

## CHAPTER VII

# CONCLUDING OBSERVATIONS: CODIFICATION AND CHINESE LEGAL HISTORY

*The foregoing chapters have detailed the main codification efforts in dynastic China and have offered a sketch of the historical setting in which these efforts took place. This short concluding chapter aims to draw from those details some general themes and conclusions. In particular, we consider how China's experience with codified law bears on (or reflects) its political continuity, its occasional social chaos, its cultural isolation, and its handling of challenges both from within China and from outside influence and conquest.*

### VII.A. Codes and Continuity

To a Western observer, one of the most remarkable features of China is the continuity of its civilization, however one may wish to define "civilization." Using China's own definition of civilization as bound up importantly with writing,<sup>1</sup> one could conclude that China has been *legally* civilized for at least two and a half millennia, since the time the first *xing shu* were etched on the bronze tripod vessels,<sup>2</sup> and possibly for many centuries before that.<sup>3</sup> Moreover, China's history shows another kind of continuity: political continuity. At least since the centralization of control that occurred in the Qin dynasty, China has

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1. See *supra* section III.C.2., explaining that the Chinese term for "civilization" means "the transforming influence of writing."

2. See *supra* sections II.B.6. and II.B.7., describing the *xing shu* (books of punishment) and their significance.

3. See *supra* section II.B.6.b. for the view that written law, even codified law of a sort, existed as early as the very beginning of the Zhou dynasty, perhaps around 1100 BCE.

been, on balance, much more politically stable, for much longer, than other societies have been.

What kind of relationship, if any, is there between such kinds of continuity—continuity of civilization and continuity of political stability—and the codification efforts that we have summarized in the preceding chapters of this book? We offer below, in an abbreviated form, our own views on this question, drawing mainly from a personal interpretation of the history outlined earlier and partly from speculation that might or might not withstand closer scrutiny.

### VII.A.1. Qin Unification

The Qin dynasty (221–206 BCE) was a time of meltdown for both Confucianism (already modified from the form that Confucius first espoused) and Legalism (proven effective in the Qin state before the unification under Qin Shi Huangdi). Indeed, one might see the fires that were set at the orders of Li Si and Qin Shi Huangdi to burn the classical Confucianist literature as serving only to melt Confucianism rather than to burn it away; and, in like fashion, one might see the intensity with which the Qin leaders imposed Legalist theories as causing those theories also to overheat and melt down.

In short, the Qin dynasty was a fiercely hot cauldron that melted and merged those two ingredients—Confucianism and Legalism—which had developed in the sixth, fifth, and fourth centuries BCE. When the molten mass cooled—that is, when the Han dynasty had succeeded in extinguishing the fires of the Qin—Legalism and Confucianism were inextricably bound together, in a new compound material, a legal alloy, that was strong enough to last for the next two thousand years as a central core for China's government and culture. A principal manifestation of this new alloy was the Han Code, which revealed a merger of practical Legalism and Imperial Confucianism.<sup>4</sup>

### VII.A.2. Continuity and Legal Conservatism

Once the pattern for Chinese codification was set in the Han Code, that pattern stood the tests of time. We might see the first and most important of those tests coming with the reunification of China under the Sui, in the late

4. For a discussion of Imperial Confucianism, see *supra* section III.C.3. A description of the conflict between Legalist views and Confucianist views appears at section II.B.5., *supra*, and the unification of China under Qin Shi Huangdi, employing Legalist techniques that had proven effective in the state of Qin, is described in section III.B., *supra*.

sixth century. Perhaps Yang Jian, the founder of the Sui dynasty, should receive credit not just for the reunification itself<sup>5</sup> but also for having revived and refined the pattern of codification, for it was he (born and raised a Buddhist, ironically) who promulgated the Kaihuang Code and gave shape to the examination system that was to endure throughout the remainder of dynastic Chinese history.<sup>6</sup> The Kaihuang Code, by formalizing the five punishments and the Ten Abominations, reasserted the importance of the Legalist-Confucianist alloy that had been forged in the Qin-Han period, and the Sui then passed along that alloy to the Tang.

