

Five Penalties:

A Psychological-Cultural-Social-Historical Construct

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***Abstract** In this thesis, we first find the etymological meanings of *xing* and then introduce briefly the phases of *wu xing*, Five Penalties—the Old, the Transitional, the New and its remains. And we reach a conclusion that the “five penalties” involves more psychological, cultural, social and historical complications rather than sheer development of productivity for the most destructive wars in the last century and the war still lasting in the so-called modern and postmodern worlds are obvious enough for us to witness violence, torture and humiliation blooming here and there just like *LES FLEURS DU MAL*. Namely, the “Five Penalties” generation, construction, promotion, reformation, execution and related interpretations are just the comprehensive result of a *gaudrinity* of psychological, cultural, social and historical interactions in ancient Chinese culture with the collective unconsciousness to fulfill its*

ultimate purpose—seeking pleasure for absolute freedom in the form of abusive power, violence, humiliation—at its bottom.

Key words: *Five Penalties; violence; humiliation; psychological-cultural-social-historical interactions; pleasure; absolute freedom*

Introduction

“Five penalties”, *wu xing*, was a general term referring to all the main punishments in ancient Chinese legal system from the Xia (about 2100 B.C.-1600B.C) to the Qing Dynasty (1644-1911A.D.). Just as humiliation is a historical-cultural-social construct (Lindner,2007), “five penalties” is a psychological-cultural-social-historical format in nature. In this paper, we first make a very brief introduction to the nature of *xing* and its relations with *fa* (law), then have a historical glimpse over the inner changes in *wu xing*, and analyze it psychologically, culturally, socially and historically.

1 Etymological meaning of *xing* related to *fa* and *lü*

Etymologically, *xing* has the following meanings: 1) killing: “(*xing*) is used to kill the criminals” (in the historical book *Yi Meng*); 2) punishment: “ (The ultimate purpose of) Punishment is just to eliminate itself” (in *Shu*¹ *Dayumo*); 3) government : “Ministers assist the King to rule the state” (in *Zhouli Qiuguan*); 4) model: “A real benevolent person is tolerant” (in *Liji Liyun*), and 5) law(*fa*), regulations(*lü*), torah:

“Punishments according to the torah varies at different times”(in “*Shangshu Luxing*”).

To sum it up, *xing* was just *fa* in the *Xia*, *Shang* (about 1066 A.D.-771 A.D.) and *Zhou* Dynasties (about 770 A.D.-221 A.D.) before it had the denotation of written laws in the Warring States Period. Generally speaking, *xing*, *fa* and *lü* were interchangeable though all the codes in ancient China were nominated *lü*, or *xing lü*.

2 A historical glimpse of the “Five Penalties”

Although the term “five penalties” has been used for more than 4,000 years in ancient China, it was practiced rather differently at different times. To be more exact, *wu xing* falls into four phases (<http://www.baikē.baidu.com/view/123743.htm>).

2.1 The “Previous Five Penalties” (The Old/Slavery Five Penalties)

As a specific term, it first appeared in *Shangshu Lüxing* recorded as *mo* (tattooing), *bi* (cutting off the nose), *fei* (cutting off the feet), *gong* (castration) and *da bi* (killing), while in *Zhouli Qiuguan* as *mo*, *bi*, *gong*, *yue* (cutting off the feet of the criminal), and *sha* (killing) since the *Xia* Dynasty. In the *Shang* Dynasty, *wu xing* became far more barbarian than ever before, for different means were utilized to kill a criminal by *hai* (mincing up into meat), *fu* (drying the criminal), *fen* (burning), *pou xin* (digging out the heart), *ku* (cutting open) and *ti* (scraping flesh off bones), which occasionally practiced in the following dynasties by the emperors.

The Western Zhou Dynasty gave birth to such complementary punishments as imprisonment, imprisoning hard labor, expiation and exile, which symbolized the maturation of the slavery punishment.

2.2 Transition

The penalties in the Spring and Autumn(770B.C.-476B.C.), the Warring States Periods(475B.C.-221B.C.) still centered around the traditional savage *wu xing* (for instance, *che lie* splitting the criminal asunder by five horses' pulling in five directions). The *Qin* Dynasty(221B.c.-206B.C.) saw transitional penalties, in which *chi* (whipping) and *zhang* (bastinado), together with *tu* (imprisonment), *liu fang* (exile), *rou* (corporal punishment), *si* (hanging and beheading), constituted the “five penalties” while *ru* (humiliation), *jing ji* (fine) and *zhu lian* (involving others in a criminal case) were annexes.

It was Emperor *Wen* in the Western Han Dynasty(206B.C.-23A.D.) who gave an imperial edict to reform the *Qin*'s five penalties characterized by substituting hard labor and scourging for corporal penalties (tattooing, shaving off the hair and cutting off nose and foot), only with castration unchanged. It was during the Three Kingdoms, Western & Eastern Jin, Southern & Northern Dynasties (about 220 A.D.-581 A.D.) that dramatic changes occurred with castration abolishment (547 A.D.) and decreasing of the people involved in a criminal.

