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A Study of Legal Tradition of China from a Culture Perspective

Searching for Harmony in the Natural Order

Chapter 10

Rites and Law: Legalization of Moral Norms



Where rite goes, punishment is taken. Those who violate the rite should be punished, as the rite is compulsory.

—*Hou Han Shu · Chenchong Zhuan* (Fan, Ye. 2019. *Hou Han Shu · Collected Biographies · Collected Biographies of Guo and Chen*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/hou-han-shu/guo-chen-lie-zhuan>. Accessed 11 Feb 2022).

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Shen Jiaben, who lived in the Qing dynasty, wrote *Textual Research on the Criminal Law of the Past Dynasties*, which included two sections, “Dong Zhongshu’s Adjudication” and “Adjudication Based on the Spring and Autumn Annals,” explaining how Dong Zhongshu, a Confucian scholar, decided cases on the basis of Confucian classics argumentation. Dong Zhongshu was born in the Han dynasty, by which ancient Chinese law had witnessed its development for at least more than a thousand years, and the system of laws and regulations had been of magnitude. However, as a great master of a generation, he went too far concerning judging cases according to the general principles of the *Spring and Autumn Annals* and the tenor of the sage. This has really attracted our attention.

By the year when Dong Zhongshu was born, the reign of the Han dynasty had been established, and the state had been unified. People stopped arguing which was necessary, the rule of law or the rule of morality because everything was under the “tyranny of the emperor” of the unified Han dynasty. A new Confucian system that Dong Zhongshu constructed after his extensive research and comprehensive innovation was a reflection of this historical change. In Dong Zhongshu’s grand design, though morality and rites were fundamental, the punishment was not neglected at all. Dong made an effort to reconcile the two thoughts of Confucianism and Legalism by encouraging the fashion of judging cases based on the Confucian classics and the *Spring and Autumn Annals* (one of the six classics). Historically, the effort was significant to the development of ancient Chinese law because it resulted in the fact that some of the requirements during that period were met, and the practice of judging cases based on the principles of Confucian classics started and developed until the Tang dynasty. In addition, it marked the beginning of an important period of ethical reconstruction in ancient Chinese legal history. During this period, Confucianists

remolded the law based on their value and systematically institutionalized and legalized Confucian ethics. Consequently, based on the legal heritage of the pre-Qin dynasty and even the Bronze Age, they summarized the different legal experiences after the collapse of ritual and musical legal systems. They obtained a panorama and finally created a comprehensive system for ancient Chinese law. Later, this process was called “law absorbing rites,” in which moral norms were legalized. Its impact was far-reaching both on the legal and moral aspects. Dong Zhongshu’s book titled *Using the Spring and Autumn Annals to Decide Legal Cases* (Jing Yi jue Yu) was a typical achievement.

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Professor Qu Tongzu believed that Dong Zhongshu, who decided cases based on *Spring and Autumn Annals*, should be regarded as “the first person to apply Confucian scriptures to the judicial practice.”¹ This conclusion, to some extent, maybe too absolute, but at least, we dare say that Dong Zhongshu had won the highest reputation among those who adjudicated based on the principles of the Confucian classics.² According to what is described in *Han Shu · Yi Wen Zhi*, Dong Zhongshu once compiled his case book named *Sixteen Cases Tried by Dong Zhongshu of Gong Yang School*, which was later re-edited by Ying Shao of the Eastern Han dynasty who gave a more specific introduction to Dong’s important role as follows: “The former Minister Dong Zhongshu was frequently consulted by Zhang Tang, Chief Justice, who was, more than once, appointed the Chief-Judge of the Imperial Court whenever there was an important issue, even after Dong retired out of his age and poor condition and settled in a shabby alley. Therefore, he wrote a book named *Using the Spring and Autumn Annals to Decide Legal Cases*, in which he discussed 232 cases.”³ Unfortunately, most of the transcripts of the discussions were lost, and later generations could find just a few cases. The following are the four cases referred to in Shen Jiaben’s book called *Research of Criminal Law in Past Dynasties*, which may help us to have a view.

¹ Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 313. Beijing: Zhonghua Book Company.

² “The Han people frequently made judicial decision based on *Spring and Autumn Annals*. These cases involved, for example, the crime committed by Yi Liu (the king of Jiaoxi) and An Liu (the king of Huainan), the offenses in Huainan judged by Bushu Lü, Yan Xu’s offense of acting in the guise of the king judged by Zhongjun, Fangsui Cheng judged by Buyi Juan, Kuang Xues crime discussed together by imperial ministers and chief justice, and Yan Fu’s crime discussed by Sheng Gong and others. The Han people also quoted the principles in *Spring and Autumn Annals*. That was the tread at that time, and Zhongshu recorded this.” Shen, Jiaben. 1985. *Research of Criminal Law in Past Dynasties (Volume 2)*. 881. Beijing: Zhonghua Book Company.

³ Fan, Ye. 2019. *Hou Han Shu · Collected Biographies · Collected Biographies of Yang, Li, Di, Ying, Huo, Yuan, and Xu*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/hou-han-shu/yang-li-di-ying-huo-yuan>. Accessed 11 Feb 2022. According to *Han Shu · Biography of Zhongshu Dong*, “When Zhongshu was at his own house, if there were important discussions in the imperial court, messengers and Tang Zhang, the Chief Justice, were sent to his house to ask about his opinion, and he always had outstanding responses.” Ban, Gu. 2019. *Han Shu · Biography · Biography of Zhongshu Dong*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/dong-zhong-shu-zhuan>. Accessed 11 Feb 2022.

Case One: An Abandoned Child Adopted as a Son

A question related to the case was raised as follows: "Party A who had no child, and one day picked up Party B, an abandoned child, at the side of the road. He raised Party B as his son. Party B grew to manhood and committed murder. When Party B told Party A about the murder, Party A hid Party B. Should Party A be punished?" Zhongshu answered: "Party A had no son, so he adopted Party B. Although they had no blood ties, nothing could change their relationship. The book of Shi stated that 'even a corn earworm took adoption.' According to the Spring and Autumn Annals principles, it was natural for a father to hide his son. Herein, Although Party A hid Party B and was guilty, the imperial verdict of not guilty shall be given."⁴

Case Two: A Natural Father Caned by His Adopted Son

Party A had a son named Party B, who was adopted and raised by Party C. One day, Party A was drunk and said to Party C: "You are my son." Party B burst into rage and caned Party A twenty times. Party A regarded Party B as his son and was so infuriated that he brought the case to the local court. Dongshu said in his judgment: "When Party A gave his adoption to Party C, he and Party B would have no father-son relationship. Although Party B whipped Party A, he should not be guilty."⁵

Case Three: A Father Beaten up by His Son

Party A and Party B were quarreling with Party C. When Party C attacked Party B with a knife, and Party A took up a cane intending to hit Party C. Unfortunately, Party A, by accident, hit Party B. Should Party A be punished? The law was that those who beat up their fathers should be decapitated. The remark went as follows: "Although I am stupid, I still know the close tie between father and son. When the son heard his father was being beaten, he rushed with a cane to rescue him rather than beat him. According to the Spring and Autumn Annals principles, a son with the intention to cure his father's illness helped his father take medicine; although his father died after taking medicine, a gentleman who did not have the intention to kill should be forgiven. What Party A did was not to beat his father, and he should not be guilty."⁶

Case Four:

Party C, who was Party A's husband, drowned in a marine accident and was not buried yet. Just four months later, Party C, also Party A's mother, wanted Party A to remarry. How should this act be judged? There was the law that Party A shall not remarry before her husband was buried. If she remarried without her parents' permission, she should be executed in public. Dong argued: "As a humble man, I thought that following the principles contained in the Spring and Autumn Annals, the lady whose husband has been dead should be allowed to remarry. Her mother did not force her to remarry, and her wish was fully respected. Party A remarried with her parents' permission and had no intention to fornicate. It was no secret marriage at all. Not guilty."⁷

⁴ Shen, Jiaben. 1985. Using the Spring and Autumn Annals to Decide Legal Cases. In *Research of Criminal Law in Past Dynasties (Volume 3)*. Beijing: Zhonghua Book Company. See also Cheng, Shude. 1988. Seven Researches of the Laws of the Han Dynasty. In *Research of Laws of Nine Dynasties*. Beijing: Zhonghua Book Company. Also see Cheng, Shude. 1988. Research of Spring and Autumn Annals. In *Research of Laws of Nine Dynasties*. Beijing: Zhonghua Book Company.

⁵ See Footnote 4.

⁶ See Footnote 4.

⁷ See Footnote 4.

Some old academic writings stated that cases were often decided based on the classics among the people of Han nationality because either the law was not deficient, or the law intended to be non-Confucian or even anti-Confucian, or both. I am afraid such a conclusion, to some extent, was based on assumption instead of fact. The following is my further analysis.