The Tang emperors, especially the first two of them, used that Legalist-Confucianist alloy in creating various versions of the Tang Code, which then served as a model for all the codes that followed, in ways that are obvious to us in comparing provisions in those various codes, especially the Ming and Qing codes.<sup>7</sup> Thus the continuity of the codes may be seen as a form of legal conservatism—a conserving of the grand solution (the Legalist-Confucianist alloy) that had emerged from the Qin-Han period.

### VII.A.3. Codes as Cultural Constitutions

It probably strikes most modern Western observers as odd that many of the same provisions appearing in the Tang Code would appear also in the Qing Code. One might be tempted to ask, “would not the natural changes occurring in economic, political, and social circumstances require substantial changes in the legal provisions as well?”

Our own view is that this question itself reveals two assumptions that probably do not have much validity in the context of dynastic China. The first assumption is that change is natural; the second assumption is that when change does occur, the law should bend to accommodate it. Perhaps a society whose underlying cultural philosophy centers on harmony, ritual, stability, and moral virtue<sup>8</sup> does not have much interest in change, does not regard it as nat-

5. For a description of Yang Jian's rise to prominence, establishment of the Sui dynasty, and reunification and “sinicization” of the country, see *supra* section IV.A.2.a.

6. For an account of the examination system and the Kaihuang Code, see *supra* sections IV.A.2.a. and IV.A.2.b.

7. See *supra* section IV.B. for a discussion of the Tang Code and its setting, and see sections VI.B. for an account of how the Qing Code, building on the Ming Code, bore a very close resemblance to the Tang Code of nearly a thousand years earlier.

8. For accounts of how Confucianism includes these features, see *supra* section II.B. For a description of these influences at work in the Tang Code, see *supra* section IV.B.3.a.

ural, and in particular does not see the law as a servant of change, bending to the vagaries (and mistakes) of new and untried ideas.

In this regard, the Chinese dynastic codes may be viewed as constitutions rather than ordinary laws. By their nature, constitutions (as we see them in nation-states today) set forth the less changeable, more fundamental principles that a political society regards as central to its identity. Some countries, especially the United States with its relatively old constitution, are loath to tinker and fiddle with those fundamental principles, even if they sometimes seem unresponsive to contemporary problems. In other countries, especially civil law countries, the same function—expressing key legal principles—is served by a civil code. This is true for the French, whose civil code, dating from Napoleon, is nearly as old as the U.S. constitution, commands similar respect, and has retained most of the same structure (and some of the same content) with which it was first born two hundred years ago.

The same is true of the Chinese codes. The founding emperors of several new dynasties apparently regarded the enactment of a legal code as essential to their efforts to take control and prove their legitimacy. For example, Yang Jian issued a legal code in the first year of his newly declared Sui dynasty (581)<sup>9</sup>; Gaozu (Li Yuan), the founder of the Tang dynasty, issued a legal code as soon as he gained control of the capital city in 617, which was actually before his reign officially began, and then promulgated revised codes in 619 and 624, drawing heavily on the Sui Code<sup>10</sup>; and the Song Code was issued in just the fourth year after the founding of the dynasty, and it preserved the Tang Code in its entirety.<sup>11</sup> We think it did so in part because the Tang Code was regarded as a constitutional document. Indeed, although the Song government essentially re-issued the Tang Code, it also attached new provisions to several sections of that code, and the new provisions took priority over the old ones.<sup>12</sup>

Likewise, later dynasties (especially the Qing) developed extensive and elaborate systems of sub-statutes and commentaries that allowed the code to address new circumstances as they arose—for example, economic concerns

9. See section IV.A.2., *supra*.

10. See section IV.B.2, *supra*.

11. See section V.A.3., *supra*.

12. *Id.* Our view of the codes as “constitutional documents” resembles a view taken by at least one Chinese legal scholar that “the codes to some extent implement a moral orthodoxy that itself was maintained through the various dynasties in essentially the same form by the Confucian literati.” Geoffrey MacCormack, *Traditional Chinese Penal Law 290* (1990) [hereinafter MacCormack-1990].

and “civil” demands of the eighteenth and nineteenth centuries<sup>13</sup>—while preserving the structure and content of the time-tested and revered document and the cultural values of Confucianism that that document reflected and represented.