2.3 New“Five Penalties”

The *Kai Huang Lu* in Sui Dynasty (581-618 A.D.) obliterated many extremely cruel punishments with only hanging and beheading for ending the criminals' lives, and revised exile (in terms of distance) and scourging (in terms of times), thus established new *wu xing* in the feudal society followed by much less harsh penalties in Tang Dynasty (618-907 A.D.)—the most prosperous period in ancient China.

Together with *zhe zhang* (bastinado), *ci pei* (tattooing the face of a criminal and exiling him) and *ling chi* (putting to death by dismembering the body), however, became the legal punishments in the Song Dynasty (960-1125 A.D.).

Quite different from Song Dynasty, the five penalties in the Yuan (1279-1368 A.D.) restored to that of Han's except for *ling chi*. New crueler penalties began to be applied to the criminals with the deadly resurgence of the previous corporal punishments in both *Ming* (1368-1644) and *Qing* (1644-1911) Dynasties, which went as follows:

1) Death punishments comprised *xiaoshou shizhong* (cutting off a person's head and hanging it up in a gibbet as a warning to all), *bopi shicao* (decorticating) and *mie shi zu* (exterminating all the family members and relatives, friends, teachers and students); 2) deportation; 3) dispelling (no returning to hometown forever); 4) cangue, a humiliation in Ming Dynasty but a fatal penalty for those ethnic and sexual criminals in the early *Qing*.

2.4 The Modern “Five Penalties” in the late *Qing* Dynasty

With the rumbling of the Western canons and total failure in the anti-invasion wars, a modern law— The Great *Qing* Criminal Laws issued in 1910— apparently incorporated Western bourgeois legal ideology into the traditional Five Penalties: death, life imprisonment, set term of imprisonment, custody and mulct².

2.5 A short summary

The old five penalties characterize by flesh punishments kept alive through several dynasties (*Xia*, *Shang*, *Zhou* and *Qin*, more than 2,000 years) until Emperor *Wen* in the Han reformed it with imprisonment for tattooing and whipping for cutting off feet and nose, symbolizing the feudal “five penalties” bore its birth in the *Sui* Dynasty and remained vigorous almost until the end of *Qing* Dynasty in the form of death, exile, imprisonment, bastinado and whipping. Therefore, it is quite obvious that the transition from the old to the new is a lengthy but evolutionary transition full of variations and restorations, while the transformation from the feudal to the bourgeois was a sheer abrupt surface graft, for the philosophy of law was totally different from that of Western permeated with freedom, equality and benevolence.

It is undeniable, after all, that the five penalties became less and less cruel, which embodied that the rosebud of humanity was under the way of being nurtured no matter how slow its step was.

In the following sections, this paper will analyze what contributed to the complex formation and evolution of *wu xing*.

3 Contributors to the “five penalties”

It is known that the engendering, changing, and the feature’s formation of penalties are determined by the intricate mingling of the ruler’s interpretation based on the current societal, economic development and human civilization advancement. In my eyes, however, the “five penalties” involves more psychological, cultural, social and historical complications rather than sheer development of productivity for the most destructive wars in the last century and the war still lasting in the so-called modern and postmodern worlds are obvious enough for us to witness violence, torture and humiliation blooming here and there just like *LES FLEURS DU MAL*, to borrow Charles Baudelaire’s words, if not in the form of “five penalties”.

Although it is quite difficult to draw a clear line between those contributors for they are intermingled in this or that way, to list them one by one is not just for the sake of convenience but we have the basic principle to follow: space and time, by which the tangling factors are classified. In other words, if one factor exists only for a dynasty or functions only in the slavery or feudal society, it belongs to the historical or social categories; if one factor functions both individually and collectively over at least two sorts of societies, it belongs to the psychological or cultural strain.

3.1 Psychological factors

3.1.1 Cognitive ingredients

Han (2007) made a cognitive analysis into the Number Complex in Chinese culture with Gestalt, psychoanalysis (Freud 1997) and other cognitive theories based

on Lévy-Bruhl's (1981) “*principe de participation*” in *pre-logique* and Lévi-Strauss' (1997) *multi-valued logic* reaching the conclusion that the schematization, humanization, legalization and aestheticalization of the Number Complex in Chinese culture is an evolutionary process, in which analogical thinking— the constructing prototype —arises from unconscious similarity/proximity cognition and makes an inference of the schema of the universe, thus that of social structure with corresponding human relationship and judiciary ideology and practices.

More specifically, *three* and *five* were regarded as the most mysterious and powerful numbers which constitute the primeval force to generate the whole world. From the natural phenomena such as *wu fang* (five directions), *wu zhi* (five fingers/toes), *wu guan* (five senses), *wu ti* (two arms, two legs and a head), ancient Chinese induced that the five elements/processes, namely *shui* (water), *huo* (fire), *mu* (wood), *jin* (metal), and *tu* (earth), is the origin of the universe. In the circle of the five elements the former conquers the later, and eventually the last overpowers the first, forming an ever-lasting moving wheel to push the world forward.

