

# IN SEARCH OF GOOD LAWS AND GOOD GOVERNANCE: SHEN JIABEN AND THE LEGAL REFORM IN THE LATE QING DYNASTY

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### **Abstract:**

*Seeking for good laws and good governance was the goal of the late Qing legal reform led by Shen Jiaben(沈家本), the High Commissioner for the Revision of Laws. This paper reviews his legal and political life, introduces his contribution to the construction of the rule of law in modern China, and probes into his stance and methods in the face of the complicated law conflicts between the ancient and modern eras, China and foreign countries in the legal reform. Shen Jiaben focused on the restoration of the ancient way in the issues of ancient and modern times. He distinguished the legal system of the Han and Tang Dynasties from that of the Ming and Qing Dynasties, and tried to restore Chinese classical legal ideas. He focused on mutual understanding in the issues of Chinese and Western cultures. He did not stick to the prejudice regarding the difference between China and the West, and tried to integrate the modern Western jurisprudence(法理) with the classical Chinese sense of reason(情理). He creatively developed the term “jurisprudence” in modern China. As an idealist with a practical approach, he was criticized by both conservatives and radicals during the legal reform. Shen Jiaben’s legal legacy, including the self-confidence and consciousness of Chinese classical law and legal culture, and an open-minded attitude towards learning modern Western legal civilization, is worthy of contemporary inheritance and development.*

**Keywords:** Shen Jiaben; Legal Reform in the Late Qing Dynasty; Sense of Reason; Jurisprudence

### I. INTRODUCTION

Seeking for good laws and good governance was the goal of legal reform led by Shen Jiaben (1840-1913), the High Commissioner for the Revision of Laws(修订法律大臣) in the late Qing Dynasty. As if by the hand of fate, the birth of this pivotal figure in China’s modern legal transformation coincided with the beginning of China’s humiliating

and rough modern times, and his death witnessed the end of China's imperial era and the political disorder in the early years of the Republic of China. At this historical juncture, he made significant contributions to translating Western legal materials, establishing modern law schools and drafting modern law codes. Although struggling with the internal tension of his extraordinary legal and political life, which stemmed from the conflict between the stable order pursued by the rule of law and the turbulent political and social situation at that time constituted, he promoted the modernization of Chinese legal system with his unique methodologies and concern for the times. In the process of building the socialist rule of law with Chinese characteristics in contemporary China, we need to creatively transform the excellent traditional legal culture and learn from other countries' advanced rule of law civilization. Shen Jiaben left us with not only modern legal regulations and works, but also ideas on how to harmonize the ancient and modern while synthesizing Chinese and Western traditions. These legal legacies offer an approach to constructing the modern rule of law by drawing on international experience and historical culture, which is worth inheriting and developing at present. In this context, it's essential to clarify what contribution he made to the construction of the rule of law in modern China, and what solutions he gave to the law conflicts between the ancient and modern eras, China and foreign countries in the legal reform.

## II. SHEN JIABEN'S LEGAL AND POLITICAL LIFE

Shen Jiaben, style name Zidun(子惇), pseudonym Jiyi(寄蓀), was born in Gui'an County (now Huzhou City), Zhejiang Province. According to Professor Li Guilian's research, he was born on July 22 in the lunar calendar, the 20<sup>th</sup> year of Emperor Daoguang (August 19, 1840 in the Gregorian calendar) in a common intellectual family. His father Shen Bingying(沈丙莹) had served in the Ministry of Criminal Justice(刑部) for a long time, successively serving as the Secretary of the Guangdong Department(广东司主事), the Assistant Director of the Guangxi Department(广西司员外郎), the Director of the Jiangsu Department(江苏司郎中), and the Controller of the Statutes Commission(律例馆提调). Later he was sent to Guizhou Province as an official and successively served as the Magistrate of An'shun, Tongren and Guiyang.<sup>1</sup> As stated in "*Chunxing Caotang Ji Ba*(春星草堂集跋)[*Postscript of Collected Works from Chunxing Thatched*

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1 See LI GUILIAN (李贵连), SHEN JIABEN ZHUAN XIUDINGBEN (沈家本传(修订本)) [THE LIFE OF SHEN JIABEN (REVISED EDITION)] 5, 7-8 (2017).

Cottage]” said, “The academic inheritance of Shen Jiaben comes from his father,”<sup>2</sup> Shen Bingying was well-versed in the laws, diligent in his duties, and prudent in being alone, which sows the seed of “legal gentleman”(法家拂士) in the heart of young Shen Jiaben. Because Shen Bingying went to Guizhou Province to work, the 20-year old Shen Jiaben needed to escort his mother and younger siblings there. At that time when China coincided with the Second Opium War and the Movement of Taiping Heavenly Kingdom, facing internal and external difficulties, and continuous wars. That’s why this journey of thousands of kilometers of reunion was displaced and extremely difficult. Yet the saying “having read ten thousand books, one should also travel ten thousand miles”(读万卷书, 行万里路) also gave him a deeper understanding of the national conditions.

Although Shen Bingying worked hard, but at that time the bureaucracy was corrupt and officials were fighting each other. He had no choice but to resign from the official post, and eventually was ordered to retire by the Qing court. After Shen Bingying’s retirement, in the 3<sup>rd</sup> year of Emperor Tongzhi (1864), Shen Jiaben “was assigned to work in the Ministry of Criminal Justice as an [intern] Director according to the regulations,”<sup>3</sup> thus formally entering the legal and political workplace as a legal officer and starting his career in the Ministry of Criminal Justice.

If we divide it according to the important points in his life, Shen Jiaben’s legal and political life can be divided into two stages, taking the 28<sup>th</sup> year of Emperor Guangxu (1902) when he was ordered to revise the law by the Qing court as the boundary. The first stage spanned from the 3<sup>rd</sup> year of Emperor Tongzhi (1864), when he joined the Ministry of Criminal Justice, later sent to Tianjin, Baoding as an official, to the 27<sup>th</sup> year of Emperor Guangxu (1901), when he returned to the Ministry of Criminal Justice, as the Junior Vice President(刑部右侍郎). At this stage, he first served in the Ministry of Criminal Justice for nearly 30 years, and successively served as the Chief Drafter of the Shaanxi Department(陕西司主稿), the Chief Drafter of the Fengtian Department(奉天司主稿) concurrently the Office Director of the Office for the Autumn Assizes(秋审处总办), the Director of the Fujian Department (and later concurrently held the post of the Office for the Reduction of Sentences(减等处) in charge of the events of special amnesty and reduction), the Executive Officer of the Office for the

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2 See Xu Fengzhao (徐丰兆), *Chunxing Caotang Ji Ba* (春星草堂集跋) [Postscript of Collected Works from Chunxing Thatched Cottage] in 8 SHEN JIABEN QUANJI (沈家本全集) [THE COLLECTED WORKS OF SHEN JIABEN] 123 (Xu Shihong (徐世虹) ed., 2010).

3 See Shen Jiaben Zhuan (沈家本传) [The Biography of Shen Jiaben] in QINGSHI GAO (清史稿) [DRAFT HISTORY OF THE QING DYNASTY] 12447 (1977).

Autumn Assizes(秋审处坐办), and the Controller of the Statutes Commission(律例馆提调). He gradually stood out through practice. the Office for the Autumn Assizes and the Statutes Commission, where he served, was the most demanding institutions in the Ministry of Criminal Justice for professional skills. The former was responsible for the trial of death penalty awaiting cases, while the latter is responsible for the formulation and revision of sub-statutes, and also the review of difficult cases. During that time, he was also famous for his outstanding legal professional ability.<sup>4</sup> However, he encountered obstacles in two areas that were closely related to his career advancement. The first was the imperial examination. Although he passed the imperial examination at the provincial level which was held in the 4<sup>th</sup> year of Emperor Tongzhi (1865) and entitled Juren(举人), he repeatedly failed in the highest imperial examinations. “In these decades, I suffered from stereotyped writing,”<sup>5</sup> which can be described as “youthful heads in vain turn gray.”<sup>6</sup> It was not until the 9<sup>th</sup> year of Emperor Guangxu (1883) that he passed the highest examination, and finally achieved the scholarly honour of Jinshi(进士). The second was his experience he was elected as a local official to a place outside Beijing. In spite of his outstanding talent, Shen Jiaben still did not see an opportunity after many official assessments, and he even wrote “twenty-four years of youth is gone in an instant, the future is dark and unclear”<sup>7</sup>(廿四韶华同一瞬, 前尘似漆渺难知), such a wandering poem.