## VII.B. Codes and the Rejection of Challengers

The Chinese history summarized in the earlier chapters of this book reveals many episodes in which serious challenges have been made to the political, ideological, or social status quo. Such challenges have come in the form of military attack both from inside China—the “roving bandits” of the late Ming dynasty, for example<sup>14</sup>—and from outside China, especially from the north and west.<sup>15</sup> Challenges have also come in the form of new religious and cultural influences, as when Daoism and Buddhism were introduced.<sup>16</sup>

China survived those challenges and prevailed over the challengers. For example, although the Mongols and the Manchus gained control of China—resulting, indeed, in “alien” control of China for well over half of the last six centuries of its dynastic history—the Chinese culture may be said to have prevailed throughout those centuries. As for the Mongols, their Yüan dynasty faced strong resistance at every attempt to replace Chinese values and institutions with Mongol values and institutions,<sup>17</sup> and that dynasty lasted for less than a century. As for the Manchus, the fact that they enjoyed a much longer and stronger dynasty than the Mongols did surely resulted in large part from their careful and thorough adoption of Chinese values and institutions.<sup>18</sup>

13. See *supra* Box VI-2 noting the incorporation of sub-statutes into the Qing Code, and *supra* section VI.B.5.d. for an explanation of the importance of these sub-statutes in creating a “layered” Qing Code that increasingly addressed *minshi* (people’s matters). For a discussion of the role of sub-statutes and interpretations in Ming law, see *supra* Box VI-1 and section VI.A.2.b.

14. See *supra* section VI.B.1.

15. For accounts of the various tribes and dynasties that originated in the north, such as the Jin, the Mongols, and the Manchu, see *supra* sections IV.A.1., V.B.1., and VI.B.1, and the sources cited there. See also various chapters in Volume 6 of the *Cambridge History of China* (1994), which deals with alien regimes and border states; and Herbert Franke and Hok-lam Chan, *Studies on the Jurchens and the Chin Dynasty* (1997).

16. See *supra* section III.C.3.a. (Daoism and other cosmologies) and IV.A.1.a. (Buddhism and Neo-Daoism).

17. See *supra* section V.B.1., suggesting that Mongol and Chinese forms of government were like oil and water.

18. See *supra* section VI.B.1.

This is also largely true of the religious and intellectual challenges that have faced China over the centuries. For example, Dong Zhongshu, the scholar of the second century BCE who had the ear of the Han emperor Wudi, crafted the “Imperial Confucianism” that reconciled a cacophony of concepts and influences into a unified theory,<sup>19</sup> thus taking the punch out of Daoism and other cosmologies. Likewise, the teachings of Buddhism were, in effect, subverted and overcome by traditional Chinese thought and culture.<sup>20</sup> Those Buddhist teachings had a very great impact on China, but only after they had undergone a transformation that made them relatively compatible with the cultural environment and thus less alien.

Why would this be? Why would the Chinese culture and institutions prove so durable as to withstand the full impact of these various challenges, both military and religious? We believe the legal codes, and in particular their manifestation of the “alloy” we referred to above (Legalism and Confucianism melted together), are closely related to China’s rejection-by-absorption of all its main challengers. It is difficult to say whether (i) China’s experience with codification is a contributing cause of its ability to withstand challenges to the political or cultural status quo, or whether instead (ii) both of these features—China’s ability to withstand challenges and its long, consistent record of codification—are themselves the result of some other yet more influential feature. In either event, we can see an increasingly close connection between those two features through China’s dynastic history.

