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Panel IV - "Can the West Learn from the Rest?" - The Chinese Legal Order's Hybrid Modernity†

By NICHOLAS CALCINA HOWSON*

I am asked to present on the "shortcomings of the Western model of legality based on a professionalized, individualistic and highly formalistic approach to justice" as a way to understanding if "the West can develop today a form of legality which is relational rather than based on litigation as a zero sum game, learning from face to face social organizations in which individuals understand the law" - presumably in the context of the imperial and modern Chinese legal systems which I know best as a scholar and have lived for many years as a resident of the modern identity of the center of the "Chinese world," the People's Republic of China ("PRC"). The task is difficult, if only because of the collection of assumptions and stereotypes embedded in the question offered to our panel, and

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which must be challenged: For instance, is there a unified "Western" model of legality? Is there a unified "Chinese world" (or "Asian" or "Confucian") model of legality? Is the Western model truly characterized by any of a "professionalized," "individualistic" or "highly formalistic" approach to the (unelaborated and deeply seductive notion of) "justice?" Is that part of the "Rest" which is the Chinese world *not* professionalized, individualistic or formalistic (and if not, to what degree)? Is the Chinese-world model in its modern iteration in any real sense "relational" or based on face-to-face social organizations, etc.? Are any of these characterizations about evidently dynamic systems so static that they can be proclaimed and examined in detail as if a butterfly captured under a jar?

Obviously, in posing these questions I am asking that there be significant and continuing re-appraisals of the models we seek to contrast, or at least the way we perceive and talk about these different systems. Our colleague Teemu Ruskola has written beautifully on these problems specifically with respect to comparative law and the Chinese tradition, elaborating on Bill Alford's searing critique of Roberto Unger's misconceptions of traditional (even pre-imperial) Chinese-world legality, governance and philosophy.[1] Perhaps the only thing I can offer to warm the hearts of comparative law scholars is the assurance that there is real *difference* between the Chinese-world idea of legality and legal system, on one side, and other distinct traditions and architectures, on the other side - whether it be the Anglo and American traditions so easily lumped together, the French - and perhaps distinct German - world civil law systems (and as elaborated by imperial Russia), the modern and contemporary Japanese overlay of aspects of German law (as subsequently diverted by the post-World War II American inheritance/imposition), etc. Identifying those differences, trying to understand how distinct legal orders represent varied political-religious and economic cultures in a certain place at a certain time, and comparing the understandings we can only tentatively divine, is at the center of what we call the pursuit of "comparative law."

1. William P. Alford, *The Inscrutable Oriental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEXAS L. REV. 915, 915-72 (1986); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 179-234 (Oct. 2002); ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 86-126 (Free Press 1976).

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With respect to transitional (post-Mao) China, these differences are not merely of intellectual interest, but of critical moment for China's contemporary development of a "rule of law state" (*fazhi guojia*).[2] This is exemplified in Professor He Weifang's September 17, 2008, *cri de coeur* against one pernicious throw-back idea now in vogue in the PRC: judicial "reform" leading to "mass line" justice and judicial procedure. Faced with corrosive assertions - emanating from the heights of the court bureaucracy in Beijing no less - about the "true" nature of the Chinese judiciary and how it should function in a more "democratic" (read mass-line "revolutionary") fashion, He Weifang answers with immense passion and coherence on the side of a judiciary characterized by professionalism, specialization, technical competence, autonomy, predictability, and objectivity.[3] Most importantly for this meeting, He Weifang argues in this fashion not because he identifies some excavated or ever-present and uniquely "Chinese" tradition, or conversely a tradition that is *not* Western or liberal democratic, but because the judiciary he aspires to have for China is a necessary building block for a *future* normative vision: a slightly more democratic and accountable polity, and real, or "thicker" rule of law. Thus, He Weifang employs the tools of comparative law and comparative analysis to conjure a compelling prescription for a future vision of the Chinese legal system as it can work in the modern PRC - not as it is condemned or determined to work by what one deeply pessimistic Sinologist called the "tyranny of [China's] history."[4]

With these disclaimers and exhortations out of the way, let me now engage in the same kind of synthetic abstraction I critique above, and offer our panel a few aspects which I think characterize the Chinese legal tradition in all its diversity: From imperial times, to the post-Opium Wars encounter with one idea of "modernity," and then to the contemporary legal systems as they function in post-Reform and Opening to the Outside World PRC and post-military

2. A rhetorical formulation nicely contrasted with the similar-sounding Chinese phrase "*yifa zhiguo*" which, in the most benign translation, is "ruling the country in accordance with law," but in my view signals a longer tradition that is the opposite of "rule of law" - "rule *by* law."

3. He Weifang, *Sifa gaige de nanti yu chulu [Difficulties and the Way Out for Judicial Reform]*, NANFANG ZHOUMOU [SOUTHERN WEEKEND], Sept. 17, 2008, at E31.

