法史论丛

礼与法：法的历史连接

马小红 著

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——构建与解析中国传统法

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序

马小红同志从事法史研究和教学近二十年，她的专精覃思、心无旁骛深为法史界同仁所共知，多年来论著颇丰，其中不乏有影响的力作。1997 年她出版了专著《礼与法》，这部书旁搜博采，资料丰富详实，体例严谨，尤其难能可贵的是，在较为准确地把握住古代社会政治、文化面貌的基础上，以新颖的视角来阐述中国古代法律的特征。因此，无论是这部书还是这一课题都引起了学界的关注。2001 年马小红同志考入中国人民大学，攻读博士学位，作为她的导师，我建议她就此课题继续深化、拓展。围绕“礼法”关系尚有诸多问题需要辨正，需要考探源流，需要东西方对比，研究才能高屋建瓴。比如，法的起源问题是一个古老但又常新的问题，西方学者对这个问题的研究很少使用中国的资料，所以他们总结的法的发展规律有些适应中国，有些则不适应。因此，对中国古代法起源的研究可以更全面地展现不同地区法发展的不同模式。再比如，宗教对西方法治的形成起了很大的作用，在中国，古代“礼”对法的形成、发展起了怎样的作用？礼、法的发展轨迹又是如何？由于“礼”确实是中国法律史研究中的难点，对这一课题的探索显然有待深入。

中国除了拥有延绵两千余年不绝的官修史书，还流传下大量的档案及著述典籍，而且不断有帛书、简牍、纸文书、碑刻等被发现。其中直接、间接涉及古代法律的资料不可胜数，是世界任何一个国家和地区都不具备的。然而传统怎样与现代法律建设，与世界法律研究接轨？这一问题虽已引起某些有识之士的关切，但还远未得到应有的重视。如何梳理把握史料，如何历史地、客观地认知中国古代法文明则是研究这一问题不可回避的第一步。马小红同志正是在这方面潜心研究了多年，她的博士论文较之《礼与法》，无论是对西方法律史研究的借鉴、对比，还是对中国史料的辨正、征引、运用都有了长足的进展。

英国思想家边沁说过："一部法制史著作，其最通常、最有用的目的，是展示伴随着确立实际有效的法律的那些环境。然而，阐述已被取代了的死法律，同阐述已取代了它们的活法律不可分地交织在一起。这两类科学的大用处，都在于为立法艺术提供实例。"（边沁著：《道德与立法原理导论》，时殷弘译，商务印书馆2002年，第365页）希望马小红同志的论著能够起到这种作用。

论文即将出版，甚感欣慰，是为序。

曾宪义

2003年12月

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自　序

近代以来对中国传统法的研究基本有两种方法：一是中国传统的史学方法，即勾陈梳理历史资料，客观地阐述法的内容和历史沿革；二是以逐渐涌入并成为时尚的西学理论和方法分析、解剖中国传统法的发展和性质。应该说，近代以来对中国传统法的研究是卓有成效的。尤其是20世纪以来形成的"中国法制史"、"中国法律思想史"及20世纪80年代以来形成的"法律文化"研究，都从不同的视角对中国传统法的某些方面进行了较为系统的整理。但应当引起我们注意的是，近代以来当西学理论和研究方式逐渐成为主流时，我们在诸多的研究领域中已然进入的误区，在法的研究中更是不免将西方法的发展模式作为惟一的标准，用西学所阐述的标准僵化机械地对比、评价中国，并由此而产生出诸多的误解。如：中国古代法缺少学理、中国古代法以刑为主甚至是只有刑法、中国古代社会重人轻法、中国传统意识中法只是一种工具，所以法观念中缺少对法的价值的认定等等。在诸多的误解和偏颇之论中，有两点对今天的学界影响甚大：一是将古代社会中的礼与法视为对立物，过分强调礼与法的矛盾，强调古代社会中礼对法的搁置与破坏作用。二是认为中国的法制缺少西方那样的宗教背景的支持，法治因此而很难被信仰。这种目前颇为"时尚"的误解与偏见正是以西方模式、价值观为惟一标准而造成的。

