

TRADITIONAL CONCEPTS OF THE RULE OF LAW IN CHINA AND PROBLEMS INVOLVED IN THE RECEPTION OF FOREIGN LAW

by

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In this paper I must divide the treatment of the traditional concepts of the Rule of Law into two periods, that is, before the Han dynasty and since then up to the last decades of the nineteenth century when the Western influences began to be felt and assimilated. In the concluding part, I shall treat briefly of the modern legislation and its underlying philosophy.

The old Chinese legal system as we know it began to take form only after the overthrow of the Ch'in dynasty by the Hans at the end of the third century B. C., and came to maturity under the T'ang dynasty (A. D. 618 - 906). The T'ang Code, promulgated was to become the model for the codes of all the later dynasties, including **Ta Ts'ing Lu Li**, which was promulgated in 1647, and with minor revisions from time to time, continued to be the law of China till the last days of the Ts'ing. (It was from the 1799 edition that Sir George Thomas Staunton made his translation, published in 1810.) For twelve centuries there was no visible progress in the legal system, nor, it is true, was there any serious deterioration except in some points. So far as the underlying philosophy of the legal system is concerned, it remained essentially the same since the Han dynasty.

But this underlying philosophy, in which the **typically** Chinese concept of the Rule of Law is to be found, was not the product of any one school of thought, but a coalescence of the most divergent currents into a broad channel. It is a cyncre-

tism rather than a synthesis. Contradictory tendencies and conflicting ideologies were not reconciled logically, but made to complement each other **organically** in an all-embracing cosmogony of polarities. I shall return to it in a later stage of my discussion. In the meantime, let me give a sketch of the conflicting philosophies of law and government in the period immediately preceding the final coalescence. It was a period of warring states and warring philosophies.

I. BEFORE THE HAN DYNASTY

In the history of Chinese thought, no period can compare in originality, vigor and richness with the one that began, let us say, with the birth of Confucius (in 551 B. C.) and ended with the death of Han Fei (in 233 B. C.). Politically, it was a period of growing unrest. The disintegration of feudalism, the decaying of the sense of honor and good manners, the rise of a host of powerful states, the ceaseless struggles among them for leadership, the earnest but fruitless search for the ways and means of establishing an equilibrium of powers, and finally the success of one ambitious and ruthless state in conquering and reducing to submission all the others, these momentous events and tendencies combined to present a continuous challenge to the thinking minds, calling forth the best and, in some cases, the worst in them. There was such an infinite diversity of ideas that later scholars have called this period "the age of hundred schools of thought."⁴

I shall confine myself to the main currents of thought.

(1) **The Taoists** believed that the trouble with the world was that human beings were getting too clever and human affairs too complicated, and advocated a radical return to nature and simplicity. In the words of the Taoistic classic, **Tao Teh Ching** :

Drop wisdom, abandon cleverness,
And the people will be benefited a hundredfold.

Drop benevolence, abandon justice,
And the people will return to their natural affections.

Drop shrewdness, abandon profit - seeking,
And there will be no robbers and thieves.

These three (precepts), being only the letter of Tao,
Are not yet sufficient in themselves.

Therefore, they must be subordinated
To a higher principle :

See the Simple and embrace the Primal,
Reduce the self and curb the desires.

If the ruler is mum, mum,
The people are simple and calm.
If the ruler is sharp, sharp,
The people are frustrated and sad.

The more taboos and conventional inhibitions,
The more miserable the people.
The more sharp weapons the people possess,
The greater confusion reigns in the realm.
The more clever and crafty the men,
The oftener strange things happen.
The more articulate the laws and commands,
The more robbers and thieves arise.

The Way of Heaven reduces the more-than-enough to make
up the less-than-enough.

The way of man is different; it reduces the less-than-enough
to swell the more-than-enough.

The people are no longer afraid of death.
What is the use of scaring them with the threat of death?

When the people no longer fear your power,
It is a sure sign that a greater power is coming.

Do not interfere lightly with their home .
Do not lay heavy burdens upon their livelyhood,
Only when you cease to weary them
Will they cease to be wearied of you.

The Taoists would have heartily approved the principle that "That government is the best which governs the least." "For," says the **Tao Teh Ching**, "why are the people hard to manage? Because those above them are fussy and have private ends to serve." To sum up :

The Tao never makes any ado,
 And yet nothing remains undone.
 If a ruler can keep to the Tao,
 All things will grow of themselves.

So far I have quoted from the **Tao Teh Ching**, whose author is supposed to be the founder of Taoism, Lao Tzu; but he has never been identified. Chuang Tzu, the outstanding Taoist of the fourth century B. C., developed further the ideas of the **Tao Teh Ching**. To him human history is an ugly tumour on Nature. The chief source of human misery was the fact that the rulers considered the country as their private property. In instituting the laws and punishing the criminals, they forgot that they, themselves, were greater robbers and thieves than those whom they put to death. The sages and men of ability, in serving such rulers, were only aiding and abetting them in their crimes. Chuang Tzu was fond of quoting a current saying, which ran.

"Steal a hook,
 And you hang like a crook,
 Steal a kingdom,
 And you are made a duke."

When the big thief had acquired a kingdom, he would make full use of the sages and men of learning to institute laws for the prohibition and punishment of petty thieves, and to establish schools to inculcate in his subjects the duty of loyalty to their sovereign.

While we may not agree with Chuang Tzu's wholesale repudiation of government, we cannot deny the value of the Taoistic doctrine of detachment on the part of the rulers law-givers. Laws should be made for the welfare of the people, and

only incidentally for the safety of the ruling house. But this cannot be said of the laws of the warring states that Chuang Tzu knew. Nor can it be said of the penal codes of later dynasties.

(2) From Taoism we shall pass on to **the doctrines of Mo Tzu or Mocius**, who was born around the middle of the fifth century B. C. Coming from the common people, he was a man of noble ideals and practical ability. His name was generally mentioned together with Confucius until the Han period when Confucianism was exalted to the position of a state religion. But during the last fifty years, many, western-educated Chinese have come to recognize in him the rival of Confucius.

What an extraordinary man Mocius was can even be gathered from some of the adverse criticisms levelled against him by his contemporaries. Mencius, for example, said, "Mo Tzu loves all equally. If he could benefit the world, he would not have hesitated to wear out his whole body from the crown to the heel." Mencius did not intend it as a compliment, because such self-sacrificing and universal love conduct "amounted to the denial of one's father." In this Mencius was quite wrong. It was not Mo Tzu's intention to demolish the family. What he maintained was that the love between father and son presupposes universal love. "The gentleman would do well," he said, "to understand and practice universal love; then he would be gracious as a ruler, loyal as a minister, affectionate as a father, filial as a son, courteous as an elder brother, and respectful as a younger brother, universal love must be practiced." Universal love does not necessarily mean equal love for all. It is all-embracing in scope, but not indiscriminating in degree. There is unity, but this unity does not exclude diversity. For Mocius, universal love is unselfish love, and without unselfishness, as he showed so clearly, one could not begin even to love his father. "As he loves himself and not his father the son benefits himself to the disadvantage of his father." Different relations may call forth different expressions and grades of love; but the one idea which permeates them all is the love of another as oneself.

