

Chinese Legal Tradition under the Mongols. PAUL HENG-CHAO CH'EN. Princeton University Press, Princeton, 1979. Pp. xix, 205. \$19.50.

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Few law books published in English within the past year are likely to appear more esoteric than this one.¹ The book features the text of a Chinese code of 1291, reconstructed from fragmentary sources² and supplemented by an annotated translation, extensive historiographical information,³ and several essays on law in the Yüan dynasty.⁴ Professor Ch'en aims to establish that the Mongol conquerors made a positive contribution to Chinese institutions,⁵ a conclusion of concern primarily to those who are aware that the Mongol influence generally has been considered of little significance by historians of China.⁶ Because of the specialized nature of the book, it would not be appropriate here to engage in a thorough examination of Professor Ch'en's scholarly achievement. Rather, my intention is to focus on the work as a stimulating contribution to the field of comparative law.⁷

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¹ P. CH'EN, *CHINESE LEGAL TRADITION UNDER THE MONGOLS* (1979) [hereinafter cited without cross-reference as CH'EN]. In order to conform with Professor Ch'en's usage, this review employs the Wade-Giles Romanization of Chinese characters instead of the now standard pin-yin system.

² The text of the Code, in Chinese, appears in *id.* at 159-66. Professor Ch'en reports that the reconstruction is supported by the independent work of a Japanese scholar who reached roughly the same result. *Id.* at 105.

³ In addition, the author's sources are listed and discussed in *id.* at 101-06. The historical background of the Code is discussed in *id.* at 3-40.

⁴ The dynasties relevant to this discussion are as follows (as listed in D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 57 (1967)):

T'ang Dynasty (618-906)

Sung Dynasty (960-1279)

Yüan (Mongol) Dynasty (1280-1367)

Ming Dynasty (1368-1643)

Ch'ing Dynasty (1644-1911).

⁵ CH'EN at xviii-xix.

⁶ Many scholars have argued that the Mongol influence was minor. See, e.g., D. BODDE & C. MORRIS, *supra* note 4, at 59 n.19.

⁷ The book itself does not address comparative issues directly. The author limits his work to a precise statement of the results of his examination of information for a limited

To Westerners, comparative law most frequently has involved the contrast between the Anglo-American and Franco-German systems, with decidedly less attention paid to others such as the Islamic, primitive, or Chinese. Comparative law has been based almost exclusively on European data,⁸ which means that the comparisons rarely have embraced radically different legal systems. Imperial Chinese law does offer a fundamentally different system for comparison, because China has been largely uninfluenced by Roman or other Western law. Moreover, Chinese law cannot be dismissed as of interest only as a minor historical curiosity, unlike Cheyenne law, for example. China, with its vast population and immense cultural achievements, has undergone a course of legal development as long as that of Western law. In short, though it may be difficult for a Westerner to imagine it, an extraterrestrial visitor might well select Chinese law over, say, the German Civil Code as the Earth's representative legal system.

Once one admits that Chinese law should be studied, there remains the basic problem of how to study it. The problem is not created by any lack of information from primary source materials. We have extensive records, including several complete texts and codes⁹ dating to the T'ang dynasty,¹⁰ and fragments from a millen-

time and place. His ultimate aim, however, is to establish more firmly the picture of Chinese law, a field that has received little attention in the West considering its importance. He states that he has not gone far towards that goal. CH'EN at xix. In the sense that we are nowhere near the state of knowledge that exists for European law, he is correct. Nevertheless, this book adds much to our understanding of the Chinese legal tradition and indicates why the study of that tradition should be one of the chief tasks of comparative law.

⁸ Professor David's treatise, for example, devotes 461 of 594 pages to European law, leaving the remaining pages for a discussion of the laws of China, Japan, India, Islam, and various countries of Africa. R. DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (7th ed. 1978). Professors Zweigert and Kötz devote 419 pages of the first volume of their two-volume treatise to European law, leaving only 34 pages for everything else. The second volume is devoted entirely to an analysis of the Western legal notions of contract, tort, and unjust enrichment in different systems. K. ZWIGERT & H. KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* (2 vols. 1971, 1969). To be sure, most nations now do have either Franco-German or Anglo-American legal systems, at least in theory.

