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CHINESE LAW

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China, once the land of mystery, and still the land of great surprises! Surely a fruitful field of legal research and of economic beginnings. Whether the subject be the law, medicine, religion, astronomy, irrigation, money and finance, industrial inventions, or the earth's produce such as cotton, silk, tea or grains, one cannot leave this immense factor out of any survey of the earth's treasures. Does the investigator wish to learn the principles and operations of democracy or socialism or self-government? These can be found in no region more rich in human experience and accomplishments than in a country whose inhabitants number above four millions, whose records reach back for 4,700 years at least, the oldest nation in the world, and one in whose future not only the people of America but particularly those of the Philippines are indissolubly bound.

It was John Hay, statesman, who said:

"The storm center of the world's politics, despite all eddies, has swept steadily eastward—past the Holy Roman Empire, the Balkans and Constantinople; past the Persian Gulf to India; onward to China where it will remain—and whoever understands China, socially, economically, politically, intellectually, religiously, has a key to the world's history for the next five centuries."

And it was Woodrow Wilson, president, who said on the occasion of the prompt recognition of the Chinese republic by the United States:

"I am deeply impressed with the fact of the Chinese coming into a consciousness of their possibilities under free government."

In this country of so many notable men of scholarly attainments one hopes to find records as ancient as any and one is not disappointed. Long before the time of Hamurabi (B. C. 2250) we find traces of law. The earliest known are the marriage regulations of B. C. 2700.

In the time of Yao, ruler over celestials somewhere between B. C. 2357 and 2255, for many crimes the punishments were very severe, among them being branding, castration, and all kinds of mutilations such as cutting off the hands or feet, as well as the head. During the period of Shun, his successor, who was a far milder despot, the harsh Draconian penalties were modified into banishment, wearing of the kang (cangue), and the generous use of the bamboo. In case of doubt as to the guilt of

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the accused, Shun had a better rule than that of presumed innocence. His words were, "When a man is charged with a crime he should at least be fined."

In the later years of Kuang Hsu, Manchu emperor from A. D. 1875 to 1898, among the reforms which so disgusted Empress-Dowager and proved the undoing of the Emperor, were edicts prohibiting torture, abolishing deportation and the use of the kang, and punishments generally were made commutable by fines.

The earliest Chinese laws were patriarchal. The operating principle was the submission of children to parental authority, and consistent with this doctrine all were subject to the Emperor as "the father and mother of his people." In fact up to the day of the republic, the power of life and death was conceded to the father to exercise himself or by offering the son to the executioner. The family or clan was responsible for the crime of any of its members. So the son's tendencies might bring death to the entire clan and the father was expected to deliver up the son to prevent such a direful calamity.

The husband, in China proper, in theory had the same power over the wife, but practically he was justified in putting her to death only when he slew her in the moment of adultery.

The first codes known are those of B. C. 950, 650, 535, and 220. The code of Han of A. D. 196 was the standard upon which later ones were based. The code of the T'ang dynasty was administrative only and simply an addition to that of Han's. Every dynasty since adopted a code but this was always largely composed of old codes. The first code in the juristic sense was compiled by Emperor Yung Le (A. D. 1403-1425). It was the foundation, according to Chung-Hui Wang, of the well-known Ta Ching Lu Li (Laws and Statutes of the Great Ching Dynasty) which remained in force from A. D. 1647 to 1912. The Manchu code was called "The Great Bright Legislation."

The *Lu* is the code on the old base, and the *Li* is a set of additional laws added by each succeeding dynasty to bring the law up to the conditions of the times, the *Lu* being fundamental and the *Li*, statute laws modifying the *Lu* or national law, unchangeable and omnipotent. These codes have been translated and the scholars have taken pains to show that the *Lu* was not dynastic, and in Chinese jurisprudence it could not be, as such a custom or innovation of permitting new codes for each new period would violate the primary sense of right in Chinese thought. Like the Romans the Manchu emperor K'ang-hi asserted: "Though above the law, the Emperors consider themselves bound to live under the law."

