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The Chinese Family from Customary Law to Positive Law

By WEN YEN TSAO*

Introduction

The traditional Chinese law, by its very nature, is mostly customary. The legal history of the Chinese nation, like that of any other ancient nation, convinces us that in the early stage of cultural development, customs, as the natural growth from long practice and usage, were virtually rules of conduct. Later, they fastened themselves upon existing institutions and became compulsory. With the emergence of government, these rules were the very source of positive decrees and ordinances. In this connection, Story (1779-1845) rightly observes:

Whenever we trace positive laws in the early stage of society, they are few and not of wide extent; directions for special concerns rather than comprehensive regulations for the universal adjustment of rights. No man can pretend that in Asia any such universal rules were established by positive legislation at the origin of the great nations by which it is peopled.

If we examine carefully the old Chinese statute law, we will find that the part prescribing crime and punishment, which seems to be positive in nature, is permeated with the age-old practices, called *li*, and overall Confucian ethics. As to the bulk of law regulating civil matters arising from family relations, it is none other than customary.

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1 When positive law made its first appearance in Chinese history can never be determined. What the different schools of thought postulated as to its very beginning in China is merely speculative rather than factual. According to The Shu King, the Book of History, the so-called five corporal punishments are said to have been imposed during the reign of the legendary Emperor Yao (2357?-2255? B.C.). Although the authenticity of The Shu King has often been questioned, nevertheless the enforcement of rules, in the form of decrees and orders, in a primitive society, as soon as it began to develop a form of government, must be admitted as a fact common to all cultures. See YANG HUNG-LIH, HISTORY OF THE DEVELOPMENT OF CHINESE LAW ch. I (1936) (in Chinese).

2 Story, Law, Legislation, Code, in Readings in Legal History 460-72 (Howe ed. 1953).

3 See infra note 14.
Since the Chinese customary law is our main concern, it should be noted at the outset that the term customary law as herein used comprises three elements, namely, (1) a large part of the statute law which leant heavily on Confucian ethics and li as the main source of legislation; (2) generally accepted customs and conventions, which were largely influenced by Confucian ethics and li, and which statute law gave countenance or made enforceable; and (3) locally accepted customs and conventions, which, though not necessarily coinciding with morals or precepts of any kind, statute law did not forbid. In the process of investigation for our present purpose we should not lose sight of these three elements.

In the history of Chinese civilization no institution was so tenacious as the traditional family, which had been the very foundation of Chinese society almost until the first quarter of the present century. How is this institution related to law? How has law been made to serve this institution? These two questions should be, as far as possible, properly answered. It will be soon manifested that historically the family institution determined the nature, the functions, and the end of law. In turn, law helped to stabilize and perpetuate the family institution. It is interesting to note, however, that both were moulded by Confucian precepts and li, upon which common ground they stood.

The traditional Chinese law began to decline toward the close of the 19th century, and today the despotic Communist rule, as many have feared, may hasten its burial. For they who look upon law in modern times as a body of necessary rules characterized by a high degree of such qualities as complexity, subtlety, and technicality are inclined to slight the seemingly crude form of Chinese statute law of the past. But we are mindful of Savigny's analogy of law and language: "For law, as for language, there is no cessation. It is subject to the same movement and development as every other expression of the life of the people." Especially is it true when we are concerned with the spirit rather than the form of Chinese law. In the course of our investigation we will try to explore this spirit. The writer has reason to believe that, though most of the statute laws and customs of China's past have been sloughed off, much of the spirit of the traditional law cannot and should not be put away. Can we say that this spirit is dead? Is it not appropriate to say that it is asleep and should be awakened?

The Chinese people in their struggle for modernization are still in the process of writing their own law to meet their peculiar needs in a

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4 Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, trans. in Gooch, History and Historians in the Nineteenth Century 45 (1952).
changing world. It is high time, therefore, that this spirit should be called to life. A glimpse of Chinese legal history from early times to the present will give us a better perspective and enable us to grasp the essence of this Chinese spirit.

The Legalist School and Positive Legislation

To say that the traditional Chinese law is mostly customary should not lead us into the delusion that there was no legal positivism, either in theory or practice, in Chinese history. In the following passages the Legalist School is introduced as a contrast to the Confucian School, and this contrast may be succinctly stated as government by positive legislation versus government by li. It is understandable that without mention of the theory and practice of the Legalist School the significance of Chinese customary law cannot be adequately appraised.

Throughout the long history of imperial China the only dynasty which practiced the doctrine of positive legislation was the Ch'in Dynasty (256-206 B.C.) This doctrine was advocated by the Legalist School, one of the most influential of the so-called “Hundred Schools of Thought” during the Warring States Period (403-222 B.C.). The theoretical foundation of Legalism lies in the belief that human nature is inherently bad, and that it is law with its retribution which will keep man's natural inclination toward evil from causing harm to society. Where law succeeds, the Confucian teaching of benevolence apparently has failed. "While the love of parents is not sufficient to discipline the children," Han Fei reasoned, "the severe penalties of the
district magistrate are. This is because men became naturally spoiled by love, but are submissive to authority.”7 As a natural corollary it is imperative that the state be governed by positive legislation and strict enforcement of laws on the basis of equality. “Rewards should be rich and certain so that the people will be attracted by them; punishments should be severe and definite so that the people will fear them; and laws should be uniform and steadfast so that the people will be familiar with them.”8 Again he said: “To punish a fault does not exempt the great officials. To reward merit does not exclude the commoners.”9 Similarly in Kuan Tzu we find the same doctrine of equality before the law. “[A wise king] never changed the law for his relatives, old acquaintances, or the nobles. . . A ruler considers the law more important than his relatives.”10 Seeing the positive nature of law, Han Fei, who showed no respect for antiquity as the Confucianists did, maintained that laws should be made to meet the needs of prevailing conditions. Customs and traditions were of no account in the eyes of Han Fei. “Therefore,” said he, “the sage considers the condition of the times, whether it is one of plenty or scarcity, abundance or meagerness, and governs the people accordingly. Thus though penalties are light, it is not due to charity; though punishment is heavy, it is not due to cruelty. Whatever is done is done in accordance with the circumstances of the age.”11 In other words, what matters is not the past but the present. Laws deriving their sources from long practice and usage may have to be replaced by new ones, which might have no connection whatever with such practice and usage.

By engaging the service of the Legalists, particularly that of Li Ssu (d. 208 B.C.), and by translating their theories into practice, the Kingdom of Ch’in succeeded in regimenting its people and became rich and powerful. One by one it conquered its rivals, the last of which was vanquished in 221 B.C. King Ch’eng then declared himself the First Emperor of China, with Li Ssu as the prime minister. The Legalist School had conclusively vindicated its usefulness and efficiency, and its supremacy over all other schools of thought was unchallengeable. For the first time in Chinese history China was unified under one powerful centralized government. The Legalist doctrine of uniformity in law and severity in punishment subjugated the people to the will of the ruler. The gigantic work of construction

8 Ibid.
9 Id. at 24a.
10 Tan & Wen, The Kuan Tzu 17 (1954).
11 2 Liao, op. cit. supra note 7, at 49.
the Great Wall), the supremacy and magnitude of military power, the abolition of feudalism, the standardization of weights, measures, and the writing system, and the tremendous amount of expenditure brought forth a grandeur hitherto unknown. And yet the empire that had been built by force and ruled by positive legislation was destined to be short-lived. In less than 15 years and shortly after the death of the “First Emperor,” the House of Ch’in crumbled. As its rise was attributable to the Legalists, so must be its fall. Statesmen and historians of later dynasties invariably denounced the Legalists for their sole dependence on positive laws together with harsh punishments and other oppressive measures, and for their total disregard of humanity and justice. Consequently, the influence of the Legalist School was greatly diminished.

The Confucian Influence and the Nature of Law

In contrast to the Legalist School, the Confucian School advocated government by li. It should be noted here that although Confucius assumed the self-appointed mission of endeavoring to effect the pacification of the world through good government and ideal family relations, with cultivation of the person as the very starting point, he categorically demed being an originator and humbly regarded himself as a transmitter. What he tried to preserve, interpret, glorify, and transmit was the cultural heritage which was founded on li, and which he traced back to the remote period of the legendary sage-kings, Yao and Shun, who reigned around the 24th and 23rd centuries B.C. Etymologically the pictographic character li suggests the offering of sacrifices in a jade vessel to deities. It leads us to infer that li, which originally had religious significance, developed into a body of norms,

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12 For the harsh punishments and other oppressive measures of Ch’in see Bodde, CHINA’S FIRST UNIFIER, A STUDY IN THE CH’IN DYNASTY AS SEEN IN THE LIFE OF LI Ssu (1938); Fung, op. cit. supra note 6.

13 See CHAN, SOURCES IN CHINESE PHILOSOPHY 251 (1963). Says Chan: “There has been no Legalist School in China in the last two thousand years, or even any Legalist scholar of any prominence. When the Ssu-Ku Ch’uan-Shu (Four Libraries) was compiled late in the eighteenth century, of the 3,457 works included only eight were Legalist.”

14 For general discussion of the meaning of li, see Fung, op. cit. supra note 6, at 337-41; see also Chang, The Cultural Splendor of the Western Chou Dynasty—The Institution of Rites and Music, in 6 Chinese Culture, June, 1965, p. 1. For further study see SUN I-JANG, LI SHU TUNG K’O (A Historical Research in the Classics on Rites).

