

论中国古代社会的“隆礼至法”

□ 马小红

中国人民大学法学院教授、博士生导师

DOI:10.16349/j.cnki.52-5035/c.2017.04.018

“隆礼至法”出自《荀子·君道》。如今研究者常常将其表述为“隆礼重法”，并解释为君主治国既要重视礼的作用，也要重视法的作用，荀子也因此被誉为“礼法合一”的思想先驱。其实，如果完整地阅读荀子“隆礼至法”的论述并参以自汉以后中国社会的礼法关系，我们可以体会到“隆礼至法”这四个字包含着更为丰富的思想内涵。

一、“隆礼至法”中的“礼”与“法” [见英文版第99页，下同]

“至道大形，隆礼至法则国有常，尚贤使能则民知方，纂论公察则民不疑，赏克罚偷则民不怠，兼听齐明则天下归之。”^①如果逐字逐句地解释这段出自《荀子·君道》的话，大意是治国的最高境界，即最贴近“道”的状态应该是：尊崇礼而崇尚法使国家安定；贤人受到尊敬而能人得到重用使民众有效法的榜样；集众议而出于公心行事使社会有高度的共识；奖赏勤勉的人而惩罚偷懒的人使怠慢懒惰的风气不能蔓延；兼听不同意见而明晰各种事理使天下归顺。如此解释，“隆礼至法”的内容包括了“尚贤使能”“纂论公察”“赏克罚偷”“兼听齐明”等。这里的“礼”已经不仅仅是前期儒家强调的以教化为主的礼，而是包含了价值观培养、制度构建与社会舆论引导等一系列内容。这里的“法”也不再仅仅是法家所构建的以刑为主的“禁止”性手段，而是与礼相辅相成的一种制度的安排。正如元人胡祗遹所解释的那样“余所谓法者，非止刑法而已也，百度百法皆是也”。^②春秋以来，儒法两家各执一词的礼法之争在荀子“隆礼至法”的思想中得以兼容。

值得我们注意的是，在“隆礼至法”的思想体系中，春秋以来礼法的对立关系已经大大改观。在总结各诸侯国变法实践经验的基础上，荀子的“隆礼至法”发展了前期儒家礼治的思想，将已经被破坏了的三代之礼改造成容纳法治并与法相辅相成之礼。礼成为战国之后法的灵魂与法制构建的基础。法在“隆礼至法”的思想中的变化更是显而易见，此处的法不再仅仅是三代时期的“刑”，甚至也不再是法家理论体系中与儒家的礼相对立的以刑为主的制度，而是涉及社会方方面面的“百度百法”，“尚贤使能”“纂论公察”“赏克罚偷”“兼听齐明”无不依赖于制度的完善。因此可以说荀子“隆礼至法”的思想已经勾画出了汉代以后礼法合一法律体系的蓝图。因此，“隆礼至法”绝不仅仅是“即重

① 王先谦：《荀子集解》，北京：中华书局，2016年，第282页。

② 胡祗遹：《杂著·论治法》，《元代史料丛刊·史学指南（外三种）》，杭州：浙江古籍出版社，1988年，第165页。

视礼的作用又重视法的作用”所能概括的,“隆礼至法”的“至”字也绝非“重”字可以替换。“隆礼至法”是一种不同于三代社会模式的描述,是一种新型的法律体系的构想。荀子的这种礼法关系论,经过秦政的失败后,为汉人所接受。“礼法合一,以礼为主”的中华法系由此而逐渐形成。

近代思想家谭嗣同在批判古代社会政治时指出:“二千年来之学,荀学也。”^①若不问在当时历史背景下,作为革命党人的谭嗣同所必定持有的政治观点、批判方法,而只就学术而言,“二千年来之学,荀学也”的观点是完全可以成立的。“礼法合一,以礼为主”的中华法系正是理论上儒法合流、制度上礼法兼备的体系。理论上的儒法合流、杂糅百家使中国古代的法学理论具有开放性,以“博大精深”形容古代法决非虚言;制度上的礼法兼备使中国古代的法律制度具有开明性,以民本主义为基调的礼缓和了古代法难以避免的残酷性,导人向善成为法的基本宗旨。

二、汉代以后的“隆礼”^[100]

