

exhausted.¹⁰ In any case, the function of philosophical teachings in the tradition of Chinese philosophy, especially of Confucianism, has not been the increase of positive knowledge, but rather the elevation of the mind – a reaching out for what is beyond the present actual world, and for values that are higher than those being practised.¹¹ This explains the lack of specific discussion of the notions of justice, rights and so forth. It also means that Chinese philosophies were often divorced from reality and monopolised by certain social elites. More importantly, once a philosophy was adopted by the imperial government it became the state orthodoxy, with the result that philosophical teachings were often manipulated, distorted, and sometimes abused by the ruling elites for their own political purposes. Traditional philosophy thus has to be distinguished from state ideology in practice. Indeed, recent archaeological discoveries of ancient covenant texts, and the opening of archives for scholarly scrutiny and study have brought into question previous assumptions about early Chinese law, which were based on philosophical teachings and thus confused the expression of ideals with actual social practice and social reality.¹² However, as this reevaluation has just begun, more scholarly studies are still wanting. Many of the new conclusions are thus necessarily tentative.

Bearing in mind these points, in this chapter we will first briefly review the traditional legal culture through an examination of the basic premises of major philosophies in traditional China, and outline certain fundamental features of the traditional legal system.¹³ This will then be followed by an examination of the modern legal reforms in the Qing Dynasty and under the Kuomintang (KMT). The experience of law in the PRC since 1949 will be dealt with in the next chapter.

2. Legal Culture and Heritage

2.1. An Overview

One of the early misconceptions about traditional Chinese society is that there was no law in traditional China.¹⁴ On the contrary, law in China has a long history and

¹⁰ See Dodde & Morris, *supra* note 2, at 3. There were, however, occasions when Confucian teachings were directly applied to judging cases. See discussions on the Confucianisation of law below.

¹¹ Fung Yu-lan, *supra* note 2, at 5.

¹² In particular, see Bernhardt & Huang, *supra* note 2; MacCormack, *supra* note 2; and Karen Turner, 'A Case for Contemporary Studies of Classical Chinese Legal History', (vol. 22, no. 4, 1994) *China Exchange News* 25.

¹³ A more detailed history of specific legal institutions will be examined in the following chapters when the issues are under consideration.

¹⁴ According to MacCormack, a leading authority on traditional Chinese law, Montesquieu's

rich sources. The Tang Code (*Tanlü Shuyi*), first promulgated in AD 652 with 502 articles in total, contained not only legal provisions, but also commentaries which traced the historical origins of various provisions.¹⁵ The earliest published law is believed to have been the 'Book of Punishment' (*Xingshu*), which was inscribed on a set of bronze tripod vessels probably in 536 BC.¹⁶ More recently, archaeologists have unearthed covenant texts dating back to the Spring and Autumn Period (770–481 BC);¹⁷ thus confirming the existence of written law during that period.¹⁸ The bamboo strips found in 1975 contain strikingly sophisticated laws and institutions from the Qin Dynasty (221–206 BC). These legal arrangements, it is claimed,¹⁹ perhaps represent the most advanced stage of legal development of the time in the world. It has been demonstrated by these discoveries that law in traditional China was much more prominent in social life than was previously understood.²⁰

The traditional legal system, which continued from one dynasty to another for several thousand years, was seemingly deliberately broken off by modern legal reforms at the turn of the 20th century. It was further repudiated from 1949 onwards as

Lesprit des lois has played a large role in inducing such a misconception, which is common in the West and has not been entirely dispelled even among the writings of well-informed scholars. See MacCormack, *supra* note 2, at xiii-xiv.

¹⁵ *Chinese Encyclopaedia – Law (Zhongguo Dabaike Quanshu – Faxue)* (Beijing/Shanghai: The Chinese Encyclopaedia Press, 1984), at 579-80.

¹⁶ The texts have been lost. The belief in their existence is based on references and discussions in many historical records and Chinese classics. See Bodde & Morris, *supra* note 2, at 16; Zhang Jinfan, *et al.* (eds.), *A Chinese Legal History (Zhongguo Fazhi Shi)* (Beijing: Press of the Masses, 1986), at 58. On the basis of these references, Chinese scholars often trace Chinese legal history back to the 23rd – 21st century BC. See Zhang Jinfan, *et al.* (eds.), *id.*, at 13; Chen Guyuan, *An Outline of Chinese History (Zhongguo Fazhishi Gaiyao)*, 4th edition (Taipei: Sanmin Shuju, 1970), at 43-44; Dai Yanhui, *A Chinese Legal History (Zhongguo Fazhishi)*, 3rd edition (Taipei: Sanmin Shuju, 1971), at 1. Some western scholars also believe that Chinese legal tradition can be traced back to Shang (1766–1122 BC); see H.G. Creel, 'Legal Institutions and Procedures during the Chou Dynasty', in J. A. Cohen, R.R. Edwards & F-M. C. Chen (eds.), *Essays on China's Legal Tradition* (NJ: Princeton, 1980), at 28-29.

¹⁷ Turner, *supra* note 12, at 26.

¹⁸ On the basis of a study of these unearthed covenant texts, a prominent legal historian, Professor Zhang Jinfan, has argued that Chinese legal history can be traced back to much earlier than the 21st century BC, the date commonly accepted by Chinese scholars. See Zhang Jinfan, *A Collection of Papers on Legal History (Fashi Jianlüe)* (Beijing: Press of the Masses, 1988), at 1 & 27-28.