In the 19<sup>th</sup> year of Emperor Guangxu (1893), Shen Jiaben finally got the opportunity to serve as the Magistrate of Tianjin(天津知府) outside Beijing. He was later transferred to the Magistrate of Baoding(保定知府) in the 23<sup>rd</sup> year of Emperor Guangxu (1897) and in the 26<sup>th</sup> year of Emperor Guangxu (1900) promoted to the Judicial Commissioner of Zhili(直隶按察使), then of Shanxi(山西按察使).

4 See Wang Shitong (王式通), *Wuxing Shengong Zidun Muzhiming* (吴兴沈公子惇墓志铭) [*The Epitaph of Shen Jiaben*] in 8 SHEN JIABEN QUANJI (沈家本全集) [THE COLLECTED WORKS OF SHEN JIABEN] 978 (Xu Shihong (徐世虹) ed., 2010).

5 See 542 QINGDAI SHIWENJI ZHENBEN CONGKAN (清代诗文集珍本丛刊) [THE COMPILATION OF RARE EDITIONS OF ANTHOLOGIES IN QING DYNASTY] 5 (Chen Hongyan (陈红彦), Xie Dongrong (谢冬荣), Saren Gaowa (萨仁高娃) eds., 2017).

6 This cites Yue Fei's (岳飞) patriotic lyric *Man Jiang Hong* (满江红) [Tune: *The River All Red*], “Should youthful heads in vain turn gray, we would regret for aye. (莫等闲, 白了少年头, 空悲切。)” See TANGSONG CI YIBAI SHOU (唐宋词一百首) [100 TANG AND SONG LYRICS] 223 (Xu Yuanchong (许渊冲) trans., 2007).

7 See Shen Jiaben (沈家本), *Labari Jingcha Guotang Jizi Jiazi Daobu Ba Guotang Yi Kouzhan Erlü Cheng Naiqiu Caozhang* (腊八日京察过堂计自甲子到部八过堂矣口占二律呈乃秋曹长) [Two Poems Improvisational for My Superior Naiqiu in Memory of the Official Assessment on Laba Festival as the Eighth Time during My Tenure in the Ministry of Criminal Justice] in 7 SHEN JIABEN QUANJI (沈家本全集) [THE COLLECTED WORKS OF SHEN JIABEN] 134 (Xu Shihong (徐世虹) ed., 2010).

These appointments signified his transformation from a technocrat in the central government to a local government chief. However, promotions that offer more opportunities for experience often come with greater risks, especially in the thorny issues of Sino-foreign relations that China faced in modern times. When the eight-nation Allied forces invaded Baoding, a priest who had had a quarrel with Shen Jiaben falsely accused him of having helped Boxers. Before he could take up his post in Shanxi, Shen Jiaben was arrested and imprisoned who had not yet taken up his post in Shanxi. The other six officials arrested in Baoding at that time were executed, including Tingyong(廷雍), the Financial Commissioner of Zhili(直隶布政使). Shen Jiaben was eventually released because there was no real evidence.<sup>8</sup> However, this kind of narrow escape made him sigh, "Close the door but pursue a good sleep tonight, no longer care about the past, present and future."<sup>9</sup>(闭户但寻今夜梦, 去来莫再问三生)

After leaving Baoding, Shen Jiaben went to Xi'an to meet Empress Dowager Ci Xi(慈禧) and Emperor Guang Xu(光绪), who had fled from Beijing. In the 27<sup>th</sup> year of Emperor Guangxu(1901), Shen Jiaben was appointed the Minister of the Court of Imperial Entertainments(光禄寺卿), responsible for the services of Cixi and Guangxu on their way back to Beijing. Due to the death of Xue Yunsheng, the President of the Ministry of Criminal Justice(刑部尚书), Shen Jiaben was appointed as the Junior Vice President of the Ministry of Criminal Justice, where he became the master with exceptional legal expertise.<sup>10</sup> By his 60s, Shen Jiaben has reached the peak of his development in the traditional system through outstanding professional ability, diligent work style and prudent political stance, but the era of great changes has created new opportunities for him. After the Boxer Incident, in order to save the crisis and maintain the rule, the Qing Court decided to launch a New Deal and implement reform. In the 28<sup>th</sup> year of Emperor Guangxu (1902), an edict was issued, which affirmed the value of the Great Qing Code while emphasizing that the laws should be properly modified to adapt to the new situation. It also noted the absence of special legislation in recent improving fields (e.g., mining, roads, and business) and instructed the ministers on missions to check the general laws of various countries. What's more, Yuan Shikai(袁世凯), Liu Kunyi(刘坤一) and Zhang Zhidong(张之洞) were ordered to carefully select and recommend several people who are

8 See LI, *supra* note 1, at 132-134 & 154.

9 See Shen Jiaben (沈家本), *Yiju Ershou Qier*(移居二首 (其二)) [*Two Poems in Memory of Moving House*] in 7 SHEN JIABEN QUANJI (沈家本全集) [THE COLLECTED WORKS OF SHEN JIABEN] 151 (Xu Shihong (徐世虹) ed., 2010).

10 See LI, *supra* note 1, at 175.

familiar with Chinese and Western laws to revise and enact laws.<sup>11</sup> This edict requiring the revision of the old law, the enactment of new laws, and the recommendation of talents pushed Shen Jiaben to a new stage of history and opened a new phase of his legal and political life.

The second stage began in the 28<sup>th</sup> year of Emperor Guangxu (1902), when Shen Jiaben and Wu Tingfang jointly served as the High Commissioner for the Revision of Laws through the joint recommendation of three governors-general, namely Liu Kunyi, Zhang Zhidong and Yuan Shikai. This stage continued until the 3<sup>rd</sup> year of Emperor Xuantong (1912), he participated in the ceremony of abdication imperial edict as the last Minister of Justice(司法大臣), and retired from politics. If we say that Shen Jiaben in the first stage could have left his mark in history, but his achievements may not be able to surpass those of contemporary legal experts such as Xue Yunsheng and Zhao Shuqiao(赵舒翘). However, when Xue Yunsheng was dead due to illness in old age, Zhao Shuqiao was forced suicide by the Qing court for his supporting the Boxer, and under the accumulation and superposition of many factors such as seniority, prestige and ability, the heavy responsibility of the era of legal reform fell on the shoulders of the Shen Jiaben. In addition, Wu Tingfang(伍廷芳), who was also the High Commissioner for the Revision of Laws, soon withdrew from the law revision work, Thus although the second stage was only in a hurry for ten years, Shen Jiaben became a landmark figure in the legal history of China and even the world who could not be avoided, leaving a strong mark in history and his life. His importance to the transformation of Chinese law can be reflected from the positions held in this stage, which are as follows: He was the first Minister of Laws, the first Minister of the Supreme Court(大理院卿), the Vice-president of Justice(法部侍郎), the chief counsel of the Bureau for Constitution Preparation(宪政编查馆一等谘议官), the Vice President and Designated Member of the Preparatory National Assembly(资政院副总裁和钦选议员), the first President of the Beijing Law Society(北京法学会会长) (the first national legal academic association), and the Management Minister of the Capital Law College(京师法律学堂管理大臣) (the first national legal education institution), the Minister of Justice(司法大臣)in Yuan Shikai's Cabinet,etc. The scope of his positions covered legislation, judiciary, administration, constitutionalism, legal research, legal education and other fields. Shen Jiaben can be called spiritual leader in modern China's rule of law.

