Right, Power, and Faquanism

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Right, Power, and Faquanism

A Practical Legal Theory from Contemporary China

Tong Zhiwei

Translated by

Xu Ping

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Foreword

What is the proper role of law in Chinese life? The question is one that has attracted some of the best minds in China since the time of Confucius,[1] and it is a matter of profound practical as well as philosophical importance. This has never been more true than today, when, under the placid surface of apparent dictatorial harmony, a quiet but crucial struggle is under way to determine the nature and significance of law and its relationship to power during the reign of Xi Jinping. What do the Chinese Communist Party and its assertive leader mean when they incessantly preach that the Party must control not only the military and the government but also the legal system, including both the legislature and the courts, and nevertheless also claim to support strengthening the "rule of law"?

China's leaders make frequent reference to the need to respect their country's Constitution. Yet, in practice does that document restrain the exercise of official power, whether that power is manifested in the name of the Party, the state or both? Most conventional countries usually leave it to their courts—either regular or specialized—to interpret and apply their national constitution. The People's Republic of China (PRC), under Party direction, has instead chosen to follow the path of those nations that confer that responsibility on the legislature. The PRC Constitution thus authorizes the National People's Congress (NPC) itself to "supervise the enforcement of the Constitution"[2] and the Standing Committee of the NPC "to interpret the Constitution and supervise its enforcement."[3] Yet neither the NPC nor its Standing Committee, although extremely active in recent years in enacting legislation and occasionally amending the Constitution, has been permitted by the Party to play a significant role in interpreting and applying the nation's basic government document. At the same time, the Party has consistently frustrated various efforts to resort to the courts to fulfill the need for constitutional guidance and application.

This is in vivid contrast to China's previous regime, the Republic of China (ROC), still operating on the island of Taiwan. There, since the end of martial law in 1987 and the gradual development of political democracy, the long-standing

1 See, e.g., Hugh T. Scogin, Jr., "Tradition and Law in China: A Review of Wejen Chang's 'In Search of the Way: Legal Philosophy of the Classic Chinese Thinkers'," *New York University Journal of International Law and Politics* 49, 4 (2017): 1105–1118.

2 Article 62 (2) of the PRC Constitution.

3 Article 67 (1) of the PRC Constitution.

special Constitutional Court has often played a crucial role in confirming the allocation of power among government institutions and, through interpreting relevant constitutional restrictions on the government, protecting the political and civil rights of the island's residents. The increasing prominence of the Constitutional Court has not only influenced the development of public law in Taiwan but also the development of legal thinking generally as the island seeks to find proper paths for interpreting the law in its application to many aspects of social, political and economic life by blending German, Anglo-American, Japanese and other foreign jurisprudential theories, as well as international law, with Taiwan's Chinese legal heritage, historical experience and contemporary needs.

Will the Chinese Communist Party, in the hope of bolstering its legitimacy, ever subject itself to any type of jurisprudence, normative system and independent adjudicating mechanisms that might limit its power? Despite the current repressive political-legal climate in the Mainland, some scholars loyal to the Party have been proposing and debating ideas that might persuasively bridge the gap between Party and Constitution, between Marxist-Leninist legal theory and the basic legal concepts of the West, between statism and individualism.

Perhaps foremost among them is Professor Tong Zhiwei of East China University of Political Science and Law. His prolific and far-ranging essays and lectures have sought to break new ground in response to the jurisprudential and constitutional dilemmas of reconciling East and West in coherent fashion. He has always sought, sometimes painfully, to strike a balance between democratic constitutionalism and the Party.

Professor Tong, who has served as an acting law school dean and editor-in-chief of a leading academic journal as well as a distinguished scholar, has also organized conferences to stimulate support for his imaginative theories. But he is more than a respected theoretician. He has, in addition, not been afraid to apply his critical faculties to some of the most controversial political-legal practical challenges confronting China. He recently proposed to arm a newly-established National Supervisory Commission with extraordinary powers to detain and investigate not only Party members but also other officials and government-related personnel suspected of corruption or other violations of prevailing social discipline. Nor has he shied away from the defense of individuals who have been unfairly persecuted by the State and the Party. And I am especially indebted for his invitation to the blind "barefoot lawyer" and human rights activist, Chen Guangcheng—even while Chen was being threatened with the criminal prosecution that later befell him—to lecture graduate students at Shanghai Jiaotong University Law School about the dire legal situation in the Chinese countryside.

Professor Tong's prodigious jurisprudential efforts recently culminated in his preparation of a book manuscript that offers a thoughtful and comprehensive analysis of the clash of contending legal theories in contemporary China, and he boldly presents his own innovative doctrine, which he terms "faquanism," as a potentially unifying middle ground designed to resolve the current philosophical conflict. If properly understood, "faquan," according to Professor Tong, encompasses both the idea of legal power and that of legal rights, and reflects the possible unity of these ideas in the Chinese legal system.

Unfortunately, Professor Tong has thus far been denied the official approval required for publication of this major manuscript in China. Yet, ever energetic and resourceful, he has managed the difficult task of having this intellectually demanding text translated into English for publication outside China, so that it can at least be made immediately available to readers of English, including perhaps a substantial number of Chinese scholars, reformers, lawyers and officials. One can only hope that someday soon the ancient Chinese philosophers' call to "Let a Hundred Flowers Bloom!" will be heard again in Beijing!

Jerome A. Cohen

Preface

The term Faquan refers to a unity of contradiction of right and power, and the term faquanism denominates a theory on the origin, distribution, application, and destination of the unity.

The conjecture that various jural rights and powers are ultimately a unity was formed in 1993, when I was on the faculty of the Department of Political Science of Wuhan University and in the process of writing my dissertation for a PhD in constitutional jurisprudence. A paper discussing systematic reconstruction of constitutional jurisprudence based on this conjecture was published in *Chinese Journal of Law* in 1994. Shortly after that, Dr. Zhao Shiyi and Dr. Zou Pingxue published a paper that substantially challenged and criticized some of my points, particularly the fact that I only ventured the assertion that right and power are a unity but failed to substantiate it with proper justification. For close to a year after their critique, I was agonized over my inability to adequately justify that jural right and power are ultimately a unity. During the process of testing various methods of justification, I started to focus on G. W. F. Hegel's "absolute method," and the method of elevating from perceptual concreteness to abstract and then from abstract to reasoning concreteness that Karl Marx established upon his materialistic modification of the "absolute method." There is much lively display of this research method of Marx' in his work, *The Capital*, which was precisely the required course material that I spent considerable time on during my years pursuing my Masters degree in the mid-1980s.

Based on this method, as a logical process, I first defined the object of research as various "quan," and then I identified right as the comprehensive presentation of legal phenomena such as jural right, freedom, liberty, privilege, and immunity, etc. where individuals are the subjects, meanwhile identified power as the comprehensive presentation of legal phenomena such as jural power, function, authority, competence, privilege, immunity, etc. where public agencies are the subjects, and then I developed my thesis in the following three steps: 1. Justified that right and power both embody legally recognized and protected interest, and are undifferentiated entities on the level of interest; 2. Justified that right and power are both ultimately forms of legal existence of property with defined ownership, and are also undifferentiated entities on this level; 3. Placed into one single term the common interest attributes and property attributes extracted from the comprehensive presentation of right and power, which forms the abstract concept of Faquan; and finally, based on the concept of Faquan, the reasoning concrete was elevated that reflects objective

phenomena and is constituted of right, power, quan in its totality, residual quan as well as other secondary concepts, thus elaborating the entire categorical system of jurisprudence. In this way, I was able to logically justify that right and power are fundamentally a unified jurisprudential entity, although they have various differences and contradictions on the surface.

It was for me an extremely arduous intellectual leap to form and justify the existence of Faquan, or the unity of right and power. Afterwards, I found that the road of legal studies was no longer as treacherous, because, once the concept of Faquan was established, and once an interpretation system of legal phenomena was formed based on Faquan as the core concept of legal studies, the characteristics and internal and external connections of the realm of legal phenomena became objectively reflected with unprecedented accuracy.

Faquanism appeared towards the end of the 20th Century, when the background and the structure of legal research in China were still relatively unsophisticated. While there were some textbooks and works of legal studies published in China before 1949, they were already hard to find in the 1990s. Beginning from the implementation of reform and opening policy, many legal works from the West were copied or translated into Chinese, but they had rather limited influence because they were not in tune with the Chinese tradition of legal culture and the mainstream political ideology. What was truly influential during that period was the legal works of the Soviet Union translated into Chinese in the 1950s, 1980s, and 1990s, representative of which were the textbooks addressing the issues of state and law with Marxist theory and methodology, and whose content mainly includes the following: the concept, origin, and function of state and law, the historical evolution of state and legal systems, the legal systems of the contemporary world, state systems, state functions, state agencies, principles of power allocation, law and other social regulatory systems, the origin of law, codification of law, legal systems, legal norms, legal relations, the realization of law, the interpretation of law, legal act, and legal responsibilities, etc.

Between 1956 and 1978, the content of legal education in China was extremely poor, which was mostly political ideology concerning class struggle and continuing revolution under the proletarian dictatorship, with a limited number of legal terms. That was because state legislative activities ceased to exist, most law schools were either closed or unable to have normal enrollment, and there were continuous and incessant political movements. Law schools in China did not resume enrollment and legal instruction until 1978, and up to the end of the 1990s, in terms of the content of the textbooks, Chinese jurisprudence in that period was actually a mixture of Chinese legal studies before 1949, legal studies of the former Soviet Union, and some basic elements of contemporary

Western legal studies, put together according to the guiding principles of the state that were stipulated by the Chinese constitution. In this book, such a mixture is called right-duty jurisprudence, because its basic propositions remain the same as those of right-duty jurisprudence and right-centric theory that were already popular in the field of Chinese legal studies in the first half of the 20th Century.

Faquanism as discussed in this book has largely been formulated and demonstrated in the process of critiquing right-duty jurisprudence. Scholars in the camp of right-duty jurisprudence have published some in-depth discussions, and I in turn have had rather comprehensive responses in timely fashion. Like many readers, I have sincerely hoped that scholars in the camp of right-duty jurisprudence would respond systematically to my critique, but unfortunately there have been no further reactions from their end. Such condition no doubt has prevented faquanism from reaching its rightful scope and depth.

In 2001, the center of my academic activities moved from Wuhan to Shanghai, and my research started to focus more on constitutional studies than jurisprudence, but my real academic interest remained to be perfecting and promoting faquanism. The idea of writing a monograph systematically discussing faquanism based on my already published papers was born in early 2014. The real impetus then was to make faquanism a major project under the National Social Science Fund of China, and to use it as a starting point to push for further research into the project. As a result, I was able to delve deeper into research of basic legal phenomena based on existing material, and to greatly expand faquanism, and completed the first draft of this book in Chinese by the end of 2015. But, unfortunately, the publishing house discontinued its cooperation with me for causes unrelated to scholarship.

It is fortunate for me, however, that Professor Chen Jianfu of La Trobe University, Australia, the Chinese law specialist well-known in the English-speaking world, contacted me around the time, offering to include this book in a book series edited by him. He is a fellow of the Australian Academy of the Humanities (AHA) and the Australian Academy of Law (AAL), and is highly insightful and creative in the field of philosophy of law. I have received his tireless assistance during the entire process of preparing for the publication of this book, including topic selection, press coordination, proof-reading, and finalization of manuscript, etc.

The most crucial step for this book, however, is to produce an English text. Here, I am again fortunate that Professor Xu Ping of the City University of New York kindly agreed to be my collaborator. Three decades ago, we both taught at Wuhan University, and were neighbors and close friends. Our coordination can be described as seamless in producing the English text for this book.

Professor Xu is a language and literature expert, with excellent command of both Chinese and English. And what is admirable about him is that, for all these years, he has remained highly interested in the project of establishing democracy and the rule of law in China, as well as in the mechanisms of the U.S. political system, and is rather familiar with relevant legal documents, terms, and theories. As for myself, although not a language talent, I spent substantial time on learning English in my early years, therefore am capable of comprehending the language and appreciating the quality of an English text. During the process of translation, Professor Xu has not only produced an English text that is of high fidelity, accuracy, and elegance, but also offered many invaluable suggestions related to legal studies. At the same time, in terms of professional English expressions of legal content, I have also had extensive discussions with Professor Xu to the best of my ability.

What particularly touches me is that, Professor Jerome A. Cohen, a highly respected mentor and expert in the field of Chinese law research in the English-speaking world, found time to read the entire manuscript in the midst of pressing affairs, and enthusiastically wrote the Forward for the book, with full recognition of the content of the book and my academic pursuit. I remember that I came to know Professor Cohen in 2002 through my classmate and good friend, Dr. Daniel Yu, and since then Professor Cohen has supported and helped me on multiple occasions. As Confucius said, "gentlemen seek harmony, not uniformity." There are apparent differences between Professor Cohen and I with regard to the standpoint and method in dealing with issues in Chinese law, but the obvious consensus we both share is the wish that the rule of law becomes reality in China as early as possible. Here I would also like to inform him, beginning in the spring of 2018, the Chinese publishing house has resumed its cooperation with me after adequate consultations, and it is hopeful that this book could soon be published in simplified Chinese characters.

The publication of this book has also benefited from the full support of my research assistant, Dr. Sun Ping. The original manuscript contains large quantity of quotations from the Chinese translations of Western works, and he is the one who located the source of corresponding books in the original language and replaced the Chinese quotations with the original ones, which was very time-consuming. My PhD student, Zhao Haijun, who completed his undergraduate degree in English language, also utilized his knowledge in proof-reading the English text against the Chinese manuscript and offered many quality suggestions. My MA student, Zhou Chengjian, assisted in producing the Index.

My classmate, Dr. Lu Deshan, who is now a well-established attorney, offered me his generous support in the process of writing this book.

Professor Zhang Lihong, a colleague and friend of mine, also gave me his invaluable assistance with the use of Latin terms and the nomenclature of the newly-developed jurisprudential entity.

I also would like to thank Ms. Stephanie Falconer of La Trobe University Law School for her final proofreading of the manuscripts.

In terms of the content, this book appears to be a product of pure philosophizing effort. Actually, it is not, as it is, to a great degree, a comprehensive presentation formulated by a researcher of legal studies who starts from the reality of his own country, adjusts to its basic condition, and gazes into the vast world. Now, reflecting on the process of writing this book, I would also like to thank the Law School of Wuhan University and the Law School of Zhongnan University of Economics and Law where I studied or worked earlier, the Center for Chinese Legal Studies of Columbia University, Paris Institute of Political Studies, the Law School of the University of Washington at St. Louis, the Center for East Asian Research at Harvard Law School, as well as the libraries of these institutions where I served as a visiting scholar. During the time when I studied and worked at the institutions, I was able to first formulate and initially prove some of the conjectures contained in this book, and then deepen and enrich my existing research, thus reviewing, revising or confirming my original conclusions with a much broader perspective.

I would like to extend my sincere gratitude to all these teachers, colleagues, friends, and institutions that have helped me in making this book a reality.

Tong Zhiwei
February 3, 2018
East China University of Political Science and Law

Introduction

The purpose of this book is to formulate and prove an interpretive system of legal phenomena suitable to Chinese conditions, which is based on reassessment of the influence on the field of Chinese legal studies from semantic analysis jurisprudence within Anglo-American analytical jurisprudence that treats right and duty as the primary content of the law. The book is based on some of my articles published on the most influential journals of legal studies in China in the last 20 plus years, with some changes and additions as needed in consideration of the clarity and unity of the basic concepts. In terms of its content, the book was gradually completed between 1992 and 2017, almost one quarter of a century.

In terms of its research method, the book attaches importance to the reality of legal life, and formulates, sorts out, and evaluates systems of basic concepts of legal studies based on the practices in legal life. So it belongs to practical jurisprudence, whose method of identifying and developing categorical structure is clearly different from, and even diametrically contrary to, that of semantic analysis jurisprudence. For the convenience of the readers, the following is a brief introduction concerning the problems that the book is set to resolve, and the basic threads of the interpretation system of legal phenomena that will be fully developed in the main body of the book.

1 From Analytical Jurisprudence of the West to Semantic Analysis Jurisprudence of Present China

The mainstream legal theory of contemporary China treats right and duty as the most important legal phenomena and the most important categories of legal studies,[1] which can be considered as a branch of semantic analysis

1 I would like to call it right-duty jurisprudence, whose fundamental characteristic in its research method is to treat right and duty as the most important legal phenomena, and treats the concepts of right and duty as the only two most basic categories. To call it mainstream jurisprudence is because its influence is the broadest. But there are also two other concurrent and competing theories, one considers right, duty and power as the most important legal phenomena and jurisprudential categories, the representative work of which is Professor Shen Zongling's article "Right, Duty, and Power" (*Faxue yanjiu* 12 (1998)), the other is what I have been arguing over the past 20 plus years, and will be elaborated in details in the book, which maintains that right and power are the most important legal phenomena, that duty is on a different level, and that the only core category of legal studies should be the concept reflecting the unity of right and power (namely, faquan).

jurisprudence on a global scale, which is why I would rather call it Chinese semantic analysis jurisprudence.

As literature shows, before the end of the 19th Century, there was no legal studies in China that treated the concepts of right and duty as its core categories. The interpretation system of legal phenomena centering on right and duty was directly and indirectly imported into China along with the influence of the idea of representative democracy and Western judicial system at the turn of the 20th Century, establishing an instructional system in the 1930s. The representative fundamental propositions of such legal studies back then are: "the center of legal phenomena is right;"[2] "the generally accepted view among modern scholars is that the law is the regulation of right, and jurisprudence is the study of right;"[3] "the task of the law is to regulate right and duty, the generally accepted view in modern times is that jurisprudence is the study of right and duty."[4] The theoretical root of the system is in the West, not in China. In addition to the Western legal studies, the then Japanese legal studies also had great influence on the system, although its main function was to serve as a medium between the Western legal studies and Chinese legal studies.

In the last 100 plus years or so, many Western schools of legal studies have had influence on Chinese legal studies, the most influential of which is perhaps analytical jurisprudence, especially semantic analysis jurisprudence that treats right and duty as the primary content of the law. Much like philosophy of ordinary language that strives to solve philosophical problems through analyzing ordinary language, semantic analysis legal studies particularly emphasizes solving problems of legal studies through the method of conducting semantic analyses over situations of legal life, which can therefore be considered as the application in legal studies of philosophy of ordinary language.[5]

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2 Zhang Zhiben 张知本, *Shehui falüxue* 社会法律学 [Social Jurisprudence], (Shanghai: Shanghai faxue bianyishe, 1931), 54.

3 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang bianyishe, 1933), 241.

4 Gong Yue 龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 164.

5 Professor Shen Zongling classifies it into analytical positivist jurisprudence, and lists the following as its representatives, who were all professors of jurisprudence in top Anglo-American universities in the modern time: Wesley Hohfeld, Hans Kelsen, H. L. A. Hart, and Neil MacKormic (see Shen Zongling 沈宗灵, *Xiandai xifang falixue* 现代西方法理学 [Modern Western Jurisprudence], (Beijing: Beijing daxue chubanshe, 1992), 1143–224). However, to clarify the history and disciplinary origin of the school, the works of the British jurisprudent John Austin in the 19th Century and the modern Austrian-British philosopher Ludwig Wittgenstein should also be consulted.

However, as Wesley N. Hohfeld says, "[t]he entire 'right-duty' relation would be one of the class of relations *in personam* designated in Roman law by the term obligation. More specifically, the relation would be known as an obligation *ex delicto*."[6] So, interpreting legal phenomena systematically by centering on right and duty is effective mainly in the field of private law, and has many blind spots,[7] and is over-simplistic, in interpreting the phenomena in the fields of constitutional law and public law. Therefore, analytical jurisprudence of the West has had a tendency toward complexity after entering the 20th Century. For the convenience of the readers, let us take a look at the scholarly trajectories of some of the representative scholars of Anglo-American semantic legal studies.

First, let us examine the theory of legal concept advocated by Hohfeld, who served as a professor of jurisprudence at both Stanford and Yale (1879–1918). The two articles with almost identical titles are two of the most important works of analytical jurisprudence. As early as in 1913, Hohfeld was already aware of the universality and its hidden problems of the practice of starting from right and duty in interpreting legal phenomena. About the method of right-duty interpretation, he says: "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties,' and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, 'future' interests, corporate interests, etc."[8] So, he believes that such practice is inappropriate, ambiguous, and untenable, therefore should be changed.

How to change it? Hohfeld has his own alternative. He believes that there are 8 legal conceptions that constitute two relations. One is the pairs of jural opposites: rights—no-rights, privilege—duty, power—disability, immunity—liability; the other is the pairs of jural correlatives: right—duty, privilege—no-right, power—liability, immunity—disability. But because there are too many synonyms here, he has to combine some of them. Taking rights as

6 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, The Yale Law Journal* 26 (1917), 752.

7 Personally, I strongly disagree with the practice of dichotomizing the entire effective laws of a country into public law and private law, because it ignores the highest legal status of constitution. If we somehow have to classify the laws of a country, I would advocate trichotomy: basic law, private law, and public law, where basic law only refers to constitution, with its own category.

8 Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, The Yale Law Journal* 23 (1913), 28.

an example, he says: "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities." He also points out that, "[t]he word 'right' is defined by lexicographers to denote, among other things, property, interest, power, prerogative, immunity, privilege. In law it is most frequently applied to property in its restricted sense, but it is often used to designate power, prerogative, and privilege."[9]

Upon some re-ordering, Hohfeld actually has absorbed the terms of freedom, liberty, obligations, authority, ability, responsibility, and no-power per their meanings into the terms of rights, duties, privileges, no-rights, powers, liabilities, immunities, and disabilities. The following sentences to a certain degree reflect the situation where one term absorbs or incorporates another: "[a] duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated;" "[t]his liberty is a right recognized by law;" "[t]hus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun;" "[a] legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal disability, and the correlative of legal liability."[10]

So Hohfeld's conclusion is that, "[i]f a homely metaphor be permitted, these eight conceptions,—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,—seem to be what may be called 'the lowest common denominators of the law'."[11] Apparently, this reduces analytical variables of jurisprudential research, simplifying the complex system of terminology, which is to be commended.

In another article with almost identical title, Hohfeld adopts expressions such as jural relations *in personam*, jural relations *in rem*, thus actually and logically generating a series of phrases: rights (or claims) *in personam*, rights (or claims) *in rem*; privileges *in personam*, privileges *in rem*; powers *in personam*, powers *in rem*; immunities *in personam*, immunities *in rem*, and a duty *in personam*, a duty *in rem*; proceedings *in personam*, proceedings *in rem*; a judgment *in personam*, a judgment *in rem*, etc. It looks like this is the inference and expansion of the traditional classifications of "rights *in personam*" and "rights *in rem*" in Roman law. Hohfeld further uses prepositive adjectives "paucital" and "multital" to replace "*in personam*" and "*in rem*," respectively, thus

9 Ibid.
10 Ibid., 32, 36, 42, 44.
11 Ibid., 58.

forming the following series of expressions such as paucital rights, multital rights, paucital privileges, multital privileges, paucital powers, multital powers, a paucital duty, a multital duty, etc. After such changes to the conceptual system, Hohfeld is able to further optimize the jurisprudential functions of the 8 conceptions that he has identified, including overcoming the difficulties of differentiation in litigation where both legal rights and equitable rights exist concurrently over the same property.[12]

The Austrian-American scholar Hans Kelsen is another representative of analytical jurisprudence after Hohfeld, and pure theory of law established by him can be counted as a major branch of analytical jurisprudence in the West. Like Austin and Hohfeld, Kelsen attaches great importance in his research to semantic analyses of the law over situations of legal life. In view of the discussions of the key junctions in his works, he does not define the law from the perspectives of right and duty, but it is still very apparent that he leans toward right and duty when considering jurisprudence as a whole: "[i]t is usual to oppose the concept 'obligation,' the concept 'right,' and to cede priority of rank to the latter. Within the sphere of law we speak of 'right and duty,' and not of 'duty and right,' as within the sphere of morals, where greater stress is laid on duty; and we speak of a right as something different from law."[13] He also says that, "[i]f the right is a legal right, it is necessarily a right to somebody else's behavior, to behavior of which the other is legally obligated. A legal right presupposes somebody else's legal duty." "The concept of a legal person is another general concept used in the presentation of positive law and closely related to the concepts of legal duty and legal right. The concept of the legal person—who, by definition, is the subject of legal duties and legal rights—answers the need of imagining a bearer of the rights and duties. Juristic thinking is not satisfied with the insight that a certain human action or omission forms the contents of a duty or a right."[14]

As the above quotations show, Kelsen obviously has the tendency of using right and duty as the core categories in interpreting legal phenomena, and the following statement indicates that he also sees power as part of right: "[o]bligations and rights of the State are the obligations and rights of those individuals who, according to our criterion, are to be considered as State organs, that is to say, who perform a specific function determined by the legal

12 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, The Yale Law Journal* 26 (1917), 712–727, 742–747, 763–766.

13 Hans Kelsen, *Pure Theory of Law*, translated by Max Knight, (Oakland, CA: University of California Press, 1965), 125.

14 Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Cambridge: Harvard University Press, 1945), 75, 93.

order. This function can be the contents of either an obligation or a right."[15] Here, "function" is but another name for power.

H. L. A. Hart (1907–1992), a professor of jurisprudence at the University of Cambridge, is one of the modern representatives of semantic analysis jurisprudence, who, in the introduction to his book, *The Concept of Law*, has a succinct account about his characteristic emphasis on semantic analysis in his research of issues in legal studies. He says that, "[i]ndeed, one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called 'internal' and 'external' and which can both be made whenever social rules are observed."[16]

Hart further discusses the characteristics and significance of semantic analysis by saying that, "[m]any important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena'."[17]

Now, let us examine the basic condition of jurisprudence in present China and its relations with legal studies of the West, especially with analytical jurisprudence centering on right and duty in earlier days.

The basic theory of Chinese legal studies since the implementation of reform and opening policy can be described as a huge and jumbled complex. Historically, that complex has three sources: the legal thoughts developed in consideration of the specific conditions of China on the foundation imported from the West and Japan between the beginning of the 20th Century and 1949; the legal thoughts imported from the Soviet Union in the 1950s, and those introduced into China from the West, Japan, the Soviet Union, and Hong Kong/Taiwan; and the legal theories and policy proposals formed in the process of applying the theory on state and law by Marx and Engels in China's efforts to govern according to the law and to construct a country with the rule of law.

The interpretation system of legal studies (or jurisprudence, legal philosophy, similar hereafter) in present China is constituted of three layers. The first is the general theory of Marxism, especially the theories on state, law, right, power, and duty by its founders, the second is the policy proposals of the ruling

15 Ibid., 199.

16 H. L. A. Hart, *The Concept of Law*, (London: Oxford University Press, 1965), Preface, 1.

17 Ibid.

party, namely, the Communist Party of China concerning governance according to the law and construction of the country with the rule of law, and the third is the theories that interpret legal phenomena based on legal knowledge and attempt to guide legal life through general principles of law, and the issue to be resolved on this layer is precisely how to use the concepts of right and duty as well as other basic concepts in interpreting the legal world.

The above three layers of the Chinese interpretation system of legal phenomena influence and reinforce each other: the theories on state and law by Marxist founders must be interpreted based on the need of carrying out the policies of the ruling party, and through the application of legal knowledge over legal phenomena; and the manner and the process of such interpretation in turn influence people's understanding of Marxist theory and identification with the policy of the ruling party, so on and so forth.

Chinese jurisprudents do have some influence on the first and second layers of the Chinese interpretation system of legal phenomena, but overall they are confined by using the "classics" to annotate themselves, so that their influence is extremely limited. Thus their influence on the Chinese interpretation system of legal phenomena primarily concentrates on the third layer. In terms of legal scholarship, that layer is the core of jurisprudence. Therefore, when the achievements and unsolved problems of the Chinese interpretation system of legal phenomena are discussed in this book, the focus is on the third layer, namely, the theories that interpret legal phenomena and attempt to guide legal life through general principles of law. However, in doing so, it is inevitable to touch upon the way the principles on the first and second layers are carried out on the third.

Because of the above limitation in scope, I am inclined to give a positive assessment to Chinese semantic analysis jurisprudence since the implementation of reform and opening policy. The achievements of Chinese jurisprudence during this period of time are truly remarkable: it has inherited useful knowledge and theories from jurisprudential works before the implementation of reform and opening policy, which include those from the West, Japan, and the Soviet Union, as well as those formed locally; it has introduced legal thoughts from other countries, primarily the basic concepts, methods, and theories of legal studies of the West, through sending legal scholars abroad and translating and publishing foreign works of legal studies; it has differentiated itself from the pure ideology of Marxism, especially the theory of class struggle, thus forming a relatively independent and professional system of interpreting legal phenomena; and the new system generally has helped promote the improvement in the protection of basic human rights and the formation of the rule of law in China.

Of course, legal research cannot be limited in praising the existing jurisprudence, but ought to find problems and solve them. As a result, this book will have to spend considerable time to discuss the shortcomings of Chinese jurisprudence since the implementation of reform and opening policy, and the efforts of finding remedies. Indeed, there is no unified jurisprudence in China, with numerous differences among the legal thoughts of different jurisprudents. But there is also no reason to deny thereby the fact that there have been mainstream theories in Chinse jurisprudence since the implementation of reform and opening policy.

In fact, semantic analysis jurisprudence has already secured its status of superiority in today's China. Contemporary semantic analysis jurisprudence refers to the theory and method of using the concepts of right and duty in interpreting various legal phenomena, which was formed in the process of implementing reform and opening policy since 1978. Comparing this to the situation in the first half of the 20th Century, the new semantic analysis jurisprudence has two characteristics: one is that it follows closely the general principles of Marxism, especially its theories on state, law, right, and duty; the other is that it relies on, and serves for, identification with the fundamental national tasks and various policy proposals of the ruling party, and tries to guide the construction of law and order since the implementation of reform and opening policy based on general principles.

The revival of semantic analysis jurisprudence of contemporary China started in the 1980s, coinciding with the recovery of Chinese higher education in the field of legal studies after the Cultural Revolution. Around that time, a scholar representing the mainstream of Chinese education in the field of legal studies said: "the core issue of the will of the ruling class reflected in the law is how to identify the limits of legally-defined rights, i.e., the suitability of the interest of the ruling class as reflected in the rights that are realized via the unity of both subjectivity and objectivity. Once the boundary of legally-defined rights is clarified, so is the boundary of legally-defined duty."[18] The same scholar later formulated the scheme of using right and duty as the center in interpreting all legal phenomena, and organized jurisprudence seminars for younger faculty members of the Department of Law of Jilin University in 1984 and 1985, systematically discussing the ways to use right and duty as the center to reform the legal theories originally introduced from the Soviet Union. According to the recollections of some of the scholars who participated in the seminars, the principal scholar "invited from all over the country more than

18 Zhang Guangbo 张光博, "Shilun fading quanli de jiexian 试论法定权利的界限 [On the Boundary of Legally Defined Rights]," *Shehui kexue zhanxian* 4 (1981).

30 academically acclaimed senior scholars of jurisprudence and younger scholars who had recently established themselves in jurisprudence and highly valued by the field to come to Changchun to participate in discussions on 'the basic categories of legal studies.' The seminar particularly discussed the issue of scientificity and rationality of studying and establishing a new system of legal studies by centering on right and duty."[19] The consensus reached during the seminars and in the following years was that, "right and duty should be viewed as the center in reforming the connotation of legal norms and legal relations, in clarifying the content and the nature of legislation, enforcement, and justice, as well as the specific manifestations of right and duty in various department laws, thereby forming new legal system."[20]

Later on, some scholars also jointly proposed in an official journal sponsored by the Central Committee of the CPC that, "right and duty should be used as the basic categories to reconstruct theoretical system of Chinese jurisprudence;" and that, in order to realize the scientificity, modernity, and practicality of Chinese jurisprudence, "one of the most basic and most important projects is undoubtedly the reconstruction of a theory of jurisprudence using right and duty as the basic categories."[21] Hence semantic analysis jurisprudence has clearly become something officially sanctioned.

The developmental phase of semantic analysis jurisprudence of contemporary China was in the 1990s. By then, the discussions had transitioned to whether law should be centered on right or duty. The discussions resulted in a number of influential works of legal studies,[22] and the theory of right-centricity secured more support in the field of Chinese legal studies. The conception that jurisprudence should be the study of right and duty spread further under

19 Wei Zailong 魏再龙, *Faxue quanli lun* 法学权利论 [On Jurisprudential Rights], (Wuhan: Hubei jiaoyu chubanshe, 1990), Preface, 10.

20 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), Preface, 3.

21 Zhang Guangbo, Zhang Wenxian 张光博、张文显, "Yi quanli he yiwu wei jiben fanchou chonggou woguo faxue lilun tixi 以权利和义务为基本范畴重构我国法学理论体系 [Reconstructing a Theoretical System of Chinese Jurisprudence by Using Right and Duty as Basic Categories]," *Qiushi* 10 (1989), 20.

22 The representative articles and books published during this phase include: Zhang Wenxian 张文显, "Cong yiwu benwei dao quanli benwei shi fa de fazhan guilü 从义务本位到权利本位是法的发展规律 [From Duty-centricity to Right-centricity: the Developmental Norm of the Law]," *Shehui kexue zhanxian* 3 (1990), 135–144; Zhang Hengshan 张恒山, "Lun fa yi yiwu wei zhongxin—Jian ping 'quanli benwei shuo' 论法以义务为重心—兼评'权利本位说' [On Duty as the Focus of Law—Comments on 'Theory of Right-centricity']," *Zhongguo faxue* 5 (1990) 29–35; Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993).

the new historical condition, and the conception that jurisprudence should be the study of right and duty became identified by many in the field of legal studies.

Beginning from the early 1990s, the new semantic analysis jurisprudence started to secure its status of superiority in Chinese higher education in the field of legal studies. The disciplinary characteristics of treating right and duty as the core categories already clearly existed in the interpretation system of legal phenomena manifested in the textbooks of Chinese jurisprudence since the implementation of reform and opening policy that were adopted by the top Chinese law schools, and awarded by the Ministry of Education or promoted within the ministerial system.[23] And oftentimes some relevant foreign textbooks of jurisprudence and many modern works of jurisprudence of the West translated into Chinese also played the role of strengthening the right-duty discourse of Chinese scholars.[24] Representing those are the titles included in the "Foreign Legal Library" series started towards the end of the 1990s.[25]

After 2010, the new semantic analysis jurisprudence has virtually become the mainstream legal theory in China. In 2010, a textbook of jurisprudence was published in China with the full backing of the ruling party and the Ministry of Education, which can particularly exemplify the mainstream status that semantic analysis jurisprudence, using right and duty as its core categories, has secured in the field of Chinese jurisprudence. This textbook entitled *Jurisprudence* is listed as one of the key projects under the Program of Research

23 Shen Zongling 沈宗灵 (ed.), *Faxue jichu lilun* 法学基础理论 [Basic Theory of Law], (Beijing: Beijing daxue chubanshe, 1988, 1999); Shen Zongling 沈宗灵 (ed.), *Falixue* 法理学 [Jurisprudence (3rd Edition)], (Beijing: Beijing daxue chubanshe, 2014); Sun Guohua 孙国华 (ed.), *Faxue jichu lilun* 法学基础理论 [Basic Theory of Law], (Beijing: Falü chubanshe, 1987); Sun Guohua and Zhu Jingwen 孙国华，朱景文 (ed.), *Falixue* 法理学 [Jurisprudence (4th Edition)], (Beijing: Zhongguo renmin daxue chubansh, 2015); Zhang Wenxian 张文显 (ed.), *Falixue* 法理学 [Jurisprudence], (Beijing: Gaodeng jiaoyu chubanshe, Beijing daxue chubanshe, 1999); Zhang Wenxian 张文显 (ed.), *Falixue* 法理学 [Jurisprudence (3rd Edition)], (Beijing: Falü chubanshe, 2007).

24 Such as Shen Zongling 沈宗灵, *Xiandai xifang falixue* 现代西方法理学 [Modern Western Jurisprudence], (Beijing: Beijing daxue chubanshe, 1992); Lü Shilun 吕世伦 (ed.), *Xiandai xifang faxue liupai* 现代西方法学流派 [Schools of Modern Western Jurisprudence (Vol. I & II)], (Beijing: Zhongguo dabaikequanshu chubanshe, 2000).

25 This is a large scale series of translations funded by the Ford Foundation, and the selected titles are primarily the legal works of foreign, especially Western, origins. There are 50 confirmed titles in the first phase, and these have been gradually published by China Encyclopedia Publishing House since the end of the 1990s.

and Construction of Marxist Theoretical Study,[26] and the extent of the official support of it is unprecedented.[27]

This textbook that clearly carries the mission of displaying and promoting the official Chinese jurisprudence follows the path of using right and duty as the core categories in interpreting legal phenomena in terms of scholarship. This assessment can be verified by the following key statements: "the law is the social norm regulating right and duty;" "the law is what influences human motives, guides human behaviors, and adjusts social relations through regulating human right and duty and using right and duty as its mechanisms;" "the law generally realizes its goals of governance through identifying right and duty;" "legal relations are the special social relations that occur according to legal norms, and are manifested in the form of the right-duty relationship between subjects;" "legal relations are legal right-duty relationship between subjects;" "the object of legal relations is that pointed to by the right and duty of the right subject;" "legal relations are the linkage of right and duty, which are the content of legal relations."[28] All the quoted statements show that, the authors believe that the content of the law is ultimately right and duty.

In terms of the influence of foreign jurisprudence in China, it can be divided into the first and second phase, with 1949 as the boundary. During the first phase, the influence of Western jurisprudence was predominant in China, and even the influence of Japanese jurisprudence to Chinese jurisprudence should ultimately be seen as the indirect expansion of the Western jurisprudence into China. As for the situation after 1949, it should be clear that, the Soviet Union jurisprudence was predominant for a while, although it did not have anything new that was different from the Western jurisprudence in terms of basic categories, and still inherited from the West the discourse of centering on right

26 Just to show how high a profile it has, this program is included in the official report of the 17th National Congress of the CPC, and is often quipped in academia as "the number 1 program in the world." The original text about the program is: "to advance the project of theoretical research and construction of Marxism, to answer important theoretical and practical questions in-depth, and to educate and create a group of Marxist theorists, especially younger theorists."

27 Ben shu bianxie zu 本书编写组, *Falixue* 法理学 [Jurisprudence], (Beijing: Renmin chubanshe, Gaodeng jiaoyu chubanshe, 2010). Its 4 real editors-in-chief are called leading specialists, most of whom were in-service state officials at the vice-ministerial level then, the primary participants were all jurisprudents who were high-ranking officials in both academia and government, and the members of its advisory committee and review experts were even more prominent, who were all selected by the leaders of the politburo standing committee of the ruling CPC.

28 Ben shu bianxie zu 本书编写组, *Falixue* 法理学 [Jurisprudence], (Beijing: Renmin chubanshe, Gaodeng jiaoyu chubanshe, 2010), 36, 78, 111, 114, 120.

and duty. After that, Chinese jurisprudence experienced a roughly 20-year long period of stagnation, and did not regain its vitality and momentum until the beginning of the implementation of reform and opening policy towards the end of the 1970s.

Unfortunately, upon close examination of the basic scholarly practice of analytical jurisprudence that is the mainstream in China, one has to agree that it is clearly lacking in terms of creativity in relation to the specific conditions in China, and in terms of adaptation of the new achievements of the Anglo-American jurisprudence of the 20th Century and later. The specific manifestation is that there has been no system of legal categories that is consistent with the basic conditions of China and has better functions of interpreting legal phenomena and guiding the construction of nomocracy than the pre-1949 categorical systems of jurisprudence. The study on, and the borrowing from, the Western jurisprudence, in terms of the basic categories, remain basically at the level of the initial decades around the turn of the 20th Century, where right and duty are treated as the center, and the pretty but completely illusory discourse of right-centricity is being upheld. As shown intuitively by the large quantity of the contemporary Western works of jurisprudence, including the works of analytical jurisprudence, they no longer simply use right and duty as the core categories, rather, they have adopted more precise categorical structures, and have refrained from the discourse of right-centricity that is helpless for the protection of the basic human rights.

2 The Limitations and Shortcomings of Chinese and Foreign Semantic Analysis Jurisprudence

Every theory has its limitations, Chinese semantic analysis jurisprudence and foreign semantic analysis jurisprudence are no exception.

Historically, semantic analysis jurisprudence of the contemporary China has basically followed the categorical structure and core propositions centering on right and duty that already existed in the 1930 and 1940s. As mentioned before, and will be further discussed later in the book, as early as in the 1930s, the field of Chinese jurisprudence already universally accepted that jurisprudence was the study of right and duty and that right was considered as the center of law. I believe that the fact that the two traditional basic views are followed is sufficient to show an undeniable inheritance relationship between the semantic analysis jurisprudence that has the status of mainstream in today's China and the pre-1949 semantic analysis jurisprudence.

In terms of the identification of legal content, the semantic analysis jurisprudence of the contemporary China has also almost completely adopted the theory of discussing the law and legal relations from the perspectives of right and duty characteristic of the Soviet Union jurisprudence. Jurisprudence of the former Soviet Union and even today's Russia has always been interpreting legal phenomena through centering on right and duty, which is almost the same as analytical-positivist jurisprudence of the contemporary U.S. A representative textbook of jurisprudence published in 1980 in the Soviet Union is a good example here: "the system of rights can be divided into public right and private right;" "the most important social and legal significance of legal relations is that, based on legal facts, they affirm further concreterization of right and duty."[29] What is power, then? The author says: "the capacity and the legal status of the subject of right are highly valuable for the activities organized by the subject of right, and the legal status of state agency (and its officials) as the subject of right forms the functions and powers of the agency. For example, the right that a prosecutor conducts criminal litigation concerning a criminal is also the prosecutor's legal duty."[30] Here, right is converted into power through extra-logical and extra-academic means, where the state power exercised by a prosecutor has become "right."

The system of interpreting legal phenomena in contemporary Russia has adopted the categorical structure of the Soviet Union's jurisprudence. A textbook of jurisprudence recommended by Russia's educational management agency in 1996 has completely followed the tradition of the Soviet Union era that views legal content by centering on right and duty. This is especially obvious in the chapter on "legal relations," where legal relations are divided into wider sense and narrower sense, but their subject, object, and content are all defined based on the concepts of right and duty, and power is not discussed, which is actually treated as part of the content of right.[31]

So, the limitations of the semantic analysis jurisprudence of the contemporary China can only be discovered with an eye to the development of the Western jurisprudence, in the same way that its strengths can only be appropriately explained based on the Western jurisprudence. The reason is simple:

29 L. S. Jawitsch 雅维茨, *Fa de yiban lilun—Zhexue he shehui wenti* 法的一般理论—哲学和社会问题 [General Theory of the Law—Philosophy and Social Issues], translated by Zhu Jingwen 朱景文, (Shenyang: Liaoning renmin chubanshe, 1986), 15, 175.

30 Ibid., 166–167.

31 B. B. 拉扎列夫 (ed.), *Fa yu guojia de yiban lilun* 法与国家的一般理论 [General Theory of the Law and State], translated by Wang Zhe 王哲 (Beijing: Falü chubanshe, 1999), 167–190.

the disciplinary content of the Chinese system of interpreting legal phenomena since the implementation of reform and opening policy has been formed under the influence of the basic concepts, methods, and theories of relevant Western schools of jurisprudence, and Chinese semantic analysis jurisprudence, old or new, is basically the result of inheriting and developing the categorical structures of relevant Western schools of jurisprudence. This is the importation or introduction of scholarly product, which has allowed China to have an interpretation system of legal phenomena that can integrate with the Western discourse to certain degree, and therefore is of important progressive significance.

In summary, the common limitation of Chinese and foreign semantic analysis jurisprudence primarily manifests itself in the disciplinary method of semantic analysis. The main objects of semantic analysis are basically the basic concepts of jurisprudence and the terms, phrases, or sentences in statute law and judgments. However, the content and the range of reference of any concept and term are not inherent but rather the record of the human achievements in understanding objects, which is subjective. The objective legal phenomena grow and change and will not stay with our existing level of understanding. This ensures that, the human understanding of the objects and the record of the result of understanding, even if they are accurate and correct, are bound to fall behind the development and change of legal phenomena. Therefore, instead of directly taking legal phenomena as the objects of research, the existing jurisprudence chooses the achievements of understanding that their predecessors recorded legal phenomena (namely, concepts or terms, etc.) as its objects of research. Such jurisprudence is actually merely a study that indirectly researches on legal phenomena, therefore will result in the problem of being ineffective and removed from the reality of legal life.

In addition, the understanding of legal phenomena by our predecessors not only is bound to have the problem of lagging behind the reality of legal life, but also can be incorrect, one-sided, and shallow, which determines that semantic analysis jurisprudence is subject to its predecessors: their research can have good results if their predecessors are correct, comprehensive, and thorough; while their research has to suffer if their predecessors are incorrect, one-sided, and shallow.

The secondary limitation of Chinese and foreign semantic analysis jurisprudence is that, they are based on the meaning of terms in formulating the systems of jurisprudential categories, while legal phenomena and the reality of legal life are only treated as contexts, not realistic foundations. Therefore, the conceptual systems of Chinese and foreign semantic analysis jurisprudence are

not, or are primarily not, formed based on the requirement of systematically and accurately reflecting the reality of legal life, and lack objective foundation or rationale, so it is difficult to test their correctness, or the issue of testing is not even discussed. For example, the legal manifestation of the all-powerful system of state agencies and quasi-state agencies in China is power, which is a phenomenon that is more prominent than right. But in Chinese semantic analysis jurisprudence, power is a concept that has a much lower logical status than right, and is rarely subject to theoretical explication, even merely exists as a special form of right. According to semantic analysis jurisprudence, that is not a problem, because its categorical structure is not based on reflecting legal life, nor tested by the practices in legal life.

Perhaps some would say that power occurs due to the exercise of individual rights, and that is the reason why right, not power, is particularly emphasized here. This notion is without merit because it confuses original political rights and legal rights. In terms of political origin, power indeed occurs due to rights, and is subject to, and serving for, the subject of right. But throughout history, such political ideal condition only manifests itself in brief "constitutional moments" that adjust or redraw the boundary between right and power, like in cases of formulating or amending a constitution. But realistic legal life is entirely different, where what we face is actually jural right and jural power, although I would normally omit the adjective "jural." This is also the case with jurisprudence. Different from the political rights, in a normal constitutional country or society with the rule of law, legal rights have the same status as powers, with already defined scopes, and mutual checks and balances, despite the fact that the scopes and weight dimensions of rights or powers fluctuate around the central line set by the constitution in the process of interaction and competition. As for the countries without constitutional order or rule of law, the scopes of powers and rights oftentimes are determined unilaterally by the subject of power to a great extent, and it is difficult for rights to balance and check powers.

The third limitation of Chinese and foreign semantic analysis jurisprudence is that they merely treat realistic legal life as concepts, terms, legal provisions, and judgments as the backgrounds or contexts for their semantic analysis, therefore, they always merely scratch the surface of legal life when conducting semantic analysis and cannot grasp the precise and underlying social-economic content of jurisprudential categories. For example, while recognizing that right and power are both interests, they do not understand, or do not have the intention to explore, which part of the interests in a society, especially the specific material attributes of the interests, each of them directly embodies.

The above limitations shared by Chinese and foreign semantic analysis jurisprudence determine that they both have the following defects or "common shortcomings" to various degrees:

1. They both identify the basic categories of jurisprudence based on elements such as traditional status, common meaning, and usage frequency of legal terms, rarely taking into consideration whether the categories can comprehensively, accurately, and dynamically reflect the existing facts or conditions of legal life. The existing facts or conditions of legal life are the objective world that jurisprudents face, while the conceptual or categorical system of jurisprudence is ultimately the subjective world that is formed by jurisprudents based on their understanding of the objective world. Therefore, the conceptual or categorical system of jurisprudence is not a spontaneous and for-itself self-movement and should not be evaluated based on their status itself. Jurisprudents should search for the dynamism for the origin, movement, and change of the concepts of jurisprudence from legal life and even the entire social-economic reality and evaluate a conceptual or categorical system based on whether it can accurately and dynamically reflect various facts of legal life and their internal and external relations. This is the basic measure in evaluating a conceptual or categorical system, and the higher measure is to determine whether the application of such a system is beneficial to the improvement of legal order. Here, the improvement of legal order refers to the strengthening of the protection of the basic human rights, and the promotion of the rule of law, representative democracy, equality, and justice.

As indicated by its name, semantic analysis jurisprudence confines itself within the realm of the subjective world, instead of emphasizing the conception and construction of a categorical system of jurisprudence based on the objective world. Semantic analysis jurisprudence is not completely removed from social life, but the reality that it can relate to is generally limited to the occasions where relevant terms appear, like in the cases of the constitution, the law, and judgments. The process in which Hohfeld, as a representative scholar of American semantic analysis jurisprudence in the early 20th Century, reorganized legal terms and finally identified the 8 concepts fully exemplifies the characteristics of semantic analysis of jurisprudence that is removed from social-economic content, and resolves jurisprudential issues by way of semantic analysis.[32] His work that engages in semantic differentiation and combination of like terms based on the reality of American justice should be

32 Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yale Law Journal*, 1913, 16–59; "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal*, 1917, 710–770.

valuable as a reference to Chinese jurisprudence in forming an appropriate categorical structure, but it is not directly meaningful in solving the problems of realistic construction of the rule of law that China faces.

2. They both emphasize the term of right but have never conceptualized their understanding of right as a legal phenomenon, with the result of uncertain connotation and denotation. Chinese and foreign semantic analysis of jurisprudence have always used as their most important category the term of right that is ambiguous in content, and elusive in denotation. When facing the same word, "right", scholars sometimes say that it includes power, and is in the wider sense, and sometimes say that it does not include power, and is in the narrower sense. In fact, this is the manifestation that the field of legal studies has not elevated its understanding of the relevant legal phenomena to the level of concept. Strictly speaking, only a noun can be separated into the wider sense and the narrower sense, not a concept, because a concept is the intellectual result formed when we have reached relatively accurate and stable extent in understanding the content and denotation of an object.

A British classic of legal history published in the 19th Century shows that it was already common in that era for such an ambiguous and mixed usage involving right and power. For instance, in discussing the specific contents of *patria potestas* in Roman law, the author always calls the specific contents as powers, and he says: "[l]ate in the Imperial period we find vestiges of all these powers, but they are reduced within very narrow limits. The unqualified right of domestic chastisement has become a right of bringing domestic offences under the cognizance of the civil magistrate." Here is another example: "[t]he jurists of that period very commonly assert that the power of Testation itself is of Natural Law, that it is a right conferred by the Law of Nature. Their teaching, though all persons may not at once see the connexion, is in substance followed by those who affirm that the right of dictating or controlling the posthumous disposal of property is a necessary or natural consequence of the proprietary rights themselves."[33] Testation is a right according to the laws of any contemporary state, but the author here first identifies it as power, and then includes it in right. There might have been a reason for the author to make such an arrangement back then, but it is clearly a manifestation of conceptual confusion, at least in terms of modern Chinese language and Chinese laws. There are numerous cases in the book where right and power are mixed in usage, so it must not have been a slip of a pen.

33 Henry Sumner Maine, *Ancient Law*, (Cambridge: Cambridge University Press, 1901), 133; 170.

In the field of Anglo-American jurisprudence, the elusiveness in the meanings of right and power seems to still remain today. A presently representative Anglo-American legal dictionary identifies 6 meanings for "right," the third one is "[a] power, privilege or immunity secured to a person by law," and the example given is "the right to dispose of one's estate."[34] According to the logic of modern Chinese language and Chinese law, if the subjects that "dispose" are individual citizens in the example, it should be a right, and even if it is written as "power" in English, it should still be translated as right in Chinese.

It should be recognized that, if there is a "right in the wider sense" that includes power, there should be a "right in the narrower sense" that does not include power, then we are facing three definitive research objects: "power," "right in the wider sense," "right in the narrower sense" (namely, the difference of "right in the wider sense" minus "power"). Here, since "right in the wider sense" and "right in the narrower sense" are different phenomena, then why don't we investigate their respective content and scope, record the intellectual achievements in understanding them, and give them formal names and form two independent jurisprudential concepts? The two independent jurisprudential concepts thus formed are consistent with formal logic and the basic requirement of successfully developing relevant research, but, unfortunately, no one within the camp of Chinese and foreign semantic analysis jurisprudence has given it a try.

3. In differentiating right, power, "privilege," "immunity," and other terms, Chinese semantic analysis jurisprudence and foreign semantic analysis jurisprudence are both based on some specious superficial phenomena, removed from the specific social-economic content, therefore actually have never clearly differentiated them, and have never been able to differentiate them. Let us take the differentiation between right and power as an example. In terms of theory and logic, right and power (or public power) should be equally important legal phenomena. In the political-legal environment of contemporary China, comparing to right, power in fact is an even more important legal phenomenon in terms of political status and social-economic functionality. But, according to today's Chinese semantic analysis jurisprudence, power logically is only part of right, without a status adequate to its legal status, and there has also been much less discussion on power in popular works of semantic analysis jurisprudence in China.

Concerning the differentiation between right and power, the standard used by Chinese and foreign semantic analysis jurisprudence seems to depend on whether there is coerciveness, with some traditional practices that are not

34 Bryan A. Garner, *Black's Law Dictionary*, (West Publishing Co., 2004), 1347.

uniform. A good example for that is when Henry Maine discusses *jus vitae necisque* in Roman law. Even the Chinese versions of Anglo-American legal dictionaries also show such an ambiguous standard of differentiation. An Anglo-American legal dictionary highly influential in China says: "in the most general sense, right includes freedom to act or not act in certain way (that which is protected by the law), also includes power to coerce a particular person to act or not act (that which is coerced by the law)."[35] But the problem here is that, the scope that the word coerce is involved is too broad, and too unspecified, and thus cannot serve as an appropriate assessment standard in appropriately differentiating right and power.

In fact, whether what is protected by the law is right or power should be determined based on the following factors: whether its beneficiary is an individual, private organization, or public agency, whether it embodies individual interest or public interest, and whether the underlying property supporting its corresponding behavior is private property or public property.

4. Chinese semantic analysis jurisprudence and foreign semantic analysis of jurisprudence both relatively ignore power and have never exerted as much effort on the study of power as on that of right. At the same time when they are accustomed to the difficulty of avoiding power, they attempt to describe power as a part of right and the opposite of right. Individual right and public power, or civil society and political state have always been in a parallel relationship that are mutually opposite and mutually dependent, although the weight dimension or ratios of them change all the time. However, the subjective arrangement that theoretically treats power as part of right, and places "privilege" and "immunity" under right as sub-items artificially undervalues the status and weight dimension of power in the objective world.[36]

In terms of the foundation or political origin, people's right (sovereignty) is higher than jural power, which is only a portion of the former. But after the formulation of the constitution, individuals entrust a portion of right to the government, thus forming jural power, and the portion reserved for themselves also becomes individual right, while the portion emphasized or confirmed by the constitution is called fundamental right or jural right. Therefore, in a constitutional society or country, the various forms of right and those of power are equal and parallel. In other words, the various basic rights of the citizens affirmed by Article 2 of the Chinese Constitution and the

35 Xue Bo 薛波 (ed.), *Yinghan yingmeifa cidian* 英汉英美法词典 [English-Chinese Dictionary of Anglo-American Law], (Beijing: Falü chubanshe, 2003), 1200.

36 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yale Law Journal* 26 (1917), 710.

various functions and powers of state agencies affirmed by Article 3 of the same Constitution should be equal and balanced in their legal status. The same is also true in other countries. Take the U.S. as an example, there are many powers granted to the federal government by its Constitution, and reserved for the state governments, but, in order to lower the strength of power, to prevent right from being injured by power, and to allow right to balance power, the federal Constitution and state constitutions still designed the preventive mechanisms of separation of powers and mutual restraint of various powers.

As for socialist countries that practice public ownership, primarily state ownership, of the means of production, the size of the public power's weight dimension and strength relative to right is absolutely overwhelming in comparison to that of the Western countries. In these socialist countries, power is ignored theoretically, and is considered as one of the consequences of right, which results in the virtual increase of the weight dimension of "right," and covers the real gigantic weight dimension of "power," which is very harmful to right's restraint over power and between powers.

5. The content and the scope of right and power used in Chinese and foreign semantic analysis jurisprudence are not clearly defined, so it is impossible to use them as the reference to accurately identify the content and the scope of duty. In Chinese and foreign semantic jurisprudence, the specific content and the form of the relationship between duty, right, and power are also highly uncertain. They generally both advocate or recognize that right and duty, power and duty are symmetrical and opposite. Indeed, although the manifestations of duty are multiple, they are all the negative forms of interest, namely, the expenditure or loss of interest, precisely opposite to right and power.

So, the identification of the content and the scope of right and power should be the reference for the identification of the content and the scope of duty. If the content and the scope of right and power are not clear, those of duty naturally are unable to be clear. Chinese semantic analysis jurisprudence and foreign semantic analysis jurisprudence are based on the analysis of legal terms in their study of right and power, and do not delve deeper into the underlying specific interest content and property content, which makes it impossible to achieve in-depth understanding of the specific interest content and property content of duty. Because the relationship between right, power, and duty is actually a shape-shadow relationship: there is shadow with shape, there is no shadow without shape, clear shape results in clear shadow, and unclear shape results in unclear shadow.

6. Chinese semantic analysis jurisprudence and foreign semantic analysis jurisprudence also have functional blind spots or perspectives. Under certain conditions, only after the ordinary meaning of a word is discarded and its

underlying interest-content and property-content are thoroughly observed, can we understand the true meaning of the same word in different occasions. In fact, if we don't differentiate the subjects concerning the basic categories of jurisprudence, such as the 8 concepts proposed by Hohfeld, and if we don't thoroughly investigate their underlying specific interest and property content, semantic analysis method sometimes is completely unable to explain real issues, and is even unable to explain why a word has a totally different meaning at different times and locations. Take "privilege" as an example, if it belongs to ordinary individual citizen, it should be the manifestation of individual interest, beneficial to the maintenance or increment of individual property, therefore is similar to right in nature. However, if "privilege" is enjoyed by state agency or state official, it should be the direct manifestation of public interest, should have property owned by public agency as its material foundation, therefore it is similar to power in nature.

Now take the words "duty" and "obligation" as an example. Under certain circumstances, it is entirely possible for them to have the real meanings of power or right: when parents emphasize to their minor children that they have "duty" or "obligation" in restricting the children's behavior in handling their persons or property, the real meaning of "duty" and "obligation" has in fact become the ordinary right; when a state ruler attempts to violate the principle of limited government to further deprive citizens' right and freedom, he can totally reach his goal by proclaiming that he shoulders unlimited "duty" and "obligation" to his people or society, but the real meaning of his so-called "duty" and "obligation" has in fact become power. Actually, the above two situations in the fields of civil law and public law occur quite frequently in developing countries.

7. The basic understanding contained in semantic analysis jurisprudence is, to considerable degree, removed from the reality of legal life of contemporary Western countries. Such removal first manifests itself in the displacement of the constitutions, legal texts, and judgments. Take constitutional texts as an example, in the U.S. Constitution and the English translation of the French Constitution and the German Constitution, there is the following tendency in their word choice when they use general expressions concerning interests of individual and public organization such as state: individual interest in most occasions is expressed with right, in a few occasions with freedom and liberty; power is generally used to express interest of state or other public organizations; privilege and immunity are used to express individual interest and public interest. As for "no-interest" (namely, the negative value of interest), it is basically in the form of specific enumeration, and "duty" is hardly used to perform generalized description. To use the U.S. Constitution as an example, although duty, obligation, liability, and other words can be found, they are

used to refer to customs duties and debts, not used in the sense of government responsibility.

Semantic analysis jurisprudence is even farther removed from the history and reality of Chinese legal life. In the official English version of the Chinese Constitution, right (freedom in a few occasions) is generally used to refer to individual, private interest, and duty is generally used to refer to individual, private "no-interest." The text of the Chinese Constitution generally uses "power" to refer to the interest of state or other public organizations, but usually uses "function and power" in specific cases, and occasionally uses "limit of authority" in certain contexts. Interestingly, concerning the no-interest of state and other organizations exercising public power, this Constitution uses "duty" in many places, sometimes also uses "responsibility," but the real content of the two terms in the specific contexts is closer to "power." So, there has been a reasonable notion in the field of Chinese legal studies: for state and other public agencies, power is duty, and duty is power.

Nevertheless, in the above constitutional text, right and power are the most important, symmetrical, and opposite, and there is no indication that individual or private legal person enjoys power, or indication that state and other public agencies enjoy right.[37] The categorical structure of Chinese and foreign semantic analysis jurisprudence is not accurately reflective of this reality.

Overall, there is historical and cultural necessity for the popularity of semantic analysis jurisprudence in the West, which, as a discipline, emphasizes the category of right and right-duty discourse. Because of the influence of Roman law, Western legal studies has inherited a legal culture of equalizing right and the law. In ancient Rome, "[p]ublic Law is that which concerns the administration of the Roman government,"[38] and judged by relevant works, its developmental level was also very high, perhaps as high as private law. If Roman public law had survived like private law and had influenced later generations, modern and contemporary Western legal studies could have equally stressed right and power (or called private right and public power). Unfortunately, the significant influence of Roman law to later generations has been basically limited to private law, so much so that Roman law and Roman private law have almost become synonyms. One of the direct cultural consequences of this situation has been that legal studies should be seen as the

37 However, this does not prevent a specific state agency and other public organizations from entering the market as the relevant subject of right, nor prevent a country from enjoying the status of the subject of sovereignty relative to other countries or groups of countries in terms of international law.

38 J, I.1,4; S. P. Scott, *The Civil Law*, Vol. 11 (Cincinnati: The Central Trust Company, 1932), 5.

study of right, because in Latin "law" and "right" are referred to by the same word ("*Ius*"), which apparently has shown its influence in the modern languages of many European countries. Like "*ius*" in Latin, "*Recht*" in Dutch, "*droi*" in French, "*Recht*" in German, "*Rätt*" in Swedish, "*jog*" in Hungarian, "*diritto*" in Italian, "*tiesības*" in Latvian, "*право*" in Russian, "*teisė*" in Lithuanian, "*ordni*" in Maltese, and "*direito*" in Portuguese all have double meanings of law and right. Whether they indeed indicate law or right in every individual occasion is entirely dependent on the context.

Such semantic analysis jurisprudence was suitable to the Western societies before the middle of the 20th Century, and the situation started to become different as Keynesianism emerged, which is strongly characterized by state intervention. During the phase of the so-called laissez-faire capitalism of modern Western countries before the emergence of state intervention, the government only served as night watchman or night patrolman, whose power was indeed much weaker than right. Therefore, the social relations at that time were predominated by right-right relationships, and all such relationships were, or were easily, interpreted as right-duty relationship. In the 1930s and 1940s, the legal status of power became elevated drastically worldwide. The manifestations that power phenomenon rose strongly in legal life include: the Soviet Union practiced public ownership of the means of production and planned economy, Germany, Italy, and Japan moved towards fascism, and the U.S. initiated its "New Deal" of strengthening state intervention under the banner of Keynesianism. Since then, semantic analysis jurisprudence that underestimates power phenomenon has become more and more outdated in the West. My own sense is that, today's jurisprudence of the West has long broken the constraint of the categories of right and duty, paying more and more attention to the phenomenon of power.

Semantic analysis jurisprudence that emphasizes the category of right and right-duty relationship, and underestimates the category of power and right-power relationship is removed from the history and reality of China to a great degree. In the history and reality of China, the status of power has always been much more important than in the West during the comparable periods. For more than 2000 years before 1911, absolute monarchy ruled China, where power was extremely consolidated, and right was minimal. Then after more than 30 years of domestic unrest and foreign invasion, China generally implemented in 1949 public ownership of the means of production predominated by state ownership, planned economy controlled by the government, and proletarian dictatorship, where the status and effect of power far exceeded right, although it has been permitted to move towards a non-public ownership economy and to transition to market economy since the implementation of reform

and opening policy began in 1978. The protection and promotion of rights, especially the basic human rights, have been the ultimate goals of our construction of constitutionalism and the rule of law. However, if the strength of power is not recognized, we will not be able to limit and restrain power, and not be able to effectively protect right. Therefore, the categorical system of jurisprudence has to face and accurately reflect the reality of legal life, which the categorical system of semantic analysis jurisprudence is far removed from.

3 Elaboration of a Practical Legal Theory with Faquan as the Core Category

Since semantic analysis jurisprudence is not reflective of the basic conditions of China, and is not a good interpretation system of legal phenomena, can we try to create a better replacement? I believe that the answer is affirmative, and faquanism is the specific answer that the author has been searching for over a long time period. This theory is an interpretation system of legal phenomena parallel to semantic analysis jurisprudence in that it is a practical legal theory.

Among all the basic rights, security interests such as freedom of person are the premise, but material interest with underlying property is the fundamental interest of human existence and development, and many related interests can derive from the material interest. Based on this understanding, the practical legal theory sub-classifies the total interest of a country or society into interest that is recognized and protected by the law and interest that is not recognized and protected by the law, where the former is abbreviated as legally-defined interest, whose material foundation is property with defined ownership, while the latter is extremely small in the total interest, and is abbreviated as surplus interest or extra-legal interest, whose material foundation or economic substrate is property with undefined ownership. Determined by the nature of the law, only interest that, upon injury, can be ultimately remedied through property compensation is suitable to being included in the scope of legal protection. Therefore, if put in a different way, all interests recognized and protected by the law have, or should have, property content, where the only difference is whether it is direct or indirect.

Based on the fact that individuals and public agencies are co-existent, parallel, and opposite, the practical legal theory sub-classifies the total interest into individual interest and public interest. Here individual is a class, which is primarily natural person, but also includes private organization that is constituted by natural person(s) and parallel to public agencies, such as various

private legal persons. Public agency is also a class, which is an organization that controls public power legally and practically, and governs a society, whose typical existing form is a state or a government. In fact, individual interest has private property as its material foundation, while public interest has public property such as government budget as its material foundation. Some organizations between individuals and state, such as non-governmental organizations, should be included in the class of individual, and their interest naturally also is individual in nature, as long as they are supported by private interest. The forms of such organizations and the interests that they represent are complex and intricate, but according to the practical legal theory, ultimately it will all depend on whether they are directly supported by private funds or public property such as budget.

How do individual interest and public interest manifest themselves in the law? It is very important to understand this issue. The legal manifestations of individual interest and public interest in general have many commonalities among different countries, but specifically have great differences. Take the text of the Chinese Constitution as an example, individual interest generally manifests itself as the fundamental rights affirmed by the Constitution, and specifically manifests itself as various rights and freedom, such as the right to vote and stand for election, freedom of speech, freedom of the press, and freedom of religious belief, etc. In addition, there are also some provisions that do not contain the word right but specifically protect individual right, such as "the personal dignity of citizens of the People's Republic of China is inviolable" (Article 38), "the residences of citizens are inviolable" (Article 39), etc. As for the manifestations of public interest, the Chinese Constitution generally uses the word power, and specifically uses function and power, limit of authority, and many specific stipulations protecting or guaranteeing public interest.

In the text of the U.S. Constitution, the words embodying individual interest are primarily right, plus some words such as liberty and freedom, as well as the portions of "privilege" and "immunity" that are enjoyed by ordinary citizens. And the words embodying public interest are basically power, plus the "privilege" that is enjoyed by certain public servants. The privilege and immunity enjoyed by foreign diplomats in the U.S. and the U.S. diplomats in other countries should also belong to the public interest protected by the property of public agencies. Of course, the U.S. Constitution also has many specific stipulations that do not include the words of right and power, but embody the protection of individual interest or public interest.

Based on the above explications, we can elaborate on the following few fundamental characteristics of the practical legal theory that are different from those of Chinese and foreign semantic analysis jurisprudence.

3.1 *Strict Differentiation between Right and Power Based on Property Attributes*

Strictly differentiating right and power in legal theory means that it denies the existence of a legal phenomenon that is right and power at the same time, and also denies that power is part of right or right is part of power.[39] How do we achieve that? It seems that the key is to establish an appropriate standard of differentiation.

Semantic analysis jurisprudence and other kinds of jurisprudence indeed differentiate between right and power, but their standard of differentiation has always been ambiguous: it appears to be the existence or non-existence of legal coerciveness, or appears to differentiate them according to the subject, depending on whether the right holder is individual or public agency such as the government. In fact, none of the two standards are able to appropriately differentiate right from power, and a clear indication that such standards are not effective is that no one has so far been able to strictly differentiate them using the standards. Actually, to strictly differentiate right and power, it can only serve as a reference for differentiation to determine whether the relevant content is of legal coerciveness, or whether it belongs to individual or public agency, because the existence or non-existence of "legal coerciveness" often are specious and difficult to confirm, and there are many conditions where the same subject legally exercises both right and power in different occasions. Furthermore, even if it appears to be tenable, using the two standards to differentiate right and power still clearly has the shortcoming of superfluousness.

The differentiation between right and power in the practical legal theory actually uses only one standard, but dives from the surface to the core via three levels in a uniform manner. On the surface, this standard considers the subject of the differentiated object, but on the middle level it has to consider whether the object embodies individual interest or public agency's interest, and on the deepest level it will consider whether the object is supported ultimately by private property or public expenditure. Right is what is enjoyed by individuals such as citizens and private legal persons, embodies individual interest, and is maintained by private property, while power is what is engaged by public agencies such as the government and that which acts on its behalf, embodies public interest, and is maintained by public expenditure. In other words, what

39 From the perspective of political science, politically, it is a correct statement to claim that the power of state and public agencies is part of people's rights, which is the political premise of this book. This is a book of jurisprudence, the author discusses realistic legal issues based on the distribution of right and power defined by the Constitution or the law, therefore particularly focuses on precise differentiation between right and power in terms of the law.

the relevant object indeed is at different times and occasions is not determined by its name, but is based on the assessment of its subject, social content, and corresponding property attributes. In this sense, for example, "privilege" and "immunity" in the U.S. Constitution can be the existing forms of right, and also can be the existing forms of power. Even certain "freedom," if it is claimed to be belonging to state or the government, its real content will definitely not be right, but power.

3.2 *Identification of Right and Power as Two Parallel Concepts of the Most Important Legal Phenomena*

The identification of right and power as the most important legal phenomena in legal life has always been one of the most crucial characteristics of the practical legal theory vis-à-vis semantic analysis jurisprudence. According to this theory, right and power are legal phenomena that are parallel and even opposite, but are equal in their status, and fundamentally interconnected.

As the concepts of jurisprudence, right and power refer to not only what are called "right" and "power" in legal texts, judgments and legal life, but also other legal phenomena that are different in name but identical in nature. Therefore, right and power to a certain extent indeed also function as "the lowest common denominators," to borrow a phrase from Hohfeld. The legal phenomenon referred to by the concept of right, in the text of the Chinese Constitution, is mostly written as "right,"[40] but sometimes also as freedom; in the text of the U.S. Constitution, what is referred to by the concept of right is also in vast majority of cases written as "right," and infrequently as liberty or immunity, as in Section 2 of the 4th Amendment to the U.S. Constitution.[41]

As for the legal phenomenon referred to by the term power, take the text of the Chinese Constitution as an example, it at least includes "power" listed there, such as "all power," "state power,"[42] and various specific existing forms of "power," such as functions and powers, and limits of authority, etc. And in the

40 The first "right" is a concept of jurisprudence, and is the product of thought; while the second "right" is a systematic existence stipulated by currently effective constitution, and is objective legal phenomenon, and the object of understanding and thought. Under this condition, the quotation mark is used to remind the readers of the difference, similar hereafter.

41 "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." See the Constitution of the United States of America, Amendment IV, Section 2.

42 "All power in the People's Republic of China belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power." See Constitution of the People's Republic of China, Art. 2.

case of the U.S. Constitution, the concept of power not only refers to various listed legislative, administrative, and judicial powers, but also includes "privilege" enjoyed by the members of the U.S. Congress.[43]

From a scholarly perspective, the object referred to or described by the concept of power should include all legal manifestations of the interest of state or government, such as the power, function, authority, and competence exercised by public agencies such as the government, the privilege and immunity enjoyed by public servants, and even the responsibility executed by legally defined public organizations. In addition, the corresponding concepts of the 8 concepts listed by Hohfeld should also be incorporated into this realm, which indeed has occurred here.

3.3 *The Core Category of Faquan Referring to the Unity of Right and Power*

As will be demonstrated in this book, the practical legal theory projects and proves the existence of the unity of right and power, and records the understanding of the concept of faquan as the core category of jurisprudence. The following is the research process by which this new interpretation system of legal phenomena proposes and proves the existence of the unity of right and power: (1) It starts with the conjecture that all legal rights and powers are fundamentally a unity, regardless of the manifestations that they take (for example, right, freedom, liberty, power, functions, authority, competence, privilege and immunity); (2) It proves that, in spite of the differences between right and power, they are or should be interests recognized and protected by the law, without exception, which is to say, in front of interests recognized and protected by the law, various rights and powers become an undifferentiated existence; (3) Any right and power has, or should have, property with defined ownership as its material foundation, without exception, although the procedural rights or procedural powers have only indirect property content.

The unity of right and power is a new entity in jurisprudence that scholars can understand through logical thinking, thus must have a concept reflecting and recording the understanding of such entity, in order for it to enter jurisprudential thinking. Therefore, the need to name the unity of right and power naturally arises.

To clarify the adequate naming of the unity of right and power, we need to explain the English expression of the particular Chinese term, "quan" (read

43 "They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses." See The Constitution of the United States of America, art. 1, section 6.

like "chuain," and following the convention of the Chinese language, the same written form is used throughout the book for both singular and plural). In the field of legal studies, a concept and a noun are connected but also different: a concept needs to be expressed by a noun, but not every noun referring to a phenomenon and thing is suitable to be used as a jurisprudential concept. The Chinese word "quan" refers to various jural rights, jural powers,[44] moral rights, and moral powers,[45] thus has an extremely broad scope of reference. However, the content of the word has not been comprehensively investigated so far, and as a result its understanding has not yet reached the height of conceptualization. Perhaps precisely because of that, although "quan" is full of Chinese characteristics, it has been ignored so far in the field of Chinese legal studies, and scholars often simply turn a blind eye to it, so much so that, except for using "quan in its totality" as a formal name of the practical legal theory at one time, no one has been willing to use it as a legal term, not to mention finding it an English equivalent for it.

If we place "quan" into the realm of social life and examine it, it is not difficult to see that, the object referred to by this word is the sum of right and power, legal or otherwise, which is to say, "quan"= jural right + jural power + moral right + moral power. So, in a specific context, all the 4 objects can be referred to by "quan" in oral and written Chinese language. But in Western languages, from Latin to English, there has been no word equivalent to "quan" in terms of content. In this sense, "quan" is part of the linguistic resources where Chinese language has some relative advantage over Western languages. In this book, legal right, legal power, moral right, and moral power are identified as the 4 components of "quan," which is to promote the conceptualization of the understanding of "quan" on the basis of its naming.

The scope of quan can be sub-classified into faquan plus residual quan. In terms of its content, faquan is actually only the portion of "quan" that is recognized and protected by the law, namely, the sum of jural right + jural power. Upon the denotations and the contents of "quan" being theoretically and logically identified, we have basically realized the conceptualization of "quan."

44 Jural rights and jural powers are what are normally called rights and power. The reason to add "jural" here and hereafter is because the two terms need to be contrasted to moral rights and moral powers.

45 Moral rights refer to right, residual right or extra-legal right; moral powers refer to power, residual power or extra-legal power. In a country with democracy and the rule of law, power is confined by what is listed in the constitution, and the rightfulness of moral powers should therefore not be recognized. But in terms of the actual conditions of many countries, especially developing countries, there are existing, and even obvious and abundant moral powers.

In that sense, quan can be considered as one of the basic concepts of the practical legal theory with faquan as its core category, and jural right, jural power, moral right, and moral power are all denotations of the concept of quan, with the underlying foundation of corresponding interest and property, including both property with defined ownership and property with undefined ownership, which, all together, constitute the entire social-economic content of quan.

Attempting to follow the naming convention, a few scholars and the author tried to find a Latin word or combination of words for faquan, and focused on the two words: ius and imperium. There are two basic meanings for ius:[46] one is right and right capacity (namely, the capability of enjoying right or doing something), which can be used upon persons or things, thus is the best Latin word that can be used to refer to today's jural right; while imperium[47] refers to public power, dominion, opposite and parallel to ius, is a Latin word that is closest to today's jural power in terms of meaning. Based on this understanding, the author proposed to combine ius and imperium to form a new term, iusimperium, as the name for the unity of right and power. But most other scholars considered this combination of words too complicated, to specialized, and too foreign in an English text. Thus the attempt to use a Latin combination to form a new term for the unity of right and power was abandoned.

After extensive discussions and consultations with scholars of jurisprudence and linguistics, the author decided to use the Chinese pinyin form, faquan, as the term for the unity of right and power. The "fa" ("法") in faquan means "jural" or "recognized and protected by the law" in Chinese language. Faquan ("法权"), as the combination of "fa" and "quan," means "quan recognized and protected by the law," i.e., the unity of various rights and powers.

Upon naming the unity of right and power "faquan" and forming a basic concept, faquan naturally surpasses right and power and becomes the only core category of the practical legal theory, because of the central status of the object referred to by the term in the reality of legal life. Hence we call this legal theory as faquanism.

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46 *Ius* has its basic meaning, such as "that which is sanctioned or ordained law;" "a legal system or code (with all technicalities); that which is good and just, the principles of law, equity, the right;" "what one is entitled to (esp. by law), one's right, due, prerogative, etc.;" "right over others." See *Oxford Latin Dictionary*, Oxford University Press, Ely House W.I, 1968, pp. 984–985.

47 *Imperium* also has its basic meaning, such as "the supreme administrative power, in Rome exercised at first by kings, and subsequently by certain magistrates and provincial governors;" "the power exercised by Roman emperors;" "supreme military power, command;" "supreme authority in any sphere;" "an office, magistracy, or command involving supreme power;" "a particular tenure of such an office;" "the exercise of authority, rule, discipline;" "dominion (exercised by a ruler or people), government, sway" and so on. See Oxford Latin Dictionary, *Oxford University Press*, Ely House W.I, 1968, pp. 483–484.

3.4 *Duty is Considered as a Jurisprudential Category Representing Loss of Interest and Expenditure of Property*

The practical legal theory understands duty in terms of social-economic content, not semantics. Since duty is a jurisprudential category representing loss of interest and property expenditure, and is parallel, opposite, contrary to the jurisprudential category representing attainment of interest and increment of property, there are naturally duties corresponding to quan, faquan, and residual quan, which we may as well call total duty, jural duty, residual duty, respectively. Furthermore, there must also be duties corresponding to jural rights, jural powers, moral rights, and moral powers. All together, we have jural duty, moral duty, or residual duty, where jural duty is what jurisprudence normally refers to as duty.

The specific right-duty relationship and power-duty relationship in legal life should be equal in absolute value but contrary in interest content and property content. Here, "contrary" means that duty is loss, expenditure, negative number, while right and power are attainment, increment, positive number, so on and so forth. The relationship between a specific jural right and its corresponding jural duty, or between a specific jural power and jural duty should be the same as well.

We should hasten to add that it is natural for duty corresponding to right and duty corresponding to power to have variety of differences in form due to the different subjects, but they don't have much difference in nature, namely, in terms of social-economic content. Additionally, duty can also be divided into substantive duty and procedural duty, which has no direct property content of negative value.

So, duty (not including moral duty) normally referred to in legal studies is a basic concept of jurisprudence that can denote multiple legal phenomena of the same nature, including jural duty, disability, no-right, no-power, responsibility, obligation, etc. To borrow from Hohfeld again, duty is "the lowest common denominator" for the terms referring to the relevant phenomena. However, disability, no-right, and no-power here are generally procedural duties.

3.5 *Jurisprudence as the Theory of Fundamental Research of Interest and Property Distribution*

This book proposes and proves a series of conjectures: right is the legal manifestation of individual interest, with private property as its material foundation; power is the legal manifestation of public interest represented by public agencies such as the government, with public property resulted from taxation as its material foundation; faquan, as the unity of right and power, is not a legal existence, but a jurisprudential entity formulated through human

abstract thinking, which embodies the total interest of a society, with property with defined ownership as its material foundation. Here, the total interest of a society refers to the sum of the total individual interest and the total public interest, and property with defined ownership refers to the sum of the total private property and the total public property.

Based on the above understanding, we will reach the following three conclusions by necessity: (1) The law is the rules governing the distribution of the total "quan" or quan in its totality, which is to say, if the small quantity of extra-legal right is disregarded, the law is the state's coercive rules in distributing faquan and regulating its exercise, whose essence is to distribute interest and property, as well as regulate their application; (2) On the surface, jurisprudence is the theory that studies the distribution and exercise of "quan," faquan, right, and power, but ultimately it studies the distribution and application of underlying interest and property; (3) In terms of the relationship between the law and the distribution of interest and property, we should differentiate formulation of the constitution, amendment of constitution, legislation, administration, and judiciary; generally, the characteristics of distributing interest and property are more obvious in the formulation of the constitution, amendment of constitution, and legislation process, while the implementation of the constitution and the law, including constitutional review, is primarily to guarantee the distribution plan of interest and property stipulated by the constitution and the law to be strictly and effectively implemented.

The general law of faquan distribution is: in legislations with economic content, the nature of interest distribution and property distribution is more intuitive, an example is the Health Care Act recently being pushed by the Trump Administration in the Congress. In legislations concerning power distribution, judiciary procedure, and legal system, the nature of interest distribution and property distribution is not so obvious, such as the supervision law that is being formulated, the criminal procedure law and the organic law of the people's courts that were amended in China in 2017. As for the constitution, because it is not pure private law, nor pure public law, but the fundamental law for both private law and public law, it is constituted of the general rules in distributing the total faquan and further distributing the total interest and the total property of a country, and in regulating the application of faquan, and is often related to the fundamental rules of the distribution of interest and property.

3.6 *The Categorical System of Jurisprudence Is Established Based on the Objective World of Legal Life*

The following are some of the questions that any legal theory has to answer: Does a categorical system of jurisprudence need objective basis? How is the

composition of basic categories identified? And how should its appropriateness be tested? The specific method of the practical legal theory is to treat legal life as an objective world and consider the categorical system as the theoretical foundation of the subjective world reflecting the objective world. In doing so, the relationship between the categorical system of jurisprudence and the reality of legal life becomes clear: the world of legal phenomena is the fundamental object and starting point of jurisprudential research, and the categorical system of jurisprudence should be consistent with the need to comprehensively, accurately, thoroughly, and dynamically reflect the status and movement of the world of legal phenomena; in addition to being able to reasonably explain all legal phenomena, a good legal theory supported by several basic categories should also be helpful in constructing a society of democracy and the rule of law, and be beneficial to improving the protection of the basic human rights.

About the relationship between category and the objective world of phenomena, Lenin has the following to say: "the net of natural phenomena is before human being. The man with instinct, or the barbarian, does not separate himself from the natural world, while the man with self-consciousness does separate himself from the natural world. Category is some of the small phases of such process of separation, namely, some of the small phases in the process of understanding the world, which are the knots that help us understand and grasp the net of natural phenomena."[48]

In this sense, "the net of natural phenomena" faced by scholars of legal studies are the objective and multi-faceted world of legal phenomena, and the jurisprudential categories and the categorical system are the intellectual achievements of their study of legal phenomena, which is the product of thinking, and part of the subjective world. The quality of the product of the subjective world depends on whether it can comprehensively, accurately, thoroughly, and dynamically reflect the characteristics of the objective net of legal phenomena and its internal and external connections. In terms of legal studies, the categorical system that is able to comprehensively, accurately, thoroughly, and dynamically reflect the characteristics of the objective net of legal phenomena and its internal and external connections is the best, otherwise it is not good or not very good. However, opinions differ with regard to what the objective net of legal phenomena indeed looks like, what categorical structure and theoretical system can comprehensively, accurately, thoroughly, and dynamically reflect the characteristics of the net. Different people have different answers concerning such questions. And the reason for the differences, is primarily because the positions of the observers are different, and

48 V. I. Lenin, *Collected Works*, Vol. 38, *"Philosophical Notebooks"*, Translated by Clemens Dutt (Moscow: Progress Publishers, 1976), 93.

secondarily because the capacity and the method of understanding are different. Everyone and the organization that he belongs to have their own special interests and tend to select the angle and distance most suitable to their interests in approaching an issue. For the same reason, facing the objective world of phenomena, different people may intentionally emphasize something, or intentionally weaken, ignore something, and may even deliberately distort the picture of the objective world of phenomena.

The objective world of legal phenomena is in constant changes, and the intellectual achievements of understanding legal phenomena and recording into jurisprudential categories will never be able to keep up with the change of legal phenomena themselves. Therefore, in order for jurisprudential research to reflect the realistic conditions of the world of legal phenomena and its change to the maximum, researchers should never make their primary and ultimate object the jurisprudential categories that are the record of their predecessors' research achievements. The right way for the researchers of jurisprudence should be to reference and build on existing categories to follow living legal phenomena, and to incorporate the new changes and the new understanding of them into the existing categories, which is the only way to advance the understanding of the world of legal phenomena and legal studies itself.

It should be noted that, once a theoretical system of jurisprudence supported by the categorical system appears, its content will also in turn influence the status and the development of the world of legal phenomena to various extent. The extent of the influence of the theoretical elements such as the categorical system of jurisprudence depends on its interpretability of legal phenomena, its strength of logicality, and its depth and width of understanding human beings. As for the direction of such influence, it will depend on to what degree it can satisfy the need of the people or be consistent with the trend of the times.

The world of legal phenomena and the conceptual world of jurisprudential categories influence each other, and it is only in the original and fundamental sense that the former is seen as the objective entity, while the latter as the subjective reflection. The actuality is that, no one, not even the jurisprudent, can possibly live in an original or fundamental condition other than in an interactive process between the world of objective phenomena and the complex conceptual world. In this process, neither of the two is always the most important, and primary, or the second most important, and secondary, everything depends on the specific conditions such as times and locations. Therefore, in order to construct a country with democracy and the rule of law, and to effectively protect the basic human rights, and realize fairness and justice, we must

search for the most appropriate categorical system of jurisprudence and corresponding theoretical system.

The design of the categorical system of the practical legal theory takes into primary consideration the interest identification and property identification of all legal phenomena. Its basic categories are logically listed as follows: (1) Quan, or quan in its totality, whose denotation includes all rights, powers plus moral rights and moral powers, whose content is the sum of jural interest and moral interest, and whose material foundation is property with defined and undefined ownership of a country or society; (2) Faquan, whose denotation includes all rights and powers, whose content is the total legally-defined interest, and whose material foundation is all property with defined ownership of a country or an entire society; (3) Power, whose common existing forms are jural power and public agency's functions, is the legal manifestation of public interest and its corresponding public agency's property; (4) Right, whose common existing forms are jural right, freedom and liberty, is the legal manifestation of individual interest and its corresponding private property; (5) Residual quan, or the difference of quan minus faquan, or quan minus right and power, whose common existing forms are moral right or moral power, whose social content is interest not protected by the law, and whose material foundation is property with undefined property; from the perspective of legal practice, residual quan can convert into power, or right, vice versa; (6) Duty, which refers to the objects that logically include all the content of negative interest and negative property of quan, faquan, power, right, and residual quan. Duty can be further divided into jural duty and moral duty. If not specified, moral duty is normally negligible in legal studies, so duty here refers to various forms of jural duty and its underlying content of negative interest and negative property. Duty, which is symmetrical to quan, moral right, and moral power, should also be a jurisprudential concept, but was not listed as a basic category of jurisprudence in my previous articles because of its relatively lower importance.

CHAPTER 1

Investigation and Reflection on Fundamental Propositions of Traditional Legal Studies of China

This chapter provides a brief overview of the Chinese theories of right and duty as well as their relations since the beginning of the 20th Century, and my questions and critique of the related traditional conceptions. Since the 1990s, right-centric theory has had tremendous influence in China, but virtually no one has discussed its relation with the right-centric theory popular in the first half of the 20th Century. The second part of this chapter attempts to clarify that relation. The third part of this chapter lists in detail the serious defects of semantic analysis jurisprudence of today's China that has right and duty as its core categories, and advocates for a theoretical reconstruction of such jurisprudence.

1 Re-examination of the Status of Rights and Duties and Their Relationship[1]

The status of right and duty in contemporary Chinese jurisprudence is so overwhelming that it would not appear to be an exaggeration to call today's mainstream jurisprudence as right-duty jurisprudence. But, because of various reasons, there has been no in-depth understanding of the relationship between right and duty. Therefore, the theoretical views summarizing such understanding are, to a great degree, often unable to withstand serious scrutiny, some of the views have insufficient rationale, some are limited to mere summary of phenomena, some are seemingly right but actually wrong, and some are clearly wrong. In order to further our understanding of the relationship between right and duty, I intend in this section to analyze the basic views concerning the relationship between right and duty that are popular in today's Chinese legal studies, and then discuss my own view.

My argument is based on strictly differentiating right and "right in the wider sense." One way to understand "right in the wider sense" is that it is the sum of right and power, namely, the legal phenomenon or jurisprudential

1 This section is primarily based on an earlier article of mine: Tong Zhiwei 童之伟, "Dui qaunli yu yiwu de butong kanfa 对权利与义务关系的不同看法 [Different Views on the Relation between Right and Duty]", *Fashang yanjiu* 6 (1998), 24–34.

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analysis unit that I have conducted in-depth investigations into and is designated by the term faquan.[2] Because the existing legal theory has not studied "right in the wider sense," nor accepted the concept of faquan that, to a certain degree, directly designates "right in the wider sense," and it is the most basic requirement for a scientific researcher to have a specific object and clear concepts, here I will only discuss the relationship between right and duty, not generally the relationship between "right in the wider sense" and duty.

1.1 *The Basic Views of the Existing Theory and Its Logical Premise*

Concerning the relationship between right and duty, the field of Chinese legal studies has had many discussions in the past half century, and the discussions have become more and more systematic in the recent decade, with the basic theoretical views as follows:

(1) Right and duty are indivisible. The data shows that, this view appeared first in the 1930s in China, the view back then was that, "right and duty are like the shadow of a thing, sound of a voice, and have mutual relationship in terms of the law, so duty resides wherever right is, and right resides wherever duty is."[3] In the 1940s, the statements became even more explicit. Some scholars quoted Western scholar Pollock's statement that "right and duty are indivisible, like the activity and reactivity (action and reaction) in mechanics" to prove that "the same legal rule creates right, and also produces duty. The creation of duty is also the production of right."[4] As indicated by the above writing, the view that right and duty are indivisible was formed no later than the 1930s–1940s, and very likely was a reporting of the views of Western jurisprudents.

Nevertheless, one thing that should be certain is that the view that right and duty are indivisible is not the creation of contemporary Chinese legal studies. The representative formulation concerning the issue in today's Chinese jurisprudence is: "Right and duty are indivisible: there is no right without duty, and no duty without right."[5] Here, "right and duty are indivisible" reaffirms the view on the same issue in the 1930s and 1940s in China, and the rest comes from the declaration and the "Provisional Rules of the Association" written by Marx for the International Workers Association in 1864.[6]

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2 See the section "Legal-Philosophical Explications of Faquan" in this book.

3 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang xinji shuju, 1933), 290–291.

4 Gong Yue 龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 164.

5 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 96.

6 "They hold it the duty of a man to claim the rights of a man and a citizen, not only for himself, but for every man who does his duty. No rights without duties, no duties without rights."

(2) The unity of opposites of right and duty. According to this view, "right and duty are a pair of categories of the unity of opposites," "right and duty are mutually dependent," "can be mutually converted;"[7] "right and duty are interrelated, namely, they are the unity of opposites."[8] It is indeed a new practice of contemporary Chinese jurisprudence to explain the relationship between right and duty from the aspect of the unity of opposites.[9]

(3) "The total volume of right and that of duty of a society are equal;" "in a society, right and duty are quantitatively always equal in value or quantity, regardless of how right and duty are distributed, how unequally each social member specifically enjoys right and assumes duty, and whether the provisions regulating right and duty are matched."[10]

(4) Law is right-centric, not duty-centric. With regard to the issue of the center of law, there were many discussions as early as in the 1930s–1940s in the field of legal studies, when some scholars pointed out that German scholars were the first to "promote jurisprudence as a study of right," and to "promote the theory of right-centricity;"[11] some also believed that, different from the era that was duty-centric and individually unenlightened, "in an individually

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Karl Marx & Friedrich Engels, *Collected Works*, Vol. 20, "Provisional Rules of the Association" (Moscow: Progress Publishers, 1985), 15.

7 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 28–31.

8 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 84.

9 The theory of unity of opposites, also known as the theory of contradictions, is considered as one of the basic components of Materialist Dialectics. The interpretation of the main components of the theory of unity of opposites has to start from contradiction: contradiction is the relationship of unity/opposites within the matter or between the matters; the identity and the contradictoriness are the two basic attributes of contradiction; the identity of contradiction refers to the characteristics of mutual dependence, mutual attraction, and mutual conversion of contradictory opposites; and the contradictoriness of contradiction refers to the attributes of mutual restrain, mutual exclusion, and mutual negation of contradictory opposites; the development of the matters is the result of the interaction between the identity and the contradictoriness of contradiction; the identity of contradiction is relative, while the contradictoriness of contradiction is absolute; contradictions are omnipresent, but are various; the identity and the contradictoriness of contradiction are inter-connected; contradictions can be categorized as either primary contradictions or secondary contradictions; the contradictoriness of contradiction results in constant change of the relation between contradictory opposites; and the disintegration of a unity of opposites causes the demise of old matter and the birth of new one.

10 Ibid., 85.

11 Zhu Caizhen 朱采真, *Falüxue tonglun* 法律学通论 [Introduction to Legal Studies], (Shanghai: Shijie shuju, 930), 185.

enlightened era, the notion of law is right-centric."[12] The representative view of contemporary field of jurisprudence is: "In modern society with developed commodity economy and democracy, the law is right-centric;"[13] in terms of the law, between right and duty, it is either duty-centric (the unity of right and duty with duty being dominant), or right-centric (the unity of right and duty with right being dominant). There is no such a thing as right and duty without center or right and duty with dualistic centers.[14]

To properly evaluate these basic views, we need to understand the two theoretical premises that the views are based on.

The primary theoretical premise that existing basic views on the relationship between right and duty are based on is that it considers right and duty as the most important legal phenomena, right and duty are the core, even the entire content, of legal relations, and the contradiction of right and duty is the most basic contradiction of legal life of a society. In this aspect, in Chinese legal studies before 1949, legal studies in Taiwan after 1949, and legal studies of the former Soviet Union, the views expressed in their works are very similar, without principle differences.

Before 1949, "the most popular views believed that the law is built on right and duty;"[15] in the field of legal studies in Taiwan, the consistent view was that "the core of legal relations is right and duty …… Although right and duty cannot include the entirety of legal relations, they actually occupy the main portion of legal relations;"[16] and the scholars of the former Soviet Union believed that "legal relations are special complexes of right and duty legally established for certain people."[17]

The right-duty jurisprudence popular in the past decade in China has borrowed and interpreted the above various views, and has proposed that "right and duty are the most universal and most common basic particles in legal

12 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang bianyishe, 1933), 242.

13 Zhang Guangbo & Zhang Wenxian 张光博、张文显, "Yi quanli he yiwu wei jiben fanchou chonggou faxue lilun 以权利和义务为基本范畴重构法学理论 [Reconstitution of Legal Theory with the Basic Categories of Right and Duty]", *Qiushi* 10 (1989): 20–25, 24.

14 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 92.

