

# RESEARCH ARTICLES

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## The Relationship of “Humanity, Reason and Law” with Chinese Legal Traditions\*

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**Abstract** The Chinese have created the concept of “humanity, reason and law” and developed a mentality around it. Since Confucianism was highly valued in the Han Dynasty, especially during the Han, Wei, and Six Dynasties periods, the exploration and analysis of “humanity and reason” in judicial practice has been widespread. This has led to the “filtering” and examination of laws based on “humanity and reason.” The objective aspect of “humanity” refers to the facts and circumstances of a case, extending to the latent emotions of the people involved. Confucian scholars proposed the principle of “judging a case based on its original sentiments and emotions.” The subjective aspect of “humanity” refers to sentiment and emotion, such as the “willingness” or “unwillingness” of both parties in a divorce case. The combination of the objective and subjective aspects of “humanity” together with their “reason” form the essence of “humanity, reason and law” and is the main content of this concept. “Humanity, reason and law” serves as both a principle of legal formulation and a method of application and interpretation. In modern

times, SHEN Jiaben and XIE Juezai were pivotal in the development of “humanity, reason and law” mentality. SHEN Jiaben facilitated the transition from tradition to modernity, while XIE Juezai integrated ancient and excellent traditions into revolutionary legal practices, giving it a modern significance.

**Keywords** “humanity, reason and law,” humanity, sentiment and reason, SHEN Jiaben, XIE Juezai

### I Introduction

Research on “humanity, reason and law” is a classic topic often discussed by scholars at home and abroad. CHEN Guyuan<sup>1</sup> of Chinese Taiwan in the mid-1950s, and Shiga

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1 CHEN Guyuan, 天理·国法·人情 (Heaven Reason, State Law, Human Practice), 6 (11) 法令月刊 (*Law Monthly*), (1955), in FAN Zhongxin, YOU Chenjun & ZHAI Wenzhe, 中国文化与中国法系——陈顾远法律史论集 (*Chinese Culture and Chinese Law—A Collection of CHEN Guyuan’s Law History*), China University of Political Science and Law Press, at 275–282 (2006).

Shūzō<sup>2</sup> of Japan in the 1980s, both published high-quality research. By 1990, Chinese mainland scholars had published research works. ZHANG Jinfan, YU Ronggen, ZHU Yong, GUO Jian, LIANG Zhiping, and FAN Zhongxin discussed topics such as the relationship between humanity, reason and law, the relationship between legal intent and human reason, and the relationship between law and reason.<sup>3</sup>

When it comes to Chinese legal traditions, the first topic is the relationship between humanity, reason and law, which is not only a tradition of Chinese legal philosophy, but also a tradition of Chinese legislation. We need to re-examine many issues of these traditions for building socialist rule of law with Chinese characteristics.

The PENG Yu Case happened in Nanjing and sparked a national sensation. A native young man of Nanjing, PENG Yu, helped an old lady who had been hit by a passing vehicle by sending her to the hospital and paying the deposit for emergency medical attention, but was sued by the old-lady's family. The case judge said: "In common sense, he should be the one who had knocked down the old lady, otherwise it would be illogical for him to send the injured old lady to the hospital and to pay the medical bills." So, what's the issue here? Is it a law issue? No, it is an issue of humanity and reason. The judge's common sense sounds familiar but strange. In the 1960s, China had a national role model named LEI Feng, a military truck driver, who always helped others and was commended even by

Chairman Mao Zedong. During those days, helping others was much respected and appreciated, and people believed that it was good and noble to help others. But today, such a help seems illogical and abnormal, and people are reluctant to help others for fear of themselves getting into trouble. Such a mentality change cannot be simply due to the decline of the social morality or to the lack of the mentality of mutual assistance, nor to the enhancement of legal awareness of the general public for self-protection. In fact, it is due to "humanity, reason and law," a philosophical issue in Chinese law. "Humanity and reason" is not only a moral issue, but also an issue of legal logic.

Therefore, the traditional concepts of humanity, reason, and law not only solve specific individual cases, but constitute an essential philosophical issue in Chinese law, or rather, a problem of thinking and behavior, and a cultural issue. According

2 Shiga Shūzō, 清代诉讼制度之民事法源的概括性考察——情、理、法 (*A General Investigation of the Origins of Civil Law in the Qing Dynasty Litigation System: Humanity, Reason, and Law*), 40 (1) 东洋史研究 (*Studies in Oriental Researches*), (1981), in Shiga Shūzō, 清代中国法与裁判 (*Chinese Law and Judgment in the Qing Dynasty*), Sobunsha, 1984. WANG Yaxin & LIANG Zhiping, 明清时期的民事审判与民间契约 (*Civil Trials and Civil Contracts in the Ming and Qing Dynasties*), translated by FAN Yu, Law Press · China, at 19–53 (1998).

3 In the order of the year of publication and distribution, FAN Zhongxin, ZHENG Ding & ZHAN Xuenong, 情理法与中国人——中国传统法律文化探析 (*Humanity, Reason and Law and Chinese People: An Analysis of Traditional Chinese Legal Culture*), China Renmin University Press, at 9–28, 231–239 (1992). YU Ronggen, 儒家法思想通论 (*General Theory of Confucian Law*), Guangxi People's Publishing House, at 23, 87, 580 (1992). LIANG Zhiping 法意与人情 (*Law Intent and Humanity*), Haitian Publishing House, at 149–154 (1992). ZHANG Jinfan, 论中国古代法律的传统 (*On the Traditions of Ancient Chinese Law*), 南京大学法律评论 (*Nanjing University Law Review*), Autumn, 1994. ZHU Yong, 冲突与统一——中国古代情与法的关系 (*Conflict and Unification: The Relationship Between Humanity and Law in Ancient China*), 1 中国社会科学 (*Chinese Social Sciences*), (1996). GUO Jian et al., 中华文化通志·制度文化典·法律志 (*General History of Chinese Culture, Institutional Culture Codex and Legal History*), Shanghai People's Publishing House, at 376–378 (1998).

to XIE Juezhai, a renowned Chinese legal scholar and educator, “A good law is in line with both humanity and reason.” In the past, we understood and interpreted law alongside humanity and reason, but then we only worked with law and ignored humanity and reason. Today, the issue of humanity, reason and law is still frequently discussed and debated; otherwise, it would be an issue that would remain unsolved.

