THE STATUS OF LAW AND LAWMAKING PROCEDURE UNDER THE KUOMINTANG 1925–46

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THE INITIAL reaction of the foreigner upon his first contact with Chinese law and legal system is one of frustration and noncomprehension.[1] Those given to facile generalization are apt to declare either that China is devoid of any serious juridical tradition or that it is still in a primitive state of legal development. But both of these conclusions are clearly false since the Middle Kingdom has a long and complex legal history, and, while certain jural notions of responsibility which characterize Western law have not come into being in the East,[2] their absence is not proof of arrested growth but merely that jural problems are envisaged in another fashion in the Sinitic body politic. The basic fact which the foreigner slowly comes to recognize is that, while the need for justice is constant in any culture, in Chinese society it is attained in a unique fashion.

The purposes of this study are two: first, to make more intelligible to the Western mind the role of law in modern Chinese society; second, against this brief historic background to examine the hierarchy of legislation formulated and enacted by the Kuomintang from 1925 to 1946.[3] Obviously one must begin by looking at what the Chinese themselves consider to be the proper function of law in order to arrive at what can be called a true notion of what constitutes lawfulness in China. Like Alice in *Through the looking glass* most of our standard terminology undergoes distortion if we attempt to use it as descriptive of jural behavior in an alien culture. We must divest ourselves of the comforting belief that the words "law," "right," and "state" subtend the same arc of meaning when used about China. This illusion, however, dies a bit hard because

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[1] This was the frank reaction of John Dewey, who, visiting China in 1920, wrote, "Is China a nation?" *New republic,* Jan. 12, 1921, reprinted in *Character and events* (New York, 1929), 1:237–43.

[2] John Dewey points out Chinese lack of respect for courts and legal proceedings in "The new leaven in Chinese politics," *Asia,* April 1920, reprinted in *Character and events,* 1:244–54.

[3] This article was provoked by the author's attempts to understand the various types of current law passed by the Kuomintang while serving first in the Chinese Legal Section, Far Eastern Unit, U. S. Department of Commerce, 1943–45; second, as attaché to the American Embassy, Chungking, 1945–46. It is based largely on Chinese materials which were translated under his supervision, chief of which was an extended article by Mr. Shih Shang-k'uan, Secretary of the Legislative *Yüan,* entitled "Legislative procedure since the creation of the National Government," *China law journal* (in Chinese), 3, no. 6 (1945), 37–46.

the six codes which China adopted between 1903 and 1931 were copied from French, German, or Anglo-American models.[4] Further, there is little doubt that American political theorists, such as F. J. Goodnow and W. W. Willoughby, exerted considerable influence in the drafting of successive national constitutions terminating in that adopted in 1946. The hard fact that the Chinese imitated the West largely at the conceptual level, while the body of Chinese jurisprudence embedded in custom and practice remains substantially unchanged, is best demonstrated by firsthand dealing with Chinese judges, prosecutors, lawyers, legislators, and government officials. Then and only then is the foreigner made aware of the marked discrepancy between Chinese *lex scripta* and *lex nonscripta*.[5] The foreigner finds upon arrival in China that though they have a case law there is little adherence to precedent; though there are six codes,[6] they are seldom directly enforced or decisive of a cause;[7] though statutes are detailed and frequently impose severe penalties, there is a great latitude and leniency in their enforcement;[8] and finally, though China has a constitution, there is no means through the civil courts to restrain an *ultra vires* act by a governmental body.[9]

Clearly if one encounters such marked difference in the practical operation of Chinese and Western law, then one must be equally prepared to find some

[4] The best single survey of the tremendous work which the government of China has undertaken since the time of the Empress Tz'u Hsi to modernize the vast body of traditional law by the drafting and adopting of "six codes" is given by Jean Escarra in an address before the Société de Législation Comparée in Paris, May 23, 1930, printed in *Bulletin mensuel de la Société de Législation Comparée*, 59 (July–Sept. 1930), 407–49.

[5] This distinction from Roman and English law is acknowledged to have only an imperfect fit when applied to China, but the distinction indicated is that between written and customary law.

[6] The "six codes" were adopted by China as follows: commercial laws 1903–05, 1929; Criminal Code of Procedure 1912, 1915, 1918, 1919 (articles placed in force piecemeal because of the unsettled political state of the country); Criminal Code 1912, 1923, and 1935 (original enforcement by Sun Yat-sen with complete revisions); Civil Code of Procedure 1921; Organic Law 1928 and 1931; Civil Code 1930–31; see Escarra, *passim;* also Jean Escarra, *Le droit chinois* (hereafter Escarra) (Paris, 1936), pt. 2, chap. 2.

[7] Law is viewed as a social model or example, not an unconditional rule. "What is in a legal code is not enforced," according to Wang Tchien-sien, *Legal principles of ancient China* (in Chinese) (Shanghai, 1925) as quoted in Escarra, 74.

[8] Comment of Sir George Thomas Staunton in his translator's preface to *Ta Tsing leu lee; being the fundamental laws, and a selection from supplementary statutes of the penal code of China* (London, 1810), xxvii. It is the writer's observation that this free construction of legal penalties is still characteristic of modern Chinese enforcement of law.

[9] From 1908 to the present the Chinese government has wavered in establishing a check on *ultra vires* acts, except as the Judicial *Yüan* may be called upon to make a ruling. This accords with the continental view that an act of an executive or administrative agency cannot be reviewed by an ordinary civil court. The dean of the law profession, Wang Chung-hui, pointed out years ago that his country deliberately had copied the jural system of France and Germany and not that of England and the United States; Wang Chung-hui, *Law reform in China* (London, 1919), *passim.* Out of fifteen constitutions and organic laws between 1908 and 1946 only eight (those of 1913, 1919, 1923, 1925, 1931, 1934, 1936, 1946) embraced the notion of unconstitutionality. The fugitive life of the first four documents is described by M. T. Z. Tyau, *China's new constitution and international problems* (Shanghai, 1918), 19–21, and H. G. W. Woodhead, *China year book 1920; 1924* and *1926–27* gives three others. Pan Wei-tung, *The Chinese constitution* (Washington, D. C., 1945) gives the text of eleven constitutions.

major differences at the philosophical level. If one remembers that China today is the oldest extant continuous civilization it is not at all surprising that she still adheres to a customary view of law, and that the attitude of Blackstone or John Austin that law is "a rule of conduct given by a superior to an inferior" is relatively unknown.[10] Indeed, the Confucian view is that politics is entirely auxiliary to morals; hence, law is but an administrative means of carrying out rites, customs, and imperial orders. Law for the Chinese people is not an autonomous body of rational rules and precedent which is applied uniformly to all classes in society,[11] as is true in Western Europe and the United States; it is merely a tool to bring the more recalcitrant members of society who are not open to moral suasion into line with established mores.[12] Thus from earliest times law was deemed to be primarily criminal and administrative in character. When a feudal state in the time of Confucius multiplied its laws, the sage declared that its mass behavior had gotten out of hand so that there was wholesale violation of custom and morality and such a state was in the process of dissolution.[13] Both in its origin and development Chinese law was deemed as penal and punitive,[14] so that its extensive use signified a lamentable departure of man from the path or course of nature.

