MARRIAGE LAW AND CONFUCIAN ETHICS
IN THE QING DYNASTY

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The Qing Dynasty is the last dynasty of all the twelve dynasties in Chinese history. Its family law embodied the Confucian conception of the integration of family, country and the world under heaven. The rule of traditional Chinese society was depicted as “the Rule of Propriety and Music” which had been established by Duke Zhou as an instrumentalist mechanism and refined by the Confucian humanistic value orientation. This rule exhibited the intricate fabric of both family and country in five-types in dressing-service, making the laws and legalities in the Qing Codes and Cases peculiar in marriage, divorce, property inheritance and heir adoption and confirmation with obvious female and juvenile discriminations. Since Confucian ethics was introduced as a remedy to the deficiency in regulation and the stereotypes of mentality in the late Zhou Dynasty, their suggestions on equal and universal moral rights have become apparent in the relative enactments and cases ever since. As a system of social regulation, the Qing Codes and Cases demonstrated validity and stability in all areas of family law as well as in their compromise with Confucian ethics in the solidarity of family, clan, country and world where the right to live and the balance between right and duty had been always prioritized.

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INTRODUCTION

The Qing Dynasty (清朝) witnessed the longest reign by an ethnic minority in Chinese history, and its legal system mainly was comprised of the Qing Codes and Cases (daqing lüli 大清律例) and the Man (滿) Ethnic Social Conventions. The family law in this legal system exhibited its defining features in marriage, taking concubines, divorce, remarriage of widows and property inheritance. In the making of the Qing family law, some traditional customs and usages of the
Man ethnic people were either reformed or rejected, and the traditional marriage of Han (汉) people based on Six Rituals also underwent some transformations regarding kinship marriage (zongbiao hun 宗表婚). Also, the property division among the offspring of both wife, concubines and even housemaids, as well as rights and obligations caused by such marriage were interpreted and implemented in their relative edicts or arbitrations. The official acquiescence and postponed confirmation of social conventions among plebeian have been attributed to the clashes and compromises between Confucian ethics, imperial authorities and social regulations.

I. PROPRIETY AS THE CONTEXT OF FAMILY LAW

A. Marriage as the Basic Unit of Family Law

The family law of the Qing Dynasty followed the Chinese legal tradition of integrating family structure with marriage, which functioned both as the basic unit for social regulations in the context of family, country and world, and religious bondage in sustaining the life in a clan by ever-reproducing family members. therefore, in the whole span of imperial China, family law had been established, interpreted and implemented in the spirit of “predominance of propriety over legality,” i.e. family relations between clan members including marriage, adoption, property inheritance, husband-wife relation, parent-child relation, divorce, custody and support, etc. were mainly regulated and maintained by propriety (li 礼), though supplemented by legality (fa 法) and conventions (xisu 习俗).

B. Propriety as Both Convention and Regulations

1. The Violations of Propriety and Music. — Propriety, as a governmental regulation, was popularly acknowledged as a political and legal invention by Duke Zhou. According to him, propriety was derived from conventional entries of “the rule of propriety and music” (liyue zhi zhi 礼乐之治) and “the violations of propriety and the spoils of music” (lihuai yuebeng 礼坏乐崩), which denotes both the harmonious rule of the world and the social chaos in the world respectively. In Confucian Classics, propriety has been paraphrased in a similar way as the definition of law by Western natural law theorists, which states: “Propriety has
been defined as cosmic principles governing the heaven and the earth in its rotation of heavenly bodies, as well as human beings in their social actions.” \(^1\) Therefore, Confucian scholars believed that these principles expressive of propriety were natural laws invariably governing human beings in their family relations, given that family was taken to be an irreducible unit that constitutes the country and by extension, the world. Thereupon, both the family law and natural law are equally evidenced in the interpretations and implementations of propriety.

