophers were in fact the hierarchical rights legalized and established in the new era to make the upper and lower class live in peace and each fulfill their own duties. Therefore, the enlightened politicians and the far-sighted emperors always gave publicity to their people that their laws were the laws of the world, but they had not dared to say that their laws were the laws of a family or of any particular persons. In Western Han Dynasty (202 B.C.–9 A.D.), Zhang Shizhi said, “Laws are granted by the emperor to the world to be observed.”¹² Li Shimin, the Emperor Taizong of the Tang Dynasty (599 A.D.–649 A.D.) once said, “The law is made not only for me, but for all under the heaven”.¹³ He also said, “The law is given by ‘Tian’ (heaven) to the emperor, so no one is permitted to break his promise

¹¹“Du Zhi” (On the Systems) in *Chun Qiu Fan Lu (The Luxuriant Dew of Spring and Autumn Annals)*.

¹²“Zhang Shizhi Zhuan” (The Biography of Zhang Shizhi) in *Han Shu (The History of Former Han Dynasty)*.

¹³“Gong Ping” (Impartiality) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)*.

because of their own selfishness”.¹⁴ It is worth mentioning that in his reign he had declared that “the impartiality of law should be upheld, and if the law is broken, the offenders must be punished without differentiation”.¹⁵ It was recorded that in history Emperor Wen of the Han Dynasty (202 B.C.–157 B.C.), Emperor Wen of the Sui Dynasty (541 A.D.–604 A.D.), and Emperor Shizong of the Jin Dynasty (1123 A.D.–1189 A.D.) had all had their relatives punished in accordance with the law so as to maintain the justice and impartiality. In Song Dynasty (960 A.D.–1279 A.D.), Zhen Dexiu had clearly pointed out in the article “Yu Zhou Xian Guan Liao (the Bureaucrats in Yuzhou County)” that:

When settling the legal cases, what is right and what is wrong should be decided according to truth, and the leniency and the severity of punishments should be decided according to law. Officials should not negate the generally acknowledged truth for the selfish interests of their own, nor should they bend the public law for others’ benefits. The revered Mr. Zhuge once remarked: I had a scale in my heart, but it would not lose its balance for the benefit of other people. And his words should be taken as a rule by those officials.¹⁶

In the late Ming and the early Qing Dynasty, after learning from the historical experience, Gu Yanwu had stressed that “the law is to bring impartiality for all under the heaven.”¹⁷

The impartiality of law was not only reflected in the contents of specifications, but also in the legal practices, which was guaranteed by the coordination of legal stipulations and the responsible law executors. Only by the legalization of impartiality of law and the impartiality of law enforcement was it possible for law to be endowed with authority, and to be observed by the people initiatively instead of compulsorily. The reasons for the dynasties of Han, Tang, Ming and Qing to establish and maintain a relatively stable legal order shortly after they had founded the imperial states were inseparable from the fact that the rights of the majority of people in the society were impartially protected.

4.2 The Legal Principles Embodying Impartiality

4.2.1 “All Judgments Made According to Law” and “No Impartiality for Punishments”

During the Warring States Period (403 B.C.–221 B.C.), in order to break with the tradition that “‘Li’ (rites) does not go down to the common people, (and) the penal statutes do not go up to the senior officials” which had lasted for three dynasties

¹⁴“Tang Ji Shi Er” (The 12th Records of Tang) in *Zi Zhi Tong Jian (History as a Mirror)*.

¹⁵“Gong Ping” (Impartiality) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)*.

¹⁶*Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Vol. 1.

¹⁷*Ri Zhi Lu (Daily Understanding)*, Vol. 8.

(Xia, Shang, and Zhou), the legalists had proposed clearly that “the state should be ruled by law” and that “everything should be judged by law”. For instance, when Shang Yang was carrying out the monarchical reform, he was under the banner that “there should be no discriminations in punishments, and no matter who, whether the ministers of state and generals or the senior officials and ordinary folks, if they have disobeyed the king’s commands, violated the interdicts of the state, or rebelled against the statutes made by the ruler, they should be punished by death penalty and should not ever be pardoned”,¹⁸ in order to crack down upon the old aristocratic forces that were against the reform, to get the legal status for the new landowners, and to publicize the value orientation of the new law. Shang Yang also showed his firm determination to establish the authority of the new laws by declaring resolutely that “(The intelligent ruler) should not accept what are not in accordance with the law, should not encourage what are not in accordance with the law, and should not perform what are not in accordance with the law”.¹⁹ After accepting Shang Yang’s view that “there are distinctions for punishments”, from different perspectives, Han Feizi further proposed that “the law is not unfairly partial to the noble”,²⁰ “the punishments for wrong-doings never excluded the ministers, and the rewarding for good deeds never discriminate against the common people”.²¹ In the book *Guan Zi* (an ancient Chinese book by Guan Zhongzi) which was completed in the Warring States Period, the principles that “laws should be observed by both the monarchs and the ministers, the superior and the inferior, the high and the low”, and that “the legal system should be taken as a basis for rendering judgment” were viewed as the embodiment of “ruling by law successfully”.²²

In Eastern Han Dynasty (25 A.D.–220 A.D.), in allusion to the situation that “cases are unfairly settled because different laws were applied in settling a single case, or a single case was settled by applying different laws, which had finally led to the inequity in punishments”,²³ it was suggested by Huan Tan that “the different laws and regulations should be analyzed, compared and unified” so that “the laws and regulations can be fair and impartial”, the “civil officials can be educated, the government decrees and military orders can be thoroughly carried out”, “the imperial strategies can be made known, and the complaints about the abuse of punishments can be eradicated”.²⁴

During the period of “San Guo” (Three Kingdoms) (220 A.D.–265 A.D.), after reading the line in *Sun Zi Bing Fa* (*Master Sun’s Art of War*) that “where is the law and regulation most rigorously enforced”, Cao Cao, in order to show his strong determination to manage the army and make all judgments by law, made an

¹⁸“Shang Xing” (Rewards and Punishments) in *Shang Jun Shu* (*Book of Lord Shang*).

¹⁹“Jun Chen” (Kings and Ministers) in *Shang Jun Shu* (*The Book of Lord Shang*).

²⁰“You Du” (Being Lawful) in *Han Feizi*.

²¹ *Ibid.*

²²“Ren Fa” (Relying on Laws) in *Guan Zi* (*The Book of Master Guan*).

²³“Huan Tan Zhuan” (The Biography of Huan Tan) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

²⁴ *Ibid.*

explanatory note that “when a law is made, it is not allowed to be violated, and once it is violated, the offenders must be put to death”. Besides, it was recorded in *Cao Man Zhuan* (*Biography of Cao Man*) that “when the troops were marching in wheat fields, they had received orders that ‘those who have damaged the wheat should be punished by death penalty!’ The soldiers all got down from the horses and carefully walked in the fields. However, the horse of Emperor Taizu had carelessly stepped on the wheat. Emperor Taizu asked “Zhu Bu” (a subordinate to the chief in charge of the official documents and ancient records or books) what punishment he might get. Then, the officer referred to the words in the book *Chun Qiu* (*Spring and Autumn Annals*) and said that the penal statutes never went up to the senior officials. At that, Emperor Taizu replied, ‘I have made the rule but then I have broken it without being punished, how can I lead the troops? Now I can not commit suicide since I am the general of the armies, but still I would like have a self-punishment.’ After saying this, he cut his hair with his sword and threw it on the ground.”

Zhuge Liang, the minister of the state of Shu Han during the period “San Guo” (Three Kingdoms) (220 A.D.–265 A.D.), was known for his “strict rules and regulations” and his “strict enforcement of laws for both the high and the low”. He was often self-disciplined by the principle that “I have a scale in my heart, but it will keep its balance for the benefit of people”,²⁵ and he said, “If one has committed evil crimes and broken the laws, or if one is loyal and law-abiding, he will be punished or rewarded in accordance with law, whether he is in the imperial palace or in the government”. After realizing his wrong choice of a general at Jie Ting Fort (a strategic place), he had submitted a memorial to the emperor to plead to be “demoted three ranks lower as a self-punishment”.²⁶ Because Zhege Liang had “followed laws and disciplines in rewarding merits” and had made adjudication in accordance with law, it was possible for the state of Shu to have well-ordered administration and strict military regulations and to launch military offensives at anytime against its strong enemy, the state of Wei.

At the beginning of the Tang Dynasty (618 A.D.–907 A.D.), it was stressed by Wei Zheng that “the essence of rewards and punishments is to encourage benevolence and punish evil doings. The reason why the emperors will get the same punishments as the common people is to show that the leniency and the severity of punishments should not be decided by the social status of the noble and the humble or the relationships of the far and the near.”²⁷ In Song Dynasty (960 A.D.–1279 A.D.), Zhao Dongxi had put forward the proposal from the perspective of summarizing the historical experience: “if there are offenders, even if they are nobles, they are still to be punished, which will make the people in the world obedient.”²⁸ Sima Guang also

²⁵ *Tai Ping Yu Lan* (*Imperial Readings of the Taiping Era*), Vol. 429.

²⁶ “Zhuge Liang Zhuan” (The Biography of Zhuge Liang) in “Shu Zhi” (The Book of Shu) in *San Guo Zhi* (*The History of Three Kingdoms*).

²⁷ “Xing Fa” (The Criminal Law) in *Zhen Guan Zheng Yao* (*Essentials about Politics from Zhen Guan Reign*).

²⁸ “Za Yi” (Miscellaneous Discussions) (Part 2) in “Xing Wu” (The Fifth Punishments) in *Tong Dian* (*The General Codes*).

held that the primary condition for “enforcing and upholding the regulations and principles” was to “make all judgments according to laws”. He said, “The only thing that can be made use of by rulers in governing the world is the law. The stipulation that a murderer is punishable by the death penalty has been unchangeable in the penal law for centuries ever since it was made, therefore, if a murderer is not punishable by the death penalty or if the scoundrel is not punishable by imprisonment, then even if the king is as great as Emperor Yao or Emperor Shun, it is impossible for him to successfully rule the country.”²⁹

It needed to be specially pointed out that the Jurchen Emperor Shizong of the Jin Dynasty (1123 A.D.–1189 A.D.) had stressed that the law should not be violated even though “Yi Qin” (the crimes committed by those who had made contributions to the state may be judged through a special trial) was included in “Ba Yi” (The Eight Deliberations) in order to establish and maintain the feudal legal system. He said, “The law is a scale used for balancing the impartiality in the world. If the punishments for the emperor’s relatives are reduced, it will definitely make them more arrogant and they will commit more crimes.” In the 26th year of Da Ding, a decree was issued that “if the ‘Da Gong’ (the person wearing the mourning apparel of soft sackcloth in the third mourning degree) of the crown prince’s dauphines, or the people beyond the mourning degrees of the emperor, or the morally worthy are found guilty of private offences, they are not included in “Ba Yi” (The Eight Deliberations).”³⁰ It was also recorded in the ancient books that Emperor Shizong of Jin “had never bent the law for the benefit of his relatives and old friends”. Likewise, as a politician in the Yuan Dynasty (1271 A.D.–1368 A.D.), Yelv Chucai, had stated in *Chen Shi Wu Shi Ce (Ten Strategies for Current Affairs)* that the impartial enforcement of law was a necessary guideline for ruling the country. He was against bending the law for the benefit of relatives and said, “I would like to grant gold to my relatives to establish friendly relationship, but if any of them has become the government officials and has broken the law, I will not bend the law for their benefits.”³¹

In Ming Dynasty (1368 A.D.–1644 A.D.), the expressions like “as strong as rocks and as faithful as four seasons” were used by Qiu Jun to describe the seriousness and constancy which laws should have. He had shown appreciation to Liu Song’s viewpoint that “if the matters are handled according to law, then the law will be trusted by the people, the officials will be intolerant of evil conducts, and only then is it possible to carry out administration smoothly.”³²

In short, although the feudal legal system which had been in existence for more than 2,000 years after the Warring States Period was intentionally instituted for the privileged, no rulers in any dynasties had dared to abandon the principle of “making

²⁹“A Memorial to the Emperor about Executing Severe Punishments for the Crime of Murdering” in *Sima Wen Gong Wen Ji (The Collected Works of Sima Guang)*.

³⁰“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)*.

³¹*Zhan Ran Ju Shi Wen Ji (The Collected Works of Lay Buddhist Zhan Ran)*.

³²“Shen Xing Xian” (Prudent Infliction of Punishments) in *Da Xue Yan Yi Bu (Supplements for the Derivational Meaning of the Great Learning)*, Vol. 9.

all judgments according to laws”, because if they had done so, it meant that they would have admitted that their ruling was absolutely lawless, which was impossible to bring people a long-term peace and stability.

4.2.2 The Enforcement of Public Law and Abandoning of Private Law, and Making the Country Prosperous and Bringing People Peace and Stability

Since impartiality had been the value orientation of law, and law itself had been referred as the instruments of measurement, pursuing public interests and eliminating private interests were taken as the guiding principles of legislation. Shen Zi said, “Legal systems and the books of rites are all for pursuing impartiality and justice. So, for pursuing impartiality, the private interests should be eliminated.”³³ He also said, “It is a competition of the selfishness and law to pursue private interests by taking advantage of laws, and the chaos which it may bring about will be as serious as the lawless state.”³⁴ In the view of Shen Zi, it was impossible for the public interests to coexist with the private interests, therefore, for pursuing the public interests, the private interests must be abandoned, and only when the private interests had been abandoned, could impartiality be retained. It was once stated by Xunzi that “only when fairness prevails everywhere could the selfish private interests be eliminated, and only when the public good be made known could the private interests be eradicated”.³⁵ Thus, only in this way could the laws be “the scale used for balancing the impartiality in the world”, and the people be safe and the state be in good order. Just as Han Feizi had once said, “It is possible for the people to be safe and the state in good order only when the rulers are able to expel the private dishonesty and uphold public laws”.³⁶ There were many such examples in ancient China, for instance, in Zhen Guan Reign (627 A.D.–649 A.D.) (A golden age of Tang Dynasty in China's history ruled by Li Shimin whose reign title is Zhenguan), great efforts had been made by the law-makers to “pursue impartiality and justice”, moreover, it was especially declared by the prerogative emperor that “the law, . . . , shall not make people lose the faith by protecting the private interests”. He had also apologized to the people in the world for his breaking the law by his selfish conducts, through which he had effectively maintained the order of ruling by law, and endowed law with great authority. According to what was recorded in historical books, at that time, “the officials were all cultivated by self-discipline and uprightness, and the

³³“Wei De” (The Virtue of Authority) in *Shen Zi (Master Shen)*.

³⁴“Yi Wen” (The Lost and Scattered Articles) in *Shen Zi (Master Shen)*.

³⁵“Jun Dao” (On the Way of a Lord) in *Xunzi*.

³⁶“You Du” (Being Lawful) in *Han Feizi*.

princes, the dukes, the dauphines, and the gentlefolk had all held the law in awe and did not dare to bully the common people”.³⁷

In Southern Song Dynasty (1127 A.D.–1279 A.D.), from a new understanding of the complexity of the civil and commercial laws and the argument over the profits and justice, Chen Liang had pointed out that “the real intention of the laws made by the sages is to pursue justice for everyone in the world”,³⁸ and he had also emphasized that “the national laws should not be violated by the private punishments”,³⁹ and that “laws are not made for the selfish private interests of a certain person”.⁴⁰ Chen Liang’s view on the private and the public law was a new outlook developed with the market economy of the Northern and Southern Song Dynasties. During the periods of the late Ming Dynasty and the beginning of the Qing Dynasty, Huang Zongxi’s inference about “the law of the world” and “the law of the emperor” was of epoch-making significance, because he had discussed both the conflicts between the public interests and the private interests and the effects which the conflicts might have caused in the aspect of legal systems starting from the criticism of the brutalities of autocracy which had led to the subjugation of the Ming Dynasty. Huang Zongxi said that if the laws which had been applied for three dynasties were instituted for the public interests, it could be regarded as “having included the laws of the emperors in the world”, but “not for the interests of any particular person”, therefore, “the law is the law of the world”. Moreover, “the more such laws prevail, the less chaotic the world will be”, which, as it were, was “the law without being included in law”. If the laws made in the three dynasties were just for private interests, “how could they have any concern for the world?” Therefore, such laws were only “the laws of emperor”, which were made for the emperor himself as well as for his own sons and grandsons. Thus, “the severer” the emperor’s laws were, “the more chaotic the world would be”, which, as it were, was “the law illegally made”. In conclusion, he said, “The laws of the world” should be recovered and “the laws of emperor” should be eliminated.⁴¹ Huang Zongxi’s proposal of “having the public laws enforced” and “the private laws eliminated” was not only a yelling in allusion to the problems in the society in Ming dynasty in which the laws had been perverted and abused by the emperors at will and trampled on by the powerful eunuchs, but also a yearning for establishing a legal order in which “laws are implemented for justice”. His words that “the people in the imperial court are not honorable, the people from the lower ranks are not humble”, and they should be equally restrained by law, were the reflections of the ideas of natural law. Even though Huang Zongxi’s reform blueprint could not produce any practical positive effect in the legislation

³⁷“Zheng Ti” (The Political System) in *Zhen Guan Zheng Yao (Essentials about Politics from the Zhenguan Reign)*.

³⁸“Hui Da Ba” (The Eighth Answer) in *Chen Liang Ji (The Collected Works of Chen Liang)*.

³⁹“Shang Guang Zong Huang Di Jian Chen Zhen” (Didactic Letters to Emperor Guangzong) in *Chen Liang Ji (The Collected Works of Chen Liang)*.

⁴⁰“Shang Xiao Zong Huang Di San Shu” (The Third Memorial to Emperor Xiaozong) in *Chen Liang Ji (The Collected Works of Chen Liang)*.

⁴¹About Huang Zongxi’s words, please refer to *Ming Yi Dai Fang Lu (Waiting for Dawn)*.

reform later in the Qing Dynasty, it had provided valuable ideological materials for the struggle against absolutism in the late Qing Dynasty.

4.2.3 *Granting Awards in the Light of Merits Achieved, and Enforcing Punishments in the Light of Crimes Committed*

The rules for awarding the meritorious and punishing the guilty were the concrete reflection of the impartiality of laws, about which there were many discussions by the philosophers, law-makers, and judicial officials. As early as the Spring and the Autumn Period (722 B.C.–481 B.C.), Mozi had proposed that “the virtuous should be awarded and the wicked should be punished with no partiality to their relatives and brothers”,⁴² and “the awards should be granted to the virtuous and the punishments to the wicked. Besides, the innocent was not to be prosecuted and the guilty was not to be exonerated.”⁴³ One important part of the reform implemented by an early legalist named Li Kui in the State of Wei was “to find a proper way to govern the state in which the labor will be rewarded with food and clothes, the meritorious service will be rewarded with emoluments, rewards must be granted properly and punishments must be given impartially”.⁴⁴ In the historical books, the Shang Yang Reform was highly praised for having implemented impartial rewards and punishments. According to what was recorded in “Qin Ce” (Strategy of Qin) in *Zhan Guo Ce (Stratagems of the Warring States)*, “in the reign of Shang Jun, the laws and orders were both strictly and impartially enforced, and no matter how powerful those people were, if they had committed crimes, they were punished; no matter what close and intimate relations those people had with the ruler, if they had not made any achievements, they were not to be awarded.” As the great master of legalism, Han Feizi had said, “The punishments for wrong-doings never excluded the ministers, and the rewarding for good deeds never discriminate against the common people”, and that “those with real merits, however low and humble, must be awarded; those with no merits, however close and intimate, must be censured”.⁴⁵ What Han Feizi had said was regarded as the negation of the privileges of the hierarchical slavery system and the patriarchal clan system. In the book of *Lv Shi Chun Qiu (Spring and Autumn Annals of Master Lv)*, the principle of “awarding the meritorious and punishing the guilty” was proposed, and at the same time, the serious warning that “improper awards and punishments may lead to more legal

⁴²“Jian Ai” (Universal Love) (Part 2) in *Mozi*.

⁴³“Shang Tong” (Promoting Equality) (Part 2) in *Mozi*.

⁴⁴“Zheng Li” (The Principles of Government) in *Shuo Yuan (Forum)*.

⁴⁵“Zhu Dao” (The Way of Ruling the State) in *Han Feizi*.

offences” and would definitely affect the normal social order and the stability of the imperial government was also given.⁴⁶

In the period of “San Guo” (Three Kingdoms) (220 A.D.–280 A.D.), the principle which Zhuge Liang applied to govern the state of Shu was that “the loyal and the meritorious, even though they are the former enemies, will surely be rewarded; the guilty and the wicked, even though they are close and intimate, will surely be punished”,⁴⁷ which had consequently brought about the order of ruling by law in the State of Shu. Thus, although it was located at the southwest corner of China, it was possible for the state of Shu to contend with the powerful State of Wei. In Jin Dynasty, the policy of “awarding the meritorious and punishing the guilty”⁴⁸ was taken by Ge Hong as a standard model for “keeping justice and observing the law”. At the beginning of the Tang Dynasty, one of the most important political issues that the emperor and the ministers discussed was how “to implement rewards and punishments rigorously”. It was said in the article of “Qiu Jian” (Asking for Remonstrations) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)* that:

From the ancient times to the present, most of the emperors have subjected themselves to the changing moods. When they are happy, they immoderately award those who have no merits at all; when they are angry, they slaughter the innocent at will, which have led to the disturbance and turmoil in the country.

In “Feng Jian” (Conferment and Establishment) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)*, it was commented that:

The most important affairs of a nation are awards and punishments. The meritorious are awarded for their contributions, so those without merits will give up voluntarily; the guilty are punished for their offences, so the wicked will be intimidated, consequently, the people will understand that the awards and punishments are not given rashly.

Just for this reason, Li Shimin, Emperor Taizong of the Tang dynasty, had regarded the principle that “punishment for evil-doings never excludes the close and the intimate; and award for good deeds never exclude the ex-enemies” as “a way of pursuing the impartiality for everyone in the world”.⁴⁹ Wei Zheng, an important official who had contributed greatly in “Zhen Guan Zhi Zhi” (Excellent Governance during Zhen Guan Reign), also believed that if “the achievement of impartiality is set as a goal”, then the principle that “the award for good deeds will never exclude the remote and the humble, and the punishment for wrong-doing will never exclude the intimate and the honorable” should be put into practice.⁵⁰

⁴⁶“Gui Xin” (On Respect and Trust) in *Lv Shi Chun Qiu (Spring and Autumn Annals of Master Lv)*.

⁴⁷“Zhuge Liang Zhuan” (The Biography of Zhuge Liang) in “Shu Zhi” (The Book of Shu) in *San Guo Zhi (The History of Three Kingdoms)*.

⁴⁸“Liang Gui” (Good Rules) in *Bao Pu Zi Wai Pian (Additional Articles of Bao Pu Zi: Ge Hong)*.

⁴⁹“Tang Ji Shi San” (The 13th Records of Tang) in *Zi Zhi Tong Jian (History as a Mirror)*.

⁵⁰“Ze Guan” (Official Selection) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)*.

In the Song Dynasty, both Bao Zheng and Sima Guang had given some advice on giving impartial rewards and punishments. Bao Zheng said, “The meritorious must be awarded in accordance with their contributions without any favor bestowed by the emperor; the guilty must be punished in accordance with their offences without any commutations.”⁵¹ In addition, Sima Guang said, “Do not grant award out of favor; do not inflict punishment out of anger; do not award a man because he is favored, do not punish a man because he is hated.”⁵² In Ming Dynasty, Zhang Juzheng, upholding the idea of “ruling the country by law”, had summarized the historical experience and emphasized that “severe punishments shall be enforced, whether the guilty are intimates or kin; justice shall be implemented, whether the wronged are the remote or the humble”.⁵³

When the Manchu people of the Qing Dynasty (1644 A.D.–1912 A.D.) were still out of Shan Hai Guan Pass before the country was founded, Emperor Taizu of the Qing (Nurhaci) had pointed out that “the credit of the country is shown through awards, and the prestige of the country is enhanced through punishments”.⁵⁴ He also said, “What is the most important in the governance? It is the justice and the strict and impartial laws in dealing with matters”.⁵⁵ So he called on his people “to keep justice in mind, whether in high or low social status”,⁵⁶ and to follow what Emperor Da Ding had done in “strictly observing the laws, granting awards and carrying out punishments”.⁵⁷ He further said, “If the sages and the virtuous are not respected or honored, how do we persuade people to be virtuous? If the wicked are not dismissed or punished, how do we punish those evil doers?”⁵⁸ In order to strictly carry out the rules for awards and punishments and provide them with overall restraining force, he emphasized that if the Manchu noblemen in the government were found to be guilty, they shall be “brought to justice”,⁵⁹ consequently, a unique legal tradition was established when they were outside Shanhai Guan Pass, that was, “the law is much more important than the nobles”. Nurhaci also showed great admiration for the great achievements that Zhuge Liang had made after the rigorous policies of punishment and award were adopted and the strict ruling of law was practiced. He had highly praised Zhuge Liang by saying that:

When Zhuge Liang was serving his young master and dealing with political issues, he had penalized the guilty without pardon, though they were close and intimate; he had promoted

⁵¹“Shang Dian Zha Zi” (Memorials to the Emperor) in *Bao Zheng Ji (The Collected Works of Bao Zheng)*.

⁵²“Jin Xiu Xin Zhi Guo Zhi Yao Zha Zi” (Memorials about Self-cultivation and the Governance of the Country) in *Sima Wen Gong Wen Ji (The Collected Works of Sima Guang)*.

⁵³“Chen Liu Shi Shu” (The Comments about the Six Things of Chen) in *Zhang Wen Zhong Gong Quan Ji (The Complete Works of Mr. Zhang Wenzhong)*.

⁵⁴*Man Zhou Shi Lu (Anecdots of Manchuria)*, Vol. 8, Zhong Hua Book Company, 1986, p. 415.

⁵⁵“Tai Zu” (Emperor Taizu) in *Man Wen Lao Dang (The Old Manchu Archive)* (Book 3), December of the Year of GuiChou (1613).

⁵⁶*Qing Tai Zu Gao Huang Di Shi Lu (The Anecdots of Emperor Tai Zu of Great Qing)*, Vol. 4.

⁵⁷*Man Zhou Shi Lu (Anecdots of Manchuria)*, Vol. 8.

⁵⁸“Tai Zu” (Emperor Taizu) in *Man Wen Lao Dang (The Old Manchu Archive)* (Book 3), December of the Year of KuiChou (1613), Zhong Hua Book Company, 1990.

⁵⁹*Ibid.*, (Book 51), the 9th of May of the eighth year of Tian Ming.

the meritorious without hesitation, though they were ex-enemies. Besides, he had imposed severe punishments on those who had refused to take responsibilities after committing minor crimes, but he had imposed lenient punishments to those who had taken responsibilities after committing serious felonies. The impartiality and the justice which he had upheld had been written into the annals of history. Therefore, until today, he is still praised.⁶⁰

Nurhaci had taken advantage of the superstitious ideas which those Manchu people had and made use of “Tian Dao” (The Way of Heaven) to advocate the importance of the execution of impartial laws. He said, “Heaven is far away from Earth, but it has been observing the restraint of the four seasons, so, wind and rain come in their time, the Sun and the moon take their turns to rotate, and “Tian Dao” (The Way of Heaven) is eternal.”⁶¹ Therefore, if people could not “keep justice in mind”,⁶² they would “be judged by ‘Tian’ (heaven)”, and would “die from serious diseases or from legal punishments”.⁶³ Nurhaci was not only an initiator of the strict rules for awards and punishments, but also an executor, because he had faithfully followed the rules that “punishment for evil-doings never excludes the close and the intimate; and award for good deeds never exclude the ex-enemies”.⁶⁴ Thanks to his efforts, Nurhaci was able to unite the domestic forces from different parties, to inspire the confidence of the officials and citizens of “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan), to open a new political dimension, and to provide a solid foundation for winning the whole country from the imperial government of the Ming.

In summary, “granting awards in the light of the merits achieved and enforcing punishments in the light of the crimes committed” was the requirement of legal justice and impartiality, in addition, it was also the symbol of the proper execution of law, which was helpful not only to maintaining the dignity of feudalistic legal system but also strengthening the control of the officials. Therefore, whether the awards or the punishments could be appropriately practiced was an important event which would always concern the winning or the loss of popular support, the safety of the state and the stability of the society. Besides, the rules of “granting awards in the light of the merits achieved and enforcing punishments in the light of the crimes committed” were supplemented by the principle of “enforcing punishments in accordance with the crimes committed”. Xunzi said, “If the punishments are enforced in accordance with the crimes committed, the laws are majestic, but if not, they are just humiliations of the authority.”⁶⁵ Mozi also said, “The virtuous should be awarded, and the wicked punished; the innocent should not be killed and the

⁶⁰ *Qing Tai Zu Gao Huang Di Shi Lu (The Anecdots of Emperor Tai Zu of Great Qing)*, Vol. 4, Zhong Hua Book Company, 1986, p. 59.

⁶¹ “Tai Zu” (Emperor Taizu) in *Man Wen Lao Dang (The Old Manchu Archive)*, Vol. 16, the first of the seventh month of the fifth year of Tian Ming.

⁶² *Qing Tai Zu Gao Huang Di Shi Lu (The Anecdots of Emperor Tai Zu of Great Qing)*, Vol. 4, Zhong Hua Book Company, 1986, p. 59.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. 62.

⁶⁵ “Jun Zi” (On the Gentleman) in *Xunzi*.

guilty should not be exonerated.”⁶⁶ Only when punishments were enforced in accordance with the crimes, and “the punishments are properly executed” was it possible that “penalties and punishment are appropriate”, and “the complaints of the people be eliminated”.⁶⁷ In order to show the seriousness of the enforcement of punishments and the impartiality of law, the principle of “enforcing punishments in accordance with the crimes” was stipulated in great detail in ancient Chinese law codes. However, during the feudal times in China, this principle was often violated by the legal provision of “enforcing different punishments for the same crime”, and sometimes, it was also dominated by the rule of “prudent inflicting of punishments”, but the violation of the former was out of “power”, and the implement of the latter was out of “human relationships”.

4.2.4 *The Faithful Enforcement of Law and the Impartiality in Justice*

It was proved by the history of legal system that the impartial stipulations in legal standards needed to be guaranteed by the impartiality in judicial procedures and by the impartial enforcement of laws by the officials. The ancient Chinese thinkers’ requirements for law executors were “faithful enforcement of law” and “impartiality in judicature”. Han Feizi had said, “If a law is of no faith, it is dangerous for the ruler.”⁶⁸ In Western Jin Dynasty, Liu Song had emphasized that “if laws are made, they must be enforced; if they are enforced, they must be carried out as faithfully as the changing of the four seasons, and as firm as the rocks.”⁶⁹ Only in this way, could the value of law be demonstrated, and the law itself be of faith.

During Western Han Dynasty (202 B.C.–9 A.D.), Zhang Shizhi, who was the “Ting Wei” (the supreme official in charge of judicature) at the time, had deeply felt that whether the law could be enforced impartially depended on the impartiality of the judicial officials. He once said, “It is the duty of ‘Ting Wei’ to keep the justice of the world, if failed, the other officials may follow suit or give lenient or severe sentences at will, then how will the people know what to do?”⁷⁰ Clearly, Zhang Shizhi had taken “impartiality” as the supreme standard for law enforcements. During the period of “San Guo” (Three Kingdoms), Gao Rou and Wan Sui in the State of Wei also expressed some similar ideas. It was recorded in “Gao Rou Zhuan” (Biography of Gao Rou) in *San Guo Zhi (The History of Three Kingdoms)* that “Rou said, the duty of ‘Ting Wei’ is to keep the justice of the universe. How could he ruin the law by his own changing moods?” In “Wang Su Zhuan” (Biography of Wang Su)

⁶⁶“Shang Tong” (Promoting Equality) (Part 2) in *Mozi*.

⁶⁷“Zhou Qin” in *Yan Tie Lun (Discussions on Salt and Iron)*.

⁶⁸“You Du” (Being Lawful) in *Han Feizi*.

⁶⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)*.

⁷⁰“Zhang Shizhi Zhuan” (The Biography of Zhang Shizhi) in *Han Shu (The History of Former Han Dynasty)*.

in the chapter of “Wei Zhi” (History of Wei) in *San Guo Zhi (The History of Three Kingdoms)*, Wang Su said, “If the guilty men, though they are honorable, will be punished, the laws will surely be held in awe by the people in the world.”

In order to ensure the faithful enforcement of law and the impartiality in justice, great importance were attached by the enlightened rulers to the selection and the controlling of officials, and it was regarded as a critical condition for achieving justice and impartiality in law to make proper laws and to select upright officials. In Tang Dynasty, Bai Juyi said, “Though the laws of the Zhen Guan period are still being applied, if there are no officials as good as the ones at the time, it will be very hard to achieve impartiality in punishments.”⁷¹ In Song Dynasty, Wang Anshi said, “It is the law that is applied to manage the properties in the world, and it is the officials who should be abided by the law. If the officials are bad, even though the law is applied, it could not be executed impartially; if the law is not well-made, even though there are the properties, it could not be managed.”⁷² In Ming Dynasty, Zhang Juzheng who was honored for “having ruled the country by law in his lifetime” had understood from his many years of political experience that “it is not difficult to make a law, but it is difficult to enforce it”.⁷³ So, the difficulty in the enforcement of law was mainly caused by whether the supreme ruler, or namely, the emperor, and his officials were willing to observe the laws. Just as Guan Zi had said, “It is the senior officials who should be abided by the laws.”⁷⁴ In Chinese history, in the dynasties when the law was observed by the emperor, the flourishing age in which “the law was properly enforced and the government was supported by the people”⁷⁵ would be brought about, however, in the dynasties when “the wise have selfish words, the virtuous have selfish motives, the superior bestowed selfish benefits, and the inferior pursued selfish desires”,⁷⁶ there would be no credit in the enforcement of law, and no impartiality in the judicial decisions.

During the late period of the Qing Dynasty when the country was opened to foreign trade, a reformer named Wei Yuan who had advocated “learning the advanced technologies from ‘barbarians’ in order to subdue them” had sighed and said, “It is not difficult to institute a law, but it is difficult to select a person to execute the law” in the grave situation where the officials were muddle-headed and the laws were abused by selfish interests. In the article of “Min Yi Yu Zheng Zhi” (Popular Customs and Politics) written before “Wu Si Yun Dong” (the May 4th Movement in 1919), Li Dazhao also had stressed the importance of the qualities of

⁷¹ “Lun Xing Fa Zhi Bi” (On the Disadvantages of Criminal Law) in *Chang Qing Ji (An Anthology of Chang Qing)*.

⁷² “Du Zhi Fu Shi Ting Bi Ti Ming Ji” (Writings for the Vice Financial Minister) in *Lin Chuan Xian Sheng Wen Ji (The Collected Works of Mr. Lin Chuan)*, Vol. 82.

⁷³ “Zou Shu” (A Memorial to the Throne) (Part 3) in *Zhang Wen Zhong Gong Quan Ji (The Complete Works of Mr. Zhang Wenzhong)*.

⁷⁴ “Ren Fa” (Relying on Laws) in *Guan Zi (The Book of Master Guan)*.

⁷⁵ “Shu Du Shi Er” (The 12th Letter) in *Zhang Wenzhong Gong Quan Ji (The Collected Works of Mr. Zhang Wenzhong)*.

⁷⁶ “Gui Shi” (Curious Motivation) in *Han Feizi*.

law executors in bringing the functions of law into a full play. He said, “The survival of the state entirely relies on law. . . . If there was no law in a state even for only one day, there would be a loss of authority”. However, “law is not a living thing, if there is no one to enforce it, it can not enact by itself”. Therefore, “it is necessary to choose some able men to have the law executed properly”.

In order to guarantee the impartiality in judicial decisions, aside from the cautious appointments and the effective management of officials, some other systems were also needed to be set up. For instance, the abolishing of interrogation system was systematized in the Tang Dynasty so as to avoid unjust adjudications. It was stipulated in “Xing Bu” (Board of Punishment) in *Tang Liu Dian (The Six Statutes of Tang Dynasty)* that “if the interrogator and the prisoner are relatives or have grudges against each other, the interrogator should be replaced.” After Tang Dynasty, the rules for the abolishing of interrogation were more specific, and it was recorded in the article of “The Avoidance of Case Trials” in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* that:

If the judge and the accuser are relatives or friends, or they have marital relationship, or teacher-student relationship (or leader-subordinate relationship), or they have grudges against each other, the judge should be removed from the court. The offenders (who have charged the accused guilty, but have not reduced or increased the punishments of the accused) shall be punished by ‘Chi’ (flogging with light sticks) for forty strokes. If the offenders have reduced or increased the punishment of the accused, they shall be punished for exonerating the guilty or implicating the innocent.

In addition, there were strict regulations for the system of evidence, which stated that the offender’s relatives (including their elder and younger brothers or relatives who were allowed mutual concealment of the crimes by the law) were forbidden to present evidence and that if the witness had committed perjury, he should be punished. It was stipulated in “Fraud and Falsehood” in *Tang Lv (Tang Code)* that “evidence shall be given without personal favor. . . ., and the penalty imposed upon the witness who has committed perjury shall be reduced by two degrees.” Whether the aforementioned stipulations were about the avoidance of case trials or about the requirement for giving evidence, their purpose was not only to prevent the judicial officials from showing partiality to any party involved but also to prevent them from violating justice.

From Tang to Qing Dynasty, the judicial review system for death penalty which had long existed was also used in examining whether the given punishments were in accordance with the crimes committed or whether there were unfair adjudications. For example, it was ruled in an imperial decree issued in April of the second year of Emperor Yongzheng that:

Since I was on the throne, I have carefully read all the memorials presented to me. Especially, I have paid much attention to the memorials about the punishments for fear that the law is executed partially and punishments are given unjustly. I have felt a great sense of compassion, therefore, except a few unpardonable cases, all the cases presented from the capital or other provinces have been reviewed with benevolence, and the penalties have been reduced.⁷⁷

⁷⁷ *Da Qing Lv Li Tong Kao Jiao Zhu (Notes on the Textual Research of the Laws and Precedents of Great Qing)*, China University of Political Science and Law Press, 1992. p. 200.

In the 40th year of his reign, in a decree Emperor Kangxi strongly criticized the indiscretion which the ministers had shown in the cases of “Qiu Shen” (the Autumn Assizes): “I have reviewed the cases of ‘Qiu Sheng’ (the Autumn Assizes) and have found many mistakes in the expressions of the charges, but they have been badly neglected by the officials in court. So, ‘Xing Bu’ (Board of Punishment) should be especially blamed for its carelessness and should be punished.”⁷⁸ In the 30th year of Emperor Qianlong, an official named Rao Quan in Hunan was found guilty and was charged with the death penalty without defense, because the time limit for defense had already expired. However, the case was reviewed by Huang Xiangzhen, the “Zhi Fu” (magistrate of a prefecture) of Zhejiang province, and Rao Quan was then sentenced to render a service in the military. After learning that two different charges had been given for the same offence, Emperor Qianlong “issued an emergent edict, ordering that the execution be suspended by ‘Zhi Fu’ (magistrate of a prefecture) of Hunan province and that the case be investigated by ‘Xing Bu’ (Board of Punishment) before the final decision was made.” In the seventh year of Emperor Jiaqing, a man from Guangdong, named Yao Dehui, was found guilty of killing others in an affray. During “Qiu Sheng” (the Autumn Assizes), his sentence was changed from “Huan Jue” (deferred execution) to “Qing Shi” (circumstances deserving of the capital punishment) with a quotation of “a life for a life” from the imperial edict issued in the 18th year of Emperor Qianlong. On this case, Emperor Jiaqing issued an edict and commented that:

The rule of ‘a life for a life’ was originally made for the settlement of the cases involving fighting with weapons between groups of people. As to this kind of ordinary affrays, considering the casualties caused by the exchanging of attacks, the raider shall be sentenced to ‘deferred execution’ according to the fact. Only the cases involving homicide heard in ‘Qiu Shen’ (the Autumn Assizes) should be settled strictly in accordance with the rule of ‘a life for a life’. Therefore, those cases of homicide shall be put into the category of ‘Qing Shi’ (circumstances deserving of the capital punishment) and shall not be considered to be given the punishment of ‘Huan Jue’ (deferred execution). For this reason, I order that the original judgment of ‘Hun Jue’ (deferred execution) be retained.⁷⁹

From these cases, it could be seen that the work of those judicial officials had been inspected and examined by the emperors of the Qing Dynasty through “Qiu Shen” (the Autumn Assizes). In the feudal times of China, the reasons for those “Qing Guan” (the honest and upright officials) to be highly praised were that they were not only impartial in executing the law, but also dared to defy the powerful and the noble, so they were men of great integrity.

⁷⁸“Sheng Zu Ben Ji” (Records of Emperor Sheng Zu) in *Qing Shi Gao (The History of Qing Dynasty)*.

⁷⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao (The History of Qing Dynasty)*.

4.2.5 *The Principle of Integrity Acting as a Standard for Civil Acts*

The main feature of ancient China was the self-supporting and self-sufficient natural economy, so it did not have the same market-oriented economy as that in ancient Rome; as a result, there were no private laws which were as well-developed as the Roman law. However, the civil legal relationship and civil laws had ever existed in China since it entered the stage of civilization, but they had just been scattered in penal codes or in other old laws instead of being collected and written into a civil code. As early as Western Zhou Dynasty (1122 B.C.–771 B.C.), there were cases of civil actions about the real rights and the obligatory rights. In Tang and Song Dynasty, the legal norms of civil laws were continuously developed and enriched, and they were penetrated with the appeal for integrity. For instance, at the beginning of the Tang Dynasty, in the face of the large numbers of the wasted lands that nobody had claimed for after the wars in the late Sui Dynasty, it was stipulated in the law that “the land will be returned to the owner who has claimed for it”, however, people were strictly prohibited by the law from claiming the public land or the lands of others. So if those lands were claimed fraudulently, the claimants shall be punished by law. According to the law, the preemption of unclaimed properties was stipulated as the following: “if the properties like the mountains and plains have been cultivated, or the products harvested, or collected”, they would be viewed as the properties of the cultivator and should not be claimed for by other people, but “if they are still claimed fraudulently, the claimants shall be found guilty of larceny”. The punishments in *Tang Lv (Tang Code)* for the fraudulent claims could be seen as a protection and advocacy of the principle of integrity from different perspectives.

In Tang Dynasty, there was an evident development in the law of obligation, which had made the contractual relationships more complicated so that both contracting parties were required to have good faith by law. For example, in the sale contract, the liability to guarantee of the seller was emphasized. The following was the stipulations about warranty against defect in the “miscellaneous laws” of the *Tang Lv (Tang Code)*: in the sale of “Nu Bi” (the slave girls and maidservants), horses, cows, camels, mules, and donkeys, after the sellers and the buyers had signed the contracts, if the objects which they had bought “are found to have old illness, the buyer is allowed to breach the contract within three days; if the illness was false, the buyer shall be punished by ‘Zhang’ (flogging with heavy sticks) for forty strokes”; if the buyer and the seller had conspired with each other in selling so that “the sellers sell the low-priced products at higher prices, or the buyers buy the high-priced products at lower prices”, or that “the prices are forced up high in the selling and the confusion in market is caused”, both the seller and the buyer would be punished by “Zhang” (flogging with heavy sticks) for 80 strokes; if “the goods have been bought, and their weight was eighty or over, the profits will be calculated and punishments shall be the same as that for

the crime of stealing. Moreover, the offenders shall be punished for larceny". In order to carry out the default guarantee, it was provided that on the contract the parties should write "whoever breaks the contract, he should pay fives bolts of cloth". Those who had breached the contracts without making the compensation would also be punished by law.

In *Tang Lv (Tang Code)* there are stipulations about the property in deposit, and the custodian responsibility of the trustee was emphasized. For example, "if the property received in deposit is consumed without authorization, the offenders shall be punished for pecuniary malfeasance and their penalty shall be reduced one degree"; "if the objects are announced dead or lost by deception, the offenders shall be punished for fraud property, and their penalty shall be reduced one degree". However, if the objects were burgled, or if the trustees had performed their obligations, but the animals had died anyway, the trustees would not have to take responsibility.

In the employment contracts collected in the extant documents of Dun Huang of Tang, the rights-obligations relationship was set in advance. For example, the payment which the employees received from the employers was mainly cash, but they also included clothes and grain. The first part of the payment would be given to the employees as soon as they had started to work, and the rest of it would be paid off when the contract was terminated. The term for the contract could be as long as 1 year, or as short as a few months. If the employees were lazy, they should be fined; if they had destroyed the farm tools or lost the animals, they should pay for the compensations; if they had escaped, the guarantors should pay the compensations; if they had breached the contracts, either the employers or the employees should be fined (usually a sheep would be fined). Moreover, in the documents of Dun Huang, the contracts of hiring cows, donkeys and camels, the specific prices, terms, punishments for breaching the contracts, the measures of handling the sick and dead animals, and the cost of guarantee, etc. had also been collected.

Aside from the stipulations about the integrity of civil acts inherited from the *Tang Lv (Tang Code)*, the punishments for double mortgage on property were more specific in "Song Lv" (*Song Code*). It was also regulated in *Song Xing Tong (The Penal Code of Song Dynasty)* that:

If the property and the land are doubly mortgaged, the owners, 'Ya Ren' (the middleman), the neighbors and those who have signed their names on the contract are punishable for burglary, and they shall be punished in accordance with the amount of money that they have obtained. The punishment for those who have not shared with the money shall be reduced three degrees, and the money shall be forced to pay back to the deceived. If the owners have used all up but are still unable to pay off the mortgage, the middleman and the neighbors who have signed their names on the contract shall pay the rest. The property and the land belong to the people who are firstly mortgaged to.⁸⁰

⁸⁰"Chen Deng Can Xiang" (Reference by the Ministers) in the item of "Dian Dang Zhi Dang Lun Jin Wu Ye" (Real Estate Should Only be Included in Pawning) in *Song Xing Tong (The Penal Code of Song Dynasty)*, Vol. 13.

In June of the first year of Qian Xing in the reign of Zhenzong (1022 A. D.), the following imperial decree was issued by Emperor Zhenzong of Song to deal with the fraudulent conducts in trading on credit:

The Office of Commercial Tax and the local government of Nan Hebei shall inform the travelers that from today forward all the goods in circulation shall be traded on cash. If the goods are purchased in large amount, and the buyers have to pay on credit, three or five or more people are needed to provide their properties for the guarantee and shall sign the contracts with the dates of the repayment; if the term for repayment has expired, but the buyers are unable to pay off, the guarantee providers shall undertake the responsibility; if the travelers have neglected the regulations and only asked the buyers to write down the amount of money that they have owed without requiring them to provide their properties for the guarantee, the cases will not be accepted by the local government; if the guarantee providers have no properties for guarantee but have provided false properties in the contracts, or if they have conspired with the shop owners or other middleman to deceive the travelers to buy poor quality products or to buy products at high prices, they shall be harshly punished.⁸¹

In volume 22 of *Qing Yuan Tiao Fa Shi Lei (Legal Provisions and Cases in Year of Qing Yuan)*, there were regulations on the acts of “undue performance by a delinquent debtor”, which was the violation of the principle of integrity. It was regulated that “if debts are delinquent, it shall be claimed by the court; if the debtor has fled away, the guarantee providers shall pay for the compensations, but shall not be held in custody.”

In the relationship of pawning, if the term for pawns had expired and the persons who had pawned the properties demanded for the redemption, but the pawnbrokers had intentionally exceeded the time limit, or refused to turn them over, the pawnbrokers should be punished. This was stipulated in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)* that “according to the law, if the owners want to redeem their properties from the pawnbrokers after the term of pawning has expired, and if the pawnbrokers have intentionally exceed the time limit or refuse to turn them over, the pawnbrokers shall be punished by “Zhang” (flogging with heavy sticks) for one hundred strokes.”

In volume 11 of *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, a case, namely, “punishment for the crime of fraud by the father and the son who were ‘Ya Kuai’ (middleman)” was recorded, and it had shown the harsh punishment given by the local magistrate in the Song Dynasty for the crime of fraud:

It is difficult for businessmen to make profits, but comparatively, it is easier for ‘Ya Kuai’ (middleman) to do so. Therefore, when doing business with the businessmen, the ‘Ya Kuai’ (middleman) should be fair-minded and should bear in mind the efforts and the difficulties which the businessmen have ever had. However, in this case, the two ‘Ya Kuai’ (middleman) have heartlessly deceived the businessman. Yan Wenlong (the businessman) came to Li Si and his son from a distance of thousand *li* away for the help of buying and selling products. Li Si and his son, having been cooperating with Yan, had made a huge profit from the business. For this reason, Yan trusted the two and delivered the money to the father and

⁸¹“Shi Huo” (Food and Commerce) in *Song Hui Yao Ji Gao (Collections of Historical Records in Song Dynasty)*, chapter 9, Vol. 37.

the son through the bank. He thought his payment would have been guaranteed by the contract he was holding, but he did not expect that Li Si and his son broke the promise and did not do anything after receiving the money. Even in court, Li Si still insisted that Yan had made two different contracts, and it was a method which the rich men had always used to bully the poor people. Having been ‘Ya Kuai’ (middleman) by trade for a long time, Li Si and his son must be crafty, so how could they sign the contract with a businessman in a distant place whom they did not trust? This was most unreasonable. What Li Si said were not only deceptive to Yan Wenlong, but to the ‘Tai Shou’ (the prefecture chief)! It is unbearable to deceive a diligent businessman, let alone to deceive the ‘Tai Shou’ (the prefecture chief). As ‘Ya Kuai’ (middleman), they were bold enough to deceive the ‘Tai Shou’ (the prefecture chief), so we could imagine how many people they had deceived! The crime of failing to pay debts is minor, but the crime of fraud is serious. Therefore, Li Si and his son shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes before being driven out of this ‘Fu’ (prefecture). They shall be still inspected to pay back the money that they owe Yan Wenlong.

4.3 The Emphasis of Criminal Law and Neglecting of Civil Law

In ancient China, although it was not as accurate as what the western scholars had said that “there were no civil laws but only criminal laws”, it was a historical fact that much importance was attached to the criminal law, but less to the civil law, and that it was also one of the features of the legal tradition in ancient China.

4.3.1 *The Synonymous Connotation of Law and Punishment and Regarding Preventing Violence and Stopping Evils as Its Basic Function*

In ancient China, law was punishment, and punishment was law, and the two were not only synonymous in concept, but similar in connotation. It was explained in “Shi Gu” (explaining the different meaning and usages of words in ancient times) in *Er Ya (Using Graceful and Elegant Languages: an ancient book containing commentaries on classics, names, etc.)* that “punishments mean principles and laws”. And in *Yi (The Book of Changes)* it was explained that “the right part of the character ‘Xing’ (punishment) is ‘Jing’ (a well), which means ‘the law’”. Besides, according to the ancient books, in the primitive times of Yao and Shun, the expression of “Xiang Xing” (symbols of punishment) had already come into use, which had originated from the phrase “*Xiang Yi Dian Xing* (meaning: he exhibited to the people the statutory punishments)” in the article “Shun Dian” (Shun Code) in *Shang Shu (The Book of Historical Document)*. According to the explanation given by the Confucianists, the characters “Xiang Xing” referred to the “symbolic punishments” imposed on “the guilty”: “those who have committed crimes punishable by

severe penalty were clothed in brown color, those who have committed crimes punishable by moderate punishment were shod in special wood clogs, and those who have committed crimes punishable by light punishment were covered with a black head-cloth”.⁸² The purpose of “marking or coloring the clothes of the offenders, or making the offenders wearing special clothes” was to show the identities of “the offenders” and to make them humiliated.

In the chapter of “Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)*, an idea was put forward about the function of the punishment that “proper punishments should be implemented in the governing of the people”, which had indicated the role that punishment (law) should play. The philosophers in pre-Qin Dynasty also had many discussions about this issue, especially the legalists, starting from the need of ruling the country by law, had held full arguments about the functions and the roles of law. From the perspective of historical evolution, Guan Zi had stated that the reason for law making was that “law is a way of praising those who are meritorious and warning those who are cruel, and ‘Lv’ (criminal law) is a method to regulate responsibilities and stop disputes”.⁸³ Shang Yang also believed that when the phenomenon that “the weak are conquered by the strong and the few are oppressed by the many”⁸⁴ occurred in the society, it needed to “Li Jin” (to institute law), “Li Guan” (to appoint officials) and to “Li Jun” (select a ruler) in order to regulate “responsibilities” and stop “contentions”. Thus, laws not only had brought about “the obligation of the sovereign and the ministers, the superior and the inferior, the ‘Li’ (rites) between the father and the son, the elder and younger brothers, the union between the husband, the wife, the concubines and mates”,⁸⁵ but also had “played a role of compulsorily enforcing severe punishments like the use of ‘Dao’ (knife) and ‘Ju’ (saw, here means punishments) at home, and dispatching military equipments and troops abroad”.⁸⁶ Han Feizi, when discussing the roles which the ancient criminal laws had played, had said,

Nothing could match the law in correcting the faults of the high, rebuking the vices of the low, eliminating the disorders, settling the erroneous, avoiding the mistakes, subduing the arrogant, straightening the crooked, and unifying the customs of the masses; and nothing could match penalty in warning the officials, holding the people in awe and veneration, rebuking obscenity and danger, and forbidding falsehood and deceit.⁸⁷

The idea of “preventing violence and prohibiting wickedness” by applying law had a profound influence on the whole ancient society. In his testament, Emperor Yongzheng, who had lived at the end of the feudal times, said, “The establishment of the penalty and the prohibition in a state is to rebuke vices and eliminate violence, to punish corruptions and stop wickedness, to regulate manners and make

⁸² *Shang Shu Da Zhuan (Interpretations of Shang Shu)*.

⁸³ “Qi Chen Qi Zhu” (Seven Ministers and Seven Rulers) in *Guan Zi (The Book of Master Guan)*.

⁸⁴ “Hua Ce” (Policies) in *Shang Jun Shu (The Book of Lord Shang)*.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ “You Du” (Being Lawful) in *Han Feizi*.

officials respectful.”⁸⁸ Shen Jiaben, who was in charge of law revision in the late Qing dynasty, also believed that “the law is a way to encourage those who are meritorious and punish those who are cruel”, and that the purpose of legislation was to “rule the people”.⁸⁹

In the legal thoughts of legalists, the doctrine of severe punishment was one of the most distinguishing characteristics. The legalists believed that “in prohibiting wickedness and stopping crimes, there are no better ways than enforcing severer punishments”,⁹⁰ and “in inflicting penalties, even the minor offences should be punished severely, because if there are no minor offences, there would be no serious ones, which is called abolishing penalties by the means of penalties”,⁹¹ so “if punishments are severely and rigorously applied, then people will not dare to have a try, with the result that there would be no people punished in the state”.⁹² The doctrine of severe punishment was a logical conclusion drawn on the basis of the theory that human nature was evil. According to the legalists, man had a nature of “drawing on advantages and avoiding disadvantages” and “disregarding moral principles in pursuit of profits”, which might also be the origin of crimes. Therefore, in order to “settle the matters without enforcing punishments”,⁹³ it was necessary to advocate severe punishments. The other ideas like “virtue comes from punishments”⁹⁴ which was advocated in legalism was in fact a different explanation for “abolishing penalties by means of penalties”. Meanwhile, the legalists had also advocated that “those who have performed meritorious services should be rewarded and those who are guilty should be punished”. Shang Yang said, “If the people have faith in the rewards, then they will achieve what they have aimed at, and if they have faith in the penalties, then the wickedness will be eliminated at the start.”⁹⁵ When he was carrying out the political reform in the State of Qin, he had strived to be “impartial in the enforcement of rewards and punishments”. Han Feizi also believed that “the administration of the state must be influenced by human relationship. Because there are likes and dislikes in human relationships, rewards and punishments can be executed; so if rewards and punishments are applicable, the prohibitions and orders can be established. This is the way of the government.”⁹⁶ For this reason, he had viewed the rewards and the punishments as the “Er Bing” (meaning “two handles” of the containers, referring to the essence of things) of the rulers in governing the country. He said, “The two handles refer to ‘Xing’ (punishment) and ‘De’ (virtue). What are the meanings of ‘Xing’

⁸⁸ “Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*).

⁸⁹ “A Memorial to the Emperor about Enforcing the same Punishment for the Various Crimes punishable by ‘Qian Jun’ (recruitment in the army), ‘Liu’ (life exile), ‘Tu’ (imprisonment) for Qi Ren as for other Common People”, in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 1.

⁹⁰ “Shang Xing” (Rewards and Punishments) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹¹ “Jing Ling” (Strict Enforcement of Laws) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹² “Shang Xing” (Rewards and Punishments) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹³ “Jing Ling” (Strict Enforcement of Laws) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹⁴ “Shuo Min” (On the People) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹⁵ “Xiu Quan” (On the Usage of Power) in *Shang Jun Shu* (*The Book of Lord Shang*).

⁹⁶ “Ba Jing” (Eight Canons) in *Han Feizi*.

(punishment) and ‘De’ (virtue)? To impose death penalty on the criminals is called ‘Xing’ (punishment) and to bestow encouragements or rewards on men of merits is called ‘De’ (virtue)”.⁹⁷

As to the applications of rewards and punishments, the legalists had suggested giving fewer rewards but enforcing more punishments. In the discussion, they had stated that “a good ruler usually punishes the evil but seldom rewards the virtuous; as a result, the people will become virtuous without being punished”.⁹⁸ Thus, from this point, it was clear that the legalists’ views upon rewards and punishments and their advocacy for severe punishments were from the legal theories characterized by utilitarianism.

The Qin Dynasty, established according to the thoughts of legalism, had developed a rigorous and cruel system of punishments and rewards, which, however, unfortunately had led to the subjugation of the empire of the second Emperor of the Qin. When summarizing the historical lessons, the people in the later generations had learned that “the reason for the prosperity of the Qin was the miscellaneous laws and heavy punishments, and the reason for the downfall of the Qin was people’s resentment and the rebellions throughout the country”.⁹⁹ The disastrous consequence of the Qin dynasty had never been expected by those legalists when they started to establish the ideological system of “severe punishments”. For this reason, the advocacies of “Ren Zheng” (Benevolent Administration) and “Li Zhi” (the ruling of “Li”) began to be stressed by the Confucianists after the Han Dynasty. Although the Confucianists had advocated “Li” (rites), they did not reject the idea of “enforcing severe penalties and punishments to those” “extremely wicked people”. They had proposed “Kuan Meng Xiang Ji” (leniency be complementary to the severe punishments), and “Wai Li Nei Xing” (“Li” should be used as the external or complementary, while punishments should be inflicted as the internal or fundamental). Sang Hongyang, who was known for his support of the ruling by law, had emphasized that “the law is a restraint on the wickedness”.¹⁰⁰ The people of “Xian Liang Wen Xue” (one of the subjects examined in the selection of officials) who valued the education of virtues had pointed out the shortage of the simple infliction of penalty and the neglect of virtues and rites. They said, “Laws can punish people but can not make them upright; laws can kill people but can not make people benevolent.”¹⁰¹ In Song Dynasty, Yang Wanli had expressed his views on penal laws by stating that “if not applied, the law is merely a law, but if applied, the law is a punishment. If there is no violation, the law is merely a law, but if there is a violation, the law is a punishment”.¹⁰² Qiu Jun in the Ming Dynasty had pointed out the relationship

⁹⁷ “Er Bing” (Two Handles) in *Han Feizi*.

⁹⁸ “Hua Ce” (Policies) in *Shang Jun Shu (The Book of Lord Shang)*.

⁹⁹ “Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

¹⁰⁰ “Shen Han” (Legalists) in *Yan Tie Lun (Discussions on Salt and Iron)*.

¹⁰¹ *Ibid.*

¹⁰² “Xing Fa Lun” (On Criminal Law) in *Cheng Zhai Ji (Collected Works of Cheng Zhai: Yang Wanli)*.

between law and penalty with simple and clear expressions: “the law is the essence of penalty, while the penalty is the application of the law; the two are in fact integrated.”¹⁰³ Since the Confucianists and the legalists had shared similar views on law and penalty, it was inevitable that Confucianism and legalism were merged together, which had begun in the Song Dynasty. Since then, “the combination of the ruling by force with the ruling by benevolence” began to be developed and continued throughout the whole feudal society.

4.3.2 *The Penal Code Applied as the Main Code in Different Dynasties*

The Chinese slavery society had gone through three dynasties, namely, Xia, Shang, and Zhou. According to historical books, “*Yu Xing (The Penal Code of Yu)* was made in order to suppress the political chaos in the Xia Dynasty; *Tang Xing (The Penal Code of Tang)* was made in order to suppress the political chaos in the Shang Dynasty; *Jiu Xing (The Code Nine Penalties)* was made in order to suppress the political chaos in the Zhou Dynasty.”¹⁰⁴ In the reign of the King of Mu in the Zhou Dynasty, the king had ordered Marquis of Lv to draft *Lv Xing (The Penal Code of Lv)*. And in all these penal codes, the purpose of law making was carried forward in one continuous line, namely, laws were made in order to suppress the “political chaos”, which had shown that the first national statutory law in ancient China was penal law.

Because for a long time the ancient society had been relatively secluded, the people’s concept of law had been staying unchanged, and to them, “law is punishment, and punishment is law”. For this reason, the principle which based on penalty was inevitably followed by the later legislations.

Fa Jing (Canon of Laws) was the first law code in the Chinese feudal times. Compared with the laws entitled “penal code” which were made in the three dynasties (Xia, Shang, and Zhou), punishments were not so stressed in *Fa Jing (Canon of Laws)* in term of the structure, but it was an agglomeration of the penal laws of each state in the middle period of the Spring and the Autumn Periods in terms of the contents. Therefore, what was described in ancient books that “Li Kui had collected the penal laws of all of the states and drew up the six sections of *Fa Jing (Canon of Laws)*” was proved to be historically true. The interrelationship between the six sections of *Fa Jing (Canon of Laws)* and their respective characteristics were clearly stated in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)*:

The old statutes of the Qin and the Han were continued to be adopted in it (*Fa Jing: Canon of Laws*). It was drafted by the teacher of Marquis of Wei Wen named Li Kui, and it was written on the basis of the regulations of the different states. Li Kui believed that punishing

¹⁰³ *Da Xue Yan Yi Bu (Supplements for the Derivational Meaning of the Great Learning)*, Vol. 100.

¹⁰⁴ “Zhao Gong Liu Nian” (The 6th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

'the thieves' and 'the robbers' was the most urgent thing to do in order to stabilize the political position of the king. Therefore, the first two sections of *Fa Jing* (*Canon of Laws*) were named 'Dao' (Theft) and 'Zei' (banditry). Since the thieves and robbers needed to be punished, the following two sections were named 'Wang' (Net) and 'Bu' (Arresting). The punishments for the crimes of 'frivolous and illegal behaviors', 'climbing over city walls', 'gambling', 'fraudulent behaviors', 'embezzlement and corruption', and 'violating sumptuary regulations on clothing and objects' were all included in the section of 'Miscellaneous Regulations'. And finally the section of 'Ju Lv' (Circumstances of Mitigation and Aggravation of Punishment) was followed. Altogether there were six sections, and they were all the regulations on crimes. Later on, they were adopted by Shang Yang so as to rule the State of Qin.

Similar records could also be found in *Tang Lv Shu Yi* (*The Comments on Tang Code*), therefore, obviously, *Fa Jing* (*Canon of Laws*) had occupied a prominent position in Chinese legal history, because it had preliminarily established the basic principle of the feudalistic legal system, created the stylistic rules and layout of "stressing punishments with the integration of various laws" in compiling law codes, and finally had become the historical origin of feudal codes. The codes drafted in the later times such as *Qin Lv* (*Qin Code*), *Jiu Zhang Lv* (*The Code in Nine Chapters*), *Xin Lv* (*New Code*), *Jin Lv* (*Jin Code*), *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*), *Tang Lv Shu Yi* (*The Comments on Tang Code*), *Song Xing Tong* (*The Penal Code of Song Dynasty*), *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*), and even *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) which was the epitome of the feudal law codes were all based on the principle of "regarding punishments as the primary", though they were different in titles, structures, and contents, just as what was said in "Ming Li" (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*): "though the laws and codifications had variations in contents, their meanings are the same."

In ancient China, "Xing" (punishments) was developed into "Fa" (law), and then "Fa" (law) was developed into "Lv" (criminal law). Although the social relationships which they had reflected and the emphasis which they had adjusted and applied were different; they still maintained an internal consistency. For this reason, it was declared in "Ming Li" (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that "'Fa' (law) also means 'Lv' (criminal law)". But whatever they were named, their central idea could be summarized as one word, namely, "Xing" (punishment).

Besides "Lv"(criminal law) which was the most formal and authoritative legal form in ancient times, the other legal forms in the past dynasties, such as "Ling" (order or ordinance), "Ke" (rule), "Bi" (analogy), "Ge" (injunction), "Shi" (standard), "Dian" (code), and "Li" (precedent), etc. had all strictly followed the principle of "stressing punishments", and some of them were in fact separate penal laws themselves. Therefore, it could be inferred that, basically, the long history of legislation in China was also the history of legislation on criminal laws, and that in the past dynasties, the typical law codes were penal codes, which had maintained the stylistic rules and layout of "the integration of various laws with no differentiation of civil and criminal laws".

“The integration of different laws” was a common stylistic feature shared by both Chinese and foreign countries in the early law compilation. For example, *Shi Er Tong Biao Fa* (*The Law of the Twelve Tables*) of ancient Roman, which was drawn up almost simultaneously with *Fa Jing* (*Canon of Laws*), was a unification of different laws. But there were some differences in *Shi Er Tong Biao Fa* (*The Law of the Twelve Tables*): first, its main content was about private laws, and most of the regulations involved were civil. Among the twelve tables, “Table One” to “Table Three” were about the procedural law; “Table Four” to “Table Seven” were about the civil law, including debts, paternal rights, the guardianship and property law, possession law, premise and land law; “Table Eight” and “Table Nine” were criminal laws, including the laws of injury and the public law; “Table Ten” was the sacred law; the last two Tables were the supplements.

Second, with the development of social civilization, as late as the sixth century A.D., when Emperor Justinian was in the reign, the independent branches of department law code were made in Rome. In the twelfth century, at the times of “the renaissance of Roman Law”, the *Corpus Juris Civilis* (or *The Code of Justinian*) became an independent civil law. However, in China, the traditional stylistic rules and layout of “stressing punishments with the integration of various laws” in law compilation was not broken until the amendment of the law code at the end of the Qing Dynasty, with the result of the introduction of the western legal systems. When discussing the characteristics of traditional Chinese legal culture, the well-known Japanese jurist Siga Jyuuzou pointed out that “although China has a long history and has enjoyed advanced civilization since ancient times, the system of private laws has never been created in its own tradition. So, the so-called law in China only refers to the criminal law on the one hand, and to the organic laws of the ruling institutions on the other, which are composed of administrative regulations and the regulations of punishments on the behaviors which had violated the regulations.”¹⁰⁵

It needed to be pointed out that during the long periods of feudal society, no efforts had ever been made in making civil laws, because the Chinese economic structure had been dominated by the natural economy and because public rights were stressed by the autocratic imperial courts but the private rights had been neglected, the customary laws which had been applied to different fields and regions had played a very important role in adjusting the civil legal relationship. For these reasons, until the end of the feudal times, there had been no collected civil codes in China; however, it did not mean that there were no civil regulations in the feudal legal systems, because the ruling class was by no means indifferent to the property and personal relations that were closely connected to their own vital interests. In fact, ever since *Tang Lv* (*Tang Code*) was made, the sections in penal laws about marriages, lands, and debts had all included complete civil regulations; otherwise, they would not have been called “the integration of different laws”. As a result of the collaboration of the national statutory laws and the various customary laws, the rules of rites and customs, and the principles of families and clans, an elaborate system of civil laws for adjusting the practical relationships were developed. After Song Dynasty, with the

¹⁰⁵Siga Jyuuzou, “On Chinese Legal Culture”, *Journal of Comparative Law*, Vol. 3, 1988.

development of the commodity economy, more exclusive regulations on civil acts were continuously made, which had shown a tendency for further development. Even without the movement of “Xi Xue Dong Jian” (the introduction of Western learning to the East) and without the introduction of western legal culture, the domestic civil law of China would still have possibly begun a new era of its own.

4.3.3 *The Strictness of the Penalty System and the Brutality of the Penal Methods*

Corresponding to the characteristics of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law) in ancient legislation, the Chinese ancient penalty system was both advanced and elaborated.

The emergence of ancient penalties in China had a close connection with wars. At the end of the primitive society, the early military laws were made by the chiefs of tribes in order to encourage the members of clan to fight bravely for the triumphs. It was recorded in “Shi Xie” (punishments on the evils and evil-doings) in *Han Feizi* that “once Yu received the feudal dukes and princes in audience in the vicinity of Hui Ji. As the Ruler of Fang Feng arrived late, he was beheaded by Yu.” This was the origin of the military order which ruled that “anyone who has arrived late is to be beheaded”. It was also clearly recorded in “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)* that both “Bing” (military) and “Xing” (punishment) had the same origin:

Therefore, the sages made ‘Wu Li’ (the five rites) by following ‘Tian Zhi’ (the Heavenly orders), and ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. ‘Mo’: tattooing on the face or forehead of the offenders with indelible ink, ‘Yi’: cutting off the nose, ‘Fei’: cutting off the left or right foot or both feet, ‘Gong’: castration, and ‘Da Bi’: the capital punishment) by following ‘Tian Tao’ (the Heavenly penalties). The military equipments were used in the most severe punishments, the axes were used next to them; the swords and saws were used in the moderate punishments, chisels and drills were used next to them, and whips were used in the lenient punishments. The bodies of the offenders executed by the severe punishment shall be laid in wildness and the bodies of the offenders executed by the moderate and lenient punishment shall be carried out in markets and busy streets. Such ways of execution has already had a long history.

The reason why the ancient Chinese penal laws were barbarous and cruel at the very start was that “Bing” (military) and “Xing” (punishment) had the same origin, and that “Xing” (punishment) had originated from “Bing” (military).

The slavery system was the first social form after the humans had shaken off barbarism and stepped into civilization. For this reason, in the slavery society, it was inevitable that some means of penalty of the barbarous times were still retained. Engels had once said, “Because man had come from the beasts, so he had to use the barbaric and almost bestial means to extricate himself from barbarism.”¹⁰⁶

¹⁰⁶ *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 3, People’s Publishing House, 1995, p. 524.

The “Wu Xing” in Chinese slavery society including “Mo” (tattooing on the face or forehead of the offenders with indelible ink), “Yi” (cutting off the nose), “Fei” (cutting off the left or right foot or both feet), “Gong” (castration), and “Da Bi” (the capital punishment) were all “barbaric and almost bestial means”, and they were made for the deprivation of human lives and the injuries of human bodies. In addition to the five punishments, there were other penalties, such as “Hai” (mincing up the offenders), “Pu” (making the offenders into jerky), “Fen” (burning the offenders to death), “Ku” (hollowing out the organs of the offenders), “Ti” (scraping off the flesh of the offenders), and “Pao Xin” (removing the heart of the offenders). These methods of penalty were all extremely cruel, and they were often used to punish the minor offences. For example, if the people had “dumped ashes on the public road”, they “should have his hands cut off” according to the rules.

Aside from the punishments frequently inflicted on slaves, there were other punishments as the following:

“Huo Xing” (punishment of cutting off the left ear of the offender) – according to “Shi Gu” (explaining the different meaning and usages of words in ancient times) in *Er Ya (Using Graceful and Elegant Languages: an ancient book containing commentaries on classics, names, etc)*, “‘Huo’ means to achieve” (note: now the meaning of this word has been changed into “to get the left ear of the enemy”). In “Pan Shui” in the chapter of “Lu Song” (Praise of Lu) in *Shi Jing (The Book of Songs)*, it was recorded that “the left ears (of their enemy) will be here presented (note: “the meaning of ‘Guo’ is the left ear of the enemy”). The penalty of “Guo Xing” was widely used in the Shang and the Zhou dynasties.

“Yue Xing” (punishment of cutting off the nose of the offender) – in “Kang Gao” (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*, it also referred to the offender “whose nose has been cut off according to the rules”.

“Bian Pu Xing” (punishment of beating with a whip or a stick) – in “Shun Dian” (Shun Code) in *Shang Shu (The Book of Historical Document)*, it was recorded that “the whip is employed in the magistrates’ courts; the sticks are employed in schools”. According to the words of inscription engraved on the unearthed Gourd-shaped Ladle made in the Western Dynasty, “Bian Xing” (flogging with a whip) was the additional penalty to “Mo Xing” (punishment of tattooing) and “Shu Xing” (punishment of redemption), the purposes of which were to punish the officials who had neglected their duties or who had violated the laws. According to the note given by Kong Anguo, “Pu Xing” (flogging with a stick) was applied to punish those who had neglected their study: “those who do not work hard in their studies shall be whipped”.

“Liu Xing” (punishment of exile to a remote location) – in “Shun Dian” (Shun Code) in *Shang Shu (The Book of Historical Document)*, words of “Liu You Wu Xing” can be found, meaning life exile was the mitigation of the “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment). Other penalties similar to “Liu Xing” (punishment of exile to a remote location) were “Fang” (expel), “Qian” (repatriation), and “Cuan” (banishing), etc.

“Tu Xing” (penal servitude) – it was recorded in “Da Si Kou” (the senior minister of justice) in *Zhou Li (The Rites of Zhou Dynasty)* that “those who have hurt other people shall be imprisoned. ... If they have made confessions, they can be sent back to China (their birth places)”, and that “if those who have committed severe crimes can mend their ways and start anew, they shall be released after a three-year-servitude; moderate crimes, a two-year-servitude; minor crimes, a one-year-servitude.”¹⁰⁷

Ju Yi (penal detainment) – it was recorded in “Da Si Kou” (the senior minister of justice) in *Qiu Guan* (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that:

The offenders shall be punished by sitting on a rock in public with handcuffs and shackles before being handed over to ‘Si Kong’ (the minister of public work). Those who are guilty of severe offences shall be punished by sitting on a rock in public for thirteen days and shall serve penal servitude for one year; those who are guilty of offences one degree lighter shall be punished by sitting on a rock in public for nine days and shall serve penal servitude for nine months; two degrees lighter, seven days on a rock and penal servitude for seven months; three degrees lighter, five days on a rock and penal servitude for five months; four degrees lighter, three days on a rock and penal servitude for three months.

In short, the characteristics of the penalties in the times of the ancient Chinese slavery could be summarized as the following:

1. The belief of divine retribution. Corresponding to the low levels of productivity and understanding, people believed that the punishments which they were given were divine retribution for their sins. The violations of the law were the offences against the will of the Spirits, and the offenders would surely be punished by “Tian” (heaven), just as what was recorded: “those who are guilty are punished by the “Tian” (heaven), and the five punishments are enforced under the five circumstances respectively”.¹⁰⁸ The rulers, in order to show the deterrent effect of penalties, had not only highly publicized the idea of “Tian Fa” (Heavenly Punishments), but also deliberately made a beautiful cover of “enforcing justice on behalf of ‘Tian’ (heaven)” for the practice of penalties.
2. Among the various executions of death penalty, the corporal punishment was the predominant. In ancient China, the death penalty was referred to as “Da Bi”. There were various executions of death penalty, but all of them were barbarous and violent. Among the executions, corporal punishment designed to damage the offenders’ limbs, skins, and the body functions were mainly used in order to well perform the functions of the penal law and to warn and frighten people. Since the corporal punishments were designed to damage the offenders’ bodies, they were also named “Shen Ti Fa” (physical punishments).
3. Different punishments for the same crimes. The punishments for the same offenses might vary according to the different social status of the offenders. The rulers of the Zhou Dynasty had declared that “the penalties are used to punish the savages”.

¹⁰⁷ “Si Yuan” in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

¹⁰⁸ “Gao Yao Mo” (The Counsels of Gao Yao) in *Shang Shu (The Book of Historical Document)*.

Therefore, the punishments given to the privileged could be mitigated and commuted according to “Ba Bi” (the eight conditions for mitigating punishments). In this sense, even if the relatives of the emperor, including the dukes, princes, or the senior officials, were found guilty, they would not be punished by “Gong Xing” (castration), and “the ruler’s kindred was exempted from the punishment to perpetuate their families”.¹⁰⁹ If these noblemen were punishable by death penalty, the places of their executions were particularly stipulated: “the senior officials shall be executed in the imperial court; the scholars shall be executed in markets and streets” and the privileged would also be “exempted from punishments if they had paid the redemption”. However, “the punishment of redemption” was not an independent punishment, and it should not be mixed up with “the punishment of the fines”. Redemption was applicable to doubtful crimes, and all the offences punishable by the “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) could be redeemed. Clearly, in some regulations of the penal laws, such as “extending the punishment of offenders to all their relatives”, the traces of primitive revenge still remained.

After entering the feudal society, with the continuous reforms of the penal systems, the system of “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) was finally established, though it was a long process.

In the Warring Period and the Qin dynasties, “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) which had been prevalent in the slavery times was all inherited. The only development made in these periods was the institutionalization of penal servitude. For example, the punishment of “Wan Bi Yi Wei Cheng Dan” (working as labors to build the city walls before noses being cut off and faces being tattooed) was instituted to be a penal servitude for 5 years; “Cheng Dan” (working as labors to build the city walls) for 4 years; “Gui Xin” (collecting firewood for worshipping ceremonies) and “Bai Can” (preparing rice for worshipping ceremonies) for 3 years; “Si Kou” (working as guards to inspect the other offenders’ labor work) for 2 years; and “Fa Zuo” (working as forced labors) for 1 year.

At the beginning of Han Dynasty, Emperor Wen implemented reforms in the penal law and changed the punishments of “Qing” (tattooing), “Yi” (cutting nose), “Zhan Zuo Zhi” (cutting the left foot) into “Tu Xing” (penal servitude) and “Chi Xing” (flogging with light sticks), which had shown the tendency that the penalties were becoming less severe. Because the punishment of “Zhan You Zhi” (cutting the right foot) was changed into death penalty, and the offenders punishable by

¹⁰⁹ “Wen Wang Shi Zi” (King Wen, the son of Heaven) in *Li Ji (The Book of Rites)*.

“Zhan Zuo Zhi” (cutting the left foot) always died from the excessive strokes of beating, the changes of the punishments were in disputes. The reform of penal law was continued when Emperor Jing was in the reign. As a result, not only the strokes of beating were cut down, but the length, the thickness of the stick used for beating, and the parts of the offenders’ bodies which were beaten were all particularly regulated by law. Because of these new changes, “the high death rates” among the offenders were gradually reduced. The reforms in penal laws at the beginning of Han Dynasty were caused by the social, economic, and cultural development, which had laid the foundations for the establishment of the system of “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) in the feudal times. Through these reforms, the severe penal laws were made “more lenient and lighter”, and consequently, certain relevant links of the superstructure which were unsuitable to the feudal economic bases were also changed, therefore, they were not only of significance with great historical progress, but also were accorded with the trend of the development of legal civilization. So, after Han Dynasty, though there were suggestions for the restoring of the corporal punishments, it was never realized.

The corporal punishments were gradually abolished in the periods of Wei, Jin, Northern and Southern Dynasties. In the penal law of the Wei Dynasty, beside the death penalty, only five other punishments were retained, namely, “Kun Xing” (shaving off the hair of the offender), “Wan Xing” (serving penal servitude with no physical punishment), “Zuo Xing” (the forced labor), “Chi Xing” (flogging with light sticks), “Shu Xing” (the redemption) and “Fa Jin” (mulct). In Western Jin Dynasty, the punishments were continuously reformed, and in the end five punishments were instituted, such as “Si Xing” (the death penalty), “Tu Xing” (penal servitude), “Chi Xing” (flogging with light sticks), “Fa Jin” (mulct), and “Shu Xing” (the redemption). The statutory punishments in *Bei Qi Lv (The Penal Code of the Northern Qi Dynasty)* were “Si” (death penalty), “Chi” (flogging with light sticks), “Liu” (life exile), “Tu” (imprisonment), “Bian” (whipping), and “Zhang” (flogging with heavy sticks). And in Sui Dynasty, when *Kai Huang Lv (The Code Made in the Year of Kai Huang)* was completed, only five punishments were implemented, namely, “Chi” (flogging with light sticks), “Zhang” (flogging with heavy sticks), “Yu” (penal servitude), “Liu” (life exile) and “Si” (death penalty). In Tang Dynasty, although the punishments were inherited from the previous dynasties, the corporal punishments were completely abolished, and the severity of the punishments of life exile and the penal servitude was also greatly reduced.

In the Five Dynasties (907 A.D.–960 A.D.), “Ling Chi” (the punishment of dismemberment and the lingering death), was added into the penal law as an applicable but unwritten penalty. But in Ming and Qing dynasties, it was finally written into the law in order to intimidate the offenders and to stabilize the imperial government. In the law code of Ming, there were 13 offences punishable by “Ling Chi” (the punishment of dismemberment and the lingering death), which were also adopted in the law code of the Qing, with other 13 offences added, such as “Jie Qiu”

(breaking into a jail and rescuing a prisoner), “Fa Zhong” (tomb digging), and “Mou Sha” (homicide), etc., which had completely exposed the cruelty of the executions of death penalty. Aside from the punishments mentioned above, in the dynasties of Ming and Qing, there were other punishments, like “Chong Jun” (military exile), “Fa Qian” (banishment), “Jia Hao” (wearing cangues in public), and “Ci Zi” (tattooing words on the faces), and so on.

The characteristics of the penal codes in the feudal times were as the following:

First, the system of penalty was complete with clear lists of the names of offences.

Take *Tang Lv (Tang Code)* as an example, the punishments for the offences were listed by the order of severity in a neatly-arranged form of degrees.

Second, the same punishments for the same crimes and the different punishments for the same crimes. In penal codes, generally speaking, punishments and the names of the offences were closely related. In other words, similar punishments would be applied to the same crimes. However, under the strict hierarchical system, the hierarchical privileges were also included in the penal laws, according to which the noble and the senior officials could be given the statutory privilege of “enforcing different punishments for the same crimes” through the processes of “Yi” (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) and “Jian” (except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree), “Shu” (redemption), “Guan Dang” (redeeming one’s official position for the atonement for a crime), and “Mian” (dismissing from official position), etc.

Third, there were punishments for redemption, but no punishments for mulcts.

Redemption was widely applied in order that the bureaucrats and the noble could avoid being punished for their crimes, but the punishment for mulcts could not be found in any feudal penal laws. Although the punishment of confiscation of property had been stipulated in the penal laws, it was carried out as a supplementary punishment. Moreover, usually, the confiscated properties were the family properties but not the offenders’ private properties, which was inseparable from the unique clan system.

Fourth, harsh punishments were enforced for the crimes of violating the principles of “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism). After the integration of Confucianism and the legalism, and the introduction of “Li” (rites) to law, the moral demands, which had been required in people’s inner hearts, had become the external and compulsory standards. For this reason, the behaviors of violating the principles of “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism) would be definitely and harshly punished.

Fifth, though the corporal punishment was abolished from the statute laws, as a supplementary punishment, it had long existed in the penal systems, and there were many extrajudicial cruel penalties.

Sixth, the provisions of the penal laws were applicable to both administrative and civil legal issues. For example, according to *Tang Lv Shu Yi (The Comments on Tang Code)*, if the offices of the local government had one more staff than necessary, the officials in charge should be punishable by “Zhang” (flogging with heavy sticks) for one hundred strokes. If three more, their punishments would be increased one more degree; if ten more, the punishments would be penal servitude for 3 years. It was stipulated that in all cases where the debts were delinquent, “if the debt, being worthy of a bolt of cloth or more, is delinquent for over 20 days, the debtor shall be punished by ‘Chi’ (flogging with light sticks) for twenty strokes; if it is delinquent for forty days, the punishment shall be increased one degree and the debtor shall be punished by “Zhang” (flogging with heavy sticks) for sixty strokes; if the debt is worthy of 30 bolts of cloth, the punishment shall be increased two degrees; if the worth is 100 bolts of cloth, the punishment shall be increased three degrees. The debtor shall perform his obligations.”

4.3.4 The Reflection of “Zhong Xing Qing Min” (Stressing the Criminal Law and Neglecting the Civil Law) in the Judicial System

Making a general view of the judicial system in ancient China, it was clear that either the establishment of judicial organs, or the applications of procedural principles, or the improvement of justice system had all centered on ensuring the execution of penal laws. Though there was a distinction between civil and criminal lawsuits as early as the Western Zhou Dynasty (1122 B.C.–771 B.C.), influenced by substantive law with the characteristics of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law), the system of civil action had failed to be further developed as it should have had. For instance, the civil cases were all heard by basic-level courts without being presented to the courts at higher levels, and some cases were even “mediated” by the neighbors, relatives or clan members without going through the judicial procedures. It was recorded in “Wu Gu Zhuan” (The Biography of Wu Gu) in *Hou Han Shu (The History of the Later Han Dynasty)* that:

When the citizens went to court to have their disputes settled, Wu Gu, who was ‘Hou Xiang’ (equivalent to the county magistrate) of Jiao Dong area, would shut himself up and pondered over his own mistakes before settling the disputes properly. Sometimes, he would visit the places where those people lived so as to mediate the disputes and to make peace.

Such tradition of settling people’s disputes through mediation was still continued in the Qing Dynasty when the civil judicial proceedings were already well-developed, which had shown that the development in the system of civil action and the civil judicial proceedings was very limited. On the contrary, in order to ensure the execution of penal laws, the system of criminal procedure and criminal justice were correspondingly developed. For example, there were detailed stipulations in penal laws about the trial jurisdiction, the initiation of actions, the methods in trial, the restraints on inquisition by torture, the legal effective of

evidence, the procedure of appeal, and the assizes of some important cases. The details were as the following:

(1) The judicial institutions, the main responsibility of which was the execution of penal law, were established. As early as the period of Xia, Shang, and Zhou dynasties, the kings had been endowed with the supreme authority of adjudication. In “Wang Zhi” (The Royal Regulations) in *Li Ji (The Book of Rites)*, it was recorded that:

..., “Da Si Kou” (the senior minister of justice) reported the settled criminal lawsuits to the king, who ordered ‘San Gong’ (the Three Councilors: heads of the three important organizations in ancient China: ‘Tai Wei’: the minister of defense; ‘Si Tu’: the minister of civil affairs and ‘Si Kong’: the minister of public work, the three together functioning as the prime minister of the state) to hear it again. When they had (once more) reported it to the king that the case was closed, the king would consider it with the three mitigating conditions, and then decided the punishment.

It was recorded in “Zhang Qiu” (the Regulations for Jailers) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that: “on the day of the execution, the names of the offenders were reported to the king, and then the offenders are sent to the officials of the imperial court”. These records indicated that the acceptance, hearing, adjudication, and execution of the criminal cases were all determined by the king, and it had shown the attention that the rulers paid to the criminal cases. In Western Zhou Dynasty (1122 B.C.–771 B.C.), the central judicial departments consisted of “Da Si Kou” (the senior minister of justice) and “Xiao Si Kou” (the junior minister of justice). And “Si Kou” (the minister of justice) was called “Qiu Guan” (minister of criminal justice, in Chinese, Qiu means autumn), which meant “the plants withered in the southing autumn wind”, and which had symbolized the solemnity of punishment. The duties of “Da Si Kou” (the senior minister of justice) were “rectifying the three law codes of the state to help the king govern the state, and control (the people of) the country”, and it also was in charge of “correcting the people’s behaviors by applying ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment).¹¹⁰ Below “Da Si Kou” (the senior minister of justice), there was “Xiao Si Kou” (the junior minister of justice), whose duties were judging the cases by applying “the five methods for hearing the cases”, dealing with the serious cases or the cases in disputes by using “San Ci San You” (the three inquires and the three abatements) and by carrying out the principle of “Ba Bi” (the eight conditions for mitigating punishments). Below “Si Kou” (the minister of justice), there was “Shi Shi” (the official in charge of criminal affairs), whose duties were carrying out the penalties to make “the punishments in accordance with ‘Wu Jin’ (the five prohibitions)”, and he was also in the charge of “writing the prohibitions and posting them

¹¹⁰ “Da Si Kou” (the senior minister of justice) in “Qiu guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

on the gates”¹¹¹ to make them known to the public in order to prevent crimes. Apart from the officials mentioned above, there were other subordinate officials, such as “Si Xing” and “Si Ci” who were specifically responsible for other judicial affairs, and other basic-level judicial offices which were responsible for hearing the civil and criminal cases of the local people. So, it could be seen that from the central imperial court to the local courts, judicial official had been appointed at all levels, so the early judicial system were established.

During the periods of Qin and Han dynasties, the central judicial authority was called “Ting Wei” (the supreme official in charge of judicature). Originally, “Wei” had been used as a title for a military officer, since there was no significant difference between military and penalty, the military title “Wei” was later used to refer to the judicial officials. “Ting Wei” was responsible for the judgment of the criminal cases and the management of the prisons. Because the local administration and the judiciary were integrated, the serious and important cases would always be reported to “Ting Wei” to be settled. The system of judicial administration of the Qin and Han dynasties had been inherited by the courts of “San Guo” (Three Kingdoms), the West and the East Jin Dynasties, and the Northern and Southern Dynasties. By the time of Sui and Tang Dynasty, “San Fa Si” (the three interdependent judicial departments) was established, which included “Da Li Si” (The Court of Judicial Review), “Xing Bu” (Board of Punishment), and “Yu Shi Tai” (The Censorate). Among the three judicial departments, “Da Li Si” (The Court of Judicial Review) was the adjudication organ responsible for “the judgments of the crimes and the inflictions of the punishments”¹¹² It usually dealt with the cases in the capital city involving the offences of penal servitude and above and the cases in other places involving the offences of exile and above. “Xing Bu” (Board of Punishment) was an office established “to carry out the statutory provisions of statutes and penal laws, to manage the prisoners, and to review (An Fu) the cases”¹¹³ “An Fu” referred to the reviews of the cases that were transferred from “Da Li Si” (The Court of Judicial Review) which involved the offences punishable by life exile and the capital penalty. Clearly, “Xing Bu” (Board of Punishment) had the authority of judging and reviewing the serious and important cases, so it had more powerful than “Da Li Si” (The Court of Judicial Review). “Yu Shi Tai” (The Censorate) was established for “carrying out the statutory provisions of the constitution and law codes”, and it was primarily responsible for supervising the officials in the central and provincial departments, but it also had the rights to participate in the activities of some of the case trials. The system of “San Fa Si” (the three interdependent judicial departments) established in the Sui and the Tang dynasties was inherited and followed by the Ming and the Qing dynasties. However, in the Ming and the Qing dynasties, the name of “Yu Shi Tai” (The Censorate) was changed into “Du Cha Yuan” (The Court of Censors), and the

¹¹¹ “Shi Shi” (the official in charge of criminal affairs) in “Qiu guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

¹¹² “Zhi Guan Zhi” (The Record of State Officials) in *Jiu Tang Shu (The History of Old Tang Dynasty)*.

¹¹³ “Bai Guan Zhi” (Records of Officials) in *Xin Tang Shu (The History of New Tang Dynasty)*.

function and power of “Xing Bu” (Board of Punishment), “Du Cha Yuan” (The Court of Censors) and “Da Li Si” (The Court of Judicial Review) were also changed: “‘Xing Bu’ was responsible for the judgment of the criminal cases; ‘Du Cha Yuan’ was responsible for maintaining the normal order of the bureaucrat organizations; ‘Da Li Si’ was responsible for reviewing the judgment of the cases”.¹¹⁴ As for the judicial power of the local courts, it became more limited.

(2) The judicial principles which focused on “Shen Xing” (prudent inflictions of punishments) were established. Basically, according to the requirement of “prudent infliction of punishments”, punishments should not only be enforced in accordance with the crimes committed, but also be impartial, and appropriate. As early as the Zhou Dynasty, a series of judicial principles focusing on “Shen Xing” (prudent inflictions of punishments) were established, such as “Yuan Qing Ding Zui” (making decisions according to the concrete situations), “Yi Yu Zhong Yi” (holding consultations for doubtful cases), “Yi Zui Cong She” (remitting punishments for doubtful crimes), “Wu Jian Bu Ting” (if there were no relevant stipulations, the cases shall not be accepted and heard), and “Xiang Shu Zhong Zheng” (enforcing punishments properly and impartially).

According to the principle of “Yuan Qing Ding Zui” (making decisions according to the concrete situations), when making judgments, the damages which the offenders had caused to the society and their motives of committing the crimes should be taken into consideration. It was recorded in “Wang Zhi” (The Royal Regulations) in *Li Ji (The Book of Rites)* that: “when hearing a case in which the application of any of “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) is required, ... the judge must consider the order of priority (of the offence), and carefully try to investigate the proper limits of the capacity of the offender, so as to show differentiation of the sentences for his guilt.”

According to “Yi Yu Zhong Yi” (holding consultations for doubtful cases), when there were doubts in the settling of cases, the judicial officials should solicit opinions about the cases from all sides. If the others also had doubts about the case, the offenders should be pardoned and released. It was recorded in “Wang Zhi” (The Royal Regulations) in *Li Ji (The Book of Rites)* that “if the judicial officials think that the criminal case is doubtful, he should discuss it with others, and if the others also had doubts about it, the defendant is to be pardoned.”

As to “Yi Zui Cong She” (remitting punishments for doubtful crimes), it meant that the offenders should be pardoned if the crimes were doubtful, which had shown the prudent inflictions of punishments. It was recorded in “Da Yu Mo” (The Counsels of Great Yu) in *Shang Shu (The Book of Historical Document)* that: “one should rather run the risk of violating the regulations than put an innocent person to death.” And similar words can be found in “Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)*: “the infliction should be canceled

¹¹⁴“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi (The History of Ming Dynasty)*.

when there are doubts about the punishment of “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment). When there are doubts about the infliction of ‘Wu Fa’ (the five penalties: the five punishments lighter than ‘Wu Xing’), which could be redeemed by ransom money, the infliction should also be canceled.”

“Wu Jian Bu Ting” (if there were no relevant stipulations, the cases shall not be accepted and heard) meant that if there were no relevant stipulations about a particular act in the criminal laws, the lawsuits would not be accepted, nor punishments be given. It was recorded in “Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)* that “if there were no relevant stipulations about a particular act in the criminal laws, the case should not be accepted so as to show the majesty of ‘Tian’ (heaven).”

“Xiang Shu Zhong Zheng” (enforcing punishments properly and impartially) meant that the punishment inflicted on the offenders should be neither too severe, nor too lenient, but should be impartial and appropriate in order to show justice. It was recorded in “Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)* that “it is therefore not the people with smooth tongues but the really decent people who should decide the criminal cases to show fairness and justice”, and “with compassion and reverence in settling the cases, ... and fair-mindedness should be used as a standard in the sentences”. In short, according to the stipulation, the judges should judge the cases impartially and should not give unjust punishments intentionally; otherwise, “unfair punishments would be given to the offenders”, so the judge should take legal responsibilities for his misconduct of “exonerating the guilty or implicating the innocent”.

The principles mentioned above and the spirits which they had reflected were inherited and passed on to many generations, and gradually were further developed and changed into many other principles like “Ju Yin Lv Wen Zheng Tiao Duan Zui” (making judgments in accordance with the provisions of law), “Zhong Zheng Ding Zui” (enforcing punishments in accordance with the provided testimonies), “Yi Zui Ting Shu” (settling the doubtful cases with redemption), and “no inflicting punishments outside the indictment”, etc.

According to the rule of “Ju Yin Lv Wen Zheng Tiao Duan Zui” (making judgments in accordance with the provisions of law), the judge should adjudicate the cases in accordance with the provisions of law, and should quote the provisions which he had followed in his written judgment to prevent ill-intentioned adjudications, to unify the application of law, and to defend its sanctity. It was provided in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi (The Comments on Tang Code)* that “incriminations must be accorded with the provisions of ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Ge’ (injunction), and ‘Shi’ (standard). If the judges have violated them, he shall be punished by ‘Chi’ (flogging with light sticks) for thirty strokes.”

The rule of “Zhong Zheng Ding Zui” (enforcing punishments in accordance with the provided testimonies) was made to be applied under the circumstances where

“the crime shall not be charged until the testimonies have been provided by three people”.¹¹⁵ It was recorded in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that:

Those who are up to the specification of ‘Yi’ (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), ‘Qing’ (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) and ‘Jian’ (except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree), or who are seventy years of age or older, or fifteen years of age or younger, or ‘Fei Ji’ (the crippled), are not subject to interrogation with torture. Their cases shall be settled according to the testimonies provided; otherwise, the judge shall be punished by intentional negligence.

The rule of “Yi Zui Ting Shu” (settling the doubtful cases with redemption) meant that if the charge of the crime was in disputes and doubtful, the offender shall pay to redeem his wrongdoings according to the doubtful charge. It was specified in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that “in all cases in which the charges of the crimes are involved in disputes, the offenders should pay the redemption according to the doubtful charges.”

According to “no inflicting punishments outside the indictment”, the judicial officials should adjudicate what had been written in the indictments, but should not give any charges outside the indictments; otherwise, they would be guilty of “false accusation of a crime”. This rule was made to prevent the judges from abusing their powers and inflicting wrong punishments on the defendants. In “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*), the crime of “exonerating the guilty or implicating the innocent” committed by the judicial officials was considered to be the most serious crime of misconduct in office that should be punished harshly:

If the judicial officials have exonerated the guilty or implicated the innocent, they shall be guilty of all the false offences that the innocent are accused of; if the degrees of the punishment are increased, they shall be punished by the increased punishment; if the punishment of crimes are changed to be severer, like from ‘Chi’ (flogging with light sticks) to ‘Zhang’ (flogging with heavy sticks), or from ‘Tu’ (penal servitude) to ‘Liu’ (life exile), they shall be punished by the increased punishment; if the punishment of crimes are changed from ‘Chi’ (flogging with light sticks) to ‘Liu’ (life exile), or from ‘Tu’ (penal servitude) to ‘Si’ (death penalty), they shall be punished by the punishment they have falsely given and if the guilty are exonerated, they shall be punished by the punishment they have given.

In *Tang Lv* (*Tang Code*), even though the punishment for the crime of misconduct in office was severe, the crime of “intentional dereliction of duty” and the crime of “involuntary dereliction of duty” were clearly distinguished. For example, it was regulated that “if the officials have involuntarily exonerated the guilty, their penalties for the original crimes shall be reduced three degrees; if the officials have involuntarily implicated the innocent, their penalties for the original crimes shall be reduced five degrees”.

¹¹⁵“Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

The judicial principles mentioned above had shown the caution and the prudence which those ancient rulers had when hearing the cases, because they were aware that only when “punishment was fitted with the crime”, could the impartiality in the execution of penal laws be possibly guaranteed, so that people would closely “follow” their rulers, otherwise, the society would be thrown into chaos. Just as was argued by Shen Jiaben that:

The law concerns people’s lives. Therefore, the role of the law is very important, and the significance of it is just great. The law derives from ‘Tian Li’ (heavenly principles) and the people’s will, and it is made for adjusting the human relationships. Without thorough investigations of the cases, the truth or the falsehood can not be clearly seen. Without the tranquility in the judicial officials’ heart, the absurd ideas can not be eliminated. If the judges who are in charge of the legal trials just simply examine and hear the cases without bothering to investigate the cases to seek for truth, many people would be inevitably harmed by the single decision which they may mistakenly make, and several generations of people would be destroyed by the single punishment which they may mistakenly give. Shouldn’t the cases be judged with caution and prudence? Therefore, this is what the gentlemen nowadays should look for and should take into consideration.¹¹⁶

(3) The judicial procedure and the trial system of criminal cases had been completed. On the basis of continually summarizing the experience of judicial practice, the rulers in ancient China had constantly made the judicial procedures and the trial systems of criminal cases more standardized and institutionalized. From the many systems established, such as “the accusatory system”, the “the system of court instances”, “the evidence system”, “the system of interrogation”, “the trial system”, “the system of joint trial”, “the reviewing system”, and “the prison-checking system”, and so forth, we could clearly see that much stress had been laid on the execution of penal laws by the rulers.

As far as the “the accusatory system” was concerned, “the self-accusatory system” was often practiced in the Western Zhou Dynasty (1122 B.C.–771 B.C.). After Qin Dynasty, the system of “Shi Wu Lian Zuo” (five or ten families punished for being related to or friendly with sb. who has committed an offence) was adopted. According to the system, five or ten families being related to an offender would be punished together. Apart from the self-accusation, there were two other ways of accusations: the accusation of crimes made by the officials and the accusation of crimes made by neighbors. Because of the two ways of accusations, the illegal conducts were reported and charged on time. “The system of court instances” referred to the system where the cases were transferred from the courts at lower levels to the ones at the higher levels for reviewing. The courts at lower levels only heard the cases involving the minor offences, but the cases involving more serious offences would be transferred to the courts at higher level. According to the system, the offences punishable by exile or above “would be reported to ‘Xing Bu’ (Board of Punishment) and be reviewed by ‘Zhong Shu Men Xia’ (the supreme organization in charge of the state affairs in ancient China)”. Clearly, the restraint on the

¹¹⁶ “Chong Ke Tang Lv Shu Yi Xu” (Preface to the Re-engraved *Tang Lv Shu Yi*) in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 6.

power of the local judicial departments also showed the importance attached to the adjudication of the criminal cases by the rulers.

As to “the evidence system”, because in ancient China the principle of “Zui Cong Ren Ding” (enforcing punishments in accordance with the convicts’ confessions) was adopted, the confessions of the convicts were usually used as the evidence for their crimes, which, however, in the practical proceedings of action, was not the ultimate evidence for the convictions, because other testimonies of witnesses and physical evidence were also needed. Therefore, there were other regulations such as “Ju Zhong Zheng Ding Zui” (enforcing punishments in accordance with the provided testimonies), “Cha Yan Shang Qing” (examining the state of the injury), and “Xian Chang Kan Yan” (investigating the crime scene), etc. However, “Zui Cong Ren Ding” (enforcing punishments in accordance with the convicts’ confessions) had led to the legalization of using tortures to coerce the confessions. There were records like “unregulated inflictions of the bastinado” (torture, in other words) both in “Yue Ling” (Monthly Orders) in *Li Ji (The Book of Rites)* and *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty). During the times of Wei, Jin, and Northern and Southern Dynasties, inquisition by torture was publically institutionalized, and the detailed provisions about it could be found in the law codes. Although the use of torture was restrained by *Tang Lv (Tang Code)*, the misuse of it could not possibly be avoided, just like what Marx had said: “Torture has a place in the medieval criminal code as a form of trial”.¹¹⁷

As to “the joint trial system”, it was developed from “San Gong Can Yi” (refers to the names of officials: the Three Councilors: heads of the three important organizations in ancient China: ‘Tai Wei’: the minister of defense; ‘Si Tu’: the minister of civil affairs and ‘Si Kong’: the minister of public work, the three together functioning as the prime minister of the state) in the Western Zhou Dynasty (1122 B.C.–771 B.C.). Till the Tang Dynasty, the joint trial system of “San Fa Si” (the three interdependent judicial departments: “Da Li Si”, “Xing Bu”, “Yu Shi Tai”) was institutionalized, according to which, the cases of death penalty or the special or serious cases entrusted by the emperor would all be heard together by the officials in “Da Li Si” (The Court of Judicial Review), “Xing Bu” (Board of Punishment), and “Yu Shi Tai” (The Censorate). In Ming and Qing dynasties, apart from “San Fa Si” (the three interdependent judicial departments: “Da Li Si”, “Xing Bu”, “Yu Shi Tai”), there was another trial system named “Jiu Qing Hui Shen” (Joint Hearing by Jiu Qing: the nine heads of central government departments in feudal China). In feudal times, the systems of collective consultation and joint trial were beneficial for strengthening the judicial supervision and balance, and to some extent, the wrongful imprisonment and punishment were effectively contained, and the spirit of “prudent infliction of punishments” was carried out in practice. Since the cases of death penalty which had been tried jointly should be reported to the emperor for the final approval, “the system of the death penalty reviewing” took shape. This system was finally established during the periods of

¹¹⁷ *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 1, People’s Publishing House, 1956, p. 178.

Wei, Jin, Northern and Southern Dynasties, and by the Tang Dynasty, it was more rigorously implemented, and the executions of death penalty must be reported to the emperor. In addition, the cases in the capital area should be regularly reported to the emperor by submitting “five memorials”, and the cases in other provinces should be regularly reported to the emperor by submitting “three memorials”. If the executions had been carried out before the final decisions were made by the emperor, the officials should be punished by life exile to a distance of 2,000 *li* in order to show the prudent inflicting of punishments, because “human life is of utmost importance, once dead, a man can not become alive again”.¹¹⁸ Apart from the systems listed above, in Han Dynasty, a system called “the prison-checking system” was established, according to which, the emperors or the judicial supervisors may regularly examine the cases and interrogated the prisoners in order to review the cases that might involve unjust, false or wrong charges. This system was legalized and included in the law code in Tang Dynasty.

In summary, there were many reasons for the formation of the legal tradition of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law), among which the most important one was the autocratic system. After China entered the class society, the autocratic political system was established and was continuously strengthened along a spiral path ever since. Under the political system of absolutism, the most important tasks of the state was to maintain the monarchical power and the stability of the imperial government, nevertheless, the civil acts, such as the disputes over property, were all viewed as “the minor cases” or “the minor affairs”. For this reason, special and more consideration were given to making more strict penal laws which might crack down the crimes against the monarchical power and the imperial government. As to the civil law, in addition to the necessary regulations made by the state, more functions of adjusting the civil relationships were endowed to the customary laws which were multitudinous, popular, and authoritative, so as to maintain the social order and stability. Because the legal tradition of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law) was formed under certain historical conditions, with their changes, it was finally declared to be ended in the process of law revision in the late Qing Dynasty at the beginning of twentieth century.

¹¹⁸“Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*).

Chapter 5

Following “Tian Li” (Heavenly Principles) and Enforcing Laws According to the Concrete Situations of Specific Cases

5.1 The Connection of “Tian Li” (Heavenly Principles) and National Law

During the Xia (2070 B.C.–1600 B.C.) and Shang dynasties (1600 B.C.–1046 B.C.), the national law and “Tian” (heaven) were closely connected, thus, the primitive religion had permeated the field of politics and to some extent, governed the national activities, with the result that the unique views of “Tian Dao” (The Way of Heaven), politics and law were formed. After Shang Dynasty was wiped out by Zhou, although some adjustments were made in the views of the people in Shang dynasty about “Tian Dao” (The Way of Heaven), the belief that God was the spirit of ancestors was negated, and the belief that only the most virtuous would be supported and made kings by “Tian” (heaven) was accepted, which was described in the sentence that “‘Huang Tian’ (heaven) is has no partial affections and it only helps the virtuous”. Undoubtedly, although a political color of realism was added by such adjustments, it had still propagated the supreme authority of “Tian” (heaven), and attributed the ruling by the people of Zhou as “Tian Ming” (mandated by Heaven).

The rulers of the Zhou dynasty had drawn the lessons from the utter isolation of and abandoning of the imperial government by friends and allies, the subjugation of the nation and the extermination of the clan at the end of the Shang Dynasty because of the cruelly and excessively inflicted punishments, the randomly imposed death penalty by the judicial officials, so they stressed “Ming De” (expounding virtue), “Cheng De” (accomplishing virtue), “Jing De” (respecting virtue), and “Shen Fa” (prudent infliction of punishments). They believed that virtue was both the key to the security of the state and the standard for a ruler’s behaviors, and emphasized that virtue would be tested by popular support; therefore, “Tian” (heaven) was closely related with the ordinary people. Consequently, various new theories were developed, such as “‘Tian’ (heaven) sees as my people see; ‘Tian’ (heaven) hears

as my people hear”;¹ “‘Tian’ (heaven) hears and sees as our people hear and see; ‘Tian’ (heaven) clearly approves and shows its fear as our people clearly approves and shows awe”;² and “‘Tian’ (heaven) will follow what the people desire”,³ etc. In such theories, efforts had been made to connect the concept of “Tian Ming” (mandated by Heaven) with the fate of the people, thereby trying to establish a new relationship between “Tian” (heaven) and Man. Thus, the people’s view of “Tian Dao” (The Way of Heaven) in Zhou dynasty had laid the foundations for the theory of interactions between “Tian” (heaven) and mankind in the Han Dynasty.

At the beginning of Han dynasty, Dong Zhongshu, who had used the Confucian thoughts as the guiding principle, developed a system of doctrines about “the interactions between ‘Tian’ (heaven) and Mankind”, and had regarded “Tian” (heaven) as a part of “Gang Chang” (the Chinese ethical tradition) and moral principles out of the need of building a politically unified great country”. Based on the political ethics of Confucianism, namely, “there is government, when the prince is prince, and the minister is minister, and when the father is father, and the son is son”, Dong Zhongshu had further put forward the theory of “San Gang” (three cardinal guides), including “ruler guides subject, father guides son and husband guides wife”, and had advocated that “the ‘San Gang’ of ‘Wang Dao’ (the benevolent government) relays on ‘Tian’ (heaven)”. He even demonstrated the master-subject relationship between the ruler and minister, father and son, and husband and wife with the “Tian Zun Di Bei” (honorable Heaven and humble Earth). In order to defend the supreme authority of the rulers, he had vigorously agitated that “‘Tian Zi’ (the son of Heaven or the emperor) receives his appointment from ‘Tian’ (heaven)”. And in order to argue for the rationality of hierarchical system, he attributed it to “the will of Heaven” and said that “the distinction between the noble and the mean is made by the will of ‘Tian’ (heaven).” In addition, in the book of *Ju Xian Liang Dui Ce Yi* (*One of the Counter Measures to the Selection of the Talented and Virtuous*), Dong Zhongshu had pointed out the great significance of the principle of “Wu Chang” (five constant virtues) to a ruler, and he said, ‘Wu Chang Zhi Dao’ (The Way of Five Constant Virtues), namely, “Ren” (benevolence), “Yi” (justice), “Li” (rites), and “Zhi” (wisdom) and “Xin” (trust), is what a king must have.” Thus, by matching “Wu Chang” (five constant virtues) with “San Gang” (three cardinal guides), a moral principle for maintaining the hierarchical system and a guiding principle for the legislation of the feudal society were established. Through Dong Zhongshu’s teaching and preaching, the idea of “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) were totally made a mystery and the violation of them was considered the violation of “Tian Dao” (The Way of Heaven).

After Han dynasty, going through Wei, Jin, and Tang Dynasty, the theories of “Chang” (constant virtues) and “Gang” (cardinal guides) were developed into a set of complicated legal norms and accepted as the basic parts of the feudal law codes,

¹ “Tai Shi” (The Great Declaration) in *Shang Shu* (*The Book of Historical Document*).

² “Gao Yaomo” (Counsels of Gao Yao) in *Shang Shu* (*The Book of Historical Document*).

³ “Tai Shi” (The Great Declaration) in *Shang Shu* (*The Book of Historical Document*).

which were applied in the various departmental laws such as the administrative law, the criminal law, the civil law and the procedure law.

In Song Dynasty, the scholars of neo-Confucianism (a Confucian school of idealist philosophy of the Song and Ming Dynasties) represented by Zhu Xi, Cheng Hao, and Cheng Yi, had further abstracted “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) as “Tian Li” (heavenly principles). According to Zhu Xi, both “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) were the reflections of “Tian Li” (heavenly principles), so they were the “moral standards for people to be guided”.⁴ He said, “In a broader sense, ‘Tian Li’ (heavenly principles) is ‘San Gang’ (three cardinal guides), and in a narrower sense, ‘Tian Li’ (heavenly principles) is ‘Wu Chang’ (five constant virtues), which have not only constantly existed, but also are applicable to all the things in the world”.⁵ He also said, “‘Tian Li’ (heavenly principles) is a general term for ‘Ren’ (benevolence), ‘Yi’ (just), ‘Li’ (rites), and ‘Zhi’ (wisdom), which are the contents of ‘Tian Li’ (heavenly principles)”.⁶ To Zhu Xi, “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues), as “the essence of human ethics and ‘Tian Li’ (heavenly principles)”, were omnipresent, in other words, “they are inescapable in Heaven and on Earth”.⁷ Moreover, “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) were also eternal, and “they can never be changed. So, the ruler is forever the ruler, the minister the minister, the father the father, and the son the son”.⁸ Since “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) were “Tian Li” (heavenly principles), their violation meant the violation of “Tian Li” (heavenly principles), so the violators are sure to get unavoidable punishments. Obviously, Zhu Xi’s purpose was to defend the inviolability and immutability of the political system, the ethic order and the supremacy of the monarchical power.

Faced with the chaotic social reality in the Southern Song, Zhu Xi had also developed a doctrine about the relationship between “Tian Li” (heavenly principles) and human desires, in which he had put “Tian Li” (heavenly principles) and human desires in an opposite position, arguing that the two could never coexist, therefore, the only choice was to promote “Tian Li” (heavenly principles) but to eradicate human desires. He said, “If ‘Tian Li’ (heavenly principles) are kept, human desires then will disappear; if human desires prevail, then ‘Tian Li’ (heavenly principles) will disappear”, and “it is impossible to have both ‘Tian Li’ (heavenly principles)

⁴“Wu Shen Yan He Zou Zha” (Memorials Presented under the Reign of Yan He in the Year of Wu Shen: 1188) in *Huian Xian Sheng Zhu Wengong Wenji (The Collected Works of Zhu Wengong)*.

⁵“Du Da Ji” (The Records) in *Huian Xian Sheng Zhu Wengong Wenji (The Collected Works of Zhu Wengong)*.

⁶“Da He Shujing” (Answer to He Shujing) in *Huian Xian Sheng Zhu Wengong Wenji (The Collected Works of Zhu Wengong)*, Vol. 13.

⁷“Kui Wei Chui Gong Zou Zhai” (Memorials Presented in the Year of Kui Wei) in *Huian Xian Sheng Zhu Wengong Wenji (The Collected Works of Zhu Wengong)*.

⁸*Zhu Zi Yu Lei (Quotations of Master Zhu)*, Vol. 24.

and human desires”.⁹ According to him, “‘Tian Li’ (heavenly principles) can be revived” until “all human desires are eliminated”.¹⁰ Clearly, Zhu Xi’s theory had completely ignored the reasonable request of the human existence and survival, and tempted people to come to terms with their poor life, to be obedient to what they had been ordered, and to endure the suppression and exploitation. In this sense, Zhu Xi’s theory was practically a doctrine that had killed people in the name of “Tian Li” (heavenly principles).

Although Zhu Xi was a neo-Confucian scholar advocating “Tian Li” (heavenly principles), he was a realist when he was dealing with the legal issues. For example, he was opposed to the policy that “laws should be lenient in essence with strict rules as supplements”. Instead, he suggested that “laws should be strict in essence with lenient rules as supplements”. If it was needed, harsh punishments should be carried out without necessarily following “the ways which the previous kings had used”.¹¹ Especially, for the crimes of “the inferior offending the superior, or the humble offending the noble”, the crime of “the farm labor killing the landlord”, or the crime of “the land labor encroaching upon the land or the property of the landlord”, the offenders must be severely punished without pardoning. He once suggested:

If one has stolen a bolt of cloth, he shall be punished by a penal servitude for three years; if he has stolen two bolts, his penalty for the crime shall be increased one degree; if he has stolen ten bolts and has caused injury, he shall be punished by strangulation and if he has caused death, he shall be punished by decapitation. The person, who has conspired to steal things, though he has gained no benefit, shall be punished by exile to a distance of 3,000 *li*; if the person who has conspired has been paid for five bolts of cloth, he shall be punished by strangulation; if he has caused death, he shall be punished by decapitation.¹²

Zhu Xi had also tried to persuade the emperor to “enforce harsh penalties”, to “have people resolutely and daringly punished”, and to “kill one so as to give warning to all...in order to stop the offences”.¹³ It seemed that the ideas mentioned above were not put forward by a Confucian scholar, but by a legalist in the Pre-Qin dynasties who were famous for their imposing severe punishments even on minor crimes. What was more, Zhu Xi even strongly supported to recover the corporal punishments, proposing that those who had repeatedly committed the crime of stealing “shall be punished by cutting off their left feet and never be permitted to return to their birth places”.¹⁴ Zhu Xi’s theory was regarded as against the trend of history, so was sharply criticized by a scholar named Chen Liang who lived at the same times with him: “this gentleman, who has claimed to follow the teachings

⁹Ibid., Vol. 13.

¹⁰Ibid.

¹¹“Li Lou” (Li Lou) (Part 1) in *Meng Zi Ji Zhu (Mencius Variorum)*.

¹²“Wu Shen Yan He Zou Zha” (Memorials Presented under the Reign of Yan He in the Year of Wu Shen: 1188) in *Huian Xian Sheng Zhu Wengong Wen Ji (The Collected Works of Zhu Wengong)*.

¹³“Lun Zhi Dao” (On Administration) in *Huian Xian Sheng Zhu Wengong Wen Ji (The Collected Works of Zhu Wengong)*.

¹⁴“Da Zhang Jingfu” (Answer to Zhang Jingfu) in *Huian Xian Sheng Zhu Wengong Wenji (The Collected Works of Zhu Wengong)*.

of Confucianism, always keeps his mind on the use of the corporal punishments. How contradictory his ideas are”.¹⁵

Zhu Xi’s preference for harsh punishments was expressed not only in words, but in actions. When he was an official in Hun Nan province, he had arrested and imprisoned thousands of farmers by himself, and had even detained the order of general amnesty issued by the new Emperor Ningzong. In fact, he did not publicize the order until he had killed 18 leaders of the peasant uprisings. From this point, it could be inferred that the neo-Confucianists (a Confucian school of idealist philosophy of the Song and Ming Dynasties), who had regarded “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) as “Tian Li” (heavenly principles), were practically not only priests, but also slaughterers at the same time, and it had also shown that in practice the so-called “Tian Li” (heavenly principles) was actually only a cover to conceal the harsh punishments and cruel suppressions which the rulers had imposed upon the people at that time.

In the feudal times, not only the extensive social activities were dominated by “Tian Li” (heavenly principles), but the legislative activities in which the state rules and regulations were made were all guided by it. As early as the beginning of the Han Dynasty, the theory of “San Gang” (three cardinal guides), created by Dong Zhong Shu, had exercised a great influence on the construction of the legal system, and was gradually introduced into law, which actually was also the process of introducing “Li” (rites) to law. In Han Dynasty, the introduction of the crimes concerning sedition, rebellion, the destruction of royal power, and the violation of ethical rules, had all reflected that the spirit of “San Gang” (three cardinal guides) had already infiltrated into the law and had become the guiding principle for punishments. After Han Dynasty, with the integration of “Li” (rites) and law, “Tian Li” (heavenly principles) with “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues) as the connotation had not only guided the legislation and the government establishment, but also was being continuously legalized. As a result, “Tian Li” (heavenly principles) had reflected the national law, and the national law had become the embodiment of “Tian Li” (heavenly principles); “Tian Li” (heavenly principles) had endowed “Gang” (cardinal guides) and “Chang” (constant virtues) with the nature of divinity, and the violation of “Gang” (cardinal guides) and “Chang” (constant virtues) meant the violation of “Tian Li” (heavenly principles); the national law had provided a penal guarantee for the ruling of “Gang” (cardinal guides) and “Chang” (constant virtues), and the violation of “Gang” (cardinal guides) and “Chang” (constant virtues) would be harshly punished. So, Zhu Xi said, “The abolishment of ‘San Gang’ and ‘Wu Chang’ would be a greatly serious felony”. “Tian Li” (heavenly principles) was closely connected with the national law, so the legal system which stressed “Gang” (cardinal guides) and “Chang” (constant virtues) was viewed as the practice of “Tian Li” (heavenly principles). Therefore, the national law and “Tian Li” (heavenly principles) were consistent, and were not contradictory to each other. As the result of the connection between “Tian Li” (heavenly principles)

¹⁵“Hui Da Ba” (The Eighth Answer) in *Chen Liang Ji* (*The Collected Works of Chen Liang*).

and the national law, the authority of law was greatly strengthened, and it had exerted a powerful deterrent effect on the illegal offenders.

A man named Zhen Dexiu in the Southern Dynasty had a different understanding about “Tian Li” (heavenly principles) and the national law from Zhu Xi’s. He said:

... In ‘Tian Li’ (heavenly principles), the right and wrong can not be confused, and in the national law, the leniency and severity of the punishment can not be overstepped. If taking what is wrong as what is right, or taking what is right as what is wrong, ‘Tian Li’ (heavenly principles) are violated; if what should be punished leniently is punished severely, or what should be punished severely is punished leniently, the national law is broken. If those officials who are in the positions of ruling the people have violated ‘Tian Li’ (heavenly principles) and broken the national law, how can they feel at ease? And how can they ignore the punishments from the thunderbolt (heaven), ghosts, gods and the prohibitions in the infallible law?¹⁶

Obviously, Zhen Dexiu’s views on “Tian Li” (heavenly principles) and the national law were not as abstract as Zhu Xi’s. His views, being realistic and focusing on the judicial practices, had shown a concrete demand for the officials in governing the people. According to him, upholding what was right and what was wrong meant to uphold “Tian Li” (heavenly principles), so, such concept of “Tian Li” (heavenly principles) was very concrete, and its relations with the national law were more closely related. Besides, many views similar to Zhen Dexiu’s were expressed in the book of *Qing Ming Ji (The Collections of the Enlightened Judgments)*.

During the Ming and the Qing dynasties, with continuous development of science, technology, and culture, the authority of the mysterious “Tian Li” (heavenly principles) was undermined, yet, to be opposite, law, the embodiment of “Tian Li” (heavenly principles), were further enforced. So, the more “Tian Li” (heavenly principles) was legalized, the more harmonious the politics and ethics had become; the more expanded the power of the monarchs and the patriarchs, the weaker the personal legal consciousness and the concept of rights. This was the path along which the 4,000-year Chinese legal history had developed.

5.2 The Combination of the National Law and Human Relationships

As for “Ren Qing” (human feelings), it was explained in “Li Yun” (The Rites in the Pre-Qin Dynasties) in *Li Ji (The Book of Rites)* that: “What is ‘Ren Qing’ (human feelings)? They refer to the seven feelings which people feel instinctively, that is, joy, anger, sadness, fear, love, hatred and lust.” This had indicated that “Ren Qing” (human feelings) referred to the common basis that was evoked by the seven feelings, in other words, it referred to as “human nature”. However, in ancient times, “Ren Qing” (human feelings) had also reflected the particularity of national conditions

¹⁶“Yu Zhou Xian Guan Liao” (Officials in Yu Zhou County) in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Vol. 1, pp. 6–7.

and the social relationships. In ancient China, human relationship was built upon the strong blood ties and the ethical kinship of people, which were demonstrated by the rights-obligation relationship established by the ethical principles between the relatives of people. Yet, kinship was social, and it was the materialization of social relationship in a family or a clan. At this point, human relationships should be understood and mastered from the perspective of the broad view of society, the kinship should be viewed as a social relationship in a much broader sense, and kinship should be expanded into the worldly affairs, and should not be simply narrowed down to an individual family or to a particular clan. For instance, in the ancient society in which the patriarchal clan system was established, the ethical blood lineage reflected in the ideas of “Qin Qin” (showing respect to the relatives represented by parents) and “Zun Bei You Xu” (showing a distinction between the noble and the humble) was widely accepted. Therefore, any words or actions agreeing with the ideas would be viewed as corresponding to human feelings and human relationships, however, beyond the ethical blood lineage, what the ideas of “Qin Qin” (showing respect to the relatives represented by parents) and “Zun Bei You Xu” (showing a distinction between the noble and the humble) had reflected was also a kind of social relationship, that was, the relationship of rights and obligations between the members of society, because the family members were also the members of society. Therefore, what was reflected in “Qin Qin” (showing respect to the relatives represented by parents)” and “Zun Bei You Xu” (showing a distinction between the noble and the humble) could be viewed as the widely accepted “Ren Qing” (human feelings) between the members of society. If human relationships were not understood on the basis of the ethical blood lineage, the understanding would deviate from the nature of patriarchal society; however, if the ethical blood lineage was merely viewed on the basis of the ethical blood lineage, the social nature of human relationships would be unsuccessful identified. In a word, “Ren Qing” (human feelings) in ancient China had its ethical, social and epochal characteristics, and it was not formed by individual preference or by the personal inclinations of a small minority, but by the universally accepted preference and by the inclinations of the vast majority of people. The standards for “Ren Qing” (human feelings) varied according to different times, social classes, and social ranks, but all of those standards had a common nature, namely, they were all the reflections of the human nature under normal circumstances.

In terms of the relationships between the national law and human relationships, in the first place, the two were consistent with each other. As what was mentioned above, the national law was made according to the guidelines of “Gang” (cardinal guides) and “Chang” (constant virtues), or “Tian Li” (heavenly principles), at the same time, “Gang” (cardinal guides) and “Chang” (constant virtues) were further legalized and written into the national law as the basic contents. For this reason, the traditional Chinese law in ancient times was also named “Lun Li Fa” (the ethical law), which was remarkably consistent with “Ren Qing” (human feelings) with blood ties, ethical value and kinship as the connotations. In the great ethical circle of ancient China, the law and human relationships were in a great harmony, human relationships and the laws were coexisted, and they were both integrated and inseparable from each other.

Secondly, they were also in conflicts with each other, because there were different requirements between the kinship and the obligations which were reflected by “Ren Qing” (human feelings) and the obligations to country which were reflected in the national law. For instance, in ancient times, even though it was believed that families were the essence of a state, if the private interests of a family had threatened the national interests, or the rules of a family had interfered with the execution of the national law, or the members of a family had defied their superiors and had caused chaos, severe punishments would be undoubtedly carried out so as to show that the state was far more important than the family, and the ruler was far superior to the head of a clan. The law, with the support of the forceful punishments, had required all the members of society to comply with the national law, to perform their obligations to the country, and to pay taxes and levies. Thus, the strict law was against human relationships. Besides, generally speaking, there were other differences between the national law and the human relationships, such as the different emphases, requirements, purposes and punitive measurements, which had also provided an objective foundation for the conflicts between the two. From the perspective of “Ren Qing” (human feelings), the national law was expected to have more concern for family affection. Though the regulation of imposing different punishments on the noble and the humble for the same offences had already been applied, the concern for family affection in the national law was rather limited, because if the limitation had been exceeded, the national law would have failed to perform its functions to maintain the social and political order, and it was not a regulator any more. For example, according to the law, grandsons were forbidden to sue their grandparents and parents; otherwise, the offenders would be punished, however, if grandparents or parents had committed the crimes of rebellion, sedition, or treason, the law would make an exception to the rule and would give grandsons the rights of prosecuting their family members. In this case, the obligations to the family were replaced by the obligations to the country. Here was another instance: even though it was ruled in the law that family members could mutually conceal the misconducts of their relatives, the concealment was strictly limited in scope, because any serious felonies that had threatened the national interests would surely not be allowed for concealment. If this supplementary regulation had not been added to law, there would have had no distinctions between the concepts of family and nation, nor between family rules and the national law. Ultimately, whether the interests of a family should be subordinated to the interests of the nation, or vice versa, had become the causes for the conflicts between the human relationships and the law. Undoubtedly, those conflicts between human relationships and law were shown not only in the conflicts between family, society and nation, but also in the conflicts based on individual interests within a family.

Lastly, in order to harmonize human relationships and the national law and to rule the country with the combination of the two, on the one hand, rulers had legalized family obligations in legislation; on the other hand, they had emphasized in legislation the importance of the principles of “Zhi Fa Yuan Qing” (executing law according to the concrete situation of specific issues) and “Zhun Qing Ding Yan” (making decisions according to concrete conditions).

5.2.1 *The Legalization of Family Affection*

First, about “Jie Guan Fu Sang” (discharging from offices for mourning) and “Qi Qin Zhi Ren” (leaving relatives to take government offices).

It was recorded in “Wang Zhi” (The Royal Regulations) in *Li Ji* (*The Book of Rites*) that:

If the parents of an official are eighty, one of their sons shall be free from all duties of government service; if the parents are ninety, all the members of their family should be free from office services; if one of the parents is disabled and needs the attendance of others, one member should be free from office service.

In order to solve the conflicts between loyalty and filial piety and to follow what was ruled in *Li Ji* (*The Book of Rites*), it was provided in the law that the officials should take leave from their offices if they were in mourning for the death of one of their parents, and concretely speaking, “officials shall take leave for three years to observe mourning for the death of their parents”. If “the officials’ parents have died but they have fraudulently claimed that it is their relatives who have died, so have not taken leave from their offices, they shall be punished by penal servitude for two and a half years”.¹⁷ If the officials had been engaged in government services before the 25-month-mourning period ended, they shall be punished by penal servitude for 3 years for not fulfilling their filial duties. Although the people had finished the period of 25-month-mourning, literally, they were still in “the mourning period” before they had finished 27 months of mourning, therefore, if they have sought for the employments in the government at this period of time, they shall be guilty of “taking official posts in the period of mourning” and shall be punished by penal servitude for 1 year.¹⁸ In addition, if a person’s paternal grandparents or parents were 80 years old, or aged or maimed, and there are no other adult males in line in the family to take care of them after they had taken the government offices, they shall be punished by penal servitude for 1 year for “leaving relatives to take government jobs”.¹⁹ In order to punish those who were reluctant to leave their official positions and to give up their own wealth and social ranks, and who had neglected their responsibilities for their relatives, stipulations about “leaving the relatives to take government jobs” had been made in Ming and Qing dynasties:

If the people’s grandparents or parents are 80 years old or older, or incapacitated, and besides, there are no other adult males in line to take care of them after these people have taken government jobs, they shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes.²⁰

¹⁷“Concealing the Death of one’s Parents” in “Zhai Wei” (Fraud and Falsehood) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

¹⁸“Violating Name Taboos in Naming Offices or Officials” in “Zhi Zhi (The State Office System)” in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

¹⁹Ibid.

²⁰“Departing Relatives to Take Government Offices” in “Li Lv” (Statute on Rites) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

Second, about “Qin Shu Xiang Ou” (fighting among relatives) and “Wei Qin Fu Chou” (taking revenge for one’s relatives).

In order to solve the conflicts of affections and obligations between different relatives, stipulations about “making private settlements when relatives are killed by others” were made in *Tang Lv* (*Tang Code*):

In all cases in which those whose relatives of the same ancestor within ‘Wu Fu’ (the five degrees of mourning) kill each other, if the distant relatives have killed the near relatives, the crimes shall be set forth and reported, and if the near relatives have killed the distant relatives, the crimes shall not be reported. Among the distant or near relatives, if the inferior or the young have killed the superior or the elder, the crimes shall be reported; if the superior or the elder have killed the inferior or the young, the crimes shall not be reported. In the cases in which those who are allowed mutual concealment of their relatives, if the distant relatives kill the near relatives, the less honorable have killed the more honorable, the low in social status have killed the high, or the young have killed the elder, the crimes shall be set forth and reported; but, if the crimes are not reported, the relatives who have concealed the misconducts shall not be prosecuted.²¹

Specifically speaking, as to the cases of “Qin Shu Xiang Ou” (fighting among relatives), there were clear stipulations in *Tang Lv* (*Tang Code*) about the conditions for the inferior and the young to fight back:

In the cases in which people’s fighting is legal in accordance with law, their sons or grandsons can be rescued but shall not be involved in the fighting. The offenders shall be punished according to the regulations on affrays. In the cases in which the husband’s paternal grandparents or parents have struck the wife’s paternal grandparents or parents, and if the wife has been involved in the fighting and have fought with husband’s paternal grandparents or parents, she shall be punished according to the regulations on affrays.²²

The conflicts between family affection and the national law were most obviously reflected in the problems of the crimes of murder committed by those who had taken revenge for the death of their relatives, and they were always troublesome for the rulers to deal with; therefore, from the Tang to the Qing Dynasty, the stipulations in the law about such offences were either vaguely worded or interpreted with the traces of compromises, just like what Han Yu had said:

The cases that sons have taken revenge for the death of their fathers have been numerous recorded in *Chun Qiu* (*Spring and Autumn Annals*), *Li Ji* (*The Book of Rites*), *Zhou Guan* (*Zhou Li: The Rites of Zhou Dynasty*), and many other historical books, but there were rules in those books about the blames or punishments for the actions. The provision for revenge is supposed to be found in laws, but no such specific provisions can be found in the law at all. Yet, it does not mean there is a loophole in law, the true reason is that if the people are forbidden to take revenge by law, the sons who want to perform their filial duty would get hurt, and the rules which the previous kings have made would be violated; but if the people are encouraged to take revenge, those who kill people in the name of law will not be stopped.²³

²¹“Making Private Reconciliation when Relatives are Killed by Others” in “Zei Dao (Violence and Robbery)” in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

²²“Assaulting the Paternal Grandparents” in “Dou Song” (Disputes and Litigations) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

²³“Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*).

So, Han Yu had offered the following solution:

... the following words should be written into law: all the cases in which the sons have taken revenge for the death of their fathers shall be reported to ‘Shang Shu Sheng’ (The Department of Secretary) and shall be deliberated and charged by the people according to the circumstances. Thus, the essence of ‘Jing’ (ethic principles) and law will be kept.

The rule that “the essence of ‘Jing’ (ethic principles) and the law will be kept” meant the compromise made between “Li” (rites) and law in handling businesses. However, this solution had not brought any legal effects. According to *Tang Lv* (*Tang Code*),

In all cases in which the paternal grandparents or parents are struck by others, their sons or grandsons are not guilty if they have struck back without causing any injuries; if injuries have been caused, the penalty shall be reduced three degrees from the that for ordinary affrays; if death have been caused, they shall be punished in accordance with the law.

In addition, compared with *Tang Lv* (*Tang Code*), more detailed regulations were made in the Ming and Qing dynasties on the issues of “the parents or paternal grandparents being struck”:

In all cases in which those whose paternal grandparents or parents have been struck by others, and their sons or grandsons have immediately helped them and struck back, if no injuries have been caused, they shall not be punished (if they have struck back later on, they shall be punished in accordance with the law on affrays); If fractures have been caused, their penalties shall be reduced three degrees from that for ordinary affrays (if they have caused incapacitation, they shall still be punished, but the penalties for them shall be reduced from life exile to a distance of 3,000 *li* to penal servitude for two years); if death has been caused, they shall be punished in accordance with the ordinary law; if the paternal grandparents or parents have been killed by others, and their sons or grandsons, have killed the attackers without authorization, they shall be punished by ‘Zhang’ (flogging with heavy sticks) for sixty strokes; if they immediately have killed the offenders, they shall not be punished (but if they have killed the offenders later on, they shall be punished by the law on homicide, and if the paternal grandparents or parents have been attacked by the elder relatives within the five degrees of mourning, their sons and grandsons are forbidden to help them and strike back. Offenders shall be punished according to the law on the punishments of the fighting among the relatives of the same surname).²⁴

In the provisions listed above, in legislation, there was no mentioning of the word “revenge”, and the actions included in the provisions were nothing special or nothing beyond the scope of ordinary affrays, however, according to the provisions, the sons or grandsons had been given the rights to fight back against the attackers without being punished on condition that if no injuries had been caused. Even if there were injuries, the penalty given to sons or grandson would be reduced three degrees from that for the ordinary affrays. Moreover, if the sons or grandsons had killed the attackers “immediately”, they would not be punished by the same provisions of the law on homicide. Hence, all of these provisions had shown the understanding and the approval for the acts of revenge by the sons or grandsons for their relatives. From the provisions in *Tang Lv* (*Tang Code*) to the notes of the law in the Ming and

²⁴“Assaulting Parents or Paternal Grandparents” in “Xing Lv (The Criminal Law)” in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

the Qing dynasties, it could be seen that much care and efforts were given to the legalization of family affection by the lawmakers.

Third, about “Yi Xiang Bi Chou” (avoiding being revenged by moving to other places).

According to *Tang Lv (Tang Code)*, “those who have committed homicide shall be punished by death penalty. But if they are pardoned under the general amnesty, their families shall be moved to a distance of 1,000 *li*.” It was also stipulated in *Tang Lv Shu Yi (The Comments on Tang Code)* that “those who have committed homicide shall be punished by death penalty. If they are pardoned under the general amnesty, and if the victims still have relatives of the third degree of mourning, their families shall be moved to a distance of 1,000 *li*”. From the perspective of legal principles, moving to other places to avoid the revenge was a negative method for preventing crimes. However, from the regulations in *Tang Lv Shu Yi (The Comments on Tang Code)* that “if the homicide victims still have relatives of the third degree of mourning”, it could be seen that this provision was made not only for preventing ordinary crimes, but for stopping the vicious circle of revenge taken by the victims’ relatives. Clearly, homicide was forbidden by law, but it was very difficult to stop people from taking revenges, because the crime of homicide caused by the acts of revenge for the death of people’s relatives was not clearly forbidden in the legislation, and it was always understood and sympathized in the legal practices. Therefore, the provision of “Yi Xiang Bi Chou” (avoiding being revenged by moving to other places) was particularly made so as to handle this awkward situation created by the conflicts between human affection and the law, which was unique in the ancient Chinese criminal law. The provision was first recorded in *Tang Lv (Tang Code)*, because both “Li” (rites) and the strict legal systems were greatly stressed in the Tang Dynasty.

Fourth, about “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) or “Liu Yang Cheng Si” (being allowed to remain at home to care for the parents or to perpetuate the ancestral sacrifices).

It was ruled in *Tang Lv (Tang Code)* that “in all cases in which crimes are punishable by the death penalty other than the offences of ‘She E’ (Ten Abominations), if the offenders’ paternal grandparents or parents are aged or maimed and require care, but the family has no other adult male, the cases should be reported to the emperor for final decision.”²⁵ The first provision of “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) could be found in the laws of Ming and Qing. In *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, it was regulated that:

In all cases in which crimes are punishable by the death penalty and shall not be pardoned by a general amnesty, if the offenders’ paternal grandparents (paternal great-great-grandfather or paternal great-grandfather) or parents are aged (seventy years old or over) or ‘Du Ji’ (the incapacitated) and require care, but the family has no other adult male (sixteen years old or over) (it is the same to the situation where the family only has one son, but the situation

²⁵“With no Adult Males to Take Care of the Paternal Grandparents or Parents after Being Punished by Death Penalty” in “Ming Li (Statutes and Terms)” in *Tang Lv Shu Yi (The Comments on Tang Code)*.

needs to be interrogated and clarified by the judicial officials), the crimes that are committed (and the reasons for remaining at home) should be set forth and reported to emperor for final decision. Those whose crimes are punishable by penal servitude and life exile (whose paternal grandparents or parents are aged or maimed and require care, but the family has no other adult male) shall be punished only by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes, and the remaining punishments may be redeemed. The offenders may remain at home to care for their relatives (This provision is also applicable to military offenders).

From this provision, it could be seen that it was a precondition for “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) that the “the punishment must be the death penalty which are not pardoned by a general amnesty”, namely, they were just the ordinary crimes, but not the very important or political ones. Additionally, it was decided by the emperor himself, that was, it depended on the will of his Majesty whether to show benevolence to the offenders outside the law. According to the penal law in ancient China, it was a strict national law that “killers must pay for their crimes”, however, the provisions that some murderers were permitted to have “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) were made according to “Ren Qing” (human feelings). From the numerous cases of “Cun Liu Yang Qing” (being allowed to remain at home to care for relatives after committing crimes), the reasons for showing mercy could be easily seen. For example, if both of the two brothers had committed the crimes punishable by death penalty, one of them should be permitted to have “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on); if offenders’ mothers were already 50 years old or over, and had been widowed for over 20 years, or if offenders had a deep affection for their relatives and committed homicide when rescuing their relatives, or the offenders had murdered some guilty men, etc., the cases could be reported to the emperor for the permissions of “Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on). However, if the murdered was also the only adult males at home and his parents were old, the murderer would not be allowed to be given “Cun Liu Yang Qin”.

In Qing Dynasty, every year the cases of “Qiu Shen” (Autumn Assizes) were divided into four categories: “Qing Shi” (circumstances deserving of capital punishment), “Huan Jue” (deferred Execution), “Ke Jin” (worthy of compassion), and “Liu Yang Cheng Si” (being allowed to remain at home to care for the parents or to perpetuate the ancestral sacrifices), which should be presented to the emperor for final decision. According to *Da Qing Hui Dian (The Collected Statutes of Great Qing)*, the judicial officials in charge of “Qiu Shen” (Autumn Assizes) should “impartially deliberate and judge the cases of ‘Huan Jue’ (deferred Execution), ‘Ke Jin’ (worthy of compassion), ‘Qing Shi’ (circumstances deserving of capital punishment), and ‘Liu Yang Cheng Si’ (being allowed to remain at home to care for the parents or to perpetuate the ancestral sacrifices)”.²⁶ Obviously, the provisions of

²⁶*Da Qing Hui Dian (The Collected Statutes of Great Qing)*, Vol. 57.

“Liu Yang Cheng Si” (Remaining at home to care for parents or to perpetuate the ancestral sacrifices) and “Cun Liu Yang Qing” (committing crimes and remaining at home to care for relatives) were only different in expressions, but the same in contents. This regulation had reflected the integrity of “stressing the penal law” and “executing law according to the concrete situation of specific issues”.

Fifth, the introduction of “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) in the law.

“Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) referred to the particular system in the Chinese feudal society, in which the scope of the relatives of the same ancestor was established and the ranks and degrees of the relatives were distinguished by the different mourning clothes which they wore at funeral ceremonies. “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) originally was included ritual systems, and it was particularly recorded in *Yi Li (Etiquette and Ceremonials)*, in the books on official, private and ceremonial rituals and in the statutes. “Wu Fu” (the relatives within the five mourning degrees) was not written into law until Jin Dynasty when “Confucian ethics and rites” were prevalent. In Ming and Qing dynasties, “Wu Fu Tu” (diagrams of five mourning degrees) within one’s own lineage was placed at the beginning of the law codes, and after the diagram there was a chapter about “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations), which had made “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) the most important component of the law codes of Ming and Qing dynasties, and it had finally become one of standards for enforcing punishments in criminal law (according to the system, the relatives are divided into the following: “Zhan Shuai”: the person wearing the mourning apparel of soft sackcloth in the first mourning degree, “Qi Shuai”: the person wearing the mourning apparel of soft sackcloth in the second mourning degree, “Da Gong”: the person wearing the mourning apparel of soft sackcloth in the third mourning degree, “Xiao Gong”: the person wearing the mourning apparel of soft sackcloth in the fourth mourning degree and “Si Ma”: the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree). For example, a series of special provisions had been made for the offences against the infringements and the injuries between the relatives, and its generous principle was that if the elder had killed or injured the young, the closer the relationship between the elder and the young, the lighter punishments the elder would be given. But if the young had killed or injured the elder, the closer the relationship between the young and the elder, the severer punishments the young would be given. On the contrary, the punishments for the damages of properties was different, the closer the relationship between the parties involved, the lighter punishments the offenders would be given; or the more distant relations the parties involved, the severer punishments the offenders would be given. As far as the crime of adultery was concerned, the closer the relationship between the parties involved, the severer punishments the offenders would be given without considering the ages and the levels of ranks of the offenders. From these points,

it could be seen that “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) had played an important role in making convictions and implementing punishments. In Yuan Dynasty (1271 A.D.–1368 A.D.), in his book *Wu Fu Tu Jie (Diagrams and Explanations of Five Mourning Degrees)*, Gong Duanli had pointed out that “the principles of mourning degrees should be illustrated first before the names of punishments were clarified, if the principles of mourning degrees are clear, the names of punishments will be corrected; if the mourning degrees are confusing, the names of punishments would be inappropriate.” In Ming Dynasty, Wang Kentang also stated in his book *Jian Shi (Annotations and Interpretations)* that “placing mourning degrees at the beginning of the law is to clarify the general degrees of mourning, which has provided standards for the mitigation and the aggravation of punishments.”

The examples mentioned above had obviously reflected the introduction of family affections into laws. However, it was not only reflected in the legislation of criminal law, but also in the civil law. For example, “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) was not only used as the standards for making convictions and implementing punishments, but also as the basis for adjusting the civil legal relationships between the relatives. Taking the stipulation about “Li Si” (adopting one’s sons as heirs for succession of family line) as an example, it was stipulated in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* that:

If the family has no sons, it is permitted to adopt the son of the same lineage as the heir, but the son of the paternal relatives should be adopted first, then the son of ‘Da Gong’ (the person wearing the mourning apparel of soft sackcloth in the third mourning degree), and then ‘Xiao Gong’ (the person wearing the mourning apparel of soft sackcloth in the fourth mourning degree), and ‘Si Ma’ (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree). If all of the relatives have no sons, the family is permitted to adopt the son of a family with the same surname or the son of the remote relative as the heir.

Apart from these stipulations, there were many other examples in which family affection was introduced into law concerning marriages and the division of family properties. Here are the examples:

Example one: about the rights to arrange children’s marriages. In the past dynasties, the principle that the elder lineal relatives had the rights to arrange their children’s marriages was written in the laws and it was also widely accepted in the civil customs. According to the law codes of Ming and Qing, “marriages shall be arranged by the paternal grandparents or parents, if a person has no paternal grandparents or parents, his or her marriage shall be arranged by the other relatives.” However, the other relatives’ rights of arranging the marriages were far less important than those of the elder lineal relatives. Hence, from Tang to Qing Dynasty, the responsibilities of the paternal grandparents, parents, the elders of the second mourning degree, and other relatives below “Da Gong” (the person wearing the mourning apparel of soft sackcloth in the third mourning degree) were clearly distinguished by the provisions in the law for the arrangements of marriages. If any provisions were violated, different punishments would be given according to the different mourning degrees.

Example two: about “Qi Qie Shi Xu” (the reversal of the order of wives and concubines, or treating concubines as wives), “Ju Sang Jia Qu” (marriages during the mourning period), “Zun Bei Wei Hun” (marriages between the superior and inferior), and “Qu Qin Shu Qi Qie” (marrying the wives or concubines of the relatives). The regulations for these offences could be found in the law codes of Tang, Ming and Qing dynasties, and they were all considered against the ethical principles, the people’s affection and the order of ranks. Because the marriages were prohibited either by law or by affection, they should be forced to be dissolved and the offenders should be punished by “Zhang” (flogging with heavy sticks) according to the law, but the strokes of beating varied.

Example three: about the marriages with the daughters of paternal aunts, or maternal uncles or aunts. It was regulated in “Zun Bei Wei Hun” (marriages between the superior and inferior) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* that “if the person marries the daughters of his paternal aunts, or maternal uncles, or aunts, the marriage shall be forced to be dissolved, and the offender shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes”, however, such marriages were not prohibited by the law, on the contrary, they were popular among the people and were already accepted as a tradition. For this reason, in the eighth year of Emperor Yongzheng, the following regulation was enacted, “when marrying the maternal relatives, except that the rules of the senior or junior are violated (the cases shall be deliberated and memorized in accordance with the law), the marriages of the daughters of paternal aunts, or maternal uncles, or aunts are legal in accordance with people’s preference.” Clearly, this regulation had shown that the law was made in order to comply with the people’s desires. Therefore, it was written into the law in the fifth year of Emperor Qianlong when laws were revised.

Example four: about establishing separate household registers and dividing the family properties by descendants. It was regulated in the law codes of Ming and Qing dynasties that “if the grandchildren or children have established separate household registers or divided the family properties when the paternal grandparents or parents are still alive, the offenders shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes.” In the first year of Emperor Shunzhi, a note was added to this provision which stipulated that “this provision is not applicable to the cases in which the grandchildren or the children follow the elders’ last will and testaments”. It meant that if the parents had written in their will that the children could establish separate household registers or divide the family properties, the children’s actions should not be punished according to this provision. From this point, it could be seen that this note was a reflection of the tradition. When the law code of Qing was revised in the third year of Emperor Yongzheng, the following provision was further added: “when the paternal grandparents or parents are alive, the grandchildren or the children are not allowed to establish separate household registers or divide the family properties. But if the children are given the rights to establish separate household registers and divide the family properties by their parents, they shall follow accordingly.” The note added in the year of Emperor Shunzhi emphasized the last will and the testaments of their parents after they died, while the note given in the year of

Emperor Yongzhen emphasized the permission given by the parents when they were alive. In these issues, the laws had followed the parents' instructions in order to show that the ethical principles and "Ren Qing" (human feelings) were greatly valued.

5.2.2 "Zhi Fa Yuan Qing" (Executing Law According to the Concrete Situations of Specific Issues)

The relationship of the conflict and integration between the national law and "Ren Qing" (human feelings) was not only shown in legislation but also in judiciary. On the one hand, the rulers in the feudal society had demanded that the officials should judge cases in accordance with the law, and should not "violate the law for practicing favoritism" or "bend the law for people's benefit"; on the other hand, "making laws to conform to 'Ren Qing' (human feelings)", or even "practicing favoritism by violating the law" were advocated under some special circumstances so as to boast the ruler's moral instruction and benevolent government, to strengthen the communication between law and the will of the people, and to increase the social cohesive force. As a result, from the magistrates in "Zhou" (subprefecture) and "Xian" (county) to the emperors in the imperial court, all could boast that they were following the principles of "Zhi Fa Yuan Qin" (executed laws according to the concrete analysis of specific issues) and "Yuan Qing Ding Zui" (making decisions according to the concrete situations). The word "Yuan" in the phrase "Zhi Fa Yuan Qin" literally meant "to examine" or "to investigate the causes of events". The use of this word could be found in "Rong Di Er Shi Liu" (The 26th Admonitions) in *Guan Zi* (an ancient Chinese book by Guan Zhongzi) that "in spring, (the previous ruler) went to visit places to 'Yuan' (investigate) the problems in agriculture. His visit was named 'You' (the tour of investigation)". The word "Yuan" was further explained by Yin Zhizhang in a note: "'Yuan' literally means 'to investigate'". The word "Qing" in the expression "Zhi Fa Yuan Qin" meant both "Ren Qing" (human feelings) based on the family affection and "Qing Li" (the common sense) widely acknowledged and accepted by the people in ancient society. For example, at the beginning of Tang Dynasty, "Du Du" (the military viceroys and procurators) of Guangzhou named Dang Renhong was punished by death penalty, but Emperor Taizong (Li Shemin) exempted him from the death execution in consideration of "his old age and his contribution to his country".²⁷ But after that, Emperor Taizong issued an edict of self-criticism and confessed that he had "bent the law for practicing favoritism", so he "asked 'Tian' (heaven) for the punishments". He said, "In enforcing the law, it is wrong to make people lose faith by selfishness. Now, I have violated the law by pardoning my associate, Renhong. What I have done has broken 'Tian Li' (heavenly principles). So I ... will hold a ceremony for three days to express my

²⁷"Xing Fa Zhi" (The Record of the Criminal Law) in *Xin Tang Shu* (*The History of New Tang Dynasty*).

apology for the offence.”²⁸ And in the meanwhile, he had also confessed that he had committed three offences:

I have indulged myself, followed my own inclination and let the bad behaviors of the officials go unchecked, so I have deceived the public. This is the first offence I have committed. I have chosen the officials unwisely so that some corrupt officials are appointed. This is the second offence I have committed. I have not rewarded the meritorious, nor have I punish the guilty. This is the third offence I have committed.²⁹

During the reign of Emperor Wen in Han Dynasty, Chun Yugong, who was from the state of Qi and the magistrate of Taicang was to be punished by the corporal punishment, his youngest daughter named Tiying followed him to Chang’an and presented a memorial to the emperor saying that she would like to be a servant in the government office to atone for his father’s crime. Emperor Wen was so moved by the affection between the father and the daughter that he issued an edict to abolish the corporal punishment. He said, “When a person has been found guilty of wrongdoings, if we do not educate him but simply punish him, he was rejected the chance to change his behaviors to be a good man.” He also said,

Why can’t we stop the wickedness, though we already have three kinds of corporal punishments? ... Being punished, the hands or feet of the offenders are cut down, and the skin of the offenders is tattooed, but the wounds on their bodies can never heal up in the rest of their lives. How immoral it is to make them painful and suffering! ... The situation must be changed by the abolishment of the corporal punishment.³⁰

The abolishment of corporal punishment in the reign of Emperor Wen was the inevitable result of the development of the ancient penal system and it was also influenced by the policies of recovery from the effects of war at the beginning of the Han Dynasty. Yet, it was Tiying’s memorial that had made Emperor Wen decide to abolish the corporal punishment. Emperor Wen, who had changed the punishment because of the affection between the father and the daughter, had been highly praised in history, though the changes which he had made were controversial, because he had changed the corporal punishment to the punishment of “Chi” (flogging with light sticks).

Some cases which were settled by Zhu Yuanzhang, the Emperor Taizu of Ming Dynasty according to “Zhi Fa Yan Qing” (executing law according to the concrete analysis of specific issues) were also recorded in ancient books:

Case one:

“When a man’s father was falsely accused and arrested, he made an appeal straight to ‘Xing Bu’ (Board of Punishment). The official charged him with the offence of overstepping indictment. Emperor Taizu commented: ‘this man appealed against

²⁸ *Zi Zhi Tong Jian (History as a Mirror)*, Vol. 196.

²⁹ *Ce Fu Yuan Gui (Records of Great Events)*, Vol. 150.

³⁰ “Xiao Wen Ben Ji” (Records of Emperor Xiao Wen) in *Shi Ji (The Records of the Grand Historian)*.

the false accusation of his father, which has shown that he has deep affection for his father. So he shall be pardoned.”³¹

Case two:

“When the son of a person had committed a crime, the person had bribed the official in charge to exempt his son from the punishment. The senior official of ‘Yu Shi’ (the censors) decided that the man was also guilty. Emperor Taizu commented: ‘the son is about to be executed, and the father wants to save his son just because he has deep affection for him. The son shall be punished, but the father shall be pardoned’.”³²

Case three:

“On the tenth day of the first month of the eighth year of Hongwu, in Shanyang County of Huan’an ‘Fu’ (Prefecture), a man’s father was found guilty and was to be punished by ‘Zhang’ (flogging with heavy sticks). The man appealed to be punished on behalf of his father. Then Emperor Taizu discussed the case with the senior officials of ‘Xing Bu’ (Board of Punishment) and said, ‘The affection between the father and the son is out of human nature. There are cases in which the sons, neither affectionate nor caring, are indifferent to their parents when their parents are in trouble. In this case, it is the deep affection which the man has for his father that has made him bear the punishment on behalf of his father. In order to praise the filial piety of this man and to inspire the people in the world, I would rather bend the law. The man and his father shall be released.’”³³

Obviously, the crimes in the cases listed above were neither harmful to the society, nor to the administration of the government. Moreover, all of them were sentenced by the judicial officials, but were pardoned by the emperor by taking the human affection and the concrete conditions into consideration, so they were well chosen to praise the benevolence of those so-called wise rulers, which had also shown that “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) was the guiding principle of “Zhi Fa Yuan Qin” (executing laws according to the concrete situation of specific issues). Therefore, “Zhi Fa Yuan Qin” was a specific judicial practice of “Li Xing Xiang Zuo” (supplementing moral teachings with punishments) and “Ming Xing Bi Jiao” (integrating punishment with moral teachings). Seemingly, it was self-contradictory to stress both law and human affection, but making the law conform to human affection had actually not weakened the authority of the national law; on the contrary, it had effectively whitewashed the principle of “Xun Xing” (prudent infliction of punishment) propagated by the ancient rulers.

In the ancient times of China, there were also others who had strongly opposed the ideas of “bending the law to conform to human relationships” and “subduing the law with morality”, and they had suggested that the law should be strictly observed.

³¹“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi (The History of Ming Dynasty)*.

³²“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi (The History of Ming Dynasty)*.

³³“Hou Feng Su” (To Lay Stress on Customs) in *Ming Taizu Bao Xun (The Instructions of Emperor Taizu)*, Vol. 2.

For example, Liu Song in Western Jin Dynasty had proposed that judgments and punishments should be inflicted in accordance with law. He pointed out in the book *Xing Fa Shu (Explanatory Notes of Criminal Law)* that, “if matters are expected to be most properly handled, the precedent (law) would not be fairly carried out; if matters are expected to be most perfectly handled, the law would not be completely executed”, consequently, “there would be different kinds of laws for a single legal issue and diverse orders for a single matter, ... which may be made use of by the wicked and the dishonest to exercise their affections indiscriminately”. So, he emphasized that “the fair-minded judges must patiently hear the cases and impartially decide the punishments to the best of his ability in defiance of people’s affections. Although what they have done would not be acceptable or not reasonable to the ordinary people, the law is justly enforced”

However, more legalists and philosophers supported of “Zhi Fa Yuan Qing” (executing laws according to the concrete situation of specific issues), though they had different focuses of attention. For instance, at the end of Ming and the beginning of Qing Dynasty, Wang Fuzhi had expounded his views on “Yuan Qing Ding Zui” (making decisions according to the concrete situations) from the perspective of judicial practices.

Based on the principles in *Chun Qiu (Spring and Autumn Annals)*, namely, “enforcing punishment on the those who should be punished, however small their crimes, and pardon those who should be pardoned, however great their crimes”, Wang Fuzhi insisted that in theory the principle of “Lun Xin Ding Zui” (made decisions according to human feelings) should be carried out in court so as to investigate the motive of the offences. By referring to the offences of murder, he said that those who had committed the crimes of intentional homicide “shall be given punishment accordingly”, while those who had committed the crimes of involuntary homicide “shall be granted pardon carefully”. Therefore, as judicial officials, they should always “make decisions according to the concrete and specific conditions of the cases, and should not just give a general judgment for the different cases without paying attention to the particularities”.³⁴ From Wang Fuzhi’s suggestion of “Lun Xin Ding Zui” (made decisions according to human feelings), we could see that he was a Confucianist who had laid stress on man’s morality, however, the meaning of “human feelings” which he referred to had exceeded the “family affection”, and it was endowed with the meaning of the analysis of the concrete conditions of different cases. For example, he said that there were different causes for the same crime of homicide:

One might commit homicide when he has a deep hatred for the other person, or he has the feeling of jealousy of the others, or he has the accumulated grievances against the other in competitions. People then become enemies. ...they are involved in the situations where one may kill the other, or may be killed, and where the winners may kill the losers, and where

³⁴*Du Tong Jian Lun (Comments on Zi Zhi Tong Jian: History as a Mirror)*, Vol. 6.

one may feel hatred toward the other. They may have no intention to kill the others at the beginning, but when they exchange blows, and when one vital part of the body is hurt accidentally, the killing occurs.³⁵

Hence, Wang Fuzhi thought that before the punishments (laws) were given impartially, the truth of the cases should be investigated, and he said, “When taking account of the facts of the cases, the offences can be distinguished by different degrees; when readjusting the laws and the principles, the punishments can be distinguished by severity and leniency”. He also argued that whether the punishments were given “in accordance with the crimes”, or whether they were “free pardons”, the judgments should be given on the basis of facts and in accordance with the law. He had also illustrated his opinions by citing the crime of “exonerating the guilty or implicating the innocent” and pointed out that the facts of each individual case should be considered and analyzed, and that “the same judgment should not be supplied to different cases”. He pointed out, “as to the crime of ‘exonerating the guilty’ or ‘implicating the innocent’, there are the differences of whether the bribes have been accepted or not, if the offenders have not taken any bribes, the punishment which they are given shall be comparatively lighter”, nevertheless, if “the officials have deliberately implicated the innocent, even though they have not accepted the bribes, the punishment which they are given shall be the same as those who have accepted the bribes”.³⁶ Therefore, the result of ‘exonerating the guilty’ or ‘implicating the innocent’ were different, and “if they have caused death, the penalty which they are given shall be doubled”³⁷. Moreover, the problems that “whether the people involved in the cases were wronged” and “how badly they were wronged” should also be clarified”.³⁸ In this way, whether the punishments were enforced or “turned over to ‘Li Bu’ (Board of Personnel) to be recorded”,³⁹ they were fairly conducted according to the crimes committed.

Clearly, Wang Fuzhi’s discussions about “Zhi Fa Yuan Qing” (executing law according to the concrete situation of specific issues) had shown his matter-of-fact attitude. He had not simply discussed the abstract points of human relationships and the concrete conditions of cases, but had conducted a detailed analysis of the real legal cases, so his discussions were practically significant. In history, the honest and upright officials had always given considerations to both human relationships and law in judicial practices, although there were particular class standards and class interests in human relationships, the wealth of experience accumulated in judicial practices were highly significant for later reference.

³⁵ Ibid.

³⁶ Wang Fuzhi, *E Meng (Nightmares)*.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

5.3 The Harmonious Unification of “Tian Li” (Heavenly Principles), National Law and “Ren Qing” (Human Feelings)

From the doctrines which Dong Zhongshu had preached to the principles which the philosophers of Cheng-Zhu School had advocated, it could be found that “Tian Li” (heavenly principles) and the national law were closely integrated. Moreover, from the theory of “interactions between ‘Tian’ (heaven) and ‘Ren Qing’ (human feelings)”, “Tian Li” (heavenly principles), the national law, and “Ren Qing” (human feelings) were closely linked in a harmonious unification by centering on the national law so as to ensure the social order and stability of the country. This had not only shown the close relationship and interaction between politics and moral principles and politics and legal system in ancient China, but also indicated the common social foundations and aims which they had possessed. Because “Tian Li” (heavenly principles) had been embodied by the national law, the national law was irresistibly veiled in mystery. In addition, the national law was added an ethical color when the execution of law was conformed to the concrete conditions of the people. Therefore, the enactment of the national law was not only protected by state authorities, but also supported by clan authority and the public opinion, so the role of the national law was more fully played, which was exactly the starting point and the final destination of the unification of “Tian Li” (heavenly principles), the national law, and “Ren Qing” (human feelings).

In feudal times, a horizontal inscribed board engraved “‘Tian Li’ (heavenly principles), the national law and ‘Ren Qing’ (human feelings)” was usually hung on the wall of the courts of “Zhou” (sub-prefectures) or “Xian” (county) so as to warn the litigants that the national law was the embodiment of “Tian Li” (heavenly principles) and the concentrated reflection of “Ren Qing” (human feelings), therefore, all of them should be fully observed. In the judgments of legal cases included in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, there were many comments, such as “making decisions according to the concrete situation of specific issues and the provisions of law”, “taking both ‘Ren Qing’ (human feelings) and the stipulations of law into consideration”, and “being restrained by legal provisions and ‘Ren Qing’ (human feelings)”. One comment was especially made by Hu Shibi: “The legal provisions and ‘Ren Qing’ (human feelings) are in fact two integral parts of a whole. When making decisions, it is neither right to bend the law for the benefit of relatives or friends, nor to disobey people’s wishes for rigidly following the provisions. If the balance between the two is kept and both the legal provisions and people’s wishes are followed, the matters would be dealt with perfectly.”

At the beginning of Ming Dynasty, it was stated by Liu Weiqian in *Jin Ming Lv Biao (A Memorial to the Emperor about Ming Code)* that since in the law of great Ming “‘Tian Li’ (heavenly principles) has been verified, the people’s will has been taken into consideration”, besides, “since the law was the product of acting in accordance with ‘Tian’ (heaven) and complying with the aspirations of the people”,

it surely would be “a yardstick applicable for hundreds of dynasties”.⁴⁰ Xu Xuan in the Ming Dynasty also said, “The laws are the countermeasures and punitive regulations made to comply with ‘Tian Li’ (heavenly principles) and the aspirations of the people.”⁴¹ He had attributed the functions of the laws in providing preventive and punitive measures for stopping violence and wickedness to their compliance with “Tian Li” (heavenly principles) and “Ren Qing” (human feelings). So accordingly, he had concluded that it was following “Tian Li” (heavenly principles) and obeying “Ren Qing” (human feelings) to carry out the law, and it was violating “Tian Li” (heavenly principles) and opposing “Ren Qing” (human feelings) to break the law.

“Tian Li” (heavenly principles), the national law and “Ren Qing” (human feelings) had been coexisting in a harmonious unification in which they were mutually complementary and interdependent, which had instituted one of the legal traditions in ancient China. Nevertheless, the unification of the three was by no means accidental; on the contrary, it was determined by the social structure of the patriarchal society in ancient China, and also by the long-time cultural accumulation, the national mentality, and people’s political and legal consciousness. It was a common theory recorded in ancient books that law derived from “Tian” (heaven), which, after being vigorously propagated by the rulers in the feudal society, had become known and widely accepted by the public and society. When law was mentioned, it was always linked with “Tian” (heaven) and the expression “Feng Tian Cheng Yun” (the divine rights of rulers) would also be used to defend the legality of the administration and the legal system. The self-enclosed society, the small-scale production, and the backward technology and culture in ancient times had all made the people believe that the law was dominated by “Tian Li” (heavenly principles). Furthermore, since the state was ruled by law, the law and “Tian Li” (heavenly principles) were closely integrated, then “Tian” (heaven) was closely linked to law; since people had regarded “Tian (Heaven) with reverence, they surely would also regard the national law with reverence.

In ancient China, there were also some philosophers who had opposed the theory that law originated from “Tian” (heaven), and they declared that law came from human world. For example, Shen Zi said, “Law does not come from ‘Tian’ (heaven), nor from ‘Di’ (Earth); it is from human world to fulfill peoples desires”.⁴² Guan Zi suggested that “the orders should be conformed to people’s wills”.⁴³ And it was also stated by Shang Yang that “the laws which are made without taking ‘Min Qing’ (the condition of the people) into consideration can not be implemented”.⁴⁴ Besides, Yi Wenzhi had even viewed “Tian Dao” (The Way of Heaven) as “a way of conforming

⁴⁰ *Jin Ming Lv Biao* (A Memorial to the Emperor about Ming Code) in *Da Ming Lv Ji Jie Fu Li* (Great Ming Code with Collected Commentaries and Appended Sub-statutes).

⁴¹ Xue Xuan, *Yao Yu* (Important Words).

⁴² “Yi Wen” (The Lost and Scattered Articles) in *Shen Zi* (Master Shen).

⁴³ “Mu Min” (On Ruling the People) in *Guan Zi* (The Book of Master Guan).

⁴⁴ “Yi Yan” (Unification of Words) in *Shang Jun Shu* (The Book of Lord Shang).

to people’s wills”.⁴⁵ In short, the views of these philosophers had laid the theoretical foundation for the integration of the national law and “Ren Qing” (human feelings).

Because “Min Qing” (the condition of the people) and “Ren Qing” (human feelings) had possessed their own sociality, and they were the foundations for the making of law, if the law was divorced from “Min Qing” (the condition of the people), the life of law would be ended. Viewed from the history of the development of the legal systems, it could be found that if the law was in accordance with “Ren Qing” (human feelings), it would thrive; but if the law was against “Ren Qing” (human feelings), it would decline. With the introduction of “Ren Qing” (human feelings) into law, the law was merged with moral principles, so it was much easier to be accepted by people; with the law in accordance with “Ren Qing” (human feelings), its outward rigidity and brutality were weakened, and it was much easier to be implemented. Integrating law with “Ren Qing” (human feelings) had made it possible to unify legal and family obligations, which was also a goal which the decent officials in ancient times wished to achieve. Those officials would rather bend the law to conform to “Ren Qing” (human feelings) so as to resolve the conflicts between them, to avoid the law being violated by “Ren Qing” (human feelings), to improve the sense of cohesion among the people of patriarchal society, and to bring the legal function of law in moralizing the people into a full play through the infliction of punishments.

The harmonious agreement of “Tian Li” (heavenly principles), the national law and “Ren Qing” (human feelings), the blending of “Tian Li” (heavenly principles) and “Ren Qing” (human feelings), the integration of moral principles and law, the unification of legal and family obligations, and so forth, had all exerted significant influence not only to the development of Chinese ancient laws, but to the development of laws in the oriental countries in the cultural circle of Confucianism, such as ancient Korea, Japan and Vietnam.

⁴⁵“Yin Xun” (Following the Beaten Track) in *Shen Zi (Master Shen)*.

Chapter 6

The Law Deriving from Monarch, the Monarchy Power Overtopping Law

6.1 The Power of Absolute Monarchy and the Legal System in the Pre-Qin Periods

In Ancient China, the absolute monarchy centered on the king had been established ever since China entered into the class society and the states were founded; therefore, it was of a long standing. It was recorded in the documents of Shang (1600 B.C.–1046 B.C.) and Zhou dynasties (1046 B.C.–771 B.C.) that the words of “Yu Yi Ren” (Tian Zi: the son of Heaven or the emperor) was particularly used by the king to refer to himself and to symbolize his supreme position and absolute privilege. All the national activities, such as punitive expeditions, sacrifices, etc., were named “Wang Shi” (the king’s affairs) to suggest that the king was the state, and that the king and the state were an organic whole. In the oracle inscriptions of the Shang Dynasty on tortoise shells or animal bones, the words like “Wang Ming” (the king’s commands), “Wang Ling” (the king’s orders), and “Wang Hu” (the king’s words) could be found repeatedly, which had indicated that the national affairs were conducted according to the orders of king who not only had the supreme administrative and military power, but the supreme legislative and judicial power.

During Xia and Shang dynasties, the king had taken the advantage of “Tian Dao” (The Way of Heaven), in which “Tian Ming” (the mandate of Heaven) was preached about so as to strengthen the authority of their royalty. In Western Zhou Dynasty (1122 B.C.–771 B.C.), though the doctrine of “Tian Ming” (the mandate of Heaven) was infused with “Yi De Pei Tian” (matching heaven with virtue), the concept of “Tian” (heaven) was still mainly used to refer to the monarchial power. During Eastern Zhou Dynasty (770 B.C.–256 B.C.), a theory was put forward by the philosophers of many schools of thoughts, which had suggested that the sages and the monarchs “could form a Triad with ‘Tian’ (heaven) and ‘Di’ (earth)”, which had further made the monarch a super character. For instance, Xunzi said, “The gentleman is the triadic partner of ‘Tian’ (heaven) and ‘Di’ (earth), the summation of the myriad of things, and the parents of the people. If there were no gentleman, ‘Tian’ (heaven)

and ‘Di’ (earth) would have lacked any principles of order.”¹ Though the philosophers of many schools of thoughts had different emphases in their theories, they had a common goal, that was, to serve the politics of the absolute monarchy. In *Lun Liu Jia Yao Zhi* (*Discussion on the Main Points of the Six Schools*), Sima Tan had pointed out that “the six schools, including ‘Yin Yang’ (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive), Confucianism, Mohism, School of Ming (a school which stressed the research of the relationships between concepts and facts), Legalism and Daoism, are all for the ruling of the state. However, because of the different views which they have held, they are different from each other in emphasis.”² Moreover, the clan system, which was produced on the soil of Chinese culture, had laid a solid foundation for the establishment of absolute monarchy. In terms of legal systems, its implement and practical application in the dynasties of Xia, Shang and Zhou had all centered on the will of the monarchs. As a result, the law was overtopped by the imperial power, and both law and punishment were made by the rulers. For example, the law of the Xia Dynasty was generously referred to as *Yu Xing* (*The Penal Code of Yu*), which was named after the emperor. It was recorded in “Zhao Gong Liu Nian” (The Sixth Year of Lu Zhao Gong) in *Zuo Zhuan* (*The Chronicle of Zuo*) that “when the government of Xia had fallen into disorder, the penal law code of Yu was made”. According to “Xing Fa Zhi (The Record of the Criminal Law)” in *Han Shu* (*History of the Former Han Dynasty*), “after Yu succeeded Yao and Shun, the corporal punishment was applied because of the decaying of virtue”. Obviously, the penalty (or law) in Xia Dynasty was believed to be made by Yu so as to deal with the social changes which had brought about “the social disorder” and “the decaying of virtue” at that time. The penal law code was named after Yu to show that the law code was made by Yu, and at the same time it had shown the great respect which the Xia people had for their ancestor as well as for the first king of the country.

The law of Shang Dynasty was generously named “Tang Xing” (*The Penal Code of Tang*). It was recorded in “Liu Nian” (The Sixth Year of Lu Zhao Gong) in *Zuo Zhuan* (*The Chronicle of Zuo*) that “when the government of Shang had fallen into disorder, the penal law code of Tang was made.” Here, “Tang” referred to the name of the first monarch of the Shang Dynasty, Cheng Tang. The reason for naming the penal law code after the monarch of Tang was the same as that for the naming of penal law code of Yu. Moreover, the important military orders and legal provisions in the dynasties of Xia, Shang and Zhou were all issued in the forms of “Ming” (command) and “Shi” (standard) from the monarchs. For instance, in “Gan Shi” (the military order issued at Gan) in *Shang Shu* (*The Book of Historical Document*), the military order which Xia Qi had issued before an expedition was recorded: “you who obey my orders, shall be rewarded before (the spirits of) my ancestors; and you who disobey my orders, shall be put to death before the altar of the spirits of the land, and I will also put to death your children,” which had shown that it was the

¹ “Wang Zhi” (The Royal Regulations) in *Xunzi*.

² “Tai Shi Gong Zi Xu” (Preface by Tai Shigong himself) in *Shi Ji* (*The Records of the Grand Historian*).

king of Xia who had the rights to give military orders, or decrees, and who had the power to kill people. Still in “Tang Shi” (an order issued by the king Tang of Shang Dynasty when attacking the state of Xia) in *Shang Shu (The Book of Historical Document)*, the military orders given by Cheng Tang before launching the attack on Xia State were almost the same as that in “Gan Shi” (the military order issued at Gan): “if you do not obey the words which I have thus spoken to you, I will put you and your children to death—you shall find no pardon.” The instructions of Pan Geng recorded in “Pan Geng” in *Shang Shu (The Book of Historical Document)* were also a case in point: “it is I who decide your life and death”, “I am the only one to make the plans, the only one. ...to err in the application of punishments”, and “I will cut off their noses, or utterly exterminate them”. Till East Zhou Dynasty, “Gao” (imperial mandate), “Shi” (standard), and “Ming” (command) issued by the monarchs of Zhou were all the legal forms with supreme authority.

In addition to the legislative power, the monarchs in ancient times also were endowed with the supreme judicial power. In the oracle inscriptions of the Shang Dynasty on tortoise shells or animal bones, there were the words of divination: “the divination (shows) the decision which the king has made is not right”, “the divination (shows) the decision which the king has made is right”, and “this oracle is to divine whether the man shall be punished”. All these words had indicated that the king had the judicial power to make the final decisions. During the period of Western Zhou Dynasty, the rulers were in fact also the supreme arbiters dealing with the legal disputes between the states. “It was stated in ‘Zhang Qiu’ (the Regulations for Jailers) in the chapter of ‘Qiu Guan’ (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that “on the day of execution, the names of the condemned are reported to the king, and then the condemned are sent to the officials of the imperial court”. With the development of the state machine of Zhou dynasty, under the leadership of the monarch, the central judicial organizations headed by “Si Kou” (the minister of justice) and “Shi Shi” (the official in charge of criminal affairs) were established, and the local judicial organizations, named “Xiang Shi”, “Sui Shi”, “Xian Shi”, “Fang Shi”, and “Ya Shi”, had also been set up to deal with the judicial affairs.

The relationship between political power and law in ancient times was convincingly demonstrated in the historical records of the dynasties of Xia, Shang and Zhou: the political power dominated the law and the law was submitted to the political power, which was determined by the autocratic political system and maintained by the economic, military, patriarchal, and religious power kept in the hands of monarchs. For example, the financial power was monopolized by the king himself, and especially, the means of production—the lands and the producers (the slaves) was monopolized. Seemingly, the means of production and the slaves were controlled in a state-owned form which was in fact the form owned by the king, as was described in the saying that “under the wide Heaven, all is the king’s land. And within the sea-boundaries of the land, all are the king’s servants.”³ Although the means of

³“Bei Shan” (Decade of Bei Shan) in “Xiao Ya” (Minor Odes of the Kingdom) in *Shi Jing (The Book of Songs)*.

production and the slaves were distributed to the noblemen by the king, the ownership, however, was not transferred, and such a mode of production in ancient Asia had laid the material foundation for the autocratic monarchy.

Besides, the great military power was also held by the king. Take the Western Zhou Dynasty as an example: the king owned six troops, the dukes or princes of a bigger state owned three, those of a medium size owned two, and those of a small size owned one. The king had the rights to send a punitive expedition against those who had disobeyed his orders.

Under the hierarchical clan system, the King of Zhou was also the head of Zhou Family, thus, the imperial and the clan power were integrated with each other, the imperial family and the state were closely related, and the grades of the ranks in clans paralleled those in politics. As a result, the pyramids-shaped political ranks were developed, within which “the king makes the duke his servant; the duke, the senior officials; the senior officials, the (junior) officials”,⁴ and “states are established by ‘Tian Zi’ (the son of Heaven or the emperor); collateral families are established by the princes; ‘Ce Shi’ (side rooms: refers to concubinage) was instituted by the ministers. Moreover, ‘Da Fu’ (senior official in ancient China) had ‘Er Zong’ (an official in ancient China) as their subordinates; the (junior) officials have their sons and younger brothers as their servants”.⁵ The rights and the obligations of different imperial clans varied according to their ranks, but they must observe the regulations without overstepping them. From this point, it could be inferred that the clan power was the backbone of imperial power, and only by applying the two power systems, namely, the political and the clan system was it possible for the king of Zhou to keep his imperial power.

Additionally, the king’s power was also greatly strengthened with the help of theocracy. During the dynasties of Xia, Shang, and Zhou, because the productivity was low and the scientific technology was not advanced enough to explain some complicated natural phenomena, the people held the nature in awe. On this account, the kings during this time had purposely taken the advantage of religion to explain the major political activities and to strengthen their imperial powers. For instance, in the military order of Xia Qi before the attacking of You Hushi, it was recorded that “‘Tian’ (heaven) is about to destroy him and bring his appointment (to Hu) to an end; therefore, I am now reverently executing the punishment appointed by ‘Tian’ (heaven).”⁶ In his military order of punitive expedition against Xia Jie, Cheng Tang also announced that “for the many crimes of the sovereign of Xia, ‘Tian’ (heaven) has issued orders to destroy him. ...so I, the only man, am to carry out the punishment appointed by ‘Tian’ (heaven).”⁷ Moreover, the infliction of punishment was also carried out in the name of heavenly punishments: “‘Tian’ (heaven)

⁴“Zhao Gong Qi Nian” (The 7th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁵“Huan Gong Er Nian” (The Second Year of Duke of Huan) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁶“Gan Shi” (the military order issued at Gan) in *Shang Shu (The Book of Historical Document)*.

⁷“Tang Shi” (an order issued by the king Tang of Shang Dynasty when attacking the state of Xia) in *Shang Shu (The Book of Historical Document)*.

punishes the guilty - are there not 'Wu Xing' (the five forms of punishments in ancient China, i.e. "Mo": tattooing on the face or forehead of the offenders with indelible ink, "Yi": cutting off the nose, "Fei": cutting off the left or right foot or both feet, "Gong": castration, and "Da Bi": the capital punishment) to be severally enforced for that purpose?"⁸ In "Da Yu Mo" (The Counsels of Great Yu) in *Shang Shu (The Book of Historical Document)*, when explaining the principle of "Tian Ming" (the Mandate of Heaven), it was stated that "great Heaven has endowed you its favor, and bestowed on you its appointment. Suddenly you have possessed all within the four seas, and become the ruler of all under heaven". Those kings of the Shang Dynasty had closely related the worshipping of "Tian" (heaven) to the worshipping of their imperial ancestors, and they had propagated that the God of Heaven was the God of Ancestors of their family, and that the God of Heaven was the God in "Tian" (heaven), and the King of Shang was the God on "Di" (earth). Thus, the religious power was closely connected with the imperial power, which had brought a mysterious color to the aristocracy in the slavery society. However, after the establishment of the Zhou administration, the doctrine of "Tian Dao" (The Way of Heaven) preached in the Shang Dynasty was completely abandoned on account of the changing historical circumstances. The king of Zhou had stopped to endorse the idea that the king was the descendants of the God of Heaven, yet they had propagated that "Tian" (heaven) only helped the virtuous, therefore, the reason for the successful replacement of Shang by Zhou was that the king of Zhou had accepted the principle of "Yi De Pei Tian" (matching heaven with virtue).

In short, the autocratic kingship was the synthetic embodiment of the absolute power of theocracy, clan, military, economy and judicature, and it was also the supreme power of the state. Besides, the king, except being submissive to God, was free from any restraint, and the law was not only the will of the noble class headed by the king, but also an instrument for governing the country according to the king's will. So, the law was not a tool to restrain the absolute power of the king in ancient China, but had become another tool of tyrannical despotism, which was different from the systems in ancient Greek and Rome. In the times of slavery in ancient China, although statute laws were made, they were never publicized to the society so as to keep them in secret to show that "if the penalty is unknown by people, its power is unfathomable, and the people will hold the rulers in awe".⁹ Thus, such a secret state of the statute laws was beneficial for the noblemen, especially for the king, to "deliberate on affairs" with random applications and to maintain the interests of noblemen and the ruling of the government. In the three dynasties of Xia, Shang and Zhou, because the relatives of the rulers and the members of the ruling class were integrated, the state and the families were closely related, and both the national law and the family rules were consistent with and complementary to each other, in adjusting the complicated social relationships, either the national law or the

⁸"Gao Tao Mo" (Counsels of Gaotao) in *Shang Shu (The Book of Historical Document)*.

⁹"Zhao Gong Liu Nian" (The 6th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*, annotated by Kong Yingda.

family rules could be applied. For example, the custom that “designating the eldest son as the heir, whether he is able or virtuous; designating the son as the heir, whether he is the eldest”¹⁰ had become a rule both for the family and the state, which should be strictly followed in both the succession of the throne and the succession of the head of patriarch. As to the clan member who had done something harmful to the state interests, he would be punished by both the national law and the family rule, and often “an execution in the ancestral temple” would be carried out.¹¹ The extensive application of domestic customary laws was the remaining traces of clan systems, which had already been eradicated in ancient Greek and Rome where commodity economy was well developed.

6.2 The Systematization and Legislation of Imperial Power

The theories in defense of the imperial power were further developed ever since Qin and Han dynasties. For example, in Qin Dynasty, based on the theory that “under the wide heaven, all is the king’s land; and within the sea-boundaries of the land, all are the king’s servants”,¹² another principle was put forward: “Within ‘Liu He’ (the six directions: the world or universe), all is the king’s land; within the lands where there are human beings, all are the king’s subjects”.¹³ In a word, the two major components in the world—the land and the people, all belonged to the emperor; therefore, the word “emperor” had a connotation of “possessing everything in the country”. After succeeding to the throne, Emperor Han Gaozu said to his father in an ironic tone of settling accounts with him: “you always say I am a scoundrel, unable to purchase my own estate, and not as good as my younger brother. See what I have had today. Now, who has got more wealth, my brother or I?”¹⁴ Clearly, this was nothing but a declaration that all of the wealth in the world was the private property of the Emperor himself. Similar to the idea that the emperor had the supreme rights of ownership, another thought that “the subjects were blessed by the emperor” was prevalent among the people, according to which, everything that the subjects had was bestowed by the emperor, even the execution of the death penalty of the subjects was called “Ci Si” (the death blessed by the emperor), and the people who had been given the death penalty were obliged to “Xie En” (thank the emperor for the blessing), which was by no means strange in the logic thinking of

¹⁰“Yin Gong Yuan Nian” (The First Year of Duke of Yin) in *Gong Yang Zhuan (The Biography of Gongyang)*.

¹¹“Cheng Gong San Nian” (The Third Year of Duke of Cheng) in *Zuo Zhuan (The Chronicle of Zuo)*.

¹²“Bei Shan” (Decade of Bei Shan) in “Xiao Ya” (Minor Odes of the Kingdom) in *Shi Jing (The Book of Songs)*.

¹³“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

¹⁴“Han Gaozu Ben Ji” (Records of Emperor Han Gaozu) in *Shi Ji (The Records of the Grand Historian)*.

the ancient people, because they had believed that the emperor had the supreme ownership of the people and the wealth in the world; therefore, he also had the supreme authority of random disposition, and he could dispose of them at will, which had not only endowed the emperor with an absolute privilege, but also had provided a theoretical basis for the emperor to abuse his power tyrannically.

In Han Dynasty, the theory of “the interactions between ‘Tian’ (heaven) and ‘Ren’ (human beings)” was put forward by Dong Zhongshu, he said, “‘Tian’ (heaven) has given birth to ‘Ren’ (human beings), ... and has selected an emperor for the good of them, and this is ‘Tian Ming’ (the Mandate of Heaven)”; “‘Tian Zi’ (the son of Heaven or the emperor) is entrusted with the ‘Tian Ming’ (the Mandate of Heaven) to govern the country”,¹⁵ and “‘Tian Zi’ (the son of Heaven or the emperor) is following the order of ‘Tian’ (heaven), therefore, the people should follow the orders of ‘Tian Zi’ (the son of Heaven or the emperor)”.¹⁶ According to Dong Zhongshu, only the emperor had represented the inevitability of nature and society; so if people wanted to observe the law and to accept the inevitability of nature, they must follow the orders of the emperor. Hence, the doctrines of “Tian Ming” (the Mandate of Heaven) and “Feng Tian Cheng Yun” (the divine rights of rulers) had always been preached in the feudal society in order to defend the sanctity and rationality of imperial power.

Based on the theories of “San Gang” (three cardinal guides) and “Wu Chang” (five constant virtues), a completely far-flung network of politics and moral principles was built by Dong Zhongshu, from which no one could escape. Being in a subordinate position in the network, the independent value of the individual was always ignored. From the point of “Tian Li” (heavenly principles), the feudal order of absolute monarchy was further affirmed by the Confucian scholars in the Song Dynasty, and it was argued that “the relationship between father and son is the same as that between the sovereign (the superior) and the ministers (the inferior). Therefore, it is a universal truth under ‘Tian’ (heaven), which had guided everything in ‘Tian’ (heaven) and ‘Di’ (Earth)”.¹⁷ Besides, an ideological environment was also created for the necessity of absolute monarchy by popularizing the moral values of “promoting ‘Tian Li’ (heavenly principles) but eradicating human desires”.

6.2.1 *The Systematization of Imperial Power*

After the annex of the six states and unification of China, an imperial system was instituted by the ruler of Qin, who had named himself “Shi Huang Di” (the First Emperor), thus, the systematization of absolute monarchy was initiated.

¹⁵“Yao Shun Tang Wu” (Yao, Shun, Shang Tang and King Wu of Zhou) in *Chun Qiu Fan Lu* (*The Luxuriant Dew of Spring and Autumn Annals*).

¹⁶“Wei Ren Zhe Tian” (The Mandate of Heaven) in *Chun Qiu Fan Lu* (*The Luxuriant Dew of Spring and Autumn Annals*).

¹⁷*Yi Shu* (*The Posthumous Papers*), Vol. 5.

In order to show the special sovereign status of the emperor, from the “First Emperor of Qin”, a series of words were exclusively coined for the emperor: the commands of the emperor were referred to as “Zhi” (regulations) and the orders of the emperor were “Zhao” (decree); the emperor referred to himself as “Zhen” (I, the emperor), and the subjects addressed the emperor as “Bi Xia” (Your Majesty); the emperor’s inspection visits to some places were “Xing”; his whereabouts was “Xing Zai Suo”; his residence was “Jin Zhong”. These words which were monopolized by the emperor were basically used in the whole feudal society. For example, in Han Dynasty, “the title of ‘Tian Zi’ (the son of Heaven or the emperor) is ‘Huang Di’ (the emperor). He refers to himself as ‘Zhen’. The subjects address him as ‘Bi Xia’ (Your Majesty). His orders are ‘Zhi Zhao’ (decrees). He was addressed by the historiographers as ‘Shang’ (the superior); his carriages, horses, clothes, weapons and personal effects are generally named ‘Cheng Yu’; his whereabouts is ‘Xing Zai’; his food is ‘Yu’; his orders are either called ‘Ce Shu’ or called ‘Zhi Shu’, ‘Zhao Shu’ and ‘Jie Shu’”.¹⁸

According to the book of *Yi Zhi Ling* (*The Regulations of Ritual Ceremonies*) written in the year of Kai Yuan of the Tang Dynasty, the emperor was generally addressed by people at home and abroad as “Huang Di” (the emperor) or “Tian Zi” (the son of Heaven or the emperor); he was generally called “Zhi Zun” (the most revered) by the ministers; he was called “Bi Xia” in the ministers’ memorials; his inspection visits were “Che Jia”, and so forth.¹⁹ Besides, it was regulated that:

From the crown prince down to every male within the sea-boundaries of the land, all referred to themselves as ‘Chen’ (subjects) when speaking to the emperor; from the empress down to every female including the grandma-empress, and the dowager empress within the sea-boundaries of the land, all referred to themselves as ‘Qie’ (concubine) when speaking to the emperor; from ‘Liu Gong’ (the place where empress lived, it may refer to the concubines of emperor) down to every female within the sea-boundaries of the land, all referred themselves as ‘Qie’ (concubine) when speaking to the empress. In their memorials, the officials referred to the grandma-empress, the dowager empress, and the empress as ‘Dian Xia’ (Her Highness) and they referred to themselves as ‘Chen’ (subjects). The officials and the officials in the palace of crown prince addressed the crown prince as ‘Dian Xia’ (Your Highness, or His Highness) (same to the one in memorials). When referring to themselves, the officials used their own names and the eunuchs used the word ‘Chen’ (subjects).²⁰

Moreover, in order to show respect to the imperial authority, taboos and titles in the style of official documents were systemized: in all the documents, the characters of “the emperor” shall be topped on the page, and in the languages of the common people, the name of the emperor was a taboo. It was regulated in “Gong Shi Ling” (the order for the forms official documents) in the year of Kai Yuan that “when writing historical books or recording historical events, if it was unavoidable to mention the

¹⁸ Cai Han, *Du Duan (Making Arbitrary Decisions)*, Vol. 1.

¹⁹ Noboru Niida, *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House, 1989, p. 400.

²⁰ Noboru Niida, *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House, pp. 400–401.

names of the emperors, incomplete strokes of characters should be used or the characters should be changed.”²¹ In addition, it could be found in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that:

If the officials have accidentally broken the taboo for the reference of the imperial ancestors when making reports or presenting memorials to the emperor, they shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes; if they have broken the taboo by a slip of tongue when discussing affairs in court with the emperor or by mistakes when writing other official documents, they shall be punished by ‘Chi’ (flogging with light sticks) for fifty strokes; if some people have deliberately used the names of the imperial ancestors, they shall be punished by penal servitude for three years; if the names which they use sound the same as the ones of the imperial ancestors but have different characters, or the names they use have the same character as that of the imperial ancestors’, they are free from punishments.²²

Emperor Taizong (Li Shimin) in Tang dynasty had a liberal attitude toward the taboo of names. He said, “It is better to simplify the matters in accordance with the regulations of ceremonies. We do this for following the regulations applied in the past and also for making new regulations for the future. If the two words of ‘Shi’ and ‘Min’ (Emperor Taizong’s name) are not put together in the names or titles of people, or in official or private documents, they shall not be avoided as taboos.”²³

In ancient times, the emperors primarily dealt with the national affairs by holding courts. In this regard, the systems of “Chao Yi” (imperial court consultation) and “Chao Hui” (imperial court convention) were developed.

The system of “Chao Yi” (imperial court consultation) was developed from the gentile council, which had allowed the experienced and the knowledgeable people to discuss national affairs irregularly with the officials in court so as to make correct policies. After the imperial system was instituted by Qin Shi Huang (the first emperor of Qin), though it was regulated that “the things under heaven, whether they are important or small, are all decided by the emperor”, still the emperor would “hold consultation” with ministers when there were affairs with regard to national defense and administration. The system of “Chao Yi” (imperial court consultation) was continuously retained by the emperors after Qin Shi Huang (the first emperor of Qin), but the authority of holding court consultation lay in the emperor, and any ministers were forbidden to hold the consultation without the permission of the emperor. It was one of the features of “Chao Yi” (imperial court consultation) for the emperor “to solicit opinions from all sides and make decisions on all state policies by himself”. The purpose of “soliciting opinions from all sides” was to prevent the ministers from concealing the truth from the emperor and to collect useful advices for the emperor’s administration, and the conduct of “making decisions on all state policies by the emperor himself” had fully reflected the sovereign control and the supreme authority of the imperial powers. For instance: at the beginning of Qin,

²¹ *Ibid.*, p. 504.

²² “Taboos in Presenting Memorials” in “Zhi Zhi (The State Office System)” in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

²³ “Li Yue” (Rites and Music) in *Zhen Guan Zheng Yao* (*Essentials about Politics from Zhen Guan Reign*).

a memorial requiring the emperor to confer the titles of the King of Yan, the King of Qi, and the King of Chu upon the princes was presented to the emperor by “Cheng Xiang” (the Prime Minister) Wang Wan and other officials, and during the court consultation, “all ministers agreed on the proposal” except a “Ting Wei” (the supreme official in charge of judicature) named Li Si. Then, the conferment was cancelled,²⁴ because Qin Shi Huang (the first emperor of Qin) believed that “the opinion put forward by Li Si was rational”. In this regard, “Chao Yi” (imperial court consultation) was by no means a democratic consultation for restraining the imperial power; on the contrary, it was an effective method for the imperial dictatorship.

The system of “Chao Yi” (imperial court consultation) was a system for the emperor to deal with the national affairs in court and hold regular audiences.

The evidence of the emperor’s exercising the imperial power was “Xi Fu” (the imperial jade seal and tally), and the documents for publicizing the decisions and the instructions of the emperor on the national affairs were named “Zhao” (decree), “Chi” (instruction), and “Ling” (order or ordinance). If the officials who were in charge of editing “Chi” (instruction) had made any mistakes, they would be punished in accordance with law. It was regulated in “Gong Shi Ling” (the order for the forms official documents) written in the year of Kaiyuan that:

In all cases where the meaning or logic of the texts is not changed by the mistakes of omissions or wordiness in the drafts of ‘Chi’ (instructions), the mistakes shall be examined and clarified by the officials in charge before making corrections with no need of presenting memorials to the emperor. If the mistakes of omissions or wordiness are found in the ordinary official documents, they shall be reported to the officials in charge before making the correction.²⁵

However, “those who have found mistakes that may change the meaning or logic of the texts in the imperial decrees and who have corrected them without presenting memorials to the emperor shall be punished by “Zhang” (flogging with heavy sticks) for eighty strokes”; those who had found the mistakes either in the meaning or logic of ordinary official documents, and “have corrected them without reporting to his leaders will be punished by ‘Chi’ (flogging with light sticks) for forty strokes, and those who have found mistakes in the drafts of imperial decrees or in the ordinary official documents and who have still issued them without presenting memorials to the emperor or without reporting to his leaders shall be punished by the same penalty”. But if the words in the drafts of imperial decrees or the official documents were deliberately conversed or revised, the penalties given to the offenders shall be “increased two degrees”. The above regulations were particularly made for maintaining the imperial power, but they were also helpful for ensuring the proper implementation and the effect of the official documents.

In order to ensure that the throne could be succeeded within the same imperial family for thousands of years, a system of succession to the throne by the crown

²⁴“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

²⁵Noboru Niida, *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House, p. 534.

prince was instituted. At the beginning of Han dynasty, Shu Sun tong, who had learned the lesson from the history of the Qin Dynasty, suggested to Emperor Gaozu (Liu Bang) that a system of succession by the crown prince should be adopted. He said, "Because Fusu had not been appointed the crone prince by Qin at the beginning, Hu Hai then took the opportunity and seized the power through his fraudulent conducts, and Qin was thus annexed, which was what Your Majesty has seen."²⁶ Since then, the rulers of Han had realized that "the crown prince is the foundation of the state, and if this foundation is shaken, the whole state will be in chaos".²⁷ In the history of feudal politics and legal system, the succession to the throne was always the most important matter with regard to the imperial family and the feudal system, which was full of the struggle for scrambling for power. From Hu Hai's illegal seizing of the power in the Qin Dynasty to the Xuan Wumen Coup in the Tang Dynasty (599 A.D.–649 A.D.), and to the struggle for the succession to the throne at the end of Emperor Kangxi's reign, the similar struggle for scrambling for the imperial power had recurred and never stopped in history.

Other equally important systems were also used and legalized under the imperial system about the management of imperial harems, the ancestral temples of the imperial family and the mausoleums of the emperors and their families. Every regulation which was included in each system was made in order to show the supreme authority of the imperial power and to strengthen the sovereign control.

From its first establishment in the reign of Qin Shi Huang (the first emperor of Qin) to its being finally overthrown in Xin Hai Revolution (or Revolution of 1911), the imperial system had lasted for more than 2,000 years, which was extremely rare in the history of the world. Therefore, the influence the imperial system on Chinese social development, politics, economy and culture had been strong and profound. At the beginning, the imperial system had played a positive role not only in unifying the multinational forces and strengthening the country, but also in resisting the foreign aggressions and developing the economy and culture of the feudal times. However, the unrestrained sovereign power warranted by the imperial system had inevitably resulted in the corruption of imperial government, which in turn had fettered the development of society, bounded people's intelligence and wisdom, and even had plunged people's lives into an abyss of misery. Soon after the unification of China in Qin Dynasty, "no matter how hard the peasants had worked in the fields, the grain which they had produced was not enough for the provisions and funds for troops; no matter how hard the women had worked on looms, the cloth which they had produced were not enough for the clothes", and "the wealth under the Heaven was all collected and given to the emperor".²⁸ Consequently, a massive peasant uprising broke out at the end of the Qin Dynasty.

²⁶"Su Sun tong Zhuan" (The Biography of Su Sun tong) in *Han Shu (The History of Former Han Dynasty)*.

²⁷Ibid.

²⁸"Ping Zhun Shu" (On Fair Trade) in *Shi Ji (The Records of the Grand Historian)*.

From the later period of the Ming dynasty to the early period of the Qing, a philosopher of the Enlightenment, namely Huang Zongxi, had bitterly attacked the autocratic power in his book *Ming Yi Dai Fang Lu (Waiting for Dawn)*. He said, “The emperor has appropriated all the benefits and wealth under the heaven for himself, but brought all sorts of harmfulness under the heaven to his people”. Moreover, the emperor had taken the national property as “his personal property”, and under the guidance of egoism, the emperor “has killed people in the world and separated the children from their families” in the name of “starting an undertaking for his descendents”. In addition, once he had seized the power, he “would exhaust all the wealth of the world and separate all the children from their families” just for “his own self-indulgence”, which was simply viewed by him as an “price paid by the undertaking”. So, the emperor was regarded as “the foe” by all the people, and “had been believed to have brought great harm to the people under heaven”.²⁹

6.2.2 *The Legalization of the Imperial Power*

Through the establishment of all sorts of systems, the emperors were given the autocratic power “to decide all state policies by themselves”, which was legalized with the help of all kinds of legislations.

Firstly, the status of the emperor and the ministers was established in the form of law so as to maintain the ranks of the superiority of the ruler and the inferiority of the subjects and to take strict precautions against the illegal overstepping.

Take the Tang Dynasty (599 A.D.–649 A.D.) as an example. There were clear stipulations in *Tang Lv (Tang Code)* that “if the sumptuary regulations on houses, carriages, clothes, tombs, stone animals, and other objects are violated or the limitations are broken, the offenders shall be punished by ‘Zhang’ (flogging with heavy sticks) for hundred strokes, though they might be pardoned, the usurpation shall be demolished”. “In all cases where the chief manager borrows or loans carriages or clothing of the emperor to other people for their personal use without authorization, he and the people who have borrowed the objects shall be punished by penal servitude for three years respectively; if the chief managers have borrowed or loaned other belongings of the emperor to other people for their personal usage without being authorized, he and the people who have borrowed the belongings shall be punished by penal servitude for one year respectively; if the chief manager has loaned the belongings of the emperor to the people in the same official department for official usage, the penalties given to him and to those who have borrowed the belongings shall be reduced one degree respectively”. As to the envoys of the emperor, the subjects shall show their respect to them and shall strictly comply with the imperial orders which those envoys have issued. And if “the subjects have violated the ranks of the high and low, shown offences to the envoys, or have

²⁹“Yuan Jun” (On Monarchs) in *Ming Yi Dai Fang Lu (Waiting for Dawn)*.

refused to follow the imperial orders with offensive remarks, they shall be punished by strangulation”.

When dealing with the military, political, and judicial affairs, the officials must present memorials to the emperor to report the issues that ought to be reported in accordance with law. They were not allowed to deal with the affairs without authorization. It was stipulated in *Tang Lv (Tang Code)* that “those who have not memorialized matters that ought to be memorialized, or who have memorialized matters that ought not to have been memorialized shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes” When participating in sacrifices, worships, court audiences, or the escorts of the emperor, if “the officials have made mistakes in carrying out rituals or misbehave in ceremonies, they shall be punished by ‘Chi’ (flogging with light sticks) for forty strokes”. Besides, “the officials who have delayed in escorting the ‘carriage’ of the emperor, or who have returned from the escort earlier, shall be punished by ‘Chi’ (flogging with light sticks) for strokes times. If they have delayed for three days or they have returned three days earlier, their penalty shall be increased one degree. If the strokes of beating which they are given have exceeded one hundred, their penalty shall be increased one degree for delaying ten days or for returning ten days earlier. The punishment shall be limited to penal servitude for two years. The officials of ‘Wu Pin’ (the fifth rank) and above are responsible for escorting the ‘carriage’ of the emperor, and the penalty of the offenders shall be increased one degree”.

In Qin Dynasty, the offence of “disclosing the secrets in the imperial palace” was established, which was adopted in *Tang Lv (Tang Code)*, and it was stipulated that those who “have exchanged words with the maids in the imperial palace”, or who had personally “delivered massages, belongings or clothing from the maids to the outside of the imperial palace, or who had delivered the messages, belongings or clothing from outside to the maids inside the imperial palace”, shall be punished by strangulation.

Secondly, the crimes against the imperial government and the personal safety of the emperor were severely punished.

In *Tang Lv (Tang Code)*, among the most serious crimes of “Shi E” (The Ten Abominations), the following was involved in the offences against the emperor:

The first is ‘Mou Fan’ (plotting rebellion or plotting to endanger “She Ji”: the country); the second is ‘Mou Da Ni’ (great sedition); the third is ‘Mou Pan’ (plotting treason, or, plotting to betray one’s own country, or to go over to another country) ... ; the six is ‘Da Bu Jing’ (being greatly irreverent: to steal the objects for the Great Sacrifices to the spirits or the clothing or the personal belongings of the emperor; to steal or counterfeit the imperial seals, mistakenly not to follow the correct prescriptions when preparing imperial medicine or to make a mistake in writing or attaching the label; mistakenly to violate the dietary prescriptions when preparing the imperial food; or mistakenly to fail to make imperial touring boats sturdy).

According to the explanation in *Tang Lv Shu Yi (The Comments on Tang Code)*, “plotting” particularly referred to the “intention of rebellion”, the “intention of betraying the emperor”, and the “intention of wickedness”, but not the actual remarks or the actions against the emperor. Since the subjects were not allowed to make any mistakes when dealing with the imperial affairs, though some wrongdoings included in

“great irreverence” may be caused by mistakes, those wrongdoings were undoubtedly included in “Shi E” (The Ten Abominations). Because the crimes of “Mou Fan” (plotting rebellion or plotting to endanger “She Ji”: the country) and “Mou Da Ni” (great sedition) could endanger the imperial government, the penalties for these crimes were always the severest. In addition, people who were related to or friendly with those who had committed such offences would also be punished so as to “eradicate the evil and the wickedness”. It was ruled in *Tang Lv* (*Tang Code*) that:

Those who are involved in ‘Mou Fan’ (plotting rebellion or plotting to endanger “She Ji”: the country) and ‘Mou Da Ni’ (great sedition) shall be punished by decapitation and their sons who are 16 years old or older shall all be punished by strangulation. Their sons who are 15 years of age or younger and their mothers, daughters, wives and concubines, paternal grandfathers, grandchildren, brothers, sisters, and ‘Bu Qu’ (the private army) shall be punished by serving in official departments, and their personal property, land and houses shall be confiscated. Nevertheless, the males in their families who are 80 years old or who are ‘Du Ji’ (the incapacitated); or females who are 60 years old or who are ‘Fei Ji’ (the crippled) shall be exempted from the punishment. Their uncles or uncles’ sons shall be punished by life exile of 3,000 *li*, whether they are in the same household registration. Although their remarks have failed to agitate or persuade people to follow them, those who are involved in ‘Mou Fan’ (plotting rebellion or plotting to endanger “She Ji”: the country) shall still be punished by decapitation. Their parents, sons, and daughters shall be punished together by life exile of 3000 *li*, but their personal property shall be exempted from confiscation. Those who are involved in ‘Mou Da Ni’ (great sedition) shall be punished by strangulation.

The penalties for the offence of plotting rebellion included in the Ming and the Qing codes were even severer than those in *Tang Lv* (*Tang Code*).

According to *Tang Lv* (*Tang Code*), the sons or grandsons were usually forbidden to sue their parents or paternal grandparents, and “Bu Qu” (the private army) or “Nu Bi” (the slave girls and maidservants) were forbidden to sue their masters, however, if the sons or grandsons had sued their parents or paternal grandparents, or “Bu Qu” (the private army) or “Nu Bi” (the slave girls and maidservants) had sued their masters for “Mou Fan” (plotting rebellion or plotting to endanger “She Ji”: the country), “Da Ni” (great sedition), or “Mou Pan” (plotting treason, or, plotting to betray one’s own country, or to go over to another country), they not only had the rights to report, but also were protected, which was explained in *Tang Lv Shu Yi* (*The Comments on Tang Code*):

Those who are involved in ‘Mou Fan’ (plotting rebellion or plotting to endanger “She Ji”: the country), ‘Da Ni’ (great sedition), or ‘Mou Pan’ (plotting treason, or, plotting to betray one’s own country, or to go over to another country) against the emperor are not considered the subjects of the emperor; therefore, the offenders’ sons or grandsons who have sued their parents or paternal grandparents for such crimes are exempted from punishments. Wherever the sun and moon shines, all the people are the king’s servants, hence, although ‘Bu Qu’ (the private army) and ‘Nu Bi’ (the slave girls and maidservants) are all the properties of their masters, their masters are not considered the subjects of the emperor whenever they are involved in the crimes of ‘Mou Fan’ (plotting rebellion or plotting to endanger “She Ji”: the country), ‘Da Ni’ (great sedition), or ‘Mou Pan’ (plotting treason, or, plotting to betray one’s own country, or to go over to another country). In this case, ‘Bu Qu’ (the private army) and ‘Nu Bi’ (the slave girls and maidservants) are permitted to sue their masters.

If the crimes against the relatives of the emperor had been committed, the penalties would still be severer than that for the ordinary offences. For example,

Those who have struck the emperor's distant relatives (excluded from "Wu Fu": the five degrees of mourning) shall be punished by penal servitude for one year; those who have caused injuries shall be punished by penal servitude for two years; those who have caused serious injuries shall have their punishments increased two degrees severer than those for the ordinary affrays and batteries; those who have struck the emperor's relatives of 'Si Ma' (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree) or above shall have their punishment successively increased one degree, and those who have caused the death of the emperor's relatives shall be punished by decapitation.