## II Features and Formulation of “Humanity, Reason and Law”

The Chinese created the concepts and mentality of “humanity, reason, and law.” In terms of behavior, it seems that Chinese people must involve humanity and reason in understanding, interpreting, and applying law. In the application of law, it highlights the characteristic of humanity and reason based on the facts and circumstances. In terms of the relationship between humanity, reason, and law, it seems that equal attention should be paid to each of them, and law should not be discussed in isolation and should be understood, presented, and explained together with humanity, reason, and the related circumstances. That is, law should not be applied separately, and reason should be utilized to examine and filter application of law, thus creating a general impression that more than often humanity and reason are superior to law.

The 100 masters and schools of thought in the pre-Qin Dynasty, when Confucianism was applied in

governance, did not discuss law in isolation. Combining law with humanity and reason became the practice. Even the legalists in the Qin Dynasty applied such practice, and this was further developed and analyzed in justice administration in the Han, Wei and Six dynasties. Humanity and reason played a major role in the administration of daily life of the general public, including expecting others to respond and behave in accordance with humanity and with reason. Thus, the application of law conforms to the everyday experiences of Chinese people, and this is the broad and profound foundation of humanity and reason in the life of the general public. In addition, humanity and reason are behind the true intent of the law, and ensure that simplistic legalism is not applied, so that the law does not become a draconian dogma and a demanding foreign object. Thus, legal thought and philosophy are dominated by anti-legalists and anti-harsh-rulers of the past. With the emergence of the School of Principle, the expression of “heaven reason, state law, and human practice” became more prevalent. In the Qing Dynasty, the governments at provincial (in charge of promotion and demotion of officials), prefecture and county levels were all required to put up these six words of “Heaven Reason, State Law, and Human Practice” were inscribed on plaques above archways, highlighting that reason and humanity would be satisfied in law enforcement and justice administration.<sup>4</sup> Later on, these six words were incorporated in the law.

4 HE Gangde, 客座偶谈 (*Guest Talks*), Vol. 3, Shanghai Ancient Books Bookstore, at 9 (1983).

Thus, in the county yamens of Pingyao of Shanxi Province, and Neixiang of Henan Province, we can still see these six words on the plaques at their main gates, illustrating that those Qing Dynasty government requirements were a reality.

### III Humanity and Reason in Law

Objective aspect of humanity refers to the circumstances or facts of a case, namely the case details; it can also be extended to latent sentiment and emotion of the people or individuals involved in the case. Thus, the Confucians put forward the principle of “judging a case based on its original sentiment and emotions, and with mercy,” which means considering the latent aspects before making a judgment.<sup>5</sup> Although “it is impossible for judges to know every detail of circumstances of all the cases, big or small, yet they must consider humanity and reason in making a conviction, which must satisfy both reason and humanity.” Thus, such a judicial attitude is dubbed “judging based on humanity and reason,” being summed up as the earliest judicial ethic in phrases such as “be loyal to the fact,”<sup>6</sup> or “respect the fact” and “be prudent in fact determination.”<sup>7</sup>

During case investigation and fact determination, reason must play a critical role in analyzing, understanding, and deciding circumstances of the case. The objective details of a case concerning specific internal factors such as conduct of a crime, method of committing a crime, as well as

external factors such as assault motivation, legitimate self-defense, faulty defense and any other intentional or unintentional subjective acts (involving purpose, mistake, conspiracy, fight, drama acting, negligence, and so on) should be considered. Many legal concepts, techniques, rules, principles, and theories that were historically emphasized in Chinese law may also be included in the category of humanity. The application of legal principles and theories thus adopts a special Chinese-style solution, which better suits the knowledge structure, values, and humane pursuits of the Confucianist officials who were responsible for understanding less obvious aspects of humanity.

The Confucianists maintained that case investigations and fact determinations should integrate reason with various legal concepts, techniques, rules, principles, theories, and so on. The application of legal principles and theories had introduced a particular Chinese solution, which were fit for leveraging the knowledge structure, values, and pursuits of Confucian officials responsible for gaining insight into less obvious aspects of humanity.

Subjective aspect of humanity refers to reason, emotions, and affections. The judicial attitude of “examining and determining humanely” also involves subjective humanity, and this specifically

5 论语·子张 (*Analects of Confucius · Zizhang*); ZHANG Yanghao, 牧民忠告卷下 (*Warning to Herdsmen*), Part II; Qiu Jun, 大学衍义补 (*Explanation on The Great Learning*), Vol. 106.

6 左传·庄公十年 (*Zuo Qiuming's Edition of the Spring and Autumn Annals · Ten Years of Duke Zhuang*).

