Front. Law China 2010, 5(1): 91–114
DOI 10.1007/s11463-010-0005-4

RESEARCH ARTICLE

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Understanding of Criminal Reconciliation in Ancient China

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Abstract It is the duty of literature on criminal law to record the states orthodox criminal legislation and justice. However, it is difficult to find a systematic and sufficient historical literature for directly expounding the criminal reconciliation outside the state criminal litigation system. This is a civil act among people or a non-statutory criminal reconciliation. Meanwhile, the object of historiography of modern criminal law is usually limited to the evolution and development of the state criminal law and official criminal justice. Thus researchers focus on these areas leaving little systematic evidence for scattered, local, individual, non-statutory and non-normalized criminal reconciliations between victims and offenders. However, upon investigation of the long standing institutional change of Chinese society as well as an analysis of the social reality reflected by Chinese traditional social and legal cultures, it can be confirmed that criminal reconciliation in ancient Chinese society existed reasonably and necessarily.

Keywords criminal reconciliation, countryside autonomy, integrated administration and judicature, traditional culture

Based on its systematic limitations, the current unitary criminal prosecution system and penalty system fail to give full consideration to all the circumstances when handling crimes. For example, the maintenance of state unified and specialized power of criminal punishment may lead to neglect of recovery of victims' right and need to realize damage indemnity; justice of punishment may be realized but the conscience of criminals may not be sparked; and in practice

Translated from *Zhengfa Luntan* 政法论坛 (Tribune of Political Science and Law), 2008, 26(3): 39–48

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there is severe shortage of judicial resources while there is huge backlog of cases. Furthermore, though the existing criminal legal system only grants and confirms state prosecution power and power of criminal punishment, "self-determination" or criminal reconciliation between victims and offenders, for numerous unavoidable reasons, can not be eliminated at all, as it is "privately settled" outside the existing legal system. This will inevitably jeopardize the uniformity and authority of the criminal statute. In recent years, it seems people may have started to realize that criminal reconciliation is of extensive social and legal value. It can effectively make up for the aforementioned deficiencies in the criminal legal system. Due to the current consideration of pragmatism and rationality or utility, criminal reconciliation has become a hot topic. Nevertheless, within the practice of criminal judicial departments and the exploration of theorists, criminal reconciliation is mainly considered as a model or pattern developed in modern times, or even an ideal exhibited from the West. As a matter of fact, criminal reconciliation had long coexisted reasonably with the criminal judicial system in China. Before modern times it was as an ancient mode of handling crime. Criminal reconciliation is reminiscent of the "private settlement" of crimes. Consequently, it displays a historical origin. Moreover, the influence of criminal reconciliation and its relationship with the criminal judicial system of ancient China has also provided relevant references to the apparent systemization of today's criminal reconciliation.

1 Discussion of the Legal Perspectives that Formed the Foundation of State Rule in China

1.1 The Influence of Benevolent Rule and Cautious Punishment of Ancient China

In regard to the handling of crime, Mr. Cai Shuheng held: "In the primitive society the sanction was education rather than punishment" and "in the era of the Three Kings there were only bastinado and exile without [the] death penalty or corporal punishment". In Vol. 8 of Lu Shi • Qian Ji (Great History—Early History), it was written that under the rule of Zhu Song, "people were moralized without imposition of penalty"; in Vol. 5 of Lu Shi • Hou Ji (Great History—Late History), it was recorded that under the rule of Shen Nong, "general social morality is good without implementation of criminal penalty;" and it was recorded in Shangjunshu • Huace (The Book of Lord Shang—Policies) that "in the era of Shen Nong, the society was governed successfully without criminal punishment"—all those are the reflections of reality. It was written in Tan Huan's Xin Lun (New Essays), "A king is a king for not having to execute criminal penalty." It can be seen that no criminal penalty is the reason why the

Three Kings were called King. (Cai, 2005) Although there were many rulers in ancient China who abused criminal penalty without mercy, most of the emperors in ancient China tried to follow the example of the Three Kings by executing and emphasizing benevolent rule. For example, as recorded in Jiu Tang Shu • Xing Fa Zhi (Old Book of Tang Dynasty—Criminal Law), "There are three patterns of policies for rulers in the ancient times: (1) Kings ruled by benevolence to win over people; (2) overlords ruled by power and wisdom to overawe people; (3) powerful governors intimated people by enforcing criminal punishment. If benevolence is not effective, awe should be adopted; if awe does not work, criminal penalty would be implemented. And penalty has never been the first choice of kings." (Jiu Tang Shu) It can be said that, at the first place, as pioneers of the development of Chinese civilization, ancient kings had set the examples of benevolent rule and cautious punishment in the development of Chinese society and history. Secondly, the thought put forward by Duke Zhou in Xi Zhou Dynasty called "noble morality and cautious punishment" in literary works and ancient records (Shang Shu) promoted moral education and cautious punishment. It illustrated that the rulers of Xi Zhou Dynasty agreed with the sages of ancient times. Holding that the guiding ideology and action in governing a country, making and enforcing law should be firstly to adopt a policy of mollification, educate and persuade people with morality, and supplement moral education. The use of punishment is left for only those who failed to follow moral education and broke laws（Feng, 2006). In addition, this thought of rule and legislation was the fundamental influence on the Hundred Schools of the Spring and Autumn Period, and went on to form the traditional thought of rule of state. It continued as the rule of law for the almost 3000 years that followed. For example, on the one hand, Confucian ancestors, Confucius and Mencius, who were most representative with dominant influence on the formation of the ruling ideas of the emperors in all the coming dynasties. They were the first to accept and advocate such thought. Confucius said, "The culture and system of Zhou Dynasty were built on those of Xia Dynasty and Shang Dynasty and is so rich and complete. I am willing to follow the suit of Zhou Dynasty" (Lun Yu • Ba Yi); "Ruling by morality is like the polestar, which remains unmoving in its mansion while all the other stars revolve respectfully around it" (Lun Yu • Wei Zheng); "When the grand virtue prevails, the world is equally shared by all; the talented and virtuous are elected to serve people; mutual confidence is emphasized and brotherhood is cultivated." (Li Ji • Li Yun) Furthermore, based on the ideology of "noble morality and cautious punishment", inherited from Xi Zhou Dynasty, Confucius developed the rule of "rites" from the rule of "morality". He said, "If people are led by laws and uniformity is sought by criminal punishment, they may shun crime due to fear but have no sense of shame; if people are led by morality and uniformity that are sought by rule of rites, they will have the sense of shame and

