懷念先賢 品味經典

——重讀瞿同祖先生的《中國法律與中國社會》

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十月初,瞿同祖先生仙逝,學術界同聲悼念,法律史學科更以爲失去一泰斗級人物。董彥斌先生囑我寫一篇紀念的文字,出於對瞿同祖先生的崇敬,本人也沒有過多推辭。但應承下來後,心中也有一些疑惑,踟躕旬月未得思路。

大凡懷念性文章,作者大都與逝者有較深的淵源,或爲親友,或爲弟子門人。本人雖可稱瞿同祖先生的晚輩後學,但與瞿先生並沒有直接的淵源,也沒有什麽私人的交往。彥斌先生把這個命題文章交我,大概是因爲十年前,本人曾與蘇亦工教授一同訪談過瞿同祖先生,並寫了一篇訪談錄,發表在《法律史論集》第一捲上。

瞿同祖先生的道德文章,學界已有公論;其學術生平,也早有較多的論述。本人搜尋關於先生的訪談文章數篇,翻看一過,深感其所言所述已經細緻詳盡,實在令人再難置喙。思之再三,還是以爲重讀瞿同祖先生的著述可能是對先生最大的敬意。故再讀了《中國法律與中國社會》一書,細閱之下,也算是有些許心得,不揣粗陋,拿出來與大家分享,也算是對瞿同祖先生的一種紀念吧。

瞿同祖先生與法學界結緣,特別爲法律史界所推崇,蓋源於先生之《中國法律與中國社會》,此書已堪爲法史經典之作。瞿同祖先生治學嚴謹,著此書時,恰在抗戰時期,其隨學校輾轉到云南,「授課之餘,即伏案寫讀,敵機不時來襲,有警輒匆匆挾稿而走。」這部著作雖作於戰亂之際,但並非隨意而行之作。論據明確,引述甚多,引證極爲廣博。中外著作,正史、筆記、文獻資料所引者數以百計,且對佐證觀點的史料處置很細緻。同時,史料的運用自如而有節。史料充分而不混雜,以史料論證史實,以史料說明問題。在該書中,瞿同祖先生採用了大而小之,小而大之的研究方法。對於中國傳統法律的精神本質這個大問題,並沒有大張其言,僅僅歸納出三條五款,而是用許許多多的細微論證綜合得出結論;而對於親屬、婚姻、服制、復仇、貴賤等「小問題」,也沒有把它們作爲微細的方面處理,而是統籌於中國傳統法律的本質這個大問題中。

瞿同祖先生著此書時,距帝制時代未遠,其對舊時秩序、制度有較多切身體會,自比今日的研究者多一份心得。加之先生出身世家,於社會體制變遷感受尤深。這部著作實際上只着重研究了一個問題:中國法律的儒家化特質。但這個問題的解決,也提出了一個更爲形而上的問題:中國古代傳統法律的精神何在?在瞿同祖先生的這部著作中,對這個問題作了深入的研究。他開宗明義地指出「中國古代法律的主要特徵表現在家族主義和階級概念上。二者是儒家意識形態的核心和中國社會的基礎,也是中國法律所着重維護的制度和社會秩序」。而中國古代法律這種本質特徵的形成,蓋因於儒家思想對中國法律的改造,從實際運作上而言,是禮法融合的結果。

成文法律在中國,起源之時與其他文明的法律並無不同,爲公平划一之強制性社會規範,其爲法家所倡導和建立。而與此同時,儒家對社會秩序的建立有其不同的主張,其認爲採用禮這種等級制社會規範對治國平天下更爲有效。禮與法二者根本不同,也未有調和的餘地。秦朝二世而亡,所存不過區區十四載。這個歷史教訓使後繼的漢朝統治者雖踵襲其制,但心有耿耿。終於到儒術獲獨尊地位之時,儒家人物掌握了政治權力。此時,完全廢除法律而實行禮治已不可行,故採用以禮入法的方式對法律進行了徹底的改造。儒法兩宗,其所選擇的社會規範,本來根本不同。漢代以降,儒家已非純儒,而是雜匯了其他流派的思想。以禮入法,實際上是借法家之源而注儒家之流,以法衛禮,以法崇儒,以法尊士。賦法律以禮的功用。如此,古代中國的法律成爲獨樹一幟的法律,成爲世界上最不像法律的法律。但法律終歸是法律,法律爲社會所必須,也不得不爲儒家所接受。瞿同祖先生提出了三個特別重要的論點:其一,漢代以後,儒家實際上已經不是以往的儒家,所謂儒家只是讀書人的代名詞。其二,國家需要法律已成爲客觀的事實,不容懷疑,不容辯論,法律的需要與價值的問題自不存在。其三,儒家成爲實際上的執政者。「聽訟成爲做官人不可迴避的責任,成爲考核成績之一以後,讀書人自不會再反對聽訟,反對法治;而高唱德治、人治迂論,事實上是不允許的」。瞿同祖先生這種清晰而明確的論述,可以使我們比較清楚地知道禮教下的中國法律的本質。即中國古代傳統法律經過發展演進,終成爲儒家化的法律,其基本特徵爲家族主義和等級制。

