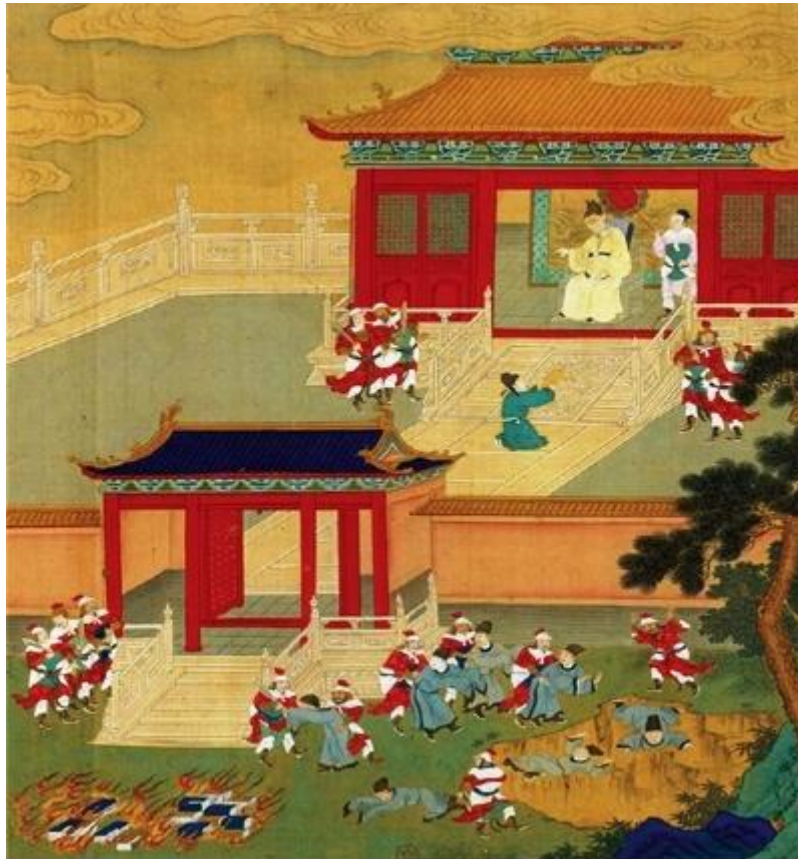


Law in Imperial China – Confucianism and Legalism

By Aris Teon Published: May 07, 2016



Killing the scholars and burning the books

(anonymous 18th century Chinese painting)

The legal system of imperial China developed from two schools of thought: Confucianism and Legalism. Although both of them exerted a deep influence on China's state-building as well as on its moral and legal traditions, at the beginning these two philosophies were bitterly opposed to each other, as they were based on entirely different principles (see: Xin Ren: Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China, 1997, p. 19).

Confucianism (儒家) originated from the teachings of Confucius (551 – 479 BC), a Chinese scholar, politician and philosopher who lived in the Spring and Autumn period. The main body of the Confucian canon comprises the Four Books and the Five Classics (四書五經), texts which have been traditionally attributed to Confucius himself, although their authorship is not ascertained beyond doubt.

Confucius' philosophy revolved around two concepts: the nobleman and the establishment of a well-ordered society. The nobleman (君子, pinyin: jūn zǐ, also translated as "gentleman" and "superior man") is a term that in ancient China referred to the son of a feudal lord. Confucius, however, gave this word a new meaning. For him, a nobleman was such by merit and not by birth. The nobleman is a righteous individual, an example of filial piety, humane behaviour, virtue and propriety (Ren 1997, pp. 19-20; Lee Dian Rainey: Confucius & Confucianism: The Essentials, 2010, p. 42). Ideally, a well-ordered society is constituted of noblemen who put righteousness and propriety before selfishness and pettiness.

In the philosophy developed by Confucius and his followers, the law played a secondary role in shaping human behaviour. Instead of the legal system, early Confucian scholars emphasized the concepts of morality and ritualism. The term "ritual propriety" (禮, pinyin: lǐ), describes the "proper" social relationships and the set of rituals which regulate them. The fundamental social relationships are those between the emperor and his ministers, between father and son, between husband and wife, between brothers and between friends. Li "governs relationships between the ruling and the ruled, the senior and the junior, man and woman, and the blood-related and the acquainted" (Ren 1997, p. 20). Confucius placed great importance on language. He believed that for a society to function harmoniously all social relationships had to be named properly. This means that society needs social ranks and rituals so that each individual will constantly be made aware through language and rites which position he occupies in the social fabric and which behaviour is proper in dealing with others.