2. The Rule of Proper Dressing. — The rule of propriety was also depicted as the rule of proper dressing in the image of the cultivated man. This has been a simple and observatory illustration to the rule of law in Chinese context, which in Confucian classics often referred to as the distinction between naked animals subject to the jungle law and dressed human beings abiding by man-made law. An influential Confucian scholar in the Qing Dynasty explained the rule of propriety in tone of Western natural law tradition: “In Xi Ci, the Book of Changes, there is a document that Bao Xi ruled the world under heaven majestically by observing principles of the heaven and the earth. It also tells the story that Yellow Emperor, Yao and Shun ruled the world by tidy dressings, distinguishing between coats and trousers vertically like upper sky and downward earth. So from the ancient times on, all saint kings have been adhering to cosmological principles. …if more explanations are needed, we could say that the grandeur of heaven suggests holy height, and being politically gorgeous suggests longer rule for more populations.” \(^2\) So dressing tidily bears more message than individual taste and economic conditions, it tells the political and legal situations and whether a society is properly organized and ruled. Since the world is the community of countries and a country the extension of families, the harmony of the world, the rule of the country and the management of family life tend to be integrated in a metaphorically-expressed dressing system. And again, as the dressing system is often explained as “the rule of filial piety” (yi xiao zhi tianxia 以孝治天下), family law is associated with the most basic and important


\(^2\) Baonan Liu, 论语正义 (Notes to Tai Bo, Authentic Introduction to “The Analects of Confucius”), in 诸子集成 (Anthologies of Master Scholars), vol. 1, Shanghai Bookstore Publishing House (Shanghai), at 166 (1986).
law in Chinese legal system in the mechanism of five-types in dressing-service (wufu zhidu 五服制度).

C. Confucian Impacts on Chinese Law

1. Ethos of Family in Confucian Ideology. — The political ideology of imperial China was Confucianism, symbolized by the phrase “self regulating, family establishing, country ruling and world harmonizing” (xiushen qijia zhiguo pingtianxia 修身齐家治国平天下). These four stages of the regulatory ladder of imperial China succinctly revealed the essential conventions reinforced by propriety in their interpretations and implementations once the five-types in dressing-service acquired moral sense and legal validity in Chinese society. In the due course, the five-types in dressing-service functioned as legal skeletons to embody the ethos of family law in traditional China.

2. Five-Types in Dressing-Service as Ethical Law. — The relations between heaven and earth, monarch and his subjects, father and son, husband and wife have been distinctive. This was illustrated by the mourning of death. The time span and dressing type should reflect both family relations and the duties and rights between the central government and its surrounding local subordinate agents. In the Chapter of Great Yu’s Contribution, the Book of History (shangshu yugong 尚书・禹贡), the political and legal relations between the central government represented by the Heavenly Son (tianzi 天子) were revealed as “dressing-service,” which gradually reduced the service burden by every five hundred miles from the capital: The area at the distance of five hundred miles was called dianfu 甸服, with its service being corn and rice providers; the area five hundred miles away from dianfu was called houfu 侯服, with its service being official mission performers for the country; the area five hundred miles away from houfu was called suifu 绥服, with its service being the guardian of Heavenly Son and the promotion of his political and religious doctrines; the area five hundred miles away from suifu was called yaofu 要服, with its service being the keepers of the Heavenly Son’s orders and being peaceful neighbors to the nearby residents; the area five hundred miles away from yaofu was called huangfu 荒服, its service being discretionary and exempt. These were the famous five-types in dressing-service. Such kind of “dressing-service” at the country level has its focus on the unilateral obligations for the ruled. In parallel, the young were also bound by such “dressing-service” in their family relationships.
At both country and family levels, the ruled and the young were legally and ethically subject to the unilateral “dressing-service” to the ruling class represented by the Son of Heaven and the aged personified by parents. And such “dressing-service” demonstrated the ignorance of the rights of the ruled and the young and the supremacy of power of the ruling class and the aged, constituting the prevalent doctrine of predominance of the noble and veteran over the humble and the young. Since a country was assumed to be an enlarged family, the mechanism of social regulation had its origin in the family context which proved to be the prototype of social five-types in dressing-service. Yet the five-types in dressing-service in the family context were exhibited in the mourning form rather than by the provision of substantive service.

3. Legal Obligations Expressed in the Mourning Period. — In general, the five-types in dressing-service were expressed in the mourning period as three years dressed in zhancui 斩衰, one year dressed in qicui 齐衰, nine months dressed in dagong 大功, five months dressed in xiaogong 小功, and in three months dressed in sima 讪麻. Zhancui was the propriety for the persons as son, wife and concubine to show their respect in mourning toward their deceased monarch, fathers and husbands. Qicui was the propriety for their offspring and husbands in mourning their deceased mothers and wives. Dagong was the propriety for their offspring in mourning the deceased relatives of their grandfather. Xiaogong was the propriety for their offspring in mourning their deceased relatives of grandfather by one more generation distant. And sima was the propriety for their offspring in mourning for their deceased relatives of grandfather by two more generations distant or the relatives from one’s mother’s side. The five-types in dressing-service in mourning the family-related members implied the social relations of being superior and inferior by biological orders, with the senior being presumably superior and the junior inferior. According to this dressing-service, criminal law was officially applied according to the five-types in dressing-service as such (zhun wufu yi zhizui 准五服以治罪). In the Qing Dynasty, this legal spirit was strictly observed and implemented in family law.