書中的許多觀點,可以說是對中國法律與中國社會的根本性認識,可以成爲後代研究者的理論基礎。如

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「從家法與國法，家族秩序與社會秩序的聯繫中，我們可以說家族實爲政治、法律的單位，政治、法律組織只是這些單位的組合而已。這是家族本位政治法律的基礎，也是齊家治國一套理論的基礎，每一家族能維持其單位內之秩序而對國家負責，整個社會的秩序自可維持。」再如，中國古代「法律在維持家族倫常上既和倫理打成一片，以倫理爲立法的根據，所以關於親屬間相侵犯的規定是完全以服制上親疏尊卑之序爲根據的」。這些觀點現在已經爲學術界廣泛接受，成爲研究中國古代法律史的基礎性論據。

《中國法律與中國社會》中還有許多精深的見解，值得研究者細心體會，如他在論述父母對子女的生殺權時，將權力和意志加以區別，極有說服力。其言：「我們可以看出法律對於父權的傾向，父親對子女的生殺權在法律制度發展到某種程度時，雖被法律機構撤銷，但很明顯地，卻仍然保留有生殺的意志。換言之，國家所收回的只是生殺的權力，但堅持的也只是這一點，對於父母的生殺意志卻並未否認，只是要求代爲執行而已。」筆者以爲，這是一個很重要的學術見解，很深刻地說明了中國古代法律對父權的保護，也說明了法律中權力與意志的內在關係。

這樣的深刻見解在書中可以說是比比皆是，以下再略述一二，與大家共同欣賞，共同研究。

在論及關於父母呈送發遣問題時，作者寫道：「我們從呈送發遣的事例上可以清楚地看出祖父母父母對於子孫身體自由的決定權力。他們不但可以行使親權，並且可以借法律的力量，永遠剝奪其自由，放逐於邊遠。子孫被排斥於家族團體之外，同時也就被排斥於廣大的社會之外——包括邊境以外的全部中國，不能立足於社會。……更重要的，我們從中也可以看出父母在這方面的絕對決定權，剝奪自由與否的決定，執行一部分以後，免除其罪刑與否，全取決於他們的意志。法律只爲他們定一範圍及具體的辦法，並代爲執行而已，不啻爲受委託的決定機構。從形式上看，判決的是法司，從實質上看，決定的還是向法司委託的父母，法律上早已承認他們的親權。」這種論述和分析，看似平實，實際上很耐人尋味，給人以極大的思考空間。

《中國法律與中國社會》中還有些問題已經提出，但出於研究角度、研究方法、研究目的的原因，作者並沒有把它們引向深入，而有待以後的研究者加以解決。比如，書中寫道：中國古代法律，在有些情況下，「所重的是倫紀問題而不是是非問題」。我們知道，在家族法方面，這種論述是正確的。但在其他的法律調整範圍內，這種論述是不是也是準確的呢？在西方的法律制度中，是不是也有這種情況出現，在西方的法律中，有沒有倫紀的問題？如果有，在多大程度上表現爲是非問題，在多大程度上表現爲倫紀問題？或倫紀問題以什麼樣的形式表現出來？這些都是有價值的研究課題。

在「親屬復仇」一節中，作者顯示了社會學的深厚功底，他運用比較研究的方法，對世界範圍內其他社會的復仇習慣進行了清楚明瞭的敘述，極有說服力。同時，他也通過比較，提出了自己獨到的觀點，如「其他社會復仇的責任不外乎親屬，中國則不止於此，這是值得注意的一點，也是中國復仇習慣中的一個特點」。這種社會學的功力還體現於書中許多地方，如在書中，設有「巫術與宗教」專章，特別顯示了作者的社會學研究身份，這也是法律史界很少有人研究的領域。其中在「福報」一節中，瞿同祖先生顯示了很敏銳的研究洞察力，其關於由於「福報」思想而在司法過程中官吏出入人罪的論述很有說服力。

