

内容摘要

一、清末刑法改制原因论质疑与解惑。清末刑法改制是在特定的极其复杂的历史背景下展开的。学者把清末刑法改制的直接原因论归纳为两种对立类型：冲击反应模式说与中国中心观说，经济基础决定说和非本质原因说。

上述四种观点都蕴含着一定的真理成份，但亦存在偏颇失衡之处。应采取辩证唯物主义和历史唯物主义立场，抛弃就现象论现象的绝对、静止的做法。清末刑法改制是中西综合因素的产物，其逻辑起点是西力渐进而导致的中国近代经济基础的转型，其观念基础是西方个人本位价值观念的导入，其法律基础是治外法权的沦丧及收回的欲望，及日本变法成功的示范效应。

二、清末刑法改制的动因基础。一是西力渐进与中国近代经济结构转型。所谓西力，是指西方的物质文明和制度文明，这种由工业革命带来的巨大的生产力及与此相连的政治制度、价值观念、思想意识等汇成不可阻挡的潮流，随着鸦片战争的爆发而涌入中国，冲击着东方农业民族的自然经济结构。但因近代中国自然经济和商品经济二元结构体系的存在，西力的冲击并不是畅通无阻的，由此而带来的法律文化的冲击也受到中国传统的以礼治为核心的重刑轻民的法律文化的阻挠，清末刑法改制的艰巨性是可想而知的。二是清末刑法改制的思想基础在于个人本位价值观念的导入。西方的个人价值本位聚焦于对人的尊重，对人的自由

的向往和保护，对人作为一个独立的个体予以最大限度的关怀，这一观念传入中国，演绎成了个人本位的国家主义法律观。这种法律观既树立重视个人独立、自由的权利范式，又强调国家的自由大于个人自由，既高扬西方近代的个人价值观念，又掺杂有中国传统的国家大于个人的观念，导致清末刑法改制形式上的近代化大于内容上的近代化。三是清末刑法改制的法律基础是治外法权的丧失和收回的欲望。治外法权的沦丧，使清王朝陷入二难境地：既要维护司法独立，又要顺应世界法律发展潮流。唯一出路就是进行刑法改制，以换取治外法权的收回。

三、人性论的嬗变与吸纳。刑事法理论和原则是围绕人、人性问题展开的，中西先哲们对人性问题的关怀最显著的差异是：一个是从伦理学角度予以关注，一个是从理性的角度予以关注。中国古代人性论强调人性的伦理之性，而西方近代人性论的特质在于强调人性的理性。

中国近代人性论在中国古有人性论的伦理性基础上，将西方近代人性论的理性成份吸纳进来，强调“人各具一魂”，人是理性的动物，由此对人之所以为人提出了更为具体高层次的内涵：即人是平等的自由的，享有不可剥夺的自然权利，构筑了较为科学、实证的观点。诚然，这其中，有许多唯心的色彩，是人的一种臆想和主观愿望，这是其自身的局限，也是历史的局限。但它为清末刑法改制所铺垫的刑法本源基础，却是有历史价值的。

四、清末刑法改制之进程。清末刑法改制是历史阶段的历史产物，清末刑法改制本身又是一个过程，在这一过程中，刑法改制所进行的每一步骤都使中国刑法更贴近于近代化，更走向近代化。君主立宪使立法权、司法权的独立初具雏型；外国法律的翻译为移植西方立法模式打开大门；日本刑法改制成功的范式刺激了清末刑法改制的深入；《大清现行刑律》的拟定在很大程度上为清末刑法改制铲除中国封建思想浓重的刑法内容、吸纳西方刑

法治思想扫清了路障。可以说，清末刑法改制的进程是举步维艰的。特别是《大清现行刑律》的出台，在体例上打破了中国数千年来诸法合体的传统形式，刑名的厘正意味着在中国倡行数千年的刑名体系的解体，具有由身份刑向自由刑倾斜的味道，是《大清新刑律》采用自由刑制度的前奏。

