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Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture

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I. THE MEANING OF "LAW" IN WESTERN AND CHINESE CIVILIZATIONS

Nineteenth century legal historians believed that just as language and customs were the product of a nation's past history and cultural mentality, so were their laws. This proposition is correct in the following sense: as essential elements of a culture, law and language both in their own way reflect the distinguishing features of the overall culture.

Anytime one language is translated into another language, one often encounters the problem of the translation failing to accurately express the original meaning. This problem arises from neither the level of the translator's proficiency in grasping and using a language nor the inherent expressiveness of a language, but rather it is simply that it is impossible to find an appropriate word that corresponds to the meaning of the other word. These difficulties in translation are a reflection of historical and cultural differences. Perhaps the subtle linguistic barriers created by these differences can never be eliminated.

Taking the proposition that language will always be the product of a specific history and culture as a starting point, we can proceed to a more meaningful examination: through the creation, evolution and definition of their form and meaning, words have come to encompass specific social phenomena. Furthermore, a new understanding of these words is provided through their connotation as reflected in the historical and cultural characteristics expressed in these social phenomena. Through this process, a few words with which we are familiar will take on a fresh new significance, and our knowledge of interrelated social phenomena can also be further deepened. This process is expanded upon below, and a word with which everyone is very familiar (at least people believe so) has been taken as the starting point for this process: "law."

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There are at least two different approaches one can take toward understanding "law." First, it is a word used in literature and linguistics; second, it signifies that type of social phenomenon we refer to as "law." "Law" as a word and "law" as a social phenomenon are closely related, and thus, cannot be separated. History determines ideas, but ideas also influence history. Linguistic, semantic, historical, and social factors must all be given equal weight without emphasizing one at the expense of another. Otherwise, studying the concept of law would either be concealed by the phenomenon itself and be limited to the superficial, or we would merely know it is so and not know why it is so, being unable to distinguish the basic similarities and differences of the concept of law in different cultures.

It is well accepted that law is a special type of behavioral norm. However, it is extremely difficult to find a consensus if the question involves aspects of the origins, character, and features of law. The analytical legal school which existed at the same time as the historical legal school emphasized the coercive nature of law and viewed forced obedience as one of the essential elements of law. We can temporarily disregard the degree of truth which is actually contained in this viewpoint; however, ultimately it will be useful to take it as a premise for this article. At the very least, the words for "law" covered in this article and the social phenomena they express, regardless of whether they are in reference to ancient China or ancient Greece and Rome or how old their origins are, can all be viewed as "the organized violence of society."

The origin of the Chinese word "law" (*fa*) is extremely remote, and it seems impossible to verify the exact time it became a word. Below, the relatively consistent meaning and usage of the word "law" will be discussed. The question to be resolved now is whether it is possible to "translate" the full meaning of certain words in other linguistic families such as Greek, Latin and German using the character *fa*. In examining this question, we must start from the word itself.

A. *The Meaning of the Word "Law" in the West*

Not many words can be translated as "law" in the Latin lexicon, the two most significant being *jus* and *lex*. *Jus* has two fundamental meanings: one is law, and the other is right. The famous definition of the Roman jurist, Inventus Celsus, that "law is the science of what is good and just" (*jus est ars boni et aequi*) takes this first meaning of *jus*; and the Latin proverb "a right does (or can) not arise out of a wrong" (*jus ex injuria non oritur*) takes the other meaning. In addition, *jus* also has rich moral implications of fairness, justice, and other

meanings. In comparison, the meaning of *lex* is relatively simple. Its original meaning referred to the laws decreed by the Roman emperor during the Imperial Period (753-510 B.C.) and the laws passed by the various senates during the Republican Period. Basically speaking, *lex* is specific and definite and must be used within a purely judicial realm and can refer to any type of enacted law. In contrast, *jus* has only an abstract nature. It is extremely important to understand the meaning of these two words, not only because this linguistic phenomenon has a relatively universal significance within the Indo-European linguistic branches of Greek, Latin, and German,¹ but also because in European legal history, the meaning and its conceptual dualist opposition has an objective basis, which has had a far reaching influence.²

It must be further explained that the English word "law" does not contain the meaning of rights; however, equally clear is the fact that this word did not derive from the ancient Mediterranean civilizations. According to research, the word "law" originated from northern European languages and passed into English usage about 1000 A.D.³ From this point in history, the legal developments in England diverge from those on the European continent. However, English still has a word approximating *jus*, namely "right." The basic meaning of the word "right" refers to the abstract meaning of law which forms the basis of all rights.

It is well known that due to the adoption of the common law system, England became the freest European state. This is because the common law system has retained more elements of ancient Germanic law than the legal systems of other European countries. English law developed in accordance with the basic premise of Western

1. See the chart below:

Word Type	Greek	Latin	French	German	Italian	Spanish
I	δικαιον	Jus	Droit	Recht	Diritto	Derecho
II	Υόμον	Lex	Loi	Gesetz	Legge	Ley

The first row of words in the chart all refer to law and rights while at the same time having meanings of justice, fairness and morality; their meanings are complex, abstract, and are rich with philosophical significance. The second row of words normally refer to specific rules; their meanings are concise, specific, and strongly technical.

2. The dualistic opposition manifested in the relationships between soul and body, religion and secularity, spirit and material, and subject and object, constitutes a primary characteristic of Western thinking. B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 302 (1945); H.J. BERMAN, *THE INTERACTION OF RELIGION AND LAW*, ch. 4 (1976). A principle element constituting this type of thinking—opposition between the empirical realm and the transcendental realm—is also a main source for the modern Western theories of the rule of law. R. UNGER, *LAW IN MODERN SOCIETY* 66-86 (1976).

3. See D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 34, 51-54 (1963).

law, namely that law is considered the guarantor of rights and the measure of freedom. This article examines primarily this "basic premise" of Western law and its origins. Furthermore, because this article examines the "great tradition" of the entirety of Western law from this particular linguistic phenomenon of combining "law" and "rights" into one, the discussion focuses on the early history of Western civilization as well as Greek and Latin.

B. The Meaning of the Word "Law" in Chinese

In Chinese, the Latin words *jus* and *lex* can be translated as either *fa* or *falü*. However, in reality, even when legal experts use the terms *fa* and *falü*, it is difficult to determine whether they themselves are able to comprehend the words' meaning and dualistic opposition as contained in the terms *jus* and *lex*. This is because in ancient Chinese, *fa* and *lǚ* each had its own particular meaning, each of which differs vastly from its current meaning. Although the Chinese characters *fa* and *lǚ* have a history of more than two thousand years,⁴ as an independent compound, *falü* was imported from Japan during this century.⁵ To confer a completely new meaning onto this term within such a short time period is much easier said than done.

As a rule, whoever discusses the Chinese character *fa* will invariably quote the famous definition from the *Shuo Wen*.⁶ The *Shuo Wen* explains that the ancient form of *fa* was *fa**, and that *fa** was punishment, "leveled as even as water, thus it comes from the character for 'water;' " and that it was *zhi*, in that "it strikes those who are not upright and removes them, thus it comes from the character 'to remove.' " ⁷ Some people rely on this passage to hold that etymologi-

4. *Fa* is the usual generic term for positive or written law as an abstraction, but it may also be used to mean separate "laws." In one of its archaic variants, *fa* was comprised of the symbols "to adapt" (*chi*) and "uprightly" (*zheng*), hence the meaning of "law;" "rule;" or "a model for behavior." D. BODDE, *THE LAW IN IMPERIAL CHINA* 11 (1967); G. WILDER & J. INGRAM, *ANALYSIS OF CHINESE CHARACTERS* 89 (1981); L. WIEGER, *CHINESE CHARACTERS* 288 (1965). This character's legendary origins and etymological development are discussed below in the text.

Lǚ, meaning a "statute," or a "fixed law," is the technical designation for the major articles into which the legal codes of later dynasties were divided. The word can also be used to refer to the code itself. BODDE, *supra* note 4, at 11; WILDER, *supra* note 4, at 272; WIEGER, *supra* note 4, at 336.

5. See SHI TENG HUI XIU, *ZHONGGUOREN LIUXUE RIBEN SHI* (A History of Chinese Studying in Japan), ch. 7, pt. 13 (1983).

6. The *Shuo Wen*, or *Shuo Wen Jie Zi*, (preface dated A.D. 100) was purportedly written by Xu Shen, and was the first real dictionary of the Chinese language. B. WATSON, *EARLY CHINESE LITERATURE* 194 (1962). See also R. MILLER, *PROBLEMS IN THE STUDY OF SHUO-WEN CHIEH-TZU* (1953).

7. SHUO WEN, *Zhi Bu* (Shuo Wen, Zhi Radical).

The asterisk indicates a different Chinese character. The ancient Chinese character *fa**

cally the Chinese character *fa* contains both the meanings of fairness and justice, similar to the ancient meaning of "law" in other languages.⁸ However, this theory is not accurate. Cai Shuheng felt that the four characters, "leveled as even as water," "were improperly added by unlearned men of later generations," and are unreliable. It is best to start from an anthropological perspective to examine the ancient meanings of this character. Using this approach, the meaning of water is not symbolic but purely functional. It refers to placing a criminal on the water to drift away with the current, what is now called banishment.⁹ In ancient society this was a very harsh punishment. At present, we shall not discuss the accuracy of Mr. Cai's explanation, but it should be said that his chosen approach is correct.

In legends, the *zhi* was a single horned mythical beast. According to *Critical Essays*, the *xie zhi*, or *zhi*, was a single horned ram.¹⁰ When Gao Yao, while administering justice, was doubtful about the guilt of a culprit, he ordered the ram to butt him. If he was guilty, then the ram would butt the culprit; if he was not guilty, then the ram would not butt the culprit.¹¹ This was the so called "sage animal born with one horn, a most efficient assistant in judicial proceedings."¹² This method of judgment that we would today call trial by ordeal was frequently related to man's primitive religious thoughts. Therefore, there are plenty of examples of this in the early history of almost every nation. In China, from the Han Dynasty (206 B.C.-A.D. 220) onward, legal officials wore the crests of the *xie zhi* on their robes and hats, a practice which signified the function of expelling the crafty and the obsequious. Finally, after having viewed together each school's explanation of *fa*, neither the idea of "leveled as even as water" nor the idea of "sending the guilty to drift away with the current" exceeds a general procedural meaning, and naturally, neither has ever con-

was composed of the radical for water, the symbol for *zhi* (explained in the text below) and the symbol *qu* meaning "to go" or "to remove." Though pronounced the same, the modern character *fa* is a simplified version of its ancient form in that the symbol for *zhi* has been deleted.

8. FAXUE CIDIAN (Legal Dictionary) 454 (Shanghai ed. 1980).

9. CAI SHUHENG, ZHONGGUO XINGFA SHI (A History of Chinese Criminal Law) 170 (1983).

10. The *Critical Essays*, or *Lun Heng*, was written by the Han scholar Wang Qong (A.D. 27-ca. 100) for the stated purpose of combating the many "fictions and falsehoods" that had been absorbed from popular superstition and legend into Han Confucianism. WATSON, *supra* note 5, at 194-97.

11. WANG CONG, LUN HENG (Critical Essays), *trans. in* A. FORKE, LUN-HENG 321 (1962).

Gao Yao is the name of a man who served as chief judicial officer for the legendary sage-king Shun (ca. 2200 B.C.).

12. JU TONGZU, ZHONGGUO FALÜ YU ZHONGGUO SHEHUI (Chinese Law and Chinese Society) 253 (1981).

tained the characteristics of a theory of political justice. It is a grave error to confuse the character *fa*, which only has a simple idea of fairness, with words like *jus*, which contain comprehensive and profound ideas of justice. In every instance, this type of literary approach reveals only the obvious etymological meaning of *fa*. In order to truly grasp its specific and rich meaning, one still must look at the relationship between *fa* and other words.