The difference between the *Lu* and the *Li* is not that between the statute and the common law, for both were published. The *Li* were really by-laws. Similar to the Anglo-Saxons the Chinese have a legal maxim, "If the law does not provide a remedy

for injustice, one must be found." Also, "The law lays down great principles. The *Li* accommodates these principles to human nature." An example is found in the edicts of several emperors who, finding drink becoming a great danger to the nation, decreed the death penalty upon manufacturers, vendors and purchasers of intoxicants. The record of the earliest order known is in B. C. 1100. The same law was promulgated by other emperors and today we are told that the Chinese are the most sober people on earth, an example surely of the efficacy of prohibition laws when sincerity accompanies enforcement.

Sir George T. Staunton, who translated the old Chinese code, said in the *Edinburgh Review*:

"The most remarkable thing about it is its great reasonableness, clearness and consistency. The laws are businesslike, brief, direct in their provisions, written in plain and in moderate language. Though redundant in many particulars and absurdly minute, yet no European code is so consistent or so free of intricacy, bigotry and fiction. In everything relating to political freedom or individualism, it is indeed woefully defective; but for repression of disorder and the gentle coercion of a vast population, it appears mild and efficacious."

Not only are there Chinese codes, statutes and decrees, but there is a long list of old decisions. We, alone, cannot pride ourselves upon the principle of *stare decisis*.

As to wills, in A. D. 999, before a magistrate of Hangchau, a brother brought action against his sister for the recovery of his proper share of the paternal estate. When the father died the son was three years old. The deceased parent left three-tenths of his estate to the son and seven-tenths to the daughter, and the latter share was conditioned that the daughter and her husband should bring up the son. The brother-in-law in defense exhibited the last testament to the judge, sure of his wife's rights. But the magistrate was a "Solomon come to judgment," for he said that the father was a wise man who had relied upon the magistrate to make the intended distribution of his estate and correct the seeming injustice to the son. What the testator really meant was to leave the seven-tenths to the son and the three-tenths to the daughter, as he well knew that the son would never survive unless the daughter and her husband were bribed. This decision is greatly praised by Chinese authors.

The early laws, as in all countries, were very severe, leaning to corporal or physical punishment, and these survive in many parts of China to this day, but in practice they were not enforced as commonly as many suppose, though harsh punishments, it is true, were more usual than in Europe or America. As stated previously, many emperors relaxed the infliction of capital penalties. Mu, in B. C. 1001-946, is specially mentioned as having introduced the custom of the commutation of penalties by the payment of fines. There had been precedents before his reign but it was now sanc-

tioned as a regular system. Chinese officials and writers are profuse in giving reasons for the old laws and the later additions thereto, being very careful to find a cause for the custom and a philosophical explanation, that "all who read may run." Permeating these expositions is the idea that the law should be severe in terms but lenient in enforcement, that "no criminal shall slip through its meshes." When judges sentenced a criminal they put down the penalty and added, "subject to revision." The case was first sent to the immediately higher authority and finally to the Emperor so that he alone might receive the praise for leniency. Such a practice, of course, led to the corruption of public officialdom, yet the Chinese, being a really peaceable and law-abiding people, were never guilty of frequent and long-continued lawlessness.

The civil law was supreme except at eruptive periods. The people have always been slow to arouse *en masse*. No military intervention was, as a rule, tolerated, for soldiers were despised as they came from the lowest class and were not paid, or, if paid, it was so small an amount that they became necessarily thieves. If the Emperor acted against the Chinese predilection for peace, he knew that a sword of Damocles hung over his head and on calling out the military he relied upon getting vindication on the ground of the safety of the State as an excuse for the dubious act. When military held sway, it was as rare as our own martial law except that such warlike measures with us are proclaimed in advance, while in troubled times in China this was impossible or off would go the head of the Emperor. In more quiet times, too, we read that the Emperor was often advised to forego his tendency to leniency and if he acceded to the request he did so under the pretense that he was reluctant to treat his "children" so. Of course, in many cases, where officials became incensed at the people, he did not hear of the trouble until the act was done. In such cases the subordinate official often lost his head. Such a state of affairs explains many vicissitudes in the life of Yuan Shi Kai in the turmoil of 1914.

