



# The Confucianization of Law and the Lenient Punishments in China

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## Abstract

*This article provides a clue on China's criminal policy on lenient punishments in history, including the confucianization of law and the alternatives to punishments in imperial era, the attack on Confucianism and the praise of the legalism in Mao era, and the shifts of criminal policy since reform and opening up, which may shed light on the complexity and prospect of lenient punishments in contemporary China.*

Keywords: Lenient punishments, the Confucianization of law, Chinese criminal policy.

## Introduction

The recent criminal policy advanced by CPC is “balancing severe punishment and leniency”(宽严相济, *kuanyanxiangji*). The new policy means that, on one hand, the public security and judicial organs should continue to crackdown on crimes which endanger national security, organized crime and severe violent crimes. But, on the other hand, some minor offences could be decriminalized and lighter sentences especially non-custodial sentences should be given to perpetrators of less violent crimes and to minors and first offenders (Ni, Wu, & Zhang, 2007). Here we can see the newly espoused “leniency” is mainly embodied at the minor end of punishment spectrum.

Traditionally China's criminal policy has prescribed that changes in the concrete circumstances of social development be reflected in CPC's norms (Tifft, 1985). The recent criminal policy reflects China's latest version of socialist transformation rhetoric, “harmonious society” (和谐社会, *he xie she hui*). Literally, “He” was a name of ancient musical instrument. It was said in *Shi Yue*释乐of *Er Ya*尔雅 (an ancient book containing commentaries on classics, names, etc.) that “the large wooden pipe is called ‘Chao’ while the small one is called ‘He’”. “Xie” meant harmonization. It was said in *Shun Dian*舜典in *Shang Shu*尚书that, “the eight different kinds of musical instruments could be adjusted so that none of them will interfere with each other and the harmonious tune is not violated”. The combined meaning of “He” and “Xie” was the harmonious tune and concordant coordination. “He xie” had often been used to symbolize social harmony, stability and

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order by the ancient thinkers and politicians, and the establishment of harmonious societies was also regarded as the goal of their struggle. Harmony was advocated in the ancient Chinese culture, just as was stated by Confucianists that “the function of rites (礼,li) is to achieve harmony” (J. Zhang, 2013). Specific to the political context of China, “Building harmony society” has risen to rhetorical prominence as a blanket catchphrase that purports to deal head-on with the rapid and dramatic rise in “social contradictions” triggered by unprecedented economic growth and social transformation over the last decade or more. By dint of “building harmony society”, China’s criminal policy has moved away from “strike hard” (yan da, 严打) to “balancing severe punishment with leniency”. Many scholars and practitioners indicated that handling all criminal offenses under the sole approach of “strike hard” was not in the spirit of building a harmonious society. Then criminal justice authorities began to correct the inclination of punish all types of crimes “severely and swiftly” under the “strike hard” criminal policy (Trevaskes, 2010).

From the inception of Chinese criminal policy shift, interest in studying the implication of “leniency” has dramatically increased. Here in the first part, I will provide a clue on China’s criminal policy on lenient punishments in history, including the confucianization of law and the alternatives to punishments in imperial era, the coexistence of reform through labor and re-education through labor since Mao era, and the way to rule of law and the shifts of criminal policy since reform and opening up, which may shed light on the complexity and prospect of lenient punishments in contemporary China. Community correction program, acting as a lenient part of the recent criminal policy, are highlighted in the second part.

## **I. The Lenient Punishments in imperial China**

One of the distinctive characters of Chinese imperial culture is its astonishing consistency throughout two millenniums. From the inception of Han Dynasty (206B.C.-A.D.220) to the late Qing Dynasty (1644-1911), China possessed a highly developed and sophisticated system of penal law, and the legal provisions survived many centuries of development with very little change. At the same time, the penal philosophies that the penal laws reflected also did not change in their essence for two thousand years.

### **1. The Confucianization of Law**

The penal law of imperial China was described by some western academics as legalist in form and predominantly Confucian in spirit, although marked in some respects by a legalist spirit (MacCormack, 1996). While most Chinese scholars describe it as “Legalism with a Confucian façade” (Hui, 2008; D. Zhang, 2011). Obviously, Confucianism and legalism, the two established schools of thought in East Zhou Dynasty (B.C.1046-B.C.771), exerted a major influence on penal philosophy in imperial China. About how to deal with offences, there was endless “tug of war” between them.

Confucius believed that the subjects’ faith in the rule was based on their faith in the rite system (li yuezhi, 礼制). Rite system was codes of ethics and canons of good manners in ancient China. Confucius said, “Rites are the rules of propriety, that furnish the means of determining the relatives, as near and remote; of settling points which may cause suspicion or doubt; of distinguishing where there should be agreement, and where difference; and of making clear what is right and what is wrong” (Wang, 2001). For those who broke the

rules of rites, confucianists founded that it was possible to bring about improvement by moral educational influences. Confucius accepted that there could be extraordinary circumstances in which a ruler had to apply punishments as a last resort for dealing with determined evildoers who cannot be affected by moral instruction. But even here, Confucius stresses that the ruler must exercise great moral influence before punishments imposed. Otherwise, “To execute capital punishment without having instructed the populace, this is called cruelty” (Confucius, 1996). Moreover, as kinship system is system of priority in rite system for confucianists, they also advocate that the ruler should accept the unity of the family and forbear from intruding into the family for matters of law enforcement. A good Confucian family would supervise the behavior of its own members and act on infractions. Punishments should be carried out within the family rather than publicly, and it was the family’s duty to bring about repentance and moral improvement in the offender (Mühlhahn, 2009; J. Zhang, 2013).

Contrarily, the legalists advocated for enacting a uniform law, so that punishments could be determined entirely by objective standards rather than abstract rites. The legalists object to pardons. They argued, “if a small fault were pardoned, crimes would be numerous” (GuanZi, 1996). For legalists, a principle frequently invoked is that, were the smallest offence to be met with severe punishment, in the end the people would cease to offend and recourse to punishment itself would become unnecessary (MacCormack, 1996). This is what the legalist called as “abolish punishments by means of punishments” (Deng, 2011; G. Sun, 1997).

