

CHINA'S LEGAL SOUL

CHINA'S LEGAL SOUL

THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT

John W. Head

PROFESSOR OF LAW

UNIVERSITY OF KANSAS SCHOOL OF LAW

LAWRENCE, KANSAS

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2009
John W. Head
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Head, John W. (John Warren), 1953-
China's legal soul : the modern Chinese legal identity in historical context /
John W. Head.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-636-6 (alk. paper)

1. Law--China--History. 2. Law--China--Philosophy. 3. Rule of law--China--
-History. 4. Law and ethics--China. 5. Law reform--China. I. Title.

KNQ120.H43 2008
349.51--dc22

2008046146

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

CONTENTS

List of Maps, Boxes, and Diagrams	ix
Preface and Overview	xi
Notes on Language, Terms, and Technical Conventions	xix
Acknowledgments	xxvii
Chapter I Dynastic China's Legal Development	3
A. Highlights and Patterns	3
B. Confucianism and Legalism	8
B1. Foundations of Lǐ and the Confucianist Tradition	8
B1a. Confucius and the Lǐ	8
B1b. Mengzi and Xunzi	15
B2. Legalism and the "Confucianization" of the Law	17
B2a. The Legalists, Fǎ, and the Qin Dynasty	17
B2b. The Han Dynasty and Dong Zhongshu	20
C. Law Codes in Dynastic China	26
C1. The Han Code	26
C2. The Kaihuang Code and the Tang Code	27
C2a. Yang Jian	27
C2b. The Tang Code	28
C3. The Song, Yüan, Ming, and Qing Codes	32
C3a. Song, Yüan, and Ming Continuity	33
C3b. Qing Code — General Structure and Substance	34
C3c. The District Magistrate	35
C3d. Civil Law under the Qing Code	37
C3e. Rules of Behavior outside the Code	42
D. Key Themes in Dynastic Chinese Law	44
D1. Law and Continuity	44
D1a. Qin Unification	47
D1b. Continuity and Legal Conservatism	48
D1c. Codes as Cultural Constitutions	48

D2. Law and Dynastic China's Rejection of Challengers	50
D2a. Military and Political Challenges	51
D2b. Religious and Intellectual Challenges	54
D2c. European Ideas and Economic Pressure	55
D2d. Durability in China's Response to External Influence	58
D3. The Rule of Law versus Political Control	59
D4. The Guiding Ethic in Law and Government	63
Chapter II Modern China's Legal Development	67
A. The Republic of China (1911–1949)	75
A1. The Qing Collapse, Legal Reform, and the May Fourth Movement	76
A2. Nationalists and Communists	79
B. The PRC in Mao Zedong's Grip (1949–1978)	80
B1. A Sharp Left Turn	80
B2. Governing by Movement	82
B3. Revolutionary Meltdown	84
C. The PRC in Reform Mode (1979–Present)	85
C1. Legal and Economic Reclamation	85
C2. A Legislative and Regulatory Frenzy	86
C3. Institutional Recovery	90
C4. Summing Up as of 2009	92
D. Discontinuities and Disconnections in Contemporary Chinese Law	92
D1. A Termination of Dynastic Chinese Law's Continuity	93
D2. The Balance Between Indigenous and Exogenous Influences	97
D2a. Striking the Balance in Dynastic Chinese Law	97
D2b. Striking the Balance in Contemporary Chinese Law	97
D2c. Reasons for a Thorough Filtering	103
Chapter III Rule of Law in China — Carefully Crossing the River	105
A. Preliminary Definitions and Distinctions: <i>Fazhi</i> , <i>Renzhi</i> , and Instrumentalism	105
A1. Rule of Law — A Survey of Meanings	107
A2. Rule of Law in a Chinese Context	109
A2a. In General	109
A2b. Rule of Man, Rule of Law, and Rule by Law	112
A2c. Constitutional Considerations	114
B. Three Questions	117
B1. Control versus Discretion	119
B2. A Focus on <i>Minshi</i>	121
B3. Who Writes the Rules?	123

