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Li and law, the perennial dichotomy in Chinese society: a historical survey: a thesis...

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LI AND LAW - THE PERENNIAL DICHTOMY IN CHINESE SOCIETY

A HISTORICAL SURVEY

A Thesis
Presented to
The Faculty of the American Academy of Asian Studies
College of the Pacific

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

by

Willard Perry Norberg
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>A. Scope of Thesis</td>
<td>1</td>
</tr>
<tr>
<td>B. &quot;Rectification of Names&quot; - The Problem of Terminology</td>
<td>4</td>
</tr>
<tr>
<td>C. Basic Contrasts Between Western and Chinese Law</td>
<td>7</td>
</tr>
<tr>
<td>II. DEVELOPMENT OF LAW IN ANCIENT AND FEUDAL CHINESE SOCIETY</td>
<td>9</td>
</tr>
<tr>
<td>A. Limitations Imposed by Philosophical Tenets of Chinese Society</td>
<td>9</td>
</tr>
<tr>
<td>B. Effect of Confucian Doctrines on Development of Law</td>
<td>17</td>
</tr>
<tr>
<td>C. The Rise, Fall, and Legacy of the Legalists</td>
<td>29</td>
</tr>
<tr>
<td>III. DEVELOPMENT OF CODES AND OTHER SOURCES OF CHINESE LAW</td>
<td>42</td>
</tr>
<tr>
<td>A. Pre-Han Dynasty Codes and Legislations</td>
<td>42</td>
</tr>
<tr>
<td>B. The Han Code and Related Legislation</td>
<td>50</td>
</tr>
<tr>
<td>C. Sources of Chinese Law Outside of the Codes</td>
<td>59</td>
</tr>
<tr>
<td>D. Comparative Scope of Western and Traditional Chinese Law and the Fallacy of the Criminal Civil Law Distinction</td>
<td>63</td>
</tr>
<tr>
<td>IV. MODERN DEVELOPMENTS IN CHINESE LAW</td>
<td>70</td>
</tr>
<tr>
<td>A. Westernization of Law in the Republic of China</td>
<td>70</td>
</tr>
<tr>
<td>B. Law and Legal Development in Communist China</td>
<td>82</td>
</tr>
<tr>
<td>V. CONCLUSION</td>
<td>110</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>113</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTION

A. SCOPE OF THESIS

Of the many and varied institutions which make up a particular culture or society, enabling it to survive and prosper, any judgment as to relative importance or significance is perhaps impossible. Yet it is difficult to deny that law, defined in its broadest sense, with its accompanying legal institutions, normally plays a significant role. To the historian dealing with ancient history, the Code of Hammurabi, the Russkas Pravda of Yaroslavi the Wise, the Laws of Manu, and the Acts of the Saxon Kings are documents of immense importance. They portray in clear terms property relationships, behavior patterns, and class structure. In addition, however, they represent value judgments. Each prohibition, each effort to provide restitution for injury, each rule governing the conduct of the individual or the group, rests implicitly on a positive "ought". Each era, historically speaking, makes ethical judgments which are enshrined in law.

The historical entity which we label the "Chinese civilization" is no exception. As one uniquely qualified observer has noted, "A
country could not possibly have lasted so long without sound legal
principles as her foundation and without having continually drunk from
the life-giving fountain of justice to perpetually renovate herself.¹
It cannot be emphasized too strongly that the Chinese legal system not
only was the third earliest historically, preceded so far as is known
only by the Egyptian and that of Mesopotamia, but also had the unique
distinction of being the only ancient system that survived continuously
to the 20th century.²

In this study an attempt has been made to paint a broad picture
of the role of law in Chinese society down through the centuries of
Chinese recorded history. The similarities and contrasts, particularly
the latter, between the structure and function of law and legal institu-
tions in Western civilizations and those in China are investigated. The
role of the almost indefinable "li" and its never-ending struggle with
the forces of positive law are surveyed. Beginning with the develop-
ment of law in ancient and feudal China, and the, historically speaking, early
conflict between the Confucianists, exponents of the "li," and the
Legalists, advocates of positive law, the study proceeds to an historical
survey of the sources of positive law, from the classic texts through

¹John Wu, "Readings from Ancient Chinese Codes and Other Sources

the unbroken line of codes. An attempt is made to analyze the apparent lack of a clear distinction in Chinese law between the civil and the criminal aspects, seemingly so "foreign" to Western thinking. Finally, the Westernization of Chinese law in the 20th century is described, concluding with some tentative observations on the developing structure of law in Communist China and the difficulties faced by a society attempting to reconcile its role as historical heir to the "li" - "law" dichotomy and political heir to Marxist legal theories.
B. "RECTIFICATION OF NAMES" - THE PROBLEM OF TERMINOLOGY

One of the major difficulties faced in any discussion or analysis of Chinese law, or any non-Western legal system, is that of defining what we mean by "law", as contrasted with "ethics" or "customs" or similar sociological concepts. Although the Confucian ideal of "rectification of names" may not be entirely possible, some distinction must be made at the outset between some of the basic concepts involved.

Ethics in the broadest sense of the term is the set of rules which tell people how to behave so as to promote the greatest well-being. As employed in the literature of philosophical and sociological jurisprudence, and by many historical jurists, the term "law" coincides entirely or to a large extent with ethics, and includes most if not all of the processes of social control. The analytical jurists, however, beginning with Austin, confine the term to the field of "positive law", or that system of rules promulgated by some agency of the society and enforced by some agency. To the positivists the field of law is coterminous with organized legal sanctions. Obligations imposed on individuals in societies where there are no legal sanctions would be regarded as matters of custom and convention but not of law.

It should be recognized, of course, that in nearly all cases positive law has developed out of custom and is never entirely separated

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3Julius Stone, The Province and Function of Law, (Sydney; Maitland Publication, 1950), Part III.

4Ibid, p. 67
from its roots. As explained by Sir Henry Maine in his classic work "Ancient Law", earliest law was the case-law of unwritten custom in primitive societies. There was little sanction save the moral disapproval of the society if the rules or customs were transgressed. With the growth of governmental power, the will of the lawgiver generally saw fit to embody in written codes those laws which had as their basis the immemorial customs of the folk. Later would be added laws which seemed good to the lawgiver for the greater welfare of the state; even these, however, normally had some relationship either close or remote to the mores or ethics of the people. What was new in this "positive law" was that it partook of the nature of the commands of an earthly ruler, obedience was an obligation and precisely specified sanctions followed transgressions.

This distinction between positive and non-positive law, e.g., custom, ethical proscriptions, etc., is logical and possesses some practical merit; however, it has the unfortunate result of eliminating from a discussion of the role of "law" in many societies, including that of China, those quasi-legal rules or socially conditioned principles that govern a large segment of individual and group conduct which in the West is governed by "positive" law. For this reason this study of the

5Ibid, p. 456
6Ibid, p. 457
role of law in Chinese society is not restricted to a survey of "positive" law; such a restricted analysis would necessarily present an incomplete picture, since the significant feature of Chinese society vis-a-vis law and legal institutions is the degree to which it has been able to avoid or minimize the use of positive law in producing social unity and avoiding social upheavals in the presence of recurring political and economic crises.
C. BASIC CONTRASTS BETWEEN WESTERN AND CHINESE LAW

Traditional classification has divided civil law of the principal countries of the world into three classes: (a) the English legal system, (b) the Continental law code, and (c) the Mohammedan law. The Chinese system would appear to belong to a fourth category.

"...while a common basis of philosophical or rather legal rudiments (a persistently religious thought and the Roman theory of obligations) links to a certain extent the three traditional classes, the ideas at the root of Chinese law carry us into another and different world."[7]

There are admittedly certain similarities between Chinese and Roman law, as for example in the case of family law. But the differences are much more striking than the points of similarity. In the framework of her general civilization, the scholars of China developed a unique legal philosophy which must always be considered when studying Chinese law.

In Western civilizations law is more or less sacrosanct. It has the status of a categorical imperative defining and ruling in an abstract manner the conditions and effects of all forms of social, political, and economic activity.[8] The role of the courts is not only


[8]A culmination of this tendency appears to have been reached in the current year with the proclamation by President Eisenhower of May 1st as Law Day U.S.A. - "a day for rededication by the American people of their faith in the rule of law and time for recalling the supreme importance of the law in the lives of free men." Charles S. Rhyne "Law Day U.S.A.", American Bar Association Journal, XLIV, No. 4, (Apr., 1958) p.313.
to apply the law but very often to interpret and sometimes to declare
the law, in the course of litigation in which all interests are repre-
sented. Jurists through the years build up a vast body of doctrines,
through analysis and synthesis, in an attempt to perfect the technical
elements of the system of positive law.

In China and its neighbors - Korea, Japan, Annam, Siam, and
Burma - law has historically been accorded an inferior place. Judicial
institutions receive a minimum of emphasis and attention. The state and
its delegate, the judge or magistrate, have played a minor role in con-
trast to that of the chief of the clan or guild, of the father of the
family, the administrator in general, each governing rights within his
respective domain and ruling on conflicts on the basis of equity, usage
and local custom.
CHAPTER II

DEVELOPMENT OF LAW IN ANCIENT AND FEUDAL CHINESE SOCIETY

A. LIMITATIONS IMPOSED BY PHILOSOPHICAL TENETS OF CHINESE SOCIETY

The history and characteristics of the classical Chinese system of law and justice cannot be understood or appreciated without taking into account the general philosophy of life that underlies it. For as mentioned previously, law whether positive or customary, must in the long run rest on the solid foundation of a sympathetic social philosophy reflected in accepted rules of behavior.

When we speak of the philosophical tenets of Chinese society as the basis or limiting factor for the legal system we refer to the Confucian doctrines, predominant throughout most of recorded Chinese history. By its very nature, Taoism did not furnish the people with a concrete set of rules for behavior. The Taoists looking at nature found that nature's operations are accomplished without effort or seeming purpose. "The Heavenly Reason strives not, but it is sure to conquer." 1 Confucian scholars on the other hand, constructed an elaborate philosophy, the

ultimate purpose of which was to indicate "right conduct" and to promote the unity and security of society, likewise the normal goals of a legal system. Only a few of the more significant Confucian doctrines, from the standpoint of their effect on the development or inhibition of a legal system, can be analyzed here; the concepts discussed are not intended to be exhaustive.

A fundamental doctrine of the Confucian philosophy was a belief that the universe and everything in it conformed to a natural order and unity.\(^2\) Through the cooperation of heaven and earth life was sustained and all things created. Human society was a part of the universe and not essentially different from any of the other factors existing therein. Social rules and the organization of society had to imitate or be in harmony with the organization of the rest of the universe - the natural phenomena. In other words, the whole universe had to be kept in harmony at all times.

The idea of the direct influence of the universal order on the human social order is not unique; similar ideas are found in other civilizations. What was new was the stressing of the reverse influence - the belief that by insuring the order and harmony of human society man might promote the harmony of the universe. In other words, "obedience to rules, of which the natural laws furnish the model, will exercise

a favorable influence on the natural phenomena and...that natural order is troubled by trouble in the social order." 3 Improper action by individuals or groups was therefore not merely a cause of social disorder on earth, but more important, disturbed the harmony of the universe.

The operation of this doctrine was particularly evidenced when the sovereign failed in his duties; such misconduct would have immediate repercussions in the universal order. Extraordinary occurrences were expected to reveal this resultant disturbance of harmony. The nature of the disorder determined the nature of the fault. As noted in the Shu Ching, excessive rain was a sign of the emperor's injustice, prolonged drought indicated that he was making serious mistakes, intense heat accused him of negligence, extreme cold for lack of consideration, and strong winds showed that he was being apathetic. Such natural calamities were interpreted as the result of some error in governmental policy, and it was the sovereign's duty to correct the error so as to restore the harmony of the universe. Conversely, the formal recording of suspicious natural phenomena meant recognition of political achievement or other social good. 5

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3 Ibid., p. 8.
5 For example, the T'ung-chin Restoration was aided by favorable natural phenomenon appearing in the fall of 1861. Mary Wright, The Last Stand of Chinese Conservatism (Stanford: Stanford University Press, 1957), p. 18.
Other examples can easily be found of this emphasis on the importance of the correspondence between law and nature. In Han times the Emperor ordered the judges not to accept complaints against officials during the months of springtime and only accept cases of serious murder, because that was the time for life to be awakening and one must not act contrary to nature. The autumn term of court, however, in all dynasties was employed for the trial of cases punishable by death, since one should follow the example of nature who chooses that season for the decline and death of the forces of life.

The whole system was felt to be one of mutual relationships - between man and man, man and society, society and nature. Each part of the system was closely connected with every other part. When once the principles were discovered one had power over the universe. In a system such as this the Western abstract categories of time, space, quantity, and quality were of no significance; the rules of causation were equally superfluous. In contrast, the favorite line of argument was analogy.

An initial step in maintaining the order of the universe was the "rectification of names", or cheng ming (程名). In brief,

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6 Escarra, Le Droit Chinois, p. 11.
this theory consists of holding that if each thing, each condition, each relation receives the name which fits it exactly the dynamism included in that thing, that condition, that relation, would operate in conformity with the natural order. The sovereign accomplished this "rectification of names" by acquiring a true knowledge of the universe and all things in it and defining them clearly.

Once the proper correspondence between names and objects had been established, the character of all things was known to the sovereign, who could then perfect himself and serve as an example to his people. Primary regulation of human society and its various relationships would then be carried on by "li".

The word "li" is difficult if not impossible to define. It has been variously translated as "rules of propriety," "ceremony," "rites," "rules of etiquette," "principles of social usage." A more comprehensive definition might be "a body of rules or conventions, some of which existed before there was law properly so called, and which...govern the conduct of men, particularly educated men, in addition to the law..." In its primitive sense, the word "li" is said to have represented "sacrifices offered to the spirits to obtain prosperity." Later, however, it came to mean that which is proper,

8 Escarra, Le Droit Chinois, p. 12.
10 Escarra, Le Droit Chinois, p. 16.
ought to be done, in conformity with the good social order and universal harmony.

