

The Spirit of the Rule of Law in China

By Qiang Fang

In *The Spirit of Laws*, Charles Montesquieu argued that China was a despotic state whose principle was fear.¹ A century later, by developing the theory of “Asiatic mode of production,” Karl Marx suggested that China operated under the principle of “oriental despotism” in which the emperors were regarded as fathers of the state. While historian Karl Wittfogel disagreed with Marx on the term of Asiatic mode of production, he generally accepted the notion of oriental despotism—that hydraulic (agriculture with small-scale irrigation) societies such as China “are usually headed by a single individual in whose person is concentrated all the power over major decisions.”² Today, despite the arguments made by such Western scholars as Voltaire that [the] Chinese constitution was the best in the world,³ the dominant view of Chinese law remains largely the same as that of Montesquieu, Marx, and Wittfogel. Scholars in both China and America argue that China has only the rule *by* law or the rule *by* men and the concept of the rule *of* law is alien to China.⁴ Some even go further by arguing that a Chinese ruler who enjoyed unlimited power “not only did not abide by the law but his personal will is the law.”⁵

This article makes the case that China not only had a theory of the rule of law but also put it into effect in many periods. Not only was the rule of law a cornerstone for most dynasties, but its spirit was deeply embedded in the minds of both the ruler and the ruled.

Definition of the Rule of Law

Although the notion of the rule of law, as Ronald Cass notes, means “very different things to different people,”⁶ many Western scholars accept a common understanding of the concept. For example, Stanley Lubman argues that in the West, one of the basic principles of the rule of law is that the law should be the supreme legal authority.⁷ Other influential intellectuals assert that the rule of law has three ideas: the supremacy of regular law as opposed to arbitrary power, equality before the law of all persons and classes, including government and officials, and the incorporation of constitutional law as a binding part of the ordinary law of the land.⁸ Ultimate objectives of the rule of law include a legal system that subordinates the politically and economically powerful to the law and a government of laws and not of men.⁹

Theory of the Rule of Law in China

If the core of the rule of law in the West means that law has supreme legal authority and that ruling elites should subordinate to law—would we then argue that major Chinese schools of law, such as Legalism, Daoism, and Confucianism—proposed elements of a rule of law theory which conforms to the modern Western concept? During the Eastern Zhou (770–256 BCE), rulers could no longer maintain political order. As a result, Legalists emerged with arguments that their system, if enacted, could make states stronger. Guan Zhong, Lord Shang, and Han Fei were the most prominent early Legalists.

Guan Zhong was a powerful official in the Eastern Zhou dynasty, and his view of the rule of law arguably influenced later Legalists. In Guan Zhong’s work, *The Guan Zi*, he attributes the rule of law (*fa zhi*) to former sage kings who were to be followed by contemporary rulers. The author stated that sage kings would let no one, no matter how clever or noble, or how close they were to the rulers, violate the law.¹⁰

Both Lord Shang and Han Fei lived in the Warring States Era (475–221 BCE), a much more fierce period when only about seven major states remained in much of the area known today as China. To

strengthen the state power, Lord Shang and Han Fei urged the rulers of Qin, the powerful state, to give law the supreme power. Like Guan Zhong, both of them considered former sage kings to have implemented the rule of law as the best way to attain great order (*da zhi*). Lord Shang observed that non-discriminatory application of the law was the system that rulers should use. Everyone, from “prime ministers, generals, and officials to common people” who went against state law, would be punished without pardon. Even if someone had done good things before, he would still be punished if he did something wrong later, for “state law cannot be violated.”¹¹ Because Lord Shang comprehended that the rulers were more likely to infringe the law, he stressed that “law must be obeyed by both the ruler and officials.” “The upheaval comes when the ruler and officials resort to personal will and not law,” Lord Shang claimed, “and the well-governed society appears when the law is clearly enacted and neither the ruler nor officials break the law with their personal wills.”¹²

Han Fei, a strong supporter of the rule of law, is renowned for having provided the most comprehensive and thoughtful arguments among Legalists.¹³ The laws, he argued, should be implemented impartially. He described the benefits of the rule of law and opposed the Confucians’ view, which too often meant rule according to the will of the ruler. If the ruler relied on his personal will and not law, even Yao—the legendary first ruler—could not have governed a state well. . . . and even if the ruler is mediocre, he can still administer the state without making a mistake if he sticks to the law.¹⁴ As a result, Han Fei identified the importance of the rule of law:

*The ruler who most clearly uses law (fa) will count on law (shu) and not on men. Therefore, the state managed in accordance with law (fa) is unrivaled.*¹⁵

Daoism, another important Chinese belief system, included similar views on the rule of law. Daoism rendered law with certain divine meaning. The recently discovered anonymous text, the *Jingfa* (*Classic of Law*), offers a naturalistic source of law. In its words, “The *Dao* (way) gives birth to the law, and law is what marks success and failure. Used as a marker, it distinguishes what is crooked from what is straight.” This text, combined with other more eclectic texts such as the *Guanzi* and the *Huainanzi*, spelled out the implications of the *Dao* for rulers and officials intent on administering to a large and diverse population. The Daoist *Dao* shared the universality of the Confucian *li* (ritual) and the Legalist *fa* (law) but it emphasized nature over sages and people over the state. Like the *li* and the *fa*, the *Dao* imposed constraints on the ruler, and it came close to the concept of natural law advocated by Greek stoics and Roman jurists. Unlike natural law in the West that undergirded the duties and rights of citizens, the *Dao* in China was brought to bear more on the responsibilities and opportunities of rulers and officials.¹⁶

Confucianism is arguably the dominant school of law in Chinese history. Confucius (551–479 BCE), a teacher and prison warden in the state of Lu, placed morality higher than punishment, and made *li* into a more universal concept, potentially available to all social strata and ethnic groups. Confucius also invoked earlier historical leaders, both legendary and historical, as sages who could serve as models (*fa*) for rulers of his own day. In these ways Confucius and his followers, including Mencius and Xunzi, who became collectively known as the Confucian scholars, fashioned a form of “natural law” that Chinese rulers after the Han should follow.¹⁷

In sum, despite their different views, Chinese Legalist, Daoist, and Confucian texts have at least one thing in common: all advocate a legal system that puts officials, and even the rulers, under the law. Their theories contain elements similar to the ideas of the rule of law posed by Greek thinkers like Aristotle,¹⁸ and may be likened to the “core” of the rule of law in modern theories.

Practice of the Rule of Law in China

The theory of the rule of law that Legalists and Daoists strongly advocated did not simply exist in their texts, but was actually practiced by many Chinese rulers in most dynasties, though even the most honest Chinese rulers sometimes violated the law. The Legalists claimed that, in the reigns of legendary sage kings, such as Yellow Lord (*Huangdi*) and Yao, the rule of law was supposedly observed by all citizens without exception.

After the Xia, Shang, and Zhou dynasties (from about 2000 to 256 BCE), the practice of the rule of law persisted to varying degrees throughout the later period. Instead of sage kings, according to promi-

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nent Song historian Sima Guang, there were three kinds of rulers: honest rulers (*jun zi*), dishonest rulers (*xiao ren*), and stupid men (*yu ren*). In general, honest rulers practiced the rule of law more often than not, while dishonest rulers practiced the rule of law only occasionally.

During the Warring States Era, the practice of the rule of law was best exemplified by Lord Shang, who became the prime minister of the state of Qin under Xiaogong (381–338 BCE) in 381 BCE. Sima Guan asserted in his *Historical Records* that, when the heir-apparent violated the law, Lord Shang remarked: “Violations by the upper class are why the law cannot be implemented.”¹⁹ Although Lord Shang did not have the power to punish the heir-apparent and was unable to persuade the king to punish his son, he did have teachers of the heir-apparent severely mutilated. According to Lord Shang, seeing that even the heir-apparent’s retinue would be punished in accordance with law, no one dared break the law any more. In this case, Qin Xiaogong practiced the rule of law by backing Lord Shang’s punishment on the heir-apparent, and his actions were similar to the sage kings that the Legalists admired.

Founded on the debris of the Qin, the Han dynasty (206 BCE–220 CE) largely inherited Qin laws and institutions. Honest rulers such as Wendi (179–157 BCE), Jingdi (156–141 BCE), and Guangwudi (25–57 CE) came closest to following the rule of law. In one case, for example, when Han Wendi rode his horse across a bridge, a man suddenly came out of the bridge and startled the horse, almost causing Wendi to fall. Wendi immediately ordered the man detained and sent to Judge Zhang Shizhi for punishment. But Zhang reported that the man should only be fined. Infuriated, Wendi demanded the man be punished more harshly. Zhang replied that the law should be followed by all people under heaven. If the man received heavier punishment than the law stated, people would no longer trust the law.²⁰ Wendi was eventually persuaded, and abided by the law, even though he suffered a personal offense.