五、中国刑法近代的法典化——《大清新刑律》。晚清的刑法改制是在内外交困的情况下进行的。在外交上，治外法权的逐年丧失，西方的“变法便撤消治外法权”的引诱，日本变法国力渐强的事实，使清政府自上而下的改制呼声渐起。在内部，君主立宪形式的确立、大规模的翻译外国法律、修律馆的创立及《大清现行刑律》的完成，都为《大清新刑律》的出台铺垫了基石，因而说它的出现是多种合力的结果。《大清新刑律》是中国刑法近代改制的产物，是中国刑法摆脱封建法律体系，叩开近代化大门的标志，是中国汇入世界法律潮流的开始。针对于《大清新刑律》所展开的礼法之争，是近代刑法思想和中国固有的刑法理念的一次大较量，但《大清新刑律》的颁行，在一定意义上说，标志着刑法改制派所持的采西方刑法思想和原则为我所用的观点已占上风。《大清新刑律》在内容和形式上两方面体现了近代化内容：在内容上采西方刑法通用术语，明确规定了缓刑和不论罪的内容；在形式上，《大清新刑律》的出现标志着中国封建刑法体系的解体和近代刑法体系的建立。后被北洋军阀、国民党政府所仿效，成为中国刑法近代化的起始点。

六、《大清新刑律》之近代化内容。《大清新刑律》共分总则十七章和分则三十六章，这种体例完全是吸纳欧美、学习日本的立法经验，兼采中国传统立法模式而成就的。较为突出的是蕴含中国古有刑法思想的内容与体现刑法近代化意蕴的刑事立法内容相结合，杂糅而形成了中国近代刑法的新鲜血液，如不为罪、刑事责任年龄、共犯罪理论和立法、缓刑制度和假释制度等。其

《大清新刑律》的不为罪制度主要包括正当防卫不为罪、紧急行为不为罪；刑法的效力在保留中国传统刑法中的属地原则基础上，增加了保护原则和隔地犯等内容；在刑事责任年龄上一是提高其年龄阶段，二是于教育刑基础上设置惩治场，初具保安处分的雏形；《大清新刑律》的共犯内容可以说是清末刑法改制中吸纳大陆法系刑法理论和刑事立法例较完整、较系统、最具近代化的部分，其近代化色彩通过共犯的内涵及共同犯罪人的分类、过失之共犯和片面之共犯等内容体现出来。刑罚制度的近代化内容则通过缓刑和假释制度加以体现。

七、罪刑法定原则与中国刑法近代化。罪刑法定在中国古代刑法中始终以“主义、主张、思想”的身份存在并绵延几千年，是因为没有促使罪刑法定由思想上升为刑法原则的历史氛围和人文要求。至近代，随着西方利船尖炮而来的西方刑法中的罪刑法定原则，成为当时志在修律、创制新法的有识之士追逐的目标，因为罪刑法定原则本身就是宪政、民主、人权、平等的象征，而这些正是中国近代法律发展的一大主题。《大清新刑律》体现近代资产阶级刑事立法的原则之处有很多，但其中最能体现中国刑法近代化趋势、倾向和象征的则是罪刑法定原则的确立。但只是在形式上实现了罪刑法定原则，在实质内容上，却未能落到实处。清末刑法改制受西方近代罪刑法定原则的影响，自然承袭了否定类推适用、刑不溯及既往、法律面前人人平等法治原则，但受国内刑法改制时社会背景的影响，清末刑法改制在吸纳这些思想时却大打折扣：表面上否定类推适用，实质是允许其存在；官当制度宣告废除，但在《暂行章程》中却将皇室的特权视为圭臬。因而我们说，废除官当制，只是在形式上实现了罪刑法定原则所倡行的法律面前人人平等之义，而这一形式意义上的完美却是历史性的进步。

八、刑名体系的科学化与中国刑法近代化。 《大清新刑律》

所确立的刑名体系，分为主刑和从刑两大类。主刑包括 5 种，并依刑罚由重到轻排列：死刑、无期徒刑、有期徒刑、拘留、罚金；从刑包括两种：剥夺公权和没收。可见，清末刑法改制所创设的刑罚体系，与中国历史上以往各朝代的刑名体系是大相径庭的，它既有刑罚体系方面的近代化，又有刑罚思想和刑罚重心的近代化。这种刑罚思想和刑罚重心的近代化体现在肉刑制度的废除、自由刑制度的兴起，死刑执行一元化制度的兴起。死刑轻缓化、人道化的倾向，折射出中国近代刑法近代化的趋势，成为中国近代刑名体系迈向近代化的一个标志性窗口。