C. Thick and Thin Versions of a Rule of Law	127
C1. Peerenboom and Fuller	127
C2. Proposing and Testing a Hypothesis	131
C2a. A Hypothesis on Aspirations	131
C2b. “Feeling the Stones When Crossing the River”	134
C2c. Democracy and Rule of Law	136
C2d. Importance of Administrative Procedure Rules	138
C2e. Restrictions on Officials’ Power	139
C2f. Rule of Law and International Standards	140
C2g. Rule of Law or Rule of Lǐ?	141
C2h. Pluralism in Perspectives	142
C2i. Consensus in Observation?	143
D. A Summing-Up on the Rule of Law	146
Appendix to Chapter III — A Sampling of Rule-of-Law Definitions	149
Chapter IV China’s Legal Ethic Today — Searching for a Modern Correlative to Imperial Confucianism	163
A. Preliminary Observations	163
B. Where to Find the Central Legal Ethic — A Survey of Possibilities	166
B1. A New Confucianism?	166
B1a. Neo-Confucianism	167
B1b. New Confucianism	170
B1c. Confucianist Influence in Today’s China	173
B2. Marxist-Leninist-Maoist-Dengist Thought?	178
B2a. Constitutional Foundations	178
B2b. Party Line as a New Legal Ethic?	182
B3. Rule of Law?	188
B4. Constitutionalism?	189
B4a. A Comparative Detour	189
B4b. Constitutionalism in China	192
B5. Religion?	196
B6. Nothing?	202
C. A Materialist-Oriented, Legitimate, Extroverted, China-Appropriate Restorative Progressivism (MOLECARP)	206
C1. Progressivism	208
C2. Restorative	209
C3. China-Appropriate	210
C4. Extroverted	211
C5. Legitimate	212
C6. Materialist-Oriented	213

Concluding Observations	219
Selected Bibliography	223
Contemporary Chinese Law	223
Books	223
Law Journal Articles	224
Dynastic Chinese Law	225
About the Author	227
Index	229

LIST OF MAPS, BOXES, AND DIAGRAMS

Map 1. Modern China, with Key Rivers, Cities, and Neighboring Lands	xxiv
Map 2. Modern China, with Provinces and Neighboring Lands	xxv
Chapter I Dynastic China’s Legal Development	3
Diagram I-A. Simplified Time-Line of Most Significant Chinese Dynasties	4
Box I-1. Main Chinese Dynasties and Periods	5
Box I-2. Highlights of Chinese Legal History	6
Box I-3. Chinese Legal Terms and Concepts	11
Box I-4. The Tang Code — Article 1	30
Box I-5. The Tang Code — Selected Specific Provisions	31
Box I-6. Sample Provisions from the Qing Code	37
Diagram I-B. Comparative Degrees and Continuity of Political Organization	46
Box I-7. General Definition of “Rule of Law”	60
Chapter II Modern China’s Legal Development	67
Box II-1. Selected Chinese Legal and Political Developments from about 1900	68
Box II-2. The “Anti-Rightist” Campaign	82
Box II-3. The “Great Leap Forward” Movement	83
Box II-4. Post-1979 Chinese Laws — Selected Listing	88
Chapter III Rule of Law in China — Carefully Crossing the River	105
Box III-1. Rule-of-Law Definitions — An Array of Typical Elements	107
Diagram III-A. Formality, Discretion, and Control in Fazhi, Renzhi, and Rule by Law	114
Box III-2. Excerpts from 1999 Constitutional Amendments on “Rule of Law”	115

Box III-3. Focusing on Fazhi and the Role of Law in China	118
Box III-4. “Democratic” Elections in China	126
Box III-5. Lon Fuller and the “Morality” of Law	129
Chapter IV China’s Legal Ethic Today — Searching for a Modern Correlative to Imperial Confucianism	163
Box IV-1. Excerpts from 1999 and 2004 Constitutional Amendments on Ideology	178
Box IV-2. Main Features of the Contemporary Chinese Legal Identity	207

PREFACE AND OVERVIEW

A Triple Anniversary for Chinese Law

The year 2009 marks a “triple anniversary” for Chinese law reform. Thirty years ago, in 1979, the People’s Republic of China (“PRC”) embarked on a dramatic new phase of legal reform. Having just emerged from the chaotic era—one might say disastrous era—in which Mao Zedong had delivered such tragedies as the Great Leap Forward and the Cultural Revolution, China and its leaders began charting a dramatically different economic course which in turn required fundamental changes in the nation’s laws and legal concepts.