7 “Zhou Gong said: ‘Mr. Court Historian, Administer Su, we must seriously handle prison litigation cases so that our State can enjoy long-term peace and stability. Now it is necessary to be cautious and meticulous in the process, so as to establish a clear system of rewards and punishments (尚书 *The Book of Documents*).’”

refers to the emotions and affections of the parties in a trial. For example, the subjective humanity of men and women in marriage who are willing or unwilling to divorce in SHEN Jiaben's case study, is a vital factor for judges to examine in considering divorce requests. SHEN Jiaben said: "When a woman is betrothed twice for marriage, principally she should marry the first man, no matter whether she wants to live with the second man; this is how the law works. However, should she have become engaged to the second man while the first man had refused to have her as his wife, then she should get married to the second man. This is how reason works; the law offers the needed flexibility." The reason here includes both the subjective unwillingness of the first husband and the objective humanity in that the woman has become the wife of the second man and the situation has become a *fait accompli*. Humanity in this case should be legally supported. SHEN Jiaben has provided the optimal perspective to interpret legal norms for understanding humanity based on principle and flexibility.<sup>8</sup> It should be noted that there is also reason here. The fact that "the woman decides to marry the second man" follows the reasoning that "she should live to the very end of her life with the second man" and "one woman should not marry to two men at the same time." In this regard, the general relation between humanity and reason is that where there is humanity, there must be reason, and vice versa.

Humanity refers to emotions and affections. Talking about human relations, particularly the

relationship between parents and children, it is essential to note the family affection and family ethics. The traditional Chinese five cardinal relationships between fathers and sons, husbands and wives, seniors and juniors, friends and friends, all have their own reasons: righteousness, affection, distinction, order, and faith (the affection between fathers and sons, righteousness between monarchs and courtiers, distinction between husbands and wives, order between seniors and juniors, and faith between friends). This pairing of humanity and reason is part of the essence of law and historically dominated many aspects of law.

Objective humanity and subjective humanity as well as their respective reasons form the main body of "humanity and reason" and the main content of "humanity, reason and law." In addition, humanity and reason are often mentioned and appreciated for promoting tolerance, modesty, humanity, and civilization in law enforcement. For example, SHEN Jiaben upheld two thoughts that were prominent in the periods of Shun, Yu and Zhou that regarding "punishing an offender without punishing his descendants" and "punishing an offender without involving his wife and children." These thoughts are similar to criminal laws of Western countries regarding "punishing the offender himself." LIU Song of the Jin Dynasty advocated that "punishment cannot be conducted without clear provisions of laws and

8 SHEN Jiaben, edited by DENG Jingyuan & PIAN Yuqian, *妇女离异律例偶笺* (Women's Divorce Laws and Regulations), in *《寄篋文存》卷五* (Collected Works of Letters), Vol. 5, later recorded in *《历代刑法考》卷四* (Research on Criminal Laws of the Past Dynasties), Vol. 4, Zhonghua Book Company, at 2171 (1985).

regulations,” which can be likened to the legal principle of crime and punishment of Western criminal law. The “reading the verdict based on the law” of the Zhou Dynasty, the “theory of reading aloud the criminal facts before capital punishment is implemented” of the Han Dynasty, and the “declaration of capital punishment verdict” of the Tang Dynasty are the same as the “declaration of capital punishment” in the laws of Western countries. The practices of “at the end of the year, local officials count the criminals and report the problems of corrupt officials to the emperor, hoping for lenient and fair judgments to those offenders” of the Zhou Dynasty, and “reporting to the emperor about cases of similar severity as those requiring the death penalty” of Song Dynasty, are the same as the “counting the cases at the end of the year” in the laws of Western countries. The ancient Chinese thought that “prisons are not built to hurt and humiliate people,” and the fact that prisons in Xia, Shang, and Zhou dynasties all avoided hurting people, are like the prison administration philosophy of some western countries for “reforming and educating criminals.” Tough and harsh measures clearly are not manifestations of humanity and reason.

#### **IV Existing Form of “Humanity, Reason and Law”**

As SHEN Jiaben pointed out, humanity and law exist in three different forms in the history of Chinese law, in addition to being present in the form of two separate elements

within the same legal norm. These three forms are the three levels of our understanding of “humanity, reason and law.”

#### ***A | “Humanity, Reason and Law” Being a Method of Law Application — The Application Principle of Humanity and Reason in Law (Justice)***

Indeed, from ZENG Zi elaborating that “legal cases should be tried mercifully and prisons should be administered compassionately,” to CAO Gui suggesting to Emperor Lu of State Lu that “cases should be judged humanely” in his discourse on war strategy, we can see that humanity, reason and law provide an appropriate basis for law application.

Later generations have often referred to the case-determination concepts of “making the best use of both humanity and law,” “making the best use of the strengths of both humanity and law,” “equal attention given to both humanity and law.” These concepts emphasize that law application should consider humanity to uphold justice, and should satisfy every party concerned. In this regard, law application is not simply a mechanical use of legal provisions, but requires judges to be able to appropriately interpret the law for humane application.

However, it is important to note that “making the best use of humanity and law” does not mean that humanity exists externally to law, but rather that humanity is a part of law and is included within law. *Book of Wei Dynasty · Record of Penalty* has the best saying: punishment should be based on humanity. SONG Zhengke’s *Zheyu Guijian* (Volume 8, a book about

legal case investigation, trial, identification, arbitration, and convictions in the Song Dynasty) refers to the causal relationship between humanity and law, stating that “in the past, laws were established based on humanity, and now humanity should be considered when making a conviction.”

***B | “Humanity, Reason and Law” as a Method of Lawmaking Based on Humanity and Reason***

From many judicial cases of the Han, Wei, Six dynasties, as well as those of the Ming and Qing dynasties, we can see that “humanity, reason and law” is a constituent principle of law.

