

Classical Chinese Jurisprudence and the Development of the Chinese Legal System

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I. INTRODUCTION

The development of the traditional Chinese legal system began over two thousand years ago, it continued through the millennia even during periods of domestic unrests and the conquest dynasties (e.g., the Yuan [1206-1367] and the Qing [1644-1911]), its pace varied but it was never seriously disrupted or stopped. Although not always for the better, the system was made more sophisticated, and thus marking it as a rare, exceptional phenomenon in human history. Students of the system were usually impressed by its resilience and overwhelmed by its complexity. They probed here and there, but, like the proverbial observer of a leopard with a long, thin tube, could see only the spots in its fur but not the whole animal. If he generalized what he had learned or extrapolated from it, the result could be ludicrous. Legal history textbook writers tried to present a panorama, but succeeded only in painting scattered patches, without explaining why they so appeared. A better approach is to view the development as an epic drama. To grasp its main story line, a viewer has to identify the key players and recognize the pivotal events. If he is to evaluate the drama and see what lesson it may teach, he has to keep in mind first the question what the dramatist wanted to achieve, and then the question how the players performed – in our case, he has to ask what the objectives the Chinese society were to pursue, what it wanted its various institutions, including the legal system, to accomplish, and then how the various people – the intellectuals, the rulers, the administrators and the common people – who participated in establishing and operating the legal and other systems, worked to reach for those objectives. A comprehensive study has to take such an approach, but due to the restriction on its length, this paper discusses mainly the contributions of the

intellectuals, and points out only the most conspicuous influences they had on the traditional Chinese legal system. After taking a bird's eye view of the legal system, the author addresses some common questions about it and point out some of its distinctive characteristics. Finally, the author takes a look at the prospect of its future and proposes a few suggestions for its further development.

In the great antiquity the tasks of making and enforcement of rules that govern people's behavior were probably carried out by persons who controlled society with power. But people soon became aware of many complicated questions. One of the most serious questions concerned the legitimacy of the ruler's power. Other questions were broader: How should people live? If there could be different ways, were some better than the others? Was there one way that was the best, or *the right* way? What did "right" mean? What distinguished "right" from "wrong?" How could people know the difference? How were people to follow "the right way?" More specifically, how should people in a particular circumstance "rightly" act in relation to other people, other things, and the environment? Should the "right" way be manifested in the forms of rules for people's behavior? What was a rule? What were the immediate and ultimate objectives of rules? Who made rules? What should be the qualifications and credentials of a rule-maker? What made a rule good or bad? Where different rules were applicable, how should people choose, particularly if the rules were in conflict? Who implemented rules? What qualified someone for this job? How should rules be implemented? What if a rule was not generally accepted? What if the maker and/or the implementer of rules abused his power? What was and should be the relationship between the people and the makers and implementers of rules – in other words, between the common folks and the authorities? Such questions inevitably led to many more philosophical ones, including how people and other things came into existence, and questions like what distinguished humans from other creatures and things? Was there a "human nature?" What was the meaning and purpose of life? Why did people live in a society, what made a society viable or precarious? This is just to name a few and the list goes on.

It was the thinkers who tried to answer such questions. In different times and places thinkers offered different answers and supported them with different jurisprudential theories. Such

theories influenced the behavior of everyone, including the ruler, the implementer of rules and the ordinary people. Their reactions in turn caused the thinkers to modify the theories. Through these steps the traditional Chinese legal system developed. Accordingly, the author starts with an analysis of the theories.

II. BACKGROUND OF JURISPRUDENTIAL THEORIES

In ancient China during the Xia (夏, circa 23-18 centuries B.C.), the Shang (商, circa 18-12 centuries B.C.), and the Zhou (周, 1122-255 B.C.) dynasties there were already established social and political norms –*li* (礼 the rites) for the aristocrats and *fa* (法 the law) for the commoners and slaves. The rites prescribed detailed rituals for worshipping deities, spirits and ancestors, and also proper behavior for people in everyday life. The law consisted of numerous prohibitions against antisocial activities.

According to Shuxiang (叔向), a prominent statesman of Jin (晋), a vassal state of the Zhou in the Spring and Autumn Period (772-468 B.C.), there was good governance for a considerable period of time. When there was a problem disturbing social order, the king would consider all factors and circumstances relevant to the case and make an appropriate decision without specifically citing a promulgated rule (*xi xian-wang yi-shi yi zhi bu wei xing-pi* 昔先王议事以制, 不为刑辟).¹

A transformation began in the latter half of the Zhou due to political and economic changes. It became clear that regulation of rules were urgently needed, on the one hand, the behavior of the aristocrats, and on the other hand the new relationship between the aristocrats and the commoners. More importantly, since the rulers became more dependent on the support of the populace, the commoners wanted to know what they were expected. The laws had to be spelled out and publicized.

¹ See, 杨伯峻, 春秋左传注 1274 (2d ed. 1982) (1981), Yang Bojun, *chun qiu zuo zhuan zhu* [ANNOTATION ON THE CHUN TSEW WITH THE TSO] 1274 (2d ed. 1982) (1981). For a more literal translation, see JAMES LEGGE, *THE CH'UN TS'EW WITH THE TSO CHUEN in 5 THE CHINESE* 609 (Oxford: The Clarendon Press 1971) (1883) (Taiwan).

Some states responded accordingly. Most conspicuously in 536 B.C., Zichan (子产), the chief minister of Zheng (郑), a vassal of the Zhou, casted a bronze vessel with some criminal law provisions inscribed on it,² apparently with the intention to publicize them and to emphasize that they were to be enforced strictly. Shuxiang sent a letter criticizing the move, saying essentially that criminal laws should not be made specific and public. If they were publicized as if they were the only rules to obey, people would discard the rites – the broader rules of proper behavior – seek the loopholes in the laws, commit crimes not specifically proscribed, and argue the finest points in the publicized provisions to thwart justice. As a result, litigation would proliferate and bribery of the judiciary would become rampant. Foreseeing these inevitable consequences, the ancient kings were fearful and therefore took elaborate measures to safeguard the state from falling into that quagmire. They established the correct principles of conduct, turned them into practical rites, taught them to the people, observed them personally to serve as good examples, protected the livelihood of the people, appointed wise and upright officials to solve people's disputes and, in criminal cases, took into consideration of all relevant factors and made quick, equitable decisions to determine culpability and imposed appropriate sanctions. Due to these measures, the people were able to avoid wrongdoing and became peaceful and orderly. In his simple reply, Zichan recognized Shuxiang's points but remarked that he did not have the talent and the ability to bring about long term changes for an ideal society; he was only to save the state of Zheng from its bad present problems.³ Obviously his position was accepted by rulers of other states, which also promulgated their criminal laws shortly thereafter.⁴

Although they were men of action responsible for actual government work, Zichan and Shuxiang unwittingly sowed the seeds

² See 杨, YANG, *supra* note 1, at 1274.

³ *Id.* at 1274-77. For a literal translation, see LEGGE, *supra* note 1, at 609-10.

⁴ In 513 B.C., 23 years after Zichan's unusual act, the State of Jin also cast a bronze vessel with penal provisions inscribed on it. Shuxiang was no longer around to comment on this event, but Confucius was. He pointed out that the State of Jin used to have good norms and in comparison the laws inscribed on the vessel were inferior. More importantly he argued, essentially in agreement with Shuxiang, that once the laws were inscribed on the vessel, the people would only look at the vessel and would no longer respect the authorities who were to make decisions, see 杨, YANG, *supra* note 1, at 544-46, 1506. For a translation of Confucius's comments, see LEGGE, *supra* note 1, at 732.

of jurisprudential theories that germinated during their time, fully blossomed shortly thereafter, and continued to be enlightening and inspiring ever since. To put simply, these wise men made two classic arguments that were to be repeated endlessly in different guises by Chinese thinkers of later periods. Basically the first argument maintained that publicized laws could provide clear guidance to people and help them get out of a disastrous situation; the second argument insisted that law alone, unassisted by other norms, was inadequate to produce long lasting good results. These basic ideas were turned into two important themes of classical Chinese jurisprudence – the former by *Fajia* (法家 the Legalists), the latter by *Rujia* (儒家 the Confucians). As a reaction to both schools, which, in spite of their differences, shared a belief that humans could by their own device solve the problems they faced, people who were skeptical of this belief formed a different theory. Convinced that instead of being the means to solve human problems, man-made things, including rules, institutions as well as tools and goods, were the cause of human misery, these people argued for the destruction of these artifacts and advocated a simpler way of life more in conformity with the way of nature, or *dao* (道 the Way). Following this advocacy, these people were known as *Daojia* (道家 the Daoists).

III. CLASSICAL THEORIES

A. *Theories of the Confucians*

Among the intellectuals of ancient China, those versed in classic canons – mainly, *Shu-jing* (书经 *The Book of Historical Documents*, a collection of proclamations of rulers), *Shi-jing* (诗经 *The Book of Poetry*, a selection of verses from folk songs), *Yi-jing* (易经 *The Book of Changes*) – observed a set of rules of refined behavior known as *li* (礼 the rites) and studied the principle behind them – *ru* (儒). Confucius (551-479 B.C.) was one of them. He taught the classics and the rites as well as formulating a profound social and political philosophy, including a jurisprudential theory. Many intellectuals became his disciples and formed a school known as

Rujia (儒家 the Confucians). Among them, two thinkers, Mencius and Xunzi, of the period before the Qin dynasty (221-205 B.C.), significantly expounded his teachings. Their theories as well as that of the master will be discussed below; special attention will be given to the influence they had on the traditional Chinese legal system.

1. Confucius

Facing the new situation of his time, Confucius had many ideas about solving the contemporary problems. First, he addressed the problem whence rules came. The Chinese people in ancient times had a simple answer – a super being, known as *di* (帝 the Supreme Lord), or more commonly, *tian* (天 Heaven) – and believed that Heaven was a benevolent figure which rewarded the virtuous and punished the evil. But that was not always the case; there were widely observed instances where Heaven indiscriminately inflicted disaster on people. More incredibly it apparently let some guilty persons free and many innocent ones perish. Those who suffered asked: What were they punished for?⁵

It was a hard question. Confucius did allude to *tian* and *tian-dao* (天道 the Way of Heaven) but did not clarify what they were and how exactly they affected humans.⁶ He was more interested in how humans could and should regulate their own affairs. His effort started with a simple observation that people were “by nature” similar.⁷ He then suggested two precepts for social conduct: a negative one that a person should not impose on others what he did not wish to happen to himself, and a positive one that a person who wished to establish himself and reach his goal should help others to establish them and reach their goals. The significance of these precepts was obvious – human beings, rather than a supernatural being, were recognized as the source of social norms. It was a

⁵ See 屈万里, 诗经诠释, Qu Wanli, shi jing quan shi [ANNOTATION ON THE BOOK OF SONGS] 326, 347, 362, 372, 376, 395, 506, 527, 546 (1983) (Taiwan).

⁶ Confucius was cautious about what he did not know well. His disciples stated that they did not hear him discuss *tian-dao*, and he was famously reticent when discussing deities (*shen* 神) and ghosts (*gui* 鬼), see 刘宝楠, 论语正义, Liu Baonan, lun yu zheng yi [RECTIFICATION OF ANNOTATION ON THE ANALECTS] 54, 98, 126, 146, 243 (1978) (Taiwan).

⁷ *Id.* at 263.

groundbreaking, revolutionary idea. Less evident but more important, were two essential element imbedded in these precepts – reason and compassion. Confucius must have assumed that humans were capable of being reasonable and compassionate, otherwise the precepts would not be plausible, as unreasonable and self-centered persons could not be expected to carry out the fundamentally altruistic undertakings the precept prescribed.

On the basis these two precepts, Confucius built a comprehensive set of norms for social interaction between people in various relationships. In *Lun-yu* (论语 *The Analects*) they appeared in four groups: *de* (德 moral principles), *li* (礼 the rites), *zheng* (政 government decrees), and *xing* (刑 penal laws). Among the moral principles, the primary one was *ren* (仁 humaneness). Basically *ren* denoted that people should treat fellow human beings with empathy, care and respect. From this principle Confucius derived more specific moral rules, including *xiao* (孝 filial piety), *ti* (弟 brotherly love), *zhong* (忠 loyalty), *xin* (信 faithfulness), *qian-rang* (谦让 modesty and yielding), *gong-jing* 恭敬 humility and respect), *hui* (惠 kindness and generosity), *shu* (恕 understanding and forgiving), *yi* 义 rectitude and justice) and *zhi* 直 straightforwardness, honesty, truthfulness, uprightness).⁸

Confucius gave considerable weight to *li*, emphasizing that these rules of propriety, contrary to a common view of his time, were not mere formalities but measures to demonstrate restraint on oneself and deference for others. To be acceptable, a rite ought to be appropriate for its time and circumstance and, more importantly, in agreement with reason and shared human feelings. Such measures, if observed, could help moderate people's temperament, make their behavior proper and elegant, and create a harmonious society.⁹

Confucius did not discuss *zheng* and *xing* in detail. He did not belittle their usefulness; but merely thought that they, in comparison to moral principles and the rites, were less important. This point

⁸ For quotations of Confucius' discussion of the various principles in *Lun-yu*, see 张伟仁, 先秦政法理论, Zhang Weiren, xian qin zheng fa lilun [EARLY CHINESE POLITICAL AND LEGAL THOUGHT] 9-13 (2006) (P.R.C).

⁹ For quotations of Confucius' discussion of the origin, the form and the substance, and the functions of *li* in *Lun-yu*, see *id.* at 13-17.

was not made explicit by him, but many passages in *Lun-yu* supported it, the most well-known one being the famous statement: “Guide them by government decrees and keep them in line with penal laws, the people will stay out of trouble but will have no sense of shame; guide them by moral principles and keep them in line with the rites, the people will not only have sense of shame but also strive for higher standards.”¹⁰ Here Confucius seemed to take a utilitarian view and relegated government decrees and penal laws to a low status because they could only have limited effect on people – to make them avoid wrongdoing but not to make them know why something was wrong and bad, let alone to inspire them to learn and do what was right and good; these norms created by government authorities only established the lower standards of behavior. Other passages in *Lun-yu* suggested that Confucius gave each of the four types of norms a rank. He once asked a rhetorical question: “What can a man who is not humane do with the rites?”¹¹ It was palpable that Confucius thought the moral principle of humaneness was more fundamental than the rites.

We can imagine the Confucian system of norms being a pyramid in reverse. At the top was *ren*. With its roots in similar human dispositions and common empathy, it was in agreement with reason and feelings and could be recognized intuitively and accepted willingly by most people and therefore formed the broad cover. The more specific norms derived from *ren* were at a lower and narrower level because they were less deeply so rooted and therefore less easily comprehended and willingly accepted. The rites occupied a still lower and narrower level because some of them, being formulated by custom, were not entirely reasonable, and they were not widely followed because they varied from time to time and from place to place, and many people did not have the material resources and leisure required for observing them. Finally, the government decrees and penal laws came at the narrowest bottom because being the product of persons in political power who were not necessarily the wisest and high-minded, they could be arbitrary, sometimes in contradiction with reason and human feelings, and

¹⁰ In Chinese it reads: 导之以政，齐之以刑，民免而无耻，dao zhi yi zheng, qi zhi yi xing, min mian er wu chi. See 刘, LIU, *supra* note 6, at 22.

¹¹ *Id.* at 44.

worse still, they could easily be prejudiced in favor of those in power. Therefore, these lowest norms were incapable of eliciting from the people the respect they gave to the higher norms. In most cases the implementation of these lowest norms was made possible only by the government using force.

