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THE LEGAL CODES OF TRADITIONAL AND TRANSITIONAL CHINA,
A COMPARITIVE STUDY WITH EMPHASIS ON HOMICIDE STATUTES.

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Law, as one type of social control is closely related to customs and mores. It maintains and affects existing values and institutions, and it reflects the social structure of a particular society at a given time.¹

A.F.P. Hulsewé

This study will examine two societies separated in time, and their respective social structures as reflected in a microcosm of the laws of each. More specifically the topic of this study is the treatment of homicide in traditional China as opposed to that in transitional China. "Traditional China" as it is used here will refer to the predominantly stable society that existed from early times through the Ch'ing dynasty. It was in the Ch'ing that new influences and ideas began to transform patterns that had prevailed for many centuries -- some for as many as 23 centuries. "Transitional China" refers to the years between the height of Ch'ing and the Communist revolution in 1949. This period was characterized by the radical alteration, and sometimes destruction, of the age-old institutions and practices of traditional China.

Of particular interest here are questions concerning the "tailoring" to societal attitudes and mores of the legal codes of each time, and in particular the statutes on homicide. The first section of this paper

will deal with the adaptation of the ancient legal system to the society of traditional China. The second will examine the penal code of the early twentieth century with respect to the culture of transitional China. Particular attention will be paid to the influences of the west on both law and society during that period. A final section will attempt to compare and contrast the treatment of homicide in traditional China with that in transitional China and consider the degree to which such treatment accurately reflected the culture of each.
CHAPTER I

TRADITIONAL SOCIETY AND THE LAW

Chinese law in the traditional period was essentially an institutionalization of the Confucian values upon which the culture was based. The society was highly organized, hierarchical, patriarchal, and philosophical in nature. The Chinese believed in a continuum of man and nature, which when balanced, provided harmonious existence for all. It was the responsibility of all parties to fulfill their duties and therefore contribute to the balance so critical to this view of life. Before examining the traits of the traditional Chinese legal system that were tailored to fit that society and going on to examine instances of this as reflected in statutes on homicide, a brief look at the evolution of this system is in order.

THE DEVELOPMENT OF THE TRADITIONAL CHINESE LEGAL SYSTEM

A major aspect of the evolution of the Chinese legal system is the struggle between the Legalist school and the Confucian school of thought. The essence of the conflict between the two schools was the Confucian belief that rule should be by moral precept and example (education) and the Legalist conviction that the Confucian ideal was unrealistic -- in order to assure domestic tranquility and security, rule should be by harsh law and punishment. This struggle continued through several dynasties with the
Confucian approach eventually triumphing over the Legalist one, but certain elements of the Legalist philosophy remained embodied in the law.

Very little actually remains of early efforts at codifications of laws. Legend has it that the first Chinese "written" law was inscribed upon bronze vessels sometime in the sixth century B.C., and that these laws were exclusively criminal, although nothing now remains of these attempts.

Only descriptive information about the 資治通鑑 (Canon of laws)², said to have been promulgated in the 5-4th centuries B.C. during the Warring States period has survived. According to this information, the Marquis Wen of the state of Wei ordered a compilation of the laws of the neighboring states. The reputed editor of this canon was Li K'uei, the prime minister of that state. This document as described by a 7th century A.D. dynastic history represents an important evolutionary step in Chinese codes, for elements of its structure and some of its contents were represented in dynastic codes into the twentieth century. Of the six sections entitled "laws" (fa), that translated as "various enactments" (tze fa) was still intact in the legal code of the Ch'ing Dynasty, and that translated as "general laws" (chü fa) became the introductory section of the Ming and Ch'ing codes, which was known as "terms and general principles". The remaining sections concerned theft (tso fa), violence (tsoi fa), criminals under detention (imprisonment) (ch'iu fa), and laws on arrest (pu fa). These laws presumably prevailed until the time of the

²Translations are those of Bodde and Morris in Law in Imperial China, (Cambridge: Harvard University Press, 1967) unless otherwise noted.
Han, although there is some question as to the content of the law in the Ch’in dynasty when the Legalist school of philosophy was preeminent. The Han Code, however, was based on the Fe Ching.

With the issuance of a dynastic code in the reign of the first Han emperor (206–194 B.C.), a tradition was established wherein each dynasty issued a code under its name. It was felt that this practice strengthened the new reign and aided in the establishment of the new rulers, although quite frequently there were few, if any, substantive changes from the code of the preceding dynasty. Efforts were generally made to reduce the number of statutes from the prior code as a result of the Confucian preferences for education over regulation; the fewer the statutes, the greater the moral force of the emperor was felt to be. More discussion of this point follows below.

Hulsewé, a leading authority on traditional Chinese legal concepts, characterizes the Han law as:

... the law of the unified, bureaucratic empire, standing to all practical purposes at the very beginning of the development of this empire; although as in any human society, changes occurred constantly in the following centuries, the main principles of imperial rule as laid down by the Han persisted, even down to details in both administrative and penal law. 3

Of this set of laws, only a few fragments of the actual code remain. Knowledge of the contents and organization of the articles must be gleaned from contemporary documents such as written records and commentaries. The Shih

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Chi (Historical Records, ca. 85 B.C.) and the histories of the Former (ca. 80 A.D.) and Later Han dynasties provide some valuable insights into the constructs of this codification.

The Han Code (Han 篇) retained the six basic sections of the Fa Ching and added three further divisions on family matters (hu 增), taxes (hsing 增), and the Imperial Stables (chiu 增). Texts on homicide, mortal wounding, and some different categories of theft were also incorporated.

Not enough is known of this code to speak of its organization beyond its apparent composition of regulations divided into the general categories of Ordinances and Statutes, with some case law (analogies) included for further elaboration. This combination remained the basic composition of all subsequent codes. It is not known what constituted the difference between an Ordinance and a Statute in Han time, although by the next dynastic code that has survived (the T'ang code), they had come respectively to signify penal and administrative maxims. An intervening code, of the Sui dynasty (581-607 A.D.), is now lost.

"Confucianization" of the law (the incorporation of the Confucian li into both the letter and spirit of the law) which was only beginning in Han times had reached its height by the T'ang dynasty (618-908 A.D.). In the Han, a struggle for prominence between the Legalist school and the Confucian school was just resuming after a temporary period of legalist triumph under the Ch'in Dynasty (221-207 B.C.). In the Han legal remnants, we find

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4Dr. T'ung-tsu Ch'ü is the author of the term "confucianization of law".
only vague references to any of the Confucian Rites, but in the T'ang code there are entire sections on the subject of mourning rites and other such ceremonial and ritual matters. Violations of the stipulations on these topics resulted in punishment.

Wu Laiwei feels that a larger discrepancy between the letter of the law and its application (particularly with regard to punishments sanctioned in the law, and those actually applied) existed in the later dynastic codes than was the case in Han times. As successive codes evolved, a pattern of increasing formalization of procedures emerged which left magistrates less latitude in sentencing, especially with respect to the application and administration of capital sentences. By T'ang times, imperial review of all death sentences was mandatory, whereas in earlier days flexibility appears to have been the rule. Other procedural and contextual refinements and rearrangements took place as dynasties changed, but alterations affecting the substance and fundamental meanings of the codes were few. This sentiment is expressed, albeit a bit strongly given actual events, by another leading authority, T'ung-tsu Ch'i:

... after... law had been crystalized by the Confucianists, there were no fundamental changes in it throughout the history of China... the law retained its general characteristics for centuries, until the promulgation of modern law. This stability resulted from the fact that the social structure, in particular, the family and class system, was static. The law maintained the existing order, and thus it reflected a static society.  

The T'ang code was divided into 12 sections or books titled: Terms and General Principles (ming li), The Imperial Guard (wei chin), Administrative Regulations (chih chih), The Family and Marriage (hu hun), [Government] Stables and Treasuries (chiu k'u), Levies (shan hsing), Violence and Theft (ts'ai tso), Conflicts and Suits (tou sung), Deceptions and Frauds (ts'ao wei), Miscellaneous Statutes (ts'ai lun), Arrests and Escapes (pu wang), and Trial and Imprisonment (tuan yu). Very few of these sections were entirely new.

The Sung code, promulgated in the tenth century A.D., was the T'ang code, rearranged into 20 rather than 12 sections. The Yuan Code of the early thirteenth century was essentially identical, and the first Ming Code (of 1373-4) was also virtually unchanged from the T'ang code.

A second Ming code (1397) did represent a break with the former codes, particularly in organization, although all material attributed to Mongol influences was excised at this time, effecting some substantive changes. The format of this code was the prototype for the definitive Ch'ing codes. The number of sections was increased to 30, and they were regrouped into seven categories consisting of: Terms and General Principles (ming li), Civil Office (li lu), Revenue and Population (hu lu), Rites (li lu), War

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(Ping 10), Punishment (hsing 10), and Public Works (kung 10). The concept of statutes within statutes was introduced in this reorganization. The changed content was still in the form of commentaries, divided into statutes, ordinances, and analogies, as introduced in the Han code.

The Ch'ing codes (of 1646, 1740 and 1890), culminating in the Ta Ch'ing Li Li (the 1740 edition), remained the standard until the revisions of the Republic in the twentieth century. The Ta Ch'ing Li Li had many sections new in substance, although the format of the Ming code was retained.

CULTURAL ASPECTS OF TRADITIONAL CHINESE LAW

The legal system of traditional China was certainly not stagnant as held by Dr. Ch'6; it did change, as did the society of traditional China. However, what changes did occur were not drastic ones. Rather, the codes can truly be said to have evolved over a long period of time, and a remarkable continuity can be seen over 23 centuries of events. As shall be shown, this system was well suited to the society it served. In the following discussion, an attempt will be made to note which code is being referenced where the available codes differ. The available codes (both in terms of preservation and translation into English) are those of the T'ang and of the Ch'ing.

Staunton's translation of these categories are perhaps more straightforward for the English speaker. His rendition of the seven divisions (as he calls them) titles is: General Laws, Civil Laws, Fiscal Laws, Ritual Laws, Military Laws, Criminal Laws, and Laws Pertaining to Public Works. Sir George Thomas Staunton (translator)Ta Ts'ang Liai Lee; Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China. (London: The Stroud, 1810; reprint ed., Taipei, Taiwan: Ch'eng-wen Publishing Company, 1966)
It is especially true of traditional China that its social structure was reflected in its written laws. More than in most societies, ancient Chinese social mores, attitudes and beliefs were mirrored by those regulations which were set down in writing. As the society put great emphasis on filial piety and familial loyalty, as it was highly moral, so it was philosophically rather than divinely oriented, and as it was stratified, so was its law.

Traditional Chinese society was not legally oriented; the social order was primarily maintained by the customs and ethical norms of extralegal societal institutions such as family, clan, guild and/or community. Because these institutions were quite efficient in resolving disagreements, they sufficed for most civil disputes. In addition to social pressures which reinforced some behaviors and discouraged others, many clans had explicit rules governing the conduct of clan members and stipulating punishments for violations of these rules. These institutions were unequipped only to handle those offenses so outside the social norm as to be without prescribed behaviors, i.e., criminal offenses.\(^8\)

The formal juridical structure was considered an extraordinary and last recourse; for reasons discussed below, resort to it was viewed as

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\(^8\) The clan rules mention a large number of vices and criminal offenses which may be classified into four categories: individual indulgence and self-debasement, misbehavior that gives rise to notoriety, misdemeanors that are not serious legal offenses, and criminal offenses that are punishable by penal sentence. The rules on the whole are not too concerned with the last category, for serious crimes did not occur frequently, and if they did, the government would deal with them. What the law itself should deal with are the first three categories." Hui-Chen Wang Liu, Traditional Chinese Clan Rules, (Locust Valley, New York: J. J. Augustin, 1959), pp. 172-173
extremely undesirable. Imperial authority was reverted to only when
other societal institutions could not resolve a matter through their
customary procedures. As a result, Chinese legal codes promulgated before
the advent of the 20th century contain a heavy preponderance of criminal
law and are virtually devoid of civil (contracts, property, individual
rights) law as we know it in the West. In the words of A.D. Thomas, "law
became an institution associated almost entirely with crimes and punishments."9
Inheritance, mourning, and marriage seem to be the only non-criminal topics
dealt with in the codes, and of these, only mourning rituals were treated
in any detail.