Case One was called “a case hardly decided by law,” but the judgment had a clear conclusion that “although... guilty, he should not be punished.”⁸ What was “hardly decided” was the nature of the facts instead of the applicable law.⁹ In Case Two, the applicable law was not mentioned, but the nature of the case indicated it should fall into the category of Case Three (Parent Beaten by Son), which could be tried based on the “Theft Act.”¹⁰ In Case Four, it was apparent that “possible judgment” just referred to the one made based on the existing law.¹¹ Thus, it can be inferred that Dong Zhongshu’s choice of dealing with cases based on the classics was not attributed to the lack of applicable law, but to other reasons, namely, either

⁸ See Footnote 4.

⁹ According to an imperial verdict in year four of Dijie of Emperor Xuan, “The ties between father and son, and the doctrine between husband and wife, were made based on human nature. Although there are trouble and disaster, it still exists after they die. With honest love in mind, it appears to be the best clemency, and we shall not go against it! From now on, if a child for the first time conceals the misconduct of the child’s parents, or if a wife conceals the misconduct of her husband, or if a grandchild conceals the misconduct of the grandchild’s grandparent, the verdict of not guilty shall be given; if parents conceal the misconduct of their child, or if a husband conceals the misconduct of his wife, or if grandparents conceal the misconduct of their grandchild, even though that would result in death penalty, the case shall be reported to the Chief Justice for further verdict.” Ban, Gu. 2019. Han Shu · Chronical Record · Chronicle Record of Emperor Xuan. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/xuan-di-ji>. Accessed 12 Feb 2022. This was thirty-eight years after Zhongshu’s death. It is hard to prove whether or not Zhongshu said “the imperial verdict of not guilty shall be given.” However, it can be inferred from this that the principle regarding “the father conceals the misconduct of the son, and the son conceals the misconduct of the father” had already been established at that time. This does not contradict with the words “from now on” in the imperial verdict. The scope of “concealment” in the latter went much beyond the father-son relationship. In addition, it is common to reiterate old laws using new laws. Also, Mr. Shen’s words were quoted from Volume 69 of *Tongdian* (The Memorial to the Throne Written by Mrs. Yu, the Lovely Wife of He, Assistant Minister of Sanqi, in Year Five of Xianhe of Emperor Cheng of the Eastern Jin Dynasty); after verifying the original book, what appeared in the original book was exactly the words “the imperial verdict of not guilty shall be given.” According to Zhuangzi · The Robber Zhi, “If fathers are unable to lay down the law to their sons, and if elder are unable to instruct their younger brothers, they do not fulfil the duties of the relationships which they sustain.” See Zhuangzi. 2019. Zhuangzi · Miscellaneous Chapters · The Robber Zhu. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/zhuangzi/robber-zhi>. Accessed 12 Feb 2022. Here, “verdict” means “lesson;” however, since the First Emperor of Qin unified written words, the word “verdict” had specified meaning. The word “verdict” that Zhongshu quoted in judgements would certainly mean nothing else.

¹⁰ Mr. Shen said in the reference note under this case that “For details, see Parent Beaten by Son in *Theft Act*.” Shen, Jiaben. 1985. *Research of Criminal Law in Past Dynasties (Volume 3)*. 1771–1772. Beijing: Zhonghua Book Company.

¹¹ Mr. Shen said in the reference note under this case that “For details, see Becoming Other Person’s Wife in *Miscellaneous Act*.” Shen, Jiaben. 1985. *Research of Criminal Law in Past Dynasties (Volume 3)*. 1772. Beijing: Zhonghua Book Company.

the unfavorable effects that emerged when the law enforced morality or the failure to grasp the pure spirit of Confucianism in the process of applying the law. In any case, it is difficult to conclude that the law at that time was non-Confucian or even anti-Confucian. In Case One, it was to solve the problem of fact-finding, which had nothing to do with law, but the words that “although... guilty, he should not be punished” present us a purely Confucian rule. In Cases Two and Three, Zhongshu made the decisions based on something else (“Confucian classics”), but the law that “those who beat up their fathers should be decapitated”¹² did reflect the purpose of maintaining the feudal ethics. The behavior of “beating up father” was one of the most severe crimes, but he was declared acquittal in this case. There must be a particularly profound meaning there. We will discuss it in detail in the following part. Now it is necessary to point out that concerning the cases tried based on the Confucian classics at that time, the applicable law existed, and the law should not be regarded as non-Confucian or even anti-Confucian law. In Case Four, the existing law and Zhongshu’s argument would lead to two very different results, but the basic position from which they started was quite similar. Perhaps that was why, in the above four cases, Zhongshu quoted the classics to find the facts rather than deny the existence of legal rules.

3

Of course, it is not unreasonable to say that Dong Zhongshu used Confucian classics as the basis to make the judgments to solve the problems concerning the application of the law. In other words, he intended to change the existing law and reconstruct the ethical structure of ancient law.

It should be noted that a significant change happened to ancient Chinese society around 300 B.C. That period witnessed a shift from a consanguine State into a territorial State and a gradual transition from the great pattern of the direct family-State unification to a new uniform pattern of the indirect family-State interconnection. A society, as a rule, went through such processes as the disintegration of the old order, the establishment of the new system, the loss of the social balance, and the restoration of the balance in sequence, all of which were certainly accompanied by the process of the loss and reconstruction of value system. Dong Zhongshu and his contemporaries were involved in the process of value reconstruction, which was launched by others rather than themselves.

Chen Yinke, a historian, once stated: “Li Si, whose idea was influenced by the theory of Xun Qing, helped the Qin dynasty establish its legal system ... the one which was subject to the school of Confucianism. ‘All carriages with the wheels of the-same size, all writings with the same characters and all occupations with the same standards of value’¹³ as described in *Zhong Yong (The Doctrine of the Mean)* were regarded by Confucianists as a part of an ideal institution (Sima Qian praised this as ‘a contribution as important as First Emperor of Qin’s contribution of making

¹² See Footnote 4.

¹³ Legge, James. 2019. Translation of Liji · Zhong Yong. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/liji/zhong-yong>. Accessed 07 Feb 2022.

dress codes for adults'¹⁴), which was finally realized under the reign of Emperor Qin Shihuang. The Han dynasty inherited the institution of the Qin dynasty and adopted the same official system as the previous dynasty."¹⁵ Chen drew a very bold conclusion that the legal system of the Qin dynasty was subject to the influence of Confucianism. In any case, his conclusion was a unique in the academic scope.

Shang Yang supported the Qin dynasty to make its law on the basis of Li Kui's *Fa Jing* (*Classic Doctrine of Law*). His contribution should be re-emphasized to the legal evolution of the Qin and Han dynasties and the Wei, Jin, Sui, and Tang dynasties. This has been proved not only by the status of *Fa Jing* in the legal history of ancient China but also by the archaeological evidence of the Qin dynasty. Several Qin bamboo slips unearthed in Yun Meng in 1975 contained a piece of writing called "Legal Questions and Answers," which interpreted some provisions, terms, and intentions of the law of the Qin dynasty, similar in scope to the six articles in the *Fa Jing*. More notably, some of the content in this document, which the researchers consider to be legally valid, was purely "Confucian," such as the following two examples:

Case One:

Shall a man or woman who has reached the duty-free age make at least three separate requests before his request for his or her unfilial son's or daughter's death penalty is accepted? Not. An arrest action should be taken immediately when the request is made lest escape happens.¹⁶

Case Two:

"If a son should accuse his parents or a concubine of the Lord, it is a non-official accusation that should not be heard." What does "non-official accusation" mean? At his discretion, the Lord kills or punishes his son or his concubine or shaves off the hair of his son or his concubine, which are called "non-official accusations." In these cases, the accusations should not be heard. Those who persist in their non-official accusation shall be guilty. Another accusation made by someone else against the persistent accusers who have been punished shall be heard.¹⁷

¹⁴ Sima, Qian. 2019. Shiji · Chronological Chart · Monthly Chart in Qin and Chu Era. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/shiji/qin-chu-zhi-ji-yue-biao>. Accessed 12 Feb 2022.

¹⁵ Feng, Youlan. 1984. Examination Report III (by Yinque Chen). In *History of Chinese Philosophy* (2). Beijing: Zhonghua Book Company. The imperial system (including the legal system) established during the Qin dynasty was in reality a significant legacy that legalism had left for future generations. See Boddle, Derke, Morris, Clarence. 1973. *Law in Imperial China*. 498. Cambridge: Harvard University Press.

¹⁶ 1978. *Bamboo Slips of Qin Tombs in Shuihudi*. Ed. Compilation Group of Bamboo Slips of Qin Tombs in Shuihudi. 195. Beijing: Wenwu Press.

¹⁷ 1978. *Bamboo Slips of Qin Tombs in Shuihudi*. Ed. Compilation Group of Bamboo Slips of Qin Tombs in Shuihudi. 196. Beijing: Wenwu Press.