¹⁹ Zhang Jinfan (1988), *id.*, at 2.

²⁰ Turner, *supra* note 12, at 25. This is particularly true if we not only see law as being state positive law. As will be shown below, civil matters in traditional China were often left not unregulated but to be dealt with largely by local customary laws.

being a feudalist remnant.²¹ However, certain fundamental features of the traditional legal culture clearly persist in the contemporary legal system and in social attitudes towards law. The past, as Tu Wei-ming reminds us, 'lives on in China, muted and transformed in certain ways, vital and persistent in others.'²²

Traditional Chinese conceptions of law have been largely influenced by the writings of traditional schools of philosophy.²³ Of these, three have had a particular influence, namely *Ru Jia* (Confucianism); *Fa Jia* (Legalism); and *Yin-Yang Jia*, with Confucianism being the dominant force since the Han Dynasty (206 BC).

2.2. Confucianism

The starting point of Confucianism was its emphasis on the educational function of morality (*li*) in governing a state. That is, Confucianists believed that people were educable and, by education through *li*, an ideal social order could be created on the basis of virtue (*de*). Regarding the role of law (*fa*), Confucianists strongly opposed the Legalists who emphasised the necessity of using severe punishment for maintaining a desired social order. According to Confucianism, only a government based on virtue could truly win the hearts of men.²⁴ This idea is reflected in one of the most cited Confucian passages:

Lead the people by regulations, keep them in order by punishments (*xing*), and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by the established morality (*li*), and they will keep their self-respect and come to you.²⁵

In short, a good government was seen as a government based on virtue (*de*) and *li*.

²¹ Until quite recently, scholars in the PRC had insisted that traditional legal culture was a part of the 'feudalist tradition' that was only abolished in 1949 when the PRC was established. See *Chinese Encyclopaedia - Law*, *supra* note 15, at 4-7. See also *infra* note 183. It is only more recently that traditional legal culture has been treated more seriously as part of a cultural heritage that still has some value in shaping the future of Chinese law. See e.g. 'Taking Traditions Seriously in Creating the Future - A Report on the Seminar on Recent American Academic Writings on Traditional Chinese Law', (no. 3, 1995) *Studies in Law (Faxue Yanjiu)* 84.

²² Tu Wei-ming (ed.), *China in Transformation* (Cambridge, Massachusetts: Harvard University Press, 1994), at x.

²³ For an excellent summary of Chinese philosophy, see Fung Yu-lan, *supra* note 2.

²⁴ Bodde & Morris, *supra* note 2, at 20-21. It should be pointed out that Confucianism is not a gender neutral philosophy; thus the use of gender neutral words may in fact distort Confucian doctrines. I have used the past tense here and below in describing the main features of the traditional philosophies. I am however not suggesting that they are totally irrelevant in China today. See *supra* note 22.

²⁵ Cited in Bodde & Morris, *supra* note 2, at 21-22.

In Confucianism, a government based on virtue meant that the ruler was a sage who observed benevolence (*ren*) and social rightness (*yi*) as the basic roots of government; and that the ruler himself possessed all morality and set an example for his subjects. Thus, in reply to a question concerning the conduct of good government, Confucius said: 'Set yourself as an example to the people both in conduct and in physical labour'.²⁶ As such, the Confucian idea of government has been described as a government of 'rule by man'.²⁷ But perhaps this should be understood to be 'government lies in man'.²⁸

The word *li* expressed a very comprehensive idea and had an extraordinarily wide range of meanings.²⁹ It can be translated as ceremonies, rituals, or rules of social conduct.³⁰ It regulated social relations, curbed the natural desires of man, and cultivated moral habits. In fact, 'Confucianists called all rules which upheld moral habits and served to maintain social order by the generic name of *li*'.³¹

Li thus was a set of general rules governing proper conduct and behaviour by which rulers could maintain an ideal social order.³² It was never a body of detailed rules designed to deal with all situations, but a general instrument for training character and nourishing moral force.³³ However, *li* was not a set of rules universally applicable to all men, but rather varied according to one's status in society and in the family. This was a very basic principle of government in Confucianism. To Confucianists, to govern was to 'rectify names' (*zheng ming*), i.e. each class of things should be given a name which had certain implications attached to it, in order to regulate a society in an orderly and hierarchical fashion. Confucius once replied to his disciple concerning the question of ruling a state: 'The one thing needed first [to rule a state] is the rectification of names'.³⁴

²⁶ Cited in Chang Chi-yun, 'Confucianism vs. Communism', (no. 2, 1959) *2 Chinese Culture* 1, at 32. For many similar Confucian passages, see Chang Chin-tsen, 'Li and Law', (no. 2, 1960) *2 Chinese Culture*, at 6.

²⁷ Yu Ronggen, 'Questioning the Theory of Rule by Man in Confucianism and Rule of Law in Legalism', (no. 4, 1984) *Law Science Quarterly (Faxue Jikan)* 60.

²⁸ T'ung-tsu Ch'ü, *supra* note 2, at 257.

²⁹ Indeed, Confucianists saw it as their duty to dedicate their whole lives to studying and interpreting the meaning of *li*, which they believed was created by the ancient sage.