The year 2009 also marks the sixtieth anniversary of the founding of the PRC. That point in history, punctuated by the great celebration at Tiananmen Square on October 1, 1949, was also one of dramatic legal change in the country—in addition, of course, to being the official beginning of a momentous political transformation.

Moreover, the year 2009 marks the ninetieth anniversary of the May Fourth Movement, which also had legal reform at its core. In addition to voicing other complaints, the thousands of protesters who took to the streets of Beijing on May 4, 1919 were expressing outrage at the refusal of the negotiators at Versailles (following World War I) to honor their earlier promises to end the practice by powerful European powers (and the USA) of exercising legal jurisdiction within the territory of China on grounds that China’s own legal system was inadequate or uncivilized.

At this time of a “30-60-90” year anniversary, it seems particularly appropriate to reflect on legal reform in China, and to give special attention to the course that this legal reform has taken in the past few years. Countless books and articles have been devoted recently to explaining law in contemporary China, and much of the English-language literature offers comparisons of PRC law to US law or to the laws of other countries.

I wish to take a somewhat different approach. Instead of assessing legal reform in China on the basis of a comparison with Western legal systems—or indeed with any other contemporary system(s)—I want to offer an assessment that rests primarily on a comparison between contemporary Chinese law and dynastic Chinese law. Let me explain why I find this sort of comparison, while less common, highly worthwhile.

The Background and Aims of This Book

A few years ago I was the lead co-author of a book on Chinese legal history—*LAW CODES IN DYNASTIC CHINA*.¹ A key aim of that book was to provide, in a single volume, a concise summary of the legal history of China. My co-author and I attempted this by focusing on a single centralizing theme—legal codification—and tying the entire story to it. In the preface to the book, I explained why this approach appealed to us:

[L]egal codification is a natural theme to use in studying China. Legal codes have played a central role in Chinese law for at least two and a half millennia, although it has been a dramatically different role from that played by codes in the civil law tradition, such as Justinian’s Code of the sixth century CE or Napoleon’s of the nineteenth century. And, happily for researchers in this area, the 1990s saw important new discoveries and scholarship in the area of Chinese dynastic law codes, including the publication in English of the two most important such codes—those of the Tang dynasty ... and of the Qing dynasty...²

In this book I wish to build upon the foundation laid in that *LAW CODES IN DYNASTIC CHINA* book for the purpose of examining what I call the “modern Chinese legal identity”. As I intend to make clear in the pages that follow, by the term “legal identity” I mean that cluster of key defining features that lie at the core of a society’s law and legal tradition.

I consider this subject—that is, the modern Chinese legal identity—to be both unique and important. In a sense, of course, every country’s legal identity is *unique*, reflecting a complex “brew” of ingredients—some in-

1. John W. Head & Yanping Wang, *LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING* (2005) [hereinafter LCDC].

2. *Id.* at xii. Since our book was published, an English translation of the Ming Code has been released. See Jiang Yonglin, *THE GREAT MING CODE: DA MING LU* (2005).

digenous, some imported—that are specific to that country’s legal system alone. But China’s legal identity is unique for another reason: it features a remarkably long legal history that is largely unbroken, at least from the days of the Qin dynasty (in the third century BCE) through the end of the Qing dynasty in 1911 CE. As I shall emphasize at various points in this book, China’s law is in a league of its own when judged in terms of age, stability, and effectiveness. It is one of the three great legal traditions in the world (the other two being civil law and common law) that have been officially adopted by governments of nation-states presiding over very large and diverse populations, encompassing broad geographic areas, and enduring for multiple centuries. Yet unlike the other two great legal traditions, which encountered tumultuous political changes and numerous episodes of splintering, reunification, colonization, and independence, Chinese law remained in place, with little fundamental change, in a country that (despite some periods of disunity) was from at least the sixth century CE onward always assumed to consist of a single state. This special character of Chinese law makes it unique, and uniquely fascinating.

It is also profoundly *important*—and not just to “China experts” or curious readers or Western exporters scrambling for markets, but to everyone on the planet. Many of the rules and institutions that comprise the substance of China’s contemporary legal system have been carefully constructed to facilitate a program of economic modernization that over the past quarter-century has proven dazzling in its success. China is quickly becoming such an economic powerhouse that all aspects of that country—social, cultural, ideological, and of course legal—exercise influence on the rest of the world. In the process, China increasingly represents an alternative model for political and social organization that promises to challenge Western ideas more and more in coming years.