15 Gong Yue 龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 164.

16 Liu Ri'an 刘日安, *Faxue xulun* 法学绪论 [Introduction to Legal Studies], (Taibei: Sanmin shuju, 1966), 136.

17 杰尼索夫, *Guojia yu falü de lilun* 国家与法律的理论 [The Theory of State and Law], (Shanghai: Zhonghua shuju, 1951), 438.

phenomena," "the unity of opposites of right and duty contains the embryonic bud of all contradictions within legal phenomena," and "all the contradictions, conflicts, disputes, and struggles in the field of law originate from the opposition between right and duty."[18]

That jurisprudence is a study of right and duty is another theoretical premise that the various basic views concerning the relationship between right and duty are based on. Such a view was already quite popular before 1949 in China. As early as in the 1930s, a Chinese translation of a work of legal studies says: "The law often is a combination of more than two parties, with one party being the holder of right that has certain will and certain action, the other being the holder of duty corresponding to various rights, and both parties are interrelated."[19]

Later, some scholars in China made it even more straightforward: "Right and duty are the most important concepts in legal studies, therefore constituting its main content;"[20] "the task of the law is to stipulate right and duty, so modern general theories all maintain that jurisprudence is a study of right and duty."[21] Right-duty jurisprudence gradually rising in the 1980s inherited such views, believing that "it is more appropriate to call jurisprudence a study of right and duty," "all legal norms are centered on right and duty, with no exception,"[22] and that "all the issues in terms of the law are reduced to right and duty. Right and duty constitute the logical linkage from legal norms to legal relations and to legal responsibility, and permeates the entire process of all the legal departments and legal applications.[23]

1.2 *The Main Shortcomings of the Existing Theory*

The main shortcomings of the existing theory of the relationship between right and duty are all reflected in its basic views. Now let us analyze them one by one.

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18 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 18.

19 Takayanagi Kenzō 高柳贤三, *Falü zhexue yuanli* 法律哲学原理 [Theory of Legal Philosophy], (Shanghai: Shanghai dadong shuju, 1932), 234.

20 Hu Yuqing 胡育庆, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai taipingyang shudian, 1933), 124.

21 He Renqing 何任清, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shangwu yinshuguan, 1946), 119.

22 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 7 (Introduction), 82.

23 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 95–96.

(1) The view that right and duty are indivisible is untenable. The view that right and duty are indivisible (or inseparable) is one of the basic views in today's Chinese legal studies that is universally accepted and often repeated, but it is actually an incorrect view. Such a view has caused much misunderstanding in the practice of legal life of the society and the theory of legal studies.

To understand the problem of the view that right and duty are indivisible, we need to identify three facts.

a. Whether right and duty can be divided and whether right and duty are compatible are two different theoretical issues. The former has to do with the issue of whether right and duty can be objectively separated and divided; and the latter with the issue of how, under the premise of affirming that right and duty are not compatible, right allocation and duty allocation in a just society should be coordinated. On the one hand, the two issues should not be confused; on the other, even if they are confused, it can only increase the difficulty of theoretical analysis, and is unable to prove that the view that right and duty are indivisible is in any way helpful. Because, under the latter condition, the so far often existing fact that right and duty are not compatible themselves already negates the view that right and duty are indivisible, regardless of in what historical type of country such facts exist, and how universal they are.

b. Right and duty are two different things. "Quan" at least can be divided into right and power, where right is the "quan" that the individuals such as citizens, legal persons (not including state here), and other social-economic organizations enjoy and exercise, while power is the "quan" that is controlled and exercised by public agencies and their officials representing the state, and the two "quan" are not the same thing. In modern times, from the American "Declaration of Independence," to the French "Declaration of the Rights of Man and of the Citizen," to the US Constitution of 1787, to the French Constitution of 1791, to the current Chinese Constitution, all fully exhibit and reflect such differences.

Family, Private Ownership, and the Origin of State, the most important work concerning the origin of state and the law in Marxism, more strictly differentiates right from power. In this work, all the "quan" controlled and exercised by public agencies are called powers; and all the "quan" relative to the power of public agencies are called rights.[24] Some existing works of jurisprudence in China also recognize and clearly reflect this type of difference between right and power. For example, when the scholars who uphold the view that right and duty are indivisible try to prove that right is the center relative to duty and power,

24 Karl Marx & Friedrich Engels, *Collected Works*, Vol. 26, "Origin of the Family, Private Property and State" (Moscow: Progress Publishers, 1990), 269–276.

they are speaking under the premise that emphasizes the difference between right and power.

c. Duty is not only relative to right, but also to power. For every power, there must be a corresponsive duty (manifested as legally defined responsibility, obligation, no-power, etc.). That is self-evident.

After having identified the three facts, we can easily see that, from the aspect of social-legal life, right and duty are divisible, separable, and often times divided and separated. First, one portion of the entire duty is corresponsive to right, and the other portion is corresponsive to power. The portion of duty not corresponsive to right therefore is the duty separated from right. This portion of duty is in fact the duty without right, or it can be called the duty with power. Second, speaking about the unfair distribution of right and duty in class societies, Engels criticizes such societies as ones "assigning to one class pretty nearly all the rights, and to the other class pretty nearly all the duties."[25]

But the existence of such unfair phenomena also indicates that right and duty can be separated in social-legal life. Because it shows that, when the right corresponsive to certain duty is taken away from the subject of duty and is enjoyed by another portion of people, such duty itself has been separated from the corresponsive right, and given to the other portion of people. This situation was ordinary in all types of countries in the pre-socialist era, and still exists under socialist conditions to certain degree. These are all facts.

Here, there is a question that is to be asked inevitably: isn't it the case that the view that right and duty can be separated directly negates the famous proposition "there is no right without duty, and no duty without right"? Absolutely not! The view that right and duty can be separated does not contradict the above proposition of Marx' at all.

Here I have to say that many in the field of legal studies have misunderstood the meaning of the sentence by Marx. As indicated by the original work, it was a sentence in the "Preliminary General Rules of the Association" that Marx wrote for the International Workers Association in 1864, and again emphasized in the "General Rules of the International Working Men's Association" he wrote in 1871.[26] What is proposed or stipulated by this sentence is only a principle of right and duty distribution that a specific social organization should have, and it only demands that the distribution of right should be balanced and consistent with the distribution of duty, and it does not deal with the issue of whether

25 Ibid., 276.

26 "That it acknowledges no rights without duties, no duties without rights." Karl Marx & Friedrich Engels, *Collected Works*, Vol. 23, "General Rules of the International Working Men's Association" (Moscow: Progress Publishers, 1988), 4.

right and duty can be objectively separated. But some contemporary scholars completely discard the specific historical conditions, such as time and location, under which the sentence was written, improperly treating it as a general jurisprudential principle and further engaging in its elaboration, thereby completely distorting the original meaning of the sentence as written by Marx.

It should be understood that a principle of right and duty distribution that is stipulated by the articles of what a specific social organization should have, cannot and should not be treated as a general principle of legal studies. Because, under the former condition, it is sufficient to just consider the appropriateness of the situation of right and duty distribution of individual members and various offices of a relevant social organization, and approach it from the perspective of the law, namely, from right and duty. Under the latter condition, as a general legal principle, it must be applicable to all areas, and must consider the existence of power, one of the basic elements in the field of the law. Under the former condition, this sentence is only to set forth a specific requirement, and to establish a code of conduct. Under the latter, it should properly reflect the objectivity of history and reality.

Logically, when we discuss the relationship between right and duty, they are already separated. The reason why right is called right, not duty, is because it is understood as different from duty, so that the linguistic sign, right, is used to separate it from duty. It is also true if we reverse the situation. Furthermore, if right and duty are not separated, or is not divisible or differentiated, then there will be no relationship between them to speak of.

On the other hand, even if right and duty were really difficult to separate or impossible to divide from the aspect of legal life, legal studies, as a science, must still strive to separate them, and if jurisprudents of one generation cannot do it, those of the next generation should continue. Why do we need science? Regardless of natural sciences, social sciences, or humanities, their purpose is to understand that which is still not understood so far, and to resolve the problems that are still not resolved so far.

And to do what people have been trying to do, but have failed to do, one of the most important tasks is to separate that which seems indivisible. As early as more than 2000 years ago, Zhuang Zi already proposed the idea of dividing matters, "a foot-long stick, cut in half each day, and you can never exhaust it." The development of physics, after dividing matter into molecules and atoms, is now advancing the process of division to the level of elementary particles. And in recent years, scholars have also proposed the view that elementary particles are not elementary, and are attempting to advance the division of matter to the level of quark. In the process, some countries have spent tens of billions of US dollars to construct a circular accelerator with a track as long as a few dozen

kilometers (CERN, the European Organization for Nuclear Research), and use the energy of hundreds of millions of electric volts to bombard particles, so as to "separate" them—can't this give us jurisprudents some inspiration?

Therefore, the view that "right and duty are indivisible" is a typical one against scientific spirit.

(2) The correct view of the unity of opposites of right and duty covers up a series of incorrect understandings. Any two sides of a contradiction can be said to be the unity of opposites. In this sense, the proposition of the unity of opposites of right and duty is no doubt correct. But, in terms of the research activities of any academic subject, including legal studies, it would be too easy a task to simply apply the principle of the unity of opposites in the textbooks of mandatary college course in politics to the opposites as the objects of scientific research.

So, facing the two legal phenomena, right and duty, what is really invaluable is to truthfully evaluate or clarify the status of the pair of contradictions that they constitute in the entire system of legal phenomena, the deep-rooted social-economic content contained in the unity of opposites between them, and the lively and specific relationship between them and other important legal phenomena, etc. And it is precisely in these aspects that the existing theories have not offered answers or have offered answers of little significance.

For example, when discussing the opposition between right and duty, some scholars mention that right represents interest, duty represents burden, and they are two separate and opposite components and elements of the one thing: the law, while at the same time they are interdependent, and interlinked.[27] However, no one has clarified the following key issues: Which part of the total interest recognized and protected by the law does right embody, and what is its relationship with the interest embodied by power? Is the burden embodied by duty that which is correspondent to both right and power, or to right only? If the interest and burden here are both related to right but not power, which means the discussion is limited to the realm of private law, then how can we reduce all legal issues, including issues related to public law, to right and duty, as claimed by some scholars? Right and power, power and right, like right and duty, are two separate and opposite components or elements of the law, are the opposites that are mutually exclusive, and are closely related three pairs of

27 See Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 28–29; Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 84.

contradiction. How can we sort out their relationships, and what kind of interest content and property content does the contradiction of the three pairs of legal phenomena reflect?

In summary, the discussions of the existing jurisprudence about the relationship of the unity of opposites of right and duty have the following problems.

a. They have incorrectly estimated the status of the pair of contradictions of right and duty in social-legal life, and treated non-basic and localized contradiction as basic and overall contradictions. What is related to the two most basic facts of social-legal life, namely, civil society and state, is right and power, respectively, therefore, the most basic contradiction in legal life is the contradiction between right and power, and the most basic relationship of the unity of opposites is the relation of the unity of opposites of right and power. And the secondary is the contradictions and the relationship of the unity of opposites formed by various differences within right, and the contradictions and the relationship of the unity of opposites formed by various differences within power. Here, theoretically, the relationship between right and power can be summarized as a faquan relationship; while legally, the relationship of the contradictions and the unity of opposites of rights are manifested as that between right and duty, and the relationship between powers is manifested as that between power and duty.

The existing theory of the relationship between right and duty is limited by the Chinese and foreign traditions that have for a long time reduced all legal issues to the concepts of right and duty, is unable to recognize the fundamental status of the contradiction between right and power in social-legal life, and ignores the importance of the contradiction between right and power, thereby reversing the order, improperly elevating the relationship between right and duty and their contradiction that only reflect right-right opposition within civil society to the status of the entire legal relations and the basic contradictions of legal life.

b. In terms of the discussions on the relationship between right and duty itself, the existing theory of the unity of opposites of right and duty does not recognize the precise and specific social content behind right and duty, nor understand their specific property attributes, so much so that their discussions tend to be hollow, giving the readers a sense of simplistically deducing the theory of the law of the unity of opposites in the textbooks of dialectical materialism in the field of legal studies. Such works of legal studies, when dealing with the interdependence, interlinkage, mutual conditioning, and mutual conversion of right and duty, are almost always doing the same thing. Take mutual conditioning as an example, according to the existing interpretation,

"the existence and development" of right and duty "must be conditioned on the existence and development of the other party."[28]

Would this mean that, on the one hand, only when duty is developed is it possible for right to develop, on the other hand, only when right is developed is it possible for duty to develop? If that were true, then none of right and duty would be able to develop!

The real situation is that right is generated during the production process of a society, more accurately, it is the legal manifestation of the property formed or incremented during the production process after it is assigned to citizens and other individuals. Duty is only an auxiliary phenomenon along with right, not the condition for the creation and development of right. In terms of mutual conversion, for example, philosophically, it refers to that, both sides of opposition, through struggle, convert to their opposite under certain condition, and there are many forms of conversion, progressive and regressive, substantial and formal, etc. There is no qualitative identity between right and duty, and the so-called mutual conversion between them is often merely spatial replacement, or the change of relative position due to the transition of people's perspective, which is fundamentally different from the mutual conversion between right and power under certain condition, because right and power are both legally recognized and protected interests, and both have property as their material foundation. About such specific content with substantial significance, the existing theory of the unity of opposites of right and duty has not done necessary analyses.

c. What the existing theory of the unity of opposites of right and duty discusses is the unity of opposites of the entire rights and a portion of duty, and at the same time, it does not discuss at all the relationship between this portion of duty and other duties and the entire duties, therefore, such theory is one-sided and lacks the necessary distribution, and cannot explain many issues. In the entire legal duties, there is a difference between the duty corresponding to right, and the duty corresponding to power. What the existing theory of the unity of opposites of right and duty touches upon is only that portion of duty corresponding to right, while the portion of duty corresponding to power has no direct relationship with right, so there is no reason and possibility to take it to form "the unity of opposites" with right.

It seems that some scholars are completely unaware of that, do not recognize that they must differentiate the duty corresponding to right from the

28 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 84.

duty corresponding to power, and do not understand even the approximate boundary of the object that they are dealing with. This fact alone is sufficient to determine that the existing theory of the unity of opposites of right and duty is not quite appropriate, and is unable to reflect the real relationship between right and duty.

(3) The total volume of right and the total volume of duty are not equal, and even if they were equal, it would be impossible to reveal their equality with existing methods. In terms of quantitative relations, the total right and total duty of a society are impossible to be equal in value or amount. Strictly speaking, the total volume of right should be smaller than the total volume of duty. The reason is simple: the total duty of a society is divided into two parts: the duty corresponding to right and the duty corresponding to power, even according to the existing theory of the relationship between right and duty, the total volume of right can only be equal to the total volume of the duty corresponding to it, and cannot be equal to the sum of the duty corresponding to right and the duty corresponding to power.

In other words, even if right and duty were objectively and actually equal in terms of their total volume, according to the method of analyzing the relationship between right and duty adopted by the existing right-duty jurisprudence so far, it would be still impossible to reveal or prove that they were equal, at most there would be only room for guesswork. The reasons for that are twofold.

The first is that their understanding of right and duty is too fuzzy and superficial. The signs for fuzziness are: in terms of legal phenomena, the boundary between right and power is not clear, therefore the boundary between the duty corresponding to right and the duty corresponding to power is not clear either; in terms of social content, although right is recognized as interest, and duty is recognized as something opposite to right, and is "no-interest," it is never clarified what interest right specifically embodies, whether it is the total interest legally recognized and protected or merely part of it, and if it is merely part of it, which part it is precisely, etc. At the same time, whether it is interest, or "no-interest," they are all abstract and social content that can only be manifested through human relations, and cannot be quantified theoretically and practically. It is also the case with duty. As for the sign for superficiality, it refers mainly to the fact that the property content corresponding to right and duty is not revealed.

The second is that, before jumping to conclusions about the quantitative relationship between right and duty, they have not explored, and have not known that they should explore, the unified measuring standards and calculating units to directly and indirectly conduct quantitative assessment on right and duty. It is clear that, before advancing the research of right and

duty from the level of fuzzy interest and "no-interest" into the level of property content, it is impossible to obtain such unified measuring standards and calculating units. Only at the level of property content, can currency and its calculating units become the unified standards of indirectly measuring the total volume of right and duty.

(4) The formulation of right-centricity is untenable in theory, and unworkable in practice. Perhaps, today's China is indeed in an "era towards right," as the title of a book predicts. Precisely because of this reason, the reformulation of right-centric theory has been widely praised in the field of legal studies now, as if the notion of right-centricity of law has become the truth of our time. But, is the era of right the era of people's right or the era of legal right? Is right-centricity people's right-centricity or legal right-centricity? It is not clear. In relation to that, is the renewed popularity of right-centric theory due to the fact that it contains rich elements of the truth, or due to the fact that it satisfies people's warm anticipation for right by giving them psychological consolation? It seems that the reason is primarily the latter. The truth does not need a charm offensive, and the understanding of the truth also cannot follow the principle of the minority submitting to the majority.

The notion of right-centricity is incorrect in theory, and unworkable in practice. It should be pointed out that, right, as people often talk about it, is actually divided into two levels, the first is the right that is original, and in the sense of the term in macro theory of politics, the most typical usage of which is "people's right." Such right historically is prior to political society, the law, and state, and realistically is a political state, whose subject is the entire nationals, with a status higher than the law and state.

Such right that is original, and in the sense of the term in macro theory of politics (i.e., the people's right) is something real, but cannot be discerned through intuition, and can be seen only through the "eyes" of theoretical and abstract thinking. Nonetheless, in some special eras, it is inevitably exhibited directly in front of audiences to a great degree, such as the rights exercised by the revolutionaries and their representatives during the French Revolution,[29] and the rights exercised by the Chinese people and their actual representatives in September of 1949 (referring to the 1st Plenary Session of the Chinese People's Political Consultative Conference).

The second is the right that is legal right, namely, the right that is legally recognized and protected, whose subject is citizens and other individuals, and is

29 Refers to the National Assembly established by the representatives of the third estate of France on June 17, 1789, which was renamed as the National Constitutional Assembly on July 9 of the same year.

a legal life. The first level of right, namely the original right of the people, logically includes all legal rights, legal power, and residual quan (i.e., the remainder of the original right of people minus legal right and legal power), therefore, the legal right discussed in legal studies is only a portion of original right, or is the legal form of the conversion of a portion of the original right.

In both of the two levels of right, if the right referred to in the notion of right-centricity refers to the original right of people, namely, the civil right, it is reasonable and tenable in terms of the theory of political sciences; but if it refers to legal right, namely, the right of citizens and other entities of a current society, then it is incorrect, and untenable. However, in terms of the content of the notion of right-centricity, the right that it refers to is precisely legal right, not people's right.

This is firstly because, concerning the right discussed in legal studies, if is not specifically clarified, its specific object refers to legal right, which is the conventional usage. The term right in right-centricity has been used in such context, which is apparent in current works of legal studies.

Secondly, what corresponds to the original right of people is legal right, legal power, and residual quan, and what is corresponding or opposite to legal right is legal power and duty. If the center that the theorists of right-centricity talk about refers to people's right, then such center exists in the relations between people's right and the following three: legal right, legal power, and residual quan. When the center that the theorists of right-centricity talk about refers to legal right, such center should be embodied as quadruple relationship between legal right and the following four: people's right, legal power, legal duty and residual quan, and if we don't consider the non-legally defined content, namely, people's right and residual quan, there will be only a double relationship left. Such double relationship is that between right and duty, right and power in today's legal studies.

Because what the contemporary theorists of right-centricity have always emphasized is that "right-centricity exists in two relationships, one is the relationship between right and duty, and the other is that between right and power,"[30] therefore, it is clear that, the right-centricity that they have been talking about refers to legal right-centricity, not people's right-centricity in political sciences.

Why do we say that, in terms of legal right, right-centricity is incorrect? The main reasons are as follows:

30 Zhang Wenxian 张文显, *Ershi shiji xifang fazhexue sichao yanjiu* 二十世纪西方法哲学思潮研究 [A Study of Schools of Western Legal Philosophy in the 20th Century], (Beijing: Falü chubanshe, 1996), 507.

First, legally, right is what is really opposite to power, and duty is just the existing forms of the internal opposition of both right and power. Therefore, to discuss right-centricity in this sense, it should primarily and mainly about power, not duty. In addition, even if it is about duty, it can only refer to the portion of duty that is corresponding to right. It is the manifestation of logical confusion to discuss right-centricity in terms of the entire legal duties that include the duty corresponding to power, because, right is not corresponding to the portion of duty that is corresponding to power, so there is no need to link them together.

Second, the statuses of legally recognized and protected right and power are equal, and they are only subordinate to, and submit to, people's right and people's will, or the law, that collectively reflects such original right. As for the relationship between them, everything is dependent on the stipulations of the law, no one is necessarily subordinate to, and submits to, anyone else. But "the right-centricity that is discussed by Chinese scholars is generally that right should serve as the starting point, center, and guidance of the entire legal system;" and one of the intentions of proposing right-centricity is "to liberate right from power, namely, 'the untying of hands'."[31] Because all these are untenable if we look at the center of law from the perspective of legal right: what can serve as the starting point, center, and guidance of the legal system can only be people's right, not legal right.

How to distribute legal right, legal power, and the entire duty depends on the need of realizing the people's right. In order to carry out the plan for the distribution of right and power in the legal system, right should supervise power, and power should also regulate the exercise of right, stopping and punishing the behavior of abusing right.

Power must restrict right by the law, and generally there is no issue of liberating right from power and "untying the hands" of right. Of course, if the restriction of right by power exceeds the necessary boundary, where the "tie" becomes too tight, and is not beneficial to the full realization of people's right under the condition of the balance and coordination of right and power, it becomes a different issue. But even under such conditions, we can only, through the formulation of the constitution, amendment of the law, and legislation, relatively loosen the tie a little that restricts right. Right cannot be let loose completely, otherwise, there would be no need for the law, and also no need for any discussion of the issues of legal studies.

31 See Zhang Wenxian 张文显, *Ershi shiji xifang fazhexue sichao yanjiu* 二十世纪西方法哲学思潮研究 [A Study of Schools of Western Legal Philosophy in the 20th Century], (Beijing: Falü chubanshe, 1996), 506–507.

Legal studies is a science, and we cannot say anything just because it is what the readers want to hear. In a society of market economy, no one would deny that power should be reduced more substantially than before, while right should be expanded corresponsively, only the relevant formulation should be really consistent with jurisprudence, based on the facts, and measured.

Third, legally, right has never been, and is impossible to be, in the position of the center. According to the basic proposals of right-centricity, logically, if there is a conflict between right and power, power should withdraw and submit to right. But such a situation can never happen, otherwise it would result in anarchy. Therefore, even in countries that uphold people's sovereignty and enjoy a healthy rule of law, and even if the purpose of the existence of the government is to protect human rights, the real solution of the conflict between right and power is not that power yields to right, but that the conflict is resolved according to the law, where there is no right-centricity relative to power to speak about. As for the relationship between right and the portion of duty corresponding to that right, it is merely the manifestation of the mutual exchange of right and right, or the relationship of their interaction. Since the relationship between right and duty is essentially that between right and right, the notion of right-centricity thus cannot explain anything. The theorists of right-centricity have indeed not clarified through actual examples the specific manifestation of right-centricity in social-legal life.

1.3 *My View on the Relationship between Right and Duty*

To really clarify the relationship between right and duty, we must roughly identify the scopes and characteristics of right and duty. Right is a jurisprudential category that signifies legal right and freedom enjoyed by natural person, legal person (not including state), and other social-economic organizations, whose social content is the interest of citizens and other individuals, and whose material foundation is the property owned by citizens and other individuals. Duty is a jurisprudential category that signifies legal duty, legal responsibility, disqualification, and other phenomena that are corresponsive to right and power, whose social content is contrary to the interest embodied by faquan, and whose material foundation is equal to the total volume of the wealth embodied by faquan but itself is a negative number. Theoretically, right and duty ultimately can both be represented by certain currency. About such characteristics of right and duty, I have already elaborated from the perspective of constitutional law studies.[32]

32 See the second section of Chapter 5 of the book.

However, based on the above consideration, what I would like to emphasize here is that, right is only corresponsive to a part of duty, namely, it is only corresponsive to the duty that is relative to right, not corresponsive to the other part of duty that is relative to power. Therefore, we should clearly draw a conclusion that, the so-called relationship between right and duty actually can only directly involve with that between right and the part of duty that is corresponsive to right. And there is no direct linkage between right and the part of duty that is corresponsive to power. Traditional legal studies tried to discuss that part of duty within the model of the relationship between right and duty, which is itself a mistake of simplification, theoretically deviating from the principle of specifically analyzing specific issues.

Of course, there is a relationship between right and the part of duty that is corresponsive to power, but that relationship is indirect. In terms of research procedure, it is necessary to first understand the direct relationship between right and the part of duty that is corresponsive to right, and then to be able to understand the indirect relationship between right and the part of duty that is corresponsive to power. Here we first focus our discussions on the relationship between right and duty that is opposite to right, which is also the focus of the following pages. Based on the fact of legal life, and assimilating the invaluable research achievements of relevant branches in jurisprudence, I would like to make a few points concerning the relationship between right and duty that is corresponsive to right (simplified as corresponding duty hereinafter):

(1) The relationship between right and corresponding duty is actually the existing form of the relationship between right and right. Any form of the relationship between right and corresponding duty is formed through exchange, coordination, opposition and other means within right or between various rights. Contractual relationship is a typical relationship between right and corresponding duty, but contractual relationship also is normally a typical relationship where one kind of right is exchanged with another kind of right. For instance, the content of a sales contract of goods is an exchange between the right embodied by currency and the right embodied by goods, and the content of a technology transfer contract is an exchange between the right embodied by currency and the right embodied by technology, so on and so forth. Legally defined duty is also no exception. According to the relationship between the basic right formed by constitution and the basic corresponding duty, it is also the manifestation of the opposition, coordination, and balance of one right and the other right of an individual, or one person's right and other persons' rights. Such condition determines the relationship between right and corresponding duty formed based on general law, so should also be understood by way of the relationship between right and right.

(2) The relationship between right and corresponding duty is only a part of the entire legal relations, and is not even the most important part. The entire legal relations in terms of content are all faquan relations, which include the relationship between right and power, that between right and right, and that between power and power. In the context of the differentiation between right and power, whether it is according to the reality of legal life or any existing theoretical rules, "the relationship between right and corresponding duty" can only be the reflection or manifestation of that between right and right, and cannot reflect or manifest that between right and power, and that between power and power.

Concerning the relationship between right and power, some scholars call it the right-power relationship,[33] which does make some sense, but is also problematic in that it cannot reflect the deep and unified social content and material attributes behind such relationship, which is why I have always advocated to directly calling it faquan relation. Such relation has the total legally recognized and protected interest as its unified social content, and has the property with legally defined ownership as its unified material foundation. As for the relationship between power and power, it is normally manifested as that between power and corresponding duty, in the same way that the relationship between right and right is manifested as that between right and corresponding duty.

(3) The essence of the relationship between right and corresponding duty is the interest relationship between citizens and other individuals. In the past few hundreds of years, many jurisprudents have discussed the view that what right embodies is interest, and what duty embodies is burden or no-interest. Admittedly, such view is roughly consistent with the reality, but there are still two shortcomings: one, it does not identify which part of the interest right is corresponsive to; second, it mistakes the duty corresponding to right as the entire duty of legal life.

Considering the above shortcomings, I propose to clearly differentiate the interest embodied by right and the interest embodied by power. Specifically speaking, it is to position right as the interest of individuals legally recognized and protected, chief of which is citizen's interest and other entities' interest that directly derives from citizen's interest, so as to differentiate the interest embodied by right and the interest embodied by power as well as the total interests legally recognized and protected as different analysis units. Similarly,

33 See Qi Yuan 戚渊, "Shichang jingji yu xianfaxue yanjiu de shenhua 市场经济与宪法学研究的深化 [Market Economy and Deepening of the Research of Constitutional Law Studies]", *Tianjin shehui kexue* 1 (1995):48–55, 48–49.

I have also accordingly differentiated the duty corresponding to right and the duty corresponding to power as well as the entire legal duties as different analysis units.

Having understood the two shortcomings of the traditional theory, the conclusion becomes apparent: right embodies legally recognized and protected interest of individuals, and the duty corresponding to right embodies the burden or no-interest corresponding to the interest of individuals. Considering that the relationship between right and corresponding duty is actually that between right and right, we can say that, right refers to the interest that the relevant subject obtains, takes, and harvests corresponding interests, while corresponding duty means that relevant subject loses, expends, pays, and sacrifices corresponding interests, and the relationship between right and corresponding duty is actually a relationship that pays, expends, and sacrifices another interest in order to obtain and take an interest, which also means a relationship that uses its own interest in exchange for an interest of others, so on and so forth. Because the legally recognized and protected interest of individuals is ultimately material interest, and must have corresponding property as its material foundation, the relationship between right and corresponding duty eventually will be manifested as the property relationship between relevant subjects, as a relationship that pays, expends, and sacrifices a property in order to obtain another property, or a relationship that uses one's own property to exchange for another property of someone else's, so on and so forth. Of course, the property content of procedural duty is indirect.

(4) Right and corresponding duty are opposite in nature, but equal in absolute value. That they are opposite in nature means that, in terms of social content, right embodies interest, and its corresponding duty embodies burden or no-interest; in terms of property attributes, right ultimately embodies property income, while corresponding duty embodies the expenditure or loss of property. This should be easy to understand with what has been discussed above. What is more difficult to understand is the notion that right and corresponding duty are equal in absolute value.

With the current level of jurisprudential research, it is impossible to prove the notion that right and corresponding duty are equal in absolute value. That is not only because the existing research achievements of jurisprudence have not revealed which part of the entire legally defined duties the duty corresponding to right belongs to, and more importantly, it is because the research of right and corresponding duty has not been advanced to the level of the material content that they embody. What has been touched upon is merely the manifestation of right and corresponding duty on legal level and interest level, but after all phenomena such as legal right and corresponding duty is unable to be measured directly, and interest is also an element that is embodied through

person-to-person relationships and is unable to be measured with a specific numerical standard.

It is true that many scholars have talked about the quantity of right and duty, but such talk is purely guesswork, because so far no one has proved in theory their measurability, nor clarified how and in what units to calculate their quantity. Precisely because it is guesswork, they cannot become aware of the mistakes even if there are obvious ones. A good example of that is the notion that the total right and the total duty of a society are equal in quantity. In the example, relevant scholars actually believe that the total volume of right is equal to the sum of the duty corresponding to right and the duty corresponding to power, which is untenable even according to the existing theories.

Only when the research of right and corresponding duty is advanced to the level of property content, and when right and duty are specifically measured with currency units, can the relationship that they are opposite in nature but equal in total volume become clear.

Generally speaking, because the property owned by citizens and other individuals is the unified material foundation of right, the relationship between that part of property and right is a conversion-reversion relationship, therefore, the total volume of legal right of a society is corresponsive to the total volume of property owned by individuals, and such property itself is in turn measurable with currency units and expressed by the quantity of currency, thus the total volume of right and the total volume of corresponding duty can then be indirectly indicated through the amount of currency, with the only difference being that what indicates the total volume of right is a positive number, while what indicates that of corresponding duty is a negative number with the same absolute value.

Specifically speaking, for example, according to a sales contract, one party of the contract has the duty of delivering the goods worth 1 million yuan and at the same time has the right of receiving the payment of 1 million yuan, and it is the other way around for the other party. So the quantity of right in the example is 1 million yuan, and the quantity of duty is also 1 million yuan, only the former is a positive number, while the latter is a negative one. Of course, many rights and corresponding duties do not appear to have direct property content, such as personality rights in substantive rights, almost all procedural rights, political rights, and the duties corresponsive to them, etc., but the fact that they do not appear to have direct property content does not mean that they do not have any property content. In fact, with regard to the relationships between various rights and private property, the degree of the explicitness of their connections varies greatly, some of them are intuitive, therefore obvious, and some of them can only be grasped through thinking capacity based on known clues or traces in legal life.

(5) Right and corresponding duty can be separated in legal life, and in the foreseeable future are also difficult not to be separated at all; while in terms of scholarly research, they must be separated. To discuss from the aspect of legal life whether right and duty can be divided or separated, there is a necessary condition if a correct conclusion is to be reached, namely, there must be a clear-cut differentiation between the issue of whether right and corresponding duty *should* be separated and the issue of whether these two legal phenomena *can* be separated. Here, whether they should be separated is strictly speaking addressed from the perspective of morality, or in terms of ethics, where the issue is how to do it according to certain subjective standards and how to do it in order to be consistent with justice; while whether they can be separated is an issue of judgment over whether a fact, or a condition exists or not. Based on such differentiation, what we are discussing here is clearly the latter issue. In this regard, as pointed out by many articles, the separation of right and corresponding duty is one of the basic features of legal life under the social-economic system of extreme injustice. This generally acknowledged fact alone is sufficient to prove that right and corresponding duty are divisible.

Even under socialist conditions, the constitution and the law have also strived to implement the principle of right corresponding to duty, but because complex historical and realistic reasons, the phenomenon of separation between right and corresponding duty still objectively exists. For instance, one segment of "Focus Report" of CCTV in 1997 reflects a typical situation as follows: individual business households from other provinces have been doing businesses in a large city in the South, paying taxes to the local authority according to the law, but because their residence certificates are not locally issued, their children are not permitted to attend local schools. These people have fulfilled their duty of paying taxes but have not enjoyed the right that is being enjoyed by local tax payers. To them, aren't right and corresponding duty separated? There are many examples like this one.

In terms of the requirement of scholarly research, right and corresponding duty not only should be separated, but must be separated. We need to differentiate legal life and scholarly activity in order to appreciate that. From the aspect of social-legal life, there is nothing wrong with the notion that right and duty are difficult to separate (note that it is not indivisible); but from the perspective of scholarly research, it would be a gross mistake not to separate right and duty, because that would mean that we abandoned research and investigation.

Fundamentally, to do research on certain object is to analyze it and break it down as meticulously as possible, without stopping until there is no means to continue. Without trying to analyze and break down an object, it is impossible to further our understanding of it. Discussing the research of politics, Aristotle

once wrote about his understanding of the general rule, saying that "(i)n every other matter it is necessary to analyse the composite whole down to its uncompounded elements (for these are the smallest parts of the whole)."[34] Engels also commented that the nature, human history, or human mental activities infinitely constitute in front of us a total picture through their various connections and interactions, where everything is changing, but in order to clearly grasp the total picture, we must know every single detail, and "(i)n order to understand these details we must detach them from their natural or historical connection and examine each one separately, its nature, special causes, effects, etc."[35] In other words, scientific research requires that the seemingly indivisible object from the aspect of life be divided and separated from its connections with other objects. In this regard, Lenin put it even more straightforwardly: "We cannot imagine, express, measure, depict movement, without interrupting continuity, without simplifying, coarsening, dismembering, and strangling that which is living. The representation of movement by means of thought always makes coarse, kills,—and not only by means of thought, but also by sense-perception, and not only of movement, but every concept."[36]

So, to understand right and corresponding duty, we absolutely have to separate them. Academically, it is extremely immature of the practice that intentionally makes the concept of right and the concept of duty inseparable, always tries everything to display them as a pair, just in order to show that they are indivisible.

(6) If we have to talk about the issue of the center of law, then it should not be right-centricity, nor duty-centricity, not to mention power-centricity, rather, it should be people's right-centricity or faquan-centricity. Specifically, from the perspective of political science, the idea of people's right-centricity is more appropriate, while from the perspectives of the law and legal studies, faquan-centricity is more logical. I advocate the idea of faquan-centricity mainly for the following reasons: this idea is based on the law, positions right and power on an equal status, is completely consistent with the reality of legal life, and is consistent with the objective demands of a society with the rule of law. It should be noted that, the right referred to here is legal right, not people's right, so such idea does not deny the status of centricity of people's right vs. legal right and power, on the contrary, it shows that the balance of legal right and legal power is a means and a necessary condition in realizing people's right.

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34 Aristotle, *Aristotle Politics*, Translated by Harris Rackham (London: Heinemann, 1959), 5.

35 Karl Marx & Friedrich Engels, *Collected Works*, Vol. 24, "Socialism: Utopian and Scientific" (Moscow: Progress Publishers, 1989), 299.

36 V. I. Lenin, *Collected Works, Vol. 38, "Conspectus of Lectures on the History of Philosophy"*, Translated by Clemens Dutt (Moscow: Progress Publishers, 1976), 259–260.

To advocate faquan-centricity is actually to maintain that, in the process of legislation, enforcement, and justice, the entire interest legally recognized and protected as a whole should be placed as the most important of various interests, or at the position of the foundation, instead of favoring the interest of social individuals as embodied by right, or favoring the public interest as embodied by power, both right and power are treated equally, everything is in accordance with the stipulations of the law that embodies the entire interest, with no one submitting to the other unconditionally. In terms of property content, it is also to maintain that all lawful property must be treated and protected equally, regardless of whether it is publicly-owned or privately-owned. Equal protection of lawful property of various subjects reflects the objective demand of developing the socialist market economy.

Finally, under the main title of the relationship between right and duty in this section, there is also an issue of the relationship between right and the part of duty corresponding to power. Such a relationship is an indirect one. Logically, it can only establish a linkage with right through the medium of power. So, the relationship between that part of duty and right belongs to the realm of the relationship between right and power. Due to the thematic restraint, I don't intend to further address the issue here.

2 An Overview of Right-Centric Theory in the First Half of the 20th Century in China[37]

The issue of the center of law is an indispensable link in the logical construction of a systematic legal theory, so, establishing an appropriate concept of the center of law or the focus of law will be beneficial to the advancement of Chinese legal studies, and the formation and improvement of the condition of the rule of law. The history of the research on the center of law in China can be at least traced back to around 1904, and in the 1930s and 1940s, the center of law had become a topic most jurisprudents paid attention to, with some of the works being quite influential. This section is written to prepare for our further discussions of the issue of the center of law, but at the same time also to allow readers who are interested in the issue but have not conducted specialized research into it an opportunity to have a general understanding of the history of the issue.

37 This section is primarily based on Tong Zhiwei 童之伟, "Ershi shiji shangbanye fa benwei yanjiu zhi deshi 二十世纪上半叶法本位研究之得失 [Successes and Failures of the Research of the Center of Law in the First Half of the 20th Century]", *Fashang yanjiu* 6 (2000), 3–8.

2.1 *The General Background and Main Views in the Research of the Center of Law in the First Half of the 20th Century*

Based on available materials, the first Chinese scholar who talked about the concepts such as the center of law, right-centricity, and duty-centricity was Liang Qichao. The following passage where he discussed about the center of law is rather interesting: "The most unfortunate aspect in the field of legal studies in China has been that it entirely lacks private law. There are many outstanding aspects of Roman law that allow it to influence all the later centuries and to have the reputation of a first-rate legal system in the world, but its most invaluable aspect is the completeness of private law (where debt law is especially complete, so as to be adopted entirely by many modern countries). So in the beginning of the modern time, namely, during the Renaissance, the study of Roman law already started, and from which the modern civilization has actually originated, with tremendous impact. It is actually because of the influence of Roman law that many modern countries have adopted right-centric theory rather than duty-centric theory. Since right is at the center of law, the law is not merely used to restrict people's right (before 1949, citizen's right was normally called people's right in China—Tong Zhiwei), but actually to protect people's right."[38]

As indicated by this passage, the center of law, right-centricity, or duty-centricity that he discusses are all within the realm of private law, are all related to the history of Roman private law. Strictly speaking, the "center" he talks about is only the center of private law. And considering his discussions, he already adopted the practice back then to expand the center of private law and treat it as the center of the entirety of law. In fact, such practice is unfounded, and incorrect, but its influence is far-reaching.

The earliest writing that I have found to be comprehensively discussing the issue of the center of law comes from a book published by Zhu Caizhen in 1930, he writes: "State organizations became stronger and stronger, and then there was legal conception based on the just law, but such law was duty-centric …… The prosperity of legal thinking on right in the modern time is due to German scholars, because they first established that jurisprudence is the study of right, like *The Struggle for Law*, which advocates right-centric theory, believing that the purpose of right is peace, while the means of right is struggle."[39] The

38 Liang Qichao 梁启超, "Lun zhongguo chengwenfa bianzhi zhi yange deshi 论中国成文法编制之沿革得失 [On Evolution, Merits, and Demerits of Chinese Statutory Law Codification]", in *Liang Qichao faxue wenji* 梁启超法学文集 [Legal Writings of Liang Qichao], (Beijing: Zhongguo zhengfa daxue chubanshe, 2000), 174–175.

39 Zhu Caizhen 朱采真, *Falüxue tonglun* 法律学通论 [Introduction to Jurisprudence], (Shanghai: Shijie shuju, 1930), 185.

German scholar he is referring to here is apparently Rudolf von Jhring, and *The Struggle for Law* refers to the famous book by Jhring, *Der Kampf ums Recht*.[40]

Indeed, in the book written from the standpoint of civil law, the author has elevated right to the supreme height within the realm of law. He said: "Generally, the premise of all rights, be it the right of nationals or individuals, is that they are always prepared to advocate for rights;" "generally, all rights, be it individual right or national right, face the danger of being violated or constrained—because the interest advocated by the right holder is often in conflict with that advocated by those who deny his interest—Obviously, such struggles occur again and again in all the realm of the law, from private law up to public law and international law;" "Advocating for right is a duty for the society;" "the struggle for right is the struggle for law."[41]

It appears that it is highly likely that, in the early years, the concept of right-centricity in Chinese legal studies directly originated from the summary of Jhring's view about right.

Later, a well-known jurisprudent at the time, Zhang Zhiben, rather comprehensively examined the issue of the center of law. First, considering the special connection between the two meanings of law and right in Western languages, he tries to clarify the basis of the concept of right-centricity. He says: "In France, Germany, and Italy, the term of law at the same time also indicates the meaning of right, and the generally accepted views in modern times all believe that when the law is observed objectively, it is law, while when the law is observed subjectively, it is right, in other words, they believe that law and right exist simultaneously, and the center of legal phenomena is right."[42] The basis of such reasoning is apparently the fact that law and right have different meanings but share the same word in a number of European countries.

Second, Zhang Zhiben analyzes the trend of change of the center of law and its corresponding social-economic cause. He believes that right-centricity embodies the development of the concept of right, and "legally, the development of the concept of right follows the result of the development of modern industry and commerce. Before the modern times, the law was duty-centric, and mankind was under feudalistic tyranny, where people only knew duty, without the awareness of right. As industry and commerce gradually develop, the law of feudalistic duty-centricity becomes inconsistent with the actual

40 See Liang Huixing 梁慧星 (ed.), *Minshangfa luncong* 民商法论丛 [Series on Civil and Commercial Law], Vol. 2., (Beijing: Falü chubanshe, 1994), 12–59.

41 Quoted in Liang Huixing 梁慧星 (ed.), *Minshangfa luncong* 民商法论丛 [Series on Civil and Commercial Law], Vol. 2., (Beijing: Falü chubanshe, 1994), 12–59.

42 Zhang Zhiben 张知本, *Shehui falüxue* 社会法律学 [Social Jurisprudence], (Shanghai: Shanghai faxue bianyishe, 1931), 54.

existence of mankind, therefore the idea of "innate rights of man" is formed and the concept of right already enters the mind of the general population."[43] Hence the law of right-centricity.

Third, Zhang Zhiben also speaks about the pattern of the content of duty-centricity and society-centricity, as well as the development and replacement of the center of law. He says: "In the law of duty-centricity in the feudalistic era, the so-called duty was the duty where the majority was loyal to the minority, which is different from the meaning of duty-centricity in modern times. For modern duty-centricity, duty is the duty to fulfill social responsibility, thus can also be called society-centricity, and right-centricity is called individual-centricity. From duty-centricity to right-centricity, and again from right-centricity back to duty-centricity, is a forward development along the stages of social evolution, and since it is a forward development, today's duty-centricity is quite different in terms of content, although it is back to the previous duty-centricity in form."[44]

Finally, Zhang Zhiben also indicates his opposition to right-centricity, his attitude in advocating duty-centricity and its reasoning. He believes that, "the law is social norm, its primary task is to support social interest, all the legal thinking about right-centricity is merely the law that supports individuals, not society, and such law has indeed abandoned its original mission. Although at the time of fighting against feudalistic power the so-called notion of "human right" was more progressive than the feudalistic legal notion of duty-centricity, and could liberate people from tyranny. Such a notion is already against the original mission of the law, it would be alright to use human right against 'royal right,' and seek its negative effects, but if human right is used to strengthen human right (positive effects), making it the unchangeable fundamental law, then it would follow that many contradictions would develop out of human right. If the notion that the law supports individual right is pushed to extremes, without regard to social interest, then the so-called human right will result in a situation where there is only human right for the minority, while the right of the majority will definitely be deprived by the human right of the minority."[45] Zhang Zhiben is in agreement with Duguit's theory of negation of rights, but he also adds that "in my understanding, the negation of rights in terms of the law does not mean that the law absolutely should not regulate right. But in regulating right, it should be duty-centric, not right-centric. In other words, the

43 Ibid.

44 Zhang Zhiben 张知本, *Shehui falüxue* 社会法律学 [Social Jurisprudence], (Shanghai: Shanghai faxue bianyishe, 1931), 63.

45 Ibid., 55.

right that the law should protect is the right to exercise the right to fulfill social duty, not the right to exercise the right to expand individual interest."[46]

A book edited by Zhou Bangshi that was published in 1932 also discusses the views about the origin of the center of law, quite similar to the book by Zhang Zhiben in content, but the discussions are more specific. He writes: "the ancient law was generally duty-centric, which is the same in China and abroad. After the 18th Century, because of the development of industry and commerce, feudalism collapsed, the notion of innate rights of man became rampant, and thus the legal concept of right also grew vigorously. Its first manifestation in public law was the declaration of human rights during the French Revolution in 1789; and its first manifestation in private law was the French civil code of 1804. They influenced many countries, which followed their footsteps; right-centricity thereby replaced duty-centricity."[47]

There were also many legal works published in 1933 that discussed the issue of the center of law. Among them, the discussions in the work by Ouyang Xi are rather noticeable. He first defines the meaning of the center of law, believing that, "before studying right and duty, we have to especially discuss the concept of 'the focus of the foothold of law,' i.e., the center of law."[48] He also points out that, "the universal concept of the center of law is right. Therefore the generally accepted view among modern scholars is that the law is the regulation of right, and jurisprudence is the study of right."[49]

He also elaborates on the priority of duty relative to the birth of the law and the formation of right, and the reason why duty-centricity transforms into right-centricity. He says: "Judging from the degree of evolution of human society, the concept of duty alone is what first occurs before the phenomenon of group solidification. The core of a society results in the law due to the enforcement of duty. So duty exists before the law, and the law occurs after duty. The duty that occurs first only submits to the highest power. Because of the result of such submission, to the others in the same group, duty is defined legally. Because of the result of such defined duty, the concept of right gradually occurs. Furthermore, because of sufficient individual development, through the result

46 Ibid., 63.

47 Zhou Bangshi 周邦式 (ed.), *Falüxue gaiyao* 法律学概要 [The Essentials of Jurisprudence], (Shanghai: Lantian xinzhongguo shuju, 1932), 130.

48 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang bianyishe, 1933), 241.

49 Ibid.

of struggle between individuals and the highest power, the development is affirmed, thus the concept of law enters right-centricity from duty-centricity."[50]

In addition, he also discusses the correspondence between the developmental level of individuals and society and the change of the center of law as well as the trend towards society-centricity: "Right-centricity evolves from duty-centricity; ideally, the focus of law should not treat right as the only center. The protection of right originates from the enforcement of duty, but the ultimate goal of the law is not merely enforcing duty in order to protect right. Its ultimate goal is to advance the common interest of social existence, and to search for the safety of mankind, therefore it is certain that the focus of law will transition to society, and must become society-centric. When individuals are not enlightened, the idea of the law is duty-centric, while in an era of individual enlightenment, the idea of the law is right-centric. Now we are stepping into the era of individual enlightenment, the idea of the law will have to emphasize the common interest of the society and become society-centric."[51]

In the same year, the legal work edited by Zhang Yingnan discussed the issue of the center of law from a different angle. His basic view is similar to Zhang Zhiben and Ouyang Xi, but his specific formulation has his own characteristics. He writes: "The concept of the law and the concept of right are inseparable, because it is called the law if viewed objectively, generally, and abstractly, while it is called right if viewed subjectively, particularly, and specifically, that is why jurisprudence is called the study of right. The law and right exist simultaneously, but in terms of the order of conceptual development, the laws in ancient times were all duty-centric, since the 18th Century, the center of law has been transitioning from duty to right, and recently again trending towards duty-centricity, and further into society-centricity. There are also proposals from a school of negation of rights, saying that the law should be based on social solidarity, and in order to realize the goal of such solidarity, duty has to be the foundation of the law, therefore the theory of power/right is not quite accurate and correct. If the existence of social solidarity is accepted, then its duty should be the power and right of the society."[52]

The last sentence above is worth special attention. It apparently refers to the ideas of the French scholar Duguit. Duguit denies both individual right and state sovereignty, and only emphasizes the fulfillment of the duty of social

50 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang bianyishe, 1933), 242.

51 Ibid.

52 Zhang Yingnan 张映南 (ed.), *Faxue tonglun* 法学通论 [Introduction to Jurisprudence], (Shanghai: Shanghai dadong shuju, 1933), 211.

solidarity relation, so, under such condition, the so-called duty-centricity is actually almost power/right-centricity.

In terms of the issue of the center of law, there was no obvious development in the 1940s, but the notion that right and duty should be equally stressed gained more currency than in the 1930s. With regard to works, in addition to the late 1940s reprints of the works published by Ouyang Xi and others in the 1930s, there were some other works that briefly discussed the issue of the center of law. For example, Gong Yue said in his *Outline of Comparative Jurisprudence*: "The question of whether the law is right-centric or duty-centric is also a prerequisite issue in discussing the law;" "the most accepted conception is that the law is established on both right and duty. The same legal stipulation creates right and at the same time creates duty, vice versa."[53] Similarly, He Renqing also expressed the following view: "the ideas of right and duty are very important in legal studies, because the task of the law is to regulate right and duty, the generally accepted view in modern times is that jurisprudence is the study of right and duty."[54] This is the notion that right is in accordance with duty, or right and duty should be equally stressed.

Due to the limited documents, the above materials are certainly not comprehensively reflective of all the aspects of the research of the center of law. But because the materials used are popular and commonly used books of legal studies, the above materials should be able to proximately reflect the basic conditions of the research of the center of law in that era.

2.2 *Evaluation of the Contribution and Shortcomings of the Research of the Center of Law in the First Half of the 20th Century*

Almost a century has passed. Now looking back at the scholarly discussions on the center of law in the first half of the 20th Century, we can still appreciate the contributions the scholars made in that era. Here is a summary of the main contributions of the era with regard to the research of the center of law.

(1) The topic or the field of discussion about the center of law was created. In legal studies, the issue of the center of law is an original topic, and I tend to believe that it was initiated by Chinese scholars at the beginning of the 20th Century. In order to accurately explain the issue, we should differentiate the identification of an existing condition of the law or legal studies from the identification of the existence of a topic. In other words, the law that centers on

53 Gong Yue 龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 161.

54 He Renqing 何任清, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shangwu yinshuguan, 1946), 119.

certain legal phenomena, and legal studies that centers on certain legal concepts are different from the topic of what is the center of law. For instance, some scholars say that "civil law has always been right-centric."[55] In this sense, civil law, as the law of right-centricity, has had a long history, and at least should be traced back to Roman private law. Take another example, Dworkin says: "Kant's categorical imperatives compose a duty-based theory; and Tom Paine's theory of revolution is right-based."[56]

Thus Kant's theory can be called a duty-centric theory, while Paine's can be called a right-centric theory. In this sense, there were legal studies of right-centricity a long time ago, at least part of which includes the legal theories of Locke, Jefferson, Bentham, Mill, Hobbes, Brandeis. But, to have the law of right-centricity, and to have legal studies of right-centricity does not mean that there is a legal topic of the center of law.

Generally speaking, to treat the center of law as a topic, we must set up the issues of "what the law is centered on or should be centered on" and engage in debates; at least, there should be scholars who clearly advocate what the law should be centered on and prove the relevant views. Concerning this issue, I have made tremendous efforts but have yet to find any evidence that a debate around the issue of the center of law (or the focus of law) in China as well as abroad, and I have also not seen any Chinese scholar who directly quotes such materials. Thus, although some scholars maintain that there has been a consensus of right-centricity after debates over the issue in the West, I believe it is merely guesswork, because they have not provided any evidence.

(2) The meaning of the center of law was relatively properly identified. It is clear that the scholars back then already defined the "center" in the center of law as "the focus of the foothold of law" or "the focus of law." Different theories of the center of law are manifested as different theories of the focus of law, only that some focus on the content of the law or legal relations (such as the classification of right-centricity and duty-centricity), some focus on the objects served by the law or the beneficiary of the implementation of the law (such as the ideas of individual-centricity and society-centricity). In addition, different understandings of the law or the content of legal relations can also result in different views on the center of law. For example, only by admitting that power and right are equally the content of legal relations can it be possible to accept the notion of power-centricity, otherwise it would be illogical to accept the notion of power-centricity. To properly identify the meaning of

55 Li Shuangyuan and Wen Shiyang 李双元、温世扬 (eds.), *Bijiao minfaxue* 比较民法学 [Comparative Civil Law Studies], (Wuhan: Wuhan daxue chubanshe, 1998), 76.

56 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 172.

the center of law is a basic endeavor, which establishes the condition for continuing discussions of the issue. Obviously, to date, people are still benefited by the results of the work in discussing the issue of the center of law. It is clear that the right-centricity in today's jurisprudence refers to precisely the focus of right!

(3) The foundations or social-historical origins of various centers of law were usefully explored. For example, according to Zhang Zhiben, the origin of duty-centricity is the lack of development of industry and commerce, as well as feudalistic tyranny, while the origin of right-centricity is the development of industry and commerce, as well as the popularity of the idea of innate rights of man. Such views seem to more or less contain some elements of historical materialism. In addition, speaking of right-centricity, Zhang Zhiben uses the fact that identical word form for both right and the law has been found in a number of Western languages to prove the objective connection between the law and right. The basis of this practice is the view coming from the field of Western legal studies. According to the view, there is "such a particularly significant fact, that is, in most European languages, the word law and the word right are identical in their word form, *jus* in Latin, *Recht* in German, *diritto* in Italy, *derecho* in Spanish, *Pravo* in Slavic all refer to the legal rules that restrict people, and the legal right that everyone claims to belong to himself. This alignment is not accidental, and should also not be perceived as caused by confusion of the true meanings of the words in the languages; on the contrary, they show a deep connection between the law and right. At the same time, it is not difficult to see why words such as *jus* and *Recht* face these two situations: On the one hand, perhaps all private rights can be said to have originated from legal order, on the other hand, legal order in a certain sense is a coordinated aggregate of legal rights."[57] However, using the fact that one word is used for both "right" and "law" in some European languages to prove that the law is right-centric is contradictory to the above-mentioned notion that the center of law changes along with the times, which means that the center of law changes along with the times, while the meanings of the words do not have corresponding change following the change of the times.

(4) There were already multiple theories of the center of law or attempts of identifying the center of law. Relatively mature theories of the center of law include duty-centric theory, right-centric theory, and society-centric theory. The attempts of identifying the center of law include individual-centricity, duty-priority, equal stress on right and duty, correspondence of right and duty,

57 Sir Paul Vinogradoff, *Common Sense in Law*, Oxford University 1913 first edition, 1959 third edition (reprinted in 1987 by Greenwood Press, Inc.), 54.

and foundation (center) of power and right, etc. Such attempts come from different scholars, without unity and ordering, therefore are not well coordinated, and some don't have very specific meaning. There are two aspects worth noting here: First, in society-centric theory, the definition of society is not clear, which appears to refer to the public interest in terms of its relation with interest, but public interest can be divided into two parts, namely, the part protected and manifested by public morality and the part protected and manifested by public law (i.e., protected and manifested by state power), and the whole constituted by the two parts, which together form three analysis units. Upon such analysis, one would inevitably wonder which part of public interest is emphasized by society-centricity. Generally, public interest in legal studies should be legally recognized and protected public interest, which is manifested by power. Therefore, in terms of its content, it seems that society-centricity is power-centricity.

Second, in some way, duty-centricity of jurisprudence of social solidarity is almost double centricity of power and right in terms of its content. How do we understand that logically? I believe that, it is not only logical but also consistent with the reality to implement and protect power and right through establishing duty. However, logically, double centricity of power and right in actuality is tantamount to the absence of centricity.

(5) The center of law was treated as changeable, and it changes along with social development. As for the trend of change, based on the above quoted materials, most scholars maintain that it moves from duty-centricity to right-centricity, and then to society-centricity, but some also believe that it is possible for right-centricity to return to duty-centricity or double centricity of power and right. Concerning the reason for the change of the center of law, some explain from the perspective of the development of legal consciousness or legal conception, some explain from the perspective of the development of the law itself, still some explain from the perspective of the change of social-economic conditions. In spite of the differences, they ultimately all maintain that the center of law is changeable.

(6) Realistically, most scholars back then believed that law should be right-centric and society-centric, thus we can say that there was some consensus in terms of the issue of the center of law. With regard to the manifested tendency, it generally affirms that law is right-centric, and in terms of reality, most maintain that society-centricity is or should be replacing right-centricity. As mentioned earlier, society-centricity is actually power-centricity, with a strong tendency of statism. That perhaps should be understood as the shadow of the then political reality in the field of legal studies.

All the above six aspects are what should be recognized or valued in the research of the center of law in the first half of the 20th Century. However, in retrospect, the research of the center of law in that era also has many shortcomings. In that era, in spite of the differences of views that scholars have in terms of specific issues such as what the center of law is, the discussions concerning the center of law have some common theoretical features: ① They almost all treat right and duty as the foundation or the basic content of law; ② They all consider the idea of right and duty as the most basic legal idea, and consider jurisprudence as the study of right and duty, or equate right and the law, maintaining that jurisprudence is the study of right, and call the corresponding legal views as generally accepted theory in the field of legal studies. The mistakes or problems of the research of the center of law are all the result of the two features or their influence.

The main mistakes or problems in the research of the center of law in the first half of the 20th Century may be summarized from the following aspects:

(1) Its basic analytical framework is limited to the realms of right and duty, which can be used to explain the phenomena in private law, but often are powerless when dealing with the field of public law. However, the "law" in the center of law is precisely the law in general, including both private law and public law. Therefore, the difference is extremely clear when the relatively narrower theoretical capacity of the basic jurisprudential categories of right and duty is compared to the vast legal reality constituted of private law and public law.

(2) It evolves around right and duty, but does not have much decent understanding of the social-economic content of right and duty themselves, thus the issues that are discussed and the conclusions that are drawn are very superficial, even somewhat nonsensical. The above-quoted statement from Zhang Zhiben, "the right that the law should protect is the right that right exercises to fulfill social duty, not the right that right exercises to expand individual interest," is a somewhat nonsensical example that does not understand the relationship between right and individual interest, and opposes individual interest against its existing legal form (right).

(3) The discussions of the center of law are almost entirely removed from legal reality. No one has ever clarified or has tried to clarify how legislation implements right-centricity, duty-centricity or any other centricity, nor have they considered how to implement their chosen centricity in applying the law, not to mention to use specific laws and specific cases to compare the practical consequences of the laws of different centricity. Of course, no one has clarified what actual differences the laws of different centricity really have and the actual mechanism resulting in such differences.

(4) The various "centricities" that have been discussed do not have a unified categorization standard but oftentimes are lumped together, with very chaotic relations. For example, it is puzzling to comprehend what the standard by which to divide "right," "duty," "individual," and "society" in right-centricity, duty-centricity, individual-centricity, and society-centricity is and why they are lumped together. Also, one of the representative statements that has been quoted above is that "since the 18th Century, the center of law has been transitioning from duty to right, and recently again trending towards duty-centricity, and further into society-centricity." But the problem is that, with all the changes of the "centers," what is the basis by which the authors approach them? And what characteristics does each "center" have that are different from other "centers"? There are no answers to be found with regard to this kind of basic problem. In fact, the so-called "center" is probably merely a fuzzy feeling that certain scholars possess.

There are still some other problems, which I intend to further evaluate later in this book.

The research of the center of law in the first half of the 20th Century is almost 70 years old. In retrospect, the achievements and mistakes of the research activities back then have greatly influenced the research of the center of law towards the end of the 20th Century. Here, it is sufficient to merely point at the following two facts: The first fact is, almost all basic propositions or statements, including right-centricity, during the debate concerning the center of law towards the end of the 20th Century are basically mere duplications of what was said earlier. It certainly should be admitted that the propositions or statements have been given the content of the new era, and more comprehensive and more in-depth interpretation. The second fact is: the debate concerning the center of law towards the end of the 20th Century has also repeated all theoretical shortcomings exhibited by the then research activities concerning the center of law. This has to be something regrettable.

3 Renewal of Existing Chinese Semantic Analysis Jurisprudence[58]

The jurisprudence referred to here is the basic theory of legal studies based on Marxist philosophy as its methodology. Currently it is, to a great degree, a theory that is constructed around right and duty, and systematically interprets

58 This section is based on Tong Zhiwei 童之伟, "Lun falixue de gengxin 论法理学的更新 [On Renewal of Jurisprudence]," *Faxue yanjiu* 6 (1998): 3–20.

legal phenomena and influences legal reality. Because of its characteristics in content, we can call it right-duty jurisprudence, which is Chinese semantic analysis jurisprudence in view of its historical heritage.

Right-duty jurisprudence was formulated through the advocacy and efforts of a group of outstanding jurisprudents. The most important and representative among them are Professors Zhang Guangbo and Zhang Wenxian. The scholarly views and analytical methods of right-duty jurisprudence are reflected in many books and articles of legal studies, as well as textbooks of jurisprudence, the representative books among which are *A Concise Theory of Right and Duty*,[59] and *A Study of Basic Categories of Jurisprudence*,[60] while the representative article is "Reconstructing Legal Theory with the Basic Categories of Right and Duty."[61]

The characteristics or features of right-duty jurisprudence can be summarized as follows: It inherits the research results of Chinese and foreign legal studies that reduces all legal issues into the issue of right and duty; It treats right and duty as the most important legal phenomena; It identifies the object and scope of legal studies around right and duty; It treats the contradiction between right and duty as the most basic contradiction of social-legal life; It considers the law as right-centric; It chooses right and duty as the most basic and most important categories, namely, the fundamental categories; It uses the lexical analysis method as the most important method in designing the structure of legal categories and integrating the legal system.

Right-duty jurisprudence was formed in a highly special time in the development of the society, the law, and the rule of law in China. It was formed roughly around the end of the 1980s, and became basically mature in the middle of the 1990s. The main characteristics of the development of legal studies during that time are that, economic construction, the construction of democracy and the rule of law, and the implementation of reform and opening policy had great and urgent need for the law and legal studies; but there were unprecedented shortages of legal professionals due to the disruption of legal education during the previous 20 years, scant and backward knowledge concerning legal studies and the theories that were consistent with the reality of the new era in China were even more lacking. It was precisely in that period of time that right-duty

59 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989).

60 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993).

61 Zhang Guangbo & Zhang Wenxian 张光博、张文显, "Yi quanli he yiwu wei jiben fanchou chonggou faxue lilun 以权利和义务为基本范畴重构法学理论 [Reconstructing Legal Theory with the Basic Categories of Right and Duty]", *Qiushi* 10 (1989): 20–25.

jurisprudence was formed, whose first sign of birth was the conference on basic legal categories held in Changchun in the summer of 1988. It was during the conference that a consensus was born concerning constructing a legal theory centered on right and duty that is needed for the new era.

In retrospect, the formulation of analytical jurisprudence actually was an emergency response of Chinese legal studies under tremendous stress that was caused by the gigantic mismatch between the rapid development of the economy of Chinese society and the extreme scarcity of legal theories. Overall, the design of constructing jurisprudence centered on right and duty was only a theoretical "improvisation." At a time when there was no in-depth research, or even rudimentary research, into the legal phenomena such as right and duty, once some scholars recycled some basically long-existed jurisprudential views concerning right and duty, many others felt that they made some sense, and then a group of scholars immediately concurred, then started to write in large quantities to prove, interpret, and elaborate the views. As indicated by the data of legal studies, the practice then was largely to use as the object and material the Chinese legal works before 1949, the legal works of contemporary Taiwan, and the works of the former Soviet Union concerning the content of right and duty, and to use the language and thinking of Marxist philosophy to reiterate and reorder them. Such remolding made the existing right-duty theory more consistent, to a certain degree, to the then conditions of China. Upon having a foothold, certain scholars again supplemented with some outcome of the research into right and duty by contemporary foreign scholars, which was used as corroborating documents.

Right-duty jurisprudence appeared as an "improvisation," but it is nonetheless the result of legal studies adjusting to the social development in China, and the product of the times, therefore has much reasonableness and positive, progressive significance.

First, it preliminarily realizes its proponents' design to "use right and duty analysis units to replace the crime and punishment analysis units, and to shift the focus of legal studies from crime and punishment, and from class struggle to legal right and duty, and their application and social values,"[62] which was consistent with the great historical transformation from class struggle to the center of economic construction, reflecting the need of the time.

Second, it helps, to a great degree, the transition of the basic theory of Chinese legal studies from the political ideology dominated by the cold-war

62 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993).

mentality in the past to jurisprudence in the sense of a true social science, which is a great improvement.

Third, its proponents formulate and prove many jurisprudential views that are reflective of the spirit of the times and the spirit of democracy and the rule of law, giving socialist jurisprudence of the new era relatively substantive content and vitality, the most representative and striking of which is the reinterpretation of the legal concept of "right-centricity," conferring the long-existed concept a new content that is more consistent with the need of contemporary Chinese people and the trend of social development, and influencing many legal professionals and jurisprudents.[63] Of course, its theoretical premise may not be correct, but that is a different issue.

Finally, it conducts a very comprehensive study of right and duty as well as their relations, and its explanations of other legal categories and legal phenomena based on right and duty are quite successful and reasonable, especially in the area of private law.

Today, right-duty jurisprudence has actually become the predominant basic theory of legal studies in China. This is reflected in the formulations concerning legal relations and their objects, subjects and contents in the major college textbooks of jurisprudence in China. I have four such textbooks by my side now, including textbooks of jurisprudence used in the top universities in China, a general college textbook of jurisprudence reviewed by the Editorial Department of Legal Textbooks within the Ministry of Justice, and a textbook of jurisprudence used for the higher education examination program for the self-taught, which together can represent the overall picture of the education in jurisprudence in China.[64] These textbooks, without exception, reduce legal

63 The issue of the center of law was raised at the beginning of the 20th Century, and back then there were three competing views in the field of legal studies, namely, right-centricity, duty-centricity, and society-centricity. See Liang Qichao 梁启超, "Lun zhongguo chengwenfa bianzhi zhi yange deshi论中国成文法编制之沿革得失 [On Evolution, Merits, and Demerits of Chinese Statutory Law Codification]," in *Liang Qichao faxue wenji* 梁启超法学文集 [Legal Writings of Liang Qichao], (Beijing: Zhongguo zhengfa daxue chubanshe, 2000), 175, and Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shanghai huiwentang bianyishe, 1933), 242.

64 Shen Zongling 沈宗灵 (ed.), *Faxue jichu lilun* 法学基础理论 [Basic Theory of Law], (Beijing: Beijing daxue chubanshe, 1994); Sun Guohua 孙国华 (ed.), *Falixue jiaocheng* 法理学教程 [The Course on Jurisprudence], (Beijing: Zhongguo renmin daxue chubanshe, 1994); Zhang Wenxian 张文显 (ed.), *Falixue* 法理学 [Jurisprudence], (Beijing: Falü chubanshe, 1997); Shen Zongling 沈宗灵 (ed.), *Faxue jichu lilun* 法学基础理论（高教自考）, [The Basic Theory of Legal Studies], (Beijing: Beijing daxue chubanshe, 1988).

relations to the relationship between right and duty, reduce the content of legal relations to right and duty, and the subjects and objects of legal relations are also interpreted from the aspect of the subjects and objects of right and duty. This shows that, the universally accepted view in the field of legal studies is that the center of law is considered as right and duty, the most basic contradiction of legal life is considered as that between right and duty; and the legal conception that centers on right and duty and the jurisprudential conception that treats the concepts of right and duty as the most important categories of legal studies have been considered settled and reliable scholarly ideas to be widely disseminated among law students and legal professionals.

However, in view of the promotion and application of right-duty jurisprudence in the last decade, such jurisprudential theory has exposed its inherent problems and irreparable defects, and is not a basic theory of legal studies that is consistent with the need of social development of China. In recent years, I have become more and more convinced during my teaching and research in legal studies that the interpretability of right-duty jurisprudence in terms of legal phenomena is extremely weak, and it basically cannot be effective as a general theory of the law. In terms of its breadth, there are many legal phenomena that it cannot interpret or its interpretation is forced and contradictory. In terms of its depth, its interpretability often can only touch upon superficial attributes and connections, and can only stay on the exterior of legal phenomena.

It is clear that right-duty jurisprudence is already inconsistent with the need of constructing a socialist country with the rule of law, therefore urgently needs to be renewed. In other words, the field of legal studies should gradually sublate right-duty jurisprudence, and, under the guidance of Marxist philosophy, formulate a basic theory of legal studies that is more consistent with the contemporary conditions of China, and is capable of more comprehensively and profoundly interpreting all legal phenomena.

To realize the renewal of jurisprudence, we first need to sufficiently recognize the series of problems, shortcomings, and even serious defects of the existing right-duty jurisprudence; otherwise there will be no motivation to explore a new system of jurisprudence. This author is willing to offer to the public, without any reservation, my own analyses of the defects or problems of jurisprudence.

In the process of my teaching and research, I find that right-duty jurisprudence has the following five serious problems or defects. Their existence is therefore the basic rationale and reason for my proposal of renewing jurisprudence.

3.1 *Serious Deficiency in Theory*

As indicated before, there are three sources for right-duty jurisprudence: one is Chinese jurisprudence before 1949, plus, to some degree, jurisprudence in Taiwan after 1949, one is jurisprudence of the former Soviet Union, and one is modern Western jurisprudence.

The deficiency of right-duty jurisprudence is reflected in the fact that it has completely inherited the existing defects of its three predecessors. The most serious defects among them are the following two: 1. Its understanding of right in the wider sense and right in the narrower sense is too superficial, and is never able to advance such understanding to the level of concept; 2. Its positioning of right and power is unclear, seemingly separated but actually not, and the relevant concepts are thus ambiguous. In order to truly understand the deficiency of right-duty jurisprudence, it is necessary to conduct a historical investigation of the symptoms of the two "inherited" defects.

The first existing serious defect that jurisprudence inherits from its "predecessors" is that it does not in fact clarify the difference between right in the wider sense and right in the narrower sense, and also does not form corresponding disciplinary concepts through in-depth understanding of the two.

It is the common knowledge of logic that, a concept represents the conceptual form of an object or a thing, there should be one concept for one object, and two different concepts should be used to represent two different objects, thus the two concepts should relatively stabilize the understanding of the particular attributes of the two objects, and subjectively differentiate them (such differentiation is but a reflection of their objective differences). "Right in the wider sense" and "right in the narrower sense" are two different things, legal studies should form two concepts with defined connotation and denotation based on the clarification of their different attributes, thereby identifying and stabilizing the understanding of them by people. The differentiation of concepts is the necessary result of the deepened understanding of particular objects; otherwise, if it is aware that two objects are different but different concepts are not yet formed to represent them, it can only mean that the study of the relevant objects is still not thorough. Until now, the fundamental reason that the existence and differences of "right in the wider sense" and "right in the narrower sense" can be felt intuitively but two true legal concepts cannot be formed is because the understanding of them is still too superficial, which is the case in both Chinese and foreign jurisprudence.[65]

65 Here it needs to be noted that, the phrases and words such as "right in the wider sense," "right in the narrower sense" and "quan," before the form and content of the corresponding

Actually, the basic conditions have been in place to resolve the issue of understanding, it is only that the crucial step has not been taken. If we simplify the elements involved in the theories of right from China before 1949, Taiwan, the former Soviet Union and the West, and link them as much as possible with legal documents and reality, it becomes very easy to see the fact that, the fundamental difference between "right in the wider sense" and "right in the narrower sense" lies in that, they are two entirely different analysis units: the former includes power, while the latter does not, the former refers to right that includes power, the latter refers to right that does not include power. If we take into consideration the element of power that differentiates the two, the relationship between the three elements is immediately simplified: right in the wider sense minus right in the narrower sense equals power, right in the narrower sense plus power equals right in the wider sense, and right in the wider sense minus power equals right in the narrower sense.

From the perspective closest to Chinese laws, right in the narrower sense means the legal right of citizens and other individuals; power means the authority, or legal power, of state agencies, quasi-state agencies, and their officials, while right in the wider sense means the sum of legal right and legal power. They are three distinctively different things, and are the three objects that legal studies have to deal with.

But, according to the schools that treat all legal issues from the aspect of right and duty in legal studies of China before 1949, Chinese Taiwan, the former Soviet Union, and modern Western countries, it appears that the three objects can all be expressed with the concept of right, so much so that the word right in fact is used sometimes to indicate right in the wider sense, sometimes to indicate right in the narrower sense, sometimes even to indicate power. Therefore, whether the word right in such legal works indeed refers to right in the wider sense, or right in the narrower sense, or power is in a condition where there is no clear rule to follow, no defined usage, and much self-contradiction.

In terms of the lack of differentiation between right in the wider sense and right in the narrower sense, current Right-duty jurisprudence, in comparison to its "predecessors," is not only the same, but even more extreme. Take the word of right as an example, its "predecessors" oftentimes differentiate the wider sense from the narrower sense, and analyze as much as possible right in the wider sense, such as what Hohfeld and Pound and others have done, which right-duty jurisprudence has not done, nor has absorbed the achievements of its predecessors in this regard.

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things is accurately understood, are merely lexical symbols with undefined meaning, therefore are not concepts, and cannot constitute legal categories.

The second existing serious defect that right-duty jurisprudence inherits from its "predecessors" is that the phenomena of right and power are not factually differentiated, with ambiguous concepts.

Right and power are two distinctively different legal phenomena. Using different concepts to represent them is by itself the recognition of their difference. In order to clarify this issue, it is necessary to discuss it together with right in the wider sense (namely, the unity of right and power). In Chinese social-legal life, Constitution, and laws, the general practice is as follows: to use the word "quan," which is strongly inclusive and of Chinese characteristics, to refer to right in the wider sense, to call the portion of "quan" that belongs to citizens and other individuals as right, and to name the portion of "quan" that is controlled and exercised by public agencies (state, government, etc.) as power.

As data shows, such practice has had a long history, and contemporary China is by no means an exception. In the field of legal studies, many jurisprudents in different times also use legal concepts that are linked, as much as possible, to legal terms, the famous of whom include Grotius, Locke, Montesquieu, and Hamilton, etc., and the works of Kelsen, Hayek in the modern time, and Professor Guo Daohui of China are also quite representative in this regard. Of course, theoretically, it is not without difficulty to appropriately and thoroughly divide "quan" into two parts of right and power according to a unified standard, we will discuss the actual procedure in due course.

Historically, all theories that reduce all legal issues to the concepts of right and duty or have such tendency have a common characteristic that, they use both concepts of right and power, but at the same time consciously or unconsciously confuse their differences sometimes, or emphasize their differences some other times; whether they confuse them or differentiate them entirely depends on the time, location, and their own subjective need, with no regard to the conditions of self-contradiction and logical confusion.

The practice of confusing right and power is very typical with legal studies of pre-1949 China, contemporary Taiwan, and the former Soviet Union: on the one hand, the scholars all recognize that right is different from power, and even discuss the opposition between right and power; but on the other hand, they always sub-classify right into public quan and private quan, private quan into personal right and property right, public quan into citizen's public rights and state's public powers, and state's public powers into ordinance power and enforcement power, etc. According to them, the "quan" such as state's ordinance power and enforcement power come from right, thus there is naturally no difference between right and power.[66] Per such practice, there is apparently

66 See Xu Buheng 徐步衡 (ed./trans.), *Sulian faxue yuanli* 苏联法学原理 [Legal Theories of the Soviet Union], ((Shanghai: Shanghai sanmin tushu gongsi, 1950), 60–65; Gong Yue

no need for the concept of power, but in actuality, the concept of power not only exists, but also is used side by side with the concept of right. Such conditions inevitably make one wonder why the relationship between right and power is rendered so inconsistent? As for the schools in modern Western legal studies that reduce all legal issues to that of right and duty, the problems exposed in their legal works in terms of understanding right and power are similar to what happened in pre-1949 China and the former Soviet Union.

In Western legal studies, Hohfeld, in analyzing the relationship between right and duty, actually sub-classifies right in the wider sense into the elements of right in the narrower sense, privilege, and exemption,[67] and Pound points out the six meanings of right in the wider sense, namely, interest, interest plus legal means to protect it, right in the narrower sense, power, liberty, and privilege,[68] but they are not helpful in clarifying the boundary between right and power. Furthermore, because of too many analytical variables introduced, the necessity that "quan" should be primarily and predominantly divided into right and power is actually obscured, thus trivializing the objective foundation for differentiating the two legal concepts of right and power.

In terms of the lack of differentiation between right and power, right-duty jurisprudence has also been entirely inherited from its "predecessors," in that it sometimes treats power as a component of right, and unifying and equating them, and sometimes treats power as something independent of right, thus opposing them, with no regard to the obvious self-contradiction. For example, "the functions and powers" of the state agencies enumerated in the Chinese Constitution are rightfully the typical and basic existing forms of power, but Professor Zhang Guangbo believes that "the right and duty of state agencies in their operation are what is normally called the function and power of state agencies. Such functions and powers are the unity of right and duty."[69]

Now, "the functions and powers" become right, thus the right enjoyed by citizens and the functions and powers controlled by state are both right, as if the concept of power were unnecessary in legal studies! There is even a case where the same person in the same book claims that "all legal issues are

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龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 160–170; Zheng Yubo 郑玉波, *Faxue xulun* 法学绪论 [Introduction to Jurisprudence], (Shanghai: Sanmin shuju, 1981), 117–126.

67 See David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), pp. 1070–1072; Shen Zongling 沈宗灵, "Dui huofeierde falü gainian xueshuo de bijiao yanjiu 对霍菲尔德法律概念学说的比较研究 [A Comparative Study of Hohfeld's Concept of Law]," *Zhongguo shehui kexue* 1 (1990): 67–77.

68 Roscoe Pound, *Social Control through Law* (New Haven: Yale University Press, 1942), 88.

69 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 105.

ultimately those of right and duty,"[70] "state agencies …… as the Country representatives exercise right (authority) and fulfill duty (responsibility),"[71] which calls the functions and powers of state agencies as right; but in other places he also says that "after the separation of government and enterprise, …… the power that the government has in managing the economy and other relevant powers should be legalized and institutionalized, and the government can only exercise its management right and supervisory right according to legal procedure within the scope of its legally-defined functions and powers."[72] Here the scholar seems to have instinctively sensed that right is different from power, thus using the word power to refer to what he used to call right (the functions and powers of state agencies).

It is even more typical of right-duty jurisprudence in terms of its self-contradictory, extra-logical, and extra-scholarly conditions in its discussions of legal relations and other issues. On the one hand, in order to prove that right and duty are the most important categories, and to show that right and duty can be used to explain all legal phenomena, some representative scholars of right-duty jurisprudence intentionally minimize the differences between right and power, forcefully call state power and its specific existing form (function and power) as "right," exhibiting the tendency of completely excluding the concept of power from the vocabulary of legal studies. According to them, the subjects of all legal relations (administrative, criminal, civil, and litigation relations included) are all the subjects of right (and duty), and the content of all legal relations are right and duty, therefore, state agencies such as administrative and judicial organs are all the subjects of "right" like citizens, and the state's direct enforcement power such as administrative power and judicial power are also "right" like the personal right and property right of citizens, without logically leaving any room for "power."[73]

On the other hand, because of the objective differences between the two phenomena of right and duty, relevant legal phenomena cannot be explained without the concept of power; therefore, these scholars in such situations have to use the concept of power. A clear example is a paragraph from a representative scholar of jurisprudence of right and power: "With regard

70 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 95.

71 Ibid., 173.

72 Ibid., 316.

73 Representative in this aspect are some of the chapters on legal relations in the two books published by Professor Zhang Wenxian, one of them is above-mentioned *A Study of Basic Categories of Jurisprudence*, the other is his *Jurisprudence* published by Falü chubanshe in 1997.

to the relationship between right and power, we advocate right-centricity, against power-centricity, in order to liberate right from power, namely, what people often refer to as 'untie,' with the purpose of realizing the relative separation between politics and economy, between government and enterprise, and between state and civil society, completely abandoning the feudalistic remnants of official-centricity, and state-centricity …… and realizing the rational balance between right and duty, and right and power."[74] Isn't the "power" here what is considered the "right" of state power and the function and power of state agencies by the same author in another occasion as mentioned above? Why are they no longer "right", but, instead, "power"?

In comparison to the above-mentioned practice of treating power as "right," this paragraph is not only fundamentally contradictory logically and scholarly, but also in terms of political-legal theory: isn't treating state power, the function and power of state agencies, and citizen's rights all as right the scholarly negation of "the relative separation between politics and economy, between government and enterprise, and between state and civil society"? Since state power and the functions and powers of state agencies are "rights," then according to the semantic analysis method emphasized by these scholars, doesn't right-centricity already include the idea of state-power-centricity and the function-and-power-centricity?

There are numerous examples of self-contradiction and forced explanation of legal phenomena in right-duty jurisprudence. I don't plan to continue to list and discuss them here, other than offering the following two points: 1. Right and power are closely related, but they ultimately are two different legal phenomena that can be relatively differentiated, and should be marked and differentiated with two different concepts, as it has been done in legal life and the constitutions and laws of many countries; 2. Differentiating the concept of right from that of power is historically a significant advancement in understanding legal phenomena in legal studies, so it is actually a serious retreat in scholarly research to forcibly eliminate such differentiation in order to justify certain theory.

Perhaps some would argue that what is discussed before is right in the wider sense, which includes power, and the power discussed later is the power relative to right in the narrower sense, a part of right in the wider sense. Maybe it is the case, but the problem is that, what is right in the wider sense? What is right in the narrower sense? What is power? What is their relation? And what

74 Zhang Wenxian 张文显, "Shichang jingji yu xiandai fa de jingshen lunlue 市场经济与现代法的精神论略 [On the Spirits of Market Economy and Contemporary Law]," *Zhongguo faxue* 6 (1994):5–12, 7.

connection do they have with duty? All such most basic questions of legal studies are the ones that the proponents of that theory have never clarified, or have never even tried to clarify.

With regard to the issue of the lack of differentiation between right in the wider sense and right in the narrower sense, between right and power, Shen Zongling once quotes a statement from Salmond, the New Zealand jurisprudent, made at the beginning of the 20th Century: "the term right-duty (in the wider sense) has been overused, which is often used in relations that are actually not similar, therefore resulting in confusion in legal discourse."[75] And his comment on the quote is that, "in reality, even in the works of legal studies, there are phenomena where these concepts are confused. The commonly seen examples are the confusion between 'right in the narrower sense' and power, between 'right in the narrower sense' and privilege; "such confusion has deteriorated to such a degree that one understands it this way, the other understands it that way, and the same one can have different understanding in different occasions."[76] In this aspect, today's right-duty jurisprudence has inherited the shortcomings of their predecessors, and has gone even further. As indicated before, it does not see the slightest inappropriateness in understanding "right" differently at the same occasion.

3.2 *Weak Basic Research in Supporting Theoretical Systems*

In this aspect, the problem of right-duty jurisprudence arises because it centers on right and duty but has not conducted in-depth research on right and duty themselves. This defect is closely related to the one discussed above but should be independently examined.

Selecting right and duty as the center of the theoretical framework is the common tendency of all legal theories that reduce all legal issues to those of right and duty. "In legal studies of many countries the presumption is very common that various complex legal relations are to be reduced to the concept of right-duty."[77] Such practice has a history of at least a century in the West, and became popular in China about four decades ago. But, the common problem of the legal theories that have such a tendency is that they talk about right

75 Shen Zongling 沈宗灵, "Dui huofeierde falü gainian xueshuo de bijiao yanjiu 对霍菲尔德法律概念学说的比较研究 [A Comparative Study of Hohfeld's Concept of Law]," *Zhongguo shehui kexue* 1 (1990): 67–77, 68.

76 Shen Zongling 沈宗灵, *Xiandai xifang falixue* 现代西方法理学 [Modern Western Jurisprudence], (Beijing: Beijing daxue chubanshe, 1992), 153.

77 Shen Zongling 沈宗灵, *Xiandai xifang falixue* 现代西方法理学 [Modern Western Jurisprudence], (Beijing: Beijing daxue chubanshe, 1992), 153.

and duty at length on the one hand, and fail to conduct in-depth research on them on the other hand.

The same is also true with right-duty jurisprudence, which, while basically inheriting the existing theory and identifying right and duty as the center of legal studies, basically has only conducted some lexical analysis on the concepts of right and duty on the foundation of is predecessors' understanding, and has not conducted in-depth research on the two phenomena themselves. Adopting such practice itself guarantees that it is impossible for the understanding of right and duty to have any substantive advancement. And the issue is precisely that, if a legal theory that centers on right and duty is not built upon an in-depth understanding of right and duty phenomena, it is impossible to be solid and reliable.

Specifically, the first manifestation of the weak basic research of right-duty jurisprudence is that its research on right is insufficient and does not resolve—and even is not aware of the need to resolve—the main problem that has not been well resolved in legal studies historically. And the primary manifestation of the insufficient research on right in right-duty jurisprudence is that it does not clarify the scope of right. In order to study a jural phenomenon, it is necessary to first clarify its scope, otherwise the positioning of the research object will not be accurate. The clarification of the scope of right involves the determination of the boundary between right and duty, and between right and power, etc., but mainly between right and power. Clarification of the scope of right is not entirely identical to differentiation between right and power but they can basically be the two aspects of the same issue. We have actually touched upon the issue of the scope of right when discussing the difference between right and power previously, the following are merely some supplements based on the original foundation.

It is not very difficult to clarify the scope of right if viewed subjectively and in isolation, but it becomes extremely difficult if we try to make the clarified scope logically consistent with the entire legal theory that builds on, and develops from, the scope, and to make the scope conceptually reflect the objective status of all legal phenomena and their relations. Perhaps precisely because of the difficulty, while many Chinese and foreign scholars have had the intention to clarify the scope of right, no one so far has been able to do it. Right-duty jurisprudence has not even thought about resolving this problem, which can be seen clearly from the attitude and choice that it has never seriously differentiated right and power.

The second manifestation of the weak basic research of right-duty jurisprudence is that it is unable to specifically and accurately identify the relationship

between right and interest. The discussion of this issue is often linked to the discussion of the essence of right. The objective connection between right and interest was recognized a long time ago. When Aristotle commented that "(n)ow the laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort,"[78] he was already referring to the close relationship between right and interest, in terms of the relation between the law and right.

Grotius was the earliest scholar who relatively clearly defined the relationship between interest and right. In *The Rights of War and Peace* of 1625, Grotius points out: "Right, strictly taken, is again twofold, the one, PRIVATE, established for the advantages of each individual, the other, SUPERIOR, as involving the claims, which the state has upon individuals, and their property, for the public good."[79]

With regard to the revelation of the relationship between right and interest, many now hold Jhering in high esteem, because he directly uses interest as a key defining term in his definition of right, namely, "subjective right (i.e., legal right—noted by the author) is legally protected interest."[80] In fact, this statement from Jhering came 200 plus years after Grotius, and his discussion, fundamentally speaking, does not provide anything more than Grotius already did.

With regard to the relationship between right and interest, legal studies of the 20th Century, including right-duty jurisprudence, has only inherited the theories of its predecessors, and it has discussed more without making substantive advancement over the understanding of more than 400 years ago. There have been many formulations regarding the essence of right in legal studies from the West, the former Soviet Union, and China, including contemporary Taiwan, in the past century. In addition to interest theory, there have been liberty theory, meaning theory, legal force theory, hybrid theory, capacity theory, etc. But overall what is influential and identified by the majority of scholars is still the practice of clarifying right based on interest. Take China as an example, there was a basic consensus about it among Chinese scholars of legal studies as early as the 1930s and 1940s. For instance, a textbook of legal studies published in the 1930s says: "The law is legally conferred capacity, with its content being

78 Aristotle, *The Nicomachean Ethics*, Translated by William David Ross (Oxford: Oxford University Press, 1980), 108.

79 Hugo Grotius, *The Rights of War and Peace*, translated by A. C. Campbell (Washington: M. Dunne, 1901), 20.

80 Jhering, *Esprit dudroit romain Eraduit par Meulenaere*, 1877, IV, 326.

specific interest."[81] Other works of legal studies also hold basically the same view. It is known to all that, so far, similar views are still the mainstream in the works of legal studies in both Taiwan and mainland China.

Unfortunately, historically, in discussing the relationship between right and interest, scholars have not clearly and specifically formulated or proven which interest it is indeed that is corresponding to right: is it limited to the interest legally recognized and protected, or the totality of a society's interest? If it is the former, is it the entire interest recognized and protected by the law, or only a part of it? And if it is only a part of it, which part is it indeed? What is the rationale for affirming its position? And if it is the latter, does the content of interest have nothing to do with power, which is so important, and is almost the primary target of competition for all governmental activities? None of the works of legal studies has provided answers to these questions.

Viewed from the perspective of purely scholarly research, there are at least two reasons why there have been no answers. ① The scope of right is unclear. If the object to be reflected by the concept of right is not identified, how can we specifically identify that which is corresponding to the object? ② The methodology is restrictive. Most of the scholars of legal studies in the West and in the countries and regions where Western legal studies has had much influence actually don't advocate the exploration of the essence of legal phenomena. For example, analytical-positivist jurisprudence that has been popular for a long time focuses on the research of concept analysis and normative systems, emphasizing the aspect of "purity," while sociological jurisprudence focuses on the social effects of the law, is opposed to any discussion of the abstract content of the law, and is against "using imaginary and invisible metaphysical entit[ies] to explain what is visible."[82] If right is studied according to such methodology, then it becomes unnecessary to explore what is behind right, not to mention to answer what is indeed that which is behind right.

In contemporary China, its right-duty jurisprudence has been heavily influenced by the German classical philosophy, emphasizing the guidance of Marxism. But in actuality, there is not much essential appreciation and in-depth thinking reflecting the disciplinary reality, and too much quotation of slogans, therefore the specific content of interest corresponding to right has not been adequately grasped for such a long time.

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81 Li Jingxi 李景禧 (et al.), *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shangwu yinshuguan, 1937), 257.

82 Léon Duguit, *Traite de Droit constitutionnel, 2e edition, tome I, La règle de droit—Le prorlème de l'etat* (Paris: E. de Boccard, 1921), 401.

The third manifestation of the weak basic research of right-duty jurisprudence is that it does not reveal the material content of right. To reveal the material content of right is to reveal the profound essence of right, namely, the material attributes behind interest embodied by right. This aspect has rarely been addressed by Chinese and foreign scholars, and even when they do talk about it, it is no more than fragmented guesswork, without any special argumentation. Actually, there must be material content of certain existing forms behind interest embodied by right, and to truly understand right, we must clearly and specifically identify such material content. Therefore, right as well as its corresponding interest ultimately can only be the manifestation of material content in legal relations, and if we cannot clearly and specifically understand the relation between right and material content or wealth, it is impossible to clearly and specifically understand right. With regard to the current conditions of jurisprudential research, because the scope of right is uncertain, and the specific relationship between right and interest is unclear, we can say that there is no theoretical premise by which to clearly and specifically understand material content.

The weak basic research of right-duty jurisprudence is also reflected in the understanding of duty. Historically, the achievements in understanding of duty can be summarized as in the following two aspects: 1. Duty is seen as something coerced, which can be from legal norms, or from a command. From Kant and Austin to Kelsen and Hart, many Western jurisprudents hold similar views.[83] 2. Duty is always considered as something contrary to interest, and is a legally adverse condition set up to protect specific interests, and is usually opposite or corresponsive to right. The famous jurisprudent Pound's view is representative in this aspect, and under his influence, Chinese jurisprudents of the 1930s also accepted such a view.[84]

In Chinese works of right-duty jurisprudence since 1978, the earliest and the most representative writings on duty come from Professor Zhang Guangbo, whose main points can be summarized as follows: duty is the other side of right, and is the behavior in conformance to right; with regard to the entire society, there is no duty without right, no right without duty; duty and right

83 See Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Edited & Translated by Allen W. Wood, (New Haven: Yale University Press, 2002), 16; John Austin, *The Province of Jurisprudence Determined*, Edited by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 2001), 21–22; Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd Edition (Oxford: Clarendon Press, 1994), 86–87.

84 See Roscoe Pound, *Introduction to the Study of Law* (Chicago: American School of Correspondence, 1912), pp. 20–21; Li Jingxi 李景禧 (et al.), *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shangwu yinshuguan, 1937), 257.

can be mutually converted; they are the pair of categories in the unity of the opposites; duty is relative to the material condition of a society, and is also relative to right, and ultimately is a means, etc.[85] There are some new ideas here compared to those of his predecessors, but overall there is no breakthrough advancement in the understanding of right and duty. This is primarily manifested as: obviously, it is not able to reveal the exact relationship between duty and negative interest, such as under what conditions legal duty is corresponding to what kind of negative interest; on the deeper level, it does not reveal the relationship between duty and negative property, such as under what conditions legal duty is corresponding to what kind of negative property content, and how it is calculated or quantified.

Among the multiple reasons why the study of duty in right-duty jurisprudence cannot achieve remarkable success based on the achievements of its predecessors, one reason that is especially worth noting is that its level of understanding of duty is limited by its level of understanding of right, power, and right in the wider sense. This is a fundamental limitation. Because, if the study of right, power and other phenomena is not thorough, the study of duty no doubt will not go anywhere.

For instance, if we cannot be clear about whether certain rights embody the corresponding specific interest of a certain social entity and the exact property content of such a specific interest (which usually can always be expressed in quantity of currency), how can we clarify the specific content of negative interest corresponding to duty and the exact quantity of the content of negative interest contained in duty? Determined by this fundamental limitation, right-duty jurisprudence so far has actually not found the theory and the form of measurement that can specifically identify the social content and material content of duty.

3.3 *The Identification of the Basic Object and Scope of Legal Studies Is Removed from Reality and Devoid of Factual Support*

Right-duty jurisprudence believes that right and duty are the basic objects of jurisprudential research and the basic scope of jurisprudence is identified around the center of right and duty. Its specific propositions primarily are as follows: "Right and duty are the core of the law;"[86] "the law is essentially constituted of the basic particles of right and duty, and is revolving around

85 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 28–55.

86 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 4.

the axis of right and duty,"[87] "right and duty are the most universal and the most common basic particles;" "all legal norms have right and duty as their core content, without exception," "legal relations are the social relations that are formed between subjects constrained by legal norms and are under the cover of right and duty;"[88] and "it is more appropriate to call legal studies as the study of right and duty."[89]

Generally, such propositions are not new by any means, similar views were the mainstream of Chinese legal studies as early as in the 1940s, when scholars said: "the idea of right and duty is very important in legal studies because the task of the law is to regulate right and duty, the generally accepted view in modern times is that jurisprudence is the study of right and duty;"[90] "the most popular views are that the law is built on right and duty."[91] The works of legal studies in the former Soviet Union, from the books by Levin and Denisov translated into Chinese in the 1950s, to the books by Jawitsch translated into Chinese in the middle of the 1980s, all unambiguously describe the content defined by legal norms and the content of legal relations as right (or subjective right) and duty, which shows that these books actually treat right and duty as the most basic objects of legal studies and thereby determine the scope of legal studies.