According to Cai Shuheng's research, one aspect of the meaning of the word *fa* is to prohibit, but another aspect is to command.¹³ Then, what means should be used to guarantee this principle of ceasing what is prohibited and carrying out what is ordered (*jinzhi lingxing*)? The ancient pronunciation of the Chinese character for

13. Mr. Cai's research shows that the ancient pronunciation of the character *fa* was *fei*, and *fei* (to abolish) was inscribed on *zhong* and *ding* instead of *fa*. (*Zhong* and *ding* refer to large ritual bells and tripod cooking vessels made of bronze which were used during the Shang (trad. 1765-1123 B.C.) and Zhou (1122-256 B.C.) dynasties. Laws and their punishments were often inscribed upon them. See also *infra* note 76, and accompanying text.) Consequently, the meaning of the character *fei* gradually became that of the character *fa*. The *Rights of Zhou* states that the meaning of the character "*fei* is like *e*" (to stop, to prevent). ZHOU LI, *Tianguan Zhongzai* (Rights of Zhou, Grand Intendant), trans. in B. KARLGREN, CHOU LI (The Museum of Far Eastern Antiques No. 3, 1931). The *Rights of Zhou* is of uncertain date or authorship, and is an idealized description of the bureaucratic system which was supposed to have been in effect during the Zhou Dynasty. WATSON, *supra* note 6, at 139. The *Er Ya* states that the meaning of the character "*e* is *zhi**" (to stop, to cease), and that of "*fei* is *zhi**." ER YA, *Shi Gu*. The *Er Ya*, a brief lexical work, is a collection of glosses on words in the Confucian Classics and probably dates from the late Zhou Dynasty. WATSON, *supra* note 6, at 148 n4, 194. An annotation to *Intrigues of the Warring States* says that the meaning of the character "*zhi** is *jin*" (to prohibit, to forbid). ZHANGUO CE, *Qi Ce* (Intrigues of the Warring States, Intrigues of the State of Qi), trans. in J. CRUMP, CHAN-KUO TS'E (1970). The *Intrigues of the Warring States* is a semi-historical, philosophical work covering the Warring States Period written during the Eastern Zhou. It is a collection of anecdotes arranged in rough chronological order in sections devoted to 12 states. WATSON, *supra* note 6, at 74-91. The *Conversations from the States* says that the meaning of the character "*fei* is *jin*." GUO YU, *Zheng Yu* (Conversations from the States, Conversations from the State of Zheng). The *Conversations from the States* is a narrative collection of semi-historical anecdotes and speeches written near the end of the Zhou Dynasty. WATSON, *supra* note 6, at 66-74. Therefore, the meaning of *fa* is that it is considered to have a prescribed limit. The word "*fajin*" (criminal prohibition) then can be viewed as proof of this conclusion. In addition, *bi* (to force, to compel, to coerce) changed into *fa*. The *Shi Ming* states that the meaning of the character "*fa* is *bi*," and that, "there is not one who does not desire to follow his will, coercion rightly causes them to have limits." SHI MING, *Shi Dian Yi*. The *Shi Ming* is a commentary written during the Eastern, or Latter, Han Dynasty (A.D. 25-220) and is patterned after the *Er Ya*. Thus, there is also the meaning of *jin* (to prohibit) in this explanation as well. An annotation to the *Zuo Commentary* states that, "*bi*, [means to] take by force man's power and influence." ZUO ZHUAN, *Xiang Gong Ernian* (Zuo Commentary, The Second Year of Duke Xiang), trans. in S. J. LEGGE, THE CHINESE CLASSICS (1982). The *Zuo Commentary* is a historical narrative written during the Eastern Zhou Dynasty as a commentary to the *Spring and Autumn Annals*. WATSON, *supra* note 6, at 40-66. The *Er Ya* states that the meaning of the character "*bi* is *po*" (to press, to force, to compel). ER YA, *Shi Yan*, *supra*. What is stressed throughout these explanations is forced compliance, moreover, the meaning of to command.

"law" (*fa*) closely resembled that for the Chinese character "to punish; to subjugate; to attack" (*fa* **). As a result, punishment (*fa* **) was used to effectuate law (*fa*). In this context, *fa* acquired the meaning "punishment."¹⁴ Prohibitions and commands emphasize the function of law; punishment, however, is primarily the means by which the realization of this function is guaranteed. Therefore, these two are quite closely connected.

In ancient Chinese texts, there are at least two very important characters that can serve as an explanation of the word *fa*. One is *xing*, another *lü*.¹⁵ *Xing* and *fa*, and *fa* and *lü* can be interchanged.¹⁶ Of course, ancient characters had rich connotations, and were frequently interchanged with other words and characters, shifting definitions to the point where a new meaning was formed. Also, through the vicissitudes of time, the form, pronunciation and meaning of a character might undergo a variety of changes. Therefore, the focus here is the general relationship between the three characters *xing*, *fa*,

14. In *Guan Zi*, it states that, "[w]hat selects in accordance with a single way things large and small for execution, extermination, prohibition, or punishment is called law." GUAN ZI, *Xinshu* (The Art of the Heart), trans. in A. RICKETT, KUAN-TZU 175, n.125 (1965). The *Guan Zi* is a philosophical work containing a rather eclectic collection of writings by anonymous writers that is traditionally attributed to the statesman Guan Zhong (d. 645 B.C.), though the work was probably compiled two to four centuries later. WATSON, *supra* note 6, at 179-82. The *Discourses on Salt and Iron* states, "that which is *fa* is punishment and fines, therefore it is prohibition, force and violence." YAN TIE LUN, *Zhao Sheng* (Debates on Salt and Iron, Imperial Instructions), trans. in HUAN K'UAN, DISCOURSES ON SALT AND IRON (Sinica Leidensia No. 2, 1931). The *Discourses on Salt and Iron* is purportedly a record compiled by Huan Guan during the first century B.C. of the debates that occurred in 81 B.C. concerning the state monopolies of the salt and iron industries. WATSON, *supra* note 6, at 191-94. Regarding the examination of the character *fa* above, see CAI SHUHENG, *supra* note 9, at 5, 6, 41.

15. *Xing* is the Chinese word for punishment or punishments, more specifically "corporal punishment." The modern form of this character is comprised of the ideograph for knife and balanced scale pans; however, Chinese epigraphers and philologues have shown that this writing is an incorrect variant of its original, archaic form which had the symbol for a well (*jing*) instead of that for balanced scale pans. The character for well symbolized nine plots of land farmed by eight families, the ninth plot was farmed jointly to benefit the state. It was on this ninth plot that public functions, e.g., executions, were held. Together with the knife, this denotes punishments, usually decapitation. Once written laws (*fa*) came into existence, the meaning of *xing* extended to include punishment per se as well as the written prohibitions whose violation would result in these punishments. In this sense, *xing* means "penal law," or "laws." See BODDE, *supra* note 4, at 11; WILDER & INGRAM, *supra* note 4, at 226; WIEGER, *supra* note 4, at 270.

16. For example: the *Er Ya* states that the meaning of "*xing* is *fa*," and that of "*lü* is *fa*." ER YA, *Shi Gu*, *supra* note 13. The *Shuo Wen* states that the meaning of "*fa* is *xing*." SHUO WEN, *supra* note 6. The Tang Code states that the meaning of "*fa* is also *lü*." TANG LÜ SHU YI, *Ming Li* (Tang Code with Commentary, Terms and General Principles), trans. in J. WALLACE, THE TANG CODE: VOLUME I, GENERAL PRINCIPLES (1979) (The Tang Code was first enacted in A.D. 653 and achieved final form in 737. It is the oldest surviving Chinese code and was based largely on the now lost Sui Code of A.D. 581-583.)

and *lü*, particularly their intrinsic logical link. From a chronological perspective, what we today refer to as ancient law was, during the Three Dynasties (Xia, trad. 2205-1766 B.C., Shang, trad. 1765-1123 B.C., and Zhou 1122-256 B.C.) referred to as “*xing*,” during the Spring and Autumn period (722-207 B.C.) and Warring States period (403-222 B.C.) referred to as “*fa*,” and during the Qin (221-207 B.C.), Han (206 B.C.-A.D. 220) and later dynasties referred to mainly as “*lü*.” With regards to the relationship among the three characters, there is not the same stratification as there was between *jus* and *lex*, nor do they contain within them the profound meanings of rights and justice. However, these three are not of equal importance. The central meaning of these three is still *xing*. As a result, it is difficult for people today to understand the meaning of certain ancient words. For example, the word *fazhi* (legal system; laws and institutions) with which everyone is familiar, was defined in *Master Lü’s Spring and Autumn Annals* as, “in this month, the office was ordered to restructure the legal system, repair prisons, prepare shackles, prohibit craftiness.”¹⁷ Other examples include *faguan*, the government official in charge of law, punishment and prisons; *fali*, a warden; or *fasi*, the government agency in charge of law, punishment and prisons. In addition, *fazhang* (bamboo rod used for punishment), *fashi* (prison cells), *fake* (laws), *fasi** (board of punishment), *facao* (judges), *fachang* (execution ground), *fabi* (criminal punishments), *fajin* (criminal prohibitions), and *fawang* (the reach of the law), all had meanings which can be brought within the realm of what is referred to today as criminal law. Pre-Qin legalism was also referred to as the study of “accountability” (*xingming zhi xue*).¹⁸ In later dynasties there was the position of secretary of punishments (*xingming shiye*), which referred to the advisors of the local county government office who helped the county magistrate manage legal affairs. Through the existence of these designations, one can begin to appreciate the origins of

17. LÜ SHI CHUNQIU, *Meng Qiu Ji* (Master Lü’s Spring and Autumn Annals, Records of Meng Qiu), trans. in R. WILHELM, *FRLING UND HERBST DES LÜ BU WE* (1928).

The *Master Lü’s Spring and Autumn Annals*, was written near the end of the third century B.C. and like many other texts of the late Zhou, dealt with the political problems of how to judge men’s abilities for government. WATSON, *supra* note 6, at 186-89.

18. The concept of “accountability” was an attempt by legalists to insure conformity to an established definition of office and responsibility. Any deviation from the prescribed form was met with fatal displeasure. See D. HALL & R. AMES, *THINKING THROUGH CONFUCIUS* 165 (1987). The importance attached to this concept necessarily required the detailed examination and articulation of the nature and names of offices, duties, punishments, and rewards. See also H. CREEL, *The Meaning of Hsing-Ming*, in BERNHARD KARLGREN *DEDICATA* 199-211 (1959). Cf. WING-TSIT CHAN, *A SOURCE BOOK IN CHINESE PHILOSOPHY* 787-88 (1973) (Chan maintains that the term *Xingming* had nothing to do with the legalists but rather the philosophical relation between name and actuality).

the importance of punishment in the tradition of China's ancient legal culture.

Returning now to the question first posed in this article, whether the character *fa* fully captures the meaning of terms like *jus*, the answer is self-evident. In short, traditionally what China and the West call law are linguistically dissimilar with vastly different meanings, making it impossible to use *fa* as the counterpart for *jus*. Although the character *fa* now in use already has a new meaning, it is still very difficult to completely express the true profound meaning of the word *jus*. Thus, the discrepancies in meaning between *fa* and *jus* illustrate the differences in historical progress and social values of the different nations, or more specifically the differences between Chinese and Western cultures. Only by starting from this perspective is it possible to give a more appropriate explanation of the real differences in the two linguistic phenomena discussed above. Consequently, our discussion must continue with the origins of the state and laws in ancient Greece, Rome, and China, since during these periods of history, these two developments are closely linked together.