瞿同祖先生認爲，中國於復仇，

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「法律雖不承認復仇的權力，卻已予以特殊考慮，爲一兼顧禮法而具有彈性的辦法」。由於中國法律的儒家化，中國法律成爲兩種社會規範的結合體，其中必有矛盾之處，而關於復仇的理論和實踐，就體現了這種矛盾性，所謂「倫理的概念和法律的責任常處於矛盾的地位」。「法律上原無復仇的規定，復仇而得減免，原是法外施仁，爲例外，可是一般人，尤其是讀書人，卻以例外爲正，頗加讚嘆，反以例內爲非，大加抨擊，認爲防阻教化，不足爲訓。這可看出禮與律之衝突，法律與人情之衝突。」筆者認爲，這堪稱結論性的論述。爲什麼這種衝突基本上會以禮的特殊性破壞法的普遍性呢？這是因爲中國社會的基礎是儒家社會，禮的社會基礎更爲牢固，法律雖已向禮無限靠近，但終歸有其本質上的限制，不能等同於禮。法還是法，禮還是禮。法可以「一準乎禮」，但不能「一概乎禮」。所以，法的邊界永遠不是牢固的，它常常會被突破。近代中國的法制變革，變法者想用簡單的立法手段將禮的內容驅除於法律之外，這在一定程度上獲得了成功，但當他們想把法的邊界變成牢不可破的城牆時，終於受到頑強的反擊。只要中國社會基礎還是禮教的，這種邊界就不能是牢固的。

瞿同祖先生很敏銳地提出了許多問題，甚至有些是法律史界至今還沒有特別關注的，至少是沒有系統加以論述的，比如社會上的公然違法的情況，實際上是一個很有價值、很有趣味的課題。如同姓互婚的問題，兄弟收娶的問題，兼祧兩宗的問題。同姓婚本爲律法所禁止，同姓結婚應被宣佈無效，但如果法律這樣處理，會引發一系列的禮法問題，如尊卑問題，名分問題，而這些問題實際上又直接構成法律問題；兄死弟娶寡嫂，弟亡兄收弟婦，不僅僅是違法的問題，而是按律當絞，於法合死的重大犯罪問題，但社會上由於社會條件的限制，這種情況往往出現，而且並非屢禁不絕，而是沒有成爲社會禁忌。只有出現其他形式的訴訟案件問題時，其才成爲一個嚴重的法律問題。這實際上說明法律與社會現實不適用。兼祧兩宗，娶得兩婦，在法律上是不允許的，法律上只承認一夫一妻，但民間認爲，兩宗必有兩婦，其地位是相同的。故在這種情況下，或爲重婚，或認定其中一妻爲妾，無論何種情況，都會引發社會問題。爲什麼會出現這麼多社會上公然違法的問題呢？其中重要的原因在於禮法的不相適應。對古代中國而言，禮是亙古不變的，把這種不變的禮直接轉變爲法律的方式，這種不適應在所難免。由於禮律的融合，本來分野明確的兩種社會規範被納入法律之中，特權從法外轉移到法內。庶民可得法外施恩，而貴族官僚則可享受法內之恩。所以，以禮破律，以例破律的現象層出不窮。也可以說，例的出現，在很大程度上也是禮律不相融合的一種後果。在例中，究竟有多少是由於禮例衝突而形成的，可能也是一個很有趣味的課題。瞿同祖先生對這些問題都做了初步的研究，但由於該書的核心問題不在此，故沒有能夠深入，這裡提出，也希望有研究者能夠把這個問題的研究深入下去。

最後，也提出閱讀這部著作時，自我感覺存在的一些小問題。從法律史專業的角度看，這部著作對史料的運用缺少一個明確的說明，在具體問題跨時代引用史料時，少了一些具體性沿革情況的考證。在敘事結構上也有不甚合理的地方，如依筆者淺見，最後一章「法家與儒家」應放在開始部分，使讀者有一些基本認識。另外，感覺關於階級部分沒有家族部分厚實可靠。以上只是筆者略說心得，而非責備賢者之意。

