BOOK REVIEW

THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY. By Thomas A. Metzger.* Cambridge: Harvard University Press, 1973. Pp. x, 469. $20.00

It is quite usual nowadays to find scholars in almost any field of law making use of sociological, economic, historical, psychological, and other material to aid their legal analysis.[1] It is often felt that law can be understood only if it is placed in its social or intellectual context. Even the strongest proponents of such an approach would admit, however, that it is possible to be a very effective lawyer and still to ignore such matters, at least in many areas of law. And I should doubt if there are very many law professors, to say nothing of lawyers, who do not at times find it necessary to deal with their discipline in isolation—to ask whether or not the case came up on a directed verdict, or whether the holder of a negotiable instrument sent proper notice of dishonor after proper presentment. They might even engage in that old game of distinguishing "holding" from "dictum."

This is not the case with Chinese law. It is not possible to study Chinese law without studying Chinese administrative practice, and one cannot go far in any study of the bureaucracy without running into issues or actions that we would characterize as "legal." Hence any study which is useful for the study of the bureaucracy is also useful for the study of law. This is certainly true of Professor Metzger's book. Before going into the book itself, however, it may be well to give some rough idea of the condition of Chinese legal studies at the present time, so that it can be seen where Professor Metzger's discoveries fit.

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1. Citations for such a proposition are doubtless otiose, but I have in mind such works as M. RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE AND THE LAW (1972) (use of sociological data in a comparative treatment of divorce); any one of the five volumes of the American Bar Foundation, Administration of Criminal Justice Series, *e.g.*, W. LAFAVE, ARREST (1965) (use of sociological data to study the way the criminal law system is in fact administered); any of the various studies conducted at the University of Chicago in its law and behavioral sciences project, *e.g.*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

The primary problem in studying Chinese law has been the existence of a myth—namely, that the Chinese never really had a legal system. To the extent that they had one, they supposedly regarded it as an unwelcome concession to the weakness of the flesh. The scholarly man, it was said, ought to rule by moral suasion, not force, and law is force. Hence in the ideal society there would be no law. While it is unfortunately the case that most societies have on occasion felt it necessary to have some sort of law, law is something to be minimized. It is certainly not to be studied.[2] Consequently there is no tradition of

2. *See* D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA 16-29 (1967) [hereinafter cited as BODDE & MORRIS]. The traditional view of Chinese attitudes towards law is probably best treated there. This notion is still widespread. A recently published bibliography of English language works on Chinese law begins with the following quotation:

> "The ruling principle of order in the traditional Chinese realm was the Sinocentric ideology of the Heavenly Mandate, and this was administered not through impersonal laws, legislatures, federal devices, and judicial systems, but through the mechanisms of family ethics and social ritual, on the one hand, and an elaborate administrative bureaucracy on the other. The first carried the full authority of the Confucian school, the second that of the Legalists. All meanings carried by 'law' in pre-Maoist China derived from the operation and interaction of these two sets of principles. Thus, it was only when social order could not be maintained by reliance on the separate codes of behavior which inhered in each of the classical five relationships that administrative 'law' was invoked, and it operated vertically from state upon subject rather than horizontally and directly between individuals. Furthermore, and as classical Chinese literature makes abundantly clear, law was so overwhelmingly penal in emphasis as to become tantamount to punishment. Indeed, governments held fast to the view that one must punish severely so that one will not have to punish again. Contractual law had no place either in the Legalist or the Confucian system, for the latter's stress on rigid gradations in family and class relations made inequality the basic norm. Within this social milieu, consensus and conciliation were assiduously sought, but autonomous individual intentions—the prerequisite for contract—could not emerge. And the same holds true, by definition, of civil rights and constitutional frames of rules."

Progressive Center for Comparative Legal Research, University of Illinois Law Library, New Titles in Foreign and International Law, Jan. 21, 1974, at 1, *quoting from* Bozeman, *Law, Culture and Foreign Policy: East Versus West*, 1 ASIAN AFFAIRS 106, 114-15 (1973). *See also* Ma, *Law and Morality: Some Reflections on the Chinese Experience Past and Present*, 21 PHIL. E. & W. 443 (1971). Almost every westerner who does research into Chinese law has had the maddening experience of being informed of the superiority of Chinese civilization to western because the Chinese did not use law to settle disputes. At any rate I have. *See also* J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 4 (1968). Indeed, one need not be very interested in law to hear such statements. At least, that is the way I interpret the remarks of the "philosopher" to Somerset Maugham that are reported in S. MAUGHAM, ON A CHINESE SCREEN, in THE TRAVEL BOOKS 91-97 (1955). It has also been suggested, however, by one of the most prominent sinologists, that the Chinese government was consistently repressive and authoritarian from a very early period and used Confucianism as a useful prop for totalitarianism. *See* E. BALAZS, CHINESE CIVILIZATION AND BUREAUCRACY 17-19 (1964).

the study of Chinese law which western scholars can use,[3] and in effect, there is a sort of covering up of the system (at least as westerners interpret the evidence).

In fact, the Chinese had a highly elaborate, formal legal system, which played a central role in their lives. It was widely known and much used. Its heart was a code, called in Ch'ing times the Great Ch'ing Code.[4] It was, however, a system that was very different from anything that we recognize as law, and we do not really have the conceptual tools to study it. If there was any tradition of legal study, it died out with the revolution of 1911. All modern Chinese legal scholars are western trained, as are the Japanese; so they are no help.[5] Perhaps as a result of this, little work on traditional Chinese law had been done in the West until recently. With the development of interest in China, there has also been a development of an interest in Chinese law. This interest became well established with the publication in 1967 of Professors Derk Bodde and Clarence Morris' *Law in Imperial China.* This book constitutes, in effect, a summary of what was known and believed about Chinese law by Chinese and westerners up to that time. It includes an excellent bibliography and discussion of sources. It is, therefore, both a good statement of existing doctrine which subsequent

3. Officially at least, there were no lawyers, in the sense of either advocates or solicitors or notaries. *See* BODDE & MORRIS 4-5. *See also* S. VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 69 (1962) [hereinafter cited as VAN DER SPRENKEL]. *See also* J. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA 24-25, 219-20 (1972) (content of the bureaucracy entrance examinations). A leading Ch'ing official Hsüeh Yün-sheng, complained of magistrates' lack of legal knowledge. 1 HSÜEH YÜN-SHENG, TU-LI TSUN-I (RESERVATIONS ON READING THE LI) 80-81 (Huang Tsing-chia ed. 1970) [hereinafter cited as HSÜEH].

4. *See* text accompanying note 29 *infra.* The fact that there was usually a part of the dynastic history devoted to the Code would seem to indicate its importance. BODDE & MORRIS 52-53. For a subsequent translation of portions of the Ming legal history, see F. MÜNZEL, STRAFRECHT IM ALTEN CHINA 34-75 (1968). Portions of the Code were apparently included in the semi-monthly inspirational readings that magistrates gave, or were supposed to give, to the people. HSIAO KUNG-CHUAN, RURAL CHINA 190 (1960). Even more telling, to me, is the existence of a centuries-old tradition of detective stories, all of which center around a trial under the Code. The best known in the West is perhaps DEE GOONG AN, THREE MURDERS SOLVED BY JUDGE DEE (R. van Gulik, transl. & ed. 1949), but there were many more. See C. HSIA, THE CLASSIC CHINESE NOVEL 25-26 (1968) for a discussion of the genre.