15 The Analects of Confucius VII: 1. The Master said, “A transmitter and not a maker, believing in and loving the ancients, I venture to compare myself with our old P’ang.” (Old P’ang is the Chinese name for Methuselah.)
precepts, and rules, the habitual observance of which resulted in customs and conventions. It was the Duke of Chou, one of the founders of Chou Dynasty (1028-256 B.C.), who was given the credit for bringing about a comprehensive system of \( li \), which became the very regulating force of almost all human institutions, especially the family institution. This accounts for Confucius’ highest esteem and unlimited admiration for the Duke.\(^6\)

The character \( li \), which in Chinese has a broad sense including the meaning of rite, ritual, ceremony, protocol, and etiquette, provided rules of behavior with respect to marriage, kinship, government, official system, court audience, archery, chariot-driving, military ceremonies, funerals, sacrifices, etc.\(^7\) Graced by these all-embracing and all-pervading functions, ancient China was virtually governed by \( li \) rather than by statute law.

In theory as well as in practice, the Confucian concept of an ideal society was a moral order in which \( li \) played the predominant role. Each individual person in that society was assigned a specific status or place in various forms of social relationships.\(^8\) The \( li \), as general

\(^6\) The Analects of Confucius VII: 5. The Master said, “Extreme is my decay. For a long time I have not dreamed, as I was wont to do, that I saw the Duke of Chou.”

\(^7\) See J. Legge, Texts of Confucianism 367, 388 (1883); 4 Id. 272 (1885).

\(^8\) According to Confucianism, there were five relationships, called Wu Lun, namely, between sovereign and minister, between father and son, between husband and wife, between brothers, and between friends.

The Confucian teaching of the “rectification of names” has a close bearing on these classifications of human relations. In the pursuance of \( li \) the sovereign is expected to act as a true sovereign, the minister, a true minister, the father, a true father, the son, a true son. (The Analects of Confucius XII: 5.) In Li Chi it is recorded: “As a ruler, he rested in benevolence; as a minister he rested in respect; as a son he rested in filial piety; as a father he rested in kindness; in intercourse with his subjects, he rested in good faith.” Legge, Texts of Confucianism, IV 416 (1885). It is quite clear that between the two individuals of each of the five classifications of human relations, there was a strong sense of reciprocity on a give-and-take basis. According to Confucius, “A ruler should employ his ministers according to the principles of propriety (\( li \)), and ministers should serve their ruler with loyalty” (The Analects of Confucius III: 19.) Obviously the latter's loyalty should be contingent upon the former’s observance of \( li \). In this connection Mencius went even further. In answer to a question whether it was all right for a minister to murder his king, Mencius asserted that the king who had outraged the principles of humanity and righteousness, was like a bandit and a mere ordinary man (no longer justified in being called king), and therefore deserved death. (The Book of Mencius IIB:8 (Lyall ed. 1932).)

When the scope of human relations was broadened to include those between noble and humble, superior and inferior, elder and younger, near and remote, the same rule of status and the same teaching of the “rectification of names” was held to apply. In Li Chi (The Book of Rites), annotated by Cheng Hsuen (127-200 A.D.), Confucius is quoted as having said:

Of all things by which the people live, the \( li \) are the greatest. Without
rules of behavior, serve as an indispensable guide to man in all his activities from the worship of supernatural beings and deceased ancestors to daily intercourse with his fellow men. Traced back to ancient times even before the Confucian era, they were traditional mores which had the force of law.

The fundamental principle of *li* according to Confucius, however, is not merely the strict observance of its outward formalities but the upholding of its inner spirit, which makes the formalities meaningful. In the *Analects* there are a good many passages in which Confucius stressed the essence of *li*. To quote a few will suffice. “If a man is not humane (*jen*), what has he to do with ceremonies (*li*)?” “In rituals or ceremonies, be thrifty rather than extravagant, and in funerals, be deeply sorrowful rather than shallow in sentiment.” “When Confucius offered sacrifice to his ancestors, he felt as if his ancestral spirits were actually present. When he offered sacrifice to other spiritual beings, he felt as if they were actually present.” “Filial piety nowadays means to be able to support one’s parents. But we support even dogs and horses. If there is no feeling of reverence, wherein lies the difference?” “He who sins against Heaven has no god to pray to.” “What you do not want done to you, do not do to others.” From these aphorisms we can see that the spirit of *li* has been manifested in humaneness, in truthfulness, in sincerity, and above all in reasonableness.

If the inner spirit of *li* is observed, government by *li* obviously has a great advantage over government by law. *Li*, being all pervasive and mostly positive in nature, performs the function of social education and serves to eliminate evils at the root, whereas law with retribu-
tive punishment, being negative in nature, can only condemn them after they have actually happened. Therefore, Confucius says:

Lead the people with governmental measures and regulate them by law and punishment, and they will try to evade punishment but have no sense of honor and shame. Lead them with virtue and regulate them by the rules of propriety (li), and they will have a sense of shame and, moreover, set themselves right.\(^{25}\)

In hearing litigation I am not unlike any others, what is important is to cause the people to have no litigation.\(^{26}\)

The sharp distinction between the Legalist School and the Confucian School does not mean that they are poles apart. Even from the theoretical point of view the Legalist School was by no means diametrically different from the Confucian School.\(^{27}\) From the very beginning Confucian scholars accepted law and punishments, which they regarded as correlated with or supplementary to moral influence.\(^{28}\) This attitude of compromise on the part of the Confucianists was particularly manifested in the early period of the Han Dynasty and prevailed in succeeding dynasties. The Han Dynasty, which followed the Ch’in, envisaged an empire in the real sense of the word. The unification of China by the preceding dynasty was expected to be long preserved and the imperial order to be indefinitely maintained. All efforts were then directed to this end. In the intellectual field, the thought of Confucian scholars of the Western Han Dynasty (202 B.C.-9 A.D.), of whom Tung Chung-shu (c. 179-c. 104 B.C.) was the most eminent, was therefore characterized by a syncretism commensurate with the magnitude and grandeur of the empire. The controversy between moral education based on ethical teaching and li and the deterrent effect of retribution under law was first debated in the imperial court in 81 B.C. and deliberated in a series of court discussions during the Eastern Han Dynasty (25-220 A.D.) Once and for all it was settled in this manner: “Why must a sage employ punish-

\(^{25}\)Id. at II: 3.

\(^{26}\)Id. at XII: 13.

\(^{27}\)Hsun Tzu (283-238 B.C.), from whom the Legalist School borrowed some fundamental ideas, was a great Confucianist. Unlike Mencius (371-289 B.C.), he postulated the inherent wickedness of human nature and advocated the necessity of both law and education for better government and for pacification of the whole empire. It is no wonder that Han Fei and Li Ssu, two of the great Legalists during the Warring States Period, were his students.

\(^{28}\)“Therefore the superior man framed rules of ceremony (li) for conservation of virtue; punishment to serve as barrier against licentiousness; and declared the allotments (of Heaven) as a barrier against evil desires.” LEGGE, op. cit. supra note 17, IV at 284.
ment in governing the empire? It is for the purpose of supplementing virtue and helping the governing. 29

From the practical point of view there should be no controversy, for though no society can solely depend on law for its harmonious existence, yet no government can be operated without law. If the power of polity could be employed to enforce the ethical teachings and the rules of conduct in conformity with 1i, no Confucian scholars would be opposed to it. As a matter of fact, though the Legalist School began to wane after the fall of the Ch'in, the legal system in the form of a penal code and other statutes, which was attributed to the school, was passed on to the Han, and from the Han on down to all succeeding dynasties. Ironically the Confucian bureaucracy, which had monopolized the administration of Chinese government, central and local, until the birth of the Republic, was the staunch supporter of this system. And yet within the frame of the legal system the bureaucracy made law, subject to the predominant influence of Confucianism, especially the Confucian concept of familism, so much so that the traditional Chinese law became what may be described as Confucianized. 30

In summary, it will suffice to point out that Chinese legal history has given abundant proof of the fact that Confucian ethics and those traditional mores embodied in Li Ch'i were largely incorporated in the Chinese code of law, especially the part dealing with family relations. This accounts for the customary nature of Chinese law. Long before the emergence of the traditional Chinese legal system it was the function of ethics and 1i to regulate human relations and stabilize the family institution as well as all other institutions. The regulating influence of ethics and 1i gave rise to customs, which in time became the source of law. A survey of the nature of the traditional Chinese family will bear out this point.

The Confucian Influence and the Traditional Family

The nucleus of the traditional Chinese society is the family, not the individual person. Economically the family has been the unit of production, especially among the peasants and artisans. All members of the family work as a team to earn a livelihood. Whatever they produce or make belongs to the family as a whole. As to merchants


and the gentry class, since they neither produce nor manufacture, the family is the unit of consumption, for they share a single budget, drawing upon such sources as rent, salary, or some other means for sustenance. Socially the family is also the component unit; it presents a united front for all its members to the outside world. Each individual person is referred to merely as a member of such and such family, and it is his duty to uplift its prestige and honor. Politically and legally the family is like a juristic person. Members of the family share a collective responsibility for the conduct of each, and usually the principal of the family bears the brunt. In civil matters, as we shall see, the principal of the family transacts all kinds of business for the household. Even marriage is none of the business of the parties concerned; it is the head of the family that contracts the wedlock.

The traditional Chinese family was patrilineal, patrilocal patronymic, patriarchal. Depending on the complexity of its structure, it may be classified into three types or forms. The simplest form is a small household comprising a man, his wife, and their unmarried offspring. The man as father and head of the family assumes unchallengeable authority over all members of the household. In its extended form it includes several generations under the same roof or in one enclosure. It may be called a joint family. The head of this joint family is usually the paternal grandfather, or if he is deceased, his oldest surviving brother or son. This extended family system was common, especially in rural China, and was necessitated by economic factors, for it was the unit wherein productive activities were centered. In a further extended form and in its broad sense, the term chia, family, is sometimes synonymous with that of tsu, clan, for these two are often used in a compound, e.g., chia-tsu. It is interesting to note that in the traditional concept, the family as an institution was seldom meant to be a small independent social entity, standing only for itself. On the contrary it was an organized society in which a considerable number of households were knit together on the basis of kinship in order to live a communal life.