In the Han dynasty, even a dishonest ruler like Wudi (140–87 BCE) could implement the law strictly. In one case, his nephew was sentenced to death after killing someone while intoxicated. Wudi, in the face of petitions from his closest officials, reportedly “wept and sighed” as he told the officials: “The laws are created by my former royal fathers. If I break their laws because of my sister, how can I face them in the royal temple after I die? Also I will betray my people.”²¹ In this case, Wudi chose to obey the state law of his ancestors, rather than yield to any “despotic inclination” he may have had.

In both the Sui (581–618 CE) and Tang (618–907 CE) dynasties, many emperors—including Sui Wendi (581–604), who possessed a fickle personality and frequently meted out harsh punishments to innocent people, realized in some cases that the law should not be violated, even by himself. As the Chinese scholar Tang Chengye argues, the practice of law in the reign of Sui Wendi not only conformed to Chinese Legalist thought, but also “complied with the modern spirit of the rule of law.”²² Emperor Tang Taizong (627–649) might be one of the best models for the rule of law in Chinese history. But rulers less famous than Taizong also practiced the rule of law. For instance, during Emperor Xuanzong’s reign (846–859), when his favorite musician, Luo Cheng, was arrested for murder, many of his fellow musicians pleaded that Xuanzong pardon the killer so that he might be able to continue to amuse the ruler. The ruler’s responded, “What you are thinking about is nothing but the skill of Luo, but what I am thinking about is the law of Gaozu and Taizong.”²³ Like other honest rulers, Xuanzong could keep the rule of law in mind even when his servants seemed to forget it, and even when it was not in his personal interest to abide by the law.

In the Song dynasty, good emperors such as Song Taizu and Song Xiaozong (1162–1189) demonstrated little “despotic inclination” and consciously recognized the importance of the rule of law. Because General Guo Jin was tough on implementing the law, Taizu always warned the soldiers sent to Guo’s army that they should obey the law, for even if the emperor wanted to pardon them, General Guo would have them killed.²⁴ Here, Taizu assumed that the law was outside even his control. Like similar predecessors in earlier dynasties, dishonest rulers like Song Taizong (976–997) also abided by the rule of law in certain cases. When Taizong’s favorite doctor Chen Liyong was arrested after committing several murders and other crimes, Taizong planned to lightly punish him. Zhao Pu, the prime minister, insisted that Chen be punished more severely in accordance with the law, and Taizong eventually let the judges condemn Chen to death.²⁵ Although Taizong became notorious for pardoning many criminals, in this case he was constrained to act according to the law.

It is widely believed that during the Ming and Qing dynasties, Chinese rulers became more absolute than in former dynasties. Yet, despite this tighter political control, rulers and officials probably practiced the rule of law as frequently as in other dynasties. Ming dynasty founder Ming Taizu (1368–1398) consciously understood the importance of the law even before he was enthroned in 1368. The new emperor

believed in the importance of law because preceding Yuan emperors engaged in widespread legal abuses. In his view, *li fa* (ritual and law) was the fusion of *li*, “the boundary system of the state,” and *fa*, the law, both of which were crucial for a state. Without the law, Taizu stated in 1385, no ruler, including Yao and Shun, “could fulfill his duty simply by radiating ‘mercy and virtue.’” In addition, Taizu conceived the lack of *fa du* to be the decisive cause of the fall of other warlord regimes.²⁶

Ming Shenzong (r. 1572–1620) was a dishonest Ming dynasty ruler who wanted the son of his favorite concubine, instead of the son of the empress, to be the heir apparent. The court opposed this because it violated the customary law that the eldest son of the first wife should be the successor. Confronting the unanimous objection of officials, Shenzong had to yield by promising that he had no intention to abandon the customary law. Even though Ray Huang is correct that, throughout the Ming dynasty, rulers had absolute power that usually was not challenged, in practice this absolutism did not always conform to reality.²⁷

The Qing rulers largely adopted the Ming legal code and bureaucratic system. It is commonly believed that under the reigns of Yongzheng (1723–1736) and Qianlong (1736–1796), authoritarian rule was at its height. However, as in the Ming dynasty, Qing rulers such as Kangxi—one of the best rulers in Chinese history—also manifested consciousness of the rule of law and governed accordingly. Even Yongzheng, a dishonest ruler who illegally executed many officials—including several of his own brothers who challenged his reign—not only understood the importance of the rule of law, but also justified much of his killing in the name of maintaining the law. Yongzheng once wrote: “If I, a person above all others, want the law to be enforced, I must first implement the law myself and then other people will follow.”²⁸

It is possible to draw at least one conclusion based on this evidence. Contrary to conventional wisdom, the rule of law is present in varying degrees in many Chinese dynasties. The above cases are merely the tip of the iceberg. Indeed, despite numerous violations of the law by many rulers, including even honest rulers such as Tang Taizong and Qing Shengzu (1654–1722), we can find plenty of evidence in the long Chinese history that both honest and dishonest rulers respected law as something higher than their sovereign power.²⁹ Similarly, officials, whether they were upright or evil, high-ranking or low-ranking, could admonish their rulers to abide by the law.

