

## BIÊN KHẢO:



# TRÍCH YẾU ẢNH HƯỞNG CỦA KHỔNG GIÁO TRONG HỆ THỐNG PHÁP LUẬT CỔ TRUYỀN VIỆT NAM, THÊM VÀI ĐIỂM SO SÁNH VỚI TRUNG QUỐC: CAI TRỊ BẰNG PHÁP LUẬT VÀ PHÁP TRỊ.

**Luật sư Tạ Văn tài.**

LGT: Luật sư Tạ Văn Tài, Tiến sĩ Chính trị học, Thạc sĩ luật khoa Hoa Kỳ, nguyên giáo sư Học Viện Quốc Gia Hành Chính và Đại học Luật Khoa Sài Gòn, hiện hành nghề luật sư tại Hoa Kỳ. Bài biên khảo này được LS. Tạ Văn Tài viết bằng Anh Ngữ. Chúng tôi cho đăng tải phần Trích yếu bằng song ngữ Việt - Mỹ để độc giả có thể đọc nhanh và sau đó có thời giờ sẽ đọc toàn bài Biên khảo đầy đủ chi tiết bằng Anh Ngữ.

Xin cảm ơn Giáo sư Tạ Văn Tài đã gửi bài Biên khảo giá trị này cho Trang Web VILAS và trân trọng gửi đến quý độc giả khắp nơi tại hải ngoại cũng như trong nước Việt Nam để tham khảo.

Trái với sự hiểu lầm thông thường cho rằng các Nho gia trong Trung Quốc cổ thời ưa nhân trị, còn các Pháp gia chủ trương pháp trị (thực ra phải dịch là cai trị bằng pháp luật)--hiểu lầm bắt nguồn từ cuộc tranh luận thời thượng cổ giữa hai trường phái ấy—bài này mô tả các Nho gia Việt Nam cổ thời (cũng như Trung Quốc cổ thời) đã dùng luật để cai trị quốc gia như thế nào (cai trị bằng luật) nhưng đồng thời đã tôn trọng tới mức độ khá cao các tiêu chuẩn (chuẩn mực) về một nền pháp trị theo nghĩa hiện thời (pháp trị, theo đúng ý nghĩa thực sự thời hiện tại, là : tất cả công dân sống dưới sự ngự trị của luật pháp).

## **I.- CAI TRỊ BẰNG PHÁP LUẬT của Nho gia đã được thực thi bằng cách KHỔNG HỌC HÓA LUẬT PHÁP..**

Trước hết, chúng tôi sẽ đưa ra tổng quan về gần hai ngàn năm ảnh hưởng của Trung Quốc trong hệ thống pháp luật Việt Nam, đặc biệt chú ý đến những điểm nào trong luật pháp đã bị ảnh hưởng bởi ý thức hệ Nho học.

Sau đó sẽ mô tả ảnh hưởng của Khổng học trong 4 lãnh vực luật pháp.

1. Như một thứ hiến pháp nền tảng, hay là một thứ tương đương với hiến pháp, các vị hoàng đế luôn dùng đến ý niệm Khổng học đưa ra , là Thiên Mệnh, để biện minh cho sự chính danh, hay chính đáng, của nền cai trị của các vị ấy; ý niệm này bắt đầu từ Khổng Tử và Mạnh Tử, nhưng rồi được dùng lại bởi tất cả các hoàng đế sáng lập các triều đại lớn ở Việt Nam: Lý, Trần, Lê và Nguyễn.

2. Ảnh hưởng của Nho học trong luật pháp về quản lý nhà nước: hệ thống sát hạch về các sách kinh điển Khổng học để tuyển lựa các thí sinh vào trong quan trường, trong bộ máy hành chính cai trị, nỗ lực hay có sự thực sự gạt bỏ vai trò các trí thức tu sĩ Phật giáo và Lão giáo ra khỏi giới thống trị, quy định trong luật các nghi lễ theo tôn chỉ Khổng học trọng chữ “lễ”, và quy định các luật về mức độ tiêu dùng (sumptuary laws).

3. Ảnh hưởng của Nho học trong luật dân sự và luật gia đình: đề cao gia đình (a) ngay cả vào thời gian thân nhân đã qua đời rồi, với quy định về sự để tang cho thân thuộc trong 9 thế hệ, quy định chặt chẽ về thừa kế tài sản thờ cúng tổ tiên, và (b) trong sinh thời của các thân nhân, với sự ban hành bộ luật về luân lý gia đình (thí dụ: 24 điều răn thờ Lê), dùng luật bắt thi hành đạo hiếu của con cái, nhà vua ban khen các trường hợp hiếu thảo, anh em hòa thuận, và góa phụ thủ tiết, giới hạn tưng tụng giữa các thân nhân, đối xử bất bình đẳng với phụ nữ (chồng có thể rầy vợ , tức bỏ vợ, vì một trong 7 lý do --thất xuất—trong khi vợ không thể bỏ rơi chồng v.v.), và với ty thuộc (bà con

cấp dưới), để theo đúng tiêu chuẩn của ý thức hệ Khổng học là trọng nam/khinh nữ và trọng tôn trưởng. Trong luật dân sự chi phối tương quan xã hội ngoài gia đình, thầy đồ dạy Nho học quan trọng đến nỗi nếu phi báng thầy dạy, sẽ bị phạt tội hình nặng hơn trường hợp thường, và giai cấp nô tỳ cũng có quyền lập gia đình và có tài sản gia đình. NHƯNG có sự giới hạn trong ảnh hưởng của Khổng học, như thấy rõ trong quyền bình đẳng về tài sản, đặc biệt của người phụ nữ Việt Nam (người phụ nữ Trung Quốc ít quyền hơn), và sự độc lập nhiều hơn của các con đã trưởng thành trong một hộ Việt Nam, các con ấy có quyền lập hộ riêng (so với quyền ít hơn của các con đã trưởng thành tại Trung Quốc, trong một hộ thường đông đúc, ở đó trưởng họ có quyền lớn, kể cả giữ sổ sinh tử giá thú cho nhà nước).

4. Ảnh hưởng Nho học trong luật hình được thấy rõ trong các hình phạt bất bình đẳng cho cùng một tội danh, nặng hay nhẹ là tùy theo tương quan gia đình giữa nạn nhân và phạm nhân, thí dụ, phi báng, đánh hay giết ông bà, cha mẹ, hay các bà con hàng tôn trưởng, sẽ bị phạt nặng hơn trường hợp phạm đối với các thân nhân vai vế thấp hơn hay là các người dung không thân thuộc, vợ phạm tội hình đối với chồng bị phạt tội nặng hơn chồng phạm tội với vợ. NHƯNG không phải lúc nào ý thức hệ Nho học cũng ảnh hưởng đến chính sách hình sự, vì trong đời Lý và Trần, Phật giáo đã ảnh hưởng mạnh để đưa tới chính sách hình sự khoan hồng và nhân đạo, rất tôn trọng nhân quyền.

## **II. NỀN PHÁP TRỊ đã được các quan lại theo Nho học xây đắp trên căn bản các bộ luật và các lệ của các triều đại.**

Họ giúp các hoàng đế soạn các bộ luật và các lệ, kể cả các luật lệ tổ tụng cần thiết cho nền pháp trị. Trong khi thực thi, họ cố gắng theo đúng các tiêu chuẩn của một nền pháp trị, trong luật nội dung cũng như trong luật thủ tục.

Chúng tôi dùng các thành tố của Nền Pháp Trị theo quan niệm hiện đại như những chuẩn mực để xem xét các luật thành văn và các án lệ mà các quan lại Nho học đã xây đắp cho các vua các triều đại, nhưng chúng tôi chuyên chú đến Triều Đại Nhà Nguyễn, so sánh với Triều Đại Nhà Thanh ở Trung Quốc, vì các triều đại đó có các bộ luật giống nhau và còn lưu lại các bằng chứng lịch sử nhiều hơn các đời trước.

Trong bài này, nền pháp trị được mô tả trong hai đề tài:

1. Có sự tuân hành diễn tiến luật định về mặt nội dung (substantive due process of law), gồm có các đặc điểm: a) Diễn tiến làm luật và tu chính luật có quy luật đều đặn và có thể tiên liệu được; b) việc áp dụng hợp lý các luật thành văn được xác định rõ ràng cũng theo quy luật đều đặn và có thể tiên liệu được; và c) luật có tính phổ quát và nhất quán.
2. Có sự tuân hành diễn tiến luật định về mặt thủ tục (procedural due process of law), tức là có các đặc điểm: a) có một hệ thống tôn ty các tòa án có thẩm quyền toàn thẩm để xét xử sơ thẩm và tái thẩm qua thủ tục kháng án; b) có một tầng lớp chuyên nghiệp để điều hành hệ thống đó; và c) có các thủ tục đều đặn được ấn định rõ cho mọi giai đoạn của diễn trình xét xử, như cáo trạng, giai đoạn tiền xét xử, xử công khai và công bình, và có bản án rõ ràng.

## **KẾT LUẬN.**

Cai trị bằng pháp luật và pháp trị cũng như sự giằng co và bổ túc giữa hai hiện tượng ấy, trong các quốc gia theo Khổng học như Việt Nam và Trung Quốc, thực ra là các vấn đề muôn thuở của tất cả các xã hội loài người. Ngay trong thế giới hiện tại, cũng có sự căng thẳng giữa những người chủ trương là nhà nước phải được điều hành bằng nền pháp trị, do sự ưng thuận của người bị trị, và dưới nó, tất cả mọi người, kể cả các nhà cầm quyền, phải sống và tuân hành, và những người đưa ra lập trường là nếu nhà nước đưa ra các luật lệ phải chăng để cai trị xã hội, qua một diễn tiến nào đó, thì người bị trị phải tuân hành, và ai vi phạm thì đáng bị trừng trị.

Cai trị bằng pháp luật bởi các Nho gia trong nước Việt Nam cổ thời đã đưa đến kết quả tốt: việc thi tuyển công chức quan lại theo một hệ thống bình đẳng dựa trên tài năng, đề cao sự hòa hợp trong gia đình và ngoài xã hội, tuy trong một hệ thống đẳng cấp tôn ty. Nhưng sự cai trị bằng pháp luật đó cũng có vài hậu quả khắc nghiệt như sự đối xử bất bình đẳng các thành viên của gia đình và xã hội, như sự gạt bỏ hay toan gạt bỏ ý thức hệ khác của Phật giáo và Lão giáo và sự đàn áp đôi khi tàn bạo đối với Thiên Chúa Giáo.

Nhưng các hậu quả khắc nghiệt ấy của việc cai trị bằng pháp luật đã được giảm bớt nhờ cái tinh thần và sự thực thi một nền pháp trị về cả hai phương diện nội dung và thủ tục, nền pháp trị ấy có lẽ đã nảy sinh nhờ nhân sinh quan công bình, trọng công lý, có tình thương và cư xử như “phụ mẫu chi dân” đã được truyền đạt trong nhiều trang sách của các kinh điển Nho học.

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## ABSTRACT

### **Ta Van Tai, CONFUCIAN INFLUENCES IN THE TRADITIONAL LEGAL SYSTEM OF VIETNAM, WITH SOME COMPARISONS WITH CHINA: RULE BY LAW AND RULE OF LAW.**

Contrary to the common misunderstanding that the Confucianists in ancient China favored rule by man (nhan tri) and the Legalists promoted rule by law (phap tri)—which originated with the debate in antiquity between the two schools of thought—this paper will describe how the Confucianists in old Vietnam (and also in old China) used law to rule their country (rule by law) and also respected to a great extent the essential features of a rule of law in the modern sense ( this rule of law means all citizens live under the law-- or the real phap tri ). We will discuss the two aspects: Rule by law and Rule of Law.

#### **I. The RULE BY LAW of the Confucianists was implemented by the Confucianization of the law.**

We will first survey the nearly two thousand years of Chinese influences in the Vietnamese legal system, especially where the Confucianist ideology influenced the law.

Then the Confucianist influences will be described in 4 areas of law:

1.As a kind of fundamental constitution, or as equivalence to a constitution, the imperial rulers typically used the Confucianist-inspired notion Mandate of Heaven to claim legitimacy of rule: it started with Confucius and Mencius, but it was repeatedly used by all the founders of the major dynasties in Vietnam: Ly, Tran, Le and Nguyen

2. Confucian influences in the law relating to the management of the state : the examination of candidates on classical Confucian texts for their recruitment into the state bureaucracy, the actual or attempted exclusion of the Buddhists and Taoists from the ruling circle , the codification of rituals according to the Confucian respect for propriety (le) and the elaboration of sumptuary laws.

3.Confucian influences in civil and family law: promoting the family (a) even after the members' death, with mourning among relatives of 9 generations, strict regulation of ancestor worship succession, and (b) especially during the members' lifetime, with promulgation of moral code (ex: code of 24 precepts under the Le), enforcing by law the moral duty of filial piety on the children, rewarding by the emperor for filial piety, brotherly harmony and virtuous widowhood , limiting lawsuit among relatives, imposing the unequal treatment of women (husband could repudiate wife for one of 7 reasons—*that xuat*, but wife could not desert husband etc.), and of junior relatives, to conform to the Confucian ideology of male dominance and senior relatives' dominance. In the area of civil law governing society outside the family, the teacher of Confucianism was so important that heavier penalty was imposed for reviling them, than in other cases of defamation, and the rights to marry and form a family and to have family property were recognized even to the serf (*no ty*). BUT there were limitations to Confucian influences, due to the particular equal property rights of Vietnamese women (the status of Chinese women had less right) and the higher independence of the

Vietnamese grown-up children in a clan household who could set up a separate household (compared to the Chinese children in the big Chinese household, where the clan head had much more power, including the administrative role of maintenance of birth/death registration books)

4. Confucian influences in criminal law were revealed in the unequal punishments for the same crime, depending on the victims' family status vis-à-vis the offenders' , say, reviling, striking or killing grandparents and parents or senior relatives were punished more severely than toward lesser relatives or non-relatives , wife committing crime against husband was punished more severely than husband committing crime against wife . BUT the criminal policy was not always totally influenced by the Confucian ideology, because under the Ly and the Tran, the influence of Buddhism had great impact for a more lenient and humane criminal policy, much in respect of human rights.

## **II. The RULE OF LAW was elaborated by the Confucian mandarins on the basis of the dynastic law codes and regulations.**

They helped the emperors writing the law codes and regulations, including the procedural law and regulations necessary for a rule of law.. In practice, they tried to adhere to the various standards of a rule of law, both in substantive law and in procedural law.

We use the elements of the modern concept of Rule of Law in the West as criteria to examine the statutes and the case laws elaborated by the Confucian mandarins for the emperors of the various dynasties, but we refer in particular to the Vietnamese dynasty of the Nguyen, in comparison to the Ch'ing dynasty of China, because their codes were similar and we had more historical evidence than with the previous dynasties.

We subsume our discussion under two headings:

1. Substantive due process of law, consisting of a) Regularity or predictability in rule-making and amending; b) Regularity or predictability in a rational application of the written rules which were clearly ascertainable; and c) universality or uniformity of the law.
2. Procedural due process of law, consisting of a) a hierarchical system of courts organized to have general comprehensive jurisdiction to try cases and review judgments of lower courts through the appeal process; b) a legal professional class running the system; and c) well-defined regular procedural rules, through various stages of the legal process, such as accusation, pre-trial stage, public and fair trial and judgment.

## **CONCLUSION..**

The issues of rule by law and rule of law, and the tensions between them and their complementariness, in the Confucian states of Vietnam and China, are actually the eternal issues in all human societies. Even in today's world, there is tension between those who advocate that the state must be run by the rule of law, which is derived from the consent of the governed, and under which, everybody, including the rulers, must live and respect, and those who claim that if the state enacts, for governing society, enough reasonable laws, through certain process, then the governed must respect them and people who violate these laws deserved to be punished.

The rule by law under the Confucianists in old Vietnam had good impact: egalitarian merit system in civil service examination, promotion of harmony in family and society, even though in a hierarchical system ..But it had also some harsh consequences in the unequal treatment of different members of family and society, in the exclusion or attempt at exclusion of the alternative ideology of Buddhism and Taoism and the sometimes brutal oppression of Christianity .

But the harsh consequences of the rule by law had been tempered by the rule of law spirit and practice in both substantive and procedural due processes, that might have resulted from the sense of fairness, justice, compassion and paternalism taught in many parts of the Confucian classical texts.

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# CONFUCIAN INFLUENCES IN THE TRADITIONAL LEGAL SYSTEM OF VIETNAM, WITH SOME COMPARISONS WITH CHINA: RULE BY LAW AND RULE OF LAW.

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Many scholars of Confucianism like to contrast Confucianism with Legalism, especially by referring to the classical debate between the Confucianists and the Legalists in antiquity Chinese thought. It was often said that the Confucianists proposed that the best government was not by rule of law but by rule of good men (gentlemen or *jun tzu* or *quân tử*), through the teachings and practices (and thus giving examples) of the principles of morality and propriety (*li* or *lễ*); and that the Legalists thought that men must be governed by the rule of the law, because one cannot trust that the virtues of men would be always consistent.

But according to Liang Ch'i-ch'ao (1873-1929) and Hsiao Kung-ch'uan, who wrote in the 1940's, and many Western sinologists, even in the classical Chinese thought, *fazhi* or *pháp trị* (better translated as rule by law), propounded by the Legalists, did not mean Rule of Law, because the Legalists still placed the ruler above the law, and emphasized the ruler's use of harsh laws as an instrument of government (exemplified in the punitive laws advocated in the Legalist theoreticians of the 4<sup>th</sup> and 3<sup>rd</sup> centuries and implemented in the state of Qin in the 4<sup>th</sup> century.) In this view, *fazhi* or *pháp trị* did not mean the institutionalization of a genuine Rule of Law, but it was also *renzhi* or *nhân trị* (rule by man): the main difference between the Confucianists and the Legalists was that the former valued the judgment of moral men more than the law as the means toward good government, while the latter emphasized punitive laws as the instrument of rule.

Hsiao Kung-ch'uan, in his comprehensive *History of Chinese Political Thought* (translated by F.Mote, 1979), at 446, complained that “Throughout the two thousand years of China's imperial history, when did there ever appear a single instance of a government embodying the Rule of Law?”. Liang Ch'i-ch'ao, like Hsiao Kung-ch'uan, believed that the lack of a constitution as supreme authority hindered the Rule of Law (*History of Chinese Political Thought* (L.Chen trans., 1930, at 113).

However, with recent excavation and discovery of ancient legal materials (The Manwangdui texts found in a Western Han dynasty [206 B.C.-A.D.9] tomb in 1973-74 and The Shuihudi materials unearthed from a Qin [221-206B.C.] site in 1975), a more positive role of law in early China has been pictured as resembling aspects of the classical Western notion of natural law. The Mawangdui treatises connected positive law with universal, natural standards, the *dao* (1). Thus, during these early dynasties in China, closer to the times of Confucius, the law of the state already combined the rule by law (law imposed by the rulers) and somewhat the idea of the rule of law (law reflecting natural law).