To understand the true nature of the traditional family institution it is necessary that it be viewed from the ideological and the organizational aspects, the two being interrelated and mutually conditioned. The ideology was Confucian ideology. The organization was a typical example of a status system. The ideology moulded the organization, which in turn transformed the former into actuality. The ideal society according to Confucianism, as we have seen, is one ordered by li. The central idea of li in its simplest term is to differentiate. Between man
and woman it is intended to segregate. Between the superior and the inferior it is designed to bring about submission of the latter to the former. To define the proximity of relationships, it is employed to show relative affinity commensurate with various degrees of kinship. Since of the five cardinal human relationships three are connected with the family, the importance of the family institution can hardly be exaggerated. How this institution was organized in conformity with Confucian ideology is our immediate concern.

In the family moulded by Confucian ideology the basic principle is that each person should be assigned a specific place or status in various kinship relations with other persons. From the organizational point of view, therefore, family relations must be clearly defined, and this was done in China by evolving a kinship system, which was so much elaborated that we can hardly find anything equal in complexity in any other ancient country. "The architectonic structure of the Chinese kinship system is based upon two principles: lineal and collateral differentiation, and generation stratification. The former is a vertical and the latter a horizontal segmentation. Through the interlocking of these two principles every relative is rigidly fixed in the structure of the whole system." In addition to these two principles, age and proximity should also be taken into consideration.


32 The word "age" has two meanings. First, it refers to generation. Respect is due to those who are senior in generation stratification. Second, it refers to chronological age. Respect is due to those who are senior in years.

33 Let us explain how the system works. A person's relation with another member of the kinship is measured first by the horizontal segmentation, which will tell him whether he is in a senior or an inferior position with respect to that member. If he is of the same generation stratification as that member, seniority depends on the chronological age. Seniority, however, tells only half of the kinship system. Proximity tells another half. A person's proximity with another member belonging to the same lineage is measured by counting upward or downward, as the case may be, from himself to that member the number of generation stratifications. This is simple enough. But with respect to his proximity with a member of collateral kinship, it is not so simple. This will be measured first, by tracing to the common ancestor; second, by counting upward the number of generation stratifications from the person himself to the common ancestor; third, by counting downward the number of generation stratifications from that ancestor to that member; and finally, by making a total sum out of the number of all stratifications. The various degrees of proximity were made into *Pen-tsung Ch'u-tsu Wu-fu T'u* (The Chart of the Nine Tsung and the Five Degrees of Mourning of One's Own Tsung), which was incorporated in the *Yuan Code*, the *Ming Code*, and the *Ch'ing Code*, known as *Ts'ai-Ch'ing Lu Li*. "The reason for the inclusion of the mourning charts in the code is to make the degree of mourning between the various relatives clear so that the judge will be able to have a standard for increasing or decreasing the punishment." (Ciu'u, op. cit. supra note 29, at 69.) This is a further proof of the fact
There is another factor which affected seniority and proximity in the kinship system, and this is the subordination of female members in the traditional family. The so-called San Kang (three bonds) required that, like the minister to the sovereign and like the son to the father, the wife be subordinated to the husband. Because of this distinction, which was given cognizance by law, Chinese women never could stand on an equal footing with men. Though in the same generation stratification, they were inferior to their counterparts. This conventional practice of subordination of women had a direct bearing on the question of proximity. One is more closely related to kinsfolk on the father’s side than to those on the mother’s side. Likewise one is more closely related to descendants from males than to those from females of the same family tree in the same generation stratification. For example, I am more closely related to chih and chih nü, nephews and nieces who are children of my brothers, than wet sheng and wet sheng nii, nephews and nieces who are children of my sisters.

It must be pointed out that the practices of the kinship system which had followed closely Confucian ethics and li were incorporated into the law and the question of seniority and proximity were therefore given their full weight in the legal sense. In the administration of criminal justice, for instance, punishment was aggravated or mitigated depending on the degree of proximity between the offender and the injured party, if they were kinsfolk, and also on whether the offender was a junior or senior according to the generation stratification. As a general rule, punishment would be heavier if the offender is a junior according to generation stratification and more closely related to the injured party.

It is interesting to note that unlike homicide, assault, illicit intercourse, and other offenses, punishment for theft if committed by a relative would be imposed in inverse proportion to proximity of relationship between the thief and the owner of the goods stolen. Again the old Chinese law took cognizance of the Confucian concept of familism: the closer the relationship between two individuals the greater the obligation for mutual aid. The culpability of the thief, therefore, would be less if he preyed on one who happened to be more closely related to him.

As the degree of proximity between parents and children is of the highest order and as filial piety according to Confucian ethic scheme

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34 See Ch'ü, op. cit. supra note 29, at 41-78.
35 Id. at 67-70.
is the cardinal virtue, filial impiety was socially and legally denounced. The term "filial impiety" has a broad meaning which includes any improper behavior toward one's parent, ranging from scolding to killing. In either case, if convicted, capital punishment would ensue. Striking one's parent, of course, was a heinous crime, and the law did not take cognizance of the distinction whether the parent was unmured, mured, mured slightly, or mured seriously; the only criterion was the initial act of striking. If striking one's parent was a heinous offense, patricide should have been one of the most unpardonable crimes. The mere fact of killing a parent would justify capital punishment. It did not matter whether it was by intention, or by circumstance, or by mistake.\textsuperscript{38}

This respect for seniority culminated in filial piety, which had both ethical and legal significance, applied to every facet of family relationship, and became the fundamental principle of law. Again it is unmistakably shown that law in China simply followed customs and conventions, and in many cases it went to the extent of being arbitrary, harsh, and inhuman even with respect to civil matters. For example, retirement of persons in official positions during period of mourning (three years) following the death of their parent was made compulsory and any violation was punishable.\textsuperscript{37} To beget a child during this period was an infamous case for an official, and he would be surely dismissed.\textsuperscript{38} These and other provisions and practices concerning civil matters such as marriage and succession, which will be related in the following passages, will further convince us that in their attempt to Confucianize the statute law the Confucian bureaucrats sometimes turned a deaf ear to the Sage's insistence upon the spirit rather than the form of \textit{li}.

\textbf{Marriage and Succession under the Old Law}

\textit{Marriage}

From what we have so far observed we may be able to perceive that both the traditional Chinese law and the family institution were subjected to the same formative forces of Confucian ethics and \textit{li}. This does not mean, however, that there is a complete consistency between law and family institution on the one hand and ethics and \textit{li} on the other. Since the family institution was manifested and strengthened by law the consistency between the two calls for little refutation. But

\textsuperscript{38} Id. at 41-53.
\textsuperscript{37} Id. at 89.
\textsuperscript{38} Id. at 90.
in the course of development the law ordering and regulating family
relations sometimes became so unreasonable, arbitrary, and harsh,
that it ran counter to the very spirit of li commended by Confucius.
In considering the following passages we should bear this point in
mind.

Of the five classifications of human relations, that between husband
and wife is the fundamental and therefore the most important. With-
out the wedlock there would be no relation between father and son,
nor would there be one between brothers. Without wedlock there
would be no family; without family there would not have been such
an organized society called state.

Since the chief function of marriage was to serve the ancestral
temple and continue the family line, it became a contract, not be-
tween the principals directly concerned with it, but between the
heads of the two contracting families through the assistance of go-
betweens. The prospective groom and his bride could express no
consent, nor were they required to express it under the law or accord-
ing to custom. Old practices die hard; the authority of parents over
children’s marriage was still recognized in the early years of the
Republic.

It should be noted that the traditional Chinese family was not only
exogamous, but went much beyond. Marriage between persons of a

89 Id. at 91; Li Chi Su 61, 4h.
40 The parties who had the power to contract a valid marriage for them were in
the following order: (1) parents and paternal grandparents; (2) paternal uncles and
their wives; (3) paternal aunts; (4) elder brothers and elder sisters; (5) maternal
grandparents; (6) master of the house, in the case of slaves. (JAMESON, CHINESE
FAMILY AND COMMERCIAL LAW 46 (1921).) Since it was contracted by the parties in
this order, if the marriage was found illegal, the parties actually contracting it should
be liable to punishment; the groom and his bride would be exonerated from any
responsibility.

41 Before a betrothal agreement was reached the two families concerned would
make proper enquiries and take into consideration “men dang hu dwel” (literally “gates
and doors match,” which means that the families concerned could match each other
on the socio-economic level) and personal qualities of the prospective groom and his
bride, such as character, temperament, ability, and attainments. In short, marriage was
viewed objectively, and little allowance was given to personal feelings of the principals
directly concerned, no matter how amorous such feelings were. The shortcomings of
this kind of marriage are obvious. The prospective groom and his bride had no way
of knowing, not to speak of loving, each other before the wedding actually took place.
Oftentimes marriage was made to serve the interest of the heads of the families
contracting it. Not infrequently heads of the two contracting families betrothed their
children in their tender years only to discover regretfully later that the changing
conditions of the two families or of the two principal parties directly concerned were
so serious that the intended marriage might be considered as most undesirable.

42 Ch’u, op. cit. supra note 29, at 99.
group which can trace descent from a common ancestor exclusively through males were, of course, strictly forbidden. This rule was further stretched by making marriage illegal between persons of the same family name, irrespective of the fact that they could not in any way trace their descent from a common ancestor. Obviously this restriction had nothing to do with blood relations. For instance, marriage between cross-cousins or parallel cousins on the paternal side was of course forbidden, but the same on the maternal side was tolerated.

