

**Aspects of Legalist Philosophy and the Law in Ancient China:
The Ch'in and Han Dynasties
and the Rediscovered Manuscripts of Mawangdui and Shuihudi**

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Confucian thinking espouses a hierarchy of social norms, each one of which is required to maintain social order. These are, in order of importance, *dao*¹ (the Way), *de* (moral precepts), *li* (rites), *xisu* (custom), and *fa* (law). The Confucians of early China believed that law was the lowest of social norms, and in the face of an unclear or inadequate law, each of the superior norms above the law would rule over it. According to the Confucians, certain norms had deeper meaning than others and were therefore more widely accepted and more authoritative. Codified law, being the product of a handful of government officials, rather than the collective reasoning and experience of the entire society's existence, lacked the spiritual or metaphysical weight of the superior norms.² However, in the earliest recorded eras of Chinese history, prior to the advent of the extensive influence of Confucianism, a movement existed which pushed forward what would be considered today a Positive Law school of thought. These early attempts to codify and administer formalized law ran contrary to most of the existing Chinese philosophy on the virtue and morality of the society and would later lapse into a more blended form of social regulation. The extreme brand of legalism which existed during the five centuries prior to the current Common Era gives rise to questions of the nature of and the need for codified law within a society.

¹ As some of my source works pre-date *pinyin* standardization, I mix different romanization systems of Chinese words without discrimination, generally in favor of the original translation text. Where I have come across differing spellings of the same name or term, I offer the variations in the first instance, for example, Taoist (*Daoist*). Certain Chinese scholars have adopted non-standard romanized spellings of their names and I cite them as given.

² Wejen Chang, Introduction to *The Limits of the Rule of Law in China*, Ed. Karen G. Turner, James V. Feinerman and R. Kent Guy (Seattle: University of Washington Press, 2000). Page viii.

Scholars identify four distinct stages in the development of law in early China.³ The earliest period, going back to the eleventh century BCE, was the period of the Zhou (*Chou*) rulers. Later referred to as the “sage rulers” by the Confucians, these rulers enforced laws maintaining fundamental concepts that would retain relevance into the modern era. The earliest recorded instance of rule of law is the *K’ang kao*, a set of instructions issued by King Wu (r. 1049/45-1043 BCE)⁴ to a younger prince for the government of a fief.⁵ The *K’ang kao* espouses a rule preserving filial piety, showing proper respect to one’s father or elder brother, a concept that would dominate later Confucian philosophy and would remain one of the most heinous crimes of China up through the end of the Qing dynasty in the twentieth century.⁶ In the *K’ang kao*, King Wu distinguished between offenses committed deliberately and those committed by inadvertence. In cases of accident or negligence, the offender should not be killed, unlike those intentional offenses. The person who has committed an offense with intent “has acted more wickedly”, and therefore deserves a greater punishment, than one who has offended by mistake.⁷

The *Shang shu* credits King Mu of Zhou (r. 956-918 BCE) with establishing the first systematic legal code. The *Shang shu* (translated: Classic of documents) dates back to the 4th century BCE. This document initiates the criticism by the classical Chinese

³ Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: The University of Georgia Press, 1996). Page 2.

⁴ Edward L. Shaughnessy, “Calendar and Chronology”, in *The Cambridge History of Ancient China, From the Origins of Civilization to 221 B.C.* (Cambridge: Cambridge University Press, 1999). Page 23.

⁵ Herrlee G. Crell, *Origins of Statecraft in China*, Volume I, *The Western Chou Empire* (Chicago and London: University of Chicago Press, 1970). Page 450.

⁶ Joanna Waley-Cohen, “Collective Responsibility in Qing Criminal Law,” In *The Limits of the Rule of Law in China*, *Supra*. Page 117.

