The Rule of Law and the Rule of Virtue:
On the Necessity for Their Mutual Integration

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Abstract

In this paper I argue, after examining the overall development of the rule of law in contrast to the rule of virtue in the history of both Western and East Asian political thought, that the rule of virtue is necessary to complement the rule of law in contemporary democracies. In order to do this, in section two I summarize the views of modern Western thinkers who asserted that the rule of law was absent in the non-Western world and briefly define the key concepts used in the paper. In sections three and four, I examine the development of the idea of the rule of law, focusing on major ancient political theorists of the West and East Asia, while at the same time showing that all civilized societies have actually pursued the integration of the two systems. In the concluding section, I argue that respect for the law is actually the outcome of the rule of virtue rather than of the rule of law, thereby stressing that the modern rule of law should be complemented by the rule of virtue.

Keywords: the rule of law, the rule of virtue, constitutionalism, the rule of li, Plato, Aristotle, Weber, Eurocentrism, Confucius, Mencius, Xunzi, Han Fei Tzu

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Introduction

Since her independence, South Korea has introduced and accommodated Western political institutions and ideas, including the rule of law, and has proclaimed itself in its constitution to be a democratic republic. However, for a variety of reasons, the rule of law has not been fully consolidated, so that its legal order has remained in a state of considerable disorder.

Korean society is suffering from a paradox-the simultaneous excess and dearth of the rule of law. While a great number of laws regulating politicians and citizens accumulate daily, they do not have much effect on society. The ruling elite of successive governments have not hesitated to violate laws in order to maintain power. Although a bill of rights is clearly stated in the Constitution, respect for human rights still remains low among public officials. Common citizens also do not hesitate to violate the law for their private gain and convenience even now, fifteen years after the beginning of the democratic transition in 1987.[1]

The situation in Western societies does not seem much different. Despite the elaborate legal system and strict law enforcement, crime and deviant behaviors are increasing all the more. In addition, cases in which violators of the law escape convictions by employing highly paid and highly competent lawyers are common in the United States. Thus, a Korean saying—"Guilty if you don't have money, innocent if you have money"—seems to apply equally to the West.

The so-called "prisoner's dilemma"—an exemplary case in game theory—also dramatizes a situation in which criminals who commit the same crime together are preoccupied with finding a "rational" strategy to minimize their punishment while weighing and calculating the potential effects of confession. An enthusiastic engagement with such game theory is a testimony to the sick and gloomy reality that the conscience of good citizens—and the belief that one should willingly confess to a crime with moral repentance—is completely lost. In fact, the theory academically reproduces and legitimizes the actual flaws of the rule of law.

1. Of course, it cannot be denied that there has been considerable progress in adapting the rule of law and respect for human rights since 1987.

The solution to such problems facing contemporary Rechtstaats (constitutional states) should be either to further strengthen the rule of law or to search for alternatives. Here we are reminded of the benign influence of the rule of virtue, which operated as the ruling principle in the traditional Confucian age. For even if the legal system were elaborated to the fullest degree, it would only remain so on paper without contributing to the moral improvement of public officials and citizens. The idea of the rule of virtue originated from the sober awareness of such problems inherent in the rule of law and aimed at the direct moral improvement of citizens. The rule of law, which demands external obedience to the law, and the rule of virtue, which stresses inward adherence to moral norms, are principles that not only do not conflict, they reinforce and complement each other. Thus, the academic comparison of these principles in terms of their strengths and limitations has significant practical implications for integrating them into an intertwined whole.

The purpose of this paper, then, is to present an argument that the rule of virtue is necessary to complement the rule of law in contemporary democracies by examining the overall development of the rule of law in contrast to the rule of virtue in the history of both Western and East Asian political thought. For this purpose, in section two I summarize the views of modern Western thinkers who asserted that the rule of law was absent in the non-Western world and briefly define the key concepts used in this paper, such as the rule of virtue, the rule of li (commonly translated as "propriety" or "ritual principles"), the rule of law and constitutionalism. In sections three and four I examine the development of the idea of the rule of law, focusing on major ancient political theorists of the West and East Asia (since the rule of law is the dominant of the two principles in the contemporary world), while at the same time showing that all civilized societies have actually pursued the integration of the two systems. Thus, in section three, I examine the development of the idea

of the rule of law, primarily focusing on Plato, Aristotle, and Cicero, and then try to show that the idea of the rule of virtue was integrated with the idea of the rule of law in their legal philosophy. In section four, I examine the conventional status of the rule of law in the history of Chinese political thought with special focus on the pre-Qin era, examine the integration of the two principles in the political thought of Confucius and Mencius, and discuss the Confucian idea of the rule of li in comparison to the Western idea of constitutionalism. In the concluding section, I argue that respect for the law, which is indispensable to the modern ideal of the rule of law, is actually the outcome of the rule of virtue rather than of the rule of law, thereby stressing that the modern rule of law should be complemented by the rule of virtue.

Preliminary Examination

The Orient Lacking the Rule of Law

Modern Western intellectuals actively engaged in translating Western military and economic dominance into cultural and intellectual superiority in the process of Western expansion over and conquest of many parts of the globe. Underlying such a task was the Eurocentric Weltanschauung (worldview). Eurocentrism was typically formulated using simplistic dichotomies, and the typical logic was to point out that "something does not exist in 'the Rest,' while it does in the West." If we take capitalism as an example, the typical question that Western intellectuals usually posed was: "Why did capitalism develop in the West, and not in the Rest?" And the normal reply was that a certain mode of production (feudalism) or a certain spirit (the Protestant ethic) that would induce capitalism was absent in the Rest. Thus, it is significant to note that Max Weber began his famous book, The Protestant Ethic and the Spirit of Capitalism, with the following question: "A product of modern European civilization, studying any problem of universal history, is bound to ask himself to what combination of circumstances the fact should be attributed that in Western civilization, and in Western civilization only, cultural phenomena have appeared which (as we like to think) lie in a line of development having universal significance and value" (Weber 1976, 13).