九、历史的感悟与反思。清末刑法改制所体现的具有近代化意味的刑法思想和原则，浓缩于《大清新刑律》之中，在中国刑法史上产生了许多“第一次”现象：罪刑法定原则首次在中国刑法史的首部刑法典中的体认，由此而衍生出的刑不溯及既往原则、免除官当，实行法律面前人人平等原则，缓刑制度的规定；在刑法体系上，首次实行总则和分则分类法，以此为起点，刑法体系步入正规；在刑罚体系上，首次构建了具有近代刑法成份的死刑、无期徒刑、有期徒刑、拘役、罚金等主刑和附加刑体例；首次规定死刑执行唯一论，体现了以自由刑为中心代替以肉刑为中心的历史趋势。所有这些“首次”现象，在清末刑法改制中是通过立法环节体现出来的，而立法多体现于法律的形式上合理性。在当时的历史氛围中，中国刑法改制所体现的形式合理性的历史价值是无法回避和抹杀的。其价值主旨体现在：首开部门法典化的先河，创设了法治主宰人治的法律雏形，罪刑法定原则的确立开启了中国刑法近代化的大门。

清末刑法改制的形式合理性可以说达到了一定的程度，但其内容合理性的欠缺是无法掩盖的事实。这种缺憾在于当于缺乏法治正常运行的经济、人文环境，特别是法律在人们观念中的地位没有达到法律运动所需的那种程度，即人们对法律的信仰程度。

只有将法律作为一种理念、一种信仰、一种终极关怀，那么法律改制也好，法律转型也罢，带给我们社会的将是实质合理性的改变，而不应象清末刑法改制，无力于刑法实质合理性的改变。记住历史，反思历史，以便更好地对待现实的刑法问题。

ABSTRACT

I. The Causes of the Reform in the System of Criminal Law in the Late Qing Dynasty. The reform in the system of criminal law in the late Qing Dynasty took place under complicated historical circumstances. Scholars attribute it to the following two pairs of the main causes: impact and response vs China centricism; the determination of economic basis vs non - substance.

To some extent, the above - mentioned four notions all contain truth. But at the same time, they are also one - sided. It seems to the author that it should be dealt with in an approach of dialect and historic materialism and from a dynamic perspective. This reform was the result of comprehensive western and Chinese factors. Its logical starting point was the changes in the economic basis of modern China caused by the incoming western forces, its conceptual basis was the introduction into China of the idea of the value of the individual in the West, its political basis was the loss of extra - territorial right, the desire of China to recover it and the model of successful Japanese reform.

II. The Basis of the Dynamic Causes of the Reform. One of such causes was the incoming western forces and the changes in the economic basis of modern China. The western forces here refer to

the material and institutional civilization. The huge force of production released by industrial revolution and the relevant political system, value concept, ideology, created an irresistible tide that poured into China with the outbreak of the Opium War. It led to a huge impact on the structure of natural economy of an oriental farming nation. However, in modern China, natural economy and commodity economy existed side by side. The process of the western forces coming into China was not a smooth one. The impact of western legal culture met with resistance from Chinese tradition illegal culture that stressed punishment and showed slight concern for the individual. This made it very hard for the reform to be carried out. The second one lay in the introduction of the concept of the fundamental value of the individual from the West into China. The concept of the fundamental value of the individual in the West focuses on the respect for the individual. The protection of his freedom and the freest concern for his independence. After its introduction into China, it has become the legal concept of the nation. This concept on the one hand tried to establish a model that attached great importance to the right of individual freedom and independence, and on the other hand stressed that state freedom was more important than individual one. The two sides were mixed together, thus leading to the modernization of the criminal law system in form much more than in its content. The third one was that politically, China lost her extra-territorial right and wanted to gain it back. The loss of extra-territorial right placed China in an awkward situation in which she on the one hand wished to maintain her legal independence, and on the other hand to follow the world trend in the development of legal science and practice. The only way out was to carry out reform so as to

recover the extra - territorial right.

