SHAME V. GUILT AS A BASIS OF LAW
(A CASE OF SHEER MORALITY VERSUS POSITIVE LAW)

I. The Yin And Yang Of Eastern Legal Philosophy[1]

Lao Zi[2] said: *"All things submit to Yin and embrace Yang. They soften their energy to achieve harmony."*

Being part of the Daoist[3] philosophy, this saying dates back to the sixth century B.C. The doctrine of Yin Yang is the Eastern belief that the harmonious balance of opposites creates a healthy whole - the universal Dao. Naturally, the Yin aspect is exemplified by darkness, softness, coldness, humidity, and that which yield. These qualities form a dynamic continuum with their opposite - the Yang characteristics of light, hardness, heat, and that which does not yield.

Another easy to understand example of the opposites of Yin and Yang are Female and Male. The complement of all opposing processes of the Yin and Yang is part of the whole. And the harmonious universe has all at the same time, the opposing forces of Yin and Yang. The paradox of Yin and Yang permits harmony to arise from confrontation through limitless transformations as a result of the balancing of opposites. Ultimate harmony in the universe is thus guaranteed.

Most Western thinkers can easily understand that Yin and Yang represent the opposites of the universe. Indeed "yin yang" is now part of contemporary English. The English speaker when articulating the words "yin yang" usually is thinking of the limited aspects of opposites, such a male versus female. But to understand the Dao of Yin and Yang, one must grasp that Yin and Yang, while being opposites, always come together to form the universe and this universe is harmonious and in balance, despite the ever opposing forces of Yin and Yang. The universe is harmonious because of the very opposition between Yin and Yang. From Yin and Yang can be derived the ultimate principle of the universe.

While the mystical Lao Zi focused more on the metaphysical relationship between humanity and nature, he is also revered for some very profound statements on

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[1] There are three basic legal systems in Asia, namely (1) the system based on Islam, (2) that originating from India (based on the various traditions of Hinduism), and (3) that originating from China (and traceable to the teachings of Confucius). However, in order to address the issue of shame versus guilt in some depth, this paper when discussing the "Eastern legal system" will focus solely on the legal system originating from China.

[2] Spelled as "Lao Tzu" in some older texts, although they are one and the same.

[3] Also spelled "Taoist."

government. Respecting government, Lao Tzu's philosophy stresses spontaneity and harmony with nature, and represents a rebellion against the Confucian obsession with form, duty, and hierarchy.

The Dao De Jing[4] teaches that a wise ruler will exercise power sparingly: *"Governing a large state is like boiling small fish" - they can be ruined just by being handled."*[5] Stated in another way, Lao Zi believed that "a *happy country would be one where people could hear neighbor's dogs barking in the morning, yet would have no desire to go there forever."* The other Daoist legacy to the Chinese mind is the idea of *wu wei. Wu wei* is action modeled on nature and often misunderstood as an injunction to do nothing. However, *wu wei* does not mean: "sit on your mass and wait for everything to fall into your lap." *Wu wei* is to act through Dao and to reach the object, but not through one's own will. The willful effort to win an outcome can be the one good way of losing one's harmony. It is the practice of moving not by struggling against the flow of the stream, but by blending into the flow and letting the flowing water do the work. Human happiness consisted of understanding and living in harmony with natural order of the universe.

The other great sage of China is Confucius.[6] Confucius occasionally is thought of as a contemporary of Lao Zi - it has been said that Lao Zi met Confucius once and criticized Confucius for his ambition. To reciprocate, Confucius could only compare Lao Zi to a dragon, powerful symbol albeit a mystical one. Confucius remarked: *"I know that birds can fly and fish can swim and beasts can run. Snares can be set for things that run, nets for those that swim and arrows for whatever flies. But dragons! I shall never know how they ride the wind and cloud up into the sky. Today I saw Lao Tzu. What a dragon!"* The significance of this anecdote is that Confucius did not see himself agreeing completely with Lao Zi — in fact they disagreed on many things and yet they agreed. In fact a careful reading of Confucius will reveal that either consciously or sub-consciously, he built on the foundations laid down by his senior, Lao Zi. For example, Confucius taught:

> *Let the states of equilibrium and harmony exist in perfection, and a happy order will prevail throughout heaven and earth, and all things will be nourished and*

[4] The Dao De Jing is the basic text of the Daoist school and has affected the thinking of other Chinese schools such as Neo-Confucianism and Legalism.