If the penal law had many problems, the natural question Confucius had to address would be how to make it better and limit the necessity of its use. His answer was to give the powers of making laws and administering justice to the right persons. This leads us to his discussion on government authority. First of all, he did not endorse the traditional view that such authority had a supernatural source. His view was revealed in two brief statements: 1) “When the Way prevails in the world, rites, music and government measures are initiated by the Son of Heaven (i.e., the king in the feudal system); when the Way does not prevail in the world, they are initiated by the feudal lords.”¹² 2) “A ruler ought to behave as a ruler.”¹³ From the former, we get the impression that Confucius favored the concentration of government authority, but in the latter he gave us a qualifier, namely, the ruler of a state (*jun* 君, either the king or a feudal lord) has to observe certain behavioral rules.

How should a ruler behave? At Confucius’s time, much of the authority of making and enforcing law was not in the hands of the ruler but in those of the powerful ministers. Ministries, according to Confucius, ought to be assigned to “noble men” (*jun-zi* 君子) who had the ability and willingness to learn and practice the primary norm *ren* by restraining his own desires and observing the rites (*ke-ji fu-li* 克己复礼).¹⁴ From this point onward, Confucius’s arguments were clear and smooth, following a rigorous logic: Only with rectitude could a ruler rule. To restrain oneself and to observe the rites were the necessary first steps for a ruler to “rectify himself” (*zheng-ji* 正己). A ruler would not have the people’s respect if he fails to rectify himself, subsequently, his decrees and laws would not be obeyed by them. Having rectified himself, he could then correct the people, teach them the ideas of right and wrong and the more

¹² *Id.* at 354.

¹³ *Id.* at 271.

¹⁴ *Id.* at 35, 133-34, 262, 263, 283, 284, 290, 329, 417-18.

detailed behavioral rules.¹⁵ The most effective form of education was not preaching but “teaching by example” (*shen-jiao* 身教). Whichever way a ruler went, the people would follow. “The character of a noble man is like that of wind; the character of a commoner is like that of grass. When the wind blows over, the grass is sure to bend.”¹⁶ This famous statement of Confucius reiterates the above argument.

Thus, Confucius believed that human nature (*xin* 性) was malleable, and most people could be transformed by education (*xi* 习). Nevertheless, he realized that there were persons of very high intelligence (*shang-zhi* 上智) and persons of very low intelligence (*xia-yu* 下愚) who would not change no matter how they were taught.¹⁷ For these persons, special measures had to be taken to prevent them from going awry – the lewd music must be banned and persons making crafty arguments twisting the truth banished.¹⁸

When people got inextricably involved in disputes and conflicts, judicial authorities had to step in to solve their problems. Confucius said that if he were a judge he would not be different from others in conducting trials, but if he were put in a position to administer justice he would make people avoid litigation.¹⁹ What did he mean? Surely he did not think he could eliminate disputes and conflicts. More likely he thought litigation (*song* 讼), a procedure involving adversarial claims and a formal trial leading to a decision based on law, was not the only or a preferable way of solving problems. He probably agreed with an adage in *Yi-jing* that litigation always ends in disaster (*song-ze zhong-xiong* 讼则终凶),²⁰ and therefore would help people use other methods, including conciliation, mediation and arbitration, to reach more amiable solutions based on reason, compassion, and norms higher than law. In any event, it was his belief that if people were properly and

¹⁵ *Id.* at 274, 286, 289.

¹⁶ *Id.* at 275.

¹⁷ *Id.* at 368.

¹⁸ *Id.* at 339.

¹⁹ *Id.* at 273.

²⁰ See 孔颖达, 周易正义 (下) in 十三经注疏4 (阮元 ed., 1815), Kong Yingda, *zhou yi zheng yi* (xia) [RECTIFICATION OF NOTES TO THE ANALECTS OF CHANGES OF ZHOU (II)] in 1 shi san jing zhu shu [QING DYNASTY COMMENTARY ON THE 13 CLASSICS] 4 (Ruan Yuan ed., 1815) (P.R.C).

thoroughly taught the higher norms, and those in authority set themselves up as models observing those norms, litigation and application of law could be avoided.

When people committed crimes, punishments had to be used. Confucius accepted this principle but regarded its implementation as a sign of failure on the part of the authorities in teaching the people the right behavior. After all, why was a crime committed? Perhaps the wrongness of an act was not made clear to the people; perhaps they were misled by those in high positions acting wrongly themselves. In either case, judicial action might be necessary, but the authorities should act with sympathy and leniency. “Upon successfully discovering the truth in a criminal case they, instead of being glad, should feel sorry and have pity on the culprit, because in one way or another they had lost their way, and the people had long been left wandering in the wilderness without guidance.”²¹ This statement was attributed to Zengzi (曾子), a favored disciple of Confucius, but the fact that it was recorded in *Lun-yu* must mean that the idea was acceptable to the Master. In any event Confucius maintained that minor transgressions should be pardoned,²² and insisted that the extreme form of punishment – death penalty – was unnecessary.²³

The authorities should also be careful in their attempt to uncover crime and discover truth. *Lun-yu* reports that when Shegong (叶公), a magistrate of the State of Chu (楚), stated proudly that among the people of his district a “upright fellow” (*zhi gong zhe* 直躬者) gave evidence supporting the accusation against his father of unlawfully taking a sheep, Confucius dismissed the bragging and argued that it was “upright” for a father to cover up his son’s crime, and vice versa. Obviously Confucius was distinguishing two obligations, the legal one of reporting a crime, and the moral one of protecting one’s father, and he emphasized that when there was a conflict, the moral one should prevail. Nevertheless, to characterize concealment of a crime as “upright” was, to say the least, unconventional. A possible explanation is that to Confucius

²¹ 刘, *LIU*, *supra* note 6, at 407 (P.R.C).

²² *Id.* at 280.

²³ *Id.* at 275.

“rightness” or “justice” was not an absolute concept, it could have different meaning in different contexts. To report a crime and to protect one’s father were both “right” acts, but the latter was more “right” than the former. This may sound argumentative, but one would agree with him after realizing these facts: 1) If everyone were similar to or compelled to be similar to the “upright fellow” of She, mutual trust among people would be destroyed and the network that held society together would be ripped asunder. 2) Where people of close relationships testified against each other, it would be extremely difficult to evaluate such testimony because it could simply be one person’s words against those of another, without being supported by corroborative evidence.

Confucius then addressed the crucial question of the relationship between the individual and the authorities. His famous statement on this subject was: “Let a ruler be a ruler, a subject a subject, a father a father, a son a son” (*jun jun, chen chen, fu fu, zi zi* 君君, 臣臣, 父父, 子子).²⁴ In the context of the conversation between him and the ruler of the state of Qi (齊) who asked how a state could be properly governed, this statement meant that a ruler ought to behave as a ruler *should*, a subject ought to behave as a subject *should*, and so on. Thus contrary to a misunderstanding, what Confucius advocated was not a one-way relationship, but one of certain reciprocity. The Qi ruler instantly comprehended this and responded, saying: indeed, if not so, “then even if there be grain, would I get to eat it?”²⁵ In other words, a relationship would not last if the two corresponding parties do not interact in a mutually beneficial way.

How should a ruler behave in this reciprocal relationship? Again Confucius went through the argument that a ruler must firstly “cultivate” himself (*xiu-ji* 修己) and “make himself correct” (*zheng-qi-shen* 正其身), because “to govern is to correct” (*zheng zhe zheng ye* 政者正也). If the ruler were not correct how could he correct others? Having made himself correct the ruler could then lead the people, but he should not impose upon them what he himself did not

²⁴ *Id.* at 271.

²⁵ *Id.* at 271.

want.²⁶ When he was to give an order to the people he should act according to the rites and with dignity and piety, as if he were conducting a great worshipping ceremony.²⁷ In response, the people, especially those in government service, should also treat their ruler in accordance with the rites and follow the “right way” (*zhi-dao* 直道). They should never deceive him with false words and deeds, but should stand up to him for the truth, and stop serving him when he would not accept it.²⁸

Even the parent-child relationship, in Confucius’s view, was not one-sided. When he was asked about filial piety, his initial reply was simply: “Do not disobey” (*wu-wei* 无违). But he did not mean simple subjugation of children to their parents. Instead, he further explained that a child should, during his parents’ lifetime treat them according to the rites and after their death bury and worship them according to the rites.²⁹ Thus what a child should obey was not simply the orders and wishes of his parents but the higher principles of proper conduct.

In Lun-yu, Confucius addressed, albeit briefly, many of the questions mentioned earlier in this paper. His contribution to Chinese jurisprudence was of great significance. He recognized the existence of several types of norms and ranked them according to their closeness to human feelings and reason and their degree of acceptance by the people, thus placing moral precepts at the top and penal law at the bottom. He stressed the role of good men in serving as models for the people and believed that after a careful and patient process instilling in people’s minds a clear understanding of right and wrong and refining their behavior with a set of rules of propriety they could transform themselves and become good, and, as result, the use of penal law would be unnecessary. Basically his arguments were an echo of Shuxiang’s. The route to achieve social order through education he suggested might seem to be a long detour, but he believed it would avoid the pitfalls imbedded in the quick shortcuts offered by those who were too hasty, like Zichan, and the Legalists. He insinuated that there should be reciprocity in

²⁶ *Id.* at 35.

²⁷ *Id.* at 62, 263.

²⁸ *Id.* at 62, 250-51, 318.

²⁹ *Id.* at 25, 406.

every human relationship but he stopped short of giving family juniors and ordinary people justifications for defying the family seniors and the political authorities that were wrong. Nevertheless, the often-heard criticism of him as a supporter of authoritarian rule is unjustified.

2. Mencius

The most crucial work of Mencius (390-305 B.C.), *Mengzi* (孟子), systematically spelled out some details of Confucius's theory along with some original contributions of his own, including an explanation of the origin of society and society's need of norms and government authorities, a hypothesis of human nature and its effect on the creation and enforcement of norms, and a more radical view of the relationship between the people and the authorities.

Like Confucius, Mencius believed there was a proper "way" (*dao* 道) for human behavior,³⁰ and that a person could find this way in his own heart. To prove that this was possible he started with a premise that people were born with many traits in common, including some common tastes, a common ability to see reason (*li* 理), a common sense of rightness (*yi* 义),³¹ and above all, a common disposition (*xing* 性) which was "good" (*shan* 善).³² He used a single example to illustrate this last point: A person who saw a child about to fall into a well would feel alarmed and distressed. This fact proved that every person had an inborn "heart of compassion" (*ce-yin zhi xin* 恻隐之心), which had nothing to do with his wish to win praises from his friends and neighbors or to create good relationship with the child's parents. From this Mencius extrapolated, without giving further evidence, that every person also had a "heart of shame" (*xiu-e zhi xin* 羞恶之心), a

³⁰ For instance, he observed that when the Way prevails in the world, persons of small virtue and small abilities serve persons of great virtue and great abilities; when the Way is in disuse, persons who are of small means and weak serve persons who are of great means and strong, see 焦循, 孟子正义 in 1 新编诸子集成 291 (1978), Jiao Xun, *meng zi zheng yi* [RECTIFICATION OF NOTES TO THE ANALECTS OF MENCIUS] 291 in 1 *xin bian zhu zi ji cheng* [NEW EDITION OF THOUGHTS OF IDEOLOGISTS IN ANCIENT CHINA] (1978) (Taiwan).

³¹ *Id.* at 441-51.

³² *Id.* at 433-34, 443, 456-57.

“heart of humility” (*ci-rang zhi xin* 辞让之心), and a “heart of right and wrong” (*shi-fei zhi xin* 是非之心). He argued that these four “hearts,” just as a person’s four limbs, were inborn, and therefore, anyone who did not have these “hearts” was not human.³³

Furthermore, Mencius alleged that the four “hearts” were the “buds” (*duan* 端) of norms for good social behavior – from the heart of compassion, “humaneness” (*ren* 仁) could be developed; from the heart of shame, “rightness” (*yi* 义); from the heart of humility, “propriety” (*li* 礼); and from the heart of right and wrong, “wisdom” (*zhi* 智).³⁴ Because these norms could sprout from the four “hearts,” they were not something foreign to burnish (*wai-shuo* 外烁) a person’s character but were inherent (*gu-you* 固有) potentials that everyone was naturally endowed to.³⁵ If a person could carefully nurture these “buds” – “not forgetting them, not forcibly make them grow” – they could develop into full-blown behavioral norms without external assistance.³⁶ Thus finding the norms in one’s own heart was not difficult, and, if a person kept his moral character growing, he could become as good as Yao (尧) and Shun (舜), the two legendary sage-kings of Chinese antiquity.³⁷ Mencius did not talk much about education in the sense of inculcation or instruction by an outside agent because of this logic – although ironically he lived as an instructor, dispensing advice and admonitions to everyone he encountered.

But why were there people who committed wrong? Unlike Confucius, Mencius did not recognize that some people were unable to distinguish right from wrong, or unwilling to accept a conventional distinction, he insisted that a person committed wrong only after that person’s inborn good nature was damaged by evil forces from the outside. To illustrate his point Mencius used *Niu-shan* (牛山), a mountain southeast of the capital of the State of Qi, as an example. According to him it was once verdant, but after being

³³ *Id.* at 138.

³⁴ *Id.* at 139.

³⁵ *Id.* at 139.

³⁶ *Id.* at 117-22.

³⁷ *Id.* at 477-81.

over-logged and over-grazed it became totally barren.³⁸ He did not explain the source of external evil forces.

Mencius also discussed types and ranks of norms. An analysis of his work suggests that he saw four groups of norms, respectively for self-cultivation, personal interactions, government action and the relationship between the individual and the authorities; and in each group he saw the norms in different ranks. In discussing norms for self-cultivation, he said that there were “major principles” (*da-ti* 大体) and “minor principles” (*xiao-ti* 小体), and he said one who followed the former was a “great person” (*da-ren* 大人); one who followed the latter a “petty person” (*xiao-ren* 小人). He urged people to “follow the major principles” and “do things a great man does”. What did a great man do? In Mencius’s words, a great man “dwells in humanness and follows the path of rightness” (*ju-ren you yi* 居仁由义). Such a man “will not be corrupted by wealth and high office, will not abandon his position because of poverty and low status, and will not be cowed by authority and force.” Such a person was a “great man” (*da-zhang-fu* 大丈夫).³⁹

To Mencius, *ren* and *yi* were obviously the higher norms and the others lower ones. When in conflict with a higher norm a lower one could be ignored. Accordingly a great man did not necessarily keep his word and carry his action to fruition (*yan bu-bi xin, xing bu-bi guo* 言不必信, 行不必果); instead, he would do what was right (*wei yi suo zai* 惟义所在).⁴⁰ Moreover, Mencius pointed out that some norms were not right, for instance, there were “improper rites” (*fei-li zhi li* 非礼之礼), which a great person would not observe at all.⁴¹

The argument that some commonly accepted behavioral rules were inferior to others was not an easy comprehension for ordinary people. Mencius was asked by many people to justify some seemingly strange acts of his own as well as some such acts of Shun (舜), and Confucius.⁴² He did so with ingenuous arguments,⁴³ but

³⁸ *Id.* at 456-57.

³⁹ *Id.* at 245, 327, 465, 467, 546.

⁴⁰ *Id.* at 327.

⁴¹ *Id.* at 325.

⁴² For some examples, see *id.* at 150-55, 181-82, 273-77, 352-54, 364-65, 370-73, 492, 546-49.

⁴³ Such arguments must have contributed to his reputation of being argumentative, see *id.* at 263.

also confessed: “What a great man does is indeed difficult for the common people to understand!”⁴⁴ This admission exposed a serious flaw in the Confucian theory of norms; namely, it is difficult for ordinary people to see the ranks Confucians assigned to the various norms and to identify a proper one to observe in a specific circumstance.