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11 See 495 QING DEZONG SHILU (清德宗实录) [RECORDS OF THE EMPEROR DEZONG OF THE QING DYNASTY] (in February of Guangxu Twenty-eight Year).

### III. SHEN JIABEN'S CONTRIBUTION TO THE CONSTRUCTION OF RULE OF LAW IN MODERN CHINA

Through the legal reform presided over by Shen Jiaben, China completed the transformation of the rule of law concept from ancient times to modern times. He profoundly pointed out the fundamental difference between the traditional legalism dictatorship rule of law and the modern human rights protection rule of law. He believed that, the traditional theory represented by Shen Buhai(申不害) and Han Fei(韩非) was fundamentally authoritarian, characterized by harshness and the use of deterrence. In contrast, the modern Western theory of the rule of law tried to preserve public order, protect citizen's freedom, and limit the abuse of power so that no one could stray beyond the scope of law.<sup>12</sup>

Shen Jiaben and Wu Tingfang jointly submitted "*Shanchu Lüli Nei Zhongfa Zhe* (删除律例内重法折) [*The Memorial Concerning Abolishing The Cruel Punishments In The Qing Code*]" to Empress Dowager Ci Xi and Emperor Guang Xu, which clearly proposed to use "benevolence" as the standard to reform the old laws, and creatively used the Confucian benevolence to understand the modern humanitarian punishment, "We lieges personally think that the way to run the country should be the benevolent policy first. Those who discussed criminal law have always taken justice as the standard and benevolence as the criterion, so criminal law should be changed from heavy punishment to light punishment, which is the important task of today's benevolent government, and also the purpose of revising laws."<sup>13</sup> Their suggestions were approved by the imperial court, thus abolishing the torture and cruel punishments that had been practiced for thousands of years, such as slicing, beheading, posthumous execution, collective punishment and tattooing.

Shen Jiaben led the Bureau for Revision of Laws, which was a major legislative institution for codification in the late Qing legal reform. The Bureau for Revision of Laws independently or in collaboration with other institutions drafted significant laws such as "the Current Criminal Code of the Great Qing"(大清现行刑律) (the last traditional code), "the New Criminal Code of the Great Qing"(大

12 See Shen Jiaben (沈家本), *Faxue Mingzhu Xu* (法学名著序) [*Preface to the Anthology of Legal Classics*] in 4 *LIDAI XINGFA KAO FU JIYI WENCUN* (历代刑法考(附寄谳文存)) [STUDIES ON ANCIENT CHINESE CRIMINAL LAW IN THE PAST DYNASTIES (INCLUDING SELECTED WORKS OF JIYI)] 2240 (punctuated and collated by Deng Jingyuan (邓经元) & Pian Yuqian (骈宇騫), 1985) [hereinafter *STUDIES ON ANCIENT CHINESE CRIMINAL LAW*].

13 See Shen Jiaben (沈家本), *Shanchu Lüli Nei Zhongfa Zhe* (删除律例内重法折) [*The Memorial Concerning Abolishing the Cruel Punishments in the Qing Code*] in 4 *STUDIES ON ANCIENT CHINESE CRIMINAL LAW* 2024.



清新刑律) (the first modern criminal code), “the Draft Civil Code of the Great Qing”(大清民律草案) (the first modern civil code draft in China), “the Organic Law of the Courts”(法院编制法) (the first modern court organization law in China), “the Draft Law of Criminal and Civil Procedure of the Great Qing” (大清刑事民事诉讼法草案)(the first modern procedure code draft in China), “the Police Law”(违警律), “the Regulations on Nationality of the Great Qing”(大清国籍条例) (the first modern nationality law in China), “the Draft Law of Criminal Procedure of the Great Qing” (大清刑事訴訟律草案), and “the Draft Law of Civil Procedure of the Great Qing” (大清民事訴訟律草案), and so on, establishing the rudimentary framework of China’s modern legal system.

Shen Jiaben was responsible for the establishment of the Supreme Court, demonstrated the necessity and importance of adjudicatory independence, and attacked the shortcomings of the judiciary and administration without distinction in imperial China. He pointed out from the height of the constitutional system that “adjudicatory independence is closely related to constitutionalism”; “the theorists say that the enhancement of national power is based on constitutionalism, but in fact adjudicatory independence plays an important role in the process.”<sup>14</sup>

Shen Jiaben advocated the professionalism of law, believing that only professionals could legislate and enforce laws to achieve good results. “Law is a specialized discipline that cannot be fully understood by ordinary officials. Only those with specialized knowledge can analyze it precisely and meticulously and create laws that are fair and just. With the most fair and just laws and the most meticulous and precise thinking, how could there be bad laws? And when they are implemented, with the most meticulous and precise thinking and the most fair and just laws, how could there be bad judgments?”<sup>15</sup> He further elevated the importance of legal studies to a dialectical height of the rise and fall of national politics. “The rise and fall of legal studies is closely related to the governance of the state. However, when legal studies are flourishing, it cannot be guaranteed that governance will be good, but when legal studies are in decline, it can be determined that

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14 See Shen Jiaben (沈家本), *Diaocha Riben Jianyu Caipan Qingxing Zhe* (调查日本监狱裁判情形折) [*The Memorial Reporting on the Investigation of the Situation of Prisons and Judicial Activities in Japan*] in *Diaocha Riben Caipan Jianyu Baogaoshu* (调查日本裁判监狱报告书) [Report On The Investigation Of The Situation Of Prisons And Judicial Activities In Japan] in *DONGKANG FAXUE WENJI* (董康法学文集) [LEGAL COLLECTIONS OF DONG KANG] 641 (He Qinhua (何勤华) & Wei Qiong (魏琼) eds., 2004).

15 See Shen Jiaben (沈家本), *She Lübooshi Yi* (设律博士议) [*The Proposal for Settlement of Special Officer for Legal Research*] in 4 *LIDAI XINGFA KAO FU JIYI WENCUN* 2060.

governance will surely decline.”<sup>16</sup>

#### IV. SHEN JIABEN'S METHODOLOGY 1: DISTINGUISH THE LAW OF THE HAN AND TANG DYNASTIES FROM THE LAW OF THE MING AND QING DYNASTIES

Facing the complex conflicts between the ancient and modern eras, China and foreign countries, which were governed by both old and new laws, how did Shen Jiaben respond in terms of academic theory? It should be noted that Shen Jiaben was not a purely academic legal theorist in the traditional sense, but a legal practitioner who was actively involved in legislation, the judiciary and other fields. He expounded his theories while solving specific problems, so we need to explore, infer and construct his methodology from his writings.

The ancient and modern issue of modern Chinese law is mainly a historical problem, and the domestic and foreign issue is mainly a cultural problem. With regard to the historical issue, the core idea of Shen Jiaben's methodology is to focus on restoration in the ancient and modern issue, that is, to distinguish the differences between the legal systems of the Han and Tang Dynasties and those of the Ming and Qing Dynasties, and attempt to restore the classical legal meaning. The Xia, Shang, and Zhou dynasties were regarded by Confucianism as the best model of governance. Therefore, it's necessary to rediscover and inherit the spirit and the governance principles of this era. Shen Jiaben argued that the Han Laws and the Tang Code preserved the legal legacies of the rulers from the Xia, Shang, and Zhou dynasties. By contrasting the law of the Ming and Qing dynasties with those of the Han and Tang dynasties, he aimed to identify the shortcomings of the former, use the ancient rules as the standards during the process of formulating and revising laws, and then advance the development of the rule of law in China.

Shen Jiaben was a jurist with a strong sense of historical consciousness, who examined both Chinese and foreign legal systems from a historical and dynamic perspective, as well as through multiple lenses. For instance, in the context of the development of modern prisons, he highlighted the evolution of the underlying concept in Western penitentiary systems - from “inflicting suffering and humiliation” to emphasizing “reform.”<sup>17</sup> While analyzing how criminal law in Western countries historically treated suicide as a felony, he also

16 See Shen Jiaben (沈家本), *Faxue Shengshuai Shuo* (法学盛衰说) [*The Comment on Prosperity and Decline of Law*] in 4 *LIDAI XINGFA KAO FU JIYI WENCUN* 2143.