II. THE DEVELOPMENT OF THE STATE AND LAW IN ANCIENT GREECE

Due to the existence of numerous polity centers, ancient Greek history has many distinguishing features. Naturally, this article cannot discuss the history of each Greek city-state. For convenience the author examines only the Athenian state. Another reason for this choice is that the formation of the Athenian state has been considered "an example of an unusual model of the formation of the typical state."¹⁹ This assertion is based on the fact that the formation of the Athenian state was not subjected to any forced exogenous or indigenous interference.²⁰ Certainly, long before the emergence of the Athenian state, internal changes in the society had already eroded the old clan structure. The growth of division of labor in society gradually eroded the old organizations based on blood lines, and caused the emergence of new groups which were based on occupation. Furthermore, owing to the expansion of slave labor and the increase in the number of foreigners who moved to Athens for commercial purposes, the composition of society became increasingly complex, and a whole

19. ENGELS, *The Origins of Family, Private Ownership, and the State* in THE SELECTED WORKS OF MARX AND ENGELS 115 (1972).

20. *Id.* Another reason is that, "the highly developed structure of the state, the democratic republic, is formed directly from clan society." However, on this point there is some dispute in the academic world. See generally GU ZHUAN, XILA CHENGBANG ZHIDU (The Greek City-State System) (1982).

series of new social demands were created. As a result, the old structure based on clan organization was completely unable to satisfy these new demands. This was the turning point in the creation of the Athenian state. Just as the state was emerging, twelve small scale districts were established in each tribal settlement. Engels believed that these measures had two distinguishing features: first, they created a public power separated from the public masses; second, it was the first time the residents were divided according to territory and not according to family groups.²¹ The latter was a meaningful, far-ranging step leading to the final formation of the Athenian state.

The transition from a pure clan structure to a true state structure not only followed a very long route, it also took innumerable "intermediate forms." It is arbitrary and premature to reach a conclusion at this point. However, by analyzing and describing the entire historical process, we can extract from history essential characteristics and also locate important events which act as historical milestones. In the history of the formation of the ancient Greek and Roman states, law is one such milestone. The Solon reforms of 594 B.C. were promulgated in the form of law; therefore, these reforms are known historically as the "Solon legislation."²² The Solon legislation divided the citizens into four classes based on the amount of property owned and determined their respective rights, but it still maintained the tribal settlement divisions. This was the only clan remnant that could be seen in the state system. This situation persisted for about one century until the Kleisthenes reforms of 509 B.C., when the formation of the Athenian state was finally completed.²³

Each step in the process of marching from clans toward state was reflected in the law. This phenomenon is worthy of attention because it touches upon the function of law, the position of law in society, and a whole series of other questions that are also related to the formation of a state. The background of the Solon reforms was the intense struggle between the two large groups of the elite and the commoners. At that time, social conflicts had already intensified to the extent that a new social order was needed; otherwise, these two large groups would have perished together and caused the collapse of society. Solon used the status of "elected intermediary" (Aesymenites) to enact law.²⁴ Engels points out:

21. See ENGELS, *supra* note 19, at 110. This is also a theory adopted by modern Western academic circles concerning the origins of civilization. See ZHANG GUANGZHI, KAOGUXUE ZHUANTI LIUJIANG (Six Lectures on topics in Archaeology) 14 (1986).

22. See generally 4 THE CAMBRIDGE ANCIENT HISTORY SERIES 41-50 (1930).

23. *Id.* at 141-50.

24. See *id.* at 52.

[The state] is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have a power seemingly standing above society that would alleviate the conflict and keep it within the bounds of "order;" and this power . . . is the state.²⁵

This is precisely a portrayal of the formation of the Athenian state. To say that the state is the power that rides above society, is the same as saying that law is the power that rides above society. This premise is the basis for the complete authority of the Solon legislation and contains the essence of what the modern West has called the rule of law.

In the Athenian state, the distribution of the rights and duties for each class was stipulated by law. For example, "free men" and "citizens" were sheer legal concepts. According to Aristotle's definition, this type of status was determined by relying on the nature and quantity of rights enjoyed by law.²⁶ In another respect, the organization and administrative methods of a state differed because of time and place, depending entirely on the rise and fall of the strength of interest groups. This is both a problem of governmental structure and a constitutional problem. Therefore, factional struggles in the Athenian state were ultimately reflected in the law. This point can be clearly seen from the laws enacted by Solon, Kleisthenes and Pericles. The opposition and conflicts of the interest groups necessarily lead to different understandings of justice and different demands on the constitution and the governmental structure. These two questions are interrelated. It can be seen from the ancient Greek documents passed down that the inquiries into law, rights, justice and morality were always interwoven together. The Sophist Lycophron said that law is "a guarantor of men's rights against one another."²⁷ However, Aristotle believed that law "should be a rule of life such as will make the members of a polis good and just."²⁸ When law conforms with the goals of justice, the two can even be unified as one. Defending a constitution is also preserving a system of government. Likewise, in real-

25. ENGELS, *supra* note 19, at 166.

26. For a detailed discussion of the status of citizen, see ARISTOTLE, *THE POLITICS* 92-110 (E. Barber ed. 1952).

27. *Id.* at 119.

28. *Id.*

izing a type of justice, what is lawful is also what qualifies as justice.²⁹ Although some Sophists have drawn support from the concept of natural law to raise doubts and even to deny the justness of city-state law (man-made law), the objective is to substitute laws that conform to justice for laws that are harmful and evil. Ultimately, law is still the power that rides above society. Many great thinkers of ancient Greece recognized that rule by the law of "universal principles," was superior to the individual orders of "separate precedents." Esteem for the "rule of law" forms the keynotes of *The Laws* and *The Politics*.³⁰ Just as the flourishing of ancient Greek political philosophy originated within the development of the political life of the society, the Greek concept of the "rule of law" and the close links between the terms law and rights, justice, and other concepts all originated within the formation of the Athenian state and its law.

III. THE DEVELOPMENT OF THE STATE AND LAW IN ANCIENT ROME

The history of the formation of the Roman state is similar to that of Athens. Although the history of the Roman imperial period is not very clear, we do know that late in this period struggles between social groups were already very intense. As Engels affirmatively states, revolution arose from the struggles between the commoners (of conquered lands) and the Roman people (*populous romanus*).³¹ It is said that in the sixth century B.C., King Servius Tullius took Greece as a model, particularly the new system established by the laws enacted by Solon.³² He eliminated the original divisions of clan and tribal settlements, divided the entire Roman free population into six classes according to the quantity of property owned, and allocated political rights anew.

"This way, in Rome as well, before the so-called monarchy had been abolished, the ancient social structure founded upon individual blood relationships had already been destroyed, and rising up and replacing it was a new, true

29. *Id.* at 125-26.

30. See STRAUSS, *THE ARGUMENTS AND THE ACTIONS OF PLATO'S LAWS* 55-59 (1975); ARISTOTLE, *supra* note 26, at 140-42.

31. ENGELS, *supra* note 19, at 125. Engels believed that the commoners were made up of immigrants and the residents of conquered territory. Thus, he developed the theory of struggle between the roman populous and the commoners. *Id.* at 124.

The term *populous romanus* in Roman law refers to the whole body of Roman citizens, patricians (patricians and senators), and plebeians or commonality.

32. See generally 7 *THE CAMBRIDGE ANCIENT HISTORY SERIES*, *supra* note 22, at 387-97.

state structure founded upon territorial divisions and property disparity."³³

Afterwards, the conflict between the commoners and the Roman people turned into the conflict between the plebeians and the patricians. All the laws enacted in early Rome were produced from these struggles and developed within this scope. Beginning with the Valerian Law (*lex Valeria*) of 449 B.C., each victory achieved by the plebeians was codified in law.³⁴ A whole series of laws illustrate this historical process. For example, the Licinio-Sextan Law (*leges Liciniae Sextiae*) of 367 B.C. recognized the right of plebeians to hold executive office and other high official positions, and abolished the limitation on marriages between plebeians and patricians.³⁵ The Hortensian Law (*lex Hortensia*) (287 B.C.) provided that resolutions passed by the plebeian senate would become state law with general binding force.³⁶ Of course, the most famous law was the Twelve Tables, proclaimed during 451-450 B.C.³⁷ This code of law, which formed the foundation for the entire body of Roman law, is also a record of the victory of the plebeians over the patricians and will be discussed further below.

Clearly, the general conclusions reached above concerning the state and law of Athens are also applicable to Rome. This is primarily because of similarities in the historical process itself. However, it must be noted that as a result of the contact and infiltration between these two cultures, concepts in Greek society influenced and even dominated Roman jurists. This aspect is manifested primarily in the latter's acceptance and utilization of the idea of natural law.³⁸ Outside of the positive law, the concept of natural law also encompasses rights, justice, and other moral ideas. Thus, it provides a glimpse of the legal thought of the Greeks at that time. Although natural law exists in opposition to man-made law, just like the duality between *jus* and *lex*, their pure forms exist only in logic since in real life the two are closely interconnected. The three basic divisions of

33. ENGELS, *supra* note 19, at 126.

34. See 7 THE CAMBRIDGE ANCIENT HISTORY SERIES, *supra* note 32, at 447-48.

35. See *id.*, at 524-42.

36. See *id.*, at 482-84.

37. The Twelve Tables, or *lex Duodecimum Tabularum*, was the earliest code of Roman law and was based in part on the laws of other nations though still primarily Roman.

38. In European history, the birth, development, and spread of the concept of natural law comprise a complete historical cycle. The concept of legal dualism in Western civilization, the theory of the supremacy of law, and the approach that considers law, rights, justice, and other concepts together as one are all related to this idea. Unfortunately, since this discussion focuses on the early stages of the history of Western states and law, and the origin of the historical relationship between law, rights, justice, and other concepts, this later period of history will not be examined.

Roman law: the civil law (*jus civile*), the law of nations (*jus gentium*), and the natural law (*jus naturale*) all use *jus*. From the word *jus* itself, the differentiation between "moral law" and "positive law" is not apparent, hence *lex* was often used as a synonym for *jus*. Actually, there is no way to prove either that in reality the abstract law (like *jus*) can simultaneously refer to rights and justice, or that specific law (like *lex*) is completely unrelated to these concepts. Although as society developed, stratification was inevitable, because these concepts were products of a single society their characteristics are similar. This point is particularly pronounced when comparing them in different cultural settings.

IV. THE FORMATION OF THE ANCIENT CHINESE STATE AND ITS IMPACT ON EARLY CONCEPTIONS AND FUNCTIONS OF "LAW"

The Chinese state formed at least a thousand years earlier than the states of Greece and Rome. However, differences in time are probably not important. What truly distinguishes the Chinese state from the Western states are the processes and methods that formed it.

A. *The Formation of the State*

The mythological Xia dynasty (trad. 2205-1766 B.C.) is China's earliest state. The archeological work of the past few decades has proved the existence of this Chinese state.³⁹ However, we know very little concerning this period of history. Judging from current materials, without a doubt, Xia culture fell far short of that of both the succeeding Yin Shang (trad. 1765-1123 B.C.) and the well developed Zhou culture (1122-256 B.C.). However, if viewed from the perspective of an entire cultural history, then the Xia, Shang and Zhou, the so called Three Dynasties, constitute one complete era, namely China's bronze age.

At the start of the bronze age, the divisions of social power and wealth were already very apparent. By the start of the Zhou dynasty, the organization of the ancient state was almost completed. Paradoxically, in sharp contrast to this development was the fact that, "through the entire Chinese bronze age, metal was never the primary material for making the tools of production; the tools of production of

39. Though many questions remain and debates concerning the Xia persist, most archaeologists agree that a culture existed, often referred to as the Erlitou culture, during the period and in the regions traditionally ascribed to that of the Xia dynasty. See generally K.C. CHANG, THE ARCHAEOLOGY OF ANCIENT CHINA 307-16 (1986); *The Origin of Shang and the Problem of Xia in Chinese Archaeology*, THE GREAT BRONZE AGE OF CHINA: A SYMPOSIUM 10-15 (1983).

this period were still made from stone, wood, horn, bone, and other materials."⁴⁰ Bronze was still used primarily for making ritual vessels and weapons. Thus, the formation of China's bronze age state was not the result of qualitative changes in social production such as the widespread use of bronze tools. In other words, preserving a new social order under these conditions and maintaining its continued stability certainly would have required a system of strict upper class control. From this conclusion the following two questions emerge: first, how was ancient China's earliest state formed (a question of process)? Second, how was this type of state organized (a question of method)?