I believe we need, therefore, to explore and understand the essence, more than the details, of Chinese law. Hence, this book does not concentrate on substantive points of Chinese law (although many such substantive points will serve as raw material for my analysis) but rather on its spirit and soul.

That brings me to the title of this book. The main title is CHINA’S LEGAL SOUL. Of the many meanings that the word “soul” might carry, I wish to emphasize the following: “an animating and vital set of principles”; “the spiritual nature” or “central core” of a person or (in this case) a society; the “moral essence” or “animating force” or “heart” of such a person or society.³ In particular, the shade of meaning that I wish to convey is perhaps best embodied

3. I have drawn these definitions from a variety of online dictionaries.

in the term “ethic”, insofar as “ethic” is defined as “a set of principles of right conduct” or “a theory or a system of moral values”. The word “ethic” draws some of its meaning from the notion of “character”, to which the word “ethic” is related in its Greek roots.⁴ In fact, I would have titled this book CHINA’S LEGAL ETHIC but for my apprehension that using the word “ethic” in the title could be misleading—it might suggest that the book focuses on the related notion of “ethics” rather than “ethic” in the sense I intend. The risk of such confusion is heightened, of course, by including the word “legal”, since “legal ethics” is a well-known area of inquiry and scholarship.

Hence I have settled on the word “soul”, and particularly on the term “legal soul”. By “legal soul” I mean the set of fundamental and animating legal principles or values that give a society, particularly the legal system of that society, its unique spirit and character. In short, I have used CHINA’S LEGAL SOUL as the main title of the book in order to signify my desire to explore that central core (if there is one) of generally-accepted legal principles or values currently at work in China at the public level—particularly in the PRC’s legal system.⁵ As I shall emphasize in the pages that follow, the “legal soul” that I am searching for in *today’s* China (if such a “soul” exists there at all) is a contemporary descendant of the Imperial Confucianism that lay at the heart of *dynastic* China for many long centuries—a centerpiece of which was the concept of *lǐ* going right back to the days of Confucius.⁶

4. I have drawn the two quoted definitions (above) of “ethic” from the American Heritage Dictionary of the English Language, which offers the following etymological explanation of the word “ethic”: “Middle English *ethik*, from Old French *ethique* (from Late Latin *ēthica*, from Greek *ēthika*, [meaning] ethics) and . . . from Greek *ēthikos*, [meaning] ethical, from *ēthos*, [meaning] character . . .”. The same source distinguishes the word “ethic” from the word “ethics” (plural), which typically would refer to either “the study of the general nature of morals” or to more specific “rules or standards governing the conduct of a person or the members of a profession”.

5. For a set of definitions of various conceptual terms—for example, “legal soul” (or “legal ethic”), “legal identity”, and “legal system”—see below in *Notes on Language, Terms, and Technical Conventions*, where I summarize more detailed explanations offered elsewhere in the book.

6. The characterization of Imperial Confucianism—and the *lǐ* that lay at the center of it—as the “soul” of Chinese law is not original with me. See Zeng Xianyi and Ma Xiaohong, *A Dialectic Study of the Structure and Basic Concepts of Traditional Chinese Law and an Analysis of the Relationship Between Li (Ceremony) and Fa (Law)*, 1 FRONTIERS OF LAW IN CHINA 49 (2006) (asserting that in the Han dynasty, “fa’ was the body and ‘li’ was the soul” of traditional Chinese law). In other passages, these authors also characterize *lǐ* as the “spirit of traditional Chinese law”. *Id.* at 52. The concepts of *lǐ* and *fǎ* are explored in Chapter I, below.

This connection that I am drawing between past and present—that is, between dynastic China and modern China—is what inspires the subtitle to this book: *THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT*. My studies of dynastic Chinese legal history⁷ have convinced me that an understanding of modern Chinese law (or indeed a meaningful grasp of any aspect of modern China) is impossible without some familiarity with the rich tapestry of dynastic Chinese history. A central thread in that tapestry—and a key element in dynastic Chinese law—is Imperial Confucianism. Born in the 6th century BCE with the teachings of Confucius, suffering under Mengzi and Xunzi, Confucianism was crucified, dead and buried, in the third century BCE at the hands of Qin Shi Huangdi and Li Si, and then rose again from the dead in the Han dynasty through the efforts of Dong Zhongshu and a series of emperors who saw in the sophisticated teachings of Imperial Confucianism a *legal soul* or *legal ethic* by which their claim to power could be legitimized and thereby sustained. I believe these developments in dynastic China's legal heritage—which I shall summarize and discuss in Chapter I—form a necessary backdrop to a search for China's "legal soul" of today. In other words, I regard the development of dynastic Chinese law as not only an engaging story worthy of study in its own right but also as a key that can help us unlock the door to understanding the essence of contemporary Chinese law.