Right-duty jurisprudence treats right and duty as the most basic objects of legal studies, and centers on right and duty to identify the scope of legal studies as completely removed from the actuality of social-legal life, and is indeed a fundamental mistake in its theory. In reality, the most common and the most important legal phenomena are not right and duty, but right and power. The works of legal studies published in China today, except for very few, almost all accept or acquiesce to the view that right and duty are the most common and the most important legal phenomena, and almost all deny that right and power are of equal status. The reason is that scholars have been influenced too heavily by the old books, rather than experiencing the frequency and importance of the existence of power from real life.

87 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 13, 18.

88 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 82.

89 Ibid., 83–84.

90 He Renqing 何任清, *Faxue tonglun* 法学通论 [Introduction to Legal Studies], (Shanghai: Shangwu yinshuguan, 1946), 119.

91 Gong Yue 龚钺, *Bijiao faxue gaiyao* 比较法学概要 [An Outline of Comparative Jurisprudence], (Shanghai: Shangwu yinshuguan, 1947), 164.

The reality in China has been, particularly under the system of planned economy, that the importance and the predominance of power phenomena exceed those of right phenomena, which in the last thirty years has improved somewhat due to the development of some market economic elements such as the co-existence of multiple economic components and multiple distribution means, but even today it is impossible to claim that right phenomena in social life appear to be more important and more predominant than power phenomena. If that is true, we should categorically say that the practice of not treating power phenomena as the most common legal phenomena is not the result of understanding the issues starting from the experience of the social-legal life in China or any other countries, but the result of starting from certain books.

The practice of listing duty as one of the most common and the most important legal phenomena and excluding power has had a long history, but is ultimately not the case of seeking the truth from facts. In actuality, under any historical condition, as long as the law is needed, power is always one of the most common and the most important legal phenomena, especially today.

First, right and power are the most common and the most important in the real world of legal phenomena, and duty is far from being on a par. This is a conclusion that I have reached upon conducting some detailed statistical study on the relevant content of the legal code books of some representative countries. Because constitution is the fundamental law that comprehensively regulates social-economic-political existence, the commonality and importance of specific legal phenomena reflected in constitutions are more reliable.

I have conducted statistical research on the texts of a few representative constitutions, with the result that faquan is much more common and much more important than duty: In the 1954 Chinese Constitution, right, power, and other terms reflecting faquan appear 54 times in total, while the terms such as duty, responsibility and obligation reflecting duty only appear 6 times; in the current Chinese Constitution, the relevant terms appear 75 times (right 30, freedom 13, power 12, function and powers 14, limit of authority 6) and 22 times (duty 15, responsibility 5, obligation 2), respectively; in the current U.S. Constitution, the corresponding numbers are 63 times (right 16, freedom 1, liberty 3, power 37, privilege 4, immunity 2) and 25 times (legal duty 19, disability 3, obligation 3), respectively; in the Japanese Constitution, the corresponding numbers are 59 times (right 30, freedom 8, liberty 3, power 15, authority 3) and 5 times (duty 2, responsibility 1, obligation 2), respectively; in the French Constitution, the relevant terms reflecting faquan appear 85 times (right 42, freedom 22, liberty 6, power 15), while those terms reflecting duty appear only 16 times (legal duty 9, disability 1, responsibility 4, obligation 2); in the German Basic Law,

the corresponding numbers are 280 times (right 144, freedom 25, liberty 6, power 105) and 56 times (duty 26, responsibility 20, obligation 10), respectively. I believe that the numbers above are quite sufficient in illustrating which is more common and more important.[92]

Some may argue that the examples from only modern constitutions are not sufficiently convincing. Now, let us provide the following statistics: in the English version of the *Laws of the Twelve Tables*, the terms reflecting faquan appear 39 times (right 19, privilege 3, power 8, authority 9), while those reflecting duty only appear 3 times (responsibility 1, and responsible 2).[93]

All the statistics intuitively show that, in the reality of legal life, the phenomena of right and power are the most common and the most important, and the right-power relationship is the most common and most basic in the real world of the law, and then come right-right relationship, and power-power relationship. The so-called right/duty relationship is merely an outdated theoretical model that is far removed from the reality and is used by the traditionally-minded scholars confined within their studies in describing living legal phenomena. We should also add that, all the figures listed here are superficial, and the reason for listing them is only to allow the readers some awareness concerning the real importance of the two basic legal phenomena, namely, right and power. The fundamental reason why the importance of right and power is emphasized and the theoretical status of duty is diminished in faquanism is because the interest content and property content represented by right and power as a fundamental unity contain almost the entire world seen from the vintage of the law, which is far beyond what duty can possibly achieve. The theory that only takes the portion of right out of faquan and puts right on a par with duty is not only harmful to the nature of right and power as a fundamental unity, but also unhelpful in constructing a decent legal order in accordance with the spirit of democracy and the rule of law.

Second, right and power in reality always embody the value orientation of people's life and endeavor or that which they strive to obtain, but duty does not. Viewed from the perspective of the law, generally, human activities are always with an eye to enjoy as much right and power as possible, and assume as little duty as possible. Therefore, the frequency of occurrence and the actual status of right and power in the world of legal phenomena are much higher than

92 The statistics here are based on the Chinese versions of the Chinese Constitution, whose current form includes the amendments ratified in March 2018, and on the English versions of other countries' constitutions posted on the websites of the respective legislative organs or constitutionality review bodies.

93 S. P. Scott, *The Civil Law*, Vol. 11, The Laws Of The Twelve Tables, (Cincinnati: The Central Trust Company, 1932), 57–76.

that of duty. In terms of the relationship between right and duty, I am in agreement with such a statement that "right is the goal, while duty is the means, the purpose of setting up duty by the law is to guarantee the realization of right; right is the primary element, while duty is secondary, right is the foundation and meaning of the existence of duty."[94] Power and right are fundamentally homogeneous (which I will provide proof later in the book), therefore, power, like right, is also a concept corresponding to duty, so the relationship between power and duty, much like the relationship between right and duty, is also that the former is predominant relative to the latter, and is manifested as the goal and the primary element.

Third, right and power are both the legal manifestation of certain interests and property, while duty is manifested as payment and sacrifice of interest, and the expenditure and loss of property. Therefore, among the three, only right and power are homogeneous legal phenomena, and the nature of duty is contrary to that of right and power. So, theoretically, it is not appropriate to equalize duty with both right and power, or with either respectively. In order for the new interpretation system of legal phenomena to be able to conduct interest analysis or economic analysis that is truly characteristic of legal studies as a discipline, we must theoretically identify right and power as concepts that positively embody interest and the corresponding property content factually as the most common and the most important (or the most basic) legal phenomena, and separate them from duty that embodies the element of no-interest and the content of negative property. Only by first simplifying right and power as much as possible, and severing the connection between them and duty as much as possible, can we possibly truly understand right, power, and duty, and clarify the specific linkage between right, power, and duty.

In comparison to right and power, duty is much less common and a much less important legal phenomenon, only right and power embody almost all the realistic pursuit of people and the value orientation of social-legal life. The view that right and duty are the most important legal phenomena is purely an inference that is removed from the reality, and the real content of social-legal life is the interaction between right and power, between right and right and between power and power, as is manifested as their mutual opposition, mutual coordination, mutual improvement, mutual conversion, and their co-existence or unity, etc. Therefore, the practice of treating right and duty as the basic objects of legal studies and using them as the center to identify the scope

94 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 89.

of legal studies is inadvisable, and jurisprudence also is not the study of right and duty.

3.4 *The Assessment of the Most Basic Contradiction of Social-Legal Life Is Not Consistent with the Reality*

Social-legal life is social life from the perspective of the law. Correct assessment of the basic contradiction of social-legal life is the conceptual foundation by which a society correctly understands the basic function of the law in our time, and is also the theoretical premise by which legal studies correctly and appropriately identifies its realistic effects. Therefore, one of the important tasks for jurisprudence is to assess truthfully the basic contradiction of social-legal life.

Right-duty jurisprudence is very clear about what the most basic contradiction of social-legal life is: "All the contradictions, conflicts, disputes, and struggles in the field of law originate from the opposition between right and duty."[95] On that, one scholar makes the following comment: "In the legal world, right and duty are the most basic pair of contradictions. This conclusion is the consensus in the field of legal studies, and no one has disputed the conclusion so far."[96]

It should be pointed out first that even though the view to position the most basic contradictions of social-legal life as the contradiction between right and duty has been predominant in Chinese legal studies in the last two plus decades, it has never been the only voice in this aspect within the field of legal studies. For example, so far, most scholars of constitutional law actually have conducted their research from the theoretical premise that considers the contradiction between the citizen's right and state power as the most basic contradiction of social-legal life, which, from the perspective of jurisprudence, is actually a negation of the view that right and duty are the most basic contradiction of social-legal life.

The faquan analysis method that I propose here also explicitly negates the proposition that right and duty are the most basic contradictions of social-legal life. In the field of constitutional law, many have accepted the view that citizen's right and state power (or right and power) and their relations are the most basic content of the constitution, and the jurisprudential foundation of the view is the understanding that right and power, instead of right and

95 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 18.

96 Chen Zhen 陈桢, "1995~1996 nian zhongguo fali xuejie de lilun shifei 1995~1996 年中国法理学界的理论是非 [Theoretical Conditions of Chinese Jurisprudence: 1995–1996]", *Faxue* 4 (1997): 6–13, 9.

duty, are the most common and the most important legal phenomena; and the earlier and the most representative view in this regard was also raised from the perspective of constitutional law.[97] Later there were again scholars of civil law who pointed out directly from the perspective of jurisprudence that "the objects regulated by modern law are primarily the relationship between right and power, and secondarily the relationship between rights and that between powers."[98] All the views in fact have negated the idea that the contradiction between right and duty is the most basic contradiction of social-legal life, and clearly indicates that the most basic contradiction of social-legal life should be approached from the relationship between right and power.

Of course, this is still not sufficient. There are three major reasons why we negate the idea that the contradiction between right and duty is the most basic contradiction of social-legal life.

First, in the social-legal life of any contemporary country, there are two facts that are often in existence and effective: one is the right of citizens and other individuals, such as the various basic rights of citizens stipulated by the Chinese Constitution, the other is the power that belongs to all people but is controlled and applied by state agencies of various levels and kinds according to the law (in the Chinese Constitution, it is appropriately called power, namely "all powers of the People's Republic of China"), whose various specific existing forms are normally called functions and powers, or occasionally limit of authority, in the Chinese Constitution and law.

Clearly, the Chinese Constitution, like those of many other countries, has already affirmed their difference, and named the former right, and the latter power. Because the relationship between right and duty is actually just an existing form of right exchange relations between equal subjects, if we use the contradiction between right and duty to explain the contradiction of social-legal life under such condition, it would be tantamount to claiming that the various rights of citizens and the contradiction between the rights are the basic contradictions, and which power and state agencies of various levels and kinds as the subject of power have nothing to do with. Such an assessment is clearly extremely one-sided. Perhaps some scholars would say that the right referred to here is the right that includes power. My answer to that would be: social-legal life is not a word game. The meaning of the term right is already

97 Liu Jinghai 刘惊海, "Gongmin quanli yu guojia quanli 公民权利与国家权力 [Citizen's Right and State Power]", *Jilin daxue xuebao* 6 (1990), 21–26.

98 Dongfang Yushu 东方玉树, "Chengwenfa de san shuxing: quanli yu quanli de pinghengdu 成文法的三属性：权利与权力的平衡度 [Three Attributes of Statutory Law: the Balance between Right and Power]", *Falü kexue* 5 (1993), 36–41, 49.

well defined in the constitutions and the laws of various countries, and there is no reason to avoid the word that is well defined in the law and to agree on another concept of right that includes power.

Second, as indicated throughout this book, only right and power are the most important legal phenomena, while duty is not, therefore it is also impossible for the contradiction between right and duty to be the most basic contradiction of the legal world. The descriptions of the relationship between right and duty in contemporary works of Chinese legal studies are all manifestations of the distortion of the relationship between right and power, between powers, and between rights by the existing vocabulary system.

Third, the notion of the contradiction between right and duty is merely a jurisprudential description of the contradiction between rights, which is unable to include the more important contradiction between right and power, nor the contradiction between powers, therefore is highly one-sided and inconsistent with the reality. Because, with regard to both of the reality and the requirement of lexical examination or semantic analysis, the theoretical description of "the contradiction between right and duty" is only able to include the contradiction between the rights of individuals (mainly citizens), not the contradiction between the power of a state agency and that of another state agency, the contradiction between the right of citizens and other entities and the power of state agencies, and in actuality, the contradiction between the right of citizens and other individuals and the power of state agencies far exceeds the previous two contradictions in terms of realistic and theoretical status.

In fact, even if some are willing to accept the notion that the "right" in "right and duty" includes power, then what relationship does such "right" have with the right that is legally recognized and protected in the law of various countries? And how do we differentiate them? There should be some reasonable explanation concerning such inevitable questions, but the works of right-duty jurisprudence have never touched upon the questions.

3.5 *Inappropriate Disciplinary Basic Analysis Method*

Method is a specialized tool for jurisprudents, much like an axe for a woodcutter. A woodcutter's axe needs to be ground after a period of use, and should be replaced if too old, the specialized tool for jurisprudents also needs to be inspected frequently, ground and even renewed. For contemporary Chinese legal professionals, it is not enough to simply use existing theories of legal studies to explain and influence legal reality, rather, they should often inspect, improve and even renew theoretical tools based on the efficacy of the theory and people's realistic needs. Based on this understanding, and considering

the various limitations of right-duty jurisprudence that I have found in my teaching and research for a long period of time, I believe it to be necessary to analyze the shortcomings of the disciplinary methodology of such jurisprudence, for the purpose of its improvement or renewal.

Let us take a look at the level of the research method of legal studies and appropriately evaluate the semantic analysis method. In order to accurately evaluate the disciplinary methodology of right-duty jurisprudence, we must first differentiate the three levels of the research method of legal studies. The first is philosophical methodology. Philosophy is the highest theoretical summarization of the achievements in understanding the world in an era and it is unconceivable to have a legal theory without philosophical methodology, which would not be a true "theory." The second is disciplinary methodology (called the basic analysis method of legal studies). It refers to the most important analysis method in terms of disciplinary characteristics that is formed under the guidance of certain philosophical methodology and in consistence with the disciplinary characteristics of legal studies and the need to systematically interpret legal phenomena.

With regard to the relationship between the two levels, philosophical methodology should guide disciplinary methodology, and disciplinary methodology should rely on philosophical methodology and professionally implement the logic and the requirement of philosophical methodology. If a disciplinary methodology does not have a foundation of philosophical methodology or is removed from the foundation, the theory resulting from such methodological logic must be shallow, loose, and short of dialectical spirit. Philosophical methodology and disciplinary methodology in legal studies are both methods that are comprehensive and persistent throughout the entire legal theory, but only disciplinary methodology can confer legal studies with its own characteristics. The third is the locally applicable and technical method of legal studies, having no direct relationship to philosophical methodology. What I am going to analyze is the shortcomings of the second level of the research method of legal studies, namely the disciplinary methodology, which is closely related to philosophical methodology, and does not have much to do with the method of the third level, so there is no need to involve the third level.

Based on the above classification, we can draw two conclusions in reading the representative works of right-duty jurisprudence:

(1) The philosophical methodology of right-duty jurisprudence is Marxist philosophy, in particular, its dialectical materialism. In the introduction of one of the representative works of right-duty jurisprudence, *A Concise Theory of Right and Duty*, the author, in discussing the purpose of his research, makes it very clear what his chosen philosophical methodology is. The purpose,

according to him, is to "establish [a] systematic conception of right and duty of Marxism-Leninism, scientifically clarify the differences and connections between right and duty in both capitalist and socialist countries, and discover the nature, characteristics, and laws of development of right and duty."[99] In the introduction of another representative work of right-duty jurisprudence, *A Study of Basic Categories of Jurisprudence*, the author also says clearly that Marxist philosophy is his philosophical methodology in studying legal studies, including the issue of right and duty. He says: "In the field of legal studies, the reason why Marxist legal studies can be unique among many schools of jurisprudence, and exhibit obvious theoretical strength, is that it benefits from the scientificity of its research method …… In this methodological system, the most fundamental method or methodology is dialectical materialism and historical materialism."[100]

(2) The disciplinary basic analysis method of right-duty jurisprudence is the semantic analysis method. The main proponents of right-duty jurisprudence are not unified in their views on this issue. In the works of Professor Zhang Guangbo, because the author directly adopts the ideas of Marxist philosophy to explain right and duty, and to connect relevant legal phenomena, while exerting no effort for systemization, there is no clearly defined disciplinary methodology differentiated from philosophical methodology. The works of Professor Zhang Wenxian is different in that they not only are more systematic in their content, but also clearly formulate and implement disciplinary methodology. He says: "Under the methodology of dialectical materialism and historical materialism, there are a series of basic methods and specific methods. For the research of legal categories, the most characteristic basic method is semantic analysis method, while, at the same time, the historical investigation method, value analysis method, and class analysis method are also indispensable basic methods."[101] For a specific discipline, because the system of categories is the theoretical framework of the entire discipline, the most important method that a scholar chooses to construct the system of categories of his discipline is actually the disciplinary methodology that the scholar identifies for the discipline.

Therefore we can say that, the semantic analysis method is the basic analysis method of right-duty jurisprudence, and the other methods are secondary.

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99 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [A Concise Theory of Right and Duty], (Changchun: Jilin daxue chubanshe, 1989), 4.

100 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 19–20.

101 Ibid., 20.

Indeed, the components of right-duty jurisprudence as exhibited in *A Study of Basic Categories of Jurisprudence* are all connected through the semantic analysis method. I intend to comment from the following three aspects about that method:

(1) Semantic analysis method doesn't have a foundation of philosophical methodology.

On the surface of the representative works of right-duty jurisprudence, its disciplinary methodology, namely, the semantic analysis method, seems to have a foundation of philosophical methodology, but a close scrutiny can reveal that it is actually lacking such a foundation. In *A Study of Basic Categories of Jurisprudence*, during his discussions of the disciplinary methodology that he adopts, the author cites two different philosophies, namely, semantic analytical philosophy and Marxist philosophy, intending to show that the disciplinary methodology that he uses derives from the two. But the real situation is far from that.

There is no substantive connection between the semantic analysis method and semantic analytical philosophy in terms of their relationship. Semantic analysis and semantic analytical philosophy are rather different. Semantic analysis is an indispensable method involving language and linguistic expressions, regardless of which cultural level, which discipline, and which occasion. It is indispensable for everyone's everyday life and study, which is called semantic analysis of everyday life. Semantic analytical philosophy, on the other hand, is a philosophical school that emphasizes how to resolve philosophical issues through analyzing language. However, semantic analysis itself is not a philosophical method, but rather the content of linguistics, which is the view held by the scholars who criticize semantic analytical philosophy, and is not denied by even semantic analytical philosophers themselves.[102]

Therefore, semantic analysis is a general method and does not belong to any specific discipline other than linguistics, when it is used to resolve philosophical issues it is the component of philosophy, and when it is used to resolve legal issues it is a component of legal studies, which is true for humanities and social sciences, even natural sciences. In layman's words, semantic analysis is nothing more than lexical differentiation, and there is absolutely no need for us to add a layer of mysterious philosophical hue to it when using it to resolve legal issues, just in order to show that one's own disciplinary methodology has a foundation of philosophical methodology.

102 See *Zhongguo dabaike quanshu* 中国大百科全书 [Encyclopedia of China] Law Vol., (Beijing: Zhongguo dabaike quanshu chubanshe, 1985), 729.

In actuality, the semantic analyses that right-duty jurisprudence has conducted on the terms of right and duty is the commonly seen lexical differentiation, without any substantive connection with the philosophical thinking of Russell, Moore, and Wittgenstein and others by way of semantic analyses. If Chinese jurisprudents really admire the spirit of analytical philosophy, they actually should specifically analyze the differences of the word 'right' in everyday language and artificial language, the connections and differences between its wider sense and its narrower sense, the connections and differences between right and power, and other basic issues of jurisprudence, in order to eliminate the current condition where jurisprudence faces severe confusion concerning its basic concepts.

Unfortunately, the proponents of right-duty jurisprudence have not made sufficient efforts in this aspect. For example, right-duty jurisprudence has not formulated anything concerning the following most basic issues: Under what condition does the use of the concept of right include the meaning of power? Under what condition does it not include the meaning of power? If the right that includes power and the right that does not include power are apparently different, then why don't we use two legal concepts to represent them?

The semantic analysis method also has no foundation in Marxist philosophical methodology. To treat Marxist philosophy or dialectical materialism as the philosophical foundation of semantic analysis method is, to a great degree, due to the erroneous understanding of the relevant principles of Marxist philosophy, especially dialectical materialism. It is necessary to particularly discuss such a misunderstanding, and its influence on the actual efficacy of right-duty jurisprudence.[103] Only after this issue is clarified can many theoretical issues be clarified. Normally, the disciplinary methodology of legal studies is primarily and predominantly manifested in identifying the most basic and the most important categories of legal studies and developing theoretical systems, but the problem is precisely that right-duty jurisprudence does not have sufficient efficacy in appropriately explaining legal phenomena (which will be further discussed later), and one of the purposes of this section is to find the reason why it does not have sufficient efficacy.

So, for a discipline, no shortcoming is more severe than the fact that its basic analysis method is built upon the misunderstanding of a philosophical methodology. And the misunderstanding of the relevant content of dialectical

103 About this, some scholars may contend that it is alright as long as it can explain the issue, regardless of whether it has misunderstood dialectical materialism. In fact, it is not that simple, because misunderstandings may indicate that such theory lacks the necessary philosophical foundation.

materialism by the proponents of right-duty jurisprudence has caused serious problems precisely in this aspect, which makes their proposed philosophical methodology completely disjoined with the keystone categories and the method of developing the entire system that they identify based on such methodology. For example, on the one hand, a relevant scholar advocates that Marxist legal studies should "treat all legal practices of mankind as the background, apply dialectical materialism that has apparent methodological superiority to the research of legal studies, thoroughly follow the method of the unity of subjectivity and objectivity, and the unity of logic and history, and truthfully and profoundly reflect the scientific categories of legal phenomena derived from the objective attributes, internal connection, and development process of legal phenomena themselves.[104] On the other hand, during the actual research process, he erroneously understands the research method that "has apparent methodological superiority" in dialectical materialism, and implements a research path based on a misunderstanding.

What is indeed the research method that "has apparent methodological superiority" in dialectical materialism? With regard to the issue, Engels makes it clear when dealing with the issue of constructing the theoretical method and categorical system in political economics: "Marx was and is the only one who could undertake the work of extracting from the Hegelian logic the kernel containing Hegel's real discoveries in this field, and of establishing the dialectical method, divested of its idealist wrappings, in the simple form in which it becomes the only correct mode of the development of thought. The working out of the method which underlies Marx's critique of political economy is, we think, a result hardly less significant than the basic materialist outlook."[105]

The method that was used by Marx to construct the categorical structure of political economics was originally formulated by Hegel, who called it the "absolute method," of which Marx conducted a materialistic transformation. When particularly discussing the method of political economics later, Marx called it "the method of advancing from the abstract to the concrete."[106] He believed that this method "is obviously the correct scientific method," and "is simply the way in which thinking assimilates the concrete and reproduces

104 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 7.

105 Karl Marx & Friedrich Engels, *Collected Works*, Vol. 16, "Karl Marx, A Contribution to the Critique of Political Economy" (Moscow: Progress Publishers, 1980), 474–475.

106 Karl Marx & Friedrich Engels, *Collected Works*, Vol. 28, "Economic Manuscript of 1857–58" (Moscow: Progress Publishers, 1986), 38.

it as a mental concrete."[107] Therefore, we can say that this method is developed particularly for the construction of categorical structure of disciplines of philosophical nature. That is true for both Hegel and Marx. It is clear that the method has nothing to do with the semantic analysis method of right-duty jurisprudence.

(2) The extreme contrast between the semantic analysis method and the method of advancing from the abstract to the concrete.

As the disciplinary methodology of right-duty jurisprudence, although the semantic analysis method has nothing to do with the method of advancing from the abstract to the concrete that truly has its theoretical superiority in constructing the disciplinary system of dialectical materialism, its proponents nonetheless use Marxist philosophical methodology subjectively as the foundation, and claim that, in terms of scientific methodology, they will proceed "according to the model of constructing scientific categorical system in Marx's *The Capital*,"[108] the model that uses precisely the method of advancing from the abstract to the concrete. In order for people to really understand the extreme contrast between the disciplinary methodology of right-duty jurisprudence in its actual application and the disciplinary methodology that it publicly seeks, and to understand the severe shortcomings of the semantic analysis method, we should compare some of their major points.

First, let us take a look at the basic trajectory of forming a theoretical system. In *The Capital*, the basic trajectory of the method advancing from the abstract to the concrete can be summarized as two procedures or two continuous stages: "The first procedure attenuates the comprehensive visualisation to abstract determinacies, the second leads from abstract determinacies by way of thinking to the reproduction of the concrete."[109] This process can be expressed as: perceptual concreteness (complete visualization) → abstract determinacy[110] → thinking concrete. In *The Capital*, the trajectory in which Marx uses this method to construct the categorical structure is: various merchandises → value (surplus value) → wage, profit, rent, interest, price, currency, capital, etc. In right-duty jurisprudence, the categorical structure and therefore the entire theoretical framework of legal studies is built upon the foundation

107 Ibid., 18, 19.

108 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 17.

109 Karl Marx & Friedrich Engels, *Collected Works*, Vol. 28, "Economic Manuscript of 1857–58" (Moscow: Progress Publishers, 1986), 38.

110 We choose to translate the term as determinacy instead of "determination" as in some of the English renditions of relevant works, as we believe that the former can better convey the original meaning of the term in the texts of Marx and Hegel.

of reflecting legal reality through perceptual intuition and the lexical differentiation of the concepts of right and duty, are put together forcibly through emphasizing certain superficial connections between right, duty, and other phenomena, and are without systematic logical order, not to mention any element of dialectical thinking. It does not detract from the phenomena of right and duty any commonality like socially necessary labor time, nor does it formulate through the abstraction of a concept such as value that transcends a specific phenomenon. In almost all the important aspects, such trajectory of thinking is totally different from the model of constructing categorical systems that relevant scholars subjectively wish to follow.

Second, let us take a look at whether the element identified as the most basic research object of legal studies has necessary singularity or identity of content. The reason why the most basic research object is "basic" is because it has essentially and fundamentally become "one" rather than "two" or more. According to Marx, commodity is identified as the most simple, most universal, and most common, and although various merchandises are different from each other, they all have the identity in nature, which is socially necessary labor time; according to the proponents of right-duty jurisprudence, there is no need to abstract the identity of the nature of the most simple, most universal, and most common legal phenomena, namely, right and duty, except that they are both legal phenomena in form.

Third, in *The Capital*, commodity, as the most important and the most basic economic phenomenon, is considered as the object of abstraction, and is treated as "raw material," from which Marx abstracts or "extracts" the abstract higher than commodity such as socially necessary labor time and surplus labor time, and uses corresponsive terms (value and surplus value) to relatively fix the simple determinacies of the abstract to form concepts; the proponents of right-duty jurisprudence also talk about "abstracting" and "extracting," but right and duty have never entered the process of being abstracted or "extracted," and there is also no single legal work that has abstracted or "extracted" anything higher than right and duty.

Fourth, in *The Capital*, what is represented by the concept of value (surplus value), which is the most important category (also called core category or keystone category), is abstracted or "extracted" from commodity, the most basic object, and is therefore "metaphysical;" while for the proponents of right-duty jurisprudence, the concepts of right and duty, which are treated as the most important categories, always remain right and duty phenomena themselves that are still under the condition of "raw material."

Fifth, in *The Capital*, Marx uses surplus value, the most important category in his theoretical system, to explain commodity, which he identifies as the most

important economic phenomenon; while the concepts of right and duty that are identified as the most important categories by right-duty jurisprudence are unable to explain the phenomena of right and duty themselves that the theory has identified as most important, most simple, and most common. One may have to wonder, if a category is unable to explain the most important, most simple, and most common phenomena of its own discipline, then why is it taking the position of the most important category (or keystone category) of the said discipline? More importantly, the basic knowledge of logic requires that the defining term cannot include the defined term, so right and duty cannot be used to explain right and duty. The practical legal theory is able to use faquan to explain right, power, duty and other basic legal phenomena, but right-duty jurisprudence is unable to avoid the logical trap of having to use the defined term as the defining term.

Sixth, in *The Capital*, there is only one core category, namely, value (and surplus value is the most important category by which Marx differentiates his own theory from the classical political economics). This single core category reflects the identity of the nature of various merchandises, constitutes the foundation of the identity of social-economic content contained within the theoretical system, therefore allowing the entire theory to have comprehensiveness. In right-duty jurisprudence, however, the concepts of right and duty only represent the two legal phenomena, right and duty, respectively. Because right and duty are opposite in nature, the concepts of right and duty cannot reflect the identity of any nature of right and duty phenomena at all, nor construct a theoretical system based on the concept that is of logical and social content unity. Because, right and duty in this type of jurisprudence are always two things that cannot find commonality and identity, which means that there is no theoretical bridge, medium, or linkage connecting the two. Naturally, a legal theory centered on the concepts of right and duty is by necessity disorganized internally, disjoined among its different parts, and even self-contradictory.

It is inevitable for the proponents of right-duty jurisprudence to draw conclusions that are against the basic requirements of abstract thinking, because, before they even completely understand the "correct scientific method" referred to by Marx, they already attempt to use it to prove the case that right and duty are the most important categories in legal studies. Here is the first example: according to the relevant scholar, "right and duty are the most universal and most common basic particles in legal phenomena, and are the most simple abstracts and determinacies."[111] Just imagine that, right and duty themselves

111 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 8.

are also legal phenomena, or perceptual concreteness here, and they are not concepts (indeed, they would not work even if they were concepts), how can they become "the most simple abstracts and determinacies" of other legal phenomena? This is an erroneous statement, just like if it were claimed that the commodity phenomenon (not the concept of value) within Marx's system of political economics were "the most simple abstract and determinacy" of various merchandise.

The second example: the scholar mentioned above says: "Right and duty are the most profound and most comprehensive reflection of the ontological property and intrinsic connection of legal phenomena," and "right and duty, as the keystone categories of legal studies, reveal the core and the essence of legal phenomena."[112] Again imagine that, how can concepts such as right and duty, which have not undergone the process of abstraction, and are concepts directly representing legal phenomena, reflect the ontological property, intrinsic connection, core, and essence of legal phenomena, which include right and duty themselves? This does not make much sense, just like if it were claimed that, within the scope of Marx's economics, commodity (not value) could most profoundly and comprehensively reflect the ontological property, intrinsic connection, core, and essence of various economic phenomena that include merchandise. Obviously, the author falls here again into the logical trap of using the defined term as the defining term.

The third example: the same scholar quoted above says: "Jurisprudential categories …… are further abstractions on the basis of the categories of other departments in legal studies, and use them as medium to further enter into the various levels and realms of legal phenomena."[113] It is indeed a little extreme to believe that jurisprudential categories, primarily the two most important categories of right and duty, are abstracted from the categories of other departments of legal studies. The process of forming categorical systems according to the method of dialectical thinking should start from perceptual concreteness, not category, and, upon the formation of scientific and abstract concepts, infer all other categories along the direction of advancing from the abstract to the concrete, not the other way around. Take *The Capital* again as an example. In the book, the author first starts from the complete visualization (note specifically that, commodity here is not a concept or category), abstracts the concept

112 Zhang Wenxian 张文显, "Lun faxue de fanchou yishi, fanchou tixi he jishi fanchou 论法学的范畴意识、范畴体系和基石范畴 [On the Awareness of Category, the Categorical System, and the Keystone Category in Jurisprudence]", *Faxue yanjiu* 3 (1991): 1–8, 6, 8.

113 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [A Study of Basic Categories of Jurisprudence], (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 18.

of value (surplus value), then advances from the abstract concept to the concrete concepts such as wage, profit, rent, interest, and other more concrete concepts. This order absolutely cannot be reversed, and the author's trajectory of constructing categorical system of the scholar is precisely its reversal, with no logic to speak about.

In summary, when they discuss these highly theoretical and logical issues, the proponents of right-duty jurisprudence basically misunderstand the nature of the issues themselves that they are talking about. Using the method of lexical differentiation to identify the most important categories of legal studies and to develop categorical systems is impossible to profoundly and correctly explain legal phenomena, and the conclusion is also not going to be reliable. Lexical differentiation, regardless of what name of philosophy is given, remains to be lexical differentiation, and as a method, it is indispensable in all occasions where people engage in language and linguistic communication or expression. This determines that it is impossible to have the characteristics of any discipline, and also is impossible to be profound. As disciplinary basic concepts, the function of category is to relatively fix subject's understanding of relevant objects, and to formulate thinking forms, therefore, the meaning of a category can gradually be enriched, and even undergo a revolutionary transformation along with social life, but these are all the result of people's deepening understanding of the object.

Lexical differentiation and semantic analysis of a term representing a legal phenomenon at best can only find or decompose and synthesize its existing meaning, and is absolutely not the way to deepen the understanding of the object reflected by it. Therefore, the hard logic is that, using the method of lexical differentiation to study category and thereby construct a system of legal studies is absolutely impossible to have substantial creation, to surpass the predecessors, which is also a hard fact. In addition, the method of lexical differentiation itself does not, and cannot, have any element of dialectics.

(3) The existing disciplinary methodology under the theory centering on right and duty is impossible to be renewed.

Using the interest analysis method to explain political-legal phenomena is the intrinsic tradition of historical materialism. In the past two centuries, the Western legal studies also has very much emphasized understanding legal phenomena through interest. In the past few years, works also have appeared in China that especially focus on explaining political and legal phenomena from the perspective of interest.[114]

114 Wang Puqu 王浦劬 (ed.), *Zhengzhixue jichu* 政治学基础 [The Fundamentals of Political Science], (Beijing: Beijing daxue chubanshe, 1996); Sun Guohua 孙国华 (ed.),

At the end of the 20th Century, right-duty jurisprudence also has started to pay attention to the method of interest analysis, showing the tendency of renewing disciplinary methodology and replacing the method of semantic analysis with that of interest analysis. One of the proponents of right-duty jurisprudence discussed especially this issue, he said: "The relationship between the law and interest is the core issue of legal works such as legislation, enforcement, and justice;" "in the research of legal studies, particularly the research of socialist law in contemporary China, the application of the method of interest analysis must be highly emphasized;" "the research of the relationship between the law and interest and the application of the method of interest analysis will certainly result in the deepening of the research of the essence of the law."[115]

Using the element of interest and the concept of interest to explain legal phenomena, including right and duty is possibly a step forward on the one hand, but on the other hand, it makes the following problems even more serious: right-duty jurisprudence is self-contradictory, and is unable to self-justify. Admittedly, using the concept of interest to explain legal phenomena, including the phenomena of right and duty, is much more logical than using the concepts of right and duty to explain the legal phenomena centering on right and duty. But at the same time it should also be noted that emphasizing the method of interest analysis actually has the tendency of treating the concept of interest as the most important category of legal studies.

Leaving aside that interest is not a jurisprudential concept, even if it were, to emphasize its status of centricity in terms of disciplinary methodology would directly negate the original theory of treating right and duty as the keystone categories of legal studies. Furthermore, developing categorical systems and theoretical systems, as well as analyzing legal phenomena should be different theoretical functions of the same disciplinary methodology, and, with regard to this issue, we cannot emphasize the predominant function of the method of semantic analysis one day, and emphasize the predominant function of the method of interest analysis another day. With regard to these types of issues, we cannot simply follow our perceptual intuition, nor follow the new ideas of the others.

Makesizhuyi falixue yanjiu 马克思主义法理学研究 [A Study of Marxist Jurisprudence], (Beijing: Qunzhong chubanshe, 1991).

115 Zhang Wenxian 张文显, "Faxue lilun yanjiu zhong de jige wenti" 法学理论研究中的几个问题 [A Few Issues in the Theoretical Research of Legal Studies], *The People's Daily*, August 6, 1997.

Although it is appropriate in certain aspects, the method of interest analysis is not suitable, and is impossible, to become the disciplinary methodology of legal studies, at least within the framework of right-duty jurisprudence. This is firstly because interest is something that all disciplines of social sciences have to face, and the method of interest analysis is the research method that all disciplines of social sciences have been using. Using the method to explain legal phenomena cannot enhance the disciplinary characteristics of legal studies, nor allow it to become the unique research method of legal studies. Secondly, before understanding the specific and multi-faceted connections between interest and the basic legal phenomena such as right, power, and duty, there is not much practical significance to equate interest and legal phenomena. Because, under the conditions where the concepts representing legal phenomena have not revealed the exact interest content of the corresponding phenomena, conducting interest analysis of legal phenomena can only create the typical phenomenon of "two sets of skins."

So far, whenever interest and legal phenomena are discussed in the works of jurisprudence, it is clearly the case that the interest content is not synthesized into the understanding of legal phenomena. The obvious example is that no one has been able to show the relationship between interest content and right or duty. The true interest analysis of legal studies should first instill the understanding of the specific interest content of the relevant phenomenon into the jurisprudential category reflecting such legal phenomenon, and then use the jurisprudential category to think, so as to achieve high-degree fusion and natural synchronization of the analysis of legal phenomenon and interest analysis, where interest content is within, while jurisprudential category is without.

I believe that, in terms of disciplinary methodology within the realm of Marxist legal studies, the most theoretically superior method is still the philosophical methodology of advancing from the abstract to the concrete, so we could try to formulate the disciplinary methodology of contemporary Chinese jurisprudence under the guidance of this philosophical methodology.

3.6 *Conclusion: Right-Duty Jurisprudence Should Be Renewed*

Based on the above discussions, there are the following three assessments regarding right-duty jurisprudence:

First, the theoretical system formed through the method of lexical differentiation is limited and shallow in its interpretability of legal phenomena. With regard to legal phenomena, the crucial mission of jurisprudence is to lead us to see what is behind them, to understand the deep connection between them, and further summarize the new understanding about them in theory.

But even on the basic attributes of right that is most emphasized by it, right-duty jurisprudence has not clarified, or has even tried to clarify, issues such as the subjects of right, the exact limit or scope of right, the specific interest content behind right, the specific property content behind right, the difference between right and power, the similarities and differences between right in the wider sense and right in the narrower sense, etc. The situation is about the same in terms of right, duty, and other basic legal phenomena and jurisprudential concepts.

Because of its shallow understanding of legal phenomena, many highly important propositions of such jurisprudence actually are merely clichés without much real content. Here is a common one: "Right and duty are interrelated, namely, a unity of opposites."[116] Almost every proponent of right-duty jurisprudence talks about the unity of opposites of right and duty. But no one has elaborated on what they are united into. Some may say that they are united into the law, but this is apparently not enough, because all legal phenomena are united into the law, not just right and duty. Another example: the proponents of right-duty jurisprudence often say that "right and duty are quantitatively equal in value," "the total volume of right and that of duty of a society are equal."[117] For instance, a heap of fruits and a heap of rice cannot be compared to determine whether their total volumes are equal, unless they are commensurable through something (such as currency). In *The Capital*, in order to explain the issues such as why a piece of 20-yard cloth can be equal to a single jacket, Marx makes herculean efforts to find their commensurability, and ultimately affirming their commensurability as a certain amount of human labor. However, what can be used to commensurate right and duty? And for things that are not commensurable, how can we judge whether the total volumes of the two are equal or not? When announcing their views, the proponents of right-duty jurisprudence have never paid much attention to such requirements of basic academic research.

Second, the basic theory of right-duty jurisprudence is self-contradictory, cannot be self-justified, and is filled with the elements of extra-logical and extra-scholarly coerciveness. One most striking manifestation of it is to forcibly use the concepts of right and duty that originally can only explain private law phenomena superficially to interpret all legal phenomena, including public law. Thus, as far as right and duty are concerned, all powers are referred to by the concept of right, or by the concept of right in disguise, and power

116 Zhang Wenxian 张文显 (ed.), *Falixue* 法理学 [Jurisprudence], (Beijing: Falü chubanshe, 1997), 12.

117 Ibid.

stipulated by the constitution and the law and their specific manifestation and authority, are all considered as right, so much so that the differences between the law and right and power that in fact have already been differentiated in social-legal life are all mixed up.

The function of jurisprudential theory should have been to clarify the relationships and issues that are not clear, while right-duty jurisprudence is contrary to that, it often throws once again into confusion the basic concepts and basic relationships (namely, the concepts of right and power as well as their relationship) that are already clearly differentiated in legal documents and social-legal life. This is the manifestation that jurisprudential theory falls behind the reality of social-legal life, and in fact hinders, instead of advancing, the development and improvement of legal reality. There is another commonly seen example of the self-contradiction and the lack of self-justification of right-duty jurisprudence: on the one hand, in order to prove the rationality of using the unity of right and duty to explain legal phenomena, they treat duty and right as equally being the most important categories (keystone categories) of legal studies; but on the other hand, when they need to prove that right is the center of law, they also try their best to degrade duty. With regard to such a contrast, one may wonder, in discussing the center of law, where duty is so out of tune with right, then why don't they identify the single concept of right in affirming the most important category?

Furthermore, in the interpretation system based on right and duty, power is seen as a part of right, so right-centricity already includes the content of power-centricity, but at the same time when right is talked about as the center in comparison to duty, statements such as the following is surprisingly added: "in the relationship between right and duty, we advocate right-centricity, and oppose power-centricity."[118] Here, how come power is no longer within right, and jumps out as opposite to right? Perhaps the concept of right in "right-centricity" and the right that is seen as one of the keystone categories are two different things, which is indeed overly confusing.

Third, viewed from the perspective of social-legal life, right-duty jurisprudence can only be applied to private law, not public law, therefore it has actually abandoned half of social-legal life. Right and duty are concepts that originated from Roman private law, and the relationship between right and duty is merely the externalized form of the exchange relationship of right

118 Zhang Wenxian 张文显, "Shichang jingji yu xiandai fa de jingshen lunlue 市场经济与现代法的精神论略 [On the Spirits of Market Economy and Modern Law]," *Zhongguo faxue* 6 (1994):1–8.

between equal subjects. The most important and most common phenomena of public law is power and its specific manifestations, such as authority, and the limit of authority, etc., which is the fact confirmed by the law of various countries and social-legal life ever since Britain's Glorious Revolution, the American Revolution, and the French Revolution, and is also the fact affirmed by the Chinese Constitution. However, in order to uniformly explain all legal phenomena from the perspective of right and duty, right-duty jurisprudence closes its eyes to the facts, using extra-scholarly and extra-logical attitude to force power into the interpretative model of right and duty, with the result that can only make jurisprudential theory to be removed from the law and the reality of social-legal life, rendering jurisprudential theory contradictory to the rule of law, and legal practice.

So, what we see today in the field of public law is: some important works and textbooks dominating the field of public law don't accept right-duty jurisprudence, which is basically external to fields such as constitutional jurisprudence, criminal jurisprudence, criminal procedure jurisprudence, and cannot fulfill the function of general legal theory. In order to obtain the support of a basic theory of legal studies, some disciplines within the field of public law implausibly borrow the analysis method of right-duty jurisprudence. These disciplines are primarily administrative jurisprudence, administrative procedure jurisprudence, and economic jurisprudence, and the consequence of borrowing from right-duty jurisprudence is that, it makes authority, which is the specific existing form of state power according to the standard of the Chinese Constitution, right in such jurisprudential works, theoretically resulting in the typical and universal situation of undifferentiation between right and power. In teaching activities, teachers, facing questions from the students in this regard, either remain speechless, or use a lame argument, wavering between right in the wider sense and right in the narrower sense. Therefore, for the entire field of public law, fundamentally right-duty jurisprudence is actually without logical interpretability.

So my conclusion is that, right-duty jurisprudence has severe and insurmountable intrinsic defects, so it should be renewed based on the basic conditions of China. How it should be renewed calls for the collective wisdom of the field of legal studies, and I will put forth my own views in the following chapters.

CHAPTER 2

The Fundamentals of Faquanism

As a practical legal theory, faquanism is fundamentally different from semantic analysis jurisprudence with right and duty as its core categories. In contrast to semantic analysis jurisdictions, this chapter specifically elaborates on the philosophical foundation of faquanism, the basic ideas and proving process of faquanism, and the interpretation of the form and content of legal relations that is quite different from the traditional theory. Faquanism focuses on revealing right, power, their unity, and the concrete interest content and property content behind the corresponding duty. Of course, right, power, and duty referred here are all complete presentation of the same kind of legal phenomenon, which is to say, as the complete presentation of the same kind of legal phenomenon, right refers to what is traditionally called right in legal texts as well as freedom, liberty, and the portion of privilege and immunity that individuals legally enjoy; similarly, power refers to power in traditional legal texts as well as function, authority enjoyed by public agencies and the portion of privilege and immunity that public servants enjoy in their performance of official duties; the same can be said about duty as well.

1 Legal-Philosophical Explications of Faquan[1]

The concept of faquan has been formulated to establish a core category of legal studies that has better interpretability and can better suit the need for the construction of democracy, constitutionalism, and the rule of law. The formulation of the concept is based on the following understanding: right and power are the opposites only on the perceptual and superficial level, but are in fact unified and undifferentiated on the rational and fundamental level. There have been debates on the nature and the appropriateness of the concept of faquan following the publication of my earlier articles on this subject.[2] In order to answer the questions raised, and more importantly, to reveal the

1 The content of this section is primarily based on my earlier article, "Shehuiquanli de fazhexue chanshi 社会权利的法哲学阐释 [The Legal-Philosophical Explications of Social Right]," *Faxue pinglun* 5 (1995): 12–18. "Social right" was the term initially used to denote the unity of right and power.

2 Zhao Shiyi and Zou Pingxue 赵世义、邹平学, "Dui 'yong shehuiquanli fenxi fangfa chonggou xianfaxue tixi' de zhiyi 对'用社会权利分析方法重构宪法学体系'的质疑 [Questions

intrinsic connection of right and power, the author is offering here a more comprehensive elaboration of faquan.

1.1 *The External Characteristics of Faquan*

In terms of its external characteristics, faquan is similar to the notion of "legal right in the wider sense" that has been widely accepted in the field of legal studies.

While they appear in different forms, right and power are fundamentally the same. Within the field of legal studies in China, the representative views on the close relationship between right and power are as follows: "right and power are intertwined, there is power within right, right in the wider sense includes power, and power is also one form of right;"[3] "right and power are the same in their origins," "the authoritativeness and coerciveness of power is but the centralized embodiment of right, which is to say, the power authority has the capability of controlling others and forcing their behaviors to conform to its own will. Such capability can be considered a form of right, or right of a particular status."[4] According to *The Oxford Companion to Law*, "it is, accordingly, one sense of the more general term 'right'."[5]

As the American jurisprudent Pound points out, the term "right" has six different meanings: interest; interest plus legal means to protect it; legal right in the narrower sense; power; right of liberty; privilege. He believes that right in the second and the fourth category includes, or is equal to, power. And he says that right in the second category is "used to mean the legally recognized and delimited interest plus the legal apparatus by which it is secured. This may be called legal right in the wider sense."[6] Here, "the legally recognized and delimited interest" is precisely the definition of right according to the "interest theory" of Western legal studies. For example, the German jurisprudent Jhering, whom Pound holds in high esteem, once said: "right is an interest protected by law."[7] So the "interest" that Pound uses here refers to legal right in the

on 'The Reconstruction of Constitutional Jurisprudence using the Method of Social Right Analysis']," *Faxue yanjiu* 1 (1995): 49–55.

3 Guo Daohui 郭道晖, "Shilun quanli yu quanli de duili tongyi 试论权利与权力的对立统一 [On the Unity of Opposites of Right and Power]," *Faxue yanjiu* 4 (1990): 1–9, 2.

4 Wen Zhengbang 文正邦, "Youguan quanli wenti de fazhexue sikao 有关权利问题的法哲学思考 [Legal-Philosophical Considerations on Right] *Zhongguo faxue* 2 (1991): 44, 47–53, 47, 52.

5 David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), 937.

6 Roscoe Pound, *Social Control through Law* (New Haven: Yale University Press, 1942), 88.

7 Quoted in ibid., 86.

narrower sense, the legal apparatus protected by the law refers to power, and "legal right in the wider sense" is the sum of right and power.

The statements from the above writings in jurisprudence make it abundantly clear that the authors are well aware that right and power are fundamentally the same. The word "right" referred to by these authors or in their writings does not include power, much like the case in the field of legal study in China. Therefore, the "right" that does include power is labelled differently as "legal right in the wider sense," "broader 'right'," or "general legal right."

Unfortunately, none of the authors have formulated a single concept to denote the unity of right and power, or has used an unambiguous term of jurisprudential quality to indicate the unity. Some scholars have been aware of this situation. For example, when discussing "legal right in the wider sense" or right in his second category, Pound lamented: "[u]nhappily we have no one word to use for the second meaning, which is often very important."[8]

I hope that the concept of faquan can help eliminate what Pound deems as "unhappy." In this sense, faquan is actually the theoretical abstraction and evolution of what is normally referred to as "legal right in the wider sense."

1.2 *The Interest-Attribute of Faquan*

Now let us explore the essence of faquan. The essence of faquan refers to the question of what that which is called "legal right in the wider sense" actually is. The reason is that faquan is constituted of various legally defined "quan," that is, various rights and powers, and its essence can only be understood through investigating right and power, or more precisely, through reducing right and power to something undifferentiated in nature. That something will undoubtedly be the essence of faquan.

The essence of faquan cannot be anything other than legally defined interest, because only in terms of legally defined interest can right and power be directly reduced to something undifferentiated, thereby achieving sameness or identity. In terms of its content, right is the legal manifestation of certain interests, which has been widely accepted in the field of legal studies. As early as in ancient Roman Empire, a legal course authorized by the Emperor already claimed that "justice is the constant and perpetual desire to give to each one that to which he is entitled."[9] Here, justice refers to the legal content, while what he is entitled to is the interest he is entitled to.

As for the understanding of interest as the essence of right, the following statements from contemporary scholars are also in agreement: "[t]here have

8 Ibid., 91.

9 J, I.1,1pr., S. P. Scott, *The Civil Law*, Vol. 11 (Cincinnati: The Central Trust Company, 1932), 5.

always been theoretical disagreements concerning the nature of power, now many scholars believe that it is certain interest recognized and protected by law;"[10] legal right is used "to describe a type of institutional arrangement in which interests are guaranteed legal protection, choices are guaranteed legal effect, or goods and opportunities are provided to individuals on a guaranteed basis;"[11] and "the bearer of rights is in a position to make demands based on what is deserved or due."[12]

Like right, power is also a legal manifestation of interest. Power has carried numerous meanings throughout history, but basically it refers to legal coercion, force, authority, and privilege, etc. Some Western scholars have even proposed a "one-dimensional view," "two-dimensional view," and "three-dimensional view" with regard to the definition of power.[13] And Max Weber defines it as follows: "'[p]ower' (*Macht*) is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests."[14] Despite the differences of the above statements, the discussions are always predicated on the assumption that power is the realized form of interest.

Many scholars have directly addressed the issue that power is the realized form of interest. As early as in the era of the Enlightenment, Hobbes already considered power in the following terms: "[m]en have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all;" "[h]ereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man."[15] There have also been a variety of statements in our contemporary world, but they all point to the interest-attribute of power. The left-wing Greek scholar Poulantzas believes that, "the concept of power is related to that precise type of social relation which is characterised by class '*conflict*' and struggle; that is, to a field inside which, precisely because of the existence of classes,

10 Sakae Wagatsuma 我妻栄 (ed.), *Xin falüxue cidian* (*Xinban*) 新法律学辞典 (新版) [New Dictionary of Legal Studies (New Edition)], trans. Dong Fanyu 董璠與 (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), 254.

11 David Miller (ed.), *The Blackwell Encyclopaedia of Political Thought* (New York, Oxford: Basil Blackwell, 1987), 443.

12 Tom L. Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (New York, St. Louis [etc.]: McGraw-Hill, 1982), 195.

13 Steven Lukes, *Power: A Radical View* (2nd ed.) (Basingstoke & N.Y.: Palgrave Macmillan, 2005), 16–29.

14 Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York: Free Press; London: Collier-Macmillan, 1947), 152.

15 Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1943), 95–96, 131.

the capacity of one class to realize its own interests through its practice is in opposition to the capacity and interests of other classes;"[16] the British legal sociologist Cotterrell thinks that power "can be thought of as the probability of being able to carry out one's own will despite resistance or the capacity to produce intended effects on the behaviour of others. Undoubtedly control of material benefits—economic power—is one of its major forms."[17] In a word, what power embodies is fundamentally certain interests, whose realized form is related to coerciveness and the use of violence.

That it is reasonable to recognize the essence of faquan in terms of interest can also be justified based on the following facts: interest recognized and protected by the law must, and can only, be embodied through the two forms of right and power, which is to say, they cannot be embodied singularly through right or power, or anything other than these two. Since the law reflects interest in certain forms of totality, the content of legal relations must include the entire content of the interests reflected by the law. Therefore, when it is concluded that the content of legal relations is the sum of the subject's right and duty, the following two points must be made clear: 1) Within the sum, only right is the manifestation of interest or legal interest, while duty is not; 2) The right in the content of legal relations can only be faquan, i.e., the legal right in the wider sense that includes power as well. Otherwise, if right is conceived in the narrower sense, or if power is excluded from the definition of right, where are we going to place that portion of interest embodied by power within the content of legal system or legal relations? Unfortunately, now when dealing with the content of legal relations, scholars in legal studies almost always understand right in its narrower sense. It is conceivable that this is the only possible understanding without the concept of faquan. It is in this sense that I stated elsewhere that it is incorrect to conceive the constitutional relations as right-duty relations.

However, what interest is embodied by faquan? While there is a variety of categorization of interests within the scope of concern in this book, we should, to the minimum, differentiate legal interest and non-legal interest, social interest in its totality and ruling class's interest in its totality, individual (citizen, legal person, etc.) interest and public interest, social interest in its totality as determined by social-economic relations and social interest in its totality as perceived by the lawmaker, interests that we ought to have and interests that we already have or may have, etc.

16 Nicos Poulantzas, *Political Power and Social Classes*, ed. and trans. Timothy O'Hagan (London: NLB and S&W, 1973), 105.

17 Roger Cotterrell, *The Sociology of Law: An Introduction* (London: London Butterworths, 1984), 119.

In my view, the actual embodiment of faquan in these interests can be summed up as follows: it embodies legal interest but not other interests; it embodies social interest in its totality in form but the dominant social class's interest in its totality in essence; it embodies individual interest through the aspect of right, while embodies public interest through the aspect of power; it should embody the ruling class's interest in its totality that is determined by economic relations, but in actuality can only embody the ruling class's interest in its totality conceived subjectively by the lawmaker; its development should be guided by the should-have interest but in reality is limited to already-have interests or could-have interests, etc. In contemporary China, faquan in essence is the legal manifestation of the Chinese people's interests in their totality that are recognized and protected by the law.

Based on the above conception, I now describe the characteristics of faquan in terms of interest-attributes as follows: faquan is the social interest in its totality as reflected in jurisprudence, is recognized and protected by the law, and is manifested specifically as legally-defined quan of various forms.

It is clear from this attribute that the interest that should be recognized and protected by the law is objective, while the interest that is actually recognized and protected by the law is conceived subjectively by the lawmaker. Therefore, in a society of class opposition, faquan in actuality is the interest subjectively conceived by the class in control of the lawmaking, namely, the ruling class, only assuming the form of the social interest in its totality.

It is also clear from this attribute that, under socialist conditions, the social interest in its totality that should be recognized and protected as well as actually recognized and protected by the law should be able to eliminate the gap created by class self-interest, but missteps and even serious dislocations can occur due to the intellectual limitations on the part of the lawmaker or imperfection of lawmaking procedures and techniques.

In this sense, as a concept, faquan is not a term to be used in legal provisions, but a legal category that is coined to denote interest in its totality as reflected in the law, and it is the product of abstraction.

The concept of faquan denotes interest recognized and protected by the law in its totality, not a society's interest in its totality, because "it is not necessary for every interest fact to be transformed into legal right,"[18] or power.

The components of faquan within a specific region are all legal "quan" within that region, and the basic elements of faquan are the right of citizenry and the power of the state, from which, individually or collectively, there are also derivative rights and powers, such as the right of enterprise legal-person

18 Guo Daohui 郭道晖, "Lun quanli tuiding 论权利推定 [On the Presumption of Rights]," *Zhongguo shehui kexue* 4 (1991): 179–188, 179.

relative to the state and the internal authority of legal-person in China, paternal power, authority of the husband, *potestas dominica*, and *iura patronatus* within Roman law, theocracy in feudalistic societies, as well as the public power exercised by non-state agencies in certain countries with a relatively low degree of nomocracy, etc.

1.3 *The Essential Attributes of Faquan*

I have discussed before the external attributes of faquan. Based on the above understanding of its essence, I believe that the internal or essential attributes of faquan include the following:

(1) Property is the real foundation for faquan, which is converted from the property of a society. Material interest, as the foundation of various interests, is merely the general form of various material wealth. Therefore, property, as the foundation for material interest, is also the material foundation for all the right and power, namely, faquan, of a society. In terms of right, the right of the person, property right, political-economical-cultural right and other rights within a society, are all converted from property, or are predicated by a certain degree of accumulation of such property.

That is even more obvious in terms of power. As pointed out by Nozick, "the concentration of all physical force in the hands of the central authority is the primary function of the state and is its decisive characteristic;"[19] "power is unmistakably a value, other value categories or 'preferred events' gratifying the desires of men are wealth, that is, control over economic goods and services."[20] Other scholars put it in even more straightforward manner: "[s]overeignty is the extraction of violence from private transactions and its monopolization by a concern;"[21] "power—closely related to physical force as it is."[22]

(2) Faquan is the product of social-economical process. Since the material foundation for faquan is various property in the final analysis, the total volume of faquan must have an objective corresponding relationship with the total volume of property within a society, with the latter determining the former, and the former being controlled by the latter. The relationship between the two can be found from the connection between property and the specific form

19 Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), 116.

20 Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Belknap: Harvard University Press, 1981), 149.

21 John R. Commons, *Institutional Economics: Its Place in Political Economy*, Vol. 2 (New Brunswick: Transaction Publishers, 1990), 684.

22 Richard A. Posner, *The Problems of Jurisprudence* (Belknap: Harvard University Press, 1990), 18.

of faquan: if the ratio structure of faquan is constant, the amount of the total volume of property of a society determines that of right and power.

All substantive rights are either direct/indirect conversion of property, or are predicated by the property's level of production and that of accumulation, and by the corresponding forms of production, distribution, exchange, and consumption, with all the procedural rights established in order to fulfill the substantive rights. While they do not have direct property content, procedural rights are indispensable protection as substantive rights fulfill their property content. The total volume of a society's property as a whole is the objective indicator of the total volume of the state's productive forces and its level of development. It is also obvious that property and power enjoy a positive correlation, which can be seen in the example of state power: the objective indicators of state power, such as the quantity, quality, and effectiveness of state apparatus, government officials, military, police, courts, etc. are all corresponding to the volume of property that the state extracts from the society, and is thereby able to sustain itself.

As indicated by this internal connection to social property, faquan is the product of social-economical process, primarily that of production of physical material. At the same time, it is the product and manifestation of the processes of distribution, exchange, and consumption. In this sense, faquan can be said to increment along with the development of productive forces in a society, and it is also in this sense that faquan can be said to be "produced," and its specific forms, such as right and power, etc., can also be said to be "produced." Faquan, like right, is restricted by the following rules, namely, it "can never be higher than the economic structure of society and its cultural development conditioned thereby."[23]

(3) The development and evolution of faquan is fundamentally caused by the production activities of physical material. This conclusion should be obvious since faquan is the conversion or derivation from property. Historical facts have also proved that to be the case. In my article, "The Reconstruction of Constitutional Jurisprudence Using the Method of Social Right Analysis," I have discussed five external attributes.

It is not difficult to recognize the decisive force of productive activities of physical material, especially the technological equipment, in a society in determining these five attributes: the historical change of faquan-related relations is the necessary result of the fact that productive forces cause the change of social conditions; the increment of faquan's total volume is the legal manifestation

23 Karl Marx, "Critique of the Gotha Program," in Robert Tucker, ed., *The Marx-Engels Reader*, (New York: Norton, 1972), 388.

of expanding productive forces and multiplication of wealth; the correlation among the elements of faquan is the embodiment of the specialization and cooperation of productive process and product exchange, whose depth and scope are determined by the level of development of productive forces; the structural change and the infinite approaching toward the state of socialized distribution are also caused by productive forces, which has been confirmed by the historical process up to now, and has also been confirmed by Marxist theories on changes of historical forms of state, and historical destiny of state power.

In addition, the changes of faquan's basic components can also be used to illustrate this issue: the individual rights and the immergence of state power, the socialization (equalization) of the individual rights, the functional disintegration and the structural separation of state power are all caused by the productive activities of physical material of a society.

(4) Faquan in its totality can only be conceived by the power of reason, which is the power of abstraction particularly emphasized by philosophical jurisprudence. To conceive faquan in its totality, the only way is to grasp it abstractly, through perceptual phenomena of right and power, as well as their specific ways of functioning. In this regard, we can learn a great deal from Marx's method of analyzing the commonalities and differences of commodities with various use values as well as proving values. Marx says: "As use-values, commodities are, above all, of different qualities, but as exchange-values they are merely different quantities, and consequently do not contain an atom of use-value." He continues: "[a]long with the useful qualities of the products themselves, we put out of sight both the useful character of the various kinds of labour embodied in them, and the specific forms of that labour; there is nothing left but what is common to them all; all are reduced to one and the same sort of labour, human labour in the abstract."[24]

That is to say, all commodities, be it as large as an airplane or a supertanker, or as small as a loaf of bread or a needle, are undifferentiated on the level of value, in spite of their tremendous differences in use value. We can use this method of abstraction to conceive the existence of faquan, and also draw the following conclusion that, despite all the differences between right and power, and their contradictions and oppositions in real life, they are fundamentally the direct or indirect forms of interest recognized and protected by the law. On this level, they have no differences, and are in one unity. The question is: does faquan have certain undivided prototypes? The answer is yes.

24 Karl Marx, *Capital* (Vol. One): *A Critique of Political Economy*, trans. Samuel Moore and Edward Aveling; ed. Friedrich Engels (Mineola, N.Y.: Dover Publications, 2011), 44–45.

The first undivided prototype of faquan is the primitive "quan" before the establishment of state, where right and power existed in a mixture. Its typical era, according to Morgan's standard of periodization of human pre-history, should be the stage of savagery and that of barbarism. When there were highly developed clanships and established civilizations, the mixture of the primitive right/power was no longer significant, because it was already obviously differentiated into embryonic forms of right and power. But, before the establishment of state, no matter if or to what degree the differentiation of the mixture of the primitive right/power occurred, it was still an undifferentiated whole in terms of law. It goes without saying that the definition of law is directly related to the existence of state, it would be quite a different story if the definition of law were changed.

The second prototype of faquan is the portion of "quan" that has proliferated but has not yet been differentiated after the original disintegration of right and power. The material basis of this portion of "quan" is the newly proliferated property that has been produced but has not been distributed or divided, and the disintegration of faquan essentially is the legal manifestation of the distribution or division of the newly proliferated property. In modern times, because of strengthened legislative anticipation and preventive legislation, the entity of faquan has become more and more difficult to discern. Under these circumstances, faquan is often "pre-divided" (divided, distributed and differentiated in advance).

The newly proliferated portion of faquan was differentiated long after its initial existence, then was differentiated immediately after being produced, and then was "pre-divided" before being actually produced. This process of evolution indicates the betterment of legislative technique and the advancement of nomocracy. Here "pre-division" has already become the basic form of distribution of the newly proliferated faquan in a society with the rule of law. Therefore, the more advanced a society is, the more developed its nomocracy is, the more difficult it is to perceive the existence of the entity of faquan, the higher the degree of abstraction is required to study it. This is an intellectual domain that cannot be judged and elaborated through mere perception and commonplace supplied by textbooks in jurisprudence.

1.4 *The Historical Attributes of Faquan*[25]

Determined by its external and internal characteristics, the ownership of faquan has historical variability. In the primitive society without state or public

25 This section is based on Tong Zhiwei 童之伟, *Faquan yu xianzheng* 法权与宪政 [Faquan and Constitutionalism] (Jinan: Shangdong renmin chubanshe, 2001), 439–442.

power, the boundary between right and power was obscure, thus appeared to be a mixture of right and power. At that time, faquan existed in the form of primitive quan, equally belonging to everyone. After the emergence of public power and state, faquan belonged to a small number of people both legally and actually, and then was converted into the condition where faquan legally belonged to the majority and even everyone, but actually the minority benefited from it far more than the majority. Many critics in history, including the founders of Marxism, held such view of the law. They all hoped that, one day an ideal society would be created where faquan would belong to the majority both legally and actually, and ultimately belong to everyone once again on a new foundation. Of course, there was no concept of faquan as such back then, and my description of the view of faquan of our predecessors is derived from their view of property and history from the perspective of faquan.

It should also be noted that the total volume of faquan is incremental. Since faquan derives from material wealth or property, its total volume is naturally not constant, rather, it increments along with technological advancement and furtherance of division of labor. Every discovery and every creation of new fields of endeavor mean the generation of an unprecedented faquan. In a political society, this at the same time means that faquan needs to be distributed between individuals and the state according to certain principles. For example, the creation and application of the Internet technology has generated related faquan, which has quickly been divided into the right of citizens in producing, selling, and using the Internet equipment and the power of state in managing such activities. The situation is basically the same with every new technology in other fields.

So, once generated, any new faquan must be divided according to the principles of faquan distribution of the country where it is generated. Therefore, in order to correctly explain many issues in legal studies, it is very important to formulate the concept of the total volume of faquan and to understand its increment. This is the necessary premise of studying issues such as the structure of faquan in depth and understanding the laws of its historical development.

Faquan derives ultimately from property, which determines the complex interrelation among the components of faquan. In terms of the basic foundations, namely, the relationship between right and power, it manifests itself as inter-relation, mutual conversion, and mutual derivation. For instance, under the condition of constant total volume of faquan, the power abandoned by state must be converted into the right of citizens. At the same time, right and power are different, which means that they should not be confused, and there should be clear boundaries between them, so as to maintain an appropriate

ratio. They are also mutually constrained and balanced, which means that, within the structure of faquan, the individual's efforts of demanding expanded right and resisting the expansion of state power always co-exist with the state agency's efforts of expanding power and limiting the expansion of individual right. In practice, there is also the same relationship of mutual differentiation, inter-relation, and mutual conversion between a basic right of a citizen and another basic right of a citizen, and between a state power and another state power.

The structure of faquan has periodic changes. The structure of faquan refers to the quantitative ratio of power and right (power/right) within the total volume of faquan, and consequently their intensity, where the quantitative ratio is ultimately manifested as the ratio between the total volume of property owned by public agencies and that owned by individuals. We should add that, the total volume of property owned by either public agencies or groups constituted of individuals is not necessarily corresponsive to the intensity of the portion of faquan that they control. Because the intensity of power and right is influenced by power, right, and the concentration level of the property that supports them, in addition to the influence of the total volume of the property that supports them. Take power as an example, the higher its concentration level is, the more intense it is. The intensity of a power that is concentrated and with relatively smaller weight dimensions can surpass that of a power that is dispersed and with relatively larger weight dimensions. That is also true with right in terms of resisting power, where the intensity of a right that individuals gather through exercising their basic rights such as freedom of association or through ways like monopoly of property often far exceeds the legally defined right for an ordinary individual citizen.

The above principles of the balance of the total volume of the structure of faquan and the balance of the intensity of faquan are completely applicable to interpreting the relations of power competition and checks and balances within state agencies, such as the relations between legislative power, administrative district, and judicial power or between central authority and local authority. Similarly, they are also applicable to interpreting right conflicts between citizens and other individuals.

Before a society has a separated public power, the primitive form of faquan is a "quan," which has structural integrity or indivisibility, namely, not being differentiated into individual right and power of state and other public agencies. Initially it belongs to the entire society, manifests itself in the possibility that, according to the customs of a primitive society such as the clan system, everyone equally enjoys freedom of movement and realizes certain interests. The emergence of the nation-state indicates that a portion of "quan" has already

been converted into legal power, with the rest being manifested as legal right.[26] The formation of the nation-state at the same time means that the original integral "quan" is disintegrated, forming the structure of faquan.

Numerous historical facts show that, the structure of faquan has experienced some developmental stages, where in every subsequent stage the weight of right in the total volume of faquan has become more pronounced than previous ones, and its distribution among individuals has become more equal than previous ones. Generally, in the early stages of the development of the structure of faquan, the weight of right was very small or relatively small, while power was predominant relative to right. This was primarily the condition in countries with slavery and feudalistic monarchies. With the French Revolution and the American Revolution as the turning point, the capitalist structure of faquan replaced the structure of slavery and feudalism. In the new structure, the weight of right, at least legally or formally, surpasses that of power, and occupies a basic and dominant status. As for the socialist structure of faquan, based on the theories on nation-state of the founders of Marxism, it should be affirmed that there is a historical pursuit of gradually lowering the weight of power, expanding the weight of right, and returning power to right. This can be seen from the following quote from Engels, which is often dubbed as the theory of "state demolishment": "[t]he society that is to reorganize production on the basis of a free and equal association of the producers, will transfer the machinery of state where it will then belong: into the Museum of Antiquities by the side of the spinning wheel and the bronze ax."[27]

The balance of the structure of faquan is the basic social-political condition for the realization of constitutionalism and the rule of law. The structure of faquan where power assumes overwhelming superiority over right and right is powerless in resisting power by necessity manifests itself as despotism or tyranny; while the condition where right assumes overwhelming superiority over power and power is powerless in containing the abuse of right manifests itself as anarchy. They are the two extreme conditions that should be prevented by all means by those who pursue constitutionalism and the rule of law. Furthermore, a society or state with a balanced structure of faquan does not necessarily enjoy developed democracy, but history tells us that, the structure

26 In the 17th Century, many European scholars from the school of natural law described it as the process of transitioning from the natural state to the political state; in the mid-19th Century, Friedrich Engels described such a process as the history of transitioning from the primitive society to the emergence of family, private ownership, and the nation-state.

27 Friedrich Engels, *The Origin of the Family Private Property and the State* (Chicago Charles H. Kerr & Company, 1909), 211–212.

of faquan is impossible to balance without democratic elements at all or with little democratic elements.

1.5 *The Academic Value of the Concept of Faquan*

In legal studies, it is necessary and appropriate to introduce and utilize the concept of faquan, which I believe will help strengthen the research of jurisprudence, especially that of constitutional law studies. The main reasons are as follows:

(1) In terms of the relationship between a concept and its object, since right and power have the same origin, and constitute a unified entity, this unity should have a proper name for it, despite their differences in appearance. Property is the origin of right and power, the unity of which is a society's interest as a whole that is determined by economic relations (such interest, in a society of class opposition, would be the ruling class's interest as a whole). On this level, right and power are a qualitatively undifferentiated unity. Faquan is the proper name for this unity.

(2) The formulation of the concept of faquan is a culminating result of the intellectual pursuits on "right in the wider sense" in jurisprudence, preliminarily realizing the conceptualization and normalization of the notion of "right in the wider sense." It is not enough to merely point to the existence of something, what is important is to reveal its internal and external attributes, and refine the existing understanding of the attributes and formulate concepts and categories for a specific field of study. The formulation and definition of the concept of faquan is thus a necessary summation and further development of the understanding of the relationship between right and power within the circle of legal studies, although it is still at a preliminary stage.

(3) In terms of the difference between law and statutes, the concept of faquan is also indispensable. It is positive for the advancement of legal studies to differentiate law and statutes. I am in agreement with the following differentiation: law is the faquan relation and objective principle, while statutes are the recognition and expression of the lawmaker on the faquan relation and objective principle. Along this line, we can clearly see the proper status of the concept of faquan and its relative position vis-à-vis right and power: objective faquan is a society's interest as a whole as embodied in the law, is independent of human will, is complete and unified, and is the essential form determined by the essential content of economic relations; the faquan realized within the legal system is the lawmaker's subjective undertaking and recognition of a society's interest as a whole, is expressed through the recognition, distribution, and regulation of right and power in real life, and is therefore the external manifestation of the above-mentioned essential form.

(4) The formation of the concept of faquan provides a convenient and practical tool for the research of legal studies, particularly that of constitutional law studies. For instance, in jurisprudence, the convenience of using faquan to denote the sum of right and power is as reasonable and practical as the word "furniture" that is used to denote table, chair, chest, and dresser in a household. And in constitutional law studies, the rationality and necessity of using faquan to denote citizen's rights, state power, and other individually or collectively derived rights and powers is as indisputable as the word "family" that is used to denote a husband, a wife, and their children. It is indeed very convenient and accurate to use faquan to sum up citizen's rights, state power, and other individually or collectively derived rights and powers, to use faquan relations to sum up the relationship between citizen's rights and state power, that between these and other rights and powers, that between certain citizen's rights and those of other citizens, and that between certain state power and that of the other state powers.

(5) The formation and application of the concept of faquan can help end the practice of unreflectively confusing right and "right in the wider sense" in legal studies, thus improving accuracy of jurisprudential concepts and scientific quality of legal studies. Presently, in Chinese academic works (including textbooks) of legal studies, the concept of right is not accurate, and the meanings conferred on the word "right" are not secure. When "right" is discussed in Chinese works of legal studies, it is sometimes inclusive of power, and sometimes exclusive of power. For example, in the works of constitutional law, administrative law, and economic law, when state agencies are discussed as a subject in legal relations, right practically is treated unreflectively as "right in the wider sense," as power, the subject of power, and the object of power, without exception, are seen as right, the subject of right, and the object of right, which in fact already treats power as part of "right in the wider sense." On the other hand, in works on civil law studies and others, the word "right" apparently does not, to a great degree, include the meaning of power.

In dealing with right, especially right within legal relations, jurisprudence, as a basic discipline, should have unequivocally stated under what condition the term "right" includes, or does not include, the meaning of power, and why these two instances are not individually reflected in two different concepts, etc. Unfortunately, no work of jurisprudence has so far done this. What has happened is, authors of jurisprudential works often are not aware of the need to differentiate between right, power and faquan, and the term "right" they use in discussing issues such as legal relations can only be reasonably replaced by the concept of faquan. Under these circumstances, the concept of right occupies the position that belongs to faquan. This abnormality thus forces some

works of department law to treat power, the subject of power, and the object of power as right, the subject of right, and the object of right, without proof, when dealing with legal relations.

These aspects are actually just a few examples, not all the rationale for elaborating on the necessity and theoretical functionality of the concept of faquan, which is yet to be further reflected upon and investigated. Recognizing the existence of faquan and affirming this concept or category may, to certain degree, shock the internal "order" of certain components within the current system of legal studies, but the newly formed system should be more effective and more reasonable than the current one, once all the relations are rationalized again on a new foundation.

2 Fundamental Propositions of Faquanism[28]

Today, when right-duty jurisprudence has been exposed as having incurable shortcomings, it has become a task of utmost importance in the basic research of Marxist legal studies to sublate right-duty jurisprudence, and to develop new basic theories of legal studies that suit the fundamental conditions in contemporary China. Based on the demand for nomocracy and for the construction of a socialist country under the rule of law, and the need to advance legal studies, new basic theories of legal studies should have the functionality of profound intellectual inquiries and comprehensive and in-depth interpretation of legal phenomena, while at the same time also exhibit strong empirical and practical characteristics. Specifically, how should we renew jurisprudence? Here I would like to formulate and prove the following five fundamental propositions, which I believe can serve as the core content of a new framework for jurisprudence.

2.1 *In Law, the Most Important Phenomena Are Right and Power, and the Most Fundamental Contradiction Is That between Right and Power*

As indicated by the history of theoretical inquiries, systematic research in social science oftentimes starts with identifying certain empirical facts or objects of the utmost importance, and largely relies on observation, experience, and perception, although it certainly requires vast amounts of knowledge and relevant theoretical foundations. Recognition of certain empirical facts is different from formulating a thesis, and strictly speaking is not an issue of being correct or

28 This part of the book is primarily based on the author's earlier article, "Zailun falixue de gengxin 再论法理学的更新 [Revisiting the Renewal of Jurisprudence]," *Faxue yanjiu* 2 (1999): 3–21.

not, rather, it is an issue of whether the subjective consciousness matches the objective reality, where exhaustive demonstration is often unnecessary. That is why, despite the complexity and vastness of his theoretical system of political economics, Marx only uses the following few dozens of words to identify his analytical starting point (commodity): "[t]he wealth of those societies in which the capitalist mode of production prevails, presents itself as 'an immense accumulation of commodities,' its unit being a single commodity. Our investigation must therefore begin with the analysis of a commodity."[29] He would not waste any more words on why he makes this choice, and then immediately enters the process of substantive research.

But the selection of the analytical starting point and the identification of the most important research object for a specific field of study, though appearing very easy, can have overall impact on the development of the field, depending on whether the results are matched to the objective reality, thus involving the direction of the inquiry, and determining the outcome of the entire theoretical system. In this sense, it is not in conformity with the reality, and it is therefore inadequate for right-duty jurisprudence to accept existing conceptions, treating right and duty as the elemental, the most common and the most important legal phenomena, and as the actual analytical starting point.

As demonstrated through social experiences, it is right and power that are the most important, the most common, and the most fundamental legal phenomena, thus legal studies should consider right and power as its most fundamental research objects and analytical starting point, thereby formulating new categorical structures and new interpretations system of legal phenomena. Following the above-affirmed understanding, we can directly enter the study that centers on right and power, without providing any rationale. But in order for the field to judge the two different paths of thinking through comparison, I state here two basic reasons for identifying right and power as the most important legal phenomena:

(1) Civil society that is constituted of citizens and other individuals and the state that is consisted of public agencies are the two basic facts in legal life. The legal embodiment of civil society is right, while the legal embodiment of the state is power. Only right and power are corresponding to, and equal to, these two most basic facts in legal life.

(2) Comparing to duty and other legal phenomena, right and power are more common, more universal, and more important. I have calculated and recorded the frequency of occurrences of the terms reflecting right, power, and duty

29 Karl Marx, "A Critique of Political Economy," in Friedrich Engels, ed., *Capital* (Vol. One), trans. Samuel Moore and Edward Aveling (Mineola, N.Y.: Dover Publications, 2011), 41.

in six constitutions from the following five countries: China, the US, France, Japan, and Germany. In the six constitutions, the total number of occurrences of the words marking right and power is 562, where the total number of occurrences of the terms reflecting "right" is about the same as that of the words reflecting "power," while the number of occurrences of the words marking duty is only 124, just 22% of the sum of the other two.[30]

These numbers intuitively and powerfully demonstrate that, comparing to duty, right and power are much more important, much more common, and much more universal in social life. In a word, there has been no evidence showing that any other legal phenomenon is more common, more universal, and more important than right and power. Therefore, if we need to identify the most important among all legal phenomena, they have to be right and power.

Now let us discuss briefly another theoretical issue closely related to the status of right and power, namely, the issue of identifying the most basic contradiction in legal life. Properly identifying the most basic contradiction in legal life is the theoretical condition for properly identifying the practical function of the law and legal studies, and therefore has been attached importance by jurisprudents.

Determined by the practical status of right and power, the most basic contradiction in legal life is not the contradiction between right and duty, but that between right and power. The world of legal phenomena is rich and varied, and has numerous complicated contradictions, but there is only one pair that constitutes the most basic, and the most dominant contradiction. According to the objective laws of the formation and function of contradiction, it is impossible for this contradiction to occur between two secondary legal phenomena, or between a most important legal phenomenon and a secondary one, rather, it can only occur and exist between two legal phenomena of, relatively speaking, the most important status. This determines that it is impossible for duty to act as a party to the most basic contradiction in legal life, and that only right and power deserve to be the contradiction's two sides of the unity of opposites. This is in general the case, and exceptions occur in only occasional and individual instances, which are not considered here.

The reality of legal life shows that, in complex contradictions, the contradiction between right and power is the most fundamental one, reigning over the development of other contradictions. Among these complex contradictions, three are relatively more important: the first is the contradiction between power and right, whose actual manifestation is the contradiction between state and citizens as well as other individuals; the second is the

30 The figures derive from the statistics in Section III of Chapter One of this book.

contradiction between rights themselves, whose actual manifestation is the contradiction between citizens as well as other individuals themselves, or within a civil society; the third is the contradiction between powers themselves, whose actual manifestation is the contradiction between state agencies of various levels and kinds.

These three contradictions impact and interact with each other, but the dominant influence is the contradiction between power and right, namely, the contradiction between state and citizens as well as other individuals. This basic and dominant status indicates that the relationship between state and citizens as well as other individuals decisively influences the relationship between state agencies and citizens as well as other individuals, the most powerful manifestation of which is that, the total interest and wealth of a society must be first divided between state and citizens as well as other individuals according to certain ratios, which has fundamental impact on the distribution of interest, property, and right between citizens as well as other individuals, and the allocation of interest, resources, and power among state agencies.

The primary and dominant status of the contradiction between right and power also manifests itself through the universality and importance of the contradiction between the intent and behavior for gaining interest and property on the part of citizens as well as other individuals and legal requirements, enforcement and judicial behavior of state agencies. This contradiction determines, to a great degree, the content of the relationship between citizens as well as other individuals, and that between state agencies.

To understand the proposition that the contradiction between right and power is the most fundamental one in legal life, we must strictly differentiate discussion of the most fundamental contradiction in a political-legal society from discussion of the source and origin of political society, state, and law. While the former concerns right and power under the condition that state and law have already been formed, where right and power are therefore realistic and statutory, the latter is about the situations under primitive or quasi-primitive conditions, where there was no law, no legally-defined right and power, where the only mover for the formation of political state was the primitive and original right-right contradiction.

In terms of the origin of law and the origin of political state, the reason why power initially was formed, maintained and sustained was all because of the irreconcilability of the contradictions among different components of the primitive original right. In this sense, original right-right opposition is of fundamental nature, where this opposition is expressed as the opposition between individuals before the formation of state. Throughout history, when the opposition between human original rights themselves converts into a political state

with the laws, the opposition primarily and predominantly manifests itself as the contradiction between right and power, namely, the right-power contradiction as discussed above, and secondarily manifests itself as the contradiction between rights themselves, and between powers themselves.

Now, how should we understand the contradiction between right and duty, and their actual status? The contradiction between right and duty in actuality is only an externalized form of the contradiction between rights themselves. For instance, in commerce, the buyer pays for the corresponding goods of the seller, according to right-duty jurisprudence, the buyer has the duty to issue payment, and the seller has the right to receive payment; the buyer has the right to receive goods, and the seller has the duty to deliver goods. This relationship is normally described as that between right and duty. But here the right-duty relationship is only a language model used by scholars to describe the relationship between rights themselves through the medium of duty, where actually the buyer uses the right exemplified by currency in exchange for the right exemplified by goods on the part of the seller, which is therefore the right-right relationship. All other real right-duty relationships are, without exception, the reflection or expression of right-right relationships.

On the other hand, because what is controlled by state agencies is power, not right, the concept of right and duty does not include power at all, therefore, if the contradiction between right and duty is seen as the most basic one in legal life, it will theoretically lead to the exclusion of the contradiction between rights themselves from the most basic contradiction in legal life. That is unjustifiable. So the contradiction between right and duty, as an externalized form of the contradiction between rights themselves, is at most a component of the "basic contradiction," far removed from "the most basic contradiction."

2.2 *Rights Are Legal Forms of Individual Interest and Individually-owned Property*[31]

Throughout history, scholars worldwide have achieved abundantly with regard to the research of right, but there have always been three large issues unresolved. If these issues are not well resolved, research of right will not be able to have substantive improvement, and Chinese jurisprudence will also not be able to advance. The three large issues are: 1) The scope of right is not clearly defined, right and power are confused with each other; 2) The objective relationship between right and interest is not accurately and

31 Here "individual" refers to individual as natural person (citizen), and private entity constituted of natural persons (citizens).

specifically illustrated; 3) The material attribute of right is not accurately and specifically illustrated.

To solve these difficult issues, and to improve the research of right and formulate new ideas in jurisprudence, the basic attributes of right should be established. In this area, there have been scholars who have, based on comparison with power, discussed the issues from the following aspects such as subject, behavior attributes, degree of coerciveness, and legal status, etc.[32] I am in basic agreement with these views. But it should also be pointed out that these discussions have yet to solve the above-mentioned difficult issues. To solve the issues, I propose to identify the following attributes in order to improve and advance our understanding of right.

(1) The subject of right is private entities,[33] primarily and predominantly individuals, while state agencies or quasi-public agencies can only become the subject of right under certain circumstances. There are many forms of indeterminacy of the scope for right, but most directly it is the indeterminacy of the subject of right, or the indeterminacy of necessary conditions for being the subject of right.[34]

In conforming to the requirement for coherent and uniform interpretation of legal phenomena, the subject of right can be further divided into the basic subject of right and the combinatory subject of right. The basic subject of right is the relatively simple subject of right, primarily citizens, foreigners and stateless persons, and secondarily the enterprise legal persons and other social-economic organizations that are in the position of individuals, i.e., in the position of a subject within civil law relationship, relative to public agencies or quasi-public agencies.

Two points should be made clear here: First, the basic subject of right is only relatively simple subject of right, not absolutely unrelated to power. For

32 Guo Daohui 郭道晖, "Quanli yu quanli de duili tongyi 试论权利与权力的对立统一 [On the Unity of Opposites of Right and Power]," *Faxue yanjiu* 4 (1990): 1–9.

33 Here and elsewhere in the book, the term "entities" refers to the concept relative to state as a whole, primarily it refers to individuals, but also includes legal persons and other social-economic organizations other than the state.

34 To judge whether a "quan" is right or power, legal scholars in the past often held the view that it should be differentiated based on whether it is coercive or the degree of its coerciveness. I agree that this differentiation is reasonable in terms of realistic and everyday life, but I don't think it is reasonable in terms of theory. This is because if we sub-classify "quan" into right or power according to whether it is coercive or the degree of its coerciveness, the result of the classification cannot be corresponding to the multi-level essential division of "quan." Additionally, "quan," as social phenomenon, is impossible to be measured in terms of its degree of coerciveness, and there is even no necessary measuring standard to relatively draw a line of demarcation.

instance, a citizen in a democracy, as an individual, is in a position of "subject," only enjoys the rights of a citizen, but at the same time, he is also a component of the sovereign, politically participates, by law, in exercises of sovereign power, so this political right can be converted into political power when all the citizens exercise as a whole their political rights. Here the term "citizen" refers to individual as in its customary sense, the case where citizens as a whole exercise political power is an issue of a different nature, and will be discussed in due course. Second, enterprise legal persons and other social-economic organizations, as basic subjects of right, can only be the enterprise legal persons and other social-economic organizations from which governmental functions have been separated. These enterprise legal persons and other social-economic organizations without separation between the functions of the government and enterprises should not be considered the basic subject of right, they are actually double subjects of right and power, often in reality are subjects of right in certain times or certain occasions, and subjects of power in others, and when and where they are subjects of right depends on their functional attributes exhibited by their specific behavior.

The combinatory subject of right primarily refers to state agencies and other entities of a public nature, in terms of the missions and functions assumed by these entities, they belong to basic subject of power, but at certain times and occasions they can also directly become subject of rights. More specifically, which entities belong to the combinatory subject of right?

It is not easy to answer this question. Since the combinatory subject of right is an entity of public nature, it is natural to think of the state. But I believe that, as a complete sovereign entity, within domestic law, the state is a simple subject of power, not a combinatory subject of right. If the state is seen as a certain form of the subject of right, it will theoretically confuse the nature of right and power, completely defeat the effort to differentiate right from power, and in legal practices promote power's tendency towards authoritarian suppression of right, exclusion of right, and extrication from check and balance of right.

Obviously, within the scope of domestic law, the view that state is the simple subject of power, is not, and is impossible to become, the subject of right in any sense of conflicts with the common notion in the field of legal studies, especially in terms of the issue of state ownership. Because the logic with which this issue is considered in the field of legal studies is: the subject of state ownership is state, and ownership is a civil right, therefore the state is one of the subjects of civil right, and enjoys civil right.

In my view, the above logic exhibited by the common notion in the field of legal studies is one-sided, and does not match realistic conditions. First, it is the result of approaching the issue one-sidedly from the perspective of civil

law. From this perspective, ownership is a civil right, and since state ownership is an ownership, it certainly cannot be the exception. Scholars of civil law are certainly aware of the fact that state ownership is different from ordinary ownership of property, but perhaps due to the limitation of specialization, no one, it seems, has considered that it may be more appropriate to identify the portion of capacity within the ownership as power.

In fact, judging from the perspectives of constitutional law, administrative law, and other public law branches, state ownership in many situations primarily and predominantly is power, the case in point is the situation where there is no separation between the government and enterprises in a planned economy; even in the market economy and with separation between the government and enterprises, part of the capacity of state ownership still has to be expressed as power, for example, that the government enjoys and exercises management rights over state property is an exemplary power.

Of course, jurisprudence, as a general theory of law, cannot approach issues merely from the perspective of civil law, and cannot approach issues simply from the perspectives of constitutional and administrative law either. On the contrary, it should transcend all department laws, even fundamental law, acknowledging the double attribute of right and power of state ownership.

In a market economy and with separation between the government and enterprises, the capacity of right of state ownership belongs to relevant enterprise legal persons or other individuals, expressed as right; while the capacity of power of state ownership belongs to the state, expressed as the authority of relevant state agencies, namely, power; the state does not enjoy or exercise any capacity of right of state ownership, i.e., it does not enjoy or exercise any right, and only enjoys and exercises correspondent power.

In China, state property is under the management system of unified ownership by the state, level-by-level supervision by the government and authorized operation by the state. Therefore the possession, use, proceeds, and disposal of state property can be also regrouped into management right and operation right.

We can also regroup various capacity combinations of state property ownership into the capacity of power and the capacity of right, and allow the capacity of power to include management right, allow the capacity of right to include operation right, where the capacity of power jurisprudentially belongs to the realm of power, with the state as the subject; the capacity of right belongs to the realm of right, with state-owned enterprises and other entities that rely on state property for their existence and development as the subject.

Thus, state property ownership is theoretically divided into two parts: right and power. It can then be further presumed that when state agencies represent the state in exercising the capacity of power of state ownership, what it

exercises, in theory, is power, not civil right, in actuality relevant state agencies are indeed exercising this portion of their capacity like they exercise any other power.

Based on partial division and combination of the four capacities of possession, use, proceeds and disposal of state property ownership, some regulatory documents in China early on already put forward two new concepts: investor ownership and enterprise legal person ownership. According to this differentiation, as an owner, if the state grants state property to an enterprise legal person, it is tantamount to establishing legal person's property right, and the state itself therefore converts from owner to investor, thus should step back to the position of shareholder in exercising supervision; in this case, the state no longer possesses, uses, and disposes the property, and only enjoys the right for relevant asset income, important decisions, and management selection, while the enterprise legal person enjoys the right of independent allocation and management over the entire legal person property granted by the state for operation and realized through liabilities. Among these capabilities, the capacities belonging to the state can be categorized as management right and supervision right, which, considered from the perspective of civil law, are the property right derived from state ownership, but from the perspectives of constitution and administrative law, undoubtedly belong to the authority of state agencies, namely, state power. This is because the determination and capture of profit from state property, the management of budget and final accounts of operation of state property, and the management and supervision of an enterprise legal person in operating and applying state property, are all conducted by state agencies or organizations authorized by state agencies, primarily manifested as the authority of state agencies.

All that can be considered as right within state ownership belong to the property right within the scope of operation of right and management right, and divided or derived from state ownership, and these rights belong to the enterprise legal person and other entities, and are not to be enjoyed by the state.

There are two more points to make in order to accurately present my view on this issue. First, the "quan" of issuing bonds and Treasury bills by the state are often considered as civil right, and in the circumstances the state is seen as the subject of civil right. This view is untenable, and it would be much more appropriate to view this kind of "quan" as power, namely, the authority of state agencies. Because the state has a monopoly over these "quan," which directly represent public interest, whose exercising scope and conditions are also defined unilaterally by the state, and are exercised by state agencies, therefore have a highly special status, whose nature is far removed from civil right.

Second, it is a general notion that, with regard to foreign trade, the state can act as the subject of right. This issue is involved with domestic law and

international law, and is rather complex. Suffice it to say that, even though the state can be the subject of right in foreign trade, the right enjoyed by state remains right in the sense of international law, and is substantially different from the right discussed here in the sense of domestic law.[35] Considered from the aspect of its status, the state represents in domestic law the "whole" relative to the individual, and is the embodiment of "the public" in relative terms; while in terms of international law, relative to the international community or transnational or multinational organizations that represent, to a certain degree, multinational common interests, the state is in a position of the individual, and is the embodiment of the "private." The foundation for this kind of right is international treaties, and international trade convention, etc., not domestic legislation. In international economic relations, domestic legislation regarding foreign trade cannot forcefully grant its own state a right not recognized by the resources of international trade laws.

Although state is not the combinatory subject of right, state agencies can be. State agencies are different from the state in that state agencies are separated from the national treasury and are relatively independent, can be and often are in a position of the subject of civil right. But it should be noted that, the position of the subject of civil right here does not refer to the capacity of power where state agencies represent the state to exercise state ownership, but the necessary civil activities undertaken by an agency in performing public functions and representing said agency, mainly reflected in the purchase of goods and services. Here, state agencies are in a position of an individual relative to the state as a whole, their behavior is also not to directly execute public functions, thus are legally in the same position as the various subjects of right identified above.

That state agencies double as a subject of right is in general a sign that the agencies, in order to realize their function as a subject of power, are undergoing a brief and transitional role change. Qualitatively, this brief and transitional period is actually a public agency's partial return to the position of individuals, and during this process, the agency is in a position equal to other individuals in the society. In order to undertake normal public functions, state agencies, if necessary, assume the identity of general civil legal relationship to undertake civil activities, which, theoretically, is merely to allow a portion of power to temporarily return to the position that is equal to right, and after the necessary

35 It should be made clear here that the legal phenomenon as interpreted here, is limited to domestic law, and international law is a phenomenon of a different nature, therefore cannot be uniformly interpreted in a simple and undifferentiated manner.

exchange with other rights, ascends once again to the position of power under equivalent conditions.

A quasi-public agency is also a combinatory subject of right. The scope of a quasi-public agency is different across countries. In China, it refers to party and youth league agencies, social organizations and public institutions that have been included in the institutional establishment of state administration. Currently in China, a quasi-public agency clearly plays a dual role of a subject of right and a subject of power, and its role of being a subject of power often outweighs that of being a subject of right. As for when and to what degree a quasi-public agency is a subject of right or that of power, I believe should eventually be determined by its funding composition, which refers to the ratio of self-financing vs. funding from public budget. The former portion of the funding forms its right characteristics, while the latter forms its power characteristics.

(2) The direct social content (or primary nature) of right is the interest of individuals that is recognized and protected by the law, and is symmetrical to public interest embodied primarily by state subject and power. For the purpose of clarity, in this book all rights are divided into substantive rights and procedural rights, and substantive rights are further divided into rights of the person, property rights, political rights, and social rights, while procedural rights are the rights enjoyed by subjects in order to realize these substantive rights.

The very condition of all rights is right of the person, the core of all rights is property right, the upper strata and prominent portion of all rights are political right, and social right constitutes the necessary conditions for the realization of the other rights, with corresponding procedural rights as the guarantee of their realization.