PECULIAR SCOPE OF STATE AND LAW

To grasp the Chinese meaning of the terms "state" and "law" we must also understand the close integration of the terms man and nature in that society. Just as the Stoics viewed their "law" and "state" as resting upon certain immutable principles inherent in the nature of both the material and moral world, so the classical Chinese thinkers such as Lao Tzu and Confucius saw the "state" and "law" as interconnected by natural bonds. But the cultural development of the two civilizations progressively diverged in their respective unfoldment. Social thinking in the West took two directions entirely different from that taken by China and Japan. The cosmology and psychology of Christianity split the world into two halves: the realm of matter and the realm of man, so that man and nature were deemed eternally separate. Specifically this meant that the West had set man over against nature; the Roman *anima* and

[10] W. W. Willoughby, *Constitutional development in China* (Washington, D. C., 1922), 49.

[11] The exception was the school of Legalists *(Fa-chia)* of which Han Fei Tzu was the most brilliant exponent advocating governance of the state by an external body of rules applied uniformly to all persons (K. S. Latourette, *The Chinese* [New York, 1934], 1:80–83). Detailed treatment of this school is given by Leang K'i-tch'ao, *La conception de la loi et les théories des légistes à la veille des Ts'in* (Peking, 1926); J. J. L. Duyvendak, *The book of Lord Shang* (London, 1928); and *The complete works of Han Fei Tzu*, translated by W. K. Liao (London, 1939).

[12] Escarra, 69–70.

[13] *Ibid.*, 72.

[14] Hu Shih points out in his *Development of logical method in ancient China* (Shanghai, 1922), 174–75 that before the fourth century B.C. the Chinese notion of law was largely penal *hsin*, meaning penalties, which under Neo-Mohists influence was supplanted by the word *fa*, meaning model or mold. From standard of measure its meaning was extended to the relation of ruler and subject, then conventional social form, and finally to the ordering of people or law.

Greek *pneuma* were significantly eliminated from the human scene. Next, the rules governing man which arose under Roman law were deemed not only independent of nature, but as constituting an autonomous body of law which could be rationally elaborated further.[15]

Neither of these distinctions ever became current in Chinese thinking. In the more than two thousand years of recorded history of that country there were only two attempts to employ law as an independent instrument of social change. The philosopher Mo Ti, soon after the death of Confucius, starting from a premise similar to that of traditional Christianity – that man was basically bad and weak – taught that the "law"and "state" were necessary external means of attaining virtue in the individual and order in society. The moral activism of Mo Ti and his followers, however, went down to defeat before the current social nihilism of Taoism and the humanistic morality of Confucianism. The social reforming fervor of the Mohists petered out in epistemological speculation in the second century B.C., and Confucianism became the state philosophy during the Han dynasty. The Legalists were the only other school of thought that might have created a body of law independent of morality: Shang Yang, Shen Pu-hai, Shen Tao, and Han Fei Tzu flourishing in the fourth and third centuries B.C. Here again the dominance of the paternalistic humanism of Chinese rulers[16] and the use of the Confucian classics as the base for civil service examinations prevented the acceptance of a pragmatic view of law and of the state. The primacy of the family and of blood ties, coupled with a "man-centered" interpretation of the classical writings,[17] has focused Chinese attention on concrete social consequences and bred hostility to any change urged merely on the grounds of reason or efficiency. For the Chinese official or judge today, social reason is simultaneously a part of and congruent with nature (not an alien nature in a mathematically constructed external world) and inclusive of all legal and social actions of man. The current Chinese notion of the "law," "right," and "state" are mortised and tenoned in the very nature of things. It is the duty of government officials to interpret this "law" or "right" to man as the occasion arises.

[15] Fung Yu-lan, "Why China has no science," *International journal of ethics*, 30 (April 1922), *passim*. This penetrating article suggested to the writer the course of analysis of this and the next few pages.

[16] Jean Escarra, *Bulletin mensuel de la Société de Législation Comparée*, 59:409. China since Chou times has pursued the rule of magisterial supremacy as opposed to the Western doctrine of the supremacy of law in government whereby government was made independent of the personal goodness and capacity of the ruler. These two schools of thought were already contending for a following in the time of Confucius. The school which elevated *li*, or humane traditionalism, triumphed. Thus Escarra remarks, "Il n'est pas necessaire qu'il gouverne; il suffit qu'il demeure immobile dans sa perfection...."

[17] Hu Shih, 1–5, declares that the key to Chinese thought since Sung times lies in the various interpretations given to the Chinese phrase *ko-wu* found in the *Ta-hsüeh (The great learning)*. Does it mean "to investigate things" (naturalistic knowledge); or does it mean "to rectify the mind in order to have intuitive knowledge" (humanistic knowledge)? Because Chinese reflection and philosophy turned from natural objects and confined itself to problems of moral and political philosophy it developed no natural science. *Ko-wu* was taken only in its latter meaning; Chinese thought became exclusively centered on man.

This Chinese outlook upon modern social affairs, the age-long product of the slow amalgamation of Taoist, Buddhist, and Confucian world views, has confronted us in our commercial and governmental dealings with modern China. Since China has been open in some degree to foreign trade for several centuries we can no longer very well plead ignorance — say, even that of the Lord Napier mission of 1834.[18] Specifically in the field of law we are faced with an alien view of both "law" and the "state." To the Chinese jurist and lawyer the particularities of the case in hand are always as crucial as the applicable universal rule. Justice demands in the Chinese mind a weighing of the *ch'ing*, meaning "circumstances or facts," against the *li*,[19] meaning "abstract right, principle or rationale." While the Chinese have a case law,[20] just as we have in the Anglo-American world, the citing of an analogous case as precedent does not restrict the freedom of the court in arriving at its own independent decision. Under the doctrine of *t'ien-li jen-ch'ing*,[b] meaning "looking at the whole aspect of the case," the judge or magistrate may in his discretion not follow the precedent, but recognizing that special circumstances modify the application of the general rule, which, if too stringently enforced would work a hardship on one of the parties, he may decide the case as he deems right in his heart.[21] To the untutored foreigner this doctrine of interpretation appears to remove all legal certainty where there is a cumulation of analogous decisions. To the Chinese legal practitioner, however, certitude is never a desideratum in and of itself. No abstract reason can ever sanction a rule of social conduct according to Chinese "natural reason." Malleability to circumstances, rather than rigid application of rule, is axiomatic in both social and legal Sinitic relations. Western legal systems appear to the Eastern mind both too rigid and didactic as well as too inhuman.