In this way, Western social scientists faithfully carried out their task, which was to demonstrate the "fact" that Western civilization was unique and superior, by converting cultural differences that exist—or are supposed to exist—between the West and the Rest into cultural superiority. Likewise, Western social sciences developed rapidly along with the imperialist expansion of European powers. The underlying premise was the Weltanschauung that represented Western superiority through European exceptionalism and the inferiority of the Rest by way of Orientalism. In this sense, Andre Gunder Frank remarks that European exceptionalism and Orientalism are two sides of the same coin (Frank 1995, 184).

Of course, without exception, the dichotomous scheme based on Eurocentrism was used to compare the West to the Rest in terms of their legal (normative) cultures. That is to say, while the West was regulated by law, the Rest was ruled not by law but by the capricious and arbitrary will of individual rulers. Montesquieu, a French enlightenment thinker who became famous for his book, The Spirit of Laws, formulated the concept "Oriental despotism." He denigrated Persian and other Asian civilizations as areas where the rule of law was absent. He states that, since the peoples of Asia and Africa possessed a servile spirit and lacked the spirit of liberty throughout all periods of their history, despotism—a form of government in which "a single man, unrestrained by law and other rules, dominates by his will and caprices"—reigned supreme outside Europe (Richter 1977, 196). In his analysis of Confucianism and Daoism, which formed the cultural foundation of China, Max Weber argued that capitalism was not able to develop in China, as laws, rational administration and other judicial systems hospitable to it were utterly absent (Weber 1951, 100-104).[2]

2. Long before writing *The Religion of China*, Weber had already stated in *The Protestant Ethic*: In fact the State itself, in the sense of a political association with

Likewise, major Western intellectuals defined the politics of Asian civilizations, including Persia, India and China, as Oriental despotism lacking the rule of law. Within Korea, research focusing on the rule of law and the rule of virtue has also been conducted in the shadow of such Eurocentric dichotomies.

Defining Basic Concepts: the Rule of Virtue, the Rule of "Li," the Rule of Law, and Constitutionalism

In this section I shall briefly define the rule of virtue, the rule of li, and the rule of law, and constitutionalism. First of all, the rule of virtue is the political principle that seeks to build a peaceful community devoid of crimes and conflicts by inspiring people through the moral influence of virtuous leaders.[3] This idea is based on the premise that people will concede and cooperate with each other only when leaders take the initiative through morally exemplary words and deeds (Yi 1998, 184). Li in Confucianism has dual normative aspects, both behavioral and compulsory. First, li works as a "behavioral norm that coordinates the internal relationships among ruling classes, stipulates positions, privileges, property inheritance among various strata, and regulates the daily routines of the common people." But li also has the attribute of a compulsory norm in that coercive punishment and execution by public power is mandatory when laws are violated. However, many of the clauses in li, which the Confucian literati codified and ritualized, were not compulsory norms in the sense that their violation was not accompanied by punishments, so they could not be regarded properly as laws. Apart from such exceptional clauses, though, the Confucian rule of li approaches the rule of law. In this vein, Yi Seung-hwan distinguishes the rule of li by Confucians and the rule of law by Legalists by stating that the Confucian li corresponds to the law according to natural law, while Legalist law corresponds to the law by legal positivists (Yi 1998, 178). However, most Western scholars and many East Asian scholars have conventionally overlooked the rule-of-law aspect in the rule of li, conceptualizing li as either moral norms or rituals. In contrast, the "rule of law advocated by Legalists accepted the unlimited rights and power of a king, so that it is no more than an autocratic rule of law in which all the people under him must obey law made by him" (Yi 1998, 185). This is completely different from the modern Western notion of the rule of law that requires obedience to laws created by an assembly of popularly elected representatives. Thus, the main purpose of the Legalists' rule of law was to strengthen royal power and to control subjects, while democratic "rule of law adopted the guarantee of civil rights and the separation of powers as its core principles" (Yi 1998, 184-185).

Since the rule of law developed in modern Western societies and has come to reign supreme as the universal criterion by which non-Western societies are judged, we need to define the concept in greater detail. Today, the rule of law as one of the core principles of liberal democracy is generally thought to incorporate three main ideas: "(1) the supremacy of regular laws as opposed to arbitrary power, (2) equality before the law of all persons and classes, including government officials, and (3) the incorporation of constitutional law as a binding part of the ordinary law of the land" (Solum 1994, 122; Gaus 1994, 328-330). Historically, the rule of law in a more traditional sense was understood as referring to the first idea. However, even when the first and second conditions are satisfied, oppressive

a rational, written constitution, rationally ordained law, and an administration bound to rational rules of laws . . . is known . . . only in the Occident despite all approaches to it (Weber 1976, 16-17).

