

emperor and his officials, the activities of legal specialists and the development of a legal profession were strongly discouraged, if not prohibited, by all dynasties. Indeed, lawyers were politely described as ‘litigation tricksters’ or ‘pettifoggers’ and less politely as tigers, wolves or demons.<sup>102</sup>

(3) *Law as a supplementary/secondary tool*: With Confucianism as the state orthodoxy, state positive law was not seen as a primary regulator for state affairs, much less as a regulator for affairs among individuals. *Li* was the primary regulator. Indeed, the invention of *fa* (law) was attributed to a ‘barbarian’ people, the Miao people, who, it was alleged, ‘made no use of spiritual cultivation, but controlled by means of punishments.’<sup>103</sup> The ancient character for *fa* represented a fierce animal.<sup>104</sup> As a supplementary means for social control, the word *fa* (law) is more a synonym for the word ‘punishment’, with its first and primary meaning being penal law.<sup>105</sup> Civil matters were seen as trivial (*xigu*) and the claims and suits of citizens between themselves were of secondary interest to the state;<sup>106</sup> they were largely left to be regulated by customary law.<sup>107</sup> When they were regulated by state law, penal sanctions were always attached to prevent the breakdown of the desired social order. The best sum-

102 MacCormack, *supra* note 2, at 25.

103 Quoted in Bodde & Morris, *supra* note 2, at 13.

104 See *Chinese Encyclopedia—Law*, *supra* note 15, at 76.

105 Schwartz, *supra* note 33, at 65.

106 Bodde & Morris, *supra* note 2, at 4; Zhang Jinfan, ‘Chinese Legal Tradition and the Beginning of Modernisation’, (no. 5, 1996) *Journal of China University of Political Science and Law (Zhengfa Luntan)* 77, at 78; and Gao Huanyue, ‘The Uniqueness of Ancient Chinese Civil Law’, (no. 3, 1997) *China Law* 90, at 92.

107 There are disagreements among scholars as to whether the imperial state saw civil matters as trivial and that thus customary laws were not part of state law. For instance, Alford insists that it is wrong to believe that the imperial state was indifferent to civil law matters and the regulation of these matters by local customs should be seen as a kind of controlled delegation of authority. See William P. Alford, *To Steal a Book Is an Elegant Offence: Intellectual Property Law in Chinese Civilisation* (Stanford: Stanford University Press, 1995), at 11. A prominent Chinese scholar, Liang Zhiping, however, declares that, if understood in the Chinese cultural context and compared to the notion of ‘civil law’ or ‘private law’ as understood in the West, there was only one law in traditional China, and that was penal law. See Liang Zhiping (1997), *supra* note 92, at 249. This disagreement seems to be more about characterising traditional Chinese customary law than about its functions in society. In fact, most scholars agree that customary law was officially recognised as having legal effect by authorities and played an important role in Chinese traditional society. See Zhang Jinfan (1988), *supra* note 18, at 6; Bodde & Morris, *supra* note 2, at 5–6; and MacCormack, *supra* note 2, at 23–27.

mary of the attitude towards law as a supplementary means for social control is the Chinese saying *chuli ruxing* ('Outside the *li* are punishments').<sup>108</sup>

(4) *Law as a tool for social stability*: The Confucianisation of law also produced two distinctive features of Chinese law. First, the upholding of Confucianism as state orthodoxy led to the remarkably long continuation of a core group of legal provisions, which survived many centuries of development with little change.<sup>109</sup> Secondly, it also led to the upholding of a hierarchical relationship, with the family as the basic unit.<sup>110</sup> The abstract concept of the individual was conspicuously lacking in traditional Chinese law. Since rules were seen as being laid down by ancestors and inherited by generations, it is not surprising that modern law reforms, which were later to undermine the foundation of the traditional institutions and structure, as discussed below, were strongly resisted by conservative forces in the society.

In short, traditional Chinese positive law was mainly conceived of as penal law, operated in a vertical direction, and used as a supplementary means for maintaining a hierarchical social relationship that continued for centuries.

### 3 The Beginning of Modernisation—The Wholesale Westernisation of Chinese Law

#### 3.1 *Constitutional and Political Reform at Gunpoint*

Modern law reform, a process initially mainly concerned with the revision and making of law, started in the late 19th century when traditional values and systems were facing strong internal pressures for reform and external challenges. Internally, there was widespread social unrest (e.g. the Taiping Rebellion of 1851–1864 and the Boxer Rebellion of 1900) and official corruption. Externally, Western economic, cultural and political ideas had begun to penetrate into China, and with it China also suffered from repeated humiliations at the hands of outside powers, including the defeat by Japan in the Sino-Japanese war of 1895 and, consequently, had to concede to demands of extraterritoriality by these powers. In response, intellectuals and other social elites began attempts to modernise (such as the Self-Strengthening Movement of 1860–1894), to press for reform (such as the Hundred Days Reform of 1898) or even to call