汉代以后的中国,“隆礼至法”是历朝历代统治者以至黎民百姓共同追求的境界。先说“隆礼”:从法的角度而言,隆礼的宗旨首先是将帝王将相以至黎民百姓都纳入到礼的约束中;其次是将礼的精神,忠孝节义贯彻于立法司法的实践中。“隆礼”继承了孔子的教化思想——“道之以德,齐之以礼,有耻且格”。(《论语·为政》)礼教的目的在于培养人们的荣誉感,为君一定要做“明君”,为臣一定要做“忠臣”,为民一定要做“良民”。与同时代的西方社会相比,中国古代社会的特点就在于,荣誉感不是贵族阶层的专属,而是每一个人,甚至包括仆人都应具有做人起码的准则。二十五史中的《孝子传》《孝友传》《孝义传》《列女传》《游侠传》《卓行传》等就记载了诸多“闾巷”之民的事迹,这些人或为孝子孝女或为侠客义仆,皆以品德而入于正史,与帝王将相同样彪炳史册。《宋书·孝义传》中记载,南朝时有一个良民的典范,名叫郭原平。郭原平是一个孝子,他在工作时对雇主的款待总是婉言谢绝,因为他心中记挂父母,不忍一人独享佳肴。他总是与雇主商议将佳肴折成工钱,买些父母喜欢的东西带回家。父亲病重,郭原平衣不解带,终日侍奉在父亲身边。郭原平也是一位本分人,他到集市上去卖东西,从不欺诈,只赚取工本费。久而久之,被传为美谈。许多人到集市上想高价买他的产品以表敬意,但他从不接受。买者欲贵买,卖者欲贱卖,“君子国”中争相让利的买卖竟成为现实。郭原平的孝行义举多次得到朝廷及当地官府的旌表。当朝皇帝驾崩,郭原平这位布衣平民号哭至恸,有人不解,问道:“谁非王民,何独如此?”郭原平答道:“我受朝廷表彰,如此大恩未能报答,故而悲痛如此。”可以看出,礼教的价值观与旌表制度使郭原平对自己的荣誉充满了自豪感。如郭原平这样家境贫寒又身无官职但却被朝廷旌表最终入于正史传中的布衣草民在中国古代不可胜数。

礼在中国古代不仅约束着民众,也约束着帝王官僚。魏征曾上疏唐太宗劝谏:“圣帝明王皆敦德化而薄威刑也。德者,所以修己也;威者,所以理人也。”^②意思是圣明的君主以礼教所提倡的“德”要求自己自律的。中国古代社会皇帝虽然可以凌驾于法的制度之上,但却要受到礼的制约,礼对皇帝来说是无形至上的“大法”。这一点西方思想家有着精彩的论述,如黑格尔言:在中国假如皇帝不是“彻底地道德的、辛勤的、既不失掉他的威仪而又充满了精力的——那么,一切都将废弛,政府全部解体,

① 谭嗣同:《谭嗣同全集》,北京:中华书局,1981年,第337页。

② 吴兢:《贞观政要集校》,北京:中华书局,2003年,第294页。

变成麻木不仁的状态”。^①“口含天宪”的皇帝有时可以无视制度的制约，甚至依照自己的意志而变法改制，但却无法随意变动铭刻在世世代代中国人心中的礼。

二千年来，王朝更迭频繁，礼却一脉相承。在法制废弛、消亡、崩溃的情况下，礼起到了复制、创制的作用，新王朝的制度无不建立在礼的基础上。^②从这一意义上说，“隆礼”实在可以与我们的现代社会“宪法至上”相比拟，因为礼成为中国古代社会一切制度的根本，是中华民族创制精神之所在。

三、汉代以后的“至法”^[102]

再说“至法”，汉代思想家在批判秦法过苛的同时，并没有将礼法关系绝然对立而否定法的作用，相反，在荀子“至法”思想的指导下，改造了法家“以刑为主”的法，而将法的内涵拓展为“百度百法”，即深入到政治与社会各个领域中的法。与礼相比较，中国古代的法具有“典”的特征，即官府明确公布，体系完备，条文规范。比如律、令、格、式、典、例等，都是“法”的表现形式。与西方同时代的法相比，中国古代的法不仅注重法的“禁止”作用，而且也关注法的导向作用。伏尔泰在评价中国古代旌表制度时指出：“在别的国家，法律用以治罪，而在中国，其作用更大，用以褒奖善行。”^③这种法实际上与礼构成了密切的相辅相成的关系，尊礼必定守法，守法也必定尊礼。这种以礼的实现为宗旨的法，对皇帝的权力也不无制约。仅以汉唐间皇帝与法的几则“故事”说明。