⁷ MacCormack, Page 190.

scholars of the role of codified law in Ancient china, "...if he had been a virtuous king there would have been no need for laws."⁸

The second stage begins in the sixth century BCE. The Zhou kingdom disintegrated into numerous warring states. Over time, several of these states inscribed metal cauldrons with their codified penal laws. In 536 BCE, Zi Chan of Zheng announced a law code and inscribed it on a bronze vessel to be displayed in public. It was meant as a dramatic gesture to demonstrate the permanence of the law and to assure the public that the law would be applied strictly according to the code and would be free of government manipulation.⁹ Twenty-three years later, Jin Wen Gong also cast a legal code on an iron cauldron.¹⁰ None of these texts exist today, but are believed to be the first instances where the law was given the role of limiting the authority and discretion of the noble class.¹¹

Chinese philosophers complained that law was being given too prominent a role in Chinese society, at the expense of the hierarchical distinctions between the people and their leaders.¹² Conservative ministers argued that if the commoners knew the legal statutes, they would no longer obey the state authority or respect its traditions.¹³ When Zi inscribed his penal laws, Shuhsiang of Chin criticized the codification and observed that

⁸ Shaughnessy, "Western Zhou History", In *The Cambridge History*, Supra. Page 323.

⁹ Wejen Chang, Introduction, *The Limits of the Rule of Law in China*, Supra. Page vii.

¹⁰ Cho-yun Hsu, "The Spring and Autumn Period", In *The Cambridge History*, Supra. Pages 584-585.

¹¹ MacCormack, Pages 2-3.

¹² Creel, "Legal Institutions and Procedures during the Chou Dynasty," In *Essays on China's Legal Tradition*, ed. Jerome Alan Cohen, R Randle Edwards, and Fu-mei Chang Chen (Princeton: Princeton University Press, 1980). Pages 35, 37.

¹³ Attributed to Shu Xiang, a Jin minister and friend of Zi Chan. Cho-yun, quoting from *Zuo zhuan* (Zuo's Tradition) one of the so-called Confucian writings of the fourth or fifth century BCE, In *The Cambridge History*, Supra. Page 585.

the kings relied on moral virtues to instill principles of good behavior in the subjects, but still found it necessary to have punishments to awe them into compliance.¹⁴ As described by Guy,

“ In China law was an instrument, itself amoral, used by the state to preserve an essentially moral order. ...Far from reflecting any sort of “natural law,” the Chinese statutes had of themselves no particular moral legitimacy; if anything, the need for such a tool as law was a sad commentary on the failure of the natural human propensity for goodness to prevail in the world. Law itself and those who invoked it were legitimate only as long as the tools of government were used to secure moral political ends.”¹⁵

Yet another criticism was that the inscriptions of the codified law onto what were sacred objects gave the law a measure of religious sanction or authority that it did not merit.¹⁶

A continuing theme throughout ancient Chinese legal development is the conflict between preservation of the social hierarchy and the desire to limit the abuses and corruption of upper level officials. Upon learning in 513 BCE of Jin’s casting of the bronze tripod with legal inscriptions, Confucius commented that it would likely lead to the disruption of social hierarchies; treating all the population according to the same terms of punishment is a poor way of government as compared with guidance and demonstration of principles.¹⁷ The degree of implementation of the codified law at the expense of the sovereignty or unfettered discretion of the political elites would distinguish particular eras of the development of law in China.

¹⁴ MacCormack, Page 189, from James Legge, *The Chinese Classics*, volume 5. 1867 (Taipei: Ch’eng Wen, undated reprint).

¹⁵ R. Kent Guy, “Rule of Man and the Rule of Law in China: Punishing Provincial Governors during the Qing”, In *The Limits of the Rule of Law in China*, Supra. Page 88.

¹⁶ Michael Lowe, “The Heritage Left to the Empires”, In *The Cambridge History*, Supra. Pages 1006.

¹⁷ Ibid., Page 1007.