³⁰ Fung Yu-lan, *supra* note 2, at 147; T'ung-tsu Ch'ü, *supra* note 2, at 230.

³¹ Chang Chin-tsen, *supra* note 26, at 4. For further discussions on the concept of *li* in Confucianism, see T'ung-tsu Ch'ü, *supra* note 2, at 226-241.

³² T'ung-tsu Ch'ü, *supra* note 2, at 230.

³³ Benjamin Schwartz, 'On Attitudes Toward Law in China', reprinted in J.A. Cohen, *The Criminal Process of the People's Republic of China 1949 - 1963: An Introduction* (Cambridge: Harvard University Press, 1968), at 64.

³⁴ Fung Yu-lan, *supra* note 2, at 41.

This well-ordered society, according to Confucianism, consisted of five cardinal relations of men. They were the relationship of ruler and minister; of father and son; of husband and wife; of elder brother and younger brother; and of friend and friend. Out of the five, three clearly belonged to the family, but the remaining two could also be conceived of in terms of the family: The relationship between the ruler and the minister could be seen as analogous to that between the father and son, while that between friend and friend was like the one between elder and younger brother.³⁵ In fact, the concept of family was one of the fundamental concepts in Confucianism, and the concept of state was only an extension of that of family. Individuals were no more than members of a family or a social group; there was little significance for their separate and independent existence, least of all the appreciation of liberty and individual rights.³⁶ To govern a state was similar to regulating a family, which was achieved through the cultivation of individual morality, as the Confucian social formula suggested: cultivating the personality – regulating family life – ordering a state – ensuring world peace (*xiushen – qijia – zhiguo – pingtianxia*).³⁷ The fusion of the concept of family with that of state thus provided a basis for elevating morality to the status of state law.³⁸

Corresponding to the concept of *li*, the Chinese family system was a hierarchical system. Members were differentiated according to criteria of generation, age, degree of relationship and sex, with one's status determining one's different obligations and duties.³⁹ Citizens of a state, like members in an extended family, were similarly ranked as noble and humble, with varying levels of superordination and subordination.⁴⁰

³⁵ *Ibid.*, at 21.

³⁶ See Lucian W. Pye, 'The State and the Individual: An Overview Interpretation', in Brian Hook (ed.), *The Individual and the State in China* (Oxford: Clarendon Press, 1996), at 16-24.

³⁷ It is stated in the Great Learning, one of the Confucian classics, that: 'The ancients who wished to illustrate illustrious virtue through the kingdom, first ordered well their own states. Wishing to order well their states, they regulated their families. Wishing to regulate their families, they first cultivated their persons'. Cited in T'ung-tsu Ch'ü, *supra* note 2, at 255.

³⁸ In fact, a great part of Confucianism is the rational justification or theoretical expression of the Chinese family system as a social system. See Fung Yu-lan, *supra* note 2, at 21-22. Xun-zi (Hsun tzu), also a great Confucian scholar, once replied when asked about ways of governing a country: 'I have heard only about self-cultivation, but never about ways of governing a country'. Cited in T'ung-tsu Ch'ü, *supra* note 2, at 255.

³⁹ A Confucian passage says: 'The father should be kind, the son filial, the elder brother affectionate, the younger brother respectful, the husband good-natured, the wife gentle, the mother-in-law kind, the daughter-in-law obedient – all in conformity to *li*'. Cited in Chang Chin-tsen, *supra* note 26, at 2. For further discussions on the hierarchical relationship, see T'ung-Tsu Ch'ü, *supra* note 2, at 226-231.

⁴⁰ One Confucian passage states: 'there must be gradations of the noble and the ignoble, differences of dress for different people, and different positions for high and low officials at court'. Cited in Chang Chin-tsen, *supra* note 26, at 2.

'Therefore, to rectify names was to differentiate 'family' members, and hence social status, by means of *li*, or in other words, to rule a state was '[to] let the ruler be ruler, the minister be minister, the father be father, and the son be son.'⁴¹ To achieve this, it was necessary to have *li* for 'without *li* it would be impossible to tell the difference between the position of a prince and that of his minister, between the position of a superior and that of an inferior, or between the position of an elder person and that of a younger one. Without *li* it would be impossible to fix the degrees of relationship between the sexes, between father and son, and between brothers',⁴² and to be without these differences, 'it is to be like the beasts'.⁴³ In other words, the final goal of good government was the correct operation of hierarchical human relationships.⁴⁴

However, it would be wrong to conclude that Confucianists abandoned law completely even though the concept of law was rarely deliberated by Chinese philosophers.⁴⁵ What Confucianists opposed was the replacement of moral influence by punishment and the improper application of punishment. This was because Confucianists believed that human beings, whether their nature is good or bad, were educable and, thus moral education and influence should be the first priority in maintaining an ideal social order. Confucius himself did not refuse to hear litigation; he was alleged to have said that: 'In hearing cases I am as good as anyone else, but what is really needed is to bring about that there are no cases!'⁴⁶ Nor did he absolutely oppose punishment. Rather, he held moral influence to be basic and punishment supplementary.⁴⁷ This point was made even more clearly by his follower, Xun-zi (Hsun Tsu), who said: 'If people are punished without education, penalties will be enormous and evil cannot be overcome; if they are educated without punishment, evil people will not be punished.'⁴⁸ The proper relationship between law and *li* was discussed in the most important Confucian classics, the *Li Ji* (*Li Chi*),⁴⁹ as follows: '*li* forbids trespasses before they are committed, whereas law punishes criminal acts

⁴¹ Cited in Fung Yu-lan, *supra* note 2, at 41.