The concepts of murder and theft are nearly universal in human
civilization and human ideas on these issues are apt to remain constant (or
relatively so). As a result, penal law is far more likely than civil law to
remain stable over a span of centuries, the more so if a dramatic change
has not occurred governmentally. Civil law, on the other hand, is likely
to change with governmental regimes: even subtle modifications in systems
of taxation, census-taking, and governmental monopolies affect and alter
mercantile proceedings and their regulations.

Although perhaps this explains why the predominantly criminal legal
codes of traditional China exhibit such remarkable stability over long
stretches of time, even coupled with the influence of social institutions
on the culture, it does not fully explain why the law did not grow to

9A.D. Thomas, Chinese Political Thought: A Study Based Upon the
Theories of the Principal Thinkers of the Chou Period, (New York: Greenwood
include civil affairs. This primarily penal bent to the ancient Chinese law is an almost unique characteristic -- most legal systems early in their development did grow to encompass civil affairs and evolved over time to include safeguards for individual liberties. This was not the case in China. Derk Bodde describes this situation as follows:

The law was only secondarily interested in defending the rights -- especially the economic rights -- of one individual or group against another individual or group, and not at all in defending such rights against the state. What really concerned it ... were all acts of moral or ritual impropriety or of criminal violence which seemed in Chinese eyes to be violations or disruptions of the social order. ...a violation of the social order really meant, ...a violation of the total cosmic order, since, in the Chinese world view, the spheres, or man and nature were inextricably interwoven to form an unbroken continuum.\(^{10}\)

This brings out another important point concerning the adaptation of traditional law to society: Although cosmological considerations (based on the movements of nature) were incorporated into both the letter and the spirit of the law, the law was regarded as in no way divinely inspired\(^{11}\). While recognizing the harmony of man and nature, the formulation of the law was not attributed to any deity. The law was authored by sages (many of whom were later practically immortalized, but were nonetheless not God-

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\(^{11}\)As put by A.D. Thomas: "Their law does not have its beginnings in commandments written by the finger of God on tablets of stone or in a ready-made code of a Sun God delivered in person to a Hammurabi. Their origins are found in the experience of human society. Divinity may have been present, but man was never absent, and the law was his evolution and not God's revelation." \textit{Chinese Political Thought}, p. 223.
figures), and was not backed by any supernatural sanctions (curses and the like) but only by the prescribed physical punishments administered by human authorities. The complete absence of any reference to divine inspiration or guidance of the law was at that time unique to the Chinese. No other system until modern times advanced a legal code without some sort of divine reference for legitimacy or justification.

Because there were no blatant religious references in traditional codes, they have generally been classified as secular. This characteristic has been attributed to the ascendancy of philosophers in Chinese society, and their tendency to search for rational explanations for all things. The euhemerization of early Chinese mythology has been cited in support of this argument.

Relative to this view, however, it must be pointed out that the same authors who state that law and religion were separate in ancient China concurrently use such terms as "sympathetic magic" and "magico-mythical" in describing the law or its development. T'ung-tsu Ch'ü holds that while Chinese law was not "God-made", nor dependent upon religion or magic for enforcement, the cosmological strains present in the law subordinating the law to nature, and in particular the four seasons, are evidence of a significant relationship between law and magic and religion.

On reflection, Ch'ü's view seems to have a great deal of validity. Bodde even coined a term for that thinking which interlaced man and nature in traditional China, terming the process which applied it to

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12Bodde, p.394.
13Hulsewé, p.5.
the law the "naturalization" of the law. None of the authors classifying
the laws as secular deny the powerful influence of Buddhism during certain
periods, nor the pervasive Confucianist influence, including incorporation
of rituals in the law, which sometimes bordered on religious.

The consequences of efforts to maintain the harmony of man and
nature show most clearly in those sections of the various codes which
delineated the seasons (or portions thereof), in which executions and
other serious legal actions were permitted or forbidden. In general,
it was believed that such actions were appropriate only in the seasons
of decay and death (autumn and winter) while spring and summer (being
seasons of rebirth and growth) were for the setting free of shackles and
prisoners. Violations of these general precepts were believed to result
in natural disasters. In times of calamities, such as droughts or floods,
cases were often reinvestigated and prisoners set free in attempts to
restore cosmic harmony and right the balance presumed to have been
upset by the promulgation of injustices.

The degree to which such beliefs were adhered varied considerably
under different dynasties. In T'ang China, the proliferation of times
during which executions were prohibited left at most one to two months
a year in which they were performed. Such performance followed only after
an elaborate set of reviews of the death sentence, final approval of
which had to emanate from the emperor himself. Bodde remarks that if one
had to be in a position to be subject to capital punishment, the ideal
place to have been would have been T'ang China.15 The influence of Buddhism

15Bodde and Morris, Law in Imperial China, p. 47.
was at its zenith during this time, and would seem to have been at least partly responsible for this set of circumstances. Neither before nor after this period were restrictions on executions so onerous. In fact, in the Ch'ing code they were drastically reduced, leaving a cumulative total of less than three months in which they were prohibited, compared to almost ten in the T'ang. Bodde attributes this to the weakened belief in the doctrine of the oneness of man and nature in Ch'ing times. This is one point refuting the thesis of Dr. Ch'ü that both legal system and the society of traditional China were static. At no time did these restrictions apply in cases of treason or in the killing of a master by a slave.

Another more basic manifestation of the belief that the total cosmic order was related to the social order was the assumption of a degree of guilt, even if innocence was eventually established. The attitude was that anyone who had so mishandled his affairs as to be involved with the law had brought disgrace upon himself and his family, disturbed the magistrate, who had other work to attend to as the chief administrative officer on the hsien level, and disrupted the natural order of things. These attitudes derived directly from the concept of responsibility.

The concept of responsibility is a fundamental one in traditional Chinese law and society. Aspects of it have already been touched on: in times of natural disasters, cases were reinvestigated and sentences reviewed (and often lessened or commuted). The motivation for this was the belief that an injustice must have occurred which dramatically upset the cosmic harmony, causing whatever calamity was in force. The only action
which would repair the imbalance was to right the original wrong. The emperor himself would often conduct these reexaminations of cases, for if an injustice accounting for the disruptions could not be found, the moral fitness of the head of state, and his mandate from heaven, would be called into question. The obvious solution in the case of a ruler no longer able to assure harmony between the "human order and universal order"16 (as Escarra puts it) was to replace him. This represented quite an incentive for the emperor to seek out and redress any injustices perpetrated in the realm!

This concept extended all through society. Just as the emperor was to provide a virtuous model for all his subjects, so too was the magistrate or the residents of this district, and also the head of a household for its dependents. In the case of a magistrate it was said: "The best magistrate is he before whom comes the fewest lawsuits."17 In the case of the head of a household, if he neglected to set a good example, he shared the responsibility for the crimes of a member of his house. In particularly heinous cases, a whole household was liable to be punished for a crime committed by one of its members. This collective responsibility illustrates the primacy of familism in Chinese society and emphasizes the point of Sir Henry Maine that: "...the unit of an ancient society was the family."18

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17 Ibid.

Beyond a philosophical repugnance for invoking the law, representing as it did moral decay the society, there were pragmatic reasons for avoiding contact with the law. Aside from the guilt by association ascribed to anyone involved with the formal legal system, and the resultant public disgrace, there was a very real likelihood of undergoing physical as well as emotional trauma. The use of torture on all parties (accused and witnesses alike) appearing before a magistrate was a common practice in attempts to establish the facts of a situation, as well as to punish any wrongdoing. Hui-chen Wang Liu reports that:

One clan rule warns its members in no uncertain terms that: "Many people do not seem to realize that litigation is dangerous... The outcome of litigation is so unpredictable. Some lose their lives and others, their family property, causing the discontinuation of the family descent line." 19

Once involved in the law, a person was totally at its mercy. There was no private legal profession to which one could turn for advice or assistance in court. Also, even though a hierarchical system of review existed, there was very little chance of appeal except in cases where capital punishment had been applied. Other clan rules warn against the varying quality of the magistrates:

Some magistrates may not look into a case carefully, but follow "their own unpredictable emotions". Under good magistrates who have wisdom and integrity, justice prevails. Under corrupt and cruel magistrates, "one has no assurance of getting justice at all". 20

19Liu, p.154.

20Ibid.
Robert van Gulik states that:

...the magistrate had full freedom to act on hearsay evidence, and to deceive, intimidate and insult everyone connected with a case. The accused could not choose his own witnesses, and legal counsel did not exist. Shouted at and reviled by the magistrate, growled at and beaten by the constables, the position of the accused was a most unfavourable one indeed. Small wonder that having to appear in court was considered by the people at large as a terrible misfortune, an experience to be avoided if at all possible. 21

In addition to all this, as Bodde remarks "Probably China is the world's only country where the true reporting of a crime to the authorities could entail legal punishment for the reporter." 22 This again was a reflection of the mores of the society: prevalent Confucian ethics held that filial piety and loyalty to ones superior were cardinal virtues. Reporting a crime committed by one to whom you owed filial respect (a parent, husband, or assorted lesser relatives) was by extension a cardinal sin meriting punishment. Needless to say, the punishment was even more harsh if the report happened to be fallacious. Although this was in direct conflict with the concept of joint (collective) responsibility (a predominantly Legalist tenet), 23 this is a prime example of the extent of


22 Bodde, Law in Imperial China, p.40.

23 This is not to say it was exclusively a Legalist procedure. The Confucian emphasis on the primacy of family and community, as well as the communal nature of Chinese society probably also contributed to the incorporation of this concept into the law. Bodde explores this on pp.28-29 of Law in Imperial China.
the final triumph of Confucianism in the law. Under Ch'ing law, a son
denouncing a father rightly (e.g. when the father did commit the crime)
was punished for his unfilial behavior by three years imprisonment and 100
blows of the heavy bamboo. An incorrect denouncement resulted in
strangulation of the son. As was the case with the prohibitions of
execution, treason was an exception to his right of concealment: there was
no penalty for reporting treasonable activities, but not reporting resulted
in execution or exile for all members of the immediate household.

A further example of the ultimate Confucianization of the law was the
vital importance of familial relationships in the determination of
sentences of the law. The codes recognized myriad distinctions based upon
the generation, relationship, and sex of the offender and victim which were
key in determining what, if any, violation had occurred. For example, a
father killing his son in the course of disciplining (beating) him did not
violate any law: the superiority of the parent was unquestioned, as was
his right to discipline a child. (There were provisions for unreasonably
disciplining and killing a child, but these were rare and there were few
instances in which they applied.) A son striking his father, on the other
hand, was a particularly serious violation of the law resulting in
decapitation whether or not the father was injured, much less killed. In
addition, a child killing a parent by accident (while attempting to
defend the parent in a fight, for example) was still subject to capital
punishment. (See further discussion below.)

Crimes within families were punished more heavily than the same crimes
directed against strangers, with the exception of theft, which was punished
less severely, perhaps because of the notion of collective ownership.
In addition to family relationships, the relative social status of persons involved with the law was vital. A person of low station assaulting one of higher station was much more severely punished than in the opposite case. In the latter, there was frequently no punishment at all. The major groups of people recognized by law were slaves, commoners, and officials. In the general case, officials committing any crime were liable to far fewer punishments than commoners. Quite often the punishment for an official who had committed a capital crime was exile or expulsion from his position instead of death. The higher the rank or age group of the offender, the greater exemption from punishment. Filial responsibilities also often merited exemption from punishment: the only living descendant of aging parents also was not subject to execution after committing a capital crime, for example, in order that he might care for his parents. Likewise, the only living male descendant of a family was also exempt from capital punishment in order that the family sacrifices to the ancestors could continue.

Wallace Johnson provides an apt summation of these points in reference to the T'ang Code that applies equally well to all of the legal codes of traditional China:

"Thus, before punishment could be administered under the [T'ang] Code, not only had the question of guilt to be decided, but also the legal status of the offender, the circumstances of the crime, and the relationship of the offender to the victim."  