Actually, it was only toward the end of the Warring States period (402-221 B.C.) and the beginning of the Han dynasty that the Confucian scholars evolved general theories about "li." The Li Chi contains many passages in which "li" is described as a mould for defining and maintaining the various gradations of human society so as to promote unity and stability and prevent conflict. Chapter I of the Li Chi says that "the li are that whereby are determined the observances toward close and far relatives, points which may cause suspicion or doubt are settled, similarity and differences are differentiated, and right and wrong are made clear." 11 Similarly, in Chapter VII of the Li Chi it is said that "the li are the embodied expression of what is right." 12

The "li", in short, is very similar to what contemporary social scientists mean by a "norm", generally defined as "an idea in the mind of the members of a group, an idea that can be put in the form of a statement specifying what the members or other men should do, ought to do, are expected to do under given circumstances." 13

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Theoretically, according to the Confucian tenets, the proper mode of
coduct, what should be done in a given set of circumstances, would be
indicated by "li". "Li", as laid down in the Classics, provided the
set of rules which would tell the people what behavior would be in
accord with observed nature, taking into account in the observation the
faculties, qualities, and relations of the particular individuals in
question. When every person perfected himself in accord with "li", and
governed his actions in accord with "li", it followed from the structure
of society that the family would be well ordered, the country well gov-
erned, and the world peaceful and harmonious.

The customs, rules, usages, and ceremonials which were summed up
in "li" were not simply those which had empirically been found to agree
with the instinctive feelings of rightness experienced by the Chinese
people. They were those which it was believed accorded with the "will"
of heaven and the harmonious structure of the universe, referred to
earlier. Hence, the basic distrust aroused in the Chinese mind by crimes,
or even disputes, because they were felt to be "disturbances in the com-
plex network by which mankind was connected on all sides with Nature." 14

A logical corollary to the basic principles previously stated is
that, strictly speaking, there are no individual rights in the Western
sense of the term. There are only duties, governed by the notions of

14 Needham, op. cit., p. 528.
order, responsibility, hierarchy, and harmony. The sovereign, assisted
by the sages, assures by his example that these notions will preponderate
throughout the realm. The supreme ideal of the "chun-tz" - the man
who seeks to follow "li" - is to exhibit moderation, love of compromise,
reciprocal concessions. To abuse his position, to invoke his "rights",
is to commit grievous error. The great art is to give in on certain
points in order to obtain advantages in other directions. 15

15 Escarra, Le Droit Chinois, p. 17.
B. EFFECT OF CONFUCIAN DOCTRINES ON DEVELOPMENT OF LAW

It can readily be seen that the principles of Confucian philosophy strongly inhibited the development of positive law in China. And the laws that were written never, at least not until the 20th century, succeeded in escaping completely the limitations imposed by the Confucian tenets.

In theory, positive law always yielded precedence to natural law. It was felt that positive law should confine itself to translating the natural law into written formulae. If the translation were correct, the written law would be good and binding. If incorrect, if the government in formulating the law had misinterpreted the law of nature, the written law was felt to be not binding. 16

Ideally, government should be by personal example, in contrast to the idea of government by laws. According to Confucius, a government would be effective without the issuance of laws if the personal conduct of the sovereign were correct, i.e., in accord with "li". If his conduct were incorrect, laws might be promulgated but they would not be followed. 17

Similarly, in Book II, Chapter III, of the Lun Yu (Analects) we read: If the people be led by laws, and uniformity sought to be


given them by punishments, they will try to avoid the punishments, 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." 18

There is no question but that Confucius regarded with extreme distaste the enactment and publication of written laws. Thus, in writing to a prince of Ch'in to rebuke him for publishing a penal code, Confucius said: "The ancient sovereigns deliberated on the circumstances in order to decide the punishment of crimes; they did not make criminal codes, in the fear that it would give rise to a litigious spirit in the people... Then people acquire thus a litigious spirit and make appeal to the letter of the texts, hoping that, by chance, they will succeed in their argument. One is not able to continue to govern them..." 19

In one of the chapters of the Li Chi of the elder Tai (Ta Tai Li Chi) the following comparison is made between "li" and "law":


"The li serves to put interdictions in advance on what is about to take place, while law makes interdictions on what has already occurred. Hence the use of law may be easily perceived, while it is difficult to know what the li will bring about... (The li) are valuable for cutting off evil before it has sprouted, and evoking respectfulness from the smallest beginnings, making the people daily move toward goodness and put sin at a distance, without themselves realizing it. Confucius has said: 'In hearing lawsuits, I am no better than other men, but surely the great thing is to bring about that there are no lawsuits.'”

Elsewhere it has been related how Shu-hsiang, a statesman of Tsin, announced that he was opposed to the promulgation of a law because he considered that it would make people know how to evade legal consequences and cause more lawsuits. He further alleged that if the governors were good men, justice and peace would follow.

"When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express word, hoping preadventure to be successful in their argument. They can no longer be managed. When the government of Hsin had fallen into disorder, the penal code of Yu was made; under the same circumstances, the penal code of Tang; and in Chou, the code of nine punishments. Those three codes all originated in ages of decay...What need is there for any code. When once the people know the grounds for contention, they will cash propriety away and make their appeal to your descriptions. They will be contending about a matter as small as the point of an awl or a knife. Disorderly litigations will multiply and bribes will walk abroad...I have heard the saying that when a state is about to perish there will be many new enactments in it."
Thus from the beginning the supple and personal relations of li were felt to be preferable to the rigidity of fa. As one of the chapters of the Shu Ching (Chapter 15) says, "Virtue has no invariable rule but fixes on that which is good as its law. And goodness itself has no constant resting place, but accords only with perfect sincerity." Or as stated in an ancient proverb - "li i fa, seng i pi (立法 恕) "For each new law a new way of circumventing it will arise." 23

Throughout the successive dynasties, the publication of many new laws was considered to be a sure sign of decay, since it denoted an increase of disobedience and disorder. It is said that each new dynasty tried to decrease the number of penal provisions, without much success, however, it should be added. And the ideal of punishment was to make itself superfluous, i.e., P'i yi chi'h p'i (不足矣止) 24

It should be noted that this antipathy to law and formal judicial institutions was not restricted to the Confucian ideology. A similar or even stronger attitude was emphasized in the Taoist philosophy, as evidenced by the following excerpts from the Tao Teh Ching: "When the Great Reason is obliterated, we have benevolence and justice. Prudence and circumspection appear, and we have much hypocrisy." 25

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24 Shu Ching, Ch. 41, in W. H. Medhurst (tr.), The Shu Ching Historical Classic (Shanghai: Mission Press, 1846), P. 294.
25 Carus, op. cit., p. 84.
"Abandon your benevolence; put away your justice; and the people will return to filial piety and paternal devotion." 26 "The more mandates and laws are enacted the more there will be thieves and robbers." 27

As a later discussion of the Chinese codes will show, the Confucian ideal of government by virtuous example rather than by law was not completely achieved. But the legal system that developed bore the unmistakable marks of the Confucian doctrines and offered a substantial contrast in many aspects with comparable features of Western legal systems.

A fundamental point of distinction between Chinese law as it developed and that of Western countries, heirs to the Greco-Roman-English legal tradition, is that the notion of law as a fixed definite objective concept, "a revered implement for precise decisions, a gauge for the just and the unjust" 28 has never taken root in the Chinese milieu; the preference seems always to have been for something that could be considered as a "model". 29 And a "model", of course, while something to strive for, was always susceptible to adjustment to particular circumstances of a given situation, to the purpose at hand, and the personality of the parties to a dispute.

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26 Ibid., p. 85.
27 Ibid., p. 113.
29 Escarra, Le Droit Chinois, p. 69.
As a consequence, the concept of absolute "rights" is foreign to the Chinese legal system. Individuals do not possess fixed immutable rights, susceptible of judicial declaration and enforcement by the power of the state.\textsuperscript{30}

To a large extent this result follows from differing theories of knowledge in the West and in China. In the West, beginning with the Greeks, the phenomenon of nature became known by postulation, rather than by direct inspection, or at least in addition to direct inspection.\textsuperscript{31} Of critical importance was the postulate of a universal relation or law in nature, the heart of Stoic philosophy and a basic postulate of Roman law.\textsuperscript{32} Under this theory, law is applicable to all and is the same for all, regardless of the relationship, the circumstances, or the time factor. Chinese law, on the other hand, "rested on knowledge which was entirely given through immediate apprehension, and immediate apprehension when it gave knowledge through the sense of anything determinate also gave the knowledge that the thing would change, would be different for different observers in different positions and under different circumstances. Consequently, Confucius very correctly asserted that the right thing to do was to take account of the change,

\textsuperscript{30}\textit{Tbid.}, p. 17.
the relation of the persons in the situations, and the circumstances, in determining how to behave." 33

Such an approach to legally protected interests naturally leads to compromise, adjustment, and arbitration. To turn one's private convictions into immortal issues, thereby giving rise, as the moral, legal, and religious teachings of the West tend to do, to costly legal disputes to the bitter end in courts, during which every party loses, and a fair balance of justice to both parties under the circumstances tends to be lost, is to the Chinese classical mind the height of folly. "The assumption of the Western court that one site or the other must get the verdict is...an expression of the fallacious notion that the determinate aspects of conduct have an absolute character holding for both parties; and that consequently the determinate conduct of one must be right for both, and the determinate conduct of the other wrong for both." 34 Insistence upon principles and rigid demand for one's due become almost as reprehensible as a vulgar physical struggle. Compromise becomes a supreme virtue; intolerance and obstinancy a mark of defective character.

An interesting corollary to this attitude is the practice noted by Wigmore of executing on a civil decree only when the losing party signified his acceptance of it, on the theory that it would be

33 Dorsey, op. cit., p. 464.
34 Northrup, op. cit., p. 391.
contrary to natural law to use compulsion on a free mind.  

"Rights" in the sense conceived of in the West are, therefore, under classic Chinese theory merely a concomitant of ethics or rules of morality - the benefits gained from mutual conformity with the "li". Whereas in the West moral rules intervene only to complete the force of judicial precepts, in China the juridical precepts intervened only to complete the force of the moral rules. And such a step was often accompanied with doubt and reservations. For example, the preface of the 7th century T'sang code, a detailed example of "positive" law, suggests that it is dangerous and ominous to "leave li and engage in legally fixed punishments." (Ch'u li ju hsing) (出理符皆)  

Another logical consequence of the Confucian philosophy was that the ideal was a "government of men not of laws", the direct opposite of the often expressed Western ideal. Great reliance was placed on the wisdom and discretion, to be utilized in enforcing the laws, was composed on intimate knowledge of the rules of "li" and the unwritten customs of the people. Not only was law expected to reflect custom and public opinion, but even when formulated as positive law it was

35 Wigmore, op. cit., p. 144. 
36 Escarra, Le Droit Chinois, p. 70. 
38 Wigmore, op. cit., p. 151.
supposed to defer to custom, as well as being always subject to modification or interpretation in the light of specific circumstances. In the West, enforcement of the strict letter of the common law necessitated the development of rules of equity. This flexibility was apparently a built-in feature of the Chinese system.

Finally, a violation of positive law, even of purely civil rules, necessarily involved at the same time a penal sanction. There are several possible explanations for this. One reason suggested is the military and frontier aspect of the origin of positive law, which was apparently used first of all against the outlying "Barbarians." As might be expected from origin in a martial environment, ideas of prestige, hierarchy, and command are attached to the promulgation of law codes. 39

A second reason, more basic is that since positive law is the concrete manifestation or expression of natural law, a violation constitutes a disturbance of the harmony of the universe, a breach of the preexisting order of nature -- and liable to cause injustice, public discontent, or dangerous conflicts in the community. 40 A clear line of distinction between morality and law was unthinkable. If a rule was so settled and obvious that it had earned a place in the

code, it ought morally to be obeyed by all. The few who resisted, the few incapable of observing the natural order, must necessarily be coerced or intimidated by a penalty.

Private law is theoretically reduced to a small number of rules, which are maintained only by reason of their importance to public order and the state. Typical examples are family law, marriage - subjects of extreme importance to society. The apparent rarity of legal cases of private law in China is explained, primarily by the fact that the only laws of justiciable interest are those which affect the institutions regarded as essential to maintain the harmonious universal order.

Marriage according to the rules and correct inheritance are crucial to the universal order, whereas a sale, a lease, or a contract are not. The latter are part of the domain of usage or private agreements, under the authority of the traditions established by the various collective institutions - the clan, the family, the guild. And these collectives aimed at realizing justice and equality, not by principles of rigid law, but by procedures full of concessions, arrangements, and compromise, all express or represented by the word "jang" (禮讓), meaning 'to yield, to surrender, to take a lower place,' a basic concept of both the Confucian and Taoist schools. ⁴¹

⁴¹Ibid., p. 61.
Before concluding this brief survey of the effect of the Confucian ideology on the legal system, some passing attention should be given to the related concepts of "responsibility" and "relationship." Unlike the Western rule, responsibility was not viewed as something arising out of the individual violation of a fixed legal obligation. On the contrary, it was a concept arising directly from the ideas of natural order and hierarchy. Responsibility was placed on individuals in many cases because they had been "concerned" with an occurrence or had a "relationship" to it without having been a "cause" of it. The responsibility for calamities of the state rested in the sovereign, because he was unable to assure the proper harmony between the human order and the universal order. If inferior officials committed faults, blame could be placed on their superiors for failure to set them a good example. If the people committed numerous crimes, the local magistrate must have failed somehow. The father is punishable for the crime of his son, because he failed to set the good example. Responsibility, in other words was fixed not necessarily in terms of "who has done something" but of "what has happened." When something wrong has happened, responsibility must be assigned, based largely on who occupied the requisite relationship to the happening.

The subject idea of "fault," dominant in the West but increasingly

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being replaced by "responsibility related to risk", is substantially replaced in the classical Chinese system by the objective criteria of "relationship".

This importance of relationships, which so dominated the legal system, even undermined the idea of laws applicable to all without distinction, another dominant Western doctrine. Thus, provisions of law often began with the word "fan" (fan), which signified that a general rule was being stated for cases in which no special relationship applied. The real nature of an action was dependent upon the relation in which one person stood to another. This consideration of relationship could be either a mitigating or an aggravating influence. It was mitigating whenever the law was softened to meet the requirements of justice. It was an aggravating circumstance when, for example, within a family, the offender was of a junior generation to the person offended against.