For example, by the time of the Tang dynasty, the pattern of codification was well formed. Also by the time of the Tang dynasty, the period of Chinese disunity was largely a thing of the past. Another look at Box I-1, in Chapter I, reveals that the two principal periods of disunity in China were in the five centuries or so that preceded the Qin dynasty (the Spring and Autumn period, followed by the Warring States period<sup>21</sup>) and just after the Han dynasty, the dissolution of which led to about 350 years of fragmentation in which, “apart from a brief interlude between 280 and 316, no one dynasty ruled the whole of China.”<sup>22</sup> After the pattern of Chinese codification was firmly set in the Tang dynasty, China no longer suffered any significant periods of fragmentation—

19. See *supra* section III.C.3.

20. See *supra* section IV.A.1.a. for a description of the “sinicization” of Buddhism, by which some Buddhist concepts were simply changed to fit with existing Chinese culture.

21. Although the names of these two periods suggest that the earlier one was relatively more peaceful than the later one, in fact “wars were equally frequent in both periods.” J.A.G. Roberts, *A Concise History of China* 13 (1999).

22. J.A.G. Roberts, *supra* note 21, at 40, quoted more fully in section IV.A.1., *supra*.

that is, division into a large number of sections. Instead, aside from a division of China into north and south for about a century and a half from 1127 to 1279,<sup>23</sup> most of the period from the end of the Tang to the end of the Qing, a stretch of almost exactly one thousand years, saw a unified China.

## VII.C. Dynastic Codes and Contemporary Issues

The last of the dynastic codes finished its service about a century ago. Given that fact, why do any of these old codes warrant our attention? We see two obvious reasons. First, the very durability of the dynastic codes, and their apparent effectiveness in contributing to hundreds of years of political order in a huge and diverse country, should be enough to make us want to know how they worked and what they represented. Second, there can be no doubt about the central importance of codes in Chinese history generally, and the more we learn of Chinese history the better we can understand the China of today.<sup>24</sup>

Beyond those points, however, lies another one that connects the codes of dynastic China even more directly to our contemporary life and law. The codes reflect answers that the Chinese gave (for several centuries) to many of the same questions that lawmakers and citizens face today. In the following paragraphs we offer four illustrations of such questions.

### VII.C.1. Judicial Discretion and Political Control

A first question is this: “How much discretion should judges be given in prescribing punishment to criminals?” On their face, the Chinese codes give virtually no such discretion. Instead, they set forth in great detail the precise

23. See *supra* section V.A.1.

24. For an explanation of how contemporary developments in China reflect deep historical trends and cultural assumptions, see Zhengyuan Fu, “Continuities of Chinese Political Tradition,” in *Studies in Comparative Communism*, vol. XXIV, No.3, September 1991, 257–279. According to Fu, “[p]olitics under the rule of the Chinese Communist Party (CCP) cannot be divorced from the Chinese autocratic tradition. This tradition had been formed during more than two thousand years of imperial history and is deeply rooted in Chinese political culture.” *Id.* at 260. For example, despite innovations brought by Communist rule, “one can detect traditional behavioral patterns among the majority of the peasantry, and these patterns are even more pronounced among the political elites. Mao Zedong, who is still regarded as a radical revolutionary by most Westerners, is now perceived by most Chinese as a founding emperor and restorer of the imperial order.” *Id.* at 261.

form and amount of punishment that is to attend every type of prohibited behavior, with further instructions for increasing or decreasing the punishment depending on the social or political status of the persons who engage in the behavior and the persons who suffer from the behavior. This specificity was designed to achieve harmony (by ensuring that the punishment fit the crime<sup>25</sup>) and to maintain control by the emperor over the bureaucracy, and especially over the magistrates responsible for administering the law.<sup>26</sup>

In contemporary American law, the recent debate of sentencing guidelines raises the same question regarding discretion. Sentencing guidelines have the aim of strictly limiting judicial discretion and thereby expressing, through the legislative and executive branches of government, the will of the people in calculating (in advance) just what punishment fits what crime. As in the case of the dynastic Chinese codes, the central issue is one of political control—by the emperor in the Chinese context, by the people in the contemporary American context.