Another characteristic of the Chinese law is the large amount of self-government. The steps upward were the family, then the head of the clan usually with a literary degree and sometimes one who was the oldest capable man in the clan; then came the guilds for members engaged in business who had their own laws and regulated all commercial transactions. What we call civil and commercial jurisprudence did not concern the Government of China. The national laws dealt mostly with collection of the revenues and the maintenance of public peace. In their private affairs the people took care of themselves. However, the Imperial decrees were supreme. The Chinese cannot understand how any State of the Union (as for instance, California) should pass laws to contravene the treaties of the United States, the laws of Congress or the executive orders of the President.

Family fights, quarrels, robbery and even murder were not matters for the State to look into unless they proved of such importance as to lead to public danger. A stranger who witnesses such events has to stand idly by because the experience of China is that a stranger interferes only for the purpose of plunder or some personal advantage. So he had better keep out of the affairs of others, unless invited to interfere as peacemaker. The Chinese are not prone to use clubs, knives or other weapons to settle their quarrels. Their method is to use the tongue, which, as we know, may be a very cutting instrument at times. This has its advantage. By loud talking the contestants are able to attract a passer-by to act as peacemaker and he is often allowed to settle differences of opinion. "Talk it out and this obviates the mutilation and destruction of the Eternal Spirit."

Lawyers, as we know them, were unknown in China except in the extra-territorial courts, but there were three classes of men who exercised some functions of *abogados*. First, there were the middle-men or mediators who acted between contending parties. These men did not simply hear the parties and interpret the law but they had powers resembling commissioners in the United States, making additional regulations and agreements to be observed in settlement of controversies. Secondly, there were notaries or scribes who drew up complaints for presentation to the rulers or magistrates, but it was considered illegal to insert any argument whatever, and if the latter was done it was severely punished. Thirdly, we find a class of counselors employed, however, only by the officials, somewhat as the city attorney or attorney-general is with us. Their function was to direct the official consulting them in order that legal bounds might not be transgressed, but woe be to them if they exceeded their jurisdiction by doing more than what was asked or giving their own opinions. There is an account of a counselor who was given eighty blows with a bamboo and two years' imprisonment for attempting to bring a murder down to a homicide without the request of the official.

Another phase of interest is the social responsibility for crime. The father was responsible for all the members of his family. The head of a clan and sometimes the whole clan has been held liable, resembling the ancient Roman and the Jewish law. The reason for this, say the Chinese commentators, is that the father is expected to know what goes on in the family. If the father or the chief of a clan is aware that a member is vicious, it is considered his duty to deliver up the guilty party, if possible, or at least to lodge a complaint against him and not to await action by the local or distant official of a province or prefecture. Civil authorities in parental cases usually followed the father's judgment and inflicted death if the father so advised. As a rule Chinese officials were not held responsible by their superiors for individual crimes committed within the region of their supervision, but only in cases of large increase

of crime or of rebellion, and then on the ground that the subordinate official, like the father of a family, is supposed to know the people over whom he has been set to rule. He was expected to be versed in the first principle of good government—that prompt action on his part will prevent increase of disorder. The tendency of such a policy was to cause a suppression of the true facts so that parents and officials might escape penalties themselves; and, on the other hand, it had a good effect, in that crime in China became far less in proportion than even in the United States.

The bad effect of having one person as judge and executive was apparent in several ways. Torture was customarily used to get confessions from both culprits and witnesses. Salaries were notoriously inadequate for the heads of city or provincial government. Judges of the courts and collectors of revenues had to provide themselves with all the agencies for carrying out matters of administration, nothing being provided them by the Government, and this was a great incentive to extortion of fees, the taking of bribes and graft generally.