behave well." (Wei Zheng) "If names are not established, what is said will not sound reasonable; if what is said does not sound reasonable, what must be done can not be accomplished; consequently rituals and music can not be developed and lead to inappropriate punishment, and then people will not know what course to take." (Lun Yu • Zi Lu) Like Confucius, Mencius also advocated benevolent rule，although he believed that all people had four virtues, namely, benevolence, righteousness, rituals and intelligence, but "the common man loses them while the gentleman retains them". For this reason he emphasized more the edification of people to achieve "love between father and son, propriety and righteousness between emperor and his officials, difference in and outside home between husband and wife, respect and order between old and young, and honesty and trustworthiness among friends", so that eventually "everyone will love their parents and respect the elder, and the world will be peaceful". (Meng Zi • Li Lou) As for the relationship between virtue and criminal punishment, Confucius once questioned, "Why should you think it necessary to depend upon capital punishment in your government?" And he regarded that "putting people to death without having instructed them is called cruelty". Though not denying punishment, Confucius believed the application of punishment should be based on the development of rituals and music, and emphasized, "The way I try cases is not different from that of other people, but my goal is to eliminate litigation." (Lun Yu • Yan Yuan) Besides encouraging rulers to civilize people with rituals and music, Confucius and Mencius advocated the thoughts of "moderation" and "harmony". These eventually became the humanity spirit and principle of conduct in the blood of Chinese nation still present today. It can be seen that Confucianism promoted humanity, righteousness and benevolence of rulers, and propriety, good faith and harmony in people. It pursued social harmony regarding one of the means to achieve harmony is education, and one of the manifestations of harmony is "no litigation". On the other hand, different schools of thoughts during the Spring and Autumn Period, which had similar profound influence on the cultural tradition of Chinese nation, also advocated the ruling ideology of peaceful moralization and the thought of rule by law reflected in "elimination of punishment by executing punishment". For example, Taoism believed that "ruling by doing nothing", illustrated in "I take no action and people are reformed; I enjoy peace and people become honest; I do nothing and people become rich; I have no desires and people return to the good and simple life", is the right way to achieve social harmony of "the unity of man and nature"; furthermore, with respect to punishment, Lao Tzu even directly pointed out, "If people does not fear to die, why threaten them with it?" Han Fei, who best represented the Legalist School, was famous for his emphasis on rule with a legal system featured by "law & punishment, political manipulation and power". He highly recommended social regulation by the "combination of punishment and

morality". He praised Emperor Shun's social governance as the "moralization of sage", and formed moralization operation of "using law as the way of education" in the process of combining punishment and morality. At the same time, he did not think that litigation was good, since "if there were too many lawsuits, the farmland will not be attended to, consequently the storehouses of the government will be empty, and eventually our country will be poor." (Xu, 2006) Even during the Qin Dynasty, the era of harsh law that flourished lasted only for over 100 years in Chinese history of several thousand years. Thus, it can be concluded that in both ruling ideology and the thought of rule of law, the pre-Qin schools of thoughts emphasized morality and propriety as guidelines. Promoting moral edification and social harmony and keeping punishment as the last resort to maintain rule by morality, rule by propriety, or rule of law. Therefore, from the perspective of origin of thoughts, punishment was never an important means to handle crimes and maintain social rules in ancient China.

1.2 The Influence of the Thought of "Harmony and Unity" and "No Litigation" in Ancient China

China's legal tradition was originated in the pre-Qin Period, and gradually took shape after Qin and Han dynasties. Stabilized in Sui and Tang dynasties, and continued until the reforms and revisions of law at the end of Qing Dynasty. In the early Han Dynasty the social ruling ideology of "banning all other schools of thoughts and worshipping Confucianism only" was established. The rules of propriety of Confucius and Mencius and the ideas of "benevolence (propriety) supplemented by punishment", "combination of propriety and punishment" and "edification coming first", eventually became the ruling ideology and the foundation of governance for emperors. This could not be subverted in the Chinese history. Consequently it has become the orthodox legal thoughts of Chinese feudal society for 2000 years. Meanwhile, with the prosperity and expanding influence of Buddhism in China during the Sui and Tang dynasties along with the continuous development of the Taoist philosophy, unity of man and nature and of doing nothing that goes against nature; the social traditional culture was gradually formed with Confucianism, Buddhism and Taoism seeking common ground while still reserving differences. Thus, allowing each philosophy to learn from the strong points of others in order to overcome the weakness through mutual integration. The ideal of social rules to commonly pursue "harmony and unity" through the use of law had also taken shape. In this regard, the doctrine of Buddhism taught "mercy and tolerance" and "good for evil". It stressed karma and retribution and the belief that "a wrongdoer can achieve salvation so long as he gives up evil". While in Confucianism, which was the core of China's traditional thought on the legal system, belief of "no

litigation" was the maxim for Confucians in the coming generations as well as the standard social order pursued by rulers in history. "No litigation" required for harmony among people and settlement by consultation in case of contradiction and disputes, without simply resorting to courts. In regard to specific implementation of "no litigation", there were only two ways.

Firstly, officials are required to "discourage litigation" and "stop litigation". This mediation must be carried out to seek resolution acceptable by both parties, instead of easily conducting trial and promulgating judgment binding on related parties. Alternatively, persuasion and education of the litigants must be conducted to help them rethink their original claims and give up litigation in favor of an out-of-court settlement.