⁴² Cited in Chang Chin-tsen, *supra* note 26, at 2.

⁴³ Mencius, cited in Fung Yu-lan, *supra* note 2, at 151.

⁴⁴ T'ung-Tsu Ch'ü, *supra* note 2, at 239.

⁴⁵ The character of '*fa*' (law), however, was commonly used interchangeable with the character '*xing*' (punishment). See further discussions of the concept of law in sections 2.3 and 2.5 below.

⁴⁶ Confucius, cited in Bodde & Morris, *supra* note 2, at 21.

⁴⁷ T'ung-Tsu Ch'ü, *supra* note 2, at 268.

⁴⁸ Xun-zi, cited in T'ung-tsu Ch'ü, *supra* note 2, at 269.

⁴⁹ See T'ung-tsu Ch'ü, *supra* note 2, at 271.

after their commission'.⁵⁰ To a Confucianist, law had only short-term effects whereas *li* had a broad and permanent influence on members of the society.

Confucianists also opposed the improper application of laws, requiring that people should be educated before they could be punished by law. Confucius once said: 'To put the people to death without having instructed them; - this is called cruelty. To require from them, suddenly, the full task of work, without having given them warning; - this is called oppression'.⁵¹ To him, not to instruct people and to put them on trial was to kill the innocent. He insisted that if the law was improper the people should not be punished, for the guilt was then not on the side of the people.⁵²

2.3. Legalism

In strong contrast to the Confucian conception that all men are educable, Legalists believed that man was naturally evil.⁵³ Their main concern was thus primarily with evil behaviour, and the primary function of law in their conception was to prevent evil, not to encourage good behaviour.⁵⁴ Thus Legalism was primarily associated with the concept of punishment, indeed, severe punishment.

To a Legalist, neither moral influence could determine the social order, nor the virtue of the ruler be powerful enough to transform society or create order or disorder.⁵⁵ To him, a uniform law was the only means to govern a state, and law must be universally applicable to all.⁵⁶ The commonly cited Legalist idea of government is summarised as 'ignoring the [difference between] the close, the remote, the noble, the humble, and evaluating all by the law'.⁵⁷ On the basis of the face value of this idea of government, many Chinese scholars have since the 1920s held the view that the historical struggle between Confucianism and Legalism was the struggle between

⁵⁰ Cited in Chang Chin-tsen, *supra* note 26, at 4.

⁵¹ Cited in T'ung-tsu Ch'ü, *supra* note 2, at 252.

⁵² See T'ung-tsu Ch'ü, *supra* note 2, at 252.

⁵³ Fung Yu-lan, *supra* note 2, at 162.

⁵⁴ Thus, a good ruler 'seeks offences and not virtue' and 'punishes the bad people, but does not reward the virtuous ones.' See T'ung-tsu Ch'ü, *supra* note 2, at 261. There were however also Legalists who emphasised equally the importance of rewards in ruling a country. See Wu Chunlei, 'On Different Conceptions of Law in Different Historical Periods in Our Country', (no. 1, 1996) *Journal of Gansu Institute of Political Science and Law (Gansu Zhengfa Xueyuan Xuebao)* 7.

⁵⁵ T'ung-tsu Ch'ü, *supra* note 2, at 257.

⁵⁶ One of the famous teachings of Legalism is that '[o]rder cannot be changed because of the will of the ruler. Order is more important than the ruler.' See T'ung-tsu Ch'ü, *supra* note 2, at 244.

⁵⁷ Cited in *Chinese Encyclopedia - Law*, *supra* note 15, at 97.

the idea of rule by man and the rule of law.⁵⁸ However, this interpretation is not without major problems. Firstly, Legalists neither opposed social differentiation between the noble and the humble or between the ruler and the ruled, nor did they reject privileges for the nobles and rulers; though they considered such matters minor, irrelevant and even a hindrance to the governing of a state.⁵⁹ Equality before the law had its own specific connotation: 'The ruler creates the law; the ministers abide by the law; and subjects are punished by the law. All (the ruler, the minister, the superior, the inferior, the noble, and the humble) are subject to law'.⁶⁰ Indeed, the real objectives of Legalist theory were 'to respect the position and prerogative of the prince and to support authoritarian policies'.⁶¹ Secondly, although Legalists defined law in many ways, such as 'measures', 'rules', and 'codified books',⁶² they all emphasised severe punishment, and some even advocated that 'bad law is better than no law'.⁶³ This conception was derived from their belief that human nature was inherently evil and that, therefore, only 'force and power can suppress violence and that kindness and leniency cannot put an end to social anarchy'.⁶⁴ One of the most famous Legalists, Han Fei Zi, once said that: 'It is by means of strict penalties and heavy punishments that the affairs of state are managed'.⁶⁵ Shang Yang, whose reform helped the Qin State to conquer other states and unify China, said: 'Nothing is more basic for putting an end to crimes than the imposition of heavy punishment',⁶⁶ and 'in applying punishments, light offences should be punished heavily'.⁶⁷ The Legalists believed that law was the order imposed by the state to suppress individuals' desires on the grounds that it was the nature of man to seek profit and avoid harm and that, therefore, rewards and punishments were two effective ways of governing, i.e. to establish the interdicts and commands of the state.⁶⁸

As Legalists diametrically opposed the Confucian idea of 'rule by man', they also advocated strict regulation of and control over government officials (backed

⁵⁸ See Yu Ronggen, *supra* note 27, at 60-61.