From the comprehensive survey of the ancient Chinese society, it could be seen that not only a set of complete and elaborate imperial systems were established with the aim to strengthen the autocratic ruling, but also a series of laws were made so as to make the emperor's sovereign power "legalized" and to ensure that the emperor could "exercise the exclusive power to rule the world without any restrictions".³⁰

Thirdly, to affirm the emperor's supreme power over the state.

1. The emperor could make laws at his own will. There were two primary categories of legislation in ancient China: one was the compilation of code laws, which was the basic legislation in the past dynasties and was characterized by being comparatively stable; the other was the compilation of the imperial decrees, regulations, and legal cases, which had functioned as the supplementary laws, and which were more flexible and more representative of the emperor's will. For example, in Han Dynasty, the law was used as the basic law, while the "Ling" (order or ordinance), "Bi" (analogy), and "Li" (precedent) were the supplementary laws. "Ling" (order or ordinance) referred to the imperial orders, and it was defined as "the revised or the added part of the imperial decrees, excluded from the statute law".³¹ The emperor's imperial orders could not only overtop the law, but also take the place of some stipulations of the law, and could be added up as the new stipulations of the law. For this reason, when the "Ting Wei" (the supreme official in charge of judicature) in Han dynasty named Du Zhou was asked the question that "you are a judicial officer supposed to judge legal cases for the emperor, but what you actually do is merely making decisions in accordance with the emperor's will, but not in accordance with 'Fa' (law). Is this what a judicial officer ought to do?" He clearly answered: "How 'Fa' (law) and 'Ling' (order or ordinance) are made? The ideas approved by the previous emperors are made into 'Fa'; the words written by the present emperor are made into 'Ling'. The decisions made by the emperors could only properly handle the situations at that time, so, what is the point of adopting the 'Fa' which belonged to the past?"³²

³⁰"Li Si Lie Zhuan" (The Biography of Li Si) in *Shi Ji (The Records of the Grand Historian)*.

³¹"Xuan Di Ji" (The Biography of Emperor Xuan) in *Han Shu (The History of Former Han Dynasty)*, annotated by Wen Ying.

³²"Du Zhou Zhuan" (The Biography of Du Zhou) in *Han Shu (The History of Former Han Dynasty)*.

What he said was a true reflection about the whole feudal legal system. With the extremalization of the centralization of feudal monarchy, among the various forms of law, “Chi Ling” (instructions and orders) signed by the emperors and “Qing Ding Li” (the precedents by imperial order) became more and more important, which could be seen in “Ling” (the orders or ordinances) of Tang, “Chi” (instruction) of Song, the “Gao” (imperial mandate) of Ming, and “Li” (precedent) of Qing. Since the supreme legislative power was practically in the emperor’s hands and the emperor’s will was expressed in the form of law, the law must have undoubtedly focused its main goal and core content on the maintenance of the supreme imperial power. Besides, since the emperors’ wills were made into law, the national law was also entitled to “Qing Ding” (being approved by the emperor) so as to indicate that laws were made by the emperors. As a result, the special privileges of those emperors had not only overtopped, but also totally dominated all forms of laws without any legal restraints. In history, among the tremendous amount of legal codes, there were no particular laws for restraining the imperial power of emperor until the Constitution was written in the later period of the Qing Dynasty. Even in *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*, it was still regulated that, “the emperor’s dignity is sacred and inviolable”. In the long-lasting feudal society of China, the law was made just to control the subjects, and its ultimate goal was to rule the people. Nevertheless, in order to govern the common people, the officials should also be administered, because only in this way could the functions of bureaucratic machines be perfectly operated. If in the pre-Qin period, the national law had been mixed together with the family rules, then until the late Qing Dynasty, the national law was still viewed as an “ancestral family rule”. Therefore, Huang Zongxi had sharply criticized that the law in this autocratic regime was “the law of one family”, but not “the law of China”.

Because the law was a tool used by emperors to govern the people, to stop the violence, to punish the wicked, and to establish imperial governments, in history, the ambitious emperors had not only paid much attention to legislation, but also even presided over legislation by themselves. Take Emperor Zhu Yuanzhang of the Ming Dynasty as an example, before he was on the throne, in the tenth month of the first year of Wu, Zhu Yuanzhang had ordered Li Shanchang and other officials to draft a law, and he had pointed out that “the law should be concise and proper”, and that “if we fish with a net with very fine meshes, no big fish will be left in the lake, and if there are very strict stipulations in the law, no subjects could survive in the country”. He suggested to Li Shanchang and other officials that every day they should “report the newly drafted stipulations to him”, so that he could personally “make decisions after careful consideration”.³³ Till the 30th year of Hongwu (Emperor Zhu Yuanzhang), the law code of Ming was finally completed. Liu Weiqian, who was in charge of the revision of the law code stated in *Jin Ming Lv Biao*

³³“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi (The History of Ming Dynasty)*.

(*A Memorial to the Emperor about Ming Code*) that the law code of Ming had been revised and amended by Zhu Yuanzhang himself:

The copies of every completed chapter were memorialized to the emperor, and then were posted on the walls of the west palace. The emperor made revisions and comments on the copies by himself. ... because of the emperor's profound insights, it is possible for this law code to both verify 'Tian Li' (heavenly principles) and reflect the people's will, so it will become a yardstick applicable for hundreds of dynasties.

Moreover, Zhu Yuanzhang had collected the legal cases of the officials and the common people and compiled them into *Yu Zhi Da Gao* (*The Imperial Grand Decrees*), *Yu Zhi Da Gao Xu Pian* (*The Sequel of the Imperial Grand Decrees*), *Yu Zhi Da Gao San Pian* (*Three Articles of the Imperial Grand Decrees*), and *Da Gao Wu Chen* (*Grand Decrees to Military Officials*). And totally, there were 236 articles included in those books, which were compiled so as to "warn the ignorant and the stubborn" and to let the subjects know the ways of "pursuing good fortune and avoiding disaster". Those grand decrees had played a very important role in the legal system at the beginning of the Ming Dynasty.

In *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), which was enacted in the fifth year of Emperor Qianlong, either the articles, the explanations, or the notes, were all examined and approved by the Emperor himself. Because Emperor Zhu Yuanzhang and Emperor Qianlong had respectively worked on *Ming Code* and *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) with painstaking efforts and careful considerations, the two legal codes were announced to be statute laws, with no further modifications made, but with only supplementary legal cases added up to it to make it more perfect.

2. The emperors had the supreme administrative power of the state. In the autocratic system of the feudal society, the emperors were the monarchs of the state, who were endowed with supreme administrative powers.

Firstly, "Zhao" (decree), "Ling" (order or ordinance), "Zhi" (regulation), and "Chi" (instruction) were issued by the emperors to control the administrative activities of the state. As early as Qin Shi Huang (the first emperor of Qin), "Ming" (command) was enacted as "Zhi" (regulation), and "Ling" (order or ordinance) as "Zhao" (decree). After the Qin Dynasty, there emerged the forms like "Chi" (instruction) and "Ge" (injunction). And they were the most authoritative documents guiding the administrative activities of the state, so whether in the central or local governments, the activities must be carried out according to them. Additionally, those documents were also the forms of laws which had great legal effects. Shang Yang once pointed out that "if there is an intelligent ruler or a loyal minister born in this age who is able to lead his country, then he should not be forgetful of the law for even one moment".³⁴ Therefore, in each dynasty, the emperor had supplemented the insufficiency of the national statute laws by issuing "Zhao" (decree), "Ling" (order or ordinance), "Zhi" (regulation), and "Chi" (instructions). Since they were perfect embodiments

³⁴"Shen Fa" (Prudent Enforcement of Law) in *Shang Jun Shu* (*The Book of Lord Shang*).

of the wills of the emperors, a crime of “ostensibly complying with the imperial orders but disobeying in private” was written into the law of Qin dynasty. It was recorded in *Fa Lv Za Chao (Miscellaneous Excerpts of Laws)* in “Qin Jian” (bamboo writing slips in Qin Dynasty) that “the officials who have ostensibly obeyed the imperial orders but secretly disobeyed them shall be punished by exiling to the border areas serving as laborers. . . ., besides, they shall be permanently removed from office”. The time limit for delivering the imperial orders was also stipulated in the law of Qin: “if the orders are urgent, they shall be delivered immediately”; “if they are not urgent, they shall be delivered within a day”, and if the orders were delayed, “punishments shall be given in accordance with the law”. In *Tang Lv (Tang Code)*, there were also stipulations about “making mistakes in drafting the imperial decrees”, according to which, the officials who had found mistakes in the texts of imperial decrees shall report them to the emperor in memorials and shall not correct the mistakes without authorization; otherwise, they shall be punished.

Secondly, “Chao Yi” (imperial court consultation) was held so as to gather the officials to have discussions about the military or the administrative affairs. “Chao Yi” (imperial court consultation) in the dynasties of Qin and Han was held to make strategic decisions. During the consultations, the officials discussed the issues about crowning the emperor, choosing the heir to the throne, handling the affairs of ancestral temples, and about the sacrifices, the ceremonies, the conferment, the rewards, the legal system, the affairs of boarder areas, and punishment and imprisonment of officials, etc. After the discussions, the emperors’ final decisions were written into “Zhao” (decree), “Ling” (order or ordinance), “Zhi” (regulation), and “Chi” (instruction) and were delivered to relevant official departments to be carried out.

During the dynasties of Sui and Tang, the court meetings presided over by the emperors, which were referred to as “Chang Can”, were held so as to make strategic decisions. They were held every day or every two days, and the participants were usually civil officials who were “Wu Pin” (the fifth ranks) or above. In the court meetings, the affairs in national defense and administration, or the affairs mentioned in the memorials presented by the officials would be proposed and discussed. During the middle of the Tang Dynasty, the court meetings which involved “Zhong Shu Men Xia” (the supreme organization in charge of the state affairs in ancient China) and “Shang Shu” (the minister) of each department, and which were held in Ting Ying Hall by the emperor were the most important imperial conferences. At the meetings, motions were proposed by “Zai Xiang” (the Prime Minister), and approved orally by the emperor, and finally the resolutions proposed by “Zai Xiang” (the Prime Minister) were written down and memorialized for the emperor’s approval before being carried out.

In Ming Dynasty, if confronted with important military and civil affairs, the emperors would hold and preside over court meetings before making decisions. In the years of Zhengtong (Emperor Zhu Qizhen, 1436 A.D.–1449 A.D.), according to the issues being discussed, discussions were held by the chief ministers of departments, and then the results were presented in memorials to the emperor for resolutions. If the resolutions were disapproved of by the emperor, they would be sent back to the ministers to be further discussed.

Before the Manchus entered Shan Hai Guan Pass, the Council of Princes and Ministers which was attended by the Manchu nobles, was the most important institution for handling the affairs in national defense and administration. After the Manchus entered Shan Hai Guan Pass, the Council of Princes and Ministers was cancelled and changed into “Jiu Qing Hui” (The Council of the Nine Chamberlains) as a result of the increasing imperial power and the adoption of political strategies for weakening the power of the “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan). “Jiu Qing Hui” (The Council of the Nine Chamberlains) were hardly comparable with the Council of Princes and Ministers either in compositions, nature, or function.

In short, “Chao Yi” (imperial court consultation), convened or presided over by the emperors, was an important institution for researching and making decisions about the national administrative affairs. However, “Chao Yi” (imperial court consultation) had not imposed any restraints on the emperor, on the contrary, the issues, such as whether “Chao Yi” (imperial court consultation) needed to be held, what needed to be discussed during the consultation, and what kind of final resolutions needed to be given, were all decided by the emperor himself, which, on this account, had provided a necessary condition for the emperor to “solicit opinions from all sides” and to “make decisions on state policies by himself”. Thus, “Chao Yi” (imperial court consultation) was an important way for the emperor to direct the administrative activities. Compared with the tours of inspection by the emperors, “Chao Yi” (imperial court consultation) was held more frequently and regularly.

Thirdly, to appoint and supervise officials to perform the function of administrative management instruments. Because the officials were very important instruments to perform the functions and power of the state with human individualities, and the bureaucratic organizations were the backbones of the feudal autocratic systems, on the one hand, the emperors had appointed a great many of officials to be in charge of the military, punishment, financial and agricultural departments; on the other hand, they had taken many measures to manage and control the officials so as to let them play their roles by careful selection and supervision.

During Qin and Han dynasties, the officials were primarily selected by recommendations from the common people. According to the law of Qin, “if the common people are considered competent, they can be officials”, however, “if the selected people have conducted wrongdoings, they shall be punished according to the crimes which they have committed”. In Han Dynasty, the officials were usually appointed, and thus, a series of regulations on the methods, rules, and the time limit of appointment were made. In order to ensure the centralization of authority, in the reign of Emperor Wen of Han dynasty, it was provided that the officials with the salary of 2,000 *dan* (the unit of measurement in ancient China) of grain shall be appointed by the central government. During the reign of Emperor Jing of Han dynasty, the rights of appointing all the officials were taken back to the central government. In the period of Emperor Wu of Han dynasty, the officials’ avoidance system was adopted, according to which, “Ci Shi” (feudal provincial or prefectural governor), “Jun Shou” (the governor of prefecture) and “Guo Xiang” (the official in charge of civil affairs) shall withdraw from the provinces and the prefectures where they were born,

and “Xian Ling” (the county magistrates), “Cheng” (the assistant officials), and “Wei” (a military officer) shall withdraw from the counties where they were born. In Eastern Han Dynasty (25 A.D.–220 A.D.), in order to prevent the threat to the emperor, restrictions were imposed on appointing the imperial relatives and on their official ranks. However, most of these regulations on appointing officials were abolished at the end of the Eastern Han Dynasty as a result of the decline of the centralization of powers.

In the periods of Sui and Tang dynasty, “Ke Ju” (the imperial examination) for selecting officials was implemented, and it was continued in the dynasties after Tang because it had provided the important support to the feudal bureaucratic politics. The imperial examination scheme was divided into three examinations: “Xiang Shi” (the provincial examination), “Hui Shi” (the metropolitan examination), and “Dian Shi” (the final imperial examination). “Dian Shi” (the final imperial examination) was presided over by the emperor himself, so it was also called “Ting Shi” (the final court examination). Since the examinees were examined by the emperors himself, those who had passed the final examination were also called “Tian Zi Men Sheng” (the students of the emperor). Thus, through the final imperial examinations, the emperors had further controlled the rights of the appointment of officials. Except the final imperial examinations, the emperors could also select more officials through “En Yin” (the appointments of the descendants of those who had made great contributions to the state) or through the recommendation of other officials.

In order to keep control of the officials, to bring the roles of the bureaucrats into full play, and to guarantee the operation of administrative institutions, the system of official examination and supervision was established and adopted in different dynasties. Either in the system of “Da Ji” (the officials were assessed once every 3 years) adopted in Qin and Han dynasties, or in “Ba Fa” (Eight Regulations, namely, greed, ruthlessness, passiveness, imprudence, agedness, sickness, fickleness and incompetence) adopted in Ming and Qing dynasties, the final dismissal, promotion, rewarding or punishment of the officials were all controlled by the emperor himself.

Apart from the methods mentioned above, the supervisory institutions personally controlled by the emperors also performed the task of administrative supervision, which had acted in coordination with the system of official examination and supervision, but their only difference was that the former carried out supervisions regularly, but the latter irregularly.

Fourthly, the officials were strictly forbidden to attach themselves to bigwigs or to gang up to endanger the imperial power. Thus, in order to prevent the imperial power from being weakened, throughout the dynasties of Qin, Han, Ming and Qing, strict preventive measures and harsh punishments were carried out to prohibit the organization of the cliques of officials. In the reign of Qin Shi Huang (the first emperor of Qin), in the settling of the two cases of “Lao Ai” and “Lv Buwei”, thousands of families were involved and harshly punished, the scope of which was surprisingly wide. At the beginning of Han dynasty, particular policies were carried out so as to strengthen the central power and weaken the local power, so, regulations

were made to have those who had attached themselves to bigwigs or ganged up punished harshly. If the officials “have rendered fame to each other or recommended higher positions to each other”, or “ganged up for evil doings”, they could be punished either by removing their official titles for the lenient punishments or by the death penalties executed in market-places for the harsher punishments. After learning from the historical lessons that the imperial power was weakened as a result of the gang-up of bureaucrats at the end of the Tang Dynasty, in the dynasties of Ming and Qing, the crime of “organizing treacherous cliques” was written into the legal codes, according to which “any official who has threatened politics by forming treacherous cliques shall be decapitated. Besides, their wives shall be enslaved, and their property shall be confiscated”.³⁵ The local officials from “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan) who went to the capital on business, were also forbidden to visit the princes (the heads) of their own “Qi” (Banners); otherwise, they would be punished.³⁶ In order to prevent the ministers from organizing treacherous cliques by private recommendation, it was rigorously stipulated in law that only the emperors had the right to select officials, and “if the high officials have selected the junior officials without authorization, they shall be punished by decapitation”.³⁷ Moreover, “the relatives of the ministers should not be removed from the office or be appointed without special authorization from the emperor”; otherwise, the offenders would be punished by death penalty. Meanwhile, it was also stipulated that: “if any local government officials were proved to be guilty of malpractices or of betraying the government, or of disclosing the secrets in the imperial palace by associating with eunuchs in palace or with the court attendant officials of the emperor, they shall be punished by decapitation, and their wives and sons shall be punished by exile to a distance of 2,000 *li*.”³⁸

Finally, the policies were changed from restraining the power of “Cheng Xiang” (the Prime Minister) to its abolishing. The position of “Cheng Xiang” was implemented in the period of Warring States (475 B.C.–221 B.C.), and it had been existing for more than one thousand years throughout the dynasties of Qin, Han, Sui, and Tang before it was finally abolished in the reign of Emperor Zhu Yuanzhang. “Cheng Xiang” (the Prime Minister) was the supreme chief executive in the central government and the head of different officials. Moreover, “Cheng Xiang” (the Prime Minister) was not only an important assistant of the emperor, but also a balancing

³⁵“Jian Dang” (Cliques of Traitors) in “Li Lv” (Statute on the Regulation of officials) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

³⁶“Li Lv” (Statute on the Regulation of officials) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

³⁷“Unauthorized Selection of Officials by High Officials” in “Li Lv” (Statute on the Regulation of officials) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

³⁸“Jiao Jie Jin Shi Guan Yuan” (Colluding with Imperial Attendants) in “Li Lv” (Statute on the Regulation of officials) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

power for restraining the emperor from exercising his imperial power. Therefore, on the one hand, the emperor had to rely on “Cheng Xiang” to deal with the administrative affairs and to mediate the relationship between different departments; on the other hand, he had to fight against the interference of “Cheng Xiang” in his exercise of imperial power. Sometimes the emperor even had to inflict punishments on “Cheng Xiang” for the interference. For example, altogether 13 “Cheng Xiang” were appointed during the 54-year-long reign of Emperor Wu of Han, among them, Li Cai and Yan Qinqu “have committed suicide for feeling guilty”; Zhao Zhou, Gongsun He, and Liu Qumao “were imprisoned to death”; Wei Wan, Dou Ying, Xu Chang, and Xue Ze were removed from offices for malpractices (Ying was punished by the death penalty executed in the marked-place after being removed from office). When Che Qianqiu was appointed “Cheng Xiang”, Huo Guang became the “Fu Zheng Da Jiang Jun” (Assisting Senior General), for this reason, his position of “Cheng Xiang” existed only in name. Among the 13 people who had held the post of “Cheng Xiang”, only three still remained in the position of “Cheng Xiang” when they died, and this was because Tian Fen was the uncle of the emperor, Gongsun Hong had never “argued in the court” and always “complied with the orders of the emperor”, and Shi Qin “was a man without great strategies except for his profound knowledge”. Generally speaking, the power of “Cheng Xiang” (the Prime Minister) were not only divided, but also weakened ever since the post was created. In Tang Dynasty, a system which consisted of several prime ministers was adopted, according to which, the ministers participating in the court meetings were all named “Cheng Xiang”, so sometimes the number of “Cheng Xiang” could be as many as a dozen or so. At the beginning of Ming Dynasty, “Cheng Xiang” were given the authority to make important national policies, to issue official orders, and to directly lead “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works) and other departments. Therefore, to some extent, such power of “Cheng Xiang” had restrained the emperor from exercising his imperial power, which must have become the reason why Emperor Zhu Yuanzhang had wanted to have the “Cheng Xiang” system abolished. But before the abolishment, Emperor Zhu Yuanzhang had created public opinion and said, “Most of the “Cheng Xiang” in the past dynasties have abused and usurped their powers”. Furthermore, he had attributed the extinctions of the Qin, Han, Tang, Song, and Yuan dynasties to “the dictatorship and interference with the administrations by the prime ministers”.³⁹ After that, various measures were taken by Emperor Zhu Yuanzhang to weaken the power of “Cheng Xiang”. In the 13th year of Hongwu (1330 A.D.), Emperor Zhu Yuanzhang had used “Zuo Cheng Xiang” (the second prime minister) Hui Weiyong’s rebellion as an excuse, killed his associates, and then seized the opportunity and abolished the position of “Cheng Xiang”. Finally, the power of “Cheng Xiang” was deprived and seized in the emperor’s own hands. As a result, the long-existing conflicts between the imperial power and the power of “Cheng Xiang” ended up with the emperor’s victory.

³⁹ *Ming Shi Ji Shi Ben Mo (Historical Records of Ming Dynasty)*, Vol. 13.

3. The emperor held the supreme military power of the state. The military forces were not only a principal constituent of the feudal state institutions, but also the backbone of the autocratic system and a decisive factor in the stability of political power. It had been proved in the history of the feudal politics that the fragmentation of military force was a major reason for the weakened centralization of power, and that the disintegration of military troops had always been a sign of the extinction of a dynasty. Therefore, on the one hand, the emperors in the past dynasties had all made every effort to set up troops that could carry out duties home and abroad; on the other hand, they had also exerted their best to concentrate the military power and to put the power of military control into their own hands, which they had regarded as major steps in strengthening the absolute monarchy.

During Qin and Han dynasties, the emperor was the supreme military commander, and the senior generals, like “Guo Wei”(an officer in charge of domestic and foreign affairs in the state of Qin), “Tai Wei”(the minister of defense), “Jiang Jun”(the great general), “Wei Wei”(an officer in charge of defending the emperor’s residence), “Zhong Wei”(an officer in charge of defending the capital), and “Jun Wei”(an officer in charge of the military affairs in a prefecture), etc. were all appointed or dismissed by the emperor himself. And the troops should not be deployed without the emperor’s commands which were testified by “He Fu”(a tally shaped into two halves for evidence).

It was stipulated in *Tang Lv* (*Tang Code*) that the emperor’s permissions were needed when dispatching an army of 10 soldiers and “an army of ten soldiers shall not be dispatched until the two halves of a tally shaped into a bronze fish match with each other, or until the two halves of an imperial seal on the document match with each other. If troops are urgently needed to be mobilized, but there is not enough time to get the emperor’s permission, the troops can be sent but the deployment shall be reported promptly”.⁴⁰ If troops were moved without authorization, the offenders shall be punished according to the number of soldiers they had moved: “if more than ten soldiers have been dispatched without authorization, the offenders shall be punished by penal servitude for one year; if less than one hundred, the offenders shall be punished by penal servitude for one year and a half; if more than one hundred, the offenders’ punishments shall be increased one degree; if ten hundred, the offenders shall be punished by strangulation”.⁴¹ Although documents of dispatching the troops had been received from “Bing Bu”(Board of War), the generals still should present memorials to the emperor before dispatching any soldier; otherwise, the commanders should be severely punished according to the

⁴⁰Noboru Niida, *Tang Ling Shi Yi* (*An Interpretation of the Orders of Tang Dynasty*), translated by Li Jing, et al. Chang Chun Publishing House, p. 136.

⁴¹“Shan Fa Bing”(Dispatching Military Troops without Authorization) in “Shan Xing Lv”(Laws for the Punishment of the Conducts Unauthorized by Imperial Decrees) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

number of soldiers they had deployed without authorization. The troops could be moved in urgent cases, but it should be reported to the emperor without delay:

If the rebel forces have launched a sudden attack, or within cities or towns where foot or cavalry troops are stationed, there are people who are engaged in rebellions or treasons, or there are people cooperating from within, so the matters are urgent, or the distance is great, the troops should be quickly deployed, ... if the command for the deployment of the troops is delayed, or if the command is given, but the deployment of the troops and horses are delayed, the offenders shall be punished by the same punishment for having 'transferred the troops without authorization' according to the number of soldiers involved, and if the report of the deployment of the troops is delayed, the penalty given to the offenders shall be reduced one degree according to the number of the deployed soldiers.⁴²

By learning from his past personal experience, Emperor Zhao Kuangying of the Song Dynasty had realized that "if the military power is seized, the society will be prosperous, but if the military power is lost, the society will decline".⁴³ For this reason, he had divided the military power into three parts: the power of controlling the army, the power of deploying the army, and the power of commanding the army, and then he had divided the different powers to three parts—"Dian Qian Si" (the Palace Command), together with "Shi We Ma Jun Si" (the Metropolitan Cavalry Command) and "Shi Wei Bu Jun Si" (the Metropolitan Infantry Command) had the power of controlling the army, "Shu Mi Yuan" (Privy Council) had the power of deploying the army, and the generals were temporally dispatched to command the army. Each of the three units was responsible to the emperor, and none of them had the exclusively military power to set up a separatist regime by forces, hence, the military power was ensured to be controlled by the emperor. Because the professional troops were tightly controlled by the emperor, moreover, and besides the military personnel were successfully prevented from interfering with politics, the institutions of the imperial government were able to function smoothly.

In Ming Dynasty, although the concentration of the military power was strengthened, nevertheless, because the eunuchs had been involved in the controlling of the military troops, it had reflected the characteristics of the times, namely, the extreme corruption of autocratic politics.

In Qing Dynasty, the emperors had exercised the supreme leadership of "Ba Qi" (the Eight Banners: banners, a division of Manchu nationality and the emperor's clan), the green camp army, the Mongolian cavalry soldiers, the local soldiers, and the soldiers of alien tribes.

4. The emperor held the supreme judicial power. As early as the times after the unification of the Qin Dynasty, Qin Shi Huang (the first emperor of Qin) had read over and made comments on the documents, settled cases, carried out the punishments and granted rewards according to concrete situations. During the periods

⁴²"Shan Fa Bing" (Dispatching Military Troops without Authorization) in "Shan Xing Lv" (Laws for the Punishment of the Conducts Unauthorized by Imperial Decrees) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁴³Fan Jun, "Wu Dai Lun" (On the Five Dynasties) in *Xiang Xi Ji* (*Collections of Xiang Xi*), Vol. 4.

of the Western Han and Eastern Han dynasties, the emperors had often attended the court hearings by themselves. For example, Emperor Xuan of Han had “always gone to the courts to settle the cases by himself”.⁴⁴ In order to try the major cases, a provisional judicial organization was ordered to be set up according to an imperial decree issued by Emperor Ai of Han, which was named “Za Zhi” (the office for handling the miscellaneous cases). For instance, during his reign, “a ‘Ting Wei’ (the supreme official in charge of judicature) named Liang Xiang, ‘Cheng Xiang Zhang Shi’ (the assistant of the Prime Minister), ‘Yu Shi Zhong Cheng’ (Grand Censor), and five other senior officials with the payment of 2,000 *dan* (the unit of measurement in ancient China) of grain as salaries had constituted a ‘Za Zhi’ (the office for handling the miscellaneous cases) and worked together on the case of the Prince of Dongping named Liu Yun.”⁴⁵ Actually, the trials were just a form, because the decisions of the miscellaneous cases were all made in accordance with the emperor’s will. In the period of “San Guo” (Three Kingdoms), Western and Eastern Jin, and Southern and Northern Dynasties, there were many records in books about the attendance of the emperors to the trials. In the third year of Taihe, Emperor Mingdi of Wei had changed the name of a temple from “Ping Wang” into “Ting Song” (Hearing Litigations), and the emperor himself had frequently been to the temple to hear litigations. In the second year of Yong Chu, Emperor Songwu of Southern Dynasty had been to Hua Lin Garden and Ting Xian Temple and conducted five trials. In the seventh year of Da Ming, he personally went to the places of Mo Ling county in Jian Kang, Nan Yu Zhou (Nan Yu subprefecture), and Jiang Ning to hear litigations. During the years of Jian De, Emperor Wu of the Northern Zhou often “tried cases in Zheng Wu Palace from morning to night, until it was too dark, and candles had to be lit”.⁴⁶

In Tang Dynasty, if there were major doubtful cases or major petitions, the emperors might issue decrees to order the ministers of “Da Li Si” (The Court of Judicial Review), “Shang Shu” (the minister) of “Xing Bu” (Board of Punishment), and “Yu Shi Zhong Cheng” (Grand Censor) to conduct joint trials, which were referred to as “San Si Tui Shi” (the joint trial of three departments). According to *Tang Lv* (*Tang Code*), the final decisions of the doubtful or major cases, or the cases involving noblemen, bureaucrats or the death penalty, should be made by the emperor himself. Therefore, the emperors had seized the judicial power in his hands through the judicial processes of “Yi” (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be

⁴⁴“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*).

⁴⁵“Wang Jia Zhuan” (The Biography of Wang Jia) in *Han Shu* (*The History of Former Han Dynasty*).

⁴⁶“Wu Di Ji” (Records of Emperor Wu) in *Zhou Shu* (*The Book of Zhou Dynasty*).

remitted by one degree) and “Jian” (except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree), “Shu” (redemption), “Guan Dang” (redeeming one’s official position for the atonement for a crime), “Mian” (dismissing from official position), “Hui Shen” (the joint trial), “San Fu Zou” (the triple review), “Wu Fu Zou” (the quintuple review), the interrogation of prisoner, the grand amnesty, and the prudent infliction of punishment. Besides, the emperors could also issue some particular decrees for some special cases to make convictions, implement punishments and control the judicature. This special judicial process was a reflection of the judicial privileges of the emperor, and other officials did not have any rights to quote from the issued decrees to make court decisions without authorization. It was regulated in *Tang Lv* (*Tang Code*) that “the decrees and official documents issued by the emperor are for accommodating to the circumstances. Therefore, they are just for temporary use, and can neither be applied permanently, nor be cited as examples or standards for the settlement of other cases. If they are cited so that the guilty are exonerated and the innocent are implicated, the offenders shall be punished for intentional offences or negligence”.⁴⁷

Even though the execution of the death penalty had been approved by the emperor after going through the judicial procedure of “San Fu Zou” (the triple reviews) or “Wu Fu Zou” (the quintuple reviews), it could not be carried out immediately until 3 days later; otherwise, the offenders would be punished:

Those who have executed the prisoners punishable by death penalty before the case is reviewed shall be punished by exile to a distance of 2,000 *li*. Even though the memorials concerning the prisoners punishable by the death penalty are approved by the emperor, the prisoners shall not be executed until three days later. Those who have executed the prisoners before the time limit shall be punished for penal servitude for one year, and those who have delayed the execution of the death penalty for one day shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes; for a delay of two days, the penalty shall be increased one degree.⁴⁸

At the beginning of North Song Dynasty (960 A.D.–1127 A.D.), a judicial organization called “Shen Xing Yuan” (The Case Review Court) was set up in the imperial palace to further strengthen the emperor’s control over the judicial power. Any case which had been tried by “Da Li Si” (The Court of Judicial Review) should be transferred to “Xing Bu” (Board of Punishment) for reviewing, then to “Shen Xing Yuan” (The Case Review Court) for deliberation before an imperial decision was made. When the judicial system was reformed in the reign of Emperor Shenzong of Song, “Shen Xing Yuan” (The Case Review Court) was abolished because of the overlapping of organizations. As the supreme judge, the emperor not only had personally tried the doubtful cases in the capital, but had appointed judges to hear the major cases to have them reported to him. The cases settled by the emperor were

⁴⁷“Zhe Yin Zhi Chi Duan Zui” (Citing the Imperial Decrees in Making Judgments) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁴⁸“Si Qiu Fu Zou Bao Jue” (Memorials to the Emperor about Convicts Sentenced to Death) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

referred to as “Zhao Yu”, and the court in which “Zhao Yu” was tried was called “Zhi Kan Yuan” (The Provisional Superior Court). During the reign of Emperor Huizong of Song, the decisions made by the emperor himself had even “replaced the old regulations”, which had shown the emperor’s privilege in “deciding the life and death of the people” and “implementing lenient or severe punishments”. As to the cases settled by the emperor, if anybody had criticized them on the pretext that they were against the “common law”, and had refused to carry them out, they would be punished for the crime of great irreverence; if anybody had reported to “Shang Shu Sheng” (The Department of Secretary) the inappropriateness of the imperial settlements, he would be punished for the crime of “violating the imperial decisions”, and if “the imperial settlements have been delayed to be implemented by the officials for one hour, the officials shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes; delayed for one day, they shall be punished by penal servitude for two years; delayed for two days, the penalty shall be increased one degree. ...delayed for three days, they shall be punished by great irreverence”.⁴⁹

In Song Dynasty, the amnesty system prevailed. The amnesties were given a multitude of names, for example, “Da She” (the grand amnesty), “Qu She” (the partial amnesty), “De Yin” (the virtuous pardon), and “Shu Jue” (the clarified court decision), etc. In Song Dynasty, within the 230 years, there were totally 301 amnesties. The randomly granted amnesties in Song Dynasty were not only in conflict with the principle of stressing law, but also had interfered with and brought damage to the policy of ruling by law. Besides, they had demonstrated that the emperors of the Song Dynasty had absolute rights over people’s life and death.

In Ming Dynasty, Emperor Zhu Yuanzhang not only tried the important cases of the central government agencies, but also took the jobs of other departments into his own hands to try the civil and criminal cases that should be judged by the local governments. Since the cases were judged by him according to his own likes and dislikes, it had often led to “the frequent change of the regulations”, with the result that “rewards were granted in the morning but punishments were enforced at night” and that “punishments were inflicted at one moment but amnesties were announced at the next”. Consequently, it had proved that the emperors had the rights not only to issue any laws and decrees, but also to abolish them.

In Qing Dynasty, the trial system of the Ming Dynasty called “Yuan Shen” (The Joint Trial) was succeeded and developed into “Qiu Shen” (the Autumn Assizes), or namely, “Jiu Qing Hui Shen” (Joint Hearing by Jiu Qing: the nine heads of central government departments in feudal China), which was endowed with supreme authority to settle the major cases concerning the reviewed death penalties reported by the local courts. The cases which was tried in “Qiu Shen” (the Autumn Assizes) were divided into four categories, namely, “Qing Shi” (circumstances deserving capital punishment), “Huan Jue” (deferred execution), “Ke Jin” (worthy of compassion), and “Liu Yang Cheng Si” (remaining at home to care for the parents or to perpetuate the ancestral sacrifices). Those cases should be reported to the emperor

⁴⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi* (*The History of Song Dynasty*).

for final decisions before the punishments were carried out. “Qiu Shen” (the Autumn Assizes) was rendered as a great ceremony to show the emperors’ solicitude for people’s lives and to judge cases in accordance with the law, but, in fact, it had further tightened the emperor’s control over the judicial power, which could be proved by the comments on “Qiu Shen” made by the emperors since the reign of Emperor Kangxi. For example, in the 40th year of his reign, Emperor Kangxi showed his serious concern about “Qiu Shen” and his hope to control it in a decree. He said, “I have reviewed the cases of “Qiu Shen” (the Autumn Assizes) and have found many mistakes in the expressions of the charges which have been badly neglected by the officials in court. So, “Xing Bu” (Board of Punishment) should be especially blamed for its carelessness and should be punished.”⁵⁰ In an imperial decree issued on May 27th of the third year, Emperor Yongzheng said, “I have been concerning about the punishment and judgment since I was on the throne. Whenever I am presented the memorials concerning the decisions of legal cases, they will be reviewed repeatedly for fear that mistakes should be made.”⁵¹ In the 14th year of Emperor Qianlong, a decree was issued:

Whenever it is the time to carry out the capital punishment, I will check off the names repeatedly, sometimes as many as five or six times, until I have everything clear. Before the execution of the capital punishment, I will discuss the cases with the ministers and deliberate them carefully before making any decisions. It is actually far more than three reviews.⁵²

In addition to the control over the supreme power of legislation, administration, military, and judicature, the supreme supervisory power was also controlled by the emperors through the operations of the supervisory institutions, which had been acting as the emperors’ eyes and ears. Either the officials in the central government or the officials in the local government were all supervised by the supervisory institutions. Usually, supervisors did not have very high ranks; however, since their power was attached to the imperial power, moreover, they “could present memorials to the emperor to get the imperial decisions if the matters were important, but they had the rights to make quick decisions themselves if the matters were minor”, they became immensely powerful. As to the economic power of the state, it was also seized in the hands of the emperors, because those emperors had viewed “everything in the world” as “the great properties” of their own. Deng Zirong once commented that “under the heaven, all is the king’s land; and at home and abroad, all is the emperor’s wealth.”⁵³ We could learn from above that the saying that

⁵⁰“Sheng Zu Ben Ji” (Records of Emperor Sheng Zu) in *Qing Shi Gao (The History of Qing Dynasty)*.

⁵¹“Shizong Xian Huang Di Shang Yu” (Imperial Edicts of Emperor Shizong) in *Da Qing Lv Li Tong Kao Jiao Zhu (Notes on the Textual Research of the Laws and Precedents of Great Qing)*, China University of Political Science and Law Press, 1992, p. 200.

⁵²*Qin Ding Tai Gui (The Rules for the Censorate by Imperial Order)*, Vol. 14.

⁵³“Gui Chong Jing Chuan Fu Deng Zi Rong Zhuan” (The Biography of Gui Chongjing and Deng Zirong) in *Jiu Tang Shu (The History of Old Tang Dynasty)*.

“the matters under the heaven, whether they are important or not, are all determined by the emperor” was really in accordance with the actual historical realities in China under the autocratic system.⁵⁴

6.3 The Conflicts Between the Imperial Power and Law

The law made in the feudal times was a tool not only to rule the country, but also to maintain the imperial authority, to set up the idol of the emperor among the people, to unite the people and to make people obedient to the emperor. During the feudal times when “‘Zhen’ (I, the emperor) is the country”, to be loyal to the emperor meant to be loyal to the country, and to die for the emperor meant to die for the country. For this reason, the process of strengthening the imperial power was also the process of the consolidation of the highly centralized state power of despotism.

Since “whatever the emperor has said is law”, and the emperor was regarded as “the hopes of the state”, and he was by no means be restrained by law. For this reason, the rise and the fall of the order of legal system had entirely depended on the virtue and abilities of the emperor. If the emperor was wise and liberal, to some extent, the feudal legal system would be maintained, the society would be stable and the economy would be developed. However, in the feudal times of China, there were few wise and liberal emperors, but many fatuous and dissolute ones. During Tang Dynasty, altogether there were 21 emperors, but only Emperor Taizong could be referred to as an enlightened sovereign, and most of the emperors were fatuous and self-indulgent who had “regarded the flattery and lies that their worshipers had paid to them as the greatest compliments, but the sincere words as heresies”. They had “shown despise to the virtuous and the able, and only promoted the wicked and the immoral”. Under the rules of those emperors, the order of legal system was inevitably trampled on, let alone judging the cases in accordance with law.

When the emperors had grasped all the financial, material, and human resources in his hands, it meant that the emperors had great energy in store, which might either be used to develop the country and build the state or be used to bring about great pain and suffering to the society. For example, after the unification of China, Qin Shi Huang (the first emperor of Qin) had indulged himself in governing the state and the people at will, and continued to enslave the people and construct palaces and the mausoleum for himself ever since he was on the throne. In his reign, “men were forced to serve in the army and women were forced to be engaged in transportation. Consequently, the people had no means of livelihood, and a great many of them had hanged themselves on the trees along the roads, and the dead bodies could be seen everywhere.”⁵⁵ Another example was that in the reign of Emperor Yang of the

⁵⁴“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

⁵⁵“Yan An Zhuan” (The Biography of Yan An) in *Han Shu (The History of Former Han Dynasty)*.

Sui Dynasty, heavy corvée taxes were imposed upon people for the endless extortion of money. As a result, “the people often died of hard labor, and the families were ruined by the heavy burden of debts”.⁵⁶ At the times when the weak small-scale peasant economy was dominating, it was very harmful to the social productivity, meanwhile, it would inevitably bring crisis to the ruling itself.

Because absolute power would always bring about absolute corruption, most of the emperors in the past dynasties would be involved in the vortexes of politics, where they were close to the villainous but estranged from the virtuous. As a result, “the virtuous have often been suppressed and can not bring their abilities into full play, whereas, the villainous have often taken the opportunities to spread slanders and to shift the blame towards the virtuous. On this account, few people would like to engage in any great undertakings”.⁵⁷

Montesquieu once said, “All the people with power may abuse it easily, which is a lasting and unchangeable experience.”⁵⁸ And it was only after the balancing system of the imperial power and the law itself was successfully overcome that the extreme development of the autocratic imperial power was finally achieved. The establishment and the abolishment of the post of “Cheng Xiang” (the Prime Minister) was a good case in point.

Nevertheless, the law was both the embodiment of the state will and the guarantee for the permanent interests of the state. Its function of resolving social conflicts and establishing social order was also applicable to restricting the imperial power from being abused. However, the successful enforcement of law would have both relied much on the devoted, unselfish and decent officials who could carry out the law impartially and on the enlightened emperors who could not only show respect to the law, but also accept people’s advices. Unfortunately, most of the philosophers in the feudal times had preached that “the imperial power is superior to the law”, and that “the power is solely possessed by the rulers.”⁵⁹ Disapprovingly, the legalists and the bureaucrats who had advocated the ruling of law had proposed that the imperial power should be restricted within the scope of law. Guan Zi had said, “The law is superior to the rulers,”⁶⁰ and he suggested that “the ruler should follow the law and the regulations first before he may require his people to do so”,⁶¹ namely, the ruler should set an example in obeying the law, so that “the law is abided by everyone, including the rulers, the ministers, the superior, the inferior, the noble, and the humble”. In Eastern Han Dynasty, Zhang Min believed that “the rulers should follow the rules of the ‘Tian’ (heaven) and ‘Di’ (Earth), conform to the rules of four seasons,

⁵⁶“Shi Huo Zhi” (Records of Food and Commerce) in *Sui Shu (The History of Sui Dynasty)*.

⁵⁷“Zhi Guan Yi” (State Officials, Part 1) in Xu Wen Xian Tong Kao (*A General Textual Research of the Extended Documents*).

⁵⁸Montesquieu, *Fa Yi (The Spirit of the Laws)*, The Commercial Press, 1993, p. 154.

⁵⁹“Xiu Quan” (On the Usage of Power) in *Shang Jun Shu (The Book of Lord Shang)*.

⁶⁰“Fa Fa” (On Observing the Law) in *Guan Zi (The Book of Master Guan)*.

⁶¹Ibid.

set up standards for the sages, and observe the classic doctrines and the law”.⁶² In Western Jin Dynasty, it was pointed out by Liu Song that “the law is what the king and the subjects should commonly observe”.⁶³ During the dynasties of Han and Tang, the famous judges like Zhang Shizhi and Dai Zhou had tried to restrict the conflicts between the imperial power and the observation of law in the scope of the order of the legal systems according to their standpoint of ruling by law. For example, one day, when Emperor Wen of the Han dynasty was on Zhong Wei Bridge, his horse shied as a man was walking under the bridge. Then a “Ting Wei” (the supreme official in charge of judicature) named Zhang Shizhi punished the man with a fine for “frightening ‘the carriage of the emperor’”. Yet when a harsher punishment was asked to be enforced by Emperor Wen, Zhang Shizhi then presented a memorial to the emperor, saying that “the law is made both for ‘Tian Zi’ (the son of Heaven or the emperor) and the people in the world. Now according to the law, such a punishment shall be given to this man. If a harsher one had been given, the people would lose their faith in the law.” Then he also said, “The position of ‘Ting Wei’ (the supreme official in charge of judicature) is the symbol of impartiality and justice. If the cases are judged partially by ‘Ting Wei’, the other officials may follow suit and give lenient or harsher sentences at will, and then how will people know what to do? I hope Your Majesty could carefully think about it”.⁶⁴ Emperor Wen was finally convinced by what he said. At the beginning of Tang Dynasty, as to the situation where most of the appointed officials had faked their qualifications and records of service, a particular decree was issued by Emperor Li Shimin, which ruled that if they had not confessed, they would be punished by the capital penalty. Soon, the faked personal documents of an official named Liu Xiong in Wen Zhou were discovered, and then he was “imposed the punishment of exile on in accordance with the law” by the minister of “Da Li Si” (The Court of Judicial Review) named Dai Zhou. Emperor Li Shimin said, “The decree has been issued to tell the people that if the crimes are not confessed, the offenders shall be punished by the death penalty. Now you have changed the punishment to exile, and it will make people lose faith in me”. Dai Zhou then replied “I could do nothing if Your Majesty wants to have that man killed immediately. However, the case now is being dealt with by the judicial institution, and I dare not violate the law.” The emperor then said, “You are telling people that you are observing the law, but are you trying to let people lose faith in me?” In reply, Dai Zhou said, “The law is referred to as the publicized regulations of the state, and it is made to win the trust of people. What Your Majesty has said is out of your personal joy or anger; therefore, it is not right if people are killed because Your Majesty is angry. Now if the case is permitted to be judged in accordance with the law by Your Majesty, it is proper to restrain your ‘minor’

⁶²“Zhang Min Zhuan” (Biography of Zhang Min) in *Hou Han Shu (The History of Latter Han Dynasty)*.

⁶³“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)*.

⁶⁴“Zhang Shizhi Zhuan” (The Biography of Zhang Shizhi) in *Han Shu (The History of Former Han Dynasty)*.

anger and to win the ‘great’ trust of the people. But if Your Majesty yields to your own ‘minor’ anger but loses the ‘great’ trust, I will feel sorry for Your Majesty”. Finally, Emperor Li Shimin was persuaded and said, “It is true that there are faults in my law, but now they have been rectified by you. So, what else should I worry about?”⁶⁵

From the two cases mentioned above we could see that even if the emperor had the power of killing and enforcing punishments at will, as long as the cases were brought into the judicial processes and were dealt with by the impartial and fair-minded judges, restraints could be imposed upon the imperial powers by the application of the law. In history, the Han and Tang dynasties had always been referred to as the times of peace and prosperity, and the major reason for this was that the relationship between the law and the imperial power were properly developed. However, the cases of the imperial power being restrained by law were very rare in the feudal times, and it was practically impossible to change the fact that the law was not only made by the monarchs, it was also the dependency of the imperial power. Mostly, in history, the cases were that the emperors had just wantonly violated or even trampled on law by virtue of the supreme power in their hands. Emperor Wen of the Sui dynasty, who had proposed that “the law should not be violated”, had required that “the prisoners be beaten to death with the heavy sticks in June”. Nevertheless, according to the Confucian theory that punishment should be carried out in autumn and winter, the Minister of “Da Li Si” (The Court of Judicial Review) presented a memorial to the emperor to show his opposition: “summer is the season for everything to grow on earth, but not the season for killing”. Yet Emperor Wen answered, “it is true that June is the season for everything to grow, but there are still thunderbolts during this time, which is an expression of ‘Tian Dao’ (The Way of Heaven), and which has shown the anger of ‘Tian’ (Heaven). Now I am following ‘Tian Dao’ (The Way of Heaven), is there anything wrong?” Consequently, the prisoners were then killed according to the emperor’s order.⁶⁶ In his old age, Emperor Wen had “executed laws even more strictly, and in the end he had become very moody and was overindulged in killing”.⁶⁷

The remonstrance system in the feudal times was also designed to correct the monarchs’ mistakes and to restrain the abuse of the imperial power. The remonstrance system was very popular in Tang Dynasty, but in Ming and Qing dynasties it had lost its independence because of “Ke Dao He Yi” (the amalgamation of the supervisory institutions). Generally speaking, the remonstrance system had not significantly affected the supremacy of the imperial power. Since it was believed that “the emperor was born to be dependent on by the subjects; the subjects were born to serve the emperor”, and that “the ministers have to depend on the emperor to live on”,⁶⁸ no matter how sincere the ministers were when they were remonstrating with

⁶⁵“Gong Ping” (Impartiality) in *Zhen Guan Zheng Yao (Essentials about Politics from Zhen Guan Reign)*.

⁶⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu (The History of Sui Dynasty)*.

⁶⁷“Gaozu Ji” (The Biography of Emperor Gaozu) in *Sui Shu (The History of Sui Dynasty)*.

⁶⁸“Jun Chen” (Kings and Ministers) in *Guan Zi (The Book of Master Guan)*.

the emperor, what they had said would be definitely regarded as the violation of the imperial power. It was once stated by Han Feizi that “though the wisest have attempted to persuade the sages . . . , he is not necessarily be welcomed upon his first arrival”⁶⁹; “the weights and measures, however accurate, are not always adopted; the doctrines and principles, however perfect, are not always practiced.”⁷⁰ In fact, these phenomena had not existed just in the reigns of the emperors who had ruined their own country, they were the common failings of the autocratic monarchs, and the only difference was the seriousness in degrees. In fact, those who had used blunt words to remonstrate their emperors were doomed by their miserable ending, and usually, “those who had remonstrated with the emperor would be killed, and those who had flattered the emperor would be promoted”.⁷¹

In short, it was one of the legal traditions in ancient China that the law was not only made by the monarchs, but also was dominated by the imperial power, and that the law had provided protections for the imperial power which had in turn overtopped the law. Such a tradition had its deep social, historical, and cultural origins, and its conservativeness had hindered the social development. The far-sighted people in each dynasty had tried to solve this problem by integrating theories with practices. For example, Huang Zongxi had sharply criticized that the most corrupt practices of the autocratic system was that all of the political, military, legislative and judicial power were concentrated in the hands of the monarchs, and that the likes and dislikes of the monarchs had become the standards for judging the merits and faults of the people. He put forward his proposal of reformation that the “law of emperor” should be replaced by the “law of the world”; the centralized power should be divided and the autocracy should be changed into autonomy. When criticizing the autocratic system, Huang Zongxi had run the risk of blaspheming the imperial power, however, he had not thoroughly negated the monarchical system, but only focused on restraining the monarchical power in order that the emperor “should not do things merely to benefit himself, but should do things to benefit the people; should not do things merely to avoid himself being harmed, but should do things to avoid the people being harmed”.⁷² However, in the Chinese feudal autocratic system, it was impossible for Huang Zongxi’s proposal of reformation to produce any real effects, on the contrary; he had become the victim of “Wen Zi Yu” (literary inquisition) in the Qing dynasty. Obviously, ruled by the extremely autocratic system of the Qing dynasty, the law had become a dependency of the imperial power. In the debate about whether “the imperial power dominates law” or “the law dominates the imperial power” conducted in the constitutionalism in the late period of the Qing dynasty, it was finally agreed that “the major power belongs to the imperial court, but all the political affairs shall be publicized and discussed by the public”.⁷³

⁶⁹“Nan Yan” (On the Difficulty of Offering Advice) in *Han Feizi*.

⁷⁰Ibid.

⁷¹“Ba Guan” (Eight Observations) in *Guan Zi (The Book of Master Guan)*.

⁷²“Yuan Jun” (On Monarchs) in *Ming Yi Dai Fang Lu (Waiting for Dawn)*.

⁷³*Fa Zheng Qian Shuo Bao (Introduction of Laws and Politics)*, Vol. 17, published in the third year of Xuantong, p. 19.

The ultimate goal of the legal and political reforms undertaken in the modern times was to solve the problems in the relationship between the law and the power, or, in other words, to decide which of them was in a dominant position. On account of the autocratic system which had long lasted in China and the inertia which this system had brought along, the difficulty of solving this problem was increased. However, just as what was said in a poem, “hills verdant cannot block my view and the eastward the rivers continue to flow”. Upon the land that had bred the Chinese nation, a nation which is ruled by law will certainly emerge.

Chapter 7

Clan Orientation and the Ethical Rule of Law

7.1 Clan Regulations as Significant Parts of the Traditional Laws

Since ancient China had entered the class society along the way from family to state, the clan and lineage relationship had exerted strong influences upon the various aspects of the society and the nation. The high-level combination of patriarchal clan system and politics in especial had led to the particular system of the integration of the family and the state, and the intimates and the nobles. More specifically, the family was the miniature of the state, and the state the amplification of the family. Besides, the constitution, political structure and national activities of the state were all based on the dual principle of lineage and politics. When China entered the feudal society, the political system in which the family and state were integrated was changed, but the family was still the essential unit of the society, and the patriarchal power to manage a clan or a family was still acknowledged by the state. Patriarchs were authorized to exercise some functions of grass-roots administrative organizations, such as pressing for land taxes and maintaining public order. Due to the protection of law and the economic foundation on which it had relied, the family-oriented social structure remained stable for over 2,000 years, and it had become another important backbone of the feudal autocratic regime.

As clan existed as a legal subject in ancient China, there emerged the punishment of executing a whole clan and exterminating a whole family.

With the establishment of Confucianism as the ruling philosophy of the state, the process of merging and development got started in which morality became legalized and law became moralized. The Confucian ethical code of “Gang Chang” (the Chinese ethical tradition) became not only the theoretical foundation for the construction of legal system, but also the principal content of feudal codes, which had led to the formation of the distinctive ethical law that had closely combined law and morality. Therefore, the ethical law was not only a fundamental part of the Chinese legal system; it had also sufficiently reflected the characteristics of the Chinese legal system.

In the legal system of feudal China, the regulations which had adjusted the rights and obligations between clans centering on the paternal power were of great importance. The essential and central task was to preserve the privileges of the patriarchs so as to consolidate the patriarchal domination in feudal families. Blood lineage which had distinguished the noble from the humble, and the intimate from the distant, had had a direct impact on the civil sanctions imposed upon the torts and conviction of crimes and the measurement of punishments concerning “Qin Shu Xiang Fan” (infringement among relatives). Patriarchs were entrusted with the function to mediate disputes and handle affairs within the clan by the government, and to represent the laws and disciplines on behalf of the imperial court. For example, as to the disputes on adopting heirs, if the settlements from the feudal officials were not agreed upon, the patriarch could assemble all members of the clan to settle disputes through public discussions. It was also stipulated in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) that “in a family where a woman has no heir after her husband has died, she will inherit her husband’s status and resort to the patriarch to select someone of the same patrilineal group who is of appropriate age and generation to be an heir.” And “the only son can inherit two households only with the agreement of all clan members.”

Here, the public discussion of the whole clan was actually a clan meeting dominated by the patriarch. Since the patriarch had “acted under the official law to regulate juniors in the clan”,¹ he was like the judge of the clan. It was explicitly announced in a decree in the tenth Year of Emperor Daoguang (1830 A.D.) that “any affair within a clan, whether serious or trivial, shall be judged by the patriarch,” and among the clan members, “if there are lawbreakers, the patriarch should have them arrested and tried in the court of ‘Zhou’ (subprefecture) or ‘Xian’ (county)”.² With the support of feudal officials, the patriarchs had procured extensive powers to have the clan members punished, including compelling them to apologize and compensate, expelling them from the clan, exiling them to a distant place, imposing physical punishments, and even sentencing them to death.

In the later period of feudal society, the class contradictions had become constantly intensified. So under the circumstance, the patriarchs were much more needed by the government to have the clan members controlled, the society stabilized and the political power consolidated. Therefore, the alliance within the clan was encouraged in Northern Song Dynasty, which had further strengthened the position of patriarchal families as the essential units of the feudal society. The statute laws within the clan which were greatly popular in society, such as the “family precepts” and “clan disciplines”, had provided more support for the patriarchs to suppress and constrain the clan members. The neo-Confucianism philosopher Zhu Xi once had written the “family precepts” and “family disciplines” by himself. He said, “If a person can not manage his family well, how can he talk about the national affairs?”

¹ Chen Hongmou, *Pei Yuan Tang Ou Cun Gao* (*Accidentally Saved Manuscripts by Chen Hongmou*), Vol. 40.

² *Da Qing Xuan Zong Cheng Huang Di Shi Lu* (*Records of Emperor Xuan Zong Cheng of Great Qing*), Vol. 181.

So, he appealed to the officials of all ranks to “exercise the administration of one family”³ and to have faith in the idea of “promoting ‘Tian Li’ (heavenly principles) and eradicating human desires”, with the purpose to maintain the regime of Southern Song Dynasty. In ancient China, the feudal governments were fully aware of the deep-rootedness of the clan conception and its practical restraining force in the society. For this reason, they had granted legal efficacy to those various forms of “family precepts” and “clan disciplines” centered on patriarchs.

To sum up, the family precepts and clan disciplines since Northern Song Dynasty had all been formulated after being revised and processed under the guiding ideology of “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) and based on the national laws and patriarchal customs. In essence, they were the same with those laws of feudal states: to govern the country and control the families, therefore, their significance cannot be ignored, as was described in the following words:

A family with rules is just like a country with codes. A country has made codes so that the subjects can be regulated through rewards or punishments; and a family has made rules so that the juniors can be taught through lectures or punishments. Although they are two different matters, they have the same principles.⁴

Thereby, the dual legal networks were formed, and compared with national law, the family disciplines were different only in their much harsher and detailed contents and the clan form which they had taken. The following rules had been included in the Domestic Rules of a certain *Li* Family in Sanjiang which were printed and published in the 16th Year of Emperor Wanli (1588 A.D.):

“Honoring ancestors”, “forbidding offending the superiors”, “keeping harmony with clan members”, “encouraging filial piety”, “respecting teachers and friends”, “doing one’s best in the work”, “avoiding ill manners”, “revering national religion”, “attaching importance to heirs”, “attaching importance to the building of tombs”, “relieving hardships and tribulations”, “valuing pedigrees”, “eradicating minor resentments and grudges”, and “respecting patriarchs”.

Nevertheless, those clan laws which were in contradiction with the national laws would be abolished.

By the 29th Year of Emperor Qianlong (1764) of Qing Dynasty, the clans in which ancestral temples were established had amounted to 8,994 in Jiangxi Province alone. At that time, in order to meet the needs of administration, the family disciplines had become more and more varied in forms, and their scope of adjustment covered almost every area of clan life, such as the origin of clans, the order of the noble and the humble, the relations about property, the marriage and inheritance, the offering of sacrifices to ancestors, the theft of money and gambling, and so on. Family disciplines were not only in agreement with the national laws in nature, but also were interchangeable in application, because any behaviors which had violated

³“Zhu Zi Wen Ji” (The Collected Works of Zhu Xi) in *Zhu Zi Yu Lei* (*Quotations of Master Zhu*), Vol. 68.

⁴“Ci Gui Yin” (Extract of Temple Rules) in *Xian Yuan Ben Xi Xiang Shi Zu Pu* (*The Pedigree of Xiang Family in Benxi Xianyuan*), Vol. 1, in Anhui.

the national laws were bound to be strictly prohibited by the family disciplines; on the contrary, any behaviors that had violated family disciplines were certainly not to be tolerated by the national laws. The dual legal system which had integrated the family disciplines and national laws was peculiar to ancient China.

Because the practice of patriarchic power was in accordance with the requirements of the state, and the contents of family precepts and clan disciplines had reflected the legal provisions and legal awareness of the state, the patriarchs had obtained the recognition of feudal authorities to regulate and punish clan members according to the family precepts and clan disciplines. For instance, it was stipulated in *Huo Shi Jia Xun (Precepts of the Huo Family)* of Nanhai:

Any son or nephew who has done something wrong should be tried in the ancestral temple on the first day or the middle day of a month, and be punished at the beating of drum. If it is a misdemeanor, he shall be sentenced to 'Chi' (beatings with light sticks) for ten times for the first offence, twenty for a second offence, and thirty for a third offence.

In Hefei district, the patriarchs could punish those clan members who had violated family precepts or clan disciplines by "imposing the fine of money or feasts, or carrying out the penalty of beating with sticks, or as severely as sentencing them to death by hanging".

As family precepts and clan disciplines became universally popular, the organizations which were established within the clans to restrain clan members and implement family precepts were also expanded. It was recorded in *Guang Yang Za Ji (Notes by Guang Yangzi)* by the writer Liu Xianting in Qing Dynasty that there were altogether over 200 people in the Zhao Clan of Zhenjiang:

The Zhao Clan has one chief heir, assisted by eight patriarchs. Selected from those smart and upright in the entire clan, four are appointed judges and eight take the duties to execute the penalty of beating with sticks. A temple has its chief, and a house has its head.

It was apparent that this set of clan organization was similar to a basic-level government organization, except that it was set up within the clan.

7.2 The Evolution of Ethical Clan Law

Early in slavery times, with the formation of patriarchal clan system, the patriarchal and clan power had acquired the recognition of the government, and had even played a prominent role in politics. However, in terms of the evolution of the ethical law, it was still at the primary stage, so it was after China had entered feudal society that the clan-oriented ethical law began to be formed and developed.

The period of Qin and Han dynasties (221 B.C.–220 A.D.) was the time when the feudal clan-oriented ethical law was formed. It was stipulated in *Qin Lv (Qin Code)* that there were two forms of actions: "Gong Shi Gao" and "Non-Gong Shi Gao". "Non-Gong Shi Gao" referred to the cases between patriarchs and sons, the humble, or the young. And these cases only involved family offences within the clan, which meant that the humble, the young and "Nu Bi" (the slave girls and maidservants)

could not bring the lawsuits against the patriarchs to the local authorities. Anyone who had insisted on doing so would be punished for serious offences. Two cases about the sons being sent by their fathers to be punished by the local authorities were recorded in *Feng Zhen Shi* (*Judicial Principles, Methods and Cases*) in “Qin Jian” (bamboo writing slips in Qin Dynasty). One was about a case in which the father required the local authorities to have the son punished with instruments of torture, and to exile him from Shaanxi to the remote areas of Sichuan; the other case accounted that the father had requested the local authorities to have his son executed, because he was not “filial” enough as a son.⁵ These were the earliest records that the patriarchs had the power to have their offsprings punished.

With the Confucianization of the feudal laws in Han Dynasty, more recognition was given to the patriarchal and clan power. Compared with *Qin Lv* (*Qin Code*), *Han Lv* (*Han Code*) was much more detailed and developed in the following aspects: the punishments of sons and daughters for crimes against filial piety and the patriarchal power; the right to inherit property, the titles of nobility and official posts; the establishment and dissolution of marriages; the affirmation of the principle of “Qin Qin De Xiang Shou Ni” (a law in Han Dynasty which ruled that crimes committed among the kinsfolks should be concealed and not reported to the government), and so on. In Han Dynasty, the clans which had laid emphasis on “family education”, observed family precepts and clan disciplines, and shown reverence to the Confucian rites and moralities were not only highly honored by the imperial court and the populace, but also well-known throughout the villages and towns. For example, it was described that Fan Hong’s father with the name of Chong “is good-natured, and observant to disciplines and laws. In his family, the properties are shared by three generations; he is greeted by his children and grandchildren as frequently as in families of dukes and ministers every morning and evening. While he is doing business, nothing would be wasted, and attendants and servants are all deployed in their proper positions. Therefore, it is possible for everyone to make efforts to have the wealth increased year by year.”⁶

The period from “San Guo” (Three Kingdoms), “Liang Jin” (The East and West Jin dynasties) to “Nan Bei Chao” (The Southern and Northern Dynasties) saw a huge wave of social turmoil and a great integration of nationalities. In order to maintain their ruling, the various regimes, competing with each other and contending for the hegemony, had all stressed having the patriarchal families controlled by law, because they were considered the basic units of society. Even the rulers of those minorities who had conquered the Central Plains of China, had strengthened the construction of ethical legal system in an attempt to consolidate the fruits of feudalization by assimilating the ruling experience of the Han Nationality.

In Western Jin Dynasty, during the course of the Confucianization of laws, the patriarchal power and clan power became more and more legalized and standardized.

⁵ *Feng Zhen Shi* (*Judicial Principles, Methods and Cases*) in *Shui Hu Di Qin Mu Zhu Jian* (bamboo writing slips found in the tomb of Qin in Shui Hu Di).

⁶ “Fan Hong Zhuan” (The Biography of Fan Hong) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

Tai Shi Lv (*Tai Shi Code*), compiled in the period of Emperor Wu of Jin, was the first typical Confucianized code in feudal China, in which great priority was put on the rites and proprieties, and the people's status was strictly differentiated, therefore, the principles of patriarchal ethics were more easily adopted in the national statutory law. This was specifically manifested in two aspects: first, the crimes were convicted and punishments were enforced in accordance with "Fu Zhi" (mourning apparel system or the system of wearing different clothes at funerals to show different relations), and anyone who had violated the statutory relationships of the noble and the humble were given severe punishments; second, the rituals reflecting the ethical relationships within the family were written into laws and were directly legalized, and charges such as "Bu Jing" (being irreverent), "E Ni" (abusing or murdering the elders), and "Fan Ni" (treachery) were written into law as violations of rituals.⁷ In a sense, *Jin Lv* (*Jin Code*) was a code which had focused on the maintenance of the patriarchal rituals and etiquettes.

It was stipulated in *Liu Song Lv* (*Liu Song Code*) in Southern Dynasty that "anyone who has injured or assaulted his parents shall be given the punishment of 'Xiao Shou' (to hang the criminal's head up at public spots for people to witness); anyone who has abused his parents shall be executed with 'Qi Shi' (to put the corpse in the marketplace), and anyone who has murdered her husband's parents shall be executed alike".⁸ Although a general amnesty was granted in the period of Emperor Ming in Song dynasty, still "anyone who has murdered his parents, his grandparents, or his brothers... is not included in the cases of pardon".⁹

After Tuoba tribe of the Xianbei Nationality had unified the north and established the Northern Wei Dynasty, the government was unable to deal with the complicated social relationships and various contradictions, because the "etiquettes and customs were ingenuous and the regulations of the punishment were simple.... Due to the lack of laws of interrogation and imprisonment, anyone who had committed a crime would be immediately punished".¹⁰ Hence, in Northern Wei dynasty, Emperor Xiaowen had moved the capital to Luoyang, implemented a large-scale reform on the outdated tribal systems, and carried out a comprehensive policy of localization. Accordantly, the patriarchal and clan power also became constantly legalized. For instance, in the law revision, Emperor Xiaowen had intentionally included the ethics and rites concerning family precepts, added such offences as "Bu Dao" (Depravity), "Bu Xiao" (being unfilial) and "Bu Jing" (being irreverent),¹¹ and regarded the crimes like "E Ni" (abusing or murdering the elders), "Bu Xiao" (being unfilial), "Nei Luan" (incest within the family) which had severely violated the feudal ethics and virtues as the "Shi E" (The Ten Abominations). Therefore, this was a very important expression of the development of the ethical clan law.

⁷"Xing Fa Zhi" (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

⁸"Sun Jigong Zhuan" (The Biography of Sun Jigong) in *Song Shu* (*The History of Song Dynasty*).

⁹"Xing Fa Zhi" (The Record of the Criminal Law) in *Song Shu* (*The History of Song Dynasty*).

¹⁰"Xing Fa Zhi" (The Record of the Criminal Law) in *Wei Shu* (*The History of Northern Wei Dynasty*).

¹¹Ibid.

In Northern Dynasty, those families which had observed the rites and proprieties and lived harmoniously in different places were even greatly praised by the rulers. The following case was recorded in “Li Ji Zhuan” (The Biography of Li Ji) in *Wei Shu* (*The History of Northern Wei Dynasty*):

Liji was a person from Anping, Boling. In his family, seven generations had lived together and shared the property; there were 22 rooms and 198 people. The elderly and the young amounted to a great number, all renowned for their courtesies and etiquettes. As for the construction of houses, both the humble and the young took part; the clan was admired and praised by all neighbors.

In addition, it was regarded as a very important standard for selecting and examining government officials whether they could strictly abide the ethical norms, and those who had committed serious offences of ethical morals would not only be permanently rejected from the official posts, but also be punished for their crimes. For instance, “‘Tai Pu’ (an official in charge of the emperor’s carriages) of Xuande (name of a place), Liu Langzhi, son of Guerilla General Liu Qu, did not support his nephew, which had caused the boy’s mother to be remarried and the boy to leave with his mother. For this reason, he was removed from his official post and imprisoned permanently.”¹²

After Chen was wiped out by Sui Dynasty, Su Wei, who had participated in the drafting of *Kai Huang Lv* (*The Code Made in the Year of Kai Huang*), marched down the south along with the army. He later issued *Wu Jiao* (*Education of Five Virtues*), i.e. teaching father the righteousness, mother kindness, elder brother friendliness, young brother respect, and son filial piety, and had implemented it in various patriarchal clan organizations by the national coercive power. The basic-level organizations which had synthesized both the patriarchal clan institution and local administrative institutions were also established by the Sui government. For example: “Five households made up a ‘Bao’ (security group) with a head installed; five ‘Bao’ made up a ‘Lv’ (neighborhood), and four ‘Lv’ a ‘Zu’ (clan), with a head appointed in each of them; out of ‘Ji’ there was appointed a chief of ‘Li’, which was equivalent to the chief of ‘Lv’; the head of ‘Dang’ was equivalent to the chief of ‘Zu’.”¹³

In this way, the national political power was closely integrated with the clan organizations, so the patriarchs were bestowed with legitimate authorities.

Tang Dynasty was the period when clan-oriented ethical laws became more perfected. The principles and regulations of ethical laws since Qin and Han dynasties were inherited and developed in *Tang Lv Shu Yi* (*The Comments on Tang Code*), a paradigm of Chinese feudal codes, which had symbolized the maturity of Chinese feudal clan-oriented ethical law in that almost every basic aspect concerning the patriarchal power and clan power was confirmed by written provisions. It was the famous principle of “Yi Zhun Hu Li” (using rites as the only guiding principle),

¹²“Fei Di Yu Lin Wang Ji” (The Biography of the Dethroned Emperor Yulin) in *Nan Shi* (*The History of Southern Dynasties*).

¹³“Shi Huo Zhi” (Records of Food and Commerce) in *Sui Shu* (*The History of Sui Dynasty*).

which had adequately shown the characteristics of clan-orientation through its legislative spirit, legislative principle, legal provision, legal application and others.

In Song Dynasty, the clan-oriented ethical law was further strengthened. With the reinforcement of autocratic rule and the intensification of class contradictions, in Northern Song Dynasty, the patriarchal families were attached with further importance as an important backbone of the feudal order. The statute laws such as “family precepts” and “clan disciplines” within the clan, which were very popular in the society, had provided more supports to the patriarchs in suppressing and restraining the clan members. The neo-Confucianism philosopher Zhu Xi once had written “family precepts” and “family disciplines” himself, arguing that if the family affairs were not well managed, the national affairs could not be discussed.

In Ming and Qing dynasties, in order to impose further restriction on the clan members, the organizations established within clans for implementing family precepts were continuously enlarged. Taking the Confucius Family Mansion of Qu Fu as an example, it was granted the title of “Duke of Yansheng”, and a complete set of institutional framework which was independent of the ordinary government agencies was established.

In feudal China, the system of ruling by clans led by the leaders of clans or chiefs of temples was not only independent, but also mutually supportive and reliant on the local basic-level authorities, which had shown a close connection between the clan power and political power. In Qing Dynasty, in the clan ruling system, there was a clan leader, a temple chief and a house head; in the local basic-level ruling system, ten households made up a “Pai” with a head appointed; ten “Pai” made up a “Jia” with a head appointed; ten “Jia” made up a “Bao” with a head appointed. If the head of “Bao” had neglected his duty, the patriarchs could appeal to “Zhi Xian” (magistrate of a county) to have him impeached; the security head of a town should also consult and coordinate with the patriarchs when making decisions about the management of local affairs.

7.3 The Concrete Contents of Ethical Law and Embodiment of Patriarchal Power

Through the ethical clan law, the feudal order of priority, seniority and precedence within the clan was confirmed, the dominant position of patriarchs was established, and the rights and obligations among clan members were adjusted in the form of law.

1. The affirmation of patriarchal power to make decisions on marriages of sons and daughters

In the ancient Chinese society, the instructions of parents were decisive to the establishment or revocation of marriages of sons and daughters. The parents could choose a wife for the son, or a husband for the daughter, and could also force them to divorce according to their own preferences. It was recorded very early in “Nan

Shan” (South Mountain) in *Shi Jing (The Book of Songs)* that “parents should be informed by the son of what kind of woman he is to marry as a wife.” Since the parents’ power to dictate marriages was recognized by the law, and besides marriages were considered to be a decent union of two family names, so as long as the parents of two families had reached consensus, a marriage would be established regardless of the defiance of their children. Even when the son or the daughter grew to be adult, or if the son was engaged to a woman in some place far away from where he had held his official post, the arrangement of his parents could not be defied. Thus, if the parents had arranged a marriage for the son at home—even if it was discovered later that the son’s engagement was against his own will, it would still be effective. If the son or the daughter did not obey the arrangement of the parents by using his personal engagement as an excuse, he or she would be punished by “Zhang” (flogging with heavy sticks) for eighty to a one hundred strokes in accordance with the law. In this case, even if there were violations of law in marriages, only parents would be blamed, because they were the ones who had the power to dictate marriages.

In addition, the order of the people who had the power to dictate marriages was also explicitly stipulated in the law: “marriages shall all be dictated by grandparents or parents. If neither grandparents nor parents are alive, the other relatives shall succeed the role of dictating marriages.” Here “the other relatives” included uncles, aunts, elder brothers and elder sisters, and grandparents on the mother’s side. Nevertheless, other than parents, those who had dictated marriages had no arbitrary powers to arrange marriages; thence under such circumstances, marriages should be arranged with the consent of sons and daughters. If a marriage was illegal, the person who had dictated it should be identified as the prime culprit, whereas the two parties involved accessory culprits; if the responsibility was on the two parties involved in the marriage, then the two parties involved should be identified as the prime culprits, and the person who dictated it the accessory culprit.

After the wedding ceremonies, the newlyweds should also hold “the ceremony of ‘Miao Jian’ (to worship ancestors in the ancestral temple)”, otherwise, the marital relation would not be completely established, which had indicated that the late ancestors still had certain dominant influence on marriages of the humble and the young in reality.

It was also confirmed in the feudal law that the parents could exercise patriarchal powers upon the daughter-in-law. For example, the daughter-in-law would be unfilial if she had assaulted or insulted her parents-in-law, and if she had been killed for this, the father-in-law would not be convicted. There were further stipulations in the laws of Ming and Qing dynasties:

A daughter-in-law’s infringement upon the parents-in-law is of equivalence to the grandchildren’s infringement upon the grandparents and parents. If the daughter-in-law accuses her husband’s grandparents or parents, she shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes and three years of imprisonment; if she brings a false accusation, she shall be hanged to death; if the daughter-in-law abuses and insults her parents-in-law, she shall be hanged; if she assaults them, she shall be decapitated; if she murders them, she shall be put to ‘Ling Chi’ (the punishment of dismemberment and the lingering death); if the daughter-in-law negligently kills her parents-in-law, she

shall be sentenced to the punishment of 'Zhang' (flogging with heavy sticks) for a hundred strokes and to be exiled to three thousand *li*¹⁴ away; if she negligently injures them, she shall be sentenced to the punishment of 'Zhang' (flogging with heavy sticks) for a hundred strokes and three years of imprisonment; if she murders them, she shall be decapitated or put to 'Ling Chi' (the punishment of dismemberment and the lingering death).

In the above cases, the offender would never be allowed to be ransomed, besides, the parents-in-law could request the local authorities to sanction the daughter-in-law in the excuse that she had violated the moral ethics. If the daughter-in-law was assaulted by the parents-in-law, and if the beating had not caused physical disability or serious sickness, the parents-in-law would not be accused of mayhem. According to the law of Tang Dynasty, anyone who had beaten the daughter-in-law or the wife the grandson and had caused her to be disabled would be sentenced to the punishment of "Zhang" (flogging with heavy sticks) for one hundred strokes; and if he had caused her to be seriously sick, he would be sentenced to a year of imprisonment. According to the laws of Ming and Qing dynasties, anyone who had beaten the daughter-in-law or the wife of grandson and caused her to be disabled for no reasons would be sentenced to the punishment of "Zhang" (flogging with heavy sticks) for eighty strokes, and if he had caused her to be seriously sick, he would be sentenced to the punishment of "Zhang" (flogging with heavy sticks) for eighty strokes; but if he did have reasons and had her beaten, then he would not be punished as was stipulated here. It was stipulated in all the laws of Tang, Ming and Qing dynasties that anyone who had beaten the daughter-in-law or the wife of grandson to death for no reasons would be sentenced to 3 years of imprisonment; anyone who had intentionally killed them would be exiled to 2,000 *li* away; but anyone who had negligently killed her would not be punished.

The husband's dominance over his wife was also protected by the feudal law. Based on the classic doctrines of Confucianism, women must attach themselves to men, as was expressed that, "women should be attached to men... So, there is the doctrine of "San Cong" (The Three Cases of Obedience) for women: namely, obeying their father before getting married, obeying their husband after getting married, and obeying their sons in widowhood".¹⁵ In this way, women were constrained and bounded by four nooses: the political power, the religious power, the clan power and the power of the husband.

It was both confirmed in the feudal ethics and feudal law that women had no qualification to be leaders of families, no rights to dispose of the property, and no rights to educate their sons and daughters. Moreover, in feudal China, women were not allowed to go out to participate in the social activities, just as was expressed in these words, "women should not talk about the affairs outside the family", and "women should only concerned themselves about foods and wines."¹⁶ In order to secure the rule of the husband's power, in all the feudal laws since Han Dynasty the provisions on "Qi Chu" (seven reasons to repudiate the wife) had

¹⁴*li*, a Chinese unite of length (=1/2 km).

¹⁵"Ben Ming" (Natal Position) in *Da Dai Li Ji (Collections of Classic Rites by Da Dai)*.

¹⁶"Qu Li" (The Summary of the Rules of Propriety) in *Li Ji (The Book of Rites)*.

been formulated, which included: “not having given birth to a son”, “being lascivious”, “not being filial to the parents-in-law”, “gossiping”, “committing theft”, “being jealous” and “having wicked habits”. The husband could choose any of these as the excuse to “repudiate his wife”. However, the wife could never require the marital relations be dissolved, no matter how miserable a life she was living. In *Bai Hu Tong Yi* (*The Virtuous Discussions in White Tiger Hall*), it was stated that, “the husband is ‘Tian’ (heaven)”, so “‘Di’ (earth) has no moral justifications to leave ‘Tian’ (heaven)”.¹⁷ If the wife had accused her husband, even if what she had accused of was true, she would still be convicted, and it was made as a warning to those who had committed the offence of “Gan Ming Fan Yi” (the seniors are prosecuted by the youngsters).

Tormented by both the feudal laws and the moral ethics, the broad masses of women either died of the malpractices of laws or the discriminations of rites. In Qing Dynasty, the writer Fang Bao once said,

I have studied the history books and county records nationwide and discovered that there were very few women who had adhered to preserving chastity for their deceased husbands and refused to remarry before Qin and Zhou dynasties; and there were a few from Han to Tang Dynasty; but there were many since Northern Song Dynasty.¹⁸

2. The affirmation of the patriarchal rights to dispose of property

Of the rites pursued by the Confucian School, one principle was that while the parents were still alive, the sons and daughters were not allowed to own property privately, which was described in the following words: “(sons) dare not privatize property”, and “the sons and daughters-in-law have no private goods, no private savings and no private utensils, furthermore, they dare not lend or give things to others personally”.¹⁹ This principle of the rites was legalized in the feudal law and was reflected in the phenomenon that anyone among the humble and the young who had lived together with his or her parents should be given criminal punishments if they had privately employed family property without the permission of the patriarchs, and moreover, the punishment would be measured according to the amount of property employed. It was stipulated in *Tang Lv* (*Tang Code*) that if “someone of the humble and the young have employed family properties without permission”, he should be sentenced to the punishment of “Chi” (flogging with light sticks) for ten strokes for ten *pi*,²⁰ and the punishment should be one level severer for each ten more, which could be up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes. The same stipulations were made in *Song Xing Tong* (*The Penal Code of Song Dynasty*) as in *Tang Lv* (*Tang Code*) about the punishment on “the humble and the young who have employed family properties without permissions”.

¹⁷ *Bai Hu Tong Yi* (*The Virtuous Discussions in White Tiger Hall*).

¹⁸ “Preface to the Biography of Chaste Women of the Cao Family in Yan Town” in *Fang Wangxi Xian Sheng Quan Ji* (*The Completed Works of Fang Wangxi*), Vol. 4.

¹⁹ “Nei Ze” (Domestic Rules) in *Li Ji* (*The Book of Rites*).

²⁰ *pi*, ancient Chinese unit of length (=13 1/3 m).

The laws of Ming and Qing dynasties also had similar provisions on “the humble and the young employing family property without permission”, and it was stipulated that the punishment of “Chi” (flogging with light sticks) for twenty strokes should be given for 20 *guan*,²¹ and the punishment should be one level severer for every twenty more, which could be up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes.

If the son or grandson had conditionally sold family properties while the parents were still alive, the act of selling would be identified to be invalid. It was explicitly stipulated in *Song Xing Tong (The Penal Code of Song Dynasty)* that, as far as “the conditional sales of property” or “registered loans” was concerned, the elders or patriarchs of the clans must meet with the bosses of private banks or their messengers and “sign contracts face to face”, otherwise, such acts would be considered invalid. If the humble and the young have “deceived the elders and patriarchs, sold things privately, asked for loans, mortgaged things or faked the names of the elders or patriarchs, all the people including the humble and the young, the middlemen and the introducers shall be resettled, and the money and property involved shall be returned to the two parties respectively”.²² Even when the patriarchs were at places within 300 *li* from home, the children (including sons, grandsons, younger brothers and nephews) still were not allowed to privately sell or pawn slaves, domestic animals, land and buildings, and other properties without permission; and only when the patriarchs were away in remote areas, or were stuck in wars, could the children ask the local authorities to render official documents for the deal. In the cases in which it was violated by the parties concerned, the property involved should be returned to the owner, and the money involved should be confiscated and never to be recovered.

In addition, the sons and grandsons were strictly prohibited by the feudal laws from “establishing new households to transfer the properties”, because such conducts were in disagreement with the ethics of family support and would cause severe spiritual damages to other family members. Thus, it was identified as one of the unfilial crimes, and its punishment was severer than that for the crime of privately employing properties: the offender shall be sentenced to 3 years of imprisonment in accordance with the law of Song Dynasty and the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes in accordance with the laws of Ming and Qing dynasties. Even if such a crime was committed during the mourning period after the death of the parents, the offender should also be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for eighty strokes. Therefore, the purpose of the feudal laws was to consolidate the economic foundations of the families, to avoid family disintegration caused by the division of properties and to protect the patriarchal power of property disposing. What’s more, not only did the sons and grandsons and the humble and the young have no rights to dispose of properties, they would also resign themselves as properties at the disposal of the patriarchs. During the reign of Emperor Gaozu of Han, orders were once issued by the

²¹ *guan*, ancient unit of measurement of money, a string of 1,000 cash.

²² *Song Xing Tong (The Penal Code of Song Dynasty)*, Vol. 13.

government that “people are free to sell their sons and daughters,”²³ hence as the saying went that “people had provided clothing and food for the families through the sale of titles, sons and daughters”.²⁴ Chun Ru had once made a commentary on this by saying that “according to the customs of Huainan, selling sons or daughters to be slaves is called ‘Zhi Zi’ (pawning of sons or daughters); if the sons or daughters are not to be redeemed within 3 years, they will be slaves permanently.” In Qing Dynasty, “the number of the families in which sons and daughters were sold to be slaves in the rich families in the capital city was uncountable”.²⁵

3. The affirmation of the patriarchal power to punish the offsprings

In the eyes of the feudal rulers, the rules of punishment within the families were indispensable and equivalent to the laws of criminal punishment within a nation. In *Lv Shi Chun Qiu* (*Spring and Autumn Annals of Master Lv*), it was stated that, “if there are no rules of punishment in a family, then the children will become conceited even when they have done something wrong.” In addition, in *Yan Shi Jia Xun* (*The Family Instructions of Master Yan*), it was also said that “managing families with lenient or harsh rules is just like the administration of a state.” In ancient China, the parents’ power to punish the offsprings was not just limited to the minors. In the period of Southern Liang, the mother of “Da Sima” (the first minister of military affairs) Wang Sengbian had managed the household very strictly: “Sengbian, over forty years old, was the commander of three thousand soldiers; however, if his mother had felt even slightly dissatisfied with him, she would still have him punished by ‘Zhang’ (flogging with heavy sticks).”

During the period when the ancient patriarchal clan system prevailed, the parents even had the power to order children and grandchildren to commit suicide. Emperor Er Shi (the Second Emperor) of Qin Dynasty had colluded with Zhao Gao and forged an imperial edict of Qin Shi Huang (the first emperor of Qin) to order Meng Tian (a famous general of Qin) and Fu Su (the eldest son of Emperor Shi Huang) to commit suicide. After receiving the edict, Fu Su knew it was faked, but subject to the provision that “if the son is ordered by his father to commit suicide, he is not allowed to object”,²⁶ he had to kill himself. After Qin Dynasty, with the development of autocracy, the rights to determine the life and death of the people began to be intersected with the rights of the state and sovereign. Although the patriarchs had no rights to order the children to die, they were still allowed to exercise punishments such as “Zhang” (flogging with heavy sticks) on the children. In Northern Wei, it was stipulated in the law that “the grandparents or parents who have killed the children or grandchildren with weapons out of anger shall be sentenced to five years of imprisonment; those who have beaten them to death shall be sentenced to four years

²³“Shi Huo Zhi” (Records of Food and Commerce) in *Han Shu* (*The History of Former Han Dynasty*).

²⁴“Yan Zhu Zhuan” (The Biography of Yan Zhu) in *Han Shu* (*The History of Former Han Dynasty*).

²⁵*Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), Vol. 18.

²⁶“Li Si Lie Zhuan” (The Biography of Li Si) in *Shi Ji* (*The Records of the Grand Historian*).

of imprisonment; and for those who have intentionally killed them because of detestation, the punishment shall be one level severer respectively.”²⁷

In Tang Dynasty when the legal order was very much emphasized, the elders who had killed the children or grandchildren would all be sentenced to imprisonment. For example, those who had beaten their children or grandchildren to death should be sentenced to one and a half years of imprisonment, and those who had killed them with weapons should be sentenced to 2 years of imprisonment; for those who had killed them because of their violation of the moral ethics, the punishment should be one level lighter than the punishment for intentional killings. When it came to Yuan, Ming and Qing dynasties, in consideration of the continuously sharpened class contradictions in the later period of feudal society, the government had granted relatively greater power to the patriarchs, and required them to take the place of the feudal government agencies and to assume the duties and functions of the government in supervising the clan members, collecting taxes and implementing moral ethics. Thus, it was stipulated in the law that except for the situations where the parents should be punished in accordance with the laws for having intentionally killed the innocent children, if parents had killed or accidentally killed the children for their unfilial behaviors such as abusing and insulting the parents, they should not be punished. In accordance with *Yuan Lv* (*Yuan Code*), “those parents who have beaten the children for some reasons and have accidentally caused their death shall be exempted from the criminal punishments.” The laws of Ming and Qing also had the similar stipulation: “if children or grandchildren are punished in accordance with the law by the patriarchs for the violation of moral ethics, and are accidentally killed, the patriarchs shall not be punished.” For the situations where the patriarchs had beaten the children to death for no reasons, although the patriarchs had been identified as being guilty by the law, the punishment was rather lenient, because they would be only be punished by “Zhang” (flogging with heavy sticks) for one hundred strokes as was prescribed in the laws of Ming and Qing dynasties. In the feudal laws, there were extraordinarily broad and complicated stipulations concerning the “violation of moral ethics”, including those of being unfilial, gambling and committing rapes and theft. The conducts of the violation of moral ethics were judged according to the opinions of the parents, which had granted parents extensive power to punish their offsprings.

In accordance with the laws of Ming and Qing dynasties, in the cases in which the children did not obey their parents, the parents not only had the power to punish them personally, but also had the power to hand them over to be punished, i.e. to ask the local authorities to have them punished. Thus, it was ruled that those children who were handed over to be punished should be given the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes, or be punished in conformity with the suggestions of their parents. This was expressed exactly in these words: “if the parents have prosecuted their children, the children shall be punished in line with the parents’ accusations without being brought to trials.”

²⁷“Xing Fa Zhi” (The Record of the Criminal Law) in *Wei Shu* (*The History of Northern Wei Dynasty*).

In addition, in Qing Dynasty, the parents also had the power to hand over their children to be exiled. They could ask the feudal authorities to have the unfilial son exiled to the remote areas of Yunnan, Guizhou, Guangdong or Guangxi. The official documents of “Xing Bu” (Board of Punishment) of the Qing Dynasty once had the following interpretation on that power:

If (parents) ask the local authorities to have their children exiled, the local authorities shall bring them to a distant place for penal servitude accordingly; if the local authorities do not have them exiled, they should be punished by ‘Zhang’ (flogging with heavy sticks) in accordance with the law.

During this process, no evidence or interrogation was needed, because they were all problems concerning the ethics and virtues rather than the right and the wrong according to the feudal moral and legal principles. In this sense, it was the parents who were in control of the power to adjust the punishments. In the cases in which the children were handed over to be exiled, they were generally not allowed to be remitted. Only when there was a special imperial edict of pardon, could the punishment be commuted, and they would be released after a month of jailing by shackles in accordance with “the rules favorable to the relatives and the elders”. Nevertheless, they were not allowed to return home by the feudal authorities until after enquiring their parents who had agreed to withdraw the accusations. However, if the children had repeated the offences, they shall again be hand over to be exiled, but this time they were to be the slaves of the officers or to be soldiers serving in Xinjiang.

4. The affirmation of the principle of severer punishments for the violation of parental rights

Since the Confucian “Gang Chang” (the Chinese ethical tradition) was regarded as “Tian Li” (heavenly principles), and “Bu Xiao” (being unfilial) was considered as a severe offence in feudal society, severer punishments had been implemented in the feudal laws on the conducts of the humble infringing upon the noble. For example, for those who had insulted the ordinary people, the punishment would be “Chi” (flogging with light sticks) for ten strokes at most; but for those who had insulted the grandparents or parents, the punishment would be death by hanging. It was not until in the late Qing Dynasty when the criminal law was revised that the punishment of “Jiao Jue” (death by hanging with an immediate execution) was changed into that of “Jiao Jian Hou” (death by hanging with a postponed execution). As for those conducts which were more serious than insulting, which had exceeded the limit of the misbehavior of “Bu Xiao” (being unfilial), they were identified as “E Ni” (abusing or murdering the elders) in the feudal law. Anyone who had committed “E Ni” should be given the punishment of “Xiao Shou” (to hang the criminal’s head up at public spots for people to witness) in accordance with the laws of Han and Song dynasties, and be given the punishment of “Zhan Jue” (to cut down the criminal’s head) in accordance with the laws of Tang, Ming and Qing dynasties.

Among the feudal laws, only in the *Yuan Lv* (*Yuan Code*) the punishment for those who had assaulted the grandparents or parents were made according to the injuries caused, and in other laws, those who had assaulted their grandparents or parents were all sentenced to death, regardless of whether there were injuries caused

or how serious the injuries were. There was a specific commentary in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), which had stated that “in the cases where the parents are assaulted by the sons or daughters, irrespective of prime or accessory culprits, and regardless of whether there are injuries caused or how serious the injuries are, the assaulters shall all be sentenced to death by decapitation.” There was also *Tiao Li* (*Ordinance*) attached to this stipulation, ruling that “in the cases where the grandparents or parents are assaulted by the children or grandchildren, if there are no other facts to be found in the trial, regardless of how serious the injuries are, they shall be sentenced to death by decapitation with an immediate execution.” Even if the injury was caused accidentally by the assaulters, still he shall be sentenced to death by decapitation. If the assaulter had beaten his parents to death, he should be given punishment at a severer level. In accordance with the laws of Yuan, Ming and Qing dynasties, he should be sentenced to “Ling Chi” (the punishment of dismemberment and the lingering death), on which occasion, even if the criminal had been naturally dead, his body would still be dismembered and exposed in public; if the assaulter had accidentally injured his parents and thus caused their death, he should be sentenced to death by decapitation with an immediate execution. In late Qing dynasty, the law was revised, with the punishment of “Ling Chi” (the punishment of dismemberment and the lingering death) changed into the punishment of decapitation, the punishment for assaulting the grandparents or parents to have caused them injuries was changed to the punishment of “Jiao Jue” (death by hanging with an immediate execution), and the punishment for insulting the grandparents or parents was changed to the punishment of “Jiao Jian Hou” (death by hanging with a postponed execution).

If any children or grandchildren had negligently caused an injury to the grandparents or parents, they should be sentenced to 3 years of imprisonment; if they had negligently caused their death, they should be exiled to somewhere 3,000 *li* away. During the reign of Emperor Qianlong in Qing dynasty, the regulation was made that anyone who had committed negligent homicide should be sentenced to death by hanging with an immediate execution, and he should not be ransomed anyway. To publicize the legislative spirit of the ruler, an annotation was particularly made:

Although the negligent conduct is involuntary, the children and grandchildren should treat their grandparents and parents with due reverence and prudence rather than with any negligence. For this reason, while the ordinary criminals can be ransomed, those children and grandchildren shall be sentenced to exile or imprisonment. This means that the subjects should show no negligence for the sovereigns and offsprings should show no negligence for their fathers.

Apart from this, in the cases of the parents or grandparents being threatened by force by the sons or grandsons, or death had been caused due to their ill performance of filial duties, they should be sentenced to death by decapitation with an immediate execution. In the cases of the parents or grandparents being caused to commit suicides by the sons or grandsons due to their violation of moral ethics, the sons or grandsons should be sentenced to death by “Jiao Jian Hou” (death by hanging with a postponed execution).

Punishments on mayhems among the non-linear relatives were also different from those on mayhems among the ordinary people. The kinships among the relatives within the range of “Wu Fu Qin” (relatives within the five degrees of mourning) and “Jiu Zu” (family ties on father’s side, mother’s side and wife’s side) were more important than those among ordinary people according to the feudal order of human relations. Therefore, in the laws of Ming and Qing dynasties, “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations) was established, in which the intimate was distinguished from the distant in blood lineage on the first pages, and it was made the criterion for punishments in the cases of “Qin Shu Xiang Fan” (infringement among relatives). In accordance with “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations), the more intimate the blood lineage was, the severer the punishment would be; the more distant the blood lineage was, the lenient the punishment would be. Even when the relationship was beyond the range of “Wu Fu”, and if it could be proved in reference to the bloodline, it should still be abided by the feudal order of the noble and the humble. In the cases in which the noble had infringed upon the humble, the punishment should be one degree lighter than that in the ordinary cases; in the cases in which the humble had infringed upon the noble, the punishment should be one degree severer than that in the ordinary cases.

It was also specially stipulated in the feudal laws that the humble and the young, and the children and grandchildren should not apply self-defense against the elders of lineal relatives and other elders such as “Qi Qin” (the relatives within the mourning period of 1 year), “Da Gong” (the person wearing the mourning apparel of soft sackcloth in the third mourning degree), “Xiao Gong” (the person wearing the mourning apparel of soft sackcloth in the fourth mourning degree) and “Si Ma” (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree), otherwise, the offence would be equivalent to those in which the two parties had assaulted each other, and they should be punished accordingly. The provision that no self-defense should be applied against the elders was once abolished in *Xiu Zheng Xing Lv Cao An* (*The Draft of the Revised Criminal Law*) of the late Qing Dynasty, but it was strongly opposed by the die-hard, so it had to be appended as an additional clause to the new criminal law of the Qing Dynasty. In the third year of the Republic of China (1914), this provision was rewritten into the supplementary ordinances of the provisional new criminal law enacted by Beiyang government.

Those who had committed the crime of “Qin Shu Xiang Jian” (adultery among relatives) should generally be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes and 3 years of imprisonment; the rapist should be sentenced to death by decapitation with a postponed execution. More seriously, if anyone had raped the concubines of his father or grandfather, or committed adultery with them, “Nei Luan” (incest within the family) would be constituted. As it was one of the crimes of “Shi E” (The Ten Abominations), the criminal should be hanged or decapitated.

As for the cases in which thefts were committed among relatives, the principle of punishment was contrary to that for the assaults among relatives: the more intimate

the blood lineage was, the more lenient the punishment would be; and vice versa. It was prescribed by *Tang Lv* (*Tang Code*) that for cases in which the theft was committed among “Si Ma” (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree) and “Xiao Gong” (the person wearing the mourning apparel of soft sackcloth in the fourth mourning degree), the punishment should be one degree lighter than the ordinary cases; for “Da Gong” (the person wearing the mourning apparel of soft sackcloth in the third mourning degree), two degrees lighter; and for “Qi Qin” (the relatives within the mourning period of 1 year), three degrees lighter. It was stipulated in the laws of Ming and Qing dynasties that for the cases in which thefts were committed among “Si Ma” (the person wearing the mourning apparel of soft sackcloth in the fifth mourning degree), the punishment should be two degrees lighter than that in the ordinary cases; for “Xiao Gong” (the person wearing the mourning apparel of soft sackcloth in the fourth mourning degree), three degrees lighter; for “Da Gong”, four degrees lighter; and for “Qi Qin” (the relatives within the mourning period of 1 year), five degrees lighter. As for the ordinary people who had committed thefts, they should be given the punishment of “Ci Zi” (tattooing words on the faces) in accordance with the laws of Yuan, Ming and Qing dynasties; but for those who had committed thefts among relatives, they should be exempted from that punishment.

5. The affirmation of the principles of “bending criminal laws for ‘Xiao’ (filial piety)” and “bending criminal laws for ‘Qin’ (kinships)”

The rulers in successive dynasties had all flaunted “ruling the country by ‘Xiao’ (filial piety)”, thus; they had advocated “bending criminal laws for ‘Xiao’ (filial piety)” and “bending criminal laws for ‘Qin’ (kinships)”. For instance, it was encouraged for the father to conceal the crimes of the sons and the sons to conceal the crimes of their father by the Confucian school. Since Han Dynasty, the feudal governments of successive dynasties had all accepted the principle of “Qin Shu Xiang Rong Yin” (concealment of crimes among relatives, or, refusing to testify among relatives in court), and it was also ruled in *Han Lv* (*Han Code*) that “crimes should be concealed among kinfolks”. In the fourth year of Di Jie (title of reign) under the ruling of Emperor Xuan of Han Dynasty (89 B.C.), there was an imperial edict which ruled that:

The relations between fathers and sons and husbands and wives are of heavenly nature; even if there are the occurrences of crimes, they would rather die than reveal them, because this is the requirement of love and benevolence, which cannot be disobeyed. From this day on, the sons who have concealed the crimes of parents, the wives who have concealed the crimes of the husbands, and the grandsons who have concealed the crimes of the grandparents shall all be exempted from punishments. Where parents have concealed the crimes of their sons, husbands concealed the crimes of their wives, or grandparents concealed the crimes of their grandsons, even though death penalty should be given to the criminals, the elders can appeal to be heard by ‘Ting Wei’ (the supreme official in charge of judicature).²⁸

²⁸“Xuan Di Ji” (The Biography of Emperor Xuan) in *Han Shu* (*The History of Former Han Dynasty*).

After Tang Dynasty, the range of concealment was expanded, not just limiting to the lineal relatives and spouses. For any relatives who had cohabitated, whether or not they belonged to the scope of “Wu Fu” (relatives within the five degrees of mourning), they were all allowed to conceal the crimes among them, and this even had included the domestic servants. In accordance with *Tang Lv (Tang Code)*, “Nu Bi” (the slave girls and maidservants), and “Bu Qu” (the private army) were allowed to conceal the misconducts of their masters. During the time of Ming and Qing dynasties, the range of concealment had covered the relatives on the wife’s side, the parents-in-law, the sons-in-law, “Nu Bi” (the slave girls and maidservants), and the employed workers. Not only were those who had concealed crimes not guilty, but they could also reveal the information in advance to help the criminals escape; however, this could not be applied to such severe crimes as “Mou Fan” (plotting rebellion or plotting to endanger ‘She Ji’: the country), “Mou Pan” (plotting treason, or, plotting to betray one’s own country, or to go over to another country) and “Mou Da Ni” (great sedition).

In addition, in the cases of the sons or grandsons having committed crimes, with nobody to attend to the elders, they were allowed to appeal for a postponed execution or exemption with petitions, as was prescribed in the laws of Tang, Yuan, Ming and Qing dynasties. Moreover, the punishment of imprisonment and exile could be suspended or implemented after the death of the parents or the elders. In the cases of several brothers having committed the same crimes, one of them could be commuted and left so as to attend to the elders; for anyone who had met the requirements of the abatement from penalty, the punishment of imprisonment or exile should be changed to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes, with the rest penalties redeemed; in this case, if the parents or the elders had died, the commuted one was not to be exiled; nevertheless, for the unfilial crimes, no exoneration was allowed.

The one to be punished could be replaced by anyone among fathers, sons and brothers; this was the so-called “Dai Xing” (substitution of the punished). Although there was no direct stipulation in feudal laws, it was permitted in practice as feudal sovereigns always advocated stressing the ethical guides and virtues and the filial piety. For this reason, those who had taken the place of the criminals to be punished would usually be commuted or pardoned. For example, at the time of Emperor Ming of Han, it was announced in an imperial edict that in the case of someone being punished to be exiled to remote areas, if his parents or half-brothers asked to be punished instead of him, it would be permitted. In the early Ming Dynasty, a man from Shanyang was convicted for a crime and was sentenced to the punishment of “Zhang” (flogging with heavy sticks), but his son requested to take the punishment for him; for this, Emperor Taizu (the founder) of Ming Dynasty specially issued an edict, which stated that “this son has requested to take the punishment for his parents, which is out of true feelings. So, I shall bend the law for this filial son so as to set an example for the people all over the country. Thus, he shall be pardoned.” During the time of Emperor Xianzong of Ming, it was stipulated that “in the case where the criminals are over 80 and have diseases, if they are punished to be exiled permanently, the sons or grandsons shall take the punishment for them.” Therefore,

from then on, it had become an obligation for the sons and grandsons to take the punishment for the elders.

In terms of litigations, based on the Confucian doctrine that “the sons shall not reveal the fathers’ crimes”, it was stipulated in the law in the period of Liu Song in the Southern Dynasties that the “officials (judges) of trials are not advisable to order sons or grandsons to expose the crimes committed by their parents or grandparents; otherwise, this would be the utmost violation of moral ethics.” It was also stipulated in *Tang Lv (Tang Code)* that the kinfolks among whom crimes were concealed should not be forced to testify in trials, and that any chief judges who had violated this should be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for eighty strokes (the punishment was changed to “Zhang” for fifty strokes in Ming and Qing dynasties). In Northern Wei, the sons and grandsons, or the humble and the young who had accused the parents and the elders of serious crimes should be sentenced to death by hanging in accordance with the law. During the reign of Emperor Yingzong of Yuan, the emperor’s son-in-law had accused his father of plotting treason against the state, but the emperor said, “to attend to parents, sons shall conceal the conducts of their parents and not rebel against them. Now you do not remonstrate with me about your father’s fault, but instead, you have reported it to the local authorities. This is not an appropriate conduct of a son.” Therefore, the emperor gave orders to have his son-in-law decapitated.²⁹ During the later period of feudal society of Ming and Qing dynasties, the class contradictions had become daily intensified, which had weakened the constraining forces of rites and rituals. Hence, the punishments on the crime of “Gan Ming Fan Yi” (the seniors are prosecuted by the youngsters) were lighter than those in previous dynasties. Only those who had lodged a false accusation should be sentenced to death, otherwise, they shall only be sentenced to “Zhang” (flogging with heavy sticks) for one hundred strokes and 3 years of imprisonment. In the meantime, it was also stipulated that provisions on “Qin Shu Rong Yin” (concealment of crimes among kinfolks) and “Gan Ming Fan Yi” (the seniors are prosecuted by the youngsters) were not applied to the severe political crimes such as “Mou Fan” (plotting rebellion or plotting to endanger “She Ji”: the country), “Mou Pan” (plotting treason, or, plotting to betray one’s own country, or to go over to another country) and “Mou Da Ni” (great sedition). This not only had demonstrated the characteristics of the times in the later period of feudal society, but also revealed that when there were contradictions between the family and the state or between “Xiao” (the filial piety) and “Zhong” (loyalty), the priority should be placed on the state, the sovereigns, and the loyalty.

From above we could see how the patriarchal power and clan power were affirmed and maintained, and how they were legalized in feudal laws. The law had played a vital role in the long-time continuation of Chinese feudal patriarchal families and the complete integration of the four kinds of feudal power, namely, the political power, the religious power, the clan power and the power of the husband. By legal stipulations, the moral ethics and politics were further incorporated, the

²⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Xin Yuan Shi (The New History of Yuan Dynasty)*.

relationship between the family and state was further compacted, and in the end the patriarchal family had become an organization of sovereignty. So, the patriarchal power and the clan power had become an epitome of the autocratic royalty, and the patriarchs had become not only the legislators, but also the judicators inside clans. They had enjoyed broad rights which were originally possessed by the royal members, and undertaken due obligations to the state. For example, in Han Dynasty, the statutes on lease had taken the patriarchs as the subjects to be regulated, and where fault was made in the acts of leasing, the patriarchs were the ones to be blamed. In Ming and Qing dynasties, if there were occurrences of the “violation of rules in dressing and housing”, the patriarchs should be punished in accordance with the law. For other cases, in which “when religious ceremonies were held by the families in mourning, men and women were mixed together drinking and eating”, the patriarchs would be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for eighty strokes, in order to show that the patriarchs were not only supported, but also demanded by the state, with the purpose to give a full play to the duties and functions of the patriarchs. The reason why the family precepts and clan disciplines were recognized as laws inside clans in feudal countries was that they could not only supplement the deficiencies of national laws, but also embody the consistency of clan disciplines and national laws.

7.4 The Social Causes of Clan-Oriented Ethical Law

The ancient Chinese clan-oriented ethical law could be dated back to quite an early time, which had not only brought wide-range influences but also played a significant role. The ethical relationship of lineage, which was adjusted by the ethical law, had possessed a high level of stability. In terms of the patriarchal and clan power, it had almost started and ended along with the feudal autocratic system itself. Moreover, it was not accidental for the clan-oriented ethical law to be widely accepted by the general public, because it had its more profound causes because of its distinctive characteristics which the other laws had not possessed.

1. The economic cause: the dominated natural economic structure

In feudal society where the natural economy had occupied a dominant position, one household was a production unit. Within the small scale of production, the agriculture and handicraft industry were closely integrated, therefore, “men tilling the farm and women weaving” was a typical portrayal of this economic pattern. The feudal patriarchal families, as the most basic economic organizations in society, were the very social organs formed to fit this economic pattern. The powers which the patriarchs had in managing and supervising the production and disposing of family properties were exactly the requirements of the existence and development of this type of feudal economy featured by a small-scale production. It had exhibited that in the feudal states, the patriarchal families were affirmed in maintaining the privileged positions of the patriarchs, and in adjusting the rights and obligations

among family members according to law, not merely out of political considerations, but also out of the economic purpose to retain the economic reproduction of every single unit. Besides, the long-time existence of feudal patriarchal families was attributed to the secluded and conservative feudal natural economy. Early in the time of Shang Yang Reform in the Warring States period, the political and legal powers had been utilized to establish single households in correspondence with the individual production: “if there are two men in a household which is not divided, the tax on it shall be doubled.” Thus, from then on, the feudal patriarchal families were gradually developed into stable social communities. Meanwhile, the law which had been used to adjust the clan relationships and to maintain the privileges of patriarchs had become an important part of the feudal legal system, just as Li Dazhao had pointed out during the period of “Wu Si Yun Dong” (the May 4th Movement in 1919): “China is a nation based on agriculture... thus, the system of large clans is thriving in China. The large Chinese clan system is the agricultural economic organization of China, which has been the fundamental social establishment of China for over two thousand years”.³⁰

2. The rich cultural soil and long history of the patriarchal clan system

The patriarchal clan system evolved from the clan system which was based on the blood relationships. Early in the last years of Shang Dynasty, the succession of the throne and the patriarchal relationships were closely connected to each other, which had endowed patriarchal relationships with obvious political features. After the Zhou Dynasty was established, in order to consolidate the ruling order in the vast territory and to meet the demand of large-scale enfeoffment, a set of patriarchal system, which was far more complete than that of Shang Dynasty, was established.

The patriarchal system was closely connected with the social estate system in the Zhou Dynasty. The suzerains at various levels possessed not only the clan power, but also the executive and judicial power. All of the most important official posts in the nation were monopolized by the hereditary noble families; moreover, the management system and the administrative layout of the state were also established in agreement with the patriarchal clan system, and the overall ruling net was woven by the lineage of various huge noble families. To a certain extent, the capital of the state was not just the center of politics, but also the site of ancestral temples, which were then the clanish tribunals where clan members were sanctioned by the patriarchs. Through the patriarchal clan system, the royal and clan power were integrated into one, the “family” was interlinked with the “state”, and the intimates were integrated with the nobles, so that “Si” which referred to the activities of sacrificing to the ancestral temples and the state, and “Rong” which referred to the activities of defending the ancestral temples and the state had both become the most important activities of the country, which was expressed in this sentence: “the most important affairs of a state are sacrifice and warfare.”³¹ In accordance with the criminal law, the conducts of

³⁰ *Xin Qing Nian (The New Youth)*, No. 2, Vol. 7.

³¹ “Cheng Gong Shi San Nian” (The 13th Year of Duke Cheng) in *Zuo Zhuan (The Chronicle of Zuo)*.

“Bu Xiao” (being unfilial) and “Bu You” (being unfriendly) were regarded as the most serious crimes of all, and were called the “most abhorrent crimes”. Other crimes, such as “Bu Ti” (not loving brothers), “Bu Mu” (inharmonious), “Bu Yin” (being unmarried) and “Bu Jing Zu” (showing no reverence for ancestors), were also identified as serious crimes due to their violation of the patriarchal ethics.

After ancient China entered the feudal age, the bureaucratic system and the system of “Jun Xian” (prefectures and counties) were formed on the economic basis of the acknowledgement of the privatization of land, which had greatly and directly weakened the political influences of the patriarchal clan system. Nevertheless, the basic spirits and principles of patriarchal clan system were completely inherited and widely spread, which included: the integration of the monarchical power and clan power; the legitimate privileges of the patriarchs; the system of lineal primogeniture and the lower status of women, and the inequality of rights and obligations between the noble and the humble and so on. From the long-time ruling experience, the feudal sovereigns had realized the special functions of patriarchal and clan power, therefore, they had strived to fulfill the task of consolidating the feudal ruling of the specific social organs—families. In this way, they had managed to have the massive clan members constrained and oppressed through complicated patriarchal and clan organizations. It was precisely in consideration of this that the patriarchal power and the clan power was affirmed and protected through various forms of laws by the feudal states by the way of actively building the system of ethical law, and constantly enriching its contents.

3. Confucianism: the solid theoretical foundation of the feudal ethical law

The patriarchal clan system was not only highly praised, but also expounded and exemplified by the Confucian school, so, the patriarchal power was closely integrated with the family and the state. Here were some famous doctrines of Confucianism: “a sky cannot have two suns, a state not two sovereigns, and a family not two patriarchs”; “the foundation of the world is the state and the foundation of the state the family”; “a family should first be put in order so that a country can be well administrated”; and “first, one’s moral character should be cultivated, and then, one’s own house should be put in order, then the state should be well administered, and finally peace may prevail in the world”. In these doctrines, a whole set of the plan of Confucianism as to how to rule a state and manage a family was fully demonstrated. During the time of Emperor Wu of Han, due to the policy of “banning all the thoughts of the non-Confucian schools and espousing Confucianism as the only orthodox ideology of the state”, Confucianism became the dominant thought in society, and began to serve as a guideline for the construction of feudal legality. In Han Dynasty, “Zun Zun Qin Qin” (showing respect to nobility represented by the emperor and showing respect to the relatives represented by parents) was further developed into “San Gang” (three cardinal guides). What was advocated in the theory of “San Gang” (three cardinal guides) was the sanctity of the monarchical power, the patriarchal power and the power of the husband. Anyone who had violated “San Gang” would be regarded as the violation of law and the infringement upon “Tian” (heaven), so he should be severely punished.

The integration of the monarchical and patriarchal power was also demonstrated by Confucianism, which had tried to introduce the patriarchal power into the administrative area by preaching that the monarchical power was the incarnation of the patriarchal power of the whole country for the purpose of having the monarchical power further reinforced. According to “Bao Xuan Zhuan” (The Biography of Bao Xuan) in *Han Shu (The History of Former Han Dynasty)*, “His Majesty is the royal son of ‘Tian’ (heaven) in the heaven and the parent of the common people in the secular world.” In the meantime, Confucianists had advocated “changing the filial piety to the elders into the loyalty to the rulers”, and emphasized that “there is no one that is filial but defies his superiors”. Besides, “a man of noble character conducts filial piety to his elders, so he can practice loyalty to the sovereign”, “so he is considered loyal if he had practiced filial piety to the sovereign”. Consequently, the patriarchal power was also used by the feudal states to strengthen the rule of local administrative authorities, so the official of a “Zhou” (subprefecture) or “Xian” (county), who was regarded as “the person who has treated the common people as his family members”, was often flattered to be the parent official of the common people. This was exactly like what Marx once had pointed out, “As with the fact that the emperor was often respected as the father of all people across the country, the officials under the emperor were also regarded as those to maintain this patriarchal relationship in their own jurisdictions”.³²

In ancient Chinese society in which the feudal order of priority or seniority in human relationships was universally valued, the authoritative teaching based on moral ethics was the key to bring the coordinating and controlling function of the patriarchs and clan leaders to the clan members into a full play. Then, the affectionate ethical relationships in the form of blood ties were transformed into strong legal relationships with rights and obligations as their fundamental connotations through the laws made by the feudal states.

4. The feudal sovereigns’ summary of the experience of the special functions of the patriarchal and clan power

From the long-time ruling experience, the feudal sovereigns had realized the special roles of the patriarchal and clan power in maintaining the national rule, so they had strived to fulfill the task of consolidating the feudal ruling of the specific social organs—families. In consideration of this, while feudal governments had conferred various privileges on the patriarchs to control clan members, they had also required them to assume more obligations, and in the cases of criminal offences, only the patriarchs would be blamed. Especially at the time of political disorder, the patriarchs were demanded to play a critical role in the stabilization of the state. When Wang Yangming in Ming Dynasty had launched a suppression on the peasant uprising, he had demanded by explicit orders that the patriarchs in that area should strictly restrain their clan members, to ensure that “morality and righteousness be encouraged and wrong-doings regulated mutually among themselves”, and that

³² *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 1, People’s Publishing House, 1972, p. 691.

“they should behave themselves so as to obey the official laws and keep thrifty so as to pay taxes”.³³ In the late Qing Dynasty, when Zeng Guofan led his army to suppress the rebellion of “Tai Ping Tian Guo” (Taiping Heavenly Kingdom), he even issued “official seals” (clan licenses) to the patriarchs of big clans in the area of Hunan and allowed them to control part of the local armed forces with the purpose to arrest, interrogate and even kill randomly those clan members who dared to rise in rebellion. This was compared to “controlling the sons and younger brothers of a clan through the fathers and elder brothers of the clan”,³⁴ which had shown that the patriarchal families were not only the ligament of the feudal states to carry out economic exploitations and political oppressions, but also the social foundation to support the autocratic ruling. Thus, it was not difficult to understand why the sovereigns of different dynasties had intentionally applied laws to regulate the ethical relationships, and it was in this way that the ethical relationships was legalized and the dominant position of patriarchal and clan power was guaranteed.

The patriarchs should not only manage the affairs inside families or clans, but also implement laws and rules on behalf of the government so as to have the clan members controlled, just as was described in the words: “they have the rights to follow the official laws and to investigate and control the junior and the younger brothers in the clan.”³⁵ In the imperial edict of Emperor Daoguang in Qing Dynasty, it was explicitly announced that “any affairs serious or trivial within a clan shall be judged by the patriarch”, and among the clan members “if there are criminals, the patriarch should have them tied up and handed over to be tried in the local courts of the “Zhou” (subprefecture) or “Xian” (county).”³⁶

In a clan consisted of relatives of the same surname, the kinships gradually evolved into a major social relationship, and the family obligations was gradually turned into legal obligations inside the clan. With the restraint of rigorous ethical relationships, the ordinary members of the clan were almost appendants to the patriarch, so they had lacked the consciousness of legal subjects because it was the patriarch who had represented (was the legal person of) the family.

“Patria potestas” (patriarchal power in Latin) was also established in the ancient Roman law. It was stipulated that the sons and grandsons had the obligation to accept the supervision and punishment of the patriarchs. The patriarchs could exercise guardianship and disciplinary power over their sons and even had the power to have them killed. Consequently, a son had even no rights to conclude contracts with outsiders in his own name. However, once the political interests of the state or groups were involved, the sons of a family would not have to undertake the obligations endowed by “patria potestas”, and the family ties were completely surrendered

³³ “Plate Laws of Ten Families to Instruct the Fellow Countrymen of Various Prefectures” in *Wang Wen Cheng Gong Quan Shu (The Complete Works of Wang Yangming)*, Vol. 16.

³⁴ *Zeng Guofan Pi Du (Official Comments on Documents by Zeng Guofan)*, Vol. 1.

³⁵ Chen Hongmou, *Pei Yuan Tang Ou Cun Gao (Accidentally Saved Manuscripts by Chen Hongmou)*, Vol. 40.

³⁶ *Da Qing Xuan Zong Cheng Huang Di Shi Lu (Records of Emperor Xuan Zong Cheng of Great Qing)*, Vol. 181.

to the pure legal relationships. With the expansion of the territory of the Roman Empire and the development of commerce, the system of patria potestas which had regarded the restraint of the behavioral patterns and civil rights of sons as its essential duty could not adapt itself to the changing Roman society. With a greater centralization of judicial powers, patria potestas was gradually restricted by the application of laws, so the family obligations began to give way to legal obligations. By the reign of Constantine the Great, the patriarchal power to kill the offsprings was abolished. At that time, if a father killed his son, he would be sentenced to capital punishment in accordance with the law. In *Gu Dai Fa (Ancient Law)*, the evolution process of patria potestas was described by Maine in the following words:

In the periods of imperial ruling, we have found vestiges of all these powers, but they are reduced and exist within very narrow limits. The unqualified rights of domestic chastisement has become the rights of bringing domestic offences under the cognizance of the civil magistrate; the privilege of dictating marriages has declined into a conditional veto; the freedom of selling has been virtually abolished, and the adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, can no longer be effected without the assent of the child transferred to the adoptive parentage. In short, we are brought very close to the verge of the ideas which have at length prevailed in the modern world.³⁷

Pursuant to the Germanic Law, sons could possess property independently. Even though the fathers had the rights to manage, to profit from and to dispose of the movable properties of their sons, they were not allowed to privately dispose of them without the consent of their sons; otherwise, such conducts would constitute breach of the law, which had indicated that the differences in national conditions and cultural backgrounds between the East and the West had resulted in the divergences both in the patterns of the conflicts between family and legal relationships and in the patterns of the resolutions to these conflicts.

³⁷Maine, *Gu Dai Fa (Ancient Law)*, The Commercial Press, 1959, p. 79.

Chapter 8

Regulating Official by Law, Defining Duties and Obligations

In the autocratic system of feudal China, the rulers must depend on a medium of power to effectively apply their powers to the administration of the country and society and the enforcement of their orders, and this medium of power was the official. Officials were a group of people who had administrated the state, so they were the personified tools to enforce the national functions and powers. Therefore, the so-called “Ren Zhi” (the ruling of man) in ancient China was in essence “Guan Zhi” (the ruling of officials). In order to give a full play to the functions of the ruling of officials, it was necessary that the officials be regulated first. Han Fei once said, “The wise emperors rule officials instead of the common people”, which was regarded by the feudal emperors as the standard for ruling, hence the theoretical pattern was formed: “Ren Zhi” (the ruling of man)—“Guan Zhi” (the ruling of officials)—“Zhi Guan” (regulating officials)—“Li Zhi” (good administration of officials)—“Zhi Min” (regulating the common people). With the fact that the bureaucratic team was the backbone of the feudal autocratic system, and that how well the officials were regulated would affect the rise and fall of the country, so the tradition of regulating officials by law took shape pretty early in order to consolidate the complicated bureaucratic networks and to guarantee their operation. The main contents of the law on regulating officials included: defining the authorities, the power and responsibilities of the officials; setting the behavioral pattern of officials and the mechanism for them to adjust and restrict themselves; implementing a series of systems concerning recommending, testing and supervising the officials so that the appointed officials could show respect to justice, be abided by law, serve the state, and be responsible to the sovereigns. With the advance of social civilization and the development of national institutions, the laws on regulating officials were continuously enriched, contributing to the situation in which there were laws for officials to follow in various aspects such as the organizational construction, the political operation, the economic and cultural planning, the settlement of civil affairs, and the judicial judgments. Thus, the feudal officials had played a crucial part in society. If the administrative laws of ancient China were regarded as an indispensable part of Chinese legal system, then the laws on regulating officials should

be considered as the core of ancient administrative laws, and the two of them were not only mutually promoted but also organically integrated.

8.1 The Appointment and Organization of Officials

The general situation of the appointment and organization of officials in Zhou Dynasty (1046–256 B.C.) over 3,000 years ago was reflected in the early classic “Li Zheng” (On the Proper Government of a State) in *Shang Shu (The Book of Historical Document)*. *Zhou Li (The Rites of Zhou Dynasty)*, written in the Warring States Period, was not only an ideal administrative code in ancient China, but also a rudiment of the historical documents of regulating officials by law and the laws on the arrangement and establishment of officials in the slavery-dominated states in ancient China. Firstly, it had explicitly discussed the purpose of appointing officials: “when the sovereign establishes the state, he should figure out and point out the directions of development, be devoted to the governance of the country, and appoint officials to various posts, so as to have a good control of the common people.”¹ As for this, Jia Yan had commented that the “officials are appointed to rule the common people so as to ensure that the common people will obey the laws and not betray what they have committed to.”

Secondly, “Tian” (heaven), “Di” (earth) and the four seasons were used to name the officials, as was shown in the words: “the officials take the names of ‘Tian’ (heaven), ‘Di’ (earth) and the four seasons, being called ‘Liu Qing’ (Six Ministers).” The six ministers were: “Zhong Zai” (the executive minister) in the Celestial Ministry; “Si Tu” (the minister of civil affairs) in the Terrestrial Ministry; “Zong Bo” (the minister of ritual affairs) in the Spring Ministry; “Si Ma” (the minister of military affairs) in the Summer Ministry; “Si Kou” (the minister of justice) in the Autumn Ministry; and “Si Kong” (the minister of public work) in the Winter Ministry. Since the ancient officials were appointed for specific affairs, the arrangement of officials was “specialized” and the assignment of duties was “clear”. “Specialized” meant that officials for wars, farming, industries and punishments each had their specific responsibilities; “clear” meant that the limits of authorities for officials at various levels were not to mix up with each other. It was concluded in these words: “each performs its own functions so that every social sector can operate smoothly”.² It was emphasized in “Tian Guan Zhong Zai” (The Executive Ministers) in *Zhou Li (The Rites of Zhou Dynasty)* that the civil affairs should be managed in accordance with “Liu Dian” (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*), meaning that the officials must deal with the political affairs in line with their statutory limits of authorities. The main contents of “Liu Dian” (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*) were as the following:

The first is the Regulating Code, which serves to measure the fiefdoms and the state, to regulate the ministries and to manage the people. The second is the Instructing Code, which serves to consolidate the country, to instruct the ministries and to civilize the people. The

¹“Tian Guan Zhong Zai” (The Executive Ministers) in *Zhou Li (The Rites of Zhou Dynasty)*.

²*Ibid.*, annotated by Zheng Xuan.

third is the Ritual Code, which serves to harmonize the country, to unite the ministries and to bring the people together. The fourth is the Governmental Code, which serves to appease the country, to rectify the officers, and to bring equality to all people. The fifth is the Punishment Code, which serves to guide the country, to punish the officials, and to correct the people. The sixth is the Labor Code, which serves to enrich the country, to appoint the officials, and to nourish the people.³

Lastly, not only were there a fixed number of posts for the six ministers, there were also a fixed number for the officials affiliated to the six ministers. In the commentary on *Zhou Li (The Rites of Zhou Dynasty)*, Zheng Xuan wrote that “there are 60 officials in each of the offices of the six chief ministers, totaling 360 officials.” There were also clear divisions of duties for the officials affiliated to the six chief ministers, and “each of them has a specific field to play his role”. Although the records concerning the appointing of officials and establishment of systems in *Zhou Li (The Rites of Zhou Dynasty)* contained some ideal elements of the people in the Warring States Period, there were still some historical relics in them; besides, they had exerted profound influences on the later dynasties.

In Qin Dynasty, the inheriting system of officialdom and salary was abolished, and it was replaced by the bureaucratic system in which officials could be freely appointed by the rulers. After China was united in Qin dynasty, “the systems are established and laws are enforced” so that “the disciplines and rules of conduct” be propagated and “the country governed”. Not only was the highly centralized administrative system established, but the feudal officials were imposed with effective control and regulation. In terms of the organization of the bureaucratic team, the officials were appointed in accordance with law, and the procedures and qualifications for official posts were stressed. Since the redundant officials of the six states were massively dismissed after they were annexed, even though the centralized administrative organization was largely expanded, there was no obvious increase in the overall formation. In Qin Dynasty, those who had made tax payments with grains or who had defeated the enemies in the battles could be ennobled, but they were not granted with official posts. Nevertheless, differences still existed between official posts and noble titles; and only when those who had possessed noble titles reached certain levels, could they become officials.

It was different in Han Dynasty. Apart from the recommendatory system, the selecting system and other approaches to appoint officials, the system of appointing the descendants with aristocratic background was also practiced in Han government, as was said in the sentence: “the ministers recommend their sons to be officials”.⁴ At the time, it was a very prevalent common practice that people could become officials by means of paying money, which had provided a hotbed for the redundancy and corruption of officials. According to “Zhi Guan” (State Officials) in *Tong Dian (The General Codes)*, during the reign of Emperor Ai of Han (27–1 B.C.), the number of officials, up from “Cheng Xiang” (the Prime Minister) down to the local officials, in

³“Da Zai” (name of an ancient official) in “Tian Guan Zhong Zai” (The Executive Ministers) in *Zhou Li (The Rites of Zhou Dynasty)*.

⁴“Ji An Zhuan” (The Biography of Ji An) in *Han Shu (The History of Former Han Dynasty)*.

“Fu” (prefecture) and “Zhou” (subprefecture) had amounted to 130,285. In Eastern Han Dynasty (25–220 A.D.), for the sake of containing further expansion of the bureaucratic class, it was stipulated that in counties close to the borders, if the population had reached over 100,000, one person who was “Xiao Lian” (those who were noted for their filial piety and moral records) should be recommended each year; if the population was less than 100,000, one should be recommended every 2 years; if the population was less than 50,000, one should be recommended every 4 years. Besides, there was also an age limit for the person recommended. At the same time, the regular assessments of officials and the retirement of old officials were adopted, in an attempt to stabilize the organization of officials and to guarantee the quality of the bureaucratic class.

In Tang Dynasty (618–907 A.D.), the appointing and organization of officials was further legalized and systematized. During that period, the appointment and assignment of duties of the officials were mainly issued in the form of “Ling” (order or ordinance), for instance: “in the 7th Year of Wu De (Emperor Gaozu of Tang, 624 A.D.), an ordinance was issued so as to set up the official posts: ‘Tai Wei’, ‘Si Tu’ and ‘Si Kong’ as ‘San Gong’ (the Three Councilors: heads of the three important organizations in ancient China: “Tai Wei”: the minister of defense; “Si Tu”: the minister of civil affairs and “Si Kong”: the minister of public work, the three together functioning as the prime minister of the state); ‘Shang Shu Sheng’: The Department of Secretary, ‘Meng Xia Sheng’: the organization in charge of examining the imperial edicts in ancient China, ‘Nei Shi Sheng’: or ‘Zhong Shu Sheng’, the office in charge of drafting imperial edicts, ‘Mi Shu Sheng’: the office in charge of Confucian classics, ‘Dian Zhong Sheng’ (the official in charge of the emperor’s accommodation), and ‘Nei Shi Sheng’: the office in charge of the internal affairs of the palace) as ‘Liu Sheng’ (The Six Government Offices); ‘Ci Yu Shi Tai’ (the secondary censorate), ‘Ci Tai Chang’ (the secondary court of sacrificial worship), ‘Guang Lu’ (The Banqueting Court), ‘Wei Wei’ (The Court of Sacrament), ‘Zong Zheng’ (The Court of Imperial Affairs), ‘Tai Pu’ (The Court of Imperial Carriages and Horses), ‘Da Li’ (The Court of Judicial Review), ‘Hong Lu’ (The Court of State Ceremonials), ‘Si Nong’ (The Court of Agricultural Affairs), ‘Tai Fu’ (The Court of Finance and Trade) as ‘Jiu Si’ (the Nine Bureaus); ‘Ci Jiang Zuo Jian’ (The Secondary Bureau of Palace Construction); ‘Ci Guo Zi Xue’ (The Secondary Bureau of Education); ‘Ci Tian Ce Shang Jiang Fu’ (The Secondary Bureau of Senior Military Affairs); ‘Ci Zuo You Wei’ (The Second and First Secondary Bureaus of Guards), ‘Zuo You Xiao Wei’ (The Second and First Bureaus of Bodyguards), ‘Zuo You Ling Jun’ (The Second and First Bureaus of Commanding Officers of Imperial Guards), ‘Zuo You Wu Hou’ (The Second and First Bureaus of Public Security), ‘Zuo You Jian Men’ (The Second and First Bureaus of Sentries), ‘Zuo You Tun’ (The Second and First Bureaus of Garrison Reclamation), and ‘Zuo You Ling’ (The Second and First Bureaus of Leading Officers) as ‘Shi Si Wei Fu’ (the Fourteen Bureaus of Guards). In ‘Dong Gong’ (The Eastern Palace) were arranged ‘San Shi’ (Three Masters: ‘Tai Shi’, ‘Tai Fu’ and ‘Tai Bao’, all three are the teachers of the prince), ‘San Shao’ (Three Deputy Ministers), ‘Zhan Shi Fu’ (the office in charge of imperial family affairs), and the two offices of ‘Men Xia’ (the subordinates of the local magistrates)

and ‘Dian Shu’(the office in charge of stored books); ‘Ci Nei Fang’ (secondary office in charge of palace affairs), ‘Ci Jia Ling Si’ (secondary office in charge of royal family affairs), ‘Lv Geng Si’(office in charge of palace music and punishments), ‘Pu Si’(office in charge of royal horses and carriages), ‘Ci Zuo You Wei Lv Fu’ (The Second and First Secondary Offices of Guards), ‘Zuo You Zong Wei Lv Fu’ (The Second and First Offices of Clan Guards), ‘Zuo You Yu Hou Lv Fu’ (The Second and First Office in Charge of Mountains and Rivers), ‘Zuo You Jian Men’ (The Second and First Offices of Sentries), and ‘Zuo You Nei Lv Fu’ (The Second and First Offices of Imperial Household) as ‘Shi Shui Fu’ (the Ten Offices of Daily Imperial Affairs). Under princes and dukes, the ‘Fu Zuo Guo Guan’ (the affiliated officials) was set up. Under princesses, ‘Yi Si’ (an office in charge of the affairs of princesses) was set up, which was also one of the official agencies in the capital; the officials in ‘Zhou’ (subprefecture), ‘Xian’ (county), ‘Zhen’ (towns), ‘Shu’, ‘Yue’, ‘Du’, ‘Guan’, and ‘Jin’ are all serving in the local official posts”.⁵

The number of officials in various posts was also specified mainly in the form of “Ling” (order or ordinance). Taking “San Shi” (Three Masters: “Tai Shi”, “Tai Fu” and “Tai Bao”, all three are the teachers of the prince) and “San Gong” (the Three Councilors: heads of the three important organizations in ancient China: “Tai Wei”: the minister of defense; “Si Tu”: the minister of civil affairs and “Si Kong”: the minister of public work, the three together functioning as the prime minister of the state) as examples, in *San Shi San Gong Tai Sheng Zhi Yuan Ling (Ordinance on Officials in the Offices of Three Masters and Three Councilors)* under the Reign of Kai Yuan (Emperor Xuanzong of Tang, 713–741 A.D.), it was stipulated that:

There shall be one ‘Tai Shi’, one ‘Tai Fu’, and one ‘Tai Bao’ (all three are the teachers of the prince). The three masters of exemplary virtues shall set examples to the whole country. There shall be one ‘Tai Wei’, one ‘Si Tu’, and one ‘Si Kong’, and the three councilors shall manage the state, discuss national affairs, and balance the ‘Yin’ and ‘Yang’ (the two opposing principles in nature, the former feminine and negative, the latter masculine and positive). In the activities of sacrificing, ‘Tai Wei’ shall be responsible for the second libation, ‘Si Tu’ shall provide the utensil, and ‘Si Kong’ shall do the sweeping. For officials lower than “San Shi” (Three Masters: “Tai Shi”, “Tai Fu” and “Tai Bao”, all three are the teachers of the prince), if no one appropriate could be appointed, then the position shall be vacant.⁶

As an important administrative legal code, *Tang Liu Dian (The Six Statutes of Tang Dynasty)* was also a complete law on the appointment and organization of officials. “The officials are regulated by codes, and the affairs are managed through officials” who “performed their duties and administrated affairs accordingly”. In terms of the establishment of officials, the guiding ideology was “granting officials positions according to their abilities and making the administration simplified”. It was stipulated in *Tang Liu Dian (The Six Statutes of Tang Dynasty)* that “every official post should be set up with a fixed number of

⁵“Zhi Guan Zhi” (The Record of State Officials) in *Jiu Tang Shu (The History of Old Tang Dynasty)*.

⁶Noboru Niida, *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House, 1989, p. 24.

personnel. In the 23th Year of Kaiyuan, an edict was issued, and according to which the supplementary officials at all levels were too redundant, so, over ten government offices were ordered to be revoked, and over three hundred redundant and unserviceable officials dismissed. In addition, the number of personnel had been presented in the memorial in detail, and the specific information about the heads of each specific department and those which are not completed had also been arranged according to the ordinance.” For example:

“*Shang Shu Sheng*” (The Department of Secretary): one “Ling” (Chief), one “Zuo Cheng Xiang” (The Second Prime Minister), one “You Chengxiang” (The First Prime Minister), one “Zuo Cheng” (The Second Assistant Officer), one “You Cheng” (The First Assistant Officer), one “Zuo Si Langzhong” (The Second Secretary), one “You Si Langzhong” (The First Secretary), six “Du Shi” (deputies), six “Zhu Shi” (staff), eighteen “Ling Shi” (subordinates of Shang Shu), thirty-six “Shu Ling Li” (junior officials), six “Ting Zhang” (village officials), and fourteen “Zhang Gu” (subordinates of central government officials).

“*Yu Shi Tai*” (The Censorate): one “Da Fu” (senior official), two “Zhong Cheng” (Assistant Officers, subordinates of Da Fu), four “Shi Yushi” (executors, the assistant of Zhong Cheng), one “Zhu Bu” (a subordinate to the chief in charge of the official documents and ancient records or books), two “Lu Shi” (office clerks), fifteen “Ling Shi” (subordinates of Shang Shu), twenty-five “Shu Ling Shi” (junior officials), six “Ting Zhang” (village officials), and twelve “Zhang Gu” (subordinates of central government officials). In the court are arranged six “Shi Yushi” (executors, the assistant of Zhong Cheng), eight “Ling Shi” (subordinates of Shang Shu), and ten “Shu Ling Shi” (junior officials); ten “Jian Cha Yu Shi” (the supervisory censors), and thirty-four “Ling Shi” (subordinates of Shang Shu).

Officials in “Zhou” (subprefecture) and “Xian” (county): one “Ling” (Chief), one “Cheng” (the assistant officials), one “Zhu Bu” (a subordinate to the chief in charge of the official documents and ancient records or books), one “Wei” (a military officer), one “Lu Shi” (clerk), two “Si Hu Zuo” (officers in charge of revenue), with four “Shi” (secretaries) and one “Zhang Shi” (accountant); two “Si Fa Zuo” (judicial officers), with four “Shi” (secretaries); six “Dian Yu” (correctional officers); four “Wen Shi” (interrogators); eight “Bai Zhi” (staff); one “Shi Ling” (officials in charge of commercial districts), one “Shi” (secretaries), and two “Shuai” (local senior official); one “Bo Shi” (instructors), one “Zhu Jiao” (assistant), and twenty “Xue Sheng” (apprentices).

From the fixed number of officials provided in *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, it could be seen that the administration at that time was more simplified. In “Shang Shu Sheng” (The Department of Secretary) which was the central executive branch of the state with 6 boards and 24 departments, the total number of officials up from “Shang Shu” (the minister) down to “Zhang Gu” (staff), was 1,292. The number of personnel in “Zhong Shu Men Xia” (the supreme organization in charge of the state affairs in ancient China) was altogether less than 665, which could not only economize the administrative expenditure by paying fewer salaries to the officials, but also improve the administrative efficiency. From the period of Emperor Gaozu of Tang (628–683 A.D.), the bureaucratic organizations began to swell. In general, however, in the form of “Ling” (order or ordinance), strict restrictions were set by the Tang governments on the number of officials at various levels and in various departments from the central government to the local governments. *Tang Ling (The Orders of Tang Dynasty)* consisted of 33 chapters, among which the orders on the appointment and organization of official

personnel accounted for six chapters, which were the largest among all the ordinances. It had particularly provided in detail for the organizations and ranks of all types of officials in all branches including “Liu Wai Zuo” (the official not included in the nine-rank) and “Shi” (secretaries), and demanded this setting up to be practiced strictly. Anyone who had violated the orders of the appointment and organization of the official personnel and arranged officials who had exceeded the fixed number without authorization would be given the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes to 2 years of imprisonment in accordance with *Tang Lv (Tang Code)*.

The simplification of the organization of officials in Tang Dynasty had brought about relatively higher administrative efficiency, so that the national affairs could be handled within the legal period of time, or, within the so-called “limit of time”. In *Rong Zhai Sui Bi (Essays Written in Rong House)*, writer Hong Mai in Song dynasty had commented that the administrative efficiency of Tang Dynasty was “beyond the reach of the later generations”. In *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, it was regulated that:

For any affair received by all departments, on the notification, the issuing date is printed and the time limit regulated. The time limit for receiving is one day and that for reporting is two days (if the affair is an emergency such as sending prisoners, it shall be handled upon its arrival). For a minor affair, the limit is five days (this type of matter does not need to be reviewed); for an intermediate affair, the limit is ten days (this type of matter involves reviewing prior cases and certain questionings); for an important affair, the limit is twenty days (this type of matter involves calculating accounts and certain consultations); for a jail case, the limit is thirty days (this type of matter involves settlement from superior decisions) and the settlement of urgent matters shall not be regulated.⁷

Harsh punishments should be given to anyone who had caused serious results due to the violation of time limits. For example, if the messenger had delayed his journey, and thus led “more than one resident, soldiers, guards, recruited people and border soldiers and those garrison soldiers to be taken prisoners”, he should be sentenced to death by hanging.⁸ Among the large number of official documents of Tang Dynasty discovered in Dun Huang and Turpan, there were many official notes labeled with dates, and those dates of implementation and judgment were mostly in accordance with the statutory time limit.

The legislation on the organization of officials in Song Dynasty generally followed the pattern of those in Tang Dynasty. Nonetheless, due to the increase of enrollment in the imperial examinations and the fact that anyone could become an official once he was accepted, the total number of officials rose sharply. In addition, a great number of people from the autocratic families were easily appointed, which had given rise to the situation that the “official positions were different from the duties, and their official titles were out of line with their performances”. It was a

⁷“Shang Shu Du Sheng” (or Shang Shu Sheng: The Department of Secretary) in *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, Vol. 1.

⁸“Yi Shi Ji Chen” (Messengers who has delayed the journey) in “Zhi Zhi” (The State Office System) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

disorganized bureaucratic system in which “Chai Qian” (the commissioners) was in actual possession of the powers which had led to the situation that “nine out of ten of those who occupied official posts did not know their duties and responsibilities”.⁹

The central administrative organs were largely reformed in Ming and Qing dynasties: “Zhong Shu Sheng” (the supreme organization in charge of the state affairs) was abolished; the post of “Zai Xiang” (prime minister) which could be traced back to the Warring States Period was repealed and replaced by the post of “Dian Ge Da Xue Shi” (Imperial Grand Secretary); meanwhile, “Yu Shi Tai” (The Censorate) was transformed into “Du Cha Yuan” (The Court of Censors), under which “Tong Zheng Shi Si” (The Transmission Office) was established, with the admixture of a series of Manchu bureaucratic establishments; as to the laws on the organization of officials, it was further standardized based on the revision of records of laws and systems of Ming and Qing dynasties.

Ming Hui Dian (*The Collected Statutes of Ming Dynasty*) in which “the laws and decrees of successive dynasties were collected and the rules and regulations of the time were made had been regarded as the great classics and the fundamental law of the whole generation” which was “abided by hundreds of departments and respected by later generations”. As to the layout of *Ming Hui Dian*, with “the bureaucratic system of Ming Dynasty as the outline”, and “the matters, numbers, forms of rites and hierarchy as the table of contents”, it was more comprehensive than *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*). For example, in “Li Bu” (Board of Personnel) was arranged one “Shang Shu” (the minister), one “Zuo Shilang” (the second vice minister) and one “You Shilang” (the first vice minister). In each of the subordinate four departments were appointed one “Lang Zhong” (head of a subministry department), one “Yuan Wai Lang” (deputy head of a subministry department), and one or two “Zhu Shi” (staff). At the beginning of Ming Dynasty (1368 A.D.), the capital was Nanjing, but it was moved to Beijing after the enthronement of Emperor Chengzu (1402 A.D.). During the reign of Emperor Renzong of Ming, in Nanjing were still established the subsidiaries of the six boards, which were referred to as The Six Boards of Nanjing, which inevitably had increased the total number of officials. As far as the number of local officials was concerned, in a county were arranged one “Zhi Xian” (magistrate of a county), one “Xian Cheng” (deputy), one “Zhu Bu” (a subordinate to the chief in charge of the official documents and ancient records or books) and one “Dian Shi” (police inspector or warden). There were also a fixed number of officials in other local government offices. For example, there was only one instructor and director in the office of Confucian studies, one clerk in the office of taxation, one instructor in the office of “Yin Yang” studies, one clerk in the office of medicine, one clerk in the office of Buddhist studies and one clerk in the office of Taoist studies.

There were also explicit stipulations on the arrangement, scope and duties of the officials in *Qing Hui Dian* (or *Da Qing Hui Dian: The Collected Statutes of Great Qing*).

⁹“Zhi Guan Zhi Yi” (The Record of State Officials, Part 1) in *Song Shi* (*The History of Song Dynasty*).

It was a distinctive feature of the organization of officials in Ming and Qing dynasties that clerks accounted for a massive number and they were in actual possession of the executive operations. For example, in the 13th year of Emperor Hongwu (1380 A.D.), the bureaucratic system of “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works) was established; in this system, there were altogether 548 officials and petty officials, of which the number of petty officials reached 443, four times of the number of officials. By the end of Ming Dynasty, “the petty officials increased in large numbers with each passing day, with the total number amounted to over a thousand in every county”.¹⁰ In Qing Dynasty, apart from the common officials, some assistants and petty officials were recruited and appointed in every local government office to help deal with the official businesses, as was described in the saying that “the world was shared by Qing rulers and the petty officials”.

In conclusion, the laws on the organization of officials in ancient China either took the form of slip laws, or integrated themselves into administrative codes. Anyway, they were formulated on the basis of the summary of the experience of the organization and construction of administrative agencies, therefore, they were not only the first step for regulating officials in accordance with the law, but also the most fundamental opening chapter of the administrative law of ancient China. It had been revealed in the statutory formation of officials in successive dynasties that the officials in the area of economic management were superior to those in other areas. For example, in Qing Dynasty, the total number of officials in “Li Bu” (Board of Personnel), “Li Bu” (Board of Rites), “Bing Bu” (Board of War) and “Xing Bu” (Board of Punishment) was 620, whereas the number of officials in only “Hu Bu” (Board of Revenues) and “Gong Bu” (The Board of Works) reached 501. This was because the economic management had a wider coverage of affairs, and it was not only the key for the people’s livelihood, but also the foundation of the existence and operation of the state apparatus. Therefore, it could be seen that the size of the formation of officials in ancient China was determined by the complexity or simplicity of official duties and responsibilities, which was very scientific.

Besides stipulating the fixed number of officials, more attention was paid to the defining of the scope of authorities and responsibilities, and the differentiation of the relationships of administrative subordination to improve the administrative efficiency in formulating laws on the organization of officials. Just as what was said in “Zhi Guan” (State Officials) of *Tong Dian (The General Codes)*, “in the establishment of officials, the internal is connected to the external, so that the distance of ten thousand *li* is like the stretch of an arm, and among the mass of common people, the breaths are interlinked.”

The ancient laws on the organization of officials had also demonstrated the profound influence of the autocratic imperial power. For instance, palatines had been established ever since the Zhou Dynasty; in Han Dynasty, there was a

¹⁰Hou Fangyu, “E Li Xu” (The Number of Petty Officials) in *Qing Jing Shi Wen Bian (The Collected Essays of the Statecraft of Qing)*, Vol. 24.

division of the central palace and the outer palace; in Tang Dynasty, the official posts involving the “respecting of the emperor and sacrificing to gods” accounted for almost half of all posts. In addition, only in the position of “Zhu Shan” which was responsible for the preparation of meals for the emperor, there were more than 700 people. In Ming and Qing dynasties, the number of attendants in the imperial palace who served the emperor had increased continuously, because its number could be decided by the temporary edicts issued by the emperor without being limited by the statutory number. Even when it came to the time of the reformation of the bureaucratic system of late Qing dynasty in 1906, the officials serving the emperor still belonged to the category of “Wu Bu Yi” (five things forbidden to be discussed). In the article of “Guan Zhi Yi” (On the State Official System, Part 1), Kang Youwei wrote:

It was in the powerful countries like European countries and America that there are a large number of official posts for the service to the common people and only a few for the service of officials; and it was in the weak countries Turk, Persia and China that there are only a few official posts for the service to the common people and a large number for the service of officials.

However, because this “chronic disease” in the bureaucratic system was caused by the feudal autocratic system itself, therefore, it would only exist and perish along with the autocratic system.

With more complexity of social relationships and the more intensification of class contradictions, the number of officials in “Xing Bu” (Board of Punishment) in charge of judicial powers rose continuously. In Tang Dynasty, “Xing Bu” (Board of Punishment) consisted of four departments; in Ming Dynasty, it was increased to 13 departments; and in Qing Dynasty, 18 departments, with the division of duties more meticulous and the number of officials larger in order to intensify the control of society, to strengthen the legal adjustment and to cope with the severe political disturbances.

There were different laws in each dynasty on the establishment of officials. Besides, during the enlightened periods, it was strictly forbidden to break the statutory number, so anyone who had broken it would be given criminal punishments. For example, in Tang Dynasty, it was stipulated in the law that:

The number for the officials in every post is fixed. Anyone who has arranged officials exceeding the limit or has arranged someone whom should not be arranged shall be given the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes for arranging one person, and the punishment will be one degree severer for having arranged three persons, and the punishment will be two years of imprisonment for ten persons.

The purpose of this stipulation was to prevent the decline of administrative efficiency because of the redundancy of officials, which had reflected the awareness of feudal sovereigns about the disadvantages of redundant officials and their determination to have them contained. Generally speaking, the number of officials should be of certain proportion to the total population. For example, in Tang Dynasty, before the period of Kaiyuan (Emperor Xuanzong of Tang, 713–741 A.D.), the number of officials was 18,809; in the 22nd Year of Kaiyuan (734 A.D.), the

population was 16,163,863, thus, the proportion was 1:2460. In Song Dynasty, before Huangyou (Emperor Renzong, 1049–1054 A.D.), the number of officials was 24,000; in the fifth Year of Huangyou (1053 A.D.), the total population was 22,292,861, thus, the proportion was 1:926. At the beginning of Ming Dynasty, the number of officials was 24,633; in the 14th Year of Hongwu (1380 A.D.), the population was 59,873,305, thus, the proportion was 1:2425. *Li Dai Zhi Guan Biao* (*The Table of State Official in Successive Dynasties*) compiled in the 15th Year of Qianlong of Qing (1749 A.D.) showed that the number of officials was 31,894; the population in the 18th Year of Qianlong (1752 A.D.) was 102,750,000, thus, the proportion was 1:3221. To sum up, the normal proportion of the number of officials to the population should be between 1:2000 and 1:3000. If the number of officials were too large, it would be unbearable for the common people, which usually became the source of unrest. For this reason, the sovereigns had strictly prohibited the breach of the fixed numbers for officials. From the development of Chinese history, it could be seen that during the initial periods of the dynasties and the reign of open-minded rulers, in order to develop production, stabilize society, and promote the administrative efficiency, the rulers usually focused on streamlining government organs and had strictly enforced the established laws on the organization of officials. Even though this could not fundamentally overcome the overall failure of bureaucratic politics—the swelling of the organizations, it had really played the role of restraining. The corruption of a dynasty would inevitably have brought about those situations where institutions were overlapped and redundant officials flooded. Besides, the law on the establishment of officials usually had become a mere formality; therefore, the simplicity or redundancy of the organization of officials had become one of the symbols of the cleanness or corruption of the politics.

8.2 The Appointment, Removal, Examination and Promotion of Officials

After the great social changes of “Li Beng Yue Huai” (the disintegration of rites and collapse of rituals) in the period of the Spring and Autumn (770–476 B.C.) and Warring States (475–221 B.C.), the feudal bureaucratic system in which all civil and military officials were appointed by the rulers was gradually built up. With the aim to win the wars launched to annex other lands, “appointing officials based on their abilities” had become a universal principle in the various states, which could be seen from the principle in *Wei Li Zhi Dao* (*The Way of Being an Official*) recorded on “Qin Jian” (bamboo writing slips in Qin Dynasty): “the abilities of the people should be examined when being appointed as officials”. In the State of Qin, anyone who had the ability to “reclaim land”, “pacify riots” or “contribute to the development of agriculture” could be appointed as an official. In ancient China, the emperors were in control of the power of the appointment and removal of officials, but the officials also had the rights to have others recommended, on which occasion they

should shoulder the responsibility together with the recommended so as to ensure that their recommendations were deliberate and cautious. In “Fan Ju Cai Ze Lie Zhuan” (The Biography of Fan Ju and Cai Ze) in *Shi Ji (The Records of the Grand Historian)*, it was written that “in accordance with the law of Qin dynasty, if someone has recommended an incapable person, he and the recommended one shall be punished respectively for their misconducts.”

With the establishment of the feudal bureaucratic system, the official seal, which had acted as the legitimate credential of officials’ powers, also appeared. It had become a statutory system to grant officials seals at appointments and take them back at removals. According to “Fan Ju Cai Ze Lie Zhuan” (The Biography of Fan Ju and Cai Ze) in *Shi Ji (The Records of the Grand Historian)*, “the king of Qin appointed Fan Ju as the ‘Xiang’ (prime minister), so he withdrew the official seal from the marquis of Rang”, and “due to illness, the marquis of Rang requested to return the official seal of ‘Xiang’ (the prime minister)”. Since the “official seal” was the credential of the power and identity of an official, it was strictly prohibited to have it forged. In *Qin Lv (Qin Code)*, there were provisions on the crime of forging the seals of “Xian Chen” (assistant of county magistrate) and “Se Fu” (a minor official in the county).

Qin Lv (Qin Code) also contained provisions about the legal procedures and requirements for the appointment of officials. For example, if a person was recommended by a current official with his personal guarantee, he would be appointed by the senior officials of administrative institutions of different ranks. However, the “removed officials” could not be reappointed; otherwise, those in charge should be punished with the fine of “Er Jia” (two armors). For an appointed official, only when he had received the credential of appointment, could he take office and attend to businesses; otherwise, he would “be punished in accordance with the law”. The newly-appointed officials were not allowed to bring his old subordinate officials to his new office. In addition, there was specific point of time stipulated in Qin dynasty for the appointment and removal of officials. For instance, “the removal of officials in the level of ‘Xian’ (county) and the twelve ‘Zhou’ (sub-prefecture) should be started on the first day of December, and it should last for three months before it is ended”.¹¹ However, if “an official has died and thus, the post becomes vacant”, it shall be “filled immediately”. Conversely, if the vacant post had not been filled within 2 months, the chief official should be punished.

In Han Dynasty, the recommendatory system and the selection system were adopted as the two main approaches in appointing officials. The recommendatory system was a long-standing system of Han Dynasty in selecting officials, which was started from the “edict of recommending virtuous people” issued in the 11th Year of Emperor Gaozu (196 B.C.). Successively, edicts were also issued by Emperor Hui (195–188 B.C.) and Emperor Wen (180–157 B.C.) to hunt for the gifted men who “are not only filial, respectful and have done excellent work in farming”, “but also virtuous and upright”, and “dare to put forward frank advices”. In the early years of

¹¹“Zhi Li Lv” (Statutes on the Regulation of officials) in “Qin Jian” (bamboo writing slips in Qin Dynasty).

the reign of Emperor Wu, it was ordered that one “person who is noted for his filial piety and moral records” should be recommended in every prefectural state.

The selection system started in Western Han Dynasty (206 B.C.–24 A.D.) and flourished in Eastern Han Dynasty (25–220 A.D.). Not only the officials could be selected by the emperors by issuing edicts, but also be recommended by the councilors, ministers and senior officials in “Zhou” (subprefecture) and “Jun” (prefecture). However, if the one whom they had selected was not competent, they should shoulder the responsibilities together. Besides, the students of “Bo Shi” (instructors) could also become officials by taking examinations, which was called “Lang Xuan” (selection of “Lang Xuan” officials). Those senior officials who had been in office for over 3 years and whose annual salary reached more than 2,000 *dan* (the unit of measurement in ancient China) could recommend one of his sons to be a “Lang”, which was called “Ren Zi” (Appointment of Sons), as was expressed in the words that “sons became ‘Lang’ through the recommendation of fathers”. During the reign of Emperor Wu of Han dynasty, due to financial difficulties, the sales of official posts and titles were practiced, which had broken the path for “the selection of officials by means of their wealth”. Because in the appointment of sons and selection of officials by means of their wealth, the people’s abilities and moral characters had not been taken as a criterion, it was severely criticized and ridiculed by the people at that time.

In Western Han dynasty, the selection of officials was seldom restricted by their native places. For instance, “Tai Shou” (the prefecture chief) of Kuaiji Zhu Maicheng was himself from Kuaiji. Nevertheless, there were restrictions on the social status: the businessmen could not be officials (this stipulation was once abolished during the reign of Emperor Wu of Han dynasty), and the imperial kinsmen could not hold the post of councilors and ministers. Besides, the officials in Han Dynasty had all occupied their posts for a long time without time limits. For example, Yu Dingguo was once in the position of “Ting Wei” (the supreme official in charge of judicature) for 17 years, and Feng Jiaofang had held the post of “Tai Shou” (the prefecture chief) for 27 years.

In the early years of Han Dynasty, in order to strengthen the centralization of power, the emperor had personally appointed the minor officials whose annual salary was only 100 *dan* (the unit of measurement in ancient China) of grain. Later, with the evolution of power relationships, “Cheng Xiang” (the Prime Minister) also possessed the power to transfer senior officials to other posts. The modes of appointment in Han Dynasty included: “Jia”, meaning to act on behalf of someone in a post; “Jian”, meaning to take on other duties apart from one’s own; “Ling”, meaning to hold a concurrent post (for example: “Ling Shangshu Shi”, meaning to hold the concurrent of post of “Shangshu”); “Xing”, meaning to hold the post which was vacant temporarily; and “Shi Shou”, meaning to be formally appointed only after a year of probation. The diversity of the modes of appointment was on the one hand to show the cautiousness in appointing the gifted to be officials; on the other hand, to prevent the excessive expansion of the bureaucratic class, and to avoid financial crisis and the complaint and fury of the common people. In Eastern Han dynasty, the political corruption had made the once prevailing recommendatory

system a mere formality. In the essay “Shen Ju” (Examining Promotions) in *Bao Pu Zi* (*The Master Embracing Simplicity*), Ge Hong wrote:

Those selected ‘Xiu Cai’ (those who passed the imperial examination at the county level in ancient China) are not actually educated, and those recommended ‘Xiao Lian’ (those who were noted for their filial piety and moral records) are actually living apart from their parents; those so-called innocent and upright from poor and humble families are actually as filthy as sludge, and those so-called competent officials who have performed excellently in examinations are actually as timid as rabbits.

During the period of Wei, Jin and Southern and Northern Dynasties, the aristocratic families had enjoyed great legal privileges, which had given rise to the official selecting system of “Jiu Pin Zhong Zheng” (the nine-rank system). This system started with the law of “Jiu Pin” (nine-rank) officials formulated by Chen Qun who was then “Shang Shu” (the minister) of “Li Bu” (Board of Personnel) under the reign of Emperor Wen of Wei dynasty. That was, at the level of “Zhou” (subprefecture) were arranged “Da Zhong Zheng” (the senior official in charge of the appraisal of the officials), and at the level of “Jun” (prefecture) were arranged “Zhong Zheng” (the junior official in charge of the appraisal of the officials); they should evaluate the local officials according to the standard of family status and list them in nine ranks: “Shang Shang” (very excellent), “Shang Zhong” (excellent), “Shang Xia” (not very excellent), “Zhong Shang” (above the average), “Zhong Zhong” (average), “Zhong Xia” (below the average), “Xia Shang” (poor), “Xia Zhong” (very poor) and “Xia Xia” (the poorest). Those from the highest ranks could assume the positions of senior officials, which had resulted in the situation where “there are no poor and humble families at the higher ranks and no aristocratic families at the lower ranks”.

The “Jiu Pin” (nine-rank) system of selecting officials had lasted for over 300 years until it was abolished in Sui Dynasty. Emperor Wen of Sui repealed the selection of officials in “Jun” (prefecture) and “Xian” (county) and the recommendation of officials in towns and villages, instead, established “Xiu Cai Ke” (The Division of “Xiu Cai”), and ordered that in each “Zhou” (subprefecture), three persons should be selected and recommended annually into this division. In the period of Emperor Yang, “Jin Shi Ke” (The Division of “Jin Shi”) (“Jin Shi”: an imperial scholar, a graduate of the imperial examination) was instituted, which had symbolized the establishment of the system of selecting scholars to be officials through imperial examinations.

In Tang Dynasty, in order to adapt to the fast development of feudal economy and bureaucratic politics, the system of selecting scholars to be officials through imperial examinations was meliorated so that medium and small landowners could get access to the political power. Compared with the system of “Jiu Pin” (nine-rank system) which only protected the privileges of aristocratic families, the imperial competitive examinations were more democratic and were a great historic progress because they had enlarged the ruling bases for the centralized power and helped to select a group of famous scholars from the poor and humble families to participate in the political administration, for example, Ma Zhou, Sun Fujia, Zhang Yingsu, and so on. The power of selecting civil officials was unitarily under the control of “Li Bu” (Board of Personnel), whereas the power of selecting military officers was

under the control of “Bing Bu” (Board of War). Those who had passed the imperial competitive examinations should take the examinations of “Hong Ci” (composition of poems, essays and argumentations) organized by “Li Bu” (Board of Personnel), and only those outstanding ones among them could be appointed and started their official careers. Those who did not take such examinations could be convened by “Li Bu” (Board of Personnel) during a certain time and take the examinations of “Shen” (physique: those who were physically straight and tall would be selected), “Yan” (speech: those who were eloquent would be selected), “Shu” (calligraphy: those who wrote beautiful scripts would be selected) and “Pan” (writing: those who wrote better essays would be selected), and those who were qualified could be appointed to fill the vacant official posts. Not only did the central government possess the power to select officials, the chief officials of local authorities in “Zhou” (subprefecture) and “Xian” (county) also had the power to appoint their subordinates and staff that would be given the treatment of selected qualified officials by “Li Bu” (Board of Personnel) as soon as they were assigned to certain posts. In addition, it was one of the obligations of officials above “Wu Pin” (the fifth rank) in the capital, the chief magistrates and “Ci Shi” (feudal provincial or prefectural governor) in various “Zhou” (subprefecture) to select and recommend talented people. Nevertheless, if “the people whom they had recommended were actually incompetent” or “if they had failed to recommend the people whom should be recommended”, they would be sentenced to 1 year to 3 years of imprisonment.

To cultivate the reserve forces of feudal bureaucrats, schools were built in large scale both at the central and local levels. During the reign of Emperor Xuanzong of Tang (712–756 A.D.), laws on the national education and the systems of schools were formally written into *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*), and the details about teachers, the fixed number of enrollment, the targets of enrollment, the contents of study, and the treatments on teachers and students in various schools were stipulated. As a matter of fact, the schools in Tang Dynasty had played a significant role in the education and cultivation of the bureaucratic reserve forces.

For those official posts requiring expertise, there were particular procedures of official selections. For instance, the officials of special techniques should be selected and appointed by the department to which they belonged, and the appointment should be reported to “Li Bu” (Board of Personnel) for records. As far as the appointment of judicial officials was concerned, “Shang Shu” (the minister) of “Li Bu” (Board of Personnel) should consult with “Shang Shu” (the minister) of “Xing Bu” (Board of Punishment) and then made decisions together about the appointment. As for the appointment of “Tai Chang Bo Shi” (chamberlain for ceremonials erudite), “Shang Shu” (the minister) of “Li Bu” (Board of Personnel) should consult with “Tai Chang Qing” (the Minister of Sacrificial Worship) and then made decisions.

The appointment of officials should be confirmed by “Gao Shen” (the diploma for official appointment) which was used as the legal credential. In accordance with *Tang Lv* (*Tang Code*), “Gao Shen” was generally drafted by “Zhong Shu She Ren” (the official in charge of drafting imperial edicts) in “Zhong Shu Sheng” (the supreme organization in charge of the state affairs), about which there were certain

specifications. However, after the middle of Tang Dynasty, the officials became redundant and corrupted, so those who had the power to appoint officials got a lot of blank “Gao Shen” (the diploma for official appointment), filled them arbitrarily, and granted to those who had bribed them.

At the beginning of Song Dynasty, the civil-service examination system of Tang dynasty was inherited. Originally it was held once a year, but was changed into once every 3 years from the time of Emperor Yingzong, and since then, the system was established. Besides, the admission quota was increased so as to positively recruit the capable talents for the purpose of further strengthening the centralization of power and enlarging the bases for government. Moreover, once a person was admitted, he would be appointed as an official and his official rank would be defined according to his rank in the examination. Apart from the civil-service examination system, the system of “En Yin” (the appointments of the descendants of those who had made great contributions to the state) was also carried out, according to which, the sons or kinfolks of imperial lineage and senior officials could all be granted official posts because of the merits of their families. The officials appointed through this approach had amounted to a large number in Song Dynasty, and most of them were extremely corrupted.

Originally in Song Dynasty, the power of selecting officials was shared by the “Zhong Shu Sheng” (the supreme organization in charge of the state affairs) and “Shen Guan Yuan” (The Institute of Official Examination). After the Yuanfeng Reform (1078–1085) of Emperor Shenzong, the power of selecting civil officials was granted to “Li Bu” (Board of Personnel), whereas that of selecting military officers to “Bing Bu” (Board of War).

When it came to Ming Dynasty, “the system of selecting civil and military officials through examinations” was established in 1364. In the 15th Year of Emperor Hongwu (1382), it was set that the imperial examination should be held every 3 years, and that those who were admitted to “Jin Shi” (an imperial scholar, a graduate of the imperial examination) should be granted official posts. Apart from the system of examinations, another two approaches of becoming officials included being recommended and being employed as petty officials. For civil officials, if they had rendered meritorious service, they could have their sons appointed; for military officers, their posts could be succeeded by their sons. From the time of Emperor Daizong of Ming, official posts could also be obtained by those who had donated money and grains. And during the time of Emperor Muzong, those who had paid money could get themselves into government posts, which was then called “Li Jian”, and which had doubtlessly corrupted the ethos of officials greatly. In Ming Dynasty, the power of selecting officials was also shared by “Li Bu” (Board of Personnel) and “Bing Bu” (Board of War). Besides, the procedure in which the officials were directly appointed by the emperor was called “Te Jian” (Special Selection), and the procedure in which officials were selected by “Li Bu” (Board of Personnel) was called “Ting Xuan” (Ordinary Selection); the procedure in which someone was selected by the local officials of “Zhou” (subprefecture) or “Xian” (county) to fill a vacant post was called “Xing Qu” (Local Recommendation), and the procedure in which the local officials in “Zhou” (subprefecture) or “Xian”

(county) passed examinations and then got themselves appointed was called “Kao Xuan” (Selection through Examinations). In addition, the appointment procedures which were applied to the senior officials above “San Pin” (the third rank) also included “Ting Tui” (Recommendation by the Imperial Court) and “Bu Tui” (Recommendation by the Department). Besides, the appointment of officials was also restricted by their qualifications and places of birth. Generally, the chief officials of “Zhou” (subprefecture) or “Xian” (county) were not allowed to assume their offices in their places of birth. In terms of the modes of appointment, apart from “Shi Shou” (formal appointment), there were “Shu”, “Shi”, “Jian”, “She” and “Li” (all meaning holding concurrent posts), and those who held concurrent posts could also get salaries.

In Qing Dynasty, the civil-service examination system was still the formal approach of selecting officials. In addition to regular subjects, some special subjects could also be the contents of examinations, such as “the subject of ‘Bo Xue Hong Ci’” (an imperial examination taken by people with literary reputation recommended by local officials or gentry) and “the special subject of economy”. Some posts, such as those in “Zhan Shi Fu” (the office in charge of imperial family affairs), “Han Lin Yuan” (The Hanlin Academy), and various departments under “Li Bu” (Board of Personnel) and “Li Bu” (Board of Rites), could only be assumed by those who had passed the imperial examinations. The officials directly appointed by the emperor were called “Te Jian” (Special Selection), and the officials from the joint recommendation by senior officials were called “Hui Tui” (Joint Recommendation). The sons of the officials who had served meritoriously or who had died martyrs could get appointed because of their fathers’ contributions. Besides, those who were able, virtuous and honest could also become officials through recommendations. For example, Emperor Qianlong once ordered his court officials many times to secretly recommend those who were able and virtuous to be officials.

In addition, the system of appointing officials according to their donations was also widely practiced in Qing Dynasty. In the 13th Year of Emperor Kangxi (1673), in order to suppress the “San Fan” (The Three Feudatories) rebellion, donations from the general public were required to supplement the military expenditures, and those who had donated money would be granted official posts, so within 3 years, over 500 people had become officials by means of donations. In order to prevent the mediocre officials from disturbing the common people, it was stipulated in the law that:

If the officials originally appointed through donations have been in office for three years, the competent ones among them shall be promoted or transferred according to particular cases, whereas the incompetent ones shall be impeached and punished.¹²

Nevertheless, it was impossible for this stipulation to be implemented in practice. It was true that the system of appointing officials according to donations had provided extra fiscal revenues for the Qing government, but it had also caused the vicious redundancy of feudal bureaucratic institutions and resulted in the phenomenon that

¹²“Xuan Ju Zhi” (Records of Official Selection) in *Qing Shi Gao* (*The History of Qing Dynasty*).

“officials have become unsatisfied with their lower positions, scholars become impatient with their studies, and everyone rambled in disorder to seek fame and money”.¹³ Therefore, the ethos of officials was further degraded.

The modes of official appointment in Qing Dynasty included: “Shu Zhi” (appointment after probation), meaning that the newly appointed officials could only be formally appointed if they had proved competent in 2 years of probation (changed into 3 years later); “Jian Zhi” (holding concurrent posts), meaning that “Da Xue Shi” (the grand secretary) held a concurrent post of “Shang Shu” (the minister), and “Zong Du” (viceroy) held a concurrent post of “Bing Bu Shang Shu” (the minister of the board of war) and “You Du Yu Shi” (the first imperial inspector or censor); “Hu Li”, meaning inferior officials holding concurrent posts of senior officials; “Jia Xian” (addition of titles), meaning an official being granted additionally with a higher official title and extra appointment, which was special treatments from the emperor. The Qing government had prohibited the officials from taking their posts in their native provinces; even the posts in the provinces within the range of 500 *li* from their native provinces were not open for them. The local officials were not selected by “Li Bu” (Board of Personnel), instead, they were selected by “Du Fu” (the viceroys and procurators) and then submitted for approval. The officials in the capital and those outside the capital could be promoted and transferred among them with fixed terms of holding offices.

It was thus concluded that the appointment, removal, examination and election of officials were an important part of regulating officials by law. Consequently, great progress was made in the official selection system from the hereditary official position succeeding system and the “Jiu Pin” (nine-rank) official system, which were dominant by nepotism and pedigree, to the relatively democratic civil-service examination system. The great importance attached by the state to selecting talents and the favorable treatments granted to officials would certainly attract scholars of a variety of expertise to participate in the political administration and to serve the country. Just as what was expressed in “Gongsun Hong Bu Shi Er Kuan Zhuan” (The Biographies of Gongsun Hong, Pu Shi and Er Kuan) in *Han Shu (The History of Former Han Dynasty)*:

The emperor (Emperor Wu) just wanted to give a full play to the civil and military officials and officers, but he could not obtain those talents even though he had longed for them. Thus, he welcomed Mei Sheng with Pu Lun cart, and sighed when he saw the master. From then on, a number of talents responded to his call and many people with extraordinary talents were selected: Bu Shi was originally a shepherd, Hong Yang was promoted from his status as a businessman, Wei Qing was chosen from a group of slaves, and Jin Richan was once one of the captures. So, these talented people all had come from the lower positions such as craftsmen and vendors. Since the government in Han dynasty had managed to obtain persons with extraordinary talents, it began to become strong and prosperous.

From this, it could be seen that it was because of the change of the traditional policy of appointing officials by favouritism that “the success in getting persons

¹³ *Qing Chao Xu Wen Xian Tong Kao (A General Textual Research of the Extended Documents of Qing Dynasty)*, Vol. 93.

with talents” in Han dynasty was ensured. Besides, the emperor was both courteous to the wise and condescending to scholars, which had it possible for those with talents to stand out from the crowd.

The appointment of officials was closely linked to education from the selection of the students of “Bo Shi” (instructors) to be officials in Han Dynasty to the educational system in Tang, Song, Ming and Qing dynasties, which had provided rich sources to supplement the feudal bureaucratic classes. Moreover, the methods of “Mi Feng” (sealed and signed) and “Teng Lu” (transcribing) created in “Ke Ju” (the imperial examination) were both effective examination methods which could be created in feudal times. Those outstanding officials active in the political stage of Northern and Southern Song dynasties, such as Xue Juzheng, Lv Mengzheng, Kou Zhun, Lv Yijian, Fan Zhongyan, Wen Yanbong, Wang Anshi, Li Gang and Wen Tianxiang, all convincingly had demonstrated the achievements and value of this system. However, it must be noted that appointing officials in accordance with law in feudal times was only one side of the coin; because many people could become officials by the privilege of “En Yin” (the appointments of the descendants of those who had made great contributions to the state). In Song Dynasty, for example, the descendants from the privileged families could obtain official posts far more easily than those who went through “Ke Ju” (the imperial examination). The writer Zhao Yi in Qing Dynasty said:

It was true that ‘En Yin’ (the appointments of the descendants of those who had made great contributions to the state) was just a way of rewarding by the imperial court, but none has been so abused in Song Dynasty....Once a person of the family entered the political career, then his sons and other kinsfolk could all get official posts, some even up to ‘Men Ke’ (subordinates of an aristocrat) and ‘Yi Shi’ (ancient doctor), which was really disastrous.... Consequently, the sons of the officials of ‘Jun’ (prefecture) had got official posts in this way, and usually they were still in childhood when they began to earn salaries.¹⁴

Then he added:

At the beginning of Song Dynasty, there was fixed number for each post when appointing officials. Afterwards, the way of recommendation and selection was broadened, and the system of ‘En Yin’ (the appointments of the descendants of those who had made great contributions to the state) was abused, which had led to the existence of a number of corrupted officials and a great burden of salaries. By and by, the situation became hopeless. In the 4th Year of Xianping, under the reign of Emperor Zhenzong, over 195,000 redundant officials were dismissed. From this, the number of the redundant officials who had not been removed could be imagined.¹⁵

What’s more, in the autocratic system, the implementation of appointing officials in accordance with law was usually swayed by personal moral characters and the experiences of emperors.

¹⁴“Song Yin En *Zhi Lan*” (the abuse of the special privileges enjoyed by the descendants of meritorious families in Song Dynasty) in *Er Shi Si Shi Zha Ji (Reading Notes of the Twenty-four Histories: Dynastic Histories from Remote Antiquity till the Ming Dynasty)*, Vol. 25.

¹⁵“Song Rong Guan Rong Fei” (Redundant Officials and Wasted Expenditures in Song Dynasty) in *Er Shi Si Shi Zha Ji (Reading Notes of the Twenty-four Histories: dynastic histories from remote antiquity till the Ming Dynasty)*, Vol. 25.

8.3 The Assessment, Reward and Punishment of Officials

It was proposed as early as in “Shun Dian” (Shun Code) in *Shang Shu (The Book of Historical Document)*, that “the assessments of officials’ performances should be conducted in every three years, and those fatuous officials should be removed, whereas those sagacious ones shall be promoted.” According to Kong Yingda’s commentary, this meant that “those fatuous officials should be dismissed and those sagacious ones promoted” so as to ensure that “all officials appointed are serviceable” instead of dilapidating “the imperial cause”. Besides, according to *Zhou Li (The Rites of Zhou Dynasty)*, early in Zhou Dynasty, the system of “Da Ji” and “Da Bi” (all mean the regular assessments of officials in every 3 years) was put into practice, “in every three years, the performance of officials would be evaluated and rewards or punishments would be implemented respectively”.¹⁶ “The inspectors made notes while listening to the general plans of the officials to have an assessment of their performances”.¹⁷ “At the end of the year, the subordinate officials would be assessed and special rewards would be granted to those who had made meritorious performances..., and the officials in the suburbs and villages would also be evaluated in every three years”.¹⁸ It was in the Warring States Period when the bureaucratic system was established that the assessments of officials began to be systematized and legalized, and starting from that time, the officials were assessed in the way of “Shang Ji” (the reports made by the local officials), meaning that the revenue budget of a year should be written on a wooden coupon, which would be cut into two pieces, and the monarch had the right piece, while the officials had the left one. At the end of the year, the monarch would personally conduct the assessments and made decisions on the removal or promotion of officials based on the ratings of assessments.

The legalist ideology that “the wise emperors rule officials instead of the common people” was adopted in Qin Dynasty; therefore, much stress was laid on the assessment, reward and punishment of officials so as to consolidate the political power of the landlord class. It was stipulated on in *Wei Li Zhi Dao (The Way of Being an Official)* written on “Qin Jian” (bamboo writing slips in Qin Dynasty) that anyone who had practiced all of “Wu Shan” (Five Pieties: loyalty, honesty, decency, benefaction and reverence) “are bound to be rewarded”, whereas anyone who had conducted one of “Wu Shi” (Five Immoralities: ruthlessness, extravagance, forcible occupation, defying superiors without knowing the consequence, and despising scholars but coveting money) are to be severely punished. In especial, the officials were required to respect and abide by the law, and if any official had not made appropriate judgment in a case or had intentionally acted with bias, he

¹⁶“Da Zai” (name of an ancient official) in “Tian Guan Zhong Zai” (the executive ministers) in *Zhou Li (The Rites of Zhou Dynasty)*.

¹⁷“Xiao Zai” (name of ancient petty official) in “Tian Guan Zhong Zai” (the executive ministers) in *Zhou Li (The Rites of Zhou Dynasty)*.

¹⁸“Xiao Si Tu” (the assistant of “Si Tu”) in “Di Guan Si Tu” (name of an ancient official) in *Zhou Li (The Rites of Zhou Dynasty)*.

would be “investigated in accordance with the law”, and would be charged with the crime of “Shi Xing” (infliction of improper penalties), the crime of “Zong Qiu” (conniving at criminals), and the crime of “Bu Zhi” (intentional inappropriate sentences). In the 34th year of Qin Shi Huang (the first emperor of Qin) (213 B.C.), it was recorded that “at that time, the officials who had intentionally made inappropriate sentences were sent to do the manual work of building the Great Wall and the construction work in the area of Southern Yue”.¹⁹ Besides, it was recorded in “Qin Jian” (bamboo writing slips in Qin Dynasty) that “the name list of those who have received grains and other expenditures submitted by ‘Tai Cang’ (the official in charge of the warehouse for ordinary people) in various counties shall be reported together with the account book of the year”,²⁰ and “when grains and forages were put in the warehouses, they shall be recorded in the account book and submitted to ‘Nei Shi’ (the official in charge of revenues)”.²¹ This was called “Shang Ji” (the reports made by the local officials) which was practiced to have the officials examined in Qin Dynasty.

In Western Han and Eastern Han dynasties, the assessments of officials were still mainly in the form of “Shang Ji” (the reports made by the local officials), with the enactment of the slip law *Shang Ji Lv* (*The Statute of Shang Ji*). Accordingly, “grains should be collected by ‘Jun Guo’ (prefectural states) and ‘Shu Xian’ (subordinate counties) in autumn and winter, and then be delivered to the ‘Jun Guo’” (prefectural states) which they attached to.²² The scope and procedure of “Shang Ji” (the reports made by the local officials) were as the following:

From the autumn and winter to the end of the year, every county shall record the acreage of tilling lands by all households, the gaining and expenditures of money and grains, and the number of occurrences of thefts and violence onto the account book. In positions lower than ‘Cheng Wei’ (the county magistrates), the officials shall pay a formal visit to the lords of ‘Jun Guo’ (prefectural states), so that their performances can be assessed. Those who have made meritorious contributions, especially those who have made the most achievements, shall be rewarded by ‘Ting Wei’ (the supreme official in charge of judicature) so that they are encouraged to keep up their excellent performances; those who have made terrible performances, especially those whose performances are the worst, shall be punished by ‘Hou Cao’ (the official in charge of legal affairs) so as to rectify their remissness.²³

As for “Jun Guo” (prefectural states), the officials in charge of “Shang Ji” (the reports made by the local officials) shall carry with them the account books at the end of the year to the capital and present them to the emperor. According to a record of “Zhi Guan XV” (State Official, Part XV) in *Tong Dian* (*The General Codes*), the chief officials of “Zhou” (subprefecture) should “each send one official in charge of

¹⁹“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji* (*The Records of the Grand Historian*).

²⁰*Shui Hu Di Qin Mu Zhu Jian* (bamboo writing slips found in the tomb of Qin in Shui Hu Di), Cultural Relics Publishing House, 1978, p. 42.

²¹*Ibid.*, p. 38.

²²“Bai Guan Zhi” (Records of Officials) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

²³*Ibid.*, annotated by Hu Guang.

‘Shang Ji’ (the reports made by the local officials) respectively at the end of the year to personally report various affairs within their prefectures, which was called the ‘Ji Xie Bu’ (Book of Records)”. For those officials who had made no merits, they would be punished either lightly by reprimand, or severely by removal and demotion. Those who had made merits would be either by following the principle of “Ping Sheng” (being promoted successively) or “Ju Sheng” (being promoted by leaps). The officials of the central government were mostly previous local officials who were promoted, and the position of “Zai Xiang” (the Prime Minister) was usually held by the previous “Yu Shi Da Fu” (Grand Censor) after being promoted.

During Wei and Jin dynasties, the system of the official assessment in Han Dynasty was generally followed with the only difference that the three-year period was changed into one-year period and that the assessment was organized by “Shang Shu” (the minister) and “Shi Zhong” (assistant officers). However, in Southern Dynasties when chaos was caused by wars, the power was seized by the bureaucratic families, and the officials evaluating system became a mere scrap of paper.

Reforms were conducted by Emperor Xiaowen in Northern Wei, and the policy of the “assessments of the performances of officials in every three years..., by removing or rewarding them accordingly” was implemented. Accordingly, the performance of officials under “Liu Pin” (the sixth rank) was assessed by “Shang Shu” (the minister), whereas performance of officials above “Wu Pin” (the fifth rank) was assessed by Emperor Xiaowen and other councilors and ministers. Consequently, “those who have performed excellently would be promoted, while those who have performed poorly would be removed, and those who have performed the average would be retained in their posts.”²⁴

In Tang Dynasty, the evaluation results were classified into nine levels in line with the merits and demerits of the officials. And “Si Shan” (four virtues), namely, “noble character and high prestige, uprightness and prudence, equity in judgments, and diligence and perseverance” was used as the criteria to assess officials classified as “Liu Nei” (officials from the first rank to the ninth rank). Apart from the “Si Shan” (four virtues), there were “27 Best Performances” in dealing with official businesses. For instance, “making reasonable judgments with decisiveness is the best performance for judges”, “leading troops in the right way and there being no faults in defense is the best performance for the commander of troops in the imperial palace”, “making meticulous investigations and appropriate accusations is the best performance for prosecutors”, and so on. So “anyone who has made one of the 27 best performances and possessed the four virtues is identified as a ‘Shang-Shang’ (very excellent) official; anyone who has made one of the 27 best performances and possessed three of the four virtues is identified as a ‘Shang Zhong’ (excellent) official; anyone who has made one of the 27 best performances and possessed two of the four virtues is identified as a ‘Shang Xia’ (not very excellent) official; anyone who has made none of the 27 best performances and possessed two of the four virtues is identified as a ‘Zhong Shang’ (above the average) official; anyone who has

²⁴“Gaozu Xiao Wen Di Ji” (The Biography of Emperor Gaozu Xiaowen) in *Wei Shu* (*The History of Northern Wei Dynasty*).

made none of the 27 best performances and possessed only one of the four virtues is identified as a ‘Zhong Zhong’ (average) official; anyone who has performed recklessly and has no best performance or virtue is identified as a ‘Zhong Xia’ (below the average) official; anyone who has performed capriciously and made inappropriate decisions is identified as a ‘Xia Shang’ (poor) official; anyone who has committed jobbery and neglected his duties is identified as a ‘Xia Zhong’ (very poor) official; anyone who has acted duplicitously and been corrupted by accepting bribes is identified as a ‘Xia Xia’ (the poorest) official”.²⁵

The assessment of “Liu Wai” officials (officials that were not included in the nine ranks) was divided into four levels:

Anyone who has performed diligently and uprightly is a ‘Shang’ (excellent) official; anyone who has dealt with official businesses disinterestedly is a ‘Zhong’ (average) official; anyone who has shown no diligence and perseverance to perform his duties is a ‘Xia’ (poor) official; and anyone who has been corrupted by accepting bribes is a ‘Xia-Xia’ (the poorest) official.²⁶

On the basis of those identified levels of their performances, the officials evaluated would either be promoted with the increase of salaries, or be retained in the current posts with no change in salaries, or be removed. Besides, the fluctuation in the number of households in “Zhou” (subprefecture) and “Xian” (county) would also be one of the factors to decide whether an official should be promoted or removed. The officials responsible for the official assessment in Tang Dynasty had the disposition power, but if the assessment results which they provided were actually not real, or if they had selected incompetent officials, their punishment would be one degree lighter than that for “recommending and selecting inappropriate persons to be officials”.

The official assessment in Tang Dynasty could be divided into two categories: one was the minor assessment which was held once a year; the other was the major assessment which was held once every 4 years. They were hosted by the “Kao Gong Si” (Department of Assessments) under “Li Bu” (Board of Personnel), but a special edict would be issued by the emperor every time in order to appoint those with seniority and prestige from the officials in the capital to be the evaluators. And some special officials would also be sent by “Zhong Shu Men Xia” (the supreme organization in charge of the state affairs in ancient China) to serve as supervisors. In the early days of Tang Dynasty, the assessments of officials were extremely strict, so those whose performances were identified as “Shang Shang” (very excellent) and “Shang Zhong” (excellent) were very rare. However, after the period of Tianbao (title of Emperor Xuanzong, 742–756), wars broke out continuously and social unrest prevailed, which had made it tremendously difficult to implement the assessment system. Nevertheless, it should be noted that it was in Tang Dynasty that the assessment system was brought into the legal orbit by further legalization, which had exerted profound influences on later dynasties.

²⁵ “Bai Guan Zhi” (Records of Officials) in *Xin Tang Shu* (*The History of New Tang Dynasty*).

²⁶ *Ibid.*

The official evaluating system in Song Dynasty was different from that in Tang Dynasty in that the minor assessment was held once a year, while the major one was held once every 3 years. The criteria and contents of assessments were also standardized through various forms of laws. For example, there were seven factors to be considered in evaluating the local officials: the first was whether they had acted appropriately in their posts; the second was whether they had supported agriculture and encouraged cultivation; the third was whether the number of households had increased or declined; the fourth was whether they had brought good to the common people and removed evil from them; the fifth was whether they had made mistakes in investigations and judgments; the sixth was whether they had rectified criminal punishments and the last was the number of occurrences of thefts and violence.

The chief officials of “Zhou” (subprefecture), “Jun” (prefecture) and “Xian” (county) were assessed in accordance with “Si Shan” (four virtues) and “Si Zui” (four best performances):

‘Si Shan’ (four virtues) includes: noble character and high prestige, uprightness and prudence, equity in judgments, and diligence and perseverance. ‘Si Zui’ (four best performances) includes: the best performance in maintaining households: facilitating the increase of population and the number of members in families; the best performance in managing official businesses: leaving no unjust cases and collecting taxes without difficulties; the best performance in encouraging the development of agriculture: supporting agriculture and building water conservancy projects; the best performance in offering support to the common people: getting rid of thefts and violence so as to guarantee peace for the common people and supporting the poor to ensure that they do not have to lead a vagrant life.

Compared with the assessments of local officials, the assessments of court officials were relatively undemanding. According to “Xuan Ju Zhi” (Records of Official Selection) in *Song Shi* (*The History of Song Dynasty*), “any civil or military official who has performed his duties diligently and uprightly, and made meritorious contributions is identified as an excellent official; anyone who has behaved diligently and uprightly is identified as an average official; and anyone who has had no diligence or uprightness and has made mistakes in most officials businesses is identified as a poor official”.²⁷

The assessments of officials in Song Dynasty laid more emphasis on seniority, so that as long as an official had not made mistakes during his office term, he would have the chance to be promoted. For this, Fan Zhongyan used to criticize that “one can be promoted to be ‘Tong Pan’ (official in charge of agriculture under “Zhi Fu”) after he has served as ‘Zhi Xian’ (magistrate of a county) for two office terms, and he can be promoted to be ‘Zhi Zhou’ (subprefectural magistrates) after he has served as ‘Tong Pan’ (official in charge of agriculture under “Zhi Fu”) for two office terms”, which has made “no difference between the sagacious and the fatuous, or between the honest and the corrupted”.²⁸ As a result, the officials mostly would

²⁷“Xuan Ju Liu” (Official Selection, Part 6) in *Song Shi* (*The History of Song Dynasty*).

²⁸“Sheng Wu Nian Shang Zhi Zheng Shu” (A Memorial to the Throne about the Administration in the 5th Year of Tiansheng) in *Fan Wen Zheng Quan Ji* (*The Complete Works of Fan Wenzheng*), Vol. 8.

rather avoid making mistakes than making merits, and they had contended to appear mature and experienced without willing to shoulder responsibilities. Consequently, the whole official circle of Song Dynasty was enveloped by this decadent and gloomy atmosphere.

At the beginning of Ming Dynasty, Zhu Yuanzhang had attached great importance to the regulation of officials after he had learned lessons from the last years of Yuan Dynasty when officials greedily scrambled for personal profits, which had given rise to mass uprisings. In the 11th Year of Hongwu (1378), he ordered that official assessment be made by interviews in “Li Bu” (Board of Personnel).

Anyone who has performed competently and made no mistakes is considered an excellent official; ... anyone who has made faults but performed competently is considered an average official; ... anyone who has made faults and performed incompetently is considered a poor official.

The assessments of officials in Ming Dynasty consisted of two parts, namely, “Kao Man” and “Kao Cha”, the former was held once every 3 years and was held three times every 3 years, and it was divided into three levels: competent, average, and incompetent, based on which the officials would be promoted or removed. The latter was conducted so as to assess the officials of all ranks according to “Ba Fa” (Eight Regulations, namely, greed, ruthlessness, passiveness, imprudence, agedness, sickness, fickleness and incompetence). The officials in the capital were assessed once every 6 years, which was called “Jing Cha”, while the officials away from the capital were assessed once every 3 years, which was called “Wai Cha”. The officials in the capital above “Si Pin” (the fourth grade) should report their achievements and derelictions in administration actively to wait for judgments made by the emperor. The officials below “Wu Pin” (the fifth rank) were to be demoted, or ordered to retire, or ordered to leave office to be civilians according to their performances; nevertheless, it should be specifically presented to and decided by the emperor.

The local officials in “Zhou” (subprefecture) and “Xian” (county) would all be assessed by “Bu Zheng Si” (the government office in charge of civil affairs at the provincial level). The assessments were conducted once every 3 years, with the results summarized to be reported to “Li Bu” (Board of Personnel). Based on these results, the future of an official would be decided, which was called “Da Ji”. After the officials in the local “Bu Zheng Si” (the government office in charge of civil affairs at the provincial level) who were over “Si Pin” (the fourth rank), “An Cha Si” (The Judicial Commission) and “Yan Yun Si” (officials in charge of salt delivery) who were over “Wu Pin” (the fifth rank) had finished their office terms, it would all be determined by the emperor whether they would be promoted or removed. Besides, anyone who had been punished in “Da Ji” (assessments of officials once every 3 years) would never be reappointed. In Ming Dynasty, the official assessment was directed by “Shang Shu” (the minister) and “Du Yu Shi” (the imperial inspector or censor) of “Du Cha Yuan” (The Court of Censors). If what they had reported were false, explanations needed to be offered; but if they had intentionally reported inappropriately, they would be punished for being involved in the offence.

During the time of Wanli (Emperor Shenzong of Ming, 1573–1602), Zhang Juzheng (prime minister of the time) had made positive efforts to rectify regulations on officials. Moreover, he had made the laws of assessments by integrating regular assessments with temporary assessments, and investigations with warnings, because he had emphasized that the official assessment was the will of the people. However, with the corruption of autocratic politics in the later period of Ming Dynasty, not only was the assessment of officials a mere formality, even “the laws of the imperial court were made use of by the officials in doing business with each other to their own advantages”.²⁹

In Qing Dynasty, the method of “Jing Cha” (the officials in the capital were assessed once every 6 years) and “Da Ji” (the officials were assessed once every 3 years) in the Ming systems was both inherited, but the specific methods of assessments were slightly different. The officials in the capital who were above “San Pin” (the third rank) and the local “Zong Du” (viceroy) or “Xun Fu” (procurators) should report their political performances by their own, while the officials below “San Pin” (the third rank) should be assessed by “Li Bu” (Board of Personnel) and “Du Cha Yuan” (The Court of Censors). The criteria of assessments consisted of “Si Ge” (four requirements), which included the administrative ethical practice, administrative ability, political attitude and health conditions, and “Ba Fa” (Eight Regulations, namely, greed, ruthlessness, passiveness, imprudence, agedness, sickness, fickleness and incompetence). Anyone who was given an excellent assessment would be promoted by one level; anyone who was given an average or poor assessment would stay in his former post; anyone who was passive or imprudent would be removed; anyone who was old and sick would be ordered to retire; anyone who had performed blunderingly would be demoted by three levels, and anyone who had proved to be incompetent would be demoted by two levels. “Da Ji” (the officials were assessed once every 3 years) was conducted by levels in “Fan” (vassal states), “Nie” (provincial judiciary), “Dao” (the administration district below the province), “Fu” (prefecture), “Zhou” (subprefecture) and “Xian” (county), and then the results would be submitted to “Du Fu” (the viceroys and procurators). “Da Ji” (the officials were assessed once every 3 years) was divided into two types: “Zhuo Yi” (outstanding) and “Gong Zhi” (average). Those outstanding whose official ranks were above “Zhi Xian” (magistrate of a county) should report themselves to the emperor and waited for the imperial edict; those who had violated “Ba Fa” (Eight Regulations, namely, greed, ruthlessness, passiveness, imprudence, agedness, sickness, fickleness and incompetence) should be either accused or impeached; those who were punished and removed because of “Da Ji” (the officials were assessed once every 3 years) should not be reinstated, and those evaluators who had played favoritism and committed irregularities should be punished in accordance with the law for being related with the offence of recommendations. The punishment of officials was usually judged by “Li Bu” (Board of Personnel) or “Du Cha Yuan” (The Court of Censors) and special cases were all decided by the emperor in the way of issuing edicts. The officials who had

²⁹“Qiu Shun Zhuan” (The Biography of Qiu Shun) in *Ming Shi* (*The History of Ming Dynasty*).

committed the most serious crimes should be sent to be punished by “Bing Bu” (Board of War), and they would either be decapitated or be exiled to garrison the border areas. Moreover, in cases in which the officials were removed from their posts, the severe punishment would be added with the words “never be reinstated” in the judgment, whereas the light punishment would be added with the words “remain in office” in the judgment. Then, as to the demotion of officials, it varied from the first rank to the fifth rank. “Du Fu” (the viceroys and procurators) could impeach or transfer their subordinate officials at any time, but they should report it by presenting memorials to the emperor.

In summary, the assessment of officials was an important content of the law on regulating officials. The principle that “where there are officials, there should be assessments” was the common view of ancient statesmen and philosophers, and it was regarded as the great code of the state. After the assessment, the officials would either be promoted or removed, or either be rewarded or punished, which were all conducted in accordance with the law, and it had played an important role in correcting the malpractices of the officials, maintaining the honesty of the bureaucratic class and making them fulfill their duties in their posts.

8.4 The Salaries and Retirements of Officials

The salaries of officials were also the product of the bureaucratic system and the recompense granted to officials by feudal states, however, they were in essence a reflection of the employer-employee relationship between the feudal monarchs and the subjects. Han Fei said, “The monarch sells official posts and titles, while the subjects sell their wisdom”.³⁰ In the period of Warring States, the salaries given to officials were in the form of material objects. As measurement was different in the six states, salaries were also different from state to state, but they were mainly measured in units such as *dan*, *shi* and *zhong* (all were the units of measurement in ancient China). The senior officials would enjoy the salary of 10,000 *dan* or *zhong* of material objects, but there were also “petty officials with the salary of only several *dou* or *dan*”. The payment of salaries was materially supported by taxes imposed on the residents, which was the economic source of the contradictions between officials and the common people.

In Han Dynasty, the unit *dan* (the unit of measurement in ancient China) was used to define the official ranks and the unit “*hu*” was used to define the amount of the salary. For example, “Cheng Xiang” (the prime minister) ranked at the level of 10,000 *dan* with a monthly salary of 350 *hu*. The salary was mainly in the form of grains, but sometimes grains would be exchanged into money. In Eastern Han Dynasty, money and grains each accounted for half of the total salary.

³⁰“Wai Chu Shuo You Xia” (Outer Categories of Sayings: Lower Right) in *Han Feizi (Master Han Fei)*.

In Tang Dynasty, the officials were firstly appointed and then land granted. The legal standard was as the following:

The civil and military officials with their posts in the capital are granted land according to their duties. The land granted to ‘Yi Pin’ (the first-rank) officials is 12 *qing* (1 *qing* is equal to 6.6667 hectares); that to ‘Er Pin’ (the second-rank) officials is 10 *qing*; that to ‘San Pin’ (the third-rank) officials is 9 *qing*; that to ‘Si Pin’ (the fourth-rank) officials is 7 *qing*; that to ‘Wu Pin’ (the fifth-rank) officials is 6 *qing*; that to ‘Liu Pin’ (the sixth-rank) officials is 4 *qing*; that to ‘Qi Pin’ (the seventh-rank) officials is 3.5 *qing*; that to ‘Ba Pin’ (the eighth-rank) officials is 2.5 *qing*; and that to ‘Jiu Pin’ (the ninth-rank) officials is 2 *qing*.³¹

The officials who were granted land could collect land rent. Secondly, the officials were paid annual salaries in line with the 18 official ranks: the officials at “Zheng Yi Pin” (the full first rank) were given 700 *dan* and those at “Cong Jiu Pin” (the vice ninth rank) were given 30 *dan*. Besides, the salaries of the officials away from the capital were one level lower than those of the officials in the capital. Moreover, the officials were sent a certain number of servants in line with their official ranks. The number of servants sent to “Yi Pin” (the first-rank) officials was 96, whereas that to “Jiu Pin” (the ninth-rank) officials was only two. The last part was the monthly salaries: 24,000 for “Yi Pin” (the first-rank) officials and 1,900 for “Jiu Pin” (the ninth-rank) officials. The legal salaries in Tang Dynasty were not high, in addition, because of the influence of An Shi Rebellion (taking place in China during the Tang Dynasty, from 755 to 763, also known as the Tianbao Rebellion), the national finance was stressful and the national treasury became empty, which had resulted in the situation in which the “officials in the capital could not provide for themselves, and they had to borrow money from the local officials”.³² The official salaries at that time were so low that the officials could not support their families and help the poor; therefore, they had no choice but to bend the laws for their personal interests and to seek private gains through power by accepting bribes, which turned out to be impossible to be prohibited.

When it came to Song Dynasty, an enormous group of bureaucrats was formed, and they were given a large quantity of salaries, including grain, money and silk, in addition, attendants were sent to them and the clothes and grains for these attendants were also provided. Due to the development of commodity-money relationship in Song Dynasty, the material objects in salaries were mostly exchanged into money. During the time of Emperor Shenzong of Song (1067–1085), Wang Anshi came into power, and he had granted munificent salaries to officials in order to make them conduct themselves with dignity, but it was of no avail.

In Ming Dynasty, the salaries granted to officials were rather slim, which consisted of both grains and money. The statutory monthly salary of a “Qi Pin” (seventh-rank) “Zhi Xian” (magistrate of a county) was less than 2 *liang* (1 *liang* is

³¹“Kai Yuan Tian Ling” (The Order for Land Usage during the Reign of Kaiyuan) in Noboru Niida: *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House p. 575.

³²“Tang Dai Zong Da Li Shi Er Nian” (The 12th year of Da Li under the Reign of Emperor Daizong of Tang) in *Zi Zhi Tong Jian (History as a Mirror)*, Vol. 225.

equal to 50 g) silver. The poor salaries had accelerated the corruption of officials in that the high-ranking officials became wealthy by taking graft and low-ranking officials helped themselves get rid of poverty by indulging in malpractices. Consequently, no one had cared about the laws and disciplines at that time.

In Qing Dynasty, the officials in the capital were granted grains apart from the salary, but there was no “Yang Lian” money (bonus granted to them to keep them uncorrupted) for them, which was different from the local officials, who was granted “Yang Lian” money but no grain apart from the salary. In general, the system of slim salaries of Ming Dynasty was continued in Qing Dynasty.

As a system, the retirement of officials had originated from Han Dynasty. According to *Bai Hu Tong Yi (The Virtuous Discussions in White Tiger Hall)*, usually, the officials in Han Dynasty retired at the age of 70, and then they handed over their official posts to the young who were both able and virtuous. After a high-ranking official whose annual salary was more than 2,000 *dan* (the unit of measurement in ancient China) retired, he would enjoy a pension of one third of his original salary. “When an official with a salary of more than 2,000 *dan* retires, his original salary will be divided into three parts, one of which will be continuously granted to him so as to support his life until his death”.³³ And it had become a common practice that the retirement of officials in Han Dynasty was implemented in accordance with the law. “Cheng Xiang” (the Prime Minister) Wei Xian and “Yu Shi Da Fu” (Grand Censor) Du Yannian had both asked for retirement on account of old age. Consequently, they were granted gold, wine and medicines by the emperor and sent to their hometowns in comfortable carriages, which had become a much-told tale at that time.

In Tang Dynasty, the officials also “retired at the age of 70”. It was written in “Zhi Guan Zhi” (Record of State Officials) in *Jiu Tang Shu (The History of Old Tang Dynasty)* that “the officials who are over 70 years old should ask for retirement; if they are healthy, they can still deal with official businesses.” The retired officials whose original rank was above “Wu Pin” (the fifth rank) could obtain pensions half of their original salaries. The retired meritorious officials could even get pensions equivalent to their original salaries with the emperor’s charity. For example, the distinguished “Cheng Xiang” (the Prime Ministers) Fang Xuanling and Song Jing had managed to be granted pensions equivalent to their original salaries after their retirements. During the time of emperor Xuanzong, when the Prince’s subordinates He Zhizhang asked to return to his hometown because of old age, emperor Xuanzong gave him a farewell dinner in person and composed a poem to express his feeling of reluctance to part from him. He said, “The practice of retirement of officials is not merely to show respect to the aged, but also to set examples and educate future generations.” After the middle period of Tang Dynasty, eunuchs had dominated the political power, so conflicts between factions became intensified, which had damaged the system of retirement. In “Bu Zhi Shi” (No Retirement) in *Qin Zhong Yin (Chant in Qinzhong)*, Bai Juyi acutely attacked:

The retirement of officials at the age of 70 is explicitly stipulated in ‘Li’ (rites) and law.
Don’t those who have coveted high positions and great wealth know about this? The poor

³³“Ping Di Ji” (The Biography of Emperor Ping) in *Han Shu (The History of Former Han Dynasty)*.

officials of 80 or 90 years old have lost their teeth and cannot see clearly. In the morning they seek after fame and money, while in the evening they have to worry about their descendants. When wearing the caps, they miss the green thread; when using carriages, they miss the red wheels. Not wearing the golden chop by the waist, they present themselves to the emperor with the back bent. Who does not love wealth and rank and who does not hanker after the emperor's graciousness? They should retire when getting old and part with their official positions. They used to laugh at the old officials who would not retire, but they mostly follow them when they are also old. The sagacious 'Er Shu' (referring to Shu Guang and his nephew Shu Shou) of Han Dynasty, what kind of person on earth you are? When you walked down the road of East Gate, no one followed because of the dust stirred up by you.

In Song Dynasty, the legal retirement age of officials was also 70; nevertheless, most officials still cling to wealth and positions, and even when they were over 70 years old, they would not want to retire. Thus, the imperial court was filled with officials of 80 or 90 years old. Bao Zheng once suggested that those civil and military officials and officers over 70 years old who were not willing to retire "shall be impeached by 'Yu Shi Tai' (The Censorate)".³⁴ In the early years of Song Dynasty, pensions for the retired officials, either the equivalence of half of the original salary or of all of it, were decided by the emperor. In the first year of Chunhua of Emperor Taizong (976), it was stipulated in the edict that: the pension for any retired official should be the amount equal to half of his original salary. In the fifth Year of Xiangfu of Emperor Zhenzong (1002), the edict stipulated: the pension for any retired official should be the amount equal to all of his original salary. In a word, throughout Song Dynasty, the retirement system was comparatively in disorder.

At the beginning of Ming Dynasty, in the first year of Hongwu (1368) an edict was stipulated: "the officials over 70 years old shall retire in accordance with the law, whereas those who are selected to remain in office for special reasons are not included by this provision."³⁵ An edict in the 13th year of Hongwu (1380) stipulated that "the civil and military officials over 60 years old shall retire in accordance with law, and they shall be granted with credentials."³⁶ In the fourth year of Hongzhi of Emperor Xiaozong (1491), it was stipulated that, for any official who had reported to be sick, if he was over 55 years old, he should retire with his official rank; if he was under 55 years old, he should stay with his official rank but attend to no official businesses. The retired officials still had their official ranks, so that they could continue to enjoy the privileges of being exempt from corvee labor; but if one was removed from his official rank to become a common citizen, he would lose this privilege. To the retired officials, either lands, or money, or attendants were granted, but there were no statutory stipulations about this. The old age was not the only reason for retirement in Ming Dynasty, and another reason was returning home to support the aged parents. However, since the time of Wanli, of ten

³⁴"Zhi Guan Zhi" (The Record of State Officials) in *Song Shi* (*The History of Song Dynasty*).

³⁵"Zhi Shi" (Retirement) in *Da Ming Hui Dian* (*The Collected Statutes of Ming Dynasty*) (Gravure), Vol. 13, Jiangsu: Guangling Classics Printing House, 1989, p. 244.

³⁶Ibid.

official posts, nine were vacant, which had made the retirement system cease to have constraining force.

In Qing Dynasty, the officials retired at the age of 60. The retired officials who had hereditary posts were granted pensions according to their official ranks; those who had no hereditary posts were granted pensions equal to half of their original salaries, and those who were under the age of 60 but asked to retire because of illness would be granted no pensions. Besides, it was a special bestowal from the emperor, rather than a statutory stipulation, that the retired officials were promoted in their ranks, or sent to home in carriages, or allowed to pass on their posts to their sons or grandsons, or granted pensions equal to the original salaries.

In a word, the legalization and implementation of the retirement system was conducive to the stability of the establishment of officials, the fostering of the update of the bureaucratic team, and the enhancement of the vitality of administration, moreover, it had reflected the accumulation of the experience of bureaucratic politics.

8.5 The Common Supervision and Legal Restriction of the Officials

With the purpose to ensure that the officials kept loyal to the sovereign, devoted to the state, and diligent in dealing with official affairs, rigorous supervisory systems were implemented in successive dynasties. Since Tang and Song dynasties, the supervision laws had constantly been perfected, and the supervisory organs had gradually grown into networks, which was rather remarkable in both world politics and the history of law.

Early in the Warring States Period, “Yu Shi” (the censor) began to possess the power to supervise officials at all ranks. In “Gu Ji Lie Zhuan” (Biographies of the Virtuous and Eloquent People) in *Shi Ji (The Records of the Grand Historian)*, it was recorded that:

King Wei of Qi banqueted in the seraglio. He summoned Chun Yukun and bestowed wine to him, asking, ‘how much wine at most can you drink?’ Chun answered, ‘I could be drunk after drinking only one *dou* (the unit of measurement in ancient China), and I could also be drunk after drinking one *shi* (the unit of measurement in ancient China, equals to ten *dou*).’ King Wei said, ‘If you would be drunk after drinking only one *dou*, how could you even manage to drink one *shi* (the unit of measurement in ancient China, equals to ten *dou*)? I’ve never heard about this!’ Chun said, ‘with your majesty standing in front of me, law enforcers beside me, and censors behind me, I will be so scared that I’ll just bend down and drink. Thus, I will already be drunk after drinking only one *dou*.’