Based on such inference, they had illegitimate inferences such as 1) in the natural world: *wu wei* (the five flavors: sweet, sour, bitter, pungent, salt), *wu xiang* (the five spices: prickly ash, star aniseed, cinnamon, clove, fennel), *wu cai* (blue, yellow, red, white, black), *wu geng* (the five watches/periods of the night), *wu du* (the five poisonous creatures: scorpion, viper, centipede, house lizard and toad); 2) in the societal kingdom: *wu jing* (the five classics: *The Book of Songs*, *The Book of History*, *The Book of Changes*, *The Book of Rites*, and *The Springing and Autumn Annals*), *wu*

de (the five virtues: benevolence, righteousness, propriety, wisdom, trust), *wu deng* (five ranks of the nobles: duke, marquis, earl, viscount and baron), and *wu guan* (five kinds of officials in charge of affairs of heaven, earth, gods, civilians and other categories). In the judiciary system, they had *wu guo* (five misfeasance in the West Zhou Dynasty), *wu ci* (appealing of the plaintiff and defendant), *wu fa* (five economical penalties for slight criminals), of course, *wu xing*—the five penalties—was the quintessential, which was closely related to the cosmological phenomena four thousands years ago, *wuxing lianzhu* (five stars appeared in a chain, to be discussed in 3.3).

This very interesting phenomenon is just in harmony with Gestalt theory of similarity/proximity cognition (Solso, Maclin & Maclin, 2004/2005) principles and Gentner's (1998) theories of analogy, according to Han (2007). Similarity/ proximity cognition constructs image schema (Thomas, 1999) for man's later unconscious communication with the outside world. At the conceptual and propositional levels, it's highly probable for a man to make 1) a retrieval to access a prior similar or analogous example from long-term memory if given some current situation in working memory, 2) a mapping consisting of aligning their representational structures to derive the commonalities and project inferences from one to the other if given two cases in working memory, 3) an evaluation of the analogy and its inferences and often followed by 4) abstraction of the structure common to both analogs to form a schema abstraction—the common system that represents the interpretation of an analogy is retained for later use, and 5) re-representation—adaptation of one or both

representations to improve the match.

That's to say, ancient Chinese found some commonalities in the nature and they re-represented the relative truth valid in a small world with an over-expanding inference to other items cognitively and socially, which is certainly against the logic nature in daily observation and social practice .Nevertheless, it is a reality—the reality of ancient Chinese thinking and their life.

3.1.2 Emotional factors

By emotional factors, we refer to such cases as human's awareness of shame taken advantage of by the ruling class, and the king's or emperor's personal psychological tendencies which greatly impact the modification of the five penalties either in the form of words or decrees, to be more exact, they are 1) abuse³ of violence, torture, and humiliation by the powerful against the powerless; 2) the rulers' individual commiseration for the humble. I use the awareness of shame to explain the humiliating penalties, and abuse of violence and torture to interpret the psychological roots of the ruler's wanton, inhuman killing his enemies (such as decorticating, putting to death by dismembering the body, barbecuing to death in a urn, vertebra fracturing, filling melting lead into stomach, boiling to death in oil or water) under the disguise of “five penalties” granted by the heaven.

Psychologically, the rulers generally had three chief purposes to make wide use of violence and torture and impose man's awareness of shame:1)terrorizing the criminals

and others by committing killing and inflictions, life-threatening acts making criminal and potential enemies feel unsafe; 2) humiliating the criminals by belittling, degrading, shaming in public; and thus 3) solidifying their sovereign. However, there is always an exception to the rule. Some rulers got extreme ecstasy just like being addicted to cocaine. In the following paragraphs, awareness of shame, psychological roots of violence and torture abuse, and commiseration will be discussed one after another with rulers as their owners.

Firstly, let's deal with human's awareness of shame. Quite different from the awareness of guilt popular in the Christian world, the awareness of shame was shaped by Confucian ideology of benevolence, righteousness, propriety, wisdom, trust, among which propriety was interpreted and followed as total royalty to the king or emperor, complete filial piety for the parents, and absolute fidelity to the husband. Should anyone violate it, he or she would be condemned, despised, insulted and abandoned by nearly all the other people even his or her family members. The positive effect did exist (see 3.2.2). However, the spurning marks on his or her face, and body were just like a blunt knife which tortured him or her in public or in privacy for the whole life so that it was almost impossible for the afflicted person to renew and identify himself (herself) to be a 'good' member of the society and the family. In a sense, making the criminal feel belittled is something more poignant, which devours the spirit, sucking every morsel of the dignity and self-respect, often bringing an agony much worse than death penalty itself.

Secondly, the psychological roots of abusing violence and torture practiced by the powerful should be highly emphasized. In fact, researchers did numerous studies on the roots of violence, universally or specifically. There is no doubt that malignant aggression is connected with traumas and frustrations in childhood and infancy, according to Grof (1996), however, “modern consciousness research has revealed additional significant roots of violence in deep recesses of the psyche that lie beyond postnatal biography and are related to the trauma of biological birth (or *perinatal*).”