[5] This famous saying was quoted by President Ronald Reagan as an opening remark of his State of the Union Address for 1988. He said: Mr. Speaker, Mr. President, distinguished members of the I-louse and Senate, when we first met here seven years ago, many of us for the first time, it was with the hope of beginning something new for America. We meet here tonight in this historic chamber to continue that work. If anyone expects just a proud recitation of the accomplishments of my administration, I say let's leave that to history. Were not finished yet. So my message to you tonight is: Put on your work shoes, we're still on the job. History records the power of the ideas that brought us here those seven years ago, ideas like the individual's right to reach as far and as high as his or her talents will permit, the free market as an engine of economic progress and, as an ancient Chinese philosopher, Lao Tzu, said: **Govern a great** nation as you would cook a **small** fish, **do not overdo it.**

[6] Confucius lived during the Spring and Autumn period of warring states (55l-479B.C.); the dates that apply to Lao Zi is less certain, although his time may have been many years before that of Confucius and his lifespan has been said to extend by centuries.

flourish.[7]

Unlike Lao Zi, Confucius liked to discourse more on the relationship between man and man (and taking it one step further, between man and state). Perhaps the most important principle to understand of Confucius' world view is that he held humans to be fundamentally good, saying:

> *Man is born for uprighteousness. If a man loses his uprighteousness and yet lives, his escape from death is because of mere good fortune.*[8]

From the above references to Lao Zi and Confucius, it can be inferred that these sages preferred that man be governed by nature, that is to say from within oneself.

But, "How does one really govern oneself?"

The key is through emphasis on the power of shame. It is recorded in the *Analects* that a student once asked Confucius: "What qualities must one have to be called a minister?" The Master answered:

> *One who knows a sense of shame and when sent to any quarter will not disgrace his prince's commission.*[9]

In the sphere of contracts, Confucius also relied on the sense of shame:

> *When agreements are made according to what is right, what is spoken can be made good. When respect is shown according to what is proper, one keeps from shame and disgrace.*[10]

According to Confucius, one can gain the attributes of a superior man (or gentleman) when one knows shame and is also willing to examine oneself from within:

> *I daily examine myself on three points: whether in transacting business for others, I may have been not faithful, whether in dealings with friends, I may not have*

[7] *The Doctrine of the Mean*, Chapter *1.5.*

[8] *Analects*, Book VI, Chapter XVII.
[9] *Analects*, Book XIII, Chapter XX.i.
[10] *Analects*, Book I, Chapter XIII.

> *been sincere; whether I have not mastered and practiced the instruction of my teacher.*[11]

Confucius' admonished war dukes who wished to govern a nation to *"go before the people with your example and work hard for their affairs."* His advice for proper behavior between peers was to *"hold faithfulness and sincerity as first principles; have no friends not equal to yourself."*[12]

But what did Confucius say about the plebian rabble? The desire to see goodness in man carries through into the sphere of crime and punishment for Confucius said of "old hundred names:"

> *When people are led by laws and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they are led by virtue, and uniformity be given them by the rules of propriety, they will have the sense of shame and will become good.*[13]

Confucius has also made plain his aversion for lawsuits:

> *When hearing a lawsuit, I am like any other tribunal. What is necessary, however is to cause the people to have no lawsuits.*[14]

He preferred that humanity, having a natural yearning for uprighteousness, would regulate themselves by elevating the concept of duty, self-examination, and shame to the highest levels of human rationale. Here we discern the source of the Eastern paradigm of "shame over guilt." Indeed Confucius went even further when he opined on the desirability of capital punishment:

> *What do you say about killing the unprincipled for the good of the principled?*
> *Sir, in carrying out your government, why should you use killing at all?*
> *Let your manifested desires be for good and the people will do good.*[15]

Judging from all of the above quotes, did Confucius live in utopia? No he did not for the period of warring states was one of messy feudal warfare. Then, he must be longing for

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[11] *Analects,* Book I, Chapter II.i.
[12] *Analects,* Book I, Chapter VIII, ii-iii.
[13] *Analects,* Book II, Chapter III.
[14] A*nalects,* Book XII, Chapter XIII and *The Great Learning,* Chapter IV.
[15] *Analects,* Book XII, Chapter XIX.

an utopia where the virtuous, self-examining gentleman prince ruled over a kingdom of good people who are so imbued with the sense of shame that there no further need for positive law or the criminal code, not to mention capital punishment?
The seeds of discord also lie within the One, for even in the Confucian scheme of goodness and morality, he recognized the need for justice as redress against injury:

> *What do you say that injury should be repaid with kindness?*
> *With what then is kindness to be repaid?*
> *Therefore repay injury with justice and kindness with kindness?*[16]

Of greater potential for detraction is the strong sense for hierarchical authority that permeates Confucian thought. Confucius insisted:

> *There is government, when the prince is the prince, and the minister is minister, and when the father is father and the son is son.*[17]

Here from the heart of morality, one sees also the seed for authoritarianism. As Georg Wilhem Friedrich Hegel and his student Karl Marx are wont to say, from the thesis (Yin) there will be an antithesis (Yang) and the two will create a synthesis of a higher order (can that be the higher order of universal harmony or Dao as seen by Lao Zi?).