⁹ There are several translations of the important Ch'ing Code. The only English translation is poor and incomplete (none of the important statutes is included). G. STAUNTON, *THE TA TSING LEU LEE* (London 1810). G. BOULAIS, *MANUEL DU CODE CHINOIS* (Variétés Sinologiques Monograph No. 55, 1924) is a good but incomplete French translation, whose omissions are not apparent until one looks at the Chinese text. By far the best translation is P. PHILASTRE, *LE CODE ANNAMITE* (2d ed. 1909). The Annamite Code was essentially the Ch'ing Code with some sections omitted. Philastre indicates the omissions and variations, and includes some commentary.

¹⁰ The T'ang Code of 653 is the most important early Chinese statute.

nium earlier. Rather, the chief difficulty in studying Chinese law is that there is no accepted native Chinese tradition of legal analysis. Consequently, we do not immediately know how to organize the information. Western law, by contrast, has been an object of intense academic study since Roman times, and thus when one wishes to analyze a Western country's legal system it is easy to find the native approach in treatises and university courses of study.

In China, no such approach to law developed. Chinese intellectuals wrote and applied law, but they did not treat it as a proper object of study like statecraft, poetry, or calligraphy. They developed no detailed principles of legal institutions.¹¹ The result is that one must either view Chinese law as though it were a body of Western law or try to devise a special technique for dealing with it.

In order to avoid a biased approach to Chinese law, one naturally wishes not to employ Western ideas in analyzing it. It is difficult, however, to know what else to use. One possible approach is to analyze an apparently essential part of the Chinese legal system to discern its basic conceptual structure or ideology, and then to use that structure to organize other information. Such a method would work for Western law. An analysis of the General Part of the German Civil Code,¹² for example, yields a fair summary of Western ideas about law. Such an endeavor shows that the law is primarily concerned with persons: their rights, their relationships with each other, and the ways in which they settle disputes. Using this basic notion, one can analyze everything from international relations¹³ to gifts to minors.

Looking at the Ch'ing Code¹⁴—the great code of the Ch'ing dynasty—in the same way, one sees that the structure is much different from that of Western law. The law is concerned with actions

For a brief discussion of the antecedents and influence of the T'ang Code, see W. JOHNSON, *THE T'ANG CODE* 5-9 (1979). The essential text of the Ming Code of 1397 was not substantially changed during the succeeding Ch'ing dynasty (though it was renamed the Ch'ing Code), so it really remained in force for more than 500 years. Changes were effected by means of regulations or statutes. See D. BODDE & C. MORRIS, *supra* note 4, at 63-68.

¹¹ I discuss this at greater length in Jones, *Studying the Ch'ing Code—the Ta Ch'ing Lu Li*, 22 AM. J. COMP. L. 330, 331-36 (1974).

¹² BÜRGERLICHES GESETZBUCH arts. 1-240 (W. Ger.).

¹³ A truism worth recalling is that traditional Western public international law is based on the doctrines of civil law, with nations substituted for persons and treaties substituted for contracts. This is not surprising given that the founding fathers of public international law—for example, Gentili, Grotius, and Pufendorf—were well-known authorities in civil law.

¹⁴ The translation used here (because it is the only English translation) is G. STAUNTON, *supra* note 9 [hereinafter cited without cross-reference as CH'ING CODE].

of people only as they affect operations of the government. Instead of being organized according to categories of private relations—torts, contracts, or property—or the Roman categories of persons, things, and actions, Imperial Chinese law was organized according to the six ministries of the government: Civil Service, Finance, Rites, War, Punishment, and Works.¹⁵ The legal category of a rule would depend upon the ministry it affected.

Some rules appear on their face to deal with the same social phenomena as laws familiar to us. The Chinese mortgage, for example, was similar to the old English mortgage: the mortgagee took possession and had to surrender the property when the debt was paid.¹⁶ In our law the mortgage is discussed in terms of the nature of the private rights or property interests of the parties, such as the right of the mortgagor to redeem. In China, mortgage law was mentioned in the Ch'ing Code only because the government, in order to determine who was liable for real property taxes, had to have a rule to determine land ownership. Accordingly, mortgage laws are placed in the Finance Board part of the Code.¹⁷ Social phenomena were legally significant as they affected government activities; otherwise, the law tended, with some exceptions, to ignore them. This attitude is similar to the way in which our law regards "mere" social or moral obligations. This is the pattern of the similar Ming and Ch'ing Codes, statutes that remained substantially unchanged from 1397 to 1911.¹⁸ It thus seems fair to call this the Imperial Chinese legal tradition in the way that Gaius and the civil codes constitute the Western tradition.¹⁹

As a legal system that looks at human activities primarily from the point of view of how they affect governmental operations, much of Imperial Chinese law is concerned with what we would regard as internal administrative matters.²⁰ Another principal as-

¹⁵ See D. BODDE & C. MORRIS, *supra* note 4, at 59-60, for a discussion of the government ministries.