1. *Law should be enforced by considering humanity.* ZHU Bo, a senior judicial official of the Western Han Dynasty, said, “Instead of enforcing law by mechanically following legal provisions, law should be enforced humanely.” Facing challenges from his subordinates, he re-examined and re-judged many difficult cases even though he was no expert of legal terminology, theories, and systems; he relied solely on his experience of working as a local government official. Surprisingly, his new verdicts were largely consistent with the old ones.<sup>9</sup> YAN Shigu, an established historian of the Han Dynasty, commented, “This means that law can be understood through humanity.” In other words, the content and purpose of the law can be understood through humanity and through understanding of human emotions.

2. *Law is developed based on humanity and reason.* FU Long, an official in the Southern Song Dynasty believed that “rite and law originate

from nature itself.” “Law should be enforced humanely” refers to the natural humanity rooted in blood relationships, based on which the principle of righteousness cannot be lost.<sup>10</sup> Such relationship exists between parents and children, and between grandparents and grandchildren.

HE Shudu, a minister responsible for policy formulation and for official promotion and demotion in the Southern Song Dynasty believed that “efforts to prevent evil deeds are rooted in humanity and reason.” This means that humanity and reason are the content and foundation of the law. Therefore, when judging cases, judges needed to consider any pitiable sentiment and any reason for leniency.<sup>11</sup>

***C | “Humanity, Reason and Law” as a Method of Legal Explanation — Analysis of Law’s (Norm) Humanity and Reason***

From the legislation of the Tang Dynasty and the case studies of the Northern and Southern dynasties, we can infer that “law, humanity and reason” provides a method of legal analysis that is closely related to law application.

During the reign of Tang Dynasty Emperor Taizong, there were two discussions about the appropriateness and balance of collective family punishment provisions for treason and rebellion, specifically about the relationships of fathers and sons, grandfathers and grandsons, and brothers. Below are some discussion details: In terms

9 汉书·朱博传 (*The History of the Han Dynasty: ZHU Bo Autobiography*).  
DU You, 通典 (*Ancient China Encyclopedia*), Vol. 167, Chapter 5 on Criminal Law.  
10 Id.  
11 Id.

of the relationship between brothers, they were significantly bonded, yet such a bond differed from the relationship of fathers and sons, and of grandfathers and grandsons, concerning reason and fairness. Between brothers, when they were alive, they had to split properties inherited from parents. Even after their death, they had a distinction between the main family and the branch family. Moreover, the hereditary official titles were only descended to one's own offspring, while the distribution of benefits was unrelated to the relationship between brothers. Since brothers did not gain from the privileges, why should they bear the consequences and be held responsible for their brother's actions? This kind of "unreasonable and unfair" situation should not be allowed to occur. Therefore, the discussion resolutions reached were as follows: In cases of treason and rebellion, fathers and sons should be executed, while brothers should be deprived of their official positions, and should not be executed.<sup>12</sup> Similarly, in cases of treason, both grandfathers and grandsons and brothers should be punished by taking away their official positions. Thus, the past practice of executing brothers while sparing grandfathers and grandsons had been significantly adjusted.<sup>13</sup> Those punishable by light penalties should survive, while those punishable by heavy penalties should pay the heavy price. These resolutions aimed to resolve the awkwardness against humanity and reason.

Such discussions ultimately sought after the principle of "consistency of interests," which was equivalent to the judicial method of "principle-based adjudication" as

advocated by scholars.<sup>14</sup> The "consistency of interests" principle was essentially the principle of fairness, which was achieved through the process of analysis of "humanity and reason." It might appear in the judicial process but resulted in the modification of laws. This was also reflected in the later provisions of the "Tang Code with Commentaries on Treason and Theft," which updated the provisions on collective family punishments for fathers and sons, grandfathers and grandsons, and brothers. The updated provision said: "Those plotting rebellion or commit treason shall all be beheaded; their fathers or sons above the age of sixteen shall all be hanged, those sons below the age of fifteen, as well as mothers, daughters, wives, concubines (including sons' wives and concubines), grandfathers and grandsons, brothers, sisters, and close relatives in the same big family, shall have all their official positions and possessions of property, land and houses confiscated. Men who are eighty years old or suffering from serious illness, and women who are sixty years old or disabled, shall be exempted (except for cases where women are involved in the crime). Uncles, brothers' sons, and nephews shall all be exiled for 1500 kilometers, regardless of their status and closeness to the emperor." These updates<sup>15</sup> incorporated the

12 Id.

13 旧唐书·刑法志 (*Old History Book of the Tang Dynasty · Record of Criminal Annals*).

14 REN Qiang, 司法方法在裁判中的运用——法条至上、原则裁判与后果权衡 (*The Application of Judicial Methods in Judgment Involving the Primacy of Statutory Law, Principle-Based Judgment, and Balancing of Consequence*), 6 中国社会科学 (*Chinese Social Sciences*), 127-128 (2017).

15 Authored by ZHANGSUN Wuji, and edited by LIU Junwen, 唐律疏议 (*Tang Code with Commentaries*), Zhonghua Book Company, at 321 (1985).



resolutions of the above two discussions.

The analysis of humanity and reason, as a method of law application, was often used in civil lawsuits. However, Volume 2, “Accurate Understanding of Facts of a Case Can Avoid Injustice” of *Tu Min Lu*, an advisory book on code of conduct for officials, authored by YUAN Shouding<sup>16</sup> of the Qing Dynasty, stated:

It is difficult to trust evidence due to the possibility of falsification and forgery in a lawsuit. Although some evidence can be used as proof, such as witness testimony, contracts, official documents, and family genealogy, such evidence is often subject to bribery, forgery, and tampering. So, what will the judge deciding the lawsuit rely on? SIMA Qian believed that only by accurately understanding the facts of the case and scrutinizing the trial can one avoid injustice. Only through this can the people obtain fairness.