25 Ibid. p.25.
In addition to the already named factors taken into account before punishment was prescribed, it was of prime importance that the punishment also fit the crime:

"Chinese law was essentially a means to restore the natural order where preventive measures to preserve that order, i.e., education, had failed. Therefore, in the first place the criminal fact is redressed, punishment of the offender comes in the second place. The fact that punishment is the reaction of authority upon disruption of the natural harmony accounts for the symbolic character of punishment." 26

To this end, there existed five punishments, each of which had several subcategories. The five were: beating with a light stick, beating with a heavy stick, penal servitude, life exile, and death. The differentiations within these categories were matters of degree. For the beatings with either the light or heavy bamboo, it was the number of blows that varied with the severity of the crime. For the penal servitude, the number of years. For the exile, the distance from the home province, and for death, the method varied. Thus, the punishment for crimes particularly reviled (e.g., parricide, regicide, treason, etc.) was particularly dreadful. It was referred to as "lingering death", or death by slicing. Its purpose was the total destruction of the criminal, and it was executed by slicing the body to pieces while the offender was alive. The codes were always quite explicit about what crime merited which punishment, and to what degree.

The extreme detail of the codes will be illustrated in the discussion on the treatment of homicide in traditional China.

CHAPTER 2

HOMICIDE STATUTES IN TRADITIONAL CHINA

The statutes on homicide in traditional Chinese law provide a particularly apt illustration of the hybrid formed by the intermingling of Confucian ideals and Legalistic philosophy. Confucian mores permeated the society of ancient China. Likewise, they permeated the law. Submission to one's elders and superiors was a basic tenet of this way of life. Violations of this were considered heinous crimes. The belief that man and the universe were closely interrelated was commonly held. The law contained many provisions for the restoration of balance to that relationship when upset by the actions of man. In the hierarchical society there were clear guidelines which defined to whom one's loyalties and responsibilities were owed. The legal manifestations of this are discernable in the concept of collective responsibility and in the gradations of crime based on familial relationships and social status. The myriad legal adaptations of Confucianism will be further addressed in later discussion.

That remnants of the Legalistic approach to governing were embodied in the law is clear; one has only to look as far as the titles of the homicide statutes in the Ch'ing dynasty legal codes for this to be forcefully brought home:
Book II -- Homicide

Preconcerted homicide; Murder
Murder of an Officer of Government
Parricide
Killing an Adulterer
Widows Killing Their Deceased Husband's Relations
Murder, with the Intent to Mangle and Divide the
Body of the Deceased for Surgical Purposes
Rearing Venomous Animals, and Preparing Poisons
Killing with an Intent to Kill, and Killing in an Affray
Depriving of Food or Raiment
Killing or Wounding by Play, by Error, or Purely
by Accident
A Husband Killing his Culpable Wife
Killing a Son, Grandson, or Sis xx, and Attributing
the Crime to an Innocent Person
Wounding Mortally or Otherwise by Shooting Arrows
and Similar Weapons
Wounding Mortally or Otherwise by Means of Horses
and Carriages
Practitioners of Medicine Killing or Injuring
Their Patients
Killing or Wounding by Means of Traps or Swings
Occasioning the Death of an Individual by Violent
and Fearful Threats
Compromising and Concealing the Crime of Killing
an Elder Relation
Neglecting to Give Information of, or to Interfere
and Prevent a Violent Injury which is Known
to be Intended1

The Ch'ing legal codes, in the case of homicide, differentiate on the basis of familial relationships of the involved parties, their ages, the method of murder (or the attempt), intent, and vocation. Of the twenty statutes in the book on homicide, seven explicitly mention family or marital relationship in their titles: Parricide; Killing an Adulterer; Widows Killing their Deceased Husband's Relations; Murder of Three or More Persons in One Family; A Husband

Killing His Culpable Wife; Killing a Son, Grandson, or Slave and Attributing the Crime to an Innocent Person; and Compromising and Concealing the Crime of Killing an Elder Relation. Of these, only one involves the case of a superior (elder) relative killing an inferior one. This is not the Confucianist ruling by moral precept and example, but the Legalist ruling by law. The specificity of the statutes demonstrates the Legalist's penchant for describing misbehavior and its results. The degree to which this manner is used in lawgiving is characteristically and uniquely Chinese. The contents of the statutes on homicide mirror the values of the Confucian society, but the form reflects the convictions of the Legalists.

One illustration of the specificity of the homicide statutes lies in the differentiation provided for a murder committed by accident as opposed to an intentional homicide. In the statute entitled "Killing or Wounding by Play, by Error, or Purely by Accident", it is held that in the case of a killing caused by a true accident, the payment of a fine to the family of the victim by the culpable individual is sufficient, and that no other punishment is required or necessary. The following excerpts from a single statute typify the great detail found in the code. What circumstances constitute a true, or "pure", accident are carefully enunciated:

By a case of pure accident, it is understood a case of which no sufficient previous warning could have been given, either directly, by the perceptions of sight and hearing, or indirectly by the inferences drawn by judgment and reflection; as for instance, when lawfully pursuing and shooting wild animals, when for some purpose throwing a brick or a tile, and in either case unexpectedly killing any person; when after ascending high places, slipping and
falling down, so as to chance to hurt a comrade or beholder, when sailing in a ship or other vessel, and driven involuntarily by the winds; when riding on a horse or in a carriage, being unable, upon the animal or animal's taking fright, to stop or govern him; or lastly, when several persons jointly attempt to raise a great weight, the strength of one of them failing, so that the weight falls on, and kills or injures his fellow-labourer. — in all these cases there could have been no previous thought or intention of doing an injury, and therefore the law permits such persons to relieve themselves from the punishment provided for killing or wounding in an affray, by a fine to be paid to the family of the deceased or wounded person, which fine will in the former instance be applicable to the purpose of defraying the expense attending the burial, and in the latter, to that of procuring the medicines and medical assistance. 2

In addition, some circumstances not considered accidents are described:

If any person, knowing that a place resorted to in order to ford a river, is deep and full of mud, deceitfully represents it to be shallow and good ground; or, knowing that the planks of a bridge or ferryboat are rotten, and therefore not trust-worthy, deceitfully represents the same to be good and secure, such person shall in either case be chargeable with the consequences according to this law; — when, therefore, any individual is induced on the strength of such wilfully false information to cross the water, and is drowned, or in any manner injured by making such attempt, the offending party shall be deemed guilty of playing with the means by which he was aware that an individual might be killed. 3

2Ibid., p. 314.

3Ibid., p. 313.
And covered in this statute is the case in which a person premeditatively plans to kill one person but kills another by mistake; this offender receives the same punishment that is applied in any case of intended homicide, meaning (barring no mitigating circumstances, that is). An accidental death resulting from horseplay or brawling, whether the victim was provoked or not, carries the same penalty as any death resulting from brawling, strangulation. This was a less serious than if the death were intentionally caused, but it is still a capital crime.

Explicit in both statutes covering deaths caused by brawling is strong disapproval for such behavior: for the instigator of an affray, whether he actually engages in it or not, it is stipulated that he shall be punished with at least 100 blows and perpetual banishment of 3000 li. The statute on accidental death and death resulting from play is worded in such a manner as to indicate that the offender ought to have known better than to engage in such behavior: "All persons playing with... any weapon, or other means whatsoever, in such a manner as obviously to be liable by so doing to kill...". In either case, while the penalty is less than that provided for a premeditated or intentional killing, the occurrence of a death increased the gravity of the offense of brawling.

Quarrelling and fighting, and abusive language were such grave breaches of the social order by themselves that an entire book is devoted to each in the division of the penal code on criminal laws. The book on quarrelling and fighting contains such detail that it is even longer and has more articles.

"Ibid."
(statutes) than the book on homicide. It also differentiates much more thoroughly on the basis of family relationships than does the book on homicide. Again one sees the form of the Legalist reinforce the values of the Confucian society.

The incorporation of traditional Chinese beliefs on the harmony of man and nature into the law has already been discussed. It was believed that the actions of man and nature were related and that any injustice could affect the cosmic balance. Thus it was important that neither state nor individual perpetrate injustices. In times of natural disaster investigations were often reopened for recent cases to discover and eliminate any possibly unfair punishments. Ch’t presents a statement made by a 5th century Minister of Justice:

Now there are more than one thousand jails in the various local governments. If there is a case of injustice in each prison during the period of a year, then more than one thousand innocent people will be killed. The grievances of the dead will interfere with the harmonious order of nature. This is of great importance to a sage ruler, who should be careful about the causes which bring about such a result. 5

He also cites a late Han case in which:

In A.D. 59 it was reported that there was a drought in the capital; for this reason the Empress Dowager went personally to investigate the various cases up for trial. She found a man who had been falsely charged with murder and forced by torture to confess. The magistrate was put in jail, and rain fell before she returned to the palace. 6

5Ch’t, p. 214.
6Ibid.
Another method ... attempting to right an imbalance, or of attempting
to assure harmonious circumstances, was to declare a general amnesty in
which prisoners had their sentences reduced or lifted. "In Han times an
amnesty was generally declared during an eclipse of the sun, during an
earthquake or a blizzard." In addition, Hulsewé records many cases of
amnesties being granted on the accession of a new ruler or birth of an heir
to create favorable cosmic conditions.

The efforts of the state to prevent or to remedy any imbalance in the
crucial harmony by specifying the seasons appropriate for governmental taking
of life were introduced earlier. Bodde states that in the Ch'ing dynasty,
the months in which executions were forbidden (the seasons of growth and
life) were restricted to only the first and sixth solar months, and several
days surrounding the Winter and Summer Solstices. The periods in which
executions were allowed were then much lengthier than during earlier
dynasties (in particular the T'ang through Ming dynasties) in which only the
autumn and winter months were deemed appropriate for life-taking.

However, it was not only executions which were believed to have
effects on the cosmic harmony. Lawsuits and governmental actions could
also be deemed responsible for cosmic discord. Hulsewé reports the
explanation of a Han-time Yin-Yang specialist in 7 B.C. for the number of
calamities that had recently occurred: "recently great lawsuits have been
tried during the three months of spring. . . . To reward and punish without
regard to the seasonal prohibitions will make it impossible to attain

7Ch'ü, p.215.
harmony, even though one has the intentions of (the paragons of antiquity, the mythical emperors) Yao and Shun." He also records an edict of May 17, 76 A.D. "deploiring the decline of agriculture due to a cattle disease resulting i.e. in higher grain prices and hardship, it was ordered that investigations into crimes not punishable by death should be postponed until "the beginning of Autumn", i.e., until approximately 7 August."^ 9

The symbolic nature of punishments was yet another manifestation of incorporations of cosmological beliefs into the law. Chinese law was primarily concerned with the restoration of the natural order. Hence, punishment sought first to atone for the crime, and second to punish the criminal. (See Chapter 1.) Meijer explains the symbolic importance of the gradation of punishments as an attempt to distribute the severity of punishment to correspond to the seriousness of the disturbance of the natural harmony. While this relationship is not clear for the lesser punishments, it is abundantly clear for the capital penalties.

For capital punishment, three separate methods of execution were applied to distinguish the severity of the offense. Strangulation was the least severe method of execution. Decapitation was a more severe punishment, with the dreadful "lingering death (death by slicing) representing the ultimate

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8 Hulsewé, p. 105.
9 Ibid.
10 Meijer, p. 32.
penalty. Although generally more painful (and longer lasting) than
decapitation, strangulation was considered the most desirable of the three
modes of execution because it left the body of the offender intact. In this
way, his soul could continue to inhabit his body, and he would not have been
guilty of unfilial behavior by mutilating (or causing to be mutilated) the
body bestowed upon him by his parents. There were two degrees of
strangulation: after the assizes, or immediately. After the assizes was, of
the two possibilities, the lesser punishment, for there remained the
potential for review of the sentence, redemption, or pardon. The homicides
for which strangulation was the punishment included: being an accessory to
premeditated homicide; killing in play or in error; the killing of a culpable
wife by her husband when the wife was not culpable of a crime deserving of
death; causing the suicide of an elder relation (to the first degree) by
threatening them; and being an adulterer who killed the husband of his
paramour, but without the wife's (i.e., the paramour's) contrivance.