3. It cannot be denied that the concept of the rule of virtue in this paper is defined in a Confucian-centered way. Therefore, there is some difficulty in identifying the rule of virtue in Confucianism with that of Greek political theorists such as Plato and Aristotle. However, whereas the rule of law is primarily concerned with the question By what mechanism are the people to be governed? the rule of virtue is mainly interested in the question What kind of a person should govern the people? Thus, as the latter is preoccupied with the moral and intellectual qualities of political leaders, there are significant similarities between Greek and Chinese ideas of the rule of virtue in contrast to that of the rule of law. I will disregard some important differences that might exist in the substance of virtue between Greek and Chinese concepts of virtue, as they seem irrelevant at least to the purpose of this paper.

rule is still possible. For example, if a law banning travel abroad is enacted and applied equally to all, then we can say that the rule of law according to the first two ideas are still valid. Thus, the third idea becomes necessary so that the rule of law may require "a higher or constitutional law that governs ordinary lawmaking, as well as politically independent courts of law to enforce this higher law against public officials" (Macedo 1994, 149). Thus, constitutionalism was added to the rule of law in the modern era. Constitutionalism, together with the guarantee of human rights, the separation of powers, and the existence of a written constitution are all inseparable parts of the rule of law.[4]

The Evolution of the Rule of Law and Its Integration with the Rule of Virtue in the History of Western Political Thought

The Evolution of the Rule of Law in the History of Western Political Thought

Greek political theorists such as Aristotle, Roman lawyers, the natural law thinkers in the medieval era, modern thinkers such as J. Locke, Rousseau, Montesquieu, Hegel, and the Founding Fathers of the United States all generally advocated the rule of law in the historical development of Western political thought. However, as this idea developed in close connection with constitutionalism in the modern era, the rule of law today is commonly examined in terms of constitutionalism.

Western constitutionalism is based on the Greek notion of politeia—a "moderate and balanced form of government" or a limited government. Greek politeia was also identified "either with the rule of law or the rule of right" as opposed to "the rule of forces" (Maddox 1989, 52). Furthermore, for Aristotle, the rule of law was identified with the rule of God and reason: "He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. . . . Law [as the pure voice of God and reason] may thus be defined as Reason free from all passion" (Aristotle 1979, 146). He also maintained that "laws resting on unwritten custom are even more sovereign, and concerned with issues of still more sovereign importance, than written laws" (Aristotle 1979, 147). Thus he attached greater importance to "fundamental laws" (nomoi) based on customs than to "assembly laws" (psephismata) (Maddox 1989, 53).

At the end of the Roman republic, incorporating and transmitting Greek political thought, Cicero coined the term "constitutio," which then referred to his approximation of the Greek politeia and meant a "moderate and balanced form of government" (Maddox 1989, 51). Cicero also imported into Rome the universal law of nature originally developed by the Greek Stoics, and raised the "revolutionary notion that wherever the laws of states did not conform with true law-eternal, unchangeable reason—then these particular laws would be invalid." Indeed, his constitutio was rule by true law (Maddox 1989, 54-55). Graham Maddox sums up this ancient tradition of the rule of law as follows: "The foundation of Western constitutionalism, therefore, was popular sovereignty, rooted in the nomos of the Greeks, and hallowed in the jurisprudence of the Romans as the rule of right reason deriving from the universal law of nature" (Maddox 1989, 55).

In this way, due to the political traditions and practices of Greece and Rome, the rule of law retained the positive meaning of right rule in connection with popular sovereignty and the law of nature. Thus, while the word constitutio assumed authoritarian overtones in the long ages after the Roman empire, the rule of law linked to the law of nature retained a positive meaning. The idea that "the king is subject to no person, he is under God and the law" was widely accepted (Maddox 1989, 58).

With the advent of the modern age, however, the idea of the rule of law was revived by the social contract theory based on the law of

4. Of course, there is a notable exception. England is known to have an unwritten constitution.

nature. Notably, John Locke argued for the separation of the legislative and executive powers. He also argued for government through laws made by popularly elected representatives. This rule of law was developed into a full-blown modern constitutional principle through Montesquieu's doctrine of the separation of powers, which sought to guarantee freedom to citizens through checks and balances among the three branches of the legislative, the executive and the judiciary. With the adoption of the American constitution in 1787, the rule of law became established as one of the firmest principles of modern democracy.

However, it should be noted that the ideal of the rule of law did not work effectively in Western societies until full democratization occurred. It was established as one of the basic principles of the governments of England and the United States in the nineteenth century and later in other European countries in the early twentieth century. In the meantime, the political reality of the latter was far from the ideal (Dicey 1985, 109-115).

Although it is widely thought that French monarchs before the French Revolution were arbitrary and oppressive, the reality was different. On the contrary, law and public opinion counted for a great deal more than in other European states, such as Spain, Germany and the petty states of Italy (Dicey 1985, 192). The royal lawlessness of French kings was nothing peculiar, and yet it is an error to suppose that up to 1789 anything like the supremacy of law existed under the French monarchy. The episodes of Voltaire—the most famous Enlightenment thinker of his time—dramatically demonstrate the absence of the rule of law in France. He was sent to the Bastille over a satirical poem he had not written. Furthermore, the Regent treated the affair as a joke, playing upon the poem that described the prison. Voltaire had to pay a second visit to the Bastille, for he later complained on a private occasion after lackeys had mocked him at a formal party in the presence of a duke (Dicey 1985, 190). Dicey commented on the lawlessness of France before the Revolution: "A brave officer and a distinguished diplomatist could, for some offence still unknown, without trial and without conviction, be condemned to undergo a penance and disgrace which could hardly be rivaled by the fanciful caprice of the torments inflicted by Oriental despotism" (Dicey 1985, 191; emphasis by the author). It is indeed ironic that Dicey applied the same concept of Oriental despotism to the home country of Montesquieu, who had originally coined the term to refer to the politics of Asian civilizations. Except for England and the United States, which began earlier to establish the rule of law, the ideal of the rule of law on the European continent was to be realized only after a fierce struggle for democracy over a period of a few hundred years. Its full implementation, however, like democracy, was rather a recent phenomenon.

