

A legal historical study on surrender system: Investigations from Tang Code to modern criminal law

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ABSTRACT. *Surrender system is an important penalty measurement of criminal law. In China, with its long-standing history, surrender system is indispensable to criminal law history. The research about surrender system is ongoing and has profound historical origins. Surrender system has experienced a long historical evolution from its emergence to maturity. The legal historical study on surrender system has great significance to understand and improve the investigation on surrender system in modern criminal law.*

KEYWORDS: *surrender system, Tang Code, Japanese Ritsuryo, legal historical study*

1. Introduction

It is known that surrender system in Tang Dynasty was relatively comprehensive and perfect, and beneath the success of that, evidence showing surrender system had already shown an earliest prototypical influence in Zhou Dynasty. “The Announcement of the Prince of Kang”, from The books of Zhou(《尚书·康诰》), said: “既道及厥辜, 时乃不可杀”, it means “if all the crimes are confessed and not hidden, then even the crime is heinous, the death penalty should not be carried out”. [1] Qiu Ming, the Confucian scholar in Ming Dynasty, proposed a doctrine that the prototype of surrender from the books of Zhou is the ideological origin of the surrender system in the ancient Chinese law.

It took a long time for voluntary surrender to be stipulated as a system into the law. The criminal activity legislation on surrendering started as early as the Penal Code of Qin Dynasty in 356 B.C. Then laws of Han Dynasty provided: “先自告, 除其罪”, it means those people who surrender themselves voluntarily can be exempted from penalty. To Tang Dynasty, Tang Code improved and completed the surrender system on the basis of the previous studies. There are many advanced theories in Tang Code, rich in structure and content, and it is not inferior to modern criminal law. In addition, many modern criminal theories of surrender system are found to be in Tang Code, such as surrender of joint crime, surrender of several offences, and

surrender of negligent crime. The surrender system in the Tang Code has an important influence on Chinese criminal law in later generations.

On the other hand, surrender system in ancient Japanese criminal law was also influenced by Tang Code. YoRo Code was one of the basic Code in ancient Japan, it was compiled by Tang Code as a template, and most of its wording and phrasing was extremely similar to the Tang Code. This situation also came with the surrender system, which was regulated by Article 37 in Ming Li of the Tang Code(名例律), And in the YoRo Code with same chapter arrangement. Although the regulations of surrender system in Tang Code and YoRo Code are very similar, they still have the differences that are in line with their respective social cultures. Surrender system and its theory of leniency, still has profound influence on modern criminal law theory.

2. Surrender system in Tang Code

Article 37 in Ming Li of Tang Code said: “诸犯罪未发而自首者, 原其罪”, [2] it means people, those who surrendered themselves before be reported can be pardoned. There are four conditions of the voluntary surrender in Tang Dynasty.

2.1 The time of surrender

According to Article 37 in Ming Li of Tang Code, the conditions regarding time need to be met “未发”, which means surrender was established only when the crime was not reported, voluntary surrender emphasizes timeliness, there are two situations about “未发” as follows:

Firstly, the crime is not detected by the feudal official(ya men), including no one has discovered the crime, or there are other people who have discovered the crime but have not reported it to the officials.

Secondly, when someone reported the crime to the feudal official or the criminals confessed themselves, the voluntary surrender will no longer be established in the future. In this situation, once someone reported the crime to official, even if no official documents have been submitted to the feudal official, the surrender system will not proceed if the criminals want to surrender themselves. It can be seen that the surrender system is not only emphasizes timeliness but also proactive.

2.2 Organs accepting surrender

Article 353 in Tang Code said:

犯罪未发, 皆许自新. 其有犯罪欲自陈首者, 皆经所在官司申牒. 但非军府, 此外曹局, 并是“所在官司”. [3]

It means any criminal, when the crime committed by which is not be exposed or reported, should be allowed to repent and have the chance of rehabilitation by giving himself to law. And the Organs accepting surrender provided by law should be the feudal officials, which are the Non-military institutions in the place of crime. If it is not to surrender to the statutory body, the surrender is not established.

In general, crimes should be surrendered to non-military institutions as mentioned above, but there are still exceptions. One of the cases that the military institutions can accept the surrender is the crime with seriously harmful action.

What the “seriously harmful” means in Tang Code refers to the crimes named “谋叛”(treason) or serious crimes above treason. There’re ten categories of major crimes in feudal China, that are collectively called “十恶”(ten abominations) [4]:

Plotting rebellion (谋反): to overthrow the current regime. This is the most serious major crime in Tang Dynasty, if someone harbours rebellious thoughts against the ruler, he must then be put to death.