17 See Shen Jiaben (沈家本), *Jianyu Fangwen Lu Xu* (监狱访问录序) [*Preface to the Records of Prison Visits*] in 4 *STUDIES ON ANCIENT CHINESE CRIMINAL LAW* 2238.

drew attention to the contrasting views of the Greek Stoic school, which advocated for its innocence.<sup>18</sup> In tracing the origins of Western scholarship, he referenced the foundational contributions of Greece and Rome.<sup>19</sup> Furthermore, when evaluating the application of the death penalty in Europe, the United States, and Japan, he identified a clear trend—from being “extremely cruel in the past” to becoming increasingly “less frequent and more humane in recent years.”<sup>20</sup>

Compared to the attention given to the history of foreign legal systems, Shen Jiaben devoted significantly more effort to exploring the history of the Chinese legal system. He successively printed several ancient legal codes and works, including “the Tang Code With Commentary”(唐律疏议), “the Great Ming Code”(大明律), “the Song Penal Repertory”(宋刑统), “Instructions to Coroners”(洗冤集录), “Concentration on Doubtful Matters While Perusing The Sub-statutes”(读例存疑), and “Collections of the Han Laws”(汉律摭遗). An intriguing phenomenon is that “the Tang Code With Commentary” was printed in December of the 16<sup>th</sup> year of Emperor Guangxu (1890), while “Collections of Han Code” was published in the first year of the Republic of China (1912). One was released prior to the late Qing legal reform, and the other after the fall of the Qing dynasty. It can be argued that regardless of whether influenced by Western law or not, and irrespective of the existence of the Qing court, Shen Jiaben’s internal rational path of thought centered on exploring the classical legal meaning in the three ancient dynasties (Xia, Shang and Zhou) through studying the legal systems of the Han and Tang dynasties. This was brilliantly summarized by Shen Jiaben in the preface to his final work “Collections of the Han Laws(汉律摭遗)”:

“The Han Law embodies a wealth of ancient ideas, and it remains a legal legacy of the ancient rulers in the Xia, Shang and Zhou dynasties. Among the legal systems of both ancient and modern times, only the Tang Code can be regarded as impartial and equitable, which implies that it retains the essence of the governance principles established by the rulers of the three previous dynasties. The succession of Han Laws in the Tang Code cannot be enumerated... If one seeks to uncover the roots of the Tang Code, it is necessary to study the Han Laws.”<sup>21</sup>

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18 See Shen Jiaben (沈家本), *Lun Weibi Ren Zhisi* (论威逼人致死) [*The Thesis on the article Putting Pressure on Another so as to Cause Him to Die*] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2089.

19 See Shen Jiaben (沈家本), *Zhengfa Leidian Xu* (政法类典序) [*Preface to Political and Legal Dictionary*] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2241.

20 See Shen Jiaben (沈家本), *Xuni Sizui Gaiwei Liu Tu Zhe* (虚拟死罪改为流徒折) [*The Memorial Concerning Amending the Purely Conceptual Death Penalty to Penal Servitude or Life Exile*] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2028.

21 See Shen Jiaben (沈家本), *Hanlü Zhiyi Zixu* (汉律摭遗自序) [*Preface to Collections of Han*

It is evident that from the Tang Code to the Han laws, Shen Jiaben aimed to reconstruct the classical legal spirits of the Xia, Shang, and Zhou dynasties. The Tang Code, which has been passed down through dynasties, embodies the essence of benevolence and reflects the legal significance of the ancient three-dynasty laws. Consequently, during the legislative process when addressing controversial provisions, Shen Jiaben frequently used the Tang Code as a benchmark for evaluation. For instance, in discussing the article regarding “Killing the Adulterous Lover(杀死奸夫)” in Ming dynasty, he noted that the Tang Code does not include such a provision. Instead, the article “the law regarding arrests when a person has been beaten or hit, or robbery or illicit sexual intercourse by force has occurred(被殴打奸盗捕法)” in the section “Arrest and Flight(捕亡)” specifies that the adulterer shall not be killed without armed resistance, thereby denying the rationality of the “Killing the Adulterous Lover” law. Furthermore, the Tang Code’s provision on “Entering a Person’s House at Night without Reason(夜无故入人家)” in the section “Violence and Robbery(贼盗)” lacks any implication of killing an adulterer, thus refuting the use of this provision to justify the article “Killing the Adulterous Lover.”<sup>22</sup> Additionally, when examining the article “Putting Pressure on Another so as to Cause Him to Die(威逼人致死)” in Ming dynasty, Shen Jiaben noted that the Tang Code contains no provisions wherein individual A commits suicide, but individual B is required to compensate for A’s life due to tenuous or indirect factors, thereby questioning the rationality of such legislation.<sup>23</sup> Within the context of Shen Jiaben, since the Tang Code represents a model of positive admiration, the Ming law, which included several provisions absent in the Tang Code, such as provisions allowing “Killing the Adulterous Lover” and “Putting Pressure on Another so as to Cause Him to Die,” have become targets of negative criticism. Consequently, the Qing legal system, which inherited the Ming law’s framework, has naturally been regarded as an evident object for reform. Thus, the legal systems of the Han and Tang Dynasties

Laws] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2230.

22 See Shen Jiaben (沈家本), *Lun Shasi Jianfu* (论杀死奸夫) [The Thesis on the article Killing the Adulterous Lover] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2083–87. It should be noted that although Shen used anonymous person reference when he mentioned the supporters of the justification the article “Killing the Adulterous Lover” (杀死奸夫) citing another article “Entering a Person’s House at Night without Reason” (夜无故入人家) in Tang Code, one of the probable targets of criticism was Ji Tongjun (吉同钧), who argued that the absence of a specific provision for “killing an adulterer” in the Tang Code can be attributed to the fact that related regulations are dispersed throughout other sections of the legal framework. For instance, the act of “Killing the Adulterous Lover” is already addressed under provision prohibiting “Entering a Person’s House at Night without Reason”. See Ji TONGJUN (吉同钧), *DAQING LU JIANGYI* (大清律讲义) [THE LECTURES OF QING CODE] 111 (Yan Xiaojun (闫晓君) ed., 2017).

23 See Shen, *supra* note 18, at 2088.

became the affirmative legal paradigm for Shen Jiaben, while the legal systems of the Ming and Qing Dynasties were categorized as the negative legal paradigm.

**V. SHEN JIABEN'S METHODOLOGY 2:  
TRANSITION FROM THE CONSTRUCTION OF  
"JURISPRUDENCE" TO GROUNDING IN "SENSE OF REASON"**

In addressing the increasingly complex and challenging issue of cross-cultural communication between China and foreign countries, Shen Jiaben focused on two pivotal concepts: "jurisprudence" and "sense of reason". His definition of "jurisprudence" was similar to law or legal principles, and "sense of reason" included heavenly principles and human nature, which would be discussed in detail in the following sections.