Two basic factors in the evolution of Chinese society have prevented the appearance of an independent legal tradition. First, the primacy of family and face-to-face social groups has determined legal responsibility (i.e., position in the patriarchical social hierarchy fixes liability). Second, the scant differentiation between public and private rules of conduct (i.e., there was little property

[18] The modicum of preparation of members of presidential missions sent to China both under Roosevelt and Truman is well known. Also one might wonder if they were appreciably more successful than those sent by England a century earlier.

[19] This *li* should not be confused with the entirely different *li* mentioned earlier, meaning rite, ceremony, worship due ancestors, or courtesy. See H. A. Giles, *A Chinese-English dictionary* (Shanghai, 1912) for detailed use of *ch'ing* (character 2187) and *li* (character 6879). For Chinese terms used in this article see characters at end of article.

[20] Jean Escarra, together with several Jesuit priests has gathered together the decisions of the Chinese supreme court. A summary of the facts and rulings are given in Chinese and French as follows: covering the years 1912–23 in *Recueil des sommaires de la republique de Chine* (Peking, 1924–26), 3 vols.; covering the years 1928–37 continued in *l'Année judiciaire chinoise (jurisprudence de la cour supreme de Nanking)* (Tientsin, 1933–38), 10 vols. The word "jurisprudence" in the foregoing titles is used in its continental sense of law as enforced by courts, officials, and daily practice; not in its English sense of history of jural thought or legal philosophy.

[21] Escarra, *Le droit chinois*, 409, declares that the central Confucian doctrine causes the "state" and "law" to depend upon the personal goodness and capacity of the ruler who by his knowledge of universal law keeps the material world in order; see also footnote 16 above.

which was not either familial, communal, or state so that civil acts of rental, sale, etc., by persons *qua* individuals were relatively few).[22] This unique unfoldment of Chinese society has made law throughout its long history the bondmaid of morality, the servant of custom, and the factotum of any administration in power. Practically, therefore, the jurisprudence of China has been a static element in Far Eastern tradition[23] — a fact very hard for the Western mind to grasp, accustomed as it is to the dynamic role of law since the days of Rome.[24]

The other practical consequence of the two factors mentioned as characterizing Chinese society is that with clan, family, guild, etc., dominant socially no universal or invariant rule of law could arise. Chinese law accordingly gives a maximum place to the "given" and a minimum to "mental constructs."[25] No doubt the hieroglyphic nature of Chinese writing may have accentuated this trend *vers le concret*[26] long present in Chinese thinking, influencing in turn the elaboration of legal schema.[27] Marcel Granet in his *Pensée chinoise* explains the absence of any logical system in Chinese law as the result of the nature of social class relations which precluded the appearance of any unconditional rules of social or legal liability.[28] The observance of traditional propriety and morality *(li)* was the base for all social action and custom.[29] Because the universe is one, society being part of nature, there is no need for law to place it in order.[30] On the contrary, suppleness in human rules is desired to fit every human situation.[31] The stress is on the adaptation of principle or abstract right *(li)* to fit individual cases.[32] Thus we end up with the other practical fact that

[22] *Ibid.*, 74–75.

[23] *Ibid.*, 70.

[24] Munroe Smith, *A general view of European legal history* (New York, 1927), 332–36. The author points out that whenever law making and interpretation are left in the hands of social face-to-face groups, there is no "general will," and law reverts to local custom. The description is perhaps not too inadept an analysis of Chinese jural relations throughout most of their history, except that these "localized laws" possessed a unified setting, namely, a common Confucian tradition.

[25] Escarra, 69.

[26] A curious parallelism seems to have arisen here between Chinese and modern French thinking. A work by Jean Wahl, *Vers le concret* (Paris, 1932), caused a great stir in continental circles somewhat over a decade ago. This same trend in French philosophy has been carried still further after World War II by current existentialism.

[27] P. Masson-Oursel, "Etudes de logique comparé. Evolution de la logique chinoise," *Revue philosophique*, 84 (July 1917), 59–76. The French professor of comparative religions observes that since the Chinese language has a minimum of grammar with meaning dependent on the position of the characters, the result is a broad and dry expository style whose precise meaning turns upon the method of interpretation of the larger text. Thus, though the Chinese language may be serviceable enough to express with some precision its own indigenous concepts of law, its inherent structure imposes certain limitations on the full representation of European jural notions. To the present writer the Chinese language appears to be simultaneously too concrete and too vague for ordinary legal expression and rule making.

[28] The writer did not have access to Granet's work at the time of writing, so *Pensée chinoise* (Paris, 1934), 589–90, as cited in Escarra, *Le droit chinois*, 70, was used.

[29] *Ibid.*,

[30] *Ibid.*

[31] *Ibid.*, 76.

[32] Matter expounded earlier in connection with footnote 32.

"Chinese law is above all...a discrimination of concrete cases without system"[33] – another surprising conclusion to Western man, accustomed as he is to legal logic in the Occident.

THREE PHASES OF LAW MAKING UNDER THE KUOMINTANG

With some of the foregoing caveats in mind we are ready to inspect law making procedure under the Kuomintang as it established itself as the National Government of China from 1925 to 1946.[34] Law making procedure went through three phases under the Kuomintang government: first, a period of three years from July 1, 1925, until October 8, 1928, when the party, government and military establishment were more or less one, and legislative procedure had not yet been regularized; second, a period of nearly a decade from October 8, 1928, to July 7, 1937, when the five *yüan* were duly established in Nanking and a regularized procedure for preparing, debating, approving and promulgating laws and regulations came into force; finally, third, a period of almost a decade from July 7, 1937, to 1946, characterized by eight years of belligerency which entailed some disruption of orderly legislative procedure because special legislative powers were given to the Supreme National Defense Council and other war bodies.[35]

This initial three-year period from 1925 to 1928 was characterized by little or no demarcation between political power *(cheng-ch'üan)* and governing power *(chih-ch'üan)*[c] as defined by Sun Yat-sen in his *San-min chu-i* (translated by Frank W. Price; Commercial Press, 1938). During this space of time the executive organs of the Kuomintang as well as the legislative bodies were the source of law making. Frequently it was difficult to draw a line between what constituted a general law and what constituted an enforcing regulation or order, though the distinction between general law, *fa-lü,* and enforcing regulations or orders, *t'iao-li,*[d] with numerous subclasses thereof, was recognized as a fundamental character of modernized Chinese government.[36] Causes for this legal ambiguity also were to be found in the fact that three basic jural questions had not yet been answered: first, to what extent that body of constitutional and statutory law which came into existence from 1911 to 1925 was to be accepted or altered by the incoming Kuomintang administration; second, the absence of any standardized legal procedure for the drafting and adoption of legislation; third, precisely how the two kinds of power, *cheng-ch'üan* and *chih-ch'üan,* were to be allocated between the executive-administrative branch and the strictly legislative branch of the government.