瞿同祖先生撰述《中國法律與中國社會》一書，初衷有三：其一，仰慕前輩大師之著述，而思仿而效之，欲以自己的作品與前輩對話，與大師比肩；其言：「少時讀 H.Maine 之 Ancient Law 及 Early Law and Custom 等書，輒嘆其淵博精深，頗有效顰之志」。其二，解決一個實際的問題。想當年訪問先生時，其最爲強調的就是，研究者必須有問題、有心得，方可從事研究。沒有問題要探討，只是爲了所謂「成果」，爲了實際的需要，所做工作難有內容；而研究每一心得，沒有自己的獨立思考、獨立見解，其所述所作歸根到底也只是學舌效顰。其三，爲此一學科的發展貢獻一些力量。先生言：「若因拙作而拋磚引玉，海內賢達起而正之，並爲新作，他日中國法律之研究，得與西哲東西媲美，則區區介紹此新觀點與方法之目的，亦幸而達矣」。

可以說，瞿同祖先生的這三個願望均已實現。先生憑其卓越的工作，傳世的作品終獲推崇和讚譽，其作品也進入經典之列。如果說，自此書問世以來 60 餘年未有可匹敵者，也似非諛辭。而這部傳世之作，從根本上解決了一個重大的學術問題，即中國傳統法律的儒家化問題。其所言中國傳統法律制度的家族主義與等級制兩特徵，觀點鮮明，爲學界廣泛接受；最後，先生所謂「拋磚引玉」之說，也全爲謙辭。社會在發展，思想在更新，學術的方式方法在不斷進步，學術手段在不斷多元化，學術的進步也是必然。經典的學術著作並不是永遠不可超越的，而是在於它能夠不斷地啟迪後人，激勵來者。從這個意義上，瞿同祖先生完全可以笑慰平生，他的著作堪稱一座學術的里程碑，指引後人，標示着學術進益的方向。 法

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Commemoration of A Sage and Study of A Classic Work

– *Review of The Chinese Law and Chinese Culture Written by Mr. Qu Tongzu*

By Gao Xuchen

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In early October 2008, Mr. Qu Tongzu passed away. The academic community mourned his death in unison. The circles of legal history studies all deeply regretted the loss of a leading scholar of the times. At this point, Mr. Dong Yanbin – Executive Editor-in-Chief of *China Law* magazine – asked me to write a commemorative article. At the reverence of Mr. Qu Tongzu, I could not insist on declining the request. But once I agreed, I felt somewhat uncertain, and hesitated for a dozen days before I could get the main idea on my writing.

Generally speaking, for commemorative articles, they are most written by persons having relatively deep-rooted original ties with the deceased, by relatives or by disciples. For me, though I can be called a scholar of a younger generation to Mr. Qu, I had neither direct original ties with Mr. Qu nor any kind of personal relations with him. Mr. Dong Yanbin asked me to write this article with an assigned topic, perhaps because Professor Su Yigong and I jointly conducted an interview on Mr. Qu Tongzu and had it published on Volume I of *Analects of Legal History* ten years ago.

As far as the articles on ethics written by Mr. Qu Tongzu are concerned, they have been universally affirmed by the academic circles. Besides, there have been relatively many positive comments on his academic level for a pretty long period of time. In preparation for writing this article, I found several interviews on Mr. Qu. After reading through them, I could profoundly see that both the statements of Mr. Qu and the comments made in the interviews had already been elaborate and specific enough, and that it would be difficult for anyone to get involved by making additional comments. After thinking it over and over again, I became determined that a review of works written by Mr. Qu Tongzu could a most rightful way of paying tribute to this great master. Therefore, I spent time reviewing the book *The Chinese Law and Chinese Society* written by him. I can say that, when carefully reading this book again, I was able to learn something new and get some new ideas. I hereby venture to have everyone share what I have learned and got anew in the review of the book, which I think can be a form of commemoration of Mr. Qu Tongzu.

Mr. Qu Tongzu's integration into the legal community, particularly the legal community's reverence to him, generally stemmed from the publication of his book *The Chinese Law and Chinese Society* by the Commercial Press in 1947. This book deserves the reputation as a classic work on legal history. Mr. Qu Tongzu was strict in the pursuit of academic studies. The time of writing this book was in just in the period of the War of Resistance Against Japan (1937-1945). Because of the war, Mr. Qu Tongzu and other members of the university staff reached southwest China's Yunnan Province after passing through many different places. "At spare time after giving lectures to students, I would sit at the desk writing or reading. Enemy planes came to launch air strikes from time to time. Whenever air alarm sounded, we would hurry away with books and manuscripts in hands," Mr. Qu said. Although this book was written at wartime, it is by no means a causerie. Rather, it is based on definite grounds of argument, with plenty of quotes and with an extremely wide range of materials cited as proof or evidence, including hundreds of quotes from Chinese and foreign works, official history books, notes and documentary archives. Mr. Qu was very careful in handling the points of view of historical data quoted. Meanwhile, he was also skillful and restrained in the application of historical data. The historical data he quoted were sufficient, without any confusion. Mr. Qu was using historical data to prove historical facts and verify historical questions. In writing this book, he applied the research approach of stating a big topic in a simple way and stating a small topic in a specific way. For example, in expounding the big topic of the spiritual nature of the traditional Chinese law, he, instead of making a large number of statements or making summaries with several general clauses or articles, just comprehensively drew a conclusion with many elaborate grounds of argument. Meanwhile, in expounding such "small topics" as kinfolk, marriage, the mourning apparel system, revenge, distinction between the noble and base, etc, he, instead treating them as minor aspects, integrated them into the big topic of the nature of the traditional Chinese law on a unified basis.