Mocius attributed all the troubles of his times to the want of precisely this universal spirit of love. Why were there so many thefts, robberies, rebellions, and wars? I will let him answer in his own words :

"As he loves only his own family and not other families, the thief steals from other families to profit his own family. As he loves only his own person and not others, the robber does violence to others to profit himself. And the reason for all this is want of love. This again is true in the mutual disturbance among the houses of the ministers and the mutual invasions among the states of the feudal lords. As he loves only his own house and not the others, the minister disturbs the other houses to profit his own. As he loves only his own state and not the others, the feudal lord attacks the other states to profit his own. These instances exhaust the confusion in the world. And when we look into the causes we find they all arise from want of mutual love."

But what makes the philosophy of Mocius particularly significant for the history of jurisprudence is that he derived the duty of universal love from the will of Heaven, and placed all persons, including the emperor, under God. In his own words, "The will of Heaven is the origin of magnanimity and justice." Being a rigorous logician, he proceeds to prove that God is above the emperor by this argument: "I know Heaven is more honorable and wise than the emperor for a reason: When the emperor practices virtue Heaven rewards, when the emperor does evil Heaven punishes. When there are diseases and calamities the emperor will purify and bathe himself and prepare clean cakes and wine to do sacrifice and libation to Heaven and the spirits. Heaven then removes them. But I have not heard Heaven invoking the emperor for a blessing. So I know Heaven is more honorable and wise than the emperor." He also supported his argument by a quotation from one of the Odes :

"O bright and high Heaven,
Who enlightenest and rulest this lower world."

For Mocius, the will of Heaven constituted a higher law than the laws made by the state. It is true God loves all; but He loves **with justice**. "Hence those who love and benefit others Heaven will bless. Those who hate and harm others Heaven will curse, for it is said that he who murders the innocent will be visited by misfortune."

By many kinds of proofs, logical, moral, historical, and religious, Mocius established two fundamental principles. First, "Heaven desires to have men love and benefit one another and abominates to have them hate and harm one another." Secondly, the sum of a man's duty is to desire what Heaven desires and to abominate what Heaven abominates, carrying out the former and avoiding the latter. This coincides exactly with the primary precept of the natural law, which according to St. Thomas Aquinas, is **Pursue the good and avoid the evil**.

Of all the Chinese philosophers, Mocius comes nearest to the moral teachings of Christianity. If his philosophy had prevailed instead of Confucianism throughout the later generations, the history of China would have taken a different course and her civilization put on a different complexion. However, he himself was partly responsible for the ultimate defeat of his doctrines. His practical program was in many parts too somber and severe for the rank and file of the people, but especially for the freedom-loving intellectuals. I can sympathize with his criticism of the ritualistic extravagances of Confucianism, whose attention was obviously focused on the aristocratic classes. But I cannot understand why Mocius should have condemned music. His system was too cut-and-dried, too logical and rationalistic. His starting points were sounder than any other school of thought of his time. But he did not succeed to fill the skeleton with flesh and blood. Speaking of the Mahists, Chuang Tza said, "Their way is too rough-grained. It makes of life a sad and dreary business. Their standard is difficult to live up to. I am afraid it is not quite the way of the Sages. It runs counter to the hearts of men, and the world at large would not be able to endure it. Mo Tzu him-

self may have been able to bear such a burden; but who else in all the world?"

In spite of their differences, there is a great deal in common between Confucius and Mocius. Both of them laid emphasis on the importance of having good men in the government. Both of them had faith in Heaven and believed in a natural law higher than the positive written enactments of the state. Both of them were interested in improving the human world through moral education. With both, Heaven is a personal God, who is interested in the welfare of mankind, punishing the wicked and rewarding the virtuous.

But Confucius was more moderate in his ways, more historically-minded, more interested, in the humanities and learning, more concrete and empirical in his pedagogy. This partly explains why he was much popular with the later scholars, than Mocius.

(3) **Confucius** saw the source of all evils in his day in the decadence of traditional morals, especially among the ruling classes. He advocated a government by personal example. He said, "If you lead the people by political measures and keep them in order by penal laws, they will avoid transgressing them but they will lose their sense of honor. If you lead them by virtue and keep them in order by ritual and morals, they will not only preserve their sense of honor but become thoroughly transformed." His faith in the influence of personal virtue of the ruler upon his people was unbounded. This seems to be the keynote of his philosophy. For, as he observed, "He who governs by the example of his virtue is like the pole-star, which keeps its place while all the lesser stars move around it in homage.,,"

Once a high officer of the State of Lu, Chi K'ang, asked Confucius about government; his answer was : "To govern is to be well-governed in oneself. If you lead the people by being well-governed, who would dare to be ill-governed?., Another time, Chi K'ang being worried about the prevalence of thieves and robbers in the country, came to consult Confucius as to

what to do about it; the latter replied brusquely, "If you yourself were not greedy, they would not steal even if you should offer them a reward for doing it." Still another time, the same person asked whether it would not be the best way of governing to slay the wicked for the protection of the good people. Confucius said, "In governing, why should you resort to slaying? Once you set your heart upon goodness, the people will be good. For the virtue of the superiors is like the wind, while the virtue of the inferiors is like the grass. When the wind passes over the grass, the grass cannot choose but to bend.,,

To Confucius, government and moral culture are one and the same thing. He maintained, as we have seen, that to rule is to be straight. He further maintained that to be straight is to rule, even if one held no position in the government. Once somebody asked Confucius, "Why do you not enter into the government?" "Well," he replied, "what does the **Book of History** say of filial piety? when one is filial to his parents, he will naturally be friendly to his brothers, thus contributing to government. This too is taking part in governing. Why must one hold a position in the government?"

Confucius did not exactly despise the penal laws, nor did he refuse to hear litigations. But there can be no denying that his emphasis was predominantly on ritual and music and the cultivation of personal virtues as the primary means of government. "If ritual and music are not promoted," he said, "then punishments cannot attain the just measure, and, if so, the people will not know where to put their hands and feet."

On another occasion, he declared, "In hearing litigations, I am like others. But the important thing is to cause litigations to cease." He did not excel in the art of adjudication, not because he lacked the necessary qualities of a judge, but because his ethical preoccupations directed his attention to the ways and means of bringing about a condition of social harmony in which all litigations would cease, and this prevented him from working out objective principles of legal decision.

It is not quite true to say that Confucius was opposed to the Rule of Law. Although he did not rely upon an explicit tariff of penalties, he had the greatest faith in the unwritten law, which he called the "norm," which consisted in what he considered as general principles of justice and humanity, together with the rules of conduct as approved and practiced by sages like King Wen and the Duke of Chou. Distrustful of the positive law set up by the state, he preferred to deduce laws from the nature of human relations. His doctrine of the rectification of names, while dominantly ethical in motivation, has profound significance also for the science and philosophy of law.

