1956

Chinese and American Criminal Law: Some Comparisons

Huai Ming Wang

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Huai Ming Wang, Chinese and American Criminal Law: Some Comparisons, 46 J. Crim. L. Criminology & Police Sci. 796 (1955-1956)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CHINESE AND AMERICAN CRIMINAL LAW: SOME COMPARISONS

HUAI MING WANG

The author is a former Justice of the Appellate Court of Shansi Province, China, in which province he also served as Presiding Judge of its Criminal Court. He was also a Professor of Law in National University and President of the University.

Judge Wang received a Master of Law degree from Northwestern University in 1922 and he returned in 1952 to pursue additional graduate study leading to a degree of Doctor of Juridical Science. The thesis he prepared for this degree was upon the subject of this article which is the first of ten sections of his thesis dealing with this general subject. Judge Wang received his S.J.D. from Northwestern University School of Law in 1955—EDITOR.

INTRODUCTION

In view of his study of law both in China and in the United States coupled with experience in the administration of Chinese criminal law for a number of years, the writer is profoundly interested in the comparison between Chinese and American criminal law. When he was the head of the Second Branch Higher Court of Shansi, China, and concurrently the presiding judge of the criminal court thereof, questions of law arising in actual cases oftentimes caused him to recollect the American rules of law which he had studied at Northwestern University Law School from 1920 to 1922. It was his pleasure to point out to his friends the differences between these two legal systems, and since then he has cherished an idea of making a comparative study of them, but could hardly get a chance to start it until he came back again to the United States as a student at Northwestern University School of Law in 1952.

By reason of the present political situation, it is to be noted that in writing about Chinese criminal law, we must refer to the law now in force in the territory known as "Free China" under the control of the Nationalist Government, which is recognized as the only legal government of the Republic of China by the United Nations and also by most of its member nations, including the United States. This is the law formally enacted by the competent legislature and put into force throughout the whole country. Since the end of world war II, Taiwan (Formosa) and Pong Hu islands (Pescadores) were given back to the Nationalist Government and the above Chinese law was made fully effective in all these newly restored areas. The Communist regime on the mainland (known as the People's Central Government of the People's Republic of China) is looked upon by the Nationalist Government as a mere puppet of the Soviet Union. Precisely what laws are applicable under that regime, no one outside the area knows for sure. The writer does not want to indulge in speculation or exaggeration, but the testimony given by a foreigner who recently returned from China may furnish us with some information in respect of the administration of law there. It was published in the Chicago "Sun Times," October 3, 1954, that Mr. Richard Applegate, the National Broadcasting Company correspondent, was

imprisoned by the Peiping government for 18 months and was released not long ago. The following remarks made by him are worth noting:

The thing that horrified me—and horrified the Chinese people into keeping their mouths shut—obviously was what the Reds inside China are doing with chains to the people of China. I heard the clanking of the chains inside Canton prison every day for ten months. I mean real, physical, heavy chains which sounded as though they might weigh as much as 50 pounds when prisoners outside in the corridor dragged them along the concrete floor. Nobody but the communists know who are in Chinese prisons, because there are no trials, no accusations, no admissions, no courts, and no law except the whim of some communists working in the night. I cannot help wondering how long I would have been able to stand up under those brutal chains, if the whim of the Reds had gone that way in my case.

It is futile, therefore, to attempt any comparative study of criminal law on the Chinese mainland, for there appears to be no "law" as we understand its meaning in the free world. Only the law now effective in Nationalist China has legal and historical value, and it alone should be taken as a representation of real Chinese law.

Another source of the writer's interest in making this comparison of Chinese and American law is the hypothesis, perhaps somewhat imaginative, that on account of the rapid development of transportation and communication, the whole world is growing smaller day by day, and the differences in each field are progressively tending toward unity or reconciliation. It seems to be most worth while to help melt away as much as possible the unnecessary differences which merely cause confusion or struggle. We now have the United Nations as a world organization for the maintenance of international peace and security, and we also have various social movements tending to help achieve world unity in religion, calendar, and even in government such as what the "World Federalist" is doing in the United States. But in order to help melt away the differences in each field, we must first know them by contrast. Law is a large field which manifests wide differences among nations and even among states under a federal system like the United States. Actually, however, such differences are not absolutely necessary, for laws are man made and therefore changeable in nature. The only difficulty is that when a particular rule of law has become a traditional custom and especially connected with social morality or family ties in a particular area, it is not easy suddenly to change it. That is why we need comparative study. This dissertation is going to serve as merely a preliminary attempt to proceed along this line, and it covers only a few important aspects of Chinese and American criminal law, with a view to ascertaining whether comparative analysis produces significant results.

In the course of this undertaking, it was suggested to the writer that he include a brief description of Chinese criminal procedure in order that people here in the United States may have a better understanding of the administration of Chinese criminal justice. The Chinese Law of Criminal Procedure, containing 516 Articles, is too extensive even to summarize here. The following points may be helpful to meet our needs:

1. PUBLIC PROSECUTION AND PRIVATE PROSECUTION

First of all, we must make clear the following three terms: "Prosecution", "Accusation", and "Information". "Prosecution" is a formal action instituted against an

offender in court by a public prosecutor or the injured party. "Accusation" is a complaint made to the public prosecutor or the police against an offender by the injured party, or his guardian, or spouse, or close relatives as specified by law. "Information" is a report made by any third party to the public prosecutor or the police about his own knowledge or suspicion of the commission of a crime.

The general rule is that a crime is a public wrong, to be regarded as injurious to the public at large, as distinguished from a civil wrong or tort, and to be prosecuted by the public prosecutor on behalf of the state. This is called public prosecution. But the law under certain circumstances permits the injured party to institute a prosecution himself without resort to action by the public prosecutor. This is called private prosecution. According to the former Chinese law of Criminal Procedure, which prevailed from July 1, 1935 until December 26, 1945, private prosecution was limited to (1) offenses which directly infringed upon individual rights, and (2) offenses for which prosecution could be instituted only upon complaint by the injured party or other person who has right to complain as provided by law. But on December 26, 1945, an astonishing modification was made in this matter. Although most of the provisions regarding public prosecution are still maintained, the scope of private prosecution has been greatly enlarged. The law now provides that any person who has been criminally injured may directly and personally institute a prosecution against the offender. If a public prosecutor has started to investigate a case, and, before the conclusion of his investigation, has found that the same case has already been prosecuted by the injured person, then the public prosecutor must abandon his investigation and leave the matter to the court. Thus, private prosecution has been extended nearly to any criminal case involving an injured person except (a) where an offense is committed against a person by his lineal blood ascendant, (b) where one due to his own default has lost his right of private prosecution, (c) where the public prosecutor has already concluded his investigation.

2. FUNCTIONS OF PUBLIC PROSECUTORS

There is no jury system in China. Chinese law-makers have been of the belief that (1) jury system is not in accord with the psychology of the Chinese public, since they have never had such a tradition and practice; (2) the finding of facts requires technique and experience, and ordinary people are not competent to carry on this work; (3) the jury system might cause hatred or strife among neighbors or friends. Questions of fact and law all have to be decided by judges, although the public prosecutors take the first steps in an investigation.

The functions of public prosecutors may be listed as follows: (a) to investigate the facts, (b) to institute public prosecution in court, (c) to help private prosecution, (d) to act in behalf of the private prosecutor when the latter is absent or has died, and (e) to appeal from the court's decision, or (f) to direct the execution of the decision.

3. BURDEN OF PROOF

It was provided in the Code of Chinese Criminal Procedure (Article 268) that the facts which constitute the commission of an offense shall be established by evidence.

Hence, the investigation of evidence is of utmost importance in criminal administration, and the burden of its preliminary investigation rests on the public prosecutor. When he is informed by an accusation, or information, or through any other channel, of suspicion concerning the commission of an offense, he must commence his investigation of the evidence. But the evidence obtained by him is not necessarily decisive. It is sufficient if it supports the suspicion of the commission of an offense, and based upon this evidence he may institute a prosecution in court. In his prosecution he must name the offender, reveal the evidence supporting his prosecution and specify the provisions of law which have been violated. Then the court examines the evidence and starts an inquiry into the whole case. If the evidence furnished by the prosecutor is found to be insufficient, the court has to investigate it itself, and would not turn the case back to the prosecutor for re-investigation. Whether the evidence is sufficient to support a conviction is to be decided by the court. Anything deemed to be evidence must be shown to the defendant, asking for his opinion, and every witness or expert must be cross-examined as to his testimony. The final decision both as to law and as to fact should be made by the judges. The judge determines the evidence entirely according to his own experience, logic, and what is called "free conscientious judgement", and not according to certain specific rules as laid down by the American law of evidence.

Another point to be mentioned here is that before a witness gives testimony in court he is required to make a recognizance (a binding statement) instead of taking an oath which is a common practice in the United States courts. It is provided in the Code of Chinese Criminal Procedure that a recognizance which must be signed by the witness and his seal affixed to it must clearly specify that the witness should tell the truth without any concealment, glossing, exaggeration, or mitigation of the real facts; and the court also informs him that false testimony is to be punished as perjury. (Articles 174, 175, 176.)

4. THE COURT SYSTEM

Chinese courts are organized in what is called the "three grade system", namely, the local court, the higher court, and the supreme court. The local court is the lowest court—a trial court set up in each county or municipal district. One judge may try minor cases but three such local court judges are required to try graver cases. The higher court is an appellant court, set up in each province or special municipal district, having jurisdiction of cases appealed from the local courts and of certain special cases in first instance. Each case must be heard by three judges. If the provincial area is too large, some higher court branches may be added. The supreme court is the highest for the whole country, having jurisdiction of cases appealed from the higher courts. Each case must be heard by five judges, but for minor cases, as specified by law, each is heard by three judges only. Branch supreme courts may be set up for some areas too far from the national capital.

Each court is aided by a prosecution department composed of a certain number of public prosecutors who exercise their power of investigation and prosecution independent of the court. The local court and the higher court have to decide upon the questions both of law and fact, but the supreme court deals only with questions of

law. As a general rule, each criminal case may reach all three grades of courts, with the following exceptions:

(1) Cases involving offenses against the internal security of the state, or against the external security of the state, or against friendly relations with foreign states, should commence in the higher court, and may be appealed to the supreme court.

(2) Offenses which are of trivial nature, and the punishment for which may be remitted (according to Article 61 of the Criminal Code), may be first tried in the local court and appealed to the higher court; the decision of the latter court is final.

5. UNIFORMITY OF CHINESE CRIMINAL LAW

China, though with a large area and population, is a simple state, so far as its political and administrative system is concerned. It is quite different from a federal system. The legislative power of criminal law is vested in the national legislature, and the various provinces are not entitled to enact any law or statute punishing crimes. Hence Chinese criminal law is uniform throughout the whole country.

6. THE EFFECT OF THE SUPREME COURT'S INTERPRETATION OF LAW

The Supreme Court, as already mentioned, decides only the question of law, and its interpretation in respect to civil and criminal cases is to be followed by all the lower courts. In addition to deciding appealed cases, the Supreme Court may also answer questions presented to it by lower courts. But the lower courts are not allowed to ask questions of law arising out of actual cases awaiting trial, as this sort of interpretation might result in the interference with the lower court decision which should be made independently. Hence, the pure questions of law always come up in hypothetical form. It is to be explained that since the establishment of the Judicial Department in the Chinese Government on November 16, 1928, the Supreme Court has become one of the three sections of that Department,¹ and since then the pure interpretation of law is carried on in the name of that Department, though it is still done by the Supreme Court judges. According to the Chinese Constitution (effective from December 25, 1947), the Judicial Department has a certain number of what are called "grand judges" to perform the function of interpreting law and government mandates, but, as a matter of fact, these grand judges are responsible only for answering questions of law and mandates other than those arising out of criminal and civil cases, which are still adjudicated by the Supreme Court.

Chinese courts in rendering their decision of a case must cite the provisions of law on which it is based, but very rarely cite previous cases as the authoritative basis, unless some questions of law are raised by the parties or lawyers and need special reference to the cases of authority for interpretation. Moreover, Chinese courts do not make reports of all the cases involving points of law already settled as American appellate courts do. Only the above mentioned pure interpretation of law and the

¹ The Judicial Department is composed of the Supreme Court, Administrative Court, and Board of Administrative Punishment for Officials.