\(^{43}\) Escarra, *Le Droit Chinois*, p. 78.
C. THE RISE, FALL, AND LEGACY OF THE LEGALISTS

As will be seen, (Section III, post, p. 46) the Confucian ideal of a government of men not laws was never fully realized; detailed codes of positive law have been the rule during most of Chinese recorded history. Yet these codes represent not necessarily a defeat of the Confucian ideas but a compromise, whereby the Confucian philosophy retained its supremacy as the dominant ideology. The real threat to the Confucian doctrines came from the School of Law, or Legalists, which rose to short-lived power in the Ch'in dynasty and effected fundamental changes in government policy and practices, some of which changes became permanent despite the almost immediate return of the Confucian dogma to its dominant state.

Both Lao Tzu and Confucius lived in a period when feudalism, which resembled that in Europe in the Middle Ages, was fully developed. Strong feudal lords struggled among themselves and annexed the smaller territories. The Chou dynasty itself had been declining in power and prestige since the 8th century B.C. as a result of the encroachments of the feudal lords; the Chou king became merely a figurehead. During the Ch'un Ch'iu and Warring States periods (722-221 B.C.), however, far-reaching social and economic changes took place, among them a collapse of the classical feudal system. The eventual results were,

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44 Tseng, op. cit., p. 11.
on the one hand, the emancipation of the common people - the peasantry - from their status of practical serfdom to their immediate overlords; on the other hand, there resulted a concentration of power in the hands of the state rulers. In brief, the "political tendency of the time was a movement from feudal rule toward a government by rulers possessing absolute power; from government by customary morality (li) and by individuals, to government by law." 45

Under the early feudal system, the relationship between ruler and subject, overlord and serf, was a personal one, permitting government based solely on the mores or li handed down from generation to generation. Later, however, when the feudal system began to crumble, power became more centralized, and government on a personal basis became impossible. As a result, one after another of the various states promulgated law codes.

The Theoretical argument supporting this shift to government by law was supplied by the Legalists, commencing in the 4th century B. C. who exalted law as the one and only arbiter of human conduct. The purpose was to legitimize the increased power of their principals, previously felt to be based on force alone, and also to pave the way ideologically, for an all-powerful state authority which could forcibly:

put an end to the prevailing disorder. The attack was aimed at the traditional view of the world and government and against those who supported the old traditional system. The proponents of the new order asserted the validity of human laws against the tradition of a law of nature and contributed theories to explain the necessity for new written laws. The law which they created became one of the tools by means of which was established the Ch'in dynasty of 255-206 B.C. 47

One other theory of the origin of a "positive" legal system has previously been mentioned - that is, the rule of military expansion out of the original strongholds of Chinese civilization into the surrounding areas. 48 In the new lands acquired by conquest from the "Barbarians", lands which had escaped the feudal customs, the princes imposed regulations as they chose, assuming the role of legislators. Their legal scholars worked out a theory of the sovereign as the author of laws which bring civilization, backed by force, to the uncivilized who were naturally ignorant of the "li". A penal code was considered to be the foundation of an administrative organization whose first object was to reform manners and customs by the aid of punishments. The penalties were rationalized as necessary repressive measures to protect the civilizing function from disruptive influences.

48 Supra, p. 25.
49 Granet, op. cit., p. 398.
Under the Legalist theory, the state was conceived as all-powerful with its subjects severely regulated by a detailed system of rewards and punishments. The law, according to this new school of thought, ought to be explicit and publicly proclaimed everywhere so that the people might know what punishment and rewards to expect. In the words of Han Fei-tzu, a law was defined as that which has been "recorded on the register (i.e., statute books), set up in the government offices, and promulgated among the people." A collateral result of course, was to tend to relieve the ruler from the responsibilities formerly placed on him by the paternalistic Confucian system.

The relationship between the Legalist doctrines and those of the Taoists should also be mentioned. The Legalists apparently accepted completely the Taoist explanation that when the rules of nature governed the world, before man made any rules, definitions, or distinctions, complete peace reigned, because the object of man's covetousness, and hence the cause of conflicts and disputes is not the material thing itself but the value which the name, assigned to the thing by man, represents in their minds. For the Taoists, therefore, peace is to be found by a return to the order of nature, or Tao, which involves the abolition of all names for things and thereby all desires and all resulting disputes and conflicts.

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50 Fung, op. cit., p. 322, quoting from Ch. 30 of Han Fei-tzu.
51 Tsang, op. cit., p. 21.
52 Pomeroy, op. cit., p. 449.
The Legalists, while accepting the Taoists' analysis of the problem, did not accept their solution. They felt that since rules of nature were not successful in governing man in a complex society, man should make their own rules, rules of law. And since names were mere conventions, the way to achieve harmony was to define the meaning of names precisely and keep the meaning fixed and unchangeable. This means that punishments must be administered according to the exact meaning of the word which designates the crime, regardless of the circumstances; otherwise the meaning of the word will become changed and there will be no exact standard which the people can know and by which they can guide their actions.

The theories of the Legalists were adopted with vigor and enthusiasm by the Ch'in Emperor. Throughout his official inscriptions Shi Huang-ti boasts of having reformed morals by the aid of laws. "Exercising his authority with vigilance...he made and decided upon clear laws...his subjects under him became more perfect and better...The Sage of Ch'in having taken the government in hand...was the first to determine punishments and names...Posterity will receive his laws with respect."54

The basic doctrines of the Legalists can be found in the writings of five individuals, each of whom made a substantial contribution to the over-all theory - Kuan-tzu, Shen Tao, Shang Yang, Shen Pu-hai, and Han Fei-tzu. The first of these, Kuan-Tzu, though technically a scholar and historian rather than a Legalist, presented one of the earliest expositions of Legalist thought (about 3rd century B.C.). "Laws," said Kau-Tzu, "are the models for the empire and the representative standards for all affairs...Hence the chapter 'The Meaning of Laws' says: 'When a state is governed by law, things will simply be done in their regular course'....The intelligent ruler bases his regulations on laws and standards, and therefore his multitude of ministers govern squarely and uprightly, without daring to be wicked. The people know that the ruler conducts affairs according to law, and so when the officials have law for what they enforce, the people obey them, and when they lack law, the people stop obeying them...Therefore the chapter, 'The Meaning of Laws' says: 'When there are regulations based on laws and standards, there cannot be any craftiness based on deception.'"

Basically, Kuan-Tzu emphasized the role of law in promoting efficiency. The two fundamental canons of his theory were: (1) Make the law clear and keep it tenaciously; (2) Suppress private tendencies to violate it; once the law is promulgated there must be complete

\[55\] Fung, op. cit., p. 321.
obedience on the part of the people, with no room for rival opinions.

Shen Tao, who was a Taoist as well as a Legalist, headed a group who laid greatest stress on "shih" (§), which may be translated as "power" or "authority". He insisted that the function of law is to free those in control from accusations of partiality or favoritism. "Therefore it is said that the great rulers govern the people not by their own persons but by law... Thus, whatever the law decides upon, be it reward or punishment, is accepted by all without any grudge toward the ruler."

Shang Yang emphasized the law (§) itself, defining law as "the means by which a sense of propriety may be given to the people, security may be rendered to the sovereign's position, and peace and government may be guaranteed to the state." The sense of propriety was given to the people by making them fear the punishment of law and by using law to regulate and adjudicate their differences. Security was given to the sovereign because law represented the supreme force of the state. Law, according to Shang Yang, should be permanent - once established it should remain unchanged; it should be clear - so that even the stupid could understand it; and it should be certain - rewards and punishments must be awarded without exception.

56 Wu Kuo-Chung, Ancient Chinese Political Theories (Shanghai: The Commercial Press, 1923), pp. 139-144.
57 Fung, op. cit., p. 318.
58 Tseng, op. cit., p. 22.
59 Wu, op. cit., p. 159.
60 Ibid., pp. 162-164.
Shen pu-hai, who was appointed minister in Han in 351 B.C., emphasized "shu" (しゅ), literally "tricks" or "schemes," that is, statecraft or methods of government which serve to keep the ruler in power. These methods consisted, in the main of "awarding offices according to their responsibilities, and holding actualities in accord with their names - keeping in one's hand the power of life and death, and in examining the ability of one's subjects."

The scholar who coordinated these three groups, and also borrowed from the theories of Lao-tzu and Hsun-tzu, was Han Fei-tzu, who lived and wrote during the 3rd century B.C. He believed that neither power (shih), methods of government (shu), nor laws (fa) could be neglected in the search for Good Government.

The gist of the teaching of Han Fei is that government should be conducted by law sternly enforced, as opposed to government based on benevolence and conducted by men deemed to be virtuous and wise, as contended by the Confucian school. "When ruler and minister, superior and inferior, noble and humble, all obey the law, this is called having Great Good Government."

In line with Confucian examples, Han Fei-tzu referred to classic traditions to support his theories:

61 Fung, op. cit., p. 319.
62 Ibid., quoting from Han Fei-tzu, Ch. 43.
63 Ibid., p. 322.
"In ancient times the early kings exerted their forces to renovate the people and doubled their efforts to clarify the law. As the law was made clear, loyal subjects were encouraged... At the time when Wei was clarifying and establishing laws and upholding mandates without fail, men of merit were infallibly rewarded; men guilty of crimes were infallibly censured; her strength was sufficient to rectify All-under-Heaven (T'ien Hsia) and her authority prevailed among the neighbors on the four sides. As soon as laws came to be neglected and rewards became arbitrary, the state was dismembered day after day... Hence the saying: "Who clarifies the law is strong; who neglects the law is weak." 64

The Confucian ideal of the virtuous sovereign leading the people by his example to follow the "li", is disparaged. "The intelligent sovereign makes the people conform to the law and thereby knows the true path; therefore with ease he harvests meritorious results. To discard the compasses and trust to skillfulness, and to discard the law and trust to wisdom, leads to bewilderment and confusion." 65 Virtue is not "goodness" or "benevolence" but obedience to the law as fixed by the state. Hence the doctrine of the Five Corrupting Worms (wu-tou) which destroy the state, enumerated by Han Fei-tzu: 66 (1) The Confucian scholar praising the ancient sage-kings and discussing benevolence and righteousness; (2) the clever talker using events to his private advantage and falsifying words; (3) the soldier of fortune collecting troops of adherents; (4) the merchant and artisan accumulating wealth; and (5) the official thinking only of personal interest.

65 Ibid., p. 165.
66 Needham, Science and Civilization, Vol II, p. 208, quoting from Han Fei-Tzu, Ch. 49
Other lists added additional things alleged to sap the authority of the state: the study of the Qišs and History Classics, the Rite, Music, filial piety, brotherly duty, moral culture - all essential elements of the Confucian system.

The open conflict between Legalist law and Confucian ethics is well illustrated by the debate as to whether a son should conceal his father's crime, or denounce it and give evidence against him, an issue to arise again in the 20th century under Communist ideology. The debate had already started in the 6th century B.C., for Confucius had emphatically stated that filial piety should prevail against state law. 68 Han Fei-tzu, however, argued strongly for the opposite view. 69 With the ultimate overthrow of the Legalists, the orthodox Confucian view was transmitted to posterity in the Filial Piety Classic (Hsiao Ching).

The goal of Han Fei-tzu's teachings, as was generally true of all Legalist ideology, was the power and security of the state, considered a necessary prerequisite to the general welfare. "If conformers to law are strong, the country is strong; if conformers to law are weak, the country is weak." 70 Similarly, "By the strict..."
observance of law, everybody may be given his due - then peace will reign in the state, and there will be nothing left for the sovereign to do but enjoy his good government." 71

Once the laws have been made, everyone in the state, both ruler and ruled, must obey them and cannot change them at will. The highest ideal of the Legalist school is that ruler and minister, superior and inferior, noble and humble, all obey the law. Similarly, when laws have once been established so that everyone obeys them, all heterodox doctrines of private individuals must be prohibited because they strike at the efficacy of the law. All words and acts not in accord with the law must be prohibited. As stated in the Han Fei-tzu, "In the state of the intelligent ruler, there is no literature of books and records, but the laws serve as teachings." 72

In view of this strict prohibition against criticism of the laws, there arises the question of what would happen if bad laws were enacted. The Legalist view on this question was well expressed by the later exponent of this school, Han Tzu, in the following words: "Bad law is better than no law, because it establishes uniformity. If you divide cattle or money by drawing lots, it does not mean that such a drawing makes a fair division, but disputes will thus be avoided." 73

71 Wi, Ancient Theories, p. 164, quoting from Han Fei-tzu, ch. 20.
72 Fung, op. cit., p. 323, quoting Han Fei-tzu, Ch. 49.
73 Tseng, op. cit., p. 30.
This view of the law and its function would evoke a sympathetic reaction from present-day critics of the sociological trend of modern jurisprudence, by virtue of which fixed and long-standing precedents have gradually been modified in the light of changed economic and social conditions. On the other hand it is in sharp contrast with the view advanced by Jeremy Bentham to the effect that "every law is an evil, for every law is an infringement of liberty, and government has but the choice of evils." 74

The Legalists were not concerned solely with the attempts at demolishing the Confucian ideology. They also had a habit of distorting Taoist ideas. In Han Fei-tzu the Taoist ideal of self-contained villages is transformed into a model of rural society on a Legalist pattern. 75 The expression "wu wei (無為) to the Legalists meant not non-directed activity, or activity in conformity with the rules of nature, but the absence of governing activity on the part of a ruler who has enacted sufficient positive law to allow for government being carried on automatically and to ensure that this shall continue to happen even if his successors proved incompetent. 77 Thus, the Tao of the Legalists was not a universal ethical principle, like that of both the Taoists and Confucianists, but was the motive power or an

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76 Liao, op. cit., p. 41.
77 Duyvendak, op. cit., pp. 88-89.
authoritarian society based on strict enforcement of positive law. The Confucian doctrine of "government by man" (jen chih chu 人治主義), was replaced by a rigid "government by laws" (fa chih chu 法治主義).