The purpose of this paper is to demonstrate that in the development of the CONFUCIAN STATE in later dynasties in Vietnam, and in China, UNDER THE DOMINANCE OF CONFUCIAN IDEOLOGY, the state promoted both the RULE BY LAW by Confucianization of

the law and the RULE OF LAW by elaboration of the various standards equivalent to those in the Western concept and practice of rule of law. This, hopefully, shows that the alleged classical dichotomy in antiquity between the Confucianists and the Legalists has been too simplistic. The Confucianists and the Legalists, in antiquity, were different in their approaches to law mainly in terms of different degrees of emphasis on the respective use of laws or of men as methods of governing. Then, overtime, Confucianism has developed through the centuries in China , and after it was fermented in the new synthesis of Confucian tenets in the Confucian Classics for adaptation to Chinese society during the T'ang and Sung (called Neo-Confucianism, in the West, the great commentator/ synthesizer being Chu-Hsi, 1130-1200), it had remained a lasting and rigid core of Chinese ideology (all civil examination answers had to conform to Chu-Hsi's commentaries) until the twentieth century, when it was confronted by the West's cultural and military onslaughts. During this long history of stable continuation and development of Confucianism, the Confucianist rulers of the Chinese dynasties and the Vietnamese dynasties had resorted to law to spread the tenets of Confucianism in the whole society (Confucianization of the law), and at the same time, and overtime, had developed a legal system that incorporated most of the characters of the rule of law in the Western sense, as will be demonstrated below when we compare the Nguyễn and the Ch'ing dynasties. Confucianism in China and Vietnam has become an ideology in practice, combining rule by law and rule of law.

The paper deals mainly with traditional Vietnam. But given the thousand years of Chinese rule in Vietnam from the later Han dynasty to the Sung dynasty (111B.C. to 938 A.D.), and the subsequent centuries of Vietnamese adoption of the Chinese model of state organization and law by all the Vietnamese dynasties during independence from the 10<sup>th</sup> to the 19<sup>th</sup> centuries, references to the Chinese experience from time to time, for comparable purposes, are inevitable and useful. And because of the comparative lack of historical and legal data on the earlier dynasties of Vietnam, Ngô (939-965), Đinh (968-980), Former Lê (980-1009), Lý (1009-1225), Trần (1225-1400)—due to the confiscation of Vietnamese books by General Chang Fu of China's Ming Dynasty during the brief occupation of Vietnam (1407-1427)—we will have to discuss mainly the data from the dynasties of the Lê (1428-1788) and the Nguyễn (1802-1945) , for which we still have extant documents.

## PART I. CONFUCIANIZATION OF THE LAW: THE CONFUCIANISTS' RULE BY LAW .

We will describe in broad stroke the general trends of Confucianist influences and then will give more details thereof in the different areas of law: Mandate of Heaven as a fundamental constitutional principle; administrative law for management of the state; family and civil law ; and criminal law.

### A. GENERAL TRENDS OF CONFUCIANIST INFLUENCES IN LAW

The first caveat on the influence of Chinese culture in the one- thousand-year Chinese domination in Vietnam, including the learning of Confucian classics, is : Chinese officials occupied only the district level positions, leaving Vietnamese in village posts and China, although endeavoring to assimilate the Viet people culturally ( attempting to change social mores), was reluctant to allow many Vietnamese access to advanced Chinese learning, which might have provided a channel for upward social mobility. This resulted indirectly in the importance of Buddhism and the Buddhists in Vietnam from very early times. The only indigenous intellectual

class was the monks who had to study Chinese to read the Buddhist scripts. They were to become influential in governmental affairs under the Đinh, Former Lê and Lý dynasties, especially in diplomatic relations with China.

However, very early on, even before the thousand-year Chinese colonial domination over Vietnam, the local Chinese rulers of the still independent Vietnam tried to apply Chinese law in Vietnam. The first legal system of Ch'in law was applied by Triệu Đà, even before the official Chinese colonial rule on Vietnam. He was a Ch'in general whose Chinese name was Ch'ao T'o, who absorbed the original Vietnamese kingdom of Âu Lạc and then seceded from Ch'in China and established the Kingdom of Nam Việt (207- 111BC). In 196 B.C., Triệu Đà paid tribute to the succeeding Han dynasty in China, but then staged raids into China (Ch'ang Sha district in modern Hunan) and declared himself emperor of Nam Việt in 183 B.C., and then, in 170B.C., again paid tribute to the Han as Nam Việt's king. Triệu Đà governed from his capital near modern Canton, far away from the territory of former Âu Lạc and divided Âu Lạc into two districts and appointed a civilian and a military official for each, while the old nobility of Âu Lạc still held the power to rule the Lạc Việt people.

In 113 B.C., the Han emperor sent an emissary to Nam Việt to persuade King Triệu Ai Vương and the queen mother (a former lover of the emissary) to submit themselves more completely to the Han emperor; and at the advice of the queen mother, the Vietnamese king agreed to allow Nam Việt, already a tributary state, to become an internal vassal state of China and to abolish all frontier checkpoints. Nam Việt agreed to abandon the penalties of tattooing and cutting off the nose and to adopt Han laws according to the practice of internal vassal states (2). In 111B.C., Nam Việt was fully incorporated into the Han empire, and thus began the thousand-year Chinese domination.

In the year of 39 A.D., a brief revolt of the Trưng Sisters broke out in Han China's Giao Chi (Chiao-Chih) province, formerly of Nam Việt. Trưng Trắc declared herself queen and seized sixty-five citadels. After Han Emperor Kwang Wu sent General Ma Yuan (Mã Viện) to vanquish the Trưng sisters, the general, according to *Hou Han Shu*, "memorialized that Việt laws, compared to Han laws, were different in more than ten items. After that, the old laws [Han] were re-promulgated to inform the Việt people and to control them; from then on, the Lạc Việt people had to abide by the old laws of Ma Yuan."(3)

Later on during the long Chinese colonial rule, T'ang law was applied in Vietnam and retained its influence on Vietnamese law even down through the 15<sup>th</sup>-century code of the Lê Dynasty (4).

The impact on Confucianism in Vietnam before the middle age was inevitable and strong, both in moral and social teachings among the ordinary Vietnamese and in the application of the Confucianist-influenced legal systems of China, whether Han or T'ang Law.

However, indigenous or customary Vietnamese laws constituted limitations to the influence of Chinese law. For example, under Triệu kings, and even under the direct Chinese colonial rule after 111 B.C., because of the indirect rule of the Triệu or the Chinese governors later on, ancient indigenous customary laws continued in force. In the first century A.D., after more than a century of Chinese rule and policy of cultural assimilation, the Chinese governors of the two commanderies of Chiao-chih (Giao Chỉ) and Chiu-chen (Cửu Chân) still had to make efforts to teach marriage ceremonies to the Việt people, because the old indigenous customs and laws still prevailed. *Hou Han Shu* states that the people of Chiao-chih did not differentiate between, as in Confucian

tradition, between seniors (*tôn trưởng*) and juniors (*ty thuộc*), did not know the marriage ceremony, and did not respect the mutual obligations of husband and wife [like in Confucian precept] (5). *San Kuo Chih* (Annals of the Three Kingdoms) reports levirate marriage practices (marrying sister-in-law) among the Việt people, contrary to Confucian precept (6).

After Vietnam's independence was regained in 939 B.C., the rulers of the quickly succeeding Ngô, Đinh and Former Lê dynasties were military men, busy consolidating their shaky power and when they died, the throne often went to the strongest military officer in their courts. Few people during this period had the resources to devote to learning Chinese language and culture, except the Buddhist monks who acquired Chinese language for translating scriptures and found their knowledge useful in state affairs, as advisors. Except for some reports on severe criminal penalties being applied by the Đinh and Lê, no law code was mentioned as codified during this time, probably for lack of time and expertise, although the Ngô did establish new court rites (7), and the Former Lê changed regulations on official functions and court dress to conform to the Sung Confucian pattern (8)

During the Lý Dynasty(1010-1225), all three religions of Confucianism, Taoism and Buddhism were held in esteem. But Buddhism was the most influential, because of its connection with the Lý throne from the beginning: the dynastic founder Lý Công Uẩn, later to become Emperor Lý Thái Tổ, was an illegitimate son and was adopted by a monk, Khanh Vân; another monk, Vạn Hạnh, encouraged him to take the throne when he saw portents in a tree struck by lightning. Many Buddhist temples were constructed during the Lý, many monks ordained, and upon retirement, many emperors became monks. The influence of Confucianism must have been checked or restrained and a scholar of the later Trần dynasty complained: "Buddhist temples are in every village but nowhere does one find one for Confucius" ( 9).

However, state management during the Lý Dynasty was following the Sung Confucian pattern, with the adoption of the Dynastic Law Code called *Hình Thư* (Book of Punishments) in 1042 , after emperor Thái Tông ordered that the laws be revised, written into articles and classified into categories to make them more suitable for the time and to prevent the judges from sticking too much to the letter of the law to the extent of being harsh and condemning innocent people. Unfortunately, this book is no longer extant and what we have now are only remnants of Ly laws in the historical records. We detect the influence of Chinese law (such areas as the five-penalty system, the ten heinous crimes, redemption of penalties and amnesty, and the regulations of public offices and court rites) and also indigenous Vietnamese legal concepts (such as lenient treatment of prisoners, punitive damages in civil law). The trend in thought, as stated above, was influenced by all the "three religions"; but Buddhism was the more dominant, shaping the lenient legal philosophy and practice. As will be pointed out in more detail later when we discuss criminal law, Confucian scholars later criticized the lenient Lý laws as being influenced by Buddhism.

The Trần Dynasty took over state power when the last ruler of the Lý, Empress Lý Chiêu Hàang, ceded the throne to her husband who became the first Trần Dynasty emperor, Trần Thái Tông, in 1225. No comprehensive code remains extant from the Trần. However, according to Lê Qué Đôn (1726-1784), Trần laws were complete at its zenith of power. At least two or three codes were promulgated : the 20-volume *Quốc Triều Thông Chế* (Book of General Statutes of the National Dynasty), in 1230, by Trần Thái Tông, who ordered that previous dynasties' regulations be consulted, criminal law and rites be reformed (10); *Hình Thư* (Book of Punishments); and *Hàng Triều Đại Điển* (Great Institutions of the Dynasty) , in 1341, by Emperor Trần Dụ Tông, who

instructed Trương Hán Siêu and Nguyễn Trung Ngạn to compile them. (11). While there were many Vietnamese features in Trần laws, we point out here the Chinese influences in the five-penalty system, redemption of penalty, amnesty, confession, the determination of penalty by the deliberation of the officials in Thẩm Hình Viện (Criminal Review Agency) adopted from the Sung (already also by the Lý Dynasty) (12). Late in the Trần Dynasty, some Confucians even proposed and succeeded briefly in having Sung laws and institutions adopted on a large scale. When Lê Bá Quát and Phạm Sư Mạnh (court officials who were students of the famous Confucian scholar Chu Văn An) first advocated this policy under Emperor Minh Tông (reign: 1314-29), this emperor rejected it: “Our country has its own definite principles [of laws]. The Northern and Southern countries [China and Vietnam] are different. If we adopt the plan of the pale-faced students [*bạch diện thư sinh*], disorder will immediately follow” (13). But during the Đại Trĩ reign period (1358-69) of Emperor Dụ Tông (r. 1341-69), these pale-faced Confucian students were able to secure the wholesale adoption of Sung laws and practices. In 1370, Emperor Nghệ Tông (r. 1370-72) repealed these Sung laws and returned to the old system of law of the Khai Thái period (1324-29) of the previous Emperor Minh Tông, with this statement: “Our forefathers, since the very beginning of the Dynasty, established their own system of laws and did not follow the Sung laws and institutions. Each of the Northern and Southern countries is sovereign within its sphere and does not need to follow each other’s laws. In the Đại Trĩ reign the pale-faced students, who were consulted at the time, did not know the deep meaning of legislation: they abandoned all the system of law bequeathed by our forefathers and adopted the northern ways in the areas of clothes, music, institutions and may other matters” (14). Although the wholesale borrowing of laws from the Sung model proved to be short-lived, the underlying intellectual impetus of neo-Confucianism of Sung period was to persist and become influential in later Vietnamese political and legal development. For example, in 1396, near the end of its rule, the Trần Court adopted a provision of Ming law that Buddhist monks and Taoist priests under fifty years old had to return to lay status (15).

In the last decade of the Trần, Court Advisor Hồ Quý Ly, already powerful before seizing the throne in 1400, exerted his influence as a determined but unorthodox Confucian who, in his book *Minh Đạo* (Enlightened Way) submitted to Emperor Nghệ Tông in 1372, treated the Duke of Chou as the First Saint and Confucius as the First Teacher, and who also translated part of *Shu Ching* (Book of History) into Vietnamese *nôm* characters in 1395 to teach Emperor Thuận Tông, and who restricted the ordainment of Buddhist monks to people above 50 years old (16). He sought to weaken the Trần nobility, curtailed land ownership and issued paper money.

Under the brief reign of the Hồ (1400-1407), no new law code was promulgated but from the fragments of Hồ laws in the historical records, we can see that Confucianism spread influence in the various areas of law, such as the five-penalty system, including penalty for criticizing the emperor, management of the state with regulations on military organization and population registration.

The Ming invaded Vietnam in 1406 under the pretext of punishing the Hồ usurpation and restoring the Trần, but soon established direct Chinese rule over Vietnam. Confucianism gained considerable headway, with more than one hundred schools established, vigorous promotion of state Neo-Confucianism under the self-styled “civilizing mission”, even attempting to reform Vietnamese customs by introducing Neo-Confucian social practices and ritual observances (17).

Although the Ming rule in Vietnam lasted for 20 years from 1407 until 1427 when the negotiated peace with Lê Lợi permitted them to withdraw back into China, Lê Lợi already started

the 10-year war of national liberation in 1417 from Lam Son. In 1428, Lê Lợi became the first Emperor Lê Thái Tổ of the Lê Dynasty that lasted 360 years until 1788, with six years of being discontinued by the Mạc Dynasty's uncontested rule (1527-1533). During the first century of unified Lê government (1428-1527), the Lê emperors were the real rulers. However, in the next 265 years, Vietnam suffered a long North-South partition, first during the Lê-Mạc struggle (1533-92) and then, during the Restored Lê period in which Trịnh Lords and Nguyễn Lords were rivals and even engaged in war, under nominal Lê rule (1600- 1788). During their short rule, the Mạc kept on using Lê laws in their area, only promulgated additional decrees when needed. Lê laws continued to be national laws in the territory under Lê control during the Lê Mạc struggle and then, later on during the Restored Lê period, in both the Northern territory (*Đàng Ngoài*) under the Trịnh Lords' rule (a kind of shogunate, Vietnamese style) and the Southern territory (*Đàng Trong*) under the Nguyễn Lords' rule. The Nguyễn claimed that they fought only against the Trịnh and always recognized the Lê emperors; they used the Lê emperors' reign titles. Indeed, near the end of the Lê Dynasty, the Trịnh forces captured two provinces from the Nguyễn and Lê Quý Đôn (1726-84) was sent there to manage them; and he observed that "the Nguyễn family administered the territories of Quảng Nam and Thuận Hóa generation after generation but applied without change the Hồng Đức [Lê] regulations concerning population registration, military draft, land distribution and taxation (18) So, it is remarkable that Lê laws were national laws even though Vietnam was partitioned for a long time.

The Lê Dynasty adapted the T'ang Code, with the bulk of the *Quốc Triều Hình Luật* (Penal Code of the National Dynasty) compiled and promulgated from the year of 1428 under the first Emperor Lê Thái Tổ to 1449 under Lê Nhân Tông; but later emperors, especially Lê Thánh Tông (reign 1460-97), contributed enormously to the codification process (Thánh Tông contributing about 69 articles) (19). The Ming Code, compared to the T'ang Code, was much clearer in style and much more rational and systematic in the organization of subject matters into articles and sections or chapters. After an opening chapter on general principles, the articles were grouped into six chapters to six boards (Public Office, Civil Affairs, Rites, Military Affairs, Punishments and Public Works). However, instead of the Ming Code, The Lê Dynasty used the The T'ang Code as a model, both in its organization of the articles and chapters and in its archaic style, and even borrowed two hundred articles directly, probably because of the reluctance to follow the Ming, which Lê Thái Tổ just threw out of Vietnam after a 10-year war of national liberation. But this adaptation of the earlier T'ang law still incorporated many of the Confucian features of Chinese law and institutions. And later, Emperor Lê Thánh Tông's infatuation with Ming law and adaptation of the state bureaucratic organization model of the Ming, neo-Confucianism gradually emerged as the predominant ideology in state organization and law, especially because Thánh Tông was a learned Confucian scholar (20). The other legal documents were promulgated under Lê Thánh Tông (except the last three, compiled during the Restored Lê period); some were later amended: *Thiên Nam Du Hạ Tập* (Collection of the Leisures of the South of Heaven), 1483 (under Thánh Tông), an encyclopedic work on literature, institutions, laws and regulations (to be abbreviated as DHT); *Sĩ Hoạn Trâm Qui* (Instructions for Officials); *Lê Triều Quan Chế* (System of Public Offices of the Lê Dynasty), 1471; *Quốc Triều Thư Khế* (Legal Form used under the National Dynasty), 1468-71; *Hồng Đức Thiện Chính Thư* (Book of Good Government of the Hồng Đức period), including not only laws and summaries of cases of the Hồng Đức period but also of the Mạc Dynasty (to be abbreviated as HDTCT); *Quốc Triều Chiếu Lệnh Thiện Chính* (The Dynasty's Edicts and Decrees Promulgated for Good Government), compendium of edicts and decrees promulgated between 1619 and 1705; *Quốc Triều Khâm Tụng Điều Lệ* (Procedural Code of the national Dynasty), 31 chapters, 1777; *Cảnh Hưng Điều Lệ* (Decrees of the Cảnh Hưng Reign [1740-86]), with decrees

corresponding to a number of chapters in Quốc Triều Khâm Tụng Điều Lệ. Because Lê Thánh Tông was prolific in his law-making, and also energetic in enforcing the laws, The Lê Code was popularly known as the Hồng Đức Code.

No legal document remains from the Nguyễn Tây Sơn (1788-1802).

In 1802, Nguyễn Ánh, a nephew of the last Nguyễn Lord killed by Tây Sơn, recovered power after long and arduous years of struggle, and as the Gia Long Emperor, he started the Nguyễn Dynasty (1802-1945). After asking the commission headed by Nguyễn Văn Thành to consult both the Lê and the Ch'ing Codes (Thành described both as comprehensive, but the Lê Code as concise, simple in style and easy to research on), Gia Long –“upon thinking that the Ch'ing Code had incorporated all the good laws of previous dynasties and was clear, complete and tight” -- specifically ordered the officials to take from the Ch'ing Code whatever was usable for the formulation of laws of his Dynasty. The Nguyễn Code (*Hàng Việt Luật Lê*) or Gia Long Code was almost an exact copy of the Ch'ing Code (21), omitting only 39 articles from the latter and adding only one article on “Ritual laws” (Art. 164) banning the vile custom of demanding large meals from families in mourning. The Nguyễn Code also incorporated 30 articles on analogy at the end of the Ch'ing Code. Almost all the articles were identical to those in the Ch'ing Code. The chief difference was the Nguyễn Code dropped many Ch'ing statutes. On the other hand, the Nguyễn Code did not, while the Lê Code did, have many provisions on a number of subjects, such as inheritance and matrimonial estate. This prompted the French colonial courts in Vietnam later to take into account the Lê Code provisions relating to these matters, especially the separate property of the wife, to supplement the deficient Nguyễn Code for ruling on those matters, prior to the promulgation of the new French-influenced criminal codes and civil codes for different regions of Vietnam, to supersede the traditional Gia Long Code.

Gia Long's ancestors had had good relations with the Ch'ing, unlike Lê Thái Tổ who had to fight the Ming for independence. And so, Gia Long chose to remain within China's cultural realm and even looked for political legitimacy through asking for an investiture by the Ch'ing emperor (22). Gia Long had fewer qualms than Lê Thái Tổ about getting closer to China, by asking to have investiture by the Ch'ing, in the old tradition of vassal states as described by Mencius, and by adopting the Confucian Chinese laws and imitating Chinese Confucian organization of the Court (tendencies to be pushed much further by his successor, Emperor Minh Mạng). Also, there might have been another reason: many of Gia Long's high officials and many inhabitants in Southern Vietnam under the Nguyễn Lords (*Đàng Trong*) were ethnic Chinese settlers from Ming China fleeing the Manchu take-over of China, and stayed loyal to him during his struggle against the Tây Sơn.