II. Chinese Legalists: The Right Wing of the Confucian School

Confucius was a prolific instructor of students but no governor of men. Perhaps the great sage's preoccupation with ethics and morality made him a poor minister of the state. But Confucius produced many students of varying political shades and philosophical colors. The foundation of the orthodox wing of the Confucian school was cemented by Mencius who is sometimes referred to as "China's second sage" (this should carry no disrespect for Lao Zi, who after all has been said and done, was a mythical character, but one who manifests the very essence of the Chinese). Mencius reaffirmed the Confucian premise that man is inherently good but added a very important new idea. Mencius introduced a very early form of the modern concept of the "social contract." Mencius, like Confucius, maintained the belief that rulers were divinely placed in order to ensure peace and order among the people they rule.[18] Unlike Confucius, Mencius taught that if a ruler failed to

[16] *Analects*, Book XIV, Chapter XXXVI.
[17] *Analects*, Book XII, Chapter XI.ii.

[18] For example, the king of Liang asked Mencius how the empire could be settled, and he replied that one who is not fond of killing could unite it; but among the shepherds of people at that time there was not one

uphold peace and order, then the people could be absolved of all loyalty to that ruler and could, if they were feeling strongly enough, to rise up to replace him.[19] By doing so, Mencius intended to bolster the Confucian imperative for rulers to govern by benevolence and superior humanity. However this also added to the anxiety of the one at the top.

Critics of the Confucian-Mencius orthodoxy began to point to an inherent weakness: the excessive reliance on ethical conduct and moral ideal resulted in an inability to master the practical aspects of enforcement. The void was filled by that which I would call the Right Wing of the Confucian school, or more commonly known as the Legalists or the Chinese School of Law.[20] Opposed to Mencius was Xun Zi[21] who instigated the belief that there exist within humanity those who are incorrigibly evil and that goodness may have to be attained by other external means. This student began to differ from the Master by stressing that good government can only be maintained through the application of stricter control, especially against those who insist on being evil.[22] Xun Zi's authoritarian inclinations grew into the School of Legalism.

In due course, the doctrines of Legalism were solidified by Xun Zi's students, Han Fei Zi[23] and Li Si.[24] These men built upon and enlarged upon Xun Zi's insipient premise that human nature was evil, As man was inherently evil, the only way to preserve the social order was to impose discipline from above and to enforce laws strictly. The Legalists placed the well-being of state above the welfare of the common people - all goodness must flow from the emperor as the emperor defines what goodness is to be. The legalism of Han Fei Zi greatly influenced the daily administration of the Qin Empire[25] (221 B.C. -

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doing so. Mencius said that King Hui could become a true king by bringing peace to the people; but he was failing because he did not practice kindness. *First Book of Mencius.*

[19] For example, King Xuan asked Mencius if regicide was permitted since Shang founder Tang banished Jieh, and King Wu marched against the last Shang king; but Mencius responded that these rulers so mutilated humanity that they should be called outcasts not kings. In 315 BC the King of Yen abdicated and appointed his prime minister, causing a revolt in Yen. Mencius was asked if it was all right to march on Yen, and he said yes, because the king had no right to give Yen to another; but he explained that he was not encouraging Qi to invade Yen, because only a heaven-appointed officer had the right to do so. After Qi invaded Yen, King Xuan asked Mencius if he should annex Yen. Mencius said that if annexing it would please its people then it could be done; but if annexing it antagonized its people, then he should not. *First Book of Mencius.*

[20] The Chinese School of Law must be carefully distinguished from the western concept of "Rule of Law." Probably, the better term to use is Chinese Legalism as this is apt to cause less confusion. Even so, Chinese Legalism encompasses a more authoritarian application of legal principles than can be ever imagined by the casual observation of western legalism. Chinese Legalism is a political philosophy that places the sovereign above the subjects and is primarily concerned with the maintenance of the sovereign's power.

[21] Also spelled Hsun Tzu Zi (300-237 BC).

[22] For example, Xun Zi said:

Then, when the commands of government have been fixed and the customs of the people unified, if there should be those who depart from the customary ways and refuse to obey their superiors, the common people will as one man turn upon them with hatred, and regard them with loathing, like an evil force that must be exorcised. Then and only then should you think of applying penalties.

Basic Writings of Hsun Tzu tr. Burton Watson, p. 74.

[23] Also spelled Han Fei Tzu.

[24] Also spelled Li Ssu.

[25] Also spelled Chin.

207 B.C.), the first unified state in China under the strong arms of Qin Shi Huang.

Perhaps, the most noteworthy saying of Han Fei Zi is this:

> *The affectionate mother has spoiled children, but the stern household has no overbearing servants.*[26]

The reason Han Fei Zi made this statement was to make certain emperors applied censure without fail and punished without weakness. Because the Legalists will acknowledge if pressed upon the issue that there will be occasion when the ruler is merely one of average abilities, here was all the more reason for the existence of a system of strict positive law to maintain the position of the ruler.