The triumph of the Legalist school under the Ch'in Empire was due to the fact that it alone could point to a record of successful application to state policy, the Legalist school having flourished in the State of Ch'in. Because of the success of Ch'in, the Legalists concluded that the rule of law had been proved to be the only doctrine which really built a strong state and that the rival schools were only capable of undermining the authority of the sovereign and ruining the empire.

The implementation of all these ideas on the scale which the success of the State of Ch'in made possible left lasting marks on the structure of Chinese civilization, despite the failure of the Legalists to retain their position as the orthodox spokesmen. There can be no question that the Legalists accomplished their primary mission of changing the form of the state. It is also apparent that the vast bureaucratic system of every dynasty after the Ch'in would have been unthinkable without the groundwork in legal theory laid by the Legalists, although it was the Confucianists who became the beneficiaries of the strategic position eventually achieved by the bureaucracy. Even in the

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practical field of civil law the effects of the Legalists were felt, for it was the land reforms of the Legalists which abolished the ancient "well and nine fields" (ching t'ien) system of feudal land tenure, set up irregular fields and gave the people the right to buy and sell land. 79

The Legalist school failed in its chief endeavor, the permanent suppression of every rival doctrine, and in the reaction against the brutal regime of the Ch'in empire this school suffered the fate it had meted out to the others. Although the Han, after the overthrow of the Ch'in (206 B. C.) purportedly made as much use of jurists and judicial scholars as did the latter, they took care to repudiate their theories. All the Ch'in laws were immediately repealed, but other laws, albeit milder ones, took their place. Later, one of the first decrees of Emperor Wen (179-157 B. C.) admitted the usefulness of the laws but assigned to them a double object: their aim was not only to "repress the wicked" but also to "encourage the good." 81

Finally, in 141 B. C. a memorial asking that all officials and scholars conversant with or sympathetic to the Legalist theories of law and government be dismissed, was approved. 82

79 Ibid., Vol II, p. 213.
80 Granet, op. cit., p. 399.
81 Ibid.
Confucianism was, therefore, the ultimate victor, at least in outward appearances, except for a brief resurgence of Legalist domination during the Sui dynasty (581-604 B.C.) However, the Legalists bequeathed one of their main dogmas to their rivals, i.e., the idea of a single orthodox doctrine which was alone deserving of government patronage and support. This idea was taken over by the Confucians of the Han dynasty and later was used to invest their doctrine with a sanctity it had never enjoyed or even claimed in the feudal period. Confucius had not desired that his ideas should receive the force of law, for he was firmly opposed to the idea of law, no matter whom it purported to benefit. He did not want men to be constrained by fear of penalties, but charmed by the lustre of a brilliant virtue. Let the sovereign be truly virtuous and he will be "like the North Pole star, which keeps its position, while all the other stars turn toward it."  

It is somewhat ironic, therefore, that despite the outward triumph of the Confucianists the history of detailed written law codes, beginning around the time of the Ch'in, continues in an unbroken line down to the present day. Not until the 17th century did a Confucian scholar offer a logical explanation of criticism of this apparent

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contradiction. Huang Tsung-hsi, a political philosopher and official of the Ming dynasty, refused to accept the traditional view that there was a basic antithesis between rule by law and rule by man. The law codes of the imperial dynasties, according to Huang, were not true law but simply a mass of laws enacted for the benefit of the ruling house. "True law was enacted for the benefit of the people by the sage-kings and is embodied in the system of government laid down in the classics. It consists not in the multitudinous statutes, prescribing in detail what men should do and attaching a severe penalty to each infraction, but rather in a simple and general set of institutions which are basic to proper functioning of government and to promotion of the general welfare." 85

Huang differed from most Confucianists in his recognition of the fundamental importance of law. Huang insisted, however, that dynastic law was not inviolate and that "unlawful" laws fetter men hand and foot. There must be laws which govern well before a ruler can be expected to be a good ruler. The choice is not between men and laws, but between true law and the unlawful restrictions of the ruler.

Huang visualized the establishment of only a few basic laws, i.e., something more in the nature of a constitution of system of government than a legal code; such laws which could be maintained without resort to force, supplementary legislation, or endless litigation. While this has a Utopian sound, it at least was an attempt to make a stand on a middle ground between the "virtuous example" of the Confucianists and the Legalists' government by strict and detailed laws.

\footnote{\textit{ibid.}, p. 173}
CHAPTER III

ORIGIN AND DEVELOPMENT OF CODES AND OTHER SOURCES OF CHINESE LAW

A. PRE-HAN DYNASTY CODES AND LEGISLATION

Although no great confidence can be placed in specific dates or occurrences prior to the latter part of the Chou dynasty, references to legal enactments in earlier periods are significant as indicating the ever-latent opposition to the Confucian government by "li".

It has been suggested that as early as the period of the legendary Emperor Fu-hsi, purportedly reigning during the period 2835-2738 B.C., the Chinese

"knew not only how to remove obstacles to peace and order by the use of punishment, but also how to establish justice and order as inspired by such natural elements as lightning and thunder. For when there is lightning nothing is left unearthed, and when there is thunder everybody is struck with awe. Proper administration of justice results therefore only from revealing and establishing all relevant facts of the case, and order is maintained by constantly keeping the people in fear of the authority of the law." 1

The same author states that at the time of Fu-hsi there were persons entrusted with the office of administering justice, called "Pai Lung Shih", or White Dragons. 2

2Ibid.
The Emperor Muant-ti, the Yellow Emperor, is said to have established rules of law that were not subject to constant changes, so that the people might have a feeling of certainty and security, a suggestion of future Legalist doctrine. He also allegedly defined and distinguished the status of superior from that of subordinates, and readjusted domestic relations. Any violation of law subjected the actor to punishment.

The first legal enactment having specific substantive content is the so-called "five corporal punishments", attributed by some scholars to Emperor Yao (2537-2256 B.C.) and by others to his successor Shun (2255-2206 B.C.). The so-called Canon of Shun is found in the Shu King, or Book of History, a series of historical records purporting to cover the period from 2355 B.C. to 719 B.C. This code is said to have introduced banishment as a substitute for the pre-existing five corporal penalties, suggesting that the latter originated with his predecessor. The code also ordained that the birch-rod should be used as a reformatory measure.

3Ibid.
5Chu, op. cit., p. 3.
The punishments permitted were of varying severity, with heavier forms for repeated violations and reduced punishment in case of mere negligence. The institution of pardon was also said to have existed.

Of some interest is an alleged conversation between Emperor Shun and his Chief Justice, Kao-yao:

"Punishment is to be used with the purpose of not having to use it any more in the future...(but is to be) instrumental to the establishment of human relationship, which is the end of all good government and administration." Kao-yao purportedly replied: "When the case is doubtful, I am rather inclined to acquit the accused." Lenience was to be shown "when the facts of the case cannot be established rather than condemn an innocent person." 7

During the Hsia (2205-1766 B. C.) and Shang (1766-1123 B. C.) dynasties, more elaborate systems of punishment apparently became necessary. The Tso Chuan refers to a penal code of Yu, the founder of the Hsia, and a penal code of T'ang, the founder of the Shang. 8 The Tso Chuan suggests that it was those codes that helped cause the decay of these dynasties. Others suggest that the decline in virtue

7Chu, op. cit., p. 4.
of the emperors was the initial deteriorating factor. The distinction may be purely semantic, since to an orthodox adherent to the Confucian tradition only an emperor who had abandoned virtue would turn to a law code as an aid to good government.

The first complete law code, said to have been prepared by the Marquis of Lu on order of Emperor Wu of the Chou dynasty in 952 B.C., is known as the Lu Hsing, or Legal Regulations of Lu, and can be found as a chapter of the Shu Ching, or Book of History. This code instituted new ideas on penal legislation. Those under 8 or over 80, as well as those mentally unsound, are in principle exempted from punishment. Mistake, ignorance, and negligence were made valid defenses under certain conditions. The concept of self-defense was also recognized.

Emperor Wu's instructions to his princes and officers upon the promulgation of this code suggest some of the procedural rules to be followed:

"When you have any doubts as to the existence of the crime, then you should not inflict either corporal punishment or fine, but should acquit the prisoner. Even when you have closely examined the evidence and have taken testimony, so as to remove any reasonable doubt, yet you must not make a hasty conclusion, but form a judgement from studying the appearance of the criminal. Any prosecution which is not substantiated by evidence should be dismissed immediately... Let the punishment be in just proportion to the offense, neither insufficient nor excessive. Admit no presumptuous, disorderly, or profane arguments. Enforce no laws that have already fallen into disuse."

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Inscriptions on Chou dynasty bronzes sometimes contain elaborate accounts of disputes at law. Only a beginning has as yet been made in their study. It has been shown, however, that from the 7th century B.C. onwards, a distinction was made between civil (sung 聘 然) disputes regarding property (i huo ts'ai hsiang kao 炊屑曉) and criminal (Yu 鬧) cases (i tsui hsiang kao 炊曉). The Tso Chuan tells us that in 543 B.C. Tzu Ch'an, a famous statesman of the State of Cheng, composed and promulgated a detailed criminal code, a later version was enacted in 501 B.C. These codes were inscribed on bronze vessels and bamboo tablets respectively. Also during this same general period, a code was enacted for the State of Chin in 513 B.C., and inscribed on iron tripods. No copies of these codes were preserved; they are known solely by the strong criticism they evoked from other statesmen of the time, followers of the orthodox Confucian ideas.

15. Ibid. p. 521; Chu, op. cit., p. 6; Fung, op. cit., p. 314.
Although some writers have contended, with considerable evidence to support their contention, that it is a later forgery, the real ancestor of the long line of later dynastic legal codes may be one prepared by one Li K'uei, minister and counsellor to Marquis Wen of the State of Wei around 400 B.C. His code was called the Fa Ching (法治) or Juristic Classic, and apparently consisted of a collection into six books or chapters of what he considered to be the best laws of the neighboring feudal states. Although no copies were preserved, the headings of the six books consisted of the following: (1) Robbery; (2) Larceny; (3) Imprisonment; (4) Arrest; (5) Miscellaneous Matters; and (6) Definition or Classification of Penalties. These divisions are found in all subsequent codes.

Li K'uei's code, assuming it ever existed, was taken by Wei Yang, better known as Shang Yang, to the rising feudal state of Ch'in where he became premier. He purportedly used Li K'uei's code as

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19 Fan, op. cit., p. 459.
20 Tao, op. cit., p. 2. There is considerable disagreement as to the proper title for Book 6 of the Juristic Classic and as to the contents of this section of the code. Compare Hulsewe, op. cit., p. 32, with Needham, Science and Civilization, Vol II, p. 523.
21 Fan, op. cit., p. 459.
the basis for the Ch'in code, which appeared about 350 B.C. This code, in turn purportedly became the basis for the Han Code of which the details are more confidently known.

Additional evidence of the substantially advance state of judicial procedures is found in the chapters of the Li Chi covering the royal regulations. Although the period covered by the reference is not known, it is in any case prior to around the 2nd century B.C. According to the rules summarized therein, after the initial decision by the magistrate in a criminal case,

he must refer it first to other officers, secondly to the clerks and lastly to the people, in order to get their opinion as to its correctness. (Cf. the jury system under Western common law, and the procedure under the Chinese Communist system, discussed infra, Chapter IV.) Though a party had clearly the intention to commit a crime, if there were no evidence of any overt act, the charge should be dismissed....Facts must be proved before the judge could base his decision upon them; and in hearing any criminal case he should take into full consideration filial duty and loyalty which might have affected the defendant's act, thus making allowances for all human impulses. He should carefully differentiate grave offenses from light ones, and discriminate with an unbiased mind the various phases and degrees of the criminal intent. In other words,

22 Wright, Studies, p. 34. The doctrine or philosophy of Shang Yang has already been mentioned, supra, p. 35.

23 Legge, Shu King, pp. 92, 140, 215, 235-237.
he should strive to his utmost to fathom and understand the
true situation of each case and to give every man his due,
to the full satisfaction of all parties concerned.

In case a criminal charge appeared to be doubtful, the judge
must submit the case to the people at large for the investigation of
the facts, and in case the latter could not ascertain them, the prisoner
should be acquitted. Furthermore, the judge was to examine all the pre­
vious decisions on cases similar to the one before him and base his judg­
ment upon principles evolved from a deliberate comparison between them.
B. THE HAN CODE AND RELATED LEGISLATION

During the early years of the Han Dynasty - about 200 B.C. - Hsiao Ho, the prime minister, compiled a new code, known as the Hsiao Code. Although we are poorly informed as to the exact organization of this code, it is fairly certain that, at a minimum it included the six chapters or titles of the Ch'ın code plus three additions, as follows: (7) The Census, Family Relations, and Marriage; (8) Military Service; and (9) Corvée Labor. At some unknown date during this general period additional sections were added covering regulations for the imperial household and the court.

Although this code was apparently lost by the time of the Sui dynasty (581-618 A.D.), a good idea of Han practice may be gained from Chapter 23 of the Ch'ien Han Shu (前漢書), entitled "Record of Law and Punishments," or Hsing Fa Chih (刑法志). The Han was the first known dynasty to expressly distinguish by special terminology between different forms or types of positive law. The nine chapters or titles which formed the fundamental code were known as "lu", or sometimes called "statutes". However, there apparently were twenty or thirty additional sections or titles, covering

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24 Hulsew, op. cit., p. 32; Tsao, op. cit., p. 2. The pre-Han order was slightly changed, the "definition of punishments" formerly the main portion of Title 6, being placed at the head of the new code. By the T'ang dynasty, this had been given the new title of "General Provisions."

25 Needham, op. cit., p. 523.

26 Translated by A.F.P. Hulsew and contained in his study Remnants of Han Law, op. cit., pp. 321-350.
various aspects of governmental administration which also fell within the category of "lu". The other main category was entitled "ling", sometimes translated as "ordinances". As one of the leading Western students of this period in Chinese legal history has said, "The only thing that can be confidently deduced from the studies that have been made is that the statutes were considered to be older and the ordinances to be more recent. The distinction made by early authors does not imply that the respective spheres of "lu" and "ling" were different; both statutes and ordinances covered penal and non-penal matters."27

It is suggested, however, that a change occurred at about the 3rd century A.D. whereby "lu" covered penal matters solely, while "ling" were used to preserve regulations for affairs, "is., civil matters. However, violations of the latter would presumably also involve punishment, there being no distinction between "criminal" and "civil" matters in regard to applicability of punishment.