What I have written in this book also reflects another perspective that should be acknowledged now, at the very outset. It is a *Western* perspective and a *personal* perspective. Indeed, the subtitle to the book might more accurately read *A WESTERN AND PERSONAL PERSPECTIVE ON THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT*—but that would be so long a subtitle as to wear out any prospective reader before she even opens the book. Still, this point is important: Because I am not Chinese, I am studying this enormous topic⁸ from a "cultural distance" and with the corresponding limitations and

7. See LCDC, *supra* note 1. See also John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 *DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW* 1 (2003). I have taught Chinese law for nearly fifteen years as part of my teaching package at the University of Kansas and elsewhere, following a Fulbright lecturing fellowship in China in 1994.

8. The enormity of the subject was reflected well in Randall Peerenboom's comment that "China is like the proverbial elephant. Too big for any one person to grasp in its entirety, how we see it depends on what part we happen to grab on to." Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System"*, 2 *WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW* 86 (2003). It is worth remembering that in the story of the elephant—in which each of several blind men describes the animal on the basis of the particular part (trunk, tusk, ear, tail, etc.) that he is touching—it was possible for each

biases that afflict any foreigner examining another society's legal system. I can only hope that the shortcomings that this perspective presents will be counterbalanced somewhat by the objectivity that such a "distance" can also afford.

Structure of the Book

I shall start my exploration by identifying (in Chapter I) the features that I consider especially noteworthy in Chinese dynastic law. This exercise will take the form of a "nutshell" account of the development of Chinese dynastic law, emphasizing how the combination or "alloy" of two competing ideologies—Confucianism and Legalism—provided great strength to the legal system, especially as manifested in China's long series of legal codes. Then I shall examine these four themes: (i) the remarkable continuity of China's traditional law, (ii) how Chinese dynastic law consistently deflected, filtered, or swallowed outside influences that might easily have displaced the traditional structure had it been weaker or less well-entrenched, (iii) what role, if any, there was for the "rule of law" in dynastic China, and (iv) the manner in which Imperial Confucianism served as the "legal soul" or "legal ethic" in dynastic China.

My aim in examining these four themes in *dynastic* Chinese law will be to set the stage for identifying some points of comparison in *contemporary* Chinese law. It is this subject that Chapter II is meant to explore. Our study there will begin with a brief historical survey of the frantic spasms of law reform that began at the three times I mentioned above in referring to the "triple anniversary" that the year 2009 marks: (i) in the early part of the twentieth century (starting in fact before the year 1919, which I have used as a convenient marker), (ii) in the earliest days of the PRC (announced by Mao in 1949), and (iii) once China regained its balance after Mao's death and set about establishing a new order (in 1979).

Having laid that foundation, we shall start considering how the four themes I identified as central to Chinese dynastic law play out, if at all, in contemporary Chinese law, giving most emphasis to the law as it has developed in the most modern phase of Chinese history—namely, the last thirty years since Deng Xiaoping inaugurated a new legal regime following the death of Mao Zedong. My discussion of the first two of those four themes—legal continuity and legal insularity—will occupy the end of Chapter II. Each of the other

of the men to contradict all the others. The same is true, no doubt, in respect of this book. I imagine that many of the specific views I express in these pages can be quite plausibly contradicted by other researchers experiencing the subject from their own different perspectives.

two themes, relating to the rule of law and to the “legal soul” or “legal ethic” at work in modern China, warrants more detailed discussion. Hence, issues relating to the rule of law will receive our attention in Chapter III and issues relating to China’s “legal soul” or “legal ethic” will occupy us in Chapter IV.

The aim of this exercise as a whole, of course, is to shed some light on the modern Chinese legal identity. A summary of my views in that regard will appear at the end of the book, in the form of some “Concluding Observations”.