This had shown the deterrent impact of the supervisory roles of censors on officials. By the time of Qin and Han, the system of supervision and impeachment had begun to take shape. It was written in “Zhi Guan I” (State Official I) of *Tong Dian (The General Codes)* that “Qin unified the world, established the title of emperor, and arranged posts of officials of all ranks.... It had also installed ‘Yu Shi

Da Fu' (Grand Censor), which had become the supervisory post in Qin and Han dynasties." In Han Dynasty, it was "Yu Shi Zhong Cheng" (Grand Censor) (later changed into "Yu Shi Da Fu" (Grand Censor) who was in control of the power of supervision and impeachment, and at the same time he had the power to supervise the officials of "Jun" (prefecture). Emperor Wu of Han divided the whole country into three supervisory jurisdictions and sent censors to supervise the local despotic powers which had brought damage to the centralization of power. In the capital, "Si Li Jiao Wei" (Field Supervisory Officers) was installed to conduct supervisions. "Yu Shi Zhong Cheng" (Grand Censor) and "Jian Cha Yu Shi" (the supervisory censors) thus became a special bureaucratic system with "great responsibilities and important duties", because they were "specialized in presenting memorials of impeachment". In Eastern Han Dynasty, every time in the imperial session, "Yu Shi Zhong Cheng" (Grand Censor), "Si Li Xiao Wei" (procurator) and "Shang Shu Ling" (equivalent to 'Zai Xiang' or the Prime Minister) each held one special seat (while other officials could only stand), which was called "San Du Zuo" (The Three Uniquely Seated Officials). In Tang Dynasty, the supervisory organs were enlarged. "Yu Shi Tai" (The Censorate) was established to be the central supervisory organ, in which "Yu Shi Da Fu" (Grand Censor) was the chief officer and the three courts of "Tai Yuan", "Dian Yuan" and "Cha Yuan", respectively headed by "Shi Yu Shi" (subordinate of 'Tai Yuan'), "Dian Zhong Shi Yu Shi" (subordinate of 'Dian Yuan') and "Jian Cha Yu Shi" (the supervisory censors) were installed. "Shi Yu Shi" of "Tai Yuan" was mainly responsible for investigating and impeaching officials of the central government who had broken the law; "Dian Zhong Shi Yu Shi" of "Dian Yuan" was mainly responsible for investigating and impeaching officials who had violated the rites and rituals in the imperial sessions or sacrificing activities in the countryside; "Jian Cha Yu Shi" (the supervisory censors) of "Cha Yuan" was responsible for "investigating and inspecting the officials of 'Jun' (prefecture) and 'Xian' (county)", besides, they also had the power to hear local criminal litigations. During the time of Emperor Taizong of Tang, "Shi Yu Shi" (subordinate of 'Yu Shi Zhong Cheng' or Grand Censor) Zhang Xuansu had impeached a "Xian Ling" (county magistrate) for stealing official rations. Enraged at this, Emperor Taizong gave a special order to sentence him to death by decapitation. It was after taking the advice of Wei Zheng that the emperor later exempted him from death. Because "Yu Shi" (the censor) had the power to "restrain all government organs, investigate anyone who have committed unlawful conducts", "straighten the imperial laws and disciplines and expose the faults committed by various government organs",³⁷ Emperor Ruizong of Tang had commented that "it is the duty of 'Yu Shi' (the censor) to advocate goodness and restrain evil, to drain away the mud and bring in fresh water. In a word, it actually all depends on it whether the administration would be conducted in order or in a mess."³⁸

³⁷"Yu Shi Tai" (The Censorate) in *Tang Hui Yao (Collections of Historical Records in Tang Dynasty)*.

³⁸"An Edict for Censors to Report Central and Local Official Affairs by Submitting Memorials" in *Tang Da Zhao Ling Ji (Collected Grand Edicts and Decrees of Tang Dynasty)*, Vol. 100.

In Ming Dynasty, Zhu Yuanzhang appointed “Zhong Shu” (the Prime Minister) to manage the government affairs, “Du Du” (military viceroys and procurators) to lead the army, and “Yu Shi” (the censor) to conduct the supervision, because he thought that “the implementation of imperial laws and disciplines is determined by them, and the supervisory posts are of the greatest importance.”³⁹ In the 15th year of Hongwu (1382), “Yu Shi Tai” (The Censorate) was changed into “Du Cha Yuan” (The Court of Censors), together with the installment of “Jian Cha Yu Shi” (the supervisory censors) with 12 jurisdictions. The Qing government followed the establishment of Ming by appointing “Zuo Du Yu Shi” (the second imperial inspector or censor) of “Du Cha Yuan” (The Court of Censors) to “supervise the activities of officials and enforce laws and disciplines”.⁴⁰

The forms of impeachment in feudal times mainly included face-to-face impeachment, impeachment by submitting memorials to the emperor, repetitive impeachment, case impeachment, severe impeachment, joint impeachment and self-impeachment. If an important event was involved, the impeached and the impeacher were permitted to “argue in front of the emperor”,⁴¹ and then the adjudication will be made by the emperor himself. The power of “Yu Shi” (the censor) in supervision and impeachment was affiliated to the imperial power, so it was determined by the emperor and was greatly limited. Generally speaking, in times of political enlightenment, the implementation of the power of impeachment would meet relatively less resistance and the censors would have more courage to initiate impeachment to the lawless officials.

The supervisory organs in ancient China were independent of each other in terms of the establishment, relationships of subordination and principles of activities. All of them directly responded to the emperor, and the emperor had acted as the central controller to maintain the balance of various organs and the supervision at all levels. In addition, the appointment of supervisors was also controlled by the emperor himself. Both the continuous expansion of specialized supervisory organs and the power of “Yu Shi” (the censor) to launch impeachment upon the hearing of even some rumors had reflected the powerful positions of “Yu Shi” (the censor) who had served as the ears and eyes of the emperor. However, if a false impeachment was lodged, “Yu Shi” (the censor) in charge shall be punished; besides, the investigating officials shall be punished as well if they have lodged false impeachments for private interests....”⁴²

Not only did “Yu Shi” (the censor) exercise administrative supervision on the central and local officials, but also conducted supervision on the judicial activities of the judiciatures. Thus, they had acted not merely as the enforcers of regulating officials by law, but sometimes also as judges in serious cases.

³⁹“Zhi Guan Zhi” (The Record of State Officials) in *Ming Shi (The History of Ming Dynasty)*.

⁴⁰“Zhi Guan Zhi” (The Record of State Officials) in *Qing Shi Gao (The History of Qing Dynasty)*.

⁴¹“Bai Guan Gong Qing Biao” (Tables of Officials, Dukes and Ministers of All Ranks) in *Han Shu (The History of Former Han Dynasty)*.

⁴²“Wu Gao Fan Zuo” (Punishments for Those Lodging Wrong Accusations) in “Dou Song” (Disputes and Litigations) in *Tang Lv (Tang Code)*.

To regulate the activities of officials, apart from the common supervision from the supervisory organs, strict restrictions were also imposed by law in order to prevent the officials from conducting malpractices and yielding to the temptation of greed.

The sentence that “the decline of a nation starts from the evils of the officials”⁴³ was a basic understanding of the importance of officials to the nation by ancient people. For this reason, the rulers of different dynasties had paid much attention to regulating officials by laws, thus numerous laws relevant were enacted. To a certain extent, *Zhou Li* (*The Rites of Zhou Dynasty*) could be seen as a primitive form of the law on the officials in ancient China. The “Liu Dian” (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*), “Ba Fa” (Eight Regulations, namely, greed, ruthlessness, passiveness, imprudence, agedness, sickness, fickleness and incompetence), “Ba Ze” (The Eight Rules) and “Ba Bing” (The Eight Disciplines) in *Zhou Li* (*The Rites of Zhou Dynasty*) had all contained the contents like requirement, punishment, reward and order for the officials.

The “punishments on five malpractices” recorded in “Lv Xing” (The Penal Code of Lv) in *Shang Shu* (*The Book of Historical Document*) were the sanctions on the following five conducts: “Wei Guan” (abusing power), “Wei Fan” (abusing public power to retaliate an enemy), “Wei Nei” (abusing public power to protect families), “Wei Huo” (abusing public power to extort money) and “Wei Lai” (perverting justice for a bribe), which were described as “the malpractices which must be investigated”, and it had shown that the officials who had broken the laws or committed malpractices were severely punished in accordance with law in Zhou Dynasty.

After entering the feudal society, the laws on the regulation of officials had become very complete and strict in the dynasties of Sui and Tang after experiencing the periods of Warring States, and Qin and Han dynasties. Taking “Zhi Zhi Lv” (Statute on the System of State Offices) in *Tang Lv* (*Tang Code*) as an example, it had made detailed provisions on the unlawful acts, malpractices and crimes of officials.

Firstly, clear distinction was made between private crimes and public crimes. The private crimes referred to those committed for private interests instead of official businesses; those committed for official businesses but involving private interests and the conducts with intentional bias and distortion of facts would also be considered as private crimes. Public crimes referred to those “the circumstance of which does not involve private interests”, i.e. the crimes committed for official businesses. The major distinction made between private and public crimes was that the punishment on public crimes was more lenient, whereas that on the private ones was much severer, with the purpose to punish those officials who had practiced favoritism so as to strengthen their sense of responsibility and strictly reinforce their awareness of laws and disciplines.

Secondly, the system of joint responsibilities for the same duty was established, that was, the officials of the same department were divided into four levels: “Zhang Guan” (chief officer), “Tong Pan Guan” (deputy of the magistrates of “Zhou” and

⁴³“Huan Gong Er Nian” (The Second Year of Duke of Huan) in *Zuo Zhuan* (*The Chronicle of Zuo*).

“Xian”), “Pan Guan” (assistant official) and “Zhu Dian” (official in charge of specific affairs). Correspondingly, the prime responsibilities and secondary responsibilities were distinguished. For example, if there was failure or omission of household registration in “Zhou” (subprefecture) or “Xian” (county), “Zhang Guan” (chief officer) should bear the prime responsibility, “Tong Pan Guan” (deputy of the magistrates of ‘Zhou’ and ‘Xian’) the secondary responsibilities, “Pan Guan” (assistant official) the third responsibilities, and “Zhu Dian” (official in charge of specific affairs) the fourth responsibilities. However, if it was caused by the failure or omission in the official document, “Zhu Dian” (official in charge of specific affairs) should bear the prime responsibility, while the responsibilities “Zhang Guan” (chief officer), “Tong Pan Guan” (deputy of the magistrates of “Zhou” and “Xian”) and “Pan Guan” (assistant official) should be mitigated by ranks. This system had not only defined the responsibility of the officials at each level and the relationship of punishment and reward, but also encouraged the officials to supervise each other, which had helped to improve the administrative efficiency.

Lastly, the crime of the officials of “Jian Lin” (officials with supervising duties) and “Zhu Shou” (officials in direct charge) was severely punished. According to *Tang Lv Shu Yi (The Comments on Tang Code)*, of the four-level officials in Tang Dynasty, those above “Pan Guan” (assistant official) were all called “Jian Lin”, while “Zhu Shou” included “the officials who were in charge of businesses such as looking after warehouses, guarding prisoners, and keeping sundries”, and they were petty officials who took care of specific businesses. One example of the principle of inflicting severe punishments on “Jian Lin” (officials with supervising duties) and “Zhu Shou” (officials in direct charge) could be seen from the fact that the death penalty was excluded from the common punishment for the crime of theft. Generally speaking, if one had stolen 50 *pi* (measure word, meaning a bolt of cloth), the most severe punishment would be exile. Nevertheless, if a petty official had stolen what was entrusted to him, he would be given the punishment twice as severe as a common one. If he had stolen 30 *pi* (measure word, meaning a bolt of cloth), he would be sentenced to death by hanging and he would never be pardoned under any circumstances.

In the aspect of public affairs, requirements on “Jian Lin” (officials with supervising duties) were also more rigorous than those for the average officials. For instance, if there was failure or omission of household registration, desertion of farmland, disequilibrium of taxations, insufficiency of taxations, disrepair of embankment and bridges, disasters of blood and fire, damage of stored objects, or stealing inside the job, the chief official should bear the prime responsibility and assistant official should bear the secondary responsibility. In this way, the power and responsibility were closely connected to each other.

Apart from the principles discussed above, there were a number of provisions on the punishment of malpractices in *Tang Lv (Tang Code)*. For example, in Tang Dynasty, if the chief officials of “Zhou” (subprefecture) or “Xian” (county), or officials in various “Zhou” (subprefecture) were away from their jurisdictions with no permission for over a night, they would be punished with the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes. Any official who did not go to

work for no reasons, or did not take night duties when he was supposed to, or did not return to his duty in time after his holidays, or did not assume office within the time limit would all be given the punishment of “Chi” (flogging with light sticks) or “Zhang” (flogging with heavy sticks) or “Tu” (imprisonment) respectively according to the number of days he was off duty. If an official who went on a diplomatic mission according to the order did not return to report his duty on time, or if he had interfered with other affairs, he would be sentenced to one and a half years of imprisonment; if damages had been caused, he would be sentenced to 3 years of imprisonment; if, in accordance with law or orders, anyone did not report what should be reported, or reported what should not be reported, or conducted implementations or corrections by himself before getting the reply from the superiors, he would be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for eighty strokes. Furthermore, anyone who had exceeded his authority to sign documents would be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for eighty strokes; anyone who had exceeded his authority to make judgments would be sentenced to a year of imprisonment. The Tang government also required officials to maintain secrecy, and anyone who had leaked secrets about “important affairs” such as “planning to launch a surprise attack to arrest conspirators” would be sentenced to death by hanging; anyone who had leaked secrets about ordinary affairs would be sentenced to a year and a half of imprisonment and anyone who had leaked secrets to foreign envoys would be given the punishment one level severer.

Among the ancient laws on the regulation of officials, those on the punishment of officials who had embezzled money and engaged in corrupt practices should be specially mentioned. With a long history and elaborate regulations, they had not only become a fundamental part of Chinese criminal legal history, but also an important embodiment of regulating officials according to the law.

Early in Xia Dynasty, laws had been made to punish the malfeasant officials. By quoting *Xia Shu (History of Xia Dynasty)*, it was stated in “Zhao Gong Shi Si Nian” (The 14th year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)* that “anyone who commits ‘Hun’ (evil), ‘Mo’ (taking bribes), ‘Zei’ (banditry) or ‘Sha’ (murder) shall be given the punishment of ‘Gao Yao’ (the father of ancient Chinese legislation).” Besides, anyone “who is evil and has plundered what is beautiful has committed the crime of ‘Hun’; anyone who embezzles money and corrupts the disciplines of officials has committed the crime of ‘Mo’; anyone who has killed people without fears has committed the crime of ‘Zei’ (banditry)”. Therefore, it could be seen that “Mo” referred to the crime of embezzling money and engaging in corrupt practices, and anyone who had committed this crime would be given severe punishments. In the early years of Shang Dynasty (1600–1046 B.C.), in *Guan Xing (Criminal Punishments on Officials)*, which was formulated to straighten out disciplines of officials, the punishments on the behaviors of “being indulged in wealth and women”, or the so-called “dissolute ethos” had been recorded.

In *Lv Xing (The Penal Code of Lv)* made in Western Zhou Dynasty, the embezzlement of officials was considered as one of the “Five Malpractices” and severe punishments were enforced. Furthermore, a praiseworthy idea that “the bribery

taken by the officials in settling cases are not their treasure but just the stolen goods, so the officials can not escape the punishment” was put forward. According to an explanation in *Zheng Yi* (the annotations of Confucians’ classic and books of history in ancient times), “the bribery taken by the officials in settling cases are not their treasure, but the evidence of their crime.” Therefore, the officials had to be cautious about their conducts.

In the Warring States Period, in the book *Fa Jing (Canon of Laws)* written by Li Kui, charges with explicit names and the corresponding punitive measures were put forward, such as “abusing power for something dishonest” and “accepting bribes”. He also wrote, “If ‘Zai Xiang’ (the prime minister) has accepted bribes, the people around him shall be sentenced to death; if the officials under the rank of ‘Xi Shou’ (generals) have accepted bribes, they shall be sentenced to death, and if they have accepted less than 24 *liang*,⁴⁴ they shall be punished but shall be exempted from death penalty.”

In Qin Dynasty, the principle that “when faced with money and benefit, do not take at will to get rich” was regarded as a laudable “way as an official”, and “taking filthy lucre in one’s post” was considered one of the “five malpractices as an official”.⁴⁵ It was also stipulated in the law of Qin that anyone who had made a loan of the public money without permission should “be given the same punishment as that on thefts”; anyone who had concealed the rations of the common people should be punished for the same crime as “concealing the farmland”; “anyone who had conducted ‘Tong Qian’ shall be executed the punishment of ‘Qing’ (to tattoo on the face) and be sent to build the city walls in the early morning”. “Tong Qian” was a general word for bribery and the punishment on it was much severer than that on the conduct of stealing properties, moreover, the person who had harbored the property should also be punished. In accordance with the law of Qin dynasty, “if someone is fully aware of the situation of bribery, but still helps to conceal it”, or even if “the briber has taken back the money”, he should still be punished when his conduct was discovered.

In Han Dynasty, the crime of corruption included such items as accepting bribes from someone under one’s own supervision, accepting bribes of money, accepting the invitation of someone to entertain, accepting money to pervert the law, and accepting money from someone asking for a favor. Besides, “Zhu Shou” (officials in direct charge) was distinguished from “Jian Lin” (officials with supervising duties), with the punishment on the former much severer than that on the latter. For example, “if a ‘Zhu Shou’ has stolen 10 *jin* of gold (*jin*, a monetary unit in ancient China, equal to ten *liang* of silver), he shall be executed with the corpse exposed in the marketplace”⁴⁶; “if a ‘Jian Lin’ (officials with supervising duties) has accepted drinks or food from his subordinates, he shall return the money to them; if he has

⁴⁴ *liang*, a unit of weight (=50 g).

⁴⁵ “Wei Li Zhi Dao” (The Way of Being an Official) in *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty).

⁴⁶ “Wang Ruchun Yin Lv” (Laws Quoted by Wang Ruchun) in “Chen Wannian Zhuan” (*The Biography of Chen Wannian*) in *Han Shu (The History of Former Han Dynasty)*.

accepted money, he shall be removed from his title and be demoted a common people; if he has not possessed any title, he shall be sentenced to the fine of 2 *jin*⁴⁷ of gold and the confiscation of his gaining.”⁴⁸ Moreover, if he had “perverted the law to accept money so as to do a favor for the briber”, or “accepted money to do a favor for someone who had intimidated him”, he should be given a severe punishment. According to “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*), “any official who has perverted the law after accepting money from someone who asks for a favor... shall be executed with the corpse exposed in the marketplace.” During the time of Emperor Wu of Han (156–87 B.C.), Liu Qi, the Marquis of Gekui, “ordered to have one of his subordinates tied up, killed and his corpse exposed in the marketplace, because he has accepted money from someone who has asked him for a favor”.⁴⁹ According to *Han Lv* (*Han Code*), not only were the officials who had accepted the money from someone asking for a favor punished, the one who had bribed officials for a favor was also punished. For instance, Guan Xian, the Marquis of Linru, “had committed the crime of bribing officials to ask for a favor, so his imperial title was removed”.⁵⁰

In the period of Wei, Jin, Southern and Northern Dynasties, of the 18 chapters of *Wei Lv* (*Wei Code*), the two chapters entitled “Qing Qiu” (Bribery to Ask for a Favor) and “Chang Zang” (Reimbursement of Bribes) were specially drafted. Besides, the stipulations like *He Ren Shou Qian* (Forcing Officials to Accept Bribes by Threatening) and *Shi Zhe Yan Hui* (Envoys Investigating Briberies) were also made, which had not only indicated that the laws on punishing the corrupted officials were continuously becoming more meticulous and detailed, but also reflected the widespread corruption of the officials at that time.

In Jin Dynasty, it had become in vogue to make commentaries on laws, which had further standardized the concepts of bribe taking. For instance, “the profits of properties and money are called ‘Zang’ (booty)”; “accepting bribes from someone for nolle prosequi is called ‘Shou Qiu’ (accepting bribes from someone asking for a favor)”; “forcing an official to accept bribes by intimidating is called ‘Liu Nan’ (making things difficult for someone); and gaining others’ property and storing them in government warehouses is called ‘Shan Fu’ (levying taxes without authorization)”.⁵¹ In *Jin Lv* (*Jin Code*), extremely harsh punishments were stipulated on the corrupted officials and according to it, even if a person was remitted and exempted from the death penalty, he should still be punished for life imprisonment and if in a minor case, for 20 years. During the time of Southern Chen, it was added in the law that the punishment on those who had not perverted the law but had accepted bribes would be the same as the punishment on “those who have committed the theft of official property”. In Northern Wei, if a “Jian Lin”

⁴⁷ *jin*, a unit of weight (=1/2 kg).

⁴⁸ “Jing Di Ji” (The Biography of Emperor Jing) in *Han Shu* (*The History of Former Han Dynasty*).

⁴⁹ “Wang Zi Hou Biao” (Table of Princes) in *Han Shu* (*The History of Former Han Dynasty*).

⁵⁰ “Fan Li Teng Guan Lie Zhuan” (The Biographies of Fan, Li, Teng and Guan) in *Shi Ji* (*The Records of the Grand Historian*).

⁵¹ “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

(officials with supervising duties) had “accepted the bribe of a goat or a cup of wine, the punishment would be up to death penalty”,⁵² and “he shall be sentenced to death all the same, no matter how much he has perverted the law”.⁵³ Xin Xiong in Northern Wei dynasty even had proposed the evidence theory for the conviction of corrupted officials. He said,

If the evidence is established when one sees with his own eyes the conduct of giving and accepting money among three persons, it is too lenient; if the evidence is established when one hears about the conducts of giving and accepting property, it is too haste. Therefore, I suggest that only when the witness and the two parties have all seen the bribes after bribery, which means that the evidence is obvious, can the evidence be established. Xin’s suggestion is adopted in the imperial edict.⁵⁴

Tang Dynasty was the time when feudal legality became mature and finalized, correspondingly, the law of punishing the corrupted officials also tended to become complete. The concept of “Liu Zang” (Six Malfeasances) was formally confirmed by *Tang Lv* (*Tang Code*):

In accordance with the law, there are six types of formal malfeasance: ‘Qiang Dao’ (robbery through violence), ‘Qie Dao’ (theft), ‘Wang Fa’ (accepting bribes and perverting the law), ‘Bu Wang Fa’ (accepting bribes without perverting the law), ‘Shou Suo Jian Lin’ (accepting bribes from someone under one’s own supervision), and ‘Zuo Zang’ (pecuniary malfeasance). The conducts other than these six types shall all be punished according to the rules mentioned.⁵⁵

The concept of “Liu Zang” (Six Malfeasances) was not only a summary, a conclusion and a systematization of the legislative fruits of the criminal law in the successive dynasties, but also a major progress of the techniques of criminal legislation. Meanwhile, the principle of calculating bribes by reasonable conversions, namely, the method of “Ping Gong Yong” (evaluating bribes at the market price and converting the mediocre performance into the corresponding malfeasance) was also put forward.

Of the six malfeasances, robbery and theft were the crimes of general property and all the others specially referred to the misconducts of officials. In *Tang Lv* (*Tang Code*), a distinction of circumstances were made as to whether the officials had accepted bribes by perverting the law or not, and then proper punishments were inflicted on them accordingly. “If those officials who have the duties of supervision or are in prime and direct charge have accepted bribes and perverted the law, the punishment shall be ‘Zhang’ (flogging with heavy sticks) for a hundred strokes

⁵²“Zhang Gun Zhuan” (The Biography of Zhang Gun) in *Wei Shu* (*The History of Northern Wei Dynasty*).

⁵³“Xing Fa Zhi” (The Record of the Criminal Law) in *Wei Shu* (*The History of Northern Wei Dynasty*).

⁵⁴“Xin Xiong Zhuan” (The Biography of Xin Xiong) in *Wei Shu* (*The History of Northern Wei Dynasty*).

⁵⁵“Yi Zang Ru Zui” (Making Convictions for the Crime of Bribery) in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

for accepting one *chi*,⁵⁶ and one degree severer for accepting another one *pi* (measure word, meaning a bolt of cloth), up to 15 *pi* (measure word, meaning a bolt of cloth) when the punishment will be death penalty by hanging; if they have not perverted the law, the punishment shall be ‘Zhang’ (flogging with heavy sticks) for ninety strokes for accepting one *chi*, and one degree severer for accepting another 2 *pi* (measure word, meaning a bolt of cloth), up to 30 *pi* when the punishment will be exile.⁵⁷ Even if an official had accepted money afterwards, he would still be investigated for whether or not having perverted the law. “If the affair is perverted by him, he shall be punished for perverting the law; if the affair is not perverted by him, he shall be punished only for accepting bribes from someone under his supervision.”⁵⁸ In accordance with the *Tang Lv* (*Tang Code*), “any official with supervisory duties who has accepted money from someone under his own supervision shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for forty strokes for one *chi*, and the punishment shall be one level severer for another *pi*, up to 8 *pi* when the punishment will be one year of imprisonment, which then again will be one degree severer for another 8 *pi*, up to 50 *pi* when the punishment shall be the exile of two thousand *li* away. Anyone who has bribed an official will be given the punishment of 5 degree lighter than the punishment on the official, with the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes at most; if the official has extorted bribes, the punishment on him will be one degree severer; if the official has forcibly extorted bribes, he will be punished for perverting the law.”⁵⁹ Any official who had accepted bribes when he was ordered to serve his duty as an envoy should be given the same punishment as that for accepting bribes from someone under his own supervision. In addition, the conducts of an official such as borrowing property from someone under his supervision and privately using labors under his supervision, including petty officials, forced labors, ‘Nu Bi’ (the slave girls and maidservants), livestock, carriages, boats, business lodge, or the stone mill for his own purpose, would all be considered as malfeasances. Even if an official had accepted the bribe of property from his former subordinates, or scholars and the common people previously under his supervision, or if he had extorted or borrowed money from them after leaving his post, he would still be given the punishment three degrees lighter than that for accepting bribes from someone under his own supervision.

If an official had accepted money from someone for some reasons, he should be given the punishment of “‘Chi’ (flogging with light sticks) for twenty strokes for one *chi*, and one degree severer for another *pi*, up to 10 *pi* when the punishment will

⁵⁶ *chi*, a unit of length (=1/3 m).

⁵⁷ “Jian Zhu Shou Cai Wang Fa” (Crimes Committed by Supervising Officials by Accepting Money) in “Zhi Zhi” (The State Office System) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁵⁸ *Ibid.*

⁵⁹ “Dai Suo Jian Lin Cai Wu” (Crimes Committed by Supervising Officials by Accepting Money from Those under Jurisdiction) in “Zhi Zhi” (The State Office System) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

be one year of imprisonment, which then again shall be one level severer for every another 10 *pi*, amounting to three years of imprisonment at most; punishment on the one who has bribed the official shall be 5 degree lighter”.⁶⁰ The range of application of “Zuo Zang” (pecuniary malfeasance) was relatively wide. If an official had accepted bribes from someone and then done him a favor, he should be punished for the crime of pecuniary malfeasance; if an official with supervisory duties had abused his power to force sales so that he could gain interests, he should be punished either for extorting money or property from someone under his supervision or for perverting the law; if an official did not pay his debts within the time limit, and still did not pay them for another 50 days, he should be punished for accepting property from someone under his supervision,⁶¹ and if, after leaving his post, an official had accepted presents from his former subordinates, or scholars and common people previously under his supervision, or extorted or borrowed property from them, he should be given the punishment “three degrees lighter than that when he is still in office”. In the supervisory jurisdiction of an official, if his family members “do the misconducts of accepting, extorting or borrowing property, using labor for private purpose, and doing inappropriate sales, they shall be given the punishment two degrees lighter than that on the official who has done those misconducts”. If the official knew of their misconducts, he should be jointly punished, but if he did not know them, “he shall be given the punishment five degrees lighter than that on his family members”.

From above, it could be seen that there were extraordinary detailed stipulations about the malfeasances of officials in *Tang Lv* (*Tang Code*). However, since the malfeasances of officials were bred in the hotbed of feudal system, the occurrences of them could not really been eliminated just by the laws on the regulation of the officials’ conducts. As a result, in the second year after the enactment of *Yong Hui Lv Shu* (also named *Tang Lv Shu Yi*), a “policy” was made, which had stipulated with rigorous terms that “if the petty officials in ‘Zhou’ (subprefecture) have accepted a bribe of more than one *pi*, they shall firstly be sentenced to ‘Zhang’ (flogging with heavy sticks) for a hundred strokes, and then be punished in accordance with the law”.⁶² The additional punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes apart from that stipulated in the law had displayed the determination of feudal government to regulate the conducts of officials by law, meanwhile, it also had reflected the seriousness of the situation at the time when the laws were perverted by the officials for bribery. In the sixth year of Zhenyuan of Emperor Dezong of Tang (789), an imperial edict was issued by the emperor which stated that “from now on, if ‘Tai Shou’ (the prefecture chief) or ‘Zhi Xian’

⁶⁰“Zuo Zang Zhi Zui” (Crimes Committed by ‘Accepting Inappropriate Properties) in “Za Lv” (Miscellaneous Laws) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁶¹“Dai Suo Jian Lin Cai Wu” (Crimes Committed by Supervising Officials by Accepting Money from Those under Jurisdiction) in “Zhi Zhi” (The State Office System) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁶²“Za Ji” (Miscellaneous Records) in *Tang Hui Yao* (*Collections of Historical Records in Tang Dynasty*).

(magistrate of a county) had committed malfeasances, they shall be sentenced to the punishment one degree severer than that for ordinary cases according to this order.” Furthermore, the system of “Lian Zuo” (be punished for being related to or friendly with someone who has committed an offence) had also been implemented: “if ‘Cheng’ (assistant official), ‘Bu’ (clerk) or ‘Wei’ (military officer) have committed misconducts, ‘Zhi Xian’ (magistrate of a county) shall be jointly punished, and the punishment on him shall be two degrees lighter than that on the official who has committed the misconducts. It is hoped that they can supervise each other and prevent each other from committing any further misconducts.”⁶³ Nevertheless, since the middle of Tang Dynasty, the ethos of officials became more severely corrupted, and it was impossible to be restrained by the mere enactment of several legal provisions any more.

In the early years of Song Dynasty, the corrupted officials were given severe punishments by law. During the reign of Emperor Taizu and Taizong, the officials who had conducted pecuniary malfeasances were all executed with the corpse exposed in the marketplace. For other officials who were convicted of malfeasances, even though they were remitted somehow, they would never be reappointed. This had become an established order at that time. However, when it came to the time of Emperor Zhenzong, the punishment of executing corrupted officials with the corpse exposed in the marketplace were replaced by the punishment of “Zhang” (flogging with heavy sticks) and exile. But during the ruling of Emperor Renzong, it had become rare for the corrupted officials to be given the punishment of “Zhang” (flogging with heavy sticks) and exile, consequently, the once strict law on the punishment of corrupted officials had become gradually lenient, which had made the regulations of the officials daily lapsed.

In Yuan Dynasty, greater importance was attached to the regulation of the officials by Emperor Chengzong. He stressed that “if those officials can not regulate themselves first, how can they regulate the common people?” Therefore, he issued an imperial edict:

Henceforth, if the officials have accepted bribes for some reasons, apart from the convictions in accordance with the law, those who have perverted the law shall never be reappointed. Those who have not perverted the law shall be degraded to the bottom of the bureaucratic structure for three years and then shall be reappointed according to the imperial order; if they have committed malfeasances again, they shall never be reappointed in the lifetime.⁶⁴

In general, relatively lenient punishments on the crimes of malfeasances had been enforced in Yuan government. For example, for a misconduct of perverting the law for a bribe more than 200 *guan*, the punishment was only “Zhang” (flogging with heavy sticks) for 107 strokes; if the official had not perverted the law, the punishment would be reduced by three degrees. There was an extremely detailed classification, though. Moreover, the charges and the characteristics of crimes such

⁶³ Ibid.

⁶⁴ “Qu Shou” (Accepting Bribes) in “Zhu Zang” (Various Malfeasances) in *Yuan Dian Zhang* (Statutes of Yuan Dynasty), Vol. 46.

as “Qu Shou” (accepting bribes), “Qin Dao” (robbery or theft), “Qin Zhang” (infringing and occupying the property of others), “Hui Qian” (selling illegal gainings), “Guo Qian” (offering a bribe), “Shou Zang” (accepting bribes) and “Zang Fa” (illegally imposing fines) were all listed in detail in *Yuan Lv* (*Yuan Code*). Even if the corrupted official was dead, the bribes would still be recovered from his families. It was also stipulated in the imperial edict of Emperor Shenzu that the officials who went on an official errand should not squander, or extort property from the common people, and it was not without its epochal pertinence.

After the founding of Ming Dynasty, the rulers had summarized the historical lessons learnt from the former Yuan Dynasty when corrupted officials had abused the common people and invoked civil commotion, for this reason, great emphasis was laid on the regulation of officials. Zhu Yuanzhang once issued instructions to the officials of “Fu” (prefecture), “Zhou” (subprefecture) and “Xian” (county) by saying:

Since the whole country has just been pacified, the common people now have few financial capabilities. Therefore, they are like the birds that have just learnt to fly, whose feathers cannot be plucked, and they are like the newly planted vegetations, the roots of which cannot be shaken, because they are trying to settle down and start production. Only those with clean hands can control themselves and benefit others. All of you should keep this in mind.⁶⁵

“Li Lv” (Statute on the Regulation of officials) was put at the first chapter of *Ming Lv* (*Ming Code*), which ruled that the officials should first be regulated in order to regulate the common people. Besides, the subject of “Shou Zang” (accepting bribes) was specially drafted, which included 11 items:

The officials accepting bribes; officials being punished for conducting pecuniary malfeasances; officials accepting property after the event; people asking for a favor by bribing; officials extorting or borrowing money from the common people while serving in his official post; family members of the officials extorting property; supervisory officials accepting bribes; levying public taxes privately; officials accepting property from dukes or marquises privately; officials embezzling discovered bribes, and officials indulging briberies.

This was more complete than any other laws in the former dynasties.

In *Ming Lv* (*Ming Code*) much harsher punishment on the corrupted officials than those stipulated by *Yuan Lv* (*Yuan Code*) had been made. For anyone with an official salary, he should be sentenced to death by hanging if he had perverted the law by accepting a bribe of 80 *guan*; for anyone with no official salary, he should be sentenced to death by hanging if he had had perverted the law by accepting a bribe of 120 *guan*, and punishment on supervisory officials under the same circumstances should be three degrees severer. In *Ming Lv* (*Ming Code*) the method of calculating bribes and deciding on the punishment was also brought forward: anyone who had perverted the law by accepting a bribe should be given full punishment, while anyone who had accepted bribes but not perverted the law should be given half of the punishment. Furthermore, in *Da Gao* (*The Great Announcement*) written by Zhu Yuanzhang himself in the early years of Ming Dynasty, the cases of embezzling money,

⁶⁵ *Er Shi Shi Zha Ji* (*Reading Notes of the Twenty Histories*).

accepting bribes and extorting property were specially listed, and the sanctions concerned far exceeded the scope of *Da Ming Lv* (*The Great Ming Code*), with those corrupted officials usually sentenced to death penalty.

As the last feudal dynasty, Qing dynasty had epitomized the laws on the punishment of corrupted officials. Early in the decree of Emperor Shunzhi's enthronement, it was pointed out that "the safety or danger of the country all depends on whether the officials are honest or corrupted".⁶⁶ In *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), the concepts of "Liu Zang" (Six Malfeasances) in *Tang Lv* (*Tang Code*) were inherited, but "Qiang Dao Zang" (robbery) was replaced by "Chang Ren Dao Zang" (theft of official property by the common people). In the meantime, the structure of *Ming Lv* (*Ming Code*) was followed, placing "Liu Zang Tu" (Graphic Presentation of the Six Malfeasances) at the first page. Of these six malfeasances, except "Chang Ren Dao" and "Qie Dao", the other four all specially referred to the misconducts of officials.

In *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), the punishments on the crimes of corruption were aggravated. For example, anyone who was discovered with irrefutable evidence to have accepted a bribe and perverted the law would be sentenced to death by hanging; anyone who had committed theft in his official post for three times would also be sentenced to death by hanging. Besides, over 20 "subsidiary statutes" concerning officials' acceptance of bribes were added. Anyone who had accepted a bribe and perverted the law "shall be given a full punishment"; anyone who had accepted a bribe without perverting the law "shall be given half of the punishment", but those with no official salaries (whose monthly salary was less than 1 *dan*) would be respectively given the punishment one degree lighter. For those supervisory officials whose duty was to investigate and rectify the misconducts of officials, if they had "extorted or borrowed property from others, gained extra interests from sales, or accepted presents", they would be given the punishment two degrees severer.⁶⁷

In Qing Dynasty, power was abused by the petty officials, who, having relied on their authorities, had accepted bribes and perverted the laws, which had brought a lot of harm to the common people, so it had become an age-old malpractice. As a result, of the statutes added to the item of "bribe-taking by officials" in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), most were targeted at the so-called "Ya Du" (Yamen runners or bailiffs in local government offices). If they had committed misconducts, they would be given severe penalties, as was stipulated that:

As for the clerks, 'Ya Men' runners and bailiffs in various local government offices, if they have practiced fraud and made trouble to disturb the common people, it means their deliberately breaking the law, thus, they shall be given the punishment one degree severer than

⁶⁶*Da Qing Shi Zu Zhang Huang Di Shi Lu* (*Records of Emperor Shizu Zhan of Great Qing*), Vol. 9.

⁶⁷"Feng Xian Guan Li Fan Zang" (Crimes Committed by Supervising Officials by Accepting Money) in "Xing Lv" (The Criminal Law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

the ordinary people; those who have accepted bribes shall be more severely punished according to the calculation of bribes.⁶⁸

Under the reign of Kangxi, in an attempt to rectify the regulations of officials, the government used to stipulate that anyone who had “bribed an official to ask for a favor” or “offered money for discussing something” “shall be given the same punishment as that on those who have accepted bribes”. But in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) formulated in the fifth Year of Qianlong, severe punishment was imposed on the bribees but lighter punishment on the bribers. For example, if a person had to offer money because of the officials’ “threatening and coercion”, he would not be punished, which was not only rational, but also pertinent. In the laws of Qing dynasty, there were also provisions on the crime of intermediating for bribery, or the so-called “Shuo Shi Guo Qian” (offering money for discussing something), but the punishment on those who had committed this crime was one or two degrees lighter than that on those who had accepted the money, to a maximum of “Zhang” (flogging with heavy sticks) for one hundred strokes.

As for “Zuo Zang” (pecuniary malfeasance), it is interpreted in *Da Qing Lv Ji Jie* (*Collected Interpretations of Great Qing Code*) that “‘Zuo Zang’ is not ‘Shi Zang’ (actual corruption), it is a crime caused by malpractice.” It meant, if an official had caused damage to the public or private property because of his misconduct, he would be at most given the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes and 3 years of imprisonment.

In Ming and Qing dynasties, any official who had accepted a bribe would be removed from his post, any petty official who had accepted a bribe would be dismissed from his job, and both of them would never be reappointed or reemployed.

In conclusion, the laws on the punishment of the corrupted officials in ancient China were systematic with detailed stipulations and epochal characteristics. Despite the discrepancies in the implementation, they had played a positive part in maintaining the regulations of officials, giving due play to the officials, and ensuring the normal operation of the state apparatus and the stability of society. Therefore, the emergence of flourishing ages was closely related to the implementation of the laws of punishing corrupted officials and the improvement of the regulations of officials. Emperor Kangxi once said, “The administration of a country is more or less the punishment of corrupted officials.” Emperor Yongzheng also said that “the most important thing of administering the country is regulating officials by punishing the corrupted.” Furthermore, Emperor Qianlong even stressed that, “if the depraved officials were left in their posts for one day more, then, for one day more, it may bring suffering to the common people and damage to the state”, and “if fetters were not put on the corrupted officials, those corruptions would never be stopped.”⁶⁹ One reason for the prosperity which had lasted for over a hundred years from Kangxi to Qianlong was that the officials were regulated and the corrupted were contained by

⁶⁸“Guan Li Shou Cai’ Fu Li” (Supplementary Precedents to “Accepting Bribes by officials”) in “Xing Lv” (The Criminal Law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

⁶⁹“Xing Fa Lue” (The Outline of the Criminal Law) in *Qing Chao Tongzhi* (*General Annals of Qing Dynasty*), Vol. 78.

law. In the 42th Year of Kangxi (1702), an imperial edict was once issued by the emperor, in which it was stated that:

If the senior officials are honest and self-contained, the petty ones will naturally follow suit. If a senior official does not perform diligently and prudently and thus disrupts official businesses, how can I abandon the state law for pardoning just one person?⁷⁰

The implication was that he could not invalidate the national laws just to pardon a corrupted senior official.

8.6 The Requirement for Officials to Hold Trials According to Complaint and to Make Convictions by Law

Judicial trials were activities which were of great significance to the performance of the function and power of the state, to the realization of the vital interests of the common people, and to the stability of society. Thus, great importance was attached to them by the rulers of successive dynasties. To ensure that cases might be tried by officials in accordance with law without playing with lawsuits and practicing favoritism, legislations were made in each dynasty to have the responsibilities of the judiciary defined and the illegal conducts sanctioned.

Early in Western Zhou Dynasty, the Duke of Zhou had warned Kang Shu of “Jing Ming Nai Fa”, which meant enforcing the law and inflict penalties with prudence. From this it could be seen that much stress had been laid on the judiciary by the Duke of Zhou. In Qin Dynasty, whether the laws were thoroughly understood and orders were prudently issued had become the criterion to distinguish a good official from a bad one. If inappropriate penalties had been inflicted by a judge, he would be punished for the crime of “Shi Xing” (infliction of improper penalties); if it was intentionally done, the judge would be accused of committing the crime of “Bu Zhi” (intentional inappropriate sentences); if a criminal was intentionally absolved, the judge would be accused of committing the crime of “Zong Qiu” (conniving at criminals). Moreover, if a decree or a procedure which was no longer in force was implemented by a judge, he would be “punished in accordance with the law”. In Tang Dynasty, relatively more comprehensive stipulations were made concerning the legal requirement that judges should settle a lawsuit in accordance with law, which, to some extent, had not only inherited the quintessence of justice in Qin and Han dynasties but also opened the prelude of the judicial activities in Ming and Qing dynasties, therefore, it had become the most important chapter in the judicial history of feudal China. The following discussions were all based on *Tang Lv* (Tang Code).

Firstly, the system of judicial jurisdictions was established with the judicial limits of power defined. In Tang Dynasty, “the criminals shall all be sent to be

⁷⁰ *Da Qing Sheng Zu Ren Huang Di Shi Lu (Records of Emperor Shen Zu Ren of Great Qing)*, Vol. 228.

convicted in the courts in ‘Zhou’ (subprefecture) or ‘Xian’ (county) where they came from. As for the various departments in the capital city, the criminals therein shall be tried by ‘Da Li Si’ (The Court of Judicial Review) if the punishment involves imprisonment or severer, and to be tried by ‘Dang Si’ (the local government office) if the punishment is ‘Zhang’ (flogging with heavy sticks) or ‘Chi’ (flogging with light sticks). If the criminals are captured by ‘Jin Wu’ (policemen or guards), they shall also be convicted by ‘Da Li Si’ (The Court of Judicial Review).”⁷¹ The stipulations concerning the limits of judicial power were as the following:

For any criminal, if the punishment is not as severe as ‘Zhang’ (flogging with heavy sticks), the decision shall be made by the magistrates of county courts; if the punishment involves imprisonment or severer, the judgment shall be delivered to be reviewed by the judges of ‘Zhou’ (subprefecture), and if the convicted meets the requirement of being pardoned, the punishment of imprisonment and exile shall be changed into the punishment of ‘Zhang’ (flogging with heavy sticks) or ‘Chi’ (flogging with light sticks). If the common people or officials have been convicted by ‘Da Li Si’ (The Court of Judicial Review) or the courts in Jingzhao and Henan but later they are exonerated, the decisions shall be delivered to be reviewed by the relevant offices. Only when the decisions have been reviewed and confirmed can they be transferred to the subordinate offices immediately. If there is inappropriateness, the convicted can appeal based on the evidence. If ‘Da Li Si’ (The Court of Judicial Review) and the courts in ‘Zhou’ (subprefecture) have made judgments with the punishment of exile or severer with the exception of the removal of official posts, the convicted officials can write complaints and appeal. ‘Da Li Si’ (The Court of Judicial Review) or the courts in Jingzhao and Henan therefore shall seal the archives and deliver them to the higher courts. Then the cases shall be reviewed in the imperial court, following the procedures of the courts of ‘Zhou’ (subprefecture), and debates are allowed for both parties. If there is still the need to be heard again, the officials concerned shall be recalled to the court; if he is not in the capital, a messenger shall be sent to recall him, but if he is in the capital, he shall be brought to the court by ‘Xing Bu’ (Board of Punishment). Consequently, the final decision shall be made when he arrives.⁷²

If an official with a certain rank and position had committed a crime, he would be arrested and tried only after a memorial was presented to the emperor. And “if the officials with specific duties above ‘Wu Pin’ (the fifth rank) or officials with no specific duties above ‘Er Pin’ (the second rank) have committed crimes and if they are in the capital, they shall only be arrested after the emperor has ratified the relevant memorials; if those officials have committed crimes and they are not in the capital, they shall be arrested at first and then the relevant memorials shall be presented to the emperor. If the officials with or without specific duties above ‘San Pin’ (the third rank) have committed crimes, before they are imprisoned and interrogated in accordance with the law, the executive agencies shall report it to the emperor to be reviewed first.”⁷³ If the chief officials of executive agencies “have not reported to

⁷¹“Kai Yuan ‘Yu Guan Ling’” (“The Order for Prison Officials” during the Reign of Kaiyuan) in Noboru Niida: *Tang Ling Shi Yi (An Interpretation of the Orders of Tang Dynasty)*, translated by Li Jing et al., Chang Chun Publishing House, p. 689.

⁷²Ibid.

⁷³Ibid., p. 718.

the emperor when they are supposed to, or have not waited to report when they are supposed to, and have made decisions by themselves, they shall be given the punishment three degrees lighter than that on the intentional negligence”.⁷⁴ In this way, the emperor’s supreme judicial power was maintained.

Secondly, the principles of accepting and hearing complaints were established. In Tang Dynasty, litigations “all started both from the lowest level and from the courts of native places”, and the plaintiffs should make complaint to the court level by level. Thus, a complaint that bypassed due levels would not be accepted, and if it was accepted, the plaintiff and the accepter would both be sentenced to the punishment of “Chi” (flogging with light sticks) for forty strokes. Any complaint that concerned the previous pardons would not be accepted, otherwise, it would be seen as an act that blasphemed the imperial power and disrupted the judicial order. Any official who had accepted such a complaint “shall be punished for intentionally imposing charges on people. If he has caused death of the victim, the plaintiff and the accepter shall both be given an additional punishment of exile”.⁷⁵ Besides, if the date of occurrence or the fact of a case was doubtful, the case would not be accepted; otherwise, the official concerned would be given the punishment one degree lighter than that on the plaintiff. Any official who had accepted the “anonymous complaints to accuse others” would be given the punishment two degrees severer. In addition, if an official had accepted complaints concerning prisoners in custody and the people over 80 or less than 10 years old, unless the complaints were to inform the crime of rebellion, treason or conspiracy, he would be given the punishment three degrees lighter than the average one.

However, if an official had “intentionally rejected a case when he was supposed to accept it, he would be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for fifty strokes and the punishment shall be one degree severer for rejecting another additional three cases, amounting to the punishment of ‘Zhang’ (flogging with heavy sticks) for ninety strokes for rejecting ten”. Anyone who had obstructed legitimate appeals should also be sentenced to the punishment of “Chi” (flogging with light sticks) for fifty strokes. As for the appeals to the authorities in the capital, if the officials in charge had not accepted them immediately, they would be given the punishment one degree severer than the average one.

Thirdly, it was greatly stressed to try the cases in accordance with the law. In Tang dynasty, it was explicitly stipulated in *Tang Lv* (Tang Code) that “when the judges make decisions, they shall all cite the main text from ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Ge’ (injunction), ‘Shi’ (standard), and anyone who has violated this shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for thirty strokes. If several items are included in the same article, the one concerning the committed crime shall be cited.”

⁷⁴“Ying Yan Shang Dai Bao Er Zhe Zi Duan Jue” (Making Decisions by Judicial Officials on their own instead of Reporting to the Emperor) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁷⁵“Yi She Qian Shi Xiang Gao Yan” (To Inform about the Pardoning of Previous Crimes) in “Dou Song” (Disputes and Litigations) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

This stipulation was considered by both Chinese and foreign scholars as a typical provision that had reflected the principle of “Zui Xing Fa Ding” (a legally prescribed punishment for a specified crime). It was required that the judiciary should convict according to law as well as “the legal provisions” so as to avoid “the violation of the law”. While trying the cases according to the law, if the new provisions were inconsistent with the older ones, the judges should follow the principle of “applying light punishments instead of severe ones” and lighter punishments should be inflicted on the convicted. Since it was impossible for law to cover everything, when there were no specific provisions for a concrete circumstance, the judge was allowed to apply similar provisions by analogy:

For the crimes that should be sentenced inculpable, or the severe crimes that should be sentenced minor ones, if there is no provision on the crime, but there is a provision on the one that is much severer, a lighter punishment shall be given based on it. For the inculpable that should be sentenced guilty, or the minor crimes that should be sentenced severe ones, if there is no provision on the crime, but there is a provision on the one that is lighter, a much severer punishment shall be given based on it.

In terms of the cases involving foreigners, “if those foreigners of the same nationality have infringed upon each other, the case concerned shall be tried according to the conventions of their own; if those of different nationalities have infringed upon each other, the case concerned shall be tried in accordance with *Tang Lv* (Tang Code)”, which had not only displayed the principle of judicial sovereignty of the great Tang Dynasty, but also reflected the respect for the foreign laws and conventions, therefore, it had been followed by the various dynasties after Tang.

Furthermore, it was required that “the judges should all try by complaint. Anyone who has inflicted charges beyond the submitted complaint shall be punished for intentionally imposing charges on people”. During the trial, if the punishment was severer than imprisonment, the judge should summon the criminal and his families and tell them about the accusation. Besides, the judge should “ask the convicted whether he is convinced by the judgment”, if the convicted did not plead guilty, the judge should conduct “more exhaustive trying”. Any official who had violated this should be sentenced to the punishment of “Chi” (flogging with light sticks) for fifty strokes; if a death penalty was involved, he should be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; if a judge had deliberately reduced or added charges on the defendant during the trial, or “if all the charges were deliberately imposed, the judge should be punished according to the charges, and if the charges are more than what they are supposed to be, the judge shall be punished with the added charges. Besides, if the criminal penalties are changed, for the cases in which the punishment of ‘Chi’ (flogging with light sticks) is changed into that of ‘Zhang’ (flogging with heavy sticks), and imprisonment is changed into exile, the judge shall be punished with the added penalties, but for cases in which the punishment of ‘Zhang’ (flogging with heavy sticks) or ‘Chi’ (flogging with light sticks) is changed into imprisonment and exile, or imprisonment and exile are changed into death penalty, the judge should be imposed with all

the penalties. The cases in which the charges are reduced should be settled in the same way”.⁷⁶ If a judge had negligently reduced or added charges, or “if he has falsely added charges, he shall be given the punishment three degrees lighter than the one he has sentenced, and if he has falsely reduced charges, he shall be given the punishment five degrees lighter than the one he has sentenced.”

Lastly, stipulations about the time limit for holding trials and executing death penalties were made in accordance with law. According to “Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*), the time limit for trials by “Da Li Si” (The Court of Judicial Review) and “Xing Bu” (Board of Punishment) was set accordingly on the basis of whether it was a severe case (involving more than ten people and more than 20 charges), an average case (involving more than six people and more than ten charges), or a minor case (involving fewer than five people and fewer than ten charges). The time limit for trials was as the following:

A severe case shall be settled within the time limit of 30 days by ‘Da Li Si’ (The Court of Judicial Review), and if either party appeals, it shall be heard within the time limit of 30 days by the ‘Xing Bu’ (Board of Punishment); an average case shall be settled within the time limit of 30 days by ‘Da Li Si’ (The Court of Judicial Review), and if either party appeals, it shall be heard within the time limit of 25 days by ‘Xing Bu’ (Board of Punishment); a minor case shall be settled within the time limit of 25 days by ‘Da Li Si’ (The Court of Judicial Review), and if either party appeals, it shall be heard within the time limit of 20 days by ‘Xing Bu’ (Board of Punishment)... anyone who has violated the time limit shall be punished in line with the days he delayed.

The purpose of setting the time limit for trials was to improve the judicial efficiency and prevent “‘Xing Bu’ (Board of Punishment) and ‘Da Li Si’ (The Court of Judicial Review) from excessively delaying the hearing and judgment of a lawsuit”.

As to the civil cases concerning farmlands, buildings, marriages and debts, the time limit was fixed in consideration of facilitating the agricultural production. The “cases concerning farmlands, buildings, marriages and debts shall be investigated and tried from the 1st of October to the 30th of March the next year”. Nevertheless, such cases as those in which the “contracts have been signed, and the parties concerned have infringed upon one another are only exceptions”.⁷⁷

In the feudal judicial system, corporal punishment was legitimate, but in order to prevent extorting a confession by means of torture, the officials concerned were required to carry out punishments in accordance with the law. For instance, it was regulated that “the officials who are in charge of interrogating the prisoners must first of make great efforts to resort to the methods of education and persuasion; if the decision still cannot be made due to the lack of evidence in interrogation, then the case should be put on record and torture can be used in the interrogation. Anyone who has

⁷⁶“Guan Si Chu Ru Ren Zui” (Crimes Committed by Judicial Officials by Reducing or Increasing Charges Randomly) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁷⁷Noboru Niida, *Tang Ling Shi Yi* (*An Interpretation of the Orders of Tang Dynasty*), translated by Li Jing et al., Chang Chun Publishing House, p. 788.

violated this shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for sixty strokes.”⁷⁸ In addition, “interrogations should be conducted with an interval of twenty days. But if before the interrogation has not been finished, the prisoner has been transferred to another agency, or if the interrogations still have to be conducted (when the prisoner is transferred, the case concerned shall be transferred together with him), then the previous interrogation should be continued until three interrogations have been carried out. If the prisoner has not committed any severe crimes and there are few doubtful points in the case, it is not necessary to have the three interrogations conducted. If the prisoner is tortured to death, the official in charge of interrogating shall write a report and be checked by the supervisory officials.”⁷⁹ Furthermore, the “tortures conducted on the prisoner should be within three times, and the total number of specific punitive actions should be within two hundred times. Where a prisoner is sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks), the number of specific punitive actions should not exceed the number of floggings sentenced. If no confession is made after three times of torture, the prisoner can be bailed out; if the official in charge of interrogating has used other methods to have the prisoner tortured with the punishment of ‘Zhang’ (flogging with heavy sticks) in addition to the three tortures mentioned, he shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes; if he has executed excessive beatings to the prisoner, he shall be punished in turn by the exceeded punishments; if he has tortured the prisoner to death, he shall be sentenced to two years of imprisonment; if the official in charge of interrogating has tortured the prisoner who is already been wounded, he shall also be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes; if he has beaten the prisoner, he shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for fifty strokes, and if he has tortured the prisoner to death, he shall be sentenced to a year and a half of imprisonment.”⁸⁰

However, those, who had enjoyed such legal privileges as “Yi” (cases involving eight privileged groups were not to be tried directly by judicial organs, but to be reported to and decided by the emperor, and thus the accused would usually be pardoned or remitted), “Qing” (cases involving officials above the fifth rank shall be reported to and decided by the emperor, the punishment other than death penalty would be remitted by one degree) and “Jian” (except for death penalty, other punishments on officials above the seventh rank and their families could be remitted by one degree), who were at the age of over 70 or less than 15, and who were disabled, would not be interrogated by means of torture, and they could only be convicted

⁷⁸“Xun Qiu Cha Ci Li” (Interrogating Prisoners by Lecturing and Reasoning) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

⁷⁹“Kai Yuan ‘Yu Guan Ling’” (“The Order for Prison Officials” during the Reign of Kaiyuan) in Noboru Niida: *Tang Ling Shi Yi* (*An Interpretation of the Orders of Tang Dynasty*), translated by Li Jing et al., Chang Chun Publishing House, p. 712.

⁸⁰“Kao Qiu Bu De Guo San Ye” (Prohibiting Interrogating Prisoners for more than three times) in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

according to the existing evidence. Moreover, any official who had violated this would be punished for deliberate misconduct.

In summary, regulating officials by law was a long-standing tradition of the legality in ancient China, and it had involved all aspects of the regulation of officials. There were not only positive requirements, but also punitive stipulations. Consequently, the contents of these two aspects had functioned together and supplemented each other, which had ensured the realization of due effects of the regulation of officials. In ancient China, the starting point of regulating officials by law was “the ruling of man”, so the law was merely a tool. The principle that “the wise emperors rule officials instead of the common people” advocated by Han Fei, who had epitomized the legalist thoughts, together with his criticism on Shang Yang who had “practiced merely laws but no actual means”, had all embodied the compliment on “Ren Zhi” (the ruling of man) under the mask of “Fa Zhi” (the ruling of law). It should be noted, however, that the regulation of officials, with the aim to bring the activities of officials into the legal track and to prevent them from overstepping the boundaries of law which was representative of national interests, was not only of vital importance to the lasting political stability of the feudal dynasties, but also of great benefit to the common people.

Chapter 9

Historical Comparison and Timely Adjustment of the Legal System

In the continuous over 4,000 years of Chinese legal history, the internal connections and interrelations of change and development could be clearly seen. It was almost a common practice to have the advantages and disadvantages of the legal systems of preceding dynasties carefully investigated and their experience and lessons drawn at the beginning of legislation by the founding rulers of newly established dynasties, and to form new legislative ideologies and principles or to implement the necessary legal reforms. As the legislative activities of successive dynasties were mostly conducted on the basis of summarizing the past experience and focusing on the present conditions by historical comparison, the legal codes formulated would still be slightly different in contents and innovative in structure compared with the preceding ones, despite their consistency in the fundamental nature. Therefore, the legal history of ancient China could be considered as a legal history of historical comparisons, which had started from the Shang Dynasty in about 1600 B.C. Just as Confucius had said, “The Yin dynasty followed the rites of the Xia: wherein it took from or added to may be known. The Zhou dynasty followed the rites of Yin: wherein it took from or added to may be known.”¹ So, “Li” (rites) in ancient China had a broad coverage, not merely referring to rituals and etiquettes, but also including the laws and regulations of the state. For this reason, Confucius’ inference was really insightful and practical to the reality of Chinese legal history. He had not only revealed the evolutionary relations between “Li” (rites) of Xia, Shang and Zhou dynasties, but also pointed out that the development of “Li” (rites) in the three dynasties was exactly carried on and completed by comparisons. After all, only from the perspective of comparison, can the gains and losses be grasped. Thus, in a sense, Confucius was the first person who had advocated, supported and put the principle of the comparative study of legal history into practice.

¹“Wei Zheng” (Handling Political Affairs) in *Lun Yu (The Analects)*.

9.1 Drawing Lessons from the Preceding Dynasties and Establishing the Priorities of the Legal System Construction

According to historical records, on the brink of the destruction of Xia dynasty, “Tai Shi Ling” (Imperial Astronomer) Zhong Gu “took out his documents..., and fled to Shang”. Therefore, Tang, the leader of Shang, “happily told other vassals that the king of Xia had violated the principles of truth and justice and treated the common people brutally..., thus, the official who has abided by the laws naturally came over and pledged allegiance to Shang”,² which had shown that the legal system of Shang was developed on the basis of the legal system of Xia. Apart from *Tang Xing (The Penal Code of Tang)*, the major legislative achievements in the early years of Shang also included *Guan Xing (Criminal Punishments on Officials)*, which was the very fruit of the summary of the failure of Xia Dynasty.

The destruction of Xia Dynasty was due to the corruption started from the time of Kongjia (the 13th king of Xia) when “(officials) offended the spirits by acting licentious”.³ The rulers in the early years of Shang Dynasty had drawn this lesson and made *Guan Xing (Criminal Punishments on Officials)* with the purpose to straighten out the disciplines of officials, to supervise and encourage “Gong Qing” (councilors), “Da Chen” (ministers) and “Zhu Hou” (vassals), who were required to be devoted to their duties and frank in criticizing the mistakes of sovereigns. In “Yi Xun” (warnings made by Yi Yin in Shang Dynasty) in *Shang Shu (The Book of Historical Document)*, it was stated that “King Tang created *Guan Xing (Criminal Punishments on Officials)* so as to exhort those in posts,” about which it had contained an annotation in *Kong Zhuan (The Biography of Confucius)*, “The criminal punishments on officials was established by King Tang to warn the officials of all ranks.” The main contents of this annotation included the following:

If anyone dares to dance frequently in the court and to sing drunkenly in the room, it would be an unhealthy trend; if anyone dares to be infatuated with money and beauties and with idling and hunting, it would be a licentious practice; if anyone dares to insult the king, oppose loyalty and honesty, abandon moralities, or abuse pretty boys, it would be a defiant practice. If any official does any one of the three practices and has violated any one of the ten taboos, his household will be doomed to be ruined, and if any ruler does any one of them, his state will be doomed to be destroyed. Moreover, any official who does not behave himself shall be punished by ‘Mo’ (to tattoo on the face) so that other foolish officials will be warned.⁴

According to the annotation of Jia Gong Yan, *Guan Xing (Criminal Punishments on Officials)* “was different from those five common penalties because it was

²“Xian Shi Pian” (Foresight and Sagacity) in *Lv Shi Chun Qiu (Spring and Autumn Annals of Master Lv)*.

³“Xia Ben Ji” (The Records of Xia Dynasty) in *Shi Ji (The Records of the Grand Historian)*.

⁴“Yi Xun” (Warnings of Yi Yin in Shang Dynasty) in *Shang Shu (The Book of Historical Document)*.

only imposed on officials in order to have them corrected and to maintain the rule of the state". For this reason, it was an innovation in the legal system of Shang Dynasty and it had become one of the sources of laws on the regulation of officials in later dynasties.

After the establishment of Zhou Dynasty, Ji Dan, the Duke of Zhou and a celebrated statesman and philosopher who was quite familiar with the law of Shang, had recommended that the laws in Shang dynasty should be conditionally applied. While advising Kang Shu on how to consolidate the rule upon the subinfeudation, he said, "As to hearing cases, you should make all the officials concerned get to know the law of Shang, because it is both orderly and reasonable"; "while settling lawsuits, the legal precedents of the Shang dynasty may be referred to by using appropriate punishments for our benefits."⁵

From the comparison of the legal systems of Shang and Zhou, it could be seen that the guiding ideology of "Ming De Shen Fa" (promoting virtue and being prudent in the infliction of punishment) and a series of other legal principles and judicial systems formulated based on this ideology had become one of the outstanding contributions of Zhou dynasty, which was obviously summarized by drawing the lessons from the failure of the legal system at the end of Shang.

At the beginning of Zhou dynasty, in consideration of the disadvantages of the policy of "Zhong Xing Bi" (the stress of severe punishments) carried out at the end of Shang dynasty, the ideology of "Ming De Shen Fa" (promoting virtue and being prudent in the infliction of punishment) was adopted as a state policy by the rulers. In "Kang Gao" (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*, it was stated that "it is your father, the late King Wen, who has behaved with respect for virtue and prudence in the infliction of punishment". "Promoting virtue" was the foundation of "being prudent in the infliction of punishment", while the latter was the specific implementation of the former, which was expressed in the words like "showing you the moral implications is for them to be applied in law enforcements."⁶ The legalization and systematization of the ideology of "Ming De Shen Fa" (promoting virtue and being prudent in the infliction of punishment) was specifically embodied in the criminal principles implemented in the early years of Zhou dynasty, such as the distinction between "Sheng" (negligent crime) and "Fei Sheng" (intentional crime), and that between "Fei Zhong" (casual offence) and "Wei Zhong" (habitual offence), the legal principle that "the criminal shall be pardoned as long as doubts exist in his conviction and punishment", "the criminal's offspring should not be affected by the sentence", and "the criminal punishments should be limited to the convicted himself", etc. It was also reflected by the system that "the sentence of imprisonment shall be made after five or six days and even more than ten days of deliberation" to ensure that the punishment given was proportionate to the crime, by the requirements for the judiciary that

⁵"Kang Gao" (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*.

⁶Ibid.

“the criminals should be sentenced with prudence” and “prudence should be shown in ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment)”. It was true that the policy of “Zhong Xing Bi” (the stress of severe punishments) in the later periods Shang dynasty had led to its extinction, however, the principle of “Ming De Shen Fa” (promoting virtue and being prudent in the infliction of punishment) at the beginning of Zhou dynasty had brought about “Cheng Kang Zhi Zhi” (The Rule of Cheng Kang) under which “peace prevailed in the whole country and punitive measures had not been applied for over forty years”.⁷ So, the contrast between the two was extremely striking.

Since Zhou Dynasty, the policy of reducing criminal punishments had been adopted by most of the new dynasties established after the tyranny of the preceding ones. For example, at the beginning of Western Han dynasty, the inhumane tyrannical policies featured by random appointment of the punitive officials and arbitrary aggravation of criminal punishments which had led to the destruction of the short-lived Qin Dynasty were abandoned, meanwhile, the legislative ideology and principle of simplifying the criminal law was established by the new government by discarding the superfluous and replacing the harsh penalties with the lenient ones. For instance, when Emperor Gaozu of Han Dynasty Liu Bang first entered Xian Yang, the capital of the former Qin Dynasty, he had made an agreement “on a three-chapter-law with the common citizens, namely, anyone who had killed another person would be sentenced to death, anyone who had injured another person or stolen another person’s property would be given a proportionate punishment and the rest of the punishments stipulated in the law of Qin dynasty shall all be abolished”.⁸ In the fourth year of Emperor Hui (192 B.C.), *Xie Shu Lv* (the ordinance of forbidding to store books issued in Qin dynasty) was abolished; in January of the lunar calendar of the first year of Queen Gao (187 B.C.), “San Zu Zui” (the penalty of killing all of the family members on the father’s side, the mother’s side and the wife’s side) and “Yao Yan Ling” (the order of forbidding the common people to discuss the emperor’s faults) were abolished. After Emperor Wen succeeded the throne, the penalties of enslavement, the punishment of “Lian Zuo” (punished for being related to or friendly with sb. who has committed an offence) and the crime of speaking ill of the emperor were also abolished. Besides, the ordinance of corporal punishments was repealed. In judicial practice, the suspected cases were allowed to be submitted to the relevant official departments, and even up to “Ting Wei” (the supreme official in charge of judicature) of the central government.

In the early years of Western Han dynasty, the Confucian theory of integrating “Li” (rites) and law and the principle of “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) were adopted by the rulers.

⁷“Zhou Ben Ji” (Annals of Zhou Dynasty) in *Shi Ji* (*The Records of the Grand Historian*).

⁸“Gao Di Ji” (The Biography of Emperor Gaozu) in *Han Shu* (*The History of Former Han Dynasty*).

It was also emphasized that the officials of all ranks must abide by the law and help the common people to rehabilitate, which not only had benefited the recovery of economy, but also conduced to the transformation of social traditions. According to historical records, under the reign of Emperor Wen, “hundreds of lawsuits were settled in one year, but few of them had involved criminal punishments”.⁹ The legal condition in the early years of Western Han dynasty was in sharp contrast to that in the Qin dynasty in which the legal provisions were over complicated and the people were frequently punished. Because of the sudden destruction of the once arrogant and powerful Qin Dynasty, many philosophers and statesmen of early Western Han dynasty had made a number of researches on the reasons of its extinction. The argument by Jia Yi about the malpractices of the arbitrary application of law and criminal punishments in Qin Dynasty had exerted profound influences on the rulers in the early days of Han Dynasty. As it were, without the summary of the failure of Qin Dynasty, it was impossible to carry out the legal reform conducted at the beginning of Han Dynasty.

In the first several years of Tang Dynasty, the ruling group led by Li Shimin, Emperor Taizong of Tang, also had laid much stress on the summary of the experience and lessons from the success and failure of the preceding dynasty in legal system, and they had insisted on choosing and following what was right and abandoning what was wrong in legislation. In the initial stage of “Zhen Guan” (title of the reign of Emperor Taizong), a topic heatedly discussed by the emperor and ministers in the imperial court was the causes of the destruction of the Sui Dynasty. Consequently, they came to the conclusion that in Sui Dynasty, “the ordinances and regulations had been all abandoned”,¹⁰ furthermore, “no attention had been paid to the illegal conducts of the officials”,¹¹ which had led to the “suffering of the common people and the final perishing of the country”.¹² Thus, they emphasized that the legislation should be lenient, “Li” (rites) should be propagated, the criminal punishments should be applied with prudence, moreover, all the crimes should be judged according to law. Therefore, the well-known “Zhen Guan Zhi Zhi” (Excellent Governance during Zhen Guan Reign) was both motivated and symbolized by the perfection of legal systems.

In the early days of Ming Dynasty, in consideration of the lessons of Yuan Dynasty in which the superfluousness of regulations had resulted in the situation where the officials had juggled with the law and acted in collision with each other, which had not only brought great damage to the state and the people but also led to people’s rebellion against the oppression of the officials, Emperor Taizu Zhu Yuanzhang, who had participated in the great uprising against Yuan government, had promoted the legislative principle and guiding ideology that “the law should be

⁹“Wen Di Ji” (The Biography of Emperor Wen) in *Han Shu (The History of Former Han Dynasty)*.

¹⁰“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu (The History of Sui Dynasty)*.

¹¹*Wei Zheng Gong Jian Lu (Records of the Remonstrations of Duke Zheng of Wei)*, Vol. 3.

¹²“Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu (The History of Old Tang Dynasty)*.

as simple and concise as possible” and that “people should be guided by the propagation of ‘Li’ and villains should be punished through the formulation of laws”. Meanwhile, he also stressed that harsh laws and severe penalties should be applied so as to straighten out the disciplines of officials and punish the corrupted ones. Furthermore, he also attached great importance to the prevention of crimes and the publicity of laws. In the 30th year of Hongwu (1397), as *Da Ming Lv Gao* (*The Announcement of the Great Ming Code*) was completed, an imperial edict was issued by him to instruct his subjects by saying, “the law is controlled by the officials and rarely known by the common people. Therefore, I order the judicial officials to select the provisions from the appendix, to choose the key points and attach them to the laws applied..., and they should further be publicized so that the people all over the country will know them and abide by them.”¹³ Zhu Yuanzhang’s legal ideology had made a certain contribution to the legal system construction in Ming Dynasty.

In Qing Dynasty, before the Manchu entered the central plains, Taizu Nurhaci (first emperor of Qing Dynasty) had pointed out that, the corruption and decline of Ming Dynasty was because “the settlement of official businesses was not trusted by the public, and the laws and regulations were not strict and impartial”.¹⁴ As a result, he had laid much stress on “justice, public credibility and law” so as to have “the countrymen moralized”.¹⁵ When Hong Taiji came to the throne, he emphasized the importance of the understanding of legal system from his summary of the historical experience. He said:

Looking back at the preceding dynasties, it can be discovered that those in which great efforts have been made to make the country prosperous and the definitions of laws clear have all enjoyed a long-standing prosperity; while those in which the government affairs have been neglected and laws and disciplines undermined have all suffered inevitable decline of the national power.¹⁶

Therefore, he regarded “the policy of the propagation of laws and disciplines and the revision of law codes” as “a guarantee to the prosperity of the nation”.¹⁷

To sum up, at the beginning of each dynasty, wise statesmen and philosophers had all earnestly summarized the success and failure of preceding dynasties and their influences on the rise and fall of the country, and on this basis, new legislative ideologies and principles were created, and new legal systems were constructed at the new cognitive point.

¹³“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*).

¹⁴“Tai Zu” (Emperor Taizu) in *Man Wen Lao Dang* (*The Old Manchu Archive*) (Book.3), December of the Year of GuiChou (1613), Zhong Hua Book Company, 1990.

¹⁵*Qing Tai Zu Gao Huang Di Shi Lu* (*The Anecdots of Emperor Tai Zu of Great Qing*), Vol. 5, p. 21.

¹⁶*Da Qing Taizong Wen Huang Di Shi Lu* (*The Anecdots of Emperor Wen of Great Qing*), Vol. 36, p. 13.

¹⁷Ibid.

9.2 The Continuous Adjustment of the Structure of Legal Codes by Comparison

In ancient China, each dynasty had its respective representative codes, which had usually succeeded the ones in the preceding dynasty, yet were different either in the structure or in style, or which had been basically formulated on the basis of the preceding ones, but had been constantly revised and adjusted by comparison. For example, *Fa Jing (Canon of Laws)* was a comprehensive collection of laws of various states in the Warring States Period. In *Tang Lv Shu Yi (The Comments on Tang Code)*, it was stated:

Zhou Dynasty declined because of the severe punishments applied, thus, in the Warring States, the systems different from that of Zhou dynasty were established. Marquis Wen of Wei appointed Li Kui as the chief counselor, who therefore had collected the criminal laws of various states and wrote *Fa Jing (Canon of Laws)* which consisted of six chapters.

In terms of the structure of *Fa Jing (Canon of Laws)*, “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu (The History of Jin Dynasty)* had the following commentaries:

Li Kui compiled the laws of the various states and made *Fa Jing (Canon of Laws)*. He thought that the most urgent business of the government was the handling of thefts and violence, thus, the law which he wrote started with the chapter of ‘Dao’ (Theft) and the chapter of ‘Zei’ (banditry). As thieves and robbers must be caught and arrested, he wrote the chapter of ‘Wang’ (catching) and the chapter of ‘Bu’ (Arresting). Besides, those frivolous and cunning conducts, the conduct of climbing over city walls, gambling, coveting others’ wealth, and other excessively lascivious conducts were included in the chapter of ‘Za Lv’ (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed). He then wrote the detailed rules to specify the punishments by applying the laws. Thus, there were altogether six chapters.

During Shang Yang Reform (475–221 B.C.), the very basic law followed by Shang Yang was *Fa Jing (Canon of Laws)*, which was recorded in the following sentence: “Shang Yang was appointed to carry out the reform, and he had transformed the appellation of ‘Fa’ (law) into ‘Lv’ (criminal law)”. The excavation of *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty) had made the various chapters of *Qin Lv (Qin Code)* which was formulated between the period of Shang Yang Reform (475–221 B.C.) and the period of the unification by Emperor Shihuang of Qin exposed to the later generations. According to *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty), *Qin Lv (Qin Code)* consisted of the following 18 chapters:

“Tian Lv” (Statutes on Farming and Forest Protection), “Jiu Yuan Lv” (Statutes on Livestock Breeding and Gardening), “Cang Lv” (Statutes on Storage of Forage), “Jin Bu Lv” (Statutes on Currency and Property), “Guan Shi Lv” (Statutes on Taxations from Customs and Markets), “Gong Lv” (Statutes on Handicraft Industry), “Gong Ren Cheng Lv” (Statutes on Public-owned Handicraft Production), “Jun Gong Lv” (Statutes on Controlling Handicraftsmen), “Yao Lv” (Statutes on Corvee), “Si Kong Lv” (Statutes on National Projects), “Jun Jue Lv” (Statutes on Military Exploit and Official Titles), “Zhi Li Lv” (Statutes on the Regulation of officials), “Xiao Lv” (Statutes on the Inspection of the

Supplies and Property of State Offices), “Chuan Shi Lv” (Statutes on the Accommodation of Officials in Courier Stations), “Xing Shu Lv” (Statutes on the Delivery of Documents), “Nei Shi Za Lv” (Statutes on State Offices in the Capital), “Wei Za Lv” (Statutes on Judicial Affairs) and “Shu Bang Lv” (Statutes on the Management of Vassal States).

These lists of laws had exerted different influences on the later dynasties. For example, “Tian Lv” (Statute on Farming and Forest Protection) and “Jin Bu Lv” (Statute on Currency and Property) were adopted in *Han Lv* (*Han Code*). Although mostly, the laws of other dynasties were different from those of Qin in the arrangement of chapters, they were similar in contents.

At the beginning of Western Han Dynasty, “the three chapters of ‘Hu’ (households), ‘Xing’ (Corvee) and ‘Jiu’ (livestock breeding) were added to the laws written by Li Kui by Xiao He who was the ‘Chen Xiang’ (the prime minister) at the time, and it was called *Jiu Zhang Lv* (*The Code in Nine Chapters*).”¹⁸ Although Emperor Gaozu Liu Bang had appealed to the public to show respect to the law in the agreement of three-chapter-law before he established a unified dynasty, he was fully aware that “as the various minorities have not pledged allegiance and wars have not been ended, it is unable to resist the foreign enemies by the three-chapter-law”.¹⁹ As a result, after Han Dynasty was established, he ordered Xiao He who was the “Chen Xiang” (the prime minister) at the time to “have a research of *Qin Lv* (*Qin Code*) and select those contents which are appropriate to be included in the rules of Han, and then drafted *Jiu Zhang Lv* (*The Code in Nine Chapters*)”.²⁰ Specifically, the parts from *Qin Lv* (*Qin Code*) which could be applied to the historical cases in Han were utilized as the basis for the drafting of the new laws, which was the so-called “Han Cheng Qin Zhi” (Qin Code was succeeded by Han Dynasty). In “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*), it was recorded that “while Xiao He was drafting the law, the punishments of ‘San Yi’ (executing all members of the three clans related) and ‘Lian Zuo’ (punished for being related to or friendly with someone who has committed an offence) were deleted, and the provisions of intentional breach of law by supervisory officials and the three chapters of ‘Xing’ (Corvee), ‘Jiu’ (livestock breeding) and ‘Hu’ (households) were added, and thus altogether nine chapters were drafted.”

The contents of the newly added “Hu Lv” (Statute on Households) was about marriages and taxation; the contents of the newly added “Xing Lv” (Statute on Corvee) was about unauthorized corvee; and the contents of the newly added “Jiu Lv” (Statute on Livestock Breeding) was about the breeding of livestock such as horses and cattle. Although *Jiu Zhang Lv* (*The Code in Nine Chapters*) had already been lost, its general structure could still be seen from “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

Apart from *Jiu Zhang Lv* (*The Code in Nine Chapters*), there were the 18-chapter *Bang Zhang Lv* (*Law of Rites*) written by Shu Sun tong who had aimed to

¹⁸ *Tang Lv Shu Yi Xu* (Preface to *Tang Lv Shu Yi*).

¹⁹ “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*).

²⁰ *Ibid.*

“supplement the items that were not covered by the existing laws”, the 27-chapter *Yue Gong Lv* (*Statute on the Security within the Imperial Palace*) written by Zhang Tang, and the 6-chapter *Chao Lv* (*Statute on the Etiquettes in the Imperial Court*). The purpose of making all these laws was to comprehensively establish the autocratic authority of the rulers. Since 1983, over 500 “Zhu Jian” (bamboo slips) about the laws of Han dynasty had been excavated in Zhangjia Mountain in Jiangling of Hubei. Of the 28 chapters which were sorted out, there were some which were the same as those recorded in “Qin Jian” (bamboo writing slips in Qin Dynasty) in Shuihudi, including “Jin Bu Lv” (Statutes on Currency and Property), “Yao Lv” (Statutes on Corvee), “Zhi Li Lv” (Statutes on the Regulation of officials), “Xiao Lv” (Statutes on the Inspection of the Supplies and Property of State Offices), “Chuan Shi Lv” (Statutes on the Accommodation of Officials in Courier Stations), “Xing Shu Lv” (Statutes on the Delivery of Documents) and “Tian Lv” (Statutes on Farming and Forest Protection). Those which were different included “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed), “Shi Lv” (Statutes on Market), “Jun Shu Lv” (Statutes on Goods Supply), “Shi Lv” (Statutes on Historical Documents), “Gao Lv” (Statutes on Prosecution), “Qian Lv” (Statutes on Currency) and “Ci Lv” (Statutes on Granting a Reward). The excavation of “Han Jian” (bamboo writing slips in Han Dynasty) in Zhangjia Mountain had provided further evidence for the relationship of the inheritance between the law of Qin dynasty and the law of Han dynasty. With the complexity of structures and the richness of contents, the law of Han dynasty had not only surpassed *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty), but also gone beyond *Jiu Zhang Lv* (*The Code in Nine Chapters*).

“Ling” (order or ordinance) was another form of law in Han Dynasty, which included *Gong Wei Ling* (*Ordinance on the Guard of the Imperial Palace*), *Yu Ling* (*Ordinance on Lawsuits*) and *Shu Xing Ling* (*Ordinance on the Atonement of Crimes*). *Shou Fa Shou Ling Shi San Pian* (*Thirteen Ordinances for Law-abiding*), which was unearthed in Yinque Mountain in Shandong, had covered many aspects such as land, taxation, markets, storage, city defense and the observance of “Ling”. This had shown that “Ling” (order or ordinance) was an important form of law in Han Dynasty. Besides, other forms of law included “Ke” (rule) and “Bi” (analogy). “Ke” was also the name for regulations in Han dynasty; “Bi” (analogy) was similar to the collections of legal cases. The typical laws in the form of “Bi” (analogy) included *Jue Shi Bi* (the precedents in lawsuit settlements), *Si Zui Jue Shi Bi* (the precedents for capital crimes) and *Ci Song Bi* (the precedents compiled according to judicial experiences), which could all be used as the legal basis of trials back in Han Dynasty. Therefore, it was obvious that a strict legal network had already been constructed at that time, and there were so many “legal documents that they were stored in several rooms and it was impossible to read them through”.²¹

²¹“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*).

However, among the various forms of law, “Lv” (criminal law) was the most fundamental as well as the most stable one.

In Eastern Han Dynasty, “Li” (rites) were introduced into law by the great Confucian philosophers Ma Rong and Zheng Xuan by explaining Confucian classics and interpreting laws on the one hand and conducting textual researches on the legal systems of the dynasties since Xia with the method of comparison on the other hand, which had made remarkable contributions to the legal construction of Eastern Han dynasty. According to historical records, “Zheng Xuan had included all great classics, collected various schools of theories, removed the superfluous and the absurd and made supplements and corrections, which had made it possible for the later scholars to understand the basic methods and structures of legal annotations.”²² The method of historical comparison characterized by exploring the origin by following the streamline which was adopted by Zheng Xuan had had great influences on the formulation of *Tang Lv Shu Yi* (*The Comments on Tang Code*) and the development of “Lv Xue” (the study of statutory laws) through interpreting and annotating laws in Qing Dynasty.

After hundreds of years of practice, there had already been age-old malpractices in the enforcement of *Han Lv* (*Han Code*) by the end of Eastern Han dynasty, because “the scarcity of chapters had resulted in the lack of provisions, the lack of provisions had resulted in the deficiency of case settlements, which had in turn resulted in the negligence of sentences for criminals.”²³ So, the legal system was in desperate need of reformation. On the basis of “following and adopting *Han Lv* (*Han Code*)”, Cao Rui, Emperor Ming of Wei, had made great efforts to have the superfluous and inaccurate structure of *Han Lv* (*Han Code*) corrected, and drafted the 18-chapter *Xin Lv* (*New Code*) which was referred to as *Wei Lv* (*Wei Code*) in history. The preface to *Wei Lv* (*Wei Code*) preserved in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*) was of extremely great historic value, because it had recorded how the 18 chapters of *Wei Lv* (*Wei Code*) was gradually formulated after the comparison of the achievements and failure of previous laws.

“Now the new code will be formulated, which should include all types of legal cases with the supplement of necessary chapters. The old criminal law is based on *Fa Jing* (*Canon of Laws*) made in Qin dynasty, with only three chapters added. Besides, ‘Ju Lv’ (Circumstances of Mitigation and Aggravation of Punishment) has not been changed, and still is placed in the sixth chapter. The items of specific crimes are not put at the beginning, nor at the end of the law, which is not the appropriate way. Thus, all items of crimes should be gathered and put at the first page of the specific criminal law, referred to as ‘Xing Ming’ (the criminal law). Robbery, threatening and human trafficking and kidnapping are all included in ‘Dao Lv’ (Statute on Theft), but they are in fact not the cases of theft, thus, they are separated

²²“Zheng Xuan Zhuan” (The Biography of Zheng Xuan) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

²³“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

from it and included into 'Jie Lue Lv' (Statute on Robbery); cheating, extorting, crossing the boundaries and faking were included in 'Zei Lv' (Statute on Banditry); cheating in life and death were included in 'Qiu Lv' (Statute on Imprisonment), and escaping corvee by cheating were included in 'Ling Jing', because it has involved various cases, thus, they are separated from the original chapters and included into 'Zha Lv' (Statute on Cheating). Illegally felling trees, killing or injuring people and their livestock and so on were included in 'Zei Lv' (Statute on Banditry); damaging or destruction of official property were included in 'Jin Bu Lv' (Statute on Currency and Property) which are separated from the original chapters and included into 'Hui Wang Lv' (Statute on Damage); filing and responding to lawsuits were included in 'Qiu Lv' (Statute on Imprisonment); prosecuting and arresting of the plaintiff and visiting others' houses to apologize were included in 'Jiu Lv' (Statute on Livestock Breeding), so they are separated from the original chapters and included into 'Gao He Lv' (Statute on Prosecution); putting criminals in custody, conducting interrogations and making judgments were included in 'Qiu Lv' (Statute on Imprisonment); cases concerning interrogation and making investigation reports were included in 'Xing Lv' (Statute on Corvee), and they should better be written into an independent chapter, thus, they are separated from the original chapters and written into 'Ji Xun Lv' (Statute on Interrogation) and 'Duan Yu Lv' (Statute on Trials and Punishments); accepting bribes from someone under one's own jurisdiction were included in 'Dao Lv' (Statute on Theft), borrowing money improperly were included in 'Za Lv' (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed); threatening officials to accept bribes in 'Ling Yi' (The Second Article of the Statute); inspection of envoys on briberies in the ordinances are similar to each other, thus, they are separated into 'Qing Qiu Lv' (Statute on Asking for Help and Taking Bribes); insulting and robbing others by force in 'Dao Lv' (Statute on Theft), levying corvee with no permission in 'Xing Lv' (Statute on Corvee), selling official documents in 'Ju Lv' (Circumstances of Mitigation and Aggravation of Punishment), and levying corvee with no permission are included into 'Xing Shan Lv'. Escaping corvee duties and remaining in one's home in 'Xing Lv' (Statute on Corvee), forestalling provisions in 'Zei Lv' (Statute on Banditry), delaying military actions or transferring of military provisions in 'Jiu Lv' (Statute on Livestock Breeding), which should be separated. Moreover, according to the old criminal law, if any official has shown no respect for the decrees or does not implement the decrees, and thus delaying military actions, he shall be given death penalty, but it can be remitted according to 'Ding You Zhao Shu' (an imperial edict issued by Emperor Wen of Han), which was issued by Emperor Wen of Han and so it was not appropriate to be used as the criminal law, consequently, they are included into 'Liu Lv' (the six laws). In Qin dynasty, originally barns, carriages and kitchens have been installed, so, this installment of Qin is adopted in Han dynasty, but they have gradually been abandoned due to the massive expenditures, so finally there are only post horses and no carriages. However, this has not been revised in the law, hence, 'Jiu Lv' (Statute on Livestock Breeding) was deleted and those proper and reasonable provisions are extracted and written into 'You Yi Ling'. The cases in which someone has been accused of treason and investigations are

conducted are included into ‘Gao He Lv’ (Statute on Prosecution). The cases in which someone has reported important events to the superior are written into ‘Bian Shi Ling’ (the rule for reporting the important events to the superior); those in which someone has reported urgent affairs, which are in conformity to the provisions in ‘Xing Lv’, are written into ‘Jing Shi Lv’ (Statute on Emergent Affairs). Returning booties to the owners in ‘Dao Lv’ (Statute on Theft), atoning punishments by handing in gold in ‘Jin Bu Lv’ (Statute on Currency and Property), and damage of official property by mediocre officials in the ordinances are written into ‘Chang Zang Lv’ (Statute on the Reimbursement of Bribes).”

In conclusion, compared with *Jiu Zhang Lv* (*The Code in Nine Chapters*) of Han Dynasty, *Wei Lv* (*Wei Code*) added nine chapters in order to remedy the defects of the incompleteness of chapters. So, compared with “Bang Zhang” (alongside other chapters), “Ke” (rule) and “Ling” (order or ordinance) of Han Dynasty, it was more concise and was also in correspondence with the basic tenet of Emperor Ming to “simplify the old provisions”. What should be noted in especial was that the style used by *Wei Lv* (*Wei Code*) in which the charges and punishments were placed in the first page of the code was followed successively in later dynasties.

In the first several years of Jin Dynasty, based on the laws of Han and Wei and under the basic tenet of “discarding the dregs and absorbing the quintessence to make provisions appropriate and conducive to the present rule”, the famous *Tai Shi Lv* (*Tai Shi Code*) was formulated with the method of historical comparison by “following the standards of Xia, Shang and Zhou, modeling on the style which has been prevalent for a thousand year”²⁴ and making an exhaustive analysis of the success and failure of the legal systems of the three dynasties.

Tai Shi Lv (*Tai Shi Code*) consisted of altogether 20 chapters, of which the four chapters of “Jie Lue” (Statute on Robbery), “Jing Shi” (Statute on Emergent Affairs), “Chang Zang” (Statute on the Reimbursement of Bribes) and “Mian Zuo” (Statute on the Exempt of Punishment) in *Wei Lv* (*Wei Code*) were deleted and the six chapters of “Fa Li” (classic cases), “Wei Gong” (guarding the palace), “Shui Huo” (water and fire), “Guan Shi” (taxations from customs and markets), “Wei Zhi” (violation of policies) and “Zhu Hou” (vassals) were newly added. Of the six newly supplemented chapters, “Wei Gong” (guarding the palace) was about the preservation of the security of the imperial palace to be adapted to the development of autocratic monarchy; and “Wei Zhi” (violation of policies) was about the punishment of those officials who had not followed the regulations and procedures to improve the administrative efficiency, which had never been included in the legal codes of Han and Wei dynasties but were honored and followed by the laws of Sui and Tang dynasties. In addition, “Jiu Lv” (Statute on Livestock Breeding), which had originally been written in the law of Han dynasty, was restored. The formulation of *Jin Lv* (*Jin Code*) was a tremendous summative project which was highly praised by both the ancient and modern scholars. Zhang Taiyan once commented that it

²⁴“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

“has the sense of beauty of violating the rulers while benefiting the civilians”.²⁵ The Southern Dynasty had been influenced *Jin Lv* (*Jin Code*) for more than 200 years.

During Jin dynasty, Du Yu, the renowned scholar of “Lv Xue” (the study of statutory laws), was also an outstanding jurist of comparative law. By the comparison of the achievements and defects of the laws of Han and Wei dynasties, he had reached the following incisive conclusion:

Thus, the law should be concise in words and direct in citing cases and what it permits or prohibits should all be brief and to the point. If the citing of cases is direct, the cases can be easily understood by people; if the prohibitions are brief and to the point, they can hardly be violated by people. Consequently, those who can easily understand it will intentionally avoid taking the prohibited actions; and without violation of law, the criminal punishments will be rarely used.²⁶

In his *Chun Qiu Zuo Shi Jing Zhuan Ji Jie* (*Collected Commentaries on the Spring and Autumn Annals and the Chronicle of Zuo*), the method of comparison was also used by him to expound the laws and regulations of the pre-Qin period. Particularly, he had mentioned that “‘Lv’ (criminal law) is used to punish crimes while ‘Ling’ (order or ordinance) is used to maintain the administrative systems”,²⁷ and for the first time the demarcation of “Lv” (criminal law) and “Ling” (order or ordinance) was clarified, which had remained ambiguous since Qin and Han dynasties. Afterwards, based on Du Yu’s theory, the following definitions of “Lv” (criminal law) and “Ling” (order or ordinance) were made by *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*): “‘Lv’ is the basis for the conviction of a criminal and the measurement of penalty, while ‘Ling’ is used for the establishment of standards and systems.”

Before the rulers of the Northern Dynasties entered the central plains, “in a case trial, the parties involved were only subject to verbal restraint, and the case was recorded only on carved wooden or bamboo slips. Besides, there were no laws concerning imprisonment or interrogation and all criminals were punished according to temporary judgments”.²⁸ Upon entering the central plains, in an attempt to stabilize the social order and to meet the demand of the control of the mass of Han nationality, the rulers of Northern Dynasties had positively absorbed the advanced culture of Han nationality, including the legal culture, with which they had conducted effective legislative activities.

In Northern Dynasties, the principle that “having both ancient and modern laws deliberated to ensure that they are not only beneficial to the nation and civilians, but also consistent with the present policies by modifying them accordingly”

²⁵“Wu Chao Fa Lv Suo Yin” (The Index of Laws in Five Dynasties) in *Tai Yan Wen Lu* (*The Selected Works of Zhang Taiyan*).

²⁶“Du Yu Zhuan” (The Biography of Du Yu) in *Jin Shu* (*The History of Jin Dynasty*).

²⁷Quoted from “Du Yu Lv Xu” (Preface to the Law of Du Yu) in *Tai Ping Yu Lan* (*Imperial Readings of the Taiping Era*), Vol. 638.

²⁸“Xing Fa Zhi” (The Record of the Criminal Law) in *Wei Shu* (*The History of Northern Wei Dynasty*).

was applied in legislation, meanwhile, much stress was laid on the assimilation of both the quintessence of the legal cultures of Han, Wei and Jin dynasties and the successful experience of their legal constructions. In his book *Study on the Origin of Sui and Tang Systems*, modern writer Chen Yinke had accurately explained the reasons for the development of the laws of the Northern Wei Dynasty:

The criminal law of the Northern Wei Dynasty was an epitome of the greatest works of that time, because it had in fact comprehensively assimilated not only the classics in Han dynasty which were only passed down to the noble families in the central plains, but also the laws of Han, Wei and Jin which were preserved and developed by the Confucian scholars in the west of the river basin after the The Disaster of Yongjia (referred to events that occurred in 311 A.D. when Liu Cong forces captured Luoyang, the Jin capital), as well as the study of criminal laws since the Western Jin Dynasty conducted by the scholars in the lower reaches of the Yangtze River. If it had been formulated only according to *Jin Lv* (*Jin Code*) which had been followed by the Southern Dynasties, it would have been relatively well-developed than *Han Lv* (*Han Code*); however, the officials in the lower reaches of the Yangtze River had thought it not worthwhile to do the research on criminal laws, so the study of the criminal law had experienced no evident development. In addition, the exquisite principles in the study of the laws of Han dynasty were actually abandoned by scholars in the east of the river basin. Nevertheless, ‘Lv Xue’ (the study of statutory laws) since Han dynasties in the west of the river basin had developed independently, which was slightly different from what were remained in the central plains at the beginning of the Northern Wei Dynasty. Consequently, it was possible for the legislators in Northern Wei dynasty to make comprehensive comparisons by absorbing the quintessence. Therefore, such a marvelous achievement was not made by accident, but by extensive adoptions and collections.

The greatest legislative achievement in Northern Qi Dynasty was *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*). It consisted of 12 chapters, which included “Ming Li” (Statutes and terms), “Jin Wei” (Rules for Guarding the Imperial Palace), “Hu Hun” (Rules for Households and Marriages), “Shan Xing” (Rules for Military and Official Construction), “Wei Zhi” (Rules for Violation of Policies), “Zha Wei” (Rules for False Accusations), “Dou Song” (Disputes and Litigations), “Zei Dao” (Rules for Banditry and Theft), “Bu Duan” (Rules for Arrests and Prosecutions), “Hui Sun” (Rules for Damage or Destruction of Official Property), “Jiu Mu” (Rules for Breeding of Livestock) and “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed). It was obviously formulated by epitomizing the laws of Wei and Jin dynasties. In “Cui Ang Zhuan” (Biography of Cui Ang) in *Qi Shu* (*History of Qi Dynasty*), it was recorded that in *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*) “most of the contents of the ancient and modern laws were revised and modified” by the employment of the method of comparison, so it was just on this basis that most of the modification of the contents was completed. *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*) was significant because it was a direct and very important source of the criminal law of Sui and Tang dynasties. Thus, as far as the contents of the law were concerned, although there were divisions and combinations, it still had not broken through the framework of the preceding 12 laws.

Because Tang Dynasty represented a very prosperous period of feudal China, *Tang Lv* (*Tang Code*) could be considered as the much maturer and standardized forms of Chinese feudal laws. Furthermore, its appearance had reflected the massive efforts made by the law revisers in researching and comparing the successes and

failures of the studies of the laws of the preceding dynasties and summarizing their experience. Just as what was commented in the *Preface to Yong Hui Lv Shu* (also named *Tang Lv Shu Yi*):

Thus, 'Lv Shu' (Commentary on Law) is made for the clarification of regulations and rules. To formulate it, the materials, including the ancient ones such as the edicts of emperors and kings and the recent ones such as works of Xiao and Jia, have all been studied in the way of historical comparison. In the exploration of their origins, the superfluous provisions have been removed and the structure has been simplified. The process is similar to that in which the weight is known by means of measurement and the circumference is calculated by means of ruler. So, it is just like looking at one picture to skim through the three chapters.

Compared with *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*), of the 12 chapters of *Tang Lv* (*Tang Code*), those which were the same included "Ming Li" (Statutes and Terms), "Hu Hun" (Rules for Households and Marriages), "Shan Xing" (Rules for Military and Official Construction), "Zha Wei" (Rules for False Accusations), "Zei Dao" (Rules for Banditry and Theft) and "Za Lv" (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed), while those which were different included the following: "Jin Wei" (Rules for Guarding the Imperial Palace) was changed into "Wei Jin" (Rules for the Security of State Institutions), "Jiu Mu" (Rules for Breeding of Livestock) was changed into "Jiu Ku" (Government Stables and Treasuries), "Bu Duan" (Rules for Arrests and Prosecutions) was separated into "Bu Wang" (Rules for Escaped Prisoners) and "Duan Yu" (Trials and Punishments), "Hui Sun" (Rules for Damage or Destruction of Official Property) and "Wei Zhi" (Rules for Violation of Policies) were removed, and "Zhi Zhi" (The State Office System) was added.

Tang Lv (*Tang Code*) was concise in provisions and lenient in criminal punishments. Compared with *Sui Lv* (*Sui code*), it "had reduced 92 articles on death penalty and 71 articles on the punishments of exile and imprisonment.... Those provisions which were simplified by cutting out the superfluous and those in which the severe punishments were modified into lenient ones had amounted to such a great number that they could not be recorded one by one".²⁹

In the third Year of Yonghui (652), considering that "there is no fixed annotations, and there are no standard answers to the examinations of laws and regulations held every year", an edict was issued by Emperor Gaozong stating that, "thus, it is advisable to summon the scholars who are familiar with laws to present memorials on legal provisions with commentaries."³⁰ Consequently, in accordance with the principle of "widely gathering precepts and mandates while studying and exploring classics", Zhangsun Wuji, Li Yi, Yu Zhining and several other officials had made annotations on *Yong Hui Lv* (*Yong Hui Code*) and named them "Lv Shu" (Commentary on Law), which was of equal legal effect to the legal provisions. "Lv Shu" (Commentary on Law) was of great instructive significance to judges in case trials because "in making judgments, the annotations are quoted by almost

²⁹ "Xing Fa Zhi" (The Record of the Criminal Law) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*).

³⁰ *Ibid.*

all of the judicial officials”,³¹ in the meantime, it had also greatly stimulated the development of the science of law in feudal China. The historical prototype of “Lv Shu” (Commentary on Law) was the “legal questions and answers” in “Qin Jian” (bamboo writing slips in Qin Dynasty), by which, the meaning of legal provisions could be illustrated and some problems concerning the application of those provisions could be solved.

The major form of law in Tang Dynasty was “Lv” (criminal law); others included “Ling” (order or ordinance), “Ge” (injunction), “Shi” (standard), “Dian” (code), “Chi” (instruction) and “Li” (precedent). “Ling” (order or ordinance) originated in Qin and Han dynasties, and the typical laws in the form of “Ling” in Han Dynasty included *Ling Jia* (the first order) and *Ling Yi* (the second order). “Ge” (injunction) appeared in Northern Wei Dynasty and an example was *Lin Zhi Ge* (injunction made in the Lin Zhi Temple) which had evolved from “Ke” (rule) of Wei and Jin dynasty. “Shi” (standard) came from Jin Dynasty, such as “Hu Diao Shi” (the basic economic and financial standard in Jin dynasty). “Dian” (code) originated from *Zhou Guan* (*Zhou Li: The Rites of Zhou Dynasty*), and *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*) which consisted of six parts: “Li Dian” (Administrative Code), “Jiao Dian” (Code of Education), “Li Dian” (Code of Rites), “Zheng Dian” (Code of Policies), “Xing Dian” (Code of Punishments) and “Shi Dian” (Civil Code) was composed according to it. “Chi” referred to the administrative orders and decisions on relevant legal norms issued by the emperor. “Li” (precedent) derived from “Bi” (analogy) in Han Dynasty. In a word, each of the legal forms in Tang Dynasty had its historical origin, and through comparison and modification, they had constituted a fairly complete legal system so as to adjust the social relationships which were then becoming more and more complicated.

The fundamental law in Song Dynasty was *Song Xing Tong* (*The Penal Code of Song Dynasty*), the style of which had represented a significant evolvement of the traditional style of criminal law since Qin and Han dynasty, and its historical origin could be dated back to *Da Zhong Xing Lv Tong Lei* (*Collections of the Major and Medium-sized Criminal Laws*) compiled at the end of Tang Dynasty. Although several legislative activities were conducted in the middle of Tang dynasty, they were nothing more than corrections and deletions of “Ge” (injunction) and “Chi” (instruction). In fact, those activities were mostly compilations of “Chi” (instruction), because “Chi” (instruction) had become the most authoritative form of law by the later period of Tang and its legal validity and applicability had both surpassed those of “Lv” (criminal law), “Ling” (order or ordinance), “Ge” (injunction) and “Shi” (standard). In the imperial edict issued on the 23rd of December of the third year of Changqing (823 A.D.), which was recorded in “Duan Yu Lv” (Statute on Trials and Punishments) in *Song Xing Tong* (*The Penal Code of Song Dynasty*), there were the following words:

‘Yu Shi Tai’ (The Censorate) submitted a memorial to the throne, proposing that the application of ‘Chi’ (instruction) should not be restricted by other forms of laws. Thus, from now on, the final judgments by the two judicial agencies shall all be made according to ‘Chi’ (instruction).

³¹ Ibid.

The improvement of the status of “Chi” (instruction) had reflected the urgent need of making flexible legislations in time under the circumstance of social turbulence. By the seventh year of Dazhong (853 A.D.), Zhang Kui, who was “Cang Cao” (an official in charge of grain storage) in the “Wei Shuai Fu” (the army defending the imperial court), had divided the criminal provisions of Tang into 121 categories based on the different objects of regulations and added “Ling” (order or ordinance), “Ge” (injunction), “Shi” (standard) and “Chi” (instruction) which had similar features to those provisions according to the principle that “all criminal provisions should be classified into various categories and should be appended with ‘Ge’ (injunction) and ‘Chi’ (instruction)”. After it was finished, it was named *Xing Lv Tong Lei* (*Collections of Criminal Punishments*), which contained altogether 1,250 articles. Subsequently, it was enacted and enforced by “Xing Bu” (Board of Punishment) on the request of the imperial edict of Emperor Xuanzong, therefore, the common law was integrated with the specific form of law by the addition of “Ge” (injunction) and “Chi” (instruction) to the criminal articles, which was of great benefit to the improvement of the efficiency of the application of laws and to the flexible settlement of lawsuits by the judicial officials. This method of legislation, which had raised the status of the specific form of law to that of the common law, had symbolized the main tendency of legal development in the later period of feudal China.

The reason why the legal form of “Xing Tong” (collection and classification) was adopted instead of the form of “Lv Shu” (commentary on law) in Song Dynasty after its establishment was that the rulers of Song Dynasty were fully aware of the immense difference between the general environment of Song and that of the earlier Tang dynasty. As free transactions of land and development of commodity economy had not only led to the changes of social relationships but also to the increase of crimes, it was requisite to have the legal provisions modified promptly and the judicial enforcements strengthened. As a result, after Song Dynasty was established, “Xing Tong” was instantly chosen as the fundamental form of national law.

Song Dynasty was an era when the feudal autocracy was intensified, so the adjustment range of “Chi” (instruction) issued by emperors was continuously expanded and finally the number of “Chi” greatly increased. Therefore, it was necessary to classify them by following the principle of keeping the quintessence and removing the dregs. Since the early period of Song dynasty, the compilation of “Chi” (instruction) was frequently conducted, so the compilation of “Chi” (instruction) had become the most constant legislative activities. In “Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi* (*The History of Song Dynasty*), it was recorded that “the legal forms of Song derived from ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Ge’ (injunction) and ‘Shi’ (standard) of Tang dynasty, whereas immediate modification was accomplished through the compilation of ‘Chi’ (instruction).”

As the last two dynasties of feudal China, Ming and Qing were also the two dynasties which had their own particular characteristics in terms of legal construction. Early before a unified Ming Dynasty was established, Li Shanchang, who was “Zuo Cheng Xiang” (the second prime minister) at the time, had started to make laws according to the emperor’s order with other officials. He suggested to

Emperor Taizu Zhu Yuanzhang that “since the form of *Jiu Zhang Lv* (*The Code in Nine Chapters*) of Han dynasty have been modelled by almost all the preceding dynasties, and by Tang dynasty, it had become an aggregator of preceding laws, it should be followed in the lawmaking”.³² Later, this suggestion was taken, so the form of *Tang Lv* (*Tang Code*) was basically followed in *Ming Lv* (*Ming Code*) which was enacted in the first year of Hongwu (1368 A.D.). After the establishment of the unified Ming Dynasty, with the aim to formulate a great law which could “be applied for hundreds of years”, Zhu Yuanzhang ordered four Confucian and legal officials to teach 20 criminal articles chosen from *Tang Lv* (*Tang Code*) each day so as to make preparations for the drafting of a new law. *Da Ming Lv* (*The Great Ming Code*) was enacted in the seventh Year of Hongwu (1374), and its structure had totally followed that of *Tang Lv* (*Tang Code*), with 36 volumes and 606 articles. In the 22nd Year of Hongwu (1389), *Da Ming Lv* (*The Great Ming Code*) was revised according to the ruling experience in the early years of Ming Dynasty, which had involved many changes in content, style and structure: the 12 chapters were modified and changed into 7 chapters, which included “Ming Li Lv” (Statutes and Terms), “Li Lv” (Statute on the Regulation of officials), “Hu Lv” (Statute on Households), “Li Lv” (Statute on Rites), “Bing Lv” (Statute on Warfare), “Xing Lv” (The Criminal Law) and “Gong Lv” (Statute on Handicraft Industry). The reform of *Ming Lv* (*Ming Code*) was carried out on the basis of the reformation of the administrative system by abolishing the official post of “Cheng Xiang” (the prime minister), therefore, it had distinctive epochal characteristics.

In the 13th Year of Hongwu (1380 A.D.), Zhu Yuanzhang repealed “Zhong Shu Sheng” (the supreme organization in charge of the state affairs), which had terminated the contest between the imperial power and the power of “Cheng Xiang” (the prime minister) lasted for more than 1,000 years with the ultimate victory of the imperial power. Subsequently, the status of “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works) was greatly raised and it had become the central organization in control of the administration, finance, military, judiciary, education and engineering construction, directly subordinate to the emperor.

The reform of central administrative structure of Ming dynasty was aimed at strengthening the centralization and unification of the central administration and consolidating the imperial power in order to let the emperor exercise his power more freely. Therefore, “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works) was designated respectively to administrate the general aspects of national affairs, and specialized departments were also instituted under “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works) to manage the specific affairs so that responsibilities could be defined and the administrative efficiency improved. Correspondingly, the provisions of *Da Ming Lv* (*The Great Ming Code*) were classified in accordance

³²“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*).

with the duties and functions of “Liu Bu”, and in this way, the adjustment range of the laws in each area had become more transparent and each one was related to its relevant ministry. In the end, the 12-chapter stylistic rules and layout of *Tang Lv* (*Tang Code*) which had been followed for over 800 years was changed and a new style of “Liu Lv” (the six laws) was created. So, it could be seen from this that the historical comparison had always been conducted for the practical requirements, and that none of the activities of revision, either supplementing or removing, either classifying or incorporating, were just mechanical copying of the styles of the laws in preceding dynasties, and even in the copying, the contents were either removed, or absorbed and written into the new law, so not a single provision was blindly abandoned. For instance, the “Li” (precedent) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*) was written by following the “Li” (precedent) applied in judicial adjudications at the end of Song dynasty. As for the formulating process of *Ming Lv* (*Ming Code*), it was summarized in “Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*History of Ming Dynasty*):

Ming Lv (*Ming Code*) was ordered to be formulated by Emperor Taizu. It was initially drafted in the first year of Wu, and finalized in the first year of Hongwu. Then, it was revised in the 22nd Year, and enacted in the 30th year. With the lapse of time, it had become more and more complete. Thus, the legal code of a dynasty began to be established, and subsequently, every judicial judgment had been made in accordance with the law enacted in the 30th year.

The main reason for it to “become more and more complete” was the extensive comparison of ancient and contemporary laws and the comprehensive investigation of the realistic conditions. When *Da Ming Lv* (*The Great Ming Code*) was enacted in the 30th Year of Hongwu (1397 A.D.), Zhu Yuanzhang made an announcement to all officials, stressing that “I follow the example of ancient sovereigns to rule, I respect ‘Li’ (rites) so as to guide the common people, and I establish the laws so as to punish the evil-doers”, which was a sublimation of Zhu Yuanzhang’s guiding ideology after he had summarized the experience of the legal constructions of Tang and Song dynasties and the lessons of the invariable implementation of severe penalties at the beginning of Ming dynasty which had produced few notable effects.

The basic law in Qing Dynasty was *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), which was formulated both on the basis of and by the development of the style of *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*). While Manchu people were still making preparations outside the Shan Hai Guan Pass, Emperor Taizong of Qing Hong Taiji had already established the guiding philosophy of “following the laws of Han nationality in revising the law of Jin” in the legislation, which not only was the best legislative plan chosen after the comparison of the old laws of Manchu and the laws of Ming dynasty, but also was in line with the actual condition at that time. If the rulers of Manchu nationality, whose legal culture was extremely backward, wanted to successfully conquer the central plains, they had to follow the laws of Han nationality to have their own laws revised. The legislative principle that “formulating the national statute on the basis of the exhaustive interpretations of *Ming Lv* (*Ming Code*)” which was put forward after Manchu entered the central plains in 1644 was in fact a

materialization of the former ideology of “following the laws of Han nationality in revising the law of Jin”. For this reason, the revision of *Ming Lv* (*Ming Code*) only included the following aspects: the three articles of “Lou Yong Chao Yin” (Failure to Use Money Mark), “Chao Fa” (Provisions on Money Use) and “Wei Zao Bao Chao” (Counterfeiting Official Money) were removed; “Xin Pai” (Messenger Certificate) originally in the category of “Gong Shi” (Public Power) was included in the category of “Zhi Zhi” (The State Office System); “Xie Lou Jun Qing” (Leak of Military Secrets) was included in the category of “Jun Zheng” (Military Affairs). By this revision, *Da Qing Lv Ji Jie Fu Li* (*Great Qing Code with Collected Commentaries and Appended Sub-Laws*) was formulated and then enacted in the fifth Year of Shunzhi (1647 A.D.), which was almost a reprint of *Da Ming Lv* (*The Great Ming Code*).

After Shunzhi administration, the revision of the law in Qing dynasty was continued in Kangxi and Yongzheng administrations, and finally in the fifth Year of Qianlong (1739), after nearly a hundred years of revision, *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was finalized and enacted. While the “Li” (precedent) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*) was in a subsidiary position, the “Li” (precedent) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was endowed an equal status to “Lv” (criminal law), which was not accidental. Just as Emperor Taizu had instructed that *Da Ming Lv* (*The Great Ming Code*) should not be altered arbitrarily by his descendants when it was finalized in the 30th Year of Hongwu (1397 A.D.), Emperor Qianlong also declared that *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was the established law to be observed by later generations when it was finalized and that it should only be supplemented by “Li” (precedent) instead of being altered by anyone. As a result, the status of “Li” (precedent) was raised because “where there is ‘Li’ (precedent), the relevant provisions of ‘Lv’ (criminal law) shall be removed, and where there are new precedents, the relevant old one shall be removed”.³³ Besides, the Qing government also imitated Song government in the compilation of “Chi”. In the 11th year of Qianlong (1745 A.D.), a policy was made: “Li” (precedent) should be slightly revised every 5 years and greatly revised every 10 years, and every time “Li” (precedent) was revised, supplements and corrections shall account for the most part, while deletions and incorporations shall only account for a small part. For this reason, the number of “Li” (precedent) increased from 1,049 in the fifth year of Qianlong (1739 A.D.) to 1,892 in the ninth year of Tongzhi (1869 A.D.).

The annotations of *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) were also made according to those of *Da Ming Lv* (*The Great Ming Code*), with some modifications made after comparison. For example, each of the three items concerning “‘Nu Bi’ (the slave girls and maidservants) scolding the patriarchs”, “the junior scolding the elderly” and “the descendant scolding grandparents or parents” in *Da Ming Lv* (*The Great Ming Code*) was attached with the following

³³“Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*).

note that “the offenders shall be punished only if the offended has filed accusations.” This annotation was modified into a provision of “Lv” (criminal law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), in order to manifest the value of annotations. Moreover, in the annotations of *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) the achievements of *Ming Lv Zhuan Zhu* (*Compiled Commentaries on the Ming Code*), which was a model for legal annotations in Ming Dynasty, were also adopted. For instance, in the provision of “establishing new households to transfer property”, it was stipulated that “...if brothers establish new households to divide properties after the parents have died, they shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for eighty strokes.” The annotation to this provision was that “they shall be punished only if the seniors or the elderly in the family have filed accusations.” As for this, however, it was stated in the annotation of *Ming Lv Zhuan Zhu* (*Compiled Commentaries on the Ming Code*) that “in such cases, the brothers may follow the will of the dead, which are unknown by the outsiders, but this delicate circumstance has been neglected by this legislation.” In correspondence with the interpretation of the stipulation that “they shall be punished only if the seniors or the elderly in the family have filed accusations” in *Ming Lv Zhuan Zhu* (*Compiled Commentaries on the Ming Code*), an annotation had been added in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) stating that “if the brothers are following the will of the dead, this provision shall not be applied.”

The “Li” (precedent) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was also written according to those of *Ming Lv* (*Ming Code*), and the modifications made were generally similar to the annotations discussed above.

9.3 The Contents of Legislation Being More Appropriate and Closer to Real Life by Comparison

Although a set routine had been followed during the course of legal development in China for over 4,000 years, from the perspective of historical comparison, it could still be discovered that the laws formulated in later dynasties were not only more appropriate in content, but also closer to real life, which could be convincingly proved by the laws of Ming and Qing dynasties.

It was true that *Da Ming Lv* (*The Great Ming Code*) was formulated “by following the old style of the law of Tang dynasty”, but due to the distinctive historical conditions in which they were made, *Ming Lv* (*Ming Code*) and *Tang Lv* (*Tang Code*) indeed “differed from each other especially in the arrangement of contents”.³⁴ By comparison, it could be obviously seen that *Ming Lv* (*Ming Code*) was characteristic of “giving lenient punishments on minor crimes and severer punishments on serious crimes”. Specifically, once arrested by the feudal government, severer punishments

³⁴Xue Yunsheng, *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*).

would be enforced in accordance with *Ming Lv (Ming Code)* than *Tang Lv (Tang Code)* for any offence concerning the “violence or theft which has endangered the national treasury or rations”, but much lenient punishment would be enforced in accordance with *Ming Lv (Ming Code)* than *Tang Lv (Tang Code)* for the “conducts violating ceremonies, customs, rites and moralities”. Another example was the different stipulations on the crime of conspiracy and treason: as was prescribed in *Ming Lv (Ming Code)*, “any conspirators, primary or accessory, shall all be sentenced to the punishment of ‘Ling Chi’ (the punishment of dismemberment and the lingering death), and their grandfathers, fathers, sons, grandsons and those cohabitants, with or without a same family name, together with their uncles, brothers and sons of them, whether or not they are in the same household, with the same family name, over the age of 60, or in bad health conditions, shall all be sentenced to death by decapitation.” According to *Tang Lv (Tang Code)*, however, the criminals of the crime of conspiracy and treason should be sentenced to death by decapitation, no matter whether they were primary or accessory culprits, and the family members of them, except fathers and sons who were over 16 years old, should all be exempted from death penalty. Besides, if the conspirator was “unable to instigate the public by his speech or to lead others by his competence”, he should be decapitated but his father or sons should be exempted from death penalty. Furthermore, those who were severely sick or disabled should also be exempted from death penalty. For the crime of robbery, it was stipulated in *Ming Lv (Ming Code)* that any robber who had carried out the conduct of violence but not taken the property should be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes and be exiled to 3,000 *li* away; anyone who had taken the property should be decapitated, no matter whether he was the primary offender or the accessory one. It was stipulated in *Tang Lv (Tang Code)* that any robber who had not taken the property should be imprisoned for 2 years, while anyone who had taken the property of over ten *pi* and had caused the victim injury should be decapitated. For the taxation of grains, it was stipulated by *Ming Lv (Ming Code)* that “if the grains are not taxed as regulated, the resident who has not paid the grains and the officials who are responsible, shall be punished based on the ten portions of the quota, that for every unpaid portion, they shall be given the punishment of ‘Zhang’ (flogging with heavy sticks) for sixty strokes, up to a maximum of a hundred beating; if a resident has not taxed the required grains for more than a year, the resident and head of the village should be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes and then be exiled, while the tax collector and clerk of taxation shall be sentenced to death by hanging.”

For such cases, it was stipulated in *Tang Lv (Tang Code)* differently:

If the tax is not paid within the time limit, the punishment shall be enforced in line with the ten portions of the quota, that for every unpaid portion, the punishment is that of ‘Chi’ (flogging with light sticks) for forty strokes, and head of the household shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for additional forty times.

In terms of the crimes discussed above, the punishments given by the *Ming Lv (Ming Code)* were apparently severer than those given by the *Tang Lv (Tang Code)*.

Particularly, in accordance with the newly added provisions in the *Ming Lv* (Ming Code), anyone had who formed cliques to conduct unlawful acts should be sentenced to death with no leeway, which was never regulated in *Tang Lv* (*Tang Code*). Because at the stage of feudal society in Ming Dynasty, the despotism became more intensified, the life of the common people more difficult and their resistance much fiercer, the deceptive functions of “Li” (rites) and moral education which used to be effective in the past were no longer helpful in easing the sharp struggle in reality. For this reason, the rulers had to resort more to the suppression of laws.

Compared with the laws of Yuan Dynasty, the sentences on serious crimes such as “Shi E” (The Ten Abominations), violence and thefts prescribed in *Ming Lv* (*Ming Code*) were approximately not changed. Nevertheless, for the crimes concerning the national treasury, rations, customs and moral education, the punishments stipulated by *Yuan Lv* (*Yuan Code*) were far more lenient than those by *Ming Lv* (*Ming Code*). For example, anyone who had profaned the sacrificing ceremonies should be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for 80 strokes in accordance with *Ming Lv* (*Ming Code*), but by *Yuan Lv* (*Yuan Code*), even though such conducts were prohibited, there were no sentences of punishments. For the marriages between two people belonging to the upper and the lower classes, in accordance with *Ming Lv* (*Ming Code*) the two would be punished by “Zhang” (flogging with heavy sticks) for 80 or 90 strokes and be ordered to divorce, while in *Yuan Lv* (*Yuan Code*), permission would be granted to such marriages and it was stipulated that if a noble man married a “Nu Bi” (the slave girls and maidservants), their children should still be noble, but if a noble woman married a male maid-servant, their children should be abased to be maid-servants. As for the marriages between two people of the same family name, according to the *Ming Lv* (*Ming Code*), the two would be punished by the punishment of “Zhang” (flogging with heavy sticks) for sixty strokes and be ordered to divorce, but in *Yuan Lv* (*Yuan Code*), there were no such stipulations. Other cases in which the conducts were considered “unfilial” and “immoral” according to *Ming Lv* (*Ming Code*) and the offenders would be sentenced to death, such as “establishing a new household to transfer property while the parents were still alive” and “the younger brother marrying his late elder brother’s wife” were relatively permissible in *Yuan Lv* (*Yuan Code*). This was because all these lenient provisions were related to the historical conditions of the ruling in Yuan dynasty, in which the main body of its administration was the Mongol nationality, whose traditional customary laws were still functional in the regulation of the standard at that time. Nevertheless, the traditional “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism) had lost the binding forces; this was how the specific legal provisions which were inconsistent with the feudal traditions were produced.

Through the above-mentioned comparisons, it was obvious that under the new historical circumstances, the tendency of controlling people by severe penal codes had been enhanced by the laws of Ming Dynasty. Just as was commented in “Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*History of Ming Dynasty*) that *Ming Lv* (*Ming Code*) “was less lenient than *Song Lv* (*Song Code*)”,

which had deviated from the moderate style of Chinese law. This comment was true to the actuality.

It was also a historical fact that *Da Qing Lv Li (The Laws and Precedents of Great Qing)* was produced from *Ming Lv (Ming Code)*, and it was also a well-grounded argument in the documents of Qing dynasty that the legal system of Qing dynasty was inherited from the legal system of Ming dynasty. However, compared with *Ming Lv (Ming Code)*, the provisions about convictions and sentences as well as the newly supplemented annotations and the newly formulated “Li” (precedent) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* had reflected the stigma of the times in a more profound sense and were much closer to real life.

Since Qing Dynasty was at a historical period when national conflicts and class contradictions became extremely intense, compared with *Da Ming Lv (The Great Ming Code)*, in order to strengthen the autocratic rule, much severer punishments were enforced in the laws of Qing dynasty on the crimes such as conspiracy and treason which had posed serious threats to national security. In accordance with the laws of Qing dynasty, the annotation to the offence of “Mou Fan” (plotting rebellion or plotting to endanger “She Ji”: the country) was that “it is against the state, which is manifested by the endangerment of the stability and safety of the country”; the annotation to the offence of “Mou Da Ni” (great sedition) was that “it is against the sovereign, which is manifested by the destruction of temples, mountain tombs and palaces”. The references to “against the state” and “against the rulers” were both newly added in the laws of Qing dynasty, which had not been seen in the original annotations of *Ming Lv (Ming Code)*. Apparently, the newly added annotations had highlighted the positions and sanctity of the state and the sovereign and had indicated that they should never be infringed upon. Furthermore, these annotations were brief in the use of words and easy to be understood by the readers. For example, the sentences on conspiracy and treason according to *Da Qing Lv Li (The Laws and Precedents of Great Qing)* were the following:

If anyone has committed conspiracy and treason against the state or the sovereign, the primary and accessory conspirators shall all be given the punishment of ‘Ling Chi’ (the punishment of dismemberment and the lingering death). Their fathers and sons, grandfathers and grandsons, brothers and cohabitants, with or without a same family name, together with their uncles, brothers and sons of them, whether or not they are in the same household, with the same family name, or of bad health conditions, if they are over the age of 16, shall all be implicated and sentenced to death by decapitation. As for other family members, males under the age of 15 and all females, including their mothers, daughters, wives, concubines, sisters and wives and concubines of their sons, shall all be abased to be slaves in the families of meritorious officials. Their property shall be confiscated into national treasury; even though their sons and grandsons do not know the situation, if they are over the age of 11, they shall be castrated and then sent to be slaves in the families of officials in Xinjiang.

In *Ming Lv (Ming Code)*, rather rigorous punishments were stipulated on those who had committed conspiracy and treason, but in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* much harsher measures were obviously adopted. According to the newly added annotations in the laws of Qing dynasty, “any conspirator, whether he has carried out the actions or not, shall be given the punishment of ‘Ling Chi’ (the punishment of dismemberment and the lingering death)”,

which was in fact an exhibition of the punitive ideology in the Qing dynasty. In the 34th year of Qianlong (1768 A.D.), it was further stipulated in a regulation formulated that anyone who had “set up heretic organizations” or “made up heresy to instigate and confuse people’s minds” should be convicted according to the punishments for the crime of conspiracy and treason. The father of the criminal, even though “he does not know the situation and does not live together with him so as to nose out the acts”, should still be exiled to 3,000 *li* away.

The sentence on the offence of “Mou Pan” (plotting treason, or, plotting to betray one’s own country or to go over to another country) in accordance with the law of Qing dynasty was as the following:

If a rebellion is committed, the primary and accessory conspirators shall all be sentenced to ‘Ling Chi’ (the punishment of dismemberment and the lingering death). Their wives, concubines, sons and daughters shall be abased to be slaves in the families of meritorious officials; their property shall be confiscated into national treasury.... If they have fled to the mountains and forests and do not turn themselves in, they shall be punished for the offence of attempting to rebel; if they have made enemy of officials and soldiers, they shall be punished for the offence of having completed a rebellion.³⁵

What especially should be noted was that a regulation was made in the 43th year of Qianlong (1777 A.D.) to extend the range of the offence of rebellion to the conducts of the gathering of the sworn brothers among the people. It was ruled that:

If people of different family names become sworn brothers by smearing the blood and burning papers, they shall be punished for attempting to rebel. The leading one shall be sentenced to death by hanging with a postponed execution; the followers shall be given the punishment of one degree lighter. If a crowd of more than 20 persons are gathered, the leading person shall be sentenced to death by hanging with an immediate execution; the followers shall be given the punishment of ‘Chong Jun’ (military exile) away to the border areas of Yunnan, Guizhou, Guangdong and Guangxi. If the people of different family names become sworn brothers only by the sequence of their ages without smearing the blood or burning papers, and if a crowd of more than 40 persons are gathered, the leading person shall be sentenced to death by hanging with a postponed execution; if a crowd of fewer than 40 but more than 20 persons are gathered, the leading person shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes and then be exiled to 3,000 *li* away; if a crowd of fewer than 20 persons are gathered, the leading person shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes and be shackled for two months. The followers shall all be given the punishment of one degree lighter than that on the leading one.³⁶

Therefore, if it was due to the intense class contradictions in the later period of feudal society and the emphasis on the focus of judicial suppression that much severer punishments were enforced in *Ming Lv* (*Ming Code*) than in *Tang Lv* (*Tang Code*) on the serious crimes which had threatened and offended the feudal rule, and comparatively lighter punishments were enforced in *Ming Lv* (*Ming Code*)

³⁵“‘Mou Fan’ Fu Li” (Supplementary Regulations to “Mou Pan” (plotting treason, or, plotting to betray one’s own country, or to go over to another country) in “Xing Lv” (The Criminal Law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

³⁶*Ibid.*

than in *Tang Lv* (*Tang Code*) on the crimes that had violated ceremonies, customs, rites and moralities. Besides the acute class contradictions, the more complicated national conflicts had become another reason for the rules of much harsher punishments to be made in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) than in *Ming Lv* (*Ming Code*) on the similar serious crimes.

The crime of organizing cliques to conduct unlawful acts was again taken as an example here. In the early stage of Ming Dynasty, in consideration of the historical fact that the imperial power was frequently impaired by the cliques organized by the officials in the preceding dynasties, the officials were strictly prohibited from forming cliques by the rulers. In *Da Ming Lv* (*The Great Ming Code*), special stipulations on the offence of “Jian Dang” (a clique of traitors) were added, which was never seen in the criminal laws of Han, Tang, Song and Yuan dynasties. It was stated that:

“If the officials holding positions in the imperial court associate with friends and form cliques to interfere with the national affairs, they shall all be decapitated; their wives shall be abased to be slaves and their property be confiscated into national treasury”; “if they have committed crimes and should be sentenced to death in accordance with the law, and any other ministers who have put forward suggestions with smooth tongue in order to mitigate the punishment shall also be decapitated”; “if any official has offered suggestions to ‘Zai Zhi Da Chen’ (the executive prime minister) to praise the excellence and competence of the convicted officials, he must be a partner of them, and thus shall be interrogated so as to investigate the facts, and if he is verified to be a conspirator, he shall be sentenced to death by decapitation, with his wife to be abased to be a slave, and his property to be confiscated.”

In the early years of Ming Dynasty, after the occurrence of Hu Weiyong case (Hu was the prime minister in Ming Dynasty who was killed by Zhu Yuanzhang in 1308 A.D.) and the Lan Yu case (Lan was a minister in Ming Dynasty who was killed by Zhu Yuanzhang in 1393 A.D.), “many dukes, marquises and officials who were clique friends of them were sentenced to death one after one, and none of them were exempted”.³⁷ In *Chong Ke Gu Tang Lv Shu Yi Xu* (*Preface to the Re-engraved Tang Lv Shu Yi*), Sun Xingyan, the writer in Qing dynasty wrote that “since the drafting of *Yong Hui Lv* (*Yong Hui Code*), it has been adopted in the laws of Song and Yuan dynasties. But only in the law of Ming dynasty, numerous revisions have been made by adding the chapter of ‘Jian Dang’ (a clique of traitors), because of which, false charges are posed against the upright officials and lighter punishments are enforced on the minor crimes while harsher punishments are enforced on the serious crimes. However, the lighter the punishments are on the minor crimes, the more easily they would be committed; the harsher the punishments are on the serious crimes, the more the unjust charges would be imposed upon the officials. So, these are not appropriate provisions.”

When comparing the similarities and differences between the laws of Tang and Ming dynasties, Xue Yunsheng argued that the provisions on “Jian Dang” (a clique of traitors) “were all added at the time of Hongwu, thus, it is obvious that Emperor Taizu of Ming was suspicious of his subjects and kept vigilance against everything, which had caused him to formulate extremely harsh criminal provisions”. For this reason, “he had spared no efforts to prevent the subjects from arrogating

³⁷“Tang He Zhuan” (The Biography of Tang He) in *Ming Shi* (*The History of Ming Dynasty*).

power and forming cliques to ally with each other. Nevertheless, the imperial court were impaired by the excessive suspicion, which had given rise to the situation where most of the court officials were so greedy that they tried to keep what they had gained, performed their duties in a perfunctory manner and gave no constructive suggestions in the cases of important events, which had brought no benefits to the settlement of national affairs.”³⁸

What’s more, the officials were also strictly prohibited from colluding with the eunuchs. “If the officials of various government offices have colluded with the eunuchs or other imperial attendants, leaked secrets, indulged in malpractices and thus presented memorials in collusion, the officials and eunuchs concerned shall all be decapitated, and their wives shall be exiled to 2,000 *li* away.”³⁹ This provision was declared to be an injunction which should be observed by the descendants of later generations.

In *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), the provisions of *Da Ming Lv* (*The Great Ming Code*) on the crime of forming cliques to conduct unlawful acts and the crime of collusion with imperial attendants were completely inherited; furthermore, new stipulations in the sub-statutes were added according to the characteristics of the Qing government. For instance, the crime of collusion with imperial attendants was stipulated in the sub-statute which was newly added in the 34th Year of Qianlong (1768 A.D.):

On the occasions of festival or the birthday of an official in the capital, those subordinate to princes and ministers of ‘Ba Qi’ (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan) can visit and meet with the official; on any other occasion, they are not permitted to introduce the non-local officials who have come to the capital for official businesses to meet with their princes or ministers, or pass on their messages to their princes or ministers, otherwise, they shall be given harsh punishments, so shall their princes or ministers.

The purpose of this sub-statute was to prevent the princes and ministers of “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan) from colluding with the officials outside the capital, which otherwise would have impaired the centralized authority of the emperor. During the time when Manchu were still outside the Shan Hai Guan Pass and after they were in the central plains, each of the princes and ministers of “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan) was in real control of the military and political power, which had in fact become a formidable acentric force. In order to weaken the power of those princes and ministers of “Ba Qi” (the Eight Banners: banners, a division of Manchu nationality and the emperor’s clan), resolute measures had been taken by Kangxi, Yongzheng and Qianlong in their administrations. Therefore, it was for this very political purpose that the sub-statutes discussed above were supplemented to *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

³⁸ *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*).

³⁹ “Jiao Jie Jin Shi Guan Yuan” (Colluding with Imperial Attendants) in “Li Lv” (Statute on the Regulation of Officials) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

In the aspects of civil law such as marriages and farmlands, some annotations or sub-statutes in *Da Qing Lv Li* (The Laws and Precedents of Great Qing) were much closer to real life than those in *Tang Lv* (*Tang Code*) and *Ming Lv* (*Ming Code*). For example, in the legal provision on “establishing new households to divide property” in Qing dynasty, it was stipulated that “when the grandparents or parents are still alive, if new households are established by sons or grandsons so as to divide the properties, those involved shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for one hundred strokes. If different households have been established by the brothers to have the property divided during the mourning period of their late parents, those involved shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for eighty strokes.” About this, an annotation was added at the time of Shunzhi by stating that “if the brothers follow the will of their parents to have the property divided, they are not to be punished by this provision.” This brief annotation was exactly made according to the real situation in Ming and Qing dynasties where it was common that family property was shared among sons and grandsons in line with the wills. Therefore, it was the supplement of annotation that had added flexibility to the application of rigid legal provisions in Qing Dynasty.

Another example was the provision on “marriages between the noble and the humble”. It was stipulated that “anyone who has married his cousin shall be given the punishment of ‘Zhang’ (flogging with heavy sticks) for eighty strokes and they should get divorced.” Nonetheless, the marriages between cousins had become a custom among the civilians and it had continued despite the prohibition in law. Therefore, in the eighth year of Yongzheng (1729 A.D.) an ordinance was issued which had stated that “if there are marriages between a person and his paternal or maternal relative, except for the cases in which the marriages are between the elder and the inferior, which shall be tried in accordance with the law, marriages between cousins can be conducted according to the parties’ convenience.” This ordinance was further confirmed when the law was revised at the time of Qianlong.

On the “marriages between the two persons of different nationalities”, it was stipulated in *Ming Lv* (*Ming Code*) that “if a person of Han nationality is not willing to marry a person of another nationality, he is allowed to marry a person of his own nationality, which is not within the scope of prohibition.” In Qing dynasty, a special annotation was added on this issue, which had stated that, “people of different nationalities have different dietary and living customs, thus, they can act according to their own conveniences in marriages.” This annotation had specified the reason why a person of Han nationality was unwilling to marry a person of another nationality with human touch.

In order to make the masters get their maidservants married timely, “the offence of violating the statute on marriages by interference” was stipulated in the sub-statutes on:

If the gentries or civilians do not timely get their maidservants married and cause them to be alone and solitary, they shall be sentenced to the punishment of ‘Zhang’ (flogging with heavy sticks) for eighty strokes for not complying with the law. This punishment shall be executed immediately on civilians, whereas the gentries can pay a ransom and then be ordered to choose husbands for their maidservants.

This ordinance was set in the 13th year of Yongzheng (1734 A.D.) and was written into the law in the fifth year of Qianlong (1739 A.D.). In Qing Dynasty, raising maidservants had become popular in the households of both officials and civilians. The maidservants were bought as “objects” from the market, thus, they had to follow the orders of their masters and their marriages were also controlled. This sub-statute had forced the masters to get their maidservants married to get rid of loneliness and solitariness which might lead to severe social problems. So it had not only set eye on the stability of society, but also reflected certain humanitarian spirit.

Under the reign of Qianlong, disputes frequently occurred in civil sales and mortgage businesses because there was no regulation for their time limits. In consideration of this, an ordinance was issued:

If anyone buys a property, and if it is a lease contract, it must be marked with the word ‘to be redeemed’ in the contract; if it is a sales contract, it must be marked with the word ‘bought out and never to be redeemed’ in the contract. Where a contract was concluded before the 18th year of Qianlong when this regulation is made and the unknown property is recorded in it, if it was concluded less than thirty years before the issuing of this ordinance and there are no such words as ‘bought out’ therein, the property concerned shall be redeemed accordingly; if it is concluded more than thirty years before the issuing of this ordinance and there is no reference of the redeemer therein, even if there are no such words as ‘bought out’ in it, the property concerned shall still be considered being bought out, thus shall be redeemed by no one. If disputes arouse and mutual accusations are launched, the parties concerned shall be punished for not complying with the law.

This ordinance was set in the 18th year of Qianlong (1752 A.D.), and it had played an indispensable part in the dispute settlement of buying or mortgage contracts in which no clear clause about time limit was written.

In terms of litigations, in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, the importance attached to civil litigations by the last feudal dynasty and the development of litigant systems was mainly displayed. Firstly, the principle was established that a lawsuit should be filed to the local office of the locality of the incident. In the sub-statute of “Yue Su” (appealing by bypassing the immediate leadership) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, it was stipulated:

Lawsuits concerning the trivial disputes over marriages, farmlands, debts, assaults and gambling shall be filed to the local office of the locality of the incident and shall not be filed to magistrates of ‘Zhou’ (the subprefectures) or ‘Xian’ (county) where the plaintiffs live. Such lawsuits should not be accepted by the officials of the ‘Zhou’ (the subprefectures) or ‘Xian’ (county) where the plaintiffs live by abusing their power, at the same time, such lawsuits should not be rejected by the officials of the locality of the incident, and any official who has violated this shall be punished. If a magistrate of the locality of the incident has accepted a lawsuit and needed to bring the criminal to trial, yet the official of another jurisdiction has held the criminal and refused to release him, the official of another jurisdiction shall be punished in accordance with the law.

This ordinance was set in the sixth year of Yongzheng (1727 A.D.) and written into the law in the fifth Year of Qialong (1739 A.D.).

Secondly, it was required that the magistrates of “Zhou” (the subprefectures) or “Xian” (county) must personally hold trials. In the sub-statute of

“Gao Zhuang Bu Shou Li” (Rejecting Lawsuits) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), it was stipulated:

If the lawsuits concerning trivial disputes over the dividing of farmlands and the relationships between relatives are filed, the magistrates of ‘Zhou’ (the subprefectures) or ‘Xian’ (county) can order the local heads of villages to investigate and report the facts, and they must settle the cases personally instead of ordering the heads of towns or villages to settle the disputes and close the cases. If any magistrate orders the heads of towns or villages to settle the cases without trying them personally, he shall be investigated by his superior and be punished in accordance with the law.

This ordinance was set in February of the 30th year of Qianlong (1768 A.D.) when it was presented to the emperor by Fo De, “Bu Zheng Si” (the head of the government office in charge of civil affairs at the provincial level) in Henan province, and was written into the law in the same year. The requirement that the magistrates of “Zhou” (the subprefectures) or “Xian” (county) should personally try cases concerning “the trivial disputes” among civilians had reflected the consciousness of Qing rulers about the possible social problems that could be caused by the trivial disputes and the rigorous responsibilities which they had put on the judicial officials.

Lastly, the supervisory form of “case report” was established. In the sub-statute of “Gao Zhuang Bu Shou Li” (Rejecting Lawsuits) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), it was stipulated that:

The magistrates of ‘Zhou’ (the subprefectures) or ‘Xian’ (county) shall personally hear all cases concerning marriages, farmlands, and other such matters, and write case reports as the government officials in the capital have done. They shall include all details of the cases settled in a month into the monthly report, including the reasons for the settlement of a case and the circumstances where the time limit of a trial is extended or a case is to be retried. The monthly case report shall be submitted to the superior ‘Zhi Fu’ (magistrate of a prefecture) and ‘Zhi Li Zhou’ (governors of subprefectures to be directly under the jurisdiction of “Bu Zheng Si”) and ‘Zhi Zhou’ (subprefectural magistrates) to be reviewed at the end of every month. Anyone who has delayed the settlement of a case or omitted information shall be investigated by the supervisor and be punished in accordance with the law.

Therefore, it was an indispensable supervisory system established in order to prevent the magistrates of “Zhou” (the subprefectures) or “Xian” (county) from delaying the trials by excuses, making subjective random judgments and infringing the interests of the parties concerned.

In summary, it could be seen that it was a long-standing tradition in the development of Chinese law to have historical comparisons by carrying forward the cause and forging ahead into the future. In the evolution of the basic laws in successive dynasties, the trace of historical comparison could be clearly discovered. It was a respect of the tradition to have a historical comparison and to acknowledge the continuity of the development of law. So, to show respect to tradition did not just mean the respect for the tradition of law and legal culture, but the respect for and the inheritance of the entire cultural tradition. The integrated culture was the source of the legal culture, whereas the legal culture was a significant part of the integrated cultural. Without the political culture of absolutism, without the ethical culture of “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues), and without the special “religious” culture in which man and nature were integrated, there would have been no legal culture in ancient China.

Historical comparison was linked to the summarization of experience and lessons. Without comparison, the advantages and disadvantages would have never been comprehended, and there would have been nothing to be learnt from or summarized. Therefore, the historical comparison was the foundation of the advancement of laws. Many jurists in successive dynasties had numerous elaborations about it, and some even had written specialized works on comparative legal history. A typical one was *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*) written by Xue Yunsheng, who was “Shang Shu” (the minister) of “Xing Bu” (Board of Punishment) of the Xianfeng (1850–1861) administration in Qing Dynasty. As a distinguished jurist, Xue Yunsheng had affirmed that when “Lv Xue” (the study of statutory laws) was conducted, their origins should be explored and compared, and their differences, stresses and neglects should be annotated so that it could be easily understood by readers. His masterpiece, *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*), was an exceptional work on the comparative legal history. In this book, he had conducted comparative researches on the laws of Tang and Ming Dynasty, which were the two representative legal codes of feudal China. He had analyzed their differences, measured the criminal punishments stipulated, discussed their achievements and failures, identified their advantages and disadvantages, and shown his assessments by comparison. He argued that it was intended that the law of Ming would “surpass the law of Tang, yet in fact it was at opposite poles”. Especially, it “has only focused on the esteem for the sovereigns, but has neglected the respect for the officials”, and that “it has intentionally stipulated lenient punishments where there should be harsh ones, while recklessly stipulated harsh punishments where there should be lenient ones”. By dispraising the law of Ming dynasty, Xue Yunsheng was actually targeting at the law of Qing Dynasty, because either in form or in content, the laws of Ming had been basically followed by the laws of Qing dynasty.

When it came to the early stage of the twentieth century, Shen Jiaben, who was in charge of law revision in the last years of Qing dynasty, was an advocator of applying the method of historical comparison to study the traditional laws of China. He seriously argued:

Are the similarities and differences between ‘Lv’ (criminal laws) and ‘Lv’ (criminal laws), between ‘Li’ (precedent) and ‘Li’ (precedent), and between ‘Lv’ (criminal laws) and ‘Li’ (precedent) not studied and then differentiated by comparison? Are the disparities between the lenience of ‘Lv’ (criminal laws) and the harshness of ‘Li’ (precedent), between the harshness of ‘Lv’ (criminal laws) and the lenience of ‘Li’ (precedent), between the harshness or lenience of ancient ‘Lv’ (criminal laws) and modern ‘Lv’ (criminal laws), and between the harshness or lenience of this ‘Lv’ (criminal laws) and that ‘Lv’ (criminal laws) not examined by comprehensive comparison?⁴⁰

What Shen Jiaben advocated was a logic and research method of comparative thinking. His book *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*) could be seen as the most distinguished accomplishment in the historical comparison of Chinese law. Shen Jiaben had not only thoroughly

⁴⁰“Da Qing Lv Li Jiang Yi Xu” (Preface to the Lectures of Da Qing Lv Li) in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 6.

understood the traditional “Lv” (criminal laws) and “Li” (precedent) of China, but also devoted himself to the study of western laws and managed to grasp the general ideas of them. From his point of view, China at that time could no longer be isolated from other countries in the world, nor could it stubbornly covet the outmoded and reserve the outworn given that it was facing the historical trend of rapid development. Thus, soon after he received orders to revise the laws, he had established the guideline of “Bo Qu Zhong Xi” (extensively adopting both Chinese and foreign laws) and “Hui Tong Zhong Xi” (the harmonization of Chinese and western laws). While he was broadly collecting and sorting out ancient legal materials of China and the customary laws which were popular among the civilians, he had also made great exertions to widely translate and interpret the western laws and actively introduced the western legal culture. He had advocated having “the deficiencies of Chinese law” replaced by “the merits of western laws”, “taking the essence and discarding the dregs of western laws”, and “overcoming the shortcomings of Chinese law by learning from the merits of western laws”. The series of new laws made under his guidance were all the fruits of the study on both Chinese and western laws by using the method of transnational comparison. Unlike traditional Chinese scholars of comparative legal history, Shen Jiaben had broken through the stereotyped pattern of vertical comparison and created a new era of transnational comparison. It was due to his pursuit of the approaches of the reform of Chinese law that the comparative “Lv Xue” (the study of statutory laws) and the comparative study of legal history in the modern sense came onto the historical stage, and that the isolated development of Chinese law and “Lv Xue” (the study of statutory laws) was successfully terminated and the interconnection with the development of the advanced laws in the world was finally initiated.

Chapter 10

Unified Interpretation of Law and Unparalleled Flourishing of “Lv Xue”

10.1 The Evolution of “Lv Xue” (The Study of Statutory Laws) in Ancient Times

As an epitome of ancient Chinese jurisprudence, “Lv Xue” (the study of statutory laws) had been a miracle in the garden of ancient Chinese legal culture, and the forms and achievements of its development had become a key criterion to measuring the ancient Chinese legal culture. In the ancient Chinese “Lv Xue” (the study of statutory laws), the constraint of religious theology had been cast off in quite an early time, but the direction and level of development were still strictly controlled by the autocratic state. Thus, “Lv Xue” (the study of statutory laws) was basically conducted by the official authorities and the private commentaries on law were only regarded as supplements to the official commentaries. The major task of “Lv Xue” (the study of statutory laws) in ancient China was to expound the legislative intents and legal principles of a nation, to annotate the conceptual terminologies of law, to comment on the origin, the success and failures and the evolution of legal provisions, and to reveal the relationships between “Lv” (criminal laws) and “Li” (precedent) and between other forms of law, in an attempt to achieve a uniform application of law so that a highly unified national legal system and political rule could be maintained.

“Lv Xue” (the study of statutory laws) in ancient China originated from the Shang Yang Reform (475–221 B.C.), prevailed in Han Dynasty, prospered in Wei and Jin dynasties, matured in Tang Dynasty, declined in Song and Yuan dynasties and then revived in Ming and Qing dynasties. Although the private annotation of laws was once very prevalent for a short time in Qing Dynasty, yet as a matter of fact, it was approaching to the end. The evolvement of “Lv Xue” (the study of statutory laws) was based on the cultural and ideological materials that the forerunners had left for the later generations, so the real process of its development was inheritance and transformation. The fruits achieved in “Lv Xue” (the study of statutory laws) at each stage of development had pushed the ancient legal culture a step forward; therefore, they were of great benefit to the practical judicial work justice.

10.1.1 “Lv Xue” (*The Study of Statutory Laws*) in Qin and Han Dynasties

During the rule of Xia, Shang and Western Zhou dynasties, it was emphasized by the rulers that “if the penal punishments were unpredictable, then their powers would be unfathomable”. Therefore, the laws were shrouded in secrecy, and the convictions and sentences were made completely according to the arbitrary judgments of the aristocrats. Thus, in laws there had lacked both stability and predictability. Under such circumstances, there was neither the possibility nor the necessity for the emergence of “Lv Xue”, because it had just acted as an intellectual system to interpret laws.

The Spring and Autumn Period was a period of “Li Beng Yue Huai” (the disintegration of rites and collapse of rituals), and the violent social change and the large-scale adjustment of social structure had made the legal knowledge which had been restricted inside the aristocratic groups begin to be spread to the whole society. According to historical documents, Deng Xi, who was “Da Fu” (senior official in ancient China) of the state of Zhou and the founder of “Ming Bian Zhi Xue” (the School of Logicians), “had signed contracts with those civilians who needed the help in lawsuit settlements, and the price for settling a serious case was a garment and for a minor one, the price was a shirt or shorts; and there were many people who had paid garments, shirts or shorts to learn how to settle lawsuits from him”.¹ Moreover, the method of logical thinking which had prevailed in Spring and Autumn Period was introduced into the field of law, which had provided the methodological foundation for the emergence of “Lv Xue” (the study of statutory laws). However, the greatest contribution to the study of “Lv Xue” was made by the legalists in the Warring States Period, especially Shang Yang.

In 361 B.C., Shang Yang began his reforms. He had transformed the appellation of “Fa” (law) into “Lv” (criminal law), and provided a carrier for the initiation and development of “Lv Xue”. Thus, it was true that the traditional Chinese “Lv Xue” (the study of statutory laws) had begun in the period of Shang Yang Reform (475–221 B.C.) and the purpose of Shang Yang’s legal reform was to strengthen the uniform application of law so as to have an overall adjustment of the radically changing social relationships and to consolidate the newly established autocratic institutions and systems. The legalists had stressed that law should be made public, and it was called “Fa Mo Ru Xian” (it would be better to have the laws made public). According to them, to make the various newly made laws which had reflected new relationships of “people’s status” “universally known by both the mediocre and the wise”,² and to enable all people to understand “the meanings of legal provisions”, laws had to be annotated. Consequently, as a new system of knowledge, “Lv Xue” (the study of statutory laws) had naturally come into being. In order to guarantee the

¹“Li Wei” (Inconsistency between Words and Thoughts) in *Lv Shi Chun Qiu* (*Spring and Autumn Annals of Master Lv*).

²“Ding Fen” (Defining a Person’s Social Status) in *Shang Jun Shu* (*The Book of Lord Shang*).

unified application of law, Shang Yang had “set up the system of justice, asked the officials in charge of legal affairs to be the instructors of people”,³ brought “Lv Xue” (the study of statutory laws) into the official field, initiated the pattern of the official study of the statutory laws, and pioneered the official study of the statutory laws by “Yi Fa Wei Jiao” (regarding laws and decrees as the main contents of teaching) and “Yi Li Wei Shi” (regarding officials as teachers) in the successive dynasties after Qin.

By following the theory of legalists, in Qin Dynasty, “literary books were burnt and laws propagated”, and the legal pattern of “administrating the nation in accordance with the law” and “making laws unified” was implemented with great efforts. Meanwhile, the autocratic rule in the culture and ideology field was carried out and the arbitrary learning of law by the common people was prohibited. It was regulated at that time that “any of the common people who wants to learn the law must take an official as his teacher”, which had indicated that only the officials were qualified to study, annotate and teach the laws. The officials in Qin dynasty, however, were merely making faithful annotations to the original legal provisions, because it was impossible for them to contend with each other just as what the scholars had done in the Warring States Period, or take justice as the core of law and conduct researches on laws beyond the political system just as what the western jurists had done. From then on, the ancient Chinese “Lv Xue” (the study of statutory laws) had taken a distinctive path characterized by the annotation of laws, with “Legal Questions and Answers” in “Qin Jian” (bamboo writing slips in Qin Dynasty) as a precursive work of jurisprudence.

The achievements of “Lv Xue” (the study of statutory laws) in the pre-Qin period was concentratedly reflected in *Fa Lv Da Wen* (*Legal Questions and Answers*) in “Qin Jian” (bamboo writing slips in Qin Dynasty) which was excavated in the No. 11 tomb of Shuihudi in Yunmeng County, Hubei Province at the end of 1975. In Qin Dynasty, since the duties of interpreting laws were assigned to the government offices, if a common official did not understand the law, or was confused while applying the law, he should ask the chief law official for explanations, and *Fa Lv Da Wen* (*Legal Questions and Answers*) was actually a collection of such legal interpretations. The book consisted of 180 items which had touched upon both the field of substantive law and procedural law. Moreover, it had involved three aspects: the interpretations of legal concepts, the confirmation of criminal charges and criminal penalties. The first part was about the interpretation of the legal concepts, for example, the interpretation of “Bu Zhi” (intentional inappropriate sentences) was like the following: “‘Bu Zhi’ is the conduct of intentionally giving a lenient punishment when a severe one should be given, or intentionally giving a severe punishment when a lenient one should be given”; for “Zong Qiu” (conniving at criminals), it was interpreted as “the act of intentionally making the judgment of acquittal when there should be a judgment of conviction, and intentionally exempting the criminal from imprisonment when he should be imprisoned”. The second part was about the confirmation of criminal charges. For example, “if A is given the punishment of

³ Ibid.

‘Qing’ (or the punishment of ‘Mo’:tattooing the face) and serving hard labor in the construction of city walls for falsely accusing B of offering a bribe, shall A’s family members, property and the aged be implicated? Answer: they shall not.” “If A accuses B of having stolen a cow and injured somebody, but in fact, B has not stolen a cow or injured anybody, what punishment shall be given to A? Answer: if he has intentionally lodged a false accusation, he shall be punished for false accusations; if he does not, he shall be punished for misrepresentations.” The third part was about the confirmation of criminal penalties. For example, “if A, who is sentenced to serving hard labor in the construction of city walls, has lodged a false accusation against B, causing him to be punished by tattooing the face and serving hard labor in the construction of city walls, what punishment shall be given to A? Answer: He shall be given the punishment of ‘Qing’ (or the punishment of ‘Mo’: tattooing the face). If A has assaulted and injured B, but the official judges that A has injured B in a fight with B, shall the official be punished or not? Answer: He shall be held accountable.” “If A, who is sentenced to serving as a slave in government offices, has lodged a false accusation against B, causing him to be sentenced to serving hard labor in the construction of city walls, what punishment shall be given to A? Answer: He shall be sentenced to serving as a slave in government offices and to serving hard labor in the construction of city walls.”

Apart from the method of questioning and answering, there were some other methodologies employed in *Fa Lv Da Wen (Legal Questions and Answers)* to interpret laws, such as precedent comparison and making comparisons by giving examples, which had represented a relatively high level of interpretation of laws in Qin dynasty. In particular, the annotations were concise in language, accurate in wording, and powerful in generalization, which had clearly clarified the distinctions between different charges and the definitions of legal terminologies, and which had provided rich and valuable experience for the interpretation of laws in the later dynasties and established a solid foundation for the development of “Lv Xue” (the study of statutory laws) in ancient China.

In Han Dynasty, the system of Qin was inherited. For this reason, there was a continuity and constancy in “Lv Xue” (the study of statutory laws) between Han and Qin dynasties; nevertheless, there were also great disparities between them. Firstly, in terms of the guiding ideology, the theory of legalists was pursued in Qin dynasty, while in Han dynasty, the theories of “Huang Di” (Yellow Emperor, a legendary ruler) and Laozi (a philosopher in the Spring and Autumn Period) were initially pursued and then the neo-Confucian theory represented by Dong Zhongshu was established as its ruling ideology. Secondly, the researchers on “Lv Xue” (the study of statutory laws) in Qin Dynasty were mainly officials, who had made effective commentaries on laws on behalf of the state; in Han Dynasty, in addition to the officials, many Confucian scholars had made commentaries personally, but except for a small number of commentaries which had become effective after being acknowledged by the emperor, most of the others were invalid. Thirdly, the commentaries on law were made in accordance with the theories of legalists in Qin Dynasty, while in Han Dynasty they were made on the basis of Confucian classics.

The rulers at the early stages of Han Dynasty had drawn lessons from the Qin Dynasty which had lasted for only two dynasties because of its application of the legalists' theories. Thus, the doctrines of “Huang Di” (Yellow Emperor, a legendary ruler) and Laozi (a philosopher in the Spring and Autumn Period) were practiced which were characterized by advocating lenient criminal punishments and providing the people with easy living conditions. At the same time, they had flaunted and employed “Ren Zheng” (Benevolent Administration) which had combined the criminal punishments with moral education. However, with the constant transformation of social relationships and the emergences of various new crimes, the rulers could only make adjustments and sanctions by constantly enacting specific regulations which were large in number and complicated in contents and which could mostly only be applied to specific cases at specific times. All this had made it impossible to form a standardized, rigorous and unified legal system. According to “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*), “there were altogether 357 chapters of provisions in laws and regulations, including 409 articles of ‘Da Bi’ (the capital punishment), involving 1,882 categories of cases, and there were 13,472 ‘Si Zui Jue Shi Bi’ (The Precedents for Capital Crimes). With all these legal documents collected and stored in the archive room, even judicial officials were unable to read them through.”

The aforementioned phenomenon had resulted in the situation where “contradictory judgments were made on the same crimes, and wicked officials juggled with the laws to seek profits by exonerating those whom they wanted to be alive and intentionally putting charges on those whom they wanted to be dead; and many people had suffered unjust charges and bore grudges against those officials”. In an attempt to realize the uniform application of laws and to solve the contradictions between the establishment of Confucianism as the ruling ideology and the inheritance of the laws of Qin dynasty as the source for statute laws, the Confucian doctrines had been used as a standard to interpret the statute laws since the time of Emperor Wu of Han. It had opened up a shortcut for the introduction of “Li” (the rites) into law by the employment of the Confucian doctrines to annotate laws, which had further motivated the Confucianization of laws, or, the integration of Confucianism into existing laws.

Since the Confucian doctrines were employed to annotate laws, “San Gang” (three cardinal guides) had become the foundation of the legislation and the criterion for justice. Moreover, the Confucian doctrines such as “the concealment of crimes between father and son”, “the prohibition of murdering of fathers or sovereigns by sons or subjects,” and the “enjoyment of rewards by the entire family and the assuming of penalties by only one person” were written into the laws and any conducts that had gravely violated the moral ethics would be sanctioned within the range of criminal law. Hence, the employment of Confucian doctrines had contributed greatly to the establishment of the legal order of the feudal state. Especially, the viewpoint of the great unification of the whole country was totally consistent with the demand of establishing a unified autocratically centralized state, therefore, it was acknowledged by rulers of the Han Dynasty. From then on, annotating laws and

making judicial judgments based on the Confucian doctrines had become a principle which was characteristic of “Lv Xue” (the study of statutory laws) in Han Dynasty. As far as the effect was concerned, annotating laws and making judgments based on the Confucian doctrines had served as a means of adjustment and remedy to the situation where laws were complicated with cruel criminal penalties and confused provisions; for this reason, it had helped to relieve the punitive effect of the criminal law. Nonetheless, it would be inevitable to draw wrong conclusions by false analogies and lead to the disunity of the application of laws just to give up the original intents of law, and to randomly cite the Confucian doctrines to annotate laws and make judgments without taking the practical problems in judicial practice into consideration. As modern scholar Zhang Taiyan had criticized:

(Dong) Zhongshu made judgments on 232 cases.... The higher-rank officials have kept the methods of annotating laws secret, leaving the common people no chances to learn laws; the lower-rank officials have juggled with the law to attain private profits, and then they have given up the criteria of regulations, and were entrapped by the ethos of corruption. So it was pathetic that the Confucian classics had become ‘Ji Shi’ (the spawn of louses: meaning unimportant things) and the law had become ‘Bi Bai’ (the imperfect grain and rice seedling like weeds: meaning trivial things).⁴

Therefore, as far as the development of “Lv Xue” (the study of statutory laws) was concerned, annotating laws by applying the Confucian doctrines had made “Lv Xue” (the study of statutory laws) a mere appendage to the study of Confucian classics; consequently, it had lost its own independence in the development.

The legal annotators in the period of Western Han dynasty could be divided into two categories: one was represented by the bureaucratic scholars such as Dong Zhongshu and Shu Suntong, who had enjoyed eminent prestige, and were highly regarded by the emperor. Therefore, even though their commentaries on laws were private, they were accepted by the emperor and were regarded as effective commentaries. The other one was represented by the officials who had held specialized judicial posts, such as Zhang Tang, Yu Dingguo and Lu Wenshu, who had not only learned Confucian classics, but also studied the law. Therefore, their focus was to make their commentaries on law consistent with the legal spirits and principles. As most of their commentaries were made during their judicial practices and were of certain legal validity, they were regarded as the official legal annotations.

In addition, in the later period of Western Han dynasty, there appeared some well-known families which had regarded making commentaries on laws as a profession, and private education of laws were prevalent. According to historical records, “there were special families who had regarded making commentaries on law as a family business usually inherited by their sons and grandsons; and the students who had accepted the private legal education amounted to several hundreds.”⁵ The famous families included the Du family (Du Zhou and Du Yannian), the Yu family (Yu Dingguo and his father), the Zheng family (Zheng Hong and his father), and the

⁴“Yuan Fa” (On Law) in *Jian Lun (Essential Discussions)*.

⁵Cui Zusi, *Qing Ze Ren Xi Lv Ling Zou (A Memorial to the Emperor for Recommending People to Study Laws and Regulations)*.

Guo family (Guo Hong and his father). In addition, these families had been engaged in the study of the laws for generations, which had created a new path for the development of the traditional “Lv Xue” (the study of statutory laws). As it had become a social hotspot of that time to cite the Confucian classics to annotate laws, not only were many judicial officials enthusiastic about it, some princes and marquises also had studied and made investigations into laws, which had given rise to the general mood of making private commentaries as well as studying laws. The privately made commentaries on the current laws were permitted in Western Han dynasty, which had shown that the coexistence of the different theories of various schools was not only in accordance with the national interest but also in agreement with the national demand and were of remarkable impact on the judicial judgments after the consolidation of the unified country.

The custom of making private commentaries on laws in Western Han dynasty was followed by Eastern Han dynasty. Besides the continuous application of the Confucian classics in annotating laws, more students were gathered and laws were taught, which had brought about prosperous family businesses passed on to generations, with the feature of “teaching by the masters”, and “observing by the later several generations”. Consequently, various schools of “Lv Xue” (the study of statutory laws) were formed due to the large number of families engaged in law teaching. The prestigious scholars of legal study at that time, such as Zheng Xuan, Ma Rong, Guo Lingqing and Wu Xiong, were also learned Confucian scholars, who had frequently gathered hundreds of disciples and taught them the Confucian classics and laws, which had led to the phenomenon of “the contending of Guo (Gong), Wu (Xiong) and Chen (Chong) with each other in the study of statutory laws”, and “the discussion of various theories by the three schools”.⁶ Because the rulers in the Western Han dynasty had continued to encourage the private commentaries on laws and had regarded the knowledge of Confucian classics and laws as the stepping stones for those who wished to enter the bureaucratic circles, it had become a common practice at that time for the Confucian scholars and officials to devote themselves to law study. Books were also written by Ma Rong and Zheng Xuan, who were both masters of Confucian classics, to expound the theories concerning the annotations of law, which had fostered the ancient Chinese “Lv Xue” (the study of statutory laws) to move towards prosperity.

The law annotators in Eastern Han dynasty had greatly motivated the Confucianization of the legal system by completely integrating “Lv Xue” (the study of statutory laws) into the orbit of Confucianism. A prominent manifestation was that the study of “Zhang Ju” (interpretations of laws) which had been originally employed in the study of Confucian classics was introduced to the annotations of law, by which, the laws of Han Dynasty were annotated sentence by sentence in each chapter. Nevertheless, because “the Confucian classics were divided into chapters and had to be analyzed in paragraphs, and also, the structures were so complicated, the schools were so various, the wording was so far-fetched and the

⁶“Chen Chong Zhuan” (The Biography of Chen Chong) in *Hou Han Shu (The History of Latter Han Dynasty)*.

contents were so miscellaneous and changeable”,⁷ “the Confucian scholars, such as Shu Sunxuan, Guo Lingqing, Ma Rong and Zheng Xuan, had written their own different sets of annotations which amounted to over 26,272 articles, and altogether more than 7,732,200 words, each consisting of over 10,000 words”.⁸ Therefore, the laws which had already been miscellaneous became more complicated and superfluous after being annotated. As was expressed in the sentence, “the more complicated the sentences are, the more difficulties it is for the readers to understand them”, such annotated laws had brought great difficulties to law executors in their legal practices. To solve this chaotic situation, an order was issued by Emperor Ming of Wei, which stated that “the annotations by Mr. Zheng shall be the only ones to be applied in the legal practice, and the others are not to be applied”.⁹ Thus, the annotations made by Zheng Xuan were recognized as the only authoritative legal interpretations, which had shown the further acknowledgements of the validity of making private commentaries on laws. The annotations made by Zheng Xuan had “covered almost all great classics, touched upon various schools of theories, removed the superfluous and the absurd and made detailed supplements and corrections so that the later scholars could know the basic methods and structures of legal annotations”.¹⁰

Some legal terms and concepts were also interpreted by the law annotators from the perspective of lexicology. For instance, it was stipulated in the law of Han dynasty that “if an orphan is under the age of ten, he shall be punished by ‘Zuo Lv’ (be punished for his relation to his father or elder brother who has committed a crime) even though he is innocent.” The annotation on this penalty was like this: “comments have been made by Fuqian: ‘Lv’ refers to the criminal penalty; comments have been made by Ruchun: ‘Lv’ refers to the orphan’s parent.”¹¹ Another example: as for the punishment of “Zei” (banditry) and “Dao” (theft), Xu Shen had commented in *Shuo Wen Jie Zi* (*Origin of Chinese Characters*):

‘Zei’, refers to ‘Bai’ (which means “failure” in Chinese); it carries the root of ‘Ge’ (the Chinese character: 戈) and the sound of ‘Ze’ (the Chinese character: 则); ‘Bai’ means damage, thus the literal meaning of ‘Zei’ is to damage and ‘Zei’ is a phonetic and associative character. ‘Dao’, refers to privatization of property and carries the component of ‘Ci’ (the Chinese character: 次); ‘Ci’ means desire for ‘Min’ (the Chinese character: 皿), thus it is an associative character. Such are the literal meanings of these two characters.

Such annotations, which were made in a more standardized way, had symbolized a new achievement in the method of law annotation, and it had exerted far-reaching influences on the later dynasties.

⁷ Wang Liqi, *Feng Su Tong Yi Jiao Zhu* (*Collation and Annotation of the General Principles of Customs*).

⁸ “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

⁹ Ibid.

¹⁰ “Zheng Xuan Zhuan” (The Biography of Zheng Xuan) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

¹¹ Cheng Shude, “Han Lv Kao” (A Textual Research of the Laws in Han Dynasty) in *Jiu Chao Lv Kao* (*A Textual Research of the Laws of the Nine Dynasties from Han to Sui*).

10.1.2 “Lv Xue” (*The Study of Statutory Laws*) in Wei and Jin Dynasties

The time from Wei to the Southern and Northern Dynasties was a historical period in which the political powers in the south and the north confronted with each other and the changing of dynasties was extremely frequent. In this period, the rulers' consciousness that laws were “the tools for ruling” was greatly enhanced after they had experienced the struggle of wresting and consolidating the political powers. Therefore, they had all doubled their efforts in the legal construction in an attempt to maintain the relative stability of the political power and their strength to contend for hegemony. In terms of legislations, the laws of Wei and Jin dynasty were the products of summarization, whereas the laws in Sui and Tang dynasties were the chief sources of those of Northern Qi dynasty. Correspondingly, the annotations of laws were attached with more importance. In especial, more space had been given to the development of “Lv Xue” (the study of statutory laws), and the activities of annotating laws were fostered into prosperity because of the weakening of the political autocracy by the separatist regimes and the turbulence which had lasted for over 200 years. Thus, this period was a significant phase for the development of “Lv Xue” (the study of statutory laws) in ancient China; furthermore, it was with distinctive characteristics.

Firstly, the privately made commentaries on laws were again replaced by the official annotations. The famous masters of law annotations at that time, such as Wei Chenqun, Liu Shao, Wei Ji, Jin Jiachong, Liu Song, Zhang Fei, Du Yu, and so on, were all important government officials who were not only legislators, but also law executors, and they had even made comments on laws and regulations so as to answer the legal questions. As officials who had held important legislative and judicial posts in government offices, they could grasp the main points and the sources of laws and make pertinent and feasible annotations; in the meantime, it was also easier for their annotations to be acknowledged by the emperors and to gain authoritativeness. The most representative ones included *Han Jin Lv Xu Zhu* (*Prefaced Annotations of the Laws of Han and Jin Dynasties*) and *Lv Jie* (*Annotations of Laws*) written by Zhang Fei, *Lv Ben* (*Book of Legal Annotations*) by Du Yu, and *Xing Fa Lv Ben* (*Book of Criminal Annotations*) by Jia Chong and Du Yu. Among them, the annotations made by Zhang Fei and Du Yu were the most authoritative, which were enacted by the emperor as the standard annotations of the law in Jin dynasty and had equal legal effect to *Jin Lv* (*Jin Code*), therefore, they were known as “Zhang Du Lv” or “Du Zhang Lv”.

Secondly, “Lv Xue” (the study of statutory laws) began to break through the confinement of law annotation by citing the Confucian classics in Han Dynasty, gradually cast off its affiliation to the study of Confucian classics, and experienced momentous innovations in both the methods and contents of the annotations, which was particularly obvious in the accurate interpretations of legal terms and the application of the principle of law as well as the clarification of legislative and judicial theories. Thereon, “Lv Xue” (the study of statutory laws) was gradually developed

into a relatively independent discipline. For example, Du Yu wrote in *Lv Ben* (*Book of Legal Annotations*):

Laws are the bases for making judgments on the cases, not books of principles and reasons. Thus, the law should be concise in words and straightforward in cases and what it permits or prohibits should all be brief and to the point. If the cases are straightforward, they can be easily understood by the people; if the prohibitions are brief, they can be hardly violated. Those who can easily understand it will intentionally avoid taking the prohibited actions; and with little violation of law, the criminal punishments will be rarely used.... The legal annotations today have all been made after the various theories of laws have been collected, and the standardized definitions for the various crimes have been supplied; so the judicial officials should make his specific choices according to the specific cases in their judicial practices.¹²

Zhang Fei said:

The criminal law is enforced by the officials who make judgments on justifications, whereas justifications involve the chances of intercession.... Thus, each criminal adjudicator must examine the real intention of every criminal, investigate the details and make specific judgments in specific cases.¹³

Here, Du Yu and Zhang Fei had regarded the “concise words and straightforward cases” and the application of the laws after detailed investigation of the cases as the fundamental demand in legislative and judicial activities, which had represented a comparatively high level of perception.

“Lv Xue” (the study of statutory laws) in Wei and Jin dynasties had a wider coverage of contents. Its main achievement was the clarification of the styles of legal codes and the standardized interpretations of legal terms. For instance, the distinction between “Lv” (criminal law) and “Ling” (order or ordinance) had always been ambiguous in the period of Warring States and Qin and Han dynasties. In Jin Dynasty, Du Yu explained that “‘Lv’ (criminal law) is used to justify the punishment of crimes”, which meant that the criminal law was the basis for the conviction of crimes and the measurement of penalties; and “‘Ling’ (order or ordinance) is used to maintain the regulations”, referring to other codes and regulations besides the criminal law. Such definitions were not merely adopted by the law makers in Jin dynasty, but also inherited by those in later dynasties. The interpretation that “‘Lv’ (criminal law) is the basis of the convictions of criminals and the measurements of penalties; ‘Ling’ (order or ordinance) is used for the establishment of standards and systems” in *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*) were exactly copied from Du Yu’s annotations.

In *Lv Biao* (*Standards of Law*), Zhang Fei had made concise, accurate and standard interpretations of the concepts and implications of a series of important crimes. For instance:

Deliberately breaking the law is ‘Gu’ (an intentional act); thinking oneself always correct is ‘Shi’ (a negligent act); rebelling against and deceiving the superiors is ‘Man’ (Deception); breaking promises and concealing hypocrisy is ‘Zha’ (swindle); and abandoning etiquettes

¹²“Du Yu Zhuan” (The Biography of Du Yu) in *Jin Shu* (*The History of Jin Dynasty*).

¹³“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

is ‘Bu Jing’ (Irreverence). If two litigators have contended with each other, it is ‘Dou’ (fighting); if two friends have done harm to each other, it is ‘Xi’ (hypocrisy). Assaulting another person for no reason is ‘Zei’ (banditry); unconsciously committing an offense is ‘Guo Shi’ (negligence); violating moral integrity and principles is ‘Bu Dao’ (Depravity); infringing the superiors or arrogating the noble is ‘E Ni’ (abusing or murdering the elders). Intending to harm another person but not yet exercising the harm is ‘Qiang’ (intention to harm); being the first to propose an unlawful act is ‘Zao Yi’ (instigation); two people discussing the plan of an unlawful act is ‘Mou’ (conspiracy); deluding others and making plans is ‘Shuai’ (leading a rebellion). Being on bad terms is ‘Qiang’ (conflict); attacking villains is ‘Lue’ (plundering); conducting an unlawful act by three people is ‘Qun’ (mobbing); taking property which do not belong to oneself is ‘Dao’ (Theft) and making profits from goods or other property is ‘Zang’ (booty). In a word, all these twenty definitions are to rectify the general legal terms.¹⁴

In *Lv Biao* (*Standards of Law*), the distinction between intentional and involuntary crimes was made, the basic constituents of “Zao Yi” (instigation), “He Mou” (conspiracy) and “Qun” (mobbing) were put forward, the distinction between deliberate dereliction of duties and involuntary crimes were clarified, and the meanings of such characters as “Zang” (booty), “Xi” (hypocrisy), “Dou” (fighting), “Zha” (swindle), “Qiang” (conflict), “Lue” (plundering), “Qiang” (killing) and “Shuai” (leading a rebellion) were explained. These standardized interpretations had exhibited a new academic level of “Lv Xue” (the study of statutory laws) in ancient China, and they had also made pathbreaking contributions not only to the abandonment of the farfetched method of citing Confucian classics in annotating laws, but also to the scientific development of “Lv Xue”. Therefore, they were highly praised and followed by the legislators and law annotators in later dynasties.

However, it should be pointed out that even though “Lv Xue” (the study of statutory laws) in Wei and Jin dynasties had broken away from its affiliated position to the study of Confucian classics, it had still kept the principle of integrating “Li” (rites) with law. For example, specifically, in annotating the laws, on one hand, the scholars in Wei and Jin dynasties had laid much stress on “collecting the diverse theories of laws”, meaning that the annotations should be in conformity with the legislative intentions; on the other hand, they had emphasized that “the basis of criminal law was the definition of the punishment of the crimes, thus, every specific crimes should be examined..., and specific standardized definitions should be given to each crime”.¹⁵

The achievements of the annotation of law in Wei and Jin dynasties had shown that “Lv Xue” (the study of statutory laws) in ancient China had reached a level of logicalization and scientization, which had not only had the distinct features of times but also had reflected the rationality and wisdom of Chinese scholars in the construction of legal civilization. They had been further inherited and promoted by the scholars in later dynasties including Tang, Song, Yuan, Ming and Qing dynasties.

¹⁴“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

¹⁵Ibid.

10.1.3 “Lv Xue” (*The Study of Statutory Laws*) in Tang Dynasty

Since Tang Dynasty was one of the flourishing ages of feudal China, its laws and regulations were becoming finalized, therefore, the purpose of “Lv Xue” (the study of statutory laws) began to be directed to a new orientation. What the law annotators concerned about was no longer annotating laws by applying the Confucian classics, but to solve the contradictions existing between the rigid laws and the increasingly complicated social relationships. Therefore, they had strived to expound the legislative intents of the state, outline the legal principles, interpret the concepts and the terms of laws, and comment on the sources as well as the success and failure of the provisions in order to improve the judicial officials’ ability to settle cases, to increase the accuracy of law application, and to avoid inappropriateness. The formulation of *Yong Hui Lv* (*Yong Hui Code*) and the specific annotations made by Zhangsun Wuji and others according to the emperor’s decrees had not only displayed the maturity of the legislative techniques, but also reflected a new achievement in “Lv Xue” (the study of statutory laws). Among all of the existing legal codes of ancient China, *Tang Lv Shu Yi* (*The Comments on Tang Code*) was not only the most complete, but also the earliest and most rigorous work on “Lv Xue” (the study of statutory laws). On the basis of the summary of “Lv Xue” (the study of statutory laws) in Wei and Jin dynasties, the law annotators in Tang dynasty had appended annotations to legal provisions, which was such an extraordinary innovation that it was possible for law enforcers to understand the meanings of laws and to avoid biased judgments in legal practices. As was recorded in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*), “in the 3rd year (of Yong Hui), it was said in the edict that ‘because there are no fixed annotations of law, there were no standard answers to the examination of laws and regulations conducted every year, so it is advisable to summon the scholars who know laws well to present memorials with commentaries on legal provisions under the supervision of ‘Zhong Shu Men Xia’ (the supreme organization in charge of the state affairs in ancient China). Therefore, ‘Tai Wei’ (the minister of defense) Wuji, the Duke of Zhao and “Si Kong” (the minister of public work), the Duke of Ying and others had made annotations to the law, which had amounted to altogether 30 volumes. They were submitted to the emperor in October of the fourth year and then enacted to be applied throughout the whole country. Since then, every judicial judgment has been made in line with them.” From this, it could be seen that *Yong Hui Lv Shu* (also named *Tang Lv Shu Yi*) was still a collection of the official annotation of law, which not only involved the standard interpretations of legal spirits, principles and terms, but also included the predictions and relevant resolutions of the potential problems in legal practice. In terms of the methods of annotation, the study of literal meanings and that of the historical sources were integrated, which was both simple and concise in its wording and syntax. So, its completion had not only provided the legal basis to be “quoted and analyzed” by the judges, but also the unified criteria for the imperial test of laws and regulations.

The achievements of Tang dynasty in jurisprudence, represented by *Tang Lv Shu Yi* (*The Comments on Tang Code*), were of extremely high value in the history of the development of the ancient Chinese “Lv Xue” (the study of statutory laws) by their unique characteristics such as comprehensiveness, accuracy and coordination. The comprehensiveness referred to the variety of annotated contents, which included not only the meanings of words, but also the theories of laws; not only the restrictive interpretations, but also the expansionary ones; not only the historical evolvement and sequence of the names of specific laws, but also a number of other decrees as supplements and references, which had strengthened the comprehensiveness and the thoroughness of annotations. Besides, the style of writing was also consistent with the demand of contents, which was straightaway, but not boring, and which had contained not merely literal explanations but also the answers to the puzzling questions.

The so-called accuracy referred to the strict logic, refined words, precise choice of languages and explicit interpretations. All these elements had made the legal provisions easier to be understood and more feasible to be applied, which had established a solid foundation for the accurate application of laws.

The so-called coordination referred to the scientific integration of the legal provisions, the specific annotations, the assumptions and the answers to puzzling questions, the well-organized chapters and articles, and the rigorous and reasonable arrangement of stylistic layout, which had not only raised the theoretical value of the contents to a large extent, but also greatly intensified the guiding significance to judicial practice. Such a style of annotation, with the integration of provision and annotation had produced tremendous influences on the annotations of laws in Ming and Qing dynasties. All in all, “Lv Xue” (the study of statutory laws) in Tang Dynasty, which had served as a link between the past and future, had reached a new height.

By Tang Dynasty, it had been hundreds of years since the establishment of the Confucianism as the dominant ruling ideology. If the Han and Jin codes were regarded as the beginning of the Confucianization of law, then *Tang Lv* (*Tang Code*) could be regarded as its accomplishment. As “Li” (the rites) advocated by the Confucian school was in agreement with the national mentalities and the unified autocratic rule, their basic norms were included into “Lv” (criminal law) and finally took the form of law. The relationship of “Li” (rites) and “Fa” (law) was identified as that of “Ben” (the essence) and “Yong” (application), just as was expressed in the words, “the moralities and rites are ‘Ben’ (the essence) for the political administration while criminal punishments are its ‘Yong’ (the application)”, which were compared to the natural phenomena such as “dusk and dawn, sunrise and sunset, and the four seasons” to signify their immutability. It was not only the guiding philosophy but also the fundamental spirit of the jurisprudence to use “Li” (rites) as the standard to judge laws. For example, for the item “improper act”, it was annotated in “Za Lv” (*Miscellaneous Laws*: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed) that it referred to “those acts that are not prohibited by the legal provisions, but still should not be done according to the principles of ‘Li’ (rites)”.

In terms of the method of annotations, the method of “Wen Li” (unity and coherence in writing), and the method of historical and systematic study were employed in the

“Lv Xue” (the study of statutory laws) in Tang Dynasty. Therefore, with the integration of such methods, the meanings of legal provisions became more and more explicit. Taking the penalty of “Chi Xing” (the punishment of beating with light sticks) as an example, it was stated in the provision of *Tang Lv (Tang Code)* that “there are five levels of the penalty of ‘Chi’ (flogging with light sticks): ten strokes, twenty strokes, thirty strokes, forty strokes and fifty strokes.” According to the annotations:

‘Chi’ is lashing. It is a measure to punish and teach people to feel disgraced. If a person has committed a minor offence; he must be punished by the law, thus, the punishment is ‘Chi’ (flogging with light sticks) so as to give him a lesson.... Therefore, its meaning is explained in the saying that ‘Chi is a penalty for moral education’ recorded in *Shu (Books)*. In the 13th year of Emperor Wen of Han, Tiying, daughter of ‘Tai Cang’ (the official in charge of the warehouse for ordinary people), Chun Yuyi, had presented a memorial to the emperor, saying that she was willing to be a maidservant for government offices just to redeem his father’s penalty. The emperor sympathized with her, thus, revised the corporal punishment: anyone who is supposed to be punished by ‘Qing’ (or the punishment of ‘Mo’: tattooing the face) should be sent to serve hard labor in building city walls instead, and if the offender is a woman, she should be sent to pestle grains; anyone who is supposed to have his nose cut off should be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for three hundred strokes instead. This was how the punishment of ‘Chi’ (flogging with light sticks) and ‘Zhang’ (flogging with heavy sticks) came to be used.... From ten beating to fifty beating with light sticks, there were altogether five levels; the levels and the number of the penalty of ‘Zhang’ (flogging with heavy sticks) were the same.

The literal meaning of the penalty of “Chi” (flogging with light sticks) and “Zhang” (flogging with heavy sticks) was hereby provided, together with the conditions and levels for the application of this penalty and the textual research of its historical evolvement. Such styles and methods of annotations were apparently more reasonable and advanced than those which were used in the annotations of laws in Jin Dynasty.

Another example was the commentary on “Hua Wai Ren” (foreigners). It was stated in *Tang Lv Shu Yi (The Comments on Tang Code)* that “‘Hua Wai Ren’ refers to people from other countries with their own rulers, different customs and legal systems.” This showed that “Hua Wai Ren” in the law of Tang dynasty referred to the foreigners who had lived in China, but not those small minorities in China. What should be especially noted was that the laws were also cited to interpret laws in Tang Dynasty. For instance, for the provision that “as for the crimes that are not regulated in the laws, if they should be punished more leniently, the principle of ‘Ju Zhong Ming Qing’ (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented) should be applied”.¹⁶ So according to the commentary:

No legal provisions for certain illegal conducts means that there are no charges for such conducts as is provided in the law; an example for ‘lenient punishment’ is that, according to *Zei Dao Lv (Statute on Banditry and Theft)*, ‘if a person kills someone who has broken into his house for no reason at night, he shall not be punished’, if the master has injured the burglar, he certainly shall not be punished.

¹⁶“Duan Zui Wu Zheng Tiao” (there were no legal provisions for making convictions) in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi (The Comments on Tang Code)*.

From the discussions above, it could be concluded that what was pursued by “Lv Xue” (the study of statutory laws) in Tang Dynasty, represented by *Lv Shu* (Commentary on Law), was a more accurate application of law, which was precisely what was required by the centralized powers of the unified feudal empire. The marvelous achievements accomplished by the legal annotations of Tang dynasty were actually an epitome of “Lv Xue” (the study of statutory laws) in Han, Wei and Jin dynasties, as was expressed in the following words:

“The materials, either the historical ones such as the edicts of emperors and kings or the contemporary ones such as the works of Xiao and Jia, have all been studied in the way of historical comparison. In the exploration of their origins, the superfluous provisions have been removed and the structure has been simplified”.¹⁷

Besides, *Lv Shu* (Commentary on Law) was a collective work of the great law annotators in Tang Dynasty such as Fang Xuanling, Zhangsun Wuji, Li Ji, Song Shi and Yu Zhining, whose social status and authorities had ensured the authoritative-ness of its commentaries, and endowed them the equal validity to legal provisions. Compared with the 50-volume *Xue Shuo Hui Cuan* (*The Pandects of Justinian*), a collection of works and answers to legal questions by several generations of Roman jurists and a magnum opus concentrating on the interpretation of civil law, which was enacted in 529 A.D. by the Roman Emperor Justinian, *Tang Lv Shu Yi* (*The Comments on Tang Code*) was a spectacular and monumental work which had focused more on the interpretations of the criminal law.

10.1.4 “Lv Xue” (The Study of Statutory Laws) in Song and Yuan Dynasties

In Song Dynasty, great importance was attached to legal construction, because the rulers had thought that “only when the legal system is established, can all affairs be handled accordingly and the administrative activities be managed”.¹⁸ Under the reign of Emperor Shenzong of Song dynasty, specialized legal talents were badly needed to meet the requirements of the reform, thus, legal education thrived and the “examination of laws and regulations” was set up in order to meet the needs. However, after the failure of the reforms conducted by Emperor Shenzong, “Lv Xue” (the study of statutory laws) began to decline. Meanwhile, with the strengthening of despotism, even though the officials were required to learn and implement the laws accordingly, the civilians were strictly prohibited from transcribing and printing them, let alone engaging in the private education of the law.

In Southern Song Dynasty, “Li Xue” (Neo-Confucianism: a Confucian school of idealist philosophy of the Song and Ming dynasties) emerged, which had

¹⁷“Xu” (Preface) to “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

¹⁸*Xu Zi Zhi Tong Jian Chang Bian* (*Sequel to the Full-length Zi Zhi Tong Jian: History as a Mirror*), Vol.143, September, the 3rd year of Qingli.

brought about a great change of academic atmosphere from pragmatism to idealism. As “Li Xue” (Neo-Confucianism: a Confucian school of idealist philosophy of the Song and Ming Dynasties) at that time was an ideological “study of man’s heart and mind”, which focused on expounding the abstract “Yi Li” (Etiquette and Ceremonials) and “Xing Ming” (emotions, personality and the mandate of heaven), it was precisely opposed to the annotative “Lv Xue” (the study of statutory laws) which had “focused on the practical usage”. Influenced by such an idealist atmosphere, numerous scholars had made special researches on it, which had become a prevailing practice in society. As a result, the jurisprudence, which had been a distinguished learning for a long time, was gradually reduced to an inconspicuous one. Therefore, in general, the ancient Chinese “Lv Xue” (the study of statutory laws) was beginning to take on a trend of a tremendous landslide.

Nevertheless, since the cultural control in Song and Yuan dynasties became looser, to some extent, the private commentaries on laws conducted by officials were further developed in a certain way, so some influential works on “Lv Xue” (the study of statutory laws) were written, such as *Xing Tong Fu* (*Discussions of Criminal Provisions*) written by Song scholar Fu Lin, *Lv Yin Yi* (*Interpretations and Implications of Laws*) by Sun Shi, *Xing Tong Fu Jie* (*Analytical Comments on Criminal Provisions*) by Xi Bingyuan; *Tang Lv Shi Wen* (*Textual Research on the Law of Tang Dynasty*) and *Tang Lv Zhuan Li Wu Xing Tu* (*Depiction of the Five Criminal Penalties in the Sub-statutes to Tang Code*) written by the scholar Wang Yuanliang in Yuan dynasty, *Yong Hui Fa Jing* (*Comments on Yong Hui Code*) by Zheng Ruyi, *Xing Tong Fu Jie* (*Analytical Comments on Criminal Provisions*) by Liu Gaofu, *Yi Yu Ji* (*Collection of Doubtful Cases*) and *Yan Yu Ji* (*Collection of Cases*) by Yuan Jiang. Among them, Yuan scholar Zheng Ruyi had made a comparative study of the laws of Jin and Tang dynasties in his book *Yong Hui Fa Jing* (*Comments on Yong Hui Code*) which was praised as “having placed the laws of Tang dynasty in the preceding chapters and the laws of Jin dynasty in the appendix, and having made elaborative and accurate comparisons of the two by analyzing the similarities or differences and by additions or deletions” in the general table of contents of *Si Ku Quan Shu* (*Complete Library in the Four Branches of Literature*). So it was a valuable works of the comparative study of law.

The legal practice was also attached with great importance in Song Dynasty, thus, some works featured in the summarization of the experience of legal practices were written with the demands of times. Those typical ones included *Tang Yin Bi Shi* (*Collection of Criminal Cases*) written by Gui Wanrong, *Zhe Yu Gui Jian* (*Collections of Lawsuits*) by Zheng Ke and *Xi Yuan Ji Lu* (*Record of Redressing Mishandled Cases*) by Song Ci. *Zhe Yu Gui Jian* (*Collections of Lawsuits*) was the first book in China in which the cases concerning the judicial judgments and the investigations with relevant analyses, commentaries and summaries were collected. As a juristic works studying the ancient Chinese judicial system, it had not only reflected the author’s proposal of “Shang De Huan Xing” (stressing moral education while mitigating criminal punishments) and “Ming Shen Yong Xing” (being prudent in the infliction of punishment) but also his resentment to the fatuous and greedy officials who had “imposed severe criminal punishments and pursued cruel

penalties stubbornly”. *Tang Yin Bi Shi (Collection of Criminal Cases)* “consists of altogether 144 provisions, which are all about the doubtful cases in history”. In this book, the experience was summarized and the lessons from the judicial trials in the successive dynasties drawn from the perspectives of legal enforcement, judicial judgments, the measurement of penalties and the judicial inspections, for this reason, it had exerted widespread and far-reaching influences.

Xi Yuan Ji Lu (Record of Redressing Mishandled Cases) was written by Song Ci on the basis of cases collected the about the forensic inspections in the works of the predecessors as well as his own practical experience, thus, it was a comprehensive summarization of the ancient Chinese forensic science. As the earliest works in China which had focused on the forensic science in a relatively complete way, it was also the first monograph on the forensic science in the world. It was not only a must-read book for the Southern Song judicial officials who were handling homicide cases, but also was “respected as the golden rule” by the judicial investigators in the later dynasties. The book had been translated into Korean, Japanese, French, English, German and many other languages, and it was a remarkable contribution to the development of the world legal culture.

10.1.5 “Lv Xue” (The Study of Statutory Laws) in Ming and Qing Dynasties

After Ming Dynasty was established, Zhu Yuanzhang immediately set about the work of making laws and setting up institutions. He required that laws be understood and abided by the officials and the common people. Thus, for the first time, the article that “officials should read and discuss laws and regulations” was included into the legal code, which had demanded that all officials “must read the laws carefully, interpret their meanings explicitly and then make judgments accordingly”. So, in no time, it had become a vogue to read and comment on laws, hence, a favorable social atmosphere was created for the revival of the ancient “Lv Xue”. The earliest achievement of the official law annotation at the beginning of Ming Dynasty was *Lv Ling Zhi Jie (Interpretations of Laws and Regulations)*. In the 30th year of Hongwu (1397) when *Da Ming Lv (The Great Ming Code)* was made, the order was issued by Zhu Yuanzhang that anyone was strictly prohibited from revising and making comment on laws; otherwise, he should be punished for disobeying the systems of the ancestors. Consequently, this had led to the situation where there were only a few private commentaries on *Da Ming Lv (The Great Ming Code)*, apart from those which were officially made according to the emperor’s orders.

However, to meet the development of society and the practical need of legal application, the laws were in bad need of being annotated more thoroughly and meticulously. Since the time of Wanli (starting from 1573 A.D.), the social and economic relationships became more complicated, the class contradictions more intense, and social problems and crimes had increased constantly, so in order to make legal adjustments, the compilation of regulations was made several times,

which had resulted in the various interpretations of laws and regulations in application. As a result, it was not sufficient to solve the various problems newly emerged in judicial practices with the original simple method of law annotation. Therefore, expansionary interpretations should be done on *Da Ming Lv* (*The Great Ming Code*) so as to solve the contradictions between “Lv” (criminal law) and “Li” (precedent). For this reason, the issue of law annotation was quietly put on agenda. Unfortunately, after the middle period of Ming Dynasty, politics fell extremely corrupted. Because the power was dominated by the eunuchs and the emperors were becoming fatuous, no large-scale official activities of law annotation could be possibly organized. In the end, the only hope was placed on the private law annotators, whose annotations were not only acknowledged, but also encouraged, as long as the legislative intents of the state were embodied both in accordance with the interests of the rulers and to the benefit of the implementation of current laws.

In Ming Dynasty, the works on “Lv Xue” (the study of statutory laws) had amounted to a great number, among which the typical ones at that time included: Zhang Kai’s *Lv Tiao Shu Yi* (*Commentaries on Legal Provisions*), in which the various crimes were enumerated in the form of diagrams, each one including the charges, legal provisions and criminal punishments, and all were put in order so as to be fully understood at one glance. He Guang’s *Lv Jie Bian Yi* (*Annotations of Laws and Explanations of Doubtful Cases*), which consisted of elaborative annotations, had set a model for the annotation of works of ballads, poems and prose in Qing Dynasty, thus providing the diversified methods for law annotation. Wang Qiao’s *Du Lv Jian Shi* (*Interpretation of Law*), which was written according to the author’s over 10 years of experience of judicial practice and the advanced theories of various schools, and which was with exhaustive and accurate contents, was not only a representative work of private annotations of laws appeared quickly after the middle period of Ming Dynasty, but also was respected as a model by jurists in later generations. It had had profound influences on “Lv Xue” (the study of statutory laws) in Qing Dynasty. Another famous work was *Da Ming Lv Fu Li Jian Shi* (*Interpretation of the Sub-Laws of Great Ming Code*), an authoritative one written by Wang Kentang, who had taken the scholarly studies of his family as the sources and absorbed the quintessence of other scholars’ works. There were also *Xing Shu Ju Hui* (*Interpretations of the Criminal Law*) written by Peng Yingbi and *Fa Zhui* (*Annotations of Law*) written by Tang Shu, both of which were innovative works which had laid an important foundation for the prosperity of the private “Lv Xue” (the study of statutory laws) in Qing Dynasty.

Qing Dynasty, as a feudal autocratic dynasty which had ruled China for over 260 years, had witnessed the epitomization of the achievements of traditional “Lv Xue” (the study of statutory laws) and the flourishing stage of private “Lv Xue” (the study of statutory laws) in Chinese history. At that time, various schools appeared and annotators emerged in large numbers. Although they had stemmed from the tradition, yet they had not simply repeated or imitated tradition. With common inclinations, they had created colorful contents and displayed diverse styles, each of whom had his specialty and emphasis; meanwhile, they had influenced and inspired one another,

bringing about unprecedented historical achievements of “Lv Xue” (the study of statutory laws) in Qing Dynasty.

A number of factors had contributed to the upsurge of “Lv Xue” (the study of statutory laws) in Qing Dynasty. Firstly, the rulers of Qing dynasty had not only paid much attention to the function of law, but also to the appointment of the appropriate people for the law enforcement, so the qualities of the bureaucratic teams who had just read books but neglected law needed to be improved by clarifying the legal spirit through law annotation in order to give a better play of the functions of judicial organs. Secondly, Qing dynasty was in a situation where there was extraordinarily vast territory and the coexistence of multi-nationalities; so there were extreme unbalances in the development of politics, economy and culture between the capital and coastal areas, and between the inland areas and the areas where the small minorities had lived. Therefore, legal annotations had become essential to ensure that the laws of central government be understood and implemented correctly. Thirdly, it was required by the relation between “Lv” (criminal law) and “Li” (precedent) formed in the legal system of Qing dynasty and the various problems arised in the wide application of “Li” (precedent) that jurists should pay more attention to the annotation of both “Lv” (criminal law) and “Li” (precedent), of which the latter was particularly urgently needed in the judicial practice. Fourthly, the development of “Lv Xue” (the study of statutory laws) in Ming Dynasty, especially the experience of private law annotations after the middle of Ming Dynasty, had laid a solid foundation for the development of “Lv Xue” (the study of statutory laws) in Qing Dynasty. Meanwhile, the textology, which had appeared in the middle period of Qing, had provided the methodological support for its development.

In brief, in Qing Dynasty, after experiencing the much more complicated and intensified contradictions and sharp struggles in the later period of feudal society, the field which the law annotators had involved was much larger, the materials which they possessed were more abundant, and the annotations which they made were more precise. Therefore, before long, they had begun to break away from the tendency of depending on the Ming scholars and stepped onto their own path of innovation.

10.2 The Achievements of “Lv Xue” (The Study of Statutory Laws) in Qing Dynasty

10.2.1 The Simultaneous Development of Both Official and Private “Lv Xue” (The Study of Statutory Laws) with the Diversification of Schools

There were two categories of law annotators in Qing Dynasty: one was made up of the judicial officials and local officials, such as Wang Mingde, Yu Yin, Wu Tan, Xue Yunsheng, and so on; the other was mainly made up of the senior private legal

advisers, such as Shen Zhiqi, Wan Weihang, Shen Xintian, Cai Songnian, Wang Youhuai, and so on. The official annotators were the main forces of “Lv Xue” (the study of statutory laws) in Qing Dynasty, and due to their particular identities and the permissions from the imperial court, even though their annotations were not made according to the orders of the imperial court, they had, in fact, the characteristics of official annotations. As for the private annotators mainly made up of those senior private legal advisers, they were an enormous group which were not only closely connected but also passed on from generation to generation. The experiences of senior private legal advisers had determined that the hot spot of their annotation was bound to be focused on the accurate application of laws and regulations. So, their achievements in law annotation derived from and in return was applied in their legal practice, as a result, they had very important guiding values to the judicial activities of Qing Dynasty. To a certain extent, the law annotators in Qing Dynasty were like thousands of stars shining brightly in the sky. They had inspired each other and hundreds of fruits of law annotations were handed down to present times. Some of the people were skilled in editing annotations, some were renowned for textual researches, some were famous for their annotations in judicial applications, and some were praised by people for their employment of diagrams and verses. Indeed, books of various kinds were written one after another, with each leading the trend.

10.2.2 Stemming from Yet Transcending the Traditions

In the annotations of Qing Dynasty, not only was the traditional “Lv Xue” (the study of statutory laws) in ancient China inherited, especially the “Lv Xue” (the study of statutory laws) in Ming Dynasty was directly succeeded. Nevertheless, in Qing dynasty, with the stabilization of political power, the consolidation of economic foundation and the development of social relationships, the trend of the inheritance of “Lv Xue” (the study of statutory laws) in Ming dynasty was gradually replaced by its independent development. For this reason, the law annotators in Qing Dynasty had to adapt to the new situations by changing their attitudes and methods in jurisprudence with their foothold completely shifted to the realistic foundation. In the 13th year of Kangxi (1673), Wang Mingde wrote *Du Lv Pei Xi (Answers to the Puzzling Problems in Reading the Law)*, which had symbolized the beginning that the influence of Ming scholars began to be shaken off in “Lv Xue” (the study of statutory laws) in Qing dynasty. Afterwards, *Da Qing Lv Ji Zhu (Collected Commentaries on Great Qing Code)* written by Shen Zhiqi in the 54th year of Kangxi (1714) was representative of the new style, new perspective of views and new achievements in “Lv Xue” (the study of statutory laws) in Qing dynasty after it had stepped on the path of independent development. Henceforth, what Qing law annotators had focused on was not to repeat the old theories of Ming scholars, but to open up new frontiers, to summarize fresh experience and to create new values.

10.2.3 *Exhaustive Textual Researches and Meticulous Elaborations*

The work of the researches on the origins of laws and regulations by the law annotators in Qing Dynasty had enriched the knowledge of law enforcers, so that they could grasp the patterns of the development of the law in Qing dynasty from the perspective of the relationship of cause and effect. For instance, after the research on the provision of “assaulting and intentionally killing someone”, the following analysis was made:

This provision originated in the item of ‘assaulting and negligently killing or injuring someone’, which was previously included in the law of litigations, but in Ming Dynasty, it began to be changed into ‘assaulting and intentionally killing someone’, while the item of ‘negligently killing or injuring someone’ was merged into the two items of ‘killing someone in games’ and ‘negligently killing someone’ with specific provisions after them. The various annotations in the articles and provisions were all made in the first year of Shunzhi. Herein this explanation is made.

Through the textual research above, the context of the changes of this provision was clarified.

What needed to be pointed out was that the meticulousness of the annotations of legal provisions had particularly reflected the high level of “Lv Xue” (the study of statutory laws) in Qing Dynasty. For example, on the concept of “Dao Qie” (theft), *Da Qing Lv Ji Zhu* (*Collected Commentaries on Great Qing Code*) had the following commentary:

The legal meaning of the two words ‘Dao Qie’ (theft) is quite subtle, so they should be deliberated word for word. ‘Dao Qie’ (theft) means that the offender’s plots and acts all belong to the range of stealing and that he has no intention to kill or injure the offended and to resist being arrested; ‘Lin Shi’ (temporary) means that the offender’s acts of killing or injuring are all performed temporarily and accidentally, and that he has no premeditation.... If the offended tries to catch the offender and the offender resists being arrested so that they run into a fight in a canyon, this is a case of resisting being arrested.

10.2.4 *The Improvement of Legislation and Judicature*

Because “Lv Xue” (the study of statutory laws) in Qing Dynasty was mostly the summarization of the experience of judicial practice which was not only concise and to the point but also always with an eye on the reality, to some extent, it had managed to improve the legislation and judicature and promoted the development of the legal system in Qing Dynasty.

In the fifth year of Yongzheng (1726), *Da Qing Lv Ji Jie* (*Collected Interpretations of Great Qing Code*) was enacted, which had included the achievements of Shen Zhiqi’s *Da Qing Lv Ji Zhu* (*Collected Commentaries on Great Qing Code*) and Wang Mingde’s *Du Lv Pei Xi* (*Answers to the Puzzling Problems in Reading the Law*). It had shown that the private law annotations had been introduced into the legal code

and that their validity as legislative interpretations was acknowledged by the state. Moreover, in the fifth year of Qianlong (1739), when “the diagram of atonement for the crimes through money” was supplemented, it was explicitly stipulated that in the application of this “diagram”, the judicial officials should consult the relevant interpretations in *Du Lv Pei Xi (Answers to the Puzzling Problems in Reading the Law)* “so as to avoid unjust judgments”.¹⁹ Besides, in *Du Lv Pei Xi (Answers to the Puzzling Problems in Reading the Law)*, the annotations of the meanings of the eight characters which were generally used in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*—“‘Yi’ (以), ‘Zhun’ (准), ‘Jie’ (皆), ‘Ge’ (各), ‘Qi’ (其), ‘Ji’ (及), ‘Ji’ (即), ‘Ruo’ (若) were all taken as standard interpretations”.

The achievements in “Lv Xue” (the study of statutory laws) in Qing Dynasty had also played a significant guiding role in the judicial practice. Besides, *Da Qing Lv Ji Zhu (Collected Commentaries on Great Qing Code)* was mostly referred to by the local judicial offices, and whenever the annotations in it were slightly contradictory to the legal code, the private annotations instead of the original laws and regulations were usually applied by the judicial officials. According to *Xing An Hui Lan (Collections of Criminal Cases)*, there were nearly 40 cases which were judged based on the private annotations. In particular, if there were no explicit stipulations in legal provisions, the private annotations would mostly be employed as the basis for the legal judgments. *Da Qing Lv Ji Zhu (Collected Commentaries on Great Qing Code)* was even consulted by “Xing Bu” (Board of Punishment) of the central government to give official replies to the subordinate judicial institutions about the relevant questions of the implications of legal provisions.

From the discussions above, it could be seen that, to a great extent, the achievement in the law annotation in Qing Dynasty were enlightening to the legislators, and the essential affirmation made in the way of national legislation had displayed its value more evidently. Moreover, the private commentaries had made legal provisions more applicable, which had further increased the accuracy of law application and improved the quality of justice. Just as Ma Tengjiao had commented, “it had made it possible for the judicial officials to review the criminal cases from a comprehensive perspective by the elaboration of the quintessence of laws and regulations.”²⁰

From the middle of Ming Dynasty to Qing Dynasty, one characteristic of the development of “Lv Xue” (the study of statutory laws) was the continuous and steady prosperity of the private commentaries on laws. The private annotations were in essence made according to the orders of the state and served the legal interpretations of the nation. In addition, they were merely the several branches of a huge systematic project. Therefore, the guiding ideology of legal annotations must not only comply with the need of autocratic politics, but also maintain the correct implementation of current laws. It was exactly because the private annotations of

¹⁹“Bu Ban Fan Li” (Notices Issued by the Government Departments) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

²⁰“Ma Tengjiao Xu” (Preface Written by Ma Tengjiao) in *Da Qing Lv Li Ji Zhu (The Collected Commentaries on the Laws and Precedents of Great Qing)*.

law had embodied the legislative intents of the state and conformed to the need of judicial practices that they were acknowledged and even encouraged by the rulers, thus, they had managed to be retained for hundreds of years.

In summary, in the course of over 2,000 years, “Lv Xue” (the study of statutory laws) in ancient China had been continuously undertaking the tasks of clarifying legislative intents, differentiating legal spirit, interpreting legal terms and principles, and striving to regulate the diverse social relationships through the limited legal provisions. During this process, the transformation of the social trend of thoughts, politics and economy in different historical stages had all exerted different influences upon the law annotation, at the same time, “Lv Xue” (the study of statutory laws) had also been constantly reformed to be adjusted to the social needs. No doubt, just as the development of ancient laws, ancient Chinese “Lv Xue” (the study of statutory laws) had come down along a distinct and continuous line and continued to be developed along the path of practical application, and “Lv Xue” (the study of statutory laws) came to a stop only after it had lost its carrier because of the disintegration of ancient laws.

10.3 The Basic Characteristics of “Lv Xue” (The Study of Statutory Laws) in Ancient China

From the general survey of the history of the development of “Lv Xue” (the study of statutory laws) in ancient China, it could be perceived that the ancient Chinese “Lv Xue” (the study of statutory laws) was as long-standing as any other cultural phenomena, and that it had freed itself from the religious theological constraint in quite an early time. Besides, the legal relations which it covered were very wide, ranging from the individuals to the families, from the families to the states, and from the states to the society, and its basic contents included the clarification of the implications of legal provisions, the differentiation of legal principles and the interpretation of legal terms, with its ultimate purpose to reinforce the law enforcement through legal provisions. Despite the minor disparities between different dynasties, the basic tradition had been passed down in one continuous line, which had become the traditional “Lv Xue” (the study of statutory laws) peculiar to China in the ancient east.

Although “Xing Ming” (the criminal law) and “Lv Xue” (the study of statutory laws) had been taken as the major contents of study in the traditional Chinese jurisprudence, it was more than that, because it had also contained the contents of some departmental laws. As there was no such concept as the science of law in ancient China, which was introduced into China together with the western culture when the country was opened to foreign trade in modern times, traditional “Lv Xue” (the study of statutory laws) could be considered as the science of law under particular historical circumstances in ancient China, and the high level reached by the traditional “Lv Xue” (the study of statutory laws) had become an important standard to measure the level of development of the ancient Chinese legal culture.