Because the codes of Lý and Trần dynasties are no longer extant, a systematic discussion on Confucian influences in the legal system of traditional Vietnam must resort mainly to the data from Lê and Nguyễn codes and periods of rule.

The legal system of traditional Vietnam (and China) was imbued with (a) the Confucian precepts of *tam cương* (three bonds), i.e. *quân thần* (subject's loyalty to the absolute monarch), *phụ tử* (children's filial piety owed the parents), *phu phụ* (wife to follow husband), and (b) the Confucian principles of *ngũ thường* (five basic virtues), i.e. *nhân* (humanity), *nghĩa* (uprightness), *lễ* (respect of propriety), *trí* (knowledge) and *tín* (reliability).

These Confucian moral principles, as elaborated not only by Confucius but by his disciples through the ages, which sought to edify a hierarchical society imbued with a hierarchical social order (*tôn ty trật tự*), have been applied or implemented, precisely according the Confucian principle of *tri hành hợp nhất* (theory and practice are a unity), in the areas of ideological/legal justification of the dynastic rule (equivalent to the constitutional foundation of the modern nation-state), the codification of administrative law and regulations for administrative management of the state bureaucracy, the regulations of family and civil relations and the codification of criminal law .

One point to make in terms of historical development: the ascendancy of the Confucianists and Confucianism over other social forces and ideologies in Vietnam came gradually, and became complete with the Lê and Nguyễn Dynasties . During the Đinh, Former Lê and Lý Dynasty and even the Trần Dynasty, the Buddhist monks served as important political advisors to the emperors (Monks Ngô Chân Lưu or Khuông Việt, Lạc Thuận, Khánh Vân, Vạn Hạnh) or advisors on religious matters to the emperors and the imperial household (Man Giác, Huệ Sinh, Viên Chiếu, Thông Biện, Chân Không, Giác Hải , Không Lộ); and many emperors themselves became monks when they retired. Under the Lý and the Trần, the imperial clan members were allowed to maintain private armies and even given territories to tax and levy corvée. However, because the adoption of the Chinese way of using Confucianism as moral and political precepts for organizing state and society, the role of Confucianism as official ideology and the Confucianists as state bureaucrats became the norms. Already in 1070, Lý Thánh Tông built The Temple of Literature (*Văn Miếu*) where he sent the crown prince for study and where Confucian classics were stored; he also had statues of Chou Kung , Confucius and the seventy-two saints fashioned. Although in the spirit of coexistence of the Three Religions, i.e. Confucianism, Buddhism and Taoism, the famous Buddhist monks retained some influences on the emperors, either as sons or nephews, or as religious teachers, already in 1075, Lý Nhân Tông organized the three-stage examination system and, in 1076, established the National College (*Quốc Tử Giám*) to teach students in the Confucian classics.

This did not mean that the emperors let Confucianism dominate the state to the extent of excluding Buddhism or other Vietnamese practices. We already see above how the Trần emperors nipped in the bud the attempt by Lê Bá Quát and Phạm Sư Mạnh and other “pale-faced students” of Confucianism to impose wholesale Sung neo-Confucian institutions and laws on Vietnam.

Under the first Lê emperors, after the initial period of Confucianists ruling together with the generals of the liberation war against the Ming and the eunuchs, the more complete ascendancy of Confucianism and the triumph of the Confucianist bureaucrats occurred when the Lê government organized the Court along Ming lines, extending even to the villages, under Emperor Lê Thánh Tông, himself a learned Confucian scholar.

This dominance of the Confucianists in state bureaucracy continued until the end of the imperial period of the Nguyễn Dynasty in Vietnam, with these limitations: the ultimate political power always resided with the emperors who had monopoly of force of arms (all appointments of military commanders had to be made by the emperor—The Lê Code article 276), or the Trịnh and Nguyễn Lords who were supreme military commanders in their areas of Vietnam while nominally under the Restored Lê emperors.

## B. CONFUCIAN INFLUENCE IN THE JUSTIFICATION OF DYNASTIC RULE : THE MANDATE OF HEAVEN AS A FUNDAMENTAL LEGAL BASIS OF RULE, EQUIVALENT TO A CONSTITUTIONAL FOUNDATION .

The Confucian doctrine of Mandate of Heaven is that the right to rule of the king or emperor is not derived from the sovereignty of the people, but is conferred by the Mandate of Heaven and the king or emperor is Son of Heaven. Mencius said : “*Lạc Thiên gia , bảo thiên hạ; uy Thiên gia, bảo*

*kỳ quốc*” ( By satisfaction of Heaven, one can preserve the empire; by respect of Heaven, one can preserve the nation). This is understandable because China before Confucius and during his time was already a big country, and there would be no possibility of direct rule by the people assembled in a democratic meeting like in the Greek city-state of antiquity, which developed democracy with the people as sovereign and a government by the people, of the people, and for the people. The doctrine of sovereignty derived from the Mandate of Heaven must have been arising also because the usual road to power of the founding emperors of the Chinese dynasties was through the force of arms (power grew out of the strike of the sword, if not the barrel of the gun). This military road to power dated back to the Ch'in and Han dynasties, after Confucius, and even before Confucius and the Confucianists who just validated that road to power. Before Confucius, King Shun and King Wen, rulers of the third and second millennia B.C., came originally from Barbarian regions, not the Han ethnic area. Thus, the Mandate of Heaven theory of sovereignty was a necessity to justify the absolute power over the people, because obviously it was not a government by the people. The divine origin of the rule over the people was common to several major early civilizations: Judaic-Christian (The ten commandments received from God), Hammurabi, Egypt, India, Greece (Plato), Rome (Cicero), and Islam.

However, if the absolute ruler counted on the absolute loyalty of the subjects, as reflected in the Confucian saying “*Trung thân bất sự nhị quân*” (Loyal subject would not worship two kings), his Mandate from Heaven would require that moral virtue is a condition for continued rule, and so the government, if not by the people, must be the government of the people and for the people. In other words, the king must be a benevolent ruler. There was a saying : “*Ý dân là ý trời*” (The people’s wish is Heaven’s wish). Mencius said : “*Dân vi quý, xã tắc thứ chi, quân vi khinh*” (The people are the most worthy; second comes the state; and the king is the least weighty) (Book 7, 2<sup>nd</sup> chapter). Mencius also apparently recognized a right of revolution--- when he answered a question about subjects killing a king : “*tàn tặc chi nhân, vị chi nhất phu; văn tru nhất phu Trụ hỹ, vị văn thí quân già*” (a brutal tyrant is simply an ordinary person; I heard about [king Wu ] killing an ordinary person named Chou, but I did not hear about the killing of a king) (Book 1, 2<sup>nd</sup> chapter) ; in other words, “*Tru bạo quốc chi quân nhược tru đợc phu*” (to kill a tyrannical king is like to kill a simple man). These assertions were not contradictory to the Mandate of Heaven, because there could be a loss of Mandate of Heaven. Mencius’s idea of the right of revolution was more drastic than even Jefferson’s words in the American Declaration of Independence, which announced to the world that the people of the United States rejected the mandate of the King of England.

How did a founder of a Vietnamese dynasty make a declaration to point out his Mandate of Heaven, to begin his rule with this functional equivalent to a constitution of his new regime?

### 1. The L ý.

The L ý Dynasty began when L ý C ông Uẩn, an illegitimate son adopted by Monk Khánh Vân, was encouraged by Monk Vạn Hạnh to take over the throne from the depraved Former Lê emperor, when the monk saw portents in a tree struck by lightning from Heaven ( 23). During this early period of Vietnam’s history, very few people knew Chinese characters and literature and almost all the learned scholars were the Buddhist monks and the majority of the poems of Vietnam’s literature during the Lý were in Chinese and were written by Buddhist monks. And yet, the Buddhist scholars who surrounded the first Emperor Thái Tổ of the Lý proposed a very long reign title for the first Emperor, consisting of fifty two Chinese characters, mentioning the

Confucian concept of Mandate of Heaven, using words such as “*Phụng thiên chí lý*” (“Complying with Heaven’s disposition”), “*thiên hạ thái bình*” (“Peace under Heaven”) (24)

The Mandate of Heaven of the Lý Dynasty was later reaffirmed during the war against the Sung invaders, in a poem by the famous general Lý Thường Kiệt: “*Nam Quốc Sơn Hà Nam Đế Cư, Tiết Nhiên Định Mệnh Tại Thiên Thư*” (“The Southern Country is occupied by the Southern Emperor. Such Mandate is inscribed in the Book of Heaven.”) (25) .

## 2. The Trần

The advent of the Trần clan to the throne was through a peaceful transition of power. When Lý Chiêu Hoàng, the last and female ruler of the Lý Dynasty, abdicated and passed the throne, in 1225, to her husband who became the first Trần Dynasty Emperor, Trần Thái Tông, she issued a Proclamation, stating that: “Our Lý Dynasty, receiving the Mandate of Heaven [*thụ Thiên quyền Mệnh*], has bequeathed the throne to successive kings for more than two hundred years. Unexpectedly, our Father Emperor fell ill and had no male progenitor and facing the danger of national upheaval, he ordered me to obey his edict to assume the throne; that was something that has never occurred in our history. Alas, I am a female ruler with negligible talent and virtue who had no advisors in the face of many rebels, how can I keep safe this sacred legacy? Now, in thinking it over, I have found that only Trần Cảnh, with brilliant mind, is a sage gentleman, compared to whom even Emperors Han Gao-tsu [*Hán Cao Tổ*] and T’ang T’ai-tsun [*Đường Thái Tông*] were not superior. With much deliberation, I think I can cede the throne to him, to satisfy Heaven [*đãi úy Thiên tâm*] and to pacify my own conscience, and together we can make effort to preserve this nation for peace.” (26)

## 3. The Lê

After Lê Lợi expelled the Ming colonial rulers, he ordered Advisor Nguyễn Trãi to draft and he issued, in 1427, the Grand Proclamation on Vanquishing the Chinese (*Bình Ngô Đại Cáo*). It began with the assertion of Vietnam’s long independence from China, and then adduced the furor of Heaven against the 20-year exploitative rule of the Ming: “For a long time before this, our Viet nation already declared to have a civilized culture, a separate territory with borders demarcated from the Northern country and with different customs. We have been independent under the Đinh, Lê, Lý, Trần dynasties, and sovereign in our realm, side by side with the Han, T’ang, Sung and Yuan dynasties....Recently, the Hồ politics was wrong ..the mad Ming took advantage of it, and in the complicity of the traitors who sold out our country, attacked and condemned the poor people to suffer from their fire of savagery and their dungeon of calamity. This atrocity prolonged for twenty years...What a cruelty! All the bamboo plants in the jungles could not record all their crimes. What a filth! All the water in the oceans could not wash away their dirty acts. How can Heaven forgive them? ...[ After Lê Lợi enumerated the initial hard times in the war of national liberation, the Proclamation continued] . Probably Heaven has wanted to entrust the burden to me and to challenge me through hundreds or thousands of difficulties; therefore, I have endeavored to persevere and to accept all deadly dangers....When the enemy generals were captured, they kowtowed and admitted to their crimes. In the name of Benevolent Heaven, I spared them from death....and gave them several hundreds of boats .. and several thousands of horses to return to China.... The State is now secure...due to the protection of Heaven and our ancestors.”(27).

During the Restored Lê period, despite the dominance of the two families of Trịnh and Nguyễn Lords (*Chúa*) in the Northern and Southern parts of divided Vietnam (called *Đàng Ngoài* and *Đàng Trong*), both of them did not dare to call themselves emperors, apparently still ceding the Mandate of Heaven to the nominally ruling Lê emperors. When Lord Nguyễn Phúc Khoát (1738-1765) of Southern Vietnam, then called Duke Hiệu Quốc Công, was suggested in 1744 by his followers to declare himself King (*Vương*), on the ground that he had 3000 *li* of territory, much more than the area of the first Shang emperor in China. He decided to become King with the title of Thiên Vương, vis-a-vis the tributary countries to the southern borders; he made himself a royal seal, and changed the verb used by officials to present documents to him from *thân* (submit) to *tấu* (memorialize), and called the ancestor worship house (*từ đường*) as royal temple and mausoleum (*tông miếu*); but he still used the calendar of the reign year of the Lê emperor who, alone, was the Son of Heaven (*Thiên Tử*). Thus, although he had become a king, he still adhered to the concept of Mandate of Heaven and respected the duty of faithfulness to the emperor (*trung quân*), upholding the Lê emperors [Mandate of Heaven to rule] in opposition to the usurpers Trinh lords (*phò Lê diệt Trịnh*) while at the same time he really did not want war with the Trinh. In other words, it seems that Nguyễn Phúc Khoát, in carving out for himself a more independent regime, justified his kingship with his lower Mandate of Heaven to support the higher Mandate of Heaven of the Lê emperor. Only much later, under the first Gia Long Emperor of the next Dynasty of the Nguyễn, was he bestowed by Gia Long the posthumously the reign title of Võ Hoàng Đế (Emperor Võ) (28).

We should note that even Quang Trung Nguyen Hue of the Tay Son Dynasty did not dare to claim the Mandate of Heaven in his first expedition to The Le's Thang Long capital in the North of Vietnam and also had to use the pretext of *phò Lê diệt Trịnh*.

#### 4. The Nguyễn

The first Gia Long Emperor of the Nguyễn Dynasty justified, in a document in *Đại Nam Thực Lục Chính Biên Đệ Nhất Kỳ* (Veritable Records of Dai Nam, First Era), his ascent to the throne by reciting his effort to recapture the lost power of his ancestors and of the Lê, from the Tây Sơn, and then by concluding that: “All of this was accomplished by relying on the assistance of Heaven, the aiding spirits of the late ancestors of the Nine Ancestral Temples, the meritorious services of the officers and the effective efforts of the Three Armies[i.e. the soldiers]”. Gia Long compared his exploit of recapturing lost power with the story, recorded in the *Spring and Autumn Annals*, of one kingdom (Ji) destroying another kingdom (Qi) to take revenge for an insult taking place nine generations earlier: “I have heard that to take revenge after nine generations is one of the great lessons of the Spring and Autumn Annals, and to console the people by punishing the wicked is the highest form of benevolence for a monarch” (29). One can see that Gia Long justified his ascent to power by referring to the concept of Mandate of Heaven and the classical Confucian text of *Spring And Autumn Annals*.

The sacred nature of the Mandate of Heaven gave rise to the severe punishment (death by decapitation) of the crime of lèse majesté (*đại bất kính*) against the current emperor or the preceding emperors, one of the ten heinous crimes, which included such acts as theft of the emperor's clothing or personal effects, his seal, stealing articles of worship used in imperial mausoleums or ancestral temples, criticizing the emperor in terms harmful to his prestige, or resisting an imperial envoy in a manner denoting a lack of respect owed the emperor by a subject, or merely erroneously preparing drug or meals for the emperor. To see the great influence of the Confucian doctrine of

the Mandate of Heaven on the severe penalty in *lèse majesté*, in Vietnam as well as in China, one just compare it with the impunity with which people auction off the personal effects of contemporary Heads of State (for example, those of President Kennedy) (30)

### C. CONFUCIAN INFLUENCES IN THE CODIFICATION OF ADMINISTRATIVE LAW AND REGULATIONS FOR THE ADMINISTRATION OF THE STATE

Once a dynasty acceded to full control of the nation, it always embarked on the codification of a national code of law. This started with China's Han Dynasty law code (only partially remaining extant), which included the various Confucian principles for state organization and criminal law. This tradition continued in China with the later dynasties, T'ang, Sung, Ming, Ch'ing. The law codes organized the state management, such as the conduct of examination on knowledge of Confucian classical texts to recruit members of the ruling bureaucracy, the provisions on the six boards, and their management of state affairs, including the conduct of various Confucian rituals, such as the worship of the God of agriculture by the emperor etc....

As described above, Vietnam's dynasties followed the same tradition of marking the advent of the new dynasty with a law code and other supplementary statutes.

We will describe Confucian influences in three areas of the management of the state: the recruitment into the state bureaucracy of administrators through examination of their knowledge on the ideology in the Confucian classics, the sumptuary laws and the laws on rituals.

#### 1. The official Confucian ideology for statement management and the recruitment of the state bureaucracy

The state's adoption of Confucianism influences the education or indoctrination of the candidates for state bureaucracy through immersion in the Confucian ethics. Education and examination became a means of indoctrination in Confucianism. Parents were not free to teach their children any religious or moral doctrine, but had to teach them an approved official ideology, Confucianism, if they were to hope that their offspring would pass examinations to join officialdom and become the ruling class. The contents of education were the orthodox Confucian classics and histories. At the age of seven, male students began to learn Chinese characters with their teachers; at eleven, they studied the four books: *Analects*, *Mencius*, *The Doctrine of the Means*, and *Great Learning*; at fourteen, they began the five classics: *The Book of Odes*, *the Book of History*, *the Book of Changes*, *the Record of Rituals*, *The Spring and Autumn Annals*, and the earlier Chinese dynastic histories. The girls stayed at home and generally studied special primers written for them, such as those by Nguyễn Trãi and Lê Quý Đôn, in which they were taught the four virtues of how to stand and sit properly, *dung*, how to speak respectfully, *ngôn*, how to sew and cook, *công*, and how to be virtuous and gentle, *hạnh*. Thus, the education system discriminated against women, as did the civil and criminal law provisions (see below)

The orthodox ideas and philosophical orientation derived from these classics and histories were reinforced by the examination system. In Professor Woodside's description of the Nguyễn period, this system "imposed Chinese-style topics and conventions upon Vietnamese minds...[and required] exegetical elaborations of aspects of the Four Books and Five Classics, based upon their Sung Neo-Confucian commentaries... The ghosts of the twelfth-century Chinese Sung neo-Confucian philosopher Chu Hsi and his followers hovered over Nguyễn examination sites. [In this

process] individual discretion and originality were reduced (31), because students were learning by rote from the same old books and dared not deviate from the neo-Confucian viewpoint in taking examinations, afraid as they were of flunking for propagating ‘maverick’ doctrines.

After the golden times of Buddhist influence and the officially proclaimed policy of Coexistence of Three Religions (*tam giáo đồng nguyên*) [Confucianism, Buddhism and Taoism] during the Lý and the Trần Dynasties, in later more Confucian times of the Lê and Nguyễn, non-Confucian doctrines were referred to as “maverick, immoral or false doctrines” and the teaching of them will be subject to the punishment of death penalty for the offenses of high treason and grave insubordination, two heinous crimes, under the Nguyễn Dynasty. Under the Lê Dynasty, there was such document as the 1663 Decree of Lê Huyền Tông on Forty-Seven Articles on Moral Education which forbade printing, selling and buying books on Taoism, Buddhism and “other maverick doctrines” (article 35 of the 47) and stated that “Buddhist temples are useless; except for those which are famous and already registered, villages must not without authorization construct new ones, wasting labor and money” (article 36 of the 47). Popular beliefs were suppressed in the law. The belief in and use of witchcraft or incantations to arouse love or affection from parents/grandparents, husband was punishable by penal servitude; if the purpose was to elicit the emperor’s love or affection, the penalty would be death by strangulation (32).