He maintained that there must be a correspondence between name and reality. For instance, once he saw a vessel which was called "horn-gourd," but which was actually not made of horn and gourd. He exclaimed almost instinctively, "A horn-gourd that is neither horn nor gourd. What a horn-gourd! What a horn-gourd!., That is to say, it was a horn-gourd only in name.

In the light of this incident, we can more easily understand the laconic answer he gave to Duke Ching of Ch'i, who wished to know what is the best way of government: "Let the prince be a prince, the minister a minister, the father a father, and the son a son." The Duke grasped the idea immediately, and commented, "How true! If indeed the prince is not a prince, the minister not a minister, the father not a father, and the son not a son, however much grain I may have, shall I be able to eat it?"

This way of reasoning reminds me very much of what St. Paul wrote: "Honor widows that are widows indeed.... For she that liveth in pleasure is dead while she is living." (I Tim. 5:3 and 6).

The truth is that while in physical sciences, names, or concepts, must be made to correspond with realities, in moral sciences, such as ethics and jurisprudence, realities must be measured and rectified by names or concepts. For in moral sciences, a concept not merely denotes a person or a thing, but contains certain connotations of ethical or axiological nature.

It is a crystallized value-judgment. When Confucius said that the father must be a father indeed, he had certain preconceptions of what a father ought to be, to deserve the name of father. Those preconceptions were a mixture of reason and experience.

That this method of rectifying realities by names is of paramount importance for the science of law will be crystal-clear to anyone who has studied the cases of the common law. I have found that the great judges of the common law countries have all employed legal concepts in exactly the same way as Confucius did.

In the Confucian ideology the family occupies the central position. The five cardinal relations of men, according to Confucius, are: sovereign-subject, father-son, husband-wife, senior-junior, and friend-friend. Out of the five, three belong to the family. The sovereign was at best the common patriarch of his people, as the state was but a big family. The friends were assimilated to brothers. Confucianism may be called Panfamilism. This overwhelming emphasis on the family had, of course, most important consequences both in theory and in practice, both in ethics and in jurisprudence.

In the *Analects*, there is a record of a characteristic conversation between a certain duke and Confucius. The Duke said, "In my community there is a straight man. When his father misappropriated a sheep, he bore witness to it." "The straight man in my community would act differently," said Confucius. "For a father to screen his son, and a son his father,--- there is straightness in that."

To Confucius and his followers, the family is the foundation of civilization as well as of the state. They did not deny the legitimate claims of the state, but the state should protect the integrity of the family relations. But, as one can well imagine, there may be situations in which the legitimate interests of the family may clash head-on with equally legitimate interests of the state. One such question was brought up by a pupil of

Mencius, T'ao Yin. "Suppose," he asked Mencius, "that at the time when Shun [the sage emperor] was on the throne, and Kao Yao [the sage Judge] was the Chief Justice, Ku Sou [the good-for-nothing father of Shun] should have murdered a man, what would have been done in the case?" Mencius answered, "Why, Kao Yao would simply have arrested him., "But would Shun not have forbidden the arrest?," "Oh, no," was the reply, "how could Shun have forbidden it? The Chief Justice had received the law from the proper source." "What then would Shun have done?" inquired the pupil. The answer of Mencius is characteristic: "Shun was a man who regarded the abandoning of everything under heaven as throwing away a pair of old sandals. He would have stolen away the prisoner and, carrying him on his back, escaped together into concealment, living somewhere on the sea-side. There he would have remained all the rest of his life, cheerful and happy, forgetting about the empire."

I am sure that this is what Mencius himself would have done, but I am not so sure whether the emperor should have abandoned his public duties even without a resignation. After all, the empire is not a piece of private property which one can throw away like a moth-eaten overcoat.

But what is noteworthy in this conversation is that Mencius shows here an implicit respect for the Rule of Law. I think this is in the tradition of Confucius. It should be pointed out, however, that the Confucian concept of law included not only the written laws but also the unwritten laws. Professor Needham shows a deep insight when he writes: "Confucius seems to have believed that the true aim of government ought to be the welfare and happiness of the whole people, and that this would be brought about not by rigid adherence to enacted arbitrary law, but by subtle administration of customs generally accepted as good and having the sanction of natural law.,, (2 Science and Civilization in China, 7-8). When Mencius said that "the Chief Justice had received the law from a proper source," he did not mention what the source was; but it could

not be other than the people, who, as he said elsewhere, are the ultimate sovereign of a nation, quoting an ancient saying: "Heaven sees as my people sees, Heaven hears as my people hears."

(4) **The Legalists.** No school was so antagonistic to the Confucianist ideology than the school of legalists. Both them were levelling movements, but they moved in opposite directions. There was an adage dating from the heyday of feudalism: "Ceremony and good manners do not descend to the common people; penal laws do not ascend to the level of great officers." Now, the Confucianists and the legalists were agreed that this duality of standards was no longer tenable. But here their agreement ends. The Confucianists wanted to extend the cultivation of ceremony and good manners or the code of honor to the common people, while the legalists wanted to extend the penal laws to the nobility.

If these two movements had come to a mutual understanding by dividing the field between them, each working in its proper sphere, one in education and the other in government, the whole course of Chinese history and civilization would have been entirely different from what it has been. But as it is, each school strove to occupy the whole field. However, the Confucianists were much less extreme in this respect than the legalists. The former only pointed out the inadequacy of penal laws as a means of government and asserted the primacy of morality over law; while the latter not only asserted the primacy of law to morality, but actually banned all moral teachings as subversive of the public order of the state. Lord Shang went to the extent of denouncing as "maggots," or "pests," ceremony and music, Odes and History, care for old age, the cultivation of goodness, filial piety and fraternal love, sincerity and faith, purity and integrity, benevolence and righteousness, detraction of the army, and being ashamed of taking part in warfare. One can well understand why the last two were loathed by him as pests, but it is not so easy to see why he should hate the rest.

Without trying to justify the extreme legalistic position against the Confucianist teachings, let me present some of the psychological reasons behind it.

In the first place, the legalists thought that the Confucian emphasis on the solidarity of the family undermined the Rule of Law. We have already seen what Confucius said of the "straight,, man who bore witness to his fathers's theft. Han Fei Tzu placed the story in a different setting:

"In the state of Ch'u there was a certain straight man, who when his father stole a sheep, reported him to the law officer. The authorities said, "The son should be put o death." Their reason was that although the son was straight towards the prince, he was crooked towards the father, and therefore he should be charged with the father's guilt. Thus, a dutiful subject of the prince becomes an unfilial son of his father."

Han Fei Tzu told another story in which Confucius himself was involved:

"There was a man of Lu, who followed his prince to the war but ran away three times in three battles. When Chung-ni [Confucius] asked him the reason for that, he explained, "I have an old father, and if I die there would be nobody to take care of him." Chung-ni, impressed by his filial piety, recommended him for a promotion. Thus, a filial son of his father was at the same time a traitor to his prince."