As the ancient Chinese “Lv Xue” (the study of statutory laws) gradually became mature, it had exhibited the following distinct features:

1. It had reflected the political and cultural policies of absolutism. The autocratic politics in ancient China was concentratedly represented by the grand unification of the imperial power, thus, the uniform application of laws pursued by “Lv Xue” (the study of statutory laws) was intended to serve its purpose. As far as the autocratic cultural policy was concerned, it was mainly reflected in the respectation for Confucianism, the emphasis on classics, the unification of the ideologies of the law annotators, and the prohibition of the expression of free will, which had left a deep imprint on “Lv Xue”.
2. It had shown a tendency of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law). Under the more than 200 years of feudal autocratic ruling, enforcing punishments on the criminal acts which were harmful to the state was taken as the principal task of the ancient Chinese law, while the civil disputes over property were always taken as trivial matters, which were not attached with sufficient importance in legislations; furthermore, they were usually treated with indifference in judicial practices, and were mediated randomly or settled after only one trial. From Qin to Qing Dynasty, “Lv”, or criminal code, had always been the uppermost form of law in ancient China and had been in the dominant position in the entire legal system. Due to the special importance of “Lv” (criminal law), the achievements in “Lv Xue” (the study of statutory laws) were all made in the form of detailed interpretations of the legal codes of various dynasties. More specifically, they had included the interpretations of current legal provisions, the clarifications of legal intents, the definitions of legal terms, the specifications of the scope of application of legal provisions, the distinctions of the boundaries between crime and innocence and between different crimes, the researches on the historical sources of legal provisions, and the comparisons of various annotations which were collected, etc. In this way, the unitary application of law was more easily executed. Because legal provision was considered as the object of research for “Lv Xue” (the study of statutory laws), generally speaking, it was basically the criminal law and the criminal procedure law which was closely connected to it. Under the influence of the dominant consciousness of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law), the jurists tended to merely stress the “criminal law” and the various articles in the chapter of “Duan Yu” (Trials and Punishments), whereas to ignore the provisions concerning civil “trivial matters”.
3. There was only historical inheritance yet no horizontal absorption. The conservative nature of the natural economy of ancient China, the foreign policy of secluding the country from the outside world, and the political considerations of the autocratic state system had led to the secluded condition in ancient China. So, it was in this closed country that “Lv Xue” (the study of statutory laws) was developed. Since it had never been influenced by foreign legal culture during its course of development, there was only historical inheritance, yet no horizontal comparison and absorption, therefore, such independence was in fact also a kind of isolation.

4. It was full of the spirit of the integration of “Li” (rites) and law, and the simultaneous application of “Li” (rites) and law throughout its history of development. “Li” (rites) was endowed with broad regulative forces due to the special channel of the formation of the ancient state, the long-standing constraint from the patriarchal and blood relationships, as well as the influence of the sole respect of the Confucianism in feudal dynasties. Because “Li Zun Yu Fa” (showing more respect to “Li” (rites) than to law) and “De Zhu Xing Fu” (employing moral teaching as the primary means, punishment as the supplement) had been an accumulation of the experience of feudal rulers and a fundamental national policy, from the application of Confucian classics in law annotation in Han Dynasty to “Lv Xue” (the study of statutory laws) in later Qing Dynasty, “Li” (rites) had always been respected and any annotation that had violated “Li” (rites) were invalid. In addition, the relationship between “Lv Xue” (the study of statutory laws) and the rule of “Li” (rites) was as intimate as that between “Lv Xue” (the study of statutory laws) and the rule of law. The guiding philosophy of “Lv Xue” (the study of statutory laws) was “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues). Thus, the theoretical basis of “Lv Xue” (the study of statutory laws) was the Confucian doctrines, which had fostered “Lv Xue” (the study of statutory laws) to pursue the ideal kingdom of Confucianism in which “Li” (rites) was respected and no lawsuits were filed. As a result, in the traditional “Lv Xue” (the study of statutory laws), not only laws were annotated, but also “Li” (rites) was honored; not only legal spirit was interpreted, but also moral principles were advocated. In this way, the law annotators not only had safeguarded the dominant position of Confucianism in Chinese culture, but also maintained the legal authority of the autocratic state.
5. Its direction of development was subject to the macro-control of the state. As an ideology, it was inevitable for “Lv Xue” (the study of statutory laws) to attract the attention of autocratic states. With the intensification of autocracy, the interference and control over “Lv Xue” (the study of statutory laws) by the state became daily reinforced in order to ensure that its direction of development was in agreement with the national interest. Consequently, from Han to Tang Dynasty, “Lv Xue” (the study of statutory laws) had always been an official conduct, which meant that the basic annotation was all made by the feudal officials. When it came to Ming and Qing dynasties, it became more urgent for the law to be enforced by the state, so more was expected from “Lv Xue”, in the end, private law annotation was encouraged for the supplement the official ones. Actually, the private annotators at that time were the personages who were with official or half-official backgrounds and who had made the annotations of legal provisions either being ordered by the imperial court, or being employed by their superiors. During this process, they had not only summarized the experience from their work as criminal advisers, but also expressed their understanding of “Lv Xue” (the study of statutory laws). Although it was free in name, they must neither go beyond the macro-control of the state, nor violate the traditional legal consciousness and the basic norms of “Li” (rites), nor establish the other so-called heresies. What they were allowed to do was to annotate the implications of legal provisions, to clarify the essence of law and the original intents of legislation,

to make distinctions between the correlative charges and between the provisions, and to conduct other activities within the framework set by the rulers. The purpose was to make the national laws more applicable so that they could be applied uniformly. If the law annotators had stepped beyond this scope, not only might their annotations be considered invalid, they would also be punished. Therefore, in this sense, the freedom enjoyed by the private law annotation was actually limited to some extent.

6. It was noted for the feature of empiricism and the lack of the connotation of abstract analysis. “Lv Xue” (the study of statutory laws) was developed in order to adapt to the need of judicial practices, meanwhile, it was also the accumulation and summarization of law annotators’ experience in their work as criminal advisers. In all the books about “Lv Xue” (the study of statutory laws), there was not a single question that did not come from experience, moreover, the knowledge for annotation was also based on experience. The greatest achievement in “Lv Xue” (the study of statutory laws) was the integration of the new experience and the legal culture and the inclusion of the new contents into the revised national laws. Therefore, the applicative value of “Lv Xue” (the study of statutory laws) was much greater than its academic one. In Qing Dynasty, the development of “Lv Xue” (the study of statutory laws) mainly resulted from the increase of the members of jurists who had rich practical experience, and those who had conducted “Lv Xue” (the study of statutory laws) in Qing Dynasty included not only those incumbent and retired officials of “Xing Bu” (Board of Punishment) and some local senior officials, but also the criminal advisers in offices at all levels from “Xian” (county), “Fu” (prefecture), “Sheng” (provinces) to other departments, who had formed a great army of law annotators coordinating with the official ones. They not only knew well about the laws and regulations, but also were experienced in judicial practices, and their actual advantage was fully displayed by the achievement of “Lv Xue” (the study of statutory laws) in Qing Dynasty.

Nevertheless, in most cases, “Lv Xue” (the study of statutory laws) had not managed to break through the scope of experiential accumulation and the level of intuitive inspiration. Therefore, it was devoid of abstract speculation and theoretical sublimation, it was natural that the jurists had failed to establish a certain kind of logical theoretical system in “Lv Xue” (the study of statutory laws). As a result, the traditional Chinese “Lv Xue” (the study of statutory laws) was merely a “technique” which was used to guide legal practices but not a science which had really probed into legal theories.

7. It had taken pragmatism as its value orientation. In traditional “Lv Xue” (the study of statutory laws), the idea of “putting what has been learned into the practical application” was maintained, so pragmatism was taken as its value orientation. On the one hand, the principle which stressed practical application was expressed by the theory that legal application should be both the starting point and the ultimate goal, on the other hand, it was also reflected by the fact that the abstract and speculative philosophy of law which had no direct relationship with the legal applications in reality were seldom involved in “Lv Xue” (the study of statutory laws).

Such law annotation, which had laid much stress on the practical use, had exerted great constructive influences on the legislative activities of the feudal state. Not only had they expanded the horizon of the legislators and enriched their legal consciousness, more importantly, they were also either transformed into legal provisions or granted with legal validity by the legislators, thus, had become part of the legislation of the state. Since Qin Dynasty, it had been the most straightforward way in which the development of legal system was greatly influenced by “Lv Xue” (the study of statutory laws), which in turn had also become the main expression of the value of “Lv Xue” (the study of statutory laws) in ancient China. Such typical works included *Fa Lv Da Wen* (*Legal Questions and Answers*) in Qin Dynasty, *Lv Biao* (*Standards of Law*), *Lv Jie* (*Annotations of Laws*) by Zhang Fei and Du Yu in Jin Dynasty, and *Tang Lv Shu Yi* (*The Comments on Tang Code*). In Ming and Qing dynasties, even the private works on “Lv Xue” (the study of statutory laws) were also usually included into legal codes in the form of “law annotations”. During the time of Kangxi (1661–1722), *Da Qing Lv Ji Zhu* (*Collected Commentaries on Great Qing Code*) written by the famous jurist Shen Zhiqi had enjoyed such great esteem in the imperial court that it was honored as “the imperial system”, with many of its opinions absorbed into legal interpretations or established as the specified references for legal interpretations.

The pragmatism of “Lv Xue” (the study of statutory laws) was embodied not only in legislative activities, but also in judicial practices. Many of the jurists in Qing Dynasty were judicial officials or advisers who had engaged in long-term judicial practices and possessed abundant experience. Their starting point in the law annotation was mostly to solve the various conflicts and problems which had emerged in judicial practices. For this reason, the excellent works on “Lv Xue” (the study of statutory laws) were both highly authoritative in the judicial circle and frequently regarded as working handbooks by the local judicial offices and even by “Xing Bu” (Board of Punishment) itself, or applied in reciprocal reference with laws and regulations, or extracted with some viewpoints to interpret legal spirits, clarify legal intents and resolve confusing problems. For instance, in the 22nd year of Jiaqing (1817), while retrying the case of “Fu De and Gong Yunzhan holding a grudge and making false accusations”, the commentary on this provision which had ruled that “if anyone, by means of giving advice, has taken advantage of government officials’ weakness, stained their integrity by exposing their dubious, corrupt behaviors, and taken revenge for a personal grudge...” in Shen Zhiqi’s *Da Qing Lv Ji Zhu* (*Collected Commentaries on Great Qing Code*) was referred to by “Xing Bu” (Board of Punishment), consequently, the original judgment was amended.²¹ What’s more, whenever there

²¹“Yue Su” (Appealing by Bypassing the Immediate Leadership) in *Xing An Hui Lan* (*Collections of Criminal Cases*), Vol.45; or in “Shuo Tie” (The Note of Interpretation) in the 22nd year of Jiaqing.

were no explicit provisions in law or regulation, the principles of “Lv Xue” (the study of statutory laws) would be directly applied as the basis for judicial judgments. For example, in the seventh year of Jiaqing (1802), while retrying the Liu Zeng case, Wan Weihuan’s *Da Qing Lv Li Ji Zhu* (*The Collected Commentaries on the Laws and Precedents of Great Qing*) and Shen Zhiqi’s *Da Qing Lv Ji Zhu* (*Collected Commentaries on Great Qing Code*) were referred to by the Department for “Hu Guang” (Hunan, Hubei, Guangdong and Guangxi) in “Xing Bu” (Board of Punishment) as the basis for judicial judgment.²² It had been proved by practice that to quite a large extent, the traditional “Lv Xue” (the study of statutory laws) had not only improved the case-solving ability of the judicial officials, but also guaranteed the accuracy of the application of laws and coordinated the operation of state machines by clarifying the legal spirit and interpreting the legal provisions.

8. It had broken away from the influence of religious mysticism and neo-Confucian doctrines. “Lv Xue” (the study of statutory laws) had been changed along with the transformation of social living standards, the social relationships and the social existence. Moreover, it had evolved along a spiraling path based on the cultural and ideological materials left to later generations by the forerunners. In Ming and Qing dynasties, the development of science and technology and the introduction of western astronomy, mathematics and geography also had helped the jurists to break away from the influence of the religious mysticism and the neo-Confucian doctrines which were considered as “nonsense with no reference to books” and to observe the legal phenomena of the state with a more practical attitude and a more comparatively scientific method so as to conduct the complicated work of law annotation. In the long process of the development of “Lv Xue”, various methods which were meticulous to the utmost were formed in order to engage in law annotation. For example, the methods employed in interpreting the legal terms included the standardized interpretation, the cross-check interpretation, the restrictive interpretation, the expansionary interpretation, the analogic interpretation, the interpretation by Confucian classics, the interpretation by precedents, and so on. “Lv Xue” (the study of statutory laws) in ancient China was equal to the Roman jurisprudence, and in every stage of its development many extremely influential representative works had been left behind, which had served not only as teaching materials for the learners of laws, but also as models for the officials who had read and studied laws and regulations and references in judicial trials for the officials who had read merely books but no laws. Moreover, they had not only provided the materials for the publicity of legal systems and institutions, but also symbolized the overall height reached by the ancient Chinese jurisprudence.

²²“Xi Sha Wu Sha Guo Shi Sha Shang Ren” (Killing or Injuring People by Joking, Manslaughtering, and Negligent Homicide) *Xing An Hui Lan* (*Collections of Criminal Cases*), Vol. 32; or in “Shuo Tie” (The Note of Interpretation) in the 22nd year of Jiaqing.

10.4 The Comparison of Chinese and Western Legal Cultures

On the premise of basically recognizing the reasonableness of the laws in force, “Lv Xue” (the study of statutory laws) in ancient China had focused on the research on how to define the legal terms and how to understand and apply the legal provisions so as to provide a direct and effective guidance for the law enforcers, who thus could avoid the situation of not knowing what to do due to obscure legal languages and indistinct words. Besides, it had also involved the relationship between “Lv” (criminal law) and “Li” (precedent), the inner connection between provisions and legal spirit, as well as many other aspects such as the legislation and the application of laws, the conviction and the measurement of penalties, the justice and society, the law and morality, the annotation of law and the respect for Confucian classics, the law enforcement and the regulations of officials, and the legal sources and evolvement, etc. So, in terms of its meticulousness, extensiveness and practicability, it was more advanced than any other contemporary “Lv Xue” (the study of statutory laws) in the world at that time.

However, because traditional “Lv Xue” (the study of statutory laws) was created in ancient China which was secluded, it had merely strived for the development and inheritance along the historical level and completely rejected the influence of the foreign legal cultures. So such a narrow and limited legal culture had obstructed people’s views and restricted their wisdom. By the comparison of “Lv Xue” (the study of statutory laws) in Qing Dynasty with the western jurisprudence, great disparities between Chinese and western legal cultures could be discovered:

1. The ancient China was noted for its culture of family-oriented public law, while the western countries for their culture of individual-oriented private law

As an early-maturing form of eastern civilization, China had been family-oriented from the moment it entered class society. So, the family was connected to the state in such a way that the family was the fundamental element of the state, while the state was the expansion and extension of the family. After the family-orientation had become integrated with the autocratic politics, the emperors started to take advantage of the patriarchal power to strengthen their political rule. Thus, politics was turned ethicized, and law was changed into an appendage to this combination.

In order to prevent the interests of the state and family from being infringed, the criminal law, with its purpose to punish the wickedness, was particularly emphasized. For this reason, the crime and punishment had become the core of ancient Chinese law, and the other basic legal systems were generally all included in the criminal law. On the contrary, the civil law was in a state of fragmentation due to the lack of individual equality in the law and the numerous restrictions on the transferring of properties. As a result, no system of private law had ever been formed in ancient China.

As individuals were affiliated to families, what was required of them by law was due obligations to the state and families rather than enjoying more rights. The value of individuals was determined by their social estates in feudal order and their positions in government institutions, so such identities and ethical relationships had not only been reflected in law, but also maintained to show the importance of “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues). For this reason, the ancient Chinese society which had lasted for thousands of years had been operated precisely in conformity to such rules, and there was neither any development of wider contractual relationships, nor any movement initiated for freer identities.

The western politics and laws also started from family-orientations, however, as ancient Rome developed into a commercial and military empire in the world, equal rights of individuals were urgently required for the convenience of the transferring of properties. Gradually, the individuals had broken away from identity restrictions from families and acquired more rights of independence and freedom. This was how the transition from family-orientation to individual-orientation had begun. By the time of Renaissance, the legal principles of individual-orientation in the Roman law had been greatly promoted, which had emphasized that the individuals were the subjects of rights and laws and that the freedom of individuals in their development of personality, spirit, morality and other such aspects should be guaranteed by law. To some extent, this theory of individual-orientation had set a cornerstone for the modern bourgeois human right theories. In western legal systems, the private laws which were used to adjust the relationships of rights and obligations between equal subjects had in fact represented the main legal trends. Therefore, from a general perspective, the western countries were dominated by the culture of individual-oriented private laws.

2. The legal system in ancient China was closed, while the legal system in western countries was open

As an inland country, the self-sufficient natural economy had provided China with the material basis for its independent development, which was further strengthened by the long-term policy of secluding the country from the outside world pursued by the autocratic governments. Moreover, the continuity of blood lineage and the maintenance of geographical relations had provided social support for the seclusion and conservatism of the independent development. The political system which was established in such a country was the dictatorial system which had remained unchanged for over 2,000 years, and the Chinese legal system which had been inherited and continued by following a set routine had become its main legal system. Therefore, there was only output but no input in Chinese legal culture, besides, there were no bidirectional exchanges.

As far as the criminal system was concerned, the criminal law was the best representative, which had included the various kinds of laws such as administrative law, civil law, economic law and procedural law, and formed the traditional style of “the integration of various laws with no distinction between civil and criminal laws”. The guiding ideology of stressing the criminal law while neglecting the civil law was embodied not only in the uneven proportions of the legislation, but also in

the conflict of settling civil and economic disputes by the application of criminal punishments. Therefore, the nature of legal norms was basically restrictive and punitive in essence, and the independent value and dignity of certain legal subjects were openly negated, which had shown the prerogative and hierarchical feature of the ancient Chinese law.

Under the condition that the unitary statute laws were practiced and the official education of laws was advocated by the state, the legal theories were also relatively unitary, which could only be used to argue in favor of the unified national legislation and to promote the ethicization of laws under the guidance of Confucianism. Correspondingly, the role which the jurists could only play was to pursue the uniform application of laws rather than conduct innovative researches in the sense of “Lv Xue” (the study of statutory laws) or construct a new legal system.

However, the ancient Greek and Roman laws, which were the legal sources of western laws, were in a state of open and wide exchange in culture due to the fact that their carriers were oceanic countries, for which the oversea trade was the economic lifeblood to their survival. After absorbing the minor Asian cultures, the legal systems and theories which were wide in scope, colorful and diversified in content were formed in the ancient Greek law. As for ancient Roman law, its legal conceptions and principles had derived from ancient Greek culture. By the medieval times, those which had coexisted with the Roman law and canon law in Western Europe included the German law, the local law, the city law, the commercial law and the edicts of kings which had not only assimilated each other, but also coexisted with each other. The inter-assimilation and extensive exchange of western laws had fostered the trend of diversification of legal systems. So, the colorful legal systems were made up of the public law and the private law, the basic law and the common law, the constitution and the departmental law, and the substantive and the procedural law. This phenomenon of the existence of many schools with distinctive characteristics was also expressed in legal theories with not only theoretical but also historical and departmental jurisprudence. It was thus proved by the practical experience that only an open environment could make legal studies vigorous and that only mutual debate, criticism and assimilation could enable them to acquire perceptive sublimation.

3. The research on legal culture was restrictive in ancient China but liberal in western countries

Although the legal culture of China could be traced back to extremely early times, its development was rather slow, its primary cause was the autocratic political system which was manifested in the restriction of free development of learning and thinking in the cultural field, and it was even worse in jurisprudence. As the ancient laws were formulated officially as statute laws, they were beside reproach of anyone, and the jurists could only annotate the current laws, understand the intents of the legislators, and study the application of laws, but no free comment was allowed, let alone criticism.

The policy of showing sole respect to Confucianism in Western Han Dynasty was an embodiment of the cultural restriction at a deeper level, as it had strangled

the academic atmosphere which had lasted from the Warring States Period featured by “Bai Jia Zheng Ming” (the contention of a hundred schools of thought). Under such a policy, only “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) centering on the imperial power could be pursued, and only the integration of “Li” (rites) and law within an established scope could be studied in “Lv Xue” (the study of statutory laws) with Confucianism as its guiding ideology. Besides, all academic achievements should be accorded with the requirement of the unified country and the concept of the supremacy of sovereigns; otherwise, they would be considered as heterodoxy.

Starting from Song Dynasty, absolutism was more and more intensified. The freedom of academic research was so suppressed that the researchers were frequently investigated for criminal responsibilities by the government. The political oppression on academic studies was fully demonstrated in “Wen Zi Yu” (literary inquisition) in Ming and Qing dynasties, by which the scholars were threatened and their independence, scientific attitudes, individuality and dignity in the process of research were deprived. Nonetheless, it would be impossible to produce any rational achievements in the academic researches without political freedom. For a long time, the areas touched upon by the ancient Chinese jurists were no more than legislative techniques, arrangement of chapters within legal codes, standardization of legal terms and forensic examinations. In spite of the extremely high level reached in some aspects after the integration of the age-old experience, the ancient Chinese jurists had never devoted themselves to the study of jurisprudence, which had made them giants only in the practical application of law, but dwarfs in theoretical studies.

In western countries, free academic studies were provided with favorable conditions thanks to the comparatively democratic and open political environment as well as the development of commodity economy. For example, the Roman jurists had taken strict critical attitudes to the legal systems in operation and the achievements of legal studies so that in people’s ideology, a legal system could never be perfect, a theory never be enriched without being criticized, and only those legal works full of critical spirit could be publicly acknowledged as authoritative ones. This concept had profound influences on the development of modern western jurisprudence.

4. In ancient China, the scholars of law were just law annotators with subordinate status, while in western countries, they were professional jurists with independent status

The flourishing of “Lv Xue” (the study of statutory laws) was inseparable from the scholarly attainments, the personal characters and the social or political status of the subjects. The ancient Chinese jurists were either bureaucratic jurists, or jurists of Confucian classics, or the “senior private advisers”. Responsible only for the emperors, they believed that the national interest and the rights of sovereigns came above everything else; therefore, they treated social equality, justice and personal interests with indifference. Consequently, it was the emperors’ acknowledgement that had determined the value of their academic achievements. In this case, the function of law became unitary, concerning no more than prohibiting violence and punishing wickedness, at the same time, “Lv Xue” (the study of statutory laws)

also became unitary, concerning no more than the applications of laws. As for the ancient law practitioners, who were similar to modern lawyers in nature, they were not only disdained by society, but also banned by government with explicit orders.

In the western countries, however, the jurists had enjoyed high social status and were duly respected because of their connection to law which was of limitless authority. They were professional jurists with independent status full of academic independence and free spirit. Their individualities in academic studies were of great importance to the formation of the really independent science of law. For instance, by studying Roman law, the Roman jurists had promoted the development of the theories of private law, and Cicero had provided the theoretical foundation for Roman laws by systematically putting forward his theories of natural law.

The approximate comparison above between “Lv Xue” (the study of statutory laws) in Qing Dynasty and the western jurisprudence had demonstrated the different roads of their development and their respective regularities. Anything that existed must have had its reason and rationality, therefore, it would all be one-sided either to follow the modern studies but deny the ancient ones, or to follow the foreign studies but deny the Chinese ones. The horizontal comparison between China and western countries was both conducive to summarizing the past and creating the future and to overcoming the shortcomings of Chinese “Lv Xue” (the study of statutory laws) by learning from the strong points of western countries. So, the Chinese history had become a mirror for today’s development, and the foreign history was also enlightening to people’s thoughts. The successful experience of the western jurisprudence should be employed in the Chinese “Lv Xue” (the study of statutory laws) so that China could always stand proudly in the family of nations. While it was true that the strong points of western jurisprudence were the abstraction and generalization in theoretical jurisprudence, it was also true that “Lv Xue” (the study of statutory laws) in ancient China had gained remarkable achievements in the applied jurisprudence. Such achievement was not merely a miracle of Chinese legal culture, but also an incredible contribution to the human treasury of legal culture.

Chapter 11

“Zhu Fa Bing Cun” (The Coexistence of Various Laws) and “Min Xing You Fen” (The Differentiation Between Civil and Criminal Laws)

11.1 The Inheritance and Conservativeness of Legal Codes in Styles

From the time China entered the class society and began the legal civilization, criminal law had always been the basic form of the expression of law. It was stated in “Shi Gu” (explaining the different meaning and usages of words in ancient times) of *Er Ya (Using Graceful and Elegant Languages: an ancient book containing commentaries on classics, names, etc.)* that “‘Xing’ (punishment) is both the constant and the law”, and it was also mentioned in *Yi Jing (The Book of Change)* that “‘Jing’ (punishment) is the law.” During the period of the three ancient dynasties, namely, Xia Dynasty (2033–1562 B.C.), Shang Dynasty (1600–1046 B.C.) and Zhou Dynasty (1046–256 B.C.), the legal codes were mainly criminal laws, such as *Yu Xing (The Penal Code of Yu)*, *Tang Xing (The Penal Code of Tang)*, *Jiu Xing (The Code Nine Penalties)*, *Lv Xing (The Penal Code of Lv)*, *Xing Shu (The Penal Code)* and *Xing Ding (Sacred Container Inscribed with Penalties)*. To the Period of Warring States, to adapt to the epochal need of reform and the trend of standardization and codification of laws, Li Kui, “Si Kou” (the minister of justice) of Wei had gathered the criminal laws of every state and made the six-chapter *Fa Jing (Canon of Laws)*. *Fa Jing (Canon of Laws)*, which was known as the first codified feudal law with comparatively systemized structure, had expressed the legalists’ proposals that “there should be no discriminations between the intimate and the distant or between the noble and the humble” and “severe penalties be executed for minor misdemeanors” for the purpose of upholding the authority of the centralized feudal despotism. As for its structure of compilation, *Fa Jing (Canon of Laws)* was centered on the criminal law, but it also had incorporated the procedural law and the administrative law, therefore, it had inaugurated the legal tradition of compiling a codified law with “Zhu Fa He Ti” (the integration of various laws) and “Min Xing Bu Fen” (with no differentiation between civil and criminal laws).

Till Shang Yang Reform in the State of Qin, “Fa” (law) was transformed into “Lv” (criminal law). Thus, the importance of adopting a uniform application of law

was stressed by making “Lv” (criminal law) the main form of law, however, the structure of “Zhu Fa He Ti” (the integration of various laws) and “Min Xing Bu Fen” (with no differentiation between civil and criminal laws) in law compilation was retained, as was manifested in *Qin Lv* (*Qin Code*) which was excavated today.

Through a series of legal activities carried out in the periods including Qin, Han, Wei and Jin dynasties, such a structure of compilation was finalized and substantialized with the promulgation of *Yong Hui Lv* (*Yong Hui Code*) in Tang Dynasty. In addition to applying the criminal law as the main part, other departmental laws such as the procedural law, the administrative law, the civil law, the economic law, the military law and the prison law were also integrated, so, *Yong Hui Lv* (*Yong Hui Code*) had become a comprehensive code which had assembled the laws in nearly all areas. In general, all illegal conducts would get punished by the criminal penalties except for a small number of violations which would be only settled by the administrative or civil measures.

After Tang Dynasty, whether in *Song Xing Tong* (*The Penal Code of Song Dynasty*) or in *Da Ming Lv* (*The Great Ming Code*) or *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), the structure of the law compilation which had included various departmental laws into one code was passed down from one dynasty to another and it had remained unchanged throughout the history for over 1,200 years. Obviously, the understanding and ideology of the Chinese jurists had never undergone any fundamental changes until the second half of the nineteenth century when the legal culture of the capitalist countries was introduced into China. Influenced by western legal theories, some open-minded thinkers began to put forward proposals to the court of Qing Dynasty that specialized commercial laws and civil laws should be enacted. Most prominently, in the early twentieth century, Shen Jiaben was appointed to be in charge of the reform and revision of the law. Consequently, in accordance with the continental legal system, the criminal law, the civil law, the commercial law, the civil procedural law, the criminal procedural law and the law on the organization of courts were made respectively, by which the yoke of the traditional structure of the law compilation to systemize various departmental laws into one code had been finally overthrown, to a certain extent, the Chinese legal system was brought in line with the advanced ones of the world.

Throughout the legal history in the world, the legal codes in the early phases of the legal civilization were mostly an integration of various departmental laws. For instance, the renowned *Shi Er Tong Biao Fa* (*The Law of the Twelve Tables*) of Rome was a code which had incorporated the criminal law, the civil law, the civil procedural law and several of the administrative regulations. Even the Germanic tribal code was a mixture of criminal and civil laws. In the ancient eastern kingdom of Babylon, *The Code of Hammourabi*, the most prominent representative of its legal achievements, had included not only the stipulations about crime and justice, but also the regulations about the exchanges of goods and the protection of the ownerships of moveable properties. As for *mānava dharma sāstra* (*The Institutes of Manu*) of ancient India, although it was comprised of many non-legal rules, such as the religious disciplines, moral maxims and general customs, it had also served as a legal document since it had included the administrative provisions to uphold the

hereditary caste, the civil provisions to clarify ownerships, the creditors' rights and the rights and obligations in the aspects of marriages and family life, as well as some detailed criminal and procedural stipulations. In summary, it could be seen that "the integration of various laws with no differentiation of civil and criminal laws" was a common feature in the early phase of the legal history, and what was different was the proportion of the civil and criminal laws and the difference in the time when different departmental laws started to diverge and become independent. For example, the civil law took up a predominant position in *Shi Er Tong Biao Fa* (*The Law of the Twelve Tables*) of Rome and, furthermore, it broke away from the legal relations in which criminal measures were used to adjust civil affairs. In the eleventh century, when trade on the western Mediterranean Sea rejuvenated, many autonomic cities appeared, meanwhile, the commercial laws were made and grew into maturity in the Western Europe. By the thirteenth century, a large number of trade laws, navigation regulations and maritime codes had already been issued by the countries in Western Europe, such as *Amalfi Tables* (*Tavole Amalfitane*), *Admiralty Law Compilation*, *Laws of Oléron*, *Laws of Visby* and etc., which had indicated that the codified style of the integration of various laws in one single code started to be disintegrated in the medieval west. When it came to 1532 A.D., *Constitutio Criminalis Carolina*, a feudal code of criminal and procedural law was enacted by Charles V, Emperor of the Holy Roman Empire.

In China, however, all the way from the fifth century B.C. to the early twentieth century, such a tradition of "the integration of various laws with no differentiation of civil and criminal laws" was followed by generations and remained basically unchanged for over 2,500 years, the conservativeness of which was a rare in the world. Undeniably, in such a long history, the formulation of *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*), the emergence of "Ling" (order or ordinance), "Ge" (injunction) and "Shi" (standard), the compilation of "Hui Dian" (*Collected Statutes*) of Ming and Qing dynasties and the departmental rules and regulations of Qing Dynasty had all reflected the tendency of codification of the feudal administrative laws which had developed independent of the criminal laws. Nonetheless, some important rules and regulations about the administrative management, the responsibilities of officials, the selection and promotion of officials, the institution of paperwork and the administrative offences were still included either in *Tang Lv* (*Tang Code*) or *Da Ming Lv* (*The Great Ming Code*) or *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*). Meanwhile, the laws on the management of the officials were ranked first in "Liu Lv" (the six laws) in both Ming and Qing dynasties, which had indicated a continuous existence of the stylistic rules and layout in which the various laws were included in criminal codes.

In Song Dynasty, the development of market economy, the free circulation of land and the emergence of overseas trade had led to the increase of decrees and imperial edicts in order to adjust the related civil relations, so the civil law gradually took up a relatively large proportion in the whole legal system. For example, in Qing Dynasty, some regulations in *Hu Bu Ze Li* (*Regulations for the Board of Revenues*) had already the nature of civil law. Moreover, some civil provisions were also included in *Sheng Li* (*Regulations at the Provincial Level*) and *Zhang Cheng* (*Local*

Regulations) in Qing Dynasty, which were unprecedented in the previous dynasties. However, no independent civil codes had been formulated until the legal revision in late Qing Dynasty in the early twentieth century, and the rigid structure of law compilation with no differentiation between civil and criminal laws was maintained in China till that time.

Why was such a structure of “Zhu Fa He Ti” (the integration of various laws) and “Min Xing Bu Fen” (with no differentiation between civil and criminal laws) in law compilation adhered in ancient China for such a long time? This was by no means accidental, but was inseparable from the national conditions in ancient China.

First, although commodity economy—still weak on the whole—began to appear and had made certain progress in some period such as Song Dynasty, the ancient natural economy remained in the dominant position until the nineteenth century when “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) was abolished for the first time. As the basic units of production, the patriarchal families were isolated from each other, thus only simple reproduction was undertaken and the capability to proceed with more extensive reproduction was lacked. The common people were basically self-sufficient in everyday necessities by means of the pattern of feudal farm work by men tilling the farmland and women weaving. Therefore, they were independent of the market, and there was not the driving force for the commodity economy, which had further impeded the development of civil law. If the ancient Roman law could be said to have represented an advanced form of private law which had “clarified all of the essential legal relationships concerning simple commodities (such as those between sellers and buyers, the debtors and creditors, the contractors, and the debtors, etc.)” by extremely explicit stipulations,¹ then in China, there had lacked the social and material bases to breed the private laws like those in ancient Rome.

Second, the policy of “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce), together with the policy of “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) in feudal China had restricted the development of commodity economy. What the feudal autocratic system which had lasted for over 2,000 years required was a closed economic pattern, so it had had an inherent affinity to natural economy, but had opposed and shown great disgust towards the commercial exchanges and the opening-up to the outside world. Starting from Shang Yang Reform in Qin dynasty, the agriculture-oriented policy of encouraging agriculture rather than all other economic activities was established and a variety of restrictions on the activities of merchants were enforced, so the merchants were deprived of the equal legal rights for a long time even after Qin Dynasty. The policy of “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce) was followed as an established national policy in feudal China, so that even though for a time in late Ming and early Qing Dynasty, Huang Zongxi, Tang Zhen and a few other scholars had proposed that “both industries and commerce should be regarded as the essence of economy” and both “agriculture and commerce should equally be regarded as the essence of economy”, such proposals

¹ *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 4, People’s Publishing House, 1972, p. 206.

were considered as ideological reflux and disappeared under the upcoming intense political and cultural pressure in the late Qing dynasty.

Foreign trade, which was closely related with the policy of “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce), was not fully developed because it was prohibited and encouraged alternatively under the rigid control of the feudal government. Especially, “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) in Ming and Qing dynasties had blocked the market channels for commodity exchanges between China and foreign countries, which had done great harm to the development of commodity economy. Moreover, the official business, the official handcraft industry and the officially monopolized industry had posed greater threat to the civil commodity economy. Under such harsh circumstances, the merchants had turned to land business and made rent a much more reliable source of income, and in this way, they had managed to attain the social identity as both merchant and landlord. However, with the profits from commercial capital being transformed into rent rather than being invested in reproduction, the development of commodity economy was again restricted, for this reason, it had become one of the most fundamental causes of the underdevelopment of Chinese feudal civil legal relationships.

Third, because of the permanent existence of the supra-economic personal attachment, no “individual equality” concerning rights and obligations in law could be widely provided. In the strictly stratified society of ancient China, the members from different classes had their respective legal rights and obligations parallel to their social status, and none of them could cross the line without being given severe punishments afterwards. While people of the general working class were the major social subjects, they had no choice but attach themselves to landlords, aristocrats and officials in one way or that, consequently they had become subjected themselves to the ruthless economic and supra-economic exploitations. Correspondingly, those various forms of personal attachment were maintained forcibly by the law. For instance, before Southern Song Dynasty, if a landlord had transferred his land, his tenant peasants had also to be transferred with the land, furthermore, even the rights of marriage and remarriage of those tenant peasants’ wives and daughters were controlled by the landlord. Before Ming and Qing dynasties, when a debtor was unable to pay off his debt, his creditor could force him as well as his wife and daughters to “be enslaved to pay off the debt”.

Since Tang Dynasty, the vast majority of people categorized as “Jian Ji” (the people of inferior household registration) had enjoyed only limited civil rights. For example, they were deprived of the rights to attend the imperial examinations by which they could get official posts. Moreover, the legal status of “Nu Bi” (the slave girls and maidservants), who was at the bottom of society, was “no better than that of domestic animals”. They were regarded as the objects in civil legal relationships, and might be transferred or sold to others by their masters, moreover, even their rights to live was in constant danger. Therefore, in ancient China, only the minority of aristocrats, officials, landlords and merchants had the equal rights to participate in civil legal activities. In the society as a whole, however, a wide-spread “individual equality” in the legal sense was lacked, which was not only disadvantageous to the

development of civil legal relationship, but also was obstructive to the codification of a single and centralized civil law. From the perspective of the western legal history, the precondition of civil law in Rome was exactly the widely-recognized “individual equality”.

Fourth, the emphasis of public rights and neglect of private rights had led to the lack of the concept of adequate protection and adjustments of the private interests of the common people according to the law. In feudal autocratic China, as an intensive embodiment of the interests of the landlords, officials and aristocrats, the national interests were put in a supreme position. Besides, since “‘Zheng’ (the appellation used by an emperor to refer to himself) is the state”, which meant that the emperor was the sole representative and incarnation of a state, an offence against the emperor was identical to one against the state, which was an unforgiveable felony as well. Therefore, it was decided by the nature of the autocracy to overstress the public rights and interests. Since the entry into civilized society, China had been swept by the hideous flood of autocracy and had never experienced any forms of democracy like those in Greece or Rome, therefore, it was perfectly justified to attach great importance to the public rights and interests, namely, the national interests, and to neglect the individual interests, namely, the individual interests of the common people. For example, when a property dispute took place among the common people, it would be presumed as a “minor matter” or “trivial cause” and would be settled by mediation with no litigation in the court; even if it was brought to a court, it would be hastily tried by merely invoking customary traditions or rituals. Furthermore, the judgments made by the judicial officials at the level of “Zhou” (subprefecture) and “Xian” (county) would be the final ones, so anyone who still insisted on appealing to courts at a higher level under such circumstances would be punished for disturbing the judicial order by the punishment of “Zhang” (flogging with heavy sticks) before his case was heard again.

The emphasis on the public rights and neglect of private rights in the autocratic system had inevitably led to the trend of “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law). Making a general view of the legislations in successive dynasties, the criminal law had accounted for the most part. Although the source of civil law was mainly codified laws, other sources such as the customary law, the rules of town and villages and the Confucian rites and ethics were coequally applicable, which was the very evidence of the weakness of civil legislation and the government’s indifference to the private interests.

Fifth, the family precepts and clan disciplines functioned as a practical tool to regulate the civil legal relationships within the clan. As China had entered civilization along the path from family to state, so the family and state were closely interrelated and the intimate and the noble were integrated. Thus, the patriarchal system was not only a dominant system succeeded within clans, but also a state organizational principle incorporated into the political hierarchical structure. Although the development of society had lessened the political color of the patriarchal system, the patriarchal spirit always had an unfathomably profound influence on the state, the society and the families, so that the clan power which had a ruling of all of the clan members, and the family precepts and clan disciplines which had been used to

adjust the relationships of the rights and obligations within the clan were all recognized and guaranteed by the state.

In the patriarchal system, “Qin Qin” (showing respect to relatives represented by parents), “Zun Zun” (showing respect to nobility represented by the emperor), “Zhang Zhang” (showing respect to the seniors) and “Nan Nv You Bie” (giving different treatments to males and females) had been regarded as its instructive principles and theoretical basis, which were also the yardstick for formulating family precepts and clan disciplines. The family precepts and clan disciplines were all written customary laws applied within the clan and had practical functions in settling disputes over the family pedigrees, family records of register, inheritance, marriages, properties and minor criminal misdemeanors. Passed down from the dynasties of Xia, Shang and Zhou dynasties, its range and extent of influence was connected to the political influences of the patriarchal clans. On the whole, its influence decreased with the decline of “Shi Zu” (the gentry) and the rise of “Shu Zu” (the common people). However, after Song Dynasty, with the growing of “Shu Zu” (the common people), a large number of big families living in clan systems appeared in the Yangtze valley, which had further led to the emergence of family precepts and clan disciplines in large numbers as well. As the validity of family precepts and clan disciplines to control the clan members was acknowledged by the state, anyone who had violated them would face double sanctions from both the clan and state law. In this way, the family precepts and clan disciplines had become important supplements to the statute laws of the state.

It should be noted that the object of adjustment of family precepts and clan disciplines was mainly the trivial matters among the family or clan members, namely, civil legal disputes, but as to the criminal offences which had infringed upon the national interests and brought about damages to social stability, they must be tried by the judicial officials so as to show the superiority of the state to families. In a clan, the patriarch had acted not only as a representative to enforce the state laws and regulations, but also an authoritative mediator to settle civil disputes within the clan. Generally, he would make judgments on the common disputes in person, while in some tricky cases he had to convene a clan meeting to have them settled. Indeed, the family precepts and clan disciplines had complemented the civil legislations of the state, which had shown their survival value, nevertheless, it was just because of this that it had prevented the legislators from reflecting on the civil legislations.

Sixth, there was a lack of comprehensive study of jurisprudence. As in ancient China the criminal law had been taken as a fundamental part of the legal system, the studies on law were mainly in the form of “Lv Xue” (the study of statutory laws).

“Lv Xue” (the study of statutory laws) was a special form of law in a special stage of development of the Chinese legal history, and its subject matter was to explore the sources of criminal provisions, to make necessary annotations on them and to discuss how to apply them in specific cases. In comparison, the pure jurisprudential researches and discussions existed only in “Bai Jia Zheng Ming” (the contention of a hundred schools of thought) in the Spring and Autumn (770–476 B.C.) and Warring States (475–221 B.C.) periods. With the establishment

of the centralized autocratic Qin Dynasty, “Lv Xue” (the study of statutory laws) became the subject of official education of which “the officials should be respected as teachers”. At the time of Western and Eastern Han dynasties (202 B.C.–220 A.D.), although there emerged a trend of private teaching of laws to the assembled students, “Lv Xue” (the study of statutory laws) was no more than making legal analogies, i.e., employing the Confucian classics to interpret laws currently in effect and making annotations only to meet the requirements of the unified autocratic dynasties. Thus, the scholars were restrained in mind, and it was impossible for them to express their ideas freely. The annotations on *Yong Hui Lv* (*Yong Hui Code*) in Tang Dynasty had represented the most prominent achievement of feudal “Lv Xue” (the study of statutory laws), in spite of that, they were still crippled in the field of jurisprudence.

From Song to Qing Dynasty, absolutism became more and more intensified, which had left less and less free space for the development of “Lv Xue” (the study of statutory laws). Taking the annotative “Lv Xue” (the study of statutory laws) in Qing Dynasty as an example, although a number of prestigious annotators with fresh styles of legal annotations had sprang up, they had to conduct their activities of annotations within the framework set and permitted by the government and to be in line with the current laws in force and the traditional Confucianism. Those annotators who were in compliance with the emperor’s intentions would be granted with authority, while those who were not would be dismissed from their posts and even be punished. In terms of the social status of those law annotators, most of them had served as advisors affiliated to local officials except for a few ministers with judicial duties, so they were never able to achieve any prominent authority comparable to that of Roman jurists.

11.2 “Zhu Fa Bing Cun” (The Coexistence of Various Laws) and “Min Xing You Fen” (The Differentiation Between Civil and Criminal Laws) in Legal System

Since the domain of jurisprudence had seldom been touched upon in traditional Chinese “Lv Xue” (the study of statutory laws), the division of various departmental laws was neither summarized theoretically nor defined practically, let alone being specifically studied systematically, which had not only made it possible to have the stylistic layout of the “Zhu Fa He Ti” (the integration of various laws) and “Min Xing Bu Fen” (with no differentiation between civil and criminal laws) in legal system sustained for quite a long time, but also led to a misunderstanding that this was not only the basic feature of Chinese legal system, but also the legal system of ancient Chinese law. Until 1930s and 1940s, this opinion had prevailed among many scholars both at home and abroad. Maine, a distinguished scholar on ancient legal history, had made a rather hasty conclusion that “in ancient China there were only criminal laws, but there were no civil laws at all.”

A legal system referred to an entirety constituted by the various departmental laws of a country, while a departmental law was an aggregation of similar laws and

regulations classified in accordance with the social relationships adjusted by it and certain criteria and principles which it had adhered to. For this reason, the complexity and diversity of social relationships led to the complexity and diversity of the modes of adjustment, which had in turn led to the drafting of a variety of departmental laws applicable to different objects and in the end, they had become the parts relatively independent from one another within a legal system. As a legal system was established according to social relationships, it was the fruit of the objective social development rather than the outcome of the subjective will of anyone. As for the style and structure of the code, nevertheless, it was decided subjectively by legislators, thus, the legislative notions, principles and techniques employed would sufficiently reflect the legislative level at the time. Therefore, the stylistic layout of a code and the legal system were two completely different concepts and they could not and should not be mixed up with each other; otherwise, misunderstandings might occur in the way that one of them would be taken for the other. Consequently, the idea that in ancient China there were only criminal laws but no civil laws from the perspective of the stylistic layout of the legal codes was absolutely wrong, because it had obviously mixed the legal system with the stylistic layout of legal codes. Consequently, it was necessary to point out that the ancient Chinese legal system was composed of various departmental laws including the criminal law, the civil law, the administrative law and the procedural law, and that it was featured by the coexistence of various laws with a clear-cut differentiation between the civil and criminal laws. In terms of the stylistic layout, a code was either compiled with a mixed structure which was featured by the systemization of various departmental laws in a single code without differentiation between the civil and criminal laws, or was compiled independently. It was just a matter of legislative technique and a choice made by legislators at a specific historical stage, which was restrained, of course, by the requirement of legal rectification and the specific historical circumstances.

“Zhu Fa Bing Cun” (the coexistence of various laws) and “Min Xing You Fen” (with differentiation between civil and criminal laws) were stated in terms of the specialty and concreteness of the social relationships adjusted by the law and the legal system formed therefrom. As to whether the various laws could be developed into independent departmental laws, more specific analyses should be carried out. Particularly, the current notion of departmental laws should not be used as a standard to mechanically measure the ancient laws; instead, an appropriate conclusion should be drawn by properly applying the knowledge of modern jurisprudence according to the reality of Chinese legal history. It would be illustrated in the following by taking the administrative and civil laws as examples.

11.2.1 The Development of Ancient Chinese Administrative Law and Its Characteristics

In ancient China, in order to confirm the organization, authorities, responsibilities and management system of the state institutions, to guarantee the smooth operation of the state machine as a whole, and to urge the officials to fulfill their duties in

administering the country and controlling the common people, a large number of administrative regulations and rules were issued which had gradually and automatically developed into a complete system and become an important part of the feudal legal system.

Qin and Han dynasties were the stages at which the foundation of the ancient Chinese administrative law was laid. After a united Qin Dynasty was founded in 221 B.C., the administrative legislation was reinforced with the purpose to establish the autocratic system with centralized power. For example, the imperial system was set up with the establishment of “Jun” (prefecture) and “Xian” (county), the reformation of official institutions, the unification of Chinese characters, measurement and currency, etc. The administrative laws which had taken the form of “Lv” (criminal law) at that time had embodied a distinctive feature of Chinese administrative law at the initial stage. In Han Dynasty, along with the fortification of centralized and autocratic feudal power, the administrative law in the 60-chapter *Han Lv (Han Code)* was more developed compared with that of Qin Dynasty, and *Chao Lv (Statute on the Etiquettes in the Imperial Court)* was a systemized administrative law of that time. Furthermore, to enhance the economic foundation of centralization, Emperor Wu of Han had established a national monopolization of the selling of iron and salt and taken the power of minting coins back to the central government, consequently, the administrative regulations to adjust the financial and economic affairs were further strengthened.

Tang Dynasty was a period of prosperity in feudal China, and its state and legal systems had become mature and finalized. During the reign of Emperor Xuanzong of Tang (712–756), it took 16 years to formulate *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, a compilation of administrative regulations concerning the duties, responsibilities, activities and management system of government institutions and a summary of administrative legislations of previous dynasties. Since then, “Dian” (code) and “Lv” (criminal law) had become separated and the administrative law had become an independent branch of law in the feudal legal system. *Tang Liu Dian (The Six Statutes of Tang Dynasty)* was not only an outstanding achievement of the legislative activities in Tang Dynasty, but also a model of the administrative law which had exerted far-reaching influence on the administrative laws in later dynasties. Apart from *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, in the relevant “Ling” (order or ordinance), “Ge” (injunction) and “Shi” (standard), a number of administrative specifications and other related laws were also regulated, which had marked the great progress made in the feudal administrative law.

In Ming and Qing dynasties, with the further perfection of state administrative management system, the administrative law also reached a very high level. *Hui Dian (Collected Statutes)*, which was promulgated in both dynasties by imitating *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, was much richer in content and more rigorous in structure and could be regarded as a comprehensive encyclopedia of feudal administrative legislations. Emperor Jiajing of Ming stated in the prologue of “the royal institutions” in *Hui Dian (Collected Statutes)* that “as a collection of the administrative regulations of all previous dynasties, it has set up a basic model of statutes for this dynasty; it is so comprehensive and specific that it contains

almost all that should be included.” Because in *Qing Hui Dian* (or *Da Qing Hui Dian: The Collected Statutes of Great Qing*) almost all “important rules about the rites, instrumental institutions, criminal punishments and administration” and all “long-lasting and conventional systems” were included, it was called “the constitution of the Qing empire”. Wei Xiangshu, who was a prestigious official in the court of Emperor Kangxi, wrote in his book *Han Song Tang Ji* (*Anthology Written in Han Song Room*):

‘Hui Dian’ (*Collected Statutes*) is indeed the constitution of the age, and it is an inseparable part of ‘Lv’ (criminal law) and ‘Ling’ (order and ordinance). Besides, it has recorded the administrative rules that should be observed by all officials. In ‘Hui Dian’ (*Collected Statutes*), the functions and duties of all departments, namely, the institution of official posts and rituals, are all stipulated in detail.²

Furthermore, in the reign of Qianlong, *Qianlong Hui Dian* (*Collected Statutes of Qianlong*) was drafted, and in the first provision of “Fan Li” (Guides to the use of the book), it was solemnly declared:

In ‘Hui Dian’ (*Collected Statutes*), the decrees, regulations, and compendium of government and social institutions are included. And those recorded are all the rules and regulations which have been implemented for a long time. Thus, the important state principles and laws recorded should be observed by all departments and obeyed by all officials. At the same time, they shall be the general guidelines for the administrative activities. For this purpose, this code is accomplished.

When *Jiaqing Hui Dian* (*The Collected Statutes of Jiaqing*) was formulated, Emperor Jiaqing emphasized in its prologue that “‘Hui Dian’ (*Collected Statutes*) is not only the guideline for all government offices, but also the instructive book for all officials”, for this reason, “it should be established as a permanent standard which will be observed by descendants without being changed”.³

In addition to “Hui Dian” (*Collected Statutes*), there were other numerous regulations made by the various central organizations of Qing Dynasty to build up their institutional frameworks and to formulate instructions for the administration of internal affairs. “Ze Li” (regulation) made in each department had to go through a series of legal procedures including discussion, motion and final approval, which had also become a very important legislative activity as well as remarkable achievement in terms of the administrative legislation in Qing Dynasty. Therefore, there was the saying that:

Qing Dynasty ruled the country with ‘Li’ (precedent). Every year, the cases which it had solved would be gathered in a collection of regulations in the sequence of four seasons, which would be further edited and adopted as new administrative rules for the various departments. With new rules adopted, the old ones would be abolished, which meant that

² Wei Xiangshu, “Now that the great code of our honorable dynasty has been promulgated, further revisions should be made so that different departments should know their duties and roles accordingly in order to undertake the responsibility of managing the national affairs” in *Han Song Tang Ji* (*Anthology Written in Han Song Room*), Vol. 1.

³ “Xu” (Preface) in *Xu Xiu Jia Qing Hui Dian* (*The Continued Amendments to the Collected Statutes of Jiaqing*).

such administrative rules had to be revised every five years and amended every ten years. Among them, those administrative rules selected and compiled into ‘Hui Dian’ (*Collected Statutes*) were named ‘Hui Dian Ze Li’ or ‘Shi Li’ (collected statutes and regulations).⁴

‘Ze Li’ (regulation) was in nature a type of administrative rules. However, due to the limited legislative techniques, some included the elements from other departmental laws. For example, in *Hu Bu Ze Li* (*Regulations for the Board of Revenue*) there included some provisions concerning the civil and economic affairs.

In summary, the ancient Chinese administrative laws had the following features:

1. Specific and detailed in regulation and independent in system

In the stylistic rules and layout of the compilation of “the integration of various laws with no differentiation between civil and criminal laws”, some administrative regulations were also included in the criminal codes. However, many offprint administrative orders and regulations did exist. The emergence of *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*) had partially broken away from such a system, as was argued by Zhang Binglin in “Jian Lun” (Essential Discussions) in *Han Lv Kao* (A Textual Research of the Law of Han Dynasty):

Despite the great number of books and records at the time of Zhou dynasty, *Liu Dian* (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*) had contained almost all the main ideas and details. Second to that are the book about rituals and the book about punishments, and they are all entitled *Zhou Li* (*The Rites of Zhou Dynasty*), while all of them were compiled into ‘Lv’ (criminal law) in Han Dynasty. In the later dynasties, the book about bureaucratic establishment and etiquettes was again separated from ‘Lv’ (criminal law). As a result, in Jin Dynasty, there were such books as *Xin Ding Yi Zhu Bai Guan Jie Ci* (*Newly-Established Systems for Officials of All Ranks and Descriptions*) which had contained the rituals as well as the procedures in both public and private areas; In Tang Dynasty, *Liu Dian* (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*) and *Kaiyuan Li* (*The Book of Rituals of Kaiyuan*) were issued. Since then, ‘Lv’ (criminal law) had become a style especially used for compiling the criminal laws but no longer for editing any constitutional regulations. But it was different in the very ancient times.

Meanwhile, Yorozu Oda, a Japanese jurist, had also stated in his book *The Administrative Law of Qing Dynasty*:

The legal system of China is associated with its national culture..... As to the origin of its administrative law, it is quite difficult to secure an exact time. But the most remarkable achievement of the administrative legislations was undoubtedly made in Tang Dynasty. As an outstanding model for later dynasties, *Liu Dian* (or *Tang Liu Dian: The Six Statutes of Tang Dynasty*) in Tang Dynasty had recorded the rules and regulations to run a country with the forms of codes. Compared with such laws in the name of ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Ge’ (injunction) and ‘Shi’ (rules for government agencies) since Han dynasty, it is prominently distinctive..... Therefore, two codes have been formed in China since ancient times: the criminal code and the administrative code.

Within the ancient Chinese legal system, the administrative law had not only a long history with distinct courses of change and development, but also its own system which were made up of the administrative laws of the central government, the

⁴Deng Zhicheng, *Zhong Hua Er Qian Nian* (*China with Two Thousand Years of History*), Vol. 5, Zhong Hua Book Company, 1958, p. 531.

local government and the authorities in minority regions. In terms of the content, it was constituted by different sections about officials, revenue, logistics, ritual, education, technology, nationality, religion, judicial procedure, scrutiny activity and military administration. Thus it could be seen that its range was wide, its contents were detailed and its provisions were meticulous.

2. Administrative code compiled with the outline of official ranks

As early as in *Zhou Li* (*The Rites of Zhou Dynasty*), the administrative law was divided into six sections in accordance with the six ranks of officials, which had set an example to appoint officials and clarify their duties by law. Such a style was inherited in *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*) as was described in the sentence: “the six statutes today have followed the administrative system of Zhou Dynasty”. In the outline of “San Shi” (Three Masters: “Tai Shi”, “Tai Fu” and “Tai Bao”, all three are the teachers of the prince), “San Gong” (the Three Councilors: heads of the three important organizations in ancient China: “Tai Wei”: the minister of defense; “Si Tu”: the minister of civil affairs and “Si Kong”: the minister of public work, the three together functioning as the prime minister of the state), “Wu Sheng” (Five Government Offices: Shang Shu Sheng: The Department of Secretary, Meng Xia Sheng: the organization in charge of examining the imperial edicts in ancient China, Nei Shi Sheng: or Zhong Shu Sheng, the office in charge of drafting imperial edicts, Mi Shu Sheng: the office in charge of Confucian classics, and Nei Shi Sheng: the office in charge of the internal affairs of the palace), “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works), “Jiu Si” (Nine Bureaus: “Guang Lu” (The Banqueting Court), “Wei Wei” (The Court of Sacrament), “Zong Zheng” (The Court of Imperial Affairs), “Tai Pu” (The Court of Imperial Carriages and Horses), “Da Li” (The Court of Judicial Review), “Hong Lu” (The Court of State Ceremonials), “Si Nong” (The Court of Agricultural Affairs), “Tai Fu” (The Court of Finance and Trade), “Wu Jian” (Five Offices: “Guo Zi Jian”: the highest educational body in ancient China, “Jun Qi Jian”: the government office in charge of military supplies, “Dou Shui Jian”: the government office in charge of rivers, canals, bridges and burrock, “Shao Fu Jian”: the government office in charge of the making of carriages, weaving, smelting, etc., and “Jiang Zuo Jian”: the government office in charge of construction, whitewashing, carpentry, etc.), “Shi Liu Wei” (16 Guards), “Dong Gong” (Eastern Palace), “Du Du Fu” (Offices of Military Affairs), “Zhou” (subprefecture) and “Xian” (county), it had exhaustively depicted the duties, subsidiary posts, official ranks, main principles, and the measures and rules of administrative management, as well as the relationship between various institutions. Because it had included a great number of administrative laws made during the Reign of Kaiyuan on the basis of the current administrative structure and management system, it was considered to be another legislative achievement of Tang Dynasty.

Ming Hui Dian (*The Collected Statutes of Ming Dynasty*) was compiled by following the style and structure of *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*). Besides, the official system of “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments,

Board of Works) was used as the guiding principle, and it was divided into different volumes in accordance with the different official posts to specify the different duties and affairs of different administrative institutions respectively as well as to clarify their mutual relationships and administrative principles. When outside Shan Hai Guan Pass, the policy of “referring to the institution of Han Dynasty and learning from that of Jin” was adopted, thus in the first year of Chongde (1626) *Chongde Hui Dian* (*Collected Statutes of Chongde*) was promulgated, which was a comprehensive administrative code including extensive contents such as the ritual, official and penal system, the marriage institution, the legal procedures, and religion and economy. Of all the contents, nevertheless, the administrative regulations had accounted for a relatively larger proportion. On the whole, it had reflected the various social relationships and the trend of development of the political superstructure at the times of social upheaval, and the historical characteristics of the further transition of customary law to statute law. After Qing rulers entered the central plains through Shan Hai Guan Pass, a number of laws were formulated. In the 23rd year of Kangxi (1683), orders were issued by the emperor to have the code of collected statutes compiled and reformulated, consequently, *Kangxi Hui Dian* (*Collected Statutes of Kangxi*) was completed in the 29th year (1689). Later on, a series of statutes such as *Yongzheng Hui Dian* (*Collected Statutes of Yongzheng*), *Qianlong Hui Dian* (*Collected Statutes of Qianlong*), *Jiaqing Hui Dian* (*The Collected Statutes of Jiaqing*) and *Guangxu Hui Dian* (*The Collected Statutes of Guangxu*) were enacted one after another. These five statutes of Qing Dynasty were issued end to end, in which the duties, events and working principles of “Zong Ren Fu” (The Imperial Clan Court), “Nei Ge” (The Cabinet), “Jun Ji Chu” (The Grand Council), “Zhong Shu Ke” (The Zhong Shu Section), “Liu Bu” (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works), “Li Fan Yuan” (Board for National Minority Affairs), “Nei Wu Fu” (Board of the Imperial Household), and other government branches at the level of “Si” (bureaus), “Yuan” (institutions), and “Jian” (offices) were recorded, which had made them the most complete administrative codes in feudal China.

The stylistic rules and layouts of the ancient Chinese administrative codes with the guidance of official ranks had shown an inherently consistent tradition of the rigorous appointment and strict management of the officials. Meanwhile, a large number of laws and regulations about the management of officials which were preserved also proved indirectly that the official system had played a significant role in ancient Chinese administrative laws.

3. The integration of the administrative legal system with the system of “Li Zhi” (the system of “Li”)

The specific historical and social conditions of ancient China were a determinant factor for setting “Li” (rites) as the yardstick in demarcating social ranks and orders, separating the noble from the humble, strengthening the established systems and settling civil affairs. While introducing “Li” (rites) into the legal system or, integrating “Li” (rites) with the legal institutions was one of the major characteristics of ancient Chinese legal system, the integration of the administrative legal system with “Li Zhi” (the system of “Li”) was another basic characteristic, which had the following features:

Firstly, by means of the relationships of patriarchal ethics, the paternal power was introduced into the administrative area, which had contributed not only to the further integration of moral ethics and administrative institutions, but also to the reinforcement of the imperial and administrative power as well as the authorities of officials. Marx wrote in his book *The Chinese and the European Revolutions* that “just like the emperor was often respected as the father of all people across the country, the officials below the emperor were also regarded as the people who were to maintain this patriarchal relationship in the area under their administration”,⁵ which was in agreement with the reality of the ancient Chinese history.

Secondly, the ritual system required by the ruling class was fortified by legalization. The reason why “Li” (rites) was regarded by the ancient rulers as “the political basis” for “governing a nation and sustaining its stability” was that the social hierarchy had been rigidly maintained, and “different rituals were made for different classes”.⁶ Therefore, both “Li” (rites) and law were entitled as “the essential criteria”, and “Li” (rites) was the guideline for law, while, in return, law was the impetus for “Li” (rites), which had made them merged together in both theoretical and practical senses. The ancient Chinese administrative law was a product and a prominent expression of the intimacy between law and “Li” (rites). The setup of six official posts in *Zhou Li (The Rites of Zhou Dynasty)* was a typical example of merging “Li” (rites) with law. As for “the hundreds of main guidelines of ‘Li’ (rites) and the thousands of specific rules for etiquettes” recorded in *Li Ji (The Book of Rites)*, they referred neither purely to “Li” (rites) nor purely to law, but the integration of “Li” (rites) with law because the two were both connected and divided. After Han Dynasty, doctrines such as “different systems of ‘Li’ (rites) for different classes” and “the strict division of the upper and the lower or the noble and the humble” which were promoted by Confucianists were integrated into legal principles. The principles of “Li Zhi” (the system of “Li”) about clothing, housing, chariot, marriage, funeral, sacrifice and etc. were incorporated into different forms of legal codes and regulations, therefore, the social hierarchical system were perfectly consolidated. Just as was recorded in *Xin Shu (New Writings)*:

Different patterns and decorations are added to different costumes as a way to clarify the criterion between the upper classes and the lower classes and define the distinction between the noble and the humble. Therefore, the differences in class have led to the differences in their names and titles; the differences in names and titles have led to the differences in their powers and privileges; the differences in powers and privileges have led to the differences in their ways to handle their businesses; the differences in the ways to handle businesses have led to the differences in their flags and seals; the differences in flags and seals have led to the differences in their auspicious decorations; the differences in auspicious decorations have led to their manners and ceremonies; the differences in manners and ceremonies have led to the differences in their salaries and incomes; the differences in salaries and incomes have led to the differences in their hats and shoes; the differences in hats and shoes have led to the differences in their robes; the differences in robes have led to the differences in their

⁵ *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 1, People’s Publishing House, 1972, p. 691.

⁶ “Zhuang Gong Shi Ba Nian” (The 18th Year of the Duke of Zhuang) in *Zuo Zhuan (The Chronicle of Zuo)*.

jade pendants; the differences in jade pendants have led to differences in chariots and horses; the differences in chariots and horses have led to the differences in the titles of their wives and concubines; the differences in the titles of wives and concubines have led to the differences in their social positions; the differences in social position have led to the differences in their residences; the differences in residences have led to the differences in their beds and mattresses; the differences in beds and mattress have led to the differences in their household utensils; the differences in household utensils have led to the differences in their food and drinks; the differences in food and drinks have led to the differences in their ‘Li’ (rites) of sacrifices; the differences in rites of sacrifices have led to the differences in their funeral ceremonies.⁷

All of the above-mentioned differences were the requirements of “Li” (rites) as well as the fixed rules stipulated by law, so anyone who had violated such fixed institutions and manners would be given administrative or even criminal punishments.

4. The embodiment of the spirit of autocracy

In China, the autocratic political system of the aristocratic slave-owners headed by the king had been established since Xia and Shang dynasties, which was much similar to that of other autocratic countries in the ancient East despite the difference in the condition of the establishment. After the State of Qin annexed other six states and established a united centralized autocratic state in 221 B.C., after over 2,000 years of development, the autocracy became more and more consolidated, and the emperor had become the head of state in the real sense by centralizing all political powers. Therefore, the administrative law, as an important branch of state legislation, surely, would reflect the spirit of absolutism.

Firstly, the emperor was regarded as the supreme executive head of the state. So “all state affairs, whether big or small, are decided by the emperor”,⁸ moreover, the emperor had commanded a group of officials to execute the administrative power, to mediate the relations between the administrative institutions of the state centered around him and to guarantee the smooth operation of the state machine.

Secondly, the imperial edicts were both regarded as a major source of the administrative laws and endowed with the supreme authority. During the reign of Emperor Wu of Han Dynasty, Du Zhou, who was the ‘Ting Wei’ (the supreme official in charge of judicature) at the time said:

How does ‘San Chi’ (law) come into being? The previous emperors have codified laws, while the succeeding ones have made interpretations, and include them into ‘Ling’ (order or ordinance). Whatever is suitable for the present era is to be included into the proper laws. So, is it still necessary to adopt the ancient laws?⁹

These words had touched upon the nature of the feudal legal system; furthermore, they were also in accordance with the reality of administrative legislation. As was stipulated in the administrative laws of Qin and Han dynasties, such acts as forfeiting imperial edicts or imperial policies and refusing to implement an imperial

⁷“Fu Yi” (Doubts about Costume Rules) in *Xin Shu (New Writings)*, Vol. 1.

⁸“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

⁹“Du Zhou Zhuan” (The Biography of Du Zhou) in *Han Shu (The History of Former Han Dynasty)*.

order or the ultra vires of an official were considered serious offences that would be punished with severe penalties.

Thirdly, the system of “Chao Hui” (imperial court convention) in which the national affairs were dealt with by the emperor was established. The system of “Chao Hui” (imperial court convention) rooted in *Zhou Li* (*The Rites of Zhou Dynasty*), was created in Qin Dynasty and continued in Ming and Qing dynasties. Everything concerning the important policies, major cases, legislative and military affairs was all included in the contents of “Chao Hui” (imperial court convention); however, in “Chao Hui” (imperial court convention), the power of making final decisions was still in the hands of the emperor himself.

Fourthly, the political system of integrating the local judiciary with administration was confirmed. After China had become a united country, a specialized branch of judiciary was set up in central government, nevertheless, there were no judicial offices in the local government and the local administrative offices had to be concurrently in charge of the judicial affairs. Thus, the local executive organizational system was almost the same with that of the judiciary, and the executive chief was also the judge at the same time, which had made the administrative authorities override the judicial ones. Although both “Ti Dian Xing Yu Gong Shi” (an official in Song dynasty equivalent to the legal medical expert) set up in Song dynasty and “Ti Xing An Cha Shi” (an official in charge of the judiciary and supervision) set up in Ming and Qing dynasties had represented the judicial branches at the provincial level, their practical work was still under the control the chief executive officials at the same level, consequently, they were reduced into an appendage of the executive institutions. In a word, such a political system which had integrated both the executive and the judiciary was rather convenient for the emperor to control the judiciary.

Fifthly, some handicraft and commercial businesses were under the centralized management of the state. On “Qin Jian” (bamboo writing slips in Qin Dynasty) excavated in Yunmeng, Hubei Province in 1976, a series of administrative regulations were written, which had shown that the handicraft and commercial business and the livestock industry were all controlled by the government. In Han Dynasty, the system of the prohibition of private dealings of salt, iron and wine was established in order to protect the national monopolies over these commodities and to strengthen the economic foundation for the feudal autocratic power. Since Tang Dynasty, the production and circulation of tea had also been taken under the government control. Subsequently, in the following Song, Yuan, Ming and Qing dynasties, the rules for granting the tea and salt selling certificates were enforced, which had made the marketing of tea and salt by the merchants subjected to the control of the government. In the period of Song, Liao, Jin and Yuan dynasties, border markets, or the so-called “Que Chang”, were opened and sponsored by government. Correspondingly, strict restrictions and management systems were made about the sites, the commodities of border markets and the ways of commodity exchanges. Such a system of government-managed handicraft and commercial business had not only become an efficient way for the central government to control the economic activities, but also become an important object to be regulated by the ancient Chinese administrative law.

5. Broad supervision over the administrative activities through supervisory institutions

Since very ancient times, “Yu Shi” (the censor) had been installed in the Chinese central government to execute prohibitions and injunctions in the royal palace and to impeach the officials who had violated the law. In Western Han Dynasty (202 B.C.–9 A.D.), the establishment of “Yu Shi Tai” (The Censorate), the central supervisory institution, and the installation of “Bu Ci Shi” (Prosecutors) in local governments had represented remarkable progress made in the development of feudal supervisory system. In Eastern Han Dynasty (25–220 A.D.), “Yu Shi Tai” (The Censorate) was also called “Xian Tai” to show its duty of investigating and exposing the illegal deeds of the officials; meanwhile, the duty of “Bu Ci Shi” (Prosecutors) was further expanded, and they could not only supervise the local officials, but also control the local military affairs, which had reflected the intensification of feudal centralized powers. In the Period of Wei and Jin dynasty (220–589 A.D.), “Yu Shi Tai” (The Censorate) was no longer an institution under the central government but an independent supervisory organization directly under the control of the emperor, and “Yu Shi Zhong Cheng” (Grand Censor) was endowed with such great authorities that might have “shocked all of the officials”. On the one hand, the expansion of supervisory organizations and their powers had indicated that the rulers had attached greater importance to the supervision and encouragement of the whole-hearted devotion of the officials to their duties so as to give a full play to the functions of the administrative organizations; on the other hand, they had also shown the significant roles played by the supervisory organizations in the investigation and impeachment of illegal officials and the implementation of wider supervision. After this period, “Yu Shi” (the censor) was permitted by the emperor to “report to him anything unlawful which he had heard about”. Moreover, if “Yu Shi Zhong Cheng” (Grand Censor) had failed to expose the guilty officials, he would be dismissed from his post. The local supervisory organizations were abolished as they were replaced by “Xun Yu Shi” (Field Supervisors) who were sent by the central government to supervise the local officials.

In Tang Dynasty, the senior official of “Yu Shi Tai” (The Censorate) of the central government was “Yu Shi Da Fu” (Grand Censor), who had “sustained the order of the court by means of ensuring the implementation of the regulations in the criminal and administrative laws”¹⁰ and who had the rights to impeach any officials, to participate in the trials of any influential cases, to supervise the expenditures of the local governments, and so on. To guarantee the supervisory power of these censors, they were permitted to “impeach the officials independently”, or to impeach the officials by directly submitting a memorial to the emperor so that the appointment or removal of the officials would never be interfered by “Li Bu” (Board of Personnel). As for the function of the censors in Tang Dynasty, Emperor Ruizong of Tang had commented that “it is the duty of censors to encourage the right and discourage the

¹⁰ *Tang Liu Dian (The Six Statutes of Tang Dynasty)*, Vol. 13.

wrong, and to punish the unlawful and protect the lawful. For this reason, it just depends on this for a country to be well managed.”¹¹

In Ming and Qing dynasties, the central supervisory organization was “Du Cha Yuan” (The Court of Censors), which was in charge of “investigating and impeaching officials of all ranks in both the central and local governments”. Accordingly, 13 “Jian Cha Yu Shi” (the supervisory censors) were installed to conduct the local inspections. In the meantime, the system of “Xun An Yu Shi” (Censors on Patrol) was set up, and the censors were ordered to “make immediate decisions about the minor affairs and report the serious cases to the emperor for imperial decisions”.¹²

In ancient China, as time went by, the execution of power, the organization and the practical operation of the supervisory organs were gradually systematized; besides, laws and regulations were also made for them to follow. For instance, *Feng Xian Hong Gang* (*Working Outline of Supervisory Institutions*), *Qin Ding Tai Gui* (*The Rules for the Censorate by Imperial Order*), and *Du Cha Yuan Ze Li* (*Regulations for the Court of Censors*) were master work in the field of supervisory laws as well as the basic components of the administrative law. Through the supervisory organizations, the feudal rulers could exercise wide-range investigation and supervision over the central and local governments to urge all officials to be loyal to the emperor and the country. As the power of supervisory officials was affiliated to the imperial power, their power was also expanding with the consolidation of the feudal autocracy.

Qin Ding Tai Gui (*The Rules for the Censorate by Imperial Order*) was first compiled and issued by “Du Cha Yuan” (The Court of Censors) in the eighth year of Qianlong (1742), and was revised in the periods of the following three emperors of Jiaqing (1796–1820), Daoguang (1820–1850) and Guangxu (1875–1908). During the reign of Emperor Guangxu, *Qin Ding Tai Gui* (*The Rules for the Censorate by Imperial Order*) was classified into eight chapters: “Xun Dian” (General Instructions), “Xian Gang” (General Duties of State Institutions), “Liu Ke” (Functions of Six Central Departments), “Wu Cheng” (Supervisory System in the Royal Palace), “Ge Dao” (Functions and Action Principles for Supervisory Officials at Different levels), “Ji Cha” (Rules for the Inspection of Specific Institutions), “Xun Cha” (Rules for the Inspection of Local Governments) and “Tong Li” (Principles for the Selection, Promotion and Transference of Officials within the Procuratorial House). *Xun Dian* (*General Instructions*) and *Xian Gang* (*General Duties of State Institutions*) could be regarded as the general provisions, while the rest as the specific provisions. They were provisions made not merely from the level of political system, but also from the perspective of procedure so that the implementation of institutions and regulations could be ensured. The special position and functions of supervisory institutions were confirmed in *Qin Ding Tai*

¹¹“An Edict for ‘Yu Shi’ (Censors) to Report Central and Local Official Affairs by Submitting Memorials” in *Tang Da Zhao Ling Ji* (*Collected Grand Edicts and Decrees of Tang Dynasty*), Vol. 100.

¹²“Zhi Guan Zhi” (The Record of State Officials) in *Ming Shi* (*The History of Ming Dynasty*).

Gui (The Rules for the Censorate by Imperial Order) so that the following roles could be guaranteed:

... encouraging the lawful and discouraging the unlawful; restructuring the organizations and improving the discipline with non-discriminatory principles and supreme authorities; reporting the wrongful and punishing the illegal; asking no reward for personal grace and taking no revenge for personal grudge; giving direct warning with faithfulness and loyalty; keeping a promise fulfilled and a heart righteous; carrying out responsibilities to the fullest extent without hankering after for fame; and stating the worries of people and guarding against the disaster.¹³

Meanwhile, it had also provided the legal basis for the supervisory organizations to exercise their supervisory powers in a wider range so that supervision could be carried out in the various fields such as administration, economy, judicial affairs, military affairs, etiquettes, education and social development. So *Qin Ding Tai Gui (The Rules for the Censorate by Imperial Order)* had been regarded as the most complete supervisory law in feudal China.

6. The interactive application of both administrative sanction and the criminal punishment

The ideology that “the wise emperors rule officials instead of the common people” remained influential throughout the entire feudal age in that it had expressed the general rule of governing a country. The principle of “managing officials in accordance with the laws and emphasizing their duties and responsibilities by means of regular inspections and assessments” had been upheld in almost every well-governed dynasty. Since Tang Dynasty, it was stipulated in most administrative regulations that anyone who “should have recommended someone but have failed to do so” and who “have recommended the incompetent” should be punished. As to the system of constant evaluations, from the “Shang Ji” (the reports made by the local officials) in the Warring States Period to the “Jing Cha” and “Da Ji” (the assessment of officials once every 3 years) in Ming and Qing dynasties, anyone who had made no accomplishments in his post or had had slight dereliction of duty would get such administrative sanctions as demotion, removal, remaining in the current position, being imposed fines, coerced resignation or being reprimanded; moreover, anyone who had committed any severe offences would get punished according to the criminal law. On some occasions, nonetheless, although some administrative derelictions had caused no great harm, the official would still get punished by the criminal law. For instance, it was stipulated in “Zhi Zhi Lv” (Statute on the System of State Offices) in *Tang Lv (Tang Code)* that “if the number of officials appointed have surpassed what has been permitted, or those who should not be appointed have been appointed, the official responsible shall be punished by ‘Zhang’ (flogging with heavy sticks) for a hundred strokes for falsely appointing one person, and the punishment shall be one degree severer for having falsely appointed every three person, up to two years of imprisonment for having falsely appointed ten persons”; “anyone who does not keep on the alert on duty when he should, or does not

¹³“Xun Dian Er” (General Instructions, Part 2) in *Qin Ding Tai Gui (The Rules for the Censorate by Imperial Order)*, Vol. 2.

sleep but stay over all night when he should, shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for thirty strokes”, and “when sacrifice ceremonies are held in the imperial cemetery, any imperial official or guard who does misconduct or violates the rituals shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for forty strokes”, and so on. If the officials were found guilty of illegal conducts or dereliction of duties, they shall either get administrative sanctions or criminal punishments, which had indicated the mutual integration of the administrative and criminal laws as well as the severity on the regulation of officials under the feudal autocratic system.

In a word, as much stress had been laid on the standardization, systematization and efficiency of administration in ancient China, a great number of administrative regulations, which were diverse in form and broad in content, were formulated. It had been proved by history that a well-managed government was closely connected to a complete administrative legal system. The prosperous periods of Chengkang, Wenjing, Zhenguan and Kangqian in Chinese history were all inseparable from their rigorous administrative management systems and advanced administrative legal systems. Conversely, when the administrative management was in disorder, the regulation of officials would be undermined and the laws and disciplines would be of no avail, which would eventually lead to the destruction of a dynasty.

11.2.2 The Development of Ancient Chinese Civil Law and Its Characteristics

The ancient Chinese civil law had undergone a process of development from simplicity to complexity, and from the appendage to the criminal law to independence. The various factors which made up of the national conditions of ancient China, such as the long-lasting dominant role of the natural economy, the social antithesis of the noble and the humble, the continuous intensification of autocratic system, the profound influence of familism and the wide infiltration of Confucianism had all restricted the development of the ancient Chinese civil law and had left the ancient civil law with deep stigmas.

The ancient Chinese civil law had left behind traces of development at different historical stages and each had its own distinctive features.

1. The Pre-Qin era: the embryonic stage of civil law

With the appearance of private properties, the transfer of property and the exchange of commodities, the standard of civil law was gradually formulated, some of which were even engraved on copper containers, which was described as “being (all important stipulations should be) written on ‘Zong Yi’ (a container used for sacrifice)”.¹⁴ In Pre-Qin era, “Ding” (a sacrificial container), which was called

¹⁴“Si Yue” (an official in ancient China in charge of affairs of contracts) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*.

“Zhong Qi” (very important utensils), was a symbol of national power. Therefore, it had reflected the attitude of the state to have the standard of civil laws engraved on “Ding” (a sacrificial container). Moreover, it was an unchangeable motto of every ruler in feudal China that “only ‘Ming’ and ‘Qi’ (both are sacrificial utensils) can never be lent to or be used by other people”. As the inscriptions on copper containers had played a prominent role in the history of ancient Chinese civil law, the civil law in the Pre-Qin era was referred to as “the civil laws inscribed in golden letters”. Furthermore, the feudal official governments had even intervened in the civil legal acts among the people. For example, if a contract of property transfer was concluded, a copy should be sent to the local authority apart from the two halves kept by both parties, and a special official agent should be appointed to supervise the signature and implementation of the contract. At the same time, the divine power was used to justify the origin of the supreme ownership of the emperor, which was described as “‘Huang Tian’ (the heaven) has been given to the Chinese people and the land to the former emperors in Zhou dynasty”.¹⁵ Besides, the seriousness of the contractual relationship and the loyalty to it were also shown by the solemn oath to “Tian” (heaven), which had shown the traces of the theocratic ideology in the civil conducts in Pre-Qin period.

During this period, the patriarch clan system had a strong influence to the civil legal relationships. As the supreme patriarch of Zhou as well as the shared master of the political regime, “Zhou Tian Zi” (the son of Heaven or the emperor) was entitled the rights to award land to his subjects and to mediate any civil disputes among his vassals. Moreover, the patriarchal system of paternal power and the lineal primogeniture system established according to the principles of patriarch clan system had a profound influence on the family, marriage and the inheritance law in later dynasties.

With the change of economic forms, various forms of property transferring contract emerged. At the beginning of Xi Zhou dynasty, those who were granted the immoveable properties only had the rights of possession and usage, while the rights of ownership were still in the hands of the ruler of Zhou dynasty. After the middle period, with the prosperity of local economy and the declining of the power of the rulers in Zhou dynasty, the feudal princes who were granted the land had actually gained its ownership; therefore, there were many records about land transferring and exchange.

The various forms of contractual debts emerged during the process of the transferring and circulation of private properties, and contracts were used as credentials in litigations on property disputes. It was recorded in “Shi Shi” (the official in charge of criminal affairs) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)* that “loan contracts or sales contract should be part of the proof in any cases that involve property disputes”. As the notion of private property became more and more established, anyone who had infringed the rights of another person must make compensations. In the well-known inscriptions on *Hu Ding* (bronze ware made in Xi Zhou), some civil litigation on torts and the liabilities of infringers for damages had been recorded. Although land in the pre-Qin period was

¹⁵“Zi Cai” (high quality wood) in *Shang Shu (The Book of Historical Document)*.

fundamentally owned by the state, which had greatly impeded the progress of property law, the law of obligation had become more developed and the legal procedures for the conclusion of contracts were established accordingly due to the wide and free circulation of movable properties. This should be taken seriously.

2. From Qin and Han dynasties to Tang Dynasty: the stage of the development of the ancient Chinese civil law

The period from Qin and Han to Tang Dynasty was the times for the feudal Chinese society to be establishment and developed. Furthermore, the civil legislations were also greatly enriched as property relationships became more and more complicated. The civil legislations in this period were mainly reflected in the laws on household, marriage and other miscellaneous laws. At the same time, some other offprint laws and regulations were also issued.

First of all, the private ownership of land was officially and widely acknowledged by government.

In 594 B.C., the policy of “collecting land taxes by *mu*¹⁶” was adopted in the state of Lu, which had symbolized the establishment of the private ownership of land. Later on, similar policies were implemented in other states, so the relevant land sales became a common practice. In “Lian Po Lin Xiang Ru Lie Zhuan” (Biographies of Lian Po and Lin Xiangru) in *Shi Ji* (*The Records of the Grand Historian*), it was recorded that:

Now that Zhao Kuo had become a senior general.... He had stored up all gold and silk awarded by the king of Zhao in his house and waited for the right opportunity to purchase any land and house available.

In “Shi Huo Zhi” (Record of Food and Commerce) in *Han Shu* (*The History of Former Han Dynasty*), it was written that “it was all different in the state of Qin as the reformatory orders of Shang Yang were carried out to change the imperial system and encourage the free sales of land by abolishing the rigid land systems”, which was the evidence of ensuring the private ownership of land by law. After Qin had annexed the other six states, it was declared that “the peasants and serfs can claim their own land according to their own measurements”, which had given a nation-wide acknowledgement to the private ownership of land, thus, the legal notion of infringement of private ownership came into being, consequently, the corresponding punishments were implemented. Mencius once mentioned that “it is an act of theft to take possession of the things which does not belong to you.”¹⁷ In *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty), there were also such legal provisions providing that “anyone who has moved the landmark in secret shall get the punishment of ‘Nai’ (a punishment to shave one’s hair and beard)”.

In this period, the acquisition of the ownership of land had a close relationship with the political privileges. In Han Dynasty, the national ownership of land by the imperial families represented by the emperor was sacred and inviolable. Till the

¹⁶ *mu*, a unit of area (=0.0667 ha).

¹⁷ “Wan Zhang” (a student of Mencius) (Book 2) in *Mencius* (*The Book of Mencius*).

policy of “Zhan Tian” (granting land according to the specific social estate of a person) in Jin Dynasty and the policy of “Jun Tian” (granting land to peasants according to the number of members of their families but granting land to the imperial family, aristocrats and officials according to their specific social estates) in Tang Dynasty, the possession of land according to social estate was further confirmed by the law, which had still integrated the political privileges with economic ones. Under the cloak of “dividing all the land equally to all the people”, the “Shi Zu” (the gentry) in the senior government positions had actually acquired far more land than the common peasants by occupying land for specific official posts and local offices and by owning an immense number of “Nu Bi” (the slave girls and maidservants) affiliated to the land. Meanwhile, the laws to protect the ownership of land in this period had also become more specific and detailed. For instance, during the Period of Southern and Northern Dynasties, when a great many farmers who had been exiled to the north returned to their native places, enormous cases of land disputes were caused, and the following record was an example:

There are too many disputes over lands to be settled, therefore, the settlements had to be delayed, which had incurred endless quarrels. However, the fertile land had been left untilled and fresh mulberry leaves had been left withering away. Those troublemakers were everywhere, which had resulted in many cases needed to be solved.¹⁸

For this, Emperor Wen of Northern Wei had advocated that “the land disputes should be settled within a fixed time limit. If it is hard to affirm its ownership due to the time, it should be given to its present owner”. In this way, the principle of “Shi Xiao” (prescription) in civil legal relationships was established so as to protect the actual owners of the land in question.

In the early years of Tang Dynasty, the ownerless land which had been left behind after the turmoil of war at the end of Sui Dynasty were allowed to be claimed and thus returned to original owners; but the attempts of anyone to occupy the public or private land which did not belong to him were strictly prohibited. According to *Tang Lv* (*Tang Code*), anyone who had occupied the land beyond a certain limit should be given the following punishments: for over-occupying 1 *mu*, he should be given the punishment of “Chi” (flogging with light sticks) for ten strokes; for 10 *mu*, the punishment should be one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for sixty strokes; for 30 *mu*, the punishment should be one more degree severer, up to 1 year of imprisonment; anyone who occupied and tilled the public or private lands which did not belong to him should be given the following punishments: for no more than 1 *mu*, he should be given the punishment of “Chi” (flogging with light sticks) for thirty strokes; for 5 *mu*, the punishment should be one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; for 10 *mu*, the punishment should be one more degree severer, up to one and a half years of imprisonment; anyone who had claimed the public or private land as his own which did not belong to him and sold it to another person should be

¹⁸“Li An Shi Zhuan” (The Biography of Li Anshi) in *Wei Shu* (*The History of Northern Wei Dynasty*).

given the following punishments: for no more than 1 *mu*, he should be given the punishment of “Chi” (flogging with light sticks) for fifty strokes; for 5 *mu*, the punishment should be one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; for 10 *mu*, the punishment should be one more degree severer, up to 2 years of imprisonment; anyone who had seized the private land while serving his duty in his official post should be given the following punishments: for no more than 1 *mu*, he should be given the punishment of “Zhang” (flogging with heavy sticks) for one hundred and sixty strokes; for 3 *mu*, the punishment should be one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; for 5 *mu*, the punishment should be one more degree severer, up to two and a half years of imprisonment; for occupying a household garden, the punishment should again be one more degree severer; anyone who had occupied and ploughed the lands of another person should be given punishment of “Chi” (flogging with light sticks) for fifty strokes; anyone who had occupied and ploughed the graveyard of another person should be given the punishment of one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; anyone who had sold the granted land should be given the following punishments: for 1 *mu*, he should be given the punishment of “Chi” (flogging with light sticks) for ten strokes; for 20 *mu*, the punishment shall be one degree severer, up to the punishment of “Zhang” (flogging with heavy sticks) for one hundred strokes; besides, the land should be returned to the original owner and the illicit money be confiscated without ever being recovered.

Furthermore, In *Tang Lv* (*Tang Code*) the ownership of the first occupier to the ownerless objects was also protected. For instance, if one had dug out a hidden object in another’s land, he would be justified to share it equally with the landowner; if one had acquired some lost property or drifting objects, he would also be justified to possess them under certain conditions. Moreover, the businesses of “Dian Mai” (pawn), “Zhi Ya Jie Dai” (pledge) and “Dian Dang” (mortgage) in Tang Dynasty had given rise to the pawning and pledge rights in the sense of civil law. Both pawn and pledge were attached with certain conditions about redemption, and, within the time limit for redemption, the creditor had the rights to own, to dispose of, and to make profits from the pawn or the pledged properties.

Secondly, the contractual relationships between the debtors and creditors had gained remarkable development.

With certain degrees of the development of commodity economy, the forms of contracts between the debtors and creditors grew more and more complicated, which had led to the emergence of such contracts as the sales, tenancy, lease and employment, as well as a set of stipulations about debt guarantees, the principle of “Shi Xiao” (prescription) and damage compensation.

In Han Dynasty, “it was to one’s own will to buy and sell” his land, but a contract should be concluded so that it could be used as a credential when disputes occurred, as was expressed in the words that “when a lawsuit was brought to the court, it should be settled according to the contract”.¹⁹ The land sale contracts and

¹⁹Annotations to “Shi Shi” (the official in charge of criminal affairs) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li* (*The Rites of Zhou Dynasty*).

some “Han Jian” (bamboo writing slips in Han Dynasty) which were excavated had again displayed the various items of ancient sales contracts, including the time of conclusion, the names of parties, the prices and payments of targeted objects, the boundary of land and houses and the witnesses. The feudal government acknowledged the legal effect of civil contracts, as was indicated in the sentence that “the private contracts between two people are like laws and orders”. In “Juyan Jian” (bamboo writing slips in Juyan), it was also discovered that the conclusion of contracts would also be needed even in the purchasing of a robe or a pair of trousers, which had reflected the development of sales contracts. Nevertheless, in the law of Han dynasty, people were prohibited from selling the same object to two different people; otherwise, the contract would be found invalid, and the seller would be convicted of larceny.

The guarantee against defective items emerged in the sales contracts of the Period of Southern and Northern Dynasties. In Tang Dynasty, it was explicitly stipulated in “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed) in *Tang Lv* (*Tang Code*) that:

(After a transaction of servants, horses and oxen, camels, mules or donkeys is completed with a contract signed, if there are any relapses of their old diseases, the buyer could withdraw from the signed contract within three days; if there is no old illness but the buyer has faked one, the contract should be kept according to the law, and the buyer should be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for forty strokes.

Furthermore, there was even the guarantee against the breach of contracts. It was clearly stated in one of the excavated contracts in Tang Dynasty that “anyone who has taken the initiative to breach the contract should compensate the other party with five rolls of silk”.

Although the contract of tenancy was not as well-developed as the sale contract, they were still recorded in ancient literature and could be seen in some concrete vouchers. In Han Dynasty, in addition to the civil tenancy contracts in which it was ruled that “the tenant who had cultivated the land of the rich should pay 50 % of a tax”,²⁰ there were also some official tenancy contracts in which the public lands, mountains, forests, pools and lakes were rent to the common people as a means of taxation. Some tenancy contracts signed in the period from Sui Dynasty (581–618 A.D.) to the Period of Five Dynasties (907–979 A.D.) had been found in Dun Huang and Turpan. For instance, the tenancy contract signed at the time of Daye (605–618 A.D.) of Sui Dynasty, at the time of Zhenguan (627–649 A.D.) of Tang Dynasty, at the time of Longshuo (661–664 A.D.) and at the time of Tianshou (690–692 A.D.) had all included the stipulations about the time limit of tenancy and the ways to pay rent, which had proved the existence of tenancy relationships among the common people under the system of “Jun Tian” (granting land to peasants according to the number of members of their families but granting land to the imperial family, aristocrats and officials according to their specific social estates).

²⁰“Shi Huo Zhi” (Records of Food and Commerce) in *Han Shu* (*The History of Former Han Dynasty*).

It was impossible for the loan contracts to be verified by the original documents in the bamboo scriptures of Han Dynasty, but they could be proved by literature records. For example, it was mentioned in “Fan Hong Zhuan” (The Biography of Fan Hong) in *Hou Han Shu* (*The History of the Later Han Dynasty*) that Fen Chong, a wealthy man in Nan Yang, once “lent millions of money to other people, and in his will he had ordered all the ‘Wen Qi’ (contracts) burned”. Here, apparently, “Wen Qi” (contracts) referred to loan contracts.

Evidence of loan contracts in Tang Dynasty had been found in Dun Huang Document. The contract discovered stipulated that the interest rate should be no more than 60 %, and “it should not double the value of the object despite the long term of loan”. Collecting interests beyond the lawful limit was regarded as “the most serious malpractices of the administration”, so it had been listed as a crime since Han Dynasty. If the debtor had lost all his property, and being unable to pay off the debt, he was allowed to “pay it back by laboring himself for his creditor”; if the debtor ran away, then the guarantor should pay it off by taking the place of him. Furthermore, “the liable person who had owed any public or private debt and refused to pay it back should be brought to court and got trialed; where the debtor did not bring the case to the court but detained the creditor’s property, such as ‘Nu Bi’ (the slave girls and maidservants), cattle, etc., if the value was above that of the contracted object, he should be convicted of the transgression of other people’s property”.²¹

In summary, the development of the law of obligation had displayed a panorama of the more and more sophisticated and diversified social and economic life, meanwhile, it had presented the prominent role of contract in civil legal relationships, as was described in the provision that “the private contract between two people is as binding as laws and orders”.

At last, an all-round feudal system of marriage and family was established.

After having suppressed the “Hundred Schools of Thoughts” and made Confucianism the sole state ideology during the reign of Emperor Wu of Han Dynasty, the ethical maxims of “San Gang Wu Chang” (three cardinal guides and five constant virtues) had functioned not only as the foundation of the law in Han dynasty, but also as a mediator to adjust the marriage and family relationships in practice. In both Han and Tang Dynasty, in the legislations concerning marriage and family the protection of paternal power and the authority of the husband had been regarded as the cornerstone, and the principles and spirits of feudal patriarchal system as the core. Therefore, the ethical order of the noble and the humble was strictly maintained, moreover, there were specific provisions in *Tang Lv* (*Tang Code*) about the establishment and restriction of marriage and divorce. For example, the approvals of the parents of both parties were the most important precondition for the establishment of marriage, and marriage certificates and betrothal gifts were attached great importance. As far as the restrictions of the marriages are concerned, they mainly concerned about the social status or the classes of families, in other

²¹“Fu Zhai Qiang Qian Cai Wu” (Detaining the Properties of the Obligees due to Their Liabilities) in “Za Lv” (Miscellaneous Laws) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

words, “although different people have different spouses, men should marry the women from the same class, because the differences between the humble and the noble have made it unsuitable for them to get married”.²² Meanwhile, the marriages between those with the same family names or between the cousins were prohibited, and all men were strictly prohibited from marrying a run-away woman; otherwise, he would be given the same punishment and be forced to divorce her.

In terms of divorce, it was stipulated in the law of Han dynasty that there were “seven circumstances where a divorce was allowed”, namely, if a wife was found to be lacking in filial piety, be unable to bear children, be unfaithful to her husband, be envious, be infected with incurable disease, be gossipy, or to have committed theft; furthermore, there were “three circumstances where a divorce is prohibited”, namely, the wife would be homeless if divorced, she had mourned her parents-in-law for 3 years, and the husband had become wealthy after experiencing the hard times when they got married. But if the reason for divorce was within the domain of “Yi Jue” (enforced cases for divorce), namely, if either of the couple had killed any immediate family members or any collateral relative of the other party, or if their marriage was unlawful, then they would be forced to be divorced and be punished in accordance with the criminal law. Besides, it was even stipulated in *Tang Lv* (*Tang Code*) that “it is not unlawful to divorce if the husband and the wife cannot get along well with each other”.

In addition, concubinage was legal in feudal society. According to *Tang Lv* (*Tang Code*), “if a ‘Nu Bi’ (slave girls and maidservants) has gained favor from her master, and consequently given birth to a son, she can be taken as a concubine”, and “if a wife has never given birth to a son when she is 50 years old, she should be replaced by a concubine”. As the ruling of the husband featured by the superiority of husband and the inferiority of wife was strictly maintained by law, the social status of husband and wife was not equal in the family.

The patriarchal family system was also confirmed by *Tang Lv* (*Tang Code*) in the legal sense, as was stipulated that “the authority of the elderly must be respected in the same household”. The patriarch in a family was granted the power of disposing of the property of the whole family, presiding over the wedding ceremonies of the inferior and young, and educating them. Under the control of the ideology that “the whole nation would be subjugated if all people were under the guidance of filial piety”,²³ the junior were only supposed to perform their obligations towards the seniors, with their own rights ignored.

In the aspect of inheritance, the lineal primogeniture system was rigorously maintained. If the eldest son was dead, then the eldest grandson in the lineage would inherit the clan pedigree; if “anyone had chosen an illegitimate successor”, he would be punished according to law. Other ordinary properties were equally divided among all the sons, therefore, in order to avoid unnecessary losses of properties, it

²²“Nu Qu Liang Ren Wei Qi” (A Slave Marrying a Woman with Common Social Status) in “Hu Hun” (Rules for Households and Marriages) in *Tang Lv Shu Yi* (*The Comments on Tang Code*).

²³“Xuan Di Ji” (The Biography of Emperor Xuan) in *Han Shu* (*The History of Former Han Dynasty*).

was strictly forbidden to adopt the sons of other families or those of the families of the lower-classes and servants, and those adopted were excluded from the inheritance of family properties.

The above-mentioned legislations in the field of marriage and family were characterized by the unequal legal status of men and women and the senior and the junior, which was a vivid representation of personal affiliations in feudal families. The legal enforcement to uphold such unequal relationships was undeniably conducive to the safeguarding of the feudal rule. From the introduction of “Li” (rites) into the legal system in Han Dynasty to the combination of “Li” (rites) and law in Tang Dynasty, “Li” (rites) had always been the central element of ancient Chinese legal system, especially in the field of marriage and family law.

3. Song, Ming and Qing dynasties: a period when the civil law was relatively complete

Song, Ming and Qing dynasties were the three imperial dynasties that had enjoyed great development of feudal economy. In this period, the ownership of great landlords of the majority of national land had declined due to the heavy blows of peasant uprisings, while the number of small and medium landlords rose strikingly with the development of feudal landlord economy. Meanwhile, the number of land-holding peasants who were in possession of their own land had increased considerably. The complete legitimation of land sale had quickened the circulation of land, and the system of land tenancy had become the principal mode of agricultural business in feudal China. Based on the development of agricultural production, the handicraft and commercial industries also became active, thus paving the way for the appearance of cities. The development of commodity and currency economy had led to the changes of people’s concept of righteousness and profits, so the traditional notion of “stressing righteousness while neglecting profits” and “avoiding mentioning profits and properties” adhered since Qin and Han dynasties was greatly impacted. Li Guan was the first scholar who had proposed that “the able and virtuous emperors and the competent officials must put top priority on the development of economy.”²⁴ Later, “the school of utilitarianism” gradually came into being, with Ye Shi in Southern Song Dynasty as the most prominent scholar in this school. What’s more, the traditional policy of “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce) was also challenged by those open-minded scholars. For instance, in later Ming and early Qing Dynasty, Huang Zongxi and Tang Zhen had put forward tit-for-tat proposals that “industry and commerce are the essence” and “agriculture and commerce are also the essence”. All these factors had further enriched and developed the civil legislations.

First, with the development of feudal market economy, in certain aspects, the civil legislations had reached a comparably perfect degree.

Civil legislations in Song Dynasty could be found in *Song Xing Tong* (*The Penal Code of Song Dynasty*), *Qing Yuan Tiao Fa Shi Lei* (*Legal Provisions and Cases in Year of Qing Yuan*) and some other laws. Even in *Ming Gong Shu Pan Qing Ming Ji*

²⁴*Li Guan Ji* (*The Collected Works of Li Guan*).

(*Collections of Enlightened Judgments*), a number of civil provisions were compiled. The following were some excerpts:

Households may be divided at the end of the mourning period for parents. The various village services will thereafter be executed by turns in line with the numbers of the kitchens of the separated households (now cooking for their own families).

If the properties of the households which have the duty of village service are twice as much as those of ‘Bai Jiao’ (those who have not enlisted in the army in ancient China) who have no duty of village services, this household can be exempted from services for ten years and be classified as ‘Bai Jiao’ (those who have not enlisted in the army in ancient China).

The land owned by an official should be reduced by half according to the original provisions about the restrictions on the land owned by officials, with him exempted from services. After his death, his successor is permitted to use his official title during his lifetime and own land which is half the size of the land he used to own. If his sons and grandsons are separated, no matter how many households there are, the total amount of land owned by them shall not exceed half the size of the land owned by him when he was alive.

All the cases which had involved the transferring of lands or buildings will not be accepted by the authorities, if three years have been spent in arguments over the debts, interests, exchange, and the like.

In all cases involving the transferring of lands or buildings, the former owner should vacate the land or the house. If the land has been divided into parcels through conditional sale, he is not allowed to become a tenant himself.

If the household has no offspring and needs to adopt an heir, the establishment should follow the orders of elderly relatives who are the respected leaders in the paternal lineage line. As for its property, if there are no unmarried, divorced and returned daughters within the family, the heir should be given one third of the property, the rest should be confiscated by the government.

After the grandparents and parents have all died, if someone has privately kept the money to himself after selling the divided land or buildings conditionally, the land and buildings shall be returned according to the law, and the one who has sold it shall be ordered to return the money. If the land or buildings have been conditionally sold for over ten years, they should not be returned, only with the money recovered from the liable person. If the sales of land or buildings have been done for over ten years and the liable person is already dead, or, if the deals have been closed for over twenty years, such cases will not be accepted by the authorities.

If the contracts are ambiguous and were concluded over twenty years ago, and the buyers and owners have all died, such cases will not be accepted by the authorities.

The government will not accept the cases concerning the divisions of property when no complaints alleging unfairness have been lodged three years after the division; the complaints dealing with the terms of last testament will not be accepted by the authorities if ten years have passed.

If the Buddhist and Taoist clergymen have resumed the secular life because they have committed crimes, they are entitled to have an average share of the property handed down by the ancestors even if their families have already divided the bulk of their property.

A woman’s property is shared together with her husband who should be the principal party.

A widow without an heir or whose heir is under sixteen is not permitted to sell the lands or houses.

In the cases in which someone has sold the stolen goods or sold goods to different people, and if the buyer knows the situation, the money he spent should be confiscated; if the buyer turns himself in, or, he does not know the situation, the money he spent shall be returned to him for good reason. If the convicted cannot return all the money, the ‘Ya Bao’ (middleman) who knows the situation shall pay the rest.

After a piece of land or a building has been conditionally sold, when it has been certified by an official seal and becomes taxable, the authorities will calculate the taxes, list the amounts due, and collect them.

In the cases in which someone has conditionally sold his land for over three years, if he lodges a lawsuit asking to sell his land at a lower price and use the money to pay off his debt, such cases will not be accepted by the authorities.

Those who are without sons or grandsons are permitted to adopt someone of the same patrilineal group who is of appropriate age and generation.

It should follow the orders of the grandparents and parents in adopting an heir. If a family line has no sons, then it should follow the opinions of the relatives with blood ties who are the respected leaders in the paternal lineage line.

It should follow the orders of the elderly relatives who are respected leaders in the paternal lineage line to installing an heir in a household where grandparents and parents are dead.

If in a household, the husband is dead while the wife is still alive, it should follow the order of the wife to install an heir.

Those without sons or grandsons are permitted to adopt someone of the same patrilineal group as an heir who is of appropriate age and generation.

The cases involving the adopted sons are not allowed to be accepted by the authorities, when the grandparents and parents of an adopted son have died, or, even if the adopted son himself is still alive, the parents and grandparents who have raised the child are all dead, whether the allegations are put forward by other persons or by the adopted sons themselves.

All infants under three years old who have different surnames may be adopted. Because they are to take the surnames of the (new) family, the parents of the adopted are allowed to petition to the officials to append their names to the family register. Legally they have the same status as natal sons and grandsons.

Males at the age of fifteen and girls at the age of thirteen are allowed to get married.

If the grandfather and father of an adopted son or grandson have died, the grandmother and mother of the adopted are not allowed to send him back to his original family for no reasons.

If a household has no sons, all its properties should be granted to the unmarried daughters.

If a household has no sons but it has adopted an heir, if there are unmarried daughters in the household, they should be given one fourth of its total property to them.

When the parents are dead, the sons and daughters will divide the property, with the daughters receiving shares half as many as those of their brothers.

Anyone who has conditionally sold his land or building to different people shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes.

A widow without a son or grandson who has arbitrarily sold or sold all the lands or houses is liable to be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes, with the property being restored to its rightful owner. The party giving the money (the buyer) and the ‘Ya Bao’ (middleman) who knows the situation shall be punished equally.

Conditional sales of land or buildings shall all be completed by the conclusion of contracts, of which the party giving the money (the buyer) and the rightful owner shall each possess one copy.

In the cases involving disputes over land or buildings, if the contracts are ambiguous and were concluded over twenty years ago, and the buyers and owners have all died, such cases will not be accepted by the authorities.

When the time limit of the conditionally sold land expires, the owner is allowed to redeem it before the deadline of the court session. If the creditor has deliberately delayed and continued to occupy the land, he is to be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes.

When a previous promise is broken, and the woman is married to another person, she shall be arrested and returned to the original husband as promised.

If a married man is transferred to be taken into custody in other places away from his home village, his wife is permitted to divorce him. If the husband has been away for three years, the wife is permitted to remarry, etc.

In Qing Dynasty, the independent civil legal standards were compiled in “Hu Lv” (Statute on Households) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) and *Hu Bu Ze Li* (*Regulation is for the Board of Revenues*), which included the following items:

If a document has been signed for the division of households and the family property, it is not allowed to divide it for a second time or to file a lawsuit to the court.

If a contract of selling a family estate contains the term that if the property has been foreclosed, it will never be redeemed, the seller is not allowed to try to redeem it; but if the contract contains no such term, the seller can redeem it.

In households where the parents are alive, their sons and grandsons can divide the properties up, with their permissions (but it is not permitted to change their registers).

Any disputes over the mountain land for cemeteries should be evidenced by the certificate, the name, and the acreage of the mountain.

Those who have no sons or grandsons are permitted to adopt the son of their nephew as an heir, who is in the same patrilineal group and who is of appropriate age and generation.

The engagement should be made out of the free will of the two families with the conclusion of a wedding certificate, and then the marriages should be arranged according to customs; in addition, marriages and weddings of men and women should all be presided over by their parents.

From the above-quoted provisions from the civil laws of Song and Qing dynasties, it could be seen that the boom of feudal economy since Song Dynasty had pushed the civil legislation towards a new stage. There were so many civil legislations since Song Dynasty that if they had ever been compiled, there would have been a feudal civil code with Chinese characteristics, let alone those civil customs in the wide-spread family precepts and clan disciplines. Therefore, from the perspective of historical development, the Chinese civil legislations would also have taken an independent road of development, even if there had been no stimulus from abroad in the middle period of the nineteenth century.

Second, the civil legislations had become much more specific about the acknowledgement of property right.

In the early period of Song Dynasty, for the purpose of the stabilization of the economic order, a decree was issued by Emperor Taizu of Song Dynasty that “a consistent cultivation of land is equal to its permanent ownership”, and “if the landowner does not show up to claim his rights, the tenant can take possession of the land after he has worked on it for five years”.²⁵ To protect the rights of proprietors, any sales of land or houses had to be completed by the conclusion of contracts so that they could get official recognition from the government. It was written in volume 26 of *Song Xing Tong* (*The Penal Code of Song Dynasty*) that “as for the sales of land or houses..., they should get official permits beforehand, and then they can be sold out of free will”. The official stamps on the contracts were called “Red Stamp”, an official certificate from the government to acknowledge the ownership of proprietors, which could be used as a credential in civil litigations caused by disputes, as was expressed that “any lawsuit about the landed estates shall be decided

²⁵ “Shi Huo Zhi” (Records of Food and Commerce) in *Song Shi* (*The History of Song Dynasty*).

according to the contract with a red stamp on it”.²⁶ If the original owner still had the contract after the wartime, then “with clear boundaries of the land, the official in charge of farming land in the relevant ‘Zhou’ (subprefecture) or ‘Xian’ (county) should return the land to the original owner immediately; otherwise, the owner is allowed to file a lawsuit to the court at any levels, and severe punishment should be imposed upon the official responsible”.²⁷ This provision was different from those in Han and Tang dynasties in that it had indicated the strict protection of the rights of private ownership. Nonetheless, if “the conclusion time of a contract is unclear but at least fifty years have passed since then”, “the land shall be owned by the tenant who is farming it”; “if one continues to bring the case to the court, the case shall be closed by giving the punishment of ‘Zhang’ (flogging with heavy sticks) for eighty strokes”, which was in favor of the actual owner of the land. For this sake, there were even some experts in Song and Ming dynasties to draw *Yu Lin Tu Ce* (*Land Register Books with Fish-scale Like Maps*) to record the locations, the names of owners and other important information of the real estates. Besides, it had contained corresponding stipulations about the discovery of hidden objects, the acquisition of lost objects, the disposal of drifting objects, the possession of ownerless objects and the ownership of the yields of production.

In Ming Dynasty, there were large quantities of plantations and various types of official lands possessed by the members of the royal families and eunuchs. But there was no such institution as the system of “Jun Tian” (granting land to peasants according to the number of members of their families but granting land to the imperial family, aristocrats and officials according to their specific social estates) under which certain amount of land was entitled to the common people; instead, it was a situation where “it was totally up to oneself to own a piece of land with either a large or a small amount”.²⁸ Therefore, the orientation of legislations was transformed from “the cases in which people had occupied too much land” to “the cases in which people had pettifogged about the acreage of their land and evaded state taxation”. Accordingly, anyone who “had pettifogged about the acreage of their land and evaded state taxation” would be given the punishment of “Chi” (flogging with light sticks) or “Zhang” (flogging with heavy sticks) with “their land confiscated and the taxation recovered”; if “the head of the village knew the fact but had concealed it”, he would be convicted for the same crime as the offender.

In Qing Dynasty, a field investigation had to be undertaken to confirm the ownership besides a stamped certificate, as was stated in the provisions supplemented in the 13th Year of Qianlong (1747):

Anyone who litigates about the ownership of the mountain land for cemeteries in recent years has to present the stamped certificate to support his claim. If it is about a case long time ago, the name and the acreage of the mountain as well as the stored map together with the receipt of taxation should be investigated and examined. If the result is consistent with the plaintiff’s claim, the court shall decide the case in favor of the plaintiff. Otherwise, if the

²⁶ *Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*).

²⁷ “Shi Huo Zhi” (Records of Food and Commerce) in *Song Shi* (*The History of Song Dynasty*).

²⁸ Xue Yunsheng, *Tang Ming Lv He Bian* (*A Collection of Laws in Tang and Ming Dynasties*).

result is inconsistent or the receipt of taxation is not provided, the old certificate or any records on a stone tablet shall not be taken as credentials to prove his ownership, for this reason, he shall be punished in accordance with the law for launching a false accusation about the possession of land.²⁹

Third, the legal protection of pawning rights had been regulated in the civil legislations.

The pawning rights referred to the rights of the pawnee to possess and benefit from the immovable property which was pawned by the pawner and for which the pawnee had paid a price. When the pawning term expires, the pawner could redeem his property by paying back for it, and if the pawnee had damaged the property on purpose or unintentionally, he would bear the responsibility of compensation. As for pawning and selling, the following interpretations had been made in *Da Ming Lv* (*The Great Ming Code*): “the act of pledging a real estate to another person for some money is an act of pawning, while that of giving a real estate to another person for some money is an act of selling. The pawned property can be redeemed while the sold one cannot.” The pawning and selling of real estates originated in the middle period of Tang Dynasty. A precedent of “pawning fertile land” had been recorded in “Lu Qun Lie Zhuan” (The Biography of Lu Qun) in *Jiu Tang Shu* (*The History of Old Tang Dynasty*). In Song Dynasty, pawning had become popular, and in that period, the main characteristic of laws concerning pawning was the protection of the interests of pawnees. For instance, it was stipulated that only when the contract was “verified to be the right one” could a pawner redeem his property; if “the pawner could not present the contract or present a contract that could not be verified, he should not redeem what he had pawned”. Meanwhile, pawning the same object to two different people was strictly prohibited; otherwise, the pawner, the middleman, the witnesses among neighbors, and anyone who had signed their names on the contract “should return the money which they have profited by deceiving from the second pawnee, and should be punished for larceny; those who have shared no profit should be given the punishment one degree lighter but should still be fined as a compensation for the deceived”.³⁰ If the pawner was not able to pay the money back, the middleman and the witnesses among neighbors who had signed their names on the contract should bear the responsibility together to compensate the loss of the second pawnee, while the pawned object should still be in the possession of the first pawnee. When a real estate was to be pawned, the relatives and neighbors of the household had the preemption of it, but if the relatives or the neighbors “could not offer an appropriate price, the owner could pawn it to a pawnee who had offered a better price”.³¹ After the owner had pawned his real estate, anyone who wanted to buy it “should first meet with the pawnee and ask to buy the pawning.... Then, he

²⁹“Dao Mai Tian Zhai Fu Li” (Supplementary Precedents for “stealing and selling others’ lands and houses”) in “Hu Lv” (Statute on Households) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*).

³⁰“Dian Dang Zhi Dang Lun Jin Wu Ye” (Real Estate Should Only be Included in Pawning) in *Song Xing Tong* (*The Penal Code of Song Dynasty*).

³¹Ibid.

should draft another contract to buy in the real estate in his name.... So the other relatives or neighbors did not need to be informed”.

In Ming Dynasty, the pawning and selling of real estates were officially legitimate only after “the contract tax being paid”. “Anyone who pawns or sells his estate without paying the tax shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for fifty strokes”, and “anyone who pawns or sell his estate shall pay the contract tax..., anyone who does not pay it shall be given the punishment of ‘Chi’ (flogging with light sticks) for forty strokes for one *mu* to five *mu*, and the punishment shall be one degree severer for every five *mu* more, up to the punishment of ‘Zhang’ (flogging with heavy sticks) for a hundred strokes; moreover, the land shall be confiscated by the government”.³² The tax on contract means that “a contract has to be reported to the department of taxation and get taxed according to the law”. Furthermore, it was provided in *Da Ming Lv* (*The Great Ming Code*) that the subject matter of pawning and selling shall be objects instead of human beings, therefore, “anyone who pawns or sells his wife or concubines to others for money shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes and anyone who has accepted the wife or concubines shall be punished by ‘Zhang’ (flogging with heavy sticks) for sixty strokes while the women involved shall not be punished”.³³

In Qing Dynasty, in order to protect the interests of pawnees, the procedures of pawning and selling were further specified. For example, in the eighth Year of Yongzheng (1729 A.D.), a regulation was promulgated:

If a contract with no clause about the redemption has been concluded to finalize the sale of a real estate, the property shall be redeemed under no circumstances; if the contract carries no words of ‘foreclosure’, or it contains note of the time limit for redemption, it can be redeemed accordingly. But if the seller has no money to redeem it..., a sales contract shall be concluded to have it finalized.

In the 21st year of Qianlong (1755 A.D.), another regulation was promulgated:

If a contract has been concluded for over thirty years and it contains no note of the redeemer, even if it carries no words of ‘foreclosure’, it shall be taken that the property involved has been sold out and it shall never be redeemed.

Besides, it was required that any contract of pawning should be marked with the word “redeem” and that any contract of selling should be marked with the words “never to be redeemed”. It was even provided in *Hu Bu Ze Li* (*Regulations for the Board of Revenues*) that both parties must “go to the governments at the level of ‘Zhou’ (subprefecture) or ‘Xian’ (county) in person to confirm the location of the estate in the official map and pay the contract tax; then they should divide the contract into two parts which should carry the serial number of the

³²“Dian Dang Tian Zhai” (Pawning Lands and Buildings) in “Hu Lv” (Statute on Households) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

³³ Ibid.

contract, the names in detail and the price concerned, of which the first part should be given to the proprietor and the second part to the official department for verification”. Furthermore, in order to guarantee the mutual fulfillment of rights and obligations, in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* it was rigorously prohibited to have any double pawning of the same object, in addition, anyone who had violated this should be punished for the crime of larceny, with the money which he had obtained recovered and returned to the second pawnee. It was also provided that any pawnee who had intentionally delayed the redemption by excuse should be sentenced to the punishment of “Chi” (flogging with light sticks) for 40 strokes, and anyone who did not pay tax while concluding a contract of selling his real estate would be sentenced to the punishment of “Chi” (flogging with light sticks) for 40 strokes together with half of the recovered money confiscated into the state treasury.

Fourth, the new development of the law of obligation.

In Song Dynasty, as tenancy system had become a major way of exploitation, the tenancy contract became one of the principal forms of contracts, according to which, the landlord could collect a fixed land rent or proportioned rent from his tenants. It was pointed out explicitly in an edict issued in the seventh year of Taiping Xingguo (982 A.D.) that “the contract should be concluded with clearly stated clauses..., and (the ripened crops) should be divided in accordance with the contract”.³⁴ If a tenant owed the landowner land rent, the government should be responsible for urging him to pay it off. And “from the first of October to the 30th of January of the next year in Chinese lunar calendar, all local magistrates shall be open to hear the lawsuits of the landlords and be responsible of urging tenants to pay the due rent in time”.³⁵

Apart from the tenancy contract, debt contract was also a very prevalent form of debt in society. In Song Dynasty, in order to enforce the fulfillment of debt contract, it was stipulated in *Song Xing Tong (The Penal Code of Song Dynasty)* that “anyone in debt who does not pay off his debt according to the contract shall be sentenced to the punishment of ‘Chi’ (flogging with light sticks) for twenty strokes; if the debt is worth more than one *pi* and the debtor has exceeded the time limit for over twenty days..., he shall be forced to pay the damages of the creditor”. It was stipulated in an edict issued in the second year of Yuanfeng (1079 A.D.) that “if the debtor does not pay off the debt when the time limit expires, he shall pay a fine of 2 % of his debt to his debtor in addition to the interests every month.”³⁶ In *Qing Yuan Tiao Fa Shi Lei (Legal Provisions and Cases in Year of Qing Yuan)*, there were the following provisions:

If someone in debt does not pay off the debt according to the contract, the local authorities shall be responsible to urge him to pay it off. If the debtor runs away, the guarantor himself

³⁴“Shi Huo” (Food and Commerce) in *Song Hui Yao Ji Gao (Collections of Historical Records in Song Dynasty)*, Vol. 1.

³⁵*Huang Shi Ri Chao (The Notebook of Huang Zhen)*, Vol. 70.

³⁶“Investigations of the policies of Jun Shu (a financial policy), Shi Yi (a policy to stabilize market) and He Mai (fair dealing)” in *Wen Xian Tong Kao (A General Textual Research of the Documents)*, Vol. 20.

shall pay it off for the debtor. However, neither of them shall be put into prison.... As for the pawning relationships, if the pawner does not redeem his property within the time limit, the private contract shall be executed accordingly.

The above-mentioned regulations had fully shown the legal protections provided by the government for the interests of creditors. Moreover, there were more specific provisions about the guarantee of debt, such as “three people acting as guarantors of debt” and “the guarantor paying off the debt for the debtor”. However, if the debtor “has been robbed, he does not have to pay off the debt...., or, in the common sense, a debtor who has died has no means of paying off his debt”.³⁷ Besides, “if a private debt has been in existence for ten years, moreover, both the debtor and the guarantor have died and no property could be used to pay off the debt, the debt shall be naturally exempted”.³⁸ In a word, the enactment of these provisions was inherently related to the historical background of Song Dynasty, and it had become one of the causes of the continuous peasant uprisings in Song Dynasty that the debtors were severely and exceedingly exploited. Consequently, to a certain extent, the ruling class was forced to loosen its rigid control of the lower class by those grave class conflicts. As to the shortening of the time limit of the validity of laws and regulations, it had precisely reflected the accelerated circulation of property as well as the progress of civil legislations.

In Ming and Qing dynasties, with the weakening of extra-economic exploitation of the people, in debt relationships, “paying off the debt by enslaving oneself and his other family members” was prohibited, so it was allowed for the creditors to force the debtors or their wives and concubines, or sons and daughters to pay back their debts by means of enslaving themselves to him. Even if the debtors had agreed to let their wives and concubines, or sons and daughters enslave themselves, the creditors still would be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for a 100 strokes. If a creditor had forced his debtor to pay off the debt by enslavement, he would be sentenced to the punishment of “Zhang” (flogging with heavy sticks) for 70 strokes and one and a half years of imprisonment; if, due to this, he had raped the debtor’s female family members, he would be strangled to death.

Fifth, “Qi Min” (Members of the Eight Banners of Manchu, the emperor’s clan, also referred to as “Qi Ren” in Chinese history) was prohibited from transferring their property.

Qing Dynasty was a feudal regime dominated by the noble families of Manchu, so the national color was also reflected on the civil legislations. For instance, according to law, all people from the Han Nationality were strictly prohibited from selling or pawning the land of “Qi Ren” (the members of Eight Banners, the emperor’s clan) in order to uphold their economic advantages. However, in reality, because many of the “Qi Ren” (the members of Eight Banners, the emperor’s clan) had no means of living after their entry into Shan Hai Guan Pass, they were living in dire

³⁷ *Wen Yuan Ying Hua (Elites of the Literal World)*, Vol. 42.

³⁸ *Song Xing Tong (The Penal Code of Song Dynasty)*, Vol. 26.

poverty, consequently, they had no choice but to pawn or sell their lands to the people of Han Nationality, which was quite a usual phenomenon at that time. During the reign of Emperor Kangxi (1662–1722), for several times, the central government had even redeemed the land of “Qi Ren” (the members of Eight Banners, the emperor’s clan) by using national treasury. Till the reign of Emperor Qianlong (1735–1795), a decreed regulation was issued in the 19th year (1753) to prohibit the transferring of the land of “Qi Ren” (the members of Eight Banners, the emperor’s clan), and another regulation was promulgated in the 28th year (1762) to forbid the servants of “Qi Ren” (the members of Eight Banners, the emperor’s clan) to buy land from the other ones. Subsequently, another regulation was made in the 34th year (1768) to prohibit the people in the capital from buying lands from “Qi Ren” (the members of Eight Banners, the emperor’s clan) and a thorough investigation was carried out to check up the lands which had already been transferred. It was stated in the regulation that “anyone who has voluntarily reported the transferred land can get the land redeemed with the money sponsored by government and then rent it out to make a living; anyone who has concealed the truth and has not reported it, or anyone who has pawned or sold his land by ignoring the decreed regulation shall be punished with his land confiscated by government”. In February of the 15th year of Qianlong (1749), Giuseppe Castiglione, the Italian royal painter of the imperial palace, had privately pawned the public land, so he should have been punished accordingly; however, Emperor Qianlong he had shown his benevolence and forgave him and his land was exempted from redemption.

Before the 45th year (1779 A.D.) of Qianlong, the selling and pawning of the houses of “Qi Ren” (the members of Eight Banners, the emperor’s clan) were restricted rather than prohibited. After that, a regulation was made that the houses of “Qi Ren” (the members of Eight Banners, the emperor’s clan) inside or outside the capital should not be pawned or sold; otherwise, the property would be confiscated and the infringer should be punished accordingly. Nonetheless, the economic exchanges among Manchu people were really necessary, so it could not be completely banned despite the prohibitions of the law. Till the second year of Xianfeng (1852), it was advocated by “Hu Bu” (Board of Revenues) that “it would actually be a nominal enforcement if the private transactions were banned according to the previous regulations, so the transactions should be permitted with the imposition of tax accordingly”.³⁹ In the fourth year of Tongzhi (1865), a specific provision was made about the land of Manchu people in the region of “Shun Tian” (the capital) and “Zhi Li” (now Hebei province) that “Manchu people are allowed to transact their lands among themselves, and taxes should be paid accordingly”.⁴⁰ Meanwhile, it was stipulated that “if the land of Manchu people is pawned through a contract, the time limit for redemption shall be twenty years (ten years in common cases), besides, the land can be redeemed within the time limit, or be sold out if the pawnier is unable to redeem it”.⁴¹

³⁹“Tian Fu” (Taxation on Land) in *Hu Bu Ze Li (Regulations for the Board of Revenues)*.

⁴⁰“Tian Fu” (Taxation on Land) in *Hu Bu Ze Li (Regulations for the Board of Revenues)*.

⁴¹ *Ibid.*

Sixth, there was a new inheritance system in which an heir could concurrently inherit two clan pedigrees.

In Ming and Qing dynasties, such a system began to prevail in society. Yu Yue wrote in the tenth volume of his book *Yu Lou Za Zuan* (*Miscellaneous Essays of Yu Yue*) that:

An heir inheriting two clan pedigrees was a special situation under the reign of Emperor Qianlong.... During the reign of Emperor Daoguang, ‘Fu Zhi’ (mourning apparel system or the system of wearing different clothes at funerals to show different relations) was discussed. When the lineal son of a clan became the heir of another clan at the same time, he has to mourn his biological parents in the grandest mourning apparel for three years, and mourn the parents of the other clan in the second grandest mourning apparel without carrying the mourning flag. When the son of the other clan became heir of the lineal clan at the same time, he has to mourn his biological parents in the second grandest mourning apparel without carrying the mourning flag and mourn the parents of lineal clan in the grandest mourning apparel for three years. This system was appropriate because the lineal clan was granted with the supreme respect by ‘Li’ (rites).

So, such a system represented a new progress in the aspect of inheritance in the patriarchal clan system.

In conclusion, the codifying style of “the integration of various laws with no differentiation between civil and criminal laws” was passed down from one dynasty to another with slight modification on the basis of different national conditions, and it had become quite conservative after long time of implementation. However, the legal system in which “the various laws coexisted with the civil and criminal laws differentiated” had been continuously enriched with the progress of society. Moreover, as the constituents of the system, different departmental laws had also become more and more independent. From the perspective of its track of development, even if there were not the Opium War in 1840, the Chinese legal system would have also broken through the bondage of ancestral tradition and stepped onto the road of modernization.

Chapter 12

Revising Laws by Legislation and Citing Precedents by “Bi Fu” (Legal Analogy)

12.1 The Status of the Statute Laws in the Traditional Laws

Among the famous legal systems of the world, the continental legal system, with a long history and great influence, is characterized by its emphasis on the authority of the statute law of the state, its focus on the completeness and the orderliness of the classification of the systems, and its strict restrictions upon the settlement of the lawsuits by judges according to statutes instead of legal precedents. On the contrary, in the Anglo-American legal system (a legal system in England and most of the U.S.) the court decisions are regarded as the common laws which are applied nation-wide, therefore, it is also called the Case Law system. But the statute laws also exist in the Anglo-American legal system and they have become the key bases of criminal judgments by gradually replacing the legal precedents especially since the twentieth century. However, whether civil and criminal substantive laws or procedure laws, in the Anglo-American legal system, they were formed by the induction of legal precedents, so a unified code was lacked. The Chinese legal system is similar to the continental one in the aspect of emphasizing the state statutes and regarding code as the sources of basic laws, moreover, it has also shared a common ground with the Anglo-American legal system in regarding the legal precedents in convictions as the supplements to statutes. However, the Chinese legal system is unique with its own obvious features, which are determined by the state condition, social convention, cultural tradition, national psychological state and the special natures of thinking modes in ancient China. In addition, it is gradually formed in the struggle to meet the needs of survival and development of the Chinese nation. As far as the mutual complementation and integration of statute and legal precedent are concerned, it is one of the features as well as the advantages of the Chinese legal system.

There were no distinctions between the definition of statute (written laws) and that of case law in ancient China. Seen from the process of the creation of Chinese law, it was an important clue that cases, formed by the juridical officials' summary of the trial experiences, were gradually acknowledged as the general mandatory codes of conducts. The saying in the ancient books that “laws were made by

Gao Tao (a juridical official in Shu period before Xia Dynasty)” should not just be regarded as a traditional hearsay with its value neglected. It was also illustrated in the connection of the original meaning of law and “Zhi” which was a beast-god in charge of settling lawsuits. Therefore, it could be deduced that “laws came from cases”, namely, after synthetical processing, most cases could become general legal regulations and consequently give guidance to the juridical practice. As to the juridical officials, they had played important roles in sublimating the typical cases into legal regulations during daily trials.

With the emergence of state, social relationships had become daily complicated and various disputes increased constantly, which had required more legal regulations and adjustments, therefore, legislation and the establishment of legal systems had become important activities of the state. The saying like “*Yu Xing* (*The Penal Code of Yu*) was made because of the instable condition in Xia, *Tang Xing* (*The Penal Code of Tang*) was made because of the turmoil in Shang, and *Jiu Xing* (*The Code Nine Penalties*) was made because of political decay in Zhou” could well be regarded as the beginning of written laws in those three dynasties, and they were made by each state in order to adjust the various kinds of relationships and settle the different kinds of conflicts. As to the *Xing Shu* (*The Penal Code*) made in Zheng State and the penal tripods (the penal code carved on an ancient cooking vessel) casted in Jin State during the Spring and Autumn period, they were just the measures which were adopted so as to popularize the state-made statute laws to the society.

It was shown in *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty) unearthed from Shuihudi in 1975 that as early as the fourth century B.C., the state statutes had already become meticulously detailed. The fields which it had adjusted involved the state, society and family, and as it were, “laws exist in almost everything”, from production to living, from individual to livestock and from state to family. If Roman law was regarded as the typical private law of slavery, then *Qin Lv* (*Qin Code*) also might be regarded as the most complete public law of early feudalism.

With the development of state statute, a series of legislative principles had already been formed during the period of slavery in China. For instance:

1. Special legislation for specific objects. After Xia was replaced by Shang Dynasty, in view of the fact that the rulers and ministers were mostly immoral at the end of Xia Dynasty, “*Guan Xing* (*Criminal Punishments on Officials*) was specially made to give warning to those civil servants”.¹ It was stated in *Kong Zhuan* (*The Biography of Confucius*) that, “a penal code was made by Emperor Tang for the governing officials so as to have them warned and controlled.” Although it was difficult to have a textual research about the official punishments in Shang Dynasty, and the reliability of *Yi Xun* (warnings made by Yi Yin in Shang Dynasty) was also questionable, it had been proved by *Wei Li Zhi Dao*

¹“Yi Xun” (Warnings of Yi Yin in Shang Dynasty) in *Shang Shu* (*The Book of Historical Document*).

(*The Way of Being an Official*) in Qin bamboo writing slips unearthed that there were indeed established traditions for the laws of the governing officials in ancient China, and it could be imagined that there must be a very long process of accumulation and experience of development before *Wei Li Zhi Dao* (*The Way of Being an Official*) of Qin Dynasty was drafted. Besides, from the “Guan Zhen” (warnings for officials) which had been handed down by the later generations and the continuous perfection of the laws for supervising officials after Qin Dynasty, the development and origin of this special officials-oriented legislation had also been explained.

2. Making different laws according to specific time and place. The idea of “enforcing different punishments according to different situations” put forward in the chapter of “Lv Xing” (*The Penal Code of Lv*) in *Shang Shu* (*The Book of Historical Document*) was a major principle which had reflected the different legislations. In Kong Yingda’s annotations, this so-called “according to different situations” meant to “enforce punishments after considering what is appropriate for the situation.” It was stated in *Zheng Yi* (the annotations of Confucians’ classic and books of history in ancient times) that, “the punishments should be leniently or severely enforced according to the situation, namely, penal codes should be made in consideration of the situation.” The saying of “laws being changed with the times” by the later generations just came from the saying of “enforcing different punishments according to different situations”, which was in accordance with the development of law. Laws themselves were just the products of time, therefore, only the laws which were synchronized with times were plausible, and otherwise, they were not. Besides, it was said in the “Da Si Kou” (the senior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li* (*The Rites of Zhou Dynasty*) that “lighter punishments shall be applied to the newly-established states, severer punishments shall be applied to the turbulent states and in the peaceful states, moderate punishments shall be applied”, which was annotated by Zheng Xuan as the following: “codes with lighter punishments should be carried out in a newly-established state, implemented by a new king on a newly-explored land, because the subjects were not accustomed to be moralized; the moderate punishments should be carried out in the peaceful states where stability were maintained and the previous achievements were safeguarded, and codes with severe punishments should be carried out in the turbulent states which were full of usurpations, regicides and treason with the aim to moralize, attack and eliminate the evils.” The situation where there were three different codes for three different states had indicated that different laws were made and practiced according to different situations, which was both needed in the legal construction in accordance with reality and based on policies and strategies.
3. Legislating with reference to “Li” (rites). “Li” (rites) is a special code of conduct developed on the soil of Chinese nation. Originated from the rites of religious sacrifice, it was then endowed with obvious political implications by the authorities after the entry into the class society. After “Li” was made in the early Zhou dynasty, the Duke of Zhou had its regulations systematized and its inherent religious features removed so that it had become the main principle and law to

guide the activities and social life of the state. The principle of “Li” (rites) is “Zun Zun Qin Qin” (showing respect to nobility represented by the emperor and showing respect to relatives represented by parents), of which “Zun Zun” means loyalty, with the aim to defend the ruler’s authority, while “Qin Qin” means filial piety, with the aim to defend paternity. “Li” (rites) was functioned to spread the code of conducts centered on the ruler’s authority and paternity to the whole society and make such codes the standards of “distinguishing the noble from the humble and the superior from the inferior”. Xunzi had said, “It is the meaning of ‘Li’ (rites) that there should be social stratum between the noble and the humble, there should be disparities between the old and the young and there should be differences between the poor and the rich, the minor and the major.”² If ‘Li’ (rites) was the standard to define social hierarchy, then law was the mandatory measure for defending it. Therefore, ‘Li’ (rites) was highly praised as “the discipline of high and low and the principle of ‘Tian’ (heaven) and ‘Di’ (earth)”³; moreover, it was put at the first place in the slavery superstructure of “Li” (rites), “Yue” (music), “Zheng” (government), and “Xing” (punishment), as was described that all “undertakings without ‘Li’ (rites) will not be completed and a nation without ‘Li’ (rites) will not be peaceful”.⁴ As for the relationship between “Li” (rites) and law, the two were consistent with each other, namely, the infringing of “Li” (rites) meant the violation of law, and vice versa. However, the scope of affairs regulated by “Li” (rites) was far wider than that by law, and its function of controlling the spirit had infiltrated the society in depth. Therefore, “Li” (rites) was meant to prevent the misconducts from happening before-handed, while laws to implement punishments after the occurrence.

“Making laws with reference to ‘Li’ (rites)” was a major principle in making state statutes. For instance, according to the principle of “Zun Zun” (showing respect to nobility represented by the emperor), the laws for the punishment of the crimes such as regicide, disobeying the king’s orders and changing class and social status were made; and according to the principle of “Qin Qin” (showing respect to relatives represented by parents), the systems for the protection of the patriarchal clan, the laws for the succession of the throne and the distinctions between the noble and the humble were implemented. Since Xia Dynasty, the unfilial conduct had been considered as a felony, and starting from the early three dynasties of Xia Shang and Zhou, this principle had been applied throughout the whole feudal society.

4. Legislating according to the ruler’s orders. After entering into the class society, the autocratic political system was established in China in which the ruler had possessed the supreme powers of administration, military, legislation and jurisdiction. The modes of legislation in the three dynasties of Xia, Shang and Zhou were mainly “Shi” (standard), “Gao” (imperial mandate) and “Ming” (command), all of which were issued in the names of Kings to show the

²“Fu Guo” (On Enriching the State) in *Xunzi*.

³“Zhao Gong Er Shi Wu Nian” (The 25th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

⁴“Xiu Shen” (Cultivating one’s Morality and Character) in *Xunzi*.

superiority of their authorities in legislations. For example, according to a record in “Gan Shi” (the military order issued at Gan) in *Shang Shu (The Book of Historical Document)*, a martial law was issued by Emperor Jie of Xia Dynasty in the war broken out in Gan (the present county of Hu in Shanxi province) which stated that, “I warn you..., that today I am honored to carry out the punishment from the heaven..., if you obey the order to fight, you would be rewarded in your family shrine, otherwise, I would order your children to kill you in your own house”. This had reflected that whatever the king said was law and he had the rights to determine the life and death of a person. In addition, according to “Tang Shi” (an order issued by the king Tang of Shang Dynasty when attacking the state of Xia) in *Shang Shu (The Book of Historical Document)*, “the Xia is guilty, so I have to bring order to the universe out of reverence for the heaven..., you are held in high esteem for assisting me in accomplishing the punishment of the heaven..., if you don’t obey this oath, I will order your children to have you killed without any exception.” Besides, the martial law issued by the Emperor Zhou when attacking Shang Dynasty was also recorded in “Tai Shi” and “Mu Shi” in *Shang Shu*. In a word, although the practice of making laws according to the King’s orders could be traced back as early as the three dynasties, it was continued throughout the whole feudal society, which had indicated that “laws are made by the kings” and “regulations are made by the imperial orders”.

After Qin Dynasty, the feudal state statute had experienced a long period of development, which had lasted for 2,000 years without any interruption.

Before seizing the power of the whole nation, in order to win people’s hearts and seize the throne, it was once declared by Liu Bang of Han Dynasty that the laws of Qin Dynasty which were featured by severe and strict punishments should be abolished and he had agreed to draw up three chapters of law with the people: “the murderer shall be punished by death penalty and the people who have hurt others or involved in stealing shall be punished.”⁵ After the establishment of Han dynasty, the principal law of *Jiu Zhang (The Code in Nine Chapters)* and the supplement 51 articles were made because “the three chapters of laws are not enough to prevent evil-doings”.⁶ With the expansion of the state activities in and abroad since the Emperor Wu, the legislation activities were increased, which was also recorded in history books: “a few statutes and orders are added and many new penal codes and articles are made”.⁷

During Wei, Jin, Southern and Northern dynasties, although some regimes had been set up and replaced quickly by others in the remote areas, legislative activities were carried out immediately by the states which were established by ethnic groups after their establishment and various codes of laws were made after their entering into the central plains of China. Some of them, such as *Bei Qi Lv (The Penal Code*

⁵“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)*.

⁶Ibid.

⁷“Chen Chong Zhuan” (The Biography of Chen Chong) in *Hou Han Shu (The History of Latter Han Dynasty)*.

of the Northern Qi Dynasty) had functioned as bridges which had linked the earlier and later stages in the history of legal system and were adopted in the laws in Sui and Tang dynasties.

In Tang Dynasty, which was a golden age of feudalism, the legislative activities were pushed up to a mature phase with greater accomplishments due to the economic, political, cultural and technological development. The modes of statute in Tang Dynasty were mainly “Lv” (criminal law), “Ling” (order or ordinance), “Ge” (injunction), “Shi” (standard), and “Dian” (code). The well-know *Tang Lv* (*Tang Code*) had become the major source of later legislations.

After Tang Dynasty, the statute in Song, Yuan, Ming and Qing Dynasty all had their own innovations and distinguishing features. Their diversified forms, complete contents, neat systems and concise dictions were rare in the history of feudal legal system around the world.

From what was mentioned above, a conclusion could be drawn that the state statute was the backbone throughout the 4,000 years of history of Chinese legal systems, which was of long standing and long stretching and unbroken. Besides, the major accomplishments were usually concentratedly made at the beginning of the newly founded states, which had shown that the founding emperors had attached much importance to and made great efforts in the drafting of the written codes, therefore, this was not accidental.

Firstly, in ancient China, the political system of absolute monarchy was implemented, in which the imperial power was supreme and the state and the emperor were considered as an organic whole, which was the so-called “‘Zhen’ (I, the emperor) being the state”, for this reason, the state was also supreme. Although it was proclaimed in all the dynasties that the family was the essence of the state and the validity of clan power and “Jia Fa” (domestic discipline exercised by the head of a feudal household) was accepted, when contradicted with state interest and law, the law and regulation concerning the state interest had to be observed to show the superiority of state over family. Since the state was supreme, the law—the written law, which had acted as the state ideology, was greatly emphasized by the rulers.

Secondly, since Xia Dynasty, a unified tribal state had been formed primarily in China. After Qin had annexed the other six states, a unified multi-national and centralized state had already been established. The goal of a great unified country was pursued by all of the famous dynasties after Qin. Subsequently, rich and powerful multi-national and centralized states were established in Han, Tang, Ming and Qing Dynasties. In order to defend the unification of the centralized country, the unified application of law was greatly stressed by almost all of the rulers, namely, a unified law was required to be applied in the whole country, including the capital city or border areas, which was closely related with the flourishing of the statute laws in the four dynasties. Besides, it was also proved by historical practices that the unified application of laws indeed had contributed both to the state stability and to the acceleration of centralization. Therefore, the enactment of statute law had always been considered as the top priority of the state.

Thirdly, the emperors in feudal periods had always expected that the throne would be succeeded by their sons or grandsons, and the whole country was ruled by

the descendants of the same surname and the same clan forever. The reason why Qin Shi Huang was called Shi Huang (the first emperor) was that he had imagined that the country could be ruled by his clan for the second and the third generation or even forever. Although his dream was broken, Qin Shi Huang (the first emperor of Qin) had provided an everlasting illusion for the later emperors. In order to ensure the later generations a long-lasting reigning, the founding emperors had all devoted themselves to the enactment of great laws which might be obeyed by the descendants of later generations. In the early Ming Dynasty, it was once stated by Liu Weiqian and others in *Jin Ming Lv Biao* (*A Memorial to the Emperor about Ming Code*) that Zhu Yuanzhang, the founding emperor (Tai Zu) of Ming Dynasty, would “make judgements by reading every completed chapter by himself..., his majesty has thought deeply about ‘Tian Li’ (the heavenly principle) and ‘Ren Qing’ (human feelings), and finally formulated the law which might be used as the yardsticks for the next hundred generations”. As soon as *Da Ming Lv* (*The Great Ming Code*) was made in the 30th year of Hongwu period, a special order was issued by Zhu Yuanzhang that “this law must be obeyed by the future generations and if any minister dares to make any changes without discussion, he shall be charged of violating the system of the ancestors”.⁸ Thus, it could be seen that Zhu Yuanzhang had connected the enactment of a great satisfactory law with the ruling of descendants in the later generations. Therefore, the ministers were forbidden to change the laws without discussion, otherwise, they would be charged of committing a serious crime of violating the system of the ancestors.

As soon as entering Shan Hai Guan Pass, the rulers of Qing Dynasty had started the process of making great laws. Up to the fifth year of Qianlong, *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was finally completed after more than 100 year of revision, and was “issued at home and abroad” to be “obeyed forever” without further revision. It was thus clear that the code which was considered as the most important thing in a state was made to ensure an everlasting ruling and ever respected authority of the rulers.

Fourthly, a written law made by the state had not only provided guidance for the state activities but also become a symbol of the stability of the political power and validity of ruling. It was just because of this that a written law was also urgently made even by the short-lived dynasties. And even under the reign of the regimes dominated by the ethnic groups, after entering the central China, the rulers had actively made laws or even simply invoked the laws from the previous dynasties. *Da Qing Lv Ji Jie Fu Li* (*Great Qing Code with Collected Commentaries and Appended Sub-Laws*) enacted in the early years of Shuzhi period was just such an example, because it was simply a transplantation of *Da Ming Lv* (*The Great Ming Code*). Although during the period of Emperor Taizong in Ming Dynasty, the rulers of Qing Dynasty had just occupied the border areas, the law which was called the law made in Shengjing (the present Shenyang) had been issued in the vassal state of Mongolia so as to symbolize its sovereignty and ruling center.

⁸“Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*).

In a word, although a complicated process and much time were needed in the enactment of a written law, furthermore, it was also conditioned by the limitation that lagged behind the lives, great importance was attached by the rulers of all times who had done their most to make the laws more completed in contents and to raise their practicability so that it was succeeded through many dynasties and was never interrupted in the history of Chinese legal system, which had formed an unique and complete tradition of law making that was rarely seen at home and abroad and had become the backbone of Chinese legal system.

12.2 The Evolution and Function of Case Law

Apart from the state statute which had acted as the core of ancient Chinese legal system, court decisions were also applied to make up for the lack of laws. In *Chun Qiu Zuo Zhuan Zhu Shu* (*The Annotations of Chun Qiu Zuo Zhuan*, a book written by Zuo Qiuming about the explanation on the history of Lu state), Kong Yingda had pointed out the limitation of written laws: “the law in written form has its limitations, because the crimes committed by people are different, moreover, because it is impossible for the written law to cover all kinds of crimes and the crimes are not always the same as are described in the law, it is naturally acceptable for the existence of some incompatibilities and inconformities between laws and crimes”. It was clear that the ancient Chinese people had realized the mutual complementary and causal correlation between statute and case laws. However, they had neither the consciousness of the contradictions of the division of the statute and the case law in the continental legal system and the Anglo-American legal system mentioned before, nor the conceptions about the statutes and case laws. In the Spring and Autumn period, Shuxiang in Jin state had attacked Zichan, a person from Zheng state, for his words in “Zhu Xing Shu” (penal codes casted): he said, “the previous kings have discussed state affairs according to the system”, and the inside meaning of the “system” mentioned by him could be understood as traditions, stories or precedents which had been in practice for a long time. In a sense, “Yi Shi Yi Zhi” (discussing official business according to the system) meant to settle new cases with the analogy of the precedents. It was annotated in “Zhao Gong Liu Nian” (The sixth year of Lu Zhao Gong) in *Zuo Zhuan* (*The Chronicle of Zuo*) that “keeping watch on current state affairs and discussing the degree of the seriousness..., no fixed laws would be announced to the public”, which had reflected the practical function of regarding “system” as the usual practice as well as its restriction to the development of case law.

From the real process of the development of legal system, it could be seen that the regulations of statute law were often limited, but the conducts in the human society were always varied. It was impossible to adjust the varied conducts with limited law articles; therefore, it was unavoidable to make judgments by analogy during the judicial practices and to have a comparison of the articles, theories, and principles in law. But, most of the comparisons were based on existing cases.

Xunzi had said during the Warring States: “When an affair is covered by the model, the model should be used as a standard for action, and when there is no provision in the model, the analogical extension of the proper categories should be used as a basis for proceeding—this is the ultimate standard in adjudicating the affairs of government”⁹ The “analogical extension” mentioned in the analogical extension of the proper categories referred to the legal principles and court decisions which should be abided by in the judicature. Therefore, analogy meant to settle cases in the light of legal principles or court decisions under the condition that there were no laws available. Because of the incompleteness of laws, it was impossible to regulate all of the complicated social relationships and the increasing varieties of crimes, precedents had been applied in trials since the early pre-Qin dynasties. Apart from the records of “Yi Shi Yi Zhi” (discussing official business according to the system) mentioned above, the saying that “in allocating labor and the carrying out punishments, the teachings of the deceased must be referred to” in “Guo Yu” (The National Language: the first book in China about history of individual countries) in *Zhou Yu* (*The History of Zhou Dynasty*) had also illustrated the regulative function of court decisions of the former dynasties on criminal trials, and it was more persuasively proved by the “Ting Xing Shi” (precedents in courts) on the bamboo writing slips of Qin Dynasty unearthed in Yunmeng, Hubei province in 1975.

Cases of legal validity during the judicial trials in Qin Dynasty had been recorded in “Ting Xing Shi” (precedents in courts). It was recorded in “Zhai Fangjin Zhuan” (The Biography of Zhai Fangjin) in *Han Shu* (*The History of Han Dynasty*) that, “it is fortunate to have regulations at present for sentence making and for guidance. Precedents are used in making sentences”, which was annotated by quoting Liu Chang: “‘Xing Shi’ or ‘Cheng Shi’ (precedents) in Han Dynasty all referred to the established cases.” In chapter 12, volume 4 of *Xing Shi* (precedents) in *Du Shu Za Zhi* (*Miscellaneous Reading Notes*), Wang Sunnian said, “Xing Shi (precedents) refers to what has been already completed. The previous cases become laws..., which are called ‘Gu Shi (old practices)’ in the law of Han Dynasty.” In *Fa Lv Da Wen* (*Legal Questions and Answers*) on the bamboo writing slips of Qin dynasty, it was mentioned many times that “Ting Xing Shi” (precedents in courts) could be directly quoted by judicial officials as the legal bases to convict and make the sentences. For instance, how to punish the person who has counterfeited the seal of village governors? He shall be charged of counterfeiting official seals in “Ting Xing Shi” (precedents in courts); “a thief hunter was murdered by the thief during the catching. Should the murderer be charged of murdering or killing people in a fight? Although the person was killed in a fight, it shall be sentenced as murdering in ‘Ting Xing Shi’ (the precedents in courts)”; “if one has accused someone of stealing a sum of money of one hundred and ten yuan, but after the interrogation, actually one hundred was stolen, how the accuser should be punished? He shall be charged of the fine of two ‘Jia’ (armor). If the accused had stolen 100, but the accuser had blackmailed 10 more on purpose, how he shall be punished? He shall be charged of the fine of a ‘Dun’ (shield) according to law. However, in fact, he would be charged of

⁹“Wang Zhi” (The Royal Regulations) in *Xunzi*.

the fine of two ‘Jia’ (armor) because in “Ting Xing Shi” (precedents in courts) he would be punished for false accusation”.¹⁰ From these detailed records on “Ting Xing Shi” (precedents in courts) on the bamboo writing slips in Qin dynasty, it could be seen that “Ting Xing Shi” (precedents in courts) was supplementary to *Qin Lv* (*Qin Code*) and its function and position in the judicial practice was also clearly reflected. Thus, it could also be deduced that the judgement of a case according to court decisions had inevitably experienced a long process in ancient times when the development in other aspects was slow. It was just because of the legal function during the legal practice that they were continuously developed. From this it could be seen that it was in a very early time that the ancient Chinese people had become conscious of making use of the precedents, moreover, they had also had a full understanding of the value of the precedent.

In Han Dynasty, the system of Qin dynasty was inherited, the precedents and settled cases approved and collected by the imperial court were called “Jue Shi Bi” (the precedents in lawsuit settlements). In “Wang Zhi” (The Royal Regulations) in *Li Ji* (*The Book of Rites*), it was recorded that “the precedents, whether important or not, must be clarified to be used in convictions”. Besides, it was annotated by Zheng that “‘Bi’ (analogy) refers to the old practices already carried out”. According to “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (The History of Han Dynasty), a decree was made by Emperor Gaozu in Han dynasty in his seventh year of ruling that “the crimes which could not be judged by “Ting Wei” (the supreme official in charge of judicature) should be stated carefully and presented to the emperor to be settled by the corresponding ‘Lv’ (criminal law), and ‘Ling’ (order or ordinance).” It was annotated by “Shi Gu” (explaining the different meaning and usages of words in ancient times) that “the cases shall be judged according to precedents by analogy.” In the annotation of the chapter of “Da Si Kou” (the senior minister of justice) in “Qiu Guan” (Ministry of Penalty) in *Zhou Li* (*The Rites of Zhou Dynasty*), “Jue Shi Bi” (the precedents in lawsuit settlements) was explained more clearly by Jia Gongyan, he said “If there are no legal articles, similar cases should be selected in punishing the crimes, which is called ‘Jue Shi Bi’ (the precedents in lawsuit settlements).” It was clear then that in the legal system of Han Dynasty, “Bi” (analogy) was one of the most important legal modes (the rest were “Lv”: criminal law, “Ling”: order or ordinance and “Ke”: rule), and it meant differently from the word “Bi” (analogy) in “making conviction by ‘Bi Fu’ (legal analogy: to refer to the ex-regulations and make the similar sentence at trials) when there are no available legal articles”. Because of the wide scope of application of “Bi” (analogy) in Han Dynasty, it could be classified according to the nature of application: the general established precedents were called “Jue Shi Bi” (the precedents in lawsuit settlements) as was mentioned in the chapter of “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (The History of Han Dynasty): “in current law, matters shall be decided according to old practices, moreover, if there

¹⁰ *Shui Hu Di Qin Mu Zhu Jian* (bamboo writing slips found in the tomb of Qin in Shui Hu Di), Cultural Relics Publishing House, 1978, p. 167.

are no legal articles, similar cases should be selected to make court decisions, so it is called ‘Jue Shi Bi’ (the precedents in lawsuit settlements)’; and the established precedents of death sentences are called “Si Zui Jue Shi Bi” (the precedents for capital crimes). During the ruling of Emperor Wu in Han Dynasty, “the ministers like Zhang Tang and Zhao Yu were recruited to make laws, 13,472 of which were about “Si Zui Jue Shi Bi” (the precedents for capital crimes)”. During the ruling of Emperor Xuan, Yu Dingguo, who was “Ting Wei” (the supreme official in charge of judicature) at the time, also had drafted about 3,472 articles of “Si Zui Jue Shi Bi” (the precedents for capital crimes), among which, 26,272 articles were “usually used to make sentences and convictions”. Up to Eastern Han Dynasty, the compiled anthologies of legal precedents included *Jue Shi Bi* (*The Precedents in Lawsuit Settlements*), *Ci Su Bi* (*The Precedents in Legal Cases*), *Fa Bi Du Mu* (*Outline of Legal Precedents*), *Ting Wei Jue Shi* (*Lawsuit Settlements by Ting Wei*) and *Ting Wei Bo Shi* (*Arguments by Ting Wei*). Besides, there is *Chun Qiu Jue Shi Bi* (*The Records of Convictions during Spring and Autumn Period*) consisting of 10 volumes by Dong Zhongshu. In addition, in *Zou Yan Shu* (*Collections of Legal Precedents*), the writing bamboo slips of Han Dynasty found in Zhangjia Mountain in recent years, many valuable legal precedents were also recorded.

From above, the important function of “Bi” (analogy) in the judicial practice of Han Dynasty could be seen. Besides, it had exerted a great influence to regard “Bi” (analogy) bot as supplements to laws and as the basis for making convictions. So, Han Dynasty could be regarded as a period of development of the case law with great numbers and wide applications. It was recorded in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*) that “the settled cases are collected in ‘Ling Jia’ (the laws) consisted of nearly 300 chapters; while there are totally 906 chapters about the precedents of marriage lawsuit in *Fa Bi Du Mu* (*Outline of Legal Precedents*) compiled by Situ Bo. If new changes take place, new articles shall be composed, new chapters added, and new events shall be included into new sections.” Because there were no proper rules or procedures for the formation of “Bi” (analogy), moreover, its number increased day by day, incompatibilities appeared between statute laws and legal precedents, which had resulted in the situation where “different punishments are often enforced for similar crimes... and erroneous judgements are often made”, which had in the end led to the violation of laws by the application of “Bi” (analogy).

In Jin Dynasty, “besides law making, articles were also composed, decrees were made and “Gu Shi” (old practices) which consisted of 30 volumes was completed and implemented along with the law by Jia Chong and other people.”¹¹ It was recorded in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*) that “more than 50 cases had been settled and included into ‘Ling’ (order or ordinance)” by the Emperor Zhang of Jin Dynasty, which had indicated that the legal precedents at that time had already taken the form of statute law after

¹¹“Juan Liu Zhu” (The Annotation to the 6th Volume) in *Tang Liu Dian* (*The Six Statutes of Tang Dynasty*).

being induced, generalized and summarized, which was an important development of ancient Chinese case law.

During Northern Wei Dynasty, “almost every verdict was made according to ‘Gu Shi’ (old practices)”,¹² which had shown that “Gu Shi” (old practices) was also a kind of established precedents implemented along with laws. During Northern Qi Dynasty, “the laws were interpreted by ‘Da Li’ (The Supreme Court) and new cases were settled by comparing with the old practices. If the supreme court wanted to absolve the criminal from guilt, the case shall be judged according to lenient laws; but if they wanted the criminal punished, the case shall be judged according to severer laws...”,¹³ as was stated in “Xing Fa Zhi” (The Record of the Criminal Law) in *Jiu Tang Shu (The History of Old Tang Dynasty)* which was revised by the authorities of Jin Dynasty that “in the light of old laws, the cases were usually settled by analogy, but it was slightly difficult to be interpreted due to the extremely large numbers of articles in law, which had amounted to about 3,000 in number. When the articles were decided later, only 500 of them were retained, therefore, similar cases would be settled by analogy.” However, because the autocratic system had become more consolidated after Tang Dynasty, the officials’ freedom of settling cases by analogy was restricted and those who had conducted comparisons without authorization were punished. Contrary to “Bi” (analogy), which was on the wane as a legal mode, “Li” (precedent) was gaining quietly strength. With “Li” (precedent), there were no such problems of implementing punishments by comparing with legal articles because the judgments were directly made according to legal precedents. So the legalization of “Li” (precedent) had made the case law in ancient China move a step forward.

The combination of precedents with law had started from the activity of “changing the old law into ‘Xing Ming Fa Li’ (criminal law and precedents)” in Jin Dynasty, soon after, in Northern Qi Dynasty, “the criminal cases were used as the titles of the criminal law and were put at the first part”, and were named “Ming Li Lv” (Statutes and Terms), which was followed all the way by Tang, Song, Ming, and Qing Dynasty. However, the “Li” in this chapter of “Ming Li” (Statutes and Terms) was different from the “Li” in legal precedents. The tradition of regarding “Li” (Statutes and Terms) as the origins of laws and the basis of judging cases could be traced back to Tang Dynasty.

In Tang Dynasty, the laws and decrees were already complete, which was an age characterized by mature and finalized feudal legal system. Therefore, the judicial practices, although it was allowed to judge cases by comparing with the established cases when there were no written laws, the attitude was relatively more strict. For instance, during the ruling of Emperor Gaozong in Tang Dynasty, Zhao Renben, who was “Shao Qing” (vice president) of “Xiang Xing Si” (or Da Li Si, The Court of Judicial Review), had summed up the practices of case laws in Sui Dynasty and compiled *Fa Li (Classic Cases)* consisted of three volumes which was “often quoted

¹²“Guo Zuo Zhuan” (The Biography of Guo Zuo) in *Wei Shu (The History of Northern Wei Dynasty)*.

¹³“Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu (The History of Sui Dynasty)*.

in convictions and discussed for compromises".¹⁴ According to "Jing Ji Zhi" (Ancient Classical Records) in *Jiu Tang Shu (The History of Old Tang Dynasty)*, Cui Zhiti, who had once served as "Shi Lang" (vice minister) of "Zhong Shu Sheng" (the supreme organization in charge of the state affairs) and then was promoted to "Shang Shu" (the minister) of "Hu Bu" (Board of Revenues), also wrote *Fa Li (Classic Cases)* with two volumes which was used as the basis for crime convictions. However, after reading it, Emperor Gaozong thought it was "too complicated and inconvenient", so he told his retainers that "the laws and orders should be made according to a general rules.... Besides, the legal articles and chapters are so complete that they are sufficient for the executors to follow. Thus, there is no need to make more precedents because they will make the executors confused about laws...., therefore, it is better to change and give up the precedents immediately. So from now on, *Fa Li (Classic Cases)* should be abolished."¹⁵ On the third of the September of the 14th year of Kaiyuan, another decree was issued by Emperor Xuanzong in Tang Dynasty, which had announced that "thereafter, it is unreasonable to apply the precedents in violation of the decrees and orders, from now on, the rule shall not be changed any more."¹⁶

In addition, the standardization of case laws by statute was also stressed in Tang Dynasty. The following principles had been clearly stated in the section of "making convictions if without written articles" in the chapter of "Ming Li" (Statutes and Terms) in *Tang Lv (Tang Code)*: "as for the crimes which are not regulated in the law, if they should be punished more leniently, the principle of "Ju Zhong Ming Qing" (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented) should be applied; and if they should be punished more severely, the principle of "Ju Qing Ming Zhong" (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented) should be applied".

It could be observed from above that laws rather than precedents had been emphasized by the supreme rulers of Tang Dynasty, and the violation of decrees by the application of precedents were especially prohibited, because it was considered as damages to the authority of the imperial law. However, "Li" (precedent) had become undoubtedly one form of law in Tang Dynasty. Although *Fa Li (Classic Cases)* written by Zhao Renben was abolished, "Li" (precedent) was still quoted in settling lawsuits during the judicial practice, but what was important was that the decrees were not to be violated and the laws not disobeyed.

During the early Song Dynasty, when laws were also emphasized, the first emperor of Song Dynasty once had strictly ordered the judicial officials of all ranks

¹⁴"Xing Fa Zhi" (The Record of the Criminal Law) in *Jiu Tang Shu (The History of Old Tang Dynasty)*.

¹⁵Ibid.

¹⁶"Ding Ge Ling" (Making Decrees and Orders) in *Tang Hui Yao (Collections of Historical Records in Tang Dynasty)*.

“to settle cases according to legal articles if there are any; otherwise, the decrees and orders of the rulers shall be applied in convictions.”¹⁷ As the expansion of the tyrannical imperial power, “Chi” (instruction) issued by the rulers had outmatched the law. After Emperor Shenzong ascended the throne, an order was issued that “because all matters cannot be covered by laws, only the decrees shall be applied to judge cases which are not regulated in the law”,¹⁸ which had further led to “the replacement of law by decrees” and the “laws existing beyond the range of decrees”. In judicial practice, “Li” (precedent) was far more applied than law, and some legal articles had become invalid written words. The replacement of state statute by emperor’s decrees, which was a symbol of strengthened autocratic system, had made the decree compilation the most frequent and most realistic legislative activity of the country. As for “Li” (precedent), in the political trend of respecting, implementing and stressing “Chi” (instruction), it had not only received little attention, but also was greatly restricted. During the ruling of Emperor Shenzong, Sima Guang once informed the king that “a judicial official could then quote ‘Li’ (precedent) to settle crimes which are not regulated by ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Chi’ (decree) and ‘Shi’ (standard). Now the criminal who has killed someone in the fighting shall be sentenced to death according to legal articles; however, ‘Li’ (precedent) has been applied by “Xing Bu” (Board of Punishment) to have him sentenced to exile instead of death, which had made the legal article about killing a person in a fighting useless.”¹⁹ He had specially pointed out the due attitude which “Zai Xiang” (prime minister) should have towards laws and ‘Li’ (precedent), “‘Zai Xiang’ (prime minister) shall assist the ruler with rules instead of ‘Li’ (precedent), because ‘Li’ (precedent) may only be applied by the inferior government officers.”²⁰ For this, a decree was issued by Emperor Shenzong that “‘Xing Bu’ (Board of Punishment) is authorized to denounce any arbitrary petitions for robbery cases in which there are irrefutable evidences for punishments. Thus, such petitions should be rejected by ‘Xing Bu’ (Board of Punishment) in order that the imperial codes shall be strictly carried out and not be violated by the application of ‘Li’ (precedent).”²¹

After the reformation of Emperor Shenzong, when legal system was changed and unstable, the function of “Li” (precedent) was largely expanded, and the phenomenon of violating legal codes by the application of “Li” (precedent) became more and more serious so that in the first year of Chongning during the reign of the Emperor Huizong, the emperor was informed by the ministers that “the legal codes have been applied by some judicial officials, but they could not cover all things, consequently, ‘Li’ (precedent) is applied. Now it is unreasonable to violate the law by quoting ‘Li’ (precedent). Therefore, the officials of different departments are

¹⁷“Zhi Guan Zhi” (The Record of State Officials) in *Song Shi (The History of Song Dynasty)*.

¹⁸“Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi (The History of Song Dynasty)*.

¹⁹Ibid.

²⁰“Sima Guang Zhuan” (The Biography of Sima Guang) in *Song Shi (The History of Song Dynasty)*.

²¹“Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi (The History of Song Dynasty)*.

ordered to have the old precedents compiled into different categories and remove those which are in conflict with the law. So the legal system before the Yanfeng period of Song Dynasty should be investigated and the regulations made in Yuanyou period should all be abolished.”²² Obviously, the purpose of this measure was to keep a balance between the legal codes and classic cases and between the constant law and the varied law, which had reflected the legal thoughts in ancient China characterized by “changeability and unchangeability”.

“Chi” (instruction) in Southern Song Dynasty covered not only the imperial decrees but also “Zhi Hui” (the orders issued by the city and administrative divisions) which was issued by the provincial levels. Therefore, the authority of “Chi” (instruction) was weakened while the position of “Li” (precedent) had become more important due to the lack of penal codes. The phenomenon of introducing “Li” (precedent) into “Chi” (instruction) had become more common when the law codes were compiled. In the judicial practice, “Li” (precedent), which was just complimentary to law codes previously, had not only become more important than the law codes, but also had become one of the most important legal bases. It was stated in “Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi (The History of Song Dynasty)* that “at that time (the eighth year of Qiandao, noted by the author), although law codes and orders were completed, the officials still conducted according to “Li” (precedent). Those which were permitted in law codes but not in “Li” (precedent) were considered implausible and they were not allowed to be carried out. Even though the law codes were contradicted with “Li” (precedent), the law would be violated by applying “Li” (precedent). The criminals would have given bribes to get lenient punishments for what he had done, and this had set an example for others.” When the judicial officials settled the lawsuits in the light of “Li” (precedent), they often judge the cases according to how many bribes they had received. In order to resolve the contradictions among “Li” (precedent) which had emerged due to the increase in numbers and especially in order to settle the conflicts between “Li” (precedent) and law codes, the work of the compilation of “Li” (precedent) was also undertaken. In the seventh year of Xining, during the reign of the Emperor Shenzong of Song Dynasty, “after having received the decree of reforming “Li” (precedent) in the Xining period, the officials had compiled the cases according to their own judgments and included the typical ones settled by comparison and discussion into ‘Li’ (precedent)”.²³ Eventually the 12-volume *Xi Ning Fa Si Duan Li (Legal Precedents by the Supreme Court during Xining Period)* was completed. Since then, the compilation of “Li” (precedent) had become an important part in the legislation of Song Dynasty. In the third year of Yuanfeng, the 6-volume *Yuan Feng Duan Li (Legal Precedents in Yuanfeng Period)* was completed; in Yuanfu period of the Emperor Zhezong, the 3-volume *Yuan Fu Xing Ming Duan Li (Legal Precedents and Laws in Yuanfu Period)* was completed; in the first year of Chongning, *Chong Ning Duan Li (Legal Precedents in Chongning Period)* was completed; in the first

²² Ibid.

²³ *Xu Zi Zhi Tong Jian Chang Pian (Sequel to the Full-length Zi Zhi Tong Jian: History as a Mirror)* written by Li Tao in Song Dynasty, Vol. 254, July, 25th, 1074.

year of Qiandao period, *Qian Dao Xin Bian Te Zhi Duan Li* (*Newly Edited Legal Precedents and Laws in Qiandao Period*) was completed, which was a collection of classified legal precedents since Shaoxing period (1131–1162). Besides, in Southern Song Dynasty, *Shao Xing Xing Ming Yi Nan Duan Li* (*Complicated Legal Precedents and Laws in Shaoxing period*), *Kai Xi Xing Ming Duan Li* (*Legal Precedents and Laws in Kaixi period*) and many others were also completed.

In the first year of Chunxi, a decree was issued in order to limit the range of the application of “Li” (precedent) to protect the position of the statute and to get rid of the chaos during judicial practice. It was stated that “except ‘Xing Bu’ (Board of Punishment) which was allowed to apply *Qian Dao Xing Ming Duan Li* (*Legal Precedents and Laws in Qiandao period*) and the judicial officials who were allowed to apply *Huo Dao Tui Shang Li* (*Legal Precedents for Thief Catching and Trade Promotion*) and *Qian Dao Jing Zhi Tiao Li* (*The Ordinance for Management in Qiandao Period*), the others were not allowed to apply “Li” (precedent).” However, the widely-spread malpractices had been deeply rooted and it was of no avail.

Although the application of “Li” (precedent) in lawsuit settlement by judicial officials had expanded their range of option, the supreme jurisdiction of the emperor had not been infringed, on the contrary, the indications or judgments which the emperor had made on certain cases had become the “Li” (precedent) with supreme authority. Under the influence of the system of emphasizing criminal laws and neglecting civil laws, “Li” (precedent) was mostly applied in criminal cases, and then next it was applied in civil and administrative cases. When “Li” (precedent), which had acted as a special law, was in conflict with the law itself, although a most suitable touch point was to be looked for, the former was more effective than the latter, which had also reflected the supremacy of the emperor’s will and the needs of the development of social life and legal relations.

The change from law-orientation at the beginning of Song Dynasty to the replacement of law by “Chi” (instruction), and then to the violation of law by “Li” (precedent) had reflected the trend of development of the legal system in Song Dynasty, which was determined by the political system that was becoming more and more tyrannical. However, the application of “Li” (precedent) was often limited to a specific case and it had neither the influence on the overall revision of the law nor the influence on the overall situation. Moreover, the judicial officials who had made use of “Li” (precedent) weren’t the key decision makers either; therefore, “Li” (precedent) was incomparable with “Chi” (instruction) at this point.

The Ming and Qing Dynasty, when law and “Li” (precedent) coexisted, had witnessed the most important period of the development of Chinese ancient case law. Because of the establishment and prevalence of the principle of introducing “Li” (precedent) from legal cases, the number of “Li” (precedent) increased greatly and its application scope was also expanded gradually in the two dynasties.

In May of the 30th year of Hongwu period in Ming Dynasty, *Da Ming Lv* (*The Great Ming Code*) was officially issued for enforcement and it was declared by Emperor Taizu that “the profits and losses have been considered so carefully and clearly in *Da Ming Lv* (*The Great Ming Code*) that it should be adhered to by the descendants of all generations. If the law has been changed by any minister without

consultation, he will be charged of violating and changing the ancestral systems". However, "only general situations have been covered by the law and it is not possible to deal with the various social relations. Therefore, based on the law codes, the precedents have been made, which have brought about more other precedents. So, the more precedents there are, the more malpractices would result in".²⁴ The "Li" (precedent) in Ming Dynasty were mainly judgments made on specific cases by "Xing Bu" (Board of Punishment) and approved by the emperor through imperial edicts to bring it the nature of general legal regulations. The procedures of creating "Li" (precedent) out of the cases in Ming Dynasty had represented the emperor's monopoly on both the rights of legislation and jurisdiction, at the same time; they had also acknowledged certain functions of the judicial officials in the law making.

Throughout the Ming Dynasty, specific regulations were presented in the form of statutes, which were based on cases and were sufficient to reflect the value of case law. For instance, for the numerous complicated regulations and the frequently-happening phenomenon of mishandling the cases in the judicial practices, an order was issued by Emperor Xiaozong to have *Wen Xing Tiao Li* (*The Ordinance for Inquisition*) revised. In the 13th year of Hongzhi period, *Wen Xing Tiao Li* (*The Ordinance for Inquisition*) which consisted of 297 articles was discussed and issued as a general law; meanwhile, it was carried out along with *Da Ming Lv* (*The Great Ming Code*) in the whole country. Thereafter, another 44 articles were added during the Zhengde period in the reign of the Emperor Wuzong, and in the 20th year of Jiajing period during the reign of the Emperor Shizong, *Wen Xing Tiao Li* (*The Ordinance for Inquisition*) was revised and its articles reached as many as 249. In the 13th year of Wanli period in the reign of the Emperor Shenzong, another revision was carried out and *Wen Xing Tiao Li* (*The Ordinance for Inquisition*) which had 382 articles was completed. Since then, more revisions followed. In the 13th year of Wanli period, *Wen Xing Tiao Li* (*The Ordinance for Inquisition*) was attached to *Da Ming Lv* (*The Great Ming Code*), which had formed the style of *Da Ming Lv Fu Li* (*The Great Ming Code Appended with Sub-Laws*). The revision of *Wen Xing Tiao Li* (*The Ordinance for Inquisition*), the most important legislation in the later period of Ming Dynasty, had changed the situation of "law codes being violated by 'Li'(precedents)" in the past into "law codes being assisted with 'Li'(precedents)" and "law codes being complementary with 'Li'(precedents)", thereupon, the status of 'Li'(precedents) was raised to that of law, which not only was helpful to the unified application of the law in Ming Dynasty, but also had enhanced the accuracy and efficiency of judicial trials and had exerted direct influence to the succeeding Qing Dynasty.

Besides *Wen Xing Tiao Li* (*The Ordinance for Inquisition*), the regulations for atonement also occupied an important position. Since Emperor Taizu, *Shu Zui Shi Li* (*The Precedents for Atonement*) was also enacted. Thereafter, a variety of regulations for atonement were made by later dynasties according to the situation at the time, including *Jing Cang Na Mi Shu Zui Li* (*The Precedents for Atoning by Paying Grain to the Capital Barn*), *Shu Chao Li* (*The Precedents for Ransom*), *Na Cao Shu*

²⁴"Xing Fa Zhi" (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*).

Zui Li (*The Precedents for Atoning by Handing in the Uncultivated Land*), *Shu Zuo Shu Shu Zui Li* (*The Precedents for Atoning through Labor Working*), *Yun Zhuan Shu Zui Li* (*The Precedents for Atoning by Transporting Bricks*), *Zui Qiu Na Ma Shu Zui Li* (*The Precedents for the Prisoner to Atone by Handing in Horses*), *Zui Qiu Na Niu Shu Zui Li* (*The Precedents for the Prisoner to Atone by Handing in Cattles*) and *Fu Ren Fan Fa Shu Zui Li* (*The Precedents for Atoning for Married Female Criminal*). Among the numerous atonement precedents, some were used as temporary solutions, while some were general laws carried out along with law codes. Additionally, there were the regulations of *Zhen Fan Za Fan Si Zui* (*Death Penalty for the Principal Criminal and the Accomplice*), regulations of *Chong Jun* (*Military Exile*) and other numerous regulations.

In Ming Dynasty, Emperor Chengzu once ordered that judicial officials should have an investigation of the prisoners according to *Da Ming Lv* (*The Great Ming Code*) rather than quote other articles or regulations without authority in order to convict someone who had committed crimes intentionally. What's more, all other regulations were abolished by Emperor Xianzong and *Da Ming Lv* (*The Great Ming Code*) was used as the only judicial standard, however, this was impractical. Although the emperor had the power to prohibit law articles from being changed, he still was not able to stop the progress of social life. Only by means of regulation could the adjustment of complicated social relationships be realized, therefore, the enactment of regulations and the replacement of old ones by the new ones were historically inevitable. According to the legal system in Ming Dynasty, the law code was the main body while “Li” (precedent) was the annotation. Carried out along with law codes, “Li” (precedent) had really performed its effective function of “assisting law codes”. As for their application in specific cases, “Li” (precedent) was not only superior to the law codes, but also had received definite legal acceptance. According to the article of “settling cases in the light of newly issued laws” in “Ming Li” (Statutes and Terms) of *Da Ming Lv* (*The Great Ming Code*), “all laws are in effect since the day of enactment, therefore, even the previously committed crimes are judged according to the new law”. It was explained that “if the crime was committed before the establishment of ‘Li’ (precedent), it would be judged according to law or the ‘Li’ (precedent) in effect. If it had prescribed a limit to time in the established ‘Li’ (precedents), only the cases within the time limitation could be judged. If the case would be punished leniently according to the established ‘Li’ (precedent), the new precedent shall be applied instead of old one.” The adjustment and evolution of the relationship between law and “Li” (precedent) in Ming Dynasty had reflected the strictness of the net of justice, the accumulation of judicial practice and the progress achieved in “Lv Xue” (the study of statutory laws).

After the establishment of Qing Dynasty, *Da Qing Lv Ji Jie Fu Li* (*Great Qing Code with Collected Commentaries and Appended Sub-Laws*) was issued by Emperor Shunzhi, which had succeeded the system of Ming dynasty, but was nothing more than a reproduction of *Da Ming Lv* (*The Great Ming Code*). The “Li” (precedent) which was attached to *Da Ming Lv* (*The Great Ming Code*) was also adopted in the law of Qing Dynasty and was included into the law codes separately. After almost ten decades, from Emperor Shunzhi, through Emperor Kangxi and

Yongzheng to the fifth year of Qianlong, *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was made and finalized as a state statute and ancestral fixed law code with no further revision, with only amendments made so as to supplement the insufficiency of the legal articles. As far as “Li” (precedent) was concerned, besides those quoted from the old ones in Ming Dynasty, the new ones concerning the new relationships and new problems were enacted to strengthen the adjustment and sanction of law. In the 18th year of Kangxi, in order to settle the conflicts between legislation and jurisdiction, “Xing Bu” (Board of Punishment) was ordered to redefine the new and old precedents in case the inconsistency of the law codes and precedents would lead to the situation where a convict was sentenced to death penalty according to the new precedents, while sentenced to life imprisonment according to the law; or the crime was punished leniently in the old law, but was punished rather severely in the new precedents. It was also explained clearly in this order that the purpose of “establishing regulations besides law enactments” was to “make citizens scared as to be conscious of the warnings and to avoid punishments”. Thereafter, “Xing Bu” (Board of Punishment) was authorized again to include new additional precedents into *Xian Xing Ze Li* (*Current Rules and Regulations*) which was completed in the 46th year of Kangxi and merged into law codes of Qing Dynasty in separate categories. However, it was never issued for enforcement even at the end of the reign of the Emperor Kangxi.

After Emperor Yongzheng was in power, because “there are too many articles and precedents..., randomly applied by people in settling cases, which had resulted in serious misjudgments”, a decree was issued to “revise and unify” the existing articles and regulations...and “make them complete in order to comply with my intention of making convictions seriously”.²⁵ Up to the fifth year of Yongzheng period, *Da Qing Lv Ji Jie* (*Collected Interpretations of Great Qing Code*) was issued for enforcement, which was attached with 815 sub-laws. In it, “Yuan Li” was mainly the old precedents in Ming Dynasty, “Zeng Li” mainly included the new ones added in the Kangxi period and “Qin Ding Li” included the ones specially decreed by the Emperor Yongzheng or the ones reported by ministers in and out of the court and approved by the emperors themselves. The inheritance of the precedents from Ming Dynasty and even from the articles in the law codes in Tang Dynasty by the Qing code had shown that some legal precedents had gone beyond the limitation of space and time through their extensively adjusted sociality and their endurance of moral regulations. Up to the fifth year of Qianlong, when *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was issued for enforcement, the number of “Li” (precedent) had increased to 1412. Because of the flexibility in form and the freedom from the complex procedure of law code enactment, it was easier for “Li” (precedent) to be adjusted to the needs of the social development and reformation. Meanwhile, the will of the ruling class could be made into laws in no time, therefore, the rules that “no application of law codes if there are ‘Li’ (precedent)” in Qing Dynasty had definitely shown the priority of precedents over law in judicial practice.

²⁵“Shizong Xian Huang Di Shang Yu” (Imperial Edicts of Emperor Shizong) in *Da Qing Lv Li Tong Kao* (*A Textual Research of the Laws and Precedents of Great Qing*).

In order to guarantee the proper application of precedents and avoid contradictions between “Li” (precedent) and its derivative precedents or between law and “Li” (precedent), which would bring damages to legal systems, the compilation of “Li” (precedent) was extremely stressed in Ming and Qing Dynasties, especially in Qing Dynasty when the deletion, confirmation and compilation of precedents had become one of the most important legislative activities. Since the first year of Qianlong and after the Emperor’s approval of the request of “Xing Bu” (Board of Punishment), the regulations were amended once every 3 years. Up to the 11th year of Qianlong, it was officially provided that “*Tiao Li (Ordinance)* shall be amended in a small-scale once every five years and in a large scale once every ten years.” Up to the amendment in the ninth year of Tongzhi, the number of precedents had reached 1892. In Qing Dynasty, “Lv Li Guan” (an official institution established in the second year of Shunzhi period) was in charge of this amendment, and its main task was to upgrade the legal precedents with general meanings to regulations and then to change them into general rules and laws and to delete and correct repetitions and contradictions between law articles and regulations or among regulations, and so on. Actually, all the precedents which were revised into law by this institution had been included in the category of statute and had become the constituent of *Da Qing Lv Li (The Laws and Precedents of Great Qing)*.

In order to carry out feudal legalism, the rulers in Qing Dynasty had followed the provision of making judgments according to law codes in *Tang Lv (Tang Code)* and it was even much strictly enforced. The article of “Citing Statute when Imposing Sentences” in Duan Yu (Trials and Punishments) in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* had ruled that “all convictions shall be sentenced according to laws and regulations, otherwise, the judge shall be punished by whipping for thirty times with bamboo strips. If the same article is cited in settling several cases, the conviction should be made by the officials according to concrete situations.” It was also provided that “all government officials shall be investigated whether the convictions have been made through fair trials and whether the established statutes or sub-laws have been cited. If they have cited one at first and then claimed that the crimes should be judged according to another severer one instead, because they thought that “the crimes are most vicious”, they shall be charged of perverting the law on purpose.” To prevent the judicial officials from arbitrarily quoting the precedents which were not affirmed as laws to serve their private interests, and to defend the rights of legislation of the central authority, it was also provided that “the edicts issued by the emperor for specific cases shall not be cited in making convictions by judicial officials as long as they have not been included into statutes and sub-laws. Any official who dares to cite this edict and bring punishments to innocent people while making the wrongdoers roam at large shall be charged of malpractice on purpose”. It was provided that “except the formal law or formal precedents, all established cases which haven’t been affirmed as sub-laws shall be strictly forbidden in usage and shall not be cited together with other laws so as to avoid discrepancies. However, if the cases settled by “Du Fu” (the procurators and viceroys) could be integrated with the old ones and included into precedents, they are allowed to be announced in this report after being examined carefully by

“Xing Bu” (Board of Punishment) and included in established precedents.” Those provisions had guaranteed the proper application of law and precedents and confirmed the procedure of making precedents according to the requests of statute law, so they were helpful to the regularization of the legislations, which was the crystallization of long-time legislative and judicial practices. However, the complex social relations and class rebellions in the later period of feudal society had made judicial tasks much harder; moreover, it had also made the range of the application of “Li” (precedent) more expanded and intensified, destroyed the coordinative relationship between the statute law and case law, and brought the legal systems into chaos. Just as what was described in “Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*): “the laws are no longer in effect, while ‘Li’ (precedent) has become more complicated and fragmentary, which has led to contradictions among them either by having much severer extra-legal punishments or by violating the law by applying ‘Li’ (precedent) or by establishing ‘Li’ (precedent) for each case or by establishing specific ‘Li’ (precedent) provincially and regionally, or by deriving one kind of ‘Li’ (precedent) from another one without worrying about violating ‘Ze Li’ (regulation) in other departments, namely, different records of the same ‘Li’ (precedent) in different departments would surely lead to discrepancies, which has made it easier to lead to disputes and which has made it harder to determine the degree of punishments.”²⁶

It was necessary to point out that “Li” (precedent) which was attached to law in Qing Dynasty was mainly from the “Li” (precedent) in Ming Dynasty with just a few revisions, for example, the original text of the precedent of “adopting a relative’s son as the heir if without descendants” in Ming Dynasty was as following:

As to the matter of adopting a son as an heir for the parties without, besides the laws and orders, if the stepson is not liked by the step-parents, the local authority whom they appeal shall decide another one. People can also choose those who are noble and virtuous as their heirs. If they have not broken the ancient order in the aristocratic ancestral shrine and obeyed the ethics order, the clan shall not be allowed to accuse them of violating orders and the trial shall not be accepted. If the adopted son and son-in-law are liked by their step-parents, the stepson and their born parents shall not scheme to force them to leave and they shall share their due property according to *Da Ming Ling* (a penal code in Ming Dynasty issued earlier than *Da Ming Lv*). If the sonless family is poor, the adopted son and the son-in-law are allowed to sell the property arbitrarily in order to support the parents.²⁷

This regulation was quoted in Qing dynasty, with the word “order” in the “laws and orders” deleted and the sentence of “share their due property according to *Da Ming Ling*” changed into “allocate the property to them with discretion”. These revisions were in accord with the historical background under the ruling of Qing dynasty.

²⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*).

²⁷“Li Di Zi Wei Fa Fu Li” (Supplementary Precedents for “Violating the Regulation of Establishing the Son Born by the Legally Married Wife as the Heir”) in “Hu Lv” (Statute on Households) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

Another example: the original text about the case of “murdering a family with three members” in Ming Dynasty was as the following:

Dismemberment, such as beating someone to death, killing them intentionally or after the killing, the murderer has chopped the dead body into pieces and buried them in order to escape the punishment. Although with no intention of dismembering at the beginning, the murderer shall be charged of beating someone to death or killing someone on purpose respectively. If the murderer has intended to dismember the victim first, but due to the other reasons, he has killed him first and dismembered him later, thus, has become notorious, he shall be charged of dismembering. Such kind of cases shall all be reported to and decided by the emperor.²⁸

This regulation was quoted in Qing Dynasty with the word “intended” in the sentence “...has intended to dismember the victim first” deleted to make it more concise.

Additionally, the original text involving the case of “beating the grand-parents and parents” in the Ming Dynasty was as the following:

If the adopted son is either adopted under fifteen years old and raised for a long time, or above sixteen years old but has shared the property and has been arranged a marriage, he shall be investigated like the son and grandson of their own according to law for beating, cursing, stealing, scaring, cheating, defaming his step-parents and his step-father’s grandparents and parents. If the step-parents and step-father’s grandparents and parents have beaten the adopted son to death and killed him on purpose, they shall be charged of beating and killing the son and grandson with different family names. As for an adopted son who has not been raised for long, and is adopted under fifteen years old though or is above sixteen but with no property allocation and marriage arrangement, if the relatives for whom the step-father would wear the mourning apparel for a year and the step-father’s grandparents has violated the laws, he shall be regarded as a hired hand in the lawsuit. The wife of the adopted son shall also be charged in the light of the ages mentioned above. If the adopted son has to return to his own clan for the reason that there is no inheritor in his own clan or he is recruited in the army, he still shall be charged as the hired hand for his crime as long as the step-parents and his step-father’s grandparents and parents have not signed paper of terminating the adoption and have not detained his shared property and wife. If the adoption has ended and he is deprived of his wife and property, the once adopted son shall be considered as a non-relative person by the rest of the relatives, whether their kinship has been ended or not.²⁹

When this regulation was quoted in the Qing Dynasty, the words like “the relatives for whom the step-father would wear the mourning apparel for a year and the step-father’s grandparents”, “he is recruited in the army”, and “by the rest of the relatives, whether their kinship has been ended or not” were deleted, and an item like “if the adopted son has committed an offense and the relatives for whom the step-father would wear the mourning apparel for a year and the step-father’s grandparents have injured and killed him, he shall be considered as the hired hand no

²⁸“Sha Yi Jia San Ren Fu Li” (Supplementary Precedents for Murdering a Family of Three Members) in “Xing Lv” (The Criminal Law) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

²⁹“Ou Zu Fu Mu and Fu Mu’ Fu Li” (Supplementary Precedents for “Assaulting Parents or Grandparents”) in “Xing Lv” (The Criminal Law) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*).

matter how old he was when adopted was added. As long as the adoption is terminated, the once adopted son shall be considered as a person with no relations of kinsfolks. The rest of the relatives shall also be considered as people with no relations of kinsfolks, whether the kinship has been suspended or not.”³⁰ This additional item apparently was more consistent with jurisprudence and “Ren Qing” (human feelings).

From above it could be seen that “Li” (precedent) of Ming Dynasty had been completely inherited by Qing Dynasty with only a few revision.

Since after Tang Dynasty, the judicial officials were required to make sentences according to law, to enforce proper punishments and to make some compromises between “Ren Qing” (human feelings) and criminal punishments, so according to the complexity and flexibility of the social relations in Ming and Qing Dynasties, regulations were adopted timely to make necessary adjustments so that during the two dynasties, “Li” (precedent) was made frequently according to the concrete situation without changing the laws. In each amendment of the regulation, besides deleting the old precedents according to the emperor’s permission, new precedents were compiled and attached to the law articles consecutively. Because the law provisions were stable, but “Li” (precedent) was changeable, the law in Ming and Qing Dynasty, especially in Qing Dynasty, had been developed and changed mainly in the aspect of “Li” (precedent) rather than law itself, furthermore, the development of legal education also focused on annotating and interpreting “Li” (precedent). Moreover, the tradition of applying “Li” (precedent) rather than law codes in the judicial practices could be dated back to Ming Dynasty and had prevailed in Qing Dynasty. In the 44th year of Qianlong (1779), it was obviously regulated in the decisions made among the central sections that “as long as there are established precedents, then it should be used instead of law codes.” It could be seen that although the law was still in a dominant and leading position of the legal system, the application of “Li” (precedent) was the priority in the judicial practice. Because the various precedents had been mastered by the lawsuit assistants, they could be used in making convictions, controlling the prefectural directors and dominating the local jurisdiction. This was an innate defect for the local magistrates who were recruited through the “Ba Gu System” (a stereotyped imperial examination).

As for the relationship between law and “Li” (precedent), it had been the guiding thoughts in the middle and late period of Ming Dynasty and Qing Dynasty for law to be supplemented by “Li” (precedent). In Qing Dynasty, it was very common to use “Li” (precedent) as the supplements to the law in legislation. Due to the complex social relations and unstable social situation, it was impossible to make flawless statutes in a certain period to cover everything; therefore, there must have been drawbacks and loopholes in the legal items. Consequently, there were inevitably some difficulties in the application of “Li” (precedent), which had required timely supplement of the case law. The organic combination of case law and statutes had made it possible to make the laws most suitable to the complex and changeable social lives. It was stated in “Xing Fa Zhi” (The Record of the Criminal Law) in *Ming Shi* (*The History of Ming Dynasty*) that “the evil-doings still exist beyond the laws,

³⁰ Ibid, Vol. 28.

so the “Li” (precedent) has been made according to the suggestions of each sage.” In “Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*), an objective evaluation was also made on the function of case laws in supplementing and rectifying the loopholes in the statutes:

The legislators have shown mercy on the criminals. For example, if the criminal is in the case of ‘Fan Zui Cun Liu Yang Qin’ (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on); if the criminal has killed his elder brother but was permitted to do the ancestral sacrifice to bring relief to the widow and carry out his filial duty; if it is found that the criminal’s grandfather, father, son, or grandson have died in the battle, a convict who is sentenced to death penalty can be exempted from the punishment for once so as to persuade people to be loyal. Those who have taken a bribe of 80 *liang* (a unit of weight, one *liang* equals 50 grams) from the briber with salaries and have broken the laws for them, and those who have taken the bribes of 120 *liang* from the briber without salaries and have not broken the laws for them shall all be hanged, because the punishment for corruption is much severer. If the official has taken bribes and is found guilty of fraud, he shall get much severer punishments after the crimes of bribery are discovered, because the purpose of punishing the officials is to protect the decent and the weak. Besides, the bandits shall not be pardoned according to the law, but some of them may be forgiven out of ‘Ren Qing’ (human feelings) with the head of the bandits’ punished while the accessory offenders pardoned. The cases of revenge shall be judged according to whether it should be punished by the state law in order to put an end to the cruelties in revenge. Those mentioned above, whether being in agreement with the ancient meaning unconsciously or having rectified the previous mistakes, are all good laws.

Several more cases could be cited for further explanation.

Case One: in the laws of Ming and Qing Dynasty, there were no articles about the raping of the patriarch’s wife and daughter by the slave or servants, so in the 53rd year of Qianlong, a “Li” (precedent) was made that “if a slave or a servant has raped the patriarch’s mother, wife or daughter, injured her body and crapped her clothes, as long as there is irrefutable witness and evidence, he shall be killed on spot whether the rape is practiced or not. If the rape is not practiced, he shall be sent to Hei Longjiang to serve the armoured armyman as slaves.”³¹

Case Two: in the laws of Ming and Qing Dynasty, there were no articles about the raping of the slaves and servants by their patriarchs, so in the eighth year of Qianlong, a “Li” (precedent) was made that “if the patriarch has raped the married maid, he shall be punished by “Chi” (beaten with light sticks) for forty strokes. If he is a government official, he shall be investigated and convicted by the relevant departments.” In addition, “if the relatives, for whom the patriarch would wear mourning apparels, have not succeeded in raping the slave’s or the employer’s wives and daughters, and the victim has committed suicide out of shame, the rapist shall be punished by “Zhang” (beaten with heavy sticks) for one hundred strokes and be exiled to the distant army.”³²

³¹“Nu Ji Gu Gong Ren Jian Jia Zhang Qi’ Fu Li” (Supplementary Precedents for “Slave and Servants Rapping the Patriarch’s Wife”) in *Da Qing Lv Li Hui Ji Bian Lan* (An Introduction of the Laws and Precedents of Great Qing), Vol. 33.

³²Ibid.

Case Three: it was provided in the article of “Marriages between the Senior and the Junior” in the laws of Ming and Qing Dynasty that “the person who has married the daughter of his father’s sister or brother as well as the person who has married the daughter of his mother’s sister shall all be punished by ‘Zhang’ (beaten with heavy sticks) for eighty strokes and forced to get divorced.” However, a “Li” (precedent) was made in Qing Dynasty that “the marriages with the relatives of the female lines shall still be discussed for the occasion and be reported to the superior according to the usual conventions, unless it occurs between the senior and the junior. The person could marry the daughter of his father’s sisters or brothers of their own accord.”³³ Since then, it had become legal to marry the children of the father’s sisters or brothers as well as those of mother’s sisters, which had in fact abolished the former articles in law.

Case Four: it was provided in the article of “Establishing Separate Household Registration and Keeping Separate Property” in the laws of Ming and Qing Dynasty that “as long as his grandparents and parents are still alive, the grandson and son shall be punished by ‘Zhang’ (beaten with heavy sticks) for one hundred strokes for establishing separate household registration and keeping separate properties.” However, a “Li” (precedent) was made in Qing Dynasty that “as long as the grandparents and parents are still alive, it is not allowed for the grandson and son to divide the property and to live under the separate household without their parents’ permissions.”³⁴ Since then, it had become legal to divide properties and to live under separate households with the parents’ permission.

Case Five: it was provided in the article of “Fan Zui Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) in the laws of Ming and Qing Dynasty that “as for a convict who has committed crimes punishable by death penalty and who is disabled and has older grandparents or parents to support in the household in which there are no other sons left, if he is sentenced to death penalty for a crime, his crime shall be reported to the emperor to be reexamined; if he is sentenced to penal servitudes or life exiles, he could stay at home to support his relatives (parents, grandparents and grand-grandparents) in the family after being punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes and after paying the ransom money.”³⁵ In the sixth year of Jiaqing period, a “Li” (precedent) was added that “if in a household there are widows who are faithful to the memory of the betrothed for twenty years on the maternal side, moreover, there are no other grown-up sons left..., the one, who is sentenced to penal servitude, may stay to

³³“Zun Bei Wei Hun’ Fu Li” (Supplementary Precedents for “marriages between the superior and inferior”) in *Da Qing Lv Li Tong Kao (A Textual Research of the Laws and Precedents of Great Qing)*, Vol. 10.

³⁴“Bie Ji Yi Cai’ Fu Li” (Supplementary Precedents for “Establishing Separate Household Register and Keeping Separate Property”) in *Da Qing Lv Li Tong Kao (A Textual Research of the Laws and Precedents of Great Qing)*, Vol. 8.

³⁵“Fan Zui Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) in *Da Qing Lv Li Tong Kao (A Textual Research of the Laws and Precedents of Great Qing)*, Vol. 4.

support the relatives as long as he is punished by ‘Zhang’ (flogging with heavy sticks) accordingly and wore the cangue (a wooden collar like stocks used to restrain and punish criminals) for one month; the one who is sentenced to military exile (serving or laboring in the distant army) may be replaced by wearing the cangue for forty days and be punished by ‘Zhang’ (flogging with heavy sticks) accordingly; while the one who is sentenced to life exile may be exempted from the death penalty by wearing the cangue for two months for ‘Fan Zui Cun Liu Yang Qin’ (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on).”³⁶ Thereafter, the son of the widow also was up to the conditions regulated in this article and it was not just limited to the sons with old and disabled parents.

Case Six: Generally, the cases of murder and injury among the relatives should be judged according to the rank of “Fu Zhi” (mourning apparel system or the system of wearing different clothes at funerals to show different relations). But under some special circumstances, they would be judged either as ordinary cases or according to a rank that was lower. In the 41st year of Qianlong, a “Li” (precedent) was made that “if the senior for whom the junior wears the mourning apparel lower than ‘Gong Fu’ (mourning apparel of soft sackcloth, namely “Da Gong” and “Xiao Gong”) has killed and robbed the junior on the purpose of usurping his property, if the senior has killed the junior by setting fire, or murdered him or her on evil purposes, he shall be convicted of killing on purpose and sentenced to execution as the ordinary people. Moreover, the punishment shall not be alleviated according to ‘Fu Zhi’ (mourning apparel system or the system of wearing different clothes at funerals to show different relations).”

Thus, it could be seen from above that “Li” (precedent) in Qing Dynasty was made either due to unforeseen events, or customs or “Li” (rites), and its actual potency had outmatched the law in practice. However, the legal articles were supplemented and amended by “Li” (precedent) totally according to the basic state policy, traditional legal consciousness and the Confucianism principles of “Ming Jiao” (the famous doctrines). Therefore, the law was continued to be applied till the early twentieth century when fundamental changes were brought about by Shen Jiaben’s law revision.

12.3 The Interaction of Statute Law and Case Law

During the long history of Chinese legal system, the state statute law had not only occupied a dominating position but also acted as the core of Chinese legal system. Besides, it had dominated and guided the various kinds of legal sources and was

³⁶“‘Fan Zui Cun Liu Yang Qin’ Fu Li” (Supplementary Precedents for the item that the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on) in *Da Qing Lv Li Hui Ji Bian Lan* (*An Introduction of the Laws and Precedents of Great Qing*), Vol. 4.

passed down from one generation to another successively, which had formed a system with a clear lineage relationship. In ancient Chinese statute law, the legislative skills were particularly stressed, the standards were elaborately considered, and the system was comprehensively designed, which was rare even in the history of legal system in the world. The influence of China's ancient statute law to the neighbouring countries and regions was extensive and long-lasting. Even up to now, the legacy of *Tang Lv* (*Tang Code*) still could be found in the criminal laws of Japan and the traces of *Ming Lv* (*Ming Code*) in that of South Korea. During the development of the statute law, the case law also had existed synchronously with almost the same origins, so the state statute law and the case law had displayed the functions respectively endowed by the state, with "Li" (precedent) as the auxiliary to make up for the defects of laws.

It was believed in the ancient books that "Kao Yao, a judicial officer, had created the law" during the period of Shun, which had implied that the written law of China had originated from the judicial practices, namely, in the numerous trials at the primary stage, the conceptions and the standards of law and the primary judicial proceedings were gradually formed because of the integration of the trial experiences from the individual cases. This meant that "Li" (precedent) had come from law, while law was the sublimation and stabilization of "Li" (precedent) and in the making of the law the judicial officials had played important roles.

In the judicial activities of ancient China, the concept of "proper punishments for crimes" was emphasized. Therefore, the prudent enforcement of punishment was not only the responsibility of the judicial officials but also the widely accepted ethic standard. However, the applicable articles in the statute law were limited, furthermore, the conciseness of the articles and the easiness for understanding were regarded as the legislative principles by the enlightened rulers of all generations, thus, it was impossible to meet the needs of the diversified and complex criminal circumstances just by settling cases according to law. So, in order to resolve this contradiction, settling cases by citing legal precedents and enforcing punishments by analogy had been used very early in judicial practices. In view of the history of the development of the case law, the times before Han dynasty could be regarded as the stage of mere quotations, while the times after Han and up to Tang dynasty could be regarded as a much maturer stage of the development of the case law when the rules for inducing legal precedents from cases and the understanding of the prior application of "Li" (precedent) to law were gradually accepted. Up to Ming and Qing Dynasty, the case law was not only deeply rooted in statute law; it had even been included in the statute law itself. Moreover, the status as well as the value of case law had become more important in the two dynasties than those of the previous ones, so it was the stage of the fast development of case law. Although there were large numbers of legalized precedents in Qing Dynasty, it was still difficult to meet the judicial needs of the proper punishment of the crimes. Therefore, it was provided in "Ming Li" (Statutes and Terms) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) that the lawsuits could be settled by comparison with certain law provisions or "Li" (precedent), but they must be in accordance with certain procedures: "if the articles are quoted for analogy when there are no applicable law

provisions or ‘Li’ (precedent), the accusation of the crime should be determined jointly by ‘Xing Bu’ (Board of Punishment) and ‘San Fa Si’ (the three trial officials: the minister and vice minister of “Da Li Si”: (The Court of Judicial Review), and the minister of ‘Du Cha Yuan’: (The Court of Censors). Besides, it should be reported to the emperor to make it clear that because there are no proper laws, the crimes are punished in the light of some other laws or legal precedents.” Among the large numbers of cases in Qing Dynasty, most of those which were settled in the way of “Bi Fu” (legal analogy: to refer to the ex-regulations and make the similar sentence at trials) had not gone through such procedures except those which had involved the crimes committed by the government officials, the crimes concerned with the death penalty and the crimes which were serious.

In addition, if it was still insufficient to make sentences by the application of law, “Li” (precedent) and the analogy approaches, the general prohibitory rules such as “forbidding”, “violating the system”, and “defying the order”, etc. in codes were used to handle those crimes which were not covered in laws. However, it was more common, more usual and more effective for the judicial institutions to quote “Li” (precedent), so it was the first step to look for “Li” (precedent) and “previous cases” when judicial officials hold court trials. Because “Li” (precedent) was flexible, diversified, and practical, moreover, it had also kept pace with times; it was possible not only to be used to amend and supplement laws, but also to be used to correct, develop and create laws and to make their contents perfect. Therefore, “Li” (precedent) and law were inseparable, although they were certain contradictions between them. In a way, the written statutes were always restricted by “Li” (precedent), for instance, *Han Lv* (*Han Code*) was once restricted by “Bi” (analogy); *Tang Lv* (*Tang Code*) and *Song Lv* (*Song Code*) were restricted by “Chi” (instruction); and the laws in Ming and Qing Dynasty were restricted by “Li” (precedent). After all, these were all caused by the autocratic system. As far as the statute law was concerned, it was the ideology of the state, at the same time; it was also the only law which was made according to the imperial orders. For the sake of the descendants of the monarchs, the ministers were usually strictly forbidden by the emperor to give offence to his unique authority or to endanger the well-established foundation of the future generations in the name of revising the statute law. The emperor could exercise his dominion by following or overstepping the law, and in order to handle the state affairs and bring the serious cases to timely trials, he also could discard the written laws, issue orders and confirm new “Li” (precedent) randomly. Therefore, on the one hand, the emperor, on behalf of the ruling groups, had highly valued the statute law and regarded it as the principles and disciplines for setting up and ruling the state, so that they were endowed with supreme authority; on the other hand, he had the right to issue orders in the name of “Tian” (heaven) and acted as the highest legislator and judicial official. In addition, his judgments on the serious cases were regarded to have represented the will of “Tian” (heaven) and were always confirmed as “Li” (precedent) in the form of “Zhao” (decree), “Chi” (instruction) and “Yu” (imperial edict) which had supreme authority. So, in practice, the statute law was begun to be replaced by “Li” (precedent) so as to adjust the new legal relations and

to provide the judicial officials with the basis to hold court trials according to the changeable situations, especially when the statute law was divorced from the social life and had become a piece of holy but waste paper. Meanwhile, the judicial officials' unscrupulous actions caused by the lack of legal standards were also prevented by legal precedents.

Because "Li" (precedent) had served not only as a supplement, but also a continuation, revision and improvement of the statute law, which had led to the awakening of the legal consciousness of "applying 'Li' (precedents) rather than law", the legislative achievements made by judicial officials were acknowledged, which could well be illustrated by the accomplishments made in the aspect of annotation, interpretation and creation of law in Ming and Qing Dynasty.

In ancient China, when "Li" (precedent) was applied, it was often a precondition to have no written regulations in law for judging cases, which had reflected that theoretically, codes still occupied a leading position, and that case law had derived from and rooted in the statute law. If the regulating methods of the statute law was to from general to the specific, then those of the case law was from specific to the general, these two methods of adjustments had been organically and harmoniously integrated, which had made the definiteness and applicability of the law unified, moreover, with the addition of the pluralism of the origins of the law, the two methods coexisted, complemented and infiltrated with each other, which could effectively be used to adjust the development and change of social life, harmonize the relationship between the stability and changeability of the law, and make the judicial officials break away from the embarrassing situation caused by their passive positions during the law enforcement.

The particularity of the ancient Chinese state conditions had separated the Chinese legal system from the continental legal system and the Anglo-American legal system, which had made it unyieldingly stand erect in the world. However, from the perspective of the judicial function and the effect of the creativity of "Li" (precedent) and the systems of the joint hearing system for important and serious cases, the Chinese legal system was very similar to the Anglo-American legal system; as regards to the fact that the fixed codes were enacted by legislators entrusted by the state and that "Li" (precedent) was only the supplements and interpretation of the written law, it was also in common with the continental law in some aspects. In the continental legal system, the stability of law was maintained by fixed codes, and in the Anglo-American system, the stability of law was maintained by the fixed legal precedents, but in ancient China, the stability of the law and society were maintained by the application of both fixed codes and the changeable legal precedents, which was a striking feature as well as an advantage of Chinese legal system. Although the form of the written code was illusory, its value was constant and long-lasting; besides, although "Li" (precedent) was created out of unforeseen events, they were sublimed to legal norms by compilation to avoid chaos, so each of them had its different value of existence and historical function, and each of them had become completely adaptive to the needs of a united multi-national centralized state. In the handling of the relationships between the statute and case law, the rulers

of ancient China had shown excellent political art and outstanding legal cultural cultivation. Thus, it was worthwhile to summarize the tradition and experience which were mutually used by both of them.

After Xin Hai Revolution (or Revolution of 1911) in 1911, a gap emerged due to the replacement of the old legal systems with the new ones. So it was urgent to improve the state of affairs in which there were no laws to rely on in the judicial trials and to promote the creation and development of the system of “Li” (precedent) in modern China. During the period of the Republic of China, “Li” (precedent) made by “Da Li Yuan” (The Supreme Court) was the most important part of the legal system at that time, which had not only had a positive guiding significance to the judicial activities, but also had promoted the reform and improvement of the legal system. The historical experience at home and abroad had proved that the advantage of the case law lay in its timely application. Today, the two great legal systems in the world tend to be converged, which had reflected the regular pattern of development that laws should be closely connected with social life, serve social life and be promoted by social life.

Chapter 13

Making Convictions by Law and Making Judgments by Analogy

13.1 The Controversies over Making Convictions by Law and Making Judgments by Analogy Caused by the Announcement of Statute Law

Making convictions by law and making judgments by analogy were totally contradictory with each other in form; however, they had actually existed in the development of Chinese ancient law and run through the thousands of years of progress of legal system, although there were different emphases for different historical stages. For this reason, the development of the legal system had been restricted by the adjustment and evolution of this contradictory relationship, which had formed the unique tradition of the Chinese law.