For interpersonal relationship Mencius listed humaneness and the rites as the primary norms. According to him, a noble man would keep humanness and the rites at heart when dealing with others.⁴⁵ A humane person would love others and would be loved by others; a person who observed the rites would respect others and would be respected by others. A person not being loved and respected by others should reflect on his own behavior and find out whether he did not love and respect others in the first place. If he had been loving and respectful yet not reciprocated by anyone, he could safely dismiss that person as indifferent.⁴⁶

Conspicuously, Mencius did not list law as a norm for either individual behavior or interpersonal relationship. It followed that he did not discuss the making and enforcement of law. His silence on these points was understandable, since law, by definition a product of the government authorities, did not come from the “hearts” of ordinary people. However he did talk about law (*fa* 法) in a general sense as a guidance for government action, particularly, he discussed at length what he referred to as “benevolent policies” (*ren-zheng* 仁政). Among them the first and most important was to provide the people with certain “constant means” (*heng-chan* 恒产) for a decent living and to avoid depriving them their time for productive work and burdening them with multiple labor services and heavy taxes. Without *heng-chan*, most people would not have a “constant heart” (*heng-xin* 恒心) or a settled mind to pursuit worthy objectives. Instead, they would become unconscionable and may engage in illegal activities. If the state punished them, it would be similar to setting up a trap to catch people (*wang-min* 罔民) in which a ruler should never do.⁴⁷ After ensuring the people a secure

⁴⁴ *Id.* at 429.

⁴⁵ *Id.* at 350.

⁴⁶ *Id.* at 350-51.

⁴⁷ *Id.* at 56-58, 196-79, 205-14.

living, a ruler should have schools set up to teach them filial piety, brotherly love and other principles. They could then be expected to behave properly and to be held accountable for any misconduct.⁴⁸ These statements are problematic. They seem to imply that there is a precondition for the “good” human nature to function; namely, people must have material security before being able to behave properly. This requisite should not be considered as a corrupting influence coming from outside. In other words, the “good” human nature was a rather delicate concept which could be easily distorted. That was probably why Mencius stressed the importance of a great man to be free from monetary temptation i.e. “profits” (*li* 利), and certainly should not pursue it, unless he could share it with others or, better still, assist others in profit gaining.⁴⁹

To implement the benevolent policies, a state required able administrators. This led Mencius to argue for the need of social and government authorities, an important subject in any political and legal theory, but alluded to by Confucius rather tangentially in *Lun-yu*, indicating that he probably took the need for granted.⁵⁰ By Mencius’s time there were already people who, repulsed by bad rulers, expressed doubt about this need.⁵¹ Particularly, a contemporary “Agriculturist” (*nong-jia* 农家), Xu Xing (许行), alleged that a good ruler should live just like his subjects did – growing his own food and bartering his produce for other things he needed. Mencius repudiated this idea, pointing out that importance of division of labor in a complex society.⁵² He even envisaged a world of peace under one single ruler. Thus when asked how the world was to become settled, his answer was: “It will be settled when it is under one [ruler, regime, system]” (*ding yu yi* 定于一),⁵³ echoing Confucius who, as mentioned above, stated that when the Way prevailed the world, measures affecting the public would originate from the Son of Heaven.

⁴⁸ *Id.* at 32-35, 40-41, 56-58, 196-97.

⁴⁹ *Id.* at 21-26, 27-30, 59-62, 79-83.

⁵⁰ 刘, LIU, *supra* note 6, at 271, 274-75, 286, 345 (P.R.C.).

⁵¹ For instance, Mencius pointed out Yang Zhu 杨朱, advocating solipsism (*wei-wo* 为我, everyone for oneself), repudiated the authority of the ruler; Mo Di 墨翟, hailing universal love (*jian-ai* 兼爱), denied that of the father, *see* 焦循, JIAO, *supra* note 30, at 269. Then as we shall see there was the Daoists who romanticized the state of nature and condemned all “sage kings”.

⁵² *Id.* at 214-30.

⁵³ *Id.* at 214-30.

Mencius addressed another question: To achieve good governance, what is more important – good rules or good rulers? It was another subject not thoroughly discussed in *Lun-yu*. Observing that even a great carpenter could not always draw a perfect circle and an exact right angle without using a compass and a square,⁵⁴ Mencius came to the conclusion that good governance could be achieved only when there were persons of ability and virtue to implement sound policies. In his words: “Goodness alone is not sufficient for government; laws cannot implement themselves” (*tu shan bu-zu yi wei-zheng; tu fa bu-neng yi zi-xing* 徒善不足以为政; 徒法不能以自行).⁵⁵ It is important to note that by “law” he meant not any rules made by persons who happened to have law-making power, but a collection of rules created by ancient sage-kings (*xian-wang* 先王, an appellation usually reserved for the legendary Yao and Shun).⁵⁶

How were men of ability and virtue to be found and installed in government? This was another question not expressly addressed by Confucius. Reportedly, in ancient times a ruler would select a person of good qualification as his successor, as Yao selected Shun and Shun selected Yu (禹). But Yu passed his position to his son Qi (启), establishing a practice followed by most subsequent dynastic rulers. But the subsequent dynasties were mostly created by revolutions and court coups. Mencius was asked about government succession and regime change. More specifically, the questions were how a person could justifiably become a ruler and how a ruler could justifiably be deposed. Mencius’s answer to the first question was unconventional. He alleged that Yao and Shun did not select their successors out of their personal preference. Before abdicating in favor of their successors they gave the candidates the tasks of offering sacrifice to Heaven and administering affairs of the people, and found both Heaven and the people were pleased. In the case of Qi, he did not simply inherit his father’s position; he was preferred by the people over Yi (益), the chief administrator under Yu and his presumptive successor. To the second question Mencius said Jie

⁵⁴ *Id.* at 279, 284.

⁵⁵ *Id.* at 284.

⁵⁶ *Id.* at 284-85.

(桀) and Zhou (纣), the last rulers of the Xia and the Shang respectively, were both cruel and unjust tyrants; to kill a tyrant was not regicide but an act to save the people from calamities.⁵⁷

By these comments on historical events, Mencius indirectly answered the question concerning the legitimacy of a person gaining the position of government by inheritance, by force or by intrigue: For a stranger to succeed an abdicating ruler, he had to have the virtue of Shun or Yu; for a hereditary ruler to lose his position he had to be as evil as Jie and Zhou.⁵⁸ More importantly Mencius maintained that the final decision on the legitimacy of a ruler was to be made by Heaven and the people acting together, although Heaven would always agree to the people's choice, as the ancient adage went, "Heaven sees what the people see; it hears what the people hear."⁵⁹

While he affirmed the need for government authority, Mencius was wary of the rulers and was unwilling to accept the prevailing norm of subjugation of the people to those in power, because he acknowledged that too many rulers had mismanaged public affairs and cruelly exploited the people. So, like Confucius, he suggested a certain degree of reciprocity as a guiding principle for the relationship between the people and the government authorities. He observed as a fact that "if a ruler treated his subjects as his hands and feet, they would treat him as their belly and heart; if he treated them as his horses and hounds, they would treat him as a stranger; if he treated them as mud and weeds, they would treat him as an enemy."⁶⁰ He compared this relationship with that between friends – when a person failed a task entrusted by his friend, his friend could discard him.⁶¹ He further alleged that when a ruler committed serious wrongs and repeatedly refused to correct himself after being urged by his close relatives serving as high ministers, they could depose him.⁶² Such remarks shocked a hereditary ruler who reacted with disbelief and anger. But Mencius went further, as mentioned above, suggesting that rulers held their positions only with the

⁵⁷ *Id.* at 86, 381.

⁵⁸ *Id.* at 381.

⁵⁹ *Id.* at 379-81.

⁶⁰ *Id.* at 322.

⁶¹ *Id.* at 83-84.

⁶² *Id.* at 429-30.

approval of the people. On this ground Mencius made a general statement: The people were the most important, the “altars of the gods of earth and grain” (*she-ji* 社稷, i.e., the state) was the next, the ruler the least.⁶³ Therefore when a ruler was cruel and abusive, the people were justified to revolt and exterminate him, and, in Mencius’s view, executing a tyrant (*zhu yi-fu* 诛一夫) was different from murdering an ordinary ruler, it was not regicide. (*shi-jun* 弑君).⁶⁴

Mencius’s view on the relationship between the authorities and a self-cultivated private person was especially unconventional. He alleged that there were three most valuable things in the world – high governmental positions (*jue* 爵), virtue (*de* 德), and old age (*chi* 齿) that usually came with wisdom. A person with high governmental position should not belittle a person who had the other two values. Instead, a virtuous and wise old person was superior to those merely with power. Therefore, Mencius suggested that when talking to great office-holders, a person of virtue and advanced age should not be awed by their pomposity but should look down on them because factors which made them arrogant – their wealth and extravagant life style – were not his desires should he have had his way. What he would desire was to be a sage-king like Shun. Therefore, Mencius admonished that rulers should never summon a person of virtue and old age to service and command him. Instead, they should treat him as a teacher and learn from him before inducting him into government service.⁶⁵

Thus Mencius filled some gaps in Confucius’s theory of politics and norms, but his own theory was actually less comprehensive. His idea that human nature was good seemed rather simplistic, and his argument that full-blown norms could sprout from the good human nature was mystifying. How were people supposed to behave? Unlike Confucius who instructed people simply to observe the rites, which were a set of specific, easily recognizable extrinsic rules; Mencius insisted that the rites, like other norms, could be found in a person’s heart, and yet he conceded that not everyone was

⁶³ *Id.* at 379-81.

⁶⁴ *Id.* at 86.

⁶⁵ *Id.* at 150-55, 596-98.

capable of making this effort. This caused uncertainty – some people might never by themselves find any rules and their behavior would be left unregulated. Moreover, those who successfully looked into their own hearts might find many incongruous and possibly conflicting norms. A few people of wisdom could see some of these norms as “major” and the others “minor”, but that was difficult for ordinary people, and they might be puzzled, not knowing what to do in some circumstances.

Mencius recognized that people committed wrongs and insisted that the cause was harmful elements which stemmed from an inhospitable environment. To change the situation he advocated beneficial government action to provide people with better living conditions and education. Such measures were mostly economic and administrative in nature. Conspicuously he did not allude to penal law as a necessary albeit inferior means to achieve peace and order. In most instances he used *fa* (法) only in the sense of government decrees, and like Confucius he did not give it much weight. In fact, he almost ignored law in this sense, and, unlike Confucius, did not discuss litigation or any other judicial procedure.

Mencius made a great contribution to jurisprudence by placing the two essential elements of society – the people and the authorities – in more appropriate positions. He argued that not only the people as a whole were more important than the authorities, but an educated individual could also be more valuable to society than a person who held government office. These ideas were accepted by the people and the intellectuals of later times and helped justifying popular uprisings, giving many an intellectual the self-esteem and the ambition to create a way to resist abusive political power, known as the right “Way of Great Principles” (*dao-tong* 道统) in opposition to the mere “way of political practices” (*zheng-tong* 政统).

3. *Xunzi*

Xunzi (340-245 B.C.), the last great Confucian before the Qin dynasty, left us with a far more voluminous work, *Xunzi* (荀子). It revisited some topics discussed by his predecessors and addressed a few others not touched by them. Like Mencius, he also stressed the need for the authorities and norms but offered a different

explanation. First he noted that, unlike some other animals with enough ability to survive in relative solitude, humans had to live in groups (*qun* 群). He further noticed that people had similar needs (*yu* 欲) from which they developed likes or desires (*shi-hao* 嗜好) and dislikes or aversions (*ji-e* 疾恶). When the resources to meet the needs were limited, each individual would grab what he liked and reject what he disliked, giving little regard to the needs of others. From these observations, Xunzi concluded that human nature was “*e*” (恶 bad). He further pointed out that people acting out of this “bad” nature inevitably caused conflict, disorder and misery.⁶⁶ To avoid this result, people needed norms to regulate their behavior and the authorities to enforce the norms.

Where could people find the norms and the authorities? It has been mentioned that in ancient times, people believed that Heaven, deities, and ghosts were the authorities who made and enforced norms. But Confucius did not endorse that view. More explicitly Xunzi rejected it, denying that a super-being played a role in human affairs. He observed that Heaven had a “constant way”, which was not affected by the action of any human being, be it a sage like Yao or a brute like Jie; and Heaven did not act with an intention to influence the humans – it neither rewarded them for doing what it liked, nor punished them for doing what it disliked because Heaven did not have values humans had. It did not see good and bad, right and wrong as humans saw, and therefore it was not a source of norms, nor could its way be copied and used as norms. Instead, because it moved according to certain patterns, a superior man (*jun-zi* 君子) could learn and take advantage of that pattern, for instance, doing certain work at a certain time to improve agricultural productivity or to avoid regular natural calamities.⁶⁷

Mencius insisted that people could find norms in their hearts. Xunzi criticized this idea wrong because, in his view, human nature was “bad”, norms could not be imbedded in it. Then how did norms come into existence? Xunzi said they were created by sages. Who were the sages? Xunzi argued that a sage was just a human but different from the ordinary people only because he studied with care

⁶⁶ *Id.* at 231, 289, 292.

⁶⁷ *Id.* at 205, 208-12.

and objectivity various things, events, phenomena, ideas, and people. Consequently, he would find the reason (*li* 理) behind everything and the course, or the way (*dao* 道), of how everything had come about and how it would develop further. He would find the right way for a person to lead a good human life is to be compassionate (*ren* 仁) and righteous (*yi* 义). If in everyday life such a person followed this way, he would become a sage.⁶⁸

Realizing that ordinary people, swayed by their “bad” nature, caused social strife and needed norms, sages, particularly the legendary early sage-kings (*xian-wang* 先王, i.e., Yao and Shun and their predecessors) made clear to people the fundamental principles of *ren* and *yi*, and, after studying people’s habits, created rules of appropriate conduct – the rites (*li* 礼) and music (*yue* 乐) for the noble persons (*jun-zi* 君子); laws (*fa* 法) for the uncouth commoner (*xiao-ren* 小人). Then the later sage-kings (*hou-wang* 后王, i.e., the founding monarchs of the Xia, the Shang and the Zhou dynasties, not any ordinary rulers) established institutions (*zhi* 制) and detailed procedures (*ming* 名) for the enforcement of those principles. Because the principles, institutions and procedure, though based on reason and human needs, inclinations and feelings, were refined and defined by the sage-kings, Xunzi labeled them as “artificial” (*wei* 偽) products of sages,⁶⁹ they were not innate to people.

How could common people be made to follow the norms? According to Xunzi, ordinary people had the ability to learn them. Under the correct guidance, people who went through a rigorous program could learn the norms – the students would be taught to read the classics that spelled out the principles and instructed to observe the more concrete rules for correct behavior, namely, the rites.⁷⁰ Such learning should be enough to transform a person because human nature, though bad, was malleable.

Xunzi also thought that norms had different rankings. The moral principles, which were more profound in meaning, were “higher” than the rites. Further, not all moral principles were equal. For instance, to be filial to one’s parents and to love one’s brothers

⁶⁸ *Id.* at 11, 14, 78-79, 263-65.

⁶⁹ *Id.* at 30, 50-51, 75, 77, 89, 101, 245, 274, 291-92.

⁷⁰ *Id.* at 5-7, 11-12, 39-40, 78-79, 263-65, 289-90, 295, 299-300.

were behavior of small significance (*xiao-xing* 小行), to be obedient to one's superiors and magnanimous to one's inferiors were behavior of medium significance (*zhong-xing* 中行), "to follow the Way but not one's ruler, and to obey rightness but not one's father" (*Cong dao bu cong jun, cong yi bu cong fu* 从道不从君, 从义不从父) were behaviors of great significance (*da-xing* 大行).⁷¹ Among the man-made norms, the rites created by the ancient sage-kings were more authoritative than law enacted by later rulers and should be used as guidelines in making and enforcing law.