Throughout the discussion, I shall rely heavily on a variety of sources that I find most professional and most persuasive in their exploration of the character of contemporary Chinese law. I should emphasize, however, that I do not aim for anything like a comprehensive review of sources or perspectives. The vastness of the literature on Chinese law—contemporary as well as dynastic—would make that impossible. Instead, as explained above, I aim at the more realistic goal of offering the personal observations and impressions of an intrigued observer examining the issues from a Western perspective and hoping to make sense of a great unfolding story. Because this is my goal and approach, I have not attempted to cite authority for numerous details or propositions that a reader might expect documentation for if my work were intended as a resource purely for further academic research. It is not so intended. Accordingly, I have offered citations mainly to highlight where I have found particularly interesting perspectives that a reader might wish to examine further.

J. W. H.

November 2008

NOTES ON LANGUAGE, TERMS, AND TECHNICAL CONVENTIONS

Language

This book assumes no knowledge of Chinese language on the part of the reader. Certain Chinese words and phrases are so central to an understanding of Chinese law and culture, however, that I have made liberal use of such words throughout this book. Most of them appear in *pinyin* form—that is, by using the system of romanization adopted by the government of the PRC in 1970 for spelling Chinese characters in letters recognizable to Westerners. However, much of the literature on Chinese law and history uses the Wade-Giles system of romanization that prevailed in earlier years. When passages in this book quote from that literature, I have occasionally inserted [in brackets] the *pinyin* version for clarification—for example “Tung Chung-shu [Dong Zhongshu].” In some instances cases I have done the reverse—placed the Wade-Giles version after the *pinyin* version.

In a few cases, the *pinyin* words also include tonal markings that signal how the character is spoken. In Mandarin,¹ which has four tones, the tonal markings (using the letter “i” as an example) are: \bar{i} = first tone (high and even); \acute{i} = second tone (rising); \check{i} = third tone (falling, then rising); \grave{i} = fourth tone (falling emphatically). I have indicated the appropriate tones for a few key terms, such as *lǐ* and *fǎ* (both are third tone). I have a specific reason for doing this in the

1. Europeans in the sixteenth century gave the name “Mandarin” to the language of the capital city of Beijing, which became the standard official spoken Chinese following the move of the capital from Nanjing to Beijing in the Ming dynasty. F.W. Mote, *IMPERIAL CHINA 900–1800* 620 (1999). Mandarin is also referred to as *putunghua*.

case of *lǐ* : to distinguish between (i) *lǐ* (third tone), relating to rules of propriety that were so central to Confucian teaching and (ii) *lì* (fourth tone) meaning “sub-statute” or “codified precedent”, as explained at Box I-3 in Chapter I. The distinction between these two completely different words is clear, of course, in the Chinese characters used to express them: 礼 (*lǐ*) and 例 (*lì*). Occasionally in this book I use the Chinese characters for especially important terms.

For convenient reference, a few Chinese terms that are used often in the book are listed immediately below—in their *pinyin* forms and in three cases with Chinese characters—as part of the Glossary of Terms and Acronyms. The shorthand definitions offered there, however, should be used only as reminders of the more detailed definitions and explanations offered in the main text of the book. (These terms appear also, in *pinyin* form, in the Index.)

Glossary of Terms and Acronyms

Selected Chinese Terms in Pinyin

<i>dao</i>		way or path
<i>fǎ</i>		published law (in general)
<i>fǎzhì</i>		rule of law or rule by law
<i>guanxi</i>		(personal) relationships
<i>guo</i>		country
<i>lǐ</i>	礼	rules of proper behavior; code of propriety
<i>lǐ</i>	理	principle or rationale
<i>lì</i>	例	sub-statute
<i>minshi</i>		people’s matters
<i>renzhi</i>		rule by man
<i>shū</i>		books or documents
<i>tianming</i>		mandate of heaven
<i>xian</i> [<i>hsien</i>]		district (administrative unit)
<i>xíng</i> [<i>hsing</i>]		punishment
<i>xíngshi</i>		punishment matters
<i>xíng shū</i>		books of punishment
<i>xué</i>		school or study
<i>yamen</i>		district magistrate’s office
<i>yi</i>		according to
<i>zhong</i>		(political) leader(s)
<i>zhi</i>		administer or govern

Definitions, *pinyin* romanizations, and Chinese characters can be found in standard Chinese-English dictionaries, including the online dictionary found at <http://www.mandarintools.com/chardict.html> (visited July 2008).