108 Zhang Jinfan (1988), *supra* note 18, at 36.

109 MacCormack, *supra* note 2, at 1.

110 Zhang Jinfan (1988), *supra* note 18, at 51–53.

for revolution.<sup>111</sup> These challenges and pressures both weakened the central government and made the Chinese people acutely aware of the serious defects of their societal structures. A climate for change was thus created which was to undermine the foundations of traditional ideology, culture and social structure.<sup>112</sup> More importantly for legal transplant, the Western Powers' promise to relinquish extraterritorial rights and to assist in law reform along Western lines propelled a concentrated effort to adopt or adapt Western law at the turn of the 20th century.<sup>113</sup>

In January 1901 the Empress Dowager, then in exile in Xi'an while the Western powers occupied the capital Beijing, issued an edict appealing to high officials in the Imperial Court and provinces for suggestions for the reform of Chinese law along the lines of Western models.<sup>114</sup> In March 1902, the Imperial Court again appealed to all ambassadors residing abroad to examine the laws in various countries and report back to the Ministry of Foreign Affairs.<sup>115</sup> In May 1902, Shen Chia-pen (Shen Jiaben), Junior Vice-President of the Board of Punishments,<sup>116</sup> and Wu T'ing-fang (Wu Tingfang), a former ambassador to the

111 For detailed studies of political, economic and social conditions as well as reform movements in China in the late 19th and early 20th centuries, see John K. Fairbank, *The Cambridge History of China*, vol. 10, Late Ch'ing, 1800–1911, Part 1 (Cambridge, UK: Cambridge University Press, 1978); John K. Fairbank & Kwang-ching Liu, *The Cambridge History of China*, vol. 11, Late Ch'ing, 1800–1911, Part 2 (Cambridge, UK: Cambridge University Press, 1980); Meribeth E. Cameron, *The Reform Movement in China 1898–1912* (New York: Octagon Books, 1963); and Immanuel C.Y. Hsü, *The Rise of Modern China*, 5th edition, (New York: Oxford University Press, 1995). For a collection of original documents (including edicts, orders, submissions, draft documents, etc.), see Xia Xinhua & Hu Xucheng (eds), *Modern Chinese Constitutional Movements: A Collection of Historical Records (Jindai Zhongguo Xianzheng Licheng: Shiliao Huicui)* (Beijing: Press of China University of Political Science and Law, 2004).

112 M.J. Meijer, *Marriage Law and Policy in the Chinese People's Republic* (Hong Kong: Hong Kong University Press, 1971), at 21.

113 See Tay, *supra* note 100, at 163.

114 For an English translation of the edict, see Cameron, *supra* note 111, at 57–58. For a full text in Chinese, see Xia & Hu, *supra* note 111, at 35–36.

115 For an English translation of the Imperial Edict, see M.J. Meijer, *The Introduction of Modern Criminal Law in China*, 2nd edition (Hong Kong: Lung Men Bookstore, 1967), at 10.

116 For a brief biographical background on Shen Chia-pen, see *Chinese Encyclopaedia*, *supra* note 15, at 525–526; and China University of Political Science and Law, *A Study on the Legal Thought of Shen Jiaben (Shen Jiaben Falü Sixiang Yanjiu)* (Beijing: Publishing House of Law, 1990).

United States,<sup>117</sup> were appointed by the Imperial Court to carefully examine and re-edit all the laws then in force, to bring them into accord with the conditions resulting from international commercial negotiations, to consult the laws of various countries, and to ensure that new laws would be commonly applicable to both Chinese and foreigners and for the benefit of the government.<sup>118</sup> In May 1904, a Law Codification Commission was established—an event seen by a former Chinese judge at the Permanent Court of International Justice, Tien-Hsi Cheng, as the commencement of a new era.<sup>119</sup> Shen and Wu were appointed commissioners to the Commission.<sup>120</sup>

At the same time constitutional reform also began, aimed at transforming the autocratic empire into a constitutional monarchy. In 1905 a commission was despatched to Japan, Europe and the United States to study constitutional methods in various countries.<sup>121</sup> On the commission's return in 1906 it recommended that the Japanese model be adopted as the two countries had many comparable conditions,<sup>122</sup> and an imperial decree was subsequently issued commanding high officials to prepare for a constitutional government.<sup>123</sup> In 1907 a constitutional committee, named the Committee for Investigating and Drawing up Regulations of Constitutional Government (*Xianzhen Biancha Guan*) was established.<sup>124</sup> In the following years until the final collapse of the Qing Dynasty in 1912, a series of edicts concerning the establishment of a

117 For a brief biographical background on Wu Ting-fang, see *Chinese Encyclopedia—Law*, *id.*, at 627.

118 For a Chinese text of the edict, see Yang Hunglieh, *A History of Chinese Legal Thought (Zhongguo Falü Sixiangshi)*, vol. 11 (Beijing: Commercial Publishing House, 1937), reprinted by Shanghai Publishing House, 1984, at 305; for an English translation of the edict, see Meijer, *supra* note 115, at 10–11.