The first administrative law code is attributed to Li Kui. Li Kui was appointed chief minister in Wei some time after 445 BCE and is believed to have authored a work entitled *Fa jing* (Classic of law). Now lost, but referred to in later works of the period, this book was divided into six sections: bandits, brigands, prisons, arrests, miscellaneous punishments, and special circumstances.¹⁸

The third stage was marked with rise of the Ch'in (*Qin*) state above the other warring states and the creation of the Ch'in dynasty in 221 BCE. Considered the most Legalist era in early Chinese history, the Ch'in adopted extensive penal and administrative codes. The concept of controlling the populace at large by legal codes as initiated by Li Kui was adopted by Shang Yang in the formation of the Ch'in code prior to the rise of the dynasty.¹⁹ Shang had served as a household official in Wei, where Li Kui had begun his legal reforms. Seeking advancement, Shang moved to Ch'in and gained the support of Xiao Gong to implement this institutionalized means of control of the population and began his work there in 356 BCE.

A substantial portion of the Ch'in code was discovered in a tomb of a local official dating to 217 BCE.²⁰ These laws imposed severe punishments for violations of the law and no class of person was distinctly immune from prosecution.²¹ The Ch'in law as described by the procedural codes discovered in Shuihudi in 1975 provided elaborate means to control government officials. The Shuihudi documents do demonstrate that the Ch'in considered

¹⁸ Mark Edward Lewis, "Warring States Political History", In *The Cambridge History*, Supra. Pages 589-590.

¹⁹ Ibid., Page 606.

²⁰ Ibid., Pages 604-606.

²¹ MacCormack, Page 3.

class differences in the enforcement of law, but the interest in controlling corrupt officials had really nothing to do with the preservation of human rights or egalitarianism, but with the government interest in preserving its resources. The ruler remained at the top of a “natural” hierarchy that could not be changed.²² The ruler was bound to a predetermined moral order that curtailed “the discretionary latitude of and potential for abuse of power by sage judges...”²³

One of the chief proponents of the adoption of the Ch’in penal codes and a founder of the Chinese Legalist school of thought was Lord Shang, chief minister of the state of Ch’in in the latter part of the fourth century BCE. Shang believed that the ruler must rely on penal law and the imposition of serious punishment to govern the people, including severe punishment for the smallest offenses.

“...punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk whosoever does not obey the king’s commands, violates the edicts of the state, or rebels against the statutes fixed by the ruler, should be guilty of death and should not be pardoned.”²⁴

Punishments were meted out for a wide range of infractions, from violence and theft to the use of nonstandard weights and measures.²⁵

These punishments, brutal by any measurement, included mutilation, the branding of offenders’ faces, castration or the amputation of feet or hands, execution by strangulation,

²² Karen G. Turner, *The Limits of the Rule of Law in China*, *Supra*. Page 8.

²³ See: R.P. Peerenboom, *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (Albany: State University of New York Press, 1993).

²⁴ J.J.L. Duyvendak, *The Book of Lord Shang*. 1928. Reprint (London: Arthur Probsthain, 1963). Page 278.

²⁵ Lewis, Page 612.

beheading or “slow slicing,” enslavement, or exile to the frontier regions that now encompass Nepal and Tibet. Punishment for particularly serious offenses generally involved some sort of tortuous death accompanied by some sort of defilement of the corpse. While it was not possible to avoid judgment for violations, under certain circumstances it was possible to be subsequently “redeemed” by paying a fine.²⁶

Shang believed rulers should delegate their authority to responsible subordinate ministers and officials, while maintaining the “twin handles” of reward and punishment. Moral considerations should not play a factor in the conduct of government.

“ Merit acquired in the past should not cause a decrease in the punishment for demerit later, nor should good behavior in the past cause any derogation of the law for wrong done later. If loyal ministers and filial sons do wrong, they should be judged according to the full measure of their guilt, and if amongst the officials, who have to maintain law and to uphold an office, there are those who do not carry out the king’s law, they are guilty of death and should not be pardoned, but their punishment should be extended to their family for three generations.”²⁷

Shang believed that considering such moral issues would lead to the ruin of the state.²⁸

An important element of the Ch’in penal system was the concept of Collective Responsibility. Traditionally, Chinese defined a person’s identity in relation to others within the society. No individual was considered to be capable of acting independently and certainly his actions were at least representative of the community or family unit in which he existed. Ch’in law reflected this notion by extending responsibility of misconduct beyond the individual. The illegal action of one person could lead not only to

²⁶ Loewe, Page 1008.