Since archeology concerning the Xia is just beginning, trying to provide a satisfactory answer to these questions is objectively impossible. Nevertheless, the author would like to borrow two of Hou Wailu's observations: The increase in power of the Xia arose from (1) warfare; and (2) the perpetuation of the traditions of the clan elders.⁴¹

1. The Influence of Warfare on the Formation of the Chinese State

All the records of antiquity contain numerous descriptions of war. Moreover, these wars were known for their intensity and frequency. The accounts of the battle of Gong Gong with Zhuan Xu and the battles of Huang Di with Yan Di and Chi You may have originated from ancient myths and legends, but ultimately they cannot be viewed as mere fabrications.⁴² Later records of the quelling of

40. ZHANG GUANGZHI, *ZHONGGUO QINGTONG SHIDAI* (China's Bronze Age) 18 (Taipei ed. 1983).

Bronze farm implements are seldom found among the Shang and Zhou bronzes excavated to date. During this period, most farm implements were still made from stone, wood, shells, horn, and other like materials. Cf. ZOU BAOJUN, *ZHONGGUO QINGTONGQI SHIDAI* (China's Bronze Age) 17-19 (1963). By contrast, this work emphasizes that bronze farm implements were used, and that there were more bronze farm implements than those discovered to date would indicate. Despite this, it is still a fact that stone, bone, wood, shells, horn, and other such materials were still commonly used during China's bronze age. This phenomenon forms a sharp contrast with the highly developed bronze smelting and forging techniques and the large quantity of bronze ritual vessels (including musical instruments) and weapons of that time.

41. HOU WAILU, 1 *ZHONGGUO SIXIANG TONGSHI* (A General History of Chinese Thought) 74 (1962).

42. These pre-dynastic battles refer to the fierce and presumably legendary wars between the half brothers Huang Di, the celebrated Yellow Emperor and creator of civilized rule, and Yan Di, or Shen Nong, a ruler and cultural hero who was the first to introduce agriculture (trad. ca. 2740-2670 B.C.). Yan Di was defeated in this struggle and an heir, Chi You, unsuccessfully sought revenge against Huang Di. This power struggle between the descendants of Huang Di and Yan Di continued with the battles between Gong Gong, a descendent of Yan Di, and Zhuan Xu, a grandson of Huang Di.

the Miao and the various wars between the Yi and the Xia can also be used to illustrate the frequency of ancient wars.⁴³

Naturally, a single battle cannot give rise to a state. In the very beginning, most of those taken prisoner in a battle were either killed outright or used as human sacrifices. Only after reaching a certain stage of social development did Chinese society use prisoners as a labor force. In pre-historic China, this stage was probably reached during the late neolithic period.⁴⁴ By at least this stage, wars, since they were able to produce large quantities of prisoners, hastened the concentration of power in clans, contributed to the stratification of the society, and effected changes in the structure of society's organization. This development certainly had an enormous influence on human life.

Generally speaking, the creation of civilization must have as its prerequisite the appearance of "surplus wealth." However,

the extent of each person's living consumption increases in proportion to the increase of productivity. For this reason, the existence of surplus materials in society is not simply a result of an increase in productivity, but must be artificially produced. In other words, the more societal relations are unequal, the more wealth can become concentrated, and the more "surplus wealth," the so-called phenomenon of civilized society, is produced.⁴⁵

43. Archaeologists believe that there were three major ethnic groups in ancient China, namely the Yi, Xia, and Miao, each made up of hundreds of small states or tribal units. The Miao refers to the group of tribal units located near modern-day Henan, Hubei, Hunan, Jiangxi, and Shenyang, and who, according to legend, were pushed back to the area of present-day Gansu and Dunhuang during the reign of the legendary sage-king Shun (ca. 2248 B.C.). See also *infra* note 61. The Xia refers to the group that inhabited the area of present-day Shanxi, western Henan and Shenxi. The Yi refers to the group which inhabited the area of Shandong, eastern Henan, northern Jiangsu, and northeastern Anhui. The major recorded events of the Xia dynasty describe the conflicts with these Yi groups. Tang (Cheng Tang, Tian Yi) who conquered much of the Xia and founded the Shang dynasty did so with the support of these Yi groups and in this sense the Shang was one of these Yi states. Most of the Three Dynasties period can be characterized as the episodic hegemonies of some of the states among many. See K.C. CHANG, *SHANG CIVILIZATION* 350-51 (1980); *THE ARCHAEOLOGY OF ANCIENT CHINA*, *supra* note 39, at 303-06.

44. This refers to the Long Shan culture (scholars divide this culture into two periods: Long Shan, 3000-2400 B.C.; and Longshanoid, 2400-ca. 200 B.C.). Most believe that this period was based on agriculture, and that private ownership and social divisions had already appeared. This period's culture is closely linked to each of the Xia, Shang, and Zhou civilizations. See AN ZHIMIN, *ZHONGGUO XINSHIQI SHIDAI LUNJI* (Collection of Discussions on China's Neolithic Age) 67, 75, 79, 245, 246 (1982). There are even some who feel that the distinguishing feature of the politicalization of the descent group had already appeared at this period. See ZHANG GUANGZHI, *supra* note 40, at 344.

45. ZHANG GUANGZHI, *supra* note 40, at 62.

The early stages of stratification of society in Greece brought about the history of the great Homer epic, but in China, it hastened the coming of the bronze age.

The formation of a bronze implement requires a whole series of complicated processes, including the extraction of the metal ore, transportation, smelting and forging. It is difficult to imagine being able to complete these processes without having a relatively high degree of concentrated political power. One could say that the emergence of bronze implements signified the existence of a certain degree of social order characterized by social stratification and concentrated authority. Moreover, bronze implements themselves also had a particular social function. They not only became an indication of social order, but they also caused the social order to develop and strengthen.⁴⁶ The extensive use and continuous improvement of bronze weapons increased the efficiency of war and resulted in the capture of even more prisoners. This result indirectly promoted the advancement of production forces and increasingly strengthened the social order dependent on it.

Bronze vessels, because they directly became a symbol of authority, are worthy of greater attention. Hou Wailu properly pointed out: "ritual vessels represented the integration of acquired possessions and governing authority. Through the process of the materialization of personality, that personality becomes materialized. In other words, *zun* and *jue* are forms of the authority of the imperial family that are not solely based on wealth."⁴⁷ In short, bronze ritual vessels embodied political authority. Because of this particular social function, bronze ritual vessels held a lofty position among the ruling class during the Shang and Zhou dynasties, touching upon every important area of state life at that time.⁴⁸ Like bronze weapons, they strength-

46. *Id.*

47. HOU WAILU, 1 *ZHONGGUO SIXIANG TONGSHI*, *supra* note 41, at 15 (emphasis in the original); ZHANG GUANGZHI, *supra* note 40, at 13, 21, 23, 110-11.

Zun and *Jue* were bronze ritual drinking vessels.

48. The contents of Western Zhou (B.C. 1122-771) bronze inscriptions included enfeoffing of feudal lords, imperial audiences, participation in sacrificial ceremonies, feasts, hunts and various other activities of the ruling household. There were also expeditions to surrounding states, recorded merits of victories, tributes to officials, sacrificial offerings to family ancestors, marriage negotiations and exchanges, legal disputes, etc. See MA CHENGYUAN, *ZHONGGUO GUDAI QINGTONGQI*, *supra* note 40, at 18-28; XIN *ZHONGGUO DE KAOGU FAXIAN HE YANJIU* (New Chinese Archeological Discoveries and Research) 264-70 (1984). From this, we can not only know the important uses of bronzes in Shang and Zhou society, but can also partially explain the phenomenon of the startling disproportion of ritual vessels and weapons to farm tools among the large quantities of excavated bronzes. Chen Mengjia writes that "in the Yin [Shang] dynasty, the technique of making bronzes was a technique specially developed by the royal family, and served the aristocrats of the imperial court." CHEN

ened the social order that they represented. During China's bronze age the State developed and gradually perfected itself in the midst of this relationship between ritual bronze vessels and political power.⁴⁹ Of course, the perfection of the state structure was completed over a relatively lengthy period of time. It is impossible to find a definitive point in time to demarcate the precise social conditions upon which the state was formed. However, it is certainly necessary to point out the procedural importance of war in the formation of the state in China.⁵⁰

2. The Perpetuation of the Clan Tradition

The *Zuo Commentary* states that, "[t]he great affairs of a State are sacrifice (*ji*) and war (*rong*)."⁵¹ *Rong* naturally refers to warfare; *ji* is related to the so called "traditions of the clan elders." To a certain extent, the importance of the clan elder within the descent group was related not to the individual person but rather to his status as the person presiding over ritual sacrifices. This was because nothing exceeded the ability of the rites of ancestral sacrifices to bond a descent group together. The perpetuation of the traditions of the clan elders demonstrates the importance of descent groups in the organization of society.

We know that the ancient legendary wars were all wars of conquests among different clans. Even the dynastic successions of the

MENGJIA, YIN XUPUCI ZONGCHU (Collection of Yin Dynasty Oracle-Bone Writings) 549 (1956). The author believes that Mr. Chen's position is entirely correct.

49. TIAN CHANGWU, GUDAI SHEHUI XINGTAI YANJIU (Research on Ancient Forms of Society) 177-82 (1980).

There is one theory that holds that it is impossible for the formation of the state to be isolated, but must instead be parallel and progressive. Archaeology and ancient texts all prove that the three dynasties of the Xia, Shang and Zhou, besides having a vertical relationship of direct succession, also had a horizontal, *i.e.*, contemporaneous, relationship of intolerance and disdain. This horizontal relationship was a basic prerequisite of succession during the Three Dynasties. See ZHANG GUANGZHI, *supra* note 40, at 31-63. The substance of this horizontal relationship was rich; a state of mutual opposition and even open battle are an important part of it. It is very probable that the earliest state of Ji Zhou was established in the course of war expeditions (unifying the West). (Ji was the surname of the kinship who founded the Zhou.) ZOU HENG, *Lun Xian Zhou Wenhua* (Discussing Pre-Zhou Culture) in XIA SHANG ZHOU KAOGU LUNWEN JI (A Collection of Essays on Xia, Shang and Zhou Archeology) 331-35, 353, 354 (1980). Moreover, it is an indisputable fact that the Zhou State was strengthened and became more complete as a result of conquering and ruling the Shang.

50. For further discussion of the transformation from a clan or tribal society to a state society in China, see, *e.g.*, M. FRIED, *Tribe to State or State to Tribe in Ancient China?* in THE ORIGINS OF CHINESE CIVILIZATION 467-93 (D. Keightley ed. 1983); K.C. CHANG, *Sandai Archaeology and the Formation of States in Ancient China: Processual Aspects of the Origins of Chinese Civilization*, in THE ARCHEOLOGY OF ANCIENT CHINA, *supra* note 39, at 495-522.

51. ZUO ZHUAN, *Cheng Gong Shi you San Nian* (The 13th Year of Duke Cheng), *trans.* in 5 J. LEGGE, *supra* note 13, at 379, 382.

Xia, Shang and Zhou dynasties were characterized by the rise and fall of single agnatic clans.⁵² For this reason, the rulers of society (including coalitions between different lineages) could often be separated from those being ruled according to clan surnames (*zuxing*).⁵³ However, the clan (*shizu*) itself was internally stratified by its division into kinship groups (*zongzu*):

members of the kinship group were related by blood and could trace their relationship through genealogies. Within a unified kinship group, members were again divided into kinship branches (*zongzhi*), based on distance from the main branch (comprised of each generation's eldest son of the legitimate wife of the family). The political authority and ceremonial position of a member of the kinship group was determined by his status among the members of the large and small kinship branches. Therefore, large kinship groups were themselves hierarchical in nature.⁵⁴

52. The roots in compounds such as *shizu*, *zongzu*, *zuxing*, *zongzhi*, involve some very complex and controversial issues in Chinese anthropology, archaeology, and philography. For simplicity, the editors have translated these as clan, kinship group, agnatic clan (or clan surname depending upon the context) and kinship branch respectively. Below are some simple definitions of the terms *xing**, *zong*, *shi* and *zu*.