《汉书·张释之传》中记，汉文帝时，有人“犯跸”，惊了文帝的御马。文帝将犯跸之人交与廷尉张释之处理，张释之依令判“罚金四两”。^④文帝以为处罚太轻，张释之言：“法者天子所与天下公共也。今法如是，更重之，是法不信于民也。且方其时，上使使立诛之则已，今已下廷尉，廷尉，天下之平也，一倾，天下用法皆为轻重，民安所错其手足？”《隋书·源师传》记，隋时有敕，宫外卫士也不得擅离所守。有一主帅却私令卫士外出，隋炀帝将主帅交付大理寺治罪。大理寺卿源师据律判以徒刑，隋炀帝却下令斩首。源师上奏：“若陛下初便杀之，自可不关文墨，既付有司，义归恒典。”《贞观政要·公平》记载，唐太宗时，太宗下令凡“诈伪阶资”（虚报为官年限）者必须自首，否者查出即处以死刑。不久有诈伪者被查处，大理寺少卿戴胄认为“诈伪阶资”据法当处流刑。太宗很生气，以为戴胄不以敕办事，有损君上的权威。戴胄言：“陛下当即杀之，非臣所及，既付所司，臣不敢亏法。”《新唐书·柳浑传》记，唐德宗时，有一位宫廷玉工为皇帝制作玉带，不小心弄坏了一块玉。玉工不敢承认，私自买了一块玉补上，玉带到了唐德宗手上，唐德宗看出这块玉与其他的玉不一样，于是责问玉工，玉工只好承认了事实。德宗很生气，以为玉工欺瞒，下京兆尹论死。时在中书门下任平章事并判门下省的柳浑对德宗说：“陛下遽杀之则已，若委有司，须详谏乃可。于法，误伤乘舆器服，罪当杖，请论如律。”这四则故事的结局是：汉文帝、隋炀帝、唐太宗、唐德宗——无论是明主还是中庸之君，甚至昏君——无一例外都忍下了自己的怒气而听从了“法官”的裁决。值得注意的是这些处在不同时代的法官，都认为皇帝有“立断”的权力，即皇帝对认为该杀的人可以“立诛之”“初便杀之”“当即杀之”“遽杀之”。但案件

① 黑格尔：《历史哲学》，王造时译，北京：商务印书馆，1963年，第171页。

② 卢梭在《社会契约论》中指出：最重要的法律“既不是铭刻在大理石上，也不是铭刻在铜表上，而是铭刻在公民们的内心里；它形成了国家的真正宪法；它每天都在获得新的力量；当其他的法律衰老或消亡的时候，它可以复活那些法律或代替那些法律，它可以保持一个民族的创制精神，而且可以不知不觉地以习惯的力量代替权威的力量。”引文见卢梭：《社会契约论》，何兆武译，北京：商务印书馆，1980年，第73页。

③ 伏尔泰：《风俗论》（上），梁守锵译，北京：商务印书馆，1995年，第217页。

④ 《汉书·张释之传注》“如淳曰：‘乙令：跸先至而犯者，罚金四两。’”（班固：《汉书》，北京：中华书局，2000年，第1769页）

一旦归于“法司”或“有司”，则进入了司法程序，法司及有司的长官应该依据法而不是皇帝的意志裁断，皇帝此时也不应再以个人的喜怒而干涉法官的裁断。

由此可见，“至法”不只是重视法的作用，更重要的是将法置于了非常尊崇的地位，即使皇帝也不能随意干涉，这才是“至法”的恰当解释。

结语 ^[104]

众所周知，中国社会的现代化不同于西方，因而西方法治现代化的道路与经验也无法完全适应于中国，这是显而易见的。^①但这并不说明中国的法律传统无法与现代法治兼容，相反，其完全可以在吸纳了西方法治经验的同时创造出新的法治发展途径。如杜维明所言：“以民主为例，深受儒家影响的社会，在发展民主时有不少异质因素，有些积习确实是反民主的，但不少儒家价值因素，同时又有使民主发展出现不同的性格和模式的潜力，所以才有东亚现代性中的儒学传统这一问题。”^②

“隆礼至法”四个字可以说是中国古人政治智慧与社会生活经验的结晶。礼是自下而上形成的“法”，其既是植根于人们心中的大法，也是社会公认的日常生活中的习惯与规则；^③法则是由朝廷官府经过一定程序颁行的成文法，是自上而下制定的“法”。^④礼法的结合，维系了中华法律文明数千年的发达，这足以使我们对祖先的创制能力充满自信。法由朝廷官府颁行，规范人们的言行；礼为社会的共识，培育人们的荣誉感，树立人们的守法意识和信念，“礼不远人”正是中国古人所追求的社会。礼法的结合，不仅证明了中国古代法律体系具有兼容并蓄的包容性，而且也证实了其与时俱进的能力。在现代社会中，中华古代法律文明中的民众自律导向完全可以转化为自治，而成为现代社会法治的传统基石。