Plotting great sedition (谋大逆): to damage or destroy royal temples, tumuli, or palaces. Ancient Chinese believed in feng shui, equated intentional damaging of royal property with casting a curse on the sovereign. This type of person breaks laws and destroys order and goes contrary to virtue and ethic.

Plotting treason (谋叛): to defect to an enemy state, usually carrying national secrets.

Contumacy (恶逆): to harm or murder one's own parents and grandparents; to murder one's own or husband's elder relatives.

Depravity (不道): to murder three or more innocent people; to disembowel a victim's body after committing a murder; to produce gu (witchcraft) and use it to cast curses.

Great irreverence (大不敬): to show disrespect to the Emperor or his family.

Lack of filial piety (不孝): to maltreat one's parents or grandparents, or to procure entertainment during periods of mourning (up to three years for one's parents).

Discord (不睦): to harm or sue one's husband or elder relatives.

Unrighteousness (不义): to murder one's superiors, mentor, or local government officials.

Incest (内乱): to have affairs with concubine(s) of one's father, grandfather, or elder male relatives.

Due to their seriousness above-mentioned, legal privileges, such as the Eight Deliberations, or leniency theory, such as amnesty were not applicable to the Ten Abominations. [5]

Another category of crime that can be accepted by the military institutions is the crime of theft. Although the crime of theft is not a kind of most serious crimes, theft is usually accompanied by the need to recover the loss immediately, so the criminals can surrender themselves to the military institutions. From this point we can see the timeliness of the surrender system from another point of view.

2.3 The principle of surrender

First of all, once someone gives himself up, he should truthfully confess his crime, including the crime motion, or crime facts. For example, According to the interpretations of law in Tang Code, if someone gets ten pieces of silk through robbery, but only confess eight pieces of them, it can not be admitted as act of surrender to the unacknowledged one piece.

Secondly, if someone surrendered himself to committed theft, but actually committed the crime of robbery, then the voluntary surrender is not applied.

Thirdly, if someone committed more than one crime, but only surrendered some of his crimes, hiding other crimes, in this situation, the surrender system only applies to the crimes that are truthfully confessed.

2.4 The treatment to the surrender

In normal circumstances, once someone surrendered himself truthfully, the crime he committed can be reduced for one or two degrees, but he must surrender and bear the legal consequences voluntarily, and it is not just verbal consent to surrender, there must be an actual behavior.

The special case is the death penalty, if a person should be sentenced to death, but his crime was not discovered until his surrender, in this case, his death sentence may be reduced. However, this provision emphasizes the subjective attitude of the criminal, who must explain the crime voluntarily and truthfully, also has the sincerity to confess and repent.

2.5 The ways of surrender

There are four ways of surrender provided in Tang Code: [6]

Firstly, people who committed the crime, and surrendered himself to official is called “身自首” (self surrender) in Tang Code.

Secondly, people who committed the crime, but send someone else to surrender the crime instead of self surrender, is called “代首” (Surrender on behalf of others) in Tang Code.

Thirdly, people who committed the crime, although he didn't give himself up voluntarily, but his close relatives, who satisfies the conditions of the principle of

“亲亲相隐” (mutual concealment of offenses among the kin)surrendered him to the official, it’s also a way of surrender that is called “为首”(close relatives confess someone for his benefit or lighten punishment).The report of close relatives can still be regarded as surrender, is because the close relatives who satisfies the condition of “亲亲相隐” , can concealing between the relatives without being punished by law, it's the Confucian interpretations of law in Tang Code. It refers to the crime of protecting and concealing one's own relatives out of the most sincere emotion in human nature, and not exposing relatives. Also, the system of concealment in ancient China excluded the crimes that seriously harmed the rule, such as treason and rebellion, from the scope of concealment.

Fourthly, because of the different purposes, people who committed the crime, and surrendered by his close relatives or someone else in order to get him punished by law not for lighten punishment is the fourth way of surrender in Tang Code called “相告言”(mutually report, report mutually to get each other punished).

The above is the basic overview of the surrender system in Tang Dynasty, there is a certain difference in surrender system between Tang Code and the modern criminal laws. In addition, the Tang Dynasty surrender system also has the following special regulations.

