

THE EARLY LEGALIST SCHOOL OF
CHINESE POLITICAL THOUGHT

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THE OBJECTIVE STANDARD AND THE LAW WHICH ALTERETH NOT

THE general argument so far has given little indication why this group of writings should be styled "Legalist," though this may have been suggested by some of the quotations given. In the quotation given from the "T'ien Sha P'ien" regarding Shen Tao it will be noted that one of the distinctive qualities of the Way of the Universe as a guide for human action is its impartiality—the absence of any assertion of personal predilection or partiality. It was in fact the doctrine of non-assertion that led the Legalists to formulate the necessity of an objective standard. For many matters must present themselves for a ruler's decision and if he is not to assert his own preferences or opinions he must have some means of deciding outside himself not subject to human limitations. It is for a similar reason, Shen Tao points out, that lots are used. But to decide both routine and important matters of state by the chance of the lots could hardly be recommended as a serious policy, and thus was deduced the necessity of an objective standard in the shape of a fixed law. This is clearly seen from the views which L. Wieger attributes to Teng Se, whom he calls the first legalist: "The 'tao' does not consult beings; the prince should treat his people as Heaven treats everyone—in a general, not a particular way. Above all he should not try to be kind to them, but merely to apply the law rigorously to them without respect of persons. . . . This is the principle unifying a principality. To rule is not to act but to let the law apply itself without intervention."

In much the same way Heo Kuan Tse says, "The efficacy of Heaven is like the pole of emanation of the virtue of 'tao', which

is 'fah'; what conforms thereto is good, what does not is evil. Heaven is a being who gives by virtue of the 'tao' their nature to all beings. The role of the sage is not to make the law but to seize it in the 'tao,' in the action of Heaven, and then to apply it without alteration. The sage each moment must make an effort to seize the decree of Heaven for that moment. The rule for politics is impartiality."

Some writers of the period treated this subject of impartiality in a broad manner, both general and generous. This is especially true of Sze Chiao who was perhaps more of a Confucianist, at least in theory, as the following passages will show: "A public mind is essential. He who looks from the bottom of a well can see only a few stars, but he who looks from a mountain top can see from horizon to horizon; it is not that the latter is more clear-sighted, it is that the standpoint is altered. The private mind is like the position within the well, the public mind is like the position on the mountain top. Wherefore if knowledge is bound by individualism little will be known, while starting from a public standpoint much may be known."

Let us take another passage, this time one quoted by L. Wieger. "One must not do to others what one likes not oneself, one must correct in oneself what one dislikes in others. No jealousy! No envy! If another profits it is as if I profit. One must rejoice in the recognition of other men as in one's own recognition, and be sorry for their faults as if one had committed them oneself. As one would suppress those who make disorder in the state so one should stifle in one's own mind thoughts and sentiments which make for moral disorder."

"Yet," adds Wieger, "he was a legalist and we can see how Wei Yang whose adviser he was, applied his ideas without any sugar coating." Perhaps this is a little unfair. But a certain affinity with the quotations from Teng Se and Heo Kuan Tse will be seen in his recommendation to "let the names rectify themselves and let the activities take their own course, but let approbation and punishment be attached to the names. Then no people will be irreverent to you." Again the idea behind his saying, "Check the names by the substances, and all will be well," is that conception of an objective standard which, as we have noted, led to the belief in the necessity of a fixed law.

The first passage from Sze Tse quoted above will recall Han Fei's pronouncement: "Those who in ancient times ruled the people followed the public law and dispensed with private policy."

That the law was regarded by some writers in the first instance as merely one form of fixed standard is shown by several quotations from Yin Wen Tse in Hu Shih's "The Development of Logic in Ancient China." "Mankind," says Yin Wen Tse, "has sought to determine length, quantity, weight and tone by means of rulers, bushels, balances and tonal regulators, respectively. It tests reality and unreality by means of names and determines order and disorder by means of law. . . . Therefore the multifarious activities are comprehended in the one, and all standards are standardised by the law. . . . It is by this means that the stupid and defective may be governed as well as the clever and intelligent." Indeed the word "fah" now usually translated "law" (but in common speech often signifying method or plan) originally applied to measures. Yin Wen Tse gives four meanings of "fah":—(1) the permanent forms, such as the relations between ruler and subjects, between a superior and a subordinate; (2) the conventional forms, such as capability and incompetency, wisdom and ignorance, similarity and difference; (3) the forms (laws) for the ordering of the people, such as rewards and punishments, honours and penalties; and (4) the standards of measurement, such as the measures of area, weight and volume." Professor Hu also quotes aptly in this connection the definition of "fah" in the "Kuan Tse" as "that by means of which activities are promoted and aggressions prohibited."

