MODERN CHINESE LEGAL AND POLITICAL PHILOSOPHY

TSE-TSUNG CHOU-HAO

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BY

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MODERN CHINESE LEGAL AND POLITICAL PHILOSOPHY

TO

MY CHIEF

HIS EXCELLENCY WANG CHUNG-HUI

PRESIDENT OF THE JUDICIAL YUAN

OF THE NATIONAL GOVERNMENT

OF THE REPUBLIC OF CHINA

FOREWORD

This treatise is the expansion of one of the author's doctorial dissertations and represents, in many respects, the continuation of his researches already published.

The author wishes to express his gratitude to many friends who have assisted him in undertaking the work. While individual enumeration is impossible as it would involve too long a list, special acknowledgment should be made to Messrs. Yuen-zang Chang, G. T. Chao, Dr. Charles F. Dawson, Mr. R. P. Richardson, and Professor W. W. Willoughby for valuable suggestions and assistance during the preparation of the manuscript, and to Miss Alice M. Roberts and Mr. Hu Che-mu, of the Commercial Press, for their careful proof reading and suggestions.

TSENG YU-HAO.

THE HIGH COURT OF JUSTICE,
ANKING, ANHWEI, CHINA,
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CHAPTER I

CHINESE LEGAL AND POLITICAL THOUGHT PRIOR TO THE INCEPTION OF WESTERN INFLUENCES

SINOLOGUES who have recently studied the voluminous classics and historical records of China have pointed out that, in addition to the presence of logic, ethics, religion, and philosophy which rival those founded by Aristotle and Jesus Christ, there have long existed in the Middle Kingdom the rudimentary conceptions of modern criminal, constitutional, and international law. Nevertheless, it has been a question as to what were the most important single factors in determining these theories and principles. The archaic Chinese laws were not altogether commands of the political superior to the political inferior, and hence the views of John Austin were incorrect. Sir Henry Maine would have been puzzled if he learned that the Oriental despots other than those Indian chieftains he knew of did formulate legislations by altering the sacred customs. And Hegel, noticing that with the empire of China begins the study of history, was unable to determine whose ideas really governed the Celestials for the last four or five thousand years. Inspired by the indigenous Shinto patriotism, a Japanese writer not long ago reluctantly admitted that prior to the reform days of Emperor Mei-ji, Chinese thought did influence his fellow countrymen, and he added that the Celestial philosophy has not progressed since Confucius and Mencius. This observation is, of course, too dogmatic and superficial, but it is not within the scope of this book to examine fallacies of this type. The

late Professor K. S. Liu (劉經庶), of Southeastern University, Nanking, said that, although Confucius (孔子, 551–478 B. C.)[1] has been worshiped by Oriental scholars for the last two or more thousand years, Taoism as expounded in Lao Tzŭ's (老子, b. 604 B.C. or 504 B.C.?)[2] "Tao Tê Ching" (道德經) is more truly representative of the real life and idealism of the Far East. As Professor Liu was a student of "The Canon of Reason and Virtue," his exposition might have been somewhat biased. Supported by the classics and history, examined elsewhere in this treatise, it is perhaps a safe generalization to say that the Chinese conceptions of law and government prior to the first reform movement of 1898 were essentially those of Lao Tzŭ and Confucius. Lao Tzŭ was an advocate of the

[1] Two of the best early accounts of Confucius are the "Tso Ch'uan" (左傳), translated by J. Legge in "The Chinese Classics," in seven volumes, Hongkong, 1872, and Ssŭ-ma Ch'ien's (司馬遷, 145–86 B.C.). "Les Mémoires historiques" (史記), Chap. 47. (The original work of Ssŭ-ma Ch'ien consists of one hundred thirty chapters. The first forty-seven chapters were translated into French by Edouard Chavannes, published in Paris, 1895–1905, leaving chapters 48–130 unfinished at the time of his death.) See also S. Couling, "Edouard Chavannes" (editorial), *New China Review*, March, 1919, Hongkong; J. Legge, "The Life of Confucius" (551–478 B. C.), "The Sacred Books and Early Literature of the East," Vol. XI, pp. 249–268, New York, 1917.

The identification of the Christian and Chinese dates in this treatise are based upon the following painstaking studies: Chen Yuan (陳垣), "A Chronological Table of the Intercalary Months, with the Corresponding Dates in the Julian, Gregorian, and Mohammedan Calendars" (二十四朝年表), Peking, 1925; M. Taheng, "Chronologie complete concordance avec l'ere Christienne de toutes les dates concernant l'histoire de l'Extrême-Orient" (2357 av. J. C.–1904 apr. J. C.), Chang-Hai (Shanghai), 1905; Ketaro Tenaka, "New Japanese, Chinese and Foreign Dates" (新纂和漢洋年鑑), in Japanese, 3d ed., Tokyo, 1905; Y. S. Fu, "Chronicles of the World's Great Affairs" (世界大事年表), Shanghai, 1921.