本著在反省近代以来研究误区的同时，力图用客观"陈述"、社会学分析和中西比较的方法来构建"中国传统法"的框架，分析中国传统法的特征及这些特征——主要是礼与法演变的特征在历史与现实中的影响，故书名曰"礼与法：法的历史连接。"副标题为"构建与解析中国传统法"。在本书中，作者所要阐述的观点主要有以下几点：

第一，辨正"古代法"与"传统法"的概念，构建传统法的体系。古代法与传统法是两个既有密切关系，又不相同的研究领域。古代法是与古代社会相适应、已经过去或静止了的法，而传统法则是与社会发展相对应，处在不断变化并对现实法的发展具有重大影响的法。从研究的角度来说，传统法与古代法的研究有着不同的视角。对古代法的研究往往是力求能贴近古代社会的客观，阐述古代社会的法制及古人对法的认识。而对传统法的研究，

则是以现代社会中“法”的概念，回观古代社会，一些在古代社会中不被称为“法”或不以“法”字命名，但确实具有“法的性质”的习惯、制度、观念、学说等也必须纳入研究的视野。因此，古代法之“法”是古代语境下的法，在中国主要指法的制度。而传统法之“法”，包含了古代法之法自不待言，但更为重要的是这个“法”还具备另一个特征，即一个随着社会发展而内涵不断演变的法。正像严复指出的那样：近代从西方引进的“法”的概念，相对古代而言应有礼、理、法、制之义。以往的研究因为没有对“古代法”与“传统法”两者的概念进行界定，所以所得的结论常常自相矛盾。比如既认为中国传统法重制度，缺少对法的价值认定，又认为“重礼轻法”是传统法的特征。其实，从法的角度看，礼的主要内容就是阐述中国传统法的价值追求。重礼，就不会“缺少对法的价值认定”；而古语中的“制度”与“法”几乎是同义，重制度就不会“轻法”。因此，本书第一章从法的概念入手论述了“古代法”与“传统法”的异同，并在此基础上比较了中西法传统不同的发展道路。

第二，强调传统法是礼与法的“共同体”，剖析礼在传统法体系中的作用和地位。通过整理20世纪中国法律史的研究，作者认为一百余年来我们研究的最大失误在于越来越强调传统的礼与法的矛盾和对立，由此导致了对传统法一些基本概念和问题缺乏研究，如传统法中的法、律、法律、礼、礼制、礼义、礼教、德政、德教具体所指究竟是什么，它们之间的关系究竟又是怎样的？等等。由于不能正本清源，以致许多学者将后人归纳的古人的“礼治”、“德治”、“人治”、“法治”等学说径直作为了证明传统法的客观存在和古人原始思想的资料，因而使研究的对象失去了真实性而不自知。本书第二章对上面所涉及到的概念逐一进行了考察，得出了这样的结论：传统法是礼与法的“共同体”，礼治、德治、人治是今人对古代思想、学说的归纳，而不同时期的礼治、德治、人治所包含的内容也并非一成不变。传统的法治与我们今天所说的法治在形式和一些内容方面存在一定的类似之处，但是在本质上却是南辕北辙。鉴于礼与法形成的“共同体”这一特色，我们应该纠正以往对中国传统法的狭隘理解，明确中国传统法中的“刑”只是法之“一端”，绝不是法的“主体”这一基本的史实。

第三，以礼与法的消长为标志划分传统法的演变阶段。以往对中国传统法发展阶段的划分多是依据王朝政治的兴衰。其实，若将礼与法视为一体，依据两者的消长来划分则更能体现出传统法的沿革规律和特征。本书第三章将中国传统法发展分为五个阶段，即传说时代的起源时期、商与西周的礼治时期、春秋至战国的法治时期、汉至清的“隆礼至法”时期、近代的演