（责任编辑：张发贤 责任校对：陈真）

① 比如北美学者郝大维、安乐哲认为：“中国的历史发展走的是不同的道路，这就排除了能将法制轻易地移入一个儒教环境的可能。中国既不宣扬统治者与公民之间有一种对抗关系，也不宣扬好的生活个人概念的多元。在西方对法制清晰理解的主要条件在中国并不存在。”参见郝大维、安乐哲：《先贤的民主：杜威、孔子与中国民主之希望》，何刚强译，南京：江苏人民出版社，2004年，第134页。

② 杜维明：《儒家精神取向的当代价值》，北京：北京大学出版社，2016年，第205页。

③ 对中国古代“礼”的特征与内容可以从以下两则资料中理解，《通典》对礼的定义说明礼具有自然法的性质，而《汉书》对礼的内容的描述，可以说明礼是自下而上形成的“法”。《通典·礼一》：“夫礼必本于太一，分而为天地，转而为阴阳，变而为四时，列而为鬼神。其降曰令，其居人曰义，孔子曰‘夫礼，先王以承天之道，以理人之情。失之者死，得之者生。’故圣人以礼示之天下，国家可得而正也。”《汉书·礼乐志》：“人性有男女之情，妒忌之别，为制婚姻之礼；有交接长幼之序，为制乡饮之礼；有哀死思远之情，为制丧祭之礼；有尊尊敬上之心，为制朝觐之礼。”“婚姻之礼废，则夫妇之道苦，而淫辟之罪多；乡饮之礼废，则长幼之序乱，而争斗之狱蕃；丧祭之礼废，则骨肉之恩薄，而背死忘先者众；朝觐之礼废，则君臣之位失，而侵陵之渐起；故孔子曰：‘安上治民，莫善于礼；移风易俗，莫善于乐。’礼节民心，乐和民声，政以行之，刑以防止。礼乐政刑四达而不悖，则王道备矣。”

④ 参见韩非对法的定义，《韩非子·难三》：“法者，编著之图籍，设之于官府，而布之于百姓者也。”

Ancient China's Exaltation of Rites and Perfection of Laws

Ma Xiaohong

The idea of *longli zhifa* 隆礼至法, or the exaltation of rites and perfection of laws, was proposed first by Xunzi in his elaboration of *jundao* 君道 (the Way of a sovereign). Present-day scholars usually interpret such a Xunzian legal concept as the equal importance a sovereign attaches to the role rites and laws can play in the management of state affairs. For this reason, Xunzi is praised as the pioneer thinker advocating the unity of rites and laws. Reexamining the thinker's full discourses regarding *longli zhifa* and the true situation of the rites-laws relationship since the Han dynasty (206 BCE–220 CE), we may grasp more accurately and more extensively the connotation of the Xunzian *longli zhifa*.

Rites and Laws in the Idea and Practice of *Longli Zhifa*

[Refer to page 79 for Chinese. Similarly hereinafter]

Xunzi asserts,

至道大形，隆礼至法则国有常，尚贤使能则民知方，纂论公察则民不疑，赏克罚偷则民不怠，兼听齐明则天下归之。

If “rites are exalted and laws perfected,” then the state has constancy. If “the worthy are esteemed and the able employed,” then the people know the direction of right conduct. If “there are continual assessments and impartial evaluations,” then the people will not mistrust the government. If “effort is rewarded and idleness penalized,” then the people will not be indolent. If “consultations are universal and judgments are uniform,” then “the whole world will come to him as to their home.”¹

It can be seen that the concept of *longli zhifa* contains proposals such as *shangxian shineng* 尚贤使能 (the worthy are esteemed and the able employed), *zuanlun gongcha* 纂论公察 (there are continual assessments and impartial evaluations), *shangke fatou* 赏克罚偷 (effort is rewarded and idleness penalized), and *jiangting qiming* 兼听齐明 (consultations are universal and judgments are uniform).