Although Xunzi exalted the moral principles, his emphasis was on the rites, evidently because they could be more easily taught and observed. He discussed them at much greater length than the other norms. First he explored their functions. Like Mencius, he recognized that in society there were various kinds of people – rulers, ministers, farmers, craftsmen, merchants, et al – engaging in different types of work.⁷² However, unlike Mencius, he did not think this division of labor made society orderly. As mentioned earlier, he believed that people, regardless of their callings, fought for limited resources and created disorder. To change this situation, the sage-kings realized the necessity to give each person an appropriate "fen" (分) – a status that would allow him to have a share of the resources in return for taking up certain responsibilities and behaving in certain manners.⁷³ This assignment should be based on rightness (*yi* 义),⁷⁴ and the rites were created to uphold this assignment, prescribing a code of conduct consisting of different rules for people of different statuses.⁷⁵ Such rules were to judge a person's conduct and attitude just like a scale was to determine weight and a

⁷¹ *Id.* at 347. In addition, Xunzi talked about "major moral characters" and "minor moral characters" (*da-jie* 大节, *xiao-jie* 小节), "great loyalty", "ordinary loyalty" and "petty loyalty" (*da-zhong* 大忠, *ci-zhong* 次忠, *xiao-zhong* 小忠), *see id.* at 97, 168-69, 348.

⁷² *Id.* at 113-14.

⁷³ *Id.* at 96, 113, 116, 144, 231, 243.

⁷⁴ *Id.* at 94, 104.

⁷⁵ Xunzi, more than Confucius and Mencius, discussed the problem of social equality. He dismissed mechanical equality – assigning the same status to everyone – as unjust and impractical. People made greater efforts to improve themselves and acquired better qualifications should take more responsibilities and be rewarded more, *id.* at 36-38, 113, 119, 144. If everyone were given the same status there could not be team work (*zhong-qi ze bu-shi* 众齐则不使) and there would be struggle for the limited resources. Thus it was both just and practical to for assigning people into different social classes (*pin-fu gui-jian zhi-deng* 贫富贵贱之等), and that, he said, was what it was stated in the *Shu-jing* (书经): "Strive for equality but not levelness" (*wei-qi fei-qi* 维齐非齐), *see id.* at 96.

carpenter's line to determine straightness. They were applied to correct a state (*zheng-guo* 正国) as well as an individual person (*zheng-shen* 正身), akin to a compass used in drawing a circle and a square in making a right angle.⁷⁶

Unlike Confucius and Mencius, Xunzi discussed law at considerable length and used the term *fa* in a narrow sense, referring mainly to the rules made by government authorities. He maintained that "where there is law it should be followed" (*you fa zhe yi fa xing* 有法者以法行).⁷⁷ He often used *li* and *fa* together, causing some confusion. His statements show that he still considered law as a lesser norm compared with the rites and had been characterizing the rites as the guidelines of law. Furthermore, he said: "Without the rites there could be no law" (*fei-li, shi wu-fa ye* 非礼, 是无法也),⁷⁸ asserting the rites as the basis of law. Xunzi had this relative low regard for law probably because he found it had two major problems – it was not comprehensive and it was ineffective by itself.

In Xunzi's time, as it is now, it was obvious that law could not regulate every human behavior. No law-maker, even a sage, could possibly provide for all contingencies. Inevitably there were gaps in laws, and even in a case where there was an apparently applicable law, a problem of inadequacy still existed because the meaning of law was not always self-evident and when construed literally, the law became rather limited in application. Of course, the same could be said about the rites or any man-made rule, even those made by sages. So why should this defect be the cause of a low regard for law? Xunzi did not directly address this question, but in his narrative, a clue can be found – when talking about the rites he often connected them to "rightness" (*yi* 义), and when talking about the law he often connected it to "numbers" (*shu* 数, as those on a measuring instrument).⁷⁹ This seems to be his logic: Being associated with rightness, the rites were closer to moral principles in molding a person's character and therefore a more effective means to regulate

⁷⁶ *Id.* at 20, 115, 136.

⁷⁷ *Id.* at 96, 329.

⁷⁸ *Id.* at 20.

⁷⁹ For examples see *id.* at 50-51, 77, 151, 291.

his behavior.⁸⁰ On the other hand, laws, as tools to determine the correctness of people's behavior,⁸¹ were often too specific, even a great assembly of them would not be adequate to do the job because human behavior was infinitely varied and complicated.

The problem of the law's ineffectiveness was less obvious. The law was enforced by the government authorities with rewards and punishments. In some cases such measures could produce quick results but not so in all cases. This was because they could be poorly drafted and were often misused, causing mistrust, resentment, and resistance. More fundamentally, they appealed not to high ideals but to personal interest of increasing gains and reducing losses. Whether a law could induce a person to act or not to act depended mainly on how heavy the rewards or punishments it prescribed. If by an action or inaction a person could gain more or lose less than what the law prescribed, the law would have no effect on him. He would actually violate it to realize his own interests. The following is an example Xunzi used to illustrate his point: In a battle when an overwhelming enemy was coming, those guarding a precarious town would abandon it, whatever rewards or punishments they were to receive. Thus the conventional way of enforcing the law was "a way to deal with hired laborers and traders" (*yong-tu yu-mai zhi dao* 佣徒鬻卖之道), not a way to implore a person to act for the interest of his society and country.⁸²

Due to the law's inadequacy, a problem not specifically provided for may be left unsolved pending the adoption of a new provision. But that was not an option acceptable to traditional Chinese jurists. Instead, Xunzi suggested that in a case where there was not an applicable law, a judge should place the case in a category of similar cases, drawing an analogy (*yi lei ju* 以类举) and deliberating (*yi* 议) an appropriate solution.⁸³ Exactly what should the judge do? He should compare the similarities and differences between the case at hand and those in the same category, and probe the common root cause (*ben* 本) of the problems involved in all the cases. Having

⁸⁰ See 孔, KONG, *supra* note 20, at 847 (stating that the educational effect of the rites are subtle and they stop evil before it materializes, thus making people to move to goodness and stay away from crime unconsciously).

⁸¹ *Id.* at 175, 218-19, 310.

⁸² *Id.* at 189.

⁸³ *Id.* at 96.

found the root cause, he should be able to arrive at a solution (*mo* 末) to the case at hand following a rigorous logic.⁸⁴ This method was not invented by Xunzi. *Shang-shu* recorded an instruction to jurists: “In a case of an offense less serious than one for which a heavy punishment is prescribed, a lighter punishment should be imposed; in a case of an offense more serious than one for which a light punishment is prescribed, a heavier punishment should be imposed.”⁸⁵ At least since this instruction was given by Lord Lü, a high judicial officer of the Zhou dynasty, this principle had been the basis for the use of analogy in making judicial decisions, but as far as one knows, the jurisprudential justification for this use was provided by Xunzi.

Deliberation (*yi* 议) was often necessary even in a case where there was a law. It was because a law could rarely be mechanically applied; there was always some interpretation necessary. In construing a law a person could not simply look at its black letters, or, in Xunzi’s words, its *shu* (数). He had to know its “spirit” (*yi* 义), or what it was for. If one did not know the *yi* but only the *shu*, no matter how broadly his knowledge was of this kind, there would be confusion while handling actual cases.⁸⁶ Xunzi did not explain this in detail, but it is fair to assume that his reason was simply this: Every concrete case was different from another. A law could not be automatically applied to all cases it was supposed to govern. Where there was a doubt as to whether it was applicable in a particular case because certain basic facts and some relevant circumstances, including social conditions and the physical and mental state of the persons involved, etc., were not evidently anticipated by the law-makers, a crucial question had to be addressed: What was the purpose of that law, or more fundamentally, the purpose of all laws? If we understand Xunzi’s term, “the spirit of law” in this sense, we can hardly disagree with him.

To deal with the problem of the law’s ineffectiveness in making people willingly do what was right and moving people towards

⁸⁴ *Id.* at 329.

⁸⁵ 屈, QU, *supra* note5, at 259.

⁸⁶ 王先谦, 荀子集解 in 4诸子集成151 (中华书局 1988) (1929), Wang Xianqian, *xunzi ji jie* [ANNOTATION ON XUNZI] in 4 zhu zi ji cheng [THOUGHTS OF IDEOLOGISTS IN ANCIENT CHINA] 151 (zhonghua shu ju [Zhonghua Book Company] 1988) (1929) (P.R.C.).

goodness and society towards harmony, Xunzi revealed his stripes as a Confucian. Confucius said that people could be forced to obey law but would have no sense of shame and that when rules of propriety were not generally followed, penal law could not be properly enforced. Xunzi went further to expound these ideas. As stated above, he thought norms were to stop people from fighting among themselves, to install an orderly society that could care for everyone, to make each person a better human being that can co-exist with others in peace, happiness and harmony. For these purposes, everyone should be assigned to a proper share of the resources, encouraged to increase production of material substances, made to behave appropriately in agreement with his social status and to do his best for the good of society as a whole.⁸⁷ Law could help implement these measures but, as Mencius said, it could not make itself effective. Moreover, from Xunzi's point of view, law, not being developed from people's good nature, could not be understood by people spontaneously. To make them realize the significance of law and abide by it, Xunzi suggested that the ruler of a state had to establish an intensive educational program to teach the people the higher norms i.e. moral principles. This consisted an elaborate process to lead them by example: care for them and be loyal and faithful to them; place those who are worthy and talented in positions to serve them; award them with honor and status to celebrate their achievements; use their labor only at proper times and ease their burdens as well as nourishing their growth. After these steps, a set of concrete rules for good conduct – the rites – could be established and laws could be made to strengthen it. When the laws for establishing the minimum standard of behavior were widely accepted, people could be expected to take a step further to improve themselves individually and work in benefit for the public. The result would be sublime. In Xunzi's words, human society would be "greatly transformed and absolutely unified." (*da hua zhi yi* 大化至一).⁸⁸ Although the statement seems phenomenal, one realizes that in essence, this is an embellishment of the remarks of Shuxiang and Confucius on how law was to be made effective.

⁸⁷ *Id.* at 106-09, 113-14, 126-27, 148-50, 152-54.

⁸⁸ *Id.*

However, Xunzi did raise a few other points concerning the enforcement of law: Law had to be made clear to people so that they would not unwittingly violate a prohibition;⁸⁹ rewards and punishments had to match (*dang* 当) merits and guilt; if a perfect match was impossible, be generous with rewards, never be too harsh with punishments;⁹⁰ reward should surely and immediately follow a worthy act, and punishment a crime;⁹¹ where there was doubt about a suspect's culpability, the authorities should risk letting a guilty person go free rather than risk punishing an innocent one;⁹² in a state where the authorities did not behave correctly, the legal system was in disorder, and the people were not properly taught the right way, those who violated law should not be punished, for they were not really responsible for their acts.⁹³ Most of these points were similar to traditional ideas, some of them seen in *Shang-shu*.⁹⁴ But the first point that law had to be made clear to people represented a conspicuous departure from Confucius's view. In addition, there was another point in *Xunzi* that had not been made in *Lun-yu* and *Mengzi*, and therefore was controversial. Reportedly Confucius, merely seven days in office as an acting chief minister (*she-xiang* 摄相) of the State of Lu, ordered the execution of Shaozheng Mao (少正卯), a notorious person in Lu. When asked why, Confucius answered: There are five types of persons that are evil, and thieves and robbers are not among them. They are those whose mind is smart but treacherous, those whose behavior is deviant but constant, those whose remarks are deceitful but eloquent, those whose knowledge is ghastly but profound, and those who follow the wrong way and glorify it. Anybody with the character of any of these five kinds would not escape execution by a right ruler. Shaozheng Mao possessed all five. As a result, he was able to gather a large crowd of disciples, with his words he was able to conceal the wrong and deceive the masses, and with his strong will he was able to resist any pressure and have his own way. He was thus the greatest among

⁸⁹ *Id.* at 300-01.

⁹⁰ *Id.* at 175.

⁹¹ *Id.* at 123-24.

⁹² *Id.* at 175.

⁹³ *Id.* at 342-43.

⁹⁴ 屈, QU, *supra* note 5, at 17, 22-23, 259, 275, 280.

the petty men, and he had to be executed. In addition, Confucius reportedly added that it was why several good rulers of the past executed similar rogues, including Deng Xi (邓析), an infamous “litigation master,” by Zichan (子产).⁹⁵ This story was not recorded in *Lun-yu*, and its authenticity was not established. Nevertheless, this and another story told by Xunzi about Confucius as chief judge (*si-kou* 司寇) of the state of Lu refusing to punish a son who sued his father,⁹⁶ were widely cited later throughout Chinese legal history to support respectively, harsh punishments against evil but not specifically guilty persons, and reluctance to decide cases involving close family relatives.

On another point, Xunzi disagreed with Mencius. Mencius recognized that to achieve good governance, both good ruler and good law were needed. Xunzi held a more biased view. Regarding them as mere tools, he pointed out that laws were for people to use or abuse, and famously stated: “Law cannot stand by itself; a precedent cannot make itself useful. When they are in the hands of the right person they function; when the right person is gone they cease to be effective.”⁹⁷ Further, he observed that historically there had been disorder under good laws but never been disorder under good rulers.⁹⁸ From this observation he concluded sweepingly that while there were men who could govern well there could be no law that could automatically produce that result (*you zhi-ren, wu zhi-fa* 有治人, 无治法).⁹⁹

On the relationship between the individual and the authorities, Xunzi took a somewhat less strident stance than Mencius did. As we have seen, he argued that one should follow the Way, not one’s

⁹⁵ 王, WANG, *supra* note 86, at 341-42.

⁹⁶ The story goes: In the State of Lu a man and his son sued each other. Confucius, as the chief judicial official of Lu, placed them in custody for three months without conducting a hearing. The chief minister was not pleased, complaining that old fellow Confucius cheated him – telling him that to govern a state one must encourage filial piety, and now letting go an opportunity to execute the son as a warning against persons violating this principle. Confucius heard this and lamented that when the ruler missed the way, it was not right for the judges to execute those among the people who go astray. To adjudicate criminal cases before educating the people was to kill the innocent as they did not know what was wrong. When the armies were routed, soldiers should not be executed; when the judicial system was not in order, people should not be punished. It was because the responsibility was not theirs, see *id.* at 342-43.

⁹⁷ *Id.* at 151.

⁹⁸ *Id.* at 173.

⁹⁹ *Id.* at 151, 173.

ruler, and pursue what was right, not just what was ordered by one's father. He further maintained that Heaven populated the world with people not for the ruler; it installed the ruler for the people.¹⁰⁰ And he warned that the ruler was like a boat, the people the water; the water bore up the boat but it could also capsize it.¹⁰¹ Nevertheless, he realized that while people living under a sage-ruler needed simply to follow him; those living under a mediocre ruler could argue with him; those living under a tyrant could not challenge or defy him, but only try to avoid his brutality and be silent.¹⁰² It was a sad admission on the part of Xunzi that by his time circumstances had changed considerably from those Mencius found, and he and his fellow men of learning had lost the opportunity and their courage to change the world according to their principles.

What contribution to the traditional Chinese theories of norms did Xunzi make? He denied Heaven as the source of norms and authorities more explicitly than Confucius did. His argument against Heaven and Fate as insurmountable elements that determined human lives, if accepted, could spur people to conduct properly and acknowledge responsibility for their own actions. It would give the system of norms a strong support. He alleged that human nature was "bad," therefore norms had to have an external origin – they were made by ancient sages. The idea that some people were sagacious was popular in ancient times but only Xunzi asserted that sageship was not inborn but attainable through study and reflection. He pointed out that ordinary people were capable of learning the norms. More importantly, he suggested concrete steps for such learning. His idea was thus more practical than Mencius's mystical proposition that norms could be found in people's own heart.

Like Confucius, Xunzi also thought law was a lesser norm than moral principles and the rites but he explained his view more clearly, pointing out law's shortcomings – that it was by nature incomprehensive and it could be arbitrary. Therefore he emphasized that in a making decision, a person should apply law not mechanically but wisely, taking into consideration of its "spirits" as well as the circumstances of the case at hand. From this sensible

¹⁰⁰ *Id.* at 332.

¹⁰¹ *Id.* at 97.