II. THE MARRIAGE PRIVILEGE

A. Marriage Dictated by Parents and Assisted by Go-betweens

Marriage was not exclusively defined as the union of two heterosexual
individuals of their own choice in traditional China, but rather as the reunion of two clans represented by bridegroom and bride. Therefore the normal marriage was acknowledged and legitimized in the principle of “dictating from parents and facilitation from the go-between” (fumu zhi ming, meishuo zhi yan 父母之命, 媒妁之言). Compared to the introduction of the go-between, the dictates of parents are obligatory conditions that validate or invalidate a marriage of their kids. As stated in one of the earliest Confucian classics, “it is the obligation to consult the agreement of one’s parent when marrying a wife” and “it is not acknowledged when the marriage is not facilitated by introduction of the go-between” (Southern Hill, Convention in Qi, The Book of Poetry, or in Chinese, Shijing-Qifeng-Nanshan 诗经•齐风•南山). This tradition of marriage dictated by the orders of parents had become influential in imperial China from the Qin Dynasty (秦朝) to the end of the Qing Dynasty (清朝) till the Republic of China (中华民国) legally prohibited it. Either in Confucian ethics or conventional legality, the privilege of legitimizing a marriage was exclusively monopolized in the hands of parents. If the marriage agreement were achieved by both parents of two marriage parties, there should be no alteration by the protests of their kids. So as the young, humble and powerless kids, their rights to free marriage had been naturally abrogated by their powerful parents.

B. Marriage in Terms of Equal Match

1. The Rights of Marriage Abused by Parental Powers. — Besides the abrogation of marriage rights for young male and female in the “dictations from parents and facilitation from the go-between,” another serious constraint on free marriage was the concept of “equal match between the male and the female regarding their economic and social conditions” (mendang hudui 门当户对). Respectively, the marriage dictated by agreement between the parents of marriage parties was termed “marriage contracted by heteronomy” (baoban hunyin 包办婚姻), and the marriage matched by economic conditions was termed as “marriage calculated by price” (maimai hunyin 买卖婚姻). In either case, marriage evidenced no autonomy of the male and female parties. And such marriage traditions still have significant impacts on rural areas in contemporary

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China. In the Qing Dynasty, even if the children were adults or served as officials in other places, the marriages agreed to by their parents at home were still authoritative and effective to them. If these children reported their own chosen marriages, intending to revoke the marriage arranged by their parents, they were subject to punishment from eighty to a hundred stick floggings by law. But if the parents violated the conventions or regulations in the marriage for their children, they were also liable to receive punishment.

As a standard conventional law, children in a family did not have rights to decide upon their own marriage and instead parents held the rights to arrange the marriage of their children. The principle of “uniting two clans by marriage” was exclusively reserved for parents as “head of the household” (jiazhang 家长). As such, these rights were turned into patriarchal powers to control the marriage process and its essence. Such privilege was also called the “powers to manipulate marriage” (zhuhun quan 主婚权), presumably affiliated to the clan chieftains in all previous legalities and conventions. The powers to manipulate marriage in the Qing Codes and Cases were distinctively stipulated to the supremacy of “head of the household”: The marriage of both male and female descendents should be exclusively manipulated by their grandparents and parents. In this case whereby both grandparents and parents are dead, the relatives at the grandparents or parents generation should be responsible for the marriage of the offspring of the clan. And if a widow remarried to another family with her own daughter, the mother was legally accountable for her own daughter’s marriage.4 Still the domination over the marriage of the younger generation by their elder relatives was gradually weakened by their kinship to the parties in the principle of five-types in dressing-service. That is, the orders of zhancui 斩衰, qicui 齐衰, dagong 大功, xiaogong 小功 and sima 绰麻 were legally accountable for their preference in manipulating the marriage of the clan, and any violating the orders in manipulating marriage for the clan members should be punished according to the interpretations of the propriety.