Decapitation also had the degrees of being performed immediately or
after the assizes. Among the crimes for which decapitation was prescribed
were: premeditated homicide; murder of an officer of government; conspiring
to commit parricide; an adulterer conspiring with a guilty wife to kill the
husband; accessories to the crime of murder with intent to mangle and divide
the body of the deceased for magical purposes; rearing venomous animals; and
a killing in an affray when the intent was to kill.

The most severe punishment, li ch’ih (death by slicing, or lingering
death) was reserved for the most heinous of crimes. These included:
parricide; murder of three or more persons in one family; murder with an
intent to mangle and divide the body of the deceased for magical purposes; and all of the offenses known as the "Ten Abominations" (shih o), or as Staunton translates them, "Offenses of a Treasonable Nature". These include Rebellious, Disloyalty, Desertion, Parricide, Massacre, Sacrilege, Impiety, Discord, Insubordination, and Incest. None of the authorities are in exact agreement as to exactly how li ch'ih was administered; it consisted of a series of cuts (from 8 to 120, depending on the authority) mutilating the body of the offender, as he was tied to a cross. Bodde quotes Shen Chi-pen (a Ch'ing legal scholar) as remarking that the codes do not describe the procedure for this punishment, making it "an esoteric technique individually transmitted by each executioner". Alabaster describes it the following way:

...the offender is tied to a cross, and, by a series of painful but not in themselves mortal cuts, his body is sliced beyond recognition... This punishment... is not inflicted so much as a torture, but to destroy the future as well as the present life of the offender—he is unworthy to exist longer either as a man or a recognizable spirit... As spirits to appear must assume their previous corporeal forms, he can only appear as a collection of little bits. 12

Bodde quotes 8 as the standard number of cuts (mentioning the possible greater numbers), while Gray relates the numbers 120, 72, 36, and 24 as the standards. He reports that "Should there be extenuating circumstances, his

11 Bodde and Morris, p. 93.
12 Ibid.
[the offender's] body, as a mark of imperial clemency, is divided into eight parts only. Alabaster denies that it is a lingering death, saying that the "coup de grace" is generally administered on the third cut. This is not generally supported by other reporters. Regardless of the details of its implementation, this punishment was reserved for the most serious of crimes, and went to extremes to assure that the offender would have no later life, and to re-establish the natural order. In fact, it mattered little if the offender died before this sentence could be executed; li ch'i h was performed on the offender, dead or alive, so important was its cosmological function.

Punishment, though, was not reserved solely for the perpetrator of an offense. For those who surrounded a violator of the law, and did nothing to stop (or later, report) the violation, the law also contained

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14 "The punishment of twenty-four cuts is inflicted as follows: the first and second cuts remove the eye-brows; the third and fourth, the shoulders; the fifth and sixth, the breasts; the seventh and eighth, the parts between each hand and elbow; the ninth and tenth, the parts between each elbow and shoulder; the eleventh and twelfth, the flesh of each thigh; the thirteenth and fourteenth, the calf of each leg; the fifteenth pierces the heart; the sixteenth severs the head from the body; the seventeenth and eighteenth cut off the hands; the the nineteenth and twentieth, the arms; the twenty-first and twenty-second, the feet; the twenty-third and twenty-fourth, the legs. That of eight cuts is inflicted as follows: the first and second cuts remove the eye-brows; the third and fourth, the shoulders; the fifth and sixth, the breasts; the seventh pierces the heart; the eighth severs the head from the body." Gray, pp. 59-60.
provisions: "The head inhabitant of the village or district, when privy to the commission of, or the design to commit this crime, and not giving information thereof, shall be punished with 100 blows; but if really ignorant thereof, he shall not be liable to any punishment." 15 However, the law did not stop with only persons privy to knowledge of an offense. The concept of collective responsibility (introduced in Chapter I) extended punishment much farther. Gray reports two cases of this sort. While neither represent homicide cases, they do show the seriousness with which crimes against parents were taken. The first shows how the magistrate and district were held accountable for crimes occurring within the district:

The punishments inflicted upon sons or daughters who beat their parents are in some instances of a far more severe nature than any I have as yet recorded. In a case of which I read, where a son, aided by his wife, had beaten his mother, both offenders were decapitated. The mother of the son's wife was, at the same time, severely flogged, and then sent into exile. The students of the district in which the crime occurred were not allowed, during a period of three years, to attend the literary examinations. The magistrates were, one and all, deprived of their offices and banished; and the house in which the offender lived was razed to the ground. This is said to have taken place during the reign of Ka-hing. 16

The second shows punishment meted out not only to the direct offender and the officials of the district, but the family, neighbors, and colleagues:

In 1865, a man named Chaong An-ching, aided by his wife Chaong Wong-shee, flogged his mother. Upon the circumstances being made known to Tung-chee, in whose reign the crime was perpetrated, an imperial

15Staunton, p. 309.

16Gray, p. 237.
order was issued, to the effect that the offenders should be flayed alive, that their bodies should then be cast into a furnace, and their bones, gathered from the ashes and reduced to a powder, should be scattered to the winds. The order further directed that the head of the clan to which the two offenders belonged, should be put to death by strangulation; that the neighbors living on the right and left of the offenders should, for their silence and non-interference, each receive a flogging of eighty blows, and be sent into exile; that the head or representative of the graduates of the first degree (or B.A.), among whom the male offender ranked, should receive a flogging of eighty blows and be exiled to a place one thousand li distant from his home; that the grand-uncle of the male offender should be beheaded; that his uncle and his two elder brothers should be put to death by strangulation; that the prefect and the ruler of the district in which the offenders resided, should for a time be deprived of their rank; that on the face of the mother of the female offender four Chinese characters expressive of neglect of duty towards her daughter should be tattooed, and that she should be exiled to a province, the seventh in point of distance from that in which she was born; that the father of the female offender, a bachelor of arts, should not be allowed to take any higher literary degrees, that he should receive a flogging of eighty blows, and be exiled to a place three thousand li from that in which he was born; that the mother of the male offender should be made to witness the flaying of her son, but be allowed to receive daily for her sustenance a measure of rice from the provincial treasurer; that the son of the offenders (a child) should be placed under the care of the district ruler, and receive another name; and, lastly, that the lands of the offender should for a time remain fallow.17

The basic (underlying) framework of the statutes on homicide, as in all of Chinese law and society is the family. Over and over, it has been shown how the family was of primal importance in the laws; in the very

definitions of crimes familial relationships were key, and in determining punishment, familial relationships were crucial. All else was built on top of the basic structure provided by the family and the role it played in society.

As age was superior to youth, and man to woman, in the society, 'it was reflected in the law. Parricide was classed as one of the ten "Abominations" -- short of treason, hardly could a worse offense be committed. The statute on parricide (more aptly translated by Bodde as "Premeditated Homicide of Parents or Grandparents")\(^\text{18}\), despite its title, deals with homicide committed by, as well as on, ascendant relatives. The statute itself demonstrates the values of the society concerning relatives of differing ranks. First stated are the punishments for killing an elder relative:

\begin{quote}
Any person convicted of a design to kill his or her father or mother, grand-father or grand-mother, whether by the father's or mother's side; and any woman convicted of a design to kill her husband, husband's father or mother, grand-father or grand-mother, shall, whether a blow is, or is not struck in consequence, suffer death by being beheaded.
\end{quote}

In punishing this criminal design, no distinction shall be made between principals and accessories [sic], except as far as regards their respective relationships to the person against whose life the design is entertained. If the murder is committed, all parties concerned therein, and related to the deceased as above-mentioned, shall suffer death by a slow and painful execution. If the criminal should die in prison, an execution similar in mode shall take place on his body. The accessories more distantly related, shall be punished according to the law. ... \(^\text{19}\)

\(^\text{18}\)Bodde and Morris.

\(^\text{19}\)Staunton, p. 305.
"Slow and painful" execution here refers to a certain setting. The crime of parricide is described in the section detailing the Ten Abominations as a "...crime of deepest dye; for such a violation of the ties of nature, which are constituted by the Divine Will, is in every case an evidence of the most unprincipled depravity." 20 The crime of killing (or wounding) a junior relation is somewhat different:

The punishment of entertaining a design to kill a junior relation within any of the aforesaid degrees of connexion or consanguinity, shall be two degrees less severe than that elsewhere provided in the case of killing with intent to kill, such junior relation. The punishment of wounding with an intent to kill, such junior relation, shall be less severe than that of killing, by one degree; when the murder is actually perpetrated, the punishment shall be the same as that already stated to have been elsewhere provided. 21

* Section CCCXVII. -- Striking a Relation in the second, third, or fourth Degree: --If the wound occasions death, the offender, in all the above cases, shall, whether killing with or without a previous design to kill shall suffer death by being strangled. 22

Ch'ing reports that even this was not always the case, due to the authority of parent over child: "In later times, the parents of a child who had been unfilial to the point of scolding or beating them were not found guilty if they killed him for such behavior. There are even cases where parents were not found guilty when the child was killed "inhumanely". A case from Ch'ing times throws light on these points:

20 Ibid., p. 3.

21 Ibid., pp. 306 and 344.
Wang Ch'i's eldest son, Wang ch'ao-tung, hated his younger brother. At one time, the former chased the latter, knife in hand. The father caught Wang ch'ao-tung, tied his hands together and scolded him. The son answered back. This so angered Wang Ch'i that he buried his son alive. He was sentenced by the General of Chi-lin for killing his son inhumanely after the latter had disobeyed instructions. But the Minister of Justice held that since the son who scolded his father was punishable by death, the case should not be considered under the article that dealt with a child who was killed because he had disobeyed instructions. As a result, Wang Ch'i went unpunished."

Bodde relates a case, translated from Ch'ing casebooks, in which "Wu Ta-wen, with the connivance of Ch'a Ch'uan-kuei, killed his own son Wu Yen-hua". In this case, Wu Ta-wen was committing adultery with Ch'a Ch'uan-kuei's wife (a privilege which he paid Ch'a for). Wu Ta-wen, Ch'a's second son, by refusing to keep quiet and countenance the situation, caused the eviction of the Wu family (including the Ch'a couple) from one set of quarters, and caused so much friction that Ch'a Ch'uan-kuei was preparing to move himself and his wife. Wu Ta-wen, to prevent this from happening (fearing, it is reported, that his affair with Mrs. Ch'a would then end), conspired with Ch'a to kill his son. Ch'a lured the son to a secluded palace, where Wu Ta-wen cut his throat.

The Board of Punishments, in reviewing this case responded thusly:

"We find it extremely cruel of Wu Ta-wen to have killed his son with premeditation because of lustful desire for an adulterous relationship."

They continue, to affirm the sentence imposed by the Provincial Court of 60

22Ch'ü, p. 24.
blows of the heavy bamboo and one year penal servitude for the father. His
complice received 100 blows of the heavy bamboo and life exile. Bodde's
comment is that "This disparity illustrates the Confucian emphasis upon
seniority within the family, under which crimes of parents against
offspring are punished much more lightly than are the same crimes when
committed outside the family, whereas crimes of offspring against parents
are punished with correspondingly greater severity."\(^23\)

As a final illustration of this principle, Robert Van Gulik, in one of his
annotations to a case he translated in T'ang-Yin-Pi-Shih, tells of a case in the
ninth century A.D. under Emperor Wen-tsung (827-840 A.D.):

A mother flogged her stepdaughter who died as a result, and the death penalty was proposed for her.
(The Minister of Justice) opposed this on the
ground that corporal punishment inflicted by a
member of an older generation is permitted; moreover,
since her son (i.e. the stepdaughter's husband) was
still alive, it was against educational principles
if a mother would be punished for an offense against
a son's wife. The Emperor decided that the mother's
death sentence would be commuted.\(^24\)

As can be seen, the very basis of the traditional Chinese legal
system was at great variance with that of Western legal systems and
culture. In fact, the conflicts were so basic that when China was
opened wide to the West in the latter part of the 19th century, some
resolution had to be found. This long and painful process will be
explored in the following chapter.

\(^{23}\) Bodde and Morris, pp. 317-18.

\(^{24}\) Gulik, p. 130.
CHAPTER 3

TRANSITIONAL SOCIETY AND THE LAW

The period known as "transitional" in Chinese history probably began around the turn of the 19th century. In this study the focus will be on the end of the period when all of the trends which characterized the era were accelerated and exaggerated: that is, the last decade of the Ch'ing through the chaotic years of the Republic.