⁵⁹ T'ung-tsu Ch'ü, *supra* note 2, at 241-2.

⁶⁰ Guan Zi (Kuan Tzu), cited in Yu Ronggen, *supra* note 27, at 62.

⁶¹ Chang Chin-tsen, *supra* note 26, at 7.

⁶² See *Chinese Encyclopedia - Law*, *supra* note 15, at 97.

⁶³ Ji Zi, cited in Yu Ronggen, *supra* note 27, at 62.

⁶⁴ Cited in Chang Chin-tsen, *supra* note 26, at 12. See also Bodde & Morris, *supra* note 2, at 18.

⁶⁵ Cited in Chang Chin-tsen, *supra* note 26.

⁶⁶ Cited in Chang Chin-tsen, *supra* note 26.

⁶⁷ *The Book of Lord Shang*, translated by Dr. J.J.L. Duyvendak (the University of Chicago Press, 1928), at 258.

⁶⁸ Fung Yu-lan, *supra* note 2, at 162.

by severe punishment) and, thus, the establishment of a sophisticated and complex system of administrative law.⁶⁹

Not only did the Legalists reject the Confucian idea of government by virtue, they also believed power and terror were the only tools that a ruler needed to govern a state.⁷⁰ The only dynasty established with the help of Legalism, the Qin Dynasty (221–207 BC), was a short-lived reign of terror,⁷¹ which ended the first (and only) period of 'a hundred schools of thought contending with each other' in Chinese history, when all books of teaching of other philosophical schools were burned, and when Confucianists were buried alive *en masse*.

In short, the legacy left by the Legalists are the concept of law as severe punishment and the need for detailed regulation and control of government officials. Its important principle of equality before the law, however it was interpreted, disappeared entirely after the end of the Qin Dynasty.⁷²

2.4. State Orthodoxy and Practice – the Confucianisation of Law

Confucianists are often described as educators and moralists, but they were also statesmen.⁷³ Legalists too were largely politicians who had a keen understanding of real and practical politics and provided practical solutions to rulers for the problems they faced. They were thus known as 'men of methods' (*fashu zhishi*).⁷⁴ Thus, the dispute between Confucianism and Legalism was more than philosophical contention; it was a political struggle for supremacy and domination in state ideology and hence state politics.

The struggle for ideological supremacy must be understood within the framework of the Chinese concept of 'Great Uniformity' (*dayitong*). This was first associated

⁶⁹ MacCormack, *supra* note 2, at 4-5.

⁷⁰ Yu Ronggen, *supra* note 27, at 63.

⁷¹ Qin is also known as 'the state of tiger and wolf'. Its unification of China was based on its military power and the brutal and ruthless ideology of Legalists. See Fung Yu-lan, *supra* note 2, at 191.

⁷² MacCormack, *supra* note 2, at 5.

⁷³ T'ung-tsu Ch'ü, *supra* note 2, at 263. One of the well-known Confucian teachings is 'academic excellence leads to officialdom'. Indeed, Confucius himself spent 14 years travelling to different kingdoms seeking official appointment. See Kuang Yamin, *A Critical Biography of Confucius (Kunazi Pingzhuan)* (Jinan: Qiru Press, 1985), ch. 2.

⁷⁴ See Fung Yu-lan, *supra* note 2, at 156. As pragmatic politicians, their rejection of the ideas of various schools of philosophy was for appearances only; they actually took whatever they found useful from these ideas for the purpose of government. Indeed, two of the most famous Legalists, Li Shi and Han Fei Zi (Li Ssu and Han Fei Tzu) were students of one of the most famous Confucianists, Xun Zi (Tsun Tsu). For a brief account of the origin of Legalism, see Fung Yu-lan, *supra* note 2, at 30-37. For the relations between Legalism and other schools of philosophy, see Fung Yu-lan, *id.*, 155-165.

with political or territorial unity, which was said to be a desire of all people long before the first unification of China by the First Emperor of Qin.⁷⁵ In order to achieve political unity, Qin took the measure, among others, of imposing unification of thought. With the help of the Legalists, in particular that of Li Si (Li Ssu), this idea of political unity was extended to include the imposition of one government, one history, and one way of thinking.⁷⁶ Thus the unity achieved by Qin also meant the end of the political and ideological pluralism found during the preceding Warring Period, and philosophical contention became a struggle for survival.