2. Polygamy Justified by Confucian Ethics. — In family law of the Qing Dynasty, polygamy with Chinese characteristics was both legally and morally encouraged and accepted, amenable to the custom of being noble in male gender and humble in female gender, but the dogma of polygamy stipulated that among

all those females associated to the husband by marriage, only one, usually the first married woman, held the title of wife, and the rest of females having sex with their husband were destined as concubines or slave maids. Therefore, the females married to a man were divided into two categories, intimate wife (di 嫡) and plebeian concubines (shu 庶) or slave maids (bi 婢, nubi 奴婢). This division not only differentiated between wife and concubines in their unequal social and legal status within a family, but also institutionalized prejudice against the offspring of the plebeian wife concerning property inheritance in the family. In particular, sons of the intimate wife (dizi 嫡子) would invariably enjoy the privilege in either social facilities or family administration; and in contrast, sons of plebeian concubines (shuzi 庶子) could be just derogatory entries. Such polygamy of Chinese style can be projected into the family structure of Chinese emperor, who married officially only one empress but was encouraged to have as many concubines as was allowed in three palaces and six courtyards and seventy-two beauty companions (sangong liuyuan qishier pinfei 三宫六院七十二嫔妃). Polygamy in the imperial palace set an example in society that encouraged the rich, the noble and scholars to have more concubines as a sign of success and grace. In such a marriage culture, the rights of women were ethically confiscated, resulted in the prevalent doctrine of “the obedience of female to their parent and elder brothers when being young, to their husbands when being married, and to their sons when being widowed.”

3. Some Restrictions on Male Privilege by Confucian Ethics. — But there were also some restrictions on marriage other than the privilege of the noble and elder male, i.e. these were the marriage bans based on blood and kinship, as well as on social status, forbidding the marriage between the social normal and abnormal classes. For the marriage bans on close blood and kinship relations, the Qing Codes and Cases stipulated: “Any marriage accomplished on the close dressing-service or on the brothers and sisters from stepparents is liable to incest, and such marriage is forced to separate,” and “the sisters from the parents-in-law, one’s nieces from the same grandparents, the sisters from one’s son-in-law or one’s adopted sisters without dressing-service are not permitted to be marriage partners, if the ban is broken, the violator is subject to a hundred stick floggings for both partners.”5 The marriage between relatives from the same generation was also harshly forbidden, and any violation should be subject to eighty stick

5 Id. at 208.
floggings for both partners and a compulsory divorce. The most severe punishments applied to the marriage between persons with the wives and concubines of their deceased intimate relatives, “if one marries the concubine of his father, grandfather and the wives of his uncles, or the younger brother takes his sister-in-law as concubine or the elder brother takes his sister-in-law as concubine, both the partners are subject to execution.”6 In these legal penalties, traditional ethics were of primary importance in judicial judgments, leaving the Chinese legal system an impression of ethical law more than covenant law.

4. Legal Punishments in Marriage Influenced by Confucian Ethics. — The feature of ethical law was also expressed in the marriage bans between normal social class (liangmin 良民) and abnormal social class (jianmin 贱民). In the Qing Dynasty, prostitutes, vagabond singers and dancers, serfs, and slave-maids were all in the category of abnormal social class, similar to “the untouchable” in Hindu Caste. Not only were these social classes excluded from the national service examination and official positions, they were also prohibited from marrying partners from the normal class. If a household head arranged a marriage between his younger male and slave-maid, he was subject to eighty stick floggings, the similar penalty applied to the slave-maid by her own marriage with a male member from normal social class. If a prostitute or vagabond singer or dancer married a male from the normal social class, she was subject to a hundred stick floggings, a similar penalty also applied to the household head who was informed of the marriage yet did not commit in frustrating it. In most cases of the marriage between the normal and abnormal social classes, the household head bore the brunt of punishment, since they were presumed to be the social privilege holders and in charge of maintaining social morality. Thereupon such marriage forbidden by legality and disdained by ethics would not be sustained in society and forcible divorce would thus be implemented after severe penalty.

III. EXCLUSIVE PRIVILEGE TO DIVORCE FOR MALE

A. Divorce as Male Privilege

“To drive off wife” (chūqì 出妻) was the main form of divorce in Chinese

6 Id. at 209–10.
traditional divorce mechanism. And this was strictly observed as a privilege reserved for the husband or his patriarchal elders in the Qing Dynasty, i.e. the freedom of divorce was dominated by the husband or his clan, while the wife or her clan remained passive throughout the process.