Since the Chinese family was a system in which each individual's position or status in relation with others was clear-cut, any marriage the effect of which tended to upset appreciably this status was unacceptable and, therefore, forbidden. For example, marriages between a maternal uncle and his niece or between a maternal aunt and her nephew were illegal. "Besides, a man was not permitted to marry a cousin of his mother or father, either parallel or cross, nor his mother's aunt, nor his paternal uncle's daughter's daughter, nor his son-in-law's sister, nor his daughter-in-law's sister."43

43 Id. at 95. Cited from TA CH'ING LU LI, 10(28)(a). The entire body of the traditional Chinese law, the result of over two thousand years of development in the work of codification, was embodied in the TA CH'ING LU LI (FUNDAMENTAL LAWS AND SUPPLEMENTARY LAWS OF THE GREAT CH'ING DYNASTY). Its first edition was promulgated by Emperor Yung Chen in 1728. From 1736 onward a general amendment of the code took place every ten years and a minor revision every five years. The final edition of the code was promulgated in 1908.

The distinction between the Lu and the Li calls for an explanation. The Lu, or the Fundamental Laws, which had been accumulated throughout the passing dynasties before accession of the Ch'ing Dynasty (1644-1911), were accepted by the new regime without alteration or amendment. The Lu are divided into 436 sections, under each of which there are supplementary laws known as the Li. The latter tend to temper the rigidity of the former.

The Li, or the Supplementary Laws, are the modifications, extensions, and restrictions of the Fundamental Laws. After undergoing a deliberate examination in the Supreme Council and receiving the sanction of the Sovereign, they were inserted in the form of clauses under the appropriate sections of the Lu. "Each section therefore consists of two parts, the first the Lu, generally in one clause, the second the Li, in two, three or more, sometimes as many as thirty or forty clauses, representing successive legislation on the particular subject. When a new law was passed it did not appear as an additional section but had to find a place under one of the existing sections as an additional Li in that particular category." See JAMIESON, op. cit. supra note 40, at 9.

The TA CH'ING LU LI contains six main divisions, corresponding to the six departments or ministries of the central government, viz., the Department of Civil Service, the Department of Rites and Ceremonies, the Department of War, the Department of Punishments, the Department of "Households."

The last-named department is called Hu Pu in Chinese, Hu being the Chinese for family or household. This department is a counterpart of the Treasury Department or the Department of Finance. Since formerly taxes in China were levied on the family
The status of the married woman, both legally and socially, made her life hardly enviable in the old days. It should be pointed out here that Confucius’ five classifications of human relations, as we have noted, were based on the principle of reciprocity. That man should have the authority to impose his will on his wife disregarding rules of *li* was contrary to Confucianism. However, in later ages when Confucian bureaucrats took up the work of codification following the customs and conventions of the existing family institution, they placed the married woman in an inferior position to her husband under the rigid and harsh statute laws, so much so that every provision of the Code with respect to marital relations seems to be an example of gross injustice.44 Economically also the married woman could not lead an independent life in a traditional family. The so-called *san tš’ung*, three dependences—before marriage, dependent on father; after marriage, on husband; and following the death of husband, on son—was a succinct description of woman’s lot. In the management of household affairs a married woman’s domain was limited to routine matters. With regard to family property the final authority rested with her husband. The Supreme Court in Peking, as late as 1918, made this point quite clear in its dictum.45 Besides, as a wife she owned no property and as a daughter she inherited none. Following the death of her husband she had no right to inheritance. She could only manage the family property in case her son was too young to do so. Besides, with the exception of *t-chueh* (breaking the bond of matrimonial relation) on certain conditions,46 which applied to husband and wife alike, the law relating to divorce was lopsided in favor of the husband. For instance, the so-called seven conditions, namely, disobedience to husband’s parents, barrenness, adultery, jealousy, incurable disease, loquacity, and theft, were man’s legal ground for divorce, hanging as they did like Damocles’ sword on his wife’s head.

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44 *Id.* at 102-118.
45 *Id.* at 104.
46 *Id.* at 122-23. The breaking of matrimonial relations was justified in cases where the husband beat or killed a member of his wife’s family, or the wife beat or killed a member of her husband’s family, or the wife had illicit intercourse with her husband’s relatives in the first, second, third, or fourth degree, or the husband had illicit intercourse with his wife’s mother.
On the other hand, however, there were three reasons or conditions which would nullify a man's action to divorce his wife on any of the above grounds: (1) the wife had observed the three-year mourning period for either of her husband's parents; (2) the family had once been poor (and she had experienced poverty with the family) and was now rich; (3) she had no old home to go to. In any of these cases if a man put away his wife, he should be liable to punishment and obliged to receive her back. Evidently these three reasons or conditions are a manifestation of equitable principles in Chinese customary law.

Bigamy or polygamy is as old as human history. Paradoxically, however, the Chinese tolerated concubinage but practiced no bigamy, the commission of which was punishable.

Under the law a man could go through the elaborate wedding ceremony only once and no more while his spouse is still living. Nevertheless, if he could afford, he would find ready excuses to have another woman in his house. In many cases the chief excuse would be the barrenness of his wife, for having no descendants is a sin against the spirits of his ancestors. Whatever be the excuse, he could not make her a second wife. Under penalty "a wife cannot be degraded to the position of a concubine, nor can a concubine be raised to the position of wife so long as the wife is alive." She is called ch'ieh in Chinese and her status as a concubine is not much above that of a maid servant. Her children, though socially of lower esteem than those of the wife, are legitimate and entitled to inheritance.

It seems the traditional law and custom struck the married woman mercilessly especially when she led the life of a widow. Women were supposed to get married only once, and for them to go through another wedding was a social disgrace. Bound by convention and custom most widows would remain in their husband's families and give no consideration of remarriage. Besides, the law forbade anyone to force them to remarry against their will. Should they choose to lead marital life again, they were not permitted to take custody of their children,
especially their sons, neither were they allowed to take away any family property besides their own personal belongings.\textsuperscript{52}

Notwithstanding these disadvantages, life of the married woman in China was by no means a total loss. Although as a daughter-in-law she was placed in a subordinate status and obliged to show respect to all those in the family, to whom respect was due, yet as a mother and mother-in-law, especially in her advancing years, she was entitled to all the tender consideration and high respect that a community of kinship could possibly extend to a married woman. Since filial piety was the cardinal virtue, and since society was conditioned to this widely accepted norm, few sons would dare to commit the unpardonable sin of filial impiety. Usually after the death of the father the mother assumed an unchallenged authority over all members of the household, and no decision of considerable importance should have been made without her consent. The exaltation of the mother was not only a dominant feature of the Chinese family life, but also one of the determining factors in court politics. Throughout Chinese history there are numerous cases in which the empress dowager, with the collaboration of her father, brothers, other kinsmen, and courtiers, meddled in state affairs “behind the screen,” and relegated her son to the status of a puppet.\textsuperscript{53}

**Succession**

In the patrilineal, patronymic, and patriarchal family such as China used to have, Chinese women were given very little consideration in the whole succession scheme. Before the turn of the present century, inequality of the sexes was perhaps the rule everywhere. That women in China were discriminated against is no wonder.

The fundamental concept of succession, in common with the chief function of marriage, is to perpetuate the family line so that the deceased may be continually commemorated in a form of ritual amounting to worship. Filial piety which obligates the son to love and revere his father (and his mother, of course) implies that this affection and reverence must continue even after the latter’s death.\textsuperscript{54}

\textsuperscript{52} See Ch’\textsuperscript{u}, supra note 29, at 104.

\textsuperscript{53} During the past twenty-two centuries in Chinese history among the powerful empresses three were the most outstanding: Empress Lu of Western Han, who reigned from 188 B.C. to 180 B.C., Empress Wu of Tang, who started her own regime and reigned from 690 to 705 A.D., and Empress Dowager Tz’\textsuperscript{u} Hsi, who was virtually the ruler for almost half a century until her death in 1908, four years before the birth of the Republic.

\textsuperscript{54} Confucius said, “When parents are alive, serve them according to \textit{li}. When they
To be in default of male issue is not only a personal tragedy for a man but also a sin against his ancestors, for with the extinction of his family line they would be deemed the sacrifices the living are required to offer from time to time.55

The Chinese family system is a Tsung system, which in its succession scheme includes only male members descending from a common ancestor and bearing the same family name. It resembles the group known as the Agnates of the Civil Law, but it does not include outsiders even though related by blood. In this system, daughters are of course excluded, and the sons of married daughters can have no claim either, because they belong to the Tsung of another family.

Where the deceased is succeeded by an only son, or where in default of male issue he is succeeded by a legitimate heir, the right to succession would of course imply the right to inheritance of the entire property. But in case he is survived by more sons than one "all family property movable or immovable must be divided equally between all male children whether born of the principal wife or of a concubine or a domestic slave."56 With the exception of hereditary official rank which descended only to the eldest son and his descendants born in lawful wedlock, primogeniture therefore was not practiced in China. According to custom the eldest son may receive a bigger share of the patrimony, but his right of succession merely entitled him to the custody of the ancestral tablets and other insignia of the family. Perhaps under the old family system this right was the more significant.

Another characteristic feature of the succession scheme is that every adult male should establish his separate line, which must be continued even though he is in default of male issue. In that event he is entitled to have an adopted son chosen from among his nephews, who are sons of his brothers. If adoption did not occur during his lifetime, it must be effected following his death, for there must be no break nor overlapping in the continuity of a family line.57

55 Mencius said, "There are three things which are unfilial, and to have no descendants is the greatest of them." The Book of Mencius, VII:26.
56 See Jameson, op. cit. supra note 40, at 16.
57 As a general rule, "Among brothers if the eldest has no son, the eldest son of the second brother succeeds, if a younger brother has no son, the second son of the elder succeeds." (Jameson, op. cit. supra note 40, at 19.) This is understandable almost as much as the eldest son of the eldest brother, who has established the senior branch, must keep this branch intact. "If the line of the eldest brother fails, he is entitled to call upon any of the younger brothers' sons to quit their original branch, and become a member of his. The individual thus transferred or adopted ceases to belong to his..."
In all these matters concerning family relations customs have a regulating force. Our next enquiry is therefore the validity of customs as a source of law.