As regards the administrative cases, China adopted the European continental system. Those cases are adjudicated by the administrative agencies and the last resort is to the Administrative Court.

Supreme Court decisions which involve special questions of law are disclosed and they are for the most part published in brief.²

CHAPTER I

HISTORICAL BASIS

1. SOURCE OF CHINESE CRIMINAL LAW

China's culture is moulded by her philosophy, uninfluenced by formal religion. Her legal history, studded with myriad codifications of law concerning crimes and punishments, buttresses that statement.

An early approach toward grouping and prescribing penal provisions emerged about 2255 B.C. under Emperor Shun's reign. Revision and extension of this embryonic law continued unfolding under the following dynasties, Hsia, Shang and Chow. During the closing years of the Chow era (circa B.C. 455), one Li Hui laboriously assembled penal provisions then extant in various Chinese states, and produced the first regular criminal code.³ This code was divided into six parts: (1) Robbery,⁴ (2) Frauds,⁵ (3) Offenses relating to the treatment of prisoners, (4) Offenses relating to arrest of offenders, (5) Other offenses, (6) General provisions.

Li Hui's code was first adopted by the state of Wi, followed by Ch'in. But precedent fell into discard under the cruel system devised by Emperor Shih Hung Ti of the Ch'in dynasty for about fifteen years. Thereafter, the Li Hui's code was re-adopted and extended during the dynasties commencing with Han through Wi, Chin, Liu-Sung, Chi, Liang, Chen, Pei-Wi, Hsi-Wi and Sui, a period roughly described as 206 B.C. to 618 A.D.

It was not, however, until the reign of Emperor Kao Tsou of the Tang dynasty (circa 618 A. D.) that a more complete code was drawn up, called "Tong Lu Su Yi" meaning "Annotated Code Of The Tang Dynasty." This code consisted of twelve parts, half of which covered criminal law and procedure. It was carefully annotated and interpreted by the well known jurists Chang Sun Wu Chi, Li Chi, and others, in compliance with the mandate of Emperor Kao Tsou. This code was not only applied in China but it was also adopted by Japan, Korea and Indo-China. The Sun,

² In the course of comparison the writer cited a number of decisions and interpretations made by the Chinese Supreme Court and also the interpretation by Judicial Yuan (the word Yuan here means department). The Chinese writers and publishers, as a rule, do not disclose party names of the cases, so that all Chinese cases cited in this writing are named by the filing marks and numbers, not by party names. For instance, the citations "De. A. No. 3816, 1939," means the decision on an appealed case, number 3816, in the year 1939; citation "De. Ex. A. No. 164, 1936," means decision on a case appealed by extraordinary process, number 164, in the year 1936; and citation "In Yuan, No. 1700, 1937," means interpretation by Judicial Yuan, number 1700, in the year 1937.

³ Li Hui's FA CHIANG (Li Hui's Criminal Code), in Part 3, Section 3, of Han Hsueh Tong's Collection of Books, by HUANG SHIH, 1893.

⁴ Part I of LI HUI's FA CHIANG was entitled "Robbery" which included treason, homicide, robbery, theft, embezzlement, abduction and other serious offenses.

⁵ The original Chinese word for the title of Part 2 of LI HUI's FA CHIANG was "Tse" which in modern use mostly means theft, but in ancient times it had different meanings such as injury, riot, killing and causing mischief by frauds. Here in LI HUI's FA CHIANG, it means frauds, including counterfeiting, forgery of official documents, and other offenses committed through false pretenses.

Yuan, Ming and Chiang dynasties continued to use the Tong code, but with repeated revision and extension. During the Chiang dynasty, it was extended to twenty-eight parts, twelve of which were related to criminal law and procedure.

It is evident that as the system of Chinese criminal law has evolved, it has developed its own tradition and history prior to the end of the Chiang dynasty. But in the last part of the Chiang dynasty about 1902, the government started a new movement of re-codification of law in order to follow the laws of modern countries. The draft of a new criminal code was completed in August of 1907. Its principles and forms were adopted mostly from Germany, France and Japan but the better rules of old Chinese criminal law particularly adapted to their needs were still reserved in the new code. It did not come into effect, however, before the downfall of the Chiang dynasty in 1911. After the establishment of the Chinese Republic, some revisions were made of the same draft, and it was entitled "The Provisional Criminal Code Of The Republic of China." This code was formally promulgated and became effective on March 10th of 1912, the first year of the Chinese Republic. It was continuously in force until the time when the Nationalists overthrew the Peking Government and set up the Nationalist Government at Nanking in 1928. The new government promulgated the "Criminal Code Of The Republic Of China" largely based upon the 1912 Provisional Code with a number of revisions. It became effective on September 1, 1928. Again it was revised by the Chinese legislature without change of title, promulgated on January 1, 1935, and came into force on July first of the same year. This is the existing Chinese criminal code under the Nationalist Government.

In addition to the foregoing brief sketch of the development of Chinese criminal law, it also seems necessary to mention its theoretical basis in order to understand its unique characteristics. Although criminal law in China developed much earlier than any other Chinese law, their fundamental basis was the same. They were all set up on a moral, ethical and ritual basis.

It is generally accepted that Confucianism⁶ has dominated Chinese law for more than two thousand years, but there had been other schools of thought progressing in competition with Confucianism, and some of them were even more predominate than Confucianism in certain periods of Chinese history. Confucianism had also derived its theories from the moral, ethical and ritual principles of the past. What was the Chinese legal theory in the earlier period? As already stated, the penal provisions started as early as Emperor Shun, about 1700 years before Confucius was born, and the written records were not complete at that time. Some scholars in the Han dynasty (begun in 206 B.C.) wrote a few records about Shun's history, including his principles of penalty, which might have been derived from hearsay or imagination based upon traditions handed down from ancient times. These records, though written long afterwards, were put into historical books and at least might represent the general thought of the authors' time reaching back to ancient history.⁷ One of these records, called *Ta Yu Mou*, described Emperor Shun's discourse with his minister of Justice Kao Yao in which Shun said:

⁶ Confucianism means the system of morals and ethics taught by Confucius and his followers.

⁷ *THE HISTORY OF CHINESE LEGAL THOUGHT*, by YONG HUNG LIEH, 1936, pp. 20 and 22, vol. 1.

Kao Yao, the fact that hardly one of my officials or of the people is found to have offended against my government is owing to your being the minister of justice and intelligent to administer the five kinds of punishments⁸ and assist in the inculcation of five duties, with a view to achieve the perfection of my government. And it should be noticed that through punishment, there may come to be no punishment.

Then Kao Yao answered:

Under your instructions, punishment does not extend to the criminal's heirs, while rewards may reach succeeding generations. You pardon inadvertent faults however great, and punish intentional crimes however small. In cases of doubtful crimes, you deal with them lightly; in cases of doubtful merits, you prefer the high estimation. You would not put any innocent person to death, even though you might run the risk of irregularity and error.⁹

A well known Japanese law writer, Dr. Masajiro Takikawa, esteemed the above quoted principles highly and regarded them as the philosophical basis of ancient Chinese law.¹⁰ Moreover, when the ancient emperors referred to criminal punishment, they were oftentimes inclined to link their ideas with virtue or morality. The Emperor Kang of the Chou dynasty (circa. B. C. 1078) in instructing his younger brother, Fung, said:

It was your distinguished grandfather, the King of Wen, who was able to illuminate his virtue and be careful in the use of the five punishments.¹¹

The Emperor Mou of the Chou dynasty (circa. B. C. 1001), in giving instructions to his minister Marquis Lu, said:

Reverently apply the five punishments so as to complete the three virtues (virtues of correctness and straightforwardness, the way of strong governing, and the way of mild governing). I must be careful in the use of criminal punishment, for the end of it is to promote virtue.¹²

In brief, ancient Chinese history shows that before the time Confucius was born, the criminal law was very simple and progressing much slower than the moral, ethical and ritual development. In the beginning of the Chou dynasty (from B. C. 1122), the rules of ethical conduct¹³ were numerous, because the government at that time laid more stress on such rules than on the penalty. They realized that penalty is only a supplement to morality or a means to an end. And they resorted to the penalty only when it was absolutely necessary. The historians gave their highest admiration to the efficient administration of the second Emperor Chang and the third Emperor

⁸ The five punishments were (1) Branding on the forehead, (2) Cutting off the nose, (3) Cutting off the feet, (4) Castration, and (5) Death.

⁹ SHU CHIANG (ancient history of China), Book 3 Ta Yu Mou, in Szu Pu Tsung Kan, 1929.

¹⁰ THE HISTORY OF CHINESE LEGAL THOUGHT, by YONG HUNG LIEH, 1936, Vol. 1, pp. 22.

¹¹ SHU CHIANG, Book II, Kang Kao, in Szu Pu Tsung Kan, 1929.

¹² SHU CHIANG, Book 29, Lu Hsiang, in Szu Pu Tsung Kan, 1929.

¹³ The phrase "rules of ethical conduct" is a translation of the Chinese word "Li" which could hardly be translated into an English term. It covers, from the Chinese viewpoint, all proper formalities, manners, rites, ceremonies or etiquettes to be observed in social or official life. Many translators prefer to use the Chinese pronunciation "Li", but here I wish to have it translated into "rules of ethical conduct" in order to indicate what it means, though not adequately.

Kang of the Chou dynasty for a period of thirty years, during which no criminal punishment was resorted to, because no one ever committed a crime. This idea was derived from Emperor Shun's high principle that "through punishment, there may come to be no punishment."

Confucius was born in the year 551 B. C. He was a genius endowed with special talent and wisdom, and a lover of historical learning. It was he who made a thorough and systematic study and arrangement of all the cultural developments in the past, and thus built up a solid foundation for Chinese moral, ethical, ritual, legal and political life. He preferred governing the people by rules of ethical conduct to governing by law. The essential point of his philosophy is the presumption that the nature of man is good. Hence, Tzu Szu, Confucius' grandson, in writing what he had learned from his grandfather, said in the first paragraph of the book "Doctrine of Mean":¹⁴

What heaven has conferred on mankind is called nature; an accordance with this nature is called the way of truth; and the cultivation of the way of truth is called instruction.¹⁵

As Confucius realized the goodness of human nature, he was naturally inclined to better the people by education, and the more effective way of education was the practicing of the rules of ethical conduct in daily life, not necessarily the infliction of criminal punishment. He said:

If the people be led by laws, and uniformity sought to be given them by punishment, they will try to avoid punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by rules of ethical conduct, they will have the sense of shame and moreover will become good.¹⁶

If the names be not correct, language is not in accordance with the truth of things. If the language be not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, proprieties and music will not flourish. When proprieties and music do not flourish, the criminal punishments will not be properly awarded. When criminal punishments are not properly awarded, the people do not know what is the proper way to follow.¹⁷

Since Confucius stressed education so much he was naturally inclined to prefer government by example to better others by one's own pattern. He said:

Let there be men and the government will flourish. But without the right men, the government decays. Therefore, the success of government lies in getting proper men.¹⁸

Chi Kan Tzu asked Confucius about government, saying:

What do you say to killing the unprincipled for the good of the principled?

Confucius replied:

Sir, in carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good. The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it.¹⁹

¹⁴ The title of the book DOCTRINE OF MEAN contains the original Chinese word "Chung" which means the exact right degree or quality of anything and especially of human conduct, without inclination or deflection, which neither exceeds nor comes short.

¹⁵ THE DOCTRINE OF MEAN, by Tzu Szu, Chapter I, Section I, in SZU PU TSUNG KAN, 1929.

¹⁶ ANALECTS OF CONFUCIUS, Chapter 2, Section 3, in SZU PU TSUNG KAN, 1929.

¹⁷ ANALECTS OF CONFUCIUS, Chapter 13, Section 3, in SZU PU TSUNG KAN, 1929.

¹⁸ THE DOCTRINE OF MEAN, Chapter 29, Section 1, in SZU PU TSUNG KAN, 1929.

¹⁹ ANALECTS OF CONFUCIUS, Chapter 12, Section 19, in SZU PU TSUNG KAN, 1929.