As early as the 536 B.C., in the argument caused by the casting of penal codes in metal tripods by the Zheng State, the contradiction between the long history of making judgments by analogy in ancient China and making convictions by law caused by the announcement of the statute law had been displayed. According to “Zhao Gong Liu Nian” (The Sixth Year of Lu Zhao Gong) in *Zuo Zhuan* (*The Chronicle of Zuo*):

The tripods were cast in Zheng State, with descriptions of the crimes and punishments upon them. In consequence, Shuxiang sent a letter to Zichan, saying, at first I have regarded you as my model, but now I have ceased to do so. The previous kings have discussed state affairs according to the system, but they did not make general laws of punishment, for fear that it should give rise to a contentious spirits among the people....When people know about the law; they do not stand in awe of their superiors any more, moreover, they also begin to develop a contentious spirit and make their appeals in written words; hoping that they could be successful in their arguments by chance. Consequently, they can no longer be controlled. When the government of Xia had fallen into disorder, *Yu Xing* (*The Penal Code of Yu*) was made; under the same circumstances of Shang, *Tang Xing* (*The Penal Code of Tang*) was made, and in Zhou, *Jiu Xing* (*The Code Nine Penalties*) was made:—those three penal codes were all made at the times of declination. And in your administration of Zheng, you have... established with reference of the codes and cast the varieties of crimes and the punishments:—will it not be difficult to control the people, as you wish to? ... Once the people know the reasons of the contention, they will cast the propriety away, and make their appeal

to your descriptions. Furthermore, they will all compete even for a matter as trivial as the point of an awl or a knife. Consequently, disorderly litigations would multiply, bribery will become prevalent and Zheng will be in ruin soon. I have heard that, 'when a State is about to become extinct, there will be many enactments.' Is your undertaking an omen of it?" Zichan answered the letter in the following way: "just like what you have said, I am not a talented person, so I have no ability to act for the posterity, because my duty is to save the present world. I cannot accept your instructions, but I dare not forget your great kindness.

The saying of "the previous kings have discussed state affairs according to the system" in the letter written by Shuxiang had denoted a system of temporary judgment of the crimes and their punishments. According to "Sikou" (minister of criminal justice) in "Qiu Guan" (Ministry of Penalty) in *Zhou Li (The Rites of Zhou Dynasty)*, when holding court trials in Western Zhou, the "Shi Shi" (the official in charge of criminal affairs) would preside over the judgment with the minister of the lowest rank as the assistant. Before the conviction, all the opinions of the ministers, government officials, and even the ordinary people about this judgment should be taken into consideration to guarantee a fair punishment for the crime. This system was mainly based on laws which had been adapted to the ruling of the state, which included either written laws, such as *Yu Xing (The Penal Code of Yu)*, *Tang Xing (The Penal Code of Tang)*, and *Jiu Xing (The Code Nine Penalties)*, or the unwritten conventions. The laws were decided by the rulers, but they were not made public in the society, so the existence of such secret statutes had made it convenient for the government officials to determine the degree of punishments for the crimes according to their own wills. Because it was thought that "the people should not be informed of the crimes and the punishments, it has made the power of law unfathomable and in the end the rulers will be held in awe".¹ Therefore, the law was endowed with unfathomable power and mystery so as to make people scared; consequently, it had become easy for the aristocrats to maintain their ranks and privileges by taking advantage of this flexibility. In the end, Shuxiang, on behalf of the old forces, had written a letter to express his fury to Zichan and criticized him just because Zichan had casted penal codes in metal tripods and made the statute public, which had apparently broken the old tradition of making arbitrary judgments, meanwhile, which had also established a new rule of making convictions by laws by "making appeals to the descriptions". Thus, the disputes which were even as trivial as the point of an awl or a knife among the ordinary people should also be settled by "casting propriety away and making their appeals to the descriptions", which had made it possible to seek protections or appeal for fair settlements according to the publicized written laws. No doubt, it was an action which had not only brought about the conception of rights and legal consciousness, but also launched a fierce attack on the old prerogative system of "Yi Shi Yi Zhi" (discussing official business according to the system). Although blamed by Shuxiang, Zichan still didn't "accept the instructions", because he thought that his "duty is to save the world", with the intention to continue the trend of the development of history and to meet

¹"Zhao Gong Liu Nian" (The 6th Year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*, annotated by Kong Yingda.

the needs of ruling class under new circumstances. Thereafter, the announcement of the written laws and the implement of making convictions by law were ushered into the historical stage.

The written laws proclaimed by Zichan was a challenge to the old tradition of making convictions and sentences at the aristocrats' free will in the past three generations, and it was also a daring reformation of the state legal system. This reform was not only a part of the all-around political and economic reforms, but also an important instrument to guarantee that the overall reform might be carried out smoothly. Besides, its success had reflected the demands of a new production relationship which was being formed during the Spring and Autumn period, and the struggle of the emerging landlords for their own rights and their desire to stand on the stage of history.

Similarly, sooner after Zichan's casting tripods with crimes and punishments in Zheng State, in Shuxiang's own state, the state of Jin, the penal tripods were also casted in the 29th year of Lu Zhao Gong, which was recorded as "a penal code made by Fan Xuanzi". It was recorded by Kong Yingda that although the penal code made by Fan Xuanzi had been "applied in imperial court", it was never "made public to the ordinary people". After the penal tripods were casted, "Xuanzi's inscriptions had become the fixed law of the state". Later on, they were "casted in the tripods to be informed to the ordinary people" and were made public to the whole society. Confucius had attacked the event of casting penal tripods in Jin state:

Zhongni said: Jin is going to be ruined, because it has lost its proper rules of administration. Jin ought to keep the laws and rules which Tangshu has made to rule the people. If the ministers and high-rank officials are willing to maintain the rules and keep them in order, the people will be able to show respect to the ruling class, and the ruling class are able to maintain their inheritance. There will be no transgressions between the noble and the humble, so we should have what might be called the proper rules....When these rules are abandoned and replaced by the tripods with penal laws on them, they will be referred to by the people. How could the noble still be respected and their inheritance maintained? When the distinctions between the noble and the humble are abolished, how could a state be a state?²

The criticism made by Confucius on the casted penal tripods was precisely the same as that made by Shuxiang on Zichan in both form and content. It was recorded in *Zheng Yi* (the annotations of Confucians' classic and books of history in ancient times) that:

In obedience of the old rules, it is impossible for people to expect the punishments to be carried out according to the real circumstances, so it is hard for them to predict the punishments in advance. Therefore, the people will show respect to those from higher ranks and hold them in awe..., and the noble could retain their inheritance, position and property. Consequently, the noble are endowed with great authority, while the humble can do nothing but stand in awe of them. For this reason, there will be no transgression between them, and the so-called proper rule will prevail.

²"Zhao Gong Er Shi Jiu Nian" (The 29th year of Lu Zhao Gong) in *Zuo Zhuan (The Chronicle of Zuo)*.

The unfathomable laws were enforced by the noble, accordingly, their arbitrary judgements of the cases had made people stand in awe by showing respect to them, which had shown that a dividing line that was impossible to be overstepped was established between the noble and the humble. However, after the penal tripods on which the proclaimed penal laws prepared by Fan Xuanzi had been casted, the disputes were settled “according to law by abandoning the propriety”. This meant that the traditional conventions and rules were discarded and the proclaimed written laws were applied in the settlements of the cases. Since then, “the people can get to know the future punishments of the crimes from the tripods, and the nobles no longer dare to impose much severer punishments on the people when holding court trials”. Therefore, the nobles had lost the domination of the jurisdiction; furthermore, their authority was also replaced by that of the law, which was referred to as “the authority from the tripods”. Naturally, the people neither needed to “stand in awe of the noble class” nor to “show respect to them” any more. To a certain extent, the problem had been raised to such an important level that it had concerned the existence and perish of the state by Confucius, which had reflected the fierce struggle between the two kinds of thoughts and actions about whether to maintain the old system of arbitrary judgements of cases or to carry out the new rules of making convictions by law. However, history had developed into a new epoch which had called for the civilization of the legal system, so even though there were many people of all kinds who had tried to prevent the trend of historical development, they were just mourning in vain for their lost old powers. The making of written laws had been started from the Zheng and Jin State and then was soon followed by others, which was in fact a victory of the emerging landlords. So, to some extent, it had restricted the privileges of the ancient aristocrats and provided a necessary precondition for the creation of a new legal order.

13.2 Making Convictions by Law and Making Sentences by Analogy in Qin and Han Dynasties

During the three dynasties of Xia, Shang, and Zhou, “Shang Xia Bi Zui” (making convictions by the comparison of the legal punishments, or “Ju Zhong Ming Qing” and “Ju Qing Ming Zhong”) was an important form of expression of making sentences by analogy used in court trials, because it was inevitable for the application of such a method at the times when the legal system was not so perfect. This principle was first put forward in “Lv Xing” (The Penal Code of Lv) in *Shang Shu (The Book of Historical Document)*, which was also known as “making convictions by analogy”. Its main principles were as the following:

If there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented, and if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented.

According to the annotation of Zheng, “even though the criminal should be punished severely, he may be punished leniently according to people’s feeling, and

there are no crimes too serious not to be forgiven in the eyes of Shun. Besides, according to *Kang Gao (The Orders of Duke Zhou to Kang Shu)*, even the most serious crimes should not be sentenced to death penalty, if they are committed involuntarily”; “even though the crimes should be punished leniently, the criminal could be punished severely according to people’s feeling, and there are no offences too minor not to be punished in the eyes of Shun. And according to *Kang Gao (The Orders of Duke Zhou to Kang Shu)*, even the minor offences should be punished, if they are committed intentionally.” As to how to apply this principle, it was determined by the judicial officials, because they were entrusted with the rights to decide the punishments of the crimes. The term “rights” here referred to “expedient”, meaning to “make decisions according to concrete situations”, which in fact was another name for arbitrary convictions. Up to the Warring States, a clear concept similar to analogy was proposed by Xunzi: “if there are relevant laws, the cases should be settled according to them; but if there are not relevant laws, the cases should be settled according to analogical extension.”³ So, the rules of making convictions and sentences by comparison and analogy were continued in the whole feudal penal codes, only with its scope of application narrowed down and its form of application diversified in the judicial practices with the enrichment of law.

During the Spring and Autumn (770–476 B.C.) and Warring States (475–221 B.C.) periods, with the proclamation of the statute law, an obvious change from “Yi Shi Yi Zhi” (discussing official business according to the system) to “Shi Duan Yu Fa” (making decisions by law) had reflected the change of legal conception. For this reason, this period could be regarded as the most important rudimentary stage for formation of the thought of “Fa Zhi” (the ruling of law) in Chinese history. Not only had the progressive ideologists advocated the necessity for people to be informed of law, namely, “the law should be known by all people”, they had also emphasized that “the law shall be abided by both the ruler and the minister; the senior and the junior and the noble and the humble”⁴ in order to show the justice and the extensively regulated function of the law. Therefore, the traditional ritual system of Xia, Shang and Zhou began to decline, and the school of legalism began to become dominant, which had provided guidance to the construction of new legal system, thereby, had repudiated the accusation of Shuxiang and Confucius with actual actions.

During the Warring States period, Li Kui, “Si Kou” (the minister of justice) of Wei State, had summarized the legislative achievements since the Spring and Autumn (770–476 B.C.) and Warring States (475–221 B.C.) periods and written *Fa Jing (Canon of Laws)* consisted of six chapters (the first written law in China), which had integrated crimes with punishments, broken down the old pattern in which the crimes were judged according to punishments, and a new system was established, which was a symbol of the further transformation of common law to the written law in ancient China. Thus, *Fa Jing (Canon of Laws)* had laid an important foundation for the development of feudal legal system. Up to Qin and Han Dynasty, with the progress of society, the ideology and practice of making convictions by law

³“Da Lue” (The Great Compendium) in *Xunzi*.

⁴“Ren Fa” (Relying on Laws) in *Guan Zi (The Book of Master Guan)*.

carried out after the proclamation of written law in the early periods had also entered into a new stage of development.

In Qin dynasty, after Shang Yang Reform and a unified empire was established by Qin Shi Huang (the first emperor of Qin), great efforts were made to have the feudal principle of “Fa Zhi” (the ruling of law) implemented. The core of Shang Yang Reform was the ruling of the state by law, and it was ruled that “anybody, from the ministers and generals to the senior officials and ordinary people shall be sentenced to death without pardoning if he dares to disobey the emperor’s orders, violate the prohibitions of the state, or to endanger the social systems.”⁵ In order to establish the authority of law, he even ordered that “anyone who dares to change the established laws and orders with even one word added or deleted shall be sentenced to death without pardoning.”⁶ He further added that “if the devoted and obedient officials have refused to follow the law, they shall be sentenced to death along with their relatives of three generations without pardoning.” According to *Yun Meng Qin Jian* (amounts of bamboo writing slips in Qin Dynasty) excavated in Yunmeng, Hubei Province in 1975, the officials were considered “Liang Li” (good officials) only when they could “understand the laws and orders”, while those who could not were considered “E Li” (bad officials). If a judicial official had failed to judge a crime according to its due severity, he should be charged of “making mistakes in punishments”; if he had made a lenient punishment on the felony or a severe punishment on the minor offence, he should be charged of making wrong punishments; if he had alleviated the circumstances of the crimes on purpose, he should be charged of conniving the crimes, hence, all these crimes mentioned above were serious ones and needed to be punished “according to the law”. In the 34th year of Qin Shi Huang (the first emperor of Qin), “the judicial officials who have made wrong punishments shall be sent to build the Great Wall or to Nan Yue Di (an area to the south of five mountains, the present Canton, Guangxi, Hainan and some parts of Jiangxi and Hunan).”⁷

From the “Qin Jian” (bamboo writing slips in Qin Dynasty) unearthed, it could be seen that the laws and regulations at that time were very detailed, and the saying that “there are laws for almost everything in Qin dynasty” which had been recorded in history books was also proved true. However, along with the founding of imperial systems, the emperor’s domination on jurisdiction had begun to be institutionalized and legalized. It was recorded that Qin Shi Huang (the first emperor of Qin) had “held court trials in the day, sorted out the relevant documents at night, and read the reports himself”.⁸ Moreover, he had “enforced punishments personally”,⁹ “often

⁵“Shang Xing” (Rewards and Punishments) in *Shang Jun Shu (Book of Lord Shang)*.

⁶“Ding Fen” (Defining a Person’s Social Status) in *Shang Jun Shu (The Book of Lord Shang)*.

⁷“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji (The Records of the Grand Historian)*.

⁸Ibid.

⁹“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)*.

applied death penalty to show his authority”,¹⁰ so that “in chariots there are numerous noses which were cut off” and “the castrated men were piled high up like mountains”.¹¹ Among those cases, there must have been some unjust verdicts caused by arbitrary judgments. So, it could be seen that on the one hand there were extensive applications of legislation and strict enforcements of law in Qin dynasty; on the other hand, there were also judgments which were autocratically and arbitrarily made, and the two of them were both contradictory and integrated with each other, which had formed the real scenario of the early Chinese feudal legal system.

By learning the lessons from the downfall of the second emperor of Qin dynasty, the rulers of the early Han had regarded “removing the harsh laws and cruel punishments” and “everyone abiding by the laws” as the starting point in rebuilding the order of legal system after the founding of the state. Meanwhile, the law of Han Dynasty which consisted of 60 chapters was enacted.

In the early Han Dynasty, Emperor Wen and Emperor Jing had taken the lead in both showing respect to law and carrying out the law, which had brought about “Wen Jing Zhi Zhi” (the excellent administration of Emperors Wen and Jing in Han dynasty), and was praised in the history book. However, since Emperor Wu, the feasibility and validity of making sentences according to Confucian classic *Chun Qiu* (*Spring and Autumn Annals*) was affirmed by him with supreme authority, which had brought unexpected troubles to making convictions by law. The basic spirit of *Chun Qiu* (*Spring and Autumn Annals*) was to maintain the imperial power of great unification and the ritual system of “Zun Zun Qin Qin” (showing respect to nobility represented by the emperor and showing respect to relatives represented by parents), which was accepted by Emperor Wu who was a person with outstanding ability, because it was adaptive to his policies and strategies in ruling the state. Nevertheless, making judgments according to *Chun Qiu* (*Spring and Autumn Annals*) had not only advocated that the judicial activities were in accordance with the popular public opinions of the society, but also opened the door of introducing “Li” (rites) of Confucianism into law and hindered the development of legal system in Han Dynasty.

The method of making convictions according to *Chun Qiu* (*Spring and Autumn Annals*) was very prevalent in Han Dynasty. Besides the reasons mentioned above, it was also because *Chun Qiu* (*Spring and Autumn Annals*) had made up the loopholes in law codes and adjusted the increasingly complicated social relations, which had resulted in the malpractice of interpreting laws by arbitrarily quoting the Confucian classics. The method of “making convictions according to people’s intentions” was criticized by the people in Han dynasty, because they worried that it might lead to the phenomenon of “making convictions without following the law”,¹² so that “a person who is considered to have good intentions is usually pardoned, even if he has broken the law, while a person who is considered to have evil

¹⁰“Qin Shi Huang Ben Ji” (Records of Qin Shi Huang) in *Shi Ji* (*The Records of the Grand Historian*).

¹¹ *Ibid.*

¹²“Xing De” (The Penal Morality) in *Yan Tie Lun* (*Discussions on Salt and Iron*).

intentions is usually punished, even if he is innocent”. Zhang Binglin and Liu Shipai in the modern times also had summarized the criticism for the method of making convictions according to Confucian classics in Han dynasty. Zhang said:

Different from other Confucians or Daoists, only Dong Zhongshu had held court trials according to *Chun Qin* and introduced Confucianism classics into the law as an annexation. He is an eloquent person....He has made 232 convictions in such way...the rulers could apply these rules to make their ruling mystified, so it was difficult for people to see the whole procedure; while the ruled could deal with the transactions with a reference to these rules, discard the clear-cut standards and make deals arbitrarily. What a sad thing! The essential components of Confucian classics have become useless and worthless to the law.¹³

Liu Shipai said, “The so-called making convictions according to the Confucian classics meant to make a reference to his famous book, *Chun Qiu Jue Shi* (*The Records of Convictions during Spring and Autumn Period*) by Dong Zhongshu, with a quotation of *Gongyang Zhuan* (a Confucian classic specially used to explain *Chun Qiu*) to interpret the current laws. In name, it was called making convictions according to the Confucian classics, but in reality, it had meant to make it convenient for the cruel government officials to consolidate their powers. At that time, Gong Sunhong had also made judgments according to *Chun Qiu* (*Spring and Autumn Annals*)...: “it was embellished by the theories of Confucianism, with lenient forms outside but profound contents. Even the smallest grievance would be revenged, ...similar terms were chosen to be in agreement with *Chun Qiu*. The right and the wrong were distinguished according to the officials’ judgements, which had made it convenient for them to consolidate their powers. Consequently, both the officials and the people became more dishonest and the law was also misinterpreted. Moreover, they were made use of by the cruel officials because it had made it easy for them to overstate the crimes committed by the people to gain their personal interests.”¹⁴

What’s more, in Han Dynasty, making convictions by analogy was further legalized. The cases could be decided according to the previous ones by analogy as long as there were no corresponding articles in the law. In early Han dynasty, a decree was issued by Emperor Gaozu which had clearly stated that “the cases which could not be judged by ‘Ting Wei’ (the supreme official in charge of judicature) should be reported in detail to the emperor and then it should be informed to the people as attachments to the law and orders.”¹⁵ It was noted in *Shi Gu Zhu* (the annotation of *The History of Han Dynasty* made by Yan Shigu, a Confucian in Tang Dynasty) that “the comparison of current circumstances with that of previous ones” meant to make convictions according to the established precedents by analogy. In fact, there were large numbers of precedents such as “Jue Shi Bi” (the precedents in lawsuit settlements), “Si Zui Jue Shi Bi” (the precedents for capital crimes), and “Ci Song Bi” (the precedents compiled according to judicial experiences). Up to Emperor Wu, the number of the “Si Zui Jue Shi Bi” (the precedents for capital crimes) alone

¹³“Yuan Fa” (On Law) in *Jian Lun* (*Essential Discussions*).

¹⁴*Ru Xue Fa Xue Fen Qi Lun* (*On the Discrepancies between Confucianism and Legalist School*).

¹⁵“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Former Han Dynasty*).

had reached to 13472. Although “Bi” (analogy), as an origin of the law, had enriched the ways of making convictions, it also had caused the chaos of the judicial order. It was noted in “Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu* (*The History of Han Dynasty*) that “the crafty and flexible methods were applied and the cases were judged according to the legal precedents by analogy. If the judge wanted the criminal to live, he would be given probations, but if the judge wanted the criminal to die, he would be given death penalty.”

13.3 Making Convictions by Law, and Carrying Out Punishments by Analogy

Up to Jin Dynasty, both legislation and law making had experienced fast development on the bases of Han and Wei Dynasty, which had reflected the need of rebuilding a unified legal system and the accumulation of judicial experience. Meanwhile, the introduction of “Li” (rites) into law was accelerated due to the social and state conditions. With regard to the problem of making convictions according to law, it had become more and more clear and specific either in thoughts or in legal articles. In the reign of Emperor Hui, Liu Song, the “San Gong Shang Shu” (the official in charge of lawsuit settlement) had proposed in a report to the emperor that “in the process of making convictions according to law, the established articles of law and the official orders should be followed. If there are not, the crimes should be judged according to ‘Li’ (precedent). And if there are no law and ‘Li’ (precedent) concerning the conducts, punishments are not to be enforced. If the people who are above the judicial officials have different opinions, they are allowed to express them.” He had also advised that “if there are any objections, only the judicial officials have the rights to discuss and interpret the laws to justify the convictions, while the other officials are forbidden to do so. The discussions could be held at any time in order to clarify the duties of judges.” Liu Song’s advice was also approved by Wang Liang, who was “Shi Zhong Tai Zai” (official in charge of the royal affairs) in Runan County (belonging to Yuzhou, the center of the nine parts in ancient China, the present Henan province) and was in charge of the affairs in the royal family, so he pleaded to Emperor Hui “to accept Liu Song’s suggestions and make them the permanent systems.” Therefore, “San Gong” (the Three Councilors: heads of the three important organizations in ancient China: “Tai Wei”: the minister of defense; “Si Tu”: the minister of civil affairs and “Si Kong”: the minister of public work, the three together functioning as the prime minister of the state), the subordinates of Meng Xia said,

The ancient emperors believed in ‘Yi Shi Yi Zhi’ (discussing official business according to the system), and since ancient times they have made convictions and sentences and settled cases. After the legislations have been made, it is better not to hold court trials by moral ethics. If the laws are often replaced by the moral ethics, the people will all appeal to moral ethics and show no fears to law, which may bring more harm than the lawlessness.¹⁶

¹⁶“Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

The regulations of Jin Dynasty and the thoughts of “Fa Zhi” (ruling by law) proposed by the people like Liu Song had obviously absorbed the elements of legal materials provided by the thinkers in Han dynasty, so they had their historical origins. For instance, in the reign of Emperor Xuan of Han Dynasty, Zheng Chang, the governor of Zhuo County (the present Baoding, Hebei province), had proposed that “as long as the laws and orders are enacted, the innocent people will know what shall not be done, therefore, the wicked officials will not be able to play with politics any more.” He had regarded it as a conduct of radical reform which had made it possible to avoid the arbitrary convictions by judicial officials.¹⁷ In Eastern Han Dynasty, in view of the fact that “cases may be judged differently according to the law and order, and different laws can be applied in judging the same case, which may result in different punishments for the same crimes..., or the same punishments for different crimes”, Heng Tan then advised that “the people who have a good master of moral ethics and laws could be ordered to have “Ke” (rule) and “Bi” (analogy) revised and to have the obsolete articles deleted in order to unify the law and unite the people in every prefecture of the state. In this way, the whole nation is well informed, therefore, there will be no unjust convictions any more.”¹⁸

Under the influence of *Jin Lv (Jin Code)*, the system of making convictions by law was also implemented in Northern Zhou. Among the nine articles issued by Emperor Zhang to “Zhou” (subprefecture) and “Xian” (county), there were the following: “Article 1: the conviction and sentence shall all be made according to the law... Articles 3: the punishment of ‘Zhang’ (flogging with heavy sticks) shall be executed properly according to law”.¹⁹ However, the analogy was still in use at the time when the law was not complete and perfect. It was clearly provided in *Jin Lv (Jin Code)* that “if there are no official legal articles, the crimes shall be judged according to ‘Li’ (precedent)”. It was also recorded in the documents of Northern Wei that “it was allowed to make convictions according to other rules when there were no official articles, so the rituals, old conventions and old cases could all be applied as the bases of laws.”²⁰

The regulation of making convictions by law, which was represented by *Jin Lv (Jin Code)*, was a significant achievement since the casting of penal codes in metal tripods by Zheng State, and it had symbolized the high level which the penal code in China had reached theoretically and institutionally. Although it could not be compared on equal terms with the theories and practices of the prescribed crimes and penalties in the modern western countries both in nature and in provision, they had the same basic principle such as judging crimes according to the regulations of law. The distinct ideas and law provisions about making convictions by law had been

¹⁷“Xing Fa Zhi” (The Record of the Criminal Law) in *Han Shu (The History of Former Han Dynasty)*.

¹⁸“Heng Tan Zhuan” (The Biography of Heng Tan) in *Hou Han Shu (The History of Latter Han Dynasty)*.

¹⁹“Xuan Di Ji” (The Biography of Emperor Xuan) in *Zhou Shu (Book of Zhou)*.

²⁰“Xing Fa Zhi” (The Record of the Criminal Law) in *Wei Shu (The History of Northern Wei Dynasty)*.

formed in China in the third century, which was more than 1,000 years earlier than the western countries.

It was worth mentioning that although the thinkers of Jin Dynasty represented by Liu Song had advocated the theory of making convictions by law, there were also others who had held the view that the monarchial power was superior to that of the state law and the affairs could be handled by expediency. Xiong Yuan, who was the “Zhu Bu”, (a subordinate to the chief in charge of the official documents and ancient records or books) had expressed clearly in his report to the emperor that “only the emperor could release prohibitions at his will and deal with the affairs with his power, while the ministers and subjects are not allowed to do so”.²¹ This was clearly a defense of the emperor’s arbitrary convictions which were perfectly justified at that time.

Sui and Tang Dynasty had both reached a prosperous stage in feudal economy, politics and culture, at the same time, the legal system also tended to be finalized. In the early period of Sui, the regulation that “all legal articles applied in the trials should be recorded by the officials”²² was a new development of the principle of making convictions by law in *Jin Lv* (*Jin Code*), and the institutionalization of this regulation had exerted a great influence on the later generations. In the fifth year of Kaihuang, a decree about false accusations was issued by Emperor Wen:

The life and death of human beings is determined by law articles which shall be included into codes and regulations easily understood by people. The officials who can fulfil their official duties and abide by the law will be selected and appointed so as to have a control of the jurisdiction; moreover, duties will be assigned to them to ensure that there will be no mistakes in making judgements in both serious and minor offences. However, according to the tradition of the past generations, the judicial officials are appointed separately, who are often the principal officials in charge of making convictions. Consequently, the rights of killing are often designated to villains, and criminal punishments are in confusion, and the people in power are self-important and abusing power for personal ends, which is the greatest failure in the management of state affairs. Therefore, ‘Lv Bo Shi’ (the legal experts) in ‘Da Li Yuan’ (The Supreme Court), ‘Shang Shu’ (the minister) or the judicial officials in ‘Xing Bu’ (Board of Punishment) and the legal students in the ‘Zhou’ (the prefectures) and ‘Xian’ (the county) should all be removed from the office.’ Since then, all officials are ordered to have the law articles recorded when settling lawsuits.²³

The regulation which had required the judicial officials to clearly record the law articles applied in their convictions had become another important guarantee for making convictions by law. Besides, the parties involved also could check up whether the judicial officials were impartial in law enforcement and decide whether to appeal to the higher-ranking judicial offices.

In addition, further regulations were made in *Tang Lv* (*Tang Code*) on this basis: “all crimes shall be judged according to the text of ‘Lv’ (criminal law), ‘Ling’ (order or ordinance), ‘Ge’ (injunction), ‘Shi’ (standard); otherwise, the violator

²¹ “Xing Fa Zhi” (The Record of the Criminal Law) in *Jin Shu* (*The History of Jin Dynasty*).

²² *Ibid.*

²³ “Xing Fa Zhi” (The Record of the Criminal Law) in *Sui Shu* (*The History of Sui Dynasty*).

shall be punished by ‘Chi’ (flogging with light sticks) for thirty strokes,”²⁴ which, as it were, was the most concise and typical generalization of making convictions by law in the era of feudal China, and it had symbolized the standardization of the judicial activities in feudal China, reflected the authority of feudal law, stressed the responsibilities of judicial officials, and maintained the feudal legal order. Although it was clearly recorded in “Duan Yu” (Trials and Punishments) in *Tang Lv Shu Yi* (*The Comments on Tang Code*) that “the emperor has the rights to judge the cases appropriately according to concrete situations”, “Zhi Chi” (instruction), “Liang Wen” (article) and “Chu Fen” (penalty) issued by the emperor for the criminal punishment could neither be used as the final judgment, nor be applied in the future cases, if they had not been accepted as fixed “Ge” (injunction), which surely was a restriction to the unlimited application of making convictions by emperors.

The scope which was adjusted by the 500 articles of *Tang Lv* (*Tang Code*) included many aspects, such as society, state, family and individual, however, it was impossible for it to cover both the various kinds of complicated social relationships and the exceedingly diversified patterns of crimes. Therefore, the method of analogy application had always been permitted to be used correspondingly with the method of making convictions by law. It was provided in *Ming Li Lv* (*Statutes and Terms*) that “as for the cases which are not directly included in law, they shall be judged by analogy according to the similar existing criminal punishment. If it is believed that the case is punished too severely according to the existing criminal punishment, the principle of ‘Ju Zhong Ming Qing’ (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented) should be used; If it is believed that the case is punished too leniently according to the existing criminal punishment, the principle of ‘Ju Qing Ming Zhong’ (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented) should be used.” Apparently, this provision was not only taken from the ancient “Lv Xing” (The Penal Code of Lv) in the chapter of “Shang Xia Bi Zui” (making convictions by the comparison of the legal punishments, or “Ju Zhong Ming Qing” and “Ju Qing Ming Zhong”) in *Shang Shu* (*The Book of Historical Document*), but also from the recent specific articles in *Sui Lv* (*Sui Code*), which had become the basic guiding principle of making judgment by analogy. Besides, it was also provided in “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed) that “the executor shall be punished by ‘Chi’ (flogging with light sticks) for forty strokes if he has conducted what should not be done, furthermore, under serious circumstances, he shall be punished by ‘Chi’ (flogging with light sticks) for eighty strokes.” By following the article “conducting what should not be done”, the conducts that had not been covered by laws and orders could be punished, which had opened a door for the judicial officials’ arbitrary

²⁴“Making Convictions without following Laws and Orders” in “Duan Yu” (Trials and Punishments) in *Tang Lv* (*Tang Code*).

convictions. Consequently, the criminal punishment could be enforced either by law or by people, and often people's function had always surpassed that of the rigid legal articles. In the first year of Shenlong period, under the reign of Emperor Zhongzong, Zhao Dongxi had made an attack in a memorial to the emperor:

Thereafter, life and death will no longer be decided according to the law, the punishment of the crimes is surely to be decided in the light of people's preference, the reasons for being rewarded or being punished remains unknown, the criminal does not know what he has violated..., but it has made it easy for the judicial officials to make convictions, because they can just refer to 'Bi Fu' (legal analogy: to refer to the ex-regulations and make the similar sentence at trials). How is it possible that there are no ministers who do not play with the law?

So he advised that: "'Lv' (criminal law), 'Ling' (order or ordinance), 'Ge' (injunction), 'Shi' (standard) shall be revised, settled and published in established forms. In the articles, the cases shall be directly described without any flowerily decorated words. The following words are forbidden to be used, such as: 'Zhun' (be abided by), 'Jia' (increase), 'Jian' (decrease), 'Bi Fu' (legal analogy: to refer to the ex-regulations and make the similar sentence at trials), 'Yuan Qing' (according to concrete condition), 'Ju Qing Ming Zhong' (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented), and 'conducting what should not be done'. The written law should be made easy so that even the fatuous men and women can understand; consequently, they will follow the law and avoid committing further crimes. How can they commit the crimes if they are informed of the punishments?"²⁵ In order to create a social atmosphere of strict enforcement of law and to make laws which were "clear enough for people to believe and unified for the emperor to implement", Zhao Dongxi emphasized that "the noble should also be punished if they have committed crimes, then all people in the world would be filled with deep esteem for the emperor and admired him".²⁶

If the regulations of "making convictions by analogy" and "conducting what should not be done" included in *Tang Lv* (*Tang Code*) had provided a rule for the officials' arbitrary conviction from the perspective of legal system, then the emperor's arbitrary decisions in jurisdiction was unlimited. In the 11th year of Zhenguan, Emperor Taizong Li Shimin had once inquired Liu Dewei, the minister of "Da Li Si" (The Court of Judicial Review) about the reason why "more severe punishments were enforced recently". Liu Dewei replied that:

It depends on Your Majesty, but not on the ministers or officials. If Your Majesty prefers lenient punishment, then the punishment will be made lenient; if Your Majesty prefers severe punishment, then the punishment will be made severe...now, the innocent people are put into jails while the evil people who have committed serious crimes roam at large. Then, in order to avoid such situations, the officials have made use of the cruel

²⁵"Za Yi" (Miscellaneous Discussions) (Book 2) in "Xing Wu" (Penal Code 5) in *Tong Dian* (*The General Codes*), Vol. 167.

²⁶Ibid.

punishment with the aim to make people fearful of punishments instead of applying moralization. If Your Majesty can make convictions according to law, this situation will instantly be changed.²⁷

From Liu Dewei's answer it had been clearly seen that jurisdiction was directly influenced by the emperor's likes and dislikes. So the interference and dominance of jurisdiction by the imperial power in the feudal times was a reflection of the nature of the feudal legal system. But it was true that although the concept of ruling by law had been greatly advocated during the early Zhenguan period, it was even violated by Li Shimin himself because Dang Renhong, "Du Du" (the military vice-roy and procurators) of Guangzhou, was exonerated from death penalty for "his old age and great contributions". Although he had made a phony act of "deciding Dang's crime according to the will of 'Tian' (heaven)", it was undeniable that he had "made decisions at his will" so that "the good-deeds are not awarded and the evil-deeds are not punished". In the 11th year of Zhenguan, Wei Zheng had once criticized sharply that the order of legal system in the early Zhenguan period was damaged by the arbitrary actions of the emperor himself. He said:

Today, punishments and rewards are not fully granted, either because the law is bent in the light of the ruler's preference, or the punishment is enforced according to his likes and dislikes. If the emperor likes the offender, he would bend the law to forgive him out of affection; however, if the emperor dislikes him, he would claim him guilty even though he is not; if he likes the person, the emperor would try his best to overstate his merits like looking for feathers by cutting open the leather; however, if he dislikes a person, the emperor would do his utmost to find fault with him like looking for dirt after it has been washed clean. If the dirt could be found, the punishment would be malpracticed; if the feathers could be found, the awards would be granted mistakenly. The malpractice of the punishment would further encourage the mean people, while the mistakenly granted awards would eliminate the moral principles of the decent. In the end, a stable society and a proper implementation of punishment are not expected to emerge, if the evilness of the mean people is not punished and the excellence of the decent people is not awarded.²⁸

Up to the later period of Zhenguan, the absolute feudal system had made Emperor Taizong, Li Shimin return to the old way of "making convictions by 'Qing' (human feeling)", which had brought damage to the situation of making convictions by law established arduously in the early Tang Dynasty. In the later period of Tang Dynasty, it had become the main legislative activities to compile "Chi" (instruction), the potency of which had surpassed that of "Lv" (criminal law), "Ling" (order or ordinance), "Ge" (injunction) and "Shi" (standard). According to an excerpt from the "Chi" (instruction) written on December 23, the third year of Changqing (823 A.C.), which was attached to "Duan Yu Lv" (Statute on Trials and Punishments) in the *Song Xing Tong* (*The Penal Code of Song Dynasty*), "'Yu Shi' (the censor) may report the crimes to the emperor, then, the crimes would be punished according to the latest 'Chi' (instruction), which may violate the previous 'Ge' (injunction). Thereafter, the 'Liang Si' ('Cheng Xuan Bu Zheng Si' or 'Bu Zheng Si' and

²⁷ *Zi Zhi Tong Jian* (*History as a Mirror*), Vol. 194.

²⁸ "Xing Fa" (*The Criminal Law*) in *Zhen Guan Zheng Yao* (*Essentials about Politics from Zhen Guan Reign*), Vol. 8.

“Ti Xing An Cha Shi Si” or “An Cha Si”: the two supreme government offices in charge of civil affairs at the provincial level) shall have a deliberate examination of the laws and regulations and all matters shall be decided finally by following ‘Chi’ (instruction).” So, the enlargement of the adjustment scope of “Chi” (instruction) and the improvement of its effectiveness had reflected the violent social turbulence and the strengthening of absolutism in the later periods of Tang Dynasty.

13.4 Holding Court Trials in Separate Departments and Making Convictions According to Law

Song Dynasty was a period which had witnessed the full development of the feudal law in China. In view of the disadvantages of the administration by the local separate regimes which had weakened the state power in the middle Tang Dynasty, the rulers of Song Dynasty had regarded the reinforcement of centralized state power as the essence of state building. Since then, much more attention was paid to the playing of the roles of law and the centralized administration of jurisdiction. Emperor Taizu of Song Dynasty had regarded law as “the yardstick for state management and the disciplines for the control of the public”. Therefore, he had required the officials and those “who have received official salaries to be close to the ordinary people and settle lawsuits by themselves”.²⁹ For this, two subjects, namely, the subject of “Shu Pan Ba Cui” (those outstanding in calligraphy and rites) and the subject of “Ming Fa” (law) were specially established in “Ke Ju” (the imperial examination). In the reign of Emperor Shenzong, a subject about “Lv Xue” (the study of statutory laws) was also established in “Guo Zi Jian” (the highest educational body in ancient China). “Jin Shi” (an imperial scholar, a graduate of the imperial examination) and the top three candidates in the highest imperial civil service examination would be “appointed officials in sequence and be tested about the knowledge of laws and the trial of cases”.³⁰ This system was not abolished until in Southern Song Dynasty. What’s more, the examination of criminal law was also conducted among the officials who were holding offices or who had finished their terms in the central or regional governments in order to choose the judicial officials. The judicial progress and the legal development in Song Dynasty owed much to learning and practice of laws by the government officials and intellectuals encouraged by the rulers. It was a common view held by the bureaucratic officials in Song dynasty that “only reading books but knowing nothing about laws will make people familiar with emperor Xiao and Shun but without understanding the techniques”.

Compared with Tang Dynasty, a more perfect system of making convictions by law was established in Song Dynasty. Besides, the spirit and regulations of ruling

²⁹“Xuan Ju” (Official Election) in *Song Hui Yao (Collections of Historical Records in Song Dynasty)*, Vol. 13, Article 11.

³⁰*Xu Zi Zhi Tong Jian Chang Pian (Sequel to the Full-length Zi Zhi Tong Jian: History as a Mirror)* written by Li Tao in Song Dynasty, Vol. 266, July, 18th, the eighth year of Xining.

the country by law were totally inherited in *Song Xing Tong* (*The Penal Code of Song Dynasty*) from *Tang Lv* (*Tang Code*), and certain supplements were added to it according to social development. For instance, it was an obvious example that the system of holding trials in different departments was implemented in the criminal trials of Song Dynasty.

In the early Song Dynasty, “Si Li Yuan” (the department in charge of trials) was established; moreover, “Si Li Can Jun” (the military staff in this region) was appointed to take charge of the case trials, and he was called “Ju Si”. The original “Si Fa Can Jun” who was in charge of both trials and convictions was changed into “Yan Si” specially set for “law inspections and convictions”. The system of holding court trials in separate departments had been continuously maintained throughout the Song Dynasty, and it was regarded as a successful experience. In the 26th year of Shaoxing, during the reign of Emperor Gaozong, Wang Yingchen, “Lang Zhong” (head of a subministry department) of “Li Bu” (Board of Personnel), claimed in a memorial to the emperor that “the trials and convictions should be carried out in separate departments at first without any interference, but they could help each other in deciding what is right and what is wrong. Then the mistakes caused by biased opinions and arbitrary decisions could be avoided.” He had thought that this was a good tradition which had been “quoted and proved by the emperors of many generations”.³¹ The purpose of holding trials in separated departments was also expressed by Zhou Lin under the reign of Emperor Gaozong, and he said, “Trials are executed by jail officials, while convictions were made by judicial officials. In this way, different affairs are dealt with by different sectors so that treacherousness could be prevented.”³² To continue this system, he sent a memorial to the emperor saying that “legal regulations should be strictly established by the trial departments and the official business should be handled by ‘Tui Si’ (the official in charge of tracking down the criminal). Before the case is closed, it is not allowed to be discussed with the judicial departments without permission, furthermore, the standard of reward should be reestablished, and the department head is allowed to be prosecuted.”³³

The implementation of “holding trials in separate departments” in Song Dynasty had not only contributed to the reduction of unfair judgments and the prevention of the corruptions of the officials, but also provided an important guarantee for the enforcement of making convictions by law. The laws in Song Dynasty were in various forms, such as “Chi” (instruction), “Ling” (order or ordinance), “Ge” (injunction), “Shi” (standard), “Li” (precedent), “Shen Ming” (declaration) and “Kan Xiang” (reviewing), moreover, they were in large numbers. In the early reign

³¹“A Memorial about the division of duties in settling cases by ‘Xing Bu’ (Board of Punishment) and ‘Da Li Si’ (The Court of Judicial Review)” in *Li Dai Ming Chen Zou Yi* (*Memorials Submitted to the Throne by Important Officials for Successive Dynasties*), Vol. 217.

³²“A Memorial about Forbidding ‘Tui Si’ (the official in charge of tracking down the criminal) to Discuss Official Business with ‘Fa Si’ (The Office of Justice)” in *Li Dai Ming Chen Zou Yi* (*Memorials Submitted to the Throne by Important Officials for Successive Dynasties*).

³³Ibid.

of Emperor Zhezong, the regulations of the different departments were compiled by “Zhong Shu Men Xia Hou Sheng” (the supreme organization in charge of the state affairs in ancient China) and published with the title of “Shang Shu Liu Cao” consisted of 3,694 volumes. Moreover, the articles and judicial judgments made by the emperors were revised and published in the form of “Chi” (instruction), consisted of more than 1,000 volumes. Consequently, it was impossible even for the most diligent officials to look through all of them, let alone choosing, quoting and applying them in practice. Under this circumstance, an official would be specially appointed to take charge of the work of “examining laws and making convictions”, which had increased the accuracy of the law application and guaranteed the institutional implementation of making convictions by law. Because of their work relations, the officials in charge then had to get familiar with the tremendous amount of legal articles to ensure the proper execution of criminal punishments in accordance with the actual situations.

Another special law inspector was also appointed in the central judicial organization in Song Dynasty, who was in charge of a careful examination of legal articles in order to carry out the law accurately and to improve judicial effectiveness.

In both Southern and Northern Song dynasties, because of the development of legal relations in civil affairs and the improvement of civil legislations, the judicial officials were also required to make sentences rigorously according to law. In the “Duan You” (similar to present court verdicts) sent to the people involved, the contents of the applied legal articles were included to show that the judgments were well-founded. For instance, a verdict about the case of “Wang Jiu Suing Wang Si for Illegal Estate Occupation” was recorded in the fourth volume of *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*:

Wang Jiu sued Wang Si for selling their commonly owned real estate without permission. He claimed that Wang Si had cheated him. Now a purchase agreement from You Dan was signed by Wang Jiu’s father, Wang Xin. This deal was made in the first year of Kaixi and was clearly stamped in the second year. According to the law, if an estate purchase agreement was made twenty years ago with no obvious agreements, or either the buyer or the owner has died, the disputes on this real estate shall not be accepted. In the case discussed, the owner has died and fifteen years have passed since the stamped agreement was signed. This case still shall not be accepted because the transaction is regarded invalid. The case of real estate should be judged according to the original agreement and the other people shall be released.³⁴

Although legal articles were not quoted in some other verdicts, it was still claimed that the conviction was made “according to the law”.

In the face of civil disputes which were filled with “Ren Qing” (human feelings), the judicial officials should also be allowed to make flexible convictions according to law in consideration of both the intention of law and “Ren Qing” (human feelings). Hu Shibi’s verdict about the trial of the case concerning Li Bian’s redeeming his estate in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened*

³⁴ *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Zhonghua Book Company, 1987, pp. 106–107.

Judgments) had clearly indicated that “it is scarcely realized that actually the intention of law and the ‘Ren Qing’ (human feelings) are closely integrated. The intention of law is not to be violated by following ‘Ren Qing’ (human feelings); nevertheless, ‘Ren Qing’ (human feelings) is also not to be ignored by following the intention of law. A balance should be struck between these two, with the intention of laws obeyed and ‘Ren Qing’ (human feelings) followed. Then the verdict can be carried out excellently without making any mistakes.”³⁵

In judicial practice, the judicial officials’ application of the rights of discretion could bring about two consequences: one was to make a just verdict satisfying both the intention of law and “Ren Qing” (human feelings) through flexible application of relevant regulations according to the concrete circumstances of the cases; the other was to provide convenient methods for the corrupt officials to play with lawsuits for to gain profits for themselves.

In Song Dynasty, the relationship between law and “Li” (Rites) had followed that left by Tang Dynasty which was featured by their mutual intersection. Especially during Southern Song dynasty, neo-Confucian rationalism (1000–1750) was prevailing, Confucianism was advocated, the maintenance of “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism) which was affirmed by “Li” (Rites) was considered as the responsibility of the judicial officials who were appointed for their knowledge of Confucianism. In Ming dynasty, Sheng Shixuan had said in *Qing Ming Ji Hou Xu* (*The afterword of Ming Gong Shu Pan Qing Ming Ji*), “It is observed that nowadays the ordinary people know very well about advices, while the officials know very well about laws and orders. Nevertheless, many people know little about laws but show great respect to Confucianism...”³⁶ “Therefore, in civil lawsuits, there is often the situation where people know nothing about laws, but show great respect to Confucianism, so the convictions are always made according to the principles of ‘Li’ (Rites). However, the relevant laws and orders should not be ignored. With regard to *Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), there are few cases which are settled only according to ‘Li’ (Rites)”. In Southern Song, Fan Xitang had elaborated the relations between “Li” (Rites) and law in judicial activities and reflected people’s opinions at that time through a “Shu Pan” (a judgment written in an authorized style, usually to test the candidate for the official on the mastering of laws and judging competence):

‘Shou Ling’ (refer to “Tai Shou”: the prefecture chief and “Xian Ling”: county magistrate) should set good examples to the common people by abiding the law. If they have discarded laws and acted at their own wills, what shall the people rely on? One divinatory trigram about families (the 37th of the 64 hexagrams of *Yi Jing: The Book of Change* which has emphasized the function of women in family; later, it means that the noble

³⁵“Redemption of the Pawns Lands and Properties Should be Dealt with either in Cash or Paper Currency, or half in each, according to the Condition of the Original Transaction” in *Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), Zhonghua Book Company, 1987, p. 311.

³⁶*Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), Zhonghua Book Company, 1987, p. 564.

shall behave and speak with evidence) is the unchangeable principle in both ancient and modern times. As for the person who has got married, he shall have his wife sit beside him. This universally praised family principle has given a reason for the divorce of wife, which could be settled in the home. How could there be appeals to government offices for the divorce? The theory of ‘Li Yun’ (The Rites in the Pre-Qin Dynasties) is also the motto of the previous sages. The people in this world have a sense of taste, could identify the different sounds, and have various ways of expressions so they are not allowed to be ignorant of this theory. The law has been totally discarded, instead, ‘Li’ (rites) is applied to settle the lawsuits around the country. The theories made by the Duke of Zhou and Confucius are inculcated into our minds by day-by-day practice, with which the descendants of ‘Xi Huang’ (the human ancestor) are ruled or managed. Is there anyone who has obtained these two qualities? The articles collected in ‘Chi’ (instruction), ‘Ling’ (order or ordinance), ‘Ge’ (injunction), ‘Shi’ (standard) don’t have to be recorded in written words, and the judicial officials who are in charge of certain departments should not be appointed; the books about laws and cases should not be compiled, and the catalogues about ‘Shen Ming’ (declaration) and ‘Zhi Hui’ (refers to ‘Zhao’:decree and ‘Chi’:instruction) don’t have to be renewed. The scholars and Confucianists are all willing to behave like this, so it is not necessary to wait for the military officers to practice these principles. The instructions left over by the emperors are applied in administering the state affairs, while the laws enacted by the ancestors are applied in settling the lawsuits, both of which are in parallels without any contradictions.³⁷

In order to prevent the over-extensive application of “Chi” (instruction) and “Ling” (order or ordinance) issued by emperor and the increasing practice of regulations from influencing the proper implementation of making convictions by law, in July of the fourth year of Jingde, a provision was made by Emperor Zhenzong according to the suggestion of Zhou Qi, the official in charge of edict drafting, that “all departments should determine the official business by specifically indicating ‘Chi’ (instruction), ‘Ling’ (order or ordinance), ‘Ge’ (injunction), ‘Lv’ (criminal law) and ‘Tiao Li’ (ordinance) in memorials to the emperor”. If the reasons are not clear and there are no relevant laws quoted, “the cases shall be analyzed in specific and the lessons shall be drawn from deliberations. Besides, the officials shall not judge what is the right or wrong at their wills or hesitate at making the judgments. If the judgments are influenced by people’s emotions, they should be discussed and reconsidered, and the application of ritual system of the imperial court should be stressed. If anyone has violated the rules, they should be reported and punished severely, moreover, the punishments should be severely enacted so that people may avoid committing crimes out of fear.”³⁸ In December of the second year of Dazhong Xiangfu (1008–1016) in Song Dynasty, another provision was made that “thereafter, state affairs would be judged by ‘Da Li Si’ (The Court of Judicial Review) which has also been granted the rights to change ‘Lv’ (criminal law) and ‘Ling’ (order or ordinance) and to declare ‘Chi’ (instruction) at any time for people to be

³⁷“Yin Jian She She” (to transport the women who had committed adultery to distant places to be the wives of soldiers as a punishment) in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, p. 449.

³⁸*Xu Zi Zhi Tong Jian Chang Pian (Sequel to the Full-length Zi Zhi Tong Jian: History as a Mirror)*, Vol. 66, July, 19th, the fourth year of Jingde period.

aware of.”³⁹ However, in judicial practice, “Li” (precedent) was used as the law and was applied in criminal judgment; it had not only enlarged the basis of ruling by law, but also abolished the restriction of the scope of analogy application.

In Song Dynasty, although the principle of “Ju Qing Ming Zhong” (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented) and “Ju Zhong Ming Qing” (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented) which was inherited from *Tang Lv* (*Tang Code*) was still used as the rule in making sentences by “Bi Fu” (legal analogy: to refer to the ex-regulations and make the similar sentence at trials), more cases or crimes were judged according to “Li” (precedent). In *Song Hui Yao* (*Collections of Historical Records in Song Dynasty*), it was stated that:

‘Li’ (precedent) is what beyond laws, therefore, only the extremely similar cases could be tried according to it. If there are no official articles in the law for judging the crimes, it is provided in the articles that the judgement may be determined by analogy. The crimes that are not covered in laws could be instructed by analogy with the so-called legal precedents which are not separated from laws in essence.⁴⁰

Although making convictions by “Li” (precedent) had made up the insufficiency of law, it had also made it convenient for the treacherous officials to cite “Li” (precedent) arbitrarily for their own profits, which had led to the situation where even if there were laws, “Li” (precedent) was applied instead, and the law was broken by applying “Li” (precedent). For this, in Song Dynasty, “Li” (precedent) was compiled, and those which were contradictory to the current laws were deleted. On the 20th of May of the first year of Chongning, Emperor Huizong was advised by the ministers “to reformulate the precedents which have been used up to now according to categories and to delete those which are inconsistent with the current laws in order to contain the officials’ treacherousness.”⁴¹ Thus, a decree was immediately issued by Emperor Huizong to have “Li” (precedent) compiled according to his order. Meanwhile, according to the discussion made by “Shang Shu Sheng” (The Department of Secretary), the imperial court reclaimed the rights of the application of “Li” (precedent). “Thereafter, for the cases which are really not covered by the official articles in law, previous similar cases shall be listed and reported to the imperial court for ultimate judgment.”⁴² Actually, it was hard to make convictions according to “Li” (precedent) which was selected by the imperial court in the long run, even though this method was intended to be used to prevent treachery. Therefore,

³⁹“Xing Fa” (The Criminal Law) in *Song Hui Yao* (*Collections of Historical Records in Song Dynasty*), Vol. 1, Article 3.

⁴⁰“Zhi Guan” (State Officials) in *Song Hui Yao* (*Collections of Historical Records in Song Dynasty*), Vol. 79, Article 6.

⁴¹“Xing Fa” (The Criminal Law) in *Song Hui Yao* (*Collections of Historical Records in Song Dynasty*), Vol. 1, Article 21.

⁴²Ibid.

on the ninth of May of the fourth year of Chunxi, another provision was made by Emperor Xiangzong in which it was ruled that:

‘Chang Er’ (official and deputy official) and ‘Lang Guan’ (assistant minister) are entrusted by ‘Xing Bu’ (Board of Punishment) to have ‘Li’ (precedent) sealed and stored, which will be chosen for application by the officials themselves. Almost all the cases are judged and convicted by the senior government officials rather than the junior ones.⁴³

So, the government officials who dared to break laws by citing “Li” (precedent) without permission and to choose “Li” (precedent) which was more favorable to them would be punished. In the first year of Zhaoxi, a decree was issued by Emperor Guangzong which had ruled that:

It is illustrated at home and abroad that if there are relevant laws, the cases should be judged accordingly, while if the cases could be settled by ‘Bi Fu’ (legal analogy: to refer to the ex-regulations and make the similar sentence at trials) and ‘Li’ (precedent), the ‘Li’ (precedent) which is illegal are not allowed to be applied, and if it is discovered by ‘Yu Shi Tai’ (The Censorate), the involved people should be punished without exceptions.⁴⁴

With the strengthening of despotism, the emperor could exercise the supreme jurisdiction arbitrarily without any restrictions of law. So, the principle of ruling by law appeared helpless in the face of monarchical power because it was believed that laws originated from the emperors. Moreover, the emperor’s special monarchical power on jurisdiction became more and more expanded by the establishment of the system and the abuse of “Chi” (instruction), in which aspect Song Dynasty had lagged behind the Tang Dynasty. For instance, before the system reformation in the period of Yuanfeng, a trial department was set up in the imperial palace so as to make it easier for him to control the judicial powers. The law breakers could be exempted from punishments by the Emperor in the name of “Jing Dai” (showing pity on) and “She You” (pardoning), even if they had been convicted to show that monarchical power was placed above the law. In the fifth year of Chongning, Emperor Huizong even declared publicly a “Zhao Shu” (an imperial edict):

It is the emperor who has the rights to enact laws and orders, decide the sentences of crimes and determine the life and death of the people. The punishments shall be determined according to the special edicts and ‘Chu Fen’ (penalty) made by the emperor and the three main departments shall act according to ‘Chi’ (instruction) to stop evil-doings. But ‘Chi’ (instruction) was often ignored by the officials and was not implemented accordingly. What is more, the minister of justice was appointed to supervise and prevent the monarchs from abusing the law for their interests. However, it should be stressed that only the emperor has the rights to determine people’s life and death and consider the gains and losses of punishment. Why are ‘Ge’ (injunction) and ‘Ling’ (order or ordinance) made by the emperor? The emperor has to be cautious because the minister’s power is becoming greater. So, from today on, punishments shall be made according to the special edicts and ‘Chu Fen’ (penalty). The punishments of the cases will be reported specifically to the emperor by the ministers, and the emperor’s instructions should be followed accordingly. If the common laws have been applied by the ministers instead of ‘Chi’ (instruction), they shall be charged of showing serious disrespect to the emperor.

⁴³ Ibid., Vol. 15, Article 25.

⁴⁴ Ibid., Vol. 79, Article 6.

In the next year, another decree was made: “as long as the cases are settled by the emperor himself, they are not allowed to be appealed to the superior administrative authority any more. The violators shall be charged of disobeying the emperor’s orders.”⁴⁵ After moving to the south, although rules were made to rectify the emperor’s violation of law by making arbitrary convictions, the emperor’s rigid control over the supreme jurisdiction had remained unchanged in the Song Dynasty.

13.5 Holding Trials by Law and Making Convictions by “Bi Fu” in Extreme Autocratic System

The method of “making convictions according to ‘Lv’ (criminal law) and ‘Ling’ (order or ordinance)” in Ming Dynasty was basically inherited from the old laws of Tang and Song Dynasty. However, in *Tang Lv (Tang Code)*, the provision that “from the time the new law is issued, the crime which has been committed before shall be punished according to it” was deleted, which had shown that in Ming Dynasty, more attention was paid to the unified application of law by the rulers in order to avoid the unfair executions caused by the different punishments provided in the old and new laws. Additionally, it was also regulated in *Ming Lv (Ming Code)* that “if there are no relevant articles in the current ‘Lv’ (criminal law) and ‘Ling’ (order or ordinance) to be applied for the conviction, appropriate punishments shall be enforced by ‘Bi Fu’ (legal analogy: to refer to the ex-regulations and make the similar sentence at trials), a criminal charge shall be drafted and sent to ‘Xing Bu’ (Board of Punishment) and be reported to the emperor. Any minister who dares to make convictions and to exonerate the guilty ones without the emperor’s permission shall be accused of malpractices.” Obviously, this regulation was quite different from that of “Ju Zhong Ming Qing” (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much severer on similar conducts, then lighter punishments shall be implemented) and “Ju Qing Ming Zhong” (where there are no legal provisions to be applied in the judgments on certain illegal conducts, if there are provisions which are much lenient on similar conducts, then severer punishments shall be implemented) in *Tang Lv (Tang Code)*. However, because despotism in Ming Dynasty was more strengthened than that in Song Dynasty, it was more decadent in Ming Dynasty than in Song dynasty. Therefore, the system of making convictions by law was seriously damaged due to the obstructions caused by the interference of the emperor’s confidants in the jurisdiction, moreover, the interference of eunuchs in state affairs in Ming Dynasty was most rampant among all of the dynasties, and they had supervised, arrested, and interrogated people recklessly by acting as the emperors’ watchdogs. With the destruction of the legal system, the system previously illegal had become legalized,

⁴⁵“Xing Fa Zhi” (The Record of the Criminal Law) in *Song Shi (The History of Song Dynasty)*.

and the right and the wrong was confused, so that there were large numbers of unfair punishments everywhere.

In the early period of reigning, making convictions by law was emphasized by Emperor Jiajing on order to quiet down the public complaints and angers caused by eunuch Liu Jin’s power abuse and legal violation. In “Ji Wei Zhao” (similar to the present inaugural speech) he said, “thereafter, the applied laws must be in accordance with the circumstances of the crimes committed, and no harsh punishments are allowed. Besides, the prisoners must be interrogated according to *Da Ming Lv* (*The Great Ming Code*), and harsh punishments or unauthorized references are forbidden to protect the innocent...”⁴⁶ However, the power abuse caused by autocratic system was not eliminated. After Emperor Jiajing, the eunuch’s role of ruling became more powerful than that in the previous generations, which had finally led to the final destruction of Ming Dynasty. Huang Zongxi, a thinker in late Ming dynasty, had once exposed in his *Ming Yi Dai Fang Lu* (*Waiting for Dawn*):

There was no such disaster caused by eunuchs in Tang and Song Dynasties, even if there were similar cases in these two dynasties, the one in Ming Dynasty was still the most serious. There might be certain eunuchs in Han, Tang and Song Dynasties who were interfering with the state affairs, however, no eunuchs had participated in the ruling itself in the three dynasties. Today, the state affairs are all reported to the emperor by ‘Zai Xiang’ (the prime minister) and the officials from ‘Liu Bu’ (The Six Boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works), but the replies are first passed down orally and then in the written form. The properties and revenues of the country are firstly used to meet the needs of ‘Nei Ku’ (the warehouse for the imperial rulers) and then ‘Tai Cang’ (the warehouse for the ordinary people). The crimes and punishments are firstly determined by ‘Dong Chang’ (a secret scouting organization set up the eunuchs in Ming Dynasty) and then by the judicial organizations. In addition, it is also the same in other sectors. ‘Zai Xiang’ (the prime minister) and the officials from ‘Liu Bu’ are just in obedience to the eunuchs’ orders. The eunuchs in Han, Tang and Song Dynasties might take the advantage of the muddle-headed emperors to gain powers, nevertheless, in Ming Dynasty, the pattern of eunuchs’ ruling of the country has already been settled down and continued..., resulting in the greatest disasters of all times.

In Qing Dynasty, the law of Ming Dynasty was adopted in the regulations of making convictions by law with the addition of “Xiao Zhu” (brief notes among the lines) in order to make the meaning of the law much clarified. Meanwhile, in Qing Dynasty, due to the special legal status of “Li” (precedent), regulations were different from those in Ming dynasty. It was specifically provided in “The Order for the Citation of Precedents When Making Sentences” in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) that “any officials who have failed to quote a proper precedent when making sentences will be punished by ‘Chi’ (flogging with light sticks) for thirty strokes. If there are different articles in a collective item, the officials shall cite the most proper one in judging the cases. However, the special edict issued by the emperor for a given case shall not be cited in making convictions by the judicial officials, if it has not been adopted as a law. And any officials who dare to cite this edict and make the innocent people punished and the wrongdoers exempt from

⁴⁶“Ji Wei Zhao” (The Imperial Edict for Enthronement) in *Huang Ming Zhao Ling* (*Imperial Edicts in Ming Dynasty*), Vol. 19.

punishments shall be charged of intentional malpractices. (Therefore, the officials who have cited the edict deliberately shall be charged of erroneous punishment by aggravating and mitigating sentences on purpose; while the ones who have cited this edict by mistake shall be punished one degree lighter.)” In *Da Ming Lv* (*The Great Ming Code*), the first sentence of the legal article of “The Order for the Citation of Precedents When Making Sentences” referred to the “citation of ‘Lv’ (criminal law) and ‘Ling’ (order or ordinance)”, and it was then changed into “citing laws and ‘Li’ (precedent)” in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), which had reflected the legal status of “Li” (precedent) at the time. In Qing Dynasty, “Li” (precedent) was applied extensively; besides, it was established largely according to the concrete circumstances and situations, therefore, it had become an important supplement to law, and in the judicial practices, “Li” (precedent) had become more valuable than law, and law was only much important than “Li” (precedent) in legal system. Especially after the fifth year of Qianlong period, because law had become ancestrally established and could no longer be revised, it had become the only way to make up for the deficiencies of law by adding “Li” (precedent) which had included with new contents to the law. Consequently, the number of “Li” (precedent) increased greatly. With the combination of law and “Li” (precedent) in structure, *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) was one the most representative codes of Qing Dynasty.

In order to adjust the conflict between new and old precedents, to match the meaning of precedents with that of the laws and to guarantee the unified law application, a provision was made in the 11th year of Qianlong which had regulated that the precedent shall be revised on a small scale in every 5 years and on a large scale in every 10 years. In each revision, the new ones should be kept, while the old ones shall be deleted. In addition, the revision should be comprehensive so as to reflect the changes in the laws of Qing Dynasty, and it should become one the most important legislative activities. From the precedents attached to the statute of “The Order for the Citation of Precedents When Making Sentences” in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), its practical value could be observed. For instance, it was provided in the first article of this statute that “the situations must be investigated comprehensively by ‘Du Fu’ (the viceroys and procurators) in lawsuit settlement, the cases must be judged according to the same standard and different punishments for the same cases are not allowed. Besides, all officials shall be supervised as to whether they have abused the laws for their profits, or confused the right and the wrong, or apparently have exonerated the wrongdoers and punished the innocent people. Those who have sentenced the criminals who ought to be sentenced to death penalty military exiles or who have sentenced the criminals who ought to be sent into military exiles death penalty also shall be punished, even when they have realized their mistakes. The officials who have just punished the criminal leniently or have quoted the laws without consultation, or have quoted the wrong laws by negligence and mistake shall be forgiven and ordered to make correction immediately as long as it has been thoroughly investigated that they have not abused the law for their profits, in the end they shall be penalized to punishments below the military exile for their wrong doings.” This precedent was the mixture of the

original and the current regulations in Kangxi period to emphasize “legal obedience” and to “prevent the application of various standards for the similar circumstances”.

In the second item of “The Order for the Citation of Precedents When Making Sentences”, it was ruled that “all government officials shall be inspected whether they have made convictions after clear trials or whether they have cited fixed statutes and ‘Li’ (precedent). If they have cited one at first and then claimed that the crimes would be judged according to another much severer one instead by adding that ‘the actual circumstance of the crime is abhorrent’, they shall be charged of presumption of guilt on purpose.” This provision was enacted by Emperor Yongzheng in his third year of reigning, and then was combined into the *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) in the fifth year of Qianlong, in which “the citation of a fixed statute or ‘Li’ (precedent)” was emphasized. According to it, the crime should not be arbitrarily judged, otherwise, the relevant officials shall be charged of presumption of guilt on purpose.

In the fourth item of “The Order for the Citation of Precedents When Making Sentences”, it was ruled that “except for the official laws and regulations, the cases which haven’t been accepted as precedents shall be strictly forbidden to be cited in trials and shall not be quoted together with other laws to prevent the occurrence of the discrepancies. If the cases handled by ‘Du Fu’ (the viceroys and procurators) could be integrated with the old cases and included in ‘Li’ (precedent), they are allowed to be reported to the emperor in memorials, then they should be examined carefully and compiled as established precedents by ‘Xing Bu’ (Board of Punishment).” This provision was enacted in the third year of Qianlong and compiled into law code in the fifth year. It was emphasized that all the settled cases that had not been adopted as fixed precedents should be forbidden in application so as to maintain the centralized unification of the legislation.

Additionally, the article of “the unlawful implementation of punishments” in the law of Ming Dynasty was also inherited in the law of Qing Dynasty with the addition of “Xiao Zhu” (brief notes among the lines), and it was specifically provided that:

The officials shall be punished by ‘Chi’ (flogging with light sticks) for forty strokes if they have not carried out punishments according to law (for example, the offender who should be punished by ‘Chi’: beating with light sticks was sentenced to be punished by ‘Zhang’: flogging with heavy sticks instead). Those whose unlawful punishments have caused death shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes. (This official) shall also pay eleven *liang* (a unit of weight, one *liang* equals 50 grams) to (the family of the dead) for the burial. The one who has executed the punishments shall be punished a degree lower (without any payment) than the one who has made the conviction. If the executor has deceived in the punishment of the criminal, after the number of the phony beating (the beating that has not touched the skin of the criminal) has been investigated, he will be punished for his misconduct (either as the instigator or as the executor). If the official has taken bribes and made unlawful punishments or phony executions, he shall be punished severely for his conduct of bending the law for bribes. If the supervisory official (civic or military) has ordered his subordinate to beat a person in a frightening place illegally (because of the public works or other reasons), or has beaten a person personally with thick sticks or military weapons, or has wounded or injured people with fists or feet, he shall be punished two degree lower than the general affray and injury. If the person has been

beaten to death, the involved officials shall be sentenced to penal servitude of three years plus the punishment of 'Zhang' (flogging with heavy sticks) for one hundred strokes and then they will be charged of the burial fee of eleven *liang*, and their subordinates shall be punished according to the punishment one degree lower. (If one "Jian Li": the prison inspector is convicted by another one, and one 'Xia Shou': an assistant is convicted by another one, and the sentence has not been made according to the official business, he shall be charged of intentional investigation of the innocent person). If the punishment has been determined by government officials and carried out by the inspectors according to law, or the criminal has been beaten on his butt or thigh, which has resulted in his later death or suicide (after beating), they shall all be pardoned.

Apparently, these notes were the concrete application of the principle of making sentence according to precedents in the execution of the punishments. What's more, the implementation of making convictions by law was also ensured by "Lv" (criminal law) and "Li" (precedent) like "inappropriate lawsuit settlement" and "inappropriate lawsuit settlement before remission" in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) from different perspectives.

In the aspect of analogical application, the laws of Ming Dynasty were inherited by Qing Dynasty, and it was ruled that "if there are no relevant articles in the current 'Lv' (criminal law) and 'Ling' (order or ordinance) to be applied for the conviction, appropriate punishments shall be enforced by 'Bi Fu' (legal analogy: to refer to the ex-regulations and make the similar sentence at trials), a criminal charge shall be drafted and sent to "Xing Bu" (Board of Punishment) and be reported to the emperor. Any minister who dares to make convictions and to exonerate the guilty ones without the emperor's permission shall be accused of malpractices." However, a new explanation was made by "Xing Bu" (Board of Punishment) at this point: "'Wu Xing' (the five forms of punishments in ancient China, i.e. 'Mo': tattooing on the face or forehead of the offenders with indelible ink, 'Yi': cutting off the nose, 'Fei': cutting off the left or right foot or both feet, 'Gong': castration, and 'Da Bi': the capital punishment) which has included more than three thousand articles should be made into law codes, and those which have not been covered in the law shall be compiled into 'Li' (precedent)... If there are relevant 'Li' (precedent), the relevant law articles shall be replaced, and the old 'Li' (precedent) shall be replaced by the new ones. If there is neither provision in law or 'Li' (precedent), the crimes shall be convicted by analogy and judged by the emperor."⁴⁷ It could be observed that the power of making convictions by analogy was controlled in the emperor's hands, which had never existed before in Han and Wei Dynasties.

A series of examples about making convictions by "Bi Fu" (legal analogy: to refer to the ex-regulations and make the similar sentence at trials) in Qing Dynasty could be given. For instance, losing the keys to the city gate was analogized with the loss of sealed letters; a person who sat the exam in the name of others was analogized with the obtaining of official positions by cheating and flirting with younger brother's wife was analogized with unsuccessful rapes.

Qing Dynasty was the last empire of the feudal society, at the same time; it was also the empire with the extremely intensified absolutism. The emperor was in

⁴⁷ *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), Vol. 54.

charge of almost all of the great power of the country, which was called “Qian Gang Du Duan” (emperor’s arbitrary and dictatorial decisions). Emperor Qianlong had once claimed publically in the decree that “it is the domestic law of our dynasty”. In the judicial aspect, the emperor could monopolize the supreme jurisdiction through “Qiu Sheng” (the Autumn Assizes), so the ultimate judgements were made by the emperor himself.

Because the local officials of Qing Dynasty had got their positions through the examination of stereotyped writing without any useful knowledge, when they had taken up the official posts, they were at a loss as to how to cope with the various puzzling cases, the complex law articles and “Li” (precedents). However, it was also required in the law of Qing Dynasty that the officials should make sentences according to law, otherwise, they would be punished, therefore, they had to rely on those “Mu Li” (the advisors) who had a good mastery of the knowledge of penal laws. Consequently, those “Mu Li” had taken the advantage to gain power, to take bribes and to bend law for their profits, which had finally become one of the most corrupted practices leading to the ruining of Qing Dynasty.

In autocratic system, the emperor was not only the supreme legislator who could enact laws at his will, but also the supreme judicial official who could settle lawsuits arbitrarily. Therefore, the judicial officials often brought in verdicts by making a guess of the emperor’s intentions. For example, Zhang Tang, who was “Ting Wei” (the supreme official in charge of judicature) in Han Dynasty, had made convictions and remissions according to “the emperor’s intentions of enforcing punishments” or “the emperor’s intention of pardoning” rather than according to the ordinary law.⁴⁸ During his term as “Ting Wei” (the supreme official in charge of judicature), Du Zhou also had “imposed unjust accusations on the person whom the emperor has intended to punish and imprisoned the one whom the emperor has intended to pardon for a long time in order to make inquiries to find out his grievance.”⁴⁹ The above two examples were very common rather than individual cases, which had reflected the limitation of making convictions by law in autarchic system. Surely, in the history of China, there were many officials like Zhang Shizhi and Dai Zhuo who had dared to fight against the imperial authority by means of law. For instance, Gao Rou, who was “Ting Wei” (the supreme official in charge of judicature) in Wei State in “San Guo” (Three Kingdoms) period, had dared to go against the emperor’s intention to prevent him from enforcing death penalty to people arbitrarily. It was recorded in “Gao Rou Zhuan” (The Biography of Gao Rou) in *San Guo Zhi (The History of Three Kingdoms)* that “since ‘Ting Wei’ (the supreme official in charge of judicature) is responsible for the justice of the universe, how could he break the law for the emperor’s likes and dislikes?’ Rou says, “many times, he has reported this to the emperor with true descriptions against the emperor’s intention.” In Tang

⁴⁸“Zhang Tang” (An official in Han Dynasty) in “Ku Li Lie Zhuan” (The Biographies of Cruel Officials) in *Shi Ji (The Records of the Grand Historian)*.

⁴⁹“Du Zhou Zhuan” (The Biography of Du Zhou) in *Han Shu (The History of Former Han Dynasty)*.

Dynasty, Liu Hun and Xue Yougong had also dared to argue with the emperor in accordance with law, which had earned him a good reputation in history.

To sum up, seen from the tradition of the Chinese legal development, making convictions by law was not only long-standing, but also was of great value; moreover, it had not only symbolized the advanced development of criminal law, but also the maturity of Chinese legal civilization. The starting point of making convictions by law in ancient China was aimed to guarantee the unified application of law and to impose a restriction on the officials' judicial power, so it was beneficial to rectifying the unjust judgements and enforcing fair convictions, and it had become the democratic elements in the Chinese legal tradition. Although it was different from the principle of "Zui Xing Fa Ding" (a legally prescribed punishment for a specified crime) which was made to oppose the encroachment of individual rights and freedom in the west, they were apparently consistent in the basic principles of making convictions and enforcing punishments by law, with the only difference that it was proposed in feudal China as early as the third century and then was carried out through the whole feudal society. Nevertheless, just because the principle of making convictions by law was put forward in the feudal times, it was surely affected by the autocratic system, therefore, it was inevitable for the emperor to abuse his power arbitrarily and to make use of analogy application excessively. Although it was in contradiction with making convictions by law, it was integrated with it in extreme disharmony, because they were all based on the needs and interests of the ruling class. From this, it was not difficult to understand why sometimes the emperor was also restricted by law.

In a word, making convictions by law was a positive legal regulation. And the emperor's abuse of power was caused by the extra-legal autocratic system, which had shown the nature of "Zui Xing Fa Ding" (a legally prescribed punishment for a specified crime) in ancient China as well as the limitation during its execution.

Chapter 14

Pursuing No Litigation, and Settling Conflicts by Mediation

14.1 “No Litigation” as a Perfect Realm of Confucianism

As the founder of Confucianism, Confucius was the pioneer and instigator of “no litigation”. He once declared solemnly that “in hearing litigation, I am the same as anyone else. What is necessary, however, is to enable people to have no litigation”.¹ His disciple, You Zi, also said, “The function of ‘Li’ (rites) is to achieve harmony, which was praised by all of the previous emperors.”² From this, it could be seen that a harmonious society with no conflicts was pursued by Confucianism. With the domination of Confucian thoughts, it had become the feature of Chinese traditional culture for thousands of years to cherish harmony, to maintain neutrality and to advocate the Doctrine of the Mean, while “no litigation” had always been the ultimate aim pursued by rulers. It was praised in the Confucian classics that the era of Yao and Shun was a time with no litigation because Shun himself was an expert in settling lawsuits and terminating conflicts. It was recorded in “Wu Di Ben Ji” (Chronicles of Five Emperors) in *Shi Ji (The Records of the Grand Historian)* that in Shun’s time, “the farmers in the Mount Li always argued about the boundary of the farmlands while the fishermen on the fishing spots”. To settle these problems, Shun had personally farmed in Mount Li and fished in Lei Marsh to teach people by his own behaviors and speeches, and in the end, “the border disputes in Mount Li were settled by people’s compromise, while the disputes about fishing spots were settled by people’s concessions on Lei Marsh”. Due to this, Emperor Yao at the time had recognized the value of Shun and abdicated the throne to him. According to “Zhou Ben Ji” (Chronicles of Chou) in *Shi Ji (The Records of the Grand Historian)*, when Emperor Wen ruled the Zhou State, he “was resolute in his kindness, reverent to the old and compassionate to the young, and he was a sage who had paid homage

¹“Yan Yuan” (Yan Hui, common name Zi Yuan, was a favorite among the disciples of Confucius) in *Lun Yu (The Analects)*.

²“Zhong Ni Di Zi Lie Zhuan” (The Biographies of the disciples of Zhongni, Zhongni is courtesy name of Confucius) in *Shi Ji (The Records of the Grand Historian)*.

to the people”. Thus, the whole state was influenced by him, and in Zhou state it had become a custom for “the farmers to yield lands on the boundary paths and for people to show respect to their elders”, therefore, “people were living harmoniously and the ruler was praised by everyone”. Consequently, the feudal lords had all come to Zhou State to “have the cases settled without bias” when they were in disputes.³ For instance, people in Yu and Jui State had come to Zhou State for the settlement of their disputes, and they were edified by the customs of “yielding on the boundary and respecting the elders” in Zhou state. Finally, they all felt ashamed and said, “we are striving what have been considered shameful by the people of Zhou. Then why are we going to meet them? This will only bring humiliation to us.’ In the end, they returned, made concessions to each other and ended the disputes”.⁴ The main reason why the reigning of Cheng and Kang had been praised in the history books was that “the world (during their reigning) was peaceful, so corporal punishments was abolished and was not applied for more than forty years.”

In Confucian classics, the ideal world in which there was no litigation was actively advocating, meanwhile, public opinions about the harmfulness of the lawsuits were also expressed. For instance, it was recorded in “Song Gua” (Hexagram Song) in *Zhou Yi* (or named *Yi Jing: The Book of Change*) that “litigation is surely ended with misfortune, so it should be restricted and discouraged.” In a word, litigation means misfortune and should be prevented before going too far. The one who is expert at litigation would surely bring misfortune.

In the chapter of “Da Si Tu” (the head of the local official) in *Zhou Li (The Rites of Zhou Dynasty)*, the author had attributed the prevalence of litigation to “the disobedience of instructions”, so “litigation was produced because people disobeyed had instructions. Subsequently, the people who were in high social status were authorized to try and settle cases, while the military officers were put to the charge of executing punishments.” At this point, Confucius said, “If people are guided by law and governed by punishment, they will try to avoid the punishment, but have no sense of shame. If they are guided by virtue, and governed by ‘Li’ (rites), they will have a sense of shame and become decent citizens; therefore, the former is not as effective as the latter.”⁵ If everyone had a sense of shame, there would naturally be no lawsuits and conflicts. So it could be seen from this that “no litigation” was the result of the “clarification of the virtue” and “obeying the rules of propriety”. The government must make people moralized, customs rectified, and human thoughts regulated, which would make people ashamed of litigation in their inner hearts, because only in this way could the purpose of ‘no litigation’ be achieved. Dong Zhongshu said, “In ancient times, the officials who were in charge of moral training always educated people by morality, and after people were moralized, there were no litigations around the country.”⁶ Therefore, in traditional Chinese legal culture,

³“Zhou Ben Ji” (Annals of Zhou Dynasty) in *Shi Ji (The Records of the Grand Historian)*.

⁴Ibid.

⁵“Wei Zheng” (Handling Political Affairs) in *Lun Yu (The Analects)*.

⁶“Dong Zhongshu Zhuan” (The Biography of Dong Zhongshu) in *Han Shu (The History of Former Han Dynasty)*.

litigation was regarded as symbols of the officials’ lack of morality and failure of achievements. Chen Chong in Eastern Han dynasty had considered litigation as the consequence of the degenerated administration of the officials. He said, “In Xizhou (the present Sichuan province), the rich and the powerful families were integrated into one interest group and many officials were corrupted. So, hundreds of lawsuits were filed everyday.”⁷ In the aspect of clarifying morality and preventing lawsuits, Confucius was not only a teacher, but also a practitioner. According to “You Zuo” (meaning to place the emperors on the right side of the seat and learn from them) in *Xunzi*, when Confucius was the “Si Kou” (the minister of justice) in Lu, there was a lawsuit between a father and a son in the court. Confucius then put them into the prison and did not resolve the case for 3 months in order that they could have introspections. He believed that “hearing cases without moral instructions is to kill the innocent...so the real blame does not lie in the people.” Eventually, the father was moved by him and requested the law suits superseded.

In Western Han dynasty, when Han Yanshou of was “Tai Shou” (the prefecture chief) of Fengyi Region, “two brothers filed a lawsuit over farmlands before the court”. He believed that “his failure in the moral instruction had led to the lawsuits among the kindred people and had ruined morality and customs”, therefore, he asked his subordinates “Zhang Li” (officials in high ranks of the county), “Se Fu” (junior officials), “San Lao” (officials in charge of moralization), and “Xiao Di” (officials of the town) to share his shame. Then he “shut himself up, pondered over his mistakes,... and ordered ‘Se Fu’ and ‘San Lao’ to locked themselves up and wait for punishment. Thus, people in their clan had all blamed the two brothers, and they felt deeply regretted, so they had shaved themselves, took off their clothes and asked for punishments. Besides, they had expressed that they were willing to abandon the farmlands and they would rather die than fight over it again.”⁸ Thereafter, “no lawsuits were filed in all of the 24 counties under his supervision.”⁹ It was also recorded in “Lu Gong Zhuan” (Biography of Lu Gong) in *Hou Han Shu* (*The History of the Later Han Dynasty*) that “Gong, the magistrate of the Zhongmou County (subordinate to the present Zhengzhou), was good at educating people by moralization rather by punishment. Once, the members from the Xu clan had disputes over the farmlands, but they could not be settled by ‘Shou Ling’ (refer to ‘Tai Shou’: the prefecture chief and ‘Xian Ling’: county magistrate). In order to solve the problem, Gong had ordered them to return home and have self-examinations. Finally, they all gave up the farmlands.”

When Wu You was the magistrate of the Jiaodong Region, “he would shut himself up and blamed himself as long as there were lawsuits among the people. When he settled the cases, he often used moral teachings to guide them, or he would make them reconciled with each other by visiting the native villages in person.

⁷“Chen Chong Zhuan” (The Biography of Chen Chong) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

⁸“Han Yanshou Zhuan” (The Biography of Han Yanshou) in *Han Shu* (*The History of the Later Han Dynasty*).

⁹Ibid.

Thereafter, the disputes and conflicts were settled, and both the officials and the ordinary people were obedient without fraudulence.”¹⁰

The above cases were typical in that the high ranking local officials had well behaved themselves to advocate lawsuit settlement by moralization. Besides, the officials of “Zhou” (subprefecture) and “Xian” (county) had “instructed through the form of verdicts” to make domestic people cherish moral ethics, and settle and eliminate lawsuits, which was called “preventing the lawsuits of tomorrow by settling those of today”. The following was an example of allocating family properties among the brothers recorded in *Wu Zhong Pan Du* (*The Verdicts Made by Wu Zhong*): “in a family of seven sons, the eldest son had monopolized the heritage after their mother’s death, so he was sued by the rest. According to law, the property shall be divided equally into seven parts. Considering that the second and third sons’ wives were in widowhood, Kuai Zifan, who was ‘Zhi Fu’ (magistrate of a prefecture), then divided the properties into seven parts equally. The eldest son got one part, and the remaining six parts were then further divided into two parts equally: one was allocated in equal division for the fourth, fifth, sixth and seventh, while one was for the wives of the second and third son.” It was written in the verdict that “the eldest son was immoral and didn’t deserve the name of brother. The rest four brothers were all virtuous and had the intention of supporting the two widowed sisters-in-law. I held high praise of them and had great expectations on these four”.¹¹ At this point, it could be seen that “Ren Qing” (human feelings) weighed more heavily than law, and the judicial verdicts and moral judgments were integrated together. Although no law articles were cited in this verdict, its function of moral education was great. The social effect which it had achieved had surpassed the simple convictions made according to law.

The verdicts in Song Dynasty were full of persuasions about giving up lawsuits. For instance, in the volume ten of *Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), a case about “Uncle and Nephew in a Property Dispute are made to listen to Instruction at School” was recorded in a verdict:

Confucius said, ‘In hearing litigation, I am the same as anyone else. What is necessary, however, is to enable the people to have no litigation’. With my little virtue and limited reputation I have been incapable of demonstrating moral influence or setting an example for the lifestyle of scholars. As a result, perversity, disputes, aggressions, and offenses regularly occur among our scholars. So, I feel deeply ashamed before the ancient people. If there is a wrongdoing, it should be punished severely and beatings should be conducted so that they could be remembered. I am afraid that there are people who care only about themselves and are not tolerant of others. However, the friends are still able to do their best to help them to shun evil and do good, to arouse their conscience, and to restore the love between an uncle and a nephew. How can I give up my expectations of the scholars at the school? The instruction of the virtue of Zhou has made the uncle and nephew reconciled. I expect you from this day on to listen respectfully to the teaching and admonitions of these friends and to restore the uncle-nephew relationship as it was at the beginning. If you should fail to reform, then I, as the people who are in charge of your case, will have to resort to punishments for the sake of education.¹²

¹⁰“Wu You Zhuan” (The Biography of Wu You) in *Hou Han Shu* (*The History of Latter Han Dynasty*).

¹¹*Qing Chao Ming Li Pan Du* (*Verdicts Made by Famous Officials in Qing Dynasty*).

¹²*Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), Zhonghua Book Company, 1987, p. 391.

When Lu Longqi was a “Xian Ling” (county magistrate) in Qing Dynasty, two brothers appealed to the court about a property dispute. Without carrying out the normal proceedings, Lu had “neither told them how to divide the properties between them nor made a distinction about who was right or who was wrong, but instead, he had ordered the two brothers to greet to each other by calling each other brothers.” Upon the fiftieth time, both of the two brothers “cried and requested the lawsuits be given up.”¹³ In the verdict, Lu wrote:

The brothers should help and support each other. Now you two have done harm to the relationship for only worldly property. How foolish you are! ...All the property shall be in the charge of the elder brother, while the younger one may assist the brother in overcoming his deficiencies, ...thereafter, as the old grumbles have been eliminated, new fortunes should be made by the joint efforts made by both of you.¹⁴

Similar to the previous ones, this verdict was also focusing on advocating moral ethics, interpreting ancient doctrines, and stressing moral education, so it was praised as a “clever verdict”.

When Lan Dingyuan, a “Zhi Xian” (magistrate of a county) in Qing Dynasty, tried a case by two brothers of Chen family about a dispute over the property left by their father, the lawsuit was also settled in accordance with the spirit of moral instruction, which was recorded in *Lu Zhou Gong An (Complicated Legal Cases in Lu Zhou)*. A dispute over the farmland of seven *mu* (unit of area equal to one fifteenth of a hectare) happened between two brothers and they sued each other in the town court. The two brothers were imprisoned separately, and at the beginning, the two sat back to back, but 3 or 4 days later, they sat face to face. Then Lan Dingyuan took the sons of these two brothers into custody and ordered the two to send one of their sons to “Yang Ji Yuan” (a shelter for the lonely people and beggars) to stop the property disputes between their sons. Up until then, the two brothers cried and kowtowed to the government to plead for the termination of the proceedings and expressed their willingness to give up the farmland to each other. In view of the fact that “the elder had yielded to the young, while the young had yielded to the elder”, Lan Dingyuan made a verdict: “from now on, this farmland will become the sacrifices of your dead father. You two shall take turns to collect the rents and prepare the annual sacrifice.” “Pleasant and grateful, they all expressed their appreciations in the court, and even made seven or eight bows before leaving”.¹⁵

From this, it was clearly seen that the local officials in ancient China were also the preachers who were in charge of advocating “Gang Chang” (the Chinese ethical traditions) and “Lun Li” (the rites and rituals of Confucianism). They had applied moral instructions to lawsuit settlement, which had produced the same effect in the solving the conflicts. Just because of this, promoting virtue and terminating lawsuits were regarded as concrete practices of the principle of “De Zhu Xing Fu”

¹³“Xiong Di Zheng Jia Chan Zhi Miao Pan” (A Clever Settlement of Disputes over Properties between Brothers) in *Lu Jianshu Pan Du (Verdicts Made by Lu Longqi)*.

¹⁴Ibid.

¹⁵*Lu Zhou Gong An (Complicated Legal Cases in Lu Zhou)*.

(employing moral teaching as the primary means, punishment as the supplement) and the real evidence of settling lawsuits by “Li” (rites).

The celebration of “no litigation” surely had not only brought about the dislike and contempt for lawsuits but also a general despise for the lawyer’s profession in ancient China. In Spring and Autumn period, Deng Xin, the earliest “lawyer” in China, had been accused of “violating the model of his wise ancestors, being immoral, and preferring the litigation rhetorics”¹⁶..., “confusing the wrong with the right, and the right with the wrong”,¹⁷ teaching people how to litigate and collecting litigation fees. Consequently, he was killed by the authorities for these reasons. In the laws of each dynasty after Tang, the litigation tricksters who had provoked disputes were strictly punished. For instance, in *Tang Lv (Tang Code)*, there were two such articles, the first one was “helping others to write and file lawsuits” and the second one was “instigating others to file lawsuits for false accusations”. In Ming and Qing Dynasty, these two articles were combined into one, and was called “instigating litigation”. Especially in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, the target of attacking was more obviously directed. According to the provision of “instigating litigation” in *Da Qing Lv Li (The Laws and Precedents of Great Qing)*, “the people who have incited litigations or added and deleted the written complaints in the petition and have accused others falsely shall be punished as false accusers”. The attached precedents were written as following:

The people who have written complaints for others, who have instigated others or have organized groups to appeal to officials, such as ‘Du Fu (the viceroys and procurators), or ‘An Cha Si’ (The Judicial Commission) in the capital, and have falsely accused other people of plundering with violence or killing shall be exiled into military in border regions; if a litigator has instigated litigations and has brought trouble to people, the local officials who have failed to arrest and prevent him because of negligence shall be seriously punished according to ‘Li’ (precedent); if they have deliberately concealed the fact to superiors, they shall be arrested and be handed over to ‘Li Bu’ (Ministry of Personnel) by their superiors for the failure of discovering arresting the tricksters. Besides, the books, which have given people instructions as to how to organize litigations, such as *Jing Tian Lei (World-Shaking Thunder)*, *Xiang Jiao (Wrestling)*, *Fa Jia Xin Shu (New Books on Legalists)*, and *Xing Tai Qin Jing (Mirrors of Criminal Punishment)* and which have been published by bookstores without authorizations, shall all be banned, destroyed and prohibited from being sold . The people who dared to compile, carve and print such books shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes and be exiled at a distance of three thousand ‘li’ (three li equals about one English mile) by the analogical precedent of publishing obscene books. Those who have carved, reprinted and sold the old books shall be sentenced to a penal servitude of three year plus the punishment of ‘Zhang’ (flogging with heavy sticks) for one hundred strokes, while the buyers shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes. The one who has hidden the old printing blocks rather than destroyed it shall be punished with one degree lower than that of carving and printing new books. Those who have hidden such books shall be punished by analogy with enacting laws without authorization. The officials who have failed to supervise

¹⁶“Fei Shi Er Zi” (The Twelve False Philosophers) in *Xunzi*.

¹⁷“Li Wei” (Inconsistency between Words and Thoughts) in *Lv Shi Chun Qiu (Spring and Autumn Annals of Master Lv)*.

them shall be handed over to ‘Li Bu’ (Ministry of Personnel) and be treated differently according to the times of their negligence”; if the imperial envoys who have been entrusted the trial of the serious cases have found out the false accusation, the people who have appealed to the officials in the capital for this accusation shall be punished by analogy with the precedent of false accusation. Besides, the officials who have originally tried this case shall be examined carefully to find out whether there are the cases of inciting litigators and organizing illegal factions, moreover, they shall be interrogated separately according to ‘Li’ (precedent). The local officials who have failed to find out the case shall be punished severely.

The government’s strict supervision and punishment for litigators was caused by people’s attitudes towards litigation, because in the eyes of ancient Chinese, the filing of lawsuits was not only a symbol of degrading morality, but also a threat to social stability, a power struggle which might make people dishonest, and a evil-doing which might bring shame to people’s personality and the honor of clan. Therefore, it was inevitable that litigators were severely punished.

However, it was certain that the dislike and contempt for litigation would lead to people’s ignorance of law as well as their neglect of the protection of their own proper interests by law, which was deeply exposed by Shen Jiaben in his law revision in late Qing Dynasty according to the imperial decree. He claimed that:

Except ‘Ming Li’ (yamen runner) and ‘Qiu Cao’ (Ministry of Punishment), few people have paid any attention to what legalists say. What the legalists have said are neglected even by the famous ministers or scholars and are seldom read because they are considered worthless. Moreover, their books are even deemed to be ominous and are kept away from the people. This is very strange.¹⁸ So the Chinese law is at a critical situation, because neither the officials nor the ordinary people are interested in it, let alone trace its origin and discuss its advantages and disadvantages.¹⁹ Since ancient times, the ignorant and influential people have known little about law, they are not willing to abide by law, and on the contrary, they might even break it. The reason why it is difficult to carry out the law is that few people have studied law.²⁰

14.2 Achieving “No Litigation” by Settling Conflicts Through Mediation

If “no litigation” was said to be the value orientation of the ancient Chinese political and legal construction, mediation had become the major means to settle lawsuits, which was age-old in ancient China. In the process, rich experience was accumulated and a complete system was set up, which was rarely seen in world history of legal system.

¹⁸“Fa Xue Hui Za Zhi Xu” (Preface to the Journal of Law Society) in *Ji Yi Wen Cun (The Classics of Ji Yi)*, Vol. 6.

¹⁹*Tian Yi Ge Shu Mu Ba (The Postscript of the Catalogue of Tian Yi Ge)*.

²⁰“Fa Xue Sheng Shuai Shuo” (On the ups and downs of the Legal Learning) in *Ji Yi Wen Cun (The Classics of Ji Yi)*, Vol. 3.

In ancient China, it was called “He Xi” or “He Dui” (reconciliation) to settle lawsuits through mediation. Early in Western Zhou dynasty, the mediations had been recorded on bronze vessels. Since Qin and Han Dynasties, the principle of settling lawsuits through mediation had been mainly followed by judicial officials. Afterwards, up to Northern and Southern Song Dynasty, with the increase of civil disputes, the mediation tended to be institutionalized. During Ming and Qing Dynasty, the mediation had become more perfect. And the object of mediation was the civil and minor criminal cases, and the presider of the mediation was usually the local officials “Zhou” (subprefecture) and “Xian” (county), the officials of basic level and the chief of clan. Because the numbers of lawsuits settled were regarded as one of the standards to judge political achievements, the officials of “Zhou” (subprefecture) and “Xian” (county) had all paid attention to the implement of the principle of “settling lawsuits through mediation”.

14.2.1 The Official Mediation by “Zhou” (Subprefecture) and “Xian” (County)

The official mediation, also called the mediation within lawsuits, was presided over and participated by the officials of “Zhou” (subprefecture) and “Xian” (county), which was rather prevailing in Song Dynasty. Several cases were recorded in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*. For instance, the case of “a boundary disputes between Fu Liang and Shen Pai’er” was settled after official mediation, and it was recorded that:

Because the case has been brought to the court, it should only be settled by law. ...However, because the disputed piece of land is only a few feet wide, it would be far better if those involved can cherish the friendship and harmony between neighbors. If Shen would like to rent that piece of land, Fu Liang should, in the interest of the harmony between neighbors, agree to this. If so, they should put it into a contract in explicit language and clearly inform each other. Therefore, both of them should file a statement, promising to have no more complaints.

Another case mediated by the officials was about “the disputes between brothers”:

What has been robbed before should be returned to the original owner in private. Thereafter, the harmonious relationship shall be restored and disputes shall be settled to avoid corrupting public morals. Otherwise, the violators shall be punished severely with no exception.²¹

The official mediation was not a fixed proceeding regulated by law, however, it had stayed prevailed from Song Dynasty to Ming and Qing Dynasty. To sum up, this official mediation prevalent in many dynasties had the following common features:

²¹ *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Zhonghua Book Company, 1987, p. 199, 371.

First, in the trial of civil cases, the mediation was combined with punishments and it was even considered a priority.

In feudal times, it was a very important standard to judge officials’ political achievements to settle the lawsuits without delay, which had made the officials strive to settle the lawsuits by mediation before turning to court trials. In practice, it was seldom that cases were directly judged without any mediation, and only when the mediation had failed was the case brought to the court to be judged whether right or wrong. The combination of mediation and punishment, which had not only integrated education with punishments, but also law with morality, was a successful experience in handling civil cases effectively.

Second, the official mediation was compulsory to some extent.

According to modern jurisprudence, mediation in civil cases must be carried out under the condition of complete mutual consent, so the judges could only help to bring about the understanding between two parties without compulsion. However, under the ancient Chinese autocratic system, the officials of “Zhou” (subprefecture) and “Xian” (county) were the dictators in the district, and they were only responsible to their superior departments and emperors instead of common people. As far as the starting point of their handling of the cases was concerned, although it could not be said that they had totally ignored the common people’s interests, they still paid more attention to their fame and political achievements. Therefore, the official mediation was compulsory to some extent, which had forced the involved parties to be submitted to the wills of the officials of “Zhou” (subprefecture) and “Xian” (county), and brought damage to their interests. For reason, “Gan Jie” (a written pledge indicating the acceptance of punishments or determinations), “He Yi Zhuang” (a description of reaching an agreement) or “Wu Zheng Zhuang” (a description of no complaints on the judgment) would be presented by the parties involved by stating that “the agreement would be obeyed”, “the reconciliation would be followed” and no more disputes would be stirred up. So coerciveness was the essence of feudal mediation. Taken the materials about “Gan Jie” (a written pledge indicating the acceptance of punishments or determinations) in Qing Dynasty as an example: “‘Gan Jie’. Hu Rui, the one who has prepared ‘Gan Jie’, would agree willingly to settle the disputes today. He will obey the agreement blessed by His Majesty: the dispute between Wu Kuanbing and Shen Laiyi over the destruction of beans has been settled. Shen shall return home and be law-abiding. No further disputes will be stirred up. The presented ‘Gan Jie’ is verified.”—June, 24th, in the 16th year of Jiaqing period, sealed by Hu Rui. “Approved”.²²

Third, the cooperation between official and citizen, and the coordination in and out of court.

Among the cases accepted by the officials of “Zhou” (subprefecture) and “Xian” (county), “those brought to trials were only less than four or five out of ten, most lawsuits were about the disputes among neighbors or disagreements on trivial matters among relatives which were caused by momentary anger.... And if the parties involved could calm down and have an understanding of each other, they would feel

²²*Bao Di Xian Quan Zong (Archival Files of Baodi County).*

regretted and ashamed. So the disputes may be settled at any time. Sometimes the relatives or neighbors would mediate the disputes among themselves and request permissions for the termination of proceedings even after the acceptance by courts. In the end, the harmony and friendship have already been restored by the two parties; therefore, the government officials shall approve the compromise and settle the disputes as far as possible.”²³ From this, it could be observed that the possibility of mediation was determined by the nature and cause of cases. As for whether the mediation was carried out by officials or by people, it all depended on the details of the cases. Sometimes, the disputes were settled by the coordination in and out of courts. For instance, if the reconciliation had failed in the court, the relatives or neighbors would be ordered to mediate in private, and then approved in the court. This coordination in and out of courts had not only mobilized all possible social forces for the mediation and settlement of lawsuits, but also had made it easier to find out the truth. Just as what was stated in volume 17 of *Mu Ling Shu* (a book of regulations on the prefectural officials’ behaviors, edited by Qing government) “in the eyes of villagers, the truth will surely be found out, but they may not be fully included in the case descriptions presented to ‘Zhou’ (subprefecture) and ‘Xian’ (Xian). Therefore, the information which was got from among the people was much more believable than that got in the court.”

Fourth, stressing the patching up of quarrels and reconciliation of the parties concerned while ignoring the standard of right and wrong.

Because the aim of the government was to settle lawsuits without considering how to protect the legal interests of the parties involved, they had just stressed the patching up of quarrels and reconciliation of the parties concerned and ignored what was right and wrong, which could be illustrated by many cases at hand. For example, during the Tongzhi period of Qing Dynasty, Kuai Zifan, who was “Zhi Zhou” (subprefectural magistrates) of Chang Zhou, “even used his own money to make a reconciliation of the disputes between the two people rather than distinguish what was right and what was wrong”. Wang Huizu, a famous official in Qing Dynasty, once said in *Xue Zhi Yi Shuo*,

It is good to hold trials and make convictions diligently; however, the right and the wrong might not be too distinctly clarified. It is better to restore harmony through mediations by the relatives and friends, and the laws should be followed in convictions and trials while the human relationships should be followed in the mediation. So, it is necessary to distinguish the right and the wrong in the law, while the boundary could be ignored with the regard to human relationships.... if an official had flaunted his discretion and rejected the requests for the termination of the proceedings, it was not the right way for reconciliation.²⁴

The so-called “being deliberately ignorant” actually referred to “Nan De Hu Tu” (where ignorance is bliss, it’s folly to be wise). Although the official mediation had certain coercive power, it was different from verdicts, so it could not be forced to be

²³Wang Zuhui, *Zuo Shi Yao Yan (Advice for Helping Governing the Country)*.

²⁴Wang Zuhui, “Duan An Bu Ru Xi An” (lawsuit reconciliation is more preferable to lawsuit settlement) in *Xue Zhi Yi Shuo (Suggestions for Government)*.

accepted by the parties involved. Moreover, although the official mediation had been authorized and guided by Confucian thoughts in which social status, manners and customs were stressed, it could not violate publicly the truth and law, otherwise, the aim of “fair implementation of policies” and “impartial handling of matters” could not be achieved.

14.2.2 *Civil Mediation*

During Ming and Qing Dynasty, civil disputes were generally settled by the relatives, neighbors and clan chiefs through mediation instead of being brought to the court, which was called “Si He” (reconciliation in private) or “mediation beyond litigation”.

In Chinese feudal society, the disputes among the people were mainly about farmlands, households and marriages. In the rulers’ eyes, these were trivial matters which had not endangered the country; therefore, if civil disputes could be mediated, it was absolutely not regarded as an encroachment to national power.

Under the guidance of Confucian thoughts, the punishment of the ritual offences was the guiding principle for feudal legislations and the basis for filing a criminal case. However, not every conduct which was against the propriety would surely have received criminal sanction, which was impossible to be reached with the combination of “Li” (rites) and punishments. Therefore, according to state jurisdiction, trivial criminal disputes may not be brought to the court, and they should be settled through civil mediations. Because common people were in awe of the officials, and in addition, they also worried about the costs of lawsuits, mediation was often excessively used. Sometimes even serious homicide cases were settled privately, although it was forbidden in state law. For instance, it was provided in an article of “making private settlements by elders” in *Da Ming Lv* (*The Great Ming Code*):

If the family heads such as grandparents, parents or husbands have got murdered by someone, the grandsons, wife, concubines, ‘Nu Bi’ (the slave girls and maidservants) or workers have settled the case with the murderer privately, they shall be sentenced to penal servitude of three years plus the punishment of ‘Zhang’ (flogging with heavy sticks) for one hundred strokes If the servants or the young have got killed, the elders who have made private settlements shall be punished one degree lower than the previous ones. If the wife’s own grandson and his wife, ‘Nu Bi’ (the slave girls and maidservants) or employees have got killed, the grandparents or family chief who have made private settlements shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes. The one who has taken bribes shall be charged of stealing and will be punished severely. Generally speaking, the one who has settled a homicide case privately shall be punished by ‘Zhang’ (flogging with heavy sticks) for sixty strokes. Those who have settled ‘Gu Shi’ (old practices) privately shall be punished two degrees lower than the general punishments plus the punishment of ‘Chi’ (flogging with light sticks) for one fifty strokes.

The so-called “Gong Shi” (old practices), explained in *Zhi Jun Qi Shu* (*Wonderful Strategies for Rulers*), “includes the conducts of settling the affrays among people

in private instead of appealing to judicial officials”.²⁵ It was strictly regulated and stated in *Da Ming Lv (The Great Ming Code)* that the punishment of the crimes above penal servitude and exile as well as the sexual violation should not be settled in private. However, with the rapid increase of civil and criminal disputes among the people, the phenomenon of private settlement had become increasingly popular; therefore, the scope of private settlement had to be specially regulated. For instance, during the Jiajing period (1522 A.D–1567 A.D.), it was regulated in *Xiang Jia Yue* (a book, written by Lv Kun in Ming Dynasty about a number of regulations and system agreed by the villagers which has made the whole society a prison) that mediation was allowed in the following nine situations: “illegal marriage; illegal owning of the farmlands; cursing and affray; eating or damaging crop seedings by livestock; default in payment of loans and the interests more than 3 years; failure to return the mortgage estate after receiving ransom; unfair dealing of and damaging others’ interests; making inroads on land boundaries; and the mandatory rule in law requiring the returning of the missing persons and livestock”.

The civil mediation was a social phenomenon commonly seen in ancient China, which was various in form, and strong in adaptability. Besides, there were neither legal procedures nor extortion from “Ya Men” runners, therefore, it was welcomed by the common people and had become popularized in Song Dynasty. For civil disputes, the judicial officials would generally prefer the mediation first in lawsuit settlement, either in court or in private. It was recorded in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)* that “as to the lawsuits among relatives, the parties involved would be ordered to have a face to face talk to deepen their mutual understanding. Most of them would completely change their minds, and in no time, harmony would be restored.” It was also recorded that “if the young has appealed to the court for unfair dividing of the properties, it should be decided according to law. However, before that, their elders must be informed first to make an equal division of the properties by themselves.”²⁶

In Song Dynasty, the mediation was mainly carried out by the government. The cases settled through civil mediation were recorded in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*. For example, as to the case of “appointing an heir in the sonless situation”, it was mentioned that “the involved Zhu Si household, in extreme grief during periods of mourning for the loss of his son, was not willing to bring the lawsuit to the court and finally harmony was restored on the advice of the clan chief.” So “restoring harmony on the advice of the clan chief” was apparently a civil mediation carried out by the clan chief. Another example involved the case of “the conspiracy to defraud of real estates”. The judicial officials were not satisfied with the mediation carried out among the relatives, so it was especially regulated in the conviction that “the relatives in the village are dishonest and know nothing about the justice. ‘Yang’ (in Chinese philosophy, medicine, etc.

²⁵ *Zhi Jun Qi Shu (Wonderful Strategies for Rulers)*, Vol. 10, p. 27.

²⁶ “Quan Yu Shi Jian Yu Hou” (Advice for the Youngsters) in “Guan Li Men” (Officials) in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Vol. 1, 1987, p. 10.

it means the masculine or positive principle in nature) is against harmony, while ‘Yin Xing’ (good deeds not known by others) is calumniated.”²⁷

In Yuan Dynasty, due to the fact that “great numbers of civil disputes were mainly over farmlands and marriages”, mediation was used extensively by judicial institutions to reduce the burdens and alleviate social conflicts. It was regulated in *Zhi Yuan Xin Ge (Yuan Code)* that “as long as the laws have not been seriously violated, the disputes over marriages, properties, farmlands, real estates and loans shall all be settled according to the instruction of ‘She Zhang’ (official in a village), because it is helpful to avoid leaving the farm uncultivated and bothering the judicial officials.”²⁸ The two parties involved were allowed, according to law, to withdraw lawsuits with mutual consent during the trial, which was called “Gao Lan” (stopping the proceedings). However, the cases settled by “Gao Lan” were not to be tried again without any judicial reasons, and not to be accepted again by the judicial officials. It was regulated in *Yuan Dian Zhang (Statutes of Yuan Dynasty)* that:

If the lawsuits about marriages, lands, properties and loans which have involved no violations of laws have been withdrawn, they are not allowed to be accepted again by the judicial officials with jurisdiction, otherwise, they will be punished by the supervisory officials...., thereafter, after the lawsuits about marriages, lands, properties and loans have been voluntarily withdrawn, approved by the government and harmony restored, if the lawsuit is filed again and there are no other violations, they are not to be accepted by the judicial officials any more. From now on, if the parties involved want to withdraw the lawsuits about marriages, lands, properties, and loans after careful examination, and if there are no other violations, after the withdrawal has been approved, the parties involved shall not bring lawsuits to court any more with no reasons, if violated, they shall be punished.²⁹

In Ming Dynasty, up to April of the 27th year of Hongwu period, it was “ordered that the lawsuits in the villages should be settled by their fair-minded and responsible elders, the disputes over marriages, lands and affrays should be settled by ‘Li Xu’ (official in charge of village or town affairs), and only those concerning serious cases should be reported to the government officials. If the disputes were directly brought to the county officials without firstly being settled by the elders of the villages, it should be regarded as overstepping indictments.”³⁰ In this decree, the procedural mediation and the trials in villages had been acknowledged as the primary trials, and if the disputes were directly brought to the county officials without firstly being settled by the elders of the villages, it was regarded as overstepping indictments. It was more specifically regulated in *Jiao Min Bang Wen* (a special penal code issued by Zhu Yuanzhang, the first emperor of Ming) issued by “Hu Bu” (Board of Revenues) that “the trivial disputes like marriages, households, farmlands, and affrays shall not be brought to the court rashly, and they must be judged by

²⁷ *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Zhonghua Book Company, 1987, p. 213, 193.

²⁸ “Xing Fa Zhi” (The Record of the Criminal Law) in *Xin Yuan Shi (The New History of Yuan Dynasty)*.

²⁹ “Gao Lan” (Stopping the Proceedings) in “Su Song” (Litigation) in *Yuan Dian Zhang (Statutes of Yuan Dynasty)*, Vol. 53.

³⁰ Gu Yanwu, *Ri Zhi Lu (Daily Understanding)*, Vol. 8.

the elders of the ‘Li Jia’ (an administrative unit created by Zhu Yuanzhang, combining several villages into one district). If this process was omitted, the violator would be punished by ‘Zhang’ (flogging with heavy sticks) for sixty strokes without being inquired of the real situation, afterwards, this lawsuit would be returned to the relevant district and judged by the elders.”³¹ The so-called elders and the seniors in the clan of the district were mostly the despotic gentry and clan chiefs, and their decisions had fully reflected the close combination of political power and clan authority.

What’s more, in Ming Dynasty, “Shen Ming Ting” (an office set up to mediate the civil disputes) was also established in almost all “Zhou” (subprefecture) and “Xian” (country) where “all civil lawsuits were allowed to be tried and judged by the elders and heads of the district.”³² “Shen Ming Ting” (an office set up to mediate the civil disputes) was mainly applied for mediating civil disputes and conflicts, and all households and marriage cases must be firstly handled by it, which had acted as the grass-root judicial organization. Because “Shen Ming Ting” (an office set up to mediate the civil disputes) had become a place where civil lawsuits were discussed and mediated, where the virtuous were encouraged and the vicious were punished, where the beneficial were promoted and the harmful were eradicated, in *Ming Lv* (*Ming Code*), an article was specially formulated that “the demolition of ‘Shen Ming Ting’ (an office set up to mediate the civil disputes)” should be strictly punished, and “those who dare to destroy the building of ‘Shen Ming Ting’ (an office set up to mediate the civil disputes) and to ruin the announcement board shall be exiled at a place three thousand *li* away, with the addition of the punishment of ‘Zhang’ (flogging with heavy sticks) for one hundred strokes.”

In the Kangxi period of Qing Dynasty, *Sheng Yu Shi Liu Tiao* (16 Imperial Edicts) was revised, and the contents of “settling lawsuits to bring harmony to villagers” was clearly regulated, which had indicated that by summing up the historical experience, the rulers were well aware that the mediation of lawsuits by the application of civil influence had contributed greatly to the elimination of the intimidation of the government offices, the extortion from the “Ya Men” runners, the fears of the instruments of torture, the time-consuming procedures as well as the bothering of official documents, which had made it easier for the two parties of the litigation to accept the settlements. Besides, the moral prestige of the elders of the district also had made it easier for them to believe that the disputes would be mediated and settled impartially and reasonably.

In Qing Dynasty, it was prevailing for people to mediate privately. For instance, during the Jiaqing period, a widow named Zhang in Sun family had sued her former husband’s elder cousin, Sun Wenxiang, for usurping her lands. Before “Zhi Xian” (magistrate of a county) held trials, the relatives of the two parties had already mediated this dispute by themselves and found out that the dead husband had mortgaged

³¹ Quoted from the case on Sept. 7th, the eleventh year of Chenghua in *Huang Ming Zhi Shu* (*Laws and Systems in Ming Dynasty before Zhengde*) (Book 1).

³² “Za Fan” (Miscellaneous Crimes) in “Xing Lv” (The Criminal Law) in *Da Ming Lv Ji Jie Fu Li* (*Great Ming Code with Collected Commentaries and Appended Sub-statutes*), Vol. 26.

the eight *mu* disputed lands to borrow money from his elder cousin and was not able to redeem it back. The widow knew that she was wrong, so withdrew the lawsuit of her accords. The mediator also had persuaded the defendant to provide financial aid for the fatherless kids and the widow accordingly. The defendant agreed and was willing to return the mortgage free to the plaintiff in view of the fact that they “are from the same clan and kindred”. A new agreement was reached that “hereafter, the two would keep the inheritance and ancestral achievements respectively without any further disputes, and they have promised to promote the harmonious atmosphere in the clan.” Then the relatives who had participated in the mediation had jointly submitted a letter to “Zhi Xian” (magistrate of a county) and pled with “the merciful magistrate to withdraw the lawsuit for the sake of kinship in view of this mediation”. In the end, they were approved by “Zhi Xian” (magistrate of a county) to have the “the case withdrawn”.

It could be seen from above that only when the two parties involved had given up part of their own interests to achieve their more realistic goal under a given situation could the private mediation of disputes be completed. However, the current state law was not allowed to be violated by the private mediation, in practice; it was carried out mainly according to the traditional customs, clan rules, village regulations and folk agreements. Although the private mediation was not completed through the court, with the permission of the state, the disputes were settled by the regional basic organizations and clan organizations. If the mediations were unsuccessful, the disputes still could be tried in the court.

The Ming and Qing Dynasty had witnessed the extensive prevalence of village regulations, folk agreements and clan rules, which had provided a practical basis for the civil mediation. The clan had become the most important link in the process of civil mediation, especially with the expansion of the clan authority and intensification of its power. It was said that “the affairs related to moral instructions and the disputes over households, marriages and farmlands shall all firstly be decided by clan chiefs and vice-chiefs; while only those serious cases are allowed to be tried by the officials.”³³ In some clan rules, it was even specifically regulated that “if disputes have occurred, the householder shall be informed first and then they will be reported to ‘Xiang Bao’ (local police) in the village. The true state of affairs shall be discussed again, and the parties involved shall be persuaded to settle the disputes and reach reconciliation.”³⁴ Moreover, it was stated in another rule that “the villages should be harmoniously maintained by the mediation of lawsuits and disputes, and the families should be managed peacefully by abstaining them. ‘Lawsuits may bring about misfortune, while honesty may produce sincere speech.’ Before the conflicts which were caused by quarrels and trivial matters concerning properties and farmlands were brought to the court by the people of the clan, they must be reported to and handled reasonably by the householders firstly according to the domestic

³³ Zhang Haishan, “Ju Min Lun” (On Assembling the People) in *Huang Chao Jing Shi Wen Bian* (A Collection of Documents about Politics, Diplomacy, Economy, and Society in Qing Dynasty), Vol. 58.

³⁴ *Li Shi Zu Pu* (The Pedigree of Li Clan), Vol. 1, in Qianyang, Anhui province.

disciplines. If the handling was unsatisfactory, the parties involved were allowed to go to the ancestral temples to report it to the ancestors. Then it should be discussed by the public and the disputes be settled and harmony be restored.”³⁵ Even if a case had been accepted by the government officials, as long as the clan chief had declared that “the punishment has been made according to domestic disciplines, its settlement still could be approved by the government”. The clan’s authority in mediation was taken seriously due to the following four reasons: first, the exercise of the clan power and patriarchal clan system were supported by the state; second, as a social community with the patriarchal features, the stability of the clan had played an important role in the stability of the whole society; third, the clan chief was not only authorized to control and manage the clan, but also to undertake more other obligations in the state. The mediation by the clan chief usually had taken into consideration the interests of both the families and the state; finally, the clan rules, as important supplements to the state laws, were state-approved laws applied in a special area of the clan.

Besides, according to the systems of the local of administration in Ming and Qing Dynasty, “Zhou” (subprefecture) and “Xian” (the county) were at the lowest rank of the administrative organizations, and their local officials were both the local administrative officials and the judicial magistrates, so their jurisdictions were wide and their public affairs were many, therefore, the “trivial” civil disputes were often put in the charge of the clan chiefs to handle. Furthermore, some chiefs of the bigger clans even served as grassroots village officials, just as was described by Ling Zhu in *Jiangxi Shi Nie Ji Shi* (the records of provincial judges in Jiangxi province), “...it is found that people in Jiangxi mostly live in groups and clans, while the ‘Bao Zheng’ (the chief of the ‘Bao’, consisted of ten households in the village) and ‘Li Zhang’ (the chief of the district) are all members of the clan.” The clan in the area of Fujian included “Zu Zhang” (clan chief), “Fang Zhang” (the householder) and “Jia Zhang” (patriarch), and “the clan chiefs were in charge of almost all of the daily affairs concerning personnel, residence, emergency, choice making, recruitments and legal affairs.”³⁶ In these areas, the clan chief was the government authorized agent, and if the clan chief was authorized to mediate, double mediating effects might be achieved by the clan and grassroot officials. In fact, after receiving litigation indictments, if “Zhou” (prefectural) and “Xian” (county) magistrates had believed that the case was not serious, and it had just involved relatives and clans, a trial would be cancelled and the chief of “Bao” (local police), clan chief or the relatives would be ordered to have mediations rather than “furthering litigation”. After mediation, the chief of “Bao” and clan chief should submit a petition about the reasons of the occurrence of disputes and the suggestions for solutions to the superiors to help them to settle the case. It was regulated in *Jiao Min Bang Wen* (a special penal code issued by Zhu Yuanzhang, the first emperor of Ming) issued by “Hu Bu” (Board of Revenues) in Ming Dynasty that “the trivial disputes like marriages, households, farmlands, and affrays shall not be brought to the court rashly, and they

³⁵ *Zu Shizong Pu* (*The Genealogy of Zhu Clan*), Vol. 11, in Xiaoshan, Zhejiang province.

³⁶ Chen Shouqi, *Zuo Hai Wen Ji* (*The Collected Works of Zuo Hai*), Vol. 6.

must be judged by the elders of the ‘Li Jia’ (an administrative unit created by Zhu Yuanzhang, combining several villages into one district). If this process was omitted, the violator would be punished by ‘Zhang’ (flogging with heavy sticks) for sixty strokes without being inquired of the real situation, afterwards, this lawsuit would be returned to the relevant district and judged by the elders.”³⁷

Although it was not regulated in the laws and precedents of Qing Dynasty that the officials of “Zhou” (subprefecture) and “Xian” (country) should order the clan and family to mediate disputes among the relatives, in practice, domestic disputes were encouraged to be mediated. Especially in the areas where clan influence was strong, the civil disputes must be mediated by the householders within the clan first, and they were not allowed to be brought to courts without authorization; otherwise, the punishments would be enforced according to family rules. It was regulated in the genealogy of the Zhu family in Tongcheng of Anhui province that “the conflicts among the clans must be reported to and handled by the respected elders in the household or the householders. People are not to bring lawsuits to courts arbitrarily, and those who dare to bully the weak by threatening them and taking advantage of their powers as well as those trouble makers shall all be punished according to family rules besides being reported to the householders.”

“Bao Jia”, a basic organization ranking lower than “Zhou” (subprefecture) and “Xian” (the county) in Qing Dynasty, was in charge of the prevention of burglary and the examination of household registers. But restrictions were regulated in *Da Qing Lv Li (The Laws and Precedents of Great Qing)* as to the dealing of civil disputes by “Bao Jia”: “‘Bao Jia’ is not to interfere with the matters concerning farmlands, households and marriages.” However, this rule existed only in name, in practice, what was forbidden still happened, because “Bao Jia” was often ordered by the officials of “Zhou” (subprefecture) and “Xian” (county) to handle the cases. According to File No. 107 in *Shun Tian Fu Quan Zong (Archival Files of the Capital District)*, in the 15th year of Guangxu, an order was issued by “Zhi Xian” (magistrate of a county) of Baodi County to let the “Bao” of the village involved to settle a land dispute, because “the matter is trivial and has involved minor injuries. The parties involved shall appeal to the ‘Bao’ of county for settlement rather than bring a lawsuit rashly.”

In the actual situation, a lot of civil disputes had been mediated and settled in families and clans or within the villages before appealing to trials. Those which were actually brought to officials and settled through trials accounted for only a few. Although the civil mediation had brought about much convenience; inevitably, it was partial and mandatory because of the different positions of the plaintiff and the defendant in clan and social status.

To sum up, it could be observed that there was a certain social basis for the mediations. In view of history, it could be said that settling lawsuits through mediation in ancient China was in accordance to the social conditions at the time, so its existence was reasonable. Besides, it had contributed greatly to the stability of the

³⁷ Quoted from the precedent on Sept. 7th, the eleventh year of Chenghua in *Huang Ming Zhi Shu (Laws and Systems in Ming Dynasty before Zhengde)* (Book 1).

social order as well as to the harmonious interrelationships among people in a given area, and it had also prevented the government clerks from seeking profits through improper measures, alleviated miscellaneous and heavy burdens of lawsuits for the parties involved and propagated the feudal conception of “Gang Chang” (the Chinese ethical tradition) and legal consciousness.

However, for the common people engaged in natural economy under the autocratic rule, it was not the legal consciousness but the traditional conception of moral ethics that had been cultivated by settling lawsuits through mediation, in which the ideological elements of “patching up of quarrels and reconciliation of the parties concerned while ignoring the standard of right and wrong” were thoroughly penetrated, which was harmful to promoting the fighting spirit of defending the people’s interests by appealing to law.³⁸

Settling lawsuits through mediation was both adaptive to the self-contained and small-scale peasant economic basis and the close blood and geographic relationships; it had not only relied on the clan authority and basic state power but also on the various legal origins with the combination of “Li” (rites) and law in order to defend the moral ethic order of “San Gang Wu Chang” (three cardinal guides and five constant virtues), in the process of which the wills of clan chief, the chiefs of “Bao” and “Jia” (two categories of households), and the officials of “Zhou” (sub prefecture) and “Xian” (county) had been reflected. Consequently, the results of mediation usually were against the wills of the parties involved, and sometimes they were even harmful.

14.3 “No Litigation” as the Basis of Ancient Chinese Legal Tradition

“No litigation”, as the value orientation of ancient Chinese legal culture and the legal tradition which had exerted a great influence, had its own social, cultural and political origins.

14.3.1 *The Social Origin*

One outstanding feature of the ancient Chinese social structure was the integration of family and state. This unique social structure could be dated back to the era of the creation of the state and was strengthened with the establishment of the mode of agricultural production under the patriarchal clan system. Because the archetype of “national affairs” was also the “family affairs”, the patriarchy was also introduced into the administrative field—the emperor was the father of the state, while the

³⁸“Duan An Bu Ru Xi An” (Lawsuit Reconciliation more Preferable to Lawsuit Settlement) in *Xue Zhi Yi Shuo* (*Suggestions for Government*).

officials were the local parents. In this situation, just as Shiga Shūzō, a scholar about the history of Japanese legal system, had said, when he talked about lawsuits, “The actions in the family, such as the parents’ teachings on the children’s bad behaviors and the settlement of the disputes between the siblings, might be used to explore the archetype of Chinese lawsuits. The metaphor that the ruler was the parent, while people were newborn babies, had existed in Chinese tradition since ancient times. In fact, “Zhi Zhou” (subprefectural magistrates) and “Zhi Xian” (magistrate of a county) were called the “parental officials” or “officials endeared to the people”, meaning that they were the “householders” responsible for the local order and welfare. The judicial affairs which they were in charge of were dispensed to people as a part or aspect of this consideration, which could be called ‘lawsuits tried by parental officials if you will.’”³⁹

What’s more, the residential mode of living where one’s clan had lived with the links of blood ties advocated at the time of the patriarchic clan system, the geographic relations of living in the same neighborhood for generations and being attached to one’s native land, and especially the economic structure of agricultural society, had made the members of the society live in a big family in which they were connected with each other and rarely migrated for many generations. With the addition of the infiltration and subtle influence of Confucian moral ethics, a living standard of getting along harmoniously and standing aloof from worldly affairs was formed so that the disputes were rarely appealed to the government offices and their settlements relied mainly on the moralization of “Gang Chang” (the Chinese ethical tradition), “Li Jiao” (feudal ethical code) and the mediation function of clan chiefs and neighbors. As French scholar Rene David had said in his book *The Major Legal Systems of the Contemporary World*, the standard in handling the relationship with others was whether it was in accordance with the reason. They had required no rights, what they required was only living together happily and harmoniously.⁴⁰ Under the influence of this ideology, a psychological state of “being ashamed of litigation” came into being. After a research of the Chinese legal tradition, Derk Bodde, the contemporary American scholar, had pointed out that “...traditionally the increase of litigation is regarded as a symptom of moral decay, and these (those involved in legal professions) were apparently viewed as enemies of social stability.”⁴¹ It was thus clear that litigation was dislike and despised by the ancient Chinese both because of the emphasis of “Ren Qing” (human feelings) and the fear of public condemnation.

Besides, the legal conception that “law means punishment” and the great burden brought about by litigation to the prosecutor had also made people regard litigation as a perilous undertaking. Therefore, the mediation made by “parental officials” for the purpose of restoring harmony was naturally welcomed. It could be said

³⁹ Shiga Shūzō, “An Examination of the Chinese Legal Culture”, *Journal of Comparative Law*, Vol. 3, 1988.

⁴⁰ René David, *The Major Legal System in the Contemporary World*, Shanghai Translation Publishing House, 1984, p. 487.

⁴¹ Derk Bodde, “Age, Youth and Infirmary in the Law of Ching China” in *Essay on China’s Legal Tradition*, Princeton University Publishing House, 1980, p. 149.

that the “no-litigation” value orientation was the result of integrating of the reality of the traditional Chinese agricultural economy and the needs of the social structure and the actual politics.

14.3.2 The Ideological and Cultural Origin

The “no-litigation” value orientation was based on the sedimentary accretion of Chinese traditional culture in pursuit of harmony. “He” was a name of ancient musical instrument. It was said in “Er Ya” (*Using Graceful and Elegant Languages: an ancient book containing commentaries on classics, names, etc.*) of *Shi Yue* (the explanation of music) that “the large wooden pipe is called ‘Chao’ while the small one is called ‘He’.” “Xie” meant harmonization. It was said in “Shun Dian” (Shun Code) in *Shang Shu (The Book of Historical Document)* that, “the eight different kinds of musical instruments could be adjusted so that none of them will interfere with each other and the harmonious tune is not violated.” The combined meaning of “He” and “Xie” was the harmonious tune and concordant coordination. “He Xie” had often been used to symbolize social harmony, stability and order by the ancient thinkers and politicians, and the establishment of harmonious societies was also regarded as the goal of their struggle. Harmony was advocated in the ancient Chinese culture, just as was stated by Confucianists that “the function of ‘Li’ (rites) is to achieve harmony.” Laozi’s famous inference that “man follows the examples of ‘Di’ (earth); ‘Di’ (earth) follows the examples of ‘Tian’ (heaven); ‘Tian’ (heaven) follows the examples of ‘Dao’ (law); and ‘Dao’ (law) follows the examples of nature”⁴² was also a praise of harmony. Actually, “no-litigation” was only a judicial reflection of the requirement of harmonious family and society. Brought up in a society of agricultural economy, on the one hand, the Chinese had shown their dependence on the nature, on the other hand, their conception of cherishing the group strength was also formed in the struggle against nature, in which the Chinese people’s intrinsic requirement for harmony was produced.

As far as legal culture was concerned, although the ancient Chinese law was centered on punishment, still punishment was not the ultimate purpose, as was expressed in *Zhou Li (The Rites of Zhou Dynasty)* that “the purpose of imprisonment is to educate people to abide by laws so that no imprisonment needs to be used any more, and the purpose of capital punishment is to eliminate punishment.” The idea of “eliminating punishments with punishments” which was proposed by legalists was in fact aimed to realize the harmonious world with “no litigation” by the means of punishment. Especially, in the doctrines of magnanimity preached by Confucius like “the benevolent loves others”, “being able to keep a foothold and successful oneself, one shall help others to do so”, and “do unto others as you would be done”, litigation caused by disputes were both opposed and contempted. Therefore, “no litigation” which he proposed was preconditioned by “contempt for litigation”, which was also

⁴²Chapter 25 in *Laozi*.

the connotation of Confucianism. With the completion of the Confucianization of Chinese feudal law, the rulers had fully understood that the universal harmony and stability could not be achieved by only relying on the balance of the relationship between law and rights and obligations, it also relied on the support of the profound Chinese culture in which “Li” (rites) was respected and virtue was valued. Therefore, moralization should be encouraged, ethics should be valued, customs should be stressed, and the rules of “Li” (rites) should be clarified. In the practical legal enforcement and administration, the settlement and prevention of lawsuits were so vigorously advocated that litigation had not only become an indecent action intolerable by “Li” (rites), but also was scorned by the sages in the minds of ancient Chinese people. Furthermore, a lot of essays and verdicts were written to persuade people to avoid litigating rashly. For instance, in Song Dynasty, it was pointed out by Hu Shibi in the verdict of the case “Wrongful Plaints over Landed Property”:

To begin with, getting involved in complaints and lawsuits is not at all desirable, because it may lead to the neglect of one’s occupation, damage the family properties, encourage the clerks to make insatiable requests, bring curses and humiliations by the soldiers, entail boring trips on the road, and may even result in confinements in prison. A lawsuit against someone else in the community is harmful to the cordial relations, and if someone is fortunate enough to win, much else has already been lost; if someone is unfortunate enough to lose, it is then too late for him to regret. Therefore, lawsuits must be caused by long-standing grievances: either the poor is merged by the rich, or the weak is murdered by the strong, or the foolish is being victimized by the cleverer. If the intractable troubles have pushed a person’s back to the wall, one has no other option but to cry out against the injustice and to appeal to the courts. Under such circumstances, the fault does not lie with the one who has filed the lawsuit.⁴³

For this reason, in *Jie Song Lu (Records of Abandonment of Appeal)*, the people in Song Dynasty were warned not to get involved in litigation easily in the form of ballads: “trivial disputes should be settled, in neither ‘Zhou’ (prefecture) nor ‘Xian’ (county) being tried; entertaining the officials with wines and tea in their offices or homes, resulting in getting a cat by selling a cattle.”⁴⁴

In Ming Dynasty, Wang Shouren, a famous thinker, said in *Jin Sheng Ci Song Gao Yu (A Declaration for the Prohibition of Litigations)* that:

According to lawsuits brought to courts by people in the places like Nanchang prefecture, most of them are related to households, marriages and farmlands. Although there are one or two serious cases, some other irrelevant trivial matters are involved. Among the cases, except for those which are doubtful, they shall be accepted after assessment. However, there are no more exceptions, . . . all the trivial matters should be forborn. So people shall not bring lawsuits to courts rashly. It is not worthwhile to lose their lives and families because of momentary anger or minor interests; then it would be too late for them to feel regretful. . . . the appeal was allowed, only if the cases have not been discussed or fairly convicted, or have wronged others. Those who dare to violate the above mentioned rules deliberately and to appeal to the officials must be punished severely by wearing the cangue (a wooden collar like stocks used to restrain and punish criminals), and they are not forgiven easily.⁴⁵

⁴³“Wang Su Tian Ye” (Wrongful Complaint Over Landed Property) in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Vol. 4, Zhonghua Book Company, 1987, p. 123.

⁴⁴Fan Gongcheng, *Guo Ting Lu (Records of the Courts)*.

⁴⁵*Wang Wen Cheng Gong Quan Shu (The Complete Works of Wang Yangming)*, Vol. 31.

In Qing Dynasty, 16 decrees had been issued by Emperor Kangxi himself to warn people with supreme authority such as "...making compromises among villagers to settle conflicts and lawsuits; clarifying 'Li' (rites) to promote customs; ... applying laws to warn the foolish and stubborn people; ...giving up the false accusations to maintain kindheartedness; ...resolving the hostility to protect one's life."⁴⁶

It could be seen from the above that "no-litigation" had its cultural origins.

14.3.3 *The Political Origin*

Under the ruling of feudal autocratic system, the pursuit of order and stability had always been one of the basic goals, which was specifically embodied by taking "no-litigation" as the value orientation of legal system construction. Because usually those involved in lawsuits were not just the two parties, but a family, a clan or even more people, the winner had achieved what he wished, while the loser would not easily admit his defeat, so that some lawsuits were not settled even in several generations, which might have caused the tension of social relations and the upheaval of the social order. Therefore, the rulers would prefer to settle the lawsuits about "trivial" matters outside courts.

Because litigation certainly would delay production, influence people's lives, break up families and even make people destitute and homeless, which had not only affected the tax revenue of the state but also brought about huge army of vagrants, this was a taboo of the feudal rulers. To avoid unstable social factors caused by the burden of lawsuits, giving up lawsuits and "no-litigation" were encouraged. So the decrease of prisoners was considered a symbol of prosperity of the country, while the increase of lawsuits was considered a symbol of the declining of the country.

In some litigation, the judicial officials had taken bribes and broken laws for his own profits, which had severely damaged the interests of the parties concerned, caused sharp conflicts between the officials and the ordinary people, made the intrinsic contradictions more intensified and become the incentive for greater upheavals. For this reason, it was natural that the peasant uprisings in feudal times were often caused by jail deliveries and prison rebels.

The saying that the dislike of lawsuit was caused by the contempt for law in ancient China was incompatible to the cognitive level of the ancient people. For the ancient Chinese people, the law always meant the so-called "Wang Fa" (the state law) which was endowed with great authority, thus, they did not show hatred, but only showed fear, doubt and even ignorance to law. In the long ancient society, there were very few emperors who had really informed the public of the laws, and most rulers had preferred to keep the ordinary people in dark about the laws for their convenience of ruling. In Song Dynasty, which was famous for law implementation, all kinds of legal examinations were set up so as to improve the officials' legal

⁴⁶ *Qing Sheng Zu Shi Lu* (Authentic Historical Materials about the Reign of Emperor Kangxi), October, the ninth year of Kangxi period.

knowledge and their ability of law application, nevertheless, the ordinary people were strictly forbidden to transcribe or print the codes or even teach laws privately. In the first year of Yuanyou period, a rule was made to award the people “who have reported the delinquent behaviors such as secretly gathering students to teach them the writing of complaints and law compilation to the officials.”⁴⁷ A further provision was made in Shaoxing Chi that “the one who has gathered students to teach the writing of complaints shall be punished by ‘Zhang’ (flogging with heavy sticks) for one hundred strokes. If informed,...each of the learners shall be punished by ‘Zhang’ (flogging with heavy sticks) for eighty strokes.”⁴⁸ Under the coercion of strict law, most ordinary people were ignorant of laws, and it was just because of their ignorance of laws that they began to show doubt to laws, which had resulted in the fear and hatred of litigation.

To reduce litigation, apart from generating the public opinions of “no litigation”, the feudal rulers had also restricted people’s rights of private prosecution in institution. For example, the young were prohibited from prosecuting the elder and the humble were prohibited from prosecuting the noble, besides, the prosecution rights of the women, the disabled and the deformed were either restricted or totally deprived of. In view of stabilizing the society and consolidating the political interests of the state, various forms of mediations in lawsuit settlement were supported by the feudal state, although they could not be read in the articles of state statutes. Those litigants who had rejected the convictions made by “Zhou” (subprefecture) and “Xian” (county) and insisted on appealing to the superior courts would be regarded as “unruly people who have got the habit of bringing lawsuits to courts” and would be punished by “Zhang” (flogging with heavy sticks) first before being turned to trials. However the result of the appeal was self-explanatory, because it was dominated by the tradition of mutual shielding by the bureaucrats and the insistence of the officials’ previous convictions.

14.4 “No Litigation” Carried Out at the Price of Avoiding the Burden of Prosecution

There were many reasons for the extensive influence which “no-litigation” had exerted on jurisdiction and the hatred and contempt which the ordinary people had shown to lawsuits. Apart from the social, cultural and political reasons mentioned above, there was another very practical and specific reason: that was the unbearable burden of the prosecution. In feudal times, once the lawsuits were filed, the litigants would be blackmailed by the litigation professionals, clerks and judicial officials, and would be confronted with the risk of bankruptcy due to the burden of prosecution. The famous judicial official Hu Shibi in Song Dynasty once pointed

⁴⁷“Xing Fa” (The Criminal Law) in *Song Hui Yao (Collections of Historical Records in Song Dynasty)* (Book 1), Article 13.

⁴⁸Ibid., (Book 3), Article 26.

out that many people would have “their ancestral achievement wasted and family properties damaged” because of litigation. And he said, “If someone is fortunate enough to win, much else has already been lost; if someone is unfortunate and has lost, it is then too late for him to regret.”⁴⁹ In Qing Dynasty, another famous judicial official Wang Huizu had also described the situation of a bankrupted peasant due to the burden of prosecution. He said:

If a peasant has 40 *mu* of farmland, several family members could be raised by the men tilling the land and the women weaving the cloth. One litigation would cost three thousand *wen* (a monetary unit), which must be paid with loans. In less than two years, the farmland would be sold. The sale of one *mu* of farmland would lead to the decrease of the production. In the end, there was nothing left to live on within seven or eight years due to the money borrowed from others. They would become poorer after seven or eight years, however, the poverty was actually brought about at the beginning of their lawsuits.⁵⁰

It was specifically provided in *Xi Shi Zong Pu* (*The Genealogy of Xi Family*) at Jinling in Jiangsu province that “those who are involved in lawsuits out of minor resentment would have their families ruined gradually, and those who have brought legal disputes over property to courts would lose their own ancestral achievement instead, so ‘lawsuits usually result in misfortune’”. In the Confucius Temple in Qufu in Shangdong province, this situation was more vividly described on a stone inscription named “Ren Song Ge” (a song encouraging people not to go to the litigation):

The common people had better to tolerate instead of appealing to officials;
 This may bring peace to oneself as well as to the others.
 Instigated by others and appealing to the court;
 Money is needed both in accusation and litigation.
 ‘Chai Ren’ (the police) needs ‘Piao’ or ‘Qian’ (tickets or bamboo slips issued by the government to detain or arrest someone) to take actions;
 Money is needed in both locking and unlocking (releasing and imprisoning people).
 Walking to ‘Zhou’ (subprefecture) and ‘Xian’ (County) and carefully calculated,
 Money is needed for both leaving and staying for the night.
 Three meals shall be provided for the neighbors to act as witness;
 Money is needed for tea and cigarette.
 The officials from the ‘San Ban’ (Zao, Zhuang and Kuai, in charge of logistics, arresting criminals and safeguarding respectively) are the most difficult to be tackled with,
 Money is needed in either trials or meditations.
 The officials are upright while clerks are corrupted since ancient times;
 Money is needed for either beating or wearing the cangue.
 The litigation instigator is naturally greedy;
 Money is needed for whether winning or losing the lawsuits.
 Being trapped in lawsuits by following the other’s advice of prosecution;
 Both the lands and the houses have to be sold.
 Being lack of food and clothes, both wife and children live a difficult life;
 Suddenly realizing the harmfulness of the litigation,
 It is too late to regret or to scold.

⁴⁹Hu Shibi, “Wang Su Tian Ye” (Wrongful Complaint Over Landed Property) in *Ming Gong Shu Pan Qing Ming Ji* (*Collections of Enlightened Judgments*), Vol. 4, Zhonghua Book Company, 1987, p. 123.

⁵⁰Wang Huizu, “Xing Shi” (Conducting Official Business) in *Zuo Shi Yao Yan* (*Advice for Helping Governing the Country*).

On the one hand, this song had expressed people's narcotic thoughts of accepting oppression and exploitation; however, on the other hand, it had also exposed the burden of lawsuits and reflected the reality of the society. In late Qing Dynasty, the “banning of prosecution burden” was one of the most important contents in the proposals for judicial reform put forward by Zhang Zhidong and Liu Kongyi, from which we could clearly see the great harm which it had brought about.

To sum up, the theory of “no litigation” was put forward 3,000 years ago, and it had been continuously carried out ever since that time, which had shown its profound social and historical origins. In the method of settling lawsuits through mediation developed by the promotion of “no-litigation”, state power and social strength were closely combined; therefore, it was a better way of settling civil disputes under the condition of natural economy, which was unique in the history of ancient world legal system with its perfect system, abundant experience and extensive implementation.

However, as a value orientation and ideal, the concept of “no-litigation” was established on the basis of unscientific cognition. From the various scholars in pre-Qin to the different Confucianists in Han and Tang Dynasty, their theories of “no litigation” and their ways and patterns of the pursuit of “no-litigation” were basically the same, and no progress had been made with the advancement of time. The basic standpoint for the pursuit of “no-litigation” was to cherish harmony, maintain neutrality and stabilize order. Although it was undeniable that the stability of order was the guarantee of social development, the over-emphasis on order and stability would surely have hindered the creativity and free exploration. For this reason, although the world without lawsuits was endowed with its designers' noble moral sentiments, it was impracticable; moreover, it had violated the law of the historical development.

Additionally, under the influence of the value orientation of “no-litigation”, the development of the legal system was difficult, the authority of law was diminished and the sense of rights and legal consciousness of the common people were weakened, and its long-lasting and great negative effect could not be ignored. Up to today, we are still confronted with the task of transformation from the traditional legal conception of settling lawsuits, contemning lawsuits and “no-litigation” to the modern legal conception of litigant rights.

Because of the complexity of the society, one trend was covered under another one. On the whole, the feudal government had regarded “no litigation” as the value orientation, and the ignorance, fear, hatred and contempt of the litigation had become the dominating concept of the common people, however, it could be observed that in a specific stage of historical development, there had appeared the phenomenon of the “prevalence of litigation” and the “rampancy of litigation”. Taking Song Dynasty as an example, on the one hand, the rulers had continued to uphold the flag of advocating moralization, cherishing moral ethics, stressing customs and settling lawsuits in order to patch up quarrels and reconcile the parties concerned; on the other hand, they had acknowledged the rationality of the legal disputes caused by the diversification of interests.

Song Dynasty had witnessed the development of the ownership of the private land and the prosperity of the commodity economy, which had made the economic

interests diversified, so the disputes over the interests of private ownership had increased greatly. Confronted with frequent invasions by the powerful enemies from the outside and the constant domestic peasant uprisings caused by the financial strain and arbitrary taxation, the rulers of Song had relatively shown more solicitude for the common people to stabilize social order and consolidate state control. In Northern Song, Lv Dafang once said, “The most urgent measure in governing a country is to protect the people, while the essence of this protection is to show favor to the old households and to attract new ones.”⁵¹ In Southern Song dynasty, Emperor Gaozu had specifically emphasized that “the government shall regard the civil affairs as the priority.”⁵² Under such circumstances, the civil disputes among the people were regarded as urgent matters related with the state, so they were required to be treated seriously. The legal protection of private rights was seldom seen before Song dynasty and it was even rare after it. For example, since Han Dynasty, according to the law, the young had been strictly forbidden to sue the elder, however, there were no such restrictions in the civil lawsuits in Song Dynasty. Among the cases recorded in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, there were not only cases about the disputes between uncles and nephews, but also those between brothers and between sons and mothers. The judicial officials had accepted these cases and expressed in the verdicts that “lawsuits between sons and mothers as well as brothers shall be fairly judged.”⁵³ The above mentioned example had shown the impact of the conception of property on the feudal order of importance or seniority in human relationships as well as the legal protection for private ownership, which was the brand of the times imposed on the ruling of law by the economic development in Song Dynasty. Therefore, it was considered a normal and unquestionable behavior to appeal to the government and the law for the maintenance of individual private rights.

Related to the daily increasing litigious actions, a group of people called “litigation agents”, “litigation sponsors” and “litigation registrars” came into being in the society, who, as a special group, had propagated “the study of litigation” and devoted themselves to helping others in litigation. Their existence and activities had received no legal prohibitions like those in Ming and Qing dynasty, which had reflected the consciousness of litigious rights created in the protection of private rights. People’s legal value in Song dynasty was inseparable from the emergence of the utilitarian ideology among mandarins. For instance, in Northern Song, Li Gou once said, “Why it can not be said that people have engaged in production for the sake of profits?... It is human nature to have desires, why can’t it be expressed?”⁵⁴ Up to the Southern Song dynasty, Chen Liang and Ye Shi, the representatives of “Shi Gong” School (emphasizing the achievement), had criticized the traditional view of putting

⁵¹ “Min Yi” (Public Discussion) in *Huang Chao Wen Jian (Complete Collection of Poems and Essays in Northern Song Dynasty)*, Vol. 106.

⁵² *Song Ji San Chao Zheng Yao (Essentials about Politics of three Emperors in Song Dynasty)*, Vol. 1.

⁵³ “Fair Judgements of Lawsuits between Sons and Mothers as well as Brothers” in *Ming Gong Shu Pan Qing Ming Ji (Collections of Enlightened Judgments)*, Vol. 10, p. 361, 362.

⁵⁴ *Li Gou Ji (The Collected Works of Li Gou)*.

the cart before the horse and the doctrine of stressing the righteousness while neglecting the profits. They believed the principle of utilitarianism and emphasized both righteousness and profits. Chen Liang’s utilitarian ideology was concentratedly expressed by the following principle: “what may help one to be successful is virtuous; and what may help one gain achievement is rational.”⁵⁵ Ye Shi then spoke overtly in defence of the trade and business: “it is wrong to assume that the prosperity of the state can be guaranteed by the interactions of the four kinds of people (scholar, farmer, worker, and businessman) and business and trade should be repressed.”⁵⁶

In conclusion, Song Dynasty had gained an important position in the history of Chinese legal system not only because of its civil, financial and economic legislation and advanced civil proceedings; it had also shown the diversity and richness of the contents of the Chinese traditional legal culture. A cultural group, consisted of scholar-bureaucrats, had made a rational criticism to the traditional views like executing punishments and releasing prisoners in autumn and winter. Starting from the awareness of unexpected suffering caused by the invasion of the northern ethnic minority, they had shown more care about social stability and people’s distress, therefore, had paid more attention to the legal adjustments of civil disputes. In Song Dynasty, the law was learned and exercised generally by the emperors (of course not all), bureaucrats and scholar-bureaucrats. Emperor Shenzong and many other bureaucrats like Wang Anshi and Sima Guang had all got involved in the argument about the decision of the articles concerning the famous “Ah Yun Case” in *Song Xing Tong (The Penal Code of Song Dynasty)*. In the poem *Xi Zi You Shu* (a poem to Zi You) which was presented to his disciples, Su Dongpo said, “If reading many books while knowing nothing about laws, even emperor Xiao and Shun would have known no tactics”, which had reflected the general understanding of the scholar-bureaucrats at that time.

In the recently discovered files of Qing Dynasty in Ziyang County of Shanxi province and Mianning County of Sichuan province, civil litigations had occupied a large proportion, which had shown that up to the later period of feudal society the public consciousness of appealing to government offices and laws to defend their own legitimate rights and interests had been raised, meanwhile, it had also shown that the “trivial things or matters” of the people and their legal settlements were stressed by the government of “Zhou” (subprefecture) and “Xian” (county), because the unresolved trivial matters might have led to more serious ones, which was unbearable by the dynasties of at the end of the feudal society.

⁵⁵“A Reply to Chen Tongpu” in *Zhi Zhai Wen Ji (The Collected Works of Chen Fuliang)*, Vol. 36.

⁵⁶“Shi Ji Yi” (Historical Records, Part 1) in *Xi Xue Ji Yan Xu Mu (The Prefaces and Contents of the Notes of Study)*, Vol. 19.

Chapter 15

The Contribution to Chinese Legal System by All Nationalities in China

15.1 The Chinese Legal System and the World

The problem of legal system began to draw the attention of the world legal field since 1884 when the famous Japanese jurist, Hozumi Nobushige had put forward his proposal that the world legal system should be divided into “Indian Legal Group”, “Chinese Legal Group”, “Islamic Legal Group”, “British Legal Group” and “Roman Legal Group”. In 1923, the world legal system was further divided into 16 groups by American scholar Wigmore, which had included the Chinese legal system. The theory had not only exerted a profound influence, but also provided an important foundation for the research on the Chinese legal system at that time.

Liang Qichao, who was exiled in Japan after “Bai Ri Wei Xin” (hundred days’ reform), was the first in China who had put forward and made research on Chinese legal system. In his essays *On the History of the Development of the Jurisprudence in China* and *On the Gains and Losses of the Compilation of Chinese Written Law*, the issues on Chinese legal system had been discussed and a declaration was made in a proud voice that “recently, the jurists in the world have claimed that there are four legal systems in the world, and the Chinese system is one of them. Among the remaining legal systems, some were created before ours, but they have long become extinct; while others are still prevailing today, but they have a short history. For this reason, we should be proud of our legal system in the world. It is said that dragons and snakes are only born and live in the deep mountains and vast lakes. Therefore, it is proper for China to have an independent and great legal system because the empire has been established by millions of divine people, moreover, it has continued for thousands of years.”¹ He also claimed that “one part of our legal system could be said to have derived from the legal system of the Miao nationality.”² “Therefore, the legal systems of the states like Gaoli (a former name of Korea),

¹Fan Zhongxin (ed.), *Liang Qichao Fa Xue Wen Xuan (Selected Works of Law by Liang Qichao)*, China University of Political Science and Laws, 2002, p. 69.

²Ibid., p. 124.

Japan, and Annan (an ancient name of Vietnam) were all derived from our legal system at that time”.³

The Chinese legal system was the only native legal system with unique feature, which had reflected the broadness and profoundness of Chinese culture, and which was the crystallization of the rationality of Chinese nation as well as the main representative of the civilization of Chinese legal system. Not only could Chinese legal system be traced back to a very ancient origin, it also had had a great vitality. Although many kinds of legal systems were created in the world, in the long process of development, some of them had disappeared gradually by being merged into other legal systems; some had die out with the extinct of the country and some had been disrupted due to other complicated reasons. Only the Chinese legal system had never been interrupted after thousands of years of development, which was unique in the world for its typical features of long-standing, integrity, systematicness and typicality.

During the long process of formation and development, the Chinese legal system not only had accumulated a profound legal culture, but also had greatly influenced the neighboring countries since Tang Dynasty. In the medieval times, the legal system, social atmosphere, the general mood of the society and even the rites and customs of the countries like Gaoli, Vietnam and Japan were all imprinted with the Chinese legal system, which had formed a circle of legal culture dominated by Confucianism.

Because Tang Dynasty was the summit of the world legal civilization at that time, the countries like Gaoli, Japan and Vietnam had all sent their envoys and students to learn legal culture in China. Since the last half of the seventh century, a series of laws originated from *Tang Lv (Tang Code)* had been successively enacted and issued in Japan. In the first year of Tenji (668 A.D.), the overseas students like Kuromasa and Monk Min had presided over the enactment of *Jin Jiang Ling (The Ōmi Code)* consisting of 22 volumes, which was the first collection of laws in Japanese history. According to the statements in his *A Comparison between Tang Ling (The Orders of Tang Dynasty) and Japanese Code* made by Nakata Kaoru, a scholar of the history of Japanese legal system, *Jin Jiang Ling (The Ōmi Code)* was enacted on the basis of the seven codes made in the seven periods of Tang Dynasty, namely, Wude, Zhenguan, Yonghui, Linde, Qianfeng, Fengyi, Chuigong. But it had already been lost during the Nara period.⁴

In the first year of Dabao (701 A.D.) during the reign of the Mikado Mommu, two epoch-making law codes—*Dabao Lv (Da Bao Code)* consisting of six volumes and *Dabao Ling* (Emperor’s orders issued in the period of Da Bao) consisting of 11 volumes were enacted in Japan. Those who had participated in the drafting of these two codes included either the students studying in Tang, such as Iki no Hakatoko and Hanibe Ikuo, or the descendants of Chinese immigrants, such as Huan Wenbei and Duan Dajiao. According to *Lv Ling Kao (A Textual Research on Laws and*

³ Ibid., p. 147.

⁴ Nakata Kaoru, *Ri Ben Si Fa Fa Zhi Shi Jiang Yi (Lectures on the History of Japanese Civil Legal System)*.

Orders) written by Satoh Seiji, “*Dabao Ling* has originated from *Jin Jiang Ling* (*The Ōmi Code*), which is based on the three codes in Wude, Zhenguan and Yonghui period with the code in Yonghui as the principal one.” Huang Zunxian had made the following records in “Xing Fa Zhi” (The Record of the Criminal Law) in *The History of Japan*: “during the reign of Kotoku, the system of Tang was adopted. “Xing Bu” (Board of Punishment) was first established, and it was divided into two departments: one was in charge of returning the stolen goods, while the other one was in charge of imprisonment. Thereafter, the penal code was created, which was divided into 12 sections: the first was “Ming Li” (Statutes and Terms), the second was the “Wei Jin” (Rules for the Security of State Institutions), the third was “Zhi Zhi” (The State Office System), the fourth was “Hu Hun” (Rules for Households and Marriages), the fifth was “Jiu Ku” (Government Stables and Treasuries), the sixth was “Shan Xing” (Rules for Military and Official Construction), the seventh was “Zai Dao” (Violence and Theft), the eighth was “Dou Song” (Disputes and Litigations), the ninth was “Zha Wei” (Rules for False Accusations), the tenth was “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed), the eleventh was “Bu Wang” (Rules for Escaped Prisoners), and the twelfth was “Duan Yu” (Trials and Punishments). Besides, articles like “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment), “Ba Nue” (Eight Cruelties), and “Liu Yi” (Six Deliberations), which were generally similar to those in *Tang Lv* (*Tang Code*) were also adopted. Many students were sent to Tang to study law at that time, after returning home, they taught people laws, so their legal systems were clarified and became detailed.” Kuwabara Jitsuzoh, a Japanese scholar, had pointed out in his *On the History of Chinese Legal System* that “*Dabao Lv* (Da Bao Code) is largely the copy of *Tang Lv* (*Tang Code*), with a few changes made according to our national conditions though.”⁵ For example, the “Ba Yi” (The Eight Deliberations) in *Tang Lv* (*Tang Code*) was changed into “Liu Yi” (Six Deliberations) with the deletion of “Yi Qin” (the crimes committed by those who had made contributions to the state may be judged through a special trial) and “Yi Bin” (the Guests of the State: to treat the descendants of previous dynasties as guests of the state who could enjoy a legal privilege). The “Shi E” (The Ten Abominations) was changed into “Ba Nue” (Eight Cruelties) with the deletion of “Bu Mu” (inharmonious), and “Nei Luan” (incest within the family). “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) in *Tang Lv* (*Tang Code*) was continued to be used as the names of punishments in *Dabao Lv* (Da Bao Code), but it was changed to “Chi” (flogging with light sticks); “Zhang” (flogging with heavy sticks); “Tu” (imprisonment);

⁵ Kuwabara Jitsuzoh (stored), *Zhong Guo Fa Zhi Shi Lun Cong* (*Studies on the Chinese Legal History*), Koubundou Publishers, 1925, p. 363.

“Liu” (life exile); and “Si” (death penalty). For life exile, there were no regulations about the distance, which was divided into three degrees: at short distance, at medium distance, and at far distance. Besides, the accusations were the same as those in *Tang Lv* (*Tang Code*), such as unauthorized entry into the palace, blocking the streets when the emperor passed by, insulting the emperor and the unauthorized crossing of the frontier and so on. *Dabao Lv Ling* (laws and orders issued in the period of Da Bao) was the product of Taika-Reform, which had exerted a profound influence in Japan, although it was lost.

In the fourth year of Yōrō (718 A.D.) during the reign of Mikado Gensho, the most perfect law in its history, called *Yanglao Lv* (*Yoro Code*) consisting of 10 volumes and *Yanglao Ling* (*Yoro Oder*) consisting of 10 volumes were enacted in Japan, which were a revision of *Dabao Lv* and *Dabao Ling*. With *Yong Hui Lv Shu* (also named *Tang Lv Shu Yi*) as the origin and *Kaiyuan Lv Ling* (Laws and Orders of Kaiyuan) as a reference, Kibi no Makibi who had “studied abroad, researched on the Confucian history and engaged in many subjects”,⁶ was ordered to do the compilation. The number of articles, titles and contents of the chapters were basically the same as those of the *Tang Lv* (*Tang Code*), only with fewer items.

Gao Li Lv was also based on *Tang Lv* (*Tang Code*). In “Xing Fa Zhi” (The Record of the Criminal Law) in *The History of Gao Li* (Korea), written by Zheng Linzhi, a historian of Shizong period in Gaoli, it was stated that “the legal system of Gao Li (Korea) mostly copied that of Tang Dynasty. As for the penal codes, *Tang Lv* (*Tang Code*) was applied according to concrete occasions, in which the following 71 articles are included: two articles about ‘Yu Guan’ (jail keepers); twelve articles about ‘Ming Li’ (Statutes and Terms); four articles about ‘Wei Jin’ (Rules for the Security of State Institutions); fourteen articles about ‘Zhi Zhi’ (The State Office System); four articles about ‘Hu Hun’ (Rules for Households and Marriages); three articles about ‘Jiu Ku’ (Government Stables and Treasuries); three articles about ‘Shan Xing’ (Rules for Military and Official Construction); six articles about ‘Zai Dao’ (Violence and Theft); seven articles about “Dou Song” (Disputes and Litigations); two articles about ‘Zha Wei’ (Rules for False Accusations); two articles about ‘Za Lv’ (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed); eight articles about ‘Bu Wang’ (Rules for Escaped Prisoners); and four articles about ‘Duan Yu’ (Trials and Punishments). In the compilation, the complicated ones have been deleted, while the concise ones have been kept. Although it will only be temporarily applied, it still should have legal bases.” In *Gao Li Lv* (*Gao Li Code*), not only in the number of chapters and writing style were the same as those in *Tang Lv* (*Tang Code*), it was also similar to *Tang Lv* (*Tang Code*) in the contents either concerning the regulations of the names of the punishments, or concerning some items which were favorable for the privileged or some regulations in other aspects.

⁶“Tian Ping Qi Nian Tiao” (The Records of the Seventh Year of Emperor Mommu’s Reign) in *Xu Ri Ben Ji* (*Shoku Nihongi*).

The laws of Li Dynasty and Chen Dynasty in Vietnam were also deeply influenced by *Tang Lv* (*Tang Code*). According to “Xing Fa Zhi” (The Record of the Criminal Law) in *Constitutional Records of All Dynasties*, in the first year of Mingdao (1042), *Xing Shu* (*Penal Code*) consisting of three volumes was issued by the first emperor of the Li Dynasty, while in the sixth year of Jianzhong, *Gao Chao Xing Lv* (*The Penal Code of Gaochao*) was issued by the first emperor of Chen Dynasty, both of which were made according to *Tang Lv* (*Tang Code*), as was described that: “when laws were examined and decided at first, the old system in Tang and Song Dynasty was considered to be adopted. However, changes were made when it came to the selection or deletion of the articles.” Up to the early years of Li Dynasty (1401), in the compilation of *Hong De Xing Lv*, references had also been “made from the laws in Sui and Tang Dynasty. A unified law shall be enacted, which will function as the standard of the whole nation. Thus, it shall be obeyed for all generations as the established constitution.” As for the contents, there were not only “Shi E” (The Ten Abominations) and “Ba Yi” (The Eight Deliberations), but also other articles, such as “Zhi Zhi” (The State Office System), “Hu Hun” (Rules for Households and Marriages), “Jiu Ku” (Government Stables and Treasuries), “Shan Xing” (Rules for Military and Official Construction), “Zai Dao” (Violence and Theft), “Dou Song” (Disputes and Litigations), “Zha Wei” (Rules for False Accusations), “Za Lv” (Miscellaneous Laws: one chapter of *Tang Lv* in which the crimes that could not be classified in any of the categories were listed), “Bu Wang” (Rules for Escaped Prisoners), “Duan Yu” (Trials and Punishments) and so on, all of which were adopted from *Tang Lv* (*Tang Code*).

As an independent legal system, it should not only have some unique features, but also be accepted or applied in some other countries or regions; otherwise, it could not be called an independent system. The profound and extensive influence of “Lv” (criminal law), “Ling” (order or ordinance) in Tang dynasty to the neighbour countries had shown that the Chinese legal system had proudly and independently stood in the world. Besides “Lv” (criminal law), “Ling” (order or ordinance) of Tang dynasty, those of Ming Dynasty had also directly influenced Japan and the Korea. Therefore, the Chinese legal system was both national and cosmopolitan.

15.2 The Creation of Chinese Legal System by All Nationalities in China

A unified multinational country was founded very early in China, and the Chinese territory, history and culture were developed and shaped jointly by different nationalities. As a whole, the “Chinese nationality” had not only possessed cultures from the same origin, but also communicated and integrated with each other at different degrees in the long process of development. The various Chinese nationalities began to be integrated and unified in ancient times before Qin dynasty. As the main force, the nationality of “Hua Xia” (an ancient name for China) had integrated with other tribes which were called Yi, Man, Yong and Di in ancient times and formed a

large-scale national community. A unified and prosperous feudal empire in Qin and Han Dynasty came into being after this successful national integration, and the national integration could also be seen in the legal field. It was recorded in history that in ancient times, laws had already begun to be enacted by Miao nationality outside of “Hua Xia” (an ancient name for China). According to records, “the people of Miao did not make use of systems of the previous kings, but instead began to use harsh punishments randomly, such as ‘Bi’ (to cut down the nose), ‘Fei’ (to amputate the feet), ‘Zhuo’ (castration) and ‘Qing’ (to tattoo on the face). They had enforced punishments irrespective of the degree of crimes, and everyone was punished without distinctions, in the end, even the innocent people were harshly punished.”⁷ After Miao nationality was wiped out by “Huang Di” (Yellow Emperor, a legendary ruler), those punishments were adopted, and the penal system of Miao was changed into the five punishments, namely, “Mo” (to tattoo on the face), “Bi” (to cut down the nose), “Fei” (to amputate the feet), “Gong” (castration) and “Bi” (capital punishment), which were commonly used in the three dynasties of Xia, Shang, and Zhou till the early Han Dynasty.

From Qin and Han to Southern and Northern Dynasties, some other nationalities were integrated into the big family of Chinese nationality, such as Hun, Xianbei, Di, Qiang, Jie and so on. During the period of Northern Wei ruled by the Xianbei tribe, the construction of legal system had been stressed by Emperor Daowu, Tuoba Gui, Emperor Wenxiao and Tuoba Hong, moreover, it had experienced several stages, including the transition from common law to statute law and the introduction of “Li” (rites) into law. With the help of thinkers and legalists in Han nationality and under the guidance of the ideology of “ruling by law and instructing by ‘Li’ (rites)”,⁸ *Taihe Lv* (*Taihe Code*) was finally issued in the fifth year of Taihe period. In this law, the Confucian legal ideology and legislative accomplishments since Han, Wei and Jin dynasties were collected; meanwhile, some old systems in Yuan and Wei Dynasties were also retained. So it could be said that this law was the product of the mixture of nomadic nationality and agricultural nationality. Up to Northern Qi Empire which was established by the descendants of Xianbei nationality, its contribution to the legal system had occupied a historical position which had served as a link between the past and future. The writing style, penal system, and major titles of the punishments of the laws of Sui and Tang dynasties had obviously been succeeded in *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*), and it was recorded that “although the chapters of *Bei Qi Lv* (*The Penal Code of the Northern Qi Dynasty*) were different from those of *Tang Lv* (*Tang Code*), twelve of the old ones were still continued to be used. Even the names of punishments still followed the old name of “Wu Xing” (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment) with just a few additions and deletions. Although the names

⁷“Lv Xing” (The Penal Code of Lv) in *Shang Shu* (*The Book of Historical Document*).

⁸“Xing Fa Zhi” (The Record of the Criminal Law) in *Wei Shu* (*The History of Northern Wei Dynasty*).

of “Shi E” (The Ten Abominations) were not retained, the articles of the ten felonies were still adopted.”⁹ For this reason, it could be seen that it was just because of the persistent drafting of the legal system and the communication of the legal culture by different nationalities that it was possible for Chinese legal system to be established during Sui and Tang Dynasties.

After the establishment of Tang Dynasty, the policy of “showing kindness and pacification” was carried out among the ethnic minorities in the frontier regions, which had made many minority nationalities submitted to the imperial court in succession, subsequently, the relationship among various nationalities became more harmonious. Emperor Taizong of Tang Dynasty once proclaimed seriously that “the people of Yi and Di tribes are also human beings, and they are the same as the people in central China. The people from different tribes mainly worried about whether they have been treated with kindness and charity rather than with suspects and jealousy. So, as long as the kindness and charity could be endowed according to people’s will, the whole world could be treated like one family.”¹⁰ Therefore, in Tang Dynasty, in the submitted national areas, the number of “Ji Mi” “Zhou” (subprefecture) and “Fu” (prefecture) (which were controlled by Tang government) had reached to 856. “‘Ji Mi’ means to be held together by the imperial court.”¹¹ In these “Zhou” (subprefecture) and “Fu” (prefecture), the government affairs were managed by the hereditary chiefs of local ethnic minorities or the chiefs conferred by the government, moreover, the original customs were all preserved with no interference from the central government, and the chiefs only paid tributes in taxes and followed military maneuvers.

The rulers of Tang Dynasty had held an attitude of approval towards the laws and customs of the ethnic minorities. According to a provision regulated in *Tang Lv Shu Yi (The Comments on Tang Code)* about the offenses committed by outsiders, “if two foreigners are from the same country, they shall be punished according to the common customs in their own country, while if the two are from different countries, they shall be punished according to *Tang Lv (Tang Code)*.” It was particularly mentioned in the above article that “‘the foreigners’ referred to the ethnic minorities in the countries around the frontier regions. These countries have different emperors, distinctive customs and different laws, therefore, if the offence has been committed among the people from the same country, the system of this country shall be referred to and the convictions shall be made according to the common customs.”¹² From this, it could be seen that as far as the state law was concerned,

⁹Cheng Shude, “Bei Wei Lv Kao Xu” (Preface to ‘Bei Wei Lv Kao’: A Textual Research of the Laws in Northern Wei Dynasty) in *Jiu Chao Lv Kao (A Textual Research of the Laws of the Nine Dynasties from Han to Sui)*, Vol. 6, Zhonghua Book Company, 2003, p. 391.

¹⁰“Zhen Guan Er Shi Yi Nian Wu Yue” (May, the 21st Year of Zhen Guan) in *Zi Zhi Tong Jian (History as a Mirror)*, Vol. 198.

¹¹“Tang Ji” (Records of Tang Dynasty) in *Gang Jian Yi Zhi Lu (A Brief General Chinese History)*, Zhonghua Book Company.

¹²“Hua Wai Ren Xiang Fan” (The Offense between Foreigners) in *Tang Lv Shu Yi (The Comments on Tang Code)*, Vol. 6.

it was unprecedented for different local laws to be applied by different nationalities or countries in a unified multinational country under certain conditions, and its influence was far-reaching and profound. In *Li Fan Yuan Ze Li* (*The Regulations of "Li Fan Yuan"*) drafted in Qing dynasty, based on the principle of the punishment of foreigners in the light of their territorial laws in *Tang Lv Shu Yi* (*The Comments on Tang Code*), it was ruled that "the wrongdoers from places out of the inner land such as Mongolia shall be judged according to penal precedents. The ordinary people who have committed offences in the Mongolian area shall be judged according to Mongolian precedents." In the boundary regions between Datong prefecture of Shanxi province and Yellow and Red Banners of Chahar as well as the regions between Shuoping prefecture and Red and Blue Banners of Chahar, "if the Mongolians and the ordinary people are involved in the cases concerning murdering and stealing...all shall be tried by 'Tong Pan' (official in charge of agriculture under "Zhi Fu") together with officials from the four banners of Chahar according to the laws of the region where the case occurred." If the people involved were all Mongolians, then Mongolian precedents shall be specially applied; if the involved were all ordinary people, the penal code of Qing shall be specially applied; if the Mongolian have ganged up with the ordinary people, much severer punishments should be enforced; if Mongolian precedents were much severer than Qing penal code, both of them should be punished by the Mongolian precedents; if Qing penal codes were much severer than Mongolian precedents, both of them should be punished by Qing penal code.

During the reign of Tang Dynasty, around the border region of mainland were some regimes established by the minority groups like Tibet, Turkic and Nanzhao, each of whom had established a suit of efficient legal system. Although these laws had a strong local color and was blended with ethnic customs and religious rules, it was undeniable that they were all included in the family of Chinese legal culture, and they were all important components of Chinese legal civilization and had all reflected the emphasis, deliberation and creativity of these minority groups.

Song Dynasty was one of the dynasties which had faced with the most ethnic minority problems, so the rulers had paid much attention to the adjustment of the relationship with "Fan Zu" (foreigners) in the northwest by the application of legal measures. Consequently, the laws like *Fan Guan Fa* (*The Laws for Foreign Officials*), *Fan Bing Fa* (*The Laws for Foreign Soldiers*), *Fan Ding Fa* (*The Laws for Adult Foreigners*), and *Cha Ma Fa* (*The Laws for Trades with Foreigners*) were enacted. During the reign of Song, many tribes like Khitan tribe, Dangxiang tribe and Jurchen tribe had risen quickly in succession and the countries like Liao, Western Xia and Jin were established. The laws like *Chong Xi Xin Ding Tiao Li* (*Chong Xi Newly Enacted Regulations*) of Liao dynasty, *Taihe Lv Yi* (*Comments on Taihe Code*) of Jin dynasty and *Tian Sheng Gai Jiu Xin Ding Lv Ling* (*The New Laws and Orders of Tian Sheng Era*) of Western Xia dynasty were separately enacted, which had not only absorbed the traditional legal culture in central China, but also possessed distinctive features of the respective nationalities. The laws of Liao and Jin dynasties had been lost, and only *Tian Sheng Gai Jiu Xin Ding Lv Ling* (*The New Laws and Orders of Tian Sheng Era*) enforced during the Tiansheng period of Western Xia

remained intact,¹³ which “is the first that has been printed in the language of the ethnic minority in Chinese history,...and it is the one of the most detailed law among the existing ancient laws, with about 200 thousand articles without commentaries and quotations of the cases. Its contents concern penal laws, procedure laws, civil laws, economic laws and military laws, which had reflected all aspects of social life in the Western Xia.”¹⁴

Up to Yuan Dynasty, the Chinese territory had become unprecedentedly vast and the national and creative features of its legal system had also become more obvious, which included the establishment of unique penal systems, the creation of a legal sector of rehabilitation, the routinization of civil proceeding and the detailing of administrative laws and regulations, etc. The currently remained *Da Yuan Tongzhi Tiao Ge* (*The General Laws and Regulations of Great Yuan*) was not only the most important law code in the legal history of Chinese nation, but also representative of the level which the legal culture of Mongolian tribes had reached.¹⁵

Originating from Changbai Mountain and Black Dragon River, Manchuria nation adopted the legislative principle of “referring to Han nation and learning from King Tribe” when they founded the state outside Shan Hai Guan Pass. A legal system with its distinctive national feature was then established outside Shan Hai Guan Pass, but it was influenced by feudalism in no time. What’s more, after entering into Shan Hai Guan Pass, the principle of “referring to Han nation and learning from King tribe” was spread to the whole country. *Da Qing Lv Ji Jie Fu Li* (*Great Qing Code with Collected Commentaries and Appended Sub-Laws*), which was enacted in the third year of Shunzhi, was actually a reproduction of *Ming Lv* (*Ming Code*). With further exchanges of legal culture between Han and Manchuria nationality, *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), revised in the fifth year of Qianlong, had essentially become an orthodox feudal code just like *Tang Lv* (*Tang Code*), except for some special regulations about the acknowledgement of Manchurian rights and interests. But strictly speaking, this code no longer belonged to the legal systems of the ethnic minorities.

The ethnic legislations carried out during the reign of Qing Dynasty had best reflected the legislative achievements that had surpassed those of the previous dynasties. By following the principle of acting according to local customs and circumstances, the laws like *Meng Gu Lv Li* (*The Mongolian Laws and Precedents*),

¹³*Tian Sheng Gai Jiu Xin Ding Lv Ling* (*The New Laws and Orders of Tian Sheng Era*), annotated by Shi Jinbo, Nie Hongyin, and Bai Bin, China Legal Publishing House, 2000. The original version was stored in the Writing Department of St. Petersburg Branch in the Institute of Oriental Studies in Russian Academy of Sciences.

¹⁴*Ibid.*

¹⁵“*Da Yuan Tong Zhi Tiao Ge*” (*The General Laws and Regulations of Great Yuan*) was the main part of *Da Yuan Tong Zhi* (*The General Code of Yuan Dynasty*). The additional “*Duan Li*” (precedents) and “*Zhi Hui*” (the orders issued by the city and administrative divisions) have been lost, however, only from “*Tiao Ge*” (laws and regulations), it could be seen that the legal system in Yuan Dynasty was perfect and creative. Now, the better revised version of “*Tiao Ge*” (laws and regulations) is *Tong Zhi Tiao Ge Jiao Zhu* (Annotation of “*Tong Zhi Tiao Ge*”: the General Laws and Regulations) annotated by Fang Linggui (Zhonghua Book Company, 2001).

Li Fan Yuan Ze Li (The Regulations of “Li Fan Yuan”), *Xining Qinghai Fan Yi Cheng Li* (The Statute of Xining, Qinghai Province), *Xi Zang Tong Ze* (The General Rules of Tibet), and *Hui Jiang Ze Li* (The Regulations of Hui Jiang) were enacted by the Qing government successively. Before this, the force of law of the original statute laws and conventions of Mongolia and Tibet had been acknowledged valid, such as *Ah Le Tan Han Fa Dian* (Aletanhan Code) and *Meng Gu Wei La Te Fa Dian* (Mongolian Oirat Code) made by the local Mongolian government as well as *Shi Liu Fa* (Sixteen Laws) and *Shi San Fa* (Thirteen Laws) enacted by the local Tibetan government.

From above, it could be seen that since Chinese nation had entered into civilization, numerous nationalities including Han nationality had been bred on the Chinese soil. Although in different era, due to the difference of their cultural, economic, and political development, they had occupied different historical positions and functioned differently in the creation of Chinese legal system. So the Chinese legal system was created jointly by the people of various nationalities, which was imbued with the legal wisdoms of various nationalities and was the result of mutual exchange and absorption of legal culture and experience in the legal system construction among the various nationalities.

The common laws and folk laws of the ethnic minorities were not only large in number, but also various in form. In addition to the long history and distinctive features, they were also closely related to and serve the social life. In addition, with profound mass bases and greater authority, they actually had played great and effective roles of adjustment in the various tribes. For this reason, their existence was both necessary and reasonable. So it would greatly enrich the treasury of the legal culture of the Chinese nation to deeply dig up and sort out the legal legacy of different nationalities and to study the rules of the historical development of their legal systems. At the same time, it would also enhance our understanding of Chinese legal system and make this bright pearl hidden in the dust of history shine again more luminously at the world stage of legal system.

Part II
The Modern Transition of Chinese Law

Chapter 16

The Introduction of Western Legal Culture

16.1 China and the World Before the Opium War

16.1.1 *The Secluded China*

China was a secluded and conservative agricultural society with the domination of natural economy. The connection between China and the world was also cut off deliberately by the autocratic government so that for a very long time there had lacked a mutual understanding between China and the world. Up to the sixteenth century, a group of western missionaries, represented by Matteo Ricci (1552–1610), came to China. Apart from preaching, they also had spread the western scientific technology and knowledge of the humanities by translating books and works in their spare time, which had enlightened the Chinese people on modern natural science, such as mathematics, physics, geography, astronomy, and weapon-manufacturing, and which had also helped China to have a primary understanding of Europe as well as the world. Subsequently, in the intellectual circles, there appeared many thinkers who were primarily influenced by the west, like Xu Qiguang, Li Zhizao, Wang Hui, Huang Zongxi, Fan Yizhi and Liu Xianting.

After the establishment of Qing Dynasty, the general mood of “Xi Xue Dong Jian” (the introduction of Western learning to the East) had always been opposed by the defenders of the traditional moral principles. They “preferred the old calendar rather than the westerners in China.” During the reign of Kangxi, the Roman pope had interfered with the domestic affairs of Chinese society by forbidding Chinese believers to worship “Tian” (heaven), Confucius and their own ancestors, therefore, the western missionaries were expelled. After the reign of Kangxi, the policy of restricting and guarding against foreigners was carried out. For reason, a series of laws and regulations were enacted, for example, *Fang Fan Wai Yi Tiao Gui* (*The Rules Guarding against the Aliens*) was enacted in the 24th year of Qianlong, *Min Yi Jiao Yi Zhang Cheng* (*Trading Rules with the Foreigners*) was enacted in the 14th year of Jiaqing, and *Fang Fan Yi Ren Zhang Cheng* (*The Rules Guarding against the Foreigners*) was enacted in the 11th year of Daoguang. Besides, there were a lot of

imperial edicts and official documents, whose main contents could be summarized as the following: (1) Foreign merchants could go to Guangzhou only in summer and autumn and trade only with the government-licensed 13 trading companies. (2) While living in Guangzhou, they could only live in the trading companies so that they would be controlled and inspected. They must return to their country by boat or stay in Macao when the transactions ended and they were not allowed to spend the winter in Guangzhou. (3) To bring no weapons into the city. (4) Not to travel in the sedan chair or to wander around. (5) Not to buy Chinese books or learn Chinese. (6) Not to submit documents to the government or to hire someone to post letters to the inner land. (7) Not to go boating in China for fun. (8) Not to hire Chinese and the Chinese were forbidden to borrow capital from them. (9) No foreign women were allowed go into the city. (10) If the boat of foreign merchants was equipped with emplacements, they should be removed when entering the ports and then would be returned when the transactions ended. What's more, there were regulations like strengthening river defense and strictly monitoring activities of the foreign boats. Some of these regulations were necessary to a sovereign state, while some were made totally out of ignorance.

The obstruction of cultural exchange was much worse compared with that of the economic exchange between China and foreign countries. The long-existing arrogant mentality of “Tian Chao Da Guo” (a heavenly kingdom) of the Chinese people had not only prevented them from understanding the outside world willingly, but also made them lose the interest for further exploration. Before the nineteenth century, only three Chinese, Ba Suoma, Fan Shouyi, and Xie Qinggao had been to Europe. Among them, Fan Shouyi had spent 13 years in traveling around Europe and returned home in the 59th year of Kangxi. He had written the first journal of traveling in Europe, *Shen Jian Lu (The Records Experienced)*, but it was not published. Xie Qinggao had stayed in Europe for 14 years, and he had “travelled through the countries oversea and learned their languages, and the islands, fortresses, customs and local products were all recorded. Fourteen years later, he returned to Guangzhou, and it was the first time for a Chinese to travel for such a long time.” What Xie Qinggao had seen and heard were compiled by Yang Bingnan in the spring of 1820 into a book named *Hai Lu (Records of Sea)* which was praised by Lin Zexu because “the foreign matters were carefully and precisely recorded”.¹

With the completion of western bourgeois revolution, the intrinsic contradiction in the mode of capitalist production became daily obvious, therefore, the capitalist big powers turned their eyes to the oriental market. So the so-called flourishing age and self-importance of Qing dynasty featured by closing the country to international intercourse would soon be broken. The warships of western capitalist invaders had already come near to China's coastal border regions, and the Chinese feudal society, which had lasted for more than 2,000 years, would soon be changed.

¹ Zhong Shuhe, *Zou Xiang Shi Jie (Marching towards the World)*, Zhonghua Book Company, 1985, p. 46.

16.1.2 The Social Crisis in China and the Threat of Western Invasion at the Eve of Opium War

After entering Shan Hai Guan Pass in 1644, Qing Dynasty had experienced three generations of the so-called golden age ruled by Kangxi, Yongzheng and Qianlong, which had lasted for more than 100 years, and the ruling of Qing Dynasty began to decline quickly from the reign of Jiaqing. The intrinsic contradiction in feudal society became more acute, which had eventually led to the “White Lotus Uprising” that had swept the five provinces for almost 9 years. This rebellion had shaken the ruling foundation of Qing Dynasty and exposed various kinds of weakness of the feudal system. Although it was suppressed, the reign of Qing Dynasty had also come to its last phase, which was just like “the black berry rose which has got withered when the spring is over”. In the later period of Jiaqing, the imperial palace was even occupied by the rebels during “Tian Li Uprising” (one sect of the White Lotus Organization), which had symbolized a new upsurge of rebellions. Up to the reign of Daoguang, Qing Dynasty had deteriorated into a dangerous state in which “it is hard to make a livelihood”. Nevertheless, all these were not incidental.

In the feudal system of Qing Dynasty, the vast majority of peasants had almost no or just a few farmlands. Sustained the taxation from the government, the exploitation of the land-owning classes, moreover, suffered from the frequently-happening floods and droughts, a large number of peasants went bankrupted because of poverty, which had brought the landowners and bureaucrats opportunities to plunder more lands and led to very rapid centralization of farmlands. During the reign of Qianlong, Yang Xifu, “Xun Fu” (procurators) of Hunan province, said in the memorial to the emperor, “Recently, almost half of the farmlands have been occupied by the rich households and those landowners in the past have now become tenant farmers. What was worse, the cost of their food for the whole-year could not be covered by their annual income.”² Take the farmlands possessed by the emperor as an example: at the end of the reigning of Qianlong, the number of farmlands owned by the emperor had reached 0.43 million hectares, which had accounted for less than 6 % of the lands in the whole country; up to the 17th year of Jiaqing, in only more than 30 years, this number had increased to 0.83 million hectares, which had accounted for less than 11 % of the farmlands in the whole country. Some big bureaucrats had taken advantage of the powers in their hands and plunder the lands crazily. In the early year of Jiaqing, after He Shen, the powerful minister, was removed from office with his house searched and his properties confiscated, it was discovered that the number of his land had reached more than 8,000 hectares. Furthermore, Bai Ling, the bureaucrat during the reign of Jiaqing, also had seized thousands of hectares of lands, and Qi Shan, a bureaucrat in the reign of Daoguang, even had seized more

² Yang Xifu, “Chen Ming Mi Gui Zhi You Shu” (The Reasons for Chen Ming’s Expensive Rice) in *Huang Chao Jing Shi Wen Bian* (A Collection of Documents about Politics, Diplomacy, Economy, and Society in Qing Dynasty), edited by He Changling, Vol. 39. Taipei: Wenhai Publishing House, 1972, p. 1398.

than 25,000 hectares of lands. In addition, there were many local big landowners, such as “He family in Huairou who had possessed ten thousand hectares of farmlands”,³ “another Kang family in Shanyou was very rich and had possessed farmlands which amounted to a thousand hectares”.⁴ Generally speaking, the landlords who had occupied tens and hundreds of hectares of farmlands were everywhere all through the country and the lands in Qing Dynasty were more centralized than those in Ming Dynasty. Consequently, the landless peasants had joined the army of refugees, which had brought a serious threat to the regime of Qing dynasty.

Besides being exploited by way of feudal land rents, the peasants were also burdened with the oppression of usurious loans and commercial capital with feudal and monopolistic features. During the reign of Qing Dynasty, although the usurious loan was restricted by law, the exploiting activities were actually still rather rampant. Not only were there many loan offices operating usurious loan business, some big bureaucrats, landlords and merchants had also lent money to peasants and craftsmen. The interaction of the exploitation of usurious loans and land rents was one of the reasons for the centralization of land. In the essay “Forbidding to Press for the Payments of Debts Caused by Disasters” published in volume 2 of *Si Ci Tang Gao* (*Manuscripts of Si Ci Tang*), it was profoundly exposed by Wei Jirui:

Some rich people are brutal, because they have regarded the poor as pieces of meat, and they have only been interested in making profits and indulging in exploitation; the number of their farmlands is underestimated or quality undervalued, they have loaned less but received more; the properties and clothes might be pawned by the borrower who would receive no money but only a real due bill; the creditors either have craved for their wives and daughters or coveted the farmlands; if they have coveted someone’s livestock products and tools which would be collected occasionally, they would have lent money to him beforehand. By conspiring with the soldiers from ‘Ba Qi’ (the eight banners) and relying on the tyrannical powers, some may even refuse to return the bill after receiving the due payment, and still ask for the payment without satisfaction. Sometimes, the debtors might have some difficulties and could not pay off the loans, by taking advantage of this, the creditors would add the debts over the years together and force them to pay the loans with their wives and to give up all his properties. The unjustly-treated poor people could find no places redress their injustices, so ‘Tian’ (heaven) would be so angry as to bring disaster to the country.

In Qing Dynasty, in the monopolistic commercial capital, the traditional system of exclusive and monopolized operation and profits-sharing was still practiced, which had involved much larger industrial and commercial fields than in Ming Dynasty. Thus, its robbery of the small private businessmen was much more unscrupulous. For example, above 90 % of the copper produced in all the mines of Yunnan were purchased by the “Official Copper Shop” established in Qing dynasty with lower prices to meet the need of minting, which had resulted in the destruction of the copper production in Yunnan. In “Discussion with ‘Can Zheng’ (the magistrate) Li of Yunnan over Copper Business”, Li Fu said, “After the establishment of

³Zhao Lian, *Xiao Ting Xu Lu* (*Sequel to the Record of Xiao Ting*), Vol. 1.

⁴Ma Guohan, *Ge Ge Ru Yi* (*Everyone is Lucky*) (Book 2).

Official Copper Station in Yunnan province, the production of copper in this province was stopped.”

It could be seen from what was discussed above that the relation of feudal production had become the shackles which had seriously fettered the development of production, and feudal society had irretrievably degraded into a decadent situation.

Similar to economic condition, accordingly, the politics in Qing dynasty also became more corrupted. Besides, the extreme development of feudal despotism had made the exercise of imperial power more unrestricted, and the ruler-minister relationship was changed into that between master and servant, which had never happened in the previous dynasties. The abuse of imperial power also had accelerated the downfall of bureaucratic politics, and the ministers had regarded “more kowtowing and less speaking” as their creeds, and more flattering and less working their merits. As Gong Zizhen had exposed, “the longer he has been an official, the more carelessly he will be in his job; the higher his position is, the more committed he will be to the flattery; the more similar their situations, the more effective this flattery will become.”⁵ The corruption of the administrative management was also shown by the greedy and brutal government officials, they “were so greedy as to extract all the wealth from people and so brutal as to do things that would have enraged ‘Tian’ (heaven).”⁶ In the late Qing Dynasty, in the article “To Some Official” in volume three of his book *Yang Hui Tang Wen Ji* (*The Collected Essays of Yang Hui Tang*), Liu Rong, “Xun Fu” (procurators) of Shanxi had exposed, “There are many officials in the country at present, but no one has been heard to do their duties for the people. On the contrary, the country is full of officials who have levied high taxes, abused punishments, extracted wealth, and even brought calamities to the people’s lives.... In order to serve the people, the government offices in the state are established and the responsibilities are divided, however, the appointed officials have not shown considerations or sympathies to the people, instead, they have treated the people as fish and meat and put the people’s lives at the mouth of the wolves. People cried out for help but only in vain and ended up in death.... What’s worse, clerks and officials in the ‘Fu’ (prefecture) were without any skills, thousands of officials just sat idling in “Zhou” (subprefecture) and “Xian” (county), and the family members of ten thousands of officials may enjoy the tasty food without any laboring.... The senior official’s performance, promotion and demotion were determined by the number of gifts which they had presented, and the junior official’s decision of lawsuits, awards and punishments were all determined by the number of bribes which he received.”

In Qing dynasty, the political corruption was more obviously manifested in judiciary. Because the supreme judicial power was in the control of the emperor, he could decide the life and death of any person and could change and break the law by overriding the law itself with his imperial power. Although the judicial officials had

⁵“Ming Liang Lun Er” (The Theory of Ming Liang: Part 2) in *Gong Zi Zhen Quan Ji* (*The Complete Works of Gong Zizhen*) (Book 1), Zhonghua Book Company, 1959.

⁶“Huang Ying Shu Zhai Hong Lu Shu” (A Letter to Huang Yingshu, the Official in Charge of Ceremonies) in *Zhang Heng Fu Quan Ji* (*The Complete Works of Zhang Hengfu*).

lacked the knowledge of laws, statutes and precedents, they still were familiar with accumulating wealth illegally and greedily, moreover, they just cared about the number of bribes and didn't bother about the right and wrong of the cases. The judicial officials even helped the criminals and violated laws by controlling the lawsuits for their own profits, which had resulted in large number of unfair punishments.

At the eve of Opium War, it was no longer possible for the feudal law of Qing Dynasty to adjust the new legal relationships in foreign trade, which had led to chaos in foreign trade. For example, according to the law of Qing dynasty, it was forbidden to borrow loans from the foreign merchants, but in fact this continued despite the prohibition. Some Chinese trading companies even owed foreign merchants a million *liang*, which were not paid back for over 10 years. Because of the lack of due legal protection for foreign merchants, Emperor Qianlong told the British king, George III in a letter in 1793 that "last time, a Cantonese merchant, Wu Zhaoping, had failed to pay off the foreign goods at the due date, which had led to losses to the two parties concerned. 'Zong Du' (viceroy) of this district then paid off the money for him by using the state money in the official treasuries in advance. In the end, this merchant was punished severely." From this letter, it could be seen that this over talented and arrogant emperor knew little about modern legal relations and legal knowledge.

The consolidation of despotism and the corruption of politics in Qing Dynasty were also reflected in its cultural policies. In order to suppress the democratic ideology of the nation and eliminate all possible anti-Qing sentiments, the autocratic policies were strictly carried out in the cultural field of Qing Dynasty. Starting from the reign of Kangxi, "Wen Zi Yu" (literary inquisition) had begun to spring up and more than 100 literary inquisitions occurred especially during the reigns of Yongzheng and Qianlong. The severe punishments in ideology, on the one hand, had accelerated the formation of superficial prosperity and the ethos to seek only ease and comfort, on the other hand, it had also brought about an academic atmosphere in which the people had just immersed themselves in textual criticism, indulged their life-time in the study of Confucian classics, and cut their researches off from the reality without caring about the worldly affairs. The reason why textual criticism had witnessed a quick development in Qing Dynasty was that the intellectuals had deliberated on the ancient works to escape from the threat of "Wen Zi Yu" (literary inquisition).

What's more, in order to bring the ideology of intellectuals into the right path which the rulers favored, neo-Confucianism (a Confucian school of idealist philosophy of the Song and Ming Dynasties) was greatly emphasized in Qing Dynasty. Zhu Xi's *Si Shu Ji Zhu* (*Variorum of Four Books*) had been regarded as the basis for the questions and argument in the imperial examination. Furthermore, it had become the usual excuses for "Wen Zi Yu" (literary inquisition) not to interpret *Si Shu* (the Four Books: Da Xue: The Great Learning; Zhong Yong: The Doctrine of the Mean; Lun Yu: The Analects of Confucius; Mencius: Mencius) according to the annotation made by Zhu, consequently, it had seriously impeded the freedom of arguments in the academic world as well as in people's ideology, and made the whole intellectual

field oppressive, suffocated and silent, just as what had been described in the poem of Gong Zizhen: “to avoid hearing news or discussions about ‘Wen Zi Yu’ (literary inquisition), some intellectuals would leave the banquet halfway, therefore, the purpose of reading books is just to earn a living.”

Just as Qing Dynasty was beginning to decline quickly, the industrial revolution had already been completed in the capitalist western countries, and the policy of expansion was pushed to the world. The first to be affected were India and China in the East.

The British bourgeois revolution started in 1640 and lasted till 1660. After the revolution, the British industry developed rapidly, and up to the eighteenth century, the British had become the strongest economic power of the world, possessing abundant capital, vast colonies and extensive overseas markets. The capitalist economic development was especially stimulated by Industrial Revolution. In order to seize overseas markets, a seven-year war was launched between Britain and France, and Britain which was triumphant had become dominant on the sea and begun to direct the invasive attacks towards the East.

In July, 14th, 1789, the Paris people broke through Bastille, the symbol of feudal autarchy, and French Revolution continued until 1794. The victory of French Revolution had cleared the way for the development of French capitalism; meanwhile, the reign of Napoleon also had witnessed a long-lasting aggressive war.

In the first half of the nineteenth century, in order to avoid the seasonal economic crisis of capitalism, Britain had launched a series of wars to seize the colonies, and made India in the East a British colony. At the same time, China was invaded by way of opium trade. Up to the 1930s, the large amount of opium import and smoking had become one of the most serious social problems in China, so in whatever aspects, either in economy, finance, military or national health, China was seriously threatened. Just as what was said by Lin Zexu, “if this problem (opium import and smoking) is still ignored, then after ten years, there will be no armies resisting the enemy in the mainland and no money paid for soldiers.”⁷ Therefore, some fairly clear-headed bureaucrats had required to put an end to the import of opium. Under the pressure of public opinion and to maintain the interests of the ruling of Qing Dynasty, Emperor Daoguang decided to prohibit opium-smoking and stop the opium trade by sending Lin Zexu to Canton to deal with this affair. Because the opium trade was related to the vital interests of the western colonialists, the colonial powers, headed by Britain, determined to defend this shameful trade by force and intended to take this opportunity to open the door to enter China with strong warships and sharp weapons. Hence, the first Opium War was started. In the war, the corrupted and inept rulers of Qing were defeated and forced to sign *Nanjing Tiao Yue* (*Sino-British Treaty of Nanjing*). Then coerced by the invaders from Britain, the U.S. and France, *Humen Tiao Yue* (*The Treaty of Humen*), *Wang Xia Tiao Yue*

⁷Lin Zexu, “The monetary matters are not so important and the opium-smoking should be strictly prohibited to eliminate the source of opium” in *Ya Pian Zhan Zheng* (*The Opium War*), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 2, Shen Zhou Guo Guang Publishing House, 1954, p. 142.

(*Sino-American Treaty of Wangxia*), and *Huangpu Tiao Yue (The Treaty of Huangpu)* were also signed. According to those unfair treaties, apart from reparations and cession of Hong Kong, the western powers had also obtained the privileges like agreed tariff, the consular jurisdiction, free navigation along the coast, unilateral most-favored nations and many others privileges, which had destroyed China's independence of sovereignty and intact of territory. Consequently, the Chinese society and state had experienced unprecedented great changes.

16.2 The Introduction of Western Legal Culture and the Breaking Up of the Seclusion of Chinese Traditional Legal Culture

16.2.1 Beginning to "Open the Eyes and See the World"

China is situated in the northeast Asia, and it is a country rich in resources, so the self-sufficiency economy had occupied the dominant position for a long time. The secluded economy had made ancient China a closed and conservative country. This seclusion and conservativeness was one of the most important conditions for the existence and intensification of the Chinese autocratic system which had lasted for over 2,000 years. The ancient Chinese law, like its overall culture, was seldom influenced by foreign factors and had maintained its independency, which was in fact a kind of isolation. For this reason, although Chinese legal civilization had been developed at an early time, its gap with the advanced countries of the world was daily increased. With the completion of Renaissance, bourgeois revolution and the establishment of a brand-new modern legal system in the Western Europe and northern America, the legal system in China was still wavering in the old medieval garden. Up to the middle of the nineteenth century, the Sino-Britain Opium War took place, in which the western invaders had opened the self-secluded door of China with cannons, thereafter; the seclusion of Chinese legal culture was broken.

In the modern history of China, Lin Zexu was the first "Feng Jiang Da Shi" (senior official of border regions) who had proposed "opening the eyes to see the world" in order to introduce and study the western culture. Although he was raised in a bureaucratic landowning family and had received traditional feudal education, he still proposed that in learning one should "be practical and realistic and should not follow the tide of the current.... Besides, one should know the anecdotes of the previous dynasties and the fundamental policies of military affairs and punishment, and encourage oneself to participate in politics and get in touch with the society".⁸ Before Opium War, he had calmly observed the western world and tried to find inspiration and the way out in the comparison between China the western countries.

⁸ Jin Anqing, "Lin Wen Zhong Gong Zhuan" (The Biography of Lin Wen Zhong) in *Xu Bei Zhuan Ji* (Collections of Biographies from Daoguang to Guangxu in Qing Dynasty), Vol. 24.

When he was in charge of banning opium-smoking and opium trade in Guangzhou, he had “asked people to make inquiries about the western affairs every day, to translate the western books and to buy the western newspapers”,⁹ because he believed that only by knowing yourself and the enemy could you fight a hundred battles with no danger of defeat. In 1836, *Shi Jie Di Li Da Quan* (*The Encyclopedia of Geography*) written by Murray was published in London, and Lin Zexu asked people to translate it into Chinese and compiled *Si Guo Zhi* (*Records of Four States*) according to it. *Ao Men Xin Wen Gao* (*Macao Press Release*) was then translated into *Ao Men Ri Bao* (*Macao Daily*). *Wan Guo Gong Fa* (*The Law of Nations*) compiled by Emer. D. Vattel, a Swiss, was also translated. Besides, *Zhong Guo Ren* (*The Chinese*) by John Francis Davis and *Zai Zhong Guo Zuo Ya Pian Mao Yi Zui Guo Lun* (*The Iniquities of the Opium Trade with China*) by A.S. Thelwall were both translated and published as *Hua Shi Yi Yan* (*Foreigners’ Opinions about Chinese Affairs*). Lin Zexu knew very well that “fighting the foreign armies without using warships, cannons and sailors is to seek for defeat”,¹⁰ therefore, after Opium War, he had entrusted his friends, Wei Yuan with the compilation of *Hai Guo Tu Zhi* (*World Geography Records*) when he was sent to Yili to have a “service for atonement”. Although Lin Zexu was not an intellectual, his practical conduct in cultural aspects had shown that he had already broken through fetter of “Yong Yi Bian Xia” (changing China by the use of foreign knowledge) and “Shi Shi Yi Di” (regarding the foreigners as teachers) and become a pioneer standing at the front of historical trend. However, his activities of understanding the west and introducing the western culture were ridiculed and scolded by the die-hard conservative power of Qing Dynasty. Even Yu Qian, the “Zong Du” (viceroy) of Fujian and Zhejiang province, who had died in the fighting against British invaders, had also issued an order that “as long as it is found that the foreign books are copied and printed, they shall be destroyed and not allowed to be retransmitted”.¹¹

16.2.2 *The Media of Introducing the Western Legal Culture— Missionaries, Merchants, and Foreign Advisors*

The western missionaries who had arrived in China since modern times were the pioneers who had broken up the closed state of the legal culture in China. Early in the seventh century, the western missionaries had maintained a certain contact with

⁹ Wei Yuan, “Daoguang Yang Sou Zheng Fu Ji”(Records on How Emperor Daoguang Had Used Fought in Opium War with Foreign Ships) in *Ya Pian Zhan Zheng* (*The Opium War*), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 6, Shen Zhou Guo Guang Publishing House, 1954, p. 142.

¹⁰ “Letters to Yao Chunmu and Wang Dongshou by Lin Zexu in Lanzhou on the Way to Garrison Yili” in *Ya Pian Zhan Zheng* (*The Opium War*), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 2, Shen Zhou Guo Guang Publishing House, 1954, p. 567.

¹¹ *Yu Zong Jie Gong Yi Shu* (*The Posthumous Papers of Yu Qian*), Vol. 20.

China. After Opium War in 1840, they began to flow into China in large numbers. The number of Protestant missionaries in China had reached 473 in 1876, increased to 1,296 in 1889, and exceeded 5,000 in 1901.¹² These missionaries had considered themselves as the representatives and spreaders of western culture and they had aimed to liberate Chinese people from the ideological imprisonment of autarchy. In 1834, Peter Parker, a missionary, had read a poem on the ship to China: “delightful the breeze from ‘Tian’ (heaven) is, accompanying with the gentleman sailing the ocean across; shouldered the important mission from God, aiming to get China freed.”¹³

Not only had the missionaries preached religious teachings in China, they had also spread the European classical science and technology by setting up newspapers and periodicals, translating western books, and introducing the works of the western legal thinkers, therefore, they had played indispensable roles in both spreading the modern western legal culture and enlightening the reformation in China. Nevertheless, it was not after Opium War that the western missionaries began to take up non-religious publishing business; on the contrary, it could be dated back to the period before Opium War. From 1810 to 1867, the types of non-religious works published by the Protestants in China had reached 108 in total,¹⁴ and up to the nineteenth century, hundreds of non-religious books covering a wide range had been translated and published.

Among the cultural publishing organizations founded by the western missionaries, “Guang Xue Hui” (The Christian Literature Society for China) was the largest, the most representative, and most influential. The organization was set up in 1887 in Shanghai by Alexander Williamson, a Scottish Protestant Missionary. Among the non-religious journals published by this organization, those whose contents were about social science occupied the most, and the missionaries had boasted of “opening up the minds of the Chinese people”,¹⁵ because they thought that “the information that they have brought with them could not only solve the moral and spiritual, but also the political and economic problems in China”.¹⁶ The spreading of their translated works in China was in fact helpful to awakening Chinese people’s consciousness of reform and accelerating the process of political and legal reform in China.

At that time, Emperor Guangxu had also subscribed for the magazines edited by “Guang Xue Hui” (The Christian Literature Society for China) and purchased more

¹²Ruth Hayhoe, *Zhong Wai Bi Jiao Jiao Yu Shi (A Comparative History of Education between China and Foreign Countries)*, Shanghai People’s Publishing House, 1990, p. 65.

¹³Jonathan Spenser, *Gai Bian Zhong Guo (To Change China)*, translated by Cao Dejun, SDX Joint Publishing House, 1990, p. 39.

¹⁴John King Fairbank, *Jian Qiao Zhong Guo Wan Qing Shi (The Cambridge History of China: the Late Qing)* (Book 1), Chinese Academy of Social Science Publishing House, 1985, p. 622.

¹⁵“Tong Wen Shu Hui Zhang Cheng” (The Regulation of ‘Tong Wen Shu Hui’) in *Chu Ban Shi Liao (The Historical Materials Published)*, Vol. 2, 1988.

¹⁶“Preface to the Special Issue for the 50th anniversary of ‘Guang Xue Hui’”.

than 89 kinds of books from it.¹⁷ During “Wu Xu Wei Xin” (Wu Xu Reform), some western books and periodicals had once been listed by Liang Qichao, and among them, ten were edited by this organization.¹⁸

Much attention had been paid by “Guang Xue Hui” (The Christian Literature Society for China) to attract the readership, and they had also regarded almost everyone as their students, including the scholar-bureaucrats, the central and local civil and military senior officials, the scholar-bureaucrats above “Ju Ren” (first-degree scholars) either in or out of office, and “Xiu Cai” (those who passed the imperial examination at the county level in ancient China) in the whole country, therefore, its scope of influence was very extensive. For example, *Tai Xi Xin Shi Lan Yao* (*The Nineteenth Century: A History*) and *Zhong Dong Zhan Ji Ben Mo* (*The Whole Story of the First Sino-Japanese War*), which were translated by it had become the essential reading materials of “Ju Zi” (examinees of imperial examinations) held in the county level in 1896 in Changsha, because it had taken a clear-cut stand in advocating the thoughts of reform. According to the statistics, about one million pirated copies of *Tai Xi Xin Shi Lan Yao* (*The Nineteenth Century: A History*) and *Zhong Dong Zhan Ji Ben Mo* (*The Whole Story of the First Sino-Japanese War*) were circulating in China and six different kinds of the pirated copies could be found in Hangzhou simultaneously.¹⁹

Through these translated works by “Guang Xue Hui” (The Christian Literature Society for China), the theories of Voltaire, Rousseau, Montesquieu, and Diderot, as well as the ideologies of legal reform were introduced, and the concept of human rights, equality and the rule of law were also propagated, which was warmly welcomed by the intellectuals who had hoped that progress could be made in China by getting to know the external world and seeking for truth from the west to save the country. It was unquestionable that it had played an important role in the ideological enlightenment; moreover, it had provided a theoretical guidance for the reformation movement in China. When Liang Qichao passed by Shanghai in 1890, had “got a chance to have an inspection of western books translated by Fu Lanya, Young John Allen and the other people from Jiangnan Manufacturing Bureau”, and he believed that this “is a year when the great world begins to have a dialogue with him”.²⁰ For reason, Kang Youwei once said to the editor of *Zhong Guo You Bao* (*The China Mail*) in Hong Kong, “I believe in reform, this is mainly because of the works by the two missionaries, priest Timothy and priest Young John Allen.”²¹

¹⁷ *Guan Xue Hui Nian Bao* (*Annals of “Guang Xue Hui”*), 1889. The booklists were included in the appendix of *Chu Ban Shi Liao* (*The Historical Materials Published*), Vol. 2, 1988.

¹⁸ Liang Qichao, “Xi Xue Shu Mu Lu” (A List of Books about Western Studies) in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 1, Shanghai People’s Publishing House, 1957, pp. 452–455.

¹⁹ Ruth Hayhoe, *Zhong Wai Bi Jiao Jiao Yu Shi* (*A Comparative History of Education between China and Foreign Countries*), Shanghai People’s Publishing House, 1990, p. 62.

²⁰ Jessie Gregory Lutz, *Zhong Guo Jiao Hui Da Xue Shi (1850–1950)* (*China and the Christian Colleges, 1850–1950*), translated by Zeng Jusheng, Zhejiang Education Publishing House, 1987, p. 39.

²¹ *Ibid.*

Besides missionaries, it couldn't be denied that the western merchants also had played a role in breaking up the closed state of Chinese legal culture and actively introducing the culture of private law. After Opium War, the rapid expansion of the modern commercial activities and foreign trade in China had "fostered the commercial revolution in China".²² Behind the merchandises, the western modern culture of civil and commercial laws and the concept of human rights, which had supported the commercial behaviors, also flowed into China together with the tide of merchandises. Because the Chinese law was backward, it was impossible for them to be adjusted to the newly-emerging legal relations, such as corporate relation, financial credit relation and bankruptcy proclamation, and they were criticized by the western merchants. Meanwhile, some new concepts also began to emerge in the frequent modern commercial activities. Taking the concept of modern contract as an example, it was just in the daily commercial activities that its legal meaning and value were gradually understood by the Chinese people. It was recorded that, "Yiji Foreign Trading Company once brought a lawsuit against the comprador Zhou Jingui in Benefit Bank", from whom "the trading company had bought some drafts. Then it was claimed that the agreed duration was four days, but it was denied by this comprador, because no rules about the time were clearly recorded in the contract, consequently, the comprador won the lawsuit".²³ The commercial activities and disputes concerning foreign affairs had provided important opportunities to spread the western culture of modern civil and commercial law to the Chinese industrial and commercial field, and the Western merchants had acted as the major media.