²⁷ Duyvendak, Page 278.

²⁸ Ibid., Pages 197, 199.

the prosecution of the original offender, but also the punishment of many others who were guilty by association. These might include family members or household servants, neighbors, and leaders of the offender's community such as the village elders.²⁹

“ Therefore, do I say that if there are severe penalties that extend to the whole family, people will not dare to try (how far they can go), and they dare not try, no punishments will be necessary.”³⁰

Local officials grouped families together in units of three or more and each member of the group was made responsible for the actions of the others. Those who reported their neighbors' crimes were rewarded, while those who failed to report them were punished along with the violator.³¹ This was intended to create a self-policing network that embraced every segment of the society and compelled its citizens to ensure the other's submission to authority and to report and denounce each other's violations.³²

“ Laws cannot stand alone...for when they are implemented by the right person they survive, but if neglected they disappear.... Law is essential for order, but the superior man is the source of law. So when there is a superior man, even incomplete laws can extend everywhere. But when there is no superior man, even comprehensive laws cannot apply to all situations or be flexible enough to respond to change.” Xunzi (d. ca. 210 B.C.E.)³³

²⁹ Waley-Cohen, *Supra*. Page 112. *See*: A. F. P. Hulswé, *Remnants of Han Law*, vol. 1: *Introductory Studies and an Annotated Translation of Chapters 22 and 23 of the History of the Former Han Dynasty* (Leiden: E.J. Brill, 1955). Pages 272-75, cited by Wallace Johnson, “Group Criminal Liability in the T'ang Code,” in *State and Law in East Asia: Festschrift Karl Büniger*, ed. Dieter Eikemeier and Herbert Franke (Wiesbaden: Otto Harrassowitz) 1981. Page 145.

³⁰ Duyvendak, Page 278.

³¹ Lewis, Page 612.

³² *See*: Robin D.S. Yates, “Social Status in the Ch'in: Evidence from the Yün-meng Legal Documents. Part One: Commoners,” *Harvard Journal of Asiatic Studies* 47, 1 (June 1987): 219-31; see also Susan Weld, “Modes of Collective Responsibility in Early China” (paper presented to the Regional Conference of the Association for Asian Studies, Harvard University, October 1989).

³³ *Quoted in*: *The Limits of the Rule of Law in China*, *Supra*. Page 3.

Often a death sentence for a guilty family member could be commuted to exile, premised on good behavior, with subsequent transgressions likely leading to the imposition of the original sentence.³⁴

While Confucianism was known during these early periods, it did not play as significant role in law and government administration as it would later on. The end of the Ch'in dynasty and the rise of the Han dynasty in 206 BCE marked the tempering of pure Chinese Legalism with Confucian values. The Han believed that the overly harsh Legalist tone of Ch'in system, including the use of Collective Responsibility, led to its premature demise.

The Han represented its new legal system as relatively benign, but it was actually more complex.³⁵ The Han recognized the need for penal and administrative laws that facilitated the rule of the state by the emperor through his system of ministers and officials, which were ultimately responsible to him. However, the Han did not adopt the rigorous exclusion of moral considerations from the penal codes or the need to meet small offenses with heavy punishments. The Han also allowed considerations of benevolence and individual merit or social position to weigh in the meting of punishment, which itself was now proportioned to the seriousness of the offense.³⁶

A discovery of a cache of Han era documents in 1973 at Mawangdui gave particular insight into a previously little known school of thought known as Huang-Lao. *Huang*

³⁴ Waley-Cohen, *Supra*. Page 118.

³⁵ *Ibid.*, Page 113.