[2] The exact dates of Lao Tzŭ's birth and death have never been positively established. Ssŭ-ma Ch'ien, in "Les Mémoires historiques," Chap. 63, even said that Lao Tzŭ made himself a spiritual being, went westward, and nothing was known as to where he died. Ssŭ-ma Ch'ien's fable was, however, discredited by Chuang Tzŭ (265 B.C.?), in whose writings Lao Tzŭ's death was recorded ("The Sacred Books of the East," "The Texts of Taoism," translated by J. Legge, Vol. XXXIV, p. 201, Oxford, 1891). Ssŭ-ma Ch'ien also mentioned that Confucius met Lao Tzŭ ("Les Mémoires historiques," Chap. 47). One Chinese scholar said that Lao Tzŭ was born in 604 B.C. Another thought that he "was a scholar and philosopher of the generation immediately preceding Confucius." See "The Sacred Books and Early Literature of the East," Vol. XII, pp. 1–14. Recently Professor Hu Shih (胡適), of Peking, thought that Lao Tzŭ was probably born in 540 B. C. "Outlines of History of Chinese Philosophy" (中國哲學史大綱), Vol. I, p. 48, Shanghai, 1918; "The Development of the Logical Method in Ancient China" (先秦名學史), p. 13, Shanghai, 1922.

theory opposed to state intervention in the affairs of its subjects. In his philosophy, "the central faith that molded his doctrines, his books, and even his life, to a gentle pessimism, seems to have been his view that in the old days of simplicity men had instinctively followed the right 'Way,' whereas in his own days of sophistication they were steadily losing not only knowledge but also the power of the 'Way.'"[1] He thought that the people hungered, because the product of the multitude of taxes was consumed by their superiors; they were difficult to rule because the government was too meddlesome. He argued that the criminal laws were useless, because, as people did not fear death, they could not be frightened by death. As the people's desires were hard to satisfy, in his view, the best method ever discovered by the ancient "holy man," or the sacred statesman, was to "weaken their ambition but strengthen their bones," so that they would always remain unsophisticated and without desires. Concerning the consequences of state intervention, he said:

"The more restrictions and prohibitions are in the empire, the poorer grow the people. The more weapons the people have, the more trouble is in the state. The more there is of cunning and skill, the more startling events will happen. The more mandates and laws are enacted, the more there will be of thieves and robbers."[2]

To this philosopher, the existence of laws and the abstract idea of right and justice were only the unhappy evidences of deterioration in the real principle of government. Without the presence of right and justice, there would be no need to talk about wrong and injustice. To secure right and justice by punishing the wrong and unjust would therefore be similar to securing health by taking poison. There were poverty, robbery, and stupidness only when there were wealth, order,

1 "The Sacred Books and Early Literature of the East," *op. cit.*, Vol. XII, p. 14.

2 "Tao Teh King, or The Canon of Reason and Virtue" (道德經), translated by P. Carus, pp. 75, 126, Chicago, 1913.

The authorship of "The Canon of Reason and Virtue" is attributed, as told by Ssŭ-ma Ch'ien, to Lao Tzŭ. Other translations were made by Alexander, Chalmers, Legge, Medhurst, Julius Grill, and Victor von Strauss. Carus's work would be more valuable to those who wish to check up the accuracy of the translation, as it contains the original Chinese text.

and skill. Hypocrisy appeared when there was prudence; filial piety existed when family relations were involved in trouble; and loyalty and allegiance corresponded to the decay of country and society:

"When the great reason is obliterated, we have benevolence and justice. When prudence and circumspection appear, we have much hypocrisy. When family relations no longer harmonize, we have filial piety and paternal love. When the country and the clans decay through disorder, we have loyalty and allegiance." [1]

Chuang Tzŭ (莊子, d. 265 B. C. ?), a philosopher of the Laǫ Tzŭ school, told a story in which the more skillful a ranchman became, the more horses died of being managed, singed, marked, clipped, pared, haltered, bridled, confined, galloped, and whipped. People, like the horses, have been too much damaged by the statesmen or the "sagely man," who has assumed the duty of a ranchman to deal with men. Consequently, society has been filled with intrigues and harmful activities:

"In the time of [Emperor] Fu Hsi (伏羲), the people occupied their dwellings without knowing what they were doing, and walked out without knowing where they were going. They filled their mouths with food and were glad; they slapped their stomachs to express their satisfaction. This was all the ability they possessed. But when the sagely men appeared, with their bendings and stoopings in ceremonies and music to adjust the persons of all, and hanging up their benevolence and righteousness to excite the endeavors of all to reach them, in order to comfort their minds, then the people began to stump and limp about their love of knowledge, and strove with one another in their pursuit of gain, so that there was no stopping them — this was the error of these sagely men." [2]

If an attempt to make more laws would simply tend to cause more lawbreakers — thieves and robbers; if wisdom, justice, and prudence existed only by virtue of being accompanied with ignorance, injustice, and hypocrisy; and if more governmental activities mean heavier damages to the

[1] "The Canon of Reason and Virtue," *op. cit.*, p. 105.
[2] "The Sacred Books of the East," edited by F. M. Müller, Vol. XXXIX; "The Texts of Taoism," translated by J. Legge, Pt. I, pp. 279, 280, Oxford, 1891.

governed, then, why should not the making of more laws, wisdom, justice, and prudence be stopped? Lao Tzŭ argued that the ancient statesman or the "holy man" would have done so:

"Therefore the holy man says: I practice nonassertion, and the people of themselves reform. I love quietude, and the people of themselves become rich. I have no desire, and the people of themselves remain simple." [1]

To let people work out their own salvation is Lao Tzŭ's cardinal doctrine of government. On the one hand, this theory is tainted with the Stoic pessimism. On the other hand, it is the principle of laissez faire, or what he called the practice of nonassertion.[2] Accordingly, a statesman should abandon pleasure, indulgence, and extravagance. He should not try to enlighten the people; reversely, he should make them simple-minded. "If people are difficult to govern, it is because they are too smart. To govern the country with smartness is the country's curse. To govern the country without it is the country's blessing." According to him, if a government were inactive, its people would be prosperous; if it were prying, the people would be needy. A big country should be governed as a small fish was fried; neither gutting nor scaling should be required. The best way to satisfy the

[1] "The Canon of Reason and Virtue," *op. cit.*, p. 126.

[2] The origin of the phrase "laissez faire" has been traced to the reply given to Colbert when the latter assembled a group of leading merchants of France and desired their advice and opinion as to how he could best serve and promote commerce. Their spokesman, who tradition says bore the name Legendre, answered in the words: "*laissez nous faire*" (Let us alone). This phrase gained currency chiefly through its being quoted by Turgot, whose policy, directly opposed to that of Colbert, took precisely this stand of laissez faire. See A. Oncken, "Die Maxime Laissez Faire et Laissez Fasser, ihr Ursprung, ihre Werden," Berne, 1886. See also W. H. Hamilton, "Current Economic Problems," 2d ed., p. 33, Chicago, 1919; W. Blackstone, "Commentaries on the Laws of England," Book I, Sec. 2, Oxford, 1765. According to A. V. Dicey, the individualism connected with the name of Bentham is that "every person is in the main and as a general rule the best judge of his own happiness."—*A. V. Dicey, "Lectures on the Relations Between Law and Public Opinion in England During the Nineteenth Century," pp. 125–149, London, 1905.* John Stuart Mill observed that "the public collectively is abundantly ready to impose, not only its generally narrow views of its interests, but its abstract opinions, and even its tastes, as laws binding upon individuals."—*J. S. Mill, "Principles of Political Economy," Book V, Chap. XI, London,* 1871.

enlightened people would be to abandon all means of satisfaction. Theft, rivalry, and confusion in society would not have existed if there were not things worthy, valuable, and prudent. So Lao Tzŭ continued:

"Not exalting worth keeps people from rivalry. Not prizing what is difficult to obtain, keeps people from committing theft. Not contemplating what kindles desires, keeps the heart unconfused." [1]

"Abandon your saintliness; put away your prudence; and the people will gain a hundredfold. Abandon your benevolence; put away your justice; and the people will return to filial devotion and paternal love. Abandon your scheming; put away your gains; and thieves and robbers will no longer exist." [2]

Lao Tzŭ considered that a statesman should preserve three treasures: economy, compassion, and not daring to come to the front in the world. The compassionate can be brave; the economical can be generous; and those who "dare not come to the front in the world can become perfect as chiefs." [3] It was reported that Lao Tzŭ, as a state librarian, was once in charge of the secret archives under the disintegrating national government of the Chou (周) dynasty.[4] The hopeless situation had probably made him believe in a completely autonomous local government. His ideal state was a small region with a small population, ruled by a government without issuing laws and imposing regulations:

"In a small country with few people, let there be aldermen and mayors who are possessed of power over men but would not use it. Induce people to grieve at death but do not cause them to move to a distance. Although they had ships and carriages, they should find no occasion to ride in them. Although they had armors and weapons, they should find no occasion to don them.