This conditioning of thoughts in traditional Vietnam, leaving no chance for freedom of thought and innovation, although it reinforced the monarchy by infusing absolute loyalty to the emperor, had ill prepared the elites when they faced Western onslaught later, and therefore they failed to meet the challenge of modernization and safeguarding the nation against colonialism.

This does not mean we do not see the positive effect of the Mencian version of Confucianism, which emphasized humanism, and even the right of revolution—mentioned above—which might have a humanizing effect on the ruler’s behavior toward the people, resulting in the benevolent social policies of the dynasties (33).

One aspect of Vietnamese education system, the government making it generally available to the population and letting the people free to choose and establish private schools outside the public school system, seemed to distinguish a particular brand of Vietnamese Confucianism, differently from the Chinese system. Professor Woodside concluded that “The education which aspiring Vietnamese scholars received was perhaps less standardized... Vietnamese scholars could rise more easily to the top of their examination system without ever having set foot in a government school than Chinese scholars could.” (34). The content of education might be orthodox Confucianism, but the free choice of educational institutions was the rule. The Trần Dynasty continued the National College already existing under the Lý (changing its name from *Quốc Tử Giám* to *Quốc Học Viện*), appointed education officials in the provinces (*đốc học*) and the prefectures and districts (*giáo thụ*), thus establishing a nationwide public school system. The Lê Dynasty connected the National College intellectually and physically with the Temple of Literature and no longer reserved it exclusively for officials’ sons. Although in the capital, the three institutions of the *Hàn Lâm* Academy were reserved for officials’ sons, in the provinces, prefectures and districts, public schools were available and accessible to all strata of the population, and more important, numerous private schools were opened by scholars who failed to pass some or all of the examination stages or officials who had been dismissed by the government. Under the Nguyễn, there were also public education officials in (although not in all) the provinces, prefectures and districts. Private schools were free to compete with them as “rivals” to woo students away from the public school system at

all levels. Particularly noteworthy was the fact that each village might have several private schools with the teachers performing their job well, with independence from the bureaucracy (35).

While law and policy in the Confucian state of Vietnam favored the spreading of Confucian learning, and the formation of the ruling class of Confucianist scholar-bureaucrats, the alternative leadership groups, the Buddhists and Taoists—after their golden times during the Lý and Trần Dynasties--were , under the Lê and Nguyễn, tightly controlled with laws which required permits necessary for printing Buddhist and Taoist books, soliciting contributions from the public, or building temples and casting bells, under the penalty of penal servitude or demotion (36) . The ordainment of Buddhist monks and Taoist priests required a government certificate and these certificates were conferred only on monks or priests who were fifty years old or older; violations of this law would be subject to penal servitude. Monks and priests who were expelled from their temples had to unfrock themselves within 10 days, under the same penalty. Monks who consumed alcoholic beverage or meat shall be unfrocked and drafted into the army; monks who indulged in sexual relations would be condemned to penal servitude. Village and district officials who failed to discover these offenses would be punished too.(37) Even the daily activity of Buddhist and Taoist priests were controlled: visiting priests had to notify local government of their stay in a temple and to leave in three months; village officials had to report violations on this (38). The women claiming to be the medium of Bodhisattva, rather harmless for the state, though playing on the superstition of the people, was to be condemned to penal servitude and prefecture, district and village chiefs who failed to arrest them were punished too. (39).

There was some social impact of the promotion of Confucianism and Confucian scholars. The title of “retired scholars” was so much respected that there were people, still not elderly yet, who falsely claimed to be “retired scholars” and assembled, for unlawful acts, in meetings of five persons and more. The penalty for them ranged from penal servitude to exile to a distant region. Officials who failed to arrest them were punished also. On the other hand, the real Confucian scholar-teacher was revered and reviling or beating him would be punished more severely than in ordinary case and killing them was considered heinous crime number 2, punishable with decapitation (40)

Vietnam’s traditional education and examination system opened to all citizens on an egalitarian basis for upward social mobility was a praiseworthy by-product of the promotion by the Confucianists of the ideology of Confucianism. However, this attempt to uphold the monopoly of the official Confucian ideology and to consider other belief systems as maverick doctrines has had stifling impact on freedom of thought, innovation, initiative, and modernization of society and, as stated above, has reduced the ability and agility of the Confucianists to save Vietnam from the attack of a foreign ideology or religion : Christianity, which was itself followed by the armed forces of a colonial power.

There is not enough space here to describe in details the resistance of Vietnam’s Confucianists to four centuries of Christian missionaries’ work in Vietnam (16<sup>th</sup> to 19<sup>th</sup> century) until the French colonialist took over the country in 1884. We would like to summarize this long struggle as follows (otherwise, we refer the reader to our book *The Vietnamese Tradition of Human Rights*, University of California, Berkeley, 1988):

( i) Although the Confucianist rulers of Vietnam, in law—through edicts-- as well as policy, would like to impose the monolithic ideology of Confucianism and to relegate other religions, especially

the “alien” Catholic Church introduced by foreign missionaries, to a subordinate role, in reality religious tolerance was more the rule than the exception during the four centuries. The initial prohibition of Catholicism was accompanied by mild penalties and during the greater part of these four centuries, people enjoyed freedom in adopting the new creed and practicing it in ceremonies or church buildings, because the edicts of prohibition were either not enforced or repeatedly withdrawn. The killing of foreign missionaries was carried out only since the eighteenth century under the Lê-Trịnh in the North (*Đàng Ngoài*); and the really bloody repression of Catholics began only with Emperor Minh Mạng’s Edict of 1833 and lasted only about 30 years, ending in 1862 under Emperor Tự Đức.

(ii) The Catholic missionaries were responsible for the defying way in which they and their Vietnamese followers rejected traditional Vietnam’s Confucian values such as the ancestor cult, the male-dominated social structure with polygamy and a lot of offspring ( The Catholic priests were criticized how they dared to question this policy of creating more manpower for economic production and heirs to perpetuate the lineage) and even the gentle treatment of the various religious beliefs of the people, such as Buddhism and the worship of village deities (Father Alexandre de Rhodes insolently called Buddha “that black liar”). All these escalated ill will between the Catholic missionaries and population and the Confucian scholar-official class ruling the country on behalf of the emperor. At first, they demanded only that the missionaries leave. But then the emperors and their Confucian officials became intolerant of any dissent from Confucian norms. Issuing edicts after edicts of prohibition of Catholicism, they demanded that as a practical test, the Catholics, who committed no crime, step over the cross to forsake their faith and thus escape penalty. In this crude way of enforcing the orthodox Confucianist ideology and law, they clearly violated religious freedom.

(iii) The emperors and their Confucian scholars-officials gradually realized that their struggle with the Catholic Church was not simply ideological and their measures of resistance, in the form of Confucianist-inspired laws (anti-Catholic edicts ) and persecution of the followers in the name of an official ideology, could not match the force of arms of the French colonialists who followed the Catholic priests and threatened Vietnam’s territorial integrity. National security considerations, for the dynasty or the state , became the main concern when actions were taken against foreign priests who might have collaborated with foreign colonial powers. For example, the actions taken by Lord Trịnh Tạc in 1659, by Lord Nguyễn Phúc Khóat in 1750, by Emperor Minh Mạng in 1838 after the Lê Văn Khôi-Marchand affair; by Emperor Thiệu Trị after de Genouilly’s shelling of Đà Nẵng City in 1847, which was provoked by the information provided by some Catholics, or by Emperor Tự Đức after the 1858-59 French and Spanish attack in Đà Nẵng and Saigon at the suggestion of Bishop Pellerin.

(iv) The Confucianist rulers slipped down the slope of overreactions , such as subjecting indiscriminately the Catholics to dispersal or to the death penalty those ordinary Vietnamese Catholics who were not involved with foreign intervention and whose only crime was refusing to abandon their faith. Such measures were indeed violations of the basic human rights of religious freedom and freedom from cruel punishment. These overreactions were the cause of a vicious circle of repression, resistance, or appeal for foreign intervention, more repression , more foreign intervention and loss of independence.

## 2. Ritual laws.

*Lễ* (respect of propriety), instead of being simply an issue of etiquette as in modern society, was codified into enforceable laws in old Confucian Vietnam, for both the living and the dead.

The deceased emperors, of the ruling dynasty as well as the previous dynasties, were worshipped in the imperial temples and mausoleums. Plotting to destroy the ruling dynasties' ancestral temples and mausoleums and palaces would constitute the second heinous crime of grave insubordination (*murú đái nghịch*) (second only to the first heinous crime of high treason --*murú phàn*, which was plotting to endanger the emperor), and would be subject to decapitation with exposure of the head or death by slicing, their followers and relatives decapitated, their wives and children seized as public serfs (41). Digging up mausoleums of previous dynasties, and violations of the imperial temples of these previous dynasties, as well as destruction of statues in temples of deities of previous generations, were punished by decapitation or penal servitude (42). Whoever destroyed shrines or tablets dedicated to renowned dignitaries, filial children and loyal husbands or virtuous wives would be subject to the heavy stick penalty and demotion; while whoever stole offerings in a Buddhist or Taoist temple or temple of a spirit would be prosecuted for ordinary theft (with penal servitude) (43). No amusement was permitted during the mourning for the emperor and during the imperial ancestors' death anniversary, which must have adequate offerings in a sacrifice (44)

There were rules for showing proper respect to the living emperor, sanctioned by criminal penalties, such as getting off the palanquin before entering the imperial city or upon passing by the gates of the imperial palace or Ancestral temple (45), no jesting in the imperial palace, in disrespect of the emperor (punishable by demotion or penal servitude), or not using indecent language or shouting in public halls (46), dutifully attending Court celebration or an anniversary of an imperial ancestor, and not making a misstep in rituals at ceremony at mausoleum or in court audience (47), not wearing wrong dress in Court or sitting in an incorrect manner in a court of law (48), not organizing a funeral in the capital one month before or after Coronation (49).

Among the people, rituals were also regulated by law; for example, ritualistic requirements in marriage ceremony, such as bringing gifts to parents' house to celebrate the wedding and the penalty for cohabitation without marriage (50)

Even forms of address were tightly regulated: under threat of criminal penalty, a person had to refrain from using the word "*thần*" (subject) unless in addressing the emperor; should use the proper forms of address (51) and could not use taboo names, especially of the emperor or his ancestors (52).

### 3. Sumptuary laws.

The Confucian principle of respect for propriety (*lễ*) in a hierarchical society also inspired sumptuary laws, i.e. laws on the levels of expenses and things used that were permitted for different classes in society. People could not exceed statutory limits concerning funerals, burials, tombs, sacrifices, worship, houses, vessels, carriages, clothing, headdresses, personal effects, under penalty of fine or demotion. Funeral dinners for guests were subject to limitations in accordance with the financial condition of the family in mourning. (53). Using the emperor clothes or carriage or his rope-pulling boats would be punished by exile or death (54). There were other miscellaneous rules such as limits on garden and residence of officials in the capital (55), on the number of oarsmen, of escorts and porters and quantity of food or equipment accompanying officials on mission (56).

## D. CONFUCIAN INFLUENCES IN FAMILY AND CIVIL LAW

The Confucianists sought to promote and protect a hierarchical structure of family or clan, as an important building block of social order. Unequal laws for family and clan members—both during their lifetime and after death-- resulted from this concept.

### 1. The dead members of the family or clan

After their death, family and clan members were mourned for nine generations: a person had to mourn for four generations preceding and four generations following him or her, and relatives of his/her own generation; and the Dynastic codes all began with Tables of Five Degrees of Mourning [wearing different garbs] for Nine Generations of Relatives. Violations of these legal requirements of mourning among such an extensive network of relatives were punished criminally. For example, wearing clothes other than mourning garb during the mourning for parents, concealing the news of the death of parents or grandparents, and not showing grief, would constitute the heinous crime of lack of filial piety (*bất hiếu*), punishable with penal servitude; wife concealing death of husband and not showing grief, but wearing clothes other than mourning garb and participating in musical or theatrical entertainment, or getting married, would be guilty of the 9<sup>th</sup> heinous crime of disloyalty (*bất nghĩa*), also punished with penal servitude (husband not mourning for wife punished more lightly with demotion) (57). Fornication during mourning for parents or husband was punishable, severely, by decapitation (58). All these rules were inspired from the Confucian ideal that the virtuous wife always followed her husband, during lifetime and even after his death (*tiết phụ*).

Ancestor worship was another important Confucian precept and practice. The inheritance of ancestor worship property (the portion of clan property reserved for expenses of ancestor worship) was regulated according to the Confucian principles of male dominance and primogeniture, tempered only by the particularly Vietnamese, and non-Confucian, tradition of equal property rights of women, which we discuss elsewhere in other publications (59). The principal son in the clan (*đích tử*), or in his decease, the eldest grandson, or failing that, the eldest daughter would be entrusted with the task of ancestor worship with the income from the ancestor worship property (recommended as 1/20 of the total clan property). Not following this rule, for example, leaving the ancestor worship property to an unfit son, or selling ancestor worship property, would be punishable as two heinous crimes of lack of filial piety and discord (60).

### 2. The living members of the family or clan

There were many more Confucianist-influenced rules of family relationships during the lifetime of the members, than after their decease. Family/clan being the foundation of Confucian society, there were strict rules on their formation: the various rituals leading to marriage as stated above (and described in footnote 50 accompanying text), prohibition against cohabitation of man and woman without marriage, the woman given fifty strokes of the light stick (which was unusual for female offenders) (61), ban on marriage with brother's or teacher's widow, punishable by exile (Lê) or death (Nguyễn) (62). The obligations and relationship among members were strictly regulated in the light of Confucian norms of dominance of male over female and of senior over junior relatives. Despite the equal property rights granted to the Vietnamese wife by the indigenous Vietnamese customs that were incorporated in Lê law, the Vietnamese wife had inferior status vis-à-vis the husband in other aspects of her relationship with husband: many criminal offenses

committed by the wife against the husband were punished with the same severity as offenses committed by children or grandchildren against parents or grandparents, or offenses committed by serfs against masters; and for the same offense the penalty was more severe when committed by the wife against the husband than vice-versa (63); also, many actions were considered criminal only when committed by the wife against the husband or the husband's grandparents or parents, and not when committed by the husband against the wife or her relatives (64). Husband might repudiate wife (unilaterally divorce her) for one of the seven grounds (*thất xuất*): barrenness, lasciviousness, refusal to serve and to obey the parents-in-law, quarrelsomeness, thievery, jealousy and incurable disease (65). Wife could not desert husband and could not entertain when husband was in detention (66)

However, the principles in the relationship within the nuclear family of husband and wife must be reconciled with the rule of respect for senior relatives in the larger, extended family, or clan. Husband who used abusive language against his parents-in-law might have his marriage dissolved (67). Children owe parents/grandparents the duties of filial piety, which require them to support or provide for them, not to disobey them or revile them and failing these duties would be subject to criminal penalties and these duties were put in the same article on the more serious crimes of beating or killing them (heinous crimes). The penalties for crimes against the parents/grandparents were much more severe than against ordinary people (68). Children were encouraged even to conceal them from criminal persecution or to offer to undergo the criminal penalty for them (69) and were allowed to strike those who struck their parents/grandparents if causing no wound, or to kill the murderer of their parents/parents or siblings with lesser penalty than the usual one. (70)

In the interest of family unity, there were restrictions, with penalty, on lawsuits against parents/grandparents and siblings (71).

Cases of family members who had shown filial piety, fraternal harmony, virtuous widowhood had to be memorialized to the emperor for reward (72).

The state promotion of family values was such that even the serfs were allowed to have family and property rights (one female serf married an emperor) (in contrast to the slavery policy in the American colonies and, later, the United States of America which split up families and treated the slaves brutally).

3. The popularization of the Confucian codes of ethics

The codification of Confucian ethical principles was not rigid, because the Le Dynasty issued a number of principles in codes of ethics, which, although promulgated by imperial edicts, and contrary to usual style in the Dynastic Codes, did not provide for penalties for moral violations. There were : (a) Six articles of moral education issued in 1471 during the Hồng Đức Reign. (b) Emperor Lê Thánh Tông's Twenty-four Articles of moral education published during his son Hiến Tông's reign in 1499; (c) the Forty-seven Articles on moral education promulgated by Emperor Lê Huyền Tông's decree in 1663. The Nguyễn Dynasty also had ten moral maxims of the Minh Mạng Emperor. We do not have space to summarize here the main Confucian moral tenets in these codes of ethics and we refer the reader to our translations of summarized versions of these three codes of ethics in our book, *The Le Code: Law in Traditional Vietnam*, Ohio University Press, 1987, vol .2, pp.107-116. These moral codes were not exactly legal statutes, but they might be enforceable under the catch-all statute of *phi vi* (committing an act that ought not to be done) written into all the Vietnamese and Chinese dynastic codes (*fei wei* in Chinese) (73) and the statute of "violating

imperial edicts” (see our discussion below in part II of this paper, on “Rule of Law”). The contents of these codes of ethics reiterated or elaborated, in the explanatory language for educational purposes, many Confucian moral principles already embodied in the Lê Code, but the codes of ethics stipulated no specific penalty for the violations except occasional references to “punishment” for violation. They mentioned obligations of family/clan members toward one another (husband/wife, parents/children, senior/junior relatives, head of household’s role, male/female/widow members), of friends and students toward one another and teachers, of wealthy toward the poor, of officials, lettrés (learned scholars) and village elders and yamen clerks, of merchants, of the common people, of innkeepers, and of village chiefs (to educate the people) and the rewards for officials for teaching the people. According to the 1663 decree promulgating the Forty Seven Articles on moral education, the officials were to read them many times over to the people, including children, assembled in villages to listen to them on New Year Day, or days of worshipping village patron spirits and the agricultural god.

#### 4. Some limits to Confucian influences.

For a balanced view, we must, however, mention some limits to the Confucian concept of the family in Vietnam: a) the equal property rights and the civil law standing of the wife in the law code of the dynasty, which had to recognize the force of customary law, despite her being treated unequally under the Confucianist-influenced laws in her relation to her husband (we do not have space here, in a paper on influences of Confucianism, to discuss in depth this particularly Vietnamese character of the woman’s equal status in property rights and civil rights, and refer readers to our other writings), and b) the Vietnamese junior relative could set up and register a separate household, something the Chinese junior relative was forbidden to do, under the penalty of the 7<sup>th</sup> heinous crime of lack of filial piety for setting up separate household . In Vietnam that portion of definition of the 7<sup>th</sup> heinous crime in Article 2 of the Code was modified and substituted by “disobeying one’s parents”. The senior relative in the Vietnamese family/clan had less power and also none of the government agent’s power granted to his counterpart in traditional Chinese law, for maintenance of birth and death registers in old China : in Vietnam that was the role of village officials (74). French scholar Deloustal observed that the option given junior relatives in Vietnam to set up separate household showed that individualism existed before the French arrival in Vietnam.

There was another limitation to Confucianism in the Confucianist-influenced laws of old Vietnam: the *realpolitik* consideration of national security interest of the regime that prompted Grand Counsellor Trần Thủ Độ to demote Empress Lý Chiêu Hoàng, sterile, to the status of princess and ordered Emperor Trần Thái Tông---brushing aside all Confucian prohibitions against sexual relations among relatives--- to marry his elder brother Trần Liễu’s wife, who was pregnant, to insure that there was a male heir to the throne and thereby assure the continuity of the Trần Dynasty. Moreover, learning from the demise of the Lý Dynasty, the Trần Dynasty might have had what the French called a *raison d’Etat* (reason of state policy) to encourage marriage among cousins in the imperial clan to assure that political power never got out of the Trần clan. Confucian historians later sometimes claimed that the Trần was immoral in that sense; but they did not have evidence that the marriages were among the cousins of the sufficiently close degree of mourning forbidden by the traditional Chinese and Vietnamese table of mourning and by the relevant law code provisions . Moreover, among the people, even the Trần laws forbade incest marriage and sexual relations among the relatives of certain close degrees of mourning relationship, in conformity with Confucianism. In any case, to have a balanced view of this Trần practice, we should remember

that *Thiên Nam Du Hạ Tập* of the Lê Dynasty permitted marriage among first cousins once removed (75).