Secondly, people shall be guided to detest litigation and feel shamed of litigation, thus minimizing the possibility of litigation. The ideas, such as "persuasion is like law to stop and deter litigation", and "if people are good and simple litigation will die", were reflection of such thought. The thought of legal system of harmony and non-litigation has been reflected in the records of all dynasties, such as "penalty aims at punishing factual crime, law aims at preventing crime", "fear is needed to deter evil man but shame is enough for man of virtue", and "man of virtue has a good sense of shame, and evil man has something to fear, then the world is peaceful." All these ideas sufficiently demonstrate people's values of despising law and litigation. (He, 2003)

Simply put, the concept of the legal system featured placing more emphasis on moral edification than on punishment. This was done by using the traditional idea of benevolence supplemented by punishment in ancient China, along with the plain ethical notion of being ashamed of litigation throughout the whole society. This illustrates that, as a means of criminal dispute resolution, punishment was neither the only nor the principal choice no matter how modern academic viewpoints describe the focus on heavy criminal penalty rather than civil procedures and the cruelty of criminal punishment in ancient China. In particular, when "no litigation" becomes the ideal of society, there is room for reconciliation between victims and criminals through consultation.

In addition, the "redemption of criminal punishment with money", meaning redemption of criminal punishment with assets or money which began in the Xia Dynasty, once again demonstrated that punishment was only the last choice determined by the limitations of natural production conditions. The level of physical development in ancient China, and the replacement of punishment with compensation or indemnity has long been existed since early ancient times. Furthermore, as a means to handle crimes, the way of "redemption" similar to that of Xia Dynasty, whether enforced by rulers, or agreed between victims and criminals through consultation, had the substantive meaning of reconciliation either between the ruler and criminals or the meaning of reconciliation between

victims and criminals as one of the means to handle crimes. Therefore, it can be deemed as one of the early manifestations of criminal reconciliation in ancient China.[1]

2 Analysis from the Perspective of China's Traditional Social Structure

2.1 The Social Structure of China's Grassroots Villages Determined Autonomy as the Way of Dispute Settlement

In view of natural geographical conditions and economic structure, China has been a large agricultural country of a vast area ever since the beginning of its recorded history. Due to limited financial resources, it was very difficult for a highly centralized royal ruler to send officials to grassroots places for implementing effective ruling. Normally the state power could only be extended to the county level. Anything below the county level was mainly run by various social organizations. For this reason, traditional social regions divided by blood tie and geographic areas were formed under the highly centralized imperial rule in ancient China. In this regard, as Weber understood: The difficulty in ruling a huge Chinese empire and the weak administrative power of the empire resulted in the fact that public power reached only the governance of cities, towns and counties, while in rural areas it was ruled autonomously by clans and village groups, officials and civil communities managed their own businesses separately.

In fact, the official administration of imperial power could only extend to metropolitan areas and sub-metropolitan areas. Beyond city walls the effectiveness of administrative authority was largely restricted, since except for powerful clans, administration also encountered the resistance of autonomous village organizations. "City" was a non-autonomous region where officials were located. While villages were autonomous regions without any officials. Under this premise, the actual operation of law and judicature of Chinese empire ran in the cooperation and confrontation of officials and civil

[1] Such punishment of crime by compensation or indemnity, which was also recorded in the early history of China's minority nationalities, did not exist in Han nationality alone. For example, in the southwestern area of minority nationalities in Tang Dynasty, "as prescribed in their laws: Robbers and thieves should compensate twice what has been robbed or stolen; killers can atone for their crime by giving the family of the victim 30 cows and/or horses." The first emperor of Jin Dynasty made the rule, "Those who kill or injure people should give one of their family members, 10 horses, 10 cows and six *liang* of gold to the family of the victim, and then the case will be settled without any further dispute." "The customs of *Nüzhen* on compensating 30 cows/horses for killing people started since then."

communities even though they had their own responsibilities. Rural areas below the county level governments of cities were basically a kind of autonomous regions. (Lin, 2004)

Local countryside communities, clans and trade guilds constituted the basis of the countryside society. In terms of the countryside society autonomous organizations could not be ignored, especially their autonomy in dispute settlement. This was partly because the state did not have enough financial resources to send officials to all the countryside communities, and partly because the government also wanted to build local places into ethically self-contained units to realize the ideal of rule by morality of Confucianism. One of the manifestations of the autonomy of villages was that moral leaders led the mediation of various disputes within countryside communities. For example, the mediation through edification by San Lao (three old administrators) in Han Dynasty, the mediation by old people of Lijia ("*Qilao*", the seniors) in Ming Dynasty and the autonomy by community covenants in Qing Dynasty. As a relatively complete autonomous community formed by blood tie, clans had a more stable position in countryside autonomy. For example, according to clan rules, clan elders had the mediation power and even the mandatory power of jurisdiction over disputes within the clan. In the Ming and Qing dynasties, many clan rules, approved by the government, could directly stipulate that all disputes (mainly civil ones) within the clan must be mediated and ruled first within the clan before entering the litigation procedure, or lodging official suit. It can be seen that due to the limitation of state administrative authority, in the broad grassroots countryside communities of China, besides formal organizations of the state, the adjustment of social relationship of villagers and maintenance of social order of villages relied more on the villagers' autonomous organizations. And one of the most important contents of countryside autonomy was social dispute resolution, and the principal means to resolve disputes was reconciliation that was different from state trials.[2]

2.2 The Interpersonal Relationship of the Countryside Community Determined Autonomous Dispute Settlement by Reconciliation

The social nature of agricultural production in ancient China determined the strong reliance of people on land, and the features of limited radius of people's

[2] Strictly speaking, mediation and reconciliation are two different modes and conditions of operation. But generally speaking, as reconciliation includes both that by the parties concerned and that reached through mediation by a third party, for the sake of corresponding to the mode of litigation, the term "reconciliation" used in the title of this paper refers to both mediation and reconciliation without specifically referring to.

living circle and extremely low population shift.[3] (You, 2005) Most of the villagers congregated based on blood ties and geographical reasons had been neighbors for generations and thus helped each other. A countryside community was totally a community of members who knew each other thus normally disputes occurred only among villagers, or rather among neighbors and relatives. Chinese traditional Confucianism had a solid basis of belief in the countryside community, and villagers strongly believed in the thought that "harmony is most precious" and the ethical idea that "it's better to make friends than make enemies". For this reason, when villager organizations handled disputes according to community covenants, or when clan leaders handled disputes within the clan according to clan rules, they should settle disputes themselves and take into account a long-term peace of generations. In this circumstance, disputes could only be resolved by reconciliation or mediation. Wittfogel once pointed out that in a country like China, which relied on irrigation agriculture, the tradition of autocracy might be formed very easily, which he called oriental autocracy. As a matter of fact, agricultural civilization could not only breed power autocracy but also create extremely favorable conditions for the unity of moral ideas. In monarchial China, it was reflected in the fact that Confucian ethics derived from agricultural civilization had become the top code of conducts shared by both officials and civil communities. Thanks to the exclusive hegemony of discourse by Confucianism, the resolution proposed after the "opinion leaders", e.g. officials and gentlemen, led or participated in the mediation according to (Confucianism) reasoning, or rather the dispute resolution proposal that was didactic, normally would not be challenged by other people. (You, 2005) It can be said that the interpersonal relationship and common ethical ideas formed due to blood tie and geographical areas in the countryside community of China made it necessary to settle disputes by reconciliation, which also provided the most basic interpersonal relationship conditions and psychological conditions for reconciliation of disputes.

