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THREE SOCIAL MODELS IN A COMPARATIVE STUDY OF CRIMINAL LAW: CHINA AS A "POWER SOCIETY," AMERICA AS A "LAW SOCIETY," JAPAN AS A "CULTURE SOCIETY"

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Introduction

When comparing criminal law in different societies, we are used to finding out the differences of the law itself. That is natural, but not enough. As Professor Unger said, "Each society reveals through its law the innermost secrets of the manner in which it holds men together. Moreover, the conflicts among kinds of law reflect different ways of ordering human groups."[1] The differences in criminal law are due to the differences in societies. So it is necessary to analyze why the differences in criminal law arise by comparing the societies. In finding out the difference in criminal law itself, there are no methodological problems. But in analyzing why those differences have arisen by comparing the societies, there are many methodological problems. In this paper I will attempt to use a new method to analyze why.

[1] Roberto Mangabeira Unger, *Law in Modern Society*, (New York, 1976), p. 47.

I. *A New Method*

As a main method to compare societies, "The Theory of Social System" was used until recently. According to it, a social phenomenon should be explained by the society's economic structure, political system and its ideology, With this method, we can compare societies having a different social system (for example, China and America), but, we can't compare those societies having the same social system (for example, America and Japan).

There are many other methods which are used in comparing societies, I will refer to them as "The Theory of Social Kind." For example, a comparative study of social culture or that of law can be considered as such one. With those methods, it has become possible to compare societies which have the same social system, which is impossible with "The Theory of Social System". But as seen in a comparative study of social culture, what has been made clear are differences about the same thing (culture and culture), not about the society itself. If we observe several societies carefully, we can find out that the same culture carries out a different social function in a different society. It is more important to find out these social functional differences than to find out the differences of the cultures themselves. But with "The Theory of Social Kinds" we cannot do it, because it is a "plane and statical" method.

Therefore we need a new method which is "solid and dynamical," and predominates methodologically over either "The Theory of Social System" or "The Theory of Social Kinds," moreover, with which we can find out the differences of the societies themselves, then based on that we can explain why the differences in criminal law have arisen. Here I will show my new method as follows.

1. In a society there is something which is the origin of the creation and maintainance of its social order. Furthermore, there is a pattern of social structure and a pattern of social function, both of them are based on the origin. The social order is created and maintained dynamically at first from the origin, then, by the pattern of social structure and the pattern of social function, and finally, through their correlation.

2. Every society has its own individual origin, pattern of social structure and pattern of social function and subsequent correlation, which are different to those of other societies. Consequently, every society's social order is different. Following the differences of social order, criminal law, which in some sense is one of "the devices" for creating and maintaining social order, also differs from society to society.

3. What can become the origin of a society is power (Namely, state power), law or culture. I define them as following: Power is a physical coercive force which is legitimate socially, but nevertheless is external to the members of society. Law (By which I mean modern law, as Professor Unger indicated, existing as a legal order or legal system[2]) is a spiritual formal equable force, which is operated by the state, but is still external to the members of society. Culture (By which I mean something other than power or law, not only "the culture" as understood generally) is an informal spiritual force, which exists in every person, private groups and unofficial organizations with a form of one's way of think-

[2] Unger, supra note 1, at 52.

ing, a social custom or group's usual practice etc. Hence, culture is internal and "belongs" to almost all of the social members, in contrast to both power or law.

II. *Three Social Models*

With the above method, we can characterize China as a "Power Society," America as a "Law Society," and Japan as a "Culture Society."

1. China as a Power Society

A. State's power as the origin of society

It is no exaggeration to say that whether China as "Chinese Society" can continue normally or not, rests with whether there is a strong state power. Formerly, Professor Wittfogel described China as a total Power Society.[3] In China, this doctrine had been criticized as a reactionary one for a long time, but now, Chinese scholars by themselves are advocating a similar doctrine known as "Guang Ben wei," which means "that as gold is a monetary standard, the state power is a social standard of Chinese society,"[4] In regard the social order in China, Balazs, a famous French China-analyst, pointed out such thing before. That is, in China there is a rule that either the public officials reign over the whole society or the whole society is in a state of anarchy.[5]

When people live in a society they have to face many social relations. In a general society, the relation with The Power is only one of them. But in China, all of the social relations have been changed to the one with The Power. What the most important to the Chinese people is The Power, on the whole The Power determines everybody's thinking and behaviour.