The Integration of the Rule of Law and the Rule of Virtue in the History of Western Political Thought

It is important to note that the thinkers briefly analyzed above did not focus solely on the rule of law. Their idea of the rule of law was also reinforced and complemented by the idea of the rule of virtue.

Plato stressed the rule of virtue over the rule of law in his early work, The Republic. He suggested rule by philosopher—kings who would pursue the common good of the political community, taking the idea of the Good as their model. Their rule was based on the firm belief in the wisdom of philosophers rather than any codification of it. Thus it approximated an impersonal sophocracy, a variant of the rule of virtue, rather than the rule of law. However, we cannot overlook the fact that there were many constitutional devices in The Republic that strictly regulated relations between the rulers and the ruled, and the education, recruitment and living conditions of rulers. In The Laws, Plato's final work, though, the rule of law is emphasized. Plato stipulated an elaborate system of laws that included civil and penal codes as well as codes to regulate rulers. However, The Laws in the end mandated the power to make and enforce laws to the Nocturnal Council, which shows his ultimate confidence in wise men, thereby adding and institutionalizing the rule of virtue. All this considered, we can conclude that elements of virtue and law coexist-

ed in Plato's legal philosophy, and yet he stressed the rule of virtue more in The Republic than in The Laws due to his optimistic confidence in the wisdom of philosophers.

Aristotle, who was influenced more by Plato's The Laws than by The Republic, stressed the rule of law more than the rule of virtue. Discussing the rule of law in contrast to the rule of men, however, he did not give up rule by the best man. Examining various types of kingship in The Politics, he posed the following question: "Is it more expedient to be ruled by the one best man, or by the best laws?" (Aristotle 1979, 141). In the end, he found that the rule of unwritten law was the safest, and the rule of a man—the single best man—might be safer than the rule of written law (Aristotle 1979, 147).[5] He was worried that the element of passion in the rule of a man would disturb human reason. However, when individual rulers were needed to cope with something that the law had not anticipated, Aristotle said that "they should be made 'law-guardians' or ministers of the law who applied the spirit of the law to concrete cases" (Aristotle 1979, 146).

In Ethics, Aristotle developed this idea further, suggesting the concept of equity to fill the gap between general law and the concrete reality. He made some room for the judge's discretionary power in interpreting the law (Aristotle 1976, 199). This position, which attaches importance to the application of equity in contemporary Western jurisprudence, also tends to stress judicial virtues and the moral education of judges to prevent the abuse and misuse of equity (Solum 1994). Here we cannot deny that such a judicial position that stresses the equity and discretionary power of a judge overlaps with the rule of virtue stressed by Confucians, as shall be examined later.

It is clear that such a position takes advantage of the rule of virtue to supplement the flaws in the rule of law rather than acknowledge the superiority of the rule of virtue to the rule of law. However, some strong strands of the rule of virtue existed in Aristotelian notions of the rule of law. He valued unwritten over written law, and identified the rule of law with that of God and reason. This seems to indicate that for him the rule of law was more opposed to the rule of men than to the rule of virtue.

5. However, in the case of the rule of the single best man, Aristotle maintains, the general principle must also be present in the ruler s mind (Aristotle 1979, 141).

The Evolution of the Idea of the Rule of Law and the Integration of the Rule of Virtue and the Rule of Law in the History of East Asian Political Thought

The Conventional Status of the Rule of Law in the History of East Asian Political Thought

In contrast to the West, the rule of law has not been considered the proper and desirable principle of government in East Asian civilization. Law and the rule of law have been perceived negatively in the historical tradition of Chinese political thought. The causes for such a negative perception are threefold. First, Legalists actively promoted a rule of law that stressed strict and heavy punishment to attain a "rich state and strong army." Second, the Qin Empire, which first unified China with the help of the Legalists, ruled rather harshly, causing its people great grief. Third, the Han Empire that succeeded the Qin adopted as the state religion Confucianism, which was very critical of the Legalist rule of law.

However, it is important to note that law (fa) was a concept with various meanings from the Zhou dynasty until the Warring States Period, and did not originally have the overly negative connotations it later acquired. Originally having the meaning of "assessing crimes and imposing punishments," meanings for the word law also included "model," "type," "formula," "frame," "standard," and "institution" (Chang 1993, 77-79). With the appearance of the Legalists, the meaning of law was enriched and it came to denote a "political institution in general (to govern the relationships between the king and subjects, and between superiors and inferiors)," "the standard by which to judge the propriety of words and practices of subjects,"

"codes of rewards and punishments" to govern the people, and "economic-related regulations," including clauses to secure the uniformity of measures and scales (Chang 1993, 89-90).

However, with the Legalists coming to power as advisors to kings and lords in the later Warring States Period, the negative connotations of law and the rule of law coincided closely with the process in which the original meanings of law were simply reduced to punishments and rewards.[6] Thus, law had to be relegated to a subsidiary status to assist the Confucian ideal of the rule of virtue and politics as education in the Han Empire when Confucians came to power. This was a cultural triumph over the Legalists for the Confucians. However, the price paid was dear: the meaning of law was reduced to punishments and rewards, and the rule of law was relegated to mere instrumental status in all periods of Chinese history that followed. As a result, the rule of virtue and li came to be respected as proper rule, while the rule of law was stigmatized as an evil rule, as demonstrated by the following brief analysis of The Confucian Analects, The Works of Mencius, Xunzi, and The Works of Han Fei Tzu.