³⁶ MacCormack, Pages 4-5.

refers to Huang Di, the mythical Yellow Emperor and *Lao* to Lao Zi, the alleged founder of Daoism. Huang-lao was already known to have had a dominant influence over the early part of the Han dynasty, but the particular tenets of its philosophy were unclear prior to this discovery.³⁷ What this discovery has now provided is an insight into what was a sophisticated political philosophy that synthesized classical Daoism with the Legalist movement. One element introduced to the Ch'in legalism is a natural law theory; laws are intended to reflect a natural order of existence, which can be discoverable by humans.³⁸

This is a significant departure from earlier Chinese legal philosophies and can be regarded as a transition between Legalism and the fourth stage of legal development, the emergence of Confucianism as the predominant philosophy guiding Chinese law. Ancient Chinese had accepted that, “because the spheres of man and nature were thought of as forming a single continuum,” violations of codified law not only were offensive to the social order, but also disrupted “the total cosmic order.” Despite this, Natural Law theory at once conflicted with both Confucianism and Legalism. To the Confucians, law itself “was a violation of the social order. Nor could it have started with the Legalists, since these men used law quite consciously to destroy and remake the old social order.”³⁹ Daoism itself rejected codified law as a means of effecting social order.⁴⁰ If the Ch'in dynasty brought forward Legalism in early China at the expense of all other schools of

³⁷ Peerenboom, Page 1.

³⁸ Ibid., Page 4.

³⁹ Ibid., quoting from Derk Bodde and Clarence Morris, *Law in Imperial China* (Cambridge, Mass.: Harvard University Press, 1967). Page 5.

⁴⁰ Ibid., Page 5.

Chinese philosophy, the Han's Huang-Lao began an effort to reconcile this multitude of directly conflicting beliefs.

Another conflict with Legalist philosophy was the well-entrenched Chinese notion of the ordainment of the leaders by the gods as infallible sovereigns. The "mandate of heaven" bestowed upon the ruler provided unquestioned obedience by his subjects and accountability to no one else. But this notion became strained as competing kingdoms struggled for hegemony. It was very difficult to proclaim your divine right as king when your neighbor's cavalry was invading your territory to preserve his divine right. The adoption of new concepts of *zhi* (edict) and *zhao* (decree) lent legitimacy to a ruler's occasionally tenuous position.⁴¹ However, it required a careful prodding by subordinate officials to get their rulers to abide by their own regulations.

"Just results emanated not from sturdy legal institutions but from exemplary "clear sky" officials who in the past summoned up the fortitude to stand on principle in the face of pressure from superior authorities. Some of these model officials did display a remarkable commitment to a notion of public welfare that transcended the ruler's will."⁴²

The success of the dynasty's legal system rested in part on the desire of these high-minded officials to preserve the rule of law in the face of arbitrary actions by their superiors.

Turner cites a story from the Han period in which the Emperor Wendi (r. 180-157 BCE) conceded to the reasoning of his commandant of justice. The official had advised the Emperor that it was inappropriate for him to order a commoner to be punished on the

⁴¹ Loewe, Page 1004.

⁴² Turner, Page 10.

spot. The official's argument was "the law is what the emperor shares in common with his people. If it were made harsher in this case, the people would no longer trust it."⁴³

Ocko cites a similar story from the first years of the Eastern Han dynasty (AD 25-220). A servant of Han Guangwu's (r. 25-58) elder sister had committed a murder in broad daylight. While the identity of the murderer was known to be the servant, no official was willing to enter the princess's home to make an arrest. However, one particularly brave official observed the servant outside the house and arrested him. The princess made a complaint against the official, Dong Xuan, and he was brought before the court for punishment.

Dong asked to be allowed to first speak and then to take his own life. "You have just achieved the restoration of the dynasty; but if you allow a slave to kill a good person," asked Dong, "how can you regulate all under heaven?" The Emperor spared Dong and rewarded him for his wisdom and courage.⁴⁴ Even in post-Maoist China, nearly two thousand years later, this incident would be looked upon as a model for upholding the rule of law,

"Dong challenged the relative and thereby caused the murderer to be subjected to the law. His thought (*sixiang*) and actions naturally served to uphold the Later Han's restoration and assist the son of heaven in ruling the empire, but objectively they also benefited social stability and the development of production, and accorded with the hopes and interests of the masses."⁴⁵

⁴³ Ibid.