It is owed to the legalists who are credited with establishing the law system that ultimately lead to Qin’s dominance. Qin set up the first unified empire in China in B.C.221, but the empire lasted for only five years. It is the shortest dynasty in China’s history. The politicians and scholars of ensuing Han dynasty attributed the fall of Qin Empire to the despotism of legalism and deviation from Confucian virtue. Han Emperor Wu, who ruled China from B.C.140 to B.C. 87, established Confucianism as official ideology of the state (Cao, 2012; Fu, 1972). But Han and later dynasties all recognized the practical need for the existence of a wide-ranging penal code. They learned from the rise of Qin that to found a centralized empire, the emperor’s subjects must be instructed to behave in certain ways; should they fail to comply, punishments are to be imposed.

Laws and rites were coextensive. Codes in imperial China became the embodiment of the ethical norms of Confucianism. One of the principal functions of penal law was to reinforce the rites by attaching punishments to behaviors that contravened those moral prescriptions deemed most important by Confucian orthodoxy.

## **2. *The power of clan in punishing minor offence***

Since Han dynasty, emperors recognized that Confucian emphasis on family and communal solidarity benefited the society as a whole. If conflicts were solved within family and community in amicable way, it would be rewarding to enhance ties of kinship and reduce magistrates’ caseload<sup>2</sup>. Hence family and community played the role of primary jurisdiction. The clan (*zongzu*, 宗族), which is defined as an exogamous patrilineal group of males descended from a founding ancestor and their families, could adopt rules for the

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<sup>2</sup> Independent courts did not exist in imperial China; the magistrates played the roles of investigators, justice as well as policemen.

personal conducts of members, including rules for minor offences. The clan leaders were chosen by inheritance rather than election. In every clan, several men of integrity and ability were selected by the clan leader to be the judges (Q. Gao & Luo, 2006; Zheng & Ma, 2002).

From the old texts of the clan codes, we find that most of the clan codes forbade members to engage in litigation in the official courts before submitting their cases to the clan leaders, and laid on clan members the duty of avoid quarrels within and conflict without. The clan leaders tended to send their clan codes to magistrates for approval. The magistrates encourage the clan leaders to do that, whereas it was not an obligation. Should there be some in the clan who commit any minor offences, the clan is to be convened in the ancestral hall and deliberate publicly the right and wrong. To be summoned to appear before the whole clan and its leader was a humiliation in itself. These punishments could be recording his offence, fines, depriving his share in the clan income for a period, beating with stick, standing or kneeling at a corner in the clans' gathering, etc. The most severe and effective punishment of all was that of expulsion from the clan. This was to be shut out from the community of the living and of dead members of the clan. If the clan found one of its members guilty of some serious and indictable offence, in addition to the punishment awarded by the clan, a charge against this member should also be laid before the magistrate (Q. Gao & Luo, 2006; Van der Sprenkel, 1966). Bodde (1963) summarized the longstanding custom of unofficial jurisdiction as follow:

“The clan into which he was born, the guild of which he might become a member, the group of gentry elders holding informal sway in his rural community, these and other extra-legal bodies helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members, mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties. The workings of such unofficial agencies were supplemented by complementary procedures on the part of the government itself which, despite their official inspiration, functioned quite separately from the formal legal system. These extra-legal organs and procedures, then, were what the Chinese everyman normally looked to for guidance and sanction, rather than to the formal judicial system per se. Involvement in the latter was popularly regarded as a road to disaster and therefore to be avoided at all cost”.

### ***3. The lenient punishments in penal codes***

Since Han dynasty, the virtues of filial piety, correction by oneself and compassion were endorsed by the rulers and incorporated into the legal code. In addition, the privilege's crimes could be extenuated in hierarchical imperial China. It is intriguing to review the punishments in community and other lenient punishments in imperial China when humane punishments are prevailing in the West. Regarding Tang Code is the earliest surviving code from which we can view an accurate picture of the range of laws in imperial China and the penal codes of following dynasties almost all copied it, here the articles are all from Tang Code.

#### ***3.1. The evolution of the “five punishments” (wuxing, 五刑)***

The codified laws in imperial China were overwhelmingly penal in emphasis. As Maine discoursed in *Ancient Law*, on the whole collections of ancient law are characterized by a feature which broadly distinguishes them from systems of mature

jurisprudence. The proportion of criminal to civil law is exceedingly different. The penal law of ancient communities is not the law of crimes; it's the law of wrongs, or to use the English technical word, of torts. (Maine, 1906) Symbolically, the five punishments is the standard expression used for the system of punishments in ancient China at any time. However, the content of "five punishments" were frequently changed by the rulers (Van der Sprenkel, 1966). As recorded in ancient literatures, before 16<sup>th</sup> century B.C., the primitive tribes of Han nationality (the dominant nationality in China) invited two kinds of punishments, which were beating with stick and exile. Beating with stick was used to educate criminals rather than punish people, while exile meant to expel criminals from the tribe. Then the five punishments from Miao nationality (a minority nationality in China) were introduced. They were "tattooing, cutting off the nose, chopping off the feet, castration, and death penalty" (mo, yi, fei, gong, da pi; 墨,劓,剕,宫,大辟). The Chinese character of "xing" (刑), which means "punishments" in contemporary Chinese language, meant corporal punishments and capital punishments in ancient Chinese language. Despite that exile, penal servitude and fine as punishments also existed in ancient China; they were not regarded as kinds of "xing". Thus in ancient time, the codified punishments were limited to irreversible punishments (Cai, 2005). Except that tattooing was imposed as a shame for offenders, the dominant purposes of other punishments were deterrence and incapacitation. Obviously, the mutilating forms of punishments made it literally impossible for offenders to commit further violations, but the imposition of physical and painful punishments also made it impossible for offenders to do labor again, that were against the rulers' goal of increasing agricultural developments.