As shown by numerous facts in legal life, all rights, regardless of their existing forms, or historical conditions, have direct social content that is the interest of individuals corresponding to the public interest embodied by power. Here, the American scholar Friedman's discussion on this aspect of right (actually right in the narrower sense according to his standard) has a point. He believes that, "[t]o begin with, a right is a claim asserted through or against some public authority. A right is a claim against the state." He also indicates that, even though some rights appear to be formulated against other individuals rather than against the state, seemingly always meaning the relationship between the two, but these rights can still be viewed as a demand not against individuals, but against the state, because "a right 'against' a particular person is a kind of ticket which entitles the holder to invoke the law, that is, the state, to protect him or advance his interests in some way." For example, "'[o]wnership' is an

owner's call on the state to protect his interests against rival claimants, trespassers, and others."[36]

(3) Every right objectively has the corresponding specific interests of individuals. The total interests of a society can be divided into legally-defined interests and non-legally-defined interests. Because legally-defined interests can only be realized through right and power, the total interests can also be divided into the interests embodied by right and those embodied by power. The interests embodied by right are the foundational portion of the legally-defined interests in their totality, and are the interests of individuals relative to the public interests.

The interests embodied by right can be divided into five components: the interest of the person corresponding to rights of the person, the material interest corresponding to property rights, the political interest corresponding to political rights, the social interest corresponding to social rights, and the procedural interests corresponding to various procedural rights. The interest of the person, particularly the portion of personality interest, is the very condition of the individual's interest in its totality. The material interest is the core of individual's interest in its totality, is the goal that subjects of right directly pursue in their production activities, and is the very motive, agent, and force that has caused great historical transformations throughout social development processes. The political interest occupies the upper strata and prominent portion of individual's substantive interests in their totality, but historically and realistically, it can only be based on the interest of the person and the material interest of individuals, and is subject to, and in service for, these interests. The procedural interests are corresponding to procedural rights, and are fundamentally the material interests of individuals, but serve for individual's material interests, and are ultimately manifested as individual's material interests.

The fact that the state acts as the owner of state property, and state agencies and other public organizations act as the combinatory subjects of right cannot change the individual characteristics of interest embodied by right. In terms of the state, because with all the capacity of its ownership it only exercises the capacity of power, therefore only represents public interest, not directly representing individual interest. As for state agency, as the manager of state property, it exercises the capacity of power in the realization process of state ownership, representing certain public interests; only when state agency enters the market as an ordinary purchaser of goods and services, can the

36 Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), 288.

"quan" that it exercises belong to the realm of right, but here the interest directly embodied by such "quan" has lost its original public characteristics, and is not fundamentally different from the interests of other individuals, until it exits the market or transaction process.

The essence here is that, certain public interests temporarily return to the position of individual interest, in order to realize qualitative commensurability with individual interests to achieve equivalent exchange with certain interests of individuals, and after the exchange, the original public interest returns from the position of individual interest to its own original position, at that time the public interest is different from the material undertaker of the public interest before the exchange, but they are the same qualitatively, and should have the same absolute value. Here we can observe the characteristics of the individual interest of state agency as the combinatory subject of right, and also dynamically discern the special background, brevity, expediency of the formation of this individual interest, and the convertibility between right and power to be discussed later.

Now let us take a look at quasi-public agencies. The characteristics of the individual interests of public agencies as the combinatory subject of right are very similar to those of state agencies, but appear closer to the interest of general individuals. As for the objectivity of the characteristics of individual interest of public agencies as the combinatory subject of right, I believe that an obvious proof is the existence of dispute arbitration mechanisms on state property rights in China, because, if this right did not have the characteristics of individual interests, there would be no need for this kind of mechanism. This issue can only be explained more clearly on the level of the property content of right.

(4) Property owned by individuals is the material foundation of right, and is the essence of right on a deeper level. Property refers to social wealth or national wealth and is the sum of physical material and similar elements possessed by a society or the state during a specific period of time, including all cumulated products of labor, natural resources that have entered production and life processes, and scientific, technological and cultural achievements as well as occupational skills. For the convenience of analysis, we divide all property into the property with defined ownership and that without defined ownership, then further divide the property with defined ownership into the property owned by individuals and that owned by public agencies. Here, the property owned by individuals is the portion of property corresponding to right and serves directly as its material foundation, while the property owned by public agencies is the portion of property corresponding to power and serves directly as its material foundation.

Among the two categories and five parts of rights, only property right has direct property content, right of the person, political right, social right, and procedural rights do not have direct property content. But not having direct property content does not mean that they don't have property content. In fact, all these rights objectively have indirect property content.

First, let us consider rights of the person, which are primarily and predominantly personality rights, the most important of which is inherent right to life. How do we determine the property content or property characteristics of the inherent right to life? Admittedly, its composition is extremely complex. To use a youth as example, the property content of his inherent right for life usually is constituted of the following components: the costs for his production and all living expenses during his developmental process, his caretaking by others or by himself (which is also a kind of labor), his educational expenses, the expenses of his career training, and his achievements in generating wealth throughout his life time, etc.

Judged from this perspective, the property content of inherent right for life is not only very obvious, but also calculable and comparable, at the same time, the property content of the human inherent right to life also has a process of formation and consumption.

As for the other contents of the inherent right to life, such as right of personal name (right of name), right of portrait, right of reputation, and right of honor, etc., they are, to various degree, intangibly informed by various forms of effective physical and mental expenditure, or manifested as the subject's contribution to the society, which is the "gold content" of their personality right, or the formative foundation of their property characteristics.

On the average social level, the more physical and mental expenditure from a subject there is, the more effective it is, and the more sacrifice or contribution to the others and the society there is, the more "gold content" of personality right there is, and with appropriate realization forms, these rights can also convert into property represented by currency according to their own "gold content." So the name of an Olympic Gold Medal holder, the sign-board of a store with a good reputation, the portrait of a superstar, as long as they are used appropriately, can be converted into large quantities of cash through certain mechanisms, while the name, portrait and other carriers of personality right of an ordinary individual have much less currency content. This conforms to "natural law."

Similarly, various specific rights within rights of status should also contain indirect property content, because in reality the indirect property content contained within rights of status, such as right of spouse, publication right, and right of authorship, etc., is almost equally apparent as that contained within

various rights under personality rights. Of course, it is more difficult to explain with regard to parental authority, custody and other rights of status, but it is not entirely impossible. Take guardianship as an example, in terms of its content, custody includes property custody and physical custody. It goes without saying that property custody has material content, but what is difficult to explain is the characteristics of physical custody, because it sometimes is treated as right, and sometimes as duty. My view is that, this is not difficult to explain, and whether physical custody is right or duty should be determined based on the relevant behavior as well as the interest relationship of the subject, instead of us making sweeping generalizations. If the subject considers various elements, and believes that physical custody suits his interest (including mental interest), physical custody becomes a right, otherwise it is a duty. Here the key is, mental interest is also an interest that is worthy of people's effort or money to pursue and obtain. Mental interest for a subject under certain circumstances is as valuable as material interest.

Now let us move to political rights and social rights. In the contemporary world, there are multiple ways to approach the material content that political rights and social rights indirectly have. Some of the rights are expressed as the necessary social conditions or methods to obtain physical material, such as the right and freedom of speech, assembly, association, migration, work and leisure, etc. Take political rights as example, the most typical among them are the right to vote, the right to be elected, the right to initiative, the right to referendum, and other rights in participation of politics, with even more obvious indirect material content. Because in everyday life, rights primarily and predominantly are tools used by the subject to realize or maintain his own economic interests. "And indeed, all so-called political revolutions were started for the protection of one kind of property by the confiscation, also called theft, of another kind of property."[37] The fundamental purpose and function of the political rights obtained through political revolution are not different from those of the political revolution itself in terms of their relationship with property. In addition, it is absolutely impossible for any political rights to be realized in social life without the corresponding material security.

As for procedural rights, they are not essentially different from the relationship between property and the three substantive rights discussed above, the only difference lies at the distance. This shows the instrumental value of procedural rights in maintaining and protecting the subject.

37 Friedrich Engels, *The Origin of the Family Private Property and the State* (Chicago: Charles H. Kerr & Company, 1909), 138.

(5) Right, interests of individuals, and property owned by individuals correspond to each other, and have a conversion-reversion relationship. Right, interest of individuals and property owned by individuals can be said to be three different existing forms of the same thing: what is useful, beneficial and valid to individuals, can be a specific right when it exists as a legal phenomenon, can be a specific interest when it is within social relations, and can be eventually expressed as individuals' property of corresponding quantity when approached from material characteristics, vice versa.

For instance, A's building can be expressed as A's corresponding ownership in terms of the law, can be expressed as A's interest rather than anybody else's interest in terms of the relationship between A and B as well as others, and can be expressed as property which is worth certain amounts of currency in terms of material characteristics. If B damages this building, which is to say, damages A's interest, and damages A's right, thus A can file legal proceedings seeking compensation for damages, demanding certain amounts of currency. Here, the correspondence and mutual metamorphic relations of individual interest and certain amounts of property are extremely clear.

Obviously, in certain typical circumstances, what is normally quite abstract, such as right and interest, once linked to the corresponding state of material existence, can often appear to be very specific and very easy to grasp!

Of course, the mutual metamorphic relations among right, interests of the individual and property owned by individuals are in the most simple, most direct, and most typical forms in terms of individual property rights, especially in terms of individual ownership, and the relationship of its corresponding interest and property, in other situations this kind of mutual metamorphic relations is much more obscure, and difficult to discern, even though it is still in existence. Let us continue to use the example of the building owner A, we can say that his intact right of reputation is a necessary condition for him to obtain employment opportunities, normal promotion, even normal rental price for his building, and if this right is severely damaged, it may cause him to suffer mentally, or to lose his job, or miss promotion opportunities, and may impact the rental of his building, forcing him to lower rent in order to secure tenants; his political right allows him to participate in the political process, thus facilitating the stability of the ownership relationship that is beneficial to him, and the state and local financial and tax policies that are beneficial to him; his social right allows him to have normal interaction with others, to work, and to rest; his procedural right allows him to secure corresponding financial indemnity, compensation, or restoration if his own building is damaged by others.

Additionally, there are two more points to be considered: 1. All rights can be real only under the condition of corresponding material guarantee. Within a

specific right structure, the degree and the scope of the realization of legally-defined rights are completely determined by the quantity of corresponding property; 2. All real rights can eventually be directly or indirectly reduced to corresponding property, which can take many different forms, such as compensable transfer of intellectual property, civil penalty for damages through judicial channels, and state administrative compensation, criminal compensation, etc. It is fair to say that, the "right" that is not given, or does not have, material conditions to guarantee the provision of property (money as the general existing form) compensation actually is not real right (which at most can be called ideal right, not quite legally-defined right, much less practical right), because they are not worth a penny! Similarly, the right of the person and other non-property rights in a poverty-stricken society or state are impossible not to be inexpensive.

(6) Right basically is the product of the social production process, more so as a society becomes more developed. In terms of its origin, right does not come from struggle, and does not come from fight, either, whether it is struggle or fight, one can only grasp or recapture the right that already existed before and should have belonged to him, and struggle and fight themselves cannot create a single atom of right.

The reason is simple: right arrives through conversion of property owned by individuals, whether there is property or how much property there is that is owned by individuals can directly determine whether there is right or how much right there is. In terms of its mode of formation, the property whose ownership is defined can be divided into two kinds: one is natural material that has entered human production and life process, the other is product of labor (including scientific, technological, and cultural achievements as well as occupational skills mastered by workers). The latter is the basic component of property, its percentage in the total volume of property is continuously increasing along with social advancement, and this property is the product of the production process. In reality, the portion owned by individuals within both these two kinds of property constitutes the material foundation for right (the rest mostly constitutes the material foundation for power), but empirical facts show that the portion that belongs to a product of labor is the basic portion, and enjoys superiority in terms of quantity. This indicates that, the right corresponding to a product of labor is the basic portion of all rights, and is completely formed during the production process.

Based on this understanding, we can form the following inferences: 1. The material content of right can be property owned by individuals, but more accurately speaking is the use value embodied in this property; 2. At least in theory, practical right should be measurable indirectly through price, and

objectively can be analyzed quantitatively; 3. The total volume of practical rights in a society during a specific era is determined by the total volume of property directly owned by all individuals of the society; 4. The quantity of practical rights enjoyed by a specific individual of a society is determined by the quantity of property owned by him; 5. The formation and enjoyment process of rights at the same time are the formation and consumption process of individual interests and individually-owned property; 6. When there is any difference between right and power, legally-defined right equality even under the most ideal conditions can only be expressed as equality of capacity for right, and cannot be either equality of practically enjoyed right, or the total volume of average shared right.

2.3 *Power Is the Legal Form of Public Interest and Public Agency-owned Property*

Power is the other, and the only other, most common and most important legal phenomenon in addition to right, but in most works of jurisprudence, especially textbooks of jurisprudence in China, power has been neglected to such a degree that it has all but disappeared. The most common and most vivid manifestation of power is the authority legally enjoyed by state agencies and their officials. The concept of power does exist in current theoretical systems. In actual applications of the concept (for example when dealing with right as a standard relative to power), it is clear that the real object reflected by the concept of power in current theories mainly refers to the authority legally enjoyed by state agencies and their officials, same as defined in this book.

This phenomenon is truly surprising: the concept of power, which reflects such important, and such common legal phenomena, and whose only equal is the concept of right, has nothing to do with the core categories, and cannot even make it onto the list of basic categories in current mainstream legal theories! Why is there such a phenomenon that seriously violates commonsense concerning theory? Legal theory should be the conceptual reflection of legal reality. Similarly, there are no specific chapters on power, even no full paragraphs to discuss it, in almost all current textbooks of jurisprudence. The works of jurisprudence that I have read are most like this, with only few that can be counted as exceptions, to various degrees.[38]

38 As far as I know, the exceptions are the following works: Guo Daohui 郭道晖, *Fa de shidai jingshen* 法的时代精神 [The Spirit of the Times of Law] (Changsha: Hunan renmin chubanshe, 1997); Xie Hui 谢晖, *Falü xinyang de linian yu jichu* 法律信仰的理念与基础 [The Ideal and Foundation of Legal Belief] (Jinan: Shandong renmin chubanshe, 1997); Ge Hongyi 葛洪义, *Tansuo yu duihua: falixue daolun* 探索与对话：法理学导论

Why has this occurred? It seems that there are three inter-related reasons: 1. We have blindly followed the notion that right and duty are the most important content and the theories that use the concepts of right and duty as the most basic tools to explain legal phenomena, which were formulated more than a century ago in both China and other countries; 2. We have been separated from the living reality of social life, trying to fit our actual social life into the theoretical systems with right and duty at their core, which were invented by foreign scholars and imported into China by previous generations, with the result that power has been left out; 3. We have not been correctly differentiating and understanding both right and power, thus are unable to accurately position power.

In order to advance the understanding of power, it is necessary to evaluate the achievements in the research of power and the difficult issues waiting for breakthrough. It is obvious that the concept of power has different meanings across different fields. In philosophy, Nietzsche maintains that all human behaviors and desires are determined by the will to power, and infinite pursuit of power is the most basic law, where his "power" in terms of its content is equal to what Western jurisprudents call "right in the wider sense." In political science, D. H. Lasswell and other Western scholars believe that the meaning of "power" includes everything from money, force to friendship and legislative power, almost synonymous to "political resources." In legal studies or from the perspective of legal studies, the scope of the object marked by the concept of power often is much more limited than those in philosophy and political science, but it is not unusual to have issues of relatively vague marking object and uncertainty of basic attributes.

Undoubtedly, there have been many achievements in the research of power throughout history, which mainly show in the following aspects:

(1) It is widely recognized that power is different from right, from which derive the two concepts of power and right. This process was completed as early as in ancient Greece and ancient Rome. This should be affirmed first, considering the special relation between power and right.

(2) It is recognized that power is a public coercive force, which is an indispensable means in maintaining social existence and development. As early as in ancient Rome, Cicero said through the mouth of Marcus that "[t]here is nothing so consonant with the justice and structure of nature—and when I say that, I want you to understand that I am speaking of the law—as the power of command, without which no home or state or nation or the whole race of

[Exploration and Dialogue: Introduction to Jurisprudence] (Beijing: Falü chubanshe, 1996).

mankind can survive, nor can nature or the world itself."[39] "Let the powers be just, and let the citizens obey them decently and without refusal. Let the magistrate check the disobedient and harmful citizen by fine, chains, or whipping if no equal or greater authority or the people forbid it."[40]

(3) Power is an interest, related to property. In the European Enlightenment era, Hobbes was already aware that power ("Common Power") is "to keep them in awe, and to direct their actions to the Common Benefit."[41] Modern scholars further point out that "[s]overeignty is the extraction of violence from private transactions;"[42] "[p]ower—closely related to physical force as it is."[43] And Engels makes it even more clear: "In order to maintain this public power, contributions of the citizens become necessary—the taxes. These were absolutely unknown in gentile society."[44]

(4) Power is a force that emerges from the opposition between primitive rights and ostensibly overrides all rights, its fundamental mission is to ease the conflicts of rights, to keep the conflicts of rights within the realm of "order," and the existence of power is predicated by irreconcilable conflicts of rights—this profound insight was initially formulated by the founders of Marxism.[45]

(5) Power derives from right, and according to the demand for social justice, it should serve for the realization and growth of right. There have been statements about this aspect throughout history: the early form of this idea can already be found in Aristotle, who insists that the purpose of city-state is to promote good and virtue, and in Cicero, who indicates that what is the most important for a state ruler is the happiness of its citizens; the rather typical formulation during the era of British Glorious Revolution is: "*Political Power* is

39 Marcus Tullius Cicero, *Cicero: On the Commonwealth and On the Laws*, ed. and trans. James E. G. Zetzel (Cambridge: Cambridge University Press, 1999), On the Laws, Book III, 157–158.

40 Ibid., 158.

41 Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1943), 131.

42 John R. Commons, *Institutional Economics: Its Place in Political Economy*, Vol. 2 (New Brunswick: Transaction Publishers, 1990), 684.

43 Richard A. Posner, *The Problems of Jurisprudence* (Belknap: Harvard University Press, 1990), 18.

44 Friedrich Engels, *The Origin of the Family Private Property and the State* (Chicago: Charles H. Kerr Company, 1909), 208.

45 Friedrich Engels said: "In order that these contradictions, these classes with conflicting economic interests, may not annihilate themselves and society in a useless struggle, a power becomes necessary that stands apparently above society and has the function of keeping down the conflicts and maintaining 'order'. And this power, the outgrowth of society, but assuming supremacy over it and becoming more and more divorced from it, is the state." Friedrich Engels, *The Origin of the Family Private Property and the State* (Chicago: Charles H. Kerr Company, 1909), 206.

that Power which every Man having in the state of Nature, has given up into the hands of the Society, and therein to the Governors, whom the Society hath set over itself, with this express or tacit Trust, that it shall be employed for their good, and the preservation of their Property." And the statement in a socialist era is that, all the state power belongs to the people, state agencies are responsible to the people, supervised by the people, and serve the people. This in fact is tantamount to saying that power is responsible to right, supervised by right, and serves to guarantee right and to promote the growth of right.

But, closely related to the issues in the research on right, the research on power also has three large issues that have not been well resolved. The first is that the scope of power is not clearly defined. Normally, it is relatively easy to differentiate between the following two: the authority legally enjoyed by state agencies and their officials is power, and the various "quan" legally enjoyed by ordinary individual citizens are rights. What is not so easy to differentiate is the authority of the agencies set up by intermediary organizations in between state and individuals and the "quan" enjoyed by some special individuals, the example for the former is the authority legally enjoyed by an enterprise legal person and agencies established by other social economic organizations, and the examples for the latter are the patriarchy in Roman law, authority of the husband in Chinese feudal society, and parental power or custodial right in modern civil law, etc.

The "quan" enjoyed by these organizations and individuals, like power, have certain direct coerciveness, but like right, are enjoyed by individuals, and of no public nature. Current jurisprudence has not provided a standard for categorization over whether these "quan" are right or power. This seemingly trivial issue actually reflects a significant deficiency within current theories.

The second is that the relationship between power and interest is not specifically and accurately identified. It is universally recognized that power is related to interest, but there is no answer as to which portion of interest power is related to, and what relationship they have.

The third is that the material characteristics of power are not discovered, with no understanding about the property content of that portion of interest corresponding to power.

These issues existing in the research on power are directly reflected in some well-known scholars' views on power. The concept of power they use is sometimes right in the wider sense, sometimes right in the narrower sense, sometimes the difference of right in the wider sense minus right in the narrower sense. And the exact scope of power is also obviously ambiguous, even when some scholars try to differentiate power from right in the narrower sense, they find it difficult to establish an appropriate method and standard,

or are unsure about the social content and material attributes behind the two. Here, scholars everywhere seem to be facing the same difficult issue.[46] In order to advance the research on power, it is necessary to identify the following characteristics of power:

(1) The subject of power is public agencies and quasi-public agencies. This is the characteristic of power in terms of the subject, corresponding to the characteristics of right in terms of the subject, and once this characteristic is recognized, it becomes easy to determine the scope of power. According to this standard, the subject of power primarily and predominantly is the state, state agencies and officials who represent state agencies to exercise authority, and secondarily is these quasi-public agencies that rely on state budget and state-owned assets as their material foundation for existence and development. Normally, only these subjects enjoy power, and the individuals corresponding to them only enjoy right, not power. But it has to be emphasized that, the subject of right can morph into the subject of power under certain conditions. The most typical situation in this respect is that, when certain citizens legally exercise their political right collectively, the concentrated right can form political power, and the citizens that originally were the subjects of right now merge into the aggregate of people, becoming a component of the subject of power. All state power belongs to people, and in this sense, people, as the aggregate of certain citizens, can legally constitute the subject of political power.

(2) The direct social content of power is a society's public interest recognized and protected by the law and is fundamentally a society's common material interest. The public interest discussed here refers to the difference of the total interest legally recognized and protected minus the individual interest as embodied by right. This portion of interest is precisely the interest embodied by power. As a legal phenomenon, the essence of power can emerge only through something else in comparison, and this portion of interest is precisely that which can emerge as the essence of power that we are searching, namely, public interest. Of course, this is expressed in the sense of

46 This has been reflected in many scholarly works on power in legal studies, especially those in Western languages. There have been some insightful discussions from very few Chinese scholars, but they are lacking in terms of depth. The representative works in this regard are as follows: Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Cambridge, MA: Harvard University Press, 1974), Chapter 13 Law as Distinguished from Other Agencies of Social Control, 277 and below. On the fundamental right and the nature and characteristics of the fundamental right, see the author's book, "*Guojia jiegou xingshi lun* 国家结构形式论 [On Structure of the State]," (Wuhan: Wuhan University Press, 1997), 233; Guo Daohui 郭道晖, "*Fa de shidai jingshen* 法的时代精神 [The Spirit of the Times of Law]," (Changsha: Hunan People's Publishing House, 1997), 283ff.

oughtness and justice, is the objective demand of a society or state with the rule of law, and is also the normal historical mission that power undertakes coming into the world. Certain power, for various reasons, actually illegitimately embodies individual interest or the interest of other individuals in a society, which has existed to certain degree in different times, but is the manifestation of alienation of power's essence or illegitimate conversion of power into individual interest.

(3) Power has property owned by public agencies as its material foundation, the positive correlation between property owned by public agencies and power is very obvious, the quantity, quality and other objective indicators of the strength of power, such as state agencies, officials, military, police, and courts, are all corresponding to the quantity of property extracted from society by the state, and are able to maintain themselves only through this property; without corresponding property as guarantee, it would be meaningless no matter how much power is legally granted to the state.

Historically, property owned by public agencies is formed precisely at the same time when legal power is formed, and theoretically, they should also disappear at the same time. In terms of the relationship between property owned by public agencies and power, their connection has indeed been seen, and their mutual influence has indeed been affirmed. But I don't think that is sufficient and we should further assume that they are two different legal forms of the same thing: property owned by public agencies is the material form of power, while power is the legal form of property owned by public agencies, one can be transformed into the other through conversion, which can also be called conversion-reversion. I believe that, comparing to other methods of interpretation, this method of interpretation is able to more appropriately interpret the relationship between power and property as well as that between power and other basic legal phenomena.

(4) There exist relationships of conversion-reversion among power, public interest and property owned by public agencies, and the relationships can be either forward or reverse. The State uses taxation and other forms to extract certain property from individuals, which forms government revenue, and then distributes in certain ways the revenue to state agencies of various levels and kinds, allowing them to legally allocate and use it. This process, if expressed on the level of interest, is the process in which public interest is formed throughout the entire society and state agencies of various levels and kinds are allowed to control and use the various portion of public interest, respectively. Legally, this is also the process in which the complete authority exercised by state power is formed, which then is allocated to state agencies of various levels and kinds, thereby forming various authorities. Here, the use and consumption

activities of state agencies' property are also the realization activities of public interest as well as exercise activities of power, which we can say are the same process' manifestation on different levels.

Theoretically, it is extremely important to reveal this process. For instance, the economic level of this process indicates that, actually, state power from the very beginning is extracted from the right of individuals (primarily and predominantly individuals), and therefore should be subject to, and serve, the right of common individuals. The main characteristic of all dictatorial systems is to prevent and hinder this economic process from expression on political and legal levels, while it is the objective demand of social historical law that political and legal process should be coordinated with economic process. The historical role of bourgeois revolution lies in that it allowed these two processes to be formally coordinated, and socialism should make the two coordinated not only formally but also substantively.

There is one additional situation that cannot be ignored, which is that, property owned by public agencies, public interest and power under certain conditions can undergo reverse conversion, namely, reductive conversion. When this occurs, power is reduced to certain public property in some complicated ways. There are many examples. For instance, according to criminal law in China, under many charges there are stipulations for property confiscation and a single fine in addition to the principal penalty, which should be understood as corresponding indemnity or compensation for the damages suffered when right is violated, and certain portions of power are hindered by a criminal act, which by nature is not different from the corresponding indemnity or compensation provided by the aggrieving party when a certain right is violated. The role of administrative fines theoretically can be deduced by analogy.

(5) Power, like right, is after all the product of the social production process. During political struggle, political revolution, and social revolution, regime and power often become the focal points of fight, but they can at most facilitate change of the subject of power, redistribution of power, or adjustment of power allocation within the system of state agencies. Power predominantly comes from the social production process, which is determined by the reality that property constituting the material foundation of power is basically constituted of products of labor.

The portion of power that does not come from a production process also originates from the natural resources considered as property and related economic process. Here there are two points that should be made clear: First, in all the natural resources owned by the state, the undeveloped portion is only potential property, only the developed portion can be counted as real property; secondly, political revolution and social revolution will also necessarily alter

the possession ratio of public and private property of a society, and alter the distribution ratio of overall interests between civil society and political state, thus resulting in the change of faquan structure, forcing some original power to convert into right, or original right to convert into power. The existence of this phenomenon by no means alters the fact that right and power after all are the product of the production process.

Based on this understanding of the attributes of power, we can draw the following inferences: the total volume of actual power of a certain society or state is determined by the total volume of property owned by public agencies; the volume of power exercised by different state agencies is determined by the volume of property they directly control. Like right, power has material content that should be properly considered as use-value; the formation and application process of power is also the formation and consumption process of public interest and public agencies. Theoretically, actual power can also be measured with price and subject to quantitative analysis.

It is worth reminding the readers that during the above analyses of the objective attributes of right and power, we have actually formulated the standard for binarily demarcating "quan" or faquan into right and power: Any "quan" that has a direct individual (natural person, private legal person, and other social economic organizations of the same legal status) interest as its social content, and has property owned by an individual as its material foundation should be considered as right; and any "quan" that has direct public interest as social content, and has property owned by public agencies as its material foundation should be considered as power.

According to this standard, any legally-defined "quan" is either right or power, there is no such "quan" that is neither power nor right, and there is also no "quan" that is both right and power. Using this standard, the usual difficulties of binarily demarcating "quan" into right and power can be readily resolved: for instance, *liberi in potestate* in Roman law, authority of the husband in feudalistic societies, and parental authority and custody in modern civil law can only be right, not power, because they directly embody the interest of the individual (at most family) relative to the state, and whose material foundation is property of individual or family.

Another example is that what is legally called "authority" is usually power (like the authority granted to state agencies by the constitution and law), but sometimes should be considered as right (like the authority of certain enterprise legal person organizations stipulated in company law in China). The reason is that the former has public interest as social content, and has government funding as its material foundation, while the latter has the interest of the enterprise legal person relative to public interest as its social content, and has

property of the enterprise legal person as its material foundation. According to the same standard, we can also divide "quan" that is enjoyed by various quasi-public agencies and is in fact recognized and protected by the law into right and power.

2.4 *Right and Power Are the Unity of Opposites, and Can Convert into Each Other*

Right-duty jurisprudence emphasizes the relationship between right and duty, and treats it as the entire content of all legal relations, while the new jurisprudence that has right and power as the core content of social legal life emphasizes the practical and theoretical status of the relationship between right and power. In order to understand any other legal phenomenon, there must be a condition of profound understanding of the relationship between right and power. What, then, is profound understanding?

Profound understanding is to truly comprehend the unity of opposites and the mutual conversion of right and power. The unity of opposites and the mutual conversion of right and power include the following two levels of meaning, i.e., internal unity of opposites, internal mutual conversion within right and power, and mutual opposition, mutual conversion between right and power. Internal unity of opposites and conversion of right and power respectively refer to the unity of opposites of various components within right and power as well as their conversion towards the opposite, while the unity of opposites and the conversion between right and power refer to the unity of opposites of the two most important legal phenomena, and their conversion towards the opposite on the basis of identity.

In this regard, because there is a conversion-reversion relationship among right, power, their corresponding interests, and corresponding property,[47] the unity of opposites of right and power should be understood from the following two aspects.

First, the internal opposition of right and the internal opposition of power respectively reflect the opposition of interest relations and property relations between individuals and state agencies, at the same time the oppositions are also unified under individual interest and public interest recognized and protected by the law. The total sum of right and power is faquan, whose volume

47 I have discussed this aspect in detail from the constitutional perspective. See Tong Zhiwei 童之伟, "Zailun yong shehuiquanli fenxi fangfa chonggou xianfaxue tixi-jianda Zhao Shiyi, Zou Pingxue dengtongzhi zhi zhiyi 再论用社会权利分析方法重构宪法学体系-兼答赵世义、邹平学等同志之质疑 [Revisiting the Reconstruction of Constitutional Jurisprudence using the Method of Social Rights Analysis—Answering the Questions from Zhao Shiyi, Zou Pingxue and Others]," *Faxue yanjiu* 6 (1995): 68–77.

after all is determined by the total volume of social property, which determines the scarcity of both right and power.

The scarcity of primitive power determined the mutual opposition of primitive rights, with this opposition facilitating the differentiation and opposition between right and power under certain social conditions; the scarcity of right created the differentiation and opposition among different parts of right; and the scarcity of power and the need for division of labor facilitated self-disintegration of power as well as the contradiction among its components.

The self-opposition of right on the legal level is the conflict of right between two people or two groups of people, and the conflict of different rights of the same person or the same group of people, with the determining factor behind the conflict being the contradiction caused by the interest relations among individuals, the opposition of property relations, or the distribution of limited interest and wealth. The self-opposition of right reflects mainly the opposition of interest relations and property relations among individuals, while the self-opposition of power reflects mainly the interest contradiction among public agencies of various levels and kinds, as well as the contradiction caused by public agencies' effort to form an allocation structure beneficial to the public property of their own agencies (such as revenue, etc.), so on and so forth.

As for the unity of the internal opposites of right and power, it means that, all rights are the legal conversion of the interest of individuals and the property owned by individuals, and all powers are the legal conversion of the property owned by public interests and public agencies. On this level of corresponding interest and property, all rights exist as undifferentiated, so do all powers.

Secondly, the mutual opposition between right and power reflects the opposition between individuals' interest and public interest, but they are unified under the social interest as a whole that is recognized and protected by the law. Determined by their social and material attributes, the essence of the opposition between right and power is the opposition between individuals' interest and public interest, and after all is the opposition between individual owners and public owners of property on the level of economic relations. Similarly, the social and material attributes of right and power also determine their commonality, namely, right and power are unified under interests recognized and protected by the law, and eventually unified under total property with defined ownership. On the level of legally-defined interests and property with defined ownership, right and power achieve complete identity, and there is no difference between them.

Here, the opposition between right and power is absolute, but their unity is relative, and conditional, which means that, there is a necessary premise

for right and power to be unified under legally-defined interest, that is, they must co-exist in a nomocratic society or state; there is also a necessary premise for right and power to be unified under property with defined ownership, that is, they must co-exist in a society or state where property, especially property owned by individuals, is equitably and effectively protected by the law. A society with the rule by man is necessarily filled with willfulness of the highest rulers (individuals or groups), forming a condition where either there are no laws to abide by, or there are only laws that the subjects, not the highest rulers, abide by, or there are laws but they are not fully observed or enforced.

Thus there are only two possibilities: 1. There are no laws at all or laws that are severely defective therefore incapable of reflecting legally-defined interest. As a result, only the interest decided by the conception, or even individual willfulness, of the highest rulers can actually be relied upon, and this interest often is but the private interest of the highest rulers, either as an individual or group, in no small measure; 2. There are legal documents reflecting social interest as a whole, but the operation process of right and power severely deviates from legally-defined norms. Similarly, if property of certain subject cannot, or is actually not, be granted equitable and effective legal protection, then it is in reality a condition where the ownership of property is uncertain, and the operation of right and power certainly cannot be unified based on property with defined ownership.

It is not quite sufficient to just understand the unity of opposites between right and power, the internal conversion and the mutual conversion of right and power should also be understood. Only by doing so, can the new basic jurisprudential theory dynamically explain, reflect, and model the ever-changing movement of right and power in social reality. On the issue of conversion, the philosopher Gao Qinghai has the following insightful view: both the two sides of a contradiction have the same characteristics, either side can be the opposite of the other side, thus it is itself and at the same time also the other side, when opposition reaches a certain point and certain conditions, one side converts to the other side; conversion is the deeper, more lively, and more vivid linkage between the opposites, only when the mutual conversion is understood, can we introduce the linkage of identity into the realm of development, and only when the linkage is lifted to conversion, can we achieve a dialectic understanding.[48]

Based on the principle of the conversion-reversion relationship among right, power and their corresponding interest and property, the new jurisprudence

48 Gao Qinghai 高清海, *Gao Qinghai zhexue wencun* 高清海哲学文存 [Gao Qinghai's Philosophical Papers] Volume III (Changchun: Jilin renmin chubanshe, 1997), 346.

should be considering the conversion of right and power from the following few aspects:

(1) The internal conversion of right and power respectively, and the mutual conversion between them are based on their identity in terms of interest and property, while the force behind the conversion is various contradictions caused by the relative scarcity of right and power. Both the internal conversion and the mutual conversion of right and power are predicated on the relative scarcity of right and power, and there are also differences within right and power, as well as between them. The objective foundation for the internal conversion and the mutual conversion of right and power is the identity of opposites: a right can be converted into another right, a power can be converted into another power, which is because various opposing rights are all legally-converted forms of property owned by individuals and individuals, while various opposing powers are all legally-converted forms of property owned by public interest and public agencies. As for the reason of the mutual conversion between right and power, its objective foundation is that they are the legally-converted forms of interest and property with defined ownership.

There is also an issue of force behind the internal conversion and the mutual conversion of right and power. Simply put, the force comes from the contradictory movement of right and power. Specifically, the force behind the internal conversion of right comes from the contradiction between the diversity of a certain subject's demand for rights and the limitation with which the subject is able to obtain right. The force behind the internal conversion of power comes from the contradiction between the limitation and relative stationarity of power enjoyed by certain subjects and the expansiveness to which the subject exercises its capacity, the imbalance of environmental changes, as well as the effort to resolve these contradictions. And the force behind the mutual conversion between right and power stems from the contradiction between the demand of certain subjects for obtaining the maximum possible right within the realm of order and the demand for extracting the necessary quantity of right in order to form power, to manage and control some right-generation order, and right-distribution order, as well as the effort to resolve this contradiction.

(2) The internal conversion of right and power, respectively, has highly rich content and form. The internal conversion mainly refers to the change from a right embodied by individual interest and corresponding property to a right embodied by another individual interest and corresponding property, such as the conversion from rights of the person to property rights, from property rights to cultural, educational, or political rights, or vice versa. For instance, a person uses his savings to pay tuition for continuing education, this action means that

legally he is using property rights in the form of currency to exchange for the right to enter an educational institution to study and obtain a certificate, etc., namely, he is realizing the conversion from property rights to the right to education, with its nature being a conversion from a subject's property interest to interest to be educated, and that from the property in the form of currency to the property in the form of knowledge or skills.

The correspondence of other internal conversions of right may not be so easily identified, but that is only a technical issue, the principle remains the same. The internal self-conversion of power mainly refers to the conversion from the authority in the form of one portion of public interest and the corresponding property owned by public agencies to the authority in the form of another portion of public interest and the corresponding property owned by public agencies, such as the conversion from legislative powers to administrative powers, or from legislative powers to judicial powers, and the corresponding transfer of interest and property (e.g., funding) or change of ownership, etc.

The internal conversion of power often emerges in the form that power alters the subject of ownership, for example, the power originally enjoyed by the legislature is later controlled and used by administrative agencies, with the corresponding power converted from legislative powers to administrative powers. Similarly, the power originally enjoyed by administrative agencies is exercised by judicial powers, namely, the corresponding power is converted from administrative powers to judicial powers, so on and so forth. For example, in the United States, independent regulatory agencies are part of the Administration, their power to make rules originally belonged to the Congress, which later was gradually transferred to these agencies because the Congress was unable to exercise the power, the transfer of the power to make rules from the Congress to the Administration is also the conversion from legislative powers to administrative powers.

Another example is that, in the criminal procedure system in China, before 1949, public indictment in revolutionary base areas was in most cases brought by administrative agencies, therefore was a part of administrative powers; after the establishment of the People's Republic of China, all public indictments were brought by the office of the public prosecutor, thus public indictment became part of judicial powers, which is a case of administrative powers converted into judicial powers. Here, the categories of powers are divided based on the nature of the agency that exercises the power.

There are a variety of ways for the internal conversion within right and power, respectively. The most commonly seen for the internal conversion of right is conclusion and execution of contract, equitable purchase and selling of goods and services, but other forms of agreement, administrative action,

judicial decision can also facilitate internal conversion. In reality, conversion of right often takes the form of constitutional amendment, legislation, founded convention, and judicial interpretation, etc. It goes without saying that these conversions are also accompanied by corresponding transfers of interest and property.

(3) The forms in which right and power are converted into each other are extremely complex, and understanding the conversion is particularly important for legal studies. The existing intellectual achievements in social science show that, historically, legal power stems from the self-opposition of primitive powers and is the result and embodiment of irreconcilability of the mutual opposition of primitive powers. In terms of its content, the fully developed form of this opposition is the opposition among different subjects of interest, therefore among different owners of property.

Opposition results in multiple consequences, the first is that, within primitive power, part of it is converted into power, the second is that, the part that has not been converted into power mostly is converted into legally-defined right, and the small part that has not been converted exists in the form of residual quan. Corresponding to the conversion process, the disintegration process of the social and material content is as follows: within the total primitive individual interest, part of it is converted into public interest, most of the other primitive individual interest is converted into legally-defined individual interest, the small part that has not been converted exists in the form of social residual-interest; within the total primitive property, part of it is converted into the property owned by public agencies, the rest mostly is converted into the property owned by individuals, and the small part that has not been converted exists in the form of property with undefined ownership.

After that, what replaces the self-opposition of simple primitive right is the complex opposition among elements resulting from the disintegration of primitive power, such as the opposition between right and power, right and right, power and power, right and residual quan, as well as power and residual quan, etc., and the opposition among the corresponding interest relations and property relations, etc. Here what is predominant is the opposition between right and power, as well as the opposition among the corresponding interest content and property content. The mutual conversion of right and power is the result of the opposition between right and power, and the contradiction dynamics of opposition and conversion promotes the development and advancement of legal life.

In reality, the conversion between right and power often occurs in two different phases of a continuing process. In terms of property content, the most basic level, the first phase of the mutual conversion process between right and

power, as indicated before, is extracted from part of individually-owned property, to be possessed in the name of a public entity (such as the state), and then controlled and used by agencies within the entity that actually realizes its functions.

In terms of interest, this economic process exists in the form of public interest that is formed through extracting from part of the interest of various individuals and is represented by public entity, and is controlled and used by various components of the entity, respectively. In terms of political-legal aspects in a democratic society, the typical expression of this process is that individual citizens use an election to entrust their own right of participating in the management of state affairs, the aggregate of the right entrusted by all individuals is therefore converted into a complete state power (administrative power), and then this power draws up a constitution and laws, organizes state agencies in accordance with the law, and divides and converts the complete power into various authorities, which are controlled and used by the central and local governments as well as legislative, administrative, and judicial agencies, etc.

Under an autocracy, the formation of property owned by the above public agencies is not much different from that in a democracy, but the formation and the existing form of public interest often seriously deviates from its nature, and in terms of political-legal aspect, the situation where power deviates from its nature is even more severe. With the social advancement, development of commodity-money relationship, and promotion of democracy and the rule of law, the situation of this serious deviation of political-legal life principle from the economic existence principle is able to be corrected gradually.

The second phase of the mutual conversion process of right and power is corresponding to the first one, it is the expenditure of state agencies in terms of property, part of which is consumed in the form of outlay by state agencies in their operation, while the other part is actually returned to the citizens in certain forms, such as the expenditure for public welfare, poverty reduction, and cultural and educational undertakings, etc. In terms of interest, this process correspondingly exists in the form of self-movement of public interest towards realizing its social function, part of the interest is consumed during the process, while the other part is converted (reduced) into individual interest in certain forms.

At the same time, the above two processes exist in the form of the execution of the authority of state agencies with respect to political and legal aspects, part of the authority is consumed during the execution, the other part is converted (reduced) into right through providing public services. In other words,

certain right is first converted into power, part of which is again reduced into right, forming a full circle.

This is only a relatively typical aspect of the mutual conversion between right and power. There are many other aspects and ways for the conversion, for example, through legislative, administrative, and judicial ways, or through administrative penalty (such as fine), criminal penalty (such as forfeit), administrative compensation, and criminal compensation, etc.

In a discussion session of my jurisprudence class, a student raised the following question: how should faquanism explain the phenomenon that a state or a public agency of similar nature collects tax from individuals, and then uses tax receipts as expenditure in social welfare in its budget to be used for the benefit of individuals? And is the property extracted by the state converted into power or right? Indeed, this is a challenging question. The collection of tax by a public agency is actually a process through which private property is converted into public agency's property. Such public agency can be a central government agency representing the state, or a local public agency or local government. The process where private property is taxed is at the same time that where the corresponding private property is converted into the power of the state agency. In traditional societies, tax receipts extracted by the state are to be completely expended. But with the emergence of the welfare state, there have been practices widely used in developed countries where a considerable portion of tax receipts are used by the state to return to individuals in the form of welfare. From the aspect of legal studies, the corresponding power is returned to the hands of individual citizens, and converted into individual right. In terms of legal status, right is first converted into power, but ultimately returns to right, which is a particularly noteworthy form in the process of right-power mutual conversion.

The above process further raises the following two questions: 1. Is the volume of power enjoyed by public agencies determined by the volume of the public property it is able to control or the volume of the public property it actually consumes? With the common sense that input and output are interrelated and that matters have to consume energy before conversion, a reasonable interpretation would be that the volume of public agency's power is determined by the volume of the property it actually consumes. Therefore, the volume of power of a country's public agency is not determined by the volume of the public budget, but by its actual final consumption, where the property it distributes only passes through it, and what is converted into power is only the cost of the management and distribution process, which does not include the property transferred out. 2. Is the volume of right of individuals such as citizens

fundamentally determined by the volume of the property that they acquire or by the total volume of the property that they are entitled to freely dispose of ultimately? Based on the same reasoning above, the answer should be that the volume of an individual's right is ultimately determined by the volume of the property that they are entitled to freely dispose of, not by the volume of their legal income or other indicators.

2.5 *Faquan or the Unity of Right and Power Should Become an Independent Analytical Unit in Legal Studies*

This is the necessary conclusion following the relatively deeper understanding of right and power as well as the essential content of their relationship. Once legal studies faces squarely the existence of the unity of right and power, understands theoretically the difference and connection between it and right and power, and formulates corresponding jurisprudential concepts based on its understanding, many theoretical problems in traditional legal studies can be easily resolved. For example, one of the most basic problems in traditional legal studies is that it is difficult to differentiate the concept of right from that of power, but if the concept of faquan that reflects the unity of right and power is used as a reference, the different relative status of right and power immediately becomes obvious.

The basic attributes of right and power show that they are fundamentally a unity. With respect to this point, there may be some doubts as follows: sometimes you say that right and power should be strictly differentiated, sometimes you say that they are fundamentally a unity, aren't you self-contradictory? Actually, there is no contradiction here, because the reason is the difference of perspectives from which the issue is approached. When we say they are different, we are looking at their result in terms of legal phenomena, and when we say they are a unity, we are recognizing their relationship under or behind legal phenomena. In a sense, the unity of right and power is very much like a gigantic iceberg in the ocean, right and power as phenomena are merely two peaks above, and separated by, the water, while their real unitary relation is hidden under the surface. Similarly, the unitary relation of right and power is also behind legal phenomena. Because of the unitary relation, right and power constitute a single entity, much like a man and a woman who register to marry to form a special personal relationship and to establish a single entity called family. In terms of social content, the individual interest and public interest directly embodied by right and power, respectively, are both interests recognized and protected by the law, and in terms of interests recognized and protected by the law, right and power are a complete undifferentiated unity. In terms of the material content embodied by right and power, both property

owned by individuals and property owned by public agencies are property with defined ownership, therefore are fundamentally an undifferentiated unity.

It is highly important to discover and identify the existence of the unity of right and power. Academically, it provides legal studies a much needed new analytical unit, which includes right and power, but is independent of, and different from, right and power. This is analogous to a water molecule, which is consisted of a hydrogen atom and an oxygen atom, but is also an independent entity different from a hydrogen atom and an oxygen atom; This is also analogous to a family in social life, which is consisted of a husband and wife, including their children, but itself is an independent entity different from a husband, wife, or their children. Similarly, much like water molecules should be an independent analytical unit in chemistry, family should be an independent analytical unit in sociology, economics, or marriage law studies, the unity of right and power should also be an independent analytical unit in jurisprudence.

Judged from the perspectives of legal theory and practical value, the discovery and identification of the unity of right and power, and of the concept of faquan signifying the unity make clear the following three layers of significance: 1. Objectively, corresponding to the unity of right and power, there is a social interest as a whole, which is consisted of individual interest and public interest, at the same time is also higher and more important than any one of these two interests. Therefore, legally speaking, neither individual interest nor public interest can be considered as fundamental, only social interest as a whole is fundamental. When the balance of interest is undertaken by legislative and judicial agencies, the standard for judgement should be on whether it is beneficial to promoting social interest as a whole, rather than emphasizing any one of the two components. 2. Within a state, the material content corresponding to the unity of right and power, i.e., faquan, is the total property with defined ownership, which is consisted of property owned by individuals and property owned by public agencies, at the same time is also higher and more important than any one of the two. Therefore, legal protection for property right should not prejudice either property, rather, it should be judged based on whether it is beneficial to promoting the increase of the total volume of property of these two subjects. 3. Similarly, with regard to right and power, the law should not in general treat right as the standard, nor treat power as the standard, and can instead only treat the unity of right and power as the standard. This has been the case in actuality, only with some prejudice in different historical periods.

Since the unity of right and power is so important, it certainly should be considered as an independent analytical unit in legal studies. Theoretically,

this requires us to condense the understanding of the unity of right and power into a new legal category, formulating new modes of thinking. The formulation of the concept of faquan suits this need.

It must be acknowledged that, the field of legal studies is not totally ignorant of the existence of the unity of right and power, and of the necessity of bringing this mode of thinking as an analytical unit into legal studies, but unfortunately the very limited understanding has been lingering at a primitive stage for a long time. In terms of actual content, "right in the wider sense" that many scholars have discussed sometimes indeed refers to the unity of right and power (of course, right in the wider sense sometimes is also used to refer to all "quan" that include extra-legal right). What is right in the wider sense? According to Hohfeld's differentiation above, it is a concept that includes the following four meanings: right in the narrower sense, privilege (liberty), power, and immunity. According to Pound's differentiation, it is a concept that include the following six meanings: interest, interest plus legal means to protect it, legal right in the narrower sense, power, right of liberty, privilege, similar to Hohfeld's.

Right in the wider sense has been accepted by many Chinese scholars. Scholarly analyses in China as well as in other countries on right in the wider sense are also of certain significance, but there are obvious shortcomings as well: there is no specific and in-depth investigation of the attributes and characteristics of right in the wider sense; there is no clear understanding of the connotation and denotation of right in the wider sense, without realizing the conceptualization and categorization of its understanding; although right in the wider sense is differentiated into specific components such as right in the narrower sense, power, privilege, immunity, etc., the differentiation is completely superficial and phenomenon-centered, with absolutely no clear explanation of their differences and relations from their origins, even with no effort of working toward that goal. The various analyses on right in the wider sense in Western jurisprudence do not have theoretical value that is worth special consideration, they are not to the point in solving the issues facing Chinese legal studies, nor can they offer much help.

So, even though the field of legal studies has been aware of the existence of right in the wider sense, it has only perceptually touched upon the issue, and has not grasped the issue rationally. The failure to strictly differentiate right in the wider sense from "right in the narrower sense" and to conceptualize and categorize the differentiation is a good example. Actually, for a long time, right in the wider sense theoretically has been something faintly discernable, content unknown, and elusive. This at least indicates that the fundamental areas of jurisprudence research in China are still very weak, because the fact that this

issue is not solved indicates precisely that we still don't have clear differentiation between, and understanding of, right and power, the two most important legal phenomena, with no idea about the objective relationship between the two.

In order to realize the categorization of the understanding of right in the wider sense, especially the unity of right and power, I started a number of years ago to identify the basic attributes of the unity of right and power, and based on the need to form a corresponding mode of thinking, I formulated the concept of faquan (called social right initially) reflecting that objective phenomenon and condensing the understanding of its essential attributes, and provided a more comprehensive interpretation. To meet the needs of legal studies, here I add some more discussion or necessary reiteration from the perspective of jurisprudence.

A further adjustment can be made to the concept of faquan signifying the unity of right and power: faquan is the total interest that is conceived from the perspective of legal studies, and is recognized and protected by the law, its material content is the total property with defined ownership, is embodied by various forms of legal right and power, and the mode of its existence is influenced by the historical-cultural tradition and the era in which a country finds itself. This definition shows that, 1. as a concept, faquan is not a term in legal provision, but a jurisprudential category denoting the total interest reflected in a country's legal system, and is the product of abstract thinking; 2. the interest reflected by the concept of faquan is corresponding to the total property with defined ownership within a society or country and therefore reflects the legally-defined portion of the society's total interest, namely, the legally-defined social interest as a whole; 3. legally-defined right and power are different in terms of legal phenomena, but they are both the legal manifestation of interest, originating from property with defined ownership, thus fundamentally are a unity; 4. as the unity of right and power, its objective social content and material attributes are determined by the social content and material attributes of right and power, so, the total volume of faquan is the sum of right and power, no matter whether approached from either aspect; 5. faquan is a three-dimensional concept in that it is the unity of three main systems and three connecting systems, in which various legal rights and powers constitute the embodiment system, social interest as a whole constitutes the origination system, the corresponding total property with defined ownership constitutes the movement dynamics system, and "a country," "the historical-cultural tradition," and "the era" constitute the condition system, premise system, and background system, where the first three are primary, and the second three are secondary.

The formation of the concept of faquan is very important. First, the establishment of the concept of faquan has completed the process to elevate the

objective existence of social interest as a whole towards a legal mode of thinking, allowing this most important interest to enter the field of legal studies, much like the individual interest reflected by the concept of right and the public interest reflected by the concept of power. This is the indispensable condition for a comprehensive analysis of legal phenomena.

Second, the formation of the concept of faquan has realized the theoretical identification of right in the wider sense and the categorization and normalization of its understanding, at the same time has ended the long history where the formal differentiation between the concept of right and that of power is unclear, and right in the narrower sense and right in the wider sense are not strictly demarcated. Third, the formation of the concept of faquan in fact has sublated a series of basic propositions of jurisprudence, thus not only constituting a tremendous challenge to existing jurisprudence, but also providing momentum for its further advancement. In this sense, as long as jurisprudence can face the concept of faquan squarely, and actively meet the accompanying challenges, this field can certainly break away from the academic quagmire of long-term stagnation, moving forward with great strides.

Finally, perhaps more importantly, the formation of the concept of faquan will offer a new way of thinking that can help us resolve, from the perspective of legal studies, some important theoretical problems that are long overdue. Take the dispute about the various problems over standard, with the concept of faquan, the perspective and conclusion regarding this problem will have to be fundamentally different: legally speaking, there will be no more dispute about whether right, duty, or both right and duty should be regarded as standard, instead, there will only be dispute about whether right or power should be considered as standard, or about faquan as the center; in terms of interest, the issue of standard will not vacillate between individual interest as standard or state interest as standard, instead, it will become the issues of individual interest as standard, public interest as standard, or the total social interest as standard; in terms of property, in addition to the dispute about whether the promotion of private property increment or the promotion of public interest increment should be given priority, there is another problem of whether the total volume of the increments of public and private property are more important than the increments of either private property or public property, therefore should be thought through first, etc.

To form a clear structure of new jurisprudence, it is not enough to have only the above five basic propositions, there should be more derivative propositions. I will discuss these derivative propositions in due course.

3 Elaboration on the Connotation of Faquan in Legal Relations[49]

After much research and investigation, I have the following four points to make about jural (legal) relations: 1. although it originated in Roman private law, and came from the West, the concept of legal relations is not an important term in jurisprudential works and legal dictionaries of contemporary Western Europe and North America, the jurisprudents of continental law countries use it more frequently, but have not had particular discussions of it, while major jurisprudential schools of Anglo-American legal systems do not formally refer to it in their representative works, so much so that even commonly used jurisprudential dictionaries (such as *Black's Law Dictionary*) do not list it as an entry; 2. the jurisprudential works of the former Soviet Union attach special importance to legal relations, and are accustomed to approaching issues from legal relations, the jurisprudential works in Japan during the first half of the 20th Century also has such tendency; 3. under the influence of legal studies of Japan, Germany, and the former Soviet Union, the Chinese field of legal studies, since the 1920s, has highly emphasized the concept of legal relations and the application of related theories, which is still very much flourishing to date in both Mainland China and Taiwan; 4. not every scholar is willing to accept the concept of legal relations, but the concept and related theories are indeed quite successful in interpreting legal phenomena, therefore it is still a valuable theoretical tool in analysis.

However, having made the above statements, I am now also more keenly aware of the one-sidedness of the existing theory of legal relations, which is especially reflected in the content of legal relations identified by the theory. If we don't overcome the one-sidedness, the value of the existing theory of legal relations will be very limited, will not have much future, and will even be abandoned by the field. Here I intend to reevaluate the content of legal relations, adjust and rationalize the understanding of the main aspects related to the traditional concept of legal relations, thus in general improve and expand the function of interpreting legal phenomena of the existing theory of legal relations.

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49 This part of the book is primarily based on the author's earlier article: "Falü guanxi de neirong chonggu yu gainian chongzheng 法律关系的内容重估与概念重整 [Reassessment of the Content and Conceptual Reorganization of Jural Relations]," *Zhongguo faxue* 6 (1999): 24–32. I have added some new discussions on power capacity here.

3.1 *The Significant Deficiency of the Existing Theory of Legal Relations*

In the past half of century, there has been much discussion on the content of legal relations in Chinese scholars' works and translated jurisprudential works, now I present some representative views in a chronological order.

Before 1949, a representative view was as follows: "the law often involves the interaction between more than two people, one side possesses certain intention, and is the right holder of certain action, while the other is the bearer of duty corresponding to the right, the two sides are linked. Such linkage is called legal relations;"[50] "whether it is public legal relation or private legal relation, they are both the relation of right and duty,"[51] "legal relations means the relation between right and duty, where one party enjoys right relative to the other party that therefore should have duty."[52]

Books published in the 1950s on the content of legal relations were mostly Chinese translations of the Soviet Union scholars' works, with very similar views reflected in them. Here are two examples: "Since the stipulations of duty and claim (namely, right—Tong Zhiwei) constitute the basic content of legal norm, duty and claim belong to the basic elements of legal relations;"[53] "legal relations are the special connection between right and its corresponding duty;"[54] "under a socialist legal system, all activities of administrative agencies, courts, procuratorates are strictly regulated by the law, therefore are activities exercising right and fulfilling duty, that is, activities forming the content of corresponding legal relations."[55]

Since the 1980s, jurisprudents in both mainland China and Taiwan have obviously maintained the same understanding as the above theories in terms of legal relations, believing that, "while legal relations are complex in terms of longitudinal genus," their core is nothing but right and duty;[56] and one of

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50 Takayanagi Kenzō 高柳贤三, *Falü zgexue yuanli* 法律哲学原理 [Principles of Philosophy of Law] (Shanghai: Shanghai dadong shuju, 1932), 234.

51 Minobe Tatsukichi 美浓部达吉, *Gongfa yu sifa* 公法与私法 [Public Law and Private Law] (Shanghai: Shangwu yinshuguan, 1941), 70.

52 Lin Jidong 林纪东 (ed.), Zhongguo xingzhengfa zonglun 中国行政法总论 [Principles of Chinese Administrative Law] (Chongqing: Zhengzhong shuju, 1943), 19.

53 Liewen列文 et al., *Guojia yu falü gainian* 国家与法律概念 [State and the Concept of Law] (Beijing: Renmin chubanshe, 1951), 88.

54 Jienisuofu杰尼索夫, *Guijia yu falü de lilun* 国家与法律的理论 [State and Legal Theory] (Shanghai: Zhonghua shuju, 1951), 435.

55 Yalishandaluofu亚历山大洛夫, *Suweiai shehui zhong de fazhi he falü guanxi* 苏维埃社会中的法制和法律关系 [Legal System and Legal Relations in the Soviet Society] (Beijing: Zhongguo renmin daxue chubanshe, 1958), 86.

56 Zheng Yubo 郑玉波, *Faxue xulun* 法学绪论 [Introduction to Law] (Taibei: Sanmin shuju, 1981), 113.

the key elements is the "right and duty that constitute the content of legal relations."[57] During those years, textbooks of jurisprudence commissioned and promoted nationwide by China's Ministry of Education (formerly State Education Commission) all, without exception, identify right and duty as the content of legal relations. Only recently has power been added after right and duty in some textbooks of jurisprudence, yet there is no rationale given, thus appearing short of integration with right and duty. This situation is known to everyone, so there is no need to go into more detail.[58]

During the same time, a theory on the content of legal relations formed in the 1990s and 2000s caught some attention, and was commented on in some works of legal studies, a theory that is based on the separation between the concepts of right and duty promoted by Hohfeld and other scholars within the Anglo-American legal system.[59] Comparing to its contemporary and forthcoming theories of relevance, this theory has an obvious tendency to specify the relationship between right and duty, but it remains within the framework of treating legal relations as right and duty.

Based on the above texts, all the theories share a basic commonality, that is, they position the content of legal relations within right and duty, which is precisely the fundamental problem of the existing theories on the content of legal relations (which can be called right-duty theories on the content of legal relations). The irreparable shortcoming of these theories is that their core categories, i.e., their concepts of right and duty cannot cover the element of power in actual public law relations, therefore can only be suitable in interpreting private law relations, not reasonably interpreting public law relations. In legal studies in China as well as in other countries, the concepts of right and power are always differentiated: legally speaking, the former is

57 *Zhongguo dabaike quanhu* 中国大百科全书 [Encyclopedia of China] Law Vol. (Beijing: Zhongguo dabaike quanhu chubanshe, 1984), 99.

58 Readers can refer to the relevant sections of the following textbooks published since 1990: *Falixue* 法理学 [Jurisprudence] or *Faxue jichu lilun* 法学基础理论 [Basic theory of law]," edited by Shen Zongling 沈宗灵, Sun Guohua 孙国华, and Zhang Wenxian 张文显, respectively. These textbooks are published by Beijing daxue chubanshe, Renmin daxue chubanshe, Gaodeng jiaoyu chubanshe, and Falü chubanshe, respectively. On the changes related to the interpretation of the content of legal relations, readers can refer to chapter 4 and Chapter 7 of the book *Falixue* 法理学 [Jurisprudence], edited by Shen Zongling (Beijing: Beijing daxue chubanshe, 2000).

59 See Shen Zongling 沈宗灵, "Dui huofeierde falü gainian xueshuo de bijiao yanjiu 对霍菲尔德法律概念学说的比较研究 [A Comparative Study of Hohfeld's Concept of Law]," *Zhongguo shehui kexue* 1 (1990): 67–77, and David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), 677.

the "quan" belonging to citizens and other individuals, while the latter is the ruling "quan" exercised by state and state agencies.

However, it has become a consensus within the field of legal studies that, the relations between the "quan" of citizens and other individuals and the "quan" of state agencies, the relations between the "quan" commanded by state agencies on various levels and kinds, are all public law relations, only those between the "quan" of citizens and other individuals can be private law relations. In all these relations, the concepts of right and duty can sufficiently reflect their private law relations, but, to a great degree, they are helpless in terms of the content of the other two public law relations.

It is true that, for centuries, the content of various public law relations has been positioned under the concepts of right and duty, but this has been the result of extra-logical coerciveness, or deliberate misrepresentation, much like what is meant by the Chinese idiom: "making a deer out to be a horse." Historically, this conception was not born in China, but in the West.[60] Concerning the specific "technique" in operating in this regard, a law dictionary influential in Anglo-American legal world makes it very clear in defining the term "legal relations": "Much legal thinking would be clarified if every time the speaker was disposed to use the term 'right' or 'duty' he substituted whichever was appropriate of the other terms."[61] Logically speaking, this is to brazenly instruct the readers how to make a deer out to be a horse, by using right or duty to replace relevant concepts, forcibly treating no-right and no-duty as right and duty, including the suggestion to treat power as right; additionally, according to the explanation of this law dictionary, it seems that, certain legal relations would not be clarified, if the process in which the concept of power is not first replaced by the concept of right, or no-right and no-duty are not first replaced by right and duty!

Unfortunately, what the scholars advocating this view do not understand is that, under the condition of not changing the original meaning, only when two nouns signify the same object, can they be used interchangeably. Two nouns signifying different objects cannot be used interchangeably, and right and power are precisely two nouns (or concepts) that signify two different objects. The reason why jurisprudents world over can subordinate the content of various legal relations to the interpretative model of right and duty is precisely that

60 See Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (Washington: M. Dunne, 1901); Immanuel Kant, *The Metaphysical Elements of Justice; Part I of the Metaphysics of Morals*, 1st ed. Trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965); G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1953).

61 David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), 677.

they utilize the "method" or "technique" of "making a deer out to be a horse," beyond which there are no other "tricks."

Perhaps some will argue that, what we are talking about is right in the wider sense, while you are talking about right in the narrower sense, and the right we are talking about includes power. But this is not the case! If right were truly treated as right in the wider sense by right-duty jurisprudence, its theory on legal relations would not have been so problematic and so illogical, and its conclusions would have been similar to what has been reached in this book. In this sense, if right were indeed treated as so-called right in the wider sense that includes power, according to the basic requirement of research to clarify, simplify, and specify its object, "right" would have to be divided into two, and form three mutually differentiated terms, i.e., right in the wider sense, right in the narrower sense, and power.

So, when dealing with legal relations and their content, at the minimum we should cover the following three aspects: right in the wider sense and duty, right in the narrower sense and duty, as well as power and duty. Unfortunately, traditional jurisprudence whose core categories are right and duty has never intended to do, and indeed has not done, this work, and right in the wider sense, right in the narrower sense, and power are all in complete disarray. Therefore, strictly speaking, right in the works of right-duty jurisprudence sometimes indeed has something to do with right in the wider sense, sometimes even accidently equates to right in the wider sense itself, but it has never clearly-defined right in the wider sense, but something amorphous vacillating between right in the wider sense, right in the narrower sense, and power.

In a word, the above-identified shortcomings of the right-duty theory regarding legal relations put its believers into a state of embarrassment every time when they have to face the issue of power. On one hand, if they admit that there is an issue of power beyond right, they then are unable to explain the relative logical status of power in reference to right, vice versa; on the other hand, if they don't admit that there is an issue of power, power actually does exist in a form different from right in social reality. So, when dealing with the issue of power, scholars have to face a dilemma: they either put power into an ambiguous status where it seems to be separated from, and at the same time associated with, right, with the result that both concepts become fuzzy in terms of connotation, and undefined in terms of denotation; or, they simply refuse to admit that there is any issue of power in the world, treating it as right, and avoiding the term power altogether, which is bound to cause their theories to become divorced from social-legal reality.

In this aspect, the right-duty theory regarding legal relations in China has inherited the tradition of early European-American legal studies, choosing the former alternative, and at the same time has also continued its original

shortcoming. Some scholars in the former Soviet Union have chosen the latter, so much so that, in a book entitled *The General Theory of Law* of more than 200,000 words in length, there is almost no place for a term on power that is relative to, and equal to, right, other situations (such as adding another word "state" to form a term like state power) are also very rare;[62] in this way, the power-right relations, the power-power relations can only be mysteriously rewritten as the right-duty relations.

In terms of both reality and theory, this kind of situation is indeed problematic, even harmful to the historical process of constructing a socialist country with the rule of law. Because in practice the notion of undifferentiated right and power goes against the protection of right, and against using right to constrain power, on the contrary, it can only help power to suppress right. The reason is that the degree of concentration and natural intensity of power is far greater than right, and if not differentiated and specifically constrained, power will definitely overwhelm right.

Historically, the formation of this one-sided right-duty theory regarding the content of legal relations has its complex background, with the most direct reason being the influence of Roman private law. Indeed, it does make sense to use right and duty to interpret the content of private law (civil law) relations, because private law relations are just the right-right relations between equal subjects, and right-duty relations are precisely the main manifestations of right-right relations. However, if the right-duty interpretation model is used to explain the content of constitution, criminal law, civil procedure law, and other public law relations, that is actually forcing the conceptual structure of right and duty to undertake a function that it does not have, thus necessarily causing illogical results. Even in countries that traditionally are accustomed to considering the content of legal relations from the perspectives of right and duty, there have been occasionally scholars who have sensed this problem, for example, one scholar during the former Soviet Union era said: "unfortunately, in Soviet jurisprudential theories, the issue of legal relations up to now is still studied in combination with civil law."[63]

The one-sided identification of the content of legal relations has also caused the one-sided understanding of the subject and object of legal relations. According to existing theories of legal relations, the subject of legal

62 See Yaweici 雅维茨, *Fa de yiban lilun* 法的一般理论 [A General Theory of Law] (Shenyang: Liaoning renmin chubanshe, 1986).

63 Yalishandaluofu 亚历山大洛夫, *Suweiai shehui zhong de fazhi he falü guanxi* 苏维埃社会中的法制和法律关系 [Legal System and Legal Relations in the Soviet Society] (Beijing: Zhongguo renmin daxue chubanshe, 1958), 85.

relations includes the subject of right and the subject of duty, not the subject of power, thus the role of state agencies and their officials when they exercise their authority is not the subject of power, but the subject of right, as if there is no difference from the status of citizens and other individuals. Similarly, the object of power also has to be treated as the object of right, obliterating the otherwise obvious differences between them.

But why has this illogical right-duty theory regarding the content of legal relations become a consensus and dominated the research on legal relations? It seems that the fundamental reason is the lack of sufficient understanding of some basic legal phenomena, primarily and predominantly the lack of in-depth understanding of the relationship and difference between right, power and duty. The lack of truth leads easily to the blind following, and the two are regularly interrelated.

3.2 *A New Conception of the Content Structure and Social-Economic Attribute of Legal Relations*

With regard to legal relations, many would point out two aspects. The first is that the relations are conceptual relations or contain the attribute of conceptual relations. I do not disagree with that. Because the law is formulated by humans, is direct manifestation of will, and the participants of legal relations also have will, so the social relations regulated by the law certainly contain the attribute of conceptual relations. The second is that the determinant factor behind legal relations is economic relations, which in general is not problematic either. But, this is not sufficient if we wish to accurately, specifically, and jurisprudentially appropriately analyze relevant legal phenomena. I believe that the content of legal relations should be discussed from the following three aspects: 1. Realistic legal norms regulating social relations (which already include the idea admitting that legal relations contain the attribute of conceptual relations); 2. The corresponding interest relations; 3. The property relations. The interest relations and the property relations are the concentrated and specific reflection of economic relations on the levels of interest and property.

In order to actually understand the content of legal relations anew, we need to clarify the difference and relationship between right and power, as well as their relationship to duty. Recent research shows that the similarity between right and power is that both are interests recognized and protected by the law, and both have property with defined ownership as their material foundation; the difference between right and power is that, the former is the legal form of individuals' interests and individually-owned property, while the latter is the legal form of public interests and property owned by public agencies; duty on the other hand is a legal phenomenon opposite to right and power, manifested

as negative interest (no-interest) corresponding to interest embodied by right and power, and as corresponding property loss (or consumption, expenditure, etc.). It should be made clear, however, that right, power, and duty should all be differentiated as either legally-defined or realized, only the realized part has real interest content and property content (including negative interest content and property content), unrealized right, power, and duty have no real interest content and property content, but have probable, or potential interest content and property content.

Now it becomes easier for us to see the elements constituting the content of legal relations and the structure of the elements. Of course, this has to be illustrated through the elements constituting legal relations themselves.

The first element of legal relations, namely, the basic element, is the relationship between individuals regulated by the law (including natural persons such as citizens as well as other social-economic organizations with an individual status, similarly hereafter) and the state (including state agencies and their officials), and the content of the relationship includes right, power, as well as their interest and property. Strictly speaking, this relation can be further divided into two sub-groups: the right-power relation dominated by right and the power-right relation dominated by power.

The first sub-group is the right-power relation dominated by right, whose actual manifestation is, for example, the relation between the right to request protection from state agencies when citizens' personal, property and other right faces a threat from others and the power (authority) to be exercised by state agencies in response to protect rights according to the law. It manifests itself in a form of right-duty relations where individuals exercise their right, and state agencies fulfill their duty, but in actuality it is a relation formed through interaction between right and power. The legal content of this relation is right-power, the social content of this relation is that individuals capture interests, while the state expends or loses interest, and in terms of material content, it fundamentally means that individuals preserve or capture property, while the state expends or loses property. In many cases, their property content is not direct, but indirect. Nonetheless, there is no right-power relation without any property content.

The second sub-group is the power-right relation dominated by power, whose actual manifestations are various. For instance, the state exercises the power of taxation, while individuals correspondingly give up a certain quantity of property rights, and use it as tax payment to be transferred to the state. Another example is that the state exercises administrative power with regard to the affairs of certain areas of social life, while individuals correspondingly waive their rights (or freedoms) to act freely in relevant aspects, etc. It

manifests itself in a form where state agencies exercise power, while individuals in response transfer relevant rights to the state or curtail their own relevant rights.

This relation appears to be that the state exercises power, while individuals fulfill duty, but in actuality it is also a relation formed through interaction between power and right. The legal content of this relation is power-right, the social content of the relation is that the state captures interests, while individuals expend or lose interests, and in terms of material content, it fundamentally means that the state captures property or effectuates property, while individuals expend or lose property. Of course, the power-right property content is mostly not direct and often has to go through multiple social transfers to show its property attribute.

Right-power relations and power-right relations are both public law relations, but the subject of the two public law relations have different strength in realizing the corresponding interest content and property content. In right-power relations, the subject of right, in order to realize interest content and property content corresponding to right, often has to submit a request to the subject of power, and is able to respond only after the subject of power has issued a judgement about the legality and rationality of the request, and the request can also be denied, while the subject of right cannot force the subject of power to realize its content of interest and that of property. In power-right relations, the subject of power is much more direct and forceful in realizing the interest content and property content corresponding to its own power.

The Japanese jurisprudent Minobe Tatsukichi calls this superiority characteristic of state agencies in unilaterally intending and then exercising coercion as the presumptive legality of state action, and defines presumptive legality as follows: "in public law relation, state's intention and action have the power to regulate an agency; and this action, until nullified or determined invalid by an agency of proper authority, is presumed 'legal,' and the other party cannot deny its validity."[64]

However, power is often related to a specific subject, and, unlike most rights, cannot be freely transferred or conveyed. This is a special limitation. The existence of presumptive legality within power-right relations is worth paying attention to in the research of the content of legal relations.

The second element of legal relations is the relation between individuals that is regulated by the law, and the content of the relation includes right, as well as its interest and property. What the traditional concept of right-duty

64 Minobe Tatsukichi 美浓部达吉, *Gongfa yu sifa* 公法与私法 [Public Law and Private Law] (Shanghai: Shangwu yinshuguan, 1941), 114.

relations in jurisprudence can signify is precisely this part of content. The legal content of this relation is right's internal exchange, transfer, and coordination, its corresponding social content is the exchange, transfer, or coordination of interests between individuals, and in terms of material content it fundamentally means that, during the process of production and existence, the interaction, transaction, borrowing, renting, and gifting of property between individuals are all the specific forms of interaction. There are two noteworthy points in understanding this relation:

(1) Any right-duty relation between equal subjects is but the externalized form of right-right relations, primarily and predominantly is the externalized form of the exchange between rights, with some secondary forms such as the realization of the mutual coordination of rights, etc. Of course, exchange and mutual coordination do not merely mean a one-to-one exchange or coordination on the spot, rather, they occur within a vast space of social life and over a relatively long time-period. For instance, according to Article 15.2 of the *Marriage Law* of China, parents have the duty to support their child who is underage or is unable to live independently, and the latter has the right to ask the parents for child support. Viewed in isolation, this right-duty relation is not right-right relation. But if the stipulation in Article 15.3 is taken into account, "if child does not fulfill his parent support duty, the parent who is not capable of working or is difficult to survive can have the right to ask his child for parent support," it then becomes very clear that, the right for a parent to obtain parent support and the right for a child to obtain child support here are objectively equal exchange relations. But this exchange is obviously not one-to-one and on the spot.

However, it should be admitted that the equal exchange between rights and their coordinated realization, within the scope of actual right, primarily and predominantly refers to property interests, secondarily refers to social-political rights, and thirdly refers to rights of the person. Within rights of the person, rights of status, i.e., the part within marriage and family relations, is to a certain degree special, whose property content and attribute of equal exchange should not be over-simplified, and affection within a family and ethical elements has to be taken into consideration.

(2) Within substantive rights, only property right has direct property content, the property content of rights of the person and social-political right is indirect; procedural right has no independent property content, whose property content is attached to corresponding substantive rights.

The third and the last element of legal relations is the relation between different state agencies regulated by the law, whose content is power and

corresponding interest and property. The realized form of this relation is that, the relation between central state agencies and local state agencies, and the power-power (authority) relation between different state agencies on the same level, are mainly related to the issue of appropriate allocation and coordinated realization of the total volume of power within the system of all state agencies. Power-power relation is externalized into power-duty relations, much like right-right relation is externalized into right-duty relations. In any case, the power-power relation is different from the right-duty relation, the theory of treating the power-power relation as the right-duty relation is the result of extra-logical coercion and is academically of no difference from mistaken identity and factual distortion.

The content of legal relations when the subject is state agencies is the power allocation and coordination within the structure, whose social content is the distribution of public interest and its control and utilization, and in terms of material content, it is state agencies' management and utilization of public property (primarily embodied by state budget revenue). Under normal conditions, the utilization of power is related and corresponding to the consumption of public property and the realization of public interest embodied by the consumption.

Because different parts of public property have different ownership within the system of state agencies, the components of public interest embodied by the public interest are different, therefore the nature of power transferred from them and the function determined by them, etc., are also different.

The contradiction formed through these differences is the origin and force for the formation and development of the interactive relations of power's internal opposition, coordination, and redistribution, etc. This is very important in understanding power-power legal relations and their content.

3.3 *Reorganization of the Concept of Legal Relations*

Having investigated the actual content of legal relations and achieved some newer and more specific understandings, we can see that the problems like the main areas of the entire traditional theory on legal relations being divorced from the reality of social-legal life become even more obvious. In order to resolve these kinds of problems, I propose, based on the above understanding, to identify the following propositions to correct the main content related to the traditional category of legal relations in jurisprudence:

(1) In terms of jurisprudence, the content of legal relations is various legally-defined "quan," namely, the unity of right and power. In terms of department law, the content of legal relations can be defined even more specifically.

As discussed above, in terms of the specific composition of various legal relations, its content is either right or power, or something that has both, and right and power by necessity are within certain legal relations. Therefore, the content of legal relations as a whole is the unity of right and power, and its name in legal studies is faquan. The relations between right, power and interest, property illustrate that, the social-economic content behind faquan is the total interest recognized and protected by the law and the total property with defined ownership, and this is the entire social-economic content covered by legal relations that have the unity of right and power as their legal content.

It is necessary here to differentiate the perspective of jurisprudence from the perspective of legal studies. Jurisprudence is to summarize the content of legal relations in the most general terms, while department law studies should consider the specificity of its field, and summarize the content of legal relations from the specific conditions of the field. Therefore, when jurisprudence summarizes the content of law as a whole on the level of faquan, department law studies also should consider the specific conditions of its field and summarize the content of legal relations of relevant department law. For example, civil law studies can start from the right-right relation and summarize the content of civil legal relations, administrative law studies can start from right-power and power-right relations and summarize the content of administrative legal relations, and litigation law studies can start from power-right and power-power relations and summarize the content of litigation legal relations, so on and so forth. Constitutional law studies is a special case.

Because constitution is fundamental law, it in principle regulates the three layers of basic relations of right-power, right-right, and power-power, so the point of view is basically coincident whether from the perspective of the constitution or the perspective of jurisprudence, and the content to be seen should be the unity of right and power, namely, the entire "quan" recognized and protected by the law. Naturally, whether we are talking about right, power, or a certain combination of the two, we cannot ignore interest and property that are determinant behind the relations.

(2) In jurisprudence, it is better to position legal relations as "faquan" relations between subjects, and department law studies can consider its specific conditions and position legal relations as right-duty relations or power-duty relations. This is a technical issue about how to state the content of already recognized legal relations, but it remains important, because if a rational understanding is not properly stated, it is impossible to be widely accepted.

In jurisprudence of the past, legal relations are stated as the right-duty relations between the subjects, whose one-sidedness and extent of divorcing from the reality is so severe that various fields of legal studies in public law

are almost incapable of logically interpreting real legal relations at all. This form of discussion in general has lagged far behind the need of legal studies' development.

Based on the new understanding of the content of legal relations, is it proper that legal relations are stated as right-power relations? Not proper either! Because right and power are different from the unity of right and power, the relation between right and power is also not tantamount to the internal relation within the unity of right and power, and the legal relations in jurisprudence precisely mean the internal relations within the unity of right and power, primarily including the relation between right and power, the relation between one right and another right, and the relation between one power and another power. Furthermore, there is even the relation between the unity of right and power and right or power, respectively, and it would be too limited to say that right-power perspectives can merely illustrate the content of the relations between right and power.

What is rational and logical is that legal relations in general are stated as the relations between various "quan" recognized and protected by the law. But this way is not what is familiar to people, and it is not succinct itself, therefore is still not convenient. Right, power, the unity of right and power are all "quan" recognized and protected by the law, are all "legally defined quan," i.e., faquan. By using the term "faquan," legal relations in jurisprudence can therefore be stated as the faquan relations between subjects, a term in the most general sense that comprehensively reflects the content of various aspects and various levels under various legal relations, and appears familiar and succinct, therefore is the most ideal choice.

When legal relations are generally stated as the faquan relations between subjects, I also admit that it is proper that the right-right relation is stated as the right-duty relation (because all real right-duty relations are the manifestation of the exchange and coordination between rights), and I further believe, for the same reason, in public law studies, the right-power relation dominated by right can also be stated as right-duty relations.

Nonetheless, power-power relations and power-right relations dominated by power cannot be stated as right-duty relations, rather, they can only be stated as power-duty relations, the reason for which I have previously discussed. From still another aspect, if the concept of duty must be included in the process of analysis, the three relations of right-power, right-right, and power-power covered by faquan relations can be theoretically converted into right-duty and power-duty relations.

Here, faquan relations are general, while all other pairs of relations are specific. For instance, according to this reasoning, in civil law studies, the right-duty

relation is still stated as the right-duty relation, only that it is now also a faquan relation (the existing form of faquan relation in civil law studies) or part of faquan relations, so actually remains right-right relations; but in administrative law studies, it may be different, for example, the legal relations between specific tax agencies and taxpayers has always been called right-duty relations following the practice of civil law studies, but in the new way of thinking, it should be stated as power-duty relations, is the reflection of faquan relations in administrative law studies, and in actuality is the externalized form of power-right relations, so on and so forth.

(3) Along with the affirmation with regard to the content, the subject of legal relations on the abstract level in jurisprudence should be changed from the original subject of right-duty to the subject of faquan. The subject of faquan is fundamentally the subject of interest and the owner of corresponding property embodied by faquan or its certain portion. On further specific analysis, this proposition contains two meanings, one on a general level, the other on a specific level. On the general level, the subject of faquan is the subject of interests recognized and protected by the law as well as the owner of corresponding property. On the specific level, i.e., in terms of the actual composition of faquan, this proposition also indicates that the subject of rights is the subject of individual interests, and is the owner of individual property; the subject of power, on the other hand, is the subject of public interest and the owner of public property. In general, while the subject of faquan should be used to replace the subject of right-duty, in terms of certain department law studies, the subject of right-duty or the subject of power-duty are still very much viable. In actuality, the subject of right-duty and the subject of power-duty often are indeed the subject of right or power. Because the subject of right-duty and the subject of power-duty are merely the externalized forms of right-right relations, power-right relations, and power-power relations; they are the same. The reason has been provided above.

Similarly, the capacity of right and the capacity of action should also be construed as the capacity of faquan and its corresponding capacity of action. According to the new affirmation with regard to the content of legal relations, the original capacity of right can only be part of the capacity of faquan, and parallel to which is the capacity of power. In other words, the capacity of faquan includes the capacity of right and the capacity of power. If the capacity of right is the legally-recognized enjoyment of right or qualification of undertaking duty and is the condition necessary for participating in legal relations, then the capacity of power is legally-recognized possession of power or qualification of undertaking a corresponding duty, and is also the condition necessary for participating in legal relations. The concept of the capacity of power is very

important in both theory and practice in today's Chinese society. In China, especially in the vast countryside, below the county/district levels there are too many subjects exercising power, many of which have no capacity of power and are not legal subjects. This has resulted in very serious illegal activities, and should cause sufficient concern among legal theorists. As for the capacity for action, it should also be divided into two parts correspondingly, namely, the capacity of action corresponding to the capacity of right, and the capacity of action corresponding to the capacity of power.

(4) The abstract and general object of legal relations in jurisprudence should be affirmed from the perspective of faquan, while from what perspective the object of legal relations in department law studies should be affirmed needs to be analyzed case by case. On the definition of the object of legal relations, there are generally two theories, one of them is the theory that differentiates the object of legal relations from the object of right-duty, the other is the theory that maintains the view that there is no need to differentiate these two. Most Chinese scholars have adopted the latter theory, which treats the object of legal relations as the object of right and duty between the subjects of legal relations.

Due to thematic constraint, I will not comment on the validity of the two theories, suffice it to say that, according to the above understanding, when using the second theory to describe the object of legal relations in jurisprudence, we should change "the object of right and duty" to "the object of faquan," in order to overcome the one-sidedness caused by the fact that "right-duty" does not include power. This way, the identification of the object of legal relations is actually to further divide faquan and its corresponding property as the content of legal relations into some specific objects of legal relations, primarily including personality, person, action, material, intellectual property, authority, etc. This is a general and descriptive view of the object of legal relations.

In terms of department law studies, the object of faquan can be further divided into the object of right and the object of power. The object of right is actually the object of right-right relations (e.g., in civil law) and the object of right-power relations (e.g., in cases of administrative law where power is dominant), and they are all externalized into the object of right and duty, so to identify the object of right is essentially to affirm the specific content of the interest of citizens and other individuals and the specific existing form of property owned by individuals. The object of power is actually the object of power-power relations (e.g., organizational law of state agencies) and the object of power-right relations (e.g., in cases of criminal law and administrative law where right is dominant), they are all externalized into the object of right-duty, so to identify this object is fundamentally to affirm the specific

demand of public interest and the specific goal of effort in the process of effectuating public property.

(5) The formation, alteration, and extinction of legal relations should be described as the formation, alteration, and extinction of faquan relations in jurisprudence, and should be described otherwise in department law studies on a case by case basis. The social-material attributes of the formation, alteration, and extinction of faquan relations is the formation, alteration, and extinction of interest relations and property relations. In department law studies, the formation, alteration, and extinction of legal relations manifest themselves as the formation, alteration, and extinction of various specific forms of faquan relations, such as the formation, alteration, and extinction of right-duty relations as right-right relations and power-right relations, and of right-duty relations as power-power relations and power-right relations, etc. Behind this process are naturally the formation, alteration, and extinction of corresponding interest relations and property relations. Along this line, legal fact is the phenomenon or condition that is legally defined and is able to result in the formation, alteration, and extinction of faquan relations and their specific existing forms. The reason for that has been provided above.

If the five propositions are valid, they, in combination, can renew the concept of legal relations in traditional jurisprudence to form a new concept of legal relations.

CHAPTER 3

Faquanist Theory of the Center of Law

The discussions on the center of law are practically significant. Beginning from the early 20th Century, Chinese semantic analysis jurisprudence has maintained that the center of law is right. This chapter investigates the history of right-centric theory, contending that the theory is unsound and void of practical legal functions, except for providing some psychological consolation to those who long for rights. The author believes and proves in detail that law should be centered on faquan. The author also responds comprehensively to the questions raised by other jurisprudents.

1 How Does a Faquanist View the Center of Law[1]

It is indeed quite necessary to explore the centricity (focus, center, etc.) of law in a country like China that has historically favored statutory law, and emphasized systematic doctrine in philosophical and cultural pursuit. More than 80 years ago, there was already general concern over the issue of the center of law in the field of legal studies in China, where multiple concepts or ideas on the center were formulated, the most prominent of which was right-centric theory, which has been touched upon previously in this book. In the late 1980's and early 1990's, a group of younger scholars once again, under a new historical condition, focused on the issue of the center of law, reaffirming and greatly enriching, through debates, right-centric theory. Since then, the research on the center of law has become absent. On the surface, it is because right-centric theory has become conclusive in the field of legal studies, with its critics having nothing or nothing new to say, and even their audience having no interest to listen to them anymore. But, in my view, that is far from the truth. The absence of discussions on the center of law is not because right-centric theory has correctly and factually resolved the issue of what the center of socialist law is or ought to be, rather, it is because, in the research on the center of law in the field of legal studies, there has been insufficient depth and specific analyses, lack of attention to practical experience, and absence of new thinking that can

1 This chapter is primarily based on the author's previously published article, "Quanli benwei shuo zai pingyi 权利本位说再评议 [Revisiting Right-centric Theory]," *Zhongguo faxue* 6 (1999): 47–65.

break the old framework formed in the early 20th century in the field of legal studies in China. It is my contention that in order to advance the research on the center of law to achieve an understanding that is more realistic and more scientific, we must first discard the blind homage to propositions such as "right is or ought to be the center of socialist law," and realistically evaluate right-centric theory with such a proposition at its very core.

1.1 *The Background for the Revival of Right-Centric Theory*

To use "revival" to describe right-centric theory is appropriate because it existed a long time ago in the history of legal studies in China, but was not mentioned for a period of time. Based on the information that I have gathered, the phrase "the center of law" initially appeared in an article written by Liang Qichao in 1904, and in the 1930's, one scholar interpreted centricity of law as "the focus of the foothold of law," or "the focus of law."[2] And right-centric theory, without any doubt, was a theory or ideal that considered right as the foothold or focus of law. At that time, there were two kinds of statements such as follows, "law exists with right, and the center of legal phenomena is right;"[3] "the general ideal of the center of law is right. Therefore it is the general view among modern scholars that law is the stipulation of right, and legal studies are the study of right."[4] Back then, there were already scholars who systematically discussed the social-economic conditions of the origin, meaning, formation, and existence of right-centric theory and its future development and evolution.[5]

Many believe that, in all the years after 1949, the discussions on the issue of the center of law, including those on right-centric theory, occurred only in the late 1980s. That is not without reason, but is not accurate. Indeed, between the establishment of the People's Republic of China and the end of the 1980's, the field of legal studies in China seemed to have forgotten everything about "the center of law" during the four decades, except for a few works of legal

2 For the original text of Liang Qichao, see the previous chapter. The original texts of the other two formulations are: "Before studying right and duty, we have to especially discuss the concept of 'the focus of the foothold of law,' i.e., 'the center of law';" "right-centricity evolves from duty, through ideological inference, the focus of law should not have right as the only center." See Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies] (Shanghai: Shanghai huiwentang bianyishe, 1933), 241, 242.

3 Zhang Zhiben 张知本, *Shehui falüxue* 社会法律学 [Social Jurisprudence] (Shanghai: Shanghai faxue bianyishe, 1931), 54.

4 Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [Introduction to Legal Studies] (Shanghai: Shanghai huiwentang bianyishe, 1933), 241.

5 See Zhu Caizhen 朱采真, *Falüxue tonglun* 法律学通论 [Introduction to Jurisprudence] (Shanghai: Shijie shuju, 1930), 185; Zhang Zhiben 张知本, *Shehui falüxue* 社会法律学 [Social Jurisprudence], (Shanghai: Shanghai faxue bianyishe, 1931), 54–63.

studies published in Taiwan. However, when evaluating right-centric theory, the fact of not using the phrase "the center of law" does not mean there was no issue of "the center" of law in this period.

During that period, although there was basically no work of legal studies using the term "the center," the law and legal studies that appeared in the period did mostly have a center. That center was literally "the will of the dominant class," and was power-centric in terms of legal studies associated with the then actual conditions. There are four reasons for such a judgment.

(1) During the first 6–7 years, the main endeavor and achievement were to introduce the works of legal studies of the Soviet Union, which, from a predominant position, considered "the will of the dominant class" precisely as the foundation of law. The legal thinking of Vyshinsky reflects well the will-of-the-dominant-class-centric view of the then legal studies of the Soviet Union. He said: "Marxism-Leninism gives a clear definition (the only scientific definition) of the essence of law. It teaches that legal relationships (and, consequently, law itself) are rooted in the material conditions of life, and that law is merely the will of the dominant class, elevated into a statute."[6] The works of legal studies of the Soviet Union translated into Chinese and published in those years all fundamentally exhibit this view of the center of law.

(2) During the last few years of the 1950's and the years before the "Cultural Revolution" in the 1960's, some Chinese authors produced many works of legal studies, but, because the entire country, in politics, practically adopted the guiding principle of taking class struggle as the key, the "will-of-the-dominant-class"-centric view was not only accepted by Chinese jurisprudents, but further strengthened.

(3) Although there was, strictly speaking, little legal studies to talk about during the "Cultural Revolution," there were activities of legislation, enforcement, and justice in nature, as well as government documents and propaganda pamphlets, where "the-will-of-the-dominant-class"-centric view did not at all become less important along with the decline of legal studies, on the contrary, it was unprecedentedly strengthened.

(4) Even after the "Cultural Revolution," during the decade after the 3rd Plenum of the 11th Central Committee of the Chinese Communist Party, the predominant status of "the-will-of-the-dominant-class"-centric view was still obvious. That is not surprising, because legal studies have their own relative independence, they can move ahead of, or fall behind of, the development of social existence. But it should be noted that, after the 3rd Plenum,

6 Andrei Y. Vyshinsky (ed.), *The Law of the Soviet State*, trans. Hugh W. Babb (New York: MacMillan, 1948), 13.

the-will-of-the-dominant-class-centric view that continued to exist in legal studies was not consistent with the demand to center on economic development, therefore was impossible to better serve for the nation's fundamental task of concentrating on socialist modernization that was affirmed by the Constitution, which is essentially the manifestation of legal studies falling behind the actual development of the then economic-political reality.

It should be made clear that, what "the will of the dominant class" emphasizes is the will of the entire dominant class in a society, which is relative to the dominated classes and all social members as individuals (including every member of both dominant class and dominated classes), thus manifesting as the will of the state. So, in terms of legal studies, the-will-of-the-dominant-class-centricity, in its real content, is power-centricity. The law in China during the period when the guiding principle was taking class struggle as the key, was indeed power-centric law in actuality. The basis for that assessment is that, economically, because of the practice of planned economy based on strict or relatively strict public ownership, the law had to be consistent with the state's need to directly control and configure the majority and even the entirety of social-economical resources, therefore had to strengthen power, especially the status and function of administrative power, which was exactly what happened in reality; politically, the focus of the law was to repress the resistance to the new order and restoration of the old order from the exploiting classes and their agents, and even after the exploiting classes as classes were actually eliminated, the law was still driven by the ideology of class struggle and the fear of restoration of the old order, thus continuing to make up new enemies that needed to be repressed.

There are some common features of power-centricity in different times and countries, especially power-centricity under the disguise of the-will-of-the-dominant-class-centricity in the history of the socialist movement and the history of the People's Republic of China. Commenting on power and right during the transition period of contemporary Chinese society, one scholar uses some very lively and succinct phrases to describe the notion of power held by the powerful during that period, which are not accurate concepts of legal studies, but vividly reveal some important characteristics of power-centric law and legal systems: 1. "boundless power," which means that the "circle of power" is infinite, the scope of application and influence of power is boundless, can permeate into any area of any right holder, and is not restricted by the boundary of "circle of power" of the powerful, the specific manifestation of which is limitless power, all-inclusive power, power with rare or no restriction; 2. omnipotent power, which means that, power can change everything, achieve everything, all those dominated by power have to obey it, otherwise they will be

punished by the powerful; 3. paramount power, which means that, comparing to everything else in a society, power appears to be the highest, enjoys supreme status, the status of the powerful also appears to be the highest in comparison to anybody else; 4. power complex, which means that, the powerful sees power as the indispensable resource, thus having a universal tendency of adoring, idolizing, and fighting for, power; 5. power over the law, which means that, the value of power is conceptually considered higher than the law, the powerful practically slights the law, empties the law, and damages legally-defined systems, using his own will to replace the law; 6. power is treated as natural and proper, the powerful is always correct whenever there is conflict with the right-holders, who are definitely in the wrong if there is anything wrong; 7. power's tendency toward independence, namely, power is pursued and protected for the sake of power, with the value of power transiting from "tool" to "ultimate."[7]

The characteristics of power-centric law or legal systems should be understood in terms of the conditions in China before centering on economic development, undertaking reform and open policy, practicing market economy, and the previous conditions of the former Soviet Union and other Eastern European countries. Thus it is necessary to supplement or add the following three characteristics in addition to the above-identified seven characteristics of power-centricity:

(1) Power-centricity especially emphasizes supremacy of state authority or power, tending to believe that, with power, there is everything, and without power, there is nothing. The common social-political manifestations of power-centricity are official-centricity, paternalism, and more strict and powerful protection of power than that of right. This characteristic predominantly manifested in the constitution and public law.[8] For instance, the Constitutions of 1924 and 1936 of the Soviet Union, the three official Constitutions of 1954, 1975 and 1978 of China, all place chapters stipulating state agencies and their authorities before chapters affirming citizens' status and rights, revealing the characteristic of power-centricity in terms of both form and content. To give another example, in terms of criminal law, the former Soviet Union always treated as its primary task the protection of social institutions and the state

7 Shi Yinxiu 石印秀, "Zhongguo shehui zhuanxing shiqi de quanli yu quanli 中国社会转型时期的权力与权利：观念分析 [A Conceptual Analysis of Power and Rights during the Transformational Period in China]," in Xia Yong 夏勇 (ed.), *Zou xiang quanli de shidai* 走向权利的时代 [Toward the Time of Rights] (Beijing: China University of Politics and Law Press, 1995), 69–106.

