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# THE CHINESE THEORY OF CRIMINAL LAW

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Chinese legal thinkers of the past believed the foundation of a nation is in morals, rituals, and ethics, and that law was only a supplement to rites or a means to achieve an end. Hence, government by rites, not by law.

To protect human rights is the main object of law but in China law is subordinate to morality, so that legal procedure is much simpler than moral procedure. The emphasis on mores and folkways makes law simple and constant. The Chinese settle their difficulties not by going to court but by holding a community council to settle disputes, chiefly on moral considerations. For in China each village is self-governed by rite. To pay revenue is the people's duty to government. To do their work diligently is their duty to themselves and their families. They settle their difficulties by themselves. Law is not of much use in villages.

Confucianism dominated the whole sphere of Chinese thought as the following quotations will show:

If the people be led by laws, and uniformity sought to be given them by punishment, they will try to avoid punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.<sup>1</sup>

Chi Kang asked Confucius about government, saying, "What do you say to killing the unprincipled for the good of the principled?" Confucius replied: "Sir, in carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good. The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it."<sup>2</sup>

If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, proprieties and music will not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or feet.<sup>3</sup>

<sup>1</sup> Confucius, *Analests*, Book II, Ch. 3, p. 10.

<sup>2</sup> *Ibid.*; Book XII, Ch. 19, p. 122.

<sup>3</sup> Confucius, *Op. Cit.*, Book XIII, Ch. 3, pp. 127-8.

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.<sup>4</sup>

In hearing litigations, I am like any other person. What I must do, however, is to cause the people to have no litigations.<sup>5</sup>

Since Confucius advocated government by gentlemen and by rite, the Chinese legal theory and code are governed by the concept of rites, and government officials and social workers are supposedly so well trained in Confucian moral and ethical doctrines that those who govern are immune from punishment. If the ruler is good, he will select virtuous officials; if the officials are good, they will govern the country well; and, if the country is well governed the people will follow the moral and ethical principles and legal forces will be unnecessary. Emperor Wen of the Han Dynasty (207 B.C. to 220 A.D.), who attempted to practice Confucian humanism, tried even to dissolve the courts, tear down prisons, and abolish punishment and torture of every kind. But the execution of his plan was of short duration.

China has had various legal codes, but there has never been a Constitution. Whatever the ruler said—that was law. Even the local government officials had their own laws. When the officials abused their power the people were punished not by laws but by officials. This is the effect of government by presumed gentlemen.

*Yin, Yang, the Five Elements, Taboo, and Their Relation  
to Chinese Law*

The Chinese law of thought is Yin, Yang and the Five Elements which have been used by the Chinese philosophers for several thousand years to interpret social and mental phenomena. Yin means female (negative) and Yang means male (positive). Yin and Yang form the positive and negative principles in Nature. The universe is composed of Yin and Yang. This dualistic metaphysics is essential to Confucian philosophy. The Five Elements are: Metal, Wood, Water, Fire, and Earth, which are the five principles of the universe as expounded by the ancient Greek philosophers. The Chinese concept of law, as well as their concept of medicine, is associated with the Five Elements. Son should obey father, subjects the ruler, wife the husband, because Earth must follow Heaven. Boys cannot depart from their parents, as Fire cannot depart from Wood. Girls, however, can depart from their parents when they get married, as gold, sand or metal flows away with the stream.

<sup>4</sup> *Ibid.*, Ch. 11, p. 131.

<sup>5</sup> *Ibid.*, Book XII, Ch. 13, p. 121.

When one gets married he must personally welcome his bride, because the Yang is condescending to meet the Yin just as the Sun is setting to welcome the Moon. The principle in Nature and also in society is Yin and Yang. Yang indicates virtue, and Yin, punishment. Virtue belongs to the sphere of morality and punishment to the sphere of law. Punishment tends toward killing the people, whereas virtue tends toward their survival. Thus Yang, like the warm sun in Spring and Summer, makes trees and grass grow, and Yin, like the cold wind in Autumn and Winter, withers them. To teach people virtue is more important than to punish them by law, Confucius thought, and it is a real tyranny if the ruler punishes his people by death without teaching them virtue beforehand. When the ruler sentences his people to death, the date of sentence is always in the Autumn, and the date of execution is always in the Winter, because the Autumn and Winter belong to Yin which denotes the time of killing when the weather is so cruel as to wither trees and grass.