III. Evolution and Absorption of the Theory on Human Nature. The theory and principle of the criminal law focus on human and human nature. The differences in such concerns of both Western and Chinese scholars lay in that Chinese scholars usually viewed the issue from the ethical perspective while western ones placed it mainly on a basis of rational and philosophical reasoning. The theory on human nature in ancient China covered a combination of human ethical attribute with his ability to know and to do things. Modern theory on human nature in the West mainly emphasized the rational side of the human. With the ethical perspective as its basis, the theory on human nature in modern China absorbed the rational element of the relevant western theory and stressed that "each individual has his own soul", thus raising the understanding, and the interpreting of human nature to a higher and more concrete level. That is, every human is equal with every one else, he is entitled to inalienable natural rights. Such understanding covered a more scientific and empirical point of views, although it was still limited. It was historical value since it was the basis of the original source of the criminal law that paved the way for the reform.

IV. The Process of the Reform. This reform was the product of a given historical period. It was also a process in itself. Each step that was taken in this process brought Chinese criminal law closer to the modern one. Constitutional monarchy led to the appearance of the basic form of the separation between legislative power and judicial one. The translation of foreign laws into Chinese made it possible for western legislative model to be adapted.

The success of the reform of criminal law in Japan as a good ex-

ample stimulated the reform of criminal law in China. The making of The Contemporary Laws of the Qing Dynasty removed the obstacle to the reform of the criminal law, the adaptation of the western ideas concerning criminal law by ridding the existing criminal law of its feudal contents. The reform had experienced a great deal of hardship and difficulties. The implementation of the Contemporary laws of Qing Dynasty broke the tradition which different kinds of laws were mixed up in China for thousands of years. The revision of the names of the punishment meant the collapse of the system of names of punishment in operation for ages and tended to move from status one to liberal one, thus serving as a prelude to the adoption of liberal punishment by the New Criminal Law of the Qing Dynasty.

V. Contemporary Criminal Law of Qing Dynasty. Code of Criminal Law in Modern China. The reform took place when China was in troubled situation both at home and abroad. Externally, there were the gradual loss of "extra - territorial right" the threat by the west that " reform would mean the cancellation of extra - territorial right", and the fact that Japan grew strong as a result of reform, thus, leading to a popular cry at all levels of Qing government for reform. Internally, the establishment of the form of the constitutional monarchy, large scale translation of foreign laws into Chinese, the founding of the academy for revising laws and completion of the Contemporary Laws of Qing Dynasty" together made the basis for the drafting and implementation of the New Criminal Law of Qing Dynasty. Consequently, its appearance was the result of many different forces. It was the product of the reform of criminal law in modern China, marking its departure from feudal legal system, the start of its modernization and the beginning of China fol-

lowing world legal trend. The dispute over The New Criminal Law of Qing Dynasty was in fact a important baffle between modern criminal thinking and the traditional Chinese concept. Its implementation, in a sense, meant that the reformers had gained upper hand already. Its content and form both reflected its modern nature. It adopted the prevailing western criminal terms. As far as its form was concerned, its appearance marked the collapse of the feudal criminal system and the establishment of the modern one. It was adopted by the northern warlords and KMT government and because the starting point of the modernization of Chinese criminal law.

VI. The Modernization of New Criminal Law of Qing Dynasty. New Criminal Law of Qing Dynasty was made of general rules and special rules, which established beyond the Europe and America's style and Japan's legislative experience. It embodied modernization in many ways, for example, no - offense , criminal age , joint offense , probation and conditional release. It's no - offense consisted of rightful behave and act of rescue . It's modern criminal age embodied by enhancing the criminal age. It's joint offense not only absorbed Continental Law completely , but also changed completely compared with Chinese traditional joint offense. The joint offense's modern componentpart embodied by the classification of joint offense person, joint offense through negligence and one - sided joint offense. The modern punishment embodied by probation and conditional release.

VII. The Principle of Punishing Crimes according to Law and the Modernization of Criminal Law in China. The idea of punishing crimes according to law was embodied in different kinds of "doctrines, thoughts" and lasted for thousands of years. The reason why

such idea did not become principle (criminal law) was that there had been no such atmosphere that demanded this. As time went by, the western principle of punishing crimes according to law came together with the western gunboats and became an objective sought by those who were determined to revise the old one and create new ones. To these people, the principle itself symbolized rule by constitution, democracy, human rights, and equality. All these formed one of the main themes in the development of modern law in China. The New Criminal Law of Qing Dynasty incorporated many respects of the principle of modern bourgeois criminal legislation, among which the establishment of the principle of punishing crimes according to law was the most important one. But such principle was there and existed only in form, but not in reality and legal practice. Under the influence of the west, the reform in China naturally inherited the legal principle of application of negative reasoning from analogy, equality for everyone before the law, and soon. However, under the influence of the social situation and condition in China at that time, there was no complete adoption and enforcement of such idea. Superficially, the negative reasoning from analogy was considered appropriate and applicable, the right of the official to make decision in all cases was suspended. However, "The Provisional Articles" provided that the privilege enjoyed by the royal family was above all. Consequently, the concept of equality before law for everyone was never realized in daily life, it existed only in form. In spite of this, it was still a step of progressive value.