8 In my view, the constitution is both public law and private law, or is neither public law nor private law, because in the legal system of a country, it is both the fundamental law of public law and that of private law.

system, and defined as the primary and the most serious crimes the damage of social institutions and the state system, showing the spirit of providing favorable protection to power and the subject of power.[9] In that aspect, criminal legislation in China has always basically followed the same spirit as that of the Soviet Union or Soviet Russia, including the Criminal Law of 1997, which all exhibit the tendency of favoring power, at least in terms of their form. By contrast, the penal codes of some countries are quite opposite to that practice, for example, the current penal codes of Switzerland and France primarily and predominantly define and punish the crimes against personal rights, secondarily the crimes against property, and only thirdly the crimes against the state and authoritative agencies. It is clear that these penal codes place the protection of rights at the primary position, while the protection of power the secondary, displaying the characteristic of favoring rights.[10]

(2) Power-centricity places state property in an especially favorable position, giving it special protection. That is the economic content of power-centricity. That characteristic manifests itself in many constitutions of socialist countries, and predominantly in their civil laws, whose specific embodiment includes: the affirmation of the infinite universality of the object of state ownership, while strictly restricting the object of individual ownership; the return of illegally obtained state property being without a statute of limitations, regardless of the subject's wrong-doing, or being in the know, and regardless of whether it is obtained directly or after several changes of hand; presumed state ownership when there is dispute between the state and individuals over property ownership is impossible to be factually determined;[11] the state claiming ownership whenever there is unknown ownership or ownerless property, and whenever a found object is without a found owner or the owner not claiming

9 See the second edition of the *Swiss Criminal Code* amended in 1971, in Xiao Rong 萧榕 (ed.), *Shijie zhuming fadian xuanbian* 世界著名法典选编 [Selections of Representative Legal Codes of the World (Criminal Law Volume)] (Beijing: Zhongguo minzhu fazhi chubanshe, 1998), 756–774; and the relevant sections of the *French Penal Code* of 1994, (Beijing: Zhongguo gong'an daxue chubanshe, 1995).

10 See the provisions regarding the task of criminal law, the concept of crime, and the unusual punishment (death sentence) of the *Penal Code of Soviet Russia* of 1922 and 1961, the *Criminal Legislative Outline of the Soviet Union and the Republics*, in Xiao Rong 萧榕 (ed.), *Shijie zhuming fadian xuanbian* 世界著名法典选编 [Selections of Representative Legal Codes of the World (Criminal Law Volume)] (Beijing: Zhongguo minzhu fazhi chubanshe, 1998).

11 See *Zhongguo dabaike quanhu* 中国大百科全书 [the Encyclopedia of China (Law Volume)] (Beijing: Zhongguo dabaike quanhu chubanshe, 1984), 519–520. The volume summarizes the civil law principles of special protections over state property in socialist countries.

it; the loser of an object ought to reward a certain percentage of the value of the object to the founder of the object (e.g., 20%), while the founder of the object has no right to reward if the found object is owned by the state.[12]

(3) Power-centricity usually proposes or emphasizes that individual interest obeys state interest unconditionally. That is the social content of power-centricity. Right has individual interest as its social-economical content, while power has state interest (i.e., public interest recognized and protected by the law) as its social-economical interest. The manifestation of power-centric social economy by necessity requires that individual interest obeys state interest unconditionally. "Revolutionary youth is a brick, and is shipped wherever it is needed;" "the state interest is important no matter how small it is, while individual interest is unimportant no matter how large it is." These once popular slogans are extremely vivid manifestation of the power-centric notion of interest.

These are some of the characteristics of typical power-centric law or legal systems, and are the result of theoretical generalization and summarization. In actuality, they may not always exist in a way that typical and comprehensive.

Comparing these characteristics with the conditions of China before establishing economic development as the focus and undertaking reform and open policy, the law and legal system or actually practiced system in China should be categorized as the power-centric type; after adjusting the ownership structure based on the level of development of productive forces, especially since practicing a socialist market economy, the characteristics of power-centricity in China have subsided to a great degree. On the other hand, there is no denying that because socialist market economy is still not mature, reform of the political system falls behind, the historical tradition of power-centricity has strong influence, and the renewal of legislation, enforcement, justice and law-abiding is still not consistent with the need of social-economic development, power-centricity within the current law or legal systems in China is still relatively obvious.

These are the social-historical conditions for the revival and development of right-centric theory, therefore are indispensable reference points to properly understand and reasonably evaluate right-centric theory.

12 See Article 68 of the *Civil Law of the Soviet Russia* that was passed in 1922 and went into effect in 1923, in Xiao Rong 萧榕 (ed.), *Shijie zhuming fadian xuanbian* 世界著名法典选编 [Selections of Representative Legal Codes of the World (Civil Law Volume)] (Beijing: Zhongguo minzhu fazhi chubanshe, 1998), 1022.

1.2 *The Fundamentals and the Real Value of Right-Centric Theory*

To use category to reconstruct jurisprudence and to discuss law-centricity based on that is a great contribution towards negating jurisprudentially the-will-of-the-dominant-class-centricity or power-centricity, and forming a legal theory basically consistent with the new social-historical condition centered on economic development and reform and open policy. The 3rd Plenum of the 11th Central Committee of the Chinese Communist Party rejected the slogan of "taking class struggle as the key," and formulated the strategic decision of transitioning the focus onto the construction of socialist modernization. The reform and open policy was further carried out universally after the 12th National Congress of the Chinese Communist Party in September 1982. Under the new historical conditions, how legal studies should further develop was the top issue for the jurisprudents.[13] Consistent with that condition, scholars adopted the analytical path to interpret legal phenomena, and conducted seminars on jurisprudence among younger instructors of the Law Department of Jilin University in 1984–1985, where they systematically discussed how to center on reform jurisprudence originally imported from the Soviet Union, and at the same time, revived the topic of centricity of law.[14] From the late 1980's to early 1990's, the field of legal studies of China discussed the issue of the center of law, with wide participation and long duration that was rarely seen in the history of modern Chinese jurisprudence.

During the debate on what is or ought to be the center of law, there were a variety of points of view, among which the most dominant was right-centric theory. The theories on the center of law during that period include duty-centric theory, right-centric theory, conformity theory, equality theory. There were also scholars who touched upon the issues of social-centricity and power-centricity. In terms of the background where the debate on the center of law was conducted within the scope of the right-duty relationship to determine which the center was, the above theories should be categorized as three standard theories: A) Duty-centric theory. In terms of the process of discussions, the center and the focus were synonyms, so duty-focused theory was actually duty-centric theory. B) Right-centric theory. C) Theory without center. Conformity (unification) theory, or equality theory both rejected that there was a center in the relationship between right and duty, thus actually was a theory without center. In addition, although social-centricity and power-centricity were

13 Zhang Guangbo 张光博, "Shilun fading quanli de jiexian 试论法定权利的界限 [On the Limits of Legal Rights]," *Shehui kexue zhanxian* 4 (1981): 202–206.

14 Zhang Guangbo 张光博, *Quanli yiwu yaolun* 权利义务要论 [On Right and Duty] (Changchun: Jilin daxue chubanshe, 1989), 3 (Introduction).

touched upon, few scholars substantively discussed or affirmed them, thus not constituting "theory." During that debate, right-centric theory was elaborated to the fullest, supported by the most scholars, and enjoyed the most influence.

Based on representative scholarly discussions, the primary theoretical characteristics and view-points of right-centric theory may be summarized as follows:

(1) The condition and background of right-centric theory is that when basic categories of legal studies were discussed in late 1980's, scholars "coincidentally focused on the issues of legally-defined right and duty, and achieved a consensus," "agreed that right and duty were the center of law," and believed that "legal studies is the study of right and duty."[15] "Right-centric theory was formed based on the ideology of 'right and duty being the core content of law.' The consensus among the scholars of right-centric theory is that all legal issues may be reduced to right and duty. Right and duty not only constitute the logical links between legal norms, legal relations, and legal responsibilities, but also govern all legal departments and the entire process of legal operation."[16] Therefore, the discussion of the issue of the center of law and the conclusion of right-centricity both proceeded within the realm of right and duty. However, certain scholars later added the following content: "Right-centricity exists in two kinds of relationships, one is the relationship between right and duty, the other is the relationship between right and power; when they propose right-centric theory, scholars of right-centric theory opposed not only duty-centricity, but also power-centricity."[17]

(2) Right-centric theory believes that "right-centricity succinctly embodies the notion that 'law is (ought to be) centered on right.' 'Right-centricity' and 'duty-centricity' are conceptual combinations introduced during the process of discussing 'the center of law.' 'The center of law' is about the issue of which one of right and duty is the origin, axis, or focus within the law, i.e., a codified right and duty system. 'Right-centricity' is an abbreviated version that right is (or ought to be) the origin, axis, and focus of the law."[18] The word "centricity"

15 Ibid., 4–7 (Introduction).

16 Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [Study of Basic Jurisprudential Categories] (Beijing: Zhongguo zhengfadaxue chubanshe, 1993), 95–96.

17 See Zhang Wenxian 张文显, *Ershi shiji xifang fazhexue sichao yanjiu* 二十世纪西方法哲学思潮研究 [A Study of Schools of Western Legal Philosophy in the 20th Century] (Beijing: Falü chubanshe, 1996), 506–507.

18 Zhang Wenxian 张文显, "Cong yiwu benwei dao quanli benwen shi fa de fazhan guilü 从义务本位到权利本位是法的发展规律 [the Developmental Path of Law: From Duty-centricity to Right-centricity]," *Shehui kexue zhanxian* 3 (1990): 135–144, 135.

in right-centricity "is but the meaning of origin, starting point, and logical beginning."[19]

(3) The prominent feature or principle of right-centric law or legal systems is that social members are all equal subjects; in terms of the relationship between right and duty, right is the purpose, the primary, and the foundation and meaning for duty; "in terms of the relationship between right and power, the right of citizens, legal persons, organizations and other subjects of right is the purpose and limit of the configuration and operation of the state's political power, i.e., the configuration and limit of the state's political power can only be legal and just when they are for the realization of protecting the subject of right, coordinating the conflict between rights, prohibiting the mutual violation between rights, and maintaining the balance of rights;" "the presumption of right may be affirmed when the law does not clearly prohibit or compel;" "in the process of exercising its right, the subject of right can only be subject to legally-defined restriction, and the sole purpose of affirming such restriction is to ensure equal and rightful recognition, respect, and protection of the right of other subjects, so as to create a free and just legal order that can best ensure the realization of the right of all subjects."[20]

(4) The "right" in right-centricity refers to legal rights. The scholars of right-centric theory have often affirmed that. They claim that, "what is revealed by 'right-centricity' is the starting point, axis, or focus of right within the totality of legal regulations of a country, i.e., the system of legally-defined right and duty;"[21] "right is the interest legally recognized and protected by state and the active means for the subject of right to choose and realize its interest according to the law."[22]

(5) Right-centricity is a derivative and general concept that is symbolic, relational, systematic, and value-oriented, thus exhibiting a lateral interest relationship. Here "'right' essentially is an equal and lateral interest relationship.

19 Zheng Chengliang 郑成良, "Quanli benwei lun—jianyu Feng Yuexian tongzhi shangque 权利本位论—兼与封曰贤同志商榷 [On Right-centric Theory: Discussion with Comrade Feng Yuexian]," *Zhongguo faxue* 1 (1991): 30–37, 31.

20 Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [A Semantic and Meaning Analysis of Right-centricity]," *Zhongguo faxue* 4 (1990): 24–33, 25.

21 Zhang Wenxian 张文显, "Cong yiwu benwei dao quanli benwei shi fa de fazhan guilü 从义务本位到权利本位是法的发展规律 [the Developmental Path of Law: From Duty-centricity to Right-centricity]," *Shehui kexue zhanxian* 3 (1990): 135–144, 157, 135.

22 Zhang Wenxian 张文显, "Cong yiwu benwei dao quanli benwei shi fa de fazhan guilü 从义务本位到权利本位是法的发展规律 [the Development Rule of Law: From Duty Standard to Right Standard]," *Shehui kexue zhanxian* 3 (1990): 135–144, 136.
Ibid., 136.

In that sense, right-centricity is the banner against 'power'-centricity characteristic of transversal and absolute domination (such as 'monarchical supremacy,' 'official-centricity,' and 'paternalism,' etc.)."[23]

(6) Socialist law is a new type of right-centric law, which is determined by the nature of the public ownership of the means of production and the peoples' democratic dictatorship; in terms of social value, right-centricity is the legal guarantee for developing productive forces, the socialist economy, and realizing socialist democracy, and the legal environment for nurturing and expanding civic awareness.[24]

These are my summary of the principles of right-centric theory, which may not be accurate and comprehensive, but it is clear that the revival of right-centric theory after the 1980's is much more comprehensive and enriched in content, and much more in depth in interpretation than previously.

There is historical necessity and important realistic significance for right-centric theory to revive and enrich under new historical conditions. It has been elaborated by the scholars of right-centric theory in the past decades and well-known in the field of legal studies in China. But I believe that, up to this point, the value assessment of the significance and practical consequence of right-centric theory has not been appropriate and accurate, much of which has been exaggerated and imagined. The reason is that there is a lack of in-depth understanding of right, power, duty and other basic legal phenomena and relevant "centers" and their relations.

To understand the real value of right-centric theory, it is necessary to first recognize four objective attributes of right: A) within the realm of domestic law, the subject of right is the social individual; the nature of the state is public power, and the state does not enjoy rights,[25] only in the legal position of a social individual can state agencies enjoy corresponding rights. Here individual refers to members relative to the political state and constituting citizen

23 See Zhang Wenxian 张文显, *Faxue jiben fanchou yanjiu* 法学基本范畴研究 [Study of Basic Jurisprudential Categories] (Beijing: Zhongguo zhengfadaxue chubanshe, 1993), 91.

24 See Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [A Semantic and Meaning Analysis of Right-centricity]," *Zhongguo faxue* 4 (1990): 24–33, 25.

25 Traditional theories treat the "quan" centered on state ownership as right, but further research indicates that when certain capacities of these "quan" are exercised by state, they are closer to power, and is more suitable to be grouped into the category of power theoretically, the other capacities under the rule of law essentially manifest as the right of enterprises and other social-economic organizations. Therefore, the state, strictly speaking, is not the subject of right. Of course, the discussion here is limited to the scope of domestic law. Concerning these contents and the proof of the four objective attributes of right, see Section 11 of Chapter Two in this book.

society (or civil society), including primarily and predominantly citizens, as well as foreigners, stateless persons, legal persons and other non-governmental social-economical organizations. B) Right has individual interest as its social content, and is the legal form of individual interest. C) Right has individually-owned property as its direct material content, and is fundamentally the legal form of that portion of property. D) Right, individual interest, and individually-owned property are corresponsive to each other, and can be converted or reduced to each other.

There is a much more important condition in recognizing the real value of right-centric theory, that is, there is the need to see the following truth behind all the different theories about the "center": up to this point, in legal life and legal studies, the debate on the "center" is essentially centered on, within the realm of right-power relationship, right-centricity or power-centricity or their existence or absence, where duty-centricity rejected by right-centric theory is actually power-centricity in terms of its content. As indicated by reality, right-right relations, power-power relations, and right-power relations constitute the entire content of legal relations, and relation is but the externalized form of a portion of the content. Through specifically analyzing realistic legal relations, we can draw four conclusions that can prove the above points.

(1) Both parties of a right-right relation are right, so there is no real meaning to talk about right-centricity; within the scope of private law, relation is and is only the externalized form of right-right relations, thus, within the relations, talking about right-centricity, in terms of content, is completely the same as talking about duty-centricity, so there is no issue as to which is the center. Right-right relation is the relation of right exchange and its coordinated realization between equal individuals, which appears in the form of the relations between right and duty after the concept of duty is introduced that embodies the negative legal form and the negative social-economical content. For example, in a buying and selling relationship formed through a sales contract, its actual content is an exchange relationship between the property ownership in the medium of money and the property ownership in the medium of goods, and is expressed as a relationship only after the concept of duty is introduced. As the relationship between right and duty within the realm of private law is essentially a relationship between rights, it is the same thing to emphasize right-focused or duty-focused in terms of a right and duty relationship, except for little difference in form. Therefore, in that relationship, there is no need to discuss the issue of the "center."

(2) Both parties of a power-power relation are power, where there is no need to talk about power-centricity, nor the issue of right-centricity; after

the concept of duty (obligation) is introduced it embodies the negative legal form and the negative social-economical content, the power-power relations between the subjects of power are externalized into the relationship between right and duty (obligation), and now the relationship between right and duty (obligation) is and is only the externalized form of a power-power relation. So when we talk about power-centricity or duty-centricity between the subjects of power, what we emphasize is actually all about power, with no need to talk about the center. Take duty as an example, in any country with the rule of law the following facts can be observed: between different state agencies, to emphasize the duty of local state agencies is to emphasize the implementation of the power of central state agencies, and to emphasize the duty of central state agencies is to emphasize the implementation of the power of local state agencies; between state agencies of the same level, to emphasize the duty of one agency (e.g., legislative agency) is definitely tantamount to emphasizing the implementation of the power of another corresponding state agency (administrative or judicial agency) of the same level, etc., and vice versa. Here, focusing on duty is exactly the same thing as focusing on power, where any talk of power-centricity and duty-centricity is unnecessary.

(3) Only within the realm of right-power relations can there be the issue of "center" about which one is the focus. The right-centric theory promoted by Chinese jurisprudents in the past decades, in terms of form, is formulated around duty-centricity within the realm of the relationship between right and duty, but essentially is elaborated around power-centricity within the realm of the relationship between right and power. Overall, right-power relations are the relation of contradictory opposition and coordinated realization, and after the concept of duty is introduced that embodies the negative legal form and the negative social-economical content, the total relationship between right and power, through the link of duty, converts into a relation between the right-duty relation model that is dominated by right and the power-duty relation model that is dominated by power.

The former is the right-duty relation model that is dominated by right, whose real form is that individuals actively exercise right, while state agencies reactively exercise their corresponding power. For example, the first model includes the following situations: a citizen exercises the right to sue in civil, administrative, and criminal private prosecution cases, and the court exercises its power to review the plaintiff's lawsuit based on the law and to decide whether to hear the case; a citizen exercises the right to report to the police and request for assistance when confronting banditry and fire, and police exercises its corresponding power to arrest bandits and control fire. Because of the identity of

a state agency's power and duty, the above relation is naturally described as the model where individual exercises right, and state agency performs duty. That model is a realistic right-centric model.

The second model is the power-duty relation model that is dominated by power, whose real form is that state agency actively exercises its power, while the social individual reactively performs its duty in exchange for the realization of the right corresponding to the duty. For example, the industrial and commerce administrative agency exercises its administrative power, and its administrative counterpart performs a corresponding duty in exchange for the realization of management rights; the taxation agency exercises its power to collect taxes, and the tax payer performs its duty to pay taxes in exchange for the realization and protection of corresponding rights, etc. That is clearly a right-power relation, but it specifically takes the form of a power-duty relation. That model is a realistic power-centric model. It is clear that, in the first model, i.e., the right-duty model dominated by right, regardless of right-centricity or duty-centricity, the actual focus is on right, the only difference is that the former directly emphasizes right, while the latter indirectly emphasizes right; in the second model, there is no difference between power-centricity and duty-centricity, and both implement power, the only difference is that the former is direct, while the latter is indirect.

Therefore, within both models, there is really no need to talk about the center, what is really significant is whether to focus on the right-centric model or power-centric model to deal with the issue of right-power relations. The first model is favored by right-centric theory, proposing that focusing on the first model to deal with right-power relations is the most important real content of right-centric theory (in terms of form, it also proposes to focus on right to deal with the relations of right and duty between equal subjects, but because the actual content of that relation is right-right relation, it has lost real significance). What is targeted and rejected by right-centric theory is actually the second model, and it opposes that by focusing on the second model to deal with right-power relations as the other most important real content of right-centric theory (in terms of form, it also opposes focusing on duty to deal with the relation between right and duty between equal subjects, but there is no real content here, for the same previously stated reason).

(4) In terms of right, power, and their relationship, all other theories about the center of law so far are merely variations of right-centricity or power-centricity: regarding duty-centricity between the subjects of right, its content is equal to right-centricity; regarding duty-centricity between the subjects of power, its content is equal to power-centricity; to equally stress right and

duty, and to equate right and duty is in fact to negate that the law has a center; individual-centricity is right-centricity that focuses on the expression of subjective characteristics; and social-centricity is power-centricity that focuses on the expression of social-economical content, etc.

Based on a comprehensive consideration of the social-historical background of the revival of right-centric theory in the end of the 20th Century, the objective attributes of right, and the content that the theory proposes and the object that it negates, we can see more clearly now about the nature of right-centricity and its real value: the law and legal system back then was of power-centricity, or very much of power-centricity, and power-centricity is a tendency toward extreme nationalism manifested in a right-power relationship; in constructing a socialist country with the rule of law and the market economy, we must correct its extreme aspects and content; and "over-correction is necessary when correcting wrongs"—emphasizing one-sidedly the status of right to the extreme in order to overcome problems caused by one-sidedly and extremely emphasizing the status and effect of power. The real value of right-centricity is mainly revealed here. Now I summarize that value from the following aspects:

1) Right-centric theory has helped the renovation and development of Chinese theory of legal studies. The legal theory of the 1980's did not show clear improvement over the era before the "Cultural Revolution," particularly, its core concept was still the will of the dominant class or class nature, with the apparent appearance of political ideology. Using right-centricity to replace the-will-of-dominant-class-centric view as the core of legal studies has allowed legal studies to break away from the appearance of political ideology, and to enjoy some professional characteristics indispensable for a subject within social sciences, thus being instrumental to the formation of the unique aspect of legal studies in viewing social existence.

2) Within the field of legal studies, right-centric theory has been consistent with the historical transition of Chinese society from taking class struggle as the key link to focusing on the development of economic construction, and reform and open policy as well as market economy, and consistent with the need for that transition and development. That is because, on the one hand, it does not reject the law's class nature and the-will-of-the-dominant-class nature, but also does not one-sidedly emphasize these attributes; on the other hand, mindful of over-expansion of power in the history and the old regimes, and severe repression of individual rights and freedoms, it affirms that, under socialist conditions, the rights and freedoms of citizens and other individuals should be focused in the legal system, which helps to further human liberation

under the new historical conditions. And human liberation and advancement of subjectivity are not only the most important symbol of liberation of productive forces, but also the basic conditions for further development of productive forces and the formation of the market economy.

3) Right-centric theory has had a corrective function on the extreme tendency of "power-centricity" in the legal field. Because of the lack of democratic tradition in history, plus the practice of planned economy in the past decades that was based on the fact that the government directly allocated a vast majority of social-economical resources, the most striking issue in Chinese legal life for a long time was "power-centricity," and the dozens of ill-characteristics of power-centricity mentioned previously were in full display during that period. Right-centric theory and the need to implement the right-centric spirit have reflected the people's strong demand for containing power-centricity, at the same time have been consistent with the need to construct a socialist country with the rule of law in terms of expanding right and containing power.

4) Right-centric theory has been helpful in eliminating the influence of nationalistic tradition in legal life, advancing the subjectivity of the subject of right or the social individual, and promoting the development of socialist democracy. The political-legal culture in China has always had a tradition of worshiping and even deifying the state and government, while ignoring and even disparaging the individual, which has been the great barrier for the development of socialist democracy. Against that tradition, right-centric theory and the effort of implementing the right-centric spirit undoubtedly have promoted the immergence of individuals who are active, and fully aware of their own legal status, individuals who are the most basic components of a democratic society. Similarly, those individuals who are concerned about, and striving for, the full realization of their rights and interests are also to become a direct force in advancing the formation and development of democracy.

5) Objectively, right-centric theory has been helpful in correcting the tendency of one-sidedly emphasizing public interest and ignoring or disparaging individual interests. Individual interest embodied by right is symmetrical with, and oppositional to, public interest embodied by power (whose legal manifestation is state interest). There have been two opposing and even polarizing tendencies in different countries about how to look at and deal with these two interests.

One is the tendency of favoring public interest, which emphasizes that public interest is unconditionally superior to individual interest, and the latter must be unconditionally subject to, and serving for, the former. The supporters of that tendency often view "individual" as an individual person or organization in a society, without recognizing that, individual, as one end of a society,

actually includes every single person and every single organization, constituting a civil society that is capable of matching with, and competing against, state. In fact, general individual interest (the law is something general) is the entire interest minus the state interest of a society.

The other extreme is the tendency of individual interest supremacy, which is contrary to the tendency of public interest supremacy in its content, emphasizing the fundamental status of individual interest, and believing that individual interest has unconditional priority and superiority over public interest. In terms of the need to maximally preserve and increase the sum of social individual interest and public interest, it is harmful to one-sidedly emphasize any one of the two ends.

However, what was emphasized in China for a long time in the past was precisely one of the two ends, i.e., the unconditional public interest supremacy or state supremacy. The previously-quoted statement "state interest is great no matter how small it is, individual interest is small no matter how great it is" best reflects the biased ideology. Imagine, is the state interest of 1 cent worth really greater than an individual's interest of 100,000 yuan? Should an individual's property of 100,000 yuan worth really be sacrificed in order to protect state property worth 1 cent? No! The law cannot set that requirement, otherwise individuals and the state will both be severely harmed. In terms of the relations between right and interest, the social content of right-centricity is individual interest-centricity. Individual interest-centricity is inadvisable, but we have to admit that, against the various maladies formed after long observation of public interest-centricity, it served to correct the "wrongs," in spite of its eventual "over-correction."

6) Right-centric theory has conceptually responded to the requirements of the times in expanding right. To liberate and develop productive forces, to allow the market to play a basic role in allocating social-economical resources, and to expand socialist democracy, all require that society continue to expand right on the existing basis. Expanding right primarily is to enrich the categories of right. For example, all the following are specific manifestations of gradual enrichment of the categories of right: from being unable to own means of production, an individual can now own means of production, from not being recognized, right to privacy is now protected, from having no right to compensation upon damage by a state agency, an individual can now enjoy the right for compensation. In addition, expanding rights requires the increase of the absolute volume of right. From 10,000 RMB to 100,000 RMB in terms of average household property value, from 9-year compulsory education to college education, from a few people who could afford to fly to tourist destinations then to most people who can afford it now, all indicate the increase of right in

volume. Finally, expanding right also shows itself in the percentage increase of right within the total volume of faquan, with a variety of actual manifestations, chief of which is power's return to right, for example, certain affairs originally controlled by the state is now handled by citizens or their self-governing organizations. Right-centric theory has been consistent with the demand in China for continuing to expand right through these three ways.

7) Right-centric theory has been consistent with the psychological expectation of the social individual in strengthening the protection for human rights and civil rights. In the past half century, because of the lack of specific protection for rights for a period of time, the extensive rights that citizens should have enjoyed according to the Constitution often were not implemented in social life, so much so that there were situations of large scale and willful trampling or depriving civil rights. After the 3rd Plenum of the 11th CCP Central Committee, the condition has had fundamental improvement, but due to various historical and realistic reasons, there are inevitably some problems in terms of protecting human rights and civil rights. Strengthening right protection naturally has become the burning desire and wish of citizens and all orders of society. Right-centric theory has theoretically met the need of the Chinese people, thus generating a strong reaction among many legal scholars.

8) Right-centric theory has been able to generally explain private law phenomena. It is appropriate to consider private law phenomena from the perspective of right and duty, and to emphasize the central status of right in the private law system. The following statement is basically consistent with the actuality: "The concept of right becomes the core concept of civil law; civil law is actually a gigantic system of rights, which is true for Roman private law, the civil codes of France and Germany, Anglo-American private law, as well as civil legislation of countries with state ownership. Therefore, civil law has always been 'right-centric' law."[26] But it should be noted that, considering civil law as right-centric law only indicates that civil law places right at its center of concern and primarily focuses on the protection and realization of right, particularly relative to power. If, however, the right-centricity under discussion here is understood as individuals being legally superior to the state, individual interest being legally superior to state interest, and individually-owned property being superior to state property in terms of legal protection, will be reaching the other extreme, and is not correct. There should also be no such legal system, and if there is, it has to be abnormal, and must be corrected.

26 Li Shuangyuan and Wen Shiyang (ed.) 李双元、温世扬, *Bijiao minfaxue* 比较民法学 [Comparative Civil Jurisprudence] (Wuhan: Wuhan daxue chubanshe, 1998), 76.

In addition, every civil law of the countries with state ownership is not necessarily right-centric law. To determine if it is right-centric law, we should not consider how much of its content is related to stipulations about right, rather, we should consider whether it places right under or over power, or equally as power.

Theory is the product of its time; the value of a theory is determined by the degree to which it is consistent with the need of a society and its people in resolving the problems they face. Therefore, the assessment of the value of a theory inevitably changes along with the change of social-historical conditions. The value of right-centric theory is determined by when and to what degree the extreme tendency of power-centricity can be eliminated. In some sense, the value of right-centric theory is determined by the degree to which the society has the need to "correct" power-centricity.

1.3 *The Shortcomings of the Research Process of Law-Centricity and Their Negative Influence on Right-Centric Theory*

Right-centric theory is valuable in many aspects in terms of the notion that "over-correction is necessary when correcting wrongs," and praised by many scholars, but overall it is far from a scientific theory, and is impossible to theoretically properly guide or lead the practice of constructing a socialist country with the rule of law.

In order to understand that, we first need to reflect on the course of the research on centricity of law since the 1930's, and be mindful of its various shortcomings. Because right-centric theory has a symbiotic relationship with these shortcomings, and even builds upon the foundation of these shortcomings to a great degree.

First, the overall theoretical framework that right-centric theory relies upon does not reflect the reality, covers only the field of private law, not that of public law, and is long outdated globally. That overall theoretical frame is a conceptual system that interprets all legal phenomena around, which I call the analytical framework. It originates in Roman private law, is purely rooted in civil law, ignores power that is one of the most basic elements of various public laws, and simplistically understands and generalizes as relations the rich and various contents of right-power relations, right-right relations, and power-power relations in everyday legal life.

Therefore, that kind of legal theory can only be primarily a theory of private law, without even minimum coverage of administrative law, criminal law, economic law, procedure law, and other public law departments, as well as the constitution as the fundamental law. Perhaps precisely because of such serious shortcomings, jurisprudents in the major European and American countries

have long basically abandoned that analytical method.[27] Retrospectively, the analytical method was already outdated in the 1930's and 1940's when it was adopted, it would appear even old and outdated in the period since the 1980's. We certainly do not need to follow the European and American jurisprudents, but we cannot afford to ignore the fact that the analytical framework does not reflect social reality. A theory that does not reflect reality is useless in explaining and solving problems.

Second, the scholars researching the center of law previously do not have specific and in-depth understandings of the basic object of their research. For example, right is most heavily discussed in the research on the center of law, but no work has so far provided or even attempted to provide an explanation about the connections and differences between civil rights and legal rights, or solved the problem of unclear content and the ambiguous boundary with regard to right and power, much less accurately revealed the social-economical content of right. It is the case with duty as well. As a matter of fact, the understanding of duty is limited by the accuracy and depth of the understanding of right. To discuss the issue of the center of law against that background it is difficult to reach an accurate and specific conclusion, and even if there is a conclusion, its content is often unclear and ambiguous. There is a good example for that: the subject of right ought to be the social individual, the social content of right ought to be individual interest, right-centricity ought to be individual-centric in terms of its subject, and individual interest-centric in terms of its content.

Therefore, right-centricity, individual-centricity, and individual interest-centricity are essentially the same thing, and their differences reside only in terms of the aspects and methods of interpretation. In order to better understand the respective relationships between right and individuals as well as their interests, I read in the past few years virtually all the books of jurisprudence translated and published by several major publishing houses after the implementation of reform and opening policy, and a few dozen English books in jurisprudence and constitutional law studies. And my conclusion is: among the works before the 1920s, many adopted the framework of right-duty analysis, after that there were gradually fewer and fewer of such works, and overall works after the 1950s have basically abandoned the analytical framework of legal phenomena centering on right-duty.

Whenever it is pointed out that right-centricity is individual-centric, scholars of right-centric theory would immediately respond by saying that "the critic

27 Li Shuangyuan and Wen Shiyang (ed.) 李双元、温世扬, *Bijiao minfaxue* 比较民法学 [Comparative Civil Jurisprudence] (Wuhan: Wuhan daxue chubanshe, 1998), 76.

has made an error of confusion of concepts;"[28] "logically, right-centricity and individual-centricity are irrelevant."[29] Actually, there is virtually no confusion of concepts here, much less irrelevance. When someone points out that right-centricity is individual-centric, he is focusing on the subject of right, rather than not knowing that right-centricity and individual-centricity are two different written words. Similarly, in terms of content, right-centricity is individual interest-centricity, much like power-centricity is public interest-centricity. But some years past certain scholars of right-centric theory insisted that "right-centricity (at least the right-centricity that we propose) is not individual interest supremacy."[30] It must be pointed out that individual interest is the intrinsic attribute of right (much like sweetness is the intrinsic attribute of sugar, and bitterness is the intrinsic attribute of *coptis chinensis*), with the two indivisible. If right did not reflect individual interest, it would not be right anymore, in the same way that, if sugar were not sweet, it would not be sugar anymore. Here is another example, right should belong to the social individual exclusively, and right-centricity is not essentially different from "individual right-centricity." However, scholars of right-centric theory insist that, in addition to individual right, right also includes state right,[31] meaning that right-centricity includes state right (actually power)-centricity. That statement not only is inconsistent with the actuality, but also greatly weakens the original positive affect of right-centric theory under particular historical conditions, and appears to be inconsistent with the original intention of those scholars advocating right-centric theory.

Third, there is not much consistence in the research on the center of law, scholars oftentimes start all from scratch, rather than building on their predecessors' achievements, with the result that some views look like new to those who are not familiar with relevant history, but actually is, to a great degree, merely low-level repetition, hindering the advancement of the research on the center of law. To conduct research on a topic, we always should take a look at what our predecessors have done, which steps they have reached, what

28 Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [The Symantic and Meaning Analysis of 'Right-centricity']," *Zhongguo faxue* 4 (1990): 24–33, 28.

29 Zheng Chengliang 郑成良, "Quanli benwei lun—jianyu Feng Yuexian tongzhi shangque 权利本位论—兼与封曰贤同志商榷 [On Right-centric Theory—Discussion with Comrade Feng Yuexian]," *Zhongguo faxue* 1 (1991): 30–37, 35.

30 Zheng Chengliang 郑成良, "Quanli benwei shuo 权利本位说 [On Right-centricity]," *Zhengzhi yu falü* 4 (1989), 2–5, 5.

31 Zhang Wenxian 张文显, "Gaige he fazhan huhuan zhe faxue de gengxin 改革和发展呼唤着法学的更新 [The Reform and Development Call for the Renewal of Legal Studies]," *Xiandai faxue* 5 (1988), 3–6, 6.

problems they have well resolved, what problems they have resolved only partially, and what problems they have not researched at all, and then take different measures, really advancing the research of relevant problems. The worst practice in conducting research is not doing any investigation, ignoring the works and achievements of predecessors in the relevant field, treating one's own project as if no one had researched it since the beginning of time, starting anew from oneself and now. That practice has been jokingly called, in academia, "the First Emperor phenomenon," making it one of the pair with "the Second Emperor phenomenon" where people blindly follow upon seeing some fashionable theory.

Unfortunately, in the history of the research of the center of law, in both 1930–1940's and the last two decades, there have been two striking phenomena: on the one hand, with regard to the analytical framework and various propositions concerning the center of law, people have mostly adopted a "Second Emperor approach," basically accepting everything without specific analysis; on the other hand, in discussing relevant propositions (such as right-centricity and duty-centricity), they have adopted a "First Emperor approach," not mentioning any relevant views and predecessors' achievements that have existed for a long time. That abnormal phenomenon has reached its worst point in the research of the center of law in the past two decades. During that period, among the scholars who have positively discussed law-centric theories, virtually no one has indicated that it is a topic discussed by predecessors a long time ago, and has virtually never mentioned the views of the predecessors. With regard to right-centric theory, for example, a critic already pointed out back then: "when did right-centric theory originate exactly? How has its theoretical trajectory been? More in-depth investigation and research are really needed to find the answers to the above questions …… One thing is certain: right-centric theory is by no means an invention."[32] To that, the excuse of the scholars advocating right-centric theory is: "Whether right-centric theory is an invention or not is not an important issue."[33]

In fact, the issue is not that they have never denied the previous existence of right-centric theory, rather, it is that they have never really faced the long-existing right-centric theory. Furthermore, whether a theory is an invention and is invented by whom, is not really a completely worthless issue, strictly

32 Feng Yuexian 封曰贤, "'Quanli benwei shuo' zhiyi "权利本位说"质疑 [Questioning the 'Right-centric Theory']," *Zhongguo faxue* 6 (1990): 30–36, 31.

33 Zheng Chengliang 郑成良, "Quanli benwei lun—jianyu Feng Yuexian tongzhi shangque 权利本位论—兼与封曰贤同志商榷 [On Right-centric Theory: Discussion with Comrade Feng Yuexian]," *Zhongguo faxue* 1 (1991): 30–37, 35.

speaking, there is also more or less an element of right involved here. More importantly, if scholarly research does not move forward based on the research achievements of the predecessors, with everything starting anew from oneself and now, it will be difficult to achieve otherwise achievable improvements. Perhaps the overall academic atmosphere back then did not yet permit research with normal methods, and what I am doing here is "not putting myself in their shoes." If so, I would be willing to withdraw what I have said above.

Fourth, there has been an apparent tendency of deviating from the principle of truth-searching in scholarly discussion in the process of debates on the center of law, which has affected the credibility of the achievements or conclusions of law-centric study. Deviation from academic principles has existed in the following two forms: one is to link the scholarly discussions on the center of law to politics, raising the issue to the height of political principles, as if they were the debate between "the left" and "the right," poisoning the atmosphere of academic freedom. The other is to act impulsively about a scholarly view, either unconditionally approving, or unconditionally opposing, and picking sides on that basis, with a clear-up boundary between the two sides, as though determined to win the battle. Under that condition, what happens is that the opponents of a certain theory reject everything about the "other" theory, with nothing positive; while the proponents of a certain theory describe their "own" theory as perfect, as panacea for constructing socialist democracy and rule of law, support each other unconditionally, put up with a united front, attacking with full force if there is anyone who disagrees even most slightly with their "own" theory. Scholarly discussion or academic freedom should be a peaceful endeavor, all participants should adopt the approach of seeking truth based on facts, search for the truth, and treat submitting to the truth as the utmost standard.

Objectively, the above-identified two forms have hindered the normal operation of the research on the center of law. In that case, even though there are some conclusions or even "consensus," they are inevitably the results won by "force." That "force" is either "authority" or "mobs," but unfortunately it is not the case where whoever has the authority controls the truth, or the theory that enjoys large quantity of proponents has more elements of the truth. I am not suggesting that authority or "mobs" have been the reason in forming and maintaining the "consensus" of right-centric theory in the field of legal studies, rather, I am saying that, although not completely useless, they cannot be determining factors in forming and maintaining a theory.

Finally, there is one issue that should not be ignored, which is that some possibly important views have been neglected during the process of researching for the center of law. These views include the following: in the 1930's, a scholar proposed that duty should be corresponding to right and power,

and that treating duty as the foundation is treating right and power as the foundation; in the recent two decades, the effort in forming the concept of power-centricity and placing power side by side with right and duty has partially broken the existing analytical framework, even though it may not be a conscious endeavor on the part of these scholars; some attempts have been made in terms of research on power on a status parallel to right,[34] offering possibilities for exploring the issue of the center of law under a new analytical framework. However, because of the lack of in-depth investigation into these views and the ensuing problems, scholars researching the center of law overall have always remained within the old analytical framework, thus unable to advance the research on the center of law.

1.4 *The Severe Shortcomings of Right-Centric Theory Itself*

In view of the particular historical conditions of its formation, its pronounced main principles, and its foundational theoretical analytical framework, right-centric theory has the above-affirmed positive values, but overall is unscientific, unsound, and deficient, in the long run may highly likely cause unwanted consequences in both theory and practice.

There are two large categories with regard to the severe shortcomings of right-centric theory, one is in terms of its content, the other is in terms of its research. Let us take a look at the four issues in terms of its content.

(1) Except for advocating right-centricity, supporters of right-centric theory have not offered the theory specific content, thus right-centricity so far remains basically a slogan of legal studies, which makes it difficult to understand the center in legal life, and makes it rather impossible to exert much actual influence on legislation, enforcement, justice, and law-abiding. What is the rationale for that assessment? I believe one of the representative works of right-centric theory has offered an answer to that question, albeit an indirect one: on the one hand, that article advocates that, "in order to meet the needs for socialist commodity economy and socialist democracy, the legal system of China and state legal activities should be right-centric, and all legal professionals and all Chinese people should solidly uphold the idea of right-centricity;"[35] on the other hand, the same article also reveals the message that

34 In that aspect, the serial articles of Mr. Guo Daohui 郭道晖 are relatively representative, see his collection of articles *Fa de shidai jingshen* 法的时代精神 [Zeitgeist of Law] (Hunan renmin chubanshe, 1997), 283–366. Later some works of Mr. Shen Zongling 沈宗灵 also reflect that orientation, see Shen Zongling 沈宗灵, "Quanli, yiwu, quanli 权利、义务、权力 [Right, Duty, Power]," *Faxue yanjiu* 3 (1998): 3–11.

35 Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [The Semantic and Meaning Analysis of 'Right-centricity']," *Zhongguo faxue* 4 (1990): 24–33, 26.

right-centricity is almost completely impossible to be comprehended and implemented. Let us read the following sentences of the article: "it cannot be asserted whether the law of a society is duty-centric or right-centric just on the basis of the difference between the number of right-related provisions and the number of duty-related provisions stipulated in the law of the society," right-centricity "is not or primarily is not about the relationship between right and duty in a specific legal norm or legal relation;" "it is also not appropriate to discuss the center of law with regard to legal relation. Some scholars, however, often use certain (or some) legal norm or legal relation as example to reject right-centricity, which is clearly unconvincing;" what right-centricity "reveals is whether right or duty is the origin, axis, and focus within the totality of legal norms of certain society (country), i.e., within the system of legally-defined right and duty."[36]

All these sentences directly or indirectly inform us that, first, right-centricity does not or primarily does not manifest in specific legal provisions, specific legal norms, and specific legal relations, and it is impossible and futile to comprehend and implement right-centricity through specific legal provisions, specific legal norms, and specific legal relations; second, right-centricity also does not manifest in any one or more statute books, therefore it is also impossible to comprehend and implement right-centricity through specific statute books. That is indeed the actuality. But, common sense tells us that "the legal system of China and the state legal activities" both specifically manifest as activities of legislation, enforcement, justice, and law-biding, and these activities also manifest as the formulating, implementing, and handling of specific legal provisions, specific legal norms, specific legal relations, up to specific statute books. Through what and how do we comprehend right-centricity, since it is not or is primarily not manifested in these legal provisions, norms, relations and books? And if right-centricity cannot be comprehended, how can we even talk about letting "the legal system of China and the state legal activities" treat right as the center through one's own action! Similarly, under that condition, regardless of whether citizens can "solidly uphold the idea of right-centricity," even if they do, there is not much real significance, because right-centricity is removed or basically removed from specific legal provisions, specific legal norms, specific legal relations, and even specific statute books, and cannot or primarily cannot be implemented through the activities of legislation, enforcement, justice, and law-abiding.

Of course, I have not forgotten that the author of the article has also pointed out for us the path of searching for right-centricity, that is, to look into "the

36 See Ibid., 25–26.

totality of legal norms of certain society (country)," which, however, is almost completely impossible upon careful consideration. Because, in China for example, that totality is too abstract, and too gigantic, which includes hundreds of laws, large quantities of administrative regulations, numerous local decrees that no one in his lifetime can possibly finish reading, autonomous decrees, special decrees, ministerial regulations, local government regulations and other regulatory documents within the legal category.

(2) Because it ignores power, right-centric theory misunderstands power, thus mistakenly treats power theoretically. Power is the legal manifestation of the state, therefore is the most constant existence of the political state, one of the most important legal phenomena, paralleling to right in status. Legal theory should truthfully reflect the reality, recognizing theoretically the rightful status of power. But the actuality is contrary. Adopting the analytical framework, the supporters of right-centric theory have basically excluded power from jurisprudence. That is why we often witness the following abnormal phenomenon: on the one hand, the supporters of right-centric theory appear to be worried and fearful about the strength of power in reality, trying to limit, suppress, even undermine power; on the other hand, they never face, attend, or research power theoretically, with the result that theory is far removed from reality.

The unrealistic approach towards power among the supporters of right-centric theory has resulted in their severe misunderstanding of power, so much so that they basically see power as a kind of pure "evil," which leads them to theoretically over-reject power that is indispensable for any country with the rule of law. Indeed, concerning government as the subject of public power, or power, Thomas Paine said towards the end of the 18th Century that, "[s]ociety in every state is a blessing, but Government, even in its best state, is but a necessary evil;" but he also added that, "[s]ociety is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices."[37] Addressing the state as public power, Engels also affirmed its necessity in view of controlling class opposition, alleviating interest conflict, and maintaining conflicts within the realm of "order": "In order that these contradictions, these classes with conflicting economic interests, may not annihilate themselves and society in a useless struggle, a power becomes necessary that stands apparently above society and has the function of keeping down the conflicts and maintaining 'order'. And this power, the outgrowth of society, but

37 Thomas Paine, *The Writings of Thomas Paine*, Vol. 1, collected and edited by Moncure Daniel Conway (New York: G. P. Putnam's Sons, 1894), 69 (italics original).

assuming supremacy over it and becoming more and more divorced from it, is the state."[38]

Furthermore, as shown by numerous facts, under normal social conditions, power, like right, is "good" in nature, only when its expansion breaks the right-power balance, extrudes, and harms right, it becomes "evil" in specific aspects and corresponding degrees. In some of their works, the supporters of right-centric theory indeed admit that power can be legal and proper, but they exceedingly limit the realm of legal and proper power, so much so that, according to their standard, the majority of power exercised by state agencies of all the contemporary countries could only be categorized as illegal and improper power.

To illustrate, let us read again the statement by a scholar quoted above outlining the principles of right-centric theory: "The configuration and limit of state's political power can only be legal and just when they are for the realization of protecting the subject of right, coordinating the conflict between rights, prohibiting the mutual violation between rights, and maintaining the balance of rights."[39] Now the issue is: is the realm of legal and proper power really that limited? Absolutely not! In fact, for the people's interest in its totality, the state has to check and punish right's invasion into power, and sanction or punish actions endangering and hindering the execution of power. Among the ten large categories of crimes stipulated in Chinese criminal law, six are related to right's endangering and hindering of power, with hundreds of individual charges: crimes of endangering national security, crimes of disrupting the order of social administration, crimes of endangering the interests of national defense, graft and bribery, crimes of dereliction of duty, and crimes of violation of duty by military personnel. Additionally, there are also administrative punishments against right's hindering or invading of power. It is clear that, no country in the world throughout history that has not used penalty or other means to punish and sanction the actions of right's endangering or hindering power, and whose legality and properness have never been rejected by any country in principle (admittedly there have been great variations in terms of the methods and the severity of punishment and sanction in different countries and different times).

38 See Friedrich Engels, *The Origin of the Family Private Property and the State*, Trans. Ernest Untermann (Chicago: Charles H. Kerr & Company, 1909), 206.

39 Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [A Semantic and Meaning Analysis of Right-centricity]," *Zhongguo faxue* 4 (1990): 24–33, 25.

There is one more aspect of the legality and properness of power that cannot be denied, which is, the power that is formed within the power system to coordinate the conflicts between different powers, to prevent invasion between different powers or between different parts of one power, and to maintain or continue the normal configuration and internal balance of power. The actual manifestations of that power are also various, typical of which includes the power of constitutional review, arbitration power of jurisdiction disputes, and other powers with which a state agency supervises other state agencies. The following powers existing in China are of that nature: the power of the National People's Congress (NCP) of China and the NCP Standing Committee in supervising the application of the Constitution, the power of local people's congresses at various levels in ensuring the compliance and execution of the Constitution, laws, and administrative regulations within their own jurisdiction, and the power of local people's congresses at various levels above county in supervising the People's Government, the People's Court and the People's Procuratorate, as well as the local people's congress at the next lower level. Unfortunately, theoretically the supporters of right-centric theory have completely rejected the legality and properness of these powers. If power were indeed treated according to their theory, that which lies ahead of us in actuality would not be a country or society with the rule of law, but chaos or anarchy.

(3) In terms of the social content that some scholars have not articulated but have practically conferred, right-centricity is an extreme and partial proposition, and is impossible to be put into practice. In a country or society with the rule of law, both right and power have their own rightful legal status, and should play their proper role, and stay within their own boundary. As long as they play their proper role and stay within their own boundary, right and power are both rational and just, and can both increase the welfare of a society and a people. Power-centricity is opposed by people not because the nature of power is "evil," but because power is placed in an extreme position far from the norm, resulting in excessive repression or injury of right.

Similarly, the nature of right is originally "good," but if allowed to stray from its rightful place and expand to the extreme, right will also inevitably result in damage to power and normal legal order, thereby becoming "evil." That right and power both play their proper role means that they should maintain approximate balance centering on faquan (the abbreviation of "legally-defined quan," the unity of right and power) and legally-defined social interest in its totality embodied in faquan, much like a set of balance and its two ends. Of course, balance is relative, and the development of social-economic existence often upsets the balance between right and power, which is when legalists and jurisprudents should try to regain or reconstruct a balance, and to

maintain balance upon the achievement of balance. We are opposed to power-centricity mainly because the power of that "center" expands excessively, occupying too large a proportion of the total volume of faquan, and breaking the balance between right and power. We can reject right-centricity based on the same reasoning.

What is "centricity"? It means focus, axis, or center according to the definition of the legal scholars of the 1930's and 1940's, and that of present supporters of right-centric theory. Both so far have been trying to break the balance between right and power, leaning towards one side, and going to extremes. Right-centricity is an extreme, and power-centricity is the other. China has a historical tradition of power-centricity, and people have deeply experienced the damage that power has brought to their right and its social consequences. Therefore, it is easy to reach consensus in opposing power-centricity. But, once power-centricity is rejected, people are actually not clear about what is to be used to replace power-centricity, even misunderstand that anything in opposition to power-centricity is what they need. So within the field of legal studies under that condition, only very few scholars, from the perspective of administrative law, have offered another option by setting right-power balance as their ideal model,[40] while all other legal scholars, almost without exception, have maintained right-centricity or duty-centricity. And because the real content of duty-centricity in practice is often power-centricity, most have rejected duty-centricity and accepted or acquiesced power-centricity, ready to use right-centricity to replace power-centricity. The reason for that is perhaps related to the fact that they have underestimated the extreme nature of right-centric law or legal systems and their inevitable harmfulness. The supporters of right-centric theory have never specifically described the characteristics of right-centric law or legal systems in their works, which is perhaps partially due to their insufficient understanding, partially due to their concern that people may not be able to accept it if clarified.

Symmetrical to the above characteristics of power-centric law or legal systems, we can readily infer the basic characteristics of right-centric law or legal systems at the other extreme: A) "boundless right," which means that the scope of application and influence of right is boundless, can permeate into any area of the subject of power, and right; B) omnipotent right, which means that, the subject of power has to unconditionally submit to the subject of right; C) paramount right, which means that, the status of right and the subject of

40 See Luo Haocai 罗豪才, *Xiandai xingzhengfa de pingheng lilun* 现代行政法的平衡理论 [Balance Theory of Modern Administrative Law] (Beijing: Beijing daxue chubanshe, 1997).

right are unconditionally higher than that of power and the subject of power; D) right is larger than the law, which means that, conceptually right is valued higher than the law, and in practice the subject of right can ignore power and the subject of power; E) right is considered as naturally more rational than power; F) right is error-free, which means that power and its subject must be in the wrong whenever there is a conflict between right and power; G) right has the tendency of breaking the confines of power; H) private property is placed in a superior position to public property and offered special protection; I) the infinite universality of the object of individual ownership is affirmed while public property should approach zero; J) social individual ownership is presumed whenever there is a dispute between the state and citizens or other individuals without clear ownership; K) it is stipulated or emphasized that state interest unconditionally submits to individual interest; and so on and so forth. Although these are not what the supporters of right-centric theory have literally addressed, they are the content that right-centric theory should have included according to its nature. It is certainly possible to practice some individual aspects of these contents, if all or most of them were put into practice, the legal characteristics of a country with the rule of law would probably completely disappear.

Of course, I recognize that comparing to power, right often is at a weaker position, and the protection of right should be stronger than that of power in order to realize the actual balance between right and power, but it is definitely not appropriate without an idea of right-power balance, and with the overall affirmation that right comprehensively overwhelms power.

(4) Right-centric theory is removed from the reality of legal life, and runs counter to the objective need of establishing legal order. To fully understand that, it is necessary to strictly differentiate people's right as a political concept and right as a legal concept, and to be clear about the relationship among people's rights, right, and power. The right emphasized by right-centric theory is legal right (which has been discussed before), and legal right is only part of people's rights. Comparing to people's rights, legal right is relatively positioned as secondary, and its theoretical status cannot be higher than, or equal to, people's rights, thus becoming the center of law. Under a democracy or according to democratic principle, the people's right is the most important and most fundamental "quan." All other "quan," be it legal right, power, or extra-judicial-residual quan, derive from people's right, and are the specific existing forms of people's right and its different components.

Legally speaking, the ratio of right and power (legal right and power, similarly hereinafter) and their relationship should be based on the need of fully realizing people's right. Here, people's right is the focus, in front of which right

and power enjoy equal status, collectively submitting to and serving for the realization of people's rights. People's right is included in a country's legal system, and is embodied through legal provisions, principles, regulations, and legal codes. Whenever there is any conflict between right and power, the theoretical requirement is that it should be resolved through means that are most favorable to the realization of people's rights, which in legal practice is manifested as resolving only through the law that reflects people's will and their interest in its totality. During that process, right is not necessarily superior to power, and power is not necessarily superior to right, with everything determined by legal stipulations. That is the case with any country with the rule of law.

To say the least, even if the rights emphasized by it were people's rights, right-centric theory would still be untenable. If the rights in right-centric theory were people's rights, then there would be no issue of it being opposite to duty-centricity, not to mention it being opposite to power-centricity. Because, power is a component of people's right, does people's right-centricity already include the content of power-centricity? In addition, if the right in right-centered theory indeed refers to people's right, then it should illustrate the relationship between people's rights and right, power, and residual quan, and prove the reality and necessity of people's right-centricity relative to the latter. Because only right, power, and residual quan can be equal to people's rights in terms of content or constitution, to a certain degree, a competitive relationship with people's right. Of course, there is also corresponding duty, but in actuality, duty is only the duty relative to right, power, and residual quan, and is supervenient.

For any society that implements or pursues democracy and the rule of law, including contemporary China, it is no doubt correct in terms of content to say that the law is centered on people's right, which can properly explain social reality, but it is completely removed from social reality, thus it is impossible to be correct to say that the law is centered on legal right. As indicated by the legal practice of modern countries with the rule of law, right and power are legally equal or should be legally equal. And the equality of right and power means that individual interest has equal status and equal protection as public interest. The most powerful evidence of why right is or should be equal to power is that no law in a modern country with the rule of law favors right or power when constantly facing large quantities of right-power conflicts (specifically manifested as contradictions and disputes during the dynamic interaction between citizens or other individuals in exercising their right and public agencies in exercising their power). When there is conflict or dispute between right and power, all countries with the rule of law always decide according to the law. The actual manifestation of which is the existence of constitutional litigation

procedures and administrative litigation procedures between involved parties of citizens or other individuals and state agencies.

In that situation, according to right-centric theory, whenever there is conflict or dispute between right and power, it should be resolved based on the premise that right should be naturally superior to power, and that the subject of power should unconditionally yield to the subject of right. But all these are only illusions of people who wishfully long for right, and cannot be put into practice in a political state where the state is necessary, because if it were put into practice, it would necessarily result in the rejection of power, the state, and the law, as well as hopeless anarchy. I believe that was not the original intent of the supporters of right-centric theory, but if right-centricity were carried out, those would be likely the logical consequences.

Now let us take a look at the scholarly shortcomings of right-centric theory. They are manifested in the following aspects:

(1) Constrained by the right-duty analytical framework, the "center" in right-centric theory logically cannot serve as the center of a country's legal system, but the center of a portion of law (strictly speaking only one half of the legal relations). Within the entire realm of legal relations, all right-right relations and part of right-power relations, i.e., the right-dominated right-power relations, can all be externalized into relations, and logically indeed have an issue of whether right or duty serves as the center; and there is simply no issue of whether right can serve as the center in the model of the entire power-power relations and the right-power relations where state agencies actively exercise their power, and individuals reactively fulfill their duty. This is because they have gone beyond the realm of the analytical framework, which has never logically left any room for power.

Some readers may ask at this point: aren't there propositions like power-centricity? Indeed there are. But these propositions have exceeded the general framework of jurisprudential analysis designed by the supporters of right-centric theory. The "excess" removed from the basic analytical framework cannot fundamentally break away from the condition where the research of the center of law is logically limited to the field of private law, on the contrary, it provides a powerful proof from the other end that it is untenable to develop the research of the center of law based on the theoretical foundation of jurisprudence. The main reason for that is that the analytical framework as the platform of basic theory does not have the room for "power," so much so that, it is logically incompatible with the framework if all the sudden a power-centricity is proposed to be equal to right-centricity and duty-centricity. To put it bluntly, that is but an attempt of explaining away and brush off when facing a gigantic theoretical hole.

(2) If the supporters of right-centric theory really approach the issue from within the framework of right-duty relations between equal subjects as they claim, then the proposals of right-centricity and the debate between right-centricity and duty-centricity are almost without any real significance. In which relationship does right-centricity show its "center"? The most representative scholar of right-centric theory has provided an answer: "right-centricity is a concept manifesting lateral interest relationship;" within that relationship, "the right of the subject is often realized through the fulfillment of duty by the right's counterpart. And the reason why the right's counterpart fulfills his duty of his own free will and faithfully is that he believes that the corresponding subject of right has fulfilled or will fulfill the same duty, and believes that he is similarly the subject of right in terms of the other party within the said legal relationship or a different legal relationship. It is clear that, what 'right-centricity' represents is an equal and lateral interest relation."[41]

Obviously, the right-centricity above is the "center" of right in the field of civil law (or private law, including commercial law) relations. As proved before, within the framework of civil law relations, there is absolutely no difference in terms of content whether right or duty is considered as the center, therefore it is actually unnecessary to talk about right-centricity. For example, in a civil contract relationship, the content and consequence are almost identical whether the focus is on protecting Party A in the realization of his right or on the enforcement of Party B in the fulfillment of his duty. In other words, Party A's realization of his right and Party B's fulfillment of his duty are the same thing. Similarly, Party B's realization of his right and Party A's fulfillment of his duty are of no difference in terms of content. For instance, A plans to sell 100 computers, B plans to purchase 100 computers, and both parties have reached an agreement about the unit price of 10,000 yuan, and a contract stipulating the date of payment. By that date, A has the duty to deliver 100 computers according to the contract, and at the same time has the right to receive 1 million yuan in payment; B's right and duty are exactly the opposite. At that point, isn't it the same thing whether we treat A's realization of his right (receiving 1 million in payment) or B's fulfillment of his duty (delivering 1 million in payment) as the center? Similarly, I also don't see any difference in terms of content and consequences whether we propose to treat A's fulfillment of his duty (delivering 100 computers) and B's realization of his right (receiving 100 computers).

41 See Zhang Wenxian 张文显, "'Quanli benwei' zhi yuyi he yiyi fenxi '权利本位'之语义和意义分析 [The Semantic and Meaning Analysis of the 'Right-centricity']," *Zhongguo faxue* 4 (1990): 24–33, 26.

With that kind of relationship, right-centricity and duty-centricity are both to protect right, and they are different only in terms of their means. Right-centricity favors positive protection of right, while duty-centricity favors enabling the realization of right from the opposite end. That is true in a specific legal relationship, as well as in the entirety of a country's civil law relations system. Therefore, within the analytical framework, the dispute between right-centricity and duty-centricity is actually based on misunderstanding, which alone has greatly lowered the real significance of right-centric theory.

Of course, I have not forgotten that certain scholars have pointed out that right-centricity is directed against power-centricity, but these supplementary discussions logically are not compatible with the overall framework of analysis.

(3) Right-centric theory has confused two fundamentally different kinds of "duty-centricity," and it is probably a targeting error for some scholars to focus on duty-centricity in order to develop right-centric theory. There are two kinds of duties addressed by right-centricity, one is the duty in the relationship between equal subjects, the other is the duty in the relationship between unequal subjects. Therefore, the so-called duty-centricity is also involved with two different kinds of duty-centricity within two specific legal relations. In the relationship between equal subjects, there is no difference in terms of content between right-centricity and duty-centricity, where it is not necessary and meaningful to emphasize right-centricity, which has been addressed previously. The other is the duty-centricity in the relationship between unequal subjects, whose characteristics and content include state agencies and their officials exercising power (such as tax levy), and individuals' fulfilling corresponding duty (such as tax payment). Within that kind of relationship, power actually plays the leading role, and is positioned at the focus, therefore it is more appropriate to use power-centricity, because the duty emphasized there is the duty relative to power and is individuals' submission to power. Hence we can say that it is inaccurate to say that the pre-capitalist law is duty-centric, while socialist law under planned economy is duty-centric, their real content is always power-centric. The main reason why power-centricity is treated as duty-centricity is that power is incompatible with the framework of jurisprudence that some scholars rely on to develop their thesis, and if they admit power-centricity, they have to break the pre-constructed framework in terms of logic and content, therefore they have to, ignoring the reality, turn to the corresponding relations between duty and power, treating power-centricity as duty-centricity.

That practice originated from the legal scholars of the 1930's. Recently, some Chinese legal scholars have inherited their predecessors' analytical framework on the one hand, and have adopted extra-logical and coercive means to break

the confines of that analytical framework, offering power-centricity in opposite to right-centricity, but they have never been clear about that, within the scope of the mutual relationship between power and duty, the duty-centricity they have been talking about is the same as power-centricity in terms of content, referring to the same legal conditions. When right-centricity is said to be opposite to both duty-centricity and power-centricity, it is clear that the scholars don't quite understand the real relationship between duty-centricity and power-centricity, and use right-centricity that is supposed to target power-centricity to target duty-centricity by mistake.

1.5 *Conclusion*

The supporters of right-centric theory have contributed to the research of the center of law, but with regard to the issue of what should be the center of socialist law, the right-centricity they propose has slipped into the other extreme in opposition to power-centricity. I personally believe that, right-centric theory is untenable theoretically, can do more harm than good in practice, and therefore is inadvisable. However, how to evaluate right-centric theory is a scholarly issue to be resolved through equitable discussions, and is not something on which any one person can draw a conclusion. I am in agreement with a scholar who said the following regarding right-centric theory: "whether this scholarly view can survive, depends on the scientific approach of the scholars and the test of practice."[42] The view elaborated in this chapter certainly depends on the same elements. Nevertheless, the issue of what should be the center of law or socialist law should be further explored, and the key is to find a general theory helpful to realize the balance between right and power. Because the issue involves the most basic legal phenomena, the basic object (scope) of legal studies, the basic categories of legal studies, the basic analytical framework of legal studies, and other vast fields of basic research, as well as their reevaluation, an in-depth exploration into the issue may drive the development of the entire basic theory of legal studies, and at least can help break the current inactivity in the basic research of legal studies.

42 Guo Daohui 郭道晖, "'Quanli benwei' de quzhe jingli '权利本位'的曲折经历 [The Winding Path of 'Right-centricity']," in *Zhongguo dangdai faxue zhengming shilu* 中国当代法学争鸣实录 [Debates in Contemporary Chinese Legal Studies] (Changsha: Hunan renmin chubanshe, 1998), 372.

2 The Core Contents of Faquanism[43]

In order to resolve the issues in the field of legal studies, especially that of constitutional law studies, I have formulated and tried to prove the following views concerning the issue of what should be the focus of socialist law: duty-centricity, power-centricity, right-centricity, and other similar propositions are untenable theoretically, are infeasible and can do more harm than good in practice. There is the necessity of continuing the discussions on the issue of the center of law, but the key is to find a general theory helpful to the balance between right and power.[44] Thereafter, *Zhongguo Faxue* magazine published two long articles advocating right-centric theory, one of which systematically reiterates relevant views published in the past two decades, the other offers thought-provoking discussions of some of my points of view in addition to further elaboration of the internal logic of right-centric theory.[45] That second article was written by Professor Liu Wanghong, I should have written a stand-alone article to respond to his piece, but I believe it can better clarify the relevant issues for me to respond to his piece after I have formulated and proven my view of what is the center of law. So I am following through my original plan to formulate and prove my conjecture of faquanism, and then answer Professor Liu's questions.

Based on the entirety of my knowledge and experience, I believe that law and socialist law focusses or should focus on faquan in pursuit of the maximization of the total volume of faquan—which is the conjecture of faquanism, or the conjecture of faquan-focus or faquan-centricity.[46] I have formulated the conjecture primarily in order for it to have the function of theoretically replacing the various visible or invisible theories including right-centric theory, duty-centric theory, or power-centric theory, and to offer a new option in the consumer market of legal products. Here, center, focus, and centricity

43 This section is based on Tong Zhiwei 童之伟, "Faquan zhongxin de caixiang yu zhengming 法权中心的猜想与证明 [Conjecture and Proof of Faquan-centricity]," *Zhongguo faxue* 6 (2001): 15–38.

44 See Tong Zhiwei 童之伟, "Quanli benwei shuo zai pingyi 权利本位说再评议 [Revisiting Right-centric Theory]," *Zhongguo faxue* 6 (2000): 47–65.

45 See Liu Wanghong 刘旺洪, "Quanli benwei de lilun luoji 权利本位的理论逻辑 [The Theoretic Logic of Right-centricity]," *Zhongguo faxue* 2 (2001): 20–29.

46 Conjecture is equal to hypothesis in natural sciences. Formulating and then proving a hypothesis is a method often used in basic research in natural sciences to discover the fundamental attributes of things and the invisible relationship among different things. I have intentionally followed that method in my investigation here. There are no laboratories and experiment materials in legal studies, but we do have society and facts of social existence, which I believe are sufficient.

are interchangeable, and I intentionally use the word "center" primarily to emphasize from semiotic dimension the difference between the conjecture of faquan-centricity (or faquanism) and various existing law-centric theories. The value of scholarship lies in innovation rather than adhering to the past, I hope that, through constructive discussions on the issue of the center of law, we can further break the conceptual confines over legalists exerted by the legal creed of "law is right-centric," which is widely supported but actually lacks rationale and does not reflect the basic needs and main characteristics of law and socialist law, so as to form a new theory that is more consistent with China's basic conditions and actual needs, and to fill the possible conceptual void in terms of the center of law after right-centric theory becomes falsifiable.[47]

2.1 *The Reasons for Formulating the Conjecture of Faquanism*

Basic research and other types of research are all to resolve the problems that have not been resolved or not well resolved by our predecessors, the field of legal studies is no exception in that regard.

The conjecture of faquanism has been formulated not to quarrel with the existing theory or theories intentionally, but to resolve problems that have for a long time perplexed the field of legal studies, especially the field of Chinese legal studies, both in theory and in practice. These problems have so far not been convincingly explained or resolved by any theory concerning the center (or centricity) of law.

In terms of political philosophy and legal philosophy, there is always an issue of the relationship between the individual and the state. That issue is either avoided (actually many theories of jurisprudents indeed adopt an ambiguous attitude towards the issue), or forces jurisprudents to make an extreme either-or choice, i.e., they either choose individual-centricity, or state-centricity, unable to find a third theory that explicitly places individual and state on the same status. I believe that the situation historically and in reality has been largely negative in its influence on social existence.

47 Based on the direct and indirect responses to my article "Revisiting Right-centric Theory," (Tong Zhiwei 童之伟, "Quanli benwei shuo zai pingyi 权利本位说再评议 [Revisiting Right-centric Theory]," *Zhongguo faxue* 6 (2000): 47–65), I have not seen any scholar denying the various fatal shortcomings of right-centric theory enumerated in my above article. So it is highly likely that the theory is eventually falsifiable. Of course, that a jurisprudential concept is falsifiable is different from whether there are supporters for the concept, the former is a scientific issue, while the latter is an issue of personal selection, and the selector has many mundane aspects to consider, which is especially true under the current distribution system of legal resources.

With regard to the relationship between the individual and the state, the first extreme theory is statism. The basic feature of statism is that it maintains that the state is supreme, the state is sacred, the individual should unconditionally submit to, and serve, the state. There has been a long history behind statism. In general, theories in history that in various forms advocate the oneness of monarch and state, divine right of kings, and absolute monarchy are relatively more ancient forms of statism. Hegelianism, neo-Hegelianism, and totalitarianism are its more recent forms.

Many Western scholars consider Marxist theory as a form of statism,[48] some scholars in socialist countries also interpret Marxist social-historical conception as similar to statism,[49] which is completely baseless, and is to a great degree a misunderstanding of the creators of Marxism. Marx and Engels made a classic announcement in their 1848 "Manifesto of the Communist Party": "In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all."[50] After the death of Marx, Engels specifically reaffirmed in 1894 their commonly-held social ideal represented by the announcement.[51] My understanding is that the announcement indicates that what they were searching for is the coordinated and balanced development of individual and commonwealth (primarily state before its demise), and is neither individualism, nor statism.

I certainly do not deny that historically and presently there is a certain statist tendency in the economic-political theories, social life, and legal systems of many socialist countries. But they are primarily related to the elements such as state ownership, the portion of state-owned economic components exceeding the limit allowed by social-economic development, and the long-term practice of planned economy and lack of tradition in democracy and rule of law, etc.

48 There are many works in this regard. See Edward M. Burns, *Ideas in Conflict: The Political Theories of the Contemporary World* (New York: Norton, 1960), especially Chapter Six.

49 Discussing the Marxist view of individual and social relations, an authoritative philosophical writing claims: "in socialist society, social interest is the foundation for individual interest" (see *Zhongguo dabaikequanhu* zhexue juan 中国大百科全书·哲学卷 [Encyclopedia of China: Philosophy Volume], (Beijing: Zhongguo dabaikequanhu chubanshe, 1985), 248). Considering that "social interest" here is legally public interest represented by the state, what is emphasized here is actually state-centricity, therefore it is to be included in the category of statism.

50 Karl Marx & Friedrich Engels, "Manifesto of the Communist Party," in Robert Tucker, ed., *The Marx-Engel Reader*, 2nd ed. (New York: Norton, 1978), 491.

51 See Karl Marx & Friedrich Engels, *Collected Works of Karl Marx and Friedrich Engels*, Vol. 50 (New York: International Publishers, 1975), 255–256.

The second extreme theory with regard to the relationship between the individual and the state is individualism. That is an individual-centric theory regarding the relationship between individual and state. Some believe that, like statism, "[t]he individualistic doctrine is of very ancient origin. It can be found in embryo in the writings of the Roman jurisconsults, and all the law of Rome in the classical period is unquestionably an admirable individualistic construction. The idea was taken up again and developed in the sixteenth century. It was the inspiration for every idea of great moments during this period and particularly with respect to the writings of the Monarchomachs."[52] The more recent forms of individualism include egoism, altruism, liberalism, and anarchism, with anarchism being the most extreme and pure but liberalism (including traditional liberalism and modern liberalism) the most representative. Historically and presently there have been many well-known liberals, with Locke, Montesquieu, Jefferson, and Mill being the representatives of traditional liberalism, and von Hayek and Nozick probably the representatives of modern liberalism.

Statism and individualism are two opposing and extreme theories in dealing with the relationship between the individual and the state, according to logic and common sense, historically and presently there should have been a legal theory that exceeds the individual and the state, and coordinates and unify the two, promoting their balanced development, but there has actually been none. In legal systems commonly used in modern countries, typical cases of individualism or statism are rare, and most are in the middle but clearly maintain features of individualism or statism. Worldwide the basic conditions of polar opposition between individualism and statism are still visible, although the boundary between them is often not very clear.

Reflected in legal life, the polar opposition between individualism and statism in legal conception has also resulted in some corresponding consequences. These consequences, content-wise, can be seen in the following three aspects:

The first aspect is the polar opposition between power and right. The opposition causes different countries or a country in different periods to often have to choose to follow self-identified right-centricity or power-centricity[53] in establishing legal systems, resulting in either-or and extreme-leaning problems.

52 Léon Duguit, *The Law and the State*, 31 HARV. L. Rev. 1, 8 (translated by Frederick J. de Sloovere, 1917), 10.

53 Within the analytical framework of jurisprudence, power-centricity is often described as duty-centricity or treated as part of duty-centric content. I am a critic of jurisprudence, and do not use that analytical framework. Here I would like to remind the reader of the connection between power-centricity and the content traditionally conferred to the word duty-centricity.

The actual political-legal content of power-centricity is statism, and the primary problems of power-centric legal system include: it seeks for the maximization of power; within the entire faquan structure (i.e., the ratio of right and power within faquan), the proportion of power appears particularly large, while that of right (especially liberty) is particularly small; power has no boundary, or there is boundary in theory but unclear in the law, or legally clear but the subject of power is in fact not responsible for acting in excess of authority; the value and effect of power is one-sidedly emphasized, and expansion of power and strengthening of power become the most common and universal responses to whatever problems that arise in social life; power (i.e., state authorities or authoritative agencies) becomes the primary object of protection by the law, especially by criminal law; customarily or systematically, whenever power injures right, the powerful cannot be held responsible or can be held less responsible, while the damage suffered by right holder cannot be compensated or insufficiently compensated; the penal system would rather do an innocent person injustice when facing the dilemma of either letting a criminal go or doing injustice to an innocent person.[54]

In contrast to that, the actual political-legal content of right-centricity is individualism, whose legal system lies in, or at least leans towards, the other extreme. I have already discussed the problem that the right-centric legal system has of necessity.[55] In summary, the extreme of the legal system primarily includes: right has no boundary, can misappropriate at will the rightful space of power; there is a tendency to sacrifice proper power to one-sidedly pursue the maximization of right; within the entire faquan structure, the proportion of right is exceedingly large, while that of power is exceedingly small, and power is unable to balance right and limit the abuse of right; there is anarchy of various forms and degrees; exercise of one right severely harms other kinds

54 In some of the well-known unjust cases in China during the past 20 years, such as the cases of the intentional homicide of She Xianglin, Zhao Zuohai, and Nie Shubin, all the defendants were convicted and sentenced under the guiding principles for case handling: guilty until proven innocent, and preference of injustice over connivance. These cases were later corrected either because the victim was "back to life," or because the real killer showed up unexpectedly. These three unjust cases were corrected in the retrials by the Supreme People's Court of the People's Republic of China in 2005, 2010, and 2016, respectively.

55 See Tong Zhiwei 童之伟, "Quanli benwei shuo zai pingyi 权利本位说再评议 [Revisiting Right-centric Theory]," *Zhongguo faxue* 6 (2000): 47–65. The way of argumentation in that article has met some criticism but I am certain that I am correct, after much deliberation, I will elaborate on my reasoning later.

of rights;[56] over-indulgence of individual action that is harmful to oneself as well as others,[57] and the rights of part of the population is overly expanded, severely misappropriating the space of others' right,[58] etc. A concept of inclusiveness and balance such as faquanism is needed in order to move beyond the dichotomy of individualism and statism.

The second aspect is the polar opposition between public interest and individual interest. With that configuration, when making systematic arrangements, people often choose to allow one interest to be superior and favorable to another interest, that is, either they choose public interest-centricity, allowing public interest to be superior and favorable to individual interest, sacrificing proper individual interest in pursuit of maximization of public interest, or they choose individual interest-centricity, allowing individual interest to be superior and favorable to public interest, squeezing indispensable public interest in pursuit of maximization of individual interest. It seems that it is either that the east wind prevails over the west wind, or that the west wind prevails over the east wind, with no room for equal and coordinated co-existence. In terms of the relationship among power, right and interest, public-interest-centricity is the social content of power-centricity, while individual interest-centricity is that of right-centricity. In order to move beyond the dichotomy of individual interest and public interest, a new calculation unit is needed, which is social interest in its totality, whose content is the sum of individual interest and public interest with regard to the law.[59]

The third aspect of the polar opposition between statism and individualism is the polar opposition between the property owned by public agencies

56 For example, according to the Second Amendment of the US Constitution, "the right of the people to keep and bear Arms, shall not be infringed." In actuality, the exercise of that right has often resulted in the consequences of severely harming citizens' rights of life and health.

57 According to a report on CCTV some years ago, a city council in a Western European country passed a legal document that allows the citizens of that city to use marijuana (a narcotic drug), which I believe is one of the newest example of over-expansion of individual rights.

58 In many countries in Europe and North America, the process of campaigning for elected representatives and public office has become a competition for spending campaign funds, while political positions are actually distributed according to "investment." Here, individuals actually use their huge property right to exclude and replace the common people's right to vote and to be elected.

59 About the categorization standard and method of individual interest, public interest, social total interest and the specific constituting elements of the interests, I have had detailed discussions previously and therefore will not specifically address here. See relevant sections in Tong Zhiwei 童之伟, *Faquan yu xianzheng* 法权与宪政 [Faquan and Constitutionalism] (Jinan: Shangdong renmin chubanshe, 2001).

(abbreviated as public agency property hereafter) and the property owned by individuals (abbreviated as individual or private property hereafter).[60] With that opposition, relevant systematic arrangement often has a tendency of allowing one property to be superior and favorable to another property. If public agency property is in a superior and favorable position, and pursues the maximization of public interest, it is public agency property-centric; in contrast to that is individual property-centric. Determined by the nature of the relationship among faquan, interest, and property, public agency property-centricity is the material content of right-centricity and public interest-centricity, while individual property-centricity is that of right-centricity and individual interest-centricity. In order to move beyond the dichotomy of private property and public property, a new calculation unit is needed, which is all claimed property or legal property, namely, the sum of private property and public property.

As indicated by numerous facts, in dealing with the relationship between the individual and the state, it is extreme and problematic to make theoretical choices according to the binary opposition and either-or mode of statism and individualism. It usually leads to two results:

One result is social practice in extreme forms: statism leads to despotism or totalitarianism, individualism leads to abuse of right, excessive unrestrained freedom, and various forms of anarchy. Absolute monarchy, Fascist totalitarianism, and other types of despotism are the practical forms of statism. Legalization or partial legalization of narcotic drugs, legalization of prostitution, overflow of firearms, laws that excessively lean towards protecting the rights of criminal suspects, and preference of connivance over injustice in criminal justice, etc.[61] are all the practical consequences of individualism by necessity.

The other result is that, some theories don't work in social life, causing practice to stray from the theory that the relevant subject wishes it to follow, which manifests very obviously in the countries universally recognized as upholding the philosophy of individualism or liberalism. In those countries, according

60 Especially referring to natural persons, legal persons, and other social-economic organizations of non-public agency status, relative to state agencies and other public agencies.

61 About legalization of narcotic drug use and overflow of firearms, I have provided examples in previous footnotes. It should be noted that prostitution has been legal for a long time in the Netherlands; as for the example where the law excessively leans towards protecting the rights of criminal suspects, allowing actual criminals to be easily harbored, the most familiar one perhaps is the Simpson murder case in the US some years ago, the Lin Liyun murder case also occurred in the US and is an even more obvious example (that is the Chinese version of "Simpson case," see Zhi Linfei 支林飞, "Ji ranbing muzi ming'an huangdan luomu 纪然冰母子命案荒诞落幕 [Ji Ranbing Murder Case's Absurd Ending]," *Cankao xiaoxi* 参考消息 [Reference News], July 10, 2001, 13.

to individualist spirit, whenever there is a conflict between right and power, between individual interest and public interest, and between individual property and public agency property, it should have been resolved in a way that satisfies the need for the maximization of right, individual interest, and individual property. But the actuality is not the case, and is absolutely not possible to be the case.

The actuality is that, in any country that upholds individualism or liberalism, when the above conflict occurs, they have to handle it according to the law, and the law in most cases actually has to treat as equal the opposite ends of the three pairs of contradiction between right and power, individual interest and public interest, and individual property and public agency property. That the law treats them as equal means that the law-centricity has shifted away from individualism, i.e., away from right-centricity, individual interest-centricity, and individual property-centricity. Similar situations have also occurred in the societies upholding socialism.

Realistically, within the analytical framework of polar opposition of statism and individualism, placing either one at the center often cannot properly explain some of the simplest phenomena in legal life in today's countries with a healthier rule of law, and not being able to properly explain it shows that there are problems. In terms of the law, we have to carefully consider the following questions: 1) Regarding the conflict between right and power, why doesn't the court decide the case according to right-centric principles where it is decided in favor of right when there is a conflict, or power-centric principles where it is decided in favor of power whenever there is a conflict, but instead conducts mean measurements according to the law, and sometimes decides power or right wins according to the case? 2) Since the law that the court relies on in deciding that kind of cases treats right and power as equals, and the court indeed decides the cases according to the law, without favoring either side, then what is the rationale to say that the law is right-centric or power-centric? 3) Since the law divides right and power, and delimits their boundaries, within which they have to stay and are not allowed to mutually invade, then what is embodied and protected by the law must be superior to right as well as power, without either side becoming the "center." However, what is that which is superior to right and power, considered by the law as the centricity or center, or protected as the foundation?

The problems are similar in terms of the binary opposition between statism and individualism as reflected on the level of interest.

The similar problems can be inferred in the same light as the above discussion according to the fact that individual interest is corresponding to right, and public interest is corresponding to power. The key question here remains

that, since socialist law and other types of law differentiate public interest and individual interest through dividing right and power, making them stay within their own boundary without mutual invasion, and stipulating sanctions measures against the invader, then how can the law treat one of the two as the center? Does it mean that the law can require that whenever there is conflict between the two, large quantities of individual interests can be sacrificed in order to preserve small quantities of public interests, or to preserve small quantities of interests at the price of sacrificing large quantities of public interest? If that were indeed the arrangement of the law, wouldn't it result in the gradual decrease of the total volume of interest, causing the issue of survival of society's existential condition?

Legally-defined interests are fundamentally material interests, and the materialized form of material interests is property. Therefore, with regard to property, it is perhaps much easier for us to discover the shortcomings of the analytical framework of the binary opposition between public agency property and individual property: if the center or centricity of law is assigned to public agency property or individual property, the inevitable question will arise: does it mean that the so-called public property-centric law or individual property-centric law can stipulate that whenever there is a conflict between the two properties, the non-centric property has to be sacrificed in order to preserve the centric property without considering its size? For example, can public property-centric law or individual property-centric law require that a property of less value (e.g., 1,000, 100, or even 1 yuan) be preserved at the price of sacrificing another property (e.g., 10,000 yuan)? If the answer is "no," how does the centricity of the relevant property show itself?[62]

If the answer were "yes," wouldn't the law become that which damages and decreases comprehensive national strength, harms productive force and social advancement, and moves a society towards self-destruction? Law and socialist law definitely cannot be like that.

In summary, the either-or theory and analytical framework of the binary opposition between statism and individualism cannot properly explain law and socialist law, nor properly guide legal life. On the contrary, they can only lead to one-sided jurisprudential theory and one-sided legal systems, therefore are inadvisable. The individual jurisprudential theories and the analytical

62 The laws in many countries indeed have stipulations that favor the state or the individual on some trivial issues (such as the issue of property of unclear ownership), but these stipulations do not represent the fundamentals of the laws of the relevant country, therefore cannot be used to decide whether certain law is a law of certain centricity, at most it is only a tendency towards certain centricity on certain issues.

frameworks of legal studies derived from the binary opposition between statism and individualism are also inadvisable, which include the following: the thinking and method of right-centricity and power-centricity (current jurisprudential theory generally describes it inadequately as duty-centricity); the thinking and method of public interest-centricity and individual interest-centricity; the thinking and method of public agency property-centricity and individual property-centricity, etc.

It is my hope that the formulation of the concept of faquan and faquanism can help move beyond and break the absolutized either-or theories and analytical frameworks of the binary opposition between statism and individualism, uphold the spirit of seeking the truth from facts, form a jurisprudential theory that treats the state and the individual equally, and consider and balance both the state and the individual. That jurisprudential theory is constituted of three layers: 1) It treats the relationship between various legally-defined quan based on the principle of faquan maximization, primarily the treatment of the relationship between right and power, and secondarily the treatment of the relationship between rights, and between powers. 2) It treats the relationship between various legally-defined interests based on the principle of maximization of total interests (the sum of individual interest and public agency interest), primarily the relationship between individual interest and public interest, and secondarily the relationship between different components of individual interest and different components of public interest. 3) It treats the relationship between a subject's various properties based on the principle of maximization of total property (the sum of individual property and public agency property), primarily the relationship between individual property and public property, and secondarily the relationship between different components of individual property and different components of public agency property.

2.2 *The Essentials of Faquan-centricity*

The polar opposition between statism and individualism in political philosophy and legal philosophy manifests in legal studies as the polar opposition between power and right. Within the framework of jurisprudence, the polar opposition between power and right has for a long time been improperly interpreted, or more accurately, ignored and covered, within the framework of the opposition of right and duty. Based on the spirit of seeking the truth from facts, this book strives to return it to the original opposition between right and power.

Regarding the one-sidedness in both theory and practice of the analytical framework of the polar opposition between power and right, Professor Luo

Haocai is the one who had the earliest in-depth understanding and proposed a corrective theory. The corrective theory here refers to the balance theory. Within the scope of the analyses of balance theory, the management theory embodies statism, and the right control theory embodies individualism. He believes that, the problem with the management theory in terms of its value orientation is that it favors state interest, in terms of its power-duty relationship it is that it places the power of administrative subject at the center, and in terms of its effect it is that it emphasizes the protection of effective management of administrative agencies, with characteristics of the rule by man; but the value orientation of right control theory is that it favors individual interest, it is in pursuit of individualism in terms of its right-duty orientation that it places right at the center, in terms of its effect it is that it emphasizes the protection of citizens' rights, with the belief that the most important goal of the rule of law is to ensure that the government abides by the law, etc. In view of those problems, he formulated the idea of uniting the above two aspects and achieving overall balance.[63] In terms of the issue of the center or centricity of law, jurisprudence, constitutional law studies, and administrative law studies have produced quite a few theories, but I personally believe that only the balance theory has in legal philosophy broken the analytical framework of the either-or polar opposition between statism and individualism, therefore is significant in terms of important theoretical innovations.

However, it should also be pointed out that the emergence of the balance theory does not, and is impossible to, completely break the tendency of legal studies regarding the polar opposition between statism and individualism, because it has great limitations in terms of general legal theory. First, the balance theory is only a theory of department law studies, it does not need to, and does not, go beyond the scope of its field (i.e., administrative law studies) to deliberate on the theoretical issues related to the entire field of legal studies, it covers primarily the relationship between administrative power and the right of administrative counterparts, and the two and their relationship is only a small part of the totality of right and power as well as their relationship. Second, due to the above-stated reason, the proponents of the balance theory do not attempt to reevaluate the basic legal phenomena, the basic contents of law, and the basic contradictions of legal life, neither conducts in-depth investigation into the interest content and property content of right, power, and

63 This is a brief summary of relevant content of Professor Luo Haocai's works based on the need for the field that the book belongs to. See the "Introduction" of Luo Haocai (ed.) 罗豪才, *Xiandai xingzhengfa de pingheng lilun* 现代行政法的平衡理论 [Balance Theory of Modern Administrative Law] (Beijing: Beijing daxue chubanshe, 1997), 1–7.

duty, thus is weak in terms of jurisprudential foundation. Third, the balance theory accommodates and follows the analytical framework that is outdated and difficult to truthfully reflect the reality of legal life, theoretically twisting the otherwise clear and straightforward issue of balancing the right of administrative counterparts and administrative power into the issue of balancing right and duty.

The balance theory has another major problem, that is, in terms of theory, while pointing out the shortcomings of power-centricity (right control theory) and duty-centricity (management theory), it does not find the focus, centricity, or center that can replace them and is more appropriate than any of them. Indeed, it is very important to recognize and emphasize the balance between power and right, but what is more important is to find the standard that can really measure their actual condition, or in other words, to find the new "center" of law that can achieve the balance based on administrative power and the right of its counterpart. Unfortunately, the balance theory has not obviously done much in that regard, resulting in a rather significant theoretical blemish. Perhaps some would say that the balance theory advocates co-centricity, or co-center, of right and power. But that is not convincing, because if both sides of the opposites have become the centricity or center, then there will be no centricity or center anymore.

I believe that in order to be consistent with the development of social-economic development in China, legal studies today should find a new center (or focus or centricity) for law and socialist law, and the starting point for the balance of right and power (traditionally the balance of right and duty), so that right and power can be coordinated and unified to the maximum and in reality guided by a new legal ideal. The conjecture of faquanism is the response to the issue of what is the center or starting point.

Determined by the configuration and fundamental attributes of faquan, faquan-centricity in fact emphasizes the following four aspects:

(1) Faquan-centricity means that the entire legally-defined portion of the right of the people (all citizens, hereafter)[64] is the center, and is the legal manifestation of people's right-centricity. People's right is a political concept, which is fundamentally different from legally-defined right in terms of its nature and content. The right in legal studies normally refers to legally-defined rights, or

64 People's right refers to the fundamental right shared by the entire members of a country or political community, whose subject is a collection, i.e., people or the entirety of nationals, people's right is a political concept. Strictly speaking, right legally only refers to the portion of "quan" that legally belongs to individuals in a country or political community, whose subject is individual, and other entities that are relative to the political state or similar to individuals in legal status.

legal rights for short, and is only a component of people's rights. In a democracy, people's rights are actually the quan in its totality, which structurally includes the following three components: the first component is power, i.e., the legal public power, which in China is basically manifested as the authority that belongs to, or should belong to, state agencies of various levels or kinds, and is the portion of people's right that is entrusted to the state to exercise on its behalf, with the means of trust being voting in a direct or indirect election; the second component is right, i.e., legal right, which means the portion that is legally recognized and protected, and is left after the portion entrusted to the state is deducted from the people's right, which in China is manifested as various rights enjoyed by citizens, legal persons, and other organizations of individual status, including liberty, privilege, and exemption as identified in theories of Hohfeld and others; the third component is residual quan, which means what is left in people's right after power and right are deducted, or some of the "quan" that are actually enjoyed but not protected, or are unable to be protected, by the law.[65] It is clear that, because the law does not recognize residual quan, faquan, as the unity of right and power, has legally become the entirety of people's right. Therefore, faquan-centricity is actually the legal manifestation of people's right-centricity. That means, theoretically, people's right is the foundation, and the law is the manifestation of people's right, right and power should be equal with regard to people's right and the law that embodies it; the ratio of right and power, their relationship, the configuration of right and power should all submit to, and serve for, the maximization of people's right, and serve for the full realization of people's right.

(2) In reality, faquan-centricity is right-power unity-centered, or right-power unity-centricity. Faquan-centricity pursues the maximization of the total volume of faquan, rejects not only power-centricity that one-sidedly expands power, unrestrictedly squeezes right, and is logically linked to totalitarianism and statism, but also right-centricity that one-sidedly expands right, unrestrictedly squeezes and demonizes power, and is logically linked to anarchy and various extreme forms (symmetrical to statism) of individualism or liberalism of legal philosophy.[66] The first requirement of faquan-centricity is that a

65 For example, some countries do not recognize engagement, nor protect the "quan" derived from engagement, but according to customs and habits, these "quan" are recognized, which is one of the typical forms of residual quan.

66 Right and power constitute the two ends of faquan, or the unity of right and power, according to the logic of faquan analysis, law is either centered on faquan, or on either end of faquan, where power-centricity means the extremes of statism, while right-centricity means the extremes of individualism, only faquan-centricity represents the

country or society forms its legal system based on the fundamental principle of seeking the maximization of the total volume of faquan, and actually applies the law according to the standard of whether it helps maximize the total volume of faquan. Obviously, based on principle or standard, faquan is always the center in both formulation and application of the law. In general, the optimal faquan structures consistent with the realization of maximizing the total volume of faquan are different in different times and countries, and every country can and should consider its own actual conditions to design a faquan structure that is most suitable to its own development.

Because the law is to be centered on faquan, not power or right, a country with the rule of law or a socialist country, in handling conflicts between right and power, can neither presume that right is error-free, unconditionally demands that power submits to right, nor presume that power is error-free, demands that right unconditionally submits to power. On the contrary, it can only handle the conflicts within faquan according to the principle of maximizing faquan and relevant standards, and based on the actual conditions, including the conflicts between right and power, between right and right, and between power and power. In order to form a faquan structure that helps maximize the total volume of faquan, there is nothing wrong with squeezing certain rights and expanding certain powers correspondingly, to squeeze certain powers and to expand certain rights correspondingly, or squeeze one portion of right or power and to expand another portion of right or power, which are all part and parcel of faquan-centricity. The above principle and standard can all be applied and implemented in constitutional amendment, legislation, justice, enforcement, and law-abiding.

(3) In terms of social content, faquan-centricity means that legally-defined total interests (i.e., the entire legally-defined portion of "people's right," which is the organic unity of individual interest and public interest, abbreviated as total interest hereafter) is the center, or means total interest-centricity. The total interest of a country or society can be divided into two categories: legally-defined interest and non-legally-defined interest, where legally-defined interest is fundamental and primary, which can be further divided into individual interest and public interest (which is normally represented by state in reality). In recent years, I have on numerous occasions demonstrated that, the corresponsive relationship between right, power, faquan and individual interest, public interest, total interest, where faquan is corresponsive to

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third path or choice that is fair and moderate. It should be emphasized that, however, individualism or liberalism is a political philosophy and legal philosophy, and is not the same as the word liberalization in current political vocabulary in China.

total interest, the total volume of faquan is corresponsive to the total volume of total interest. Therefore, total interest-centricity is the logical reflection of faquan-centricity in terms of the social content of the law. It follows that the logical requirement of faquan-centricity is that both individual interest and public interest should submit to, and serve for, the need to realize the maximization of the total interest. The total interest is the sum of individual interest and public interest, so the importance of either one of the latter two cannot be comparable to the former. In order to realize the maximization of the total interest, portions of individual interest and public interest can both be sacrificed, but in terms of individual interest and public interest, there is no, and there should not be, an issue where one of them is higher or lower than the other in status, or is necessarily the center or subordinator of the other.

(4) In terms of material content, what faquan-centricity emphasizes is the total legally-owned property-centricity, i.e., it emphasizes the equal protection of the property of various subjects or the property of various ownerships. The total property of a country or society can be divided into the two large categories of defined ownership and undefined ownership, with defined property being, quite literally, the total property with owners of a country or society, which is further divided into individually-owned property and public agency-owned property, undefined property (property without owners) is very limited in quantity, which is almost negligible in most cases in reality. Therefore, based on the fact that legally-defined property is the material foundation of faquan, it can be said that, in terms of the law, faquan-centricity is the pursuit of the maximization of the total volume of property or wealth of a country or society. And faquan-centricity indicates that the fundamentals of the law, especially the law in contemporary China, should be the pursuit of the maximization of the total volume of property or wealth.[67] With regard to the relationships among individual property, public agency property, and the total legally-defined property, the legal status, ratio relations, and existing form of the former two should serve for the need of maximizing the total property. When the need arises, individual property should be restricted and sacrificed if necessary, and public agency property should be restricted and sacrificed if necessary, as well.