¹⁰² *Id.* at 167-68.

position Xunzi jumped to a conclusion that when good [wise and capable] men were in decision-making positions it did not matter whether there were good laws. While it was well recognized since great antiquity that good men were need for good government, his position was extreme. It started a more thoughtful debate over the merits and problems of the rule of man and the rule of law.

Though Xunzi gave heavy criticisms towards law, he put greater importance than Confucius and Mencius did. He maintained that when there was a suitable law, apply it; when there was not, use an analogy. He often mentioned law in complement with the rites as if they were closely connected and could work together. Indeed, by comparing the law as devices used for measurements and tools for making correct forms, his views were similar to those of the Legalists. Thus, in the development of traditional Chinese legal thoughts, his view seems to have served as a bridge between those of the Confucians and those of the Legalists.

B. Theories of the Daoists

The Confucians saw hope in the rather bleak situation of their time – provided that the people, particularly the rulers, were to follow their respective suggestions. Laozi and Zhuangzi were pessimistic and doubtful about the belief that societal problems could be dealt with societal solutions. They had a very different view of the world; of the characters, objectives and capabilities of human beings; of how humans should live; of what norms they should follow and what they could accomplish. They asserted that they had found a different way to solve the problems of their time (and thereafter forever) and hence exalted their way above the ways suggested by other thinkers. They were therefore perceived as great expounders of “the Way” (*dao* 道) and were later labeled as founders of the “Daoist school” (*dao-jia* 道家). But grouping them together was not quite right as one shall see why.

1. Laozi

Laozi (老子), a contemporary of Confucius, reportedly wrote down his ideas in 5,000 characters. Indeed, the work *Laozi* (老子) attributed to Confucius is brief. Laozi alleged that there was a set of rules which operated constantly and affected everything. It knew no good and evil and was not judgmental.¹⁰³ Like a pendulum, it appeared to have a center from which it could move away temporarily but would always return. As an example, he pointed out that in the physical world, unusual phenomena did not last long – a gust would not blow all morning and a downpour would not continue all day, calm weather would always return.¹⁰⁴ Thus one can say that what he had in mind was not a norm but a physical law. He also observed that in society, great collections of wealth could not be kept for long by anyone, and a person who behaved arrogantly because of his rich possessions and high status would inevitably cause his own fall.¹⁰⁵ Therefore, a true sage avoids excess, extravagance and arrogance.¹⁰⁶ The implication was that the physical law also governed human behavior. It was an unwarranted extrapolation, but was nevertheless the foundation of Laozi's theory. He called this universally valid law the *Way*.

How did the *Way* come into existence? Laozi confessed ignorance but alleged that it existed before heaven and earth, and it gave birth to all things.¹⁰⁷ Because it just happened this way, it was “natural” (*zi-ran* 自然).¹⁰⁸ There was a time when this state of nature existed, everything was natural, nothing was better or worse than the anything else, there was no value attached to anything, and no judgments were made by anyone about anything, the universe was in harmony although no one was aware of that.¹⁰⁹ But somehow

¹⁰³ See 魏源, 老子本义 in 3 新编诸子集成, Wei Yuan, *laozi ben yi* [ORIGINAL SENSE OF LAOZI] in 3 *xin bian zhu zi ji cheng* [NEW COLLECTION OF BOOKS OF MASTERS AND PHILOSOPHERS IN ANCIENT CHINA] 1-2, 4, 10-11, 15-16, 19, 27, 35, 41 (1978) (TAIWAN).

¹⁰⁴ *Id.* at 18.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.*

¹⁰⁹ According to Laozi everything was relative. He observed that “[T]he Haves and the Have-nots beget each other; the difficult and the easy complement each other; the long and the short demonstrate each other; the high and the low lean against each other; different sounds harmonize one another; something

long before Laozi's time this blissful state was lost. He did not explain the reasoning behind that concept, but implicitly blamed the fall on two culprits – human avarice and the misconceived actions of the “sages.”

It is not difficult to accept Laozi's view that unrestricted desires can cause discontent and strife.¹¹⁰ But why were “sages” blamed? Laozi apparently thought that there were two kinds of sages: first, a genuine kind who had true wisdom and a deep understanding of the *Way* and were, in his words, capable of, “knowing the universe without leaving his room and seeing the *Heavenly Way* without looking out of his window”,¹¹¹ and second, a preposterous kind who had no idea what the *Way* was but trumpeted some moral principles instead as a way to solve contemporary problems.¹¹² The trouble was, in Laozi's view, that being artificial and thus imperfect, morality would inevitably cause more problems. This was proven by history. After morality failed to achieve its purpose, those who held power made the rites and then laws. The situation became worse because compared with the false sages, the makers of the rites and laws had lower intellects and more horrendous desires that made their sights even more clouded and distorted. The rites and laws they made were to gain, justify and protect their special interests,¹¹³ and therefore, were mostly harmful to the common people.¹¹⁴ As the situation deteriorated further, more laws were brought to the rescue and prompted a faster downward spiral into chaos, and the common people began to rebel against the laws and the authorities. In desperation, the authorities increased the penalties against the rebels. But they were again mistaken, for, as Laozi pointed out, the severest penalty they could inflict on people was death, but if people were no longer afraid of death, how could it be used as a deterrent?¹¹⁵ The world was, in Laozi's view, a work of wonder. Humans could not alter it; if they tried they would destroy it, just as in the case where an ordinary person took the place of a great

is ahead only because something is behind.” *Id.* at 2. So he asked, “[B]etween yea and nay, how much difference is there? Between good and evil, how great is the distance?” *Id.* at 15.

¹¹⁰ *Id.* at 12, 29, 46.

¹¹¹ *Id.* at 38.

¹¹² *Id.* at 13.

¹¹³ *Id.* at 63.

¹¹⁴ *Id.* at 57.

¹¹⁵ *Id.* at 60.

carpenter and cut timber, he could hardly avoid injuring his own hands (and would, needless to say, ruin the timber).¹¹⁶ Therefore, Laozi insisted that people should be left to follow the *Way* and be natural,¹¹⁷ the authorities should learn to govern without much ado.¹¹⁸ In other words, he advocated discarding morality and laws and exterminating the false “sages” (*jue-sheng* 绝圣).¹¹⁹

Mainly for this advocacy Laozi has been hailed as a champion against authoritarianism. But this is a misconception. A close examination of his words on the relationship between the individual and the authorities reveals an astonishingly different agenda: To lead people back to the state of nature he wanted them not only to *jue-sheng* but also to get to the root of all troubles – human intellect – and discard it (*qi-zhi* 弃智). How could that be done? It was implicit in Laozi’s arguments that for this purpose a true sage was needed. Such a sage would be very tactful. He would not present his plan straightforwardly but with disguise. He would appear to be humble, reticent, yielding and caring.¹²⁰ He would hide his intention and act as if he were leading (or, better still, following) the people where they wanted to go and then he would cause them to make imperceptible turns.¹²¹ In Laozi’s words: “If you would have a thing shrink, you must first stretch it; if you would have a thing weakened, you must first strengthen it; if you would have a thing struck down, you must first set it up; if you would take something from a person, you must first give it to him.”¹²² More succinctly, he remarked: “Ever-reversing is how the *Way* moves,”¹²³ and “a correct statement sounds like just the opposite.”¹²⁴ So was a true sage deceitful? Laozi apparently thought so for a justifiable cause. Again in his own words: “In the ancient times, those who excelled in the pursuit of the *Way* did not want to enlighten the people but to

¹¹⁶ *Id.* at 23, 61.

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* at 7, 50.

¹¹⁹ *Id.* at 13.

¹²⁰ *Id.* at 39, 20, 50, 37, 64, 35, 56-57.

¹²¹ *Id.* at 56-57.

¹²² *Id.* at 28.

¹²³ *Id.* at, 32.

¹²⁴ *Id.* at 64.

make them dumb. The reason why the people are difficult to govern is that they are clever.”¹²⁵

In practical terms, what was a true sage to do? According to Laozi, people would live in states of small size and population; that they would find no use of all the inventions of the false sages like the various labor-saving devices, vehicles, arms and so on that were supposed to make life easier, safer and happier; that they would be happy with what they had – their food, clothing, and abode; that they would be so content with their way of life that while the states were within sight of each other, the cries of chickens and dogs in one state could be heard in another, people would grow old and die without ever traveling outside the borders of their own state.¹²⁶

How could a true sage actually make people live in that way? Laozi's suggestion was that he was to fill the people's stomachs and strengthen their limbs but empty their minds and weaken their will, thereby making them feel like well cared infants, devoid of knowledge and desire (*wu-zhi wu-yu* 无知无欲).¹²⁷ Essentially, he was to keep people devoid of intelligence and power and thus live as the way he wanted them to.

In effect, Laozi wanted people to abandon what they had achieved through their intellectual and physical endeavor, to turn away from civilization, to reverse history. Mildly put, what he suggested was a revolution. Its success was predicated on the elimination of human desire and intelligence. The problem is that he failed to explain where human desire and intelligence came from. If they were inborn, would they emerge again after the false sages and their ideas and products were wiped out? He suggested that when human desires and intelligence raised their ugly heads again the true sage was to suppress them with a “nameless substance” (*wu-ming zhi pu* 无名之朴).¹²⁸ What was this substance? Laozi did not explain. Conceivably it must be something effective in keeping people from trying to gain anything by using their intelligence – perhaps a suffocating atmosphere of oppression?

¹²⁵ *Id.* at 55.

¹²⁶ *Id.* at 65.

¹²⁷ *Id.* at 3.

¹²⁸ *Id.* at 29-30.

What was the relationship between the people and the authorities in Laozi's ideal society? It had to be like that of sheep and the shepherd. Or perhaps it was worse, because in Laozi's own words: "Heaven and earth are not benevolent, they treat the myriad things as straw dogs (*chu-gou* 刍狗); the sage is not benevolent, he treats the people as straw dogs".¹²⁹ What did he mean? It was a practice of the common people in ancient China using a straw dog instead of a real animal as sacrifice in the ceremony worshipping gods and ghosts which would be discarded immediately after the ceremony. Therefore, Laozi meant that in dealing with the people, the sage was never emotionally involved, they did not mean much to him, he was simply applying the law of nature. It was not the attitude expected of a compassionate champion of the people against the authorities.

2. Zhuangzi

Zhuangzi (circa 360-290 B.C.) was traditionally labeled as another Daoist master, and indeed he and Laozi shared many views, most conspicuously, his regard for *dao* as a rule. However there is a fundamental difference between them.

Zhuangzi denied that there was *a Way* that gave birth to everything and was external to everything; that it had to be learned (and only by a true sage); that the sage was to lead the common people to *the Way*, by deceit if necessary. Instead, he believed that there were an infinite number of *Ways*. Everything had its own *Way*. One could find *Ways*, he said, in everything – ants, grass, tiles and shards etc.¹³⁰ The *Way* of a thing was built in it. It was its "heavenly mechanism" (*tian-ji* 天机) that made what the thing was, maintained its position in the universe, propelled its movements and dictated its development – thus heaven could not but be high, sun and moon could not but rise and set, a snake moved without feet, a millipede did so with hundreds of them.¹³¹ A thing was happy when it followed its own *Way*, and all *Ways* were equal, as all values

¹²⁹ *Id.* at 4.

¹³⁰ See 郭庆藩, 庄子集释 in 12 新编诸子集成, Guo Qingfan, zhuangzi ji shi [ANNOTATION ON MASTER ZHUANG] in 12 xin bian zhu zi ji cheng [NEW EDITION OF THOUGHTS OF IDEOLOGISTS IN ANCIENT CHINA] 326-27 (1978) (TAIWAN).

¹³¹ *Id.* at 261-62, 323-24.

were subjective and relative – men loved eating grain and meat, but deer preferred grass, and hawks liked mice; men enjoyed looking at a beautiful woman, but seeing her approaching fish dived into the deep water, birds flew high and away to escape. Even the long and the short, the big and the small, right and wrong, nobility and baseness had no absolute meaning; dream and reality, life and death were undistinguishable.¹³² When an external *Way* was imposed on a thing, its own *Way* was damaged or destroyed, its happiness lost and its existence threatened.¹³³ Similarly, when horses merrily grazing and frolicking in the meadow were rounded up and sent to Bole (伯乐), a famed horse trainer, to be branded, bounded with martingale and crupper, tied up in stable and stall, two or three out of ten of them would soon die. As a part of their further training, Bole would starve them, make them go thirsty, race them, teach them to prance, pull them into line, and force them to run side by side. By the end, they ran with the worry of the bit and rein in front of them, and the terror of the whip and crop behind them, and shortly over half of them would die.¹³⁴

The same happened to humans. According to Zhuangzi, originally in a “world of perfect virtue” (*zhi de zhi shi* 至德之世) people lived and played harmoniously with birds and beasts, in blissful innocence and without unnatural desires.¹³⁵ That utopia gradually deteriorated. First, people developed agriculture and weaving, they tilled their own land and made their own clothing, without an intention to harm anyone.¹³⁶ But when people started inventing and using mechanical contraptions (*ji-xie* 机械), such as the “well-sweep” (*gao* 槲) that made drawing water from a well much easier, problems arose, because after having such contraptions people would soon invent more gadgets and develop greater skills, and those who used the gadgets and skills would have a scheming and plotting heart. As one scheme begot another scheme, one plot led to another plot, people would lose their innocence and would

¹³² *Id.* at 44-45, 49-52, 254, 271-273, 312, 320.

¹³³ *Id.* at 274-75.

¹³⁴ *Id.* at 149-51.

¹³⁵ *Id.* at 151-52.

¹³⁶ *Id.* at 429.

engage in competition and strife,¹³⁷ eventually, someone would come along to create measures and rules and impose them upon others.

All rules other than the various *ways* inherent to various things were, in Zhuangzi's view, harmful. Even "*the Way*," found by Laozi's true sage was no less so, because it was alien. Hence Zhuangzi regarded all "sages" preposterous. Morality, the rites, and so on, created by them and lesser men, were more pernicious because they consisted of rules positively contradicting the *ways* people followed naturally.¹³⁸ Moreover, man-made standards with no basis in the *ways* of things were arbitrary and susceptible to different interpretations and manipulation by those with power and craft as tools to advance their private interests. For instance, the more successfully a ruler had taught his people loyalty and obedience to make them easy to govern, the easier a usurper could use the same to rule them; the stronger a person had made his treasure box with ropes, cords and locks, the easier a robber could carry it without fearing it breaking apart during his escape. Thus, Zhuangzi observed that when there were "sages", there were robbers; the former was there only to help the latter to steal more.¹³⁹ Alarmed by what happened but ignorant of the cause of the problems, the "sages" would make more rules but counterproductively cause greater harm.

Thus Zhuangzi too wanted all those rules destroyed and their creators, the "sages," exterminated. In his words: "When the 'sages' are not dead, robbers will not disappear." Therefore, he asserted: "Exterminate the sages, discard the intellect, and then the robbers will cease to exist. Break the jades, crush the pearls, and then petty thieves will not emerge. Burn the tallies, shatter the seals, and then the people will be simple and guileless. Hack up the bushels, snap the scales, and then the people will no longer wrangle. Destroy and wipe out the laws that the sages made for the world, and at last people can reason with one another."¹⁴⁰

¹³⁷ *Id.* at 193-95.

¹³⁸ *Id.* at 144-45.

¹³⁹ *Id.* at 154-56, 158-60.

¹⁴⁰ *Id.* at 446.

It is not clear what Zhuangzi meant by “people can reason with one another.” Perhaps he had in mind that after all the extrinsic rules and authorities were removed, a person would be able to follow his own way and appreciate that others should be allowed to have their own ways as well. When all people became so reasonable, the order of nature would be restored, the utopia reestablished. If in this process of transformation a person were still there as a ruler, his best course, according to Zhuangzi, was to do nothing (*wu-wei* 无为), because this transformation had to happen by itself, no one could by any action push it. The task was just too enormous, to ask anyone to take it was like “making a mosquito carry a mountain” (*shi wen fu shan* 使蚊负山).¹⁴¹ The person in the ruler’s position should therefore stay aloof. His relationship with the people should be like a high bough and a wild deer (*shang ru biao-zhi, min ru ye-lu* 上如标枝, 民如野鹿)¹⁴² – each having little to do with the other.