VIII. The Scientific Development of the System of Punishment Names and the Modernization of Criminal Law in China. The system of punishment names established by the New Criminal Law of

Qing Dynasty could be divided into 2 types, namely, principal penalties and secondary penalties. The first type included death penalty, life imprisonment, fixed - term imprisonment, detention and fine. The second one covered the forfeit of civil right and expropriation. Obviously, the system of punishments established in the reform was entirely different from those of previous different dynasties in China. It suggested not only the modernization of penalty system, but also the modernization of guiding the thinking of and focus of the penalty. Such modernization found its reflection in the removal of corporal penalty, the emergence of the system of free punishment, death sentence with reprieve.

VIII. Historical Understanding and Reflection. The movement of reforming the criminal law condensed the criminal principal and thought of modern nature in the New Criminal Law of Qing Dynasty which produced many "first times" in the history of China. The principle of punishing crimes according to law was written down and recognized in the first criminal code for the first time, there were general principles and specific provision for the first time. There were many cases like these. The reform of the criminal law in late Qing Dynasty achieved rationality in form, but lacked it in substance. This was because the economy, human circumstances, the status of law in the mind of people failed to provide condition under which the law could operate. It is only when law becomes a rational notion, a belief, an ultimate concern that the reform, transformation of legal system can bring essential, rational change to our society. Lessons should be drawn from the reform in late Qing Dynasty so that we can do a better job in dealing with present criminal issues.

第一章

清末刑法改制原因论质疑与解惑

清末刑法改制是在特定的、极其复杂的历史背景下展开的，特殊的历史环境不仅是中国近代刑法改制的推动力，而且也标示出其发展的目标与方向。1840年后，西方的坚船利炮轰开了中国封建社会闭关锁国的大门，也打破了国人沉于自我供给、自我发展的“泱泱大国、无以伦比”的梦想，震醒了中国人，产生了“西人步步东来，中国步步退让，中国意识到自己被纳入新的世界格局，无法挣脱^①的忧患意识。与此同时，中国近代的社会经济关系、阶级结构和社会主要矛盾发生了一系列变化，也正是这一系列变化触发了清末刑法改制活动的爆发与开展。学者们基于对清末刑法改制的原因论的不同认识，更为准确地说，对根本（直接）原因的不同理解与认识，提出了不同的主张。

第一节 清末刑法改制直接原因论概览

纵观学者们对清末刑法改制直接原因论的考证、研究，可分为两种对立类型：冲击反应模式说与中国中心观说；经济基础决

熊月之：《西学东渐与晚清社会》，上海人民出版社1994年版，第220页。

定说与非本质性原因说。

一、冲击反应模式说与中国中心观说

这二种学说是以西方法律文化对中国传统刑法文化的冲击及反映为视角所进行的划分。

1. 冲击反应模式说

此种学说又可称为“西方中心说”，它是由美国哈佛大学著名中国问题研究专家费正清教授（Tohok Fairbank）首倡的。费先生认为，在近代中国历史发展过程中起主导作用的因素是西方文化的入侵，即引发中国近代法制变革的最为直接的原因是“西方文化的广泛入侵”。这种“广泛入侵”小至日常伦理大至社被学说制度，从朝亥制度到条约制度演变便可印证“广泛入侵”的威力。朝亥制度是把儒家学说即中国统治者依照伦理根据来行使他的政治权力的学说，应用到对外事务上，是对“夷狄”沐浴天朝教化的一种恩典和特权。但随着鸦片战争中国的失败，不平等的条约制度开始形成，中国在世界上的位置好象突然从里面翻转到外面来了，整个场景例转了。正像马克思、恩格斯经典作家所描绘的那样：“天朝帝国万世长存的迷信受到了致命的打击，野蛮的、闭关自守的，与世隔绝的状态被打破了，开始建立起联系。”^① 因此费先生主张“必须把 19 世纪 40 年代和 50 年代条约制度形成的时期，看成是外国对中国的生活施加错综复杂和惊人影响的起始阶段。”^② 西方法律文化的冲击成为中国近代文化特别是法制转型的终极原因。严立贤先生亦主张，当 19 世纪初西