In Case One, the crime of “unfilial conduct” was established and affirmed its seriousness. It was required that those who were “unfilial” should be arrested immediately, and there was no need to make the three requests. The “three requests” originated from the book of *Zhou Li* (The Rites of the Zhou Dynasty).¹⁸ In this case, the provision that the parents’ request for punishment should be satisfied remained unchanged as a basic model in the following law.

As discussed in Case Two, we are more familiar with the provisions prohibiting children from suing their parents and maidservants from suing their masters. The philologists who sorted out the Qin bamboo slips made reference to the relevant contents of volumes 23 and 24 of the *Tang Lü Shu Yi* (*Interpretation of the Law of the Tang Dynasty*) below this case, which alone was illustrative enough.¹⁹ In addition, in another book named *Feng Zhen Shi*, which was unearthed at the same time, disclosed two more cases in which the fathers accused their sons of their unfilial conduct.

In one case, Party A requests that his son’s feet be cut off and be banished to a remote county in Shu Prefecture for the rest of his son’s life to be spent. The government satisfied his requests.²⁰ In another case, the father accused his son of being unfilial and demanded the death penalty. Therefore, the official immediately issued the arrest warrant.²¹ These two cases confirmed the provisions of the *Fa Lü Wen Da* (*Authoritative Interpretation*) mentioned above. The legal provisions and cases reflecting the same spirit were also common in the laws and regulations of the Qing dynasty and in the *Review of Criminal Cases* 2000 years later.²² Therefore, we dare say that even if the laws of the Qin and Han dynasties were “purely based on the spirit of Legalism,”²³ there were many contents that were basically in line with the Confucian creeds. This indicates not only the common cultural background of Confucianism and Legalism but also their integration in the early legal

¹⁸ According to The Rites of Zhou · Offices of Autumn Si Kou · Si Ci, “Si Ci took charge of the laws of three critique, three forgiveness, and three pardon, which could be used to support Si Kou in hearing criminal suits.... The first forgiveness was called not knowing, the second was called negligence, and the third was called forgetting.” Duke of Zhou. 2019. The Rites of Zhou · Offices of Autumn Si Kou. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/rites-of-zhou/qiuguan-si-kou>. Accessed 12 Feb 2022. See also the reference note by the original researcher. 1978. *Bamboo Slips of Qin Tombs in Shuihudi*. Ed. Compilation Group of Bamboo Slips of Qin Tombs in Shuihudi. 195. Beijing: Wenwu Press.

¹⁹ See Footnote 16.

²⁰ See Footnote 16.

²¹ See Footnote 16.

²² Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 11–15. Beijing: Zhonghua Book Company. Regarding father’s power in son in the history, as well as the various developments of the crime of unfilial, also see the same chapter in Qu’s book.

²³ Mr. Tongzu Qu believed that “the laws of the Qin and Han dynasties were formulated by the Legalists and were entirely derived from the spirit of the Legalism,” and, based on that, concluded that “this was the law that represented the spirit of the Legalists and was attacked by the Confucians,” and that “the laws of the Qin and Han dynasties belonged to the Legalist system, and it did not contain the elements of Confucian etiquette.” Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 329–330, 345. Beijing: Zhonghua Book Company. This practice of pitting the two schools of Confucianism against one other in theory and practice appears to be accused of breaking historical and cultural continuity, and it differs with the findings of this book.

practice. Above all, this also reflects the consistent and unified effort made by the Han nationality in the hundreds of years of the Qin and Han dynasties to accomplish the historical transformation and the construction of a new value system. Concerning this point, we need to discuss it from the perspective of legal history.

4

Historians have expounded their various views on the numerous merciless orders and rules of the Qin dynasty. The later generations, in most cases, just paid attention to the contribution of these orders and rules to the collapse of the Qin dynasty, ignoring another critical fact that the institution established by the Qin Empire laid the foundation of the following bureaucratic empire of the Han. This, of course, was also fully reflected in law. Xiao He (Prime Minister of Emperor Han Gao Zu) “laid down Nine Chapters as the new law based on the law of the Qin dynasty as soon as the Han dynasty was founded.”²⁴ The above comparison and analysis of Dong Zhongshu’s judicial practice and the archaeologic relics of the Qin dynasty were also illustrative. Of course, we cannot conclude that the Qin dynasty’s legislative practice had provided sufficient and perfect experience for the following dynasties. However, we may say that the Qin people were still immature in their legal practice because their empire had just survived as short as 15 years. The first emperor’s greatest achievement was no more than an initiation of a new grand unified entity, which would last for more than 2000 years. During the Qin dynasty, the people were confronted with a situation in which the “ritual and musical” values had collapsed. Except that a new value system could have been established on the ruins, it would have been impossible for a new order to build and a new community to survive. With such an issue taken into consideration, the Qin dynasty seemed too short to do any more though it had made a significant contribution as a pioneer. Even if the Qin people had successfully advocated a new value system, it would be the unavoidable responsibility of the following generations to hold it and improve it with an endless effort.

From a historical point of view, up to the Han dynasty, one of the unique phenomena in the development of ancient Chinese law was the emergence of “legal consciousness.”²⁵ Specifically, it refers to how legal studies became popular and how “deciding cases based on classics” became fashionable as discussed at the beginning of this chapter.

²⁴ Fan, Ye. 2019. Han Shu · Record · Record of Criminal Law. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/xing-fa-zhi>. Accessed 11 Feb 2022.

²⁵ I mention this only to illustrate the essence of the Han people’s interpretation of Spring and Autumn Annals, as well as the success of legalism—legal systematization and value reconstruction. For two thousand years, the “holy traditions” that the ancients acquired invisibly were not “self-conscious” for two thousand years. This is discussed in detail in the book’s chapters “Punishment, Law, and Statute” and “The Way of Governing Chaos,” and is reiterated herein only to avoid misunderstanding.

According to *Book of Jin · Xing Fa Zhi (Criminal Law Chronicles)*, “[t]he system of the Han dynasty inherited the one of the Qin dynasty. The law made by Xiao He consisted of 9 sections in total, to which, later on, Shu Suntong contributed 18 sections, Zhang Tang 27 sections, Zhao Yu 6 sections, in total 60 sections. In the Han dynasty, there were a collection of more than 300 sections in the *Ling Jia*, and Situ Baogong even compiled 960 volumes for the judgments concerning marriage and divorce.”²⁶ It suggested that the law of the Han dynasty so far was comprehensive and systematic. Of course, there were some problems there. For example, many parts overlapped with each other. We are impressed by the early Han dynasty which could survive in the crisis of no law available and even could successfully construct the preliminary legal system. All the techniques required for law-making saw their constant development and increasing attraction. From then on, legal research became popular in ancient China.²⁷

Unfortunately, the relevant writings by the Confucians have been lost and can no longer be verified. Definitely, the scholars during the period were generally interested in law and the renowned Confucian masters such as Zheng Xuan had made significant and undeniable contribution because under the circumstances where law was underdeveloped, its terminology imperfect and the technique inadequate, their interpretation and annotation of the legal text were particularly necessary. Frankly, what is discussed here is just relevant to the technical problems such as how to make a conceptual analysis and clausal elucidation. However, the legal writings by the Confucians had also potentially contributed to value construction, which was in concert with the grand reconstruction of the value system of ancient Chinese civilization in the Qin and Han dynasties.²⁸ In this regard, the enthusiasm of the people of Han nationality for judicial judgement based on Confucian classics seemed to be more convincing for the illustrative purpose.

No matter what legal basis was put forward by the other Party in the controversial case, at least, the Party invoking the Confucian classics could always remain self-conscious in value. In the previous four cases taken as examples for of Dong Zhongshu’s judgments, he attempted to clarify the genuine source of value.

²⁶ Fang, Xuanling, et al. 2019. *Book of Jin · Record · Record of Criminal Law*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/wiki.pl?if=gb&chapter=930099&reap=gb>. Accessed 11 Feb 2022.

²⁷ Jiaben Shen once quoted *Book of Jin · Record of Criminal Law* to record that Confucianists in the Han dynasty had done legislative works and wrote that “Mr. Zheng was in charge of the general statute and had gathered many schools of thought, including this one. It is apparent from this that this school of thought was highly esteemed at the time, and those whose disciples had taught it had a large number of followers. At the time, the popularity of legal studies was at an all-time high.”

Shen, Jiaben. 1985. *Research on the Prosperity and Decline of Legal Studies*. In *Research of Criminal Law in Past Dynasties (Volume 4)*. Beijing: Zhonghua Book Company.

²⁸ People like Xuan Zheng’s status in the study of Confucian classics appears to be circumstantial proof of the Han Confucianism’s worth and significance for chapters and sentences of laws, and this topic will be discussed in the next chapter. Here, it is only necessary to mention that Han Confucianism incorporate Confucian’s classics into the laws under the help of chapters and sentences, which is widely acknowledged in scholarly circles. See Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 332–333. Beijing: Zhonghua Book Company.