In such conditions, community covenants, which reflected and represented the will of people in the grassroots villages, were the means and basis for resolving grassroots disputes. The covenants developed the following legal characteristics based on the states reliance upon them to rule in areas of limited political administration.

First, community covenants were of a quasi-judicature nature. According to investigation, community covenants originated in the Book of Law of the Rites of Zhou Dynasty and flourished in North Song Dynasty. Although community covenants were not state laws and were not in the category of "rule of propriety and law" belonging to state laws, they were considered to have some sort of

[3] Mr. Qian Mu had a brilliant summary of this in four characters of "peaceful, sufficient, quiet, stable".

legitimate authorization because they established civil communities under the supervision or were approved and supported by the government. Thus they were somewhat related to state laws and had the nature of quasi-law. This was the source and basis of the legitimacy of the binding force of community covenants. For this reason, some of the substantive and procedural rules of community covenants and penalty measures not only were similar to those of state laws, but also had the mandatory power impliedly consented by the government.[4]

Second, community covenants were functional of edification and dispute resolution. Community covenants were based on the basic will of civil communities and local customs, covering extensive topics for a variety of purposes, but ethical codes and resolving disputes were often of a guideline nature. Emperor Kang Xi of Qing Dynasty followed the suit of Zhu Yuanzhang and proposed 16 imperial edicts to promote community covenants, which included: Teach your children to fulfill filial duties to parents and elder brothers and emphasize ethic relations, be loyal to your clans to achieve harmony, get along with your fellow villagers to stop disputes and litigation, value farming so as to have ample food and clothing… teach your children to prevent wrongdoings, stop malicious accusation to reflect kindness, not shelter escaped prisoners to avoid being involved in the crime, duly deliver grain and pay taxes without being urged, join in *Baojia*[5] to eliminate theft, root out bitterness and hatred to treasure life.[6] (Zhang, 2004) While serving as the basis for mediating

[4] In this regard, Prof. Weiren ZHANG pointed out: "Chinese traditional judicial officials often dismissed civil cases, and instead, they persuaded, ordered or even forced the parties concerned to conciliate or turn to relatives, friends or fellow villagers for mediation; for the cases that they accepted without choice, they normally made judgments based on ordinary truth rather than on laws and precedents. There are two reasons for this: (1) Local officials had too complex and heavy responsibilities and were unable to accept all the civil cases; (2) the traditional decrees governing civil cases were not detailed enough. However, the practice of local officials was not a serious weak point of Chinese traditional judicature, for the reason: (1) Civil disputes and minor criminal cases in the ancient society mostly occurred among relatives and neighbors, normally with very trivial causes and complicated background, and outsiders, especially busy prefecture and county magistrates, neighborhood administrative system would find it difficult to understand the whole situation and judge who was right and who was wrong; furthermore, verdict that was overly explicit and had absolute conclusion would possibly make it difficult for the parties involved and their descendants to get along well with each other; (2) in ancient China most of the prefectures and counties had well-functioned organizations in clans, villages, *Baojia*, neighborhood and trade guilds, which could take up the responsibility of mediating ordinary civil disputes and minor criminal cases among their members; moreover, as the resolution must cater to both reasons and feelings, both parties could be truly convinced and consequently easily accept the settlement, and their descendants could also continue getting along well with each other".

[5] *Baojia*, in Chinese 保甲, is a neighborhood administrative system.

[6] The teaching was recorded in 大清圣祖仁皇帝实录 (Emperor Kangxi's Veritable Records), Vol. 34. See Zhang Zhongqiu (2004).

and resolving disputes in the countryside, in terms of the scope of dispute resolution, community covenants normally did not have clear lines between civil infringement and crime due to lack of differentiation between criminal and civil proceedings in the legal system of ancient China. Especially in the autonomy of countryside communities, it was impossible to expressly tell which disputes fell within autonomy and which did not. At the same time, as the government could not control and handle all the crimes due to its limited capacity, a great number of crimes could only be handled by autonomous organizations like villager groups or by parties to crimes or disputes themselves. Therefore, except for material cases involving theft or life that needed to be submitted to courts for handling, as the code of conduct and the norms for resolving disputes at a certain level, community covenants covered both ordinary civil disputes and disputes arising out of crimes among villagers.

The above-mentioned autonomous mode illustrates that though a relatively strict criminal litigation system was established by the comparatively complete criminal law in ancient China, as far as countryside communities were concerned, mediation and reconciliation of criminal disputes by autonomous organizations was inevitable except in material cases involving theft or life. Moreover, this kind of reconciliation of criminal disputes was of certain legitimacy due to its nature of quasi-judicature.