Confucian scholars believed that human beings were inherently good and nature endowed them with four fundamental virtues: humanity (仁), righteousness (義), propriety (禮) and wisdom (知). According to Confucian thought, men's wrongdoing and bad behaviour are the consequence of negative environmental influences and lack of proper education. Wrongdoers could be taught to feel ashamed of their improper actions through education and moral persuasion. If men were brought up in a system in which social roles and ranks were clearly defined through language and rites, they would naturally internalize proper social relationships and society would function harmoniously. From this viewpoint, human beings do not exist as free individuals, but they are only small parts of a complex network of social relations in which everyone must fulfill their duties as subjects of the emperor, as fathers and mothers, as husbands and wives etc. (see Ren 1997, pp. 20-21). Confucians believed that if men acted according to ritual propriety and if the sovereign possessed all four fundamental virtues, then society would be prosperous and harmonious.

Contrary to Confucian belief in human beings' inherent goodness, the Legalists assumed that men were by nature evil and that consequently they would commit crimes if state authority did not discipline them. Since human beings are selfish and greedy, the only way a state can function is by issuing laws and by severely punishing those who violate them. According to the Legalists, men are by nature unequal, since they differ in wealth, strength and status. However, the law should apply equally to all, so as to punish the guilty and reward the innocent (Ren 1997, p. 20). In the *Book of Lord Shang*, a classic of Legalist thought from the 3rd century BC, one reads:

If penalties are made heavy and rewards light, the ruler loves his people and they will die for him; but if rewards are made heavy and penalties light, the ruler does not love his people, nor will they die for him. When, in a prosperous country, penalties are applied, the people will reap profit and at the same time stand in awe; when rewards are applied, the people will reap profit and at the same time have love. A country that has no strength and that practises knowledge and cleverness, will certainly perish, but a fearful people, stimulated by penalties, will become brave, and a brave people, encouraged by rewards, will fight to the death. If fearful people become brave and brave people fight to the death (the country will have no match, having no match, it will be strong, and being strong it will attain supremacy (quoted from: Yang Shang: *The Book of Lord Shang: A Classic of the Chinese School of Law*, trans. J. J. L. Duyvendak, 1963, pp. 200-201).

The importance of the law and its equal application is exemplified in the works of Han Feizi (韓非, c. 280 – 233 BC), one of China's most prominent Legalists. One of Han's main concerns was how to prevent uprisings and treason, and how to govern in such a way that all subjects will obey the ruler. He wrote:

If you do not guard the door, if you do not make fast the gate, then tigers will lurk there. If you are not cautious in your undertakings, if you do not hide their true aspect, then traitors will arise. They murder their sovereign and usurp his place, and all men in fear make common cause with them: hence they are called tigers. They sit by the ruler's side and, in the service of evil ministers, spy into his secrets: hence they are called traitors. Smash their cliques, arrest their backers, shut the gate, deprive them of all hope of support, and the nation will be free of tigers. Be immeasurably great, be unfathomably deep; make certain that names and results tally, examine laws and customs, punish those who act willfully, and the state will be without traitors.

In our present age he who can put an end to private scheming and make men uphold the public law will see his people secure and his state well ordered; he who can block selfish pursuits and enforce the public law will see his armies growing stronger and his enemies weakening. Find men who have a clear understanding of what is beneficial to the nation and a feeling for the system of laws and regulations, and place them in charge of the lesser officials; then the ruler can never be deceived by lies and falsehoods.

What the law has decreed the wise man cannot dispute nor the brave man venture to contest. When faults are to be punished, the highest minister cannot escape; when good is to be rewarded, the lowest peasant must not be passed over. Hence, for correcting the faults of superiors, chastising the misdeeds of subordinates, restoring order, exposing error, checking excess, remedying evil, and unifying the standards of the people, nothing can compare to law. For putting fear into the officials, awing the people, wiping out wantonness and sloth, and preventing lies and deception, nothing can compare to penalties. If penalties are heavy, men dare not use high position to abuse the humble; if laws are clearly defined, superiors will be honored and their rights will not be invaded. If they are honored and their rights are inviolable, then the ruler will be strong and will hold fast to what is essential. Hence the former kings held laws in high esteem and handed them down to posterity. Were the ruler of men to discard

law and follow his private whim, then all distinction between high and low would cease to exist.