5. The modern Chinese Code, still in force in Taiwan, is modelled on the Japanese Code, which is in turn modelled on an early draft of the German BGB. *See* J. ESCARRA, LE DROIT CHINOIS 241 (G. Browne transl. 1961); Takaganagi, *A Century of Innovation: The Development of Japanese Law 1868-1961,* in LAW IN JAPAN 30-31 (A. von Mehren ed. 1963).

scholars can shoot at, and, at the same time, an armory of weapons for carrying on such an attack. It is an enormously useful book.

Professor Bodde[6] noted that the reason little had been written about Chinese law was no doubt "the fact that the written law of pre-modern China was overwhelmingly penal in emphasis, that it was limited in scope to being primarily a legal codification of ethical norms long dominant in Chinese society, and that it was nevertheless rarely invoked to uphold these norms except when other less punitive measures had failed."[7] The law was not concerned with civil or private suits. Moreover, it was administered in a vertical way. Citizen did not sue citizen. Complaints were filed with the magistrate, who decided whether or not to act (and who could also act as complainant), and review was within the bureaucracy. The magistrate had no specialized legal training and was the representative of the crown, as it were, in the district or county. He performed all the necessary governmental functions, from keeping the public works in repair to deciding lawsuits. There were no lawyers to represent private parties. What we would regard as the heart of a legal system—torts, contracts, property—was regulated not by law but by custom, and disputes were settled in some private manner, notably mediation by a village elder.[8]

This is the picture that subsequent legal historians are seeking to tear to shreds,[9] and Professor Metzger is one of the attackers.[10] It

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6. Professor Bodde wrote most of the material dealing with China. Professor Morris wrote principally the legal analysis of the Chinese material. BODDE & MORRIS vii-viii.

7. *Id.* at 3.

8. *Id.* at 5-6. *See also* VAN DER SPRENKEL 80-111; Cohen, *Meditation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966).

9. Perhaps I exaggerate. It is my belief that Professor Metzger's book casts considerable doubt on the conclusions of Bodde and Morris. For one thing, he indicates that many "law-jobs" were decided neither by custom nor by the Code, but by other bodies of regulations. T. METZGER, THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY 235-417 (1973) [hereinafter cited as METZGER]. He also casts doubt on the non-existence of a legally trained elite. *Id.* 150-56. In general he opens up the field. I am sure that Professor Metzger does not regard himself as one who is attacking Bodde and Morris. That, nevertheless, is the effect of his book in my eyes.

One of the reviews of *Bodde & Morris* was somewhat critical in a revisionist way. *See* Chen, Book Review, 29 HARV. J. ASIATIC STUDIES 274 (1969). My guess is that when the dust has settled, *Bodde & Morris* will be recognized as being not a book on Chinese law in general, but rather as an immensely learned and marvelously useful guide to the study of the Ch'ing Code. As such it will unquestionably continue to be used for many years.

10. Unfortunately, although Professor Metzger has written what is, in fact, quite a

must be emphasized that this process of attacking existing theory—this dialectical or cannibalistic process—is the way history develops in our post-Rankean age. It was essential to have existing knowledge cogently brought together and analyzed before any further progress could be made. It will doubtless be the case that much of what Professor Bodde wrote will be reinstated in a later stage of the revisionist or postrevisionist process. Certainly no one will exceed him in his knowledge of the sources with which he deals. The problem is that there are other sources and other points of view, and these are now being developed. Revisionism is in full flower.[11]

One of the difficulties arises from the fact that Professor Bodde is a great sinologist, but he is not a lawyer. He consequently had to rely on lawyers—western-trained since there are no others—for his information about law. These legal scholars, on the other hand, were not

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radical book, calling into question many of the cherished beliefs of traditional scholarship, he has felt it necessary to decorate his work with the usual trappings of this scholarship, and has thus weakened the impact of this work. He constantly refers to the influence of "Confucianism" on the actions of the Ch'ing officials, and seems to find some basis in Confucian theory to explain their innovativeness and flexibility. *E.g.* METZGER 28-34, 63-78. This is in the grand tradition of western scholarship about China, but it is surely a curious tradition for modern historians. No one would question that educated Chinese had read and memorized a great deal of Confucianist literature. It would certainly occasion no surprise if it could be shown that they typically responded to abstract questions about government with appropriate quotations about government from *The Classics*. (Such references are notably absent from legal documents, it might be noted.)

But does that mean that there was a direct causal relation between doctrine and action? John D. Rockefeller was a devout Baptist during his entire life and was, presumably, well acquainted with the Gospels. Does an acquaintance with the Sermon on the Mount take one very far in an understanding of the development of Standard Oil? Eighteenth century Englishmen of the upper and gentry classes who had political ambitions were, of necessity, members of the Church of England, and there is every reason to believe that their adherence to that church was more than nominal in most instances. But it was not to the content of family prayers, or even well-known sermons, that Sir Lewis Namier devoted his attention—in such works as *England in the Age of the American Revolution* (1930)—in his efforts to explain the political behavior of the English group equivalent to the Ch'ing officials. Surely it is time to forget Confucius for a while and simply to try to find out what, in an objective sense, was going on. It seems to me that Professor Metzger's book is in fact a testimonial to his effort to follow, and tell it, the way it was (if one can so translate "wie es eigentlich gewesen"). One wishes he would make his adherence to this doctrine more overt.

11. This is true in many areas of Chinese history. In the field of western economic exploitation in the 19th century, we have apparently arrived at a post- or counter-revisionist period. *See* Lubot, *The Revisionist Perspective on Modern Chinese History*, 33 J. ASIAN STUDIES 93, 95-96 (1973).

sinologists.[12] All had their notions of law formed in the western—that is to say, Roman—mould. The center of their universe was the private lawsuit and the substantive rules that are used to decide it—in other words, the sort of law about which Gaius wrote.[13] "Penal" law is something off to the side, although admitted to exist. The internal operation of a bureaucracy is not something with which the law normally concerns itself.[14]

In China, on the other hand, the bureaucracy had been the center of society for centuries, perhaps millennia.[15] Government had been highly centralized for that long, and the emperor enforced his will, or governed, by means of an hierarchical bureaucracy which, by the time of the Ch'ing (1644-1911), was selected primarily by competitive examination (at least in theory).[16] All learned men, all students, either were in the bureaucracy or wished to be. There was no area of human life that was not subject to governmental control if the government had a mind to exercise that control.[17] Since this bureaucracy was the judiciary as well as the military, the board of public works, and the established church, it is here that legal study must begin. That is a very hard thing for western-trained scholars to realize. If one starts from the center of the bureaucracy (working with the officials, as it were), then the law begins to take on a very different appearance. Though we are still nowhere near knowing what appearance it will take, Professor Metzger's book contains a good deal of information to help us find out.