Here the author sees that Zhuangzi’s views departed from Laozi’s again. One can remember that Laozi also talked about *wu-wei*, but it was only a facade. Because he had little trust in the common people, his true sage-ruler had to lead the people back to the utopia and keep them there with the “nameless substance”. Zhuangzi was entirely different. He had complete confidence in and full respect of the people, believing that they would be fully capable of caring for themselves if left alone. Extrinsic norms and authorities were entirely superfluous and harmful. When they were eliminated, the people would automatically be in paradise.

Zhuangzi was therefore an optimist. The trouble with his theory stemmed from his imaginary state of nature. But his more serious problems were how to eliminate norms and authorities, and how, after norms and authorities were eliminated and the people were back in the state of nature, to keep them there and prevent them from falling out again. What made them fall out previously? To blame the “sages” and the rules they made is only to push the question back another step, forcing one to ask: who were the sages, what made a person a sage? Laozi characterized a “sage” as a person with an ability to see “the Way”; Zhuangzi believed everything had an ability

¹⁴¹ *Id.* at 131-32, 168.

¹⁴² *Id.* at 199.

to recognize its own way. Both of them called this ability “intellect” (*zhi* 智) and both denied it having an external origin – it was inborn. If so, the question is: how could this inborn ability be discarded? If it could not be, then even if it could be suppressed for a while, it would reemerge again, and some “sages” would once again cause people to fall out of the paradise. If another campaign had to be launched to eliminate the sages and force people to discard their intellect again, the circle would be completed and the cycle would start anew. It would be a never ending Sisyphean effort. Laozi had a solution to this problem – the authorities would use the “nameless substance” to permanently keep human intellect from emerging again. But that troubled Zhuangzi. In his paradise, as mentioned above, the people and the authorities, if any of the latter were still left, had little to do with each other. But this idyllic coexistence did not offer a solution to the problem of what to do with the reemerging intellect.

Moreover, Zhuangzi knew that this coexistence would not be realized soon with ease. He knew that since ancient times the authorities had never really left people alone to pursue their own ways. He reported a number of cases where people were pressed to serve the rulers, and he was afraid that such cases would appear repeatedly. So in the foreseeable future, common folks would continue to be oppressed by the authorities. Zhuangzi reminded them of the preciousness of freedom and advised them not to lose it in exchange for rewards from the authorities. If the pressure increased they should escape, if it became too great it would be better for them to disappear into the wilderness or even commit suicide than to succumb and become “upside-down people”,¹⁴³ (*dao-zhi zhi min* 倒置之民, i.e., people with their priorities wrongly placed). To most ordinary people, these suggestions might seem drastic, but to those who cherish freedom as much as Zhuangzi did, they were quite wise and acceptable. In any event, they were better than the advice offered by Laozi, namely, to be treated by the authorities as straw dogs, or dumb infants, or as sheep blindly following a shepherd to a land of ignorance and obsequiousness.

¹⁴³ *Id.* at 246-47.

What contribution did Laozi and Zhuangzi make to Chinese legal philosophy? They taught people a healthy cynicism about the authorities and a critical view of man-made rules. Zhuangzi's assertion of relativity in all things helps every person (especially the unfortunate and downtrodden) find his own value and regard it as no less significant than that of any other person. This consciousness would make a person willing to stand up against abusive power in defense of his freedom; this consciousness is the basis of a society of individual rights and human dignity.

C. Theories of the Legalists

The Legalists, so labeled because the great emphasis they placed on law, came shortly before the imperial Qin dynasty. Among them two, Shang Yang (商鞅, 390-338 B.C.) and Han Fei (韩非, 280-233 B.C.), produced two substantial works – *Shangjun shu* (商君书) and *Han Feizi* (韩非子) – espousing basically the same ideas and will therefore be discussed together.

When the Legalists were establishing their school, the Confucians and the Daoists were already popular. Shang Yang and Han Fei found all of their views disagreeable. But while being critical of many aspects of those schools, they did not hesitate to borrow from those ideas that supported their own.

The time of Shang Yang and Han Fei, known as the Warring States period (467-221 B.C.), was in Han Fei's words, "a time of great strife" (*da-zheng zhi shi* 大争之世),¹⁴⁴ during which scores of states engaged in constant military conflicts that ended in 221 B.C. When the State of Qin vanquished all of its rivals and created a unified country, China. Under these circumstances, a state had to hastily mobilize its people and make them act in unison to fight for its survival. According to the Legalists, this could only be achieved through implementation of a set of norms made by a single person and enforced by him and his agents with force. In their view, those norms were laws and that person was the ruler of the

¹⁴⁴ 王先慎, 韩非子集解 in 18 新编诸子集成, Wang Xianshen, han fei zi ji jie [THE COLLECTION OF EXPLANATIONS ABOUT HAN FEI ZI] in 18 xin bian zhu ji zi cheng [THE NEW COLLECTION OF MANY SCHOLARSHIPS' WORK] 327 (1978) (Taiwan).

state. Thus they wanted to make laws not only the supreme norms but the only norm recognized by the state and observed by the people, and they wanted the state ruler to have absolute power over his subjects, aristocrats as well as the commoners. They dismissed other norms, particularly morality and the rites, not only as impractical but actually harmful. This point is not easy to see, its reasoning needs to be examined.

Han Fei was a student of Xunzi. Like his teacher he believed that people had in common certain inclinations and needs – they got hungry and cold, they needed food and clothing¹⁴⁵ – and from these facts a person developed “a heart seeking self-interest” (*zi-li zhi xin* 自利之心) and a “calculating heart” (*ji-suan zhi xin* 计算之心).¹⁴⁶ People also faced a common threat arising from growing population and diminishing resources. To survive they inevitably had to compete against one another, regularly people in different positions fought a hundred battles a day (*shang-xia yi-ri bai-zhan* 上下一日百战).¹⁴⁷ In times of hardship, this competition could be so fierce that a person would leave his younger brother to starve; and, looking at their own long term interests, parents would kill their infant daughters.¹⁴⁸

In any battle, an army would need a commander with a right strategy and a set of clear commands for the soldiers. It was also true with a state in a time of great strife. To the dismay of Shang Yang and Han Fei, rulers of most states of their time were clueless. Representatives of numerous schools of thought would offer their advice, each claiming that his ideas and suggestions could help make a state strong in foreign relations and prosperous and peaceful at home. The ruler often did not know whom to believe; often he would honor the Confucians, admire the Daoists, and become captivated by many others. The trouble, to begin with, was that some of these ideas were self-contradictory. For instance, observed by Han Fei, the Confucians hailed both Yao and Shun as great sages, but when Shun, a commoner, was reportedly solving various

¹⁴⁵ *Id.* at 106-07.

¹⁴⁶ Han Fei gave numerous examples to illustrate this point. *See id.* at 83, 84, 173, 204-06, 294, 304, 319, 340, 356-57.

¹⁴⁷ *Id.* at 34; *see, e.g., id.* at 83-84, 184, 292, 305, 308-312, 358..

¹⁴⁸ *Id.* at 319, 340.

problems and helping the distressed people, where was Yao, the ruler? If Yao was a true sage-king, people would have been living in bliss and there should be no problems left for Shun to solve; if there were problems, Yao could not have been a sage-king. Hailing them both was to make a self-contradicting oxymoronic statement (*mao-dun zhi shuo* 矛盾之说) like one made by a seller of spears (*mao* 矛) and shields (*dun* 盾), alleging that his spears could pierce any shield and his shield could repel any spear.¹⁴⁹

In fact, many of the schools were in conflict with one another. For instance, the Confucians demanded rich burial and long mourning for one's deceased parents, but the Moists practiced the opposite. Han Fei points out that one who took the Confucian advice would be criticized by the Moists as extravagant; one who followed the Moist practice would be condemned by the Confucians as un-filial.¹⁵⁰ When all these conflicting ideas (*za-fan zhi ci* 杂反之辞) were trumpeted simultaneously, the cacophony caused great confusion and dissension among the people.¹⁵¹ If a ruler upheld them all, what would happen to his people? They would, Han Fei said, be idle, not knowing what to do, or go astray – like a horse, being whipped and yet reined back and thus unable to step either forward or backward, would walk erratically sideways.¹⁵² If a ruler chose to support one school of thought, immediately he would be denounced by adherents of other schools. What he wanted to promote would be rejected by some people; what he wanted to prohibit would be cherished by others. With this kind of contradiction between the ruler and the ruled, a state could not be governed even if it had at the helm ten sages like Huangdi (黄帝), the legendary first king of the Han people.¹⁵³

In any event, as Han Fei saw it, rulers did not have much of a choice. None of the ideas and suggestions proffered by the schools other than his were quite effective for solving the problems the states faced. Among the ideas and suggestions, the most popular but least

¹⁴⁹ *Id.* at 265.

¹⁵⁰ *Id.* at 351-352.

¹⁵¹ *See id.* at 301, 314-17, 318, 324-25, 337, 343-44, 345-46, 351-53 (examples of Han Fei's observation on this phenomena).

¹⁵² *Id.* at 261.

¹⁵³ *Id.* at 344.

practical were those of the Confucians, advocating that compassion and love could make the world better. According to Han Fei, the ancient sage-kings generally loved all people of the world (*jian-ai tian-xia* 兼爱天下) like parents loved their children. But even the most loving parents could have rebellious offspring.¹⁵⁴ The Confucians emphasized benevolence and rightness, but Confucius himself had only seventy true believers. If a ruler were to succeed in using benevolence and rightness as the guiding principle for his government, he had to be as good as Confucius, and all his people had to be as good as the seventy believers.¹⁵⁵ Thus those who hailed benevolence and rightness were unable to solve any problem; they were like kids at play, using dirt for rice, mud for soup, and wood for meat; but when it was late and they were hungry they would have to go home for dinner.¹⁵⁶ So all those ideas were just like the prayers of shaman priests – pleasing to the ears but useless for any practical purpose.¹⁵⁷

Compassion and benevolence, according to Han Fei, were not only useless as guidelines for good government, they actually caused great harm. First of all, being compassionate and benevolent a ruler would be ready to bestow benefits on those who were without merit, and hesitant to inflict punishment on those who were guilty (*shang wu-gong, bu zhu guo* 赏无功, 不诛过). That was a recipe for disorder.¹⁵⁸ Second, being empathetic and gracious, lowering his status to that of the common people and behaving just like them, a ruler made them lose the awe and respect for the authorities, another formula for inducing disaster.¹⁵⁹

Similar views were expressed earlier by Shang Yang more succinctly. He condemned kindness and benevolence as “the mother of transgressions,” (*ci-ren, guo zhi mu ye* 慈仁, 过之母也);¹⁶⁰ the rites and music as “the symptoms of excess and license” (*li-*

¹⁵⁴ *Id.* at 342.

¹⁵⁵ *Id.* at 342-43.

¹⁵⁶ *Id.* at 204.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 74, 169, 274, 284-85, 328-29.

¹⁵⁹ *Id.* at 270.

¹⁶⁰ See 严万里, 商君书新校正 in 5 新编诸子集成 10 (世界书局 1978) (1958), Yan Wanli, *shang jun shu xin jiao zheng* [THE NEW CORRECTION OF THE WORK OF SHANG JUN] in 5 *xin bian zhu ji zi cheng* [THE NEW COLLECTION OF MANY SCHOLARSHIPS' WORK] 10 (shi jie shu ju [World Book Store] 1978) (1958) (Taiwan).

yue, yin-yi zhi zheng ye 礼乐, 淫佚之征也);¹⁶¹ various other moral principles – filial piety, brotherly love, sincerity, faithfulness, etc. – and the Confucian classics that exalt them, as “Six Parasites” (*liu-shi* 六虱)¹⁶² that sucked the blood of society; and those who advocated them as various “insects” (*ming te qu zhu* 螟螣蚱蜢) that destroyed people’s food.¹⁶³ Shan Yang insisted that a different set of rules was needed. It should be created by someone with a different perspective, on different premises, for different objectives, and enforced in a different way. The creator was to be a sage, or a bright ruler of extraordinary intelligence (*ming-zhu* 明主).¹⁶⁴ He would act on the premise that the people were interested only in their personal gains of fame and profit (*ming li* 名利), and therefore could not be made compassionate and righteous, but could be led to do what they thought to be in their interest.¹⁶⁵ His objective was to make the state rich, strong (*fu-qiang* 富强), and victorious in its strife for survival, and to achieve that his immediate tasks were to make the people engage in agricultural work and serve in the military.¹⁶⁶

To accomplish these tasks the ruler should “open only one door” (*qi yi men* 启一门) – to reward those doing agricultural work (which was hard) and military service (which could result in death) with enough benefits, including wealth, social status and government positions; and to “block all unauthorized paths” (*sai si dao* 塞私道) – to penalize those who avoided agricultural work and military service and engaged in propagating the ideas of the various other schools, or doing commerce or crafts, by barring them from taking offices, slapping on them heavy taxes, prohibiting them from traveling. . . .¹⁶⁷ All these measures would be promulgated in the form of *law*. In turn, law was to be the supreme norm – once a law was made, words not in accordance with it were not to be

¹⁶¹ *Id.* at 14.

¹⁶² *Id.* at 23.

¹⁶³ *Id.* at 6-7.

¹⁶⁴ *Id.* at 24, 33.

¹⁶⁵ *Id.* at 13, 15, 30, 33.

¹⁶⁶ *Id.* at 5-7, 13, 18, 41..

¹⁶⁷ *Id.* at 3-5, 11, 18, 28-30, 31, 37-38, 41.

heeded; actions not in accordance with it not to be rewarded; deeds not in accordance with it not to be done.¹⁶⁸

To enforce law, Shang Yang made many suggestions, including, first of all, that people should be presumed wicked not innocent;¹⁶⁹ second, that a person should be punished before his criminal scheme was carried out, and for that purpose everyone should be required to report on the schemes of others;¹⁷⁰ third, that all persons with some connection with a culprit were to be given severe collective punishments;¹⁷¹ and finally, that prohibitions should be numerous and punishments against minor offenses should be heavy, so that people would not dare to commit even petty crimes, let alone more serious ones. As a result, none would be punished, this was what Shang Yang called “using punishments to eliminate punishment” (*yi xing qu xing* 以刑去刑).¹⁷²

Han Fei endorsed all those points and went further, alleging that while in making laws a ruler should take into consideration the desires of the people but should realize that the masses, though clear about their own needs, were dumb and incapable of knowing what causes problems, and he should therefore do what was good for the state, even though it was against the will of the populace.¹⁷³ Han Fei characterized law as a coercive device, similar to a timber-straightening machine (*bang-qing* 榜檠), or a hammer and an anvil (*zhui-duan* 椎锻),¹⁷⁴ and the punishments and rewards as “two handles” (*er-bing* 二柄) for the ruler to control the people,¹⁷⁵ which should be used correctly (*dang* 当) – rewarding only those who had merits and punishing only those who committed wrong.

Han Fei did not approve proportional rewards and punishments. Instead, he argued that matching the severity of punishment with the seriousness of crime, as advocated by the Confucians, was a way to induce more crimes because an offender, after careful calculation, would conclude that if he got caught he would not lose more than he

¹⁶⁸ *Id.* at 22, 39.

¹⁶⁹ *Id.* at 10.

¹⁷⁰ *Id.* at 17.

¹⁷¹ *Id.* at 29.

¹⁷² *Id.* at 9, 11, 24, 29-31.

¹⁷³ See 王, WANG, *supra* note 145, at 72, 87, 356-57.

¹⁷⁴ *Id.* at 259.