变时期。对中国传统法发展进行分期，意在说明西方法的发展模式应该是多种多样的法的发展模式中的一种，而绝不是惟一。不同民族、国家和地域，法的发展在具有共性的同时，必然存在着差异，这些差异既是环境和历史所赐，更是一个民族、国家和地域法的特征体现，历史证明这些差异的存在在一定的时期和一定的地域范围内不仅有效，而且合理。法的不同发展模式是世界不同民族、国家和地域的人民的智慧的结晶。这就是我们为什么不能将西方模式作为衡量"先进"与"落后"的标尺的原因所在。从法的目前发展状况来看，法的现代化等同于西化的时代早已过去，现代化的法在内容上应是广采各民族、地区、国家法的优秀传统因素的法，法的发展模式则是"和而不同"。

第四，法的发展模式并不是按"人"的意志产生的，一种法模式的产生与其社会环境息息相关。中国传统法的发展模式当然与中国传统社会的政治、经济、文化密切相关。以往，我们多注意政治、经济对法的影响，而对文化与法的关系论证则相对薄弱。其实，对"文化"的珍视是中华民族最引人关注的传统，这个传统直到今天也未泯灭。早在春秋时孔子就认为，没有受到过"礼"的熏陶的中原周边民族即使设立了君主，也不会比有"礼"而无君的中原地区更先进。珍视文化的传统使中国传统法不仅注重"罚"，而且注重"教"。礼教使传统的价值观深入人心。在中国传统文化中，人们很少以贫富和强弱去评价一个人的价值，相反"为富不仁"、"以强凌弱"不仅为舆论所指责，而且也为法所不容。本书第四章重点在叙述礼文化的特征及礼文化背景下的法的特征。通过对史实的考察，作者认为礼是中国传统文化的核心，同时也是传统法的核心。以礼为核心的文化最大的特征是和谐。如果以西方社会模式为标准，我们就会感到中国的哲学、宗教、科技、法律等等都带有缺陷，发展都不充分。但是如果我们整体地考察中国传统社会的结构和文化，就会发现这些局部的缺陷实为整体和谐之必要，局部的缺陷正是为整体圆满所付出的代价。对传统法的考察也是如此，如果不深入到其核心部分——"礼"，我们常常会感到传统法杂乱无章，但当我们理解了礼在传统文化中的地位，理解了作为传统法的精神——礼的价值追求时，我们才会真正感到传统法的博大精深与开明之特征。

第五，以历史文化为背景解读西方传统的宗教与中国传统的礼教之形成。有些学者认为中国由于缺乏宗教的传统，所以在社会中很难形成法治的信仰，而法治必须被信仰才能实现。本书以世界不同民族、国家和地域的法在起源时的资料为基础，陈述了法在起源时所共有的神圣性特征。并发

现，中国古代由于对“礼”的崇拜，对文化的珍视，形成了道德伦理的信念。而这一信念使中国避免了像西方那样在中世纪陷入黑暗的神的笼罩和恐怖的宗教战争中。同时代的中西文明比较，中国的“礼教”文明较西方呈现出和谐、开明、宽和、人性的特征。这也是在许多西方启蒙思想家的著作中，中国被树立成榜样、孔子成为旗帜的原因。本书第五章的结论是“中国古人应该庆幸他们对‘神’的明智态度，使他们避免了‘神’的涂炭，而享受到‘礼’的温暖。”