⁴⁴ Jonathan K. Ocko, "Using the Past to Make a Case for the Rule of Law", in *The Limits of the Rule of Law in China*, Supra. Pages 66-67.

⁴⁵ Ibid., quoting from *Faxue yanjiu* [Legal Research] *skikan*, Dec. 1978, p. 46.

The Doctrine of Collective Responsibility did not lapse during the Han dynasty. Waley-Cohen asserts that the practice was so rooted in the family oriented ideology of the Chinese that it became an integral component of the Han legal system.⁴⁶ One Han practice that was subsequently abrogated, but was nevertheless one of their most infamous, was the extermination of the criminal's entire clan for particularly egregious cases.⁴⁷ The populace came to be more and more repulsed by the atrocities that originated in the Ch'in Kingdom and Empire. The espousal of a rigorous set of laws and punishments by Shang Yang and Han Fei during the Ch'in dynasty became distasteful and a method of less Legalistic regulation of society began to prevail.⁴⁸

In Ch'in and Han dynasty China, Legalism was not an abstract and general concept of philosophy. It was a mode of punishment and reward intentionally implemented for the purpose of creating a self-regulating society.

“ The purpose of the law was to accustom the subjects to new ways of behavior, since the traditional pattern of behaviour had become the main cause of disorder and because a reform of manners seemed indispensable. Law was supposed to have an educational function in the long run. For the legalists, as for the moralists who were the heirs of Confucius, the ideal state was one in which it would no longer be necessary to inflict punishments.”⁴⁹

Pure Legalism was so at odds with traditional Chinese thinking that it was doomed to failure. As Confucius said (and Sima quotes this passage in his introduction to the

⁴⁶ Waley-Cohen, *Supra*. Page 113.

⁴⁷ See: Taichiro Nishida, *Chūgoku keihō shi kenkyū*. Tokyo, 1974, trans. Duan Qiuguan, *Zhongguo xingfa shi yanjiu* [An investigation of the history of punishment in China] (Beijing: Beijing University, 1985). Pages 148-63; Hulswé, *Remnants of Han Law*, vol. I (Leiden: E.J. Brill, 1955). Pages 112-22, 272-75; Wallace Johnson, *The Tang Code*, vol 1: *General Principles* (Princeton, N.J.: Princeton University Press, 1979). Pages 18-21, 27, 216-22.

⁴⁸ Lowe, Pages 1008.

⁴⁹ Jacques Gernet, *Ancient China, From the Beginnings to the Empire*, Trans. from the French by Raymond Rudoiff (Berkeley and Los Angeles: University of California Press, 1968). Pages 122-123.

“Biographies of Harsh Officials”): “Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves.”⁵⁰ The Confucians correctly believed that codified law without other moral standards was inadequate to control or administer a society. They pointed out that as a set of incomplete, rigid rules, law could never be applied purely mechanically; law needs to be supplemented, revised and interpreted to meet changing circumstances. The application of law is never easy, and without other moderating influences, the law is incapable of restraining those who created it. Uniform application of the law was not a triumph of justice; it could never provide each person what they were due.⁵¹ The Ch’in system of pure legalism was short-lived. The Hans improved upon their predecessors with a blend of Legalism and traditional thinking as they slowly cast aside the most offensive elements of the Ch’in system.

The Chinese would continue to struggle with the role of the rule of law in society up to the present day. It was not until the 19th century that China would be introduced to the more successful western means of administering the law, including separation of powers and democratic representation. If, as most of western civilization would assert today, such institutions were the answer to a riddle spanning over two millennia, it is particularly unfortunate that China has never successfully adopted them since. China’s contemporary abuses of authority and continued insufficient means of providing justice

⁵⁰ *Analects*, 2.3; D.C. Lau’s translation, in his *Confucius: The Analects* (Harmondsworth: Penguin Books, 1979). From: Grant Hardy, *Worlds of Bronze and Bamboo, Sima Qian’s Conquest of History* (New York: Columbia University Press, 1999). Page 208.

⁵¹ Chang, Pages viii-ix.

and equality for its people are a reflection of its long and difficult history with these problems.