The time of writing this book by Mr. Qu Tongzu was not far away from the era of autocratic monarchy in China. Therefore, he had had relatively much personal perception of the public order and systems in the old age, and naturally had learned more about the old age than today's researchers. Moreover, because he was born into an aristocratic family, Mr. Qu naturally had in-deep personal feelings about the transformation of social systems. In reality, *The Chinese Law and Chinese Society* focuses on the study of a single subject – the particularity of Confucianization of Chinese law, or the influence of Confucianism on Chinese law. But as far as the settlement of this subject is concerned, he raised an even more metaphysical question: Where does the spirit of the traditional law of ancient China lies? In this book, Mr. Qu conducted an in-depth study of this question. He made clear the theme from the very beginning by saying: "Major characteristics of ancient Chinese law were manifested through clanism and the conception of classes, which were not only the core of the Confucian ideology and the foundation of Chinese society, but were also the system and public order that Chinese law was striving to maintain." And, the formation of such an essential characteristic of ancient Chinese law originated from the transformation of Chinese law by the Confucian ideology. Viewed from the perspective

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of practical application, it was a result of integration between etiquettes and law.

In ancient China, written law, at the time of its origination, was not different from the laws of other civilizations. As impartial and uniform compulsory social norms, written law in ancient China was advocated and established by the Legalists (one of the two leading schools of thought in the Spring and Autumn and Warring States Periods, 770 B.C. -221 B. C.). Meanwhile, the Confucianists (the other of the two leading schools of thought in the Spring and Autumn and Warring States Periods) had different proposals for the establishment of the public order, considering that the adoption of etiquettes as norms governing the hierarchical society would be more effective to the governance and pacification of the country. As etiquettes and law were fundamentally different from each other, there was no room for mediation between them. The Qin Dynasty (221 B.C.-207 B.C.) perished at the hands of Qin Emperor the Second (ruled 210 B.C.-207 B.C.), and the Qin Empire existed for just 14 years. This historical lesson made the rulers of the ensuing Han Dynasty (206 B.C.-220 A.D.) feel quite uncertain, though they carried on the system from the Qin Dynasty. Eventually, when Confucianism became the sole school of thought revered, Confucianists seized power. By then, it had become unfeasible to totally abolish law and realize governance of the country with etiquettes only. Therefore, the Han rulers adopted the approach of thorough transformation of law by integrating etiquettes into law. But in reality, the Confucianists and the Legalists had chosen fundamentally different social norms. Therefore, in the Han Dynasty, the status of Confucianism was in a downtrend. As a result, Confucianism was no longer pure Confucianism. Rather, it had absorbed ideologies from other schools of thought. The integration of etiquettes into law was actually intended to advocate the ideology of Confucianism through the source of Legalism, to safeguard etiquettes with law, to show reverence to Confucianism with law and to show respect to bureaucracy with law. In doing so, they enabled law to take on the function of etiquettes. Moreover, ancient Chinese law was a unique type of law, and became a type of law with the least resemblance to real law in the world. However, law would eventually be law, and would be indispensable to society. Therefore, law had to be accepted by Confucianists. To this effect, Mr. Qu Tongzu put forward three very important points of view: Firstly, after the Han Dynasty, the Confucianists were actually no longer what they used to be, and the term of the Confucianists had become a pronoun of scholarly people only. Secondly, it had become a reality that the State was in need of law, which was indubitable and indisputable. Naturally, it became unquestionable that law was necessary and was of value. And thirdly, the Confucianists became defacto governors. "Presiding at lawsuits became an unavoidable responsibility of officials. After presiding at lawsuits became part of the criteria for grading performance, scholars would no longer object to the work of presiding at lawsuits, or object to the rule of law. Meanwhile, advocacy of the rule of virtue and impracticable argument over the rule of man were factually not permitted. " Such a way of clear and specific statement by Mr. Qu can enable us to relatively clearly understand the nature of Chinese law under the rule of the Confucian ethical code. Namely, the traditional law of ancient China, through development and evolution, eventually became Confucianized law, with clanism and hierarchism being its basic characteristics.