In B.C. 167, Emperor Wen (ruling China from B.C. 180 to B.C. 157) in Han dynasty abolished tattooing, cutting off the nose and chopping off the feet and introduced beating with stick as an alternative. He justified his reform based on Confucius benevolence. He said in his edict that, "in ancient time, the ruler just puts a marker on the clothes of criminals, and then the populace deemed it as a shame and would not commit crimes. Nonetheless, the harsh punishment could not prevent increasing crimes nowadays. Here I should take the blame myself. The growing crimes are due to my failure of moral influence. As an emperor, I should promote moral value and social reform, and give criminal the opportunities to reintegrate into society" (Sima, 2011). The punishment reform launched by emperor Wen was remarkable. Even though beating with stick retained its character as corporal punishments, it was less irreversible than tattooing, cutting off the nose and chopping off the feet.

After Sui Dynasty (581-618), the five punishments became "beating with the smaller stick, beating with the larger stick, penal servitude, life exile and death penalty" (chi, zhang, tu, liu, si; 笞,杖,徒,流,死). Since Tang dynasty, the content of five punishments had basically not changed. When comparing The Great Qing Code (the last Code in imperial China) with Tang Code, the parts of five punishments are almost identical. (Johnson, Wuji, & Gelehrter, 1979; Van der Sprenkel, 1966; Zhangsun, 1983) The list of recognized punishments is given in the part of General principles in Tang Code. They are five kinds, prescribed according to a graduated scale of intensity.

#### *The five punishments*

- Beating with the smaller stick: 10, 20, 30, 40 and 50 blows

- Beating with the larger stick: 60, 70, 80, 90 and 100 blows
- Penal servitude: 1, 1.5, 2, 2.5 and 3 years
- Life exile: 2000, 2500 and 3000 *li* (1 *li* was roughly equivalent to 520 meters in Tang dynasty)
- Death penalty: strangulation and decapitation

The abrogation of the corporal punishments was extremely progressive in light of its time. Most European and North American countries did not discard mutilation until 19<sup>th</sup> century when the enlightenment philosophers argued that the corporal punishments were overly severe and irrational, and punishments should be commensurate to the severity of crime. In Western countries, the corporal punishments were denounced partially because the demand of human labor created by industrialization. Approximate 2100 years ago, the corporal punishments were abolished for the similar reason in China. The rulers in imperial China held that the agricultural development provided a thorough grounding for the stability of society in agrarian China. Albeit that, unlike the reasons to abolish corporal punishments in the West, the annulling of corporal punishments had nothing to do with rationality, it was totally out of convenience rather than conscience.

### **3.2. Alternatives to punishments**

Here beating with stick was a widely applicable lenient punishment, yet monetary redemption and giving up official titles were clemency for special groups.

#### **3.2.1. Beating with stick as an alternative**

In imperial China, Beating with stick was seen as a correction measure. Beating with the smaller stick has the same pronunciation with “shame”. In *The Tang Code* we read, Chi 笞 means “to beat”, and is also glossed as meaning chi 耻 “to shame”. It means that if a person commits a small offense the law must discipline him. Therefore beating is used to shame him. The Tang Code quotes a statement of *Hanshu* 汉书: “Beating is employed in teaching persons to behave morally” (Johnson et al., 1979; Zhangsun, 1983).

In Song dynasty, to practice the judicial tenet of “the judicial officials must be the learned men of Confucianism and must be benevolent”, a measure called “beating with board as an alternative to other punishments” (zhezhangfa, 折杖法) was implemented, according to which “those punishable exile shall be exempted from a long journey, those punishable by penal servitude shall be exempted from laborious work, and those punishable by beating with the lesser stick and beating with the larger sticks shall be given fewer strokes of beating”(J. Zhang, 2013). The length, height and width of the standardized board was approximately 115cm, 6cm and 2.7 cm respectively. Exile to 3000 *li*, 2500 *li*, 2000 *li* was to be changed to penal servitude of three years plus 20 blows, penal servitude of two and a half years plus 18 blows, penal servitude of two years plus 17 blows respectively. Penal servitude of three years, two and a half years, two years, a year and a half, a year was to be changed to 20, 18, 17, 15, 13 blows respectively. Beating with the larger stick of 100, 90, 80, 70, 60 blows was to be changed to 20, 18, 17, 15, 13 blows respectively; beating with the lesser stick of 50, 40 and 30, 20 and 10 blows was to be changed to 10, 8, 7 blows respectively(Lv, 2007).

### 3.2.2. Monetary redemption as an alternative

In West Zhou dynasty, if the magistrate found none of the five punishments was appropriate to the crime, then the criminals were able to be exempted from punishments by paying redemption, but the magistrate still need to ascertain the facts of the crime. The monetary redemption as an alternative to punishments existed in every dynasty (Long, 2008). In Tang Code, the amount of money for the redemption of each crime was clearly stipulated. As an alternative to beating with the lesser stick, redemption by payment of copper is, respectively, 1, 2, 3, 4 and 5 Jin (斤) (a Jin is equal to 661g). As an alternative to beating with the larger stick, redemption by payment of copper is, respectively 6, 7, 8, 9 and 10 Jin 斤; As an alternative to penal servitude, redemption by payment of copper is, respectively 20, 30, 40, 50, 60 Jin 斤; As an alternative to exile, redemption by payment of copper is, respectively 80, 90, 100 Jin 斤; As an alternative to death penalty redemption by payment of copper is 120 Jin 斤 (Johnson et al., 1979; Zhangsun, 1983).

### 3.2.3. Giving up official titles as an alternative

The officials could also give up their titles to atone for their crimes. For instance, an official could use his official title<sup>3</sup> of the fifth grade to atone for his “private crime” punishable by penal servitude for two years, or to atone for his “public crime” punishable by penal servitude for three years<sup>4</sup>. If this official had a concurrent post, he should firstly use his higher title to atone for the crime, and then the lower; if the official in a high rank had committed a minor offence, he could keep the position but should pay the redemption; if the official in a lower rank and had committed a serious felony, he should give his title up and pay the redemption and if a person had lost his title because of the atonement, he could be employed as an official again but 1 year later, but with a title one rank lower. In Tang Code, there were stipulations about the officials being dismissed from their posts: “the officials dismissed from their posts can atone for their crimes punishable by penal servitude for two years, the officials dismissed from their (current) posts can atone for their crimes punishable by penal servitude for one year”, and the officials dismissed from their posts could be employed as officials with the titles of one rank lower (J. Zhang, 2013).