¹⁶ CH'ING CODE § 95. This section of the Code is discussed in G. JAMIESON, *CHINESE FAMILY AND COMMERCIAL LAW* 85-86 (1921).

¹⁷ CH'ING CODE § 95. The Finance Section is in *id.* §§ 75-156.

¹⁸ The origins of these codes date back to the T'ang Code of the early seventh century, and probably much further.

¹⁹ As to the influence of Gaius's organization on Western law, see G. BOEHMER, *EINFÜHRUNG IN DAS BÜRGERLICHE RECHT* 70 (1965).

²⁰ This is true even in the area of law the Chinese version of which seems most familiar to us: the criminal law. The Ch'ing Code includes punishments for most ordinary crimes, but mostly it is concerned with official derelictions of duty. For example, sections 332-343 are concerned with the handling of complaints, sections 344-354 with bribery and corrup-

pect of the Chinese legal tradition is that if the law takes cognizance of conduct by providing a rule, it will also provide a punishment. This principle demonstrates that those administrative matters so uninteresting to us were regarded as law of great importance; breach of one of these regulatory laws would result in punishment. The statement in the Ch'ing Code that anyone who murders another will receive a punishment is unexceptional,²¹ but most unusual are the provisions that a mortgagee who fails to relinquish possession of the land when the debt is paid will be beaten,²² and that if post houses are allowed to fall into disrepair the postmaster general will be given fifty blows with a stick.²³

How does the Yüan Code fit into this tradition? When the Mongols conquered China in the early thirteenth century, they behaved as conquerors often do by applying their own law to themselves and the indigenous law to the Chinese.²⁴ By 1271 the process of Sinicization had advanced²⁵ and the Mongols adopted the Chinese name Yüan for their dynasty.²⁶ They also repealed the Chinese code they had been enforcing.²⁷ Although the dynasty lasted for about another 100 years, it seems never to have reenacted a comprehensive code despite proposals to do so.²⁸ Rather, a large number of statutes were enacted,²⁹ most of which are lost. Probably the first significant one³⁰ is the Yüan Code—the *Chih-yuan hsin-ko* of 1291 that Professor Ch'en has reconstructed.

We probably would not call the statute a code if the Chinese did not. It almost seems like an administrative manual, a compendium of advice and exhortation to magistrates; it hardly corre-

tion, and sections 355-365 with making forged and fraudulent government documents and seals. The theft part, CH'ING CODE §§ 254-281, illustrates the differences between our systems. Of the twenty-eight sections, thirteen involve offenses against the public order rather than theft of private property; the part even includes treason, *id.* §§ 254-255, and sorcery, *id.* § 256.

²¹ *Id.* § 282.

²² *Id.* § 95.

²³ *Id.* § 240.

²⁴ CH'EN at 3. The enforced Chinese law included a code constructed on the T'ang model. *Id.* at 11-12.

²⁵ *Id.* at 10.

²⁶ *Id.* at 13.

²⁷ *Id.* at 13-14.

²⁸ *Id.* at 14-16. The Mongol rulers may have believed there was sufficient precedent established under the old code to allow the code to be abolished without leaving a legal vacuum. *Id.* at 13-14.

²⁹ Several are described in *id.* at 22, 29, 38.

³⁰ *Id.* at 16-18.

sponds to our idea of a codification. The Code specifies such quotidian matters as the time in the morning when officials should begin work,³¹ and the number of days allotted for the completion of various tasks.³² The statute even lists the personal qualities desirable in candidates for various official positions.³³ It also serves as an instruction manual, telling the magistrates how to perform their tasks and solve problems such as how to deal with rich people who try to avoid paying taxes,³⁴ how to arrange for tax relief in case of flood,³⁵ or how to conduct the inspection of prisons.³⁶

Although the Code was issued by the Emperor and so the atmosphere of compulsion is present, the tone is much different from that of statutes familiar to us. This can best be shown by quotation of three consecutive sections that are representative:

[Item 6.] Any [salt]yard, in accumulating and storing the amount of unrefined salt, shall keep it in order on a high hill where the tidewater cannot encroach. [The authorities] shall, moreover, appoint [salt] transportation officials to visit often on the spot and investigate. If the storage has not been in compliance with the proper methods or the preservation has been so unthorough as to result in damage, the negligent person shall be pressed for compensation.