[33] Escarra, 77.

[34] These time limits are accepted since they are those of the basic article used by Mr. Shih Shang-k'uan as noted in footnote 3.

[35] Shih, 1.

[36] As already indicated the republic of China after 1911 deliberately copied the jural systems of France and Germany. Accordingly the Chinese accepted the principal legal distinctions of these two countries; that is, the difference between *loi* and *règlement* of France, and *gesetz* and *ausfuhrungsgesetz,* of Germany, which difference between general law, *fa-lu,* and enforcing regulations or orders, *t'iao-li,* or *ming-ling,* was carefully incorporated in the some fifteen draft constitutions, organic laws, or programs for China between 1908 and 1946.

To some extent each of these causes of legal ambiguity were resolved in the three years from 1925 to 1928. These years were a time of extreme flux in both structure and policies of the Kuomintang.[37] The first and third legal questions were answered together by the progressive enactment of organic laws which redefined the scope and functions of the principal governmental bodies. To tide the government over this period of legal reconstruction, the Central Political Council at its 120th session, 1927, resolved: "Before the enactment and promulgation of necessary [new] laws, all substantive and procedural laws and other laws and orders previously in force, except for those articles in contravention to the outlines and principles of Kuomintang or to laws and orders of the National Government shall be temporarily applicable in every instance."[38] Which legal issue should be resolved first: the matter of partition of executive and legislative authority, or the matter of legislative procedure? The latter item appears to have been chosen for settlement first, since it did not involve the answering of any fundamental constitutional questions. Under the constitution of the Kuomintang party adopted January 28, 1924, by the first Party Congress meeting at Canton,[39] all legislative and executive power was concentrated in the Party Congress. But when the Congress was not sitting this power resided in the Central Executive Committee.[40] The actual drafting of legislation was usually left to the Political Council or Committee which presented the bill to either the Central Executive Committee or to the Kuomintang Congress for passage. On September 16, 1927, this Central Political Council yielded this drafting function to a central Special Committee.[41] The procedure for drafting, debate, and enactment of legislation was regularized by the Statute of Legislative Procedure promulgated on March 1, 1928, which set up a specific process for the enactment of law.

DISTINCTION BETWEEN LAW AND ENFORCING RULE

This Statute of Legislative Procedure sharply differentiated between general law, *fa-lü*, on the one hand and *Kuei-ch'eng* and *t'iao-li*, enforcing regulations or orders, on the other hand. The first type of legislation could be presented by the Central Political Council,[42] the various organs of the National Government,[43] the provincial governments, and the municipal governments; be debated by the Central Political Council or Standing Committee of the National Government with submission in urgent cases to the Legislative Bureau; and be promulgated by the National Government within ten days of receipt of the

[37] Jermyn Chi-hung Lynn, *Political parties in China* (Peking, 1930), 70–84 and T'ang Leang-li, *Inner history of the Chinese revolution* (New York, 1930), chapts. 12 and 14.

[38] Shih, 2.

[39] Arthur N. Holcombe, *The Chinese revolution* (Cambridge, 1930) gives the English text of the constitution as appendix C, pp. 356–70.

[40] Holcombe, 360–62, articles 27–42 of constitution of the Kuomintang.

[41] Shih, footnote 1.

[42] Paul M. A. Linebarger, *The China of Chiang K'ai-shek* (Boston, 1943), 16, 46, and chart opposite 331.

[43] Shih, footnote 2, enumerates seventeen organs of the National Government.

approved bill. Finally the National Government possessed the right to ask for a referendum. The second type of legislation might be made by organs of the National Government or units of the provincial or municipal government. The enforcing rules made by the National Government were called bylaws, *kuei-ch'eng*,[e] whereas those made by the provincial and municipal government were called regulations, *ti'ao-li*.[44]

The second period, from 1928 to 1937, was inaugurated by the passage of a series of organic acts establishing the five *yüan*, certain administrative agencies, nine ministries, three committees, and regional administration.[45] This was a decade of relative tranquility. Article 13 of the Organic Law of the National Government of October 4, 1928, which required the joint countersignature of the presidents of five *yüan*,[46] was altered by the Revised Organic Statute of the National Government (November 24, 1930), so that a law might be promulgated upon countersignature of only the president of the Legislative *Yüan*, while for orders only, the countersignature of the relevant *yüan* was necessary.[47] From the series of organic law demarcating the authority of the five *yüan*[48] and from the rules of procedure set up within the several bodies of the National Government a set legislative procedure arose.[49]

In the second period as well as in the first period the basic distinction observed by twelve constitutions, three organic acts, etc., in modern Chinese law was between statutory or general law, *fa-lü*, and enforcing regulations or orders, *kuei-ch'eng* or *t'iao-li*.[50] A general law could be submitted by the following bodies: Central Political Council or any organ of the National Government including the five *yüan*.[51] The proposing body should accompany the bill with an exposition of principles, which the Legislative *Yüan* could not change.[52] Debate on the contents of a bill was before the Executive *Yüan* with possible referment to the relevant *yüan* for consultation.[53] After approval by the Executive *Yüan* the general law went to the Legislative *Yüan* for three readings;[54] thence the bill

[44] Shih, 3.

[45] English translation of Organic Law of National Government, dated October 4, 1928, is given in appendix E of Holcombe; see also Wei, 241. The entire body of organic statutes of 1928 with alternate pages of Chinese and French translation can be found in Robert Jobez, *Organisation du gouvernement nationaliste* (Shanghai, 1929).

[46] Holcombe, 374.

[47] Shih, 3–4. An English translation of the Revised Organic Statute promulgated December 30, 1931, evidently a revision a year later of the law cited, is given in the *China handbook 1937–43* (New York: Macmillan, 1943), 88–90; Wei, 256–62.

[48] See footnote 45.

[49] Shih, 4, states that details are to be found in "Outlines of legislative procedure" passed by the Standing Committee of the Central Executive Committee June 23, 1932, and two revisions of July 1932 and April 20, 1933.

[50] See material relating to footnote 36 above.

[51] Shih, 4.

[52] *Ibid.*, 5.

[53] *Ibid.*, 4–5.