### VII.C.2 Legal Complexity and Constitutional Simplicity

A second question is this: “What is the correct balance between complexity and simplicity in the law?” Americans bewail the legal complexity that in effect requires that nearly any transaction with financial or legal consequences involve the services of professional lawyers; and the weight and density of government regulations provides constant fodder for populist politicians.

The Chinese codification experience also reveals the same struggle as in contemporary American law—in any legal system, for that matter—between (i) a system of rules that is adequately sophisticated and detailed to deal appropriately with the vast variety of people and circumstances to which it applies and (ii) a system of rules that is simple enough that the persons who are subject to it can understand it and use it as a straightforward code of conduct. As shown by the foregoing descriptions of the gradual accretion of sub-

25. See, for example, the discussion of the role of harmony in the Tang Code, at section IV.B.3., *supra*. For further discussion of the importance of having the punishment fit the crime, see Derk Bodde and Clarence Morris, *Law in Imperial China* 30–32 (1967). According to one source, the specificity of the code provisions reflects “the reluctance of the emperor and his advisers to leave any substantial discretion to the officials charged with the investigation and sentencing of offences” and also to ensure “that a proper correspondence should be observed between the gravity of the offence and the severity of the punishment.” MacCormack-1990, *supra* note 12, at 289–290.

26. See *supra* section VI.B.5.b.

statutes, commentaries, precedents, and the like, the Chinese placed great emphasis on the first of these—sophistication through details.<sup>27</sup> At the same time, the actual statutes (*lü*) themselves—that is, the key provisions—remained largely unchanged not only within a dynastic period but from one dynasty to another. Perhaps this shows an attempt to keep the system of rules simple enough that those responsible for applying it (for example, the district magistrates of the Qing era<sup>28</sup>) could have some hope of understanding it. However, this attempt probably failed. At least in the Qing era (of which we know the most in this regard), a private legal secretary was essential to the proper administration of the law.<sup>29</sup>

### VII.C.3. Ethics in Law and Government

A third question is this: “What ethical standards, if any, will we insist be reflected in our laws and in those who administer them?” Many modern Americans view law, or much of it, as amoral in character. To those persons, criminal sanctions serve mainly practical purposes—getting violent criminals off the streets, for example, or imposing a high enough cost on certain activities (speeding on the highways, dumping pollutants in the rivers, engaging in credit card fraud) that persons who might be tempted to engage in those activities will calculate that it is not worth it to them to do so. Moreover, modern Americans despair at the seeming devaluation of public service and at the instances of politicians engaging in behavior that strikes many citizens as immoral and that even results in some government officials ending up with criminal convictions and jail time.

The Chinese dynastic codes reflect a rather different approach to ethics in law and government. As for ethics in law, the fact that the legal codes were thoroughly infused with Confucianism virtually guaranteed that they would have moral content. From the Han era onward, Confucianist ideas found expression in the application of the law codes, and beginning shortly thereafter Confucianist scholars were commonly involved also in the drafting of the codes.<sup>30</sup>

27. For a description of the use of regulations and ordinances in the Tang dynasty, as supplements to the code, see *supra* section IV.B.5.a. For similar description regarding the Yüan, Ming, and Qing codes, see *supra* Box V-1, Box VI-1, and Box VI-2, respectively.