Institutions and Procedures to Enforce the Rule of Law In China

One of the crucial arguments made by some scholars is that, since Chinese rulers had unlimited power, the rule of law did not exist. “Unlimited power” means there was no measure or system to constrain the rulers’ power. However, in general, two methods that existed in Chinese history were used to prevent emperors from exerting absolute power and enforcing the rule of law. One was the censorate (an institution founded to supervise all government activities), stressed by such Confucian thinkers as Mencius and Xunzi, as well as both honest and dishonest rulers, to be an effective means to check the unlawful activities of sovereigns. Most officials appointed as censors were upright and had passed the highest level of civil examinations. Although good rulers like Han Wendi and Tang Taizong could do better, dishonest rulers such as Han Wudi and Tang Xuanzong could also respect officials who frequently rectified their unlawful wrongdoings. They even expressed a willingness to correct their mistakes.

To cite an example, after Han Xiu, a reportedly upright official, became prime minister, Emperor Tang Xuanzong (712–756) lost much weight because Han always found fault with him. When someone asked Xuanzong why he did not expel Han, Xuanzong said: “Although I am getting emaciated, our state will get fat. Unlike Xiao Song who always selects favorable things to report which makes me unable to sleep well, Han always challenges me in the court, but when I return to my home, I can have a good sleep. The reason I use Han is for the sake of our state and not for me.”³⁰

Another method used to contain a ruler’s unlimited power was the interpretation of signs from heaven (*tianxiang*). In the Han dynasty (206 BCE–220 CE), Dong Zhongshu, a famous Confucianist, claimed there was an interaction between heaven and humans. If the state failed to correct its mistakes, heaven would once again make strange signs before meting out punishments.³¹ Since then, both rulers and officials would often take natural disasters as warnings from heaven, and would accordingly try to correct their faults or change their policies. During the reign of Emperor Song Renzong (1022–1063), when his mother wanted to execute the guards after two royal buildings burned down, several officials argued against it. Censor Fan Feng pointed out that the guards should not be punished severely because the fires were actually calamities imposed by heaven. Supervisor Zhang Xi further warned Renzong that “if he punished

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the guards, it would further anger heaven.”³² In the face of such criticism, Renzong and his mother compromised by lightly punishing the guards.

As a result of the censorship system, the idea of the interaction of heaven and humans and the possibility of dethronement by officials, the power of most Chinese rulers was not nearly as “absolute” as many have thought. Since their authority was not absolute, the rulers were unlikely to violate the laws without fear.

Spirit of the Rule of Law in China

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Why did both honest and dishonest Chinese rulers, with ostensibly absolute power, have to abide by the law? Why did Chinese officials, with the status of subjects, defy the illegitimate decisions made by their powerful masters? One possible answer is that the spirit of the rule of law was profoundly embedded in Chinese culture. Not only the rulers, but also the ruled had this spirit. It was the spirit of the rule of law that caused emperors Han Wudi and Sui Wendi used to rectify their illegal decisions. It was the spirit of the rule of law that caused emperors Han Wudi and Tang Xuanzong to not forgive their close relative or favorite musician. And, it was the spirit of the rule of law that emboldened officials like Zhang Shizhi in the Han dynasty and Guo Jin in the Song dynasty to challenge the wrong determinations of their masters.