119 Tien-Hsi Cheng, 'The Development and Reform of Chinese Law', 1948 (1) *Current Legal Problems* 170, at 179.

120 Although Wu was appointed commissioner, he became vice-president of the Board of Commerce soon after his return from overseas. His position as commissioner passed to Ying Jui (Ying Rui), but Ying died soon after his appointment. This position was then taken up by Yü Liensan (Yu Liansan), an ex-governor of Shanxi. Therefore, it was Shen Chia-pen who played the major role in the Law Codification Commission. See Zhang Jinfan, 'On the Legal Thought of Shen Jiaben—Part II', (no. 5, 1981) *Studies in Law (Faxue Yanjiu)*, at 47.

121 H.G.W. Woodhead (ed.), *The China Year Book 1925–6* (Tientsin: Tientsin Press Limited), at 615. See further discussions in Chapter 3.

122 Cameron, *supra* note 111, at 102.

123 An English translation of the decree can be found in Cameron, *supra* note 111, at 103.

124 This committee was reorganised on the basis of a previous committee, the Committee for Studying the Ways of Government (*Kaocha Zhenzhi Guan*), established in late 1905, see Meijer (1967), *supra* note 115, 40–41.

constitutional government and a series of constitutional projects and documents were issued by the Throne.<sup>125</sup>

### 3.2 *An Overview of the Reform*

With the establishment of the Law Codification Commission the reform of Chinese law and the study of foreign law became a 'new cause' for the Imperial Court.<sup>126</sup> A two-stage approach was taken by the Commission. The first stage was to revise the old law, with a focus on abolishing the cruel punishments which then existed. This revision was to serve a two-fold purpose: to pave the way for the transition from traditional law to modern Western law; and to respond to Western criticisms on the cruelty of certain provisions in traditional Chinese law as reflected in the Great Qing Code (*Ta Ch'ing Lü Li*). In particular, the Commission was fully aware of the possibility of strong opposition towards such a transition, and thus of the need for measures to prepare the people for the introduction of modern Western laws into China.<sup>127</sup> The revision was done very swiftly and abolition of cruel punishment and reform of the police and prison systems were all carried out between 1902 and 1907.<sup>128</sup> By 1910 the very ancient *Ta Ch'ing Lü Li* had been completely revised and re-promulgated as a 'Current Criminal Code',<sup>129</sup> to serve as a transitional code before the promulgation of a new one.<sup>130</sup>

The second-stage reform, the making of new codes in line with Western laws, was carried out almost simultaneously, although the codes were only to be implemented after an unspecified transitional period. Thus within the space of a few years several new codes were drafted and issued: the General Principles for Merchants, the Company Law, and the Bankruptcy Law were promulgated in 1903,<sup>131</sup> the Law for the Organisation of the Supreme Court

125 English texts of many of these edicts concerning the establishment of Western-style parliament can be found in Hawking L. Yen, *A Survey of Constitutional Development in China* (New York: AMS Press, 1968); these constitutional documents included Principles of Constitution (1908), Nine Year Programs of Constitutional Preparation (1908), A Three-Year Program of Constitutional Preparation (1911), A Constitutional Framework (1911), and Nineteen Articles of Constitution (1911). English translations of these documents can be found in *China Year Book 1925-6*, *supra* note 121. See also further discussions in Chapter 3.

126 Yang Hunglieh, *supra* note 118, at 305.

127 See Meijer, *supra* note 115, at 14-15.

128 For detailed studies of the revisions, see Meijer (1967), *supra* note 115, ch. 2.

129 Zhang Jinfan (1986), *supra* note 16, at 340.

130 Beijing University (ed.), *Chinese Legal History (Zhongguo Fazhi Shi)* (Beijing: Beijing University Press, 1979), vol. 2, at 39.

131 Zhang Jinfan (1986), *supra* note 16, at 341.



was issued in 1906, and in 1910 the Law for the Organisation of the Courts was also promulgated. The last two laws established a judiciary system separate from administrative organs.<sup>132</sup> Drafts of codes on criminal and civil procedural law, commercial law and civil law, as well as a new criminal code, were all completed between 1910 and 1912.<sup>133</sup> Many foreign codes were translated into Chinese.<sup>134</sup> Finally, a modern law school was established in Beijing with the Japanese scholars Dr. Okada Asataro and Dr. Matsuoka Yoshitada as principal lecturers teaching several hundred students in 1906.<sup>135</sup> It is particularly worth noting that the Draft Law Governing Procedures in Civil and Criminal Cases, presented to the Throne in April 1906, attempted for the first time in Chinese history to distinguish civil from criminal cases, and such a distinction was finally established when the above-mentioned 'Current Criminal Code' was issued in 1910.<sup>136</sup>

In the first few years the law reform was focused on the area of criminal law while private law was totally ignored. The reform of civil law did not begin until 1907 when the above-mentioned constitutional committee was established and a general plan of codification was drawn up by the newly reorganised Committee for the Revision of Laws (*Falü Xiuding Guan*).<sup>137</sup> Under this general plan a civil code in five books was to be drafted. The Japanese scholar Dr. Matsuoka Yoshitada was put in charge of drafting the first three Books (General Principles, Obligations, and Rights *in rem*), and the Chinese scholars Chu Hsienwen (Zhu Xienwen) and Kao Chunggho (Gao Zhonghe) of drafting