In fact when Lord Shang was in power, one of his first targets was the family. "He ordered the people to be organized into groups of fives and tens as units of mutual espionage and collective responsibility. Whoever failed to inform against a culprit would be cut into two; whoever gave the proper information would be rewarded on a par with one who decapitated an enemy in the war; and whoever shielded a culprit would be punished on a par with one who had surrendered to the enemy. Any family having two or more male members without branching off into separate households would be subject to double taxation." "In a condition of perfect government," says

the **Book of Lord Shang**, "husband and wife and friends cannot abandon each others's wrongs, or cover up each other's crimes for the sake of preserving affection, nor can the people in general mutually shield each other from their superiors and government servants. This is because, although their affairs are connected, their interests are made different by the law."

In the second place, the legalists thought that the Confucian scholars were idle talkers, living upon the public like parasites. All people were working for the interests of the states. Only the scholars and the knight-errants undermined the juridical order, the former by criticizing the laws, and the latter by resorting to private fights.

In the third place, the Confucian scholars would water down the severity of the law by introducing humanitarian considerations. In this, they were short-sighted sentimentalists, so thought the legalists. The way of legalism starts from pain but ends in pleasure, while the way of humanism starts from pleasure but ends in pain. In the words of Lord Shang, "If you govern by punishment, the people will fear; being fearful, they will commit no villanies; there being no villanies, they will find peace and joy. If, on the other hand, you teach them by righteousness, they will be lax; and if they are lax there will be disorder; and if there is disorder, the people will suffer great miseries..,"

Han Fei Tzu illustrates the impracticability of moral education and the efficiency of penal law by concrete example:

"Now take the case of a boy of bad character. His parents are angry at him, but he never makes any change. The villagers in the neighborhood reprove him, but he is not moved. His masters teach him, but he never reforms. Thus with all three excellent disciplines - the love of his parents, the conduct of the villagers, and the wisdom of the masters applied to him, - he makes no change; not even a hair on his shins is altered. It is only after the distric-magistrate sends out soldiers to search for wicked men in accordance with the law of the state that he becomes afraid and changes his ways and alters his

deeds. So the love of parents is not sufficient to educate children. But, if it is necessary to have severe penalties of the district-magistrate in force at all, it is because people are naturally spoiled by love and are obedient to authority.,,

In the fourth place, while the Confucianists thought of law mainly in terms of general principles which could be applied flexibly to particular cases in the light of the circumstances of each case, the legalists thought of law only in terms of hard-and-fast specific rules which should cover every contingency, so that no discretion was left to judge. Han Fei Tzu wrote: "If a text-book is too summary, pupils will resort to ingenious interpretations. If a law is too general, litigations will multiply. Just as a wise man when he writes a book would set forth his arguments fully and clearly, so an enlightened ruler, when he makes his laws, would see to it that every contingency is provided for in detail.,, we must stick to the letter of the law at all costs.

Han Fei Tzu relates approvingly an anecdote which is typical of the legalistic position. "Of old, Marquis Chao of Han [who ruled from 358 to 333 B. C.] was drunk and fell into a nap. The crown-keeper, seeing the ruler exposed to cold, put a coat over him. When the Marquis awoke, he felt delighted. Then he inquired of the attendants, 'Who put the coat on me?' 'The crown-keeper, was the answer. Thereupon the Marquis found both the coat-keeper and the crown-keeper guilty; the coat-keeper, because he neglected his duty; the crown-keeper, because he exceeded his office." Han Fei's comment is interesting. "This was not because the Marquis did not mind catching cold, but because he considered the trespassing upon the duties of another office was a more serious evil than his catching cold."

We do not know whether the anecdote is true: but there can be no doubt that it embodies the true tradition of legalism. It is in the context of this tradition of strict adherence to law above everything else that we should view Sze-ma Ch'ien's narration of the last days of Lord Shang. As one can easily

imagine, his ruthless enforcement of rigid rules of law must have created for him numberless enemies, especially the Crown Prince, who was found guilty several times and whose tutors were punished vicariously (one of them, Prince Ch'ien, had his nose sliced off). So long as Duke Hsiao lived, Lord Shang was safe, because the Duke trusted him absolutely. It is most characteristic of Lord Shang that during the Duke's last illness he declined his offer to transmit the government to him. After Duke's death, the Crown Prince became his successor. (He later took the title of King in 325 B.C., and is known in history as King Hui of Ch'in.) The partisans of Prince Ch'ien accused Lord Shang of planning a rebellion. Lictors were sent to arrest him, and he had to flee for his life. When he reached incognito a place in the passes, he desired to lodge at an inn. But inn-keeper, not knowing who he was, refused to accept him, saying, "According to the law of the Lord of Shang, whoever shall receive at his inn guests without proper proof of identity is subject to punishment.,, Lord Shang, so the histoiran tells us, heaved a sigh, saying, "Alas, that the making of law should lead to such fatal result!."

He left and went to Wei, his native state; but the people of Wei, being afraid of their powerful neighbor, sent him back to Ch'in. King Hui had him torn to pieces by chariots.

To my mind, Lord Shang may be called a martyr of the Rule of Law. However erroneous and narrow his conception of law may be, and however materialistic and utilitarian his legal philosophy, he was true to his lights, more a fanatic than a rogue. If we look at his legalism in the light of the evolution of legal thought and comparative law, we may say that probably all this rigidity and worship of the letter are but features of the stage of strict law. Speaking of **The Book of Lord Shang**, Professor Duyvendak, who has produced an excellent translation of it, has made some fair remarks which I like to quote: "Its ideas are crude and formidable enough. Not often in the history of thought have such principles been enunciated with such terrible simplicity, grim force, and brutal one-sidedness.

The mind which first conceived these ideas could only move along one track; it was bent upon the attainment of one ideal only, willingly and consciously did it sacrifice all else to this one aim, and there is something of the terrible grandeur of the forces of nature in the crude sentences, which in their endless repetitiousness are as crushing as sledge-hammer."

Finally, the Confucinists, being educators, aimed primarily at the perfection of the individual person; while the legalists, being publicists and politicians, were primarily interested in the public order of the state. Their hero was the "average man,, just as the hero of the common law is said to be the "reasonable man." They did not care a fig for the extraordinary men. Lord Shang said, "The system of good government is to neglect the virtuous and ignore the wise.,, "Seek the transgressors, and do not seek the virtuous." Han Fei Tzu went a step further, he despised the heroes of Confucius and Mencius. As he said: "In ancient times there were Po I and Shu Ch'i. King Wu offered to transfer the empire to them, but both of them declined it and starved on the Shou Yang mountain. Now, ministers like these who are neither afraid of heavy punishments nor interested in big rewards, could not be inhibited by the law nor encouraged by profit. Such people are 'unprofitable servants.' I have little or no esteem for them and would cast them aside; but they are precisely what the rulers of the present age set the greatest store by and seek after!"