The Terms “China” and “PRC”

China is a land that has been politically unified for most of the past twenty-five centuries or so. For all but the last century (more specifically, up to 1911), the predominant form of political organization was dynastic in character, controlled by emperors and their bureaucracies under a series of dynasties typically lasting two or three centuries each. (A survey of the dynasties appears in Box I-1 in Chapter I.) However, the last hundred years have seen two main forms of political organization that departed sharply from the dynastic model, at least on the surface. The first, lasting for about forty years, was that of the “Republic of China” (ROC); the second, and current, form is the “People’s Republic of China” (PRC). Naturally, I have used the term “China” to refer to the land of China all through the dynastic period. I have also used the term “China” for the last hundred years except in those passages in which more precision is required to specify the particular political regime governing (the land of) China at different times during those hundred years. For example, I refer occasionally to the Republic of China when detailing legal reform efforts undertaken by the government led by the Guomindang [Kuomintang] party—which controlled China (more or less) in the 1930s and 1940s until the leaders of that party were forced by the Communists to retreat to the island of Taiwan (Formosa), which has thereafter been known politically as the Republic of China. Likewise, I sometimes refer to the PRC in order to emphasize the governmental or political aspects of topics under discussion, as distinct from the “legal identity” of China as a cultural matter.

Other Terms

The conceptual terms listed below are important enough to the analysis presented in the book that they deserve to be described *vis-a-vis* each other. Further elaboration of most of these terms appears, of course, in the main text, and the following definitions should be regarded as merely “shorthand” in nature.

legal identity the cluster of key defining features of a society’s law and legal tradition—including its age, its degree of sophistication, its scope of coverage in terms of both population and

	geographic reach, its legal ethic (if there is one), its aspirations and attitudes, and whether or not it adheres to the “rule of law”, and in what form.
<i>legal ethic</i>	the set of fundamental legal principles or values that give a legal system its unique spirit and character.
<i>legal soul</i>	same as <i>legal ethic</i> .
<i>legal system</i>	the network of rules—both “primary” rules and “secondary” rules—and institutions governing legal relations that comprise the law applicable in a specific nation-state or similar entity in international law. ²
<i>legal tradition</i>	“a set of deeply held, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.” ³

Acronyms

The following acronyms are used frequently enough in the text to warrant listing them separately here for easy reference:

BCE	Before Common Era
CE	Common Era
CPC	Communist Party of China (also sometimes referred to in the literature as CCP—Chinese Communist Party)

2. The reference to “primary” and “secondary” rules derives from the writings of H.L.A. Hart, whose famous formulation of the concept of law posits that law (or perhaps more precisely, according to other writers, a legal system) requires the presence of two types of rules. The first type, “primary rules”, set forth straightforward guides to action, as in the case of a rule directly requiring or prohibiting some behavior (such as “pay taxes” or “stop at a red light”) or as in the case of a facilitating rule (such as those permitting the establishment of a corporation or making a land transaction). The second type, “secondary rules”, are “meta-rules” or “rules about rules”, such as rules of change (prescribing how to amend one of the primary rules), rules of adjudication (prescribing how to dispose of disputes over the meaning and application of a primary rule), and rules of recognition (prescribing how to prove that a purported primary rule does in fact have validity within the system). See generally H.L.A. Hart, *THE CONCEPT OF LAW* (1961).

3. This definition is drawn from John Henry Merryman and Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION 2* (3d ed. 2007). Merryman and Pérez-Perdomo go on to say that “[t]he legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.” *Id.*

NPC National People's Congress
 PRC People's Republic of China

Technical Matters and Conventions

In this book I have followed certain conventions on punctuation, usage, and citation that might be unfamiliar to some readers. These conventions include the following:

- I have followed the less-used but more logical convention of placing quotation marks inside all punctuation (unless of course the punctuation itself is included in original material being quoted). Doing so allows the text to reflect more faithfully how the original quoted materials reads.
- The possessive form of words that end in the letter “s” have not had another letter “s” added to them—hence “Confucius’ writings,” not “Confucius’s writings.”
- I follow the more modern approach of using “BCE” (Before Current Era) instead of “BC” (Before Christ), and “CE” (Current Era) instead of “AD” (*Anno Domini*).
- In quoting excerpts from various writings, I have omitted footnotes and internal citations without expressly indicating that fact. I also have, in some cases, altered spacing and formatting slightly for convenience and consistency, without altering the meaning of the quoted material.
- In my citations to books, I have departed from the practice (appearing in some legal writing) of putting the authors’ names in all capital letters. Instead, authors’ names for all works—books and articles and other items—appear in regular upper case and lower case letters; then titles of books appear in large and small capitals and titles of other works appear in italics or, in a few cases depending on the nature of the work, in regular font with quotation marks.
- In indicating the names of Chinese authors, I have placed the family name first (as is ordinarily done in China)—for example, Ma Xiaohong or He Jiahong—unless it is clear that the author typically follows the Western approach of placing his or her family name last, as in the case of Jianfu Chen or Yanping Wang.

Although this book is relatively short, it is designed to provide access to some more detailed and comprehensive scholarship by offering occasional citations to authorities and additional reading. These citations appear both in the form of a Selected Bibliography and in the form of footnotes. I have tried,

however, to use footnotes sparingly in order to provide as clean and straightforward a “story line” as possible.

Map 1. Modern China, with Key Rivers, Cities, and Neighboring Lands



Map 2. Modern China, with Provinces and Neighboring Lands



ACKNOWLEDGMENTS

Professor Wallace Johnson, who died just a few months ago, was not only a giant in the field of dynastic Chinese law and society but also an enduring inspiration in my own work. Wally translated into English the entire Tang Code—by “entire”, I mean not only the statutory provisions but also the sub-statutes and commentaries that bring the code’s full rich texture into view—and he wrote and taught tirelessly to share his enthusiasm for the subject with those around him. He certainly succeeded with me, as I have found Chinese legal history a compelling topic ever since Wally first gave guest lectures in my Comparative Law class in the early 1990s. Therefore, I begin my acknowledgments with a nod of deep respect and genuine thanks to Wally, who will be sadly missed and long remembered.

This is not so big or important a book as to warrant numerous other acknowledgments. As will be obvious from footnote references and from the Selected Bibliography, I have relied heavily on many authorities with far broader expertise than I could possibly bring to bear on this subject by myself. They include especially several experts writing in English—these include Derk Bodde, Albert Chen, John King Fairbank, Harry Gelber, Wallace Johnson, William Jones, Stanley Lubman, Geoffrey MacCormack, F. W. Mote, Randall Peerenboom, Pitman Potter, J.A.G. Roberts, Xin Ren, and James Zimmerman—as well as several Chinese academics writing in Chinese, including in particular Wang Zhoujun of Suzhou University, Jiang Ming’an of Peking University, Zhang Wenxian of Jilin University, and Ma Xiaohong of Renmin University. The works of these latter authors (and several others on which I have relied) appear in the journal *FRONTIERS OF LAW IN CHINA*, which presents selected publications from Chinese universities, translated into English, under the supervision of faculty editors at Renmin University, including my friend Professor He Jiahong.

The individuals who provided personal assistance to me, in such various forms as discussing, researching, reading, editing, and critiquing my work, include (most prominently) Mary Wong and Long Qinglan of Hong Kong University, Lou Jianbo of Peking University, Zhang Xiuwen and others from Renmin University, James Dunlap of the Hong Kong office of the Lovells firm,

and Jomana Qaddour, Ambereen Shaffie, Justin Waggoner, Maria Neal, and Lin Miao of the University of Kansas. A special mention is warranted for Wang Yanping, who has generously escorted me through my slow exploration of Chinese law, and Lucia Orth for her constant support and critical editing. For the guidance, help, and patience that all these friends have provided, I offer heartfelt thanks. Support from the Fulbright Foundation and from the University of Kansas General Research Fund is also gratefully acknowledged, as is the financial support of the Paul Hastings law firm, which made possible my visiting professorship at Hong Kong University in the spring of 2008, where I was so graciously hosted by my friend Douglas Arner.

Lastly, a note of appreciation goes also to my son Austen Head, who supplied two drawings for the book. The first, an image of a “molecarp” (an imaginary animal described in Chapter IV), appears on the title page immediately preceding Chapter I, below. The other image—a simple Chinese brush painting that Austen made as a child while our family lived in China—appears on the last page of the book.