As to the theory of Taboo, it is just as important as Yin and Yang and the Five Elements in the determination of the Chinese Legal Code. Taboo is a kind of folkway; it operates in the same manner as laws in society. Taboo prevents people from entering the palaces and from coming into contact with the feudal lords. It prevents sacred names and rulers' personal names from being mentioned in any kind of writings. If one writes an article in which he carelessly uses a word which is identical with the first or middle name of the ruler, he is subject to punishment by law. To prohibit the use of a sacred name or that of the Emperor is a peculiar custom of Old China. It began with the Chou Dynasty (1027-256 B.C.), was prevalent during the Chin Dynasty (221-207 B.C.), and ended in the period of T'ang (618-907 A.D.) and Sung (960-1279 A.D.). Those who violate such taboos are condemned as rebels. Rebellion is considered as the disturbance of the order of the universe and as the chief of the ten great crimes which are: rebellion, high treason, rioting, parricide, murder, sacrilege, unfilial conduct, discord, failure in duty to one's neighbor, and incest. The death penalty must be imposed on those who violate this taboo.

### *Militarism and Law*

In Old China military science was closely associated with law, and the people who offended the authorities were punished by military means. There were five instruments for punishment: the first degree of punishment uses weapons or an axe; the second uses a knife or a saw; the third uses a whip. The virtuous

people would not be soldiers for soldiers fight and kill. When an army is organized it means that punishment begins and law is then necessary. Law implies and requires a large group of men banded together as into an army. When the Yellow Emperor (2697 B.C.) organized to fight against the barbarian Chih-yu, he also initiated law to punish him. But Chih-yu initiated law also and organized his army to challenge the Yellow Emperor. The Chinese criminal law arose with the army system. As in the army, weapons are used to punish the enemy, so in law weapons are required to punish people. When the legal philosopher Kuan-chung considered the army as the supporter of the ruler, he really meant the law was the supporter of the ruler. On the surface the army and law fall into different categories, but in fact they serve the same function—to encourage the good and to punish the bad; to get rid of evil and give peace to the good; or to suspend rebellion in order to maintain social order. Thus, in many dynasties, army officers acted as judges and military law served as criminal law.

#### *On the Theory of Equality Before Law*

That men are equal before law as the Westerners hold, was approved by the Chinese Legalist School during the Warring States (480-221 B.C.). But the Confucianists are divided into two opposite groups: one agrees with this statement, and the other disagrees. Confucius and Mencius held that men should not be equal before law. In *The Book of Chou Ritual*, there is a statement that “the judges who manage the lawsuits by means of the five punishments should not put in prison those men and women with official titles and should not execute those who are relatives of the Emperors.” The criminal law consists principally of five punishments, which are directed against three thousand offenses. Of them, disobedience to one’s parents is considered the most heinous crime. To threaten the sovereign with force is an act which shows that the wrong-doer does not know the duty of an inferior to a superior; to say anything against the government founded by the wise men of many generations gone by is an act which shows that the speaker does not know what law is; and to say that a son need not be filial to his parents is also an act which shows that the speaker does not know the natural relation and duty of a son to his parents. Such acts will no doubt lead the man to a wrong course of life, in which case the five punishments come into effect. These are: whipping with bamboos, bastinadoing, banishment, exile, and death. The five

great punishments are: cutting off the nose, amputating the feet, cutting off the ears, castration, and capital punishment.

The Chinese criminal law is based on Confucian humanism, theory of filial piety, and on Confucian theory of social status. The orthodox Confucianists consider human nature is by nature good, so that all men could be sages if government by rite were made possible. They object to law because it supposes that men are naturally bad. They think the people can all receive education, become gentlemen, act virtuously, so that there is no need of punishment nor room for criminal law.

The fundamental step toward the achievement of humanity is filial piety. The consideration of filial piety by Confucius emphasized the patriarchal line. The direct blood relation was supposed to make the community stable. This made for the large family system and for considering the nation as an enlarged family. Thus ethical relationship, mores, and folkways were supposed to be served as law. Even though the relatives committed crimes, they should be punished by the moral code, not the legal code, and eventually their crimes should be concealed by their filial or pious children. In the *Analects*, we have the following:

The Duke of Sheh informed Confucius, saying, "Among us here there are those who may be styled upright in their conduct. If their father have stolen a sheep, they will bear witness to the fact." Confucius said, "Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this."<sup>6</sup>

And in the *Works of Mencius*:

Tao Ying asked Mencius, saying, "Shun being emperor, and Kao-yao chief minister of justice, if Ku-sou (Shun's father) had murdered a man, what would have been done in the case?" Mencius said, "Kao-yao would simply have apprehended him." "But would not Shun have forbidden such a thing?" "Indeed, how could Shun have forbidden it? Kao-yao had received the law from a proper source." "In that case what would Shun have done?" "Shun would have regarded abandoning the empire as throwing away a worn out sandal. He would privately have taken his father on his back, and retired into concealment, living somewhere along the seacoast. There he would have been all his life, cheerful and happy, forgetting the empire."<sup>7</sup>

In these cases we can see that Confucianism emphasizes filial piety to the neglect of social welfare. It is due to the logical fallacy that Confucianists identify social welfare and filial piety. In relation to inferior creatures, the superior is kind, but not loving. In relation to people generally, he is loving, but not affec-

<sup>6</sup> Confucius. *Op. cit.*, Book XIII, ch. 18, p. 134.