4. W. J. F. JENNER, THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS, CH. 7: THE LAW 129-53 (The Penguin Press 1992).

rule Republic of China on Taiwan. My idea here is to offer ideas which I believe are still at work in the design, implementation and enforcement of the modern Chinese legal-political system. However, I will focus less on the present-day legal system as it functions in the PRC, because that legal system is not only so clearly in the process of development, but also because it partakes of radically different styles of operation in different contexts - for instance, criminal law and procedure, rights and rule of law discourse (constitutional law), administrative law and bureaucratic regulation, corporate and commercial law application in an increasingly (truly) "marketized" economy, etc. Thus, I do not propose to repeat here what I am convinced are deeply misleading generalizations about China's (or Taiwan's) membership in the "civil law" family (*dalu faxi*) of nations, precisely because China's affiliation with a "civil law" system of law and governance is so contradicted by its deep engagement with a hybrid accommodation dictated by globalization and global capital markets, economic reform, international trade, and the imperatives of social control in a volatile and seemingly valueless society. (One example that leaps to mind, and has been central to my research, is China's reception and implementation of essentially Anglo-American, common law type, corporate law standards applied ex post, which is the necessary result of globalized capital markets, the introduction of new business organizations, and asked-for formal (versus functional) convergence.[5] Even the PRC State Council agrees with the view that the contemporary PRC legal system is a *potpourri* of formerly distinct systems. In its February 2008 White Paper, *China's Efforts and Achievements in Promoting the Rule of Law*, it directly and correctly rebuts the constant and erroneous assertion of China's membership in the civil law system (at least with respect to formal legislation):

> China pays attention to making reference to and learning from other countries' experience in legislation. In the field of civil and commercial legislation, the basic systems of both common law countries and continental law countries have influenced the general principles of civil law, as well as the contract and the property laws, and inspiration has been drawn from the spirit of

5. Nicholas Howson, *The Doctrine that Dared Not Speak Its Name: Anglo-American Fiduciary Duties in China's 2005 Company Law and Case Law Intimations of Prior Convergence*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 193-254 (Hideki Kanda, Kon-sik Kim, & Curtis Milhaupt eds., Routledge 2008).

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> the principles of private law and legislation applicable throughout the world . . . China has adopted the principle of legal certainty and the principle of proportionality applicable in modern administrative law . . . . The Criminal Law and the Criminal Procedure Law have adopted the basic principles and spirit of the law applicable in other countries . . . . Regarding legislation for the protection of intellectual property rights and environmental protection, China has also learned much from foreign experience.[6]

Anyone who has studied or dealt with the Chinese legal system, or lived or practiced in it, knows that the State Council is *underselling* the hybridity of China's legal system melting pot.

All of the above being true, there is however an identifiable Chinese tradition of law and legality in history, no matter how contested its outlines may be. What are some of the key ways we can understand that distinct Chinese legal tradition, especially in contrast to "the West" and other regions comprising "the Rest" and as a way to comprehend what it may have to teach us? To answer that overly broad question, we first need to come to terms with the various ways in which a legal system works, or interacts, both with those who rule and those who are the subjects of rule. I, perhaps artificially, think of at least three separate spheres of application (which are close to distinctions made by historian Philip Huang in examining the late Qing and early Republican Chinese legal orders):[7] (i) formal statute and regulation, and formal institutional structures; (ii) the way in which the law actually works in practice, or how it is applied, referred to, and enforced, by the various institutions of authority in society; and (iii) perceptions of the system by the "consumers" of it, both formal aspects and experienced/applied aspects (and by both those who use it, and those who are governed by it).

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6. State Council White Paper, *China's Efforts and Achievements in Promoting the Rule of Law*, Feb. 28, 2008 at 30.

7. Huang addresses "code," "custom" and "practice" with respect to the Qing (Manchu) legal establishment. My trinity is certainly concerned with "code" and "practice" but relegates the specific concern with "custom" to something included in perceptions and experience. PHILIP C.C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED, LAW, SOCIETY, AND CULTURE IN CHINA (Stanford University Press 2001).

So, let me now offer, in a perhaps scattershot way, different aspects of the Chinese tradition of law, legality, and governance as I perceive them:

Formal "law" (*fa* in the modern idiom, *lu* in imperial times) was "moralized"[8] and understood as an expression of perfect, or aspired-to, order, rather than substantive, to be applied, law or regulation binding on any actor in society. In the words of still one of the best scholars of the imperial legal system, formal law (*lu*) was largely "the embodiment of the ethical norms of Confucianism."[9] A review of the imperial legal system, and the application (or non-application) of the *lu* shows this. One of the best concrete expressions of this dynamic I know is the imperial edict by the Yong Zheng Emperor, declaring that the provision on the *ba yi* ("Eight Special [Criminal] Procedures" for classes of people deemed worthy under Confucian principles) must remain at the very front of the imperial Penal Code, just as it had from the Tang Dynasty in the seventh century, but that the system of preferential procedures for Confucian-privileged social actors could not actually be implemented because of the stronger imperatives of state administration. Here the Emperor himself declares *explicitly* that the fully Confucianized "law" must remain in the Code, but would not be applied and would in fact be contradicted in favor of an explicitly Legalist approach (more equal application of punishments and rewards). Consistent with this use of law and legal procedure was the public, didactic, nature of criminal proceedings before the magistrate in imperial times - meant not as contests over truth and culpability, but exercises in teaching and exhorting the correct application of the moral order. This rhetorical "formalization" of law (as opposed to its being made "functional"), and the didactic, even propagandistic, function of public proceedings, are aspects of China's legal tradition which have strong resonance in the modern Chinese world.