Undoubtedly, in his attempt the focus was not on the legal text invoked by the other Party but on the cognizance of the nature of the facts. For example, Cases One and Two involved the judgment about whether there was the affection between father and son. Cases Three and Four concerned whether the perpetrators might not be punished by law. The fact that great attention was paid to the application of law reflected the importance of jurisprudence and legal practice. This meant that the practice of using Confucian classics to make judicial judgement was not only a kind of value construction but also a process of technical improvement. Such a conclusion may be supported by the fact that the popularity of studying legal science had both technical and value significance in the era. It showed that the two phenomena during the development of law witnessed by the Han dynasty shared the same historical background, the same historical causes, and even the same historical results. The two sides of a trend revealed a certain “self-consciousness” in the evolution of ancient law.

Such a “self-consciousness” couldn’t emerge in the Qin dynasty, the first bureaucratic empire which just survived 15 years. Fifteen years were too short for the Qin people to introspect. Therefore, they had no chance to understand the core of the new order from the perspective of value. A real safe and stable external environment and the material and experience accumulation were not available yet for them when they made their management and planning. A few years later, the people could create such self-consciousness after they had learned a lesson from the demise of the Qin dynasty and experienced the virtuous rule by Emperors Han Wen and Han Wu. We may admit that the people of the Qin dynasty were not conscious or at least not fully conscious toward the process of creating a new order and a new value system. In contrast, the people of the Han dynasty were aware of their work in fostering the establishment of a new order and a new value system.

As far as the legal development was concerned, either the reference to classic writings in making judicial judgments or the repetition of excellent legal transcripts could be regarded as an effort made by the people of the Han dynasty to reconstruct the value system in the legal domain, which presented a prospect of a more comprehensive legal system and a better legal order. Chen Chong, a scholar of the Eastern Han dynasty who lived after Dong Zhongshu but before Zheng Xuan, stated as follows:

I heard too much about criminal rules, but too little about ritual rules. The criminal law of the Zhou dynasty contained two hundred crimes for the death penalty and three thousand crimes for the five punishments. Where propriety goes, a sentence is taken. Anyone who behaved against the rites shall be punished. The two groups of rules should work coordinately.... However, since the Han dynasty, too many criminal rules have been made and the interpretations are so different. It is about time that we reviewed the rules in order to abolish the unnecessary ones. Finally, criminal and ritual rules would find their own proper roles.²⁹

Such an effort made to coordinate etiquette and punishment focused on the transformation of the system, which was comprehensive and unavoidable, as indicated

²⁹ Fan, Ye. 2019. *Hou Han Shu · Collected Biographies · Collected Biographies of Guo and Chen*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/hou-han-shu/guo-chen-lie-zhuan>. Accessed 12 Feb 2022.

by the practice of the Han people judging a case based on the Confucian classics. In fact, in 400 years running from the late Han dynasty to the early Tang dynasty, all the legal reforms were carried out in the direction initiated by the people of the Han dynasty. For example, noticeably, the Wei law absorbed eight ritual rules and the Jin law firstly provided that anyone who broke the ritual rules might be punished as a criminal.³⁰ The Northern Wei dynasty created the relevant law to punish officials on the basis of the ritual rules. All these crimes were copied in the Qi's law, to which even "ten evil crimes" were added. The Sui and Tang dynasties inherited the old system and established a mature, comprehensive legal system,³¹ which not only cast its influence overseas but also delineated the scope of subsequent legal development for more than a thousand years. The items, styles, and even terms and concepts determined by the Tang dynasty basically remained the same until the Qing dynasty without fundamental changes. The close connection between etiquette and punishment, which was perfectly embodied in the law of the Tang dynasty, had become the basic feature of ancient Chinese law. In this sense, the summary of the Tang Law in the *Si Ku Quan Shu* stated that "the law of the Tang dynasty provided one and only standard of value for ancient China,"³² which suggested not only that the Tang dynasty had completed the value reconstruction of the ancient law, but also that etiquette was the highest criterion in the value system. What was recognized by the rites should be enforced by law, while what was opposed by the rites should be prohibited by law.³³ Therefore, the ancient "etiquette" had the nature of the law, and

³⁰ Yinque Chen once said that "in ancient times, rites and laws were closely linked; after the conclusion of the Eastern Han dynasty, the Sima family established the Jin dynasty as a powerful Confucian family and governed China. The penal laws they enacted, in particular, had Confucianism as a characteristic. All dynasties of the Southern dynasties kept the laws. When the Northern Wei dynasty changed its laws, they were kept again. The laws were adopted by the Northern Qi dynasty, the Sui dynasty, and the Tang dynasty after various amendments. For China's criminal law heritage, the statutes were orthodox." Chen, Yinque. 1977. *Brief Reasoning of the Origin of the System of the Sui and Tang Dynasties*. 100. Beijing: Zhonghua Book Company.

³¹ For the evolution of the laws during this era, see Qu, Tongzu. 1981. Confucianization of Chinese Law. In *Chinese Law and Chinese Society*. Beijing: Zhonghua Book Company.

³² Government of the Qing Dynasty. 2019. General Summaries of Emperor's Four Treasuries · Summaries of Tang Code. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/wiki.pl?if=en&chapter=828430#p150>. Accessed 12 Feb 2022.

³³ According to the summaries by Mr. Tongzu Qu, "Confucianism believed that there were differences in nobility and inferiority between people in the upper and lower classes of society, and that these differences were caused by rites, so the 'Eight Opinions' were written into law, and noble and lowly people had different standards of punishment, as well as different severity of punishment. The institutions of dress, palaces, carriages and horses, marriages, burials, and heroic sacrifices are all distinct based on rites. As a result, the legislation specified them respectively. Confucians valued the distinction between respect and inferiority, the elderly and the young, and intimacy, and spoke about filial piety and morality; therefore, the relationship of father-son must be determined when hearing lawsuits, and the severity of punishments was determined based on the System of Mourning Apparel. 'The five penalties carry a total of three thousand different punishments, with the offense of unfilial being the most serious.' As a result, the crime of being unfaithful was particularly serious, and it had been at the top of the ten evils since the Sui and Tang dynasties and was placed at the top of the chapter before the laws had specific sections. As a result of the rites, the child was expected to serve his or her parents in filial piety, and therefore non-serving became a

the ancient law had the nature of etiquette. For example, of the 502 articles concerning prohibition as provided in the Tang Yong Hui Code, many were of ritual and moral nature. The law, which possessed the characteristics of *Rites of Zhou*, indicated that the reconstruction of the value system was just what the Han people consciously pursued. We may take this as the starting point to evaluate Dong Zhongshu's theory of adjudicating on the basis of Confucian classics.

5

The above paragraphs, which explain why Dong Zhongshu frequently made his verdicts based on Confucian classics, indicate the "unfavorable effects where law enforced morality." If this is correct, we have to accept another argument that, in Dong Zhongshu's era, the practice of enforcing morality by law was very common. The following statement made by Dong Zhongshu revealed a profound message.

As your humble subject, I heard that a wise king must have started his education at his early age. When he grew up, he could distinguish himself for his excellence. Entitlement might help his subjects adhere to etiquette, and punishment might keep them away from the evil. Therefore, the people who consciously observed etiquette were ashamed of any offense to their superiors. King Wu promoted righteousness and abolished cruel penalties and heavy taxes. Duke Zhou wrote poems praising him. In the prosperous period under the reign of Cheng and Kang, it was so peaceful that in more than 40 years, no crime was committed at all. These were the result of etiquette, benevolence, and righteousness rather than cruel punishment. But in the Qin dynasty, a change happened. With the implementation of the practice of the Shang dynasty and the theory of Han Feizi, the ruling fashion of a wise king was discarded. People started to become greedy and vulgar, and moral persuasion was ignored in governing. Punishment was made without moral consideration. Doing a good thing did not ensure no punishment and doing a bad thing did not ensure a certain punishment. The officials were all corrupted, mouthful of empty words, and ignorant of the truth. There was no just trial before death penalty. The officials pretended to be obedient to their king while they were plotting a secret rebellion. Deceit, selfishness, and shamelessness were of their quality. The officials who extorted without any mercy were widely employed. People suffered from homelessness, joblessness, and robberies. Although thousands and thousands

specific clause. Children were not allowed to hold private assets whilst their parents were alive, according to rites; consequently, owning private assets was punishable. The funeral arrangement for parents was supposed to continue three years, according to rituals; hence, not wearing mourning clothes and being cheerful, as well as marrying during the funeral arrangement periods for parents, had been crimes. According to rites, because a father and his child had the same enemy, the child should be forgiven or have his or her sentence reduced when the child exacted revenge on the father. According to Confucianism, because a father could conceal his child's misbehavior and a child could hide his or her father's misbehavior, the law permitted concealment in such cases, and the first hiding was not a crime; the law also did not require the child or grandchild to testify, nor did it permit the child or grandchild to sue their father. The rites had established the principle of allowing divorce in seven situations while banning it in three others; as a result, the law had established the conditions for divorce. Everything originated from the ritual classics. Family laws, succession laws, and marriage laws are all founded on rites." Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 32-321. Beijing: Zhonghua Book Company. Mr. Qu's study may be described as in-depth and extensive in all of the areas discussed here, which is why this book frequently skipped the relevant topics. Furthermore, Mr. Qu's book concentrated on the code and institutionalized aspects while having relatively few contents involving "home, marriage, and land." For these contents, the first few chapters of this book may be utilized as supplements.