It would seem that his ultimate aim is to understand how Chinese

12. For example, Professor Bodde's collaborator, Professor Morris, is primarily known as a professor of torts and legal philosophy. Perhaps one could classify Professor Jean Escarra, *see* note 5 *supra*, as a sinologist, but he was a western-trained lawyer.

13. Gaius divided the law into "Persons, Things, Actions"—an organization that was continued in the Institutes of Justinian. *See* 1. F. DE ZULUETA, THE INSTITUTES OF GAIUS ix (1946) (list of topics); 2 *id.* at 7-9 (1953) (discussion of the organization). For a description of the way Gaius' organization passed on into modern European—or anyway German—systems, see G. BOEHMER, EINFÜHRUNG IN DAS BÜRGERLICHES RECHT 70 (2d ed. 1965).

14. After all, the term "administrative law" as used in the United States normally refers to court review of administrative action, not the extent to which actions are taken and reviewed internally.

15. *See* E. BALAZS, *supra* note 2, at 13-27.

16. J. WATT, *supra* note 3, at 23-32.

17. METZGER 3. For a variety of sumptuary and similar regulations, see CH'Ü T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA 137-67 (1961).

(Ch'ing) officials functioned,[18] what factors influenced them in making the decisions they made, what they managed in fact to accomplish, and how. He has not made his aims too clear since he is not in any position to answer questions. As a matter of fact, he is not in any position to ask many. Rather Professor Metzger seems to be concerned with searching out the areas in which questions can profitably be asked. Since, in my opinion, that is precisely what needs to be done in this part of Chinese studies, I believe that this is a valuable book.

To be sure, Professor Metzger is primarily concerned not with the adjudicatory function of the government, but rather with its general manner of operating.[19] He studies the way it collected taxes or managed the salt monopoly.[20] The primary myths he is combatting are those connected with the administration—why it was so ineffective. To a considerable degree, however, these ideas have arisen for reasons related to the problems that face those studying Chinese law. Grossly oversimplified, the attitudes and notions that he combats result from an effort to explain why China collapsed in the face of the western attacks—military, economic, and cultural—of the nineteenth century. This is connected with the question of why China did not do as well as Japan in reacting to the western challenge. It is assumed that the inability of the government to respond to the novel situation of western intervention was a fault. Such questions are a commonplace among western historians, but surely they betray our western bias. Are they questions the Chinese would ask if they were not westernized? Are they the proper questions? That is, it is assumed that a properly functioning bureaucracy would have snapped up the superior technology and organizational attitudes of the West and turned them on their creators as the Japanese did.[21] But in terms of the harmonious

18. METZGER 3-4.

19. He does not, in fact, deal with adjudication as such: that is, the actions of the District Magistrate in deciding a complaint filed under the Code, or review of such actions by the Board of Punishments or an intermediate body. His treatment of administrative discipline does not really concentrate on process.

20. Professor Metzger seems to have done his principal, in-depth research on the salt monopoly. This is evident from the citation of authorities throughout the book. *See, e.g.*, METZGER 53-54, 223-29 (salt gazeteers described); *id.* at 468-69 (index entries under T'ao Chu, a prominent 19th century official). *See also* Metzger, *The Organizational Capabilities of the Ch'ing State in the Field of Commerce*, in ECONOMIC ORGANIZATION IN CHINESE SOCIETY 9 (W. Willmott ed. 1972).

21. It may be that professional historians of China do not concern themselves overmuch with this problem, but this is the impression I have received from a variety of

functioning of Chinese society internally, the primary concern of any Chinese regime, is it clear that the government was so incompetent? Or was it doing anything other than following its own internal logic or cycle, in which a period of decay in the nineteenth century was quite normal considering the founding of the dynasty in the seventeenth century and its flowering in the eighteenth?

Be that as it may, it seems to be Professor Metzger's belief that the administration functioned fairly effectively, or, at the very least, that the criticisms that are often directed against the regime are contradicted by a great deal of evidence. The notions he combats are several: that the Chinese bureaucracy was incapable of adapting to change, being rigidly tied to past ways of doing things;[22] that the officials lacked specialized expertise;[23] that they had no respect for law;[24] that the empire and bureaucracy were held together by terror;[25] and generally, that the bureaucracy was incapable of fulfilling its purposes or intentions.[26]

Beyond these negative findings, Professor Metzger is careful not to advance a thesis that his data do not support, and hence does not explicitly advance any thesis.[27] Nevertheless, it seems to me that he is

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sources, written and other. This is my interpretation of the thrust of even such a sympathetic statement as that in J. FAIRBANK, E. REISCHAUER & A. CRAIG, EAST ASIA: THE MODERN TRANSFORMATION 404-07 (1965). To be sure, it would seem to be a matter of great interest to modern Chinese, including the governors of the People's Republic of China, but all of these people have been much influenced by western approaches. *See* Davies, *Year of Asia's Giants*, FAR EASTERN ECON. REV., Dec. 31, 1973, at 24, 27-28.

22. METZGER 28-42. *See generally id.* at 21-91.

23. *Id.* at 150-56.

24. *Id.* at 158-60.

25. *Id.* at 241-46.

26. *Id.* at 2-3.

27. This is true notwithstanding his frequent efforts to find support in the Ch'ing materials for what he seems to regard as the hallowed principles of administrative science. For example, he seems unwilling to say in ordinary English that one way in which the bureaucracy was controlled and directed was the use of disciplinary penalties. Rather he seems to feel that it is necessary to construct a "model of control requirements hypothetically applicable to any organization." METZGER 236. These requirements are that the sanctions be regarded as "legitimated, mild, universalistic, rationalistic, and flexible." *Id.* at 397. There follows a lovely table from which we can learn that the notions of the "probationary ethic" and "sense of charisma" are "bureaucratically functional," whereas "particularism" and "egotism" are "bureaucratically dysfunctional." *Id.* at 407. These notions are said to be based on the work of Max Weber together with that of "Talcott Parsons, Gabriel A. Almond, G. Gingham Powell, Jr., S.N. Eisenstadt, and Amitai Etzioni." *Id.* at 4. Unless I am very much mistaken, none of these estimable scholars knows (or knew) anything about Ch'ing government, even when, as in the case of Weber and Eisenstadt, they purport (or purported) to.

quite sympathetic to the bureaucracy and feels that, on the whole, it did a relatively good job, considering its resources and the problems it faced.