Namely,

the vital emergency, pain, and suffocation experienced for many hours during biological delivery generate enormous amounts of anxiety and murderous aggression which remain stored in the organism. The reliving of birth in various forms of experiential psychotherapy does not involve only concrete replay of the original emotions and sensations, but is typically associated with a variety of experiences portraying violent scenes. Among these are often powerful sequences depicting wars, revolutions, racial riots, concentration camps, totalitarianism, genocide, and other such horrifyingly violent scenes.

Grof (1996) further argued that “consciousness research has revealed significant additional sources of aggression in the transpersonal domain;, archetypal images of demons and wrathful deities, complex destructive mythological themes, matrices for animal aggression, and painful past-life memories.”

Grof managed to prove his theory by many indirect instances which are not the real documents of the trauma records made at the time when those leaders were born but the facts that leaders of nations specifically use not only perinatal but also archetypal images and spiritual symbolism to achieve their political goals: the medieval crusaders were asked to sacrifice their lives for Jesus in a war that would recover the Holy Land from the Mohammedans; Hitler exploited the mythological motifs of the supremacy of the Nordic race and of the millennial empire, as well as the ancient Aryan symbol of the swastika and the solar eagle; Ayatollah Khomeini and Saddam Hussein have ignited the imaginations of their Muslim followers by references to *jihad*—the holy war against the infidels.

Harris (1994) thinks that two broad and mutually interdependent areas emerge: (1) violence arising from an individual's maladjustment, and (2) craving and violence arising from unsatisfactory social and environmental conditions, caused by the craving of others. Her theory is in agreement with the report of an Air Force psychiatrist who studied the episode for the Army (Smith 2004): physical abuses by U.S. military police of Iraqi prisoners stemmed from a mixture of soldiers' anger and frustration over poor working conditions, their racism and the absence of any meaningful supervision; their pervasive sense of danger and the indefinite nature of their tenure were factors that wore them down.

In sharp contrast with all the theories discussed above, Moore (2003), an OSB in Britain, straightly illustrates with Caesar's murderers' soaking their hands in his blood a keen insight that EXCITEMENT “lies at the root of violence. Here the individual

desire to be violent, finding expression in the extreme form of murder, finds the extreme satisfaction.” To make it more convincing, he cited another quintessential example that the theorists of National Socialism, the architects of Hitler's Germany, knew all about violence excitement, and exploited it to the full potential. It is no wonder why some murder admits with some horror at himself, "I enjoyed it " when he describes the first killing.

Paradoxically, the opposite of excitement is boredom—a thing that people admit with reluctance—the memory of how the coming of war promised relief from the boredom of peace. The unique excitement at seeing one's own desire happening in another person is just the real root of violence in oneself, namely, the desire for such excitement accounts for the peculiar satisfaction obtained by a group of men who see each other doing something truly dreadful., then expose it to each other, chew it again and again, and be ready for sharing it with each other

Moore's view on the roots of violence is, in nature, identified with the reaction from a judge of adjudication of violence: “the most basic thing about violence and crime is that people don't want to admit to the violence in themselves. They are scared of it. And the result of not accepting their violence is that it gets displaced into other more presentable emotions such as the sense of grievance and injustice.” (Moore 2003)

I have some doubts against Grof's theories due to its absence of historical literature about how these rulers were born and what traumas they had suffered while they came into the world. Therefore, I would like to illustrate Moore's ideas with a

true story of the most malicious King *Zhou* in the late *Shang* Dynasty in ancient China, and elaborate it with some drug addictions theories.

King *Zhou* in the late *Shang* Dynasty, who used to arouse all his efforts and intelligences to make the country prosperous, was defeated by his own victories in the war. Totally bored with years of peace in the nation, he began to pursue licentiously sensual pleasure. To please his beloved queen—*Da Ji*, he was extremely generous to make gigantic investment in building luxurious imperial palaces for short stays, and *jiu chi* (huge tipple pond in which boats could sail) surrounded by *rou lin* (forest of goluptious meat) in which naked male and female youngsters were ordered to chase one after another. To make it worse, both the queen and king seized great pleasures in cutting open the uterus of a pregnant woman and playing with the fetus, chopping man into pieces, snatching his uncle's heart alive. Moreover, just because *Da ji* had a peculiar thirst for beholding homicide, he ordered soldiers to burn copper post and forced civilians to climb it up. Loud laughter pierced the ceiling with the groaning shriek from the distorted body. This was the most notorious penalty—*pao luo*—in Chinese history.

Having taken a glimpse of those most villainous kings or emperors in ancient Chinese history, we find the surprising commonalities among alcohol, lasciviousness, meat that provokes the worst human qualities and behaviors to come to the fore. So addicted, excited that they experienced ecstasy—feeling high, in a modern term. Just as if they were addicted to cocaine, once indulged, it was almost impossible to escape

from the serpents' haunting which struck with ferocity known only by those who are infinitely powerful before the civilians but totally powerless against abuse of violence..