第六，如果说罗马法的主流传统是“民法传统”的话，在中国传统法体系中占主导地位的则应该是“礼”。从法的角度考察，礼有着丰富的层次，国家的祭祀大典、朝廷官府制度、官吏在各种场合的举止言谈等国家制定颁行的制度是礼；与法的精神相一致或被社会主流思想所认可的家法族规、地方习俗也是礼；更重要的是，礼是法的精神的凝结和体现。因此，研究中国传统法的难点并不在梳理浩瀚的资料和勾陈一些只留下蛛丝马迹的法条，真正的难点在于对礼的宗旨把握和感悟。使中国获“礼仪之邦”的美誉的两位至关重要的人物是制礼的周公和力倡礼教的孔子。若要深入理解礼的宗旨和把握礼的内容，必须首先研究周公和孔子。本书第六章、第七章在陈述、分析周公与孔子思想的同时，对两位思想家对传统法所具有的数千年的影响也作了力所能及的论证。作者认为如果在法的起源之时，中西法的共性大于或多于不同，那么自西周周公“制礼”时起，中西法便走上了不同的发展道路，周公的礼治实践为中国传统法的形成奠定了基础。而孔子在“礼崩乐坏”的历史时期对礼义的珍视和维护及对历史的总结成为中国传统法形成并发展的理论基础。中国传统法之所以能延绵数千年，之所以能独树一帜，周公、孔子之功不可没。

第七，自近代以来，学界将“以刑为主，诸法合体”、“压抑诉讼”等视为中国传统法的缺陷。其实，如果不带有偏见，我们可以发现“诸法合体”、“限制争讼”几乎是世界不同民族、国家和地域传统法中的共同特征。《十二铜表法》并没有将民事、刑事、程序剥离分类，查士丁尼《法学总论》中也强调要利用罚金、宣誓和人们害怕丧失名誉的心理来阻止人们轻率地进行诉讼。而中国只不过是强调利用行之有效的礼及人们以“自律”为荣的心理来限制及解决诉讼。即使在现代社会，诉讼也毕竟只是人们维护权利的手段之一，它并非惟一，更不是最佳的手段。中国传统法对和睦的竭力维护、对人情和道德的承认实际上正是现实社会中法的发展可资利用之处。本书第八章、第九章对中国传统法中所体现的人情观和道德观进行了归纳和分析。中国古

代的礼教道德，尤其在宋代之后对人性的桎梏确实不可低估，但另一方面，从大量的事例中我们也可以看到道德体系的完备对中国社会和谐发展、百姓安居乐业所起到的积极作用。儒家对“人性”充满希望的认识，使中国传统法不仅只注重“惩恶”，而且更注重“扬善”，这也是伏尔泰认为在中国法的作用较西方“更大”的原因。

第八，自近代东西方世界结束了相对封闭、相对独立的局面以来，西方依恃着一时的强大而对世界进行武力征服，西方的法治也是随着殖民的血雨腥风风靡世界的。中国传统文化，包括中国传统法文化从被一些西方启蒙大师推崇到被西方一些政客、武人、学者冠以“落后”而受到指责，这一转变的历史原因是十分复杂的。这里有西方武力扩张的需要，也有所谓“强势”者自觉或不自觉地将自己视为准则或救世主，强制推行自己价值观的需要。当然，也有被宰割者为了尽快摆脱民族和国家危难而反省传统、取法西方的原因。因为西方的殖民掠夺证明了“落后就要挨打”的道理。正是这种种原因，使我们在一定的历史阶段中无暇也无法去发掘传统法中的优良成分，而只有对传统法匆忙的进行所谓“改造”，这个改造当然是以西方为标准的。于是我们认为中国传统法重德轻法、重人治轻法治、缺乏平等自由的观念等等，同时也用传统法去附会西法，如将道家的“道法自然”附会为“自然法”、礼俗附会为“民法”等等。其实，我们对传统法的批判是在割裂传统法的状况下，以西法为标尺进行的。如果反过来看西方，我们是否也可以说西方“重法轻德”、“重罚轻教”呢？是否也可以说西方的礼制不够发达呢？其实早在两千年前史圣司马迁就说：“天下一致而百虑，殊途而同归。”不同民族、国家和地域的法，所具有的不同的发展道路自有其历史的合理性，通过“比较”而产生的结论只能是“不同”，如果产生了所谓的“缺陷”那一定不是历史的真实。为此，本书第十章、第十一章、第十二章对中国传统法中的“人治观”、“平等观”、“自然观”进行了归纳，这是中国传统法中的人治观、平等观和自然观，它们可以与西方传统法及现代法中的一些概念、观念甚至理论进行比较，但在殖民已成为历史、中华民族走向强盛的今天，这个比较应该是而且也可以是平等的。因此，通过这个比较所得的结论一定会更为学术、更为公正。