3 Traditional Chinese Administrative and Judicial Systems: Systematic Foundation for the Existence of Criminal Reconciliation

Although all the dynasties in China established detailed and complete criminal laws, which formed a unique penalty-oriented legal system of China, the traditional grassroots judicature often left the following impression: Except for trials of cases involving life or theft that seriously threatened the state order, officials usually solved most of the disputes by mediation. Shuzo Shiga, a Japanese scholar and famous expert on China's legal system history, quoted Henderson and called dispute mediation by officials in ancient China "didactic mediation", which has been proven in some historical empirical studies. For example, according to the statistics of Professor Zheng Qin, of the litigation files of Baodi County, Zhili (today's Tianjin) during the 15th to the 25th years of Emperor Jiaqing Period, about 90% of 224 "self-administered litigation (including minor criminal cases) at country level" were settled by mediation. (You, 2005) Furthermore, the large number of "out-of-court settlement of cases involving deaths" and "out-of-court settlement of cases involving adultery" in the Collection of Criminal Cases indicated that "out–of-court settlement" of cases

was common in reality. The existence of judicial mediation in ancient China can be analyzed from the following aspects:

3.1 The Integrated System of Administration and Judicature in Ancient China Determines the Special Value of Mediation

In traditional Chinese society, there had never been an independent judicial system. The integration of administration and judicature was always practiced. Prefecture and county magistrates were both administrators and judges, and judicial affairs were part of their administrative duties. Chinese traditional judges were also administrators of various levels (Weber called them patrimonial judges, Noda and Shuzo Shiga called them "parental officials").The duality of their status determined that their behavioral effect of performing judicial duties must be closely associated with the need of their administration. For either the Emperor, who was in the central government, or local "parental officials", whose major tasks were governing, their judicial activities were only a mode or a link in their administrative affairs. As a result, for a "Pan Guan (ancient judge)", any judicial activity would have to take into account administrative issues. Being both "judge" and "administrator", Pan Guan was required not only to decide the merits of a case but also to consider various specific effects after the resolution of the case within his term of office. For example, whether the resolution of the case could permanently purify the way of people's conducts and set up an example for people's behaviors within the jurisdiction, whether the judgment of the case could help obtain higher assessment by people of the administrative performance of the Pan Guan himself during his term of office, and whether the judgment of the case could stabilize local order on a long term basis? The purpose of judicature (interpretation) was not only for judicature but for longer-term and more extensive administrative goal. The interpretation of the verdict should better serve the realization of harmony with certain compromise between the state and the public, or between plaintiff and defendant, rather than deteriorate their relationship. In the relationship between plaintiff and defendant especially in the judgment of complicated and difficult cases, the cases involving ethics and morality, were often ruled by excuse of morality for the result of compromise. The important mission of Pan Guan in judging the case was to try every means to seek for a compromise between plaintiff and defendant. Consequently they even went as far as adopting extreme methods such as threatening and using supernatural beings. Of course there were also some Pan Guans who used mild means to stop the litigation between plaintiff and defendant like coaxing and education through behaviors. (Xie, 2005) For local officials or judges to achieve compromise between plaintiff and defendant and social harmony, the key means was nothing but conducting mediation by use of their functions and powers.

3.2 The Nearly Unlimited Discretion of Judges in Ancient China Laid the Foundation for Out-of-court Mediation

First of all, though the concept of state prosecution of crimes was formed early in the history of China, there was no public prosecution system of crimes at all till the period of the Republic of China. Criminal cases were directly reported to prefecture or county courts by victims or leaders of neighborhood organizations.[7] Thus, if the plaintiff and the defendant of some cases reached out-of-court reconciliation, the cases would not be submitted to the court.

Secondly, though ancient Chinese law had explicit attitudes toward "reconciliation" by out-of-court crime handling, and even officials themselves were obliged to handle criminal cases according to law, in the process of deciding the case the judge was a complete inquisitor and adjudicator, sometimes also the investigator of criminal facts. There existed the profession of Song Shi (litigation master) in ancient China, but the Song Shi was not able to participate in any litigation process. Thus, the whole litigation was fully under the control of the judge who had extremely powerful discretion.

Thirdly, under the integrated system of administration and judicature, officials in ancient China were mostly promoted from the imperial examination. These were deeply influenced by the idea of no litigation and moderation of Confucianism. Those who were short of pure legal consciousness and special legal training tended to emphasize the methods of edification, persuasion and mediation to smooth things over and to reconcile the parties involved, or to cause the parties involved to repent, so as to eventually achieve harmony within society and maintain social order. On the other hand, civil disputes and minor criminal cases in the ancient society mostly occurred among relatives and neighbors. These normally were very trivial causes with complicated backgrounds. Outsiders, especially busy prefecture and county magistrates from outside, would find it very difficult to understand the whole situation and to judge who was right and who was wrong. Furthermore, a verdict that was overly explicit with absolute conclusion would possibly make it difficult for the parties involved and their descendants to get along well with each other. With such kind of subjective will, officials not only gave tacit consent to "out-of-court settlement" and adopted let-alone policies, but even encouraged and urged the parties involved to settle the case out of court.

> The so-called tacit consent and let-alone attitude meant that, if plaintiff and defendant had the intention to settle the case out of court, judicial officials

[7] Leaders of Bao and Jia Institutions or clan elders.

> would often take the opportunity to avoid trouble whenever possible, not be against the settlement by the parties concerned themselves and not insist on prosecuting the case, while the so-called encouragement and pursuit meant that for various reasons judicial officials requested or even forced the parties concerned to settle the case out of court for the purpose of stopping litigation. Why should judicial officials encourage and pursue such kind of results? There are various reasons which are different with different people and different matters. Some judicial officials upheld the conception of edification of Confucianism, and when they saw hope of reconciliation in a certain case or a certain party involved, they encouraged and pursued such kind of results. Some judicial officials were asked to favor one of the parties, hence subject to prejudice, and even took bribes from both plaintiff and defendant, and thus they encouraged and pursued such kind of results. And when judicial officials were faced with a complicated and difficult case and were stuck and saw no way out, perhaps the best way to find a solution acceptable to all parties was to encourage and pursue such kind of results and let the case open forever. (Yin, 2007)

The Judge also had complete discretion to move a case to mediation. There were many of such examples where officials took initiatives to mediate cases in ancient China. For instance, when Lu Xiang was the Nei Shi (official in charge of civil administration) of Bo Yang in Liang Dynasty, a Peng family and a Li family brought false charges against each other. Lu Xiang "brought them into the inner room of the court and persuaded them with kind words instead of blaming them", and "treated them with food and drink and saw that they enjoyed themselves, and ultimately they went home happily together after drinking"; when Lang Mao was the Magistrate of Weiguo County in Sui Dynasty, Zhang Yuanyu had a bad relationship with his cousin Si Lan in his jurisdiction. Lang first sent elderly people in the county to persuade them, one after another", then personally reasoned with them and finally caused both of them to "get along well with each other and become friends". (Zhang, 2004)