We can observe in a famous passage from The Confucian Analects that Confucius criticized the rule of law in the narrow sense of the term—perceived mainly as punishments and prohibition. Instead, he stressed the rule of virtue: "If the people be led by decrees (prohibitions), and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety (li), they will have the sense of shame, and moreover will become good" (Confucius 1960, 146). This passage has commonly been interpreted as Confucius' opposition to the rule of law. However, scholars have recently presented a revised interpretation. They emphasize the superiority of the rule of virtue over the rule of law, especially in terms of the role of politics as education, not entirely rejecting the latter. In this regard, we need to remember that Confucianism has traditionally stressed the combination of propriety-music-punishment-prohibition as the means of normative control over people. This is to acknowledge that coercive norms are indispensable to politics. Thus, propriety and music purify humans internally, while punishment and prohibition control human behavior externally (Yi 2001, 259-260).

6. Thus, the original meaning of *fa* was very close to that of law in English. However, *fa* reduced mainly to punishments and rewards does not correspond to law in English.

However, it should be noted that, according to Confucius, the word "law" referred to political institutions in general, and never to compulsory norms such as punishments and prohibition. When Confucius praises the political achievements of King Tang, he states, "He carefully attended to the weights and measures, examined the body of the laws, restored the discarded officers, and the good government of the kingdom took its course" (Confucius 1960, 351). He also teaches elsewhere in The Analects: "Can men refuse to assent to the words of laws and reason?" (Confucius 1960, 224). From such passages we can infer that Confucius used the word "law" in a positive sense to refer to political institutions in general or to an exemplary model.

Mencius also stressed benevolent rule and criticized rulers for inflicting punishment without securing an adequate livelihood for the people and teaching them beforehand: "When they have thus been involved in crime, to follow them up and punish them—this is to entrap the people. How can such a thing as entrapping the people be done under the rule of a benevolent man?" (Mencius 1960, 240). Thus, it is clear that he also stressed benevolent rule, opposing the rule of law that primarily focused on punishment. In fact, Mencius regarded benevolent rule as the objective standard of politics, playing a similar role to the compass and square for carpenters and the tuning fork for musicians (Mencius 1960, 288). It is also significant to note that the word "law" is never used in a negative sense throughout The Works of Mencius, as the following passages demonstrate. Explaining to a duke the educational institutions for the instruction of the people and the nine—squares system of dividing the land during the previous dynasties, Mencius states, "Should a real sovereign

arise, he will certainly come and take these laws from you; and thus you will be the teacher of the true sovereign" (Mencius 1960, 243; translation revised). In another passage, he states, "Hence we have the saying: 'Virtue alone is not sufficient for the exercise of government; laws alone cannot carry themselves into practice'" (Mencius 1960, 289). All these passages suggest that laws referred to the political institution in general in a positive sense. Sometimes laws were meant to refer to principles, models and examples (Mencius 1960, 288, 290-291). In short, Confucius and Mencius used the word "law" in a positive manner to refer to political institutions, norms, models and so forth, while criticizing the rule of law in the narrow sense when it relied on coercive means such as punishment.

However, the elements of rewards and punishments in the concept of law became more predominant as the influence of the Legalists grew during the later period of the Warring States. Xunzi, although a Confucian, stressed li (ritual principles) and punishment as the basis of politics and began to assess the rule of law in the narrow sense as well as assessing the rule of ritual principles in a more positive light than Confucius and Mencius. For Xunzi, who is well known for his emphasis of the rule of li, li now gained particular significance as the standard of politics, instead of Mencius' benevolent rule (Knoblock 1988, vol. III, 177). Xunzi identified li with law in a wider sense, arguing that ritual principles were the basis of laws (Knoblock 1988, vol. I, 139), and that, of the sources of ritual principles, none is more important than the laws and reason of the sage kings (Knoblock 1988, vol. I, 157, 206). However, the following passages show that he also approved the importance of the rule of law in the narrow sense espoused by the Legalists:

> People will then clearly perceive that good, though performed in the privacy of the home, will be selected for commendation in the royal court and that acts contrary to the good, though performed in darkest secrecy, will be exposed to punishment in public view. This may be described as "having fixed principles." Such are the principles of a king (Knoblock 1988, vol. II, 101).
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> Where the government and punishments are equitable, people are attracted to make their home there. Where ritual and moral principles are perfected, the gentleman will be attracted to make his home there (Knoblock 1988, vol. II, 206).
>
> Accordingly, if there is to be order, then punishments must be heavy, and if there is to be chaos, then punishments must be light. The treatment of criminal offenders in a period of good government is sternly harsh, and their treatment in a chaotic age is exceedingly light (Knoblock 1988, vol. III, 38).

Still, he firmly maintained his Confucian identity by repeatedly stressing that rule by exemplary action through benevolence, righteousness and ritual principles was superior to the rule of law in the narrow sense, and that the gentleman, as the central agent of the rule of virtue and ritual principles, was the essential ingredient that binds together the Way and the law. He stated the superiority of Confucian li to law or force as follows:

> A lord of men who exalts ritual principles and honors worthy men will become a True King; one who stresses law and loves the people will become lord-protector; one who is fond of profit and is much given to dissimulation will be imperiled; and one who schemes after power, plots revolution, and risks secret intrigues will perish (Knoblock 1988, vol. III, 20).