Another interesting word in this connection is "hsing." This is the word now commonly used for punishment, but its original meaning seems to be a mould and so a pattern, the connection of which with the idea of a fixed standard is obvious. Furthermore in ancient books it was used for the administration of justice, and, in effect, for law. This reminds us that the law was regarded principally as the method or standard according to which rewards should be bestowed and punishments inflicted. This is certainly the standpoint from which most of the Legalists discuss it.

This point of view is perhaps most clearly expressed in Han Fei's chapter, "On Standards" (Yu Tu): "Now if men are advanced on the basis of merely reputed ability, then ministers will become estranged from the rulers and will form parties. Then if

officials are appointed for party reasons, the people will give their attention to making personal connections and will not seek to put the law into practice. Thus there will be a want of ability in office and so the country will be brought to disorder. When rewards are given according to reputation and punishments are based on slander, then those who delight in rewards and fear punishments will neglect public affairs and carry out their private schemes and men will form parties to promote each other's interests...and thus when there are flagrant faults they will be covered up; and so loyal ministers will be in danger of undeserved death and wicked ministers will enjoy undeserved security and profit...Such a state of affairs is the root of destruction...A minister who shows mercy and bestows benefits, who cares for the people for the sake of his reputation is not benevolent...The law takes no account of rank even as the carpenter's line does not follow curves. What the law decides the learned cannot explain away, nor dare the bold dispute it. The punishment of wrong cannot be escaped. When the high officials are distributing rewards the common man is not excepted...As a state respects the law, it is strong; as it fails to do so, it is weak...The wise ruler selects men by law and measures their merit by law."

The same view of law is found in the quotation from Shang Yang's discourse on the evolution of society quoted in a previous chapter: "When the land became extensive and the people numerous, then appeared irregularities and conspiracies, wherefore laws were established that standards might be fixed. Thus came about the idea of sovereign and minister, the distinctions between the various departmental officials and the limitations fixed by law."

Of course the idea of impartiality in the distribution of rewards and punishments was not peculiar to the Legalists, and it must be admitted that some passages on this subject in the "Kuan Tse" might have been written by a good Confucianist. Let us take two examples: "The former kings put great stress on glory and shame, and made them depend upon deeds. Throughout the empire there was no personal favouritism nor private spite. The good prospered, those who did evil suffered. As their rewards were clearly just they did not cause scandal, and as their punishments were clearly just they did not appear cruel." ("External Teachings").

"When one cannot establish right teaching and do away with

wrong, when one cannot recompense the deserving, nor punish crimes, if at the same time one thinks of governing the people, one thinks of doing what has never been possible."

Such views are really very like those expressed in Tong Chong Hsu's chapter "On Investigating Merit and Reputation." But the true Confucian judgment on this matter is expressed in the "Analects": "The master said, 'If the people be led by laws, and uniformity be given them by punishments, they will try to avoid the punishment but have no shame. If they be led by virtue, and uniformity be given them by rules of propriety (or a spirit of reverence), they will have a sense of shame, and moreover will become good.'" (Legge)

The "Prince of Shang" was certainly no Confucianist. According to that statesman Government depends on three things:—(1) Law, the common implement of sovereign and minister, (2) Reliability, which must exist between sovereign and minister, (3) Authority, by which the sovereign alone rules. Of these the greatest is law for it is fundamental; the others are significant only in relation to it. L. Wieger thus sums up the views of Wei Yang: "The most just and humane cannot make others so, therefore the duty of the sage-prince is only to make them keep the laws; any officer who transgresses the law or allows it to be transgressed must be put to death with his family. The law binds all the people of the state together. The law is the refrigerator that brings about solidarity."

That Shen Tao also held to the supremacy of the law may be shown by the following quotation: "The wise do not go outside the law and readily make their own schemes, scholars should not turn their backs on the law, seeking to make a name, nor should the minister turn his back on the law to gain fame. . . . One's family may be punished, one's relatives perish, but the law must never fail."

An incident recorded by Han Fei Tse indicates that Shen Pu Hai shared the views of other Legalists in this respect: Chao the ruler of Han said, "It is not easy to put Law into practice." Shen replied, "Legalists see merit and grant rank; on the basis of ability they make their official appointments. You, after making laws, listen to those about you and consequently it is difficult to put them

into practice." The prince replied, "Now I know how to cause my laws to be carried out."