The first part of Professor Metzger's book consists of a group of fairly miscellaneous observations on the functioning of the bureaucracy, subsumed under the headings of administrative flexibility,[28] communications,[29] and rule making.[30] The second half is a rather detailed description of a compendium of rules governing the disciplining of officials.[31] Professor Metzger makes a fairly good case for the proposition that our notions about the bureaucracy are not correct. At any rate, he has produced considerably more than a scintilla of evidence, even if he has not quite made a prima facie case. One would hope that he and others will pursue his lines of investigation, so that before too long it will be possible to arrive at some hypotheses about how Ch'ing bureaucrats behaved, and then to await the attack of postrevisionists as the dialectical process continues. Such discoveries will inevitably be of immense importance to legal students of Chinese law. But even the very tentative, ground-clearing activities in which Metzger engages in his book are of considerable value. To see why, one must go back to the picture of the Code presented in *Law in Imperial China.*

The whole point of Professor Metzger's book, to me, is that no one knows anything about Ch'ing government until he does what Professor Metzger has done and engages in the terribly difficult and laborious task of wading through the masses of tedious detail that are recorded about Ch'ing bureaucrats in the documents they left behind, and begins to piece together a picture of the way they worked. Perhaps even more important, until one begins to acquire a feeling for the way they did things, one will learn nothing. The researcher must acquire a *Spürsinn* for the field—his most important tool. I think Professor Metzger is acquiring this sense, if he has not already done so, and he must be one of the few people in the world who is at that stage.

Surely it is the western sociologists, who have built their theories about human society entirely out of material from western societies or very westernized versions of non-western sources, who ought to study Professor Metzger; not the other way round. His work is a large step towards a preliminary understanding of the Ch'ing government, and once we acquire enough data about that government as well as other aspects of Chinese life, all existing social theories ought to be examined in its light to see if they still hold. *See* notes 71-74 *infra.* Even something humdrum like a cross-reference table to the Ch'ing Code or Collected Statutes would take us much farther than the analysis of life at Ma Bell's in Chester I. Barnard's *The Functions of the Executive* (1962). *See* METZGER at 437.

28. METZGER 21-91.
29. *Id.* at 95-164.
30. *Id.* at 167-232.
31. *Id.* at 235-417.

In that book the "law" was said to be "penal."[32] By "law," Professor Bodde referred to the Great Ch'ing Code of Laws, a body of rules that seems even to Professor Metzger to occupy a central position in Ch'ing law. It is easy to see why it has been labeled penal, since every operative section has a punishment attached to it. The difficulty with this terminology, however, is that if we say "penal," we are likely to think "criminal," and "criminal law" means "law that is distinguished from civil law." That is very misleading. After all, our "criminal" law developed out of our civil law whether one looks at Roman or Germanic law, the principal roots of all European systems.[33] Or perhaps to put it another way, in the early periods of our legal system (Roman or Germanic), redress was sought and obtained by the victim of a misdeed and the state (admittedly a somewhat anachronistic term) did not intervene to exact its own penalty. Such intervention did not take place until much later. When it did, it was somewhat unusual, differentiated from ordinary law, and called "criminal."

There seem to be no traces of such a system of private action in Chinese law—no systems of wergild or anything similar. The earliest traces of Chinese law that we have (circa 200 B.C.) are collections of royal decrees.[34] These decrees include punishments for their violation and are, to that extent, penal, but since they did not arise out of civil or non-penal rules, there seems to be no point in using such terminology. Rather, the distinguishing feature of the Code in Ch'ing times, and probably much earlier, is its organization.

The Code consists of seven parts.[35] The first is general, indicating

32. *See* text accompanying note 8 *supra*.

33. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-50 (4th ed. 1936); H. JOLOWICZ, AN HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW, 321-22 (2d ed. 1952); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 421-23 (5th ed. 1956) (English law).

34. *Cf.* A. HULSEWE, REMNANTS OF HAN LAW 26-31, 71-72 (1955).

35. There is an English translation of the entire Code. G. STAUNTON, TA TSING LEU LEE (Taiwan reprint 1966) [hereinafter cited as CODE]. Much of the Code is also included (in French) in P. BOULAIS, MANUEL DU CODE CHINOIS (Taiwan reprint 1966) and in P. PHILASTRE, LE CODE ANNAMITE (Taiwan reprint 1967). Of these translations, *Staunton* is the most convenient to use because it includes all of the Code and numbers the sections. The most widely available Chinese text is the Taiwan reprint of the 1877 edition. The most convenient edition of the text to use is HSÜEH, *supra* note 3. It also numbers the sections and includes all of the substatutes.

Professor Metzger remarks on his gratitude to that "sinological paradise" the Harvard-Yenching Library. Few would disagree with that appellation, but for those of us who are far from "Eden's bowers," the Taiwan reprints are the only texts available. Conse-

how the rules are to be applied in the remaining parts: how to compute punishments; what dimensions the bamboo rods used in punishments should have; and what classes of prisoners should receive lighter punishments. Each of the six remaining parts is given the title of one of the six Boards that constituted the functional division of the central government in Peking: Rites, Revenue, Officials, War, Punishments, Works. The provisions within each part relate, more or less, to the work of the respective Board.

It is obvious that the Code was seen as an instrument of governing generally, and not merely as an aspect of "law." It was closely integrated with the general work of the bureaucracy. If one could stop there, it would be easy for us to understand. Unfortunately, the Code also includes rules that deal with what seem, to our eyes, to be quite different matters from administrative regulations. There are the expected provisions on such matters as the carrying out of imperial sacrifices[36] and failure to obey an imperial order.[37] But there are provisions on homicide[38] and theft[39] as well. There are also rules on usury,[40] marriage,[41] succession,[42] and mortgages,[43] to name only a few. None of these matters is treated exhaustively. A reasonable, though tentative, conclusion (that may well be wrong) would seem to be that the Code is exclusive as to punishments as therein defined (fines and demotions would not be "punishments"). That is, whatever is defined as "punishment" could be inflicted by a magistrate only as therein provided.[44] But any of what we perceive as society's "law-jobs" that are not governed by the Code would be handled in some other way, either elsewhere in the bureaucracy or outside the formal legal system. Never-

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quently, in my opinion, it is best to cite to them, and I have done so here. References to the CODE are to *Staunton*. The arrangement of the Code is discussed in BODDE & MORRIS 57-63.

36. CODE § 157.
37. *Id.* § 62.
38. *Id.* § 282.
39. *Id.* § 269.
40. *Id.* § 149.
41. *Id.* §§ 101-17.
42. *Id.* §§ 87-88.
43. *Id.* § 95.
44. Section 1 provides the punishments that can be used by magistrates under the Code. These are beating with the heavy or light bamboo, exile for a term, permanent exile, and death. Any other sanction would perhaps not be a punishment (*hsing*). This seems to be Professor Metzger's view. METZGER 277.

theless, it must be reemphasized that the Code is clearly regarded as having some sort of special position among a large body of rules.

The principal importance of Professor Metzger's work lies at this point. He has studied materials that are neither custom nor the Code, and makes it clear that such materials must be used if we are to understand Ch'ing law, even though he does not talk much about law in a narrow sense. He has examined a large mass of miscellaneous administrative material, statutes, regulations, and memoirs.[45] Even though, as indicated, he has not come up with anything that even purports to be a total explanation of Ch'ing administrative behavior, some of his observations are of considerable help to those who are trying to understand adjudicatory process, or understand it better than we do now. It may well be, as a matter of fact, that these observations are more useful to the legal scholar because Professor Metzger is not a lawyer. He reports on his observations without translating them into the language of the American or European lawyer.

