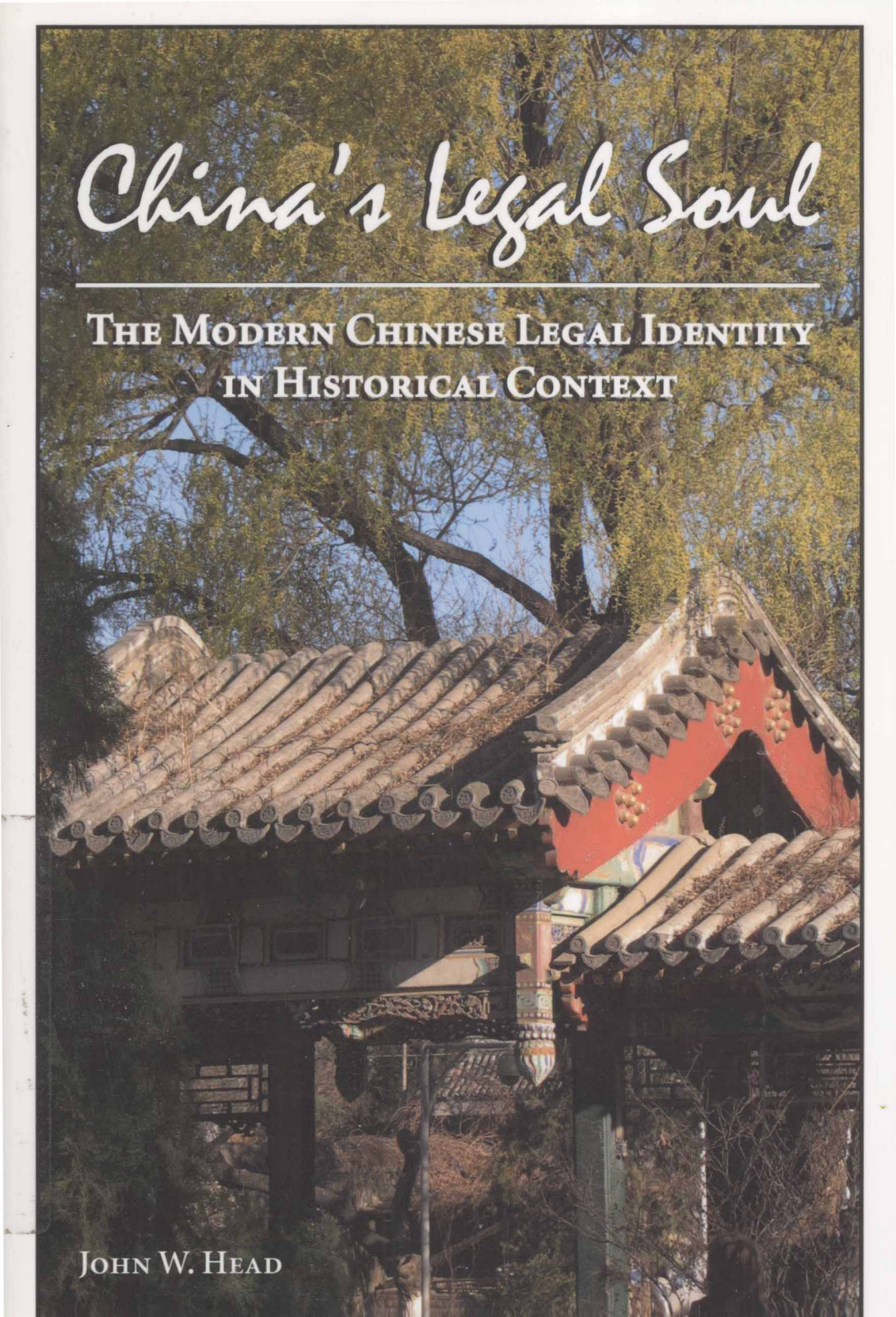


The background of the book cover is a photograph of a traditional Chinese architectural scene. It features a building with a dark, tiled roof and a prominent red-painted section. The building is partially obscured by large, leafy trees with green and yellow foliage, suggesting an autumn setting. The sky is visible through the branches of the trees.

China's Legal Soul

THE MODERN CHINESE LEGAL IDENTITY
IN HISTORICAL CONTEXT

JOHN W. HEAD

CHINA'S LEGAL SOUL

THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT

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LAWRENCE, KANSAS

CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

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

p. cm.

Includes bibliographical references and index.

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

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

KNQ120.H43 2008
349.51--dc22

2008046146

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

Printed in the United States of America

CHINA'S LEGAL SOUL

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PREFACE AND OVERVIEW

A Triple Anniversary for Chinese Law

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

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

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

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

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

The Background and Aims of This Book

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Structure of the Book

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

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

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

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

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

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

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

J. W. H.

November 2008

NOTES ON LANGUAGE, TERMS, AND TECHNICAL CONVENTIONS

Language

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

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

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

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

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

Glossary of Terms and Acronyms

Selected Chinese Terms in Pinyin

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

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

The Terms “China” and “PRC”

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

Other Terms

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

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

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

Acronyms

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

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

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

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