In addition to the "lu" and "ling" which apparently constituted the bulk of the Han code, literature of the time contains occasional reference to other legislation or legal trivias. Among these have been mentioned military laws; "ku shih" or precedents, generally involving ceremonial matters but occasionally relating to judicial affairs; "comparisons" or analogous cases, presented as aids in

27 Hulsewes, op. cit., p. 31.
deciding cases; and "k'ō", or rulings and decisions which had achieved the force or status of law. Also worthy of note is the mandate of Emperor Wen abolishing the mutual responsibility of family members for each other's crimes.

The broad scope of Han law is suggested by a case noted by Shen Chia-pen, wherein a marquis in 93 B.C. was punished for having sold a horse for $150 cash, allegedly amounting to an illegal profit, or inequitable price. This provides an interesting contrast to our federal and state laws purporting to make it illegal to sell goods at "unreasonably low prices" (Section 3 of the Robinson-Patman Act) or as "loss leaders" or "below cost" (California Unfair Practices Act).

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28 Ibid., p. 47.
29 Wu, "Readings From Ancient Chinese Codes", p. 520.
30 Letter to writer from A. F. P. Hulsewe dated 4/14/58.
C. SUBSEQUENT CODES PRIOR TO FORMATION OF CHINESE REPUBLIC

The Chin, Liu (Sung) Ch'i, Liang, and other dynasties also had codes but little is known of them. They were apparently lost before the Sui Dynasty code was prepared in 583 A.D. This, with little change, became in 630 A.D. the code of the T'ang Dynasty, now the oldest existent Chinese code.

Work on the T'ang code was begun in the early years of the 7th century under the patronage and encouragement of Tai Tsung, the second emperor of the T'ang Dynasty who reigned from 627 to 649 A.D. He appointed a commission of jurists to codify the laws and on completion of their work the T'ang code was promulgated. This code has been praised for its "Explanatory Notes" or annotations and its systematic arrangement, which included the following twelve divisions or titles:

2. Provisions for the protection of the Emperor
3. Official duties
4. Enrollment of the people (census) and marriage
5. Imperial stables and treasury
6. Independent political action
7. Theft and robbery
8. Quarrels and litigation
9. Fraud and deceit
10. Miscellaneous offenses
11. Arrests
12. Trials

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The T'ang code was considered so reasonable and practical in character that it was substantially adopted by the successive dynasties of Sung, Yuan, Ming, and Ch'ing, although the number of chapters or titles and the penalties attached to various offenses varies. One version of the Sung code apparently still exists.

It is also significant that the T'ang code was borrowed by Japan as the model for her "Ta Fao Code".

Other noteworthy legal developments purportedly occurring during the period of the T'ang dynasty were: (1) Judgments now had to be in writing; (2) Formal law training was introduced; and (3) punishment of other members of an offender's family was abolished.

The Ch'ing code, or Ta Ch'ing Lu Li, was promulgated in 1646 or 1647 under the first Ch'ing emperor, Shun Chi. From 1736 onwards, a general amendment of the code took place every ten years, and a minor revision every five years. A final major revision was issued in 1910 under the title of "Ta Ch'ing Hsien Hsien Hsing Lu", meaning "The Penal Law in Force of the Great Ch'ing Dynasty". Though called "penal", it was in fact like its predecessors far more comprehensive, comprising laws concerning governmental administration, finance, public

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32 Bodde, op. cit., p. 34.
34 Tsao, op. cit., p. 3.
35 Pan, op. cit., p. 463.
works, military affairs, and similar topics that can be found in the United States code, which has never been considered strictly as a "penal" code.

The Ch'ing code is arranged under seven leading headings, namely, General Provisions, Civil, Fiscal, Ritual, Military, Criminal, and Public Works. These in turn were subdivided into 427 sections called "lu", to which were ultimately added about 2000 supplementary provisions, or "li". The "lu" were the original code and were nominally permanent; their texts were never changed.36 The "li", or supplementary laws, were the modifications, extensions, and restrictions of the fundamental code, including judicial decisions; after undergoing examination in the Supreme Council and receiving the sanction of the sovereign, these changes were inserted at each five year revision, in the form of clauses at the end of the respective section of the code to which they were related.37 Notes and comments illustrating the practice and theory of the particular law,38 extracts from the works of various commentators39 were also appended.

36 Jean Escarré, La Droit Chinois (Peiping: Vetch, 1936), p. 162
37 Ibid.
39 Pan, op. cit., p. 465.
Under the heading of "General Laws" there were 46 sections containing rules applicable to the entire code. Included were a description of the five ordinary punishments; the definition of the ten odious crimes; the rule for the mitigation of punishment; the general directions regarding the conduct of officers; offenses of astronomers, musicians, and women; and indulgences to offenders in consideration of age, youth, or infirmities and to offenders for the sake of their parents. The remaining portions of the code included within their provisions regulations dealing with nearly the entire gamut of Chinese social life. Although a complete list of the various topics covered would serve no useful purpose, a few examples are given below to indicate the general scope of subject matter:

1. Family law
2. Land ownership, including land tax frauds, theft, and sale of lands and houses, mortgage and purchase, illegal cultivation, destruction of fields and harvests; theft of field produce and orchards
3. Marriage
4. Money lending and trusts of personal property
5. Rules governing monopolistic prices and control of markets
6. Rites
7. Stables and pastures
8. Blows and injuries
9. Lewdness, adultery, incest, and similar crimes
10. Encroachments on streets and ways
One somewhat confusing feature of the code was that when a new law was promulgated it did not appear as an additional section or "lu", but had to find a place under one of the existing categories as an additional "li" in that particular section. This led to strange results, particularly in the treatment of those new laws that fell within the major division of the code entitled "Fiscal", under the jurisdiction of the Hú Pú, or Revenue Board, one of the six main boards which superintended the affairs of the Empire. It was this board and this section of the code which governed the social life of the people, i.e., dealt with families in their corporate capacity.

Revenue originally derived from the land tax payable by the family as a unit was naturally one of the subjects included in this division, but it comprised also all matters in which the family as an individual unit is the predominant feature. As the ownership of property is always associated with the family rather than the individual, this division comprised the law of property in so far as there was legislation on the subject.

The mechanics for making changes or additions to the code were relatively simple. A memorial from one or other of the principal

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41 Ibid., p. 1.
boards requesting or suggesting a ruling on a matter of general importance, would be transmitted to the Emperor. If the sovereign approved, a decree or rescript was issued and dispatched by circular letter to all of the provincial authorities, who in turn issued proclamations in their respective jurisdictions, enjoining obedience and with words of warning of the consequences of neglect. When the time arrived for revision of the code these decrees were incorporated in their proper places among the "li" and so became part of the statutory law.

Besides the laws and regulations contained in the code, every high provincial officer apparently had the right to issue proclamations having the force of law within his own jurisdiction, to meet local requirements and unforeseen exigencies. However, all acts of this character had to be reported to the proper board at Peking, as well as to the Emperor, for approval.

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42 Ibid., p. 6.
D. SOURCES OF CHINESE LAW OUTSIDE OF THE CODES

After the establishment of the Chinese Republic in 1911 the Supreme Court, created towards the end of the Ch'ing dynasty, expressly held that civil cases should be decided "first according to express provisions of law; in the absence of express provisions, then according to customs; and in the absence of customs then according to legal principles." Thus was recognized the fact that all of Chinese law was not to be found within the four corners of the written codes.

Long established local customs, controlling relationships within the family and other social groups, rules of the various chambers of commerce in the cities, and regulations of the guilds therefore constituted sources of law, if not law itself. For there is little or no profit in drawing a sharp line of distinction between what has been officially promulgated by the state or its agents and other rules which people are "compelled" to obey, whether the compulsion be the enforcing power of the state or the equally powerful force of public opinion. Law in the West has become in recent years so much a matter of legislation that one tends to forget that historically the basic roots of most fundamental legal principles lay in traditional practices and customs.

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The family and the clan were the basic units of Chinese traditional society. Each family was nominally governed by a family head, or chia chang (家長) who was normally the most aged and respected person in the family. Several large families constituted a clan. The several family heads of a clan recognized one or more among themselves as the leader or leaders of the clan. Minor disputes at this level of Chinese society, generally involving marriage disputes or contract breaches, were normally settled by the clan leader. Judgments were based on general equitable principles or traditional precedents - rules handed down by a prominent ancestor. If the parties were not of the same clan but lived in the same village or town, the local "elders" could be called upon to settle the dispute. Even if the appeal should be made to the local magistrate, the latter would most likely follow the opinion of the clan or village leaders.

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48 Tseng, op. cit., p. 31.
In the traditional agricultural societies, such as China, until recent years, private disputes seldom go beyond questions of the family, marriage, succession, and debts. These were all provided for in the codes. However, there were good reasons for the average individual's preference for local compromise and settlement of disputes. To the people in general, law was not only unknown but even a mystery. Determination of a dispute at the lowest level entailed no delay and decisions were made by men on the spot who normally knew the parties personally and had some idea of the history of both sides of a case. In effect, what was secured was a trial by one's peers, for it was out of just this sort of social milieu that the institution of trial by jury arose in the English common law tradition. Generally, there was no bitter feeling, since normally the decision would amount to a compromise, there being an inveterate tendency in Chinese law no matter who is deciding the issue, to compromise anything that has the appearance of a hard case.

Basic principles of commercial law were enforced by the guild system in the towns and cities. The Chinese guilds, like the European guild system during the Middle Ages, established detailed rules to govern their trades and compelled obedience to them. They fixed prices and determined customs of the trade. Their jurisdiction over their members is said to have been "absolute" because of the weight of
economic and social force behind them. The Chinese courts apparently always considered the decisions of the guilds as binding awards on the parties; similarly, the rules and regulations of the guilds were considered binding upon the guild members. 49

Here again it must be admitted that guild rules and proceedings do not fall within the orthodox limits of "positive law". Yet even in the United States, with the increasing attention being paid to methods of compromising disputes and to the use of formal arbitration procedures, and with the increasing scope of the legal rules governing unincorporated associations, a thorough analysis of "law" cannot ignore such extra-judicial means of settling disruptions of social harmony.

49 Bryan, op. cit., p. 10.
E. COMPARATIVE SCOPE OF WESTERN AND TRADITIONAL CHINESE LAW AND THE FALLACY OF THE "CRIMINAL-CIVIL" DICHOTOMY

It has often been stated, or at least strongly implied, that codified Chinese law was confined to purely criminal matters and that positive law was reduced to a minimum from the Han dynasty onwards, as a result of the defeat of Legalist views. Such a statement does not convey a correct impression of traditional Chinese positive law.

Insofar as the substance of the law is concerned - the subject matter relating to which legal principles were developed over the years - the difference between Chinese law and Western law has always been a matter of degree. This difference may in large measure be due to the form in which economic development has proceeded in the West as contrasted with the relatively static economy of China. Industrialization and the accompanying process of urbanization creates considerably more complex individual and group problems than are present in the predominantly agricultural economy. Nevertheless, the basic areas of Western law - Persons, including family law and other aspects of personal relationships; Things, including rules governing real and personal property; and Rights, such as contract rights and obligations - are for the most part represented in Chinese law.

A few examples will give some indication of the universal nature of many basic legal concepts and the advanced degree of development of the Chinese rules.

The Chinese codes, from at least the T'ang dynasty onwards, contained detailed rules concerning many aspects of family law, including the organization of the family, shown by the so-called "mourning charts;" marriage rules and regulations and impediments thereto; relations between parents and children; and rules governing succession and inheritance, adoption, guardian and ward, and administration of estates. 51

Wills were generally unknown in the Western sense of the word, since property was owned not by individuals separately but by families collectively. A parent could not, except under exceptional circumstances, dispose of his property so as to deprive his sons or adopted sons of their inheritance. 52

It should be noted that the rules governing rights, obligations, and relationships within the family group were not all found in the codes. The Li Chi, for example, contains many rules relating to marriage and the family. 53 Moreover, those parts of the codes relating to family law quite often presented some particular detailed or singular aspects of family law, rather than outlining a systematic summary of the subject.

For example, the opening sentence of Section 784

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52 Bryan, op. cit., p. 28.

of the Ta Ch'ing Lu Li provided that, "Whoever appoints his son successor to the family contrary to law shall be liable to 80 strokes." No explanation was given therein what the particular law was that must be followed. That was understood, being the customary law which had prevailed from time immemorial.