<sup>7</sup> Mencius. *The Works of Mencius*, Book VII, ch. 35, p. 12.

tionate. He is affectionate toward his parents and kind toward lower creatures.

Confucius formulated the theory of social status by the rectification of names. (See Note 3 above.)

The rectification of names is the way to determine the social status of the individuals, as Duke Ching of Chi asked Confucius about government, and Confucius replied,

There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son.<sup>8</sup>

Again, Confucius divided all people into two classes: superior men and mean men. Superior men, who are virtuous, should not be punished by any means but self-rebuke; mean men, who have no virtue, may be punished by law. In the *Book of Rites* it is stated:

The inferior men are not expected to practice rites, while the superior men are not subjected to be punished by law.<sup>9</sup>

There are eight kinds of people who have social status who should be favorably treated by law: 1. The relatives of officials; 2. the bosom friends of officials; 3. the sages, wise men, or scholars; 4. the capable military and political leaders; 5. the meritorious generals who have achieved a great deal on battlefields; 6. the honorable officials who have official rank above the third degree; 7. military officers who have suffered in action; and 8. state guests, that is, those diplomats who are guests from other feudal states. These people, though subject to punishment when violating the law, should enjoy mitigation of punishment.

### *Some Other Phases of Chinese Criminal Law*

Although Confucian humanism dominated Chinese legal thought, Chinese legal schools have in various stages advocated "government by law." Some rulers have even adopted the proposals of the legal schools to impose various severe punishments upon those who deviate from social norms. First of all a system of examining a criminal by torture was initiated. This system began with the Ch'in Dynasty when the rulers attempted to strengthen and enrich their Empire by initiating various laws to form a dictatorial government. When the judge holds a preliminary hearing, his judicial investigation is based on words, manner, attitude, hearing, and vision; then he uses the punishment of bambooning and bastinadoing so that the offender may be forced to admit the crime.

<sup>8</sup> *Ibid.*, Book VII, ch. 11, p. 120.

<sup>9</sup> Confucius, *The Book of Rites*, ch. 7, section 2.

Secondly, there was a system of joint responsibility, that is, when one committed a crime and was sentenced to death all other members of his father's, mother's, and wife's families were sentenced to death also because of his crime. This system was initiated by Duke Wen of the State of Chin (350 B.C.). During the Han Dynasty even the members of the offender's concubines' families were involved and sentenced to death. Such was the case of Shun-yu Chang, whose six concubines had been remarried after he was arrested and before he was sentenced to death, but whose concubines' families were eventually sentenced to death regardless of some officials' protest against it.

In the third place, there was a system of revenge. As Confucianism emphasized the theory of filial piety, so the theory of revenge was encouraged when one's father was murdered by others. In *The Book of Rites* it is enjoined "not to live under the same sky with the murderer of one's father." For the father is supposed to be the heaven of the son, and, if the murderer kills one's heaven, and one still lives with the murderer under the same heaven, he is certainly not a filial son. Besides the revenge for father, revenge for brothers and friends was encouraged also. Sometimes revenge went as far as nine generations, that is, from great-great-grandfather to great-great-grandson. In some cases, after the son revenged for his father, he went directly to the court to admit his crime which might either be pardoned or be punished slightly. According to *The Legal Code of the Ching Dynasty* (1644-1911), if the grandparents or parents were murdered, the grandson or son who killed the murderer should be pardoned or given sixty blows. If the murderer at the time escaped but finally happened to be killed by the descendents of the murdered, these descendents should be given only one hundred blows. If the murderer had been sentenced to confinement for a certain term and had been pardoned, but still was being sought by the descendents of the murdered, the descendents should only be exiled to three thousand *li* away. If the murderer was pardoned, the state law was enforced so that he should not be considered a criminal any more. But, if the descendents of the murdered nevertheless killed the murderer, the descendents should be put in prison for life. If the murderer served his term and was set free, but yet disturbed the descendents of the murdered and was killed by them, the descendents should only be banished three thousand *li* away.