Thus in the process of discussing sources, Professor Metzger employs —I assume, unconsciously—certain usages that strike a lawyer as rather curious. He tends, for instance, not to differentiate between acts by the officials when they are performing what we would call actions of a juridical nature and other acts, such as repairing canals. Thus he describes all acts of the administration as "cases."[46] Obviously, this is the way the Chinese referred to them. Even more telling is his use of the term "precedent."[47] Any administrative act can serve as a "precedent" for a subsequent act, and it does not seem to matter whether or not it is "judicial." Indeed, his principal example of the use of the word arises out of the question of which route one ought to use to send troops from Szechwan to Taiwan.[48] In discussing the

45. His principal sources are the collections of statutes and precedents listed in his table of abbreivations. *Id.* at vi. To these might be added T'ao Chu's Memorials, discussed in Appendix I. *Id.* at 419-20. But there are many more. Professor Metzger's research has been monumental. The amount of time that must have been spent in preparing Table I, *id.* at 334, is mind-boggling. One of Professor Metzger's great assets is obviously his ability to read the materials with facility. He mentions the straightforwardness of bureaucratic language, *id.* at 105, and clearly that is true enough if one is referring to the lack of literary allusions and the like. But many Americans, I for one, and a number of Chinese find it very difficult.

46. *Id.* at 21.

47. *Id.* at 185-93.

48. *Id.* at 192-93.

matter, an official cited a previous instance when it had been quicker to go by one route rather than another.

I found this terminology startling and thought-provoking. It leads—as everything in this book does, for me—to the proposition that law must be studied as an integral part of the administration. Though custom, for instance, might deal with the same subject matter—for example, tenures—as the Code, that is irrelevant to law as seen by the Chinese.[49] The factor in the social situation which we would regard as determinative of its nature—such as promise, or the transfer of an interest in land—is not what was determinative or important to the Chinese. Doubtless they saw land being transferred whether the transfer was mentioned in the Code or not. But if they were thinking about "law," then what mattered to them was, if I am correct, whether or not the particular act was punishable or otherwise the subject of government regulation. With us just the reverse is true. We look for "sales" hence "contracts" hence "promises," whenever we see goods being transferred; and if we find an "enforceable promise,"[50] we find, of course, the law of contracts. Even if it is changed into "Government Contract Law," it is still modeled to a considerable extent (at least in its phrasing) on Williston.[51] If we open up our study of law beyond the mere analysis of concepts, then we are likely to find legal systems in subgroups such as trade associations or schools,[52] or we may look to nonlegal factors influencing decisions. But the center of attention remains the lawsuit and the private legal relationship—in other words, Gaius. If we open up the study of Chinese law beyond the Code, it must be in the direction of governmental acts outside the Code. Legal

49. The Code has no provisions on tenures as such, but it recognizes the existence of various types of interests—for example, mortgages in § 95 (which deals with the required formalities for mortgage and fraudulent mortgages, but not with most of the problems of redemption). Section 92 requires that land of persons of high degree (*Staunton* translates as "nobility") that is not exempted from taxation be registered like anyone else's land, and the bailiff ("tenant or steward" in *Staunton*) of the land was responsible for this. There is a good deal of material on the contracts between stewards and land owners. For a discussion of some tenancy contracts in Fukien, see E. RAWSKI, AGRICULTURAL CHANGE AND THE PEASANT ECONOMY OF SOUTH CHINA 14-26 (1972).

50. That is, after all, the essence of the Restatement definition of a contract. RESTATEMENT OF CONTRACTS § 1 (1932).

51. *See* J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 54 (1964); Note, *Adaptation of Private Contract Principles to Government Contracts*, 27 IND. L.J. 279 (1952).

52. At any rate, that is what I am likely to find.

activity is government activity. A realistic jurisprudence of Chinese law would be a realistic administrative science.

There are, of course, many other observations of interest. One relates to the "training" of officials. It is generally agreed that there was no legal education in China and that officials had no technical training of any kind, particularly in law. Rather they resembled those almost mythical British civil servants, products of Macaulay's and Trevelyan's reforms, who, armed only with a first in Greats, marched forth to govern the heathen but maintained a sufficient interest in their education to make learned little observations on false quantities and the like in letters to the *Times*.[53] Professor Metzger records two facts that make one question this picture. In the first place, he points out—what one knew, of course, but tended to ignore—that there were a large number of Manchus in the government who had not had much philosophical or literary training and had not necessarily done well on the civil service examinations.[54] Professor Metzger suggests that they may have had practical experience. At the same time (and increasingly, as time went on), a very large percentage of the officials bought their positions.[55] This did not mean that they were uneducated, of course, but it surely did mean that they had failed, or felt a little unsure of, the exams. What influence did this have on the nature of adjudication?

At the same time that Professor Metzger points out that some of the magistrates did not have a good education, he draws attention to the fact that a number of magistrates had considerably more technical training than one would imagine.[56] Clearly the magistrates at the level of review normally had received a great deal of training, though Professor Metzger does not suggest how much. In other words, jurists would not be attorneys who represented parties, but rather legally trained officials

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53. Leonard Woolf was perhaps exceptional in taking with him to Ceylon a ninety-volume set of the complete works of Voltaire and a dog as his sufficient materials for official duties, but he fit the mold. *See* L. WOOLF, SOWING 209-12, 218-20 (1960).

54. METZGER 24 n.6. Manchus, however, were apparently much in the minority. *See* CH'Ü T'UNG-TSE, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 22 (1962) (Table 5). If Manchus were imperial clansmen, they could enter the bureaucracy by taking an easier examination. HO PING-TI, THE LADDER OF SUCCESS IN IMPERIAL CHINA 23 (1962).

55. HO PING-TI, *supra* note 54, at 47-50.

56. *See* note 23 *supra* and accompanying text.

who decided and reviewed cases. They were by no means all highly educated philosophers and litterateurs who had done exceedingly well on an esoteric examination but knew little of the real world. Rather, some of them had a great deal of very practical training but were not high-powered intellectuals. Some doubtless fit into both categories.

This leads one at once to the clerks and secretaries. Professor Metzger does not really consider them. But we know that some clerks became officials.[57] Furthermore, they did acquire some specialized legal expertise simply from the nature of their work. It would seem that such persons would have been especially influential on those district magistrates who were not very bright or not very industrious. Was there then, in fact, a legally trained elite that existed under the surface, as it were? If so, would its members not have been the ones who formed the law by drafting statutes and regulations inside the government, and perhaps pleadings and other documents outside?[58]

We are very aware of the way in which lawyers and jurists influence the development of a legal system. But what of lawyers who are all bureaucrats? What are their attitudes towards law, and how do their attitudes influence the development of the laws? Obviously, they would not be much concerned with "rights" (though they could be bribed to be interested in the welfare of a particular individual), but they were likely to be much concerned with rules and their observance.