The codes also contained many detailed rules relating to property law. Thus, the Ta Ch'ing Lu Li contained sections relating to mortgages (Sec. 95), obtaining land by fraud (Sec. 93), obligations of trustees of land (Sec 150), treatment of lost property (Sec. 151), and similar subjects. Nor was this a late development. Although there is a very little in the historical texts referring to civil suits relating to property as early as Han times, there are occasional passing references to quarrels about land and contract disputes, with complaints brought before the local magistrate. Both the Han Shu and the Hou Han Shu contain references to documents concerning loans or advances. Furthermore, the commentary to the Chou Li mentions that in Han times "when hearing plaints on debts, they are decided by means of the contracts;...in case of plaints the contracts are brought forward so as to correct the situation.""\(^5\) The existence of such contracts has also been proved by archeological finds. They show that deeds or contracts were drawn up not only for important

\(^5\)Hulsewé, op. cit., pp. 77, 78
transactions like the sale of land, but likewise for the sale of personal property such as articles of clothing.\textsuperscript{55}

The existence of detailed rules of property law is particularly significant, for the tenure of land and the modes of its transfer by individuals constitutes a kind of test of the civilization of any people. In completely uncivilized communities there is generally no private property in land or legal rules relating to property, irrespective of the form of ownership. As this right begins to exist, the methods of its disposal are at first as simple as those of the earliest real estate transaction recorded in accessible history, when Abraham bought the field of Ephron the Hittite; i.e., merely the payment of the price and the delivery of possession before witnesses.\textsuperscript{56}

With further advances, the right become more important and the modes of conveyancing more formal, cumbersome and expensive. A later development is the tendency to abridge these forms somewhat, to make transfers less difficult but at the same time to make titles secure. Judged by these criteria, Chinese property law is well advanced. The tenure of land by private ownership has been long established (leaving aside for the moment changes since the Communist Government took control), the rights of the owner, of mortgagors and mortgagees, of

\textsuperscript{55}Ibid., p. 78

\textsuperscript{56}Holy Bible (King James ed.), Genesis, 23:4-16
landlords and tenants, are strictly defined, and the methods of
transfer and forms of conveyances, and, above all, the security
given to titles by registration, are all well settled.\(^{57}\)

Turning to the contention that Chinese law, more particularly
the codes, are matters of penal law entirely, such a contention
tends more to confuse rather than to enlighten. As one of the more
profound scholars of Western jurisprudence once said, "The most intricate distinction of all, and that which comes most frequently on the
carpet, is that which is made between the civil branch of jurisprudence
and the penal..."\(^{58}\) A more accurate characterization of the Chinese
codes would be that they encompassed within a single framework the
essential elements both of a criminal and a civil code; to this, however, must be added the qualification that the purpose of both the
civil and the criminal elements are identical - to protect and pre-
serve social harmony, with punishment meted out to those unable to
comply with the rules laid down therein for the guidance of the
populace.

The Ta Ch'ing Lu Li had a distinct division labelled with the
word "hsing" (ㄏ) and containing what is generally considered in
Western jurisprudence as criminal law. Included therein were dis-
cussions of such offenses as homicide, larceny, and other common crimes

\(^{57}\) John D. G. Cock, "Chinese Conveyancing", American Law Review,
XXXVI, B. 825, 1902.

\(^{58}\) Jeremy Bentham, Principles of Morals and Legislation (Oxford:
The Clarendon Press, 1876), p. 329
known to the Western criminal law. This portion of the code was set
apart for the special supervision of the Hsing Pu, or Board of
Punishments in Peking. Although all of what is normally considered
to be "criminal law" is not found in this portion of the code, it was
quite comprehensive.

The remaining portions of the code involved legal concepts
and principles basically related to either governmental (constitutional
or administrative in nature) or civil affairs. The penal connotation
arises because every violation of the law laid down therein involved
a potential punishment or penalty. The reason for this lies not in
the nature of the subject matter but in the purpose for which the codes
were written and enforced. Although the matters involved are essentially
civil in nature, the rules laid down did not purport nor were they
intended to serve as the fountainhead of individual rights or obli-
gations, or even as the instrument for suppressing violations of rights.
On the contrary, their prime function was the suppression of violations
of the natural order. In awarding the penalty or punishment, civil
rights and obligations were often incidentally declared or confirmed,
but only because the violation of the right or the failure to perform
the obligation constituted improper behavior by producing conflict.

59 Sir Chaloner Alabaster, Notes and Commentaries on Chinese
There is a clear distinction between this use of law as an instrument of control of the whole gamut of social relations and Western criminal or penal law, dealing almost exclusively with punishment of the individual in a retributive sense. Punishment in Chinese law was not essentially retributive against the individual, but was imposed to protect society from fundamental dislocation. But the civil aspect of the law was not eliminated in the process. For example, the wrong of marrying some relative with whom marriage is forbidden was, under the codes, punished by so many strokes of bamboo. If the sanction be suppressed and replaced only by nullity of the marriage thus contracted, one is face to face with a piece of purely civil legislation. This change actually occurred in the last years of the Ch'ing dynasty.

Thus, a true characterization of traditional Chinese law might be that it was a unique synthesis of social customs, morals, and ethics (li) enforced by the strictures of positive law (fa) for the sole purpose of ensuring social harmony and an accord with natural law. Viewed in this fashion, "li" and "fa" become like the two sides of a coin, or as the Yin and the Yang, and the distinction between "penal" and "civil" ceases to have other than semantic significance.

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60 Jean Escarra, Chinese Law and Comparative Jurisprudence (Tientsin: La Librarie Francaise, 1926), p. 15.
CHAPTER IV

MODERN DEVELOPMENTS IN CHINESE LAW

During the past half-century, a major revolution in Chinese jurisprudence has been set in motion. The expulsion of the Nationalist Government from the mainland and the substitution of Communist ideology and practices has altered only slightly and perhaps accelerated this process of change.

A. WESTERNIZATION OF LAW IN THE REPUBLIC OF CHINA

Westernization of Chinese law, which began in the early years of this century and continued through the years of the Nationalist Government rule on the mainland, can be traced back to a desire on the part of the Chinese to remove the institutions of extraterritoriality and consular jurisdiction, conceded to foreign powers under treaties made in the nineteenth century.

A lack of regard for Chinese laws characterized the foreigners who went to China in the 18th and early 19th centuries. They tended to pay no attention to the local rules, feeling it impossible to obey Chinese law, different in many ways from their own, without humiliating themselves and disgracing their country. In addition, however, there was undoubtedly a sincere dissatisfaction with Chinese law and the
administration of justice by Chinese officials. 1 Particularly objectionable to foreigners were the following practices:

1) The principle of joint responsibility by which an entire family or group could be made to suffer for the crimes of an individual;

2) Chinese concepts of responsibility in cases of accidental deaths by which a number of foreigners had suffered heavy penalties including death;

3) The use of judicial torture and the general conduct of trials;

4) Barbarity of punishments.

The claim of exemption by foreigners inevitably led to disputes with local authorities, as well as with Chinese citizens. One such series of disputes ended in open armed conflict between China and Great Britain over the question of the importation of Indian opium. British victory resulted in the Treaty of Nanking in 1843 which officially recognized the rule that under certain conditions, aliens in China would be exempt from the jurisdiction of Chinese law and law courts.

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1 Citizens League, Syllabus on Extraterritoriality in China (Nanking: Committee on Abolition of Extraterritoriality in China, 1929), Pp. 6-7.

2 Ibid.
However, it was in the Treaty of Wang-hsien (1844), signed with the United States, that the principle was more clearly stated and defined. In the next 75 years the American treaty served as the model for other extraterritoriality negotiations.3

At first the idea of extraterritoriality was not completely anathemous to the Chinese, there being situations where it could be used to advantage. For example, in the 1860's the Chinese government, not wanting foreigners in the interior on any condition, used the argument that since they were not subject to Chinese law it was not proper for them to travel inland.4

Consular jurisdiction over nations of the treaty powers were first limited to a few ports, and involved only a relatively small number of individuals. However, as the number of treaty ports increased and Sino-Western contact in these ports expanded, the foreign population over whom the Chinese courts exercised no control grew to sizeable proportions. When the privilege was exacted by Japan for her subjects after the Sino-Japanese war of 1895, the problem became acute. What had originated as a "modus vivendi" designed to effect harmonious


relations between Chinese and foreigners soon developed into a complicated system of rules and courts.  

Great Britain and the United States both maintained specially organized court systems to handle their affairs. However, the majority of litigation was handled by the various foreign consuls, who carried on judicial functions in addition to their regular consular duties. Such a complex system had substantial defects, among which were the following:

1) Multiplicity of courts in one locality;
2) Diversity among and uncertainty of laws to be applied;
3) Lack of effective control over witnesses or plaintiffs of another nationality;
4) Difficulty of obtaining evidence where a foreigner committed a crime in the interior of the country, since he had to be tried by his own consul, normally quite a distance from the scene of the complaint;


7Tung Lin, China and Some Phases of International Law (London: Oxford Press, 1940), p. 70.

8Ibid.
5) Conflict of consular and judicial functions;

6) Abuses by foreigners residing in China who claimed extraterritoriality made them immune to local taxes and excises;

Because of these objectionable features, and the rising nationalistic feeling, a movement for reform and the recovery of full sovereign rights was begun, around the turn of the century. As a first step in the direction of reform, the following agreement was obtained in the revised Commercial Treaty of 1903 with Great Britain:

"China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations...Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extra-territoriality rights when she is satisfied that the state of the Chinese laws, the arrangements for their administration and other considerations warrant her in so doing."

A similar provision was also inserted in the commercial treaties subsequently concluded with the United States and Japan. 

Soon after the conclusion of the new treaties, an eminent Chinese jurist, Shen Chia-pen, and the lawyer-diplomat Dr. Wu Tingfang, were commissioned by the Emperor to bring the law into accord with Western jurisprudence; the result was the establishment of a Law Codification Commission in 1904.

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Pending preparation of major changes by this latter group, an immediate modification of the existing law was undertaken.\textsuperscript{11}

The Chinese Supreme Court, the Ta Li Yuan, was established by imperial edict in December, 1906. Its predecessor, the Ta Li Ssu, whose history went back at least 1400 years, had been merely a section of the Hsing Pu, the Board of Punishments. Then in 1907 all of the courts were put on a systematic basis, in line with Western systems.\textsuperscript{12}

Three grades of courts were established - Local, District, and High - in addition to the Supreme Court which had five judges in each of its Divisions or Branches, civil and criminal. The Local Courts were later abolished, leaving the District Courts as the trial court, presided over by a single judge. Each province was given a High Court, or intermediate appellate court, having three judges.

In the first year of the new Republic a new Criminal Code, drafted by the Law Codification Commission, was promulgated. This code was based largely upon the Japanese penal code, which in turn was modeled upon that of Germany.\textsuperscript{13} This Code continued in force until replaced by a new Criminal Code in 1928, which in turn was replaced in 1935. Not until after the First World War, when the work of the Law Codification Commission was taken over by the Legislature Yuan, were additional comprehensive laws finally enacted. These included a detailed civil code in 1930, patterned primarily after

\begin{thebibliography}{9}
\bibitem{12} Cheng, "A Sketch of Chinese Law", p. 41.
\bibitem{13} Wang, \textit{op. cit.}, pp 19, 20.
\end{thebibliography}
German and Swiss Civil Codes, and special separate commercial laws such as the Banking Law, Commercial Company Law, Admiralty Law, Insurance Law, Negotiable Instrument Law, Bankruptcy Law, Trademark Law, Patent Law, Stock Exchange Law, Commercial Guild Law, and the Industrial Guild Law. 14

No significant distinction can be noted between these laws and similar legislation in Western countries. These newer codes and laws are not Chinese nor even Oriental instruments. They are Western products, and even though filtered, in some instances, through Japanese sources, have little or no foundation in Chinese historical practices.

Leaving aside for a moment the question of the effectiveness of these changes; there can be no argument that it constituted a judicial revolution. The law now specified offenses independent of the circumstances of the universe. Individual rights were now purportedly defined and protected by the agencies of the government. Relationship lost its old importance and no longer either defined the character of an act nor acted as the natural corrective of the rigor of the law. The word "fan" (fan), given as a general definition of offenses under the assumption that it would be modified in specific instances

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by the relationship to each other of the individuals involved, disappeared from the legal texts.\textsuperscript{15}

Several similarities can be noted between this legal revolution and that led by the Legalists. The leaders of both movements were utilitarian in outlook. Each in its own day aimed at the establishment of a modern state and to control the life of the nation deliberately by means of positive law. Both felt that the law must be definite, public, and equally applicable to all. The similarity was not complete, however. The Legalist background was Taoistic and a basic aim was the separation of law and ethics; in neither case was this true of the 20th century reform. The latter modelled itself after the West, whose legal tradition was radically different from that of Taoist China and was based on philosophical foundations entirely foreign to China.

Liang Ch'i-ch'ao has pointed out\textsuperscript{16} that the Western idea of rights sanctioned and guaranteed by law was of major importance in the adoption by the Chinese of Western legal theories. While not completely understanding the principle of individual rights, the leaders of the Chinese Nationalist movement felt that they were the

\textsuperscript{15} Marcus Van der Valk, \textit{An Outline of Modern Chinese Family Law} (Peking: Vetch, 1939), p. 74.

key to Western strength. What happened was the borrowing of the
form without an understanding of the real meaning of the institution.

Adoption of the new legal system was basically a matter of
expediency for the nation, sincere as its exponents may have been.
Political upheavals and the expulsion of the Nationalist Government
from the mainland eliminated the question as to whether this alien
system could have been successfully grafted on Chinese society, al-
though the question was raised again in a similar form, as shall be
seen, in the Communist legal reforms.17

Perpetuation of the status quo antedating the arrival of
Western influence was, of course, impossible. But "Westernization"
in any area of Eastern society presents difficult, at times seemingly
impossible, problems. The law and legal system is no exception. The
principal question is always this: to what extent must place be
given for the anterior written law and for the innumerable customs
practised in the land? All countries of ancient civilization who
have adopted modern Western type laws, e.g., Turkey, Siam, Japan, have
had to solve this problem. "The risk is always one of raising a
structure remarkable on paper but without any foundation in the nation-
al juristic conscience."18

17See infra, pp. 85-105.

18Jean Escarra, Chinese Law and Comparative Jurisprudence
(Tientsen: Le Librarie Francaise, 1926), p. 22.
The problem is not one merely of securing popular acceptance of Western conception of "law" and Western judicial procedures. The changes attempted under the new legislation of the 1920's and 1930's were of a basic substantive nature, aimed, in many cases, at altering institutions of an undeniably technical precision, functioning at the will of those concerned. The matter of negotiable instruments furnishes a good illustration of this problem. Chinese businessmen for centuries utilized types of documents comparable to but slightly different from traditional bills of exchange, promissory notes and checks, some of which dated back to the T'ang dynasty. The new law sought to induce them to renounce this system, which was understood and had given excellent results, and adopt another one more in harmony with international practice but alien to Chinese custom. A similar abrupt break with tradition was the attempt to substitute a system of compulsory execution for the traditional system of execution based wholly on the debtor's voluntary acceptance of the judgment against him.

It had been noted also that the Western principle of individuality of punishment was a feature that was adopted only very slowly, constituting such a major break from Chinese tradition.

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19Ibid, p. 33

The extent to which these and other profound changes would have been accepted, given a sufficient period of normal adjustment, is impossible to judge. Results on Formosa cannot be accepted as proof or refutation of success, not only because of the minority status of the politically and economically dominant Chinese, but also because of the unlikelihood that this Chinese minority represented a true cross-section of mainland Chinese society.