of people were criminalized, inhumanly punished or even killed, the evil was not eliminated at all. Therefore, Confucius concluded, “Power and punishment may make people obedient, but cannot make them feel ashamed of what they have done.”³⁴

In the above paragraph, the criticism of the governance of the Qin dynasty can be understood at three levels. At first, the sentence that “[b]ut in the Qin dynasty, a change happened”³⁵ indicated the nature of the governance of the Qin dynasty, which functions as the general outline of the criticism. Secondly, the sentences that “[p]unishment was made without moral consideration”³⁶ and “[o]fficials who extorted without any mercy were widely employed”³⁷ provided the details. Finally, the sentence that “thousands and thousands of people were criminalized”³⁸ gave a summary. Generally speaking, the outline emphasizes the judgment based on value, while the middle part focuses on the description of the truth. The third level concentrates on the cause-and-effect relationship. As far as the issues in question are concerned, what is most noteworthy appears at the second level, specifically in the first sentence. From a positive point of view, we must acknowledge that the governance of the Qin dynasty attached too much to reputation, which might have something to do with the concepts of righteousness and evil. This inference was not only confirmed by the sentence that “[t]he officials pretended to be obedient to their king,”³⁹ but also reflected in the laws of the Qin dynasty. The batch of Qin bamboo slips unearthed in Yun Meng in 1975 not only contained the transcription of the laws and cases testifying that moral education was enforced by the law as mentioned in the previous but also the following provision:

In the circumstance of a robber or robbers attacking someone or some people in the street, those who are within a hundred paces and refuse to help shall be fined second degree Jia (a huge fine).⁴⁰

From today’s point of view, saving people in distress is a positive moral obligation. Still, it does not mean that using punishment to compel people to fulfill such an obligation has nothing to do with people’s consciousness of the good and the bad. In the famous book of *Yu Shu*, which was discovered in the official documents of the Qin dynasty in the same excavation, we can find out the following words:

At the time of Bing Xu Shuo Ding Hai of April, the 20th of the Dynasty, the officials from the counties of the South stated: In ancient times, different places had different traditions attached with different values, having caused inconvenience to the people and even harm to the state. Therefore, it was the wise kings who had the duty to make laws to eradicate the evil thoughts and customs of the people. Without sufficient and effective laws in force, the

³⁴ Ban, Gu. 2019. Han Shu · Biography · Biography of Zhongshu Dong. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/dong-zhong-shu-zhuan>. Accessed 13 Feb 2022.

³⁵ See Footnote 34.

³⁶ See Footnote 34.

³⁷ See Footnote 34.

³⁸ See Footnote 34.

³⁹ See Footnote 34.

⁴⁰ See Footnote 16.

people were inclined to fraudulence and deceit. That was why orders had to be issued from time to time. With sufficient and effective laws in force, the people were adequately guided to avoid their evil thoughts and behaviors.⁴¹

Although the etiquette and law system of the Bronze Age based on the direct unification of the family and the state collapsed, the tradition of enforcing morality by law had not been interrupted. For example, the four cases mentioned previously about how Dong Zhongshu regulated the judicial activities. The first case concerning the “imperial edict” regarding “the father concealing the misconduct of the son, and the son concealing the misconduct of the father,” the second and third cases concerning the law of severely punishing “the one who beats up his father,” and the fourth case concerning the rule obliging wives to obey their husbands, all reflect the fashion of mixing up morality with law and using criminal punishment to ensure that people should abide by the moral obligations stipulated. Although it is not quite certain whether the Han people inherited such regulations from some part of the Qin system, we, at least, dare say that this practice came down along the same line in both the Qin and Han dynasties. Dong Zhongshu decided on a criminal case based on Confucian classics and the concept of righteousness. What he opposed was not the tradition of enforcing morality by law. On the contrary, he requested to spread the tradition in the process of applying the law by clarifying the source. Doesn’t his criticism of the Qin people for their principle that “[p]unishment was made without moral consideration”⁴² reflect his blaming this result for the fact that “doing a good did ensure no punishment and doing a bad thing did not ensure a certain punishment”?⁴³ The officials were deceitful, mouthful of empty words, and ignorant of the truth. The crimes for death penalties were not verified. In his book of *Chun Qiu Fan Lu (Luxuriant Dew of the Spring and Autumn Annals)*, he confessed that “[h]earing a case at a court in the *Spring and Autumn Annals* must be based on the real causes of the issues so that those who have evil thoughts should be stopped at the early stage and those who are the principal offenders should be punished severely, and those who are accessory offenders should be punished slightly.”⁴⁴ How to deal with a behavior depends on whether the motive was good or bad.

This reflects the view in *Discourses on Salt and Iron* that “*Spring and Autumn Annals* produced verdict based on motive. Those who violate law out of good motive shall be exempted while those who violate law out of bad motive shall be punished.”⁴⁵ This type of standpoint, which pushed the principle of enforcing morality by law towards an extreme extent, was fully reflected in the case of Xu Zhi Offering Medicine to his father cited by Dong Zhongshu in the book of *Spring and Autumn Annals* (that

⁴¹ See Footnote 16.

⁴² See Footnote 34.

⁴³ See Footnote 34.

⁴⁴ Dong, Zhongshu. 2019. Chun Qiu Fan Lu · Jing Hua. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/chun-qiu-fan-lu/jing-hua>. Accessed 13 Feb 2022.

⁴⁵ Huan, Kuan. 2019. Discourses on Salt and Iron · Volume 10 · Penalty and Morality. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/yan-tie-lun/xing-de>. Accessed 13 Feb 2022.

is Case Three in the previous examples quoted from the book of *Using the Spring and Autumn Annals to Decide Legal Cases*).

Objectively speaking, this practice was reasonable to some extent at that time, but it could not be effective enough to eliminate all the shortcomings of applying law too rigidly as Zhongshu had expected. Let's take, for example, the case of "beating up father" and similar kinds of cases, that he decided using the principles in the book of *Spring and Autumn Annals*—the principle that "a gentleman who did not have the intention to kill should be forgiven."⁴⁶

There was no distinction between deliberate injury and injury by accident at that time and before, and anyone who committed the crime was sentenced to death; even after Dong Zhongshu, no law with the article telling the deliberate injury from injury by fault existed, and capital punishment was given regardless of intention or negligence.⁴⁷ On the one hand, this phenomenon, of course, owed much to the ancients' significant value of the principle of filial piety. Still, on the other hand, it also revealed a certain inherent contradiction in legalizing moral norms.

Long before Dong Zhongshu's time, Confucius had observed the contradiction between the exterior form of norms and the internal state of human will and tried to unify the two in one internal domain. Confucius once said, "If a man be without the virtues proper to humanity, what has he to do with the rites of propriety? If a man be without the virtues proper to humanity, what has he to do with music?"⁴⁸ He also said, "The superior man in everything considers righteousness to be essential. He performs it according to the rules of propriety. He brings it forth in humility. He completes it with sincerity. This is indeed a superior man."⁴⁹ A man without virtues had no proper temperament, although he practiced etiquette and music, which falsely increased his hypocrisy. Therefore, Confucius demanded that "nature" should match rites.⁵⁰ This was what morality required. Four hundred years later, Dong Zhongshu realized that "[t]he officials pretended to be obedient to their king while they were plotting a secret rebellion."⁵¹ His theory that real motive determines the nature of the issues and the final punishment was in accordance with the same moral requirements. The difference lied in the fact that the etiquette expounded by Confucius probably still belonged to the moral codes, while in the era of Dong Zhongshu, etiquette was more likely of the nature of law. In other words, what Confucius wanted to solve was a moral problem, while Dong Zhongshu was concerned about how moral principles

⁴⁶ See Footnote 4.

⁴⁷ This question was elaborated in Sect. 3 "The Crime of Wounding and Killing" within Chap. 1 of Tongzu Qu's book *Chinese Law and Chinese Society*. See Qu, Tongzu. 1981. Chapter 1 · Sect. 3 · The Crime of Wounding and Killing. In *Chinese Law and Chinese Society*. Beijing: Zhonghua Book Company.

⁴⁸ Legge, James. 2019. Translation of The Analects · Ba Yi. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/analects/ba-yi>. Accessed 12 Feb 2022.

⁴⁹ Legge, James. 2019. Translation of The Analects · Wei Ling Gong. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/analects/wei-ling-gong>. Accessed 12 Feb 2022.