Their whole system was based upon the "calculating minds" of the average people, who would weigh in a sensible manner the pains and pleasures, and see the preponderating advantages of obeying the law. The legalists did not expect even the ruler to be above average. An average ruler, who is willing to let the law rule, will accomplish more than a specially gifted ruler trying to do without law. Han Fei Tzu illustrates his point by some interesting analogies.

"If you wait for an expert swimmer Yueh [in the south] to rescue a drowning man in the central part of the country, the man would be drowned long before the man of Yueh ar-

rives, however wonderful a swimmer he may be." Han Fei shows his scientific spirit in setting no value upon fortuitous results. "If you sharpen an arrow and shoot it off blindly, its point may by chance hit a thin hair, but you cannot therefore be considered a good archer, because you do not proceed by a regular method. If one sets up a mark five square inches and shoots from distance of ten paces, only an expert archer who follows a regular method can be certain of hitting it every time." To hit regularly such a mark, easy as it may appear, is to be a good archer; while to hit a thin hair in a casual way is to remain a poor one.

The legalists were fond of comparing laws to the compasses and the square. **Kuan Tzu** put it very well: "Tough one may have a clever eye and a practised hand, one cannot draw a square or a circle so well as clumsy compasses and a square may do it. So a clever man is able to make a pair of compasses and a square, but he cannot, while disregarding these, correctly draw a circle or a square. Even a Sage, though he may make laws, cannot, while disregarding the laws, govern a state."

Thus, the Rule of Law is one of the instances of man transcending himself by means of his own creations. In law, as in science, the use of instruments and levers makes for progress, provided that we do not forget the end for the means. As soon as this happens, our own creations or inventions will go beyond our control and may come to destroy us. This the legalists did not fully realize. But there is no question that they made valuable contributions to the science of law. One can even discern some signs in their works of an emerging conception of private rights. For instance, Shen Tao wrote:

"Now, if there runs a hare, that a hundred men chase it, is not because one hare would be sufficient for a hundred men to have a share in, but because of the uncertainty of the proprietary rights. If these are uncertain even a Yao will exert himself to the utmost - how must more, then, ordinary people? But when the hares are assembled wholesale on the

market, even passers - by do not look at them. Why? Not because they do not desire hares, but because the proprietary rights over them are definite. If rights and duties are definite, then even vulgar people will not quarrel about things. Therefore the secret of governing the empire and the state consists in making rights and duties definite."

We also can discern in the writings of the Legalists some rudiments of a constitutional theory of government. Shang Yang hit upon the idea of checks and balances :

"In the disorderly states of the present time, reliance is placed on a multitude of offices and a host of civil servants, but however numerous the civil servants may be, their affairs are the same and they belong to one body. Now those whose affairs are the same and belong to one body, cannot control one another. But by making their interests different and their disadvantages dissimilar, the early kings created guarantees."

If the legalists had been more moderate and less intolerant of other schools of thought, they would have succeeded in establishing a stable Rule of Law, comparable to the achievement of the common law. But it is a great pity that their keen minds should have been wedded to a radically positivistic and materialistic point of view. They not only denied the existence of any "higher law" but categorically forbade any ethical evaluation of the positive law as a heinous crime against the state. Professor Rheinstein, in his essay on "Standards of Justice", observed that positivism in the "substantive" sense rather than in a purely "formal," sense "is more than a definition of the term law; it is that political creed which holds that the commands of the sovereign are ultimate values in themselves which are above any evaluation under any other standard, and which therefore nobody is entitled to criticize from the point of view of morality, religion or any other conceivable standard. It may be doubted whether substantive positivism has ever been advocated in this radical form." I submit that

the Chinese school of legalism espoused precisely such a radical positivism.

Professor Duyvendak, a great admirer of the legalists, has nevertheless seen their main fault. "The Jurists," he said, "wanted to make law, without any touch with the people's sense of right and wrong, into a dead mechanism, which worked automatically like a compass or a pair of scales. They ruled out entirely the source of law, which lies in the development of life itself. Hsün-Tzu has very well drawn attention to this mistake. He says: "If there are laws, but they are not discussed, then those cases, for which the law does not provide, will certainly be treated wrongly." Law can never be complete and should be supplemented by the standards which live in the people. This last truth, so long forgotten in the western conception of law, when the *Juristenrecht* prevailed, has always been alive in China."

One of the greatest paradoxes in the history of Chinese thought is that the legalists claimed to base their system on Taoism. As matter of fact, nothing could be more opposed to the spirit of Taoism. Their claim to Taoistic affiliations was based on one flimsy ground: Once the order of law is set up and well established, then everything will follow automatically, and the king will be able to reign without ruling; because the law will have distributed the functions of government among the ministers, who will be responsible to their sovereign for carrying out their respective functions according to the law. This is a realization, so they claimed, of the Taositic ideal of a government by non-action, and of following Nature. But the paradox is that it is only after they have set up an entirely **artificial** order that they begin to talk about non-action and Nature! They wanted the law of force to possess the force of law.

They did succeed in making a strong State, so strong that it conquered one by one all the other States, until it expanded itself into an Empire. Its king declared himself the **First Emperor** in 221 B. C. He burned the books of all schools except those of law, medicine and divination.

History was to begin with a clean slate. The brains of men were to be washed clean of all the memories of the past. The Great Wall was built by means of forced labor. The family was to be demolished by penalizing any failure to report the crimes of one's relatives. Confucian scholars were buried alive in caves.

All things seemed to bid fair to the creation of a mighty dynasty which was to last as long as the Great Wall. But the dynasty lasted only fifteen years. It was a towering structure built upon the foundation of uprooted humanity. As Lao Tzu said: "A whirlwind does not last for a morning."

II. AFTER THE HAN DYNASTY

In 207 B. C., Liu Pang, the founder of the Han Dynasty, entered the Capitol and accepted graciously the most abject surrender of the grandson of the First Emperor of Ch'in, and issued a proclamation to the people in the following terms:

Fathers and Elders! All too long have you groaned under the inhuman laws of the Ch'in ; those who criticized the government were exterminated together with their families, those who talked in private were publicly executed in the market - place. ***

I merely want to enter into a covenant with you, Fathers and Elders, upon three laws: he who kills anyone will be put to death; he who wounds anyone, or steals or robs from anyone, will receive due punishment; as to the rest, all the laws of Ch'in are repealed.

All officials and people shall continue to attend to their respective duties as usual. My sole subject in coming here is to deliver you, Fathers and Brothers, from oppression, not to do violence or wrong to anybody. Have no fear!