The succeeding dynasty, the Han Dynasty (206 BC – AD 220), inherited the concept of political unity of the Qin and continued its unfinished work of building up a new political and social order.⁷⁷ This resulted in the second attempt at 'Great Uniformity' in Chinese history, though the approach taken was somewhat different.⁷⁸

While Qin rule only allowed the existence of one school of thought, during the Han Dynasty only one 'ideology' was supposed to be dominant in state teaching, but private teaching of different philosophies was still allowed. However, the study of Confucianism was required as a compulsory qualification for candidature for official positions.⁷⁹ Thus came about the so-called 'Confucianisation of law', that is, the incorporation of the spirit, and sometimes the actual practice, of Confucian teaching into legal form.⁸⁰

While Emperor Wu (140–87 BC) of the Han Dynasty elevated Confucianism to the level of the only state teaching, it was the Confucian attitude of treating law as a supplementary or secondary tool for governing a state that facilitated the process of the Confucianisation of law. Gradually, the supplementary function of punishment was increasingly emphasised by Confucianists, and thus eventually the ultimate Confucianisation of law in the Han period occurred.⁸¹ This process is closely associated with the philosopher Dong Zhongshu (Tung Chung-Shu, 179–104 BC) and his philosophy.

The philosophy of Dong Zhongshu is a mixture of theories of Confucianism, *Yin-Yang*, the third of the major schools of philosophy to influence China's legal

⁷⁵ Fung Yu-lan, *supra* note 2, at 180.

⁷⁶ Hence the above-mentioned burning of all books other than Legalist teachings, and the killing of Confucianists. Books of medicine and other technologies were spared as they were seen as having nothing to do with 'ideology'. See Fung Yu-lan, *supra* note 2, at 205.

⁷⁷ Fung Yu-lan, *supra* note 2, at 191.

⁷⁸ Fung Yu-lan, *supra* note 2, at 205.

⁷⁹ Fung Yu-lan, *supra* note 2, at 206.

⁸⁰ For further discussions on this political background, see Fung Yu-lan, *supra* note 2, at 204-206.

⁸¹ See T'ung-tsu Ch'ü, *supra* note 2, at 267-273.

tradition, and that of the Five Elements.⁸² According to him, the five elements of the universe corresponded with the five human relations,⁸³ thus justifying the differentiated social relations within Confucianism. The theory of *Yin-Yang* meanwhile justified the supplementary function of punishment in governing a state, with *li*, being *Yang*, as the first instrument, and punishment, being *Yin*, as a supplementary tool for governing a state.⁸⁴ In this way he laid down the theoretical foundation for the harmonisation between Confucianism and Legalism.

Dong Zhongshu persuaded Emperor Wu to unify state ideology by placing Confucianism in a dominant position, and it was to remain the state orthodoxy in China for nearly two thousand years. However, this Confucianism was now very different from that of the previous Chou and Warring States periods, having absorbed many ideas from other rival schools, including, of course, Legalism.⁸⁵

Eventually the gap between *li* and law (punishment) was filled during a later dynasty, when the Tang (T'ang) Code was enacted in AD 653, bringing about the ultimate completion of the process of Confucianisation of law.⁸⁶ This process was further reinforced by the direct influence of Confucianism on the administration of justice. Since official positions required the study of Confucianism, and judicial and administrative functions were not separated, Confucian scholars thus controlled the interpretation of the law in addition to controlling its formulation and revision.⁸⁷

⁸² Fung Yu-lan, *supra* note 2, at 192-193. The philosophy of *Yin-Yang* and that of the Five Elements are inter-related; they are both theories of cosmology. The Chinese *Yin-Yang* philosophy explains the origin of the world: the interaction of *Yang* (originally meaning sunshine, and later developed to represent masculinity, activity, heat, brightness, dryness, hardness, etc.) and *Yin* (originally meaning absence of sunshine, later developed to represent femininity, passivity, cold, darkness, wetness, softness, etc.) produces all phenomena of the universe. The philosophy of the Five Elements explains the structure of the world: the universe consists of five powers (Wood, Fire, Soil, Metal, and Water). For further discussion on the very complicated philosophy of *Yin-Yang* and the Five Elements, see Fung Yu-lan, *supra* note 2, at 129-142.

⁸³ That is ruler and minister, father and son, husband and wife, elder brother and younger brother, and friend and friend.

⁸⁴ For further discussion of the philosophy of Dong Zhongshu, see Fung Yu-lan, *supra* note 2, at 191-206. Dong Zhongshu was however not the first philosopher to approach law with *Yin-Yang* and Five Elements philosophies. See Wang Limin, 'Yin-Yang and Five Elements and Ancient Law in Our Country', (no. 4, 1994) *Law Review (Faxue Pinglun)* 74.

⁸⁵ For a discussion of changes of Confucianism in Chinese history, see Ting Wei-chih, 'The Phases of Changes in Confucianism', (no. 12, 1978) *Studies in History (Lishi Yangjiu)* 25; Duan Qinguan, 'A Brief Discussion on the Evolution of Legal Ideology in Qin and Han Dynasties', (no. 5, 1980) *Studies in Law (Faxue Yanjiu)* 45; and Bodde & Morris, *supra* note 2, at 27. Some scholars have thus declared that Confucianism since Han was no longer genuine Confucian teaching, but fake, distorted and imposed 'Confucianism' manipulated by the ruling elites. See Kuang Yamin, *supra* note 73, at 29.

⁸⁶ See T'ung-tsu Ch'ü, *supra* note 2, at 267-279, and Bodde & Morris, *supra* note 2, at 27-29.

⁸⁷ T'ung-tsu Ch'ü, *supra* note 2, at 275-276.