This is the only method that can be relied upon.<sup>17</sup>

Since all the usual forms of evidence such as witness testimony, contracts, official records, family genealogy were unreliable and difficult to be trusted, people could only rely on the accurate understanding of the facts and careful deliberation to make a judgment based on humanity and reason.

Meanwhile, it was common for criminal cases to be required to consider mitigating circumstances.

The Ming Dynasty’s *Interrogation Regulations*, Criminal Laws, Article XI, “Judging Cases” clarified regulations for discerning wrongful accusations:

In all criminal courts, big or small, when interrogating prisoners, it is necessary to consider mitigating circumstances. If the circumstances are significant, and it is appropriate to release or exile them, then they may be sentenced to exile to deliver military service in a remote area. It is forbidden to be biased or driven by personal emotions, but decisions should follow precedents based on the circumstances.<sup>18</sup>

The crucial requirement of criminal law is to handle the relationship between humanity and law in cases.

The triangle relationship between humanity, reason and law can be seen as follows: The humanity and reason provide the

<sup>16</sup> YUAN Shouding (1705–1782), a prominent figure in the Qing Dynasty, was born in Qingjiang, Fencheng (now Fencheng City) and had the courtesy name Shulun, with the aliases Yizhai and Yushanweng. In the eighth year of the Emperor Yongzheng reign (1730), he became a Jinshi (the highest level in the imperial examination). He held various positions throughout his career, including the positions of deputy magistrate of Huitong County in Hunan, magistrate of Hongjiang County, magistrate of Zhijiang County, and prefect of Chuyang Prefecture. He had a remarkable talent for solving cases. He resigned from his official position to take care of his elderly mother, but later returned to the north to serve in the government in the 21st year of the Emperor Qianlong reign. He served as a deputy magistrate of Bagou Prefecture, magistrate of Quzhou in Zhili, and was eventually promoted to the Ministry of Rites. His work *Tu Min Lu* was published during his second term in office. He also wrote other works such as *Yushang Shi Shuo*, *Di Li Dan Zhe Lu*, *Du Yi Bao Kui*, and *Zhan Bi Cong Tan*.

<sup>17</sup> YUAN Shouding, 图民录 (*Tu Min Lu*), Vol. 2, in 官箴书集成 (*Guanzhen Shu Jicheng*), Vol. 5, published by Huangshan Publishing House, at 200 (1997).

<sup>18</sup> 大明律 (*The Great Ming Code*), edited by HUAI Xiaofeng, published by Liaoshen Book Company, at 432 (1990).

lawmaking premise and foundation, while the law is applied through consideration and analysis of humanity and reason. Only when the premise and foundation are established, can the consideration and analysis be possible.

## V The Turning Point of “Humanity, Reason and Law” in Modern Times — SHEN Jiaben, Law Revision Minister of the Late Qing Dynasty

In China, the concept of “humanity, reason and law” has spanned three eras: ancient, modern, and contemporary. In modern times, SHEN Jiaben and in contemporary times, XIE Juezai, each represented a significant turning point. SHEN Jiaben, living in the transition from traditional to modern and learning from the West, made efforts to explore the practical and theoretical differences in the “foundations of formation” of Chinese and Western laws and jurisprudence for them to complement each other. Furthermore, he worked to discover the commonality of reason and humanity in the “formation foundation” of Chinese and Western law and jurisprudence in order to facilitate mutual learning. He proposed a strategy of “integration and coherence” to establish a new concept of “humanity, reason and law” that is rooted in tradition while seeking to transcend tradition.

### *A | SHEN Jiaben’s Stance on Evaluation of Law Based on “Humanity and Reason”*

For example, the practice of allowing criminals to support their

elderly relatives is mentioned in *The Book of Wei*. In the 18th year (214 AD) of the Emperor Taihe reign, an edict was issued stating that criminals whose parents were over the age of seventy or had disabilities, in the northern cities, should have their crimes re-examined according to new laws. Those who were found guilty and were due to be punished were instead allowed to return home to support their parents. After the death of their parents, they were sent back to the remote areas to continue serving the remaining parts of their sentences. For other cases, those over the age of eighty who committed such crimes would also be allowed to return home. SHEN Jiaben believed that this was the precedent for the practice of supporting elderly relatives in modern times. Regarding the intent behind this pioneering system, SHEN Jiaben said, “Supporting elderly relatives is a humane lawmaking practice for those criminals, not because any of their crime can be forgiven. ‘After the death of their parents, they were sent back to the remote area’ is in line with reason and humanity. If they were discharged from prison without expecting them to complete the remaining punishment would be too unreasonable.”<sup>19</sup> Therefore, after the death of their parents, they should be sent back to the remote border area to continue their interrupted punishment. This approach complies with reason and humanity. However, during the Ming and Qing dynasties, it was too lenient that those criminals once released for temporarily supporting their parents would not be required to continue their

interrupted punishment, and such a practice naturally goes against reason and humanity.

Moreover, SHEN Jiaben commented on the controversial case of YAO Wenxiu's murder of his wife in the second year of Changqing in the reign of Tang Dynasty Emperor Muzong. The Ministry of Justice and the Dalisi (official judicial institutions in China, established during the Tang Dynasty) jointly decided, stating that killing without a fight was considered "intentional murder" according to law, but YAO Wenxiu's act was not considered "intentional murder" because there was a dispute involved. However, Dalisi's judge, CUI Yuanshi, had a different opinion. He pointed out that according to the law, argument was defined as a struggle, and striking was defined as an assault. Only when death occurred as a result of an assault could it be considered "violent murder." In this case, although the victim, Awang, was beaten to death, YAO Wenxiu had no injuries at all so it could not be called "violent." Cui Yuanshi argued that since Awang was already dead that night, it could not be considered an "argument" case. And since there existed violence and grudge, it should be considered "intentional murder."