[Item 7.] With regard to [the number of] officials at a [tax collecting] court or bureau, a large one shall have no more than three members. [The posts of] assistants and other functionaries shall be preserved or established in accordance with the amount of levies to be collected and the excess persons shall be dismissed so as to prevent [them] from overflowing [the court or bureau], oppressing the common people, and illegally consuming public funds.

[Item 8.] Any [commissioner of] the Chuan-yün-ssu (Bureau of Salt Transportation) or its intendant official or clerk who takes away or borrows from the [tax collecting] court or bureau of his own jurisdiction funds or goods shall be treated as a thief and the accomplice shall be subjected to the same punishment. With regard to any taxable item, any person

³¹ *Id.* at 107.

³² *Id.* at 108-09.

³³ *Id.* at 119.

³⁴ *Id.* at 123-24.

³⁵ *Id.* at 131-32.

³⁶ *Id.* at 155.

who, without following the precedent of imposing the *ch'ou-fen* (percentage levy), impresses the "tax stamp" [on the item] shall be also so punished.³⁷

Nowhere does the Code contain rules corresponding to our laws of torts, contracts, or property. Nor are there any clearly defined crimes, only occasional statements that acts or omissions may cause an individual to be "punished." Unlike the later codes,³⁸ here the nature of the punishment is never stated.³⁹

The later codes had precise rules and standards accompanied by precisely delineated punishments, in theory allowing the magistrates no discretion in administering them. The Yüan Code, in contrast, is much more vague and on its face allows for great discretion. Despite its different tone, the Chinese nevertheless seemed to consider this document to be quite as much a code of laws as the later codes.⁴⁰ One reason may be that it was consistent with the legal tradition established by the earlier T'ang Code, in its concentration on governmental activities rather than private relations as the subject matter of law.

As soon as one realizes that the centrality of the government constitutes a fundamental organizing principle of Chinese law, the contrast with Western law becomes apparent and capable of analysis. As in Western law, Chinese legal rules are directed at people but, as mentioned, people are regulated in relation to governmental operations. If one considers the sale of goods from this perspective, for instance, the individual transaction ceases to be of much importance.⁴¹ What matters under the government-centered ap-

³⁷ *Id.* at 136-37 (footnotes omitted).

³⁸ See text and notes at notes 21-23 *supra*.

³⁹ For a description of the types of penalties that were in fact imposed, see CH'EN at 41-67.

⁴⁰ See generally *id.* at 18, 40.

⁴¹ The Chinese did possess methods of solving the problems we regard as "legal," even though they would not have employed that adjective. If one asks how disputes about quality in a sale of goods are settled, for example, one must consider private dispute-settling devices as well as the types of contracts used. It is generally said that the most common Chinese dispute-settling devices were arbitration or conciliation rather than courts, and apparently they remain so. See generally Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966). There is, however, some speculation that the courts were used in civil disputes more often than is generally thought. See Buxbaum, *Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895*, 30 J. ASIAN STUD. 255 (1971). I believe we are far from evaluating the evidence we have, and there probably is much evidence of which we are entirely unaware. Buxbaum refers solely to the records of the minor province of Taiwan, and it seems likely that there are similar records for parts of the mainland.

proach is commerce—the distribution of goods throughout the nation. The condition of a nation's commerce of course greatly influences such matters as the resources available to the government, to say nothing of the general condition of the population, which in turn affects the government.

From this vantage point, one can see American law in a different light. The most significant body of law dealing with commerce in the United States would be not the Uniform Commercial Code, but rather the Sherman Act.⁴² The UCC is concerned with a sale as a transaction between two persons, with emphasis on their intentions and the interests they acquire in relation to each other. As such, from the Chinese point of view the UCC hardly would be considered law. The general principles of the UCC may reflect social values, but government policy is furthered only indirectly by it; the purpose of the statute is to facilitate private transactions. The Sherman Act, however, is a law directly imposing a governmental policy on private transactions. Certain transactions are viewed as injuring the commercial health of the nation and are regulated accordingly.⁴³ The interests of the parties are considered only incidentally, with little if any attention paid to capacity, definiteness, mutuality, and other established principles of contract law.

If a Western jurist sets out to study Chinese law with an idea of "what law is" that has been shaped by his Western legal training, he will find the materials he expects, but they will not be what the Chinese would call law. To study what he considers law, the Westerner will have to examine private dispute-settling mechanisms and customary law. He will find little in the codes—what the Chinese *do* call law—that interests him. If a Chinese scholar, on the other hand, looks at American society to find what he calls law, most of what he discovers will not be in sources thought of by Americans as legal. The Chinese scholar would be interested not in private law, but in materials like internal governmental administrative manuals, which few Western jurists ever consider. His interest in public law would be as an aid to someone who was trying to implement policy, rather than as an individual trying to conform to laws or avoid their impact.