《马克思恩格斯选集》第 2 卷，人民出版社 1959 年版，第 2 页。

② 费正清编：《剑桥中国晚清史》（下卷），中国社会科学出版社 1985 年版，第 233 页。

方资本主义入侵时，中国基本上不具备现代化的自发的条件。传统中国社会结构的顽固性和坚韧性，如果没有来自西方文明的冲击，而单靠内部力量的自我突破，很难设想能在什么时候完成^①。

2. 中国中心观说

此说是由美国学者 P.A·柯文提出的^②，以反对“西方中心说”。这一观点首先对“冲击—反应”论提出了质疑，认为这一模式把西方入侵视为 19 世纪中期开始的中国社会变迁的主导作用因素，由于其把注意力集中在挑战回应上，就很容易使人们把并不仅仅是或主要并不是对西方做出回应的发展，错误地解释为对西方做出的反应，且这一模式在解释近代中国的变化时，还引导人们采用思想文化和心理解释方法，而削弱了采用社会、政治和经济的解释方法。针对“西方中心说”的上述漏洞和弊端，柯文先生提出了中国的历史应放在中国自身之中加以研究的“中国中心论”观点，强调“尽管中国的情境日益受到西方影响，这个社会的内在历史自始至终依然是中国的”。^③因此，要以中国自身为基地，从中国的情况出发来对待历史。既不低估西方在 19—20 世纪对中国的作用，也不夸大其作用，而是把这种作用置于中国历史的具体过程中，给予恰当的有限的评价。这种有限性从利用区域系统分析方法来分析中国法制在近代化过程中各个地区的具体情况中可见一斑：沿海地区特别是一些通商口岸，与新兴的全球海洋文明发生着广泛的接触和联系，因而沿海地区社

〔美〕泰格·利维：《法律与资本主义的兴起》 纪现译 学林出版社 1993 年版，第 221 页。

美 P.A·柯文：《在中国发现历史——中国中心观在美国的兴起》 中华书局 1989 年版，第 42 页。

美 P.A·柯文：《在中国发现历史——中国中心观在美国的兴起》 中华书局 1989 年版，第 173—174 页。

会居民的价值观念在相当程度上受西方影响，沿海地区的法制特别是在法律实施方面，既会有中国的又会有西方的主权和惯例因素，而腹部地带与此大相径庭。^① 因此，总的来说，西方近代法制精神无法深深渗透到清末刑法改制之中，清末刑法改制的动因应来自于中国内部而非来自外部。

二、经济基础决定说与非本质性原因说

经济基础决定说与非本质性原因说是在对“中国中心论”说产生共识的基础上而离析出来的。所谓“共识”（Consensus）是理性的成果，而且是以交互主体性的开放和多元为前提的，主体与主体间为认同而有约束，也是在相互协调和肯认的语境和意义下为条件的。^② 二者都认同引发清末刑法改制或变革的主要根源在于中国社会内部，应从中国自身寻求转型之因。但对于究竟是中国社会内部何种因素构筑了清末刑法改制的根本动因，或经济因素、或政治因素、或社会因素抑或综合性因素，二者却产生了实质性区别，由此导致这两种观点的对立。

1. 经济基础决定说

持此说的学者认为，清末刑法改制是在经济的、政治的和社会的条件综合作用下运作的，但其中，“经济条件归根到底还是决定意义的，它构成一条全部发展进程并唯一能使我们理解这个发展进程的红线。”从根本上说，清末刑法改制“直接根源于当时经济基础的变化。”^③

美 P.A·柯文：《在中国发现历史——中国中心现在美国的兴起》，中华书局 1989 年版，第 142—144 页。

② 《当代西方著名哲学家评传》第 10 卷，山东人民出版社 1996 年版，第 468 页。

③ 《马克思恩格斯全集》第 39 卷，人民出版社 1972 年版，第 199 页。