Use the single Way and make names the head of it. When names are correct, things stay in place; when names are twisted, things shift about. Hence the sage holds to unity in stillness; he lets names define themselves and affairs reach their own settlement (Han Feizi: Basic Writings, trans. Burton Watson, 2003, pp. 17-36).

Although Confucianism later became associated with Chinese civilisation itself, prior to the founding of the unified empire the Legalist school was in many respects more influential than Confucian thought. Legalists were involved in the administration of numerous Chinese kingdoms, whereas Confucians were mostly teachers and scholars.

Although Confucianism had become an official orthodoxy, before the Han Dynasty (206 BC–220 AD) its impact on bureaucracy and state-building was relatively small. As a matter of fact, Qin Shihuang (秦始皇, 260 – 210 BC), the emperor who unified China for the first time in 221 BC, was aided by Legalist scholars—and not by Confucians—in establishing his new state. According to Legalist doctrines, Qin Shihuang created a government bureaucracy, a military force and a comprehensive taxation system. However, because of the cruelty and tyranny of the emperor, the Legalist school's reputation was tarnished, as it was identified with punishment and the severity of the law as a tool of absolute imperial rule. In the Han Dynasty, China's emperors turned to Confucianism, a philosophy regarded as more humane and benign than the cold rationality of Legalism.

The difference between Confucianism and Legalism can perhaps be most clearly observed in their respective interpretation of filial piety. Confucians saw filial piety as one of the fundamental human virtues. The Legalists, on the contrary, viewed filial piety as a hindrance to good governance. In the *Book of Lord Shang*, filial piety is listed as one of the “ten evils”:

If in a country there are the following ten evils: rites, music, odes, history, virtue, moral culture, filial piety, brotherly duty, integrity and sophistry, the ruler cannot make the people fight and dismemberment is inevitable, and this brings extinction in its train. If the country has not these ten things and the ruler can make the people fight, he will be so prosperous that he will attain supremacy (Shang 1963, p. 199, my emphasis).

The final purpose of the Legalists was the establishment of a prosperous and powerful state under the leadership of a capable and authoritarian monarch. The Confucians, on the contrary, wanted to create a peaceful, harmonious society which could be self-ruling through ritual propriety and moral virtues.

Yet despite all their differences, Legalism and Confucianism shared a common characteristic: they both endorsed the concept of the absolute monarchy. In this respect, neither of these philosophies ever offered an alternative to the traditional Chinese state form. They never questioned the legitimacy of the imperial idea.

If you want to support our website, take a look at one of our books During the Han Dynasty, Confucianism was embraced by the emperors as the best philosophy upon which to build the

imperial state. As a result, Chinese law underwent a process of “Confucianisation”: moral values such as filial piety, family ideology, righteousness and moral virtue became the cornerstone of the legal system. The government abandoned the idea of ruling mainly by instilling fear in its subjects.

Jia Yi (賈誼, c. 200 – 169 BCE), a famous Confucian scholar and poet who lived after the fall of the Qin Dynasty, condemned the latter as tyrannical and proposed an alternative model of rule by virtue instead of rule by force. In his essay *The Faults of Qin* (過秦論), Jia Yi recounts the rise and fall of the Qin state and explained – from a Confucian viewpoint – why it collapsed only eight years after Qin Shihuang’s death:

With its superior strength Ch’in [=Qin] pressed the crumbling forces of its rivals, pursued those who had fled in defeat, and overwhelmed the army of a million until their shields floated upon a river of blood. Following up the advantages of its victory, Ch’in gained mastery over the empire and divided up the land as it saw fit ...

[Qin Shihuang] discarded the ways of the former kings and burned the writings of the hundred schools in order to make the people ignorant. He destroyed the major fortifications of the states, assassinated their powerful leaders, collected all the arms of the empire, and had them brought to his capital at Hsien-yang where the spears and arrowheads were melted down to make twelve human statues, all in order to weaken the people of the empire. After this he ascended and fortified Mount Hua and set up fords along the Yellow River, strengthening the heights and precipices overlooking the deep valleys. He garrisoned the strategic points with skilled generals and expert bowmen and stationed trusted ministers and well-trained soldiers to guard the land with arms and question all who passed back and forth. When he had thus pacified the empire, the First Emperor believed in his heart that with the strength of his capital within the Pass and his walls of metal extending a thousand miles, he had established a rule that would be enjoyed by his descendants for ten thousand generations (Wm. Theodore De Bary, Wing-Tsit Chan, and Burton Watson, comps.: *Sources of Chinese Tradition*, vol. 1, 1960, pp. 151-152).