Not only law, but even the principle of "FA ZHI (Rule by law)" has existed from ancient times in China. However the law is only an instrument for the emperor and his officials to control people. Most of its contents are criminal regulations and criminal punishments. Similarly, the "FA ZHI," as a contrary principle of "DE ZHI (rule by virtue, in concrete terms, by moral education)," only means ruling by criminal regulations, in more concrete terms, by criminal punishments. The law and the principle of "FA ZHI" do not have any significance as legal order or legal system. They are advantageous only to the emperor and his officials, and subordinate to The Power. To the general people they are punitive and external, thus can not hold any significance as a favorable and internal thing. Even today this situation has not changed fundamentally.[6] So law cannot become the origin of

[3] Karl A. Wittfogel, *ORIENTAL DESPOTISM: A Comparative Study of Total Power*, (Yale University Press, 1957).

[4] Cheng Hong, "About GUAN BEN WEI," *PEOPLE'S DAILY: Overseas Edition*, August 3, 1988, (a Chinese newspaper).

[5] Etienne Balazs, *LA BUREAUCRATIE CELESTE*, (Paris, 1968).

[6] Western commentary presumed that the "FA ZHI" connoted "rule by law" as opposed to "rule of law," in the meaning that "rule by law" merely invoked the existence of law within the state's governing process, while "rule of law" implied more progressively the supremacy of law and the curtailment of arbitrary government by law. See, Charles Burton, *Political and Social Change in China since 1978* (New York, 1990). I think this commentary is correct. But there is also another commentary in western which payed attention to the Chinese legal reform being continued from 1980s, and said that the "FA ZHI" had meaned "rule of law." See, Ronald C. Keith, *China's Struggle for the Rule of Law* (New York, 1994).

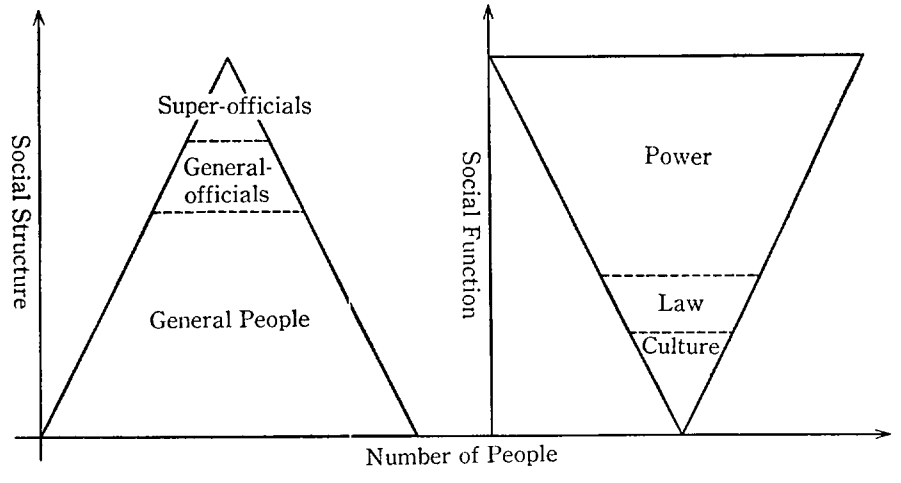
Chinese society.

As I defined above, religious organizations, families and other unofficial groups should be counted as culture, they are separate from The Power, and exist autonomously. But in China, they are not only intervened passively by The Power, but also seek the intervention positively by themselves, because they cannot hold a autonomous base which would make them normal and independent. As the result, the social customs or the usual practices existing among such private groups or organizations cannot be real culture, they are the part of The Power in reality, where they differ from The Power is that they come on stage with a face of culture. For example, Confucianism is said as the greatest religion in China.[7] But, if we analyze its contents and observe its function, whether Confucianism can be called a religion or not is questionable. With respect to its contents, we can find that most of it is about power relations becoming culture in the society, and, how people can make themselves adaptable to The Power. With respect to its function, we can say that it does give a spiritual weapon to The Power which makes it possible for The Power to rule people's spirit, but not a mental culture to general people as other religions do. As Confucianism shows, the culture cannot become the origin of Chinese society as well.