Li Si was a worthy contemporary and rival of Han Fei Zi, though both subscribed to Legalist thoughts. Both competed for the favors of the Qin court. In the end Han Fei Zi met his death through the guile of his old fellow traveler, Li Si. Li Si's primal7 advice to the ruler can be gleaned from his *Memorial On Exercising Heavy Censure:*[27]

> *The worthy ruler should be one able to fulfill his kinglv duties and employ the techniques of inspection and punishment (censure). Visited with censure, the ministers dare not but exert their ability to the utmost in devotion to their ruler. When the relative positions between minister and ruler are thus defined unmistakably, and the relative duties between superior and inferior are made clear, then none in the empire, whether worthy or unworthy, will dare do otherwise than exert his strength and fulfill his devotion to the ruler. Thus the ruler will by himself control the empire, and will not be controlled by anyone.*[28]

Li Si also left his mark in history as the counselor who prevailed on the Qin emperor to burn the books of the rival schools[29] and to bury dissidents alive.

As the authoritarian Qin dynasty failed to survive more than a few years after the death of the first emperor, the most practical and more refined principles of Legalism were synthesized under the Han dynasty (207 BC - AD 220). Shaded under the benevolent veil of the Confucian-Mencian orthodoxy, Legalism evolved into a permanent and self-perpetuating system of government. Legalistic methods became the actual tools for governing, though often carefully veiled, for Chinese dynasties and governments that followed. Confucian morality came to be ceremoniously presented as the ideal philosophy, but the emperor's intention was keep power from behind the veil with the use

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[26] Han Fei Zi, *Chapter 50L, On the Dominant System of Learning.*
[27] From *Shih Chi,* 87:15a -18a.
[28] Id.
[29] It is said these schools were like a "hundred flowers."

of the fundamental Legalist principle of positive laws strictly enforced. At its very best adherence to Confucius-Mencius, the Chinese solution was to replace one rotten emperor with another "good" emperor — hence the cyclical nature of Chinese history. The man is changed but never the system. Perhaps, this is because no one in China has yet figured out how to do without the great leader.

III. The Concept of Guilt Under Western Law

In accord with the premises of law of the western nations, while the criminal code is a *corpus* of positive laws, the fundamental concept of guilt is a "negative" one. A person is held to be *not* guilty - that is innocent - until he or she is proven guilty through the application of legal process.[30] Thus a citizen goes about his or her business in a state of innocence, especially respecting the commitment of criminal (or public) offences, unless and until specific guilt is imposed by a competent tribunal and according to the legal rules to which that person is lawfully subject.[31]

The equally important corollary is that no person may be lawfully punished until guilt is proven beyond the legal standard that defines the burden of proof. It must follow also that punishment imposed must be commensurate with the nature of offence under which a convict is guilty. One step beyond the fundamental adherence to the personal state of innocence, lies the mechanisms of criminal law enforcement: crimes are defined by a body of positive law that is enforceable by the full power and authority of the public state. In the final analysis, guilt can be imposed notwithstanding a plea of not guilty, followed by the sentence of punishment against the convicted.

Like the Yin and Yang that is attributable to Lao Zi, this Western approach uses the presumption of innocence as a vital balance against the prescriptive aspects of criminal law (and the corresponding enforcement power available to the state in discharging its laws). This balancing approach is so persuasive that, as a matter of principle, it has attained near universal recognition in the world. The hope is that by setting these opposing forces against each other, justice can be outcome.

For example Universal Declaration of Human Rights guarantees the presumption of innocence:

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[30] Compare this premise with the Confucian assertion that all men are fundamentally good.

[31] The civil counterpart (in court proceedings involving two private parties) is the presumption of an absence of civil liability on the person of the defendant. The plaintiff must prove liability against the defendant. The standard of proof for establishing civil liability is easier than for the public prosecutor to establish criminal guilt. For example, in the United States the standard of proof in civil litigation is "with the preponderance of the evidence" (i.e. more likely than not) and for criminal prosecution is "beyond reasonable doubt" (i.e. approaching near certainty).

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.[32]

The presumption of innocence is echoed by International Covenant on Civil and Political Rights:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[33]

The various nations have their own laws that implement the presumption of innocence. For example, the Judicial Chamber For Information Disputes under the President of the Russian Federation in a letter dated 24 December 1997 reaffirmed the following principles of Russian law:

> In the Russian legal system, the generally accepted legal principle of presumption of innocence is explicitly stated in Part 1, Article 49 of the Constitution of the Russian Federation. Under the rule of this article, the accused (i.e. the person charged with an offence by the procedure set out in the Criminal Procedure Code of the RSFSR) is presumed to be innocent until and unless his guilt has been proved under the federal law and adjudged by a valid verdict of a court.[34]

The South African Constitutional Court affirms this presumption as vital to an open and democratic society:

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[32] Article 11.1 of the Universal Declaration of Human Rights. United Nations' Universal Declaration of Human Rights was unanimously adopted in December of 1948, and is not binding. See also, .*Amnesty United Nations (UN) The International Criminal Court: Drafting Effective Rules of Procedure and Evidence for the Trial, Appeal and Revision International* - Amnesty International Report - ICR 40/12/99 July 1999. http://www.amnestv.itlailib/ainub/l 999/IOR/1400 1 299.htm.