The term *zu* refers to a clan, or tribe, which originally were military units based on kinship and were somewhat totemic in nature. Members of a *zu* inhabited the walled towns (*yi*) whose hierarchies made up the hundreds of states or basic interacting polities (*guo*) of ancient China. *Zu* were grouped into *zong* in ritual contexts and into *shi*, its symbol, in terms of political status. The rulers of each *guo* were members of a *xing** or agnatic clan, ruling over their own clans and other clans under their sovereignty. Warfare resulted in the subjugation of one *guo* by another. K.C. CHANG, *THE ARCHAEOLOGY OF ANCIENT CHINA*, *supra* note 39, at 303. See also FRIED, *supra* note 50, at 481-83.

*Xing**, also the "surname" of an agnatic clan, was shared by all members of a group descended from a common ancestor. The *xing** was patrilineal and exogamous. Collateral branches of the *xing** were segmented into groups, known as *shi*, which had their own names. The name of a *shi* was taken, for example, from the office held by the founding ancestor, or the individual enfeoffed with a fief not previously held thereby creating a new *shi*. H. CREEL, *THE ORIGINS OF STATECRAFT IN CHINA*, 333 n.56, 333-34, 378-80 (1970). When the ruler of a *guo* sent off a relative or official to build his own walled town, he would be granted, among other things: 1) the original name of the ruler's clan (*xing**), 2) the land, 3) people in *zu* units, 4) a new name (*shi*) designating his new polity, 5) ritual paraphernalia and regalia befitting his new political status and that of his town (many made of bronze). The latter, along with his ancestral tablets, would be placed in a ritual chamber (*zong*) which symbolized his line of descent in relation to the ancestral trunk. CHANG, *SHANG CIVILIZATION*, *supra* note 43, at 161-65.

53. TIAN CHANGWU, *Zhongguo Nulizhi Xingtai zhi Tansuo in GUDAI SHEHUI XINGTAI YANJIU*, *supra* note 49; ZHANG GUANGZHI, *supra* note 40, at 297-308. During the feudalism of the early Zhou, there are at least two imperial favors of Duke Zhou (the venerated first ruler of the Zhou Dynasty who served as a model to later kings) which are especially worthy of attention. Those are the granting of a surname to a clan and the assignment of a unit of conquered people to a clan. See *id.* at 112-23.

54. ZHANG GUANGZHI, *supra* note 40 at 19-20, 110.

Some arguments contend that prior to China's bronze age, social stratification developed according to family blood lines. When wars between clans were superseded by agnatic clan-based rule, the stratification within the ruling clans gradually formed the substance of state organization. Due to this evolution, the sacrificial rites of ancestor worship rose from being purely religious ceremonies to become the political activity of the state organization. The *Book of Rites* states that "among the ways of governing men, none is more urgent than ritual; among the five classics of ritual, none is more important than sacrifice."⁵⁵ Sacrificial ritual had the dual function of already being the binding force among family groups and at the same time strengthening state organization. The ritual vessels of China's bronze age prove this point. The vessels used in sacrificial rituals manifest a strict differential rank through their quantity, form, and decoration. These differences not only demonstrate the position of the person conducting the sacrificial ritual within family relations (the distance of relationship in the blood origin), but also point to their corresponding position in the state organization (the amount of political authority). "Normatively speaking, the stratified relationships among each kinship group and the stratified relationship of each walled town should be the same."⁵⁶ This so-called kinship legal system state was seen in the Zhou in its perfected form.

The peculiar structure formed by the combination of power strengthened by war and the traditions of the clan elders was completely different from the state organizations of Greece and Rome. First, the fragmentation of the clan organization was not the price of the formation of an ancient Chinese state. Conversely, original blood origin relationships were preserved, and inner clan family relationships became the means of organizing the state structure. Thus, the old clan organization and the new state structure were forged. Therefore, division of the inhabitants was based on clan membership and

55. LI JI, *Ji Tong* (Book of Rites, Sacrifice and Governing), trans. in 2 J. LEGGE, *The Li Ki* in THE SACRED BOOKS OF THE EAST 236 (1967).

The *Book of Rites* is ascribed to the early part of the first century B.C. Its contents are a heterogeneous compilation of political, social, and philosophical texts from the late Zhou, Qin, and early Han dynasties. See WATSON, *supra* note 6, at 140-46.

56. ZHANG GUANGZHI, *supra* note 40, at 125. Wang Guowei held that the Zhou is differentiated from the Yin Shang by the law of kinship (the institutions of hierarchies within the family, succession of the legal wife's eldest son, no marriage between common surnames, etc.). This theory has been very influential and has remained generally accepted; however, there are others that hold that the law of kinship was an institution of all three dynasties. See *id.* In addition, Fan Wenlan feels that the Yin Shang already had this institution; the Zhou merely developed it further. FAN WENLAN, 1 ZHONGGUO TONGSHI (A Complete History of China) 56, 57 (Beijing ed. 1978).

not on geographic location.⁵⁷ In this type of state, the old clan organization was indispensable, since it was the most natural and effective means of rule available under the conditions of the time. Second, strictly speaking, Chinese state authority was not manifested as "public power" that "rides above society,"⁵⁸ but as the unadorned conquest and control among agnatic clans. On this point, perhaps the form of China's bronze age state approaches the definition used by some anthropologists. Elman Service said that the state "is unified by a kind of particular mechanical function related to legitimized force."⁵⁹ Kent V. Flannery pointed out that the distinguishing feature of states is the division of inhabitants according to territory, and said that:

The state attempts to maintain a monopoly of force, and is characterized by true law; almost any crime may be considered a crime against the state according to codified procedures, rather than being the responsibility of the offended party or his kin, as in simpler societies.⁶⁰

In short, we must view the Xia, Shang and Zhou as states under the following premise: that instead of being institutions of "public power" standing above society, these states were based essentially on clan rule endowed with legitimized force. During China's bronze age, this legitimized force was punishment.

B. *The Formation and Early Function of Law in Ancient China*

A great deal is recorded in ancient texts concerning criminal administration during the Three Dynasties. The *Zuo Commentary*

57. This is a precocial state form. Regarding this point, see HOU HAILU, *supra* note 41, chs. 1, 2.

58. Every organization that can be called a state has some amount of public function. In this sense, every state can be seen as a "public force." However, this article has used this term in an even stricter sense. As mentioned above, the ancient states of Greece and Rome were the products of the struggle and compromise of two large groups within a single society; it stood above society, and became increasingly separated from society. This is the "public force" referred to by Engels in the text quoted above. However, in ancient China, which Engels never discussed, the state was formed in the wars between clans. The basic structure of society was founded in the clan organization of the rulers and the ruled. This major historical difference had a profound influence on the development of the two civilizations of China and Greece and Rome.

59. ZHANG GUANGZHI, *supra* note 40, at 58.

Elman Service developed the most widely adopted evolutionary scheme in contemporary American archaeology, namely his four "levels of integration:" band, tribe, chiefdom, and state. See, e.g., E. SERVICE, *ORIGINS OF THE STATE AND CIVILIZATION: THE PROCESS OF CULTURAL EVOLUTION* (1974).

60. ZHANG GUANGZHI, *supra* note 40, at 60 (quoting K. Flannery, *The Cultural Evolution of Civilizations*, 3 ANN. REV. OF ECOLOGY AND SYSTEMATICS 399, 403-04 (1972)).

states, “[w]hen the government of the Hea [Xia] had fallen into disorder, the penal code of Yu was made.”⁶¹ This reference not only shows that the Xia had the penal code of Yu, but also illustrates the purpose for having punishments. Some texts date the establishment of punishments even earlier. In the *Documents of Antiquity*, “[t]he emperor said, ‘Kaou-yaou [Gao Yuan], the barbarious tribes disturb our bright great land. There are also robbers, murderers, insurgents, and traitors. It is yours, as the Minister of Crime, to employ the five punishments for the treatment of offenses, for the infliction of which there are the three appointed places.’”⁶² The five punishments and three appointed places referred to here are explained in the *Conversations from the States*:

The heaviest punishment used armed soldiers; the next used an executioner’s axe; the middle level of punishment used a knife saw, or sharpened bamboo; and the lightest punishment used a whip, in order to threaten the people. By reason that the heavier ones are displayed in open country, the lighter ones are sent to the imperial market, the five punishments had three appointed places so as not to be concealed.⁶³

These two sentences tell us that using armed soldiers for foreign campaigns and wars was considered a heavy punishment to be inflicted upon neighboring states. Using knife saws and whips for internal suppression were considered medium and light punishments. The so called “at home employ knife saws, abroad use armed soldiers” dictum invariably refers to the means used by states to

61. ZUO ZHUAN, *Zhao Gong Liu Nian* (The Sixth Year of Duke Zhao), trans. in 5 J. LEGGE, *supra* note 13, at 607, 609.

The Commentary goes on to remark that the Shang wrote the Penal Code of Tang and that the Zhou wrote the Code of Nine Punishments (now lost) all during periods of social and political decay. These examples were cited as a warning to other states who were contemplating writing similar codified punishments in order to address social disorder. The confucian author of the Commentary believed that implementing these codes gave rise to contentions among the people, and encouraged a decline in public morals. *Id.* See also *infra* note 76 and accompanying text.

Yu refers to the legendary sage king who was appointed king by Shun as a reward for conquering the floods and thereby founding the Xia dynasty (trad. 2205 B.C.).

62. SHANG SHU, *Shun Dian* (Documents of Antiquity, Canon of Shun), trans. in 3 J. LEGGE, *The Chinese Classics* 44-45 (1982); C. WALTHAM, *SHU JING* (1971) (a modern version of Legge’s translation) (the character *dian* is translated by Waltham as “statute”).

The *Documents of Antiquity*, the first section of the *Shu Jing* or *Classic of History*, is the earliest Chinese historical text. It is primarily a collection of source materials containing speeches, pronouncements and declarations. WATSON, *supra* note 6, at 21-36.

63. GUO YU, *Lü Yu Shang* (Conversations from the States, Conversations from the State of Lü), *supra* note 13.

implement rule by force. These practices are the origin of punishment during China's bronze age, and from them arose the concept of "*fa*."⁶⁴ Of course, this broad concept of "*fa*" gradually evolved until, in the end, its meaning was limited only to punishment of criminals and became increasingly unrelated to warfare. Initially, however, the identification of "*fa*" with war was reflected in the fact that the concepts of *xing* (punishment) and *bing* (war; weapons) were inseparable. For example, the *Rites of Zhou* said that "the five stated codes of punishment are for restraining neighboring states, for punishing the hundred officials and for correcting the people."⁶⁵ After the Xia, much was written concerning penal law: the *Xunzi* states that "in the names of punishments they [the Xia] followed the Shang dynasty."⁶⁶ *Master Lü's Spring and Autumn Annals* states that the Shang had "three hundred punishments."⁶⁷ History records that the Shang penal law used mincing, *paoluo*,⁶⁸ and other means of tortures. By the Zhou dynasty, punishments were increasingly systematic and sophisticated. According to the *Documents of Antiquity*, the Zhou instituted the five punishments: *mo*, *yi**, *fei**, *gong*, and *dabi*.⁶⁹ Moreover, "[a]ltogether, set against the five punishments there are 3,000 crimes."⁷⁰ The *Zuo Commentary* states further that the Zhou penal

64. Ancient China has a saying that "punishments arose from warfare." Actually, ancient Chinese law was closely related to ancient wars. This historical fact had a far-reaching influence on the nature and function of ancient Chinese law as well as on the traditional idea of law. See generally, Liang Zhiping, *Gudaifa: Wenhua Chuantong yu Chayi*, DUSHU, Mar., 1987, at 47-57.