Therefore, it may be hypothesized that abuse of violence and torture may be studied with the theories dealing with drug abuse. That is to say, the inhumane indulgence either individually or collectively could be treated with these basic concepts (adapted from http://www.drug-rehabs.org/New_York-drug-rehab.htm by replacing “drugs” with “**violence and torture**” in bold letters):

Abstinence

Abstinence is the act or practice of refraining from indulging a desire. The type of abstinence we are referring to is abstinence from **violence, torture** and alcohol.

Violence and Torture (Drug) Addiction

Violence, torture addiction is a pattern of repeated violence and torture that usually results in tolerance (the need for greater amounts of violence and torture to achieve the same effect), withdrawal (physical and cognitive effects when violence and torture declines or stops), and compulsive violence and torture behavior (actions that persists despite efforts to reduce committing and despite problems with family, friends, and work).

Tolerance

Tolerance to a violence and torture takes place when an individual is exposed to the same violence and torture repeatedly and begins to build up a resistance to the drugs effects. The body then adapts and develops a tolerance for the violence and torture. The addiction produced is so powerful that it creates cravings in the doer. These cravings for violence and torture are the result of its impact on the individual's memory with feelings of pleasantness and euphoria which the individual has come to associate with violence and torture.

Violence and Torture (Drug) Abuse

Violence and torture abuse is defined as the chronic or habitual use of any tortures to quench his thirst for violence other than simply wiping out his enemies with some plausible excuses or charges.

Relapse

Relapse is a term used to describe when an individual who has quit violence and tortures starts committing once again. Some things that can lead to relapse both physically or psychologically include: 1) Being in the presence of violence and torture, or the places where he found a lot of pleasure in torturing others. 2) Feelings he perceives as negative, particularly anger; also sadness, loneliness, guilt, fear, and anxiety. 3) Positive feelings that make him want to celebrate by violence. 4) Listening to others' violence stories and just dwelling on getting high. 5) Believing that he no

longer has to worry about his future —he feels rather complacent for his dance of death ruining others first, himself second.

It's quite certain that we cannot solve the ruler's abuse of violence and torture in the same way as fighting against cocaine addiction. We do not take it for granted that violence and torture is totally a psychological and physical matter. Instead, a psycho-cultural-social-historical remedy must be found.

Now let's discuss the role of the ruler's **commiseration** on the abolishment of flesh penalties.

Just as one word of the ruler may aggravate the flesh penalties mentioned above, a seemingly coincidental commiseration of the so-called wise king or emperor for his minister or others may lead to a revolutionary change of the inhumane flesh penalties. The first historic abolishment of flesh penalties by Emperor *Wen* in the Western Han Dynasty was just this case.

Since its birth in the *Xia* Dynasty, *wu xing* saw its vigorous experience through more than 2,000 years during which no historical records showed that anyone had ever demurred at it until one day Emperor *Wen* was affected by a girl named *Tiying*, who would rather suffer the flesh punishment against his father, a noble minister.

Here is the Emperor *Wen*'s profound reflection on humanity.

“In the *Yü* Dynasty(the period of the second Emperor *Shun* in the early ancient China, 4,000 years ago),”sighed Emperor *Wen*, ”only symbolic death penalties by

particular paintings on clothes and hats generated a wonderfully lawful world !Now so many flesh penalties could not stop crimes not because I am less blessed with virtue but the civilians were absent from good instructions. How ashamed I am! How pitiful those people are who bring the penalty scars all their life!”

With this reexamination of the former law, Emperor Wen issued a decree to substitute some other penalties such as hard labor and whipping for those merciless tattooing, shaving off the hair, cutting off nose and foot, according to the degrees of imperilment.

3.2 Cultural factors

When a cognitive view (however ridiculous it is to others)is recognized as a common belief shared by a particular community, a specific culture characterized with certain totem, customs and habits and taboos will gradually come into full bloom and bear fruits big or small, good or evil, beautiful or ugly. Whatever it is, it is always the result of a certain core value, perceptively, conceptually, or rather, propositionally because this core is the basic logic for a group of people, a tribe, a nation to follow. The “five penalties” is no exception.

3.2.1 *Wu xing* (the five elements/processes) — root of the five penalties

Xu(2001) stresses that the primitive cult of five elements or processes stemmed from pantheism. The people in Xia Dynasty intuited the dialectic law from the natural world that water, fire, metal, wood and earth were the most essential elements of the universe which were interrelated, interchangeable, inter-generative and

inter-surmounted so that the “five elements/processes” was the origin of all the things in this universe.

Appearing in Xia, popular in Zhou, systemized in the Spring and Autumn, reaching the climax in the Warring States Period, integrated into Confucianism and placed at the most prominent position by Dong Zhongshu in the Western Han Dynasty and inherited by later Dynasties, this proposition played irreplaceable role in ancient Chinese cultural construction.(Han 2007) It was the substrate that nurtured ancient Chinese aesthetic tastes, bred ethic concepts and constructed social hierarchy.