There is some evidence that difficulties were encountered in erecting a theoretical justification for the change. With the destruction of the traditional system, legal theorists were forced to seek a new theoretical justification for the modern Chinese jurisprudence. This was particularly important if there was to be a popular acceptance of the traditionally unpopular and socially improper idea of recourse to the courts as a means of settling disputes and of making legal arrangements. By turning to their history the Chinese could have found a valid precedent in the Legalist doctrine. However, the Confucian literati had, over a period of 2000 years, irreparably smeared the reputation of the Legalist scholars.

The problem was to make the idea of an all-embracing positive law palatable. The solution attempted was similar to that used in Han times. Confucianism was again revived to act as a facade for the positive law, i.e., Legalist, concepts. The works of Sun Yat-sen and his successors are filled with Confucian tenets and ideas.
Opposed to such a trend were those supporting Marxist doctrines, who regarded Confucianism as a feudalistic and reactionary teaching and sought its elimination from Chinese life. Military success of the latter did not, however, settle the problem of legal philosophy.

21 E.G., Chiang K'ai-shek, China's Destiny (New York: Macmillan 1947); Hu Shih, The Development of Logical Method in Ancient China (Shanghai: Oriental Book Co. 1928), p. 6, calling for a resurrection of the ancient philosophical schools.
B. LAW AND LEGAL DEVELOPMENTS IN COMMUNIST CHINA

For many people the word "law" is so closely linked with the idea of a government bound by constitutional restraints that to speak of Communist law appears to them a contradiction in terms. The few writers who have ventured, on the basis of the scanty information available, to describe or analyze the legal system of Communist China have, with but one or two exceptions, tended to take such a completely derogatory viewpoint.

Thus, Long Liang, formerly Dean of the Law School of Sun Yat Sen University, Canton, and Judge of the Provisional Court, Shanghai, recently concluded that the "Communists on the mainland have no use for the former laws or indeed for any law," and spoke of their "crude, arbitrary, and barbarous judicial proceedings..."

22 Henry Wei, in the course of a research project for the United States Air Force, states that "under the Communist regime, the courts are mere subordinate organs in the government machinery. The subordinate status of the courts makes them liable to become instruments for political control and domination instead of instruments for the administration of justice." 23 Similarly, in recent detailed study of present day

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Communist China, the author contends that "the courts make no pre-
tense of being impartial and unbiased...are frankly 'political' in
nature, serving whatever policies and programs are laid down by the
regime and fulfilling whatever missions are assigned by it." 24

Other writers, having no personal or emotional ties with the pre-
Communist situation in China, suggest that there has been no real break
with the past but that what is occurring on the mainland is merely
a continuation or a new stage of the historical struggle between "rule
by law" and "rule by teaching of the people with a minimum of inter-
ference by the government..." 25

While the available evidence is still too sketchy to warrant
any conclusive expression of opinion, it does suggest that the more
extreme criticisms are open to two logical objections. First, ad-
mitting the existence of gross judicial aberrations in the first few
chaotic years of the Communist regime, more recently there appears to be
emerging a recognizable legal system, concentrating mainly on the areas
of traditional Chinese legal problems and utilizing methods and insti-
tutions in at least partial conformity with Chinese legal traditions.
Secondly, the more violent critics appear to be judging that the


25 Van der Valk, Chinese Family Law, p. 66.
Communist legal system by the criteria and standards of Western jurisprudence, committing much the same fallacy as was committed in the late 19th century by the more violent Western critics of the Chinese judicial system that had operated so successfully for 2000 years. For it can be said with full confidence that the Communist legal system is based, not on Western models, but on the Soviet judicial experience.  

Chinese Communist officials have on many occasions uttered the usual self-serving platitudes concerning the revolutionary changes made in the judicial system. The President of the Supreme People's Court has characterized the former courts as part of a "system for oppressing and fooling the people" and lauded the establishment of a "judicial system which is dependent on the people, related to the people, and convenient to the people." On another occasion he was quoted as saying that "our judicial work must serve political ends actively, and must be brought to bear on current central political tasks and mass movements." Such remarks conform to orthodox Marxist theory.

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26Wei, op. cit., p. 10; Liang, op. cit., p. 68; Tang, op. cit., p. 223.

27Wei, op. cit., p. 8.

28Tang, op. cit., p. 218.

Passing from words to deeds, one of the first actions of the new regime was the formal abolition, by Article 17 of the Common Program, of all the legal codes of the previous Nationalist government. In the legal vacuum that followed, certain basic documents and decrees were laid down by the Communist leaders to serve as a stop-gap legal system. As listed by Chou En-lai in October, 1950, these included the Common Program of the Chinese Communist Party, and the laws, orders, instructions, and resolutions of the Central People's Government Council, Government Administrative Council, the Supreme People's Court, and other organs of government. In addition, Article 3 of the 1951 Provisional Regulations on the organization of the People's Courts specified that the courts were "to consolidate the people's democratic dictatorship, uphold the new democratic social order, and safeguard the fruit of the people's revolution."31

Also in the first year of the Communist rule, 1950, four basic laws were enacted, each apparently modelled, at least in part, on similar Soviet laws. These included the Marriage Law, which adopted many provisions of the Soviet Code of 1926; the Agrarian Reform Law which followed the pattern of the early Soviet Decrees of 1918 relating to socialization of land, and the Trade Union Law and its

30 Tang, op. cit., p. 219; Wei, op. cit., p. 8.
supplement, the Provisional Rules for Settling Labor Disputes, are said to have been inspired by the Soviet Labor Code of 1922.\textsuperscript{32}

Emulation of the Soviet legal system was also evidenced in the more significant, at least in the long run, field of legal studies. Steps were taken for the study of Soviet legal theories and practices. Books on Soviet law and government were translated into Chinese and used as texts or references in the universities. A new law school, to which Soviet jurists were invited to lecture, was established in Peiping for the study of Marxism-Leninism and the legal system of the New Democracy; this school provides a year's course for lawyers, jurists, and professors of law schools.\textsuperscript{33}

In light of this apparent attempt to imitate the Soviet legal system, and before pursuing further an examination of legal developments in Communist China, some profit can be gained by summarizing briefly the history and results of the Soviet experimentation with its legal system. For the Soviet experience of rather violent shifts of direction of legal ideology and practice should aid in a correct interpretation of past actions of the Chinese Communists in the legal field, and shed some light on its probable future direction.

\textsuperscript{32}Liang, op. cit., pp 68-69.

During the 1920's and early '30's official Soviet doctrine denounced law as a "bourgeois" institution doomed to disappear with the introduction of socialism. Under a planned economy, it was said, private rights of property and contract would be swallowed up in collectivism; freed from capitalist ideology, the family would no longer be subject to laws of marriage and divorce; crime would be treated as mental illness. Once the class conflict had been eliminated, legal reasoning, legal precedents, and formal legal institutions would be superfluous; disputes and conflicting claims "could be settled by the spontaneous, unofficial social pressure of the whole community, by the group sense of right and wrong." 34

This doctrine was actually applied in practice up to about 1936, with disastrous consequences. The Civil Code was treated with great disdain and courses in civil law were dropped from the law schools. Among state business enterprises there was a serious decline in "contract discipline", that is, proper regard for the desirability of formulating contract obligations precisely and of adhering to them. 35

A sharp reaction took place around 1936-38. Soviet law went through a profound change, not only in form and in theory, but also

in substance and practice. It came to be understood that a planned economy cannot function without a highly developed legal system, and that law is an essential means of preserving the stability of social relations. Soviet jurists applied their powers of analysis to the problems of ownership, contracts, the relation of administrative action to judicial decision, the elements of criminal intent, and similar orthodox legal problems. The supremacy of law was declared in principle, and judges required to base their decisions on established norms and standards rather than on mere considerations of economic expediency. As a result, an American lawyer today would have little trouble in accommodating himself to the Soviet legal system as manifested in the positive law.

At the same time that this movement for stability of laws and strict socialist legality was launched, there took place the ruthless liquidation of hundreds of thousands of persons suspected of political or ideological opposition, usually without a pretense of a fair trial. And it was the existence of this political terror under Stalin that completely overshadowed the fact of the co-existence of legality in those areas of social and economic life where the regime did not feel its security to be threatened.

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36 Ibid., pp. 29-37
37 Ibid., p. 193
38 Ibid., p. 200
The contrast between Soviet law and that of the Western democratic countries, however, is not merely that in Russia one is faced with this surface coexistence of revolutionary terror and legal orthodoxy. Even apart from the historic tradition of autocracy and ruthlessness, the Soviet idea of the nature and functions of law is quite different from that of, for example, socialist England. These differences are not found directly in the words of the codes, statutes, decisions, or rules of positive law; they are evident, however, in certain basic conceptions which underlie these external indicia. 39

The Soviet state is fundamentally not a secular state, in the traditions of modern Western history, but is closer to a religious state founded on a mission and a doctrine - the mission and doctrine of the Communist faith. The whole Soviet society is conceived to be a single institution, like a single great family, school, church, labor union, or business enterprise. The state stands at its head, as parent, teacher, priest, manager, director, using the legal system as an instrument for consciously remaking the whole society. 40 Law, under such a conception, plays a much more active, much more dynamic role than in the West. It has a different center of gravity, however,

39 Ibid.
40 Ibid., p. 273
than law in a state founded on individual freedom. Soviet law starts from duties, not rights. Its emphasis is not on freedom of contract, but on obligation to conform to the rules, i.e., criminal law. Individual rights are granted by the state, as a matter of grace, in order to encourage the citizen to be loyal, hard-working and well-disciplined. Law is an educational tool - a means of training people to fulfill their responsibilities under the new system.  

Two fields of emphasis in Soviet law deserve emphasis, because of parallel developments in Chinese Communist law. The first concerns the new laws relating to the rights and duties of women. Laws were passed seeking to deliver women from their traditional legal disabilities and to emancipate them from the control of their husbands. Complete legal equality was granted, in order to introduce women into all phases of social, economic, and political life. Later there came a strong encouragement of the bonds of marriage and of motherhood, but the principle of equality was not abandoned.  

The other notable development was the extension of the field of criminal law to new areas. New economic crimes were created for the purpose of supporting the Soviet economic program, protecting socialist property, preventing negligence or misconduct of workers or managers in state businesses, and punishing any deviations from the basic economic and social principles of the new order.  

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41 Ibid., p. 204  
42 Ibid., p. 240  
43 Ibid., p. 270
In the field of procedural law, what has emerged is what might be called the "parental" legal system, as contrasted with the "adversary" system of Western law. The characteristics of such a system are the following: (1) the court may search for evidence or make prior investigation of the facts, in aid of both sides of the case; (2) the objective of a criminal trial is reintegration of the offender with the community rather than punishment; confession and repentance are normal preliminaries to the re-educational program; (3) criminal and civil derelictions tend to merge; (4) the past history of an individual may be drawn into the case at any time; it is not the offense alone but the "whole man" that is in question.

This brief survey of the leading characteristics of the Soviet legal system throws into sharp focus many of the legal developments in Communist China during the past eight years, and may provide some basis for prognostication as to the future course of Communist China's legal history.

Little information is available concerning the operations of the judicial system during the period from the abolition of the laws and institutions of the Nationalist Government and the enactment of a new Constitution in 1954. In addition to the four basic laws mentioned earlier, supra, p. 89, during this early period the Communist regime promulgated the "Regulations for the Control of Counter-Revolutionaries" and the "Provisional State Secrets Act." 45

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44Ibid., p. 307.
Pursuant to these laws, and in the process of enforcing the new Agrarian Reform Law, opposition to the Communist program was ruthlessly crushed. In speeches on February 27 and March 12, 1957 Mao Tse-tung admitted that during the period from 1949 to 1954 some 800,000 persons had been liquidated. This number may be only a small portion of those punished, for in a more recent speech by Chou-En-lai on June 26, 1957, in speaking of the period 1949 to 1952, he gave the following analysis of the treatment accorded to political suspects: 16.8% executed; 42.3% sentenced to forced labor; 32% placed under police surveillance; and the rest (9%) presumably acquitted.46

One of the quasi-judicial institutions set up to accomplish this enforcement and liquidation program was the so-called "People's Tribunals", a special court set up in the local areas to "consolidate the people's democratic dictatorship, and to bring the agrarian reform to a successful conclusion by making use of the judicial process to punish criminals who violate the agrarian reform laws, on the one hand, and on the other hand, the despots, bandits, agents, and counter-revolutionaries who endanger the interest of the people and the state by disturbing and threatening the social order." 47 Apparently, however these special "ad hoc" bodies were distinct and separate from the system of ordinary courts. They were essentially "political" rather than "judicial" courts, temporary in nature, and intended to be dissolved after their revolutionary task had been fulfilled. 48

This, of course, does not mean that liquidation of opponents of the regime ended with the eventual passing of the "People's Tribunals." As in Russia, development of more orthodox judicial practices coexists with continued suppression of opposition. By provisions of various special laws the following acts are still punishable by death, if committed with "counter-revolutionary intentions": 49

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48 Ibid.
(a) instigating the masses to resist and sabotage the collection of grain and taxes, labour service, military service, or implementation of other administrative decrees of the People's Government;

(b) alienating the solidarity between the Government and the nationalistic, democratic classes, democratic parties and groups, and people's organization, and;

(c) conducting counter-revolutionary propaganda and agitation, or fabricating and spreading rumours.

Punishment of undesirable elements by administrative rather than judicial agencies is also apparently still the rule. By decree dated August 3, 1957, certain administrative authorities were given wide powers to send the following individuals to labor camps for an indeterminate period:

1. Jobless, vagabonds, habitual minor criminals;

2. Counter-revolutionaries and reactionaries against Socialism whose acts do not amount to crimes, if they have been dismissed from their jobs and have no means of livelihood;

3. Those who refuse to work for a long period, or commit breaches of discipline or offend the public order, if they have been dismissed from their jobs and have no means of livelihood;

4. Those who habitually refuse labor distribution or transfer, do not accept direction in labor, complain without reason, or damage public works.