The Validity of Customs as Law

As we have noted, customs and conventions, which were permeated with Confucian ethics and 交, had long been in practice before they were written into law. Thus, statute law in China was by and large customary. Besides statute laws many customs also had the binding force of law. China with its vast territory and enormous population must give allowance to diversity in the application of rules for ordering and regulating human relations, especially family relations. That local customs oftentimes should have the force of law is but natural and logical. Besides, to the people generally customs are rules with which they are familiar, and by which they learn to live with their fellow men. Interwoven into the life of the people, customs are, therefore, the living law. Nevertheless, as not all laws are customary, so neither are all customs laws. Generally speaking there are two restrictions, namely, legislative and judicial. For our present purpose these two need to be briefly explained.

In China customs were laws unless they were specifically prescribed by decree, ordinance, or statute. For example, if after betrothal and payment of the engagement money the groom carried off the bride by force before the time agreed upon, the representative of the family offending should be liable to punishment. In many parts of China where people could not afford to go through a formal wedding the groom would oftentimes resort to this practice of carrying off his bride, but the law gave no countenance to such practice. Again, if any person hired out for a consideration his wife, concubine, or

original branch just as much as if he were dead, and takes the place of a natural-born son to his adopted father.” (Ibid.) In case there are no nephews, an adopted son may be chosen from the generation immediately below the prospective adoptor, “beginning with those that are nearest and proceeding in order in the collateral line to those more remote.” (Id. at 18.)

It should not be assumed however, that the system of succession was so rigid as to allow no room for reasonable adjustment. Although the adoptor may not pass over a whole class of those who belong to the generation immediately below him, and who are nearest to him in blood relationship in preference to one who is remote, he nevertheless is allowed to choose the “worthier” from among that whole class. Especially is it true where a son is to be adopted following the death of a man, the wish of his widow would be considerably respected, even though the duty to select a proper successor falls on the family or clan elders.

68 Ta Ch'ing Lu Li (Marriage Laws) § 101 Lu, translated in Jameson, op. cit. supra note 40, at 33.
daughter to be wife or concubine to another man, he should be liable to punishment. This hiring out of one's wife, concubine, or daughter was a peculiar custom in some poverty-stricken localities, and the law likewise made it unlawful.\(^{59}\) What seems most absurd was the custom of betrothing unborn children by cutting off the lapel of a coat, and thus the law also forbade.\(^{60}\)

That there were some criteria for testing the validity of customs is unquestionable, although the old code does not expressly stipulate what the criteria are. The Civil Code of the Republic of China of 1930, however, lays down conditions under which the validity of customs as a source of law shall be tested. These conditions are put in a negative way. First, "In civil matters if there is no provision of law applicable to a case, the case shall be decided according to custom."\(^{61}\) Second, "A custom is applicable in civil matters only when it is not contrary to public order or good morals."\(^{62}\)

As regards judicial restrictions, Stephen in his Commentaries maintains that all legal validity should be denied to the custom until it has been authenticated by judicial decisions.\(^{63}\) But before a particular custom can be brought to the notice of the court, it must have been long followed and practiced. In a large country such as China, which was characterized by decentralization, it is doubtful whether the actions of a local court in striking down a custom would have national

\(^{59}\) Id. at 35.

\(^{60}\) Id. at 34.

\(^{61}\) Civil Code, Republic of China, art. 1 (hereinafter cited as Civil Code): "In civil matters if there is no provision of law applicable to a case, the case shall be decided according to custom. If there is no such custom, the case shall be decided in accordance with the general principles of law." Thus, with respect to a certain civil matter if there is a provision of law applicable to it, the written law by its very nature will take precedence over a custom which may be also applicable to the case on trial. Only when the law is silent will custom become valid. Nevertheless, where the law expressly concedes its validity to a particular custom, that custom shall take precedence over the law. For example, Civil Code art. 207: "The provisions of the preceding paragraph do not apply in case there is a different trade custom."

\(^{62}\) Civil Code art. 2. What is meant by public order and good morals is a matter of legislative and judicial discretion, which will surely curtail the validity of customs in their application to civil matters.

\(^{63}\) Though custom is not in the modern world a very important source of law, Hart, The Concept of Law 44 (1961), a popular doctrine in Anglo-American law which maintains that customs may be laws, and not infrequently are laws, even before their adoption by the Courts can be sustained even today. Brown, Customary Law in Modern England, 5 Colum. L. Rev. 568 (1905). The retrospective operation of the judicial adoption of a custom is a proof that the custom in question is already law. Id. at 567-68. In practice, however, it is generally accepted that customs must have conformed to certain requirements laid down by law in order to be valid as a source of law. Id. at 570-72.
effect. Since the establishment of the new judicial system following the birth of the Republic, however, the Supreme Court has meted out a number of decisions invalidating customs of long standing, and these decisions have been made known to the people.\textsuperscript{64}

Although subject to legislative and judicial restrictions, customs are virtually laws when they have acquired both subjective and objective qualities: the subjective quality refers to a general belief taking a certain custom for law, and the objective quality refers to a general practice of following the custom repeatedly for many years.\textsuperscript{65}

**The Clan Rules**

The clan rules that had been observed and operated in China for many centuries almost until the Communist takeover are typical examples of customs which have the validity of law. As we have noted, family in its broad sense refers to the *tsu*, clan, which embodies a considerable number of households, all of which can trace their lineage to a common ancestor. Within this spontaneous social organization each household is a component unit represented by a male principal, the father or in case of his death the eldest brother. Each individual person in that household, therefore, owes a dual loyalty to his father or eldest brother and also to the clan elders. The chief purpose of this clan system is to keep families together on the basis of kinship. Genealogies were compiled and revised from time to time so that members would know their common origin and manage to keep the tie of kinship firm and alive.

In a large country such as China where diversity is the rule, the significance and strength of the *tsu* as an organized society, of course, varied. Generally speaking from the organizational, as well as functional, point of view the *tsu* played a more important role in the life of the people of South China than in the north. In the past the *tsu*...
as an organized society performed multifarious functions of the nature of social security, social welfare, education, construction, and defense. We are here concerned only with its specific function of helping to ensure an orderly and harmonious life among the component households and all members of the clan. The clan rules we are to introduce were designed for this purpose.

"The term Clan Rule designates any formal instruction, injunction, regulation, stipulation, or similar passage found in a genealogy which explicitly prescribes the conduct of clan members." Not all clans, of course, followed a stereotyped set of rules. However, viewed as a whole all clan rules (at least those found in the entire collection of genealogies in the East Asiatic Library at Columbia University) have some common distinctive features.

In the first place, the source of most of the clan rules was the classics of the Confucian School (The Analects, The Book of Mencius, The Great Learning, The Doctrine of the Mean, Book of Rites, and Book of Filial Piety) which contain almost the entire body of the traditional ethic teachings and norms. Besides, the interpretations and commentaries written by Neo-Confucian scholars from the eleventh century of the Northern Sung Dynasty (960-1126) to the eighteenth century of the Ch'ing Dynasty (1644-1911) were also sources of the clan rules. Noticeably a monumental work known as Wu Chung I-Kuet (The Five Collections of Rules), compiled by Ch'en Hung-mou, one of the eminent scholar-officials during the early years of the Ch'ien-lung period (1736-1796), was generally accepted as useful reference for drafting clan rules.

In accordance with the Confucian value scheme filial piety is considered as the root of all virtues, for as a son one is expected to live the life of a moral man. Next in the hierarchy of the value scheme is submission of the inferior to the superior: respect for senior members of the clan, for one's older brothers, and for all superiors in general.

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66 The Fan Charitable Estate, which had a history of seven hundred years, furnishes an inspiring example of a communal life based on kinship. Specific works of charity were done for indigent members of the clan and education facilities were provided for the young. See Twitchett, The Fan Clan's Charitable Estate, 1050-1760, in Nivison & Wright, CONFCUCIANISM IN ACTION 97-133 (1959). See also Hu, THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS (1948).

67 See Liu, An Analysis of Chinese Clan Rules: Confucian Theories in Action 63, in Nivison & Wright, op. cit. supra note 66, at 3. Mrs. Liu used the entire collection of Chinese genealogies in the East Asiatic Library at Columbia University as source material in presenting this commendable report, on which the following discussion is based.
The woman's position in this value scheme is woefully low compatible with the very nature of family as we have observed. That Confucian ethics and norms were incorporated into clan rules does not mean, however, the exclusion of Taoist and Buddhist precepts. Known as a land of Three Ways, namely, Confucianism, Taoism, and Buddhism, China is characterized by religious tolerance and a strong inclination toward syncretism. The inclusion of some aphorisms attributable to Taoism and Buddhism in the clan rules should have caused no wonder.

In the second place, many of the clan rules incorporated into their fold excerpts from the Penal Code and especially those from imperial edicts or injunctions, called sheng-yu in Chinese. In this manner the clan served as the transmitting agency between the throne and its subjects.

In the third place, the clan rules, while following the Confucian value scheme and ethic teachings, had to make some adjustment to the prevailing local customs. Discrepancies between these two were unavoidable, and where these did occur and were of no serious nature, clan rules were so made as to steer a convenient course injurious to neither.

In the fourth place, the most distinctive feature of the great majority of the clan rules is that they are essentially non-litigious. Most provisions of these rules stipulate duties in the ethical or moral sense rather than obligations in the legal sense. A breach of these duties would call for some form of censure but not necessarily lead to litigation.

Lastly, a clan rule is law because members of the clan have considered it to be so and have applied it to their communal life for a considerable period of time. Unless it is explicitly denounced by the legislature or the court, a particular custom that has been written into a clan rule is already law. It is binding and obligatory, and in many cases the breach of it is a breach of a positive duty.