## E . CONFUCIAN INFLUENCES IN CRIMINAL POLICY AND LAW

We will discuss the criminal policies that the Confucians criticized and advocated and then describe generally the codification of Confucian criminal policy values into definitions of crimes, classifications of penalties and the special treatments given to or the withholding of those treatments from offenders.

### 1. Confucianists' criticisms of the lenient criminal policy of the Lý and Trần Dynasties and advocacy of the neo-Confucian Sung legal institutions

The Lý and the Trần dynasties were influenced by Buddhism on both the substance of criminal law and the penal administration. Because the higher echelon Buddhist monks, not directly involved in running the state bureaucracy, were serving as advisors to the emperors (as described above), the Lý emperors were motivated by Buddhist-inspired compassion. The code *Hình Thư* was promulgated in 1042 by Emperor Lý Thái Tông because of his compassion for the people, according to the official history: “Up to that time, lawsuits in the country were complicated, judges stuck so much to the letter of the law that they became harsh, even to the point of condemning innocent people. The Emperor, having compassion for them, ordered that the law and regulations be revised to make them more suitable to the times, and had them classified into categories and written into articles of a Criminal Law Book of the Dynasty for the easy enlightenment of the readers. ..The people considered this a great service. Because the administration of justice became more perspicacious, the new reign title of *Minh Đạo* [Enlightened Way] was adopted..” (76).

The penalties provided by Lý laws for certain crimes were quite light. Killing by striking, for example, was punished with only one hundred strokes of the heavy stick, tattooing of fifty characters on the face, and penal servitude as a menial worker. Using sharp weapons to kill a person in a land dispute would lead to only eighty strokes of the heavy stick and penal servitude (77).

The Lý emperors often showed an extremely humanitarian policy in their administration of justice, including in the punishment of rebels. In 1028, when Emperor Lý Thái Tổ died, three princes brought soldiers into the Forbidden Area for a battle to contest the throne with Lý Thái Tông, the legitimate successor. One of the challengers died in battle; the other two fled but later came back to surrender. The new emperor pardoned them and returned their titles to them. Another prince subsequently started a rebellion in *Trùng Yên*; after surrender, he too was pardoned and had his titles restored. (78).

Such tolerance extended beyond the imperial clan. In 1041, the rebel *Nùng Trí Cao* was captured and brought to the capital. Moved by the fact that the rebel's father and brother had already died in a previous revolt in 1039, Emperor Lý Thái Tông pardoned him and permitted him to continue to serve as chief of *Quảng Nguyên* district and even to administer additional areas . A year later, *Nùng Trí Cao* was given a seal and the high honorary title of *thái bảo* (79). One result of this benevolent policy toward minority leaders was their effective support for the Dynasty in the successful campaigns against the Sung.

Emperor Lý Thánh Tông showed the same humanitarian concern for those caught in the toils of law. During the severe winter of 1055, he told his Court officials: “ Living in the palaces

heated up with coal stoves and wearing plenty of warm clothing, I still feel this cold. I am quite concerned about the detainees in jails who are miserably locked up in stocks and manacles, without enough food to eat and without clothes to warm their bodies, or some even undeservedly dying while their guilt or innocence has not been determined. I feel a deep compassion for them". (80) Thereupon, he ordered blankets and mats to be distributed to the prisoners and two meals a day to be provided them. It seems that the emperor considered the detainees to be innocent until proved otherwise and to deserve humane treatment. This line of legal thinking may be compared to the modern concept of presumption of innocence until conviction in a trial--- concept very important in modern human rights thought.

In 1064, while presiding over a trial in Thiên Khánh palace, the emperor pointed to princess Động Thiên, who stood in attendance next to him, and told the judicial officers: "I love the people as much as I do my own daughter. They commit offenses because they do not know [the law] and I have much compassion for them. From now on, I want all offenses, grave or light, to be judged with indulgence" (81).

Other examples of imperial clemency included frequent amnesties and lenient treatment of accused traitors, such as Emperor Lý Nhân Tông's decision in 1096 merely to exile Lê Văn Thịnh although he was accused of plotting high treason. (82)

It is interesting that in later, more Confucian times of the Lê and Nguyễn, Confucianist scholars and historians found the law of the Lý to be too much lenient. Many of these scholars blamed this leniency on the influence of Buddhism and advocated the more stringent criminal policy of the Confucian tradition.

Phan Huy Chú (1782-1840) considered Lý criminal law to be too lenient. Ngô Ngô Phong (Ngô Thời Sĩ) (1725-80) was highly critical of the heavy stick penalty and penal servitude provided for killing by striking: " Ancient laws punished those who killed with death. It is unacceptable that an offender who kills by striking is punished only lightly by the heavy stick and penal servitude. Given such a light punishment, petty tyrants and crafty wrongdoers would readily take revenge without any respect for human life. Dishonest people would violate the law easily and good people would have to suffer the injustice. What a major error in criminal policy! The rulers should never forget the comments on leniency and severity by Tzu Ch'iao and Ts'ui Shih".(83)

The fifteenth-century Confucian historian Ngô Sĩ Liên (14?-14>) (chief of the Historical Institute in 1473) also strongly disapproved of the Lý's lenient punishment for killing during a land dispute: " Ancient laws punished with death those who killed. To punish homicide in the same manner as other crimes is to fail to distinguish between crimes of different degrees of severity."(84)

The Confucian historians were also critical of what they regarded as excessively lenient treatment of rebels. Lê Văn Hưu, a thirteenth-century official historian (1231- ?) blamed the pardon of Nùng Trí Cao on the influence of Buddhism: " Previously, when his father Nùng Tồn Phúc committed treason, usurped the title [of emperor] and established a separate state, Emperor Thái Tông only punished the father and exempted the son Trí Cao. Now that Trí Cao followed the treasonous path of his father, he deserved, for his serious crime, the death penalty or [at least] the deprivation of title and land previously granted and demotion to the status of commoner. However, Emperor Thái Tông pardoned him, gave him additional districts to rule, conferred on him a seal and the noble title of Thái Bảo. This is not a justifiable policy of punishment and reward...All is due to

the fact that Emperor Thái Tông was infatuated with the petty humanitarianism of the Buddhists and forgot about the great principles of a king”.(85)

On this Nùng Trí Cao affair, Ngô Sĩ Liên also commented : “The emperor, deluded with the Buddhist doctrine of love and humanitarianism, pardoned a traitor. Therefore, his benevolence became marred. That was his defect. “ (86)

Ngô Sĩ Liên was also critical of Lý Nhân Tông’s decision to impose only exile on Lê Văn Thịnh in 1096: “To exempt from death a subject who attempted to kill the emperor and seize the throne was a mistake in criminal policy. This was due to the emperor’s faith in Buddhism”. (87)

Elsewhere, on the subject of an amnesty granted in 1129 by Lý Thần Tông, Ngô Sĩ Liên indicated that he considered the ancient *Shu Ching* (Book of History) a better guide to amnesty policy than Buddhism: “ Emperor Nhân Tông’s frequent use of the occasion of Buddhist holidays to grant amnesty was wrong, but at least he used the pretext of Buddhist celebrations. As for Emperor [Thần Tông] , he did not have any such pretext and yet he granted amnesty....If everybody were pardoned , the dishonest fellows would luckily escape punishment and this would not be of benefit to honest people. The ancient sages knew that in governing men, it would be impossible to eliminate pardons, but also realized that one had to think of the harm arising from pardoning... The *Shu Ching* says, “pardon a mistake, but punish a willful crime. Such should be the right policy.”(88)

As described above, the Vietnamese Confucianists’ advocacy, late under the Trần, of slavish and wholesale copying of neo-Confucian Sung laws and institutions was attempted twice, during the reigns of emperors Minh Tông and Dụ Tông, but emperor Minh Tông rejected these pale-faced students of Confucianism and after a brief period of adoption Sung laws and institutions under Dụ Tông, emperor Nghệ Tông also stopped them.

However, the permeating influences of neo-Confucianism were to persist throughout the whole legal systems of succeeding dynasties in Vietnam.

## 2. Codification of Confucian criminal policy values and concepts

a. Providing for Penalties to fit the crimes in accordance with Confucian concepts. The Confucian policy of making the punishment fit the crime is strongly implied and suggested in the above Confucian scholars’ debate on the lenient influence of Buddhism on Lý dynasty laws. The five-penalty system with penalties gradually rising in degree of severity served that policy purpose: the light stick penalty with five degrees (from 10 to 50 strokes), the heavy stick penalty ,also with five degrees (from 60 to 100 strokes), penal servitude with three degrees , of working in different places, exile with three degrees (to a nearby region, an outlying region and a distant region) ; and death penalty with three degrees: strangulation or decapitation, decapitation with exposure of the head and death by slicing. Due to the Confucian belief, the severity of decapitation with exposure of the head and of death by slicing is, from the Confucian viewpoint, appropriate for the most heinous crimes. The Chinese and Vietnamese concept of different degrees of death might have originated from the traditional moral belief in preserving the integrity of the body as an aspect of filial piety. Confucius said: “ Our bodies—to every hair and bit of skin—are received by us from our parents and we must not presume to injure or wound them: This is the beginning of filial piety”(89). Tseng –Tzu said, “What constitutes [a man] is given to him by his parents in a condition of perfect

integrity. If he returns it to them in the same condition, that would be genuine filial piety. If he preserves the integrity of his limbs and does not dishonor his name, it may be said that he has preserved the integrity of his being".(90) From this viewpoint, strangulation was the least severe form of death penalty, the offender being able to preserve the integrity of his body. Decapitation was severer. Decapitation with exposure of the head was even more atrocious, as the head of the offender might be paraded around and buried at a different spot than the body. Death by slicing was the most dreadful penalty, as the integrity of the body was completely destroyed and the offender would suffer much pain before death.

b. Definitions of crimes to convey the Confucian concept of stratified and unequal society and the Confucian protection of the extended family or clan against disintegration, including fornication in incestuous situation.

The listing and definition of the ten heinous crimes at the very beginning of the Dynastic codes, as well as the definition of the same criminal act as different crimes with different degrees of seriousness depending who the victim was and what relationship he had with the offender, reflect the Confucian concept of a stratified and unequal society consisting of (i) the sacred Son of Heaven at the top, to be revered in person and even in the things he used, and (ii) the hierarchical society which respects Confucian scholar/teacher and the hierarchical family in which senior relatives dominated junior ones, grandparents and parents were entitled to the filial duty of children/grandchildren, and male/husband dominated over female/wife ; and (iii) the strict protection of the extended family against sexual fornication in incestuous situation.

At the apex of society was, according to Confucianism, the emperor or Son of Heaven. Thus, any criminal act against him and the things he used would be punished to a most serious degree inconceivable in the light of the typical distinction in modern criminal codes between crimes against the person ( whether an ordinary person or the Head of state ) and crimes against property (whether used by a Head of State or by an ordinary citizen). A modern legal analyst can understand the first heinous crime of high treason, i.e. plotting to endanger the sovereign, as deserving the penalty of decapitation with exposure of the head, but it would take a Confucian mind to understand why simply destroying things such as imperial temples and mausoleums—the second heinous crime--should be punished by the same harsh punishment of decapitation with exposure of the head, and especially the offender's followers and relatives informed of the plot should be decapitated and his wife and children seized as serfs for the state. Stealing the emperor's clothes and personal effects, error in preparing food or medication for him, negligently providing an unfit vessel for him, stealing articles of worship in imperial mausoleums and ancestral temples, or just resisting an imperial envoy—all defined as *lèse majesté*, the sixth heinous crime—would be punishable by decapitation and the offender's property confiscated. (91).

There was not one crime arising from the physical act of beating or of killing a person, but because of the hierarchical structure and the male-dominated of the Confucian family, there were many such crimes , of different degrees of seriousness, arising out of the same act of beating or killing, the seriousness being a function of the family relationship between offender and victim. The act of beating or plotting murder of parents/grandparents, or the actual killing of uncle, aunt, elder brother or sister, husband or his parents/grandparents would constitute the fourth heinous crime of wicked insubordination, punishable from decapitation to death by slicing (92). [ Note: husband striking or killing wife was not mentioned here at this definition of heinous crime, and the husband would be punished three degrees lower than ordinary striking or killing by striking; moreover,

husband 's unintentional killing of wife was not punished. Le Code 482; Nguyen Code 284] Plotting murder of a senior relative of the *co* (one year) degree of mourning would be punishable by decapitation, while the same act of plotting murder, against the senior relative of the *ty ma* (5<sup>th</sup>) degree of mourning would be punishable by only exile. On the other hand, a senior relative plotting the murder of a junior relative would be punished only as ordinary murder plot, reduced by two degrees of severity in the penalty.(93)

In contrast, parents/grandparents who struck and killed a child or grandchild, for attempting to educate him after he refused to obey them, would be condemned to penal servitude as heavy work menials (the lightest of the three degrees of penal servitude) (94)

Within the Confucian extended family, there were other articles of law on beating or killing cousins which was punished in a different degree of penalty than for the case of non-relative victim , or on husband killing principal wife or secondary wives and vice-versa, or the spouse perpetrating such crimes on his/her parents/grandparents-in-law, and the penalties for them were different than for the case of non-relative victim. But we do not think we should encumber the reader with more details.

In the larger civil society outside the family, reviling and killing one's teacher (the revered Confucian scholar), or the official administering the area where the offender lived (the Confucian mandarin ), or the imperial envoys, would be also punished more severely than the case of ordinary victims, in special articles of the Codes (95).

Finally, on punishment of the crime of physical violence, the penalty for an official striking another, or killing him as a result, would be punished differently depending whether the victim was of higher or lower rank than he, the offender ( 96)

The moral (not physical ) violation against the parents/grandparents such as denouncing, cursing, reviling, is punished as the seventh heinous crime of lack of filial piety, more severely than committing the same act of denouncing, cursing or reviling another person of no relation . This seventh heinous crime of lack of filial piety also included disobeying, failing to provide for parents/grandparents, getting married and entertaining oneself and not wearing the mourning garb during mourning for them. The punishments for these acts ranged from penal servitude to exile (97)

Because of the large household in China in which relatives of the extended family or clan lived together, and the presence in the same compound of young females who were secondary wives or concubines of the fathers or uncles, were probably tempting to the sons or nephews, the Confucianist-influenced codes of China and the traditional codes of Vietnam which adapted the Chinese provisions, had provided for severe penalties for many situations of incestuous relations between oneself and step-mother, step-grandmother, or adoptive mother, aunt, sister, sister-in-law, daughter- and granddaughter-in-law, adoptive or step daughter, niece, parent's cousin and the wife of that cousin, the wife of a nephew . This crime was the tenth heinous crime and the penalty would be decapitation . The female partner would be exiled. The severe penalties for incest should be compared with the relative mild penalty for flirting with a married woman not related to oneself: the penalty for the latter crime would be only sixty strokes of the heavy stick and demotion and payment of a reparation to the husband; however, consummate sexual relations, i.e. fornication, with anyone's principal wife would be also punishable by death (the Le Code also did not mention relations with mother-in-law) (98).

c. Confucian considerations affecting criminal liability: alleviation of criminal liability with family mutual concealment and eight special considerations , balanced against the opposite principle of aggravation of criminal liability with group responsibility, and ineligibility for redemption and amnesty, for the cases of high treason, treason, grave insubordination and lèse majesté (reasons of state security).

Imitating the T'ang Code, the Lê Code , for the sake of the cohesion of the extended Confucian family or clan, permitted mutual concealment among relatives of the third or closer degree of mourning, among maternal grandparents and grandchildren, among the in-laws such as brother- or sister-in-law, granddaughter-in-law, without requiring the relatives to live together as in China (again, we see the independent household option for junior relative prevailed in Vietnam). The Nguyen Code had a similar rule. (99). Also, if the offense was not one of the ten heinous crimes, the offender could apply to the emperor for reduction of penalty if he was entitled to one of the eight special considerations (*bát nghị*), which originated since the Chou Dynasty in antiquity China. These eight special considerations were the rewards for those who embodied the Confucian values emphasized, or in other words, who had one of the eight qualifications: family/clan relationship (with the emperor or with the preceding dynasties), and long, zealous service to the ruler ( the Confucian loyalty to the emperor-*trung quân*) with distinction of talent, virtue, achievement and high position. (100)

However, there was the other side of the coin: the valued cohesion of the Confucian family/clan has given birth to the principle of group responsibility which aggravated the criminal liability by expanding it and attributing it to a wide circle of the members of the family/clan, such as husband and wife , children and parents or ascendants, relatives and household members , especially for the crimes of high treason, grave insubordination, treason, fleeing the country or surrendering to the enemy ; those who concealed these jointly liable people also were punished. (101)

In any case involving national security concerns, embodied in the just-mentioned crimes (high treason, grave insubordination, treason, fleeing the country, surrendering to the enemy etc.), all the usual special protections of the law for the offenders were no longer available : pardon normally resulting from confession before discovery of the crime was no longer applicable (102), no mutual concealment but duty to secretly denounce them to the authority, because failure to inform was punishable by exile (103); no more ban on accusation by a detainee (104), no more eligibility for the eight special considerations (105), no more ban on investigation beyond the scope of the complaint (106) , permission to pretend to have imperial edict (to use a faked one) to arrest (107) , no more ban on going beyond the hierarchy of court jurisdictions (108) , no amnesty for wicked insubordination and other offenses(109); no redemption of penalty(110).

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If the Confucianist rulers imbued the law with so many Confucianist tenets and attempted to rule by their law, did they go on and respect the law they had imposed on society, i.e. did they respect the rule of law?

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## PART II. THE CONFUCIAN RULERS' ELABORATION OF THE RULE OF LAW THROUGH THE PRACTICE OF CRIMINAL LAW AND PROCEDURE.

We will endeavor to review in some detail the actual legal practice of Vietnam, and of China, under the Nguyễn Dynasty (1802-1884) and the Ch'ing Dynasty (17<sup>th</sup> Century-1911), in order to find out whether there was an ASIAN RULE OF LAW IN THE CRIMINAL LAW AND PROCEDURE OF CONFUCIAN VIETNAM AND CHINA, in the light of various components (standards) of the modern Western concept of the Rule of Law.

The above two periods of Chinese and Vietnamese history have been chosen for study because of their similarities : Vietnam's Nguyễn Dynasty had tried to adopt wholesale the Chinese political and legal practice , as has been pointed out by Professor Alexander Woodside in his book *Vietnam and the Chinese Model* . The Nguyễn Code was almost an exact copy of the Ch'ing Code, if we look at the statutes (Chinese: *lu* or Vietnamese: *luật*) ; the chief difference was that the Nguyễn Code dropped many Ch'ing substutates (Chinese: *ling*; Vietnamese: *lệnh*), and added a few of the substutates of its own .

The comparative approach of measuring 19<sup>th</sup> Century Chinese and Vietnamese practice against the contemporary Western standards of the rule of law may be criticized as an unfair method of applying a particular (Western liberal) framework of constructs to societies that existed long before the emergence of this modern framework of the rule of law, and therefore, a hurried tendency to conclude that traditional China and Vietnam did not have the notion of the rule of law. Such criticism has been directed by Professor William Alford, Director of East Asian Legal Studies at Harvard Law School, against Professor Roberto Unger who had concluded in his book *Law In Modern Society* that, for example, pre-imperial China (436-221B.C.) lacked the rule of law in the Western sense. (111).