LATE CH'ING GOVERNMENTAL AND POLITICAL ATMOSPHERE

The final years of the Manchu dynasty were marked by frantic reform efforts in an attempt to retain power. These efforts were catalyzed by the Boxer Rebellion, which finally drove home to the Dowager Empress Tz'u-hsi that symbolic and insincere gestures of reform would not appease the people, her political opponents, or the foreign powers beginning to encroach on her rule. The conditions which precipitated the need for these reforms will be outlined below.

It is this author's contention that the conditions prevailing from the terminal years of the Manchu dynasty through the early years of the Republic were similar to the conditions which had characterized the transition from one dynasty to the next throughout Chinese history. Thus the transition may be viewed as another enactment of the Chinese dynastic cycle. Briefly,
the term "dynastic cycle" is applied to a recurring pattern in the rise and fall of dynastic fortunes in Chinese history. Essentially, the cycle works as follows: a dynasty is founded by a dynamic individual able to assemble a powerful enough coalition to overcome an established (but usually weakened) ruling house; he works hard and rules capably consolidating his power and accumulating wealth; he passes his rule onto a successor who continues this upward building trend or not (affects eventual length of dynastic rule); years of stability (often a century or more) ensue; successive rulers, raised in power and wealth, and usually lacking the talents of the founder, grow lax, and the quality of rule declines; the government, being unresponsive to the needs of the people (particularly evident in times of natural disaster) is opposed from within; a state of unrest becomes the norm until a new individual is able to amass enough strength to challenge the established reign and the cycle begins anew. There are, of course, many variations on this basic theme, such as foreign pressures on a weakened dynasty, and the durations of time involved vary considerably depending on the circumstances. The underlying pattern, however, remains the same.

The Manchu dynasty's period of stability and power lasted more than a century, starting with its final destruction of Ming loyalists in 1683 and continuing into the 19th century. This period was characterized by peace, prosperity, and myriad cultural achievements. Education was emphasized and scholars assumed a renewed and reinvigorated prominence.

But as China entered the 19th century there were foreshadowings of decay. These were not heeded and the dynasty embarked on a period of rapid decline. Natural disasters (floods and droughts), increasing population
and its associated problems, internal rebellions, and foreign wars combined to increase governmental expenditure to the point that by midcentury it exceeded revenues. Prior to this time, the Imperial treasury had always shown a surplus, but despite the institution of new taxes, the government could not keep up. The drain on the treasury continued year after year until a sizeable deficit accumulated, substantially weakening the dynasty. Corruption, already a problem within the administration, became rampant as the government began to sell public offices to raise revenue. Factions abounded. The foreign loans which had become the mainstay of Ch'ing finances weakened the position of China in international relations. A slow but steady influx of Western ideas and ways began to produce new schools of thought and weakened the foundations of the kinship society upon which the monarchical system was based. The dynasty of the Manchu's was on a downward leg of the dynastic cycle.

The degeneration continued and accelerated through the latter half of the 19th century until the royal family was forced to institute corrective procedures. In the dynastic cycle, an able ruler may reverse a downward trend and revitalize his dynasty by taking decisive action. Unfortunately, the Manchus were not blessed with such a ruler, and the Ch'ing dynasty continued to weaken. Reforms to meet the needs and problems of the nation were nominal at best. It was the calamitous Boxer Rebellion that finally demonstrated to the Empress Dowager Tz'u-hsi the need to inaugurate some changes, if only to stave off more Western interference in China's internal affairs. These reform efforts, once begun, proceeded extremely slowly, as the Empress stalled and delayed. Her central
concern was the preservation of her power, and she strongly resisted potential threats to it. Many genuine reformers attempting to work from within the government were discouraged by her attitude and new opposition to the dynasty resulted.

China was being called upon to enter the modern age, as represented by the West, and was ill-equipped culturally to do so. Other nations had managed to modernize despite obstacles, however, and China and her invaders (both military and cultural) had always managed to achieve symbiosis in the past. Why they did not in this instance is an interesting problem. It is held by some authors that had the Manchus, and Tz'u-hsi in particular, been more adaptive, the monarchical system, although radically altered, might have survived as did other monarchies of the period (for example, those of Japan and some European nations). But the monarchical system, as China had known it for centuries, did not survive its painful introduction into the modern world. In its stead came a series of attempts at governing, known collectively as the Republican era.

GOVERNMENTAL AND POLITICAL ATMOSPHERE IN THE REPUBLICAN YEARS

Many of the governmental reforms adopted by the Manchus were double-edged: though essential if the dynasty were to be rescued, many were also subversive to the continued existence of the dynasty. One vital example was the building of a new army. This generated costs that could not be borne by the government without increased taxation and foreign loans. The soldiers were foreign-trained, and their
loyalties were not to the dynasty, but to their individual commanders. One such leader was Y'fan Shih-k'ai, who was instrumental both in forming the army and in the overthrow of the dynasty. Another example was the educational reforms implemented. These included the abolition of the examination system and the foreign education of students. The removal of the examination system added to the corruption in government by eliminating any proof of merit in the selection of public servants. The foreign education of students fired their nationalism, directed against the Manchus, and stirred their revolutionary zeal. While the political reforms formally centralized power in the hands of the Manchus, they also provided forums for anti-Manchu sentiment, and eventually led to provincial power bases for those opposing the dynasty.

The revolutionary movement, founded in the 1890's by Dr. Sun Yat-sen, first tried to overthrow the government in 1895. But by 1908, the revolutionary movement was in a state of disorganization and decline. The 1911 revolution was actually triggered by an accidental bombing. The revolutionaries, lacking the power to carry through what had been started, turned to the provincial assemblies. The provincial gentry rose up, and most of the assemblies declared autonomy from the dynasty. Sun Yat-sen was called upon to serve as Provisional President of the autonomous provinces. In Peking, where the death of the Empress Dowager in 1908 had left the dynasty headed by a child, Y'fan Shih-k'ai was appointed Governor-General to quash the rebels. Through his control of the armed forces, and with the backing of foreign powers, he quickly secured the abdication of the Manchus, the assignment of Sun Yat-sen, and installed himself as Provisional President.
Within three years, Yuan attempted to get himself elected Emperor, and discontent and revolution once again spread across the nation. By 1916, it was clear that the 1911 revolution had failed. The next decade witnessed the total disintegration of the Chinese nation socially, politically, and geographically as it splintered into militarized fiefdoms under the control of warlords. The era of Warlordism brought continuous warfare, ever increasing taxation, and the brutalization of the countryside.

Although the 1911 Revolution did not achieve its goals, and the nation plunged into a chaotic state for a number of years, both it and the decade of Warlordism contained positive elements: nationalism was on the upsurge, and the economy, while not prospering, did continue to grow. In addition, China was once again seeing a revitalization of its intellectuals, as in the 1900s of the period ideas were free to take root and grow. The entire era was infused with a sense of vitality and excitement.

The May Fourth Movement was the major intellectual force of the Republican era, and has provided many of China's modern day leaders. A new generation striving to break with the traditions of the past and to create a new society was coming of age. This intellectual movement attacked Confucianism and traditional ways, including the formalistic language of the literati, and fostered nationalistic sentiment directed against the foreign powers attempting to usurp power. Many of the intellectuals saw Westernization as the solution to China's woes, although they divided sharply as to how or at the implementation.
of new ways should go. Some advocated selective, and some total Westernization, but most were in agreement that the West had some things that China and her people needed. Despite this, the revolution in values taking place among the intellectuals was not shared by the bulk of the population, most of whom continued to live according to the traditional ways. This led to an acute dichotomy in values between the people and the elite who were leading China in new directions during the Republican years.

In addition to these intellectual developments, the Warlord years saw the birth of the Communist Party, and the revitalization of the revolutionary groups under the leadership of Sun Yat-sen. The decade dominated by Warlordism in the provinces found the Communists and the Kuomintang striving to create some form of coalition to restore order in China. precarious throughout their period of coalition, as neither group following the death of Sun Yat-sen in 1925, and the assumption of power by Chiang Kai-shek, the Kuomintang-Communist alliance began to crumble.

Chiang was never completely successful in his attempts to unite China. With military aspects of the party in domination, he began to systematically suppress mass organizations and dissenters. Civil strife was rampant through 1931, and political repression intensified. The government did not become a unifying force, partially because it was so rent with factions as to be ineffectual, and partially because Chiang became more and more a personal dictator. The needs of the peasants, suffering from years of warlord destruction to the rural economies, were not met, nor were the needs of the
nation as a whole. Nationalist resources were not devoted to rectifying the economic or social problems of the people, and economic difficulties were further intensified by natural disasters. As general dissatisfaction increased, so did governmental repression. This cycle of governmental inefficacy and inattention to the tasks of national reconstruction on one hand and increasing fascism on the other had a catastrophic impact on the quality of rule.

The invasion by the Japanese in 1937 marked the beginning of the Sino-Japanese War, and signaled the end of Nationalist rule. For eight years, the Nanking government fought to repel the Japanese. Following defeat of Japan, a state of civil war reigned until the triumph of the Communists in 1949, and the flight of the Nationalists to Taiwan.

Throughout this period, despite the impoverishment and dissatisfaction of the countryside, the vast majority of rural residents remained largely unaffected by the new cultural and social movements, continuing to live by traditional Confucian values.

SOCIETAL ATMOSPHERE

The drastic changes taking place from the turn of the 20th century on were altering the very fabric of Chinese society. The population explosion and the force of the invasion by the West, as well as the technological superiority demonstrated by the West, represented unprecedented threats to Chinese culture. A standard text on Chinese history, in discussing the
social changes of the late transitional period make this sweeping statement:

The kinship society of China, with its age-old customs, values, and emphasis upon the family and clan as the basic units, was shaken to its foundations during the last decade of the dynasty. The Confucian concepts of family loyalty, filial piety, chastity, Three Bonds, and Five Relationships gave way to Western ideas of individualism, freedom, and equality of the sexes. Realization grew that the individual was more a member of the society and state than of the family, vested with inalienable rights upon which nobody, not even the family elders, could infringe. Young Chinese began to assert their independence from their families and to condemn Confucian teachings on proper relationships as adolescent and feudal. The omnipotence of the family unit was challenged.

...old familial relationships broke down under the impact of the foreign economic invasion.

Shorn of its political, legal, economic props, the kinship society simply could not survive. At the same time, it became socially fashionable and economically expedient to adopt the Western style small family system. The big family system and kinship society gradually passed out of existence as China moved from an agrarian, premodern state towards a proto-industrial, modern society.1

Although this is a dramatic synopsis, it is not a truly accurate one. For the vast majority of people, the age-old patterns of day to day life were not substantially altered. Those from life did change belonged to several categories: the intellectual vanguard who wholeheartedly embraced things Western; and others in some way directly exposed to the new ways, those receiving Western schooling, those

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1Hsu, The Rise of Modern China, chapter 18, "Late Ch'ing Intellectual, Social, and Economic Changes, with Special Reference to 1895-11", pp.523-525.
living in a locale where Westerners were common (such as the port cities, or later in areas subject to Soviet rule), and those with financial dealings as merchants and employees (i.e., families or clans in which it became necessary to find jobs for members who were previously confined to predetermined roles — often women who had heretofore been completely isolated from any nonfamilial contacts).

Outside of this small but visible and often vocal minority, life in most of China continued as it had for centuries. There is no doubt that the patterns were beginning to change, but it was a gradual process, and not by any means as comprehensive as depicted by Hau. This disclaimer precedes Marion Levy's discussion of the family in the transitional period:

Throughout the discussion of the "transitional" period it must be kept in mind that many of the "traditional" patterns persist. For the vast majority of Chinese the "traditional" patterns are anything but dead and gone, and in the case of a great many Chinese little change of any sort has taken place.  

Olga Lang, the author of Chinese Family and Society, makes the following statement in her chapter of "Summary and Conclusions":

But whatever changes there have been in China have been but slow and incomplete. In the late 1930's, almost a hundred years after the violent impact of the West had begun and more than sixty years after the first new techniques were introduced into China, the country had not completed the process but was a mixture of old and new elements. New trends were felt almost everywhere, but in many regions and strata of the population the old pattern was predominant.