65. ZHOU LI, *Tianguan Zhongzai* (Rites of Zhou, Great Intendant), *supra* note 13.

66. XUNZI, *Zheng Ming Pian* (Xun Zi, On the Rectification of Terms), *trans. in* H. DUBS, *THE WORKS OF HSUNTZE* 481 (1928).

The *Xunzi* is an important Confucian philosophical work written by philosopher/statesman Xunzi in the third century B.C. Though he held that benevolent men were still the key to good government, Xunzi, unlike his predecessors Confucius and Mencius, believed that good laws and regulations, were also required (though ineffective without virtuous men administering them). It is this latter concept that two of his most famous students took hold of to depart from traditional Confucianism, Han Feizi and Li Si, the founders of legalism in China.

67. LÜ SHI CHUNQIU, *supra* note 17.

68. The term *paoluo* refers to the ancient form of torture in which the subject was forced to walk along a slippery iron beam kept hot by coals underneath.

69. The terms *mo*, *yi**, *fei**, *gong* and *dabi* refer to the ancient Chinese punishments of tattooing the face or forehead, cutting off the nose, cutting off the feet, castration, and the death penalty (usually decapitation) respectively.

70. SHANG SHU, *Lü Xing* (Documents of Antiquity, The Code of Lü), *trans. in* 3 J. LEGGE, *supra* note 62, at 606.

The *Code of Lü* gives an explanation of the origin of *fa* as written law. According to the myth recorded in the *Shang Shu*, the origin of *fa* is attributed to a "barbarian" people, the Miao, alleged to have flourished during the reign of the legendary sage-king Shun (ca. 2200 B.C.), "the Miao people made no use of spiritual cultivation, but controlled by means of punishments (*xing*), creating the five oppressive punishments, which they called law (*fa*)." Shang Di, or the "Lord on High" (the supreme god of the ancient Chinese), seeing the disorder and

codes included nine books on punishments.⁷¹ In summary, there is no doubt about the cruelty and sophistication of the punishments of the Three Dynasties, nor of their inseparable role as distinctive features of law during this period.

The process of forming a state and its law determines not only how a state is organized but also what social function law will play. The basic divergence between the concept of law in China and in the West, and the linguistic manifestation of this divergence, should first be viewed from this perspective. We see that the states and the laws of ancient Greece and Rome were born out of conflicts between commoners and the elite. In a sense, they were the result of social compromise rather than ultimatums issued by either side to compel the unconditional concession by the other.⁷² Out of this came a kind of law that tended to favor social groups because of their relative strength, while it also functioned as a means of suppression since it was the coercive force of the state. Nevertheless, law ultimately was the essential means used for defining and preserving the rights of the various segments of society (limited of course to free men). Law, therefore, was eventually complied with consistently.

It is because of this historical precondition that the political justice theory of the city-states of Greece and the private law of Rome were able to thrive and develop, and Western civilization was able to develop into what it is today. However, during China's bronze age, due to the absence of the prerequisite political and social environment, constitutions and other concepts were utterly lacking. The state was not a "public force" but an appropriate form for a single clan to exercise its legitimized control. The state did not replace clan organization. Instead, by combining the characteristics of both these institutions, a system of strict upper class control was formed which sought to preserve stability within a system that was inherently

injustice that resulted from the Miao's treatment of the people, first separated heaven and earth so that they could no longer communicate with heaven, then later exterminated the Miao so that they had no descendants. (Some accounts merely state that the Miao were driven to the West by Shun). 3 J. LEGGE, *supra* note 62, at 591-93. *See also* BODDE, *supra* note 4, at 13-14; D. BODDE, *ESSAYS ON CHINESE CIVILIZATION* 65-67, 193-94 (1981).

71. ZUO ZHUAN, *supra* note 13, *trans. in* 5 J. LEGGE, *supra* note 13, at 609.

72. *See* UNGER, *supra* note 2, at 120-26. Professor Unger correctly emphasizes the influence that the polarization of social groups had on the development of Western law, and that because China did not have a similar social background, the development of ancient Chinese law led to a different result. *Id.* at 66-76, 86-96. However, he virtually ignores the origins of this difference in social background (existence or non-existence of pluralistic groups) and the profound influence it had on the process of legal development in China. This can be considered as one of the most important elements in the explanation of the difference between Chinese and Western law.

unstable.⁷³ Therefore, simple, unadorned statecraft took the place of a theory of political justice. Law was seen as the will of the rulers and an instrument of suppression; its primary manifestation was in punishment.

The king says, "I declare to you, ye numerous officers of Yin,—now I have not put you to death, and therefore I repeat to you my charge again. I have built this great city here in Lo, considering that there was no other place in which to receive my guests from the four quarters, and also that you, ye numerous officers, might here with zealous activity, perform the part of ministers to us with much obedience. You have still here I may say your grounds, and here you may still rest in your duties and dwellings.

If you can reverently obey, Heaven will favor and compassionate you. If you cannot reverently obey, you will not only not have your lands, but I will also carry to the utmost Heaven's infliction on your persons."⁷⁴

Commands and prohibitions: those who obey the king are rewarded, those who disobey the king are punished. This characterization, which provides a true explanation of the law during the Three Dynasties, or China's bronze age, was adopted by later generations, becoming one of the basic features of ancient Chinese law. By way of further explanation, we must examine pre-Qin dynasty legalism and the debates between the followers of Confucianism and of legalism.

V. THE IMPACT OF LEGALISM ON THE CONCEPT OF LAW AND ON LATER LEGAL CODES

Between the Spring and Autumn Period and the Warring States Period was an era of turmoil which marked the disintegration of bronze age civilization and the formation of the iron age. This turning point brought radical changes in the economic, political, philosophical and other aspects of society. The kinship legal system no longer existed, but society continued to be one of rulers and the ruled. Moreover, the state system in this era was characterized by "selfish, disloyal, and cunning ministers who try to usurp the throne." Since in China a confrontation between commoners and elite like that of ancient Greece and Rome never occurred, the ancient Chinese society never segmented into those comparable groups. Therefore, the signifi-

73. *Id.* at 18.

74. SHANG SHU, *Duo Shi* (The Document of Antiquity, The Numerous Officials), *trans.* in 3 J. LEGGE, *supra* note 62, at 461-62.

cance of the emergence of ancient legal codes in China, such as the *Xing Shu* of 536 B.C., is entirely different from that of the Solon legislation of Greece and Rome's *Twelve Tables*.⁷⁵ In ancient China, the function of law did not undergo any changes upon codification. That "The people will study the tripods"⁷⁶ was only the mark of the decay and collapse of the old order, and the symbol of the legitimized force of the "selfish, disloyal, and cunning ministers who try to usurp the throne." In China, the process of bringing this traditional way of ruling into conformity with the concept of the supremacy of law requires an extremely long period of time.

However, while recognizing those elements that have persisted throughout ancient Chinese law, one should not fail to attend to the changing elements. The Chinese legal system characterized by "*xing*" in the Three Dynasties, evolved into one of "*fa*" in the Warring States, and finally into one of "*lü*" in Qin, Han, and later dynasties. Just as the emergence of codification of laws is an element of cultural progress, the evolution of the Chinese legal system also demonstrates cultural advancement in terms of changing from a system where punishment was out of proportion to the severity of crimes into one where punishment was meted out according to the severity of the crime.

A. Legalist Views on the Concept and Function of Law

Of the various schools of thought in existence just prior to the Qin dynasty, legalism was one of the best known. The principle followed by proponents of this school was to encourage agriculture and military conquest through rewards and to emphasize immediate success and profit. Legalism acquired its name primarily because it advocated using *fa* to rule the state, or what ancient Chinese called "*fazhi* *"—governing by relying on laws. The modern English term of art, "rule of law," is also translated into Chinese as "*fazhi* *." While this translation is concise and accurate, it has created numerous difficulties. There are those who have incorrectly used "rule of law" as the equivalent of the "*fazhi* *" advocated by the pre-Qin legalists, leading to many senseless scholarly debates. The confusion results

75. The *Xing Shu*, or "books of punishment," are perhaps the earliest reliably known written laws of ancient China. They were inscribed on bronze tripod vessels (*ding*) in 536 B.C. on the order of Zi Chan, prime minister of the state of Zheng. Soon thereafter, several other states did likewise. See BODDE, *supra* note 4, at 16.

76. ZUO ZHUAN, *Zhao Gong Ershi you Jiu Nian* (The 29th Year of Duke Zhao) *trans.* in 5 J. LEGGE, *supra* note 13, at 730-32. Confucius believed that if laws were inscribed on the tripods, then people would only study the tripods and would cease to adhere to the rites and would no longer honor worthy men of rank. Confucius felt that this process would lead to social and political decay. *Id.* at 729, 732.

from differences about the function of law in Chinese and Western society. Actually, what the legalists called “*fazhi*” only embodied the meanings of the two characters “punishment and reward” (*xing shang*). Thus, Guanzi considered commands (ceasing what is prohibited, carrying out what is ordered), axes (punishment), and official pay (rewards) as the three tools of governing the state.⁷⁷ *The Book of Lord Shang* says, “[n]ow the idea of punishments is to restrain depravity and the idea of rewards is to support the interdicts. . . . So punishments and executions are the means whereby wickedness is stopped, and office and rank are the means whereby merit is encouraged.”⁷⁸

Rewards were for prompting virtue; punishment was for stopping wickedness. The function of “*fa*,” therefore, was very clear. However, just as the rites of Confucius and Mencius represented the philosophization and systematization of the kinship legal system of the Three Dynasties, the legalists merely developed to its extreme the ancient legal model, “[y]ou who obey my orders shall be rewarded before my ancestors; and you who disobey my orders shall be put to death before the spirits of the land.”⁷⁹ Looking from this perspective, it was a matter of logical and historical certainty that legalist personalities became supporters of fanatic absolute monarchy.

Both the concept of using punishment as the foundation of law and the legal thinking reflected in the principle of ceasing what is prohibited and carrying out what is ordered had deep historical and cultural roots predating the legalists.⁸⁰ The distinguishing feature of

77. GUAN ZI, *Zheng Ling* (Guan Zi, Orders of Government) *supra* note 14.

78. SHANG JUN SHU, *Suan Di* (The Book of Lord Shang, The Calculation of Land), *trans. in* J.J.L. DUYVENDAK, *THE BOOK OF LORD SHANG* 223, 224 (1928).

The Book of Lord Shang was purportedly written by Lord Shang (also known as Shang Yang or Gongsun Yang (d. 338 B.C.)), a legalist practitioner and the chief minister of the State of Qin from 361-338. Lord Shang's policies and programs helped launch Qin toward the wealth and power that would eventually allow them to unify China for the first time and found the Qin dynasty. These policies encouraged farming, weaving, and a warlike spirit among the people through the use of rewards and punishments. F. MOTE, *INTELLECTUAL FOUNDATIONS OF CHINA* 119-20 (1971).

79. SHANG SHU, *Gan Shi* (Documents of Antiquity, The Speech at Gan), *trans. in* 3 J. LEGGE, *supra* note 62, at 155.

80. Confucianism opposed “application of punishments” (*ren fa*) and advocated rule by virtue, however, their basis was the same as legalism, namely both believed law was merely the will of rulers and a means of force to implement their will. Confucius said:

If the people be lead by, and uniformly sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformly sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.

ZHONG NI, LUNYU, *Wei Zheng* (Confucius, The Analects), *trans. in* 1 J. LEGGE, *THE CHINESE CLASSICS* 146 (1982).

This criticism of law is based upon the belief that strict laws are not as effective as moral

legalism is the idea of the “unification of punishments” (*yi xing*).