Under the Han Dynasty, Confucian scholars came gradually but steadily, into power. You may be interested to know that the Founder of this great Dynasty was practically an illiterate. History tells us that in the beginning he was so contemptuous of the Confucian scholars that he went to the extent of urinating into a scholar's cap. Essentially he was a gangster en-

dowed with remarkable qualities of leadership, full of generosity, pluck, and shrewdness. Even after he had ascended the throne the manners in the court were still like those of the wine houses he used to frequent. He did not act like a monarch, nor did his old comrades act like ministers. When a Confucian scholar remonstrated, he swore at him, saying, "Your Dad conquered the world on horse-back, what use have I for effeminate learning?" The Confucian retorted, "True, Your Majesty has conquered the world on horse back: but no one has ever governed the world on horse-back." When the scholars wanted to institute court ceremonies, he said to them, "Let it be as simple as possible, so that I may be able to take part in it." After a rehearsal, he exclaimed, "Only today have I come to realize what an honor it is to be an emperor!" Throughout the ages, Confucianism has continued to remind the rulers of the dignity of being a sovereign. Fairness requires me to observe that many a Confucian scholar has been able to maintain his dignity as a scholar even vis-à-vis the monarch.

But the fact is, the so-called Confucianism of the Han scholars was no longer the pure Confucianism of Confucius and Mencius, but a mixture of many ingredients. Feudalism was gone in form, but not in spirit. The patriarchal ideology was given a cosmic sanction. The theism of Confucius, Mocius and Mencius had degenerated into a kind of cosmogonic pantheism. Providence had hardened into Fate. The universe was conceived as an organic whole composed of three integral parts, Heaven, Earth, and Man. Heaven and Earth constituted the macrocosm, and Man the microcosm. There was no bifurcation or sharp division between man and nature as in the modern west. They are interpenetrated and interdependent as members of a single organism. The polarity of **Yin** and **Yang**, or the feminine and the masculine, permeates the whole and all the parts. Heaven is **Yang**, earth is **Yin**. The sun is **Yang**, the moon is **Yin**. Man is **Yang**, woman is **Yin**. The superior is **Yang**, the inferior is **Yin**. The south is **Yang**, the north is **Yin**. Spring and Summer are **Yang**, Autumn and Winter are **Yin**. Morality is **Yang**, law is **Yin**. Benevolence is **Yang**, justice **Yin**.

Since it takes both **Yin** and **Yang** to make the universe or anything in particular, logically they should be treated as equals; but the patriarchal mentality of the Han Scholars would not allow such equality. To them **Yang** is definitely superior to the **Yin**. Their universe consisted of a hierarchy of high and low, noble and base, the active and the receptive, the positive and the negative.

In the major appendix to **The Book of Changes**, it is stated: "Heaven is noble; Earth is low. Thereby the poles of the masculine and the feminine are determined. When the low and high are exhibited, the noble and the base are seated. Motion and rest alternate regularly, and the strong and the weak are thereby decided."

This cosmogony is reflected everywhere in the legal system. Let a few instances suffice. To begin with, the reigning dynasty is always a part of the cosmic plan, being predetermined to rule the country at a certain juncture of time and for a certain period. How long it is fated to reign is, of course, not known to man; but the rise of certain unusual phenomena, such as eclipses of the sun, earthquakes, monsters, disasters, and outrageous crimes as patricide and matricide are sure signs that there is something wrong with the emperor or his imperial family. The emperor's all-embracing responsibility is the logical correlative of his omniscient authority. His authority, like his responsibility, has a cosmic sanction. This is why an attempt to overthrow government was regarded as something more than a political crime, but as an attempt to overturn the cosmic order itself. In the Commentaries on the Code of T'ang, it is stated: "The **Tso Chuan** says, 'When heaven acts against the seasons, disasters arise. When a man acts contrary to the virtues, disorder is introduced.' Now, the prince occupies the highest position of the world, and is charged with the mandate of Heaven above. His jurisdiction is coeval with what the two poles embrace and bear up, being the father and mother of all the people. The people, being his children and subjects at the same time, owe to him the duties of loyalty and filial piety. What a presumption, then, it is to

entertain such wicked ideas and to give rein to a rebellious intention! This is to turn the heavenly order upside down, and to go against human reason. This is the meaning of 'attempt to overturn.' "

Another illustration of the influence of the cosmogony is found in the prohibition to pass death sentences after the Beginning of the Spring (February 4) and before the Autumnal Equinox (September 23). Man being an integral member of the cosmic organism, the moral order and the physical order are one. It is not for man to act against the spirit of the season. Spring is the season of birth, and summer the season of growth. Both belong to **Yang**. To pass death sentences in these seasons is to introduce disharmony into the cosmos. Autumn and Winter, on the other hand, belong to **Yin**. They are the seasons of decay and death. There are innumerable poems on the seasons, particularly on Autumn, because, as the turning point from fullness to decay, it has always evoked profound pathos in the minds of the poets. I want to quote a passage from Ou-Yang Hsiu's **Autumn Dirge**:

"Alas! Autumn is upon us. *** Autumn the cruel and cold, autumn the season of rack and mist; *** autumn the season of piercing blasts; autumn the season of desolation and blight! ***

"All the rich luxuriance of green is changed; all the proud foliage of the forest swept down to earth, — withered beneath the icy breath of the destroyer. For autumn is Nature's chief executioner; and its color is pale. It is the temper of the steel; its symbol is a sharp sword. It is the avenging angel riding upon an atmosphere of death."

This, then, is the reason why all capital cases were reserved for the "Autumn Trials."

But the seamy side of this cosmic philosophy which assumes to measure human conduct by the physical order, is revealed in the story about a despotic emperor at the end of the sixth century A. D. We are told that the emperor was angry on

a summer day and wanted to beat someone to death. Chao Chu, a Judge of the Supreme Court, remonstrated strongly with him, saying: "In this last month of summer, when the heaven and earth are helping all things to grow to fullness, it is not a time for killing." The emperor replied: "It is true that the sixth month is a month of growth; but it is also a time of thunder and lightning. Since the way of heaven is to vent its majestic anger during the season of burning sun, why should I not be permitted to follow the example of heaven?"

I am not justifying the despot's action which was quite irrational in that he was acting against an established law to the scandalization of his ministers and people. I am only maintaining that the underlying philosophy of this institution is itself irrational.

I have already referred to the patriarchal mentality of the Confucian scholars. This is responsible for the marked inequality of sexes before the law, which they justified by their cosmogony of high and low. There were seven grounds for divorcing the wife, without admitting any corresponding grounds for divorcing the husband. Some of the grounds are simply ridiculous, such as childlessness and jealousy.

Just as the monarch was the heaven of his subjects, and the husband the heaven of his wife, so the father was the heaven of his son.

In the Code of Tang, we find this provision: "Any person who informs against his parents or grandparents shall be punished with death by strangulation." In the official *Annotations and Commentaries*, it is said :

"The father is the Heaven of the son. There should be mutual protection and shielding, and no exposure. Even if the father had violated the laws and committed a wrong, reason requires the son to remonstrate with him so as to remind him of the duties of respect and piety and thus to keep him from the trap of crime. If, instead of doing his, the son should forget natural affection and abandon rules of propriety, and deliberately inform against his father, he should be strangled..."