3.3 Insufficient Legislative Decrees and Inadequate Strength of Officials Determined the Necessity of Mediation

Decrees were insufficient and in ancient China officials often assumed office in the places other than their hometowns and were transferred frequently. The administrative affairs under the jurisdiction of those "parental officials" were too dedicate and complex. Consequently, from the perspective of objective conditions, it was impossible for them to understand all the decrees and try all

the lodged cases according to law. Therefore, except for material cases involving life and theft, judges often depended on the gentry of villages, or friends, relatives and clansmen of the parties involved in mediating civil disputes and minor criminal cases or even directly mediated them. In addition, on the one hand, in ancient China most of the prefectures and counties had well functioning organizations such as clans, villager groups, *Baojia*, neighborhood and trade guilds, which could take up the responsibility of mediating ordinary civil disputes or minor criminal cases among their members. On the other hand, when fellow villagers, relatives and friends mediated disputes, they must consider both reasons and feelings so that both parties could be truly convinced and then easily accept the settlement, and their descendants could also continue getting along well with each other.

4 Key Triple Elements of "Feeling, Reason and Law" in Ancient China's Litigation—Legal Basis for the Existence of Criminal Reconciliation

4.1 "Feeling, Reason and Law" in Ancient Chinese Law and Their Values

In ancient China, the harmony of "providence, human feeling and law" was highly valued. Their relationship was actually that of providence, human feeling and rites since rite and law was respectively the outside and inside of things. Rites were the reflection of providence and human feeling, and law evolved to be the reflection of providence and human feeling; sages made rites based on human feelings, and we should make judgment based on human feelings". Since Confucian scholar Dong Zhongshu in Han Dynasty developed his unique theory of Heavenly Taoism according to Yin and Yang and time sequence, ancient Chinese had always emphasized that law must both follow providence and cater to human feelings. In the opinion of ancient people, laws had boundary but human feelings were boundless. Human feelings actually represented a hierarchical society of fixed order and levels of kinship. Therefore law should not abandon feelings; on the contrary, they should try hard to adapt to the ways of the world. Meanwhile, in the deepest heart of many officials, whether human feelings could be taken good care of was linked with whether law executors would be paid by providence. Thus a good law executor should not only understand laws but also be good at understanding human feelings and customs. In short, only when limited text of laws was flexibly applied to the ever changing human feelings and measurement of penalty was made on the basis of feelings, could appropriate settlement be made. (Yin, 2003)

4.2 The Significance of "Feeling, Reason and Law" in Criminal Trials of Ancient China and Its Influence

The traditional way of trial in ancient China was the trial by "parental officials" or "Khadi (Muslim civil justice) trial".[8] In this process of local officials trying cases, what was pursued was substantive justice rather than formal legal justice. Discretion prevailed almost without any restriction by law, except for material criminal cases involving life or theft that were indeed tried according to law. Specific individual cases were normally handled according to "feelings and reasons", which Shuzo Shiga called "Chinese style feeling of justice and balance", and Weber called "substantive justice and fairness". (Lin, 2004) Shuzo Shiga believed that aside from felony involving life and theft which must be tried strictly according to law and within the scope of civil trial procedure administered in prefectures and counties; prefecture or county magistrates were almost not restricted by law and did not have to refer to the Law of Qing Dynasty. This was his belief because on the one hand, in minor cases covering matters of household, marriage and land, prefecture and county magistrates only applied bastinado to implement penalty and did not have to refer to laws. While on the other hand, there were not sufficient systematic legal provisions and there were many cases for which there were no provisions to refer to even if judges wanted to make judgment according to laws. As a result, dispute settlement based on "feelings and reasons" was preferred naturally, and it was the duty of local officials to smoothly seek for specific and appropriate solution based on "feelings and reasons". (Shiga, 1998; Lin, 2004) As for the so-called "feelings and reasons", Shuzo Shiga regarded it commonsense feeling of justice and balance, or Chinese style feeling of justice and balance. Chinese people cared more about the totality and entirety of people, and would not consider the subject matter of a dispute as an issue of the parties in isolation. Instead, they took into account all the social relationships of the parties and people around them. Furthermore, Chinese people like the relative way of thinking and are inclined to find the balance point with both parties bearing some loss respectively. With in such compromise, the feeling of balance found that the winner did not win it all, while the loser did not lose it all. The thinking mode that the reconstruction of social relations was more important than the recovery of individual right in the trial process, were indeed the reflection of Chinese traditional thinking mode in legal consciousness.[9]

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[8] Shuzo Shiga called it the trial by parental officials, and Weber called it Khadi Trial.

[9] Ibid. In view of this point, the idea of modern restorative judicature has long existed and been carried out in China.

Local officials did not follow rigidly decrees and precedents. They resorted to feelings and reasons in handling civil disputes and minor criminal cases, because there were no complete decrees and no choice. Furthermore, there was a set of legal basis: Any society would need various norms to safeguard its peace and guide its development, and the law was only one of them. In the minds of Chinese people, there were higher level and more effective norms than laws– morality, rites, customs, and clan rules, community covenants and guild rules that were made to better fit some organizations based on blood tie, geographic reason and profession; and all the norms including laws must be based on "providence" and "human feelings". Consequently, other norms, including the highest guiding principle—providence and feelings, should be referred to not only when law was not adequate, but also when there were express legal provisions but interpretation was required, so as to achieve appropriate application. Such application would not cause uncertainty of judgments, for people who had lived with each other for generations within the same society often had common cognition regarding "feelings and reasons". Local officials made judgments by reliance on such feelings and reasons while considering the special facts of individual cases, and sought common ground while considering minor differences. It was thought as the "right way" to pursue fairness and harmony. (Chang, 2006)