⁵⁰ See Feng, Youlan. 1984. *History of Chinese Philosophy (1)*. 92–97. Beijing: Zhonghua Book Company.

⁵¹ See Footnote 34..

could be applied in the legal domain. If it is the case that Confucius' efforts to unify the external requirements of propriety and the internal needs of benevolence were at least relatively easier to achieve academic success, Dong Zhongshu's extreme practice of applying the principle of enforcing morality by law would inevitably go too far and end in an opposite effect.

6

Modern men hold different views on the boundary between law and morality. Some distinguish them by judging whether they use coercive force or not. Some try to find the boundary between the two spheres based on the theory of the relationship between the external and the internal. The former focuses on form, while the latter emphasizes content. Though concentrating on the form might lead to some satisfactory academic results, the boundary would disappear because any norm enforced by law would become law. That would be equivalent to the abolition of morality. In addition, distinguishing them by the criterion of form also implies that people cannot grasp law or morality in terms of content. We can't deny that morality takes *bona voluntas* as its necessity in terms of content. Provided that *bona voluntas* is not only the requirement of morality but also that of the law, there would be no *bona voluntas* or even morality. A man who fulfills some obligations under the compelling force of society cannot be considered virtuous because morality, arising from self-determination, must take freedom as a prerequisite. In this sense, as we know, the essential characteristic of morality is autonomy, while that of law is heteronomy, which is guaranteed by external coercive force. Unsatisfied with the heteronomy of law, Dong Zhongshu tried to transplant the domain of autonomy into law so that law could directly touch the bottom of a man's heart. It was not he who initiated it. He tried to achieve a full realization of implementing the existing principles.

As we have emphasized repeatedly in the above, although the law of the Qin and Han dynasties was not yet mature in terms of value and technology, it still intended to enforce morality as its purpose, or at least inherited such a tradition. In the Qin and Han dynasties, the bad side of law ignoring the intention of the perpetrator owing to its too much emphasis on the form had been exposed. Therefore, Dong Zhongshu stressed the importance of exploring the intention of a perpetrator to realize moral principles in the legal domain. Dong's fashion was similar to what Confucius once did because he felt that "rites appeared externally,"⁵² namely, proposing "virtue" as the core concept because of the possibility that simply emphasizing on rites would result in hypocrisy at the moral level. Unfortunately, Dong Zhongshu was unable to succeed because rites were no longer moral norms at that time.

From technical perspective, although Dong Zhongshu adopted the various methods to apply the classics in the process of deciding a case, which, to some extent, helped men to master the essence of the classics and determine the nature of the issues, it would be difficult to avoid formalization and mechanization as long as the content of classics were put in law. Therefore, as far as the *natur der sache* is concerned, the law could not directly work at the level of men's will because its

⁵² See Footnote 49.

direct object was behavior. For example, the provision that a son shall not, in the case that his parents or grandparents are still alive and need his care, store private wealth or register a new property for himself. The provision that a son shall not take off his mourning clothes during the mourning period for his deceased parents to participate in a happy event such as a marriage ceremony was concerning men's behaviors. It would be no problem if the law made such a requirement. The problem was that the ancient law required more than that in most cases. For example, although they were related to behaviors, the provisions mentioned above also touched down on men's will. What was required was still the descendent filial piety to their parents and grandparents. The act of setting up household registration and dividing property in the case that parents were alive was prohibited by law because it would "not only violate the principle of filial piety but also deeply hurt the hearts of benevolent parents."⁵³ It was provided that those who divided property during the mourning period should be punished just because the legislators "abhorred any act of showing no sympathy to family members."⁵⁴ Such a direct demand on how men should feel was far beyond the scope in which law could work. Because coercion would undoubtedly lead to a severe disconnection between the means and the goal, rigidity and formality would naturally appear. The only remedy would be the emergence of innumerable judges who, like Dong Zhongshu, had a good sense of justice and deep insight into human nature, capable of studying human feelings and applying Confucian classics in the judicial practice, ensuring that "those who violate law out of good intention shall be exempted, and those who conform to the law out of evil intention shall be punished."⁵⁵ However, this was too ideal to be practical. That was the central problem in the legalization of moral norms and one of the reasons why Dong Zhongshu's plan to eliminate the negative phenomenon that "personal vanity was considered as priority"⁵⁶ ended in failure.

7

On the other hand, no matter to what extent the moral principles in the law could actually be implemented, as long as morality was fully enforced by law, the damage to morality would be fatal. The fact that morality was enforced by law would result in the externalization of morality and the legalization of morality. According to the definition mentioned above, such externalized and legalized moral rules are not moral and are even opposite to moral ones. In form, these norms possessed the characteristics of law because they had the teeth of punishment. As far as the content was concerned, what was required was men's intention rather than behavior. Men were forced to do a good deed by the threat of punishment. As a result, there would be no good deeds because the threat of punishment would deprive men of their freedom

⁵³ Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 16. Beijing: Zhonghua Book Company.

⁵⁴ See Footnote 53.

⁵⁵ Huan, Kuan. 2019. Discourses on Salt and Iron · Volume 10 · Penalty and Morality. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/yan-tie-lun/xing-de>. Accessed 13 Feb 2022.

⁵⁶ See Footnote 34.

to choose an evil end. Hegel, a German, who was also attracted by this point of view, wrote in *Philosophy of History* as follows:

In the eyes of the Chinese, their moral laws were simply natural laws – external, positive orders – coercive requirements – obligations or rules of mutual politeness, etc. If all kinds of important decisions of “reasons” were to become moral sentiment, there must be “freedom.” However, there was no “freedom.” Morality was a political matter in China, and some of its laws were presided over by government officials and legal organs.⁵⁷

In a different part of this book, he also said, “Chinese law was based on the principles of paternalistic politics, and subjects are seen as naive; the sentiment of freedom—which was the foothold of general morality, was, therefore, completely erased.”⁵⁸ Hegel once thought that “Chinese law was not law, but something that suppressed the law.”⁵⁹ Here, if the word “morality” was replaced by the word “law,” that would undoubtedly align with Hegel’s original meaning. If the law was used to enforce morality, law and morality would merge into one thing. The approach of externalizing and enforcing morality limited and even destroyed the free prerequisite condition on which morality was based, and one of the by-products was the emergence of general hypocrisy. People were obsessed with the possibility of exploring or even exceeding the limits of heteronomy while discarding self-discipline. Concurrently, the society in which law-enforced morality became more formalistic. The popularity of thinking in one way and behaving in another was a testament to the serious problem of moral consciousness missing in the traditional Chinese conscious structure. Besides this theoretical analysis, sufficient materials, such as the folklore materials that reflect ancient ordinary people’s lives, also gave their confirmation.⁶⁰ Let’s take a look at the following example.

Mo, a rich old man, had an illegal son called Zhu. One day, Mo died of illness. His illegal son, Zhu, encouraged by a group of rogues, wore a mourning gown and went to the deceased’s house for his right of succession. If he were refused, the rogues would assist him in bringing the case to the court with the expectation that

⁵⁷ Georg Wilhelm Friedrich, Hegel. 1956. *History of Philosophy*. Trans. Zaoshi Wang. 112. Beijing: Sanlian Press.

⁵⁸ Georg Wilhelm Friedrich, Hegel. 1956. *History of Philosophy*. Trans. Zaoshi Wang. 171. Beijing: Sanlian Press.

⁵⁹ Georg Wilhelm Friedrich, Hegel. 1959. *Lectures on the History of Philosophy · Volume 1*. Trans. Lin He & Taiqing Wang. 119. Beijing: Commercial Press.

⁶⁰ Recently, there were people who made an interesting comparison between *the Tragedy of Macbeth*, a tragedy written by William Shakespeare, and *Fa Zi Du*, a traditional Chinese play. Both plays had narratives that were quite similar, deal with the question of good versus evil, and contained the concept of “retribution.” The distinction is that *Fa Zi Du* merely promoted the moral theme of “evil gets evil retribution,” but *the Tragedy of Macbeth* used a large amount of ink to depict the furious conflict in people’s inner worlds when they were at the juncture between good and evil. (See Fang, Ping. 1987. *The Tragedy of ‘Human’*. *Reading Book* 12.) If both plays were about moral vigilance, then *Fa Zi Du* was evidently simply about stopping people’s immoral activities by promoting the notion of “retribution;” at this stage, what worked was the concept of fear, and this, of course, was based on heteronomy. *The Tragedy of Macbeth* was distinct in that its profound and detailed portrayal of human’s inner world was an affirmation of self-discipline. This distinction, in fact, displayed two distinct ideas of morality, as well as two distinct states of moral consciousness.

they might share a piece of cake if he would win the case. Surprisingly, Mo's eldest son, Da Lang, discovered the plot, who immediately recognized Zhu as his younger brother and accepted him to join the family. Therefore, a dispute was successfully avoided. However, the rogues did not give up after their first plot failed. At the very beginning, to lure Zhu to take legal action, the rogues had promised to give Zhu 1,000 taels of silver as financial support and successfully obtained the receipt from Zhu though they did not fulfill their promise. They had intended to have a share of Zhu's inherited estate. Therefore, they brought a new case to the court, claiming their rights as creditors. Later, the case went to a wise Judge for hearing, who knew what was good and evil and, at last, delivered a fair decision that made the evil punished and the good promoted.