What I mean by the unification of punishments, is that punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king’s commands, violates the interdicts of the state, or rebels against the statutes fixed by the ruler, should be guilty of death and should not be pardoned.⁸¹

Han Feizi said:

The law no more makes exceptions for men of high station than the plumb line bends to accommodate a crooked place in the wood. What the law has decreed the wise man cannot dispute nor the brave man venture to contest. When faults are to be punished, the highest minister cannot escape, when good is to be rewarded, the lowest peasant must not be passed over.⁸²

The reason these oft-cited words are repeated again here is because they are very representative. Other legalist scholars like

cultivation through adherence to the rites. After the Han dynasty, the criticisms by Confucianists of the “application of punishments” were all developed from this approach. Lu Jia said, “that which is law is to eliminate evil, it is not to advocate virtue,” SHI SHUO XIN YU (A New Account of Tales of the World), *trans. in* LIU I-CH’ING, SHIH SHUO HSIN YU (1976). Literature of Han dynasty Confucian scholars said, “law can punish people but cannot make people pure, [it] can kill people but cannot make people benevolent.” YAN TIE LUN, *Shen Han* (Discourses on Salt and Iron), *supra* note 14. Clearly, this type of criticism is only concerned with utilitarian questions: which is the better means of ruling, is it severe punishments and strict laws or the cultivation of morals and the use of moral exemplars? Valuable questions concerning the nature and function of law were presumed as already given by both these schools and so were never discussed. The debates between Confucianist and legalist schools were feasible because they both had the same views on the fundamental question of what was law. In addition, because of this common ground, it was also imaginable that they were able to eventually merge into one group after the Han dynasty.

Through much of the polemic discussions between Pre-Qin Confucianists and Legalists, the character used to refer to “law” was usually *xing*, and some scholars believe that the later term “*fa*” was at some level a synthesis of the word “*xing*” and the Confucian term “*li*,” ritual action or rules of propriety. *See, e.g.,* HALL & AMES, *supra* note 18, at 168-73.

81. SHANG JUN SHU, *Shang Xing* (The Book of Lord Shang, Rewards and Punishments), *trans. in* DUYVENDAK, *supra* note 78, at 278.

82. HAN FEIZI, *You Du* (Han Feizi, On Having Standards), *trans. in* B. WATSON, HAN FEI TZU: BASIC WRITINGS 28 (1964).

Han Feizi (d. 233 B.C.), or Han Fei, an ex-Confucian and former student of Xunzi, was a very important political thinker of the late third century B.C., and accomplished the synthesis of earlier “legalist” theories and practices into what became legalism. Han Fei wrote the treatise *Han Feizi*, in which men are portrayed as being manipulatable solely by rewards and punishments.

Guan Zi and Shen Dao held similar views.⁸³ The target of this thinking was the surviving old order (the kinship legal order) and old concepts ("punishment is not applicable to high ministers") of the Three Dynasties. On the other hand, this attack against the old hierarchy was in order to establish the absolute authority of the king ("selfish, disloyal, and cunning ministers who try to usurp the throne"). Thus, while Lord Shang talked of *fa*, Shen Zi⁸⁴ talked of *shu*, and Shen Zi (Shen Dao) talked of *shi*; the legalist synthesizer Han Fei combined *fa*, *shu*, and *shi* as one.⁸⁵ Accordingly Han Fei said:

The law is codified in books, kept in government offices, and promulgated among the hundred surnames. The tact is hidden in the bosom and useful in comparing diverse motivating factors of human conduct and in manipulating the body of officials secretly. Therefore, law wants nothing more than publicity; tact abhors visibility. For this reason, when the enlightened sovereign speaks on law, high and low within the boundaries will hear and know it. . . . When he applies his tact, none of his favorites and courtiers will notice it at all.⁸⁶

Ultimately, both law (*fa*) and statecraft (*shu*) are simply the methods used by the ruler to govern the state and its people. Thus, the destiny of the state depends on the good or evil of the king. Law is only an instrument to govern the state; its source of authority comes from the authority of the king. It would be more than naive to expect this kind of "law" to be applied uniformly in practice. It would be ridiculous to mention this "uniform application" of "rule by law" (*yi duan yu fa*) with "rule of law" in Aristotle's *Politics*, let alone that of the modern West.

One component of legalism maintained that punishment knows no degree or rank, another component emphasized the autocratic power of the king. Originally these two components were both mutu-

83. Shen Dao (d. ca. 275 B.C.), was a thinker of the Warring States Period who wrote *Shen Zi*, an antecedent work of formal legalism.

84. Shen Zi, or Shen Buhai, was an early legalist of the Warring States Period who wrote the book *Shen Zi* which advocates the use of technique over theory in governmental administration. See CREEL, *supra* note 52, at 4-5, 442-43 and accompanying notes.

85. The concepts of *fa*, *shu*, and *shi* are antecedents of formal Chinese legalism. Here, *fa* refers to law, or clear regulations and clear, inescapable penalties; *shu* to administrative methods, or clear regulations for the bureaucracy and for the functioning of the bureaucratic structure; and *shi* to force or power with the implications of position, tendencies latent in relative position, how to bring force to bear in situations of competing power. MOTE, *supra* note 78, at 120-21.

86. HAN FEIZI, *Nan San* (Han Feizi, Criticisms of the Ancients, series three), trans. in W.K. LIAO, 2 THE COMPLETE WORKS OF HAN FEI TZU 188 (1959).

ally opposed and complementary. However, ultimately it was inevitable that they become trapped in mutual contradiction. Thus, it was foreseeable that the life of this theory of the uniform application of law in Chinese legal history was very brief. Chinese legal history from the Han to the Qing dynasty is a complete record of the different degrees of punishments and social status. The severity of the various degrees of punishment and the complexity of social rank and stratification revealed in the laws were rarely seen elsewhere in the ancient world. It is odd that these distinctions are connected to the theory and practice of Qin and Han legalists who at the same time advocated the uniform application of the law.

B. *The Impact of Legalist Ideas on Later Legal Codes*

Although legalism was short-lived by Chinese historical standards, its achievements cannot be ignored. Even though many legalist concepts were acquired directly from those of China's bronze age, the legalists took advantage of historical conditions to enrich and cultivate their ideas, thereby implanting them deeply on the consciousness of the nation and significantly influencing the development of the Chinese legal system. This impact is multi-faceted. Selected here for discussion are its main facets.

The most famous written code of the Warring States Period was Li Gui's *Canon of Laws*.⁸⁷ The dynastical histories say that Lord Shang adopted the *Canon of Laws* in order to assist in governing the state of Qin. From this description one can infer the influence the *Canon of Laws* had on Qin *lü*. Thereafter, the Han dynasty inherited the Qin system: "the state minister Xiao He collected the *fa* of Qin, taking from it what was suitable to the time, and made the nine sections of *lü*."⁸⁸ Six chapter headings of the *Code in Nine Sections*,⁸⁹

87. The *Canon of Laws*, or *Fa Jing*, was a code of laws edited by Li Gui, the prime minister of the state of Wei in about 407 B.C., and is said to have served as the prototype of all later codes. The *Canon of Laws* was a compilation of the legislative experiences of the various states during the Spring and Autumn Period. See FAXUE CIDIAN, *supra* note 8, at 605. See also T. Pokora, *The Canon of Laws by Li K'uei, A Double Falsification*, 27 ARCHIVE ORIENTAL 96-121 (1959).

88. HAN SHU, *Xingfa Zhi* (History of the Former Han, Treatise on Penal Law), trans. in 1 A.F.P. HULSEW, REMNANTS OF HAN LAW (Sinica Leidensia No. 9, 1955).

The *History of the Former Han*, written by Ban Gu (A.D. 32-92), is a detailed and important historical work whose "dynastical cycle" served as a model for subsequent dynastical histories. The Former, or Western, Han Dynasty lasted from 206 B.C. to A.D. 8. See generally H. DUBS, THE HISTORY OF THE FORMER HAN DYNASTY (1955).

Xiao He (?-193 B.C.) helped the first emperor of the Han, Liu Bang or Gao Zu, unify China and wrote many of the laws and regulations observed during the Han Dynasty.

89. The *Code in Nine Sections*, or *Han lü*, (ca. 200 B.C.) refers to the code of laws enacted during the Han dynasty.

came from the *Canon of Laws*.⁹⁰ Despite the tumultuous and complicated history thereafter, the thread of the *Canon of Laws* is woven into each of the succeeding legal systems: the *lü* of the later Wei (A.D. 220-264), which inherited the *lü* of the Han; the *lü* of the state of Northern Qi (534-581); the *Kai Huang Lü*⁹¹ of the Sui (581-617); the *lü* of the Tang (618-906); and the *lü* of the Qing (1644-1911). Therefore, we should pay close attention to the *Canon of Laws*. Although the original text of the *Canon of Laws* has already been lost, a relatively complete record of it is found in the *History of the Jin*:

Li selected the writings on punishments of the various states and wrote the *Canon of Laws*. [He] considered that there was nothing more urgent in the king's governance than [controlling] thieves and violence, therefore his statutes start with *Thieves* and *Violence*; bandits and thieves need to be charged and arrested, therefore [he] wrote the two chapters *Detention* and *Arrest*; he slighted swindling, prison escapes, gambling, corruption, prostitution, and excesses, placing them within a single chapter *Miscellaneous Lü*; he also used a *General* chapter to cover the intermediate areas of his *lü*, for this reason [he] only wrote six chapters and no more. This resulted in the making of all the names of crime.⁹²

The *Canon of Laws* is penal law and nothing more.

The reach of law during the Qin Dynasty was very broad. Since every aspect of political and social life had its own legal framework, the six chapters of the *Canon of Laws* were naturally not sufficient.

90. These six sections are: Laws on Theft (*dao fa*), Laws on Violence (*zei fa*), Laws on Criminals under Detention (*qiu fa*), Laws on Arrest (*bu fa*), Miscellaneous Laws (*za fa*), and General Laws (*ju fa*). The *Han Lü* used the character *lü* instead of *fa*.

91. The *Kai Huang Lü*, enacted in 581 A.D., was the first code of laws adopted by the Sui Dynasty. It took the laws of earlier states and added to them. FAXUE CIDIAN, *supra* note 8, at 66.

92. JIN SHU, *Xingfa Zhi* (History of the Jin, Treatise on Penal Law), *trans. in* POKORA, *supra* note 87.

The Jin Dynasty was founded by the ruler of the State of Wei who briefly reunited China during A.D. 280-304 (the Western Jin), then controlled only part of China during 317-420 (the Eastern Jin) at which time it was further divided up by neighboring states.

This code forms a sharp contrast with the Roman *Twelve Tablets* of the same period. Although, in this early Roman code, procedural law and substantive law, public law and private law, religious law and secular law were mixed without differentiation, among them inheritance and guardianship, ownership and possession, land and dwellings, personal offenses, and common law, each occupying one tablet, had already manifested the future direction of their development. Their limitations were purely the result of the immature condition of society. Its differences with the *Canon of Laws* are cultural and are not related to differing stages of social development.

Recently uncovered Qin scrolls reveal that there were great quantities of *lǚ* (statutes) and *ling* (ordinances) regulating the economic activities of the state, including *Statutes on Agriculture*, *Statutes on Granaries*, *Statutes on Statutory Labor*, for example.⁹³ However, there is little similarity between these laws and what we today call economic law, because all regulations concerning prohibitions and commands used punishment to ensure their implementation. These regulations are a manifestation of the development of the concept of *xing* since the time of the Three Dynasties, and they are also a reflection of the people's understanding of the concept of "*fa*."

Perhaps it could be said that at that time there was only the concept of crime and none of illegality; therefore, illegality was lumped together with committing a crime. Later dynastic legal records were all dominated by this concept. Although the *Tang Code* contained twelve chapters on such varied topics as Administrative Regulations, Family and Marriage, Stables and Treasuries, it is difficult to find a clause where the offender is not punished.⁹⁴ Civil relationships like those of relatives, marriage, inheritance, property rights, and creditor rights have all been incorporated into the system of punishments. In addition, conventional social standards found outside the large quantities of official legal texts acquired binding force because they were mutually coordinated with statutes of the Code. The relationship of the *ling* (statutes), *ge* (regulations), and *shi** (ordinances) of the Tang Dynasty with the *lǚ* is explained in the dynastic histories.⁹⁵

The *lǚ* uses proper punishments to determine crimes, statutes use set forms to establish the institutions, regulations use prohibiting violations to stop evil, and ordinances use rules to guide proceedings.⁹⁶

The statutes are used to classify respectability and nobility, they are the state system, the regulations are the

93. For translations of these statutes as well as an overview of Qin Dynasty law, see A.F.P. HULSEW, *REMNANTS OF CH'IN LAW* (Sinica Leidensia No. 17, 1985).