132 Zhang Jinfan, *id.*, at 342.

133 Zhang Jinfan, *id.*, at 339–342.

134 According to Chinese scholars, more than thirty codes were translated: Zhang Jinfan (1986), *supra* note 16, at 346. These codes included the German Criminal Law and Law of Civil Procedure; the Russian Criminal Law; the Japanese Criminal Law in Force, Revised Criminal Law, Criminal Law of the Army, Criminal Law of the Navy, Criminal Procedural Law, Prison Law, Law of Judicial Organisation, Explanation of Meanings in the Criminal Law; and the French Criminal Law. English and American criminal laws were also compiled and translated by the Law Codification Commission. See Memorial of Shen Chia-pen Concerning the Deletion of Severe Punishments in Old Laws, in Yang Hunglieh, *supra* note 118, at 307; an English translation of the Memorial can be found in Meijer (1967), *supra* note 115, 163. According to Chinese scholars, the German Civil Code, the Italian Criminal Law, the Finnish Criminal Law and the American procedural laws were also translated. See Zhang Jinfan (1986), *supra* note 16, at 346.

135 Yang Hunglieh, *supra* note 118, at 321–322.

136 See Meijer, *supra* note 16, at 43–53.

137 Escarra, *supra* note 2, at 154.

the last two Books (Family and Succession).<sup>138</sup> The draft of the whole civil code was completed by 1911. Thus, with borrowings from Western legal institutions, the first draft in China's history of a distinct civil code came into being, though it was never promulgated.

### 3.3 *The Choice of Foreign Model*

The Qing reform, particularly in the second stage, thus began a process of westernisation of Chinese law. As mentioned above,<sup>139</sup> Japan was recommended by the commission despatched to study constitutional methods in various countries as a model for this process. The choice of Japan was no accident. Japan's success in reversing extraterritoriality and in becoming a mighty power in the Asian area was seen to be a result of its having a constitution and a legal system based on Western models. The similarity of the two countries in historical, ideological, and cultural features as well as in written language was seen as a further reason for the emulation of the Japanese model.<sup>140</sup> These factors prompted the concentrated study of Japanese law, including the translation of a large number of Japanese codes, and many young scholars went to Japan to study law, among other disciplines, well before legal reform started.<sup>141</sup> Thus there was a pool of Japan-trained scholars available and in favour of emulating the Japanese legal system. Also important is the fact that the Continental European, mainly German, system, which the Japanese legal system was modelled on, was seen as a form of Western jurisprudence that had been tested in an oriental society.<sup>142</sup>

138 Chang Hanchu, *A History of the Modern Chinese Legal System (Zhongguo Jindai Fazhishi)* (Taipei: The Commercial Press, 1973), at 34.

139 *Supra* note 122.

140 Foo Ping-sheung, 'Introduction', in *The Civil Code of the Republic of China* (Shanghai: Kelly & Walsh, Ltd., 1930), at xi; F.T. Cheng, 'Law Codification in China', 1924 (6) *J of Comp Leg* 283, at 285; and Li Guilian, 'Legal Reforms in Modern China and the Japanese Influence', (no. 1, 1994) *Studies in Comparative Law (Bijiaofa Yanjiu)* 24.

141 Li Guilian, *ibid.* It is difficult to determine the exact number of students studying law in Japan. According to some recent studies it is clear that the overwhelming majority of students who went abroad at the turn of the 20th century went to Japan and a majority of these studied law there. See Zhou Yiliang (ed.), *A History of Sino-Japan Cultural Exchange (Zhong Ri Wenhua Jiaoliu Shi Daxi)* vol. 2 (*Legal System*) (*Fazhi Juan*) (Hangzhou: Zhejiang People's Press, 1996), at 207; and Hao Tiechuan, 'Law Students Studying Abroad in Modern Chinese History and the Modernisation of Chinese Law', (no. 6, 1997) *CASS Journal of Law (Faxue Yanjiu)* 3.

142 Cheng Hanchu, *supra* note 138, at 285. For a more detailed study of Japanese influence on early Chinese legal reform, see Zhou Yiliang, *id.*, Chapters 7 and 8.

Little attention was given to Common Law by the early reformers. This neglect can be attributed to many causes. Technically, as Roscoe Pound has pointed out, materials in Common Law are too unsystematic, too bulky, and too scattered, and its technique is too hard to acquire, to make its adoption possible.<sup>143</sup> More fundamentally, the early Romanist Continental Law was based on the central concept of two authorities, that of the state over the citizen and that of the *pater familias* over his dependents.<sup>144</sup> This concept fitted well into the traditional Chinese conception of law and the prevailing social conditions. As one of the early authorities on Chinese law has observed:

Anglo-American law emphasises the individual as against the family, while the Continental system inherits something of the old Roman *familia*. The unit of Chinese society being the family, reform naturally seeks to preserve this institution and to modernise it as far as possible.<sup>145</sup>

Moreover, the concept of the State's authority over its citizens as inherited from Roman law also fitted well into the ultimate goals of legal reform: to secure the emperor's position permanently, to ameliorate foreign aggression and to quell internal disturbance.<sup>146</sup>

### 3.4 *The Persistence of Conservatism*

Clearly the introduction of Western law was going to further undermine the structures and the values of traditional China. This was hardly the intention of the high officials who advised the Throne to undertake constitutional and legal reforms. It is therefore not surprising that the Qing reforms met strong opposition from within the Imperial Court.