The rites mentioned here refer not only to those whereby the early Confucians could moralize the society but also to the efforts to cultivate value, create institutions, and guide public opinion. In the same vein, the laws mentioned here refer not only to coercive means

Ma Xiaohong is professor and PhD supervisor of the Law School at Renmin University of China. E-mail: xhma868@sina.com

1 Wang Xianqian 王先谦, *Collected Commentaries on the Xunzi* [荀子集解] (Beijing: Zhonghua Book Company, 2016), 282. The English translations of the *Xunzi* are based on John Knoblock's version, with a little modification.

such as punishments established by the Legalists, but also to institutional arrangements in harmony with the rites. In this regard, Hu Zhiyu 胡祗通 (1227–1293) of the Yuan dynasty explained, “The law shall not be simplistically understood as merely the penal codes; but instead, it is something [institutional] that extends to all socio-political aspects.”²

The contending Confucian and Legalistic concepts as regards rites and laws since the Spring and Autumn era (770–476 BCE) were successfully syncretized in the Xunzian *longli zhifa*. On the basis of his conclusions on reforms made by princes or ministers of differing states, Xunzi carried forward the early Confucian idea of ritual governance. He also reconstructed the archaic ritual system that was prevalent in the Three Dynasties (Xia, Shang, and Zhou), which had already been ruined in his time, into a new system uniting the mutually supplementary laws and rites. Due to Xunzi’s rehabilitating work, after the Warring States era, the rites became the soul of Chinese laws, as well as serving as the foundation of the legal system. In this sense, the laws in the Xunzian discourse were no other than the penetrating thread extending to all aspects of Chinese society. Thus, it is safe to say that the Xunzian concept of *longli zhifu* was the blueprint for the post-Han (legal) system uniting laws and rites. In view of this, one cannot simply sum up *longli zhifa* as the equal importance attached to rites and laws. Xunzi’s *zhi* 至 (perfection) is in no way a substitute for *zhong* 重 (importance). *Longli zhifa* was, so to speak, a representation of a pattern for society differing from that of the Three Dynasties, as well as denoting a new proposal of legal system.

The total failure of the governance developed by the Qin Empire (221–206 BCE) stimulated the successive Han to accept the Xunzian idea of rites and laws. As a consequence, the Chinese legal system based on the unity of rites and laws, regarding the rites as predominant, gradually took shape. As regards the traditional Chinese legal system, theoretically, the frame of reference that was applied to ancient laws was much more open, broad and profound due to the syncretism of Confucianism, Legalism, and other intellectual threads; and institutionally, the ancient Chinese legal system had an enlightened nature due to the unity of rites and laws. Most importantly, centering the rites on the great aspiration of putting the people first considerably mitigated the unavoidable cruelty of ancient laws and guiding the people to be morally good became the basic aim of the law.

The Exaltation of Rites in the Post-Han Era [80]

In the post-Han era *longli zhifa* was a dream shared by sovereigns of all ages and the ordinary people. From a legal perspective, the goal of *longli* (the exaltation of rites) lay first in the ritual restrictions placed on both sovereigns and the people, and second in the incorporation of the ritual spirit embodied in the moral characters such as loyalty, filiality, integrity, and righteousness into legal practice. *Longli* carried forward the moral education developed by Confucius, who firmly believed that only when the people were taught virtue and ritual would they have the true sense of shame (*Analects*, 2:3). The purpose of ritual education was to nourish the sense of honor among sovereigns, ministers, and commoners. In other words, the education required that sovereigns be enlightened; ministers, loyal; and commoners, law-abiding. In comparison with contemporary Western society, one of the most distinctive characteristics of ancient Chinese society lay exactly in the fact that the sense of honor did not belong only to the aristocracy, but could be shared by all people. To put it another way, the sense of honor was one of the most basic principles that could

2 Hu Zhiyu 胡祗通, “On Law” [论法治], in “Miscellaneous Writings” [杂著], in *The Three Books on the Way of Being Officials* [吏学指南 (外三种)], vol. 3 of *Collected Primary Sources Concerned the History of Yuan Dynasty* [元代史料丛刊] (Hangzhou: Zhejiang Ancient Books Publishing House, 1988), 165.

be applied to all persons, even the lowest servants. In official historical records, the good deeds done by low-born persons could be found everywhere. Because of their high moral character, such ordinary persons—filial sons or daughters, chivalrous men or women, for instance—could be on a par with the brilliant sovereigns and go down in history.

The *Book of Song* [宋书], one of the highly influential twenty-four official history books, recorded the story of Guo Yuanping 郭原平, a law-abiding person of the Southern Dynasties, who was known as a filial son. When his father was struck down by a serious illness, Guo took care of him day and night and always slept in his clothes. All the time Guo had his parents in mind, even though he was working outside his hometown. He repeatedly declined the feast his employers prepared for him, suggesting instead that if possible they convert the food into money so that he could buy something his parents favored. In no way would Guo enjoy delicious food alone. He was a man of honesty, cheating neither the old nor the young in the market. He sold products expecting merely to make enough money to cover the cost. If some offered a higher price as a mark of esteem, Guo would never accept it. As time passed, what he did became a much-told tale. The local authorities and even the central court praised and rewarded Guo for his extraordinary filial piety and integrity. When the sovereign passed away, Guo cried bitterly. Being confused by his tears, some wondered, “Are we not all subjects of the sovereign? Why do you alone act this way?” Guo replied, “I received handsome rewards from the sovereign. But, I am unable to repay His Majesty for his generosity. This is why I feel so inconsolable.”³ Guo's story indicated that the value system of ritual education, as well as the imperial reward system, helped Guo acquire a strong sense of pride.