[54] It was the personal opinion of Dr. John C. H. Wu (Wu Chin-hsiung), head of one of the committees in the Legislative *Yüan*, expressed in 1946 to the writer in Chungking, that once "the will" of the Executive *Yüan* had been ascertained, the role of the Legislative *Yüan* was largely *pro forma* in framing legislation.

passed to the Council of State for promulgation.[55] The Central Political Council had power to ask that the Legislative *Yüan* reconsider and revise a bill not yet promulgated, but other organs of the National Government apparently did not have this right.[56] In the case of budgetary bills or urgent laws the period of examination prior to action by the Legislative *Yüan* was limited to ten days.[57] In the case of a law establishing the structure of the state, such constitutive or constitutional acts were passed by the Kuomintang Party Congress or Central Executive Committee thereof, thence going to the National Government for promulgation without referment to the Legislative *Yüan*.[58]

If we now turn to the ordinance power, Shih Shang-k'uan declares that it depended upon the method of how a bill was enacted whether it was a general law or an order.[59] After the establishment of the five *yüan* in 1928 the enactment of a bill by the Legislative *Yüan* and promulgation by the National Government created a general law, *fa-lü,* whether it was called a statute, *fa;* a regulation, *t'iao-li;* or a measure, *pan-fa.*[f] On the other hand, a rule enacted directly by one of the *yüan* or their subsidiary organs and promulgated by a minister or other official was merely an order, *ming-ling,*[g] whether it was called a regulation, *t'iao-li;* outlines,[60] *kang-ling;*[h] general outlines, *ta-kang,*[i]; bylaws, *kuei-ch'eng;* rules, *kuei-tse*[j]; detailed rules, *hsi-tse*[k]; constitution, *chang-ch'eng*[l]; or measures, *pan-fa.*[61]

Despite the general truth of the earlier observation that Chinese law has not developed in a systematic fashion through historic time, since the first establishment of a Codification Commission in 1904,[62] and especially since Wang Chung-hui's feat in making in 1907 one of the definitive English translations

[55] Linebarger, 54–55, points out how the Council of State, *Kuo-min cheng-fu,* acts purely as a solemnizing body for legislation and appointments.

[56] Shih, 6.

[57] *Ibid.,* 5, articles 12–14 of "Rules governing resolutions of Legislative *Yüan*"; the organization of Legislative *Yüan* is detailed in the *China handbook 1937–43,* 93–94.

[58] Shih, 6. Examples of constitutive acts are "Provincial organic general outlines of the military council, March 11, 1932"; "Provisional constitution of Republic of China during period of tutelage," etc.

[59] Shih, 7–8.

[60] S. Y. T'ang, the translator of Shih's article, notes that a better word than "outlines" might be "principle."

[61] Shih, 7. The meaning of the technical terms describing Chinese ordinances as translated by S. Y. T'ang coincide fairly closely with Escarra's exposition as given in *Le droit chinois,* 123–24. Escarra's translation is in French: *T'iao-li* — regulation; une acte qui...vient de suite après la loi; règlement. *Kang-ling* — outlines, principles; *ta-kang* — general outlines, general principles; principes généraux. *Kuei-ch'eng* — bylaws; règlement special d'un service public, d'un établissement. *Kuei-tse* — rules; mesures de detail...prisés par [un bureau]. *Hsi-tse* — detailed rules; règlement de detail. *Chang-ch'eng* — constitution; la charte de commission [pour service publique]. *Pan-fa* — measure; modéles, formes, mode d'execution.

Escarra enumerates an additional eight types of rules, not given in Shih's article, which are short of law, as follows: *t'ung-tse*[m] — règles générales; *chien-chang*[n] — règlement, règles resumées; *fa-ch'eng*[o] — formule, modéle; *p'an-li*[p] — decisions, directives...sens technique de précédent judiciaire; *yüan-tse*[q] — principes directeurs; *tsung-tse*[r] — principes généraux; *pan-li*[s] — règles; *tse-ch'eng*[t] — statut d'un service public ou privé.

[62] Escarra, *Bulletin mensuel de la Société de Législation Comparée,* 59 (July–September 1930), 416.

of the *Deutsches burgerliches gesetzbuch*,[63] there has been no lack of detailed appreciation of French and German law in China. Thus the distinction between general statute and administrative ruling was always kept clear in the series of constitutions proposed, in the organic acts, and in court rulings.

MODERNIZATION BROUGHT MULTIPLICATION OF LEGAL TERMS

The fact that we find some sixteen terms in the Chinese language to describe the ordinance power of the government does not necessarily argue that Chinese legal notions are vague. Part of this multiplicity in terminology is traceable to how Chinese law was modernized. The Japanese government in 1870 established a translation bureau in conjunction with the *Dajōkan* wherein, during the next two decades, the French and German codes together with English law were put in the Japanese language.[64] The Chinese government, on the other hand, did not set up such a translation bureau until over a generation later, *circa* 1905, under the direction of Shen Chia-pen; within the next decade the bureau turned out thirty volumes of translation of Western law, which became a basis for the drafting of the "six codes" for China.[65] Because some of the translations were made not directly from the French, German, or English originals, but from earlier Japanese translations, much Japanese nomenclature was unconsciously introduced into Chinese legal science. Specifically, the four terms, *Kuei-tse, hsi-tse, t'ung-tse,* and *chien-chang* are adapted from the Japanese.[66] Multiplicity of terminology was also caused by the attempt to find Chinese equivalents for Western legal terms. If the disparity between the jural traditions of Western Europe and China are recognized, the technical problem of finding accurate mediating terms presents some major problems in legal logic and philosophy. Since the Chinese jural tradition stresses concreteness and eschews abstraction, it is not too hard to surmise why Shen Chia-pen, Wang Chung-hui, and their coadjutators and successors resolved the difficulty by employing a considerable number of ways of describing the ordinance power.

Despite this explicitness of Chinese terms describing regulations or orders short of law, there remains an ambiguity in the use of the terms *t'iao-li* and *pan-fa,* which may refer either to general law or to ordinances.[67] In most cases

[63] Edwin M. Borchard, *Guide to law and legal literature of Germany* (Washington, D.C., 1912), 72–73, footnote 5, lists this work as *The German civil code,* translated and annotated by Wang Chung-hui, London, 1907.

[64] I. Nitobe, *Western influence in modern Japan* (Chicago, 1931), 71–86, article by Kenzo Takayanayi, especially pp. 74–75.

[65] Tseng Yu-hao, *Modern Chinese legal and political philosophy* (Shanghai, 1930), 198, quoting from an article by Wang Chung-hui in the *Chinese social & political science review,* June 1917.

[66] Escarra, *Le droit chinois,* 123–24.