But in theory at least it was Han Fei Tse himself who carried furthest this doctrine of the absolute supremacy of Law. His reasons for this are set forth in his chapter on "Criticising Authority" ("Nan Shi"): "Yao and Shun, Chieh and Cheo are produced only once in a thousand generations; those better than the average are not equal to Yao and Shun, and those worse, not so bad as Chieh and Cheo; so to embrace Law means order, to turn the back on Law, disorder. To turn the back on Law and await a Yao or Shun to restore order would mean a thousand generations of disorder and one of order. To embrace Law and await a Chieh or Cheo to cause confusion would be to have a thousand generations of order and one of disorder." Liang Ch'i Ch'ao comments on this passage that "it is in fundamental opposition to the doctrine of the rule of the most able, which implies 'when men thrive, government prospers; when men decline, government ceases.' It holds that long continued good government cannot on this basis be hoped for." Liang in this connection quotes Hsueh Tse's criticism: "Yi's method was not futile, yet Yi did not always hit the target; Yu's 'fah' seemed sound, yet the Hsia Dynasty did not last for ever. When the method ('fah') finds the right man (to use it) there is success, when it misses the right man there is failure. . . .not to be able to adapt to circumstances is sufficient to bring to confusion."

That Han Fei, however, was prepared to maintain his theories in the face of all the Confucianists is clear from the following passage in his chapter entitled "Five Kinds of Maggots": "The Literati by their learning confuse the law, the knightly by their deeds of daring transgress the prohibitions, but the rulers treat both with respect and thus bring about disorder. To depart from the legal is criminal and yet so do all the literati by means of their learning. To oppose the prohibitions is punishable with death and yet the knights defend each other in their private exploits. Thus to those whom the law condemns the princes show favour. Those whom the magistrates would punish the higher authorities cherishWith such practices ten Huang Ti's could not maintain order

...Learning is of no use; if use is made of it disorder results. In the state of Ch'u there was a man of stiff uprightness. His father stole a sheep so he reported the matter to the courts. The magistrate sentenced him to death, for though his action was right in relation to his prince it was wrong in relation to his father. He was found guilty because he had reported a crime. According to this way of looking at things, a loyal subject is a bad son. . . . A man of Lu who led his prince's armies in three cases fled from the battle. When Chong Ni inquired of him the cause he replied, "I have an old father; if I died he would have no one to look after him." Chong Ni regarded filial piety as a ground of promotion and so promoted him. Looking at things from this standpoint, it follows that a filial son is a disloyal subject. As a result of the magistrate's action mentioned above, the men of Ch'u would conceal crimes, and as a result of the reward of Chong Ni, it became easy to subject the people of Lu. Thus what is profitable to ruler and to subject lie in opposite directions. It is vain to seek at the same time the establishment of the character of the common man and the prosperity of the state."

Han Fei never doubted that the more important was the prosperity of the state and this tended to be bound up with a mechanical application of a fixed standard and rule regarding rewards and punishments. The unqualified approval he shows for the attitude of King Chao Hsiang of Ch'in in the following story reveals the extent to which he was willing to carry this view: When a great famine raged in Ch'in, Marquis Ying observing that in the royal park vegetation had flourished suggested that the vegetables, nuts and dates there if distributed to the people would save their lives and so asked that the park and its products be thrown open to the sufferers. But King Chao Hsiang replied, "Rewards are given only to those who have earned them by their merit; if I now do as you suggest and throw open the park to all, irrespective of merit or lack thereof, such giving of rewards irrespective of merit is the way of disorder. If I were to throw the park open to all, then those with merit and those without would struggle for the products and confusion would arise. Better were it to let them die and to maintain order."

No doubt there was something to be said for a fixed objective standard in the state of affairs prevailing in China in the years

immediately preceding the establishment of the Ch'in Dynasty, and there is some truth in Liang Ch'i Ch'ao's comment on the passage quoted from the chapter on "Criticising Personal Authority," that it contains the germ of a theory of Constitutional Government. Hsuin Tse's criticism, "Not to be able to adapt to circumstances is sufficient to bring to confusion" has a certain cogency, but is not wholly apt as applied to the writings attributed to Han Fei as a whole. For it is set forth in one passage that "A wise man never expects to follow the ways of the ancients, nor does he set up any principle for all time. He studies the conditions of his time and then devises remedies therefor. There is no constant method for the government of men," the passage continues, "that which works is the law, when laws are adjusted to the time, there is good government."

However, Sze-ma Ch'ien's comment must be regarded on the whole as just and as applicable to other Legalists besides Han Fei: "He carried to excess the idea of measuring things to distinguish between right and wrong."

PENALTIES AND A PESSIMISTIC ESTATE OF HUMAN NATURE

We have seen that the Legalists regarded law mainly in terms of rewards and punishments. We have also noted the view of Yin Wen Tse that force should only be regarded as a last resort: "When the 'tao' is not sufficient then law must be used, when the law is not effective policy must be used and when authority fails force must be used; but when force has been used there must be a return to authority, etc." But this merely serves to show that Yin Wen Tse was not a true Legalist but rather a "Logician," one of those chiefly concerned with showing the importance of an agreement between "the name and the substance"; furthermore as we learn from the "T'ien Sha P'ien" he had fallen under the influence of Meh Tse.