B. The pattern of social structure, the pattern of social function and their correlation in China.

As figure 1 shows, China's pattern of social structure, its pattern of social function and their correlation can be described as the following. As to the social structure, there is a pyramid which has been formed in proportion to the closeness with The Power and the fewer or greater number of people, of which the public officials who are the fewest holding the upper part, and the general people who are the most holding the lower part. As to the social function, The Power carries out almost all of the social function, conversely, the

FIGURE 1. SOCIAL STRUCTURE, SOCIAL FUNCTION AND THEIR CORRELATION IN CHINA



[7] Paul A. Cohen, *Discovering History in China* (1984).

law or the culture carries out just a little of it. In consequence, a correlation of direct ratio exists between the pattern of social structure and the pattern of social function. That is, the higher in social structure, and the fewer in the number of people who are, the more social function they have to hold. In contrast, the lower in social structure and the greater in the number of people who are, the less social function they need to hold.

C. The characteristics of the social order in Chinese society

Provided that the social order could be classified into two kinds from its contents, one of them is the social order which is concerned with The Power (i.e. "a public social order"); the other is the social order which is concerned with other people or the other part of society (i.e. "a private social order"), We can then say that the social order in Chinese society is only a public social order, wearing a strong powerful nature, meaning that it is determined wholly by The Power as to what is the social order and how to create the social order. The aim of the social order is for The Power only, as to the general people it always exists as a external thing.

Moreover, such a social order has a strong physical nature while being created and maintained. Namely, it is created and maintained by minor concrete bodies such as public officials or state organizations, and, through physical methods such as immobilizing people by depriving people of their time and space. Rather than by the major universal factors such as law or culture, and, through spiritual methods such as fostering the awareness of law with The Power obeying the law itself.

Finally, the social order in Chinese society wears a strong fluid nature too. Namely, its scope is liable to change narrowly or widely depending on The Power's convenience completely. But, it does't change the fact that the social order's degree is intensive.

2. America as a "Law Society,'

A. Law as the origin of society

About 160 years ago, A. Tocqueville who had observed American society carefully said that American people hold a paternal love to law, and have great trust in it. Law has formed the basis of American society,[8] Even today this has not changed, we can still say that in Ameirca the "rule of law" applies more than in other countries.

Of course, the state power plays an important role in American society, especially since the New Deal.[9] But, the state power is also under law as a person or a private organization is, it has to always obey a strict due process and accept a judical review.[10] So, although the state power plays an important role, it is a secondary force in American society compared to law, and cannot be the origin of American society.

In American society, culture such as religious organizations, families and other unofficial groups are greatly developed. But, all of them have not been able to produce a social force which is general to all parts of American society,[11] because they are too varied,

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[8] Alexis de Tocqueville, *Democracy in America*, Volume 2 (New York, 1945).

[9] James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978).

[10] Charles A. Miller, "The Forest of Due Process of Law: The American Constitutional Tradition," in J. Roland Pennock and John W. Chapman (ed.), *Due Process* (1977).

[11] Peter L. Bwrger and T. Luckman, *The Social Construction of Reality* (1987).

individualistic, and are based on a spirit of independence and self-respect.[12] Therefore culture cannot be the origin of American society also.

B. The pattern of social structure, the pattern of social function and their correlation in America

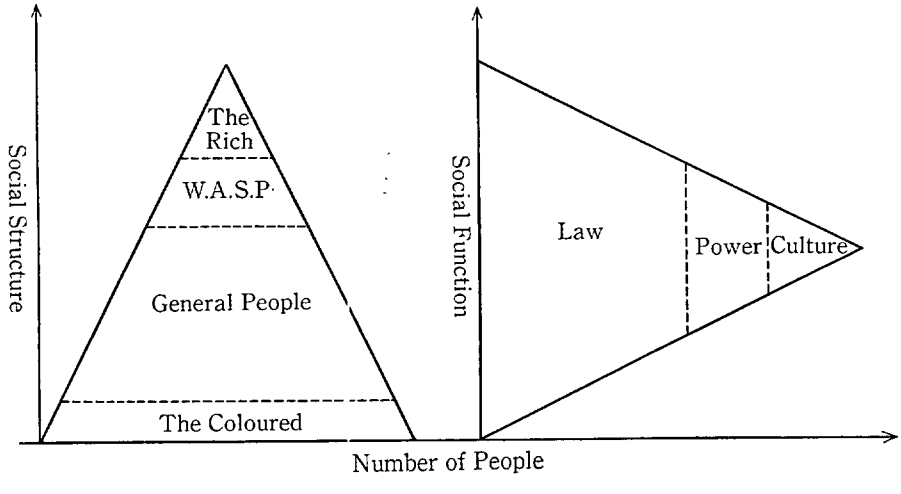
As figure 2 shows, America's pattern of social structure, its pattern of social function and their correlation can be described as follows. As to the social structure, there is a pyramid which has been formed according to the strength in economic or social competition and the races to which people belong. Of which the rich and the W.A.S.P. (White Anglo Saxon Protestants) who are the minority hold the upper part, conversely, the general people and the other races such as the coloured, are the majority of the people holding the lower part. As to the social function, the law carries out almost all of it, and The Power carries a large part of it. But the culture doesn't carry out much part of it at all. In consequence, there is no corresponding relationship between the pattern of social structure and the pattern of social function, and they cannot reinforce each other.