Confucius, having been a judge for some time, possessed experience in trying cases in the court, but he had a farsighted idea in respect to litigation. He said:

In hearing litigation, I am like any other person. But what is necessary is to eliminate the cause of litigation.²⁰

As indicated above, Confucius insisted on invoking rules of ethical conduct as the chief means to govern the people; law only as a supplement to the rules of ethical conduct. Chinese scholars have often used such phrases as "governing by rules of ethical conduct" and "governing by law". Governing by the rules of ethical conduct has a very comprehensive sense as manifested in Chinese history. A Japanese well known writer of law, Dr. Hozumi Nobshige, said:

In ancient times, the rules of ethical conduct from the Chinese point of view were a manifestation of virtue or morality and the formal regulation of human conduct. In the primitive society, the people were too ignorant to be controlled by abstract and profound principles. The practical way was to set up various rules of ethical conduct for all activities in connection with daily life, so that the people felt them easy to understand and follow. And it was these rules that brought about the achievement of maintaining social peace and order. Such rules covered really all conduct and transactions arising among the emperor and his officials and subjects, superiors and inferiors, parents and children, husband and wife, brothers, sisters and friends. They also covered nearly all manners or ceremonies with respect to the capping of youths (an ancient ceremony for the youths to begin putting on regular caps or hats when they reached certain years of age), marriage, funeral, sacrifice offering, the way of wearing clothes, the way of taking food, the manner of speaking, the way of using certain kinds of instruments, and the way of moving forward and backward, and so on.²¹

From this quotation, we may understand how large an area was occupied by the rules of ethical conduct in ancient Chinese society. However, these rules were mostly made by learned philosophers or sages and gradually accepted in social practice; some were made by government and declared by instructions. Most of them could not be modified or repealed by sudden action as we deal with statutes in modern times. When the traditional rules of ethical conduct were not adapted to meet the changing situation, they might become a stumbling block on the road of social evolution. Furthermore, the rules of ethical conduct were mostly backed up by social influence not by positive government power. Whether the people abided by them or not depended upon their moral responsibility. Such rules might become invalid when their moral spirit was not high enough. Since the beginning of the period of warring states (in the last part of the Chou dynasty, circa. 480 to 220 B. C.) there had been a tremendous change in both social and political conditions. Numerous schools of thought sprang up to rival one another, and Confucianism was opposed because of its emphasis on "governing by rules of ethical conduct" as being too idealistic.

Philosophers and profound thinkers often lack a practical viewpoint, but when they are placed in practical positions, they may act in quite a different way from what they thought. Confucius was once promoted for three months to be the premier of the state of Lou. History tells us that he made a number of improvements in government affairs within this short period, and all the people enjoyed happiness

²⁰ ANALECTS OF CONFUCIUS, Chapter 12, Section 13, in SZU PU TUNG KAN, 1929.

²¹ An Article entitled *The Rules of Ethical Conduct and Law*, by DR. HOZUMI NOBISHIGE, published in the LAW JOUR. of LEGAL ASSOCIATION, Japan, Vol. 24, Editorial No. 1, 1908.

under his administration. Although it hardly seems possible that his policy of governing by the rules of ethical conduct could achieve such a rapid improvement. Shortly after his assumption of the premiership he did one thing which excited the whole country. The death penalty was inflicted upon a high rank official by the name of Shao Chang-Mao, a most vicious and wicked person in the government. This execution satisfied all the people in the state and thus gave them a new hope that their state was going to be prosperous. They were encouraged to support Confucius and follow his instructions. This story indicates the significance of the effect of governing by law. Confucius advocated the "doctrine of mean" which means to keep equilibrium, i.e., the right point, not leaning to either side. The same should be true of governing by rules of ethical conduct as well as by law.

Confucius spent most of his time in studying and teaching, doing practical government work for only a short time. That is why he spoke more about moral, ethical and ritual principles than about practical matters. Consequently his followers were all imbued with the notion that governing by rules of ethical conduct was of first importance and that governing by law was secondary or supplemental. Mencius, a famous follower of Confucius, (circa 390-305 B. C.), found out the defect in the master's orthodoxy and said:

Mere goodness of men is not sufficient to make good government, nor could the law alone work itself.²²

Mencius' idea was that in order to have a good government, we need both good men and good law, and we should not stress one more than the other. However, Mencius was a most famous advocate of the goodness of human nature and a faithful follower of Confucius. Although he was aware of the equal value of good men and of law, he did not make a violent change in the master's teaching.

Another follower of Confucius called Hsun Tzu (circa 340-245 B. C.) had a quite different viewpoint from either Confucius or Mencius. He maintained the idea that "the nature of man is wicked".²³ He still insisted, however, upon the master's doctrine that the best way to rectify the wickedness of human nature was by means of the rules of ethical conduct. He also maintained that the rules of ethical conduct must be made by the sages who really understood the way of truth. Hence, he was also inclined to stress government by men rather than government by law. In this respect, he was still under the influence of his master's teaching and dared not boldly put the law and the rules of ethical conduct on the same level, though he recognized the wickedness of human nature. He said:

Supremely excellent be the rules of ethical conduct!! Let us esteem them as the highest standard, and no one will be able to make any increase to, or decrease from, them. You cannot be deceived by the false weight when the weighing instrument "Hang" is placed before you; you cannot be deceived by the false form of square or round, when the measuring instruments "square and compass" are placed before you; and you cannot be deceived by any other false pretences, when you carefully follow the rules of ethical conduct. Therefore, hang is the best standard of weight, square

²² MENCIUS, BOOK OF LI LOU, Chapter 1, in SZU PU TSUNG KAN, 1929.

²³ HSUN TZU, Chapter 23, THE WICKEDNESS OF HUMAN NATURE, in SZU PU TSUNG KAN, 1929.

and compass, the best standard of square and round, and the rules of ethical conduct, the best standards of human moral principles.²⁴

Hsun Tzu also said the following:

We need government of men, not government of laws. The law cannot be independently trusted. If there be right men, the government will exist. Without right men, government will collapse.²⁵

The above quotations indicate that Hsun Tzu's advocacy of government by men and by the rules of ethical conduct is about the same as that of Confucius and Mencius. The only difference is that Hsun Tzu positively asserted the wickedness of human nature. It was only because of this difference that some of his disciples went to the other extreme to become famous legists who positively advocated government by law, opposing the principles of government by rules of ethical conduct as maintained by Confucianism. The school of legists dominated the last period of the warring states. This is the only period in Chinese history during which the scholars enjoyed more freedom of thought and speech, so that each of them could express what he deemed to be the best, though causing some confusion in theoretical study. Their independent theories or doctrines were divided by historians into more than ten schools. The most dominant ones rivalling Confucianism were the school of Taoism, the school of Motzu, and the school of Legists, which may be mentioned as follows:

A. *School of Taoism*

Taoists were followers of Lao Tzu. (Historians are not sure of the precise years of his birth and death). They claimed that there is natural law in the universe, that human life must be in accordance with natural law. They disliked man-made law which, they thought, might cause more trouble in human life. Taoists held, however, that if any human-made law is considered necessary, it must be simple and consistent with the law of nature; and that human-made law cannot be perfect and has to be changed from time to time in order to meet the changing situation. On the other hand, Taoists were of the belief that natural law is perfect, eternal, and unchangeable. (By natural law I refer only to the Taoist conception). Lao Tzu said:

The way of truth that can be expressed is not the eternal way of truth; the name that can be defined is not the unchangeable name.²⁶

Lao Tzu also said:

Man follows the standard of earth; earth follows the standard of heaven; heaven follows the standard of the way of truth; and the way of truth follows the standard of nature.²⁷
The multiplicity of laws and commands causes more robbers and thieves.²⁸

²⁴ HSUN TZU, Chapter 13, DISCUSSION OF THE RULES OF ETHICAL CONDUCT, in SZU PU TSUNG KAN, 1929.

²⁵ HSUN TZU, Chapter 8, TRUE PRINCIPLES FOR THE KING, in SZU PU TSUNG KAN, 1929.

²⁶ TAO TEH CHIANG, by LAL TZU, (Li Erh) Chapter 1, TI TAO, in SZU PU TSUNG KAN, 1929.

²⁷ TAO TEH CHIANG, by LAO TZU, Chapter 25, HSIANG YUAN, in SZU PU TSUNG KAN 1929.

²⁸ TAO TEH CHIANG, by LAO TZU, Chapter 17, CHUN FUNG, in SZU PU TSUNG KAN, 1929.

Taoists repudiated what were called virtuous men or sages on the ground that they made rules of ethical conduct, laws, or systems in conflict with the law of nature, and thus created more troubles in society. One of Lao Tzu's followers, Chung Tzu, expressed the radical view that:

As long as the sages do not perish, the robbers cannot be terminated. And the people would not quarrel if the pecks and scales are destroyed.²⁹

Taoists positively upheld the law of nature and repudiated the human-made law. They felt that the more rules we make, the more trouble we have. They did not want the government to control the people too much. They believed that if all things are progressing in accordance with natural law, the people have real peace and happiness. This is why some modern scholars refer to Taoists as anarchists.

B. *School of Motzu*

The founder of this school was Moti, born in the year of 480 B. C. At first, he studied Confucianism which he gave up afterwards, because he disliked the complicated rules of ethical conduct. He thought the various rules of ethical conduct maintained by Confucianism were too trifling and expensive. They might be applicable to certain noble classes but not appropriate for the masses. Hence Moti opposed government by rituals and music. He kept an eye on the majority of the people and insisted on thrifty livelihood, practical utility, and government by law. He said:

All things have to be done according to proper law or rules. We cannot accomplish anything without resort to the law or rules. From ministerial work of our government down to various mechanical work, they all have proper law or rules which the persons engaged in those activities should follow. If the men responsible for government either of a state or of the nation do not follow the proper law or rules necessarily required for that particular work, they are less worthy than the mechanical workers.³⁰

From the Motzu School viewpoint, the law or rules for governing the people should be based upon righteousness and righteousness was to be based upon the truth of life, conferred on human beings by heaven, so that we must follow the standard of heaven.³¹

C. *School of Legists*

The legists rigorously repudiated the Confucian doctrine of government by rules of ethical conduct because of its impracticability. They claimed that in order to make a country have rapid progress and become powerful, the most effective way was to govern strictly by law. They looked upon Kuan Chung (circa 685-645 B. C.), the premier of the state of Chi, and Tzu Tsan (circa 554-522 B. C.), the premier of the state of Cheng, as their predecessors and guides. Both Kuan Chung and Tzu Tsan actually practiced government by law and both accomplished a number of constructive works for their respective states of Chi and Cheng. Consequently, Chi with its larger area and rich resources became a powerful state, and Cheng, a very small

²⁹ CHUNG TZU, WAI PIEN, CHU CHIEH, SZU PU PEI YAO, 1927.

³⁰ MOTZU, BOOK OF FA YI, SZU PU TSUNG KAN, 1929.

³¹ THE HISTORY OF CHINESE LEGAL THOUGHT, by YONG HUNG LIEH, pp. 60, Vol. 1, 1936.

state, became so strong that all the surrounding states, large and small, had to respect her and no one dared to attack or insult her. However, the situation at that time was more stabilized, compared with the later period of warring states, and Confucius had just started to preach the principles of government by rules of ethical conduct, so that the doctrine of government by law could not draw public attention. But in the time of warring states, social, political and economic conditions had drastically changed. Criminal cases were greatly increased and the old systems and laws were not sufficient to meet the changing situation. It was generally accepted that the rules of ethical conduct as emphasized by Confucianism were impracticable. The legists sprang up right at that moment.