3. Special regulations of Surrender System in Tang Code

In the Tang Dynasty, even though the above conditions were not met in special cases, the surrender was still established. Although these special provisions in the Tang Code have not formed as rigorous theories in modern criminal law, they can still be regarded as the rudiments of sentencing theories.

There are the following specific situations:

3.1 Surrender of joint crime

As mentioned above, under special circumstances, crimes already committed can also be punished as voluntary surrender. Such as the case when accomplices of non serious joint crimes is reported by others.

Article 38 in Ming Li of the Tang Code [7] emphasizes that, even the criminals are on the lam, if the petty criminal caught his accomplices who committed a felony, and surrendered his crime to the officials, then surrender system will be applied to the petty criminal in a joint crime. Even to the extent that if the petty criminal in joint crime killed his accomplices who should be punishable by death, then surrendered himself to the officials, the surrender system will also be applied. About the judgment of “ should be punishable by death”, the Tang Code said : “未须断讞”, the law is called "should die", and there is no need to end the trial. It means this situation is also applicable to those who have not yet waited for the end of the trial but should be sentenced to death according to the crime committed.

On the other hand, if the accomplice in the joint crime who feels remorse after escaping, and catches more than half of the escaped criminals and returns to surrender himself in person, his crime may also be mitigated according to law. Those who surrender themselves can be mitigated or exempted from punishment in accordance with the provisions on surrender. However, for the crimes that are not allowed to be pardoned in the amnesty order, even if they conform to the circumstances of voluntary surrender, they can not be exempted.

3.2 Surrender of several offences

There are two provisions in Article 37 in Tang Code and regulations on “voluntary surrender of several offences”. First of all, for a criminal who has committed several offences, if the petty crimes is found, but the provision of surrender system in Tang Code also can be applied to the felony which has been surrendered.

The second aspect is that the criminal reports other criminal facts not been found under the trial, surrender can also be applied to the crime which he surrendered.

3.3 Surrender of “首露”(confess to the victim)

Article 39 in Ming Li of the Tang Code emphasizes that to obtain other people's property by means of robbery, theft, and deception, regret and correct afterwards, automatically admit and expose the crime to the owner, this act of surrender is called “shou lu”. In this case, the surrender system still applies even the criminal did not surrender provided by law. [8] The provision of expose the property crime to the owner provides the criminals with an opportunity to repent and make up for it. Returning the property obtained by illegal means the victim also gets chance to reduce the property loss to a certain extent. It belongs to the special provision of surrender system in Tang Dynasty, there is no such provision even in modern criminal law.

3.4 Surrender of duty-related crime

Tang Code provides the law to deal with the surrender of official's duty-related crime. Firstly, committing negligent crime in duty, then surrender the crime voluntarily, penalty for such act should be reduced or exempted. There are also two situations, if the duty-related crime does not include the behavior of deceiving the public and perverting the law, or taking advantage of the public for private purposes, and it has not exposed before his surrendering, it can be exempted. But if it has been exposed or reported to the official, it only can be mitigated penalty for about two degrees.

Secondly, the relevant provisions on the voluntary surrender of officials who commit crimes and implicate others related this crime, such as senior officers and

officials of departments, once one of which responsible to the crime surrendered, the others can also be exempted with surrender system. Of course, the duty-related crime should not include the behavior of deceiving the public and perverting the law, or taking advantage of the public for private purposes.

Thirdly, as for the wrong judgment of a crime, the sentence has been executed, even the officials which responsible surrendered their crime, surrender system is not applicable in this case. The sentence has been executed that is to say, the execution of the sentence of death penalty, the sentence of Chī (笞) penalty, (beating on the buttocks with a light bamboo cane), the sentence of Zhàng (杖) penalty, (beating with a large stick on either the back, buttocks or legs)has been completed, Or the criminal of Liú (流) penalty,(exile to a remote location with return to one's place of birth being forbidden) has been exiled, and Tú (徒) penalty (penal servitude or imprisonment) has been completed. [9]

4. Penalty provisions of Surrender System in Tang Code

Tang Code has made relatively complete provisions on all aspects of the surrender system, including the composition of surrender system, the special regulations of surrender and the legal responsibility of voluntary surrender.

There are two forms of the legal liability after surrender being included in Tang Code: mitigated penalty and exemption from penalty.

4.1 Exemption from penalty

As can be seen from the above introduction to surrender, Most of the legal liability after surrender in Tang Code is exemption from penalty. However, it should be satisfied with two basic conditions: the crime has not been found or reported to the officials and it does not belong to “seriously harmful” crimes, such like ten abominations.