## 3.3. *The rationales for leniency*

The lenient practices are just embodiments of Confucianism, especially Confucius’s view on self- correction, humanitarianism and social class.

### 3.3.1. Filial piety

Confucius believed good family breeding naturally lead to good social intercourse. For criminals who were the only person earning the whole family’s bread, penal servitude was usually mitigated to beating with stick. The Article 27 of Tang Code proscribes that, in cases where the household has no other adults, the criminal is exempted from penal servitude and additional beating with the larger stick is substituted. This is due to pity that

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<sup>3</sup> In Tang dynasty, the hierarchies of official titles were 9 grades. There were 29 ranks of civil official titles and 31 ranks of military official titles.

<sup>4</sup> The distinction between private crimes and public crimes was only for officials. Public crimes were mainly duty crimes, such as embezzlement, bribe, dereliction or transgression of duty. Private crimes referred to crimes irrelevant to the criminal’s duty.

the criminal's household may have their food supply cut off, and the further fear that there may be difficulties and poverty within the household. This article is not applicable to cases of robbery and wounding people. If, however, relatives are old or infirm and require service, which means that the paternal grandparents or parents are eighty years of ages or order, or that they are incapacitated and require service, and the household has no other adults, this law on substituting blows with the larger stick is followed (Johnson et al., 1979; Zhangsun, 1983).

This stipulation was derived from a decree of emperor Xiaowen in North Wei dynasty (386-534). He stated that "among 3000 crimes, the severest crime is lack of filial piety". He ordered that "a person who commit a crime punishable by death but whose parents or grandparents are very old and no other children or grandchildren or other relatives to take care of them shall not have to suffer the death penalty but shall instead be permitted to live and take care of his parents or grandparents" (Head & Wang, 2005).

To avoid the opportunistic criminals, a complicated procedure was invented to judge whether the criminals were qualified. The local magistrates were required to bind over the leaders of the criminals' clan as well as the relatives of the victims, then the provincial magistrates need to hear the cases again. The ministry of justice would review the cases for several rounds, especially the serious cases. The final decision could only be given by the emperor. If anyone fabricated the evidences or even took the bribe, stringent punishments would impose on them (J. Wu, 2001).

### 3.3.2. Confession

The *Kang Gao* 康诰 in *Shang Shu* 尚书 laid down an ancient judicial tenet, if someone commissioned a felony, but he was a casual offender or negligent offender or confessed his crime, he could not be executed by capital punishment. This is the acknowledged original discourse on confession in China. In Qin and Han dynasty, the sentence on those who confessed their crime could be commuted. (An & Han, 2004) Later, Confucian confidence in the possibility of human reform underlies the remarkable provision in The Tang Code that a criminal who sincerely confesses his guilt to the authorities before his crime becomes known to them will (with certain specified exceptions) be eligible for a reduction or remission of punishment. (Derk Bodde, 1963) These rules had been passed down by the following dynasties. Article 25 of The Great Qing Code on the perpetrator of an offence who confesses almost copied article 37 of The Tang Code. (Jones, Cheng, & Jiang, 1994)

From article 37 of Tang Code we read, "In all cases where there is confession of crimes that have not yet been discovered the crime will be pardoned. To have faults and not to correct them, this is indeed a fault. Now if persons are able to correct their faults and come and confess their crimes, they will all gain pardon". "Cases where a representative is sent to confess and the person who makes the confession is one who is allowed mutual concealment by the law, or where a person who is allowed mutual concealment makes an accusation to the court are each decided according to the law on the criminal himself confessing. As for cases where a representative is sent to confess; should A commit a crime and send B to represent him and make a confession, B need not be a relative. Sending a representative to confess is the same as confessing oneself." (Johnson et al., 1979; Zhangsun, 1983)



### 3.3.3. Pity for those who are aged, juvenile, or infirm

Inspired by Confucian humanitarianism, special legal provisions concerning weaker members of society who are guilty of crime are prescribed in Code. These are notably women, the aged, the young, and the infirm (D. Bodde, 1973) Article 30 of Tang Code is on those who are aged, juvenile, or disabled.

“According to the Rites of Zhou, those who are seventy years of age or over and those who have not yet shed their milk teeth may not be enslaved. Under the present code, if those between the ages of seventy and seventy-nine, or fifteen and eleven, or disabled, commit a crime punished by life exile or less, redemption by payment of copper will be allowed. This is because of pity for those who are aged, juvenile, or infirm”. “As for exemption from forced labor in a fixed place at the place of exile, there is pity that the aged and the juvenile cannot endure bodily labor. Therefore, they are exempted from forced labor in a fixed place. The law on life exile is not the same for women and men. Even though an aged or juvenile woman commits an offense punished by life exile with added labor, redemption by payment of copper is still allowed by payment of one hundred chin of copper”.

### 3.3.4. The privilege

Members of officialdom were recognized as the privileged groups who deserved petition, reduction of punishments and monetary redemption as an alternative. *Li Ji* 礼记 states “Punishments do not extend up to the great officers”. In Zhou dynasty, when eight types of the privileged groups committed offenses, they were not judged under the penal codes. This practice had been renewed since Han dynasty and written into penal code in Cao Wei dynasty (220-266). In Tang Code, when someone belongs to the eight types of the privilege, even if he commits a capital crime, a memorial is first sent up requesting authorization to deliberate on what has been violated. This is called “the eight deliberations”.

The eight types of the privileged groups are relatives of the emperor, old retainers of the emperor, people of virtue, people of abilities, people of achievements, people in high official positions, diligent people and guests of the empire (Johnson et al., 1979; Zhangsun, 1983).

### 3.4. The limitations of the Confucian leniency

These practices mentioned above have been criticized because they are against fairness and justice. Notably, Ouyang in the North Song Dynasty (960-1127), contradicted the amnesty of Emperor Taizong on prisoners in the Tang Dynasty, since the practice is not legally defensible. He wondered whether Emperor Taizong just angled for the prestige of the “Confucian benevolence”(Ouyang, 1998). Long in the Qing Dynasty also questioned the provisional release. He remarked that amnesty irrelevant to criminal behaviors could only lead to injustice, therefore it was not the literal sense of “Confucian benevolence”(Mao, 1982).