[33] Article 14.2 of the International Covenant on Civil and Political Rights. The International Covenant of Civil and Political Rights, which is a binding treaty, was opened for signature in December of 1966 and entered into force in March of 1976. Ratification Information is available via the internet at http://untreatv.un.org/.

[34] Recommendation No. 3 (10), dated 24 December 1997 "On the Application of the Principle of Presumption of Innocence in Journalists' Activity" in response to an inquiry from the Mass Media Law and Policy Centre. See, http://www.medialaw.ru/e pages/laws/russian/jcr-l0-97.html. There is a *caveat.'* The Judicial Chamber, however, maintains that only those government bodies and government officials that are empowered to impose limitations on the human and civil rights and liberties are responsible for observing the principle of presumption of innocence in the sense set out in the constitutional rule. Only courts of justice can decide whether anyone guilty of a crime or offence and determine all legal consequences they shall suffer. Id.

> The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If in particular cases what is effectively a presumption of guilt is to be substituted for the presumption of innocence, the justification for doing so must be established clearly and convincingly. It was argued that it would be almost impossible for the prosecution to prove both the mental and the physical elements of (the offence). I do not agree. The circumstances of each case will determine whether or not the elements of (the offence) have been established beyond reasonable doubt. State v Mbatha [1996] 2 L.R.C. 208.

The common law countries certainly cherish this presumption and their legal fabric share in this "gold thread." For example, Australia's Third Report under the International Covenant on Civil and Political Rights March 1987 - December *1995* confirmed the following:[35]

> It is a fundamental precept of the Australian system of administration of justice that an accused person is presumed innocent until proven guilty. It is the task of the prosecution in criminal trials to prove each element of its case 'beyond reasonable doubt' (unless the law creating the offence applies a different standard of proof).[36]

Much of the Bill of Rights to the Constitution of the United States addresses the right of the person to the presumption of innocence and prescribes additional procedural protections to guarantee the presumption.[37] The judiciary, when applying these principles, has afforded additional protections such as the right to the Miranda warning[38] and the right of the defendant to counsel, including legal representation at public

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[35] See. e.g. http://www.law.gov.aulpublications/ICCPR3/Welcome.html

[36] However, some exceptions are made: However, in certain circumstances, legislation will reverse the onus of proof and require the person charged with the offence to prove (or more likely, to disprove) a certain element of the defense. It is Federal criminal law policy that a persuasive onus should not be imposed on a defendant in criminal proceedings except in clear and exceptional circumstances. Draft Federal legislation is scrutinized by the Senate Standing Committee for the Scrutiny of Bills to ensure that the defendant has the persuasive onus of proof only where: the matters to be raised by way of defense by the accused are particularly within the knowledge of the accused; and it would be extremely difficult and costly for the prosecution to be required to negative the defense. 767. The burden of proof on the accused **in** these circumstances is the civil standard of proof, namely, on the balance of probabilities. 768. In some circumstances, in particular where the accused wishes to rely on an exception or defense provided by the law, the accused bears an evidential burden of proof. An evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. For example, the defence of reasonable and honest mistake only requires the defendant to put the matter in issue, then the onus is on the prosecution to disprove it *(He Kaw Teh* v R (1984-85) 157 CLR 523).

[37] Amongst these, are the right to trial by jury, the right against self incrimination, the right against unlawful search and seizure, the right to reasonable bail, the right to due process, procedural and substantive, and the right against cruel and unusual punishment.

[38] Miranda v. Arizona, 384 U.S. 436 (1966).

expense.[39] Under the common law tradition, the role of the judge is to act as the impartial arbiter between the prosecution and the defense.

For example, the Canadian Supreme Court recently upheld the proposition that the right to remain silent and not incriminate oneself is inextricable tied to the presumption of innocence:

> The right to silence, which has been recognized as a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms,* is based on society's distaste for compelling a person to incriminate him- or herself with his or her own words. Just as a person's words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt. The presumption of innocence, enshrined at trial in s. 11(d) of the *Charter*, provides further support for this conclusion. In order for the burden of proof to remain with the Crown, the silence of the accused should not be used against him or her in building the case for guilt. Recent case law, particularly *R. v. Fran çois.* [1994) 2 S.C.R. 827, and *R. v Lepage*, [19951 1 S.C.R. 654, confirms that silence may not be treated as a piece of inculpatory evidence by the trier of fact. Some reference to the accused's silence by the trier of fact may not offend these Charter principles. R v. Noble [1997] 1 S.C.R. 874.

IV. Why Not *Mea Culpa?*

The chief order of business for the judicial officer in a preliminary hearing in criminal court is the taking of the plea. In one form or another, after having informed the accused of the charge and making certain that the charge is understood, the critical question is asked:

"How do you plead?'