Many points of view expressed by Mr. Qu in *The Chinese Law and Chinese Society* can be taken as results of his fundamental understanding of the Chinese law and Chinese society, and can become theoretical bases for researchers of future generations. For example, he pointed out in the book: "Through study of the link between domestic disciplines and national law and between the family order and the public order, we can draw a conclusion that families are actually political and legal units while political and legal organizations are combinations of such units, which are the standard political and legal basis of families, and which are also the basis of a whole set of theories on management over families and governance of the country. If every family can be responsible to the State for maintaining the order within the family as a basic unit, the order of the whole society can naturally be maintained." And, Mr. Qu also said in the book: "Since ancient Chinese law was in integration with ethics in maintaining moral human relations within families, and took ethics as its legislative basis, the provisions for violation among relatives were totally based on the sequence of closeness, estrangement, respectability or humbleness judged by the mourning apparel system." These points of view have been extensively accepted by the legal community, and have become fundamental bases for the study of the ancient Chinese legal history.

Besides, *The Chinese Law and Chinese Society* also contains many other profound points of view that deserve careful study or appreciation by researchers. For example, in expounding the power of parents over the life of their children, Mr. Qu drew a distinction between power and will, which is highly convincing, saying: "We can perceive the law's tendency toward paternal power. Although the power of the father over the life of his children was abolished by legal agencies when the legal system had developed to a certain extent, the will on the power over the life of children was very obviously maintained. In other words, what the State had retrieved was only the power of parents over the life of children, and what the State had adhered to in this respect was the abolishment of this power only. For the will on the power of parents over the life of children, it was never denied. What was different was that the law required execution be carried out by someone else." In my opinion, this is a very important academic point of view, which very profoundly states the protection of paternal power by ancient Chinese law, and which also states the inherent relationship between power and will in law.

Such profound points of view exist everywhere in the book. I hereby would like to make some more statements to this effect, in jointly appreciating and jointly studying the shining points of view of Mr. Qu expressed in the book.

In expounding the subject of surrender, dispatch or banishment of children by parents, Mr. Qu wrote in the book: "Through precedents of surrender, dispatch or banishment, we can clearly perceive the power of grand parents or parents to make decisions on the personal freedom of children or grandchildren. They were not only capable of exercising parental power, but could also, by means of the force of law, permanently deprive children or grandchildren of their personal freedom by sending them into exile in remote regions. Once children were excluded from their family or group, they would at the same time be excluded from the mainstream of society – including the whole of China except for frontier

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regions, and would become unable to take a foothold in society... More significantly, we can perceive the absolute decision-making power of parents in this respect. Namely, the decision on whether to deprive children of their personal freedom or not, and on whether or not to exempt children from the remnant of criminal punishment to them after part of it was executed was totally dependent on the will of parents. The law only provided for a scope and specific measures for their exercise of such parental power, and was just playing a role of executing such punishment on behalf of parents. In this respect, legal agencies were just like agencies authorized to make decisions. Viewed by form, rulings were given by the judge. In reality, decisions were made by parents who authorized the judge to do so. The law had long acknowledged the parental power of parents." Such statements analyses seem usual and practical, but they were quite meaningful and thought-provoking, leaving readers much room for consideration.

In *The Chinese Law and Chinese Society*, the author also put forward some other subjects. But because of reasons on the part of the perspective of research, methods of research and the purpose of research, he did not expound them in an in-depth way. Rather, he left them to researchers for settlement in future. For example, he wrote in the book: Under certain circumstances, "what ancient Chinese law was emphasizing were ethical and disciplinary issues rather than those of what were right or wrong." As far as we know, such a way of statement is right in terms of explanation of clan law. But, in the scope of regulation by other laws, will statement in such a way be also accurate? In Western legal systems, does such a circumstance also occur? And, in Western laws, are there also ethical or disciplinary issues? If there do exist ethical or disciplinary issues in Western laws, to what extent will they be manifested in the form of issues of what are right or wrong, and to what extent will they be manifested in the form of ethical or disciplinary issues? Or, in what specific form will ethical or disciplinary issues be manifested? These are all valuable subjects of academic research.