By considering in detail the legal system of the Yüan dynasty, Professor Ch'en raises questions regarding the role of that period

⁴² 15 U.S.C. §§ 1-7 (1976).

⁴³ An example is a contract in restraint of trade.

in shaping the legal institutions of the later dynasties. One such question concerns the significance of two very different types of documents, each of which is called a code or a law. The Yüan Code, for example, is like a general policy statement designed to induce action along certain lines, without being too specific. The later Ming and Ch'ing Codes were detailed commands, with little room for discretion by the magistrates. This leads one to wonder whether there were other statutes different from both types, and if so, how they related to each other.⁴⁴ Another question the book raises is what happened during the Yüan dynasty that caused the drafters of the Ming Code to take the provisions of the T'ang Code and categorize them in terms that correspond exactly to the six ministries of the government.⁴⁵

Professor Ch'en adds to our knowledge of another issue: the extent to which the Mongols influenced the Chinese legal system. They had a vigorous legal tradition of their own, and indeed their contributions are visible in details. Some of the traditional physical punishments, for example, were modified during the Yüan dynasty, while other punishments, such as requiring remuneration to the victim, were added.⁴⁶ As to whether the Mongols affected the basic legal structure, the question remains open.

Another aspect of Chinese law that as yet has received little scholarly attention is the nature and extent of legal training and literature. In thinking of Chinese officials, we tend to think of the magistrates, who were Confucian scholars.⁴⁷ They were generalists who did not know the details of government. There were some officials who knew the workings of government and could fill in forms;⁴⁸ those people also knew about law, in the sense that a

⁴⁴ There are various kinds of regulations or substatutes. Most sections of the Ch'ing Code are followed by a number of these in the later editions. In addition, there are separate groups of regulations for the several government ministries. One such group, providing punishments for officeholders, is discussed in T. METZGER, *THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY* 253-56, 276-81, 311-12 (1973). Apparently there were several types even in the T'ang era. See W. JOHNSON, *supra* note 10, at 5-6.

⁴⁵ See text at note 15 *supra*.

⁴⁶ See CH'EN at 41-67.

⁴⁷ They were the Chinese equivalent of British colonial officers who went confidently, equipped with degrees in the classics, to govern the heathen.

⁴⁸ In the beginning of their reign, the Mongols abolished the examination system for civil servants. For a while new recruits to the higher civil service were selected from the specialized clerks in a lower level of the bureaucracy. *Id.* at 88-89. By the end of the dynasty, however, the examinations were reinstated, *id.* at 88, and they continued until the end of the Empire. For a discussion of the examination in Ch'ing times, see J. WATT, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* 23-25 (1972).

lower-level employee in the Internal Revenue Service knows the letter of the relevant statutes and regulations. Whether there were any real legal scholars, or people like practicing attorneys, however, is a question not yet answered.

Professor Ch'en believes that there *was* more "legal professionalism"—more formal study of law—in the Yüan dynasty than previously. He cites the wider availability of collections of laws and precedents,⁴⁹ and the existence of model forms for such transactions as land sales and loan agreements.⁵⁰ There is, however, no evidence of any treatises that analyzed legal doctrine in our sense.⁵¹ It would be interesting to know whether existing legal activity was something new or whether it simply came into the open in the different atmosphere of the Yüan dynasty, and to know whether the Chinese regarded this as legal activity as we know it or as something else. It would also be interesting to know the extent to which these activities carried over into the subsequent dynasty.

The study of Chinese law is still in its infancy. General notions about it will come with more work. The pursuit of questions such as those raised directly and indirectly by Professor Ch'en's book would result in a substantial increase in our knowledge of Chinese law. We also would get some idea of the system as it appeared to the Chinese, such as exactly what they meant by speaking of laws, codes, or precedents. In addition we could understand what they did about matters we consider legal, such as conveyancing, wills, and contracts. We might also begin to understand how and why the law changed. As well as revealing the richness and complexity of the Yüan legal system, Professor Ch'en's book raises these basic questions. While any book that adds some detail to our knowledge of Chinese law is useful, one that stimulates us to rethink the whole subject is truly important.

⁴⁹ CH'EN at 89-92.

⁵⁰ *Id.* at 93-96.

⁵¹ See Jones, *supra* note 11, at 331-35.