However, if we purposely use this modern Western yardstick of the rule of law to measure the performance of 19<sup>th</sup> Century Chinese and Vietnamese societies, and objectively evaluate their traditional legal practice without putting them into a Western “procrustean bed” of the modern Western rule of law, we may come up with rewarding findings. If a relentless point-by-point analysis of 19<sup>th</sup> Century East Asian legal practice in the light of the modern concept of the rule of law would provide some definite, undeniable answer to the question of “whether there is an East Asian rule of law equivalent to the Western concept”, our conclusion on the rule of law in East Asia may look more well-founded.

First of all, we need to identify the salient features or standards of the rule of law as understood in the modern West. We take inspiration from the most comprehensive list of standards mentioned in Galanter's chapter, “Modernization of Law” in the compendium *Law and Behavioral Sciences* (112). In essence, the rule of law serves the purpose of curbing governmental arbitrariness with the help of certain legal rules and institutional arrangements.

(A) Legal rules must be

- (a) uniform, i.e. universalistic or unvarying in their application (there should not be any particularism due to religion, race, class, sex, localities etc.)—this is the protection of equality under the law against governmental arbitrary discrimination against any group—although no country has really reached this criterion fully and even modern democracies have some particularistic law, in favor of minorities, women, the young and infirm, for example.
- (b) rational, i.e. transactional or functional , rather than status-oriented, and also fair (equity is another face of substantial justice)—this is to distinguish the genuine rule of law from rule by law.
- (c) clearly ascertainable from written texts, which could be legislated or amended by regular methods or processes of rule-making---this is to protect people against the arbitrariness or the whim of the government.

- (B) Institutional arrangements must have these features :
- (a) a system of hierarchical courts, organized bureaucratically to have nation-wide and comprehensive jurisdiction to adjudicate cases and revise unjust judgments of the lower courts (there should be no ecclesiastical courts, for example);
  - (b) the court system is to be run by professionals (judges, professional lawyers etc..)
  - (c) the court system should be independent from the executive (legislative, executive and judicial functions are to be separate in personnel and technique);
  - (d) the court system must be governed by well-defined regular procedural rules ( 113).

Our comparison of the practice in the justice systems of Ch'ing China and Nguyễn Vietnam with this idealized Western rule of law reveals that they come out much better than the old image of "Oriental despotism". These systems have attained the rule of law to a significant degree, because they have provided certain substantive and procedural due processes of law against governmental arbitrariness.

When we go through this exercise of putting old wine into new bottle and prove the existence of the rule of law in the legal practice of 19<sup>th</sup> Century China and Vietnam, even as defined in the Western concept and framework of analysis, we think there may be policy implications for the present-day law reform efforts, including the work of international legal assistance programs, in China and Vietnam. These efforts and programs should be built on the rather solid legal tradition of the rule of law of the two countries, even in the midst of the tendency for rule by law . The deeper understanding of the formal legal systems developed by the Chinese dynasties and adapted by the Vietnamese imperial governments prior to the arrival of Westerners would also facilitate a better appreciation of Chinese legal culture and influence in the region of Southeast Asia ( 114).

## SUBSTANTIVE DUE PROCESS OF LAW

### A. REGULARITY OR PREDICTABILITY IN RULE-MAKING AND AMENDING PROCESSES.

Legal rules in general and, in particular, penal rules were not made by the emperor in whim: Throughout the Ch'ing Dynasty, the Statutes Commission played the role of a legislature, or at least, an advisory legislative council which selected completed cases (*ch'eng an*) and imperial edicts that seemed to have long-run significance and designated them as general circulars (*t'ung hsing*), to be circulated among judicial authorities throughout the country; then, a small portion of them would be selected by the Statutes Commission for incorporation as new statutes into the next edition of the Ch'ing Code; this revision of the Code took place every three or five years. This piecemeal modification of the law through elaborate procedures justifies the claim that Ch'ing law embodied the respect for a distinction between laws and administrative fiats. The Le Code and Nguyen Codes also permitted judges to use as precedents only imperial decisions that had been promulgated as a permanent ruling. (115 )

Vietnamese emperors were generally restrained and scrupulous in the exercise of legislative powers; for example, the Minh Mạng Emperor ordered in 1829 that in making rules, thorough research should be first carried out to collect good relevant data, avoid errors, and gather opinions from many people and then the laws should be checked again before new laws were drafted. He said, "Even this takes a long time, this does not matter" (116).

### B. REGULARITY OR PREDICTABILITY IN A RATIONAL APPLICATION OF THE WRITTEN RULES WHICH ARE CLEARLY ASCERTAINABLE.

According to the Ch'ing Code article 415 (Sir Thomas Staunton's translation of the article "*Tuan tsui yin lu ling*") and the Nguyễn Code article 380, the Chinese and Vietnamese courts at all levels were absolutely required to cite the relevant statute or substatute in pronouncing a sentence, and in so doing, sometimes went against the wishes or orders of the emperor in their strict adherence to the written law. The above articles even stated that failure to cite a statute or substatute (for example, not using a verbatim quotation) would bring the penalty of 30 strikes with light bamboo sticks. This is equivalent to the modern principle of *nulla poena sine lege* (No penalty without law). The judges were even forbidden to cite imperial decisions on particular cases that had not been promulgated as a permanent ruling or precedent; if they did so and consequently incriminated an accused, they would be charged with aggravation of a case—an act that was severely punished. Theoretically, the emperor could issue an edict to change current laws, but he could not change written laws if he did not go through the codification or amendment process. There were cases in which the emperor declared he had to apply the penalty specified in law and said: "even we [the emperor] are unable even slightly to increase or decrease the punishment" (the case *In re Ch'eng Hsiao-chu*), or in which the emperor yielded to the Board of Punishments on the citation of certain statute (the case reported by the governor of Shansi, to which the emperor wanted to mitigate the punishment of the junior relative, who beat up a senior relative who committed the initial theft from the junior; but the Board applied a more severe penalty for injuring) (117). Thus emperors had generally followed this advice by Tai Chou for emperor T'ang T'ai-tsung: "Laws promulgated by the government establish fundamental principles that the people rely on. Commands given by the ruler, on the other hand, usually reflect his personal likes and dislikes".

But was it always true that clear written rules were ascertainable with regularity, certainty and predictability?

One can arguably point out some uncertainty or unpredictability in the traditional Chinese and Vietnamese legal systems and say that their rule of law did not quite measure up to the modern standards.

1. Because of the excessive concern to "make the punishment fit the crime" in the codification process, there was a proliferation of sub-statutes that conflicted with one another, and consequently the judges could apply different provisions in similar cases and achieve different dispositions—resulting in unpredictable outcomes for the people.
2. The legal standards were sometimes blurred by the injection and use of the "catch-all statutes" which gave vague standards, such as the provision on "committing an act that ought not to be done" (The Ch'ing Code article 386 on *fei wei*; The Nguyễn Code article 351 on *phi vi*), or the provision on "violating imperial edicts"—which could give rise to abuse of power by the judges.
3. There was no permanent constitutional standard for legal rules, so that the people can challenge these rules as unjust or unlawful and the judges can rule on that claim, but the ultimate touchstone of the legality/constitutionality of the rules was the imperial will, which could at times go on unfettered by normative check. If the emperor was often advised to respect existing laws, he could always issue new and even ex-post facto and arbitrary or oppressive laws and enforce them in his courts, especially when he thought the security of the dynasty was at stake, because there was no separation of legislative and judicial powers—both of them and the executive power were embodied in the sovereign.

However, the above reservations can be explained away and 19<sup>th</sup> Century China and Vietnam could still, to a significant extent, make claim to the rule of law.

1. The conflict between sub-statutes was mainly apparent because the

Codes tried to reconcile many values (loyalty to the emperor, public order, family ties etc...). But within the cobwebs of rules, the judges could find one that reconciled the values and apply it neatly to the case at hand. For example, the judge would make a distinction between two statutes, one on the original planner or conspirator of a crime (*yuan mou, nguyên mưu*) and one on the instigator who issues order at the scene of the crime (*chu shih, chủ sự*) and who would receive a heavier penalty (118).

2. The catch-all statutes regulated only minor offenses and generally for each crime, there was a relevant statute. Anyway, even law in modern times recognizes such general standards as “the general principles of law recognized by the community of nations” (Article 15 of the International Covenant on Civil and Political Rights). So, there would not be an violation of the rule of law, if the provision on “doing what ought not to be done” meant doing some act that would offend Confucian morality or etiquette (*li\_or lễ*), or government policies, or , in other words, “the general principles of moral, ritual and positive laws recognized by the community of East Asian nations”.

3. Although acting as chief executive/law maker/and supreme judge, the emperor was still restrained by (a) fundamental laws set down prior reigns of the dynasty or even prior dynasties (*hsien wang, or tiên vương*) ; (b) censors and other advisors (such as the judicial review agency called The Three High Courts) who would be alert to point out standards of law and Confucian morality; and (c ) not the least, the ideal of the supremacy of law, even vis-a-vis the sovereign, which was embodied in popular sayings such as “ when a prince violates the law, he would be punished as a commoner”, or discussions of hypothetical cases such as Mencius’s supposing that Ku Sou, father emperor Shun, should commit a murder... In other words, there was a good chance that arbitrary or oppressive criminal laws would not be easily issued by the Chinese and Vietnamese emperors, in the same manner as the British Parliament, which, as the saying goes, may do anything except changing a man into a woman, and yet has not dared to violate the unwritten constitution of England (119).

## C .UNIFORMITY OR UNIVERSALITY OF LAW

Uniformity or universal applicability of law is an important factor for equal justice under law. Both the Ch’ing Code article 34 and the Nguyễn Code article 33 provided that national laws apply to the whole population in the national territory, including all peoples of alien culture, i.e. ethnic minorities and foreigners (*hua wai ren or hóa ngoại nhân*). [ Vietnam’s earlier Le Dynasty’s Code article 40 was different: it permitted ethnic minorities’ customary laws to apply to cases involving people of the same ethnic group]. As for the rules of the clans (*tsu or tộc*), the regulations of the guilds, and the customs of the villages, they were only there at the tolerance of the magistrates of the imperial Court. Thus traditional Vietnam and China had replaced local laws with national law, reaching the stage of modern legal system as contrasted to the pre-modern legal system, according to Galanter (he wrote that “a striking contrast between modern and pre-modern law is the way the legal system addresses the local and discordant elements”)

Despite the above, one can point out some lack of uniformity in 19<sup>th</sup> Century Chinese and Vietnamese law and say that the rule of law of that time was still not fully developed.

1. Discrimination against political offenders (120).

The Chinese and Vietnamese Codes stated that criminal offenders of high treason (plot to endanger the emperor), grave insubordination (plot to destroy imperial temples, mausoleums and palaces) and treason (turning against one’s country) would lose both substantive due process and procedural

due process protections. The usual substantive due process protections were: benefit of mutual concealment among relatives; ban on children's or serfs' accusations of parents or master; pardon in case of confession or voluntary surrender; option to redeem penalties or to have reduction of them for offenders who were disabled, young or old; the eight special considerations (*ba yi* or *bát nghi*) for imperial relatives, for long service, for virtue, etc...The usual procedural due process protections were: protection against false or vague accusations; restriction of judges' scope of investigation to the charges in the complaint; protection against false imperial order to arrest. All these substantive and procedural protections would be lost. Not only that, death might be imposed without a semblance of a trial. Moreover, offenders would be subject to the principle of group responsibility (the traitors' family members would be put to death with him).

2. Inequality under the law due to Confucian particularistic standards for personal status; (a) Within the family, there was unequal treatment of senior v. junior members (in punishments for crimes against one another, or in privileges—parents can sell their children), of males v. females (the latter had subordinate position in personal and property rights); (b) In society, there was unequal treatment: (i) privileges for the imperial clan members (eight considerations), for officials (not punished by the bamboo sticks, but only with fine and transfer only), and in China, for Manchu (as compared to Han Chinese); (ii) underdog status for serfs (slaves) and entertainers (*chien jen* or *tiên nhân*), aliens and in China, the Moslems (121).

However, one can explain and mitigate the violations by the 19<sup>th</sup> Century Chinese and Vietnamese legal systems against the rule of law in the following manner:

1. Only the most serious political offenses against the physical security of the state was subject to harsh treatment or loss of due process protections. Anyway, all modern regimes, including democracies, are implacable toward crime against national security. Moreover, in traditional China and Vietnam, the other political offenses still enjoyed the various guarantees of due process; for example, seditious speech such as uttering or writing portentous prophecies about evil events or commenting on ill omens unfavorable to the emperor or using anonymous letters to discuss national issues in an offensive manner (Ch'ing Code articles 256 and 233; Nguyễn Code articles 225 and 302)

2. Unequal treatment of family members and some elements in society were not rampant but checked. In China, officials were not often given the privilege of redemption, and were often punished, Manchus were more severely punished for moral depravity, especially among high-ranking ones. One should remember the comparison made by Professor Bodde about “the savagery with which religious and political nonconformity have been and continue to be punished in the Christian West” (122). Inequality was just a special way to organize society in accordance with the Confucian *li* (propriety). For the greater part of the population, laws were applied with uniformity. In 19<sup>th</sup> Century China and Vietnam, there was no ecclesiastical courts with special powers but only the general courts with general and nation-wide jurisdiction over the population. Moreover, in the case of Vietnam, despite the Nguyễn Code's copying of the Ch'ing Code, the equal role and rights of women in the family continued to be respected in society as customary laws.

## PROCEDURAL DUE PROCESS OF LAW

This means the following institutional and procedural arrangements in the court system.

A. A HIERARCHICAL SYSTEM OF COURTS ORGANIZED TO HAVE GENERAL, COMPREHENSIVE JURISDICTION TO TRY CASES AND TO REVIEW JUDGMENTS OF LOWER COURTS THROUGH THE APPEAL PROCESS AND ADMINISTRATIVE SUPERVISION.

1. There was a hierarchy of courts from the district level (*hsien* in China, *huyên* in Vietnam) to the central government, through which law cases could be appealed by litigants or subject to automatic supervisory review by upper courts without initiation by litigants.

To minimize government arbitrariness, a system of control or checks and balances may be secured not only by horizontal separation of powers of the judiciary from the executive to guarantee judicial autonomy, but also by vertical control of the courts by the upper authorities.

Decisions of the district magistrate as court of first instance could be successively appealed to the next higher levels of administration (prefecture, province, central government and the emperor). If the appellant was vindicated by the higher court, the case would be retried. This right of appeal would reduce any arbitrariness from a district magistrate who was also the police, the coroner and the prosecutor.

Also, the automatic supervisory review process required that all law cases—except minor ones—to be reported to, or reviewed by, the upper levels. After cases had been tried at the district level, the district magistrate had to report about them once a month in “circulating” books to the upper levels for review: the cases of striking with the bamboo stick would be reported collectively to the prefect; the penal servitude cases would be reviewed by the prefect and tried again at the province level and reported collectively by the Board of Punishments; the exile cases would be reviewed at the prefect level, tried again at the province level and the Board; the capital cases would be reviewed at the prefect level, tried again at the province level and the Board and reviewed by the Three High Courts (consisting of the Board, the Censorate, and the Court of Revision) for submission to the decision of the emperor.

The mandarin /judge would be liable for a wrongful decision and condemned for the injustice he caused. That certainly was a much stronger deterrent than can be found in any modern judiciary which grants immunity for judges in their work.

This hierarchical system of courts had general jurisdiction over all strata of the population. There was no ecclesiastical courts competing with this system of courts of general jurisdiction; nor could the existing clans (*tsu*, *tôc*) and guilds play the role of mediator if the district magistrate did not tolerate them for mediation purposes.

2. At the central government level, the review of the criminal cases pointed out the concern for justice.

For cases punishable by less than the capital penalty, the Board was very careful and always consulted the Statutes Commission, a body composed of specialists in the law.

For capital penalty cases, the review process was even more elaborate and provided ample chance for checking against unjust decisions, and for delaying or escaping execution. The Three High Courts had to review capital cases in two stages—*Hui hsiao fa* (Assemblage of Lesser Judiciary) and *Hui tai fa* (Assemblage of Greater Judiciary)—and then remand the cases to provinces if

injustice was found, or memorialize the emperor about the cases, classifying them into immediate execution or death after the Autumn Assizes. Again, the category of cases of death after the Autumn Assizes (this proceeding was open to the public) was subdivided into four categories, three being presented to the emperor for lesser penalty due to circumstances worthy of compassion; only one, called “deserving capital penalty”, was presented to the emperor for checking off for execution. Even those whose names were for imperial checking off might escape death because the emperor, always trying to “match facts with law”, might not give them the imperial vermilion brush. Execution would be carried out only three days after the emperor received repeatedly three times the three memorials asking for execution.

The only exception to the above elaborate procedure on the death sentence was the military emergency situation of treason at a frontier post, in which case execution could be carried out after investigation and confession by the offender, but then a report had to be sent to the emperor ( Ch’ing Code article 33, Nguyễn Code article 32). But this is no more than present-day permission for military courts at the fronts to execute traitors immediately.

For cases which could not be brought to the emperor’s attention through the official appellate process, a person could present a direct appeal to the emperor by beating the drum in front of the imperial palaces or prostrate himself on the road on the occasion of the imperial procession (Ch’ing Code article 332, Nguyễn Code article 301).

As evidenced in the case of Yang Nai-wu and Hsiao Pai-ts’ai , if a defendant were persistent enough, he could overcome a lot of official errors and abuses with the use of the formal checks in the appellate system and vindicate his innocence (123).

And if the emperor was a benevolent and scrupulous one, the convicted person had an added guarantee of due process, as evidenced in this declaration of the Vietnamese Emperor Minh Mạng: “ Night and day, I have worried about how to save the life of the people. I have compassion for the unenlightened masses who do not know how to save themselves and who violate the law, and I fear that the judges would not examine the cases properly. Therefore, anytime a verdict is sent to me, I calmly hold my breath to scrutinize it. If any doubt lingers on, I would not condemn the accused. Even if there are solid grounds for condemnation, I would also review the case five or six times to make sure there is no shred of doubt remaining” (124). This emperor added that even after he had approved a death sentence, the officials should memorialize for his further review if the situation justified it.

Comparing this elaborate appeal process with summary execution in modern times, we can quote Professor Bodde and Morris : “The appellate system in general and more particularly the system for handling capital cases should rightly be regarded as notable creations of the human mind. No doubt the system was complex and over-refined; perhaps it was unduly ritualized; and almost surely it was wasteful of manpower. Nonetheless, it constitutes a kind of ‘due process’ which, different as it is from our own, certainly deserves admiration and respect.” (125)

## B. THE LEGAL SYSTEM WAS RUN BY SOME SORT OF PROFESSIONALS.

Although there was a gap between the literary training of Chinese and Vietnamese officials and their work in the daily realities of administration, the court systems in 19<sup>th</sup> Century China and Vietnam could be deemed as having some sort of professional “bench” and “bar”.

1. The bench. At the province level, China had the judicial commissioner who was the full time legal expert and had considerable autonomy vis-a-vis the governor (126). At the district level, the legal secretaries (127) played the role of the magistrates’ staff attorneys who, having made a thorough study of the legal code and recorded cases, would provide legal expertise that the

magistrates did not have time to learn : giving the latter their opinions on cases, helping them draft official rescripts (*p'i*) endorsing or rejecting civil complaints, or decisions in criminal cases, and various reports to superiors—by the same token, seeing to it that the law be adhered to so that the magistrates could avoid punishment for wrong sentencing. The legal secretaries were treated with respect by the magistrates and the people, were not accountable for their opinions and not subject to disciplinary action, had adequate income to raise family and might remain for life in their position, and thus they formed a group of independent legal professionals.