It can be said that "state law is partial specification of feelings and reasons, and generally speaking, the role of feelings and reasons is of the nature of providing clues. Therefore, legal provisions are interpreted or accommodated through feelings and reasons." Having investigated the relevant records and literature concerning administration of civil affairs in Qing Dynasty, Shuzo Shiga found that "emotions", "reasons", "law", or "human feelings", "providence" and "state law" often served as the criterion for decision-making and trial of cases by officials, which was not limited to civil affairs but extended to criminal cases. If state law was applied, it did not necessarily mean that judges were strictly subject to legal provisions; and even cases that should apply the penalty of exile or above according to law (criminal cases) could possibly end up with a reduced sentence. Adoption of "feelings and reason" meant to give full consideration to the specific circumstances faced by each party concerned as much as possible. This attempted to adjust the entirety of interpersonal relations as a whole. (Shiga, 1998; Lin, 2004) With respect to the relationship between law and human feeling, reason and its application in trials, besides the understanding of overseas Sinologists, Xu Ke already described and advocated it in his Zhe Yu Gui Jian (Collection of Suspicious Cases) early in Song Dynasty. He pointed out that extreme caution should be taken in trial of cases, and furthermore, the relationship between feelings, reasons and law must be handled properly. He advocated that "law enforcement officials should not cover up facts to connive

those who are guilty and should not bend law to convict the innocent; they should consider feelings and reasons instead"; and that when conducting trials, "laws must be upheld first, and then feelings and reason should be considered". Therefore, in application of laws, judgment according to law and comparison and analogy should be combined. Also the law should be fully and correctly understood to avoid distorting legal provisions to wrongly convict people and execute harsh penalty. Meanwhile, ethics and social stability should be maintained. (Zhang, 2004) In fact, such logical annotation on the unity of providence, human feelings and state law had become a factual system from the Confucius time of the pre-Qin Era, which aimed at moralizing people, stopping litigation and fights and living in harmony. "There have been numerous cases of litigation where judgments were made through recovery of "conscience" of the plaintiff and the defendant or similar solutions in China's history of legal interpretation and judicature". According to the description of the Law of Tang Dynasty, even those who were guilty of the most heinous crimes could be granted amnesty for the sake of feelings and reasons because they are needed to "provide for their families". And in actual judiciary judgment and interpretation, specific circumstances were often considered to "smooth out contradictions". (Wu, 2005)

> As to whether criminal trials should comply with the principle of "judgment according to law"—to the scholars who advocate "judgment according to law" for civil trials, criminal trials are not worthy of serious discussion any more; and the scholars who are against "judgment according to law" for civil trials also admit that in the Ming-Qing period criminal trials basically followed the principle of "judgment according to law", and they have even come up with two opposite modes of "civil trial-feelings and reason" and "criminal trial-law". However, we can draw a basic inference: The cases that followed the principle of "judgment according to law" were basically serious criminal, involving life and theft. Minor criminal cases were handled between "law and no law", "guilty and not guilty", "penalty and no penalty" and "leniency and heavy penalty", and there was no strict criterion that must be abided by. (Xu, 2005)

As a matter of fact, not only in minor offences was it not required to follow strict criterion on judgment, it was the same with even some major crimes, where feelings, reasons and law also needed to be balanced. For example, during the reign of Emperor Jing of Han Dynasty, Fang Nian's step mother killed his father, and Fang Nian stabbed his step mother to death. While during the reign of Emperor Wen of Song Dynasty, Huang Chu's wife beat her daughter-in-law to death, and her grandson could not avenge her. The results were completely

different for the same killing among relatives. "Whether grievances may be redressed or not depends on the providence, according to which law is made." For another example, in Song Dynasty, Jia An convicted Tui Guan (judicial official one level lower than the judge) Sang Ze of Dingzhou Prefecture of ill-piety, "since the underlying reason was understood, harsh provision shall be executed because the order has to be maintained." Nonetheless, when parents-in-law clashed with daughters-in-law, even if "the parents-in-law were in the wrong", the junior should be blamed in the family, but not be punished by law. For this reason the daughter-in-law was not convicted but was ordered to provide for the parents-in-law. (Zhang, 2004) It can be seen that the trial of criminal cases in ancient China was conducted on the basis of the combination of feelings, reasons and law, and in the process of trial, feelings and reasons must be those that reflected specific ritual values.

In summary, either the tradition of Chinese law or the criminal judiciary trial conducted on the basis of the three elements of feelings, reasons and law is actually the trial that caters to the interest of all the parties and that maintains the basic ethics, the specific operation and implementation process of which is the process of dispute resolution via reconciliation through mediation among the parties concerned.

5 Traditional and Cultural Basis for Criminal Reconciliation

A summery and evaluation in regards to the social and cultural traditions of Chinese law:

(1) The culture of official historians. Such culture is characteristic of the idea that "political authority is the supreme authority, to which culture is subject, where culture should never involve any universal issue over political authority". In such social culture, law naturally could not assume the central position, or even occupy an important place. Only the supreme imperial power at the position of political rule could control everything and every land and had every of its words obeyed. Law is certainly of authority, but subject to political authority. The earliest application of Chinese law indicated that law was usually a means of intimidation only.

(2) The culture of rituals and customs. In ancient China, rituals were the general principles that dominated everything, which were the guidelines for all the conducts of politics, morality, law, military and personal life. With respect to the relationship between rituals and law, rituals played a decisive role while law played a supporting role in fact hence jointly maintaining the political authority, or the way of king. The role of law was only to stop violence and prevent evil, which, as a result, could only be in a secondary position in the cooperation of

various relationships. In addition, between rituals and law, there existed customs. Customs referred to the traditional practices that had long been formed among people. Rituals originated in customs, and thus the contents of rituals mostly came from life experience. It was a long process of natural development for customs to become rituals and rituals to become law. During which time there were inevitably conflicts among customs, rituals and law. For example, some things were forbidden by law but recognized by customs. Qu Tongzu summarized such strange situation where things explicitly forbidden by law were smoothly acceptable in the society as "life is life and law is law". In this regard, we can see the restriction of customs on rituals and law, and the real situation of inadequacy of law in regulating the society. In the culture of rituals and customs, traditional Chinese society upheld poetry and prose rather than military spirit, warrior, power and law, and in such society the benevolence was supreme, which resulted in a society of kindness and tender feelings. And in the society of kindness and tender feelings, the father was kind, the son was filial, the elder brother was friendly, the younger brother was respectful, the elderly were provided for and the children were loved. Law was indeed of not much use in the society of poetry and prose.

