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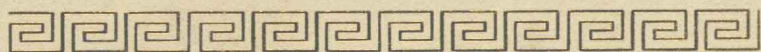
LAW AND SOCIETY
IN
TRADITIONAL CHINA

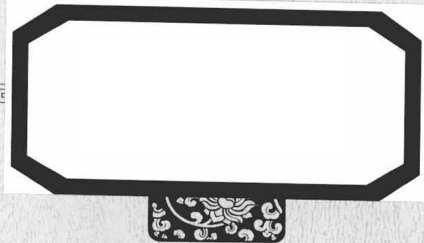
T'UNG - TSU CH'Ü



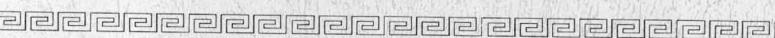
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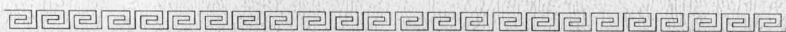
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T' UNG-TUS CH' Ü
(1910—2008)

1945年赴美，1965年回国，满腔热血投身祖国建设。回国伊始，重游故地，摄于上海。

Editorial Note

One hundred years ago, Zhang Zhidong tried to advocate Chinese learning by saying: “The course of a nation, be it bright or gloomy, the pool of talents, be it large or small, are about governance on the surface, and about learning at the root.” At that time, the imperialist powers cast menacing eyes on our country, and the domestic situation was deteriorating. The quick infiltration of Western learning made the long-standing Chinese tradition come under heavy challenge. In those days, Chinese learning and Western learning stood side by side. Literature, history and philosophy split up, while many new branches of learning such as economics, politics and sociology were flourishing, which made many Chinese dazed. However, there appeared a vital and vigorous learning climate out of the confusing situation. It was at this critical moment that modern Chinese scholarship made the transition—by exchanging views, basing on profound contemplation and even with confrontation of idea and clash of views, the scholarship made continuous progress, bringing up a large number of persons of academic distinction and creating numerous innovative works. Changes in scholarship and in general modes of thinking made transition in all aspects of the society possible, thus laying a solid foundation for revitalizing China.

It's over a century since the journey of modern Chinese learning started, during which various schools of thought stood in great numbers, causing heated discussions. The journey sees schools of thought as well as relevant arguments rising and

falling, waxing and waning instantly, leaving complicated puzzles to followers. By studying and reviewing the selected works, one may gain new insights into that journey; and it is the editor's sincere hope that readers would ponder over the future by recalling the past. That's why we have compiled "Selected Works of Modern Chinese Learning". The effort includes masterpieces of celebrated scholars from diverse fields of study and different schools of thought. By tracing back to the source and searching for the basis of modern Chinese learning, we wish to present the dynamics between thought and time.

The series of "Selected Works of Modern Chinese Learning" includes works (both in Chinese and in foreign languages) of scholars from China—mainland, Hong Kong, Macau, and Taiwan—and from overseas. These works are mostly on humanities and cover all fields of subjects, such as literary theory, linguistics, history, philosophy, politics, economics, jurisprudence, sociology, to name a few.

It has been a long-cherished wish of the Commercial Press to compile a series of "Selected Works of Modern Chinese Learning". Since its foundation in 1897, the Commercial Press has been privileged to have published numerous pioneering works and masterpieces of modern Chinese learning under the motto of "promoting education and enlightening people". The press has participated in and witnessed the establishment and development of modern Chinese learning. The series of "Selected Works of Modern Chinese Learning" is fruit of an effort to relay the editorial legacy and the cultural propositions of our senior generations. This series, sponsored by National Publication Foundation, would not be possible if there were no careful planning of the press itself. Neither would it be possible without extensive collaboration among talents of the academic circle. It is our deeply cherished hope that titles of this series

will keep their place on the bookshelves even after a long time. Moreover, we wish that this series and “Chinese Translations of World Classics” will become double jade in Chinese publishing history as well as in the history of the Commercial Press itself. With such great aspirations in mind, fearing that it is beyond our ability to realize them, we cordially invite both scholars and readers to extend your assistance.