"Induce your people to return [the custom of] knotted cords and use them [in the place of writing]; to delight in their food; to be proud of their clothes; to be content with their homes; to rejoice in their customs; then in a neighboring state within

[1] "The Canon of Reason and Virtue," *op. cit.*, pp. 98–112, 113, 127, 130.
[2] *Id.*, p. 105.
[3] *Id.*, p. 131.
[4] Ssŭ-ma Ch'ien on Lao Tzŭ, translated by Carus, *op. cit.*

sight, the voices of the cooks and dogs would be within hearing, yet the people might grow old and die before they visited one another."[1]

According to Lao Tzŭ, a man in such society would probably be as happy as described by a famous poet (Li Po, 李白) who lived two thousand years later:

"Flocks of birds have flown high and away;
A solitary drift of cloud, too, has gone, wandering on.
And I sit alone with the Ching-ting Peak, towering beyond.
We never grow tired of each other, the mountain and I."[2]

Antimilitaristic. Another feature of Lao Tzŭ's political thought is his strong opposition to the organization of armed forces. "He who with reason assists the master of mankind will not with arms conquer the empire. His methods [are such as] invite requital. Where armies are quartered, briars and thorns grow. Great wars necessarily are followed by famines. A good man acts resolutely and then stops. He ventures not to take by force." Even beautiful arms were regarded as unblest among tools; people had better shun them. Rejoicing at a conquest meant to enjoy the slaughter of men. He who enjoyed the slaughter of men would most assuredly not obtain his will in the empire.[3] Lao Tzŭ's position was supported by the theory of one of the greatest Chinese tacticians on war. Thus Sun Wu Tzŭ (孫武子, fifth century before Christ) said:

"There is no instance of a country having benefited from prolonged warfare. . . . Poverty of the state exchequer causes an army to be maintained by contributions from a distance. Contributing to maintain an army at a distance causes the people to be impoverished. On the other hand, the proximity of an army causes prices to go up; and high prices cause the people's substance to be drained away. When their substance is drained away, the peasantry will be afflicted by heavy exactions. With this loss of substance and exhaustion of strength the homes of the people will be stripped bare, and three tenths of their incomes will be dissipated; while government expenses for broken chariots,

[1] "The Canon of Reason and Virtue," *op. cit.*
[2] "The Works of Li Po the Chinese Poet," done into English verse by S. Obata, No. 29, New York, 1922.
[3] "The Canon of Reason and Virtue," *op. cit.*, pp. 112, 113.

worn-out horses, breastplates and helmets, bows and arrows, spears and shields, protective mantlets, draft oxen and heavy wagons, will amount to four tenths of its total revenue."[1]

Policy of Passive Resistance. Lao Tzŭ was by no means a man of slavish and submissive character. He considered the surest way to win a war was not to fight with weapons; for no one could defeat a man who would not fight. "The world's weakest overcomes the world's hardest. Nonexistence enters into the impenetrable." This principle, he argued, was known by every one in the world; but none would practice it. "In the world nothing is tenderer and more delicate than water. In attacking the hard and the strong, nothing will suppress it. There is nothing that herein takes its place. The weak conquer the strong, the tender conquer the rigid."[2]

The Confucian Paternalism. Lao Tzŭ advocated a government by men who might possess all powers but would not use them. This idea of government of men was fully developed by Confucius to the extent that we may use the word "paternalism" to describe the essence of his political philosophy. By paternalism is meant the ideal of government by personal example in contrast to the idea of government by laws.[3] Confucius believed that a successful government lies in getting the proper personality. "If good men were to govern a country in succession for a hundred years, they would be able to transform the violently bad, and dispense with capital punishment."[4] According to him, a government would be effective without the issuing of orders, if the personal conduct of the governor were correct. If his conduct

[1] "Sun Wu Tzŭ on the Art of War, the Oldest Military Treatise in the World," translated by L. Giles, pp. 12–141, London, 1910.

Mo Ti (墨翟, 500–425 B.C. ?), noted for his philosophy of universal love (兼愛, or *l'amour universal*), held that the crime of taking spoils through warfare exceeds a hundred times the guilt of stealing fruit in another man's garden. See A. David, "Le Philosophe Meh-ti," pp. 116–127, London, 1907; E. V. Zenker, "Geschichte der Chinesis Chen Philosophie," pp. 225–247, Reichenberg, 1926; Yu-lan Feng (馮友蘭), "A Comparative Study of Life Ideals," Chap. VII, Shanghai, 1924.