2. “The Bar”. Although magistrates frowned upon habitual litigation tricksters (*sung kun. tung côn*), regarding them as trouble-makers who would stir up dispute for a price (Yang Nai-wu in the above mentioned case was challenging magistrates and yamen a lot by pointing out their errors), the law permitted a role for scribes i.e. people who helped preparing legal documents on behalf of illiterate litigants, so long as there was no attempt to falsely accuse others (The Ch’ing Code article 340, The Nguyễn Code article 309). If the scribes were friends or relatives of the litigants, they would be viewed more favorably as having a legitimate interest in the persons they helped.

### C. WELL-DEFINED REGULAR PROCEDURAL RULES.

There were guarantees for the defendant in various stages of litigation.

#### 1. Accusation.

Anonymous accusation was forcefully suppressed to prevent unfounded charge against innocent people (du to revenge etc...) (The Ch’ing Code article 333, The Nguyễn Code article 302). False accusation was punished more severely than for the crime accused. If the crime accused would lead to the bamboo stick penalty, the false accuser would suffer two degrees more severely; if it would lead to the stick penalty, penal servitude, exile or death, the increased penalty for the false accuser would be 3 degrees more with the maximum as exile to 3,000 *li*, except when the victim had been executed, in which case the offender would also be condemned to death.

#### 2. Pre-trial stage.

--Search and seizure. There were definite rules: runners could not carry out search and seizure by themselves, but had to be accompanied by the magistrates or the security officers. Beating people during arrest was punished.

--Judicial torture was closely regulated. This explicit regulation of torture makes 19<sup>th</sup> Century China and Vietnam better than the unbridled abuses of torture in many countries in modern time. Torture was legally limited to cases of refusing to confess after confrontation of all the accused and witnesses. It was limited in the types of instruments used and in the number of times applicable (30 blows a day). The magistrate had a self-interest to find out the truth in other ways than by torturing, as he could be punished for wrong sentencing if at the upper courts, the defendant recanted, saying he had been tortured beyond the limits.

--Right of cross-examination. Witnesses and accusers had to be confronted with the accused and no one can change testimony.

--Detention was limited by the deadlines imposed on the magistrates. Harsh treatment of prisoners were severely punished (exile to 3,000 *li* or exile to malarial region) (The Ch'ing Code article 398, The Nguyễn Code article 363) (128).

--The magistrate had to disqualify himself if one party was his relative, teacher, former boss or public enemy. If he persisted in assuming jurisdiction on the case in such circumstances, he would receive 40 blows, more severely than that if the verdict was unjust (The Ch'ing Code article 335, The Nguyễn Code article 304)

--The clerks could not doctor the defendant's testimony (The Ch'ing Code article 423, The Nguyễn Code article 388).

### 3. Public and timely trial

At the district level, the trial was open to the public which could stand and watch as spectators. The Autumn Assizes proceedings in the capital were also open to the public. Thus, public scrutiny could give the defendant some assurance that the officials would not act arbitrarily.

Deadlines for rendering judgments were very stringent. Thus there was less chance for "justice delayed is justice denied". Civil cases must be decided in 20 days'; criminal cases at the district level, in 20 days, at the province judicial commissioner's level, in a month. For homicide, the magistrate had to make an inquest on the spot; if he failed to do so, he would be demoted or transferred; and he had to make a report to the superiors at once; any delay would be punished; he must apprehend the killer within six months; failing to do so, he would be suspended without pay, and demoted if that prolonged to one year. If the murderer was tried again at the upper level, the deadline for trial would be six months in ordinary homicide and four months in aggravated murder, counting the total time from the district to the province governor. At the Board level, cases had to be tried quickly also: ten days for bamboo stick penalty cases, twenty days for penal servitude and exile penalty cases, thirty days for homicide and robbery. Death penalty cases assigned to The Three High Courts must be tried within seventy to eighty days. In Nguyễn Vietnam, officials were rated according to whether they observed the time limits or not.

### 4. Post trial : Judgment

--The accused had to accept the judgment in a written statement. The judgment would be also sent to his relatives if the penalty was exile, penal servitude or death. If he retracted his confession or appealed, there would be a retrial.

--A wrong judgment would give rise to a severe punishment for the officials (The Ch'ing Code article 411, The Nguyễn Code article 376). Not only impeachment but also criminal penalties may be imposed for both unintentional mitigation or aggravation of a case (*shih ch'u* or *shih ju*; in Vietnamese: *thất xuất, thất nhập*) and intentional mitigation or aggravation of a case (*ku ch'u* or *ku ju*; in Vietnamese: *cố xuất, cố nhập*): from loss of salary to demotion to subjection to the same penalty suffered by the wrongfully condemned person (i.e. death for the official if the person was executed). This was a great deterrence to sloppy adjudication. The clerks themselves would be considered as the principal responsible persons if they did not point out the error, but would be given a three-degree lower penalty. Again, as evident from the Yang Nai-wu case, a wrong

judgment could be corrected, and the responsible official all pursued, if the litigant was persistent enough (129).

BUT we must concede that the 19<sup>th</sup> Century Chinese and Vietnamese rule of law suffered from the LACK OF A FIRM RESTRAINT ON ARBITRARY RULE WITH THE HELP OF A CLEAR SEPARATION OF POWERS BETWEEN THE JUDICIARY AND THE EXECUTIVE OR LEGISLATIVE BRANCHES OF GOVERNMENT. There is no independent institution before which one could challenge a legal rule or a wrong decision, or no independent judiciary to act as a counterweight of political power abuses or a final arbiter in the people's struggle for their rights under the rule of law. We can only say that, as stated above, THERE WERE CERTAIN RESTRAINTS ON EXECUTIVE ARBITRARINESS, INCLUDING THE EMPEROR HIMSELF, AND CERTAIN VERTICAL CHECKS ON THE LOWER COURTS BY SUPERIOR COURT, in the form of appeals and automatic reviews of judgments.

Near the end of the Ch'ing Dynasty, there was ANOTHER SOURCE OF CHECKS AND BALANCES: THE MEDIA AND PUBLIC OPINION, as the role of the newspaper Shen Pao and the intervention of the high and middle bureaucrats, including the Censors, in the Yang Nai-wu case for example.

## CONCLUSION

The issues of rule by law and rule of law, and the tensions between them and their complementariness, in the Confucian states of Vietnam and China, are actually the eternal issues in all human societies.

Even in today's world, there is tension between those who advocate that the state must be run by the rule of law, which is derived from the consent of the governed, and under which, everybody, including the rulers, must live and respect, and those who claim that if the state enacts, for governing society, enough reasonable laws, through certain process, then the governed must respect them and people who violate these laws deserved to be punished. If anyone wants to extend the discussion and broach on the implication of Confucian influences in the law for today's world, we do not go further in this paper to discuss whether, beyond the rule of law, there is the need for the additional respect for democracy, because democracy, although a desirable ideal that can be and should be advocated without resorting to violence, is actually not a requirement under international law—each state is sovereign in deciding its own political regime, as the International Covenant of Civil and Political Rights avoids mentioning it, and mentions only the need for periodical free and fair elections. Nor do we go further to discuss human rights, which is for another day (and for which we already published in 1988, at the University of California-Berkeley, the book on *The Vietnamese Tradition of Human Rights*); suffice it to say that for the promotion of human rights, the rule of law is a sine-qua-non precondition, because if there is no substantive and procedural due processes of the rule of law, to save the integrity of the person and the basic due process rights mentioned in the second half of this paper, that person would not be in a position to enjoy all the rest of other human rights, such as economic, social and cultural rights.

Even restricting the discussion to only the rule by law and the rule of law, certain conclusions can be derived from this survey of Confucianism in the traditional legal system of Vietnam.

The rule by law in the Confucian state of Vietnam has promoted good tenets for human behavior in society, especially the egalitarian merit system in the civil service examination, which encouraged self-perfection and learning, the laws and regulations, and the Confucianist code of ethics promulgated by edicts, for governing family and civil relations, which inspired people to respect one another, with decency, in a matrix of mutual obligations, thus helping consolidating social order and harmony.

On the other hand, there can be oppressive influences of Confucianization of the law, in the harsh criminal punishments for the political offenses against the central government/the imperial court, especially against the ruling monarch at the top (which can be considered as unjustifiable and inhuman by modern day standards), the unequal treatment in the law of the privileged Confucian class versus the underprivileged classes, of the junior and senior relatives, of men and women, the restrictions in the law and in policy on religious freedoms of the Buddhists, of the people in their popular creeds, and of the Christian converts during persecution periods, due to the wish of the Confucians to hold ideological monopoly with the teachings of the Confucian sages.

To give but a few examples of the use of Confucian tenets and practices by the Confucian rulers and officials to oppress alternative ideological trends or entities, in the name of their claim to the monopoly of an official ideology: even during the Ly and Tran dynasties that promoted Buddhism, there were Confucian court officials who tried to badmouth Buddhism and asked the emperors to issue edict to restrict the rights of the Buddhist ; in all dynasties, the Confucian courts insisted on the right to recognize, and to restrict, the village genii (Thần Thành Hoàng) that the people worshipped; vis-s-vis foreign ideologies such as Catholicism, the Confucianist rulers , at first seemed to be polite and tolerant, later changed into hostility with many edicts for persecuting the Catholic missionaries and Vietnamese converts ; they were criticized under the Lê Dynasty (granted that the Catholics were insolent in their language against the Vietnamese customs) but later on, they were killed under the Nguyễn dynasty (also for suspected of collaborating with the colonialist armed forces ); even when the court of Emperor Tự Đức (1848-1883), after defeat in the face of the invading French army, already issued an edict granting freedom of religion to the Catholics, the extremist Confucian scholars in the Văn Thân movement kept on persecuting and killing the Catholic converts.

But the oppressive impacts of the Confucianization of law, or the Confucianists' Rule by Law, has been tempered by the counterpoint development of the Rule of Law: the Confucian rulers in Vietnam (and China) have gradually built up a reasonable criminal law and procedure system that respected to a great extent the substantive and procedural due processes, even as understood in the light of the modern standards of the Rule of Law, because these traditional substantive and procedural processes were equivalent to those modern standards of the Rule of Law—although traditional Vietnam did not have a constitution in the modern sense of the word, as the supreme law of the land governing over everybody, and the kind of legislative process for other lower-echelon laws, that reflects the consent of the governed, and the judicial review by a supreme court as a final arbiter interpreting the laws. Probably this respect by the Confucianists for the Rule of Law was due to self-interest for social stability. Probably this was also due to a sense of fairness, justice, compassion and paternalism that permeated many teachings of Confucianism and neo-Confucianism. For example, Emperor Tự Đức, used the traditional Confucian reference to the people as “*con đỏ của Triều Đình*” (the red-skinned [newly born] infants of the Court) when he reprimanded, and threatened severe punishment of, the Văn Thân Confucianists who harassed and persecuted, and in some cases, killed the Catholic converts without evidence of their crimes

ascertained in a fair judicial process. Under the previous Lê Dynasty, there was a whole Code of Criminal Procedure to protect the people against governmental arbitrariness, called *Quốc Triều Khâm Tụng Điều Lệ* (Procedural Code of the National Dynasty ) ( 130 ), which was quite an innovation during imperial times in China and Vietnam (usually each dynasty had only one main “Code of The National Dynasty”) ; and under the Nguyễn, ever since the founding Emperor Gia Long who promulgated the dynasty Code of *Hoàng Triều Luật Lệ* (usually referred to as the Gia Long Code) with details on due process and the Emperor Minh Mạng with careful administration of justice, there had been reasonable due process protections in that Code. Thus there was a tradition of due process protection of the law against governmental arbitrariness in traditional Viet Nam, equivalent to the Rule of Law in the modern Western sense.

The Chinese spoke of the Ch’ing Code with pride, as Sir Thomas Staunton reported (131). Nowadays, Confucianism has been honored again in the People’s Republic of China after a long period of being discarded from public life: taught in schools even to children, researched and propagated in Confucius Institutes around the world, and promoted by the leadership (132). And the Vietnamese proudly say they had, in the Codes of the Lê and Nguyễn Dynasties, and other evidence from the prior Lý and Trần Dynasties, not only the Rule of Law in their history, but also a high degree of respect for human rights, for which the rule of law was a foundation (133).

#### NOTES

(1) Karen Turner, “Rule of Law Ideals in Early China”, *Journal of Chinese Law*, Spring 1992, at 9-11)

(2) *Đại Việt Sử Ký Toàn Thư*, translated by Cao Huy Giu, Hanoi, 1967, 1968, in 4 volumes, hereinafter designated as TT, I: 74,83,84.

(3) *Hou Han Shu*, in *Er Shih We Shih* (Twenty Five Histories), 1934 Reprint, book 34, p.0747, reproduced and quoted in Vũ Văn Mẫu, *Cổ Luật Việt Nam Lược Khảo* ( Vietnamese Traditional Law, a Short Treatise), Saigon University, 1970, at 61-62

(4) For a comprehensive presentation of evidence of T’ang Code’s (as well as Ming’s and Ch’ing code’s) influence on Vietnamese dynastic codes, including Tables of Conversion from codes to codes , to compare articles by articles, for similarities and identicalities--and differences--, see Nguyễn Ngọc Huy, Trần Văn Liêm and Tạ Văn Tài, *The Lê Code: Law in Traditional Vietnam*, Athens, Ohio: Ohio University Press, 1987, 3 volumes; hereinafter called Huy, Liêm, Tài, *The Lê Code*.

(5) *Hou Han Shu*, note 3, p.0898, also quoted in Vũ Văn Mẫu, at 81

(6) *San Kuo Chih*, book 53, Shanghai, 1930-37

(7) TT, I: 147

(8) TT, I:181

(9) Hoàng Xuân Hãn, *Lý Thường Kiệt*, Hanoi, 2 volumes, 1949, 1950, p.402.

(10) TT, 2:10.

(11) TT, 2:133

(12) TT, 2:21

(13) TT,2: 145

(14) TT, 2:158

(15) TT, 2: 198

(16) TT, 2: 194,197,198

(17) See John K. Whitmore, “Chiao-chih and Neo-Confucianism: The Ming attempt to transform Vietnam” *Ming Studies* 4:51-91 (Spring 1977), at 65-72

(18) Lê Quý Đôn, *Phủ Biên Tạp Lục* (Miscellaneous Items on the Pacification of the Frontier), translated into Vietnamese by Lê Xuân Giáo, Saigon, 1972, vol 1: 292.

(19) See Nguyễn Ngọc Huy, Trần Văn Liêm and Tạ Văn Tài, *The Lê Code: Law in Traditional Vietnam*, translation and annotations in 3 volumes, Ohio University Press, 1987, p.21-28, for the reasons why we think the Lê Code, even popularly known as the Hồng Đức Code (Hồng Đức was the reign title of Thánh Tông), was actually promulgated in 1428 and then amended/ supplemented over the years or centuries, with many later compilations. When we have references in this paper to The Lê Code, articles and annotations such and such, the references are the numbered articles and annotations in this work by Huy, Liêm and Tài.

(20) See John K. Whitmore’s Ph.D. dissertation, “The Development of the Lê Government in Fifteenth Century Vietnam” (Cornell, 1968).

(21) *Hàng Việt Luật Lệ* (Chinese language version), at Harvard Yenching library, and Philastre, P.L.F. *Le Code Annamite*, Paris, 1909, Vol 1: p. 10 and 13-14...References in this paper to the articles of the Nguyễn Code would be to the numbered articles in this translation of the Nguyễn Code by Philastre.

(22) When Gia Long requested the title of King of Nam Việt for investiture, The Ch’ing did not want anybody to remember the state of Nam Việt (Nan Yueh) of 207 B.C., which also included Kwang-tung and Kwang-his provinces of China, and a compromise solution was made by the Ch’ing emperor: Việt Nam was to be the country’s name.

(23) TT, 1: 185-186

(24) Ngô Tất Tố, *Văn Học Đời Lý* (Literature of the Ly Dynasty), 1941, reprinted by Xuân Thu, Houston, Texas, 1976, p. 21.

(25) Dương Quảng Hàm, *Việt Nam Văn Học Sử Yếu* [Precis of Vietnam’s Literary History], Saigon: Ministry of Education, 1968, 10<sup>th</sup> edition, p.239

(26) “*Thiên Vị chiếu*”[Edict bequeathing the Throne], reproduced in Ngô Tất Tố, *Văn Học Đời Lý*, Op.cit. ,p110 .

(27) Dương Quảng Hàm, Op.Cit.,p. 273-276

(28) Phan Khoang , *Việt Sử: Xứ Đàng Trong*, Saigon, 1967,reprinted by Xuân Thu, Houston, TX, Vol 1: 235-237, 248.

(29) quoted in Liam C. Kelley, “Confucianism in Vietnam : A state of the Field Essay”, *Journal of Vietnamese Studies* (University of California), Vol 1: nos. 1 & 2, p.352.

(30) For lèse majesté, see Lê Code articles 2,430 and 431; Nguyễn Code arts.2, 229 and 226, in which we also mention corresponding Chinese codes’ law and regulations. On criticizing the emperor or resisting the imperial envoy being punished as lèse majesté, see Lê Code 2,132. When we mention articles in the Le and Nguyen Codes, in all the subtopics that we will discuss below, readers can find the corresponding articles or equivalent regulations of China’s T’ang, Ming and Ch’ing Codes in Table of Comparison of the Codes in the Appendix and also in the annotations of the Lê Code articles, in our work: Huy, Liem, Tai, *The Le Code: Law in Traditional Vietnam*, together with our discussion on their similarities and differences and their content. Hereinafter in this paper, for simplification, and for not distracting the readers too much, we will NOT mention these corresponding or equivalent articles/regulations in Chinese law, and will concentrate on Vietnamese law, but we would like the readers to know that they CAN EASILY FIND the corresponding articles of the Chinese codes in the Table of Comparison and the Annotations in our book, *The Le Code: Law in Traditional Vietnam*.

(31) A. Woodside, *Vietnam and the Chinese model*, Harvard University Press 1967, pp.207.208.215. The author, then Harvard Professor of Vietnamese History, pointed out the close parallels between the political, administrative and legal institutions of China under the Ch’ing Dynasty and Vietnam in the first half of the 19<sup>th</sup> century under the Nguyễn Dynasty.

(32) Nguyễn Code article 223.2. For the 1663 decree on Forty-Seven Articles on Moral Education , see pp.110-115 in Huy, Liem, Tai, *The Le Code: Law in Traditional Vietnam*, 1987. About punishment for belief in and using witchcraft and incantations, see Lê Code 423; Nguyễn Code 258 was mainly on using them for harming others.

(33) See chapter 4 in Tạ Văn Tài, *The Vietnamese Tradition of Human Rights*, University of California-Berkeley, 1988.

(34) Woodside, note 31, p.186

(35) See Tạ Văn Tài, *The Vietnamese tradition of Human Rights*, pp. 219-222, on education.

(36) Lê Code articles 215, 289 and annotations; Nguyễn Code article 75.

(37) Lê Code art.288 ; Nguyễn Code 75 ; Prior to the Lê, in 1396, Emperor Trần Thuận Tông already issued an edict unfrocking monks who had not reached 50 years of age

(38) Lê Code 301

(39) Lê Code 332. Nguyễn Code 143 and 144 condemned unauthorized worshippers of spirits and sorcerers. In 1437, General Lê Ngân, commander of an army corps, was accused of worshipping in his home the bodhisattva Quan Âm (Kuan-Yin), Goddess of Mercy, in order to pray that the emperor be induced to love his daughter Nhật Lệ, who was one of his three secondary wives (*phi*). She was then demoted to the status of inferior wife (*tân*). The female medium was exiled to a distant region.