Consequently, the original penalties in the early Xia Dynasty which had been more than five were finally conceptualized into a relatively fixed *wu xing* (the five penalties, 五刑), which is pronounced the same as *wu xing*(the five elements, 五行) in Chinese *pin yin*.

Baihu Tongyi ,a scripture-interpretive classic of the social and moral patterns based on *Zhouyi* an Confucianism compiled by Ban Gu and authorized by Emperor Zhang in the Eastern Han Dynasty, forwarded a theoretical basis for the five penalties in terms of numbers and methodology:

The three Emperors (*fixi*, *nüwa* and *Shennong*)had strict and impartial laws and governed the state on the basis of five process....Laws are the result of ‘five process’. Death penalty abides by the law of flooding drowning a man, castration by earth obstructing water, picking out patella by metal conquering wood, cutting off nose by wood excavating earth, tattooing by fire subduing metal....In terms of fire subduing metal, we mean that metal gets corrupt under

fire...In terms of cutting off nose by wood excavating earth, we mean that nostril appears after the nose has been cut off.

This seemingly omniscient principle led a rather vigorous life in the history of ancient Chinese judiciary system and leaves its trace in the two criminal laws of People's Republic of China , any reformation before the Period of Republic of China must not be against it .Otherwise, it was doomed to be fiercely opposed (Xu 2001)

Cultural studies show that it is far from enough to interpret only at the political level the law system of a nation, a society and a time(Xu 2001). A law lays its foundation upon the particular culture with various patterns of thinking, value and tastes. As far as the five penalties is concerned, it is more and more accustomed consciously or unconsciously than politically as the engraving of ancient Chinese culture lasting for nearly 5,000 years.

It is known that the theory of five elements serves the foundation of “five penalties” to interpret turmoil and tranquility (administration), crime and punishment. And now let's examine other cultural factors which influenced the decreasing cruelties and savageness in the “five penalties”. That's why the mysterious “five” should survive several law systems with completely different political colors: the slavery, the feudal, the slightly-bourgeois-touched and the socialist.

3.2.2 Confucianism —Dominant force to soften the “Five Penalties”

Generally, four main theories of penalties existed in ancient China. (Liao 2007) Legalists strongly maintained severe punishments; Confucianism upheld that “morals go first, penalties second”; *Moists* argued against both Legalist’ stand and Confucian ideal that penalties should not be applied to the nobles and high-rank officials. Taoists held a cynical attitude towards severe penalties and put forward that “No-interference-is-the-best” policy. After a harsh competition, Confucianism came to the dominant place for , on the one hand, it inherited most essentials of the five process theory popular in the pre-Qin Dynasties thus had a fertilized cultural soil, on the other hand, it got the great support from the ruling classes.

For example, *Li* (propriety), a holy culture practiced in the Zhou Dynasty inherited as one of kernels of Confucianist ideology, is based on human’s awareness of shame, which was applied to cultivate one’s morality, instruct and restrain man’s demeanor and then manage state affairs (Wei 2007) “If the heretic person is managed with politics and uniformed with penalties,” said Confucius, “he will try to escape without feeling ashamed; If with morals and proprieties, he will feel shameful and abide by the law.” Mencius regarded property, righteousness, honesty and awareness of shame as *si de*, the four fundamental principles of living for he thought that “he is not human without sense of shame”(Mencius *Jinxin*), which was echoed by Zhu Xi’s idea that “he that knows what is a shame knows what should not be done”(*Analects of Zhuzi, Vol.13*). Gong Zizhen, a famous Confucianist thinker in the late Qing Dynasty, put forward well-known awareness of honor and shame:“ A scholar has the sense of shame, then the nation will never suffer humiliation; should he have no sense of honor,

it will be the great shame for the whole nation.”(*Ming Liang Lun*,II) . In a word, the ultimate strategy to govern a state in Confucianism is to practice benevolent administration with moral teachings; penalties were necessary but complementary.

With reference to awareness of shame, legalists had something in common with Confucianists, which can be well illustrated with what had been highlighted by one of the most important legalists, Guan Zhong:

Property, righteousness, honesty and awareness of shame are the four corners to support the great house—the state. Without their solidification, the state must suffer perdition. With their strong holding, the king’s decrees can be fully carried out. Therefore, the key point of modest penalty lies in the prohibition from deceitful words and that of sovereign in *si wei*, the four cardinals. (*Guanzi* ,*Herding the People*)

As a result, humiliation penalties permeated with morals and propriety instructions, for one thing, decreased the rate of severe punishment and protruded humanization; for the other, the promotion of saving face with moral instructions was beneficial to the psychological prevention and control of crimes. This is why humiliation penalties played a unique role in such a long history.

3.2.3 The *Junquan Shenshou* Cultural Schema —Origin of Uncertainty

The more-than-5000-year-old ancient Chinese culture of law characterized by “five penalties” was abundant in disregards towards human’s precious life and extreme

randomness. This is closely related to the long-lasting slavery and feudal systems with rulers as heads of *guo jia* (state-family) irrespective of their roles either as despots or wise kings.