Divorce as a privilege to the husband or his clan had its legal origin in the doctrines of propriety. Associated with the five-types in dressing-service, divorce proprieties were categorized as “to drive off wife,” “negotiated divorce” and “destined divorce.”

As for “driving off wife,” there were seven excuses for husband or his clan, namely without filial piety to the husband’s parents, bearing no male offspring, being too sexy, being jealous, bearing chronic disease, being gossipy or being committed to stealing. These seven excuses were the most obvious ethic-oriented legalities in traditional Chinese society.

As for “negotiated divorce,” it appeared to be fair on the surface, with both parties sharing equal rights to decide their marriage. But Confucian ethical approaches or social conventions compromised it, i.e. the family of the husband would rather resort to one of the seven excuses than “negotiated divorce” as to avoid “washing one’s dirty linen in public” (jiachou buke waiyang 家丑不可外扬). So in essence, “negotiated divorce” was the ethical translation of “driving off wife,” which was meticulously designed to preserve the decency of the husband’s family.

As for “destined divorce,” it was an enforced divorce under the pretext of moral principle, which proposed a destined marriage should be established on mutual affection and social ethics. When mutual affection and social ethics were not acknowledged by both marriage parties, their intimate relatives within five-types in dressing-service, or it was sentenced illegally through the legal process, such marriage should be abolished. Therefore, “destined divorce” was distinct from “driving off wife” in that the latter may be subject to the principle of either propriety or legality, while the former often resorted to criminal law. In “driving off wife,” the husband usually held the exclusive right to divorce, but in “destined divorce,” legality and ethics would exercise decisive influence. The typical cases involving “destined divorce” were murders committed by the family members or relatives in close dressing-service by either husband or wife, or illegal intercourse forbidden by ethical principles in “five-types in dressing-service,” or murders directed toward the other party of the marriage. If the “destined divorce”
was not implemented, the convicted would be sentenced in exile for one year.

**B. Administrative Power in Divorce**

For any form of divorce, the authority remained in the administrative office which issued the edict of legal divorce. Since marriage archives were preserved in the administrative offices at different levels, the officials who presided over the divorce case would declare the validity of divorce by destroying the original file, supervised the return of the marriage gifts donated by husband’s family or confiscated them as local government revenue. Like a piece of movable property, the divorced wife was either to be turned over to her clan chieftain or to be remarried again through an official bargain deal. Theoretically, the local administrative office would check and confirm the paper notice of the divorced wife by “driving off,” but in remote areas it was the clans of both families who were responsible for such divorce cases rather than the local officials.

**IV. PROPERTY AND ITS SUCCESSION IN THE FAMILY LAW**

**A. Filial Piety as Abused Right in Family and Country Contexts**

In civil relations in the Qing Dynasty, the code did not acknowledge the natural person as legal subject, nor was the legal person accepted for civil laws. Rather, the conventional family in the clan was recognized as the substitute for a legal person, embracing all members living together and common property shared collectively with the absolute power to control both family members and property at the disposal of household heads. Since Confucian ethics stressed dogmatically the philosophy of filial piety in either rule of country or family maintenance, wives, concubines, slave maids and children did not have any claim to this “common property.” In respect to property inheritance, it would be ethically and legally associated with the succession of household heads, thus the equal prejudice passed on the offspring of wife and concubines in their biological order. This invariably led to the primogeniture in property in accordance with Chinese patriarchal tradition.

**B. Abused Right of Motherhood**

In the succession to the household heads and hence the sovereignty to control
family property, the first male child was legally and ethically declared as the family heir, or otherwise penalty was enforced to ensure the succession order: “Any violation against the succession to the family property by birth seniority from the legal wife should be subject to eighty stick floggings. If the legal wife did not bear male heir after 50 years old, the son born in seniority by concubines should be declared heir in primogeniture….In the process of acknowledging successor to the family sovereignty, the order of legal wife and concubines together with their sons should be strictly observed, or otherwise the infringer is liable to penalty.” What was regarded as the infringement in primogeniture amounted to a violation of the principle of the five-types in dressing-service, presumably the privilege being exclusively reserved to the senior male in a family. But according to Confucian ethics in prioritizing clan decency to beneficial wealth, the Qing Codes and Cases had this statute: “Apart from the succession to the hereditary official titles, sons from both legal wife and concubines must follow the order of seniority by birth in addition to wife-concubine preference. As for other family assets like houses and farmlands, all sons from legal wife, concubines and slave-maids could have equal share.”