Editorial Department of the Commercial Press

December 2010

FOREWORD

The statement that China is passing through an unprecedented revolution has almost become a platitude, but its very obviousness in no way diminishes its truth. The changes which this huge and venerable country experienced in the past are negligible when compared with the developments of the last decade. The reason for this difference in degree—which amounts to a qualitative change—is that developments in the past hardly influenced fundamentals, if they ever did so at all, whereas the present transformation deeply affects them. It is even consciously aimed at changing the social structure and all that this entails.

What is, or rather what was the social structure of the Chinese? Ever since the West became acquainted with China, Westerners have tried to answer this question, but it is only in recent years that both in the East and in the West attempts have been made to do so in a manner compatible with modern scholarship. The need was felt to provide an accurate gauge by which to measure the intensity of the impact of the West—a need felt both by social and political scientists in their endeavour to understand the process of acculturation synchronically and diachronically. Examples of this type of study are the works by Olga Lang and Marion B. Levy on the Chinese family, and Chang Chung-li's study of the formation and the functions of the Chinese gentry in the 19th century. ①

An insight into the social structure of China and an under-

① Olga Lang, *Chinese family and society* (New Haven, 1946); Marion B. Levy, *The family revolution in modern China* (Cambridge, 1949); Chang Chung-li, *The Chinese gentry* (Washington, 1955). These few books are only mentioned by way of illustration; they are far from exhausting the long list of such studies.

standing of its inner workings are essential for any student, not only for the student of China's past, but also, and most particularly, for the student of China's present. For although the ideas and ideals which are being put into practice in China today are essentially occidental in origin and nature, they are applied in a Chinese milieu. Their "challenge" can only bring forth a Chinese "response".

In order to arrive at a correct appreciation and a clear analysis of this response a thorough understanding of ancient China's society is a prerequisite. It also would make for a better insight into many problems in Chinese history.

The present work by Professor Chü^② gives us a detailed analysis of the hierarchical structure of China's pre-modern society, and of the rules which this society evolved to regulate the behaviour of its members. As regards the latter, it is not so much a survey of the regulations in force at different periods as a study of their operation and their effectiveness and of the constant interplay between the living society and its rules, both as formulated and as silently understood. In view of the peculiar nature of China's written codes with their predominant stress on public law,^③ it goes without saying that Professor Chü pays the greatest attention to customary law, both as it was established in the so-called treatises on ritual and similar texts and as it can be deduced from other material.

A special word should be said about Professor Chü's basic assumption that during the last two thousand years Chinese society was static. The historian will be inclined at first to disagree, but on second thought he will realise that in spite of all growth

② I am well aware of the fact that according to the Wade-Giles system of transcription this surname is spelled Ch'ü.

③ See for a discussion of this point i. a. M. H. van der Valk's contribution to *L'étranger, Recueils de la Société Jean Bodin*, IX and X (Bruxelles, 1958), pp. 267-303.

and change (the ultimate disappearance of the feudal nobility, the emergence of a class resembling the third estate in the West though without its political power, etc.), the fundamental conditions which determined the structure of Chinese society remained unchanged. Without agreeing either to the theories of Marx or to those of his apparent antipode Wittfogel concerning oriental modes of production or oriental despotism, it is easy to appreciate the profoundly conservative traits of predominantly agricultural societies, where seafaring and trade played a relatively unimportant and subservient part. It should not, however, be forgotten that during all these centuries Chinese authors, notwithstanding their great historical sense, consciously or unconsciously assumed that Chinese society *was* static. This explains the enormous force of historical precedent. What had been applicable once, they felt, might be applied again.

The influence of the ancient structure of Chinese society and of ancient Chinese law, as well as of the specifically Chinese views on the function of law, remains to this day—in the fields both of public and of private law. This is clearly shown by recent developments in family law^④ and in criminal law.^⑤ As always, a better understanding of the past will lead to a clearer appreciation of the present. It is my sincere belief that Professor Chü's book will contribute to this better understanding and make for a clearer appreciation.