Ch’in, beginning with an insignificant amount of territory, reached the power of a great state and for a hundred years made all the other great lords pay homage to it. Yet after it had become master of the whole empire and established itself within the fastness of the Pass, a single commoner opposed it and its ancestral temples toppled, its ruler died by the hands of men, and it became the laughing stock of the world. Why? Because it failed to rule with humanity and righteousness and to realize that the power to attack and the power to retain what one has thereby won are not the same (*ibid.*, p. 152). Jia Yi’s criticism exemplifies Confucian scholars’ dislike for Qin Legalist tyranny and their desire to renew the empire by stressing morality.

Nevertheless, Legalism was not completely discarded. Although Legalism was identified with the cruelty of Qin Shihuang, its emphasis on monarchical power, on the building of a strong state and its creation of legal mechanisms to control the populace through law and fear remained appealing. In spite of Confucian idealism, an emperor could not rule such a vast country solely by means of education, good example and moral persuasion.

Already Xun Kuang (荀況, c. 310 or 314 – c. 217 or 235 BC), a Confucian scholar who witnessed the chaos of the collapse of Zhou and the rise of Qin, integrated elements of Legalism into his philosophy. Xun's basic ideas were Confucian in that he stressed moral virtue. He wrote:

Select men who are worthy and good for government office, promote those who are kind and respectful, encourage filial piety and brotherly affection, look after orphans and widows and assist the poor, and then the common people will feel safe and at ease with their government. And once the common people feel safe, then the gentleman may occupy his post in safety (Xunzi: Basic Writings, trans. Burton Watson, 2003, p. 39).

However, Xun also believed that men are by nature evil, a viewpoint he shared with the Legalists. As a consequence, he argued that laws and punishments are important for governing a state. Xun wrote:

These are the judgments of a king: no man of virtue shall be left unhonored; no man of ability shall be left unemployed; no man of merit shall be left unrewarded; no man of guilt shall be left unpunished. No man by luck alone shall attain a position at court; no man by luck alone shall make his way among the people. The worthy shall be honored, the able employed, and each shall be assigned to his appropriate position without oversight. The violent shall be repressed, the evil restrained, and punishments shall be meted out without error. The common people will then clearly understand that, if they do evil in secret, they will suffer punishment in public. This is what is called having fixed judgments. These are the king's judgments (ibid. , pp. 44-45).

Similarly to Xun Kuang, Jia Yi also argued that propriety was not sufficient to govern a state and that the law was also necessary. He wrote:

Li can prevent sinfulness before it occurs, but law can reprimand wickedness after the wrong has occurred. Therefore, law is to be utilized for curbing evil, while Li has a difficult task that requires a lifetime to accomplish. Li cultivates people, virtue and benevolence whereas punishment penalizes abominations (quoted in: Xin 1997, pp. 22-23).

Dong Zhongshu (179–104 BC), too, believed in the supremacy of propriety, but he also emphasized the importance of the law as a subordinate instrument of governance. Therefore, the Confucian ideology that dominated the Chinese empire from the Han to the Qing Dynasty was heavily interspersed with fundamental elements of the Legalist theory, although these elements were downplayed in public discourse due to Legalism's bad reputation. According to Orville Schell and John Delury (Wealth and Power: China's Long March to the Twenty-first Century, 2013), Legalism has been extremely influential up to this day.

Many Chinese intellectuals, whether in the Qing era, in Republican China or in Communist China, have more or less consciously drawn on Legalist thinking. Most especially, the idea of "enriching the state and strengthening its military power" (富國強兵), an expression coined by the Legalists in the Warring States Period, resurfaced in the 19th century as a reaction to Western powers' imperialist aggression. The debate about China's defence against foreign

domination and its self-strengthening was partly framed in the language of the Legalists (although new elements, such as Western nationalism, Communism etc. were added). The Legalist doctrine is therefore fundamental in order to understand China's relationship between governing and governed, between law and state power, and between law and state-building not only in imperial times, but also in the Guomindang and in the Communist era.