¹⁷⁵ *Id.* at 27.

knew he would; and since it was uncertain that he would be caught, the risk was worth taking. Therefore, Han Fei justified prescribing heavy punishments against minor offenses as a way to prevent serious ones. To illustrate this point he used metaphors: Even a most avaricious and reckless robber would fear for his life and not descend into a bottomless canyon to pick up some gold (*tan-dao bu fu xi er duo jin* 贪盗不赴溪而掇金).¹⁷⁶ To make the point clearer Han Fei observed that a person would stumble and fall over a lump of earth but not over a mountain (*bu zhi yu shan er zhi yu die* 不蹶于山而蹶于垤)¹⁷⁷ – in other words, while people might ignore a minor penalty and commit a crime they would never do so if the punishment was extremely harsh.

Finally, Han Fei advocated that law should not only be the supreme norm but the only one. In his words: “In the state of an intelligent ruler there were no books of learning, law supplied the only instruction; there were no sermons of the former kings, the officials served as the only teachers. When the people of such a state made a speech, they said nothing that would contradict the law. . . . Therefore in time of peace the state was rich; in times of trouble its armies were strong. These were what were called the resources for the ruler to become a true king.”¹⁷⁸

If law was the only norm, it should be binding on everyone. This principle was recognized by Shang Yang and Han Fei. But both made a twist – Shang Yang advocated “uniform application of punishments” (*yi-xing* 一刑), and maintained that “from great ministers and generals down to ordinary folks, whoever does not obey the king’s commands, violates the prohibitions of the state, or infringes a statute established by the ruler, should be punished without mercy;”¹⁷⁹ Han Fei said more concisely: “When faults are to be punished, the highest minister cannot escape.”¹⁸⁰ Thus there was no specification that everyone was equal under the law – they did not mention the ruler. In effect, the unspoken Legalist position was that law should be applied to everyone other than the ruler and the heir

¹⁷⁶ *Id.* at 150.

¹⁷⁷ *Id.* at 322.

¹⁷⁸ *Id.* at 347.

¹⁷⁹ See 严, YAN, *supra* note 161, at 29.

¹⁸⁰ See 王, WANG, *supra* note 145, at 26.

apparent – they were above it. This point was illustrated in the case where Shang Yang, as the chief law-enforcement officer, punished the teachers of the crown prince of state of Qin instead of the prince who committed a crime.¹⁸¹ In another case reported in *Hanfeizi*, where the crown prince of the state of Chu, in violation of a law ordered his chariot driven through the main gate of the king's palace, the chief judge punished the driver but not the prince, who, with the permission of the king, escaped through a back door.¹⁸²

Thus, according to Shang Yang and Han Fei, when governed fully in accordance with their principles, a state would be freed from competing and conflicting norms, and the ruler would have no rivals. There would be no norms other than law, and no other authority than the ruler. Thinkers of various other schools and their theories would no longer be competent, and the powerful aristocrats and officials would be reduced to mere servants of the ruler. Everyone other than the ruler would have to abide by law, play a role assigned to him by law, and function as a part of a well-oiled machine, orderly and efficiently. The state would become rich and strong, ready to win wars against any enemy.¹⁸³

Obviously in such a state, the relationship between the people and the authorities, particularly the ruler, was entirely different from what Zhuangzi imagined. It was also different from what the Confucians advocated. First of all, while the Confucians believed all people were by nature good or capable of becoming good if given the proper education, the Legalists had little regard for the common people. Han Fei alleged that because of their solipsistic and calculating “hearts” people were narrow-minded, myopic and stupid,¹⁸⁴ and therefore incapable of taking care of their own long-term interests. This view was shared by Shang Yang who said that before the emergence of a ruler the people were constantly fighting among themselves; their lives were miserable and perilous; the ruler was there to save them from self-destruction and to help establish

¹⁸¹ 司马迁, 史记 920 (吴书平ed., 2009) (112 BC), Sima Qian, shi ji [HISTORICAL RECORDS] 920 (Wu Shuping ed. 2009).

¹⁸² See 王, WANG, *supra* note 145, at 243-44.

¹⁸³ See *Id.* at 153-56, 298; 严, YAN, *supra* note 161, at 32, 43-44.

¹⁸⁴ An example to illustrate his point Han Fei said that when Yu 禹 tried to save the people from great flood by building drainages and discharge channels they blocked the flow of the water with tiles and stones. *Id.* at 356-57.

domestic peace and repel foreign aggression. For these purposes, Shang Yang suggested that the people had to be kept foolish (*yu* 愚), weak (*ruo* 弱), inferior (*ru* 辱), conquered (*sheng* 胜) and completely under control (*zhi* 制). In other words, they should be domesticated like animals. Indeed, Shang Yang alleged that a ruler should know how to make people gather their strength (*tuān-lì* 挾力) and use it up (*sha-lì* 杀力) in pursuing his objectives¹⁸⁵. The tool he would use was *law*. He would be in absolute command and his subjects would not dare to challenge him.¹⁸⁶ He could rule well while relaxing on his couch listening to music.¹⁸⁷

Han Fei also said that the ruler ought to use law as a hammer and anvil to mould the people into the shape he wanted them to be; to take advantage of his exalted position (*shi* 势) to enforce law; and to apply ingenious tactics (*shu* 术) to control his real and perceived enemies, including constantly spying and using ruthless punishments on them. When these steps were taken, the ruler would be unassailable, and no one would dare to oppose him. He would stay on top of things and appear as if not having much to do, but his subjects would be trembling in awe under him.¹⁸⁸ In addition Han Fei preached as a “normal rule under the Heaven” (*tian-xia zhi chang-dao* 天下之常道) that a subject should serve his ruler as a son should serve his father, a wife serve her husband, and therefore even in a case where a ruler was unworthy, his subjects should not offend him. The dominance-subservience relationship should never change. It was like hats, though threadbare, were to be worn on the head; and shoes, though embroidered, were to be trodden under the feet.¹⁸⁹

In short, Shang Yang and Han Fei found people to be incapable of managing their own affairs; they must be led and controlled by deceit and force. This position was in opposition to Zhuangzi’s that was characterized by a relativist view of everything’s value, a respect

¹⁸⁵ See 賈, YAN, *supra* note 161, at 6, 11-12, 18, 31, 32, 35, 43-44. Doesn’t Shang Yang sound here like a trainer of racing horses who would make them grow muscles and then drive them hard in order to win prizes and avoid them becoming fat and lazy?

¹⁸⁶ *Id.* at 32.

¹⁸⁷ *Id.* at 33.

¹⁸⁸ *Id.* at 18, 221.

¹⁸⁹ *Id.* at 224.

for the individual, and an abhorrence of collectivist and dictatorial social-political system with arbitrary rules. It was also in conflict with the Confucians' that, while emphasizing the need of social authority and norms, insisted on nurturing and educating the individuals, making them the solid building blocks of a good society. The Legalist position was in fact an eerie reflection of those of Laozi, who also distrusted the common people and insisted that society needed a true sage-ruler who would make all the rules and enforce them ruthlessly – with deceitful tactics and force if necessary.

What does one learn from the Legalists? Their criticism of the Confucian theories did have its merits. To say the least, the Confucian approach was indeed painstakingly slow and might not effectively remold everyone. In addition, their advocacy of coexistence of many categories of norms and their assertion that some norms were superior to others (even those in the same category) did cause confusion. But were the measures proposed by the Legalists a viable alternative? Surely, the establishment of a legal system was necessary and to make law applicable to everyone was a right move. Although allowing the ruler to stay above law was a serious flaw to the system, it could be argued that this exception did not necessarily mean that the ruler would carelessly break his own laws often. In fact, he would probably abide by them most of the time. In other words, establishing a system of law could have a constraining effect on the ruler. More troublesome was that the measures made power concentrated to one person and the law was the only norm. If implemented, these measures might mobilize the people and suppress disorder in the short term, but success would not be long lasting given the defects in the theory. Some of the problems were foreseen by the Confucians. For instance, the requirement of people to inform the authorities of the crimes committed (or plotted) by close relatives would destroy the basic trust among people and break social cohesiveness. Other problems, for example, the use of severe punishments as a means to deter crime, were criticized by the Daoists. However, one particularly serious problem was made clear by the Legalists themselves: in order to make law the only or the supreme norm, it had to be comprehensive, reasonable, in agreement with human feelings and leading to a goal accepted by the people. It was an

extremely tall order. The law-maker had to be extremely intelligent and wise. Even after the laws were established, application and enforcement were not easy. Han Fai argued that an “average ruler” (*zhong-zhu* 中主) who could hold on to his position and uphold law (*bao-fa chu-shi* 抱法处势) would be able to administer justice.¹⁹⁰ But considering the lengthy discussion he made on how the ruler had to fight “a hundred battles a day” against his scheming subjects, that assertion was not defensible. If the law was to be properly implemented, the ruler, being its final enforcer, had to be vigilant at all times. In fact, both Shang Yang and Han Fei admitted that an effective ruler could not be an “average” person. He had to be, in their words, a “brilliant master” (*ming-zhu* 明主), a sage (“*sheng-ren* 圣人), a “sagacious lord” (*sheng-zhu* 圣主), or a “bright ruler” (*ming-jun* 明君).¹⁹¹ How could the Legalists get such a ruler?

The Confucians also talked about the need of sagacious rulers, yet in two aspects their theory was different from that of the Legalists: First the Confucians believed that ordinary people could by education, reflection and self-discipline become sagacious, thus they said, “Everyone can become a Yao or a Shun.” (*ren jie ke wei Yao Shun* 人皆可为尧舜).¹⁹² The Legalists had no such belief. Their sage had to be born as such. Second, the Confucians allowed the ruler a limited role – it was mainly that of a role-model leading the people to build a good society from the ground up. The ruler required by the Legalist theory was far more extensively involved in the details of building a society from the top down – besides being a general administrator; he had to be the law-maker, the judge and the law-enforcement officer.

The Legalists’ admission of the need for a man at the top of the state was self-defeating; it made their theory untenable. Lacking such a man, the law could be arbitrarily made, wrongly applied and ineffectively or unjustifiably enforced leading to injustice. Ultimately, the ideal Legalist state would collapse.

Why did the Legalists, having had the opportunity to study the theories of the other schools, decided to make their own in such a

¹⁹⁰ *Id.* at 299-301.

¹⁹¹ *Id.* at 1, 2, 6, 14, 18, 24, 25, 27, 30, 33, 43, 154, 293, 301, 313, 324, 347, 355.

¹⁹² See 焦, JIAO, *supra* note 30, at 477-481; 王, WANG, *supra* note 86, at 39-40.

defective form? It was because, like Zichan long before them, they wanted a quick fix to the problems of their time – the chaos caused by conflicting norms and competing centers of power. The trouble with their approach was that they had neither a vision, nor a plan for a future beyond improving the material welfare of the people and the strength of the state. This shortsighted view and unfortunate consequences were pointed out by Shuxiang and Confucius and recognized by Zichan. Obviously the wisdom of the three wise men was not appreciated by the Legalists.

IV. THE THEORIES AND THE DEVELOPMENT OF TRADITIONAL CHINESE LEGAL SYSTEM

The combination of factors – social, political, economic, ideological, etc. influenced the development of the traditional Chinese legal system. The author will only discuss very briefly the influence of the classical theories of norm in this article. When society faces serious problems, thinkers would suggest solutions and construct theories explaining and justifying the solutions. A theory becomes influential only when those in power for implementation choose it. Its actual effects are produced through the interaction of the implementers and those whose life is affected by it. In the case of the development of the traditional Chinese legal system, the major thinkers were the Confucians, the Legalists, the Daoists; the power holders were the rulers (kings, emperors and their ruling cliques); the implementers were those in the government who drafted laws and applied them; the great majority of people affected by the implementation were the common people.

The four groups had different interests and agendas. Rulers appeared in different stripes – some had the interest of the nation in heart and tried conscientiously to increase the strength of the state and improve the welfare of the people, others cared less, but practically all of them wanted to protect their prerogatives and privileges. For this purpose, there was a common inclination to grab more power at the expense of ordinary government officials, community leaders and the people.

The interests of intellectuals were diverse. The Legalists, wishing to create a state that was united at home and victorious abroad, wanted to concentrate power in the hands of the ruler and to

make and enforce his commands the only law of the land ruthlessly. The Confucian model was a harmonious society where every person would have a place suitable to his ability, enjoy certain benefits offered by that society, and bear certain responsibilities toward it. To realize this, everyone should receive an appropriate education that would enable them to pursue that ideal. They argued that in this pursuit, there were norms higher than man-made laws to observe, therefore, they wanted man-made laws to be in line with the higher norms, the power to make and enforce law to be limited, and all human relationships to be reciprocal in principle.

Contrary to these two schools of positive thinking, the Daoists were pessimistic. They did not believe humans could solve social problems; they wanted people to return to a primitive state. For this purpose, Zhuanzi wanted all man-made rules to be discarded and the authorities to leave the ordinary people alone. He advocated nihilism and anarchy. Prima facie, *Laozi* seemed to agree with this view. But a more careful examination reveals that while he attacked the existing government, he actually wanted to establish an authoritarian rule in disguise.

Unsurprisingly the rulers welcomed the Legalist theory and agenda, and parts of those of the Daoists. The state of Qin implemented Shang Yang's policies, became strong and victorious against its rivals, and finally established the dynasty of Qin (221-205 B.C.). Its laws, drafted largely by him, were laws made for the unification of China and were rigorously enforced. As a result, "convicts in red garments [serving as slave laborers] jammed the roads, and prisons, filled with inmates, were as crowded as market places" (*zhe-yi sai-lu, ling-yu cheng-shi* 赭衣塞路, 圜圉成市).¹⁹³ In addition to his draconian laws, he was the first emperor ruled by arbitrary decrees. In 229 B.C., he, following the advice of Prime Minister Li Si (李斯), a Legalist, ordered the burning of *Shi-jing*, *Shu-jing*, and the works of all schools, except those on medicine, divination, and horticulture. Law was one of the few approved subjects. Anyone who wanted to know law could learn it from an official. Most Confucians were killed after some of them criticized

¹⁹³ 桓宽, 盐铁论 (王利器 ed., 1978) in 7 新编诸子集成 56 (1978), Huan Kuan, Yan tie lun (Wang Liqi ed., 1978) in 7 xin bian zhu zi ji cheng [NEW EDITION OF THOUGHTS OF IDEOLOGISTS IN ANCIENT CHINA] 56 (1978) (Taiwan).

Qin. Thus the triumph of the Legalists was complete. Moreover, they seemed to be implementing the Daoist teaching of terminating the false sages and suppressing people's intelligence. Indeed, the two schools were in agreement that ordinary people should be made dumb and docile.

Mercifully the Qin was short, overthrown by a popular uprising that ushered in the Han (260-24 B.C.). The first few emperors of the new dynasty, having learned the lesson from the Qin, followed Zhuangzi's teaching of not doing much and only loosely applied criminal law. Over a century later, many Confucians were brought into government, although those actually managing governmental affairs were still men with the Legalist views. In the 80 B.C. the emperor ordered a debate between the Confucians and the Legalists over many practical issues and the general principle of government. The Confucians seemingly won but caused only a few changes in government policy. The emperors honored the Confucians but kept the Legalists in important government positions. This practice of being Confucians in appearance but Legalists in substance (*yang-ru yin-fa* 阳儒阴法) was followed by many rulers of later periods.