In late Qing dynasty, some "Yang Mu Bin" (foreign advisors) had entered into Chinese official circles as private employers of the powerful ministers. Because they were stressed and trusted by their masters, it was possible for them to spread the modern ideology to the people around consciously or unconsciously, and they had become their enlightening teachers. Before and after the 1860s, the emergence of "Yang Wu Pai" (The Westernization Group) and its origin of thought were all inseparable from the influence of those foreign advisers. For instance, when expressing his opinions about the west, Li Hongzhang had often mentioned the "general rules of the west" and "Chinese and western general rules".²⁴ He had already had quite an understanding of the patent system, the system of joint-stock company and the tariff system in the west, which had reflected that he was apparently influenced by the teachings of these foreign advisers, because the publications about western legal culture had not been printed in large number in China in 1860's, so it could be

²²Hao Yanping, *Zhong Guo Jin Dai Shang Ye Ge Ming (The Modern Commercial Revolution in China)*, translated by Chen Chao, Shanghai People's Publishing House, 1991, p. 183.

²³Hao Yanping, *Shi Jiu Shi Ji De Zhong Guo Mai Ban: Dong Xi Jian De Qiao Liang (The Comprador in the Nineteenth-Century China: a Bridge between the East and the West)*, translated by Li Rongchang. Shanghai Academy of Social Science Publishing House, 1988, p. 248.

²⁴Li Hongzhang, "A Memorial to the Emperor about the Tentative Establishment of the Textile Bureau" in "Zou Gao" (The Memorials to the Emperor) in *Li Wen Zhong Gong Quan Ji (The Complete Works of Mr. Li Wenzhong)*, Vol. 43, p. 44.

said that the westernized ideology of “Yang Wu Pai” (The Westernization Group) in China was created mainly with the help of the foreign advisers.

16.2.3 *The Influence of Western Legal Culture by Way of Consular Jurisdiction*

After Opium War, the foreign consular jurisdiction was acknowledged by the Qing government in the unjust treaties signed with different superpowers. Thereafter, in the Chinese judicial field, the unprecedented phenomenon of “foreigners being managed by foreigners” appeared. From Tang to Qing Dynasty, the Chinese government’s principle in dealing with the cases concerning foreigners was like this: “if two foreigners are from the same country, they shall be punished according to the common customs of their own country, nevertheless, if the two are from different countries, they shall be punished according to *Tang Lv (Tang Code)*”,²⁵ which had strictly safeguarded the independence of Chinese judicial sovereignty. Before Opium War, the principle was adhered by Qing Dynasty in dealing with the cases involving foreigners in Guangzhou and Macao. For example, in 1689, a Chinese was killed by a sailor from the British merchant boat “Defence”, in the end, “a manager, a dying doctor and seven sailors were left behind to serve as prisoners.”²⁶ Another example, in 1749 some Chinese prisoners had escaped to Macao and taken refuge in Nossa Senhora do Amparo built by Portuguese. After negotiations by Chinese officials, the Portuguese then handed over the escaped people and admitted that the Chinese could “manage the cities according to the emperor’s will”.²⁷ It was shown by the handling of the two cases mentioned above that the Qing government had maintained the exercising of the jurisdiction over the foreign criminals in China according to Chinese laws.

As to the cases in which the foreigners were offended by Chinese and especially the serious cases in which the foreigners were murdered, they were also handled seriously and fairly by the Chinese government. The delegates from the victim’s country were generally allowed to hear the trials, and the execution of death punishments was attended by the victims’ delegates and relatives. At the time, there were the following records in the journals of the East India Company:

The initiative and enthusiasm which the Chinese government has shown in the punishment of these criminals are extremely astonishing yet highly praised. The desire which they (the Qing government) want to make the foreigners satisfied has already been shown in every

²⁵“Hua Wai Ren Xiang Fan” (The Offense between Foreigners), the 48th Article in “Ming Li” (Statutes and Terms) in *Tang Lv Shu Yi (The Comments on Tang Code)*, Zhonghua Book Company, 1983, p. 133.

²⁶H. B. Morse, *The Chronicles of Trading with China by the East India Company*, translated by Qu Zonghua, Vol. 1. Sun Yat-sen University Publishing House, 1991, p. 83.

²⁷Zhou Jinghai, *Zhong Pu Wai Jiao Shi (The Diplomatic History between China and Portugal)*, The Commercial Press, 1991, p. 154.

stage of the proceedings. According to emperor's orders, we are allowed to freely walk into the tribunals while a trial is going on, which has proved that the Chinese government wants to show great openness when trying the cases,...as for the current case, no matter how difficult this will be, His Majesty will always exercise jurisdiction over the criminals in his nation.²⁸

Although the Qing government had attempted to treat both Chinese and foreigners equally and impartially when exercising laws, the Chinese law was still looked down upon by the western capitalist countries, so they had tried their best to get away with the punishment. In 1785, the gunner of the ship *Lady Hughes* was sentenced to death for killing someone by accident. For this matter, the Britain had made the following commentaries over the Chinese law: "to us, this concept of obedience and surrender seems to be against the humanity and justice believed by Europeans. If we surrender automatically, the result would be that we discard all the principles concerning morality and humanity. We believe that even if the boards of directors are at the risk of losing their trade, they would surely support us to try our best to avoid doing so."²⁹ Therefore, it was decided that "the criminal jurisdiction of China would no longer be obeyed".³⁰ Because the basic concept and value in Chinese law were opposite to those in the west, it was very hard for the westerners to understand why the innocent sailors were detained by China, because the offender had not been discovered in the Case of "Lady Hughes", and why the judgment could be determined by Emperor Qianlong himself instead of judicial organizations. For this reason, they demanded that "before the crimes of the involved could be definitely and openly proved, punishments on any foreigners could not be imposed by the current Chinese government".³¹

The westerners had sharply criticized that "the Chinese law is carried out rather arbitrarily and corruptly" and that "many aspects of the system (the Chinese law) are against the principle of equality and justice in European countries",³² but their true concealed intention was actually to escape the sanctions of Chinese law. They once had attempted to set up their own courts in China and exercise their consular jurisdiction, but they did not succeed until the breaking out of Opium War. For example, in the spring of the 19th year of Daoguang (1893), soon after he arrived in Canton, Lin Zexu had quoted the various cases in which the foreigners were sentenced according to Chinese law, had requested in a memorial to the emperor

²⁸ *Shi Liao Xun Kan (Historical Records Published Every Ten Days)*, Vol. 12.

²⁹ Quoted from H. B. Morse's *The Chronicles of Trading with China by the East India Company*, translated by Qu Zonghua, Vol. 2, Zhongshan University Publishing House, 1991, p. 427.

³⁰ R. Randle Edwards, "The Legal Jurisdiction of Foreigners in Qing Dynasty" in *American Scholars' Essays on China's Legal Tradition*, edited by Gao Daoyun et al., China University of Political Science and Law Press, 1994.

³¹ "The 40th Documents of the First Session of the 26th Congress", quoted from *Mei Guo Zai Hua Ling Shi Cai Pan Quan Bai Nian Shi (The Hundred-Year History of the Consular Jurisdiction of the United States in China)* by Wu Mengxue, p. 38.

³² H. B. Morse, *Chronicles of the East India Company to China* (Oxford), quoted from *The American Scholars' Essays on the China's Legal Tradition* by Gao Daoyun, China University of Political Science and Law Press, 1994, p. 450.

that “the lawbreakers should be punished according to the new precedents of ‘Tian Chao’ (a heavenly kingdom) and their goods should be confiscated.”³³ He also presented a note to the King of England and said, “It is a general rule both in the ancient times and present to clarify punishments and promote moralization. The people from other countries are required to obey the British laws when trading in Britain, let alone in ‘Tian Chao’ (a heavenly kingdom).”³⁴ Therefore, when Lin Weixi was killed by a drunken British, Lin Zexu had sternly ordered the British to hand over the murderer, however, they refused. Then Lin Zexu had ordered to cut off their food supply, to have their servants dismissed, and had even run the risk of starting a war. Lin Zexu said, “Human life is very important, and if laws are violated for the foreigners like British, then neither could other countries be managed, nor the Chinese people be ruled.”³⁵

To sum up, from “Fang Wei Hao Incident” (The Defence Incident) in 1689 to “Lin Weixi Case” in 1839, hundreds of civil and criminal cases in which both Chinese and foreigners were involved had occurred. The conflicts over value, concept and the application of laws between China and western countries had always existed. Before Opium War, it was true that the imperial China had considered itself as “Tian Chao” (a heavenly kingdom), however, in handling the cases involved foreigners, on the one hand, it had exercised jurisdiction according to Chinese law, on the other hand, it had paid attention to justice and equality in the execution. In the 42nd year of Qianlong, the local officials were once clearly decreed not to punish the foreigners for the benefit of our own people “in dealing with the disputes involved the foreigners.” In a letter to the King of England, Emperor Qianlong said, “All matters concerning the trade with your country have been taken into account.” So, the contempt shown by the westerners for the Chinese law was intended to get rid of its rigid control, so the so-called inequality was only a pretext for invasion. As had been discussed above, it had been a long time since the westerners had attempted to acquire the consular jurisdiction in China, which was not acceptable by the Qing government. However, after Opium War, with the aid of cannons, Britain had not only opened the Chinese door, but also destroyed the authority of Chinese emperors and gained consular jurisdiction, which had trampled on the judicial sovereignty of China and led to the judicial inequality between China and the western countries.

As the national power of Qing Dynasty began to become increasingly weak, the scope of the application of consular jurisdiction had become larger and larger. The foreign consuls had not only got the rights to hear trials and to make joint judgments, but also got the same rights of judicial adjudication in the joint sentences

³³ Lin Zexu, “A Memorial to the Emperor about British Pontoons Handing over Opium” in *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for “Yi Wu” or The Foreign Affairs)* (The Reign of the Emperor of Daoguang), Vol. 1. Zhonghua Book Company, 1964, p. 155.

³⁴ Lin Zexu et al., “A Memorial to the Emperor about the Denunciation of English King” in *Ya Pian Zhan Zheng (The Opium War)*, edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 2, Shen Zhou Guo Guang Publishing House, 1954, p. 171.

³⁵ Ibid.

with the Chinese judges, which had led to the odd phenomena that “the foreigners are not punished by the Chinese penal codes, on the contrary, Chinese are punished by the foreign laws”.

After Opium War, China had become intimately related to the world, and more foreigners of different nationalities began to live in China, so disputes and lawsuits were unavoidable. In the trial, because different laws from different countries were applied, the penal law, civil law, procedural law, and the court organic law in the west were all introduced into China, which had greatly broadened Chinese people’s field of vision and brought the native Chinese legal civilization into contact with those of the western countries. It was once pointed out by the British scholar Stowe Leck that “the degree of civilization in the eastern countries (China, for example) is totally different from that of the Christian countries in the west, especially in family relationships, criminal rules and jurisdiction. For this reason, it is appropriate for British and American citizens living in those countries to follow their own national laws and tribunal jurisdiction.”³⁶ If the closedness in the past was a necessary condition to protect the feudal legal system, then after the establishment of the consular jurisdiction, the conservative Chinese traditional legal civilization gradually yielded to the advanced western legal civilization amid their collisions. Of course, the different degrees of legal civilization should never become the excuse for seizing the consular jurisdiction.

In order not to give the western colonialists an excuse to trample on the judicial sovereignty of China and to abolish the consular jurisdiction, it had become a driving force to make new laws and to reform the judicial system by the late Qing government. In 1902, Zhang Zhidong, who was jointly appointed as the minister of commerce, had revised the commercial treaties with all relevant countries. The four countries, Britain, Japan, United States, and Portugal, had claimed that consular jurisdiction could be given up only when Chinese jurisdiction was reformed and “perfected”. For this reason, an edict was issued by the Qing government that “nowadays the commercial activities and negotiations have become more and more frequent, so Shen Jiaben and Wu Tingfang will be appointed to have all the current ‘Lv’ (criminal law) and ‘Li’ (precedent) carefully examined and studied according to the circumstances of the negotiation, and by making reference to the laws of the other countries so that they are applicable both home and abroad and be helpful for the administration.”³⁷ Therefore, the aim of the ten-year legal revision in late Qing dynasty was to retrieve the consular jurisdiction. In *A Memorial to the Emperor about the Completion of the Draft of Criminal Law for your Excellency to Read by Batches and about the Main Aim of Revision*, Shen Jiaben said, “A country with independent political system shall have independent jurisdiction which is valid in

³⁶ Quoted from Qiang Lei: *Lun Qing Dai She Wai An Jian De Si Fa Guan Li (On the Legal Jurisdiction of the Cases Involved Foreigners in Qing Dynasty)*, Liaoning University Publishing House, 1991, p. 184.

³⁷ Shen Jiaben, “A Memorial to the Emperor about Abolishing Severe Punishments in Law” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 1, Zhong Hua Book Company, 1985, p. 2023.

the scope of its territory, ...nevertheless, only for our country, the consular jurisdiction is deprived because of the excuse that the judicial system is not perfect. First, the British rules are practiced, and then the German. What's more, the Japanese even have set up courts on the land of our ancestors. The daily weakening of sovereignty would bring future troubles, which is against the current circumstances, therefore, has to be changed soon.”

By imitating the system of the separation of the three powers in the west, the judicial system was reformed and the modern judicial system was established by the Qing government in 1906, which had changed the syncretic system of jurisdiction and administration that had lasted for over 2,000 years since Qin and Han dynasties.

It then could be seen that the establishment of consular jurisdiction had damaged the self-secluded legal institution of Qing dynasty, and forced the Qing rulers to face the new realities and to consider their own fates and prospects. Consequently, they had chosen the way of reformation and law revision.

16.2.4 The Introduction and Acceptance of International Legal Concepts

The legal culture in ancient China was developed in a secluded historical circumstance. Although remarkable accomplishments had been achieved, it was still featured by conservativeness and isolation due to the following of a set routine. As the guiding principle and theoretical basis of an ancient legal system, the Confucian legal ideology itself was an extremely stable system. Deeply influenced by Confucianism, the Chinese rulers were always opposed to reforms, moreover, their reforms were only partial reforms limited in certain principles. It was not easy for them to appreciate the foreign culture, let alone absorbing them consciously. The foreign countries were either regarded as the countries of “Man Yi” (the name for aboriginal tribes or minority nationality in ancient China) or their vassal states. The relationship between China and foreign countries was just the relationship in which the latter paid respects and tribute to the former; therefore, there had never been any international legal concepts in China.

In 1839, when Lin Zexu was in charge of banning the opium-smoking and opium trade in Guangzhou, he got to know the usefulness of international law through a Chinese translator Yuan Dehui.³⁸ So he sent an American doctor Parker several passages of *Ge Guo Lv Li* (*Law of Nations*) by the Swiss writer Emer. D. Vattel and asked him to translate them. The translations were recorded in Wei Yuan's *Hai Guo Tu Zhi* (*World Geography Records*). Although Emer. D. Vattel's work was called *Ge*

³⁸ Wang Tiewa, “Zhong Guo Yu Guo Ji Fa” (China and International Law: History and Reality) in *Wang Tiewa Wen Xuan* (*The Selected Works of Wang Tiewa*), edited by Deng Zhenglai, China University of Political Science and Law Press, 1993, p. 295.

Guo Lv Li (Law of Nations),³⁹ because the translation was lack of accuracy, besides, it was only an isolated incident,⁴⁰ it had not attracted enough attention from the Chinese people.

The knowledge of modern international law was officially introduced into China after Opium War.

After the war, Qing Dynasty, the so-called “Tian Guo” (the heavenly kingdom), was not as powerful as it had been any more. The self-enclosed door in the past was blown open by the cannons of the invaders, and China then was forced to have a relationship with the foreign countries which was unprecedented before. For example, it was recorded in *Nanjing Tiao Yue (Sino-British Treaty of Nanjing)* that “it is agreed that Her Britannic Majesty’s Chief High Officer in China shall correspond with the Chinese Ministers, both inside and outside the capital, with ‘Zhao Hui’ (letters of understanding or concern exchanged between governments). The British members shall be treated with perfect equality.”⁴¹ In *Wangxia Tiao Yue (Sino-American Treaty of Wangxia)* and *Huangpu Tiao Yue (The Treaty of Huangpu)*, more detailed and more explicit regulations about “The Rites of Perfect Equality” were made. Up to the signing of *Xin Chou Tiao Yue (The Peace Treaty of 1901)*, the foreign envoys’ protocols in meeting His Majesty of China, which was put forward by MacCartney in 1792 when he arrived in China and was endlessly argued, were finally settled down against the will of Qing Emperor.⁴² The victory of the aggressive war had forced the arrogant Chinese emperor to fall down from the altar where he had regarded himself as the universal ruler and to have to get close to accepting the modern international legal regulations. Longing to apply the principles of equality to meet the unreasonable demand of the foreign countries and their monarchs, China had attempted to make itself a member of the big international family.

With the signing of *Nanjing Tiao Yue (Sino-British Treaty of Nanjing)*, the foreign affairs had been gradually increasing in China. Up to the time when *Beijing Tiao Yue (Beijing Treaty)* was signed in 1860, it had become more frequent for peace negotiations to be conducted between China and other foreign countries, to deal with the aftermath, and to carry out the normal diplomatic exchanges, consequently, a series of modern diplomatic systems began to be established in China. “Li Fan Yuan” (Board for National Minority Affairs) which originally was in charge of dealing with the affairs concerned with foreign countries was unable to completely meet the demands of the situation, therefore, in 1861, “Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations) was permitted to be established by

³⁹ Wei Yuan, “Vattel’s Law of Nations” in “Hai Guo Tu Zhi” (World Geography Records) in *Wei Yuan Quan Ji (The Complete Works of Wei Yuan)*, Vol. 83, Yuelu Publishing House, 2004, p. 1979.

⁴⁰ Wang Weijian, “An Examination of the Western Works on International Law Translated by Lin Zexu”, *Journal of Zhongshan University*, Vol. 1, 1985.

⁴¹ Wang Tiewa, *Zhong Wai Jiu Yue Zhang Hui Bian (A Collection of the Old Agreements between China and Foreign Countries)*, Vol. 1, SDX Joint Publishing House, 1957, p. 32.

⁴² *The Archives of American and China Diplomacy in 1901*, edited by the History Institute of Tianjin Academy of Social Science, Qilu Publishing House, 1984, p. 5.

Prince Gong Yi Xin.⁴³ This measure was praised by the western countries, because it was regarded as “the cleverest way to maintain the everlasting harmony between China and other countries”.⁴⁴ However, because “Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations) “was overstaffed and can not fulfill its duty accordingly”,⁴⁵ finally in 1901, it was replaced by “Wai Wu Bu” (Board of Foreign Affairs) under the pressure of the western great powers. Thereafter, the diplomatic organizations of the late Qing dynasty began to be institutionalized, accordingly, the professional diplomats were also begun to be recruited and trained by the Qing government. The first diplomatic envoy was Guo Songshou, who was dispatched to British in the first year of Guangxu, while the first consul was Hu Xuanze, who was sent to Singapore in the third year of Guangxu.⁴⁶ Up to the 32nd year of Guangxu, “Wai Wu Bu” (Board of Foreign Affairs) had stopped appointing the diplomats and only employed the people who were recommended. Besides, a bureau was set up especially for the storage of intellectuals, which had become China’s first school for the training of professional diplomats. In school, many courses such as instruction, translation, criticism, compiling and editing were offered,⁴⁷ in addition, specialized training was also provided.

However, after “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) was abolished, the Chinese officials not only knew little about foreign affairs, but also made light of them. Xue Fucheng once pointed out that “the Chinese mandarins had intrinsic prejudice in the negotiation with foreign countries, and they were always boastful and disdainful of foreign affairs.”⁴⁸ Besides, they had also confused diplomacy with trade. For instance, in April, 1844 (the 24th year of Daoguang), Qi Ying was appointed imperial envoy to deal with diplomatic affairs, but his official task was to “deal with the problems emerged in trading in all provinces”. In 1861 (the 11th year of Xianfeng), when application for the establishment of “Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations) was presented to the emperor, the word “trade” was still added to the approved imperial edict, which had shown that the rulers of Qing government at the time knew little about international law. However, under the legitimate cover of modern

⁴³ *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for “Yi Wu” or The Foreign Affairs)* (The Reign of Emperor Xianfeng), Vol. 72, Zhonghua Book Company, 1979, p. 2692.

⁴⁴ *Xian Feng Chao Chou Ban Yi Wu Shi Mo Bu Yi (Addenda to Chou Ban Yi Wu Shi Mo in the Reign of Emperor Xianfeng)*, Vol. 4 (Book 1), edited by the School of History in Tsinghai University, p. 680.

⁴⁵ *A Report of William W. Rockhill—the American Special Envoy to China*, edited by the History Institute of Tianjin Academy of Social Science, pp. 5–6.

⁴⁶ *Qing Ji Zhong Wai Shi Ling Shi Biao (A List of the Consul Affairs between China and the Foreign Countries in the Late Qing Dynasty)*, edited by Ming and Qing Archives Department of Palace Museum, Zhonghua Book Company, 1985, p. 3, 73.

⁴⁷ “Fu Guan Zhi” (The Recovery of the Bureaucratic Establishment) in “Guan Zhi Yi” (On the State Official System, Part 1), the 2nd category in *Da Qing Guang Xu Xin Fa Ling (The New Laws of Guangxu Emperor of Great Qing)*, pp. 18–19.

⁴⁸ Xue Fucheng, *Yong An Quan Ji (The Complete Works of Xue Fucheng)*.

international law, the westerners in China had not only consolidated their control of the country, but also engaged themselves in extortion and plunder. In the constant practice of negotiations with western countries, the Qing government had deeply felt the urgent need to learn the knowledge of international law, so four senior officials, including one from “Han Lin Yuan” (The Hanlin Academy), were appointed by Prince Gong to help William M. P. Martin in the revision and translation of Henry Wheaton’s *Elements of International Law*, which was completed by “Zong Li Ya Men” (Office in charge of Affairs of All Nations). According to the suggestion of the newly-appointed Inspector-General of Chinese Maritime Customs Service, Mr. Hart, this book was published and used by the Qing government. Wen Xiang said later, “When dispatched as diplomatic envoys, I have often made reference to this book.”⁴⁹ Immediately, people were organized to have a revision of the book, and it was later named *Wan Guo Gong Fa* (*Elements of International Law*). In the end, more than 300 copies were printed and issued to all provinces to be used in negotiations.⁵⁰ This was the first time that the theory of modern international law was completely introduced into China.

In the 1860s, after “Tong Wen Guan” (The School of Combined Learning) was established in Beijing, with the help and encouragement of the people from all walks of life, the translation of western international legal works was put on the agenda. The international legal works translated by “Tong Wen Guan” (The School of Combined Learning) included *Gong Fa Hui Tong* (*The International Law*), *Gong Fa Bian Lan* (*Introduction to the Study of International Law*), *Gong Fa Qian Zhang* (*A Treatise on International Law*) and *Zhong Guo Gu Shi Gong Fa* (*The International Law in Ancient China*).⁵¹ Meanwhile, five western legal works were also translated by John Fryer, a British missionary employed by Jiang Nan Manufacturing Bureau, and among the books published, the following were related to international law: *Gong Fa Zong Lun* (*International Law*, original author: Robertson), *Ge Guo Jiao She Gong Fa Lun* (*Commentaries Upon International Law*), and *Ge Guo Jiao She Bian Fa Lun* (*Commentaries Upon International Law: Private International Law or Comity*, original author: Robert Joseph Phillimore).⁵² Besides, in 1898, several other translated international legal works were published, such as *Gong Fa Zong Lun* (*International Law*), *Fa Shi Zhi Nan* (*Guide Diplomatique*), *Ou Zhou Dong Fang Jiao She Ji* (*Record of Trading between Europe and the Eastern*), *Zhong Xi Guan Xi Lue Lun* (*Brief Discussion on the*

⁴⁹ William M. P. Martin, *A Cycle of Cathay or China, South and North, with Personal Reminiscences*, Guangxi Normal University, 2004, p. 159.

⁵⁰ *Ibid.*

⁵¹ Liang Qichao, “Xi Xue Shu Mu Lu” (A List of Books about Western Studies) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Vol. 1.

⁵² Yun Ling, “The Introduction and Influence of the Western Laws and Jurisprudence in the Late Qing Dynasty” in *Fa Lv Shi Lun Cong* (*Studies on Legal History*, Vol. 3, China Legal Publishing House, 1983.

Sino-Western Relations)⁵³ and *Ying E Yin Du Jiao She Shu (Negotiations with Britain, Russia and India)*.⁵⁴

What's more, generally, great importance was given to *Wan Guo Gong Fa (Elements of International Law)* by many of the modern schools built in 1860s to learn the western culture. *Wan Guo Gong Fa (Elements of International Law)* was clearly listed as the compulsory course in the regulations of "Tong Wen Guan" (The School of Combined Learning) in Beijing, Zhong Xi Xue Tang (Tianjin School of Chinese and Western Learning; the precursor of Tianjin University) in Tianjin, and Nan Yang Public School in Shanghai,⁵⁵ which had opened another channel for learning the knowledge of western international law.

To sum up, after Opium War, with the opening of the country to foreign trade, the western legal culture flowed into China like tide waves, which had enabled the Chinese to get in touch with the western legal culture and to accept it gradually. In the conflict and comparison of the new and old legal culture, they began to consider how to change the traditional feudal legal culture and to establish a new legal civilization which was integrated with those in the western countries.

In the world history of legal development, there were many examples of the horizontal transplantation of laws because of wars and conquests. As ancient Roman Empire was invaded by the Northern Germanic people, the Germanic "barbaric common law" was also introduced into Rome and became one of the legal sources in Roman legal system. In 1806, Germany, which was called the "dirty stable", was swept by the army of Napoleon, which had made the theory of French Revolution basis of the German legal modernization. The result of Japan-Russia War had proved that "the effect of the establishment of constitutional government is excellent", which had "weakened the power of those who have insisted on maintaining the current order" in Russia.⁵⁶ When talking about "the benefit which a conquered people can get", Montesquieu said, "It would be better if the politicians had only discussed the benefit which the right of conquest may sometimes bring to a conquered people, instead of expounding on its frightening consequence."⁵⁷

⁵³ Tian Tao and Li Zhuhuan, "The Introduction and Historical Role of Law in Late Qing Dynasty" in "The History of Legal System" in *Fa Xue Lun Wen Ji (The Collected Papers of Law)*, edited by China University of Political Science and Law Press, 1990, Vol. 3; and Li Guilian, "The Reform of China's Modern Law and the Influence of Japan" in *Bi Jiao Fa Yan Jiu (Journal of Comparative Law)*, Vol. 1, 1994.

⁵⁴ Xiong Yuezhi, "A Brief Introduction of the History of the Translation Office of Jiang Nan Manufacturing Bureau" in *Chu Ban Shi Liao (The Historical Materials Published)*, Vol. 1, 1989.

⁵⁵ Shu Xincheng, *Zhong Guo Jin Dai Jiao Yue Shi Liao (The Historical Materials of Modern Education in China)* (Book 1), People's Education Press, 1981.

⁵⁶ Cyril Edwin Black, *The Modernization of Japan and Russia: A Comparative Study*, translated by Zhou Shiming. The Commercial Press, 1992, p. 177.

⁵⁷ Charles de Montesquieu, *Fa Yi (The Spirit of the Laws)* (Book 1), The Commercial Press, 1961, p. 140.

Before Opium War, the Chinese law was still a complete feudal law which was compared to “feudal junk” by the westerners.⁵⁸ In their eyes, “the Chinese law is brutal and unreasonable in some aspects”. At the same time, they had no faith in the “impartiality of law enforcement in Chinese tribunals”.⁵⁹ Some liberal bureaucrats who had the sense of times in the ruling group of Qing Dynasty had also deeply felt the staleness of the law; however, the overall stubborn and conservative ruling group and the degeneration and corruption of the whole country had made it impossible for the Qing government to carry on an initiative self-reform. Opium War in 1840 was a misfortune for China, which had brought a great disaster to the Chinese nation; nevertheless, it had also destroyed the gloomy atmosphere of political oppression and thrust China into a situation where there was no choice but change. It was the introduction of western legal culture that had made it possible for the Chinese legal system to transcend the old patterns and go on the track of modernization. Marx had pointed out that the western invaders had double tasks when they came to Asia: “one is the task of destruction, namely, to wipe out the old Asiatic society; the other is the task of reconstruction, namely, to lay a material basis for the western-style societies in Asia”,⁶⁰ which had shown that the historical development was independent of the will of the human beings.

16.3 The Wide Spreading of Modern Legal Culture by Translating and Publishing

16.3.1 *The Books and Newspapers Spearheaded the Trend*

After human history entered into the nineteenth century, newspapers, magazines and books had become the most efficient ways and means for information transmission. Through these media, the western legal culture was spread to all parts of China and was recognized, understood and accepted by the people of various social classes.

The founding of modern newspapers in China was first started along the southern coasts. The first Chinese monthly magazine *Cha Shi Su Mei Yue Tong Ji Zhuan* (*Monthly Statistics of Common Customs Observation*) was founded by a British missionary Milne in Malacca on the 5th of August, 1815. The first modern Chinese periodical which was published in China was founded by the Prussian missionary Gutzlaff in Guangzhou in 1857, which was the beginning of China’s modern journalism, and which, to certain extent, had broken the isolated state between eastern

⁵⁸ Fei Chengkang, *Zhong Guo Zu Jie Shi (The History of Concessions in China)*, Shanghai Academy of Social Science, 1991, p. 147.

⁵⁹ Westel W. Willoughby, *Wai Guo Ren Zai Hua Te Quan He Li Yi (The Privileges and Interests of Foreigners in China)*, SDX Joint Publishing House, 1957, p. 341.

⁶⁰ Karl Marx, “The Future Results of British Rule in India” in *Ma Ke Si En Ke Si Xuan Ji (The Selected Works of Marx and Engels)*, Vol. 1, The People’s Publishing House, 1995, p. 768.

and western civilizations. Under the ruling of the feudal autocracy, the Chinese people were poorly informed, moreover, there were also many political taboos, for this reason, it could be said that “our nation’s modern newspapers are all created by foreigners”.⁶¹ As for the newspapers founded by Chinese, the earliest ones were *Xun Huan Ri Bao* (*Universal Circulating Herald*) founded by Wang Tao in 1874 and *Zhong Wai Xin Bao* (*Chinese and Foreign Gazette*) published by Huang Pingpu and Wu Tingfang in Hong Kong in 1875. Thereafter, some other newspapers were published in succession, among which *Xun Huan Ri Bao* (*Universal Circulating Herald*) was the most famous one, and its founder, Wang Tao, was honored as the first Chinese political commenter on newspapers.

Wang Tao once had travelled to Britain, France, Russia and other countries, serving as a translator for a long time in Hong Kong, so he had a better understanding of western legal culture. He had spoken highly of the British constitutional monarchy, and proposed taking back Macao and abolishing the unequal treaties imposed on China, such as the extraterritorial jurisdiction and tariff agreements. His political comments and legal articles were often published in *Xun Huan Ri Bao* (*Universal Circulating Herald*) which was edited by him and issued in Hong Kong, and his articles had not only expressed on his views on reformation but also established the style of political writing in Chinese newspapers.

The publication of the books about the western culture was directed by Lin Zexu, an advanced figure who had first put forward the idea of “opening the eyes to see the world” in China. He had presided over the translation of Emer. D. Vattel’s book *Ge Guo Lv Li* (*The Law of Nations*). In addition, together with his colleagues, he had compiled and translated many other books, such as *Si Zhou Zhi* (*The Geography of the World*), *Hua Shi Yi Yan* (*Foreigners’ Opinions about Chinese Affairs*) and *Zai Zhong Guo Zuo Ya Pian Mao Yi Zui Guo Lun* (*The Iniquities of the Opium Trade with China*), which had provided a lot of information about the western legal culture.

Since Lin Zexu had led the trend in compiling, translating and publishing the western books, there had appeared an upsurge of studying the foreign histories and geographies in Chinese intellectual circle, and many such books were published successively, meanwhile, the books in which every aspect of the western countries was extensively introduced were also published. The modern legal and political systems in the west were commented and criticized in these books from different perspectives, which had shown that that the Chinese had gradually changed their opinions about the western legal culture. For example, in *Hai Guo Tuo Zhi* (*World Geography Records*) compiled by Wei Yuan, not only the historical and geographical knowledge of the world was introduced, the western legal system was also reviewed. Wei Yuan believed that the western parliament system was effective in pooling the wisdom of masses and balancing the power of the monarchs:

In discussions, different opinions shall be listened to, while in the selections of officials, the virtuous will be recommended. All decisions are made according to people’s opinions at the lower levels. If the decision is approved by the public, it will be accepted; if it is negated by

⁶¹ Yi Gongzhen, *Zhong Guo Bao Xue Shi* (*The History of Journalism in China*), China Xin Wen Publishing House, 1988, p. 55.

the public, it will be rejected; if it is liked by the public, it will be adopted; if it is disliked by the public, it will be discarded. If it is agreed by 2/3 of the people, it will be approved, and those who have different opinions will have to give up theirs and follow those of the majority. Even those who have attended the discussions will be elected by the public. How perfect this is.

He had praised, “How fair it is for the U.S. president to be elected every four years”. He also appreciated the system in the west in which the judges “are selected and appointed by elections”, and if the judge is “partial and unjust” in his judgement, he “will be deposed according to the opinions of the public”. The Switzerland was especially praised as “the Peach Garden (an imaginary world, ideal world or Shangri-la) in the west” by him because “no monarch was established” there and state affairs were managed only by “officials and aristocrats”. From this, it could be observed that the western political and legal systems were also included in the scope of “learning the advanced technologies from the west” proposed by him, and the learning was not just limited to the industrial technologies like solid warships and powerful weapons. To this end, he had criticized those fatuous and conservative people because they had “merely boasted of China, but had failed to see the outside world”, so they “knew neither the directions, nor the weakness and strong points of the nation”.⁶²

In 1846, Liang Yannan, a knowledgeable person who had worried about the current affairs, had personally investigated the historical events of the foreign countries, combined his four records of western history and geography and published them with the name *Hai Guo Si Shuo* (*The Four Descriptions of Foreign Countries*). In this book, the systems concerning the presidency, election, federalism, the separation of powers, the penal codes, and the tariff law in the United States were introduced, furthermore, the general situation of the parliament, the penal code, the litigation, and the prison system in Britain were also introduced. The Magna Charta of England was especially recommended by him and it was regarded as the historical origin of constitutionalism in Britain.⁶³

In 1848, *Ying Huan Zhi Lue* (*World Geography*), which was similar to Wei Yuan’s *Hai Guo Tu Zhi* (*World Geography Records*), was edited and published by Xu Jiyu, an official in the Qing government. In this book, the world history and geography were firstly introduced, and there was also a detailed discussion about the customs, the evolution of territories and the social changes of the various countries. It was said by the westerners that “Xu Jiyu has introduced the colorful outside world to his readers.”⁶⁴ Because Washington and the American democratic politics which he had established were greatly praised in the book, 20 years after its publication, Anson Burlingame, on behalf of the U.S. government, had presented a portrait

⁶²“Wu Shi Yu Ji” (The Postscript of Military and War Affairs) in *Sheng Wu Ji* (Wei Yuan’s Essays on the Military Affairs during the Reign of Emperor Daoguang), Zhonghua Book Company, 1984.

⁶³Liang Yannan, *Hai Guo Si Shuo* (*The Four Descriptions of Foreign Countries*), Zhonghua Book Company, 1993, p. 50, 72, 78, 79.

⁶⁴Fred W. Drake, *China Charts the World: Hsu Chi-yu and his Geography of 1848*, translated by Ren Fuguang Wenchi Publishing House, 1990, p. 57.

of Washington to him.⁶⁵ President George Washington and the U.S. political system were described by Xu Jiyu as the following:

The United States of America covers an area thousands of miles wide, and there is neither the title of aristocracy, nor inherited rules to follow, and the public affairs are decided according to the public opinions, which is unique and unprecedented either in ancient or at present times. The registered permanent residence is edited once in every ten years, and in every two years, one outstanding person is to be selected from the 47,700 people to live in the capital and participate in the discussion of national politics. The president resides in the capital, besides; the senate is established, with two talented people from each state elected participating in the decisions of important politics.

Six judges are selected in every state to be put the charge of hearing lawsuits, and they are also recommended and selected by elections. If they are partial and unjust in their judgments, they shall be removed from their offices according to the decisions of the public.

From the time of Washington to present, sixty years have passed, and in all, nine presidents have been appointed to serve a four-year term. If the president is thought noble and competent by the officials in the different ministries and the congress, he will continue another four-year term. Both the officials and the ordinary people are equal, and if he is not in office, he is no different from other ordinary people.

Although the president is in charge of financial affairs, he is not allowed to use a penny of it for his own profit, except for his 10,000 yuan of salary.

The scholars could be divided into three categories: those who study the knowledge about astronomy, geography and Christian doctrines, those who study medicine to cure disease, and those who study penology to hold trials and make convictions.

In addition, Xu Jiyu had especially introduced Washington to the readers:

Washington is a prominent person who had great ambition when he was young.

After the founding of the state, Washington had attempted to take off his armor and return to his farms, but the people did not agree and insisted on electing him as the head of the state. He then told them that it was selfish to pass on power to his posterities and it was better to choose the moral person to fulfill the task of managing the people.

Although Washington had fought battles up and down the country and conquered large areas, he still did not want to become a king to pass on power to his posterities. He had set up the election system, regarded the whole world as one family, and realized the unfulfilled wills of the three generations.

Wasn't Washington the best among the great figures in the ancient and present times in the west?⁶⁶

Apart from his positive reviews on the American democratic politics, Xu also showed his admiration for the British political system, the power mechanism, and litigation system. He said that Britain was “an example to be followed by other European countries”.⁶⁷

In view of the tracks of which the western modern legal culture was spread in China, the three books published in 1840s had special important historical values. If Wei Yuan's work was said to have led the trend, Liang Tingnan's understanding was much clearer and his comments were much daring than that of Wei Yuan's. If Wei Yuan had only had a brief statements about the democratic republic system in the United States in *Hai Guo Tu Zhi (World Geography Records)*, Liang Tingnan had

⁶⁵ *New York Times*, March 29, 1868.

⁶⁶ The above is quoted from *Ying Huan Zhi Lue (World Geography)* by Xu Jiyu, Vol. 9.

⁶⁷ Xu Jiyu, *Ying Huan Zhi Lue (World Geography)*, Vol. 7.

realized the roles which the U.S. constitutional system and electoral system had played in supervising the president and preventing the power from being abused. With regard to Xu Jiyu, due to his enthusiastic praise of western democracy, he had become the object attacked by conservatives, which had ruined his career of bureaucracy.

The influence of the three works to the posterities was all-around. During “Wu Xu Bian Fa” (Wu Xu Reform), “Wei Xin Pai” (the later reformists) had always intended to take advantage of the foreign histories to propagate their own views of reformation. Tang Changcai also believed that only when “the lessons were drawn from the combination of both ancient China and the ancient western countries” was it possible to achieve a practical effect in the reformation and revolution.⁶⁸

16.3.2 The Compilation and Translation of Large Amount of Legal Works Before and After “Wu Xu Bian Fa” (Wu Xu Reform)

Starting from 1860s, the center of introducing the western legal culture into China had been changed from the cities along the southern coast to Shanghai, which with its superior geographical location, had taken the lead in the development of the mass media compared with other regions in the nation. After the beginning of law revision in late Qing dynasty, “Xiu Ding Fa Lv Guan” (The Law Revision Office) had become the center of introducing western laws.

1. “Fan Yi Guan” (The Translation Bureau), which was attached to the Jiangnan Manufacturing Bureau, was an official-founded cultural organization in China, and it was also a publication organization which had translated most books and exerted greatest influence in China in the nineteenth century. John Fryer, a missionary holding an office in Jiangnan Manufacturing Bureau, was widely praised due to his large number of translations. Among Fryer’s 77 translations, many were concerned with legal affairs, such as *Zuo Zhi Zou Yan (Homely Words to Guide Governance)*, *Gong Fa Zong Lun (International Law)*, *Guo Zheng Mao Yi Xiang Guan Shu (Books on the State Politics and Commerce)*, *Ge Guo Jiao She Gong Fa Lun, (Commentaries Upon International law)*, *Fa Lv Yi Xue (Principles of Medical Jurisprudence)* and *Ge Guo Jiao She Bian Fa Lun (Commentaries Upon International Law: Private International Law or Comity)*.

Besides Fryer, Young John Allen and Shu Gaodi also translated many other works about legal politics, such as *Lie Guo Sui Ji Zheng Yao (The Statesman’s Year Book, 1874)*, *Mei Guo Xian Fa Zuan Shi (Interpretation of American Constitution)*, *Dong Fang Jiao She Lun (On the Negotiation with the Eastern Countries)*, *Ge Guo Jiao She Gong Fa Lun (Commentaries Upon International law)*, *Dong Fang Jiao*

⁶⁸“Xiang Xue Bao” (*Hunan Academic Journal*), April, 22, 1897.

She Ji (Records of the Negotiation with the Eastern Countries) and *Ri Ben Dong Jing Da Xue Gui Zhi (Regulations of Tokyo University in Japan)*. Among them, *Zuo Zhi Zou Yan (Homely Words to Guide Governance)* and *Mei Guo Xian Fa Zuan Shi (Interpretation of American Constitution)* had become the essential reference books in “Wu Xu Bian Fa” (Wu Xu Reform) and the constitutional movement in the twentieth century. *Zuo Zhi Zou Yan*, originally named “*Homely Words to Aid Governance*”, was one of a series books compiled by British Chambers brothers and then was translated and published by Fryer in 1885. Starting from freedom and equality, from the perspectives of family, culture and education, honour and position, negotiation, law, labor, and trading, the author had mainly analysed that everyone should have the natural rights of freedom, the countries should be people-oriented and politics should be aimed to gain the people’s hearts and to be in accordance with their wills. It was regarded as “one of the books which have provided the most systematic and most detailed introduction of the western social political ideology before “Wu Xu Bian Fa” (Wu Xu Reform)”.⁶⁹ Kang Youwei had once commented that in “*Zuo Zhi Zou Yan (Homely Words to Guide Governance)*, the principles for building a country has been stated, the responsibilities of the citizens has been discussed, and the truth for getting along with each other by different countries and people has been illustrated. In addition, it is also the best book which has given a thorough analysis of the politics by probing into its origins with universal principles. The first half of the book concerned how different countries should get along very well with each other, so it is mainly about public laws, while the second half mainly concerned how people can get along with each other, so it is mainly about commerce.”⁷⁰ The books about social science which were translated and published by “Fan Yi Guan” (The Translation Bureau) of Jiangnan Manufacturing Bureau had reached 33 types,⁷¹ which had “reprinted all the knowledge in western books in a more relaxed way without charges”.⁷² Those who had accepted the knowledge were mostly Chinese advanced intellectuals or the people from the upper class. After equipped themselves with the new ideology, they had actively participated in the promotion of political reformation and in the process of Chinese legal modernization.

Through the advocacy and efforts of “Gai Liang Pai” (the early reformists), many translation bureaus and agencies, such as “Da Tong Yi Shu Ju” (Da Tong Translation House), “Shanghai Xin Zuo She” (Shanghai New Publishing House), “Shanghai Nan Yang Gong Xue Yi Shu Yuan” (Translation Department of Shanghai Nan Yang Public School), and “Xin Min Yi Shu Ju” (Xin Min Translation Bureau),

⁶⁹ Xiong Yuezhi, *Xi Xue Dong Jian Yu Wan Qing She Hui (The Introduction of Western Learning to the East and the Society in the late Qing Dynasty)*, Shanghai People’s Publishing House, 1994, p. 517.

⁷⁰ Liang Qichao, “Du Xi Xue Shu Fa” (On the Method of Reading Western Books) in *Wu Xu Bian Fa (Wu Xu Reform)*, Vol. 1.

⁷¹ Xiong Yuezhi, “A Brief Introduction of the History of the Translation Office of Jiang Nan Manufacturing Bureau” in *Chu Ban Shi Liao (The Historical Materials Published)*, Vol. 1, 1989.

⁷² Jonathan Spenser, *Gai Bian Zhong Guo (To Change China)*, SDX Joint Publishing House, 1990, p. 154.

were founded successively before and after “Wu Xu Bian Fa” (Wu Xu Reform) which had translated and published many western capitalist legal works or works on law.

2. *Shen Bao* (*Shanghai News*) published in Shanghai was the largest and most representative newspaper in the country at that time, and “it is almost read by every gentleman every day”,⁷³ because it had carried extensive information. In the 1870s, the western current social and political affairs had been regarded by *Shen Bao* as the primary topics for observation and commentary. For example, after Meiji Restoration was launched in Japan, the various legal reforms carried out by Japanese by imitating the western countries were instantly reported. In the two month of July and August in 1882, averagely two pieces of news about Japanese were reported every day, while on the 25th of June in 1882, in a single day, 11 pieces of Japanese news were reported. The news and commentaries in *Shen Bao* (*Shanghai News*) had reflected people’s astonishment at the rise of Japanese power, expressed their praise for Emperor Meiji, and especially highlighted the Japanese intention to reform the old system by imitating that of the western countries.⁷⁴ Besides, the articles about the comparison between Chinese and western political and legal systems were also published, such as “Comparison of Sino-Western Penal Codes”, “On the Differences of Chinese and Western Political Systems”, and “On the Differences of Chinese and Western Customs”, etc.
3. *Wan Guo Gong Bao* (*A Review of the Times*) published by “Guang Xue Hui” (The Christian Literature Society for China) was also a rather influential newspaper in propagating the western culture. It had covered the world news, the commentaries on current affairs, scientific knowledge and the contents concerning western culture, etc. The newspaper’s influential articles on laws and politics included *Hua Shen Dun Zhao Li Mei Guo* (*The Founding of the United States by Washington*) by a Cantonese preachers, *Fu Guo Yao Ce* (*The Essential Strategy to Enrich the State*) by Jin Puo and Zhu Fengping, *Guo Zheng Yao Lun* (*Important Statements about National Policy*) by Ernst Faber, *Lun Sheng Li Fen Li Zhi Bie* (*On the Differences between Gaining Interest and Sharing Interest*) by Timothy Richard, *Lun Min Zhu Guo Yu Ge Guo Zhang Cheng Ji Gong Yi Tang Jie* (*The Translation of the Constitution of Democratic and other Nations and Explanations of the Senate*) by Young John Allen, *Lun Tai Xi Zheng Yao* (*On the Important Politics in the West*) by a so-called hermit along the coasts, and *San Shi Yi Guo Zhi Yao* (*Records of Thirty-one Nations*), *Tai Xi Xin Shi Lan Yao* (*The Nineteenth Century: A History*) and *Da Tong Xue* (*On Great Harmony*) by Timothy Richard. At the beginning of the twentieth century, some works of the western thinkers, such as *Zi You Pian* (*On Liberty*) by British Herbert Spencer were also published in this paper. Timothy Richard’s translation *Hui Tou Kan Ji Lue* (*Looking Backward*:

⁷³Zhang Zhongli (edited), *Jin Dai Shanghai Cheng Shi Yan Jiu* (*Urban Studies of Modern Shanghai*), Shanghai People’s Publishing House, 1990, pp. 930–931.

⁷⁴Le Zheng, *Jin Dai Shanghai Ren She Hui Xin Tai* (1862–1910) (*The Social Mentality of the People in Modern Shanghai: 1862–1910*), Shanghai People’s Publishing House, 1991, p. 180.

2000–1887) was also published with the name *Bai Nian Yi Jiao* (*A Hundred-Year Sleep*) in separate edition by “Guang Xue Hui” (The Christian Literature Society for China). After its publication, a vision of the future society was offered to the Chinese intellectual circle by a westerner. In Tan Sitong’s *Ren Xue* (*Treaties on Benevolence*), the content of the book was summarized as the following:

The people in the whole world are like the members of one family. This family is just like a hotel, and the people are like brothers and sisters. Father has no need to show his mercy, while son has no need to show his obedience. The elder brother has no need to protect his younger brother, while the younger has no need to show respect to the elder and the wife does not need to obey the order of her husband. The awakening after one hundred years of sleeping which was described in the western book is just like the situation of a harmonious world described in *Li Yun* (*The Rites in the Pre-Qin Dynasties*).⁷⁵

The people like Liang Qichao, Kang Youwei, Emperor Guangxu, Huang Qingcheng, Sun Bao and Xu Weize had all read the book and were moved by the ideal of the great harmony described in it. Apart from the cultivation of the ideal world of great harmony in the Chinese tradition, Kang Youwei was also inspired by this book when he was writing *Da Tong Shu* (*A Book of Great Harmony*). Kang Youwei claimed by himself that “*American’s Looking Backward* written by American is the symbol of a harmonious world.”

Many newspapers had been published by the bourgeois “Gai Liang Pai” (the early reformists), such as *Shi Wu Bao* (*Current News*), *Xiang Xue Xin Bao* (*Hunan Academic News*), and *Guo Wen Bao* (*Guo Wen Daily*), as well as *Qing Yi Bao* (*Qing Yi Daily*) and *Xin Min Cong Bao* (*Xin Min Repository*) which were published later. These newspapers had introduced and translated a large number of western bourgeois legal works and articles. Besides, in the books like *Zhi Xue Cong Shu* (*Collections of Science Books*) (1896), *Xi Zheng Cong Shu* (*Collections of Western Politics*) (1896), *Xi Xue Fu Qiang Cong Shu* (*Collections of Being Prosperous and Strong by Learning from the West*) (1896), *Xue Xi Xue Da Cheng* (*The Achievements of Western Learning, Part 2*) (1897) and *Xin Xue Da Cong Shu* (*Collections of New Learning*) (1903) which was published later, the category of law and politics were classified in order to collect the translated legal works in the western countries.

4. After the failure of “Wu Xu Bian Fa” (Wu Xu Reform), the Commercial Press of Shanghai continued to undertake the task of translating and publishing books about law and politics. At that time, a new upsurge of the translation of legal and political books was set off by the non-government publication houses in Shanghai by taking the advantage of the “free soils” in “Zu Jie” (the leased territory), and among them, the Commercial Press was a representative. The translated legal and political books were listed in the advertisement of *Dong Fang Za Zhi* (*The Oriental Magazine*):⁷⁶

⁷⁵Tan Sitong, “Ren Xue” (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji* (*The Complete Works of Tan Sitong*), revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 367.

⁷⁶The following are quoted from “Japan’s Influence on the Outline of Constitution by Imperial Order in Qing Court” by Chen Fengxiang, the unpublished Master thesis of the Institute of Historical Research in Taiwan Normal University, p. 36.

General Principles of Law (author Yorozu Oda, translator Liu Chonggu), *General Principles of Legal Economy* (author Hiroto Ishimizu, translator He Bingshi), *State Law* (author, translator Chen Shixia), *Comparative State Law* (author Seiichi), *Politics* (author Shigeru Nambara, translator Zheng Yi), *On Administrative Law* (author Tooru Shimizu, translator Jin Minlan), *The Theory of Civil Law* (author, Masaakira Tomii, translator Chen Haiying), *The Essentials of Civil Law* (author, Kenjirou Ume), *The Principles of National Science* (author, Sanae Takata), *Local Administrative Law* (author, Mura Shima), *The General Theory of Legal Science* (author Sanryou Yamada), *The General Theory of Criminal Law* (author, Assatarou Okada), *Original Insights of Economics* (author, Amano Tamezou), *History of Japan's Reformation* (author, Muramatsu Sadaomi), *Natioal Law* (author, Ariga Nagao), *The General Trend of Big Powers* (author, Takada Sanae), *Essentials of the Civil Law* (author, Mareki Kisaburoo), *Police Science* (author, Kubota Kiyochika), *A Treatise on Money* (author, Kawazu Jin), *Handouts on the Politics, Law and Finance* (anonymous), *Chinese Version of the Dictionary of Japanese Law and Economics* (anonymous), *Japanese Statutes at Large* (anonymous), *Six Codes of Japan* (anonymous), *Essentials of Japan's Legal System* (anonymous), *Japanese Legal History of the Meiji Period* (author, Kiyoura Keigo), *Handputs on Japan's Police Law, A Detailed Study of Japan's Prison Law, The Past Facts of Japan's Provisional Constitution-making* (translator, Lin Zhijun), *Explanation on the Constitution of Great Japanese Empire* (author, Ito Hirobumi), *Records of the Japanese Parliament Orders, Laws and Regulations* (compiled by Vereinfurdeutschen Wissenschaften, translator, Xie Bing), *On Public Debt* (by Tanaka Hozumi), Translator, Chen Xingnian, et al.), *Theory of the Commercial Law* (author, Matsunami Ichiro, translator, Qin Ruijie), *Interpretation of the Criminal Law* (Makino Eiichi, translator, Chen Chengze), *Outline of the Civil Procedural Law* (author, Takagi Toyozo), *Theory of the Criminal Procedure Law* (author, Matsumuro Itaru, translator, Chen Shixia).

From the above catalogue, it could be seen that the works were either collections of Japanese laws and regulations or the works by Japanese jurists, which was not accidental. The Chinese students who were studying in Japan at that time had actively translated the Japanese laws and legal works of Japanese jurists who were influenced by western legal culture into Chinese and spread them into China, which were published by the liberal publishing houses and brought before the Chinese readers in great numbers as fast as they could. Because of the actual situation brought about by the proposition of free speech and publication in the preparation of constitutionalism by the Qing government, moreover, because of the ideological guidance and firm attitude of Zhang Yuanji, who was the founding father of Commercial Press, an increasing number of legal translations were published. Zhang Yuanji believed that the publication business could "help and guide the nation's majority, which seemed to be more important than educating only a small number of elites". In his translating plan, politics, law, financial management and commerce were the most important contents. From 1899 to 1901, dozens of such books were published by the

Commercial Press,⁷⁷ which were circulated and sold at home in large numbers; therefore, their influences could not be underestimated.

5. “Xiu Ding Fa Lv Guan” (The Law Revision Office) and “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau), which were established for the preparation of constitutionalism and legal reformation in late Qing dynasty, had also played very important historical roles in introducing the books on western legal culture. These two bureaus were the official organizations of Qing government, so they were representative of the official intentions, and their establishment had once again made Beijing a center for the introduction of western legal culture.

“Kao Cha Zheng Zhi Guan” (The Political Investigation Bureau) was the precursor of “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau), which was ordered by the Qing government to “choose the parts appropriate for the Chinese political system from the politics and laws of other countries, to deliberate on their gains and losses and to have them compiled into books.”⁷⁸ For this, “The Translation Office” was specially established in this bureau and it was required to “translate the carefully-selected sections which need to be studied from the books of other countries and then have them compiled in series.”⁷⁹ Besides, “a library is set up”, especially for the “storage of Chinese and foreign books”. What’s more, investigation bureaus were also established in all provinces to carry out the task of collecting and translating the laws, regulations and the legal books of the foreign countries. In the memorials about constitutionalism, the historical materials of the constitutional government and the constitutional theories in the western countries were quoted by both the conservative groups and the constitutional groups when they tried to prove their views, which had indicated that the constitutional knowledge in the west had been popularized to a certain extent in the Qing government, which was inseparable from the efforts of “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau).

As a law drafting organization, “Xiu Ding Fa Lv Guan” (The Law Revision Office) was required by the Qing government to have all the current “Lv” (criminal law) and “Li” (precedent) carefully examined and studied and to have new laws drafted “according to the circumstances of the negotiation, and by making reference

⁷⁷ Wang Jiarong, *A Constructor in the Era of Great Change: the Biography of Zhang Yuanji*, Sichuan People’s Publishing House, 1985, p. 55.

⁷⁸ “The Emperor’s Decree for Establishing ‘Kao Cha Zheng Zhi Guan’ (The Political Investigation Bureau) to have a Study of the Politics and Laws of other Countries and Present them in Books” (the duplicated files of “Jun Ji Chu” (the grand council) in the First Historical Archive of China.

⁷⁹ Yi Kuang et al., “A Memorial to the Emperor about Drafting the Rules for ‘Xian Zheng Bian Cha Guan’ (The Constitutional Compilation Bureau), in *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (The Historical Files for the Preparation of the Constitutionalism during the Late Qing Dynasty) (Book 1), edited by Ming and Qing Archives Department of Palace Museum (Book 2), Zhonghua Book Company, 1979, p. 50.

to the laws of the other countries”.⁸⁰ Therefore, the translation of laws and regulations was greatly valued by this bureau. In the short time of a few years, almost 26 kinds of laws were translated one after another, they included: *The Penal Code of France*, *The Penal Code of Germany*, *The Penal Code of Russia*, *The Penal Code of Netherlands*, and *The Penal Code of Italy*; *The Printing Law of France*, *The Civil Procedural Law of Germany*, *The Japanese Penal Code*, *The Revised Japanese Penal Code*, *The Japanese Navy Penal Code*, *The Japanese Army Penal Code*, *On Japanese Penal Code*, *The Prussian Judicial System*, *The Japanese Judicatory Formation Law*, *Interviews in Japanese Jails*, *The Draft of New Japanese Penal Code*, *On Legal Codes*, *The Interpretation of Japanese Penal Code*, *The Japanese Prison Law*, *Penology*, *Discussions on Prison Matters*, *Japanese Criminal Procedural Law*, and *On the Legislation Compiled by Japanese Tribunals*. Another 10 which were translated but were not completed included: *The German Civil Law*, *The Old Civil Procedural Law of Germany*, *On Belgium Penal Code*, *Belgium Prison Rules*, *Belgium Penal Code*, *American Penal Code*, *American Criminal Procedural Law*, *Swiss Penal Code*, *Finland Penal Code*, and *The Private Law in Penal Codes*.⁸¹ Out of the practical needs of legislation, both the current department laws and the important legal works in the western countries were regarded as translation objects by “Xiu Ding Fa Lv Guan” (The Law Revision Office). These translations were directly read by the ministers and the emperor himself and were at the service of law revision, for this reason, they had strong official color and sound effect of spreading. Therefore, they had not only greatly changed the situation where the senior and junior officials in the imperial government had turned blind eyes and deaf ears to the western legal culture, but also provided a blueprint for the law revision in late Qing dynasty.

16.4 The Introduction of Western Legal Culture by the Chinese Overseas Returnees

16.4.1 *The Western Countries Described by the Travellers*

The Chinese began to live abroad a long time ago. However, in the eyes of the Chinese rulers who had stressed “the protection of Chinese against the foreigners”, the foreigners were just “barbarians”, and even the Chinese people who had gone

⁸⁰ *Da Qing Guang Xu Xin Fa Ling (The New Laws of Guangxu Emperor of Great Qing)*, Vol. 1, p. 7.

⁸¹ Shen Jiaben, “A Memorial to the Emperor about the Joint Conducting of Legal Revision and Inquisition by Da Li Yuan (the Supreme Court) and Judicial Department”, in *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), edited by Ming and Qing Archives Department of Palace Museum, Zhonghua Book Company, 1979, p. 838.

abroad to make a living were mostly regarded as “discontented people”.⁸² “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) had been strictly carried out in Ming and Qing dynasties, and those who dared to leave the country secretly and violate the prohibition were strictly punished.⁸³ It was after Opium War that this prohibition was forced to be abolished by the Qing government according to the agreements signed with foreign countries. Consequently, the Chinese people had gained the opportunities to travel or live abroad. After getting in touch with the western culture in person, the Chinese travelling abroad were able to understand the spirit and nature of the exotic culture, and began to introduce the western legal culture into China through their works. For instance, in the spring of 1847, Lin Jian in Xiamen was invited to work as a translator in the U.S. and returned China in 1848. During the short time of one year, he had written *Xi Hai Ji You Cao* (*Travel Notes in the Western Countries*) and *Xi Hai Ji You Cao Zi Xu* (*The Preface to the Travel Notes in the Western Countries*). In the latter book, he had described the history of the War of Independence in the United States and the war for the abolishment of slavery. Moreover, he had also introduced the democratic election and presidential system in America. He wrote:

The officials are selected from among the able and virtuous people who are recommended by others (official candidates, either senior or junior, shall be recommended by people and those who were recommended by majority were selected). Due to the interference by other great powers, wars have been fought for eight years. The president is duly respected and he is to be elected every four years (Washington is considered to have contributed a lot to the country and then he is elected the president for another four-year term, so he now has become a precedent).

In his *Jiu Hui Bei Pian Chao Ren Ji* (*Records on Rescuing the Cheated “Chao Ren”*: people living around Ningbo, China), Lin Jian also narrated his experience in America: in order to rescue the 26 Chinese who were tricked to New York by the British, he had been trapped by the British, so he had to appeal to courts. He employed an American attorney, and with his help, he appealed to the local court. In the tribunal, together with his attorney, he had made the defense by “condemning and accusing the British convincingly”. Eventually, the British lost the lawsuit and the Chinese were released at once “amid the loud applause of the bystanders.” This was the first time that the Chinese had filed a criminal lawsuit in the western court according to the western modern substantive law and procedural law. In this narration, even though with just a few words, the American lawyer defense system and the jury system were introduced by Li Jian in an affirmative tone.

Another example, in 1876, Li Gui went to Philadelphia in the United States to attend the world exposition. After that, he had made a one-week tour around the world, and after he returned China, he wrote *Huan Qiu Di Qiu Xin Lu* (*A New Record around the World*). In this book, the federal system, the separation of power,

⁸²“Dian Xing” (Executing Punishments) in *Qing Chao Tong Dian* (*The General Codes of Qing Dynasty*), Taipei: Xinxing Publishing House, 1965.

⁸³“Guan Jin” (The Strategic Passes) in “Bing Lv” (Military Law) in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), Vol. 20.

the democratic selection system, the terms for presidents, and the procedures of legal revision were all praised:

In the United States, each province is a state, all states formed a unified country, and each has the right of military leadership. The officials below the rank of 'Du Du' (the military viceroys and procurators) are elected by the citizens, and their term in office is four years....After the four years, he could stay in office for another term, as long as he is considered competent by the majority. Retiring from office, the president still lives with the common people...; in office, if one suggestion has been put forward or a precedent is to be changed, the president has the rights to stop it, and the public also has the rights to do this.

Besides, Li Gui had studied the western prison system from the perspective of comparison and he had noticed the humanitarian spirit reflected in the western legal system.

In 1861, Wang Tao escaped to Hong Kong, because he had presented memorials to "Tai Ping Tian Guo" (Taiping Heavenly Kingdom) and was wanted by the Qing government. From 1867 to 1870, he had traveled in the countries like Britain, France and Russia, and in 1878 he also traveled in Japan. These experiences were very significant in the formation of his thoughts about the political and legal system reform. What was profound about him was not just because he had witnessed the differences between the United States and the western countries, but because he had probed further for the real reasons for the western countries to become prosperous and powerful. He had also paid attention to legal system, supported the development of capitalist industry, and suggested restricting the autocratic system by law.⁸⁴ In addition, he believed that "the methods of the western countries must be adopted in order to become strong and prosperous in a short time".⁸⁵

In September 1898, after "Wu Xu Reform" failed, Liang Qichao escaped to Tokyo with the help of Japanese and began his years of travelling in the foreign counties. In Japan, he had studied the western works rarely seen in China, which had deepened his understanding of the western culture. In 1899, Liang Qichao had visited Hawaii, and in February, 1903, he visited United States again. During his stay there, he was deeply impressed by the system of democracy, local autonomy, separation of power and the two-party politics. And after he returned from America, his opinions on political affairs were greatly changed.⁸⁶ In his *Xin Da Lu You Ji (Travel Notes of the New Continent)*, he had introduced and commented on American democracy and legal system which he had seen with his own eyes.

⁸⁴ Wang Tao, "Letters to Hermit Zhou Taofu" in *Tao Yuan Chi Du (Wang Tao's Essays)*, Zhonghua Book Company, 1959, p. 30.

⁸⁵ Wang Tao, "Pian Ming" (Titles of the Essays) in *Tao Yuan Wen Lu (Collected Essays of Wang Tao)*.

⁸⁶ Ding Wenjiang, *Liang Ren Gong Xian Sheng Nian Pu Chang Pian Chu Gao (The First Draft of Liang Rengong's Chronicles)*, Shanghai People's Publishing House, 1983.

16.4.2 *The Western Legal Culture Spread by Overseas Students*

The earliest Chinese who studied in the western countries was Rong Hong who had studied in the United States in 1847 and returned to China in 1854. In 1872, according to Zeng Guofan's order, he led the first group of 30 students to go to study in the United States and was appointed the supervisor of the students. Later he held a concurrent post of deputy ambassador to the United States and returned to China in the second year. Because he had joined "Zi Li Jun" (The Independent Army), he was selected the president of Zhang Yuan Assembly in Shanghai. For this reason, he was wanted by the Qing government, so he sought shelter and lived in the United States till his death. In his *Xi Xue Dong Jian Ji (My Life in China and America)*, he not only narrated his whole life spent under the impact of the new ideological trends in the late Qing dynasty, but also propagated the democratic and legal thoughts in the west.

In 1874, with the savings from his salaries, Wu Tingfang studied in England at his own expense. He was majored in law in Lincoln's Inn of London. Two years later, he passed the examination and got the lawyer's certificate, and became the first Chinese to have a systematic study of the British laws. Because he was familiar with the western laws, he was taken seriously by the officials of "Yang Wu Pai" (The Westernization Group) in the Qing government and was greatly appreciated by Li Hongzhang who thought that "such people who were very familiar with the western laws should be assigned to important posts in "Nan Bei Yang" (refer to Bei Yang and Nan Yang, the two organizations in charge of commercial intercourses with foreign countries in late Qing dynasty), because if there are difficult cases, they could negotiate with foreigners".⁸⁷

In 1890, the second wave of Chinese students, with altogether 88 of them, were sent to study in Europe. Although those majored in political science and law accounted for no more than 10 %, many students whose majors were not politics and law were also attracted by the western legal system and began to learn the modern legal knowledge. For example, Luo Fenglu and Yan Fu had given up the major of marine navigation to study political science and law, among whom Yan Fu was the most prominent.

Although it was very late when Chinese began to study in Japan, they had made greater contribution than the students of the previous generations in the aspect of studying and introducing the western legal culture.

In 1896, the students were beginning to be sent to study in Japan at the expense of government. In 1900, the number was less than 100, while in 1906 it had reached to 8,000.⁸⁸ However, from 1905 to 1911, the total number of students studying both

⁸⁷Ding Xianjun and Yu Zuofeng (edited), *Wu Ting Fang Ji (Collections of Wu Tingfang)*, Zhonghua Book Company, 1993.

⁸⁸Saneto Keishu, *The History of Studying in Japan by Chinese*, translated by Tan Rujian, SDX Joint Publishing Company, 1983, p. 451.

in Europe and America was less than 142.⁸⁹ The freer atmosphere and greater number of legal colleges in Japan had provided convenient conditions for Chinese students to learn law and political science abroad. In 1902, it was pointed out in *The First Report of the Association of the Students abroad from Qing* that “more than half of students were studying law, political science and police science”. In 1904, the speed-up education of law and political science were specially established in Fa Zheng University (University of Politics and Law), and more than 2,862 Chinese students had attended the study in 6 years and about 1,384 of them graduated.⁹⁰ After Meiji Reform, the western modern legal system and culture were actively transplanted in Japan, and became the mainstream of Japanese legal culture, which had provided the Chinese students in Japan with sufficient materials for the study of western law.

According to the Japanese version, the Chinese students in Japan had translated the western legal works actively and the most famous achievements in translation were from “Yi Shu Hui Bian She” (Translation Association) which was founded in Japan in the winter of 1900, with Ji Yihui as the director. *Yi Shu Hui Bian* (*Collection of Translations*) published by this society was mainly about the modern theories of social politics of Europe, United States and Japan in the eighteenth and nineteenth century, and it was classified into the special column of politics, law, economy, history, philosophy and so on. The translations were printed in periodicals and then published in separate editions. The following translated works were published in the first issue:

- Political Science* by John Burgess [America]
- Lehre vom modernen Stat* by Johann Caspar Bluntschli [Germany]
- Outline of Political Science* by Toyabe Sentairo [Japan]
- Social Administrative Law* by a German Writer
- The Spirit of the Laws* by Baron de Montesquieu [France]
- Modern Diplomatic History* by Nagao Ariga [Japan]
- The History of European Politics in Nineteenth Century* by Sakai Yuhzaburoh [Japan]
- The Social Contract* by Jean-Jacques Rousseau [France]
- The Struggle for Law* by Rudolf von Jhering [France]⁹¹

In the second issue, Spencer’s *Zheng Zhi Zhe Xue* (*Political Philosophy*) and List’s *Li Cai Xue* (*Chrematistics*) were introduced. Therefore, it could be seen that the translations published by “Yi Shu Hui Bian She” (Translation Association) were all famous works about modern law and political science in Japan and western countries, and some of them were translated into Chinese for the first time. As for the separate editions published, according to *Yi Yi Dai Kan Shu Mu Lu* (*Lists of the Translated Works for Publication*), there were altogether 66 kinds, among which 26 were related to law and politics, such as *Social Revolution* and *Social Statics* by the

⁸⁹Huang Fuqing, *Qing Mo Liu Ri Xue Sheng* (*Chinese Students in Japan in Late Qing Dynasty*), Taipei: Academia Sinica, annexed table, p. 74, 1975.

⁹⁰Li Xixin, *Jin Dai Zhong Guo Liu Ri Xue Sheng* (*Students Studying in Japan in Modern China*), The People’s Publishing House, 1987.

⁹¹*Yi Shu Hui Bian* (*Collections of Translations*), the first issue, on December 6, 1900.

British writer Spencer, *Charater und Geist der Politischen Parteien* by German writer Bluntchli, *The History of Civilization in Europe* by French writer Guizot, *The American Commonwealth* by American writer Bryce, *Sociology* by American writer Giddens, *Comparison of the National Power among Countries* by a British writer, *An Outline of a Theory of Civilization* by Fukuzawa Yukichi, *On Internationalization* by Nagao Ariga and *National Laws* by Lu Shi.⁹² In the *Lists of Works Translated and Published by Translation Association* issued in 1903, the works such as *A General View of the Regimes in Europe, America and Japan*, *New Compilation of Legal System*, *The History of American Independence*, *The Political History in Recent Russia* and *The Biography of the Independent Revolutionaries in Philippines* were also included.

It was fully indicated from above that “Yi Shu Hui Bian” (*Collection of Translations*) edited by Ji Yihui was the earliest publication to systematically introduce the theories of law and political science in Japan, Europe and America. Liang Qichao had praised that “‘Yi Shu Hui Bian’ (*Collection of Translations*) should be valued because it had introduced the ideology of the western civilization and brought enlightenment to our nation.”⁹³

At this time, the center of anti-Qing revolutionary activities carried out by the bourgeois revolutionaries who were representative of the middle and lower national bourgeoisie were still abroad. They had published more than ten publications in Tokyo, Japan. Besides the above-discussed “Yi Shu Hui Bian” (*Collection of Translations*), those famous also included: *Guo Min Bao* (*National News*) (1901), *You Xue Yi Bian* (*Complications while Studying Abroad*) (1903), *Hu Bei Xue Sheng Jie* (*Student Community in Hubei*) (later named *Han Sheng* or *The Sound of China*, 1903), *Zhejiang Chao* (*Zhejiang Tide*) (1903), *Jiangsu* (1903), *Xing Shi* (*The Awakening Lion*) (1905), *Min Bao* (1905), *Fu Bao* (1906), *Henan* (1907), *Jiangxi* (1908) and so on. In these publications, usually a special column about “Fa Zheng” (law and politics) was set up, and often the translations concerning the law and jurisprudence in the western countries were published. The earliest Chinese version or abridged edition of the famous western works were just published in *Yi Shu Hui Bian* (*Collection of Translations*), such as Rousseau’s *The Social Contract*, Montesquieu’s *The Spirit of the Laws* (translated as *Wan Fa Jing Li* at that time), and Spencer’s *Representative Government* (The earliest Chinese version and abridged version of *Yuan Zheng* was published by *Collection of Translations*). The first Chinese version of American *Declaration of Independence* (translated into *Mei Guo Du Li Zhi Xi Wen* in 1901) was published in *Guo Min Bao* (*National News*). The purpose to conduct the translation of western law and jurisprudence by the bourgeois revolutionaries was to meet the need of carrying out the plan to set up the bourgeois-democratic republic, so it had played an important role in the historical process of introducing the western law and jurisprudence into China.

⁹²Ibid., the 7th issue, on July 30, 1901.

⁹³Liang Qichao, *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 1), p. 794.

16.4.3 *The Promotion of Democratic Legal System in Late Qing Dynasty by Ambassadors*

In 1862, the earliest ambassadors were sent to the west by Qing government, among whom, an official of Manchu ethnic, named Zhi Gang, had recorded the fresh feeling and deep impression of this “unusual opportunity”. For example, the rulers’ names were not taboos in the west; the Spanish Queen abdicated the throne because of the disobedience of the citizens and the college students and citizens in Paris had the rights to demonstrate against the unfair elections, etc. He also described that during his journey, a westerner had once advised him that “the western political system should be established in China as early as possible”.⁹⁴

In 1866, another group of people were sent by Qing government to have an investigation of the west, and it was headed by a Manchu official named Bin Chun. After returning to China, he recorded his observation of the British parliamentary system in his note with an approving tone and commented generally that “there are many advantages in the western political affairs”.⁹⁵

In August, 1875, Guo Songtao, once “Xun Fu” (procurators) of Guangdong and “Shi Lang” (vice minister) of “Bin Bu” (Board of War), was appointed imperial envoy to England and became the first Chinese ambassador. During the 2 years in England, he was greatly influenced by the western democracy and legal system; in the end his social ideology was changed. Consequently, he became an advocate for bourgeois democracy and legal system, because he had recognized that “the reason why the west is getting prosperous day by day” was that in the democratic system, almost all matters were decided by the “parliament”. In addition, the rulers’ “reckless behaviors are condemned by the majority in the parliament,..., therefore, no one dares to behave unscrupulously”.⁹⁶ He proposed that the political and religious system in the west be partially adopted, and he said, “Their methods of fostering of learning and promotion of art, and the ideology of managing the country according to the public opinions should be adopted”.⁹⁷ As for the bourgeois legal system, it was also praised: “the legislators shall not only manage others but also himself”. Therefore, “it is very urgent for the state to be ruled by law.”⁹⁸ Because Guo Songtao’s ideas were rarely heard among the bureaucrats of China at that time, it

⁹⁴Zhi Gang, *Chu Shi Tai Xi Ji* (Records of Diplomatic Missions abroad), Yuelu Publishing House, 1985, p. 365.

⁹⁵Liu Zhen (edited), “Liu Xue Jiao Yue” (Education for Studying abroad) in *Zhong Guo Liu Xue Jiao Yue Shi Liao* (*The Historical Documents of China’s Education for Studying abroad*), Vol. 1. Taipei: The Institute of Compilation and Translation, 1980, p. 291.

⁹⁶Guo Songtao, *Lun Dun Yu Ba Li Ri Ji* (*Diaries in London and Paris*), Yuelu Publishing House, 1984.

⁹⁷Guo Songtao, “A Memorial to the Emperor about the Serious Case of Cen Shuying’s Unreasonable Killing of English officials” in *Guo Song Tao Zou Gao* (*Guo Songtao’s Memorials to the Emperor*), Yuelu Publishing House, 1983, p. 348.

⁹⁸Guo Songtao, *Lun Dun Yu Ba Li Ri Ji* (*Diaries in London and Paris*), Yuelu Publishing House, 1984.

was caviar to the general public. When his works were “taken to Beijing, the ministers of the whole imperial court were enraged, subsequently, he was harshly denounced, . . . and this incident was not over until the printing plate was ordered to be destroyed by the emperor”.⁹⁹ Thus, Guo Songtao experienced the humiliation of “fawning on foreign powers”; moreover, he was considered as a “Han Jian” (traitor to China). Finally after being removed from office, he returned to his hometown and died gloomily.

In 1877, Huang Zunxian was appointed the counselor to Japan by Qing government. In office, he wrote *History of Japan* in which the Japanese history, political system and local customs were introduced in detail, hoping that the Japanese Meiji Reform could be followed by Qing government. For this, he had extensively collected the legal codes and historical records of Japan, thoroughly studied the process of the transplantation of western legal systems into Japan during Meiji Reform, and specifically conducted researches on the official system which was established according to the western modern administrative law. Besides, he had also done research on the Japanese civil rights movement which emerged in the 70s and 80s of the nineteenth century with the aim to promote civil rights, open parliament and establish constitution. Besides, he had also collected the materials about the various kinds of communities, associations and parties in Japan.

In 1822, Huang Zunxian was appointed the general consul in San Francisco in the United States, thereafter; he came into further contact with the western political and legal theories and systems, which had enhanced his democratic consciousness. He wrote articles in *Xin Min Cong Bao* (*Xin Min Repository*) and said, “It is rather strange to hear this first, then I read the theories of Rousseau and Montesquieu and changed my mind, so I knew that the universal peace relied on democracy.” In 1884, he expressed his thoughts in a poem:

Red, yellow, black or white race, all equally be treated. Freedom for everyone, bring benefits to all. Better enhancing people’s wisdom, the state would become stronger. Moved by the joyful atmosphere of this great country, it is admired as the greatest.¹⁰⁰

In 1889, Huang Zunxian served as the second-rank counselor to Britain embassy. In Britain, he had studied the British constitution and the constitutional government, and he thought that the British constitutional monarchy was very appropriate for China to follow.

In 1891, Huang Zunxian was again appointed as the general counsel to Singapore. These experiences had gradually made him an enlightening democratic in modern China. His works *History of Japan* was the most influential enlightening reading

⁹⁹Liang Qichao, “An Introduction of the Theory of Evolution in China in Recent Fifty Years”, *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 1), Vol. 39, Zhonghua Book Company, 1989, p. 43.

¹⁰⁰Huang Zunxian, “Ji Shi” (Records) in *Ren Jing Lu Shi Cao Ji Zhu* (*The Comments on Ren Jing Lu Shi Cao*), annotated by Qian Zhonglian, Shanghai Ancient Books Publishing House, 1981, pp. 376–377.

materials and was honored as the book which had “paved the way” for the constitutional monarchy.¹⁰¹

After the beginning of the preparation of constitutionalism at the end of Qing dynasty, another five ministers were sent abroad to have an investigation of constitutionalism. One group was led by Zaize, while another group was led by Dai Hongci. Although the two “were assigned to the eastern and western oceans respectively”, they had all first visited Japan and the United States and then the European countries. The five ministers were ordered by the emperor to have inspection visits abroad, hence, they had officially represented the Qing government. They had very high official titles, sufficient expenses, and a large number of retainers, and had made enough preparations. Therefore, even though they had just got a superficial understanding by the quick and casual observations, they had still learned a lot, and their inspections had provided a foundation for the constitutional reformation in the late Qing dynasty.

According to the inspection journals, the journey of the group led by Dai Hongci was recorded as following:

On December 24, the 31st year of Guangxu, a visit to the U.S. prison; on January 7, the 32nd year of Guangxu, a visit to the U.S. congress and inspection of its parliamentary system; on February 4, the 32nd year of Guangxu, a visit to British House of Lords and Commons; on February 19, a visit to some of the courts and prisons in Dublin and the capital of Prussia; on February 23, a visit to Prussian parliament and the police office; on April 3, a visit to House of Lords and Commons in Switzerland; on April 23, a visit to German supreme court; on April 2, a discussion on the constitutional problems with Сергей Юльевич Витте, the previous minister of Russia; on the eighth day, a visit to the chamber of Netherlands; on the 16th day, a visit to International Arbitration Institution in Hague; on the 20th day, the inspection of the constitution in Switzerland; on the 24th day, a visit to the Italian chamber; on the 27th day, meeting with a member of the Upper House of Italia and so on.¹⁰²

Among the retainers of Dai Hongci, some were intellectuals with the ideology of reformation, while some were students who had studied abroad, such as Zhang Zongxiang, Lu Zongyu, Tang Baoe, Qian Chengzhi, Shi Zhaoji and He Guangjian.¹⁰³ During the inspection, many books and materials about law and politics in Japan, Europe and America were collected. After being translated and edited, these materials had become important references for constitutionalism in the late Qing dynasty.

The group led by Zaize had a long talk with Itō Hirobumi in Japan on the first day of the 32nd year of Guangxu; on the third day, they attended a lecture on Japanese Constitution given by Hozumi; on the fourth day, they talked with Itō Hirobumi

¹⁰¹ Wu Tianren, *Huang Gong Du Xian Sheng Zhuan Gao (The Biography of Huang Zunxian)*, The Chinese University Press, 1972, p. 377.

¹⁰² Dai Hongci, *Chu Shi Jiu Guo Ri Ji (Diaries about the Diplomatic Missions to the Nine Countries)*, Yuelu Publishing House, 1986.

¹⁰³ *Duan Zhong Min Gong Zou Gao (Duan Zhongmin's Memorials to the Emperor)*, Vol. 6.

about the constitution. On March 2nd, Zaize met Timothy Richard in Britain and attended an lecture given by Percy Échillais, an English professor of law, about English constitution; on the fifth day, ninth day and twelfth day, they attended a lecture given by Percy Échillais about the administrative regulation, tax law, local autonomous law, British constitution and the procedural law. Besides, they also listened his introduction about the separation of powers, the police system and the education system in Britain; on the 26th day, Cujas, a French judge, explained the history of constitutional thoughts in France and the history of constitutional systems in France; on the 27th day, they visited the French chamber; on the third day of April, they paid a visit to the courts at various levels in Belgium and investigated the constitution, constitutionalism, election, legislation, monarchial power and local autonomy in Belgium.¹⁰⁴

After returning to China, the five ministers had compared and analysed the constitutions of the western countries. They concluded that generally speaking in the Japanese mode of constitution-making “the public affairs are discussed by the ministers and citizens together, while the political affairs are in the control of monarch. In addition, nothing is concealed from the people, and the monarch is given solely-respected power”.¹⁰⁵ However, in the British constitutional government, the “official positions are established and different responsibilities are assigned. Although it is helpful to recover the nation and strengthen the management of the country, they are not suitable for China, so it should be discarded”.¹⁰⁶ As far as the United States was concerned, “the country is built on industry and commerce and ruled by absolute democracy, which is quite different from the Chinese political system, so it can not be enforced”.¹⁰⁷ Thus, it could be concluded that that in China, constitutionalism should be established by “tracing back to the sources” and “learning from Germany”.¹⁰⁸ It could be seen that these commentaries were not made spontaneously but were made according to their understanding.

¹⁰⁴ Zaize, *Kao Cha Zheng Zhi Ri Ji (Diaries about Political Inspection)*, Yuelu Publishing House, 1986.

¹⁰⁵ Zaize et al., “A Memorial to the Emperor about the General Situation of Investigation in Japan and the Date of Departure for England”, in *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 6.

¹⁰⁶ Zaize et al., “A Memorial to the Emperor about the General Situation of the Investigation in England and the Date of Departure for France”, in *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 10.

¹⁰⁷ Duan Zhong Min Gong Zou Gao (*Duan Zhongmin's Memorials to the Emperor*), Vol. 6.

¹⁰⁸ Duan Fang, “A Memorial to the Emperor about the Situation of Investigation in Germany” in *Duan Zhong Min Gong Zou Gao (Duan Zhongmin's Memorials to the Emperor)*.

Chapter 17

The Change of Traditional Legal Concepts

As early as 2000 B.C., China had become the center of ancient eastern Asian civilization. With regard to legal culture, it is an important symbol of Chinese civilization as well as a basic constituent part of “Hua Xia” (an ancient name for China) culture. Like the history of Chinese civilization, the history of Chinese legal culture is also long-standing. It is the world’s greatest, with its extensive contents, vivid features, complicated mechanism and powerful vitality. Especially, in its long process of development, it was passed on from one generation to another, completely and systematically, without any interruption. As far as the interior of the formation of Chinese legal culture was concerned, the different ethnic groups in different regions were mutually influenced, mutually absorbed, and were gradually integrated and unified, however, as far as the exterior was concerned, it had created a system of its own, with the feature of conservativeness and independence imposed by agricultural economy and autocratic politics. Up to the middle of the nineteenth century, before the introduction of western capitalist legal culture, the intrinsic and intact feudal legal system and the patriarchal and ethical legal culture were still maintained.

In 1840, after Opium War, with the violent impact of western legal culture and the great change of social, economic and class structure in China, the traditional legal culture was broken up, and it was difficult to adhere to the things of the past any more. So, this was a great historical change in the history of Chinese legal culture, which had proclaimed the end of the old times and the beginning of new ones.

17.1 From Adhering to the Established Statutes to Conducting Reforms by Learning from the West

For a long time, the self-esteemed Chinese rulers had lived in a closed circumstance, so an innate sense of superiority as well as an inert mind of discriminating against the foreign cultures was developed. Furthermore, they had doggedly insisted on worshipping the glorious legacies of their ancestors. After the middle of Qing Dynasty,

when Chinese law had lost their capacity for self-development, the influence of foreign culture was still defied. After “Tian Li Uprising” (one sect of the White Lotus Organization) was suppressed, Emperor Jiaqing, hardly recovering from the recent shock, immediately required the officials to “further abide by the law and fulfill their duties” in order to consolidate the old system. He had fought against those who had demanded and threatened to carry out legal reform with wars on the excuse of “ancestral principles”. Up to the eve of the first Opium War, the doctrines of “‘Tian’ (heaven) does not change, neither does the ‘Dao’ (The Way of Heaven)”, and “ruling the country by old rules” was still adhered and advocated by Emperor Daoguang. After the failure of Opium War, violent political or social upheavals had occurred in China. So the enlightened bureaucrats and intellectuals began to ponder why the proud “Tian Guo” (the heavenly kingdom) was so easy to be defeated at the first blow. They not only began to open their eyes to see the world, but also would like to understand this world to find a way to save China. In legal concepts, they had changed from adhering to the ancestral statutes to criticizing them. In addition, the new concept of “conducting reforms by learning from the west” was formed.

17.1.1 Criticism on the Laws and Judicial Systems of Qing Dynasty

Before and after Opium War, the liberal thinkers represented by Gong Zizhen, Wei Yuan and Bao Shichen had bravely criticized the “Lv” (criminal law), “Li” (precedent) and the judicial systems of Qing Dynasty from the perspective of saving the country. Gong Zizhen said, “All matters in the universe, either big or small, if restricted by the unchangeable Confucian doctrines, then even if the senior officials like ‘Zong Du’ (viceroy) can not carry out a plan or get his job done wonderfully.”¹ He had exposed the unjust settlement of the cases caused by the malpractices of the justice by the judicial assistants and pointed out, “in ancient times, convictions were made according to the real circumstances of cases, but now it is the opposite”. The convictions are made arbitrarily and subjectively by the judicial officials and the law is given up for personal benefits, which have made justice enveloped by a curtain of shady secrecy, and the right and the wrong are confounded. Bao Shichen had exposed the real reason why those judicial assistants could dominate the power, and according to him, “the power of the judicial assistant was deeply-rooted. He would recruit his followers and recommended them to control the important affairs like finance and punishment in ‘Zhou’ (the subprefectures) and ‘Xian’ (county). In this way, his official business is handled smoothly and this in turn has led to collusion, which are the main reasons for the power abuse by the officials in other provinces”.²

¹Gong Zizhen, “Ming Liang Lun Si” (The Theory of Ming Liang: Part 4) in *Gong Zi Zhen Quan Ji (The Complete Works of Gong Zizhen)* (Book 1), Zhonghua Book Company, 1959, p. 35.

²“Eight Rules Listed for Lecturer Qin in September 1820” in *An Wu Si Zhong (Bao Shichen’s Essays)* (Book 1), Vol. 31.

With his many years of experience as a judicial assistant, Bao Shichen had a deep understanding of the judicial darkness and the situation in which the ordinary people were encumbered with litigations. He said, “Usually hundreds of people were kept in custody for trials. They had nothing to do after being released, and then they began to borrow money or even sell their family properties, lands, wives and children. So it is difficult to express their miserable sufferings in words.”³ From this, he concluded that “there are no officials in the world who do not violate laws”, therefore, in the field of justice in Qing dynasty “it is wrong to be right, and it is guilty to be innocent.”⁴

Ten years after Opium War, “Tai Ping Tian Guo” (Taiping Heavenly Kingdom) took place. The leader Hong Xiuquan declared in *Feng Tian Tao Hu Xi (Calling for Arms against Qing by Heavenly Order)* that in Qing Dynasty “evil laws have been drafted to make the Chinese inescapable from its nets and at a loss about what to do”. So he continued, “The one who dares to stir up uprisings in China will be charged of conspiring against the state and his whole family will be killed in order to prevent our Chinese heroes from probing for the solutions.”

In the struggle to organize the military revolts to overthrow the Qing government, Sun Yat-sen, the bourgeois revolutionary, had also sternly lashed out at the great suffering which the law and judicature of Qing government had brought to the common people. He said, “The severer the laws are, the tighter the net of punishments would be.”⁵ The people “could only obey the rules cautiously”,⁶ while “the whole jurisdiction is manipulated by the officials, furthermore, the people are unjustly charged and they have nowhere to appeal”. Among the officials, “with unfair protection and backstage collusion, they could line their own pockets when it is profitable; however, they would deny their own responsibility when it is harmful.” Consequently, “it has become a custom to be greedy and to extort.”⁷ Besides, in jurisdiction, the accused “were interrogated with the most savage tortures to get the testimony”.⁸

The above criticism on the law and judicature of Qing Dynasty was obviously different because of the different status and purposes of the critics; however, they were common in the understanding of the backwardness of the law and the corruption of the jurisdiction in Qing dynasty, based on which they had put forward their own opinions on political and institutional reform.

³“A Memorial to the Emperor about Handling, Categorizing, and Checking up the Long-Pending Cases for Hu Maozhuang” in *An Wu Si Zhong (Bao Shichen’s Essays)* (Book 2), Vol. 31.

⁴Ibid.

⁵“Da Zong Tong Ye Ling Wen” (President’s Elegiac Address for the Visit to Ancestral Tombs) in *Xin Hai Ge Min Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 136.

⁶“Lun Dun Bei Nan Ji” (Records of Being Arrested in London) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 22.

⁷Ibid.

⁸“Zhong Guo Wen Ti De Zhen Jie Jue” (A Real Settlement of the Problems in China) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 60.

17.1.2 *The Formation of the Concept of Conducting Reforms by Learning from the West*

At the eve of Opium War, for the purpose of fighting against the enemies, Lin Zexu had advocated “looking into the state of affairs of foreigners and getting to know their actual situations”. After Lin Zexu, Wei Yuan had clearly expressed his view of “learning the advanced technologies from the west in order to subdue them”. He believed that “the one who is not good at learning from the west will be conquered by it”,⁹ and “if one wants to conquer the foreigners, he must first know their situations, so the translation offices must first be established to have their books translated”.¹⁰ In his preface to *Hai Guo Tu Zhi* (*World Geography Records*), the purpose of compiling the book had been vividly elaborated, namely, the book was compiled in order to “to fight against the foreigners with the methods used by them, to treat the foreigners with the methods used by them and to learn the advanced technologies from the west in order to subdue them.”¹¹

In his book *Jiao Bin Lu Kang Yi* (*Protest from Jiao Bin Lu*), the advantages and disadvantages between China and the west were compared by Feng Guifen with a serious and sincere attitude. He said, “The people’s talents are not as fully brought into play in China as in the West; the lands are not as fully exploited as in the West; the rulers and subjects are not as approachable as in the West, and the name and the reality are not as balanced as in the West.” So, he pointed out, “If the laws are spoiled, I would criticize them even though they are made by the ancestors; nevertheless, if the laws are good, I would learn them even though they are made by foreigners”. This was a slogan full of courage and insight.

The doctrine of learning from the west was not limited to the importing of weapons but also the introduction of political and legal cultures. It had not only symbolized the change of traditional Chinese legal concept, but also created a freer atmosphere for the extensive introduction and spread of western legal culture.

The invasion of the western colonists had brought China an unprecedented national crisis, so the problems inside the Chinese society became more obvious. The outside affliction and inside distress had made people realize the inevitability of reformation. Gong Zizhen said, “From the ancient times to the present, no legal systems are unchangeable and no situations are invariable, therefore, things always change and circumstances always vary.”¹² Wei Yuan then insisted that “the more

⁹Wei Yuan, “A General Introduction of Atlantic and European Countries” in “*Hai Guo Tu Zhi*” (*World Geography Records*) in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*), Vol. 1, Yuelu Publishing House, 2004, p. 1978.

¹⁰Wei Yuan, “Chou Hai Pian” (On Maritime Affairs) in “*Hai Guo Tu Zhi*” (*World Geography Records*) in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*), Vol. 2, Yuelu Publishing House, 2004, p. 27.

¹¹Wei Yuan, “Yuan Xu” (The Original Description) in “*Hai Guo Tu Zhi*” (*World Geography Records*) in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*), Vol. 1, Yuelu Publishing House, 2004, p. 1.

¹²Gong Zizhen, “Petition to Da Xue Shi” (the grand secretary) in *Gong Zi Zhen Quan Ji* (*The Complete Works of Gong Zizhen*) (Book 1), Zhonghua Book Company, 1959, p. 319.

completely the old system changes, the greater convenience people would be offered”,¹³ moreover, “minor reforms may bring about less effects, while major reforms may bring about greater effects”.¹⁴ He also said, “There are no laws in the world that are without disadvantages after having been implemented for one hundred years; there are no unchangeable laws; no law could bring profits unless its disadvantages are eradicated, and no law could be flexible unless they have been made simpler and more concise.”¹⁵ His conclusion was that “those who are good at ruling do not rigidly adhere to laws”, while “those who stuck to the previous cases do not know the laws”.¹⁶

In 1860s, Hong Renxuan, the leader in the later period of “Tai Ping Tian Guo” (Taiping Heavenly Kingdom), had known much about western legal culture. Therefore, after taking the charge of state affairs, he had emphasized that “the old be reformed and the new be created” in time so as to adapt to the current situation. In *Zi Zheng Xin Pian* (*New Treaties on Political Counsel*), he commented:

The situation is always changing, but the principles are not always workable. If the decisions are not workable at present but are workable in future, this is fortunate for the future generations; nevertheless, if the decisions are just workable at present, but not workable in future, this will be a disaster for the future generations. The reason lies in the timely analysis of the situation and the balance of ‘Ben’ (the essence) and ‘Mo’ (non-essentials) of the things. If the balance can be achieved by following the changes of times and situations, it may be regarded as the law which may be applicable either in trivial or serious matters, or in the provinces or countries, or in one country or in many countries from now on. The key point lies in making laws according to circumstances and enforcing them after taking the situation into consideration.¹⁷

With this understanding, he had made suggestions that the horizon of “Tai Ping Tian Guo” (Taiping Heavenly Kingdom) should be far and wide, and the western countries should be taken as good examples. He said, England “is now regarded as the most powerful country because of its good laws”; by learning the “state law” from France, Russia has “greatly fostered the teaching of political science and has become one of the most powerful countries in the north within the hundred years in the past”. Therefore, laws “can never be replaced as long as they are made according to circumstances and enforced after taking the situation into consideration”.¹⁸

¹³ Wei Yuan, “Mo Gu Xia” (Of Governance in *Mo Gu*, Part 2) (writings of Wei Yuan), Vol. 5, in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*) (Book 12), Yuelu Publishing House, 2004, p. 49.

¹⁴ Wei Yuan, “Summary of the Poems Written in Yin Xin Shi Wu” (a pavilion named “Yin Xin Shi Wu” by Emperor Daoguang) in Supplementary Records of *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*), Yuelu Publishing House, 2004, p. 727.

¹⁵ Wei Yuan, “Chou Cao Pian” (Of Funds Collection) in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*) (Book 12), Yuelu Publishing House, 2004, p. 408.

¹⁶ Wei Yuan, “Mo Gu Xia” (Of Governance in *Mo Gu*, Part 2) (writings of Wei Yuan), Vol. 5, in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*) (Book 12), Yuelu Publishing House, 2004, p. 49.

¹⁷ Hong Renxuan, “Zi Zheng Xin Pian” (New Treaties on Political Counsel) in *Tai Ping Tian Guo Shi Liao* (*The Historical Documents of Tai Ping Tian Guo*), Zhonghua Book Company, 1955, p. 30.

¹⁸ *Ibid.*, p. 35, 38, 39.

“Yang Wu Pai” (The Westernization Group) was a more liberal group among all the political powers in the late Qing dynasty, and their proposal of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) was a form of combination at the first stage of the cultural collision between China and the western countries, thus, it was a theory with the intention to integrate the two cultures with different natures. The absorption of the western culture was legalized by “Yang Wu Pai” (The Westernization Group), and it had made a breach in the closed Chinese cultural system.

In the 1860s and 1870s, the early reformers and thinkers had already linked the state prosperity with the reformation of social and political systems. In his book *Yi Yan* (*Unification of Words*), Zheng Guanying said, “The currently existing customs should be changed according to modern principles. It’s better to learn from the past, because laws are natural and lessons could be learned from the situations in the foreign countries. The strong points should be learned in order to attack their shortcomings and obtain what they already have.”¹⁹ He Qi also said, “If the current laws are not changed according to the present circumstances...the difficult problems are not to be settled, moreover, the people’s trust also could not be won.”²⁰ Wang Tao even observed China in the macroscopic world situation: “suppose no changes have taken place in China until now, is it possible to compete with the European powers in national strength?”²¹

At the end of the nineteenth century, the leaders of “Wu Xu Reform”, such as Kang Youwei, Yan Fu and Liang Qichao, had explained the necessity of reformation with the viewpoints of the theory of evolution. Kang Youwei believed that both nature and human society were all in constant change and evolution, and he said that the “Tian” (heaven) and “Di” (earth) could last long because they were apt to changes.²² In “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor), he claimed, “looking into the situation of other countries, I have found that a country could become stable as long as reforms could be carried out, otherwise, it would perish. For this reason, if a complete reform is carried out, the country would get prosperous and powerful, nevertheless, if partial reform is carried out, it still would perish.”²³ As far as the law is concerned, “disadvantages will

¹⁹Zheng Guanying, “Zi Xu” (The Author’s Preface) in “Yi Yan” (Unification of Words) in *Zheng Guan Ying Ji* (*Collections of Zheng Guanying*), edited by Xia Dongyuan, Shanghai People’s Publishing House, 1982, p. 63.

²⁰He Qi and Hu Liyuan, “Zeng Lu Shu Hou” (The Postscript of Zeng Guofan’s Theories) in *Xin Zheng Zhen Quan* (*The Real Interpretations of the New Administration*), the first draft.

²¹Wang Tao, “Bian Fa” (reformation)” and “Tao Yuan Wen Lu Wai Bian” (Supplementary Essays of Wang Tao) in *Wu Xu Bian Fa* (Wu Xu Reform), Vol. 1.

²²Kang Youwei, “The Records of Political Reform in Russia by Peter the Great” in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 3, Shen Zhou Guo Guang Publishing House, 1953, p. 197.

²³Kang Youwei, “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 197.

surely exist after a long-time application, in other words, no laws could last for a hundred years without any changes.”²⁴

According to Darwin’s theory of “survival of the fittest in natural selection”, Yan Fu had analyzed the Chinese national condition at that time. He pointed out, “if no reform is carried out in today’s China, it is inevitable to perish.... So the earlier the reforms are carried out, the earlier the favorable turn would come. If we still follow the beaten track, we would end in disaster.”²⁵

Liang Qichao thought that “all things in universe are changing”, and “changing is the universal principle in the past and at present”.²⁶ He said, “The country that is innovative would prosper, while the country that is conservative would perish”. With regard to laws, “they would surely have disadvantages after years of application (may be ten years, decades, or even hundreds of years), and it is the natural principle to seek for changes when there are defects”.²⁷

In 1901, after experiencing the aggressive war against China by “Ba Guo Lian Jun” (The Eight-Nation Alliance) and the fugitive escape to Xi’an, Emperor Dowager “was not only afraid of the offensive public opinions inside, but also frightened by the denouncement from the powerful neighboring countries”. She then “initiated a series of political reforms during the fifth and sixth years of her reign to show the intention of reformation”.²⁸ In her edict, she explained the political reform: “there are instances that may not change forever in universe, but there are no unchangeable laws for ruling. There are flaws in most of the long-existing laws which should be reformed. The laws and orders may not be abolished and the traditional customs may not be violated, however, the revival of the country relies on the reformation”. Thus, she had required all officials to put forward suggestions on the following subjects, such as “imperial institutions, national cultural heritages, official administration, people’s livelihood, education, imperial examination, military, financial administration, the things which should be followed and the things which should be reformed, the things which should be removed and the things which should be integrated, in order to strengthen China’s national power either by taking the public or individual opinions”.²⁹ In the clamour for “reformation” both in “the government and the people”, the revision of law was gradually put on the agenda.

²⁴ Ibid., p. 198.

²⁵ Yan Fu, “Jiu Wang Jue Lun” (The Decision to Save the Country) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 3, Shen Zhou Guo Guang Publishing House, 1953, p. 60, 70.

²⁶ Liang Qichao, “Bian Fa Tong Yi” (The General Discussion on Reform) in *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 1), Vol. 1, Zhonghua Book Company, 1989, p. 1.

²⁷ Liang Qichao, “Lun Bu Bian Fa Zhi Hai” (On the Harmfulness of Not Having Reforms) in *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 1), Vol. 1, Zhonghua Book Company, 1989, pp. 7–8.

²⁸ “On the Necessary Political Reform for the overall Reformation in China” in “She Shuo” (Comments) in *Dong Fang Za Zhi* (*The Oriental Magazine*) (Chapter 1), Vol. 1.

²⁹ “Shang Yu” (The Imperial Edict) (on December 10, the twenty-sixth year of Emperor Guangxu) in *Yi He Tuan Dang An Cai Liao* (*Documentary Materials of Yi He Tuan*) (Book 2), Zhonghua Book Company, 1959, p. 915.

Just like what was said in “Xing Fa Zhi” (The Record of the Criminal Law) in *Qing Shi Gao* (*The History of Qing Dynasty*): “thereafter, the new laws are in the bud”.

The diehards, led by Emperor Dowager, once had harshly rebuked the reformists and accused them of rebelling against the orthodox principles, and they had even suppressed the “Wei Xin Liu Jun Zi” (The Six Gentlemen in Wu Xu Reform) at all costs with bloody measures. Nevertheless, now even these people had begun to pick up the flag of reformation, which definitely was a great change. The “ancestral statutes”, which had been considered as “unchangeable for all ages” in the past, were now proclaimed changeable, moreover, she even required “each minister in and out of Beijing to put forward their own views earnestly and comprehensively in order to choose a proper method for reformation”.³⁰ She also acknowledged that “since the foundation of Qing Dynasty, great strategies and achievements have been made and made public, which have been passed on from one emperor to another, meanwhile, law codes have been made according to situations”.³¹ Thus it could be seen that “Shi Yi”—learning from the West and carrying out reform had become an inevitable historical trend, furthermore, the hard struggle of saving the nation from extinction and strengthening the country had broken through the conservative cultural net in China, which had brought about the change of legal concept, and further led to the disintegration of the deeply-rooted Chinese legal system.

17.2 From the Maintenance of “San Gang” (Three Cardinal Guides) to Its Criticism

Since Han Dynasty, “San Gang” (three cardinal guides) had always been the guidance for state legislation as well as a yardstick for making convictions and punishments in judicial practices, so they were not just a matter of morality. Therefore, from the perspective of jurisprudence, the criticism and opposition of “San Gang” (three cardinal guides) were the denial of the most important principle and the most essential content of feudal legal system. For this reason, it was of great significance.

In 1860s, “Gai Liang Pai” (the early reformists) had begun to change their attitude from the maintenance of “San Gang” (three cardinal guides) to its criticism. However, it must be pointed out that the majority of them were still in favor of “San Gang” (three cardinal guides), and only a few of them had held a critical attitude towards the holy doctrine. For example, He Ru and Hu Liheng had pointed out in “Shu Hou” (The Postscript) in *Quan Xue Pian* (*Exhortation to Study*) that “the

³⁰“Guan Zhi” (the State Official System) in “Nei Bian” (Main Texts), Vol. 1, in *Huang Chao Zhang Gu Hui Bian* (Collections of Anecdotes of Qing Dynasty).

³¹“The Emperor’s Edict about Establishing Official System first for the Declaration of Constitutionalism” in *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979, p. 43.

theory of ‘San Gang’ (three cardinal guides) is not what Confucius and Mencius have meant,” and “it is “San Gang” that has brought about harmful atmosphere and decadent principles and has made China barbarous.” Chen Chi also said, “When the principles were formulated by the ancient people, both men and women were treated equally, and there was no difference between them.” Thus, it was Tan Sitong who had really held up the flag to fight against “Gang Chang” (the Chinese ethical tradition) and the autocratic system, and he was one of the representatives who had shown the change of legal concepts on this issue.

Tan Sitong’s personal experience and keen observation had made him feel deeply that “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism) were like suffocating nets that had enveloped the Chinese soil, which had not only bounded and suppressed numerous Chinese people, but also had become the origin of their “ignorance, weakness, poverty and suffering”. Under the guidance of the ideology of “Ren Tong” (benevolence and understanding), he had cried out for “breaking through the nets” and explicitly suggested “breaking through the net of wealth and position”, “the net of monarch”, and “the net of ‘Gang Chang’ (the Chinese ethical tradition)”,³² which at that time was truly a stunning and thought-provoking slogan.

In the feudal “Gang Chang” (the Chinese ethical tradition), the first was the cardinal guide of “ruler guiding subject”, therefore, Tan Sitong had focused his criticisms on the system of autocratic monarchy. Tan Sitong had condemned the autocratic emperors because they had “regarded the world as their private properties and the people as animals, dirt or grass”, moreover, “they had led lives of pleasure and arrogance by exploiting the people’s blood and sweat in the world”.³³ The autocratic rulers were bitterly attacked because they had opposed reformation so as to retain their powers, in addition, they had “handled matters without caring about the right and the wrong and prohibited changing over to new ways” so that the political affairs were neglected and the administration of the officials was corrupted. He exposed that “the brutal laws beyond imagination” had been enacted by the autocratic emperors with every possible means to suppress the citizens so that their thrones and private interests could be passed on “from generation to generation”. What was worse, the Qing rulers had made various kinds of cruel laws by ransacking their brains and they had encouraged “Wen Zi Yu” (literary inquisition) in order to suppress the rebellions of the people from different ethnic groups. At this point, Tan Sitong not only exposed the reactionary and corruptive nature of the autocratic monarchy, but also pointed out that the laws in feudal countries were actually the tools used by the autocratic emperors to maintain their private interests.

In his criticism of the feudal autocratic monarchy, Tan Sitong also absorbed Rousseau’s democratic ideology and elaborated the view of popular sovereignty. It was pointed out that there were no rulers and subjects when “people were firstly created”, and that all human beings were “civilians”. Because human beings “could

³²Tan Sitong, “Ren Xue” (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji (The Complete Works of Tan Sitong)*, revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 290.

³³*Ibid.*, p. 339, 341.

not rule each other” and they “had no spare time to rule each other”, a person was then jointly selected and became the monarch. Now that the monarch was “jointly selected” by the people, it was not “monarch who chooses people” but it was “the people who choose the monarch”, therefore, “the people come prior to the monarch”. For this reason, the monarch was to serve the people, while the ministers were to “aid him in the service”. If the monarch could not serve the people, he “shall be replaced”, which was “the principle universally acknowledged”.³⁴ Tan Sitong also opposed the long-prevailing concept of “the divine rights of the rulers” and fiercely attacked the important theoretical basis which spoke in defense of the autocratic monarchy. The thoughts that the people had the rights to replace or to depose the monarch, because the monarchial power derived from people’s sovereignty which he had propagated had reflected the features of the time after “Xi Xue Dong Jian” (the introduction of Western learning to the East), thus, it was different from Huang Zongxi’s ideology of anti-autocratic monarchy in the early Qing dynasty.

The theory of father guiding son and husband guiding wife was also criticized by Tan Sitong, he pointed out that “the cardinal guide between rulers and subjects has often led to disasters, but the moral ethics between father and son and that between husband and wife are gradually considered natural, because the system is established on the basis of reputation and power, which is the harm brought about by ‘San Gang’ (three cardinal guides).”³⁵ By applying the bourgeois ideology of freedom, liberty and democracy, he had attacked the legal embodiment of paternal power and the authority of husband in the patriarchal clan system. He believed that father and son could “possess separate properties and live in separate houses” in defiance of the rules regulated in the feudal law that the descendants were not allowed to own properties without authorization or to divide households and properties when their parents were still alive. He had shown great sympathy especially to women who had been persecuted by these feudal ethical codes, and he said that both men and women “are the essence of the world”, so they should have equal rights. However, women who had lived under the shackles of feudal ethical codes “were enslaved and flogged” randomly, so that in the end “they can only commit suicides”. Furthermore, “how could the women in the villages or counties escape from the evil-doings of mothers-in-law?”³⁶

Tan Sitong believed that “Gang Chang” (the Chinese ethical tradition) was very harmful because it had not only bounded people’s conducts, but also poisoned their minds. Consequently, countless people were punished because of their violation of “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues), however, the public had shown no mercy on them but denounced them unanimously. Tan Sitong said resentfully, “the executors are impassive and they have shown no doubts about their punishments, which are also accepted by everyone who believes that ‘those should be punished by law because they have violated the feudal ethical

³⁴Tan Sitong, “Ren Xue” (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji (The Complete Works of Tan Sitong)*, revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 339.

³⁵Ibid., p. 348.

³⁶Ibid.

codes’.” He also claimed that “the people’s reverence for ‘San Gang’ (three cardinal guides) is so formidable that it has frightened them into obedience and suffocated their spirits”, so “‘San Gang’ (three cardinal guides) has brought about no faith and honesty, instead, it has become the root of the disorders.”³⁷ Because “San Gang” (three cardinal guides) “could have both physical and mental control over the people”,³⁸ “it is not only welcomed by the cruel rulers and evil-doers, but also applied to guide all the penal codes and systems, and for a long time it has become their very convenient means to rule the people”.³⁹

In Tan Sitong’s opinion, the reason why “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) must be condemned was because it had violated the spirit of “Ren Tong” (benevolence and understanding), moreover, it in fact had violated the bourgeois principle of equality and freedom. He emphasized that without abolishing “Gang Chang” (the Chinese ethical tradition) and autocratic system, it would be impossible to carry out the reform, therefore, it was impossible to make national progress. Hence, he proposed, “Now even though there are many discussions about reform both home and abroad, if ‘Wu Lun’ (the five cardinal relationships, namely, the relationship between ruler and subject, father and son, brothers, husband and wife and friends) have still remained unchanged, when it comes to the essential theories and principles, people are still puzzled by what to do, let alone the change of ‘San Gang’ (three cardinal guides).”⁴⁰

It could be observed from above that Tan Sitong’s legal concept of opposing “Gang Chang” (the Chinese ethical tradition) was clear, countertrend and representative, and its essence was the denial of autocratic monarchy and the negation of the basis of feudal ruling order and feudal legal system, which was of progressive significance at that time.

17.3 From Discriminating Against Foreigners Blindly to “Zhong Ti Xi Yong” (Studying Western Science and Technology Under Chinese Traditional Culture)

After entering into the middle of the nineteenth century, the ruling class of Qing dynasty was still dominated by a batch of political conservatives who were both obstinate and old-fashioned, and they had rejected any reforms regardless of the trend of the times and the safety of the state, refused to carry out reforms by insisting on “being guided by the old rules”, and still considered the ancestral principles unchangeable. Moreover, according to them, all conducts were required to follow

³⁷ Tan Sitong, “Ren Xue” (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji (The Complete Works of Tan Sitong)*, revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 348.

³⁸ Ibid.

³⁹ Ibid., p. 349.

⁴⁰ Ibid., p. 351.

“the holy principles of Confucius and Mencius”, and the learning from the west and the application of the methods of the western countries were criticized as “altering China by the application of the measures of the west”. They even claimed that “they would rather let the country perish than reform”. Besides, the advocacy of democracy was also criticized, because they thought that “if the sovereign rights are passed on to the people, who shall rule the country? If the people could become their own masters, what could the rulers do? This would only make the world chaotic.”⁴¹ They had not only defended the autocratic legal system of the Qing dynasty, but also regarded “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) as an infallible and inviolable law. It was still preached that “there would be no footholds if ‘Gang Chang Ming Jiao’ (feudal cardinal guides and constant virtues) are discarded, and would there be any methods of instructions if ‘Zhong’ (loyalty), ‘Xiao’ (the filial piety), ‘Jie’ (chastity) and ‘Yi’ (righteousness) are removed?”⁴² They had tried constantly to fight against the bourgeois theory of “Fa Zhi” (the ruling of law) through the traditional ideology of “Li Zhi” (the ruling of rites) and “Ren Zhi” (the ruling of man).

Meanwhile, there appeared a political faction in the ruling group of Qing dynasty which was initiated by Yi Xin and Zeng Guofan, carried forward by Li Hongzhang and brought to completion by Zhang Zhidong. By maintaining the holy principles of Confucius, Mencius and “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues), they insisted on the application of the methods used in the west in many fields, such as troop training, handicraft and legal systems in order to be adaptable to the world changes and to retain the ruling of Qing Empire. This group was called “Yang Wu Pai” (The Westernization Group) which was made up of comprador bureaucrats, and their theory was based on the principle of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture), and their legal thoughts were concrete reflections of the theory of “Zhong Ti Xi Yong” (studying the western science and technology under Chinese Traditional Culture) in the field of law. Although they emphasized that the political orders and laws must be based on “Gang Chang” (the Chinese ethical tradition), they were still different from the conservatives who had stubbornly clung to the established principles. In order to “adjust to the world changes”, namely, the new situations and changes in China after Opium War, they had also advocated employing the western methods in some aspects and adapting to the new circumstances. For example, they had proposed very early that the “public law” should be studied and the “negotiation law” be drafted in order to meet the requirement of foreign negotiations between China and the western countries. Besides, they had also actively suggested that the various laws such as the mining law, the transportation law and the commercial law be made for the convenience of setting up and monopolizing the modern enterprises like industry, mining and transportation.

⁴¹“Letters to Dean Wang Yiwu” by Bin Fengyang in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 638.

⁴²Ibid.

It was a great transformation of governing thought as well as a starting point in the modernization of the traditional legal system to change from discriminating against foreigners blindly to “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture). Although vague and unconscious, the old concept of “Xia Yi Zhi Fang” (guarding against the foreigners) and the conservative old consciousness of sticking to the old ways had begun to be challenged by “Yang Wu Pai” (The Westernization Group) in the combination of guiding thoughts and the practical measures.

17.4 From Absolute Autocracy to Constitutional Republic

Since the emperor-centered autocratic system was established in Qin dynasty, it had been developing along a spiraling track and was becoming strengthened gradually. Although the autocratic monarchy was bitterly attacked by the enlightened thinkers represented by Huang Zongxi, by the end of Ming and the beginning of Qing dynasty, the concept of divine rights and the tenet of laws coming from emperors were still unshakable. In practice, because the emperor had mastered the supreme state power, he had the rights to determine not only the rise and decline of the country but also the life and death of the people. Before Opium War, the emperor’s sacred and inviolable position was continued to be maintained, but with the invasion of the western political and legal culture, the Chinese people’s horizon was broadened, so they dimly realized that the prosperity and strength of the west had depended on the legislative institutions, while the declining of Qing Dynasty was rooted in its autocratic system. The concept of divine rights of the rulers was gradually replaced by the principle of constitutional monarchy and democratic republic, which was the spiritual power which had dominated the political movements and revolutionary activities for more than half century. Looking back at this great ideological change, Liang Qichao said,

As ‘Hai Jin’ (the banning on maritime trade and intercourse with foreign countries) was abolished, the so-called ‘western knowledge’, at first, the techniques, and then the political system, was gradually introduced. A scholar who had lived in a totally dark room and had no idea of what was changing outside suddenly saw many splendid things which he had never seen before from a window opened in the wall. After returning to the dark room, he had only found darkness and filth; therefore, he became more passionate in the pursuit of knowledge from outside and more disgusted by the scene inside, longing for lights through the walls to get rid of the darkness.⁴³

If it was said that in the 1840s scattered materials of the western political and legal systems had already been introduced by Wei Yuan and Xu Jiyu, then in the sixties and seventies, the western legislative institutions and democratic systems had been introduced, praised and propagated by many of the representatives of the

⁴³Liang Qichao, *Qing Dai Xue Shu Gai Lun (An Outline of the Academics in Qing Dynasty)*, The Oriental Publishing House, 1996, p. 65.

early reformation groups, moreover, the roads for reformation had been explored by comparing China with the western countries. Among those reformers, some had been sent to Europe to study or to have inspections after the emergence of “Yang Wu Pai” (The Westernization Group), while others were sent to European countries to serve as diplomatic ambassadors. Their personal experience had enabled them to show admiration to the western modern democracy and the legal systems, meanwhile, their ideological concepts of “the divine rights of the rulers” were completely shaken, which had been vividly reflected in their works. For example, in *Shi Ke Zhai Ji Yan Ji Xing (Records of She Ke Zhai)*, Ma Jianzhong said, “The forms of the government administration in other countries are different, either in monarchy, or in democracy or in the joint governance of the monarch and the people. The legislative, administrative and judicial powers are not concentrated in the hands of one person, but are carried out separately and independently, and they are not interfering with each other. Therefore, their handling of political affairs is reasonable, transparent and orderly.” By taking England and Germany as examples, Chen Chi explained that in the two countries, “the rulers are integrated with the people, and the upper and lower people are united together”, which “is the reason why their countries have become rich and the militaries strong, and they have conquered the whole world”.⁴⁴ Wang Tao then enthusiastically expressed his longing for the joint governance of the ruler and people. He said,

In monarchy, only the ruler who is wiser than Yao and Shun could guarantee the long-lasting and stable government, while in democracy, because there are too many legal systems to be focused on, I have found that it is not without flaws. Thus, only the joint governance by both the monarch and the people could make the whole country integrated, and it is possible for the people’s sufferings to be reported to the ruler and the ruler’s benevolence to be felt by the people, therefore, it should be greatly encouraged, which is also the wish of the ancestors of the last three generations of the Chinese people.⁴⁵

It was easily seen that, on the one hand, their views of “the joint governance by the ruler and the people” was a representation of their pursuit of modern democratic politics, on the other hand, it was a reflection of the ideological fetters which were imposed on them by the traditional monarchy system and the limitations which were caused by their individual experience and backgrounds. As a result, it had led to the contradiction that although they had the intention to reform, they still dared not stride over the traditional barriers.

After 1860s, a few people of “Yang Wu Pai” (The Westernization Group) and “Gai Liang Pai” (the early reformists), who were in praise of the western democratic politics, began to study whether and how the western systems could be transplanted to China. For example, Wen Xiang had shown appreciation to the western countries, because “any state decisions must be reported to the House of Lords in order to consult the ministers and to the House of Commons to consult the ordinary people.

⁴⁴Chen Chi, “Yi Yuan” (The Parliament) in “Yong Shu” (Mediocre Books) in *Wu Xu Bian Fa* (Wu Xu Reform), Vol. 2, p. 245.

⁴⁵Wang Tao, “Zhong Min” (Stressing the People) (Book 2), *Tao Yuan Wen Lu Wai Bian* (*Supplementary Essays of Wang Tao*), Zhonghua Book Company, 1959.

If the decisions have been considered feasible by the two Houses, it should be carried out; otherwise, it should be discarded. Therefore, all decisions must be made according to the national situations.” However, he believed that although the parliamentary system was “worthy to be adopted”,⁴⁶ it was hard to be practiced in China. Another scholar Guo Songtao had claimed that the essence of the western culture lay in the “parliament”,⁴⁷ so he advocated that the western political system should be established in China. He further suggested that “from the western countries we should learn the methods of advocating learning and promoting technology and the ways of ruling the state according to the conditions of the people.”⁴⁸

To 1880s, the representatives of early “Yang Wu Pai” (The Westernization Group) had new theoretical and practical breakthroughs due to their personal experiences abroad and their knowledge about the western political science and law. For instance, Wang Tao had preached in his works that “only the governance shared by both the monarch and people could make the whole country integrated with the people’s suffering reported to the rulers and emperor’s benevolence felt by the people. Then the state could be as stable and firm as the rocks without any domestic disorder and foreign humiliation”.⁴⁹ Zheng Guanying further explained that “in monarchy, the rights are concentrated more in the hands of the ruler, but in democracy, the rights are concentrated more in the hands of the people, however, in constitutional monarchy, the governance is shared equally by both ruler and the people”,⁵⁰ so it was more suitable to China. He had especially pointed out that after the establishment of parliament, it was not possible for the “fatuous, self-indulgent and cruel rulers to maltreat the people, for the domineering ministers to abuse power, for the officials to reject their responsibilities, and for the ordinary people to accumulate the grudges”.⁵¹

From the conception of “joint ruling by both the monarch and the people”, “Gai Liang Pai” (the early reformists) had naturally turned their thinking to the division and balance of the state power. Huang Zunxian said, “Only after the ruler has divided his power with the citizens is it possible for him to reap where he has not sown and to ensure that the state be eternally prosperous.”⁵²

⁴⁶Zhao Erxun et al., “Wen Xiang Zhuan” (The Biography of Wen Xiang) in *Qing Shi Gao (The History of Qing Dynasty)*, Vol. 368, Zhonghua Book Company, 1977.

⁴⁷Guo Songtao, *Lun Dun Yu Ba Li Ri Ji (Diaries in London and Paris)* (Book 3), p. 373.

⁴⁸Guo Songtao, “A Memorial to the Emperor about the Serious Case of Cen Shuying’s Unreasonable Killing of English officials” in *Guo Song Tao Zou Gao (Guo Songtao’s Memorials to the Emperor)*, Yuelu Publishing House, 1983, p. 348.

⁴⁹“Zhong Min” (Stressing the People) (Book 2) in *Tao Yuan Wen Lu Wai Bian (Supplementary Essays of Wang Tao)*.

⁵⁰Zheng Guanying, “Yi Yuan” (The Parliament) in “Sheng Shi Wei Yan” (Crisis Awareness in Heyday) in *Zheng Guan Ying Ji (Collections of Zheng Guanying)*, edited by Xia Dongyuan (Book 1) (Book 1), Shanghai People’s Publishing House, 1982, p. 316.

⁵¹*Ibid.*, p. 312.

⁵²Huang Zunxian, “Guo Tongzhi” (The Record of Governance), Vol. 3, in *Ri Ben Guo Zhi (The Japanese History)* (Book 1), Tianjin People’s Publishing House, 2005, p. 93.

Although the above-mentioned understanding of “Gai Liang Pai” (the early reformists) towards the western democratic political systems was superficial and even one-sided in some aspects, at that time they still represented a progressive tendency. Especially, they had expressed their political appeals on the basis of western democratic systems, which was what their predecessors couldn’t and dared not do. With the deepening of the national crisis, the ideological trend asking reform also surged forward, at the same time, the introduction and understanding of western culture were further accelerated. When commenting on the multi-party politics in Britain, Xue Fucheng said, “The Houses of Lords and the House of Commons in Britain consist of two parties: the Labor Party and the Conservative Party, and they are in office by turns and interact with each other, with one party in office and the other out of office. By such continuous alternation, the state’s political affairs could be handled successfully”.⁵³ Huang ZunXian also explained the functions and activities of western party organizations in his *Japanese History*:

I have found out that the matters in foreign countries are handled by joint efforts. It is so either in state administration or in commercial business, either in removing the dangers of spectacular significance or creating the wonders like ships and electricity, which could only be handled successfully with everyone’s joint efforts. Therefore, the reason why it is possible for people to be united is because there is ‘Li’ (rites) which is used to make distinctions between them, there are laws which are enacted to make them orderly, and there are feelings which are employed to keep them in touch, so that people’s spirit is maintained and they are not easy to be distracted. It is just because of this that they can tyrannize the world without being resisted. After looking into their customs, I have discovered that there is nothing that is not discussed at the meetings and there is nobody who has not joined a party. Furthermore, the people are well aware of the advantage, so they all support their own parties. Although each person belongs to different organizations and parties, each one is united together to compete with other parties.⁵⁴

After Sino-Japanese War (1894–1895), the national crisis was deepened further. Thus, “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) had become the loudest voice of the times. In this atmosphere, “Wei Xin Pai” (the later reformists) arose at the historical moment and stepped onto the political and historical stage. Not only had they more extensively propagated the western democratic politics, they had also carried out an experiment of political reform.

Based on the idea of “Quan Bian” (complete reform), Kang Youwei, the leading figure of “Wei Xin Pai” (the later reformists), had demanded a reformation of the institutions and laws which were closely related to the regime of Qing dynasty. He thought that China’s poverty and weakness were mainly caused by the excessively esteemed monarchical power, the failure of reporting the feelings of the common people to the higher authorities and the disintegration of the ruler and the subject. Therefore, although the western learning had been adopted in China in the past 30 years by establishing schools, setting up mining businesses and making machines,

⁵³ Xue Fucheng, *Chu Shi Ying Fa De Yi Bi Si Guo Ri Ji (Diaries about the Diplomatic Missions to the four Countries: Britain, France, Italy and Belgium)*, Social Science Academic Press, 2007, p. 177.

⁵⁴ Huang Zunxian, “Li Su Zhi” (Records of Etiquette and Custom), Vol. 4, in *Ri Ben Guo Zhi (The Japanese History)* (Book 1), Tianjin People’s Publishing House, 2005, p. 916.

it had yielded little results. Thus, in order to make the country prosperous, autocratic system must be reformed and constitutional monarchy must be implemented. Just because of this, Kang Youwei was the first person to officially make proposals to the Qing government to set up parliament and open congress.

To promote and organize the implementation of “Xin Zheng” (the new administration), Kang Youwei put forward the proposal of settling up “Zhi Du Ju” (The Bureau for Policy Making). He suggested that “‘Zhi Du Ju’ (The Bureau for Policy Making) should be established in the imperial court, and about ten all-around talents should be selected from the whole country to work in it. In the bureau, the nobles and ministers are all equal.”⁵⁵ If “Zhi Du Ju” (The Bureau for Policy Making) was established, “it is possible for the emperor to decided in person what should be discussed, what should revised, what should be retained and what should be discarded, to estimate the gains and losses for the state and the people and to remake the regulations”.⁵⁶ Therefore, Kang Youwei considered the establishment of “Zhi Du Ju” (The Bureau for Policy Making) as the key to the success of reform. He emphasized, “Without the establishment of the bureau, the measures taken would be ineffective, mistaken and delayed, and it is just like sailing in the wide seas without navigation, going across deserts without guides, just going blindly and travelling aimlessly, consequently, how is it possible for this boat not to sink when it is sailing to the other shore in a stormy, rainy, foggy, snowy, and gusty day?”⁵⁷ According to Kang Youwei’s plan, the bureau would be subdivided into twelve sections concerning law, financial affairs and tax, school, agriculture, industry, commerce, railroad, postal service, mining, foreign study and academy, army and navy respectively. It was thus evident that “Zhi Du Ju” (The Bureau for Policy Making) was actually a “cabinet for reform” which was in charge of administration and confidential affairs, law drafting and reformation planning. That’s why he said that the “establishment of ‘Zhi Du Ju’ (The Bureau for Policy Making) is especially the source of reformation”.⁵⁸

Besides, Kang Youwei also paid attention to the reform of old laws and the establishment of new legal system. He said, “The reform all relies on the establishment of institution and making of constitution.” He required that “the constitution be drafted by adopting ‘Lv’ (criminal law) and ‘Li’ (precedent) of the other countries in order to make a distinction between the public and private laws”,⁵⁹ in other words, a capitalist constitution like that of Britain or Japan should be drafted, according to

⁵⁵ Kang Youwei, “Shang Qing Di Yi Shu” (The First Memorial to Qing Emperor) in *Wu Xu Bian Fa Wen Xian Hui Bian* (*Collections of Documents about Wu Xu Bian Fa*), Vol. 2. Taipei: Ding Wen Bookstore, 1973, p. 199.

⁵⁶ *Ibid.*, p. 199.

⁵⁷ *Bo Lan Fen Mie Lun* (On the Disintegration and Destruction of Poland), a duplicated copy in the First Historical Archive of China.

⁵⁸ Kang Youwei, “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 200.

⁵⁹ *Ibid.*, p. 194.

which both the ruler and the people were administered so as to define the boundaries of their rights clearly and to have the ruler's rights restricted to guarantee the implementation of constitutional monarchy. Just as Liang Qichao had commented in *Kang You Wei Zhuan* (*The Biography of Kang Youwei*) that (Kang Youwei) "considers the making of the constitution, the reform of the official system and the defining of the boundaries of authority as the supreme principles in China's reform", and "if the constitution is established, the official system is changed and the real reforms are carried out, the domestic disorder will be eliminated".⁶⁰ As for the matters like "parliament regulations and election statutes", Kang Youwei also believed that "they are very simple things to do, because there are already many established regulations in almost all the countries both in the east and in the west, and what needs to be done is just to choose one of them and transplant it in China".⁶¹

Kang Youwei also believed that in order to set up a constitutional monarchy, the system of the separation of the three powers should be applied. He pointed out, "in the recent western political theories, the three powers—legislation, administration and jurisdiction have always been discussed—only after the system with three powers is established is it possible to make the political system perfect."⁶² Therefore, as long as "the system of the separation of the three powers is implemented in China, China's stability and prosperity can be expected".⁶³ Although there were some historical limitations in the theory of the separation of powers proposed by the bourgeoisie, the requirements of Kang Youwei and other people to replace the highly-centralized autocratic monarchy with the system of the separation of powers in the late nineteenth century should undoubtedly be affirmed.

Kang Youwei also had his own viewpoints about the relationship between reform and law. Firstly, he thought that the real reform "must begin with the reform in system and law".⁶⁴ In order to start a "legal reform in a wider scope", he had "translated many Japanese books", and "made extracts from the events in Meiji Reform and edited them into notes", "in order to be referenced" in the Chinese reform.⁶⁵ Secondly, he had suggested that the old criminal laws in Qing Dynasty should

⁶⁰Liang Qichao, "Kang You Wei Zhuan" (*The Biography of Kang Youwei*) in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by Jian Bozan et al., Vol. 4, Shen Zhou Guo Guang Publishing House, 1953, p. 34, 35.

⁶¹Kang Youwei, "A Memorial to the Emperor about Making Constitution and Opening Parliament" in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 237.

⁶²Kang Youwei, "Shang Qing Di Liu Shu" (*The Sixth Memorial to Qing Emperor*) in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 200.

⁶³Kang Youwei, "A Memorial to the Emperor about Making Constitution and Opening Parliament" in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 237.

⁶⁴Kang Youwei, "Kang Nan Hai Zi Bian Nian Pu" (*Kang Youwei's Self-edited Chronicle*) in *Wu Xu Bian Fa* (*Wu Xu Reform*), edited by Jian Bozan et al., Vol. 4, Shen Zhou Guo Guang Publishing House, 1953, p. 145.

⁶⁵Kang Youwei, "The Investigation of the Meiji Restoration" in *The Collections of Documents about Wu Xu Bian Fa* (*Wu Xu Reform*), Vol. 3. Taipei: Ding Wen Bookstore, 1973, p. 2.

be revised, because they were so savage and brutal that they were “intolerable for human beings”. In fact, it was just on the pretext of “the brutality of the Chinese criminal law” that Qing government was forced by the western countries to accept the consular jurisdiction in order that the western countries could “administer their own citizens”. Although this was the logic of the invaders, it was true that the criminal laws in Qing dynasty were cruel and brutal. So Kang Youwei said, “It is time now to refer to the laws of Rome, Britain, United States, Germany, France and Japan to have the Chinese laws enforced after revision”. “Even though the revised laws are not to be enforced in the whole country immediately, they should first be enforced in most of the trading ports”.⁶⁶ Eventually, Kang Youwei suggested that the civil law, commercial law and procedural law should be enacted first; moreover, he had especially taken the commercial law seriously in order to protect China’s trade and commerce.

Kang Youwei’s suggestion of legal system reform was just a part of his constitutional ideology. He thought that if a constitutional government was to be established in China, the western legal system should be adopted and the country should be ruled with the newly made laws. With the development of national capitalist economy and daily complexity of the social relationship, China was in an urgent need to enact new laws in order to adjust the various new relationships. If Kang Youwei’s legislative theories could be put into practice, it would mean that the Chinese old feudal legal system featured by the integration of all laws would have been replaced by the bourgeois legal system consisting of six legal branches, which was almost 10 years earlier than Shen Jiaben’s law revision.

To sum up, during “Wu Xu Bian Fa” (Wu Xu Reform), “Wei Xin Pai” (the later reformists), represented by Kang Youwei, Liang Qichao, Tan Sitong and Yan Fu, had tried to reform the autocratic monarchy with keen determination, meanwhile, they had also advocated adopting the western legal systems and institutions. Their serious research and introduction of western jurisprudence had provided important theoretical bases for the argumentation of the reform, thereby, had formed a more distinct capitalist legal concept. This had shown that the western legal culture was increasingly influencing and equipping the Chinese people who had actively participated in the movement of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival). Although “Bai Ri Wei Xin” (hundred days’ reform) had failed due to the great disparity in strength, it had shown the advantages of western democratic politics and legal systems to the Chinese people, which had enabled more Chinese to accept the ideas of reform, thereby, the army which was indulged in “pursuing truth from the west” was enlarged.

After entering into the twentieth century, the Qing government, under the pressure of international situation and the daily increasing democratic revolutionary activities, had to begin the political system reform from top to bottom, namely, the transition from autocratic monarchy to constitutional monarchy. And this transition

⁶⁶ Kang Youwei, “Kang Nan Hai Zi Bian Nian Pu” (Kang Youwei’s Self-edited Chronicle) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 4, Shen Zhou Guo Guang Publishing House, 1953, p. 200.

could be regarded as the result of more than half century of endeavor by “Gai Liang Pai” (the early reformists). Because an extensive propaganda had been made by “Gai Liang Pai” (the early reformists) about the theory of constitutional monarchy, this transition had not caused theoretical disputes. However, at this moment, heated debates were unfolded against the constitutional monarchy by the supporters of another form of political system, namely, the democratic republic.

As a new political power, the bourgeois democrats, who had been striving for a democratic republic, began to play a major role on China’s historical stage. They had combined the fighting against the monarchy and the fighting against the centralized power by Manchu people together and put forward the slogan of “expelling the Tatar barbarians” and “to establishing a democratic republic”, meanwhile, they had supported the establishment of a republican political system in China. Early before the Sino-Japanese War (1894–1895),⁶⁷ the ideal of a democratic republic had already been put forward by the bourgeois democrats, however, at that time, it had not collided with the theory of constitutional monarchy pursued by “Gai Liang Pai” (the early reformists). Furthermore, the leaders of these two groups had attempted to find out a cooperative relationship.⁶⁸ According to the existing historical records, the failure of “Zi Li Jun” (Independent Army) in 1900 had brought an end to the cooperative relationship between “Xing Zhong Hui” (Revive China Society) and “Bao Huang Hui” (Protect the Emperor Society). Hence, up to 1903, Sun Yat-sen had proclaimed publicly that “carrying out revolution and saving the emperor are definitely two different things which are just like the black and white that could not be confused, and the east and west that could not be displaced”.⁶⁹ Since then, the boundary between constitutionalism and republic was officially defined. In the same year, Zhang Taiyan published an article called “Bo Kang You Wei Lun Ge Ming Shu” (Refuting Kang Youwei’s Discussion on Revolution) in *Min Bao* (*The People’s Paper*), which had lifted the curtain of serious disputes about the modes and theories of republican and constitutional political systems. “Wei Xin Pai” (the later reformists) at that time was mired down in the mud of saving the emperor because of their insistence on the maintenance of the ruling of the Qing government through reforms. On the contrary, the idea of democratic republic was like the sun at high noon, so it had gained extensive supports.

The basic political guiding principle of the revolutionists was to overthrow the monarchy and establish a republic, which was regarded by Sun Yat-sen as a historical and inevitable world trend as well as a regular pattern of social progress. He said, “The Qing Empire is like a toppling house whose whole structure has been completely decayed. And it has been demonstrated in history that in China the lifespan

⁶⁷ Sun Yat-sen had claimed that “when China was defeated by France in 1885”, he “had made the decision to overthrow the imperial court and establish a republican country”. “Jian Guo Fang Lue” (The Strategies for Setting up the State) in *Sun Zhong Shan Xuan Ji* (*The Selected Works of Sun Yat-sen*) (Book 1), The People’s Publishing House, 1956, p. 168.

⁶⁸ John King Fairbank. *Jian Qiao Zhong Guo Wan Qing Shi* (*The Cambridge History of China: the Late Qing*) (Book 2), Chinese Academy of Social Science Publishing House, 1985, p. 540.

⁶⁹ Sun Yat-sen, “Jing Gao Tong Xiang Shu” (A Letter to the Compatriot) in *Sun Zhong Shan Xuan Ji* (*The Selected Works of Sun Yat-sen*) (Book 1), The People’s Publishing House, 1956, p. 232.

of a dynasty is just like that of an individual, including birth, growth, maturity, aging and death. The current ruling of Qing dynasty has begun to decline since the early 19th century, and now is heading for death rapidly.” Besides, “a large number of people are also willing to accept the new order, longing for the situation to be improved so as to be saved from the current miserable living circumstances”, only then was it possible for “our beautiful country to see the dawn of new era”.⁷⁰ He stressed that the monarchy “could not be tolerated any more by the citizens with freedom and equality”, so “the cause of political revolution ...and its purpose is to establish a constitutional democratic government”.⁷¹ As far as the constitutional monarchy was concerned, “it is against the general principle of evolution and has not reflected the true value of civilization”.⁷² Most of all, Zhang Taiyan had thoroughly condemned the royalists’ theory of “reforming the monarchical power” through his immortal works, and he said, “It was just the autarchy of the monarchical power, not constitutionalism. If constitutionalism can be appealed, can revolution also be appealed? This so-called constitution, established according to the decree of one person, is not the constitution established in other countries”.⁷³

As for the legal concept of the bourgeois democrats, it could be summarized as the following:

First, to expose and criticize the rottenness of autocratic feudal laws in Qing Dynasty as well as the disasters imposed on the masses.

Second, to propose a scheme for the bourgeois democratic republic, to advocate the bourgeois legal system, emphasize the theory of ruling the country by law and oppose the ruling of man.

Third, to advocate the system of separation of power, to emphasize that the jurisdiction mustn’t be interfered by administration so as to guarantee its independence.

Fourth, to create a theory of five-power constitution and a general plan to build the country.

Fifth, to abolish the outmoded conventions and habits acknowledged by feudal laws according to the principle that “all men are equal before laws”, so as to protect human rights and democracy.

Sixth, to insist on enacting laws which were suitable for China and the foreign countries at trading ports in order to safeguard the judicial sovereignty.

⁷⁰ Sun Yat-sen, “Zhong Guo Wen Ti De Zhen Jie Jue” (A Real Settlement of the Problems in China) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 67, 68, 69.

⁷¹ Sun Yat-sen, “San Min Zhu Yi Yu Zhong Guo Qian Tu” (The Three Principles of the People and the Future of China) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 75.

⁷² Sun Yat-sen, “Zhong Guo Min Zhu Ge Min Zhi Zhong Yao” (The Importance of the Democratic Revolution in China) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 66, 67.

⁷³ Zhang Taiyan, “Bo Kang You Wei Lun Ge Ming Shu” (Refuting Kang Youwei’s Views on Revolution) in *Zhang Tai Yan Xuan Ji (The Selected Works of Zhang Taiyan)*, Shanghai People’s Publishing House 1981, pp. 172–173.

In short, it was the most essential change in the legal concept of modern China from divine autocracy to constitutional monarchy, and then to democratic republic, which had reflected the periodicity of the political reform after the introduction of western legal culture into China. This periodicity was exactly an insurmountable process caused by the combination of western legal culture with the reality of China. The change from autocracy into constitutional monarchy was a breakthrough to some extent, but it had still retained the remains of the feudal imperial power; nevertheless, the change from the constitutional monarchy to a republic was a further great breakthrough, which had shown the invincible function after the combination of spiritual and physical powers. Although a few people had pioneered in this process, it had motivated large numbers of common people with great strength and vitality, which had shown that it is the common will of Chinese nation to save the nation from extinction, ensure its survival and to make the nation strong. From the perspective of historical development, it was inevitable for the existence of the legal concept of democratic republic and the political and legal systems which it had embodied in the Republic of China.

17.5 From “Ren Zhi” (The Ruling of Man) to “Fa Zhi” (The Ruling of Law)

In the long years of ancient China, the ruling of man was the lever for the operation of state institutions. The so-called “Ren Zhi” (the ruling of man) was actually the ruling of monarchs or the ruling of officials manipulated by the monarchs, which was determined by the autocratic system. In the west, during later period of the bourgeois revolution, “the theory of natural rights”, “social contract” and “popular sovereignty” was applied in the struggle against the feudal autarchy, church privilege, and national oppression, and in the realization of liberty, equality, human rights and the ruling of law. After victory, the focus of legal ideology was changed to ruling the county by law. Paine, Rousseau, Montesquieu and Dicey were all the creators and the preachers of ruling the country by law. As one of the most important contents in the western legal culture, legal thoughts were also gradually understood and accepted by the liberal Chinese bureaucrats and intellectual circles following the introduction of western legal culture into China.

Influenced by the western legal thoughts, Yan Fu was against the traditional concept of “ruling of man instead of law”. In fact, “Ren Zhi” (the ruling of man) was believed to have occurred rather accidentally. From the perspective of Chinese history, ever since the three dynasties (namely, Xia, Shang, and Zhou), there were just a few “wise monarchs”, like Emperor Wu of Han, Emperor Guangwu of Han and Emperor Taizong of Tang. For this reason, in the long-time of “Ren Zhi” (the ruling of man) in feudal China, there were fewer prosperous dynasties but more turbulent ones. So Yan Fu thought that to ensure a long-term prosperity and stability in China, first, “Fa Zhi” (the ruling of law) should be stressed, and a set of complete

legal systems followed and abided by “all Chinese”, including both the nobility and the common people should be established. Thus, the western laws shall be adopted in order to have such a legal system established.

Laws were regarded by Yan Fu as the most essential means to protect the human rights of the people and to maintain the normal order of human society. Both the country and the people “could enjoy a peaceful times only after laws have been made”, therefore, there were only two major tasks for the country: “making strict and impartial laws and commanding the troops”. He agreed with Montesquieu on the theory of “Fa Zhi” (the ruling of law) and believed that laws were “the institutions to rule a country” and to “restrict the conducts of both the monarchs and the people”, moreover, only the one who understood how to rule the country by law could be considered as “knowing the essence of ruling country”. Referring to the historical events, he further explained by citing the examples in Han Dynasty:

Zhu Bo said, “Tai Shou’ (the prefecture chief) has no idea of Confucian theories but only the laws of Han dynasty. What he said is true, and this is way there are many officials who are very familiar with the laws in Han dynasty. Wang An-Shi, through his reforms in Song Dynasty, had attempted to make the bureaucrats learn laws, which, together with the financial management, was regarded as the most important matters in good governance. He was opposed by all the members of ‘Shu Party’ (a party in Song dynasty consisting of members mostly from Sichuan) and they had claimed that his reforms were all unrealistic, and it still brought us suffering after a thousand years.”⁷⁴

In order to make laws play a better role in ruling the country, Yan Fu also had put forward some matters needing attention in the construction of legal systems. Firstly, as long as the laws were made, they must be really enforced, because “since the laws have been enacted, they should be followed even by the monarchs”.⁷⁵ Besides, if the issued laws were not carried out, it would lead to the corruptive phenomenon that the laws were ignored and perverted by the daring officials during the convictions, in the end, even the common people dared to make trouble by violating laws. Secondly, only the laws, which were made in accordance with “human feelings and natural laws”, were both feasible and workable. However, this did not mean “the catering of the laws to customs” or yielding to malpractices in society. Thirdly, only by coordinating with the measures in various aspects like education and the means of livelihood, could the implementation of legal system achieve better results.

From China’s contact with foreign countries by the end of nineteenth century, Liang Qichao had drawn the conclusion that it was “impossible for China to survive without the establishment of law”.⁷⁶ He considered the “law-making for the people” as the greatest cause of the “holy preachers, wise monarchs and good ministers”.

⁷⁴“An Yu” (Comments) in Chapter 16 in *Fa Yi (The Spirit of the Laws)* by Montesquieu (Book 1), Vol. 6, translated by Yan Fu, The Commercial Press, 1981, p. 132.

⁷⁵*Ibid.*, p. 27.

⁷⁶Liang Qichao, “Lun Zhong Guo Xuan Jiang Qiu Fa Lv Zhi Xue” (On the Lecture about the Pursuit of Legal Learning in China) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 5), Vol. 1, Zhonghua Book Company, 1989, p. 94.

He believed that if China wanted to survive and become self-strengthened, its legal system must be consolidated and “Fa Zhi” (the ruling of law) must be carried out. Therefore, he had emphasized that “legalism is the only ‘ism’ which can rescue the current times”.⁷⁷

Although he had preferred “Fa Zhi” (the ruling of law), the historical lessons and reality had made Liang Qichao realize that its role could be fully played only when the laws were coordinated with morality and education and supervised by parliament, otherwise, it was hard to be carried out by simply relying on the laws.

On the question of “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law), Zhang Taiyan had also stressed the latter and neglected the former. He believed that “it is enough to administer a country by only paying attention to ‘Fa Zhi’ (the ruling of law)”. Furthermore, as long as no one, from the top to the bottom, had violated the established law, the governments managed by the gifted people like Shang Yang and Zhuge Liang would surely have emerged again, why “should the ruling of the country rely too much on man instead of on law?” He emphasized that “the country should be ruled by law rather than by wise men, and the person who has made great contributions shall be promoted, while the person who has neglected his duties should be dismissed. Besides, those gifted people do not have to worry about their future promotions, and those in the lower social status can live a simple life and to have a peaceful state of mind”.⁷⁸ Starting from the principle that all things should be judged according to law, he had criticized the privileged principle that “criminal law does not apply to senior officials”, which had become a barrier in “Fa Zhi” (the ruling of law), and he had pointed out that such laws “were made by the predators themselves”.⁷⁹ If “one case is judged by two different legal articles” due to different status, it was very harmful to the common people.

As the leader of bourgeois democratic revolution, Sun Yat-sen was an advocate as well as a practitioner of the bourgeois theory of “Fa Zhi” (the ruling of law). Early in May, 1878, after arriving at Honolulu, he found that “the local order is good, commerce is developed, and people are living in peace and enjoying their work”, only because “the government has the laws to rely on, so the public are safeguarded”.⁸⁰ In 1906, in the foreword to *Min Bao (The People’s Paper)*, he clearly proposed that a set of democratic and progressive legal system should be established after the overthrowing Qing government, so as to “make the most proper laws adaptive to our people, and the progress of our country adaptive to the rest of the world”.

⁷⁷Liang Qichao, “Zhong Guo Fa Li Xue Fa Da Shi Lun” (On the Historical Development of Chinese Jurisprudence) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 15), Vol. 2, Zhonghua Book Company, 1989, p. 43.

⁷⁸Zhang Taiyan, “Dai Yi Ran Fou Lun” (On the Positiveness and Negativeness of Representative System) in *Zhang Tai Yan Xuan Ji (The Selected Works of Zhang Taiyan)*, edited by Zhu Weifeng, Shanghai People’s Publishing House, 1981, p. 479.

⁷⁹Zhang Taiyan, “Wu Chao Fa Lv Suo Yin” (The Index of Laws in Five Dynasties) in *Zhang Tai Yan Xuan Ji (The Selected Works of Zhang Taiyan)*, edited by Zhu Weifeng, Shanghai People’s Publishing House, 1981, p. 83.

⁸⁰Hu Qufei, *Zong Li Shi Lue (The Biography of the Prime Minister)*.

In 1912, before inaugurating as the provisional president, Sun Yat-sen claimed to have the chaotic situation reorganized and the republic system consolidated through “Fa Zhi” (the ruling of law). After the inauguration, he had instantly begun the law-making. In the article “Zi Can Yi Yuan Fa Zhi Ju Zhi Zhi” (The Consultation with the Parliament about the Organization of ‘Fa Zhi Ju’: Bureau of Legislative Affairs), he pointed out that “in order to maintain the provisional government, all laws and orders should be enacted, so it is urgent to establish ‘Fa Zhi Ju’ (Bureau of Legislative Affairs).”⁸¹ Sun Yat-sen not only emphasized “the importance of civil, criminal and procedural law”,⁸² but also urged “to make *Zhong Hua Min Guo Lin Shi Zheng Fu Zu Zhi Fa* (*The Organic Law of the Provisional Government of the Republic of China*) rapidly,...so as to consolidate the national foundation...”,⁸³ and bring the activities of the state onto the track of “Fa Zhi” (the ruling of law). Under the guidance of Sun Yat-sen’s theory of “Fa Zhi” (the ruling of law), fruitful legislative activities were carried out by Nanjing Provisional Government during the short 3 months. For example, the bourgeois republic system had been affirmed in the form of fundamental law by the making of *Zhong Hua Min Guo Lin Shi Yue Fa* (*Provisional Constitution of the Republic of China*). Meanwhile, centering round the “natural rights of man”, a series of separate laws and orders which had reflected the democratic spirit, were enacted, and it was an important step towards the ruling of the country by law.

In brief, “Fa Zhi” (the ruling of law) was an important component of modern bourgeois democratic system, as well as a major method for ruling a country. At the same time, it had also served as a cornerstone for the modern bourgeois jurisprudence. “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) were the products of two different systems, the former was produced by autocratic system, while the latter by democratic system. In fact, the opposition of the two was the problem of which one would be submitted: the power or the law. It was necessary to point out that the arguments about “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) in ancient China were quite different from the previous situations in which “Fa Zhi” (the ruling of law) was made use of by the bourgeois to fight against “Ren Zhi” (the ruling of man) under the feudal autocracy. In ancient China,

⁸¹“The Great President Consulting the Senate about the Official System of ‘Fa Zhi Ju’ (Bureau of Legislative Affairs)” in *Xin Hai Ge Min Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 24.

⁸²“The Great President Consulting Wu Tingfang, the Judicial Director, about Presenting the draft of civil and criminal law and the civil and criminal procedural law to Senate” in *Xin Hai Ge Min Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 353.

⁸³“The Great President Consulting the Senate for Discussing the Draft of the Official System of Nanjing Prefecture and the Draft of the Provisional Organic Law of the Republic of China” in *Xin Hai Ge Min Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science Zhonghua Book Company, 1961, p. 25.

there were no concept of “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law), let alone the opposition between them. These were added to the ancient ideology by later generations in the application of modern bourgeois concepts. The Confucianists thought that “government depends on man”, “laws cannot be enforced by themselves”, and “there are rulers who can bring about order, but there are no laws which can automatically bring about peace”. The legalists claimed that “the country shall be ruled according to law”, and “the wise king shall depend on laws rather talented people”. They also thought that “laws and regulations are just like ‘Sheng Mo’ (carpenter’s line marker, or rules and regulations) to restrict both officials and common people”, and they advised people “not to rely on morality but laws”. This showed that the discrepancies between “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) were caused by the different emphases on the methods of ruling a country by the two schools, and they were not opposite in essence, therefore, they were not irreconcilable. According to the actual situation, the Confucian theory of “Ren Zhi” (the ruling of man) focused on men who enforced the laws. Xunzi said, “The gentleman is the source of laws”,⁸⁴ “so the law cannot stand on its own, nor can regulations apply themselves in particular circumstances. If proper men are appointed, the law will be effective; if proper men are removed, the law will be of no avail”.⁸⁵ In his proposal of “stressing both ‘Li’ (the rites)” and law, “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) had already been integrated as one organic whole. He said,

So, if the law made by a king who pursues benevolent government is enforced by a benevolent king, it will be effective; if the law made by a king who pursues tyrannical government is enforced by a tyrannical king, it will be brutal; if the law made by a king who may bring ruining to the country is enforced by an incompetent king, it will make the country perish.⁸⁶

In order to emphasize the function of the men in the enforcement of laws, he stressed that “the one without virtues can not be the nobles; the one without abilities can not be the ministers, the one without achievements can not be awarded, and the one without crimes can not be punished”, so that the goal of “Fa Zhi” (the ruling of law) could be reached through “Ren Zhi” (the ruling of man). This theory had exerted a great influence to the later generations. Wang Anshi once had explained the relationship between law and official more obviously: “it is the officials who are in charge of safeguarding the laws of the world. If the officials are bad, even if there are laws, they could not be safeguarded.” In the late Qing dynasty, Shen Jiaben had made a historical summary about this point in *Xing Zhi Zong Kao (A General Textual Research of the Criminal Systems)*: “the perfect laws relies on those who enforce them, without such people, they are just laws”, and “it is fortunate if there are good laws, but it is more fortunate if there are the proper men who can enforce it.”

Although legalists had stressed the function of laws, they had never ignored the value of “Ren Zhi” (the ruling of man). Taking Han Feizi, a legalist who had

⁸⁴“Jun Dao” (On the Way of a Lord) in *Xunzi*.

⁸⁵Ibid.

⁸⁶“Wang Ba” (Of Emperors and Lords-Protector) in *Xunzi*.

combined all successful experiences, as an example, on the one hand, he had “regarded the law as the essence”, and emphasized that “the one who makes strict and impartial laws are powerful, while the one who neglects laws are weak”,⁸⁷ but on the other hand, he had also made an utmost effort to advocate the “ruling of rulers” and “ruling of officials”, and believed that the ruler must “monopolize powers” and centralize powers in himself, because “great power is the source of the rulers”,⁸⁸ and “the ruler is respected because of his powers”.⁸⁹ He also said, “The wise emperors rule officials instead of the common people”, and he had considered the management of officials prior to the management of the people. However, the rulers must “handle the situation according to law”, and both the officials and the ordinary people should be “ruled by law”, which are the features that had made legalists legalists. Apparently, the legalists were also the synthesists of “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) except that they had focused on the former. Just because the arguments of “Ren Zhi” (the ruling of man) and “Fa Zhi” (the ruling of law) in ancient China were not opposite in essence and completely contradictory in institution, the integration of the two was not only possible, but also necessary and inevitable, which was the so-called “Wai Ru Nei Fa” (legalism within, but Confucianism without).

With the introduction of western legal culture, the traditional concept of “Ren Zhi” (the ruling of man) was gradually replaced the bourgeois ideology of “Fa Zhi” (the ruling of law) which had become the brand-new legal concept of the enlightened thinkers as well as their goals of struggle.

17.6 From Duty-Orientation to the Pursuit of Rights

In ancient Chinese legal codes, although people’s various kinds of duties to the country, such as paying taxes, obeying laws, being loyal, doing corvee, and performing military service, were all regulated in detail, there were no clear regulations concerning people’s rights. This duty-oriented legal culture was created under the circumstances of the combination of the structure of unitary and closed peasant economy with the strict autocratic ruling. Meanwhile, preventing violence and punishing evilness had been regarded as the primary function of Chinese ancient laws, and the sanction effect of “executing punishments after the occurrence” was always emphasized, which had made people think more about legal obedience and less about safeguarding their own rights according to law, in order to gain profits and avoid disadvantages. With the introduction of western legal culture, there gradually emerged the rights consciousness which had required legal equality and liberty.

⁸⁷“Shi Xie” (Punishments on the Evil and Evil-doings) in *Han Fei Zi*.

⁸⁸“Nei Chu Shuo Xia” (Inner Categories of Sayings: Part 2) in *Han Feizi*.

⁸⁹“Xin Du” (Mind) in *Han Fei Zi*.

17.6.1 *On Human Rights*

It was exposed and criticized by Gong Zizhen, Bao Shichen and others that in the jurisdiction of Qing dynasty, false and truth was confused, severe punishments and tortures were randomly applied, disasters were brought to the innocent, and troubles were caused to ordinary people. These criticisms had reflected the awakening of the consciousness of human rights at early times. Xu Jiyu's comments on the abolition of slavery in the western countries in his *Ying Huan Zhi Lue (World Geography)* were also a praise of human rights. During the late period of "Tai Ping Tian Guo" (Taiping Heavenly Kingdom), in *Zi Zheng Xin Pian (New Treaties on Political Counsel)*, Hong Renxuan had put forward many suggestions, such as prohibiting human trafficking, forbidding to drown infants and "having those involved in drowning infants punished", opposing slave labor and abolishing the personal bondage, etc. These were all the sparkles of new ideology produced under the influence of the principles of western human rights.

Up to 1860s and 1870s, further discussions on human rights had been made by "Yang Wu Pai" (The Westernization Group) and "Gai Liang Pai" (the early reformists). Ma Jianzhong said that in Western countries "everyone has the rights to be independent, which means that everyone intends to be self-respected".⁹⁰ After the Sino-Japanese War of 1894–1895, the doctrine of man's natural rights began to be extensively spread in China. Zheng Guanying, He Qi, Hu Liyuan, Kang Youwei, Liang Qichao, Tan Sitong, Huang Zunxian, Fan Zhui, Pi Jiayou and others had all made comments on the problem of natural human rights in their works. Zheng Guanying said,

'Tian' (heaven) has endowed man with life, as well as the capability which has made him strong enough to earn a living, thereupon, human rights are formed. As far as human rights are concerned, the ministers' rights could not be deprived of by his ruler; the son's could not be deprived of by his father; the youngsters' could not be deprived by his the elder brother; and the wife's could not be deprived of by her husband. Human rights are to man what water is to fish, air to birds and beasts, and soil to plants. Therefore, as for an individual, to protect his rights from being infringed upon is to protect 'Tian' (heaven). As for the country, to value its sovereignty and not to invade each other is to follow the mandate of 'Tian' (heaven). The failure of protecting the individual's rights means to discard 'Tian' (heaven), while to be hostile to other countries and to invade them means to disobey 'Tian' (heaven). Those following 'Tian' (heaven) would be blessed, while those disobeying and discarding 'Tian' (heaven) would be punished.⁹¹

He Qi and Hu Liyuan also said, "The rights are created by 'Tian' (heaven) but not established by human beings. Since 'Tian' (heaven) endowed human beings with life, they must have been endowed with the rights of life; since 'Tian' (heaven) has prepared all things for human beings, they must have been endowed with the

⁹⁰ *Shi Ke Zhai Ji Yan Ji Xing (Records of Shi Ke Zhai)*, Vol. 2.

⁹¹ Zheng Guanying, "Postscript of 'Yuan Jun' (On Monarchs) after 1894" in *Zheng Guan Ying Quan Ji (The Complete Works of Zheng Guanying)* (Book 1), Shanghai People's Publishing House, 1982, p. 334.

rights to protect their own property”, therefore, “all rights originate from ‘Tian’ (heaven)”, and “the rights of the universe should be only in the charge of human beings”. Since “the independent rights are given by ‘Tian’ (heaven), the rulers and ministers should add no more, and the common people should have no less; it is not insufficient for the fool; and it is not enough for the sage”. In a word, “depriving people of their liberty is no different from killing them”.⁹²

17.6.2 On the Rights of Liberty and Equality

After the Sino-Japanese War of 1894–1895, the ideology of man’s natural rights were embodied in the rights of liberty and equality by “Wei Xin Pai” (the later reformists). Kang Youwei said, “Since everyone is created by ‘Tian’ (heaven), they are directly subordinate to it, so everyone shall be independent and equal.”⁹³ He also said, “Whether male or female, all men are created by ‘Tian’ (heaven) and are endowed with the physical body, which means that everyone has the independent rights and is equal under ‘Tian’ (heaven), regardless of the differences in the physical body.”⁹⁴ Kang Youwei’s views of the natural rights of liberty and equality were finally expressed through his criticisms on the moral standards of “Sang Gang” (three cardinal guides). He had attacked the supreme traditional morality of “ruler guiding the subject” and said that it could only be “made use of by the traitors to fool the people”,⁹⁵ and could only “bring people dullness, death, humiliation, suppression, and vapidness”.⁹⁶ In a family under the patriarchal system of “father guiding son”, “the family members would be encumbered with the patriarch, suppressed for half of the lifetime and never able to get the freedom”. So, the family members had “all lost their humanity and independence, therefrom; the principle of the natural rights of man is damaged”.⁹⁷ Moreover, the doctrine of “husband guiding wife” and “man superior to woman” were also against this principle, because “man and woman, thought with different physical bodies, are both creatures of ‘Tian’ (heaven), so share the same rights of ‘Tian’ (heaven)”.⁹⁸

When criticizing “Sang Gang” (three cardinal guides) and “Ming Jiao” (the famous doctrines), Tan Sitong had also found the argument evidence from the western

⁹²He Qi and Hu Liyuan, “Comments on *Quan Xue Pian* (*Exhortation to Study*)” in Xin Zheng Zhen Quan (*The Real Interpretations of the New Administration*), Vol. 5.

⁹³Kang Youwei, “Zhong Yong Zhu” (The Annotations to the Doctrine of Mean) in “Li Yun Zhu” (Annotations to Li Yun) in *Meng Zi Wei* (*The Interpretation of Mencius*), Zhonghua Book Company, 1987, p. 22.

⁹⁴Kang Youwei, *Da Tong Shu* (*A Book of Great Harmony*), Shanghai Ancient Books Publishing House, 2005, p. 129.

⁹⁵Ibid, p. 44.

⁹⁶Ibid.

⁹⁷Ibid.

⁹⁸Ibid., p. 125.

theory of man's natural rights and become a daring pioneer. When exposing the social harmfulness of "Sang Gang" (three cardinal guides) and "Ming Jiao" (the famous doctrines), he said, "'Ming Jiao' (the famous doctrines) has made people keep their tongues between their teeth and made them afraid of speaking openly, it has also imprisoned their hearts and made them afraid of thinking, that is why the emperors of all generations have used 'Ming Jiao' (the famous doctrines) as the 'method of fooling people'".⁹⁹ As for the doctrine of "father guiding son", Tan Sitong thought that it had violated man's natural rights, and he said, "The names of father and son are really believed to be the mandate of 'Tian' (heaven) so that no one dares to question them. The one who does not follow 'Tian Ming' (the mandate of Heaven) has rigidly adhered to the physical body but failed to see the soul. Actually, both the son and the father are the sons of 'Tian' (heaven), so the father is not born with the right to dictate, they are also equal with each other."¹⁰⁰ Besides, with the concept of the equal rights of man and woman, Tao Sitong criticized the doctrine of "husband guiding wife" which was established on the basis of man being superior to woman, and he thought that "man and woman are both the creatures of universe and they have been endowed with great virtues and undertakings, so they are equal with each other".¹⁰¹ In addition, "the love between man and woman is generated naturally, so should not be isolated. Therefore, the marriage between man and woman shall be agreed by both sides, and the two strangers should not be forced to join together as husband and wife".¹⁰² With soaring courage, he had called on people to break through the net which had shackled people's rights of liberty and equality endowed by "Tian" (heaven).

Through translating the western political and legal theories, Yan Fu introduced the theories of natural rights, social contract and the separation of powers put forward by the school of natural law. In his translated western works, he also wrote many very valuable comments with the intention of analyzing the Chinese legal problems by applying the western theories and introducing the anti-feudal bourgeois concepts of liberty and equality into the field of Chinese legal ideology.

Out of the need of the struggle against absolutism in Qing Dynasty, Yan Fu had actively propagated the modern western liberal ideology. He said, "It is said by westerners that the natural rights are only possessed by the people naturally born, so the free people are born with natural rights. So liberty should be given to everyone and freedom should be given to every country, and both people's liberty and the freedom of a country should not be damaged. And the infringement of people's freedom is against 'Tian Li' (the heavenly principle) and 'Ren Dao' (the Way of Human). The killing and injuring of the people as well as the stealing and seizing of others' properties are all examples of seriously infringing the other people's freedom. That is why people's freedoms are not to be infringed even by the monarchs,

⁹⁹Tan Sitong, "Ren Xue" (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji (The Complete Works of Tan Sitong)*, revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 348.

¹⁰⁰Tan Sitong, "Ren Xue" (The Doctrine of Benevolence) in *Tan Si Tong Quan Ji (The Complete Works of Tan Sitong)*, revised and enlarged version (Book 2), Zhonghua Book Company, 1981, p. 348.

¹⁰¹ *Ibid.*, p. 304.

¹⁰² *Ibid.*, p. 348, 349.

and all the punishments and regulations are established to safeguard it.”¹⁰³ After a comparison of the national conditions of China and the western countries, Yan Fu believed that what China lacked was the concept of freedom like that of the west, and it was not accidental because “the ancient Chinese rulers and sages were frightened by the theory of freedom which they had never attempted to instruct the people”.¹⁰⁴ Now that the main reasons which had made China lagged behind the western countries were the lack of free spirits, he had encouraged people to rise up and strive for the rights of liberty according to the theory of “natural selection and the survival of the fittest”. He put forward the proposal that “what is the most important for an individual is freedom, and what is the most important for a country is sovereignty”. In *Yuan Qiang (The Road to be Prosperous and Strong)*, he had stressed the necessity of people’s freedom and rights and the independence and sovereignty of a state, and he further explained, “to understand why we are born will help us understand why a community is established; and to understand why an individual’s life is eternal will help us understand why the existence of a nation and people will last long. Within the body of an individual, the form and spirit must subsidize each other, while among the community, the power and morality must be integrated with each other.”¹⁰⁵ On the contrary, if the people are not free, and the country is not independent, then for the people, “it is no better living than dying, and for a country, it is no better existing than perishing”.¹⁰⁶ Just according to such understanding, Yan Fu came up with his famous proposition of “regarding the freedom as the essence and democracy the application”. He discussed that:

In the west today, ... all things are handled according to the various kinds of academic science that are all created according to the actual observation of the objects, which become perfect and profound with generations of accumulation. Therefore, how could they just sit idle and discuss whether to abandon a thing without having its practical usefulness tested first. If the reasons are looked into, we can find that they have regarded freedom as the essence, while democracy the application. People of one state are divided into different groups in order to make achievements by competing with each other. Consequently, their initial jealousy ends in mutual complement, and each one has racked his brains to bring about changes with each passing day. Therefore, laws can be executed without being troubled by malpractices, which is why they are so formidable.¹⁰⁷

In order to make the law play the role of promoting “Min Zhi” (the wisdom of the people), “Min De” (the morality of the people) and “Min Li” (the strength of the people), Yan Fu thought that what was the most important was that man’s natural rights, especially the natural rights of liberty could really be protected by the legislation. He regarded this as the secret which had made the laws in the western country superior to those in China, and he pointed out that in all the western countries, the violation of the natural rights of the human beings was not only “against ‘Tian Li’

¹⁰³ Yan Fu, “Lun Shi Bian Zhi Cheng” (On the Rapid Change of Universe) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Shen Zhou Guo Guang Publishing House, 1953, p. 73.

¹⁰⁴ Ibid.

¹⁰⁵ Yan Fu, “Yuan Qiang” (The Road to be Prosperous and Strong) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 3, Shen Zhou Guo Guang Publishing House, 1953, p. 43.

¹⁰⁶ Ibid., p. 49.

¹⁰⁷ Ibid., p. 48, 49.

(the heavenly principle) but also the human nature”, therefore, even the rulers had no rights to violate people’s natural rights, and the major contents of “punishments and regulations” were also drafted to protect the natural rights of man. It was just because the people’s freedom was safeguarded that they were stimulated to bravely commit to the legal obligations, so that the country could become prosperous and powerful. Nevertheless, it was exactly the opposite in China. Under the ruling of autocratic monarchy, the laws were not to protect people’s rights of liberty, but to “destroy the people and their families” and to ruin the people’s wisdom, morality and strength. How might the country not be poor and weak? Thus, Yan Fu had concluded that the urgent task of rescuing China was to take actions according to the principle of natural rights. If this didn’t work, he was willing to take the blame for “disturbing politics through offensive words”.

In order to arouse people’s consciousness of democracy and republicanism and to overthrow the autocratic empire, the democrats, led by Sun Yat-sen, had placed the Chinese traditional political and legal system in the court of “rationality” and criticized it with modern western new theories and concepts like “the natural rights of man”, “freedom, equality and fraternity”, and “the equality of all men before laws”, meanwhile, in the process of criticism, they had propagated the ideology of democratic revolution. At that time, the most influential ones were Zhang Binlin’s *Bo Kang You Wei Lun Ge Ming Shu (Refuting Kang Youwei’s Discussion on Revolution)*, Zou Rong’s *Ge Ming Jun (The Revolutionary Army)* and Chen Tianhuan’s *Jing Shi Zhong (Warning Bell)* and *Meng Hui Tou (Sudden Turn)*. In *Bo Kang You Wei Lun Ge Ming Shu (Refuting Kang Youwei’s Discussion on Revolution)* published in 1903, Zhang Binlin criticized Kang Youwei’s royalist viewpoint of “wanting only constitution but no revolution” and pointed out that “under today’s circumstances, it is inevitable to establish a united republic”, and “after the unification of the republic, democracy must be practiced, which is the requirement of current situations”. So, it had promulgated that the establishment of a democratic republic was the inevitable consequence of the development of Chinese history at that time. In *Ge Ming Jun (The Revolutionary Army)* written in 1903, Zou Rong had made 25 guiding principles for the establishment of an independent and free “Republic of China” by “modeling on the theories of American independent revolution”. The major contents were as the following:

First, after the overthrowing of the autocracy of Qing Dynasty, to establish a bourgeois democratic republic with “no autocratic monarch for ever”.

Second, both men and women in China were “equal and with no difference in social status”, and everyone enjoyed the freedom of speech, thoughts and publication; besides, they were also obliged to pay tax, serve the army and be loyal to the country. The government had the responsibility to “protect the people’s rights”, but if it had failed, people would have the rights to launch revolutions and set up a new government.

Third, to establish the parliamentary system. The members of parliament should be elected in all provinces, “Fu” (prefecture), “Zhou” (subprefecture) and “Xian”

(county); and the president should be elected by “all members of the parliament of all provinces by public voting”.

Fourth, to make constitutions and laws in our country based on those of the United States.¹⁰⁸

Apparently, this was a scheme for a bourgeois republic with the pursuit of freedom and equality. Just like the spring thunder awakening the earth, his slogan of “the Republic of China” was spread across the country rapidly, which had stimulated people’s yearning for this republic and enabled them to go through hell for its realization.

With the extensive spreading of the ideology of the democratic republic, the establishment of a new republic was regarded as the guiding principles by almost all revolutionary groups organized. For example, it was proposed in *Guang Fu Jun Gao Shi* (*Notice of the Guang Fu Army*) by “Guang Fu Hui” (Restoration Society) that “we are to eliminate the evil atmosphere, rebuild the country, fight for the happiness of the republic, revenge the past rancor”,¹⁰⁹ which had related restoration and revenge with the new republic.

Among the ideological trend of democracy and republic, Sun Yat-sen’s idea of civil rights was the most representative. When setting up “Xing Zhong Hui” (Revive China Society) in 1894, in his secret vows, he had come up with the slogan of “expelling Tatar barbarians, reviving Zhong Hua, and establishing a unified government”, which had symbolized the formation of his thoughts of civil rights. From 1896 to 1897, Sun Yat-sen made investigations of the national system of the bourgeois democracy in America, France, England and Switzerland, which had much more strengthened both his conviction of the republican politics and his determination to realize it by “taking revolution as a forerunner”. He pointed out, “seen from the perspective of expelling the Manchu, the overthrowing of the Manchurian government is a national revolution, but it is a political revolution seen from the perspective of subverting the monarchy.” So, “the result of the political revolution is to establish a constitutional democracy.”¹¹⁰ He also advocated granting people complete “civil rights” according to the spirit of “freedom, equality, and fraternity”. In *Jun Zheng Fu Xuan Yan* (*Declaration of the Military Government*) (namely *Declaration of Chinese United League*), he proclaimed solemnly:

Now a national government is established by the common people through revolution, all citizens are equal in participating in politics. Besides, the president shall be elected according to public nomination, the parliament shall be composed of members elected by citizens, and the Constitution of the Republic of China shall be enacted and obeyed by everyone. Anyone who dares to establish the monarchy would be attacked by all Chinese people.¹¹¹

¹⁰⁸ *Guo Min Bao* (*The National*), Vol. 1.

¹⁰⁹ *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), Vol. 3, Shanghai People’s Publishing House, p. 77.

¹¹⁰ “Speech Made at the Anniversary Celebration of the Publication of *Min Bao* in Tokyo”, in *Sun Zhong Shan Quan Ji* (*The Complete works of Sun Yat-sen*), Vol. 1, Zhonghua Book Company, 1981, p. 325.

¹¹¹ Sun Yat-sen, “Jun Zheng Fu Xuan Yan” (Declaration of the Military Government) in *Sun Zhong Shan Xuan Ji* (*The Selected Works of Sun Yat-sen*), People’s Publishing House, 1981, p. 78.

In order to protect the people's rights of liberty and equality, the bourgeois democrats advocated that a democratic constitution be drafted, because it was believed that "the constitution is the fundamental law of a country and the protection of the people's rights".¹¹² It was also said, "What is the so-called constitution? It is to rule the country by laws. What is to rule the country by laws? It is to regard the established laws as the supreme sovereign institutions of the country. All state affairs shall be restricted by laws and all the people in the state shall be abided by laws. The noble and the humble, the respected and the low, the ruler and the subject, shall all act according to laws. There shall be no orders without legal stipulations, and there shall be no obedience to those without being regulated in laws. In a sovereign country, every one belongs to the same class without inequality."¹¹³

All in all, since the 1860s, the traditional duty-oriented legal concept was gradually replaced by the pursuit for natural rights. The theories of natural rights, freedom, equality and democracy of the western enlightened thinkers had spiritually encouraged people at that time to devote themselves to the saving of the nation from extinction and the pursuit of self-strengthening and self-survival. As people's consciousness of natural rights was awakening, the goal of struggling for the republic became much clearer. Among the broad masses, a common consensus was reached, that was, to initiate a national revolution to overthrow the autocracy which had imposed restrictions on freedom and equality. Such a change in legal concept was not only manifested in the mass struggle for natural rights before Xin Hai Revolution (or Revolution of 1911), but also reflected in a series of legislative practices of the Nanjing Provisional Government after the revolution. It was clearly provided in *Zhong Hua Min Guo Lin Shi Yue Fa (Provisional Constitution of the Republic of China)*, which was the fruit of Xin Hai Revolution (or Revolution of 1911), that "all citizens of the Republic of China are equal", and they also "have the rights of freedom". What's more, human rights were also protected by Nanjing Provisional Government through special regulations. For example, on March 2nd, 1912, a document entitled *The Ministry of Civil Affair Being Ordered by the President to Prohibit Human Trafficking* was issued. Firstly, it was pointed out that "since *Ren Quan Xuan Yan (The Declaration of the Rights of Men and Citizens)* was published by French, the principles of freedom, equality and fraternity have become as evident and obvious as the sun and the stars. So, in the laws of all countries, all human beings are considered equal". Secondly, the social roots which had caused the phenomenon of human trafficking were exposed. It was criticized that, "after the establishment of Qing Dynasty, politics was chaotic and people's livelihood was weary, so there was nowhere to escape from the disaster and the threat of death. People's wives and daughters were sold as concubines and maids, while the male became 'Zao Li' (Yamen runners: a government-employed laborer, messenger, etc. in ancient times). Consequently, the evil and dishonest people had made profits,

¹¹²"On the Fallacy that the Monarch Is Constitutionally Sacred and Inviolable" in *Xin Hai Ge Min Qian Shi Nian Jian Shi Lun Xuan (Selected Editorials in the Ten Years before Xin Hai Revolution)*, Vol. 3, SDX Joint Publishing House, 1960, p. 830.

¹¹³Tian Tong, "On the Constitutional Problems in Manchu Government" in *Shi Lun Xuan (Selected Editorials)* (Book 1), Vol. 2, p. 547.

and its pernicious influence was far and wide. What's made people more distressed is that even though our compatriots have no education and have lived a difficult life, some wicked people still have tricked them with sweet words and sold them to foreign countries. In the end, they are regarded as the beasts of burden and labor for the whole year in hunger. How cruel and vicious this is! I already feel distressed for just mentioning this". Finally, according to the theory of natural rights and the "major principle" of "bringing equality to all citizens with the establishment of the Republic of China", "Nei Wu Bu" (Ministry of Interior) was especially ordered firstly to "have the temporary regulations drafted immediately and all people are forbidden to engage in human trafficking any more, otherwise, they shall be punished according to the order; secondly, all sale contracts signed before should be terminated, and they are regarded as employers and employees, but not masters and servants."

On March 19, 1912, many documents were successively issued by Nanjing Provisional Government, such as, *The Foreign Ministry Being Ordered to Properly Plan for the Prohibition of Selling of "Zhu Zai" (or piglets, laborers) and the Protection of Overseas Chinese*, and "Du Du" (the military viceroys and procurators) of Guangzhou Being Ordered to Strictly Prohibit the Selling of "Zhu Zai" (piglets: laborers) by the President. The so-called problem of "Zhu Zai" (piglets: laborers) had already been mentioned early in the *Farewell Speech for the Members of Nanjing "Tong Meng Hui" (The Alliance Society)* by Sun Yat-sen, "The production in China is undeveloped and the people are jobless. Taking Guangdong as an example, every year, about 0.3 million 'Zhu Zai' (piglets: laborers) are exported as the beasts of burden." It was emphasized in the order to prohibit the selling of "Zhu Zai" (piglets": laborers) issued by Nanjing Provisional Government that:

It is found that in the provinces along the coast, people had been kidnapped and sold by the wicked people as 'Zhu Zai' (piglets: laborers), and their lives had been made miserable. However, this was ignored in Qing Dynasty, and the victims had nowhere to appeal to. Now that the Republic of China has been established, these victims shall be saved immediately in order to show respect to human rights and to maintain the operation of the national system. Before long, 'Nei Wu Bu' (Ministry of Interior) will be ordered to issue a temporary regulation about the prohibition of human trafficking, so as to practically carry out the principles of freedom, fraternity, and equality. Thus, the prohibition on the export of 'Zhu Zai' (piglets: laborers) is especially of great urgency. Therefore, 'Du Du' (the military viceroys and procurators) of Guangdong is ordered to strictly forbid the export of 'Zhu Zai' (piglets: laborers) while 'Wai Jiao Bu' (The Foreign Ministry) is ordered to properly plan for its eradication, to make sure that the wicked people are punished in order that the value of humanity be shown and the national system be maintained.

This order had expressed the rightful claim of the Chinese people against the imperialist enslavement.

On March 17, 1912, "The Order of the Great Provisional President, to Liberate 'Dan Hu' (those who live on water instead of on lands) and 'Duo Min' (the Good-for-Nothing or loafers) and to Grant them Public and Private Rights" was issued by the Nanjing Provisional Government. It was proclaimed that:

The human rights are endowed by 'Tian' (heaven), so all the human beings are equal. The various kinds of unreasonable legal systems have been established by the autocrats so as to insult the common people and to spread their own disgusting arrogance. The political measures of autocracy have lasted for thousands of years, and they were getting worse and

worse since the early Qing Dynasty. For example, ‘Dan Hu’ (those who live on water instead of on lands) in Guangdong and Fujian, ‘Duo Min’ (the Good-for-Nothing or loafers) in Zhejiang, the beggars in Henan, and the servants waiting on the officials with great achievements and armored soldiers are commonly referred to as ‘Yi Min’ (the rebellious people). Besides, there are special restrictions for the people who have their hair cut, the actors and actresses and the ‘Ya Men’ runners. These people are not regarded as equals of other common people. If a person has suffered humiliation, his descendants will have to inherit the insults, and there is nothing worse than such violation of human rights. Therefore, the following orders are especially issued: first, all the people mentioned above shall enjoy all rights of this country and society without slight discriminations, such as the public rights to vote and participate in political affairs and the private rights of the freedom in residence, speech, publication, assembly, and religious belief in order to stress human rights and manifest the general principles; second, after receiving this order, measures must be immediately taken by ‘Nei Wu Bu’ (Ministry of Interior) to require the citizens to do as is ordered, and this order must be shown to the military and civil servants in this province to make sure that they are all fully aware of what it means.

The “Jian Min” (rabblies or people of lower social status) who belonged to “Jian Ji” (the people of inferior household registration) was the lowest in the society during the Ming and Qing dynasties. Under the reign of the Emperor Yongzheng, “Jian Min” (rabblies or people of lower social status) and “Jian Ji” (the people of inferior household registration) who had been deprived of all the rights were liberated and given equal rights in law, although it was not complete under the historical conditions of that time. With the protection of the legislations of Nanjing Provisional Government, the social problem of “Jian Min” (rabblies or people of lower social status) and “Jian Ji” (the people of inferior household registration) which had lasted for hundreds of years was finally resolved, and they were given the rights of equality legally.

Besides, a prohibition on salutations was issued by Nanjing Provisional Government, which had cancelled the titles such as “Da Ren” (Your Excellency) and “Lao Ye” (My Lord), and strictly forbidden the inquisition by torture. Thus, all of these measures had represented the ideological concept of stressing human rights and equality. In addition, Sun Yat-sen’s ideas of national equality concerning the republic of the five nationalities were especially deserved to be mentioned. Soon after Xin Hai Revolution (or Revolution of 1911), it was already clearly proclaimed in his telegram to the prince of Kerchin that, “I really intend to unite the people of the whole nation and let all the people of the Han, Manchu, Mongolian, Hui, and Tibetan nationalities equally enjoy the freedom of human beings.”¹¹⁴ *Zhong Hua Min Guo Lin Shi Yue Fa (Provisional Constitution of the Republic of China)* enacted in his charge was the first constitutional document to acknowledge that the people of all nationalities had equal rights in the history of China. So, it was of great historical progressive significance in awakening the people of all nationalities to fight for freedom and the establishment of real democracy.

¹¹⁴“A Telegram to Nanjing” in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 30.

17.7 From the Integration of Judiciary and Administration to Judicial Independence

Under the rule of autocracy in ancient China, the jurisdiction and administration were inseparable, so the judiciary and the administrative organizations at the level of “Fu” (prefecture) and “Xian” (county) were combined. The chief executives of “Zhou” (subprefecture) and “Xian” (county) were at the same time the sheriffs. Although at provincial level, the special judiciary was established, the convictions still needed to be approved by the chief executives of this province. In the imperial court, the judiciary was the supreme trial organization, but only in name. Actually, it was the emperor who had monopolized the supreme jurisdiction. The administrative officials who were appointed by the emperor had all the rights to participate in the jurisdictions. For example, most of the officials participating in “Jiu Qing Hui Shen” (Joint Hearing by Jiu Qing: the nine heads of central government departments in feudal China) were not judicial officials, and the mixture of judiciary and administration had led to imperious administrations, which had not only prevented the judicial officials from holding trials according to law, but also damaged the legitimate interests of the common people. Therefore, after “Xi Xue Dong Jian” (the introduction of Western learning to the East), Locke and Montesquieu’s theory on the separation of power was generally welcomed by the advanced thinkers. Yan Fu believed that in the application of the measures in the western countries and implementation of the new legal system, what was the most important was to implement the system of the separation of powers, to make the judiciary separated from the administration and to hold trials independently. He said, “The so-called separation of powers has given the court the supreme rights to make judgments, so no other powers in this country could interfere with the judges’ judgments about what is right and what is wrong. The one who has the rights to impose punishments may decide how to make punishments according to state law and his own judgement. That’s it.”¹¹⁵ He had made it clear that the judicial system in the west was better than that in China, because, in China, under autocracy, the emperors and “Zai Xiang” (the prime minister) had “held concurrent posts in all of the three branches of jurisdiction, legislation and administration”. Ultimately, because of this perfunctory separation, it was hard to settle lawsuits fairly. He pointed out that the secret reason why the constitutionalism in England had “lasted for long without being weakened” and had “enabled the rulers and subjects live in peace” was the application of the separation of powers.

It was also one of the contents in Kang Youwei’s reform to carry out the system of the separation of powers. He had exposed that the major reason why China was poor and weak was the over-reverence and over-respect shown to the monarchical power. Therefore, in order to strive for the strengthening and prosperity of the state, the autocratic politics must be reformed, and the constitutional monarchy must

¹¹⁵ “An Yu” (Comments) in Chapter 22 in *Fa Yi (The Spirit of the Laws)* by Montesquieu (Book 1), Vol. 19, translated by Yan Fu, The Commercial Press, 1981, p. 335, 419.

be carried out. Besides, the implementation of the system of the separation of powers was the precondition for the establishment of constitutional monarchy. He said, "The theory of the separation of powers is often talked about in the recent western political theories, there are the administrative officials, legislative officials and judicial officials. The government system is perfect only after the system of the separation of powers has been established."¹¹⁶ "The system of a state is like the body of a human being with the legislator as mind, the administrator as hands and feet and the judicial officials as ears and eyes, and each does its own duty, then it is possible for the integrated body to function well."¹¹⁷

Taking a stand in the fighting against the feudal autocracy, Zhang Taiyan also supported the bourgeois system of the separation of powers and highly praised judicial independence. He said, "It is believed recently that the power of ruling is divided into three parts: legislation, administration and jurisdiction, and each with its separated duties. Only the jurisdiction has the rights to challenge the government, even though it is temporarily dependent on the monarchs, it is possible to carry out punishments and be respected by others."¹¹⁸ In order to show the importance of judicial independence, he had made a comparison between the present and the past: in Ming Dynasty, "Bu Zheng Shi" (local administrative officer) was established to be in charge of "financial managements, citizen control and official inspections", while "An Cha Shi" (the judicial commissioner) was established to "be in charge of the legal affairs, criminal law, government supervision and impeachment", which, he said, had shown the difference between jurisdiction and administration, and it was also exaggerated by him as "one of the five good governances" for the two thousand years after the unification of "Hua Xia" (an ancient name for China).¹¹⁹ In the article *Dai Yi Ran Fou Lun (On the Positiveness and Negativeness of Representative System)*, he had indicated how the "three evils" (the officials' encroachment of the people, the eunuch's arbitrary abuse of power and the domination of patriarchal clan) were removed in India. And Zhang Taiyan further explained that:

If the country is ruled especially by law and the judicature is separated from the administration,... then, it is impossible for the senior officials to usurp the rights of jurisdiction and to exert their harmful influences; the president can only be put in the charge of administration and national defense, besides, he can also act as a representative of the country in diplomacy, but can not be involved in its decisions. So, the duties of different branches are clarified and the jurisdiction is not subordinate to the president. Moreover, the head of the jurisdiction is the rival of the president, and he is in charge of supervising the government, settling the lawsuits among the officials and the ordinary people and impeaching the president if he is found guilty.

¹¹⁶ Kang Youwei, "Shang Qing Di Liu Shu" (The Sixth Memorial to Qing Emperor) in *Wu Xu Bian Fa* (Wu Xu Reform), edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 199.

¹¹⁷ Kang Youwei, "A Memorial to the Emperor about Clarifying the State Affairs and Revising the State Policies" in *Kang You Wei Zheng Lun Ji (Collections of Kang Youwei's Political Essays)* (Book 1), edited by Tang Zhijun, Zhonghua Book Company, 1981, p. 262.

¹¹⁸ Zhang Taiyan, "Xing Guan" (officials in charge of criminal laws) in *Zhang Tai Yan Quan Ji (The Complete Works of Zhang Taiyan)*, Vol. 3. Shanghai People's Publishing House, 1984, p. 558.

¹¹⁹ *Ibid.*, p. 545.

In order to ensure judicial independence, Zhang Taiyan came up with two suggestions: first, the law was not to be made by the government and powerful clans but by those who were expert at law and history, and those who understand the advantages and disadvantages of the people. As long as the law was made, the president had no rights to revise them arbitrarily, moreover, they were forbidden to be violated by the ministers. Everyone had the rights to appeal to the judicial officials who “have the rights to arrest and punish those violators”. Second, forbid the government to dismiss judicial officials from their posts arbitrarily or to appoint the judicial officials from the rich clans. The judicial officials should be mutually recommended by “those who are expert at laws”, so as to ensure that the judicial officials were able to exercise their powers independently without the interference of great powers and without the influence of the family backgrounds, because only in this way could the administration be supervised effectively. Although Zhang Taiyan had criticized the bourgeois parliamentary system in a way, he had always adhered to the theory of separation of powers and had placed great hopes and great confidence in it. His idea was to establish a presidential republic in which the powers were directly exercised by the ordinary people with the separation of powers between the legislation, jurisdiction and administration without parliaments.

Sun Yat-sen had not only accepted the bourgeois principle of separation of powers and emphasized that “the judiciary is an independent organization”,¹²⁰ but also provided clearly in *Zhong Hua Min Guo Lin Shi Yue Fa (Provisional Constitution of the Republic of China)* that “judges should make judgments independently without the interference of the superior officials”. Besides, “the judge’s salary should not be reduced, he is not allowed to be transferred during his term of service, and he should not be removed or dismissed from the office unless he was punished by law”. He had further emphasized that “all the judicial staffs should attend the examinations held for judges and only the qualified ones could be appointed”.¹²¹

In a word, the change from the integration of jurisdiction and administration to judicial independence was one of the most important contents of political and judicial reformation in modern China. Although different political systems, namely, the constitutional monarchy and democratic republic had been advocated by the bourgeois reformists and democrats respectively, they still took the same stand in the judicial independence. This was because they were common in opposing autocracy. After they had accepted Montesquieu’s theory of separation of power, they gradually began to change from the traditional legal concept of the integration of administration and jurisdiction to the theory of separation of powers and judicial independence. It was just under the guidance of this new legal concept that the judicial reformation in late Qing dynasty was carried out along the road of the separation of powers.

¹²⁰ “The Great President Consulting the Senate for Ordering ‘Fa Zhi Ju’ (Bureau of Legislative Affairs) to Draft the Regulation for Judge Examination Committee and the Regulation for Judge Examination” in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 357.

¹²¹ *Ibid.*

17.8 From Regarding Punishments as the Priority to the Emphasis of Various Laws

In the long history of the development of the legal system in China, it was an important tradition to stress both punishments and the criminal law but to neglect the civil law, because the public rights were emphasized and the private rights were neglected in ancient China. So, the criminal law, as a measure against cruelty and evil-doing, had become the most basic components of legal system, moreover, for all generations, the criminal codes had always been the main part of the legislation. In addition, the criminal punishment was even applied in civil and administrative offenses. “Lv Xue” (the study of statutory laws), which had regarded ‘Xing Ming’ (the criminal law) and “Fa Li”(classic cases) as its research objects, was one of the best representatives of Chinese ancient jurisprudence.

The tradition of stressing criminal law was related to “Er Bing” (meaning “two handles” of the containers, referring to the essence of things), namely, rewards and the punishments, which were the two methods of statecraft advocated by legalists in governing the country. After the establishment of feudal autocracy, the rulers had laid emphasis on the maintenance of the ruling of the country by criminal laws, so that the criminal legislation was placed on the top of legislative activities of a state. And the secluded circumstances caused by the combination of small-scale peasant economic basis with the autocratic system had imposed restrictions on the real conditions necessary for the development of private rights, which had finally made the criminal law outshine other laws.

However, after “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) was abolished, the original historical conditions for stressing the criminal laws had already been basically changed. Therefore, with the introduction of western bourgeois legal systems and legal theories, people’s legal concepts began to be changed from the emphasis of punishments to the emphasis of various laws. Therefore, the enactment of commercial law was first put on the agenda in order to serve trade wars.

Of the views of “Gai Liang Pai” (the early reformists) about reform at the early stages, it was an important content to stress and to help the merchants. Xue Fucheng once said, “The merchant ranks the top among the four occupations of the people (scholar, farmer, worker, and merchant).”¹²² Chen Chi then regarded “the prosperity and decline of commercial affairs” as the “evidence of the rise and fall of the country”.¹²³ The mercantilist ideas emerged, because after “Hai Jin” (the banning on maritime trade and intercourse with foreign countries) was abolished, the foreign capitalist economic aggression had led to a rather grave situation for China’s national industry and commerce, which had made the thinkers feel strongly that

¹²² Xue Fucheng, “Opening up Wastelands by Setting up Commercial Affairs in England” in *Yong An Hai Wai Wen Ji (Collections of Essays Overseas by Xue Fucheng)*, Vol. 3.

¹²³ Chen Chi, “Gong Si” (The Company) in *Yong Shu (Mediocre Books)*, supplementary chapters, Vol. 1.

“if the military aggression could bring disaster to the people, then it is obvious that the commercial aggression could destroy a country invisibly”.¹²⁴ Therefore, it was expected that commerce should be developed and protected and industry should be rewarded by the Qing government through the enforcement of commercial laws. It was suggested that “by imitating the western countries, ‘Shang Wu Bu’ (Ministry of Commerce) should be set up and should be in charge of by the ministers. Moreover, four offices should be established to deal with commercial laws, market situation, commercial disputes, and commercial taxes respectively”.¹²⁵ It was especially proposed that the commercial laws of the western bourgeois countries be translated and the Chinese commercial laws be enacted by modeling on the western laws after taking the Chinese situation into consideration in order to protect the merchants. Under the historical conditions at that time, their views and suggestions had attracted the attention of Qing government.

Besides, the making of commercial laws was also proposed by Kang Youwei during “Wu Xu Bian Fa” (Wu Xu Reform). On April 22nd, 1903, an imperial edict was issued by the Qing government which had clearly regarded “bringing convenience to trade and benefits to the industrialists and businessmen” as the major government business in the ruling of the country. So, Dai Zhen, Yuan Shikai, and Wu Tingfang were appointed to be in charge of the revision of commercial laws.

Moreover, during the reform, it was claimed by Kang Youwei and Liang Qichao that the making of constitution was not only the key in reform, but also the basis for carrying out new policies. They had emphasized that only after “constitution is drafted” could “the people have a standard to follow, the reform be successful, and the policies be effective”. In the report of *A Memorial to the Emperor about Requiring Officials to Settle State Affairs by Reform*, Kang Youwei again asked Emperor Guangxu “to make constitution by adopting the useful regulations of all other countries, because it is considered a universal principle”. When writing a biography about Kang Youwei, Liang Qichao once said, “Mr. Kang believes that it is the most important thing to make the constitution, to change the official system and to define the extent of power in Chinese reform.”¹²⁶

Liang Qichao was also an advocator of making constitution. He pointed out, “the politics and law are the bases of building a state,... Therefore, nothing is more urgent than the reform of constitution among the current policies.”¹²⁷ To “establish a constitution that could not be changed by anyone,... It shall be obeyed by everyone, whether the monarchs, the officials, or the people, and it will be the source of all the

¹²⁴Zheng Guanying, “Shang Zhan” (The Commercial War) in “Sheng Shi Wei Yan” (Crisis Awareness in Heyday) in *Wu Xu Bian Fa* (Wu Xu Reform), Vol. 1, p. 83.

¹²⁵Chen Chi, “Shang Bu” (The Commercial Department) in *Yong Shu (Mediocre Books)*, supplementary chapters, Vol. 1.

¹²⁶Liang Qichao, “Kang Nan Hai Xian Sheng Zhuan” (The Biography of Mr. Kang Nanhai) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 6), Vol. 1, Zhonghua Book Company, 1989, p. 86.

¹²⁷Liang Qichao, “Lun Yi Shu” (On Book Translation) in “Bian Fa Tong Yi” (The General Discussion on Reform) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 1), Vol. 1, Zhonghua Book Company, 1989, p. 69.

laws in our country”.¹²⁸ His conclusion was that “a country could not be established without the constitution”.¹²⁹ However, according to the status quo of the mentality of the Chinese people, Liang Qichao believed that it might take two decades from the preparation to the exercise of constitution. Consequently, his specific views were not only taken over by the Qing government in the preparation of constitutionalism, it had also provided Sun Yat-sen with a priori experience in the three stages of founding the state.

Finally, Kang Youwei proposed making various new laws by imitating those of the west. He pointed out, “the civil laws, civil statutes, commercial laws, city rules, trading rules, procedural laws, military laws, and public international laws in the west are all extremely detailed. Since it is impossible to close the country to international intercourse and to cut off the trade, it is inevitable to encourage the trade relations with the foreign countries. However, without laws, people would have nothing to follow, which would surely have led to all kinds of corruptions. In our country, there are never such new laws, so now it is just the time for us to make up for what we have lacked. Therefore, it is better to set up special offices to make various laws for people to follow.”¹³⁰ Among the above mentioned laws, Kang Youwei had especially emphasized the enforcement of commercial laws in order to protect the merchants. During “Bai Ri Wei Xin” (hundred days’ reform), he had successively presented several memorials to the emperor, expecting that the regulation of “Shang Wu Ju” (Commercial Bureau) could be drafted within 2 months, and “commercial laws could be made and officials in charge be appointed” so that the merchants be protected by the government. This had reflected the yearning of “Wei Xin Pai” (the later reformists) for the development of national capitalism under the condition of reforming the Qing government.

Besides, Kang Youwei also proposed having the old criminal law revised. He suggested that “It is time now to refer to the laws of Rome, Britain, United States, Germany, France and Japan to have the Chinese laws enforced after revision.” “Even though the revised laws are not to be enforced in the whole country immediately, they should first be enforced in most of the trading ports”.

Liang Qichao also suggested that “all the books about the constitutional, civil, commercial, and criminal laws should be translated”.¹³¹

Kang Youwei and Liang Qichao’s suggestions for making new laws had involved the substantive law, the procedural law, the domestic law as well as the international law. It had shown that the development of economic, social, and foreign relations

¹²⁸ Liang Qichao, “Li Xian Fa Yi” (A Discussion on Constitution Making) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 5), Vol. 1, Zhonghua Book Company, 1989, p. 1.

¹²⁹ Ibid.

¹³⁰ Kang Youwei, “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor) in *Wu Xu Bian Fa (Wu Xu Reform)*, edited by Jian Bozan et al., Vol. 2, Shen Zhou Guo Guang Publishing House, 1953, p. 200.

¹³¹ Liang Qichao, “Lun Yi Shu” (On Book Translation) in “Bian Fa Tong Yi” (The General Discussion on Reform) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 1), Vol. 1, Zhonghua Book Company, 1989, p. 69.

was urgently needed to be adjusted by enacting new laws. The failure of “Wu Xu Bian Fa” (Wu Xu Reform) had made the blueprint of legislation vanish like soap bubbles, and finally, it was realized in a more complete sense by Shen Jiaben, the minister who is in charge of law revision.

In conclusion, at the time of transition from the old to the new at the end of nineteenth century and the beginning of the twentieth century, the Chinese national crisis was deepened. The cry for “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) became louder and louder, and finally it was transformed into a political movement to fight for democracy. Although there were differences in making plans for the future country between “Wei Xin Pai” (the later reformists) and the bourgeois democrats, both of the two schools had expected that China in the twentieth century could be independent, prosperous and powerful, and the preliminary democracy and the ruling by law could be realized. For this, they had launched heated debates, and carried out struggles either by shedding bloods or by bloodless strivings. During this process, their legal concepts had been changed obviously, from the traditional to the modern, which had indicated that in the radical economic and political reformation, the people themselves were also changed. The change of the legal concepts had not only played a guiding role in the reformation of political and legal systems, but also provided ideological impetus for the modernization of legal systems, and made necessary theoretical preparation for welcoming the much large-scale revolutionary practices.

Chapter 18

The Thoughts and Practices of Legal Reform in the Transitional Process

The modern transition of Chinese law does not start from the legal reform in the late Qing Dynasty as people have commonly assumed, nor is it the result of the endeavor of some of the ministers like Shen Jiaben who are in charge of the legal revision. In fact, it has been made possible for this great historical process to be fully accomplished only by the long time exploration and striving of several generations of social elites like Lin Zexu, Wei Yuan, Li Hongzhang, Kang Youwei and Sun Yat-sen. It is only after repeated argumentation and laborious struggles that the direction and the road of the transition have been chosen and some of the people with lofty ideals even have sacrificed their lives for it. In the process of the modern transition of Chinese law, “Yang Wu Pai” (The Westernization Group), “Wei Xin Pai” (the later Reformists) and the bourgeois democrats all have made their contributions.

18.1 The Making of Laws by Slight Changes and the Introduction of Western Laws by “Yang Wu Pai” (The Westernization Group)

In the modern Chinese history, “Yang Wu Yun Dong” (The Westernization Movement) taking place in the middle and late nineteenth century was a self-saving movement started in late Qing government with the aim to enrich the country and strengthen the army by learning the western science and technology and introducing the western modern civilization, which has exerted a great influence to the modern transition of Chinese law.

“Yang Wu Yun Dong” (The Westernization Movement) was carried out not only under the pressure of frantic invasions of foreign capitalism but also in the perilous background of the breaking out of the peasant rebellion movement of “Tai Ping Tian Guo” (Taiping Heavenly Kingdom). So on the one hand, it was a self-strengthening movement by the ruling class of Qing Dynasty to adjust the policies in all aspects such as politics, economy, military, foreign affairs and legal system, on the other hand,

it had brought about some changes in social, economic and political structures as well as the updating of knowledge as the result of the establishment of modern industry, transportation, and the introduction of modern western science and technology by this movement. As far as legal system was concerned, the translation of western legal documents, the training of new type of talented people in law and the introduction of international legal knowledge have all promoted the modern transition of the traditional legal civilization in China.

18.1.1 The Guiding Principle of the Legal Reform by “Yang Wu Pai” (The Westernization Group)

The reason for the executors of “Yang Wu Yun Dong” (The Westernization Movement) and “Yang Wu Pai” (The Westernization Group) to be active for about 30 years on the political stage of late Qing Dynasty and to be of great significance in fostering the modern transition of Chinese legal system was that their guiding principle of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) was in accordance with the needs of modern Chinese development.

The idea of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) had sprouted in the ideological system of the predecessors of “Yang Wu Pai” (The Westernization Group) like Lin Zexu and Wei Yuan.

Around Opium War, practical measures had been taken by Lin Zexu and Wei Yuan to express the proposal of “subduing the ‘barbarians’ by getting to know them”. Wei Yuan even put forward his famous idea of “Shi Yi Chang Ji Yi Zhi Yi” (learning the advanced technologies from ‘barbarians’ in order to subdue them), which had not only strongly influenced the traditional idea of “Yong Xia Bian Yi” (changing the western countries by Chinese culture), but also set a precedent to learn the truth from the west in order to save China, and had laid the primary foundation for “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture).

After Opium War, the westerner Robert Hart had stated in his *Ju Wai Pang Guan Lun (Bystander’s View)* that “the people can learn what they consider to be useful from the foreign countries, and they can keep what they consider to be good from their own culture.”¹ Timothy Richard had expressed it more clearly: “If we can keep those which are good and decent in China and complement it with the science and technology in other countries, how wonderful would it be.”² This had fully shown the westerners’ support to the theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture). In his book *Jiao Bin Lu*

¹“Tongzhi Chao” (Tongzhi Dynasty) in *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for “Yi Wu” or The Foreign Affairs)* (The Reign of Emperor Tongzhi), Vol. 40.

²“Shi Shi Xin Lun” (New Commentaries on Current Affairs) in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2).

Kang Yi (Protest from Jiao Bin Lu) published in 1861, Feng Guifen, who had been an advisor of Li Hongzhang, put forward his theory of “employing Chinese ethical traditions and famous doctrines as the essence and foreign technology as the supplements to get rich and strong”,³ which could be seen as a prototype of the theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) proposed by “Yang Wu Pai” (The Westernization Group). Feng Guifen’s thought was further expounded and interpreted by other successors. For example, Xue Fucheng had said, “Now we are sincerely learning the science and technology from the westerners, and combining it with the doctrines of Xiao, Sun, Yu, Tang, Wen, Wu and Zhougong”.⁴ Sheng Shugui had more clearly expressed his views on “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture): “the Chinese and Western culture have their own advantages and disadvantages, for our benefit, it is better to study the western science and technology under Chinese traditional culture”.⁵ Zheng Guanying then further explained: “to keep the Chinese political system first and to learn from the west second. To keep what is Chinese first; to learn what is the west second.”⁶ Besides, Sheng Shoukang and Sun Jiading also expressed similar ideas. Thus, it was on the bases of these understandings that Zhang Zhidong had further generalized and systematized these ideas. In *The Statutes for the Change of Liang Hu and Jingxin Academies of Classic Learning into Schools*, he suggested, “The main aim of the two schools is to study western technology under Chinese traditional culture, because only in this way is it possible to avoid the pedantic vulgarity and uselessness and to keep the Chinese doctrines and virtues.”⁷ In his book *Quan Xue Pian (Exhortation to Study)*, he commented on the theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture): “we should first study Chinese to lay a solid foundation and take a correct attitude in study. If we have not laid a solid foundation in Chinese and have just blindly pursued the western studies, its harmfulness is even greater than ignorance about the west.”⁸ If we must first of all adhere to the doctrines of Confucius and Mencius and the principles of “Gang Chang” (the Chinese ethical tradition) in the study of western science and technology, and then take “what we have lacked in Chinese culture from the western learning and take what is helpful from the west politics and cast

³Feng Guifen, “Cai Xi Xue Yi” (Opinions on Adopting the Western Learning) in *Jiao Bin Lu Kang Yi (Protest from Jiao Bin Lu)*, in *Discussions on Adopting the Western Learning: Collected Works of Feng Guifen and Ma Jianzong*, Liaoning People’s Publishing House, 1994, p. 84.

⁴Xue Fucheng, “Bian Fa” (Reform) in *Chou Yang Chu Yi (On Preparations for Westernization Movement)*.

⁵Sheng Shugui, “Kuang Shi Ce” (To Rectify the Current Policy) in *Wan Guo Gong Bao (The Globe Gazette)* in March of the 21st year of Guangxu.

⁶Zheng Guanying, “Xi Xue” (Western Studies) in *Sheng Shi Wei Yan (Crisis Awareness in Heyday)*.

⁷“Zou Yi” (Memorials to the Emperor) in *Zhang Wen Xiang Gong Quan Ji (The Complete Works of Mr. Zhang Wenxiang)*, Vol. 47, p. 22.