The rites in ancient China not only placed restrictions on commoners but also on sovereigns and ministers. For instance, Wei Zheng 魏征 (580–643), a renowned high minister in the service of the Emperor Taizong of Tang, had admonished,

Historically, the sagacious and enlightened sovereigns without exception attached greater importance to morality than to punishments. Aspiring to set an example of being good, they strictly abided by all established moral principles. Resorting to punishments, they governed the people well.⁴

Although emperors in ancient Chinese society sometimes placed themselves above the laws, they necessarily accepted constraints imposed by the rites. In the eyes of emperors, rites were the invisible and highest law. As Hegel puts it:

If then the personal character of the Emperor is not of the order described—namely, thoroughly moral, laborious, and while maintaining dignity, full of energy—everything is relaxed, and the government is paralyzed from head to foot, and given over to carelessness and caprice.⁵

It was true that some emperors did defy the laws and even changed the laws at will; it was also true that they indeed had no way to alter the rites cherished by the Chinese people generation after generation.

Over two thousand years, dynasties of every kind rose and fell, but the rites were always there. Under circumstances when the legal system was lax and even broken, rites played a great role in the rehabilitation or (re-)creation of the legal system. Institutions of a new dynasty were all based on the existing ritual system. In this regard, one of Jean-Jacques Rousseau's assertions might be revealing. Rousseau's words read:

3 Shen Yue 沈约, *Book of Song* [宋书], vol. 8 (Beijing: Zhonghua Book Company, 1974), 2244–2246.

4 Wu Jing 吴兢, *A Compendium of the State Politics in the Zhen'guan Reign* [贞观政要] (Shanghai: Shanghai Ancient Books Publishing House, 1984), 171.

5 Georg W. F. Hegel, *The Philosophy of History* (Kitchener: Batoche Books, 1900), <https://www.marxists.org/reference/archive/hegel/works/hi/lectures1.htm>.

Along with these three kinds of law goes a fourth, most important of all, which is not graven on tablets of marble or brass, but on the hearts of the citizens. This forms the real constitution of the State, takes on every day new powers, when other laws decay or die out, restores them or takes their place, keeps a people in the ways in which it was meant to go, and insensibly replaces authority by the force of habit.⁶

In this sense, the ancient endeavor to exalt the rites could be compared to the modern effort to recognize the supremacy of the constitution. The rites were actually the foundation of all institutions in ancient China. It is in the rites that the creative spirit of the Chinese nation lies.

The Perfection of Laws in the Post-Han Era [81]

Thinkers in the two Han dynasties rebuked severely the draconian nature of laws promulgated by the Qin Empire. At the same time, they did not attempt to deny the role laws could play by alleging an absolute opposition between rites and laws. Instead, under the guidance of the Xunzian idea of *zhifa* (the perfection of laws), they reconstructed the punishment-centered laws advocated by the Legalists into the (Confucian) laws that could extend into all aspects of politics and society.

Compared with the rites, the laws in ancient China were more like codes. In other words, the ancient Chinese laws were all officially promulgated, systematized, and standardized. The ancient Chinese law was embodied in *lü* 律 (laws), *ling* 令 (decrees), *ge* 格 (specifications), *shi* 式 (rules), *dian* 典 (codes), and *li* 例 (conventions). Attaching equal importance to the prohibiting and guiding roles that laws could play, the ancient Chinese laws made themselves distinct from their Western counterparts of the same time period. Voltaire, when evaluating the guiding role of laws in ancient China, observed, “In other countries the laws inflict punishments on criminal actions; in China they do more: they reward virtue.”⁷ The Chinese laws and rites in such a theoretico-practical context were actually inseparably interconnected. Respect for the rites gave birth to abiding by the laws and likewise abiding by the laws gave birth to respect for the rites. The laws that were endowed with the basic aim of fulfilling the rites inevitably placed restrictions on the sovereign’s power.