Even the "Kuan Tse," though on the whole its views are more humane than those expressed in other Legalist works says, "When men hate each other they become violent and therefore laws are made," implying that punishments held, chronologically at least, the first place in legal matters. But the typically Legalist view is expressed quite simply in the chapter on "Rewards and Punishments" in the fragment attributed to Shang Yang where it is maintained that in a prosperous country punishments to rewards are in the pro-

portion of nine to one; in a strong country seven to three, and in a country that loses territory five to five. "The best way," he says, "to put an end to crime is severe punishment. . . . When punishments are severe and certain, the people will not venture 'to try it on,' so there will be no punishments."

In quite the same vein Han Fei observes, "When punishments exceed rewards the people are peaceful, when rewards exceed then disorders arise. Wherefore in the governing of the people the excess of punishments over rewards is the source of good government, and the excess of rewards is the root of confusion."

Such conclusions came from the very pessimistic view of human nature held by all the Legalists. They did not discuss the nature of man as a specific question of philosophy after the manner of Mencius, Hsün Tse, Tong Chong Hsu and many others more or less well known, but their views may be easily inferred. Thus Wei Yang says, "It is well said that all men are brothers, real brothers, but it is only the law reinforced by severe penalties that can make them treat each other in a brotherly way." Han Fei is very anxious to make clear that his insistence on punishments is entirely in the interests of the people, and merely because they are incapable of understanding more humane treatment. Thus he says, "The sages seek the good of the people, wherefore when they inflict punishment it is not because they hate the people, but because they love them in a fundamental manner." He illustrates this in his chapter entitled "The Five Kinds of Maggots": "Now here is a worthless son. His father's and mother's displeasure does not cause him to repent; the reproof of the country elders does not move him; his teachers' instructions do not alter him; the love of parents, the example of the village elders, the wisdom of his teachers,—all fail to affect him in the least. Then the country magistrate sends the military police to round up the disorderly characters and the fear causes him to change his behaviour and alter his practices. Wherefore when the love of parents proves insufficient for the education of sons recourse must be had to the severe punishments of the local authorities; for the people are arrogant under love, but obedient under fear."

Similarly in another passage he says, "In these days Confucianists and Mohists alike maintain that the former kings loved the whole empire and regarded the people as parents regard their

children. This, they say, is to be seen from the fact that in the administration of justice they found no pleasure in the infliction of punishments, but when they were necessary, wept. They imply that if rulers regarded their peoples as parents their children good government would result. This idea if carried to its logical conclusion School of Chinese Political Thought—Gal. 4—The Open Court, Aug would imply there was never anything wrong in the relations of fathers to their sons. . . . Now there is no greater affection than the love of parents for their children yet the result is not always order."

He also enforces his views of the comparative futility of proclaiming love and righteousness by a comparison of the results of the efforts of Confucius and of Duke Ai of Lu as we shall see in the next chapter.

But the cynicism of the Legalists is sometimes shown in passages not dealing exclusively with punishments. A selection of such may be taken from the writings attributed to Wei Yang: "When a country has rites, music and poetry books, goodness, culture, filialness, brotherliness, honesty and power of discrimination, then rulers cannot send the people to battle and the country will be destroyed. . . . When the good rule the violent, disorder and loss of territory will result; when the violent rule the good, there will be order and national strength." (Seeking Strength). "When the people are weak the state is strong, if the state is strong the people are weak. . . . When the people are simple there will be strength and when there is luxury there will be weakness. . . . When the people are stronger than the government the state is weak, when the government is stronger than the people the state is strong."

Again in the Kuan Tse we find it stated that "Love is the beginning of hate, virtue the root of envy. When the family is wealthy then behaviour declines"—but this is not Shang Yang so the qualification is added, "except in the case of the most excellent."

Shen Tao is not less cynical because he bases his argument on the "tao": "The ancient kings never appointed a man to office who would not accept the stipend belonging to it, and they never gave a stipend which was not ample—if the appointee were not to gain something for himself out of the office the ruler would not make an appointment (i.e. the emperors made sure that the interests of their officials should be identified with that of the sovereign.) . . .

All men have a mind to seek their own interests; to make use of this fact in employing them is to follow the 'tao.' We have noted in a previous chapter the comment of the "T'ien Sha P'ien" concerning Shen Tao that he "laughed at those who valued ability and virtue." The futility of such things he illustrates by observing that if "Yao had been under Li Shu the people would not have listened to him," that it was merely because the sage occupied the throne that "what he commanded was carried out, what he forbade ceased." But of this, too, we shall have more to say in the next chapter.

Fortunately the views of these Legalists on these matters do not seem to have been very influential. Chu-ko Liang, though a professed admirer of the "Fah Chia," expressed a more humane view when he says, "Make things manifest by law and when the law is functioning then know mercy."