67 In actuality, the property of a society or country does not have to be strictly divided into defined ownership (with owner) and undefined ownership (without owner). Theoretically, the total volume of property or wealth here refers to the parts with defined ownership of the total property of a society. Because property with defined ownership constitutes a very large percentage of the total property of a society, under many conditions property with undefined ownership is negligible, thus property with defined ownership can be considered as equal to the total property of a society.

It should be particularly noted that "the pursuit of the maximization of the total volume of property or wealth" is only the economic requirement that faquanism has for the law, and it is to face the competition and restraint from ethical requirements, political requirements, and the requirements of the law itself that are of the same attributes. The result of the full competition of the requirements from various aspects will by necessity be a relatively balanced state of what each aspect acquires. The ethical requirements, political requirements, and the requirements of the law itself of faquanism at least include the following elements: everyone is the equal holder of faquan, the purpose of whose activity is to obtain secular liberty and happiness; faquan allocation, especially its faquan structure (power-right) must remain balanced; protection and respect of human rights; and the rule of law instead of the rule by man.

In terms of the need for the maximization of the total property, individual property and public agency property should be entirely equal, neither side is necessarily more important than the other, and neither side has the necessary rationale to retain a status superior to the other. If the law of a country or society violates the logical demand of faquan-centricity, it will by necessity be punished by its internal law, and pay the price of decreasing the anticipated total volume of property. In that aspect, China in the past decades has paid a very heavy price, it is just that no one has actually demonstrated and assessed it. However, in order to actually provide equal protection to the two properties, the law should slightly strengthen its protection to the easily damaged or the weaker side. It follows that, since what is emphasized in faquan-centricity is fundamentally the maximization of the total property of various subjects of a country or society, it actually demands that the law submits to, and serves, the need to liberate and develop productive forces, and the need to advance comprehensive national strength.

The above meaning or content of faquan-centricity is a highly unified entity with multiple layers.

2.3 *The Proof of Faquan-centricity*

What should be proven now is that the law and socialist law should be centered on faquan, and should pursue the maximization of faquan through the optimal configuration of right and power, and should not and cannot one-sidedly focus on either right or power, and in pursuit of the maximization of either right or power.

In actuality, in terms of the relations between the state and individuals, the power-centric theory as the manifestation of statism in legal studies (society-centricity is very close to it, and duty-centric theory contains some of its content) has been in decline in terms of its influence in the field of Chinese

legal studies, and only right-centric theory as the manifestation of individualism in legal studies maintains relatively stronger influence. Under that condition, obviously, if a comparison is required in the process of proving the properness of faquan-centricity, what it is to be compared to will primarily be right-centric theory, and secondarily be certain other relevant theories.

The following is the primary rationale and reason for determining that the law and socialist law should be centered on faquan or should be centered on faquan as well as pursuing the maximization of faquan:

(1) Putting faquan at the center is the spirit and the demand of the constitution. The constitution is the epitome of a country's legal system, and that the constitution treats faquan as the center means that the entire legal system has faquan at the center. The key to proving and understanding that faquan is at the center is to have an in-depth understanding of the connection and difference among people's right, right, power, and faquan, where it should be noted that, in terms of both content and scope, faquan is the legal manifestation of people's right.[68] The first priority of a constitution is to properly identify the scope of the "quan" protected by the law (i.e., to identify faquan),[69] to subclassify faquan into right and power, and then to establish the basic principles and rules for right-sharing, to stipulate the basic principles of power allocation, the application mechanism, and the basic rules of application, and to realize faquan through positive interactions between right and power, between rights, and between powers. In this process, power and right are completely equal before he constitution: power does not have to submit to, and serve, right; on the contrary, it is to regulate and constrain the application of right, punishing the behavior of the subject of right abusing right to injure power and using

68 In the faquan analytical model, quan (in its totality) = right + power + residual quan; in terms of actual content, quan (in its totality) refers to people's right in various political manifestos and constitutions, the remainder of quan in its totality minors residual quan is faquan (i.e., the entirety of legally-defined quan). Faquan is the unity of right and power. My writings in the past two decades in this regard have been properly reprocessed and gathered into book form. The readers can refer to relevant sections in Tong Zhiwei 童之伟, *Faquan yu xianzheng* 法权与宪政 [Faquan and Constitutionalism] (Jinan: Shangdong renmin chubanshe, 2001). Also, see the chart in chapter 5 of this book.

69 Many scholars believe that, there is no issue whether the constitution recognizes the scope of faquan, the constitution and the law should both protect people's right. In principle, that is correct, but does "people's right" have a legal scope? If it has a legal scope, then "people's right" is actually "faquan," and if it has no scope, then one has to explain why every country with the rule of law has some "rights" that are not protected by the law—such as some "rights" based on ethics, customs, religious principles and the self-regulations of voluntary associations. The existence of these "rights" shows that the right protected by the constitution is limited, therefore there is actually the issue of affirming faquan from people's right, although the means of such affirmation is not obvious.

a right to injure another right; the subject of right needs to submit to power according to the law, while the subject of power needs to apply coercion to the subject of right who does not submit to power, although the latter can supervise the former according to the constitution, it has to be carried out according to set procedures; so on and so forth. Many scholars believe that power should be subordinate to right (I had such belief myself for a while), but strictly speaking, such a view is erroneous.

That is because power can and should be subordinate to people's right according to the law, i.e., to the totality of faquan, rather than right. Otherwise there would be no way to explain the basic facts such as why power needs to restrict right, and why the subject of right needs to submit to the rule of power and be coerced by power. In any country with the rule of law, how to divide and according to what percentage to divide faquan, how to allocate right and power and regulate their application, and how to set the mutual coordination and restraint relationship between right and power should be determined by the need to effectively realize faquan in its totality and promote its maximization. In that aspect, overall, there is no law in any country with the rule of law in history or reality which is an exception.

Of course, I am fully aware that some laws in history and present day, primarily the constitutions that are the foundation and core of a legal system, particularly emphasize citizens' rights and their protection, which leads to the conviction that these laws are indeed right-centric, such as the French Constitution of 1793 that includes the *Declaration of Human Rights and Citizens' Rights* and the *Constitution of the Soviet Republic of Russian Socialist Union* that includes the *Declaration of Rights of the Exploited Working People*. But that is not the actuality. The reason why these constitutions emphasized particularly rights and their protection was because that, before the revolution, common people were in a position of no rights or no protection of rights, and on the other hand state power was omnipresent and exceedingly powerful. The reason why rights and their protection were particularly emphasized in the constitutions as the fruit of revolution was that they were to change the pre-revolution situations under the new historical conditions, allowing rights to be able to balance the historically powerful power, so that right can coexist and operate with power in a balanced and coordinated manner in order to collectively promote the realization of people's right in terms of faquan or the constitution.

With regard to that aspect, that the constitutions emphasize rights and their protection only indicates that there were little rights for the nationals and extremely inferior protection of rights before formulating the constitutions in the relevant countries, and that the drafters of the constitutions wanted

to change the situations under the new historical condition, and not that the constitutions were right-centric. Just like in the treatment of a patient with gastrosia, where the doctor prescribes medicines for the illness, emphasizing the need to nourish and cure the stomach, but if someone draws a conclusion from that, believing that the stomach is the very foundation of life, and all other organs exist around the center of the stomach, then that would be one-sided and wrong. It should be noted that, when a cat confronts a mouse, it is the mouse that is making noise, not the cat. To particularly emphasize rights is precisely because of the terrible situations in right protection.

It should also be noted that to emphasize right does not necessarily advance rights to such a degree that they can balance power, and even if there were balance, rights could still not become the center, and it would be great if they could create a better condition for the full realization of faquan. The history of the decades after the formulation of the French Constitution of 1793 and the Russian Constitution of 1918 can bear witness to that view. In addition, we should also note that, the "working people's rights" in the *Declaration of Rights of the Exploited Working People* are not legal rights, but politically original rights, similar to the concept of "people's rights," which include legal right and power.

(2) Before the law and socialist law, right and power should and can only be completely equal, which highlights that only faquan, the unity of right and power, can be the center of law. Many scholars are keen to compare the superiority and status of right and power, concluding that right is higher than, and superior to, power. I believe that conclusion is erroneous and is inconsistent with the reality: It is erroneous because the scholars mistake the (legal) right of the citizens or other entities as the subjects for the people's right of the entirety of a country's population or nationals as the subject; and it is inconsistent with the reality because that conclusion is not consistent with the actuality of any contemporary countries with relative healthy rule of law, including China.

Take contemporary China as an example, to say that right and power are completely equal before the law is not only the result of theoretical inference, but also based on the law and facts. Article 5 of the Chinese Constitution stipulates that, "[a]ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law." In terms of its content, it is to require that the powerful and the right holder as well as power and right themselves should be completely equal before the constitution and the law. Other relevant laws, especially administrative procedure law and administrative penalty law,

etc., all stipulate the mechanisms of resolving conflict based on the law rather than "status" when such conflict occurs between right and power, exhibiting the spirit of the equality of right and power before the law. In that aspect, the constitution and the law of any country with the rule of law have no difference in nature, i.e., no law from any country stipulates that power or right should yield to the other whenever a conflict arises. Other than acting according to the law manifesting the requirement of faquan, there is no such a thing as right-centricity or power-centricity, and they also cannot be permitted to exist, because if the law were indeed one-sidedly centered on right or power, the rule of law and normal legal order would certainly be damaged.

In terms of the relationship among right, power, and the law, numerous legal precedents (or legal cases) of various countries all support the view that right and power are equal and should both submit to the law. For example, according to the standard of the supporters of right-centric theory, the law of the United States should certainly be considered as right-centric, but we can easily find the following situations in textbooks on the U.S. Constitution and writings evaluating judicial precedents: in numerous judicial precedents of "Certain person or organization v. the United States" or "The United States v. certain person or organization," the court was always based on the Constitution and the specific situation, sometimes ruled for the United States, sometimes ruled for certain person or organization.[70] Essentially, rather than the fact that, in the precedents, some courts ruled according to the Constitution and the law but followed the change of the times, there has been no difference in terms of status regarding right and power.

During the times when the rule of law was severely damaged in China, there was almost no constitution and no law to speak about, the position of right and power as well as their relationship were utterly chaotic, but since the relatively comprehensive legal system was established, at least in terms of formal systems, right and power are equal before the constitution and the law. Among the recent cases made available by the Supreme People's Court of China, not a small number of them are related to right-power conflict in nature, with typical outcomes being that both right and power have wins and losses. For instance, *Fujian Provincial Survey and Design Institute of Water Conservancy and Hydroelectric Power v. Fujian Provincial Department of Geological Mineral*

70 See Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, Inc., 1978); Gerald Gunther, *Constitutional Law—Cases and Maleriats* (Mineola, N.Y.: Foundation Press, Inc., 1980); James MacGquanr Burns, Jack Walter Peltason and Thomas E. Cronin, *State and Local Politics: Government by the People* (Englewood Cliffs, N. J.: Prentice-Hall, 1984); Jerome A Barron and C. Thomas Dienes, *Constitutional Law in a Nutshell*, 2nd ed. (St. Paul, M.N.: West Pub. Co., 1991).

Resources is a case where power won and right lost;[71] while *Tian Yong v. University of Science and Technology Beijing* (*a Case regarding Refusal to Issue Graduation Certificate and Degree Certificate*), *Xupu County Hospital v. Xupu County Post Office* (*a Case of Failure to Perform Statutory Duties*),[72] and *Case of Su Haiyan's Refusal to Accept Labor Reeducation Decision* are all cases where right won and power lost. There are other more complex cases related to the right-power conflict, which we are not going to list here one by one. But one thing that is obvious so far is that, regardless of which side wins or loses in a case like that, in terms of the system, it has nothing to do with the issues of the status, superiority, center, or non-center of right and power, the only standard that the courts have based on in making their rulings is the law.

But what is manifested by the law? The reasonable explanation is that, fundamentally, what is manifested by the law is the requirement for faquan-centricity and the maximization of faquan, which is also the requirement for people's right-centricity and its maximization in terms of the law. Before the law, right and power are both in a position of subordination and secondariness. Therefore, acting according to the law means that the operation of right and power is centered on the realization of faquan, and submits to, and serves for, the need to maximize faquan. Law-abiding is to abide by the specific requirement or condition in helping realize the maximization of faquan.

(3) The law adjusts all legal relationships according to the center of faquan, which is the norm of the law and socialist law. Right-power relationships, right-right relationships, and power-power relationships constitute the entire content of legal relationships. That the law adjusts legal relationships according to the center of faquan in actuality is to specifically adjust these three relationships and in the process of adjustment to strive to realize the maximization of faquan and the minimization of costs.

In all the above three relationships, logically, the law is primarily to adjust right-power relationships based around faquan as the center. Here, the primary task of the law is to optimize the faquan structure based on changing social-economic conditions, that is, to achieve the most appropriate ratio between right and power within faquan: it needs not only to maintain the existence of power and its efficiency over right, but also to maximally lower the ratio of power in the faquan structure. Normally, the existence and application of right can positively increase the total volume of faquan, thus is productive, while the existence and application of power can only negatively increase the total

71 See *Zuigao renmin fayuan gongbao* 最高人民法院公报 [Gazette of the Supreme People's Court], Volume 1, 1998, 37–38.

72 See Ibid., Volume 4, 1999, 139–142; Volume 1, 2000, 35–36; Volume 3, 2000, 106–107.

volume of faquan, thus is often nonproductive. Therefore, in order to realize the maximization of the total volume of faquan, there is a need to lower the ratio of power as much as possible and to increase the ratio of right on the one hand, and to allow right to be able to effectively check power, and power to be able to regulate and restrict right on the other. Otherwise, the social cost of increasing the total volume of faquan will be too high, even resulting in the decrease of the total volume of faquan.[73] The only standard of whether a faquan structure is optimal is to see whether the structure can realize the maximization of faquan. It is difficult to explain that issue effectively purely in terms of the law, and it becomes more specific and easier to understand when investigated in its relation to the property content of right, power, and faquan.

Secondly, in right-right relationships, the normal mission of the law is to use power to adjust the right-right exchange, to limit and punish the abuse of right, and to realize the maximization of faquan through ensuring the maximization of right. In right-right relationships, it goes without saying that inequality and incredibility will result in too high an exchange cost, even the means, the scale, and the damage to the total volume of faquan from abuse of right that is relatively less concerned about can sometimes be tremendous. The most obvious manifestation of the abuse of right is to destroy large quantities of right in order to realize small quantities of right. There have been many reports like the following: in order to achieve a yearly profit of about a million yuan, certain enterprises have polluted the surrounding environment without any restraint, some have even polluted an entire river, causing the surrounding areas direct and indirect economic loss to the tune of tens of millions yuan, and the large areas along the river have shortages of production and domestic water supply. Another example comes from a news report, "Private Enterprise Loves Low-quality Punching Machine, Two Small Towns 'Annually Produce' 5000 Injured Hands," which is about a sad story that, in two towns in Zhejiang Province, some owners of private enterprises only concerned about profit, not about

73 Considering comprehensively the two aspects above, the actual manifestations of the exceedingly high costs in increasing the total volume of faquan and the decrease of the total volume of faquan are various, some commonly seen manifestations are as follows: the total volume of power is exceedingly large, exceedingly concentrated, straggling social dynamics, and rejecting democracy and sciences; fiscal scale is exceedingly large, where public expenditure becomes a severe burden on society; there is exceeding interference of social-economic existence, even individual life, with decisions being authoritarian and arbitrary; public agencies are overstaffed, with little achievement but lots of damage; the society becomes abnormal; public safety worsens; there are political riots or periodic disturbances, etc.

their workers, causing 5000 workers to suffer injuries to their upper limbs every year.[74]

Under the situations such as the above, the law should use power to intervene in the right-right relationship, in order to prevent individuals from sacrificing larger quantities of right to gain smaller quantities of right, which is essentially to maximize the total volume of faquan and minimize the costs. Perhaps some would claim that it seems to be in pursuit of the maximization of right. Indeed, on the surface it is in order to maximize right, but the situation will be totally different if we comprehensively analyze the relationships among right, power, and faquan: The law divides right and power, allowing power to intervene in the right-right relationship, with the fundamental purpose of fully realizing and maximizing faquan, right naturally also has the issue of maximization, but it has to be the maximization within the optimal faquan structure, otherwise it would definitely hinder the maximization of faquan. Relative to the maximization of faquan, the maximization of right at most can only be considered the secondary purpose of the law, when conflict arises between the two, the maximization of right should submit to the requirement of the maximization of faquan.

Thirdly, in terms of the power-power relationship, the law usually does not ensure the maximization of the total volume of faquan through promoting power's self-growth, but relatively ensures the maximization of the total volume of faquan through optimizing the faquan structure, decreasing faquan consumption, and lowering right's exchange cost. Here, optimization of faquan structure is the condition, and there are the following three effective means for such optimization to be effective: 1) To lower the strength of power, reduce and even eliminate power's damage to right through appropriately spreading and dividing power and maintaining existing ratio structure, creating systemic condition for the maximization of right and then faquan. 2) To relatively lower the cost of using power to maintain the existing right-right structure (such as civil-commercial legal order), rather than the other way around. In this regard, the Chinese central government created a "wonder" in 2016: an announcement of 494 Chinese characters in total whose original intention was to maintain that civil-commercial legal order was issued, which was stamped by 44 state ministries and the CPC organizations, including the Supreme People's Court and the Supreme People's Procuratorate, causing an uproar in public opinion.[75]

74 It is a rather detailed report, with clear indication of the time, location, incident, etc. See *Wuhan Morning Journal*, June 24, 2000, 11.

75 "Yifen budao 500 zi de tongzhi, weishenme gai le 44 ge zui quanwei gongzhang 一份不到500字的通知，为什么盖了44个最权威公章 [Why 44 Most Authoritative Stamps from

3) To lower the inevitable cost in the right-right exchange process through optimizing power-power structures, such as various expenditures legally paid to public agencies by natural persons and legal persons as operators in the process of signing and executing contracts, including fees, taxes, time in dealing with public agencies and other various tangible and intangible things. On the influence of the low quality of the power-power structure, a media report on the problems of the administrative approval procedure has provided a vivid example: "During an investment fair in Zhoukou District of Henan Province, a foreign businessman burst into tears. It turned out that, according to the local investment conditions, the project had been fully funded, but after more than a year, the investment project was still in the process of endless approvals, and the projected investment income had become a mirage. The situation faced by that foreign businessman is not believed to be an exception, there had been an investor who, in order to do a project, had to 'force five passes and slay six captains," and obtain 150 stamps before the approval. One of the most troubling problems that foreign businessmen face in investing in China is complicated approval procedure, bureaucracy of government agencies, and ineffectiveness."[76] Isn't that the high cost that the low quality of the administrative power structure causes for right-right exchange? Of course, that is only a small one of many examples where the low quality of the power-power structure hinders the right-right exchange.

(4) In terms of recognized and protected interests, the law and socialist law should be centered on the total interest of a society, attaching high priority to pursuing the maximization of the total interest. Right, power, and faquan should be corresponding to individual interest, public interest, and the total interest, respectively, and the former and the latter are the two existing forms of the same thing, therefore, faquan-centricity means the total interest-centricity. And the total interest in faquan theory refers to the total interest that is legally recognized and protected in a country or society, and politically the total interest is also the total interest of the people (nationals) as reflected in the law. From the point of social stratification, the total interest of a country is constituted of the following two parts: the interest of various members of the dominant social group and the common interest of the various members.

Public Agencies for an Announcement of Fewer than 500 Chinese Characters?" (http://mini.eastday.com/a/160429105539904-2.html).

76 Yu Dong 于东, "Zhongguo gaige xingzheng shenpizhi kunnan chongchong 中国改革行政审批制困难重重 [Difficulties in Reforming Administrative Approval Procedure in China]," *Xin Bao* 信报, August 29, 2001.

There is not much doubt that the law should recognize and protect the total interest, individual interest, and public interest, what is really debated is which interest is the most fundamental according to the law, and should enjoy priority protection at the expenses of other interests. In that aspect, traditional theories maintain either unconditional priority of individual interest, or unconditional priority of public interest, with conceptual simplification and extremalization. The main reasons are, in terms of understanding, 1) they lack a concept of quantity, 2) they lack a concept of total interest.

The lack of a concept of quantity results in an illusion that the importance of a specific interest is determined by the nature of the relevant interest, not by its quantity, which eventually leads to the erroneous notions such as the following: according to the supporters of unconditional priority of public interest, no matter how small public interest is, it is more important than individual interest regardless of how large the latter is, as if they want to preserve public interest of 1 yuan in value at the expenses of individual interest of hundreds of thousands, millions, and even more in value.[77] That kind of notion has been quite popular in China.

I think many readers have heard about a slogan like "the state affair is important no matter how small it is, individual affair is small no matter how important it is," which is a popular elaboration of the idea of unconditional priority of public interest. Some readers may remember that, more than 30 years ago, the media reported about and praised a teenager who died trying to save a "state-owned" lamb from the river, which is perhaps the typical practice of the idea of unconditional priority of public interest. The praise of the act is an ethical commendation, not legal requirement, but it actually raises an ethical requirement of sacrificing larger individual interest and even one's life for public interest, regardless of how small it is. In actuality, that requirement is inhumane and, at least, not economical.

Unconditional priority of individual interest is also erroneous, which is only the other extreme. Logically, it can only arrive at the conclusion that no matter how small it is, individual interest is prior to public interest. That view is not very popular in China, but is quite influential in Europe and North America, and there even have been extreme cases. Many should remember that, more than 20 years ago in Washington DC there were about a dozen homosexuals who wanted to exercise their right of demonstration, in order to prevent

77 If interest can be measured by money, that notion is quite appropriate. In fact, the founders of Marxism in many occasions pointed out that, interest is fundamentally economic interest, and economic interest is again related to property and currency. Therefore, it is fundamentally correct to use currency as the unit of measuring the quantity of interest.

conflict and ensure peaceful proceeding of the demonstration, the government mobilized 4,000 policemen to block streets, clear the way for them, and protect them—which may be one of the typical manifestations of the idea of unconditional priority of individual interest. I am for the protection of the right and interest of minorities, but I don't agree that a very small quantity of individual interest is realized at the expenses of sacrificing huge quantities of public interest, because that is against the principle of the maximization of economic efficacy and the minimization of costs.

Similarly, let us take a look at the case of high concern in both China and the Chinese-American community where a visiting Chinese scholar of University of Illinois at Urbana-Champaign, Zhang Yingying, was kidnapped by a teaching assistant of the school, Brendt Christensen, in 2017. It is good to have the right to remain silent, but it appears extreme when it is emphasized to such a degree that it goes beyond injuring social interest in its totality. Zhang Yingying was kidnaped, and the objective facts of Brendt Christensen's criminality are apparent. Under such conditions, the right content of Zhang Yingying's right to life far exceeds Brendt Christensen's right to remain silent. In order to rescue Zhang Yingying, the suspect's right to remain silent should be curbed according to rational principles, but unfortunately it is not part of the U.S. legal system. With regard to this case, I believe that the view of Alan Dershowitz of Harvard University is important: "If torture is going to be administered as a last resort in the ticking-bomb case, to save enormous numbers of lives, it ought to be done openly, with accountability, with approval by the president of the United States or by a Supreme Court justice." There has been no "ticking bomb" in the case of Zhang Yingying, but the reasoning should be the same. The rationale of opposing the scope of restricting the right to remain silent is that there cannot be any exception in forbidding torture, otherwise it is going to be out of control.[78] But I believe that, here one is the issue of principle, and one is the issue of technique. And technique cannot be used to negate the principle, and technique can always be improved. It is my hope that such extreme practice will be systematically altered in the U.S.

It is clear that the above two extreme ideas and practices have the common consequence, which is to sacrifice the larger quantity of interest in order to protect the smaller quantity of interest, thus causing a society unnecessary loss of interest, creating more harm than gain, and decreasing the total volume of the total interest. The society should be able to absorb it if these situations occasionally occur one or two times, but if occurring frequently, they will

78 Alan Dershowitz, "Torture Could Be Justified," http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/.

certainly affect the normal development of a society, making the society face the threat of "bankruptcy," and at the same time will definitely result in imbalance and unfairness in interest distribution.

It should be made clear that, in all contemporary countries of all types, strictly speaking, there are only laws that favor individual interest or public interest, and there are no laws that are truly centered on individual interest or public interest, all laws to varying degree are centered on the society interest in its totality. The above-mentioned extreme cases reflecting unconditional priority of public interest or individual interest are isolated incidents. Under most conditions, laws have to be centered on the total interest, which is the requirement of social-economic development and reality itself, independent of people's will.

Faquan-centricity requires that the principle of maximization of the total interest be followed in dealing with the relationship between individual interest and public interest, as well as other more specific interest relationships. According to the principle, the law should ensure or encourage the maintenance and promotion of larger quantities of interest at the expenses of damaging smaller quantities of interest, rather than the other way around.

The law in contemporary China favors public interest, but fundamentally, it is still centered on the total interest. The dominant ethical principles and legal conceptions in China have always favored public interest. Article 14 of the current constitution, with regard to the relationship between accumulation and consumption, requires the state to "attend simultaneously to the interests of the state, the collective, and the individual," the ordering of the three interests in the Constitution already shows the spirit of public interest priority,[79] consistent with the ethical principles and legal conceptions observed in China over the past half of the century. That spirit is manifested in both the Chinese Constitution and the law, for example, the distribution of natural resources ownership in the Constitution, the handling of *bona vacatia* in civil law, the emphasis on the protection of state security, authority, and the social system in criminal law, etc., all manifest that spirit.

79 I have adopted the method of dichotomy regarding all legal interests, where public interest is equal to state interest in political philosophy, represented by a state agency and its representatives, while individual interest is an interest related to civil society, whose subject is the natural person and other forms of "private" persons. According to the method of dichotomy, the "collective interest" in the Chinese Constitution, in terms of its characteristics, should be included in the category of public interest under the planned economy system before the opening and reform, and should be included in the category of individual interest in the period beginning in the 1990's.

Does that mean, however, that it is the unconditional priority of public interest or public interest-centricity? I don't think it is, or should be. The presence of these aspects only demonstrates that in China the law "favors" public interest, and "favor" is not principle, but means, or strategy, and can be adjusted and changed accordingly. To put it specifically, favoring public interest is but the means and strategy in protecting and promoting the maximization of the total interest, and the maximization of the total interest is the principle, which is the foundation, center, and benchmark, and is highly stable.

Such understanding can be corroborated by some relevant discussions by Deng Xiaoping. As is well known, on the one hand, Deng Xiaoping talked many times, in the order that puts the state first, about how to handle the relationships among state interest, collective interest, and individual interest, so therefore he also favored state interest, but, on the other hand, when he touched upon the most fundamental issues, he was undoubtedly focused on the total interest of the society. For instance, about the essence of socialism, he particularly emphasizes "liberating productive forces, developing productive forces;" with regard to the standard pertaining to capitalism or socialism, he proposes that one "should see whether it is favorable to developing productive forces of a socialist society, whether it is favorable to increasing the comprehensive strength of a socialist country, and whether it is favorable to elevating the living standard of the population."[80] Liberating productive forces, developing productive forces, and increasing the comprehensive strength here, in terms of their fundamental content, are tantamount to the interest maximization that have been discussed above, and faquan maximization and property (wealth) maximization that have been discussed and will be further discussed.

The law in China overall also embodies the spirit of the total interest-centricity. In the Constitution, that spirit is shown in the stipulations of attending simultaneously to the interests of the state, the collective, and the individual, of protecting legal property and the interest of public property, protecting citizens, individual economy, and the private economic sector, and of arranging distribution configuration in terms of the balance between citizens' basic rights and basic duties (Chapter 2), etc. Although the traditional notion of unconditional priority of public interest has a profound influence in China, as long as China practices socialist democracy and the rule of law, that notion will not be able to realistically and comprehensively embody in the legal system, thus having to yield to the total interest-centricity.

80 Deng Xiaoping 邓小平, *Deng Xiaoping wenxuan* 邓小平文选 [Selected Writings of Deng Xiaoping], (Beijing: Renmin chubanshe, 1993), 372–373.

Precisely because of that, in Chinese legislation, there are large quantities of stipulations that are used to resolve the conflict between individual interest and public interest. When such conflict occurs, the norm is often to handle it according to the law, and the law is also to look for the mean measurement between the two sides, basically there is no issue where one side is unconditionally dependent on the need of the other side when a conflict between two interests occurs. That mean is justice, and the standard of justice is fundamentally in sync with the principle of the maximization of the total volume of interest, and overall, the realization of justice can promote the maximization of the total volume of interest, just as fairness can promote efficiency. In the process of law application, the objective need for the total interest-centricity or the maximization of the total interest can always blaze a trail for itself.

Let us take a case as an example. Many may still remember that, in 2000, a case in the court of Daqing City, Heilongjiang Province attracted wide attention in the field of legal studies, *Southern Weekend* and many media outlets reported and organized discussions on the case which are very telling. The general conditions of the case is as follows: there was a robbery in a branch of the city's Construction Bank, two criminals broke into the working area and pointed knives at one of the three female employees, Ms. Yao, who, in order to protect her own life, was forced to hand over more than 20,000 yuan, afterwards, she used her own savings to make up the 20,000 yuan that she handed over, but the head of the bank still punished her with dismissal from office, with the rationale that she should have fought against the criminals but she did not; Ms. Yao refused to accept the punishment, and sued the city's Construction Bank based on the relevant stipulations of the labor law, demanding that the bank's punishment of dismissal from office be rescinded, finally both the court of first instance and the court of second instance backed Ms. Yao, and the city's Construction Bank lost.

Without getting into small details, I believe that the key in the case is: whether it is wrong for an ordinary employee (non-security personnel) in a life or death situation to be forced to give up state property worth more than 20,000 yuan that was under her care, in order to protect her own life. According to the idea of unconditional priority of public interest, Ms. Yao was wrong, because public interest is important no matter how small it is (let alone that more than 20,000 yuan is not a small amount), and individual interest is small no matter how important it is (nothing more important than life). But according to the spirit of the total interest-centricity, Ms. Yao not only did nothing wrong, but should be approved and encouraged. Because in terms of the total interest-centricity, the total volume of interest contained in a person's life is undoubtedly far exceeding the interest volume represented by the sum of more than 20,000 yuan.

Therefore, under the condition where she was highly likely to lose her life, and where she might not necessarily safeguard the state property of more than 20,000 yuan even if she sacrificed her life, giving up the money to save her life was consistent with the need for the maximization of the total interest, and according to relevant law should also be conceived as taking certain proper measures for urgent danger prevention. Ethics, the law, and even the party constitution should all recognize such action, otherwise these norms are not only inconsistent with the demand of social advancement, but also inhumane, and will eventually be abandoned by people as something ossified and inhumane.

In the case above, the district and city courts had a relatively accurate grasp of the spirit of the total interest-centricity in their specific application of the law. This is by no means accidental, because there is always social interest in its totality grasped by the legislators, to various degrees, within a country's legal system of a specific era, although it is generally not the self-conscious behavior to grasp such interest in its totality, rather, it is due to the "overwhelming circumstances," and the impossibility of resisting the objective conditions or pressures from various aspects. The formation of the objective conditions or pressures is precisely the manifestation of the spontaneous functioning of the objective demand that the law must reflect social interest in its totality. Many believe that the law in Western countries is individual interest-centric, but that is not the case as the law there is overall also centered on the total interest and in pursuit of the maximization of the total interest, except that it favors individual interest on only few issues.[81] I have already elaborated on the basic rationale for that assessment, and I will further discuss these ideas below when we discuss the property content of the law. Interest in the law is basically economic interest, and the specific existing form of economic interest is property (or wealth), therefore, discussions about interest issues and property issues are closely related, and mutually corroborated.

(5) In terms of recognized and protected property (or wealth, hereafter), the total volume of all property with defined ownership in a country or society (its content does not include property with undefined ownership, abbreviated as the total volume of property hereafter) is the material condition of the formulation and application of the law, therefore the law should serve for the maximization of the total volume of property.[82] The total volume of property

81 Relative to public interest, certain individual interest is especially fragile, vulnerable, and objectively needs heightened protection so as to balance power. That is one of the important reasons why the law there favors the protection of individual interest.

82 The total volume of domestic property refers to all current property within a country, which is not a strict term of economics, I have coined the term in order to meet the need of expressing particular views in the book, but undoubtedly the increase or maximization

is the material foundation of faquan, so the economic significance of faquan-centricity is that the law is based on the current total volume of property, and in pursuit of the maximization of the total volume of property. In terms of its material content, faquan-centricity is centered on the total volume of property, and what it aims at is the idea that the law is centered on public agency property and that the law is centered on individual interest. These two ideas are not clearly elaborated by anyone, but they exist invisibly, at least logically, because, since public agency property and individual property are the material foundations for power and right, respectively, in terms of property content, the power-centric theory means that it advocates public agency property-centricity, while the right-centric theory means that it advocates individually-owned property-centricity.

It is impossible for the law of a country with the rule of law to be based one-sidedly on public agency property or individually-owned property, and to pursue the maximization of either property, the law should and can only be centered on the total volume of property and in pursuit of its maximization. The production of wealth is the foundation of social existence and development, is the most basic practical activity of humans. In order to survive and develop, a country or society must continue to engage in wealth production. The law of a country is both the result of meeting the need for wealth production, and the means of maintaining and promoting continuous and ordered production. Of course, that is stated in the sense of ought, and, in actuality, the laws that are not well formulated and executed can hinder wealth production. The so-called wealth here obviously refers to the total volume of property and not merely one of its components. According to the Marxist theory that the development of production forces plays a decisive role in the historical advancement and evolution of social systems, we can also logically deduce the same conclusion. That the Chinese Constitution emphasizes modernization construction as the center (economic construction as the center), and that other authoritative documents especially emphasize the improvement of the comprehensive national strength and the liberation and development of productive forces are expressing, from a different angle, the same conceptual content as the total volume of property-centricity discussed above.

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of the total volume of domestic property can be manifested as the increase of per-capita of total GNP or GDP, as well as economic growth of corresponding degrees. It should also be noted that, in fields other than legal studies, property and the total volume of property are often called wealth and the total volume of wealth, which is fine as their contents have no essential differences.

The need for the maximization of the total volume of property indicates that, various properties should not be treated, ranked, or protected differently due to the difference in their subjects. To legally affirm the priority of certain property ownership means that it allows the law to intentionally seek the quantitative maximization of the property of the subject of that property ownership, and means that the law is relatively indifferent to, or even discriminates against, the property and its quantitative increase of other subjects, artificially elevating the property of one kind of subject while denigrating the other kind, which of necessity severely disrupts the optimal structure of property ownership that the market and competition originally enjoy, and function of natural selection of survival of the fittest among business operators. As demonstrated by the history of economic development of many socialist countries, that can greatly hinder the maximization of the total volume of property.

In view of the fact that both the Chinese Constitution and authoritative documents emphasize the high importance of being centered on economic construction, liberating productive forces, developing productive forces, and increasing comprehensive national strength, all sectors in China have reached a widely shared consensus that socialist law should serve for the maximization of the total volume of property. That is actually self-evident. Some provisions in the Constitution and the law are still not well reflective of the need for the maximization of the total volume of property, and few provisions even hinder the realization of the maximization of the total volume of property, which, however, is not the mainstream view. Judging from the reality of constitutional amendments, legislation, and enforcement in the past 40 years, these problems have been in the process of improvement.

Considering the situations in capitalist countries, their laws have since been also formulated and executed around the center of the total volume of property and have been seeking the maximization of its total volume, not just seeking the maximization of private property. Many believe that it was the bourgeoisie that started different treatment of the property ownership of different subjects, which is actually a misunderstanding. The legal documents of capitalist countries have never stipulated such content. The notion that "private property is sacred and inviolable" is summarized by scholars of socialist countries according to their understanding of capitalist law, not the original text in capitalist legal documents. The original language in Article 17 of "the Declaration of the Rights of Man and of the Citizen" passed by France's National Constituent Assembly in 1789 is: "Property being an inviolable and sacred right," where "property" is not differentiated according to different owners, and there is absolutely no indication that public property is sacred and

inviolable. Furthermore, that language has not been used in the constitutions and civil laws of other capitalist countries.

In fact, many Western scholars have directly or indirectly discussed the issue that the law should be centered on the growth of the total volume of property and in pursuit of its maximization.

As early as in the 18th Century, Adam Smith already in *The Wealth of Nations* elaborated the idea that economic activity is centered on the growth of national wealth and in pursuit of the maximization of national wealth. In the 20th Century, more economists accepted that idea and implemented it in their research, the well-known economists such as Schumpeter, Rostow, Kuznets, Harrod, Domar, and Samuelson have wide-spread influence in this regard, and the fact that growth economics or development economics are prominent schools in today's economics also reflects that reality. Considering the foundational nature of economic activity in human existence and social life, we have reason to infer that, the above ideas and schools logically imply the conclusion that the law fundamentally should be centered on the growth of the total volume of property and its maximization. In fact, many jurisprudents have indeed developed their legal theory system based on these economic theories, the most influential in legal studies among them should be the American scholar, Posner. He sees economics and its relation to legal systems as follows: Economics "is a theory of rational choice, namely, a rational choice to be achieved by litigation, or a rational choice to reach the anticipated goals through the smallest possible expenditure of resources, so as to save the resources for other areas of the economic system. Regardless of the purposes of a legal system, if it is concerned about the theories of economics that aim at the economic compatibility between the means and the goals, then it will manage to realize the goals with the lowest cost."[83]

The U.S. legal system is understood and explained by Posner completely based on the principle of the maximization of economic efficiency or the minimization of costs (another form of the maximization of economic efficiency). With regard to the constitutional system, on the premise of taking the relation between efficiency and democracy into consideration, he believes that, "[e]fficiency is maximized by a constitution that confines government to measures to prevent negative externalities and encourage positive externalities and that insists (so far as possible) that, within its circumscribed sphere,

83 Richard A. Posner, "The Author's Preface for the Chinese Edition," in *Falü de jingji fenxi* 法律的经济分析 [Economic Analysis of Law], translated by Jiang Zhaokang (Beijing: Zhongguo dabaikequanshu chubanshe, 1997), 1.

government follow cost-minimizing policies."[84] And on the separation of powers, a fundamental principle of the U.S. Constitution, he explains its economic significance in the following terms: "The main purpose of the separation of powers is, in economic terms, to prevent the monopolization of the coercive power of the state, a form of monopoly potentially far more costly than any other discussed in this book."[85] But the "enhancement" "achieved by combining executive, legislative, and judicial powers in one body" is not reliable, and "the constitutional framers thought on balance inefficient because of the danger it created of excessive centralization of political power."[86] As for the protection of civil rights afforded by the Constitution, it is only "designed to prevent particularly harsh and costly forms of wealth redistribution. To take away a person's property without compensation, or make him a slave, or prevent him from practicing his religion are illustrations."[87] In other parts of the book, Posner microcosmically examines various components of the U.S. legal system, brilliantly and convincingly demonstrating, without exception, that the maximization of economic efficiency and the minimization of costs are the predominant concerns in the formation of the U.S. legal system.

(6) Faquan-centricity, as theory, principle, or spirit, can more fully and specifically manifest in almost all aspects and on all levels of the law. The main rationale for that assessment can be elaborated from the following three aspects:

1) With regard to legal relations, faquan-centricity in terms of content can cover all areas of legal life. Right-power relations, right-right relations, and power-power relations constitute the entire content of legal relations, right-duty relations are but an externalized form of right-right relations and a portion of right-power relations.[88] Therefore, as long as it is explained that faquan-centricity is the main thread throughout all these three relations, it can be demonstrated to be indeed capable of covering all areas of legal life.

Let us take a look at right-power relations first. Faquan-centricity has two requirements for the overall legal relations: (1) the optimization of faquan (ratio) structure with the purpose of maximizing the total volume of faquan; (2) conflict resolution mechanisms with the purpose of maximizing the total

84 Richard A. Posner, *Economic Analysis of Law*, 8th edition (New York: Aspen Publishers, 2011), 869.

85 Ibid., 870.

86 Ibid., 871.

87 Ibid., 874–875.

88 I have proved this point before. See Tong Zhiwei 童之伟, "Falü guanxi de neirong chonggu he gainian chongzheng 法律关系的内容重估和概念重整 [Content Reevaluation and Concept Reorganization of Legal Relations]," *Zhongguo faxue* 6 (1999): 24–32.

volume of faquan. The first aspect can be more easily experienced, because it is directly reflected in the amount of right enjoyed by individuals or the degree of freedom experienced by them, and manifests as "quan" reasonably shared between civil society and political state, which strictly speaking is reasonable distribution of faquan. In different societies and countries, the ratio structure of faquan shared between civil society and political state is different.

Take China as an example, in the faquan structure before the implementation of reform and opening policy, the political state enjoyed the absolute advantage of the volume of faquan, while individuals had the absolute disadvantage of the volume of faquan, but overall the tendency of the structural change in the last 40 years is towards balance. The ratio structure of power/right is difficult to be intuitively expressed quantitatively, because power and right are both reality that can be perceived but cannot be expressed quantitatively. However, based on the corresponding relationship of "power/right," "public interest/individual interest," and "public property/private property," we can indirectly understand and express the quantitative and ratio structure of power/right through the quantitative and ratio structure of public property/private property. This is very important. According to the calculation of Professor Chen Zhiwu of Yale University, the total assets of China in 2007 were about 115.6 trillion yuan, 27.6 trillion yuan of which was owned by individuals, while 88 trillion yuan was owned by the state.[89] Therefore, the ratio of public property/private property of Chinese society in 2007 can be quantified as 88 trillion yuan over 27.6 trillion yuan, or roughly 76.1% over 23.9%. According to the above corresponding relationship, we can say that, in 2007, China's faquan structure (power vs. right) was roughly 76% over 24%, which is highly unbalanced. However, if we take into consideration the era of the "Cultural Revolution" (1966–1976) when a pure public ownership was practiced, we must say that the 2007 faquan structure was much more balanced. This is due to the development of individual economy, private economy, and foreign investment economy after 1978. My guess is that, during the "Cultural Revolution," China's faquan structure based on the assets ownership might have been 95% over 5%. Just take housing as an example, the vast majority of city residents lived in public-owned houses or apartments during the

89 Chen Zhuwu 陈志武, "Zhongguo de zhengfu zichan guimo jiujing you duo da? 中国的政府资产规模究竟有多大 [What Is the Size of the Assets of the Chinese Government?]," http://news.21cn.com/today/topic/2008/02/26/4388815.shtml. Perhaps some would argue about the accuracy of this figure, but the problem is that, other than this figure, no one in the field of economics, Chinese and foreign, has provided any similar figures.

"Cultural Revolution," while house property was the main asset of city residents around 2007.

Within the right-power relationship, the requirement of the second aspect above, namely, the requirement of forming a mechanism of resolving conflict for the maximization of the total volume of faquan, is also very obvious: according to the principle of legality, in a conflict between right and power, the two "parties" have equal status, neither party necessarily submits to the other, the case can only be settled in accordance with the law, and submitting to the law is to submit to the specific requirement of realizing the maximization of the total volume of faquan. This issue can be more easily comprehended if considered in relation to the interest content and property content of right, power, and faquan.

In terms of right-right relations, faquan-centricity also has two different requirements, i.e., the optimization of right configuration with the purpose of realizing the maximization of the total volume of faquan, and the resolution mechanism of right-right conflict beneficial to the maximization of the total volume of faquan (or the minimization of right exchange costs). The issue about the relations between equality and efficiency that are often discussed belongs to that area. The so-called efficiency first means that in dealing with right-right relations, the expansion and maximization of faquan are the primary goals, with everything else being secondary. In the past, at present, and in the foreseeable future, equality in the process of right configuration at most can only be legal (i.e., formal) equality, can only be equality of right capacity, and cannot be quantitative equality in sharing actual rights, otherwise there would be no efficiency, which is to say, there would be no expansion and maximization of the total volume of faquan. The consequences of equalitarianism under the "People's Commune" conditions have provided a great footnote for that.

In terms of power-power relations, the requirement and manifestation of faquan-centricity can be inferred based on the above two relations. In that regard, the lessons from legal history primarily are twofold: (1) within a faquan structure, the total volume and effective scope of power should be strictly restricted. In other words, faquan-centricity and the maximization of faquan require small government, limited government, and do not tolerate big government, unlimited government. (2) power cannot be overly fragmented, nor overly concentrated, and any power should be effectively checked by right and other powers. These are universal requirements in realizing the maximization of faquan or the minimization of faquan growth costs.

2) Using the requirements of faquan-centricity as the measurement can help fundamentally provide a logical explanation over the success and failure

of legal activities in the past and at present. Take China as an example, the problems or shortcomings in Chinese legal life before the implementation of reform and opening policy can essentially be characterized as deviating from the specific requirements of faquan-centricity: "Big Commune," planned economy, and social-economic resources highly concentrated on the hands of state agencies, especially administrative agencies, resulted in absolute and overwhelming advantage of power relative to right within faquan structure, completely subverting the balance that ought to exist; the total volume of right was relatively very limited, right resources were extremely scarce, and right with already limited total volume as well as equalitarian configuration severely hindered the growth of the total volume of right and furthermore the growth of the total volume of faquan; the total volume of power was relatively immense and not legally divided, with power separating from its legal subject and overly concentrated.

The consequences of these conditions have been the formation of low-quality faquan structures, low-quality right configurations and power configurations, and an ensuing tendency of the minimization of efficiency or that of the maximization of costs. The social-economic content of the minimization of efficiency or the maximization of costs is the minimization of the total volume of right and the total volume of property. In the more than 30 years after the implementation of reform and opening policy, the rapid growth of the total volume of wealth, that of interest, and that of faquan are primarily due to the optimization of the faquan structure on the two levels and in the three aspects discussed above, with the optimization creating a condition for the expansion and maximization of the total volume of faquan.

Today's legal life still faces many problems that need to be solved gradually, a large number of which was there before the implementation of reform and opening policy, and has not been solved essentially. For example, the phenomena of hindering the optimization of faquan structure, increasing right exchange costs, and damaging the maximization of efficiency through big government, unlimited government, local state administrative agencies that exceed their power in interfering social and economic life are signs that the faquan structure predominant in the era of "Big Commune" and planned economy are still not dispelled. Of course, there are some that are new problems, for instance, many mechanisms in civil law, criminal law, and administrative procedure law are still inappropriate, unhealthy, and inefficient, featuring many characteristics of the new historical era. The existence of such phenomena indicates that China so far has not found the specific pathways and methods of maximizing faquan or minimizing operational costs.

3) The hypothesis, principle, or spirit of faquan-centricity can manifest on the macro level, and, more importantly, can enter the very cells of the law and be applied in the proceedings of an actual case—which is precisely what a law-centric theory such as the right-centric theory is unable to do, and the fact that it is unable to do that shows that the center identified by relevant scholars, be it power, right, or duty, fundamentally cannot be the center of the law. The maximization of economic efficiency or the minimization of costs is part of the content of the hypothesis or principle of faquan-centricity. With regard to that part of the content, we can find sufficient material to prove the above propositions from the resources provided by economic analysis of legal studies. In terms of the relations between what contains and what is contained with regard to faquan-centricity and the maximization of economic efficiency (or the minimization of costs) on the level of property content, we can state that the maximization of economic efficiency precisely reflects the deep content of faquanism. Just in that sense, Posner's economic analysis[90] of the U.S. Constitution and Federal system can already show that the principle of faquan-centricity can be implemented in the entire legal system of a country, and his analysis of legal economics methods with actual examples and the evaluation by another scholar accustomed of legal economic analysis on three cases in petro transportation, pollution discharge, and criminal law amendment[91] indirectly demonstrates that the principle of faquan-centricity can be implemented in legislation and even in the process of formulating specific legal norms. Furthermore, some of the examples that Posner has discussed on other occasions can be seen as illustrations that the principle of faquan-centricity can be applied in judicial processes, because he assesses these examples (such as plea bargaining) based on the measurement of the maximization of economic efficiency, the maximization of property, or the minimization of costs, the measurement that is part of the content of the principle of faquan-centricity.[92] To be sure, in the processes of constitutional amendments, legislation, and justice, there are also many testaments that the law is, and should be, centered on faquan. To use the constitutional amendments as an example, all the following articles directly or indirectly have reflected the fundamental value orientation of maximizing faquan, particularly of maximizing

90 See Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1993), Chapter 6.

91 See Robert Cooter & Thomas Ulen, *Law and Economics*, 3rd ed. (New York: Addison Wesley, 2000), 4–7.

92 See Richard A. Posner, *Economic Analysis of Law*, 8th edition (New York: Aspen Publishers, 2011), Chapter 21, "Civil and Criminal Procedure," for relevant cases and examples.

wealth, or have reflected the demand for maximally liberating and developing productive forces: the first article that permits the existence and development of private economy and the second article that permits legal transfer of land use right that were passed in 1988, the 13th article that stresses that the country should be administered in accordance with the law, and should be constructed as a socialist country with the rule of law, the 14th article that permits development of multiple forms of economic ownerships and co-existence of multiple distribution modes, the 15th article on the dual operation system that is based on household contract management in the countryside and is incorporating localization with centralization, and the 16th article that affirms that the individual, private economy is an important component of the socialist market economy that was passed in 1999. The formulation and execution of the Constitution and the law in China overall can be understood essentially in the same spirit.

2.4 *Response to the Article* "The Theoretical Logic of Right-centricity"

After having elaborated my view on the center of law, it is time now to respond to Professor Liu Wanghong's article "the Theoretical Logic of Faquan-centricity—Discussion with Professor Tong Zhiwei" (published in *Zhongguo faxue*, Volume 2, 2001, abbreviated as "Discussion" hereafter, and all quotations without specifying the sources are from the article).[93] But before responding to the criticism in the "Discussion," I would like to point out an overarching problem of the article. The problem makes it difficult for the following discussions to become thorough and to focus on a central theme: obviously, the intent of the "Discussion" is to further explain the content of right-centric theory on the level of general legal theory, but in the process of its writing, it has become a representation of the center of various parts of the law, and the basic concept is therefore undistributed, with some of its content self-contradictory.

As the readers can see, the titles for the first four sections of the article are as follows: "the Essentials of Right-centric Theory," "Right-centricity: the Basic Value Orientation of Private Law," "Duty-centricity: the Basic Value Choice of State Law," and "Right-centricity: the Value Focus in the Relation between Right and Power." Just by analyzing the titles, it is clear that the first section is

93 I am grateful to Professor Liu's interest in my article (Tong Zhiwei 童之伟, "Quanli benwei shuo zai pingyi 权利本位说再评议 [Revisiting Right-centric Theory]," *Zhongguo faxue* 6 (2000): 47–65.) and his constructive criticism. That is very rare in today's academics, as it has become less and less frequent that a scholar is truly interested in a certain view and is willing to put into writing his criticism and to display it to the readers in order to show his responsibility.

basically to reiterate existing views and to make necessary explanations, which we are not getting into here. The titles of the last three sections reveal the following information: 1) Right is identified as the center of private law, while duty is identified as the center of state law, but here the "state law" merely refers to the constitution and the laws that regulate the organization and authority of state agencies, and is not public law that is often discussed. Therefore, the sum of private law and state law is not the entirety of the laws in a country or society, so even the respective discussions of their centers are but discussions of the centers of certain parts of the law, not discussions of the center of the law in its totality. 2) Identifying duty as the center of state law already clearly rejects that that portion of the law should be centered on right. Related to the abovementioned condition, what the "Discussion" is trying to say is that private law is centered on right, state law is centered on duty, and what is the center of the rest of law is not clear at all. Thus, the article is self-contradictory and does not form a concept of an exhaustive law. Why is it self-contradictory? Because here the so-called responsibility is actually that portion of duty corresponding to the authority of state agency itself (duty is divided into the part corresponding to the right of citizens and other entities, and the part corresponding to the relevant authority of other state agencies), so advocating responsibility-centricity is also to advocate duty-centricity. So isn't it the case that the "Discussion" advocates and maintains right-centricity, while at the same time rejects right-centricity? 3) It is not clear that, based on which categorization criteria, right and power are discussed on the same level as private law and state law, but it is certain that, under the condition where right and power are not recognized as the most important legal phenomena, and right, power, and their relations are not recognized as constituting the entire content of the law, advocating right-centricity in the relations between power and right in terms of content is not tantamount to advocating that the law is centered on right. Similarly, even if the relations between right and power were centered on right, it would still not prove that the law should be centered on right, because there would be still two unclarified realms of right-right relations and power-power relations.

After the overall assessment, now let me respond to the issues raised in the "Discussion."

(1) It is well-founded and truthful to claim that right-centric theory is formed within, and limited by, the analytical framework that misunderstands and underestimates power. The "Discussion" criticizes me for "accusing that right-centric theory 'is the conceptual system that uses—centricity to explain all legal phenomena' which is baseless, is one-sided understanding of the value connotation of right-centric theory, and is unfair." I certainly don't think so. In

order to clarify that, based on the discussions above, I would like to remind readers of three facts:

First, the basic theory on which the supporters of right-centric theory rely to develop their thinking has, since the middle of the 1980's, always been jurisprudence, always treating as the entire content of the law, underestimating power, and undifferentiating power and right. That condition has not had worthwhile changes in the last 30 years. And that has been reflected most clearly in the textbooks of jurisprudence presided by certain scholars.

Second, I am fully aware that the supporters of right-centric theory do speak of things such as "right relative to power is also the center," but the key is that, such a statement is actually inconsistent with the analytical framework defined by the supporters themselves, because all the basic discussions are originally carried out around right and duty, without leaving space for the sudden mentioning of "power," therefore being logically disconnected.

Third, the supporters of right-centric theory have conducted basic discussions on right and duty, but have so far not done the same with power, therefore, even if they sense that the existence of power cannot be ignored, and they have to speak of power, power is still something external to their original theoretical framework. The issue is not whether they talk about power, rather, it is whether power has its status within the basic analytical framework, or whether the status is consistent with its actual status. To say a few words about power when it feels that power has to be talked about but is difficult to place it cannot compensate the limit of the basic analytical framework. In fact, the more additional discussions about power there are, the more it is clear that power is not consistent with the analytical framework that has to carry it, therefore the more severe the conflict between the two will become.

(2) In terms of the characteristics of the law with right-centricity, inferred from the principle of symmetry, it is by necessity, and the correctness of the conclusion is indeed difficult to verify, but logically, methodologically it is tenable. To be honest, I should not be concerned about the characteristics of right-centric law. Because, as pointed out by some scholars, along with the emergence and gradual maturation of right-centric theory, a new school of legal philosophy has formed in China, which is called the school of right.

Normally, if it is called the school of right, and it treats right-centric theory as its core theory, it should clearly explain what specific characteristics the law of right-centricity has. But for whatever reason its works do not have the content. In order to study right-centric theory, I have to summarize the specific characteristics of right-centric law based on academic common sense. Once the task is identified, there is immediately the issue of how to summarize.

I have indicated before, the current law in China is not right-centric law, the laws in Europe and North America have some characteristics of right-centricity, but overall are also not right-centric laws, therefore the laws of the countries that I am familiar with cannot serve as the prototypes of the summarization.

As a result, I have to find a new path. It is fortunate that, in history, there has been power-centric law, which is what I am familiar with and have experienced myself. Because in terms of the content power-centric law and right-centric law are legal reflections of the polar opposition of the political philosophies of statism and individualism, I infer the specific characteristics of right-centric law in comparison to power-centric law according to the symmetry principle.

It is quite certain that, right-centric law is the other extreme of power-centric law, is not something even and mean, and under the tendency of polarization between right and power (traditionally between right and duty) before the formation of the concept of faquan, jurisprudence indeed did not have propositions with even and mean value orientation. Since right-centric law is also an extreme, it must have characteristics related to such an extreme nature. To point out the characteristics should be considered as "imposing." If I were to list all the strength characteristics of even and mean law, and credit them to the right-centric law, it would be really unfair and unjust, as well as "imposed."

The "Discussion" does not identify with the characteristics of right-centric law that I list, and even considers my listing of the problems as an act of imposing, which perhaps arrives from the following tremendous contrast: on the one hand, right-centric theory and right-centric law have been idealized and idolized in the heart of the author of the "Discussion;" on the other hand, others have also offered an overall negative assessment on right-centric theory and right-centric law. It is quite understandable that disillusion ensues when something sacred and beautiful is lost.

But I need to point out that the logic and method of identifying the characteristics of right-centric law according to the symmetry principle is overall reliable, and other fields in their research also often use the principle to solve the problems, for example, the science of criminal investigation uses skulls to reconstruct facial images, archeology infers the right side of the head and even the other parts of an animal based on a fossil of the left side of an ancient animal, these are both examples of using the symmetry principle. Even in legal studies, there has been precedent in using the symmetry principle to illustrate the characteristics of various legal models. For example, Professor Luo Haocai has used the symmetry principle to enumerate the 9 characteristics of 3 different administrative legal models of the management theory, authority-control theory, and balance theory, where the management theory is an extreme, and

the authority-control theory is the other extreme, and the balance theory is even and mean-measured.[94] Of course, it may not be very accurate to use the symmetry principle to identify the characteristics of right-centric law, but I believe the fundamental direction or overall tendency is alright.

(3) In the "Discussion," the understanding of the relations between general theories of legal philosophy and specific legal phenomena is not quite proper, therefore it is unable to see the serious crisis facing right-centric theory. I have criticized some works of legal studies that discuss the center of the law without specific law, legal provisions, legal norms, and legal relations, actually rendering right-centric theory a hollow slogan in legal studies, which cannot be comprehended and carried out by others in legal life. In that regard, the "Discussion" believes that I "was not discussing the issues on the level of legal philosophy," and considers that "right-centric or duty-focused law fundamentally is determined by the legal spirit of the times and legal value orientation."[95] But in these statements, there is certain false conception. While legal philosophy occupies the highest stratus, it does not mean that it is hollow, is divorced from reality, and can be removed from the reality and various specific legal phenomena.

The real situation is that, no matter how abstract it is, any scientific theory, as a general theory, derives from what is individual and specific, and must return to explain the phenomenal world constituted by what is individual and specific, and in that process, tests its own truthfulness, and continuously adjusts itself. To talk about the center of the law, legal spirit, and legal value orientation without specific law, legal provisions, legal norms, legal relations, legal branches, and active social life, can only unconsciously lead legal philosophy research, including right-centric theory, to a dead-end. Think about it, if right-centric theory does not derive from what is "individual" and "specific" mentioned above, cannot be carried out in explaining what is "individual" and "specific," and cannot even be used in guiding the formation of a stipulation, or analyzing a case in classrooms, then isn't it a hollow slogan of legal studies?!

94 Luo Haocai 罗豪才 (ed.), *Xiandai xingzhengfa de pingheng lilun* 现代行政法的平衡理论 [Balance Theory of Modern Administrative Law] (Beijing: Beijing daxue chubanshe, 1977), 3–4.

95 During the process of discussing the issue, the "Discussion" talks about using the value orientation that the "absence of legal prohibition means freedom" as the standard in judging what the law should center on, advocating right-centric law as consistent with that standard, which in fact is to redefine right-centricity that we have been discussing. That should be the internal affair of the school of right, on which I am not inclined to comment.

I can only hope that, Professor Liu and other scholars accepting right-centric theory don't consider what I have said as an overly candid criticism, rather, they should see it as a challenge in striving to resolve the issues such as removed from individual, specific, and vivid legal reality in their research.

If the issues cannot be resolved, right-centric theory by necessity can only serve as a fair-sounding but useless slogan that is frozen inside of the memory of jurisprudents (it has existed under such conditions in the past few years). And in fact is tantamount to nothingness.

(4) The theoretical elements provided by the "Discussion" and right-centric theory are still not quite adequate to conduct effective discussions on the issue of balance or imbalance between right, power, and other legal phenomena, if a discussion is insisted, the arrived conclusion must be unreliable, even highly likely erroneous. Unfortunately, because it is not well understood that discussion of the issue of balance or imbalance needs to identify the benchmark of balance or the measuring basis, the views proposed or supported by the "Discussion" are mostly untenable. The "Discussion" several times talks about that, "the rational balance between right and duty, right and power should be realized," and believes that, "right-centric theory and the balance theory of right and duty, right and power are not contradictory, on the contrary, their fundamental value goals in terms of the law are the same. They both recognize that the fundamental value goals of legal adjustments are to realize the dynamic, rational, and comprehensive balance between right and duty, right and power;" "balance does not mean the lack of value focus, in terms of legal philosophy, the issues of the overall value choice and focus of legal adjustment must be affirmed."

As we can see, in the "Discussion" and other works advocating and supporting right-centric theory, scholars have extensively discussed the issue of balance or imbalance between right and duty, right and power, and have seemingly differentiated the rational from the irrational, the static from the dynamic, the comprehensive from the singular, and the value from the non-value in terms of balance. But their most fatal negligence is that, they forget that identifying the benchmark (or horizon) measuring the balance or unbalance between right and power, or right and duty, and if there is no measuring benchmark, any conditions formed between right and power, or between right and duty can be interpreted as either balanced or unbalanced, without any certainty. It is just like the situation that the discussion on the equality or inequality between the total volume of right and that of duty, which cannot explain any problem without identifying a third part as the measurement. In that sense, it is self-evident indeed how much rationality is contained within the discussion of balance or imbalance supported by the "Discussion" and right-centric theory.

3 Supplementary Argumentation for Faquanism[96]

In order to formulate and demonstrate faquanism, I have published a particular article responding to the questions from relevant scholars,[97] whose main content has been incorporated into the above section. This section is based on the above section, and provides more in-depth discussions, striving to give faquanism a most comprehensive overview. In addition, years ago, after a lecture for young instructors and graduate students of Zhongnan University of Economics and Law where I introduced faquanism, Professor Fan Zhongxin also raised some thought-provoking questions regarding faquanism, some of which were quite representative and challenging, I did respond to them at that time, but my response was not quite accurate and sufficient, here I provide a comprehensive response in writing, so as to answer readers' questions.

3.1 *The Maximization of the Total Volume of Faquan is the Benchmark of Legal Balance*

In the article "The Conjecture and Demonstration of Faquan-centricity," I criticize Professor Liu Wanghong's "Discussion"[98] for not setting the benchmark of measuring the balance between opposing elements in discussing the balance between right and duty, right and power, thus actually is unable to assess whether they are balanced or imbalanced. To continue discussing that issue here in this section is to emphasize the following: even if the "Discussion" suffers from the fundamental problem of not identifying and setting the benchmark of balance, the "Discussion" and its supported ideas are still untenable.

To say the least, even if there is no fundamental issue of not identifying and not setting the balance benchmark, the "Discussion" and the propositions that it supports are still baseless. What is balance? Legally the original meaning of balance is that the beam on the balance stays level, or the weight in one pan weighs the same as the object in the other pan, with the indicator pointing at the center of the dial. In considering the balance between right and power, right and duty, the "Discussion" fixes right as "the overall value choice and focus" of the two groups of symmetrical phenomena, in other

96 This section is primarily based on Tong Zhiwei 童之伟, "Faquan zhongxin shuo bulun 法权中心说补论 [Supplementary Demonstration on faquanism]," *Fashang yanjiu* 1 (2002): 3–12.

97 See Tong Zhiwei 童之伟, "Faquan zhongxin de caixiang yu zhengming 法权中心的猜想与证明 [The Conjecture and Demonstration of Faquan-centricity—Responding to Professor Liu Wanghong]," *Zhongguo faxue* 6 (2001), 15–38.

98 Liu Wanghong 刘旺洪, "Quanli benwei de lilun luoji 权利本位的理论逻辑 [The Theoretic Logic of Right-centricity]," *Zhongguo faxue* 2 (2001), 20–29.

words, it always allows the weight of power to exceed right or duty, or allows the beam to always tilt towards the end of right, with the indicator always pointing at right. If so, how can it say that "right-centric theory and the balance theory of right and duty, right and power are not contradictory?" Doesn't it directly interpret imbalance as balance? Of course, it is highly likely that the author of the "Discussion" would say that the reason to interpret imbalance as balance is precisely because "their fundamental value goals in terms of the law are the same." But what are the "fundamental value goals"? The answer in the "Discussion" is unambiguous: "the fundamental value goals of legal adjustment are to realize the dynamic, rational, and comprehensive balance between right and duty, right and power." That is a circular argument. It should be noted that, unless it uses circular arguments, the "Discussion" and right-centric theory that it maintains will find it very difficult to answer the following questions posed by the readers: if tilting towards one end is called balance, then what can be called imbalance? Can you cite an example from the reality of legal life to explain the difference between balance and imbalance? Perhaps, in the view of the "Discussion," such questioning is not addressing the issue on the level of legal philosophy, and is falling into the unphilosophical level. Then it must be pointed out that, if a legal proposition cannot explain the living legal phenomena, and cannot find its roots in the real world of legal life, then its philosophical extent has exceeded the limits allowed by theory and science.

With regard to the issue of whether right and power (or right and duty), right and right, power and power are balanced, faquanism can better resolve the above issues that the "Discussion" and right-centric theory that it maintains forgets or is unable to resolve. The basic method of faquanism is to use the maximization of the total volume of faquan, of the corresponding total volume of interest, and that of property as the benchmark in measuring whether right and power, right and right, and power and power are balanced or not, and to use that benchmark as the unified standard in measuring whether the two ends of the various legal relations are balanced. Measured according to the standard, many problems can be readily resolved. For example, according to the standard, as long as faquan structure or the distribution ratio between right and power is consistent with the maximization of the total interest and furthermore the maximization of the total volume of wealth, it can be concluded that right and power are balanced or basically balanced, otherwise they are unbalanced.

Thus, faquan structures consistent with the need of balance are different in different eras or different countries in the same era: in some eras or countries, balance can be realized only when the weight and strength of power exceed right; in some other eras or countries, the condition of realizing balance is

that the weight and strength of right exceeds power; in still other countries balance is realized precisely when the weight and strength of both right and power are equal, so on and so forth. What we are talking about here is the balance between right and power. But the issue of balance between power and power should also be understood the same way. As for the balance between right and right (the balance between right and duty in private law), the way to understand it is not special, but under some circumstances appears even more intuitive and typical. To use again the typical and relatively simple sales contract as an example, suppose there is a contract with a target of 100,000 yuan, then its actual manifestation is a right exchange between the property right embodied by the 100,000 yuan and the property right embodied by the goods worth 100,000 yuan, where the specific requirement of the principle of faquan maximization is to strictly execute the contract, because under the conditions of the market economy, that the subjects with equal status and free will exchange goods based on the principle of exchange at equal values in the market is consistent with the requirement of optimally allocating social-economic resources and realizing the maximization of economic efficiency or that of the total volume of property, to strictly execute the contract is precisely consistent with the requirement.

So, what is balance, and what is imbalance? In the above example, the 100,000 yuan buys the goods with the market price of 100,000 yuan, and the contract is so stipulated, and is so executed, which is the balance between right and duty; otherwise it is unbalance. Here, the standard of specifically measuring balance is converted into certain currency units (yuan), 100,000 yuan vs. the particular goods with a market price of 100,000 yuan, where unilateral increases or decreases in quantity from any party (even if just 1 yuan or goods worth 1 yuan) will damage the balance between right and duty, unless both parties increase or decrease in equal quantities. Therefore, the balance or imbalance in faquanism typically is very specific, and very empirical. Of course, comparing to the typical but over-simplified example of the balance between right and duty converted from right-right relations, the issue of balance or imbalance of other faquan relations (the collected name of right-power, right-right, and power-power relations) is usually much more complex in understanding and assessment, but the basic principle remains the same.

It should be pointed out that the benchmark of legal balance is beneficial to the maximization of the total volume of faquan and corresponding total volume of interest and that of property and the minimization of costs, does not necessarily require that the quantity of faquan and corresponding quantity of interest and that of property on the two ends be absolutely equal, because, due

to the influence of multiple elements, sometimes the quantity or weight on the two ends are equal but cannot be balanced, and in order to make the beam stay in balance, the only thing to do is to add more to the end that is still not heavy enough. About that, the "Discussion" shows some rudimentary awareness, but because it does not grasp the benchmark of balance, it results in the chaos in understanding the issue of balance or imbalance.

3.2 *Faquanism Is Fundamentally Different from Balance Theory*

The "Discussion" criticizes faquan theory for "limiting the issue of the center of law to the relations between right and power, therefore equating the issue of the center of law and the issue of the basic theory of administrative law, and attempting to replace the issue of the center of law in jurisprudence with the balance theory in administrative law, thus causing doubts about the 'problem domain' of the center of law." That is a misunderstanding originating from not having read closely the works that are being criticized.

My discussion of the issue of the center of law is developed in faquan relations, i.e., the three relations of right-power, right-right, and power-power, with most of the relations between right and duty being discussed within the realm of right-right relations, and a small part of it being discussed within the realm of right-power relations, and all along treating right and power (including right and duty) equally from the stand point of faquanism. So the "problem domain" of the issue of faquan-centricity (or center) as discussed in faquanism not only includes the entire realm of right-centric theory, but expands the original scope. In other words, faquanism not only includes theory relied on heavily by right-centric theory, but studies with its focus power itself and its relation to right and duty, introduces the concept of faquan, and discusses the relations between faquan and the above elements. It shows that, there is no such an issue of intentionally limiting the discussion of the issue of the center of law within a certain scope, as for identifying that the center of law only exists in the relations between right and power, it is just to affirm an objective fact. Here, the argument in the "Discussion" that is based on the relative independence of duty cannot sufficiently negate what I have said in the relevant sections above that the proposition about duty-centricity has no essential significance (I don't deny that it has certain formal significance), and that its real meaning can only be either right-centricity, or power-centricity.

Because, although infinitely exaggerated duty can "in turn become a tool in restricting and suppressing right, and become a burden of social subject," what suppresses right is actually not duty, but other right or power corresponding to that duty. For instance, some business owners use property rights and other

derivative rights to deprive the workers the right to rest, the right of personal freedom, or the right of personal dignity. Are these practices not actual examples of using one right to "restrict" and "suppress" another right?[99]

Here, the restriction and suppression of property rights over workers' right is manifested as extraordinary duty of the workers levied by the business owners. And illegal charges and excessive fines that are often talked about by people are the actual examples that certain local state agencies and their officials illegally or illicitly use power to illegally deprive or violate citizens' individual property right, but their manifestations are the citizens' duty of paying charges and fines levied by the state agency and its officials. Therefore, duty-centricity is superficial, the real content is still right-centricity (only that it is not the right of this party, but the right of the other party), and power-centricity.

Nothing is more obvious than the difference between faquanism and the balance theory. First, faquanism is a general theory applicable to the entire legal studies, while balance theory is only a theory of administrative law. Of course, faquanism also emphasizes balance, but its applicable scope is very different from that of the balance theory: right in faquanism refers to various legal rights of citizens and other entities, with extremely wide scope, while right in balance theory primarily refers to the rights of administrative counterparts, with narrower scope; power in faquanism includes all powers controlled and applied by state organizations according to the constitution and the law, while power in balance theory is at most the powers of state administrative agencies. Second, faquanism focuses its research on the relations between right and power, and advocates using the principle of faquan maximization as the benchmark or measurement in searching for the balance between right and power; while balance theory has still not abandoned the traditional analytical framework of jurisprudence, nor set up the benchmark or measurement to judge whether the power of administrative agency and the right of its counterpart are balanced (which is still seen as the balance between right and duty according to the balance theory).

99 *Wuhan Evening News* on August 15, 2001 carried a long report entitled "Workers Forced to Work Overtime in Dangerous Factory Building—Evil Boss 'Brews' Blockbuster Case," which reported the accident of the Second Electroplating Factory building collapse in Waijiao Village, Diantian Township, Jia County, Zhejiang Province, where 12 were killed, 1 missing. That is one of the examples where a business owner used his property rights and management rights to misappropriate and violate workers' right to life and right to health. Earlier, the July 17th large-scale water inrush accident in Nandan, Guangxi that shocked the entire country is another even more striking example.

3.3 *The Author of the "Discussion" Fails to Properly Understand the Center of Law*

The negligence of the author of the "Discussion" on some inconspicuous but very important issues prevents him from properly understanding the center of the law. Obvious among the issues are primarily as follows:

(1) It has not absorbed the achievements in the development and differentiation of right and other concepts, which has resulted in the inaccuracy of its key concepts. The following statement is quite representative in that regard: "In the realm of relation between right and power, power is the secondary form or transformed form of right, right is the foundation and origin of power, power derives from the conflict of social rights and the need of social management, and right stipulates and defines the rational foundation, scope, and limit of the operation of state power, and is the landmark of state power." In terms of "right," the author, first of all, confuses the difference between legal right and people's sovereign right. People's right is a sovereign, original, and political right, while legal right is specifically recognized by legislative organs, where people's right is prior to, and higher than, legal right.[100]

It should be pointed out that, people's right is truly the common origin and foundation of legal right and legal power, while legal right does not constitute the origin and foundation of legal power. Here, we should not only observe that citizens legally exercise their right to vote in electing various state agencies, we should also see that the affirmation of voting right law and laws related to voting originally formulated or recognized by state agencies exercising their power, and after voting certain state agencies can still exercise their power to change voting rights and conditions of its exercise; at the same time, the subject of power is to dominate the subject of right, and the subject of right must submit to the rule of the subject of power.

In addition, the author also confuses the difference between primitive, original right and legal right. In the sentence, "power derives from the conflict of social rights," the "right" is in no way legal right, but the "right" that is prior to the law, and above the law (in fact is primitive law). Similarly, in the statement, "right stipulates and defines the rational foundation, scope, and limit of the operation of state power," "right" is also generally impossible to be legal right, except right of initiative and right of referendum that belong

100 See the people's "right" in the following sentence from the Declaration of Independence: "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government." Such right is a typical people's right, which is sovereign, original, and political, and belongs to the collective "people," therefore it cannot be written into the law as the basic right of individuals.

to direct democracy, there has been no legal right in the world that has that function. In addition, the understanding of the concept of duty is also similarly problematic, for example, the "Discussion" does not allow the readers to see if the author understands the connection and difference between duty and "responsibility" in "responsibility-centric" theory. These concepts, particularly the difference and connection between people's right, original right, and legal right, have already clearly elaborated in the article criticized by the "Discussion," which unfortunately the author of the "Discussion" has not paid necessary attention to.

(2) The "Discussion" often simplistically reiterates or cites some already criticized views, which makes some academic issues unable to move forward as anticipated, issues that could have been clarified. Some views that the "Discussion" cites as one of its arguments have already been criticized by the article "Revisiting" as erroneous. Logically, the "Discussion" should prove with sufficient reasoning the properness and correctness of those criticized views against the criticism in the article "Revisiting," and show its counter-criticism. But the "Discussion" does not do so, rather, it quotes them as the grounds of its argument. That is not helpful in advancing research. For instance, the statement quoted in the first section of the "Discussion" has been criticized as one-sided by the article "Revisiting": "The structure and operation of state agencies can be legal and rightful only when their purpose is to protect the realization of the subject of right, to coordinate the conflict between rights, to prevent rights from mutual violation, and to maintain and promote the balance of rights; another example, in terms of power, the article "Revisiting" has already noted that faquanism places it as the opposite of right, and it is precisely under the condition of recognizing that point that the "Revisiting" has criticized that, in the basic analytical framework of right-centric theory (theory), there is no rightful place for power, so it is illogical for the "Discussion" to suddenly bring out power-centricity to counter right-centricity, without even conducting any rudimentary basic research into power. The "Discussion" fails to respond to the substantive criticisms rather, it only quotes another paragraph to prove that the supporters of right-centric theory have mentioned power-centricity, which has already been clearly acknowledged by the "Revisiting." Additionally, it appears that the "Discussion" denies that what right-centric theory so far relies on is "the conceptual system that explains all legal phenomena based on the center." Here, I doubt if such understanding in the "Discussion" is even consistent with the original meaning of right-centric theory and its supporters.

(3) The "Discussion" fails to provide necessary proof on some of its important points. The "Discussion" criticizes the "Revisiting" for the "arbitrariness

of some of the theoretical views," I am not sure if that means the author of the "Revisiting" did not consult with other scholars and decided on his own before proposing relevant theoretical points, or if that means the author did not prove those points. If it is the former, I believe the one who is criticized should be very happy to receive it, but if it is the latter, we will have to see if it is consistent with the actuality. It is certainly possible that the argumentation in the "Revisiting" is not sufficient, not empirical, and its methodology is tedious and even outdated, but there is no way that it completely lacks argumentation. In fact, I for one really have the opinion that the "Discussion" fails to argue for some of the important views. That not only refers to that the "Discussion" makes "somewhat arbitrary" assertions about "some theoretical views" in the "Revisiting" without laying out any basis, but means that the "Discussion" should offer sufficient reasoning on the following questions, and cannot simply make an assertion: under the condition of polar opposition, why are the characteristics of right-centric law inferred by the principle of symmetry "erroneous"? The "Revisiting" has conducted a full demonstration on the view that "right-centricity is but a hollow slogan in legal studies, and is almost impossible to grasp and carry out," the "Discussion" should counter against some of the bases, rather than simply saying that "it is also arbitrary" or "it does not discuss the issue of the center of law on the level of legal philosophy," and then starting an entirely different topic. In the section where "the basic value of private law" is discussed, the "Discussion" believes that, "in the legal relations between right and duty, there also exists the issue of right-centricity or power-centricity," as for why there exists the issue of power-centricity, the following sections of the "Discussion" do not say anything, and to date I still don't know why.

3.4 *Faquan-Centricity Is Different from "Society-centricity"*

The issue related to "society-centricity" was raised by Professor Fan Zhongxin. In November of 2001, I gave a lecture on the theme of faquanism at Zhongnan University of Economics and Law, where Professor Fan served as a discussant. He commented that the content of faquan-centricity appears to be the same thing as society-centricity formulated in the field of legal studies at the beginning of the last century, and what society-centricity proposed to give priority protection was also the interest of the entire society.

I was aware of the idea of society-centricity a long time ago, but I have never thought that faquan-centricity has much noteworthy connection with society-centricity in either form or content. In order to answer Professor Fan's questions, and for the sake of being cautious, I have again found, within the limit of my ability, the necessary documents concerning the idea of society-centricity.

To clarify the issue, we first need to examine the meaning of the word "society" in "society-centricity" discussed in the field of legal studies back then. As indicated by documents, at the beginning of the last century, there were already different ideas about whether the law is right-centric or duty-centric,[101] but there was no theory of society-centricity. During the 1920's and 1930's, jurisprudents often used the word society-centricity in addition to right-centricity and duty-centricity. Among them, Ouyang Xi's discussion is relatively telling, as he discusses the meaning of the word "society" before moving onto society-centricity. According to his book, the word society has four different meanings: society in its broadest sense includes human beings and all living things beyond human beings; society in a broad sense refers only to the entirety of human beings, which is human society; society in a narrow sense refers to "the majority of human beings, who gather into a unity based on particular commonality, which is society;" society in its narrowest sense is that "human beings form community based on their free will and for various purposes, which is society." He continues: "I have explained the meaning of society, and what is studied here is society that is equal to nation in its scope. Since society and nation are within the same boundary, the members of a society can be seen as the members of a nation, it is only because of the difference of observation point that we consider it nation or society." Based on the meanings of the word society, he proposes that the law's "ultimate purpose is to promote the common interest of social life, in order to search for the safety of human beings. So it can be asserted that the focus of the law will move towards society, and must be society-centric …… Now we are gradually entering the era of social self-awareness, therefore we have to emphasize public interest of society and society-centricity."[102] Judged by the quotation, the focus of society-centricity is on public interest, and state interest is the typical form of public interest, therefore the nature of the two is similar.

Around that time, the same view was also unambiguously confirmed by the writings of another jurisprudent, Zhang Yingnan. He said: "society is the organization of human beings who share commonality;" "society is the unintentional collection of isolated human beings, where the members consciously become the components of a community, the society of such community is society;" "nation is a form of society, with sovereignty and certain territory as

101 See Liang Qichao 梁启超, "Lun zhongguo chengwenfa bianzhi zhi yange deshi 论中国成文法编制之沿革得失 [On Evolution, Merits, and Demerits of Chinese Statutory Law Codification]," in *Liang Qichao faxue wenji* 梁启超法学文集 [Legal Writings of Liang Qichao] (Beijing: Zhongguo zhengfa daxue chubanshe, 2000), 175.

102 See Ouyang Xi 欧阳谿, *Faxue tonglun* 法学通论 [The General Theory of Legal Studies] (Shanghai: Shanghai faxue bianyishe, 1933), 2019–210, 242.

its characteristics;" "nation is but a society with the elements of sovereignty, people, and territory," "therefore the views on society as discussed above in the book can be used to illustrate the nature of nation." On that premise, he said: "Since the 18th Century, the center of law has advanced from duty to right, and has recently in turn been trending towards duty-centricity, and further into society-centricity."[103] Until the 1980's, the reprinted editions of previously completed works of legal studies still retained similar views. According to the views, the law's "ultimate goals rest on promoting the common interest of social life, to seek the safety of human beings, therefore the focus of the law will trend towards society, and must be society-centric."[104]

In addition, it is evident that, the "society" as understood by the jurisprudents back then is always in a position opposite to individuals, with a focus on public or organizational interest. The representative view at that time is as follows: "When discussing legislation nowadays, everyone uses Europe and North America as the norm. But the legal spirit of Europe and North America is fundamentally so erroneous! In Europe, since the collapse of Medieval feudalism, individualism has been dominating in the society …… Therefore a nation, which is said to be a community centered on individuals, can have no task other than protecting the rights of individuals. Legal provisions are formulated for the subjective rights of individuals. They only allow the state to have the responsibility of protecting the subjective rights of individuals and not the behavior of interfering the subjective rights of individuals. In other words, their laws are centered on individualism of extreme subjectivity and are not based on objective social reality and needs. Therefore, when a conflict arises between social interest and individual interest, and between social needs and individual needs, the priority is always given to individual interest and individual needs. According to their traditional legal spirit that centers on subjective rights, as long as it is permitted by the law, individual interest and individual needs should be maintained and advanced, even if they harm social interest and social needs. That legal thinking is completely metaphysical, not scientific; completely subjective, not objective; and completely in favor of individuals, not the society as a whole."[105]

The jurisprudent Tao Xisheng who was very close to the authority at the time also viewed society as the opposite to individualism. He said: "After the

103 See Zhang Yingnan 张映南, *Faxue tonglun* 法学通论 [The General Theory of Legal Studies], (Shanghai: Shanghai dadong shuju, 1933), 15–25, 211.

104 Zheng Yubo 郑玉波, *Faxue xulun* 法学绪论 [Introduction to Legal Studies] (Shanghai: Sanmin shuju, 1981), 188.

105 Zhang Yuanruo 章渊若, *Zhang Lisheng zhengfa lunwen ji* 章力生政法论文集 [Writings of Zhang Lisheng on Politics and Law] (Shanghai: Shangwu yinshuguan: 1936), 279–280.

laws of Europe and North America were introduced into China, the Chinese laws have also become individualistic. Legal studies in academics only talks about individualistic law, and few are familiar with the traditional legal system. Unfortunately, individualistic laws are also in gradual decline in Europe and North America. Most recently, legal studies have been trending towards social legal studies and socialism, and most recently the code books of Europe and North America have been moving in the same direction. But Chinese legal studies still remain within the realm of individualistic legal studies."[106] Here, social legal studies as mentioned by Tao Xisheng are none other than sociological legal studies rising in the 1920's and 1930's, which emphasize social interest and public interest more than legal studies of the 19th Century. But the social interest and public interest that he talks about do not include individual interest, but the categories standing side by side with individual interest. That has been clearly explained by Pound, the representative of sociological legal studies.[107] As for the "socialism" mentioned by Tao Xisheng, it to a great degree refers to "national socialism," whose reflection in legal studies is Neo-Hegelian legal studies that is part of the sociological school of legal studies, the nationalist nature of which has been well-known.

Society-centricity and faquan-centricity have fundamental differences, which particularly manifest in the difference between "faquan" and "society." Faquan is a concept referring to all legally-defined quan, whose connotation is the legally-defined (or legal, hereafter) total interest of a society or nation, and whose material foundation is fundamentally the total property with defined ownership in that society or nation. Here the total legally-defined interest is also called total social interest, whose components include the direct interest of individuals and public interest (in faquan analytic theory, the total legally-defined interest is only divided into two: individual interest and public interest), and is the organic unity of the two interests; while the scope of the "society" itself in society-centricity is not quite certain, and even if it is proximately certain, it will be groups and the community that are opposite to individuals, and the interests embodied by the groups and the community are either undefined, or refer to common, public interests of the society that are in polar opposition to individual interest. Such interests can be called the interests of the entire society or society as a whole, but whose components do not

106 The "Introduction" by Tao Xisheng for Li Jingxi and Qi Zisong 李景禧、齐子崧 (eds.), *Faxue tonglun* 法学通论 [The General Theory of Legal Studies] (Shanghai: Shangwu yinshuguan, 1934).

107 See Shen Zongling 沈宗灵, *Xiandai xifang falü zhexue* 现代西方法律哲学 [Modern Western Legal Philosohy] (Beijing: Falü chubanshe, 1983), 76–80.

include the direct interest of individuals, and do not treat individual interest and common, public interests equally at all, not to mention the notion of the unity of individual interest and public interest. That the readers can see clearly from the above quotation.

Of course, it is unnecessary to completely delink public interest and individual interest, because public interest is but the generalized individual interest.

3.5 *Faquan Has Subject and Representative*

During the above-mentioned lecture, Professor Fan Zhongxin also commented that it is difficult to say that faquan is a quan, because it does not have subject, nor representative, therefore cannot be manifested in reality. My view is that, the actuality is just the opposite, faquan has subject and representative, and is manifested in almost all aspects or processes of real legal life.

Let us take a look at the subject of faquan. Indeed, faquan, like people's right (here "people" refers to all the nationals of a country, is a concept relative to foreigners or stateless persons, not a concept relative to "enemy," same hereafter), is in fact a social reality comprehended by human reason, and does not have a specific subject like various legal rights or powers do. But it cannot thereby be asserted that it does not have any form of subject. Does people's right have subject? Yes, the subject is all nationals of a country. Similarly, quan is the legally-defined portion of people's right, whose subject is also all nationals of a country. If faquan is divided, it becomes various rights and powers, and its subject is manifested as citizens, legal persons, and various social-economic organizations as individuals in a country, as well as state agencies of various levels and kinds that are directly or indirectly elected by the citizens.

The representatives of faquan can be divided into the factual representative and legal representative. Factual representative refers to social groups and their leaders that in different eras represent advanced productivity. Legally, the representative of faquan is usually the monarch under an autocracy; and is the law, primarily the constitution, formulated by the nationals through their elected representatives under a democracy. In other words, the law is the embodiment of faquan, legislation is the activity identifying and distributing faquan, and regulating the application process of faquan, and the execution of the law is the activity of specifically realizing faquan, and satisfying the need for the maximization of faquan, so on and so forth. Here, legislation processes, including constitutional formulation and amendment, essentially is a process that, in different fields, on different levels, and under different conditions, discovers and records the code of conduct that is most favorable to forming the maximization of the total social interest and that of the total volume of property.

Therefore, legislation is at the same time a process of understanding and comprehending social life and its actual needs. The relations between the legal system of a country and the maximization of faquan are primarily impacted by the intellect of legislators. Such impact allows legal system to exert its effect in the following three aspects: promoting the maximization of faquan; hindering and even damaging the maximization of faquan; causing the promotion and the hindrance of the maximization of faquan to cancel each other out, with zero actual effect. Generally speaking, the third outcome is very unlikely to occur. Human beings are rational, and under normal social conditions, they are able to judge the merits and demerits of their understandings based on the social consequences of the execution of the law and to continuously correct their mistakes, improve legislation, making the law gradually consistent with the need of maximizing faquan, and eventually making the law the embodiment or manifestation of faquan and its maximization in the reality. In modern nations with the rule of law, the law of a nation, as a complete system, is the embodiment or manifestation of faquan and its maximization, both theoretically and practically.

Therefore, in modern nations with the rule of law, to protect the authority of the law, and to act in strict accordance with the law is the general social condition for protecting faquan, and maintaining the maximization of faquan, and is also the specific need for executing the maximization of faquan, and is fundamentally for the purpose of maximally preserving and increasing the total volume of the total interest and the total volume of existing property.

There are two things that need to be noted here. 1) In modern society, the will expressed by many groups, organizations, and individuals and the rules formulated by them can reflect the need for the maximization of faquan to certain degree and within certain realms, but only the law can most comprehensively, most accurately, and most consistently embody the need for the maximization of faquan. That is precisely the reason why we want the rule of law, not the rule of man, and want the supremacy of the law, not the supremacy of the speech of the powerful, the supremacy of official documents, and the supremacy of moral rules. It is not a useless debate about which is higher or lower, rather, it is a fundamental issue of whether the total volume of interest, the total volume of property, and the comprehensive national strengths of a society ought to be increased, rapidly increased, or slowly increased, even decreased. 2) There is nothing mysterious about practicing faquan-centricity and the maximization of faquan, it is fairly easy to comprehend and to execute. The entire secret of successfully practicing faquan-centricity and the maximization of faquan lies in that, everyone strictly abides by the law, citizens and other individuals fully advocate and protect their rights in accordance with the

law, and public agencies of various levels and kinds strictly execute their power in accordance with the law.

3.6 *There Is No Contradiction between Faquan-centricity and the Actual Need for Checking Power and Protecting Right*

During the above-mentioned lecture, Professor Fan Zhongxin indicated that he was concerned that faquanism could be used by people with ill intention as an excuse for promoting and advancing tyranny, and an excuse in using power to suppress right. Such concern is understandable, but I don't think it is necessary.

A theory is primarily and fundamentally determined by its social conditions, although its social function is somewhat related to its own content. The history shows that a theory can be applied from its good aspect, but can also be applied from its evil aspect. The most famous example may be Rousseau's theory of popular sovereignty. As is known to all, Robespierre used it to convict many people of the third estate as "the enemy of the people," executing bloody rule of terror over the society. Such rule might be necessary initially, but it was nonetheless overdone, and later evolving into a kind of evil. At around the same time, in The Declaration of Independence adopted by the thirteen American states that was called by Marx as "the first declaration of human rights," Jefferson used the theory of popular sovereignty to prove the rationality of popular revolution in colonies, which was consistent with the historical trend, was full of tremendous progressiveness, thus becoming an example of good application of the theory of popular sovereignty. In reality, it is clear that the same is also true with the theory of Marx and Engels. In that regard, wasn't what Lin Biao and the "Gang of Four" did during the "Cultural Revolution" in China typical as an evil application of the theory? Of course, it goes without saying that the mainstream has been of good application. Therefore, the social function of theory is fundamentally determined by the material conditions of social life. In any country, once the social-economic condition is there for implementing autocracy, there will be people who will use all possible theories to promote autocracy, creating excuses even if there is no excuse. Similarly, once there are such social-economic conditions, no theory can completely avoid being used to do evil things. So there is no need for particular concern about faquanism for such possibility.

Actually, there is no contradiction between the faquan-centric configuration of right and power and the real need in today's China for power checking and right protection. The requirement of faquan-centricity to configure faquan resources themselves on the basis of favoring the realization of maximization of faquan, so whether the configuration of right and power is balanced or not

is to be determined through the assessment of the social consequences of the execution of the law. In the process of social development, only the basis of balance is constant, the actual balance between right and power is often different from one country to another, from one era to another, and, in order to reach balance, often it is needed to expand right at one era, and to strengthen power at another, which is like "water does not have constant shape, and warfare does not have constant momentum," with everything depending on time, location, and condition. In today's world, there are two main forces that can disrupt the internal balance of faquan, one is autocracy, the other is anarchy. The general trend has been that eliminating autocratic elements and restoring the balance between right and power often through the methods of reducing the ratio of power to limit the application scope of power, adequately decentralizing power to lower the strength of power, expanding right, strengthening right protection to counter the arbitrariness of power, etc.; while to eliminate anarchy and restore the balance between right and power, power needs to be strengthened, the Chinese saying, "heavy punishment needed in chaos," reflects such need in one aspect. In terms of the latter condition, perhaps the readers still remember the situation when the hero just arrived as a magistrate at Luocheng County, Guangxi, China in the TV series *Yu Chenglong: An Honest Official*: before Yu Chenglong, several magistrates could not handle it and had to leave the post, as a result, bandits and robbers rampaged the area, the economy languished, the people were destitute, and they had almost no sense of safety, therefore welcomed his arrival. What does that tell us? It tells us that power there had been overly weak, and that what was lacking the most was power. In Luocheng at that time, the urgent need in ensuring faquan-centricity was to establish and strengthen power, the reason why his arrival was welcomed was because it satisfied the need of society for power. There, ensuring faquan-centricity was consistent with his efforts of strengthening power, not contradictory.

In today's China, comparing to the above condition, the relation between faquan-centricity and right protection is similar in principle but contrary in actuality. The reality we are facing today is that the legacy of feudalistic autocracy is deeply-rooted, the tradition of democracy and the rule of law is scarce, the unlimited power of the "unlimited government" inherited from the system of planned economy is still not truly under strict restriction by the law, and there are frequent occurrences where state agencies and their officials abuse their power, and harm the rights of citizens, legal persons, and other social-economic entities. In today's China, the main element that damages faquan-centricity, and disrupts the balance between right and power remains that power is too high in weight, and too much in strength. Therefore, the necessary condition for realizing and protecting faquan-centricity in today's

China and promoting the maximization of faquan is to restrict the power of state agencies and their officials strictly in accordance with the law, and to effectively protect various rights of the citizens and other individuals, with the two complementing each other, and interacting with each other.

3.7 *In Contemporary China, an Important Content in Advocating Faquan-centricity Is to Reform Power-Dominant Faquan Structure*

Faquan structure, also called the faquan ratio structure, refers to the ratio or weight of right and power in the total volume of faquan.

In faquan structure, in addition to the element of quantity, there is also an issue of which component plays a leading role. Here, the component that is large in quantity may or may not play a leading role.

Professor Fan Zhongxin pointed out during the above-mentioned lecture that, if faquan is the unity of right and power, it is entirely possible that the unity is one where power overwhelming right, and is manifested as a social structure of autocracy or dictatorship, therefore, if we are not careful, faquan-centricity can cause such a social structure that is against the historical trend.

Principally and abstractly, Professor Fan's concern is quite reasonable, because during the autocracy of slave owners and the feudal autocratic monarchy, the faquan structure that was centered on power existed for a long time, and was indeed consistent, or basically consistent, with the need for faquan-centricity or the maximization of faquan. But it should be noted that, that condition was associated with natural, semi-natural economy and low levels of social-economic-cultural development. After that stage, when large-scale mechanized industry and commodity-to-currency relationships have become the predominant forms of economy, faquan-centricity is bound to become incompatible with the faquan structure that is centered on power. If the two are equated or promoted at the same time, they are bound to become opposite and mutually exclusive to each other, with the necessary result that only one of them can survive.

Considering the reality of today's world, especially today's China, the above concern of Professor Fan is unnecessary. The reality is also determined by the dominant material condition of social life in today's world and China, the specific content of such conditions includes: highly developed productive forces represented by science and technology, increasing informatization and digitization of society, the practice of the market economy system, all economic resources, including labor force, are basically distributed through the market, people enjoy sufficient rights, free movement, and maximum realization of their potential and creativity, all of which have become the fundamental condition of advancing the maximization of faquan (which fundamentally is the

total volume of wealth). Under such social conditions, the faquan structure that is centered on power not only cannot satisfy the need for the maximization of faquan but also fundamentally diminishes the total volume of faquan, and seriously hinders its maximization.