C. The characteristics of the social order in American society

Provided that the social order could be measured quantitatively, we can say that the social order in American society is a minimum one. There is only such a one with which American society could exist as "America" formally. Under such minimum social order, maximum competition and furious battles are practiced, and a great variety or a large amount of disorder is permited.

Moreover, the social order in America is also a partial one. Namely, why the social order can be minimum, as described above, is that the larger part of the social order neces-

FIGURE 2. SOCIAL STRUCTURE, SOCIAL FUNCTION AND THEIR CORRELATION IN AMERICA



[12] Ted D. Westerman and James W. Burfeind, *Crime and Justices in Two Societies: Japan and the United States* (1991).

sary to the society has been thrown away and left to a real sphere as private affairs, rather than that American society or people living there need no more than a minimum social order. So, the social order in American society is only the small part of the real one, the part which has been formulated as public and lawful.

Lastly, the social order in American society possesses a universal nature and a external nature at the same time as being created and maintained, which is contradictory. Namely, on one hand, the social order is created and maintained by law, a spiritual and universal force, not by a physical and concrete force as in The Power Society. But, on the other hand, the universality of law is not beyond an external and spatial nature, therefore the social order cannot be a internal and "our" one to the general people as it does in the Culture Society.

3. Japan as a "Culture Society"

I call Japan as a "Culture Society" in the meaning that the social order is created and maintained on the whole by individuals, private groups and the like, through their way of thinking, customs or usual practices etc.

A. Culture as the origin of society

As to what is the origin of Japanese society, there are some different views. From them I can quote two that support my opinion that culture is the origin of Japanese society. One of them is the theory of "Japanese Groupism,"[13] according to it, there are a lot of groups existing in Japanese society, and for Japanese people, obeying the custom or the usual practice of the group, to which they belong, is the most important thing. The other is the theory of "The Domination of Enterprises,"[14] according to it the origin of Japanese society is the enterprises, especially, the large enterprises. Japanese enterprises exercise not only economical domination but also noneconomical domination, and not only over the employee themselves but also their families and the like, by means of such domination the enterprises carry out the large function of creating and maintaining the social order. So, either the "Japanese Groupism" or the "Domination of Enterprises" tell us that the origin of Japanese socity is not its power or law, but it is somewhere else, which I defined above as culture.

Of course, the state power also plays an important role in the creation and maintenance of the social order. Nevertheless, such role is a secondray one, because there is a special phenomenon which can be called "The Culturalization of the State Power." That is, the Japanese culture (not the culture as understood generally but as I defined above) takes on the nature of the state power in itself, we can find a state power structure in the private groups or unofficial organizations, and a command-obedience relation in their customs or usual practices, both of them can be found only in official organizations and in their formal activities in other societies. For example, the large part of the domination which the Japanese enterprises are exercising over their employees is not different from the dom-

[13] See, K. Hamaguchi (ed.), *Japanese Groupism* (in Japanese, NIHONTEKI SHUUDANSHUGI), (Tokyo, 1982).

[14] See, O. Watanabe, *The Domination of Enterprise and State* (in Japanese, KIGYOUSHIHAI TO KOKKA), (Tokyo, 1991).