One of the legists Li Hui, as previously mentioned, studied under a Confucius disciple named Tzu Hsia, but he was interested in the study of law so that he turned out to be a famous legist. He studied all the laws and usages from ancient Chinese history up to his time and finally wrote a book entitled "Fa King", containing six chapters, known as the first systematic formal criminal code in China. The King Wen Hou of Wi state learned law from him and consequently his code was first adopted by this state. A well known legist Shang Yong studied law under Li Hui and afterwards introduced this code to the state of Ch'in. After that Shang Yong became the premier of Ch'in and he thereby realized his policy of strict government by law. He devoted his whole efforts to the state without any selfish achievement. The criminal punishments were administered severely and justly without granting any excuse for the nobles or anyone in a powerful position. Under such high pressure, everyone strictly obeyed government orders without a murmur, even though an order might be unreasonable. Within a few years, Ch'in became a very powerful state and finally conquered all other states, the whole of China being thus unified under one government. This was the Ch'in dynasty. Shang Yong in his book "Shang Chium Shu" said:

To govern a country, we must depend upon three things: (a) Law; (b) Trustworthiness; (c) Power. Law has to be observed by both king and his subordinates; Trustworthiness is the mutual confidence of the king and his subordinates; And the power of the state has to be exclusively exercised by the king. If the king loses his power, it would be tremendously dangerous. If the king and his subordinates do not observe the law, everyone may act according to his selfish desire and it would result in confusion and disturbance. Therefore, the good government must be based upon the making and execution of the law, clarification of everyone's function and non-interference with administration of law by one's selfish desire.³²

Shang Yong also said:

The law aims at the realization of real love for the people. The rules of ethical conduct aim at accommodating all men to do things in proper way. The superior man, knowing these aims, does not insist on following the old standard, if his plan and method might make his country strong. And he does not necessarily observe the rules of ethical conduct if his way of managing affairs might benefit the people. The last three dynasties of Hsia, Shang and Chow all achieved what we call benevolent administration for certain periods respectively, but they did not use the same rules of ethical conduct. The five powerful state rulers all made their states (Chi, Chin, Chu, Sung and Chin) tremendously strong, but they did not use the same law. Hence, the wise man makes the law and

³² SHANG CHUN SHU, BOOK OF HSIU CHIUAN, SZU PU PEI YAO, 1927.

the stupid bigotedly adheres to it; the virtuous man creates rules of ethical conduct and the ignorant blindly follows them. Those who blindly follow the rules of ethical conduct are not good enough to understand the adaptation to new circumstances, and those who bigotedly adhere to the law are not wise enough to discuss how to deal with a changing situation.³³

During Shang Yong's premiership, the state of Chin built up a good foundation for its strength and greater achievements. Since then, the rulers of Ch'in all had confidence in the legists, and the legists naturally wished to come to Ch'in to carry out their doctrine.

Another legist named Li Szu also became the premier of Ch'in. He followed Shang Yong's steps and made the penalty even more cruel than before. Then came another well known legist named Han Fi, a school-mate of Li Szu, both of whom learned from a Confucius disciple, Hsiun Tzu. As previously stated, both Li Szu and Han Fi disliked Hsiun Tzu's teaching of government by rules of ethical conduct, but because of their master's insistence on the wickedness of human nature, they all became legists. Han Fi had never procured a position in the government of Ch'in on account of Li Szu's jealousy, but his theory was adopted by the ruler. It was the legists who helped Ch'in become the most powerful state and effected the unification of all China.

What the legists called government by law was quite different from modern constitutional government. They used the most cruel penalties to threaten and oppress the people. Under such terroristic pressure, everyone had to obey strictly government orders. After Chin's conquest of the whole country, penalties were made extremely cruel and inhuman. The government issued a command to the effect that most of the old books should be burned. If two or more persons should whisper about the old books such as the Book of Poems or Shu Chiang (book of ancient history), the punishment was "Chi Shih"—a decapitation, followed by an abandonment of the corpse in the street. And if anyone should criticize the existing government by reason of contravention of tradition and precedent, not only the offender himself but also his father, mother and wife all would be sentenced to death. People under Chin's rule suffered numerous unbearable atrocities. A well known Chinese writer Liang Chi-Chao, said:

The legists sprang up in the middle part of the period of warring states and gained some achievements in the last part. Their main defect was that they did not definitely set up a better system of legislation. . . . They emphatically pointed out that the king should make laws to restrain himself, and make rituals to rectify himself. They also said that if the king should disown laws in order to satisfy his selfish desire, it would make things fall into disorder. But if some one asked them: 'Where did the law come from and who made it?' They would reply that the king made it. The power to make the law and the power to repeal it are one thing viewed from both sides. As long as the ruler has the supreme power to make and repeal the law at his will, it would not be a perfect government by law. The claim of the legists that their system could have good government for one thousand generations and might have bad government only for one generation is obviously not well founded.³⁴

It was, therefore, the strict and severe enforcement of law that helped the state of Ch'in become powerful and strong, and it was the cruel and atrocious control by

³³ SHANG CHUN SHU, BOOK OF KANG FA, SZU PU PEI YAO, 1927.

³⁴ OUTLINE OF CHINESE POLITICAL THOUGHT BEFORE CH'IN DYNASTY, by LIANG CHI-CHAO, pp. 253-254, 1925.

law that lost the support of the people and thus caused its collapse. The Ch'in dynasty lasted only fifteen years.

Upon the establishment of the Han dynasty, the government made a new start. All the laws of Ch'in were repealed and all six chapters of Li Hui's code were re-adopted with an addition of three new chapters. This was the code of the Han dynasty. In addition to the code, many criminal provisions were declared from time to time by the emperors' mandate which were also regarded as part of law. But it should be noticed that in the beginning of this new regime, everyone became tired of Chin's turbulent and tyrannical administration. They all admitted the necessity of allowing the people a tranquillity, so that most of the government leaders were in favor of Taoism and disliked to govern too much. This movement dominated public opinion for several decades until the fifth emperor Wu. In the year of 136 B. C., Emperor Wu issued a very important mandate which opened a new era in Chinese history. This mandate expressly and decisively adopted Confucianism as the exclusive standard of national culture and rejected all other schools of thought. It was decreed that six kinds of classical books recognized by Confucius, i.e., Book of Poems, Shu Chiang (book of ancient history), Book of Rites, Book of Music, Book of Change, and Book of Spring and Autumn Annals (the only book written by Confucius) should be greatly emphasized. Chinese moral, ethical, ritual, legal and political principles were to be dominated by Confucianism for more than two thousand years.

Why did Emperor Wu of the Han dynasty issue the mandate giving Confucianism the exclusive privilege of predominance? And why should the following dynasties have continued to follow such a decision? Was it because of the upholding of the monarchical system by Confucianism so that all the monarchs took the advantage of it? This does not appear to be the main reason, since other schools of thought such as Taoism, Motzu and the Legists all supported a monarchical system, and especially the legists who gave the emperors absolute controlling power. Why could not any of them be adopted as the exclusive standard of national culture instead of Confucianism? The reasons may be briefly stated as follows:

A. Taoists insisted on natural law and rejected both the rules of ethical conduct and human-made law. They had gone to an extreme and were too idealistic and impractical. That is why some scholars regarded Taoism as similar to anarchism.

B. Motzu and his followers were not satisfied with the confusion and the expense of rituals and music which were required by Confucius. They advocated government by law and insisted on actual benefit of the people. Their idea was very similar to that of modern utilitarianism. They also advocated brotherhood and the veneration of heaven which were very similar to Christianity. But compared with Confucianism, Motzu's doctrine was not so profound, comprehensive and harmonious with the Chinese orthodox belief. Mencius strongly opposed Motzu's doctrine on the ground that his idea of love for all on an equal footing was to treat one's own parents as strangers, and as a result, no filial piety was necessary toward the parents. Such a theory was only for beasts not for human beings.³⁵ This criticism was very convincing and has dominated Chinese public opinion for more than two thousand years.

C. The Legists insisted on the strict enforcement of law, but their penalty was so

³⁵ MENCIUS, BOOK OF TONG WEN KUNG, Chapter 9, SZU PU TSUNG KAN, 1929.

harsh and atrocious that the people could hardly endure it for long. They let emperors exercise absolute power and deprived the people of their freedom. Their administration was very much like modern totalitarianism. They might accomplish something for the time being, but would collapse in the long run.

Although Confucianism had been highly esteemed by the public since the Emperor Wu of Han, the law had gradually been growing independent. The rules of ethical conduct, if significant and necessary to enforce strictly, would have been absorbed into the law—either provided in the code or put into force by a mandate with the same effect as a code. In the beginning of the Tang dynasty, a more systematic and comprehensive code, as mentioned before, had been adopted and extended by the following dynasties of Sung, Yuan, Ming and Chiang. The moral, ethical and ritual rules absorbed into the code and imbued in public opinion with respect to the administration of justice were numerous. Some important features of them were the following:

- A. In the Han dynasty, certain kinds of criminal cases might be decided according to the principles of the book entitled "Spring And Autumn Annals" written by Confucius, but the following dynasties did not follow that example.³⁶
- B. Special respect for the sovereign (emperors).³⁷
- C. Special respect for one's own parents, grandparents and other close seniors of the family.³⁸
- D. Special respect by the wife for her husband.³⁹
- E. Special privilege given to the following eight classes of persons:
 - (a) Close relatives of the emperor.
 - (b) Those who had special relations with the emperor, enjoying honorable treatment.
 - (c) Those well known as great virtuous men whose moral standard may be followed by others.
 - (d) Those who have special ability to assist the emperor in administering the political or military affairs.
 - (e) Those who have rendered meritorious work for the nation.
 - (f) High ranking government officials of certain fixed grades.
 - (g) Those who have rendered particularly meritorious service to the government.
 - (h) Hereditary officials treated as honorable guests of the government.⁴⁰

³⁶ A STUDY OF NINE DYNASTY CODES (dynasties of Han, Wei, Chin, Liang, Chen, Hou Wei, Pei Chi, Hou Chou, and Sui.), by CHENG SHU TEH, pp. 11-12, 1935.

³⁷ TA CHIANG LU LI, (The Code of Chiang Dynasty) 1870 ed., Vol. 23, Treason. The maximum punishment for murder of an ordinary person was decapitation, but the punishment for murder (even merely an attempt to murder) of the emperor was "Liang Chih" (decapitation and cutting the body into several pieces) without making any distinction between a principal and an accessory; and the offender's grandfather, father, son, grandson, brothers, others living together with the offender such as his uncle, or brother's son, all had to be decapitated if they were over sixteen years of age; the male persons under sixteen years of age living together with him, and his mother, daughter, wife, concubine, sisters, daughter-in-law were all to be sent to some meritorious officials' household as slaves; and all properties were to be confiscated.

³⁸ TA CHIANG LU LI, 1870 ed., Vol. 26, MURDER. An attempt to murder one's own grandparents, parents, maternal grandparents, uncle and uncle's wife was to be punished with decapitation; but if such murder was consummated, the punishment was Liang Chih. Whereas the punishment for murder committed by a parent against his or her son or grandson may be reduced from that prescribed for murder of an ordinary person. The same principle was applied to assault and battery.

³⁹ TA CHIANG LU LI, 1870 ed., Vol. 26, MURDER. If a wife committed murder against her husband, husband's parents, or grandparents, the punishment was Liang Chih. But if a husband committed murder against his wife, or wife's parents, the punishment was the same as that prescribed for murder of an ordinary person.

⁴⁰ TA CHIANG LU LI, 1870 Ed., Vol. 4, EIGHT SPECIAL PRIVILEGES.

The above eight classes of persons, if convicted of offenses, had the privilege of receiving mitigation of the punishments to be imposed upon them, unless their offenses came within what were called the ten felonies.

F. Some special aspects in family relations:

- (a) Different legal status in the family between a wife and a concubine.⁴¹
- (b) Beside the inheritance of property, emphasis was placed upon the succession to the male blood line of the family to continue the descendants from generation to generation.⁴²
- (c) A daughter had no right to inherit the property of her parents.⁴³
- (d) A daughter-in-law's legal relation with her parents-in-law was almost the same as her husband's with his parents, but a son-in-law's legal relation with his parents-in-law was quite different from his wife's with her parents.⁴⁴

G. Emphasis upon woman's chastity.⁴⁵

H. Important rules of ethical conduct and some rules of ceremonial performances were also prescribed in the code.⁴⁶

I. The administration of justice had a constant tendency to follow the Confucius teaching, trying to cause the people to have no litigation.