Why is it the case that, in today's world and China, the faquan structure that is centered on power will diminish the total volume of faquan, and seriously hinder its maximization? The reason is that, first, too much power means big government, and big government means multiple damages to social-economic life: the state extracts excessive economic resources from economic entities and individuals, increases the costs of production and operation, merchandise lacks competitiveness; state agencies are bloated, many rely on public finances, with overstaffing and buck-passing, and needlessly exercise their power over economic entities and individuals, engaging in excessive control or reckless interference.

Second, faquan structure that is centered on power is at the expense of the self-expansion of public agencies' power, and the abnormal suppression of the right and free movement space of citizens, social-economic entities and other individuals. And in our time, that individuals enjoy sufficient rights and free movement space is the basic social condition for their engaging in creative work and their advancing science and technology and other most important elements of productive forces, the faquan structure that is centered on power cannot satisfy such needs of society.

Third, to a society, power is an element of public expenditure that can be destructive and damaging. In terms of the relations between power and faquan, it is certainly true that there is no faquan and faquan structure without power, therefore its existence is necessary for the existence and development of society at least at the current stage. But on the other hand, reason also demands the possible minimization of the weight and scope of power within faquan. The direct economic significance of that is to lower public costs of the entire social production, at the same time to provide space for creative work, the direct political significance of that is to strengthen democratic foundation or reduce the threat of the rule by man, and the direct legal significance is to expand and further protect the rights and free movement space of citizens, social-economic entities and other individuals

As indicated by many experienced facts, in the faquan structure of today's China, the weight of power in quantity may not necessarily be dominant (theoretically, whether it is dominant can be determined through statistics in terms of the quantity of relevant property as expressed in price), but it is certain that, in terms of the effect of power, power overall is more dominant than right. The experienced facts include: the group that eats "public grains provided by

the government" is exceedingly large, the excessive control of government over citizen's person, citizens and social-economic entities is obvious; orders are capricious, interferences are whimsical, fee collections are arbitrary, fines are excessive, the administrative agencies of local governments and related organizations exercise their power almost at will; elections do not offer much choice, the application of citizens' voting rights and the election itself appear to be insignificant in the entire social-economic-political life, the votes of constituents are not the key factor for the officials of various levels and kinds to obtain and maintain power, and the reactions of constituents are still not the main indicators for the powerful in exercising power; in many places, many legitimate businesses cannot be completed without the lubricant of power, the practice and phenomenon of official-centricity still widely exist: one can make a killing with official backing, and without official support, one can have his property rapidly reduced, business bankrupted, etc.

The above facts are still commonplace in today's China, which shows that, although faquan structure in China has so far made enormous improvement comparing to the era of planned economy, it still has many important characteristics of power-centricity, therefore, reducing the weight of power, expanding the right and free movement space of individuals, and improving the existing faquan structure with the main focus on the above two aspects, is the real need of ensuring faquan-centricity in today's China. Such need reflects that the faquan structure should be consistent with the objective demand of existing social-economic development.

In summary, in today's China, faquan-centricity is incompatible with the faquan structure that is centered on power, in order to protect and pursue faquan-centricity, the characteristic of power-centricity must be eliminated from faquan structure, otherwise, the maximization of faquan will not be truly realized. Therefore, the historical trend does not allow our society to form a faquan structure where power overwhelms right.

CHAPTER 4

Methodological Foundation of Faquanism

Here the term philosophical foundation is used in its wider sense, specifically referring to the method of abstract thinking and epistemological foundation. In terms of the basic research of jurisprudence, the author advocates that faquanism, rather than class analysis, should be used as the basic method guiding jurisprudential research. Jurisprudence can be sub-classified into essentialist jurisprudence and non-essentialist jurisprudence, which should not mutually negate each other. Rather, they should co-exist, compete, and interact positively. Of course, faquanism is a typical type of essentialist legal studies.

1 The Epistemologist Basis of Faquanism[1]

For many years, I have tried to explain legal phenomena and constitutional phenomena using faquanism. I understand that there are still some misunderstandings and doubts concerning faquanism. In order to alleviate such misunderstandings and doubts, I hereby conduct a further epistemologist discussion on the theoretical basis of faquanism through comparison.

1.1 *The Principle of Abstract Thinking Suitable to Legal Studies*

The epistemological foundation that faquanism relies on is primarily the principle of abstract thinking that was initiated by Hegel and adjusted, with materialism, by Marx. That thinking principle includes two aspects: one, simple determinacy is abstracted from certain complete presentations representing objective reality, which is normally called the method of abstraction; two, abstract determinacy is elevated to concrete thinking, or concrete reason, which is normally called the method of elevation from the abstract to the concrete. The two aspects are closely related to each other, and in actuality are two continuous stages or procedures of a unified thinking process.

1 The theoretical basis for this chapter largely derives from Tong Zhiwei 童之伟, "Xianfaxue shehui quanli fenxi fangfa de renshilun jichu 宪法学社会权利分析方法的认识论基础 [On Epistemological Foundation of Social Rights Analysis in Constitutional Law]," *Faxue* 7 (1996): 35. "Social right" here in the title of the article was later corrected as faquan.

In the first procedure, thinking has to discard all individual, specific characteristics of perceptual concrete (such as jural right, freedom, liberty, jural power, public function, authority, competence, privilege, and immunity, etc.), only extracts their general nature (commonality), names such general nature, relatively fixing it as the connotation of the name, and forms abstract concepts (such as faquan, etc.), realizing the transition from perceptual knowledge to understanding. Marx has provided a great example for the operation of that thinking procedure through abstracting value or even surplus value from a perceptual concrete or the complete presentation of a commodity.

The second procedure is from abstract determinacy to thinking concrete. In that procedure, thinking allows the general abstract determinacy that embodies the nature of perceptual concrete to return to individual things, and return to them the individuality and specificity discarded in the first procedure, realizing the unity of the individual, the special, and the general, which allows perceptual concrete to achieve the representation of the spirit, thus realizing the leap from understanding to rational knowledge. Marx has provided a great example for the operation of that thinking procedure through the following: elevating from an abstract category such as value to special categories such as currency, capital, surplus value, profit, interest, rent, etc., elevating from special categories such as profit to individual categories such as industrial profit, business profit, and average profit, etc., and finally combining into a complete theoretical system reflecting the economic reality of capitalism. The two procedures of thinking movement are continuous: "The first procedure attenuates meaningful images to abstract definitions, the second leads from abstract definitions by way of reasoning to the reproduction of the concrete situation."[2]

In order to fully reveal the epistemological foundation of faquanism, we must properly differentiate the logical procedure of research from that of narrative. What has been discussed above is the logical procedure of research, which can be simplified as: complete presentation → abstract determinacy → thinking concrete, in other words, it starts from complete presentation, obtains abstract determinacy through abstraction, then it elevates from abstract determinacy to thinking concrete, and eventually unifies them with the method of combination, making concrete reality the representation of the spirit; such a process can also be expressed as: perceptual knowledge → understanding → rational knowledge. But the logical procedure of narrative is different in that its task is to reproduce the theoretical structure achieved through research, and the content of narrative already occurs before the beginning of narrative

2 Karl Marx & Friedrich Engels, "Economic Manuscript of 1857–58," in *Collected Works*, Vol. 28 (Moscow: Progress Publishers, 1986), 38.

process, therefore it does not start from perceptual concrete, but from abstraction, which can be expressed formulaically as: abstract determinacy → thinking concrete, which is also understanding → rational knowledge. The narrative process only purely logically repeats the second procedure of the research process. To use *The Capital* as an example, the starting point of its research is the presentation of commodity, and the starting point of its narrative is the abstraction of commodity, namely, the abstract category of commodity.

In the Marxist theoretical system, the above principle of abstract thinking represents the requirement of the basic theory of dialectical materialism and historical materialism to a specific field of study,[3] and is a mature method of thinking that was directly formed during a process of establishing a field of study. Therefore, it should also be the epistemological foundation of Marxist legal studies.

1.2 *The Starting Point of Jurisprudential Research*

With regard to the starting point of jurisprudential research, the field of legal studies around the 1990s favored right and duty, and some even directly chose the law or legal concept as the starting point of analysis. About that, I have already expressed my disapproval in previous discussions. The starting point emphasized by faquan analysis theory is "quan," or the basic existing forms of "quan": (jural) right, (jural) power, and residual quan, etc. In that aspect, some scholars, especially the younger generations of constitutional scholars, logically advocate that right, power, and their relationship should be the basic issue and analytical starting point. I have always been highly supportive of the research focus being on right, power, and their relationship, and I have exhaustively practiced along that line, but that does not mean that I advocate that right and power should become the core categories of legal studies or constitutional law studies. What I do advocate is that, from various "quan" or various legal phenomena represented by jural right and jural power (such as jural right, freedom, liberty, jural power, public function, authority, competence, privilege, immunity, etc.), we should abstract what is common to them, so as to form the concept of faquan as the core category of legal studies, and then form a new basic theory with the concept of faquan as the core.

It is worth noting that the categories centered on right and power and the category centered on faquan are substantially different. We will see the differences more clearly through following comparisons.

3 Refers to a new political economics embodied by *The Capital*, where the word new is relative to the classical political economics of Adam Smith and David Ricardo.

(1) The trajectory of faquanist thinking is: complete presentation → abstract determinacy → thinking concrete. Here, the "quan" that is the starting point of legal studies and right and power that are its basic existing forms are considered as abstract objects, therefore they are merely complete presentations that reflect realistic concrete (jural power and jural right etc.), merely embody perceptual knowledge, and are to be elevated towards the understanding phase of knowledge, to become abstract determinacies; as the starting point of research, their theoretical status is similar to commodity in Marx' *The Capital* where its general nature (commonality) is to be abstracted; here, quan, or the theoretical status (complete presentation) of right and power are consistent with all the requirements of the principle of abstract thinking with regard to the starting point of research.

(2) For some jurisprudents who emphasize right and power, their starting point of research is formally right and power, but because there is lack of logical thinking procedure, it is fundamentally impossible for "right and power" to obtain the logical status as the starting point of research, thus it becomes unclear what the starting point is. Because, according to these scholars, objectively, there are only two possible thinking procedures: one is to treat "right and power" as the complete presentation of perceptual concrete, then their logical trajectory is complete presentation → thinking concrete; two is to treat "right and power" as abstract determinacies (abstract concepts), then their logical trajectory is abstract definition → thinking concrete. And according to the principle of abstract thinking, the first thinking trajectory is untenable because of its lack of the necessary abstract links, while the second suits only narrative procedure, not research requirements, because research processes should not start from abstraction.

1.3 *The Selection of the Core Categories in Legal Studies*

For a philosophy of law, the core category is the foundation of the entire categorical system and even the entire theory, it maintains the internal unity, and has a fundamental impact on all important aspects of the field. Without the core category, the content of a philosophy of law, no matter how much there is, will be dispersed and isolated. The primary and substantive significance of the faquan analysis method lies in that it abstracts the general nature from right and power, the complete presentations of perceptual concretes, reveals such general internal foundations (property with defined ownership), forms abstract concepts, thus completing the first phase of the reasonable abstract thinking process, namely the first procedure; at the same time, the abstract concept (faquan) formed at the end of the first procedure can already serve as a new starting point for the spirit of legal studies to represent the various specific

legal phenomena and the medium or the bridge through which our knowledge of legal reality can be elevated from perceptual concrete to rational concrete. The reason for selecting the concept of faquan as the core category is that, as a concept of general nature that is abstracted from various legally-defined "quan" or the complete presentation of the two perceptual concretes, namely, jural right and jural power, the concept of faquan is completely consistent with the requirements of the abstract thinking process, and is the most important and most essential link in the process, in terms of the requirements of both research and narrative.

With regard to the selection of the core category of legal studies, among the few scholars who have recognized right and power as the basic legal phenomena, not many approve of the idea of the faquan analysis method, but rather tend to adopt the concepts of right and power directly, which I don't believe is tenable, because treating the two concepts as the core categories violates all the principles of reasonable abstract thinking. There are three reasons for that: 1) The concepts of right and power are purely affirmed based on the importance of the objective phenomena in reality that are represented by them, not that which are abstracted from perceptual concretes during the logical process of legal research, nor that which is produced during the process of elevating from abstraction to rational concrete. 2) The cellular form of the reality faced by a field of study is only able to enter the thinking process in the form of complete presentation and is, as a research object, abstracted by the process, and the core category can only be the result of abstraction of the complete presentation of perceptual concrete, or a product of a certain stage of the process of elevating from the abstract to the concrete. In a study of philosophical nature, any term that represents the reality cannot become the category of such study without going through the normal thinking procedures. 3) As simple concepts representing legal phenomena of right and power, right and power are still dispersed and isolated, and if they are used as core categories, the general nature of legal phenomena will not be found, and legal studies will still have no unified foundation; furthermore, because right and power are not abstracted from various basic legal phenomena, from the perspective of pure academics, it is not an advance but a retreat to use them as core categories comparing the traditional legal studies where class was considered as the core category, because the latter was nonetheless abstracted from legal phenomena, and embodied the commonality of them from a particular aspect.

1.4 *The Method of Expanding New Thinking in Legal Studies*

Here legally-defined interests and property with defined ownership are primarily abstracted from various legally-defined "quan" (or jural right, jural power, etc), and then the concept of faquan (as discussed previously) is formed. Then

the concept of faquan serves as the core category and the logical starting point, elevating from such an abstract category to a concrete category, first to a relatively concrete category, and subsequently to a more concrete category. For example, from faquan to right and power; from right to personal rights, economic rights, political rights, social rights; from power to legislative power, administrative power, judicial power, prosecutorial power; the rights of legal persons and other social-economic entities derived from the combination of right and power, etc. This is not an accurate and comprehensive description, but rather a rough sketch.

Here, what needs to be emphasized is the unity of the objective historical process and the subjective logical process. The objective historical process is a process where, after the emergence of public power and the formation of faquan and along with the emergence and continuing development of the division of labor in social production, power and right within faquan decompose, further decompose, derive after decomposition, and derive as well as decompose. The result is always the continuing formation of new forms of power and right. It is not difficult to imagine that, in the future, when spacecraft can travel between the Earth and other planets, there will be the right to produce interplanetary spacecraft, the power to manage the production of interplanetary spacecraft, the right to take interplanetary travel, and the power to manage such travel, etc. The subjective reflection of the objective historical process in legal studies is the elevation of human thinking from the concept of faquan to the concepts of power and right, and the elevation from the concepts of power and right to more concrete concepts, until the end of such a process, and eventually the results are summarized into a complete theoretical system, theoretically more accurately representing the structure of the legal world in reality.

The most obvious characteristic of this expanding process is that, it always starts from the point of the concept of faquan that abstracts the general nature from elemental forms of legal phenomena; all other categories of legal studies are directly or indirectly illustrated through the category of faquan, with almost all categories being the products of the continuous movement of the category of faquan from the general to the specific and to the individual; every category produced in the process of elevating from abstract to concrete will recapture the specificity and individuality of the portion of perceptual concrete it represents that have been lost during the abstraction in the first procedure, therefore becoming more and more concrete, and more and more enriched in its connotation.

Is such a method of expanding the theoretical system of legal studies reasonable? The answer is affirmative based on the following quote from Hegel: "For the result contains its beginning and its course has enriched it by a fresh

determinateness. The universal constitutes the foundation; the advance is therefore not to be taken as a flowing from one other to the next other. In the absolute method the Notion maintains itself in its otherness. the universal in its particularization, in judgment and reality; at each stage of its further determination it raises the entire mass of its preceding content, and by its dialectical advance it not only does not lose anything or leave anything behind, but carries along with it all it has gained, and inwardly enriches and consolidates itself."[4] "The absolute method" here refers to the thinking principle of abstraction and elevation from abstract to concrete that was later adjusted and developed by Marx and is adopted here. Lenin highly approved of this passage from Hegel, believing that "[t]his extract is not at all bad as a kind of summing up of dialectics."[5]

The key to understanding the method of expanding the new theoretical system in legal studies lies in that the entire process is seen as the self-movement of the concept of faquan in the "absolute method," as the embodiment of knowledge's flow from content to content. Perhaps some would say that it is a circular argument to start from investigating various "quan" or right and power, and to abstract faquan and then to turn back to define right and power. That is misunderstanding. "Quan" or right and power as the object of investigation is the complete presentation of the perceptual concretes such as right and power, while the right and power elevated from the category of faquan are rational concretes, which have become concrete concepts, and are entirely different.

2 Proper Positioning of Class Analysis and Faquan Analysis[6]

Jurisprudential theory ought to reflect the reality of legal life and the reality of social-political-economic life, and in this sense, the actual condition of class determines the status of class analysis method in legal studies. China is still at the initial stage of socialism, exploiting class as a class has been eliminated, although the class struggle will continue to exist for a long time within certain scope, it is no longer the main contradiction of the society, and the main

4 G. W. F. Hegel, *Science of Logic*, trans. A. V. Miller (New York: Humanities Press, 1969), 840.

5 V. I. Lenin, "*Philosophical Notebooks*," *in Collected Works, Vol. 38*, trans. Clemens Dutt (Moscow: Progress Publishers, 1976), 230.

6 This section is a revision of an earlier paper of Tong Zhiwei 童之伟, "Lun jieji fenxi fangfa zai xianfaxue zhong de heli dingwei 论阶级分析方法在宪法学中的合理定位 [On the Proper Status of Class Analysis in Constitutional law studies]," *Zhongguo faxue* 4 (1997): 18–23.

contradiction of the society at this stage is that between people's increasing material and cultural needs and the backward social production, while the fundamental task of the nation is being focused on modernization construction. This has been reaffirmed numerous times by the official authoritative documents. In the field of legal studies, there should have been factual assessment of its status under the new historical conditions based on social-political-economic development and the class analysis method, but in fact there has been no affirmative and unambiguous clarification on its rightful place, and there has even been a tendency of avoiding such an important theoretical issue. In fact, if this issue is not well resolved, it is difficult for legal studies to be consistent with the requirement of the Constitution that "[t]he basic task of the nation in the years to come is to concentrate its effort on socialist modernization." Because, under such conditions, the jurisprudent's tendency of understanding in his research often results in large vacillation due to the lack of disciplinary footing. It will hinder the healthy development of legal studies, whether the vacillation is leaning towards the right or the left, with exceeding left-leaning being particularly problematic. On the other hand, one of the original purposes with which I have attempted to formulate and apply faquanism is to use it to overcome the problems caused by the class analysis method in our time, while the relationship between class analysis and faquan analysis is not well defined so far. The following is to illustrate such problems.

2.1 *Legal Significance and Traditional Status of Class Analysis Method*

A correct understanding of the class analysis method is the necessary premise for its proper status in today's legal studies.

To accurately and comprehensively understand the class analysis method, the investigation has to start with the concept of class. As is well-known, Lenin gave the concept a classic definition: "Classes are large groups of people differing from each other by the place they occupy in a historically determined system of social production, by their relation (in most cases fixed and formulated in law) to the means of production, by their role in the social organisation of labour, and, consequently, by the dimensions of the share of social wealth of which they dispose and the mode of acquiring it. Classes are groups of people one of which can appropriate the labour of another owing to the different places they occupy in a definite system of social economy."[7] This definition shows that the most fundamental characteristic of a class society is that one social group can appropriate the labor of another group. In this sense, class in

7 V. I. Lenin, "A Great Beginning," in *Collected Works, Vol. 29*, trans. George Hanna (Moscow: Progress Publishes, 1965), 421.

its full sense only exists in societies of slavery, feudalism, and capitalism; and there is no such class as defined by Lenin under the socialist condition where exploiting class has been eliminated as a class. It should also be pointed out that, in spite of the fact that the Chinese Constitution permits the existence and development of private economy, it can only exist and develop within certain limits defined by socialist law, and is a supplement to the economy of public ownership, therefore this economic component cannot result in exploitation and exploited class in their full sense.

As for the class analysis method itself, Lenin also very clearly stated its key points (or contents). In order to accurately understand his original meaning, I quote here the entire sentence about class analysis method: "This fundamental fact—the transition of society from primitive forms of slavery to serfdom and finally to capitalism—you must always bear in mind, for only by remembering this fundamental fact, only by examining all political doctrines placed in this fundamental scheme, will you be able properly to appraise these doctrines and understand what they refer to; for each of these great periods in the history of mankind, slave-owning, feudal and capitalist, embraces scores and hundreds of centuries and presents such a mass of political forms, such a variety of political doctrines, opinions and revolutions, that this extreme diversity and immense variety (especially in connection with the political, philosophical and other doctrines of bourgeois scholars and politicians) can be understood only by firmly holding, as to a guiding thread, to this division of society into classes, this change in the forms of class rule, and from this standpoint examining all social questions—economic, political, spiritual, religious, etc."[8] Here, from "can be understood only by firmly holding, as to a guiding thread, to this division of society into classes" to the end of the quotation is where the key points or contents of class analysis method are stated.

In the past, when the class analysis method was stated in Chinese academics, what was often quoted was only the second half of the quotation, such practice of quoting out of context tends to cause misunderstandings, and has indeed caused misunderstandings. It creates the impression that it is an absolute and unconditional requirement to view social-political issues from the perspective of class. That is obviously not appropriate. The actual situation is that, the first half of the quotation limits the time frame appropriate for the class analysis method, a time frame that does not include the socialist stage where exploiting class has already been eliminated as a class, and where class struggle is no longer the main contradiction of the society. From the complete quotation from Lenin, we can only draw a conclusion that, concerning a society where

8 Ibid., "The State," 477.

class contradiction is the main contradiction of the society, we should use the concept of class to analyze all its social issues, including economic, political, spiritual and religious issues, etc.; but we absolutely cannot draw a conclusion that we must use the concept of class to treat all legal phenomena in a socialist society, including its initial stage.

Of course, the above quotation from Lenin is only a general statement concerning the class analysis method, is not completely equal to the specific meaning that it later carries as the traditional basic analysis method of legal studies. As the traditional basic analysis method of legal studies, the class analysis method has the following meanings and typical characteristics: the category of class nature is the starting point, from which the other categories of legal studies are inferred; from such categories necessary basic propositions are extended, and further expanded and combined into a complete disciplinary system; the basic reality is that a society is divided into classes, where class contradiction is the main contradiction of a society, such an understanding should serve as a guiding principle, to use the concept of class to view all legal phenomena and legal issues.

I believe that to use the class analysis method unconditionally in legal research and instruction as the most general and the most basic method of observation is neither consistent with the original intention of Marxist founders, nor suitable to the conditions of socialist society, considering that the connotation of the concept of class has changed under socialist conditions and class is no longer the class in the full sense, and that class analysis method has had its original scope of application.

In addition to identifying the place of the class analysis method in the methodology of legal research, and the proper status of the class analysis method, we should also understand the system of the research methodology of legal studies. Because any research must have its reference point and is able to be conducted only within certain system.

The system of the research methodology of legal studies is constituted of three layers. The first layer is philosophical and is directly embodied in certain philosophical conceptions. Without the difference in terms of philosophical conceptions, the research methods of different disciplines within social sciences are not fundamentally different on this layer. As a research method, perhaps it can be called a philosophical methodology, so as to differentiate from the methods on other layers. The second layer is the disciplinary basic analysis method that is primarily unique for one discipline or shared by very few closely-related disciplines. It is the concretization of the methodology on the first layer in the field of a specialized discipline. And it is called the disciplinary basic analysis method because, firstly, it is formulated by the discipline

in accordance to the need of understanding its own unique research object, and can often only be primarily used by such disciplines; secondly, as an analysis method, it is called "basic" in order to emphasize that it should be the obvious guiding thread that links the entire disciplinary system. The third layer is normally merely instrumental. It is established in research mainly in order to implement the analysis method on the second layer. Such as structure-function method, institutional analysis, the historical method, and the comparative analysis method, etc.

To reasonably assess the traditional status of the class analysis method in legal studies, we need to correctly identify the layer where it resides within the system of the research method of the discipline. In terms of the issue, we have sufficient rationale for the following two propositions: 1) The class analysis method should belong as part of philosophical methodology. Because the concept of class is one of the basic concepts of historical materialism, and the class analysis method is but the specific embodiment of understanding legal phenomena with the concept of class on the level of methodology. 2) In traditional jurisprudence and constitutional law studies, the class analysis method is actually also at the position of the disciplinary basic analysis method at the same time, while the disciplinary basic analysis method that should have been differentiated from philosophical methodology is actually absent.

Admittedly, there has been historical necessity for the class analysis method to become the basic analysis method of traditional legal studies. Whether a basic analysis method is suitable for a discipline should be judged with a view of the specific historical condition and other elements where the discipline existed and exerted social functions. The traditional status of the class analysis method in legal studies is first of all determined by the social-historical conditions under which it was formed. It is fair to say that Marxist legal studies in China was formed during the era of revolutionary war. Just take constitutional law studies as an example, as early as during WWII, an association for the promotion of constitutional government was already established in Yan'an, and Mao Zedong delivered his famous speech, "On Constitutional Theory of New Democracy," in its inauguration conference. In areas controlled by the Communist Party or the Nationalist Party, there were scholars who upheld Marxist stand points and published articles to critique and criticize the reactionary Constitution formulated by the Nationalist Party, which symbolizes the emergence of Marxist legal studies in China. At least, this is how we researchers of constitutional law studies see it. A coherent system of Marxist legal studies was established in the 1950s.

Secondly, considering the stage occupied by legal studies prior to the implementation of reform and opening policy within the entire developmental

history of Marxist legal studies, it also could only use the class analysis method as the disciplinary basic analysis method. One indicator of a mature discipline is that a basic analysis method characteristic of such discipline is established under the guidance of a philosophical methodology and is comprehensively reflective of the spirit of the methodology and at the same time is also clearly and relatively different. In order to achieve that, there should be many objective and subjective conditions, with the fundamental objective condition being what is allowed by the stage of social-historical development, without which, all other conditions would be meaningless, even if they indeed existed. Furthermore, before a discipline can establish its basic analysis method that marks its own maturity, it can often only utilize certain philosophical methodologies as a substitute in exerting its social functions. The destiny of the traditional legal studies is just that. In this sense, at least before 1956, the class analysis method was destined to be the basic analysis method of Chinese legal studies. During the roughly three decades after 1956, the class analysis method as the basic analysis method of Chinese legal studies also had certain historical necessity.

Therefore, during the New Democratic Revolution period and before the completion of socialist reform, the class analysis method, as the basic analysis method of legal studies, was not a mature choice academically, but was basically reasonable and understandable; while in terms of social practice it should have been fully recognized. The situation became different after that.

2.2 *The Proper Status of the Class Analysis Method Today*

Considering that legal theory should reflect the change of the stages of social-economic development, the class analysis method as the basic analysis method should have been replaced by some new basic analysis method in the mid- to late-1950s, but the replacement actually didn't occur because the necessary objective and subjective conditions were not entirely mature. The most important among the objective conditions was the complete elimination of exploiting class and systems of exploitation, with class contradiction no longer being the main contradiction of the society. That was accomplished as early as 1956. The most important among the subjective conditions was the correct recognition of the new developmental stage of the society and its main contradictions after the exploiting class was eliminated as a class, the abolishment of the theory of class struggle, and the corresponding establishment of the fundamental tasks of the nation under the new historical conditions. It is fair to say that such subjective conditions were basically in place, as exemplified by the 3rd Plenum of the 11th Central Committee of the CPC and the birth of "the Constitution of 1982," and the passage of Articles 3–11 of the Constitutional

Amendment of 1993 marked the comprehensive maturity of relevant subjective conditions.

However, subjective and objective conditions remain conditions, even after these conditions are in place, the class analysis method as a component of legal theory will not immediately abandon its status of the basic analysis method of legal studies automatically. What status it should assume under the new historical conditions, and how it assumes such status, is still up to legal scholars who can come up with solutions and implement adjustment through diligent theoretical research.

In this regard, the right thing to do is to continue to treat the class analysis method as a useful analysis method, without placing it at the position of the basic analysis method of Chinese legal studies. Because, the most important factors such as the establishment of the socialist system, the change of the main contradictions of the society, and the transition of the fundamental tasks of the nation to modernization construction determine that the class analysis method can no longer serve as the basic analysis method of Chinese legal studies. Legal studies must form a new basic analysis method that is able to assume a leading position within the discipline, and to overcome the limitations of the class analysis method in both theoretical quality and practical function.

However, specifically speaking, what status should be given to class analysis method within today's legal studies?

There are a number of ways to resolve the problem. I believe that the most appropriate choice is to allow the class analysis method to reduce to the concept of class so as to return to the philosophical methodology. Because, since it essentially belongs to the first layer of the system of research methods of legal studies, namely, methodology, the return is but to recover its own origin, which is natural. In this way, the observation of legal phenomena from any basic concept of philosophical methodology can and must be realized through the application of the disciplinary basic analysis method, and the application of the disciplinary basic analysis method at the same time also means that it reflects the requirement of philosophical methodology overall, including the requirement of class analysis.

Maybe some scholars will question: Is it necessary to squeeze a so-called disciplinary basic analysis method in between the philosophical methodology and specific legal phenomena in the research of legal issues? Yes, it is absolutely necessary. Any discipline, only when it is successful in doing so, can achieve the characteristics of its own discipline, can clearly differentiate from other disciplines in the research method, the general principle of philosophy and the specific situations can be ideally combined, and the discipline can be considered as mature. The same is also true with legal studies.

Perhaps some other scholars will ask, as the philosophical methodology of legal studies, dialectical materialism and historical materialism are constituted of many basic concepts, and at a specific time and place, can we appropriately emphasize, if necessary, one of the basic concepts (such as that of class) based on the need of reflecting social reality, and, how do we emphasize the basic concept to be emphasized? Indeed, at a specific time, regarding a specific legal phenomenon, which basic concept is appropriate to be used to analyze is to be seriously selected and emphasized. About this issue, I will respond from two aspects.

(1) Fundamentally, the objective reality of a society determines which basic concept of philosophical methodology is used to analyze the legal phenomena we encounter. A legal contradiction, if it is primarily and mainly the embodiment of a conflict between opposing classes, the concept of class should be used, if not, other relevant concepts should be used to analyze the phenomena. It is hard to set a fixed rule with regard to which Marxist view is to be used in analysis in terms of a specific situation, but under that condition, there is still a most basic principle to follow, which is to conduct specific analysis on specific issues, and to seek the truth from facts, because "seeking the truth from facts is the foundation of the proletarian world view, and the ideological foundation of Marxism."[9] Habitual insistence of any basic view of philosophical methodology regardless of time and location is the sign of dogmatism and rigidity and is against the most fundamental principle of Marxism. Furthermore, one of the fundamental goals of revolutionizing the basic analysis method of traditional legal studies is precisely to avoid such rigidity.

(2) Insistence or emphasis of any basic view of the philosophical methodology according to the change of time and location should only be carried out through the basic analysis method of legal studies and its procedural mechanisms. Because, within a relatively reasonable system of legal studies, its basic analysis method should be discipline-specific philosophical methodology, with the former being the disciplinary embodiment of the latter, where all the intention and change of the latter are transmitted and transported to the field of legal studies through the former. If the basic view of philosophical methodology shows itself rather than showing itself through the basic analysis method of a discipline, it should belong to philosophy, not legal studies in terms of discipline. Marxist legal studies must become disciplinary this way in order to truly have its place in social sciences. Otherwise, Chinese legal studies are fundamentally void of disciplinary characteristics, and is theoretically a mere

9 Deng Xiaoping 邓小平, *Deng Xiaoping wenxuan* 邓小平文选 [Selected Writings of Deng Xiaoping (Vol. 2)], (Renmin chubanshe: 1994), 143.

mechanical extension of the general principles of Marxism. That is clearly the sign that legal studies are still immature, and the purpose of reevaluating the class analysis method is precisely to change that situation.

Of course, there is still a long way to go from recognizing how to evaluate the class analysis method to realizing such reevaluation of the class analysis method in the systematic construction of legal studies. Many factors determine whether correct understanding can be carried out throughout the system of legal studies and the legal research process, such as appropriate research environments, scholars' efforts and efficiency, etc. But in terms of actual outcomes and comprehensive indicators, the key is whether and when the new basic analysis method of legal studies can be formed under the guidance of Marxist philosophy. The establishment of the new basic analysis method of legal studies and the reversion and return to the highest methodology of the old one (namely the class analysis method) are the two aspects of the same process, they are interrelated, mutually promoting, and are synchronized in terms of time and speed.

2.3 *From Class Analysis to Faquan Analysis*

I need to seriously remind the readers that if the views of class analysis were indeed adopted in considering China's legal issues as well as economic, political, and social issues, it could well result in great harm to Chinese society. Perhaps it is because of that reason that the official practice in China during the past 70 years has been discussing class struggle and conducting class analysis based on the social-economic bases before 1949 or modern Western societies, while always avoiding discussing classes, class struggle, or conducting class analysis over the social and economic conditions of the contemporary China. Therefore, there has been virtually no article, book, and report that has conducted class analysis over the post-1949 Chinese society, particularly the Chinese society since the implementation of reform and opening policy beginning in 1978, and even if there have been a few of them, they have adopted the term stratum instead of class.

It should be pointed out that, this has been a rather wise strategy, as it has, to a certain degree, avoided the rippling impact to the contemporary Chinese society that the theory of class and class struggle would cause by necessity. However, this has been possible only because of the conditions of a closed society and restriction of open discussions. In contemporary China with the implementation of reform and opening policy and with some space for independent thinking, it is certainly impossible to openly discuss class, class struggle, and class analysis without allowing their application to the reality of Chinese society. In fact, the division of three-classes and nine-strata that

are widely circulated in Chinese society through the Internet is already conducting class analysis on China. The social members of the first class include three strata, primarily provincial and ministerial officials, heads of large corporations, highly-connected billionaires, and presidents of top universities. The social members of the second class include three strata as well, which are as high as mayors, county heads, prominent professors, top doctors, and heads of medium-sized companies, and as low as ordinary public servants, ordinary self-employed individuals, general doctors, lawyers, and engineers. The social members of the third class also include three strata, primarily ordinary workers, owners of small businesses, workers in sweat shops, ordinary farmers, and unemployed individuals of urban underclass, etc.[10] There are also others who have divided the Chinese society into 3 classes and 18 strata.[11]

Contemporary China is a country with diametrical opposition between the officials and the public, and large gaps between the rich and the poor,[12] and there is hostility towards the officials and the rich all over the society, which makes it inappropriate to continue emphasizing division of classes and class struggle, and the method of class analysis is precisely the political and scholarly reflection of class division and class struggle. If, as Lenin said more than 100 years ago, the Chinese academia, including the field of legal studies, is "firmly holding, as to a guiding thread, to this division of society into classes, this change in the forms of class rule, and from this standpoint examining all social questions—economic, political, spiritual, religious, etc.,"[13] one day it is likely that the upper social strata will be hurt first, and then the entire society will be hurt as well.

Fortunately, in the past three decades, many Chinese jurisprudents have been aware of the above issue and have adjusted or partially adjusted their

10 Such widely spread works of "class analysis" have tremendous influence in Chinese society, which has inevitably left some traces on the Internet, one of which is entitled "The Divisional Model of the Classes of the Chinese Society" ("中国社会的阶层划分模型"), https://commondatastorage.googleapis.com/letscorp_archive/archives/52983; http://weibo.com/p/1001603909597726377734?sudaref=www.baidu.com&retcode=6102.

11 Renren, http://blog.renren.com/share/177924880/5355993295.

12 In early 2013, the director of China's National Bureau of Statistics announced, for the first time, the Gini coefficient of the previous 10 years, with the figure being 0.474 for China in 2012. The director admitted that such a figure "reflects a relative large income gap." However, before that, Southwest University of Finance published a survey of Chinese family finances showing that the Gini coefficient for Chinese families in 2010 was 0.61, which indicates that the gap between the rich and the poor was extremely serious. http://news.qq.com/a/20130119/000047.htm.

13 V. I. Lenin, "A Great Beginning," in *Collected Works, Vol. 29*, trans.George Hanna (Moscow: Progress Publishes, 1965), "The State," 477.

research trajectories in consistence with the changed historical conditions. The formulation of faquanism and the faquan analysis method is a noteworthy component of the said adjustment.

In order to clarify the direction of the basic analysis method of legal studies, and my own intention in formulating the faquan analysis approach, we need to explore the following question: Is there a disciplinary basic analysis method in contemporary Chinese legal studies? If yes, then what method is it?

This is a rather difficult question to answer. Generally, according to the differences of theoretical origins, we can divide the methods of legal research of contemporary Chinese scholars into two large camps: that which is based on Continental philosophy, particularly German philosophy, including Marxist philosophy, and that which is based on Anglo-American philosophy. The basic analysis method based on German philosophy usually excels in depth and dialectical thinking, but is weaker in terms of empirical, practical, and operational aspects; the basic analysis method based on Anglo-American utilitarianism and pragmatism usually has the merit of being empirical, practical, and operational, yet is short in terms of systemization, depth, and dialectical thinking. For Chinese legal studies to prosper, and for the process of the rule of law to advance smoothly, both the two basic analysis methods are necessary, and should co-exist, compete, and learn from each other. But with regard to the actuality of today's Chinese legal studies, I venture to offer the following two assessments:

(1) Focusing on trial, the use of the basic analysis method based on Anglo-American philosophy and legal culture has preliminarily exhibited its inherent strength and has absorbed some strengths from German philosophy, therefore is promising, in spite of the fact that it has been used for not long in the field of legal studies and relevant works are still small in quantity.[14]

(2) Focusing on legislation, legal studies that have German philosophy as their theoretical foundation and statutory law as the primary source of the law has historically never sufficiently resolved the problem of using relevant philosophical theories and logical systems to study legal phenomena, and formulating a discipline-specific, systematic, and relatively independent basic analysis method, which is basically true so far in China as well as in other countries, at least judging by the works of the school of philosophy of law and its successors. In terms of the origin, the philosophical theory of Marx and Engels is a part of German philosophy identified here, with the same fate in legal

14 These are mainly a series of articles published in the late 1990s by younger scholars who have studied in the UK and the US or have been greatly influenced by the Anglo-American methodology of legal studies.

studies of socialist countries such as the former Soviet Union and China, as well as in other countries. The main ensuing problem is that either the basic research method overlaps with the philosophical methodology, or the basic research method is undefined and ambiguous, and both result in a relatively weaker empirical, practical, and operational nature of the basic research method and the entire theory.[15] Such a situation is due to many causes, including the factors that the goal of the rule of law was not established for a long time in socialist countries, with no normal research environment to speak of for decades, and that jurisprudents have the mentality for instant success and surface scratching.

I believe that, today, the mission of Marxist legal studies in China is to change the above situation, which means that it should integrate the scientific and cultural development of the contemporary era, focus on the zeitgeist of the 21st Century and the basic conditions of China, and transform dialectical materialism into a basic analysis method of legal studies that can rationally and systematically explain all legal phenomena, can empirically analyze specific legal phenomena, and can have more obvious practical value. In this regard, we need to especially emphasize the two requirements of "transformation" and "discipline formation." The combination of the two requirements means that, the use of any philosophy to explain legal phenomena should not be direct, but indirect, and there should be a medium or a bridge between the former and the latter. Such a medium or bridge is the basic analysis method (or theory) of discipline formation. Specifically speaking, it is to say that the use of a relevant philosophical theory to explain legal phenomena should follow this path: first, integrate relevant philosophical theory and the Chinese legal actuality, to develop a basic analysis method or theory characteristic of legal studies, and then, use such method or theory to explain legal phenomena. For legal studies in China, Marxist philosophy, especially dialectical materialism, is the theoretical foundation, legal phenomena are the research objects, and the basic analysis method of legal studies is the medium or bridge between the two. These three are closely interrelated, but the boundary between them should be very clear.

Numerous facts have proved that the guidance that the system of philosophical methodology (or the most general principle) provides in resolving the problems of a practical field can only be truly realized with the bridge of discipline-specific theory, otherwise such philosophical methodology is but

15 In this aspect, it is not easy to cite one or a few representative works, because in the past half century the jurisprudential works in China with dialectical materialism as their methodology often exhibit such insufficiency to a certain degree.

an impractical dogma and furnishing to the problems of practical realms. There will never be a true form of Marxist legal studies to speak of without an independent and comprehensive basic analysis method or theory of legal studies that is based on, and different from, Marxist philosophy. Whether we can understand that and whether we can confront that will be directly linked to the prosperity and success of Marxist legal studies in China.

Have we now formulated the basic analysis method or theory of legal studies that can serve as the medium and bridge between Marxist philosophy and today's legal phenomena? I don't think we have formulated such a method. In the past, the class analysis method actually was treated as the basic analysis method in legal studies, now such methods, while still necessary, should definitely not be the basic analysis method of legal studies. The change of the social-historical conditions is part of the reason for that, but the other part that we should pay more attention to is that, according to the previously discussed scholarly standard in formulating true Marxist legal studies, the class analysis method has never played the role of being the basic analysis method of legal studies.

There are two main reasons for that: 1) The class analysis method is but a specific view point of historical materialism, not a general method, and to use the view point of class to look at all legal phenomena has actually already fallen into the one-sidedness where the mere view point of class is construed as the entirety of Marxist philosophy. 2) Even without such one-sidedness, it is still not appropriate to use the class analysis method as the basic analysis method of legal studies, because that is to directly use a philosophical view point (the view point of class) to explain legal phenomena, not to form a basic analysis method of legal studies as the medium or bridge between the two under the guidance of a relevant philosophical methodology first, and then to explain legal phenomena through such a "bridge." Here, there is a substantial difference between whether going through a "medium or bridge": it is legal studies and has the disciplinary characteristics of legal studies if it goes through a medium and a bridge, otherwise, it is not true legal studies, and does not have the disciplinary characteristics of legal studies.

In recent years, quite a few scholars have proposed to introduce the interest analysis method into legal studies, attempting to use it as the basic analysis method of Marxist legal studies in order to change the current condition of the shortages of the basic analysis method, such a proposal sounds reasonable and tenable, but in actuality is problematic. Indeed, on the one hand, the interest analysis method is much more comprehensive than the view point of class, but on the other hand, we should not fail to see that, to use the view point of interest to replace the view point of class does not represent a substantive

advancement in terms of scholarly standard, because the view point of interest is also a specific view point of historical materialism, rather than a general method, and is still generally external to jurisprudence. Of course, the most fundamental problem is still that doing so cannot change the way of using philosophy to directly explain legal phenomena, while the crucial and overwhelming need and the only way out for the development of Marxist legal studies are first to form a basic analysis method of legal studies, under the guidance of a philosophy, that is based on, and disciplinarily different from, such philosophy, and then to use such a method to analyze legal phenomena, rather than walking old paths in new shoes.

I will venture to offer two predictions: 1) The interest analysis method either cannot run through the interpretation system at all, or does not have the characteristics of legal studies at all, because, as a view point of materialism, the view point of interest, like the view point of class, can be used in political science, economics, legal studies, and other social sciences, and also in literature, history, philosophy, and other humanities, therefore is impossible to have true characteristics of legal studies, except that it is artificially lumped together with legal phenomena so that it looks like having something to do with them. 2) Along with the use of the interest analysis method, we will see the phenomenon that everywhere in the works of legal studies, the three "skins" of economic analysis, interest analysis, and legal phenomena analysis do not fit together. The reason is that such an analysis method is proposed and utilized under the condition where the exact economic content of various different interests and its precise relation to corresponding legal phenomena have not been clarified at all. So far, it is already an obvious phenomenon that the two "skins" of legal phenomena and interest do not fit together in existing relevant works in discussing the relation between the law and interest.

Then, can we discuss interest analysis method after having clarified the relations between interest, property, and the corresponding legal phenomena? That is also hard to imagine! Because, after the relations are clarified, the relevant analysis method should no longer be called the interest analysis method anymore. The norm of the basic analysis method of legal studies is the unity of jurisprudential characteristics, interest content, and economic content, and such a method should be named according to its jurisprudential characteristics. Furthermore, the intention of using the interest analysis method as the basic analysis method is inconsistent with the objective function of the existing jurisprudence that centered on right and duty, and the most obvious manifestation of which is that the basic categories of right-duty jurisprudence are far from exhausting social interest content (since there is no concept of power that is parallel to right and embodies public interest), therefore, such

jurisprudence actually does not have the theoretical form and logical premise needed for comprehensive interest analysis of legal phenomena.

So, what method can be used as the basic analysis method of Marxist legal studies? After many years of thinking and exploring, I have chosen the faquan analysis method.

The faquan analysis method is a proper medium and bridge that can link Marxist philosophy and legal reality, and is actually the jurisprudential manifestation of the logical method of advancing from the abstract to the concrete. The main points of the method can be briefly summarized as follows: its philosophical methodology is the method of advancing from the abstract to the concrete; it identifies various "quan," mainly right and power, as the most basic phenomena within the realm of legal phenomena, researches them with as much depth as possible, clarifies the exact connections between them and non-legally-defined rights or power, between them and interest, and between them and property, as well as the unity of opposites between them, and their individual internal relations; it derives from phenomena of jural right and jural power on two levels their common essential attributes, and uses one single term to signify the unity of right and power and records the internal attributes of the two levels, namely legally defined social interest in its entirety and total property with defined ownership, forming the concept of faquan; it starts from the concept of faquan, advances to the concrete concept, forming the basic category group where the concept of faquan is the core category, with six other surrounding concepts of right, power, residual quan, quan, duty, and law; it advances from the basic category group to even more concrete concepts, forming the common category group of legal studies, thereby constructing a comprehensive categorical system of legal studies; it utilizes the new categorical system, particularly its core category and basic categories, interprets all legal phenomena from the unity of opposites of right and power, the internal unity of opposites of right and power, respectively, interactions between right and power, and internal interaction, coordination, and the conversion of right and power, respectively, ultimately forming a comprehensive theoretical system that can offer in-depth theoretical interpretations of legal reality, and is empirical, practical, and operational.

Generally, all my writings on the renewal of jurisprudence can be seen as actual examples of carrying out such an approach. Because they are all developed according to the approach of the faquan analysis method, both when I evaluate the views of the others, and when I elaborate my own thoughts directly. Whether the method can achieve its anticipated goals is another matter. What I am doing here is just an experiment.

3 The Essence of Law in Faquanism[16]

The essence of law refers to the essential attributes of law corresponding to phenomena, is the relatively stable internal connection among the components of the law and what is determinative behind legal phenomena. To discuss the issue of the essence of law is fundamentally to answer the question of what the law should be construed as, thus theoretically determining the direction of legal practice and value orientation of legislation, enforcement, and justice. Precisely because of that, whether law has the essence and how we should identify the essence of law is related to the entirety of legal practice and legal theory. In the past decades, there has been a large quantity of discussions around the essence of law in the academic world, and confrontations of various scholarly views. Considering and based on such conditions, this section takes a different angle and explores the following three interrelated issues with regard to the essence of law.

3.1 *The Essence of Law: A Reality or an Illusion?*

Anyone who discusses the essence of law first has to face the question of whether law has essence. There are currently two different views about the question in the field of Chinese legal studies. The first view is affirmative about the objective reality of the essence of law. This is a popular view, and in the last half century the interpretation or debate about the essence of law in China has been premised on affirming the objectivity of the essence of law. The second view has been proposed (or re-proposed) in recent years in China, which believes that the essence of law is "a fabricated myth,"[17] tending to deny the objectivity of the essence of law.

Is the essence of law indeed a reality or an illusion? It is meaningless to give a simplified answer to this question. Judging from the history of philosophy,

16 This section is based on a series of three articles published on *Faxue* in the 10th, 11th, and 12th issues of 1998. Tong Zhiwei 童之伟, "Fa de benzhi shi yizhong shizai haishi yizhong xuwu—fa de benzhi yanjiu zhiyi 法的本质是一种实在还是一种虚无 [The Essence of Law: A Reality or An illusion]," *Faxue* 10 (1998): 14–15, 13; Tong Zhiwei 童之伟, "Yong shenme fangfa queding fa de benzhi 用什么方法确定法的本质 [Use What Method to Determine the Essence of Law]," *Faxue* 11 (1998): 5–7; Tong Zhiwei 童之伟, "Dangdai zhongguo yingdang queli shenmeyang de fa benzhi guan 当代中国应当确立什么样的法本质观 [What Kind of the Essence of Law Should Contemporary China Establish]," *Faxue* 12 (1998): 7–8.

17 Falü Wenhua Yanjiu Zhongxin 法律文化研究中心, "Falü de benzhi: yige xugou de shenhua 法律的本质：一个虚构的神话 [the Essence of Law: A Fabricated Myth]," *Faxue* 1 (1998): 7–8.

whether we affirm the reality of the essence of things or deny the reality, the true meaning is not whether the relevant proposition itself is correct or not, but the different way that it is adopted to explain the world, thus changing or influencing the world.

There has been a long history for the method of thinking that understands things through exploring their essence (including positive law),[18] which, to a great degree, is shown as a common gateway for all mankind to understand the world and is a methodological tendency that naturally arrives when the human capacity of understanding has reached a certain stage. It is not clear if this started with certain nations or certain schools.

In China, Confucius considered "benevolence" as the foundation of propriety that was virtually the basic law, at the same time offered multiple interpretations on the requirement and tradition of "benevolence," and boiled it down to "love" on the most fundamental level.[19] Should that be considered as an essentialist tendency in legal studies? I believe that this thought of Confucius not only confirms the primary essence of propriety (benevolence) that he was trying to defend, but also digs deeper into the level of the secondary essence of propriety (love). The same is true with Mencius, who said: "The essence (shi) of benevolence is to serve one's parents; the essence of righteousness is to obey one's older brothers; the essence of wisdom is to know the two things and not to depart from them; the essence of propriety is to order and adorn the two things; the essence of music is to rejoice the two things, thus resulting in happiness."[20] What is "shi"? "Shi" is nature, foundation, and essence. In terms of the content of benevolence, righteousness, and propriety, they also contain the sense of exploring the essence of law. It is clear that, comparing to Confucius, Mencius' thought is even more clearly defined in that he interprets social norms and influences social reality through affirming the essence of the norms (which could include legal norms as there was no differentiation between ethics and law at the time), and in that he shows the tendency of exploring the essence one level higher than phenomena.

Furthermore, the practice of perfecting one's own theoretical system through interpreting the classics is by itself an evidence of adopting essentialist methodology. As pointed out by Professor Jianfu Chen, "[i]n the case of China, the traditional society and legal culture are often described as 'Confucian.' However, Confucian teachings, as reflected in the Confucian Classics, have

18 Here it primarily refers to the exploration of the essence of things, not necessarily to the formation and use of the concept of "essence."

19 *Lunyu·Yuan Yuan*.

20 *Mengzi·Lilou Shang*.

been the subject of endless interpretation and reinterpretation by both philosophers and the ruling elites in China."[21] Clearly, essentialism is a deep-rooted methodology by which Chinese people understand various social phenomena, including legal phenomena.

In the West, Mencius' contemporary Aristotle said: "Scientific knowledge is judgement about things that are universal and necessary." Because "things that are universal and necessary"[22] are conceptually tantamount to the essence, the actual meaning of the above sentence is almost the same as "scientific knowledge is judgement about the essence of things." As a science, legal studies cannot be an exception (in spite of the fact that legal studies were not yet separated from political science and others back then). This is not a mere inference, in fact Aristotle defined legal concepts by way of discovering their essence: "Now the laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort."[23] Here, "the common advantage" "of all" and "the common advantage" "of those who hold power" are actually what he considered the essence of law.

The appearance of the essence as a category relative to phenomena came later than the scholarly activity of exploring the essence. In the history of philosophy, the term "essence" also originated in Aristotle. Russell points out, "(t)here is another term which is important in Aristotle and in his scholastic followers, and that is the term 'essence';" "The notion of essence is an intimate part of every philosophy subsequent to Aristotle, until we come to modern times."[24] Classical German philosophy represented by Hegel inherited and enriched Aristotle's view on essence, and Marx transformed it and injected new content into it, so on and so forth. As an evolving and changing theoretical method, the concept of essence has influenced its contemporary legal studies during every stage of historical development, Marxist legal studies is but one of the influenced schools of legal studies.

There has been also a long history for the method of thinking that does not approach things from their essence and does not recognize or even categorically denies the objectivity of the essence of things, which also has left a profound imprint on contemporary legal studies. There are two reasons for exploring certain things without examining their essence: one is when cognitive capacity is still underdeveloped, the other is when the essentialist method

21 Jianfu Chen, *Chinese Law: Context and Transformation* (Revised and Expanded Edition), (Leiden: Brill NV, 2016), 7.

22 Aristotle, *The Nicomachean Ethics*, trans. William David Ross (Oxford: Oxford University Press, 1980), 144.

23 Ibid., 108.

24 Bertrand Russell, *History of Western Philosophy* (London: Routledge, 2004), 164, 192.

is fully understood but is considered unimportant or inadvisable. Early thinkers did not discuss the essence of things because they were not aware of it, which is the former case; today's scholars do not explore the essence of things out of their conscious decision, which is the latter case. As for those who do not recognize or even categorically deny the objectivity of the essence of things, as far as I know, the foremost in the field of philosophy is George Berkeley who famously formulated the proposition of "to be is to be perceived" in the 18th Century. According to him, the so-called essence is but an "illusion." Many schools of modern Western philosophy also deny the objectivity of the essence of things in various ways, relatively well-known among which are pragmatism, neorealism, and existentialism. In addition, there are also philosophers who recognize the objectivity of the essence of things, but believe that it is beyond human understanding, the chief representative of whom is Kant, who maintains that essence is "thing-in-itself" that is of that sidedness and therefore unknowable.

Corresponding to such conditions in the field of philosophy, the conditions in the field of legal studies can be historically divided into two: one is that they do not know how to conduct essential analysis on the law and legal phenomena, and also do not know such a method, such a tendency primarily appears in some early works of legal studies; the other is that they are familiar with the method of essentialism but categorically deny that law has essence, or, while not denying it, do not emphasize this issue, or intentionally avoid this issue. For instance, Duguit, the main representative of social solidarism jurisprudence, sees essence as "imaginary and invisible metaphysical entity," and is against using it to explain legal phenomena.[25] Few utilize the category of the essence of law in the representative works of contemporary Western legal studies, especially the main schools of Anglo-American legal studies, but in the actual process of discussions, there is much content that normally belongs to the category of the essence of law, particularly when the concept of law is discussed. The reason is that it is impossible to clarify the concept of law without involving a judgment of its essence. But strictly speaking, the major schools of modern Western jurisprudence, such as neo natural law jurisprudence, analytical-positivist jurisprudence, and sociological jurisprudence, do not have the characteristics of essentialism, whether measured by the formation of the category of the essence of law, or by the intentional exploration of the internal relationship between the most general attributes of law and legal phenomena.

25 Léon Duguit, *Traite de Droit constitutionnel, 2e edition, Tome I, La règle de droit—Le prorlème de l'etat* (Paris: E. de Boccard, 1921), 401.

The standard for evaluating a school of legal studies is not whether it has the characteristics of essentialism. The general value of legal studies is that it can reasonably explain all legal phenomena and influence social reality according to the principle of promoting the maximum well-being of the nationals. Legal studies that have such functions and are beneficial to the realization of such value is what is needed, otherwise the rationale of its existence is suspicious. Which schools meet such standard better should be decided through competition, and their relative positions should be able to change, so that each can learn from the other in order to perfect oneself or to form new schools.

So, jurisprudential theory, be it essentialist, or non-essentialist, is but an instrument that explains legal phenomena and influences legal reality according to its specific purpose, it is related to a certain philosophical methodology, but should not be political ideology under the cloak of legal studies in the sense of the cold war mentality. In terms of social need, any legal studies should have the function of properly explaining legal phenomena in depth and guiding legal practice according to its defined purpose.

Measured by such a standard, historically, both kinds of jurisprudential theories have pros and cons. Essentialist jurisprudence normally is related to the tradition of statutory law, whose prominent features include dialectic, systematic, highly abstract, and in-depth analysis of legal phenomena, but it is not quite empirical or practical, it is passable in guiding legislative activities, but often unable to solve the problems in the process of justice. Non-essentialist jurisprudence normally is related to the tradition of case law, whose focus is trial process, and whose prominent features include empirical and practical, but not much dialectical and systematic, with low abstractness.

Chinese legal studies that use Marxist philosophy as the basic guiding principle are clearly essentialist. But for a long period in the past, because of the lack of competition, the air of self-importance, and class struggle as the key link, such essentialist jurisprudence in China became something extremely rigid, which was not so much legal studies as political ideology dominated by a cold war mentality. It did not absorb the merits of non-essentialist jurisprudence, but actually lost its own existing strength. In recent years, fortunately there has been a group of legal professionals working in the field who venture to maintain open mindedness and seek the truth from facts, which have brought life back into essentialist jurisprudence, allowing it to advance to a certain degree. After 1949, non-essentialist jurisprudence was not seen for a long time and was not revived somewhat until last few years. It has been only a short time since its revival, but it has good momentum, excellent potential,

and fast expansion, and is helpful in advancing the process of constructing a socialist country with the rule of law.

To further advance legal studies, we need competition of different schools. Essentialist jurisprudence cannot seek a monopoly, neither can non-essentialist jurisprudence, and it is unfounded to see any one of them as panacea. In today's Chinese legal theories, what is really created by us is very limited, the majority is imported in early years and recently, and so far the additional intellectual content from Chinese scholars has been very small. It is probably going to take a considerable amount of efforts to form legal theories that are consistent with Chinese conditions, systematic, dialectical, empirical, and practical.

Now it is time to answer the question of whether the essence of law is a reality or an illusion. I believe it should be answered from the following two aspects: 1) The actual significance of recognizing or not recognizing the reality of the essence of law is to make a choice between different approaches in interpreting legal phenomena and influencing social reality. If the theoretical function and social-practical function inherent within legal studies can be fully realized, it is really not important whether the reality of the essence of law is recognized or not, and there should be no final conclusion. 2) Personally, based on the basic conditions of China and my own educational background, I tend to recognize the reality of the essence of law in terms of methodology, and believe that essentialist jurisprudence can have good academic prospects under certain conditions. Under what conditions? It looks like at least they should include tolerance, free spirit, self-criticism, and self-renewal. If we insulate ourselves, turn oneself into sticks, treat oneself as the only criterion, regard oneself as the number one authority, we will not be able to avoid the fate of stepping into the twilight.

3.2 *What Method to Use to Identify the Essence of Law?*

We must admit the objectivity of the essence of law before discussing the method of identifying the essence of law. Therefore, this is an issue that only essentialist jurisprudence has. Furthermore, this is the most basic and fundamental issue for essentialist jurisprudence. In terms of philosophical foundations, legal studies dominant in China are essentialist, because the Marxist philosophy that guides it is essentialist. Our current discussion of the method of identifying the essence of law naturally also proceeds on the basis of the philosophical foundation that it relies on.

The method of identifying the essence of law in Chinese legal studies up to now invites much review and reexamination. First there is an issue of what theory to use in identifying the essence of law. Many would say that it should be based on Marxism. Yes, there is no question about that. But what within

Marxism should it be based on? Should it be based on some specific conclusions and specific principles of Marxist founders on certain relevant issues, or on the basic principles of Marxism?

So far, debates around the essence of law in Chinese legal studies have often focused on what the essence of law is but have not made efforts to discuss what method to use to identify the essence of law. The method is precisely the main reason why the issue has not been convincingly resolved for such a long time. Here I offer two observations:

(1) Certain statements in *Manifesto of the Communist Party* that are relied upon over the issue of the essence of law by scholars who uphold the theory of ruling class' will are only a specific conclusion of Marx and Engels over specific issues, and even if such a conclusion contains the relevant principle, it is still only a specific principle, whose "hierarchy of efficiency" is theoretically lower than some of the more basic principles of Marxism. The original paragraph in *Manifesto of the Communist Party* is: "But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, &c. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class."[26] This passage was written under capitalist conditions, was addressed to bourgeoisie, and was discussing the law of capitalist society—all very specific.

Indeed, it contains certain principles, but they are specific principles under the constraint of the above specific conditions. Therefore, we cannot take this one sentence out of its context, in particular, we cannot overemphasize one such specific conclusion or specific principle and disregard the basic requirement of materialist methodology of seeking the truth from facts. "Seeking the truth from facts is the foundation of proletarian world view and is the theoretical foundation of Marxism."[27] Its theoretical status is higher than any specific conclusion or any specific principle by Marxist founders. For a long time, with regard to the essence of law, the theory of ruling class' will insisted upon by many is only a mechanical analogy out of the conclusion that Marxist founders drew under capitalist conditions and about the essence of capitalist law, is

26 Karl Marx & Friedrich Engels, "Manifesto of the Communist Party," in Robert Tucker, ed., *The Marx-Engel Reader*, 2nd ed. (New York: Norton, 1978), 487.

27 Deng Xiaoping 邓小平, *Deng Xiaoping wenxuan* 邓小平文选 [Selected Writings of Deng Xiaoping (Vol. 2)], (Renmin chubanshe: 1994), 143.

based upon erroneous theoretical method, and is inconsistent with the practical need of the initial stage of socialism.

(2) As for the other views different from the theory of ruling class' will, their methodological foundation that they rely upon also requires reexamination. In the past 30 years, there have been several new views concerning the essence of law other than the theory of ruling class' will, which some scholars have summarized as the following three, namely, the theory of inapplicability of traditional views, the theory of civil society, and the theory of differentiation between law and the law.[28] This summarization is decent, although not comprehensive. I think that these theories have some common merits, that is, they all strive to rely upon the basic national conditions and practical needs of the initial stage of socialism, to start from re-identifying the essence of law, to renew traditional legal theories, so as to be consistent with the needs of the contemporary Chinese population and the trend of the implementation of reform and opening policy and development as much as possible. But in terms of methodology, they have a common problem, namely, they have not definitively clarified and proved their methodological basis upon which they identify the essence of law in the new era.

I believe that the most important methodological principle in identifying the essence of law is "starting from the reality," and "seeking the truth from facts." These two phrases are the most popular expressions of the basic requirements of materialist methodology.

With regard to identifying the essence of law, how can we meet the basic requirements of starting from the reality, and seeking the truth from facts? We need to start from the general methodological principles of identifying the essence of things. Concerning the issue of how to correctly identify the essential attributes of things, Lenin has provided us an excellent example in his discussion of the status and function of workers unions later in his life, and his analysis method and the principles that he follows should be learned by us when discussing this type of issues.

The whole situation was roughly as follows: with regard to the issue of the status and function of workers unions under the Soviet authority, namely, the issue of what the essence of the workers union was, Zinoviev and Trotsky had entirely different views. Trotsky maintained that the workers union was an administrative and technological agency that managed production, while Zinoviev considered the workers union as a school for the working class, and Bukharin believed that the workers union was both an agency and a school,

28 Sun Guohua 孙国华 (ed.), *Makesizhuyi falixue yanjiu* 马克思主义法理学研究 [A Study of Marxist Jurisprudence] (Beijing: Qunzhong chubanshe, 1996), 168–189.

criticizing the other two for committing the error of one-sidedness. Bukharin even used a glass on a podium as an analogy. One person says that it is a cylinder made of glass, the other says that it is a drinking utensil, and Bukharin suggested that both are one-sided, and the conception becomes complete only when it is seen as both a cylinder and a drinking utensil. Lenin criticized Bukharin's view as being eclecticist and used the analogy as an example to elaborate the penetrating dialectics of how to correctly seek the essential attributes of things. Unfortunately, scholars in the past did not seem to have fully understood the methodological significance that it contains with regard to grasping the essence of law.

In order to truly resolve the methodological issue of identifying the essence of law and other legal phenomena on the basis of Marxist philosophy, it is necessary for us to briefly compare Lenin's approach in identifying the essential attributes and fundamental functions of the workers union and the approach of some of the scholars in China in upholding the theory of ruling class' will in discussing the essence of law.

Let us examine the fundamental difference between Lenin's methodological principle in identifying the essential attributes of the workers union and the theoretical approach of those who uphold the theory of ruling class' will in seeking the essence of law today. To borrow the example where Bukharin likened the different views on the essential attributes and fundamental functions of the workers union to the different views on the essential attributes and fundamental functions of a glass, Lenin said: "A tumbler is assuredly both a glass cylinder and a drinking vessel. But there are more than these two properties, qualities or facets to it; there are an infinite number of them, an infinite number of 'mediacies' and inter-relation-ships with the rest of the world. A tumbler is a heavy object which can he used as a missile; it can serve as a paperweight, a receptacle for a captive butterfly, or a valuable object with an artistic engraving or design, and this has nothing at all to do with whether or not it can be used for drinking, is made of glass, is cylindrical or not quite, and so on and so forth."[29]

Correspondingly, have the scholars who still uphold the theory of ruling class' will with regard to the essence of law recognized that, in addition to the attribute of ruling class' will, the law has "an infinite number of them, an infinite number of 'mediacies' and inter-relation-ships with the rest of the world," which are "totally unrelated to" the class attribute of law? And if we admit that the infinite attributes, qualities, and aspects of law are "totally unrelated to"

29 V. I. Lenin, "*Once Again On the Trade Unions*," in *Collected Works, Vol. 32*, trans.Yuri Sdobnikov (Moscow: Progress Publishes, 1965), 93.

ruling class' will, then why every time when dealing with the issue of law's attributes and qualities do we only emphasize its attribute in ruling class' will and always consider it to be the most essential attribute of law, regardless of time, location, and national conditions?

Then let us compare the fundamental difference between Lenin's methodological principle in identifying the function of the workers union and the theoretical approach of those who uphold the theory of ruling class' will in seeking the essence of law today. With regard to the fundamental function of the workers union in the new era, Lenin continued to elaborate, using the example of a glass. He followed previous passages and said: "Moreover, if I needed a tumbler just now for drinking, it would not in the least matter how cylindrical it was, and whether it was actually made of glass; what would matter though would be whether it had any holes in the bottom, or anything that would cut my lips when I drank, etc. But if I did not need a tumbler for drinking but for a purpose that could be served by any glass cylinder, a tumbler with a cracked bottom or without one at all would do just as well, etc."[30]

Clearly, according to Lenin, our understanding of the essence of things should change along with the change of time, location, and other conditions, in other words, the essence of things is not immutable (which is the commonsense of dialectics). "Just now" and the past, the need for "a tumbler" "for drinking" and the need to use it for something else, under different conditions, our positioning of the essence of the same thing and the fundamental function determined by the essence should be different. However, those who uphold the theory of ruling class' will in terms of the essence of law do not seem to appreciate such basic requirements of dialectics in identifying the essence and function of things. They do not understand that, under the new historical conditions that center on economic construction, when we need to emphasize using the law as an instrument to serve for economic construction, there is "no need to know at all" whether the law is the manifestation of the ruling class' will, at least it is unnecessary to see the ruling class' will as the essential attribute of law, while what is important is to rely on the function of the law to advance economic construction, and effectuate the function of the law in liberating and developing production forces.

It can be stated unequivocally that, in today's China, the theory of ruling class' will with regard to the essence of law is a concentrated manifestation of an outdated legal theory that remains in the era before the 3rd Plenary Session of the 11th Central Committee of the CPC, which in actuality prevents

30 V. I. Lenin, "*Once Again on the Trade Unions*," in *Collected Works, Vol. 32*, trans. Yuri Sdobnikov (Moscow: Progress Publishes, 1965), 93.

the law and legal studies from effectuating their function in liberating and developing production forces. Because, if the essence of law is positioned as the ruling class' will, logically the ruling and suppressing functions of the law will be emphasized, otherwise, there would be a logical contradiction between the theory of the essence of law and the theory of the function of law—the essence of law determines the basic functions of law, which is self-evident in essentialist jurisprudence. To insist on the theory of the essence of law of the era of Vyshinsky, to maintain the theory of the essence of law of the era before the 3rd Plenary Session of the 11th Central Committee of the CPC, and to claim to support the theory of the function of law in the new historical era, will be an unthinkable phenomenon both theoretically and logically!

Concerning the issue of what a glass (actually referring to the workers union) should be seen as, Lenin, immediately following the above passages, proposed four specific methodological principles in identifying the fundamental attributes of things. These are the principles that should be followed in discussing the essence of law and legal phenomena but have actually not been focused on. Now let us analyze the four principles proposed by Lenin and contrast them with some existing propositions. I believe that that will help scholars who hold different views on the issue of the essence of law to reexamine and improve relevant methods, particularly those who maintain the theory of ruling class' will.

"Firstly, if we are to have a true knowledge of an object we must look at and examine all its facets, its connections and 'mediacies'. That is something we cannot ever hope to achieve completely, but the rule of comprehensiveness is a safeguard against mistakes and rigidity."[31] Regardless of their individual views, jurisprudents leaning towards legal essentialism should reflect and see if we have tried our best in identifying and examining all its facets, its connections and "mediacies" when dealing with the essence of law? In today's China, isn't it far removed from the historical demand of modernization construction as the center, and isn't it the manifestation of one-sided and rigid academic scholarship, when the change of historical conditions is ignored, something is taken out of the context, investigation is only conducted through books, and argumentation, refutation, and conjecture are all evolving around the ruling class' will?

"Secondly, dialectical logic requires that an object should be taken in development, in change, in "self-movement" (as Hegel sometimes puts it). This is not immediately obvious in respect of such an object as a tumbler, but it, too, is in flux, and this holds especially true for its purpose, use and connection with

31 Ibid., 94.

the surrounding world."[32] Essence and phenomena can be mutually converted, and essence itself can also change, the essence of law is not immutable—according to dialectics, everything flows, and everything changes, how can "essence" be an exception! The essence of a glass is such, so is the essence of law. In terms of a glass, when one is thirsty, it can be seen and used as a drinking utensil, and when one is attacked by a robber, a glass can be seen and used as a weapon. In the former situation, the essence of glass is drinking utensil, in the latter situation, the essence of glass is weapon for self-defense, in still other situations, the essence of glass can be some other things. Perhaps some will say that, a glass in general and original sense is a drinking utensil, and to use it for other purposes is but an expedient choice. Perhaps it is indeed the case, but we should also note that, specifically speaking, a thing in a general sense and a thing in an expedient sense can also change its status under certain conditions, for example, after extensive artistic processing, a glass as an artistic work will be far higher in value than a glass as a drinking utensil, thus becoming an artistic work in general sense and something else in expedient sense from a drinking utensil in general sense and an artistic work in expedient sense.

This is totally applicable to the understanding of the essence of law. Under the historical conditions with acute and intense class struggle, the law is primarily and predominantly the manifestation of the ruling class' will, is the instrument of class oppression, therefore should start from the ruling class' will in understanding the essence of law; during the initial stage of Chinese socialism, the fundamental task of the country is to engage in modernization construction, and the primary task of the law is to serve for economic construction, thus the essence of law should be understood from the perspective of being beneficial to the realization of such a goal; after China becomes a moderately developed country, the needs of the time and the focus of social development will likely turn to some other aspects, and at that time the way of understanding the essence of law will again different from today. Taking into consideration the theoretical trajectory of the theory of ruling class' will with regard to the essence of law in the past 40 years, some scholars will not be able to agree with such a view. But this view is precisely the conclusion derived from the above methodological principle clearly defined by Lenin.

"Thirdly, a full "definition" of an object must include the whole of human experience, both as a criterion of truth and a practical indicator of its connection with human wants."[33] What it is saying is roughly that, the whole of human experience is the criterion in testing the truth, and also determines

32 Ibid.
33 Ibid.

how relevant things are perceived, what functions they need to perform, and the whole of human experience has to be engaged in order to identify the essential attributes of relevant things or what they fundamentally are. Today, the whole of human experience in China is chiefly manifested as engaging in economic construction and executing the implementation of reform and opening policy, and legal studies should project the most important experience into our understanding of the essential attributes of law. In this era, if we discuss the essence of law while removed from the great experience, it will be either a scholastic theory of law, or a wishful imagination, which are both short of positive value.

"Fourthly, dialectical logic holds that 'truth is always concrete, never abstract'."[34] According to this proposition, the absolute requirements of achieving a correct understanding of things include comprehensively understanding and studying all attributes, qualities, aspects, relations, and the "mediacies of things." The absolute requirements for obtaining correct understandings of things are to be fully aware of the substantial influence of their spatial-temporal conditions and of the structural system around them on the things themselves, to seek truth from facts, and to conduct specific analysis over specific issues. And these are also the absolute requirements of achieving a correct understanding of the essence of law. The unchanged theories about the essence of law themselves show that, those who maintain the theory of ruling class' will with regard to the essence of law in the new era have never paid attention to such absolute requirements.

3.3 *What Theory of the Essence of Law Should Be Established in Today's China?*

Like many other things, law has or can have infinite attributes (or qualities, aspects, relations to the outside world, "mediacies," etc.), such as compulsory, normative, predictive, directive, class nature, ruling class' will, national will, social, universal, instrument for social control, prediction of future court decisions, product of interest opposition, consummation of political-cultural tradition, instrument of rights protection and distribution, instrument of power authorization and restriction, instrument of interest distribution, reason, justice, criterion of judging a case, manifestation of people's free will, the bible of people's liberty, protection of people's rights, instrument of governance, "handle of a knife," reflection of certain economic relations, a general condition of social advancement, social effects, superstructure of certain economic foundations, standardization of ruling party's policy, order

34 Ibid.

of the sovereign, rules, public will, common will of nationals, instrument for protecting and increasing wealth, social rule formulated by authoritative organizations, behavioral norms supported by the state coercive power, lever for social-economic-cultural development, embodiment of national spirit, fruit of habits and experiences, so on and so forth.

Among the infinite attributes of law, what rationale do we use to identify one or a few as the essential attributes of law? I propose that contemporary Chinese legal studies should establish such rationale from the following three aspects. The first is the basic national conditions and the zeitgeist. This should predominantly refer to the level of social-economic development at the initial stage of socialism, targeting the needs of focusing on the fundamental national task of modernization construction, the practice of the implementation of reform and opening policy, the liberation and development of production forces, of protecting and advancing human rights, and of promoting the free, comprehensive, and sustainable development of humans. The second is certain theoretical systems and methodological principles. Different theoretical systems have different ways of treating the essence of law, and oftentimes "do not attempt to work with people whose way is different." Essentialist philosophy results in essentialist jurisprudence, and essentialist jurisprudence has essentialist philosophy as its theoretical basis. The core of the theoretical system by which the essence of law is identified should be dialectical materialism and its specific methodological principles on relevant issues. About such principles, I have previously commented on in details according to Lenin's thought. The third is the requirements of legal studies as a field of social sciences. They first of all demand wide coverage of the identified attributes, so as to have sufficient distribution in interpreting legal phenomena, and they secondly demand that the adopted concepts should be scientific, namely, showing the characteristics of legal studies, having necessary abstraction, and possessing higher degree of logicality.

In summary, I believe that the essence of law today can be understood through investigating interest contents and property attributes behind the unity of right and power. Here, the unity of right and power is constituted of various "quan" that are legally recognized and protected, which are manifested as faquan. Faquan in terms of its content is similar to "people's rights" or "right in the wider sense" in Western legal studies, although, strictly speaking, they have important differences. As a concept, faquan is a legal category that reflects the total interests that are legally recognized and protected, originates from the total property with defined ownership of a society, and manifests as the sum or the unity of legal rights and legal powers.

The way of identifying the essence of law through faquan can reveal the multi-polarity of the essence, the relation between the law and rights and powers, the relation between the law and interests, the relation between the law

and social wealth, and the conversion-reversion relationship among rights and powers, the interests that are legally recognized and protected, and the wealth with defined ownership. This way of identification indicates that the primary essence of law is as an instrument for faquan distribution. Here, the law is used to distribute faquan between individuals and public agencies generally represented by the state, divide the boundary between rights and powers, distribute rights among different individuals, allocate powers among different public agencies, and regulate the right-power relationship between individuals and public agencies, the right-right relationship between individuals, and the power-power relationship between public agencies.

The secondary essence of law is as an instrument for the distribution of the total interests of a society. Here, the law distributes the total interests of a society, protects the distribution order, and regulates the ways in which relevant subjects administer their own portion of the interests, such ways including, dividing the total interest into individual interests and public interests between individuals and public agencies, distributing the individuals' rightful total interests among individuals, and monitoring the competition among various public agencies and the actions of applying the total public interests are regulated, etc.

The tertiary essence of law is as an instrument for distribution of social wealth and regulation of administration or consumption behavior, the functions of which include: the total wealth is divided into individually-owned property and public agency-owned property between individuals and state agencies, the total property distributable to individuals shared by individuals is regulated, and the total property owned by public agencies competed and applied by various public agencies is regulated. If we investigate further, until we find the most fundamental essence, I would like to offer the conjecture as follows: ultimately, the law should be the most convenient and reliable instrument for guaranteeing and promoting the free, comprehensive, and sustainable development of all humans.

Such views on the essence of law recognize the infinite diversity and development of the attributes, qualities, connections, and "mediacies" of law, and at the same time attempts to start from the three attributes of faquan, interests, and property, so as to reflect, in a concentrated and multi-faceted manner, the way of understanding the law and legal phenomena based on the current basic conditions of China. Such a choice is made because of the following three reasons:

(1) Property is the material foundation of individual and social existence, production activity is the most basic social activity, interest is the concentrated manifestation of property in social relations, and legally property and interest exist only in the form of right or power. To identify the essence of law along

this line allows us to grasp from three different levels that which is determinative behind the law, thus understanding the fundamentals of law. In addition, it reveals the correspondence and conversion-reversion relationship between the total volume of rights and powers and the total volume of social property, thereby theoretically explaining the decisive significance of liberating and developing production forces, and focusing on economic construction for fundamental human rights, democracy, and the rule of law.

(2) Such a view on the essence of law has stronger interpretability and more universal application with regard to legal phenomena, and is able to properly explain the law in different social forms and different developmental stages of one social form. The fundamental function of the law is always to resolve issues related to property, interest, and corresponding distribution and application of rights and powers. For example, under the social-historical conditions with acute class struggle, in spite of the fact that the process of resolving these issues strikingly manifests as the process of class struggle, where the ruling class' will becomes the most striking characteristic of the law, fundamentally what is determinative behind such will and serves as its objective foundation is none other than the corresponding interest relations and property relations. Therefore, even in societies with acute and intense class struggle, the ruling class' will is still a superficial attribute of law. In other words, even under the social-historical conditions with acute class struggle, it is still a theoretically proper approach to emphasize interests, property attributes, and economic function of the law.

(3) To use the concept of faquan to indicate our understanding of the essence of law realizes the disciplinary qualification of terminology. Disciplinary qualification is relative to real life, one of the important measures of the development level of legal studies is whether highly generalized disciplinary terminology that reflects the basic attributes of the research object in a multi-faceted manner. The concept of faquan with a stronger disciplinary qualification relatively accurately and succinctly expresses the understanding of the three levels of the essence of law at the same time, the effect of which is difficult to reach with ordinary two-dimensional concepts.

CHAPTER 5

Interpretative Framework of Legal Phenomena of Faquanism

A legal theory ought to be able to comprehensively and rationally interpret legal phenomena first, and then it becomes possible to guide a country in the process of constructing the rule of law. Right-duty jurisprudence is capable of interpreting private law phenomena with relative rationality but becomes very stretched in interpreting fundamental legal phenomena and public law phenomena, therefore has to resort to extra-logical and extra-scholarly coerciveness. Consistent with the need of conducting interest analysis and property analysis over all legal phenomena, faquanism formulates a basic categorical system of jurisprudence that centers on the concept of faquan and is constituted of six concepts. Based on this basic categorical system, faquanism proposes a framework that comprehensively and rationally interprets all legal phenomena, including private law, public law, and fundamental law.

1 Categorical System of Faquanism as a Legal Theory

I have formulated and proved the five basic propositions in Chapter Two of this book. In order to show clearly the contour of a basic theory of legal studies that is distinctively different from right-duty jurisprudence, it is necessary to briefly discuss its categorical structure. This categorical structure is developed according to the "absolute method" or the logic of advancing from the abstract to the concrete.

1.1 *Faquan Is Best Qualified as the Core Category of Legal Theory*

Here the so-called "best qualified" is not to be compared to other concepts that are possible candidates for the core category in the future, but rather to the concepts that have already been formulated as the core categories of legal theory.

As pointed out before, the object reflected by the concept of faquan is abstracted from the complete presentation of right and power, and is what in front of which right and power become undifferentiated existence—the total interest that is legally recognized and protected in certain society or country, which is ultimately the total property with defined ownership. This determines

that the abstract concept of faquan is at the end point of the process of abstraction beginning from the complete presentation of right and power, and at the same time also at the starting point of the logical process of advancing from an abstract concept to a concrete concept. In other words, the concept of faquan is already at the logical position of the concept of value in Marx' economic theory represented by *The Capital*.[1] This position intuitively shows that the complete jurisprudential categories and even the entire theoretical system after the renewal will be based on faquan as the core category and the logical identity. Because, according to the idea of advancing from the abstract to the concrete, the categorical structure of legal studies should be the product of the self-movement of the only abstract concept at the logical position, and the theoretical system is only the appropriate extension of the categorical structure.

Here, the readers may have the following two questions: Can we simply use the above rationale to allow faquan to take the status of the core category, the highest status of legal studies? How does the concept of faquan expand into the entire categorical structure of legal studies through self-movement? Here I intend to focus on answering the first question, while the second has already been addressed in Chapter Four.

The objective attributes of the unity of right and power show that there is a highly sufficient basis to identify the concept of faquan as the core concept of legal studies. In addition to what has been discussed before, there are some even more noteworthy considerations.

First, the interest content and the property content contained within the concept of faquan is the real foundation of the entire legal life of a society, as well as the objective basis for the entire categorical structure of legal studies with faquan as its core, and for the logical identity of the corresponding theoretical system. In a political state, the total interest recognized and protected by the law and the total property behind the interest constitute the entire material foundation of legal life, which is self-evident for Marxist legal studies. The reason why the concept of faquan can serve as the basis for the logical identity of the categorical structure of legal theory and the corresponding

1 There are three points to be clarified here: (1) although the concept of value was not first coined by Marx, he was the first one in scholarly history to place it at such a logical status in a relevant discipline; (2) the core category of *The Capital* should be value from the perspective of logic or form, that Lenin and other Marxists treat surplus value as the most important concept is because they focus on the essence, with the main rationale being that the concept of surplus value is what Marx' political economics differentiates from, and surpass, his predecessors, and value is ultimately surplus value under capitalist conditions; (3) the comparison here is not intended to use the Marx' practice to prove the author's correctness, but to help general readers understand the relevant context.

theoretical system is that behind it there are legally-defined total interests and corresponding property as the foundations of real identity for all legal phenomena. Here, the basis for the logical identity of the categorical structure of legal studies and the corresponding theoretical system is determined by the foundation of real identity for all legal phenomena, where the former is the theoretical reflection of the latter, and the latter is the basis for the former.

Second, the interest contained within the concept of faquan is the most important part of the total interest in a society, constituting an independent analysis unit, namely, the total interest in a society defined by the law. All interests of a certain society or country can be sub-classified into legally-defined interest and non-legally-defined interest (or residual-interest), where legally-defined interest can be further sub-classified into individual interest and public interest. Within the existing total interest of a society, legally-defined interest is the portion that is basic and quantitatively predominant, while non-legally-defined interest is relatively insignificant in quantity. At the same time, the real status of the total interest in a society, which is the sum and assignment of individual interest and public interest, is undoubtedly higher than either individual interest or public interest. In reality, in order to maximize the preservation and increment of the total volume of the total interest in a society, it is sometimes necessary to sacrifice individual interest, or public interest, but there is no reason to preserve or increment either individual interest or public interest at the price of reducing the total volume of the total interest in a society. From the perspective of interest analysis, the reason why the concept of faquan is more basic and more important than any other concept in legal studies is that, legally speaking, the interest contained within the concept of faquan is the most important among all interests. Legally, the total interest in a society is all the interests of a society. The law does not protect other interests beyond the scope it identifies (non-legally-defined interest), but within the scope, both individual interest and public interest, mutually independent to each other, have to be secondary and subordinate relative to the total interest in a society.

Third, the property content contained within the concept of faquan (property with defined ownership) is the most important part of the total property in a society. Corresponding to the classification of interest, the total property of a certain society or country can also be sub-classified into property with defined ownership and property with undefined ownership, where property with defined ownership can be further sub-classified into individually-owned property and public agency-owned property. Within the total property of a society or country, property with defined ownership is the portion that is basic and quantitatively predominant, while property with undefined ownership is relatively insignificant in quantity. At the same time, the real status of the total

property with defined ownership, which is the sum or totality of individual-owned property and public agency-owned property, is clearly higher than either individual-owned property or public agency-owned property. In reality (namely, if we ignore the tiny portion of property with undefined ownership), property with defined ownership is almost equal to the total property of a society or country, whose content is roughly equal to what Deng Xiaoping calls "comprehensive national strength," or, more accurately, the material form of comprehensive national strength.

In social practice, in order to maximize the preservation and increment of the total volume of the property with defined ownership, or the total volume of all social property in real terms, it is sometimes necessary to sacrifice part of individually-owned property, or part of public agency-owned property, but there is no reason to one-sidedly preserve or increment either individually-owned property or public agency-owned property at the price of reducing the total volume of all social property. Therefore, from the perspective of property analysis or economic relations analysis, the reason why the concept of faquan is more basic and more important than any other concept in legal studies is that, legally speaking, the property content contained within the concept of faquan is more basic and more important.

Perhaps some readers would say that the total property in a society containing property with undefined ownership is more important. I don't deny that, generally in terms of social life, this view is reasonable. But we should also understand that, from the perspective of legal studies, the situation is somewhat different, as the law does not protect, and cannot protect, the property that does not enter into ownership relations. Therefore, legally speaking, all social property in reality is all property with defined ownership.

Finally, the legal reality represented by the concept of faquan is higher than all other legal realities.[2] The process of discussing legal phenomena shows that the most basic legal reality of all legal phenomena is right and power. While the unity of right and power is a legal entity that can be understood only through abstraction. It, like right and power, is also the reality of legal life, and is the more important reality of legal life. The reason is that when comparing to the unity of right and power represented by the concept of faquan, either right or power is only one of the two relatively independent components within

2 The research objects can be sub-classified into two kinds: one is what can be perceived through sensory intuition, the other is what can be grasped only by abstraction, not by sensory intuition. The former is usually called legal phenomenon, which is legal phenomenon, as well as legal reality, while the latter can only be legal reality, and generally cannot be called legal phenomenon.

the unity. It is generally acknowledged that any whole is larger and more important than one of its components. Therefore, the status and importance of faquan are higher than those of both right and power.

For legal studies, faquan is a highly necessary analytical unit, because it includes in jurisprudential thinking the unity of right and power and the legally-defined total social interest and the total property with defined ownership that are embodied by the unity. In other words, jurisprudence becomes much more perfect with the concept of faquan. Similarly, looking back, some may sense the incompleteness of jurisprudence without the concept of faquan.

1.2 *It Is More Appropriate to Identify Six Concepts as the Basic Categories of Legal Theory*

The basic categories here are relative to those of right-duty jurisprudence. And the basic categories actually include the core category, because it has to be one of the basic categories.

According to the trajectory of advancing from the abstract to the concrete, the various categories within the categorical structure of legal studies, primarily its basic categories, all should be advanced from the abstract concept of faquan.[3] This advance is manifested as the dialectical self-movement of the concept of faquan as the starting point. The power for the movement comes from the contradiction of the opposing elements contained within the concept. For the concept of faquan, it contains at least three layers of contradictions: the contradiction between individual interest and public interest, that between individually-owned property and public agency-owned property, and that between various "quan" in terms of their various existing forms.

There are a few dozens of concepts that are the first group produced during the process of the dialectical movement of advancing from the abstract concept of faquan to thinking concrete, but, relatively speaking, only six of them are the most important, which are those that are major and representative, namely, all the basic categories, including the core category. They are: power, right,[4] faquan, residual quan, quan, duty. Here, the logical deduction is roughly

3 Here, I don't intend to identify all categories of legal studies, except for a few major and representative ones. They are small in quantity but constitute a miniature of the entire categorical structure.

4 Again, we have right and power here, about which some may have the following question: you start from "quan" or right and power, but now you return to right and power, isn't that a circular argument? It should be pointed out that it is not a circular argument because "quan" or right and power that are analyzed as the start points are legal phenomena, namely, the comprehensive visualization of right and power constituted by perceptual concreteness, while right and power elevated from the concept of faquan are concrete concepts or concrete

consistent with the historical development of legal phenomena. The historical development of legal phenomena refers to the following process: first the (public) power is separated from the primitive "quan" or the mixture of right and power, and at the same time (legal) right develops correspondingly, which form faquan, as well as residual quan that is what is left after right and power are separated from the primitive "quan" or the mixture of right and power; as the result of the disintegration of the primitive "quan," power, right, and the residual quan under the new historical condition are still a closely related whole, namely, quan, and all of these are also accompanied by the corresponding (legally-defined or non-legally-defined) duty. In the group of categories constituted of seven categories, faquan as the core category is the most important, which is not only the core of the group of basic categories, but also the foundation of the entire interpretation system of legal phenomena constructed in accordance with such thinking.

Jurisprudential categories should logically reflect this history, and be consistent with the need of reflecting real legal relations, if not more so. Based on this principle and the above understanding of the basic attributes of right and power phenomena, now I briefly discuss the six basic categories of legal studies in the following order. Because there have been detailed discussions on faquan, right and power above, here I will only briefly explain by listing the basic categories within the complete categorical system.

(1) Faquan

Faquan is a basic concept of jurisprudence that is abstracted from the various legally-defined manifestations of quan (namely, the complete presentation of right and power), its content is the total interest that is legally recognized or protected and the total property underlying the interest, and its denotation is the various concrete manifestations of right and power in legal life, such as jural right, freedom, liberty, jural power, function, authority, competence, privilege, and immunity, etc.

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reason. Therefore, the logical nature of the two kinds of "right" and "power" is drastically different. This process has been described by Marx as follows: "from the imagined concrete, one would move to more and more tenuous abstractions until one arrived at the simplest determinations. From there it would be necessary to make a return journey until one finally arrived once more at population, which this time would be not a chaotic conception of a whole but a rich totality of many determinations and relations." See Karl Marx & Friedrich Engels, "Economic Manuscript of 1857–58" in *Collected Works*, Vol. 28 (Moscow: Progress Publishers, 1986), 37–38, 37.

(2) Power

Historically, power is the legal phenomenon first separated from the primitive "quan" or the mixture of right and power. Logically, power is the first concrete concept derived from the advancement of the self-movement of the concept of faquan in the form of disintegration, representing the portion of faquan controlled and implemented by public agencies. Its content is public interest and public agency-owned property. And its real manifestation is the authority legally possessed by public agencies, quasi-public agencies, and other authorities reflecting public interest, whose specific existing form is different in different times and different countries. The category of power is the abstraction of the commonalities of various concrete forms of power in different times and different countries. The specific existing forms of legally defined public interest, public property, and the corresponding power often are different across times and countries, but it can be state sovereignty, imperial authority, arrogated sovereignty in history, also can be legally defined power, function, authority, competence, privilege, immunity or other authorities representing public interest and public property that are exercised according to the law.

(3) Right

Historically, right is the portion enjoyed and applied by individuals according to certain newly emerged coercive rules (law) after power is separated from the primitive "quan" or the mixture of right and power. Logically, right is the second concrete concept derived from the advancement of the self-movement of the concept of faquan in the form of disintegration, representing the portion of faquan enjoyed by individuals. Its content is individual interest and individually-owned property. In reality, right is manifested as legal right, freedom, management right, and other functions embodying individual interest and individually-owned property enjoyed by the citizen, foreigner, stateless person, and legal person.[5] It is also to be noted that the concept of right is the abstraction of the commonalities of various concrete forms of right in different times and different countries, that social individual interest and corresponding individually-owned property are the real foundations for the dialectical unity between the general attributes of right and the special attributes of various concrete forms of right, and that the specific existing forms of right are different across times and countries, but in contemporary countries with the rule of law, they are generally manifested as a jural right, freedom, liberty, and the portion of privilege and immunity enjoyed by ordinary citizens.

5 Some scholars believe that the state can also be a legal person, which is not a view adopted in this book.

(4) Residual Quan

Historically, residual quan is what is left after right and power are separated from the primitive "quan" and achieve legally defined status, and in reality it is manifested as extra-legal "quan." Residual quan is a jurisprudential category representing the portion of interest that is not, or cannot be, embodied by faquan yet objectively exists, its social content is non-legally-defined interest, and its material attribute is property with undefined ownership. Among all interests in a society, legally-defined interest can only be the main or basic portion, there are always interests that the law does not regulate or protect, and correspondingly, there is also always certain property of various forms, for example, the right for hunters to hunt certain wild animals where it is permitted is oftentimes an existing form of residual quan, and the wild animals here are the corresponding property with undefined ownership. Residual quan is related to both right and power, and under certain conditions they can be mutually converted. Certain resources, if they can be freely obtained and have not been actually owned by anyone, are manifested as non-legally-defined interest and property with undefined ownership, therefore are manifested as residual quan; while if they are actually owned by a public agency, they have been converted into power. On the other hand, right and power can also be converted or reduced to residual quan. That is why the concept of residual quan reflecting the relevant objective content is one of the basic categories indispensable in systematically interpreting legal phenomena, even though it is not very important in reality.

Residual quan does not have stable manifestations in reality. If power is strictly limited by what is stated by the law, where state or government should not enjoy residual quan, then residual quan is manifested as the portion of right beyond legal right, such as certain rights that should exist according to customs and traditions.

(5) Quan (Namely Quan in Its Totality)

If, historically, faquan is an existing form of the law theoretically presumed after originally separating from the primitive "quan" or the mixture of right and power, then quan in its totality is an existing form of society theoretically presumed under the same condition. Logically, quan is the result of the fusion of power, right, and residual quan while they are at the same time parallel, symmetrical, and opposite after the concept of faquan engenders the three concepts in its process of concrete elevation. Quan in its totality is the legal category representing the sum of right, power, and residual quan, its objective content is all the interests of a certain country or society, and its material foundation is all the property of a certain country or society. Here, all the interests

include legally-defined and non-legally-defined interests, and all the property correspondingly also includes property with defined ownership and undefined ownership. As one of the basic concepts of jurisprudence, quan has the richest content and broadest denotation, but because part of its content is beyond the realm of legal recognition and protection, legally speaking, it is secondary when compared to faquan, right, and power, although its represented object is undoubtedly a phenomenon that jurisprudence has to include. Without this concept, the analysis of legal phenomena will be greatly limited.

(6) Duty

Historically, the primitive duty is the counterpart that is equal to the primitive quan or the mixture of right and power in quantity but is contrary in nature. Corresponding to the disintegration of the primitive "quan," the primitive duty is also correspondingly disintegrated into legal duty and extra-duty (non-legally-defined duty), legal duty is further disintegrated into individual duty and public agency's duty, and individual duty and public agency's duty in turn combine into the jural duty corresponding to faquan. Duty is the product and manifestation of the internal opposition within faquan (the oppositions between right and power, right and right, power and power) and the product and opposition between faquan and the residual quan, which is true both historically and logically. So, (legally-defined) duty is the legal category representing what is the opposite of the interest represented by the concept of faquan, its material content is what is equal to the total price (which can be expressed with certain quantities of currency) of the property represented by faquan yet is itself a negative number, and its existing legal forms are often different across times and countries, usually manifesting as legal duty, responsibility, or incapacity.[6] Here, that it is "the opposite of" the interest represented by faquan refers to the fact that duty represents what is contrary to such interest, which can be called "negative interest," "no-interest," cost, expenditure, etc., and they should be equal to such interest in absolute value yet be contrary in properties of opposite signs.