Specifically, it can be summarized as follows:

Firstly, Article 37 in Ming Li of the Tang Code provides that when the crime has not been found and reported, no matter what way to surrender, it was effective at this moment.

Secondly, even the accomplices in a joint crime escaped, if the petty criminal caught the major criminal to the official, for example, the case that people who was sentenced to fixed-term imprisonment caught his accomplice who should have been exiled, and surrender himself to the official, the surrender system is applicable and his crime will be exempted. On the other hand, if the degree of crimes among accomplices is the same, accomplices who caught more than half of the other accomplices and surrender himself to the official, can be exempted.

Thirdly, the case of several offences, if the criminal take the initiative to report the felony that has not been found yet or take the initiative to report the other criminal facts that is not found yet during the trial, the provision of surrender system in Tang Code can also apply .

Fourthly, the case of exempted for duty-related crime. If the duty-related crime does not include the behavior of deceiving the public and perverting the law, or taking advantage of the public for private purposes, and it is plead of guilty voluntarily, the surrender system should be applied to this kind of duty-related crime.

4.2 commute a sentence

Cases of commutation for surrender in Tang Code are found less in amount and more detailed than cases of exempted from penalty. Specifically, it can be summarized as follows:

Firstly, In the case of those crimes in which the criminals do not truly or completely plea of guilty, the provision of surrender will not be applied, besides, the criminal will be penalized for the misrepresentations or inconsistencies. Although the confession is not complete, if the death sentence will be imposed, the provisions of surrender system can still be applied for commuting a sentence.

Secondly, the case of those who surrendered himself because of knowing that others would report him to the feudal official, or those who escaped since the crime has been committed, in both cases, the penalty shall be reduced according to the provisions of this crime.

Thirdly, the special case of duty-reeled crime. As mentioned above, part of duty-related crimes

can be exempted because of the surrender act, however, when civil officers failed to complete the task within the prescribed time, if the delay behavior violates the relevant laws, the relevant official can be completely exempted from the punishment because of voluntarily confesses. But the person in charge of the official documents(主典) [10] will not be exempted from the crime, and the penalty can only be reduced.

Fourthly, the case of helping fugitives to hide, if the fugitives surrendered or died within this period, the accomplice who hid fugitives from capture can also get a commutation.

5. Influence of surrender system in Tang code

The establishment of the surrender system in the Tang Code played a crucial role in maintaining the feudal rule of the Tang Dynasty. Strict conviction by law, handling affairs in accordance with law, being cautious in prison and compassionate punishment became the basic principles of criminal law in Tang Dynasty. Also the legal provisions on surrender system, and the leniency theory in Tang Code had a

profound impact on the laws of the surrounding East Asian countries along the later generations.

5.1 Influence on Japanese Ritsuryo(律令) in terms of provision

When talking about the influence of Tang Code on the East Asian countries at that time, we have to mention the formulation of “Ritsuryo(律令)” in ancient Japan. Ritsuryo(律令) is the historical law system based on the philosophies of Confucianism and Chinese Legalism in Japan. The political system in accord to Ritsuryo is called “Ritsuryo-sei” (律令制). Kyaku (格) are amendments of Ritsuryo, Shiki (式) are enactments.

Ritsuryo defines both a criminal code(律 Ritsu) and an administrative code(令 Ryo).

During the late Asuka period (late 6th century – 710) and Nara period (710 – 794), the imperial court, trying to replicate China’s rigorous political system from the Tang Dynasty, created and enforced some collections of Ritsuryo. Over the course of centuries, the Ritsuryo state produced more and more information which was carefully archived; however, with the passage of time in the Heian period, ritsuryo institutions evolved into a political and cultural system without feedback.

Yoro-ritsuryo (养老律令, 720, enacted in 757) –, included 10 volumes of administrative code, and 10 volumes of criminal code, was the most complete ancient written code in Japanese history. It also replicated the surrender system from the Tang Code.

First of all, in terms of legal provisions, surrender system in Japan was also set in the Ming Li Code of Yoro-ritsu. The provisions on voluntary surrender in the two codes are almost identical in terms of words and sentences. The two ancient codes are extremely similar in terms of basic principle, ways of surrender, and also treatment to the surrender. [11]

5.2 Influence on Japanese Ritsuryo(律令) in terms of leniency theory

Under the basic principle of handling affairs according to law, the surrender system was stipulated in Tang Code, which fully reflected the legal thought of allowing criminals to “repent and be good”.