As to judicial procedure, it was unique also. The judge examined the witnesses against the accused as well as the culprit himself. This being accomplished to his satisfaction, the magistrate consulted his counselor or the law-books for the definition of the crime and wrote out his decision "subject to revision." The sentence, if of enough importance, was sent up to the Board of Punishments. This practice also led to corruption, for the judicial or official hand was always impliedly extended for a fee as the price of immunity.

There was a tendency to draw fine distinctions in order to deal out exact justice. This reminds us of the Spanish Penal Code with its elaborate classification of penalties and the long list of aggravating, mitigating and exempting circumstances. Hence in China, as in some other countries, justice, though much sought, was often slow and difficult.

Some further criticism might be made of the Chinese idea of equity—for the ideal of the Chinese mind is more of equity than of law as we know it. The principles were not favorable to individual rights or to the encouragement of individual initiative. They were too patriarchal for the modern age. A study of the laws will show that they were far more uniform, however, than those of the several States of America. There was but one criminal system, and the family, the clan, and the guild or local legislature, if we may so call it, were entirely subject to the national law. There was one National Board of Punishments whose sentences, like our military punishments were referred to higher authority before they could be executed. The Board of punishments at the capital (then at Kaifengfu in the province of Honan) was established sometime between A. D. 960 and 976. Before this the power over life and death had been in the hands of the provincial officials. This reform was promulgated by

the Emperor Tai Tsu, requiring all capital offenses to be reported to the Board and then finally to be determined by the Emperor himself if he chose to act.

As subject to the various actions of the numerous guilds, the commercial law was too complex. Nevertheless, the law was founded upon common sense and was high in tone, being founded upon the moral code of Confucius. It compares favorably with the law of western nations.

There was a social reformer who lived A. D. 1068-1086, during the reign of Shen Tsung. His name was Wang An-shih. An income tax was established for the purpose of raising funds to be expended upon public works. Many of his recommendations were put into effect and they sound like provisions of the Government of the Philippine Islands in A. D. 1919. Surplus products and commodities in different provinces of the immense empire were purchased by the Government and transported to other parts where they were in demand and were sold at a reasonable profit. The reform was intended, we are told, to do away with the oppression by the rich who bought from the poor at as low a rate as possible and sold the goods at exorbitant prices. The State advanced money for the cultivation of the soil to be repaid after the harvest by the farmers, the rate of interest being two per cent. Many other reforms were attempted but they did not last as the Emperor was held back by the officials who looked at such economic theories as dangerous and destructive innovations.

China, though nominally an absolutism, was in reality a democracy with a superimposed autocracy who knew only too well that a limit to the freedom of the people must be preserved or they themselves would be wiped out. A republican form of government, i. e. rule by representation, appeals instinctively to the Chinese people. They have learned by costly experience how to protect their own hard-earned property from the rapacity of officials.

A southern Chinaman, Lun Bun Kang, in 1913, said:

“Despite appearances to the contrary, the Chinese have maintained, under every disadvantage and discouragement, a spirit of personal and communal independence which compares favorably with the liberty of the West. What though a despot sat on the Dragon throne— theoretically with Dragon powers—neither Imperial nor provincial authorities could touch the rights and privileges of the people in their towns, villages, or homes. * * * From the time of Han every Chinese ruler had to admit he was only the servant of the people, whose sufferings were due to his misgovernment and whose prosperity was his greatest joy. This profession was, of course, theoretical, as both Emperors and their officers, acted regardless of their promises. * * * The people submitted to the Imperial régime from age to age, because their domestic and provisional rights were never tampered with.”

So China is really a political phenomenon. Democracy was contented to suffer an Imperial Government, usurped as it generally was, to remain as the cheapest and easiest way to national life, so long as the precious liberties of the people at home were not taken away. The Chinese, before the time of the Witenagemote, the boasted assembly of the freemen among Anglo-Saxons, had for centuries governed their villages by a system of ruling elders chosen from responsible families.