⁸“Xun Xu” (In Proper Order) in *Quan Xue Pian (Exhortation to Study)*.

off our deficiencies,”⁹ then “even though Confucius and Mencius were alive again, they would have agreed to the reformation.”¹⁰

From above we could see, “Zhong Xue” (the Chinese doctrines and culture) referred to “Gang” (cardinal guides), “Chang” (constant virtues) and the doctrines of Xiao, Sun, Yu, Tang, Wen, Wu, Zhougong and Confucius; while “Xi Xue” (the western studies) refers to the advanced technology of the west represented by guns and cannons. The theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) meant that in a cultural structure which had been inclusive of all civilizations, the dominant position of “Zhong Xue” (the Chinese doctrines and culture) should be firstly stressed, while the function of “Xi Xue” (the western studies) was just regarded as auxiliary; it also meant to enrich and strengthen our country by accepting the fruits of western modern civilization under a precondition that the ruling of the carrier of “Lun Chang” (feudal order of importance) and “Li Jiao” (feudal ethical code)—Qing Dynasty could be continued. Just like what Zhang Zhidong had said, “To cultivate the mind and body with Chinese traditional culture, and to handle current affairs with western science and technology. ... in this way we can think and behave like sages, regard obedience and loyalty as virtues, show respect to rulers and provide protection to civilians in administration. Although driving the motors in the morning and speeding by train in the evening, it is not harmful to us because we are the followers of sages”¹¹ He also said, “What is not changeable is the moral principles but not legal systems; what is unchangeable is the holy doctrines but not the machinery; what is unchangeable is people’s intention but not techniques and crafts.”¹²

“Yang Wu Pai” (The Westernization Group) had openly acted as the pious watchdogs of “Gang” (cardinal guides) and “Chang” (constant virtues) of traditional Chinese culture, they had always regarded “Zhong Xue” (the Chinese doctrines and culture) as “Sheng Dao” (The Holy Doctrines). So although they had advocated learning from the west, they had never allowed it to break the traditional dyke. In a letter to his friend in the second year of Guangxu, Li Hongzhang said,

Since the creation of the world, only two things can help people to survive and avoid being defeated: they are ‘Dao’ (virtue) and ‘Qi’ (equipments and techniques). ... the Chinese have paid too much attention to “Dao” (virtue), while the westerners have paid too much attention to ‘Qi’ (equipments and techniques),... if we want to find the methods to fight against foreign invasion, we have to try our best to establish the self-government, to revise the sacred systems before Ming Dynasty and to avoid their existence in name only; we should also learn from the west to avoid being strangled by ourselves with the hedges we have built. Only in this way can we combine ‘Dao’ (virtue) and ‘Qi’ (equipments and techniques) together, so the day is not far for us to unite the whole world into a big family. With a large

⁹Zhang Zhidong, “Xun Xu” (In Proper Order) in *Quan Xue Pian (Exhortation to Study)* in *Zhang Zhi Dong Quan Ji (The Complete Works of Zhang Zhidong)* (Book 12), Hebei People’s Publishing House, 1998, p. 9725.

¹⁰“Bian Fa” (Reform) in *Quan Xue Pian (Exhortation to Study)*.

¹¹“Hui Tong” (Blending Harmoniously and Understanding thoroughly) in *Quan Xue Pian (Exhortation to Study)*.

¹²“Bian Fa” (Reform) in *Quan Xue Pian (Exhortation to Study)*.

population, rich resources, talented people and popularly accepted 'Li Yi' (rites and etiquette) and 'Gang Chang' (the Chinese ethical tradition), it is natural that China can become the strongest country in the world.¹³

He thought that "both Chinese civilian and military systems are quite different from those of the western countries whose systems are characterized by chaos and vulgarity. So the Chinese system can surely guarantee the safety of the country, if it has not been damaged, China is surely to prevail." He further explained: "both Chinese civilian and military systems are superior to that of the west, therefore, China can not be beaten by just using advanced weapons".¹⁴ From above we can see, as one of the representatives of "Yang Wu Pai" (The Westernization Group), Li Hongzhang thought that "Lun Chang" (feudal order of importance) and "Ming Jiao" (the famous doctrines) were irreplaceable.

The earlier reformists held the similar views. For example, Wang Dao said, "Since the doctrines of Confucius and Mencius have been bequeathed to the world, they have been called the doctrines of humanity... Therefore, they are not only eternally true and everlasting, but also even unchangeable for a thousand year, how can we doubt them?" Xu Fucheng also thought that the Chinese "Lun Chang" (feudal order of importance) and morality were much superior to that of the west, and the west had only exceeded China in technique and crafts. "So we should learn the science and technology from the western countries to safeguard the doctrines of Xiao, Sun, Yu, Tang, Wen, Wu, Zhougong and Confucius, because only in this way will the Chinese not be looked down upon by the westerners any more". Although Xue Fucheng had bravely recommended the capitalist parliamentary system in the western countries, he had criticized their moral relationships between ruler and minister, father and son, husband and wife for their violations of holy principles, and he thought that especially the instruction of 'San Gang' (three cardinal guides) in the west is much inferior to that of China.¹⁵ Guo Songtao also said, "The relationships between ruler and minister and father and son in China are clearly defined and each one knows his own responsibility", "while the teachings in the western countries are far inferior to those of the Chinese sages either in subtlety and exactness."¹⁶ His conclusion was that "Xi Xue" (the western studies) could only be used to deal with the current affairs and to help China to become rich and strong, but could be used to bring harm to traditional Chinese "Lun Chang" (feudal order of importance) and "Ming Jiao" (the famous doctrines).

¹³ Li Hongzhang, "Wen Bian" (Collections of Essays) in *Yong An Quan Ji (The Complete Works of Xue Fucheng)*, Vol. 2.

¹⁴ "Tongzhi Chao" (Tongzhi Dynasty) in *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for "Yi Wu" or The Foreign Affairs)* (The Reign of Emperor Tongzhi), Vol. 25, Zhonghua Book Company, 1979, p. 9.

¹⁵ Xue Fucheng, *Chu Shi Ying Fa De Yi Bi Si Guo Ri Ji (Diaries about the Diplomatic Missions to the four Countries: Britain, France, Italy and Belgium)*, Social Science Academic Press, 2007, p. 220.

¹⁶ *Guo Song Tao Ri Ji (The Diary of Guo Songtao)* (Book 4), Hunan People's Publishing House, 1983, p. 107.

Zhang Zhidong especially understood that “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) was the backbone of the feudal system and legal orders, so he strongly opposed the reforms which were against them. For example, during “Wu Xu Bian Fa” (Wu Xu Reform) led by Kang Youwei and Liang Qichao, he not only sharply criticized the propaganda of “Wei Xin Pai” (the later reformists) struggle for human rights, equality and freedom, but also attacked their intention to make the constitution, to establish the parliament, to set up a constitutional monarchy, to reform the old legal system and to accept the western legal system. He said, “Ruler guides subject, father guides son, husband guides wife ...these are the heavenly principles in the world that can not be changed...and these are not allowed to be changed by ‘Wei Xin Pai’ (the later reformists) ...that is the reason why saints are saints and China is China. So if we know the cardinal guides of ruler and subject, then the principle of human rights is impracticable; if we know the cardinal guides of father and son, then the principle of equal punishment of father and son for the same crime and the suggestion of abolishing the customs of wearing mourning clothes after the mourning period is over and cancelling the ritual of offering sacrifice to gods are impracticable; if we know the cardinal guides of husband and wife, the principle of equality between men and women is impracticable....Recently I have heard someone openly advocating abandoning ‘San Gang’ (three cardinal guides), so this is the most dreadful thing I have ever heard about.”¹⁷

As far as its contribution for the times is concerned, the theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) had not only symbolized the high level which “Yang Wu Yun Dong” (The Westernization Movement) had achieved, but also a profound consideration of the social reality by the reformers and the thinkers, therefore, it had exerted an unconventional and positive influence in introducing the western modern civilization and promoting the modernization of Chinese legal system. But on the one hand, “Yang Wu Pai” (The Westernization Group) still stubbornly adhered to the old traditional feudal system, on the other hand, they had tried to bring the western science and technology into a full play, which had greatly restricted the practice of “Xi Xue” (the western studies) and failed to reach goal of self-saving and self-surviving. With a deeper understanding of “Xi Xue” (the western studies) and the deep-going of the political and economic reform in Chinese society, people gradually realized that it was impossible for China to save the country and become stronger just by “applying the western science and technology but discarding its systems”.¹⁸ The limitation of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) became more obvious as “Xi Xue” (the western studies) shifted from the field of science and technology to that of superstructure. Even the people

¹⁷Zhang Zhidong, “Ming Gang” (Understanding the Cardinal Guides) in *Quan Xue Pian (Exhortation to Study)* in *Zhang Zhi Dong Quan Ji (The Complete Works of Zhang Zhidong)* (Book 12), Hebei People’s Publishing House, 1998, p. 9715, 9716.

¹⁸Zhang Shusheng, “Yi Zhe” (The Memorials Left Behind) (at the beginning of May of the 10th Year of Guangxu) in *Zhang Jing Da Gong Zou Yi (The Memorials to Emperor by Zhang Jingda)*, Vol. 8, p. 32, 33.

like Ma Jianzhong, Wang Tao and Zheng Guanying who had a new understanding of western constitutional monarchy and parliamentary system were entrapped by the dilemma of “accepting ‘Xi Xue’ (the western studies) and keeping ‘Zhong Ti’ (the Chinese political system) simultaneously”. Just as was criticized by the reformers later:

So both ‘Zhong Xue’ (the Chinese doctrines and culture) and ‘Xi Xue’ (the western studies) have their own different systems and practices, if they are separated, they may co-exist side by side, but if they are integrated, they will perish. Those who put forward the suggestions want to combine the two into one and put it into practice, but it is contradictory not only in form but also in content, and the name itself is absurd enough, let alone to put what is said into practice.”¹⁹ “Thus, according to their statements, ‘Zhong Xue’ (the Chinese doctrines and culture) means what is native and ‘Xi Xue’ (the western studies) means what is foreign; ‘Zhong Xue’ (the Chinese doctrines and culture) can be used to cultivate the body and mind, while ‘Xi Xue’ (the western studies) can be used to deal with the current affairs. I do not know how a person with no cultivation in both body and mind can have a good command of ‘Xi Xue’ (the western studies). If he is cultivated in body and mind, and then he surely can cope with the worldly affairs expertly, and if he can cope with the worldly affairs well, we know that he is cultivated in both body and mind. Therefore, the body, the mind and the worldly affairs are one integrated unity and they can not be separated into two. Without serious attitudes, how can one study the phenomena of nature to acquire knowledge? Without the intention to enrich the country, how can one be engaged in the building of railways? Without the will to self-strengthen the country, how can one be interested in promoting the military equipments? Without a mind of equality and fairness, how can one be a juror? Now they only talk about learning the superficial but not the essential and call it ‘Hui Tong’ (to blend harmoniously and understand thoroughly), then what does ‘Hui’ and ‘Tong’ mean?”²⁰

The disastrous defeat of the Sino-Japanese War of 1894–1895 had proved that if “Zhong Ti” (the Chinese political system) had not been changed and reformed, it was impossible for China to develop at greater stride, let alone to become a rich and strong.

18.1.2 The Main Contents of the Legal Reform by “Yang Wu Pai” (The Westernization Group)

In the movement of “Bian Fa Zi Qiang” (striving for self-strengthening by reformation) to enrich the country and strengthen the army launched by “Yang Wu Pai” (The Westernization Group), the advantages of the western culture had enabled them to accept the basic idea of learning the western science and technology and to introduce and spread the western modern civilization. Nevertheless, according to the

¹⁹ Yan Fu, “A Letter to the Editor of *The Newspaper of Foreign Relations*” in *Yan Fu Wen Xuan (The Selected Works of Yan Fu)*, Baihua Literature and Art Publishing House, 2006, p. 157.

²⁰ “Quan Xue Pian Shu Hou” (The Postscript of *Quan Xue Pian*) in *Xin Zheng Zhen Quan (The Real Interpretations of the New Administration)*, Vol. 5.

theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture), the modern western civilization could only function as a supplement to what Chinese culture had lacked, and the “Chinese system” could not be violated. Therefore, all this had made it impossible to shatter the foundation of traditional Chinese legal culture by the legal reform advocated by “Yang Wu Pai” (The Westernization Group).

The legal reform carried out by “Yang Wu Pai” (The Westernization Group) mainly included the following points:

First, the legalization of economic activities. The primary purpose of “Yang Wu Yun Dong” (The Westernization Movement) was to “self-strengthen” the military, so the modern military industry was established.

Because great difficulties were encountered in getting the raw materials, funds and managements needed to set up military industries, it was realized by “Yang Wu Pai” (The Westernization Group) that the development of military industry depended on a complete modern industry system and solid economic bases. The reasons for the powerfulness of the western countries lay in their solid economic power which had acted as the backup force, therefore, they began to change from the “pursuit of powerfulness” to the “pursuit of wealth” and then to “pursuit of wealth by the way of becoming rich”. Concretely speaking, they began to change from making guns, cannons, and ships by imitating the western countries to building railways, making telegraphs, mining and setting up textile mills in order to avoid “the inland rivers and outer seas being completely occupied by the westerners”.²¹ Besides, they also wanted to share “the profits of foreign businessmen” by setting up civil enterprises, consequently, a series of civil enterprises were set up and begun to be managed by imitating and transplanting some of the economic laws in western capitalist countries.

First, to set up the stockholding company system

The government absorbed the scattered fund by issuing stocks to society to set up civil enterprises which were “government-supervised and business-run”. Take “Lun Chuan Zhao Shang Ju” (The Investment Invitation Bureau for Ships) and “Kai Ping Kuang Wu Ju” (Kaiping Mining Bureau) as examples, *Lun Chuan Zhao Shang Ju Ju Gui* (The Rules for the Investment Invitation Bureau) and *Kai Ping Kuang Wu Ju Zhao Shang Zhang Cheng* (The Regulations for the Investment Invitation for Kaiping Mining Bureau) were drafted. Besides, they also regarded the western enterprises as their examples to follow in many aspects, such as the methods for raising funds, the status of shareholders, the interior management of companies and the modes of profit distribution which had made the company organization, management and operation method of western capitalism gradually understood and accepted by Chinese people.

²¹Li Hongzhang, “A Memorial to the Emperor about the Tentative Conducting of Investment Invitation for Ships” in “Zou Gao” (The Memorials to the Emperor) in *Li Wen Zhong Gong Quan Ji* (The Complete Works of Mr. Li Wenzhong), Vol. 20, p. 33.

Second, to set up financial and credit systems

In order to solve the practical problems in “inviting commercial stocks”, the financial and credit methods commonly used in modern western economic activities were adopted in order to raise funds for setting up enterprises needed by “Yang Wu Pai” (The Westernization Group). In addition, in loaning contracts, in order to pay debts, much wider range of security guarantees was provided. For example, if the debtor did not fulfill the contract, the creditor could freely dispose the debtor’s property by “selling, leasing and pawning” without any restrictions. Although many of the contents of the contract were unfair, it had promoted the legalization of the activities of the enterprises set up by “Yang Wu Pai” (The Westernization Group) and provided much experience for business legislation in the late Qing government.

Third, to guarantee the economic interests of both parties by economic contracts

The most typical example was “Qi Jia He Tong” (Fair Price Contract) signed by “Lun Chuan Zhao Shang Ju” (The Investment Invitation Bureau for Ships) with the foreign companies like Jardine Company and John Swire & Sons Shipping Company. Since its signing in 1878, it had been revised for many times to ensure “fair prices”, and it was stipulated that each party could examine the shipping bills reciprocally, but the others had no rights to change the clauses like prices except the general managers and agents from both sides. Besides, the responsibilities of contract breaching were divided into “witting” and “unwitting”, and they were punished differently.

Fourth, to protect patents

The first time for the concept of patent rights to be in used in modern China was in 1881, when Zheng Guanying and his colleagues in “Shanghai Zhi Bu Ju” (Shanghai Weaving Bureau) sent a memorial to Li Hongzhang to require him to grant the bureau a 10-year patent and a preferential treatment of tax reliefs to ensure the successful development of production. In the end they suggested that “after an investigation of the west, we discover that before a law is made, many years of preparatory work is undertaken by the westerners, therefore, it is possible for them to have a down-to-earth attitude..., besides they usually give their patentees several years of patent rights. For this reason, all of them have worked hard, consequently, the more research they make, the more advanced their techniques become.”²² The above mentioned suggestion had clearly reflected their (“Yang Wu Pai”) understanding of patent rights. Soon after that, Zheng Guanying sent the second patent application to Li Hongzhang, then in no time, Li Hongzhang presented *A Memorial for the Tentative Establishment of “Zhi Bu Ju” (Weaving Bureau)* to the emperor and put forth suggested: “after examining the cases in western countries, we have discovered that if something new is invented in a country, the inventor will be granted

²²Zheng Guanying, “A Report of the Colleagues of Shanghai Machine Weaving Bureau to Li Fuxiang, Beiyang Minister of Commerce” in “*Yang Wu Yun Dong*” (the Westernization Movement) (7), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Shanghai People’s Publishing House, 1961, pp. 482–483.

the patent rights for several years. In ‘Zhi Bu Ju’ (Weaving Bureau), cloth is made with machines, which is new in our country, hence, regulations should be made that in 10 years, only Chinese businessmen are allowed to be engaged in the production with stock shares and other weaving bureaus are not allowed to be set up”.²³ The suggestion was approved by the imperial court.

Fifth, to cultivate modern legal talents

In order to carry out the policy of westernization, “Yang Wu Pai” (The Westernization Group) took great pains to train and select talents for “Yang Wu Yun Dong” (The Westernization Movement). Li Hongzhang said, “... In the process of training talents, we should not be restricted by the conventional practices. Because the talented people are urgently needed, we should enable all the people with lofty ideals in our country to have a full understanding of ‘Yang Wu Yun Dong’ (The Westernization Movement).”²⁴ So in the January of the 11th year of Xianfeng (1861), prince Gong Yi sent a memorial to the emperor proposing to set up “Tong Wen Guan” (The School of Combined Learning).

The primary purpose of setting up “Tong Wen Guan” (The School of Combined Learning) was to train experts in translations needed in dealing with foreign affairs. Therefore, various schools for learning foreign languages were set up, such as the schools for learning English, France, Russian, German and eastern languages.²⁵ With the development of the situation, “Yang Wu Pai” (The Westernization Group) came to understand that “if we do not make fundamental efforts, but only learn something superficial, it is of no use in practice”; however, “if we are specialized and skilled in the understanding and acquisition of knowledge about the phenomena of nature, in the exploration of the method of ‘Zhi Qi Shang Xiang’ (when manufacturing an article or an equipment, it is necessary to refer to its shape or drawing) and the ways of ‘Gou He Zhai Luo’ (the ways of studying the geography or astronomy) in order to make full use of them, it is possible for China to become strong and powerful.” So teaching facilities such as the school of astronomy, the school of arithmetic, libraries, printing houses, chemical laboratories, museums, observatories and physical laboratories were set up one after another, moreover, lessons in natural science such as medicine, biology, chemistry, mineralogy and physics and lessons in social science like *Wan Guo Gong Fa* (*Elements of International Law*), *Fu Guo Ce* (*Strategies to Make the Country Prosperous*) and the histories of different countries were started. In fact, “Tong Wen Guan” (The School of Combined Learning) had been changed from an organization of foreign language education at the earlier times into a comprehensive school.

²³Li Hongzhang, “A Memorial to the Emperor about the Tentative Establishment of the Textile Bureau” in “Zou Gao” (The Memorials to the Emperor) in *Li Wen Zhong Gong Quan Ji* (*The Complete Works of Mr. Li Wenzhong*), Vol. 43, p. 44.

²⁴“Zou Gao” (Memorials to the Emperor) in *Li Wen Zhong Gong Quan Ji* (*The Complete Works of Mr. Li Wenzhong*).

²⁵*Tong Wen Guan Ti Ming Lu* (*Records of Autograph in the School of Combined Learning*), p. 43.

Furthermore, “Tong Wen Guan” (The School of Combined Learning) had also become an important gateway for people to understand the western countries by translating the western legal works. According to *The Records of the Translation of Western Works by Jiang Nan Manufacturing Bureau* by John Fryer, among the western works translated by “Tong Wen Guan” (The School of Combined Learning), the following were about international laws: *Gong Fa Hui Tong (The International Law)*, *Gong Fa Qian Zhang (A Treatise on International Law)* and *Zhong Guo Gu Shi Gong Fa (The International Law in Ancient China)*.

Apart from setting up “Tong Wen Guan” (The School of Combined Learning) to train talented people for westernization, “Yang Wu Pai” (The Westernization Group) also sent students to study abroad. On the 11th of August of the 11th year of Tongzhi, 30 Chinese students were sent across the Pacific Sea to study abroad, and this was the first group of students sent abroad to study in Chinese modern history. From that time up to 1885, altogether 209 students who were sent or recommended by “Yang Wu Pai” (The Westernization Group) at public expenses had received education in the west. These students who were educated in the west had played important roles for the development of China’s modern economy, politics, law, culture and ideological liberation. Among them, Yan Fu who had returned home from Britain was the first who had systematically introduced western philosophy, law, social politics and scientific methods into modern China. He also translated Thomas Henry Huxley’s *Tian Yan Lun (On Evolution and Ethics)*, Adam Smith’s *Yuan Fu (An Inquiry into Nature and Causes of the Wealth of Nations)*, Baron de Montesquieu’s *Fa Yi (The Spirit of the Laws)* and W.S. Jevons’s *Ming Xue Qian Shuo (Primer of Logic)*. For half a century, he was unparalleled either in the quality or in the influence of his translations. Based on his solid Chinese bedrock and wide scope of western knowledge, Yan Fu had a profound reflection of the traditional Chinese Culture and had sharply criticized the feudal system by the application of the theory of evolution and natural human rights. Just as Liang Qichao had said, “Among the students studying abroad, Yan Fu is the first person who has associated what he has studied abroad with China’s ideological world”.²⁶

Sixth, to learn and to make use of international laws

The basic idea of legal reform of “Yang Wu Pai” (The Westernization Group) was “Yin Jin Xi Fa” (introducing the western laws) and “Shao Bian Cheng Fa” (making laws by slightly changing the western laws). To them, what could not be changed was not the law itself but “Lun Chang” (feudal order of importance) and “Gang Ji” (social order and law). On the question of adopting western laws, from Yi Xin, Li Hongzhang and to Zhong Zhidong, they had all paid special attention to the study of “international laws”, because it was a very difficult problem often encountered in the activities of westernization. Whenever negotiations were held with foreigners, matters were usually handled without following the international laws,

²⁶Liang Qichao, *Qing Dai Xue Shu Gai Lun (An Outline of the Academics in Qing Dynasty)*, China Ancient Books Publishing House, 2006, p. 159.

in the end, the Chinese had to “accept the foreigners’ opinions”, because there were very few Chinese experts who were familiar with the international law, for this reason, it was impossible to reason with foreigners according to the law. So the study of international laws was stressed in order to “promote the self-strengthening movement and to help the negotiations with the foreign countries”. Zhang Zhidong had regarded the study of international law as one of the five basic studies in westernization. In “Tong Wen Guan” (The School of Combined Learning), the international law was considered a very important course in order to train the gifted people with modern international knowledge in foreign affairs. The four-volume *Wan Guo Gong Fa (Elements of International Law)* translated by William M. P. Martin was mainly used as the textbook, moreover, other books on international laws compiled and translated by William M. P. Martin and his students were also used, including the six-volume works *Guo Ji Fa Dao Lun (Introduction to the Study of International Law)* by T. P. Woolsey (the name was changed to *Gong Fa Bian Lan* when published), the four-volume *Wai Jiao Zhi Nan (Guide Diplomatique)* (the name was changed to *Xing Yao Zhi Zhang* when published), *Lu Di Zhan Li Xin Xuan (Manual of the Law of War on Land)* by German diplomat Martens and *Zhong Guo Gu Shi Gong Fa Lun Lue (The International Law in Ancient China)* by William M. P. Martin. These international laws “are studied both in their original languages and in Chinese translations”²⁷ in order to make Chinese students understand and master the newest special knowledge on international laws made in the United States and European countries at the same time of studying languages.

When Li Hongzhang set up “Guang Dong Fang Yan Guan” (The School of Guangdong Dialect) in Shanghai in 1863, and Zhang Zhidong, who was “Zong Du” (viceroys) of Huguang, opened “Guang Dong Shui Lu Shi Xue Tang” (The School for Guangdong Naval and Land Forces) in 1887, they had all regarded the studying international laws as an important subject, and they even had employed foreign jurists as professors.

With the spread of the knowledge of international law, more and more attention was gradually paid to the concept of state sovereignty and state equality. Therefore, on the one hand, the principles of international law were applied by “Yang Wu Pai” (The Westernization Group) in handling foreign affairs; on the other hand, the legal problems like extraterritorial jurisdiction were reexamined by them according to the international standards. In practice, the handling of “Da Gu Kou Incident” at Pu Dan by applying international knowledge was a good example.

In 1864 (the third year of Tongzhi), when Prussia and Denmark were at war in Europe, the Prussian envoy Rehfues wanted to come to China by Tianjin, but at the sand bar of Da Gu Kou, he suddenly ordered the warships to capture three Denmark merchant ships. The Qing Dynasty protested according to the principles about territorial waters provided in *Wan Guo Gong Fa (Elements of International Law)* translated by William M. P. Martin, and asked the Prussian envoy to release Denmark

²⁷ *Gong Fa Bian Lan (Introduction of the Study of International Law)*, the collected edition of “Tong Wen Guan” (The School of Combined Learning), the third year of Guangxu (1877).

merchant ships first before he was welcomed. After many exchanges of “Zhao Hui” (letters of understanding or concern exchanged between governments), the Prussian envoy finally yielded and agreed to release two of the Denmark merchant ships, and the Prussian consul at Tianjin consulate suggested compensating the other ships with 1,500 foreign dollars. In the “Zhao Hui” (letters of understanding or concern exchanged between governments) to Prussian, the Qing government pointed out:

The capture of Denmark merchant ships has occurred in Chinese territorial waters, and if the warships of your country have arrived in China, you should make requirements first, while reckless actions should be avoided. These special articles and regulations are listed in the documents of most of the countries. And even in the contracts of your own country, it also has mentioned that the incident has occurred in Chinese territorial waters, so it should be made public for other countries to know.²⁸

From this case, we could learn the positive influence which the modern international knowledge had exerted on the late Qing government in making decisions on foreign affairs.

Seventh, to set up modern diplomatic institutions

In order to meet the demands of foreign affairs, the Qing government had made adjustments to government organizations and set up the modern diplomatic institution, namely, “Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations), which had symbolized the ending of traditional foreign relations and the establishment of modern ones, and had led to a series of changes in political and legal systems.

“Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations) was an independent administrative system consisting of different departments headed by different officials, and each department was in charge of different affairs. In addition, its scope of administrative and authoritative power was very wide, apart from the matters in foreign affairs; it also shared a part of the power with “Hu Bu” (Board of Revenues) in financial matters and had the power of managing taxation and foreign trade. In military affairs, it shared power with “Bin Bu” (Board of War); in the affairs of personnel, a complete system of promoting, appointing and selecting officials which was independent of “Li Bu” (Board of Personnel) was set up. Moreover, it was concurrently in charge of cases involved both Chinese and foreigners especially in legal affairs. “The legal affairs are originally managed by ‘Xing Bu’ (Board of Punishment), nevertheless, because international laws have been applied by most of the countries in dealing with legal proceedings, and lawyers are often employed in judicial matters to settle the cases, who have usually given unprincipled protection to those involved in disputes, in the end, the people involved would appeal to ‘Zong Li Ya Men’ (Office in charge of Affairs of all Nations) for advice on how to settle the problems, but from the beginning, such matters have not been dealt with by ‘Xing Bu’ (Board of Punishment)”.

²⁸“Tongzhi Chao” (Tongzhi Dynasty) in *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for “Yi Wu” or The Foreign Affairs)* (The Reign of Emperor Tongzhi), Vol. 39, p. 353.

“Zong Li Ya Men” (Office in charge of Affairs of all Nations) was also the central organization which had led “Yang Wu Yun Dong” (the Westernization Movement), and it was in charge of military, financial, cultural, educational and foreign affairs, therefore, its power had exceeded that of the cabinet in western capitalist countries.²⁹

In view of the fact that “the foreigners know very well even about the different Chinese provinces because they have often come to China, but Chinese know little about the foreign countries, which has often led to many problems in dealing with foreign affairs,”³⁰ decisions had been made by “Zong Li Ya Men” (Office in charge of Affairs of all Nations) to send ambassadors to foreign countries. The leaders of “Yang Wu Yun Dong” (The Westernization Movement) like Guo Songshou, Xue Fucheng and Zeng Jize had all been sent to the western countries, who had introduced the parliamentary systems in the United States and European countries into China and become the representatives of the new forces of the movement.

Finally, to revise the Chinese law by imitating the western ones.

With the increase of foreign investment in China and the development of national industry and commerce, the civil and criminal cases involved in foreign affairs increased continuously. So the officials of “Yang Wu Pai” (The Westernization Group) felt urgently the need to learn the knowledge on international private law, the international criminal law and the international commercial law. By taking the chance of reform and “Xin Zheng” (the new administration), suggestions were made by Zhang Zhidong to the imperial court to employ foreign lawyers, to make simplified Chinese laws on mining, railway, commerce and criminal cases by extensively adopting the corresponding foreign ones. These four laws were regarded as “the wise decisions to bring benefits and necessary measures to guard against troubles”. According to the principle of “adopting those in ‘Xi Xue’ (the Western studies) which can supplement what China has lacked, and taking those in ‘Xi Zheng’ (the western administration) which can overcome what is deficient in China”,³¹ the western laws were referenced in the nine suggestions put forward by Zhang Zhidong in 1902. For example, his first suggestion was “Zhong Zhong Zheng” (stressing the evidence of the masses)—except for the cases of death penalty, in which plea of guilty were needed, as far as the criminal cases not as serious as military exiles were concerned, if there were irrefutable evidences, if the cases were reexamined by the officials themselves, moreover, if the crimes were found above suspicion, the convicts could still be sentenced according to law, and the case should be put on file for investigation even without the criminal’s confession. Another suggestion was “Gai Xing Huan” (the change of punishment to amercement)—except for the crimes

²⁹ Ma Shi, *Zhong Hua Di Guo Dui Wai Guan Xi Shi (The History of Foreign Relations of Imperial China)*, Shanghai Bookstore Publishing House, 2000, p. 353.

³⁰ “Tongzhi Chao” (Tongzhi Dynasty) in *Chou Ban Yi Wu Shi Mo (The Beginning and End of Making Preparations for “Yi Wu” or The Foreign Affairs)* (The Reign of Emperor Tongzhi), Vol. 39.

³¹ Zhong Zhidong, “Xun Xu” (In Proper Order) in *Quan Xue Pian (Exhortation to Study)* in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 3), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, p. 225.

of robbing and murdering which should be sentenced according to law, the other criminals like thieves, local ruffians, rascals, injurers, racketeers, and mobs should be sentenced to imprisonment without redeeming. Nevertheless, for the other minor lawsuits involving marriages, land conflicts, family disputes and debts problems usually occurring among gentlemen, the punishment could be changed to amercement. His next suggestion was “Jiao Gong Yi” (to reform the criminals by teaching them handicrafts)—the prisoners should learn production skills “so that after being released, they could make a living in different professions. Moreover, the prisoners could also make their own clothes and shoes.” His last suggestion was “Xiu Jian Ji” (the repairing of prisons)—to improve the living conditions of the prisoners. He also invited a student who had studied penology in Japan to build a prison by modelling on the Japanese prisons, and named it “Hubei Sheng Cheng Mo Fan Jian Yu” (The Model Prison of Hubei Provincial Capital).

As a believer of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture), Zhang Zhidong thought that “the law and Confucian classics are closely related, and the law is the exterior while Confucian classics is the interior. So what can be changed is the exterior, namely, the law itself, but not the interior, namely, the Chinese traditional political system”. He clearly expressed that “the relationship between relatives and the differences between males and females are perfectly justified, which are unchangeable and permanent principles”.³² He also criticized *Xing Shi Min Shi Su Song Fa Cao An* (*The Draft of Civil and Criminal Procedure Law*) compiled under the direction of Sheng Jiaben and Wu Tingfang because it had included the articles like “dividing family properties between brothers”, “dividing money between husband and wife”, “dividing wealth between father and sons”, “allowing women to provide evidence at the court”, which he thought had “violated the essence of Chinese laws”, “opposed what ‘Ming Jiao’ (the famous doctrines) has preached, started the ethos of equality between male and female and infringed the teachings of ancient Chinese sages about cultivating one’s moral character and managing a harmonious family”. What was worse, “this perverted theory has greatly contradicted the common sense; therefore, it should not be carried out”.³³ *Da Qing Xin Xing Lv Cao An* (*The Draft of the New Criminal Law of Great Qing*) which was revised in 1908 was also criticized by Zhang Zhidong, because there were no clauses in it stipulating that “punishment should be imposed on those who have committed adultery with unmarried women” and it had shown “contempt of the doctrines of ‘Li’ (rites)”.

What was mentioned above explained the main activities of “Yang Wu Pai” (The Westernization Group) in “adopting the western law” and “revising the Chinese law” by pursuing the policy of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture).

³²Zhang Zhidong, “A Memorial to the Emperor about the Reexamination of the Newly-Edited Civil Legal Proceeding Law According to Emperor’s Orders” in *Zhang Wen Xiang Gong Quan Ji* (*The Complete Works of Mr. Zhang Wenxiang*), Vol. 69, China Book Store, 1990, p. 152.

³³Ibid.

18.1.3 The Evaluation of the Legal Reform by “Yang Wu Pai” (The Westernization Group)

Although the movement of “Bian Fa Zi Qiang” (striving for self-strengthening by reformation) did not make modern China rich and strong, it did not mean that it had little positive influence in the process of China’s modernization. On the contrary, as far as the legal reform was concerned, the legal reform carried out by westernization group had exerted great influence to the modern transition of Chinese legal system.

Before Opium War, China had always been bragging and boasting itself of being “Tian Chao” (a heavenly kingdom) and intoxicated in the atmosphere of “Wen Zhi Wu Gong” (cultural and military achievements), and “Shen Ren Hou Ze” (profound benevolence and great favors) of Qing Dynasty. The rulers and scholar-bureaucrats still stuck to the Confucian classics, doctrines and the ways of managing the country by ancient rulers and sages, but they knew nothing about the historical changes which were occurring across the Pacific Ocean. Even if Lin Zexu had called on people to “open the eyes to the outside world”, Gong Zizhen had advocated that people should “be pioneers in leading the vogue and be modest” and Wei Yuan had supported the policy of “subduing the ‘barbarians’ by getting to know their advanced technology”, neither had they explained clearly the relationship between Chinese and western cultures in theory nor found the common ground to integrate the Chinese and western cultures, let alone to play a great role in creating a new ideological field.

Only the theory “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) propagated by “Yang Wu Pai” (The Westernization Group) had provided some explanations theoretically about the relationship of “Ti” and “Yong” (system and application) between Chinese and western cultures, and some of the elements in western legal culture which were both reasonable and acceptable in the real social situations of late Qing dynasty were absorbed and adopted in the legal reform. Since then, the scholar-bureaucrats in China had begun to face up to the difference between Chinese and western legal cultures, to admit the limitations of traditional Chinese legal culture and to show their support to adopting some of the elements of western legal culture in order to patch the loopholes of Chinese traditional culture. To some extent, without the theory of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) put forward by “Yang Wu Pai” (The Westernization Group) and their series of activities in legal reform, the modern transition of Chinese law was out of the question.

Some of the advanced elements of western legal civilization introduced by “Yang Wu Pai” (The Westernization Group) had brought many positive social and economic changes for Chinese society, affirmed the progressiveness of western legal civilization and led to the splitting up of the scholar-bureaucrat groups. One of the most important achievements of “Yang Wu Yun Dong” (The Westernization Movement) was that it had increased the world consciousness of modern Chinese people. Although their explanation of “Xi Xue” (the western studies) was limited, moreover, it was only established in Chinese culture, it was only after experiencing the process self-examination and self-criticizing of the traditional Chinese legal culture by “Zhong Ti Xi Yong” (studying western science and technology under

Chinese traditional culture) that it had made it possible to change “Xi Xue” (the western studies) from just learning the “civilization of manufacturing” to the learning of politics and law. The bourgeois “Gai Liang Pai” (the early reformists) who was split from “Yang Wu Pai” (The Westernization Group) had gradually realized the limitation of just learning the superficial knowledge from the west. For example, in *Shang Li Bo Xiang Yan Chu Yang Gong Ke Shu* (A Letter to Li Bo about my Study abroad), Ma Jianzhong said, “... I have been in Europe for a year now. When I first came here, I thought that the prosperity and powerfulness of the European countries were because of their devotion in promoting the quality of their products and the strict discipline of the soldiers. After I have examined their statutes, culture and education, I find that they are rich because they have always regarded the protection of the chamber of commerce as the foremost task and they are strong because they have always regarded getting the popular support of the people as the most important work...,” which had shown the deepening of his ideological understanding.

Besides, “Yang Wu Pai” (The Westernization Group) also paid much attention to the training of the new-type of talented people in the process of legal reform, which had provided a powerful support for the modern transition of Chinese law and broadened the social bases of legal reform.

In a word, although the purpose of introducing laws from west by “Yang Wu Pai” (The Westernization Group) was to maintain the dictatorship of Qing dynasty, in practice, it had fostered both the development of modern legal system and the changes of modern legal thoughts. The experience of transplanting laws from west and the measures of training legal talents by westernization groups had exerted great influence not only to the legal revision in late Qing dynasty, but also to the judicial reform at the beginning of the twentieth century.

But when the people like Yi Xi and Li Hongzhang introduced the laws from west, it was not planned in advance but was only out of the urgent need at the time from pragmatism, which had made their legal reform fragmentary, sporadic and without both subjective prediction and rational thinking.

It was just due to this, many measures of the reform had lost their original purpose, and even had failed in the end. For example, in the stock-share company system set up by “Yang Wu Pai” (The Westernization Group) as an experiment, because no protecting mechanism for the rights of share-holders was set up, the officials sent by the imperial court had assumed arbitrary power, which had made the representatives of the share-holders felt that “the power of the officials are so great” that “the business affairs may be greatly influenced”, therefore, finally the businessmen withdrew their rights.

18.2 “Wu Xu Bian Fa” (Wu Xu Reform) and Legal Reform

In 1870s, some of the scholar-bureaucrats separated from “Yang Wu Pai” (the Westernization Group), for example, Xu Fucheng, Ma Jianzhong, Wang Tao, Zheng Guanying, Gong Songtao, Chen Chi, Chen Qiu, He Qi, and Rong Hong, and they had got in touch with the western world in a much wider field, so that they had a

much deeper understanding of the differences between Chinese and western cultures, therefore, began to change the emphasis of social reform from technology and military affairs to politics and law, hoping to introduce the much maturer system civilization of the west into China to further reform the political and legal systems. Thus, they put forward proposals to follow the pattern of the western administration and advocated setting up parliament, establishing constitutional monarchy, revitalizing business affairs and protecting the commerce by law. However, because they still stubbornly adhered to the way of thinking of “Yang Wu Pai” (the Westernization Group) characterized by “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture), their understanding of western legal civilization were bounded both in scope and width. Moreover, because they had lacked the superior position of “Yang Wu Pai” (The Westernization Group) in late Qing government, their proposals of reformation only remained in their personal thoughts; it was not possible to influence the political and legal reform in late Qing government.

After the Sino-Japanese War of 1894–1895, the world capitalism was becoming monopolized, and the capitalist superpowers began the vehement competition to fight for leased territories and spheres of influences, so China was facing the danger of being dismembered by the superpowers, which had in turn intensified the contradiction between Chinese nationality and world capitalism; meanwhile, in order to pay back the indemnity, the principal and interest of the foreign debt, Qing government wantonly plundered the wealth of the people, which had in turn intensified the contradiction between the masses and the feudal rulers. The Chinese nation was aroused by the grim national crisis and the call of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and “Bian Fa Zi Qiang” (striving for self-strengthening by reformation) had become the most eloquent voice of the times, moreover, it had also changed the thoughts of political reform and progress of “Wei Xin Pai” (the later Reformists) in the 1870s into an upsurge of ethos with great momentum in the whole society, and gave an impetus to the emergence of another organized political reformation movement—“Wu Xu Bian Fa” (Wu Xu Reform). Liang Qichao once pointed out, “it is the Sino-Japanese war that has awakened our great dream cherished for four thousand of years, ... We are awakened from the snoring asleep.”³⁴ He also said, “Since the military defeat of Sino-Japanese War, the government and the public have got to know that the old laws and doctrines can not be continued any more, therefore, reformation have been supported by more and more people. In addition, public propaganda had been made by “Qiang Xue Hui” (Society for Study of National Strengthening) and *Shi Wu Bao* (*Current News*), which had enabled everyone to be familiar with reform, in the end, reformation is getting more and more popular.”³⁵

³⁴“Gai Ge Qi Yuan” (The Origin of Reform) in *Wu Xu Zheng Bian Ji* (*The Records of Wu Xu Reform*), Vol. 7.

³⁵“Shang Yu Gong Ba” (A Postscript of Imperial Edicts) in *Wu Xu Zheng Bian Ji* (*The Records of Wu Xu Reform*), Vol. 7.

If “Wei Xin Pai” (the later Reformists) in the 1870s was much influenced by “Yang Wu Pai” (the Westernization Group) and they had lacked both theme and focus in their reform, then by the end of the nineteenth century, greater progress had been made by the reformers represented by Kang Youwei, Liang Qichao, Yan Fu and Tan Citong. The starting point of the reformers was to save the nation from subjugation, so their central viewpoints were to reform and change the political system, namely, to change the absolute autocracy into a constitutional monarchy. The reformists, on the one hand, had strengthened the propaganda of public opinion to spread their views to the society to cultivate the reform supporting forces by widely setting up various associations and sending memorials to the emperor; on the other hand, they had tried to win the support of Emperor Guangxu to carry out reform in state decisions. Although the aim of reform was not achieved because of the failure of “Wu Xu Bian Fa” (Wu Xu Reform), the large scale propaganda of public opinion had made the western legal civilization which was introduced by the reformers and their ideas of reform exert a great and lasting influence in the society, which had greatly promoted the modern transition of Chinese law.

18.2.1 The Guiding Principle of the Reform by “Wei Xin Pai” (The Later Reformists)

“Wei Xin Pai” (the later reformists) sprang up in the background of the failure of “Yang Wu Pai” (The Westernization Group) after the Sino-Japanese War and the aggravation of the national crisis, which had made it possible for them to make theoretical innovations and reformation on the basis of learning the lessons from the failures of “Yang Wu Pai” (The Westernization Group).

After making a general survey of the whole process of “Wu Xu Bian Fa” (Wu Xu Reform), we could find out that it was the reform theories expounded by the people like Kang Youwei that were used as guiding principles by “Wei Xin Pai” (the later reformists) to demonstrate the legitimacy of the reform and to direct the reform mentality.

First, by criticizing the theories like “the unchangeable ways of the ancestors” and “rather being subjugated than reform” put forward by the diehards, the reformers came up with the view of “Bi Bian” (inevitable change) based on the theory of evolution, in which the importance and historical inevitability of the reform were stressed. In his book *Xin Xue Wei Jing Kao (The Textual Research of the Falseness of the New Classics)*, Kang Youwei explained that the society had evolved by following the three stages of “Ju Luan Shi” (autocracy), “Sheng Ping Shi” (constitutional monarchy) and “Tai Ping Shi” (democratic republic) according to the theory of “Gong Yang San Shi Shuo” (the theory put forward by “Gong Yang” Scholars during “Chun Qiu” or the Spring and Autumn period, the theory holds that society develops in three stages). He also pointed out that the Chinese society at that time was experiencing the transformation from the stages of “Ju Luan Shi” (autocracy) to that

of “Sheng Ping Shi” (constitutional monarchy). In his book *Da Tong Shu* (*A Book of Great Harmony*), he had explained the trend of historical development by attaching the popular theory of evolution of western bourgeoisie to that of Confucianism. He believed that the human society would develop into a perfect world of “Da Tong” (a pantisocracy of perfectibility), and since “the manners and morality of the time are changing and the ways of administration are transforming”, “there are no unchangeable laws that can last for a hundred years”. Therefore, now, only by “legal reform” and “political transformation” was it possible for the “great spirits of the ancestors to be glorified and the peace and stability of the state to be eternally ensured”.

By introducing Thomas Henry Huxley and others’ works, Yan Fu introduced the evolution theory of “survival of the fittest in natural selection”. He thought that if reform was not carried out in China to strive for the national survival, in the end, the country would be subjugated and the nation would be exterminated as was implied in the evolution theory. For this reason, Liang Qichao had cried out that “why the laws must be changed? This is because there is nothing in the world that may not be changed”, thus, “laws are public instruments, and changeability is an established principle”.³⁶

Second, by criticizing “Yang Wu Pai” (The Westernization Group) for their “just learning the superficial”, the theory of “Quan Bian” (complete reform) and “Bian Ben” (essential change) was put forward. Kang Youwei thought that it could not be called “Bian Fa” (political reform) if there was no “Quan Bian” (complete reform) in society and no “Bian Ben” (essential change) in political system, it could only be called “Bian Shi” (the change of events). He stressed repeatedly that “an overall planning of the situation should be made to plot for a reform”, and that people should not “just tackle the minor problems, nor just stress what was the least important and neglect ‘Ben’ (the essence) like what ‘Yang Wu Pai’ (the Westernization Group) has done.”³⁷ As to the contents of the so-called “Ben” (the essence), it was clearly pointed out by Kang Youwei that it referred to “drafting constitution, opening national congress, managing government affairs collectively with all of the people and establishing the system of separation of powers by three branches”. So it could only be called a real reform when “laws and political systems are changed first.”³⁸ In a way, the theory of “Quan Bian” (complete reform) and “Bian Ben” (essential change) had greatly sped up the making of the overall reform plan by “Wei Xin Pai” (the later reformists).

³⁶Liang Qichao, “Lun Bu Bian Fa Zhi Hai” (On the Harmfulness of Not Having Reforms) in *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 1), Vol. 1, Zhonghua Book Company, 1989, p. 8.

³⁷Kang Youwei, “A Memorial to the Emperor to Express Thanks to his Majesty and to have an Overall Planning of the Whole Situation” in *Kang You Wei Zheng Lun Ji* (*Collections of Kang Youwei’s Political Essays*) (Book 1), edited by Tang Zhijun, Zhonghua Book Company, 1981, p. 275.

³⁸Kang Youwei, “Kang Nan Hai Zi Bian Nian Pu” (Kang Youwei’s Self-edited Chronicle) in *Wu Xu Bian Fa* (*Wu Xu Reform*) (Book 4), edited by Jian Bozan et al., Shen Zhou Guo Guang Publishing House, p. 145.

Lastly, they had called for simultaneous implementation of “Zhong Xi Hui Tong” (the mergence of Chinese and western learning or a comprehensive study of both the Chinese and western subjects) and “Tuo Gu Gai Zhi” (carrying out reforms by imitating the ancients). Although the leaders of “Wei Xin Pai” (the later reformists) like Kang Youwei and Liang Qichao were long influenced by feudal Confucianism, they had also accepted “Xi Xue” (the western studies), that was why the principle of incorporating the things of diverse nature in both Chinese and western culture was adopted in their construction of ideological system in order to look for the common grounds and ways of integrating the two cultures in contradiction and conflicts. They had incorporated Chinese learning with that of the west in many ways. For example, they had matched the elements like “Ren Xue” (the doctrine of benevolence), “Tian Xia Da Gong” (justice for everyone), the thoughts of “Min Ben” (people-orientedness) in Confucianism with those of fraternity, democracy, freedom, equality, human rights in western learning. Thus it was obvious that the principle of “Zhong Xi Hui Tong” (the mergence of Chinese and western learning or a comprehensive study of both the Chinese and western subjects) was a great development compared with the idea of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) by “Yang Wu Pai” (The Westernization Group).

At the same time, on account of the fact that the conservative forces were still strong at the time, the proposal “Tuo Gu Gai Zhi” (carrying out reforms by imitating the ancients) was put forward by “Wei Xin Pai” (the later reformists) in order to reduce the resistance to reform. In his book *Kong Zi Gai Zhi Kao* (A Textual Research of Confucius’s Reform) and *Huang Chao Lie Sheng Gai Zhi Kao* (A Textual Research of the Reforms by the Saints in Qing Dynasty), Kang Youwei had discussed in detail the historical events in which reforms had been carried out by Confucius and each emperor in Qing Dynasty by taking appropriate measures according to the circumstances. And his purpose of doing so was multifold: first, because “it is too great a task for ‘Bu Yi’ (the common people) to carry out political reforms, it is better to trace it back to the former emperors, which was not only easy to be accepted but also helpful to avoid personal persecutions.”³⁹ Second, it could “deprive the conservatives of their excuses for preventing the emperor from issuing new laws”.⁴⁰ So it was not only the unique creation of “Wei Xin Pai” (the later reformists), but also their banner and weapon to carry out the policy of “Zhong Xi Hui Tong” (the mergence of Chinese and western learning or a comprehensive study of both the Chinese and western subjects) and “Tuo Gu Gai Zhi” (carrying out reforms by imitating the ancients) simultaneously.

Under the guidance of theories of political reform centered on “Bi Bian” (inevitable change), “Quan Bian” (complete reform) and “Bian Ben” (essential change), a comparatively comprehensive reform plan involving many aspects like politics,

³⁹Kang Youwei, “Kong Zi Gai Zhi Kao” (A Textual Research of Confucius’s Reform), Zhonghua Book Company, 1958, p. 283.

⁴⁰Kang Youwei, “A Memorial to Emperor to Express Thanks to his Majesty, to Appeal for Book Compilation and to Make an overall Plan for the Whole Situation quickly.”

economy, law, military, culture, education and foreign affairs was made by “Wei Xin Pai” (the later reformists). Although the opinions and the emphases of the representatives of “Wei Xin Pai” (the later reformists) were different, their overall purpose, principles and methods were similar. In all, the reform plan in which the thought of “Quan Bian” (complete reform) put forward by Kang Youwei was used as the guiding principle and the thought of “Bian Ben” (essential change) was used as a breaking-through had become the greatest achievements of “Wei Xin Pai” (the later reformists).

As far as the legal reform was concerned, the theories and practices of “Wei Xin Pai” (the later reformists) were as the following.

First, to establish new legal systems by centering on the constitution. It was one of the most important contents of the reform by “Wei Xin Pai” (the later reformists) to make new laws. Kang Youwei thought that the current laws in Qing Dynasty must be changed because they were already out of date and because “those conservatives who have still clung to the out-of-dated laws not only know nothing about the ways of the administration of the present and ancient times, but also know nothing about the methods of governing the country by different emperors.”⁴¹ Yan Fu concluded by his own observation of the British legislature that “the laws in Britain are to ensure the safety of the people and their families, but ours are to destroy them.”⁴² So he suggested, “Now everything is beginning to change, however, it is one of the most urgent to change the law codes”.⁴³ Therefore, in the reform plans made by Kang Youwei, “Fa Lv Ju” (The Justice Bureau) was placed the first among the bureaus attached to “Zhi Du Ju” (The Bureau for Policy Making), which had shown that by setting up “Fa Lv Ju” (The Justice Bureau), he had intended to make new laws reflecting the will and interests of the new bourgeoisie to guarantee the success of the reform.

In Kang Youwei’s overall thoughts of new legal systems, the most essential points were the adoption of Japanese bourgeois legal regulation after Meiji Reform in order to set up a new legal system centered on constitution. Therefore, making a bourgeois constitution like that of Britain and Japan was not only the focal point of Kang Youwei’s establishment of new legal system, but also his basis of setting up the system of constitutional monarchy. In all his previous memorials to the emperor, he had expressed that only after “the constitution is drafted” was it possible for “a standard to be set up for people to follow to carry out the reform and implement the ‘Xin Zheng’ (the new administration)”.⁴⁴ If “there were no exact interpretations

⁴¹ Kang Youwei, “Shang Qing Di Yi Shu” (The First Memorial to Qing Emperor) in *Kang You Wei Zheng Lun Ji (Collections of Kang Youwei’s Political Essays)* (Book 1), edited by Tang Zhijun, Zhonghua Book Company, 1981, p. 58.

⁴² “An Yu” (Comments) in Chapter 12 in *Fa Yi (The Spirit of the Laws)* by Montesquieu, Vol. 15, translated by Yan Fu, The Commercial Press, 1981, p. 335.

⁴³ “An Yu” (Comments) in Chapter 16 in *Fa Yi (The Spirit of the Laws)* by Montesquieu, Vol. 29, translated by Yan Fu, The Commercial Press, 1981, p. 335.

⁴⁴ Kang Youwei, “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor) in “A Memorial to the Emperor for an Overall Planning of the Nation” in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People’s Publishing House, pp. 199–200.

of the constitution”, there would be no standards for the practice of “Xin Zheng” (the new administration), and there would be chaos: “the opposers are going to refute it, to question its validity and fail to obey it; the decision makers will make decisions in a hurry and fail to do their best; the hesitators will become irresolute because of their doubt and the supporters are confused about its contents”. On the eve of “Bai Ri Wei Xin” (hundred days’ reform), in *A Memorial to the Emperor about Requiring Officials to Settle State Affairs by Reform*, Kang Youwei once again required Guangxu Emperor to issue decrees to the whole country “to adopt the best regulations of all countries, to put the articles of the constitution into practice”, and to take measures in accordance with the articles of the constitution. So from above we could see that the drafting of constitution had occupied an important position in Kang Youwei’s thoughts of reformation. In *Kang You Wei Zhuan (The Biography of Kang Youwei)*, Liang Qichao said, “Mr. Kang believes that it is the most important thing to make the constitution, to change the official system and to define the extent of power in Chinese reform. If the constitution can be made, the official system can be changed and real reform can be implemented, then the internal chaos can be eradicated”.⁴⁵ Liang Qichao also thought by himself that “the constitution is ‘Yuan Qi’ (the spirit) of a country” and “it is also the source of all legal systems”.⁴⁶ So, he suggested that “in the reformation of China, it is most important to make constitution”.⁴⁷

Except constitution, the new legal system also included other departmental laws. In “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor), Kang Youwei said clearly,

At present, the Roman, British, American, German, French, Japanese laws should be adopted, revised and be put into practice ... because civil laws, civil statutes, commercial laws, market regulations, statutes of litigation, military regulations and international laws have all been made by the westerners, and detailed regulations have been provided for forbidding to have international intercourse, to eliminate markets and to stop trade relations and commercial activities. Without laws and regulations, the citizens do not know what to follow, which may cause great trouble. Since no such new laws have been made, special offices should be set up to be put the charge of adopting and revising the laws from the west to make up what we have lacked under suitable circumstances.

The so-called legal system often referred to the overall integrity formed by all of the present legal regulations categorized by different legal sections. Because the nature of social relations which was adjusted by the various legal regulations was different in the unified legal system, different legal sections were further divided, such as the constitution, the civil law and the criminal law, etc. Thus, it could be seen that the implementation of the new legal systems suggested by Kang Youwei it

⁴⁵Liang Qichao, “Kang You Wei Zhuan” (The Biography of Kang Youwei) in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 4), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, pp. 34–35.

⁴⁶Liang Qichao, “Li Xian Fa Yi” (A Discussion on Constitution Making) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 5), Vol. 1, Zhonghua Book Company, 1989, p. 1.

⁴⁷Liang Qichao, “Kang You Wei Zhuan” (The Biography of Kang Youwei) in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 4), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, p. 34.

was based on objective foundations, that was, with the economic development of national capitalism, the appearance of the new legal relationships and the introduction of the laws from western countries, several departmental laws had been formed. For this reason, in order to bring the function of the adjustment of the law into a full play, it was inevitable to set up the new legal systems. If Kang Youwei's thoughts of building up a new legal system were realized, it meant that the Chinese modern legal system modeled on the continental legal system would be established decades ahead of time.

Second, to put into practice the principle of separation of powers and to establish specific offices to be put in charge of judicial affairs. In theory, "Wei Xin Pai" (the later reformists) all agreed to Montesquieu's theory of separation of powers on which their blue-print of reform was also based, because they thought that "it has reflected the nature of administration". Kang Youwei suggested that the reform of autocracy system continued in China for almost 2,000 years should be carried out by Guangxu Emperor by modelling on the political system of separation of powers in the western countries. He said, "In the recent essays on western politics, the separation of powers which included the executive officials, the legislative officials and the judicial officials has often been discussed. So the political system can be perfect only after the three branches are established".⁴⁸ He also said,

The political system of a state is just like the human body, and the legislative is just like the mind, the executive the hands and feet and the judicial the ears and eyes. Each organ performs its function and then the whole body is formed to complete an undertaking. Although the mind is smart, it can not perform the function of hands and feet; although the hands and feet are strong, it can not perform the function of thinking. Now a myriad affairs have to be attended and hundreds of important things have to be dealt with every day in our country, so it is impossible for 'Jun Ji' (The Grand Council) which has performed the function of the government to cope with all matters even for a while, because although it is a vital organization it can not undertake the task of governing the country. As the executive official, 'Liu Bu Zong Shu' (The General Administration of the Six Departments) has to spend time discussing all documents presented to him, so it is just like performing the function of thinking with hands and feet. Although their five sense organs are smart, they do not know what to do.⁴⁹

So he concluded that it was urgent to set up constitutional monarchy according to the theory of separation of powers, because only in this way could the monarchical power be restricted and the function of congress, government and judicial institutions be clearly defined.

During "Bai Ri Wei Xin" (hundred days' reform), Kang Youwei further clarified the political system of constitutional monarchy according to the principle of separation of powers. He said, "According to the theory of separation of powers, the

⁴⁸Kang Youwei, "Shang Qing Di Liu Shu" (The Sixth Memorial to Qing Emperor) in "A Memorial to the Emperor for an Overall Planning of the Nation" in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People's Publishing House, p. 199.

⁴⁹Kang Youwei, "A Memorial to the Emperor about Clarifying the State Affairs and Revising the State Policies" in *Kang You Wei Zheng Lun Ji (Collections of Kang Youwei's Political Essays)* (Book 1), edited by Tang Zhijun, Zhonghua Book Company, 1981, p. 262.

congress is in charge of legislature, the judge is charge of the judicial affairs, the government is in charge of executive affairs and the monarch is in charge of general affairs”, “if the political system of separation of powers is established, China is sure to become a powerful and prosperous country in no time.”⁵⁰ He also said, “The reason for the countries both in the east and west to become powerful is because constitutions have been made by them to ensure the equal government of the people, parliaments have been made by them to discuss the problems, judiciary have been implemented to guarantee the rights of the citizens and responsible governments have been authorized to manage the administration.”⁵¹ But he had regarded the drastic reform measures like the change of political system and redistribution of powers as just simple matters which could be fulfilled easily by the emperor’s change of mind. He said,

If the emperor has made the decision, ...he can take into account the method of making constitution and setting up the congress, think about the significance of separation of powers and order some officials to choose and select carefully, because there are already many readymade common practices available in many countries about the independence of jurisdiction, the responsible government and the methods used in elections of the congress for reference, so it all depends on the emperor’s change of mind.⁵²

Liang Qichao was also a firm advocator of separation of powers, he said, “The executive, legislative and judicial branches are separated and they are not interfered with each other, which can guard against the dictatorship of the government and insure the freedom of the people. The theory (which refers to the separation of power) is put forward by the French master Montesquieu after he has studied the political situation in Britain and made a reference to the generally acknowledged truth in France, which is why his theory is widely accepted by posterity.”⁵³ In his series of works on the separation of powers, although Liang Qichao stressed the rights of legislature, he had never neglected the rights of jurisdiction. After evaluating the disadvantages brought about by “Guan Zhi” (the ruling of officials) and “Fa Zhi” (the ruling of law) in the ancient and contemporary times, he stressed the importance of judicial independence and pointed out that “if both of the executive and judicial

⁵⁰Kang Youwei, “The Memorial to the Emperor about Making Constitution and Opening Parliament” in “A Memorial to the Emperor for an Overall Planning of the Nation” in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People’s Publishing House, pp. 236–237.

⁵¹Kang Youwei, “The Memorial to the Emperor about Ruling Cooperatively by the Emperor and the People and Showing no Discriminations to Manchu and Han Nationalities” in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, pp. 237–238.

⁵²Kang Youwei, “The Memorial to the Emperor about Ruling Cooperatively by the Emperor and the People and Showing no Discriminations to Manchu and Han Nationalities” in *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, p. 240.

⁵³Liang Qichao, “Ge Guo Xian Fa Yi Tong Lun” (On Differences and Similarities of the Constitutions of other Countries) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 1), Vol. 4, Zhonghua Book Company, 1989, p. 73.

powers are exercised by one government organization, those who are in charge of settling the lawsuits will often be influenced by other forces, so in order to maintain and consolidate his own position, he is not exerting his best in the law enforcement and only sit idly without taking any measures, thus, the life and property of the people are put in danger, and the whole country will be thrown into a chaotic and desperate situation... Therefore, under its influence, the foreigners will not believe in our country any more and consular jurisdiction will be established on our land, consequently, it is more difficult to manage internal administration.”⁵⁴

From his experience of on-the-spot survey of British court, Yan Fu argued that the main aspects which were superior in western legal system lay in the fact that under Chinese autocracy, “the emperor and the local officials hold concurrently three positions in the executive, legislative and judicial branches”, and there were no clear divisions in their work, so it was not only difficult to make fair judgments in trials, it was also easy to lead to usual malpractices.

In short, both “Gai Liang Pai” (the early reformists) and “Wei Xin Pai” (the later reformists) had placed high expectations on the theory of separation of powers which was put forward during the western bourgeois revolution. They thought that if the theory could be put into practice in China, it would bring progress, wealth and prosperity. This was by no means accidental, because although there was some class limitation in the theory of separation of powers, its historic significance against feudal dictatorial system could not be obliterated. The institutional divisions formed in the construction of the western countries and their mutually checking and balancing relations had forcefully safeguarded the bourgeois democracy and legal system. So, when it was impossible for Qing government to continue to rule by the traditional political systems, “Wei Xin Pai” (the later reformists) insisted that absolute monarchy should be replaced by the system of separation of powers, which was no doubt a great progress. Nevertheless, at that time, there was no exact and scientific understanding of the bourgeois theory of separation of powers by “Wei Xin Pai” (the later reformists). For example, Liang Qichao had overstressed the power of legislation and inappropriately enhanced the power of congress which had the rights not only to make constitutions and laws, but also to supervise, impeach and make supreme judgments on government officials, which had led to new unbalances. Especially in his later years, in his book *Gai Liang Si Fa Shi (On Legislative Reform)*, Liang Qichao even proposed that “Xian Ling” (the county magistrate) should also take the charge of the judiciary matters concurrently, while the theft cases should be handled by policemen, which had clearly shown his retrogression in thoughts.

Third, to advocate the principle of “Fa Zhi” (the ruling of law) and to oppose the principle of “Ren Zhi” (the ruling of man). Influenced by the thoughts of Montesquieu and Rousseau, “Wei Xin Pai” (the later reformists) had shown an obvious tendency of legalism in ideology. In this aspect, Liang Qichao was a more typical representative.

⁵⁴Liang Qichao, “Zheng Wen She Xuan Yan Shu” (The Proclamation of Political News Agency) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 3), Vol. 20, Zhonghua Book Company, 1989, p. 26.

He said, “Now the countries with constitutionalism are called the countries of ‘Fa Zhi’ (the ruling of law) by some scholars, which means that laws are used in ruling the country.”⁵⁵ “The country ruled by law called by Montesquieu refers to the country in which the laws are applied in ruling.”⁵⁶ Faced with the severe reality of deepening of the crisis of Chinese nationality and the dismembering of China by superpowers, in order to change the current situation and to rescue the country and rival with the western superpowers, Liang Qichao had raised the value of “Fa Zhi” (the ruling of law) to the height of enriching the country, strengthening the army and being independent among the world superpowers. He said, “If one country wants to maintain its position without being defeated in the whirlpool of competition involving many countries, the only way is to carry out the system of ‘Fa Zhi’ (the ruling of law).”⁵⁷ “So, only by ‘Fa Zhi’ (the ruling of law) can the purpose of enriching the country and strengthening the army be achieved.”⁵⁸ According to his opinion, it was not only the requirement of the times to implement “Fa Zhi” (the ruling of law), but also the only way to save and run the country. So he outcried: “legalism is the only principle to rescue the country at present.”⁵⁹

In order to put into practice the theory of “Fa Zhi” (the ruling of law), Liang Qichao stressed that after the constitution was made, the most important thing was to carry it out and win the trust of the people. He said, “Laws are not just decorations, what is the most important is its implementation.”⁶⁰ He even praised those legalists previous to Qin Dynasty: “making no laws unless being truthfully carried out in order to avoid being used for other personal purposes.”⁶¹ After the laws were made, if “they are changed randomly even before being fully implemented in practice”, then “the laws made later will surely lose their effectiveness.”⁶²

Because social relations were very complicated, it was impossible to include everything in the legal adjustment; so the practice of “Fa Zhi” (the ruling of law) should be combined with and complemented by moral education. The function of the positive guidance of morality and its power of punishment by public opinions were what laws could not achieve. Liang Qichao used a figure of speech to explain this point: “the law just forbids what has happened, it is just like the medicine taken after one is ill; while ‘Li’ (rites) can nip the problems in the bud, and it is just like

⁵⁵ Liang Qichao, “Guan Zi Zhuan” (The Biography of Guan Zi) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 7), Vol. 28, Zhonghua Book Company, 1989, p. 12.

⁵⁶ *Ibid.*, (Book 2), Vol. 13, p. 23.

⁵⁷ *Ibid.*, (Book 7), Vol. 28, p. 18.

⁵⁸ *Ibid.*, (Book 2), Vol. 15, 92.

⁵⁹ *Ibid.*, p. 43.

⁶⁰ Liang Qichao, “Collections of Answers to the Questions on Constitution Drafting” in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 4), Vol. 33, Zhonghua Book Company, 1989, p. 10.

⁶¹ Liang Qichao, “Guan Zi Zhuan” (The Biography of Guan Zi) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 7), Vol. 28, Zhonghua Book Company, 1989, p. 23.

⁶² *Ibid.*, p. 19.

the medical measures used for preventing an illness.”⁶³ In his book *The History of the Development of Chinese Jurisprudence: the Rise and Decline of Legalism*, he had more comprehensively expounded the relationship between law and morality by criticizing the paranoiac enforcement of law by the pre-Qin legalists. He said, “Originally laws and ethics were used alternatively, in which the power of social punishment and state penalty forces were combined together, so they are an integrated unity. This is why recently in the countries of ‘Fa Zhi’ (the ruling of law), the laws are often carried out in the name of humanism, and they are considered to be the supplement of morality. So it is wrong for people to believe that they can carry out laws even without caring about morality, moreover, it is even more wrong to believe that since laws have been made, morality is of no use any more.” Only when “Fa Zhi” (the ruling of law) was assisted with moral education was it possible to cultivate people’s conscience of abiding by law, to raise people’s self-control and to stabilize the legal order in the social life of respecting social morality. He pointed out that “without the cultivation of political customs and the establishment of political ethics, even if the best constitution in the world has been made; it is like a piece of waste paper.”⁶⁴ He continued, “If we have the new type of citizens, why should we worry about not having the new systems, new governments and new states.”⁶⁵ It was thus clear that he had placed the hope of implementing “Fa Zhi” (the ruling of law) in raising the quality of the whole people. That was why he had call out that “the essence of reform” could be obtained only by abolishing “Ke Ju” (the imperial examination), setting up schools and academies and cultivating the talented people.

From the standpoint of adhering to legalism, Liang Qichao had sharply criticized Xunzi’s viewpoints, such as “it is by people but not by laws that a country is ruled”; “it is not possible for laws to be independent and regulations to be enforced by themselves; those who have made and followed them will prevail, while those who have failed to do so will perish”; “it is ‘Jun Zi’ (a person of noble character and integrity or gentleman) who is the maker and the executor of laws, so as long as there are gentlemen, even without laws, it is perfect. Without gentlemen, even with the most complete legal systems, the order of priority is inverted, so it is difficult to cope with the changing of situation and may lead to chaos.”⁶⁶ Liang Qichao said, “The thought that ‘it is by people but not by laws that a country is ruled’ put forward by Xunzi has not only misguided the world, but also made China a lawless country and Chinese people a lawless people for thousands of years.”⁶⁷

⁶³Liang Qichao, “The History of Political Thoughts during the Pre-Qin Periods” in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 7), Vol. 28, Zhonghua Book Company, 1989, p. 80.

⁶⁴Ibid., p. 152.

⁶⁵Liang Qichao, “Xin Min Shuo” (On New Citizens) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 4), Vol. 4, Zhonghua Book Company, 1989, p. 2.

⁶⁶“Jun Dao” (On the Way of a Lord), Vol. 12, in *Xunzi*.

⁶⁷Liang Qichao, “Lun Li Fa Quan” (On Legislative Power) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 1), Vol. 9, Zhonghua Book Company, 1989, p. 163.

If the enforcement of laws was decided by people “but not by laws”, there would be no stability and authority for them. What was more, “Ren Zhi” (the ruling of man) was the politics of “Xian Ren” (persons of virtues), therefore, “if we have met with a virtuous ruler, then we can achieve peace, order and stability, however, if we have met with an ignorant ruler, then disorder and chaos may follow. So whether we have a peaceful, orderly and stable society or a chaotic and disorderly one all depends on whether the ruler is virtuous or ignorant.”⁶⁸ While under the system of “Fa Zhi” (the ruling of law), “we may have an equal chance of meeting with a virtuous ruler and an ignorant ruler. But whether we have met with a virtuous ruler or an ignorant one, in the system of ‘Fa Zhi’ (the ruling of law), the decline and decay of the country can be avoided,”⁶⁹ “Even the ordinary man may become a virtuous person when he is ruling the country according to law, ... This is where the advantage and disadvantage of the constitutional monarchy and autocracy have been shown, and it is from the comparison between ‘Ren Zhi’ (the ruling of man) and ‘Fa Zhi’ (the ruling of law) that the conclusion that ‘Fa Zhi’ (the ruling of law) was superior to ‘Ren Zhi’ (the ruling of man) has been drawn”.

After Xin Hai Revolution (or Revolution of 1911), Liang Qichao continued to uphold that “at present, legalism has been firmly established in the world, so although ‘Ren Zhi’ (the ruling of man) has existed for a long time, still ‘Fa Zhi’ (the ruling of law) should not be neglected.”⁷⁰ But when he saw that the legal system brought about by revolution had been repeatedly violated, he felt that good laws might not have brought about expected results because they needed to be applied and implemented by the people with decent moral cultivation. He said, “Although there are good laws, if they are not applied by virtuous people, they are of no avail,”⁷¹ and “laws are not the only elements which have influenced the ruling of a country, although there are good laws, if there are not virtuous people to implement them, they are useless.”⁷² What he said did not mean that his thoughts of “Fa Zhi” (the ruling of law) had been changed, but only that he had become more pragmatic. The history, either of the ancient or present, Chinese or foreign, all proved that the good laws might have acted as the “instrument of ruling” only when they were practiced by noble officials. Just like what Bai Juyi said in Tang Dynasty, “Although conscience laws had been made in Zhen Guan Reign (A golden age of Tang Dynasty in China’s history ruled by Li Shimin whose reign title is Zhenguan), if there were no noble

⁶⁸Liang Qichao, “Zhong Guo Fa Li Xue Fa Da Shi Lun” (On the Historical Development of Chinese Jurisprudence) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 2), Vol. 15, Zhonghua Book Company, 1989, p. 73.

⁶⁹*Ibid.*, p. 74.

⁷⁰Liang Qichao, “Lun Xian Fa Zhi San Da Jing Shen” (On the Three Spirits of Constitution) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 2), Vol. 29, Zhonghua Book Company, 1989, p. 94.

⁷¹Liang Qichao, “The History of Political Thoughts during the Pre-Qin Periods” in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 9).

⁷²Liang Qichao, “Zhen Li Fa Jia” (On Legislators) in *Yin Bing Shi He Ji (The Complete Works of Yin Bing Shi)* (Book 2), Vol. 28, Zhonghua Book Company, 1989, p. 1.

officials to enforce them at that time, it is still difficult to maintain an orderly and prosperous society.”⁷³

The reform suggestions put forward by “Wei Xin Pai” (the later reformists) and the series of decrees issued by Guangxu emperor during “Bai Ri Wei Xin” (hundred days’ reform) had created a strenuous and innovative atmosphere in China in which “the current affairs are talked about by almost every family, and ‘Xi Xue’ (the western studies) is discussed almost by everyone”⁷⁴ at the end of the nineteenth century. As was described by the people at that time: “by the time Kang Youwei arrived in the capital in the spring of the ‘Wu Xu’, the reform movement was surging just like a spring thunder, the men with lofty ideas overseas were burst into thunderous cheers and even the cautious and timid people were motivated as if they had taken medicines which had driven them mad.”⁷⁵ This had reflected the high-spiritedness of the people and the up-surfing of the reform movement, so its historic significance could not be neglected.

18.2.2 The Evaluation of the Reform Ideology and Practices of “Wei Xin Pai” (The Later Reformists)

“Wu Xu Bian Fa” (Wu Xu Reform) was a bourgeois reform movement launched by “Wei Xin Pai” (the later reformists) under the circumstance of the deepening of Chinese national crisis and the acute intensification of the domestic class contradictions. Its direct object was to have an overall reform of the domestic and foreign affairs by political reforms brought about by the emperor’s imperial edicts in order to make China an independent and strong country in the world and to change the severe situation of national survival. Although the movement failed because of the suppression by the obstinate forces, it had exerted a positive influence to Chinese modern social development and legal transition.

“Wei Xin Pai” (the later reformists) had not only inherited but also developed the theory of “Bian Yi” (variability) in Chinese tradition and the political views of “Gai Liang Pai” (the early reformists), at the same time, they had also absorbed the basic spirit of western evolutionary theory and formed their own idea of development centered on “Bian” (changeability) which was used as the guiding principle and basic theory of the movement. Based on this thought, they criticized the reform of “Yang Wu Pai” (The Westernization Group) for its “fragmentary and superficial”

⁷³ *Chang Qing Ji (An Anthology of Chang Qing)*, Vol. 48.

⁷⁴ Ou Quja, *On the Relationships between Political Reform and China’s Non-Subjugation in Wu Xu Bian Fa (Wu Xu Reform)* (Book 1), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, p. 156.

⁷⁵ Luo Zhenyu, “Zhen Song Lao Ren Yi Gao” (The Posthumous Manuscript of Old Man Zhen Song) in *Cai Liao Ji (Collections of Gathering Polygonum)* (selected), *Wu Xu Bian Fa (Wu Xu Reform)* (Book 2), edited by Jian Bozan et al., Shanghai People’s Publishing House, 1957, pp. 249–250.

features and accused it as “whitewashings and patching-ups”. Besides, they had advocated complete reforms in order to have a “Quan Bian” (complete reform), to “eradicate” and “even abolish the least bit of the old systems”. They stressed that without “great, complete, sudden and violent changes, it is impossible for China to survive”. Moreover, they had exposed the reasons for China’s poverty, weakness and humiliation, and pointed out that they were caused not only by the lack of advanced ships and sophisticated weapons but also by the backward feudal system, therefore, they attacked the feudal autocracy and called on people to set up a new constitutional monarchy. In the meantime, they attacked the old custom and ethics, inspired new leaning and new thoughts and encouraged to cultivate new types of people to make the country rich and strong. So as it were, “Wu Xu Bian Fa” (Wu Xu Reform) was not only a great patriotic movement to save the nation from extinction, but also a great democratic enlightenment movement; it had exerted an unprecedented great influence in promoting national awakening, raising democratic consciousness and encouraging people to challenge the old feudal systems and ideas. In fact, the preparation of the public opinion for the reform had not just started from “Wei Xin Pai” (the later reformist). In 1870s, “Gai Liang Pai” (the early reformists) that had separated from “Yang Wu Pai” (The Westernization Group) had extended the tentacles of reform to political areas and made a clear distinction between “Yang Wu Pai” (The Westernization Group). But because their proposals were usually included in books by individuals, their social influences were limited. However, “Wei Xin Pai” (the later reformist) represented by Kang Youwei had expressed their own reform opinions vehemently by appealing directly to the emperor, setting up associations and publishing newspapers under the banner of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and “Qiang Guo Yu Hai” (strengthening the country and fighting against the invasions), so it had had an effect on the people in the ruling class and made them change their viewpoints. During the period, the newspapers like *Shi Wu Bao* (*Current News*), *Xiang Bao* (*Hunan Newspaper*) and *Zhi Bao* (*Zhi Newspaper*, a newspaper published in Tianjin) had become very powerful instruments to publicize reform, because they had made comprehensive comparisons between Chinese and western learning in almost every aspect, on the basis of which a full argumentation for the plan of political reform was held. They paid attention not only to winning the support of scholar-bureaucrats, but also to making full use of the citizens’ own strength to lay a solid social foundation for the reform by “Gu Min Li” (strengthening people’s power), “Kai Min Zhi” (developing people’s wisdom) and “Xin Min De” (renewing people’s morality). It was through the modern ideological and theoretical propaganda held by “Wei Xin Pai” (the later reformists) that the people had been indoctrinated with the thoughts of basic freedom and democracy; therefore, it had become an important page in the history of the development of the thoughts of enlightenment in China. So this was a great change in China which was with a long history of feudal autocracy.

“Wei Xin Pai” (the later reformists) had inherited and developed the theory of “Yin Jin Xi Fa” (introducing the western laws) and “Shao Bian Cheng Fa” (making laws by slightly changing the western laws) put forward by “Yang Wu Pai”

(The Westernization Group), but had made a substantial leap in nature. Their theories of setting up modern legal systems consisted of departmental laws by centering around constitution making, their suggestions of establishing “Fa Zhi” (the ruling of law) and abolishing “Ren Zhi” (the ruling of man), their advocacy of human rights and promotion of freedom and equality, their proposals of separation of powers and the enlargement of legislative power, etc. were all the contents of the comparatively comprehensive bourgeois constitutionalism which “Yang Wu Pai” (The Westernization Group) had never dared to touch upon and which “Gai Liang Pai” (the early reformists) had never dare to achieve.

The legal ideas of “Wei Xin Pai” (the later reformists) had shown new tendencies and new values by absorbing the legal theories of Montesquieu and Rousseau, which were much complicated because of the complexity of their origins. Besides, because of the historical conditions, the personal experiences of “Wei Xin Pai” (the later reformists) and their cultural cultivations, their legal ideas were often immature, and to some extent, even were contradictory. For example, although they opposed constitutional monarchy, they still showed support to Emperor Guangxu; although they were against “Gang Chang” (the Chinese ethical tradition), “Li Jiao” (feudal ethical code), they still tried to bring changes to the political system by “Tuo Gu Gai Zhi” (carrying out reforms by imitating the ancients) and especially by making use of Confucianism. There were many such examples.

In short, the ideological trend of legal culture promoted by “Wei Xin Pai” (the later reformists) was formed in the historical background of fighting against constitutional monarchy and “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival). What they had been pursuing was constitutional monarchy, separation of powers, parliamentary politics, human rights, freedom and “Fa Zhi” (the ruling of law). At the time of describing the blueprints of a country with constitutional monarchy, they had also criticized the political corruption and the judicial darkness in Qing Dynasty. Although there were some similarities in this respect with the western modern enlightenment movement, the development of Chinese modern legal culture had its own regular patterns because of the peculiarity of Chinese history. This was what was needed for us to have a further research and to master.

18.3 The Legal Modernization in Late Qing Dynasty

18.3.1 Constitutionalism and Constitution

1. The raising of the problem of constitutionalism

In the period from 1904 to 1905, the war between Japanese and Russia took place, in which Russia was defeated by the island country of Japan and it had caused great surprise in public opinions. The government officials and people all attributed the success and failure of the war to the advantages and disadvantages of the political systems of constitutionalism and autocracy. Zhang Yin who was a representative of

the bourgeois upper class supporting constitutionalism said in *Zhi Yuan Shi Kai Shu* (*A Letter to Yuan Shikai*), “The success and failure of Japan and Russia is the victory and defeat of constitutionalism and autocracy. Now which country in the world is ruled by the system of autocracy? So it is high time for the autocratic government to make constitution openly”. Soon, Da Shou in *A Memorial to the Emperor for Investigating the Situation of Japanese Constitutional Government* also stated clearly that “Japanese has won the war because of constitution, while the Russia has been defeated because of autocracy.” So “it is not because that the small country can defeat a big country, but that the constitution can defeat autocracy.”⁷⁶

The officials advocating the establishment of constitutionalism had proved the necessity of making a constitution by exposing China’s reality of being invaded and humiliated by foreign superpowers and its worsening social situation. In *A Memorial to the Emperor about Deciding State Affairs to Bring Peace and Stability to the Country*, Duan Fang, “Xun Fu” (procurators) of Hunan Province, had pointed out,

Now, the world is dominated by a group of big powers, and the law of the jungle has been accepted by almost all countries, therefore, if it is not possible for a country to survive by itself, it will surely be destroyed; if it is not possible for a country to rob the others, it will surely be robbed. Thus, there is no chance to live in a fool’s paradise in order to survive. Now China lies in the center of competition of many countries and they have been craving for China’s vast territory, abundant resources and large population, therefore, it has become a commercial battlefield. For this reason, if China’s domestic affairs are not changed, its despotism not demolished, its constitutional system not established, then, there will be no hope for its becoming rich and strong.⁷⁷

In *A Secret Statement of my Humble Opinions about the Reasons for the Listing of Ten Urgent Matters*, Yuan Shikai said,

If every country plans to share the profits equally in the excuse of equilibrium of forces, the overall situation of our country will be in danger. So, no one can go to sleep soundly in such crisis, and there are no other better ways to save China from extinction except by preparing to make a constitution at once earnestly. If we still cling to the old traditions, do not take measures quickly to carry out reform and let things take their courses, the country will go from bad to worse, the sovereignty will be weakened and the territory will be eroded day by day. In the end, the situation will be worse than that of Korea. I am extremely disturbed whenever I think of this.⁷⁸

Moreover, those people were also terrified by the up-surge democratic revolutionary situation, and they had related the chaos at home with the foreign invasions to show the urgency of making constitution. Song Baoqi, the envoy to France, had appealed in his memorial to the emperor, “the constitutional monarchy should be set up by imitating the systems of Britain, Germany and Japan, and it should be first

⁷⁶ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, p. 29.

⁷⁷ “A Memorial to the Emperor about Deciding State Affairs to Bring Peace and Stability to the Country” in *Duan Zhong Min Gong Zou Gao* (*Duan Zhongmin’s Memorials to the Emperor*), Vol. 6.

⁷⁸ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*), published by the First Historical Archive of China, No. 114.

declared to the world in order to unite the people and guarantee the safety of state, . . . , otherwise, there will be more humiliations imposed by foreign countries every day. Consequently, the people, terrified by the situation, will take reckless actions. So if a crisis bursts out, it will be disastrous to the society.”⁷⁹ Yuan Shikai and Duan Fang further stressed, “There are no other better ways to wipe out the revolutionaries except establishing constitutionalism at once.”⁸⁰ Therefore, “it is better to follow the majority’s expectation of setting up constitutionalism and weeding out the treasonous groups which have been agitating against Manchu nationality.”⁸¹

Under the pressure of the requirements of the officials home and abroad and the public opinions for establishing constitutionalism, Yuan Shikai’s memorial to the emperor was accepted by the Qing Imperial Court, and the emperor was required to send his near relatives and trusted intimates to different countries in the east and west to carry out investigations about their political systems. So, on the 14th of June of the 31st of Guangxu (July 16, 1905), the following decree was issued by the emperor:

The imperial court has repeatedly issued wise decrees to strive for reformation with keen determination in order to promote prosperity but for years, although on a large scale, it is of no avail. Neither have the people in charge explained it clearly, nor have they looked into the causes, they have just followed the old customs and practices without striving for any changes, so they are negligent in their work. In this way how is it possible for them to save the country from weakness and crisis? . . . , therefore, Zai Ze, Dai Hongci and Duan Fang have been sent with their attendants to the countries in the east and west to have an investigation of their political affairs and adopt what they think are the best.

The above decree required the officials in charge of the investigation to “ask about anything interested, observe carefully and examine in detail without failing to achieve what the emperor has expected”. He also ordered that “as to the constitution . . . after the investigation, if proved harmless, it will be put into practice.”⁸²

The five officials were divided into two groups and sent to Japan, the United States, Britain, Germany, France, Belgium, Italy and Austria respectively to make on-the-spot investigations. Because in “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) the imperialist powers had seen that “the Chinese people are still immeasurably vigorous”,⁸³ consequently, they thought that “it is just sleep talking to dismember China.”⁸⁴ Hence, in policy, they put forward the proposal of “ruling

⁷⁹ *Dong Fang Za Zhi (The Oriental Magazine)*, Vol. 7, 1904.

⁸⁰ *Shen Zhou Ri Bao (Shen Zhou Daily or Global Daily)*, August 16, 1907.

⁸¹ *Duan Zhong Min Gong Zou Gao (Duan Zhongmin’s Memorials to the Emperor)*, Vol. 8.

⁸² *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 1.

⁸³ *Wa De Xi Quan Luan Bi Ji (A field-Marshal’s Memoirs: from the Diary, Correspondence, and Reminiscences of Alfred, Count von Waldersee . . .)*, translated by Wang Guangxi, Shanghai Bookstore Publishing House, 2000, pp. 143–144.

⁸⁴ Wang Qiqu, “You Guan Yi He Tuan Yu Lun” (On the Public Opinions about ‘Yi He Tuan’) in *Yi He Tuan (The Boxer Rebellion Movement)* (Book 4), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Shen Zhou Guo Guang Publishing House, 1951, p. 246.

China by Chinese”,⁸⁵ and they had considered it “the best way to support Qing Dynasty”⁸⁶ in order to ensure their interests in China; in practice, they had actively supported the activities of Qing government to establish constitutionalism and warmly welcomed and greeted the five officials. In addition, they had advised repeatedly that “if your country wants to become independent and prosperous, the most important thing is to establish constitution.”⁸⁷ In the end, memorials were presented to the emperor by the five officials to ask him to make constitution as soon as possible according to what they had seen in their investigations. After they returned, in May of the 32nd year of Guangxu (July, 1906), they advised Guangxu emperor to set up constitutional systems in a five-year period. In their memorial they wrote,

Constitutionalism is the only way to save China from extinction. Now in the world, constitutionalism has been adopted by almost all the countries, whether strong or weak, big or small, so a major programme of the most importance can be foreseen. Constitutionalism can help to bring peace and stability to the country, resist foreign invasions, consolidate the foundation of the state and protect the people ... therefore, it has become the general trend of the world, and only constitution can protect the state and ensure the government.⁸⁸

They also gave the example of Russia. In 1905, the constitution was made in order to prevent the revolution. Throughout the example, they showed that “only constitution can help prevent the revolutionary crisis”. If constitution was established, the revolutionaries “will have no pretext to tell lies and will have no followers, even if they want to agitate riots. Therefore, the criminal offences will perish from the scene.”⁸⁹

From the comparison of the constitutional political systems of various countries, they drew the conclusion that the republican systems of United States and France, in which absolute human rights were stressed, were quite “different from that of China”; although the political system of Britain was constitutional monarchy, it had too much control over the powers of the emperor, so it might lead to some worries about the “restrictions” of the power. Only the German constitution made in 1871 and the Japanese constitution made in 1889 which were typical of the system of monarchy sovereignty were “similar to that of China”, so they should be modeled on.

As to Empress Dowager’s worries about losing her power after the establishment of constitutionalism, they explained that the constitutional monarchy could benefit both the nation and the people and could “make the emperor’s power firm and solid forever”, because “in the constitutions of almost all countries, the articles are included which rule that ‘the monarchical power is of highest majesty, the ruling of

⁸⁵ Wang Qiqu, “On the Public Opinions about ‘Yi He Tuan Yun Dong’” in *Yi He Tuan* (Book 4), edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Shen Zhou Guo Guang Publishing House, 1951, p. 250.

⁸⁶ Robert Hart, *Zhong Guo Shi Ce Lun (Essays on the Chinese Visitation)*.

⁸⁷ *Duan Zhong Min Gong Zou Gao (Duan Zhongmin’s Memorials to the Emperor)*, Vol. 6, p. 18.

⁸⁸ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 111.

⁸⁹ Zai Ze, “A Secret Memorial to the Emperor about the Declaration of Constitutionalism” in *Xin Hai Revolution* (Book 4), pp. 28–29.

monarchy is everlasting, and the monarchical power is divine'. Besides, the emperor can enjoy ease, happiness, respect and honor, what is more, he does not have to shoulder the responsibilities or criticism for the arduous and difficult things, ...it is common in eastern and western countries to make guiding principles for state and military, to change the cabinet and to dissolve the congress, nevertheless, they have never attempted to get rid of monarchy." In his secret memorial, by quoting the part about the monarchy in Japanese constitution, Zai Ze also explained that "the monarchy has the power to govern the domestic and foreign affairs, to control armaments and finance, to grant awards, to exercise punishments, to demote or promote officials, to wield absolute power over others and to control the congress."⁹⁰ So Zai Ze hoped that "Empress Dowager and the Emperor can issue special imperial edict declaring that constitutional system be established within five years." About the time limit, in order to cater to the Emperor's will, Zai Ze said in *A Secret Memorial to the Emperor about Declaring Constitutionalism*:

After the constitution making is declared, it should be made clear that it is just a preparatory work, and there are no deadlines for it to be carried out. The Japanese declared constitutionalism in the 14th year of Meiji, but it did not open the congress until the 22nd year, and it is still legal, so we may follow its suit....The text of the constitution may be stated explicitly first, subsequently, the news may be spread far and wide, then the people's thoughts will be unified and their attention will be focused without any other different opinions, which will both make those expecting to reform satisfied and their obedient character cultivated.⁹¹

In summary, the five officials had clearly seen both the general tendency of the development of the world, and the disadvantageous status which China had occupied in the fierce struggle in international environment, "thus, the only way out is by constitutionalism".⁹² So it could be seen that the preparation of constitutionalism in late Qing Dynasty had started from the five officials' investigation abroad, however, what needed to be specially mentioned was that among the followers of the five officials abroad were some young and open-minded scholars who had become not only the supporters and advocators of the preparation of constitutionalism in late Qing Dynasty, but also the founders of legal systems in the early years of the Republic of China after they had been baptized by the western democratic politics.

Empress Dowager had carefully studied Zai Ze and Duan Fang's memorials, and after seven interviews and a series of meetings, she was finally persuaded by the three advantages of constitutionalism listed by Zai Ze in *A Secret Memorial to the Emperor about Declaring Constitutionalism*, "First, the emperor's position is eternally strengthened ...second, foreign invasions can be prevented ...third, domestic disorders can be avoided." So, on the 13th of June of the 32nd year of Guangxu (Sept. 1, 1906), *A Declaration of Emperor's Instruction about Setting up Official Systems for the Preparation of Constitutionalism* was issued, and it was declared that,

⁹⁰Zai Ze, "A Secret Memorial to the Emperor about the Declaration of Constitutionalism" in *Xin Hai Revolution* (Book 4), Zhonghua Book Company, pp. 28–29.

⁹¹*Xin Hai Revolution* (Book 4), Zhonghua Book Company, pp. 28–29.

⁹²*Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 29.

“Now, it is high time to have a detailed investigation and to establish constitutionalism. The great power is centralized in the imperial court and the administration is supervised by the public in order to lay a solid foundation for eternal peace of the state.” The emperor’s instruction that “The great power is centralized in the imperial court and the administration is supervised by the public” had become the guiding principle of constitutionalism in late Qing dynasty, which had reflected the nature and basic points of constitutional political system at that time.

Because the establishment of constitutionalism in late Qing dynasty was compulsory and its main purpose was to deal with the domestic and foreign crisis and to gain the so-called “three advantages”, no deadline was laid down for the preparatory work of the establishment of the constitutionalism. “It may take several years for the matter to be developed to a certain scale, to be investigated, to be consulted with the established constitutions of various countries, to be discussed about the time for its establishment and to be declared in public. The final implementation will be determined by the speed of the progress.” Therefore, because there were no time limits for its preparation, to a certain extent, it was only an empty promise that could never be fulfilled. Moreover, in the emperor’s instruction, it had been stated forcefully that during the time of the preparation of constitutionalism, “‘Jiang Jun’ (the general), ‘Xun Fu’ (procurators) and ‘Du Du’ (the military viceroys and procurators) of each province should inform the soldiers and ordinary people to work hard; to fully understand the meaning of being loyal to the emperor and be patriotic; to know the principles of being gregarious with the other people; to follow the orders and to keep peace; not to be harmful to the public interests for personal views and not to spoil great plans for little discontents, because only in this way can we become qualified citizens to be constitutionalized.”⁹³ This had actually become new excuses for restricting the freedom of speech and limiting people’s behaviors.

But in the emperor’s edict, it was admitted that the root cause which had led to the different situations of China and western countries lay in the system itself and “the decline of China’s national power is caused by the misunderstanding between officials and people and the seclusion of China from the outside world. Therefore, the officials do not know how to protect the people, and the people do not know how to serve the country. Whereas, it is possible for some of the countries to become wealthy and strong, because constitutions have been established, decisions have been made according to public opinion, the monarchs and the people have been intimately united together, so they often share a common fate. Besides, the strong points of other countries have been learned extensively and the boundaries of the power of the authority have been stated clearly. What is more important, the matters concerning financial affairs, the teachings of Confucian classics and administrations are all open to the public. Moreover, they have learned from other countries and carried out reforms according to new circumstances in order to achieve the best, which have not only made the governments function well but also made the people

⁹³ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 1), Zhonghua Book Company, 1979, p. 44.

live in peace and harmony.”⁹⁴ This was a great progress compared with the views of “Yang Wu Pai” (The Westernization Group) because according to them, Chinese was superior to the western countries both in civil and military systems but only inferior in weapons.

The Qing imperial Court had declared “to implement constitutionalism by learning from the other countries” in the form of open edict, which had caused a great stir in the political field just like a ripple in a lake of dead water. Those exiled abroad like Kang Youwei and Liang Qichao had hailed it as a “great decision”, moreover, they even had cooperated willingly with the Qing imperial Court without complaining about their old grudges in order to prevent the revolution. Later, Kang Youwei had reorganized “Bao Huang Hui” (Protect the Emperor Society), changed it into “Guo Min Xian Zheng Hui” (The National Association of Constitutionalism), and expressed his willingness to cooperate with Qing imperial court to establish constitutionalism. The people like Liang Qichao and Jiang Zhiyou had organized “Zheng Wen She” (The Political News Agency) in Tokyo, issued *Zheng Wen She Xuan Yan Shu* (*The Proclamation of Political News Agency*) and required “the establishment of constitutionalism”, the “practice of the parliamentary system, the construction of a responsible government” and the setup of local autonomy”. In the 34th year of Guangxu (1908), the headquarters of “Zheng Wen She” was moved to Shanghai, and they had got in touch with other parties in China which had supported constitutionalism and gone around crying for the support of the establishment of constitutionalism. Although they had repeatedly stated that “they have never intended to show disgrace to the emperor and cause trouble to the society”,⁹⁵ the imperial court was frightened, consequently, “Zheng Wen She” was closed down.

During the period, the constitutionalists like Zhang Jian, Zheng Xiaoxu, Tang Shouqian and Tan Yankai were also excited by the imperial court’s declaration to make preparation for constitutionalism, one after another, they began to set up organizations like “Yu Bei Li Xian Gong Hui” (The Consortia for the Preparation of the Constitutionalism), “Xian Zheng Chou Bei Hui” (The Associations for the Preparation of Constitutionalism), “Xian Zheng Gong Hui” (The Consortia of Constitutionalism), “Zi Zhi Hui” (The Associations for Autonomy), through which they had propagated constitutional monarchy in public and made organizational preparations for the subsequent presentation of petition to the congress.

At that time, only those democrats representing the lower and middle bourgeois classes had criticized the preparation of constitutionalism, they had condemned it as “putting the policy of the centralization of authority into practice under the disguise of establishing constitutionalism in order to weaken the power of Han nationality and take possession of the properties accumulated by the emperors in the thousands of years.”⁹⁶

⁹⁴ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, p. 43.

⁹⁵ *Xin Hai Revolution* (Book 4), p. 107, 101, 112, 115.

⁹⁶ Cheng Chunsheng, “The Records of Ping Li Uprising in the Year of Bingwu (1906)” in *Xin Hai Revolution* (Book 2), p. 477.

2. “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council)

After the imperial edicts were issued by the Qing Court declaring the preparation for constitutionalism, some of “Du Fu” (the viceroys and procurators) and “Xun Fu” (procurators) presented memorials to the emperor to ask for the establishment of “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council). Under the pressure of the court, the commonalty and the public opinion, the emperor issued edicts for the setting up of “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) during August and September of the 33rd year of Guangxu, and then issued the regulations of “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) and the regulations for the election of the councilors, which had initiated the large scale preparation for the establishment of the two organizations.

(a) “Zi Yi Ju” (The Consultative Bureau)

On the 13th of the September of the 33rd year of Guangxu (Oct. 19, 1907), the emperor’s edict for the setting up of “Zi Yi Ju” (The Consultative Bureau) was issued to each province, and according to the edict,

Offices should be set up in each province to hear public opinions, to discuss the advantages and disadvantages of the policies in the province, to draft plans for the administration of local social order and to select gifted people for ‘Zi Zheng Yuan’ (The Advisory Council). ‘Zi Yi Ju’ (The Consultative Bureau) should be set up in the provincial cities at once by ‘Du Fu’ (the viceroys and procurators) and ‘Xun Fu’ (procurators), besides, some wise, open-minded and righteous gentlemen be chosen to be in charge of it. ...All the important affairs concerning the starting and changing of the business in the local province should be first discussed by the members of ‘Zi Yi Ju’ (The Consultative Bureau) and then decided by the important officials to be put into practice. If some important events occur, ‘Du Fu’ (the viceroys and procurators) and ‘Xun Fu’ (procurators) in each province should present memorials to the emperor for solution. ‘Zi Yi Ju’ (The Consultative Bureau) has the right to recommend candidates to be elected to be councilors in ‘Zi Zheng Yuan’ (The Advisory Council) in future. If there is anything for ‘Zi Zheng Yuan’ (The Advisory Council) to investigate or inquire about, it can make inquiries either to ‘Du Fu’ (the viceroys and procurators) and ‘Xun Fu’ (procurators) to be delivered to the bureau or directly to the bureau. If there is anything to be discussed in the bureau, it can either inform ‘Du Fu’ (the viceroys and procurators) and ‘Xun Fu’ (procurators) of the province or write directly to ‘Zi Zheng Yuan’ (The Advisory Council) for an answer. In the mean time, the consultative congresses in each ‘Fu’ (prefectures), ‘Zhou’ (subprefectures), ‘Xian’ (county) should also be set up. Extensive measures should be taken in each province to complete the task quickly. In addition, the daily administrative activities should be in accordance with those which have been made public in order to live up to the imperial court’s expectation of assiduity and diligence in administration.⁹⁷

On the 24th of June of the 24th year of Guangxu (July 22, 1908), a memorial to the emperor about *Ge Sheng Zi Yi Ju Zhang Cheng* (*The Regulation for “Zi Yi Ju” in Each Province*) and *Ge Sheng Zi Yi Ju Xuan Ju Zhang Cheng* (*The Regulation for the Election of the Member of “Zi Yi Ju” in Each Province*) was presented by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau), it was

⁹⁷ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979, p. 667.

approved by Guangxu Emperor and then “Du Fu” (the viceroys and procurators) and “Xun Fu” (procurators) in each province were ordered to complete the work within one year.

Ge Sheng Zi Yi Ju Zhang Cheng (The Regulation for “Zi Yi Ju” in Each Province) was divided into 12 chapters and 62 articles. In the first article of *Zong Gang (The General Outline)*, it was declared clearly: “‘Zi Yi Ju’ (The Consultative Bureau) is an institution to hear the public opinions and its aim is to discuss the advantages and disadvantages of the policies in the province and to make plans for the administration of the local public security.”

“Zi Yi Ju” (The Consultative Bureau) consisted of one councilor and two associate councilors, who were elected by its members. During its adjournment, several standing councilors selected among its members were put to the charge of the work.

In addition, “Zi Yi Ju” (The Consultative Bureau) had the following powers: to discuss and decide the establishment and changing of businesses in each province; to discuss and decide budgets, final accounts, tax regulations, government bonds, the increase of obligations, the conferring and abolition of rights; to discuss and decide the amendment and revision of the separately edited rules and regulations in the province and the election of members of “Zi Zheng Yuan” (The Advisory Council); to reexamine the consulted subjects by “Du Fu” (the viceroys and procurators) and “Zi Zheng Yuan” (The Advisory Council); to receive and examine the suggestions by the self-governing associations and the people; and to arbitrate and resolve the disputes in the self-governing associations.

All that had been discussed and agreed by “Zi Yi Ju” (The Consultative Bureau) should be submitted to “Du Fu” (the viceroys and procurators) to be announced and executed. Moreover, if “Du Fu” (the viceroys and procurators) opposed, it should be reexamined by “Zi Yi Ju” (The Consultative Bureau), and if “‘Du Fu’ (the viceroys and procurators) disagree with ‘Zi Yi Ju’ (The Consultative Bureau), the disputes should be reported to ‘Zi Zheng Yuan’ (The Advisory Council) for solution”. Besides, “if ‘Du Fu’ (the viceroys and procurators) have overridden the right of ‘Zi Yi Ju’ (The Consultative Bureau), or have violated the law, it should be reported by ‘Zi Yi Ju’ (The Consultative Bureau) to ‘Zi Zheng Yuan’ (The Advisory Council) for examinations and solutions”. “The speeches made by the members of ‘Zi Yi Ju’ (The Consultative Bureau) should not be criticized by the outsiders”, and “the members of ‘Zi Yi Ju’ (The Consultative Bureau) are exempted from arrestment during the session unless with the consent of ‘Zi Yi Ju’ (The Consultative Bureau) itself if they have not committed on-the-spot crimes.”

The session of “Zi Yi Ju” (The Consultative Bureau) was divided into two types: annual and provisional sessions. The annual session was held once a year, which lasted about 40 days from the first of September to the 11th of October. “In time of emergency”, the provisional session could be held by “Zi Yi Ju” (The Consultative Bureau) at any time if it was ordered by “Du Fu” (the viceroys and procurators) and required by 1/3 of its members, the session lasted for about 10 days.

“The ‘Du Fu’ (the viceroys and procurators) of each province have the powers to supervise the elections and the sessions of ‘Zi Yi Ju’ (The Consultative Bureau), they also have the power to decide and carry out the bills passed”. If “Zi Yi Ju”

(The Consultative Bureau) had overridden its power and neglected the suggestions of “Du Fu” (the viceroys and procurators), or if the bills passed were against the law, or the members had shown violent behaviors, “Du Fu” (the viceroys and procurators) had the rights to have the session canceled. If contempt had been shown by “Zi Yi Ju” (The Consultative Bureau) to the court, or the subjects which might bring harm to the peace and stability of the society had been discussed, or the order to cancel the meeting had not been followed, or most of the members had not attended the meeting even if they had been repeatedly urged, then “Du Fu” (the viceroys and procurators) had the rights to plead to the imperial court to dissolve “Zi Yi Ju” (The Consultative Bureau) and to make reports to “Zi Zheng Yuan” (The Advisory Council). From above, we could see that the institution with the nature of so-called local parliament was in fact closely supervised by “Du Fu” (the viceroys and procurators), which had reflected the intention of the imperial court to ask the local “Du Fu” (the viceroys and procurators) to take “detailed and meticulous” precautions.

According to *Ge Sheng Zi Yi Ju Xuan Ju Zhang Cheng* (*The Regulation for the Election of the Member of “Zi Yi Ju” in Each Province*), the members of “Zi Yi Ju” (The Consultative Bureau) in each province were elected by a system of alternative vote by “Fu” (prefectures), “Zhou” (subprefectures) and “Xian” (county). The people were qualified to be candidates and could be elected as the members of “Zi Yi Ju” (The Consultative Bureau) if they fitted in with the following requirements: the males born in the province, aged over 25, who had had the experience of dealing with local affairs as well as other affairs of commonwell, and those who have obtained great achievements in their work for over 3 years; those who were the graduates of secondary schools or senior licentiates; those who were “Qi Pin” (the seventh rank) officials in civil service and those who were “Wu Pin” (the fifth rank) officers in military service formally appointed by the imperial court and those who have never been impeached or removed from offices; those native people who had properties which were worth 5,000 yuan and those non-natives whose properties were worth 10,000 yuan in the province where they live.

The males who were born in the province or who had lived in the province for 10 years and aged over 30 were qualified to be elected to be members of “Zi Yi Ju” (The Consultative Bureau).

Those who fitted in with one of the following articles did not have the rights to elect or be elected as members of “Zi Yi Ju” (The Consultative Bureau): those who had evil characters or indecent behaviors and who had dogmatically engaged in malpractices for selfish ends; those criminals who had been imprisoned; those who had cheated others in business; those who had lost property credit; those who were controlled by others; those who were in debt; those who were indulged in opium smoking; those who were mentally ill; those who could not tell clearly the sources of their property and those who were illiterate.

Besides, those who had no rights to elect or to be elected included the following: the officials and the senior private advisers in the province, the standing army men, the complementary armies, the military reserves, the policemen, the monks and Taoists and the instructors of other religions and the non-completes of all schools. Besides, the teachers in primary school also had no rights to be elected.

More than 90.9 % of the members of “Zi Yi Ju” (The Consultative Bureau) elected in each province were “Jin Shi” (an imperial scholar, a graduate of the imperial examination), “Ju Ren” (first-degree scholars), “Gong Sheng” (second-degree Scholars) and “Sheng Yuan” (students). As to the councilors and associate councilors, most of them were the leaders of constitutionalists, such as councilor Zhang Jian in Jiangsu province, the associate councilor Shen Junru in Zhejiang province, councilor Pu Dianjun in Sichuan province, councilor Tang Hualong in Hubei province, councilor Tan Yankai in Hunan Province and Liang Shanji in Shanxi province, and they had played leading roles in “Zi Yi Ju” (The Consultative Bureau).

To the August of the first year of Xuantong (September, 1909), “Zi Yi Ju” (The Consultative Bureau) had been set up in all provinces except Xinjiang. Because of the imbalanced economic, political and cultural development in each province, the understanding of the democratic constitutional political system was different, so their roles played were also different. But in a word, “Zi Yi Ju” (The Consultative Bureau) was praised as “the newest creation and the bud of constitutional politics” by the public opinion.⁹⁸

On the first of September of Xuantong (Oct. 14, 1909), the first annual session of “Zi Yi Ju” (The Consultative Bureau) was opened in each province, and altogether 21 Consultative Bureaus were set up in the whole country. Although “‘Zi Yi Ju’ (The Consultative Bureau) only represented the public opinion of one province, it was neither comparable to the national parliament, nor to the local parliament in each country”,⁹⁹ it had attracted greater political enthusiasm of the constitutionalists, and they had taken the advantage of the legal platform to pass many bills concerning legislature, justice, budget, final accounts, tax regulations, governmental bonds, state sovereignty, enterprises, education, the prevention of drugs and gambling, etc. At the same time, those corrupted and incompetent officials who had taken bribes and perverted laws were impeached, and it had exerted great influence. Moreover, they had extended the unification of different associations to that of different “Zi Yi Ju” (The Consultative Bureau). In October, 1909, a meeting was held in Shanghai by the representatives from more than 16 provinces, such as Hunan, Hubei, Jiangxi, Jiangsu, Zhejiang, Fujian, Shanxi, Guangxi, Jilin and Heilongjiang, and it was decided to send representatives from each province to Beijing to plead unanimously for the instant opening of the parliament.

From September, 1909 to October, 1910, led by Zhang Jian and others, three great petition movements to plead for an instant opening of the parliament congress, instant organization of the responsible cabinet and instant issuing of the constitution were launched. The petition movements had lasted for more than a year, and more than 100,000 people had attended, involving people from almost all walks of life.

⁹⁸Liao Zhi, “The Records of Important Events in ‘Zi Yi Ju’ (The Consultative Bureau)” in *Xian Zheng Xin Zhi* (*The New Records of Constitutionalism*), Vol. 1, No. 1.

⁹⁹“A Memorial to the Emperor about Reviewing the Jurisdiction of ‘Zi Yi Ju’ (The Consultative Bureau) by ‘Xian Zheng Bian Cha Guan’ (The Constitutional Compilation Bureau)” in *Zhong Hua Min Guo Shi Dang An Zi Liao Hui Bian* (*A Collection of Archive Materials of the Republic of China*), Vol. 1, p. 116.

The movements even had won the support of “Du Fu” (the viceroys and procurators) of 18 provinces, the members of “Zi Yi Ju” (The Consultative Bureau) and some government officials. Some overseas students and overseas associations had also expressed their support by sending telegrams. It was true that the great petitions organized by the constitutionalists were closely connected with the domestic situations at the time. Ever since the first year of Xuantong (1909), various struggles like the boycotting of paying taxes and the movements of robbing rice were widely spread. Especially, the military uprising against the ruling of Qing Dynasty by bourgeois revolutionaries were surging forward with great momentum, and the ruling of Qing Dynasty was in great danger. It was because of the clear understanding of this situation that the constitutionalists had urged the Qing government to carry out constitutionalism to save the country from the crisis. In the mean time, they also wanted to take the chance to obtain more political interests. But at the beginning, the Qing government insisted that the parliament not be opened until 9 years after the preparatory period with the excuses of “the citizens’ the lack of knowledge”. Afterwards, the requirement was refused with the excuses of “financial difficulties and widespread natural disasters”. Not until after *Chen Qing Su Kai Guo Hui Ju Zou An* (A Memorial to Plead for an Immediate Opening of Parliament) was passed by “Zi Zheng Yuan” (The Advisory Council) to require the opening the parliament in the third year of Xuantong (1911) did the Qing imperial court decide to shorten the preparatory period from 9 years to 5 years, to set up the responsible cabinet on the third year of Xuantong, and to open the parliament on the fifth year. At the same time, the representatives of the petition movements from different regions were dispersed, shortly afterwards, the plan of the fourth petition by the representatives of Hubei, Hunan and Sichuan province were forbidden by the Qing imperial court.

Although little had been achieved by the three petitions, greater positive influences had been exerted to the spreading and encouragement of democratic constitutional consciousness in the whole country, and the obstinate ruling class of Qing Dynasty was also shocked. The people realized from the experience that the bigoted rulers were not willing to give up their rights easily.

(b) “Zi Zheng Yuan” (The Advisory Council)

On the 13th of August of the 33rd year of Guangxu (September 20, 1907), the edict was issued by the Qing imperial court to set up “Zi Zheng Yuan” (The Advisory Council) and declared that “in the constitutional political system, everything is determined by the public, and administration is managed by the upper and the lower houses. But because the upper and lower houses have not been set up in China, ‘Zi Zheng Yuan’ (The Advisory Council) is set up instead to act as the foundation of the parliament.”¹⁰⁰ Meanwhile, Bo Lun and Song Jianai were appointed “Zong Cai” (president) of “Zi Zheng Yuan” (The Advisory Council) to discuss with “Jun Ji Da Chen” (the grand councilor) to draw up *Zi Zheng Yuan Yuan Gang* (The Regulation for “Zi Zheng Yuan”) which was issued on the first of September of the 34th year of Guangxu (October 14, 1908).

¹⁰⁰“Yu Zhi” (The Emperor’s Edict) in *Da Qing Xin Fa Ling* (The New Decrees of Great Qing), p. 19.

According to *Zi Zheng Yuan Yuan Gang* (*The Regulation for "Zi Zheng Yuan"*), "the purpose of setting up 'Zi Zheng Yuan' (The Advisory Council) was to lay a foundation for the upper and lower houses to hear public opinions."¹⁰¹ Two "Zong Cai" (president) were appointed to manage the general affairs in "Zi Zheng Yuan" (The Advisory Council), who should be experienced princes and ministers, or the people who had made great achievements in their work, moreover, they should be appointed by special orders from the emperor." Two vice presidents were appointed in "Zi Zheng Yuan" (The Advisory Council), who should be "gifted and knowledgeable senior officials over "San Pin" (the third rank) and be appointed by special orders by the emperor." The members of "Zi Zheng Yuan" (The Advisory Council) were to be elected in two ways: either chosen by the emperor or selected through elections. 100 members were chosen by the emperor: the princes and royal nobilities (16), peers of Manchu and Han nationalities (12), foreign princes and foreign royal families (14), "Zong Shi Jue Luo" (royal families and the emperor's near relatives) (6), the officials of different departments (except judges, court prosecutors and policemen) (36), knowledgeable scholars (10) and the taxpayers who had paid the most taxes (10). Another 100 members were elected among the members of "Zi Yi Ju" (The Consultative Bureau) of each province, and they should be examined and decided by "Du Fu" (the viceroys and procurators). Because no members were elected in Xinjiang, there were altogether 98 members from 21 provinces. Reciprocally, the number of emperor-chosen members was also reduced to 98. Both of the emperor-chosen or elected members had equal rights in "Zi Zheng Yuan" (The Advisory Council) without any differences.

"Zi Zheng Yuan" (The Advisory Council) had the rights to make budgets, make final accounts, make tax regulations, issue government bonds, make or amend laws (with the exception of constitution) and to discuss the issues entrusted by the emperor. Besides, the bills "should be presented to the emperor by 'Jun Ji Da Chen' (the grand councilor) and the ministers of each department to be prepared to be discussed at the meeting." After the relevant issues had been discussed and approved by "Zi Zheng Yuan", they should be presented to the emperor by "Zong Cai" (president), "Fu Zong Cai" (vice president), "Jun Ji Da Chen" (the grand councilor) and the ministers of each department for final decisions. To ensure that each member fulfilled his duty, "the speech of the members of 'Zi Zheng Yuan' (The Advisory Council) at the meeting should not be criticized by the outsiders" and "the members are exempted from arrestment unless approved by 'Zi Zheng Yuan' (The Advisory Council) itself if they have not committed serious crimes." The annual session of "Zi Zheng Yuan" (The Advisory Council) was held in September and lasted for 3 months, moreover, the temporary meeting lasted for about one month, and the opening and closing of plenary sessions should be "announced openly in edicts or official newspapers by the emperor."

¹⁰¹ "Xian Zheng Bu" (The Section of Constitutionalism) in *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*) (Book 1).

After *Zi Zheng Yuan Yuan Gang* (*The Regulation for “Zi Zheng Yuan”*) was issued, many other documents were released, including: *Ge Sheng Zi Yi Ju Xuan Ju Zhang Cheng* (*The Regulation for the Election of the Member of “Zi Yi Ju” in Each Province*), *Yi Shi Xi Ze* (*The Detailed Rules for Discussion*), *Fen Gu Ban Shi Xi Ze* (*The Detailed Rules of Being Responsible to Different Affairs by Different Departments*), *Zi Zheng Yuan Pang Ting Gui Ze* (*Rules for the Auditors in “Zi Zheng Yuan”*) and *Ge Bu Yuan Ya Men Guan Hu Xuan Zi Yi Yuan Yi Yuan Xiang Xi Gui Ze* (*The Detailed Rules for the Election of the Members of “Zi Yi Yuan” by Different Departments and Offices*).

On the 20th of the August of the first year of Xuantong (September 23, 1909), “The Ceremony of the Assembly” was set up. On the first of September (October 3) the first annual session was held, at which “Jun Ji Da Chen” (the grand councilor) Yi Kuang had read the emperor’s edict: “‘Zi Zheng Yuan’ (The Advisory Council) is the foundation of the upper and lower houses, and it is also the soul of the constitutional monarchy”, so “it has the responsibilities to provide useful advice to emperor and to be the representatives of the common people.” In the “Speech at the Opening Ceremony”, Prince Zai Feng said, “All members are trusted by the imperial court and recommended by the people”, so “it surely can strengthen the role of constitution and set a good example for the congress.”¹⁰²

During the plenary session of “Zi Zheng Yuan” (The Advisory Council), there was an up-surging petition movement for the immediate opening of congress organized by the provincial consultative bureaus, moreover, many petitions and telegrams from overseas avalanched. The would-be councilor Yi Zongkui suggested that “at the time of crisis, only congress can save the country from extinction, now the associations of ‘Zi Yi Ju’ (The Consultative Bureau) of each province have petitioned to open the congress soon. ... The speaker should settle the agenda and discuss the immediate opening of congress.”¹⁰³ This proposal was agreed on by all people, and in *The Memorial Presented by “Zi Zheng Yuan” (The Advisory Council) to the Emperor about the Immediate Opening of Congress*, it was pointed out formally that “we (‘Zi Zheng Yuan’) think that it is a world-wide tendency to establish similar political systems, and it is self-evident by many historical events that those who support constitutionalism will survive, while those who oppose it will perish. In addition, what is most important in constitutionalism is the establishment of parliament.”¹⁰⁴ For this reason, the imperial court had declared to change the preparatory period of constitutionalism from 9 years to 5 years.

When the members of “Zi Zheng Yuan” (The Advisory Council) decided to impeach “Jun Ji Da Chen” (the grand councilor) Yi Kuang for his lawbreaking and to petition to the emperor for the announcement of immediate opening of congress,

¹⁰² *Xuan Tong Zheng Ji (Records of Xuantong Administration)*, Vol. 27, pp. 1–2.

¹⁰³ *The Records of the First Annual Session of “Zi Zheng Yuan”*, No. 20.

¹⁰⁴ “The Records of the Eighth Meeting” in *Records of the Issues of the First Annual Session of “Zi Zheng Yuan”*, No. 10.

the bill was agreed on and supported by most of the councilors, however, it was berated by Qing emperor:

It has been prescribed in constitution by all emperors of previous dynasties that the emperor has the rights to depose or promote all imperial officials and to decide whether ‘Jun Ji Da Chen’ (the grand councilor) are responsible or not. As to the question of setting up cabinets, it is up to the imperial court rather than ‘Zong Cai’ (president) of ‘Zi Zheng Yuan’ (The Advisory Council) to decide, so the bill is not to be discussed.¹⁰⁵

The Emperor’s Edict about the non-Interference of the Emperor’s Affairs about Setting up Cabinets by “Zi Zheng Yuan” (The Advisory Council) had caused great upheaval in “Zi Zheng Yuan” (The Advisory Council), because it was accused of violation of the spirit of constitution and was condemned as “a method used by autocracy, not by constitutionalism”.¹⁰⁶ Consequently, the holy power of the emperor was greatly challenged by the legal methods used by the councilors who had supported the two motions passed successively to impeach the grand councilor; therefore, it was impossible for the emperor to impose his personal opinions upon others any more because he must also obey the laws, which was unprecedented in Chinese history.

Besides, more than 20 bills were passed by “Zi Zheng Yuan” (The Advisory Council) concerning politics, economy, military, foreign affairs, law, culture, education, local affairs and social customs, but none of them had been “paid attention to by the government.” For example, as far as the laws were concerned, the government had turned a blind eye to the laws passed by “Zi Zheng Yuan” (The Advisory Council), while the laws rejected by “Zi Zheng Yuan” (The Advisory Council) were continued to be enforced. In the matters of budget, although there were more than tens of millions of (Yuan) dollars of imbalance for the budget proposed by “Zi Zheng Yuan” (The Advisory Council), the government openly refused to cut down the budget suggested by it, furthermore, the government had arbitrarily embezzled the money from different projects and borrowed ten billion foreign debts without the consent of “Zi Zheng Yuan” (The Advisory Council), while it even did not dare to protest.¹⁰⁷

On the first of September of the third year of Xuantong (October 22, 1911), the second annual session of “Zi Zheng Yuan” (The Advisory Council) was opened at the time of the rising of revolutionary army. Because of changing situation and growing crisis, a series of important bills were passed, such as the memorial to the emperor about the abolition of temporary regulation of cabinet, the bill about forbidding to appoint relatives as ministers of state, the bill about the immediate abolition of the banning of organizing parties, the bill about pledging to be loyal to the constitution in “Tai Miao” (The Royal Ancestral Temple), the bill about allowing the revolutionaries to reform their parties according to law and to restore their activities and the bill about electing cabinet prime minister according to the

¹⁰⁵ *Xuan Tong Zheng Ji (Records of Xuantong Administration)*, Vol. 29, p. 10.

¹⁰⁶ *The Records of the First Annual Session of “Zi Zheng Yuan”*, No. 27.

¹⁰⁷ *Xuan Tong Zheng Ji (Records of Xuantong Administration)*, Vol. 29, p. 10.

articles of constitution, etc. But because Qing Dynasty was overthrown overnight, these bills were never put into practice.

In a word, the establishment of “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) by the rulers of late Qing dynasty was to deal with the pressures brought about by both the bourgeois revolutionaries and constitutionalists, besides, its establishment was also forced by the imperialist powers. Nevertheless, they had strained every nerve to restrict the powers of the two organizations in order to make them the consultative institutions under the control of emperor and “Du Fu” (the viceroys and procurators) of each province.

Because in “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council), the important policies of government had been openly discussed, openly voted and openly reported in the newspapers, the speeches and arguments of councilors had been selectively recorded and the public were allowed to attend the plenary sessions as observers, it had broken up the secrecy, the arbitrariness and the mystery of policy making at the time of dictatorship, which had not only led to the democratic awakening and the consciousness of rights of the citizens, but also fostered people’s enthusiasm for participating in the political life of the state. The constitutionalists had used the legal platform as a forum to attack the corruption and inefficiency of the Qing Dynasty, to propagate constitutionalism to the public and to fight for freedom and equality. They had tried to include the operation of state into the orbit of constitution and to expand their rights to go into politics through the legal rights of restricting and supervising government.

It needed special mentioning that the firm standing and great patriotic enthusiasm in protecting the rights of sovereignty and fighting against the political blackmail and economic plunder by foreign powers had been shown in the campaign of rejecting debts and protecting railways launched by “Zi Yi Ju” (The Consultative Bureau), which had exerted a great influence both home and abroad and led to the starting of a new phase in history.

3. *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* and *Zhong Da Xin Tiao Shi Jiu Tiao (The 19 Key Doctrines)*

(a) *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*

In the 34th year of Guangxu (1908), the Qing imperial court was shocked by the widespread and tremendous petition movement for congress taking place in 17 provinces and worried that the stability of the political situation would be lost by the joint attack of constitutionalists and bourgeois revolutionaries, so they declared that “we should meet most people’s requirement to set up constitutionalism to offset some small parties’ intention to cause trouble and repulse the Manchu nationality.”¹⁰⁸ So on the first of August of the 34th year of Guangxu (August 27, 1908), *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*, the first constitutional document in Chinese history, was issued.

¹⁰⁸ *Guang Xu Chao Dong Hua Lu (The Records of Donghua in the Reign of Guangxu)*, p. 5722.

In the memorial about the promulgation of *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) and “Zi Zheng Yuan” (The Advisory Council), it was pointed out as the following:

As to constitutions, there are different versions: the outline of constitution by imperial order and the outline of constitution by the people; as to the congress, there are different systems: one-house system and two-house system. According to the emperor’s guiding principles of accepting the good regulations of the other countries and adapting them to Chinese conditions before the constitution is issued, we should first examine the state system of our country, have an investigation of public opinion, and assess its advantages and disadvantages. For most of the countries with constitutions made by the emperor, the essence of government lies in the imperial court. So it is proper to set up congress according to the constitution, but not to make the constitution by the congress. In Chinese state system, it is inevitable to adopt the constitution made by imperial order, and it is an unchangeable truth.

Then they continued to explain the basic contents of the outline of the constitution:

The constitution is the fundamental law of the state, so it should be abided by everyone, both the ruler and the people. From the emperor to the common people, they should all follow rather than break the constitution. The state systems and constitutions in various countries with constitutional monarchy are different, but their essential main points include the following: first, the holy rights of the emperor are not to be encroached; second, the emperor claims the dominion over ruling, and the power is executed according to constitution; third, according to law, the citizens have their rights and responsibilities.

Although the constitutional structure of the separation of powers was expressed in the constitution, it concluded that “the legislature, executive and judicial powers are all governing powers that should belong to the emperor. So in a word, the constitution is most importantly to consolidate the sovereign power and to protect the rights of the people concurrently.” This obviously had made the finishing point to *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*). Thus, based on this point, the structure of the outline of the constitution was first “to list the matters concerning the ruler’s rights, then to illustrate the principle that the ruler guides the subject and finally to list the citizens’ rights and responsibilities to show that the citizens are the essence of a country. Although the rulers and the citizens, the upper class and the lower are all within the scope of law, the great power is still concentrated in the hands of the imperial court; although the good regulations of other countries have been adopted, the constitution should accord with the Chinese tradition.”¹⁰⁹

In the edict *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) issued in the name of emperor Guangxu, the work undertaken by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) and “Zi Zheng Yuan” (The Advisory Council) was praised because “the constitution and the outline for the election of the congress are not only detailed in consecution but also clear in purview. On the one hand, the good regulations of other countries have been adopted;

¹⁰⁹ *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), pp. 5977–5978.

on the other hand, they are in accordance with ‘Li Jiao’ (feudal ethical code) in China.” Besides, it also fits in with the tenet that “the great power is concentrated in imperial court, and the administration is open to public opinion”. So “it should be used as the standard for drafting the constitution and the regulation for the future election of congress, moreover, all the prescribed rights should be rightfully guaranteed and not in the least infringed.” It also announced that “the congress is not to be opened until all the preparatory work has been completed in the coming years.” Therefore, “before the constitution is issued and congress is opened, the current system should be followed, and the people should wait patiently for the preparatory work to be completed and put into practice as scheduled by the imperial court.”¹¹⁰ Finally the emperor’s edict once again stressed that “social stability can be guaranteed only when ‘Ji Gang’ (legal institutions) are strictly enforced”, and “if some trouble makers dare to agitate for sedition, stir up trouble and cause social disorder in the name of law, they will be severely punished by the imperial court according to law in order to prevent them from disturbing social peace and stability.”¹¹¹

Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order) consisted of two parts: “The Power of the Emperor” and “The Rights and Responsibilities of Citizens”. “The Power of the Emperor” was the main text made up of altogether 14 articles; “The Rights and Responsibilities of Citizens” was the appendix made up of altogether 9 articles. So its structure had shown clearly that its main aim was to maintain the emperor’s power. For example, it was stipulated in the first two articles that “the emperor’s ruling of Qing Dynasty is permanent and should be respected” and “the emperor’s holy dignity is never to be infringed”, which had actually become the unalterable cornerstone of both *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* and *Zhong Da Xin Tiao Shi Jiu Tiao (The 19 Key Doctrines)*. In the other provisions of the outline of the constitution, it was regulated that the emperor enjoyed the following powers: the enacting of laws, the delivering and submitting of bills, the convoking and dissolving of congress, the establishment of official systems and the making up of salary systems, the canceling of government departments, the commanding of land and naval forces, the making up of military systems, the declaration of wars and making of peace, the signing of treaties, the enforcement of martial laws, the issuing of orders and the assumption of overall responsibilities of justice. In time of emergency, the emperor can “issue ‘Zhao’ (decree) and ‘Ling’ (order or ordinance) which can take the place of laws” and “restrict the freedom of the citizens”. Moreover, it was also clearly stipulated in *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* that “the laws passed by the congress can not be put into practice without the approval of the emperor”; “the emperor has the rights to appoint officials with no interference from the parliament”; “the emperor has an overall responsibility for military affairs with no interference from the parliament” and “the emperor has the power to deal with

¹¹⁰ Ibid., pp. 5983–5984.

¹¹¹ Ibid.

foreign relations with no resolutions in parliament”. So it was obvious that the legislative and supervising power of parliament was very limited, and either in form or in content, the parliament was not the institution with supreme legislative power.

The part about the sovereign power in *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) was adopted from *Ri Ben Di Guo Xian Fa* (*The Constitution of Great Japanese Empire*) compiled in 1889 (the 21st year of Mingji) in the east and *Pu Lu Shi Xian Fa* (*The Constitution of Prussia*) in the west, but it had deleted the articles about restricting the emperor’s power in the Japanese constitution. So compared with the power of Japanese emperor, the sovereign power of the Chinese emperor was not only without being restricted, instead, it was legalized. In addition, it was stipulated in traditional legal code once again in the form of constitution, as was stated in the memorial by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau): “The legislature, executive and judicial powers are all governing powers belonging to the emperor. So in a word, the primary purpose of constitution is to consolidate the sovereign power and to protect the rights of the people concurrently.” Therefore, “the consolidation of the sovereign power” was “the soul of the constitution”.¹¹²

As far as the citizens’ rights and responsibilities were concerned, it was stipulated in *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) that “all those citizens who are qualified according to law can be elected civil and military officials and congressmen”; “the citizens can not be arrested, imprisoned, and punished without relevant legal provisions”; the citizens have the rights to prosecute, to own property and to live, and the citizens only accept those sentences “by the government tribunals”, but “the freedom of speech, writing, publishing, assembly and ‘Jie She’ (the organization of tongs or secret societies) are permitted only “within the frame of law”. From these regulations we could see that the purpose of constitution was not to protect but to restrict the rights of freedom according to law. In addition, “at the time of crisis, the citizens’ freedom can be restricted by emperor’s ‘Zhao’ (decree) and ‘Ling’ (order or ordinance).” In order to restrict the citizens’ freedom within the scope of law, even before *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) was issued, a series of special laws and regulations had been promulgated, such as *Jie She Ji Hui Lv* (*The Regulation of Assemblies and Organization of Tongs*), and it was ruled that:

The assemblies and tongs can be held or organized as usual if they have nothing to do with politics, but if their aims are unsound, or if they have violated the laws, caused trouble and run counter to the customs, the relevant government offices have the rights to have thorough investigations. For minor offences, the assemblies will be dissolved; for major offences, those involved should be punished. It should be advocated through public opinion in order to bring the citizens under the control of law, which is the foundation of the preparation of constitutionalism.¹¹³

¹¹² *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), p. 5578.

¹¹³ “Min Zheng Bu” (Ministry of Civil Affairs) in *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*) (Book 2).

According to the regulation, the rights of freedom of citizens were strictly restricted, and it had stressed that the freedom must be exercised within the scope of law of Qing Dynasty, but on the contrary, the regulations about the duties and responsibilities of the citizens were not restricted, and they had to perform their duties of paying taxes, serving in the army and observing the laws of the country compulsorily.

Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order) was sharply criticized because its main purpose was to maintain the power of the sovereignty. An essay in the eighth volume of *Dong Fang Za Zhi (The Oriental Magazine)* in 1908 pointed out that *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* was “just decorated with the outer covering of the constitution, but it has brought little changes in the political system and little hopes to the people.” Song Yet-san even attacked it fiercely: “the constitution is only a pretext of the Qing government which is used as a tool not only to seek the centralized power, but also to fool the people.”¹¹⁴

In summary, *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* was only a product of the special historical period in China, which had become the first chapter of constitutionalism in modern Chinese history. Although it was filled with the conservative spirit of “the centralized powers of the imperial court”, it had restricted the sovereign power in the form of fundamental law, prescribing that the sovereign power was also restricted by the constitution, which was a negation of the legislative power of the emperor whose words were once considered laws and constitutions naturally. Since Qin Dynasty, the feudal codes had become more and more elaborate and detailed, but not one of them had imposed any restrictions on the sovereign powers, because the emperor’s power was regarded superior to that of the laws which were made by sovereigns themselves. But in the memorial of *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* presented jointly by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) and “Zi Zheng Yuan” (The Advisory Council), it was pointed out that “both the sovereigns and the citizens should be abided by the constitution, and both ‘Tian Zi’ (the son of Heaven or the emperor) and the common people should observe the laws with no exceptions.” Therefore, “everyone, including the officials of the imperial court and the common people, should be permanently abided by the constitution which was made according to imperial order with no exceptions.”¹¹⁵ So to some extent, it was an unconscious negation of absolute monarchy which had lasted in China for 2,000 years.

According to *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*, jurisdiction should be exercised only by the judicial organizations according to law, and the emperor had no rights to “change the verdicts by his edicts arbitrarily”,

¹¹⁴ *Xin Hai Ge Min Qian Shi Nian Jian Shi Lun Xuan (Selected Editorials in the Ten Years before Xin Hai Revolution)*.

¹¹⁵ “Xian Zheng Bu” (The Section of Constitutionalism) in *Da Qing Fa Gui Da Quan (A Complete Collection of Laws and Regulations of Great Qing)*, Vol. 4, pp. 1–2.

which was also a negation of the autocratic judicial system in feudal times when the emperor was endowed with the supreme legislative power and the power of life and death over the people.

Not only that, at the times of feudal autocracy, the people were duty-oriented, nevertheless, in *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*, for the first time, the citizens' rights of freedom were clearly stipulated. Although its scope of change was quite narrow and was strictly limited, it had changed the citizens' roles as the bodies of social obligations, which was very significant in the awakening of people's power consciousness. In modern constitutional history, great changes had taken place: the obligation-orientedness had been changed to power-orientedness, the stressing of sovereign-rights had been changed to the stressing of the people's right, which was not only a great change in people's legal ideology, but also an important symbol of modern legal civilization. Of course, this was a long process, and constitutionalism in late Qing Dynasty was just a beginning. Under the historical condition at the time, the power of national bourgeoisie was still very weak and was comparatively at a disadvantageous place, the concept of western constitutionalism had not been widely understood and accepted, the nets of traditional "Gang Chang Ming Jiao" (feudal cardinal guides and constant virtues) had not been broken, moreover, the Japanese and German constitutions from which the constitution of Qing Dynasty was taken were also conservative in the preservation of sovereign powers, therefore, to some extent, the constitution was misshapen, nevertheless, although *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* had not "fulfilled the expectation of the whole people",¹¹⁶ its historical position and influence could not be totally obliterated.

(b) *Zhong Da Xin Tiao Shi Jiu Tiao (The 19 Key Doctrines)*

Although the series of activities held by the late Qing dynasty, from the declaration of the preparation of constitutionalism to the issuing of *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)*, had realized the ambitious expectation of the constitutionalists home and abroad, it had not prevented the military struggle of the revolutionaries led by Song Yet-san to overthrow the Qing Dynasty. The constitutionalists were also greatly disappointed by the failure of the establishment of responsible cabinet.

On the 23rd of September of the second year of Xuantong (October 25, 1910), led by Xi Liang who was "Zong Du" (viceroy) of the three provinces in northeast, 17 "Du Fu" (the viceroys and procurators) sent telegrams to the imperial court to plead for the establishment of responsible cabinet, and they required that "the congress be opened the next year".¹¹⁷ Urged by the constitutionalists in the government and the public, the Qing imperial court was forced to agree to set up responsible cabinet first, then to open congress in the fifth year of Xuantong in order to promulgate constitution and put constitutional monarchy into practice.

¹¹⁶ *Xin Hai Revolution*, Vol. 4, p. 6.

¹¹⁷ "A Memorial to the Emperor for 'Du Fu' (the viceroys and procurators) in each Province to Set up Cabinet and Congress" in *Guo Feng Bao (Guo Feng Newspaper)*, Vol. 26, 1910.

On the tenth of April of the third year of Xuantong (August 5, 1911), the 19 articles of *Nei Ge Guan Zhi* (*The Cabinet Official System*) were issued. Because the cabinet was not responsible to the congress which had no rights to decide whether the cabinet was to remain in office or to be dismissed, “Nei Ge Zong Li Da Cheng” (the cabinet prime minister) and “Guo Wu Da Cheng” (the minister of the state affairs) only had the responsibility to “keep the system running, to make political guidelines, to maintain the unification of the administration” and “to help the emperor to handle daily routines”.¹¹⁸ So the cabinet existed only in name and was quite different from that in the western countries. Moreover, in the edict issued in the same day, Prince Yi Kuang was appointed “Nei Ge Zong Li Da Cheng” (the cabinet prime minister), Natong and Xu Shichang were appointed “Nei Ge Xie Li Da Cheng” (the associate primary minister), Liang Dongyan was appointed the minister of foreign affairs, Shan Qi was appointed the minister of civil affairs, Zai Ze was appointed the minister of education, Shao Chang was appointed the minister of justice, Yin Chang was appointed the minister of land forces, Zai Xun was appointed the minister of navy, Pu Lun was appointed the minister of agriculture, industry and commerce, Sheng Xuanhuai was appointed the minister of postal service and Shou Qi was appointed the minister of “Li Fan” (National Minority Affairs).¹¹⁹ These appointments had broken the proportion of equally divided number of officials of Manchu and Han nationalities in each department, so the proportion of Manchu officials and Han officials had become 7 to 4. Besides, some of the most important departments, such as the ministry of foreign affairs, land forces, navy, accounting, agriculture, industry and commerce, were all controlled by the nobles from Manchu nationality, and five of them came from royal families, so the cabinet was called the “royal cabinet”. Consequently, the long-expected cabinet had become a product “contrary to the principles of constitutional monarchy”.¹²⁰ The constitutionalist Zhang Jian had warned the imperial court that they should “not gamble with the state”,¹²¹ because “the royal families have been appointed to control the land forces, the navy and many other important departments”. On the ninth of June of the third year of Xuantong, the speakers of “Zi Yi Ju” (The Consultative Bureau) in each province had also written to the emperor and said,

The monarchs are not to shoulder responsibilities and the royal families are not to organize cabinet, which are the sole principles of constitutional monarchy. In the world, every country with the so called constitutional monarchy should follow the principle, ...now the cabinet organized in China has violated the principles of constitutional monarchy, ... so we would like to ask the emperor to issue edicts to organize a responsible cabinet with no attendance of the royal families to fit in with the mode of constitutional monarchy and to meet people’s expectations,¹²² otherwise, it may lead to unpredictable disasters.

¹¹⁸ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979, p. 561.

¹¹⁹ *Ibid.*, p. 566.

¹²⁰ *Ibid.*, p. 577.

¹²¹ *Se Wen Zi Ding Nian Pu* (*A Self-edited Chronicle of Se Wen*).

¹²² *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, pp. 577–597.

But the Qing imperial court still stressed that “it is the emperor’s rights to organize and dissolve departments and offices, because it has been clearly prescribed in the outline of constitution made in the previous dynasty according to imperial orders that the councilors have no rights to intervene.” Meanwhile, the councilors were sternly scolded: “the constitution should be strictly abided by, and no reckless behaviors are allowed in order to be up to the original intention of constitutional monarchy.”¹²³

“The royal cabinet” had shattered the constitutionalists’ illusion to the imperial court and changed their disappointment into indignation, just as Zhang Jian had said, “The whole country is in agitation and it is fearful that the government and the people have split up more completely.”¹²⁴ So up to this point, the extinction of Qing Dynasty was just around the corner.

On the 19th of August of the third year of Xuantong (October 10, 1911), “Wu Chang Qi Yi” (Wuchang Uprising) took place; soon other provinces followed and declared independence one after another. The Qing government, which was falling apart, on the one hand, had sent troops to suppress the uprising, on the other hand, was ready to convene “Zi Zheng Yuan” (The Advisory Council) to hold interim meetings to discuss countermeasures.

On the sixth of September (October 27), Zhang Shaozen, “Tong Ling” (the commander) of the 20th Division of “Xin Jun” (the new army) stationed in Luanzhou, together with Lan Tianwei, “Tong Ling” (the commander) of the second mixed brigade, presented a memorial to the emperor to plead for the establishment of constitution.

On the 13th of September (November 3), an ultimatum called *Zheng Gang Shi Er Tiao* (*The 12 Articles of the Platform*) was unanimously presented to the Qing imperial court by five generals including Zhang Chaozen, Lan Tianwei and Lu Yongxiang which required the Qing imperial court to “decide immediately and declare clearly . . .”¹²⁵ The main contents of *Zheng Gang Shi Er Tiao* (*The 12 Articles of the Platform*) were to require that the congress be opened within one year, and the congress had the rights to make constitution, to set up responsible cabinet and to elect “Nei Ge Zong Li Da Cheng” (the cabinet prime minister). Moreover, the royal families were not allowed to be appointed “Nei Ge Zong Li Da Cheng” (the cabinet prime minister) and “Guo Wu Da Cheng” (the minister of the state affairs) forever. They also planned to organize “Yan Jin” (now Shanxi and Hebei Province) allied forces to launch an attack on Beijing and to have forced remonstrations.

Endangered by the serious threats from north and south, Prince Zai Feng issued decrees to blame himself, promised to release all political prisoners captured since “Wu Xu Bian Fa” (Wu Xu Reform), admitted that revolutionary parties were formal

¹²³ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, p. 579.

¹²⁴ *Se Wen Zi Ding Nian Pu* (*A Self-edited Chronicle of Se Wen*).

¹²⁵ “A Memorial to the Emperor by Zhang Shaozen, the Commander of the 20th Land Army, on September 13, the Third Year of Xuantong” in *Xin Hai Revolution* (Book 4), p. 96.

legal parties, accepted *Zheng Gang Shi Er Tiao* (*The 12 Articles of the Platform*), ordered “Zi Zheng Yuan” (The Advisory Council) to draft and pass *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*) in a short time and made pledges in the royal temple.

Zhong Da Xin Tiao Shi Jiu Tiao (*The 19 Key Doctrines*) was an urgent “prescription to save the nation” put forward by Qing imperial court which was threatened by forced remonstrations taking place at Luan Zhou and “Niang Zi Guan” (Niang Zi Pass) under critical situation. Out of the consideration of “strengthening the country and maintaining the ruling of royal families”, it was still stipulated the first and second article of *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*) that: “the imperial system of the empire of great Qing is to remain unchanged in all ages” and “the holy emperor is not to be infringed”. Nonetheless, in the historical background of Xin Hai Revolution (or Revolution of 1911), some new features were reflected in *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*). For example, the emperor’s power was reduced, because “the emperor’s power is restricted by what has been stipulated in the constitution” (the third article); the power of the congress was expanded, and the councilors were elected by the public rather than being appointed by the emperor; the congress had the rights to draft and to vote on the constitution, to propose amendments to the constitution, to impeach “Nei Ge Zong Li Da Cheng” (the cabinet prime minister), to discuss, decide and sign international treaties, to declare war and make peace; to make budget, to make final accounting, to decide royal expenditures and the special conditions for the emperor to mobilize army inside the country, which had made congress the institution with real powers. Moreover, the power of “Nei Ge Zong Li Da Cheng” (the cabinet prime minister) was expanded, and “Nei Ge Zong Li Da Cheng” (the cabinet prime minister) who was elected by congress had the rights to nominate “Guo Wu Da Cheng” (the minister of the state affairs), to organize cabinets and to dissolve congress when impeached by it.

However, nothing about the freedom and equality of the citizen was mentioned in *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*), which was retrogression in this aspect compared with *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*), this was because when the document was drafted only “the most important”, namely, the acknowledgement that the relationship between emperor, congress and cabinet was inseparable, had been stressed by Li Jiaju who was “Zong Cai” (president) of “Zi Zheng Yuan” (The Advisory Council). Besides, “those rules which are common to all constitutional monarchy have been omitted for the time being, and they will be amended when the whole document is drafted.”¹²⁶

In summary, constitutionalism in late Qing Dynasty was the result of the interaction between modern political civilization and legal civilization in China, and its occurrence had reflected the promotion of international historical tide and the intensification of domestic social conflicts, therefore, it was historically inevitable. Even if Guo Zengxin, “Tong Zheng Shi” (The Transmission Officer) who had presented a memorial to ask

¹²⁶ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, pp. 101–102.

for the immediate establishment of constitution, admitted that “the current affairs have been unexpected even by the predecessors, even if Confucius and Mencius were alive again, they would have to study the new reform theories.”¹²⁷ As the most important fruits of preparatory work, although *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*), *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*) and “Zi Zheng Yuan” “Zi Yi Ju” *Zhang Cheng* (*The Regulation for “Zi Zheng Yuan” (The Advisory Council) and “Zi Yi Ju” (The Consultative Bureau)*) had still retained the traces of tyrannical royal power and hierarchical privileges, they had shown the modern legal civilization which had used constitution as the cornerstone of legal systems, democratic politics, “Fa Zhi” (the ruling of law) and human rights as its basic connotation and “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and the pursuit of self-survival, self-strengthening and independence as its aims.

It was true that the historical development was often contrary to the subjective expectations of the rulers. The concepts like democracy, freedom, constitution and the separation of powers which had once been regarded as heresies were not only legalized, but also became the theoretic guidelines of constitutionalism. In addition, they had provided constitutionalists with legal bases to call on people to launch attacks upon the government and practice constitutionalism, through which the strict banning on assemblies and “Jie She” (the organization of tongs or secret societies) imposed by Qing government was completely repealed. Nevertheless, constitutionalism which was carried out in order to save the nation had not saved Qing Dynasty from extinction; it had only provided a priori for the succeeding constitutional government in the Republic of China.

18.3.2 The Amendment and Revision of Administrative Laws

In late Qing period, the tradition of compiling *Hui Dian* (*The Collected Statutes*) since Kangxi dynasty was continued. Therefore, in August of the twelfth year of Guangxu (1886), a decree was issued by emperor that “all rituals and revised statutes in each government office since the 18th year of Jiaqing should be compiled, published and circulated home and abroad”, so all government departments and offices were well prepared to begin the compilation. *Guang Xu Hui Dian* (*The Collected Statutes of Guangxu*) was completed in the 15th year of Guangxu (1899) and published in the 30th year of Guangxu (1904). It included 100 volumes of *Hui Dian* (*The Collected Statutes*), 1,220 volumes of *Ze Li* (*Regulations*) and 270 volumes of pictures. *Guang Xu Hui Dian* (*The Collected Statutes of Guangxu*) covered the period from the 18th year of Jiaqing (1813) to the 22nd year of Guangxu (1896), which included almost “all the matters concerning rituals and celebrations

¹²⁷ *Ibid.*, p. 208.

for future reference”.¹²⁸ During the period, a series of important world-shaking events like Opium War had taken place. So the work of “Zong Li Da Cheng” (the prime minister) in “Zong Li Ge Guo Shi Wu Ya Men” (Office in charge of Affairs of all Nations) was listed first, and according to it, he was in charge of the following matters,

Signing treaties with all countries to show the virtues of the imperial court; levying revenues on land and sea; making regulations for ships, vehicles and markets; managing matters in visits, banquets and currency; delimiting the borders with other countries; transmitting documents and translations; settling conflicts between churches and people; discussing and making decisions with princes, ministers and their underlings; reporting important events to the emperor and carrying out the bagatelles.¹²⁹

In the emperor’s preface to *The New Revision of Guangxu Hui Dian*, “The Instructions of Empress Dowager Cixi” and “The Admonishments of Empress Dowager Cixi” were mentioned many times, which had shown a great change of political systems characterized by “Chui Lian Ting Zheng” (ruling from behind the curtains) by Empress Dowager Cixi.

Apart from *Hui Dian (The Collected Statutes)*, *Ze Li (Regulation)* was also recompiled and amended. For example, *Hu Bu Ze Li (Regulations for the Board of Revenues)* was revised in the 28th year of Daoguang (1848), in the first year of Xianfeng (1851), in the fourth year of Tongzhi (1865), in the 13th year of Tongzhi (1874) and in the late years of Guangxu respectively. “Li Fan Yuan” (Board for National Minority Affairs) was changed into “Li Fan Bu” (Ministry for National Minority Affairs) in the 32nd year of Guangxu (1906), and *Qin Ding Li Fan Bu Ze Li (Regulations for Li Fan Bu by Imperial Order)* was issued in the 34th year (1908). *Guo Ji Tiao Li (The Ordinance of Nationality)* drafted and issued in the first year of Xuantong (1909) was a good example of the newly amended *Ze Li (Regulation)* which had reflected the changes of new times. *Guo Ji Tiao Li (The Ordinance of Nationality)* consisted of 24 articles and five chapters; it was a revision of *Guo Ji Fa (The Nationality Law)* made by the law office according to the requirement of the overseas Chinese living in Java (belonging to Holland).

In addition, the administrative legislations which had reflected the transition of legal system also included the law of new official systems and the laws and regulations concerning economy and culture.

1. Laws about new official system

In September of the 32nd year of Guangxu (1906), *The Emperor’s Edict of the Establishment of Official System before Preparation of Constitutionalism* was issued by the Qing Imperial Court. And soon after that, in November, *The Emperor’s Edict of the Establishment of Official System of the Central Government* was also issued. From then on, the official system reform movement was started.

¹²⁸ “Fan Li” (Guides to the use of the book) in “Juan Shou” (The Preface) of *Guang Xu Hui Dian (The Collected Statutes of Guangxu)*, Vol. 1.

¹²⁹ *The Guang Xu Hui Dian (The Collected Statutes of Guangxu)*, Vol. 99.

According to the new official system, some of the organizations remained unchanged, they included, “Nei Ge” (The Cabinet), “Jun Ji Chu” (The Grand Council), “Wai Wu Bu” (Board of Foreign Affairs), “Li Bu” (Board of Personnel), “Xue Bu” (Board of Education), “Zong Ren Fu” (The Imperial Clan Court), “Han Lin Yuan” (The Hanlin Academy), “Qin Tian Jian” (The Imperial Board of Astronomy), “Luan Yi Wei” (The Imperial Equipage Department), “Nei Wu Fu” (Board of the Imperial Household), “Tai Yi Yuan” (The Imperial Academy of Medicine), “Ge Qi Ying” (the army camps of Eight Banners), “Shi Wei Chu” (The Office of Bodyguards), “Bu Jun Tong Ya Men” (The Office of Land Force Commanders), “Shun Tian Fu” (The Capital District) and “Cang Ku Ya Men” (The Office of Warehouse). Besides, “Xun Jing Bu” (Board of Police) was changed into “Min Zheng Bu” (Ministry of Civil Affairs), “Hu Bu” (Board of Revenues) was changed into “Du Zhi Bu” (Ministry of Finance), “Bing Bu” (Board of War) was changed into “Lu Jun Bu” (Ministry of Land Forces), “Xing Bu” (Board of Punishment) was changed into “Fa Bu” (Ministry of Law), “Li Fan Yuan” (Board for National Minority Affairs) was changed into “Li Fan Bu” (Ministry of National Minority Affairs), “Da Li Si” (The Court of Judicial Review) was changed into “Da Li Yuan” (The Supreme Court), “Du Cha Yuan” (The Court of Censors) was changed into “Du Yu Shi” (the first imperial inspector or censor) and “Fu Du Yu Shi” (the second imperial inspector or censor), “Liu Ke Ji Shi Zhong” (the official who was in charge of the Six Branches) was changed into “Ji Shi Zhong” (The Deaconry). Moreover, “Tai Chang” (The Court of Sacrificial Worship), “Guang Lu” (The Banqueting Court) and “Hong Lu” (The Court of State Ceremonials) were combined into “Li Bu” (Board of Rites); “Cai Zheng Chu” (The Office of Finance) was combined into “Du Zhi Chu” (Ministry of Finance); “Lian Bing Chu” (The Military Training Center) and “Tai Pu Si” (the board which was in charge of raising horses) were combined into “Lu Jun Bu” (Ministry of Land Forces); “Gong Bu” (Ministry of Works) was combined into “Shang Bu” (Ministry of Commerce) and was renamed “Nong Gong Shang Bu” (Ministry of Agriculture and Industry and Commerce). Finally, “You Dian Bu” (Ministry of Posts and Telecommunications) was set up to be put in charge of ships, railways, telephone lines and post offices.

In order to ensure the successful reformation of old official system and the establishment of new one, from the 32nd year of Guangxu to the 3rd year of Xuantong (from 1906 to 1911), the laws concerning the official system and the systems of the selection and punishment of officials were also made and promulgated, they included, *Min Zhen Bu Guan Zhi Zhang Cheng* (The Regulation for the Official System of Civil Ministry), *Lu Jun Bu Guan Zhi* (The Official System of Land Forces), *Fa Bu Guan Zhi* (The Official System of the Ministry of Justice) and *Da Li Yuan Guan Zhi* (The Official System of “Da Li Yuan”).

On the 27th of May of the 33rd year of Guangxu (1907), *A Memorial about the Situation of Redrafting the Official System of each Province* was presented to the emperor by Yi Kuang, the minister who was in charge of overall examination and ratification of the official system, and it was attached with a list of *Ge Sheng Guan*

Zhi Tong Ze (*The General Regulation for the Official System of each Province*) which consisted of altogether 34 articles.

According to *Ge Bu Guan Zhi Tong Ze* (*The General Regulation for the Official Systems of each Department*), “Xue Zheng” (The Commission of Education) was changed into “Ti Xue Si” (The Office of Education), “An Cha Si” (The Judicial Commission) was changed into “Ti Fa Si” (The Office of Justice). Besides, “Quan Ye Dao” (The Office of Commerce and Transportation) and “Xun Jing Dao” (The Police Office) were also established. “Quan Ye Dao” was in charge of the affairs of agriculture, industry, commerce as well as transportation of each province, while “Xun Jing Dao” was in charge of police, fire control, residence registration and the construction, maintenance and sanitation of houses. The offices in charge of the selling of salt and grain and the management of custom houses and rivers systems were set up in each province, and the original office of “Shou Xun” (the office of security) was abolished. The coordinating officials and assistants were appointed in “Zhou” (subprefecture) and “Xian” (county) in “Zhi Li” (now Hebei province) area and the original system of aide de camp was abolished. The board of directors of the consultative council was set up in each province at “Fu” (prefecture), “Zhou” (subprefecture) and “Xian” (county) levels. The supreme tribunals, local tribunals and primary tribunals were also set up to deal with the various prosecuting and appealing cases.¹³⁰

Besides, other relevant laws concerning the official system were issued according to *Ge Bu Guan Zhi Tong Ze* (*The General Regulation for the Official Systems of each Department*), such as *The Regulation for the Official System of “Ti Fa Si”* (The Office of Justice) in each Province, *The Regulation for Education Supervising Officials*, *The Official System of “Xun Jing Dao”* (The Police Office) and *the Detailed Rules of Different Branches* and *The Regulation for Employing Managers in “Quan Ye Dao”* (The Office of Commerce and Transportation).

Moreover, “Bi De Yuan” (The Privy Council) was set up for the emperor to consult about state affairs according to the system of Privy Council and counsellorship in the western countries; moreover, *The Official System of Bi De Yuan* (The Privy Council) was drafted.

In the 34th year of Guangxu (1908), when *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) was approved to be enforced by the emperor, *Zi Yi Ju Zhang Cheng* (*The Regulation for “Zi Yi Ju”*) and *Zi Zheng Yuan Zhang Cheng* (*The Regulation for “Zi Zheng Yuan”*) were issued. In the third year of Xuantong (1911), when cabinet was set up, many other relevant regulations were issued; they included the 19 articles of *Xin Nei Ge Guan Zhi* (*The Official System of New Cabinet*), the 15 articles of *Nei Ge Shu Guan Guan Zhi* (*The Official System of the Subordinate Officials of the Cabinet*) and the 9 articles of *Nei Ge Fa Yuan Guan Zhi* (*The Official System of Courts attached to the Cabinet*).

¹³⁰ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 1), Zhonghua Book Company, 1979, pp. 506–510.

2. Laws about economy and finance

Laws concerning the administrative management were enacted in order to catch up with the development of commerce, finance and economy during the late Qing dynasty. They included the following: *The Tentative Regulation for the Registration of Brands*, *The Regulation for “Kuang Zheng Diao Cha Ju”* (*The Mining Investigation Bureau*), *The Regulation for Awards in Commerce*, *The Regulation for Awards in Setting up Agricultural and Commercial Enterprises by Chinese Merchants*, *The Revised Regulation for Awarding Chinese Companies*, *The Concise Regulation for Farmers’ Associations*, *The Regulation for Mining*, *The Concise Regulation for Railway*, *The Regulation for Registering and Issuing Licenses for Shipping Companies in each Province*, *The Tentative Regulation for Setting up Telephone Companies*, *The Regulation for Stamp Tax*, *The Regulation for Tentative Establishment of Banks*, *The Regulation for the Bank of Transportation*, *The Regulation for the Bank of the Great Qing*, *The Regulation for the Registration of Banks* and *The Regulation for the Unification of Exchequer*.

3. Laws about culture and education

After the abolition of “Ke Ju” (the imperial examination) and establishment of schools, modern schools developed fast. Modeling on the relevant Japanese laws, in the 30th year of Guangxu (1904), *The Revised Regulation for Schools* was issued, which included the following regulations: *The Regulation for Da Xue Tang* (The Grand School), *The Regulation for Advanced Schools*, *The Regulation for Middle Schools*, *The Regulation for Advanced Primary Schools*, *The Regulation for Primary Schools*, *The Regulation for Nursery Schools and Home Education Methods*, *The Regulation for Advanced Normal Schools*, *The Regulation for Primary Normal Schools*, *The Regulation for Apprentice in Arts*, *The Regulation for the Primary Enterprise Schools of Agriculture, Industry and Commerce*, *The Regulation for the Middle Enterprise Schools of Agriculture, Industry and Commerce* and *The Regulation for the Higher Enterprise Schools of Agriculture, Industry and Commerce*, etc.

Besides, many other regulations were issued, which included: *The Regulation for Law Schools*, *The Regulation for Women’s Normal Schools*, *The Regulation for Women’s Primary Schools*, *The Regulation for Financial Schools*, *The Regulation for Police Schools in each Province*, *The Regulation for the Evaluation of Primary School Teachers*, *The Regulation for Providing Better Treatment for Primary School Teachers*, *The Regulation for Learning to Read by Simplified Methods in Schools* and *The General Regulation for Libraries*.

4. Laws about Printing and News

(a) Laws about printing

After “Wu Xu Bian Fa” (Wu Xu Reform), journalism sprang up quickly in China, and both constitutionalists and revolutionaries had propagated their political beliefs by magazines and newspapers. In order to bring public opinions under control, in the 32nd year of Guangxu (1906), orders were issued by the imperial court to draft *Da Qing Yin Shua Wu Zhuan Lv* (*The Specialized Law of Great Qing for Prints*)

jointly by “Shang Wu Bu” (Ministry of Commerce), “Xun Jing Bu” (Board of Police) and “Xue Bu” (Board of Education). The law consisted of six chapters and it was stipulated as the following:

The law is applicable to everyone who is involved in publishing and marketing magazines and newspapers inside Great Qing. No matter what kind of books, magazines and pictures, the publisher should register in ‘Yin Shua Zong Ju’ (The General Publishing House) in the capital, otherwise, the printings would be regarded illegal and the publishers would either be punished by a fine less than 150 *yuan*, or be imprisoned for not more than 5 months, or be punished by a fine and imprisoned simultaneously. Those who have sold and delivered printings on which there are no names of the publishers or no address of the publishing houses are regarded illegal and would be punished by a fine of 100 *yuan*, imprisoned for not more than 3 months or be punished by a fine and imprisoned simultaneously. Whether published or not, the prints would be confiscated and destroyed. In the prints, if there are contents of slander, the publisher would be sued by civil action; if there are contents of defamation, the publisher would be sued by criminal action; if there are contents of bewitching, befooling, hatred spreading, insults and violence against the emperor, or there are contents violating laws, whether soldiers or civilians, they should report to the nearest local magistrates, and the publishers should be arrested and judged according to law. The violator should be punished by a fine less than 5000 *yuan*, or below ten years of imprisonment, or be fined and imprisoned simultaneously. Double punishments should be imposed to recidivists.¹³¹

Although the purpose of *Da Qing Yin Shua Wu Zhuan Lv* (*The Specialized Law of Great Qing for Prints*) was to bring public opinion under control, there were at least clear prescriptions of law, which was incomparable with the random literary persecution of “Wen Zi Yu” (literary inquisition).

(b) *Da Qing Bao Lv* (*The Press Law of Great Qing*)

In the 33rd year of Guangxu (1907), newspaper offices were set up everywhere in succession to publish newspapers, so *Da Qing Bao Lv* (*The Press Law of Great Qing*) was drafted by “Shang Bu” (Ministry of Commerce), and in the 33rd year of Guangxu (1907) it was presented jointly by “Min Zheng Bu” (Ministry of Civil Affairs) and “Fa Bu” (Ministry of Law) to “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau). After examination, it was finally issued. However, because the law was not abided by most of the local publishing houses, it was revised in the 2nd year of Xuantong (1910) by “Min Zheng Bu” (Ministry of Civil Affairs) and was presented to “Zi Zheng Yuan” (The Advisory Council) for approval. Soon it was presented to the emperor for promulgation; nevertheless, before it was put into practice, the Qing Dynasty became extinct.

Da Qing Bao Lv (*The Press Law of Great Qing*) was modeled on the Japanese newspaper laws, and it consisted of altogether 45 articles. It was stipulated that the newspapers published everyday should be sent to the police stations or local magistrates before 12 p.m. the day before its publishing for random verification; the monthly, biweekly and Sunday newspapers should be sent to the police stations or local magistrates before 12 p.m. the day before the publishing for random examination.

¹³¹ *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*).

In addition, the prosecuting cases forbidden to be attended as observers, the unpublicized prejudication cases, the unpublicized documents about foreign relations, naval and land military affairs, the emperors' edicts and memorials were not allowed to be reported in newspapers. Moreover, the newspapers were not allowed to contain contents which defamed the imperial court, disturbed the political system, endangered the public safety and degraded social customs, otherwise, they would be punished by paying fines or serving imprisonments and the newspapers were forbidden to be published. The violator's penalty was not to be abated even if they had surrendered themselves to the police.

Although *Da Qing Bao Lv* (*The Press Law of Great Qing*) was not put into practice, even after the founding of the Republic of China, it was still used by many provinces to suppress public opinions, and it was effective until July of the fourth year of the Republic (1915) after *Bao Zhi Tiao Li* (*The Newspaper Ordinance*) was issued by Beiyang government.

5. City administrative law of "Jing Shi" (the capital city)

Many city administrative laws and regulations were issued in late Qing Dynasty so as to bring the city administration of "Jing Shi" (the capital city) into the orbit of modern laws. For example, many traffic regulations were made, they included: *The Regulation for "Di Pai Che"* (a two-wheeled cart), *The Regulation for Bigger Carts*, *The Regulation for Rickshaws*, *The Regulation for the Punishment of Vehicles without Turning on Lights at Nights* and *The Revised Regulation for Clearing the Roads*.

The regulations for medical treatment and health included: *The Regulation for Preventing Epidemic Diseases*, *The Regulation for the Usage of First-aid Medicines*, *The Rules for Laboratories in Clinics*, *The Rules for the Management of Vaccination* and *The Regulation for the Governmental Medical Service inside and outside of the City*.

The regulations for food and service included: *The Business Regulation for the Management of Food Service*, *The Business Regulation for the Management of the Dairy Products Service*, *The Business Regulation for the Management of Various Soda Water*, *The Business Regulation for the Management of Hairdressing Service* and *The Business Regulation for the Management of Bathroom Service*.

The regulations for market management included: *The Business Rules for the Government-Owned Dong An Market inside the City*, *The Rent Rules for the Government-Owned Dong An Market outside the City* and *The Business Rules for the Management of the Government-Owned Guang An Market outside the City*, etc.

The regulations for the management of special professions included: *The Rules for the Management of Prostitutes*, *The Rules for the Management of "Yue Hu"* (special groups of musicians playing for the ruling class) and *The Rules for the Management the "Jie Yan Ju"* (Smoking Cessation Bureau).

The regulations for rectification and detention included: *The Regulation for the Primary Reeducation Factories outside the City*, *The Regulation for the Secondary Reeducation Factories outside the City*, *The Regulation for the Reeducation of Women outside the City* and *The Rules for the Management of Poor People Reeducation Center outside the City*.

Although it was not possible for all of the above-mentioned rules and regulations to be put into practice in the troublesome late Qing Dynasty, it had laid an important legal basis for the city administration in the city of “Bei Ping” (Beijing City) during the period of the Republic of China.

6. *Xing Zheng Gang Mu (The Detailed Outline of Administration)*

After *Qin Ding Xian Fa Da Gang (Outline of Constitution by Imperial Order)* was issued in the 34th year of Guangxu (1908), the Qing Government began to engage actively in the reform of administrative system. On the fourth of the October of the second year of Xuantong, in *A Memorial to the Emperor about the Method of Clearly Defining the Extent of Power of the Administrative Affairs* presented by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau), the following suggestion was put forward:

Since *Xing Zheng Gang Mu (The Detailed Outline of Administration)* has been drafted and completed in book form and presented to the emperor for approval. If it is authorized, we will send it to each government office in order to be examined article by article; if there is anything which needs to be improved and revised, or if two departments or many departments are involved, we will ask the departments concerned to hold discussions, to make detailed notes and to return it to our office within two months. Then, we will draft, revise and examine it again with ‘Zheng Wu Chu’ (the government administrative office) at the cabinet meeting, and then present to the emperor to be issued for enforcement. It will become a standard used in making official systems and checking up finance. The limits of power of ‘Zi Yi Ju’ (The Consultative Bureau) and ‘Zi Zheng Yuan’ (The Advisory Council) will also be regulated by following this example, because only when the key link is grasped, then is it possible for things to fall into their places and be performed systematically. If it is permissible, we’d like to consult with the government offices and take actions accordingly. Sincerely.” “According to the emperor’s decree: to present it to others in accordance with my opinion.¹³²

In the prologue of *Qing Ding Xing Zheng Gang Mu (The Detailed Outline of Administration by Imperial Order)*, it was claimed that,

According to the outline of the constitution, the emperor has the supreme power to rule the country under constitutional monarchy, including the legislative, executive and judiciary power. The parliament is to help make laws, the government is to assist the ruler in administration and the court is to be in charge of judiciary according to law. The government is only one of the organizations for the monarch to exercise his great powers; nonetheless, the monarch is not the head of the government any more, so he has no real responsibilities. Because the monarch has no real responsibilities, the responsibilities fall on the government. Only when the government affairs are clearly allocated is it possible for people to understand their responsibilities respectively. Generally speaking, the national affairs of a country are divided into two kinds, namely, the state affairs and the royal affairs. So, what is the most important for a constitutional monarchy is to state this clearly first. As to Chinese politics, the imperial court and the government have always been integrated since ancient times, so although ‘Nei Wu Fu’ (Board of the Imperial Household) has been set up now to take the charge of all government offices, its duty performed is just only a small part of that of the imperial court. Besides, the administrative affairs of ‘Ya Men’ (the government offices) involving other departments, offices and provinces have also been stipulated,

¹³²“Li Zheng Bu” (The Section of Official Administration) in *Da Qing Fa Gui Da Quan (A Complete Collection of Laws and Regulations of Great Qing)*, Vol. 1.

and they will be stated respectively during the royal ceremonies in future. Now first of all, the state administrative affairs have been classified by categories, analyzed in detail and summarized in 12 tables which are attached with detailed illustrations. And they have become the essence of the detailed outlines of administration for the whole country which will be used as standards for the drafting of laws for official systems, the checking up of financial matters and the making of other laws. Furthermore, the powers of ‘Zi Yi Ju’ (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) were also restricted.

In *Xing Zheng Gang Mu (The Detailed Outline of Administration)*, the state affairs were divided into “state affairs” and “royal affairs”, which was regarded as the “most important thing” in the establishment of constitutional monarchy. So according to this principle, what was discussed in *Xing Zheng Gang Mu (The Detailed Outline of Administration)* was only “limited to the state affairs”, while the royal affairs were not included.

The position of the government was clearly stipulated in *Xing Zheng Gang Mu (The Detailed Outline of Administration)*: “the government is one of the institutions for the monarch to exercise his great powers; however, the monarch does not act as the head of the government any more.” Meanwhile, it also stressed that the government’s functions and responsibilities should be clearly stated first because “only when the government affairs are clearly divided is it possible for people to understand their real responsibilities.” A detailed list and interpretation of the responsibilities of each office had been illustrated in *Xing Zheng Gang Mu (The Detailed Outline of Administration)*, moreover, even notes and comments had been attached in order to achieve the goal of “classifying by categories and analyzing article by article”.

In addition, according to the principle of “applying the established regulations of different countries for reference and adopting them according to the national situations of our country”, the state institutions are divided into four subordinating organizational systems: the system in which it was directly ruled by officials, the system in which it was indirectly ruled by officials, the system in which it was ruled by local officials and the system in which it was ruled by local autonomy. Nevertheless, the spirit of the centralization of authority is still carried out; this was because it was believed that “the future of the country lies in the centralization of authority”.

Nevertheless, the Qing Empire perished even before *Xing Zheng Gang Mu (The Detailed Outline of Administration)* was implemented.

18.3.3 The Law Revision and Judicial Reform in Late Qing Dynasty

1. the opportunity of law revision in late Qing Dynasty

The ruling class headed by Empress Dowager Ci Xi in late Qing Dynasty was one of the most corrupted and most conservative regimes in Chinese history. In order to maintain their absolute dictatorship, they even ceded territories and paid indemnities under the pretext of keeping the established laws of the ancestors rather

than carrying out innovations and reforms. The bloody suppression of the reform movement of “Gai Liang Pai” (the early reformists) in 1896 was a good example. After “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement), the ruling foundation of Qing Dynasty was fundamentally shattered, because there was nothing left for the original “Ji Gang” (legal institutions) and “Fa Du” (Laws), and the dignity of royal families were also lost. Moreover, their complete submission to the imperialist invasion had shown that it was they themselves who had led to the declining of the country, the subjugation of the race and the deterioration of the national crisis in China. Therefore, it was impossible for the ruling of Qing regime to be continued any more as it was in the past, and they had faced unprecedented ruling crisis. In the chaos and panic, they tried to look for ways of self-salvation, and finally they had no other alternative but to take over the banner of “Wu Xu Bian Fa” (Wu Xu Reform) unwillingly and declared political reformation.

After Empress Dowager Ci Xi fled to Xi'an, she changed what she had always preached in the past about the unchangeability of the laws of ancestors and claimed that “although it is certain for “Chang Jing” (eternal laws) to last even for thousands of years, the way of ruling is susceptible to change”. She said, “The political system of Qing Dynasty has been set up by ancestors according to the situations of the times, so there must have been some similarities and differences. Since we entered Shan Hai Guan Pass, the political system has already been changed and it is different from that established in Shenyang. Since Jiaqing and Daoguang dynasties, the old political systems of Yongzheng and Qianlong have been discarded.” Meanwhile, she also admitted that “the weakness of China lies in its deeply-rooted bad habits, over-strict laws, redundant philistine officials and the rarity of the exceptionally gifted people. The judges are mediocre people who just aim to keep their status by making use of their powers; the petty officials have become mouthpieces to seek profits; the governmental affairs are handled by mere exchanging of documents without relating with practice, and the gifted people are restricted because of their low qualifications, which are the reasons why the country is whiling away day by day. So it is the selfishness that has misled the country, and it is the greediness that has brought the state into difficulties.” She then concluded: “generally speaking, the laws which have remained unchanged for too long may bring harm, and laws which are harmful must be changed.” Therefore, if we want to pull ourselves together, the best way is to change “the unrevised laws and the old bad habits.” She further suggested that what should be learned from the western countries was not just the superficial knowledge but the essence. Then she made the following order:

The members of ‘Jun Ji Chu’ (The Grand Council), ‘Da Xue Shi’ (the grand secretary), ‘Liu Bu Jiu Qing’ (the six boards and nine ministers: the six boards: Board of Personnel, Board of Revenues, Board of Rites, Board of War, Board of Punishments, Board of Works; the nine ministers: the nine officials in charge of emperor’s daily activities), the ministers on diplomatic missions and ‘Du Fu’ (the viceroys and procurators) of each province to have a discussion of the current state situation, to look into the causes either by themselves or by asking other people about official administration, people’s livelihood, ‘Ke Ju’ (the imperial examination) and military, political and financial affairs, and to put forward their opinions on how to make the country prosperous, how to cultivate the talented people, how to improve the financial situation of the state and how to strengthen the military armaments

by consulting with important foreign politicians, by making reference to the old statutes, systems and policies of ancient Chinese dynasties to see what to be adopted, what to be abolished, what to be discarded and what to be combined. The detailed memorials about what have been mentioned above should be presented to the emperor within two months.¹³³

This imperial edict had shown that the ruling class of the crisis-ridden Qing dynasty still struggled doggedly in order to pull through the crisis, nevertheless, it had actually laid the foundation for the legal revision undertaken 10 years later, which had led to an upsurge of memorials about legal reform presented by the officials at various levels to the emperor. Among them, the most famous one was *Three Memorials to the Emperor about Reform* presented by Liu Kongyi who was “Zong Du” (viceroy) of Guangdong and Guangxi, and Zhang Zhidong who was “Zong Du” (viceroy) of Hu Guang. In the memorial, many suggestions were put forward, such as the prohibition of “Song Lei” (inconvenience and waste of resources and money in litigation), the simplification of laws and regulations, the mitigation of punishments, the stressing of the testimony of witnesses, the construction of prisons, the teaching of techniques to prisoners, the reduction of the costs of prosecutors, the substitution of punishments with penalty, the dispatching of commissioners, the drafting of regulations for mines, railroads, commerce and the making of criminal laws used in negotiations. Because these proposals were in accordance with the aim of the reform carried out by the ruling class headed by Empress Dowager Ci Xi, they were highly appreciated and were ordered to “be carried out accordingly as soon as possible for their great feasibility.”¹³⁴

In February, 1902, another imperial edict was issued by the Qing imperial court:

Since Han and Tang dynasties, Chinese laws have been changed and amended by each generation. In *Da Qing Hui Dian (The Collected Statutes of Great Qing)* made in our dynasty, appropriate compromises have been made and accurate and detailed explanations have been provided, therefore, it can be used as the principles to administer the country. Moreover, what is particularly precious is that it has been amended according to the current situation which is quite different from that in the past, so adequate consultation should be made before it can be put it into practice perfectly. Furthermore, situations are becoming more favorable recently, the country is becoming prosperous day by day, and business has become flourished, hence, special laws about mining, transportation and commerce should be drafted and imperial envoys should be sent abroad to have an investigation of the current foreign laws and regulations and make a report to ‘Wai Wu Bu’ (Board of Foreign Affairs). Besides, Yuan Shikai, Liu Kongyi, and Zhang Zhidong are instructed to carefully select those who are familiar with both Chinese and foreign laws and to recommend them to the capital for the work. The office for law compilation should be established and relevant laws should be drafted at once. After the emperor’s approval, the drafted laws will be issued and put into practice. We hope that the laws made should be fair, practicable and applicable both home and abroad to show our sincerity of reform according to public opinion.¹³⁵

According to this edict, a memorial was jointly presented by Yuan Shikai, Liu Kongyi and Zhang Zhidong to the emperor, and they had reported that “in the

¹³³ *Qing De Zong Shi Lu (The Chronicles of Dezhong in Qing Dynasty)*, Vol. 476.

¹³⁴ *Ibid.*, Vol. 486.

¹³⁵ *Ibid.*, Vol. 495.

western countries, political reforms have all started from legal reform”, therefore, Shen Jiaben and Wu Tingfang were recommended to take the charge of “Xiu Ding Fa Lv Guan” (The Law Revision Office) to “choose and revise the laws which they consider suitable.”¹³⁶ Soon after, the emperor’s edict was issued by the Qing imperial court:

Now, Shen Jiaben and Wu Tingfang are ordered to have all the current laws carefully checked and properly revised with a reference to the laws of other countries according to current situation. We hope that the revised laws are applicable both home and abroad and helpful in administration.¹³⁷

From then on, the legal revision in late Qing Dynasty was put on agenda.

What needed to be pointed out was that legal revision in late Qing Dynasty was closely connected with the guidance and support of imperialist big powers. Although “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) taking place in 1900 was suppressed, the imperialists had to admit that “the Chinese people are still immeasurably vigorous”,¹³⁸ therefore, “it is just sleep talking to dismember China.”¹³⁹ Moreover, they had also seen the attitude of Qing government to surrender completely to the foreign countries and realized that the policy of “ruling China by Chinese” should be used,¹⁴⁰ and they had considered it “the best way to support Qing Dynasty”.¹⁴¹ As long as the broken ship of Qing Empire had stayed afloat, it should be supported with the utmost efforts, because only in this way could their interests in China be assured and enlarged. Thus, in August of the 28th year of Guangxu (1902), when Lv Haihuan, who was “Shang Shu” (the minister) of “Gong Bu” (Ministry of Works) and the imperial commissioner in charge of commercial treaty negotiation and Sheng Xuanhuai, “Shi Lang” (vice minister) of “Gong Bu” (Ministry of Works) drafted the 16 articles of the treaty for commercial ships with James Lyle Mackay, the British commissioner for commercial treaty negotiation in Shanghai, it was stipulated in the 12th article that “China has hoped to readjust the laws and statutes on a large scale in order to be in accordance with those of the western countries, and Great Britain is willing to help to complete this task to the best of its ability. As soon as Chinese laws, statutes and the ways of making judgment have been checked carefully and the matters concerned are settled perfectly, Britain will

¹³⁶ Yuan Shikai, “A Memorial to the Emperor about Recommending People like Shen Jiaben who are familiar with both Chinese and Foreign Laws to Wait for Appointments”.

¹³⁷ *Qing De Zong Shi Lu (The Chronicles of Dezong in Qing Dynasty)*, Vol. 498

¹³⁸ *Wa De Xi Quan Luan Bi Ji (A field-Marshal’s Memoirs: from the Diary, Correspondence, and Reminiscences of Alfred, Count von Waldersee ...)*, Translated by Wang Guangxi, Shanghai Bookstore Publishing House, 2000, pp. 143–144.

¹³⁹ Wang Qiqu, “You Guan Yi He Tuan Yu Lun” (On the Public Opinions about “Yi He Tuan”) in *Yi He Tuan (The Boxer Rebellion Movement) (Book 4)*, edited by “Zhong Guo Shi Xue Hui” (The Associations of Chinese History), Shen Zhou Guo Guang Publishing House, 1951, p. 246.

¹⁴⁰ *Ibid.*, p. 250.

¹⁴¹ Robert Hart, *Zhong Guo Shi Ce Lun (Essays on the Chinese Visitation)*.

give up its extraterritoriality.”¹⁴² In the negotiations with the countries like America, Japan and Portugal, similar articles were also included, which had shown the support which the imperialist big powers had given to the late Qing Dynasty in law revision. Although the promises were illusive and unattainable, they had stimulated the enthusiasm of Qing government for legal reform; moreover, it had especially stimulated the enthusiasm of the patriotic officials who had tried to recover the extraterritoriality by legal reform. Shen Jibing, the minister who was in charge of the legal reform, had said, “The purpose of legal reform in China is first of all to recover the extraterritoriality, which is the key to ‘Bian Fa Zi Qiang’ (striving for self-strengthening by reformation).”¹⁴³ At that time, only Zhang Zhidong had felt from his long years of negotiations with the imperialist big powers that it mainly depended on “the military strength of the country and the outcome of the military battles”¹⁴⁴ rather than only laws whether the extraterritoriality could be recovered or not.

2. Shen Jiaben and the law revision in late Qing dynasty

In 1903, “Xiu Ding Fa Lv Guan” (The Law Revision Office) was set up according to the decree of the emperor, and Shen Jiaben and Wu Tingfang were appointed law revision ministers. Because Wu Tingfang was serving as an envoy in America at the time, soon after his return, he was appointed “Zuo Shi Lang” (the second vice minister) of “Shang Bu” (Ministry of Commerce), so he did not hold a concurrent post of law revision minister any more, and was then succeeded by Ying Rui. Soon Ying Rui died of disease, therefore, the position was held by Yu Lian San. Up to 1910, because of the attacks of conservatives, Shen Jiaben was transferred to other posts and was succeeded by Liu Ruoceng. To this time, Qing Dynasty was nearing its end, consequently, the task of law revision was mainly completed under the leadership of Shen Jiaben and his ideological understanding had directly influenced the making up of new laws, it was thus clear that the achievement of law revision during late Qing dynasty was closely related with Shen Jiaben.

Shen Jiaben (1840–1913), another name Zi Dun, nicknamed, Ji Yi, was born in Guian (now Wuxing in Zhejiang province). He “liked to read and contemplate when he was young” and “during his childhood, he had read all kinds of Confucian classics and had a special savvy of the official system of Zhou Dynasty.” In the ninth year of Guangxu, he had become “Jin Shi” (an imperial scholar, a graduate of the imperial examination), was selected a substitute official in “Xing Bu” (Board of Punishment) and began to be specialized in legal study. In the 19th year of Guangxu (1893), he was appointed “Zhi Fu” (magistrate of a prefecture) of Tianjin. In the 23rd year of

¹⁴² *Guang Xu Chao Dong Hua Lu (The Records of Donghua in the Reign of Guangxu)*, Vol. 5, Zhonghua Book Company, 1958, p. 4919.

¹⁴³ Shen Jiaben, “A Memorial to the Emperor for Abolishing the Severe Punishments in Laws” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 1, Zhonghua Book Company, 1985, p. 2024.

¹⁴⁴ “Zou Yi Juan” (Memorials) in *Zhang Wen Xiang Gong Quan Ji (The Complete Works of Mr. Zhang Wenxiang)* (Book 2), Vol. 69, China Bookstore, 1990, p. 153.

Guangxu (1897), he was transferred to work as “Zhi Fu” (magistrate of a prefecture) of Baoding. After that, he became “An Cha Shi” (the judicial commissioner) of Shanxi Province, “Zuo Shi Lang” (the second vice minister) of “Xing Bu” (Board of Punishment), “Zheng Qing” (the minister) of “Da Li Si” (The Court of Judicial Review), “You Shi Lang” (the first vice minister) of “Xing Bu” (Board of Punishment) and law revision minister. In the first year of Xuantong, when “Zi Zheng Yuan” (The Advisory Council) was set up, he was appointed “Fu Zong Cai” (vice president).

Shen Jiaben lived in an age of extreme turbulence when China was transforming from a feudal society to a semi-feudal and semi-colonial one. Faced with the situation of being invaded by superpowers and the breaking up of the country, he was with strong patriotism and the wish to maintain the sovereignty of the state. In the 26th year of Guangxu (1900), Shen Jiaben, who was promoted the head of “Tong Yong Dao” (now in Tongzhou of Beijing City) in “Zhi Li” (now Hebei province), was imprisoned and put under house arrest by “Ba Guo Lian Jun” (The Eight-Nation Alliance) for 9 months. During the time, he had not only maintained his national dignity, but also his own personality, moreover, he had once written poems to condemn the invaders and accused them of “being arrogant with the shining spears and armored horses”, meanwhile, he also felt sorrow, grief and indignation for the humiliation which the country had suffered. Just as what was described in his poems: “The prisoners of Chu State met in Jixin Pavilion, and after three cups of wine, they become sad in tears”. Shen Jiaben, as one of the descendants of the family of officials who had been greatly influenced by “Ke Ju” (the imperial examination) since his childhood, had hoped to work for the emperor because his patriotism was closely connected with his loyalty to him. So, revising new laws and “Bian Fa Zi Qiang” (striving for self-strengthening by reformation) had become one of the most honorable activities in his life, and his political life was closely connected with that of the Qing Dynasty.

Because Shen Jiaben had worked in “Xing Bu” (Board of Punishment) for a long time, he had the chance to look through the codes, regulations and prison documents of each dynasty and to have a systematic study and examination of the origin and development of Chinese ancient legal system. He was also a famous jurist and executor of legal reform in Qing dynasty; moreover, he was familiar with the Chinese ancient law and to a certain extent, had made some critical summaries. Shen Jiaben had once pointed out, “At the time of ‘Fa Zhi’ (the ruling of law), if we have just examined the current laws but neglected the ancient laws, and just learned the western laws but neglected the Chinese laws, then the laws that we have learned are not complete. So how is it possible to have a thorough understanding of them, to combine them with Chinese law and to enforce them in the world?”¹⁴⁵ At the same time, he was also enthusiastic about studying the laws in the capitalist countries,

¹⁴⁵ Shen Jiaben, “Xue Da Si Kou Yi Gao Xu” (Preface to the Posthumous Papers of Xue Da Si Kou) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (A Textual Research of the Criminal Laws in the Past Dynasties), Vol. 6, Zhonghua Book Company, 1985, p. 2223.

insisting that “a person with lofty ideas should study the theories of governing the state, look into the social systems of different countries, combine them with Chinese law, adopt what is the best and use them in the current society after slight amendment.”¹⁴⁶ Because he had bravely faced up to the dramatically changed social reality of China and the developing trends of the world, he had adhered to the principle of “Hui Tong Zhong Xi” (the harmonization of Chinese and western Laws) in legal reform. For this reason, he had actively organized people to translate the laws in capitalist countries; built schools for legal study; sent people abroad for investigation and recruited foreign jurists in assisting the legislative work. In the few years of his presiding over the work of law revision, he had not only deleted the backward and savage parts of *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), but also made codes and regulations with bourgeois characteristics, which had acted as bridges connecting the ancient laws with the modern ones and the domestic laws with the foreign ones. Due to historical limitation, although there had existed many problems in the law revision in late Qing dynasty, to a certain extent, it had broken up the feudal legal system which had continued for 2,000 years, so it was of great significance to Chinese legal modernization.

The late Qing period was a time of great social turmoil in Chinese society, at the same time, it was also a time of engaging, colliding and blending between Chinese and western legal cultures. Although the feudal legal culture centered on native “Gang Chang Ming Jiao” (feudal cardinal guides and constant virtues) had obstinate exclusiveness to other foreign legal cultures, the bourgeois legal culture centered on humanism obviously had irresistible advantages. So, the result of the collision between Chinese and foreign legal cultures was a further conquest and replacement of native Chinese culture by the foreign ones. The feature of the times had left deep brands on Shen Jiaben’s legal thoughts and law revision practice.

(a) the combination of Chinese and western laws

As a jurist who was famous for his legal research at the time, Shen Jiaben was a master in ancient Chinese law; nevertheless he was never constrained by it. He thought the traditional old laws were not the best ones to govern the country any more, so the best way “to make the country strong and prosperous” was to look towards the western world. And only by absorbing the essence of the western legal culture was it possible to be “beneficial to the current society”. But when absorbing the western laws, he was also against giving up the Chinese “‘Li Jiao’ (feudal ethical code) and ‘Min Qing’ (the condition of the people) which had lasted for generations”. According to him, only by “retaining some of the old laws and adopting some new ones” was it possible to make the new laws “perfectly mastered and comprehensively studied without contradictions.” This had reflected his contradictory attitude in the violent collision between Chinese and western cultures and the unconquerable

¹⁴⁶ Shen Jiaben, “Zheng Zhi Lei Dian Xu” (Preface to the Codes of Politics) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Vol. 6, Zhonghua Book Company, 1985, p. 2242.

fetter of feudal legal culture in his legal thoughts. It was just because of this that the top rulers' decree that "no rules about 'Lun Chang' (feudal order of importance) can be changed" in Qing Dynasty had been faithfully carried out by him.

It was unquestionable that Shen Jiaben had a broad, profound and good mastery of "Chinese Law", but his understanding of western law was a little superficial. On the one hand, he had primarily made a distinction between the feudal autocratic law and the bourgeois democratic law. He pointed out that "the purpose of the theories of 'Shen Han' (legalism) is for strict checking and supervision, so it is featured by intimidating and threatening, however, it is in fact the fault of autocracy, while the purpose of the theories in 'Tai Xi' (the western countries) is for safeguarding safety, ensuring the freedom of the people and making sure that laws not be broken, so the two systems are quite different".¹⁴⁷ But on the other hand, he was keen on the comparison of Chinese and western laws and he said, "The systems of 'Tai Xi' (the western countries) should be adopted and the ancient doctrines should be proved".¹⁴⁸ He also said, "We should know that among the western laws, there are also some which are similar to the ancient Chinese laws."¹⁴⁹ In his works, he had quoted *Guan Zi* (*The Book of Master Guan*) for many times, because he thought that "Guan's ideas are similar to legalism in modern western theoretical schools."¹⁵⁰

In the process of law revision, Shen Jiaben had tried his best to carry out the basic principle of "making reference to the laws of different countries" and "being applicable both home and abroad", moreover, he had also paid attention to the investigation of the legal customs of Chinese society. But on the whole, those which were reasonable and democratic in Chinese legal culture were not highly stressed, so in the newly revised laws, there appeared the tendency of one-sided transplanting of western laws. Therefore, from the very start, there had existed the problem of how to localize the transplanted western laws in the process of China's legal modernization.

(b) the combination of innovation and reform

Shen Jiaben, who was familiar with the old Chinese law, had strongly felt that the old Chinese law was so backward and savage that they must be reformed after he had accepted the influence of western legal culture. So, the new laws revised under his guidance were just copies of the western laws both in system and contents, which were surely the most daring and creative work at that time.

¹⁴⁷ Shen Jiaben, "Fa Xue Ming Zhu Xu" (Preface to the Famous Legal Works) in "Ji Yi Wen Cun" (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (A Textual Research of the Criminal Laws in the Past Dynasties), Vol. 6, Zhonghua Book Company, 1985, p. 2240.

¹⁴⁸ Shen Jiaben, "Jian Yu Fang Wen Lu Xu" (Preface to Prison Interviews) in "Ji Yi Wen Cun" (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (A Textual Research of the Criminal Laws in the Past Dynasties), Vol. 6, Zhonghua Book Company, 1985, p. 2238.

¹⁴⁹ *Ibid.*, p. 2235.

¹⁵⁰ Shen Jiaben, "Xin Yi Fa Gui Da Quan Xu" (Preface to the Newly Translated Collections of Legal Regulations) in "Ji Yi Wen Cun" (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (A Textual Research of the Criminal Laws in the Past Dynasties), Vol. 6, Zhonghua Book Company, 1985, p. 2242.

Nevertheless, Shen Jiaben's political tendency had determined that he could only express his innovation in the form of reformation. Although the suggestions he put forward when he was revising the old criminal laws, such as the abolition of severe punishments, the abandoning of the application of death penalty as the only punishment, the changing of probation to "Tu" (imprisonment) and "Liu" (life exile), the abolition of "Bi Fu" (legal analogy), etc. were aimed at abolishing the malpractices in the old law, they were only superficial reforms because they had not touched upon the nature of the feudal law.

As an official of the Qing Dynasty, it was impossible for Shen Jiaben to totally overcome the fetters of feudal legal culture. Besides, the great many representatives who had the real powers of deciding the important affairs in Qing Dynasty had often shown resistance to the Chinese legal modernization by using "Gang Chang Ming Jiao" (feudal cardinal guides and constant virtues) as the theoretic weapon to attack his deviation from "Li Jiao" (feudal ethical code) and "Min Qing" (the condition of the people). Although Shen Jiaben had tried his best to argue in his defense, he was not without misgivings and even had to make some compromises against his will. *Wu Tiao Zhang Cheng (The Five Regulations)* which was an appendix to *Da Qing Xing Lv Cao An (The Draft of the Criminal Laws of Great Qing)* was a good example. He had once said, "It is difficult to make laws, but it is more difficult to reform laws" and "it should be careful to reform laws because if the revised laws are no better, they would be more harmful",¹⁵¹ which had clearly shown Shen Jiaben's contradictory state of mind.

(c) the combination of law revision with constitutionalism

If the main task of law revision undertaken by Qing imperial court before its declaration of constitutionalism by imitating those of the western countries in the 31st year of Guangxu (1905) was to meet the needs of political reform and "Xin Zheng" (the new administration) and to recover extraterritoriality, then after its declaration of constitutionalism, law revision had already been taken into the scope of serving constitutionalism. Shen Jiaben had once suggested to the Qing imperial court that "the compilation of new code is the key in the preparation of constitutionalism".¹⁵² In addition, he had also shown the relationship between constitution and law revision by citing the example of Japan, "the Japanese Meiji Reform is also based on law revision ... the social customs have not been changed, the nation has become stronger and more prosperous, moreover, Japan has become one of the strongest countries of East Asia."¹⁵³

The preparation of constitutionalism and political reform in late Qing dynasty interacted with legal reform, nevertheless, the former was a premise, and without

¹⁵¹ "Fen Kao Shi Er" (The 12th Textual Research) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*.

¹⁵² Shen Jiaben, "A Memorial to the Emperor about the General Methods Used in Legal Revision" in "Lv Li Ba Shi Hao" (The 80th Precedent) in "Fa" (Law) in *Dang (Files)*.

¹⁵³ "A Memorial to the Emperor for Abolishing the Severe Punishments in Laws" in *Ji Yi Wen Cun (The Classics of Ji Yi)*.

political reform, there would be no law revision and legal reform like what had happened in late Qing dynasty. Of course, political reform also needed the confirmation and guarantee of law, and it was only the legalized political reform that was practical, stereotyped and valid. The eventual failure of the political reform in late Qing dynasty had made the law revision and legal reform fail to achieve the expected result.

(d) the combination of lawmaking with the cultivation of people

Shen Jiaben thought that in the end the legal reform and modernization had boiled down to the cultivation of special people. The laws that he wanted to make were bourgeois laws which were different from those old and feudal ones, and the people whom he wanted to cultivate were the special legal experts equipped with bourgeois legal culture.

In the process of presiding over law revision, he felt keenly the insufficiency of legal experts. So, he spared no efforts to write a lot of essays to demonstrate the truth that “what is most important in law is to get gifted people”, and “it is the people who make use of laws”, therefore, “even if there are laws, if they are not abided by, then it means there are no laws, however perfect the laws are”.¹⁵⁴ He also stressed that “the laws are good just because they are enforced by the talented people; if there are not such people, the laws are just laws”¹⁵⁵ by referring to the old saying that “laws themselves can achieve nothing”. He also took *Tang Lv* (*Tang Code*) as an example, although it was a very famous and decent feudal code, there were still many illegal incidents such as “the unscrupulous willful persecution by Wu Zetian” in defiance of law and the large numbers of cases of injustice by Li Linpu after he was in power. Thus, he concluded that “we can see that laws are important, but people who can make use of laws are more important; if proper people are chosen, even if the laws are stringent, they can be carried out with benevolence in practice; if the wrong people are chosen, even if the laws are lenient, they can be broken and carried out with brutality.”¹⁵⁶

In order to train the new talented people needed, he had translated and compiled books by westerners and used them as textbooks in the training of new generations of judges, opened law schools and employed foreign jurists as professors. Subsequently, within a few years, “thousands of people graduated and it became very popular at the time”. In the end, it had exerted a positive influence to the promotion of Chinese legal research and the modernization of jurisdiction. Just as what he had summarized by himself, “the suggestions of adopting western laws have just started in recent 10 years. I have participated in the task, visited and met many wise and insightful people, taken charge of the compilation work and invited

¹⁵⁴ “Xing Zhi Zong Kao Si” (The 4th Textual Research of the Criminal System) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*).

¹⁵⁵ *Ibid.*

¹⁵⁶ “Xing Zhi Zong Kao Si” (The 4th Textual Research of the Criminal System) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*).

legal experts from the east to teach. In addition, I have built law schools in order to cultivate legally gifted people to make preparation for future trials. Now it has begun to take shape, so the science of law in China has begun to bud from this.”¹⁵⁷

(e) the combination of humanism with the traditional “Ren Zheng” (Benevolent Administration)

Influenced by western bourgeois legal culture, Shen Jiaben had not only accepted Montesquieu and Rousseau’s theories of “natural rights” and “inherent rights”, but also even quoted them in his works, which had reflected his humanistic ideas centered on human rights. His thoughts were mainly expressed by his opposition to slavery and human trafficking which he thought were apathetic behaviors in defiance of human rights and dignity. In *Shan Chu Nu Bi Lv Li Yi* (*Suggestions to Abolish the Laws and Precedents for “Nu Bi”*), he pointed out, “the slaves are also human beings, how can they be victimized? So human lives should be valued and human dignity should especially be respected. The justice has not been upheld because the old customs are still kept, so that human beings have being treated as animals”. In his memorial about the completion of *Xian Xing Xing Lv* (*The Current Criminal Law*), he had sharply criticized human trafficking because “it has been universally condemned and it is against the tenet of protecting people’s rights in the political system of constitutionalism.” So, he required that “all articles about human trafficking, including ‘Nu Bi’ (the slave girls and maidservants) should be abolished in order to show ‘Ren Zheng’ (Benevolent Administration)”. The concept of “Ren Zheng” (Benevolent Administration) which Shen Jiaben had mentioned here referred to the traditional benevolent government advocated by Confucius and Mencius, but he had combined the traditional “Ren Zheng” (Benevolent Administration) with humanism in the western countries and had advocated forcefully to change the severe punishments in criminal law to more lenient ones. Because “the westerners all have blamed the brutal punishments in Chinese law for its lack of benevolence”, “it is one of the most important tasks of ‘Ren Zheng’ (Benevolent Administration) to change the severe punishments to more lenient ones”. For this reason, he had appealed to abolish the savage punishment of “Ling Chi” (the punishment of dismemberment and the lingering death), “Xiao Shou” (to hang the criminal’s head up at public spots for people to witness), “Chuo Shi” (to dig up the body after being buried), “Yuan Zuo” (collective prosecution) and “Ci Zi” (tattooing words on the faces) in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*).

But Shen Jiaben’s humanism was also branded with feudal hierarchy. For example, although he had proposed changing “Nu Bi” (the slave girls and maidservants) into employed workers, he had also suggested that “Nu Bi” (the slave girls and maidservants) in the families of Han nationalities should be limited to those under 25 years old, and after expiration, their relatives’ opinions should be consulted.

¹⁵⁷ Shen Jiaben, “Fa Xue Hui Za Zhi Xu” (Preface to the Journal of Law Society) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Vol. 6, Zhonghua Book Company, 1985, p. 2244.

The family maidservants in Qi families (banners: a division of Manchu nationality and the emperor's clan) should be changed into employed workers, but there should be no age limits". As to the question of changing the status of "Shi Pu" (life maidservants) in the family of Han Nationality, he only suggested "conditional change". Their status could be changed only after "three generations"; as to the question of adopting concubines, he thought that although "concubinage is forbidden in the western countries," "in China, the customs and situations are different, it is not necessary to be abolished." Accordingly, only slight changes were made about the relevant regulations, and it was ruled that "concubinage is only allowed with the arrangement of match-makers, at the same time, gifts and money should be presented at the ceremony, and the statements of volunteering to be concubines should be signed by the parents of the concubine, furthermore, the status of concubines and bride maids should be maintained without any changes."

From above we could see that Shen Jiaben, who was living at the times when "Hai Jin" (the banning on maritime trade and intercourse with foreign countries) was abolished and the old was replaced by the new, was different from those traditional feudal jurists. He had not only opened his eyes to the outside world, but also paid attention to the adoption of western legal culture and had earnestly carried them out in the practice of law revision. But as a feudal official, both his justice reform and law revision were far from thorough, besides, he was easily compromised in the conflict between western legal culture and native Chinese legal culture, which was no other than a reflection of his standpoint of reformism.

The achievements in law revision during the late Qing dynasty were inseparable from Shen Jiaben's work. He was not only an advocator of the introduction of the western legal culture but also an earnest participator by himself, so his historical achievements were indelible. But it should also be pointed out that law revision had not just been conducted within the 9 years after 1902, because actually it had lasted for about 40 years starting from the revision of commercial law suggested by the bourgeois reformists. Besides, Shen Jiaben was not the only person who had put forward the suggestion of revising the traditional Chinese laws by learning from the western countries; in fact, it had almost involved the whole generation starting from Hong Rengan and Feng Guifen, therefore, Shen Jiaben was only a successor, and he had just summarized them in practice.

3. the guiding principle of law revision

According to the general principle of "being applicable both home and abroad" in law revision issued by Qing imperial court, the guiding principle of "Can Kao Gu Jin" (making reference to the ancient and present), "Bo Ji Zhong Wai" (adopting widely from home and abroad)¹⁵⁸ and "Hui Tong Zhong Xi" (the harmonization of Chinese and western laws) in law revision was made by Shen Jiaben. From the

¹⁵⁸ Shen Jiaben, "Chong Ke Ming Lv Xu" (Preface to the Re-engraved Ming Code) in "Ji Yi Wen Cun" (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2210.

comparison between Chinese and western laws, he had realized that the western laws were more progressive than the Chinese old feudal legal civilization, so he suggested that “others’ good points be adopted in order to overcome our shortcomings” and “others’ laws be adopted if they are excellent, because it is foolish not to take what is necessary”.¹⁵⁹ In addition, “surrounded by big powers and under the stress of the situation of opening up to the world”, it was impossible for China to contend against the “tide of legal reform in the world” by sticking to the old ideas. Therefore, when he was in charge of law revision, the basic tenet of “winning by negotiation and learning from the powerful countries”¹⁶⁰ was established in order to make the new laws “in accordance with those of other countries”,¹⁶¹ because “any sensible person can see the advantage and disadvantage if China is fighting against all the other countries in the whole world alone”.¹⁶² He had once sent a memorial to the emperor and said by taking Japan as an example in law revision, “The Japanese Meiji Reform is also based on law revision ... the social customs have not been changed, the nation has become stronger and more prosperous, moreover, Japan has become one of the strongest countries of East Asia.”¹⁶³ He suggested that the method of “taking the essence and discard the dregs” in handling ‘Xi Xue’ (the western studies) which was used by Japan in Japanese Meiji Reform should be used to “make a fresh start”,¹⁶⁴ because only in this way was the law revision and constitutionalism in China promising.

In order to put into effect the thoughts of “Bo Ji Zhong Wai” (adopting widely from home and abroad) and “Hui Tong Zhong Xi” (the harmonization of Chinese and western laws) in law revision, Shen Jiaben had given the task of translating foreign legal documents and works an important place on the agenda. He said, “Translation is of primary importance in making references to the laws of various countries”, and “if the tenet of western laws are to be understood, first ‘Xi Xue’ (the western studies) should be studied, and especially the westerners’ books should

¹⁵⁹ Shen Jiaben, “Cai Pan Fang Wen Lu Xu” (Preface to the Interviews of Judges) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, pp. 2236–2237.

¹⁶⁰ Shen Jiaben et al., “A Memorial to the Emperor about Making New Laws according to the Current Laws”, in *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)*, edited by Ming and Qing Archives Department of Palace Museum (Book 2), Zhonghua Book Company, 1979, p. 852.

¹⁶¹ Shen Jiaben, “A Memorial to the Emperor about Changing the Punishment of Reprieve to Exile and Imprisonment” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 1, Zhonghua Book Company, 1985, p. 2029.

¹⁶² Shen Jiaben, “Chong Ke Ming Lv Xu” (Preface to the Re-engraved Ming Code) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2210.

¹⁶³ Shen Jiaben, “A Memorial to the Emperor for Abolishing the Severe Punishments in Laws” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 1, Zhonghua Book Company, 1985, p. 2027.

¹⁶⁴ Wang Shitong, “Wu Xing Shen Gong Zi Mu Zhi Ming” (The Epitaph of Childe Wu Xingshen).

be translated.”¹⁶⁵ Under the host of Shen Jiaben, up to the fall of Qing Dynasty, dozens of foreign laws, regulations and legal works had been translated.

According to the statistics, in the March of the 31st year of Guangxu, the translated foreign laws included the following: *German Criminal Law*, *German Judgment Law*, *Russian Criminal Law*, *Current Japanese Criminal Law*, *The Revised Japanese Criminal Law*, *The Criminal Law of Japanese Army*, *The Criminal Law of Japanese Navy*, *The Criminal Procedure Law of Japan*, *The Japanese Prison Law* and *The Organic Law of Japanese Court*. Besides, many legal works were translated, such as *The Interpretation of Japanese Criminal Law*, etc. and *French Criminal Law* was being proofread.¹⁶⁶

To the 33rd year of Guangxu, the various translated laws and legal works of different countries included the following: *French Criminal Law*, *German Criminal Law*, *Holland Criminal Law*, *Italian Criminal Law*, *French Printing Law*, *German Civil Procedure Law*, *On Japanese Criminal Law*, *The Prussian Legal System*, *The Record of Interviews of Japanese Prisons*, *The Draft of Japanese New Criminal Laws*, *On Code*, *The Interpretation of the Japanese Criminal Law*, *Penology*, *Opinions on Prison Matters*, and *On the Constitution Compiled by Japanese Tribunal* etc. Those which had been translated but not completed included: *German Civil Law*, *German Old Civil Procedure Law*, *On the Belgium Criminal Law*, *Belgium Prison Regulations*, *Belgium Criminal Law*, *American Criminal Law*, *American Criminal Procedure Law*, *Swiss Criminal Law*, *Finland Criminal Law*, and *On Private Law in Criminal Law*, etc.¹⁶⁷

In the first year of Xuantong, Shen Jiaben had gathered the statistics of the translated works by “Xiu Ding Fa Lv Guan” (The Law Revision Office) after it was separated from “Si Fa Bu” (Ministry of Justice) in November of the 33rd year of Guangxu, those translated works included the following: *Legal Terms* (according to the terms used in the current draft of the civil procedure law), *Japanese Commercial Law*, *German Maritime Code*, *British Nationality Law*, *American Nationality Law*, *German Nationality Law*, *Austrian Nationality Law*, *Portugal Nationality Law*, *An Investigation of the Nationality Laws of Various Countries*, *A Comparison of Naturalization Laws*, *Japanese Civil Law* (unfinished), *German Civil Law* (unfinished), *French Civil Law* (unfinished), *Austrian Civil Laws* (unfinished),

¹⁶⁵ Shen Jiaben, “Xin Yi Fa Gui Da Quan Xu” (Preface to the Newly Translated Collections of Legal Regulations) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (A Textual Research of the Criminal Laws in the Past Dynasties), Vol. 6, Zhonghua Book Company, 1985, p. 2242.

¹⁶⁶ Shen Jiaben, “A Memorial to the Emperor Presented by the Minister in Charge of Legal Revision about Abolishing the Severe Punishments in the Current Laws”, in “Xian Zheng Bu” (The Section of Constitutionalism) in *Da Qing Fa Gui Da Quan* (A Complete Collection of Laws and Regulations of Great Qing), Vol. 3.

¹⁶⁷ Shen Jiaben, “A Memorial to the Emperor about the Joint Conducting of Legal Revision and Inquisition by Da Li Yuan (the Supreme Court) and Judicial Department” in *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty), edited by Ming and Qing Archives Department of Palace Museum (Book 2), Zhonghua Book Company, 1979, p. 852.

*Spanish Civil Law, The Negotiable Instruments Law of Japan, Bankruptcy Law of the United States, On Company Law of the United States, On Company Law of Britain, On Laws of Kinships, On Bankruptcy Law of Kato Masaharu, Romania Nationality Law, The Articles of Nationality in Italian Civil Law, Revised Civil Procedure Law of Germany (unfinished), Revised Regulations of Japan for Foreigners, The Law of Compulsory Execution and Compulsory Auction of Germany (unfinished), Revised Japanese Criminal Procedure Law, Revised Japanese Civil Procedure Law, Current Japanese Criminal Procedure Law, Current Japanese Civil Procedure Law, French Criminal Procedure Law (unfinished), Austrian Court Organic Law, Austrian Civil Procedure Law (unfinished), Records of the Interviews in Tribunals, Outline of Nationality Law and the Suggestions of the Investigator by Kōtarō Shida, Notes to Japanese Civil Procedure Law, On Japanese Criminal Procedure Law, Outline of the Japanese Civil Procedure Law, The Experimental Laws of German Higher Civil Officials, German Punishment Law for Judges, German Punishment Law for Administrative Officials, International Private Law,*¹⁶⁸ etc.

Up to November of the first year of Xuantong, the other translated works included the following: *Articles of the General Rules of German Civil Law, Articles of Austrian Domestic Relation Law, Articles of the General Rules of French Civil Law, Articles of ID Cards in French Civil Law, Articles of Missing People in French Civil Law, Articles of Domestic Relation in French Civil Law, Heritage Law* by Japanese scholar Yoshindo Okuda, *Austrian Civil Procedure Law, German Coercive Execution and Compulsory Auction Law, Dictionary of Japanese Law*, etc. Those unfinished included *Reasons for the General Rules of Civil Law: the Property Right and the Creditor's Rights* by Japanese scholar Santarō Okamatsu, *Revised German Civil Procedure Law* and *German Bankruptcy Law*.