Shen Jiaben apparently recognised the possible opposition to his reform. He was thus cautious in approaching the reform by dividing it into a two-stage process. He was apparently also cautious in appointing foreign experts in drafting new codes. Thus in drafting the civil code he only appointed one

<sup>143</sup> See Roscoe Pound, 'The Chinese Civil Code in Action', 1955 (29) *Tulane L Rev* 277, at 289.

<sup>144</sup> Alice E.-S. Tay and Eugene Kamenka, 'Public Law—Private Law', in S.I. Benn & G.F. Gaus (eds), *Public and Private in Social Life* (London/New York: Croom Helm St. Martin's Press, 1983), at 68.

<sup>145</sup> Wang Chung-hui, 'Legal Reform in China', in *Chinese Social and Political Review*, June 1917, quoted in Cameron, *supra* note 111, at 174.

<sup>146</sup> See the Report on Constitutional Government by the Commissioner (Zai Ze) for Investigating Foreign Government. For a full text of the report in Chinese, see Xia & Hu, *supra* note 111, at 40–42. Zai Ze is seen as the 'architect' of the Qing constitutional reform (Xia & Hu, *id.*, at 40).



Japanese scholar to draft the general principles, obligations and rights *in rem*—legal areas that were not clearly codified in traditional Chinese law—but left the more traditional topics of family and succession to be drafted by Chinese scholars.<sup>147</sup> Mere precautions, however, did not stop fierce opposition to his reform. Indeed, virtually every major reform introduced by the Law Codification Commission, including the establishment of an independent judiciary, the introduction of procedural laws, and the revision of criminal laws, was opposed by high officials, including Zhang Zhitong (Zhang Chih-tung), one of the three high officials who nominated Shen Jiaben for appointment to the Commission. Fundamentally, the reforms were seen as challenging the traditional institutions and structures, ignoring the traditional values as embodied in Confucian *li*, and undermining the social foundation built on centuries-old social morality and customs.<sup>148</sup> To the opponents to the reforms, legal reforms were inevitable, but they had to be built upon Confucian doctrines of virtue, loyalty and filial piety.<sup>149</sup> Clearly, without a revolution in ideology, the reform was not going to succeed.

#### 4 The Continuing Reform under the Kuomintang—The Modernisation of Chinese Law

##### 4.1 *An Overview—the Continuity of Reform*

The belated Qing reform efforts did not save the Dynasty; a Republic was established in 1912 by the revolutionaries led by Sun Yatsen. Although it overthrew the Dynasty, the Republican government allowed the continued use of the Qing laws: all imperial laws formerly in force were repeatedly declared to remain effective unless they were modified by new laws or were contrary to the principles of the Republic.<sup>150</sup>

The legitimacy of the Republic was built upon revolutionary ideas and thus the need for continuing legal reform was assumed. Despite frequent changes of

147 See *supra* note 138.

148 See Meijer (1967), *supra* note 115, Chapters 2 and 5; and Guo Chengwei, 'Legal Thought of Shen Jiaben and the Controversies during the Qing Legal Reform', in *A Study on the Legal Thought of Shen Jiaben*, *supra* note 116, at 103–121.

149 Meijer (1967), *supra* note 115, at 44.

150 See Presidential Decree of March 10, 1912, in Escarra, *supra* note 2, at 169; Resolution of the Provisional Government of April 3, 1912, in Zhang Jinfan (1986), *supra* note 16, at 394; and Resolution of the Central Political Council (*Zhongyan Zhengzhi Huiyi*) of 1927, in Meredith P. Gilpatrick, 'The Status of Law and Law-making Procedures Under the Kuomintang 1925–46', 1950–1 (10) *Far Eastern Q* 39, at 45.

government and constitutions in the early period of the Republic,<sup>151</sup> the legal reform efforts of the late Qing were not abandoned. They were in fact greatly accelerated after the establishment of the Nationalist Government in Nanking (Nanjing) in 1927. An extensive programme of legislation by the Kuomintang (KMT) government was carried out, in which draft codes prepared during the Qing reforms were re-examined, revised and in some cases promulgated after re-evaluation in accordance with KMT guiding ideology.<sup>152</sup> This continuation of the Qing reform also meant the continuation of westernisation of Chinese law along the lines of the Continental European models. When the reform ultimately resulted in the ‘Six Codes’ of the Republic,<sup>153</sup> together with the establishment of a Continental-style judicial system in China, Chinese law was transformed and began to be Western law in its form, terminology and notions.<sup>154</sup> Since then Continental European models have been firmly embedded in Chinese law and law reforms, despite differences in ideologies and political principles.