94. See generally WALLACE, *supra* note 16.

95. From the Tang to the Ming dynasty (and to an extent the Qing during which time *ling* were defined as imperial approvals of proposals made in memorials), *ling* meant prohibitions or ordinances for which the Code did not prescribe a punishment. The text *Da Mingling*, officially published in 1368, enumerated the respective punishments for violating the various *ling*. See T. METZGER, *THE INTERNAL ORGANIZATION OF THE CH'ING BUREAUCRACY* 431 (1973). For further explanation of the terms, *ling*, *ge* and *shi** within the context of the Tang Code, see generally WALLACE, *supra* note 16, *passim*.

96. 6 TANG LIUDIAN (*The Six Boards of the Tang*). A book officially published in the eighth century A.D. dealing with the six boards adapted from the *Zhou Li*'s concept of six division of government administration, of which one division, or board, dealt with punishments (*xingbu*).

affairs usually carried out by the offices of the various bureaus, and the ordinances are the common laws that they observe. The government of any state must engage in these three institutions. Any violation of them and the evil act of any person which constitutes a crime must be determined by the *lü*.⁹⁷

The concept of *xing* was developed to the point of excess. This phenomenon was, of course, not limited to the Tang codes but was also a general distinguishing feature of "ancient law" right up to the Qing statutes and sub-statutes.⁹⁸

If it can be said that the influence of the *Canon of Laws* described above was primarily manifested institutionally, then the influence of the concepts connected with these institutions are even more worthy of attention. Punishments by themselves are without meaning unless they are attached to definite behavioral norms. These norms can be expressed as state prohibitions and orders against extrinsic behavior, and are reflections of the intrinsic moral demands of society. These norms and their enforcement are decided by specific cultural forms, especially by adopted social values. The author feels that this point is extremely important because it provides at least one kind of possibility, namely the combining of punishment with moral exhortations, thereby causing conventional social standards, which were originally moral concepts, to carry a legal function at the same time. Practically speaking, the implicit result is that law, or punishment, loses its independent existence. Law no longer has boundaries distinct from moral demands, such as ceremony and ethics, and thus is combined conceptually with them. This theoretical possibility is a fact of Chinese legal history; it is also the source of the tragedy in ancient Chinese law. Thus, the theory that "rites lead to the development of law" (*yi li ru fa*) is actually inaccurate. On the contrary, rites and punishment were combined. Similarly, the theory that "Confucianism and legalism flowed together" (*ru fa he liu*) has an important limitation, since the legalism inherited by later generations was not the legalism of the uniform application of the law, but the legalism that viewed law as punishment. Punishments based on suppression and fear succumbed to the ritual which emphasizes the hierarchical order of fam-

97. XIN TANG SHU, *Xingfa Zhi* (New History of the Tang Dynasty, Annals of Criminal Law), trans. in R. DES ROTOURS, *TRAIT DES FONCTIONNAIRES ET TRAIT DE L'ARME, TRADUITS DE LA "NOUVELLE HISTOIRE DES T'ANG"* (1947).

98. The *Da Qing Lü Li*, or *Statutes and Sub-statutes of the Great Qing*, was the code of laws in effect during the Qing Dynasty. G. BOULAIS, *MANUEL DU CODE CHINOIS* (Varis Sinologiques No. 55, 1924). See also G. STAUNTON, *TA TSING LEU LEE* (1966) (partial English translation).

ily and society, forming the distinctive shape of ancient Chinese law. The legalization of morality and the moralization of law is a fundamental essence of ancient Chinese law.

CONCLUSION: THE LEGACY OF ANCIENT CONCEPTIONS OF LAW

At this point, perhaps the reader understands why this article discusses at length the formation process of the Chinese state and of Chinese law and its distinguishing features. The unique form of later Chinese law arises out of this period of Chinese history. Even those who have never delved deeply into Chinese legal history know that the cruelty and variety of punishments were not characteristics exclusive to the Three Dynasties. Rather, they were distinguishing characteristics of all ancient Chinese law. What shocks many is not the cruelty and barbarism but that this cruelty and barbarism coexisted side by side with an advanced moral philosophy through 4,000 years of civilization. This seemingly contradictory phenomenon can only be explained in connection with the attitudes in traditional Chinese culture regarding the nature and function of law.

Cicero once said, "we were slaves of the law in order to be free."⁹⁹ A saying of Medieval English lawyers was, "[t]he law is the greatest inheritance which the king hath, since without the law there would be no king and no inheritance."¹⁰⁰ Kant also said, "an individual is free if he only submits to the law and does not submit to any man."¹⁰¹ However, Montesquieu believed that freedom was "the right to do any act permitted by law."¹⁰² This is the tradition and essence of Western culture. The Western formula is law→man→law; every man must obey the law, and the enactment and amendment of law also must be in accordance with legal procedures. It emphasizes the issue of legality. In this manner, law rose from just a means to become an end, an impersonal high authority. The law not only controls each individual, but also governs the entire society, and brings all of social life within an impersonalized framework. This is the philosophical foundation of modern Western theory of the rule of law. We have already discussed above the social and historical reasons which gave rise to these concepts. Even though the stages of history have already changed and once flourishing ancient states have long since been buried in the earth to become the object of excavation for

99. R. POUND, *THE TASK OF LAW* 55 (1944).

100. *Id.* at 60.

101. Lin Yusheng, *Guanyu Zhengzhi Zhixue de Liangzhong Guannian*, 1985 *ZHISHI FENZI* vol. 1, no. 4 at 90, 98.

102. MONTESQUIEU, 1 *ON THE SPIRIT OF LAW* 154 (1982).

archaeologists and historians, that progeny born out of ancient Western culture is still clearly discernable.

Still, just as it is difficult for the Chinese character *fa* to convey the true meaning of words like *jus* (one hundred years ago it would have been completely impossible), it is also not easy for Chinese people to thoroughly understand the real and profound meaning of “law” in Western culture. These problems result from difficulty of communication due to cultural differences. Law was never perceived as a means of preserving rights, freedom, and justice, since these were completely alien concepts in ancient China. Law was punishment. In an imperial edict issued as late as the Qing Dynasty, the emperor declared: “Speak of law in order to warn the stupid and obstinate.” According to traditional ideas, law was above all a tool of suppression. It was also one of countless methods of governing, which could be used and constituted at will by the ruler. Naturally, this purely utilitarian use of law undercut its status. As evidenced by many dynastic histories, in ancient China, theoretically speaking, there were rulers, but there were no laws of governing. Since law was only a personified tool of governing, it was dependent on and confined by its function, and therefore of extremely limited use. This fact was the source of what the ancient Chinese political system considered the “rule of man.” This model of governing can be expressed with the following formula: “man→law→man.” Thus, the king issues orders. The orders are carried out by the various high and petty officials on the common people as the objects of the law’s application, i.e., rewards and punishment. Because of this process, Chinese history has always connected “law” with the strengthening of the king’s authority. The Three Dynasties were like this, pre-Qin legalists were also like this, and the Qing Dynasty was still like this. Yan Fu, who found this aspect of Chinese law unbearable, said:

That which the book of examination and punishment calls *fa* is only *xing*, therefore [it] persecutes and binds the subjects, and the ruler then transcends above the law, can intentionally use law and change law, and is not restrained by law. If it is this way, then although there are laws, they are only made to fit an autocracy.¹⁰³

Beginning with Yan Fu’s translation of “The Meaning of Law”

103. Yan Fu, *Mengdesijiu Fayi: Anyu in 4* YAN FU JI (The Works of Yan Fu) 938-39 (S. Wang ed. 1986).

Yan Fu (1853-1921) was a modern thinker and translator from Fujian, China. He studied at England’s Naval Academy, held various academic positions in Chinese universities, and wrote critical essays.

and continuing through to Sun Yat-sen's "five-powers constitution," modern Western legal thought and legal systems were introduced to China.¹⁰⁴ Actually, the ceaseless efforts and daring of this earlier generation of scholars was responsible for bringing ancient China into contact with the world's most progressive legal systems of the time. However, this revolution of ideas was not completed because concepts with deep social and cultural foundations are hard to dislodge. Even when the initial conditions that produced legal concepts have already disappeared and the relevant institutions have already changed, old concepts can still remain and imperceptibly influence and even control the thoughts and the behavior of a people.

Naturally, what we call law today has a new and different meaning from that of the ancient Chinese character *fǎ*. However, when the majority of people use this word, they frequently think of criminal law, as if criminal law could represent all law. Although the latent consciousness of the average person is a manifestation of traditional concepts and historical inertia, at the same time, it also reflects certain aspects of social reality. Since 1949, a new China has gradually established its own system of jurisprudence and numerous modern legal institutions, which is a tremendous achievement. However, it would be naive to believe that because of this change, the surviving influences of traditional ideas have automatically been eliminated. We might ask ourselves why people have been so ready and willing to accept the definition of law as a tool of dictatorship, a means of class struggle, and so on? How much is the formula of "law = a tool of dictatorship," truly Marxist theory in some people's minds, and how much is it a modern form of traditional concepts? History clearly demonstrates and emphasizes that law is a tool of the dictatorship, a means of suppression, and can at anytime be changed. This reality has not only caused the abnormal development of legal institutions, but has also made it difficult for the concept of legality to establish a foothold, not to mention its effect on the stability and authority of law. Repeatedly over the last forty years, the law has been disregarded and even openly trampled upon.

During the Cultural Revolution, did not some people improperly borrow the slogan of the dictatorship of the proletariat as a means to advance their own personal cause? The judicial organs of the state could be crushed to a pulp, and any law trampled under foot; only

104. The "five-powers constitution" was a government organization envisioned by Sun Yat-sen and rather unsuccessfully implemented by his successor, Chiang Kai-shek. The five-power government consisted of five major branches, or yuan: executive, legislative, judiciary, examination, and censorate (or control). J. SHERIDAN, *CHINA IN DISINTEGRATION: THE REPUBLICAN ERA IN CHINESE HISTORY 1912-1949*, at 145, 208 (1977).

punishment remained indispensable. For a while, various forms of private punishment spread unchecked. The unprecedented disintegration of law was contrasted by an equally disastrous flood of punishment. Law was again reduced to punishment. The ancient Chinese view of law as punishment has tenaciously occupied the historical stage and has imperceptibly influenced our opinions. What facts could be more convincing than these? It is regrettable that even now we have not been introspective enough with regard to this question. Many people still place law in opposition to themselves, viewing it as a restriction only. Seldom do they include the idea of rights in their conception of law, or view law as the fundamental guarantee of freedom or rights, or even have they understood law as the *basic norm of organizing a society*. The undue emphasis of the dictatorial function of law is one of the reasons for this result.

The highly complex life style of modern society raises high expectations for reasonable behavior throughout society. In the economic sphere, the realization of this rationalization is necessarily manifested as the depersonalization of the rule of law. The democratic demands of modern politics ultimately must use rule of law as its ultimate aim. Only in this way can the understanding of the relationship between law and modern society become profound, and only by discussing the modernization of rule of law will it have real effect. Obviously, China's traditional legal concepts are incapable of accommodating the rich essence of modern legal concepts. Due to the influence of traditional concepts, our understanding is still clearly distant from the demands of a modern legal system. In order to bridge this gap, ideological innovations are necessary. We must expose and criticize past history and consciously recognize the traditions that we inherited unintentionally. Recognizing the influence that these traditions have on us today is the first step. Only when we vigorously apply ourselves to this task can we say that we are enhancing the legal consciousness of modern man.