As the “Biography of Zhang Shizhi” [张释之传] in the *History of the Former Han Dynasty* [汉书] records, one day a man unexpectedly frightened the horses driving the Emperor Wen’s wagon. Zhang Shizhi (fl. 179–143), the Imperial Commandant of Justice (廷尉) of the Former Han, had the intruder fined four taels of gold in accordance with the law. The Emperor said the punishment was too mild. In order to convince the angry sovereign, Zhang explained,

The law must be upheld by the Son of Heaven and by everyone in the empire alike, and that is the penalty the law prescribes. If I were to impose a heavier penalty in special cases, then the people would cease to have any faith in the laws. If at the time the incident occurred Your Majesty had ordered the man executed on the spot, then that would have been the end of the affair. But now the case has already been referred to me and, as Commandant of Justice, it is my responsibility to see that everyone in the empire is treated with absolute fairness. Should I once deviate from that standard of fairness, then the entire legal system of the empire would lose its impartiality and the people would be at a loss to know how to conduct themselves. May I ask Your Majesty to consider these consequences?⁸

6 Jean-Jacques Rousseau, *The Social Contract*, trans. George D. H. Cole (London: J. M. Dent & Sons Ltd., 1923), 48.

7 Voltaire, *An Essay on Universal History, the Manners, and Spirit of Nations: From the Reign of Charlemaign to the Age of Lewis XIV*, trans. Mr. Nugent (London: J. Nourse, 1759), 21.

8 The English translations are from Burton Watson, trans., *Records of the Grand Historian* (Hong Kong, New York: A Renditions-Columbia University Press, 1993), 470.

In the Sui dynasty (581–618), the central court ordered that even the guards outside the palace could not leave their posts without authorization. Nevertheless, one of commanders of the imperial guards made bold to allow several guards to leave their posts. Emperor Yang was infuriated and asked the Court of Judicial Review to punish the commander. Yuan Shi 源师, then the Court's Chief Minister (大理寺卿), sentenced the general to imprisonment. Disagreeing with Yuan, the Emperor nevertheless decreed that the offender be executed. In view of this, Yuan wrote a memorial to the throne, arguing,

If Your Majesty put the commander to death on the spot, it would be acceptable and the Court would thus be freed from the dissipation of its energy. But, if not, once the case is referred to the Court, it must be reviewed and judged in strict accordance with relevant codes.⁹

In the Zhenguan reign (627–649), the Emperor Taizong of Tang issued an edict requiring that all officials who made false declarations regarding the length of their service confess their misdeeds. Otherwise, they would be executed promptly once detected. Shortly after the promulgation of the imperial edict, a fraudulent official was investigated and handed over to the Court of Judicial Review. Dai Zhou 戴胄 (?–633), then Vice Minister of the Court (大理寺少卿), sent the official into exile. Emperor Taizong was angry at the Court's final judgment, rebuking Dai for disobeying the sovereign's order and jeopardizing the royal authority. Dai Zhou responded, "I have no right to intervene in your decision to execute the offender on the spot. Nevertheless, when a case was turned over to the Court, I will handle it impartially and try my utmost to do nothing to harm the fairness of the laws."¹⁰

A similar case may be found in the reign of Emperor Dezong of Tang (r. 780–805). One of the jade craftsmen working for the imperial workshop imprudently smashed a piece of fine jade when producing a jade belt for the Emperor. Afraid of being punished, the craftsman secretly had the broken piece replaced with one he purchased privately. When exposed, the angry Emperor asked the Metropolitan Governor (京兆尹) to try this case, hoping that the reckless craftsman would be sentenced to death. Informed of this, Liu Hun 柳浑 (715–789), then the Manager of Affairs of the Secretariat-Chancellery (中书门下任平章事) and Supervisor of the Chancellery (判门下省), said to the sovereign,

I will have nothing whatever to say to Your Majesty, provided that the craftsman has already been executed on the spot. If not, the offender should be handed over to the concerned department and his case must be tried in strict accordance with the laws. According to the law, those who accidentally break imperial articles shall be sentenced to a flogging. The final decision must be in conformity with existing laws.¹¹

These four stories have similar endings: in spite of being extremely angry at the rude or reckless offenders, Emperor Wen of the Former Han, Emperor Yang of Sui, Emperor Taizong of Tang, and Emperor Dezong of Tang—whether they were enlightened, mediocre, or incompetent sovereigns—without exception had to make a concession and allow the cases to be tried by the officials of the law. One point in relation to the stories is particularly worth being highlighted. Specifically, although the high officials in charge of legal affairs in differing dynasties unanimously agreed that the sovereign had the right to execute the offender on the spot, they could say no to the sovereign's intervention in the investigation and trial of the offender and have the case freed entirely from the highest ruler's arbitrariness as soon as the offender was handed over to the justice department. From this it

9 Wei Zheng 魏征 et al., "Biography of Yuan Shi" [源师传], in vol. 5 of *Book of Sui* [隋书] (Beijing: Zhonghua Book Company, 1973), 1553.