His application of the term "jurisprudence" can be broadly categorized into three stages. In the initial stage, despite the introduction and influence of Western learning, the term "jurisprudence" was predominantly employed based on its inherent meaning within classical Chinese vocabulary. Research by Professor Li Guilian indicates that Shen Jiaben first used the term "jurisprudence" in "*Xing'an Huilan Sanbian Xu* (刑案汇览三编序) [Preface to the Third Collection of Criminal Cases]"; which he wrote in the autumn of the 25<sup>th</sup> year of Emperor Guangxu (1899) during the late Qing Dynasty.<sup>24</sup>

"Reviewing the past, some scholars have argued that today the study of jurisprudence is constantly making new discoveries. The times are changing and the trend is approaching. This collection, though comprehensive, is but a relic, mere old paper. I, however, hold that while there is indeed a daily renewal of principles, new principles are the theories of scholars. But the false or true nature of humans varies across the five continents, and there are aspects that scholars cannot fully uncover. Therefore, by elaborating on the established theories of predecessors and comparing with past case scenarios, we can greatly complement new theories. There is no need to favor new theory proponents exclusively."<sup>25</sup>

At this time, Shen Jiaben was serving as the Magistrate of Baoding. This passage is his response to the question of whether it was necessary to painstakingly compile classical criminal cases in the context of the influx of new legal thoughts and theories. In ancient China, the term

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<sup>24</sup> See LI GUILIAN (李贵连), SHEN JIABEN PINGZHUAN (沈家本评传) [THE BIOGRAPHY AND COMMENT OF SHEN JIABEN] 141 (2016).

<sup>25</sup> See Shen Jiaben (沈家本), *Xing'an Huilan Sanbian Xu* (刑案汇览三编序) [Preface to the Third Collection of Criminal Cases] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2225.

“Jurisprudence” (法理) had three meanings: (1) rules and principles. In Han Dynasty Wang Chong (王充)’s “Lunheng • Gu Xiang” (论衡 • 骨相), it is said, “Not only are wealth and poverty, honor and disgrace determined by one’s physical constitution, but also one’s moral character is governed by certain rules and principles.” (2) Law and reason. In the “History of the Later Han Dynasty • Volume 76 • Wang Huan’s Biography” (后汉书 • 七六 • 王涣传), it is stated, “For those long-standing disputes that have remained unresolved through successive administrations and are difficult to settle according to the law and reason, he would always thoroughly investigate the truth and dispel all doubts.” In the “History of the Southern Qi Dynasty • Kong Zhigui’s Biography” (南齐书 • 孔稚珪传), it is recorded that Kong Zhigui submitted a memorial stating, “I have heard that those who create all things use the line and square as their standard, and those who govern a great country take law and reason as their foundation.” (3) Buddhist term. It refers to the principles of Buddhism. In the “History of the Jin Dynasty • Wang Min’s Biography” (晋书 • 王珣传), it is mentioned, “At that time, there was a foreign monk named Deva who had a profound understanding of the principles of Buddhism and taught the ‘Abhidharma sutra’ (毗昙经) to Wang Xun and his brother.”<sup>26</sup> Here, Shen Jiaben’s “study of jurisprudence” (法理之学) is closer to the second meaning of “law”. This can be corroborated by the first modern Chinese essay advocating the study of law in China - Liang Qichao (梁启超)’s “*Lun Zhongguo Yi Jiangqiu Falü Zhixue* (论中国宜讲求法律之学)” [*The Thesis on the Necessity of Law Studies in China*] in 1898.<sup>27</sup> Liang Qichao proposed, “I wish to introduce Western law studies to enlighten China and also to discover the law studies of our sages to enlighten the world.”<sup>28</sup> Considering the context, Shen Jiaben’s “study of jurisprudence” should be equivalent to Liang Qichao’s “law studies” (法律之学), and Shen Jiaben’s “new discoveries” should refer to Liang Qichao’s “discoveries”. The earliest known Chinese text that clearly distinguishes between “law” and “jurisprudence” is Gong Fazi (攻法子)’s “*Falü Yu Fali Zhibie* (法律与法理之别)” [*The Differences between Law and Jurisprudence*] in 1902, which states, “What is ‘law’? Law is the term for rules. What is ‘jurisprudence’? Jurisprudence is the term for the underlying principles of rules. Law is what should be, while

26 See CI YUAN XIUDINGBEN CHONGPAIBAN (辞源 (修订本重排版) (下册)) [SOURCE OF WORDS (THE REFORMATTED AND REVISED EDITION)] 1912 (2010).

27 See Li Guilian (李贵连), *20 Shiji Chuqi de Zhongguo Faxue* (20 世纪初期的中国法学) [*Chinese Jurisprudence in the Early 20th Century*], 2 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY LAW JOURNAL] 1, 2 (1997).

28 See Liang Qichao (梁启超), *Lun Zhongguo Yi Jiangqiu Falü Zhixue* (论中国宜讲求法律之学) [*The Thesis on the Necessity of Law Studies in China*], 5 XIANG BAO (湘报) [HUNAN NEWSPAPER] 1898, at 17.

jurisprudence is why it should be so. Because jurisprudence is like this, law must be determined by it; because law is like this, jurisprudence also emerges from it. The two are mutually reinforcing, yet their distinction is clear.”<sup>29</sup> However, it should be noted that although Shen Jiaben’s “jurisprudence” at this time only referred to “law,” his separate use of “principle” (理) and “new principle” (新理) already involved thinking about the principles and theories behind the law.

In the second stage, with the introduction and translation of Montesquieu and his “The Spirit of Laws”, Shen Jiaben was mainly influenced by Yan Fu (严复)’s translation and his annotations, and creatively interpreted the term “jurisprudence” (法理), endowing it with the connotations of “righteousness, order, propriety and sentiment” (义、序、礼、情).

Shen Jiaben once said, “In the recent centuries, European scholars like Montesquieu have discovered the jurisprudence,”<sup>30</sup> indicating his attention to Montesquieu. Yan Fu’s translation of Montesquieu’s “The Spirit of Laws” was published in seven volumes by the Commercial Press from 1904 to 1909, with the first three volumes coming out in 1904.<sup>31</sup> In his “Xinyi Fagui Daquan Xu (新译法规大全序) [Preface to A Complete Collection of the Statutes Translated Recently]” in the 32<sup>nd</sup> year of Emperor Guangxu (1906), Shen Jiaben mentioned, “The speaker says that the word ‘law’ in Western languages has different translations in Chinese, such as ‘reason,’ ‘propriety,’ ‘law’ and ‘order,’ not exclusively referring to criminal law.”<sup>32</sup> Here, “the speaker” clearly refers to Yan Fu. Yan Fu not only translated Montesquieu’s book but also expressed his own opinions through annotations. He pointed out in the annotations that “the word ‘law’ in Western languages has four different translations in Chinese, namely ‘reason,’ ‘propriety,’ ‘law’ and ‘order’ (理、礼、法、制), and scholars should be aware of this.”<sup>33</sup> Moreover, “what the Westerners call ‘law’ actually encompasses the

29 See Gong Fa Zi (攻法子), *Falü Yu Fali Zhibie* (法律与法理之别) [*The Differences between Law and Jurisprudence*], 9 YISHU HUIBIAN (译书汇编) [THE COMPILATION OF TRANSLATED BOOKS] 120-121 (1902).

30 See Shen Jiaben (沈家本), *Faxuehui Zazhi Xu* (法学会杂志序) [Preface to the Journal of Law Society] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2244.

31 See 1 YAN FU JI (严复集) [THE COLLECTED WORKS OF YAN FU] 144 (Wang Shi (王栻) ed., 1986).

32 See Shen Jiaben (沈家本), *Xinyi Fagui Daquan Xu* (新译法规大全序) [Preface to A Complete Collection of the Statutes Translated Recently] in 4 STUDIES ON ANCIENT CHINESE CRIMINAL LAW 2242. According to the version recorded in a complete collection of Japan statutes translated recently, Shen wrote this preface in the winter of Guangxu thirty-two years (光绪三十二年冬仲). See 1 XINYI RIBEN FAGUI DAQUAN (新译日本法规大全 (点校本)) [A COMPLETE COLLECTION OF JAPANESE STATUTES TRANSLATED RECENTLY] 9 (punctuated and collated by He Jiaxin (何佳馨), 2007).

33 See Montesquieu, FA YI (法意) [THE SPIRIT OF LAWS] 3 (Yan Fu (严复) trans., 1981).

Chinese concept of ‘ritual code.’ The Chinese distinguish between ‘ritual’ and ‘punishment’, believing that ‘ritual’ prevents misconduct while ‘punishment’ punishes wrongdoing. However, the Westerners consider anything written in official documents and enforced throughout the country as ‘law code.’<sup>34</sup> The sentence in Shen Jiaben’s preface is directly and indirectly derived from Yan Fu’s annotations in “The Spirit of Laws”, which can prove the influence of Yan Fu’s translation on him.