The most extreme practice of Confucianisation of law was the direct application of the Confucian classics in judging cases, the *Chunqiu Jueyu* (Judging Cases by *Chunqiu*) initially started by Dong Zhongshu and followed, to various degrees, in later dynasties.⁸⁸

The outcome of all this was that the Legalists' concept of equality before the law (with, of course, the ruler being above the law) was replaced by the Confucianist differentiation of social status. Law increasingly became an administrative tool for determining and maintaining social order, with the state at the centre. Because the concept of law remained that of punishment, the Confucianisation of law led to the establishment of a harsh and detailed system of penal law, and the enactment of an enormous number of regulations, which may be called law for administration in Chinese history. Thus the Chinese concept of *Fa Zhi* (literally means 'rule of law' or 'rule by law') came to be associated with harsh despotism, heavy reliance on force, and oppressive demands on the people by an interventionist state.⁸⁹

Although Confucianism remained enshrined as the state orthodoxy from the Han Dynasty until the late Qing reform of law at the turn of the 20th century, in practice Legalism was never entirely discarded. Hence rulers were said to be 'Confucianist in appearance but Legalist in reality.'⁹⁰ In other words, in state practice Legalism continued to provide its methods and solutions for government, while Confucianism was upheld as a desired and ideal order for the society.

2.5. The Legacy of History

The influence of legal and cultural heritage on contemporary China does not, perhaps, derive directly from the specific teaching of Confucianism or Legalism, but rather from the traditional patterns of thinking (morality v. punishment), the structure of institutions (the family as a central unit), conceptions and assumption about law (law as punishment), and the function of law (law as a political and administrative tool for maintaining social order). Confucianism, and indeed all traditional teachings, have been out of fashion ever since the May 4th Movement in 1919. In other words, contemporary Chinese law has few direct links with the imperial legal heritage.⁹¹ Hence, traditional legal cultures cannot explain the structure and contents of contemporary Chinese laws. These are based on the immediate circumstances (what

⁸⁸ *Chunqiu (Ch'un-chiu)* was a Confucian classic. See T'ung-tsu Ch'ü, *supra* note 2, at 275-276.

⁸⁹ See Schwartz, *supra* note 33, at 65; and Duo Fu & Liu Fan, 'On Chinese Orthodox Legal Culture and Its Modernisation', (no. 2, 1988) *Journal of the South-Central Institute of Political Science and Law (Zhongnan Zhengfa Xueyun Xuebao)*, at 61-69.

⁹⁰ Fung Yu-lan, *supra* note 2, at 215.

⁹¹ Thus one Chinese scholar has asserted that if Confucius was now given a copy of the western code and a Chinese code for him to identify which one was Chinese law, he would now mistake the western code as Chinese law and *vice versa*. See Fan Zhongxin, *supra* note 5, at 138.

the Chinese call 'reality'). The prevailing political ideology of the time in question will better explain the meaning of any specific legal provisions, but the values and techniques of traditional Chinese law continue to influence contemporary legal thinking and practice.

In this section, we will outline the fundamental features of traditional Chinese law as evidenced in state positive law,⁹² which has continued to influence and even shape contemporary Chinese law.

(1) *Law as a political tool*: In contrast to Western legal tradition, traditional Chinese law was not attributed to any divine origin, although Taoism and Buddhism did have some influence.⁹³ Both Confucianism and Legalism were primarily concerned with determining and maintaining a desired social order.⁹⁴ Thus law in China was first and foremost a political tool, operating in a vertical direction, with its primary concern being state interests, rather than on a horizontal plane between individuals. As such it was not very interested in social regulations among autonomous individuals, and least of all in defending individual rights against the state.⁹⁵ In this sense the initial stimulus of traditional Chinese law was therefore also unrelated to economic

development,⁹⁶ although some contemporary Chinese scholars have argued that law was often used to implement 'economic reforms' in traditional China.⁹⁷

(2) *Law as an administrative tool*: Largely as a legacy of the influence of Legalism,⁹⁸ traditional Chinese positive law was also a tool for state administration. The sophisticated and complex bureaucracy established and developed since the Qin period facilitated the development of, and was backed by, an equally sophisticated and highly developed system of administrative law, with its primary attention on punishment rather than on adjudication. It was the belief of Chinese rulers that 'the wise emperor governs his officials, not his subjects'.⁹⁹ Thus detailed rules on officials' obligations and powers, such as the *Tang Liu Dian*, *Ming Hui Dian*, and *Qing Hui Dian* were codified separately and systematically.¹⁰⁰

With law as an administrative tool, it is not surprising to note that there was no concept of the separation of powers. The administration of justice was always a part of general administration and judicial personnel were a part of the 'executive'.¹⁰¹ Further, as administration was within the domain of the 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.¹⁰²