In addition, that duty is equal to the total price of the property represented by right and power yet is itself a negative number refers to the fact that if the total volume of faquan can be theoretically reduced to a certain quantity of monetary income, the total volume of the corresponding duty can only be reduced to the same quantity of monetary expenditure, etc. It should also be

6 It seems necessary to include "incapacity" in the category of duty, which at least has the significance of deepening the degree of separation of the concept of duty. See Michael D. Bayles, *Principles of Law: A Normative Analysis* (Dordrecht: D. Reidel Publishing, 1987), 84–85.

noted that duty is a jurisprudential category, which reflects not only what is called "duty" in legal provisions, but also other legal phenomena that are opposite to the interest represented by right and power, such as disability, liability, no-right, no-power, responsibility, obligation, etc.

This definition reflects a number of new assessments of the objective attributes of duty in this book.

Legally, duty is corresponding to both right and power, therefore, within the entire society, the total volume of duty is equal to the negative number of the absolute value of the sum of right and power, or exactly the negative number of the total volume of faquan. The reason for that cannot be proved on the level of the law, even on the level of negative interest. It can be truly clarified only after duty's corresponding relationship with right and power is already understood on the level of the content of negative property. This resolves the issue of commensurability that needs to be resolved by quantitatively comparing right, power, and duty.

On the level of negative interest, duty is what is equal to the absolute value of the sum of the interest of individuals and public interest that are represented by corresponding right and power yet is manifested as a negative number. The negative number here refers to a certain quantity of sacrifices, cost, or negative interest. This may be more substantive than discussing the issue on the level of the law, but overall it still seems difficult to accurately position duty, because interest is a concept related to relationship, and is highly abstract. Our understanding of duty is to be furthered.

In terms of property, the material content of duty fundamentally is primarily the necessary cost for generating the corresponding portion of wealth embodied by right and power. According to Marxist economics, it should be the socially necessary labor time that should be expended (such labor time is value in economics, and is manifested as market price in economic life) and the portion of use value that does not include such labor time but has certain value because of scarcity and monopoly, etc. Directly, duty is equal to the expenditure of a certain quantity of currency needed for purchasing the portion of property embodied by the corresponding right and power. This is the material content of duty. Such duty is generally called duty *in personam* or relative duty, while the corresponding duty is generally called duty *in rem* or absolute duty. The so-called duty *in rem* is subordinated to duty *in personam*, and any negative-property content of a specific duty *in rem* is ultimately manifested as a certain quantity of duty *in personam*, while duty *in rem* itself does not have independent and specific negative-property content.

Here duty is the abbreviation of legal duty, strictly speaking, it is corresponding to right and power, therefore is corresponding to faquan. There is another content of duty that is corresponding to residual quan, which is appropriate

to be called extra-duty, and there is also the important analysis unit, duty in its totality, corresponding to quan or quan in its totality. Duty in its totality includes three components: duty corresponding to right, duty corresponding to power, and duty corresponding to residual quan, with the sum of the first two being jural duty.

The above six basic categories are determined based on the content of the law without considering the form bearing such content. If we are to consider the forms bearing the above content and pursue the unity of content and form, then we can certainly take law as a basic category, and together with the above six, form a system constituted by seven categories. Law is the product of the irreconcilable opposition and struggle between primitive rights within the primitive "quan" or the mixture of right and power. Logically, law is the external form of the entire content where the abstract concept of faquan, in the process of advancing to the concrete, places itself and all separated and derivative content. According to our understanding of right, power, faquan, and considering the reality of present China and especially the characteristics of legal studies, law is the social norm that distributes faquan and regulates its implementation in consistence with justice and has the backing of state coercive force. As for the denotations of law, they are different in different nations, but in general there are statutory law and case law, which can respectively be further differentiated into many specific forms of manifestation.

The characteristic of this view of law is that it very clearly exhibits the new assessment that we should have concerning the fundamental attributes and functions of the law based on the basic conditions of present China. In terms of legal phenomena, the general function of the law is to distribute faquan and regulate its implementation by relevant subjects in consistence with justice, but fundamentally, its attributes and functions are to distribute the entire social interest and the corresponding property. What, then, is justice? Justice is not something constant. In contemporary China, the exact content of legal justice is still to be determined by the field of legal studies, but it should be affirmed that justice is constituted of the following two principles: under the premise of recognizing the equality of right capacity, what is useful is that what a subject of legal relations provides to society or others should be directly proportional and corresponding to the quantity of the portion of faquan that he obtains; it should be fundamentally beneficial to the preservation and increment of faquan.

The fundamental attributes of law and the essence of law should be the same thing, and the above discussions have exhibited my view on the essence of law. But it must be pointed out that for roughly the last 100 years, the jurisprudence of socialist countries has almost always interpreted the essence of law from the aspect of the will of ruling class or ruling group. This is indeed

quite telling. If it is necessary to approach the essence of law from the aspect of will, then we certainly can state that the essence of law is the will with which the majority or the dominant social groups distribute faquan and regulate its application.

1.3 *The Strengths of the New Categorical Structure*

The basic categorical group that centers on the concept of faquan and is supported by the seven concepts of faquan, right, power, residual quan, quan, duty, and law[7] has some strengths that are missing in the categories formed with other methods (such as the semantic analysis method): first, its origination and constitution are consistent with the principles of dialectical thinking, philosophically inheriting the theoretical achievements of Kant, Hegel, and Marx in constructing a disciplinary categorical structure. In the field of legal research, this is the first time that this method is used to construct a categorical structure in history, and is closely related to the reality of contemporary society, reflecting the distinctive flavor of the times; second, every concept in the categorical group is a rich concept, reflecting the object from three different levels, namely, legal phenomena, interest, and property, and revealing the layered characteristics of the corresponding legal phenomena; third, every concrete concept is manifested as a synthesis of multiple determinacies and a unity of varieties, for example, the concept of right reflects the attributes of individual interest, the attributes of individual property, its connection with power and residual quan, and its correlation with public interest, public property, and the interest and property with undefined ownership; fourth, which is the most important, it theoretically includes all the property and all the interests of a society or country on the most macroscopic and the most basic level, thereby it also includes all the legal phenomena that are directly or indirectly converted from the property and interests, allowing the categorical system of legal studies to have the distribution and the confluence that are needed in conducting a comprehensive interest analysis and economic analysis over legal phenomena.

The formulation of the basic categorical group with the above characteristics makes it possible for legal studies to use concepts to realize the synchronized analyses over legal phenomena, interest, and economic relations, instantly resolving the problem of the "three skins" caused by the three elements, or the lack of confluence of the three kinds of content. With the new basic categorical group, using them to discuss and analyze it is entirely different from before. For example, now when we discuss the opposition between right and power, we are actually discussing three levels of the meanings of opposition, namely,

7 This order is the result of the adjustment based on the need reflecting the legal reality of present China, not entirely historical order or logical order.

the opposition between various rights and various powers on the level of legal phenomena, the opposition between individual interest and public interest on the level of interest, and the opposition between individually-owned property and public agency-owned property in economic relations.

Of course, there is finally an issue of developing a categorical system based on the core category and the basic categories, primarily the issue of formulating the corresponding general categories. Logically, this process can be completed through the self-movement of the core concept, namely, the self-movement that elevates from a most abstract concept to a concrete concept, and from a more concrete concept to an even more concrete concept. But in terms of historical development corresponding to the logical process, it is manifested as the division of faquan, upon its formation as an entity, into legal phenomena such as jural power and jural right, and the further division of jural power and jural right along with the development of economic-political life. Here, power is divided into even more concrete powers such as legislative power, administrative power, and judicial power, and right is divided into even more concrete rights such as personal rights, property rights, political rights, and social rights, so on and so forth. The first part of this paragraph addresses the logical trajectory of the concept of faquan, while the second part addresses the historical or empirical trajectory of the entity of faquan. The logical trajectory is roughly consistent with the trajectory of the historical or empirical movement of faquan.

2 Analytical Model of Faquan as a Tool for Legal Studies[8]

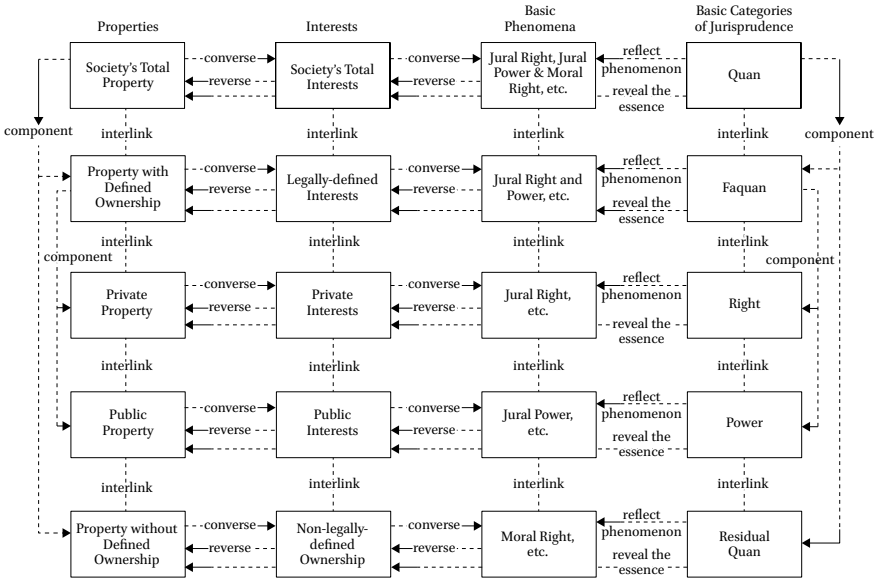
In order to illustrate the relationship between the object of basic legal studies and relevant categories, I provide the following chart that uses the analytical model of faquan to systematically display the definitive properties of the object of basic legal studies and their various specific relations (see the chart on the following page). In view of the theoretical functions and methodological characteristics of the chart, I call it the analytical model of faquan.

In this model, various interests, basic legal phenomena, like various corresponding properties, are all symmetrical in relation to corresponding basic legal categories. The model only marks the relationships between various properties and various basic legal categories, omitting the lines indicating the structural relationships between various interests and various constitutional

8 This section is based on the author's previous article, "Xianfaxue shehuiquanli fenxi moxing de sixiang yunhan 宪法学社会权利分析模型的思想蕴含 [The Conceptual Implication of the Analytical Model of Social Right in Constitutional law studies]," *Falü kexue* 4 (1996): 17–25.

phenomena. Because there are symmetrical and corresponding relations, both individually and as a whole, between various interests, between basic legal phenomena and various properties, and between basic legal categories, the omitted lines can be easily reconstructed by the readers.

As the product of cognitive activity, the analytical model of faquan has two basic functions: the first is to summarize the comprehensive and unified understanding of legal studies on the variety and specific regularity of its basic research object, and to record the result of the understanding; the second is to provide an analytical tool for legal studies to more specifically understand its research object. In terms of the relationship between the two functions, the first function is the condition and foundation of the second, while the second function is the necessary extension of the first. In order to construct a socialist theory of Chinese characteristics in the field of legal studies, I believe that, while the value of the analytical model of faquan as an analytical tool can be left for further proof in future research, the result of the understanding that the model records should be processed and published for the field to review, critique, and reference. On right and power as the unity of opposites, etc., I have had extensive discussions in some articles, but the analytical model of faquan contains at least the following aspects of importance for the field. In some of the relevant articles I have touched upon the aspects, but have never elaborated, now I sum up comprehensively and expand as follows:



Notes to the chart:

(1) What is displayed here is the five basic categories needed in conducting interest analysis and property analysis over legal phenomena and the vertical and horizontal relations between the categories and the objects that they reflect as well as the essence that they reveal. The logic projection or its reversal of this chart is the vertical and horizontal relations between the concept of duty, which is one of the basic categories of jurisprudence, and the objects that it reflects as well as the negative property content that it reveals.

(2) If quan, faquan, and the corresponding duty are all the content of law, then law itself is what contains both of the positive and negative content, much like a large container. Therefore, law itself can also be counted as one of the basic categories of jurisprudence.

(3) Quan refers to the broadest phenomena, including jural right, freedom, liberty, jural power, function, authority, competence, privilege, immunity, moral right, right as in customs and traditions, as well as power that is non-legally-conferred but sometimes can be considered indispensable, etc.

(4) Power refers to phenomena that include jural power, function, authority, and competence enjoyed by government and other public agencies, as well as the portion of privilege and immunity enjoyed by officials of government and other public agencies in performing their duties, etc.

(5) Right refers to phenomena that include jural right, freedom, liberty, as well as the portion of privilege and immunity enjoyed by ordinary citizens, etc.

(6) Faquan refers to phenomena that include jural right, freedom, liberty, privilege, and immunity enjoyed by citizens and other individuals, jural power, function, authority, and competence controlled or enjoyed by public agencies and their officials, as well as privilege and immunity enjoyed by both individuals and public agencies, etc.

(7) Residual quan refers to phenomena that include moral right, right formed based on local customs, as well as power that is non-legally-conferred but sometimes considered as indispensable.

(8) Duty refers to phenomena that include jural duty, disability, liability, no-right, no-power, responsibility, and obligation, etc.

2.1 *The Essence of Basic Legal Phenomena Is Divided into the General and the Specific*

The essence of basic legal phenomena, including the law itself, is different in terms of level, and divided into the general and the specific. The essence is what is solid and stable hidden within things or phenomena, and is their internal relationship. The essence of legal phenomena has not only one, or two, but even more than two levels. The analytical model of faquan reveals the primary and the secondary essence of basic legal phenomena, i.e., interest and property. As emphasized by Marxism since its birth, our understanding of things or phenomena is an infinite process from phenomena to essence, and from a not so fundamental essence to more fundamental essence. Therefore, basic legal phenomena have even more fundamental essence. In my view, this should be described as the contradiction between the infinitely increasing tendency of consumptive demand for faquan from the subject of legal relations and the

finiteness of faquan or quan in its totality that can be objectively provided by existing society.

The essence of basic legal phenomena should not only be divided into two or more levels, but also be divided into the general (common) and the specific. The general essence is the essence shared by basic legal phenomena, while the specific essence is the fundamental characteristics that are peculiar to individual legal phenomena, and are what makes them become themselves and not anything else. In terms of the relationship between the general essence and the specific essence of basic legal phenomena, the specific essence is merely the local differences existing between different parts of the general essence itself, under the conditions of the general essence as the foundations of composition. For example, the common essence of right and power on the primary level is society's total interest, on the secondary level is property with defined ownership, and their individual specific essence on the primary level is individual interest and public interest, respectively, and on the secondary level is property owned by individual entities and property owned by public agencies, respectively, etc.

The essence of basic legal phenomena is objective and relatively stable, it changes slowly during the process of development, but does not change at all because our understanding of it is different. It should be noted that the way to understand legal essence is dramatically different based on different human needs in different times. There is a large portion of subjectivity here. The discussions on the law and the essence of legal phenomena in the field of legal studies in China, strictly speaking, have not been discussions on the essence of the law and legal phenomena itself, but the discussions of the dimensions to be adopted in order to grasp the essence of the phenomena. Unfortunately, these discussions oftentimes are conducted under the condition of a murky understanding of the essence of relevant phenomena. Because the problem that needs to be resolved first is not resolved, the relationships are not in order, these discussions can hardly result in any valuable achievement.

Now, the traditional method of identifying the essence of basic legal phenomena is in fact merely summarizing into the categories of the field certain practice as the real decider of the slim connections between things and human needs for them. This is a subjective selection: starting from class division to reveal the essence of legal phenomena is tantamount to summarizing into corresponding legal categories the legal phenomena as the practice of class struggle; starting from faquan to reveal the essence of legal phenomena is to attempt to adapt to the changes of historical conditions in China, and summarize into relevant categories in legal studies the legal phenomena as part of the practice of economic construction. In actuality, to grasp the essence of legal phenomena

from the perspective of faquan and to grasp the essence of legal phenomena from the perspective of class both represent the affirmation of the content of interest covered by the law, only the perspective is different, and the requirement of the time is different.

As for why there is a need for the change of perspective, and why there should be change according to the requirement of the time, I propose that we should not rush for an explanation, and instead, we should first read Lenin's "Union, Current Situation, and the Mistakes of Trotsky and Bukharin Revisited," whose analogy on the attributes of a glass and discussion on why union should be a school should provide sufficient revelation for us to understand the above questions. Identifying the essence of basic legal phenomena is an extremely complex issue, and should be discussed elsewhere. But there is one thing that is certain, that is, if today we still start from class division to grasp the essence of basic legal phenomena, it will not only totally erase the social-economic characteristics of China at its current stage, and be incompatible with the theory of constructing socialism with Chinese characteristics, but also obviously over-simplified, and over-superficial, even purely in terms of academic exercise.

2.2 *The Total Developmental Level of Productive Forces Has Corresponding Relationship with Quan and Faquan in Terms of Quantity*

The total developmental level of productive forces is materialized into, and embodied by, the total volume of property, and has a defined, independent, corresponding relationship with quan in its totality and faquan in terms of quantity. That is to say, with property as a medium, the size and developmental level of productive forces and the absolute volume of quan in its totality and faquan have an objective and positive relationship. Therefore, in any society, only when the total developmental level of productive forces rises, and the total volume of property increases, can the absolute volume of quan in its totality increase. And only when the absolute volume of quan in its totality increases, can right and power within faquan structure, under the conditions of the constant ratio of residual quan, obtain increase of their own in quantity or allow the quantity of both to increase simultaneously, without diminishing the ratio of each other's.

The total developmental level of productive forces determines the quantity of the absolute volume of faquan. The affirmation of that is very important to our macro understanding of legal phenomena. If we don't consider residual quan whose ratio is already very small, or assume that the ratio is constant, there is absolutely no problem to state that the total developmental level of

productive forces determines the quantity of the absolute volume of faquan. So, the more abundant the social wealth is, the larger the total volume of faquan of the country is, the more can be distributed; otherwise, the situations will be totally different. Perhaps questions will be raised here: according to this view, the total volume of faquan in the U.S. is much larger than that of present China, and with several times more in terms of per capita figure, isn't the above affirmation tantamount to appraising capitalism and demeaning socialism? Absolutely not!

Indeed, based on the analytical model of faquan, the total volume of faquan in developed capitalist countries and its ownership per capita are far greater than those in China, and its structure is also basically balanced; but, when we criticize capitalist society as unsound, it is not because of its large total volume of faquan, not in general because its faquan structure is imbalanced but because the gigantic total volume of faquan in those countries, under the banner of equality, actually for the most part is seized and controlled by a very small group, while what can be obtained by most people is far smaller than the portion that they can obtain and should obtain. Similarly, when we approve the socialist system, it is not because the total volume of faquan and its ownership per capita in a country are large or small, but because under this system faquan can be equally shared or enjoyed by most people, even all citizens, at the same time can usher in a broad prospect for large scale increase of the total volume of faquan. The reason will be the same if we merely consider the total volume of right within faquan and its distribution.

2.3 *The Change of Economic Relations Has No Necessary Connection with the Absolute Volume of Faquan or Quan*

Economic relations (production relations), regardless of their adjustment or change, will not directly increase or decrease the absolute volume of faquan or quan in its totality. Adjustment and change of economic relations can only influence the internal ratio structure of faquan or quan in its totality. In the analytical model of faquan, economic relations become more specific, manifesting as interest and interest relations. The material foundation of interest is property, and interest entities and property are the same thing but reflect different relations. There is no legally-defined interest without the foundation of property, and there is no specific form of faquan or quan in its totality without eventually having property as the material foundation, the difference is only whether it is direct or indirect, remote or proximate.

Similarly, any revolution or change cannot directly increase the absolute volume of faquan or quan in its totality, their effect in increasing the absolute volume of the two kinds of "quan" can only be indirect, and has to be

realized through the mediate process of liberating and developing productive forces. The positive significance of revolution and change fundamentally lies in thoroughly or locally adjusting economic relations and the corresponding political-legal relations, thus improving, to various degrees, the internal structure of quan in its totality, particularly improving the ratio relations of right and power, as well as changing the original configuration, etc. Understanding this can help us realistically assess the jurisprudential significance of revolution or change themselves and their limitations.

2.4 *The Specific Existing Modes of Quan Form over the Course of History*

All the specific existing modes of quan in its totality form over the course of history, yet the stages in which they form are different, the chronology of their formation matches certain developmental levels of productive forces, especially of science and technology. Regarding human rights, the most general mode of right, Marx remarks that "they are not inborn but arose in the course of history."[9] In fact, the other existing modes of quan in its totality are the same, to understand the point, the key is to appreciate the condition and process of the formation of various modes of "quan."

Searching for the formation process of any part of quan in its totality, we have to look at humans themselves for its origin, which is human need, primarily and fundamentally the need for material existence. But need itself is not any modes of quan, it is just the condition of their formation. Only when the social productive process has provided material conditions to satisfy human need, and connected human need with certain material conditions or provided the realistic possibility for such connection, can certain specific modes of quan in its totality be formed.

In terms of economic process, need promotes production, production satisfies need, at the same time also creates new need, so the interaction process between need and production is infinite. Every human creation or discovery of new wealth during the process of productive practice and scientific experiment satisfies a new need or provides a realistic possibility to satisfy new need—viewed from the perspective of legal studies, it is to create a new category of quan in its totality: the invention and production of the automobile creates the right for citizens to produce, drive, or ride an automobile, at the same time creates the right for the state to control the production and selling of automobiles, etc.; the invention of the airplane creates the right to produce and take airplanes, at the same time also creates the right to control the

9 Karl Marx and Friedrich Engels, *The Holy Family* (Moscow: Foreign Language Publishing House, 1975), 153.

production and selling of airplanes as well as air traffic. And their production scale and extent of application directly determine the relevant right and the quantity of its volume, while their existence itself determines the existence of the relevant right and relevant power. Now there are aerospace products, IT products, the Internet, and they are similar to the above products in terms of the creation of rights.

Of course, the corresponsive relations between property and right or power are indirect, and it is difficult to discern their connection through simple inference, for example, the connection between property and the following rights and powers is relatively indirect and obscure: some political rights of citizens such as elections, recall, initiatives, referenda, marches, demonstrations, assembly and association, etc., other rights such as name, portrait, reputation, copy, and patent, etc., and the state powers protecting these rights.

Actually, like other categories of quan in its totality, the connection between property and the above rights or powers is the same, the only difference is that they normally do not form following the formation of certain specific property, rather, they are the modes of legal conversion of certain portions of the total volume of social property when it has reached certain levels of accumulation. If the total volume of social property has not accumulated to reach certain levels, none of its portions are able to be converted into these modes of right and power. That is the fundamental reason why the law during a time, and in a country, of economic under-development often does not stipulate these rights or powers.

However, the same property and the same process of satisfying certain needs satisfy the needs of different subjects in different economic relations, often with rather different results if viewed from the perspective of legal studies. When human need is satisfied or given a realistic possibility of being satisfied, the process already objectively forms certain categories within quan in its totality: in primitive societies without state, it is the primitive "quan"; in view of no differentiation or undifferentiation between individual right and public power back then, it can be defined as the primitive mode of faquan with mixed and undivided status; if the state is already formed, and it is still not within the realm recognized and protected by the law, it is residual quan; if it belongs to social members in a country with the rule of law, it is individual right; if it is controlled and used by state agencies and their officials, it becomes state power, etc.

Along with the above understanding, based on the fact that the total volume of property of a certain society is constituted of natural resources that can enter the production or consumption process and the product of human labor, we can arrive at two important conclusions, which are very necessary for properly

interpreting various rights and power phenomena in reality. 1) The most basic right of humans fundamentally (namely, not using whether it is legally defined as the standard for judgment) is formed at the same time when humans are formed, its material foundation primarily is natural resources in the early stage of human society (primitive condition): natural caves, streams, wild animals and plants and other living space are the sources of their lodging and food, constituting the foundation for right to life of primitive humans; fields, hills, jungles and other living space form the foundation for their primitive right of personal freedom, etc. 2) The categories and the absolute volume of contemporary faquan are historically formed and gradually accumulated along with the development of productive forces, which include sciences and technology, through different periods of time. Whenever certain categories and quantities of new property are discovered, produced, or accumulated, certain categories and quantities of faquan are increased, and need to be distributed between citizens and the state by a certain percentage.

Therefore, all modern and extensive forms such as right and power are formed in different periods in history. And it is impossible for any specific form of faquan to be formed at the same time in different countries, rather, it is formed of necessity first in a country where its material foundation is formed at the earliest opportunity, regardless of which historical type the country belongs to. It goes without saying that, it is an entirely different thing as to how it is distributed legally or substantively after its formation, and by whom it is actually enjoyed.

2.5 *The Subject of Property Ownership Can Be Transferred*

Many relevant facts show that the subject of property ownership can be transferred, and the transfer process in terms of social relations is manifested as the ownership change of the content of corresponding interest, which in terms of legal practice, is manifested as the mutual conversion of corresponding legal phenomena, and in terms of legal studies is manifested as the change of existing form of the corresponding portion of faquan. Wealth, legally, is manifested as property, whose ownership is actually an aggregation of various relatively independent rights (some believe there are four: possession, appropriation, income, disposal, some believe there are 11 or more).

So, the transfer of property ownership can refer to the transfer of all rights existing in the relevant object and faquan, and can also refer to the transfer of some rights. This transfer actually can be considered as all or partial transfer of the relevant object itself. In the analytical model of faquan, the difference of property categories of a society's total property apparently is caused by the different subjects of ownership: some have no subject, some have a subject,

some have individuals as the subject, some have public agencies as the subject. Under certain conditions, property can obtain or lose its subject, and its ownership can also transfer from one, or one kind of, subject to another, or another kind of subject that is the most common and most normal social-economic phenomenon. The interlink and the possibility of the mutual conversion of various specific interests within the total interests are extremely obvious. About the interlink between right, power and residual quan, I have discussed elsewhere.

It is not that difficult to understand the above phenomenon, the key is to recognize that the interlink and conversion of various specific categories within the total interest is the legal manifestation of the transfer between different subjects of, directly, various specific interests, and indirectly, various properties. It is very important for legal studies to understand the interest transfer and ownership change of property hidden behind the phenomena of interlink and conversion between right, power, and residual quan. It helps us see the economic attributes of various rights and various powers, and helps us discern the essence between conflict of rights, and competition of powers.

2.6 *There Is a Conversion-reversion Relation between Property, Interest and Basic Legal Phenomena Objectively*

When we affirm previously the definitive corresponding relations between a society's total volume of property and the absolute volume of quan in its totality and faquan, we in fact already admit this point theoretically. In reality, the quantity of property and the quantity of basic legal phenomena such as right, power, and residual quan have a directly proportional relationship, which is actually quite intuitive. Of course, there has to be certain conditions for realizing conversion between right, interest, and basic legal phenomena. It is undeniable that it has long been noticed that property and interest have an objective relationship with right, power and other basic legal phenomena. But unfortunately no scholar has described and discussed this relationship as a conversion-reversion relationship, and approaching the issue only from the perspective that the former "influences" the latter.

Actually, "influence" here is not accurate, nor specific. Conversion-reversion is the essence of the relationship between the two aspects. If we think that there is merely mutual "influence" between property, interest and right, power, and other legal phenomena, we will not be able to theoretically explain many common phenomena: why property legally obtained by people immediately directly manifests as their property right, without exception,—for example, wage from labor, a purchased TV set, inherited real estate, etc.; why the donation to the Project Hope can bring about the right to education for children

who are poor and out of school; why the power of a state is zero when it has no funds to sustain the existence of its civil service, military, police, prisons, and courts, etc.

There are numerous phenomena like these, and only when we treat relations between property and right as well as power, i.e., the most basic legal relations, as the relation of conversion-reversion, can we provide a logical explanation. In the past, the absence of proper understandings of this relation has resulted in some views in legal studies that sound to be reasonable, but actually lag far behind. For example, not long ago, some scholars in China pointed moral condemnation toward the practice of some countries in judicial proceedings where the state used money to compensate for the damage of personality right such as right of reputation, right of honor, and right of portrait, etc., insisting that it is an extremely corrupted practice that even personality can be exchanged for money there. What those scholars didn't think through back then was, what would it mean if those rights were not worth anything! Today no one in China would say anything like that anymore, but the reason is probably not that the economic attribute of personality right and other rights have been understood, but that the similar practice has later also been adopted in China.

In actuality, the damage of right, in a situation where it is impossible to compensate with the same right, eventually can only be relieved through compensating with a corresponding quantity of money. Because only money (the general existing form of property) can serve as the final material foundation of right. That is true for the right of honor, the right of reputation and other rights, it is also true for the right to life, a good example for that is, in many countries or regions, there are stipulations about judicial agency compensating for a wrongfully executed death sentence of a citizen, and about determining the calculation method of the amount. Following many countries and regions, China has also established and executed state compensation law, recognizing in the construction of legal system the conversion-reversion relation between property, interest and right.

The objectivity of the conversion-reversion relation between property, interest, and power is also very obvious. I have discussed the conversion from property and interest to power, it is not very difficult to prove the view that power can objectively be reduced to interest and property, the much-hated corruptive practice of "power-money exchange" is by itself a great example! Regardless of its legality or appropriateness, the fact that power controlled by certain people can objectively turn into money is proving the idea that state power is based on property and under certain conditions can eventually be reduced to property.

Perhaps some believe that, theoretically connecting right and power with property and interest will help promote "rush for money," thus causing moral degeneration. This worry is completely unnecessary. The conversion-reversion relationship between various rights, power and property interest is objective, it exists regardless whether we discover it, and it is independent of human will. We should analyze "rush for money" in a case-by-case manner, and if it is totally negated based on traditional views of duty and interest, that can only show that those scholars' understanding of law is lacking in dialectic elements. What really happens is that understanding the real connection between various power, various property, and interest helps strengthen the idea of power restraint in a society, and helps reach the consensus of adopting powerful systemic measures to strengthen the construction of clean government; and thoroughly understanding the material content of various rights and further fighting for and defending one's own economic interest and other interests through exercising his right is a direct manifestation of heightened legal awareness, improved rule of law, and social advancement. All of these should be advocated rather than being opposed to. In this sense, "rush to money" is actually a good thing, not a bad thing, and is moral improvement, rather than moral degeneration. It goes without saying that this affirmation is not to negate morality and pursuit of life that transcend individual interest and monetary consideration. This is the coexistence of legal realism and moral idealism. They appear to be contradictory, but in essence are unified, and complementary. It is also in this sense that, in terms of the distribution of individual consumption, we implement the principle of "from each according to his ability and to each according to his work" stipulated by our constitution, while at the same time we also advocate the morality of caring and helping others, and promote selfless contributions to others and society.

Based on the above understanding, we can draw some meaningful conclusions, which are beneficial to properly interpreting the constitution and legal phenomena. Here are the most important ones: 1) The faquan relation is fundamentally the relation of the exchange and coordinated realization of interest and property, the acquisition, transfer, and renouncement of faquan all should fundamentally be seen as the legal manifestation of the acquisition, transfer, and renouncement of certain quantities of property. 2) The variety of property and interest results in the functional variety of the components of quan, the existing form of property and interest as well as the change of the controlling subject determine the change of legal form of the relevant components of quan. 3) The actual enjoyment and application of right, power, and the residual quan fundamentally is the consumption and expenditure of property, the only difference being that some are direct and some are indirect. Conversely, the normal consumption and expenditure of property must also manifest as

the exercise of certain rights or power. 4) Many common phenomena can be given profound theoretical illustration only when they are considered as the manifestation of the reversion of various right and power to interest and eventually to property. These phenomena include compensated transfer of certain rights; monetary compensation when right is violated and injured, including state compensation; penalties given to the violator such as administrative penalties, fines, or confiscation of property when power is violated. 5) As the concentrated manifestation of faquan, power has intense and direct property attributes, and is very easy to be illegally reduced to money or other forms of property, therefore, there should be particularly strict supervisory control over the authority undertaken by the officials of state agencies as well as the application of such authority, actually strengthening the construction of clean government with the regime of law.

2.7 *Protecting Right Is Equally as Important as Protecting Power, or Even More Important*

Right and power are both specific legal forms of the total interest of a society (which in a society of class opposition is essentially the total interest of a class), so the coordinated realization of right and power means that the total interest is maintained and advanced, otherwise it means that it is injured. This is self-evident, but under the influence of the legal-cultural tradition of feudalism in history, China for a long time has exhibited in reality a tendency in favor of protecting power in terms of both theory and practice in legislation, enforcement, and justice, placing the protection of right to a relatively secondary position. This tendency is wrong. In terms of the legal status of right and power in a democracy, the legal status of right is equal to that of power. In terms of politics, people's right, as the totality of citizens' rights, has a higher legal status than power, and power is only what derives from people's rights. Fundamentally, right and power are both legal manifestations of property with defined ownership and the total interest of the society.

Thus right should enjoy, at the minimum, the same strong legal protection as power, especially during the process of legal execution, it is much more difficult in practice to achieve the same practical effect in protecting right as in protecting power, therefore right protection should be more emphasized and attended to. Because in everyday life, dispersed right is much weaker than concentrated power, is much more easily violated illegally. In order to overcome a one-sided emphasis on protecting power in legal practice, and relative underestimation of the issue of protecting rights, legal theorists have the responsibility of helping others form the correct conception about the status of right and power, as well as the normal state of their relationship.

Of course, to strengthen the protection of right is not only an issue of understanding, it is more of an issue of creating objective conditions. In this aspect, there are two points that should be emphasized: 1) The most important aspect in protecting rights is to protect the property right of citizens and other individuals, and the basic condition for protecting this right is that citizens and other individuals have property to be protected. If they have no necessary property, it is not meaningful at all no matter how much right the law provides them. Under socialist conditions, except political right, the direct and primary material protection of the basic right of citizens and other individuals is still the property belonging to individuals or families. Even political right can lose the impetus of operation and become empty, if it is not built on the foundation of citizens protecting and promoting their own property right. 2) The property owned by citizens and other individuals and the property controlled by the state should be roughly balanced. The so-called control here includes not only complete ownership of certain property, but also certain authority of sharing certain property ownership; and balance refers to that, the ratio controlled by both parties should be appropriate according to each other's legal status, so that no party can be strong enough to oppress the other party, so much so to overturn the existing constitutional order.

2.8 *There Should Be Equal Legal Protection of the Property of Various Subjects*

The relations between property, interest and basic legal phenomena indicate that protecting the property of different subjects is essentially the foundation of protecting the portion of faquan enjoyed by different subjects. Therefore, to use constitutional means to provide preferred protection to state property while relatively lowering the protection level of the property of citizens and other individuals, means on a political level preferred protection of power and relatively lowering the protection level of right. That is tantamount to constitutionally affirming that power is more important than right; power is primary, while right is secondary. That is wrong. Obviously, the constitution of China precisely exhibits the idea of granting state property preferred protection, special protection, while treating the property of citizens and other individuals as relatively secondary.[10] The passage of the 16th Amendment of

10 On the relevant provisions of the Chinese Constitution that manifest the idea of granting preferred and special protection to state property, see the representative discussions in *Zhongguo dabaikequanhu·faxue* 中国大百科全书·法学 [Encyclopedia of China · Law] (Beijing: Zhongguo dabaikequanshu chubanshe, 1984), 519–520. Xia Yong 夏勇 (ed.), *Zouxiang quanli de shidai* 走向权利的时代 [Towards the Time of Right] (Beijing: Zhongguo zhengfa daxue chubanshe, 1995), 358–374.

the Constitution has not changed the constitutional reality at all. The portions on economic content stipulated in the Chinese Constitution and the fundamental political principle of "all (state) power belongs to people" affirmed by the same Constitution is intrinsically contradictory. The field of legal studies should be clearly aware of that contradictory state and its negative influence on legal processes.

Perhaps some hold the view that the reason to emphasize the sanctity of state property and grant it special protection is that the interest embodied by state property is more important than the property of citizens and other individuals. Whether this argument is tenable depends on whether the said citizens are one or more specific natural persons or all citizens of a country. If "citizens" refers to one or more specific natural persons, the argument can be correct under certain conditions; if "citizens" is used as a class noun and includes every citizen of a country, the argument is incorrect. The "citizens" referred to in certain provisions on protection in the Chinese Constitution clearly includes every citizen, namely, all citizens, which are precisely the legal form of all people. Therefore, like the relationship between right and power, fundamentally, individual's property and individual's interest are as important as state property and state interest (referring to public interest represented by government in general). And, because right is at a weaker position when compared to power, it is easier to be injured, the strength of legal protection of right should surpass that of legal protection of power. To emphasize special protection of public property, particularly of state property while relatively downplaying the protection of citizens' property is actually because the normal relationship between the two parties is not well coordinated. The erroneous conception of this basic relationship is bound to result in an erroneous understanding of the relationships of relevant matters of higher levels, i.e., the erroneous understanding that, legally, power is more important than right, state interest is more important than the interest of citizens and other individuals.

I believe that, under socialist conditions, the property of citizens and other individuals and state property (as well as the relations between individual interest, right and public interest, power) should be approached from the following three aspects:

(1) When "individual property" is used as a general concept, namely, when its content covers the property of every citizen and other individuals, the theoretical status of "individual property" is equal to state property. The equal theoretical status of individual property and state property should be manifested in the legal (primarily constitutional) equal protection of both. Under socialist conditions, the relationship between individual property and state property can be summed up as follows: the purpose is to enrich and increase individual

property in order to eventually realize common prosperity; state property is only the means to realize the purpose, its weight in the total volume of social property, its function, its existing form and management should all be subordinate to, and serve for, the maximum preservation and increase of the total volume of all social property, to realize the need for common prosperity.

(2) Like state property, individual property has similar legal attributes. The similar legal attributes mean that both are property with defined ownership; as the material foundation or material undertaker of the total interest of a society, the two are undifferentiated in existence. Any injury to the property of citizens and other individuals as well as state property essentially is injury to the total interest of the society.

(3) When "citizens' property" is specific in social economic existence (i.e., as specific property of certain specific individuals), the status of state property may be higher than it, and so is the corresponding relation between right and power. Here the word "may" means that the higher status of state property than the property of citizens and other individuals is not necessary, or unconditional, rather, it should be compared and determined which of the two manifests the larger portion of the total interest of a society. For example, under certain conditions, moral obligations and the law can demand the realization or protection of state property with higher value at the expenses of damaging certain citizen's individual property with lower value, but in general should not demand that the private property with higher value to be sacrificed to protect state property with smaller value.

In other words, when realistically and specifically dealing with the relations between the property of citizens and other individuals and state property, we should in principle take into account the restraint of relative cost-benefit and other economic considerations, applying specific analysis on specific problems. The same principle should also be followed in principle when corresponding relations between right and power as well as corresponding interest relations are handled by the legislature, enforcement, and justice.

3 Interpretative Design of Legal Phenomena of Faquanism[11]

As a theoretical product that is rooted in legal practice and returns to legal practice, faquanism must be directly beneficial to more comprehensively and systematically interpreting all kinds of legal phenomena rationally. We have

11 This section is based on Tong Zhiwei 童之伟, "Yi 'faquan' wei zhongxin xitong jieshi fa xianxiang de gouxiang 以'法权'为中心系统解释法现象的构想 [Toward a 'Faquan'-

identified the basic categories of jurisprudence and the faquan analytical model above, now let us briefly explain the basic framework that uses the system of faquanism to interpret legal phenomena.

3.1 *The Necessity of Forming Systematic Theory*

"Philosophers have only *interpreted* the world in various ways; the point is to *change* it."[12] This statement means that "changing the world" is more ultimate, and more important than "interpreting the world," and by no means denies the significance of interpreting the world. In fact, proper interpretation of the world is the premise and foundation of effectively changing the world.

Proper and uniform interpretation of all the phenomena facing a discipline is the pursuit that the basic theory of any discipline absolutely cannot abandon, and jurisprudence is no exception. There are all varieties of legal phenomena: in terms of the times of their existence, there are historical legal phenomena and current legal phenomena; in terms of countries, there are foreign legal phenomena and Chinese legal phenomena; in terms of departments, there are constitutional law phenomena, criminal law phenomena and civil law phenomena, etc. To be able to interpret all legal phenomena uniformly rather than self-contradictorily indicates that the understanding of the relevant subject concerning various legal phenomena themselves, their connections and differences, and their relationships is consistent or relatively consistent with the objective reality and indicates that the relevant theory reflects or basically reflects the real conditions of the legal world. Otherwise, there will be only fragmented, one-sided, and shallow understandings or theories, or the interpreters' own uncertainty and self-contradiction. Of course, for a scholar, in many situations, proper and uniform interpretation of all legal phenomena is usually only the pursuit hidden deeply inside, which is gradually expressed through his/her works in discontinuous and sporadic fashion and is difficult to understand for the others.

Many scholars in the field of Chinese legal studies tend to believe that there is no need to waste time and energy to construct a systematic theory in interpreting legal phenomena, whose most prominent rationale is that such practice is out of date. I don't concur. There are two elements that determine whether a society or country needs a theory of systematically interpreting legal phenomena and what form of manifestation the theory assumes: one is

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centric Theory for Systematic Interpretation of Legal Phenomena]," *Xiandai faxue* 4 (2000): 24–28.

12 Karl Marx & Friedrich Engels, "Theses on Feuerbach," in *Collected Works*, Vol. 5 (Moscow: Progress Publishers, 1976), 5.

the ways and customs in which the philosophical-cultural tradition, thinking, and actions integrate, the other is the legal system it belongs to, and the main legal heritage.

In terms of the ways and customs in which the philosophical-cultural traditions, thinking, and actions integrate, Chinese people are similar to those in continental Europe, who have a tradition or tendency in seeking systematic doctrine and using it as the standard or reference to determine their actions. Such tradition or tendency is reflected in the attitude and customs of our ancestors and ourselves: the life sphere covered by the classics is often fragmented and discontinuous, but never mind, people can always use "commentary" to make it an all-inclusive whole, a system, which shows the strong mental needs of Chinese people for systematic theory. They treated Confucian classics in the past this way, and they treat Marxist classics today with the same cultural mentality. Such cultural tradition is irreproachable, and utterly natural. Therefore, what often happens is that, for Chinese people, in order to change their action, they often first focus on the "commentary," trying to change the relevant content of the conceptual system through new "commentary" of the classics, to effectuate the perfect justification and achievement. In this regard, the tendency of Chinese people is similar to that of the people in continental Europe, and drastically different from that of Anglo-Americans.

Furthermore, the law in China has always been statutory, even if case law is in existence, it is merely supplementary. And, as a unitary country with large size and high degree of centralization, China has to particularly emphasize the uniform interpretation and implementation of statutory law. It was the case in the past, and it is the case right now, and it will be the case for the foreseeable future. That is also where China is relatively similar to countries in continental Europe, and quite different from Anglo-American countries.

There are certainly more differences than what has been mentioned above between China and Anglo-American countries, and between their peoples, but what has been mentioned above can clearly show that Chinese jurisprudents should not ignore the specific conditions of China and blindly follow the Anglo-American jurisprudents. If we need a theory of systematically interpreting legal phenomena, then we should strive to construct one, without allowing ourselves to be confined by the Anglo-American scholars. Of course, this does not mean that I, like some others, believe that Anglo-American jurisprudents do not have, and do not pursue, the theory of systematically interpreting legal phenomena. In my view, systematic interpretation of legal phenomena is the pursuit that any real jurisprudent, including Anglo-American jurisprudents, will not abandon, and the difference lies only in terms of the developmental mode and the existing form of theory.

3.2 *The Rebirth of "Faquan" and Its New Meaning*

"Faquan" is a word that has experienced many life cycles in China.

As far as I know, the word "faquan" was first used in Chinese language as the abbreviation for extraterritoriality. For example, the so-called "Conference on Extraterritoriality Investigation" hosted by the Duan Qirui administration in Beijing on January 12, 1926 was abbreviated as "Conference on Faquan." The matter discussed in the conference that was attended by a number of representatives from Europe and America was mainly about the issues of consular jurisdiction of the powers in China. It is therefore obvious that faquan was indeed used to refer to extraterritoriality. But overall such usage was rather rare back then, in the past half century no one has used the word "faquan" in that sense, so it actually is already a dead word.

After 1949, the word "faquan" appeared again in a different sense, where it occurred due to a mistranslation of Marxist classics, and later disappeared once again following the correction of the mistranslation. The reason is: in German and Russian, *Recht* and *право* mean both "law" and "right" (much like the word country means both "nation" and "countryside"), so it entirely depends on the context that under what condition they mean law, and under what condition they mean right.

In the early 1950s, the agency in charge of translating the works of Marx, Engels, and Lenin (The Compilation and Translation Bureau of the CPC Central Committee) was sometimes not sure whether it should be translated as law or right, so they made up the word "faquan" to cope (namely, muddle through) that appears to carry both meanings, but is actually ambiguous.[13] Because of such a background of the rebirth of "faquan," this word never has a defined denotation and connotation, and does not have the most basic conditions required by a concept. The agency in charge of translating the works of Marx, Engels, and Lenin later realized the mistranslation. So, it officially corrected the mistranslation with an announcement, "'Bourgeois Faquan' Should be Translated as 'Bourgeois Right'," published on *The People's Daily*.

With regard to the form, the above announcement only states that "bourgeois faquan" is a mistranslation, pointing out that the correct translation is "bourgeois right," but it does not generally negate the value of the word "faquan." However, the official document in fact indirectly negates the translation of all "faquan" that the agency created before. The rationale for such an assessment is that, since then, in all the new editions of Chinese translations of the work of Marx, Engels, and Lenin, "faquan" in the older editions has been

13 Chen Zhongcheng, Shao Aihong 陈忠诚、邵爱红, "'Faquan' haishi 'quanli' zhizheng '法权'还是'权利'之争 [A Debate: 'Faquan' or 'Right']," *Faxue* 6 (1997): 2–3.

replaced by "right" or "law," with no exception. Not only the "bourgeois faquan" in the "Critique of the Gotha Program" that caused quite a tempest has been corrected as "bourgeois right,"[14] but "faquan" in all other places has also been corrected. To take as an example Engels' article "On Housing Question," which contains rich content for legal studies, the same sentence in the old translation is:

"Every time our good Proudhon loses the economic hang of things—and this happens to him with every serious problem—he takes refuge in the sphere of law and appeals to *eternal justice*."[15] Here "the sphere of law" was originally translated as "faquan sphere," but in the new edition, "faquan sphere" has been replaced by "the sphere of law,"[16] where "faquan" is returned to the original "law." The Chinese translation of Lenin's work is also the same. For instance, there is a sentence in "the State and Revolution" that is translated in the old edition as follows: "Of course, bourgeois right in regard to the distribution of *consumer* goods inevitably presupposes the existence of the *bourgeois* state, for right is nothing without an apparatus capable of *enforcing* the observance of the standards of right."[17] Here the original "bourgeois right" and "right" have been translated into "faquan" in the old version, but in the new Chinese edition, the two occurrences of "faquan" have been reverted to "right."[18] It is clear that, faquan in its original meaning has become a dead word in Chinese language, and the word "faquan" is merely a relic from scholarly history.[19]

After the use of faquan that was made up due to misunderstanding was officially abolished by its creator itself, more recently there have been scholars who call "legal right" as "faquan,"[20] where "faquan" is seen as the abbreviation

14 Karl Marx, "Critique of the Gotha Program," in Robert Tucker, ed., *The Marx-Engels Reader*, 2nd ed. (New York: Norton, 1978), 530.

15 Karl Marx & Friedrich Engels, *Makesi Engesi Quanji* 马克思恩格斯全集 [Collected Works of Marx and Engels], Vol. 18 (Beijing: Renin chubansh, 1964), 242.

16 Karl Marx & Friedrich Engels, *Makesi Engesi Quanji* 马克思恩格斯全集 [Collected Works of Marx and Engels], Vol. 3 (Beijing: Renin chubansh, 1995), 147.

17 V. I. Lenin, "The State and Revolution," in *Collected Works, Vol.* 25 (Moscow: Progress Publishes, 1964), 471.

18 V. I. Lenin, *Liening xunji* 列宁选集 [Selected Works of Lenin], Vol. 3 (Beijing: Renmin chubanshe, 1995), 200.

19 Chinese dictionaries in general don't carry "faquan" as an entry, few dictionaries do carry it, but at the same time note that the word "now comes into disuse because it is difficult to differentiate between law and right, therefore is replaced by 'law' or 'right'." See Zou Yu 邹瑜 (ed.), *Faxue dacidian* 法学大辞典 [Dictionary of Legal Studies] (Beijing: Zhongguo zhengfa daxue chubanshe, 1991), 1021.

20 See Lin Zhe 林喆, *Quanli de fazhexue* 权利的法哲学—黑格尔法权哲学研究 [The Legal Philosophy of Right—A Study of Hegel's Legal Philosophy] (Jinan: Shangdong renmin chubanshe, 1999), 16. The original is "legal right is also called 'faquan'."

of "legal right." This seems to be an attempt to inject certain content into the linguistic shell of "faquan" that is already without a representable object, thus revitalizing it.

In the early 1990s, I once used the word "social right" to denote the unity of right and power. After causing much misunderstanding, I had to adopt, after much hesitation, the word "faquan" to replace "social right" that had caused much misunderstanding, hoping to disentangle myself from the difficulty of finding an appropriate linguistic sign to mark the unity of right and power. This can be counted as another attempt to put new wine into an old bottle, and to revive the dead word of "faquan" for the use of today's legal studies. Only time can tell whether such a practice is appropriate, and whether it can be accepted by the field of legal studies.

Now, if we have to define the concept, "faquan" is the total interest that is conceived from the perspective of legal studies, and is legally recognized and protected, it has the total property with defined ownership within a society or country as its material foundation, and is manifested as various forms of right and power, such as jural right, freedom, liberty, jural power, public authority, competence and so on. Simply put, "faquan" is legally defined quan.

It is to be noted that faquan as I define it here is the unity of legal right and legal power, not merely any one of the two. This clearly differentiates my use of faquan from the faquan that existed before and only acted as the abbreviation of "legally defined right." It has rich significance to advocate that the interpretation system of legal phenomena centers on "faquan" that represents the unity of right and power: it affirms that in the categorical system of legal studies, faquan is at the center, and other categories, including right, power, and duty, are all relatively secondary; it states that, among various interest analysis units, legally defined total interest is the highest interest of a country, and individual interest, public interest, and other interests are not comparable; it believes that, within the total property of a country, the preservation and increment of the total volume of property with defined ownership is of the most importance and has the highest priority, etc.

3.3 *The Fundamentals of the New Interpretation System*

Based on the above considerations, I offer the following ideas for interested scholars to examine. The methodological foundation in forming the ideas is Marxist philosophy, which is specifically manifested here as the method of conducting interest analysis and property analysis on legal phenomena, the method of forming categorical systems along the path from the abstract to the concrete, and the method of proceeding from the reality of social life and referring to the social life itself, etc. In terms of the formation of the basic

propositions, the method normally adopted in the basic research of natural sciences is considered as the most important, namely, the method that is guided by conjecture, based on experience, and proves the relevant conjecture and elevates it to the theoretical basis and analytical instrument in further interpreting other phenomena.

(1) Right and power are considered the most important legal phenomena, and the object and scope of legal studies are identified around the center of right and power. The mainstream legal theory today basically treats right and duty as the most important legal phenomena and identifies the object and scope of legal studies as centered on right and duty, although its research is not thorough, and is not very successful. In my opinion, the relationship between right and duty is, and is only, a manifestation of the relationship between right and right, and in terms of content it is unable to contain the relationship between right and power that is more general and more universal, nor the relationship between power and power that is equally important and at the same level. The direct purpose of formulating faquan-centric theory where right and power are the most important legal phenomena is to correct the "deviation" of right/duty-centric theory. And although it is to correct the "deviation," it is a serious issue related to the future direction of jurisprudence that has been the mainstream for a long time, therefore should not be considered as trivial.

(2) The focus is on the exploration of the exact economic content of right and power, fundamentally explaining the attributes of right and power themselves. In this regard, the most important conclusion is: right is the legal form of individual interest and individually-owned property, the three of which can be mutually converted or reduced under certain conditions; while power is the legal form of public interest and public agency-owned property, the three of which can also be mutually converted or reduced under certain conditions. Right and power here are legal right and legal power, as an analytical unit, there is also an extra-legal quan, namely, residual quan. The social content corresponding to residual quan is residual—interest, and the property corresponding to residual quan is property with undefined ownership. Residual quan is a relatively secondary element.

(3) A uniform standard is used to strictly and theoretically differentiate the two legal phenomena with an extremely close relationship, right and power. For a long time, legal studies have not had such a uniform standard that is able to sub-classify "legally defined quan" into right and power. In order to resolve this problem, I propose to adopt the differentiation standard where interest attributes are equal to property attributes: Any legal "quan," when it embodies the interest of individuals, and has individually-owned property as its material foundation, is right; and when it embodies the public interest of a society,

and has the property owned by public agencies as its material foundation, it is power. By using this standard, all legal "quan" can be clearly differentiated: it is either right or power.

According to this standard of differentiation, some "quan" that are normally difficult to identify in terms of whether they belong to right or power now can logically find where they belong. The typical among these "quan" include *patria potestas* in European history, authority of the husband in Chinese history, state ownership in reality, authority of legal body of enterprise and the internal departments of other social-economic organizations, authority of quasi-public agencies, autonomy in regional national autonomous areas, etc. The result of using the new standard to differentiate the above quan is that: *patria potestas* and authority of the husband belong to right, in spite of the fact that they were normally included under power in the past, positioning them as "authority;" the function of state ownership and the authority of quasi-public agencies supported through public finance belong to power; if a legal body of enterprise is state owned, then its authority belongs to power, while if it is privately owned, then its "authority" belongs to right; as for the autonomy of regional national autonomous areas, the portion exercised by ordinary residents belongs to right, while the portion exercised by public agencies belongs to power. Other situations can be deduced by analogy according to the standard and logic.

(4) The special relationship between the two legal phenomena, right and power, and their fundamental identity and unity are vigorously explored and illustrated. In reality right and power are so easy to confuse that not only the general public has no means to differentiate them, but even specialized legal professionals are oftentimes helpless in terms of strictly differentiating them. I believe that such a condition is not necessarily related to the superficial similarities that the pronunciation of the two words is the same in Chinese language, and they both contain the Chinese character of "quan." Because the two words in Western languages do not have such similarities as in Chinese, and their pronunciation is drastically different, yet they are still as difficult to differentiate as in Chinese. So, the reason for such difficulty has to be looked for somewhere else. It seems that, the real reason why right and power are difficult to differentiate lies in that they have too intimate a "blood" relationship and come from the same origin: they are both legally recognized and protected interests, both have property with defined ownership as their material foundation. Fundamentally, right and power are a contradictory entity, much like a family that is a contradictory entity including husband, wife, and their children.

(5) The unity of right and power is incorporated into legal thinking as an independent analysis unit of legal studies. For a discipline that has had difficulties

for a long time and has made little progress, sometimes the introduction of a new analysis unit can produce an unexpected effect. In terms of legal studies, the unity of right and power is such an analysis unit that is extremely important for the future development of legal studies. The reason is that its realistic status is very important: in terms of the social content, it is the jurisprudential reflection of the total interest of society that is legally recognized and protected; and in terms of the economic content, it is the jurisprudential reflection of property with defined ownership. That legal studies lacks a category reflecting it is the manifestation that theory is severely removed from the reality of social life.

Of course, for the unity of right and power to enter legal thinking, it must assume the form of concept and category, and must relatively fix its connotation and denotation. That requires giving it a name. Due to the limitations of word formation in Chinse language (such limitation exists in other languages as well) and the constraint of linguistic usage, it is indeed difficult to give it an appropriate name, which has become a technical issue affecting the entire field of legal studies. In the past, I used total social right (abbreviated as social right) as its name. Now I use faquan to describe the unity of right and power, which I hope can be accepted by the field of legal studies.

(6) Centered on the concept of faquan and based on the need to conduct a comprehensive interest analysis and property analysis over legal phenomena, the five major concepts are formed as the pillars of the categorical structure of jurisprudence. The five concepts are: right, power, faquan, residual quan, and quan in its totality, which represent, from the perspective of legal studies, within a certain society or country, respectively, 1) the legal phenomena corresponding to individual interest and individually-owned property, 2) the legal phenomena corresponding to public interest and public agency-owned property, 3) the legal phenomena corresponding to the total social interest (namely, the total interest that is legally recognized and protected) and the total property with defined ownership, 4) the legal phenomena corresponding to the residual-interest and the property with undefined ownership, and 5) the total legal phenomena corresponding to the total interest (including legally-defined and non-legally-defined) and the total property (including defined ownership and undefined ownership).

(7) The basic categorical group of jurisprudence is formed with the five pillar concepts primarily, and the concepts of duty and law secondarily. Duty is added in order to further analyze the legal phenomena opposite to interest and property. The classification of duty is first symmetrical to the legal phenomena corresponding to interest and property, namely, to the various specific existing forms of faquan, indicating the expenditure, wastage, or loss of relevant

interest and property. In terms of the extensiveness of its content, it is primarily the duty that is symmetrical to quan in its totality, which is further sub-classified into non-legally-defined duty and legally-defined duty, where the former is symmetrical to residual quan, while the latter is symmetrical to faquan, and is further sub-classified into the duty symmetrical to right and that symmetrical to power. If various "quan" and duty embody, respectively, the positive and negative aspects of interest content and property content, then the concept of law is needed in legal studies in order to include these contents, where the concept of law exists as the indispensable form containing the above positive and negative aspects of the contents.

(8) It may be necessary to explore the center of law, but any one or two elements among right, power, and duty cannot be the center of law. It is the general conception that the so-called center of law is the focus of the law. In this sense, it is positive to research on the focus of the law. The works of legal studies of the first half of the 20th Century show that the research on the issue of the center of law has been going on intermittently in China for at least more than 60 years. Now it seems that there is still room to continue advancing the research on the issue.

(9) If we must interpret the law through identifying its center, and thereby guide the formulation and implementation of the law, then the most appropriate formulation should be faquan-centricity. How do we provide appropriate interpretations of the law in the past and present? And what theory do we use to guide the formulation and implementation of the law? People have different ways to respond. But responding through identifying the center of law is merely one of the numerous ways for people to choose. In China, there were already debates in the field of legal studies before 1949 on whether law is right-centric, duty-centric, or society-centric. In the past decade, the field of legal studies has in some forms revived the historical debates and has reached rudimentary consensus concerning the understanding that the law is right-centric. I believe that the consensus reached concerning the issue of right-centricity is but an illusion without any solid basis. In terms of the content and the nature of faquan, it is most appropriate to position faquan as the center of law, especially as the center of socialist law. There are three layers in the meaning of faquan-centricity: the status of the unity of right and power is higher than either right or power; total social interest is higher than either individual interest or public interest; the total property with defined ownership is more important than either individually-owned property or public agency-owned property.

(10) The state power and the power of state agencies should be differentiated. So far, the field of legal studies in China has not strictly demarcated the state power and the power of state agencies and has treated the state power

as a concept entirely opposite or symmetrical to citizens' right, which actually severs the relationship between individuals and the state power, which, strictly speaking, is theoretically inaccurate. Realistically, however, it is also reasonable, simple, and practical to divide faquan, based on the difference of exercising the subject, into power exercised by the state and right retained by citizens, without strictly differentiating the state power and the power of state agencies. But when necessary, the revelation of the true relationship between the state power and the power of state agencies and the differentiation between the two also have important value in knowledge and practice, with one of the practical values being that it can be helpful in promoting the democratic reform of the political system.

Strictly speaking, the state power and the power of state agencies are interrelated as well as different. For example, Chapter One of the Chinese Constitution stipulates that "[a]ll power in the People's Republic of China belongs to the people." Here, "all power" is the state power, and if we simply perceive it as the sum of the power of various state agencies, then there will be nothing left for "people" anymore, showing absolutely nothing constituting the state power that belongs to "people." A reasonable interpretation should be that, in a representative democracy, the state power is constituted of two parts or functions: one is the function of exerciser of state power, which is presented in the constitution as the authority or the limit of authority of various state agencies, and the other is the function of the owner of the state power, which is primarily presented as citizens' right to vote in selecting representatives and other public servants, their right to referendum in a national referendum, and their right to criticism and supervision of various forms. The relationship between the two functions of the state power is actually the relation between the "power" and the "ability" that Sun Zhongshan elaborated in his theory of the rights of the people. According to him, a country is similar to an automobile, where the people are its owner, while the heads of the government or the state agencies such as the president, premier, and ministers are all drivers. "The people are the masters, those who have power, while the governmental officials are specialists, those who have abilities."[21]

The state power is distributed among various state agencies by the constitution, which in China is presented as the authority or the limit of authority constitutionally enjoyed by various state agencies, thus constituting a relatively stable proportional relationship. As a result of the practice that power is distributed amongst various central or local state agencies through the

21 See Sun, Zhongshan 孙中山, *Sun Zhongshan xuanji* 孙中山选集 [Selected Works of Sun Zhongshan] (Beijing: Renmin chubanshe, 1981), 773–778, the direct quote is from 776.

constitution in the form of enumerating the authority or the limit of authority, if we use TSP to denote the total volume of the state power, we will have the following equation: TSP = a/TSP + b/TSP + c/TSP +..... n/TSP. In other words, suppose the total state power, TSP, is 100, then every category of participating state agencies will acquire a certain share. If the faquan structure and the structure of the state power remain constant, there is a zero-sum relationship with regard to the participating state agencies in the equation in sharing the state power.

Perhaps some will contend that what has just been discussed applies only to normal constitutional states, while in some other states the power provided to state agencies by the constitution does not reside in these agencies, which are merely "gloves." Such situations are indeed in existence, but it does not diminish the reasonableness of the above framework. In order to resolve problems in this regard, we only need to differentiate the constitutionally designated state agencies from the actual state agencies, and, if necessary, to include the organizations actually exercising the authority of the state agencies into our research.

3.4 *Further Expansion of the Fundamentals*

The above points are just the basics in constructing a theory that centers on faquan in systematically interpreting legal phenomena. How do we start from the points to expand the interpretation system? Here is a brief discussion of my general ideas.

(1) The essence (namely, the content) of legal phenomena is to be approached from the aspects of interest and property, where the essence of the basic objects of legal studies such as right, power, faquan, and duty should be primarily and mainly approached from these aspects. The method of approach can be direct or indirect, can be positive or negative (for example, in terms of duty). Admittedly, it is possible to approach the law from other aspects, but I believe that it is most fundamental and most thorough to approach the law and legal phenomena from the aspects of interest relations and property relations.

(2) On the basis of sub-classifying the value of the law into ultimate value and realistic value, the free, comprehensive, and sustainable development of human beings should be identified as the highest pursuit and ultimate value. Using this as a reference should help resolve some directional issues in the development of legal studies and the law.

(3) On the premise of respect for human beings and human dignity, the standard of legal justice should be affirmed based on the equal exchange of faquan, where justice is understood as the portion of faquan that one can obtain and will only obtain what he ought to. From the perspective of the law, it

is unjust if one does not obtain the faquan that he is entitled to, and it is also unjust if one obtains more than what he is entitled to, while it is civil trespass if one generally violates the faquan that originally belongs to others, and it is crime if one seriously violates the faquan that originally belongs to others. It has to be emphasized that the equal exchange of faquan is the equal exchange of various "quan," interests, and properties, and the entitled faquan is certainly entitled "quan" and corresponding interest and property.

(4) The law is to be understood as a system of norms that identifies faquan assignment and resolves faquan conflict according to certain concepts of justice. Faquan assignment is legally manifested as right or right assignment, while its social content is the corresponding interest assignment, which is ultimately property assignment. Faquan conflict is legally manifested as right-power conflict, right-right conflict, or power-power conflict, while its social content is the corresponding interest conflict, which is ultimately property conflict.

(5) The effect and function of the law should be interpreted from the perspective that faquan conflict between various subjects should be resolved in ways that embody the requirement of the ultimate value of the law and are consistent with justice, so that the conflict can be contained within a predetermined range. In terms of the form of faquan conflict, it is specifically manifested as right-power conflict, right-right conflict, and power-power conflict. In terms of its content, it is specifically manifested as interest conflict behind right and power, which is ultimately property conflict between relevant subjects. Here, to emphasize the embodiment of the requirement of the ultimate value of the law is to ensure that the law always progresses in consistency with the free, comprehensive, and sustainable development of human beings, and to emphasize the consistency with justice is primarily to allow an easier understanding of the various punitive rules of the law.

(6) While recognizing the appropriateness of the realistic value of the law from multiple aspects, I believe that, fundamentally, the realistic value of the law should be to preserve and increment the total volume of faquan to the maximum, namely, to preserve and increment the total volume of right and power, the total volume of interest, and the total volume of corresponding property of a certain society or country. As discussed earlier, the ultimate value of the law is to promote the free, comprehensive, and sustainable development of human beings. To put everything together, we can say that the processes of realizing the realistic value and the ultimate value of the law should be consistent with each other, the latter is the goal of the former, and the latter assumes its practical significance and the real possibility because of the former. Based on this concept of the value of the law, it is more logical to explain the issues in

various departments of law, and it appears to be more preferable than explaining the value of the law by way of freedom, order, justice, and other elements.

(7) The rule of law is to be understood as the principles and rules of distributing and implementing faquan according to the will of the majority and the political form of strictly following the principles and rules. The essence of the rule of law is to democratically and equally determine the distribution and enjoyment of interest and property. And the legal system can be understood as the generic term for the legal regimes that distribute and implement faquan, which is actually the generic term for the legal regimes that distribute and enjoy interest and property.

(8) Legal order is to be understood as the legal conditions that are realistically most beneficial to the preservation and increment of the total volume of faquan, and ultimately the total volume of the total social interest as well as its material foundation, the total volume of the property, and are ultimately most beneficial to the free, comprehensive, and sustainable development of human beings. Legal order is not characteristic of order and stability, it is entirely possible for it to be fluid, agitated, and fiery.

(9) When legal relations are expressed as faquan relations, their specific constitution has two levels and three kinds of relationships from a macroscopic perspective, namely, right-power relationship, right-right relationship, and power-power relationship, whose content is the corresponding interest relationship and property relationship. Similarly, legal facts are to be understood as all that cause the origination, change, and elimination of faquan relations.

(10) The essential content of legal responsibility understood from the perspective of returning faquan according to the requirement of justice and compensating the loss of faquan is the return of interest and property and the compensation of interest and property. Civil, criminal, and administrative responsibilities can all seem to be understood in this way.

(11) Faquan balance is to be identified as the most basic principle of legislation, enforcement and justice. This refers to the issue of choosing what to give priority to in protecting, sacrificing, or abandoning under various specific conditions where there is contradictory conflict between right and power, between one right and another right, and between one power and another power. Faquan balance is legally manifested as the balance between various components within the unity of right and power, and in terms of social life it is interest balance, and ultimately is property balance. The purpose of faquan balance or the issue to be resolved by it is how, under the premise of not deviating from the ultimate value of the law, to regulate and manage every specific situation in order to achieve the best preservation and the maximum increment

of the total volume of faquan and the corresponding total volume of interest and property.

(12) The ultimate political goal that is the mainstream in the Chinese society is the demise of the state. From the perspective of legal studies, the state is the carrier of power and the political manifestation of power, and the demise of the state means the demise of power, which strictly speaking is that power gradually transforms into right, and under a new historical condition returns to the mixed conditions of right and power. Therefore, the demise of state also means that within the faquan structure (power/right), the continuously shrinking ratio of power and the gradually expanding ratio of right are historical tendency recognized by the Chinese official political doctrine. All rational human beings must pursue the unity of process and goal, because human beings can only live in the process and it is impossible to live in the goal, although the process cannot be separated from the goal. This determines that, in the reality of legal life, they must demand the strict limitation of the quantity and strength of power (as evil) within the necessary realm, and must demand fully respecting and protecting human rights.

(13) The maximum preservation or increment of the total volume of faquan and the full respect and protection of human rights are the two basic requirements of faquanism, which are mutually complementary, and cannot be emphasized at the expense of the other. It is absolutely normal to have competition among proper goals within the same historical period. But these two requirements should be the fundamental measure for constitutional amendment and legislation, as well as the natural law to be followed in the processes of constitutional review, enforcement and justice.

The above points and ideas are primarily applicable to interpreting domestic legal phenomena. As a whole, it can be called an interpretation model of domestic law. However, based on the principle of analogy, an interpretation model of domestic law can be converted into an interpretation model of international law. The principle of analogy is constituted of the following basic rules: the subject in international law such as the state is analogous to that in domestic law such as the citizen and legal person, the general international organization or regional inter-state organization such as the United Nations is analogous to the "government" in domestic law, the worldwide faquan or faquan in international law is deduced from the nationwide faquan or faquan in domestic law, the portion of faquan enjoyed by the subject (namely, right) that acts as an individual such as a state under international law is analogous to the right enjoyed by individuals such as citizens and legal persons under domestic law, the portion of faquan exercised over its member state (namely,

power, for instance, the function and powers of the U.N.'s General Assembly and the function and powers of the U.N.'s Security Council) by the general international organization or regional inter-state organization such as the United Nations under international law is analogous to the power exercised by the "government" under domestic law, and the state responsibility under international law is analogous to the legal responsibility of individuals such as citizens and legal persons under domestic law, etc.

Conclusion

Scholarship ought to be part of the market, which is most afraid of monopoly. The purpose of formulating faquanism and advocating the formation of a practical legal theory is to add a theoretical product for the consumers of jurisprudence so that they can choose between it and semantic analysis jurisprudence. To a certain extent, this theory, with faquan as its core category, has been influenced directly by Marx, and indirectly by Hegel. But the influences are limited to the mode of thinking, rarely involving social-political theories.

The practical legal theory effectively reduces the basic categories to six, which center on the concept of faquan. Hohfeld's semantic analysis jurisprudence reduced multiple concepts of similar meanings to eight around a century ago, and concerning his method of reduction, he says that, "[i]f a homely metaphor be permitted," the eight concepts "seem to be what may be called 'the lowest common denominators of the law'."[1] Actually, the method he adopted appears more akin to a combination of like terms in mathematics. But at any rate, the value of his method is undeniable.

Different from Hohfeld, the practical legal theory adopts the method of abstraction in resolving such issues. The key of the method of abstraction is to extract (i.e., abstract, similar hereafter) the interest content and property content contained in two or more legal phenomena and legally-defined matters, and then to use a concept to record the understanding of such relevant phenomena and matters, thereby bringing them into jurisprudential thinking. After such a logical process, the concept and the object whose commonalities have been extracted by it are sometimes similar, even identical, on the surface, but their nature is different, with the former belonging to the subjective conceptual world, and the latter to the objective phenomenal world.[2]

The specific method in which the practical legal theory uses the method of abstraction to formulate the six basic categories is as follows:

1. It extracts the common interest attributes and property attributes from the object such as the relevant legal phenomena or legally-defined matters, thus forming the concept of quan. The object of extraction in forming the concept of quan, relatively speaking, is the most broad, and is from the following three

1 Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 58.

2 For example, such relations exist between the concept of right and jural right as one of the legal phenomena being extracted, and between the concept of power and jural power as one of the legal phenomena being extracted.

aspects: jural right, freedom, liberty, privilege, and immunity that are enjoyed by individuals such as ordinary citizens; jural power, function, authority, competence, privilege, and immunity that are exercised or enjoyed by public agencies such as government or personnel performing official functions in the name of government;[3] residual quan and its possible manifestations such as moral right or moral power, etc. The commonality or the common social content of all such objects of extraction is the interest, regardless whether legal or extra-legal, of a specific society or state, while their common property content is the property of a specific society or state, regardless of whether the ownership is public or private.

2. It extracts the commonality from jural power, function, authority, and competence enjoyed by public agencies such as government, and the phenomena such as privilege and immunity that are enjoyed by officials of public agencies such as the government in performing their functions, thus forming the concept of power. The commonality extracted here is legal public interest and public property contained in all objects of extraction. Power is divided into substantive power and procedural power, and the interest embodied by them is also divided into substantive public interest and procedural public interest, with the latter having only indirect content of public property.

3. It extracts the commonality from the phenomena or matters such as jural right, freedom, and liberty, as well as privilege and immunity enjoyed by individuals such as ordinary citizens, thus forming the concept of right. The commonality extracted here is legal individual interest and the underlying private property contained in all objects of extraction. Right is divided into substantive right and procedural right, and the interest they embody is also divided into substantive interest and procedural interest, with the latter having only indirect property content.

4. It extracts the commonality from jural right, freedom, liberty, privilege, and immunity enjoyed by individuals such as citizens, as well as jural power, function, authority, competence, privilege, and immunity controlled or enjoyed by public agencies such as the government and its officials, thus forming the concept of faquan. The commonality extracted here is jural interest and its underlying total public property contained in the object of extraction, regardless of public or private ownership.

5. It extracts the commonality from various extra-legal rights and powers, such as moral right and moral power, thus forming the concept of residual quan. The commonality extracted here is extra-legal interest and property

3 Including diplomatic privileges and immunities enjoyed by foreign diplomats in one's own country and one's own diplomats in foreign countries.

with undefined ownership contained in the object of extraction. Residual quan is much less important than right and power in legal life, but it is an indispensable logical link for the basic categories of the practical legal theory.

6. It extracts the commonality from legal phenomena or matters such as jural duty, disability, liability, no-right, no-power, responsibility, and obligation, thus forming the concept of duty, the last basic category of the practical legal theory. The commonality extracted here is the legal contents of negative interest and negative property. Disability, no-right, and no-power are procedural duties, with only indirect property content. Here duty is actually parallel and correspondent to faquan, not including extra-legal duty such as moral duty. However, extra-legal duty or moral duty should also be a jurisprudential concept, only that it is not a basic category. Duty parallel to right and duty parallel to power also have important differences other than commonality, but these are relatively secondary issues, thus not needing further discussions.

Among the above six basic categories of the practical legal theory, faquan is at the center. The reason why faquan is at the center is because of the importance of the object that it refers to, including the importance of the interest content and the property content it contains, and the importance of its disciplinary function. In terms of its disciplinary function, the practical legal theory can use the concept of faquan to define all other basic concepts of the discipline. For example, the law is thus defined as "the rules governing faquan distribution and application that are passed and publically proclaimed by a public organization such as a national representative organ and are generally binding;"[4] right is thus defined as the portion of faquan that is enjoyed by the individual, embodies individual interest, and is with private property as its material foundation; power is thus defined as the portion of faquan that is exercised by public agencies, embodies public interest, and is maintained through public property; duty is thus defined as the legal phenomenon that is symmetrical in a positive mirror image, equal in absolute value, but contrary in attributes of interest and property, vis-à-vis faquan, so on and so forth. Using the six basic categories centering on faquan, we can derive and appropriately explain all other categories needed in jurisprudence, thereby forming a complete categorical system.

Based on the understanding that the legal phenomena referred to by the concepts of right and power are the most important and the most common

4 The formulation that the law is "passed and publically proclaimed by a public organization such as a national representative organ" takes into consideration the conditions that the law worldwide is primarily manifested as the statutes formulated by representative organs, but at the same time there are occurrences of case law.

among all legal phenomena, this book formulates and proves the following conjecture: right and power are fundamentally a unity of internal elements that are opposites. Faquan refers to the unity of right and power and records the jurisprudential category as the understanding of the unity. It has interest protected by the law and property with defined ownership as its content, and manifests itself as the external forms of jural right, freedom, liberty, jural power, public function, authority, competence, privilege, and immunity, etc. The purpose of formulating and implementing the law is not only to appropriately distribute faquan and regulate its application, but also to promote the maximum protection and increment of faquan. In that sense, this is the basic conclusion of the book.

What is difficult to comprehend in this conclusion is the issue of what can be considered as "appropriate" faquan distribution. In terms of the process of faquan distribution, the "appropriateness" in a constitutional society requires the general participation of citizens and the maintenance of faquan balance, despite the fact that balance can only be relative. In terms of the sustainability and purposiveness, "appropriateness" means that faquan distribution must strive to promote the maximum protection and increment of the total volume of faquan. So, the former is the requirement for fairness and balance, and the latter is the requirement for development and efficiency, where one of them can be emphasized at a particular time, but overall both should be considered.

As one of the elements of the "appropriateness," it is extremely important for a modern state to maintain the relative balance of faquan. The word "relative" is used here out of the double consideration of both development and efficiency. The relative balance of faquan includes the following three aspects in terms of the content: (1) The balance of faquan structure (right/power), namely, the relative balance of the ratio between right and power in the total faquan of a country. The weight of power cannot be too large, otherwise right will not be able to balance power, and, under serious conditions, it can lead to arbitrary power, even autocracy; the weight of right cannot be too large either, otherwise power is unable to effectively constrain the abuse of right, which is bound to result in anarchy to a correspondent degree. (2) The relative balance of the internal elements of power, namely, the balance of the lateral allocation of power and the balance of the horizontal allocation of power, where excessive concentration of power must be prevented because it is bound to impede the constraint of power and to harm the protection of the basic human rights. The balance of the lateral allocation of power requires the balance of power allocation among different branches within a state organ of the same level, relatively typical of which is the check and balance among the three branches of administration, legislation, and judiciary. The balance of the horizontal

allocation of power primarily manifests itself in the balance between the degree of centralization of authority and decentralization (autonomy). (3) The relative balance of right allocation. It is related to the following two issues: a. under the premise of equality before the law, there must be relative balance in terms of the actual consequences of implementing rules of right competition, whose serious imbalance will intensify the tension among various social strata; b. there should be relative balance among different rights enjoyed by individuals, because, if the law one-sidedly emphasizes some rights while ignoring others, it will result in one-sided and distorted life for the individuals, and the lack of happiness.

The practical requirement of maintaining the relative balance of faquan is implemented through the balanced allocation of faquan by way of formulation of the constitution, amendment of the constitution, and legislation, as well as through carrying out the balanced allocation of faquan stipulated by the constitution and the law by way of enforcement and justice, avoiding extremalization and polarization. Theoretically, faquan allocation has two extremes, one is equality, the other is a single person or a single group monopolizing unlimited right or unlimited power. Absolute monarchy, personal dictatorship, anarchy, slavery, and polarization of the rich and the poor are all the consequences and manifestations of the extreme allocation of faquan on different levels. Historically, there might have really been the necessity for the conditions of extremalization of faquan allocation, but at least they are not consistent with the mainstream values of the contemporary world.

There is an issue of exploring the optimal balance point in today's faquan allocation on the level of, and in the process of, formulation of the constitution, amendment of the constitution, legislation, enforcement, and justice. There must be a relevant optimal balance point objectively, but in actuality it depends on relevant persons or organizations that subjectively make judgments based on the specific conditions of the time and location in the formulation of the constitution, amendment of the constitution, and legislation. The exploration for the optimal balance point of faquan is in fact a process of faquan measurement, which should at least maintain two standards: a. fairness, which is to allow relevant parties, be it natural person, or legal person, and be it ordinary citizen or state agency, to obtain what they should obtain; b. utility, which is to be beneficial to the maximum protection and increment of the total volume of faquan, which is similar in meaning to the formulation of realizing the maximum happiness of the maximum people.

If we move beyond the consideration of interpreting the world to judge it from the perspective of changing the world, we can say that faquanism of the practical legal theory provides a theoretical foundation for the middle

course between individualism and statism. Following the doctrine of the mean to avoid leaning to either side has always been the mainstream way of conduct and governance in the past two thousand plus years since Confucius, whose representative statements are as follows: "the mean is the virtue to its ultimacy;"[5] "the mean is the fundamental root of all beings;" "the superior man is for the mean, while the inferior man is against the mean, the mean of the superior man is that he always maintains the mean;" "the mean is the ultimate."[6] But in actuality, in both China and the West, since the beginning of the modern times, people have often been perplexed by the two opposing extremes of individualism and statism (including collectivism) in legal life and jurisprudential research.

The theoretical perplexity that the two opposing extremes of individualism and statism bring to the society is: from the standpoint of statism, one is bound to elevate to the extreme the status and value of state, power, public interest, and public property, and at the same time to relatively degrade the status and value of the individual, rights, private interest, and private property; from the standpoint of individualism, one is bound to elevate to the extreme the status and value of the individual, right, private interest, and private property, and at the same time to relatively degrade the status and value of state, power, public interest, and public property. Even if people recognize the bias of the opposing extremes, and try to break free from them, they are troubled by not being able to find a theoretical middle point equidistant from the two extremes. The realistic perplexity of the opposing extremes is to use ideological dogma for the fact, irrationally believing that the status and value of the individual, rights, private interest, and private property are unconditionally higher than those of the state, power, public interest, and public property, or equally irrationally believing that the order should be completely reversed. From both the two logical orders, the only inevitable harmful conclusion will be that legislation, enforcement, and justice do not have to consider the volume of faquan involved in a case, and they only need to affirm the order of protection according to their different attributes.[7]

5 *Lunyu·yongye* 论语·雍也 [Analects·Yongye].

6 *Liji·zhongyong* 礼记·中庸 [The Book of Rites·The Mean].

7 During the 30 years before the implementation of reform and opening policy, especially during the Cultural Revolution, the mode of thinking accepted by both officials and citizens was to promote the sacrifice of important individual interests, even one's own life, in order to protect trivial state or collective interests, the nature of which is undoubtedly extreme statism. As for the extreme mode of thinking of individualism, we can find it in the attitude of some Chinese netizens who are "against any power" regardless of time and location. Actually, around the time of formulating the U.S. Constitution, it was also the manifestation of the

However, the social conditions where the extremalization of individualism and that of statism achieve their full manifestations are totally different, the condition for the former is a democratic society with low level of nomocracy, while the condition for the latter is a society of autocracy. In both these two kinds of societies, and in the process of transitioning from autocratic rule by man to democratic rule by law or from a democracy with a lower level of nomocracy to a democracy with higher level of nomocracy, they will naturally tend to pursue the maximization of faquan. Because, the maximization of faquan is the maximum preservation and increment of the total social interest and the total volume of property, the following characteristics of democracy and nomocracy make it necessary for both individualism and statism to strive to overcome their own bias, and to naturally move infinitely towards the balanced condition of faquan: the basic rights, especially freedom of speech, freedom of press, and political right, have effective protection; representative democracy with sufficient competition; there is no longer an individual who is the law that can speak, and at the same time the law gradually becomes the silent supreme ruler; the justice that is independent and universally recognized within and without the country.

In this aspect, one of the primary utilities of faquanism is to be completely free from the limitation of the polarized thinking, and to form the middle course of the concrete faquan as the third road outside of the two extremes of individualism and statism. It is my belief that the emergence of the third road in China will help both officials and citizens to advance the theoretical awareness of constructing a society with balanced faquan, while pursuing the maximization of faquan.

The treatment of residual quan has a particularly prominent status in the configuration of faquan in contemporary China. Theoretically, residual quan does not seem to be a very important legal phenomenon, but it actually is. In a country like China, where the rule of law is relatively underdeveloped, because there is not enough accumulation of achievements in the rule of law, the volume of residual quan is extremely large or very large, and it is much more complex and difficult in distributing residual quan or handling the relation between residual quan and faquan than in countries with a developed rule of law. What are corresponding to the relation between faquan and residual quan are the relations between the law and the other social norms in reality. In the West, the so-called other social norms generally refer to the code of conduct

mode of thinking leaning towards the extreme of individualism that some politicians did their utmost to protect the rights of individual states and persons, and to degrade the value of federal power.

such as ethical norms, religious creeds, and charters of various social and corporate organizations. In any country, the relation between faquan and residual quan is in essence an issue of demarcating the boundary between the two, clarifying the realm where conduct is regulated by the law, and the realm where conduct is regulated by the extra-legal norms.

In terms of the reality in China, the treatment of the relationship between residual quan and faquan is related to some of the very important areas in China's development towards the rule of law, primarily to the issue of the demarcation in power and function between various organs of the ruling party and state agencies. In a socialist country, the power of the party is, to a great degree, a special type of public power, and the relationship between various party organs and state agencies theoretically belongs to the category of power-power relations. In China, the treatment of faquan and residual quan is also related to some broad realms such as the relationship between the law and ethics, and the relations between the law and the code of conduct of social organizations, enterprises, as well as public institutions. In general, the content related to the relationship between Faquan and residual quan in China is significantly different from that in the West, and is primarily embodied in dealing with the affairs of the following areas:

1. The relationship between the law and the ruling party's policy. The social relations regulated by the law are within the realm of Faquan, while the social relations regulated by the ruling party's policy belong to that of residual quan, and the scope of such regulation by the party's policy is therefore the first portion of residual quan. During the 30 years between 1949 and 1978, in addition to an interim constitution and the constitution, there was only a marriage law that existed for a long time and was basically valid, and the implementation of the constitution and marriage law was considerably poor. During that period of time, there were not some of the basic laws such as civil law, criminal law, code of civil procedure, code of criminal procedure, and various organic laws of state agencies, with the entire social relationship regulated by the policy of the Communist Party of China. Even though there were the few laws mentioned above, whenever there was conflict between the law and the ruling party's policy, the law was frequently the one that yielded to policy.

In the 40 years between 1978 and 2018, the number of laws in China increased astronomically. As of the end of September 2015, there were as many as 244 valid laws and 746 administrative regulations.[8] At this point in 2018, we can say that, while the vast majority of social relations are already regulated

8 See Li Shishi 李适时, "Buduan wanshan yi xianfa wei hexin de zhongguo tese shehuizhuyi falü tixi 不断完善以宪法为核心的中国特色社会主义法律体系 [Continuing Improvement

by the law in China, the policy of the ruling party remains very important. In the last few decades the policy of the ruling party in China has been routinely the precursor of the law—when facing a newly emerged public affair, the normal procedure has been that the ruling party generates and implements a policy, and a law is not enacted until such policy becomes mature. Therefore, there is an unwritten rule known to legal professionals in China that has been observed since the implementation of reform and opening policy, i.e., in situations where the government enforces the law or the court settles a lawsuit, the law is to be followed if there is such a law, and the policy of the ruling party is to be followed if there isn't such a law.

2. The relationship between the law and the party discipline of the ruling party. The party discipline refers to the charter of the ruling party and the principles or rules promulgated by the authoritative organs of the party (such as the CPC Central Committee and the CPC Central Discipline Inspection Commission) that are binding for the organizations and the members of the ruling party. A party member who violates the law definitely violates the party discipline as well, but one who violates the party discipline does not necessarily violate the law. Here, the area of social relations regulated by the party discipline of the ruling party is also within the realm of residual quan, therefore it can be called the second portion of residual quan, which should also have a boundary between it and the realm regulated by the law that needs to be adequately addressed. In general, the realms of the law and the social relationship regulated by the party discipline are relatively clearly demarcated, but sometimes there are situations where the party discipline seems to be in conflict with the law (primarily the Constitution). The law and the party constitution/party discipline of the ruling party are two sets of social regulatory systems that are different in level and nature, and the connection between them occurs because they simultaneously restrain the behavior of a group of people (party members among citizens). In recent years, there have been increasing unofficial discussions in China regarding this issue, whose topics include the following: whether the basic rights guaranteed by the Constitution are renounced once a citizen joins the party; which basic rights can be renounced, and which cannot; to what degree can the party organizations or agencies require party members to renounce their basic rights; whether a case should

of the Socialist Legal System with Chinese Characteristics and the Constitution as its Core]," *Zhongguo renda* 23 (2015).

be set for judicial finding if there is a dispute between the civil right advocated by a party member and a party organization or agency, etc.[9]

There is an example worth mentioning here if we assume the notion of "one China." In March 2013, Wang Jinping, the president of the Legislative Yuan in Taiwan brought a civil lawsuit regarding "confirmation of party membership" after his party membership was revoked by the Party Discipline Committee of the Nationalist Party due to his involvement in justice intercession. In March 2014, a district court in Taipei reached its first trial decision, ruling in Wang's favor, and the Nationalist Party was against the decision and appealed to a higher court. After several twists and turns, in April 2015, the Supreme Court of Taiwan issued its final verdict, ruling in Wang's favor against the Nationalist Party. This is a case in Taiwan where the law is in conflict with the party discipline.[10] If there were a sound legal system in mainland China, it would be likely that cases like this one could surface occasionally.

3. The relationship between the law and ethics. Ethics in its origin is certain ideas regarding the truth and the untruth, the good and the evil, the justice and the injustice that people form in their social life, but it is also the code of conduct implemented through innermost belief, social customs, and public opinion, etc. The realm regulated by ethics in social relations can be called the third portion of residual quan, which is primarily the residual quan shared by individual citizens. China calls for the combination of the rule of law and the rule of virtue in running the country and has introduced a series of topics that need to be handled with balance with regard to the relationship between the law and ethics. The basic issue related to the relationship is that, in terms of citizens, legal persons, and other social organizations, which actions should be regulated by the law, and which should be left for ethics to regulate. The law and ethics can be mutually converted, ethical norms can become legal norms through legislative procedure, and legal norms can also return to the category of ethics through repealing legal provisions. If the realm regulated by the law is too expansive, and the realm regulated by ethics is too limited, then the space for individual freedom will be limited, and the law will appear too harsh; if the realm regulated by ethics is too expansive, and the realm regulated by the law is too limited, then it can lead to a certain state of anarchy. Therefore, in

9 Tong Zhiwei 童之伟, "Shehui zhuyao maodun yu fazhi zhongguo jianshe de guanlian 社会主要矛盾与法治中国建设的关联 [The Connections between the Principal Social Contradictions and the Development of the Rule of Law in China]," *Faxue* 12 (2017): 3–11.

10 "Dangji'an luomu, Wang Jiping: yi jiedao panjueshu 党籍案落幕, 王金平: 已接到判决书 [The Case of Party Membership Ended, Wag Jinping: the Verdict Received]," http://taiwan.huanqiu.com/roll/2015-04/6156830.html.

a society, the realms regulated by the law or ethics should be properly distributed in order to achieve some balance.

In any country, it is normal for the governmental authority to rule by law, because the original mission of state agencies is precisely to make and enforce the law, and decide on societal disputes according to the law. Based on the traditional Chinese legal culture, the ruling party in China has proposed the rule of virtue in addition to the rule of law, and decided to "combine the rule of law and the rule of virtue in running the country" in China.[11] The rule of virtue means that there should be organizations and personnel who can apply ethics in running the country, which naturally will raise some questions: does the rule of virtue mean that the governmental authority and its officials will formulate and enforce ethical norms, and make ethical judgments? If the answer to such a question is affirmative, then ethics will lose its original characteristics and nature, and become indifferent from the law, and revert to the historical conditions where the law and ethics were undifferentiated. This will almost inevitably cause the governmental authority and its officials to move beyond the realm of the law in exercising their power, and at the same time reduce individual rights and freedoms, resulting in conflict with the rule of law. But if the answer is negative, one will have to ask: Who are then the subjects of the rule of virtue? If they are not the officials that formulate and enforce ethical norms, and make ethical judgments, and if we maintain the societal convention of formulating and effectuating ethical norms, then there will be no need to propose the rule of virtue. Because "running" is an act of exercising public power, while the ordinary citizens or corporate bodies can abide by ethical rules on their own volition, and even if they do not abide by, they should not be forced by the state, much less the notion that the citizens are those who apply ethics in running the country.

Therefore, it is indeed not an easy task at all to combine the rule of law and the rule of virtue without damaging the rule of law with the rule of virtue or reducing the space of individual rights and freedoms with the rule of virtue. The key here is how to understand the rule of virtue. If the rule of virtue is perceived as the subjects of the public power monopolizing the formulation and enforcement of ethical norms and serving out ethical judgments, then it is essentially the embodiment of faquan exceeding its boundary and intruding into the realm of residual quan. However, it should be recognized, and it can become practical only if the rule of virtue is understood as something where legislation attaches importance to its connection to moral education,

11 Constitution of the Communist Party of China, General Program.

and where administration, enforcement, and justice take into consideration the morality level of a concerned party, treating it as one of the circumstances in influencing discretion.

4. The relationship between the law and the internal code of conduct of social organizations, religious groups, enterprises, and institutions. In China, there are numerous social organizations, which belong to complex categories, exhibit vast differences in their political and legal status, and share much of residual quan. This is primarily because the Chinese Communist Party, the other eight major parties, and the various people's organizations that constitute the Chinese People's Political Consultative Conference should all be considered as quasi-state agencies or the subsidiaries of state agencies, because their funding source is basically the public budget, and the considerable portion of the "power" that they enjoy is not formally granted by the law, but is obtained through historical tradition or certain extra-legal means. Based on the need for the rule of law, there is an issue here that the power exceeding the realm of the law should be included into the realm of legal control as much as possible, which is to say that the corresponding residual quan should be converted into faquan, including the legal clarification of the scope and procedures for quasi-public agencies in exercising their power.

The residual quan in the hands of individuals is embodied as actual right or freedom, but the residual quan in the hands of state agencies or quasi-state agencies is inevitably embodied as unrestrained privilege beyond the "cage" of the law. Today's China is a country in the early stage of the transition from the rule of man to the rule of law, with imbalanced distribution of residual quan among individuals, state agencies, and quasi-state agencies. The basic embodiment of such an imbalance is that, the residual quan enjoyed by individuals is relatively limited, while the residual quan enjoyed by state agencies and quasi-state agencies is exceedingly abundant. Based on the need for the rule of law, the residual quan in the hands of state agencies and quasi-state agencies should be zero. So, their currently possessed residual quan should partially be converted into faquan through legislation, such as their actual power of management that is dependent on public budget but not granted by the law, and partially be released and transferred to individuals or autonomic organizations of individuals, such as the actual power to formulate and enforce ethical norms.

Finally, if China attempts to resolve in its legal life the important theoretical and practical issues discussed in this book, it has to face its established ultimate goal of social development according to its national guiding principle affirmed in its Constitution: "We shall have an association in which the free

development of each is the condition for the free development of all."[12] This is the ideal society that we are pursuing, where "the public power will lose its political character."[13] And such an ultimate goal has established the following three basic standards for the long process of promoting that the government "governs the country according to law and makes it a socialist country under rule of law."[14]

(1) Socialist society should be a historical stage where the state and its legal existing form, power, start to move towards demise, and the trajectory of that demise is that the function of power and the power itself are gradually replaced by various basic rights. In other words, the existing society whose most striking characteristics are the co-existence and opposition of power and right will ultimately "return" under a new condition to the chaotic status of power/right where faquan and residual quan are undifferentiated. Therefore, the inevitable historical trend should be the gradual expansion of individual basic rights, including freedom, and the corresponding reduction of public power. And the theoretical confirmation of such a historical trend is complimentary with the realistic pursuit for the balance of faquan structure. This is because the balance of faquan structure does not require the absolute equality of the length and the weight on either end like in a seesaw. On the contrary, one end of a balanced faquan structure can prevail and, indeed, normally prevails over the other end, and as long as the prevalence is not excessive, the balance will not be disrupted.

(2) There is no free development of each without free development of all, so, comparing to prior social forms, socialism should attach more attention to the application of democracy and the rule of law, and to the protection of basic human rights, including various freedoms. If our society has not been able to achieve this, then it is necessary to seriously reflect, and to sincerely undertake the reform of political and economic systems, particularly, to actually protect citizens' freedom in speech and publication, right to vote and to be elected, and independent judiciary that are all affirmed by the Constitution. And equally important is also the pursuit for the equal constitutional protection of public and private property.

(3) Socialism should maintain the unity of the development process and the ultimate goal of the development, allowing the ideal of the ultimate goal to be gradually created and displayed in the development process. Every person

12 Karl Marx and Friedrich Engels, *The Manifesto the Communist Party* (Charles H. Kerr & Company, Chicago, 1907), 47.

13 Ibid., 46.

14 *The Constitution of the People's Republic of China*, Art. 5.

and every generation can only live in the development process, rather than the ultimate goal. If socialism cannot allow all members of its society to gradually obtain the opportunities of developing more freely, the ideal of the ultimate goal will be entirely meaningless to them. Therefore, to construct a nation with the rule of law under a socialist condition can only mean that, comparing to those under capitalist conditions, everyone can obtain more complete freedom, more equal opportunities in participating in the decision of public affairs, more of a fair share of the products of economic growth, and a more just and humane life, not the other way around.

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