BAI Juyi, an historically renowned poet in the Tang Dynasty, agreed with CUI Yuanshi and refuted the judgments of the Ministry of Justice and Dalisi. He suggested that Yao Wenxiu be charged with "intentional murder." SHEN Jiaben supported Bai Juyi's opinion and explicitly pointed out that this kind of analysis embodied a "reasoning based on humanity and reason." He said, "In the case of YAO Wenxiu, the victim was beaten badly, and CUI intended to charge him with intentional

murder. In terms of facts, humanity, and reason, it is difficult to support the judgment around argument." The terms of "facts,"<sup>20</sup> "humanity," and "reason" were mentioned.

### ***B | SHEN Jiaben Elaborating on the Humanity-Law Relationship***

*Collected Works of Letters* Volume 5 "Annotations on the Laws Regarding Divorce for Women" is a chapter in SHEN Jiaben's collection that discusses the relationship between "humanity and law" in the Qing legal system. It covers 31 articles from the Great Qing Code pertaining to household, military, and criminal laws, as well as the "Regulations on Supervising Arrests." This chapter best reflects SHEN Jiaben's perspective on the relationship between humanity, reason and law.

In the context of "humanity, reason and law" in the "Annotations on the Women's Divorce Regulations" by SHEN Jiaben, the term "law" usually refers to legal provisions or regulations. However, in this work, SHEN Jiaben divides the laws (legal norms) into two parts — "law" and "humanity." He stated, "The law can be principled regulations, and flexible norms considering specific circumstances and emotions of parties involved." Because of this distinction, he analyzed the inner subjective humanity (emotions) and the external objective humanity (circumstances) related to the willingness or unwillingness of the parties involved in divorce. Narrowly, "law" refers to the principled regulations, while "humanity" represents flexible norms that consider specific circumstances and

subjective intentions. SHEN Jiaben argued that “humanity” should be included within the broader concept of “law” (legal norms). Furthermore, he divided humanity into subjective humanity and objective humanity. Subjective humanity refers to the emotions at play in the parties’ willingness or unwillingness to divorce, while objective humanity refers to external circumstances of the case, generally referring to the circumstances within the case but sometimes extending to external factors. Additionally, the concept of reason is sometimes explicitly expressed and sometimes derived through analysis. It mostly refers to the moral principle of women being expected to remain in a marriage until the end. SHEN Jiaben emphasized the satisfaction of the need for humanity and he opposes approaches that always prioritize enforcement without considering humanities.

For example, in an article of “Man and Woman Marriage” of the “Household Regulations” of the Great Qing Code, there was a provision that stated: “If a man and a woman are married but then one of them promises to marry someone else, the unmarried party will be punished with 70 strokes, while the married party will be punished with 80 strokes, and the woman will return to her former husband. If the former husband refuses, the woman’s family must pay double the betrothal gifts as compensation, and the woman will still marry the second husband. If the first man’s family regrets, the same applies (the first man will still marry the former wife, but the subsequent betrothal will depend on whether she agrees to marry her

first man).”

The commentary of SHEN Jiaben stated, “For a woman to return to her former husband is a matter of law; but if she is unwilling and goes with the latter husband, it is a matter of humanity.” However, this applies to those who are already married. If they are not yet married, they cannot simply follow the latter husband based on their unwillingness. Similarly, “If the man’s family regrets and changes their mind, he is still required to marry the former wife, but the subsequent betrothal will depend on whether she agrees to marry her first man. This is a matter of law.” However, if the “later engagement” has already been invalid, and they are required to divorce, it goes against human sentiment. Therefore, the “General Commentary” of SHEN Jiaben explained, “If they are not yet married, the original betrothal is canceled, and the woman may marry the second man; if they are already married, they must separate from the latter and listen to the original betrothal for remarriage.”<sup>21</sup> It is evident that the “law” mentioned by SHEN Jiaben refers to principles, while “humanity” refers to flexibility. SHEN Jiaben’s statement that “both law and humanity must be taken into account, and the law cannot be blindly enforced without considering humanity” emphasizes that one should not simply emphasize principles while neglecting flexibility.

SHEN Jiaben’s exposition of the principle of the “relationship between law and emotions” revealed that concepts such as “humanity and love determine the law”

and “humanity and love are the basis of lawmaking”, and are the ideal legislative principles. The notions that the law is also humane, the law has connection with humanity, both the law and humanity are fully considered in making a conviction, and equal attention are paid to both the law and humanity, were followed in judicial and legal analysis during the Tang Dynasty. These formulations were also based on traditional legal propositions, and conclusions such as decisions should “not allow the law to prevail over humanity” generally inherited traditional legal principles.<sup>22</sup>

**C | SHEN Jiaben’s Updated View of “Humanity, Reason and Law”**

SHEN Jiaben’s traditional “relationship between law and emotions” perspective came from his roles as a criminal court official and as a traditional legal scholar. He utilized the basic concepts and analytical methods of traditional legal studies. Furthermore, his new “relationship between law and emotions” perspective emerged solely from his position as a minister of legal reform. It was a new phenomenon, new insight, and new development that arose when he placed matters in the context of conflicts between Chinese and Western laws and within the framework of comparative legal studies.