Professor Metzger makes another rather startling point, although he does not pursue it too far—namely, that the emperor himself was in some sense subject to the rules that he nominally had made.[59] Profes-

57. One of the best known was Wang Hui-tsu. *See* METZGER 149. He wrote one well-known magistrate's handbook that is discussed and translated in part in VAN DER SPRENKEL 137-51. One wonders about the status of "Ch'ien Lao-yeh" in I. PRUITT, *supra* note 4, at 115. Pruitt states: "They came from an old family of famous lawyers. No court in China was considered complete without a Ch'ien of Hsiao Hsing."

58. As to the existence of a notariat, as it were, it seems likely that it existed because of the prohibitions against it. *See* BODDE & MORRIS 189-90. It seems to me that there is indirect evidence of such an institution in a story in one of the most popular collections of Chinese detective stories, the *Pao Kung An.* In *Yao she, K'ou hou (Bite tongue, grab throat)*, a servant prosecutes a neighbor for having killed his mistress and debauched his wife. Though nothing is said about who wrote the complaint, it seems unlikely that a person in such a humble position could have written such a formal document himself, if he could have written at all. Obviously, fiction should be used as a source only with great care, but I think this is entitled to some weight. It may be that Yamen (the local government office) clerks wrote complaints.

59. METZGER 158-62, 398. *See also id.* at 84-85 (discussion of immutability of the Code).

sor Metzger does not really venture to suggest what this means. Nor do I. In part, it must mean that the emperor was a creature of his law—that is, to be emperor meant to be the apex of a system of rules or law. These could be changed, but only within limits, unless one wished and was able to change the whole system—which may have meant changing the entire society. Apart from the internal political problems, there is a problem of imagination. Perhaps the Chinese simply could not conceive of an emperor who did not fit this pattern, and those from outside, like the Manchus, could not either.[60] It may be that the Mongols managed a little better for a time, though in the long run they surely became quite Sinified.[61] We are dealing, in other words, with a society that has long since disappeared (it being assumed to have existed at some point). The emperor had nominal power to issue more laws, but in fact could do so only in a limited way; the bureaucracy was also skittish about issuing new laws;[62] the Law seems to be an almost self-sustained entity, which can be changed, but only in accordance with its own internal logic—all this in a society which was notorious for not observing the rule of law.

The preceding analysis avoids, in a sense, the impossible question. What was the legal system? The law? We cannot even answer the simple mechanical question: Where is it to be found? As indicated

60. The Manchus began to Sinify their government as they began to make preparations to conquer China. E. REISCHAUER & J. FAIRBANK, EAST ASIA: THE GREAT TRADITION 350-56 (1960).

61. *See* J. DARDESS, CONQUERORS AND CONFUCIANS 1-2, 31-32, 157 (1973).

62. *See, e.g.*, METZGER 398. It seems to me that Professor Metzger does not sufficiently consider the probability that the bureaucrats in fact drafted most—perhaps all—rules and legislation. The formula that the emperor is concerned about this and that, *e.g., id.* at 319, that upon learning of a breach in canal banks he stated the disaster resulted "from Our lack of virtue," *id.*, that the emperor was angered and "broadly ordered," *id.* at 313, or even that he broke out in a cold sweat, *id.* at 319, does not necessarily mean anything more than "Le Roy veult" means at the end of an English statute. It does seem to be true that the Chinese emperor both ruled and reigned. *See, e.g., id.* at 393-94 (procedure for audiences with officials). Still, he could not have taken the time to consider every minor matter that he had to approve. There is considerable doubt that he even knew which prisoners he was designating for execution in the elaborate semiannual ceremonies at which he purported to make the decision. BODDE & MORRIS 139-41. The K'ang hsi emperor, however, claimed to know. J. SPENCE, EMPEROR OF CHINA 32-34 (1974). It seems likely that one could say that almost all "law," whether rules or decisions in cases, was the product of the bureaucratic process. Actually, Professor Metzger implies as much, *see* METZGER 176-80, but I think this point should be made more explicitly.

above, it is usual to speak of the Great Ch'ing Code as the Code. And apparently it did have some sort of special position among the multitude of statutes and regulations that existed. But it was also connected with them. How, it is not clear to me and apparently not to Professor Metzger either. What he does is to point up the problem, or at any rate those problems that are presently visible. Other horrors will doubtless emerge. At present, doing research in Ch'ing law is roughly like being put in a room with copies of the *United States Code Annotated*, the *Code of Federal Regulations*, and the *Federal Reporter* and told to start studying American law. There are no texts, no indices, no key numbers, no *Shepard's*, and no cross-reference tables. Even the Code has no numbers on the sections, and cross-references are by a few words out of the text, as in early English statutes (*Quia Emptores*) or Papal Bulls (*Rerum Novarum*). Professor Metzger is, as far as I know, the first to point out that the Code's organization has some relevance for the study of law.[63] Moreover, he has coupled this observation with another: that there are many other sources that must also be used, all of which are equally unorganized. It is as though he had thrown an unindexed national reporter system onto the pile.

This is the effect of his emphasis on the importance of the Administrative Regulations on Discipline, to which he devotes almost half his book.[64] These regulations consisted of a body of rules that provided for "punishment of officeholders for light offenses involving governmental affairs by means of impeachment and of economic and status deprivations."[65] Some of the rules are included in the Code and some are not. They apparently do not include the punishments administered by the Board of Punishments. If an official committed a serious crime, it was usual to dismiss him from office, and then send him over to the Board of Punishments to be tried and punished.[66] Professor Metzger believes that this body of rules forms an intermediate body of rules that

63. *See* METZGER 96-98 (discussion of clarity); *id.* at 155-56 (comment on difficulty of using sources).

64. *Id.* at 235-417. The principal text he is referring to is apparently the *Ch'in-ting Ch'ung-hsiu Liu-pu Ch'u-fen tse-li* (1887). *See* METZGER 438. There is, I believe, a reprint of the 1892 edition in *Chin-tai Chung-kuo Shih-liao Ts'ung K'an* (collected historical materials of modern China), Chen-lung Shen ed., as vol. 332 (on front cover, on title page, no. 34).

65. METZGER 235.

66. *Id.* at 277-78.

fall somewhere between penal law and administrative law. He would thus make a tripartite division of Chinese law.[67] My feeling is that the outlines are not so clear. What seems to me to be indicated is the existence of other groups of rules in addition to the Code that will have to be considered in arriving at any total picture of Chinese law. Even in the field of discipline, it seems likely that there were other bodies of rules—for Manchus and soldiers, for instance. As a matter of fact, it would appear that there were such disciplinary rules for examiners as well, administered by the Board of Rites.[68]

The lesson that I have drawn from Professor Metzger's book is that while it is still profitable to restrict oneself to the Code and its commentaries, since these are very little known and one must start somewhere,[69] it must be constantly realized that these are only part of the bureaucratic legal system. It has long been obvious to anyone interested in the matter that the Code does not cover all of Chinese law. It has been assumed that if one wishes to understand the Chinese legal system (as we understand the concept), there is a large body of customary law to be studied as well.[70] It now seems to me that the basic division is not between law and custom. Rather, one must make functional divisions within the structure of bureaucratic rules and decision making. This division might be made between the Code and other rules, since the Code probably occupies some sort of special position. The task is both to understand the Code in its own terms, and at the same time to discover and study the other bodies of rules that exist, such as those discussed by Professor Metzger. Eventually one

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67. *Id.* at 169-70 n.3, 207-14.