The two most prominent key points in this story were Mo Dalang's attitude towards his illegal brother and the judge's decision. Here, Mo Dalang's attitude determined whether what he did was moral or not, and the judge's decision clarified the moral standards or the moral consciousness of the society. Some details are as follows.

Zhu dressed up as a filial son; he cried and kowtowed to his deceased biological father; Mo's mother was "outraged by this and shouted, 'Where is this wildcat from? A disgusting Cry!'" She had initially intended to drive him out. "Luckily, Dalang Mo, who was quite sophisticated and knowledgeable, stopped his mother and explained, 'Mom, stop it. It is not a simple thing. At this moment, we are arranging our funeral. Some ill-minded men can take advantage of this and make some trouble. We must be very cautious. Otherwise, we would fall into a trap. Our family should not be broken up. For the sake of our interests, please just do as I tell you.'"⁶¹ Mo successfully stopped her and recognized his biological brother. Later on, Mo's mother complained, "Why did you recognize this illegal bastard as soon as you met him?" Mo Dalang explained, "Our family is so rich that many are jealous of us? He is the biological son of my father. If I had driven him away, the rogues would have used him against us. We would certainly have to cope with endless allegations. The court officers would blackmail us, and our relatives would take advantage of us! At last, we would not be able to avoid the fate of losing money and land. Isn't it a good idea to recognize him and disillusion all the men with the ill intentions beforehand?"⁶²

Of course, Mo Dalang's confession, which showed that he was an intelligent and sophisticated man, did not indicate anything related to moral motive in recognizing his brother. On the contrary, it was immoral to recognize his brother after a financial calculation. Although Mo Dalang himself did not say that what he had done was morally motivated, he should have believed that what he had done was moral. His attitude revealed the general moral consciousness which he and the society stuck to. The following was the transcript of a talk at court:

Governor nodded, "Yes, yes!" He told Mo Dalang to stand up and asked, "Why did you recognize him?" Mo Dalang replied, "The rogues in our city try to make trouble anywhere.

⁶¹ Ling, Mengchu. 1983. *Slap the Table in Amazement Again (I)*. 213–214. Shanghai: Shanghai Classics Publishing House.

⁶² Ling, Mengchu. 1983. *Slap the Table in Amazement Again (I)*. 216. Shanghai: Shanghai Classics Publishing House.

I should have thanked them for my decision to recognize him. Otherwise, they would have made even more trouble for me. The cost would be several times more than now.” Governor said with a smile, “That is great! I admire your righteousness and wisdom...”⁶³

Finally, he delivered the verdict that the rogues who brought up the case should be guilty of abetting and fraud and be punished by 20 canings on the back each and being sent to the labor camp in Junzhou after being tattooed in the face. Later on, “the Governor of Tang praised the Mo family by bestowing a tablet inscribed with ‘Gate of Filial Piety and Righteousness’ and ordered that the Mo family be exempted from corvée.”⁶⁴ His praise was surprising because it showed that motive was not crucial in judging his “filial piety and righteousness.” No wonder why the Governor praised him for his “wisdom” and “righteousness.”⁶⁵ Such a practice was far different from the aim of “verdicting on crimes based on heart” advocated by Dong Zhongshu. However, this, ultimately, derived from there logically. It was another contradiction in the process of legalizing moral norms. It was also another reason why Dong Zhongshu could not solve the problem of “punishment was made without moral consideration.”⁶⁶

The practice of overemphasizing the importance of morality and making it as dignified and inviolable as law would lead to the disappearance of morality, the erosion of people’s moral consciousness, and the transformation of the so-called virtue into uselessness. This was the failure of Dong Zhongshu and the failure of the ancient law, which was designed to enforce moral norms. Although the legalization of moral standards might not be the only cause for the lack of moral consciousness in the ancient Chinese conceptual structure, it was undoubtedly the leading cause.⁶⁷

8

The previous discussion is mainly about the development of the ancient law, especially the value reconstruction of ancient law and the legalization of moral norms and

⁶³ Ling, Mengchu. 1983. *Slap the Table in Amazement Again (I)*. 218. Shanghai: Shanghai Classics Publishing House.

⁶⁴ Ling, Mengchu. 1983. *Slap the Table in Amazement Again (I)*. 219. Shanghai: Shanghai Classics Publishing House.

⁶⁵ Despite the fact that this narrative was based on a Ming Dynasty novel, there is no doubt about its authenticity, not to mention the fact that the subject of moral consciousness that we are exploring is unwittingly disclosed here. The author’s intention was to persuade people not to fight for litigation; however, it resulted in a moral case. From this, we can find an additional evidence made by the author, in addition to Mo Dalang and the Governor of Tang, to support the viewpoint of our book.

⁶⁶ See Footnote 34.

⁶⁷ Mr. Huang Renyu (Ray) once said that “Official reliance on the *Four Books* as the legal guide and code of ethics for at least two hundred years had resulted in the absence of any effort to develop an intermediate zone of legality...” (Huang, Ray. 1981. *1598, A Year of No Significance: The Ming Dynasty in Decline*. 210. New Haven and London: Yale University Press.) “This resulted in a society with more solidification...” (Huang, Renyu. 1982. *1598, A Year of No Significance: The Ming Dynasty in Decline*. Trans. Renyu, Huang. 236. Beijing: Sanlian Press.) “[M]ediocrity was encouraged in the name of morality and intellectual dishonesty remained a fixed characteristic of bureaucratic life.” (Huang, Ray. 1981. *1598, A Year of No Significance: The Ming Dynasty in Decline*. 210. New Haven and London: Yale University Press.) This was a major issue that went across the traditional Chinese social and cultural structures.

its influence on the Chinese moral consciousness after the rise of the bureaucratic empires of Qin and Han. There is little discussion about the cultural and technological causes for the astonishing development and change. At most, what is mentioned is the established tradition of enforcing morality by law in the Qin dynasty. However, the tradition boasted a deeper meaning and a long history.

The source of the legalization of moral norms or the tradition of enforcing morality by law can be traced back to the beginning of ancient Chinese civilization. At that time, “family” and “state” meant the same thing. Therefore, the ritual institutions derived from this reality were actually the instrument of morality, and accordingly, the principle that “[w]here propriety goes, a sentence is taken; anyone who behaved against the rites shall be punished”⁶⁸ was certainly pursued. After the Spring-Autumn and Warring States Periods, the pattern of “one unity made up by home and state” was broken, and the relationship between home and state was changed. However, home and state were newly combined rather than separated as a result. “State” was ruled by the monarch indirectly, the basic administrative unit was “family,” and the philosopher developed a whole set of a political and moral philosophy based on “family” and “state” ethics. Thus, “family” and “state” were tied up in a new way. The principles that “[w]here propriety goes, a sentence is taken; anyone who behaved against the rites shall be punished”⁶⁹ were certainly revived. The law of the Tang dynasty was “consistent with rites,” just as what happened in the Zhou dynasty. However, rites and law in the two dynasties were combined differently, which reflected that the fashion by which “family” and “country” were combined had changed. The “family” of the Zhou dynasty did not exist anymore in the Tang dynasty, and the “state” of the Tang dynasty was far more mature and comprehensive than that of the Zhou dynasty. All these changes had witnessed a very long history. Traditions were passed down from generation to generation and developed and innovated. Some were discarded at first and then retaken, and some remained the same all the time, such as those I’ve mentioned. Among those that might be regarded as holy traditions, we can name one of them: the tradition that morality was enforced by law.

Although some legal rules of the Qin dynasty were contrary to Confucian ethics, we cannot conclude that the law of the Qin dynasty was made under the guidance of anti-Confucian ideology.⁷⁰ We can discover that Legalism was consistent with

⁶⁸ Fan, Ye. 2019. *Hou Han Shu · Collected Biographies · Collected Biographies of Guo and Chen*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/hou-han-shu/guo-chen-lie-zhuan>. Accessed 12 Feb 2022.

⁶⁹ See Footnote 68.

⁷⁰ Generally speaking, Legalists argued against rule of morality based on the rule of law, and they were primarily concerned with the manner by which the country should be governed, not with specific content. In other words, the Legalists may utilize the law to enforce morality (even what Confucians could support) while remaining true to its original aim. Some of the Qin system’s contents were non-Confucian, such as the regulation requiring fathers and sons to form different families that Yang Shang made, but it should be noted that the formulation of such laws was to reward farming to better prepare for wars, as well as to establish a rich country with strong military forces. It had its own practical reasons and did not specifically aim at Confucian ethics. There are existing examples in the main text regarding where the laws of the Qin dynasty were consistent with Confucian ethics; therefore, they are not included here.