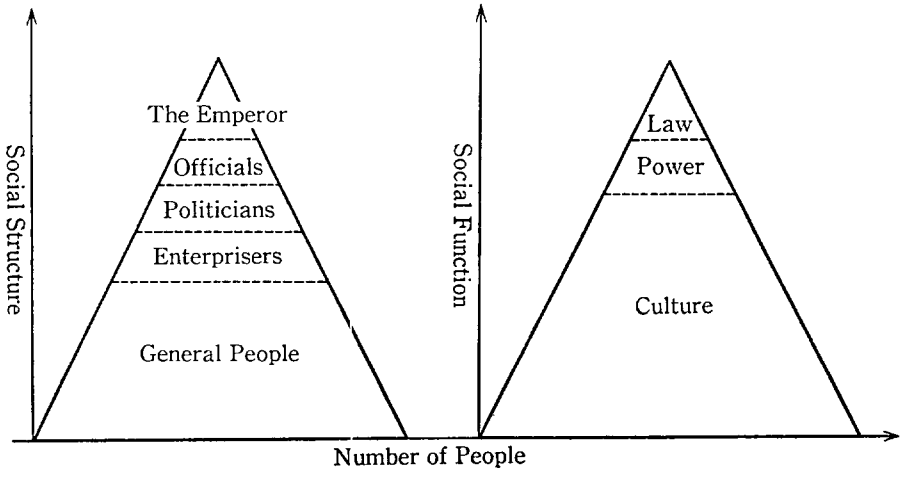
inations which could be exercised only by the state power in the other societies. So, we can say that the state power in Japanese society is only an extension of the culture, a extended culture, which has taken the form of state power. Such state power cannot be the origin of Japanese society.

Law is also an important factor while the social order is created and maintained, but it is not the origin of Japanese society, like the state power. The reasons are as follows. In Japanese society, unformal customs or usual practices are prefered to formal law, the private relationships are made more important than the public relationship established by law. For example, the relations among enterprises or between government and enterprise are adjusted largely by the "GYOSEISHIDO (Administrative Direction)," but it doesn't have a clear ground in law, and is given usually by mouth, not compling with due process, so the "GYOSEISHIDO" is not a lawful practice but a cultural one. As this example shows, the law cannot be the origin of Japanese society.

B. The pattern of social structure, the pattern of social function and their correlation in Japan

Why the culture has been able to become the origin of Japanese society is because the culture has a characteristic which I describe as "Pursuing a Orthodoxy Exclusively." Namely, although there are countless unofficial groups, all of them have the same dynamics to pursue orthodoxy. What is held as orthodoxy varies with group and time, but emotionally speaking, it is always something that is thought of as "Group's" or "JOSHIKITEKI (Common-sensible)." As the consequence that all of the groups have the same dynamics, a common orthodoxy has been produced, the concrete content of which is "NIHONTEKI (Japanese-sensible)." As Figure 3 shows, the pattern of social structure, the pattern of social function and their correlation is determined by not the others, but by the Japanese orthodoxy (more or less the Japanese-sensibility). As to the social structure, there is a pyramid which was formed in proportion to the Japanese-sensibility, The Tenno (The Emperor),

FIGURE 3. SOCIAL STRUCTURE, SOCIAL FUNCTION AND THEIR CORRELATION IN JAPAN



who has been regarded as the highest symbol and the most concentral embodiment of the Japanese-sensibility, is in the highest position of the pyramid, and next to The Emperor are officials, politicians, enterprises (economic men) and general people. But as to the social function, the order is in contrast with that of the social structure, namely, general people, who are regarded having the least Japanese-sensibility, have to carry out the greatest social function, next to the general people is enterprisers (economic men), politicians, officials, for The Emperor it is enough to carry out the lest, consequently, there is a correlation of indirect ratio between the pattern of social structure and the pattern of social function, they are reinforced by each other. That is, the lower in the social structure and the more in the number of people who are, the greater social role they have to play, conversely, the upper and the lesser people who are, the less social role they need to carry out.

C. The characteristics of the social order in Japanese society

Firstly, it wears an internal nature. Namely, because the social order is created and maintained mainly by private groups or unofficial organizations and through their customs or usual practices, the social order is regarded as "ours" not "others" by the most of the Japanese people. Provided that the social order could be classified into the public order and the private order, or the compulsory order and the voluntary order, we can find that there is no distinction between them in Japanese society, all of them are received and supported as an internal and "our" by the whole society.