To be more exact, there was no obvious distinction between family (*jia*) and state (*guo*) so that *guojia* or *jiaguo* is inseparable from each other more politically, socially and culturally than linguistically. It was taken for granted that the ruler was just the Patriarch in a large family in which the paterfamilia's words, decrees, state laws, family laws complement each other at different social hierarchies.

Within such a system, the rulers strongly follow such an illegitimate logic:

1) It is predetermined that heaven is superior to earth and the sovereign is handed down from heaven (major premise) .And because

2) he is the son of heaven(minor premise);

Therefore,

3) All the things and people are under the subjugation to none but the ruler;

4) The ruler has the infinite freedom to animate anything or destroy anybody;

5) Should anyone dare rebel against the ruler's words or actions, it has no difference from fighting against the heaven, which is doomed to be severely punished.

Willingly or not, almost nobody showed any discredit for such a propositional system, which later became a schema to follow. Therefore, it is no wonder that dozens of dynasties performing up and down the historical stage for more than 5,000 years had not been able to launch a revolution against the legal system. Even though some historic figures like *Chen Sheng* were only bold enough to suspect whether *Qin Ershi*

—the second and the last emperor in the Qin Dynasty—was the son of heaven, they had no doubt for such an absurd logic.

This suffocating schema had not been shaken until Sun Yat-sen, father of modern China, overthrew the *Qing* Dynasty by a bourgeois revolution with new ideas from the western world.

Under the forceful driving of his extreme superior power with no restraints, the rulers might change the law quite casually as he wished, sometimes under the disguise of *li* (propriety) while no excuses were needed at most times. The laws either in the written form or not were nothing but a piece of paper in the ruler's hand which could be twisted into any shapes or just cast away in accordance with his personal likes or dislikes. Penalties beyond laws were so frequent that people were accustomed to it, or simply numb to it. Consequently, it is typical to see great uncertainties in ancient Chinese laws with the civilian's happiness and freedom kidnapped. For example, although there was no regulations about *wenzi yu* (imprisonment or execution of an author for writing something considered offensive by the imperial court; literary inquisition), all such cases would be severely punished as rebellion or regicide.

3.3 Social contributors

Soaked in such a culture discussed above, the following social factors contributed the changes of the five penalties.

3.3.1 The highest power of a king or an emperor—Performance of *Junquan Shenshou* Schema

Over 5,000 years, the king or the emperor enjoyed the superior power to others, the most freedom nearly without any restrictions. He himself was just the law maker, punishment executive, reformer and destroyer. He was the law itself. It was so natural that nearly everyone accepted it silently without any doubts until modern historical wheel crashed it asunder. Consequently, no fixed certainty had been guaranteed by a truly efficient judiciary system.

3.3.2 Criminals as workforce

The penalties became less severe sometimes just because the rulers came to know that it would be advantageous to keep the criminal alive than kill them because it might win the support from the working people on the one hand, and possess them as labor force almost at no cost, which was greatly beneficial to solidify their diadem.

3.3.3 Capitalist germination—the 导火索 blasting fuse to the much more severe penalties in the *Song, Yuan, Ming and Qing* Dynasties

The five penalties saw a two-summitted curve in terms of severity and cruelty in the Xia and Shang Dynasties and in the Song, Yuan, Ming and Qing Dynasties respectively. The first one was marked with the maturity of *wu xing* closely connected with the ancient slavery culture (to be discussed in 3.3.2), and the second was particularly applied to suppress the capitalist germination by restoring old flesh penalties and inventing more and more inhumane ones.

Historically, smallholder economy continued to develop and witness its tendency of impotency in contrast with the vigorous germination of capitalist economy which

demanded more freedom. Frightened by the sharper and sharper social contradiction, the rulers determined to aggravate *wu xing* to punish criminals and terrorize others to asphyxiate the civilian's eagerness for freedom and cement their tyrannical monarchy.

3.3.4 Peace and upheavals

Another aspect of the five penalties' uncertainty was due to the peace and upheavals at different times. The theory that penalties should be in accordance with the age showed its bud in the Xia and Shang Dynasties and got its maturity in the Western Zhou. Here is the ideologies written in *Shangshu Luxing* : "There should be different scales of penalties against different criminals, and at different times" "Mild punishments should applied to the new state, medium for the peaceful, severe for the upheavals."

Such theories were fully practiced in ancient Chinese history. In the Warring Period, the whole china was in complete chaos with warring warlords struggling for the sovereign of the state so that severe punishments were highly emphasized by the newly arising landed class. Likewise, more drastic punishments were enforced in the Song, Yuan, Ming and Qing Dynasties. On the contrary, mild and medium punishments were executed in the Tang Dynasty with the most prosperous and splendid development into the political, economic and cultural center in Asia.

3.3.5 The savage atmosphere in the slavery system

The inhumane pleasure experienced by Emperor Zhou in the Shang Dynasty and his Queen *Da Ji* discussed in 3.1.2 had its social soil. The social hierarchy at that time

was composed of the ruling class—the emperor and nobles, slavers, merchants, and the ruled class—slaves.