Confucianism concerning some fundamental issues (often with no intention). Some legal principles of the Qin and Han dynasties were generally following Confucian ethics. It deserves particular attention that morality was enforced consciously by law in the Qin dynasty, which was earlier than the Confucian initiative. Although the early Confucianism did not exclude the function of law, it intended to attach little importance to legal enforcement because of the unswerving advocacy of the rule of morality. In this sense, the value system reconstructed by the Confucians of the Han dynasty, who established the principle of “punishment fostering education,” was directly influenced by the institutions of the Qin dynasty, although with the gap of three generations. This influence was reflected in the similarity of the laws of the Qin and Han dynasties in content and the general spirit existing in the different rules and norms of the two dynasties. In the Qin dynasty, the law was enforced to “correct men’s evil thoughts” and uproot the bad custom, which had, in essence, the same function as the provisions recommended by Li Si, who was responsible for the legislation of the Qin dynasty, that “those who talk about the classic books of *Shi* and *Shu* shall be sentenced to death. Those who refer to the past to criticize the present shall be sentenced to death together with his relatives falling into the category of nine clans,”⁷¹ and the provision in the Han dynasty that “those who complain about the emperor’s rule privately shall be punished,”⁷² and Don Zhongshu’s doctrine of “verdicting on crimes based on heart.” Herein, the law was used to regulate how men think. The problem was that such a law was not following nature. Consequently, since the law that prohibited “silent complain” were made, “ministers and scholars began to frequently please people by flattery;”⁷³ just as this phenomenon, verdicting on crimes based on heart only caused more hypocrisy.⁷⁴

⁷¹ Sima, Qian. 2019. Shiji · Biography of the First Emperor of the Qin Dynasty. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/shiji/qin-shi-huang-ben-ji>. Accessed 12 Feb 2021.

⁷² According to Han Shu · Record of Food and Commodity, “At the beginning, Yan Yi was just the Police Chief of Jinan and later was promoted to one of the Nine Ministers thanks to his honesty and integrity. The Emperor Wu of the Han dynasty and the Vice Prime Minister of Zhang Tang had already created the new currency out of the white deer’s skin, and asked Yan Yi’s opinion. Yan Yin said, ‘Nowadays, the blue jade that kings and ministers use has several thousand value while the deer’s skin has four hundred thousand value. The cart is put before the horse.’ The Emperor was unhappy about his response. A long time of estrangement have been in existence between Zhang Tang and Yan Yi. When someone reported Yan Yi to the Emperor, the Emperor asked Zhang Tang to handle the case. It was said that Yan Yi once chatted with a guest, and when the guest complained about the inconvenience caused by the new law, Yan Yi said nothing and curled his lips to show contempt. Therefore, Zhang Tang proposed to the King that Yan Yi, one of the Nine Ministers, who was aware of the negative impact of the new law and took an action of silent complaint, should be sentenced to death. From then on, there was the law to punish silent complaint, and ministers and scholars began to engage in a fashion of flattery.” Ban, Gu. 2019. Han Shu · Record · Record of Food and Commodity. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/shi-huo-zhi>. Accessed 11 Feb 2022. Regarding causing moral hypocrisy, these examples are same.

⁷³ See Footnote 34.

⁷⁴ As was the situation in the West during the Medieval Era, enforcing religion through the law yields the same outcome. The conflict between religion and state throughout the Medieval Era, on the other hand, was significantly different from the relationship between rites and law in ancient

Of course, the legalization of moral norms in a country like China, which boasts a well-developed ancient law and a legal system with a rich culture and a very long history, should have witnessed a highly complex process. Theoretically, the beginning, development, and completion in the process depended not only on the ancient Chinese's fundamental values but also had a very close relationship with the nature of the ancient law.

9

On the basis of the conclusions made in the previous chapters, we dare say that the so-called "law" in ancient China was actually "criminal law." Of course, this does not mean that the ancient concept related to law just referred to criminal punishment. The pure criminal punishment did not work at any time unless it was connected with a particular will or attached to a specific norm. But what kind of nature the legal norms should possess, in other words, what sort of norms the criminal punishment should be associated with, was determined by choice of fundamental values made by the whole society instead of the criminal punishment, which itself did not have any specialty. Once law just referred to criminal law, it would lose its character of independence. In this sense, ancient Chinese law was associated with criminal punishment could not alone lead to the legalization of moral norms there, but, at least, it made it possible. This was particularly noticeable in the relationship between Confucianism and Legalism in history.

The Spring-Autumn and Warring States periods witnessed the remarkable transformation of the ancient Chinese society, during which the old order was dissolved, and the new system was established, and the first group of independent thinkers and the earliest cultural self-consciousness emerged. It was expected that the great transformation would lead to the birth of new ideas and theories that could help the Chinese change their old-fashioned legal concept and find a new direction for the development of ancient Chinese law. Unfortunately, it turned out that those newly emerged legal theories based on the earliest "cultural self-consciousness," which contained some new content, were still the theories of criminal punishment in nature. This implied that the so-called new legal concepts didn't win independence from the old tradition, and law was still equated with punishment. Prominently, law was confined to the old domain without any fundamental breakthrough even after the great social change. As a result, although the Legalists developed a set of fledged legal theories in accordance with the requirements of the times, they neither molded a law with independent character nor pointed a new direction for the development of ancient Chinese law. Jurisprudentially, there was little difference between the rule, made by Shang Yang, providing for double taxation imposed on the family with two sons who still lived together at the age of independence and the rule made later providing for a ban on a son registering a new household when his parents were still alive because the former only differed from the latter in content instead of nature. In other words,

China; as a result of such differences, the evolution of law and morality in China and the West differed greatly. This book's third chapter "The Way to Governing Chaos" discusses the factors that eventually led to the separation of church and state, as well as the separation of law and morality, as demonstrated in the most authoritative late Medieval Era's theological ideas in the West.

the ancient Chinese habitually viewed the legal phenomenon from the perspective of criminal punishment, which confined any change of law to a formal one. From this point of view, any norm can be regarded as law in principle. “A norm which was enforced by social sanction would fall into the category of rites while a one which was enforced by legal sanction would fall into the category of law.”⁷⁵ This provides a basis on which we may believe that the Legalists did not mold a law with independent character and ancient Chinese law possessed the character of criminal punishment, and at least moral norms were legalized.⁷⁶

In conclusion, we may also raise the question of whether the fact that the prohibitory function of punishment was very close to the obligatory function of morality could be another hidden reason why ancient Chinese law had its special characters. Although we have found the unique source of ancient Chinese law, we still wonder whether the strong tendency of moralization diverted its later development. However, in the Yonghui Code of the Tang dynasty, which contained 502 prohibitory articles, we can not only feel the ubiquitous existence of the moral spirit but also have a chance to appreciate the perfect combination of the moral elements with the principle of severe punishment.

⁷⁵ Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 221. Beijing: Zhonghua Book Company. Jia Yi from the Han dynasty once concluded that “ordinary people’s wisdom can only help them to know what has already happened rather than what will happen. Accordingly, what rites prohibit is what will happen while what law prohibits is what has happened. As such, the function of law can be easily understood while that of rites can be hardly known.... However, it is believed that rites are valuable because they can eliminate the evil before it grows and enlighten people when the evil are hardly seen, so that people unconsciously become good and stay away from crimes.” (Ban, Gu. 2019. *Han Shu · Biography · Biography of Jia Yi*. In *Chinese Text Project*. Ed. Donald Sturgeon. <https://ctext.org/han-shu/jia-yi-zhuan>. Accessed 13 Feb 2022.) This paragraph appears to distinguish between rites and law on the surface, but it does not distinguish between the two in terms of content. The focus on rites’ preventative role can be understood as opposing the idea of punishing before enlightening, negatively speaking, and as freeing people from litigation, positively speaking. The gist focused on the word “enlightening.” The argument is that non-compliance after enlightening could also result in punishment, which was in line with the generations’ belief that punishment occurred only after rites had been applied. We may deduce that ancient Chinese law was in line with ancient moral ideal. As a result, law worked as a tool to punish and enlighten those who were not obedient. In other words, law changed into morality when it had the purpose of enlightenment. This is something we will talk about in the upcoming chapter.

⁷⁶ In the past, it was noted that the debate on rule of law and rule of morality likewise only involved a matter of form. The harsh punishment advocated by the Legalists and the enlightenment emphasized by the Confucians are all about the means and forms. Legalists could use punishment to impose moral norms, and Confucians could also use violence to enforce their moral demands. Just as Professor Qu Tongzu explained, “The central issue that Confucius dealt with should be more accurately described as rule of rites than rule of morality. The fundamental question was what standards of behavior should be established. In contrast, the force used to impose those standards was the secondary issue.” (Qu, Tongzu. 1981. *Chinese Law and Chinese Society*. 321–322. Beijing: Zhonghua Book Company.)

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