[67] This ambiguity was noted both by Dr. Y. C. Ho, Dean of the National Central University Law School, Nanking, and by Robert T. Byran, Jr., a veteran American lawyer of Shanghai in discussion with the writer at the American Embassy. During World War II the printing of various legislative acts was frequently incomplete, failing to disclose the originating body and process of enactment. In such cases, therefore, the lawyer was presented with a major ambiguity in legislative intent.

this doubt as to whether a law or an order is intended can be resolved by retracing the legislative process of enactment. But also the special legal situation of 1927 and the decade thereafter must be recalled. During this period Borodin was ousted from China, and the Nationalists waged a series of extermination campaigns against the Communists.[68] *T'iao-li* was deliberately enacted by national provincial bodies, not as enforcing rule but as temporary general law, to tide over a transitional situation during which Communist forces were driven out of various areas and a legal regime was erected under Nanking control.[69]

After determining to what category an act belongs, the further question arises as to what matters entail a general law and what a regulation or order. The rule for general law, *fa-lü*, is that it should treat matters of national moment and scope, matters of substantive law, and matters of organization and structure of government.[70] The rule for regulations or orders, *ming-ling*, on the other hand is that they should be confined to matters of an executory or administrative nature. Such rules short of law should "be predicated upon laws; orders may not violate or impinge upon laws; matters which should be provided for by laws may not be provided for by orders."[71]

ADMINISTRATIVE RULE OVERLAPS GENERAL LAW

We come now to the third period, from 1937 to 1946. Some time in 1937 before the beginning of the Sino-Japanese War, the Legislative *Yüan* drafted a General Mobilization Act which gave emergency war powers to Chiang Kai-shek as head of state.[72] But for reasons which are not disclosed this act was never put into effect.[73] To permit unified prosecution of the war, however, the Supreme National Defense Council (SNDC) was created in January 1939 as the top body to direct all the organs of the Central Executive Committee (CEC), the five *yüan*, military boards, and other departments of the National Government.[74] The normal process of legislative procedure was now extended to include either origination by or submission to SNDC of all bills dealing with

[68] Linebarger, 161–70, 174–75; Edgar Snow, *Red star over China* (New York: 1939), 147–76.

[69] The author does not possess the official documents to authenticate this point. It was common knowledge, however, among the Chinese legal profession during 1927–37 that the *t'iao-li* of the period was passed with intent of "temporary law" to be duly superseded when quieter times arrived. This opinion was expressed to the author by Chinese lawyers who resided both in Nanking and in Canton during the period.

[70] Shih, 8. The Standard Statute for Enactment of Laws & Regulations, promulgated May 14, 1929, declares the following require statutory bills: (1) amendment or repeal of statute, (2) additional action called for in the law, (3) matters affecting organs of government or rights and duties of people.

[71] *Ibid.*

[72] *Ibid.*, 10.

[73] Shih, 9–10, surmises two possible reasons to be: (1) the Legislative *Yüan* was in session most of year, hence there was no difficulty in passing laws at any time, (2) the Supreme National Defense Committee had power to enact special legislation.

[74] Done at the fifth session of CEC; see *China handbook 1937–45 with 1946 supplement* (New York, 1947), 60–61. The SNDC appears to be successor to the Central Political Council which co-ordinated top KMT and National Government activities from 1924 to 1938 (*China handbook 1937–43*, 84–85).

war measures.[75] Chiang Kai-shek, as *tsung-ts'ai* (party leader), in December 1941 was granted the right to run the National Government and revise laws and regulations as the war emergency might require.[76]

What were the effects of the superimposition of the powers of SNDC and of *tsung-ts'ai* on the process of legislation, the traditional bounds of law and ordinances, and their correct description? The immediate result was that the well-established distinction between law and administrative order became more and more obliterated, so that the legislative intent and scope of a measure's application could no longer be ascertained from its legal title. Also, the status of an embryonic constitutional law in China was imperiled.[77] What had been so carefully demarcated in types of law and their appropriate procedure for passage under the Standard Statute for Enactment of Laws and Regulations promulgated May 14, 1929, could be abrogated by the *tsung-ts'ai* under his emergency war powers after December 22, 1941.[78] But, more serious still, during the Sino-Japanese War two abuses arose from the acts of subsidiary commissions and agencies of the National Government, and even of single ministries: first, the required practice of submitting laws and regulations to the Legislative *Yüan* was by-passed; second, these bodies sought to regulate matters germane to general law by administrative rulings. Accordingly, on June 4, 1943, a Standard Law for the Enactment of Laws and Regulations was promulgated. By way of instruction to all subordinate organs the National Government expounded, under the title "Eight points of principles for readjustment of laws and regulations now in force,"[79] the earlier distinctions between different types of law and the proper legislative procedure.[80]

The overlapping of the sphere of general law by administrative rule was

[75] Shih, 9.

[76] The act of the ninth plenary session of CEC December 22, 1941, merely stabilized as normal the president's right to rule by "emergency orders" recognized by article 44 of the Draft Constitution of May 5, 1936; Shih, 9–10.

[77] In eleven out of the twelve constitutions proposed or adopted by China between 1908 and 1946, there was a "bill of rights." Living still under the influence of Confucian philosophy it was unthinkable to the Chinese jurists who drafted these successive constitutions that governmental powers should be inherently limited. Accordingly, the rights and privileges allowed to citizens in the constitution were always offset by the enumeration of duties and obligations or by the phrase that rights were to be enjoyed "in accordance with law." (See Pan Wei-tung, appendices, and Constitution of December 25, 1946, printed by *Chinese news service*, 1947.)

Anglo-American restraint of governmental power, however, is still to be attained in modern China. The Chinese *habeas corpus act* in "Regulation for safeguarding the freedom of human person," July 15, 1944, which was to become effective August 1, 1944, demonstrates this point. The eleven articles of the law given in *China handbook 1937–45*, 265–66, indicates that all the National Government has accorded the arrested party is the right that (a) the accused and his relatives shall be duly informed of the charge (art. 3), (b) an appeal may be made to the superior level of the arresting agency to review the charge (art. 6). It should be noted that no right for judicial review of the act of a governmental agency is provided unless the order of arrest issues itself from a court. The claim that this is a *habeas corpus* procedure in the Anglo-American tradition would appear to be premature.

[78] When the writer departed from China in July 1946 the National Government was passing interim legislation to care for the reoccupation of liberated areas. It is to be presumed the wartime grant of powers continued at least until then, and probably down to 1947.

[79] Shih, 14.

[80] *Ibid.*, 12–15.

induced not only by civil disorder, but by a certain amount of interbureau jealousy and jurisdictional rivalry as well. Conflicts between rule making by a single ministry and the National Government or between different ministries have repeatedly arisen. Under the Draft Constitution of May 5, 1936, article 79, and under the Constitution of December 25, 1946, article 78, the Judicial *Yüan* was specifically empowered to sit as an administrative court "to unify the interpretations of laws and decrees."[81] From reliable sources it was reported in 1945–46 that the vice-minister of social affairs, Ho Chung-han, had infringed the substantive rights of labor unions by certain decrees on labor organization. The record of the administrative court established in 1932 reveals, however, no cases of ministerial decrees infringing general law, particularly in the field of labor.[82] Possibly for reasons of political expediency such suits against a ministry have never been instituted. The labor unions concerned, not desiring to create powerful enemies in the Chinese government, may well have refrained from challenging a ministerial decree by a court proceeding.