Though not fully in power, the Confucians strived to influence the socio-political development in China, particularly, they attempted to dissipate the concentration of power, which was adopted by the Legalists. They believed that absolute power was wrong and dangerous and endeavored to modify the criminal code that was initially drafted by the Legalists because they considered many of its provisions cruel and counterproductive to the creation of a harmonious society. The first attempt largely failed. The rulers continued to accumulate more power, including that over administration of justice, and became extremely authoritarian. The second attempt was more fruitful, resulting in "the Confucianization" of the criminal law. What they did included eliminating a number of cruel punishments; lifting the ordinary people's responsibility to report actual or potential crimes; granting leniency to the old, the young and the disabled; making procedural law, particularly the law of evidence, more reasonable; prescribing finer gradation of punishments to match the seriousness of crimes. In addition, they introduced a large number of provisions giving special consideration to family relationships and establishing special behavioral rules for family members. But their success, though impressive, was not

complete. Many harsh provisions remained in the code; torture was still allowed even though it was subject to some restriction; the rulers imposed upon the family contained many onerous burdens, including most noticeably the collective responsibility for some crimes committed by family members.

Certain Confucian jurisprudential ideas produced even more profound impacts on the legal system. First of all it was the idea that man-made laws were inadequate and defective and thus the application of laws always needed interpretation and supplementation, which could only be done in accordance with reason and principles of morality. The second idea was that laws had to be applied with compassion because they were often arbitrary and unnecessarily harsh. These ideas were popular. Throughout Chinese history, many judicial officials interpreted laws liberally to avoid their rigidity or harshness and to achieve equitable or merciful results. This effect was especially clear in capital cases. Many judges admitted that their purpose was to “save those alive not those already dead” (*jiu-sheng bu-jiu-si* 救生不救死).

The Confucians made another, even greater, impact on the legal system by helping the common people to create a second dimension or component to it. The first one, which had been discussed previously, was established by those in the government which was official and formal. The common people accepted it passively, participated in its operation reluctantly and were largely dissatisfied with it. Consciously or unwittingly they followed the teaching of the Daoists, particularly Zhuangzi, and tried to avoid that system and manage their own affairs without the help and interference of the authorities.¹⁹⁴

In order to maintain some degree of autonomy, the people established many self-governing organizations, including clans, villages, guilds, professional associations, religious congregations, and secrete societies. Every organization had a charter which included provisions spelling out the rules governing the behavior of

¹⁹⁴ The author specifically found many lawsuit records in the archives of some Qing local governments. But analysis reveals that many of the initial complaints were filed by a small number of persons known as “litigious scoundrels” *hao-song zhi-tu* 好讼之徒, or by persons who wanted to have their cases formally accepted but not actually tried by the magistrate, a practice known as *tu-zun bu-tu-shen* 图准不图审 so that they could compel their opponents to come forward for an out of court settlement. Thus the records could not sufficiently support a refutation of the observation made above.

the members and the procedure for application and enforcement of the rules. The collection of such provisions formed a compendium more comprehensive than the formal code because it included a far greater number of provisions on civil matters such as contracts, property, marriage, family and other relationships, etc. It could be considered as an informal “civil code.” Since most of the charters were drafted by Confucian scholars, this code largely reflected their ideas and ideals emphasizing the achievement of social harmony as a primary objective; and since it were created by the people, its implementation was more effective. Problems from the members or between them and the outsiders were largely and successfully solved by the organizations without resorting to the law and the judicial tribunals. In this way, most of the organizations helped maintain social order and stability and were approved by the government. Through time many types of organizations multiplied in number, each grew in size, and some prospered for centuries. Thus there was a “civil society” in traditional China. It had an informal “legal system” that coexisted with the formal one. More accurately speaking, the two “systems” were dimensions or components of the traditional legal system. They supplemented and complemented each other, making that system more efficient.

Although the Confucians made considerable contribution to the traditional legal system, they also did a disservice to it: they caused the decline of legal education and impeded the rise of a learned legal profession.

The Confucians had a low regard for law, seeing it as a low norm in comparison with the rites and the moral principles; and they were dismissive of the Legalists for being narrow minded, too focused on the immediate results, and “incapable of seeing the big picture” (*bu-shi da-ti* 不识大体). They insisted that only those who understood the limited role law played in achieving the high objectives of a society could make good law and apply it properly. They disparagingly labeled those who had learned the letters of law and applied it mechanically as “petty clerks” (*dao-bi-li* 刀笔吏), and those who provided legal services to private individuals as litigation tricksters (*song-gun* 讼棍). These views and attitudes first emerged in the Han. They caused talented aspirants of government appointments to shun training in law and jobs involving routine law

work. After the establishment of the official civil examination system in the Tang dynasty (618-906), this practice became more obvious. Although the civil examination included a test of law, it was not taken seriously simply because the examination system and society as a whole gave more weight to tests of the Confucian classics. Those who demonstrated well in their knowledge of the texts and their ability to expound on them would pass the examination with honors, receive adulation from the public and acquire good government positions; those who merely did well in the law tests were belittled and assigned to low jobs.

As a result legal education declined. Those who were unable to take the civil examination or had failed to pass it but wanted to work in the government were allowed to serve as low-level officials and clerks and had to learn law as a part of their in-job training. No matter how well they performed, they were denied the opportunity of appointment to higher offices. Without a good career prospect, they abandoned efforts of self improvement and took up a routine of clerical work, involving mainly keeping records and finding the laws in the books and the precedents in the archives applicable to cases to be decided by the officials. While the work was crucial because an important decision had to be based on a law or a precedent, it was tedious and inglorious, with the clerk receiving no credit in the decision he helped make.

Although they had the help of the clerks, officials still had to be able to see the relevance of a law or precedent in a case they were handling. They needed better legal counsel than what the clerks could provide. This need was met by another group of people, the law secretaries. Their background was similar to that of the clerks and petty officials but they wanted a career less mundane, more prestigious and intellectually challenging. They studied law under the tutorship of someone who had legal knowledge – perhaps an experienced clerk or an reputable law secretary. After finishing their study and apprenticeship, they were employed by officials, especially those with judicial responsibility, as their private assistants. In that capacity, they checked the work of the clerks, gave legal advice to their employers and draft decisions for them. They had no official status and no prospect of entering officialdom without taking the civil examination or some other tests specially designed for them. Therefore, their hearts were not wholly in their

job. In drafting decisions they seldom rejected the law and precedents “found” by clerks, because following a law or a precedent was the easiest and safest way for them, as low government functionaries, to do their job. Many used the time saved to study on the side in preparation for the civil examinations. Those who eventually succeeded passing the exams would leave; those who stayed were often dispirited and devoted little time in pursuit of advanced legal education, research and publication.

Thus in the competition for getting their ideas accepted and implemented, the Confucians scored better than the Legalists. However, because they despised law and shunned legal education, they became mere propagators of high sounding principles and incompetent administrators, thereby losing the control of the actual operation of the government, particularly the judicial system, to the clerks and law secretaries. These law specialists formed a legal profession, but it was one of low caliber. Its members kept the legal system going but did not make much contribution to its improvement. The result was unfortunate.

The Daoists also had some impact on the traditional legal system, mainly through their influence on the common people’s view of norms and authority. People apparently accepted Zhuangzi’s ideas that everything had its own value, and values were subjective and relative; that in human affairs, particularly, no proposition could be considered absolutely right or wrong; that facts could be seen from different angles and would appear different; and that everyone could have a different position, and society should be accommodating. They did so not only because his ideas were philosophically appealing, but they also found them in agreement with their life experience – they lived in closely knit communities generation after generation; their relationship were complex and complicated, resulting from a lot of gives and takes. Law, being a simple rule that was to determine right and wrong, was often not up to the job of regulating this kind of relationship. When a dispute between people in this relationship arose, it was very difficult, if not impossible, to have a clear-cut decision that could declare one party to be absolutely right or wrong. Since that was the kind of decision the law required a judicial official to make, people often avoided the formal judicial process. Instead, parties to a dispute resorted to mediation and arbitration to reach an out of court settlement that

would not establish right and wrong or even clarify certain facts, but instead, would enable them and their descendents live together in relative peace. For this purpose, people adopted many rules other than law which created many private organizations to apply and implement the rules, and thus, as it was pointed out earlier, established a second branch of the traditional legal system. Although the rules of this branch were drafted mostly by Confucian scholars, the inspiration and much of the driving force for the establishment of this branch was provided by the Daoists.

The Daoist influence was enhanced by the Dao religion (*dao-jiao* 道教) which claimed Laozi as its patron saint and incorporated some of his teachings in its dogma. It was a polytheistic folk religion with roots in the ancient Chinese belief that gods and spirits interacted with people, rewarding their good deeds and punishing their transgressions against various moral and superstitious rules. This interaction, known as (*yin-zhi* 阴鹭), became more believable after the introduction of Buddhism to China. The Hindu-Buddhist idea of trial after death and karma were particularly attractive to the common people. It provided them a faith that justice would eventually be made. In some extreme cases, an aggrieved, desperate person with this faith would commit suicide in order to bring his complaint to the king of the netherworld for a final judgment. More generally, the faith helped ease the pain many common people suffered under the legal system of this world, enabling them to endure the harsh laws and abusive authorities. In either case, the faith prevented people from seeking redress from the traditional legal system and making efforts to reform it. In this sense the faith had a negative effect on the development of the legal system.

V. CONCLUSION

The development of the traditional Chinese legal system was influenced by the Confucians, the Legalists and the Daoists. It is beyond the scope of this paper to describe the results of their influence more than what has been done above. Nevertheless, the author addresses some questions often asked by people who are not familiar with the system in hope to illustrate some of its distinctive

characteristics and to clarify some misunderstandings. First, was the system mainly penal? The answer is yes and no. The system had two branches, the one created and operated by government authorities was designed largely to maintain public order and was therefore mainly penal in nature; the one created by the people and operated through their private organizations regulating the everyday activities of most ordinary folks was basically civil.

Second, was the criminal law excessively cruel? Again, yes and no. In the Qing dynasty (1644-1911), there were over 840 offenses punishable by death, but for 469 of them the punishment was “nominal death” (*xu-ni si-zui* 虚拟死罪), mostly to be reduced to exile. When the country was largely in peace, the number of persons actually executed was no more than a hundred (out of a population of two to three and half hundred millions) a year.

Third, did the system overemphasize the family and overlooked the individual? Yes, there were laws to protect the family as a social unit and to impose collective responsibilities on its members. But out of more than 1,700 statutes and substatutes in the Qing code only a few scores were of this kind; the remainders were to regulate behavior of the individual.

Fourth, did the system stress too much on people’s duties and made people less conscious about and assertive of their rights? Indeed, in traditional China there was not a character for “rights.” The closest one was *fen* (分 a share). A person who made a contribution to society was awarded a share of its resources (goods, services, positions, status, etc.). He was not born with a share; he had to earn it. In this sense, what one could claim and what society should give were combined; they were the two sides of one thing. A person could claim a right only if he could take the duties attached to it. That being said, it must be added that Chinese people were not unfamiliar with the idea of “human rights.” They believed that every human being had something in common and everyone should treat everyone else as *a human being* like oneself – at least, as Confucius advised, one should not give others something one does not want for oneself; and more positively, one should help others achieve their objective as one wanted to achieve one’s own. Thus, although in traditional China, a person who had not made a contribution to society (an infant, a born invalid) could not claim a

fen, everyone else should nevertheless treat him as a human being like themselves.

Fifth, did the system cause a disrespect of law and a distrust of the judicial process, and if so, would it not be difficult to have a law-abiding society? Yes, the Chinese found law inadequate and regarded the assertion that law should be a norm superior to many others was naive. They also found the judicial process defective and its outcome often unsatisfactory. But these facts did not make them challenge either the law or the judicial process; they used them when advantageous and avoided them when possible. They did not strictly observe the law but they observed many other norms, especially those established by the private organizations they created; and by doing so they usually could live in peace without having a brush with the law. Thus we may say that the traditional Chinese society was not law-abiding but was abiding by many other norms.

Sixth, if the Chinese people shunned the formal legal system and the informal system sought conciliation and compromise, did they not seek justice in social problems? The Chinese believe that for a social problem, facts could be seen in different perspectives, especially if one observed their historical developments; when many other factors, including human relations and feelings, were taken into consideration, it was nearly impossible to get a clear, black and white picture. Therefore in many instances, the parties to a dispute did not seek absolute justice, believing that it was not achievable or even desirable; they preferred peaceful coexistence to formal justice that separate them into winners and losers.

Seventh, if law was not the guidelines for solving social problems and justice not the final objective, would the solutions be too unpredictable, depending too much on the problem solver's personal views and preferences? Would rule of law become untenable? Several scholars have alleged that traditional Chinese judicial process was indeed arbitrary and its result unpredictable. But this is a misperception due to a lack of understanding of the process. Since the Tang dynasty, those who passed the civil examination and became judicial officials usually did not have much training in law. Decisions were normally drafted by government law clerks and private law secretaries. Being basically low rank bureaucrats with no profound knowledge of law and burdened by heavy routine work, they did not relish in writing novel decisions

that required elaborate reasoning; they tried to find apparently relevant laws and precedents and, when successful, applied them mechanically. Their draft would be readily accepted by the trial judge and his superiors because any one of them who rejected it would have the trouble of explaining his position against an applicable law or precedent – a trouble few bureaucrats would take. As a result, decisions on similar cases made by judicial officials in traditional China were actually quite consistent and predictable. This should not be a surprise. Anyone who knows something about how a bureaucracy functions – it always take the easiest and the least troublesome route in doing its job – would find this outcome quite normal.

In addition to the questions analyzed above, there can be many more, but the author will explore no further. Instead, the author takes a bird's eye view of the subject. Generally speaking, with its two branches complementing each other, the traditional Chinese legal system worked to a certain extent. The people who lived under it were not satisfied, but they tolerated it, because they did not expect much of its official branch; they lived largely under the other branch and managed to do so peacefully in many periods of Chinese history, some stretching to several hundred years.

Unfortunately, these facts were unclear to the foreigners and many Chinese. In the late Qing after the imperial powers of both the West and the East triumphed in their aggressive wars against China and imposed upon her their extraterritorial jurisdiction, many Chinese, especially the intellectuals under the influence of foreign critics, saw only the defects of the system and wanted to discard it completely. After each of the two revolutions in the twentieth century, Chinese elites launched a law reform trying to create in haste a system based mainly on Western models, oblivious of the fact that some features of that model were in conflict with Chinese ethos. Moreover, in both cases they failed to appreciate the fact that the Western systems had their own shortcomings and had been constantly evolving in order to adapt to domestic conditions. As a result, the systems introduced by the Chinese reformers never worked smoothly; they encountered open and covert resistance from the ordinary people. Moreover, those systems have not been capable of meeting the challenges of the ever changing conditions in China and the world. Thus more efforts have to be made to

improve the situation in order to create a truly new *Chinese* legal system.

Before embarking on this daunting task, the reformers must find answers to two fundamental questions: What are China's long term goals, and what are the immediate tasks to be assigned to the new legal system? Having found the answers, the reformers have to proceed with caution, keeping in mind that the previous efforts failed because their predecessors did not have enough understanding of both the Chinese and the Western legal cultures. They should learn from past experiences and avoid repetition. A study of the theories that influenced the development of the traditional system should be a good start. There are many pitfalls to avoid, including, first, a state of mind of self-doubt and self-denial induced by China's defeats at the hands of foreign powers; second, an intellectual laziness that impeded careful studies of the problems of China's past; third, a desire prompted by frustration and ignorance to abruptly discard the Chinese tradition, forgetting that while old laws and institutions are relatively easy to change, entrenched ideas and practices are not; fourth, a blind faith in the ideas, institutions, and practices of the West which seem to be responsible for its success in grabbing world power and accumulating material wealth; fifth, a chauvinistic assertion of the Chinese views and values, and a xenophobic rejection of foreign influences; sixth, a temptation to score immediate gains that may jeopardize the long term goal; and seventh, a romantic mindset of using the legal system to achieve absolute justice. In order to create a new legal system that can on the one hand protect the various interests and agendum of different groups of people in China enabling them to live in peace and prosperity together, and on the other hand help make China a respected and responsible member of the international community joining other nations in building a better world, reformers must take into consideration of all good ideas, be it Chinese or Western, old and new, and avoid the pitfalls mentioned above.