This preface should have been written by the eminent Western specialist in the domain of Chinese law, Jean Escarra, Pro-

④ M. H. van der Valk, *Conservative tendencies in modern Chinese family law* (Leiden, 1956).

⑤ Communication on 8 September 1959 by K. Grüll during the 12th Annual Conference on Chinese Studies, held at Cambridge.

fesseur à l'Université de Paris. ⑥ He died before he had the opportunity to make even a first draft. I consider it a great honour that Professor Chü has asked me to write a preface to his book. It affords me the pleasure of stating my indebtedness to both the late Jean Escarra and to Professor Chü, both of whom I, in common with many others, honour as having been my teachers through their works.

Leiden

A. F. P. HULSEWÉ

⑥ For a brief life history of this eminent scholar see *T'oung Pao* XLIV (1956), p. 304ff.; this obituary note also contains a bibliography of his works on Chinese law.

PREFACE

This is the English version of my earlier work in Chinese, *Chinese Law and Chinese Society* (published in 1947), which was mainly based upon my lectures on Chinese social and legal history at the National Yünnan University, China. I have made a free translation, and I have also taken this opportunity to improve my work by including those sources not available in the libraries of Kunming when during the war I prepared my Chinese text, and those works published after 1947. Besides, I have not hesitated to make changes when I felt that a different presentation was preferable or when I developed ideas different from my earlier viewpoint. Revisions are to be found here and there, especially in Section 3 of Chapter VI, which was largely rewritten. But the main theme and the basic concepts remain the same.

My gratitude is due to Professor A. F. P. Hulswé for his kindness in providing the Foreword. I am indebted to the late Professor Jean Escarra, an authority on Chinese law, who scrutinized my manuscript and offered valuable criticism. Professor A. L. Kroeber and Professor M. H. Fried read the entire manuscript; Professor R. M. MacIver and Professor S. M. Lipset read the chapters on social classes. For their comments I am most grateful. My thanks are also due to Professor Paul Demiéville and Mr. Fang Chao-ying for their suggestions and advice. Professor L. S. Yang had read my original book in Chinese before I began to prepare the English version, and therefore I have been able to benefit greatly from his criticism and suggestions. The author, of course, assumes complete responsibility for the faults and shortcomings of this book. I wish to thank Mrs. Esther S. Goldfrank, who edited my manuscript,

and Mrs. Ruth S. Ricard, who typed it.

To the Institute of Pacific Relations I am indebted for its sponsoring of the preparation of the English version, which was completed in 1955. Finally, I wish to acknowledge my gratitude to the Center for East Asian Studies of Harvard University for financial assistance toward the publication of this book.

Cambridge, Massachusetts
October, 1959

T'UNG-TSU CH'Ü

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INTRODUCTION

The primary aim of this study is to analyze the main characteristics of traditional Chinese law before the introduction of modern law, that is, from Han (202 B. C. – A. D. 220) to Ch'ing (1644 – 1912). Law, as one type of social control, is closely related to customs and mores. It maintains and affects existing values and institutions, and it reflects the social structure of a particular society at a given time. It cannot, therefore, be treated as a separate entity apart from society. Since the law of any society has its own characteristics, the following discussion attempts to explain traditional Chinese law against the background of the social structure of China and to delineate that social structure as reflected in the law. 9 边码下同

The main characteristics of traditional Chinese law are to be found in the concept of family and in the system of classes. Since these concepts are basic to Confucian ideology and to Chinese society, they are also basic in Chinese law as well. The importance of familism has been widely recognized, but the significance of the class system has been usually overlooked, both by Chinese and foreign scholars, some of whom have even denied the very existence of classes in Chinese history. In fact, however, not only did social status determine an individual's way of life, his rights and obligations under the law; it also dominated the Confucian ideology of the social order. The significance of these differences is seen by the fact that specific laws were established to deal with them, and the maintenance of such differences was believed essential to the maintenance of legal order. Two chapters, therefore, are devoted hereafter to the discussion of family and marriage, and two others to the social classes in China.