Such governmental activities constitutes a prime example of a parallel development of Soviet and Chinese Communist law, i.e., a loose

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50Ibid., p. 11.
quasi-judicial procedure with no safeguards whatsoever for individual rights, coupled with a greatly extended scope of substantive law into fields of social and economic life.

Turning to the more orthodox field of law and legal procedures, a Law Codification Committee was set up in the spring of 1950 to formulate comprehensive codes. The snail-like progress that was made is evidenced by various official reports or speeches during the following years. In September, 1950, Tung Pi-wu, Chairman of the Committee on Legal and Political Affairs, Government Administrative Council, stated that an Outline Penal Code, a Judicial Procedure Code, and Outline Law on Organization of People's Courts, a Company Law, and other statutes were being prepared. In May, 1951 P'eng Chen, Vice Chairman of that committee could report no further definite progress. He contended, however, that there was no real hurry to complete detailed law codes which would be "neither mature nor urgently necessary." As of 1955, apparently, the criminal procedure had not yet been enacted.

Formal legal basis for the court system, however, was incorporated in the 1954 Constitution (Section 6) and outlined in detail in the separate Organic Laws adopted by the First National People's Congress, on September 21, 1954. This does not mean that there was no court

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51 Tang, op. cit., p. 220.
52 Wei, op. cit., p. 9.
53 Tang, op. cit., p. 220.
54 Ibid., p. 10.
55 Ibid., p. 223.
system functioning prior to this date, despite the formal abolition of the Nationalist Government laws. Apparently an ad-hoc system, a substantial duplication of the prior system, was continued, although it is probable that "a considerable degree of confusion reigned."

The regular court system thus established consists of a Supreme Court and four levels of lower or intermediate appellate courts. In addition, special courts may be created by the State Council, including military courts, railway transportation courts, and water transportation courts, all subject to appellate review by the Supreme Court.

The biggest problem, apparently, was a lack of trained dependable cadre whom the Government could trust to operate the courts in accord with Government directives. This led to a shortage of courts and the creation of a huge backlog of cases. This in turn meant that each court had to deal with a number of cases too vast for its capacity.

For example, from March 13 through October 31, 1949, the Peking Municipal Court received 13,561 cases, of which 8,451 were criminal cases and 5,110 were civil, the latter mainly involving house rent, marital troubles, and debts. During this same period the court decided 11,082 cases, leaving 3,117 cases pending. Other courts reported similar congestion. Such volume of litigation is fantastic even compared

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58 Ibd., p. 224-225.
59 Wei, op. cit., pp. 12, 16.
with courts in the United States, long noted for congestion and case back-logs.

This shortage of personnel, elimination of case law precedents and failure to enact new codes together contributed to a certain informality of procedure and adjudication during the early years of the Communist regime. In part, this was a studied policy, the intent being to simplify the former "bourgeois" procedures and thus bring the institutions of justice more within the understanding of the litigants, and also to judge cases not according to a written code but "ex aequo et bono," (according to equity and conscience). 61

The most interesting feature of the somewhat unorthodox procedures adopted was the informal participation of the general public in litigation at the trial court level. Either during a case or at its termination any member of the audience is permitted to stand and, with the court's permission, ask questions or express his or her opinion with regard to any matter pertaining to the case. The judge, or senior judge if the court were composed of more than one, then explains the court's decision of viewpoint of the case; and, if different from that expressed by the audience, is expected to convince the latter of the correctness of the court view. This is supposed to have great educative value for the public.62

60 For example, in a comparable period of time, i.e., 7½ months, approximately 6,000 cases are filed in the Municipal Court of the City and County of San Francisco, a notoriously litigious community.

61 Bonnichon, op. cit., p. 13.

62 Sundaralal, op. cit., pp. 309, 349; see also Tang, op. cit., p. 226, discussing "mass participation" in the judicial process.
For somewhat the same reasons, special offices were apparently established for educating the people in legal matters so that they might understand the laws and be able to draft their own legal documents, if necessary. For it was not until 1956 that lawyers began to practice for the public in general as well as for governments agencies, and public enterprises. According to figures given in January 19, 1957, in the Kuang Ming Jih Pao, 3500 lawyers were then available for consultation by the public, and about 1000 legal advice centers had been organized.

The great volume of litigation has apparently not been completely favored by the Government. In instructions to judicial officials on November 3, 1950, Chou En-lai urged wider adoption of such means as arbitration and conciliation to mitigate litigation. It is difficult to ascertain the extent to which such proposals have been implemented.

Some limited information is available concerning steps taken in Peiping to forestall litigation, on the one hand, and to adopt methods of settling litigation without formal trial. Various public information media have been utilized to help the people understand the law and thereby avoid becoming entangled in legal problems. The various policies and decrees of the Government, model cases, and practical experience gained in judicial work were made known to the

63 Sunderlal, op. cit., pp. 350
64 Bulletin, op. cit., p. 11.
people through the press, radio broadcasts, public trials, movies, and the posting of judicial decisions (printed in large type) in public places. 66

Mediation and conciliation measures have been used on a large scale, with a mediation section or office being set up in the local district government offices. All civil cases, except those involving aliens, are subject to mediation, as are criminal cases of a less serious nature, except those involving professional thieves. 67

To further aid in reducing court congestion, two other procedures have been tried. One is called a "collective trial," involving the mediation, and trial if necessary, of a group of similar cases; the mediation always included lectures on the enlightenment of the new government policies, the evil of disturbing the social harmony, and the desirability of effecting a private settlement within a short period. The other procedure involved, in effect, bringing the court to the litigants, saving them trips to the Peking Court. Under both procedures, the aid of government organs, social associations, and other inhabitants of the locale of the litigants were sought, to aid in settling or deciding the case. 68

66 Ibid.
67 Ibid., p. 15
68 Ibid.
The failure of the Communist Government to enact detailed codes and statutes during its early years has apparently been overcome. That the leaders of the regime are sensitive to the criticism that they have neglected legislation and the judicial system is apparent from the statement of the newspaper Kuang Ming Jih Pao, reported on Radio Peiping on August 3, 1957, to the effect that "some 4,118 laws and ordinances of the present regime refute the fallacious views of the bourgeois Rightists that China had never paid essential attention to legislation an that there was no law among Government and judicial organizations." At least three volumes of such laws have been published by the legislation bureau of the State Council under the title "Chung Hua Jen Min Kung Ho Kuo Fa Kuo Lu Pien," and covering the period through June, 1956.70

Greatest attention, both from a legislative and judicial standpoint, has been given by the Communist government to the subject of family law for the same purported reasons that this subject was given priority in the Soviet legal reforms. As expressed in Chapter I of the New Marriage Law, promulgated on May 1, 1950, "The arbitrary and compulsary feudal system of marriage, based on the superiority of men over women shall be abolished. The new system is based on

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free choice of partners, on monogamy, on equal rights for both sexes, and on protection of the lawful interests of women and children.\footnote{E. Stuart Kirby, \textit{Contemporary China} (London: Oxford University Press, 1956), p. 125.}

The Marriage Law actually covers not only the subject of marriage, but also other matters traditionally part of the Chinese codes relating to personal and family relationships. Basically the Law involves the following six problems:\footnote{Marcus H. Van der Valk, \textit{Conservatism in Modern Chinese Family Law} (Leiden: E. J. Brill, 1956), p. 2.}

1. Rules of Relationship and prohibition to marriage by individuals within certain specific relationships (Ch. 2).

2. Rights and obligations arising from membership in the "house" or family, including the problem of concubinage. (Ch. 3)


4. The custom of "t'ung yang hai" (传统完婚) or betrothing a girl and sending her to live with her future husband's family while still a child. (Ch. 5)

5. Rules governing marriagable age. (Ch. 6)

6. Sale and pawning of women. (Ch. 7)

None of these represents an excursion by the Chinese Communists into new fields of law. Each represents problems that have been faced in slightly varying fashion by Chinese dynasties since the earliest recorded Chinese legal history. The actual wording of the new law is
full of ambiguities, open to various interpretations, depending upon whether the interpretation is made by conservative rural cadres, moderate Chinese intellectuals, or radical party-men in the more urbanized or cosmopolitanized circles. However, the general principles stated are similar to those of the Civil Code of the Nationalist Government, and it is difficult to determine just what in the "old system" is under attack.

The portion of the law relating to restrictions on marriage provides, inter alia, that "The question of prohibiting marriage between collateral relations by blood within the fifth degree of relationship is to be determined by custom." 74 The Communist legislators have stressed that this is a unique feature of the New Law; actually, however, the only difference between this and prior Chinese Nationalist law is that formerly marriages within the fifth degree of consanguinity were generally prohibited, 75 whereas under the New Law they would be permitted if in accord with "custom." It has been suggested, however, that the "custom" referred to by Communists is Russian custom, which permits marriage between relatives within the fifth degree, particularly since Chinese Communist spokesmen have purportedly stated that "from the examples furnished by the modern Russian people, who do not prohibit marriage between collateral relatives, it has been proved that there is no harmful hereditary influence by blood." 76

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73 Kirby, op. cit., p. 125.
74 Ibid., p. 126.
75 Ibid., p. 127.
76 Ibid.
Enforcement of the New Marriage Law has apparently met with considerable difficulties, despite the fact that it represented merely a continuation of several decades of similar attempts; customs and habits of centuries-old duration apparently offering an equal challenge to Nationalists and Communists. In each year following promulgation of the law - in 1951, 1952, 1953, and 1954 - extensive campaigns were launched by the Government to carry through the reforms called for by the law. The cadre in the field, charged with the enforcement program, were severely criticized, although the charges were not consistent. On the one hand they were charged with not enforcing the law, and on the other with upholding wicked feudal customs, interfering with freedom of marriage, oppressing women, and bringing about uninterrupted series of suicides and homicides. In any case, there was apparently a recognition that there had not yet been created an officialdom able and willing to enforce the new laws.

It has been suggested that the Government sees its main task as one of educating both its own officials and the people and to correct erroneous views of both through education, admonition, propaganda, and severe criticism. If true, then the new law becomes merely a model, an ideal to strive for but without binding force. The policy becomes

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77 Van der Valk, Chinese Family Law, p. 1; Kirby, op. cit., p. 132.
79 Ibid., p. 64.
80 Ibid., pp. 65-67.
one of attempting to change the custom by education and exhortation, rather than by law.

To conclude this brief survey of legal developments in Communist China, the Communist system appears to involve dual tendencies. On the one hand the Communists are continuing without material change the attempts of the Chinese Nationalists to construct a Western system of law and induce its acceptance by the Chinese people, still in the process of change from the traditional peasant society to one of at least partial industrialization on Western patterns. They have substituted Soviet positive law as the model in place of that of the Western democracies; this change is mainly one of degree rather than substance, involving more the degree in which positive law is to be used to alter and shape society, rather than the importance of positive law as such. On the other hand they appear to have reverted to some extent to a more traditional interpretation of the role of law and litigation - a de-emphasis on detailed laws to be followed literally by the courts; a re-emphasis on the role of arbitration and conciliation and the deciding of each case on its particular equitable merits, the merits of a case to be based on the extent to which the parties' claims conform or depart from the general goals of the Communist state. As under traditional Confucian dogma, the goal is "one big happy family", all working and living together in harmony, with each doing the task
assigned to him by his place in society. Unlike the traditional Confucian ideal state, however, the Communist goal is to be achieved through the purposeful use of positive law, following the pattern set by its Soviet predecessor.
CHAPTER V

CONCLUSION

Twice in the course of its recorded history the basic structure of Chinese political and social life has been profoundly altered, first, by the successful establishment under the Ch'in of the imperial idea, marking the demise of feudal institutions, and secondly, in the 19th and 20th centuries by the inexorable tide of Western influence. In both cases the status, form, and function of law and its relation to Chinese society were similarly affected in substantial measure.

Prior to the ascendency of the Ch'in, nothing challenged the at least theoretical supremacy of the Confucian dogma and its view of the natural order and harmony of the universe, the interdependence of all of its parts, and the duty of each individual to act in conformity with the universal rules of natural order, so as not to disturb the cosmic equilibrium. Chinese society was guided by "li", relatively unraveled by the dictates of positive law. With the victory of the Ch'in and the temporary dominance of the Legalist scholars, positive law, like the proverbial camel, "stuck its nose under the tent" and has never been ousted.
With the Han there emerged a body of rules, with penal, secular, and pragmatic purposes, seemingly able to stand independent of any connotation of universal harmony or natural law. The early formal suppression of the teachings of the School of Law was unable to prevent the continuance of the Legalists' insistence on written codes of law. The bureaucratic empire could and did become thoroughly Confucianized as far as the role of government and the proper organization of society were concerned; but the tool with which to carry out the program of insuring the harmony and social equilibrium of the empire was the positive law codes of the Legalists.

"Li" did not disappear as the major influence. It constantly governed the interpretation, application, and enforcement of the law. Law, therefore, remained conservative in spirit. In only rare cases can it be said to have been creative, i.e., inducing or aiding the growth of new social, political, or economic situations.

The entry of the West changed the harmony of this delicate balance of li and law. The drastic effect of Western economic imperialism, political ideology, social institutions, and, above all, military force, meant a new role for law and legal institutions in Chinese society. Wholesale substitution of Western positive law by the Chinese Nationalist leaders, revolutionary in this area as in other ways, may or may not have succeeded; with their expulsion from
the mainland this question has become almost academic. The Chinese Communists are equally indoctrinate with Western positive law, but with a branch of Western law, the Soviet Russian variety, that stresses duties and responsibilities rather than rights, and emphasises community rather than individual interest. This may be a position closer to the Confucian tradition than the detailed codes adopted by the Nationalist Government and hence may be accepted more readily.

In any event, the Communists appear to have been in no haste to commit themselves in any clear cut fashion to a battery of positive law codes.

In exploring procedures of conciliation and arbitration, the Communists have reverted in some respects to the Confucian tradition, although they would be the first to deny any legacy from such a "reactionary" source. Yet, if the pattern of Soviet legal development provides any guide, further development of positive law in the Western style, and an increasing emphasis on strict "legality" can be expected in the future.
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