China's backwardness and arrested development, according to many who have carefully examined her situation, has been due, not to slumber or intellectual inability, but to her past isolation and self-satisfaction, her heathenism and reactionary dynastic government. Her greatest recommendations for membership in the sisterhood of nations are her long-continued respect for moral and intellectual forces, her two thousand or more years of scholastic attainments, her conservatism for accredited authority, her unhesitating reverence for justice and the wonderful reliability in obligation or contract.

With such an inheritance behind her and the fact that she has now shown her earnestness in breaking away from her inertness of the last thousand years, this great nation with half of the people of Asia within her borders, is sure to make herself felt in the arts, literature, commerce and government. With all her mistakes she has made wonderful strides in the last decade, especially in the legal sense. Her prominent men desire a republican government, though she is, of course, in the great travail of new birth. Julean Arnold has pointed out one great error, "in allowing the legislature to draft the constitution, thus sacrificing the executive and judicial powers of the State."

Up to a few years ago China had the oldest criminal code in force—a collection of rules and precedents which had been handed down from dynasty to dynasty. But a Bureau of Law Reforms was established for the purpose of revising and codifying the laws. This was succeeded by the Law Codification Commission in 1914, and there is now in force a Provisional Criminal Code which, according to the Hon. Wenfu Yiko Hu, associate justice of the new Supreme Court, was drawn up in the closing year of the last dynasty and proclaimed in the first year of the republic. Gradually the attempt will be made to enforce it, but with such a vast country to cover, lacking railroads, the telegraph and other means of communication except along the coastal area, it is too much to expect a rapid advance in the interior and almost inaccessible west. There prejudices will no doubt be difficult to overcome.

The courts have been remodelled and the intention is to make a thorough revision of the laws. There is an intricate organization of the higher and subordinate courts, with a bench of three judges, each court having civil and criminal divisions for "better specialization." It is intended that non-contentious matters shall be decided by

these courts, and even separate courts have been provided for deciding questions of administrative law and also others for offenses committed by the military.

The civil and commercial law has not yet been codified, and, unfortunately, it seems to be the intention to follow the German Civil Code with all its clumsiness, as well as Japanese and Swiss precedents. "The reproduction in the Chinese code of the chief characteristics of continental rather than Anglo-American law requires explanation," says the Hon. Chung-Hui Wang. "The choice was not accidental but the result of mature deliberation. Anglo-American law emphasizes the individual at the expense of the family. The family being the unit of Chinese society, anything that weakens the existence of that institution must be unacceptable in principle and unworkable in practice."

The procedural law proposed is said to be exceedingly elaborate, purposing to embody also the main principles of the European codes.

One of the greatest difficulties in China, as it has been in Japan, is to secure adequate salaries and thus insure proper dignity to judges.

In spite of these criticisms, some of which it is hoped will fall by the wayside, we must remember that China is in a transitional state of change and must, like all nations, work out her own salvation to a great extent by experience, readjustment and adoption of that system of jurisprudence most in consonance with her customs and traditions which cannot be ignored however undesirable to prolong them. Her statesmen may be able in time to invoke a new public opinion where it is thought best supplant them with the results of modern thought.

Old Chinese law has been a favorite subject for study by travellers, historians and thinkers for over a century. The same efforts deserve to be expended in the investigation and transcribing of the unwritten and popular law of the Philippines in pre-Spanish times. With the great advance of the Filipinos in religion, education and science, as well as in the law, in the last four centuries, we are liable to lose sight of an invaluable opportunity for establishing another factor in the study of comparative law. There is now a movement under the auspices of the Secretary of the Interior and the University to record, before it is still more difficult or perhaps too late, the old native laws of the Filipinos. However out of date, these old customary laws are entitled to as much respect as the legal inheritance of China or any other country. It is the duty of Americans and Filipinos to insure that the law conceptions of these insular peoples are not lost to posterity.