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2 Levy, p. 42.

3 Lang, p. 335.
Lang thus differentiates between the "modernized" and the "traditional" strata in her study, and treats them separately.

According to the degree of modernization the population of China can be divided into the following groups. I. Traditional Strata. Peasants (minimum degree of change); wage earners and lower middle-class of the nonindustrialized cities (moderate change); middle-class businessmen in the nonindustrial cities, employees and clerks in traditional establishments (somewhat greater change). II. Modernized Strata. Slowly changing groups: industrial workers, middle-class employees and officials; landlords; upper-class businessmen in non-industrial cities and nonmodernized branches of trade. Rapidly changing groups: middle- and upper-class intelligentsia (educators, physicians, engineers, high-school teachers, and college professors, writers, motion picture actors, etc.); upper-class officials and high employees, owners of modern industrial and commercial establishments and banks.4

That convention will be adopted in this study also. For those exposed to the influx of Western culture (the modernized strata), the effects were devastating, and the juridical system (which concomitantly changed) to which they were now subject was only one aspect of their altered environment. For those without Western exposure (the traditional strata), the changes were not so great.

It has been shown how closely interrelated the culture and the penal system were in the traditional age, and how the two were mutually reinforcing. In discussing the interplay of culture and formal justice system in the transitional period, a key issue will be whether this relationship was maintained. Prior to discussing this, though, some

4Lang, p.101.
information regarding the changes in the juridical system is necessary.

CRIMINAL CODE REVISIONS IN THE TRANSITIONAL PERIOD

In response to growing unrest and the beginnings of the revolutionary movement, a series of governmental reforms was proposed in 1898. These started well, but despite her early endorsements, soon ran into opposition from the Empress Dowager. Though in semi-retirement, she became convinced that the reformers were trying to undermine her power, and moved to quash them. The reform movement of 1898 rapidly degenerated into a power struggle; Tz'u-hsi triumphed, coming out of her "retirement" to resume the seat of power. The Kuang-hsu Emperor was deposed as even the nominal head of government, and the major achievements of the reformers were reversed.

Following the Boxer Rebellion the Empress Dowager Tz'u-hsi publicly accepted blame for the conditions which had precipitated the uprising, and vowed that the necessary changes would be instituted. A powerful motivation for these actions was to forestall further Western encroachment upon her rule. She solicited advice on needed reforms from high officials within her administration across the realm, finally admitting that fundamental, not minor, reform was in order. As part of the response to this call, three memorials to the throne, jointly authored by two provincial governors, were received. These formed the basis for a period of Ch'ing reform lasting from 1901-1905. This era of reform focused on reorganization and the strengthening of the government, and culminated in the abolition of the examination system. Another phase of late-Ch'ing reform attempts started
in 1905, with the goal of an eventual conversion to constitutional monarchy.

Tz'u-hsi's basic attitude did not change in the three years between 1898 and 1901 but the circumstances did, and she did her best to adapt. Still, it was well known within the top echelons of government that Tz'u-hsi was not well inclined toward suggestions of adopting Western ways. As a result of this, the memorialists she received in 1901 were extremely circumspect with respect to advocating the adoption of Western practices. The belief in the value of Westernization was so pervasive among thinking people of the time, however, that some were openly advancing the concept.

The three memorialists by Chang Chih-tung and Liu K'un-i, two provincial governors, outlined existing problems in many areas and possible corrective measures. In them, the value of the existing system was emphasized, and the Western methods that were suggested as solutions were carefully presented as additions to, not replacements of, current ways. In the sixth section of the second paper was an analysis of the shortcomings of the legal system. It recommended, in addition to other measures, that a revision of the Ch'ing code of laws was necessary. A portion of the third memorial mentioned the need for new regulations to deal with innovations introduced by contact with the West (e.g., railroads and mining).

These memorialists were quite well received, and as a result of their recommendations, a Committee for the Compilation of Laws (Fa-lu pien-tuan kuan) was formed by Imperial edict in 1902. Several Chinese scholars were appointed to this commission, but it also included law students returned from abroad and a Japanese advisor. Over the course of the next several
years, this committee effected the following changes in the dynastic code: all corporal punishments were abolished, capital punishments were lessened in severity by one degree and the number of capital crimes decreased, collective responsibility and certain symbolic punishments were abolished, and the system of banishments was revised. M. J. Heijer, in his legal history of this period concludes that:

"...the idea of punishment as a means to retaliate against infractions of the natural order, was either entirely abandoned, or at least abstracted from practical legislation - the question might be left a matter of academic interest, without direct influence on actual criminal legislature. ... I believe that the decision [was made] to abstract criminal law from its old philosophical notions, and that the measures to abolish symbolic punishments are proof of this attitude. I have no texts to prove this clearly, but from the general tenor of these and later memorials, I am inclined to draw this conclusion."\(^5\)

In addition to revising certain aspects of the codes, this commission began work on an entirely new criminal code. Their work was based on the codes of foreign nations (in particular Germany and Japan), and was presented to the throne in 1908. Other aspects of Chinese law were also studied by this committee, and the results of those efforts presented between 1907 and 1910. However, the enactment of these codes was delayed due to the overthrow of the Manchu dynasty.

Following the proclamation of the Republic, the laws of the Manchus were publicly announced to be in effect unless expressly disavowed. In addition, a committee was appointed to examine and edit the Imperial

\(^5\)Heijer, *Modern Criminal Law in China*, p.35.
recodification effort. As Jean Escarra, author of *Le Droit Chinois*, put it, "...in a new order of affairs, new institutions become entirely necessary, or, at the very least, different names to designate existing institutions." This group became known as the Commission on the Codification of Laws (*Sieou t'ing fe lu kouan*), and sat until the mid 1920's. The membership of this committee originally included a Frenchman and two Japanese. On their departure in 1921, the Japanese members were replaced by Escarra. After several revisions, the code prepared by the Imperial commission was promulgated in 1912 as the Provisional Criminal Code (*Chan hing sin hing lu*). This code, with minor revisions, remained in effect until 1928, when it was replaced by yet another revision of that same original work under the title Criminal Code of the Republic of China. Escarra describes the fate of that code:

"As the case showed for the provisory Criminal Code of 1912, the work of revision and adaptation of the Criminal Code of 1928 began shortly after its promulgation, about December, 1931. ... these works have resulted in not a simple revision of the 1928 Code, but in a recasting equivalent in many cases to a complete reformation. ... we shall observe that the 1935 Code, while remaining like that of 1928, a sort of compromise between the theories of the classical and the positivist schools, displays a marked tendency in the latter direction".

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7Romanization of Gertrude Browne in her translation of Escarra, *Le Droit Chinois*. All translations in her work conform to the French conventions, as established by the Bulletin de l'École française d'Extrême-Orient (BEFEO), rather than to English and American practice. Until further mention, all transliterations in text are those of Browne-Escarra.

8Ibid. pp.298, 313.
PROVISIONS OF THE VARIOUS TRANSITIONAL CRIMINAL CODES

Transitional China, between 1911 and 1935 had three separate criminal codes, in addition to several civil, commercial and criminal procedural codes. The first of the three (that of 1912) claimed historical continuity with the codes of traditional China, the second (that of 1928) was a revision of the first, and the third (1935) was a completely revised code, based on several foreign codifications. These attempts at devising an apt legal system for the China of the day each varied in their approach to the problem of balancing the old and the new ways. In many respects, the results they obtained differed very little; in every instance the value system propagated by the code was at variance with that of a large sector of the population.

The 1912 code, known as the Provisional Criminal Code, was little different from the final draft by the Committee for the Compilation of Laws submitted to the throne prior to the 1911 revolution. Some minor corrections and revisions were implemented and the chapter outlining the punishments associated with offenses against the royal family was repealed, but in substance the two were the same. Each draft of this code, when submitted to the throne, had been accompanied by careful documentation supporting the assertion that the proposed code was but a revision of the existing dynastic code. Each major departure from the current conventions and practices of the dynastic juridical system was supported by historical
precedents demonstrating that it was not an innovation but merely a reversion to original practices of ancient dynasties. Meijer asserts that this was but a tactic employed by the major author of the new code to ensure its acceptance by the traditionalists of the Ch'ing dynasty.9

Most of the proposed changes, accompanied by their historical justifications, were eventually approved resulting in some major departures from the dynastic legal tradition: there was a complete reorganization of the provisions of the law, with any matters pertaining to civil or commercial aspects of the law being removed10; the old practice of law by analogy was replaced by a legalistic approach to the definition of offenses which held that there could be no offense (nor punishment) without there being a law which predated the commission of the act in question establishing that act as illegal; the exhaustive enumeration of circumstances which influenced the severity of an offense was discontinued; concurrence of offenses, a concept never included in dynastic codes, was introduced (i.e., a punishment was applied for each crime committed -- under the dynastic system a person charged with more than one crime suffered only the punishment for the most serious offense); judicial discretionary reduction of punishment was introduced; and in most cases violations of moral laws or stipulations were no longer penal offenses. In particular, most provisions which increased the severity of crimes

9Meijer, pp.75-76

10Replacing the seven categories of the Ta Ch'ing Lu Li were but two: General Provisions, and Offenses and Their Punishments.
depending on familial relationships were excised. However, the reformers were unsuccessful in their attempts to delete the legal superiority of father over son, and of family elders over descendents. Despite their repeated refusal to codify the legal bases for superior-inferior relations, the reformers were overruled and the final draft and the Provisional Criminal Code provided no legal recourse for a junior relative against an offense by a senior relative. In addition, both contained heavier penalties for personal crimes (homicide, injury, etc.) against lineal ascendants than against other persons. This code still retained the reforms effected in the existing dynastic code by the Committee for the Compilation of Laws.

The criminal code adopted in 1928 was a revision of the 1912 code begun in 1915 and completed in 1919. Political events subsequent to 1919 were responsible for its dormancy until 1927 when it was slightly revised and submitted to the Kuomintang. It was adopted as the Criminal Code of the Republic of China in 1928. This code followed the organization and format of the 1912 code, but attempted to incorporate the principles and ideals of the Republic into the spirit and body of the law. To this end, some reorganization within both sections of the code (General Provisions, and Specific Offenses and Punishments) took place. Several chapters of new offenses, such as acts against the President and State were also added. These took the same place and form as the chapters in the 1912 Code which outlined the penalties for offenses against the the Imperial family and State. In addition, the English right to Writ of Habeus Corpus following arrest was incorporated, as well as the extension
to women of equal rights under the law.

As previously indicated, work on revising the 1928 code began shortly after its promulgation. In this effort the criminal codes of many nations\textsuperscript{11} were examined and culled. The resultant criminal code was more exclusively devoted to criminal law than any other Chinese codification had been, for in 1931 a Civil Code had finally been promulgated\textsuperscript{12} which incorporated many of the stipulations previously included in the criminal codes. The most important of the provisions to move from the Criminal to the Civil Code was the definition of the system of relationships surrounding the family. As Olga Lang characterizes it:

The Chinese Republic did not create a system of political and social philosophy comparable in scope to Confucianism. The only systematic arrangement of ideas concerning the family is the new legal code.

The provisions of this code leave no doubt that the legislators were inspired by the desire to remold the Chinese family on an essentially Western pattern, preserving only a few characteristics of the old Confucian organization. The code completely disregards ancestor worship--a pillar of the old family and kinship system. . . . Though the idea is not carried through with absolute consistency, the equality of women is recognized in principle . . . Man's authority as father is also drastically attacked. He can no longer kill his children with impunity. . . .

The code takes a new attitude toward kin and clan. Members of the clan are not mentioned as being entitled to preferential treatment, and the kinsmen are mentioned only once (in the Penal Code). The penalties for maltreatment, for unlawful confinement, false accusation, and murder are heavier when these offenses are com-

\textsuperscript{11}Italy, Spain, France, Switzerland, Germany, Russia, Czechoslovakia, Cuba, the Phillipenes, Japan, Siam, Turkey.