As is well known, Confucius laid the greatest emphasis on filial piety. "When the parents are living, serve them with propriety; when they are dead, bury them with propriety. He was insistent upon keeping the period of mourning for one's parents at three years. In the Code of Tang there is a most extraordinary provision in this connection: "Whoever gives birth to a child during the period of mourning *** is punishable with one year penal servitude." In the *Annotations* it is explained that the period of mourning was fixed at twenty-seven months, that "giving birth to a child" means "conceiving." For instance, a child might be born a month after the death of one's parents. This was something that could not have been helped, so it was not a crime. On the other hand if a child is born a month after the completion of the period of mourning, the party would still be held guilty, because it must have conceived within the inhibited time. It was also pointed out that in such cases, if the party should surrender himself to the public authorities and make a frank confession, he should be excused. But the *Annotations* is silent on whether it was the husband alone who was guilty or whether the wife would be equally guilty.

Concerning this provision there is an interesting history. In the fourteenth century, the first Emperor of the Ming Dynasty, in his preface to a book on the relations between parents and children, wrote:

"In some points the ancients erred by excess, for they went too far away from human nature. Take for instance the prohibition of child birth during period of mourning. I have looked into the classics and pondered at their philosophy, and I have concluded that this particular law could not be immutable. If we should adhere to the precedent, the race of human would soon perish."

Subsequently, the provision disappeared from the later Codes. I venture to think that Confucius himself would have agreed with Ming T'ai Tsu.

Of course, the relational idea has a legitimate place in any system of law, so long as it is kept within due limits. I have no quarrel with the T'ang Code where it uses the family relationships as an index to the degrees of punishment. Time does not permit me to cite all the interesting instances in which the presence of a certain relationship would increase or decrease, as the case might be, the penalty ordinarily imposed for the same crime in the absence of such a relationship. Generally speaking, the presence of a family relationship would increase the penalty in crimes against the person, and decrease it in crime against property. One of the most interesting instances is to be found in the following provision of the T'ang Code: "Whoever steals or destroys an image of the Lord of Heaven (Taoistic Deity) or an image of Budha, shall receive 3 years penal servitude. If a Taoist priest or nun should steal or destroy an image of the Lord of Heaven, or if a Buddhist monk or nun should steal or destroy an image of Buddha, the penalty shall be banishment with hard labor. If the image in question is that of a **True Man** or a **Bôdhisatva**, the penalty shall in each case be reduced by one degree." (Art. 276).

But the most devastating effect of the philosophy of Yin-Yang on the legal system is the complete identification of law and morals. Instead of reconciling them logically or delimiting their fields of operation, the traditional cosmogony turned them into a polarity of the **Yin** and **Yang** phases of the government. While this syncretism was formed in the Han period, the authors of the T'ang Code have given a crystalline expression to it in these words: "Now, virtue and morals are the foundation of government and education, while laws and punishments are the operative agencies of government and education. Both the former and the latter are necessary complement to each other, just as it takes morning and evening to form a whole day, and spring and autumn to form the whole year."

It is significant how the powers of government and education were united in a single organ and law and morals were made to function as the two wings of a bird.

But let us consider the consequences of such syncretism. Law and morals are identified as the head and tail of one and the same coin. Moral duties are *ipso facto* legal duties in the sense that the law sanctions them by penalizing their breaches. Whatever is immoral is not only illegal but a criminal offense. This is the enforcement of Confucian ethics by the technical methods of the legalists.

Under this kind of ideology there could be no such thing as a purely civil law. Even a debtor who failed to discharge his obligation was made punishable with flogging in addition to being compelled to pay the full amount owed. Why? Because a breach of contract involves a breach of faith, which is a moral wrong, and as such requires some penal discipline.

But no provision expresses the spirit of Confucian moralism and personal government more completely than this:

"Whoever does anything which he ought not to have done is punishable with 40 blows light flogging; and when the impropriety is of a serious nature, 80 blows heavy flogging."

The **Annotations** says :

"Miscellaneous offences and light crimes are full of ramifications, so that the general categories and specific rules can hardly cover them all. So whenever the judge can find no applicable provisions in the laws or ordinances, and cannot even reason analogically from them, he should exercise his discretion and determine the guilt according to the circumstances of the case. Only in this way can the gaps be filled up. This is the rationale of this article."

This was a veritable catch-all. Under such a legal system, there could be no real freedom. It is directly contrary to the modern Western principle of *nulla poena sine lege*, which has been adopted in the penal code of modern China.

Edward Jenks, in his *New Jurisprudence*, has pointed out that the sanctions of criminal laws are punitive or disciplinary, while those of the civil law are restorative or compensatory. "From the former, there is never entirely absent the spirit of stern reproach and chastisement. *** The atmosphere of the latter is that of the business meeting, at which sentiment and moral indignation are, as a rule, entirely out of place, and the only object is to get affairs straightened up as quickly as possible." Indeed, the existence of an ethically neutral margin in the map of law is the *sine qua non* of the rules and blossoming of civil jurisprudence. But there was no such neutral margin in the old Chinese system.

The traditional morals frowned upon litigations as such. This is one reason why the science of law and the concept of rights were never developed. I suspect that the Chinese cosmogony reinforced the discouraging of litigations, because its ideal is harmony rather than justice. Any conflicts and controversies were considered as bad in themselves, for the simple reason that they introduced a discordant note into the cosmic harmony. I remember reading in an anthology of exemplary decisions a case which is typical of the Chinese ideal. Two brothers were litigating for a farm. The magistrate, Su Ch'iung, said: "The most precious thing in the world is brotherly love, and the least precious thing is the farm. Why should you brothers quarrel for the least precious at the expense of the most precious?," Moved by this sagacious admonition, they were reconciled to each other, and began again to live together after ten years of estrangement.

Beautiful as the outcome is, it does not indicate an atmosphere in which principles of law could be fully developed. Many years ago I wrote a paper in Chinese trying to do some psychological analysis in regard to the reproachful attitude toward litigations. As this has won a warm approval from a prominent historian of Chinese legal thought as voicing the modern view, I want to quote a part of it:

"We certainly do not expect moral teachers to encourage litigations. But to regard litigations as ipso facto immoral is

a most dangerous thing. Litigations are something unavoidable in social relations. They cannot be radically uprooted by moral persuasions. Since they cannot be uprooted, then the best policy is to utilize this social phenomenon to the end that we may, patiently and dispassionately, evolve certain principles from the arguments of the parties. The flourishing of the science of law and the development of the spirit of the Rule of Law depend fundamentally upon the litigations. Without litigations and arguments there could be no finding of truth and justice. The law springs from litigations and tends to justice as its goal.

"To inhibit contentions and controversies over the rights and wrongs would cause our people to fall into a frustrated state of mind. When a man feels wronged, but, being inhibited by the traditional moral teachings, dare not complain frankly about it for fear of social disapproval, he will at first try to be patient in bearing the wrong. But the human heart is after all not made of wood, there are limits to what it can bear. As soon as the limits are exceeded, he will lose all control of himself and burst into a temper like thunder and lightning. The force of the reaction is in proportion to the degree of suppression. Instead of orderly arguments and contentions, he will resort to curses and fists. These disorderly expressions may properly be said to be the bastard of that morality which disapproved of litigations. This is a good illustration of the paradox that when you set your ideal too high, you may often fall too low. This is what the simple-minded Confucians do not see. In one word, if we want to prevent irrational outburst, we must transform litigations into a science and an art. Law is nothing but the science and art of litigations."