In the fourth place, there was a system of punishment according to booty, loot, and spoil. Officials who are avaricious, or who rob, or secrete booty, or receive plunder, or sell liberty to a

prisoner, or buy stolen goods, or sit still and share the plunder, or place stolen property with an innocent person for the purpose of involving him in the theft, are punished in various degrees according to the value of the booty, bribes, and property. The punishment is from fifty blows to a sentence to death by hanging.

In the fifth place, there was a system of amnesty and probation and parole. The system of amnesty began with the period of Spring and Autumn (770-481 B.C.). In some dynasties the enforcement of amnesty was very frequent when the ruler attempted to practice Confucian humanism benevolently. But some rulers like Emperor Tai Tsung of the T'ang Dynasty were careful in the grant of amnesty because it encouraged criminals to threaten the security of good people. When Emperor Tai Tsung's empress was sick, their prince asked the ministers to urge the Emperor to grant an amnesty in order to show the royal kindness to the people, so that God might bless the Empress. However, the Empress rejected this proposal, and the Emperor initiated a system of setting prisoners free on parole. The system of probation was not often practiced, for the Chinese criminal law emphasized the retributive theory of punishment.

In general, the Chinese Code makes homicide the highest crime against the law of nature that man is capable of committing. According to English law, homicide is of three kinds: justifiable, excusable, and felonious. When justifiable, there is no guilt at all; but, when felonious, it becomes the highest crime against the law of Nature. The provision of the Chinese Code, which brings a homicide under the third classification makes it felonious. It reads as follows:

In every case of persons preconcerting the crime of homicide, whether with or without design, against the life of an individual, the original contriver shall suffer death by being beheaded. All the accessories to the contrivance, who likewise contribute to the preconcerted homicide, shall suffer death by being strangled.

Another provision of the Code reads:

All persons guilty of killing in an affray, that is to say, striking in a quarrel or affray so as to kill, whether the blow be struck with the hand or the foot, with a metal weapon, or with an instrument of any kind, shall suffer death by being strangled.

Immediately following is this paragraph:

All persons guilty of killing with intent to kill shall suffer death by being beheaded.

The quotations from the *Code* make it clear that to convict of the crime of murder, either in English or Chinese law, there must

be proof of a felonious intent. In the Chinese Code the felonious element is expressed by the words "preconcert or design to kill." So is rape, which is judged by the fact that the mind is criminal. In English law, rape is defined as "the unlawful, carnal knowledge by a man of a woman, committed with force, where she does not consent." The same law implies that a boy under the age of fourteen years is conclusively presumed incapable of committing the offense, whatever be the real facts of the case. The reason is that puberty does not often develop at an early period, and indecencies which tend to corrupt public justice are thereby prevented. In a female the law establishes the age of twelve years for her legal puberty. The cases which have been decided by the Chinese courts mainly sustain in principle the definition in English law of what is necessary to constitute the crime of rape.

### *Modern Trends*

Since Western legal system was introduced into China, Chinese criminal law has been greatly improved. Formerly there was no clear demarcation between law and morality, but now people pay attention to the idea of "human rights" and "obligation." After the Boxer uprising of 1900, two viceroys, Liu Kuan-I and Chang Chih-tung, submitted a petition to the Emperor for the change of Chinese laws. The criminal law they attempted to change was in the following nine headings:

1. To exempt the litigants from all expenses of lawsuits.
2. To investigate facts by not misusing or abusing language.
3. To get rid of the system of examining a criminal by torture.
4. To emphasize witnesses.
5. To improve the prisons from the humanistic point of view.
6. To build penitentiaries and reformatories and to train the prisoners in various crafts.
7. The government should pay all expenses to those coroners who used to be supported by the defendants.
8. To limit as much as possible the system of fines which are imposed to atone for offenses.
9. To appoint special administrators to supervise the courts and prisons.

Following this petition came a revision of the traditional criminal law. Later on the Chinese legalists, such as Shen Chia-pen and Wu Ting-fang, also submitted a petition to urge the authority to revise criminal law. The important items were four in number. First, to abolish the practice of ignominious slow punishment by quartering a criminal, which was initiated after

the T'ang Dynasty. Second, to abandon the practice of decapitating a criminal and exhibiting his head on a pole, which was initiated in the periods of Ch'in and Han. Third, to abolish the system of joint responsibility, which was initiated during the State of Chin. Fourth, to discontinue the system of branding words on criminals or of branding criminal terms on a criminal's forehead, which started on its way during the Chou Dynasty. All these points aim at improving Chinese criminal law. Some even advance the theory that in order to practice Confucian humanism it is advisable to stop all sorts of severe punishment, while others consider that education is more important than punishment, and that scientific inquiry is more important than a hostile attitude.