The first paragraph of the first volume of “The Spirit of Laws” translated by Yan Fu explains the close connection between “law” and “reason”:

“Law, in its broadest sense, stems from the natural reason of all things. Since heaven created all things, there is order and structure. Once there is order and structure, law naturally encompasses them without the need for artificial establishment. There is nothing in the universe without law; when things exist, law takes shape. Heaven has its own reason, and physical forms and energies have their own reasons. What is above form has its reason, and what is below form also has its reason. Even animals, plants, and all living things are like this, and it is especially evident in humans. Where there is reason, there is law.”

Yan Fu’s annotation to this passage is: “What Confucianism calls reason and what Buddhism calls law are not two separate things at the beginning.”<sup>35</sup>

Regarding the relationship between reason and law, Yan Fu also made an important annotation:

“Montesquieu believed that all laws are formed by nature, but only human conduct has self-imposed laws. However, the establishment of laws must be based on reason. There must be right and wrong first, and then laws; it is not that laws are established first and then right and wrong are determined by their permission or prohibition... In Chinese, what is right and wrong in things is called reason, and what is prohibited by the state is called law. But in Western languages, both are generally called law. Therefore, people tend to think that reason and law are the same thing, and that human conduct has no inherent right and wrong, but only what is permitted or prohibited by law is considered right or wrong. This is the confusion caused by language.”<sup>36</sup>

From the close relationship between “law” and “reason” in the translation to the annotation’s “reason and law are not two separate things at the beginning”, “the establishment of laws must be based on reason”, and “what is right and wrong in things is called reason, and what is prohibited by the state is called law”, it can be inferred that Shen

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<sup>34</sup> See *id.* at 7.

<sup>35</sup> See *id.* at 1.

<sup>36</sup> See *id.* at 2–3.



Jiabben was likely influenced by Yan Fu's translation and adopted the term "law and reason" namely "jurisprudence," defining it as "the principle of law," with the "right and wrong" reason becoming the evaluation standard of law.

"*Lun Shasi Jianfu* (论杀死奸夫) [*The Thesis on the article Killing the Adulterous Lover*]" is the most typical example of Shen Jiabben's application of "jurisprudence." He criticized the legislation of the Ming and Qing Dynasties that husbands were not guilty of killing their wives' adulterers and proposed an important proposition about good laws in his mind: "I secretly think that the laws made by later generations must be better than those of the previous ones to be implemented without drawbacks. If a law is established but fails to fully conform to jurisprudence and is not beneficial to politics, customs and people's livelihood, then what is the value of having such a law?"<sup>37</sup> Shen Jiabben's contributions to "jurisprudence" are as follows: Firstly, he made "jurisprudence" an internal value standard of law, together with external factors such as politics, customs and people's livelihood, to form a comprehensive perspective for evaluating good laws.

Secondly, he transformed "jurisprudence" into an analytical and practical concept. This "jurisprudence" comprises four core elements: righteousness, order, propriety, and sentiment. In modern terms, these correspond to justice, fairness, ethics, and humanity, respectively. Here, the Shen Jiabben demonstrates a profound understanding of historical legal statutes, with his arguments grounded in established rules.

Regarding "justice," it is noted that Tang, Yuan, and Ming laws did not impose the death penalty for adultery. Therefore, it was illegitimate for a husband to kill an adulterer who did not deserve such punishment, as this act was guilty but not accountable, which was against justice and did not conform to jurisprudence.

Concerning "order," it is pointed out that while the guard kills the prisoner who should be sentenced to death without authorization, the guard will be receive the heavy bamboo punishment, while the husband could remain unpunished when he kills the adulterers who deserve the heavy bamboo punishment. This internal imbalance within the legal system reflects unfairness and non-compliance with jurisprudence.

With respect to "propriety," it is argued that according to traditional rites, a woman's adultery constitutes one of the "seven grounds for divorce" (七出), and the "seven grounds for divorce" is written into the "Household Law" (户律) as the provisions of mandate divorce in the process of Confucianization of law, but there is no death penalty. The Ming Code even specifies that if any of the "three

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37 See Shen, *supra* note 22, at 2084.

exceptions” apply, a wife cannot be divorced. A gentleman severing ties with friends does not resort to defamation, let alone the way a husband treats his wife. Thus, allowing a husband to kill an adulterous wife violates ethical norms and deviates from jurisprudence.

On “sentiment,” it is emphasized that human nature values life and abhors killing, especially within familial contexts where there is no justification for imposing death. The existence of laws permitting concealment among relatives aims to safeguard familial harmony between parents, siblings, children, and spouses. Requiring mutual reporting would disrupt safety and stability, contradicting human nature and violating jurisprudence.<sup>38</sup>

In the third stage, Shen Jiaben sought to reconcile the “sense of reason” of classical China with the “jurisprudence” of modern Western countries.

An interesting phenomenon that has not been previously discovered is that “jurisprudence” was Shen Jiaben’s weapon to criticize traditional Chinese law, while “sense of reason” was his tool to critique Western law. In “*Lun Weibi Ren Zhisi* (论威逼人致死) [The Thesis on the article Putting Pressure on Another so as to Cause Him to Die]”, Shen Jiaben demonstrated his critical thinking. He criticized the unreasonable aspect of the Ming and Qing laws that emphasized the need to pay for the life of the suicide with “jurisprudence,” and also questioned the Western law’s classification of suicide as a serious crime with “sense of reason”:

“If the Western claim that suicide is a serious crime is not accepted by the scholars in their own country, as Stoic philosophy suggests, then it is only the religious adherents who insist on this view. Judging from the perspective of “sense of reason,” this is indeed not satisfactory. When a person is subjected to unbearable suffering and resorts to death, this is the most pitiful and deserving of sympathy. Now, instead of showing pity and sympathy, they impose a crime on them. A kind-hearted person would never do this. According to etiquette, it is only that one does not offer condolences. But to further humiliate them is against human nature. If a person is guilty, it must be because they have harmed the world. Those who are not happy to live and are willing to die, what harm do they cause to the world that they must be punished, have their property and honor taken away and be cast out? This is against heavenly principles. Moreover, if the deceased has knowledge, they will drink in resentment in the netherworld and suffer for eternity. If the deceased has no knowledge, even if they are sentenced to a serious crime, how can it serve as a warning? If a murderer who has not been

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38 See *id.* at 2084–85.

sentenced to death commits suicide, there is no other crime to be sentenced. Those who commit suicide without guilt are punished more severely than those who commit murder. In traditional Chinese law, those who self-harm are punished, such as one has committed an offence and is awaiting trial intentionally injures or mutilates himself (and he will receive 100 strokes of the heavy bamboo. Law on '[f]eigning Sickness, Death, or Injury to Avoid Tasks'), in order to intimidate of falsely accuse another (80 strokes of the heavy bamboo, same as above law), and in order to avoid fighting (the punishment is limited to 100 strokes of the heavy bamboo. Law on 'Delays in Following Orders to Go to Meet the Enemy'). If such people die from his self-inflicted injuries, there is no provision for punishment, because the person is already dead and the crime cannot be further punished. If a person who is guilty and commits suicide is not punished, how can a person who is not guilty and commits suicide be punished? Is this in line with human nature? Is this in line with heavenly principle? This is a point of criticism of Western law."<sup>39</sup>

