

## 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)”.<sup>1</sup> 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)?”<sup>2</sup> 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)”.<sup>3</sup> 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.)

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“Zhao Gao” (The Announcement of Duke Zhao) in *Shang Shu (The Book of Historical Document)*.

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“Xi Bo Kan Li” (The Conquest of the Li People by the Chief of the West) in *Shang Shu (The Book of Historical Document)*.

<sup>3</sup>“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”,<sup>4</sup> and “‘Tian’ (heaven) is not to be trusted”.<sup>5</sup> They had discovered that “awful though Heaven be, yet it helps the sincere, which can be predicted by the conditions of the people”,<sup>6</sup> and that “man should not use water but should use people as mirrors”.<sup>7</sup> 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)”,<sup>8</sup> 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”<sup>9</sup> 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

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

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“Jun Shi” (Lord Shi) in *Shang Shu (The Book of Historical Document)*.

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“Kang Gao” (The Orders of Duke Zhou to Kang Shu) in *Shang Shu (The Book of Historical Document)*.

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“Jiu Gao” (The Announcement about Drunkenness) in *Shang Shu (The Book of Historical Document)*.

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“Tai Shi” (The Great Declaration) in *Shang Shu (The Book of Historical Document)*.

<sup>9</sup>“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."<sup>10</sup> 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?"<sup>11</sup> 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",<sup>12</sup> and "of all (creatures with their different) natures produced by 'Tian Di' (heaven and earth), human being is the noblest".<sup>13</sup> 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,

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

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

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"Tai Shi" (The Great Declaration) in *Shang Shu* (*The Book of Historical Document*).

<sup>13</sup>"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".<sup>14</sup> 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",<sup>15</sup> and that "the people are the most important in a nation; the state is the next; the sovereign the least important".<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

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,

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

<sup>15</sup>"Tai Shi" (The Great Declaration) in *Mencius*.

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

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

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

disorderly and mysterious”,<sup>19</sup> and had also explicitly stated that “(Man) may stay at a respectful distance from the Supernatural Beings”,<sup>20</sup> 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”.<sup>21</sup> Mozi also held the idea that Supernatural Beings were “like the compasses to the wheelwright and the square to the carpenter”,<sup>22</sup> and he thought that they were the tools used by man.<sup>23</sup> 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.<sup>24</sup>

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”.<sup>25</sup> In view of the fact that “the nature is the principle”, Zhu Xi, a neo-Confucianist in the

<sup>19</sup> “Shu Er” (Transmitting) in *Lun Yu (The Analects)*.

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

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

<sup>22</sup> *Ibid.*

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

<sup>24</sup> “Wang Zhi” (The Royal Regulations) in *Xunzi*.

<sup>25</sup> “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)”.<sup>26</sup>

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”;<sup>27</sup> 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.”<sup>28</sup> 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”.<sup>29</sup> 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.<sup>30</sup>

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”,<sup>31</sup> and that “giving birth to life is the way of ‘Tian Di’ (heaven and earth)”.<sup>32</sup>

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

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

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

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

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

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

<sup>32</sup>“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).<sup>33</sup>

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).”<sup>34</sup> 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.”<sup>35</sup> 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).”<sup>36</sup> 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”.<sup>37</sup>

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’

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

<sup>34</sup>“Li Lou” (Book 1) in *Mencius*.

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

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

<sup>37</sup>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)”.<sup>38</sup>

## 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”<sup>39</sup> 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”.<sup>40</sup> 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

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

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

<sup>40</sup>“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”,<sup>41</sup> 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”<sup>42</sup>; “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”.<sup>43</sup> 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

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

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

<sup>43</sup> 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.<sup>44</sup>

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)".<sup>45</sup> 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)".<sup>46</sup> 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",<sup>47</sup> 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".

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

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

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

<sup>47</sup>*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.<sup>48</sup>

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”<sup>49</sup>; “this oracle is to divine whether this man shall be punished”<sup>50</sup>; “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)”<sup>51</sup>. These oracle inscriptions showed that in order to get the support from the religious authority for the practical legislation and judicial application, the rulers

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

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

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

<sup>51</sup> *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).”<sup>52</sup> 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”<sup>53</sup>; 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”.<sup>54</sup> 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).<sup>55</sup> 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

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

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

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

<sup>55</sup>“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.”<sup>56</sup>

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.”<sup>57</sup> 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”.<sup>58</sup> 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

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

<sup>57</sup>“Wang Zhi” (The Royal Regulations) in *Xunzi*.

<sup>58</sup>“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.<sup>59</sup>

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”.<sup>60</sup> 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”<sup>61</sup> 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”.<sup>62</sup> Learning from the lessons in history, Emperor Taizong of the Tang Dynasty (626 A.D.–649 A.D.) had concluded that “historically, when benevolent

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<sup>59</sup>*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.

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

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

<sup>62</sup>“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.”<sup>63</sup> 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)”.<sup>64</sup> 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”.<sup>65</sup> 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.”<sup>66</sup> 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:

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

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

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

<sup>66</sup>Shen 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.<sup>67</sup>

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".<sup>68</sup> 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".<sup>69</sup> 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".<sup>70</sup> 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".<sup>71</sup>

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,"<sup>72</sup> 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

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

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

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

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

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

<sup>72</sup>"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”,<sup>73</sup> 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.”<sup>74</sup>

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).<sup>75</sup>

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.”<sup>76</sup>

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

<sup>73</sup>“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)*.

<sup>74</sup>“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)*.

<sup>75</sup>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. 136.

<sup>76</sup>“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.”<sup>77</sup> 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.<sup>78</sup> 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

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

<sup>78</sup>“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”.<sup>79</sup> 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,<sup>80</sup> 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

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

<sup>80</sup>“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.<sup>81</sup>

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<sup>81</sup>“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”<sup>82</sup> 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”.<sup>83</sup> 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!”<sup>84</sup> 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.<sup>85</sup>

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

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

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

<sup>84</sup>“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*).

<sup>85</sup>“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.”<sup>86</sup>

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

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<sup>86</sup>“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”,<sup>87</sup> and that “the sages made music in response to ‘Tian’ (heaven), and framed ceremonies to match ‘Di’ (Earth)”.<sup>88</sup> 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)”.<sup>89</sup> 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”,<sup>90</sup> 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

<sup>87</sup>“Wang Zhi” (The Royal Regulations) in *Xunzi*.

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

<sup>89</sup>Ban Gu, *Bai Hu Tong (The Introduction of Bai Hu)*.

<sup>90</sup>“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.



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