最后，本书重点说明的是：第一，不能以西学的标准来臧否中国传统法，将中国传统法中无，而西方法中有者尽视为中国传统法之缺陷，不问具体情形地一概从西方“拿来”；而将中国传统法中有，西方法中无者又尽视为法之“毒赘”，必除之而快。第二，传统法是法发展、演进的基础——这是法的发

展规律所决定的，中国当然也不例外。许多人以日本为例证明法的可移植性，其实从历史的发展角度看，日本的传统正是善于学习而短于创造，即使如此，近代日本在学习西方法的同时也保留了许多民族的特色。中国自清末以来对传统法的矫枉过正、使法的变革缺乏传统动力的支持，这也是近代以来中国法的变革举步维艰的重要原因。今天，在中华民族已经度过生死存亡的危难，独立于世界民族之林的时代，我们不仅有条件而且有责任对五千年的传统法进行发掘以贡献给世界，以贡献于未来。珍惜传统不仅是为了过去，更是为了面向现实与未来。

马小红

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Preface

Since the modern times there have been two basic methods in the study of the Chinese traditional law. The first one is the Chinese traditional historian method, by searching and combing historical data, objectively to elaborate contents of law and its historical trends. The second one is by using the theory and method of the Western learning, which has rushed in and gradually become the order of the day, to analyse and anatomize the development and nature of the Chinese traditional law. It should be noted that the study of the Chinese traditional law since the modern times has made outstanding achievements. In Particular, the study of the history of Chinese legal system and of Chinese legal thinking carried out since 20th century and that of legal culture gathered force since 80s last century have from various angels systematically sifted some aspects of the Chinese traditional law. However, we should draw our attention as well that when the theory and method of the Western learning gradually became dominant, we have gone astray in various research spheres. By applying the criterion elaborated by the Western learning to Chinese law, with the development model of the Western law as the only yardstick, the rigid and mechanical comparison and evalution have resulted in many misunderstandings, such as the Chinese ancient law lacks academic reasoning, is composed mainly of punishments or rather only a penal law, the Chinese ancient society puts stress on human rather than on law, law in Chinese traditional ideology is served only as a tool, and therefore there is no recognition of the value of law in its concept, etc. etc. In various misconceptions and biases, the following two points have gained quite big influence among the academic circles. The first is that proprieties and law In ancient societies are viewed as two opposites, over-emphasizing their contradictions and stressing the withholding and destructive effect of proprieties on law. The second is that as the Chinese legal system lacks the support of Western-like religious background, rule by law is very difficult to turn into a belief. These quite popular misunder-

standings and biases are solely created as a result of applying the western model and value concept as the only yardstick.

This article, while reviewing the misunderstandings in the study, makes great efforts to construct the structure of the Chinese traditional law and analyse its characteristics by using the method of objective statement, sociological analytics and East-West comprison. Hence the title "Construct and Anatomize Chinese Traditional Law". In this 400,000 words thesis, want I try to elaborate is as follows.

1. To differentiate the concept of ancient law from that of traditional law and construct the system of traditional law. Ancient law and traditional law are of two closely related but not the same areas of study. Ancient law is the law which is suited to ancient society and has become obsolete or static, whereas traditional law is the law which adapts the developing society and always changing, and exerts a tremendous influence upon the development of the present day law. In terms of research, they are studies from different view angles. The study of ancient law is kept as closely as possible to the objective reality of ancient societies and the views of ancient men on law, whereas the study of traditional law is carried out with the legal conception of the present day society, to review ancient societies and their habits and customs, systems and institutions, ideas, theories, etc., which were then were not called law or named as such but possessed the characteristics of law, and should also be included in the study. Therefore, the Chinese character "fa" (literally law) used in the ancient law in the then circumstances solely refers to the institutions and rules of law in China, whereas the same character "fa" used in the traditional law, it goes without saying, contains the laws of the ancient law, but more importantly it also possesses another characteristic, the connotations of which have always been evolutive with social development. Just as Yian Fu pointed out that the law concepts introduced from the West in the modern times, in comparison with the ancient times, should contain the meaning of proprieties, reason, law and institutions. As no differentiation is made concerning the concepts of ancient law and traditional law in the past studies, conclusions drawn have often been self-contradictory. For example, Chinese traditional law is considered to put stress on the system and lack recognition of the value of law,