"Contrary to the heavenly principles" and "contrary to human nature" were the reasons given by Shen Jiaben for criticizing the Western laws that regarded suicide as a serious crime. Shen Jiaben was aware of the religious background of this Western law and considered it "not worth emulating." His argument based on "sense of reason" can also be summarized as the Western laws violating the four elements of "sense of reason": righteousness (suicide, which is a form of suffering, is instead punished), order (imbalance in the legal system's severity), propriety (contrary to the principles of propriety), and sentiment (contrary to the benevolent heart of a virtuous person). It is evident that there is a certain alignment between "sense of reason" and "jurisprudence." In terms of the writing time, "*Lun Shasi Jianfu* (论杀死奸夫) [*The Thesis on the article Killing the Adulterous Lover*]" and "*Lun Weibi Ren Zhisi* (论威逼人致死) [*The Thesis on the article Putting Pressure on Another so as to Cause Him to Die*]" were written in succession.<sup>40</sup> In terms of the use of key words, "jurisprudence" and

39 See Shen, *supra* note 18, at 2091–92.

40 The two essays, criticizing the old Code and discussing the legislation of New Criminal Law of the Great Qing (大清新刑律), are tentatively dated to the period between 1906 and 1907. The two essays were placed consecutively in *Jiyi Wencun* (寄移文存) [Selected Works of Ji Yi]. As comparison, Article 285 "Killing the Adulterous Lover" (杀死奸夫) and Article 299 "Putting Pressure on Another so as to Cause Him to Die" (威逼人致死) are close in position in the Qing Code (大清律例) as well. Similarly, when organizing his own essays, Ji Tongjun (吉同钧) also put his two essays in the same topic -- *Shu Jiulü Shasi Jianfu Men Hou* (书旧律杀死奸夫门后) [*The Comment on the article Killing the Adulterous Lover in the Old Code*] and *Xinglü Yuan Zongjiao Ersheng Yu Zongjiao Xiang Biaoli Lun* (刑律缘宗教而生与宗教相表里论) [*Clans and Rites as the origin of Criminal Law and Their Exterior-interior Relationship*] -- in adjacent order. To some

“sense of reason” followed each other, indicating Shen Jiaben’s continuous and in-depth thinking on how to integrate Chinese and Western laws.

This line of thinking was concisely summarized in his “*Faxue Mingzhu Xu* (法学名著序) [Preface to the Anthology of Legal Classics]” in the 3<sup>rd</sup> year of Emperor Xuanton (1911): “New learning often evolves from old learning. The more events there are, the more intricate jurisprudence becomes. However, in essence, they all boil down to the term ‘sense of reason’. Whether it is old learning or new learning, it is impossible to formulate laws without considering the sense of reason. What is valuable is to integrate and connect them.”<sup>41</sup>

A phenomenon worth pondering is that Shen Jiaben, a jurist who was not proficient in foreign languages and had never visited foreign countries, mainly learned about foreign situations by reading translated works and studying with overseas students. On the one hand, this might have been a disadvantage for him; on the other hand, it could also have been an advantage, enabling him to avoid being confined by the legal background of the country where he might studied abroad and to make more objective and reasonable choices when drawing on foreign laws.

## VI. CONCLUSION: THE FATE OF THE REFORMER AND HIS LEGAL LEGACY

Legal reform is not an entertainment, but inevitably accompanied by power struggles, interest games, and value conflicts. In this process, the disputes among the the Bureau for the Revision of Laws(修订法律馆), the Ministry of Justice(法部), and the Supreme Court(大理院) over the authority to draft laws, the disputes between the Bureau for Constitution Preparation and the Preparatory National Assembly over the authority to review and approve Laws, the disputes between the Ministry of Justice and the Supreme Court over the authority of the judiciary, the disputes between the Confucianist Faction(礼教派) and the Pro-law Faction(法理派) over the retention or abolition of the cardinal rituals in Chinese Ethics in the New Criminal Code of the Great Qing, and so on, are embodiments of these contradictory relationships. Shen Jiaben could not distance himself from those disputes; instead, he was inevitably embroiled in them, facing great pressure.

For instance, during the debate on the New Criminal Code of the

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extent, it could be proved that debates on the above topics had taken place between the two jurists. See Ji Tongjun (吉同钧), *LESUTANG WENJI* (乐素堂文集) [COLLECTED WORKS FROM LESUTANG] 119–21 (Yan Xiaojun (闫晓君) ed., 2014).

41 See Shen, *supra* note 12, at 2240.

Great Qing, Shen Jiaben explicitly acknowledged that, “[p]ositioned between the western powers and compelled by the forces of international interaction, it is nearly impossible for China to keep clinging to traditions”; “Out of caution regarding the current situations, changes are unavoidable”; “[g]iven the international considerations, changes are imperative”; “[d]ue to lessons learned from the missionary cases, changes are necessary.”<sup>42</sup> As the leader of the Pro-law faction who argued for the proper separation of rituals and laws, he was fiercely attacked by the Confucianist Faction and even faced the risks of literary persecutions and personal attacks. Initially, Zhang Zhidong, the Minister of the Ministry of Education (学部), “Accused Shen Jiaben of shielding revolutionaries and wanted to have him imprisoned. That’s because the provisions of the New Criminal Code indicated that those convicted of the crime of insurrection might not necessarily be sentenced to death. But he(Zhang Zhidong) was blocked by Bao Xi(宝熙), the Vice Minister of Education. Furthermore, Zhang Zhidong denounced Shen Jiaben for undermining the foundation of the Confucian Code of Ethics, as the chapter on sexual crimes omitted explicit criminalization of consensual adultery with unmarried women or widows(无夫奸).”<sup>43</sup> Later, Liu Tingchen(刘廷琛), the President of Imperial University of Peking (京师大学堂), said that “This High Commissioner for the Revision of Laws, having received profound imperial favor and Confucian education, how could he rebel against the traditional orthodoxy to such an extent?..... The Bureau for Revision of Laws secretly undermined the fundamental ethical orders, arbitrarily defied imperial decrees, and acted on its own will. While the Mandate of Heaven remains unaltered, how can we tolerate the minister who disobeys it? I fear that he cannot bear such a grave responsibility and culpability..... He has placed the Emperor under the accusation of abolishing the Confucian Code of Ethics, and it will be written in the annals of future generations that the national abolition of rituals began with our Emperor, by which I feel privately heartbroken.”<sup>44</sup> Not only

42 See Shen Jiaben (沈家本), *Xiuding Falü Dachen Shen Jiaben Zou Xinglü Caoan Gaocheng Fenqi Shandan Chenglan Bing Chen Xiuding Dazhi Zhe* (修订法律大臣沈家本奏刑律草案告成分期缮单呈览并陈修订大旨折) [The Memorial Reporting the Completion of the Draft of the Criminal Law, declaring the Following Submission by Stages and Explaining the Purpose of the Amendment] in 2 QINGMO CHOUBEI LIXIAN DANGAN SHILIAO (清末筹备立宪档案史料) [ARCHIVES OF PREPARATION OF CONSTITUTIONALISM IN THE LATE QING DYNASTY] 845–846 (Department of the Ming and Qing Dynasties Archives of the Palace Museum (故宫博物院明清档案部) ed., 1979).

43 See Dong Kang (董康), *Qianqing Fazhi Gaiyao* (前清法制概要) [Overview of Legal System in Qing Dynasty], in DONGKANG FAXUE WENJI (董康法学文集) [LEGAL COLLECTIONS OF DONG KANG] 232 (He Qinhua (何勤华) & Wei Qiong (魏琼) eds., 2004).

44 See Liu Tingchen (刘廷琛), *Daxuetang Zongjiandu Liu Tingchen Zou Xin Xinglü Buhe Lijiao Tiaowen Qing Yanchi Shanjin Zhe* (大学堂总监督刘廷琛奏新刑律不合礼教条文请严饬删

the Confucianist Faction, but also the radicals within the Pro-law Faction were disapproval of Shen Jiaben, considering his reforms insufficiently thorough. Yang Du(杨度) openly criticized that, “The High Commissioner for the Revision of Laws was a prudent and experienced person with decades of experience in traditional laws and years of discussions about new laws. How could he possibly be unaware of those superficial meanings raised by commentators? Yet ultimately the draft had been finalized in such a way. Isn’t it exactly abandoning traditionalism and embracing a new doctrine according to the intention of our nation’s legal reform?”<sup>45</sup> In fact, Shen Jiaben was faced with accusations from both the conservative and radical factions, caught in a dilemma. With the mindset of bearing disgrace and a heavy burden, he strived for a ten-day extension of the Preparatory National Assembly’s First Annual Session, so as to secure the maximum time for the deliberation and approval of the New Criminal Code, ensuring its eventual promulgation.