J. Public opinion laid more stress on the performance of one's own duty than on struggling for the right.

The 1911 revolution overthrowing the monarchy made a tremendous change in Chinese history. In fact, a movement of modernizing Chinese law had started even a little earlier than the downfall of the imperial government. Since that time, Chinese jurists have met with many difficulties in adopting the legal system from other countries and also preserving their own traditional laws which were particularly adapted to their own needs. Professor Roscoe Pound has made the following analysis:

Two ideas, sometimes held dogmatically in extreme form, have been in conflict as to the making or remaking of law in China. On the one hand, there is an idea of imitating or borrowing the latest legal ideas and doctrines and institutions of western countries and, on the other hand, an idea of developing and adopting ancient and traditional Chinese institutions and teachings.⁴⁷

This is a real picture of China in the transitional period of remaking the law. In the west, the analytical jurists claimed that "the law was to be made, not to be found", but the historians maintained just the reverse, i.e., "the law was to be found, not to be made." The Chinese jurists of that period tried their best in both ways, the "made" and the "found". "In truth," said Pound, "law is both made and found. There is a made element and a found element; an element made by reason to the

⁴¹ TA CHIANG LU LI, 1870 ed., Vol. 10, HU LU, Part 3, Marriage, Section 3, Violation of The Legal Status of a Wife and Concubine.

⁴² TA CHIANG LU LI, 1870 ed., Vol. 10, HU LU, Part 1, Household and Residential Affairs, Section 4, Illegal Adoption of one's own heir.

⁴³ TA CHIANG LU LI, 1870 ed., Vol. 10, HU LU, Part 1, Household and Residential Affairs, Section 4, Illegal Adoption of one's own heir.

⁴⁴ TA CHIANG LU LI, 1870 ed., Vol. 3, Diagrams showing the different degrees of family relations.

⁴⁵ TA CHIANG LU LI, 1870 ed., Vol. 26, MURDER, Part 4, The Killing of Paramours. The killing by a husband of his wife and the paramour on the spot where they were committing adultery was not punishable; and Vol. 33, Part 1, Adultery and Fornication.

⁴⁶ TA CHIANG LU LI, 1870 ed., Vol. 16, and 17.

⁴⁷ COMPARATIVE LAW AND HISTORY AS BASES FOR CHINESE LAW, by ROSCOE POUND, 61 HAR. L. REV. 749, 1948.

exigencies of newly pressing interests and an element found by experience and declared by legislation or left to tradition of teaching and doctrinal writing."⁴⁸

Let us try to find out how many moral, ethical and ritual traditions of the old code have been preserved in the new laws. The court decision by the principles of "Spring and Autumn Annals" was practiced only in the Han dynasty. The special respect shown to the emperors and to the husband by his wife, and the special privileges given to the eight classes of persons have been all eliminated; the ritual and ceremonial rules have been wiped out of the code; the succession to the male blood line of a family has been abolished; the daughter and son now have the same right to inherit their parents' property; the daughter-in-law's legal relation with her parents-in-law is now the same as that of her husband's with her parents; the legal status of a concubine in the family is not recognized by law; and an unmarried woman over sixteen years of age who has sexual intercourse with a man is not punishable by law. All of these changes have been adopted from foreign systems. The existing Chinese Criminal Code has preserved only a few old provisions such as that under which homicide committed against one's own lineal blood ascendants is to be given heavier punishment than that against a person not so related. And the same is true of a bodily harm against one's own lineal blood ascendants, and so on.

The question arises as to whether the sudden changes of Chinese law, especially the new rules adopted from foreign countries, were to be well received by the people of China. The answer is that some of the changes were and some were not. When the new provision has changed their moral traditions, family relations, or affected their personal reputation, it could not be enforced satisfactorily. For instance, to keep a concubine in the family is now unlawful, but a few people still follow that immoral practice, because some wives impressed with the old notion still reluctantly permit their husbands to do so. And the new law gives a daughter the same right to inherit her parents' property as her brothers and this law was put into force twenty years ago, yet it has not been fully carried out throughout the whole country, because the inheritance of property is connected with another custom by which the son has to live together with, support, and take good care of his parents until their death, while the daughter has to follow and share the same burden with her husband to take good care of her parents-in-law. As long as this custom has not been changed, the inheritance law is regarded by the people as unfair and impracticable.

Another change of the old law is that the Chinese tradition laid more stress on woman's chastity. According to the law of the Chiang dynasty, it was a crime for an unmarried woman to have sexual intercourse with a man, but such an act is not punishable in the new law, which was adopted from Japan and some European countries and was absolutely incompatible with Chinese custom. When the writer of this dissertation was the head of Second Branch Higher Court of Shansi Province, China, and concurrently the presiding judge of the Criminal Court, a fornication case was brought before him and the evidence clearly indicated that three brothers, A, B, and C lived together and all were married. B died of some kind of fever and was survived by his wife D who still lived in the same building with the other brothers

⁴⁸ COMPARATIVE LAW AND HISTORY AS BASES FOR CHINESE LAW, by ROSCOE POUND, 61 HAR. L. REV. 749, 1948.

and sisters-in-law. Shortly afterward, D, being a widow, had sexual relations with a man E. They came in contact with each other very often, causing scandal in the neighborhood. Brothers A and C, realizing this to be an unbearable disgrace, caught E in D's room and sent him to the local court. The court understood that E's act was not punishable, but under the pressure of public opinion, sentenced E to imprisonment for three months, obviously against the law. E of course appealed. The Second Branch Higher Court reversed the judgment of the lower court and gave a decision for the acquittal of E. Upon declaring the decision, A, flushed with rage, said: "Upon what ground could the court make such a decision, a tremendous mistake?" The writer, then the presiding judge, sincerely explained the new law. But A, greatly surprised, said: "The law is entirely wrong. If the court cannot relieve me from such a humiliation, I will do it myself at the price of my life." He meant to murder E. Although E was acquitted, the court did not let him go back until two and one-half months later when A's family trouble was settled through the intermediation of social workers who helped separate the widow D from the family and let her move to a place several miles from that village. This case clearly indicated that if the law is absolutely incompatible with the prevailing moral tradition or custom, it not only loses the support of public opinion, but also causes many troubles in connection with social peace and order.

2. SOURCE OF AMERICAN CRIMINAL LAW

The criminal law of the United States came from quite a different legal system. It was derived from the law of England. When the early English settlers came to America, they brought with them the English common law, also known as the customary or unwritten law, which was a common source of legal authority for nearly all of the colonies. The common law of England consisted of those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest their authority upon any express and positive declaration of the will of legislature. However, a mere custom or usage did not in itself constitute law. It had to be recognized and declared so by the courts, and when so declared and generally accepted in judicial quarters, it becomes law. The early American settlers brought with them or preserved only those parts of the English common law which were applicable to their new social conditions. They also brought with them such of the appropriate English statutes as were in force at the time of their emigration. Furthermore, some of the English statutes enacted after their emigration and before the Revolution, also were adopted in the colonies by general consent. All of these statutes became a part of the American common law. In addition to these, some usages growing out of peculiar conditions in the colonies were gradually adopted. And the early courts also relied heavily on certain treatises on common law, written by well known English writers. One of these was Blackstone's *Commentaries*, which was quoted in every court and became the standard legal authority.

After the revolution, the common law, so far as it had not been changed or modified by statutes, was received or adopted either by constitutional provisions or by statutes or by judicial authority in all states except Louisiana and Texas, both of which were originally subject to continental civil law influences. But the common law as to

crimes and criminal prosecutions has been adopted to some extent by statutes in both of these states.

Although the common law has been modified or in many particulars repealed by the statutes of various states, it is not to be considered modified or repealed unless the legislative intent is plainly manifested. In some states, no offense is punishable except in pursuance of a statute. These states are Georgia, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, New York, Ohio, Oregon, and Texas. When the common law and a statute differ from each other as to an offense, the common law should give place to the statute. Where a statute evidently undertakes to cover the entire subject matter involved, the common law will be repealed by implication. In case a statute provides for punishment of a crime merely giving it a common law name and not further describing it, the common law is to be consulted to ascertain the essentials of the crime.

It should be noticed that the federal courts cannot exercise common law jurisdiction in criminal cases under the constitution of the United States. They can exercise such powers only as are conferred upon them directly by the constitution or by Congress. However, where the statutes made by Congress only designate the offense by its common law name without any further description, the federal courts must look to the common law for the definition of the offense.⁴⁹

The foregoing is a very brief description of the source of American criminal law. Since this part of the dissertation is not expected to be used as a reference by Americans who know more about the historical development of their own law, the writer does not want to go any further with this topic. But he might go into more detail when he has a chance to write his comparative study in Chinese.

CHAPTER II

MENTAL ELEMENTS OF A CRIME

1. CRIMINAL INTENT

Under the Chinese Criminal Code, the mental elements of a crime are of two kinds: criminal intent and negligence. There is no punishment for an act done unintentionally and without negligence. Article 12 provides:

An act not done intentionally or with negligence shall not be punishable.
A negligent act shall be punishable only when specifically made so by law.

With respect to criminal intent, there are two theories: One is called the knowledge theory, which means that the actor must know or understand his doing of a criminal act. The other is called the expectation theory, which means that the actor, besides knowing his doing of a criminal act, must also have an expectation or desire to accomplish it. The Chinese law-makers agreed to accept both theories. It is provided in Article 13 of the Chinese Criminal Code as follows:

⁴⁹ The materials for this brief description of the source of American criminal law are derived from the following authorities: (1) Chapter 2 of *A TREATISE ON THE LAW OF CRIMES*, by CLARK AND MARSHAL; 2) Chapters II, III, and IV of the *LAW OF CRIME*, by BURDICK.

1. An act is done intentionally when the offender knowingly and wilfully causes the accomplishment of the constituent elements of an offense.

2. An act is deemed to have been done intentionally when the offender could have foreseen that the act would accomplish the constituent elements of an offense and the accomplishment was not contrary to his will.

Paragraph 1 of the above Article gives effect to the expectation theory while paragraph 2, gives effect to the knowledge theory. According to these provisions, the criminal intent may be defined as being "the knowing or understanding by the offender of the constituent elements of an offense and his willingness to accomplish it, or its accomplishment is not contrary to his will." The criminal intent in the active commission of an offense is the knowing by the offender of the result to be brought about by his action and he is determined to carry it out, while the criminal intent in effectuating an offense through omission of an act is the knowing by the offender of his duty to prevent a certain cause from bringing about the criminal result, but he is determined not to render such prevention.

In order to know more of Chinese viewpoints about criminal intent, the following aspects have to be mentioned:

(1) The offender must know the specific facts necessary to constitute the essential elements of the particular offense, such as in theft the taking away of movable property of another with intent to appropriate the same for himself or for a third party.

(2) Where an increased punishment is prescribed by law on account of certain specified results of an offense, this shall not apply if such results could not be foreseen by the offender (Art. 17), such as death resulting from an intentional injury; if the death has no causal relation with the injury and hence could not be foreseen by the offender, he is not responsible for the death.

(3) If the offender knows the specific act which he is doing, he should be deemed as having intent to do it, even though he does not know his act is against the law.

(4) Criminal responsibility is to be decided by the facts and the law, which are not necessarily required to be known to the offender. For instance, it is provided in paragraph 1 of Article 18 that an act done by any person who has not completed the fourteenth year of his age shall not be punishable. If an offender over 14 years of age honestly believes himself to be under 14 years of age, he cannot, by reason of his miscalculation, be deemed as having no criminal intent.

(5) If a man honestly believed some forged documents, received from others, to be genuine and brought them to the court to prove his right to certain property, he cannot be held responsible for circulation of forged documents, because his lack of knowledge of such forgery negatives his criminal intent (Supreme Court decision A. No. 233, 1916).

(6) Criminal intent is different from "motive" though the former is often caused by the latter. The difference between these two may be explained by the following:

A. Criminal intent in respect of any offense is of the same nature as already defined, but the motives for committing offense differ widely with one another. A homicide may originate in patriotic emotion, or hatred, or cupidity for money, or revenge, or envy, or even love for the victim.

B. Criminal intent is an essential element of an offense while the motive is not. No matter how strong the motive is, it has nothing to do with the nature or components of the offense.

However, motive is of great importance to help the court understand the offender from a moral viewpoint and make a reasonable assessment of the punishment, and also to help the criminal administration deal with prisoners in more appropriate or effective ways for their reformation. The Chinese Criminal Code lists in Article 57 ten important items to be taken into consideration by the court when the punishment for an offense is under estimation. The first of them is the motive. Article 57 provides:

At the time when a sentence is passed, all the circumstances of the case shall be taken into consideration and special attention should be paid to the following facts to determine whether a heavier or lighter sentence is to be given:

1. The motive of the offense;
2. The object of the offense;
3. The provocation or incitement at the time of committing the offense;
4. The means employed for the commission of the offense;
5. The living conditions of the offender;
6. The character of the offender;
7. The intelligence of the offender;
8. The relations ordinarily existing between the offender and the injured party;
9. The danger arising from or damage caused by the offender;
10. The behavior or attitude of the offender after his commission of the offense.