The Operation of the Clan Rules

Like any man-made rules, the significance and value of the clan rules depends on whether they work and on the way they work. That they did work is not questionable. As late as 1929 the Supreme Court of the Republic of China asserted: "Clan Rules are rules with respect to the genealogy of a clan, and therefore they are in fact the rules for observance by the kinship group. To the extent that they are

68 18th Year (1929) Appeal 2265.
neither contrary to any compulsory provision of a statute nor to public order or good morals, they have binding effect on all the kinsmen who constitute the clan."

In the past, though the magistrate’s court was the court of first instance, it did not have sole jurisdiction over all residents within the territory under the magistrate’s administration. By default or according to custom, the magistrate’s court seems to have taken cognizance of the exercise of jurisdiction by such social groups as the guild and the clan.

In common with a popular abhorrence of litigation, most clans having clan rules seem to have imposed on themselves a general jurisdiction by forbidding members to engage in litigation in the magistrate’s court before submitting their disputes to the clan leaders.

The jurisdiction of the clan was a general one of both criminal and civil nature. Although there was no uniformity of clan procedure, the way it exercised its jurisdiction depended on the civil or criminal nature of the matter brought before its leaders or elders.

As to matters of criminal nature, the wrongdoer involved must have done the things that he ought not to have done, in violation of inhibitive clauses of the clan rules, or failed to do what he ought to have done, amounting to dereliction of some positive duties. As we have noted, rules made by clans often included excerpts from that part

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69 Id. (dictum).
70 Every craftsman or trader, for his own benefit and protection, was required to join a craft guild or a merchant guild. All matters concerning the activities of a craft or a trade were ordered and regulated by guild rules, which were made from prevailing customs. Disputes arising from among members of a guild would invariably be brought before the guild leaders for arbitration. Rarely would the loser resort to the magistrate’s court for adjudication, because disobedience to the guild’s decision would have serious consequence, and the magistrate’s court would seldom upset the decision already made. See Sprenkel, Legal Institutions in Manchu China 89-96 (1962).
71 To these two we are tempted to add the village. But the village leaders in the past seem to have performed their duties in subordination to the magistrate, and mainly for this reason no mention of it is necessary as far as this article is concerned.
72 The people generally shunned the magistrate’s court and preferred what may be called extra-judicial settlement. For one thing, the legal system practiced in China in former days made no discrimination between civil and criminal laws. Law was made to obey. Whoever violated a provision of the law, whether it involved a civil or a criminal matter, was liable to punishment, often corporal punishment. Inherent in this system was the abusive use of the judicial power, namely, by torture and imprisonment to extract confession from witnesses, amounting to self-incrimination. Besides, the wheel of justice, whether in China or elsewhere, has always ground slowly, and litigation is too costly even for a man of means. Mainly for these reasons no man with sense would choose to ruin himself by getting involved in a litigation beginning in the magistrate’s court.
of the statute law which may be called the Penal Code. In addition, they prescribe a list of punishable offenses such as vagrancy, debauchery, gambling, theft, illicit intercourse, violent behavior, and unfilial deeds.\textsuperscript{74} The last mentioned may imply some positive duties such as proper burial for one's parents and constant care for ancestral graves, and the non-commission of which is culpable.\textsuperscript{75}

The clan procedure for the censure of the wrongdoer of course varies. Generally speaking, for minor offenses, he would be dealt with by the principal of the family to which he belongs, or by the head of the fang, a subdivision of the tsu, which comprises the family. In case of more serious offenses, especially in case of difficulties in dealing with the offender, the matter would be brought before the head of the tsu, who would convene the whole tsu in the ancestral hall for deliberation and decision.\textsuperscript{76} It should be noted that to convene the general assembly of the tsu is a very serious matter and seldom done.

Depending on the seriousness of the offenses or misdeeds, the mode of penalty imposed on the wrongdoer is of four kinds: reprimand, fine, corporal punishment (flogging), or expulsion. In a social group based on kinship the last mentioned is a severe punishment. The wrongdoer thus punished would lose his membership in the tsu and forfeit all the privileges that go with it. "He may not join in the ancestral rites nor enjoy material benefits from the common fund. After his death his tablet cannot be admitted into the ancestral hall, nor his name appear in the genealogy. He is shut out from the community of the living and of the dead members of the tsu."\textsuperscript{77} This severe punishment, however, is not meant to be irrevocable. The culprit might change his ways so as to be reinstated. His sons and grandsons might be wise and virtuous, bringing glory to the tsu. His father or grandfather might be philanthropic, bringing benefits to the tsu. These latter considerations might also lead to his reinstatement.\textsuperscript{78}

As to disputes which involve civil matters arising from succession, from administrating the effects of deceased persons, from landed property and money debts, from breaches of promise, from causing damage to the property of others, and many other petty disputes, the fundamental principle of the clan procedure is to mitigate the seriousness of the contention, to appeal to reason and sentiment, to reach conciliation through mediation or arbitration, and by all means to avoid

\textsuperscript{74} Id. at 131-37, Appendices 25-33.
\textsuperscript{75} Id. at 134, Appendix 30.
\textsuperscript{76} Id. at 133, Appendix 28.
\textsuperscript{77} Id. at 61.
\textsuperscript{78} Id. at 135, Appendix 30.
When disputes occurred, they would usually be brought to some elders in the *tsu*, who are held in high esteem on account of their prestige, personality, or intellectual attainments, for mediation or arbitration. Since the mediators are familiar with the parties concerned and the circumstances involved, they are expected to reach a fair and satisfactory settlement. Whatever be the remedy, a compensation, a restitution, or a specific performance, it should be acceptable to both parties. Sometimes the remedy might be a mere apology. To bring the dispute to a pleasant conclusion, the parties involved together with the arbitrators and all others interested in the dispute would usually join in a feast, presumably the party at fault having to pay.

The end of the clan procedure for settling disputes can be epitomized in one Chinese character *ho*, harmony, which is one of the fundamental teachings in Confucianism. Yu Tzu, one of the disciples of Confucius, said, "Among the functions of *li* the most valuable is that it establish harmony. The excellence of the ways of ancient kings consists of this. It is the guiding principle of all things great and small." It should be noticed that harmony in Confucian sense refers to human feelings and sentiments. When disputes arise there would be a conflict of these feelings and sentiments. To bring about a settlement through conciliatory means is to remove that conflict and re-establish a harmonious state in which the reciprocal expression of good will makes life meaningful. To engage in litigation tends to aggravate that conflict and inevitably ends in enmity.

**The New Era of Positive Legislation**

**The Transition**

As a result of the impact of the West on China, the traditional Chinese law began to decline, and its long period of continuous existence for over three and a half millenniums was destined to give way to a new era of positive legislation. In the latter part of the 19th century, China's door was forced open by the Western Powers. She could no longer with arrogance and self-contentment live in cultural and economic seclusion. She was forcibly awakened to the existence of a changing world in which she could only play an insignificant role, having no such dominant influence as she once had. She was brought

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70 Id. at 132, Appendix 26.
80 See Yang, A Chinese Village 165 (1945).
81 The Doctrine of the Mean I:4.
82 The Analects of Confucius I:12.
to view her own military weakness and political backwardness. In spite of herself she was to embark upon projects of modernization, of which judicial reform was particularly called for by the exercise of extraterritorial rights in China by foreign powers on the excuse of the inherent defects of Chinese law and courts. Therefore, in 1904, Emperor Kwang Hsu of the Ch'ing Dynasty ordered that Prince Tsai Cheng, Yuan Shih-kai and Wu Ting-fang be commissioned to draft a commercial code, which was completed and submitted to the Throne in the same year.

The laborious efforts of the Codification Commission resulted in a draft civil code entitled Draft Civil Code of Ta Ch'ing, which consisted of five books, namely, General Principles, Obligations, Real Rights, Family, and Inheritance, and was published in 1911, the year that marked the outbreak of the Republican Revolution.

After the birth of the Republic, codification remained a herculean task to be tackled. The whole legal system needed a complete overhaul, and that could not be done in a day. Unfortunately, the new Republic had inherent weaknesses which made the work of codification even more difficult. Besides, military factions held full sway in the government and the political situation was far from being stable. Nevertheless, the work had to be carried on. It was generally admitted that a modern state, such as China was destined to become, ought to be governed by law. In 1918, the second Codification Commission was established under the directorship of Wang Chung-hui. The program of the Commission largely concentrated on the revision of the Provisional Penal Code enacted in March 1912, the remodelling of the Draft Civil Code, and the drafting of a Civil and Criminal Procedure. Although what the Commission drafted and compiled did not eventually become law, its achievements were the groundwork for later legislation.

**The Civil Code of 1930**

After the successful conclusion of the military campaigns led by Generalissimo Chiang Kai-shek against the northern warlords, the National Government was established in 1928, and the Legislative Yuan became the highest law-making body of the government. The work of codification, which was carried out with outstanding success during the early years of the National Government, should be attributed to the ingenuity and efforts of the members of the Legislative Yuan under the energetic leadership of Hu Han-min (1879-1936), one of the most eminent scholars that modern China has produced.
For the purpose of preparing a civil code, the Legislative Yuan had set up a Commission on Civil Codification, which was merely a technical body so far as law-making is concerned. It should be noted that before the coming into force of the Constitution of the Republic of China on December 25, 1947, the National Government derived its mandate from the Central Executive Committee the members of which were elected by the National Congress of Kuomintang delegates. Therefore, theoretically the National Government was subject to the rule of the Kuomintang. The Central Political Council of the Central Executive Committee of the Kuomintang was empowered to lay down the national policies of the government and fundamental principles of law for legislation. Guided by a set of specific directions on 19 main points issued by the Political Council in December 1928, the Commission began to draft the first Book on the General Principles of the Civil Code, which was adopted by the Legislative Yuan in April 1929, and promulgated by the National Government the next month. Later, in pursuance of further specific directions issued by the Political Council from time to time, and in accordance with the established procedure of legislation, Book II (Obligation) and Book III (Law of Things) were adopted by the Yuan in November 1929, and were promulgated by the National Government in the same month. Toward the end of 1930, Book IV on Family and Book V on Succession were similarly adopted and promulgated.

