

Rule by Law and Literati Tradition

China has been a country with a long history of rule by law, not rule of law. There have been well developed penal codes that the state would enforce with sovereign right. The Chinese idea of jurisprudence is semantically in two words: law 法 and rites 礼, each of which by itself belongs to a school of thoughts that were formed as early as the fourth century B.C.. They are Chinese legalism 法家 and Confucianism 儒家. To oversimplify, the legalists approached human affairs by emphasizing law and mechanisms of social control whereas Confucianists believed in rule by benevolence. One is a realism like Machiavellianism and the other idealism like Platonism. The tension between the two philosophical traditions underscores nearly all cases of social justice, and these differing emphases and intellectual orientations have significantly shaped Chinese jurisprudence and bureaucracy. To Confucius (551-- 479 B.C.), the distinction between human beings and animals was rites and rituals that people observed to honor and respect their elders. The paradox of this Chinese “natural law” that equates social hierarchy with family ranks arises when loyalty to the state is at odds with one’s filial piety and ethical obligations to family elders (忠孝不能两全), like in Sophocles’ tragedy Antigone, in which the heroine challenges the man-made state law with the authority of a higher (natural) law. During the time of Eastern Han (20 ~ 220 A.D.) there was the murder of Zhao Jun’an by Li Shou. For some reason the killing went unpunished, leaving the three sons of the Zhao family vowing to avenge their father’s death. But before they could exact revenge, all sons died in a pandemic. Mr. Li was relieved that no male heir in Zhao family could harm him now, counting out Zhao E, the daughter who was already married. But it was Zhao E who finally ambushed Li on the road and killed him, much to the surprise and admiration of the villagers who saw her give herself up to the local authorities carrying Li’s severed head. To uphold the Confucian ideals of loyalty and filial piety, the local officials declared Zhao E not guilty and commended her heroic deed as recorded in the Exemplary Women.

东汉末年，甘肃酒泉有个叫李寿的人，杀死了同县的赵君安。可李寿并没有被惩罚。那赵家的三个儿子放出话来要报仇。可这时酒泉闹瘟疫，赵家的三个儿子都在瘟疫中死掉了，只剩下一个已经出嫁的女儿，叫赵娥。已经是外姓人了。但她说：“难道我就不是赵家的后人吗？”突然有一天晚上，赵娥把李寿给杀了。《列女传》记载，光和二年二月，赵娥杀李寿于路上。搏斗

中，赵娥的刀断了，是用手把李寿脖子给拧断的。赵娥复仇后，提着李寿的人头到衙门自首。“乡人闻之，倾城奔往，观者如堵焉”，都是既敬佩又感动。当地官员也附和民意，向中央请愿。最后，官府立碑表扬赵娥。

Chinese history of jurisprudence is replete with such legal cases that elaborate “rite vs law controversies”. Xü Yuanqing lived in Tang Dynasty (~ 700 A.D.) and committed murder because his father was wrongfully punished by the order of local official Zhao Shiyun. After killing Zhao out of vengeance, Xü turned himself in, confident that righteousness would prevail. In the Book of Rites, one of the Confucian classics, it says “there is no way to reconcile the wrongs committed against the father”. In a recorded conversation between Confucius and one of his disciples, Zi Xia asked, “What do you do about the hatred that parents have?” Confucius replied, “I’d sleep on straws with my shield as my pillow; I’d avoid officialdom, and I’d never share the sky with their enemies until I kill them wherever I run into them, in the market or in court, with or without a weapon in my hand”.

唐朝徐元庆杀死了仇人赵师韞后被处死。赵师在任上杀死了一个叫徐爽的人。徐元庆决心要为父亲报仇。杀死了赵师韞后，他并没有逃走，而从容就缚，等待审判。不过，他是先被处死，后被表彰。关于“礼法之争”，儒家五经之一的《礼记》说：“父之讎，不共戴天。”孔子也说过类似的话。子夏问孔子：“居父母之仇，如之何？”孔子回答说：“寝苫，枕干不仕，弗与共天下也。遇诸市朝，不反兵而斗。”所以，“父母之仇，不共戴天”，是儒家对于复仇问题的明确立场。（成文法《唐律疏议》）

Xü’s case was eventually adjudicated by Empress Wu Zetian. According to Tang legal statutes, murders resulting from family feuds were prosecuted as criminal offenses under the category of “violent riots”. Operating under the state religion of Confucianism to maintain social hierarchy, Empress Wu was inclined to pardon Xü as a paragon of filial piety. However, she was dissuaded by a Chen Zi’ang, one of her legal consultants, who presented his legal thought in writing titled On Revenge. He argued that, as far as Confucian rites go, Xü should be commended for what he did. But law and statutes must be honored and respected to maintain order. Xü therefore should receive capital punishment for his murder. If he be allowed to live and his penalty commuted, then he would be robbed of honor that was rightfully his.