When it came to the plebeian family, which had no hereditary official titles to succession, the heir of birth seniority tended to be the patriarchal hero rather than family administrator. This minute difference between bureaucratic and plebeian communities expressed a social compromise between legal privilege and conventional force. Such balance has been also evidenced in the popular saying “Emperors have their rights to favor princes in seniority, but plebeians their youngest sons.” (huangdi ai zhangzi, baixing ai yao’er 皇帝爱长子，百姓爱幺儿)

**C. Synchronous Heir System Justified by Confucian Family Ethics**

In primogeniture in the Qing Dynasty, some exceptional situations were also discussed and then enacted as statute. If one family was confronted with a situation of having no male offspring from wife, concubines or slave-maids, what might be the ethical and legal remedy for the family’s doomsday situation? In the Qing Codes and Cases, a legal entity named “synchronous heir” was introduced.
as the remedy for a zero-male-offspring family. The remedy for zero-male-offspring in primogeniture was invented in the Ming Dynasty in the imperial family, but was legitimized and enacted as legal entity in the Qing Dynasty. The gradual acceptance into the legal system in the Qing Dynasty was explained by a Confucian scholar Yu Yue in his research: “The only son (duzi 独子) serving as the heir for two families was previously applied only to the family of killed generals or soldiers at battles, and later on it was gradually accepted as universally applicable legality.”9 Since it was written into law as the “synchronous heir,” both the imperial family and plebeian clans appealed to it as the legal and ethical solution for the no-male-offspring situation. Still, some situations were to be taken into consideration, i.e. if one family had no son, the family in the closest dressing-service to the target family had only one son, it was obligatory for the subject family to contribute its son as the adopted one to the target family as mutually-shared heir, and the two families should have household heads as genetic brothers. Under the agreement of the two families, the synchronous heir was obliged to bear offspring for two families as well as legally access the properties of the two families. In order to preserve the properties and genetic lineages of both families, the synchronous heir had to marry two independent wives, establishing two parallel families possessing respective homes and properties. The married wives lived with their respective parents-in-law and shared their individual legal status as female household heads along with any possible concubines and slave-maids in the family, while their common husband should take turns in living in the two families, serving as the common household head.

D. Property Succession in Five-Types of Dressing-Service

Yet the equal succession into the property of the two families was not fairly reflected in the religious duties. This imbalance between right and duty mirrored the Confucian ethics in priority of blood ties, since the synchronous heir had received more breeding care from the direct genetic family. The ethically recommendable religious service was that the synchronous heir should serve three years in mourning as Zhancui for his own parents, while serving only Qicui

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in one year mourning in dressing-service for his adopted parents. Again being ethically obliged, either the synchronous heir from the patriarchal family of the eldest son or from the general clan family of younger son, the synchronous heir should serve Zhancui in three years for the parents of the patriarchal family, while serving only Qicui in one year for the parents of general clan family. But if the general clan family chose the only son to be the synchronous heir, he might reasonably serve Zhancui for both the patriarchal family and his own family. And as for the religious service for other relatives concerning the two families, the dressing-service should be deduced accordingly in parallel with the services in the synchronous two families.

E. Property Amended to Wife

Apart from the property inheritance, the property issue concerning wives in the family law of the Qing Dynasty was also obvious in its discrimination against women. Since the wife in the family was regarded as an inferior member, she did not enjoy independent legal status, and her dowries were considered, often implicitly, to be the property of the family. Since Confucian ethics encouraged the doctrine that “woman should submit herself to her father at home, to her husband when married, to her son when her husband died,” a wife or concubines did not have much legal access to property succession. When the entry of husband-wife (fuqi 夫妻) was habitually employed as a phrase in traditional China, the legal status of the woman was intentionally ignored, and her right to property was thus denied. And if the wife was entrusted to manage a family property, she did not have the right to deal it freely, since her dowries were legally claimed to be the property of the family when married, and her right to family property was diminished with the transfer of the property to the male heir when her husband died or the property was confiscated if she was driven off or remarried by the death of her husband.