(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

⁹² As alluded to earlier (*supra* note 20), a large part of social life in civil relations was dealt with by customary laws in traditional China. However, because of their scattered nature and informal operation, it is difficult to draw any general conclusions from these customary laws. For studies on customary laws in traditional China, see Liang Zhiping, *Customary Law in Qing Dynasty: Society and State (Qingdai Xiguan Fa: Shehui yu Guojiao)* (Beijing: China University of Political Science and Law Press, 1996); Liang Zhiping, *The Pursuit of Harmony in Natural Orders: A Study on Chinese Traditional Legal Culture (Xunqiu Ziran Zhixu Zhong De Hexie: Zhongguo Chuantong Falü Wenhua Yanjiu)* (Beijing: China University of Political Science and Law Press, 1997); Gao Qicai, *On Chinese Customary Law (Zhongguo Xiguan Fa Lun)* (Changsha: Hunan Press, 1995); Li Zhimi, *Ancient Chinese Civil Law (Zhongguo Gudai Minfa)* (Beijing: Publishing House of Law, 1988); Gao Huanyue, 'The Uniqueness of Ancient Chinese Civil Law', (no. 3, 1997) *China Law* 90; Kong Qingming, Hu Liuyuan & Sun Jiping (eds.), *A History of Chinese Civil Law (Zhongguo Minfa Shi)* (Changchun: Jilin People's Press, 1996); Hui-chen Wang Liu, *The Traditional Chinese Clan Rules* (New York: Association for Asian Studies, 1959); Mark Elvin, *The Pattern of the Chinese Past* (Stanford: Stanford University Press, 1973); Francis L.K. Hsu, *Under the Ancestors' Shadow* (New York: Columbia University Press, 1948); Zhao Xudong, *Power and Justice: Dispute Resolution in Rural Societies and Plurality of Authorities (Quanli Yu Gongzheng - Xiangtu Shehui de Jufen Yu Quanwei Duoyuan)* (Tianjin: Tianjin Ancient Books Publishing House, 2003); Su Li, *Roads to Cities - Rule of Law in Transitional China (Daolu Tongxiang Chengshi - Zhuanxing Zhongguo de Fazhi)* (Beijing: Law Press, 2004); and Tian Chengyou, *Local Customary Law in Rural Societies (Xiangtu Shehui Zhong de Minjianfa)* (Beijing: Law Press, 2005).

⁹³ Bodde & Morris, *supra* note 2, at 10 & 12-13; Zhang Jinfan (1988), *supra* note 18, at 36; and Pye, *supra* note 36, at 17. Whether Chinese law was comparable to natural law is however controversial. See Turner, *supra* note 12, at 27; Peerenboom, *supra* note 2.

⁹⁴ T'ung-tsu Ch'ü, *supra* note 2, at 226.

⁹⁵ Bodde & Morris, *supra* note 2, at 4; Jones, *supra* note 6, at 4.

⁹⁶ Bodde & Morris, *supra* note 2, at 10-11.

⁹⁷ See e.g. Zhang Jinfan (1988), *supra* note 18, at 12 & 42-43; Wang Qianghua, 'On the Role of Law in Reform and the Three Legal Reforms in Our History', (no. 5, 1982) *Studies in Law (Faxue Yanjiu)* 58.

⁹⁸ See *supra* note 69.

⁹⁹ Zhang Jinfan (1988), *supra* note 18, at 19; Jones, *supra* note 6, at 6.

¹⁰⁰ For further discussion see Zhang Jinfan, 'Administration and Administrative Law in Ancient China', in Zhang Jinfan (1988), *supra* note 18, at 171-217; Alice Erh-Soon Tay, 'Law in Communist China - Part I', (1969) 6 *Syd.L.Rev.* 153, at 157-160; and Gao Huanyue, 'Ruling Government Officials through Laws: the Essence of Rule by Law in Ancient China', (no. 4, 1997) *China Law* 98.

¹⁰¹ A local magistrate was 'the judge, the tax collector and the general administrator. He had charge of the postal service, salt administration, pao-chia, police, public works, granaries, social welfare, education, and religious and ceremonial functions.' See T'ung-tsu Ch'ü, *Local Government in China under the Ch'ing*, quoted in Jones, *supra* note 6, at 10.

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

of punishments.¹⁰³ The ancient character for *fa* represented a fierce animal.¹⁰⁴ 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.¹⁰⁵ Civil matters were seen as trivial (*xigu*) and the claims and suits of citizens between themselves were of secondary interest to the state;¹⁰⁶ they were largely left to be regulated by customary law.¹⁰⁷ When they were regulated by state law, penal sanctions were always attached to prevent the breakdown of the desired social order. The best summary of the attitude towards law as a supplementary means for social control is the Chinese saying *chuli ruxing* ('Outside the *li* are punishments').¹⁰⁸

(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.¹⁰⁹ Secondly, it also led to the upholding of a hierarchical relationship, with the family as the basic unit.¹¹⁰ The abstract concept of the individual was conspicuously lacking in traditional Chinese law. Since rules were seen as laid down by ancestors and inherited by generations, it is not surprising that modern law reforms, which were

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 function 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.

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.

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 nineteenth century when traditional values and systems were facing strong internal and external challenges and pressures for reform. Internally, a commodity economy had emerged and, at the same time, 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 penetrated into China, and with the invasion of foreign ideas 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 extra-territoriality 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 for revolution.¹¹¹ These challenges and pressures both weakened the central government and at the same time made the Chinese even more 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.¹¹² More importantly for legal transplant, the Western

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 I (Cambridge: 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: Cambridge University Press, 1980); Meribeth E. Cameron, *The Reform Movement in China 1898–1912* (New York: Octagon Books, 1963); Immanuel C.Y. Hsu, *The Rise of Modern China*, 5th ed. (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.