徐元庆案发于武则天时期，按照《唐律疏议》，血亲复仇属于刑事犯罪，单纯的杀人当属《斗讼律》的处理范围，但别忘了，儒家伦理主导中国封建社会主流意识形态千余年，“君臣父子”所构成的伦常关系是人们行为的价值准则。这时，作为武则天最欣赏的文人陈子昂站了出来，写出了名篇《复仇议》。他认为：礼是为了教育百姓的，徐元庆孝子复仇，符合儒家伦理，应该表彰；法是为了治理国家的，徐元庆杀人违法，应该处死。处死后，徐元庆在家乡被表彰。陈子昂说：“今若释元庆之罪以利其生，是夺其德以亏其义”？

Chen's logic was shredded by a legal scholar Liu Zongyuan (773-819) one hundred years later. In his legal treatise titled "Refutation of On Revenge", Liu pointed out that the moral ambiguity of Xü's case should not even exist if people had looked into the facts of the matter in the first place. If his father's death was the result of a just verdict rendered by Zhao, then Xü deserved capital sentence for his murder of Zhao. If Zhao took the life of Xü's father out of self-interests, then Xü should not be convicted at all and should be commended as a true Confucian.

可刚过了一百年，柳宗元就把陈子昂驳了个体无完肤，他的文章就叫《驳》，超级名篇，被收入了《古文观止》。（柳宗元的《驳》逻辑严密）柳宗元说，徐元庆案的关键是深挖徐元庆杀人原因，如果赵师为是秉公执法，徐父是因犯法被杀，那徐元庆报仇是“仇天子法”，应当严惩；反之，如果是赵师为私利杀徐父，则徐元庆的行为符合儒家复仇之义，不仅不该受罚，反而应该得到旌表。

The same legal thinking was also reflected in the way Judge Hai Rui (1514-1587), political figure and official of Ming Dynasty, adjudicated cases in his court. "When there is doubt in cases of litigation, be less lenient with the younger brother rather than older brother, with nieces or cousins rather than with uncles, with the wealthy rather than the poor, with the stubborn and conniving rather than the foolish and simple-minded. When there are disputes over property and business, protect the commoner rather than officials so as to prevent bankruptcy and foreclosure. When there are controversies over reputation and personal honor, give the benefit of the doubt to the officials rather than plebeians so as to preserve moral integrity."

凡讼之可疑者，与其屈兄，宁屈其弟；与其屈叔伯，宁屈其侄；与其屈贫民，宁屈富民；与其屈愚直，宁屈刁顽。事在争产业，与其屈小民，宁屈乡宦，以救弊也。事在争言貌，与其屈乡宦，宁屈小民，以存体也。 _____
海瑞

The relationship between state rulers (apparatuses of political power) and intellectuals such as Confucius and Mencius have always been filled with tension and mutual envy. Scholars train because of their aspiration for officialdom after the civil service exam. But to the extent that Confucian tradition is also a form of idealism, the literati class often hold an ingrained moral contempt for ruthless rulers and political tyrants with little respect for benevolence and true justice. One example of this ruler-scholar tension is this excerpt from Mencius which is a perfect case of speaking truth to power. 'During the frequent interviews of the duke Mü with Tsze-sze, he one day said to him, "Anciently, princes of a thousand chariots have yet been on terms of friendship with scholars;- what do you think of such an intercourse?" Tsze-sze was displeased, and said, "The ancients have said, 'The scholar should be served:' how should they have merely said that he should be made a friend of?" When Tsze-sze was thus displeased, did he not say within himself,- "In point of position, you are the prince and I am your subject. How dare I be friends with you? In point of virtue, it is you who ought to serve me. How can you presume to be friends with me?"

繆公亟見于子思，曰：‘古千乘之国以友士，何如？’子思不悅，曰，‘古之人有言曰，事之云乎，豈曰友之云乎？’子思之不悅也，豈不曰，‘以位，則子，君也；我，臣也；何敢與君友也？以德，則子事我者也，奚可以與我友’？孟子《萬章下》