\textsuperscript{12}After 28 years and multiple drafts.
mitted against parents, grandparents, or great grand-
parents (lineal ascendants), but all the other relatives
are treated on the same basis as strangers. 13

One of the major innovations in the 1935 Code revolved around the
institution of what Escarra calls (and Browne translates as) "safety
measures" 14. These provided for the rehabilitation in appropriate
institutions of juveniles, alcoholics, insane persons, deaf-mutes, the
feeble minded, vagrants and the unemployed, and drug addicts. In addition,
judicial discretion in the application of punishments was increased. While
these ideas were represented in the 1928 Code, these provisions were much
expanded and improved upon in the 1935 Code. The reforms generated for the
1912 and 1928 codifications were generally retained in the new code.

Standard Interpretations of the Transitional Criminal Codes

Meijer contends that the code adopted as the Provisional Criminal
Code was "a code based on foreign concepts most of which were alien to
Chinese thought or which had in the course of history been discarded as
alien to Chinese society." 15 His assessment of the content of this code
is that "we can hardly see what remains of the old law...all its
essentials are changed...we can hardly speak of a revision, but of a

13Lang, pp. 115-118.

14This is also translated as "peace preservation measures". Lawrence J.
Fuller and Henry A. Fisher, translators of The Criminal Code of the Republic

15Meijer, p. 71.
substitution."16 We have seen what concepts were introduced in this code, and how much of it was new. The concepts he refers to as alien to Chinese thought were concurrence of offenses, discretionary reduction of punishments, and the generalized statement of offenses. That which had been tried and discarded as unsuitable for Chinese society was the legalistic statement of offenses as opposed to law by analogy (see Chapter 1). The facts support Meijer's analysis that the essentials were changed, although to say that they were all changed is an overstatement. At least one of the fundamentals of the dynastic code (i.e., the reinforcement of familial authority) was retained. However, to speak of the Provisional Criminal Code (or, as Meijer has, the drafts that became this code) as a substitution for the old code does have validity.

While classifying the provisions introduced into the law as based on concepts alien to Chinese thought and/or society, Meijer does not at the same time hold that Chinese society had already changed so as to be amenable to these concepts. He implies just the opposite, in fact, by anticipating the argument that a law based on concepts alien to the culture will be of little use to it or of little effectiveness in it. He dismisses this view with the blythe remark that "the reformers may have gone too far, but especially a people with such strong individuality as the Chinese can be trusted to find the ways for a practical compromise."17 On this prediction, Meijer was all wrong. Subsequent events showed clearly that,

16Ibid. p. 76.
17Ibid. p. 125.
for a variety of reasons, the Chinese were not able to reach a practical compromise.

Very little historical attention has been paid to the 1928 Code (at least in English), possibly because it was so similar to the 1912 Code. The 1935 Code, however, has been considered significant, especially when viewed in conjunction with the 1931 Civil Code. Escarre concludes that it is

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... a remarkable scientific work, based on profound studies of criminology and comparative law. The great Chinese criminal tradition is evidenced in it. ... Its authors had in view intentions corresponding as exactly as possible to the conditions of the country and the needs of its transformation. Yet, in order to obtain the results at which they aim, they have elaborated a code much too systematic, have yielded to too many principles and concepts. ... 18

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The biggest single flaw he finds in the code is the section on "safety measures". He states:

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... I am, nevertheless, very skeptical about the value of this institution for China, in the present state of its social conditions. The conception of punishment, and especially of severe punishment whose intimidating effect has been discounted, is one which in all periods has been popular in China. And the very graded individualization, legal or judicial, which has always in appropriate cases tempered the striking application of the penalty, has always been regarded as sufficient to handle the infinite variety of circumstances of infraction. The contrary idea of considering the crime rather than the criminal, of seeking to remove the danger he presents for society instead of checking his fault, to limit, in a word, in an abstract manner, his degree of "potential menace (témibilité)" rather than the concrete infraction of which he is guilty,

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18 Escarre, p. 316.
all that is very far from the traditional Chinese conceptions. . . . Today, because one's hands are tied in the name of fine principles respecting human dignity and other theories of that order, one rejects with horror everything that might recall the ancient penal system. But some exceedingly civilized nations like England, where respect for the human individual is greater than anywhere else, recognize corporal punishments and benefit by them. And, in criminal affairs, the worst that can happen is to yield to theories! . . . It is most of all unsuited to Chinese civilization. 19

Werner Levi, after surveying the state of the family in the criminal and civil law, concludes that:

This review of the peculiarly Chinese aspects of the family law indicates quite clearly the problem with which the Chinese legislator was faced. His main aim was to comply with the demands of western powers and modernize Chinese. On the other hand he was aware that the promulgation of new laws could not change traditions thousands of years old. In order to have reality, the law had to be adapted to Chinese ideas and customs, otherwise the new codes would have remained without meaning and might only have stimulated disrespect for the law. The compromise which the modern Chinese family law represents is a move away from the individualistic European law codes and a part concession to that collective basic unit of Chinese society: the family. The individual is better protected in modern Chinese family law than was the case before 1929, but at the same time the legislator attempted to preserve the existence of the family on traditional bases at the expense of the individual wherever he could possibly do so without appearing too "old fashioned." Modern Chinese family law represents a step toward Europeanization. Large masses of the Chinese people are ignoring it and live unaffected by the new laws. Yet

19Ibid. pp. 313-315.
the great number of cases reaching the Supreme Court indicates that the Codes find application.20

Other authors (generally writing before 1949) also point out the wide gap between the law and actual practice, but most share the sentiment of Francis L. K. Hsu that "they will gradually bridge over the difficulties which arise from the fact that modern Chinese law has not grown up with the life of the people, but is in a large measure given to the people."21 That the demise of Republican China later proved this thesis wrong was not entirely the fault of the law. There were many sources of turmoil which contributed to the downfall of Republican rule in China. Economic difficulties, corruption and factionalization in government, civil strife, foreign challenges, etc., all made their contribution. However, we shall see that the law did not play as much of a stabilizing role in the society as it had in traditional China.
CHAPTER 4

HOMICIDE STATUTES IN TRANSITIONAL CHINA

In the course of the Republican era recodification efforts, a number of significant changes were made in the criminal codes. The new form of the code left it exclusively criminal in nature whereas the codes of traditional China had contained many offenses not necessarily criminal, such as violations of Confucian Rites. The extreme detail and specificity which had characterized the traditional codes was no longer in evidence. The articles of the transitional criminal codes were general in both scope and nature; they applied to one and all, and no longer contained a morass of detail defining sets of extenuating circumstances. Instead of containing seven lengthy books as had the old code, the format of the new Republican codes had two sections only. The first section held general provisions, such as definitions, and the other enumeration of specific offenses. The internal organization within each section was still by chapters. Each chapter addressed a particular category of crimes, (homicide, extortion, theft, etc.). The new chapters, though, were considerably more compact than those of old, having both fewer and shorter statutes. A primary result, then, of recodification was a vastly shortened criminal code. This was a direct consequence of the dominant Western influence which shaped the entire recodification effort.
In the chapter on homicide in the first Republican\(^1\) code of 1919, there are only eight articles. Of these, only seven actually enumerate punishable categories of homicide. The eighth states that in addition to the prescribed penalty for individual crimes, a suspension of civil rights may also accrue. This article was deleted from the chapter on homicide in later revisions (1928, 1933), and the number of articles on homicide was further reduced to six.

Besides the drastic reduction in the number of homicide offenses (from 20 in the Ch’ing Code), the variety of capital punishments found under traditional law were also reduced. Replacing the five traditional capital punishments\(^2\) was a single one, strangulation. While there remained a scale for increasing and decreasing the severity of punishment for extenuating circumstances, strangulation represented the ultimate penalty under the new system of punishments. It was explicitly stated that: "A death penalty may not be increased."\(^3\) In addition, a category of imprisonment penalties was added. Now, in the place of the gradations of execution and exile, the adjudication of capital crimes resulted in strangulation, or one of two

\(^1\)Although there were slight variations in content, the form and essence of the various transitional codes were basically the same. For the sake of convenience, they will be referred to collectively for most purposes. A distinction will be made as to version of the code when it is necessary for accuracy.

\(^2\)Strangulation after the assizes, immediate strangulation, decapitation after the assizes, immediate decapitation, and death by slicing.

entirely new punishments: imprisonment of varying duration, or fines.

The seven articles describing actual offenses in the 1919 Code's chapter on homicide are: a general article specifying punishment for causing the death of another; an article on causing the death of lineal or collateral ascendants; one outlining the penalties for causing death by premeditation, with cruelty, in facilitation of another offense, or for benefit; a provision for homicide committed with justifiable provocation; one for the case where a mother causes the death of an infant at, or shortly after, birth; an article on instigating or assisting the suicide of another person; and one making it a crime to cause the death of another by negligence or occupational negligence. The article deleted in the 1928 and 1933 revisions of this code was the one on premeditation, cruelty, facilitation, and benefit. Also excised was the specification of penalty for causing the death of a collateral ascendant. This originally was a part of the statute on causing the death of a lineal ascendant. It remained a separate crime to cause the death of a lineal ascendant, but, presumably, killing a collateral one then fell under the general category of causing the death of another person. The same penalties (death or imprisonment for life) were imposable in both cases.

Instead of the extreme detail and specification of circumstances and exceptions found in the traditional statutes, the articles of the new criminal code were straightforward and brief. A typical example of the form of the statutes in the Republican code is as follows:

Article 281. Whoever causes the death of any of his lineal ascendants, shall be punished with death.
Whoever causes the death of any of his collateral ascendants, shall be punished with death, or with imprisonment for life.
An attempt to commit an offence under this Article shall be punishable.
Whoever makes any preparation to commit an offense under this Article shall be punished with imprisonment for a period of not more than three years.4

This is radically different from the form and tenor of statutes in the traditional codes. With this change in style, a major portion of the Chinese legal tradition was discarded.

The penalties in this new, streamlined, criminal code for homicide range from a fine of up to 3,0005 yuan, to 6 months imprisonment (a specified minimum prison sentence), to life imprisonment, to the ultimate penalty, death. The imposition of fines is specified as an option for punishment only in the article on negligence:

Article 286. Whoever by negligence causes the death of another, shall be punished with imprisonment for a period of not more than two years, or with detention, or with fine of not more than three thousand yuan.6

This article also encompassed occupational negligence. The lower bound of the range of prison sentences, six months, was specified as the minimum sentence for a woman found guilty of the crime of killing her newborn child. The article reads: "...with imprisonment of not less than six


5This became 2,000 yuan in following codes.

months nor more than five years." For homicide resulting from justifiable provocation and causing suicide, the span of sentence was at least one year in prison, but not more than seven years. Life imprisonment was specified as an option in causing the death of a collateral ascendant, and in the statute on premeditation, etc. The only crime for which there was no choice of punishments was the crime of causing the death of a lineal ascendant. This carried a mandatory death sentence. Execution was a discretionary matter for the general article on causing the death of another, causing the death of a collateral ascendant, and for the article on causing death by premeditation, cruelty, facilitation, or benefit.

Although not included in the chapter on homicide, there are other statutes scattered through the Republican codes which contain homicide references. These mostly concern homicide during the commission of another crime. The chapters on the "Offense of Causing Bodily Harm", "Abortion", "Abandonment", "Snatching, Robbery, or Piracy", "Extortion", "Offenses against the President", "Offenses against Friendly Relations with Foreign States", "Offenses against Public Safety", and "Offenses against Public Morality" (Rape, etc.), among others, all contain references to homicide. Of these, the crimes of robbery (or piracy) in conjunction with arson or rape, robbery (or piracy) in conjunction with the causing of death, and rape in conjunction with a killing, are punishable by death. Offenses against the President and State are also in some instances capital offenses.

7Ibid. Article 284, p. 95.
It is interesting to note that after the excision of the article on causing another's death by premeditation in revisions of the 1919 Criminal Code, there is no differentiation provided between the causing of death with intent and with premeditation.

With the exception of the special case of causing the death of ascendants, there is very little characteristically or uniquely Chinese about any of these homicide statutes or sentences. They all reflect the strong Western influences exerted during the recodification processes.