According to Peng(2006), the king was the highest owner of all the things in his state. It was he who distributed earth and slaves to the ministers and generals, nobles and leuds, who also treated the slaves as their own possessions. Consequently, the slaves were just regarded as the tools **which** could only speak and had little difference from the domestic animals and mechanical apparatus.

To make it worse, it was quite popular for a large number of slaves to be sacrificed for their dead master and for the slavers' ancestors. So popular it was that slaves had no sense of being human being, they were just treated as animals: being buried alive, headed off, paunched, nose-cut, foot-cut, minced ...

Therefore, it is no wonder the “Five Penalties” was so brutal at that moment.

3.4 Historical factors

The historical factors refer to those that occurred once with a historic significance at a certain period of time, and thus affected the establishment and primitive savageness of “five penalties”.

The following historic events which strengthened or constructed the schema of “Five Elements/Processes” have been proved true by a grand program launched by a team in China Science Academy(Song 1996, Tse 2005) :

- 1) The successive appearances of *wu xing* (the Five Stars: Mercurial, Mars,

Saturn Jupiter and Venus) did occur in 2054 A.D.;

2) The solar eclipse did happen in 1961, registered as the period of the 4th emperor in *Shangshu Xiashu* (the earliest history book ,chapter of the Xia Dynasties) and the 5th year of *Zhongkang* in *Zhushu Jinian* (Annals in Bamboo Slips);

3) The alternate appearances of the “Five Stars” and three suns’ co-arising in the heaven did take place at the period when *Jie*, the last emperor of the Xia Dynasty, was overthrown by *Tang*, the first emperor of the Xia Dynasty. This event was recorded in *Zhushu Jinian*.

4) The “Five Stars” did cluster in the period of *Zhou*, the most villainous emperor in the Shang Dynasty.

Meanwhile, other historic events had once been thought of as the result of either following “Five Elements/Processes” or disobeying it.

According to the early history book *Shangshu Hongfan*, When *Gun* was leading the people to block heavy flood irrespective of the law of “Five Elements/Processes”, the emperor got so furious as to refuse to grant *Hongfan Jiuchou*⁴ and killed him to sacrifice the heaven. Later, *Yu*, the son of *Gun*, led the flood successfully and restored the state into peace just because he laid enough emphasis on the five processes .Therefore the heaven obliged him *Hongfan Jiuchou*, with which he became a wise emperor.

So far it is quite obvious that together with psychological, social and cultural contributors, these historic records soaked with the five elements deeply influenced

the “Five Penalties” formation, construction, promotion, reformation, execution and related interpretations.

Conclusion

In this thesis, we first find the etymological meanings of *xing* and then introduce briefly the phases of *wu xing*, Five Penalties—the Old, the Transitional, the New and its remains. And we reach a conclusion that the “Five Penalties” generation, construction, promotion, reformation, execution and related interpretations are just the comprehensive result of a **quadrinity** of psychological, cultural, social and historical interactions in ancient Chinese culture with the collective unconsciousness to fulfill its ultimate purpose—seeking pleasure for absolute freedom in the form of abusive power, violence, humiliation—at its bottom.

Notes

1 *Shang Shu* was the earliest historical book in China, which used to be named *Shu* in the Spring-Autumn and Warring States (770 B.C.-221 B.C.) and called *Shang Shu* (previous history book) since Han Dynasty, which consists of four parts: *Yu Shu*, *Xia Shu*, *Shang Shu* and *Zhou Shu*.

2 Interesting enough, the main penalties in the articles from 27 to 30 of People's Republic of China Criminal Law of 1997 includes five categories: restriction, custody, set term of imprisonment, life imprisonment and death with mulct, deprivation of political rights and confiscation.

3 Here the word "abuse" just follows one of the modern meaning— a synonym for addiction. Deepti (2002) like alcohol abuse, drug abuse, narcotics abuse, solvent abuse and substance abuse ,cocaine abuse, crack abuse and steroid abuse, which is somewhat related to proliferation of eating disorders and obesity such as laxative abuse and snack abuse and maltreatment of another person like physical abuse, sexual abuse, emotional abuse, psychological abuse, ritual abuse and satanic abuse ,elder abuse and old age abuse.

4The Nine Categories in the politics book entitled *Hongfan*, also called *Dafa Jiuzhang*(The Nine Chapters of Great Laws in *Han History*, Chapter of *Five Elements*), *Dafa Jiulei* or *Dafa Jiudeng* in Sima Qian's *Records of the Great Historian*. It includes five elements, the kings' five behaviors(looks, words, observing , hearing and thinking), eight administrative positions, five records of time(year, month, day, celestial bodies, methods of examination), emperor's mightiness, three virtues,

suspicion and inspection, five climates(rainy, sunny, warm, cold, windy), five blessings(long life, wealth, health and peace, accessing to good virtues, a natural death) ,six extremities.

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