Of the five Books of the Civil Code only the last two call for discussion for the present purpose. Perhaps we should begin by having a glimpse of the historical background against which these two Books were given their birth.

In the general agitation for modernization or Westernization toward the close of the nineteenth century, the intellectuals began to show less respect for China's traditional ways of life. Gradually this iconoclastic attitude culminated in the May Fourth Movement of 1919. The prevailing thought before and after the Movement was that to rejuvenate and save China many of the threadbare traditions must be jettisoned and the individual must be freed from the shackles of the age-old customs and institutions, especially the family institution. Thus this Movement ignited what may be called a "revolution of the family."83

With this historical background in clear perspective we shall proceed to examine some of the characteristic features of these two Books.

First, the Civil Code of 1930 simply ignores the clan as an institu-

tion, but gives cognizance to the independent existence of the "house," which is no longer a unit of the clan. The obligation of maintenance, which is made mutual and which is limited to lineal relatives by blood, brothers and sisters, and members of the same household only, is legally defined. The legislative intent as stated in the Introduction to these two Books is to extirpate "parasitism." "The bond between members of the same clan has been so strong under the old system that tradition usually imposes on a certain member the burden to support those who are unable or simply unwilling to work for their livelihood." While loosening the excessive grip of the old clan ties and family ties over the individual, the law clearly indicates that individual freedom means individual responsibility.

Second, the Civil Code gives no recognition to the traditional family institution with all its ramifications, especially woman's inferior position in that institution. The traditional concept of succession, as we have noticed, is to perpetuate the family line through the male descendants and to continue the practice of ancestral worship. Consequently women were discriminated against, and they played no part in it. The new code not only ignores ancestral worship but also transplants the Western concept of succession, which is succession to property only. The term "heir," for example, is given a Western concept, for parents and grandparents may become heirs. As a corollary the old system of agnatic succession to property was put to an end. Sons and daughters are put on the same footing and they share equally the inheritance of their parents. Even a reluctant parent cannot deprive the daughter of this legal right under the provisions concerning compulsory portions.

Finally, the Code emancipates women from the old bondages in marital relations. The traditional practice of contracting a betrothal or a marriage between two families without the consent of the principal parties concerned is replaced by a provision which stipulates that "An agreement to marry shall be made by the male and female parties of their own accord." The only restriction imposed on them is based on age. A minor making an agreement to marry or taking steps to

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84 Civil Code arts. 1122-28.
85 Civil Code arts. 1114-21.
86 Introduction to Books IV and V, Civil Code, Republic of China XXV (Foo trans. 1931).
87 Civil Code art. 1138.
88 Civil Code arts. 1143, 1223-25.
89 Civil Code art. 972.
90 Civil Code arts. 973, 980.
conclude a marriage must first obtain the consent of his statutory agent. 91

Gone also are the days when the so-called seven conditions for divorce subjugated women to a precarious position in the family. Under the Civil Code either spouse may apply to the court for a divorce on one of the prescribed legal grounds. 92 Besides, divorce by mutual consent can be effected in a written agreement which required the signatures of at least two witnesses. 93

Now that women's right to inherit and therefore to own property is legally protected, this right with respect to their marital relations needs to be further defined. This is a question of a married woman's property right vis-à-vis her husband's property right. In this connection it is interesting to note that when the Code was in the making, the Political Council of the Kuomintang, after reviewing the outstanding legislations on this subject at that time, decided to follow the Swiss system, because it was most suitable for China. According to the Swiss system, the union of property is the statutory regime of the spouses who have made no contract for the holding of property. 94 Besides the statutory regime, contractual regimes comprise community of property regime, unity of property regime (to which the provisions concerning the statutory regime apply mutatis mutandis) 95 and separation of property regime. 96 Husband and wife may, before or after marriage, adopt one of these regimes as their matrimonial regime. 97 Whatever regime they decide on the wife keeps as her separate property, subject to her exclusive management, the articles which are intended for her personal use, or which are essential for her occupation, the remuneration which she acquires by her labor, and the gifts which the donor has given her to be kept separate. 98 For the first time in Chinese history woman's right to own property is legally prescribed.

Referring to the Civil Code of 1930, Roscoe Pound, who once served as adviser to the Ministry of Justice of the Chinese Government, rightly commented that "China has excellent codes." 99 This does not

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91 Civil Code arts. 974, 981.
92 Civil Code art. 1052.
93 Civil Code art. 1051.
94 Civil Code art. 1005.
95 Civil Code art. 1043.
96 Civil Code arts. 1031, 1048.
97 Civil Code art. 1004.
98 Civil Code art. 1013.
99 "China has excellent codes. They will compare with the best of the recent codes which have been framed and enacted since 1896. The Civil Code is exceptionally well done. Also the Civil Code is well adapted to Chinese conditions, since it makes
mean that by positive legislation alone the law will enforce itself. Twelve years after the promulgation of the Civil Code a Chinese scholar made an investigation of the law in operation in Tali area, Yunnan Province, and found that much of the law was at variance with the customary rules of conduct of the people. Largely due to disrespect for and ignorance of the new code, the cases he cited show clearly that people in the village still followed many of the traditional rules of sexual conduct, practiced concubinage, and contracted betrothals and marriages the way their ancestors did.\(^{100}\)

The practice of concubinage was a headache amounting to a dilemma for the legislators during the law-making process. It could no longer be tolerated, but how about the additional woman with whom a man has already cohabited? Again, what will be the consequence if a man ignores the law and follows the custom by taking another woman into his life or into his house? The ingenuity of the legal mind solved the seemingly insoluble problem. Adultery, a legal ground for divorce, is of course punishable,\(^{101}\) but the right of action lies only with the husband or the wife as the case may be within six months after having had cognizance of it.\(^{102}\) This right is further restricted under article 1053 of the Civil Code, which stipulates that the party who evokes adultery as a legal ground may not apply for a divorce, where he or she previously consented to the act or has since condoned it or has had cognizance of it for over six months, or where two years have elapsed after the occurrence of the act, with or without such a cognizance. Consequently, what had happened before the promulgation of the Code was not to be disturbed. In the future it is up to the man to take the advantage of the law. He might manage the affair suavely by making it known to his spouse and yet playing for time until the required six-month period is over, or simply turn the affair into a clandestine one for two years. Either way concubinage would continue to exist in practice, though not recognized by law.

As to woman's equal right to inherit the property of her parent the observation made by a French jurist concerning the discrepancy between the statute law and its actual operation was quite applicable to many parts of China.\(^{103}\) But it should be understood that laws

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\(^{100}\) Hsu, Some Problems of Chinese Law in Operation Today, 3 Far Eastern Q. 213-18 (1944).

\(^{101}\) Criminal Law art. 239.

\(^{102}\) Criminal Procedure art. 216.

which did not grow up with the life of the people but were made merely through positive legislation cannot be expected to be readily acceptable. With a liberal allowance of time coupled with the change of social conditions, laws made to meet the needs of the people will be accepted. Unfortunately such an allowance was denied to the Government of the Republic of China as a result of the outbreak of the Sino-Japanese War, which lasted eight long years. Shortly after the conclusion of the war the Communists started a large-scale rebellion, which culminated in the engulfment of the entire mainland of China in 1949.104

The Communist Marriage Law of 1950

When the Chinese Communists seized power on the mainland in 1949, they repealed the entire corpus of law set up under the National Government, including the provisions concerning the family, even before they had established any legal code of their own. In this interim period, the courts were given the very general instructions simply to carry out the policies of the new regime.105

A new Marriage Law, which was to go into effect at once, was promulgated by the Communist government on May 1, 1950. Many of the provisions of the Family Law (Book IV) of the Civil Code of 1930 were carried over into this law more or less intact. For instance, the emancipation of women, the adoption of monogamy as the only legal form of marriage, and the equal status of husband and wife, which are the characteristic features of the Civil Code, are also the keynote of the new Marriage Law.

On the other hand, the Marriage Law of 1950 goes considerably beyond the Family Law of 1930. In addition to equality of the sexes, the establishment of monogamy to the exclusion of concubinage and the provisions for divorce, the new law stipulates that marriage shall be based on the complete willingness of the two parties, no third party shall be allowed to interfere,106 and exaction of money or gifts in connection with marriage shall be prohibited.107 What seems to be most drastic is a complete disregard for the solemnization of matrimony. Instead of the elaborate ceremony of the traditional marriage, the new law requires a simple registration with the proper government authorities:

104 How the Family Law of the Civil Code is in operation in Free China (Taiwan) today calls for a separate treatise.
106 Marriage Law art. 3.
107 Marriage Law art. 2.
In order to contract a marriage, both the man and the woman shall register in person with the people's government of the subdivision or district in which they reside. If the marriage is found to be in conformity with the provisions of this law, the local people's government shall, without delay, issue a marriage certificate. If the marriage is found to be incompatible with the provisions of this law, no registration shall be granted.

To insure universal enforcement of this article, the regime in 1955 promulgated a set of supplementary Rules for Marriage Registration. These rules officially assigned the duty of registering marriages to lower-level governmental officials. This made the facilities for registration much more readily available to the common people. Further, the officials assigned to the registration of marriage were instructed to explain the provisions of the new Marriage Law to all registrants. In this way, the law was expected to be made known to the common people.