There is perhaps one other provision in the chapter of homicide laws which does reflect the Chinese foundation rather than the Western influence. This is found tacked onto the end of the article on instigating or aiding the commission of a suicide: "If two or more persons in furtherance of an agreement to die together commit the offence specified in this Article, the punishment may be remitted." The Judeo-Christian tradition of the West is not noted for countenancing such actions, and thus this provision must be regarded as Chinese in origin.

Another example of this sort appears in an interesting, but unrelated, statute in the chapter of laws on theft. This article stands out among those surrounding it as an example of traditional Chinese values remaining institutionalized in the law:

Article 333. If any of the offenses specified in this Chapter is committed against a lineal ascendant, a husband or a wife, or any other relative of the same household, the punishment shall be remitted.

8Ibid. Article 285, p. 96.
If any of the offenses specified in this Chapter is committed against any relative not specified in the preceding paragraph, prosecution may be instituted only on private complaint.\(^9\)

This is a leftover from the notion of family collective ownership. Of all the traditional Chinese values, it was only a select few, mostly those directly relating to the family in society, that were preserved to any degree in the transition from the dynastic to the Republican juridical systems. In fact, despite the efforts of those participating in the recodification process to achieve a balance of Chinese and Western legal traditions, it appears that most aspects of the extensive Chinese legal tradition were abandoned in the transitional period.

\(^9\)Ibid. Article 333, p. 111.
CHAPTER 5

CONCLUSION

In the opening pages of this paper, the following statement by A.F.P. Hulsewé was reproduced:

law, as one type of social control is closely related to customs and mores. It maintains and affects existing values and institutions, and it reflects the social structure of a particular society at a given time.¹

We have seen how closely related were the laws of traditional China and its mores and customs, and we have seen reflections of that society in those laws, particularly in the statutes on homicide.

The culture (the values and institutions) of dynastic China was highly organized and hierarchical. Each hierarchy (guild, clan, family) had built-in mechanisms for controlling the behavior of its constituents, resolving disputes, or disciplining its members when other controls failed. The laws of such a society by needs did not address most issues in the realm of civil affairs. The intervention of external forces was required only for violations so offending the social order as to merit drastic punishment, that is, criminal offenses. As a result, the legal codes of

traditional China were almost exclusively penal in nature, with few pronouncements on civil affairs. This quality of the legal system was a unique reflection of a unique culture.

The culture of dynastic China was also patriarchal and family oriented. This too shown through in the legal codes. Of the 20 Ch'ing dynasty statutes on homicide, seven of them explicitly address family killings, either of one family member by another, or killings of related individuals. Familial relationships were also implicitly important in many other statutes. The classification of the offense of causing the death of a parent (or other lineal descendants) as one of the ten most heinous crimes clearly shows the emphasis which the society placed upon filial piety and obedience. One example of the importance of familial loyalty and solidarity is that even an accurate report to the authorities of a crime committed by another family member would result in punishment for the reporter. In addition, if one member of a family committed a crime, his entire family was often jeopardized: the concept of collective responsibility dictated that families (and other groups) were often treated as a unit.

The culture of traditional China was highly moral, in the sense of having great concern for right vs. wrong, and in the justness of one's actions. It was a philosophically, rather than divinely oriented society. The law was painstakingly careful in its attempts to distinguish between actions resulting from actual malintent and those that were genuinely accidental. By

\(^2\)With the exception noted before of treason.
carefully delineating many situations and sets of extenuating
circumstances, it strove, with its very specificity, to be fair to one and
all. It provided bases for analogies to be drawn for all types of offenses
and all kinds of offenders. It provided penalties for having knowledge of
a crime but not preventing or reporting it, but took pains to provide for
cases of true ignorance. The law implicitly recognized the harmony of man
and nature that was believed to be the true state of affairs, and contained
many provisions for the maintenance of this balance. In the cases in which
the continuum of man and nature was considered broken, there were specific
procedures for its restoration.

This legal system reigned for 23 centuries, and was remarkably stable
during that time. One concludes that the laws were indeed closely related
to customs and mores, did indeed maintain and affect values and
institutions, and were indeed an accurate reflection of the culture they
served. That the laws and the society of traditional China were mutually
reinforcing, operating to their mutual stability and benefit seems clear.

Despite their radical departure in content from the traditional
legal codes, it is the thesis of this author that the changes implied
by the transitional criminal codes were not pervasive. In issuing
new codes, the new governments were following an old Chinese pattern
for change of rule. They departed from this time-honored pattern by
dramatically altering the contents of the code, largely in response to
Western pressures and influences. Since corresponding societal changes were

\[\text{See discussion of the evolution of the traditional codes.}\]
so narrowly distributed, the law was no longer a stabilizing factor in the
culture for much of the nation.

In all essential elements of form, the promulgation of laws in
the transitional period resembled the issuance of a dynasty code.
At the start of a new dynasty, a group was appointed and charged with
producing a new codification of the laws. This group began with the
code of the preceding dynasty, and revised it to conform to the biases
of the new rulers. This entailed a general reevaluation of the
provisions of the various laws, and often resulted in some minor changes
in the laws pertaining to the structure of society. For example, in
Ming times, such a reevaluation produced a decrease in the stipulated
periods of calibacy following the death of a parent, as the Emperor
considered 27 months to be excessive. At the outset of the Ch'ing
dynasty, special regulations pertaining to Manchus and their social
privileges relative to Chinese were inserted into the codes.

There was not widespread societal change from the reign of the
Manchus to that of the Republicans. Olga Lang states that "From
75% to 85% of China's population in the late thirties was peasants,"^ and peasants composed but one segment of the group she defined as
belonging to the traditional strata. Even within the few industrialized
cities there remained a large tradition-bound portion of the population.
Within the modernized strata, there were still great variations in
acceptance of the new ways; the only group voluntarily and consciously

*Lang, p. 66.*
changing their lifestyles were the intellectuals. Others falling into the modernized strata did so by virtue of inhabiting a changing environment. These persons did not necessarily subscribe to the ideologies which produced these changes. On the other side of the coin were those intellectuals professing new ideas but still living in old ways.

Among the workers and peasants living in new conditions the changes in behavior preceded the changes in attitudes. With the members of the educated classes the changes in ideas and attitudes preceded changes in behavior. The workers and peasants often behave in new ways toward their parents, husbands, or children without realizing that they are repudiating the old Confucian rules; the young intellectuals often have new ideas about paternal authority, marriage, etc., without being able to put them into practice.5

The new criminal codes, based on the ideals of a small intellectual elite borrowing heavily from Western culture, did not, as a result, mesh well with the lives of most of China's citizens. Change and modernization were inevitable for China, given the pressure from the West, but they were not spontaneous, nor natural. In too many instances, Western ways which were inappropriate given the Chinese cultural tradition were forced upon the Chinese, as square pegs into round holes. The principles of the new codes were not in response to evolutionary changes within the society. They were designed for a desired society, not for the real society. As a result, they did not reinforce or maintain the existing social order.

5Ibid. p. 337.
The motivating forces behind the abandonment of many of the basic elements of the traditional Chinese legal system in the recodification process were basically twofold. The first stemmed directly from pressures applied by foreign nations. Outside observers had historically decried the juridical system of the Chinese as barbaric. This perception was often the first reaction of ethnocentric observers, convinced of the superiority of their own, and familiar, ways of doing things. Observers more sensitive to the many refinements of Oriental culture often recognized this fact. However, most Westerners dealing with the Chinese were bent on conquest, commercial or military, not on learning or appreciating an alien culture. To these people, the differences between their accustomed practices and those of the Chinese convinced them only that the ancient ways of the Chinese were uncivilized. As circumstances increased their influence in Chinese affairs, they began to press for fundamental change.

The second major force behind the move towards a Westernized legal system was provided by the intelligentsia. Many of this elite were Western educated, and most were greatly influenced by Western ideas. The Chinese had a long standing history of cultural preeminence, and they traditionally considered themselves and their nation to be the center of the Universe. The overwhelming military and commercial superiority and power of the West, demonstrated at the turn of the century, destroyed this image for thinking Chinese. The wholesale adoption of Western institutions was seen as a way of regaining national self-esteem and standing in the international community. Despite some moderates pushing for selective Westernization, the assumption of Western ways was often done in a seemingly noncritical way. The results of this course of action were mixed.
For those in the traditional strata, still living in traditional environments, the new laws probably had minimal direct effects. The filtering process to rural areas of China was slow, and the cultural aversion to the formal legal system provided further insulation. However, the reinforcement of the cultural order provided by the old codes was now lacking, thus removing an element of societal stability. Instead of maintaining the existing values and institutions, or reflecting the social structure, as Hulsewé noted that it should, the law was now in drastic conflict with the attitudes of most of the population. Laws that are disregarded by most of the population serve to lessen respect for the government propagating them. In a society as authoritarian as that of China, this can be catastrophic. While certainly not the only (or even a major) cause of instability and disintegration⁶ in the transitional period, it could only have been a contributing factor.

Even for the modernized strata, the laws were not an integrating factor; as the society was not stable, neither were the laws. Instead of reinforcing and maintaining each other, they were now sometimes in harmony, but more often at cross purposes:

Government was based more on personal relations than upon institutions; from the beginning of the Republican era, laws, formal institutional responsibilities, constitutions, were in substantial measure irrelevant to the realities of Chinese political life.⁷


⁷ Sheridan, p. 208.
To speak of the modernized strata as a whole is even somewhat misleading: there were those subject to environmental changes, as those living in the cities or working in factories who were modernized in behavioral, yet not attitudinal ways (cf. Lang). There were those modernized by virtue of their economic position; e.g. women earning wages were no longer at the mercy of their parents or parents-in-law (particularly their mothers-in-law). And there were the intellectuals, divided among themselves:

The intellectuals seized upon many aspects of Western thought, some of which, however, were incompatible with other . . . . The May Fourth Movement signaled the coming of age of a new Westernized intellectual elite, with deep internal divisions. The new elite was not a functioning part of existing institutions, and it was largely cut off from the peasant masses of China.8

In summation, the transitional laws clearly did not serve their society as well as the traditional laws served their society: the new laws were not interrelated to the society of its day as the old had been, and this was a factor contributing to the disintegration of society rather than its integration or reintegration. Whereas the old codes were stabilizing factors in society, reinforcing the cultural values, the new were not. A new order was in the making, but there was no stable aspect of it. Cities were growing, government was changing, mores and values were in flux. The new codes were not even stable, much less the society.

8Ibid. pp. 20-21
We have spoken of the continuity of the traditional codes, and attributed that at least partially to their predominantly penal nature. Yet, the transitional codes were more exclusively devoted to criminal offenses and their punishments. Why then were they less stable? And how to account for the more fundamental changes over 33 years than in three centuries? Largely, it was no longer the case that human ideas on the universal criminal concepts were stable: the very concept of crime had changed in the West with the prominence of sociological and criminological considerations in the laws. As these considerations were incorporated into Western law, they were incorporated into Chinese law, and as Escarra points out, they were particularly unsuited to Chinese civilization.

The instability of the modern culture, the instability of the law and the transitory nature of the Republican era were all closely related. A standard sociological text of that period describes one of the symptoms of the time and its cause: "Maladjustment occurs generally when technological change is suddenly or abruptly introduced, so that it disturbs the established culture."9 Not only was technological change introduced abruptly into the established Chinese culture in the form of industrialization, but new cultural elements were imparted at the same time, and at a rapid rate. In that strata of the population most affected by these changes, the established culture was shaken to its very foundations. In discussing the resultant social situation,

Marion Levy's observes:

...The solidarity of the family unit relative to the aspects of Chinese society outside it is one of the most important factors in the analysis of the social situation in "transitional" China, for since there was neither any other overriding solidarity in the society nor any equal to the solidarity of the family unit, any breakdown of that solidarity inevitably had far reaching effects.10

No longer did the law reinforce the crucial solidarity of the family unit as it had done in traditional China. One of the farthest reaching effects of this breakdown of familial and societal solidarity was the collapse of Republican China and the eventual rise of a new social order. This is not to say that had the legal system not changed, the new government would have survived. Far from it. Law is only one type of social control, and does not, in and of itself, maintain a stable society. However, the loss of the law as a strong stabilizing factor represented one more major hurdle for the transitional governments to overcome.

10 Levy, p. 164.
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