In spite of continuous disputes, for many emperors and other people in power, applying community-based punishments were viewed as an effective way to acquire the reputation of “Confucian benevolence”. “Filial piety is the basic rite” (Zuo, 2011, p. 173). If the criminal was responsible of feeding and housing his family or even being the only support of his family, he could not observe his family filial piety when serving custodial

sentence. Since the Han Dynasty, emperors recognized that the Confucian emphasis on family and communal solidarity benefited society as a whole. “The foundation of the country are families” (Tan, 2003, p. 52). It is impossible for the government to grant pension benefits for the aged and maintenance payments for the young in the whole nation. The aged and the young could not enjoy their life unless the breadwinners in their families were willing to provide for them. Permitting the criminals to temporarily return home if they were the sole breadwinner or during plough and harvest seasons could guarantee the food supply of the criminals’ household. If only every family’s basic living requirement was ensured, could the social stability be achieved. Wu and Liu confirmed that those practice corroborated the fact that rites came before laws in imperial China. The value of filial piety overweighed that of just desert (X. Liu, 2005; S. Wu, 1994).

Some researchers interpreted that these practice were not only conform the doctrine of filial piety, but were also justified by the contention of Confucianists that human nature is malleable. Appreciated by the emperor’s benevolence, the criminal might be conscious of shame and jealous of his privilege, so that they could better reformed and reintegrated within the community(X. Liu, 2005; S. Wu, 1994; J. Zhang, 2005; Zhao & Zhang, 2007; Zhu, 2007). However, as Zhang articulated, even though “humanism was the philosophic foundation of the ancient Chinese legal system and legal culture” (J. Zhang, 2013, p. 38), “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” (J. Zhang, 2013, p. 49). After the plough season, harvest season, spring festival or the death of their parents and grandparents, in most cases, the criminals had to serve their sentences again, whether they had been reclaimed or not. It is recognized that “there were many reasons for the duty-orientation of ancient Chinese law, but the negative influence of Confucian humanism should not be underestimated” (J. Zhang, 2013, p. 49)

## II. Law Nihilism in Mao Era

From 1902 to 1907, “Criminal Law of Qing” was drafted under the leadership of ShenJiabao, partly by the Japanese legal scholar Okada Asatarô. (H. Chen, 2013; Hua, 2013) In the “General Principles” of “Criminal Law of Qing”, the punishments were divided into principal punishments and supplementary punishments. The principal punishments were death penalty, life imprisonment, fixed-term imprisonment, criminal detention and fines. Deprivation of civil rights and confiscation comprised supplementary punishments.(Bourgon, 2003; Lai, 2004) “Criminal Law of Qing” had never be promulgated, but the code itself was an epochal change in China’s legal reforms.

During the Republic China era (1912-1949), six codes (Constitution, Civil Code, Criminal Code, Commercial Code, Civil Procedure Code and Criminal Procedure Code), following the examples of Germany and Japanese legal systems, were implemented national wide. But legal reform could not gain a foothold in the chaotic civil war condition. Mao virulently denounced any theories from Confucianism and Nationality Party. Moreover, after People’s Republic of China (PRC) was founded, he held to the decision that all the old systems, including codes, must be completely rejected. Then a punishment system based on socialist antagonistic contradiction theory was established. Punishment system was viewed as an instrument to facilitate class struggle. To add insult to injury, the legal system mostly in disarray during the Cultural Revolution decade (1966-1977).

**a) *The attack on Confucianism and the praise of the legalism***

During the Cultural Revolution, there was a campaign against “The Four Olds”, which were old thought, old culture, old tradition and old custom. This campaign intensified because the contrast “Old vs. New” resonated so intensely with “Bourgeois vs. Proletariat”. In his “On New Democratism”, Mao wrote, “Those who worship Confucius and advocate reading the classics of Confucianism stand for the old ethics, old rites and old thoughts against the new culture and new thought—as imperialist culture and semi-feudal culture serve imperialism and the feudal class, they should be eliminated. As Confucius embodied the “Olds”, he inevitably became the personification of capital and foreign influence. He could no longer be reverently ignored, for he was no longer inheritable. As the Party's campaign against “The Four Olds” became more energetic, the measures it took against Confucius became more radical. The revolutionaries had to destroy every reminder of Confucius—temples and relics, statues, shrines, monuments, and sacred texts (especially those located in Qu Fu, Confucius's birthplace)—to articulate fully their contempt for the old system's corruptness.(T. Zhang & Schwartz, 1997)

At the same time, the traditionally deplored legalist school of thought was defended to condemn Confucianism. In contrast to the “reactionary” features of Confucianism, Chinese writers in the campaign praised Legalism because its stand for progress and reform, for law and order, for economic and scientific development, and for unification and centralization.(Leng, 1977) Yang Rongguo, a favorite historical scholar in the era of Cultural Revolution, extolled the wisdom of legalism in his essays. He said, Shang Yang opposed the ideas of Confucius which upheld the old slave system. Marx tells us that law is a reflection of economic conditions, and the law reforms of Shang Yang also express exactly this point, Shang Yang made new laws in the interests emerging landlord class. He stressed agriculture of the newly land war and opposed the urban merchants who catered to the slave-owning aristocracy. He believed in the equality of commoners and nobles under the law. Through merit in war, a commoner could rise to the aristocracy. People could become wealthy through the farming of private plots. The legalists were good materialists very progressive for those times. It is a little strange to see arguments concerning the economic benefits of private land ownership and the notion of public good resulting from private wealth being so flaunted in Mao era.(Moody, 1974; R. Yang, 1974)

It is a tradition that political conflicts have been fought with the weapons of historical analogy and historical allusion in China. In order to debate issues that cannot be debated openly or to criticize individuals who cannot be criticized publicly, incidents and figures from China's past have been used as surrogates.(Goldman, 1975) The anti-Confucian campaign was utilized as an instrument to criticize leaders within CPC who had different political views with Mao. Unfortunately, any leaders within CPC and thousands of civilians who had “old thought” could be reformed arbitrarily, and the private property of them could be destroyed and confiscated as they were parts of “The Four Olds”.