#### 4.2 Guiding Principles—*San Min Chu I*

However, KMT laws were made in accordance with some unique political principles—those of the *San Min Chu I* (*San Min Zhu Yi*) of Dr. Sun Yatsen. These principles are often translated into English as the Three Principles of the People—Nationalism (*Minzu*), Democracy (*Minquan*)<sup>155</sup> and People’s

151 For discussions of changes in government, see Ch’ien Tuan-Sheng, *The Government and Politics of China* (Cambridge, Massachusetts: Harvard University Press, 1950), at 57–69; and William L. Tung, *The Political Institutions of Modern China* (The Hague: Martinus Nijhoff, 1964), at 22–117. For a history of the making of the Constitution under the Republic, see W.Y. Tsao, *The Constitutional Structure of Modern China* (Melbourne: Melbourne University Press, 1947), at 1–22; and Pan Wei-Tung, *The Chinese Constitution: A Study of Forty Years of Constitution-making in China* (Washington, DC: Institute of Chinese Culture, 1954). See also discussions in Chapter 3 on Constitutional Law.

152 For detailed studies of legislation by the KMT, see Escarra, *supra* note 2, particularly at 152–346; Meijer, *supra* note 115; Roscoe Pound, ‘Law and Courts in China: Progress in the Administration of Justice’, 1948 (34) *ABAJ* 273. For a historical study of KMT laws in the Chinese language, see Chang Hanchu, *supra* note 138, particularly ch. 7.

153 The term ‘Six Codes’ does not necessarily connote six separate codes, but is often used to mean the collective body of laws of the KMT government. See *Chinese Encyclopedia—Law*, *supra* note 15, at 393.

154 Tay, *supra* note 100, at 164.

155 *Minquan* literally means ‘people’s sovereignty’ or ‘people’s rights’. However, as Dr. Sun Yatsen mainly referred to the issue of democracy when he was talking about *Minquan*, the term has thus more often been translated as ‘democracy’.

Livelihood (*Minsheng*).<sup>156</sup> They laid down the ideological and theoretical foundation of KMT laws and were institutionalised in all KMT constitutional documents.<sup>157</sup>

In general, the doctrine of nationalism meant the reconstruction of China into a unified state internally and a strong country on an equal footing with other nations externally; the doctrine of people's sovereignty (democracy) was the practice of Western democratic ideas within a Chinese context; and the doctrine of people's livelihood referred to the establishment of a welfare system for the nation and an improvement in the life of the masses, mainly by means of equalisation of land ownership and control of capital.

Although Dr. Sun saw his *San Min Chu I* as being equivalent to government 'of the people, by the people, and for the people' as declared by President Abraham Lincoln in his famous Gettysburg Address,<sup>158</sup> and he compared his doctrine with the catchwords of the French Revolution—Liberty, Equality and Fraternity,<sup>159</sup> his doctrines were both authoritarian and instrumentalist. He said:

Although democratic ideas came to us from Europe and America, yet the administration of democracy has not been successfully worked out there. We know a way now to make use of democracy and we know how to change the attitude of people towards government, but yet the majority of people are without vision. We who have prevision must lead them and guide them into the right way if we want to escape the confusions of Western democracy and not follow in the tracks of the West.<sup>160</sup>

156 The principal means of Dr. Sun Yatsen for elaborating his theory of *San Min Chu I* was his lectures delivered in 1924 to popular audiences: Sun Yatsen, *The Three Principles of the People: San Min Chu I* (With two supplementary chapters by Chiang Kai-shek) (Taipei: China Publishing Co., undated). For some English studies on *San Min Chu I*, see e.g. Paul M.A. Linebarger, *The Political Doctrine of Sun Yat-sen: An Exposition of the San Min Chu I* (Baltimore: Johns Hopkins University Press, 1937); and Chu-yuan Cheng (ed.), *Sun Yat-sen's Doctrine in the Modern World* (Boulder/London: Westview Press, 1989).

157 See the Preamble to the Organic Law of the National Government of China (4 October 1928); the Preamble to the Provisional Constitution of the Republic of China for the Period of Political Tutelage (1 June 1931), and Article 1 of the Constitution of the Republic of China (25 December 1946). The Organic Law and the Provisional Constitution can be found in Pan Wei-tung, *supra* note 151, at 241 and 247 respectively; and the Constitution can be found in W.Y. Tsao, *supra* note 151, at 275.

158 Sun Yatsen, *Fundamentals of National Reconstruction* (Taipei: published by China Culture Service and printed by Sino-America Publishing Co. Ltd., 1953), at 43.

159 Sun Yatsen, *supra* note 156, at 77.

160 *Id.*, at 128–129.