V. CONFUCIAN ETHICS IN LEGAL INTERPRETATION

A. Confucian Ethics in Renovating the Abused Proprieties

1. Ethical Facets of Propriety and Music. — Traditional China had been commonly depicted as a “society of propriety” (lijiao shehui 礼教社会), which
meant its society had long been effectively regulated by propriety and music to the credit of Duke Zhou’s invention. But when the Zhou Dynasty developed into the Spring and Autumn Period (722 B.C.–481 B.C.), the time when “the world under heaven has been thrown into chaos” (tianxia daluan 天下大乱), in Chinese legal terms it was “the violations of propriety and the spoils of music.” This was exactly the social context from which Confucianism emerged as a political and legal ideology with its ethical features. Confucius attributed the deficiencies of Duke Zhou’s propriety and music to its lack of humanistic value orientation and develop his own ethical doctrines to remedy the institutional fallacies of propriety and music.

2. Humanistic Fairness Revealed in Confucian Ethics. — In the traditional social regulations of propriety and music, the aristocracy and the plebeian were not equally treated in official legal system, i.e. “proprieties are not applicable to the plebeian while penalties are not imposed upon the aristocracies.” But Confucius advanced his own alteration for this, saying “Administer social rule by political edicts and equalize both the aristocracies and the plebeian before criminal penalty, people might not commit crimes for fear of punishment, administer social rule by virtue and both the aristocracies and the plebeian would be on the equal stand before the proprieties, people would all try to evade committing crimes for a sense of shame.” But Confucius also criticized the traditional rule of propriety and music as “If not guided by humaneness, can any person behave himself in accordance with propriety? If not guided by humaneness, can any person behave himself in accordance with music?” By proposing equality before the proprieties and the predominance of humaneness, Confucius did intend to revolutionize the stereotyped rule of propriety and music invented by Duke Zhou and to introduce into the traditional legal system a humanistic value orientation. As for the application of propriety in the family law symbolized in dressing-service, Confucius also proposed an ethical facet for its stability and predictability, noting that “with the tender care for three years from parents, a child can only be steady in growth. Therefore mourning in dressing-service for three years for his/her parents should be universally observed.”

10 “Qu Li,” The Book of Rites (liji-quli 礼记·曲礼).
commitment to rectify the rule of propriety was later introduced into the legal system in five-types in dressing-service. This indeed found a curious echo in Immanuel Kant’s explanation of moral principle that any course of human action, if not universally adopted, must be morally impermissible.

B. A New Phase of the Rule of Propriety and Music

1. The Ethical and Legal Agreement. — The propriety and music, which originated as social conventions and religious routines in clan communities, were adopted and reformed by Duke Zhou as the social and political instruments to rule. Still, they were critically and ethically assessed and updated as the “common entry of law and institution” (fādù zhì tōngmíng 法度之通明), being endowed with compulsory and obligatory norms for society and ultimately acquiring the sense of “cosmic principles governing heaven and earth… as well as human beings in their social actions.” And while propriety was worshipped as religious teachings for both social ethics and value orientation for legality in the form of five-types in dressing-service, Confucian legal philosophy steadfastly worked its way into the traditional Chinese legal system. With the moral principle distinctively stated in one of Confucian classics as “The introduction of propriety and music into the political and legal systems by our ancient saint kings was not intended to satisfy the physical desire of human beings, but to rescue people from evil tracks by treating them with the principle of fairness and equity.”

14 This moral transformation guided by Confucian ethics from traditional rule of propriety and music was typical in two phases: One was in the Han Dynasty when propriety was introduced into the legal system as its moral base and objective of legal implementation, and the other was in the Tang Dynasty when the Tang Codes witnessed the integration between propriety and legality that the spirit of law, the principle of the legislature and the applications of legality “all comply with propriety” (yì zhùn hu li 一准乎礼). Since the country was regarded as an enlarged family, the integration between propriety and legality was accurately mirrored in the family law. Therefore, Qing Dynasty was the last phase in Chinese imperial history during which its family law and national law still reflected the ethical facets of Confucianism.