As a political figure, Shen Jiaben also had to face the public opinion pressure from modern media. “*Ti Ching News*(帝京新闻)” mocked his performance in the Preparatory National Assembly with a political cartoon, depicting him as a puppet manipulated by Secretary-General Jin Boping(金伯屏).<sup>46</sup> Additionally, another report stated that, “Shen Jiaben, the Vice President of the Preparatory National Assembly, was imperially appointed as a Knowledgeable Confucianism-expert assembly member (钦选硕学通儒议员), and then was specially designated as the Vice President by an imperial decree. Since the establishment of the Preparatory National Assembly, he was repeatedly attacked by members, appearing utterly perplexed and indecisive. Fortunately, he avoided making a fool of himself due to the guidance of the Secretary-General and his self-positioning was a puppet.”<sup>47</sup> In fact, according to “*Stenographic Records of the Meetings in National Assembly*(资政院议场会议速记录)”, during the First Annual Session of the Preparatory National Assembly, President Pu Lun(溥伦) presided

尽折) [The Memorial Concerning Deleting All the Articles Violating Rites in the New Criminal Law] in 2 QINGMO CHOU BEI LIXIAN DANGAN SHILIAO (清末筹备立宪档案史料) [ARCHIVES OF PREPARATION OF CONSTITUTIONALISM IN THE LATE QING DYNASTY] 845, 888–89 (Department of the Ming and Qing Dynasties Archives of the Palace Museum (故宫博物院明清档案部) ed., 1979).

45 See Yang Du (杨度), *Lun Guojiazhu yi Yu Jiazuzhu yi Zhi Qubie* (论国家主义与家族主义之区别) [Discussing the Differences between Nationalism and Familism] in 2 YANG DU JI (杨度集) [THE COLLECTED WORKS OF YANG DU] 46 (Liu Qingbo (刘晴波) ed., 2008).

46 See *Shihua* (时画) [Current Affairs Paintings], *DIJING XINWEN* (帝京新闻) [TI CHING NEWS], Sep. 19, 1910, at 2.

47 See Xiao Yi (小乙), *Huaji Tanpian Shen Yizhang You Cizhi Zhi Shuo* (滑稽谈片：沈议长有辞职之说) [Satirical Sketches: Rumors about the Vice President Shen’s Plan to Resign] *DIJING XINWEN* (帝京新闻) [TI CHING NEWS], Sep. 19, 1910, at 7.

over 31 sessions (of which he left early 7 times for reasons) and was absent 11 times; Vice President Shen Jiaben presided over 11 full sessions and temporarily assumed presiding duties 7 times. In the First Annual Session of the Preparatory National Assembly, there were a total of 42 meetings. Excluding 3 preparatory as well as the opening and closing ceremonial meetings, Shen Jiaben presided over 19 of 39 sessions, nearly half of the whole.<sup>48</sup> As can be seen through these statistics, despite his possible lack of skilled experience in parliamentary debates, Shen Jiaben was to some extent unfairly scapegoated.

The pressures from both internal and external, coupled with exhaustion from consecutive late-night sessions, overwhelmed this septuagenarian. Zhang Zongxiang(章宗祥) recorded the accident that, “Last year, after the New Criminal Code was passed in the Preparatory National Assembly, Shen (Jiaben) went to the Preparatory National Assembly to attend the following day’s closing ceremony. When he descended the platform, he accidentally stumbled and fell, injuring his nose and bleeding excessively. He then returned to his residence for recuperation. Ultimately, due to his advanced age compounded by injury, he has been sick a lot since then.”<sup>49</sup> Although legal reforms in late Qing were not violent revolutions, the new legislation was also marked by the bloodstains of the reformers. To this extent, this idealist with practical approach could be said to have attained what he pursued.

On June 9<sup>th</sup> in the second year of the Republic of China (1913), corresponding to the Dragon Boat Festival in the lunar calendar, the 73-year-old Shen Jiaben passed away at his Beijing residence in Jinjing Hutong(金井胡同). It is said that Professor Li Guangcan(李光灿) once called Shen (Jiaben) “the Sun Yat-sen in the legal realm,”<sup>50</sup> which I think is a vivid metaphor for his legal and political performance and ideal pursuit. In the first stage of his life, Shen Jiaben faced many obstacles in his official career, and was even wrongfully accused and

48 See ZIZHENGYUAN YICHANG HUIYI SUJILU: WANQING YUBEI GUOHUI LUNBIAN SHILU XIUDINGBEN (资政院议场会议速记录：晚清预备国会论辩实录（修订本）) [STENOGRAPHIC RECORDS OF THE MEETINGS IN PREPARATORY NATIONAL ASSEMBLY: MEMOIR OF THE DEBATES IN PREPARATORY CONGRESS IN THE LATE QING DYNASTY (REVISED EDITION)] (collated and annotated by Li Qicheng (李启成), 2022).

49 See 1 WENSHI ZILIAO CUNGAO XUANBIAN (文史资料存稿选编) [ARCHIVAL COMPILATION OF CULTURAL AND HISTORICAL RECORDS] 37 (2002).

50 The comment was relayed by Professor Li Guilian (李贵连). Professor Li Guangcan (李光灿), as documented in a published paper, proposed that Sun Yat-sen’s (孙中山) political and legal thought belonged to the same category as that of Shen Jiaben (沈家本). This assertion could corroborate the comment cited in the text. See *Cong Shen Jiaben de Zouyi He Xiulu Kan Tade Falü Sixiang* (从沈家本的奏议和修律看他的法律思想) [*Shen Jiaben’s Legal Thought as Reflected in His Memorials and Amendment of law*], 3 JINDAISHI YANJIU (近代史研究) [MODERN CHINESE HISTORY STUDIES] 201, 202 (1982).

imprisoned. Nonetheless, he put in a lot of effort and continuously enhanced his professional skills, which prepared him to engage in the important tasks in the second stage of his life. Since 1902, Shen Jiaben has presided over the compilation of many new laws like the Current Criminal Code of the Great Qing, proved the necessity and importance of judicial independence and set up the Supreme Court. He also promoted the development of legal research. Moreover, Shen Jiaben criticized blind worship of Western laws and adherence to conventions without careful consideration, providing methodologies for how legal development can balance the achievements of the rule of law in ancient and modern times and in China and Western countries. On the one hand, from the perspective of history, he distinguished the laws of the Han and Tang Dynasties from those of the Ming and Qing Dynasties, advocated “benevolence” as the spirit of law, and clarified the differences between traditional autocratic rule of law and the modern human rights protection rule of law; on the other hand, from the perspective of culture, he compared the concept of “jurisprudence” and “sense of reason,” and maintained the legal confidence while learning Western law.

The good traditional Chinese legal culture is an essential part of China's traditional cultural heritage and serves as a necessary ideological source for advancing law-based governance in all respects. Shen Jiaben, pioneered a crucial path for China's legal transformation through his legal philosophy and reform practices, which bridged Chinese and Western traditions as well as ancient and modern systems. His legacy includes not only valuable regulations and institutions such as legal codes and the judicial system, but also two important methodologies regarding to legal reform, continuing to offer important resources for the creative transformation and innovative development of traditional Chinese legal culture today. Shen Jiaben's rich legal legacy—whether in terms of thought and philosophy or achievements and methods, especially his deep confidence and consciousness of Chinese classical laws and legal culture, as well as his open-mindedness toward modern Western legal civilization—remains vital for the inheritance and development of contemporary legal construction.