Turning to the earlier Legalists, laws retained the nature of moral norms, referring to social customs and political institutions in general (Chang 1993, 85-88). However, by the age of Han Fei Tzu, their meaning was reduced to the narrow sense of punishments and rewards. Law as merely a governing tool was brought into sharp relief. This is easily confirmed in the following passages: "[The king] must control his subjects by state laws" (Han Fei Tzu 1999, 32) and "the high ministers resented their laws and the common people hated orderly government" (Han Fei Tzu 1999, 104). While Xunzi recognized the importance of both ritual principles with educative functions and laws in the narrow sense, Han Fei Tzu conceived of benevolence and righteousness as opposed to laws: "A king who has mas-

tered statecraft keeps himself distant from benevolence and righteousness, overlooks prudence and wisdom, and follows only laws and institutions" (Han Fei Tzu 1999, 466). Whereas benevolent politics were the compass and square for Confucius and Mencius, as ritual principles were for Xunzi, Han Fei Tzu's compass and square was the law in the narrow sense—punishments and rewards: "If an ordinary king observes the law and institutions and a poor artisan applies the measure, there will be no mistake either in state affairs or in carpentry. Thus a king as such. . . will accomplish a great deed if he puts efforts to apply the method by which an ordinary artisan should not make a mistake" (Han Fei Tzu 1999, 244).

It is natural, then, that Han Fei Tzu criticized the utility of the rule of benevolence and ritual principles. He argued that people would become licentious and disorderly if a ruler treated them with benevolence (Han Fei Tzu 1999, 496). Few would do good things inspired by a sage, while many would restrain from doing evils when scared by laws (Han Fei Tzu 1999, 533). Furthermore, benevolent rule espoused by Confucians would become impossible in an age of increased population with relatively scarce goods, even though it might have been possible in the age of Kings Yao and Shun when people were scarce and goods were sufficient (Han Fei Tzu 1999, 512-513).

It is difficult to deny that the Legalists, who emphasized rewards and punishments as instruments of statecraft and the notion of a "rich state and strong army," contributed to Qin's unification. In addition, Han Fei Tzu suggested the expansion of some positive aspects of the rule of law; he demanded that laws be displayed in public offices and proclaimed to the populace, that laws that would be hard to obey not be made, and that laws be applied equally regardless of status. Nevertheless, the critical flaw in his idea was that he did not come up with any institutions or devices to serve as checks against the arbitrary will of rulers, although his idea of the rule of law assumed their mediocrity. Thus, his idea would inevitably lead to the acceptance of tyranny, because there were no institutional mechanisms to prevent those rulers, who were to be armed with the laws of punishments and rewards as well as influence and trickery, from whimsically wielding power. Finally and most importantly, Han Fei Tzu decisively contributed to the reduction of law to mere punishments and rewards, as well as to its negative connotation in the history of Chinese political thought. To intellectuals as well as to the general populace, the rule of law as such came to symbolize the model of oppressive rule originating from the Qin empire.

The Integration of the Rule of Law and the Rule of Virtue: With Special Focus on Confucius and Mencius[7]

I have argued thus far that Confucius and Mencius placed more emphasis on the rule of virtue and li, approved the rule of law in the wide sense, and did not reject the rule of law in the narrow sense of punishments and rewards. However, there are certain passages in The Confucian Analects and The Works of Mencius that are likely to be interpreted as opposing the narrow sense of the rule of law. Therefore, I shall present my own interpretations of these passages to demonstrate that they may not only be reconciled with the rule of law in the narrow sense, but also adapted to the modern idea of the rule of law. The purpose of this section is to clearly demonstrate that their legal philosophy, based on the rule of virtue, is fully compatible with the modern rule of law.

First of all, we can see in the following passage that Confucius recognized law in the narrow sense or legal punishment as positive or neutral: "The superior man thinks of virtue; the small man thinks of comfort. The superior man thinks of the sanctions of law; the small man thinks of favors which he may receive" (Confucius 1960, 168). This passage indicates that the gentleman takes into consideration punishments as well as benevolence and virtue when determining his conduct. In addition, Confucius did not deny the need for liti-

7. In this section, I shall not discuss Xunzi, for the rule of *li* and the rule of law existed side by side in *Xunzi*, nor Han Fei Tzu, for he was vehemently opposed to the rule of virtue.

gation, although he aimed at its ultimate abolition: “In hearing litigations, I am competent like anybody. What is necessary, however, is to cause the people to have no litigations” (Confucius 1960, 257). This passage suggests that, although he did not deny the positive function of litigation, it was not his cherished ideal.

Moreover, it seems inadequate to interpret the famous dialogue between the Duke of Sheh and Confucius as the latter’s opposition to the rule of law. In the dialogue in which they debate whether it was good for a son to reveal his father’s theft to the public authorities, the duke praised the son as a righteous man, while Confucius refused to consider him righteous. The latter view was commonly interpreted as Confucius’s opposition to the rule of law. However, this debate only suggests that in the conflict between filial piety and loyalty, Confucius stressed the priority of filial piety, while the duke emphasized loyalty. This should not be interpreted as Confucius opposing the proper execution of law for the father nor condoning the son’s probable resistance against a public official who came to arrest his father. In this episode, it is not clear yet whether the son was legally obligated to report the father’s theft to the authorities. In connection with this, it should be noted that the contemporary penal code does not punish the harboring of criminals or non-reporting of a criminal when his or her family members or close relatives are the perpetrators. In this regard, the modern Rechtstaat, which is supposed to give higher priority to law and order over family ties, makes an important concession. It is also clear that Confucius would be willing to endorse such provision. Furthermore, it suggests that public authorities that give priority to the public over the private cannot but honor the primacy of certain private relations by withholding the application of state laws in some exceptional circumstances.