2. The Connection Between Family and National Law. — According to the

14 “Notes on Music,” The Book of Rites (liji-yueji 礼记·乐记).
Confucian ethics with regard to propriety, the legal interpretation and implementation, edict or enactment would not gain its validity without propriety. These were cases frequently referred to in Chinese legal history as “convicting with family compassion,” “justice with family compassion,” or “supremacy of filial piety for family over social legality.” Here, the constituents in family compassion and filial piety for families were embedded in the patriarchal context, where Confucian ethics took root and enjoyed sustainable support from all walks of life in Chinese society. This had been particularly true for the China before the Revolution of 1911, which overthrew the Qing Dynasty and then established the Republic of China. That Chinese social stability and durability had been maintained for more than two thousand years in her imperial span owed much to the integration between propriety and law with Confucian ethics, expressed in five-types in dressing-service at both family and country levels. Therefore, Chinese family law cannot be comprehensively understood apart from its extensive involvement with national law, and vice versa.

3. Confucian Ethics Revealed in Chinese Legal System. — Yet there were other negative facets of Confucian ethics, the most notorious legal principle being the “tolerance and concealment of crimes for genetic relations” (qin qin xiang yin 亲亲相隐) which exposed Confucian ethics to modern legal justice. Confucius once explained this as “Gentleman Ye told Confucius that the family compassion in my home town would be this: If the father stole other’s sheep, his son would stand out to identify the theft; but Confucius retorted that the family compassion in his home town would be drastically different from this: If the father stole other’s sheep, his son would just tolerate and keep silent for the theft, and vice versa.” The family compassion was considered most valuable in an ancient patriarchal society, so Confucian commentary reflected its conventional ethics, and for this he deserves denunciation and cannot be defended by John Rawls’ A Theory of Justice. The justification that lies in Confucian legal principles is that family serves as the base for Chinese national law in traditional society, and the country should be regulated as an enlarged family, so the principle of “tolerance and concealment of crimes for genetic relations” has been acknowledged and legalized as the built-in stabilizer for Chinese traditional society and legal system. Exceptions to this ethical-legal principle amounted to

conspiracies against the royal family or revolts against the imperial government. Accordingly, one can be critical of Confucianism for its ethical cowardice and the legal dilemmas created in its much-attached family law.

**CONCLUSION**

As the last dynasty of imperial China, the Qing Dynasty exhibited all the peculiarities of Chinese Legal System, i.e. its civil service system by Confucian-style examination, criminal law and family law. These three components are ideologically related to the Confucian ethics. In the juristic structure of Confucian rule administrators were selected and nominated through civil service examination, propriety-oriented criminal law and family law served as the base for national law and largely mirrored the principle of filial piety, which, as the spirit of law, sustained the unity and integrity of both family and country, revealing the moral obligations instead of individual rights in Chinese legal philosophy. Justified by the Confucian philosophy of the harmony between family and the world, the family law in the Qing Dynasty fully attested to the congruence between family law and national jurisdiction.

Officials at different administrative levels in the Qing Dynasty continued the traditions of Chinese political and legal system, serving as both administrators and judges in the unified body of all branches of law. They did not specialize in political and juristic disciplines of modern Western style, but were basically aware of Confucian ethics since they had to sit for the national service examination based on Confucian classics. Through their administration and jurisdiction, Confucian ethics were more or less socially exhibited. Despite its exposure to all kinds of modern critical rejection in the areas of marriage, divorce, heir selection and confirmation as well as property inheritance, the family law in traditional China with the Qing Dynasty as her ultimate example still transmitted to us some positive messages in regard to keeping the absolute power exclusively invested by Zhou’s propriety in check by Confucian humaneness, which functions as the moral obligation imposed universally on both the aristocracies and the plebeian. As to family compassion and filial piety, which were often acknowledged as the kernel concepts in Confucian ethics, these were introduced into the administration and jurisdiction, and a sense of political and legal balance between moral right and administrative-legal power became earnestly felt and
intuitively apprehended. In the interval between the Ming and Qing Dynasty, a leading Confucian scholar was much extolled for his verse: “Issues relative to family, country and world are nothing but my own business” (jiashi guoshi tianxiashi, shishi guanxin 家事国事天下事，事事关心). This was echoed in the ancient Confucian tradition that a scholar should take the world affairs as his own business (shi yi tianxia wei jiren 士以天下为已任). Such ethically motivated undertakings had been anticipated both by administrators and civilians in their understanding of family, national and international laws in terms of five-types in dressing-service, which fostered the supremacy of moral rights over administrative and legal powers. The stability and durability of traditional Chinese society was maintained by the complex of Confucian moral checks on both the individual rights of women and young males as well as the administrative powers authorized by Zhou’s propriety in its family law.