68. *See* note 75 *infra*. Of course it may be that I have simply misunderstood the reference, and that this matter is covered in the Regulation on Administrative Punishment.

69. That is, it is clear that the Code is going to be important in any study of Ch'ing law. Since, however, we do not know how to use it on its own terms (how its rules interrelate, for example), it will obviously be necessary to make extensive and intensive studies of it, regardless of whatever other materials must also be studied. Even such basic tools as a cross-reference table are lacking.

70. *See* BODDE & MORRIS 5-7; VAN DER SPRENKEL 80-111. The principal sources are Japanese. *See* J. FAIRBANK, M. BANNO & S. YAMAMOTO, JAPANESE STUDIES OF MODERN CHINA 75-78 (1971). There is a German translation of part of a 1930 Chinese study. DIE AMTLICHE SAMMLUNG CHINESISCHE RECHTSGEWOHNHEITEN (E. Kroker transl. & ed. 1965). These are all fairly old. It seems likely that a great deal of additional relevant material is still extant both in China and elsewhere, particularly in reference to land contracts. *See* note 49 *supra*.

might hope to pull it all together into some sort of tentative whole. Pending that, it seems to me that it would probably be best to keep customary law entirely separate. Otherwise, one runs the risk of imposing western conceptions on the Chinese material. If one looks for the equivalent of contract law in customs, the Code, and other government-promulgated rules, one is likely to miss the whole point of Chinese law, which is that it is not like ours, but rather regards bureaucratic rules and customs as quite separate. In consequence, "contract" may not be a significant concept.[71] There are, of course, similarities between western law and Chinese, as is likely to be the case with social institutions of any two societies (Christmas is a Potlatch, as it were). But the first thing to see is the difference. This is where the interest in Chinese law lies.

If we consider that as of the date of the promulgation of the Code Civil (1804), China was at least as large in population and area as western Europe and had a continuous legal history as old or older,[72] we ought to do some re-thinking of our notions of law. For these notions are totally European. Comparative law, as we normally understand the term, is the comparison of different types of Roman law.[73]

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71. Particularly in view of the fact that much of the production and movement of goods in China was carried on by government instrumentalities. Thus many taxes were payable in grain, and the grain was shipped on government barges to Peking to be distributed to government officials. *See* Chen Shao-kwan, *The System of Taxation in the Ch'ing Dynasty 1644-1911*, 59 COLUM. STUDIES IN HIST. ECON. & PUB. L. 176-83 (1914). There were many government factories. *See* CODE § 430, which refers to textiles and weapons.

72. It would seem likely that Chinese population was in excess of 200 million at this time. *See* E. REISCHAUER & J. FAIRBANK, *supra* note 60, at 393. It may have even reached the neighborhood of 300 million. *See* HO PING-TI, STUDIES ON THE POPULATION OF CHINA 1368-1958, at 281 (1959). The population of what are essentially the present European Economic Community countries plus Scandinavia, Spain, Portugal, Austria, and Switzerland was about 120 million. RAND MCNALLY ATLAS OF WORLD HISTORY 193 (R. Palmer ed. 1957). Chinese legal history goes back in extant texts at least to the T'ang and probably to the Han or before. BODDE & MORRIS 55-63. *See also* CH'Ü T'UNG-TSE, *supra* note 54, at 11-12. Roman law cannot be said to have had a continuous history in western Europe after the fall of the western empire in the fifth century.

73. To be sure, Anglo-American law is supposed to be non-Roman. But in some areas, such as bailments, the borrowings from Rome are overt. In others, notably contract law, the similarities are so striking as to make one certain that English law was essentially Roman. One might change Maitland's statement to read that the common law of contracts was developed by the Roman law of contracts seeping through the interstices of the form of action. The similarity of the systems is shown in a remarkable

This problem of cultural chauvinism is not, to be sure, limited to law. Not even science is immune. Though it is now acknowledged that acupuncture and other forms of "folk medicine" have some validity,[74] western science deems unnecessary a reexamination of its theoretical underpinnings. Rather the new data can, it is assumed, be assimilated to accepted views. One is somewhat reminded of the oscillations of the epicycles which the Ptolemaic astronomers devised to compensate for observations that did not fit their theory of the earth-centered universe and circular orbits. It seems probable to me that we miss much of the benefit of studying Chinese and other nonwestern history by persisting in looking at events as occurring in a Europe-centered world. Suppose an eighteenth century Chinese encyclopedia had bothered to comment on European history. Would it be too far-fetched for something like this to have appeared?

> The nations of the eastern Mediterranean present a curious and rather pathetic history. At various times and places in ancient times, societies that one could truly call civilized seemed to be developing. This was especially true in the river valleys of the Nile and the Tigris-Euphrates. There were outstanding mechanical and civil engineering achievements, and there could be clearly seen the beginnings of a science of government, but internal upheavals or foreign invasions, or both, always resulted in the collapse of society. One of the principal obstacles to stability was the existence of two extremely aggressive and primitive barbarian tribes that lived on the periphery of this area—the Greeks and the Romans. The former were an especially difficult people. They exhibited immense talents in some directions, notably mathematics and astronomy, but seem to have been totally unable to grasp any basic principles of government, and retained a very primitive political organization.

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way by the massive work edited by Professor Rudolph Schlesinger: *Formation of Contracts* (1968). The book investigates the law of contract formation in a number of European and European-based systems (including the Anglo-American) by means of a series of questionnaires, submitted to jurists in various countries, in the form of hypothetical fact situations with questions. The replies were then compiled and systematized by an international panel of scholars. 1 P. BONASSIES, G. GORLA, J. LEYSER, W. LORENZ, I. MACNEIL, K. NEUMAYER, I. SAXSENA, R. SCHLESINGER & W. WAGNER, FORMATION OF CONTRACTS 30-41 (R. Schlesinger ed. 1968). The aim was to begin work on finding a "common core of legal systems." While there are, of course, differences among the national reports, the relative ease in synthesizing the answers of all respondents surely indicates that the systems are essentially the same.

74. *See* Roberts, *A Reptile a Day*, FAR EASTERN ECON. REV., Feb. 4, 1974, at 25.

> They were very quarrelsome and were constantly involved in internal and external disputes. A leader from one of their tribes engaged in a devastating series of conquests that were disruptive but offered little permanent order. Soon thereafter, however, the other tribe, the Romans, began their conquests. They were less gifted in mathematics than the Greeks, but were exceptionally strong militarily. They conquered the East, but discovered—apparently on their own, without receiving any information from us—the truth of that old adage that though you can conquer an empire on horseback, you cannot rule it from there. They assimilated such notions of government as had been developed in Egypt and Mesopotamia and seemed to be on the verge of establishing a true civilization in those parts. Unfortunately, they were soon overrun by tribes from central Asia (including some that have been very troubelsome to us) and their empire came to an end. It has left little lasting trace. This entire history is perhaps a lesson in the importance of natural boundaries to the devlopment of civilization.