28. See *supra* section VI.B.5.b.

29. *Id.*

30. See *supra* sections III.C.4.c. (Han), IV.A.1.b. (between Han and Tang), and IV.B.3.a. (Tang).

As for ethics in government, although there was undoubtedly much corruption among the members of the bureaucracy, the foundation upon which the entire edifice of government rested was an ethical one. The civil service examination system focused intensely on Confucianism, that system of ethics and morality that was developed in the sixth century BCE and fine-tuned in the centuries that followed. The highest calling in society was that of a government official, and it was a calling open only to those who mastered the ethical doctrine. A district magistrate in the Qing dynasty “had to exemplify the Confucian virtues deemed essential to govern the uneducated masses, and he spent a good deal of his time and personal money in patronage to the educational, religious, and cultural development of the community.”<sup>31</sup>

#### VII.C.4. Government Control over Law

A fourth question is this: “Who should control, and who should benefit from, the law and its application?” Whereas it has been an American ideal, stretching back probably to the American Revolution, that laws are made for the benefit of the people, codified dynastic Chinese law had a very different aim. As Bodde and Morris have expressed it, codified Chinese law was “vertical” in character and therefore remained always in the province of government:

[T]he official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals. If a dispute involved two individuals, individual A did not bring a suit directly against individual B. Rather he lodged his complaint with the authorities, who then decided whether or not to prosecute individual B. No private legal profession existed to help individuals plead their cases....<sup>32</sup>

31. Richard C. DeAngelis, “People’s Republic of China,” appearing as Chapter 12 in A.N. Katz, ed., *Legal Traditions and Systems* (1986), at 248. It is perhaps worth pointing out that we do not have enough evidence to conclude that the public endorsement of Confucianist values was in fact matched by private virtue. That is, just as an observer in the American Bible Belt might notice some differences between Saturday night at the country club and Sunday morning at church, likewise it is impossible to know just how faithfully the virtues of Confucianism were actually practiced by those in the Chinese elite and bureaucracy who studied and professed them. I am indebted to Professor William Jones for this insight.

32. Bodde and Morris, *supra* note 25, at 4. However, for a discussion of the recent scholarship suggesting that the codes—or the Qing Code at any rate—did in fact serve as the foundation for protecting a wide range of private interests as well, see *supra* section VI.B.5.d.

Indeed, Chinese codified law remained within the control of the government bureaucracy in another way as well: it was addressed, in essence, by the emperor to the bureaucracy<sup>33</sup>—as distinct from the population at large, much of which would not be literate enough anyway to use the codified law. As one expert on Chinese law and legal history has pointed out, “the implications [of this fact that the Chinese law codes are addressed to the bureaucracy] are fundamental... [and] the contemporary relevance is momentous... [because] ‘secret’ and ‘internal’ rules in China have been roundly criticized by human rights [groups and others] for decades, and now China is under great pressure on the WTO compliance front to improve the ‘transparency’ of its legislative process.”<sup>34</sup> Although some of China’s perceived deficiencies in the area of legal transparency may be attributed to its one-party rule, it is important (this expert explains) to realize that “China’s language, history, and bureaucratic tradition have all combined to entrench deeply the notion that laws begin and end within the bureaucracy.”<sup>35</sup>

In short, the law codes in dynastic China addressed many questions that look familiar to us today. The answers they gave to such questions also look familiar, and perhaps some of them look better than our own answers. This is only one reason among many that those dynastic codes deserve our attention. If the next two decades make available to us as much new information about those codes as the last two decades have, then we have a great deal to look forward to in that regard. We hope this book might help provide a framework for future study of those codes.

33. For a discussion of this point regarding the “audience” or “addressee” of the dynastic legal codes, see *supra* section VI.B.5.d.

34. E-mail message from R. Randle Edwards to J.W. Head, April 10, 2003.

35. *Id.* Professor Edwards points out that this notion that laws begin and end within the bureaucracy, and the lack of “transparency” that this notion yields, is related to “the Confucian and Mencian belief in the basic goodness of mankind....” Because “the officials of the empire were all deeply immersed in Confucian values,... [they] were by definition good people who need not be subjected to external supervision by the masses.” I am indebted to Professor Edwards for bringing these points to my attention.