[2] "The Canon of Reason and Virtue," *op. cit.*, pp. 119, 135.

[3] W. S. A. Pott, "Chinese Political Philosophy," p. 69, New York, 1925.

[4] "The Chinese Classics," translated by J. Legge, "The Analects" (論語), Book XIII, Chap. CL, Boston, 1883.

were incorrect, he may issue orders, but they would not be followed.[1]

A man of virtue, according to Confucius, would be a good ruler. "He who exercises government by means of his virtue, may be compared to the north polar star, which keeps its place, and all stars turn towards it."[2] A good ruler should be a man of decision and intelligence.[3] He "never in walking takes a short cut and never comes to an office, excepting on public business."[4] He "does not boast of his merit."[5] He ought to possess wisdom; "to give one's self earnestly to the duties due to men, and, while respecting spiritual beings, keep aloof from them."[6] He would, in his eager pursuit of knowledge, forget his food; in the joy of his attainment, he forgets his sorrows; and does not perceive that old age is coming on.[7] He would not be "proud and niggardly."[8] He would serve "his prince according to what is right."[9] He could make his prince "leader of all the princes, and unite and rectify the whole empire."[10] He should not be worried about his salary; "a minister, in serving his prince, reverently discharges his duties, and makes his emolument a secondary consideration."[11] A prince should not neglect his relations; nor cause the great ministers to repine at his not employing them; nor dismiss from their offices the members of old families without some great cause.[12] A person in authority would be considered excellent when he "is beneficent without great expenditure; when he lays tasks on the people without being covetous; when he maintains a dignified ease without being proud; when he is majestic without being fierce."[13]

1 "The Chinese Classics," *op. cit.*, Book XIII, Chap. XX.
2 *Id.*, Book II, Chap. I.
3 *Id.*, Book VI, Chap. VI.
4 *Id.*, Chap. XII.
5 *Id.*, Chap. XIII.
6 *Id.*, Chap. XX.
7 *Id.*, Book VII, Chap. XVIII.
8 *Id.*, Book VIII, Chap. XI.
9 *Id.*, Book XI, Chap. XXIII.
10 *Id.*, Book XIV, Chap. XVIII.
11 *Id.*, Book XV, Chap. XXXVII.
12 *Id.*, Book XVIII, Chap. X.
13 *Id.*, Book XX, Chap. LI.

Essentials of a Good Government. The Confucian test of a good government is grounded in the ethical philosophy of human relations. Confucius lived in an age when there were numerous cases where princes were murdered or deserted by ministers, fathers by sons, husbands by wives, brothers by brothers, and friends by friends.[1] Naturally, he would be inclined to think that these occurrences should be stopped under a good government. Once a minister of his neighboring state murdered the duke. Confucius went to court and asked the sovereign of his state (Lu, 魯) to punish the murderer. In his "Spring and Autumn" (春秋), or "The Annals," Confucius cited prominently many cases of regicides and patricides with a view of showing that such murderers had received severe punishment in history. His system tended to foster the authority in a Chinese ruler and father; the inferior and younger generations have been made submissive. As Mencius (孟子) put it, "Confucius completed the 'Spring and Autumn,' and rebellious ministers and villainous sons were struck with terror."[2] In fact, to make history a study of morals as well as one of facts has been a distinct characteristic of the Chinese historians since Confucius wrote his "Annals." Finally, the master regarded the sufficiency of food, the sufficiency of military equipment, and the confidence of the people in their ruler as the requisites of government. The military force was for protection; in conducting domestic administration, one should not kill.[3] When the people were numerous, enrich them; when they were enriched, teach them.[4]

The Confucian Golden Rule. Confucius frequently spoke of the excellent rule under the ancient emperors—especially Emperors Yao (堯) and Shun (舜). In the last chapter of "The Analects," it is recorded that Yao once told Shun: "Oh! You, Shun, the Heaven-determined order of succession now

1 Ssŭ-ma Ch'ien said that in the period of "Spring and Autumn," there were thirty-six cases of regicide, and fifty-two cases of the extermination of the state. Cases where rulers fled from their own ancestral halls were numerous. See "Les Mémoires historiques," *op. cit.*, Chap. 130.

2 "The Works of Mencius," translated by J. Legge, Book III, Pt. II, Chap. IX, Boston, 1882; Ku Hung-ming (辜鴻銘), "The Spirit of the Chinese People," pp. 34, 35, Peking, 1915.

3 "The Chinese Classics," *op. cit.*, Book VII, Chap. XIX.

4 *Id.*, Book XIII, Chap. IX.