**b) *Movements to destroy the whole judicial system in China***

Given the heavy reliance on Party policy rather than law during the Mao era, China lack even the most basic laws such as a comprehensive criminal code, civil law, or contract law.(Peerenboom, 2002) After the founding of PRC, Mao announced the complete abrogation of all the laws and decrees enacted by Nationalist Party. At the same time, Mao

decided to adopt a legal system based on Soviet mode. Before 1957, the Law Committee of People's Government drafted 22 criminal laws.(R. Liu, 2009) During this period, several specific criminal regulation was published, such as "Acts for Punishing counterrevolution", "Acts for Punishing Corruption" and etc.

However, from 1957 to 1966, Mao launched "Rectification Movements", "Anti-rightist Movements", "Great Leap Forward" and "Socialist Education Movements". Legal system was neglected and abused. At the beginning of 1957, the 22<sup>nd</sup> draft of Criminal Law was passed by NPC and would be put into practice on a trial basis. However, in the following "Anti-rightist Movements", most noted criminal scholars fell under "rightists", and some basic notions in Criminal Law, such as presumption of innocence and constitutive elements of a crime, were stigmatized as "bourgeois", since they were learned from western criminal laws. Then the implementation of the 22<sup>nd</sup> draft of Criminal Law was suspended. In 1959, Ministry of Justice were dismantled.

In 1962, Mao said that "Now China is a lawless wilderness, we need to make civil law and criminal law". Work on a criminal Code was resumed. In 1963, the 33th draft of Criminal Law was approved by Mao, but it was never tabled and discussed by NPC. Later "Four Clean-Ups Movements" began in 1964. Subsequently, "Cultural Revolution" were sponsored in 1966. (M. Gao, 2011) Mao treated the public security organs, the courts and the procuratorates as the products of bourgeoisie dictatorship and advocated the movements of "smashing the public security organs, the courts and the procuratorates". Consequently, legal system was decimated, the public security organs were controlled by armies, the courts became empty shells and the procuratorates were abolished thoroughly. (S. Zhang, 2009) Mao said that "Without movements, contradictions within the people could never be solved. We could not only rely on laws which are sets of dead rules. Compared with laws, criticism of the masses and class struggles in conferences are much more effective". (G. Zhang, 2011) He assumed that laws were easily obsoleted in China's revolutionary period, if only guided by regularly updated policies made by himself, those revolutionary movements could be successful. He frequently quoted Lenin as saying: "The power of proletarian dictatorship could not restricted by laws".(S. Yang, 1997) Yet for all that, Mao also approved for movements to repeal prisons and RTL institutions. Mao said "Putting criminals in the masses is better than restraining them in prisons". (X. Sun, 1994) Whereas in Cultural Revolution era, not only the criminals, but also the masses could be injured and even killed by "the masses" in brutal ways.

### **III. The Current Criminal Policy of "Balancing Severe Punishment with Leniency" and its Traditional Roots**

Deng and later leaders of CPC are not favorable to denunciation of anything Confucian. They are more readily receptive to the suggestion of many scholars that some traditional cultural elements could be "creatively transformed" into rationales of new policy, and the new policy with cultural identity would be more acceptable for the public (Lin, 2011; G. Yang, 1995). In 2007, the 17th National Congress of CPC put forward a conception named "socialist core value system" (she hui zhu yi he xin jia zhi ti xi, 社会主义核心价值观体系), "carrying forward national spirit" became a part of "socialist core value system". Correspondingly, the value of Confucian humanitarianism carry weight again. For example, two paragraphs were added in Amendment VIII of Criminal Law, "A person attaining the age of 75 may be given a lighter or mitigated penalty if he commits an intentional crime; or shall be given a lighter or mitigated penalty if he

commits a negligent crime.” “Death penalty shall not be given to a person attaining the age of 75 at the time of trial, unless he has caused the death of another person by especially cruel means.” In addition, Article 72 is amended as “Where a convict sentenced to criminal detention or imprisonment of not more than 3 years meets the following conditions, a suspense of sentence may be announced, and a suspense of sentence shall be announced if he is under the age of 18, is pregnant or attains the age of 75”. These articles on liberal treatments towards the aged criminals are deemed as a reflex of national spirit in China’s traditional legal system (Li, 2011; B. Zhao & Yuan, 2010).

The criminal policy of “balancing severe punishment and leniency” is also rooted in China’s legal tradition. Influenced by Confucianism and legalism, “balancing severe punishment and leniency” was a prevailing criminal policy in imperial China despite nuanced difference in wording. In Zhao Gong 昭公 of Zuo Zhuan 左传, Confucius said, “If punishments are lenient, the populaces will neglect punishments, then the ruler need to correct the populaces with severe punishments; if punishments are severe, the populace will be inflicted, then the ruler need to implement lenient punishments. Leniency is used to adjust severity, and severity is used to adjust leniency, thus harmony could be achieved”. This is the derivation of “leniency be complementary to the severe punishments” (宽猛相济, kuan meng xiang ji). In fact, CPC’s criminal policy of “balancing severe punishment and leniency” also has its origin in the second Sino-Japanese war time (1937-1945). In On Policy (论政策, lun zheng ce), Mao proposed the criminal policy of “combining suppression and leniency” (zhen ya yu kuan da xiang jie he, 镇压与宽大相结合). He said suppression should be imposed on traitors and anti-Communist elements, but vacillating elements and reluctant followers among the reactionaries should be dealt with leniently. In 1950, the report of the 3rd Plenary Session of the 7th Central Committee of CPC suggested that the chief criminals shall be punished without fail, those who are accomplices under duress shall go unpunished and those who perform deeds of merit shall be rewarded. From then on, this criminal policy appeared repeatedly in CPC’s documents. Then the wording of “combining suppression with leniency” changed subtly into “combining punishment with leniency” (cheng ban yu kuan da xiang jie he, 惩办与宽大相结合) in the report of the 8th national congress of CPC in 1956 (Ma, 2008). “combining punishment with leniency” as a principle was also enshrined in Article 1 of the Criminal Law in 1979, whereas the following criminal policy of “strike hard” made it void to some extent. Since the criminal policy of “leniency” was re-emphasized by the CPC, harsh punishments for minor offences encouraged by the ethos of heavy penaltyism have been tempered.