Indeed, Dr. Sun divided mankind into three groups on the basis of the individual's natural intelligence and ability: those to guide, those to follow and those to be guided.<sup>161</sup> Individuals, according to him, 'should not have too much liberty, but the nation should have complete liberty.'<sup>162</sup>

The application of Sun's political doctrines in KMT law-making and their implications for KMT law were clearly explained by the first president of the Legislative Yuan, Mr. Hu Han-min, in his speech at the opening of the Legislative Yuan in November 1928.<sup>163</sup> This speech was seen as laying down the guiding principles of KMT legislation.<sup>164</sup>

According to Hu Han-min, *San Min Chu I* legislation was a revolutionary legislation which was both progressive and creative. Compared with traditional Chinese law, *San Min Chu I* legislation was designed to protect national interests in place of the family and clan system; to safeguard all new organisations which protected the national spirit, democratic ideas and happiness of the people instead of the autocratic monarchy; and to promote a national economy based on both industry and agriculture instead of a family economy based solely on agriculture. *San Min Chu I* legislation also separated private law from public law. Unlike Western laws, it was designed primarily to protect social interests as a whole rather than individual freedoms and private interests. According to Hu Han-min, a legal system [that is, the Western legal system] which took individuals as its basic unit was more backward than the Chinese traditional legal system for which the family and the clan were the basic units. This Western law was even more backward when compared with *San Min Chu I* legislation, which took the society as the basic unit.<sup>165</sup> Individuals were to be protected, not because of concern for the safety of individuals, but for the safety of the society.<sup>166</sup> The guiding principles of *San Min Chu I* legislation were to maintain social stability, to protect economic development and to adjust and balance social interests.<sup>167</sup>

The implementation of KMT ideology was carried out through the Party, which controlled the making of law. The making of the Civil Code clearly illus-

161 See *id.*, at 115.

162 *Id.*, at 76.

163 The full text of the speech was printed in the *Journal of the Legislative Yuan (Li-fa Ch'uan K'an)*, vol. 1, 1929, 1–13.

164 See Escarra, *supra* note 2, at 200–201; and M.H. van der Valk, *An Outline of Modern Chinese Family Law* (Peking: Henri Vetch, 1939, reprinted by Ch'eng Wen Publishing Co., Taipei, 1969), at 45–49.

165 Hu Han-min, *supra* note 163, at 4–6.

166 *Id.*, at 9.

167 *Id.*, at 11.

trates this practice. Drafting members of the Civil Codification Commission first formulated fundamental points of law in the form of 'preliminary questions of law' for the Legislative *Yuan*, which in turn submitted them to the Central Political Council. Within the Council, the 'preliminary questions' were first discussed by the Council and then transmitted to the Legal Department within the Council for further examination. After this they were returned to the Council with a statement of opinions and a request for an official decision on the statement. Final decisions were then resolved by the Council in the form of *Li Fa Yuanze* (general principles of legislation). Final drafts of the code were first presented for approval to the Central Executive Committee of the KMT (of which the Central Political Council was a permanent organ and the highest authority), before they were submitted to the National Government for adoption and promulgation as required by legislative procedures.<sup>168</sup>

It is also worth noting that KMT law not only incorporated KMT principles, it also created a legal basis for the possible future implementation of KMT principles in further laws and regulations, a practice later also to be found in the PRC. The most obvious example is the registration of land. One of the major goals of the principle of people's livelihood was the equalisation of land ownership. However, when the Civil Code was drawn up land reform could still not be effectively carried out, since the land reform law had not yet been enacted. Nevertheless, Article 758 of the Civil Code made registration a compulsory requirement for ownership of immovables. This requirement, according to Hu Han-min, established a legal basis for future land registration legislation. This, in turn, was to serve the KMT land reform policy, which consisted of three elements: equalisation of ownership, land to the tiller, and state ownership of land. Land registration thus served to pave the way for possible future compulsory purchase of land by the government.<sup>169</sup>

#### 4.3 *Between Westernisation and Modernisation of Chinese Law*

In supporting the *San Min Chu I* as guiding principles for KMT legislation, Hu Han-min seems to have rejected the idea of a wholesale import of foreign laws when he said:

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168 See e.g. the making of Book IV, in van der Valk, *supra* note 164, at 54–58, and English translations of Preliminary Questions of Law of the Family and Statement of Opinion on the Preliminary Problems of Family Law, in Appendixes I and III of the same book.

169 See Yang Hunglieh, *supra* note 118, at 353.



Those who do not know *San Min Chu I* believe that we should borrow from European and American laws and institutions to make our legislation. That is in truth an error.<sup>170</sup>

However, the actual implementation of these guiding principles seems to have been quite different and much more utilitarian and instrumentalist than he implied. Foo Ping-sheung, then Chairman of the Civil Codification Commission of the Legislative Yuan, later explained:

Whilst in Europe and America they try to adjust the opposing interests of different classes of [the] population, the *Kuomintang* tries to make the notion of social order prevail. In practice the legal forms through which the conceptions are expressed do not differ, and in order to execute the intention of the Party the Commission had only to combine on that matter precedent derived from various foreign legislations.<sup>171</sup>

The result of the law-making, as illustrated by the Civil Code, was explained by one of the prominent Chinese legal scholars of that time, Dr. John C.H. Wu:

If the Civil Code is studied carefully from Article 1 to Article 1225, and then compared with the German Civil Code, the Swiss Civil Code and the Swiss Code of Obligations, we will find that ninety-five percent of the provisions [in the KMT Civil Code] have their origin there: they are either copied directly or copied with some changes of expressions [from these foreign codes].<sup>172</sup>

The justification for using foreign laws while upholding the *San Min Chu I* was explained by Dr. Wu. He argued that the *San Min Chu I* legislation was a kind of creative legislation and that creation was nothing more than selection. Therefore, if the choice was appropriate, then selecting foreign laws and making them parts of Chinese law was not an action of simple blind copying of foreign laws. He argued that the prevailing legal thoughts and legislative trends in the West at that time happened to match perfectly the Chinese national sentiments. It was therefore natural for the revolutionary legislators to make selections from among foreign codes.<sup>173</sup>

<sup>170</sup> Hu Han-min, *supra* note 163, at 13.