From this quotation, we understand that motive under the Chinese code is only one of the factors to be taken into account for assessing punishments, but is not an essential element of the offense. It should not be confused with the specific intent requisite to an offense, such as provided in Article 231, paragraph 1, that "Whoever for the purpose of gain, induces or keeps any female person of a respectable family in order that she should have carnal knowledge with a third party shall be punished with . . .", and Article 235, paragraph 2, provides that "Whoever with intent to sell . . . indecent writings, drawings, or pictures . . . shall be punished with. . ." The words "for purpose of gain" and "with intent to sell" are specific intents and not motives of those respective offenses.

There are different forms of criminal intent, such as simple intent, premeditated intent, definite intent, indefinite intent, prior intent, and subsequent intent. These may be briefly explained as follows:

(1) Simple intent, also called sudden intent, means that the offender decided to commit the offense all of a sudden without previous meditation.

(2) Premeditated intent means that the offender starts to commit an offense after he has taken it into consideration, but such consideration does not necessarily require any substantial period of time. It is sufficient if he has deliberated it before his action. Actually, the existing Chinese code makes no difference between a sudden intent and a premeditated intent. The reasons will be stated later in the discussion of homicide.

(3) Definite intent, also called direct intent, means that the offender definitely knows the all requisite facts of the offense and willingly consummates the offense,

such as if he knows the gun could shoot a man to death and willingly kills the victim with it.

(4) Indefinite intent means that the offender knows a crime may possibly be committed and lets it happen. This might happen in the following different ways:

A. General Intent, such as, if the offender shoots a gun at a crowd; he knows that someone will be killed but does not know who will be that one.

B. Alternative Intent, such as if the offender shoots at A and B and is satisfied to kill either of them.

C. Uncertain Intent, such as if the offender throws a large piece of stone onto the street from a roof. If someone is passing by, he will be killed; if not, it will hurt nobody.

(5) Prior intent means that the offender did not realize that his criminal act had already brought about the result and does some more things for another purpose, and in so doing actually accomplishes his intended result. For instance, A attempted to kill B with a knife and merely injured B. In Ignorance that B had already been killed and, for the purpose of destroying the evidence, A throws B's body into a river and thus actually kills B.

(6) Subsequent intent means that the offender originally had no intent to commit a crime, but after acts innocent in themselves he forms the intent and then makes use of those acts to carry out his subsequent intent. For instance, when a medical doctor was performing a surgical operation on a patient, he had no intent to hurt his life, but after cutting the abdomen, he recollected his former hatred for the patient and purposely leaves the cutting open, resulting in the latter's death.

Under American law, criminal intent is more complicated than in the Chinese criminal code. Generally speaking, criminal intent is the state of mind under which one willingly does an act against the criminal law, upon his free choice or volition. At common law the mental element required in a crime is the voluntary exercise of one's own will, and everyone is presumed to intend the natural and probable consequences of his own acts, though he is allowed to rebut this presumption by showing that such an intent, as a matter of fact, was not present. Hale said:⁵⁰ "When there is no will to commit an offense, there can be no transgression, and because the choice of the will presupposes an act of understanding. When there is no understanding there is no free act of the will." Since criminal responsibility rests on free will, so far as the mental element is concerned, the law does not punish children of tender age, and insane persons who are mentally incapable of understanding the nature of their acts, persons acting in good faith and without negligence under a mistake of fact, and persons acting under compulsion or necessity.

According to this simple explanation, it seems that criminal intent in American law is about the same as that in Chinese code, but looking at other aspects, we can find many different viewpoints:

(1) Criminal intent in American law is oftentimes used synonymously with the phrase "*mens rea*" which comes from the old maxim "*Actus non est reus, nisi mens sit rea*," and is usually translated as "The act is not a guilty one unless the mind is guilty." But it had different meanings as interpreted by the jurists. In the case of

⁵⁰ HALE, P. C. Chapter 2.

Brown v. State in Delaware,⁶¹ the court quoted with approval the words of Sir James Stephen found in his "History of The Criminal Law": "The truth is that the maxim about mens rea means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature. Thus, in reference to murder, the mens rea is any state of mind which comes within the description of malice aforethought. In reference to larceny, the mens rea is an intention to deprive the owner of his property permanently. In forgery the mens rea is the intent to defraud. Hence, the only means of arriving at a full comprehension of the expression mens rea is by a detailed examination of the definition of particular crimes, and therefore the expression itself is unmeaning."

Professor Burdick said: "There is no general agreement as to what mens rea means. Many cases used the term in the sense of 'general criminal intent', others in the sense of 'guilty knowledge', or a conscientious sense of wrong doing in distinction from an entirely innocent mind, and others, more wisely, have used the phrase to indicate whatever state of mind may be required by law in any particular crime. Consequently, the maxim 'Actus non facit reum, nisi mens sit rea' becomes equivalent to the fundamental and general proposition that an act does not constitute a crime unless the mental state is that required by law with reference to the particular crime charged. . . . To repeat the words of Justice Stephen with reference to mens rea, the expression itself is unmeaning."⁶²

Professor Hall expressed the idea that Justice Stephen failed to appreciate the significance of the general characteristics of the various criminal intents; the fact that the mens rea in murder differs from that in robbery is not inconsistent with the presence of a common, essential element, namely, the voluntary doing of a morally wrong act forbidden by penal law. But Hall especially laid more stress on the motivation and moral culpability so that his understanding of mens rea is also from a different viewpoint. He said: "With the rise of motivation to an important place in criminal law administration, the meaning of mens rea has changed."⁶³

As mentioned above, mens rea, synonymous with criminal intent, is so complicated that the writer is unable to reconcile the explanations of different well known jurists about this term, and he can only point out its difference from the criminal intent in Chinese law which is simplified, not involved with any other similar expression.

(2) Another term often used in American criminal law and very easy to confuse with criminal intent is the word "malice" which ordinarily means hatred, grudge, spite, ill will against another, but in law has nothing in common with such ideas. It was sometimes used by the jurists in a sense very much like or close to criminal intent. Professor Wharton said: "Malice is evil mind." He also quoted from some old cases saying that "Malice is where a person willingly does that which he knows will injure another in person or property." He also said: "In our own system, malice in its most general sense includes all unlawful intents."⁶⁴ Justice Stephen said: "Malice means

⁶¹ 23 Del. 159.

⁶² BURDICK, *THE LAW OF CRIME*, Vol. I, pp. 162, 1946.

⁶³ HALL, *PRINCIPLES OF CRIMINAL LAW*, pp. 164-168, 1947.

⁶⁴ WHARTON, *CRIMINAL LAW*, Vol. I, 1932, pp. 190, 193.

one thing in relation to murder, another in relation to the malicious mischief act, and a third in relation to libel.”⁵⁵ This illustration seems to be not clear enough. Probably, we can understand more in detail in the following explanations. Justice Holmes said in the case of *Commonwealth v. Chance*:⁵⁶ “Reduced to the lowest terms, malice in murder means knowledge of circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps, with an implied negation of any excuse or justification.” For other offenses where malice (or ‘malicious’) appears as an element particularly in the common law offenses of arson, libel and mayhem, Professor Burdick said: “The term (malice) means something more than a mere voluntary act. It means that the act is done wilfully, intentionally, without any legal justification or excuse, but it has no reference to any malevolent feeling against the party injured. . . . The malicious mischief, as said by Blackstone, requires either a spirit of wanton cruelty or black and diabolical revenge, and some common law cases in this country (U.S.A.) have held that the crime requires a motive of personal injury to the owner of the property.” However, Professor Burdick admitted that many statutory offenses do not even involve moral turpitude and the use of the word “malice” as synonymous with “criminal intent” in their case would seem entirely out of place.⁵⁷

From these quotations, we may get a general idea of the word “malice” as employed in American criminal law, but it seems that its various meanings may be included in a broader sense of “criminal intent” as viewed by Chinese jurists. Actually, criminal intent in the Chinese code has to be construed so as to include all the meanings implied in the word “malice”. For example, intentional homicide in the former Chinese Criminal Code was divided into premeditated killing and immediate killing, while the present code makes no such distinction, because the law-makers thought that this difference was related to very delicate mental activities which oftentimes could not be easily proven, and the criminal gravity of homicide cannot always be determined by the fact as to whether or not it was committed with premeditation; it often happens that an immediate intentional killing is more serious than a premeditated killing, according to the circumstances. They also thought that the prescribed punishment for homicide in Article 271 (death, imprisonment for life or for not less than ten years) is broad enough to meet both grave and mitigating circumstances. The writer disagrees with this new provision and his opinion will be stated later in connection with the topic of homicide.

(c) Criminal intent, literally speaking, could not include the whole scope of the mental elements of crime, since it only means the state of mind which shows that one intends or purposes to do some criminal act and cannot cover criminal negligence, which is also a mental element but oftentimes contrary to the will of the doer, so that the term “criminal intent” is not sufficiently inclusive. Some American jurists take the view that although mental elements of various crimes differ widely, they all have one mental element in common; they must be voluntary, that is, must proceed from the will, from a mind free to act. Criminal negligence, insofar as the state of

⁵⁵ *Queen V. Tolson*, 23 B. Div. 168.

⁵⁶ 174 Mass. 252; 54 N. E. 551.

⁵⁷ BURDICK, *THE LAW OF CRIME*, 1946, Vol. I, pp. 132-135.

mind is free to proceed, imports a criminal intent, or a constructive intent, or technical intent.⁵⁸

However, under the Chinese code, negligence stands side by side with intent; the former is not included in the latter and both are mental elements of crimes; one is positive, the other negative. Hence, whenever they say that the offender has done negligent act, it means such act was not intended by him and may even have been against his will. They would not regard negligence as a technical intent.

(4) Another aspect of American criminal law to be mentioned is the dispensing with the necessity of criminal intent by the legislature. Although criminal intent is an essential element of a crime, it is within the legislative power to dispense with it in its enactment of some penal statutes. In the case of *Helsted v. State*,⁵⁹ the court said: "In such investigations, the dictates of natural justice, such as that a guilty mind is an essential element of crime, cannot be ground of decision, but are merely circumstances of weight, to have their effect in the effort to discover the legislative purpose. As there is an undoubted competency in the law-makers to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of law, such knowledge or motive to be shown. In such instances, the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention."

Chinese legislators have never enacted a criminal statute dispensing with the necessity for criminal intent, nor has the Chinese court ever made any interpretation of a crime to that effect. But does the Chinese Legislature have such a power? It should be construed as having it. Although the criminal code prescribes in its "General Provisions" that an act not done intentionally or thorough negligence shall not be punishable, the legislature still has the inherent power to make new statutes contrary to that provision. This is indicated by Article II of the same code which reads:

In the absence of any provision to the contrary, the General Provisions of this code shall apply to any law which prescribes criminal punishment.

Chinese legislators have never enacted a statute contrary to the above provision, not because they have no such power but because they attach too much weight to the mental elements of crime. However, they have made some laws or statutes of an administrative nature, punishing certain acts irrespective of knowledge or intent of the doer of such acts, such as "The Law Of Police Offenses" which requires no intent or negligence as an essential element of a police offense, but only prescribes in Article 21 as follows:

Punishments may be increased or reduced by one fourth or one half after taking into consideration the past conduct, state of mind of the offender and other circumstances.

2. NEGLIGENCE

Under the Chinese code, criminal negligence means the lack of knowledge by the offender of the constituent elements of an offense which he would have known, if he

⁵⁸ CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES, 1952, pp. 60; BURDICK, LAW OF CRIME, 1946, Vol. I, pp. 126, 127, 154, 155.

⁵⁹ 41 N. J. L. 552; 32 Am. Rep. 247.

had exercised the care which he should and could have exercised in that particular situation. Hence, to constitute criminal negligence, the offender must (1) have a duty to exercise due care, (2) have mental capacity to exercise such due care, (3) have neglected to exercise such due care, and (4) lack the knowledge of the constituent elements of the offense because of non-exercise of such care.