In the section of "Kindred Revenge", the author showed his profound learning in sociology by applying the method of comparative research in making clear, definite and highly convincing statement of the customs of revenge in other societies around the world. Meanwhile, by making comparisons, he put forward his unique points of view in this respect. For example, he wrote in the book: "Assumption of the responsibility for revenge in other societies will not exceed the scope of kindred. But in China, it goes beyond this scope. This is a noteworthy point, and is also a characteristic of the customs of revenge in China." Such profound learning in sociology on the part of the author is also manifested in many other parts of the book. For example, the book has a special chapter of "Witchery and Religions", which particularly indicates the identity of the author also as a sociological researcher. Sociology is a field where researchers from the legal community seldom conduct research. In particular, in the section of "Retribution of Fortune", Mr. Qu showed a very keen research insight, and his statements on incrimination or acquittal of officials in the process of judicature are highly convincing.

Mr. Qu considered that as far as revenge in China was concerned, "though Chinese law does not admit the right to seek revenge, it has already extended special consideration to it, which is an elastic approach with the integration of both etiquettes and law." As a result of Confucianization of the Chinese law, the Chinese law had become a combination of two types of social norms, in which there were inevitably contradictions. It was the theory and practice of revenue that were in embodiment of such contradictions, just like what Mr. Qu pointed out in the book: "The conception of ethics and the responsibility of law are often in a state of contradiction." "The law originally has no provision for revenge. Where someone's punishment is mitigated or exempted because his offense was in revenge, it means an extra-legal extension of benevolence, which is something exceptional. But ordinary people, particularly intellectuals, consider what is exceptional to be what is rightful, and make quite a lot positive comments on it. On the contrary, they consider what is unexceptional to be what is wrongful, and make quite a lot criticism against it. They believe that what is unexceptional is against enlightenment by education, and is therefore not instructive. From this, we can perceive conflict between etiquettes and law, and between law and human feelings," Mr. Qu wrote. In my opinion, this statement may well be rated as a conclusive judgment. Why would such conflict basically result in the destruction by the particularity of etiquettes of the universality of law? This is because the foundation of Chinese society was a Confucian society, and the social basis for etiquettes was firmer. Besides, although law was limitlessly getting closer to etiquettes, law would eventually be subject to the restriction of its nature, and would not be equal to etiquettes. Law would eventually be law while etiquettes would eventually be etiquettes. As far as law was concerned, there could be "Complete Observation of Confucian Ethical Codes in Legislation", but there could not be "Universal Observation of Confucian Ethical Codes in Legislation". Therefore, the boundaries of law are not permanently firm, and may often be broken. In the transformation of the legal system in modern China, reformists were trying to apply simple legislative techniques to remove the contents of etiquettes from law, and they achieved success in this endeavor to some extent. But when they were trying to turn the boundaries of law into unbreakable walls, they eventually met powerful counterattack. As long as the foundation of Chinese society was still that of etiquettes, it would be impossible for the boundaries of law to be unbreakable.

Mr. Qu acutely put forward many questions, including some questions which even the circles of legal history studies have not paid particular attention to, or least have not systematically expounded so far. For example, he put forward the question of brazen violation of law in public, which is actually a very valuable and very interesting subject. He also put forward such questions as marriage of couples with the same surname, levirate and concurrent maintenance of two marriages. The marriage of couples with the same surname was originally prohibited by law, and should be declared invalid. But if law really managed it so, it would give rise to a series of questions related to etiquettes or law, including questions of respectability or humbleness, questions of entitlement, etc, which in reality directly constituted legal issues. In levirate, the younger brother would marry the widow of his dead elder brother or the elder brother would marry the widow of his dead younger brother. Such a practice was not only in violation of law, but was also a serious crime for which the couple would