After surveying all the sources cited *ad seriatim* it is evident that the distinction carefully set up in modernized Chinese law since 1904 between general law and enforcing rule — employing the Chinese terms *fa-lü*, statute, and *t'iao-li*, regulation or subsidiary law, as general law, and sundry types of *ming-ling*[83] as administrative ordinances — was preserved under the Standard Law of 1943. According to articles 1 to 3 statutes, *fa-lü*, and subsidiary laws, *t'iao-li*, had to be submitted to and passed after three readings by the Legislative *Yüan*[84] before they could be lawfully promulgated. By article 6 any attempt to regulate by rules short of law matters of a general nature was prohibited, while by article 2 the area proper for general legislation was set out under four heads: (1) "rights and duties of the people," (2) "organization of the various national organs," (3) "amendment and repeal of laws," (4) "those expressly required by laws to be regulated by laws."[85] Nor could rules short of law be used to "controvene, alter or infringe upon law" according to article 5 of the same law.[86]

In respect to *ming-ling* some eight types of administrative ordinances were set forth as not requiring reading and passage by the Legislative *Yüan*. Under the "Eight Points" there were four kinds of rules short of law which could be

[81] Pan Wei-tung, 295, and Constitution of 1946 printed by the *Chinese News Service;* Escarra, *Le droit chinois*, 284, describes this activity of the Judicial *Yüan*.

[82] *Chinese law review*, 1933–46 (in Chinese), contains a running summary of all decisions of the administrative court. The National Government did not erect the administrative court till November 17, 1932, and it did not come into operation until 1933; see Escarra, *Le droit chinois*, 311–16.

[83] Escarra, *Le droit chinois*, 87–90. The French jurist indicates that the Chinese terms *fa*, *lü*, and *ling* have long individual histories stretching back into Chou times. Consult also his footnote 25 on page 16. Details of Chinese legal past are to be found in Shen Chia-pen's collected works, *Shen chi-i hsien-sheng i-shu* (40 volumes), cited on p. 495 of Escarra's bibliography.

[84] There is of course the exception hereto created by wartime grant of powers noted above in connection with footnote 76.

[85] Taken from an English translation made at the American Embassy of the Chinese text of the Standard Law for the Enactment of Laws and Regulations of 1943.

[86] *Ibid.*

enacted by a ministry or subsidiary organ: that is, bylaws, *kuei-ch'eng;* rules, *kuei-tse;* detailed rules, *hsi-tse;* and measures of enforcement, *pan-fa.*[87] Additionally there were four types of rulings enacted by the Central Executive Committee of the Kuomintang or the Supreme National Defense Council or their subordinate organs: that is, outlines, *kang-ling;* fundamentals,[88] *kang-yao*[u]; general outlines, *ta-kang;* and principles, *yüan-tse.*[89] Article 7 of the Standard Law of 1943 stipulated, however, that *kuei-ch'eng, kuei-tse, hsi-tse* and *pan-fa* should be submitted for inspection to the Legislative *Yüan* to see whether or not they contained any matter contravening existing constitutions or laws.[90] Since China follows the continental rule of construction of the powers of government, it would seem improbable that the enumeration of four types of administrative rulings in the Standard Law of 1943 and eight kinds of *ming-ling* in the "Eight Points" of the SNDC excluded by inference the possibility of ministries or subsidiary organs of the National Government passing orders short of law besides those specifically enumerated.[91] Shih Shang-k'uan on this point merely observes: "other terms [evident reference is to the eight kinds of administrative ordinance just discussed] may on no account be excessively employed."[92] From this we may conclude that under the Kuomintang from 1925 to 1946 Chinese law was divided into two basic categories: general law, such as *fa-lü* and *t'iao-li,* and enforcing rules, sometimes called *t'iao-li* and at other times *ming-ling.* But though rules short of law were now standardized into eight kinds, this action did not appear to abolish or prohibit the continuance of another eight or more kinds of administrative rulings.

OTHER SOURCES OF LEGAL UNCERTAINTY

Finally, in addition to the aforementioned ambiguities, some uncertainty has been produced in Chinese law by the inveterate habit of governments since the Double Ten Revolution of 1911: first, of continually revising constitutions and laws; second, while promulgating a constitution or law, of delaying its enforcement date for years.[93] Such practices were perhaps excusable in the instances of the first eleven constitutions[94] because of rapid political changes, but like reasons do not apply to leaving important areas of substantive law uncertain where the legal rule has hung suspended as the sword of Damocles over foreign and domestic persons because no enforcing regulation was ever

[87] Shih, 14; the detailed definitions are: *kuei-ch'eng* — organic bylaws; bylaws for handling office affairs; *kuei-tse* — enforcement of laws or orders; rules for meeting; rules for administration; *hsi-tse* — detailed enforcing rules; detailed rules for handling affairs; *pan-fa* — methods designated or enacted for carrying out rules; enforcement measures.

[88] This term is not to be found in Escarra.

[89] Shih, 14–15.

[90] *Ibid.,* 14.

[91] There remain eight kinds of *ming-ling* listed by Escarra and given in footnote 61 above. *Kang-yao,* it should be recollected, is not given by Escarra; hence, the count is an additional nine rather than eight types of rules which might be passed by administrative bodies.

[92] Shih, 15.

[93] Escarra, 121–22.

[94] Consult footnote 9 above.

passed. This unfortunate situation can be illustrated from two diverse fields: personal relations and corporation law. The venerable status of concubinage lost its last shred of legality in 1935 when under article 239 of the Criminal Code, sexual relations of either spouse outside of marriage were declared to be adultery.[95] But since no enforcing act was ever passed to abolish the "secondary wife," together with the common practice whereby the legitimate wife signed an antenuptial agreement with her husband not to prosecute him under the criminal law if he took a concubine,[96] this old institution has been able to flourish down to the present. In the field of business enterprise there have been three major pieces of legislation adopted by the Chinese government in the past thirty years: viz, the Commercial Associations Law passed January 13, 1914,[97] the Company Law passed December 26, 1929,[98] and the Company Registration Law passed June 30, 1931.[99] The initial Law of Association of 1914 was not enforced until several years later,[100] while the enforcement of the Company Law of 1929 was not declared in effect until February 21, 1931.[101] A still greater delay occurred, however, in the case of the Company Registration Law of 1931,[102] which was left unenforced for over a decade. In 1943 the original Company Registration Law of 1931 was extensively revised, with the Chinese government threatening to enforce registration requirements in 1944 as they stood.[103] The Company Law passed April 12, 1946, is not open to the above stricture, as under its final article it went into force at once.[104] Both the legal

[95] Promulgated January 1, 1935, and effective July 1, 1935. Comments on the wisdom of bringing about this basic change in Chinese mores are made by Francis S. Liu, "Adultery as crime in China," *China law review*, 7 (July 1935), 144–47. The issue is discussed further by Marc van der Valk, *An outline of modern Chinese family law* (Peking, 1939), 171, 193, quoting the decision of the Central Political Council forwarded to the Legislative *Yüan* July 23, 1930: "Although it [concubinage] actually exists it is inadmissible that the law should recognize its existence. The concubine's position need not be provided for in legal codes or special laws." Under historic Chinese codes, especially the Ch'ing code of 1646, a concubine received legal recognition; see Escarra, 104–05, footnote 52. This legal sanction of the "secondary wife" continued down to the thirties, since only as the "six codes" were adopted were the relevant provisions of the Ch'ing law superseded.