<sup>171</sup> Foo Ping-sheung, *supra* note 140, at xxi.

<sup>172</sup> Cited in Yang Hunglieh, *supra* note 118, at 369.

<sup>173</sup> *Id.*, at 369–370.

However, the *San Min Chu I* ideology tilted the process of reform more towards modernisation than total westernisation: while the Qing reforms tried to incorporate Western laws by adopting the most recent developments, the Kuomintang took account of many of the latest developments of Western jurisprudence, but only adopted them if they were in harmony with *San Min Chu I* principles. Both had a utilitarian and instrumentalist approach to foreign laws and legal systems. A specific example of the ideological difference in action was in attitudes towards Chinese traditions and customs. Besides its conservative approach to family and succession matters, the Qing reforms largely failed to preserve certain ancient and deep-rooted customs, such as the civil law institutions of *Yung-tien* (a long-term lease) and *Dien* (a kind of usufructuary mortgage). The Kuomintang Codification Commission took a different approach. It believed that in a vast country with a large population it was impossible to impose uniform and detailed rules on every sort of human activity. In cases of the absence of express provisions and expressions of intentions of parties, the best interpreter was established local practice.<sup>174</sup> The Kuomintang also took into consideration Chinese traditions and customs in adopting and adapting Western legal doctrines and institutions.<sup>175</sup> The Kuomintang law reform was thus notably more progressive than the late Qing reforms in balancing the process of westernisation and modernisation of Chinese law, while preserving Chinese traditions and customs.<sup>176</sup>

That is not to say that KMT law was of a conservative nature. On the contrary, it was the KMT revolutionary ideology that contributed substantially to the introduction of the modern family and succession law in China. One of the key KMT social and political programmes of reconstruction was to reform the Chinese family and inheritance system, which was seen as being feudal and backward. The task of the reform was to 'superimpose on the primitive notion of the unity of the clan or the family that of the unity of the nation composed of the whole body of these families and these clans.'<sup>177</sup> Thus the KMT Party

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174 Foo Fing-sheung, *supra* note 140, at xvi.

175 For instance, in the case of civil law, two devices were applied in the Code. One was generally to uphold the validity of customs in so far as they were not contrary to public order and good morals; the other was expressly to preserve some traditional legal institutions and customs and practices thereunder. See further discussions in Jianfu Chen, *From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the PRC* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), at 25–27.

176 See a detailed discussion in Chen, *id.*, ch. 1.

177 Introduction of the French translation (of the Civil Code), vols. II, III, cited in Escarra, *supra* note 2, at 256.

Congress of 1924 passed resolutions concerning equality of the sexes.<sup>178</sup> These resolutions, for the first time in Chinese history, formally established equal status for women with men. More and more foreign law provisions, largely attributable to the political ideas of the KMT, were incorporated into Books IV and V (on Family and Succession) of the 1925 Draft. When the KMT Political Council resolved the principles governing family and succession, equality of the sexes was no longer an empty principle: the actual equality of rights in the spheres of economic, political as well as private rights was stressed. In its Resolution, Point III provided that:

It seems, however, that with regard to the equality of the sexes we should stress the actual situation, such as economic and political equality as well as equality of private rights, rather than appearances.<sup>179</sup>

Indeed, such issues as freedom of marriage, common property during marriage, and the equal right of male and female heirs to share inheritance were all addressed in these resolutions. When Books IV and V were drawn up, all the above KMT principles were embedded in the Code, and thus the traditional family system—the basic unit of traditional China—was formally broken, at least on paper.

## 5 Concluding Remarks

It is clear that modern legal reforms, started by the Qing Dynasty during its dying days and continued by the Nationalist Government, broke down the traditional institutions and structures that had continued for centuries. However, there is no universal agreement on the evaluation of the significance of these reforms and of the continuing influence of the traditional conceptions of law.

For instance, regarding the progress of legislation under the KMT, which clearly was a continuing process from the Qing reforms, Pound has remarked:

Thus in twenty-four years, from the overthrow of the Empire and setting up of the Republic, the work of providing a modern Constitution, modern codes, and a modern organisation of Courts was done, and well done. This would have been a remarkable achievement in any case, seeing that it had to be done with little to build on, by study of foreign institutions

<sup>178</sup> Escarra, *supra* note 2, at 165.

<sup>179</sup> For an English translation of the Resolution, see van der Valk, *supra* note 164, at 175–194.