## Conclusion

Historically, it is recognized that China’s criminal policy is a combination of severe punishment and leniency in all likelihood. The lenient aspect of criminal policy has become a driving force for developing human penal ideas and approaches. In imperial China, the main impetus came from Confucian humanism. Confucius accepted in principle that moral educational instruction could enable criminals without suffering from evil intention again, thus he stressed that the rulers must exercise great moral influence before punishments imposed. As he also emphasized on communal solidarity, family

played a vital role in bringing about moral improvement in offenders. In addition, the imperial penal codes were filled with compassion on venerable members in society.

Confucius was explicit denigrated in Mao era. After the end of Cultural Revolution, the attacks on Confucius and his followers were also terminated. Recently, the popularity of Confucianism keep rising. The criminal policy of treating minor cases leniently is part of the strategy to re-embrace Confucian humanitarianism. However, it is recognized that the leniency in imperial China was not an individual right, but came from the grace of the rulers. The individual was not provided with enough rights to fight against the rulers if they failed to follow the clauses in the criminal codes. The tension between state power and individual rights is clear and present in today's China. The inadequate constraints on state power still lead to concerns that the rights set forth in the revised laws might not be fully implemented, and new forms of punishment could be established at any time. Recently, a famous actor was detained for a half year through an administrative coercive measure called "House and Education" (Shou rong jiao yu, 收容教育) because he engaged in the solicitation of prostitution. (Y. Chen, 2014; Shen, 2014). This case was highlighted by the media and legal professionals because it signals that some individuals, who formerly would have been sentenced to the RTL, are being held through other forms of detention. Constructing a more humane and lenient punishment system does not only require more clauses on individual rights and freedoms in the criminal laws and criminal procedure laws, but also stricter constraints on state power. If the police still have the discretion to detain citizens for several months, it will be difficult to fully implement the lenient punishments set forth in China's Criminal Law.

## References

- An, B., & Han, J. (2004). Zhong guo gu dai zi shou zhi du jian jie. [Introduction on confession system in ancient China]. *Journal of Chinese People's Public Security University*, (4), 112-117.
- Bodde, D. (1963). Basic concepts of Chinese law: The genesis and evolution of legal thought in traditional China. *Proceedings of the American Philosophical Society*, 375-398.
- Bodde, D. (1973). Age, youth, and infirmity in law of Ching China. *University of Pennsylvania Law Review*, 121(3), 437-470. doi: 10.2307/3311299
- Bourgon, J. (2003). Abolishing 'cruel punishments': a reappraisal of the Chinese roots and Long-term efficiency of the xinzheng legal reforms. *Modern Asian Studies*, 37(4), 851-862.
- Cai, Q. (2005). *Zhong Guo Xing Fa Shi*. Beijing: China's Legal System Press.
- Cao, D. (2012). *Zhong Guo Zheng Zhi Si Xiang Shi*. Beijing: Senior Education Press.
- Chen, H. (2013). Bai nian hui mou shui yu gong - ji qing mo xiu lv da chen shen jiaben yu "da qing xin xing lv". Retrieved on 15<sup>th</sup> February 2015 from <http://www.lawinnovation.com/html/xwzs/182892.shtml>
- Chen, Y. (2014). Huang Haibo bei shou rong jiao yu liu ge yue wei shen me shi cuo wu de. Retrieved on 15<sup>th</sup> February 2015 from <http://wqcyx.zfwlxt.com/RDGZ/20140603/195706.html>
- Confucius. (1996). Lun Yu. In C. C. C. Agency (Ed.), *The Collection of Chinese Classics*. Beijing: Zhonghua Book Company.
- Deng, J. (2011). *Zhong Guo Fa Zhi Shi*. Beijing: Peking University Press.
- Fu, L. (1972). *The History of China*. Taipei: China Publisher Company.

- Gao, M. (2011). Jian zheng xin zhong guo di yi bu xing fa dan sheng de jian xin. Retrieved on 15<sup>th</sup> February 2015 from <http://history.people.com.cn/GB/198819/218133/16660786.html>
- Gao, Q., & Luo, C. (2006). Zhong guo gu dai she hui zong zu shen pan zhi du chu tan. [Research on patriarchal justice system in ancient chinese society]. *Journal of Huazhong Normal University ( Humanities and Social Sciences)*, 45(1), 84-89.
- Goldman, M. (1975). China's Anti-Confucian Campaign, 1973-74. *The China Quarterly*, 63, 435-462.
- GuanZi. (1996). Guan Zi. In C. C. C. Angency (Ed.), *Chinese Classics Collection*. Beijing: Zhonghua Book Company.
- Head, J. W., & Wang, Y. (2005). *Law codes in dynastic China: A synopsis of Chinese legal history in the thirty centuries from Zhou to Qing*: Carolina Academic Pr.
- Hua, S. (2013). Shen Jiaben and the Late Qing Legal Reform (1901-1911). *East Asia*, 30(2), 121-138.
- Hui, V. T.-b. (2008, Mar/Apr 2008). How China Was Ruled. *The American Interest*, 3, 53-65.
- Johnson, W. S., Wuji, C., & Gelehrter, C. (1979). *The T'ang Code* (Vol. 1): Princeton University Press Princeton, NJ.
- Jones, W. C., Cheng, T., & Jiang, Y. (1994). *The Great Qing Code*: Clarendon Press Oxford.
- Lai, Z. (2004). Shen Jianben yu qing mo xing fa qing huan hua. Retrieved on 15<sup>th</sup> February 2015 from [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleId=67095](http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=67095)
- Leng, S.-C. (1977). The role of law in the People's Republic of China as reflecting Mao Tse-Tung's influence. *Journal of Criminal Law and Criminology*, 356-373.
- Liu, R. (2009). Zhong guo xing fa xue liu shi nian. [Criminal law of China from 1949 to 2009]. *Journal of Zhejiang University( Humanities and Social Sciences)*(12), 10-21.
- Liu, X. (2005). Lun cun liu yang qin zhi du zai feng jian she hui cun zai de he li xing. [The justifiability of the system of permitting culprit to support lineal elders in the feudal society of China]. *Contemporary Law Review*, 19(3), 133-138.
- Long, J. (2008). Lun zhong guo li shi shang de shu xing zhi du. [On monetary redemption in Chinese history]. *Shandong Social Sciences*, 159(11), 142-144.
- Lv, Z. (2007). Zhe zhang fa dui song dai xing fa zhong xing hua de ying xiang. [The impact of "beating with board as an alternative to other punishments" on heavy penaltyism in Song dynasty]. *Modern Law Sciences*, 29(5), 175-179.
- MacCormack, G. (1996). *The spirit of traditional Chinese law*: University of Georgia Press.
- Maine, H. S. (1906). *Ancient Law*. New York: Henry Holt and Co.
- Mao, H. (1982). Long Qirui he "Zong Qiu Lun". [Long Qirui and "Zong Qiu Lun"]. *Law Science Magazine*, (2), 34-37.
- Moody, P. R. (1974). The new anti-Confucian campaign in China: the first round. *Asian Survey*, 307-324.
- Mühlhahn, K. (2009). *Criminal justice in China: A history*: Harvard University Press.
- Ni, S., Wu, C., & Zhang, M. (2007). China rejects "strike hard" anti-crime policy for more balanced approach. Retrieved on 15<sup>th</sup> February 2015 from [http://news.xinhuanet.com/english/2007-03/14/content\\_5846317.htm](http://news.xinhuanet.com/english/2007-03/14/content_5846317.htm)