[96] Information supplied to the writer by S. Y. T'ang, Dr. Y. C. Ho, and other Chinese lawyers.

[97] Text published by Extraterritoriality Commission 1923.

[98] British Chamber of Commerce, *The Nanking government's laws and regulations* (Shanghai, 1929–39), 5:1–45. The English translation of important Chinese commercial laws passed from 1900 to 1935 consists of 27 mimeographed volumes.

[99] For text of the law, see *ibid.*, 5:46–62. The writer's article entitled "Foreign corporations must register in China," *U.S. foreign commerce weekly*, July 1, 1944, discusses the registration law of 1931 and its revision in 1943, especially as it affected foreign corporations doing business in China.

[100] Francois Théry, *Les sociétés de commerce en Chine* (Tientsin, 1929), discusses the earlier Commercial Association Law of 1914 and the draft of the Company Law of 1929. Since the writer does not have Théry's treatise before him as this is written, the exact enforcement date for the law of 1914 cannot be given.

[101] British Chamber of Commerce, *op. cit.*, 16:7–12.

[102] *Ibid.*, 7:1–11, gives text. The most comprehensive available article on the topic of business registration in China is by P. Tchen Ngan-min and R. H. Mankiewicz, "Le registre de commerce en Chine," *Mélanges juridiques de l'université l'Aurore* (Paris, 1946), 299–363.

[103] For details consult author's article cited in footnote 99.

[104] Text procurable from Chinese Legal Section, Far Eastern Unit, Office of International

status of a "secondary wife" and corporation legislation are excellent examples of uncertainty introduced into Chinese law by prolonged withholding of enforcing ordinances.

In conclusion, the foreigner finds that the traditional role of law in China is an integral part of morality and custom; it is a static element, not a dynamic factor in social change; further, it obeys no intrinsic rules of logic but is a body of concrete rules without underlying order.[105] Following in the jural footsteps of France and Germany, Chinese government officials sought to modernize their state after 1900 and their laws after 1904. In their constitutions, laws, and ordinances the Chinese legislators established a sharp and clear distinction between law and administrative orders. This continental partition of law the Kuomintang brought to full fruition in the period from 1926 to 1946. During the Sino-Japanese conflict from 1937 to 1945 some confusion arose because administrative rules usurped the place of law, and ambiguities arose in legislative intent from the overlapping of legal terms applied to legislation. But in 1943 the National Government set out to cure these defects by the resolution of the SNDC and the Standard Law of that year. Thus, taking the entire period of 1904 to the present we find that legal ambiguities and uncertainties when they arose in Chinese law were in most cases the natural concomitant of rapid social and political change, or of the considerable difficulties of translating European legal idiom into the alien Chinese jural tradition. Specifically, during the period of Kuomintang control from 1926 to 1946 the categories of legislation were as clear and unambiguous as a very well-trained corps of Chinese lawyers and judges could make them.[106]

What is the outlook for the future of Chinese law? If as in pre-Han and pre-Sui times the area of China is split either east and west or north and south, the need for a set of legal norms still endures.[107] These forty-four years of effort at modernization, the enactment of "six codes," the adoption of some twelve

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Trade, U. S. Department of Commerce. See also Myron Wiener, "Registration of foreign companies in China," *U.S. foreign commerce weekly*, June 8, 1946.

[105] The Italian Giambattista Vico appears to be the first modern European thinker to grasp the notion of "organic unfoldment of history," exhibiting the interconnection of myth and social institutions of which China as well as Greece are outstanding examples. The reign of "abstractionism" which settled over Western thought after Descartes, Puffendorf, Grotius, *et al.*, never caught on in the Far East where Chinese and Japanese notions of law remained concrete. The opposition of Vico to the trends of late Renaissance thought is well discussed by C. E. Vaughan, *Studies in the history of political philosophy before and after Rousseau* (Manchester, 1939), 1, chap. 5, especially pp. 210–18, 229–36. In 1948 Vico's *Scienza nuova* was translated into English by T. G. Bergin and M. H. Fisch (Ithaca, N. Y.: Cornell University Press).

[106] Wang Chung-hui, John C. H. Wu (Wu Chin-hsiung), Chinese staff of Soochow University Law School, *et al.*, were largely trained in Western law either in the United States or in major countries of Europe. The best account of Chinese legal educational curricula and institutions is given by Escarra, pt. four. Chinese colleges and universities offering instruction in law are tabulated on pp. 373–83.

[107] The jural truism that war and civic disorder do not repeal law but merely suspend its operation was enunciated by Cicero in the first century B.C. The Roman lawyer living in an age, similar to our own, of prolonged war and civil strife reflected extensively on the relation of expediency to public morality; consult bk. 3 of his *De officiis*.

constitutions and of three organic laws, etc., all provide a rich arsenal of legal forms, procedures, and experience upon which future governments may draw. The hope of Goodnow and Willoughby's generation that China could be swung into the path of Anglo-American legal tradition is now rapidly fading. But just as neither Fascist Italy, Nazi Germany, nor Communist Russia could fully abandon their jural past, similarly the heads of the People's Republic of China are still captives of a long and tenacious social tradition. If Communist China decides to go still further in the Russian direction of a party *étatism*, it may find it expedient to revive many provisions of the Ch'ing code of 1646,[108] since books 20–30 of that code accord extensive criminal jurisdiction over daily life.[109] What the commingling of the three strands of Chinese Communism, Sun Yat-senism, and Neo-Confucianism will yield in the way of new conception and practice in "state," "law," and "rights" remains for the future to disclose. Impending legal changes are but part of the last wave of Occidental influence which is now washing over the shores of the Western Pacific.

[108] Staunton's translation has already been mentioned in footnote 8; Escarra also analyzes the main features of Manchu code on pp. 100–105 plus footnotes.

[109] Though police surveillance was no novelty in either Yüan Shih-k'ai or Kuomintang times, these governments at least did not have the temerity to explicitly specify such power in the "six codes."

a 理:禮	h 綱領	o 法程
b 天理人情	i 大綱	p 判例
c 政權:治權	j 規則	q 原則
d 法律:條例	k 細則	r 總則
e 規程	l 章程	s 辦例
f 辦法	m 通則	t 則程
g 命令	n 簡章	u 綱要