but at the same time it is considered that its characteristic is to put stress more on proprieties than on law. As a matter of fact, viewing from law angel, the main contents of proprieties have elaborated the value pursuit of the Chinese traditional law. When importance is attached to proprieties, there will naturally not exist "lacking recognition of the value of law", whereas in the ancient Chinese language, institution and law are almost synonyms. It is impossible that importance is attached to institutions, but law will be neglected. Therefore, the First chapter of this article discusses in terms of the law concept the similarities and differences between ancient and traditional laws. And on this basis, it further compares different development roads of law traditions between the East and the West.

2. To emphasize the traditional law as "a community" of proprieties and law, and analyse the role and position of proprieties occupied in the traditional law system. By going through the studies of Chinese legal history carried out during the 20th century, this article holds that the biggest fault in our studies of the past hundred years or so is the emphasizing with each passing day of contradictions and antithesis between the traditional proprieties and law, thus resulting in the lack of studying some basic conceptions and problems of the traditional law, such as what the terms law, code, legal institution, proprieties, proprieties system, proprieties and righteousness, proprieties education, rule of virtue, moral education really mean, and what their true relationship is, etc. etc. Lack of the thorough-going study has made a number of scholars take the ancient theories of "rule by proprieties", "rule of virtue", "rule by men" and "rule by law" summarized by later generations simply as original data proving objective existence of the traditional law and ancient primary ideas, so that the authenticity of the study object is lost even without realization. The second chapter of the article examines one by one all the above-mentioned concepts and draws the conclusion that the traditional law is a community of proprieties and law, that rule by proprieties, rule of virtue and rule by men are the summary of ancient thinking and theories by the contemporaries, and that the contents of the above three concepts in different periods do not remain all the same and are not immutable. The traditional rule by law and the present rule by law discussed nowadays do share some similarities in form and certain

contents, but in essence they are entirely different, just like trying to go south by driving the chariot north, In view of the characteristic shaped as a community with proprieties and law pooled together, we should correct the previous narrow understanding of the traditional law, and make it clear that it is a basic historic fact that punishment in the Chinese traditional law is only one item of law and never the principal part of it.

3. To divide evolution stages of the traditional law with the growth and decline of proprieties and law as criteria. In the past, the development stages were often divided in accordance with ups and downs of dynastic politics. In fact, if proprieties and law are viewed as an integral whole, the division in accordance with their growth and decline could more clearly demonstrate patterns of trends and characteristics of the traditional law. The third chapter of the article divides the development of the traditional law into five stages, e. i the birth period in the mythologic era, the rule by proprieties period in the Shang and West Zhou dynasties, the rule by law period in the Spring and Autumn and Warring States periods, the "grand proprieties and supreme law period" from the Han to the Qing dynasties and the evolution period in the modern times. The division of the Chinese traditional law into periods is meant to illustrate that the development model of the Western law should be one of development models of various laws and is never the only one. While the development of laws in different nations, countries and areas will share some similarities, it must have differences. And these differences are bestowed by environment and history, and become a characteristic demonstration of the laws of a particular nation, a country or an area. The history proves that the existence of the differences at a certain period and in a certain area is not only effective but also reasonable. The different development models of laws is the crystallization of the wisdom of the peoples of different nations, countries and areas in the world. This is why we can not take the Western model as the yardstick to judge progress or backwardness. Judging from the present developing situations of law, it has become a thing of the past when the modernization of law is equated to the Westernization of it. In terms of contents, a modernized law should be a law of absorbing all the best traditional elements in the laws of all nations, countries and areas. The model of law development is "to get together

but not become same".