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both be put to death by hanging in accordance with law. But, as a result of limitation of social conditions, such a practice occurred from time to time. It was not the case that levirate was always in existence despite repeated prohibition by law. Rather, it did not become a social taboo. Only when it was involved in other forms of lawsuits, would levirate become a serious legal issue. The existence of such a phenomenon actually indicated inapplicability of law to social realities in feudal China. In concurrent maintenance of two marriages, a man would have married two women, which was also prohibited by law. Nominally, the law would only recognize monogamy. But in society, people would believe that two marriages must involve two separate women, who must be of the same social status. Therefore, under such a circumstance, concurrent maintenance of two marriages would belong to bigamy, or one of the two wives would be redefined as a concubine. Concurrent maintenance of two marriages, in whatever circumstances, would give rise to social problems. Why were there so many brazen violations of law in society? A major cause was lying in unsuitability between etiquettes and law. For ancient China, etiquettes would be eternal. If such eternal etiquettes were directly converted into legal means, the existence of such unsuitability would be unavoidable. As a result of integration between etiquettes and law, the two types of social norms – which were originally sharply distinguishable from each other – were included into the scope of law, and privileges were brought under the coverage of law from outside the coverage of law. Then, ordinary people could benefit from extralegal extension of benevolence while autocracy and bureaucracy could benefit from privileges under the coverage of law. Therefore, phenomena of using etiquettes or precedents to break law emerged endlessly. Namely, it is tenable to say that the occurrence of precedents was to a great extent a result of unsuitability between etiquettes and law. As far as precedents were concerned, it was probably also a very interesting subject that how many precedents on earth were formed because of conflict between etiquettes and precedents. Mr. Qu conducted preliminary research into this subject. However, as *The Chinese Law and Chinese Society* is not focused on this subject, he did not conduct in-depth research into it. I hereby point out this question in hoping that there will be researchers who can proceed to conduct in-depth research into this subject.

Finally, I would like to say, in reading *The Chinese Law and Chinese Society*, I personally felt that there exist some minor problems in the book. Viewed from the perspective of the discipline of legal history, this work lacks a definite explanation about the use of historical data. In the quotation of historical data on specific issues involving different ages, there was somewhat insufficiency of textual research of specific courses of change and development. Besides, there are some aspects in the structure of statement of events that are not rational enough. For example, in my humble opinion, the last chapter – The Legalists and the Confucianists – should have been placed at the beginning, in order that readers will have some basic knowledge about what will be discussed in the book. Moreover, I felt that the part on classes is not as sufficient and reliable as the part on kindred. However, the aforesaid opinions are only what I generally think in the study of the book, which are by no means intended to blame the sage.

As far as I can understand, in writing the book *The Chinese Law and Chinese Society*, Mr. Qu Tongzu had the following three original intentions: Firstly, admiring works written by great masters as his predecessors, Mr. Qu wished to do the same by writing master-pieces, and wished to have dialogue with predecessors and compare with them with his own works, just like what he said: "When reading such books as *Ancient Law* and *Early Law and Custom* written by H. Maine at a young age, I would always acclaim their broadness and profoundness, and would have a great aspiration to follow their footsteps." Secondly, Mr. Qu wished to solve a practical question by writing the book. I remember that when I was conducting the interview on Mr. Qu ten years ago, what he most emphasized was that researchers must have questions in mind and must know what they were thinking in research, only with which could research be conducted. If one has no question for research, and if one's research is merely intended to "make achievements" or meet practical needs, the work done will hardly have any specific content. Moreover, in the research of every aspect of what one thinks in study, if one has no independent thinking or independent point of view, what he states and what he does will eventually be simple imitation. And thirdly, Mr. Qu was hoping to make some contributions to the development of the discipline of legal history, just like what he said: "If my poor work can play the role of throwing out a brick to attract a jade, if prominent personages in China will act to prove or correct what I have said here and make new writings about it, and if future legal research in China will be able to match Western philosophic works, the mere purpose of introducing this new point of view and this new method will have been fortunately met."

Today, it is tenable to say that the aforesaid three original intentions of Mr. Qu have all been met. With his prominent hardworking and with his great work that will be handed down to posterity, Mr. Qu has eventually won reverence and honors, and his works have been ranked among classic works. If we say that *The Chinese Law and Chinese Society* has been matchless since its publication more than 60 years ago, it does not seem to be a flattery. For this great work that will be handed down to posterity, it has fundamentally solved a major academic question – the question of Confucianization of the traditional Chinese law. Mr. Qu's statement of the two characteristics of clanism and hierarchism of the system of China's traditional law is of definite points of view, and has been universally accepted by the legal community. Lastly, Mr. Qu's claim of "throwing out a brick to attract a jade" was completely a self-depreciatory expression. As society keeps developing and ideology constantly undergoes renewal, academic means and methods also keep developing. With academic means keeping turning multiple, academic progress will be inevitable. It is not the case that classic works will be eternally insurmountable. Rather, the value of classic works lies in their capacity to keep enlightening and encouraging future generations. In this sense, there are all reasons for Mr. Qu Tongzu to rest relieved about his whole life. His works can well be rated as an academic milestone that serves as a guide to future generations and that indicates a direction of academic progress.

(Because of the limited space here, the footnotes to this article have been omitted.)

Translated by Liao Zhenyun

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