The great many foreign laws translated had provided available reference models for the making of new laws during late Qing dynasty. From the statistics of the translated works, we could see that most of the translated works by the end of the nineteenth century were British and American laws; nonetheless, at the beginning of the twentieth century, the translation was diverted to Japanese laws which had originated from Roman legal systems. In the end, the Britain and American legal systems were replaced by the Roman legal system, so the construction of Chinese modern legal system was completed.

Apart from the translation of books, Shen Jiaben had invited many foreign jurists, such as Asataro Okada, Yoshimasa Matsuoka and others from Japan to act as legal consultants in law drafting.

At the same time of introducing western laws, Shen Jiaben also thought that “in the age of ‘Fa Zhi’ (ruling of law), if we only make reference to the current laws but neglected the ancient laws; make reference to the foreign laws but neglected the Chinese laws, then, the laws are not complete. How can we achieve mastery through

¹⁶⁸ Dong Fang Za Zhi (*The Oriental Magazine*), March, 1909.

a comprehensive study of them and make them popularized in the world?”¹⁶⁹ Besides, “those imperfect laws should be abolished because it is wrong not to abolish those which should be abolished.”¹⁷⁰ Although foreign laws should be referred to, “‘Li Jiao’ (feudal ethical code) and ‘Min Qing’ (the condition of the people) which have been passed on from generation to generation in China should not be violated”,¹⁷¹ because only in this way was it possible to “make the new laws perfectly mastered and comprehensively studied without contradictions.”¹⁷² When he summarized the experience of carrying out the tenet of “achieving mastery of the new laws through a comprehensive study” in law revision, he said, “I am ordered by the emperor to have the laws revised, so the western laws have been adopted, references have been made and their similarities and differences been compared, but if the origins of the Chinese laws have not been studied in depth, its pros and cons have not been considered, and they are arbitrarily combined with western laws, then it is just like a square peg in a round hole. How can we expect them to be thoroughly understood? Therefore, the teaching of Chinese law should be emphasized.”¹⁷³

In conclusion, in the law revision in late Qing dynasty, the Chinese and western laws interlocked, the old and new laws co-existed, moreover, they were both contradictory and unified, which had become a representative of the legal culture in the new age. But generally speaking, a historical tendency of transition from feudal legal system to bourgeois legal system in modern China had been reflected the law revision in late Qing dynasty. What was more, the modernization of Chinese legal system had benefited from the introduction of western laws, and as it were, the series of new laws made were important beginnings of the modernization of Chinese law, which had laid a solid base for the legislation and establishment of constitutional systems in the later Beiyang government after the Republic of China. So, to a certain extent, Shen Jiaben was successful at this point. However, the purpose of Shen Jiaben’s law revision was only to reform the legal system and to improve the ruling of Qing Dynasty in order to adapt to the needs of western superpowers and to

¹⁶⁹ Shen Jiaben, “Xue Da Si Kou Yi Gao Xu” (Preface to the Posthumous Papers of Xue Da Si Kou) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2223.

¹⁷⁰ Shen Jiaben, “Cai Pan Fang Wen Lu Xu” (Preface to the Interviews of Judges) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2236.

¹⁷¹ Shen Jiaben et al., “A Memorial to the Emperor about the Specific Provisions of Criminal Law” in *Da Qing Guang Xu Xin Fa Ling Fu Lu (The Appendix to the New Laws of Guangxu Emperor of Great Qing)* (Book 1), The Commercial Press, 1910.

¹⁷² Shen Jiaben, “Da Qing Lv Li Jiang Yi Xu” (Preface to the Lectures of Da Qing Lv Li) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2233.

¹⁷³ Shen Jiaben, “A Memorial to the Emperor about Making New Laws according to the Current Laws”, in *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), p. 853, 854.

help it to get over the crisis in the assaults of revolutionary struggles taking place all over the country, so at this point, Shen Jiaben was also a failure,¹⁷⁴ because Qing Dynasty had not survived in spite of his legal system reform.

4. the achievements of law revision

The law revision in late Qing was an important event in Chinese legal history, because since then, the Chinese feudal legal system had been broken down and the Chinese modern legal system had been set up by modeling on the frames of the continental legal system. The achievements of law revision in late Qing dynasty had been reflected in a series of new laws made later, and it had led to a nationwide reform of legal systems and the implementation of new style law education.

During the time when Shen Jiaben was the minister in charge of law revision, the laws revised directly under his guidance included the following:

Da Qing Xian Xing Xing Lv (The Current Criminal Law of Great Qing), was started being revised in 1908, presented to the emperor for approval in 1909 and issued for enforcement in 1910.

Xing Shi Min Shi Su Song Fa (The Criminal and Civil Procedure Law), was presented to the emperor for approval in 1906, however, was not put into practice because of the opposition of “Du Fu” (the viceroys and procurators) of various departments.

Da Qing Xin Xing Lv Cao An (The Draft of the New Criminal Law of Great Qing), was presented to the emperor for approval in 1907, opposed by conservatives, revised many times and issued for enforcement in 1910.

Fa Yuan Bian Zhi Fa (The Court Organic Law), was presented to the emperor for approval in 1907 and issued for enforcement in 1909.

Wei Jing Lv Cao An (The Draft of the Regulation for the Offence of Police), presented to the emperor for approval in 1907 and issued for enforcement in 1909.

Da Qing Shang Lv Cao An (The Draft of the Commercial Law of Great Qing), was started being compiled in 1908 and presented to the emperor for approval in 1908.

Xing Shi Su Song Lv Cao An (The Draft of Criminal Procedure Law) and *Min Shi Su Song Lv Cao An (The Draft of Civil Procedure Law)*, were presented to the emperor for approval in 1910.

Guo Ji Tiao Li (The Ordinance of Nationality) and *Jin Yan Tiao Li (The Ordinance on the Banning of Opium-Smoking and Opium Trade)*, were approved and issued for enforcement in 1909.

Besides, many other laws had been made with the help of Shen Jiaben.

In summary, the “six-law” system (the system mainly composed of laws made in the six departments) had been basically set up through law revision.

¹⁷⁴ Shen Jiaben, “A Memorial to the Emperor about the Specific Provisions of Criminal Law” in “Fa Lv Bu” (The Section of Law) in *Da Qing Fa Gui Da Quan (A Complete Collection of Laws and Regulations of Great Qing)*, Vol. 11.

The traditional pattern of “Zhu Fa He Ti” (the integration of various laws) and “Min Xing Bu Fen” (with no differentiation between civil and criminal laws) formed since Li Kui’s *Fa Jing* (*Canon of Laws*) had experienced great historical changes after the introduction of continental legal system in the law revision in late Qing Dynasty. Subsequently, the modern Chinese legal system which consisted of six main departmental laws was beginning to be established, which was inseparable from those officials who were mostly educated and influenced by the continental legal system and who had participated in law revision. In fact, it was according to the continental legal system that Shen Jiaben, who was in charge of law revision, had reformed the traditional Chinese legal system. He stressed that the Chinese legal system must be reformed because it was not only against the “the excellent codes common to all other countries, but also against the latest theories of modern world”. He said:

The gains and losses of laws are determined by their timely changes. Although the old forms of law are specialized in criminal affairs, they are mixed with military, civil, commercial and litigation items. Now the military system has been changed, so ‘Lu Jun Bu’ (Ministry of Land Forces) is responsible for the military affairs. Besides, the laws about civil commerce and litigation have been made according to the decree of the emperor, so only those criminal affairs should be dealt with by the criminal law. As the old saying goes, everything is changing constantly, it is only by changing that everlasting stability can be brought about, and therefore, the old rules should be changed.¹⁷⁵

Shen Jiaben was not only active in the making of entity laws but also in the making of procedure laws. By taking criminal procedure law as an example, he said, “Generally speaking, the criminal law is regarded as the essence and the procedure law is regarded as its application. If the essence is not perfect, it is impossible to show the tenet of the legislation and if the application is not complete, it is impossible to achieve the goal of the law. So the two are interrelated with each other and should not be impartially stressed.”¹⁷⁶ Through the efforts of Shen Jiaben and others, it had become one of the most important fruits of law revision in late Qing Dynasty to set up the “six-law” system and to integrate them with continental legal system.

(a) the criminal law and the relevant laws and regulations

(i) *Da Qing Xian Xing Xing Lv* (*The Current Criminal Law of Great Qing*)

Shen Jiaben, the minister in charge of law revision, thought that “because the criminal law is the most important law of the various laws, it should be compiled first”. Thus, the revision of criminal law had become the hard core of law revision in late Qing Dynasty.

On the 29th of January of the 34th year of Guangxu (1908), in *A Memorial to the Emperor about Compilation of Current Criminal Law in Order to be Used as a*

¹⁷⁵ Shen Jiaben, “A Memorial to the Emperor about the Completion of the Draft of the Specific Provisions of Criminal Law” in “Lv Li Ba Shi Hao” (The 80th Precedent) in “Fa” (Law) in *Dang* (Files).

¹⁷⁶ *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*), Vol. 11.

Basis for Making New Laws, Shen Jiaben and other people had suggested that before the issuing of new criminal law, it was necessary to have the current criminal law revised as a transition and it should be revised according to the principle of “appropriate deleting of catalogues”, “appropriate revision of the titles of the punishments”, “appropriate adoption of new chapters” and “appropriate simplification of case texts”.

Xian Xing Xing Lv (The Current Criminal Law) was completed in May, 1910, and soon an edict was issued by the Emperor, “I have carefully read and annotated *Xian Xing Xing Lv (The Current Criminal Law)* and found it appropriate, so it should be compiled and printed at once, and then be enforced outside the capital city and abided by everyone.”¹⁷⁷

Da Qing Xian Xing Xing Lv (The Current Criminal Law of Great Qing) consisted of 30 categories, 414 legal items and 1,066 sample cases, and it was published as a transitional form of the new criminal law. The main contents of the revision included the following:

The deleting of catalogues: according to the principle of “applying appropriate methods to the current situation”, “the law is still divided into 30 categories in accordance with the current law, and the names of the “six-law” system have been abolished for verification”.

The change of the names of punishments: “those overlapping items of the punishments are changed, and the punishments are simplified and become more lenient. So, the names of criminal punishments prescribed in laws like ‘Chi’ (flogging with light sticks), ‘Zhang’ (flogging with heavy sticks), ‘Tu’ (imprisonment), ‘Liu’ (life exile), ‘Si’ (death penalty), ‘Wai Qian’ (repatriation) and ‘Chong Jun’ (military exile) have been changed and divided into only four categories: ‘Si’ (death penalty), ‘An Zhi’ (settlement), Gong Zuo (work) and Fa Jin (mulct)..., and the various names of punishments in laws have been newly defined to avoid misunderstandings.”

The adoption of new chapters: the crimes which were not mentioned in the old laws, such as “destroying of telephone poles and the minting of money without permission” were added.

The deleting and combination of “Li” (precedent): “Li” (precedent) was often made according to times and incidents. So “those which are not in accordance with the current situation should be changed, and new chapters should be adopted. Besides, there are many problems in the existing ‘Li’ (precedent). For example, some of them exist only in name, some of them are quoted from irrelevant ones in the previous cases and some of them are discrepant.” So they should be deleted and combined after discussion and “made as simple as possible.”¹⁷⁸

¹⁷⁷ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), Zhonghua Book Company, 1979, p. 880.

¹⁷⁸ *Ibid.*, p. 853.

In order to abolish the various savage punishments in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*), in *A Memorial to the Emperor about Abolishing the Severe Punishments in Law*, Shen Jiaben stated, “It is the most important duty of ‘Ren Zheng’ (Benevolent Administration) to change the harsh punishments in the criminal law into lenient ones.” So the excruciations like “Ling Chi” (the punishment of dismemberment and the lingering death), “Xiao Shou” (to hang the criminal’s head up at public spots for people to witness), “Chuo Shi” (to dig up the body after being buried) should be abolished and replaced by “Zhan Jue” (to cut down the criminal’s head), “Jiao Jue” (death by hanging with an immediate execution) and “Jian Hou” (to be imprisoned). At the same time, the principle of “Xing Fa Zhi Yu Yi Shen” (enforcing punishments only to the criminal himself without involving relatives or friends) in the criminal law of capitalist countries and the ancient doctrine of “Zui Ren Bu Nu” (enforcing no punishments to the criminal’s families) had been quoted, and he suggested that the punishments like “Yuan Zuo” (collective prosecution) and “Ci Zi” (tattooing words on the faces) be abolished, meanwhile, “those who know nothing about the criminal cases should not be persecuted collectively, those who deserve to be tattooed on their faces should be taught to learn skills and crafts instead. In addition, the years for serving sentences should be decided according to the seriousness of their crimes.” Consequently, the above mentioned harsh punishments were abolished in *Xian Xing Xing Lv* (*The Current Criminal Law*) according to Shen Jiaben’s suggestion.

A Memorial to the Emperor about Abolishing the Severe Punishments in Law was highly praised. Yang Honglie said, “It had abolished the most backward and out-of-dated sections in Chinese law, so it could be regarded as an important declaration of the reformation of Chinese legal system.”¹⁷⁹

According to the principle that “the severity and leniency of punishment should be determined by concrete times and situations ... while should not be restricted by traditional established rules”, Shen Jiben presented a memorial to the emperor to require that the three probation of capital crimes like accidental killing, manslaughter and intentional killing be changed into “Tu” (imprisonment), “Liu” (life exile). He said:

These above-mentioned crimes are punished only by imprisonment in other countries, and even in *Tang Lv* (*Tang Code*), death penalty is not enforced. But in Chinese current laws, accidental killing, manslaughter and intentional killing are all categorized as ‘Dou Sha’ (to be killed by mob fighting) and sentenced to ‘Jiao Jian Hou’ (death by hanging with a postponed execution). The crimes are reprieved once in ‘Qiu Shen’ (Autumn Assizes) and are allowed to be abated. Moreover, the punishments for more severe crimes are allowed to be abated for three times, so it is death penalty just in name, but in reality, it is the same with the punishment of ‘Liu’ (life exile), which have caused great trouble in ‘Qiu Shen’ (Autumn Assizes). So now the name should be checked and the burdensome work reduced. Why not change it directly into the punishment of ‘Liu’ (life exile) to make things simpler? ... So, I require that the punishment of the crime of accidental killing be changed into ‘Tu’ (imprisonment).

¹⁷⁹ Yang Honglie, *Zhong Guo Fa Lv Si Xiang Shi* (*The History of Chinese Legal Ideology*), China University of Political Science and Law Press, 2004, p. 280.

As for the crimes of manslaughter and intentional killing, and ‘Jiao Jian Hou’ (death by hanging with a postponed execution), they should be all changed into ‘Liu’ (life exile) ... so that the severe punishments in current law can be made more lenient and be in accordance with the punishments in other countries.”¹⁸⁰

Besides, according to the principle of “Min Xing You Fen” (the differentiation between civil and criminal laws), the statutes belonging to civil criminal laws in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*) about inheriting, division of property, marriage, pawn, lands and houses, money and debts were made exclusively with no more penalty enforced to show the distinction of civil and criminal cases. In penal systems, the original punishments like “Chi” (flogging with light sticks), “Zhang” (flogging with heavy sticks), “Tu” (imprisonment), “Liu” (life exile), “Si” (death penalty) were replaced by the measures like “Fa Jin” (mulct), “Tu” (imprisonment), “Liu” (life exile), “Qian” (repatriation) and “Si” (death penalty). All those regulations against “Xin Zheng” (the new administration), such as forbidding the civilians to go out to sea and to engage in mining, were abolished, in the mean time, according to the social and economic changes, some new charges were added, such as the damaging of telephone lines and important railway facilities.

In a word, in layout, the general catalogue of the six-department laws was given up in *Xian Xing Xing Lv* (*The Current Criminal Law*); in system, a separation of criminal and civil affairs was made; in penal system, the punishments like “Chi” (flogging with light sticks), “Zhang” (flogging with heavy sticks), “Tu” (imprisonment), “Liu” (life exile), “Si” (death penalty), “Wai Qian” (repatriation) and “Chong Jun” (military exile) were changed into five penalties like “Fa Jin” (mulct), “Tu” (imprisonment), “Liu” (life exile), “Qian” (repatriation) and “Si” (death penalty). Furthermore, there were only two kinds of death penalties: decapitation and hanging, and those savage punishments like “Ling Chi” (the punishment of dismemberment and the lingering death), “Xiao Shou” (to hang the criminal’s head up at public spots for people to witness), “Chuo Shi” (to dig up the body after being buried), “Ci Zi” (tattooing words on the faces) and “Yuan Zuo” (collective prosecution) were abolished. So it should be mentioned that it was only in the new historical background that it was possible to make these changes, although the essence of feudal criminal law had not been touched upon.

(ii) *Da Qing Xing Lv* (*The Criminal Law of Great Qing*)

Da Qing Xing Lv (*The Criminal Law of Great Qing*) was also called *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*), which was started to be drafted from 1906 and it had taken about 6 years to finish, then it was revised seven times and was not issued for enforcement until October, 25, 1911. The law consisted of 53 chapters and 421 articles including five articles of *Zan Xing Zhang Cheng* (*The Temporary Regulations*).

In layout, the new criminal law was divided into the general provisions and the specific provisions, and the former was the guiding principle of the whole document

¹⁸⁰ “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Vol. 1, Zhonghua Book Company, 1985, p. 2029.

and the latter the concrete examples of each item. According to the principle “Zong He Tong Yi” (an overall examination of similarities and differences) and “Xie Jiao Duan Chang” (an estimate of advantages and disadvantages), the following important reforms were made:

First, “the revision of ‘Xing Ming’ (the criminal law)”, namely, by imitating the laws in western countries, the five savage punishments like “Chi” (flogging with light sticks), “Zhang” (flogging with heavy sticks), “Tu” (imprisonment), “Liu” (life exile), “Si” (death penalty) which were prevalent in China since Sui Dynasty had been changed into five primary penalties, i.e. death penalty, life imprisonment, a fixed-term of imprisonment, custody and “Fa Jin” (mulct) and other two secondary penalties, i.e. the deprivation of the rights of citizenship and the confiscating of property.

Second, “the reduction of the number of death penalties according to situations”, namely, the articles concerning the probation of death penalty in *Da Qing Lv Li* (*The Laws and Precedents of Great Qing*) were abolished, moreover, the articles concerning death penalties were also reduced according to the usual practices of other countries.

Third, “the sole application of death penalty”, namely, only one kind of death penalty was allowed to be put into practice, i.e. hanging, which should be carried out in a special place secretly. The punishments for those crimes of utmost flagrance like “Mou Fan” (plotting rebellion or plotting to endanger “She Ji”: the country), “Da Ni” (great sedition) and the murdering of parents and grandparents were prescribed in special precedents, and in such cases, the penalty of “Zhan Xing” (to cut down the head) could be executed.

Fourth, “the abolition of ‘Bi Fu’ (legal analogy)”, namely, the principles of “Zui Xing Fa Ding” (a legally prescribed punishment for a specified crime) in the bourgeois criminal law of the western countries were adopted, the tradition which had often resulted in inconsistent trials and unfair judgments by random application of “Bi Fu” (legal analogy) in the case of the lack of relevant articles was abolished, and the principle of “no punishments without established articles” (*nullum crimen sine lege; nullum poena sine lege*) was established. So it was a negation of the feudal dictatorship in trials and a reflection of the bourgeois principle of “Fa Zhi” (ruling of law).

Fifth, “education by punishments”, namely, by following the criminal laws in the west, it was stipulated that “the juvenile delinquency should be punished by custody, and they should be kept in special places to be reformed and educated to show “Ming Xing Bi Jiao” (integrating punishment with moral teachings).¹⁸¹ It was also stipulated that “the behaviors of youngsters under twelve and the behaviors of patients with mental disease” were not regarded as crimes, so they were just to be reformed and educated or be punished by custody.

¹⁸¹ Shen Jiaben et al., “A Memorial to the Emperor about the Specific Provisions of Criminal Law” in *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*), Vol. 11.

The three principles of the western modern criminal law—"Zui Xing Fa Ding" (a legally prescribed punishment for a specified crime), "Zui Xing Shi Ying" (enforcing appropriate punishments for the crimes) and humanism were adopted in *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*).

The basic implication of "Zui Xing Fa Ding" (a legally prescribed punishment for a specified crime) was "no punishments without established articles" (*nullum crimen sine lege; nullum poena sine lege*), which was first expressed in the 59th article of the British *Da Xian Zhang* (*Great Charter*) in 1215. In China, the thoughts similar to "Zui Xing Fa Ding" (a legally prescribed punishment for a specified crime) was put forward by Liu Song in Jin Dynasty, but the national situation of the feudal autocracy in ancient China had determined that it was impossible for this thought to be significantly developed, because the principle of legal analogy not only was deeply-rooted but also had a long history in legal practices. At the time of law revision during the late Qing Dynasty, Shen Jiaben had proposed that the bourgeois criminal legal principle "no punishments, without established articles" (*nullum crimen sine lege; nullum poena sine lege*) be adopted and he had opposed legal analogy in lawsuit settlement. He said, "The crimes are justified only when it is explicitly stipulated in the main articles of law, namely, legal analogy should not be applied in criminal law". It was explicitly stated in the tenth article of *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*) that "without being stipulated in the main articles of the law, the conducts, whatever they are, are free from penalty." It was specially stated by "Xiu Ding Fa Lv Guan" (The Law Revision Office) to explain the reasons for the drafting of the article in the following way: "all crimes listed in this article are justified only if they have been stipulated in the main articles of law, and it is an important principle that legal analogy should not be applied in criminal law."

In addition, influenced by the theory of natural rights, the concept of human rights was unprecedentedly embodied in *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*), such as the forbidding of human trafficking and the owning of "Nu Bi" (the slave girls and maidservants). Besides, Shen Jiaben had fiercely attacked the acquiescence of human trafficking and slave owning in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), and he emphasized that:

How could the 'Nu Bi' (the slave girls and maidservants) be ill-treated, now that they are also human beings? It is true that life itself is important, but human dignity is more important, and it should especially be respected. Because proper principles have not been applied and old habits were still continue to be used, human beings are still regarded as animals.¹⁸²

He also said, "Human trafficking has been forbidden in European countries and the United States, because humanism has been widely accepted and human dignity has been respected, so we should follow suit."¹⁸³ These opinions were accepted by

¹⁸² "Chong Ke Ming Lv Xu" (Preface to the Re-engraved Ming Code) in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 6.

¹⁸³ "On Revising the Old Precedents of Human Trafficking" in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 1.

the Qing imperial court; consequently, the articles of human trafficking and the ownership of “Nu Bi” (the slave girls and maidservants) in the old codes were abolished in *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*). In addition, according to the principle of the equality of human rights, Shen Jiaben criticized the regulations about the prerogative redemption and the unequal punishments of the crimes committed by people of different social status stipulated in the articles of “Ba Yi” (The Eight Deliberations) in the old traditional laws. He pointed out: “the articles in ‘Ba Yi’ (The Eight Deliberations) ...are among those that should be abolished because they may only result in doubts”.¹⁸⁴ He also said:

If an official kills a ‘Nu Bi’ (the slave girls and maidservants), he is only penalized by confiscating his salary; if a Qi Ren (the members of Eight Banners, the emperor’s clan) kills a Nu Bi (the slave girls and maidservants) intentionally, he is only penalized by Jia Hao (wearing cangues in public), which is lighter than the punishments for killing a cow and a horse, and which has shown a contempt of human life.¹⁸⁵

After a careful investigation of public opinion, in *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*) which was revised under his direction, the long-practised system of “Ba Yi” (The Eight Deliberations) and the open inequality in law caused by people’s nobility and humbleness was finally abolished. Moreover, Shen Jiaben proposed that equal punishment should be enforced for both “Qi Ren” (the members of Eight Banners, the emperor’s clan) and the Han people if they had broken the law, and he opposed the regulations in *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*), according to which “Qi Ren” (the members of Eight Banners, the emperor’s clan) would be not be punished by the common judicial offices for their crimes, and even if they were punished, they had enjoyed the privileges like “abatement from penalty” and “change of penalty”. In *A Memorial to the Emperor about the Enforcement of Punishment for the Crimes like “Qian Jun”* (recruitment in the army), “Liu” (life exile), “Tu” (imprisonment) Committed by “Qi Ren” according to the Punishment for other People, he suggested, “I have heard that the principle of governing a state is first to make laws to govern the people. However, if laws are different, the people will be suspicious...; if laws are equal, people will be obedient. ...so, from now on, if ‘Qi Ren’ (the members of Eight Banners, the emperor’s clan) have committed crimes which are punishable by “Qian Jun” (recruitment in the army), ‘Liu’ (life exile), ‘Tu’ (imprisonment), they will be punished in the same way as other civilians, and the relevant articles about abatement from penalty in current laws should be abolished to show equality and to avoid discrepancy.”¹⁸⁶ Soon afterwards, *A Memorial to the Emperor about the Change of*

¹⁸⁴ “Comments on the Catalogues of Ming Code, Part 1” in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*).

¹⁸⁵ “On Revising the Old Precedents of Human Trafficking” in *Ji Yi Wen Cun* (*The Classics of Ji Yi*), Vol. 1.

¹⁸⁶ “A Memorial to the Emperor about Enforcing the same Punishment for the Various Crimes punishable by ‘Qian Jun’ (recruitment in the army), ‘Liu’ (life exile), ‘Tu’ (imprisonment) for Qi Ren as for other Common People” in *A Complete Collection of Laws and Regulations of Great Qing*, Vol. 1.

Regulations in the Old Law Concerning “Qi Ren”’s Dealing with their House Properties was presented by Shen Jiaben, in which he expressed his opposition to the regulations which had forbidden “Qi Ren” to trade their properties to protect their economic bases. He thought that “forbidding ‘Qi Ren’ to trade their house properties has displayed one aspect of the existing discrepancy. So, hereafter, ‘Qi Ren’ and the civilians are allowed to trade their real estates.” Consequently, the regulation forbidding “Qi Ren” to trade their properties in *Da Qing Xin Xing Lv (The New Criminal Law of Great Qing)* was abolished and their litigation cases were tried in the same adjudication divisions at different levels.

Shen Jiaben’s concept of human rights was also reflected in his prison reforms. Starting from the understanding that “punishments and prisons are two sides of the same coin”, at the same time of revising the new criminal law, he also put the prison reform on the agenda. In *Jian Yu Fang Wen Lu Xu (Preface to Prison Interviews)*, he stressed, “The purpose of setting up prisons is not to humiliate and torture but to influence and reform people”, so “it is not allowed to change the place of influencing and reforming into a place of humiliation”.¹⁸⁷ In *A Memorial to the Emperor about the four Matters that Must be Paid Attention to in Carrying out Prison Reforms*, he proposed that new prisons should be set up, and prison regulations should be made by making a reference to the newly edited prison charters of other countries, because the purpose of setting up prisons is to influence and reform people. In addition, he was against brutal terrorism as well as the punishments for juvenile delinquency. After that, *The Regulation to Set up Institutions for Criminals to Learn Handicrafts in each Province* was adopted by “Xing Bu” (Board of Punishment) and it was regarded “as the best solution” to arrange those prisoners who were sentenced to “Qian Jun”(recruitment in the army), “Liu” (life exile) and “Tu” (imprisonment).

Shen Jiaben’s concept of human rights, as outstanding merits of his legal thoughts, was basically embodied in the laws revised under his leadership. But in the drafting of civil laws, only the generally accepted principle of honesty and credit was adopted without mentioning the principle of equality, which was not out of momentary negligence but out of the existence of unequal social relations in real life.

Besides, the modern bourgeois theories and principles of criminal law were also reflected in the general provisions of *Da Qing Xin Xing Lv (The New Criminal Law of Great Qing)* by the regulations about the effectiveness of time and space, the age and the ability of criminal responsibilities, the justifiable self-defense and necessity (the agent is not legally responsible for whatever done through such situation), the attempted crimes, recidivist, complicity, principal penalty and subordinate penalty, the validity and the interruption of validity of the rights of public prosecution and punishment, the restriction of aggravation of punishments when several crimes were committed at the same time and the practice of probation and parole for the criminals who were able to start with a clean slate.

¹⁸⁷ “Jian Yu Fang Wen Lu Xu” (Preface to Prison Interviews) in *Ji Yi Wen Cun (The Classics of Ji Yi)*, Vol. 6, Zhonghua Book Company, 1985.

In view of the changes of the nature of the society, the situation of the state and the rapid development of economy, a series of new charges were listed in *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*), such as the crime of sedition, the crime of foreign invasion, the crime of infringing upon the leaders and delegations of foreign countries, the crime of obstructing elections, the crime of violating social order, the crime of counterfeiting national currency and the crime of sabotaging public health, etc.

On October 3, 1907, *A Memorial to the Emperor about the Completion of the Draft of Criminal Law for your Excellency to Read by Batches and about the Main Aim of Revision* was presented by Shen Jiaben, then the draft of the criminal law was sent by imperial court to every department and “Du Fu” (the viceroys and procurators) of each province to seek for opinions, and it had aroused strong and repeated criticisms. Zhang Zhidong, the Grand Councilor and the head of “Xue Bu” (Board of Education), had refuted it totally. Based on Zhang Zhidong’s opinion, orders were issued by “Xue Bu” (Board of Education) to “have an article-by-article comparison between the old laws and precedents and the newly drafted criminal law. Those which have brought no harm to ‘Li Jiao’ (feudal ethical code) and are only concerned with the various degrees of charges should be discussed, selected and adopted; those which are concerned with ‘Lun Chang’ (feudal order of importance) and ‘Gang Ji’ (social order and law) should be completely revised. In a word, the laws made should not only be in accordance with times, but at the same time they should also agree with the main ideas of ‘Li Jiao’ (feudal ethical code)..., we should benefit from rather than be harmed by the reform.”¹⁸⁸

Because of the opposition of some of the local “Du Fu” (the viceroys and procurators) and the ministers of some of the departments, *The Emperor’s Decree about Forbidding to Change the Articles Concerning ‘Lun Chang’ (feudal order of importance) in the Revision of New Criminal Law* was issued by Qing court on the 27th of January of the first year of Xuantong, which stressed that “all articles about ‘Lun Chang’ (feudal order of importance) in the old law should not be changed in order to prevent the justice and social ethic standards from being degraded. So it is of great importance for every minister to regard it as the tenet in law revision.”¹⁸⁹

On the fourth of October of the second year of Xuantong (November 5, 1910), *Xiu Zheng Xing Lv Cao An* (*The Draft of the Revised Criminal Law*) was completed and sent to “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) for examination. Then its name was changed to *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*) and after it was signed by Yi Kuang, the minister of “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) it was presented to the emperor.

¹⁸⁸ “Xing Kao Liu” (The 6th Textual Research of the Criminal Law) in *Qing Chao Xu Wen Xian Tong Kao* (*A General Textual Research of the Extended Documents of Qing Dynasty*).

¹⁸⁹ “The Emperor’s Decree about Forbidding Changing the Articles of ‘Lun Chang’ (feudal order of importance) in Revising the New Criminal Law” in *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), p. 858.

The revised draft of the new criminal law was still criticized by “Li Jiao Pai” (The School of Feudal Ethics). Liu Tingchen, the general supervisor of “Da Xue Tang” (The Grand School), had criticized that “there are many articles in the new criminal law which are against the rites and customs of our country, and among them, the most erroneous and absurd are the stipulation that even if the children are rebellious against the teachings of their elders and even if the unmarried women have committed adultery, they are still free from punishments.” Therefore, “the new law can be enforced only after ‘Li Jiao’ (feudal ethical code) is abolished, while obviously it is not allowed to abolish ‘Li Jiao’ (feudal ethical code), so the new laws can not be fully practiced.”¹⁹⁰ Lao Naixuan, “Ti Xue Shi” (the head of the provincial education department) of Jiangning, was one of the most important representatives who were against the new law. His criticism was mainly focused on Shen Jiaben’s notes to *Xiu Zheng Xing Lv Cao An* (*The Draft of the Revised Criminal Law*), because according to him the articles about “Lun Chang” (feudal order of importance) in the old laws, such as “Zun Zun” (showing respect to nobility represented by the emperor), “Qin Qin” (showing respect to relatives represented by parents), “Zhang Zhang” (showing respect to the seniors) and “Nan Nv You Bie” (giving different treatments to males and females) were unalterable. All the articles about the following crimes should be revised and included in the main text of the criminal law, they included “Gan Ming Fan Yi” (the seniors are prosecuted by the youngsters), “Fan Zui Cun Liu Yang Qin” (the criminal can be pardoned in order to take care of their parents if their parents are old and have nobody to depend on), “Qin Shu Xiang Jian” (adultery among relatives), “Qin Shu Xiang Dao” (the theft among relatives), “Qin Shu Xiang Ou” (fighting among relatives), “Qin Shu Xiang Wei Rong Yin” (concealment of crimes among relatives, or, refusing to testify among relatives in court), “Gu Sha Zi Sun” (killing the descendents intentionally), “Sha You Fu Bei You” (killing the children of the younger generation), “Qi Ou Fu” (wife beating husband), “Fu Ou Qi” (husband beating wife), “Wu Fu Jian” (adultery with unmarried woman), “Zi Sun Wei Fan Jiao Ling” (the descendents’ violation of doctrines and instructions), etc. He criticized Shen Jiaben because he thought that Shen Jiaben had intentionally chosen those in which “Lun Chang” (feudal order of importance) was neglected from foreign countries. Moreover, because Shen Jiaben’s ideas were greatly prejudiced, they “have to be modified”. In order to arouse publicity, he even showed his intentionally written essay *Xiu Zheng Xing Lv Cao An Shuo Tie* (*Comments on the Draft of the Revised Criminal Law*) to everyone in the capital city.

As to the two items of “Wu Fu Jian” (adultery with unmarried woman) and “Zi Sun Wei Fan Jiao Ling” (the descendents’ violation of doctrines and instructions) which Lao Naixuan had fiercely attacked, Shen Jiaben stressed that “because these only concerned with ‘Feng Hua’ (morals and manners) and may be handled through

¹⁹⁰ “A Memorial to the Emperor Presented by Liu Tingchen, the General Supervisor of ‘Da Xue Tang’ (The Grand School), about Completely Abolishing the Articles Incongruent with ‘Li Jiao’ (feudal ethical code) in the New Criminal Law” in *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979.

educational methods, they should not be included in the criminal law.” About this point, the Japanese jurist Asatarō Okada who had participated in the drafting of the criminal law said:

Everyone knows it is against the legal principle to include the crime of adultery into the criminal law, and in fact, it is unlikely to happen. But why do so many people still insist on including the crime of adultery into law? It is just because China is a country in which ‘Lun Chang’ (feudal order of importance) and ‘Feng Hua’ (morals and manners) have always been stressed, so people just feel that by the punishment of adultery, ‘Feng Hua’ (morals and manners) may be maintained, however, they are just groundless talks. Although people are fully aware that these articles are mere scraps of worthless paper, they are still arguing and debating about them, the reason is that people are still confused about the borderlines between ‘Li Jiao’ (feudal ethical code) and law and they just want to get undeserved reputation in the society by doing so. What is more, those behaviors which are against ‘Lun Chang’ (feudal order of importance) harmful to the society are beyond the reach of criminal law, so it is difficult to be put into practice. If people know that laws are only instruments existing in name only, the prestige and authority of criminal law will be completely lost. Consequently, people will show contempt for the laws and regulations just because of these harmful articles. In a word, although the harm of adding the article of adultery is not so great, it may lead to people’s loss of respect to all of the criminal law, therefore, its harmfulness is tremendous. Adultery has been regarded as a moral and religious sin to jeopardize society in the eastern and western countries, which is not different from China at the beginning, but the crime of adultery has not been included in their criminal laws, isn’t it accidental? If ‘Li Jiao’ (feudal ethical code) is rigidly adhered to but the legal principles are failed to be understood, the laws made are by no means perfect. In addition, as a legislative organization of China, what ‘Zi Zheng Yuan’ (The Advisory Council) has said is surely to have drawn the attention of the countries all over the world, so is it just a shame of ‘Zi Zheng Yuan’ (The Advisory Council) to become a laughing stock in the field of legal studies of the whole world for such silly problems?¹⁹¹

As to how to punish “Zi Sun Wei Fan Jiao Ling” (the descendants’ violation of doctrines and instructions), Asatarō Okada criticized Lao Naixuan’s proposal to add the article that “anyone who has intentionally disobeyed the reasonable instructions of immediate family members should be arrested”, and he said:

I have looked into the current law and found out that if descendants have disobeyed their parents and grandparents, they will be flogged one hundred times. Moreover, it is added in the note that if the instructions are sound, but still they are intentionally violated by the descendants, and they have been accused by their grandparents and parents themselves, they will be convicted. According to the new law, there are four reasons to abolish this article: firstly, the term “instruction” used in the law is too ambiguous for people to get to know which behavior is offensive and which is not. Secondly, the grandparents’ and parents’ rights of instruction are not clearly defined, so when their instructions are contradicted with each other, it is more difficult to judge whether their descendants have committed the crime or not. Thirdly, if all the behaviors against their parents’ instructions are punished, it is more difficult to judge whether they have violated the principles of ‘Lun Chang’ (feudal order of importance) or they have violated the criminal law, so it is difficult to judge which one is to be punished or which one is not, consequently, the criminal law will only probably

¹⁹¹ “On Excluding the Penalties on Adultery from the Criminal Law by Doctor Asatarō Okada”, quoted from Li Guilian, *Shen Jiaben Zhuan (The Biography of Shen Jiaben)*, Law Press, 2000, p. 327.

be regarded as a piece of worthless paper, which may lead to the contradiction between theories and practices. Fourthly, in civil law, grandparents and parents all have the rights of guardianship to punish their descendants, and it is within their power to supervise their descendant's behaviors, so it is not necessary to punish them any more according to criminal law." In short, grandparents and parents have the rights of instruction in the aspect of 'Lun Chang' (feudal order of importance); they have affection of love in the aspect of 'Ren Dao' (the Way of Human); and they have the rights of punishment in the aspect of law, therefore, they can achieve the aim even without employing the criminal law.¹⁹²

At the time, Yang Du working in "Xiu Ding Fa Lv Guan" (The Law Revision Office) and Wu Tingxie had discussed the reasons of making new laws and denounced the attacks of the conservatives in the two articles *On the Difference of Nationalism and Familism* and *Defending Law with Old Theories* written by them respectively. In September of the second year of Xuantong (October, 1910), Yang Du himself attended the meeting held by "Zi Zheng Yuan" (The Advisory Council) to have an examination of *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*), and at the meeting, he had explained the purpose of *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*) and the reasons to practice nationalism instead of familism.

On the 25th of December of Xuantong (January 25, 1911), a decree was issued by the Qing government:

The new criminal law is of special importance to the constitutional administration ..., because it concerns about the time of constitutional preparation, and it really can not be delayed any more. Now the general principle, the specific provisions of the new criminal law and *Zan Xing Zhang Cheng* (*The Temporary Regulations*) are issued first to be prepared to be put into practice.¹⁹³

Zan Xing Zhang Cheng (*The Temporary Regulations*) consisted of five articles, and they were added because of the persistent request of "Li Jiao Pai" (The School of Feudal Ethics). It had obviously shown that severe punishments had been enforced on the crime against "Gang Chang" (the Chinese ethical tradition) and "Lun Li" (the rites and rituals of Confucianism), meanwhile, some of the bourgeois legal principles confirmed in the main body of criminal law had been negated. But the way in which the views of "Li Jiao Pai" (The School of Feudal Ethics) were handled through a temporary regulation had itself shown a compromise and balance of power between "Li Jiao Pai" (The School of Feudal Ethics) and legalists. The main contents of *Zan Xing Zhang Cheng* (*The Temporary Regulations*) were as the following: those who had committed the following crimes could be sentenced to death penalty, namely, the crime of endangering the emperor's vehicles, the crimes of treason, rebellion and the murdering of their senior relatives; besides, the damaging, abandoning and stealing of corpses and the digging up of the tombs of their senior relatives could be sentenced to above second-class imprisonments, they can also be

¹⁹² Asatarō Okada, "On the Emphasis of 'Li Jiao' (feudal ethical code) in *Da Qing Xin Xing Lv*" in *Fa Xue Hui Za Zhi* (The Journal of Law Society), Vol. 1, No. 1.

¹⁹³ *Shen Jiaben Nian Pu Chang Bian* (*Complete Chronicles of Shen Jiaben*), edited by Li Liangui and examined and approved by Zhang Guohua, Cheng Wen Publishing Co. LTD, 1992, p. 376.

sentenced to death penalty according to concrete situations; those who have committed the crimes of stealing can also be sentenced to death penalty according to concrete situations; in the case of adultery with unmarried women, both of the parties involved should be sentenced to fifth-class fixed-term imprisonment, detention or less than 100 *yuan* of fine penalty, and “justifiable self-defenses are forbidden in the case of disputes with senior relatives.”

So, the conflict between “Li” (rites) and law caused in the revision of criminal law was inevitable under the historical background at the time. And it was in fact a concrete reflection of the conflicts between western and Chinese legal cultures. Just as what was said in *Fa Zheng Qian Shuo Bao* (*Introduction of Laws and Politics*) at the time:

The newest theories of the world which are quite different from the doctrines in our old legal systems have been adopted in the new criminal law, so they are opposed by ‘Li Jiao Pai’ (The School of Feudal Ethics).¹⁹⁴

Under the guidance of western bourgeois criminal legal theories, the legalists headed by Shen Jiaben had exerted their best to recover extraterritoriality by revising the Chinese criminal law and to make them in accordance with those of the western countries, by regarding individuals as the standards, nationalism as the calling and learning from the superpowers as the goal. Since 1860s, the patriotic officials and scholars had always regarded the recovery of extraterritoriality as one of the goals of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and to make the nation stronger. Shen Jiaben believed that the revision of laws and precedents in China would have forced the western countries to give up their consular jurisdictions, so he had exerted his best to have the Chinese law revised according to the legal patterns of the western countries. He said, “Now that the commercial treaties have been revised, China is urged to have legal revisions by the four countries, namely, Britain, America, Japan and Portuguese. So, firstly, recovering extraterritoriality is the key to ‘Bian Fa Zi Qiang’ (striving for self-strengthening by reformation).”¹⁹⁵ Thus, he had actively consulted “the criminal laws of various countries in order to recover extraterritoriality.”¹⁹⁶ And this, as it were, was the real motivation of the legalists to carry out criminal law revision, therefore, it was not difficult to understand why almost all the clauses in the old laws which had reflected “Gang Chang” (the Chinese ethical tradition) and “Lun Li” (the rites and rituals of Confucianism) and which were against the bourgeois criminal theories had been abolished, and it was only by the insistence of some of the people of “Li Jiao Pai” (The School of Feudal Ethics) like Lao Naixuan that the article of “adultery” was preserved against his will.

¹⁹⁴ *Fa Zheng Qian Shuo Bao* (*Introduction of Laws and Politics*), Vol. 11, 1911, p. 17.

¹⁹⁵ Shen Jiaben, “A Memorial to the Emperor for Abolishing the Severe Punishments in Laws” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Vol. 1.

¹⁹⁶ Shen Jiaben, “A Memorial to the Emperor about Changing the Punishment of Reprieve to Exile and Imprisonment” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Vol. 1.

Because in the specific practice of law revision, attention had been wholly focused on the transplanting of western laws by the legalists, there appeared the tendency of simple referism, which had unexpectedly resulted in certain foresightedness for the newly-revised draft of criminal law. In the making of civil commercial law, investigations were organized by Shen Jiaben on the civil commercial habits in various places, however, in the making of criminal law, the real basis of economic structures formed in the changes of modern China and the interrelated relationship between the reality of social relationships and law were neglected.

Although “Li Jiao Pai” (The School of Feudal Ethics), headed by Zhang Zhidong and Lao Naixuan, had lived at the beginning of the twentieth century, their thoughts were remained in the theories of “introducing of ‘Li’ (rites) into law and combining ‘Li’ (rites) with Law”. What they had adhered was not the democratic elements in traditional Chinese legal culture, but the dross and dregs like “San Gang Wu Chang” (three cardinal guides and five constant virtues), for this reason, they had not broken away from the set pattern of “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture). As a result, it was not possible for both legalists and “Li Jiao Pai” (The School of Feudal Ethics) to scientifically understand the relationship between the western law and the real situations of China. So the legalists’ subjective striving for “ruling the country by law” was far from complete, and the fierce struggle of “Li Jiao Pai” (The School of Feudal Ethics) to maintain the ancestors’ law would be washed out by time sooner or later. Nevertheless, they had left a question for later generations to continue to deliberate and explore.

Apart from the new criminal law, other relevant regulations included *Wei Jing Lv* (*The Regulation for the Offence of Police*) compiled by “Min Zheng Bu” (Ministry of Civil Affairs) and “Xiu Ding Fa Lv Guan” (The Law Revision Office), which was put into practice in 1908. The regulation consisted of 10 chapters and 45 articles, and it was the first offprint regulation for public security. In addition, other laws made included: *The Punishments for the Crimes of Private Coining of Silver Dollars and Counterfeiting Paper Money*, *The Regulation for the Punishment of the Crimes of Counterfeiting Stamps and the Use of Old Stamps*, *The Special Articles for the Punishment of the Crimes for Counterfeiting Foreign Currencies* and *The Special Article for the Punishment of Selling Morphia*, etc.

(b) the civil law and the relevant laws

At the end of the nineteenth century and the beginning of the twentieth century, the national capitalist industrial and commercial enterprises had occupied a large proportion in the social and economic life, so it was impossible to adjust the complicated property relationship formed in the process with the old civil laws. With the introduction of western legal culture and the development of Chinese legal thoughts, the drafting of independent civil laws by modelling on the continental legal system was gradually put on the agenda.

In May of the 33rd year of Guangxu (June, 1907), the following memorial was presented to the emperor to plea for an immediate drafting of civil law by Shan Qi, the minister of “Min Zheng Bu” (Ministry of Civil Affairs):

I have looked into the laws of various countries in the east and west and found out that the laws are divided into public law and private law. The relationship between the state and the people is settled by the public law, namely, the criminal law; while the relationship between the people and people is settled by the private laws, namely, the civil law. The two laws are interrelated and neither can be neglected ... the disputes and falseness can be prevented by the civil law before-handed, which concerns fulfilling and neglecting one's duty in administration, so is especially important. Although the civil laws in various countries are different, they are similar in themes and outlines. Take the following clearly defined laws as examples: The law of property rights defines the rights of the ownership of the properties; the law of the creditor's rights defines the credit in inter-communication; the law of kinships defines the relationship of relatives, and the law of succession settles the conflicts between successors. Every article is clearly defined and categorized in the law and it has become the standard in dealing with daily occurrences, the document to make judgments without doubt and the guarantee of the peace of the people and the stability of the society. But there are no clear division between criminal and civil law in the Chinese laws and precedents. The earliest term mentioned about the civil law is from *Shang Shu Kong Zhuan (The Book of Historical Document and the Biography of Confucius)*. According to the laws of different dynasties, the articles about marriages belong to civil law, but they are far from perfect. ... I think, in order to establish civil administration and clarify its origin, it is highly necessary to make civil laws immediately, because only in this way is it possible to learn the good ways and methods and to focus on the main points in order to avoid unpreparedness. Therefore, I plan to ask the ministers in charge of the legal revision to look into the Chinese customs and habits and to consult the laws in various countries to have the civil law drafted. After that, together with 'Min Zheng Bu' (Ministry of Civil Affairs), I shall present it to the emperor to be approved and issued, because it is one of the most important things to do in governing the country.¹⁹⁷

In the memorial, the reasons for immediate drafting of civil laws were demonstrated, the general outlines of the civil laws in western countries were introduced, the adjustment object of the civil law was displayed and the steps in civil law making were primarily planned, so it was finally approved by the emperor, who decreed that "it should be carried out as has been ordered."¹⁹⁸

On the first of May of the 33rd year of Guangxu (June 11, 1907), in *A Memorial to the Emperor about Appointing Ministers to be in Charge of Civil Law Making*, Zhang Renfu, "Zheng Qing" (the minister) of "Da Li Yuan" (The Supreme Court), had discussed the importance of civil law making from the perspective of the undebatability of law. He said, "There is only one law in China, i.e. the criminal law, and the affairs like marriages and land disputes are also included in it, which shows that the laws are far from completed. Moreover, the mixture of criminal law with civil law has especially been criticized by foreigners. So what is most important in law revision is firstly to study the distinction of the nature of laws."¹⁹⁹ He thought that civil laws were applied to adjust "the relationship between people and people",

¹⁹⁷ *Guang Xu Chao Dong Hua Lu (The Records of Donghua in the Reign of Guangxu)*, edited by Zhu Shou and punctuated and collated by Zhang Jinglu et al., Zhonghua Book Company, 1958, pp. 5682–5683.

¹⁹⁸ *Ibid.*, p. 5683.

¹⁹⁹ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), Zhonghua Book Company, 1979, p. 835.

so it was included in the realm of “private law”; while criminal law belonged to “public law”, so they should not be confused and compiled in one part. He thought that civil law making was preliminary in “the practice of criminal law”, because “the disputes of common people are often caused by trifles which usually can be settled by the application of civil law. So, civil law can prevent the disputes from escalating into criminal affairs. Now civil laws have been stressed by almost all the countries, thus, it is true that the wider the scope of civil laws, the narrower the scope of criminal laws.”²⁰⁰ He also stressed that “the law of a country should be in accordance with its ‘Min Qing’ (the condition of the people) and customs and habits”. Meanwhile, he took the civil law of Japan as an example, “three of the five chapters of Japanese civil law, i.e. the property rights law, the law of the creditors’ rights and the property law are adopted from the private laws of western countries, while the other two chapters, i.e. the kinship law and the law of succession are made according to the old traditional customs of the native country.” So in the making of the new law, “we should first of all retain “the quintessence of our country and then make a reference to the laws of other countries to supplement what is deficient. The new law should be based mainly on Chinese legal system and supplemented by Roman, German and other legal systems.”²⁰¹

On the 26th of July of the 33rd year of Guangxu (September 3, 1907), Zhang Zhidong also expounded his proposition to make independent civil laws in *A Memorial to the Emperor about the Examination of the Newly-Made Criminal and Civil Procedure Laws according to the Emperor’s Decree*. He said,

The civil law is a very important and indispensable part of law, and it is as important as the criminal law. The civil law is classified into different categories in the laws of eastern and western countries, but in China, all laws are combined together into one part, and it is intricate, complex, labyrinthic and hard to understand. Now, in law revision, the laws of the eastern and the western countries should be widely consulted and carefully studied so that the new law may be instantly made. But it is still advisable that the new law be in accordance with the political and moral principles of China.²⁰²

On the fifth of September of the 33rd year of Guangxu (October 11, 1907), Yi Kuang, the minister of “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) and some other people had stated in *A Memorial to the Emperor about the Measures Taken in Law Revision*,

We have planned to adopt the methods used by other countries, so apart from criminal law ... which will be completed soon, other laws and adjunctive laws should also be made, including the civil law, the commercial law, the civil procedure law and the criminal procedure law. The drafting of the above-mentioned laws should be completed within three years.²⁰³

²⁰⁰ Ibid., p. 836.

²⁰¹ Ibid., pp. 834–835.

²⁰² *Shen Jiaben Nian Pu Chang Bian (Complete Chronicles of Shen Jiaben)*, edited by Li Liangui and examined and approved by Zhang Guohua, Cheng Wen Publishing Co. LTD, 1992, p. 168.

²⁰³ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), Zhonghua Book Company, 1979, p. 850.

In October of the same year, in order to complete the task of making civil law, commercial law, civil procedure law and criminal procedure law within 3 years, Shen Jiaben, who was in charge of the law revision, presented a memorial to the emperor to require that “on the one hand, more newest codes and reference books should be bought from other countries and more translating materials should be sent and translated, meanwhile, people should be sent to various countries to have an investigation of their current laws, foreign experts should be employed with higher salaries for consultancy at any time, and the laws should be discussed and compiled according to the concrete situations of our country to achieve mastery through a comprehensive study of it, to blend it with Chinese situations harmoniously, and to grasp the main points thoroughly.”²⁰⁴

In November of the same year, in view of the fact that “the various civil and commercial law is for distinguishing the duties and responsibilities of common people prescribed in laws and regulations, which are much more complicated in content and meticulous in structure, and which are not as simple as what the legislators have stipulated in the past just to guard against the people,”²⁰⁵ at the opening of “Xiu Ding Fa Lv Guan” (The Law Revision Office), after the discussion with other people, Shen Jiaben had decided to set up two departments to be in charge of investigating and drafting the civil law, the commercial law, the civil procedure law and the criminal procedure law to show the primary work direction of “Xiu Ding Fa Lv Guan” (The Law Revision Office). Because “Xiu Ding Fa Lv Guan” (The Law Revision Office) had widely “recruited those with ability and wisdom”, many excellent and talented people who had studied abroad in many countries were employed, such as Jiang Yong, Wang Chonghui, Ding Shiyuan, Chen Ce, Zhu Xianwen and so on. Moreover, many Japanese legal experts were appointed consultants or draftsmen, which had made it possible for “Xiu Ding Fa Lv Guan” (The Law Revision Office) to complete the task of revising the draft of civil law, and it had also had made “Xiu Ding Fa Lv Guan” (The Law Revision Office) the research center for studying the Chinese civil law at the time.

Besides the firm support of Qing officials in the making of civil law, it was also enthusiastically welcomed by the social public opinion. In the 32nd year of Guangxu (1906), an article entitled “On the Matters Needing Attention in Law Revision” was published in *Shi Bao* (*The Times*), and it was pointed out that “since ancient times, the laws in our country have been made according to the orders of emperors and controlled by officials. So the laws are far from completed, and they are laws just in name. ... So, legislation today is not just to follow but to create.” However, “a real great difference lies in the two sections, i.e. the civil law and the criminal law, which are not only the origins of all other laws but also what the legal spirit has embodied.” In autocratic system, “the negotiation between people is of no account, and it is only

²⁰⁴ *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), edited by Zhu Shou and punctuated and collated by Zhang Jinglu et al., Zhonghua Book Company, 1958, p. 5766.

²⁰⁵ *Ibid.*, p. 5803.

after the independence of civil law and the separation of civil and criminal law that people's rights have been increasingly respected." What was more; the order of civil law, criminal law, commercial law and civil procedure law in the law revision was also illustrated in the article: "The civil law originates from constitution, but if constitution is not made, there would be no civil laws. So, firstly, the order of things should be made clear before doing the work itself in order to avoid confusion and to get the corresponding benefits." "Now although the civil law has not been made, the commercial law is issued first, moreover, both civil procedure law and criminal procedure law are to be issued soon." For this reason, "it is just like putting the cart before the horse... so this is what we should pay attention to."²⁰⁶

After the petition of government officials and people, the drafting of civil law was put on the agenda. In November, 1908, Japanese jurist Kōtarō Shida and Yoshimasa Matsuoka were invited by "Xiu Ding Fa Lv Guan" (The Law Revision Office) to act as consultants to begin drafting the three chapters, i.e. *The General Rules of Civil Law*, *The Law of Creditor's Rights* and *The Property Law*. In March, 1909, *The Law of Kinship* and *The Law of Succession* in civil law were entrusted to Zhang Zongyuan, Zhu Xianwen and Chen Xiao to be drafted together with "Li Xue Guan" (The Office of Moral Etiquette Studies). In 1911, *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*) was completed, which was regarded as "the first draft of civil law in history", and "the first draft of civil law" for short, but Qing Dynasty had perished before its enforcement.

The first three chapters of the first draft of civil law were mainly based upon the Japanese civil law made in the 29th year of Meiji; meanwhile, references were also made to German and Swiss civil laws. Although the elements of feudal civil laws were adulterated in the latter two chapters, the relevant principles of modern civil laws were basically adopted. The most advanced Pendekten system was adopted in the first draft of the civil law, so it had a higher starting-point. Just as Yu Liansan and Liu Ruoceng, the ministers in charge of law revision, had expressed in *A Memorial to the Emperor about the Completion of the First Three Chapters of the Civil Law*, "*Da Qing Xing Lv Cao An* (*The Draft of the Criminal Laws of Great Qing*) is aimed to emphasize the most common legal principles in the world, to adopt the latest and the most exact legal theories, to go in quest of laws most adaptable to Chinese situations and to expect to make laws most beneficial to Chinese."

The premise of the so-called "to emphasize the most common legal principles in the world" was the recognition of the open and commercialized world full of trade battles. "If lawsuits arise between Chinese and westerners, the westerners will often make full use of the established regulations of the world; nevertheless, we just stick to the old rules and customs, so there is a great discrepancy in the advantages and disadvantages." For this reason, the world-acknowledged laws in commercial contracts, interest rates and time-effectiveness should be adopted in order to "be fair and be equal to westerners."

²⁰⁶ Quoted from *Dong Fang Za Zhi* (*The Oriental Magazine*), Vol. 12, p. 234.

The so-called adopting “the latest and the most exact legal theories” could be explained by the fact that if the law was made later, the newest academic achievements, theories and experiences could be adopted, so “it has attracted the most attention of the world.” Therefore, in the making of Chinese civil law, only by adopting what was the best was it possible to ensure its practice. For example, the regulations such as the “legal person and land debt” in the first draft of the civil law were taken from the newest legal theories, as it were, “the contents were copied and plagiarized from the established rules according to Chinese real situations.”

The so-called statement of “going in quest of laws most adaptable to Chinese situations” meant that because there were different customs and habits for different countries, it was impossible to enforce the same civil laws. “Only the laws concerning kinships, marriages, succession and so on, which are against the constitution, should be discussed and changed; if the laws are in accordance with the constitution, their original meanings should be kept, and they should only be amended with a reference of the moral principles, or just be revised according to the current laws in order to protect the established customs and habits and to maintain the prosperity that has been lasted for thousands of years”. From above, we could see that the first draft of the civil law was the product of the basic integration of Chinese and western civil laws.

The so-called expectation of “making laws most beneficial to Chinese” meant that since “change and reform is the best policy to rescue China from disaster and it is harmful to stick to the out-of-dated ideas and thoughts in the administration,” in the drafting of civil law, other laws such as the real right law and the credit law were especially made in order that the law revision be carried out in an orderly way and the guiding lines be settled so as to benefit from the common customs and etiquettes.

In contents, the following was worth mentioning for the draft of civil law:

First, about the practice of the principle of honesty and credit: it was prescribed that “the rights and fulfilling of obligations should be exercised according to the methods of honesty and credit”.

Second, about people’s rights and abilities: it was regulated in the 4th article of the 2nd chapter that “rights and responsibilities should be enjoyed by people within the limits of law,” and it was the first time that people’s rights and obligations were legally unified in the form of law. Moreover, it was stipulated in the 5th article that “people are endowed with civil rights as soon as they are born”, which had shown the equality in form to enjoy civil rights.

Third, about behavioral ability: the regulations in Japanese and Swiss civil laws were adopted, and it was provided that “those who are above 20 years old are regarded as adults” and they had complete behavioral abilities, which had changed the ambiguous regulation in the old laws in which the notion of “Ding Nian” (the age of 16 regarded as adults in Qing Dynasty) was used as the criterion for adults. But among them, the wife’s behavioral abilities were restricted, because according to it, “the wife can perform daily activities outside family routines only with the permission of the husband.”

Fourth, about the ability of responsibility: it was regulated that “those who have infringed other people’s rights intentionally or unpremeditatedly should be responsible for their behaviors. But those below 7 years old or mentally ill were exceptions.

Fifth, the establishment of legal person system for the first time: it was stipulated that “the corporations and consortiums may become legal persons according to this or other laws”, “the legal person has the ability to enjoy rights and shoulder obligations within the law.” And “it needs no permission from “Ya Men” (the government offices) in establishing corporative legal persons with economic purpose to show the emphasis of civil law on the promotion of economic development.

Sixth, it was clearly stipulated that there were not only natural properties for “substance”, but also economic, cultural and scientific values which are controllable by people, such as lands, forests, rivers, mineral resources, machines and so on. “Nu Bi” (the slave girls and maidservants) who had been regarded as properties like animals since Tang Dynasty were not regarded as substances any more in civil law, which was itself a historical progress.

Seventh, about the protection of proprietor’s private properties and landowner’s rights.

Eighth, although it had a detailed regulation about the rights of creditors, it had failed to take protective measures for the legal interests of debtors.

Ninth, the statute about “the rights to own real property” was instituted by following German civil law, but it had failed to stipulate the rights of mortgage, which was totally divorced from Chinese real situations.

Tenth, in the chapter about family members, familism was adopted, so it was full of patriarchal clan spirit. For example, in marriage, the feudal regulations that marriages between people with the same family names were not allowed, and marriages should be arranged with the permission of parents were retained. It was also stated that the husband had the rights to manage, use and get profits from the properties commonly owned by both husband and wife, and even the properties owned by wife alone. Moreover, the system of the inheritance of clan pedigree was continued to be used.

From above we can see that both the forms and principles of bourgeois civil law were adopted in the first draft of civil law, and in the process of integrating the native Chinese civil law with those of the western countries, the old legal structures with no separation of criminal and civil law were broken up, and new laws began to be made in accordance with modern bourgeois civil laws, which had become an important milestone in the development of Chinese civil law. Although the first draft of civil law had not been put into practice, it had provided an important foundation for the succeeding national government in making new civil laws. In addition, in the process of civil law making, people’s legal concepts were greatly enlightened, because in feudal times, people still had no idea of protecting their private rights by law, but through drafting civil law, they were taught a vivid and effective lesson.

In the process of drafting the civil law by “Xiu Ding Fa Lv Guan” (The Law Revision Office), *Tong Xing Diao Cha Min Shi Xi Guan Zhang Cheng Wen* (*A General Regulation for the Investigation of Civil Customs*) was made in order to be locally-oriented and to be in accordance with China’s actual national conditions. The regulation consisted of ten items, and it was sent to every province and district so that well-organized, purposeful and much-required investigative work could be carried out to provide important materials for the drafting of civil law. Because China under the rule of Qing Dynasty was a big country which had developed unevenly in politics, economy and culture, the civil customs popular in various districts were tremendously different and diverse. Although most of them were in accordance with the legal regulations of Qing Dynasty, some of them were in conflict with the legal regulations and even had the backwardness of feudalism, so it had become a complicated problem how to choose the materials of social customs collected in the investigation. If the introduced western civil laws could be integrated with some of the good civil habits, the value and practicability of the draft of civil law were surely to be increased. But what was regrettable was that the makers of civil law had paid too much attention to seeking common points from the civil laws of the western countries, and had failed to seriously discriminate and adopt the great numbers of civil habits and customs collected in the investigation, which was shown especially in the making of property law when the long-established customs and legal relations among the people were completely neglected. One of the reasons for revising *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*) put forward by jurist Jiang Yong, who had been the attorney general in Beiyang government, was that the “the laws made have mostly followed the foreign law, but have neglected the native Chinese law. For example, there are neither regulations on the popularly accepted ‘Hui’ (paying money) in ‘Zhai Quan Pian’ (The Creditor’s Rights) in *Min Fa* (*The Civil Law*), nor there are any regulations on ‘Lao Dian’ (old tenant), ‘Dian’ (mortgage) and ‘Xian Mai’ (preemption) in *Wu Quan Fa* (*The Real Right Law*), nor on ‘Pu Di’ (the furniture and odds and ends of a shop, workshop, etc.) in *Shang Fa* (*The Commercial Law*). The success and failure of these codes are of great significance to the gains and losses of social and economic development, so it should not be disregarded.”²⁰⁷ In the 12th year of the Republic of China (1923), in the preface to *Zhong Guo Min Shi Xi Guan Da Quan* (*A Complete Collection of Chinese Civil Customs and Habits*), Yang Yuanjie pointed out:

Since the beginning of the reform of the ex-Qing dynasty, people are idolized by Europeanization and learning from Japan, therefore, the drafts of civil laws are mostly German and Japanese copies, and a detailed textual research of the native civil customs and habits of our country has not been included, consequently, it has not been put into practice until more than ten years later.²⁰⁸

²⁰⁷ Xie Zhenmin, *Zhong Hua Min Guo Li Fa Shi* (*The Legislative History of the Republic of China*), Cheng Chung Bookstore, 1937, pp. 903–904.

²⁰⁸ *Min Shi Xi Guan Diao Cha Bao Gao Lu* (*Records of the Investigation Report of Civil Custom*), punctuated and collated by Hu Xuecheng, Xia Xinhua and Li Jiaofa, The University of the Political Science and Law Press, 2001, p. 11.

Thus, it has shown that the principle of “going in quest of laws most adaptable to Chinese situations” had not been completely carried out.

The special civil regulations related to civil laws had also been issued in the legal revision in late Qing dynasty, such as *Piao Ju Fa* (*The Bill Law*), *Gong Si Li* (*The Company Precedent*) and *Shang Ren Tong Li* (*The General Precedent of Merchants*), etc.

In September, 1908, the Japanese jurist Kōtarō Shida was invited by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) to have *Piao Ju Fa* (*The Bill Law*) drafted, which was completed in 1911. The draft was made according to the similar bill rules of Hague and with a reference to German and Japanese bill laws. It consisted of 94 items, 13 chapters and 3 volumes, and was called *Zhi Tian An* (*The Zhi Tian Code*) in history.

In January 1904, Wu Tingfang and other people were ordered by Qing imperial court to draft *Gong Si Li* (*The Company Precedent*), consisting of 131 items. As it were, it was the beginning of the legalization of Chinese corporation systems, which had shown the intention of late Qing government to “stress commerce and politics and to invigorate the nation”.²⁰⁹ The other laws issued at the same time included the nine items of *Shang Ren Tong Li* (*The General Precedent of Merchants*) and *Po Chan Fa* (*Bankruptcy Law*), etc.

What needed to be specially mentioned was that in the second year of Xuantong (1910), the Japanese jurists were invited to have drafted *Zhu Zuo Quan Lv* (*Copyright Law*), consisted of 54 items and 5 chapters.

The concept of copyright was clarified in *Zhu Zuo Quan Lv* (*Copyright Law*) and it referred to “the works itself and the rights of the writer to own and republish his works”. The scope of the works included arts, pictures, copy books, photos, inscriptions and models, etc. All the works should be registered and licensed in “Min Zheng Bu” (Ministry of Civil Affairs) and be protected by law. The copyrights belonged to the writers themselves for life, and after their death, their successors might continue to succeed it for another 30 years. All the works registered and licensed were not allowed to be pirated, copied and counterfeited, and the copyrights were not to be infringed upon. If violated, the copyright owners had the rights to appeal to “Ya Men” (the government offices) in charge and the violator should be ordered by the justice offices to be amerced and to pay for the losses. *Zhu Zuo Quan Lv* (*Copyright Law*) during the late Qing dynasty was made by imitating the relevant laws of the capitalist countries like Britain and U.S., which was unprecedented in traditional ancient Chinese laws. Although it was not carried out, it had laid an important legal foundation for the later constitutionalism.

(c) the civil procedure law and the relevant laws

Under the rule of Qing government, there was not a centralized civil procedure law, so the parties were always in a passive position in the increasing litigation cases between China and western countries. Moreover, “discriminations have often been

²⁰⁹ *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), edited by Zhu Shou and punctuated and collated by Zhang Jinglu et al., Zhonghua Book Company, 1958, p. 5132.

shown because our trial system is different from those of the westerners”, and “often, the common litigation disputes may give rise to serious problems involved in negotiations. For this reason, “the procedure laws must be changed”,²¹⁰ and the old legal structures of “settling lawsuits according to criminal laws” must be reformed. At the same time, on account of the fact that in legal practice, the civil and criminal cases are different in nature, “so even in the same court, the methods used in trials are different.”²¹¹ In western countries, because the laws such as civil, criminal and procedure laws were collected in special volumes, excellent results had been achieved in the legal practice. This was because the “perfect system has resulted in orderliness, and the merits of equality and reason have served as a ‘Fu Qi’ (symbol-assumpsit, an authoritative piece of paper to give orders in ancient China).” Subsequently, it was much easier to control the foreigners. So, when a memorial was presented to the emperor by Shen Jiaben, he required that “when the procedure laws are made, the civil and criminal procedure laws should be separated.”²¹²

On April 15, 1906, under the host of Shen Jiaben, *Xing Shi Min Shi Su Song Fa Cao An* (*The Draft of Civil and Criminal Procedure Law*) was completed and presented to the emperor to be implemented. This was the first time a distinction was made between entity law and procedure law in Chinese legislation. The jury and attorney system in the western countries were absorbed in the draft, because Shen Jiaben thought that the adoption of the two systems could not only make up the judicial officials’ lack of knowledge, but also prevent them “from practicing favoritism after taking bribes, protecting criminals and making judgment arbitrarily”, and enable them “to umpire according to axiom and verdict according to public opinion”. Thus, it was considered “an important exordium to redeem the judicial power”.²¹³ However, “Du Fu” (the viceroys and procurators) of each province insisted that the law was unenforceable and should be laid aside and discussed again because it had fallen short of the actual situation of China.

Since 1907, once again, the criminal and civil laws were begun to be drafted respectively by Shen Jiaben and other people. On January 27, 1911, *Da Qing Min Shi Su Song Cao An* (*The Draft of the Civil Procedure Law of Great Qing*) was completed and submitted for deliberation. In *A Memorial to the Emperor Presented by Law Revision Minister Shen Jiaben and other People about the Completion of the Draft of the Civil Procedure Law for your Excellency to Read*, from the perspective of “stressing the importance of the protection of private rights”, the following was stated:

Although the laws in the eastern and western countries are different, they are circumspect in maintaining people’s private rights. The civil law has served as the foundation while the civil procedure law has served as the measures for application, consequently, the malpractices

²¹⁰ Shen Jiaben et al., “A Memorial to the Emperor about the Tentative Practice of Procedure Laws” in “Fa Lv Bu” (The Section of Law) in *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*), Vol. 11.

²¹¹ Ibid.

²¹² Shen Jiaben et al., “A Memorial to the Emperor about the Tentative Practice of Procedure Laws” in “Fa Lv Bu” (The Section of Law) in *Da Qing Fa Gui Da Quan* (*A Complete Collection of Laws and Regulations of Great Qing*), Vol. 11.

²¹³ *Da Qing Xin Fa Ling* (*The New Decrees of Great Qing*), Vol. 19.

like making arbitrary decisions can be prevented, and the wise opinions can be widely spread. Besides, in China, the mixing of civil and criminal laws has been age-old, although there are no special books for criminal procedure law, their relevant regulations can be found in the criminal law. As a result, no independent, uniform and standardized rules for civil procedure law have been made; hence it is easier to cause all kinds of corruptions. If special laws are not made at once, the preventive measures not taken and the perfect policies not adopted in order to be well prepared for the hidden troubles, the rules of administration and litigation principles are not expected to be fully realized, and the future of justice will not be promising. My colleagues and I have engaged in the compilation by extensively looking through the reference materials, investigating the established regulations of different countries, absorbing the newest theories, reconsidering Chinese folk customs and studying each of them one by one..., finally it is completed and submitted for approval by your Excellency.

Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing) was completed by mainly modeling on the civil procedure laws of Japan and Germany, and it consisted of 4 volumes, 22 chapters and 800 items, which are compiled in the following order, “Shen Pan Ya Men” (The Judging Office), “Dang Shi Ren” (The Parties Involved), “Tong Chang Su Song Cheng Xu” (The Common Proceedings of Legal Litigation) and “Te Bie Su Song Cheng Xu” (The Special Proceedings of Legal Litigation). Because of the fall of Qing Dynasty, it had not been put into practice. In all, the contents of the draft was comparatively detailed, moreover, the principles which were commonly used in the civil procedures of the modern western countries, such as “litigantism” and “non-interference of the debating by courts” were adopted, which had shown the great importance attached on private rights.

Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing) was quite different from the part of civil action in the old law of Qing Dynasty because it was an independent civil procedure law, which was not only a pioneering work in Chinese legal history, but also a symbol of the beginning of modernization of the Chinese civil procedure law. During the period of the Republic of China, it was once declared that some part of it had been adopted, and after amendment, it was compiled and named *Xiu Zheng Min Shi Su Song Lv (The Revised Civil Procedure Law)*. It consisted of 34 volumes and 800 items, and was used until 1935 when *Min Shi Su Song Fa (The Civil Procedure Law)* was issued by the Nanjing National Government.

Besides, some laws which were related with the civil procedure law, such as *Zhuang Zhi Tong Xing Ge Shi Zhang Cheng (The Regulation for the Common Format of Lawsuit Papers)* were also issued.

(d) the criminal procedure law and the relevant laws

On December 24th of the second year of Xuantong (January 24, 1911), the completed *Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing)* was submitted to the Qing Court by Shen Jiaben and Yu Liansan, in which the following was stated:

In the memorial which we presented you last November about the matters concerning our office, we have said that after the civil, commercial and the criminal and civil procedure laws are completed, they will be presented to you for approval one after another. After having

examined the various laws, we find that the criminal procedure law is of the greatest importance. As the saying goes by the westerners, if the criminal laws are not drafted, little harm may be done to the decent civilians, but if the criminal procedure laws are not drafted, greater harm may be brought about. So generally speaking, the criminal law is the intrinsic essence and the criminal procedure law is the outward expression, and they are closely related and should be equally stressed. In China, the criminal laws are age-old, but no specific criminal procedure laws have been made, moreover, some of the regulations in criminal procedure law are included in criminal laws. For example, the law for imprisonment and arrestment has been referred to by Li Kui in his *Fa Jing (Canon of Laws)*; in *Tang Lv Shu Yi (The Comments on Tang Code)*, the laws for 'Duan Yu' (Trials and Punishments) and 'Pu Wang' (Rules for Arrestments) which are equivalent to the laws for imprisonment and arrestment respectively are also discussed, but in fact, they all belong to the scope of criminal procedure law. Since Han and Wei dynasties, the contents of regulations have been changed and modified in almost every dynasty, and detailed laws have been made especially in Song and Ming dynasties about lawsuits, obtests, prisoners, judgments, arresting and trials. Such items as litigation, imprisonment and arresting were also included in *Qing Ding Da Qing Lv Li (The Laws and Precedents of Great Qing by Imperial Order)* made in this dynasty; this is not because there are no criminal procedure laws in China, but because the relevant regulations have been sporadically included in criminal laws, and the independent and special criminal procedure laws have not been made. After receiving orders, we have spared no efforts to instruct and encourage office members to devote ourselves either to translations or editions. In the end, *Xing Shi Su Song Lv (The Criminal Procedure Law)* has been completed, which is composed of 6 volumes and 515 items. Now we would like to present the outlines of the law to the emperor by the following:

- First, about the proceedings of impeachment in litigation. The litigant should be the main body of litigation in the proceedings of impeachment, and the prosecution should be made by litigants themselves. This is called the principle of 'no trial without complaints'.
- Second, about the prosecution by the inquisitor. The public prosecution refers to the exercising of the rights of punishment to maintain the public safety of the state. So the prosecuting rights belong to the inquisitors representing the state.
- Third, about disclosing truth. It has three layers of meanings, namely, first, the freedom to give evidence; second, direct trials; third, verbal debates.
- Fourth, about the equal treatment of the prosecutor and the defendant. The so-called "equal treatment" does not mean equal status, it means both offending and defending can get the same advantages in the process of lawsuits.
- Fifth, about open trials. This should be the most important document in constitutionalism. The open court allows those irrelevant people to hear the case, observe the process and show the rightful guidelines, which is beneficial to the officials and helpful to avoiding the malpractices like corruption and abuse of power.
- Sixth, about deprivation of litigant's rights to execute punishments. The criminal litigation is to appeal to the state for proper punishments according to the public laws. Its rights belong to the state, so even the inquisitor himself has no rights to execute punishment at random, let alone the defendants.
- Seventh, about the application of interventionism. The judge should decide whether the prosecuted is culpable or not, and should intervene to have investigations to all necessary matters concerned without being restricted by the litigant's argument.
- Eighth, about the three-trial system. If not convinced by the first trial, the prosecutor can appeal for a second trial. And if not convinced by the second trial, the prosecutor can appeal for a third trial.

What we have mentioned above are the common practices of most countries, which are sufficient to make up what we have lacked, and they have been chosen carefully and listed in each chapter.... So these are the reasons for presenting *Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing)* to the emperor, and have been

carefully stated in the memorial. We sincerely ask your Excellency to have a thorough examination. Presented discreetly.²¹⁴

Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing) consisted of 6 volumes and 515 items. As far as the legal origins were concerned, those in the far-away countries of France and Germany had been discarded, while those in the near neighbor of Japan had been followed. Therefore, the law was drafted by modeling on the Japanese criminal procedure law made in 1890, and completed with the help of Japanese jurist Asatarō Okada. The draft was not only a completely transplanted criminal procedure law, but also one of the most important achievements of the codification of proceedings. In addition, it was fundamentally different from the litigation and the lawsuit settlement in traditional old laws, so its enforcement had symbolized the end of an ancient Chinese tradition in which entities were emphasized and procedures were ignored. Moreover, in this draft, a series of modern western legal proceeding principles and systems had been introduced, such as the system of the separate settlement of civil and criminal cases, open trial, equal treatment of prosecutors, defendants and juries and the defense system. So it had shown that the newly made law had begun to be brought into line with the advanced world criminal procedure laws, meanwhile, it had become an important starting point for the modernization of the Chinese criminal procedure law, with obvious spirit of the time, progress and practicability. Although the draft was not issued for enforcement because of the immediate fall of Qing Dynasty, some parts of the draft were declared to have been adopted in the orders issued by “Si Fa Bu” (Ministry of Justice) of the Republic of China on May 9, 1912,²¹⁵ and it was not abolished until the promulgation of *Xing Shi Su Song Tiao Li (The Ordinance for Criminal Procedure)* in 1922, which had shown the important position and value of *Da Qing Min Shi Su Song Cao An (The Draft of the Civil Procedure Law of Great Qing)* in the history of the development of the modern criminal procedure in China.

In 1910, *Da Qing Yu Lv (Cao An) (The Prison Law of Great Qing)* (draft) drafted by the Japanese penologist Shigejirō Ogawa was also completed, which consisted of two parts, namely, the general principle and the specific provisions. It included altogether 14 chapters and 241 items, and it was a complete transplant of the modern western state prison legislations.

Besides, some laws relevant to the criminal procedure laws were also drafted, such as *Yi Xue Xiang Yan Tiao (The Ordinance for Reducing Expenses of the Parties Involved in Lawsuits)*, *Da Li Yuan Ji Cha Piao Chuan Ren Zheng Chu Ru Zheng Cheng (The Regulation for Summoning Witnesses by Inspecting Officials*

²¹⁴ *Shen Jiaben Nian Pu Chang Bian (Complete Chronicles of Shen Jiaben)*, edited by Li Liangui and examined and approved by Zhang Guohua, Cheng Wen Publishing Co. LTD, 1992, pp. 367–370.

²¹⁵ Quoted from *Zhong Hua Min Guo Zheng Fu Gong Bao Di Shi Jiu Hao (The 19th Government Bulletin of the Republic of China)*.

of “*Da Li Yuan*”) and *Zhuang Zhi Tong Xing Ge Shi Zhang Cheng* (*The Regulation for the Common Format of Lawsuit Papers*).

(e) *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*)

On account of the fact that “many systems for judges are far from completed, and if without special regulations, there are no unified standards in administration”, the members of “*Xiu Ding Fa Lv Guan*” (The Law Revision Office) were organized by Shen Jiaben to be put the charge of drafting *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) by modeling on *Cai Pan Suo Gou Cheng Fa* (*The Japanese Tribunal Organic Law*) according to the principle of “investigating the developments in both ancient and modern times and studying the similarities and differences of both China and western countries” to try to realize the separation of political and penal systems and to win the independence of justice. Moreover, in a way of “*Jie Gu Yu Jin*” (narrating anecdotes of the past in alluding to the present), Shen Jiaben said that in the period of Zhou Dynasty the duties of the politicians and penal officials were clearly divided, so “each of them can do their best to ensure the stability of politics, the righteousness of lawsuits and the perfection of customs”. Similarly, “in recent Europe, the separation of political and penal system is much like that in Zhou Dynasty”.²¹⁶ Meanwhile, in allusion to some of the conservative officials’ excuses that *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*) was already detailed enough, therefore, it was not necessary to make any court organic laws, Shen Jiaben emphasized that although *Da Qing Hui Dian* (*The Collected Statutes of Great Qing*) was “detailed enough”, “it was basically concurrently performing the double functions of administration and justice. A study of the present system has shown that the law is a little inappropriate, so it is not possible to provide a unified standard for administration.” He also demonstrated the importance of justice independence from the perspective of constitutionalism and pointed out that “constitutionalism in eastern and western countries sprouts from the independence of justice,”²¹⁷ so “the quintessence of constitutionalism lies in the independence of making judgments”, and “the independence of justice is the bases for future constitutionalism”.²¹⁸ By Shen Jiaben’s endeavor, *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) was issued and put into practice in the second year of Xuantong (February 2, 1910).

Fa Yuan Zhu Zhi Fa (*The Court Organic Law*) consisted of 16 chapters and 164 items. It was stipulated that the tribunals were divided into four levels, i.e. the primary court, the local court, the high court and the central judicial office, and the four-level and three-trial system was set up. Besides, the systems of sole-judge trial and collegial trial were adopted by each tribunal respectively; the trial systems of the western countries like defense, jury, parry, open trial and reviewing were

²¹⁶ Shen Jiaben, “*Xing Guan Kao*” (A Textual Research of the Officials in Charge of Criminal Laws) in *Li Dai Xing Fa Kao* (*A Textual Research of the Criminal Laws in the Past Dynasties*), Zhonghua Book Company, 1985.

²¹⁷ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979.

²¹⁸ *Ibid.*

also applied, and “the establishment of judicial organs, the system of different levels of trials and the responsibilities of the officials are to be examined one by one.” At the same time, the primary, local, high and the general procuratorates were established to be in charge of the investigation, punishment, suing and prosecution of the criminal cases and the supervision of the practice of judgment. In order to ensure the independence of trial, it was stipulated concretely in *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) as the following:

The matters like supreme trial and unified interpretations of law are dealt with by ‘Da Li Yuan’ (The Supreme Court) according to state law. All cases of death penalty heard at present are not to be sent to ‘Si Fa Bu’ (Ministry of Justice) to be reexamined in order to stress the independence of trials. All the places outside the capital city where the tribunals have been set up, whatever the governmental offices, if they have no rights of jurisdiction, according to the law, they are not allowed to illegally deal with the cases involved in civil and criminal procedures.

After *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) was issued and enforced, another memorial was presented to the emperor by Shen Jiaben and other people to abolish the old feudal trial systems of Qing Dynasty, such as “San Fa Si Hui Shen” (the collegial trial by the three legal offices, i.e. “Xing Bu”, “Du Cha Yuan” and “Da Li Si”), “Jiu Qing Hui Shen” (Joint Hearing by Jiu Qing, i.e. the nine heads of central government departments in feudal China), “Qiu Shen” (the autumn assizes), “Chao Shen” (palace assizes) and “Re Shen” (the summer assizes) to ensure the non-intervention of justice by administration, which had exerted an epoch-making significance in the history of legal system in China.

Fa Yuan Zhu Zhi Fa (*The Court Organic Law*) was not only an achievement of the legal reform during the late Qing Dynasty; it had also laid a legal foundation for the promotion of further reform. Just as what was said in the emperor’s edict about the issuing of *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*),

After *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) is issued, all legal administrative affairs should be supervised by each of the judicial departments, and all judicial affairs should be handled by the tribunals below ‘Da Li Yuan’ (The Supreme Court) according to the state law. The extent of power between different departments which have not been clearly defined before should be clearly marked off ..., from now on, as independent jurisdiction has been offered to each tribunal by the imperial court, the administrative officials are no longer to be allowed to intervene illegally.²¹⁹

Fa Yuan Zhu Zhi Fa (*The Court Organic Law*) was a much more comprehensive and systematic court organic law in late Qing Dynasty, and its issuing and enforcement had made the legal system in late Qing Dynasty basically break away from the traditional track, which no doubt was of great historic progressive significance, and which had been succeeded by the government of the Republic of China. However, on the other hand, it still retained the traces of autocracy, because the final trial of “Da Li Yuan” (The Supreme Court) and the reexamined cases of “Si Fa Bu” (Ministry of Justice) were still to be determined by the emperor himself.

²¹⁹ *Da Qing Xuan Tong Zheng Ji* (*Records of Xuantong Administration in Great Qing*), Vol. 28.

(f) the legal system reform

Even before Opium War, the corruption and darkness of the judiciary system of the late Qing Dynasty had been openly exposed by the people like Gong Zizhen, Wei Yuan and Bao Shichen who had asked for immediate reforms. After Opium War, the legal system reform in the late Qing Dynasty was accelerated because the Chinese judiciary sovereignty was trampled on by the western aggressors through consular jurisdiction. In *A Memorial to the Emperor about the Completion of the Draft of Criminal Law for your Excellency to Read by Batches and about the Main Aim of Revision*, Shen Jiaben, the minister in charge of law revision, had called for reform and he had said sorrowfully:

Since the state system of a country is independent, the judiciary right is also naturally independent. Moreover, the judiciary right has always been exercised within the scope of the territory. ... But only for our country, jurisdiction has been granted to the consuls on the excuse of the incompleteness of the legal system. The British have plotted the conspiracy at the beginning and the Germans have followed closely, while the Japanese even have set up their courts where our ancestors were born. It is obvious that the state sovereignty is being weakened day by day, and the future troubles are becoming endless. Therefore, the current troublesome political situation has to be changed with no delay.²²⁰

On the 30th of June of the first year of Xuantong, the procurator of Zhejiang Province Zeng Yun also related legal reform with the recovery of extraterritorial jurisdiction, and he pointed out in “*A Memorial to the Emperor about the Situation of Setting up Tribunals at all Levels in Zhejiang Province*”,

Up to now, we have been forced by foreigners to accept the extraterritorial jurisdiction on the excuse of the incompleteness of the legal system. And the extraterritorial jurisdiction should be recovered because it concerned the state sovereignty. Since constitutionalism is to be established, and legal system is to be reformed by the imperial court, the tribunals at all levels should be prepared in one year and be set up within time limits, because only in this way can the laws be clarified and revised and the methods to consolidate the state power be provided.²²¹

After declaring the preparation of constitutionalism by Qing imperial court, some liberal officials took the chance and advocated reforming the legal system to realize judicial independence. On the 21st of December of the 32nd year of Guangxu (February 3, 1907), in *A Memorial to the Emperor about Reorganizing the Official System in other Provinces to Strictly Separate Administration from Justice*, Wu Fang, the “Yu Shi” (the censor), had said, “The independence of justice is the essence of the preparation of constitutionalism, ... I think the independence of justice concerns the safety of current political situation, so it can not be delayed any longer.”²²² On the 2nd of the August of the 33rd year of Guangxu (September 9, 1907), in

²²⁰ “A Memorial to the Emperor for Abolishing the Severe Punishments in Laws” in *Ji Yi Wen Cun (The Classics of Ji Yi)*, Vol. 1.

²²¹ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), Zhonghua Book Company, 1979, p. 876.

²²² *Ibid.*, pp. 821–822.

A Memorial to the Emperor about the Drafting of Court Organic Law for your Excellency to Read, Shen Jiaben, the minister in charge of law revision, said, "I have heard that constitutionalism in the eastern and western countries all sprouts from the independence of justice".²²³ On the 5th of the September of the 33rd year of Guangxu (October 10, 1907), Yi Kuang, the minister of "Xian Zheng Bian Cha Guan" (The Constitutional Compilation Bureau), presented *A Memorial to the Emperor about the Measures Taken in Law Revision* together with other people, in which they once again emphasized, "after we have looked into the constitutional states, we have found that the separation of legislature, executive and judiciary is of great importance."²²⁴

Because of the overall environment created by the preparation of constitutionalism and the promotion of constitutional movement, the concept of judicial independence came to be approved by government officials and the public. So to speak, constitutionalism was an important factor which had fostered legal reform; consequently, legal system reform was realized with great difficulties.

Shen Jiaben, who was in charge of law revision, not only had advocated legal reform by propaganda and agitation, but also used the relevant legal works translated from western countries as evidence. On May 18th of the 32nd year of Guangxu (July 9, 1906), *A Memorial to the Emperor about the Situation of Law Revision and the Request for Coordination between "Fa Bu" (Ministry of Law) and "Da Li Yuan" (The Supreme Court)*²²⁵ was presented by him, and in this memorial, he had explained that among the 26 translated legal works and codes, 5 concerned legal trials, i.e. *German Civil Procedure Law*, *Prussian Legal System*, *Japanese Tribunal Organic Law*, *Japanese Criminal Procedure Law* and *On Japanese Tribunal Organic Law*. The unfinished translations included *German Old Civil Procedure Law* and *American Criminal Procedure Law*. All these translated books had enabled the reformers to have a more rational understanding of the western legal trial system and helped them to get both reference models for their legal reform and evidence for drafting the relevant laws.

Apart from the translation of relevant laws, investigation teams were also sent to western countries by the imperial court to make on-the-spot investigations of their legal systems. On February of the 32nd year of Guangxu, investigation teams were sent to Germany to have a study of the layout of courts, the organization of judges, the status of the prosecutors and defendants and the participation of the defense counsels.

In addition, organizational preparations for legal reform were also provided by the official system reform carried out during the preparation of constitutionalism. According to a decree issued by the emperor on the 20th of September of the 32nd year of Guangxu (November 6, 1906), "'Xing Bu' (Board of Punishment) is changed into 'Fa Bu' (Ministry of Law), which is solely in charge of justice; and 'Da Li Si'

²²³ Ibid., p. 843.

²²⁴ Ibid., p. 850.

²²⁵ Ibid., p. 838.

(The Court of Judicial Review) is changed into ‘Da Li Yuan’ (The Supreme Court), which is solely in charge of trials.”²²⁶ Since then, the executive and judicial branches were beginning to be separated, which had symbolized the beginning of modern transformation of Chinese traditional legal system. On the 4th of October of the same year, Shen Jiaben, “Zheng Qing” (the minister) of “Da Li Yuan” (The Supreme Court), had presented a memorial to the imperial court by explaining in detail the importance of setting up “Da Li Yuan” (The Supreme Court), the organization of supreme judgment:

Now as far as the world ocean transportation is concerned, we are surrounded by strong neighbors... who, on the excuse of the incompleteness of our legal systems, have planned to expand the consular jurisdiction day by day. Without enhancing sovereignty, how is it possible to build a country? So, in order to introduce the civilized administration, to blend what is good in both Chinese and foreign traditions, it is a very important political decision to set up ‘Da Li Yuan’ (The Supreme Court) so as to improve court trials and recover extraterritorial jurisdiction. . . ., in both the eastern and western countries, supreme courts are regarded as the supreme judgment offices. Besides, the higher tribunals and local tribunals are also established, and they are strict in consecution and well-ordered in sequence, so can act as complementary organizations at different levels. The supreme courts are solemn in scale and sublime and majestic in system; their prisons are qualified and managements are effective, . . ., now if we want to put them into practice by learning from them, the following measures should be taken: first, courts should be set up; second, penology should be taught; third, higher tribunals, local tribunals and judicial bureaus should be set up one by one, and finally judges should be trained for future use.²²⁷

On October 27, *A Memorial to the Emperor about Reorganizing the Extent of the Power of Judicial Judgement* was presented by Shen Jiaben, and in the memorial he said:

In China, the administrative and judicial power are usually mixed together, but I am greatly honored to be exclusively in charge of the trials which are completely separated from ‘Fa Bu’ (Ministry of Law) because of Your Excellency’s wise guidance, so it is necessary to clearly divide the extent of power and the levels of judicial authority in order to establish them in proper order, because only this way is it possible to be in accordance with the legal systems of constitutional states.²²⁸

He suggested that Chinese legal system be changed by modeling on the Japanese established laws, and the four-level trial organizations including “Da Li Yuan” (The Supreme Court), the higher tribunals, local tribunals and “Xiang Yan Ju” (the town judicial bureau) should be implemented, moreover, capital local tribunals and the various city judicial bureaus be set up first jointly with “Fa Bu” (Ministry of Law). The memorial was approved by the imperial court, and it was ordered “to be enforced as what has been suggested.” After that, in order to standardize the organization, the extent of power and the responsibilities of “Da Li Yuan” (The Supreme Court) and

²²⁶ *Qing Mo Chou Bei Li Xian Dang An Shi Liao (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty)* (Book 2), Zhonghua Book Company, 1979, p. 471.

²²⁷ *Guang Xu Chao Dong Hua Lu (The Records of Donghua in the Reign of Guangxu)*, edited by Zhu Shou and punctuated and collated by Zhang Jinglu, Zhonghua Book Company, 1958, p. 5586.

²²⁸ *Ibid.*, p. 5579.

the tribunals at all levels in “Jing Shi” (the capital city), *Da Li Yuan Shen Pan Bian Zhi Fa (The Organic Law of “Da Li Yuan”)* was completed under Shen Jiaben’s guidance, and it was also “approved and ordered to be enforced” by the imperial court.

Da Li Yuan Shen Pan Bian Zhi Fa (The Organic Law of “Da Li Yuan”) consisted of 5 chapters and 45 items, i.e. The General Principle, “Da Li Yuan” (The Supreme Court), The Capital Higher Tribunals, The Local Tribunals inside and outside the City and “Xiang Yan Ju” (the town judicial bureaus). In the law, many principles different from the traditional legal trial systems were acknowledged, therefore, it was regarded as the first court organic law in China in modern sense.

The specific responsibilities and extent of power of the four-level and three-trial system established by *Da Li Yuan Shen Pan Bian Zhi Fa (The Organic Law of “Da Li Yuan”)* mainly included the following:

‘Da Li Yuan’ (The Supreme Court) is the supreme tribunal in the whole country, and it mainly deals with all criminal cases involving the crimes committed by members of the imperial clans and officials, the criminal cases against government authorities and other criminal cases specially entrusted. . . . if the criminal suspects are not satisfied with the preliminary trial cases settled by the local tribunals and the higher tribunals, they have the rights to appeal to ‘Da Li Yuan’ (The Supreme Court) for final trials.²²⁹

If the criminal suspects who have committed misdemeanors are not satisfied with the sentences made either by ‘Xiang Yan Ju’ (the town judicial bureaus) or by the local tribunals, they have the rights to appeal to the higher tribunals for final trials; if the criminal suspects have committed a felony and are not satisfied with the judgments made by local tribunals, they have the rights to appeal to higher tribunals for a second instance. In addition, the cases heard in the higher tribunals should be reported respectively to ‘Fa Bu’ (Ministry of Law) and ‘Da Li Yuan’ (The Supreme Court); they could also be reported to ‘Fa Bu’ (Ministry of Law) via ‘Zhi Fa Si’ (The Law Enforcing Office). And the cases involving death penalties should be reported to ‘Da Li Yuan’ (The Supreme Court) respectively.

Moreover, the local tribunals were in charge of the cases involving “the punishments from ‘Tu’ (imprisonment), ‘Liu’ (life exile) and ‘Si’ (death penalty) and the civil procedure cases which had involved damages over 200 *liang* of silver dollars. The charges should be decided after interrogation and verification. As to the cases of ‘Liu’ (life exile), they should be reported directly to ‘Fa Bu’ (Ministry of Law) and ‘Da Li Yuan’ (The Supreme Court), or be reported to ‘Fa Bu’ (Ministry of Law) via ‘Zhi Fa Si’ (The Law Enforcing Office). The cases involving the death penalty should all be reported to ‘Fa Bu’ (Ministry of Law) and ‘Da Li Yuan’ (The Supreme Court).”

“Xiang Yan Ju” (the town judicial bureaus) mainly dealt with the charges “punishable by ‘Chi’ (flogging with light sticks) and ‘Zhang’ (flogging with heavy sticks) and the punishment of ‘Tu’ (imprisonment) without involving murdering. It also deals with the civil procedure cases involving damage under 200 *liang* of silver dollars. After interrogation and verification, the charges should be settled without being consulted and should be bounded into copies and reported monthly to ‘Fa Bu’ (Ministry of Law) and ‘Da Li Yuan’ (The Supreme Court) respectively;

²²⁹ Ibid.

they should also be reported to ‘Zhi Fa Si’ (The Law Enforcing Office) in detail to be checked.”²³⁰

Besides, specific provisions about the establishment of trial institutions at all levels, the internal structures and staffing were also regulated in the law.

Da Li Yuan Shen Pan Bian Zhi Fa (The Organic Law of “Da Li Yuan”) was in fact the organic method for the tribunals and trial divisions at all levels in “Jing Shi” (the capital city), which had clarified the separation of civil and criminal legal systems in the form of law, stressed the principle of the independence of jurisdiction, stipulated the methods of trial institutions at different levels and introduced the western trial supervision mechanisms. So its drafting and enforcement had symbolized a wider range of legal system reform in the late Qing Dynasty, so it had evoked greater repercussions.

On the 27th of May of the 33rd year of Guangxu (July 7, 1907), the reform scheme for local bureaucratic establishment was issued, and it was stipulated that “Ti Fa Si” (The Office of Justice) should be set up in each province to take the charge of judicial administration management and the adjustment of all-level tribunal supervision and inspection affairs.²³¹ The relationship between “Ti Fa Si” (The Office of Justice) and tribunals at all levels was in accordance with the principally regulated relationships between “Fa Bu” (Ministry of Law) and “Da Li Yuan” (The Supreme Court). On the same day, *The Decree about Starting the Provincial Bureaucratic Establishment Reform firstly from the three Provinces of Northeast to be Popularized Gradually if Effective* was issued by the Qing imperial court, and “Zhi Li” (now Hebei province) and Jiangsu provinces were chosen as the experimental areas because they were known for their liberal ideas and reforming spirits. Yuan Shikai, who was “Zong Du” (viceroy) of “Zhi Li” (now Hebei province) at the time, took the lead in setting up tribunals at all levels in Tianjin, and issued *Tianjin Fu Shu Shi Ban Shen Pan Zheng Chang* (The Regulation for the Tentative Implement of Tribunals in Tianjin Prefecture). In order to show the effect of the new legal system practiced in Tianjin, Yuan Shikai stated in his memorial that “after months of experiments, the unexamined official documents have all been resolved, so it is praised for its convenience by the public.” He also said:

Since the beginning of court session, more than ten cases submitted by ‘Xian’ (county) and ‘Fu’ (prefecture) or sued by the foreign merchants themselves have been settled. The foreigners take off their hats to show respect when they appear in the court for trials and pay litigation costs when the cases are closed. In addition, although most of the people are abided by the regulations of the tribunal, there are still some people who do not first report to their consulates but instead directly bring their lawsuits to the tribunal. It is true that the judicial independence can not be achieved at one go, but as long as a good beginning has been started, it is much easier to have further reform in future. Up to now, although the magistrates of ‘Xian’ (county) and ‘Fu’ (prefecture) do not preside over the trials, they still

²³⁰ *Guang Xu Chao Dong Hua Lu* (The Records of Donghua in the Reign of Guangxu), edited by Zhu Shou and punctuated and collated by Zhang Jinglu, Zhonghua Book Company, 1958, pp. 5599–5600.

²³¹ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty) (Book 2), Zhonghua Book Company, 1979, p. 507, 510.

hold concurrent posts like the heads of tribunals and issue orders and use their official seals when the cases are reported and documents are handed over. Moreover, all the layouts of the architectures have made it difficult for the magistrates of 'Xian' (county) and 'Fu' (prefecture) to remove the responsibilities.²³²

The drafting and enforcement of *Tian Jin Fu Shu Shi Ban Shen Pan Zheng Chang* (*The Regulation for the Tentative Implement of Tribunals in Tianjin Prefecture*) had provided a prior experience for the promulgation and enforcement of *Jing Shi Gao Deng Yi Xia Ge Ji Shen Pan Ting Shi Ban Zhang Cheng* (*The Regulation for the Tentative Implement of Tribunals at all Levels below the Higher Tribunal in the Capital City*) on the 29th of October of the 33rd year of Guangxu (December 4, 1907) by the order of the emperor.

Jing Shi Gao Deng Yi Xia Ge Ji Shen Pan Ting Shi Ban Zhang Cheng (*The Regulation for the Tentative Implement of Tribunals at all Levels below the Higher Tribunal in the Capital City*) consisted of altogether 120 items and 5 chapters which included The General Principles, The General Rules of Trials, Litigation, The General Rules of the Procuratorates at all levels and The Appendix. The main contents were as the following:

- First, to have a new definition of criminal and civil cases, i.e. "all those which have to be judged whether they are culpable or not by litigation belong to criminal cases; all those which have to be judged whether they are true or not by litigation belong to civil cases," which obviously were much more exact compared with the definition in old China, in which it was stated that "criminal cases refer to those caused by crimes, while civil cases refer to those caused by disputes over properties." Moreover, they were more general than Shen Jiaben's explanation in *Xing Shi Min Shi Su Song Fa* (*The Criminal and Civil Procedure Law*), because according to Shen Jiaben, "all those involving treason, murder, intentional killing, coinage and letter counterfeiting, robbing and other behaviors which have to be tried by criminal laws belong to criminal cases"; while "all those involving debt, premise, land, contract and other compensation matters belong to civil cases." For this reason, it was helpful to avoid missing the important points.
- Second, the scope of jurisdiction of tribunals at all levels was clarified, i.e. those who were not clear about it could require the higher tribunals to define the scope of jurisdiction through the tribunals which had accepted the case.
- Third, the scope of withdrawal was enlarged, i.e. if the judge himself was the plaintiff or defendant, a near relative of a party in the case or had affinity with the accused; if the judge had an interest in the case at present or in the future; if the judge had served as a witness and expert witness; if the judge was the ex-judge of the case by which the litigant remained unconvinced, and so on, then after statements were made by the judges, the procurators or the litigant himself, the president in charge should approve the withdrawal.

²³² *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), edited by Zhu Shou and punctuated and collated by Zhang Jinglu, Zhonghua Book Company, 1958, pp. 5694–5695.

Fourth, it was stipulated that the criminal cases should be prosecuted by the procurators, however, the civil cases may not be prosecuted “unless by the parties in the case and their legal representatives”.

Fifth, the general rules of the procuratorate at all levels had been drafted and a comparatively complete procurator system was established.

Sixth, the rules on prosecution, appealing, witnesses, expert witnesses, detention, bailment and the litigation costs were proclaimed.

Thus it could be seen that *Jing Shi Gao Deng Yi Xia Ge Ji Shen Pan Ting Shi Ban Zhang Cheng* (*The Regulation for the Tentative Implement of Tribunals at all Levels below the Higher Tribunal in the Capital City*) was a concise regulation with the integration of court organic law and criminal and civil procedure law, and it had symbolized the overall initiation of legal reform in the late Qing Dynasty from system to procedure. Therefore, its enforcement had set an important exemplary example to the establishment of tribunals in different provinces. Nevertheless, in the regulation, there were also traces of succeeding the traditional litigation system. For example, it was stated that if the official was a plaintiff, he had the rights to ask an agent to prosecute for himself; but women “are not allowed to act as agent ad litem”; the legal role of lawyers in litigation was positively affirmed, however, their rights were restricted. When the regulation was sent to each province, department and “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) for verification by the imperial court, changes were made by “Fa Bu” (Ministry of Law) in order to maintain the privileges and interests of the nobles. Consequently, it was prescribed that “the civil and criminal cases involving ‘Zong Shi Jue Luo’ (royal families and the emperor’s near relatives) and those cases presented by ‘Tong Ling’ (the commander) of the army and ‘Ya Men’ (the government offices) are still judged by ‘Da Li Yuan’ (The Supreme Court).”

Since then, in order to set up procuratorate institutions in provincial cities and trading ports to “consolidate legal rights and manifest unification” according to law, *The Organic Outline for Procuratorates at all Levels in every Provincial City and Trading Port* consisted of altogether 12 items was issued. Moreover, the regulations like *The Matters Concerning the Preparation of Tribunals at all Levels in each Provincial City and Trading Port* were also issued for enforcement in each province.

In order to urge each province to speed up the process of preparation, in April of the second year of Xuantong (1910), four members including Lu Zongyu were sent to each province by “Xian Zheng Bian Cha Guan” (The Constitutional Compilation Bureau) to “have each case in the provincial capitals, the trading ports and booming towns investigated, the public opinions widely collected, recorded and bound in volumes.” Finally, the following investigation report was presented:

According to the list of preparation, the tribunals in each provincial city and trading port must be set up within one year. Besides the provinces in northeast where tribunals are being set up in succession, they have already been set up in Tianjin, and arrangements for the implementation are being made in Baoding in ‘Zhi Li’ province (now Hebei province); in Shanxi province, a court session has been opened to have a test run in April this year; in Hubei and Fujian province, the tribunals at all levels have been temporarily attached to government offices, which is against the original meaning of judicial independence, so they

are to be reorganized and improved. Fujian province is an exception, because of financial difficulties, they can only make things done with whatever is available as far as the court buildings and judicial funds are concerned. In Guangdong province, the curricula of legal research office are the most perfect; in Zhejiang province, special arrangements have been made to strive for perfection, but only in Jiangsu province the duties are performed negligently. Preparations have been made in the other provinces in an orderly way, and the task can be completed according to schedule. As far as the tribunals at all levels are concerned, the constructions have been completed in 'Feng Tian' (now Shenyang), Jilin and Shanxi province, while the construction may be completed within the year in 'Zhi Li' (now Hebei province), Shandong, Henan, Hubei, Zhejiang, Guangdong province. Jiangsu and Fujian province are in a hurry to catch up, and the construction may be completed a little later.²³³

From February, 1909 to March, 1911, memorials about the situations of the preparation were presented to the emperor successively by fourteen provinces including Shandong, Hubei, Anhui, Sichuan, Xinjiang, Yunnan, Guangdong, Henan, Guangxi, Guizhou and Hunan province. Generally speaking, the construction had begun one after another according to "the nine-year preparation list", but in reality, *Jing Shi Gao Deng Yi Xia Ge Ji Shen Pan Ting Shi Ban Zhang Cheng* (*The Regulation for the Tentative Implement of Tribunals at all Levels below the Higher Tribunal in the Capital City*) and *Fa Yuan Zhu Zhi Fa* (*The Court Organic Law*) were only carried out in "Jing Shi" (the capital city), "Feng Tian" (now Shenyang), "Zhi Li" province (now Hebei province) and Tianjin Prefecture, and they were not widely enforced in the whole country, so the principle of judicial independence was not fully put into practice.

It was proved by the legal reform during the late Qing Dynasty that the reform was not an isolated incident but a part of the overall political reform. The scope and depth of legal reform were determined by the process of the preparation of the establishment of constitutionalism during the late Qing Dynasty. Moreover, it was impossible to eliminate the influence of traditional legal system in a short time, and it took time to raise people's legal consciousness. Besides, the popularization of legal education and the training of modern judicial personnel could not be completed in one day, so, the legal system reform could only be a gradual process. Nevertheless, the basic judicial pattern set up in the late Qing Dynasty and the trial system adopted from the western countries was obviously a great historical progress compared with the traditional legal trial system, although over-advanced and formalistic tendencies had been inevitably shown in some of them.

²³³ *Qing Mo Chou Bei Li Xian Dang An Shi Liao* (*The Historical Files for the Preparation of Constitutionalism during Late Qing Dynasty*) (Book 2), Zhonghua Book Company, 1979, p. 798.

Chapter 19

The Continuing Progress of the Modern Legal Transition During the Period of the Republic of China

By the joint efforts of the legal elites like Shen Jiaben during the late Qing Dynasty, the new legal system was set up by modeling on the continental legal systems, meanwhile, the out-of-date feudal legal system characterized by “Wu Xing” (the five forms of punishments used in later periods: “Chi”: beating with light sticks; “Zhang”: beating with heavy sticks; “Tu”: imprisonment; “Liu”: life exile; and “Si”: death penalty), “Bi Fu” (legal analogy) and the non-separation of justice and administration had been abolished, and the ancient Chinese legal tradition like the integration of “Li” (rites) and law, “Zhu Fa He Ti” (the integration of various laws), “Zhong Xing Qing Min” (stressing the criminal law and neglecting the civil law) was changed. In addition, the legal principles and systems which had symbolized the modern western legal civilization including “Zui Xing Fa Ding” (a legally prescribed punishment for a specified crime), humanitarian punishment and judicial independence were introduced, which had initiated an important step in the modernization of Chinese legal system. But the modern transition of Chinese law had not been, and in fact, could not have been completed by the law revision during the late Qing Dynasty, because the special social environment, the upheaval political situation both home and abroad, and the resistance of the conservative forces in the Qing imperial court itself had made the law revision during the late Qing Dynasty more difficult, hesitated and irresolute. So some of the legal principles, such as people’s sovereignty, “Fa Zhi” (the ruling of law), equality before the law, the holiness of the private rights, the presumption of innocence, and the system of the protection of human rights had not been made and put into practice. Besides, in the newly revised laws, there were still not only many backward feudal contents, but also the problem of putting the civilized elements of the introduced western legal systems into legal practice. All these had required the succeeding Republic of China to go forward by following the road of modern Chinese legal transition opened up by the law revision during the late Qing Dynasty.

19.1 The Background of the Continuing Progress

As early as the late nineteenth century, the Chinese national capitalist industry and commerce had developed to a large scale, and at the beginning of the twentieth century, the development momentum was further accelerated. From 1905 to 1911, more than 320 new factories were built up with the total capital of more than 77,000,000 *yuan*, which was 1.4 times more than that of 30 years ago. Especially during the 3 years from 1906 to 1908, the numbers of newly built industrial and mining enterprises had reached to 178, with the total investment of 53,000,000 *yuan*. Although the national enterprises were small in scale, and were mostly concentrated in a few large cities, they had already had some influence. In the same way, the lower and middle forces of the national capitalists were increasing quickly, which was reflected politically by the appearance of bourgeois democrats on the political stage.

After “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) was suppressed in 1900, the Qing government was forced to sign the unfair *Xin Chou Tiao Yue* (*The Peace Treaty of 1901*) and the new *Tong Shang Xing Chuan Tiao Yue* (*Treaty of Commerce and Navigation*) with the imperialist superpowers, which had further enhanced their economic and political rights in China. But in order to prolong its last grasp, the traitorous policy of “winning the favor of foreign countries with the material resources of China” had been unabashedly declared by Qing government, which had intensified the contradiction between imperialists and the Chinese nationality and that between feudalism and the common people. Under such circumstances, the overthrowing of Qing government was not only the key to end up feudal dictatorship, to set up democratic republic and solve the domestic conflicts, but also the key to fight against imperialism, to seek national independence and to settle the foreign conflicts. So, the bourgeois democratic revolution was not only a political revolution, but also a national liberation movement. For this reason, from whatever points of view, it was an inevitable and necessary choice for the modernization of Chinese society.

In 1911, the late Qing Dynasty was overthrown by the bourgeois democrats headed by Sun Yat-sen, and the feudal dictatorship system in China was declared to be ended, so national independence, democratic republic, and human rights had become the key note for the various constructions during this period of China. The positive changes taking place in political, economic and cultural areas had symbolized that China had entered into the modern society, which had provided a favorable objective condition for the promotion and perfection of the modern transition of Chinese legal system. Even the warlords Beiyang government headed by Yuan Shikai, who had usurped the fruits of victory of Xin Hai Revolution (or Revolution of 1911), and set up Beiyang government—Beijing government, which mostly consisted of feudal forces, however, it had become the mainstream of the society for Chinese people to accept and adhere to the democratic and legal systems, therefore, it was impossible to turn the history back any more, which had been proved by Yuan Shikai and Zhang Xun’s failure to restore the imperial system.

19.2 The Ideological Basis for the Continuing Progress

After Qing empire was overthrown by the bourgeois democrats headed by Sun Yat-sen through military struggles, the democratic republic—The Nanjing Provisional Government was set up according to the aim and scheme of the “establishment of a coalition government”. As absolute monarchy was replaced by democratic republic, the Chinese feudal legal culture was criticized on a large scale, and the advanced western legal civilization was more widely accepted and thoroughly acknowledged. Thus, a more comprehensive modern transition had begun for Chinese law. In the whole process, the legal thoughts of democratic republic, “Fa Zhi” (the ruling of law) and human rights proposed by the people like Sun Yat-sen, Zhang Taiyan, Wu Tingfang and others had played a guiding role in the legal construction at the beginning of the republic of China. Moreover, because it was also in accordance with the basic direction of the evolution of legal civilization, it had not only served as the fountainhead of power, but also the guiding line in people’s struggle against feudal restoration.

The basic ideological basis for the continuing progress of the modern transition of Chinese law was as the following:

1. the idea of democracy and republic

As a great democratic revolutionary, Sun Yat-sen had always linked national revolution with the political revolution of overthrowing Qing Dynasty. He said himself, “Since defeated in the Sino-France War in the year of ‘Yi You’ (1885), I have made up my mind to ‘overthrow Qing Dynasty and set up a republic’”.¹

In 1894, “Xing Zhong Hui” (Revive China Society) was created by Sun Yat-sen, and the slogan of “setting up a coalition government” was used as the oath for the enrollment of its members. In 1903, in his speech to overseas Chinese in Honolulu, he expressed his wish to “follow the example of the presidential election of the United States, to abolish autocracy and to establish the republic,”² which had drawn a demarcation line with “Wei Xin Pai” (the later Reformists) and royalists in politics.

In 1904, in the party constitution of “Zhi Gong” Party drafted in North America, the proposal of “expelling the Tatar barbarians, reviving Zhong Hua, establishing a Republic, and distributing land equally among the people” was put forward, which had made the aim of setting up a republic much clearer.

In 1905, “Tong Meng Hui” (The Alliance Society) was founded. In its manifesto, it had made the following explanations about the political creed of “setting up the republic”,

Now, the national government is founded by the revolution of civilians, so all people in the nation have equal rights to participate in political decisions. The president is to be elected by

¹ Sun Yat-sen, “Jian Guo Fang Lue” (The Strategies for Setting up the State) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 168.

² “A Speech made at Hotel Street Theater in Honolulu” in *Sun Zhong Shan Wen Ji (The Collected Works of Sun Yat-sen)*, edited by Meng Qingpeng, Unity Press, 1997, p. 462.

everyone, and the congress will be formed by members elected publicly by the people. The constitution of the Republic of China will be made, which will be abided by everyone. If anyone dares to restore the system of absolute monarchy, he or she will surely be condemned by all the people in the country.³

What was more, Zou Rong, a young revolutionary, had proposed for the first time in his book *Ge Ming Jun (The Revolutionary Army)* that the country which would be founded by the revolutionaries after the overthrowing of Qing Dynasty should be named “The Republic of China”. The constitution, the autonomous laws and the official systems to be instituted in the Republic of China should follow those of the United States. The citizens in the Republic of China, whether male or female, were equal, and there were no distinctions between the high and the low and the noble and the humble. They had the rights not only to enjoy freedom and natural rights, but also to shoulder legal obligations of the state. Individual rights should be protected by the Republic of China, and “if anyone has been involved in the actions in which the rights of the people are violated, and then the people have the rights to launch revolutions to overthrow the old government..., to readjust their rights and to set up a new government.” The Republic of China enjoys all rights and is equal with other big powers in the affairs like declaring war, making peace, signing treaties and regulating trade relations. Thus, it could be seen that there were some similarities between Sun Yat-sen and Zou Rong in the understanding of the nature of the republic.

In 1905, in the prelude to “Min Bao” (*The People’s Paper*), Sun Yat-sen’s political philosophy of “San Min Zhu Yi” (The Three Principles of the People, i.e. the principle of nationalism: Min Zu, the principle of democracy: Min Quan, and the principle of welfare: Min Sheng) was put forward, which had made up of his complete ideological system. Among his principles, the principle of democracy was most representative of his thoughts of a republic. He said, “It is inevitable to have civil rights to comply with the tide of the world.” And the goal to fight for civil rights was to set up a republic government with freedom, equality and fraternity as its everlasting spirit by following the European countries and United States. He stressed, “Revolutions are unavoidable even if the monarch is a ‘Han Ren’ (Han people, or Han nationality),”⁴ so this viewpoint had transcended the simple goal of fighting against Manchu, and had endowed the national revolution with much profound democratic political contents.

Sun Yat-sen’s thoughts about bourgeois democratic republic were not only an important crystallization of the pursuit of truth from western countries by Chinese progressive thinkers since Opium War, but also the greatest thoughts with epoch-making significance which had guided the occurrence of Xin Hai Revolution (or Revolution of 1911) and the construction of Nanjing Provisional Government.

³ Sun Yat-sen, “Tong Meng Hui Xuan Yan” (The Manifesto of Tong Meng Hui) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)* (Book 1), The People’s Publishing House, 1956, p. 69.

⁴ Sun Yat-sen, “San Min Zhu Yi Yu Zhong Guo Qian Tu” (The Three Principles of the People and the Future of China) in *Sun Zhong Shan Xuan Ji (The Selected Works of Sun Yat-sen)*, The People’s Publishing House, 1956, p. 75.

At the same time, the ideal blue print of the republic was also designed by Zhang Taiyan and Wu Tingfang.

Although Zhang Taiyan had proposed setting up a republic government, he had no blind worship of the bourgeois parliamentary system. In October, 1908, he had sharply criticized the parliamentary system in an article entitled *Dai Yi Ran Fou Lun* (*On the Positiveness and Negativeness of Representative System*), meanwhile, he had also held a negative viewpoint as to whether the parliamentary system could be enforced in China, because he thought that China was a country with broad land and large population, which was quite different from the European countries and the United States. In addition, it would be difficult to have assemblies if more congressmen were elected, while the parliament would be controlled by plutocrats if fewer congressmen were elected. So, “in name, it is a parliament, but in reality, it is a place filled with treacherous officials,” “and it is just like being fettered by strong men.” Moreover, if parliament system was carried out in China, ‘Zhou’ (subprefecture) would be set up in local places, which would destroy the unification of China as a multiracial country, consequently, “another American Civil War will surely have taken place on Chinese soil”. He strongly suggested that a republic with presidential government be established, in which the congress was not installed as the supreme organ of power, while the citizen-elected president had acted as the head of state to be put in charge of administrative, military and foreign affairs. Besides, the presidential power was enforced together with the power of other state officials, and in the presidential government, the people not only enjoyed the rights of free assembly, speech and publishing, but also direct civil rights.

Wu Tingfang thought that the essence of republic politics was “the execution of state affairs by the representatives of the people” and “the representatives of the people not only decide the state affairs, but also undertake the due obligations”. Moreover, the people should enjoy the rights of equality and freedom. In 1912, he sternly denounced the imperialists’ criticism of the republic, and pointed out, “It has taken more than one hundred years for the United States and France to make the republic perfect, but we have been accused and blamed, so how can they expect us to reach our goal in one go?”⁵ Furthermore, “China is the biggest and oldest country with thousands of years of history, so it is more difficult for China to discard the old ways of life and adopt what is new than the European countries and United States”.⁶ As to the grief of “Wang Qing Yi Guo” (the extinction of Qing meant the change of country) expressed by the old fogies and young diehards of Qing Dynasty, he specially wrote an article entitled “The ex-Qing Officials Should Know the Establishment of Republic does not mean the Changing of the Country” in his book *Zhong Hua Min Guo Tu Zhi Chu Yi* (*On the Administration of the Republic of China*) and pointed out, “The republic belongs to the fellowmen of the five races (Han, Manchu, Mongolian, Hui or Islamic and Tibetan) and it is not the private property

⁵“Zhong Hua Min Guo Tu Zhi Chu Yi” (On the Administration of the Republic of China) in *Wu Ting Fang Ji* (*Collections of Wu Tingfang*) (Book 2), by Ding Xianjun and Yu Zuofeng, Zhonghua Book Company, 1993, p. 596.

⁶*Ibid.*, p. 621.

of one people and one race. For this reason, it represents one family in which we are attached to each other like brothers. If this is realized, the personal assumptions about the boundary of countries and races will be proved wrong, and the doubts will disappear.” Wu Tingfang’s statement was sound and reasonable, and as it were, it was a specific complement to Sun Yat-sen’s theories of nationality and civil rights.

2. the idea of human rights protection

The ideas of human rights of the bourgeois democrats were mainly reflected in the statements about freedom, equality, fraternity, “Fa Zhi” (the ruling of law) and judicial independence:

As far as freedom was concerned, it was declared by Sun Yat-sen in *Dui Wai Xuan Yan Shu (Proclamation to the outside World)* on January 5, 1912 that “it has been my long-cherished wish to attain the natural rights of freedom, to pray for everlasting happiness and to sweep away the obstacles in future development, but my goal has not been achieved yet”, “now, . . . , the world is filled with freedom and happiness, which is a pageant occurring only once in a thousand years.” In order to realize the grandiose ideal, the constitutional system of Nanjing Provisional Government was developed by focusing on the aim of protecting the people’s freedom. Then, Sun Yat-sen declared, “The people of all nationalities in our country should enjoy equally all the rights of the state and society including the public rights, such as election, participation in politics, and the private rights, such as the freedom of residence, speech, publishing, assembly and religious belief.”

Wu Tingfang also thought, “The people can behave according to their own free will within the law, and they should be detained by no one. If detained illegally, they can charge the detainers in courts. Whether the lawbreakers are officials or civilians, they will be punished all the same. . . and this is what is called freedom.”⁷

As far as equality was concerned, firstly, people’s equal political rights should be confirmed. When interpreting the manifesto of “Tong Meng Hui” (The Alliance Society), Sun Yat-sen pointed out,

Now, the national government is founded by a civilian revolution, so all the people to have equal rights to participate in the political decisions. The president is elected publicly by the citizens and the parliament is also made up of representatives elected publicly by the citizens. Besides, the constitution of the Republic of China is to be drafted and abided by everyone, and the citizens have equal rights to enjoy the blessings of the civilization.

Then, he further explained the equality of the citizens, “The 400 million people are equal in every aspect. Thus they are equal in their rights and responsibilities, and there are no differences between nobility and humbleness and between richness and poverty. So everyone is treated equally with no discriminations.”⁸

⁷“Zhong Hua Min Guo Tu Zhi Chu Yi” (On the Administration of the Republic of China) in *Wu Ting Fang Ji (Collections of Wu Tingfang)* (Book 2), by Ding Xianjun and Yu Zuofeng, Zhonghua Book Company, 1993, p. 611.

⁸“Zhong Hua Ge Min Dang Ge Min Fang Lue” (The Revolutionary Strategies of the Chinese Revolutionary Party) in *Sun Zhong Shan Quan Ji (The Complete Works of Sun Yat-sen)*, Vol. 1, edited by Guangdong Academy of Social Science, The Institute of Modern History of China Academy of Social Science, and Sun Yat-sen University, Zhonghua Book Company, 1981, p. 317.

Wu Tingfang also thought, “The law should be abided by everyone, high or low, and is difficult even for high officials to abuse. The lawbreakers, no matter high or low, should be punished in the same way, and this is what is called equality.”⁹

Secondly, all nationalities in China were equal. On September 11, 1912, in his speech made on “A Reception of the Association of the Unified Political Reform of Beijing and Mongolia”, Sun Yat-sen said, “Now the republic has been founded, so the countrymen of Mongolian, Tibetan, Qinghai and Huijiang who were suppressed in the past by others have all become the masters of the country.”

Thirdly, men and women were equal. Sun Yat-sen criticized the traditional thought that “men are superior while women are inferior” and pointed out, “According to the principles of natural rights, men and women are equal, and there are no differences between them. Therefore, I can not agree more to the idea.” So, “the principle of equality between males and females should be affirmed in law, in politics, in education and in society in order to promote the rights of females.”

The feudal marriage system reform, the prohibition of early marriage and concubinage were also regarded as important aspects of human rights protection by Wu Tingfang.

As far as fraternity was concerned, according to the spirit of fraternity, a series of laws and decrees about the prohibition of human trafficking, concubinage and “Zhu Zai” (piglets: laborers) trafficking, the protection of overseas Chinese, the permission of “Dan Hu” (those who live on water instead of on lands) and “Duo Min” (the Good-for-Nothing or loafers) to enjoy public and private rights and the forbiddance of torture at inquisition were issued by Nanjing Provisional Government urged by Sun Yat-sen, which had fully shown the fraternal spirit of humanism and the respect of human dignity.

3. the idea of “Fa Zhi” (the ruling of law)

As early as May, 1878, when Sun Yat-sen arrived at Honolulu with his elder brother Sun Mei, he was already deeply impressed by the legal order of the western countries. Afterwards, after arduous exploration and accumulation of the experience of real struggle, he had realized the important role played by law in the ruling of a country, and gradually the notion that “apart from officials, the law is the next most important part of a country”¹⁰ was formed.

Zhang Taiyan had demonstrated the value of the principle of “Fa Zhi” (the ruling of law) from many aspects by quoting the old sayings to explain the present situation, and stressed that a country would surely be prosperous if “ruled according to law”. In order to put the principle of “Fa Zhi” (the ruling of law) into practice, the most basic requirement was to carry out the policy of equality before the law and to enforce the law unitarily.

⁹“Zhong Hua Min Guo Tu Zhi Chu Yi” (On the Administration of the Republic of China) in *Wu Ting Fang Ji (Collections of Wu Tingfang)* (Book 2), by Ding Xianjun and Yu Zuofeng, Zhonghua Book Company, 1993, p. 611.

¹⁰“The Concrete Measures of the Three Principles of the People” in *Sun Zhong Shan Quan Ji (The Complete Works of Sun Yat-sen)*, Vol. 3, edited by Guangdong Academy of Social Science, The Institute of Modern History of China Academy of Social Science, and Sun Yat-sen University, Zhonghua Book Company, 1984, p. 41.

Because Zhang Taiyan had always stressed the principle of “Fa Zhi” (the ruling of law), on the question of “Fa Zhi” (the ruling of law) and “Ren Zhi” (the ruling of man), he had attached great importance to the former while neglected the latter. At the same time, he thought that “it is enough to run a country by only stressing law”¹¹ because “it may lead to chaos if overstressing ‘Ren Zhi’ (the ruling of man) and neglecting ‘Fa Zhi’ (the ruling of law)”. He also stressed, “it depends not on the ruling of the noble men but on rules and regulations to strengthen the ruling because only in this way is it possible to encourage those who have worked hard, to dismiss those who have abused their powers, to let those gifted people not to worry about their future promotions and to let those in lower social status to live a better life and to have a peaceful state of mind.”¹²

4. The thoughts about judicial independence

If some of the bourgeois democrats had expressed doubts over the question of parliamentary system which had controlled the rights of legislature by saying “yes” and “no”, then on the question of judicial independence, they expressed almost similar views. Sun Yat-sen, who had always advocated the unity of theory and practice, not only proposed setting up independent judicial institutions and implementing bourgeois litigation and trial systems, but also tried to put the theory of judicial independence into practice when he was the president of Nanjing Provisional Government. His book *Zhong Guo Zhi Si Fa Gai Ge (Legal Reform in China)* was the first legal thesis on law written by a modern Chinese scholar to criticize the traditional legal system represented by Qing Dynasty by applying western legal theories and to call for judicial independence. In *Zhong Hua Min Guo Lin Shi Yue Fa (Provisional Constitution of the Republic of China)* drafted under his guidance, it was clearly stipulated that “judges should make judgements independently without being interfered by his superior officials and departments”, and “the judges’ wages should not be cut, moreover, they should not be transferred to other professions during their terms of service or be dismissed from their posts, unless they have been convicted guilty or penalized by quitting from their offices according to law.” In order to ensure the judges’ mastery of law and enabled them to be competent for their jobs, he issued orders that “all the judicial personnel should take judicial examinations, and only those qualified can be employed.”¹³

Although for many times Zhang Taiyan had criticized the bourgeois parliamentary system and even wavered over the scheme of bourgeois republic, he had always

¹¹“Qin Zheng Ji” (Records of the Administration of Qin Dynasty) in “Wen Lu Yi” (Collection of Essays, Part 1) in *Zhang Shi Cong Shu* (Series of Books by Mr. Zhang).

¹²Zhang Taiyan, “Dai Yi Ran Fou Lun” (On the Positiveness and Negativeness of Representative System) in *Zhang Tai Yan Quan Ji (The Complete Works of Zhang Taiyan)*, Vol. 4, Shanghai People’s Publishing House, 1984, p. 309.

¹³“The Great President Consulting the Senate for Ordering ‘Fa Zhi Ju’ (Bureau of Legislative Affairs) to Draft the Regulation for Judge Examination Committee and the Regulation for Judge Examination” in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 36.

adhered to and expressed great hope and confidence in the theory of separation of powers. In order to ensure judicial independence, two measures were proposed by him: first, law making should not be controlled by government office, the privileged class and the prestigious despots any more, on the contrary, “those who are expert at law are authorized to make investigations with those who are not only familiar with history, but also familiar with what the common people have concerned about in order to change the ethos of coming to heels with the superiors.” Second, the judicial officials could not be removed from their posts arbitrarily by government, and they also should not be chosen from the prestigious despots, instead, they should be appointed “according to the recommendation of those legal experts”. Besides, the judges should not be nominated by the imperial court, nor should they be selected from the people with influential powers, in this way, “pandering to the privileged is prohibited, and the judges are chosen just on account of their scholarly achievements, which have relieved the people of their worries and sufferings.”¹⁴

Zhang Taiyan always emphasized judicial independence, because he had found out that even in the countries where bourgeois constitutionalism was established, it was impossible for the judges who were not elected by the voters to balance the power of the president, so the administration must be supervised through independent judicial institutions. He said:

There are many methods to restrict the president’s power and to extend civil rights. So as far as I know, they are roughly as follows . . . , there are clear divisions of powers: the president is mainly in charge of the executive affairs and the national defense, however, he has no rights to interfere with foreign affairs, because it is handled by representatives. Therefore, judicature is not affiliated to the head of the state, and its leader has the same status as the president. Moreover, it is not only in charge of the punishment of government officials, but also the litigation of the citizens. Even if the president is found guilty, he will be arrested, punished and deposed.¹⁵

The thoughts of Sun Yat-sen, Zhang Taiyan and others about judicial independence had become the guiding principle of the legal reform and institutional construction in Nanjing Provisional Government.

19.3 The Process and Achievements of the Continuing Progress

During the period of Nanjing Provisional Government, much effective legal work had been carried out on account of the pursuit of democracy, “Fa Zhi” (the ruling of law) and civil rights, which had greatly fostered the modern transition of Chinese legal system. In order to maintain the unification of legislation, the order of the great president was issued by Sun Yat-sen, which emphasized that “all laws in the Republic

¹⁴Zhang Taiyan, “Dai Yi Ran Fou Lun” (On the Positiveness and Negativeness of Representative System) in *Zhang Tai Yan Quan Ji (The Complete Works of Zhang Taiyan)*, Vol. 4, Shanghai People’s Publishing House, 1984, p. 309.

¹⁵Zhang Taiyan, “Dai Yi Ran Fou Lun” (On the Positiveness and Negativeness of the Representative System) in *Zhang Tai Yan Quan Ji (The Complete Works of Zhang Taiyan)*, Vol. 4, Shanghai People’s Publishing House, 1984, p. 309.

of China are valid only after being discussed and approved by the senate.”¹⁶ With regard to the promulgation of *Zan Xing Bao Lv* (*The Temporary Press Law*) by “Nei Wu Bu” (Ministry of Interior), he had criticized it and ordered it to be repealed at once because “it is invalid without being approved by the senate”, therefore, it should not be enforced on the excuse of being “provisional”, and it should not “be put into practice by the way of executive orders”. He also suggested that Chinese and foreign experts be organized to participate in the work of law making, and stressed that “since it is an important task to make laws, it is impossible to complete the work without adopting the advanced Chinese and western learning and without long years of accumulated investigation and research.”¹⁷ With Sun Yat-sen’s attention, active organization and urging, in the short time of 3 months, legislations in many areas such as administration, economy, education and society had been drafted by Nanjing Provisional Government. These legislations were featured by the abolition of old practices and the introduction of new measures; therefore, it was a great activity of practice of the bourgeois legal theories in modern China. Although they were not systematic and well-developed, it had reflected the bourgeois legal civilization in its modern sense.

19.3.1 *Equality and Civil Rights Legislation*

(1). The abolition of the old salutations which had reflected the feudal bureaucratic privileges. From his understanding that “both president and officials are the servants of the people”, Sun Yat-sen earnestly expressed his opposition to the statutory and non-statutory privileges enjoyed by officials under feudal autocratic system, and ordered “Nei Wu Bu” (Ministry of Interior) to inform the various government offices to have the salutations which it had reflected the bureaucratic hierarchical privileges of Qing Dynasty abolished. He pointed out:

The government offices are institutions to manage national affairs, and the clerks are the public servants of the people, so they are not special classes, why should they be given the presumptuous salutations? After we have investigated the government departments and offices of the ex-Qing dynasty, we can see that there are different salutations to different officials of different ranks like ‘Da Ren’ (Your Excellency) and ‘Lao Ye’ (My Lord) From now on, all government officials are not to be greeted by their ranks. Among the folks,

¹⁶“The Great President’s Order for ‘Nei Wu Yuan’ (Ministry of Internal Affairs) to Abolish *Zan Xing Bao Lv* (*The Temporary Press Law*)” in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, p. 257.

¹⁷“The Great President Consulting the Senate for Discussing *Min Xing Fa Lv Cao An* (*the Draft of the Civil and Criminal Law*) and *Xing Shi Min Shi Su Song Fa* (*The Civil and Criminal Procedure Law*) presented by Chief Law Officer Wu Tingfang” in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 353.

people are generally greeted as Mr. or Gentleman and the loathsome salutations of the ex-Qing must stop to be used.¹⁸

At the same time, the protocol of “Gui Bai Li” (kowitz or kneeling and touching the ground with one’s forehead) was also abolished and was replaced by bowing. The significance of changing the old salutations and abolishing the protocol of “Gui Bai Li” had gone beyond their forms, and it had reflected the principle of equality before law and the respect of people’s dignity advocated by bourgeoisie.

(2). To strictly prohibit human trafficking and protect the rights of freedom. Although the items of human trafficking and slavery were abolished in *Da Qing Xin Xing Lv Cao An (The Draft of the New Criminal Law of Great Qing)* revised during the late Qing Dynasty, it was not enforced after Qing Dynasty became extinct. From the viewpoint of human rights protection, Sun Yan-sen firstly exposed the social causes of its existence in the article of *The Ministry of Civil Affair Being Ordered by the President to Prohibit Human Trafficking*, he said:

During the ruling of ex-Qing dynasty, there were no guiding principles in politics, so it was hard for people to make a living and to find shelters to live. The wives and daughters were sold to become concubines and sons and nephews become ‘Zao Li’ (Yamen runners: a government-employed laborer, messenger, etc. in ancient times). So for a long time, the wicked people had got profits and the pernicious influence had been spread wide. What was worse, some fraudulent people had taken advantage of the hard living of the uneducated countrymen and lured them with sweet words to be sold to others. The sold people were treated like animals and had to work hard all the year around but could not eat their fills. From now on, the subordinates should be informed that such things as human trafficking are prohibited; the violators should be punished as ordered; the previously signed transaction contracts should be terminated and their relationships are not those between masters and slaves any more, but between employers and employees.¹⁹

As to the phenomenon of human rights being seriously infringed by the imperialists’ smuggling of “Zhu Zai” (piglets: laborers) to plunder the cheap labor force from China since Opium War, Sun Yat-sen, in the name of provisional president, solemnly declared in *The Great President’s Order to “Du Du” (the military viceroys and procurators) of Guangdong for Strictly Prohibiting the Selling of “Zhu Zai” (piglets: laborers)*:

After the provinces in coastal areas have been investigated, it is found that the wicked people have abducted ‘Zhu Zai’ (piglets: laborers) to plunge countless people in China into an abyss of misery. Though it was begun long ago in Qing Dynasty, people have since turned a blind eye to it. Besides, the people in distress are too poor to bring lawsuits to the court. Now the republic has been set up, these people should be rescued so as to show

¹⁸“The Great President’s Order for ‘Nei Wu Yuan’ (Ministry of Internal Affairs) to Inform the Various Government Offices to Abolish the Titles of Department Officials of Ex-Qing Dynasty” in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 216.

¹⁹“The Great President’s Order for ‘Nei Wu Yuan’ (Ministry of Internal Affairs) to Forbid Human Trafficking” in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 216.

respect to human rights and to provide protection to the whole people... Apart from ordering 'Du Du' (the military viceroys and procurators) of Guangdong to strictly prohibit the export of 'Zhu Zai' (piglets: laborers), the government departments have also been ordered to look for methods to prohibit human trafficking, to protect overseas Chinese and to fully enforce the principles of equality and fraternity.²⁰

(3). To completely get rid of the status of "Jian Min" (rabble or people of lower social status) and "Jian Ji" (the people of inferior household registration). In the earlier years of Yongzheng, the decrees of abolishing the status of "Jian Min" and "Jian Ji" were issued, but it was only on condition and was extremely incomplete. So, after the establishment of Nanjing Provisional Government, *The Order by the Great President to Give "Dan Hu" (those who live on water instead of on lands) and "Duo Min" (the Good-for-Nothing or loafers) the Public and Private Rights* was issued by Sun Yat-sen, in which he pointed out:

Human rights are natural, and the officials and subordinates are equal. However, in order to oppress people, various unjustifiable laws have been drafted by the autocrats, which have doubled their vicious arrogance. ..., for example, there are special restrictions for the following groups of people: 'Dan Hu' (those who live on water instead of on lands) in Fujian and Guangdong, 'Duo Min' (the Good-for-Nothing or loafers) in Zhejiang, the beggars in Henan, the servants waiting on the officials with great achievements and armored soldiers, the people of lower social status, the people who have had their hair cut, the actors and actresses and the 'Ya Men' (the government offices) messengers. Besides, they are not regarded as equals of other common people, and if a person has been punished, his descendants will have to inherit the insults. So there is nothing worse than such violation of human rights. Now at the time of the establishment of the republic and the avocation of humanity, how can such harsh decrees be continued for long to bring shame to the country? Therefore, special orders are issued to show that the above-mentioned people have all the rights offered by the state and society, and they include the public rights like the rights of election and participation in politics and the private rights like the rights of residence, speech, publishing, assembly and religious freedom. The rights should be given to everyone without discrimination to show respect to human rights and to demonstrate the generally acknowledged truth.²¹

According to the order, "Jian Min" and "Jian Ji" who had been deprived of all rights were exonerated and they were given equal legal rights.

(4). To ensure women's equal statutory rights with men. According to the theory of natural rights and "equality between men and women", Sun Yan-sen elaborated the contributions made by women during the revolution: "there are many talents among women, and they are comparable to any men of high aspirations because they have joined 'Tong Meng Hui' (The Alliance Society), have rushed about for

²⁰"The Great President's Order for 'Du Du' (the military viceroys and procurators) of Guangdong to Stop 'Zhu Zai' (piglets: laborers) Trafficking" in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 312.

²¹"The Great President's Order to Liberate 'Dan Hu' (those who live on water instead of on lands) and 'Duo Min' (the Good-for-Nothing or loafers) and to Grant them the Public and Private Rights" in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 302.

national affairs, moreover, they have kept on fighting in spite of setbacks.” So, “women have rendered great service in expelling the Tatar barbarians”. For this reason, he stressed that after the establishment of the republic, it was “natural” for women to participate in politics.

The legislatures about equality and human rights mentioned above were the basic connotation of Chinese modern legal civilization which had greatly stimulated the revolutionary enthusiasm of the common people and had won their support for the republic government.

19.3.2 *The Official System Legislation*

China had been an official-oriented country since ancient times, so effective systems were lacked to restrict the administrative power. Therefore, in order to realize the dream of “Fa Zhi” (the ruling of law), it was necessary to supervise and standardize the administrative power and make corresponding laws on official system. Soon after the establishment of Nanjing Provisional Government, Sun Yat-sen suggested, “general regulations on official system of each department and office should be made and enforced.” At the beginning of February, 1912, copies of *Ge Bu Guan Zhi Tong Ze* (*The General Regulation for the Official Systems of each Department*) compiled by “Fa Zhi Ju” (Bureau of Legislative Affairs) and the official system of each department (except Bureau of Finance, Bureau of Industry, Bureau of Navy and Bureau of Justice) were respectively sent by him to senate for resolution. Moreover, he also ordered “Fa Zhi Ju” (Bureau of Legislative Affairs) to have an examination of *Lin Shi Zhong Yong Cai Pan Suo Guan Zhi Ling Cao An* (*The Draft of the Order for the Official System of Provisional Central Tribunal*) presented by “Si Fa Bu” (Ministry of Justice). Besides the central official system, on March 10, the 23 items of *Nanjing Fu Guan Zhi* (*The Official System of Nanjing Prefecture*) were issued in the name of the provisional president. Because Nanjing “Fu” (Prefecture) was the seat of the provisional central government, the making of *Nanjing Fu Guan Zhi* (*The Official System of Nanjing Prefecture*) had become a model of the local official systems.

The making of laws on various departmental official systems had provided the organizational activities of the governmental institutions with laws to abide by, which was not only an important measure in the power construction of Nanjing Provisional Government, but also a reflection of the diversity of official system establishment by law.

Not only that, in order to put into practice the principle of “appointing officials and granting positions according to abilities and virtues”,²² Sun Yat-sen put forward

²²“The Great President Consulting the Senate for Discussing the Draft of Conducting Examinations for Civil Officials, Diplomats and Consular Officials” in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 193.

the suggestion of selecting officials through examinations. He said, "It is only through examinations that those who are willing to serve the interests of the public and without working for his personal gains can be chosen"²³ and "the only way of reinforcing the management of officials is to conduct examinations for official positions and assign the qualified officials to each province for appointments."²⁴ For this purpose, "Fa Zhi Ju" (Bureau of Legislative Affairs) was ordered to "complete the drafting of the regulation of civil official examinations quickly and properly."²⁵ In addition, he also suggested that "the selection procedures must be settled" in order to select officials according to law. Besides, "Ji Xun Ju" (the organization to supervise and award those who have made achievements) was set up to completely put an end to the phenomenon of "getting rewards by taking advantage of official positions" and "refusing to employ those who have made achievements", which were harmful to the state itself.

From what was discussed above, it could be seen that on the important matters of official system reform and the reinforcement of the management of officials which concerned the major issues of state construction and consolidation, Sun Yat-sen had not only put forward the principles, but also organized people to make relevant laws. Although under the historical condition at that time the official systems and regulations made were not, and in fact, could not, be fully put into practice, it was undeniable that they had exerted a significant influence to later periods.

19.3.3 *The Civil Affairs Legislation*

The decades during the ruling of Beiyang government were periods of great changes taking place either in Chinese social economy or in social organizations. The original hierarchical social order and Confucian ethic ideas were continuously eroded, furthermore, the traditional value system was in upheaval and was even on the verge of disintegration. With industrial, commercial and social development, the relationship between people became more complicated, so it was natural that legal adjustment and protection was required in the social and economic development, which in turn had fostered the development of civil affairs legislation. In 1915, the second draft of the seven chapters of civil law which concerned the regulation of kinsfolks was completed; in 1926, the second draft of the five chapters of

²³ Ibid.

²⁴ "The Great President's Order for 'Fa Zhi Ju' (Bureau of Legislative Affairs) to Examine and Approve the Tentative Regulations of the Examination of Civil Officials" in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 168–169.

²⁵ "The Great President's Order for 'Fa Zhi Ju' (Bureau of Legislative Affairs) to quickly Draft the Tentative Regulations for the Examination of Civil Officials" in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 152.

civil law, i.e. the chapters about the general rules, debts, property rights, relatives and inheritance was completed.

The main feature and value of *Min Guo Min Lv Cao An* (*The Draft of the Civil Law of the Republic of China*) lay in its integration of both Chinese traditional and western modern civil laws. For example, the regulations in *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*) about the natural person, which had restricted the independent personality were deleted. In particular, the items about the inequality of men and women were removed and the items like “the rights and responsibilities of wives and husbands” and “matrimonial regime” were added, which had shown that the principles of equality and freedom in western modern civil laws were further acknowledged. Here was another example: in *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*), the items of “moveable property” and “immoveable property” were simply adopted from the German civil code, and no regulations were made about the pawning rights which had long existed in China. Nevertheless, in *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*), there was one chapter exclusively about the pawning rights and a more complete modern pawning rights system was formulated, which had indicated that the connection between traditional Chinese and western civil law had changed from a mere superficial compatibility in form to an inner integration.

Because of the tangled warfare among warlords, it was impossible to go through the normal legal proceedings, therefore, after *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*) was completed, it was only applied as “regulations” by the legal institutions at all levels according to the order of “Si Fa Bu” (Ministry of Justice) of Beijing government, which had shown its value in legal practices. What specially needed to be mentioned was that under the historical conditions at the time, “Da Li Yuan” (The Supreme Court), as the supreme trial organization, had performed the function of legal institutions by means of legal precedents. The main idea of the civil legal precedents of “Da Li Yuan” (The Supreme Court) had not only given guidance to the central and local civil legal activities but also reflected the integration of traditional and western civil laws and the integration of written laws, civil customs and “Tiao Li” (Ordinance). When describing the condition of the practice of the main points of civil legal precedents, Hu Changqing, who was one of the contemporaries at the time of the Republic of China, said, “*Pan Li Yao Zhi Hui Lan* (*Collection of the Main Ideas of Legal Precedents*) consists of three volumes of main texts and two volumes of sequels. Almost everyone engaged in legal activities has one copy of them and when in litigation, both lawyers and judges had invariably based their lawsuit settlements on the trials made on ‘a certain date, in a certain year recorded by ‘Da Li Yuan’ (The Supreme Court)’.”²⁶

Apart from the essential points of legal precedents, the case interpretations written by “Da Li Yuan” (The Supreme Court) also belonged to judicial interpretations. For example, the main idea of No. 228 case interpretation in the fourth year of the Republic of China had offered an interpretation for property rights and the

²⁶Hu Changqing, *Min Fa Zong Lun* (*A General Introduction of Civil Law*), The China University of Political Science and Law Press, 1998, pp. 35–36.

rights of disposition of the grown-up, the humble and the young which was different from that in the traditional civil law: “the current law does not prohibit the possession of property by the humble and the young. ...those who have grown into manhood can dispose their property freely. Those involved have the rights to have their family properties divided up and “courts should accept the case and make judgments for them.”

As to the legal precedents drafted according to the trials of civil law suits, they also had the nature of the sources of law. Some of the legal precedents had shown the preliminary integration of traditional and western civil laws. For example, to prevent the family senior members’ violation of individual marital rights, it was affirmed in No. 831 trial in the ninth year of the Republic of China that “it is not considered a very important factor whether the officiators (the parents or their proxies of the bride and bridegroom who are considered to have a final say in their children’s marriages) agree or not.” In the same year, it was clearly indicated in No 1207 trial that “if there are no justifiable reasons, the parents are not to become the officiators in the marriages of their grown-up children and the court should make judgements after checking the facts.” In the 11th year of the Republic of China, it was declared in No.1009 trial that after the children had grown up, if the children did not agree to the marriages arranged by their parents, “they are not to be forced to obey,” which had in fact deprived the family senior members’ rights to interfere and to decide their grown-up children’s marriages.

To sum up, we could see that by integrating the traditional and western civil laws, the part with the most feudal color in the traditional civil law had been transformed with the utmost efforts, and new status had been obtained by individuals in clans and families, which had shown that the level of law makers’ understanding of how to combine the transplanted foreign laws with the native culture had been raised. Moreover, it was beyond doubt that their legal interpretations had played effective roles in the progress of civil law theories and legal practices, and its historical experience and lessons were also worthwhile to be utilized for future reference.

19.3.4 The Criminal Law Legislation

In April, 1915, *Xiu Zheng Xing Lv Cao An (The Draft of the Revised Criminal Law)* was completed according to *Zan Xing Xin Xing Lv (The Provisional New Criminal Law)* by Beijing government. In *Xing Fa Cao An Xiu Zheng Yao Zhi (The Essentials in the Revision of the Draft of Criminal Law)*, ethics was still used as a slogan, and it was declared that “for thousands of years, ‘Li Jiao’ (feudal ethical code) has always been the cornerstone of founding the nation. The ancient people have said that punishments are needed where ‘Li’ (rites) has lacked. So legislations should be based on ‘Li’ (rites) and customs.” Consequently, the chapter named “Qin Shu Jia Zhong” (severer punishments should be enforced for the crimes committed among relatives) was added in the general rules. Besides, the regulation that even if being infringed upon by the senior relatives in the family, no justifiable self-defense was

permitted was formulated, and the regulation about “Wu Fu Jian” (adultery with unmarried woman) in *Zan Xing Xin Xing Lv Bu Chong Tiao Li (The Complementary Ordinance of the Provisional New Criminal Law)* was also formally adopted into the main text of the draft of the criminal law.

In July, 1918, Duan Qirui, the warlord of “Wan Xi” (a group mainly from now Anhui Province) who had dominated Beijing government after Yuan Shikai, had given orders to set up “Xiu Ding Fa Lv Guan” (The Law Revision Office) to once again have the draft of the criminal law revised. The famous jurist Dong Kang and Wang Chonghui were appointed “Zong Cai” (president) to be in charge of a large-scale revision of *Xiu Zheng Xing Lv Cao An (The Draft of the Revised Criminal Law)*. In 1919, *Xing Fa Di Er Ci Xiu Zheng An (The Second Amendment of the Criminal Law)* was completed. The main features of the law were as the following: some principles and contents of modern bourgeois criminal legislation were adopted; the regulations with feudal characteristics were deleted and the different chapters of the special provisions were reasonably adjusted. For example, the “crime of murder and injury” in *Zan Xing Xin Xing Lv (The Provisional New Criminal Law)* was changed into “the crime of murder” and “the crime of injury” to show the different nature and degrees of seriousness of murder and injury. Because of the complicated political environment and changeable situation at the time, the second amendment of the criminal law was not issued and put into practice; nevertheless, it had become the foundation of Nanjing national government in making criminal laws.

In addition to the basic practice of *Zan Xing Xin Xing Lv (The Provisional New Criminal Law)*, a great number of special criminal laws were also made by Beijing government out of the need to set up warlord autocratic ruling, which could be used prior to common laws to exert special punishments. For example, it was openly stipulated in the order of promulgating *Cheng Zhi Dao Fei Fa Shi Xing Fa (The Law for Implementing the Regulations for the Punishment of Robbers)* that “the punishments are far from severe in preventing further crimes” and that “over indulgence of wickedness may lead to treacherousness”. In *Jie Yan Fa (Martial Law)*, it was stipulated that military suppression could be conducted on the pretext of “special incidents” and “the state of war”. In short, severe punishments were used by Beijing government to intimidate the people and suppress the democratic movement, which had shown the true nature of criminal law.

Apart from the distinctive feature of military suppression, the criminal law of Beiyang government had also shown the tendency of retrogressing to the feudal criminal law. For example, it was stipulated in the fifteenth article of *Zan Xing Xin Xing Lv Bu Chong Tiao Li (The Complementary Ordinance of the Provisional New Criminal Law)* that even if being infringed upon by the senior members of the family, no justifiable self-defense was allowed. In the chapter of “Qin Shu Jia Zhong” (severer punishments should be enforced for the crimes committed among relatives) in *Xing Fa Xiu Zheng An (The Amendment of the Criminal Law)*, it was provided that “for the crimes which have involved the lineal senior relatives, the punishments should be increased by two degrees, for the crimes involved the non-lineal senior relatives, the punishments should be increased by one degree,” “and for the crimes involved relatives, death penalty is permissible.”

In the penalty system, there was also the tendency of retrogressing to the feudal legal systems. For example, the long abolished punishments of “Qian” (repatriation) and “Chi” (flogging with light sticks) were restored in *Tu Xing Gai Qian Tiao Li* (*The Ordinance for the Change of Imprisonment to Repatriation*) and *Yi Chi Tiao Li* (*The Ordinance for the Change of Punishment of “Chi”: flogging with light sticks*) and issued in 1914.

Because the period of ruling by Beijing government was also the time of up-surging movements of patriotic mass struggle against imperialism and the workers’ movement, *Xiu Zheng Xing Lv Cao An* (*The Draft of the Revised Criminal Law*) and the special criminal law were directed at the patriotic anti-imperialistic behaviors of the people and the workers’ movement. The workers “who have conspired to go on strike in the same trade are to be punished: the chief plotter is to be sentenced to fixed-term imprisonments below four-degree, the chief leader is to be sentenced to life imprisonment or to imprisonment above two-degrees”. Under the suppression of the criminal laws of Beijing government, the leaders of the workers’ movement in the places like Hunan and Shanghai were continually persecuted.

Above all, during the period of ruling by Beijing government, the continuous industrial and commercial development had led to sustained progress of the civil law; however, in the field of criminal law, because of special political purposes of the rulers, a tendency of regressive development emerged. It was true that the modern transition of Chinese law was dragging along during the period.

19.3.5 *The Continuing Reform of Legal System*

The legislative progress was only a starting point and superficial change in the realization of modern transition of Chinese law, so a series of continuous reform of legal system which could ensure the enforcement of laws was needed, and it was a sign of all-around and further development of the modern transition of Chinese Law.

Wu Tingfang, who was the attorney general in Nanjing provisional government, had paid much more attention to legal reform, and in the outline of the constitution drafted by him with the aim of safeguarding the human rights of citizens, he stressed, “without qualified search warrants issued by ‘Ya Men’ (the government offices), no matter for what reason, on one has no the rights to intrude into stores and houses to search and arrest people without the owners’ permissions.” Evidence should be stressed when arresting people: “the arrested people should be brought to trial in 24 h, and they should be interrogated in public and judged openly according to scheduled time”. Furthermore, “the victims have the rights to ask for compensation by prosecution”, “the rights to appeal to higher courts” and so on. He thought that this was the “foundation of Chinese legislation”, and if it could really be put into practice, it surely could make the countrymen live happy and peaceful lives.²⁷ On the question of legal reform, the provisional great president Sun Yat-sen had given active

²⁷“Zhong Hua Min Guo Tu Zhi Chu Yi” (On the Administration of the Republic of China).

support. For example, he had actively safeguarded the “four-level and three-trial system” postulated in *Zhong Hua Min Guo Lin Shi Yue Fa* (*Provisional Constitution of the Republic of China*) and refuted the proposal of “two-trial system for slighter offences” put forward by Guo Han, the local chief procurator of Nanchang City, Jiangxi province. At the same time, he pointed out that “this is a doctrine in which people’s lives and properties have not been respected and the seriousness of the cases and the complexity of the trials have not been understood. Moreover, because it is one of the most basic rights of the people to appeal to higher courts, the problem of whether preserving or abolishing people’s rights should not be recklessly settled”. He had clearly made his attitude public by stating that “the ‘four-level and three-trial system’ is comparatively complete, so it should not be abandoned just because it had been practiced in ex-Qing dynasty”.²⁸

The Nanjing provisional government had also set an example in adopting civilized trials by abolishing inquisition by torture. According to his understanding of the principle that “because human rights are divine, it should not be despised, moreover, no punishments should be enforced during imprisonments because it has been prescribed in the ancient teachings”, on March 2, 1912, Sun Yat-sen issued *The Order of the Great President for ‘Nei Wu Bu’ (Ministry of Interior) and ‘Si Fa Bu’ (Ministry of Justice) to Inform their Subordinate Departments and Offices to Stop Using Inquisition by Torture*. In this order, it was pointed out that “the purpose of criminal law is to defend the rights of the state and protect the safety of the public...., the criminals are punished by the state not to revenge the personal hatred, nor to warn the public against crimes, but because just by this way, the state existence can not be guaranteed, and the equality of people can not be maintained.” In addition, he had condemned the phenomenon of disregarding for human life and abusing the inquisition by torture during the ruling of Qing Dynasty, and declared formally:

I have advocated humanity and attached more importance to people’s lives ..., I have criticized ex-Qing Dynasty for its cruelty and tyranny and announced to people home and abroad that I especially have a strong hatred for inquisition by torture. So, even when I have thought of it at midnight, I have felt deeply disturbed and greatly anguished. For this reason, I hope that the order can be delivered to every subordinate offices of the department. Whether the administrative, judicial or governmental offices, or whether what legal case, inquisition by torture is not allowed... the previously illegal-used torture instruments should be destroyed.²⁹ Because the custom of ‘Zui Cong Gong Ding’ (enforcing punishments in accordance with the convicts’ confessions) which was popular in the trials of the

²⁸“The Great President’s Reply to the Provisional Outline of the Department of Procuratorate in each Province Presented by Local Chief Prosecutor Guo Han in Jiangxi Province and Delivered by the Head of ‘Fa Zhi Ju’ (Bureau of Legislative Affairs) Song Jiaoren” in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 266.

²⁹“The Great President’s Order for the Subordinate Offices of ‘Nei Wu Bu’ (Ministry of Interior) and ‘Si Fa Bu’ (the Department of Justice) to Stop Inquisition by Torture” in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 215–216.

feudal times has made inquisition by torture legal, I especially declared that in hearing a case, the conviction should be made according to adequate evidence rather than the statements confessed by an accused under examination. Therefore, those who have made wrong judgments in trials, those who have tried to recover the old practices with the passing of time and have instigated the harmful tradition of ex-Qing Dynasty must be punished according to law, besides being removed from offices.³⁰

According to Sun Yat-sen's order, "Si Fa Bu" (Ministry of Justice) and "Nei Wu Bu" (Ministry of Interior) had strictly prohibited all subordinate government offices and "Zhou" (subprefecture), and "Xian" (county) of provincial government from making inquisitions by torture. On March 8, "Si Fa Bu" (Ministry of Justice) had delivered Sun Yat-sen's order to prohibit inquisition by torture to "Du Du" (the military viceroys and procurators) of each province. So from then on, it had become illegal to extort confession by torture. But it was not easy for the deeply rooted feudal legal system of extorting confession by torture to be completely eliminated just by mere scraps of laws and decrees. Several days after *The Great President's Order for the Subordinate Offices of 'Nei Wu Bu' (Ministry of Interior) and 'Si Fa Bu' (the Department of Justice) to Stop Inquisition by Torture* was issued, there occurred the vicious incident of "interrogating women with torture" in Shanghai Municipal Tribunal. So on March 11, 1912, *The Great President's Order for the Subordinate Offices of 'Nei Wu Bu' (Ministry of Interior) and 'Si Fa Bu' (the Department of Justice) to Stop Corporal Punishments* was once again issued by Sun Yat-sen, in which it was sternly pointed out:

As far as the punishments in the world are concerned, for the criminal, either his freedom or his life is deprived; however, corporal punishments have never been wrongly exercised by maltreating the criminal's body and punishing them physically. As for civil cases, there are the items about compensation for the losses and restoration to the original state; as for criminal cases, there are the items about the payment of fines, detainment, imprisonments and capital punishment. Justice can only be obtained by our enforcing laws according to concrete situations. We should avoid malpracticing severe punishments rashly in order to have a quick settlement of the criminal cases in defiance of law. Corporal punishments have been condemned and abolished by many countries in the world. ... But I have just heard the vicious incident of 'interrogating women with torture' in Shanghai Nan Shi Tribunal. Shanghai is a city which opens earliest to the world, and which may attract the world attention easily, nevertheless, the officials have still clung to the old traditions. So no doubt, there are officials in other provinces who might have made use of the time when the republic has just been founded and complete legal systems have not been set up in order to recover the old ways of doing things. Thus, the order is solemnly declared and such occurrences should be stopped at once. Moreover, it should be delivered to each subordinate unit of various departments and to the officials either in administrative or legislature branches, and the illegal torture instruments like beating sticks and cangues are forbidden to be used in the trial of civil cases. The crimes punishable by 'Chi' (flogging with light sticks), 'Zhang' (flogging with heavy sticks) and 'Jia Hao' (wearing cangues in

³⁰"The Great President's Order for the Subordinate Offices of 'Nei Wu Bu' (Ministry of Interior) and 'Si Fa Bu' (the Department of Justice) to Stop Inquisition by Torture" in *Xin Hai Ge Ming Zi Liao (The Materials of Xin Hai Revolution)*, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 215, 216.

public) should be handled with 'Fa Jin' (mulct) and detainment instead. For detailed regulations, please refer to the codes made in future.³¹

The legal practice of Nanjing provisional government had reflected the democratic spirit of Sun Yat-sen's legal thoughts, and "every line of Sun Yat-sen's guiding principle was permeated by his militant and sincere democratism."³²

The abolition of inquisition by torture was also reflected in the proposal of civilized trial put forward by Wu Tingfang, who had also criticized the popular traditional idea that "without torture, it is impossible to find out the details of the cases and to prevent crimes". It was declared solemnly that "since the application of severe punishments in China hundreds of years ago, has anyone seen the administration simplified and punishments reduced?" He had especially condemned the absurd view that "trials can not be conducted according to the western laws because Chinese are different in nature", and he said, "There are millions of Chinese abroad, but no one has heard of inquisition by torture."³³

Besides, the democratic spirit was also shown by many other measures, such as the selection of juries by "Si Fa Bu" (Ministry of Justice); the allowance of hiring lawyers to defend in court, the open trial and the free public access to the court. Among them, the establishment of lawyer defense system and open trial system had especially drawn people's attention at the time. Sun Yat-sen supported the establishment of lawyer system and he pointed out:

The lawyer system and the judicial independence are complementary with each other, which have been universally applied in almost every civilized country. At present, the lawyer's associations are set up everywhere one after another, so relevant laws should be made to be used as the standards. Now the original presentation and draft are sent to the bureau to be reviewed and examined, which will be presented to the senate later for discussion. Look forward to your reply, act accordingly.³⁴

As to open trials, in the 50th item of *Zhong Hua Min Guo Lin Shi Yue Fa* (*Provisional Constitution of the Republic of China*), it was stipulated that "the court trials must be open to the public; but it can be tried in secret if it is considered to be harmful to the stability of social order." It was also regulated in *Lin Shi Shang Su Shen Pan Suo Zan Xing Tiao Li* (*The Temporary Ordinance on Provisional Court of*

³¹"The Great President's Order for the Subordinate Offices of 'Nei Wu Bu' (Ministry of Interior) and 'Si Fa Bu' (the Department of Justice) to Stop Corporal Punishments" in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 270, 271.

³²Lenin: "The Chinese Democratism and Nationalism" in *Lie Nin Xuan Ji* (*The Selected Works of Lenin*), Vol. 2, The People's Publishing House, 1960, p. 424.

³³"Zhong Hua Min Guo Tu Zhi Chu Yi" (On the Administration of the Republic of China) (chapter, 12).

³⁴"The Great President Consulting the Senate for Ordering 'Fa Zhi Ju' (Bureau of Legislative Affairs) to Examine, Collated and Report the Draft of the Law for Lawyers" in *Xin Hai Ge Ming Zi Liao* (*The Materials of Xin Hai Revolution*), edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Zhonghua Book Company, 1961, p. 337.

Appeal) made by Hubei military government that “trial debating and the declaration of court decision should be made in public, however, for special events, they may not be made public after the reasons have been explained.”³⁵

The defense and open trial system were the main contents of bourgeois legal systems, which Sun Yat-sen had tried to put into practice where the administrative power of Nanjing provisional government had reached. Above all, with the efforts of the people like Sun Yat-sen and Wu Tingfang, a favorable situation had appeared in legal reformation during the period of Nanjing provisional government, which had greatly changed Chinese people’s understanding of legal civilization.

During the early period of Beijing government, the basic direction of legal reform of Nanjing provisional government was succeeded, and public notices were given in which it was stressed that “the separation of power between legislature, executive and judiciary is the spirit of the republic, and judicial affairs are not to be interfered with by any government organizations.” Thereafter, according to *Zan Xing Fa Yuan Bian Zhi Fa* (*The Temporary Court Organic Law*), the clerks could not be removed, replaced, dismissed and deposed randomly, moreover, their salaries could not be cut by government institutions at all levels without following the law. “Da Li Yuan” (The Supreme Court), which had acted as the supreme trial institution was set up according to the theory of “elite justice”, and it had set up very strict standards for the qualification of clerks. For example, the clerks in “Da Li Yuan” (The Supreme Court) must have the experience of law study for over 3 years both home and abroad, must take and pass two law examinations, must have over 10 years of experience in legal practice, must have excellent legal work records and must be recommended by “Si Fa Bu” (Ministry of Justice) before being appointed by the president.

Because the principles like “independent adjudication and non-interference by superior departments and offices” were earnestly carried out, and the morality and behavior of the judges were more emphasized by “Da Li Yuan” (The Supreme Court), it had not only won the overall recognition of the public, but also established a greater judicial authority in the process of exercising the rights of independent jurisdiction and integrating the rights of legal interpretation, which had left a page worthy of our study and notice, even though it was brief. Nevertheless, the period of Beijing government was characterized by the dictatorship of warlords and long-years of tangled wars, so the state revenues were mostly spent on military expenditures instead, which had led to the shortage of funds for judicature and the especial lack of gifted judicial personnel. Besides, the rulers had taken a passive attitude in their cognition, which was added by some cultural, racial, customary and psychological estrangement, all these had made the legal system of Beijing government a capricious mixture of Chinese and western laws. So in the whole country as a whole, judicial independence still was at an idealized stage. Especially under the special historical circumstances ruled by Beiyang Warlords, no matter

³⁵ *Hu Bei Jun Zheng Fu Wen Xian Zi Liao Hui Bian* (*A Collection of Documentary Files of Hubei Military Government*), co-edited by Museum of “Wu Chang Qi Yi” (Wuchang Uprising) of Xin Hai Revolution and The Committee of Hubei Province of the Chinese People’s Political Consultative Conference, Wuhan University Press, 1986, pp. 735–736.

big or small, the warlords in central or local places would interfere with the normal judicial trials by making use of martial judgments. So articles had once been carried in *Dong Fang Za Zhi* (*The Oriental Magazine*) in which it was described that “administration and justice have been interfered with by army men, which has brought harm to legal independence. Moreover, these illegal behaviors are often openly conducted in the name of marital law.”³⁶ It was thus clear that in a country with more than 2,000 years of feudal dictatorship, it was obviously unusually difficult to complete the task of judicial independence, because it was a historical development process which was full of struggles. For this reason, compared with the shortage of funds for judicature and the lack of gifted legal personnel, it was more difficult to overcome the interference of administrative power, the obstruction of various forces and the power struggle.

What was worth mentioning about was that because *Si Fa Shen Pan Yuan Kao Shi Fa* (*The Examination Law for Judges*) and *Si Shen Pan Guan Yuan Ren Mian Ling* (*The Order for the Appointment and Removal of Judges*) had been issued by Beijing government and strict selection and appointment systems had been put into practice, the quality of judges was greatly improved. Liang Qichao, who had been the attorney general from 1913 to 1914, had made the following comments:

For decades, the measures taken by the governmental organizations have been disappointing, however, only in the field of justice, achievements expected by the people home and abroad have been made, and the reasons are as the following: first, the articles of laws are strict and proceedings meticulous, so misinterpretations have been avoided; second, the established regulations and standards for the promotion of gifted people are closely observed, and rules to guarantee its enforcement have been made. Besides, the clerks have been engaged in this profession for a long time and they are both experienced and very familiar with their work. Third, their jobs are considered marginal and unimportant, so there are fewer flattery officials around, and fewer cases of corruption in their official positions. That is why greater achievements have been made in the field of justice than in other fields: partly because of law and partly because of man,³⁷ which was of great significance of the present.

³⁶ *Dong Fang Za Zhi* (*The Oriental Magazine*), Vol. 24, No. 2.

³⁷ Liang Qichao, “‘Ti Ci’ (Inscription) for *Fa Lv Ping Lun*” in *Fa Lv Ping Lun* (*The Law Review*), Vol. 1.

Chapter 20

The Historical Value of the Modern Transition of Chinese Law and the Experience for Reference

20.1 The Westernized form of the Modern Transition of Chinese Law

In the long process of development, the Chinese law had been in isolation from the outside world, which was a necessary condition to maintain the intrinsic political and legal structure of China, nevertheless, at the same time, it had resulted in the establishment of a fixed routine which had been inherited and succeeded by generations. However, after the closed door was thrown open by the gunfire of the western colonial countries and under the situation that it was impossible to continue the ruling in the old traditional way any longer, it had become an unavoidable choice to begin the political system reform and the modern legal transition. Moreover, it was carried forward simultaneously in the introduction of western culture and in the conflicts and integration with the traditional culture. It was a historical movement in the wake of the social development which was not designed by any authorities, nor enforced by any political powers. On the one hand, the political change and reform during the late Qing Dynasty had provided prerequisite conditions for the modernization of Chinese legal system; on the other hand, the development from natural economy to modern commercial economy had laid the material foundations. Although there had been golden times for traditional law, by the end of Qing Dynasty it had come to a dead end, which had not only far lagged behind the bourgeois law in the west, but also become fetters to impede the development of Chinese society. Even before Opium War, there had been urges for legal reform, so even without the war, progress would surely have been made slowly in Chinese law; therefore, the war itself had in fact become its catalyst and impetus.

After Opium War, with the continuing invasion of western countries, China was faced with the change “which was unprecedented for hundreds of years” in history, and Chinese nation was in the danger of subjugation and genocide. It was just because of this that in modern Chinese history all important changes and political activities were closely connected with “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival). So similarly, the modern transition of Chinese

legal system had also developed around this principal line, and the patriotic spirit of fighting against enemies, opposing invasions and “Fu Guo Qiang Bin” (making the country rich and its military forces efficient) had become a great driving force to push the modernization of Chinese legal system forward. Besides, relevant to what was mentioned above, the wish to take back the rights of consular jurisdiction seized by the western powers and to restore China’s legal sovereign rights had also become important reasons for the patriotic officials and scholar-bureaucrats to devote themselves actively to legal reform.

The modern transition of Chinese legal system started in the later half of the nineteenth century, and it had experienced a long process of development, and had become an inseparable part of the transition of the whole society. Because the level of traditional economic, political and cultural development was different in different countries and nations and the forms of state, political systems, geographical environments, social customs and national traditions were also greatly different, the modern transition of different countries and nations had assumed different modes with special features. Even for the same country or nation, different features had been shown at the different stages of development because of different economic developments, political systems, levels of civilization and degrees of opening up of the society. The roads and modes of legal transition taken or adopted by any country or nation at certain special stages were always closely related with the situation of social development during the special periods, which had its own national and stage features. The modern transition of Chinese legal system had started from “Yin Jin Xi Fa” (introducing the western laws) and “Shao Bian Cheng Fa” (making laws by slightly changing the western laws) by “Yang Wu Pai” (The Westernization Group), undergone the theoretical debating of “Wei Xin Pai” (the later Reformists) during the time of “Wu Xu Bian Fa” (Wu Xu Reform) and was pushed to a new stage in the integration of theory and practice by the preparation of constitutionalism and law revision at the end of Qing Dynasty. Since then, Chinese law had begun to be integrated with the advanced laws of the world. Later, after being continuously advanced in the period of the Republic of China, Chinese law was finally edged into the laws of the world. This had not only accorded with the trend of historical development but also reflected the common aspiration of the people, which had shown its historical inevitability and vitality, therefore, was irresistible by any obstinate groups or individuals.

The advanced western legal culture had been regarded as a theoretical guidance for the modern transition of Chinese law, so the form which it would assume was certainly the westernized one. The western legal culture had always been regarded as the model to learn from either in the political reform and law revision during the late Qing Dynasty or in the legal construction at the beginning of the Republic of China, so it was obvious that a comparatively stronger western color was shown in the modern transition of Chinese law. The roads of modernization for the countries of the world were generally divided into two kinds according to modern theories, i.e. the modernization caused by internal reasons and external reasons.¹

¹Luo Rongqu, *Xian Dai Hua Xin Lun (New Commentaries on Modernization)*, Beijing University Press, 1933, p. 123. Some scholars also called them the modernizations caused by internal or external reasons respectively.

The former referred to the road of modernization of the internal innovation generated by social power itself which had experienced long process of social changes; while the latter referred to the road of modernization of the internal ideological and political change caused by outside impacts under the influence of international environment which had resulted in economic changes. The modernization caused by external reasons mainly occurred in the underdeveloped countries, whose elements of modern productive power had to be transplanted from foreign countries.² According to this standard of division, the modernization of the western European countries was typical of the modernization caused by internal reasons, while the Chinese modernization (including the modern transition of legal system) had generally shown the features of the modernization caused by external reasons. Before Opium War, China had been a closed country with no separation of law and morality, in which the overall social modulation mechanism had demonstrated the characteristics of stressing the public rights while neglecting the private rights; stressing “Ren Zhi” (the ruling of man) while neglecting “Fa Zhi” (the ruling of law); stressing the state while neglecting the individual and stressing the ethics while neglecting the differentiation of right from wrong. This legal value orientation ran counter to the symbolic elements of legal modernization—constitutionalism, republic, “Fa Zhi” (the ruling of law), judicial independence and the lawyer system, etc. Therefore, to realize the modern transition of Chinese law, it was necessary to carry out legal reform according to western modern legal standards and to actively introduce the modern civilized legal systems, principles and successful experiences, which was the root reason for the overall feature of exogenousness and westernization of a certain degree which were definitely reflected in the modern transition of Chinese law. Thus, it could be said that without the model effect of the western legal civilization, it was not possible to set up the modern legal system in China at the beginning of the twentieth century.

However, it did not mean the negation of the elements of Chinese culture which had promoted the modern legal transition and even had played decisive roles at some levels to admit the exogenous feature shown generally in the modern transition of Chinese law. Before western bourgeois legal civilization was introduced into China in the later half of the nineteenth century, although in traditional Chinese culture, the natural economy, tyrannical political system and the patriarchal clan system were still regarded as the economic, political and social bases, since Ming and Qing Dynasties, with the development of commercial economy, the bud of capitalism began to emerge in Chinese society: the economic life had become more active, and the equal positions of the principal subjects of various economic exchanges had been enhanced day by day; the land which was regarded as the main property in feudal society was exchanged more often and the varieties of contracts which were used in transactions had become more complicated. In the field of ideology, many enlightenment thinkers appeared like Gu Yanwu and Wang Fuzhi who had expressed criticism to the absolute monarchy; in addition, some philosophic schools were formed represented by Dai Zhen, Wang Zhong and Ruan Yuan who

²Ibid., pp. 123–124.

had taken critical attitudes towards the traditional Confucian school doctrines; in social life, the social position of employers and “Jian Min” (rabble or people of lower social status) was improved, the individual freedom of industrialists and businessmen was enhanced gradually, moreover, such situation of social development was more intensified by the end of Qing Dynasty. Consequently, feudal natural economy dismantled in the face of invasion by western capitalist economic forces, which had made it possible for national capitalism to get the chance to survive in the cracks between imperialism and the comprador-bourgeoisie (in China a local agent for a foreign business who had charge over the native workers); the Chinese feudal officials and scholar-bureaucrats began to come into contact with western political and legal thoughts and institutional civilizations introduced through translating and publishing of foreign books, which had greatly changed their political viewpoints. With the adjustment of power structures of central and local places in late Qing Dynasty, some officials who had accepted and supported the western politics and legal systems like Zhang Zhidong and Shen Jiaben had entered into the core of the central power. Thus all these had offered internal conditions for the law revision in late Qing Dynasty and the start of modern transition of Chinese law. Therefore, these conditions were made perfect gradually in the process of modern legal transition carried out later, its role in the legal system construction had been strengthened and its affect had become more obvious. So, as far as the whole historical process of modern transition of Chinese law was concerned, the color of westernization would certainly show the tendency of being gradually faded, which was mainly because the commercialization of economy, the civilization of politics and the liberal-mindedness formed in the development of modern Chinese society itself had provided Chinese legal modernization with a driving force which was becoming more and more obvious. In the historical process of modern legal transition of Chinese law, its exogenousness was becoming weaker and weaker while its endogenousness was becoming stronger and stronger. The Chinese legal civilization had not only occupied an important position in the ancient world, its long-standing humanistic spirit had also coincided with that of modern legal civilization which was both traditional and modern. Besides, it had included many principles, such as the complement of “De Zhi” (the ruling of virtue) and “Fa Zhi” (the ruling of law); “Yi Fa Wei Jiao” (regarding laws and decrees as the main contents of teaching) and “Zong He Wei Zhi” (ruling with comprehensive measures); the democratic consciousness of the nobility of the common people and the humbleness of the rulers, the equality spirit of “You Jiao Wu Lei” (to provide education for all the people without discrimination) and legal protection to disadvantaged groups, etc. Only by having a foothold in the native condition of a country and its people, by showing respect to the native creation and legal tradition of a country and by laying stress on exploring the democratic elements among them and adopting them into the newly-built legal systems was it possible to overcome the barrier of westernization in the process of modern transition of Chinese law and to achieve the majestic and profound goal of modern legal system construction.

The modern transition of Chinese law was a transition from the traditional to the modern, and it was also a great historical change in the field of law. So its main symbol in the late Qing Dynasty and at the beginning of the Republic of China was the dismantling of Chinese traditional legal system and the establishment of the continental legal system in China. Since then, the development of Chinese legal system had freed itself from the state of isolation and was integrated into the tide of world legal development.

In the process of modern transition of Chinese law, it had obviously shown the feature of stages because of the influence of social, economic, political and ideological development. After the law revision in late Qing Dynasty, many stages had been experienced, such as the establishment of legal system in the period of Nanjing provisional government and the legal system construction by Beijing government. At different stages, different schemes of “Fa Zhi” (the ruling of law) were adopted by different governments according to class interests and political needs which they had represented. Some of them had become adaptive to the general trend of modern legal transition, so it had promoted the development of modern Chinese legal system, while others had deviated from the basic direction of the development of Chinese society, so it had delayed and sometimes prevented the process of modern legal transition. The law revision during the late Qing Dynasty was almost equal to westernization; nevertheless, it was inappropriate to regard the whole process of modern transition of Chinese law as westernization just because of the westernization color shown in late Qing Dynasty. Viewing from the historical process of the development of human society, it is impossible for any country or nation to use foreign legal culture as the standard to guide the development of native legal system from beginning to end. Especially, the example of opening up to the world in the recent 30 years has shown that the future of Chinese legal system lies in taking on our own roads, and the Chinese legal civilization will eventually witness its own great revival.

Since the modern transition of Chinese law was a long and slow development process, the main achievements of law revision during the late Qing Dynasty were not just made within 10 years, and it had reflected the accumulation resulted from the collision and assimilation of Chinese and western culture; in addition, it was also not the work of just one or two people like Shen Jiaben, but the endeavor of several generations like Lin Zexu and Wei Yuan. In this process, the old forces representing the traditional law did not readily admit the losses of their vested interests, thus, they were sure to resist and contend. For this reason, the process of modern transition of legal system was a process of long and repeated struggles between the old and new forces. At the same time, because of the diversity of the factors which had influenced and restricted the modern transition of law, the process was destined to be complicated and circuitous. This meant that the state and form of transition must be described and illustrated from the general trend and essential characteristics of the social and legal development, and the general state and form of the whole process could not be replaced by the features of a certain stage.

20.2 The Orientation and Historical References of the Modern Transition of Chinese Law

20.2.1 *The Reasons for Adopting the Continental Legal System*

As was mentioned above, the main symbol of the modern transition of Chinese law was the dismantling of the Chinese traditional legal system and the establishment of the continental legal system in China. But before this, it had experienced the process of changing from British and American legal systems to the continental legal system. When the late Qing government was beginning to accept the western legal systems, they had emphasized British and American laws, especially in international laws. Nonetheless, at the time of law revision at the beginning of twentieth century, both the system and contents were taken from the continental legal system. This was neither because the European continent was the economic center of the capitalist world, nor the continental legal system was the most typical, most perfect and most representative law of the society with private ownership, but because of many reasons.

First, in traditional China, there were also concepts of nationalism similar to those in European continental countries. Nationalism characterized by the monopoly of legislature by the state had been pursued by the continental countries, which was proved by the series of legislatures made like *Luo Ma Cha Tu Ding Ni Fa Dian* (*Roman Justinian Code*), *Fa Guo Min Fa Dian* (*French Civil Code*) and *De Guo Min Fa Dian* (*German Civil Code*). But in China, since Qin and Han dynasties, an autocratic country with highly centralized authority had been established, in which the imperial court had the supreme power of legislature, and its power was constantly consolidated by following a spiral track. The representative codes like the codes of Qing and Han and the codes of Tang and Ming were all written codes drafted by the state. Although in practice, they had been definitely complemented by legal precedents according to concrete situations, the former was primary and stable while latter was complementary and changeable. Therefore, up to the end of Qing Dynasty, law revision was mainly carried out in the form of code compilation. The similarity in legal origins was one of the main reasons for adopting the continental legal system and abandoning the British and American legal systems in the law revision of late Qing Dynasty.

Second, there was the tradition of codification in both traditional China and the countries with continental legal systems. In the continental legal system, the unification of legislation was advocated and the social and governmental need was met by drafting written laws, while the function of judges was mainly limited to the choice of suitable legal articles and the interpretation of their exact meanings. In ancient China, the making of unified statute law had always been the symbol of centralized authority, so even if the short-lived dynasties or the regimes set up by the small minorities after they entered into the central plains of China were actively involved

in the activities of code drafting. Hence, it was a tradition to attach great importance to statute laws in the history of the development of ancient Chinese law, and it was just this tradition that had provided a historical foundation to use the continental legal system as a reference in the modern Chinese legal system construction.

Third, in modern China, there lacked a team of judicial officials who were familiar with British and American legal systems. As was known, British and American legal systems mainly consisted of legal precedents, so there were very few statute laws to be adopted. In the countries with British and American legal systems, the judicial officials had accepted the teaching methods of legal precedents during their study, and after they had engaged in judicial work, it had become one of their basic trial methods to settle lawsuits by referring to legal precedents, which had required that the judicial officials had excellent qualities and rich experience. In ancient China, although there were “Lv Bo Shi” (the legal experts) and the subject of “Ming Fa” (law) was specially established in “Ke Ju” (the imperial examination), the legal education was totally feudal and the tendency of declining had been shown in Ming and Qing Dynasties. Although since late Qing Dynasty, modern legal schools had been set up by the central and local governments, it was impossible to train many highly qualified judicial officials who could make use of legal precedents in a very short time. Therefore, comparatively speaking, it was more feasible to adopt the continental legal systems.

Finally, the success of Japanese Meiji Reform had played an enlightening role for the transplantation of continental legal systems in modern China, because there were not only similar origins of legal culture between China and Japan, there were also many similarities between the national situation of Japan before Meiji Reform and that of China before the modern transition of legal system. Hence, the success of Japanese Meiji Reform had brought China great enlightenment. Since the Japanese legal system after Meiji Reform was set up by adopting the continental legal systems, the late Qing Dynasty also followed suit with Japan as an intermediary. Meanwhile, because of the similarities between Chinese and Japanese languages, many Japanese legal works were translated, which had exerted extensive, profound and far-reaching influence to Chinese legal practice and research. Moreover, some Japanese jurists like Okada Asatarō, Yoshimasa Matsuoka and Kotaro Shida were invited in the drafting of the statute laws like *Da Qing Xin Xing Lv* (*The New Criminal Law of Great Qing*) and *Da Qing Xin Xing Lv Cao An* (*The Draft of the New Criminal Law of Great Qing*), through which the basic spirit and contents of the continental legal system were more directly introduced.

It should be pointed out that it was not because of a few people’s personal preferences that the methods of continental legal systems were introduced, but because of many social, historical, political and cultural reasons. The introduction of the advanced foreign legal cultures had not only stimulated the Chinese law to transcend tradition and move towards modernization, but also introduced the advanced western legal thoughts and mode of thinking into Chinese society; in the meantime it had fostered the awakening of Chinese people’s legal consciousness.

20.2.2 The Historical Lessons for Reference

The modernization of Chinese legal system was an objective historical process independent of people's will either by generalizing the historical trend of human legal civilization or by investigating the interior and exterior challenges confronted by Chinese modern society. The modernization of Chinese legal system was well under way despite the resistance of the diehards in the late Qing government to law revision and the anti-revolutionary policy of Beiyang government by openly holding the banner of "Zun Kong" (worshipping Confucius) and "Fu Gu" (returning to the ancients). When we looked back at the history of this period and investigated the regular patterns of the irreversible process of legal progress, we found the following points which deserved our attention:

First, the modern transition of Chinese law could only be carried out in a free social environment.

If the countries like Britain, United States and France which had been listed as the models of internal-source modernization had achieved their goals after experiencing the social changes of Glorious Revolution, War of Independence and French Revolution in the process of modernization, then China, as a country with the general mode of external-source modernization, had to experience changes not only in politics but also in cultural and ideological fields, if the historical process of modernization was to be completed. Hence, the scope and depth of the modern transition of Chinese law was unmatched by the previous political reforms. The political reform in ancient China was merely the adjustment or reform of one or several system in the field of law, but the modern legal transition had not only involved the reform of legal systems and the change of the mode of legal thinking, but also the change of legal values and even the change of the destiny of legal tradition, therefore, it was impossible to be started without greater driving forces. Because China had been in a secluded cultural system for a long time, consequently, there was only historical inheritance but no horizontal comparison and assimilation for Chinese law; in addition, the tradition of "Xia Yi Zhi Fang" (guarding against the foreigners) was strictly followed by the rulers who were highly alert at the danger of "Yi Yi Bian Xia" (to change the culture of 'Xia' or China by using that of 'Yi' or barbarians, ethnic minorities). What was worse, the closed-door policy was stiffly upheld by Qing rulers, which had made the ruling class arrogant in national character and obstinate and conservative in political attitude. So in such a political system and under such a social environment of Qing dynasty, it was impossible to transcend the hedges of feudal legal system and to begin the historical journey of modern legal transition initiatively.

After the breaking out of Opium War, the door of Chinese Empire was thrown open forcibly by the western capitalist countries with solid ships and better guns. Frightened by the military threats of imperialism, the late Qing government was forced to adopt the open-door policy, which had made it possible for the advanced political and legal thoughts to be introduced into China. Since then, the great changes which were "unprecedented for 3,000 years" had taken place in Chinese society. Although the opening up in the late Qing dynasty was enforced militarily by the

western colonists, it had not only made it possible for a long-time closed country to get in touch with the new thoughts and new systems of the outside world, but also made it possible for the patriotic people with lofty ideas to observe and think in new modes and to look for better ways to make the country strong by “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival).

From the policy of secluding the country from the outside world to the formation of the tenet of “Bo Ji Zhong Wai” (adopting widely from home and abroad)³ in law revision; from the establishment of six-law system by imitating the continental legal system to the establishment of the modern legal system, the modern transition of Chinese legal system was finally on the right track. In the process of development from non-existence to existence, from ancient times to the present, the open social environment was the most very important condition. Because the modern transition of legal system had started from horizontal exchanges, firstly foreign legal cultures should be introduced in order to understand their overall forms and states, to compare and differentiate the differences between Chinese and foreign legal cultures, and to provide a reference for the modern legal transition. So, obviously, the opening up of the nation was the precondition of modern legal transition. Similarly, the open environment had made it possible for people to gradually develop a state of mind to have an equal treatment of both Chinese and foreign legal civilization, to have a comparison of their advantages and disadvantages calmly, to make choices according to the standard of progressiveness and social adaptability and to realize the final integration of the two legal civilization. Take Sun Yat-sen’s change of legal thoughts as an example: in his earlier years, he was an admirer of the western legal civilization, so after the victory of Xin Hai Revolution (or Revolution of 1911), a series of legal papers including *Zhong Hua Min Guo Lin Shi Yue Fa (Provisional Constitution of the Republic of China)* were issued, and the blueprint adopted from the western republics was put into practice. However, after Xin Hai Revolution (or Revolution of 1911), and especially after the incident of restoration of the monarchy by Yuan Shikai and the centralized power of dictatorship by Beiyang warlords, he had gradually seen the incongruity of western cultures with Chinese economic condition, cultural conception and the situation of the society and people,⁴ and he had also realized the rational aspects of the Chinese traditional legal civilization, therefore, his theory of

³Shen Jiaben, “Chong Ke Ming Lv Xu” (Preface to the Re-engraved Ming Code) in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 6, Zhonghua Book Company, 1985, p. 2210.

⁴For example, the representative system had been regarded as the most advanced constitutional system by the westerners, but Sun Yat-sen had noticed its disadvantages. He thought that “after the rich have accumulated so much wealth, they can monopolize the state affairs and are able to commit all kinds of atrocities. However, the poor have to work for the rich as slaves whose lives are no better than horses and cattles, because they have no ways to make a living”. (“Speech Made at the Anniversary of Guangdong First Women’s Normal School” in *Sun Zhong Shan Quan Ji (The Complete works of Sun Yat-sen)*, Vol. 10, edited by the Team of Historical Materials of the Institute of Modern History of China Academy of Social Science, Sun Yat-sen University et al., Zhonghua Book Company, 1986, p. 23. From above we could see that the advancement of the western legal culture was also relative.

separation of power by five branches of the government was the integration of the theories of separation of power by three branches in the western countries with the traditional Chinese system of choosing officials by “Ke Ju” (the imperial examination) and the inspection system. Thus, it could be seen that without open social environment, there would be no introduction, exchange and comparison of the western culture; consequently, there would be no rational thinking and choice of the roads of the modern transition of Chinese law.

Second, the modern transition of Chinese law was closely connected with the political system reform.

As was mentioned above, the modern transition of Chinese law was not an isolated phenomenon of historical development, and it was closely connected with the political, economic, ideological and cultural reform. Especially, the modernization of political system was of great importance to the modern transition of law. The political system of any society was of great importance to law, moreover, the modern legal transition was inseparable from the progress and consolidation of political system. Whether in Britain or France, only after final victories were won in the bourgeois revolutions, the power was taken by the bourgeoisie and the constitutional monarchy was established was it possible to make the laws like *Fa Guo Min Fa Dian* (*French Civil Code*) and *Fa Guo Xing Fa Dian* (*French Criminal Code*) to record the modern fruits and promote the modern transition of law. To an underdeveloped country like China, if the modern legal transition was to be realized quickly, a modern political system must be set up first to bring the organization and motivation function to a full play, but such a modern political system did not exist before “Xin Zheng” (the new administration) was carried out in late Qing Dynasty.

After “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) in 1900, the ruling class headed by Empress Dowager was forced to issue decrees in January, 1901 to acknowledge the rationality of political reform, believing that “the laws which have remained unchanged for too long may bring harm, and laws which are harmful must be changed”.⁵ Soon, it was declared that “at present, only by timely and detailed investigations and by following constitutionalism..., is it possible to lay a solid foundation for the state to last long,”⁶ which had opened the prelude of political reform and “Xin Zheng” (the new administration) and started the process of the modernization of political system. During the period of the preparation of constitutionalism, the central official system was reformed; “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) were set up; councilors were elected; the annual sessions of “Zi Yi Ju” (The Consultative Bureau) and “Zi Zheng Yuan” (The Advisory Council) were opened and *Qin Ding Xian Fa Da Gang* (*Outline of Constitution by Imperial Order*) and *Zhong Da Xin Tiao Shi Jiu Tiao* (*The 19 Key Doctrines*) were issued by Qing government. Although the reform of political system was limited both in scope and depth, it had symbolized the

⁵ *Guang Xu Chao Dong Hua Lu* (*The Records of Donghua in the Reign of Guangxu*), edited by Zhu Shou and punctuated and collated by Zhang Jinglu, Zhonghua Book Company, 1958, p. 4655.

⁶ *Ibid.*, p. 5563.

beginning of the transformation of the traditional autocratic political system based on the theory of divine rights of emperors. The political transformation had provided not only political guarantee for the law revision in late Qing Dynasty, but also reasonable argumentative bases for the law revision activities. Shen Jiaben said, "The compilation of new code is the key in the preparation of constitutionalism".⁷

In sharp contrast to this was "Wu Xu Bian Fa" (Wu Xu Reform) in 1898. In the period of 103 days, Guangxu emperor had issued more than 110 laws and decrees, the contents of which involved almost every aspect, such as politics, economy, military, culture and education. However, because the overall political system was still controlled by the obstinate conservative forces, these laws and decrees had become mere scrap of useless papers with the failure of "Bai Ri Wei Xin" (hundred days' reform). Just as what was commented by the western scholars: "the failure of the reform movement has shown one fact, namely, it has not only exposed the astonishing incompetence of the Chinese political system in the face of the overall reform, meanwhile, it had also shown how incapable the political leaders were in revitalizing the political system and withstanding the self-reform necessary at the time of crisis in China".⁸

The influence of the degrees of the modernization of political system to the modern transition of legal system was more obviously reflected in the process of the development of legal system in the late Qing Dynasty. During the period of Beijing government, the Beiyang warlords like Yuan Shikai had usurped the fruits of the victory of Xin Hai Revolution (or Revolution of 1911) and established warlord dictatorship under the banner of democracy and republicanism. It was not possible for the political system set up against the tide of the history to undertake, promote and consolidate the great mission of the modern transition of Chinese law which had already been started. So, during the time of ruling by Beiyang warlords, the process of the modern transition of Chinese law was retarded and even retrograded. For example, the civil legal relations were mainly adjusted according to the valid part of civil law in *Da Qing Xian Xing Xing Lv* (*The Current Criminal Law of Great Qing*) issued in the late Qing Dynasty, in which the order of patriarchal clan and ethic relations like the superior and the inferior, the senior and the junior, the intimate and the distant, the wife and the concubine, the superiority of man and the inferiority of woman was still maintained, which was in sharp conflicts with the basic principles of modern legal system. So compared with *Da Qing Min Lv Cao An* (*The Draft of the Civil Law of Great Qing*) made in the late Qing Dynasty, it was no doubt a great regress.

Third, the function of theoretical guidance must be stressed in the modern transition of Chinese law.

No doubt, the guidance of scientific theories was needed in great practices. This classic statement about the relationship between human practice and scientific theory was also applicable in the whole process of the modern transition of Chinese law.

⁷ Shen Jiaben, "A Memorial to the Emperor about the General Methods Used in Legal Revision" in "Lv Li Ba Shi Hao" (The 80th Precedent) in "Fa" (Law) in *Dang (Files)*.

⁸ *Jian Qiao Zhong Guo Wan Qing Shi* (*The Cambridge History of China: the Late Qing*), edited by John King Fairbank (Book 2), China Social Sciences Press, 1993, p. 371.

Because the legal reform was unprecedented both in contents and depth in Chinese history, moreover, the complexity of the process and scope involved had also never been seen before, so in order to achieve the established goal, it was necessary to have scientific theoretical argumentation and guidance to get the best results at the least cost in the shortest time and in more exact directions. Take Britain as an example, although its process of legal development was, to a great extent, a typical case shaped by experience, there was no denying the fact that the scientific guidance had also played a significant role. The systematization of British lawsuit proceedings and judicial system in the nineteenth century was inseparable from the so-called “legal reformist”⁹ Jeremy Bentham and his theories of utilitarianism and legal reform.¹⁰ Besides, the natural legal theories of the French enlightenment thinkers and the jurists’ researches on Roman law had also exerted a guiding influence for the French legal modernization which had resulted in the drafting of French modern constitution and civil codes.¹¹

If theories were still needed for the countries like Britain and France whose modern transition of law had been promoted by internal sources to ascertain the aims and to guide the directions, then for a country like China, whose modern transition of law was promoted by external sources, the theoretical role of “Fa Zhi” (the ruling of law) was more prominent. The modern transition of law in the countries like Britain and France was self-motivated in the process of social development of their respective countries, and it was true that the driving force was from the societies themselves. In addition, the basic direction of the development of the legal system was, to a large extent, determined by the special economic and political needs of each country and the basic nature of the legal tradition. For this reason, their legal theories were mainly the sublimation of the native legal practices, and what it had expounded and proved was only the development of law itself. But it was quite different in China, because the mission of the modern transition of Chinese law was firstly to “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and “Fu Guo Qiang Bin” (making the country rich and its military forces efficient). Hence the value of the development of the law itself was, to a large extent, neglected. When Shen Jiaben took the charge of law revision in late Qing Dynasty, the regulating function of law was ranked behind political education, because he believed that “the way to teach people lies in political education rather than in the power of punishment”.¹² In the traditional atmosphere of regarding laws

⁹ Jeremy Bentham, *Zheng Fu Pian Lun (A Fragment on Government)*, The Commercial Press, 1966, p. 35.

¹⁰ About the comments of Bentham’s utilitarian theories on legal reformation, please refer to Robert Dinwiddie, “The Theories and Practices of the Modernization of Bentham’s Utilitarianism”, quoted from Wang Juefei, *The Modernization of British Politics, Economy and Society*, Nanjing University Press, 1989, p. 397.

¹¹ Please refer to Masao Tki, *The Comparative Law*, Law Press, 1999, pp. 144–160.

¹² Shen Jiaben, “A Memorial to the Emperor for Abolishing the Severe Punishments in Laws” in “Ji Yi Wen Cun” (The Classics of Ji Yi) in *Li Dai Xing Fa Kao (A Textual Research of the Criminal Laws in the Past Dynasties)*, Vol. 1, Zhonghua Book Company, 1985, p. 2025.

as only instruments, the first task of legal theory was to demonstrate the role which legal modernization would play in bringing prosperity and recovery to the country, and then in the second place the problems concerning the development of the law itself, such as the problems of legal standards and the technical problems in law making were emphasized. Besides, the process which the modern transition of Chinese law had experienced was also different from that of the countries like Britain and France. The modern legal transition in Britain and France was, to a large extent, a historical process which occurred inside a country or a nation, nevertheless, in China, the modern legal transition was started when it was faced with the challenge of western legal civilization, which meant that the modern transition of Chinese law was carried out in many extremely complex conflicts and by overcoming many obstacles, so, a set of scientific theories were urgently needed in order to have a correct understanding of contradictions and their solutions.

When legal civilization was linked with the prosperity of the country by the Chinese people, their legal conceptions began to be changed, because they had realized that if the country was to become independent and prosperous, it was not possible to stubbornly and arbitrarily adhere to the old established laws any more, so reform must be carried out by learning from the “barbarians”. The principles like “no rigidly adhering to laws by good administrators”¹³ and “regarding changing as the generally acknowledged truth since ancient times”¹⁴ had gradually become the common view of the people. “The only way to save the nation is to carry out reforms which must be practiced by learning from the foreign countries”,¹⁵ therefore, the people naturally turned their eyes to the west, and began to look for effective remedies from the western legal civilization in order to save the nation. Accordingly, the traditional viewpoints of absolute monarchy, “Ren Zhi” (the ruling of man), the duty standard and the non-separation of justice and administration were replaced by the basic theories and systems of modern legal institutions like constitutional monarchy, “Fa Zhi” (the ruling of law), the rights standard and legal independence, which had become the primary goal of legal reform in late Qing Dynasty. Kang Youwei once proposed, “The making of codes and constitutions is the fundamental of the reforms”,¹⁶ which meant that a constitution advocating constitutional monarchy should be drafted in order that both the monarch and the people could be equally governed; besides, Liang Qichao thought, “Legalism is the only doctrine today that

¹³ Wei Yuan, “Zhi Pian Wu” (The Fifth Essay on Administration) in “Mo Gu Xia” (Of Governance in *Mo Gu*, Part 2) (writings of Wei Yuan), Vol. 5, in *Wei Yuan Quan Ji* (*The Complete Works of Wei Yuan*) (Book 12), Yuelu Publishing House, 2004, p. 49.

¹⁴ *Ibid.*

¹⁵ *Mao Ze Dong Xuan Ji* (*The Selected Works of Mao Zedong*), Vol. 4, The People’s Publishing House, 1991, p. 1470.

¹⁶ Kang Youwei, “Kang Nan Hai Zi Bian Nian Pu” (Kang Youwei’s Self-edited Chronicle) in *Wu Xu Bian Fa* (*Wu Xu Reform*) (Book 4), edited by Jian Bozan et al., Shen Zhou Guo Guang Publishing House, 1953, p. 145.

can save the nation”¹⁷; Zhang Taiyan had advocated the reasonableness of judicial independence from the standpoint of anti-feudal autocracy; what was more, Yan Fu had introduced and propagandized the bourgeois theories like the natural rights of man, social contract and the separation of powers by translating the western bourgeois political and legal works. The conclusion of the theoretical argument was reflected in the administrative reform and law revision in the late Qing Dynasty in various degrees. Thus, it could be seen that without modern western legal theories, it was impossible to guide the legal system to develop in the direction of modernization, nor was it possible to promote the renewal of legal concepts and the change of the modes of legal thinking.

Nevertheless, any new theories and thoughts would come into full play only after they had been mastered by human beings.

The modern transition of Chinese law, whether at institutional or conceptual level, was closely connected with the role of people who had mastered both the new theories and new thoughts. At the institutional level, the modern institutions needed to be verified, designed, applied and enforced by the people with new thoughts; at the conceptual level, the advanced institutions must be supported by advanced thoughts and concepts. Only when the advanced legal concepts were mastered by the vast majority of people was it possible for the advanced system to be abided by the people consciously and for the benefits of institutional standardization to be brought into full play. In the aspects of cultivating and inoculating the advanced legal concepts to the common people, the role of the people with new theories and thoughts was much more important. It was through their struggle with traditional old legal system and concepts that the new and advanced legal system and the authority of the new concepts were established. This was why people had always regarded the lawyers and judges in Britain and America and the jurists in Germany as one of the most important factors in the legal modernization of their own countries.

As far as China was concerned, the function of the people with new theories and thoughts in the modern transition of law had not only lain in the requirement for them to design and carry out the advanced legal systems, to propagate the advanced legal concepts, to set up the authority of the new legal systems and concepts, but also in the requirement for them to expose the unreasonableness of old legal systems and concepts, to introduce and demonstrate the adaptability of the adopted legal systems and concepts to the social realities of the country and the people, to reduce the social impacts caused by the replacement and integration of the old and the new systems and to promote the process of modern legal transition.

In the historical process of the modern transition of Chinese law, there had emerged many people with lofty ideals who had shed their heart's blood to go around campaigning for the cause. These elites had not only initiated the process of the modern transition of Chinese law, but also made constant adjustments so as to

¹⁷Liang Qichao, “Zhong Guo Fa Li Xue Fa Da Shi Lun” (On the Historical Development of Chinese Jurisprudence) in *Yin Bing Shi He Ji* (*The Complete Works of Yin Bing Shi*) (Book 15), Vol. 2, Zhonghua Book Company, Zhonghua Book Company, 1989, p. 43.

make it work more smoothly. Therefore, it was just because the people in charge had realized that more people with new theories and thoughts were needed in order to exert their influence in the development of Chinese law that in the law revision in late Qing Dynasty they had especially stressed the education and training of the legally talented people who had participated in the revision of the old laws and the drafting of new ones with advanced legal theories and techniques. After the positive efforts of the people like Shen Jiaben, not only many legal schools were set up, many people were also sent abroad to have on-the-spot investigations and to be engaged in advanced studies. In addition, many foreign legal experts were also invited to China to teach, which had greatly enlarged the reserved forces for the modern development of Chinese law. During this period, the more than 1,000 legal experts trained in legal schools had become the backbones to continuously promote the modern transition of law during the ruling of the Republic of China.

Finally, the relationship between transplanted law and native law must be well dealt with in the modern transition of Chinese law.

For a country in which legal modernization was started by external sources, it was the fastest, most convenient and also the most necessary way to conduct law transplantation in the realization of the transition from traditional legal system to the modern one.

It was from law transplantation that the modern transition of Chinese law was started. Take the law revision in the late Qing Dynasty as an example, the western laws either had been totally adopted to fill in the vacancy, or had been used to replace the parts in the present backward and outdated laws. A typical example of the former was *Po Chan Lv (Bankruptcy Law)* made in 1906, whose style and contents were all copied from *Japanese Bankruptcy Law*; while a typical example of the latter was the criminal law: under the leadership of Shen Jiaben, the old laws were deleted and changed, *Xian Xing Xing Lv (The Current Criminal Law)* was revised and finally *Da Qing Xin Xing Lv (The New Criminal Law of Great Qing)* was drafted by “Xiu Ding Fa Lv Guan” (The Law Revision Office). After an overall law transplantation, a comparatively more complete “six-law system” was established by the late Qing government by following the continental legal system, which had basically determined direction of the modern transition of Chinese law and established its general frame. Then, the government of the Republic of China continued to follow the mode of revising the traditional legal systems and establishing the new legal systems by law transplantation started by the late Qing government. There was no denying the fact that law transplantation had played a significant role in the modern transition of Chinese law, because it had filled up the vacancies in Chinese modern legal system in a very short time, changed the embarrassed backward and conservative situation at the institutional level very quickly, eliminated the unfavorable helpless situation caused by legal loopholes in dealing with the new social relationships and provided text bases for the spreading of legal concepts among the people. Nonetheless, after all, the contribution of law transplantation to the modernization of legal system was limited. If full functions were to be brought into full play, the key was how to integrate the introduced legal systems and principles with the present native systems and principles in order to give play to the group effect.

This was the problem how to coordinate the relationship between law transplantation and law localization.

The transplanted laws must not only reflect the progressiveness of times, but also adapt to the real social situation of the native country and people and show its adaptability to society. The law localization should not only make the introduced laws in accordance with the real social situation of the country and the people, and transform them into the forms adaptable to the real Chinese society in order to acquire the maximum efficiency of social adjustment and to form new systems and doctrines on their bases under the precondition of retaining the progressiveness of the introduced laws. There were many successful examples in the legal history of both China and foreign countries. For example, in British legal history, after the counsel and investigation techniques were introduced to England from Frank kingdom by Normans, they finally evolved into the jury systems. And it had already been proved by practice that this mode of thoughts in lawmaking was very reasonable.

If the legal system set up by westernization in late Qing Dynasty was basically in accordance with the progressive standard of the times, at the level of social adaptability, there were a lot of important lessons for us to learn. Take *Po Chan Lv* (*Bankruptcy Law*) as an example, although *Japanese Bankruptcy Law* had been used as a reference both in systems and contents, which had shown the progressiveness of integrating with the world commercial legislations, it was openly criticized by the open-minded entrepreneurs and opposed by government officials because it was in sharp conflict with the level of economic development and the economic operating system in the late Qing dynasty, so in the end it was not enforced. The law revision activities guided mainly by westernization in late Qing Dynasty had provided both experience and lessons learned for the modern transition of Chinese law in later periods. The experience was that the legal construction of a country must be carried out according to the basic standards of the modern legal civilization in order to pursue the advancement in “Fa Zhi” (the ruling of law), because only in this way was it possible to go on the road of legal modernization; the lessons were that at the same time of adopting the advanced elements of western civilization, an attitude must be taken in which the native legal traditions and the real situation of the country must be fully understood and respected. Furthermore, the democratic elements in the traditional law must be absorbed into the newly established legal system as much as possible so as to provide profound social soil and cultural support for the advanced legal system. So, excessive westernization is not the best way for the modern transition of Chinese law. Ultimately, the modern transition of Chinese law is surely to transcend over the fetters of westernization, and the great resurrection of Chinese legal civilization will be realized.