4. The model of law development is not created according to the will of human being, and its creation is closely related to the social environments. The development model of the Chinese traditional law is naturally closely related to the politics, economics and culture of Chinese traditional societies. In the past, we paid much attention to the political and economic effects on law, but the relation between culture and law was comparatively less discussed. In fact, cherishment of culture is the most fascinating tradition of the Chinese nation and this tradition has not disappeared up till the present day. As early as the Spring and Autumn Period, Confucius held that the nations without nurture of proprieties around the Central Plains who even set up kingdoms could never be as advanced as the nations educated by proprieties inside the Plains who even lost their kings. The tradition of cherishing culture enables the Chinese traditional law to lay stress on punishment as well as on education. The education of proprieties makes the traditional sense of value strike deep roots into the hearts of the people. In the Chinese traditional culture, the value of a person is seldom judged by his wealth or poverty, or by his power or weakness. On the contrary, those "rich out cruel" and "the strong bullying the weak" type people are not only subjected to the censure of public opinions, but also condemned by law. In the fourth chapter of the article, my emphasis is to outline the characteristics of proprieties culture and those of law against the background of proprieties culture. By examining historical facts, I hold that proprieties are the kernel of the Chinese traditional culture and law. And harmony is the most outstanding feature of the culture with proprieties as the kernel. If we take the Western social model as the yardstick, we will find that the philosophy, religion, science and technology, law, etc, etc. all have defects and are not fully developed. But if we examine the structure and culture of the Chinese traditional society as a whole, we will find that these partial defects are necessary for the whole of harmony and are actually the price paid for the fullness of the whole. It is the same with the examination of the traditional law. If we do not go deep into the kernel part—proprieties, we will often find the traditional law disorderly and unsystematic. But when we understand the position occupied by proprieties in the traditional culture and the value pursuit

of proprieties as the spirit of the traditional law, then, only then, will we truly find the broad, deep and enlightening characteristic of the traditional law.

5. To explain the formation of the western traditional religion and the Chinese traditional proprieties against the background of their historical cultures. Some scholars argue that owing to the lack of religious tradition in China, it is very difficult to foster the belief in the rule by law in the Chinese society, and the rule by law has to be achieved only by beliefs. The article tells, on the basis of law data at their early birth period of different nations, countries and areas in the world, about the common original characteristic of sacrosanctity of law. And it is found that the worship of proprieties and the cherishment of culture in the Chinese ancient times help to foster a faith in moral ethics. And this faith helps China avoid plunging into the dark shroud of deity and the horrible religious war like the west in the middle ages. By comparison of civilizations of same period between the East and the west, the Chinese proprieties culture has the qualities of harmony, enlighten, magnanimity and humanity. It is why China is set up as a fine example and Confucius as a standard bearer in various works written by the Enlighten thinkers. The fifth chapter of the article concludes that "The ancient Chinese should be pleased with their wise attitude towards divinity, thus avoiding them from the misery and suffering of divinity and instead enabling them to enjoy the warmth of proprieties".

6. If "civil law tradition" is the main tradition of Roman law, then proprieties should occupy the leading position in the Chinese traditional legal system. Examined from law angle, proprieties have rich layers. They consist of all the rules made and issued by the state concerning the grand state sacrificial rites, the decrees of the court and government offices, manners and words taken by officials at all kinds of occasions, as well as all the family codes and local customs consistent with law spirit or recognized by the main social ideology. All these rules, decrees, codes and customs are called proprieties, and what is much more important is that proprieties are the condensation and demonstration of the spirit of law. Therefore, the difficulty in the study of the Chinese traditional law does not lie in combing the great mass of data and searching traces of a few remnant law articles. The real difficulty lies in grasping and perceiving the aims of proprieties. Because of the two most important person-

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