Although the recognition and lenient punishment of meritorious persons in ancient Chinese law has always been attached to the system of surrender, its punishment directly affects the conviction and sentencing, which fully reflects the wisdom of the ancients in dealing with the complex practical problems.

Tang Code based on the foundation of the previous generation, stipulated the criminal policy that rewards person who surrender and render meritorious service by

legal provisions. In later generations, Ming code inherited the provisions of surrender system of Tang Code and improved it in detail.

In the history of foreign legal system, the thought and practice about "meritorious service and reward" is not rich, and there is no legal language about render meritorious service. Taking Japanese Ritsuryo as an example, it imitates the Tang Code, formulated the provisions of surrender and render meritorious service, and according to the attitude and behavior of criminals, the practice and concept of lenient punishment of criminals is similar to the theory of meritorious service system in China.

In the long years after the Tang Dynasty, the influence of Confucianism on Japan is not without profound. It was not only widely accepted by the Japanese ruling class, but also penetrated into all aspects of Japanese society. It was integrated with the existing Japanese cultural traditions and formed a wide range of influence in Japan. Leniency theory is a part of benevolence thought in Confucianism, and it is also absorbed into laws and decrees. Surrender system is exactly one of the representations.

5.3 Influence on modern criminal law: from Tang Code to modern criminal law

Surrender system is a worldwide adjudication of punishment, its existence has important value. In the history of China, every dynasty established the system of surrender based on the provisions of Tang Code.

According to the Article 67, Criminal Law of the People's Republic of China, provides: Voluntary surrender refers to the act of voluntarily delivering oneself up to justice and truthfully confessing one's crime after one has committed the crime. Any criminal who voluntarily surrenders may be given a lighter or mitigated punishment. The ones whose crimes are relatively minor may be exempted from penalty.

Although the surrender system of Tang Dynasty can not be regarded as the direct prototype of modern surrender system, its detailed provisions on voluntary surrender and its provisions on several offences and accomplices undoubtedly reflect the high level of Tang law compilation. However, we still can not equate the surrender system in Tang Code with that in modern criminal law, which forms a perfect theoretical system. The most important reason is that the essence of the two surrender systems is not the same.

As mentioned above, surrender system in Tang Code, it is an externalization of benevolence, which aims repenting and be good. But in modern criminal law, penitence and repentance are not the specific attributes of surrender, but a legal phenomenon independent of the surrender. There are many opinions about the essence of surrender, however, as an essence of surrender, it must have at least two characteristics:

Firstly, voluntary surrender must emphasizes the autonomy, the voluntariness of the case and the truthfulness of the confession after bringing to justice.

Secondly, these characteristics are exclusive to surrender and different from other laws. Therefore, penitence and repentance, none of them is the specific and unique attribute of surrender. For example, Article 72 in Criminal Law of the People's Republic of China, provides: "A suspension of sentence may be granted to a criminal sentenced to criminal detention or fixed-term imprisonment of not more than three years if, according to the circumstances of his crime and his demonstration of repentance, it is certain that suspension of sentence will not result in further harm to society." [12] It can be seen that in modern criminal law, the performance of repentance is one of the conditions for the decision of probation, which is not only applicable to those who surrender themselves. On the other hand, in the provisions of the law and judicial interpretation, there is no conclusion that the establishment of surrender must require repentance. In many cases of practice, even if it is not out of "repentance", it is also recognized as a case of surrender.

6. Conclusion

As a worldwide adjudication of punishment, surrender system has important value, it is an important part of the penalty system. To explore the value of surrender system, we must take the essence of arrange surrender system as the premise. The essential theory of surrender system lies in the explanation of voluntary surrender as the root of penalty discretion system. The retrospection and Research on the surrender system in Tang Code, helps us understand the essential meaning of surrender, surrender of the system in practice to promote a better use.

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- [8] Zhangsun Wuji, Tang Code, ZHONGHUA Book Company, 1983, p109.
- [9] The Five Punishments in Imperial China: During the Western Han dynasty, tattooing and amputation were abolished as punishments and in subsequent dynasties, the five punishments underwent further modification. By the Sui dynasty and Tang Dynasty, the five punishments had attained the basic form.

- [10] 主典(zhu dian): refers to the officials in the central and local governments of the Tang Dynasty, who is responsible for the investigation and production of the official documents and detects the mistakes of the above behaviors of the assistant to the chief local official.
- [11] Inoue mitsusada, Ritsuryo, Iwanami Shoten, 1977, 45-51.
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