(40) Lê Code 464 on “retired scholars”. Lê Code 2,489; Nguyễn Code 2,280 on Confucian teachers.

(41) Lê Code 2,411, *Hồng Đức Thiệu Chính Thư* paragraphs 211,234;

Nguyễn Code 2, 223.

(42) Lê Code 597,599, 600 ; Nguyễn Code 91

(43) Lê Code 599, 432

(44) Particular to Le Code 144 ; Le Code 104, 105

(45) Le Code 83,209

(46) Le Code 95,239.216

(47) Le Code 100,107,108 ; Nguyen Code 54,55 139,149, 150

(48) Le Code 89

(49) Le Code 213, 709

(50) Lê code 314. Emperor Lê Thánh Tông ordered the Board of Rites to fix the details for marriage ceremonies and the gifts required: (a) a proposal of marriage (*ngợi hôn*), (b) determination of marriage (*định thân*) or request for name (*vấn danh*) (c) presentation of gifts ( *nạp trung*), (d) reception of the bride into the bridegroom’s house (*nginh hôn*), and (e) the bride’s greeting of the bridegroom’s parents on the day after the marriage and greeting of the bride’s parents by the bridegroom three days later. Huy, Liem, Tai , *The Le Code*, vol.2, p 177.

(51) Lê Code 147, 148 . Addressing the emperor, the word “*tấu*” (memorialize) was used, but addressing an official, the word “*thân*” (report) must be used .

(52) Lê Code 125,126. Using taboo imperial names as personal or style name would be punishable by exile or death.

(53) Lê Code 141,142 and Annotations on them in Huy, Liem, Tai, *The Le Code*; Nguyễn Code 156, 164. In the Annotations, we point out that sumptuary laws were numerous, with traces of them in the remnants of Lý Dynasty laws; that some decrees in 1661,1664,1665 specified even details on clothes and articles of daily use for different social classes; and that the Vietnamese customs of paying “the debt of the mouth” by inviting people who had extended hospitality to them to come and have dinners, had constituted such a heavy financial burden to the people that the Confucian government had to issue the rule of frugality in funerals. But the people continued to go against that

Confucian ideal in national law. That was why Nguyễn Code article 164 was unusual: it was one of only several provisions in the entire Code which reflected Vietnamese rather than Chinese legal precedent.

(54) Lê Code 143 and Annotation mentioning numerous historical incidents related to this rule.

(55) Lê Code 226 and Annotation pointing out the area of land plots allowed to different ranks of officials.

(56) Lê Code 287,302, 185,193,531,673,717 and Annotations

(57) Lê Code 2,7, 130,317, 543; Nguyễn Code 2, 98,160. See Annotation to Lê Code art. 317 for decrees under the Lê punishing more severely women marrying during mourning and permitting a way out by marrying on the day of death, when hopefully the deceased might still resurrect during the first two days of death (the custom of *cưới chạy tang*, or marrying ahead of mourning).

(58) Lê Code 408. Nguyễn 338. However this rigid Confucian rule, that had been interpreted as a ban on making one's wife pregnant during the mourning for parents (3 years), was later not enforced under Lê Hiến Tông (1498-1504), for fear of making people die lonely and heirless and therefore fail in their filial duty. See Annotation of Lê Code 408.

(59) On the equal property rights and other personal rights of the Vietnamese women under the Lê Code, in contrast to the Chinese women's status, see part II of the article by Tạ Văn Tài, "The status of women in Traditional Vietnam: A comparison of the Code of the Lê Dynasty with the Chinese codes", *Journal of Asian History*, Vol. 15, no. 2 (1981), pp. 115-141. See also Huy, Liem, Tai, *The Le Code*, Vol. 1, pp. 80-84

(60) Lê code, 389,390, 391, 392,293,395, 396, 398, 400. The Lê Code was more flexible than the Nguyễn Code 76,83 which adopted the Ch'ing Code notion (more rigidly Confucianist) that the ancestor worship property had to be entrusted to the eldest son and then the other son of the principal wife first, and not to whoever was the eldest son of all the wives (principal and secondary and concubine), or even the eldest daughter, as in the Lê Code. For the intricacies of the inheritance of ancestor worship property and also of the general estate—which we cannot go into detail in this general survey on Confucianism in the legal system—see annotations to Lê Code 388- 398 in Huy, Liem, Tai, *The Le Code*.

(61) Lê Code 314

(62) Punishable in Lê Code 324, Nguyễn Code 102, despite the fact that Vietnam indigenous culture prior to Chinese influence might have some form of levirate marriage (marrying brother's widow)

(63) Wife's offenses of accusation: Le Code 504, 502, 503, Nguyen Code 306 (punishable by exile or penal servitude) ; of plotting murder or murder : Le Code 416, 2, Nguyen Code 253,2 (punishable by decapitation and death by slicing). Other examples on husband: husband was punished more lightly than wife when striking wife (three degrees more lightly than striking an unrelated person, 80 strokes of the stick) or killing her (even more lightly when killing wife who beat up his parents) ; husband exonerated completely if it was accidental killing, Le Code 482, Nguyen Code 262.

(64) For example: accusation, bringing suit against husband's parents or grandparents , Le Code 511, but the Codes were silent on husband's bringing suit against wife's parents, grandparents.; striking or reviling husband's senior relatives, Le Code 483, Nguyen Code 289,299, but nothing in law about husband's offense against wife's relatives; wife would be punished, but husband was not, if participating in musical or theatrical entertainments during spouse' s detention, Le Code 131, Nguyen Code 161; wife would be punished, but husband not punished but only lost right as husband, if leaving home without authorization of the spouse, Le Code 321, Nguyen Code 108 ( the latter allowed the husband of the woman in flight to sell her; if she remarried while absconding, she would be strangled).

(65) Le Code 310, Nguyen Code 108.

(66) Le Code 131, Nguyen Code 161. Lê code 321 on wife's desertion: punishable by penal servitude and her property confiscated Also no marriage when parents were in detention, Le Code 131, 318

(67) Le Code 333

(68) Le Code 2,506 Nguyen Code 2, 307(duty of children to obey and to provide sufficiently for parents/grandparents, failure would be the same heinous crime as denouncing, cursing and reviling them, or striking them) , Le Code 590 (children liable to pay parents' debt), Le Code 475,476, Nguyen Code 288,298 (penalties specified for reviling, beating, killing ), Le Code 504, Nguyen Code 306(crime of denouncing parents/grandparents) . Killing siblings was also the heinous crime of wicked insubordination (Le Code 2, Nguyen Code 2). Respect was owed to parents/grandparents during mourning and during their incarceration , Le Code 130, 131, 317 (wearing mourning garb and no marriage during mourning, no entertainment during parents/grandparents' incarceration); Nguyen Code 160,161,98 .

Reviling and striking teachers in the Confucian society was punished three degrees higher than in ordinary cases, because they were almost part of the extended family. (Le Code 489, Nguyen Code 280).

(69) Le Code 38 on suffering penalty for parents/grandparents . Under the Nguyen, the practice of allowing children to suffer either the stick penalty for their parents continued to be common practice, though not sanctioned by any legal provision. The Le Code 39 and Nguyen Code 31 on mutual concealment of relatives.

(70) Le Code 485, 425. Nguyen Code 292 did not give a lesser penalty in case of a fight leading to death.

(71) Le Code 511, 512

(72) Le Code 297.Annotation cites a number of cases under the Trần and

L ê.

(73) See Le Code 642 and Annotation on the extensive and flexible use of this *phi vi* article by the judges. Nguyen Code 351.

(74) The Le Code 285 and the Nguyen Code 74 (remarkably broke away from the usual copying of the Ch'ing Code, in one of the rare instance of independence in legislation) provided that the maintenance of the population registers was the responsibility of the village officials. See more detailed discussion in Huy, Liem, Tai, *The Le Code*, vol. II, pp. 165-166.

(75) See Le Code 319 and Annotation. Nguyen Code 102

(76) TT, 1: 219

(77) TT, 1: 255, 278

(78) TT, 1:203,204

(79) TT, 1: 218, 221

(80) TT, 1: 229-230

(81) TT, 1: 232

(82) TT, 1:242

(83) Phan Huy Chú, *Lịch Triều Hiến Chương Loại Chí* (Annals of the Laws and Institutions of Successive Dynasties)—Section entitled *Hình Luật Chí* [Law or Legal Section], book 33-38, translation by Cao Nãi Quang, Saigon, 1957, herein after referred to as *H.L.C.*, p.519 and p,523

(84) H.L.C., 525, also TT, 1: 278

(85) TT, 1: 221

(86) TT, 1: 228

(87) TT, 1:242. But the leniency might be due to the lack of evidence against Lê Văn Thịnh, a high dignitary with great achievements. The emperor was sailing in a fishing boat on lake Dâm Đàm, watching a fisherman at work. Suddenly, fog rushed in on the area and amidst the fog, the sound of the paddles of an approaching boat was heard. As the fog cleared off , a tiger was seen in that boat. The fisherman, Mục Thận, threw the net over the tiger which then became Lê Văn Thịnh. The truth might be that Thịnh was boating out into the lake to look for the emperor when the fog was coming, and the emperor did not see him clearly and mistakenly took him for a tiger.

(88) TT, 1: 264-265

(89) *Hsiao Ching* or the Canon of Filial Piety, in *the Sacred Books of the East*, translated by James Legge, Oxford, 1899, Ch. I, p. 466

(90) *Li Chi* , or *Li Ki*, as translated by S. Couvreur, 1933, T. II, p.306

(91) Le Code 2, 411, 430,431; Nguyen Code 223, 226,229

(92) Le Code 2,475,416. See Annotation of Le Code 475 in which we refer to *Hồng Đức Thiệu Chính Thư* , paragraph 299, to point out that: beating these people would be subject to decapitation,

but murdering parents would be subject to death by slicing.. Nguyen Code 288 ,298 and 253. Unintentional killing of parents/grandparents was, however, punishable by exile, a lighter penalty than death by slicing for murder or strangulation for intentional homicide (or striking and killing) in these articles. Similarly, modern law does not punish severely any unintentional crime.

(93) Le Code 416, Nguyen Code 253,255

(94) Le Code 475, Nguyen Code 288, 298 punished even more lightly : 100 strokes for beating and killing, one year of penal servitude plus 60 strokes of the heavy stick for murder : there was insufficient protection of children from abuse and violence by parents/grandparents, compared to modern law.

(95) Le Code 2,489,418,487. Nguyen Code 2, 280 252

( 96 ) Le Code 472, 488 ; Nguyen Code 277,278,276

(97) Le Code 2 (acts defined as heinous crime), 504 (denouncing),423 (cursing),475 (reviling), 506 (disobeying and not providing for), 317( getting married during mourning) and 130 (entertaining during mourning); Nguyen Code corresponding articles: 306,335,258, 288,298,307, 98 and 160.

(98) On incest : Le Code 2, 406; Nguyen Code 2, 334. The Nguyen Code punished the female partner as severely as the male partner. See annotation to Lê Code 406 for a number of cases and other regulations. On adultery or fornication with a married woman: Le Code 401. On flirting with non-related women : Le Code 405; Nguyen Code 332

(99) Le Code 39, Nguyen Code 31.

(100) Le Code 3,4,6 ; Nguyen Code 3,4 . See Annotation to Le Code 3 for a description of the Book of Rites statement on the eight special considerations and the distinction between rites (*li*) and punishments (*hsing*), and the application of the eight special considerations through the various dynasties. Our Annotation 3 also discusses another principle not clearly the result of the impact of Confucianism but worth mentioning : redemption of penalty.

(101) Le Code 307, 341,411, 412, 653, 628 . Nguyen Code 223, 224. This group responsibility principle resulted in the tragedy of the condemnation to death, on the basis of the group responsibility, of all three clans of Nguyễn Trãi, advisor to the founding and succeeding emperors of the Lê, because of the suspicion that his young, beautiful and literary secondary wife Thị Lộ caused the death of the young and frolicking emperor Lê Thái Tông, on his visit to Nguyễn Trãi's Lê Chi Garden and being entertained all night by her, whom he had been fond of and used to jest with in the imperial palace, as night-and-day attendant.

(102) Le Code 18, See Annotation also for cases where pardon was granted; Nguyen Code 24,26.

(103) Le Code 39, 500; Nguyen Code 223, 224.

(104) Le Code 507: Nguyen Code 308; The Nguyen Code, but *not* the Le Code , banned women from suing, except for high treason, grave insubordination, treason, impiety of children, and murder, injury, robbery, deceit or economic crime against themselves or persons living with them; in other words Lê Dynasty gave full capacity to women to pursue litigation.

(105) Le Code 4; Nguyen Code 4

(106) Le Code 670; Nguyen Code 371

(107) Le Code 519; Nguyen Code 321, 322

(108) Le Code 672; See Annotation for detailed discussion of levels of jurisdiction; Nguyen Code 301.

(109) Le Code 11 mentioned only wicked insubordination: Nguyen Code 15 ; Historical events under the Le and Nguyen Code enumerated more offenses than just wicked insubordination, that were also not eligible for amnesty. There were also general amnesties for the entire range of crimes under The Lý and The Trần.

(110) Le Code 4, 14, 16 and Annotation of Article 6; Nguyen Code 4, 12,21.

(111) Professor Roberto Unger's viewpoint, expressed in his well-known book *Law in Modern Society*, was scathingly attacked by Professor William Alford, also Harvard Law School professor, in his article "The Inscrutable Occidental ? Implications of R.Unger's Uses and Abuses of the Chinese Past", 64 *Texas L. Rev.* 915 (1986.)

(112) *Law and Behavioral Sciences* , edited by Lawrence M. Friedman and Stewart Macaulay, is a compendium of many articles written by a wide range of scholars in law and social sciences. We find that among many writings on the rule of law in the modern Western sense , Galanter's summary of the standards or features of the modern rule of law in his chapter ("Modernization of law" ) in that book is the best, because it encompasses the essential features of the rule of law.

(113) Galanter omitted the requirement of regular procedural rules in his summary of the characteristics of the Rule of Law; but procedural rules are all important in deciding substantive justice, as all lawyers know, and as best described in the motto of the American revolutionaries who fought against Britain : "no taxation without representation".

( 114) In contrast to the concept of Oriental despotism, as in the title of the book of Wittfogel, *Oriental Despotism*, (Yale University Press, 1957), the policy implications of the Traditional Chinese and Vietnamese Rule of Law have been subject of many international conferences. There was a 4-day conference beginning May 30,1998 in Fanchengang City, in Quangxi Shuang Autonomous Zone in China, organized by the State Commissions of Social Sciences of the two countries for 56 Chinese and Vietnamese scholars and specialists. In June 1998, there was another conference in China on "Confucianism and Human Rights" in which Chinese participants insisted that there was much overlap between Confucian Tradition and Western Tradition. The American co-chair of the conference, Columbia University Professor William T.deBarry observed that the Asian countries that share the Confucian tradition all embrace the concept of human rights.

( 115) On rule-making and rule-amending processes in Ch'ing China, see Bodde,D. and C.Morris. *Law in Imperial China*. Cambridge: Harvard University Press,1967, pp.66,67,128 and 152. LE Code 685, 41; Nguyen Code 380, 43.

(116) *Minh Mệnh Chính Yếu* (The Minh Mệnh Emperor's Records). Translation from Chinese into Vietnamese, Saigon, 1974, 4:92

(117) Almost all cases translated in Bodde and Morris. *Law in Imperial China* referred to certain statute or sub-statute. *In re Ch'eng Hsiao-chu* (where the sex offender was not allowed to surrender for more lenient treatment) was published in *Hsing-an hui-lan* (Conspectus of penal cases). Shanghai, 1886, 4:69b-72 ; translation at Harvard Law School.

The case where the emperor had to yield to the Board was reported in a memorandum in *Hsing-an hui-lan*, translated at page 298-300 of Bodde and Morris. *Law in Imperial China*.

(118) Memorandum in *Hsing-an hui-lan* ,17.38/19a-b, translated at pp. 369-371 of Bodde and Morris. *Law in Imperial China*.

(119) Sybille Van der Sprenkel, *Legal Institutions in Manchu China*, University of London, 1962, at p.127, wrote: "It has been suggested that the administration would not have been unwise as to enforce laws which would meet with resistance from ordinary people. For example, Hsieh writes: "Scarcely ever was a law contrary to the wishes of the people given permanent operation.. It might appear from this that law derived from the combination of Emperor's command and people's consent".

(120) For a more detailed discussion of the impact on the rule of law and human rights of these national security exceptions to the usual guarantees of due process, see Ta Van Tai, *The Vietnamese Tradition of Human Rights*, University of California-Berkeley, 1988, at p.92-98. Although this book deal with the Vietnamese traditional law and practice up to the Nguyen Dynasty, the reader can combine its reading with the reading of the comparative notes of articles and tables of conversions of Vietnamese and Chinese dynastic law codes in the author's other book, *The Le Code: Law in Traditional Vietnam*, to find out about the corresponding legal provisions in the Chinese dynastic codes and probably the traditional Chinese legal practice too.

(121). See chapter "Equality or discrimination" in Ta Van Tai, *The Vietnamese Tradition of Human Rights*, for detailed discussion.

(122) Bodde and Morris, *Law in Imperial China*, p.43.

(123). See William Alford, Trial and Error in Late Imperial China: A Reconstruction and Analysis of the Case of Yang Nai-wu and Hsiao Pai-ts'ai. Harvard Law School: unpublished thesis, 1977.

(124). *Minh Mệnh Chính Yếu* ( The Minh Mệnh Emperor's Records), translated from Chinese into Vietnamese, Saigon,1974,4:68

(125) Bodde and Morris, *Law in Imperial China*, p.142

( 126) Bodde and Morris, p.115

(127). For a detailed discussion of legal secretaries , see Ch'u T'ung-tsu, *Local Government in China under the Ch'ing*, Cambridge :Harvard University Press, 1962, pp.93-129

(128) For example , Ch'ing courts punished with those penalties of exile the government underlings for mistreating the detainees who committed suicide after being chained to the window bars or handcuffed at night time or chained hand and foot during transportation (See three leading cases from *Hsing-an hui-lan* ,27.59/5b-6a, translated in Bodde and Morris, *Law in Imperial China*, pp.450-453.

(129). The magistrate was sentenced to hard labor in Heilungchiang and the prefect, the province judicial commissioner and the province governor were all punished .

(130) *Quốc Triều Khâm Tụng Điều Lệ* (The Procedural Code of the National Dymasty). French author Deloustal translated into French in Bulletin de l'Ecole Francaise d'Extreme-Orient, XIX, 1919. Among the 31 chapters of this Code, there are rules on different levels of jurisdiction (with appeal rights), on fair trial and rules of evidence, and suits against magistrates

(131). “With all its defects, however, and with all its intricacy this Code of Laws [the penal code] is generally spoken of by the natives with pride and admiration ; all they seem in general to desire is its just and impartial execution, independent of caprice, and uninfluenced by corruption” (Staunton, *Ta Tsing Leu Lee*, Introduction, p. xxviii)

(132) Well known reporter Willy Wo-Lap Lam, in his book *Chinese Politics in the Hu Jintao Era: New leaders, New challenges*, New York: Sharp,2006, mentions the current Chinese officials' references to Confucianism, even implying the Mandate of Heaven for the Party. Is it implied that President Hu was a descendant of Hu Shih, the great scholar on Confucianism?

(133). For a book-length treatment of human rights in Traditional Vietnam, see Tạ Văn Tài, *The Vietnamese Tradition of Human Rights*, University of California-Berkeley, 1988.