There is basically two ways to answer: (1) Guilty, (2) Not Guilty (i.e. Innocent). One function of the magistrate is to make sure that the plea, whether of guilt or of innocence, is given freely and without coercion. A third more tenuous option is to remain silent and refuse to enter a plea, in which case, the magistrate, because of the presumption of innocence, is under a judicial duty to make an entry of NOT GUILTY on behalf of the accused.

Moving into the mind of the hypothetical accused, how is he or she to plead? As a matter

[39] Gideon v. Wainright, 372 US 335 (1963) (right to free counsel for indigents); See also, Escobedo v. Illinois. 378 U.S. 478 (1964) (right to counsel triggers when an investigatory process becomes accusatory).

of fact, an accused must either be guilty or innocent of the charge. If guilty, the accused may either admit the guilt or affirmatively plead not guilty. If innocent, the accused naturally would enter a plea of not guilty although in a few special instances, there may be motivation to plea guilty. As noted, silence is construed as a plea of not *guilty.*

What advice would Confucius give if he were counsel to the accused? *Mea culpa!* More likely than not, Confucius would have much preferred that his client had possessed a greater sense of shame and therefore could have restrained himself from ever committing the crime. But if the client is actually guilty, Confucius would insist that he admit to the wrong and throw himself to the mercy of the benevolent philosopher king. Confucius would have something to say to the government as well - the ruler must take some responsibility for the moral failure of the subject — and hence an explanation for the Confucian call for leniency in punishment. The ruler must also accept the burden of self examination to determine why the subject failed to be good. But in the final analysis, it would seem that a plea of not guilty is never available to the accused if he or she is actually guilty. Perhaps, it is even better if the one who is guilty, compelled by the sense of shame, could rise up and voluntarily undertake the imposition of punishment upon self. Better a belated *Mea culpa* than never!

This would not be the approach of the Legalists. Regardless of the plea, the king, through his ministers and magistrates, reigns supreme. And the king can do no wrong. It is to compound another offense to the majesty of the emperor even to deny guilt, for how could the imperial prosecutor err in bringing a charge? Or in making an arrest? Thus, the cross examination of the accused could very well be conducted by escalating physical means that is calculated to prove the government right. Like it or not, *mea culpa!* Woe to the criminal dragged before the judge. But what is served by this approach to the enforcement of the emperor's laws?

An explanation is that the Legalists, building upon the Chinese tradition of accepting the emperor as wielding a mandate from Heaven, viewed the law as being imposed from the one onto the many. The continuation of the emperor's mandate to rule is the supreme prerogative. The emperor must always be secure and comfortable in his reign. As the holder of Heaven's mandate the emperor can never err nor is it possible to say that he erred. The ministers and magistrates exist to serve the security and pleasure of the emperor. And so on in the Chinese authoritarian scheme, one that can be traced to Confucius, although Confucian authoritarianism is tempered by the belief that man in upright and by the sage's injunction that a king is to rule by moral superiority. The Legalist brand of authoritarianism operates on the assumption that man is evil and perhaps the only good man is the emperor himself as he is the one the Gods have smiled upon.

The western liberal tradition is perhaps the Yin as Chinese Legalism is the Yang. For example, John Locke (1632-1704) in his plans for a better state sought to avoid the evils of absolute power. Locke believed that human nature is such that it will succumb to the temptation by a strong personality to grasp for absolute power. Locke advocated the

limitation of the power of government through a "social contract" that divided the monolith of government into several parts. The power of the state is thus placed into different hands which ensured no party wielded absolute power. Locke squarely rejected the divine right of kings. Locke was born during the Personal Rule of Charles I (beginning 1629) when Parliament by royal will was dissolved. As a boy he witnessed the English Civil War (1642-1646), and lived through Republicanism (1649-1660) under Parliament[40] and then under the Lord Protector and finally saw the English Restoration (1660 when Charles II returned and was crowned the following year). Even if England, after the Cromwellian lessons, must put up with a king restored, Parliament must remain equal if not supreme to the monarch. For a period after the Restoration, the monarchy was welcomed as balance against the zeal of Parliament and actually functioned as an effective counterweight. Under the Westminster system, the judiciary cannot overrule an Act of Parliament.[41]Ultimate political power flows upward from the people through their elected representatives who meet as a Parliament, and from whose majority members the Prime Minister must come.

The Lockean empirical view was further expounded by liberal philosophers such as Montequieu, Rousseau, Hume, Mills, and many others. Indeed, similarities can be discerned between the Confucius-Mencius approach and the liberal traditions of the west.