Secondly, it wears a integrated nature. Namely, because all of the private groups or the unofficial organizations are persuing the same Japanese-sensibility as an orthodoxy, a fundamental confrontation can not take place among the different parts or the different classes of Japanese society with only a few exceptions, the difference among them is only slight differences of the orthodoxy. So, the social order, granting that it is only the control of the state power, will be regarded as one which is necessary for all of the society, then be created and maintained by all parts of the society.

Finally, the social order in Japanese society possesses both a stable nature and a maximum nature. Namely, because the social order has been created and maintained as a cultural one mainly by the unofficial parts of the society, it is very stable. At the same time, as the cost of the stability, the social order's scope is a maximum and universal one, Japanese people have to obey not only the social order which is concerned with the state power, but also the others in reality.

III. *Application to a Comparative Study of Criminal Law*

1. The Chinese Case

With respect to substantive criminal law, China rests its important points only on the acts which are considered as harmful to the state power, the others are not noticed much. The scope of criminal intervention is a narrow one relatively. But its degree is always very severe.[15]

With respect to procedural criminal law, China has adopted the Inquisitorial Sys-

tem as its basic principle, the requirement for the "Due Process" is very weak.[16]

The reason why the criminal law of China wears these characteristics as described above can be explained as follows. On one hand, because the state power is the origin of Chinese society, the state power is apt to pay attention only to the orders concerned with itself strongly, so the scope of criminal intervention can be a narrow one. But on the other hand, because the social order is created and maintained only by the state power itself and only through a physical way, the degree of the criminal intervention had to become a very severe one, and the requirement to the "Due Process" had to been weakened.

2. The American Case

With respect to substantive criminal law, the scope of criminal intervention is very narrow. But its degree is severe, especially the treatment of prisoners, which is miserable.

With respect to procedural criminal law, America has adopted the Adversary System as its basic principle, the requirement for "Due Process" is the most strong, excepting that the "Hands off Doctrine" which had excluded "Due Process" had governed correction for a long time.

It can be explained as follows why the criminal law of America wears these characteristics described above. Because only one part of the real social order has been made as the public social order, and the object of law is only a minimum and formal one, so the scope of the criminal intervetinon can be a narrow one, and the requirement for "Due Process" can be very strong. But, because more than one part of the real social order is necessary for American society to exist normally, as it is for every society, the law in America is expected to be able to create and maintain the social order necessary for the society, so it has to answer such overweight expectations by tightening the part of social order which was made as its object. This is one of the reasons why the treatment of prisoners in America is miserable. The other reason is that because law is universal but not external to the most people, so physical ways are apt to be used while creating and maintaining the social order.

3. The Japanese Case

With respect to the substantive criminal law, the scope of the criminal intervention is a wide one. But its degree is a lenient one relatively.

With respect to the procedural criminal law, at least on the lawful level, Japan has adopted the Adversary System as an important principle, the requirement to the Due Process is strong. Nevertheless, both of them are not so important and strong as in America.

It can be explained as follows why the criminal law of Japan wears these characteristics described above. Because the social order in Japanese society is created and maintained mainly by its culture (not culture as understood generally but as I described above), and

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[15] For example, it is necessary for bribery to be deemed as crime that the amount of the bribe is over 2 thousand YUAN (about 250 U.S. dollars). This amount is equivalent to a half year's wages for a university professor. But the maximum punishment to bribery is the death penalty.

[16] For example, the time that defense counsel can intervene in the criminal proceeding is after suspect had been initiated to the court by the people's procuratorate.

the law plays a role to complement or formulate the culture only, so law and culture are in a unseparated condition. This is the reason why the scope of criminal intervention in Japan is a wide one. Similarly, because the important point of the punishment for creating and maintaining social order is cultural punishment rather than the lawful one, the degree of the criminal intervention can be a lenient one. Moreover, on one hand, because the role of the law is only to complement or formulate the culture, the procedural criminal law of Japan could adopt the Adversary System and recognize the principle of the Due Process in a short time, but on the other hand, because law and culture are in a unseparated condition, the Adversary System and the Due Process in Japan are not thorough yet.

Closure

Somebody may criticize my research in this paper, in that, it is defending the actual criminal law (especially that of China), but I would like to point out that my research is only about reality, I have not made any value judgment here. I believe that it is the first step in making a value judgment to make the fact clear, and even a universal value may have a different significance in a different society. In this meaning, I hope my research can become the first step to advocate universal value judgments concerned with criminal law.

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