- Ouyang, X. (1998). Zong qiu lun In H. Gao (Ed.), *Tang Song Ba Da Jia Wen Chao Jiao Zhu Ji Ping* (Vol. 42, pp. 1995-1999). Xian: Sanqin Press.
- Peerenboom, R. (2002). *China's long march toward rule of law*: Cambridge University Press.
- Shen, B. (2014). Gai ge shou rong jiao yu bu shi wei Huang Haibo han yuan, *Oriental Morning Post*.
- Sima, G. (2011). *Zi Zhi Tong Jian*. Beijing: Central Compilation and Translation Press.
- Sun, G. (1997) *Zhong Guo Fa Xue Da Ci Dian* (Vol. Jurisprudence, pp. 247). Beijing: China's Procuratorate Press.
- Sun, X. (1994). *Zhong guo lao dong gai zao zhi du de li lun yu shi jian: li shi yu xian shi*. Beijing: China's University of Political Science and Law Press.
- Tan, G. (2003). *Si Shu Wu Jing*. Beijing: Xiyuan Press.
- Tift, L. L. (1985). Reflections on capital punishment and the "campaign against crime" in the People's Republic of China. *Justice Quarterly* 2(1), 127-137.
- Trevaskes, S. (2010). The shifting sands of punishment in China in the era of "Harmonious Society". *Law & Policy*, 32(3), 332-361.
- Van der Sprenkel, S. (1966). *Legal institutions in Manchu China: a sociological analysis*: Athlone press.
- Wang, W. (2001). *Li Ji yi jie*. Beijing: Zhonghua Book Company.
- Wu, J. (2001). Qing dai de fan zui cun liu yang qin. [The system of "criminals stay at home to look after their parents and grandparents" in Qing Dynasty]. *Chinese Journal of Law* (5), 126-136.
- Wu, S. (1994). Zhong guo chuan tong fa lv wen hua de jia zhi ji chu. [The basic value of Chinese traditional legal culture]. *Science of Law*, 54(2), 58-62.
- Yang, R. (1974). *Lun fa jia he ru fa liang jia de dou zheng*. Beijing: People Press.
- Yang, S. (1997). *Zhong hua ren min gong he guo guo hui zhi bian qian: cong mao ze dong dao deng xiao ping*. Gaoxiong: Gaoxiong Fuwen Press.
- Zhang, D. (2011). Jia zuo ben wei shi jiao xia de fa lv ru jia hua. [On the confucianization of law in a clan-oriented view]. *Journal of Comparative Law*, (3), 12-23.
- Zhang, G. (2011). *Zheng zhi zhi du lun li : li shi fa zhan yu zhong guo de she hui shi jian*. Beijing: China's Social Science Press.
- Zhang, J. (2005). Ren ben zhu yi-zhong hua fa xi te dian zhi yi. [Humanism-a kind of characteristic of Chinese legal genealogy]. *Hebei Law Science*, 23(9), 84-92.
- Zhang, J. (2013). *The Tradition and Modern Transition of Chinese Law*: Springer.
- Zhang, S. (2009). *Tu wen gong he guo nian lun: 1960-1969* (Vol. 2). Shijiazhuang: Hebei's People Press.
- Zhang, T., & Schwartz, B. (1997). Confucius and the cultural revolution: a study in collective memory. *International Journal of Politics, Culture, and Society*, 11(2), 189-212.
- Zhangsun, W. (1983). *Tang Lv Shu Yi*. Beijing: Zhonghua Book Company.
- Zhao, Y., & Zhang, W. (2007). Zhong guo gu dai min qiu zhi du kao lue. [The study on compassion for prisoners in ancient China]. *Criminal Science*, (2), 108-113.
- Zheng, D., & Ma, J. (2002). Lun zong zu zhi du yu zhong guo chuan tong fa lv wen hua [On clan system and Chinese traditional legal culture]. *Jurist*(2), 19-30.
- Zhu, X. (2007). Zhong guo chuan tong fa de ren lun jing shen yu he xie she hui ren ben fa lv guan de gou jian. [The emphasis on human relation in ancient Chinese law and the construction of humanitarian harmonious society]. *Social Science Research*, (5), 77-81.
- Zuo, Q. (2011). *Zuo zhuan zheng zong* (Vol. 6). Beijing: Huaxia Publishing House.