I would suggest that such a history is no more inaccurate (maybe less so) than our notions about China and indicates our almost total failure ever to look at the world with anything except European eyes. Doubtless it will be impossible for us ever really to put ourselves in the position of the Chinese in order to look at law—ours and theirs. Still, if we ever make the effort, it may give us a different perspective.

Consider, for instance, the effect of a new approach to what are, perhaps, the most common ways of looking at comparative law: consideration of the structure of the legal system and consideration of legal process. Either way Professor Metzger's book offers promise of interesting discoveries. To consider structure first, all western legal systems concentrate on private law.[75] All except the Anglo-American follow generally the analysis of Gaius.[76] Governmental activity has to be fitted into this system in some way. In China, the center of attention quite clearly is not going to be the person-to-person relationships of European law, but rather the emperor and the central government. Law consists of directives that formally come from the emperor, but are actually drafted, interpreted, and enforced by his bureaucracy. To a certain extent, these directives bind the issuers. The purpose of law is to help the government of the Empire effectuate its purposes.

75. Consider the American first-year law school curriculum.

76. *See* notes 15 & 73 *supra* and accompanying text.

The divisions of law, then, follow generally the functional divisions of the government. The development of the law, however, does not always follow the plan, and rules get tacked on here and there for various reasons, so that the ultimate structure may be quite different from that of the original Code.[77] This result is similar to what happened in Rome and England in the development of substantive law out of the forms of action.[78] It is not possible at the present time to see just

77. For example, § 76 of the Code required every household and all of its members to be registered according to status (military, civilian, physician, dancing girl, slave, etc.), and forbade any change in status, as from military to civilian. The status goes back to the Ming Code, *see* 2 HSÜEH 233, and was clearly designed to prevent tax evasion. It is the second section in a group of fifteen that deal with the labor tax (as opposed to the next group, beginning with § 90, that deal with the land tax). The first substatute is also Ming and is related to the principal section since the substatute requires military personnel who buy civilian land to pay the taxes. The remaining 24 substatutes (using the numbering in *Hsüeh*) are all Ch'ing and deal mostly with various problems involved in changing registration. But most attention is given in the substatutes to the problems arising out of the rule that three generations must pass after a slave is freed before his descendants can become officials by examination or purchase (*e.g.*, substatute 5). This leads to the problem of whether the children of other unfortunates, such as those who have engaged in unlawful religious activities, can examine (substatute 23), and extends into a setting out of the penalties for taking an examination in an improper district as well as for being negligent in administering the examination (substatute 24). Several of the notes refer to disciplinary proceedings for examination officials who perform their duties improperly. 2 TA CH'ING LÜ LI 853-55 (Taiwan reprint 1966).

The entire section is usually referred to as a basis for the law of slavery or of status, not the law of taxation. G. BOULAIS, MANUEL DU CODE CHINOIS 161-71 (Taiwan reprint 1966); G. JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 56-61 (1970). Moreover, the reference to the disciplining of an official of the Board of Rites (the Board responsible for examinations) is contained in this section, although the section itself is in the Board of Revenue part of the Code. Yet the regulations on disciplining officials discussed by Professor Metzger, METZGER 235-417, are under the Board of Officials. It may be added that all of the cases that are noted under this section in the *Hsing An Hui Lan (Conspectus of Penal Cases), see* BODDE & MORRIS 144-56, deal with the question of who can examine (the problem arising because some ancestor has been a slave, engaged in a mean occupation, or something of the sort). *See* 2 HSING AN HUI LAN 611-20 (Taiwan ed. 1968).

78. For English law perhaps the best example is assumpsit, which is the form most contract actions eventually took. Yet it grew out of trespass on the case, in itself a development of trespass, an action whose original purpose was to protect against violence. *See* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 65-69 (1948). A Roman example might be emancipation—the means by which a son acquired legal capacity. His father "sold" (mancipated) him three times and thus freed him according to a provision in the Twelve Tables, which had not been intended to provide for easy freeing but only to protect against undue severity. Since the statute did not mention daughters or grandchildren, it was decided that they could be freed by one sale. H. JOLOWICZ, *supra* note 33, at 87.

where Professor Metzger's analysis will lead, but if one regards such regulations as the heart of law, one would not begin legal study with the person and his rights.

If one turns to legal process, the differences are also striking. We tend to equate process with adjudication. How are disputes between individuals settled?[79] This is a natural way for us, in view of our history. But it would seem that in China, the central process is legislative or rule making. To be sure, we are quite conscious that decisions of courts have a prospective legislative effect, and judges often make this explicit. In China, the rule making often arose out of the adjudication of a particular case, and the Chinese officials were presumably quite conscious of adjudication. Still, the focus of attention is different.

If this is a correct analysis, or even if it seems to have some plausibility, then surely Chinese law is so different from ours that its continued existence over so many centuries ought to force us to reexamine our notions of what legal systems are all about. It is impossible, and I would say inadvisable, to say at this point where such an examination might lead us.[80] But it will only be possible to pursue it with the help

79. For American jurists, the starting point is perhaps the famous statement by Holmes from *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897): "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law." This attitude is especially notable among the legal realists. Professor Llewellyn's entire *oeuvre* was more or less concerned with this matter. But consider what is perhaps his basic work, THE BRAMBLE BUSH 12 (1951). His work also influences anthropologists who study law. *See* M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955). *But see* Bohannon, *Ethnography and Comparison in Legal Anthropology*, in LAW AND CULTURE IN SOCIETY 401 (L. Nader ed. 1969).

80. Our task is somewhat similar to that of the Glossators when faced with the Corpus Juris. Of course, we are much closer to the living law than they were. The materials are immeasurably more extensive, and in addition, our attitudes are different. We are—one hopes—more critical, more sophisticated in the use of sources. Nevertheless, we are faced with a legal system that scarcely anyone alive has worked with, and we have to try to understand it with very little help. The only hope of understanding it is to acquire a sensitivity to the material. And it would seem that this can be developed only by the kind of arduous slogging through the documents which Professor Metzger has done. It may be that success in this field of research will come about more as the result of intuitions acquired in this way, than as the result of rational analysis.

Of course, Professor Metzger is not alone. Several recent works by other writers are also quite useful. *See* J. WATT, *supra* note 3; S. WU, COMMUNICATION AND IMPERIAL CONTROL IN CHINA: EVOLUTION OF THE PALACE MEMORIAL SYSTEM (1970). An interesting approach is shown in Jonathan Spence's *Ts'as Yin and the K'ang Hsi Emperor* (1966), in which an effort is made to see a Ch'ing official as a human being with family, tooth-aches, etc. Since the official's grandson wrote what is perhaps China's best-

of thorough and sensitive work like that of Professor Metzger.

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known novel, *The Dream of the Red Chamber* (a fictionalized account of his family history), there were obviously unusual materials for the study. Still one wonders if some materials, at least, are not available for other officials. The usual Ch'ing documentary sources are pretty bloodless.

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