He wrote in the *Preface to Legal Classics*, “In our country, the old school has established its legal system, with profound insights into benevolence and righteousness. The essence of the new school is

already contained within it, so there  
is no need to diligently seek novelty.  
The new school often deduces from

22 See SHEN, fn. 8 at 2181.  
23 See SHEN, fn. 8 at 2240.  
24 See SHEN, fn. 8 at 2217.  
25 See SHEN, fn. 8 at 2238.

the old school, and as the circumstances change and the legal principles become more intricate, the fundamental essence always boils down to the two words humanity and reason. Whether following the old school or the new school, one cannot discard humanity and reason and distinguish them as separate from the law. What is valued is the integration and coherence.”<sup>23</sup> He believed that emotion and reason are the common denominators of Chinese and Western law and legal studies, and they form the foundation of his integration and coherence approach. This is his perspective as a reformist legal scholar.

SHEN Jiaben’s exploration and generalization of the common ground of Humanity and Reason in Chinese and Western law touches on the commonality and regularity of the development of world legal civilization and legal culture. When discussing the relationship between experience and theory of Chinese and Western forensic medicine, he said: “When it comes to truth, ancient and modern China and the West are consistent.”<sup>24</sup> When discussing the commonality of the purpose of the establishment of Chinese and Western prisons, he listed the similarities of prisoners’ sports ground, clean food and clothing, safe living place, teaching room and parole system, and then said: “There must be an extreme certainty in all things, and if we follow analysis to the extreme, there will be no difference between ancient and modern China and the West.”<sup>25</sup> The

“extreme certainty” and “truth” are rules, which are the objective inevitability or inherent nature of things in different environments and conditions. Undoubtedly, SHEN Jiaben understood the reflection and inclusion of humanity and reason in law as a matter of regularity. What he aimed to achieve through “integration and coherence” was precisely this “humanity and reason.”

## VI The Turning Point of “Humanity, Reason and Law” in Contemporary Times: Communist XIE Juezai

An exceptional scholar of the early Qing Dynasty, and familiar with ancient books, XIE Juezai was naturally familiar with the traditional concept of humanity, reason and law, and the principle of the relationship between them.

### *A | XIE Emphatically Affirms “Humanity Rationality” and Harmonizes It with Revolutionary “Humanity”*

XIE pointed out that revolution does not exclude personal friendships, filial piety, or the desire for descendants.

(1) The comradeship in revolution does not exclude personal friendships, otherwise it would violate human sentiments.

(2) The comradeship in revolution does not exclude the filial bond between parents and children, otherwise it would violate human sentiments.

(3) The comradeship in

revolution does not exclude the desire for descendants, otherwise it would violate human sentiments.

XIE Juezai’s viewpoint expands our understanding of “humanity” by shifting our focus from a previous emphasis on the understanding of “objective emotions” such as “prison circumstances” or “case circumstances” to the observation of the “subjective emotions” of the individuals who act as examiners or participators.

### *B | XIE Thoroughly Analyzed the Relationship Between “Humanity” and “Reason”*

On August 27, 1944, XIE wrote in his diary:

What is humanistic may not be reasonable, but what is reasonable must be humanistic. An unreasonable humanity is due to concealment. Reason is the humanity that has been washed and refined. There are people who think that to be deliberately inhumane is a characteristic of the real Bolshevik. It is not necessarily all dogmatism or sectarianism that makes a revolution collapse by killing people and even themselves. Lack of good nature is also one of the reasons.<sup>26</sup>

This is a classic interpretation of the relationship between “humanity” and “reason” by a communist who had mastered Marxist theory. Certainly, these conclusions are based on the practice of a

26 谢觉哉日记 (*Xie Juezai's Diary*), Vol. 1, People's Publishing House, at 679 (1984).

revolutionary legal system. He especially hated the paranoia and the destruction of the leftist line in the Jiangxi Communist Area based on reason.

XIE did not draw the conclusion that “what is humanistic is reasonable, and what is reasonable is humanistic” can be established by forward and inverse deduction, but said that what is humanistic can be reasonable or unreasonable—it may not always be reasonable; on the contrary, what is reasonable must be humanistic, and there are no circumstances in which what is reasonable is inhuman. Naturally, the reasonable side of humanity should be the normal state of the relationship between humanity and reason, but this is not the focus of XIE. He focuses on the unreasonable side of humanity. Why is it humanistic but unreasonable?

1. *If “humanity” is blocked, “reasons” shall be unreasonable.* XIE’s view can be understood in this way: The reasons why “what is in line with the humanity may not be reasonable” are as follows. First, humanity is an individual and private thing, involving a mutual requirement of general equality, such as friendship involving talk, mutual assistance, mutual understanding, as well as family affection involving fostering (raising, supporting), mutual care, integration with the outside world. Second, humanity has characteristics of fixed objects and non-choice, such as the family affection between parents and children, brothers, and sisters. Friendship also has a social circle, such as friendship based on age, friendship not based on age, friendship with food friends, close neighbor

friendship. There are also circles of colleagues and peers. Finally, humanity has many emotional factors, such as love, favor, trust, expectation, dependence. However, if we blindly consider such humanity, we may violate the requirements of reason. XIE said that “unreasonable humanity is due to concealment of humanity”—concealment is due to its isolation, circle, emotion, and other factors. This is obviously undesirable. It is humanistic but unreasonable.