An episode that Han Fei Tzu cited to criticize Confucius’ conduct should also not be interpreted as the latter’s opposition to the rule of law. In this episode, rather than punishing a soldier who had deserted three times to support his elderly father, Confucius allegedly set him free and rewarded him with a good position (Han Fei Tzu 1999, 518-519). It is true that in this case Confucius condoned the soldier’s violation of the law and that he was not a legal positivist who demanded unconditional obedience to positive law. However, we cannot say that there is no way to protect such a soldier even according to the modern principle of the rule of law or according to the logic of legal positivism. In this case, although positive law binds a judge, by considering the extenuating circumstances, Confucius as a judge might be able to release him with a suspension of his sentence. In a modern constitutional democracy, he would be able to challenge the constitutionality of the military service act that enlists a person whose elderly parents have to rely upon him for their subsistence, or request a judicial review of the act by a constitutional court. There was no such constitutional device in the time of Confucius. However, it does seem quite clear that a judge possessed broad discretionary power in those early times, so that he could release a defendant without punishment. Such a situation allows us to think that no laws were violated. As such, the episode does not prove that Confucius was against the rule of law. Through the reinterpretation of these two episodes, therefore, we can find that the Confucian ideal of the ethical order can be accommodated to fit the contemporary rule of law.

Mencius also stressed the integration of the rule of virtue and the rule of law in the same spirit as Confucius, as I cited earlier. However, a case is frequently cited that is commonly interpreted as his opposition to the rule of law (Mencius 1960, 469-470). Mencius was asked how King Shun would have acted if his father had committed a homicide and the minister of justice was about to arrest him. This question is similar to the one Confucius faced in the aforementioned case-a clash between loyalty interpreted as obedience to the law of the country and filial piety. Mencius replied that whereas the minister would have executed the law soberly, Shun would have been willing to abdicate the throne without any hesitation, escape to a remote seashore carrying his father on his back, and live there forgetting worldly affairs. In his reply, Mencius had the minister execute the law, thereby stressing equality before the law regardless of status. Although Shun’s escape with his father did not accord with the law, the rule of law was not violated and somehow respected in the sense

that Shun gave up his throne to become a private person without attempting to abuse his office by escaping the law, thereby exempting himself from performing his public duty. Now the rest of the story amounts to the question: "What if a son should hide his father who committed a crime?" And this is the familiar question that was already examined with regard to Confucius' dialogue.

Considering all this together, we need to note that Confucius and Mencius sought to oppose or suspend the application of positive laws to protect ethical values. In the three cases examined above, the value was filial piety and the laws opposed or suspended were criminal laws. The basic spirit of protecting such values by suspending the laws of the country when they threatened to infringe upon the rights of the populace fully accords with an important aspect of the contemporary rule of law—the protection of civil rights and liberties. The words and deeds of Confucius and Mencius in the three cases above are consistent with Confucius' saying quoted earlier: "The populace should be governed first by virtue and propriety." If the actors in the above three cases had been accused of crimes of non-reporting, harboring criminals, or deserting from the military according to the strict application of the law, they would not have felt ashamed of themselves regardless of the actual outcomes—whether they were convicted or acquitted. Should they have been found guilty, they would have felt aggrieved or resentful of the law. Moreover, it is clear that positive laws that punish such acts clash head—on with the Confucian principle of "for the people" as well as the ethical order Confucians cherish. And their punishment would correspond to the case in which Confucius criticized laws that injured benevolence: "When punishments are not properly awarded, the people do not know how to move hand or foot" (Confucius 1960, 264). Thus, we can conclude that even the limited cases in which Confucius and Mencius seem to have opposed the rule of law in favor of benevolent rule are not only compatible with, but also welcomed by the contemporary rule of law.

Contemporary Constitutionalism and the Confucian Constitutionalism of "Li" in East Asia[8]

When we compare the Chinese legal philosophies of Confucianism and Legalism with the modern Western rule of law, we find that Legalism stresses the first two aspects of the modern rule of law—the supremacy of laws and equality before the law. In contrast, Confucianism does not acknowledge the supremacy of the positive law and denies equality before the law, because it approves the discriminatory treatment of people according to status. However, Confucian legal philosophy has maintained an unusual and consistent concern with the third element of the rule of law—the constitutional problem of how to control rulers. Above all else, Confucianism has stressed the moral discipline of rulers and especially the education of the people through the rule of virtue. Confucian ideas of the "people as the basis" and "for the people" also emphasize benevolent rule. In Confucianism, only rulers who rule benevolently can attain legitimacy as true leaders. Thus, the constitutional spirit has been internalized in Confucian philosophy, such as in the rule of virtue, the mandate of Heaven, the idea of "for the people," and so forth.

In the history of Western political thought, constitutionalist thought developed by focusing on popular sovereignty, the idea of a mixed constitution, and the rule of law as the collective will of the community or the law of nature. Thus, constitutionalism has evolved in close relationship with the rule of law. Moreover, it has attained a strong status with the liberal—democratic addition of human rights and the separation of powers. However, in East Asian civilization with China at its center, the situation was different. Concerns about controlling a ruler's arbitrary power and protecting the rights of the people did not develop in relation to the rule of law, for the law was reduced to the mere tools of a ruler, that is, punishments and rewards.