But the most difficult question is what degree of care should one use with regard to his act or omission in order to avoid criminal responsibility. There are several theories in respect of this question. One is the objective theory which maintains that the standard of due care must be measured by that degree of care an ordinary reasonable man in the same situation should use. If anyone fails to use that degree of care, it is negligence. The other is the subjective theory which maintains that the standard of due care has to be measured by the degree of care the doer has by his capacity habitually used. And still another is the eclectic theory which maintains that the degree of due care should be weighed by the standard which an ordinary reasonable man should use, but if the doer's capacity obviously could not reach that standard, his conduct may be estimated by his own usual ability.

The Chinese law-makers thought that objective theory is too strict for those persons whose capacity is below that of average men, while the subjective theory makes capable persons assume more liability to criminal punishment; both are inappropriate. Hence, they adopted the eclectic theory. Article 4 of the Chinese criminal code provides:

1. An act is done through negligence when the offender, though not acting intentionally, fails to exercise that degree of care which he should and could have exercised in the circumstances.

2. An act is deemed to have been done through negligence when the offender, notwithstanding that he could have foreseen the possibility of the occurrence of the offense, honestly believed that such offense would not take place.

The above provisions indicate two kinds of negligence both of which do not involve the question of criminal intent, but differ in degrees of the state of mind. Paragraph 1 is what is called "careless negligence", under which the offender has no knowledge of the occurrence of the offense. The main fault is his failure to use the necessary degree of care which he should and could have used in the circumstances. In other words, if he had used that degree of care, the criminal result would have not occurred. The word "should" indicates that he has a duty to use that degree of care and the word "could" indicates his capacity or the possibility in the particular situation to use that degree of care. But when the duty has been expressly prescribed by law, statute, regulations or any lawful contract and the standard of care required by this duty is specific, there may be no such difficulty in its application, such as when a railroad watchman fails to give the signal to the coming train as he should have done pursuant to his duty, and thereby someone is killed by the train. His failure to do so makes him guilty of negligent homicide. The same is true of the failure of an employee in the mine to plank up a shaft when charged with this duty, if death is caused thereby.

But where the duty is implied merely by interpretation of some provision or the standard of care required for performance of such duty is not so specific, it is rather difficult to measure the degree of care which the doer should exercise. Suppose a child was run over and killed by a horse wagon while he was crossing the highway and the

evidence shows that at that moment the driver held the reins in his hands. But the mere holding of the reins is not sufficient to save him from criminal responsibility. The question is whether he used due care required in that situation to restrain his horses from running over the child. What is the criterion to estimate the necessary due care? The jury system has not been adopted in China. The only way for the court to do is to notice the objective standard, i.e., to call some impartial experienced drivers, asking them what degree of care an ordinary reasonable driver should exercise in that particular situation, and then find out if the accused driver has capacity to use the degree of care. From this illustration, we understand that in dealing with this kind of care, the conduct of an ordinary reasonable man is a good example to determine the standard of the word "should" and the word "could" is to be determined by the doer's capacity and the possibility in the situation. However, it should be noticed that the word "should" has nothing to do with moral obligation. A failure to perform acts of mercy is not criminal negligence, even though death might result from such failure.

Paragraph 2 of Article 14 is what is called reckless negligence, which means that the offender can foresee the possibility of the occurrence of the offense, but he honestly believes that it will not happen. Although it may be said that his misbelief is also due to the lack of due care, reckless negligence is quite different from careless negligence, so far as the state of mind is concerned. In the former, the offender has knowledge of the possibility of the occurrence of the offense while in the latter, he has no such knowledge. Reckless negligence must also be distinguished from what is called "indefinite intent" as previously defined. They both involve the same condition that the offender can foresee the possible happening of the criminal result, but in indefinite intent the offender has an expectation of such result or at least such happening is not against his will, while in reckless negligence, the offender does not expect such happening nor does he cherish the idea of letting it happen. For instance, if a man is going to shoot a gun at a target nearby a person, he knows that his shooting may possibly hit the target or the person, and willingly proceeds to shoot whereby that person is killed, this is indefinite intent. But if the offender, in the same situation, honestly believes that by reason of his skill and long experience in shooting he will not hit the person nearby, but unexpectedly that person is shot to death, this is reckless negligence.

The Chinese Criminal Code also makes a distinction between general negligence and occupational negligence. The former means negligence resulting from ordinary human activities, such as arson or homicide caused by careless or reckless acts without any connection with technical performance, while the latter means negligence occurring in the performance of some special occupation by professional or expert workers, such as a physician, surgeon, pilot, or professional chauffeur, etc. The law imposes much behavior punishment for negligent offenses committed by the latter than that by the former.

American law recognizes a distinction between ordinary negligence and a high degree of negligence, variously called gross, culpable, willful, or criminal negligence. Most of the courts seem to prefer to use the word "reckless" to denote the high degree of negligence instead of using other epithets. It is reckless negligence which

should result in criminally responsibility and ordinary negligence only in liability for damages in a civil action. Professor Perkins laid more stress on the nature of the risk and conduct acceptable to the society. He wanted to distinguish the risk not socially acceptable from those regarded as fairly incident to our mode of life, the former being spoken of as unreasonable. And even an unreasonable risk may have been created without social fault, if the one who created the risk did not know or have reason to know of the existence of such risk under the circumstances. Hence, he insisted on the distinction between risks that are realizable and those that are not. Conduct may be said to fall below the line of social acceptability if it involves a realizable and unreasonable risk of social harm. Based upon this reasoning, he gave the following definition: "Negligence is any conduct except conduct intentionally harmful or wantonly and wilfully disregarding of an interest of others against unreasonable risk of harm." He also said: "The social purpose underlying the requirement of compensation to the person harmed is not identical with that which forms the basis of punishment. . . . There is a tendency to speak of the type of behavior amounting to criminal negligence in terms of "reckless conduct" or "recklessness".⁶⁰

The above quotations clearly indicate that the lack of ordinary due care which constitutes mere civil liability cannot be regarded as criminal negligence. But what is the actual state of mind of criminal or reckless negligence, distinguishable from that of ordinary negligence and of intentional guilt?

To answer this, I would like to refer to Professor Hall's profound approach in this regard. He made a clear distinction between intention, negligence and recklessness. He said: "The two extremes in such states (mental states), intentionality and negligence, are readily distinguishable. In the former the actor seeks the forbidden end; he directs his conduct toward that end or knows that it is very likely to occur. The forbidden end is in his mind as a stimulus as he moves towards its attainment. . . . At the other extreme, negligence implies inadvertence, i.e., that the actor was completely unaware of the dangerousness of his behavior, although actually it was unreasonably increasing the risk of the occurrence of a proscribed harm. . . . Between the poles of intentionality and negligence lies recklessness. Recklessness is like the former in that the actor is conscious of a forbidden harm, he realizes that his conduct increases the risk of its occurrence. It is thus a form of intentional harm doing in that it is volitional in a wrong direction. But recklessness differs from intentionality in that the actor does not seek to attain the harm; instead, he believes that the harm will not occur. That he deliberately took the risk that he thought there was some increased likelihood of harm does not alter the essential fact that he believed that no harm would actually be committed. On the other hand, recklessness resembles negligence in that both include an unreasonable increase in the risk of harm. But as noted, the negligent harm-doer is inadvertent thereto."⁶¹

I am not going to state other aspects of American law which are analogous to Chinese law in respect of the subject of negligence. But I must point out the different aspects of these two systems for comparison. American jurists all insist on the distinction between ordinary negligence and reckless negligence. It is the harm caused

⁶⁰ PERKINS, *CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE*, 1952, pp. 334-335.

⁶¹ HALL, *PRINCIPLES OF CRIMINAL LAW*, 1947, pp. 215, 216, 217.

by reckless negligence that makes the actor responsible for criminal punishment and that caused by ordinary negligence only makes him liable for damage in a civil action. The actual state of mind of recklessness as explained by Professor Hall is about the same as the Chinese explanation of reckless negligence, i.e., the offender, notwithstanding that he could have foreseen the possibility of the occurrence of the offense, honestly believes that such offense would not take place. However, ordinary negligence, excluded from the criminal area in American law, is included in criminal negligence under the Chinese code as already explained. Therefore, negligence in the Chinese Criminal Code has a much larger area than in American law. It may be surprising that the Chinese code would be so strict in punishing negligence. But, as a matter of fact, it is not so severe as others thought. We must notice the following:

(1) The Chinese punishment for negligence is much lighter than that in the United States. Let us look at homicide and bodily injury. Since the Chinese Republic, the first criminal code (effective March 10, 1912) provided in Article 324 as follows:

Whoever through negligence causes death or injury to any person shall be punished with:

- (a) Fine of not more than 500 yuan, when death or grievous harm results;
- (b) Fine of not more than 300 yuan, when infirmity results;
- (c) Fine of not more than 100 yuan, when slight injury results.

Speaking extremely, a negligent homicide, according to the above provisions, might be punished even with one yuan if the negligence was proved very slight. They provided for these light punishments because the jurists at that time insisted on the theory that criminal punishment is principally inflicted for an intentional offense and a negligent offense is punished only as an exception. Hence, Article 13 of that code reads:

No unintentional act constitutes an offense except where negligence is specifically made punishable by law.

During the effective period of that code, the word "negligence" was interpreted by the Supreme Court as being ignorance of the existence of the criminal facts by the offender because of lack of due care.⁶² The existing Chinese criminal code (effective since 1935) has broadened the description of negligence as already cited (Article 14) and also increased the punishment for negligent offenses. The punishment for negligent homicide is imprisonment for not more than two years, detention, or a fine of not more than 2,000 yuan (Article 276, Paragraph 1); for slight injury by negligence, imprisonment for not more than 6 months, detention, or fine of not more than 500 yuan; and for grievous injury by negligence, imprisonments for not more than one year, detention, or fine of not more than 500 yuan (Article 284). The Chinese punishment for ordinary negligence may be said to be severe compared with American law which makes the actor only liable for damage, while the Chinese punishment for reckless negligence is much lighter than American law which makes negligent homicide a manslaughter for which the punishment in a number of states is ten years or less.

⁶² De. A. No. 126, 1914.

(2) The Chinese punishment for negligence is limited to only a few offenses. According to Article 12, a negligent act is punishable only when specifically made so by law. Actually, the law punishes only the negligent homicide, negligent bodily injury, negligent failure to deliver military supplies, negligent disclosure or delivery by a public officer of secret documents, and the like, negligent execution of a criminal punishment, negligent liberation by a public officer of any person detained in his custody, and some negligent offenses against public safety. All other offenses described in the criminal code, if done by negligence, are not punishable, and many other harms done by unlawful acts resulting in liability for damages are free from criminal sanction. Moreover, the slightest punishment for any criminal negligence, is prescribed as a fine of not more than a certain number of yuan, so that there is no question of severity in this respect. On the contrary, the punishment for the graver negligent offenses is not severe enough. This will be discussed later in connection with the topic of negligent homicide.

Another point to be mentioned is that in the United States, although a negligent act is punishable only when it is of reckless nature, yet statutes have been enacted in a number of jurisdictions such as Michigan and California, making homicides, resulting from ordinary negligence in the operation of an automobile, a crime, sometimes called "negligent homicide". It may be said that they apply the tort standard of care in criminal cases. But in China, there is no such necessity of enacting special statutes for homicide caused by negligent driving of any vehicle, because the Chinese interpretation of negligence is broad enough to cover this kind of case.

Incidentally, under Chinese law one kind of unlawful act, which might cause a tremendous damage to others and constitutes a negligent offense, is not compensatory. That is the destruction by fire through one's ordinary negligence of anything leased from some other person. According to Article 173 of the Chinese Criminal Code, whoever through negligence destroys by fire any occupied dwelling house . . . shall be punished with imprisonment for not more than one year, detention, or a fine of not more than 500 yuan. And Article 434 of Chinese civil code provides that where a lessee through his "grievous" negligence damages, destroys any leased thing, he shall be liable to pay the lessor for such damage done by him. We must notice that the lessee is only liable to pay for damage done by fire through his grievous negligence. In other words, if the fire is set through the lessee's ordinary negligence, he is not liable to pay. In the case of De. A. No. 142, 1920, the Supreme Court of China held that "the offender cannot be held responsible to pay for the damage done by fire unless the fire was caused through his own intentional act or grievous negligence. Here the defendant has been punished by the criminal court with a fine for his setting fire by ordinary negligence, but we cannot regard his negligence as being grievous and thus make him also liable for civil compensation, simply because he has already received criminal punishment." However, this rule of law cannot be applied to any other circumstances. In the case of De. A. No. 3, 1937, Wuhan, the Chinese Supreme Court held that "anyone who destroys another's building by fire through his ordinary negligence is liable to pay for the damage, except damage done to leased properties by the lessee, which requires 'grievous' negligence as provided in Article 434 of civil code."