The viewpoint of Locke can be usefully contrasted with that of Thomas Hobbes (1588-1679). Contrary to the supporters of limited government formed by a "social contract" with the people, Hobbes believed in the strong rule of the king. On the question of whether the sovereign may be one man or an assembly — the Hobbesian view prefers one man. It is essential that the sovereign power be unrestricted. The sovereign is the executive, legislative, and judicial power all in one. As legislator and the sole source of law the sovereign determines what is just and unjust, right and wrong, as dictated by the needs of a harmonious social life.[42] Furthermore, a nation, when conducting relations

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[40] It is interesting to note here that Charles was brought from confinement at Carisbrooke Castle to Westminster and tried before a tribunal of 135 commisioners. All courtesy and consideration was given to the comfort of the King but the charge was of a capital nature. Refusing to recognize the legality of this Parliamentary court to try the King, Charles refused to plead but was found guilty by a vote of 68 to 67. He was sentenced to the punishment of death and was beheaded outside the Banqueting House on 30 January 1649. Thus began the period of the English Republic.

[41] It was in the United States that witnessed the rise to supremacy of the judiciary. Marburv v. Madison, I Cranch 137 (1803). Since Chief Justice John Marshall established judiciary supremacy in the United States, that tradition has been preserved and is viable today. If anything, with the constitutional crises during the Nixon presidency, the public prestige of the courts has been enhanced, see e.g., U. S. v. Nixon 418 U.S. 683 (1974) (the president must obey a subpoena *duces tecum* issued by a federal district court but the Court at the same time has a very heavy responsibility to see to it that Presidential Conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. ut . Nixon v. Fitzgerald, *457* U.S. 731 (1982). Cf. Barlow v. Fitzgerald, *457* U.S. 800 (1982).

[42] Hobbes was, after all, tutor of mathematics to Charles, the Prince of Wales who was restored as King Charles II. Despite his admiration of the strong monarch, Hobbes himself was a timorous figure of "effeminate courage" who repeatedly sought refuge from the actual political struggles and wars. He was in much fear for his life after the restoration of Charles II, presumably because the Merry Monarch was very compliant to the wishes of Parliament. The later Stuart Kings and Queens were less amenable and Parliament was very happy that Queen Anne died without heir and the Hanoverian Kings could be invited

with other nations, needed an authority figure to provide clear direction and firm leadership. Because the people were only interested in promoting their own self-interests, Hobbes argued that democratic consensus which gave the power citizens to choose their government leaders could not work. To Hobbes, the best government was an all powerful creature comparable to the Biblical sea monster, the Leviathan.[43] Hobbes stood for keeping government intact as one and under the strong rule of a king. Hobbes, insofar as his thoughts on the strong king is concerned, was not without his supporters in the centuries that followed.

The Chinese Legalist School is not without affiliates in the West. We are indeed fortunate in that we can afford to examine at leisure the thoughts of, *inter alia,* Hegel, Nietzsche, Stalin, Houston S. Chamberlain, and Hitler.[44] These western thinkers traveled a parallel course as the Chinese Legalists. And of course, the greatest practitioner of Chinese Legalism is home grown: Mao. These mental sojourners (and the doers as well from among them) would agree well and be quite comfortable sharing the same compartment with the ancient Chinese Legalists. The common silk thread is the belief in a chief executive of unrestricted power from whom emanates all that is good. The Chinese attributes this omnipotence to a mandate from Heaven. If power is delegated to subordinate officers, it is to maintain the supremacy of the great leader. All law in the state also serves to uphold the majesty of the singular sovereign and when the sovereign is comfortable, good also comes to the people. The pleasure of the emperor is the *raison d'etre* for law.[45]

V. Guilt versus Shame: Who Prevails?

Guilt can be distinguished from shame in a number of ways. Shame arises from within a person. Shame is imposed by self. No magistrate can compel a person to suffer shame. Guilt is imposed upon one from without. Guilt is a judgment levied by others. A defendant who has pleaded innocent can nonetheless be found to be guilty. Along with guilt follows the imposition of penalty from without. Herein lies the threat to individual liberty as a powerful government unrestrained has the ability to impose guilt upon the innocent.

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to Britain to serve as figureheads.

[43]Nothwithstanding his distrust of democracy, Hobbes believed that a diverse group of representatives presenting the problems of the common person would, hopefully, prevent a king from being cruel and unfair. Rather surprisingly, Hobbes came up with the concept of "voice of the people," which meant that one person could be chosen to represent a group with similar views. However, this "voice" was merely solicited and not necessarily listened to - the last say lay with the king.

[44] 42Lao Zi said: "True words are not pleasant, pleasant words are not true. Good words are not persuasive; persuasive words are not good."