2. *If “humanity” is associated with “reason,” “reason” must be in line with humanity.* As XIE said, “reason is refined humanity,” and reason is the sublimation and refinement of humanity, so “what is reasonable is humanistic.” First, this reason is determined or recognized by a larger group or collective, which has moved somewhat away from the independence, absolute individuality and privacy of humanity, and has abandoned the self-smallness, and reflected on collectivity and commonality, thus meeting the requirements suitable for or adapted to a wider range of humanity. It is the move towards “general humanity” and away from “small humanity.” Second, “reason” has removed the concrete and objective emotional components of “humanity,” showing more reasonable or rational color, which is a kind of transcendence. So, it is more macroscopic, abstract, and principled, and provides general rules. The pattern of the relationship between reason and humanity lies in the fact that “humanity” is concrete, while “reason” is abstract; “humanity” is scattered, while “reason” is general; “reason” must be based on “humanity,” otherwise “reason” has no

reason to come into being; “humanity” must be governed by “reason,” otherwise it is subservient to “small humanity” rather than “general humanity.” Therefore, the relationship between “humanity” and “reason” should be:

humanity ≠ reason; reason ≠ humanity  
reason ≠ humanity; reason = humanity

### **C | XIE Promoted “Humanity, Reason and Law” to a New Level**

1. *Law is about humanity.* In the relationship between “law” and “humanity,” XIE suggested that “Law is about humanity.” Habits that conform to humanity should be respected and can be adopted into the formal law. Habits that do not conform to humanity but cannot be eliminated immediately for specific reasons should be gradually changed by education and political power. But habits that are already disapproved of by ordinary people should be eliminated by decisive means.<sup>27</sup> That is to say, the basis of law and the content of law are humanity.

2. *Law is enacted and enforced in accordance with humanity and reason.* On May 8, 1963, XIE pointed out in his speech at a meeting of judicial cadres of Jiangsu Province and Nanjing City: “There is an old saying in China: “people must act in line with heaven reason, state law and human practice.” “Everyone knows these words, “heaven reason” does not mean that the Heaven gives us reasons, but that we have common principles to respect and follow. Heaven, earth, monarch, parents, and teachers are the heaven reason of the feudal era. The bourgeoisie has its own reasons

and the proletariat has its own reasons; the proletariat’s reasons are collectivism. Humanity also has different meanings in different classes of society. Reason and humanity cannot solve the problem, so law is involved. Law is formulated and applied according to humanity and reason, and this needs to be further studied.<sup>28</sup> That is to say, in the relationship between law and reason, the formulation of law is based on reason, and the implementation of law should also consider reason.

3. *A good law should be humanistic and reasonable.* In the relationship between good law and “humanity and reason,” XIE put forward: “A good law should be humanistic and reasonable.”<sup>29</sup> That is to say, whether the law is good or bad is based on whether it is “humanistic and reasonable.” This echoes his proposition that judicial content, including “explaining humanity and situations” and “giving reasons” and judgement, should be humanistic and reasonable; this shows that XIE’s understanding of law and justice is consistent and integrated and constitutes the principal thread of his view of humanity, reason and law.

### **D | XIE Is an Expert in Analysis of Cases in Terms of Humanity and Reason**

XIE Juezhai believed that people appreciate the comedy *Funny Love Affairs* of

27 XIE Juezhai, *一得书 (Yi De Shu)*, Hunan People’s Publishing House, at 118 (1983).

28 谈审判工作中的几个问题 (Several Issues in Judicial Work), in 谢觉哉文集 (*Collected Works of XIE Juezhai*), People’s Publishing House, at 1132 (1989).

29 See XIE, fn. 26 at 469.



Magistrate Qiao, because Magistrate Qiao's judgment is based on both "humanity" and "reason." There are two key sentences in Magistrate Qiao's verdict:

If someone else's wife is taken away, one's own wife will also be taken away; the grievances between the two families can be resolved to end the turmoil.

To enjoy happiness alone is not as good as enjoying it together; three married couples should live harmoniously like fish in water.

XIE indicated that the subtlety of this verdict lies in: "The first quotation says "reason," and the second one says "humanity," so those who are disinclined to accept it are naturally convinced."<sup>30</sup> What is the "reason" in the first quotation? It is the reason of retribution. There are two kinds of retribution: retribution for good and for evil. In this case, it is retribution for evil. If you take away another person's fiancée, another person will also take away your fiancé. So, the two families have the same loss, and their grudges will be offset. What is the "humanity" in the second quotation? It is the humanity shared by all—all shall be well, Jack shall have Jill and Jill shall have Jack. That is, not only is the man married with his lover, and other people also have spouses. Three pairs of young people, all get married, and all have the pleasure of close intimacy and sexual intercourse. He is convinced that the verdict should be explained in a very clear way like this.

## VII Conclusion

The "humanity, reason and law" or "heaven reason, state law and human practice" is a philosophical concept within the framework of Confucianism in China, which corresponds to the concept that "the application of law should always be in line with the intention and purpose of the law, rather than just following the literal wording of the law," which follows the Daoist framework of the Wei and Jin dynasties. It involves the pursuit of law and justice that is in line with humanity, and reason and law, and is related to the Chinese philosophical consideration of the original or fundamental principles of law. Therefore, promoting "humanity" and emphasizing "reason and law" are the overall characteristics of Chinese law and standard of justice. These concepts and expressions do not have corresponding vocabulary and expressions in Western thought. Throughout history, "humanity and reason" often play a role in correcting the strict and rigid aspects of positive law, blocking arbitrary motives and tendencies, and serving as a form of "natural law" in the Western sense. The process of seeking "humanity and reason" is often a process of seeking the true essence, spirit, and even principles of law. In ancient times, the role of "humanity, reason and law" was primarily positive. In modern China, "humanity, reason and law" occasionally appear in judicial cases, which is evidence of the continuation of this excellent tradition of legal culture from ancient times.