(3) The hierarchical society. Ancient China was a hierarchical society in which the whole clan was a grassroots judicial unit, and clan rules could mostly be accepted psychologically by villagers due to geographical and blood tie. Being penalized by clan rules meant being spurned by the whole clan. The head of the clan had the grand power from mediating disputes to putting clan members to death and such power constituted the basis of state power, hence recognized by state law.

(4) The society dominated by morality. The characteristic of traditional Chinese society was to consider morality as elixir to solve any problem, believes in the fundamental power of morality in administering the country, place hopes on the moralization of people and make light of other administrative methods. Therefore, traditional Chinese society was also a society upholding morality rather than power and law.

(5) Rural society. The so-called rural society meant that Chinese culture had always been built on the foundation of agricultural civilization. The nature of Chinese society was locality or closely related to land. In a rural society, peasants live in villages, and their life is locally oriented. The rural society is a "familiar society" without strangers. "In a familiar society, we can enjoy sufficient freedom at will without crossing the boundary of rules, which is different from the freedom guaranteed by law." A rural society may be and is necessarily a society of rituals and customs, a society of morality and a society of poetry and prose, which, however, may not necessarily be a society of law. The law of a rural society must fit the nature of the rural society. A rural society is centered on

the family doctrine and thus law aims at maintaining the family doctrine. Laws of all dynasties specified a great number of provisions aiming at maintaining the family doctrine, and punishment for criminal behaviors was normally not based on the seriousness of the case but determined by the degree of kinship, the superiority and the inferiority, and the seniority between the plaintiff and the defendant. Additionally, law also confirms some special moral principles generated in a rural society in conflicts with law, such as the rule of refusal to testify against family member and relatives. The purpose for the state to formulate law is to punish crimes, and thus it is natural to encourage prosecution and testifying. But when there are conflicts in between, the state will bend the law and even maintain such principles by law. (Yin, 2003)

The above-mentioned five aspects of the social and cultural foundation of Chinese law were interrelated, penetrated mutually and influenced each other and eventually integrated with each other. This represented the spirits of Chinese traditional culture and determined the nature and contents of Chinese traditional law. Among them, the culture of official historians determined that the important indexes for evaluating the performance of local officials was harmony and stability of local areas under their administration rather than the fairness of judicial judgments. In the background short of an independent judicial system, neither the parties involved nor the judicial and administrative officials would take "ruling according to law" as the only or important means for resolving disputes. Instead, emphasis was put on harmonization and edification to realize and guarantee security and peace of local areas. Complementary to and supporting the culture of official historians was the culture of rituals and customs that had existed in all ages of China. As China's long lasting guidelines for governing the country, the supreme realm of rites is still to maintain and pursue social peace, harmony and order. Starting from the ultimate utility of "harmony", people are often reluctant to submit disputes to government courts but inclined to resort to unofficial solution channels for resolution in the principles of fairness and human feelings. The unofficial way to dispute settlement started from "feelings", proceeded to "rituals" and "reasons" and finally went to "law". In taking "feelings", "rituals" and "reasons" as the priority in dispute settlement, the concept of being "shamed of litigation" from emperors to ordinary people took shape in Chinese traditional culture. Emperor Kang Xi of Qing Dynasty once declared to the public:

> I think that in the best administered country edification comes before laws. Laws are of short-term effects while edification lasts long. Implementing laws only while ignoring edification is like attending to trifles and neglecting essentials." "If common people are not afraid of the government and the court, but believe justice can easily be done, litigation will drastically increase; if

> litigants get benefits then disputes will multiply. If so, even though half of the people become officials, they can not clear half of the litigations. Therefore I think we should be harsh with people who like to initiate litigation, and make sure that common people fear laws and shudder at the sight of judicial officials. (David, 1984)

In order to achieve the harmony "without litigation", as far as government officials at various levels were concerned, they should be able to adopt the approach of "blaming both sides", which would cause the plaintiff and the defendant to get tired of litigations and stop them, and edify the public as much as possible. One example recorded in the Collection of Enlightened Legal Judgments by Famous Officials of Ancient China (in Chinese) was the teaching of Hu Ying, a famous official in Song Dynasty:

> It is not good for litigation to become popular: Work will be neglected, and family assets will suffer a loss; petty officials will make exorbitant demands, and lead their followers to scold and insult people; people will be tired of running about, and may end up in jail. Bringing a charge against clan members will ruin the kindness of the clan; suiting a fellow villager will hurt the friendship with fellow villagers. Even if the case is won, much has been lost; if it is lost, there is a lot to regret. Therefore, only when there are serious grievanc such as the poor is swindled by the rich, the weak is ruined by the strong, and the slow-witted is taken advantage of by the smart; or the tyrannical offense is too outrageous to tolerate, can we then resort to litigation and the fault is not with us.

In addition, grassroots organizations like those of villages and clans with quasi-judicial power would try their best to solve contradiction and disputes through internal mediation. For example, "if disputes arise among clan members, they should first be brought to the head of households within the clan for handling. No litigation should be initiated hastily; anyone who blackmails other people, bullies the weak or stirs up issues will be punished according to family rules except for those reported by the head of the household." "For any grievance people should go to the head of the household first, and then to the head of the village; and consequently, the actual situation should be presented and discussed to settle the disputes in a fair way." (Clan Zhu) Otherwise, "starting litigation for trifles will gradually wreck the family, and by contending with each other for family assets, litigation will eventually cause total loss of assets. In a word, the result of litigation is always bad." (Clan Xi) It can be said that the long lasting Chinese ideological tradition of no litigation is determined by China's social

development conditions, and consequently it is long standing and well-established.

Only by discussing criminal reconciliation from the social, historical and cultural aspects can Chinese traditional law culture be understood in depth. Generally speaking, the core of Chinese traditional culture is to pursue and maintain "right time, right place and right people" among "heaven, earth, four winds of heaven, union and harmony". Right time and right place can not often be controlled by human power, while right people can be achieved by people. Such idea of concord and harmony is the spiritual resources of Chinese nation down through the ages. Against such long standing social and cultural background, the handling of crimes as one of the means to settle social contradictions and maintain social order inevitably relies on reconciliation, another important way besides legal methods.

Acknowledgement Special thanks to Isabel Del Vecchio, J.D. candidate from the University of Connecticut School of Law, Hartford, CT, USA, who revised this article in detail.

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