[45]Private disputes not involving the state are apt to be left to resolution by Confucian principles of morality and ethics to be best handled outside officialdom, preferably within the family hierarchy. Hence, there is a dearth of official materials on private disputes

Further, under the guilt-innocence approach, the finding of guilt itself is deemed to be insufficient to protect the interest of the state. Final sentence takes the form of the imposition of punishment. It is the punishment that has the sting; otherwise there will be no need for sentencing. Judge Richard A. Posner, formerly a professor at the University of Chicago, began his analysis of punishment from the perspective of individualism, using the basic assumption of humanity that man is selfish, and concluded that man pursues self-interest to its furthest limit. People, therefore, react to different stimuli of benefit, and the basic function of law is to provide or change stimuli. Using criminal law as an example, punishment is the price society demands for criminal behavior; to prevent crime, the cost of criminal behavior must exceed the value of such behavior to the perpetrator, otherwise there is no deterrence. Increasing fines and sentences increases the price of crime, thus furthering efforts to deter and reduce crime. This is a modem theory of guilt and punishment that is derived from free market economic theory.[46]

A system that relies on shame will work better as it is based on prevention rather than remedy, provided all members of that society shares a well cultivated sense of shame. Indeed, the sense of shame will manifest outwardly as supreme self-restraint. A person with a residual sense of shame is less likely to be a repeat offender. With a person who truly knows shame from within, there will never be a need to inflict the death penalty from without.

To add to the confusion, here is a good place as any to quote a portion of Alexander Solzhenitsyn's 1978 address to the graduating class of Harvard:

> **Legalistic Life:** Western society has given itself the organization best suited to its purposes, based, I would say, on the letter of the law. The limits of human rights and righteousness are determined by a system of laws; such limits are very broad. People in the West have acquired considerable skill in using, interpreting and manipulating law, even though laws tend to be too complicated for an average person to understand without the help of an expert. Any conflict is solved according to the letter of the law and this is considered to be the supreme solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right, and urge self-restraint, a willingness to renounce such legal rights, sacrifice and selfless risk: it would sound simply absurd. ... I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed, But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, **there is an atmosphere of moral mediocrity, paralyzing man's noblest** impulses. And it will be simply impossible to stand through the trials of this

[46] Richard A. Posner, Economic Analysis of Law 321 (Little Brown Press) (1992).

> threatening century with only the support of a legalistic structure [Emphasis added].[47]

Perhaps Solzhenitsyn is either too quick to conclude or too "black and white" in his vision. Mencius, that faithful student of Confucius, drawing upon the power of the mean, recognized that: "Goodness alone is not capable of governing; laws alone do not enforce themselves."[48] Compare this with the declaration of that paradoxical American, William Penn: "Though good laws do well, good men do better; for good laws may want good men and may be evaded or abolished by ill men; but good men will never want good laws or suffer ill ones."[49]

Therefore, should a society strive to nurture enlightened citizens who manifest shame from within or should it maintain law and order through the imposition of guilt and punishment from without? As a matter of practical law, which system, the one based on shame or that based on guilt is more workable?

If one was shopping in the worldwide marketplace of ideas, which model would one purchase?[50] Examine, for instance, the wares of that famous Chinese vendor of devices of war. According to an ancient source,[51] this arms merchant had a lance and a shield for sale. Being an enterprising salesman, he was quick to represent the quality of his goods. To anyone interested in the shield, he proclaimed:

"*My shield is so strong that no lance can pierce it*."

To others who inquired of his lance, he also sang similar praises:

"*My lance is so strong that it can pierce through any shield*."

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[47] Alexander Solzhenitsyn, *Text of Address At Afternoon Exercises* (Harvard), Thursday, June 8, 1978.
[48] *"Book of Mencius,* III.A.1.
[49]William Penn, *The Great Law 1682.* See also, John H. C. Wu. *Chinese Legal and Political Philosophy, at* p.8. While best known as the founder of Pennsylvania, this remarkable man also made his mark as a Quaker leader and social philosopher during his lifetime. A friend of England's kings, yet a firm believer in religious and political freedom in America, his life and writings show him to be a thinker of paradoxical political and religious beliefs.
[50] Third, the idea of market force procedure was pioneered by the leading American economic analyst, former University of Chicago professor and now Judge. Richard A. Posner wrote: 'legal procedure is competitive like the market." For example, in his economic analysis, Judge Posner found that "the result of many cases depends on whether the resource allocation can achieve its maximum efficiency, which is usually decided by the market. S, Richard A. Posner, *Economic Analysis of Law* 321 (Little Brown Press) (1992).
[51]This paradox has been attributed to Han Fei Zi, the Chinese Legalist, but it also deeply reflects on the Dao. It was Lao Zi himself who said: *"Great truth appears paradoxical; great cleverness appears stupid; and great eloquence appears awkward."*

Surely, such spear and lance cannot co-exist in nature as proclaimed by this armorer! The truth may be found not within the words of the armorer nor in physical nature of the lance and shield. It lies within the consumer of ideas. The symbolic lance, as well as, the symbolic shield may be as supreme and invincible as the Dao of their new owner. To one who has not mastered the Dao, both lance and shield when wielded in service, may turn out to be made of useless glass.

The Old One said: *"There is one universal principle of Dao and the One becomes the many."* And it must be supplemented, the Many becomes the one.

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