3. IGNORANCE OR MISTAKE

Ignorance or mistake on the part of the doer is not an essential constituent element of a crime, but both bear a close relation to criminal intent and negligence, so that it is necessary to include a brief discussion of ignorance or mistake of fact or law at the last part of this chapter.

(1) *Ignorance or Mistake of Fact*

Ignorance and mistake are sometimes used synonymously, but they differ from each other. Ignorance of fact is the want of knowledge of the fact while mistake of fact is where one misapprehends or believes a fact to be other than it actually is. American writers often put these two words together, such as ignorance or mistake of fact, because there is no difference in their legal significance. Chinese jurists use only the word mistake, but it is interpreted to include misapprehension as well as lack of knowledge. They all admit that ignorance or mistake of fact, if no criminal intent or negligence is involved therein, is not punishable. In a leading English case often cited by American courts, the evidence showed that the defendant reasonably believed that there was a burglar in his house and thrusting his sword in the dark where he thought the burglar was concealed, killed a woman who had come into the house to assist his maid servant in her work. It was held that the defendant committed no crime because of the mistake of fact.⁶³ The same rule of law was applied in China. In the case of *De. Ex. A. No. 48, 1913*, the Supreme Court of China held that "the defendant was shooting at a thief, but by mistake shot his brother to death. The killing of his brother constituted no crime, because the evidence indicated that he was not negligent in such killing. . . ."

Chinese writers often give the following illustrations with respect to mistake of fact:

A. Mistaken belief in the existence of some fact which actually does not exist. This may vary in different circumstances. If one in the night mistook an animal as his enemy and shot it to death, he committed no offense. Where one by mistake believed that another person had money in his pocket and thrust his hand into it, trying to steal, but found nothing therein, he should be convicted of an attempt to steal. But if he by mistake took away another's property, honestly believing it to be his own, he is not guilty of theft.

B. Mistaken belief in the non-existence of some fact which actually exists. For instance, if one was trying to shoot birds on the tree in the night, but unexpectedly shot to death a boy on the tree, he cannot be held responsible for such death, unless it is proved that he was negligent in the shooting.

C. Mistake of object. For instance, if A intended to shoot B, but by mistaking C as B, shot C to death, A should be responsible for this intentional homicide, because the law punishes the killing of a human being by another human being, regardless of whether the person killed is B or C. But if one for sporting amusement covered himself with a tiger's skin, trying to crawl in a valley, and a huntsman, mistaking him as a tiger, shot him to death, in this case, the huntsman cannot be convicted

⁶³ *Levett's Case*, Cro. Car. 538; 1 HALE, P.C. 474.

of homicide, unless negligence is proved in the killing. Furthermore, the mistake of object, also called mistaken perception, must be distinguished from what is called "hitting by mistake", which means the actor intended to shoot A, but due to his lack of skill shot another person B to death; the actor is responsible for the death only when he was negligent in the killing. In the case of *De. A. No. 1008, 1939*, the Supreme Court held that "hitting by mistake" means the doer intends to hit a particular person or thing, but by mistake he hits another person. If the defendant mistook an innocent person as a bandit and shot him to death, this is a mistaken perception or mistake of object, not a hitting by mistake."

Mentioned above are some Chinese legal viewpoints in connection with ignorance or mistake of fact which are very similar to American rules of law. But the following differences between the two legal system are worth noting:

A. As previously stated, under American law the legislature has power to dispense with the necessity of criminal intent in prohibiting and punishing particular acts. And it can do the same with criminal negligence, or ignorance or mistake of fact, if it deems necessary. Under such legislation, the person who does the prohibited act does it at his peril and cannot defend himself on the ground that he did so in bona fide, without negligence or by ignorance or mistake of fact. Under Chinese law, the legislature is presumed to have the same power, but it has never made any criminal statute to that effect.

B. American law often makes a distinction between a harm done in doing an unlawful act *malum prohibitum* and that in doing an act *malum in se*. In the former, ignorance or mistake of fact is a good defense, while in the latter, it is otherwise.⁶⁴ Chinese criminal law makes no such distinction. A harm done by negligence or ignorance or mistake of fact in the commission of another offense is treated in the same way as if done separately, unless it constitutes what is called a consequent offense or implicated offense, both of which will be described later in the discussion of punishment for several offenses.

C. Chinese jurists often raised the question of mistaking an aggravated offense as an ordinary offense or vice versa. In this respect, they always give such examples as where a man intended to kill another person, but by mistake killed his father, or he intended to kill his father, but by mistake killed another person. Under the Chinese code, the punishment for homicide against one's own parent is heavier than that against an ordinary person. The general rule governing these cases is derived from the former criminal code (1912 Code) which provided in paragraph 3 of Article 13 as follows:

When the offense committed differs from the offense intended the offender shall be punished according to the following rules:

1. When the offense committed is equal to, or more serious than the offense intended, he shall be punished for the offense intended.
2. When the offense committed is less serious than the offense intended, he shall be punished for the offense actually committed.

This means that in case there is a discrepancy between the offense intended and the offense actually committed, the punishment is to be imposed according to the

⁶⁴ *Commonwealth V. Adams*, 114 Mass. 323; 19 Am. Rep. 362.

lesser offense. Although the existing Chinese criminal code did not adopt that provision, this rule is still applicable. The legislators thought it a natural and reasonable interpretation, needing no express provision. In the first instance, the offender had no intention to kill his father, that is, the grievous part of the killing was not intended. In the second instance, the grievous part of his intention was not carried out. The law does not punish an unintentional act, nor does it punish a mere grievous intention. In either case, the consistency of the offender's intention with his act is in the killing of an ordinary human being, so that the offender can be punished only for an ordinary homicide.

American law makes no distinction between a punishment for homicide against one's own parent and that against an ordinary person. Hence, I cannot find any case exactly the same as the above instances, but we may draw an inference from other rules of law for comparison. The felony murder rule makes murder a homicide committed in the perpetration or attempted perpetration of some other dangerous felony, without regard whether the death is intended, or results from negligence, or from mistake of fact. Take the case of adultery. Under American law, a man who has unlawful intercourse with a married woman cannot defend himself against a charge of adultery on the ground that he reasonably believed that she was not married.⁶⁵ Whereas under Chinese law, if an unmarried person charged with adultery reasonably believed that the person of the other sex was unmarried at the time, such person cannot be punished for that offense.⁶⁶ The same is true of bigamy. Under Chinese law, to constitute the offense of bigamy, there must be knowledge on the part of the offender of the continuance of the first marriage. Without such knowledge, it may be regarded as being without criminal intent, or ignorance of fact, and, therefore, a good defense. In the interpretation of In. No. 1415, 1920, the Supreme Court of China said that "the second marriage of the woman A with a man B, after three years since her first husband C disappeared and has never been heard of, is permissible by law. Neither A nor B can be punished for bigamy unless they knew that what was written in the marriage agreement about the ignorance of C's whereabouts was untrue." Whereas under American law, the ignorance of the continuance of the first marriage is often regarded as an ignorance of law, or is clouded by the holding that bigamy does not require a criminal intent, as stated by Professor Hall. He also said: "In some states, the difficulties have been avoided by express provisions requiring knowledge of the continuance of the first marriage. But most of the statutes are silent as to that; they run in the traditional terms of forbidding 'a person who, being married, goes through a form of marriage.' These statutes have been interpreted to exclude mens rea. . . . The chief source of such extremity is the *Mash* case⁶⁷ which held that even a reasonable mistake regarding the death of the spouse was no defense."⁶⁸

⁶⁵ *State v. Anderson*, 140 Iowa 445; 118 N.W. 772; *Commonwealth v. Murphy*, 165 Mass. 66.

⁶⁶ A COMMENTARY ON CHINESE CRIMINAL CODE, by CHANG-HSIU YU, Vol. 3, pp. 593; TREATISE FOR SPECIFIC OFFENSES OF CHINESE CRIMINAL CODE, by Hsi-Tso Tsui, Vol. 2, pp. 112.

⁶⁷ 7 Metc. 472 Mass. 1844.

⁶⁸ PRINCIPLES OF CRIMINAL LAW, by HALL, 1947, pp. 367, 368.

The above comparison clearly indicates that American law is in some aspects more strict than Chinese law with respect to ignorance or mistake of fact.

(2) *Ignorance or Mistake of Law*

Ignorance of law may be said to involve no criminal intent, but it excuses no man from criminal obligation. It is an exception to the old maxim "Actus non facit reum, nisi mens sit rea". Ignorance of law is quite different from ignorance of fact, which can be inferred from the external circumstances. According to human experience, normality or reasonableness may be resorted to as a measure to determine the similar issues regarding the question of mistake of fact, but it is rather difficult to use the same method to test knowledge of law. It may be said that the accused did not know the law in question because he was in a foreign country when it was passed, and he violated it only a few days after his return. Even under such condition, he might have a better chance or facility to know the law than ignorant people who have never been abroad. The question of knowledge of the law is a mental activity, not easy to prove by external data. As regards the technical meaning of law, it may be difficult for professional lawyers. It is because of the difficulty of proving knowledge of the law that the maxim *ignorantia legis neminem excusat* was formulated. If ignorance of law were an excuse, a wrong-doer might shield himself from punishment in many cases by his failure to learn it. The criminal law of any country would not overlook and thereby encourage this fraudulent evasion.

The above rule of law is similarly applicable in the United States as well as in China, and the only difference is that it is more strictly administered in the former than in the latter. It was briefly stated by Professor Clark and Marshall that "it makes no difference in the application of this rule that defendant was unavoidably ignorant, as by reason of being absent and beyond communication with the state when the law was passed and his forbidden act committed, because promulgation is not a necessary ingredient of the law in the sense the individual must have notice, or that he was a foreigner temporarily resident in the country and not reasonably able to familiarize himself with the law."⁶⁹ It was also said by the Minnesota court on the question of ignorance of law in the case of *State v. Edwards* that it is best to adopt the theory that the rights and responsibilities of everyone shall be the same as if he in fact knows the law.⁷⁰

The Chinese criminal code is more liberal in the assessment of punishment for ignorance of law. It provides in Article 16 as follows:

Ignorance of law shall not discharge a person from criminal liability. Provided, that the punishment may be reduced according to the nature and circumstances of the case. If, however, the offender honestly believed that his act is permissible by the law and can give a good reason for his belief, the punishment may be remitted.

This provision first adopts the uniform rule that ignorance of law excuses no man. Secondly, it opens the way for reduction of the punishment for those whose ignorance

⁶⁹ CLARK AND MARSHALL, *A TREATISE ON THE LAW OF CRIMES*, 1952, pp. 104.

⁷⁰ 227 N.W. 495.

of law deserves a lesser penalty according to the nature or circumstances of the case. And thirdly, it opens the way for remitting altogether the punishment of those whose honest belief sufficiently excuses them. However, the Chinese courts do not feel any difficulty in application of this provision, because the question of ignorance of law has been very rarely brought up in the courts and the courts have been very careful in applying the provision of this Article, especially the remission of punishment. The large percentage of criminal cases coming to the courts are of immoral nature or unlawful by common sense, such as theft, robbery, homicide, bodily injury, embezzlement, kidnapping, frauds, arson, adultery, bigamy, abduction, and the like. Thus the offenders have no reasonable ground to raise the question of ignorance of law.

Mistake of law may vary according to different circumstances. If a man has mistaken fraud as larceny, it is the same as ignorance of law and will afford no excuse for his actual offense. If a specific intent is an essential element of the offense and the accused's mistake of the law is relevant to the question of his intent, it may be a defense in showing that he had no such intent. Thus in the case of larceny or embezzlement, it is a defense if the accused was mistaken that he had a legal right to take the property. The same rule may be applied to perjury. This may be called mistake of mixed law and fact. There is no difference between American and Chinese criminal law in this regard.