The supremacy of law in the minds of rulers and officials is the origin, requirement, nature, and role of the law in Chinese history. First, as Western legal tradition noted, that law was the will of God.³³ Chinese rulers also believed that law came from heaven. Emperor Tang Taizong once stated “Law is something rulers obtain from heaven and they cannot violate it for personal reasons.”³⁴ Second, laws in Chinese history not only ultimately came from heaven, but also were handed down by the ancestors. Because of this, Emperor Ming Shenzong was constrained by customary law when he tried unsuccessfully to change the heir apparent. Third, law was commonly identified with justice in Chinese history. With this in mind, Emperor Zhang Shizhi could admonish Han Wendi to abide by law. Fourth, both rulers and officials in China were aware that law was indispensable for a state. In their eyes, law for a state was like the foundation for a building; if the foundation crumbled, the building would fall. During Emperor Jin Zhangzong’s reign (1189–1208), he warned his officials that they should implement laws with justice because the “basis of ruling a state lies in law and regulations.”³⁵

Thus, as law possesses elements that are holy, supernatural, and crucial to a state, the spirit of the rule of law planted its root deeply in the minds of both the rulers and the ruled in Chinese history for over two thousand years. Accordingly, most emperors believed that they had the duty to abide by the law, and many felt guilty when they broke the law. Despite their subject status, the officials, on the other hand, “following *dao* and not rulers,” gained legitimacy in defying the unlawful activities of their rulers. As most officials consciously put their rulers below the law, whenever their rulers’ activities contradicted the law, they could stand on the law to challenge their rulers.

CONCLUSION

This review of over two millennia of Chinese history suggests that, despite numerous violations, many, if not most, emperors were constrained by the rule of law that was valued in both theory and practice. There was no linear development in the unchecked growth of Chinese despotism that placed the ruler above the law. Instead, different dynasties, different rulers, and even different periods of a single reign manifested different approaches to ruling and to the law.

The spirit of the rule of law, similar in many aspects to the core of the “modern Western” conception of the rule of law, that law is supreme and no one is above it, persisted throughout Chinese history. In the minds of both emperors and subjects, law was a function of the way that included all things both holy and profane—both rulers and the ruled. This spirit was so powerful that, on the one hand, it could force emperors to feel guilty or to yield after being warned against breaking laws and, on the other hand, it could provide officials with a potent weapon to challenge the unlawful decisions of their rulers. ■

NOTES

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3. R. S. Ridgway, *Voltaire and Sensibility* (Montreal: McGill-Queen's University Press, 1973), 87–88.
4. Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999), 16; Xu Xianning, Xie Hui, *Fazhi zhizhi yu fazhi zhizhi [The Government of the Rule of Law and the System of the Rule of Law]*; *Fa Xue [Jurisprudence]* 10: 1998, 21.
5. Guo Luoji, *Gongchandang weifa an jishi [The Veritable Law Violating Case of the Communist Party]* (Hong Kong: Democratic University Press, 1997), 205.
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11. Gong Sunyang, *Shang Junshu [The Book of Lord Shang]* (Beijing: Zhonghua shuju, 1965), chapter 17.
12. Gong Sunyang, *Shang Junshu [The Book of Lord Shang]* (Beijing: Zhonghua shuju, 1965), chapter 14.
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15. *Ibid*, 1189.
16. Karen Turner, "Sage Kings and Laws in the Chinese and Greek Traditions" in Paul S. Ropp, ed., *Heritage of China: Contemporary Perspectives on Chinese Civilization* (Berkeley: University of California Press, 1990), 101–104.
17. Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* (Westport: Greenwood Press, 1997), 20.
18. Aristotle has been extolled by modern scholars for his first comment on the rule of law. The concept of the rule of law he offered is: "The Rule of Law. . . is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law." See Turner, "Rule of Law Ideals in Early China" in *Journal of Chinese Law* 6.1 (Spring) 1992, 1–44.
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22. Tang Chengye, *Sui Wendi zhengzhi shigong zhi yanjiu (The Study of Sui Wendi's Political Activities)* (Taiwan: Chinese Awarding Committee of Academic Works, 1968), 69.
23. Sima Guang, 1956, 8064.
24. Bi Yuan, *Xu zizhi tongjian (The Continued Comprehensive Mirror for Aid in Government)* (Beijing: Zhong Hua Shu Jü, 1965), Chapter 1, 10.
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26. John W. Dardess, *Confucianism and Autocracy: Professional Elites in the Founding of the Ming Dynasty* (California: University of California Press, 1983), 197–202.
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29. Tang Taizong, see Sima Guang, 1956, 6256; Qing Shengzu, see Jonathan Spence, *Emperor of China: Self-Portrait of Kangxi* (New York: Vintage Books, 1974), 30.
30. Sima Guang, 1956, 6801.
31. Dong Zhongshu, *Chunqiu fanlu tianren sance [Rich Dew of Spring and Autumn. Three Strategies of Heaven and Human Interaction]* (Hunan: Yuelu shushe, 1997), Chapter 8.
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