The agitation for legal reform in China began in the last decades of the nineteenth century. The adverses she had suffered in her military conflicts with the western nations and the establishment of consular courts caused deep resentment in the hearts of our people, but at the same time awoke the

more far sighted and open-minded leaders of those days to some of the intrinsic defects of our legal system. In the meantime, the western ideas of the rights of man and the Rule of Law struck fire in the hearts of many and made them realize how much the Chinese people had suffered under a legal system which was practically a policing of traditional morality. The legalists of the Warring States saw only the state; the Confucianists saw only the family; the young radicals of the early days of this century saw only the individual. In those days, the most popular books with the intellectuals were Adam Smith's *The Wealth of Nations*, Darwin's *Origin of Species*, Herbert Spencer's *Social Statics*, all translated by the master hand of Yen Fu. I was, of course, still too young to read those books, but I often hear such slogans as "struggle for existence," "survival of the fittest," "free competition," "individual liberty," and "equality of the sexes." There were also some who maintained that it was a dangerous thing to make a clean slate of history, and that the western ideology and way of life was too much like those of the legalists and cared too little for the family solidarity for China to adopt. They even feared that as all the western nations were trying to expand, they would sooner or later come into a terrific clash and end in mutual destruction. When the First Great War came, many Chinese intellectuals were disillusioned with a Rule of Law which seemed to rest on nothing but force and which gave rein to individual self-assertion and sanctioned cut-throat competition between nations as well as between individuals. It is most ironic that Yen Fu, who had been infatuated with individualism and the prospects of industrial civilization should have said shortly after the War, "Western progress has culminated in four achievements: to be selfish, to kill others, to feel little integrity and less shame." (Vincent Cronin, *The Wise Man from the West*, p. 285). This, of course, was an exaggeration, due to an unwarranted identification of the Western civilization, with a passing phase of it. But I am only narrating our bewilderment at the modern Christendom.

It was not possible to produce a Civil Code before we had

made up our minds on the underlying philosophy which was to replace the out-moded cosmogony and to serve as the background of the new legal system. But in the Criminal Law, the reform began as early as 1902, at the instance of Liu K'uen-I and Chang Tzu-T'ung. Emperor Kuang Hsu appointed Shen Chia-Peng and Wu Ting-Fang to study the problems of legal reform. That the impetus came from the public opinion of the West is apparent from the very wording of the rescripts :

"Seeing that problems arising from international commerce are multiplying every day, I hereby appoint Shen Chia-Peng and Wu Ting-Fang to investigate carefully into all the statutes and precedents that are now in force, and to suggest necessary revisions in the light of the problems that have arisen in our relations with foreign countries, and on the basis of a comparative study of the laws of all nations, to the end that our new laws may be applicable both to our own people and to foreigners, and that our administration of justice may be improved."

Shen and Wu worked for several years, and in the end, thanks to the salutary influence of European and American legal ideas, all the barbarous forms of punishment, which had been introduced subsequently to the T'ang Code, such as slow death and the mutilation of corpse, were abolished, and so was collective responsibility. The revised Penal Code, which was the result of their labor, was promulgated in 1910. The good Emperor Kuang Hsu did not live to see it. It has been superseded by later penal codes, but it was a good start.

As to the civil law, it was not until 1930 that The Civil Code of the Republic of China was promulgated. It contains 1225 articles, divided into five books : General Principles, Obligations, Rights over Things, Family, and Succession. The guiding spirit of this noteworthy Code is the philosophy of the San Min Ch I, which Dr. Sun Yat-sen had formulated after the pattern of Lincoln's "Of the people, by the people, and for the people." As the philosophical basis is very broad and cosmopolitan, so is the law. In his preface to the English trans-

lation, Hu Han-Min, late President of the Legislature, said, "The new Civil Code follows in its theoretical portions the principles which the modern juridical science is spreading steadily all over the world and which are tending to constitute a sort of universal common law and to remove the discrepancies due to the dissimilarity of the various national legislations, thus facilitating the development of international relations. In this respect, its coming into force will strengthen the ties which link us with the friendly nations of the world and will foster our trade relations with them." What he meant by the "theoretical portions" were, of course, the General Principles and the Law of Obligations. Indeed, the tendency toward uniformity in some branches of law is very marked. They belong, so to speak, to the *ius gentium*. There will be a day when the laws of contracts and torts in all modern nations will be as uniform as the law of negotiable instruments.

Hu Man-Min further pointed out that, "in order to meet the geographical, economic and demographic needs of a country with so many diversified regions as China, a number of old customs must be maintained in the present Code, principally in the matter of real rights. Many of its characteristics are therefore essentially Chinese." This is especially true of the law of real property. For instance, a whole chapter is given to a very peculiar form of property, called "dien," which is defined as "the right to use an immovable of another and to collect fruits therefrom by paying a price and taking possession of the immovable," usually for an agreed period of time. If, during the continuance of the dien, the dienor expresses his desire to transfer the ownership to the dienee, the dienee may acquire such ownership by paying the difference between the current value of the property diened and the price he had given for it. But if the value of the property has fallen in the meantime, the dienor has no duty to redeem it, for if he fails to redeem it within two years after the expiration of the dien, the diene automatically acquires the ownership of the property. In other words, the dienor has a right to redeem at the original price but he has no duty to do it. That means that if the

land has risen in value, he can redeem it at the original price; but he does not have to redeem it or to make up the difference between the original price and the present value, if the land has fallen in value.

This may seem to be a bad bargain for the dienee. Yet dien was a rather common custom among the country folks before the promulgation of the Code; and all that the drafters did was to translate the practice into articles.

Hu Han-Min explained this custom as an expression of the spirit of our people. The dienor is usually poor, and the dienee is as a rule better off financially. The poor man, in parting with his land does not give up his hope that someday he may be in a position to redeem the land. In the meantime, he has the consolation of thinking that he still owns it, and that he is not in debt. The dienee, on his part, would not like to take advantage of his neighbor's distress, and so he is willing to take the risk of having to own the land although the value has fallen, and to give the dienor a chance to redeem it at the original price if the value has risen. But in most cases, a dien is virtually a sale. As the proverb goes, "Nine out of ten diens stick fast."

But the most revolutionary of changes are to be found in the laws of family and succession. The new Code has replaced the principle of *agnatia* by the principle of *cognatia*. For the first time in the recorded history of China, females are empowered to inherit in equal shares with the males in intestate succession. From my experience on the bench and at the bar, shortly after the law came into force, I can assert that the fathers did not drop the idea of *agnatia* so easily, and many of them resorted to the making of wills. However, they could not take away their daughter's compulsory portion, which is "one half of her successional portion." (Art. 1223).

This is one of the greatest triumphs in our history of law-making since China's contact with the West. With this I beg to conclude.