This determined effort on the part of the Communists to educate the people about the new Marriage Law is one of the most important features of the new system and one which is largely responsible for the continued and increasing deterioration of the old family system. All modes of mass communication are employed. Books, magazines and newspaper articles, often employing themes from folk literature and using plain language understandable by the common people, constantly preach the new order and attempt to undermine the old. In rural areas, where printing presses are scarce, blackboards and notices posted on walls inform the public of the new laws. State plays dealing with the Marriage Law are encouraged, while the traditional Chinese opera, extolling the old family institution, is repressed or revised. The principles of the new law are taught to organizations of women and youth, to labor unions and to the armed forces. In short, a great number of the people are now familiar with the provisions of the new Marriage Law.

Another characteristic feature of the Marriage Law is that "both husband and wife shall have equal rights in the possession and management of family property." In the light of the interpretation given by the Communist government to the term "family property," the matrimonial regime adopted seems to be the Community of Property Regime, in which husband and wife own the family property in com-

\(^{108}\) Marriage Law art. 6.


\(^{110}\) Marriage Law art. 10.
mon. Under the Civil Code the common property is managed by the husband, whereas under the Marriage Law the wife is assured of a complete equality. But "husband and wife may make mutual voluntary agreements regarding ownership, disposal, and administration of any kind of family property." The term "property right," as we in the Free World understand it, however, is becoming increasingly insignificant under the Chinese Communist regime. Yang observed: "By 1957 China's farms had been collectivized into the agricultural producers' cooperatives, and urban private businesses had been socialized into joint state-private concerns controlled by the state. The individual or the family no longer owns land, business enterprise, or any other significant means of production, and private property is reduced mainly to personal articles, with private ownership of houses in serious doubt." What seems to be a Bill of Rights for Chinese women is no better than "a painting of cakes to assuage hunger."

Nevertheless, we should not overlook the ideological significance of the Marriage Law. Notwithstanding the schism between the Chinese and Soviet Communists, their opposition to the conventional family system is almost in full accord. The idea of the Soviet family in contrast to that of the "bourgeois" family can be seen from the following comment:

The Soviet family, as a family of a new type, arises from and develops on a completely different socio-economic basis than does the bourgeois family. If the essence of a bourgeois family depends on private property, the social nature of the Soviet family is determined in the final analysis by the socialist system of economy and by socialist ownership of the instruments and means of production. In conformity with the new economic and social order, the Soviet family has, in addition to the natural function of reproduction of family life, acquired two other functions, which reflect its social nature: the communist rearing of children and mutual assistance by [the family's] members.

What a candid confession! The family is made to serve the interest of the Communist ruling class as its tool. To all intents and purposes this is exactly the lot of the Chinese family on the mainland. Yang has

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111 See CENTRAL PEOPLE'S COMMITTEE ON LAWS AND INSTITUTIONS, Peking, Questions and Answers on the Enforcement of the Marriage Law 41-46 (1950), translated into English in YANG, op. cit. supra note 109, at 141-42.
112 CIVIL CODE art. 1032.
113 YANG, op. cit. supra note 109.
114 YANG, op. cit. supra note 109, at 143.
accurately found: "The Communist regime is bent on building an industrial society on the socialistic pattern and it is fully aware of the incompatibility between such a society and the kinship-oriented structure." He goes on to give another, related reason for this determined assault on the family in China: "Also important for the political structure of the regime is the incompatibility between the individual's traditional loyalty to the family and the new requirements of his loyalty to the state and to the Communist Party".

The need to break down the former loyalty and to transfer it to the state and to the Party leads the Communist regime to go almost all the way to destroy the edifice of the traditional family system. Rather than maintaining the proper and traditional balance between the law on the one hand and the customary institutions of the people on the other, a balance in which each side gives strength to the other, the regime is trying to use the new law to re-educate the public to destroy old customs and institutions and to set up new ones based on the Communist ideology.

Conclusion

From the dawn of Chinese history to the latter part of the nineteenth century, Chinese culture, except for the introduction of Buddhism in the first century of the Christian era, was subject to no outside influence. Thus the growth of an almost homogeneous culture owing to isolation led also to the solitary development of the traditional Chinese law, which, as we have analyzed it, is characterized by its customary nature.

Toward the close of the nineteenth century, under the impact of Western influences, China was obliged to resort to a reform movement. As far as judicial reform is concerned, the work of codification, culminating in the Civil Code of 1930, opened a new era of positive legislation. New ideas and legal principles were adopted and in many cases foreign laws were borrowed and incorporated into the Chinese codes. If the solitary development of the old legal system can be compared to the growth of a tree from its seedling, then the work of codification obviously must be a transplantation.

Nevertheless, in view of China's vast territory, enormous population, long history, and great diversity of local conditions, the lawmakers were fully aware of the futility of applying uniform rules to every sort of human activity. In spite of positive legislation, there-
fore, the validity of customs as a source of law, provided they are not contrary to public order or good morals, was recognized as a fundamental legal principle of the Civil Code. The Court holding a double-edged sword, was, and still is, expected to preserve those customs that are legally acceptable and slough off others that are not. By thus incorporating customs into the law, the latter becomes richer and more adaptable to the life of the people.

As a contrast, positive legislation by the Chinese Communist regime, insofar as the Marriage Law is concerned, was not designed to adapt itself to the life of the people, but just the other way around. Although there is one provision in the Marriage Law which recognizes the validity of custom as a source of law,\textsuperscript{118} the Law as a whole unmistakably presents itself as a tool of the ruling party to impose upon the people a new order fashioned by the Communist ideology. From the historical point of view this might be the first time in China that an established regime has so deliberately and systematically diverted the law from its course: instead of laws following the prevailing institutions, the reverse is now the rule; instead of Confucianism being the source of China's customary law, Communism is now the mold of positive laws.

Nevertheless, iconoclasm is not new in China, and the Communists are not the first iconoclasts. Twenty-two centuries ago the Legalists, for instance, had no respect for antiquity, but were concerned with only the actuality of the prevailing conditions. Throughout Chinese history numerous scholars have held similar views.\textsuperscript{119} Down to the middle of the nineteenth century the leading Taiping rebels were perhaps the harbingers of iconoclasm, but being the vanquished they are forgotten. In the revolutionary movement under the leadership of Dr. Sun Yat-sen, the Nationalists were no less iconoclastic than the Communists, as evidenced by the complete Westernization of China's judicial system and the promulgation of the Civil Code in 1930.

That many of China's old institutions should be jettisoned is unquestionable. We are, of course, aware of the fact that institutions are made by man, not man by institutions, and that from time to time changes should be effected if necessary. But in the agitation for reform during the second decade of the present century and thereafter, Confucianism was singled out as the synonym for all the traditional

\textsuperscript{118}Marriage Law art. 5(a). The question of prohibiting marriage between collateral relatives by blood within the fifth degree of relationship is to be determined by custom.

institutions, especially the family institution. Therefore, an attack on the family institution was oftentimes preceded by a denunciation of Confucious. No greater injustice could have been done to the Sage, the Noble Teacher, of the Chinese people. In the course of human history whenever an idea was institutionalized or codified, often the original idea was betrayed. The enforcement of the so-called Blue Law in Virginia in the eighteenth century is a case in point. Matters now regarded as purely religious and ecclesiastical were embodied in the criminal law, and corporal punishments were inflicted on culprits for violating any of the provisions of the law, including absence from church.\(^{120}\) Is this not at too great a distance from the teachings of the meek Nazarene?

Furthermore, formality, uniformity, rigidity, and artificiality are the common features of all man-made rules. Therefore, as soon as an idea is institutionalized or codified, whatever tenets the original idea might have comprised would tend to diminish, or even to drift away.

Besides, from the operational aspect, no legal system in the world can ever be considered as satisfactory. Sixty years ago Dean Pound pointed out that “dissatisfaction with the administration of justice is as old as law.”\(^{121}\) Today dissatisfactions with the legal system in the United States are still rumbling and may possibly become a roar some day. This convinces us that dissatisfaction with legal systems is universal and, unhappily, perennial. We cannot expect the Chinese legal system to be otherwise. The fallibility and frailty of man drowns his hope of ever becoming an angel.

And yet looking into the traditional Chinese institutions and laws, we do not fail to find many qualities of humaneness and reasonableness. Almost a half century ago an English professor observed: “The fact that Chinese law is in need of reform in no way involves the admission that China is devoid of a legal history and equitable principles.”\(^{122}\) In a treatise entitled “Equity in Chinese Customary Law,” this writer came to the same conclusion.\(^{123}\)

Humaneness and reasonableness are two of the best legacies Chinese customary law inherited from Confucianism. Yet there was another legacy in the principle of reciprocity, which the customary law oftentimes overlooked. Although like any ancient society the Chinese society in the past was one in which the relation of each individual

\(^{120}\) See Tsao, Rational Approach to Crime and Punishment 27 (1955).

\(^{121}\) Sayre, The Life of Roscoe Pound 148 (1949).

\(^{122}\) Parker, China—Her History, Diplomacy and Commerce 308 (1917).

person with other persons was ordered by his status, nevertheless, this should never be equated with the blind submission of the inferior to the superior. The Confucian teaching of reciprocity imposed on each individual a moral duty appropriate to his status in order that harmony, the end of an ideal social order, may be attained. And let us once again emphasize that the word "harmony" epitomizes a happy state of human relationship, which is characterized by a mutual expression of good will. To recapitulate, we may say that humaneness, reasonableness, reciprocity, and harmony combined to create the spirit of Chinese culture.

Dynasties rise and fall; rulers come and go. But the Chinese nation endures. And it is this spirit of culture, not military might, nor material advancement, nor economic development, that perpetuates the nation. In these changing times, notwithstanding our dissatisfaction with the existing legal systems and all man-made institutions, we nevertheless hope this spirit of culture will be revived and again be infused into Chinese law, both substantive and procedural, so that human relations among the Chinese people may continue to be harmonious. Perhaps what has been said of Chinese law is none the less true of any other law.