10 Wu, *A Compendium of the State Politics in the Zhen'guan Reign*, 165.

11 Ouyang Xiu 欧阳修 et al., "Biography of Liu Hun" [柳浑传], in vol. 16 of *New History of the Tang Dynasty* [新唐书] (Beijing: Zhonghua Book Company, 1975), 4672.

can be seen that ancient China's aspiration for *zhifa*, or the perfection of laws, did not only attach great importance to the role the laws could play but also enshrined the laws in the supreme position immune from arbitrary royal power. Therein lies the best explanation of the Xunzian *zhifa*.

Concluding Remarks ^[82]

It is well known that Chinese and Western modernity are not the same. In view of this, it is safe to say that the Western modernization of laws can by no means be entirely applicable to China. In this regard, the comment of two American scholars may be helpful. They say,

China's rather different historical development precludes easy translation of the rule of law into a Confucian context. China advertises neither an adversarial relationship between rulers and citizens nor a plurality of individual conceptions of the good life. The principle pre-conditions of the distinctive understanding of the rule of law in the West were not present in China.¹²

It must be noted that the above citation should not be used to corroborate the claim that the Chinese legal tradition is incompatible with the modern (Western) rule of law. On the contrary, not only is the Chinese tradition open to the Western experience of the rule of law, but it is also capable of creating a new mode of rule of law. As Tu Wei-ming 杜维明 puts it:

Take democracy for example. In the societies that have been deeply influenced by Confucianism, there are some heterogeneous factors in the course of democratization, and older customs that are truly opposed to democracy. But on the other hand, quite a few Confucian values can endow democracy with a distinct nature and pattern. This is just where the Confucian tradition stands on the question of East Asian modernity.¹³

Longli zhifa, or the exaltation of rites and perfection of laws, crystalized the political wisdom and life experience of the ancient Chinese. The laws in ancient China denoted the written statutes and decrees that were promulgated and implemented in a top-down manner.¹⁴ The rites were also a kind of law. Rites were made in a bottom-up manner, rooting deeply in the Chinese mind and serving widely as the everyday customs and rules.¹⁵ The laws were used to regulate people's words and actions; and the rites, to nourish the sense of honor, as well as to establish people's law-abiding consciousness. A society wherein the rites would not be far from the people was exactly what the ancient Chinese pursued. For thousands of years, the unity of rites and laws remained the anchor of the traditional Chinese rule-of-law civilization. Not only does this demonstrate the open and tolerant nature of the ancient Chinese legal system, but it also confirms the ability of this system to keep up with the times. It enables us to be fully confident in the creativity of our predecessors. In present-day China, the people's self-discipline nourished by the ancient Chinese legal tradition can be transformed into an autonomous practice, which in turn constitutes the cornerstone of the modern rule of law.

12 Roger T. Ames and David L. Hall, *The Democracy of the Dead: Dewey, Confucius, and the Hope for Democracy in China* (Chicago, ILL: Open Court, 1998), 215–216.

13 Tu Wei-ming 杜维明, *The Significance of Confucian Spiritual Aspirations to the Modern Society* [儒家精神取向的当代价值] (Beijing: Peking University Press, 2016), 205.

14 See Han Fei's 韩非 (a leading thinker of Legalist in the Warring States era) definition of law: "The law is codified in books, kept in governmental offices, and promulgated among the hundred surnames" (*Hanfeizi*).

15 The characteristics and contents of ancient Chinese rites can be found in "Rites Part I" [礼一] of *An Encyclopedic Collection of Ancient Chinese Institutions* [通典] and "Treatise on Rites and Music" [礼乐志] of *History of the Former Han Dynasty* [汉书]. The definition of rites in the former book gave expression to the spirit of natural law. *History of the Former Han Dynasty's* delineation of the contents of rites shed light on the truth that the rites were a kind of law with a bottom-up nature.

Bibliography of Cited Translations

Knoblock, John, trans. *Xunzi: A Translation and Study of the Complete Works*. Stanford, CA: Stanford University Press, 1990.

Liao, Wenkui, trans. *The Complete Works of Han Fei Tzu, A Classic of Chinese Political Science*. London: A. Probsthain, 1939.

Watson, Burton, trans. *Records of the Grand Historian*. Hong Kong, New York: A Renditions-Columbia University Press, 1993.

Translated by Chi Zhen

Chi Zhen is associate researcher of Shanghai Academy of Social Sciences.