8. In this section I have drawn heavily upon Hahm Chaihark s work in general and his concept of Ritualist constitutionalism in particular. See Hahm (2000) for more details.

Of course, successive dynasties in China filed and published elaborate codes of laws and decrees, according to the principle of "Confucianism on the outside and Legalism in the inside." This, in turn, promoted the simultaneous trends of the Confucianization of law and the legalization of Confucian li beginning in the Han dynasty. Notable examples are the Tang liudian (Six Canons of Tang), Da ming huidian (Collected Canons of the Great Ming), Da qing huidian (Collected Canons of Great Qing), and so forth. These codes included administrative laws (dian)—the assignment and division of government offices and the distribution of their elaborate jurisdictions and authorities—as well as penal laws and other laws regulating civil and commercial affairs. Looking into these codes carefully, we find that the first two elements of the modern rule of law took shape as basic principles. Therefore, some sophisticated Western scholars have argued that East Asian civilization lacked the notion of constitutionalism in the sense that there have never been any explicit constitutional institutions or norms to regulate rulers.

However, if we examine the Confucian rule of li more closely, we can recognize some significant elements that correspond to Western constitutionalism, albeit not liberal in form. In this regard, it is important to remember that constitutional elements, which had previously been incorporated into the law in a wider sense, were transferred into the concept of li when Legalists reduced the meaning of law to mere punishments and rewards. We also have to pay special attention to the legalization of li, for it stresses the idea of regulating the activities of all government actors, such as disciplining rulers, whereas the Confucianization of law has to do with promoting Confucian values among the populace through coercive means (Hahm 2000, 126-127). The traditional East Asian constitutional framework is comprised of three parts: ritual (li), administrative (dian), and penal (leu). Hahm Chaihark has argued that among the three, li should be seen as the constitutional norm, for they were indeed a regularized restraint on the rulers (Hahm 2000, 112). Some parts of the Great Canons, when referring to li, stipulated detailed clauses that regulated the ritual processes of a monarch's conduct and the

proper rituals to be observed between monarchs and ministers. Thus, we should note that li's most important function was to regulate human behavior from without and to restrain it from within. That disciplinary function of li was explicitly recognized in The Confucian Analects: "Look not at what is contrary to propriety; listen not to what is contrary to propriety; speak not what is contrary to propriety; make no movement which is contrary to propriety" (Confucius 1960, 250).[9] As the ritual the rulers had to follow had been codified since the Han empire, the function of li in disciplining rulers was reinforced (Hahm 2000, 127). In addition, dian—the administrative law, which regulated the administrative process—played a constitutional function as well. Thus, if rulers did not observe proper rituals, they were perceived as having lost their legitimacy as rulers in China and Joseon Korea.

Thus, following Hahm's interpretation, we can conceive of li as a political norm, taking an intermediate form between law and morals, that played a constitutional role in restraining rulers in a regularized form. In England and the United States, constitutionalism was accomplished by subjecting the exercise of political power to the jurisdiction of the court. In that process, the rule of law was fully developed and strengthened. However, the constitutional system in China and the Joseon dynasty conceived of political power as ritualist and sought to regulate rulers through li as much as possible, so that the exercise of a ruler's political power was strongly subjected to li. In that process, the "way of the ancient sage kings" such as Yao, Shun, or Duke of Zhou, and "the way of the former kings" and "ancestral laws" were effective in regulating a ruler's behavior.

Such constitutional ideas were institutionalized most systematically and effectively in the Joseon dynasty, which sought to carry out Confucian ideals to the fullest degree among East Asian countries. If we make a brief summary of these institutional arrangements, we may cite the "prime minister," "royal lectures," "institutionalized

9. Elsewhere in *The Confucian Analects*, the philosopher Yu says of *li*: In practicing the rules of propriety, a natural ease is to be prized. In the ways prescribed by the ancient kings, this is the excellent quality, and in things small and great we follow them (Confucius 1960, 143).

remonstrance" and "court historians" as notable examples. In addition to these, the famous ritual controversies among political partisans in the Joseon dynasty may be duly interpreted as a proper form of constitutional debate over the issues, some of which were directly related to how to control kings and royal families (Hahm 2000, for more details).

Conclusion

Our examination of the development of the rule of law and the rule of virtue in the history of Western and East Asian political thought, albeit sketchy, has shown that the general position of the two civilizations was not to take the one and to exclude the other, but to integrate the two. This is because most political thinkers of the East and West were soberly aware of the modern legal predicament that the rule of law alone would not be fully realized without the spirit of law-abidingness, which in turn is a product of the rule of virtue, which imbues citizens with civic virtues and positive habits. The Confucian emphasis on the rule of virtue also comes from the same concern. Confucius, while he once claimed to respect the political institutions and affairs of the Zhou dynasty saying, "I shall follow Zhou," stressed the rule of virtue to mitigate the overly legalistic and elaborate aspects of the Zhou legal system. He might have been fully aware that to assert the rule of law in times of extreme confusion and chaos such as in the Spring and Autumn Period would seem quite utopian. Nevertheless, the reason why he adhered to such a bold philosophy is that he firmly believed it was impossible to secure the observance of social norms among the populace—not to mention their moral improvement—only by building elaborate institutions, especially for punishment and prohibition. This also came from his belief that the rule of virtue, aside from its function as an idealist goal, should constitute part of our reality by being constantly applied as a criterion by which we are to interpret and criticize that reality.

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GLOSSARY

dian (Ch.) 典
fa (Ch.) 法
lau (Ch.) 律
li (Ch.) 禮

(Ch.: Chinese)