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8. "Confucianized" per Qu Tongzu's influential view of 1948. CH'Ü T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA, (Mouton & Co., rev. ed. 1965), *expansion and English translation of* QU TONGZU, ZHONGGUO FALU ZHI RUJIAHUA [THE CONFUCIANIZATION OF CHINESE LAW] (1948), *in* GUOLI BEIJING DAXUE WUSHI ZHOUNIAN JINIAN LUNWENJI [COLLECTED PAPERS IN CELEBRATION OF THE 50TH ANNIVERSARY OF STATE-ESTABLISHED PEKING UNIVERSITY] (Peking University Publishing House 1948).

9. Derk Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, 107 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 375, 376 (1963).

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This idea should give us a clue as to the work-horses of the imperial legal system, in terms of real, applied, law. If the law was "moralized" or "Confucianized" and not meant to be applied, and acknowledged as such, the state still needed recourse to specific regulation or sub-statutes, and administrative pronouncements (*fagui* in the modern idiom, *li* in the Qing Penal Code). Herein lay the Legalist's secret victory over the Confucianist's apparent domination of the legal-political landscape. For, it was the *li* which were promulgated with the idea that they would have real effect and actually be enforced (or describe the relative rights and duties of citizens and bureaucratic actors). The extraordinary work of Qing officials and legal reformers Shen Jiaben and Xue Yunsheng show the ways in which the functioning legal system was rooted in the sub-statutory world, a system which sometimes stood in stark opposition to the commands of the formal legal system or deeply moralized Penal Codes. But what is important about this insight, for the modern Chinese legal system, is the apparent willingness of the polity to accommodate this kind of contradiction - a Confucian, formalized, settlement of law, alongside a Legalist, implemented, structure of governance norms.

At the same time, "law" and the legal order was (and until recently continued to be) strongly associated with punishment and the harsh, coercive, aspects of the government. This is captured by the overwhelming use in Chinese legal history not of the character "*fa*" in connection with the legal system, but the character "*xing*" which speaks to punishments meted out by a strong ruler and his subordinates. This does not mean that we are forced to think of the legal order in action as synonymous with cruel tyrants slow-slicing those who have offended against heaven and the Emperor, but instead a system of law which did not - at least traditionally - accommodate "rights-bearing" law, i.e., law that carried with it rights against other non-state actors much less the state itself. Assuredly, other private actors, and the imperial court itself, had obligations and duties, and private actors had some rights of enforcement or appeal, but those rights were not clearly embedded in "law" and the legal system. Only with China's encounter with the West and Meiji Japan in the late 19th century has the idea of "rights-bearing" law (in private and public law, and later public international law) become something of relevance.

An associated vision holds that if the "law" wasn't meant to be applied, and a body of subsidiary administrative regulation was most relevant to the vagaries of everyday, real, life, then the real governance work in society was done by other important norms and institutions. As Professor Bodde summarized the long-standing view:

> . . . in China, perhaps even more than in most other civilizations, the ordinary man's awareness and acceptance of such norms was shaped far more by the pervasive influence of custom than by any formally enacted system of law. The clan into which he was born, the guild of which he might become a member, the group of gentry elders holding the informal sway in his rural community - these and other extra-legal bodies helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members, mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties.[10]

There is no doubt that in traditional China, and in the contemporary governance order, much was and is accomplished via extra-legal system institutions (broadly defined). My view however is that this idea may have been oversold, by foreign and Chinese analysts alike, perhaps enamored of something "other" or non-Western. I say this after review of literally hundreds of Qing and Ming dynasty legal cases, the certainty that some of these extra-legal institutions - like clan or guild - allowed appeals outside into the formal magistrate's and provincial court system, and doubts about the provenance of 19th and twentyth century surveys of local "custom" undertaken by the Republican governments or the Japanese colonial governments in Taiwan or mainland China. Whatever the truth of the matter, and as difficult as it is to generalize about a reality which was no doubt wildly different throughout the Chinese world, we are still left with the strong perception of this aspect of legal pluralism, which as with the things noted above, has strong resonance in the Chinese world today.

Perhaps most important in this string of generalizations is the fact that the dynastic legal system was explicitly about two things: (i) social control or the administration of society in the service of stability, and (ii) control and management of the bureaucratic apparatus (magistrates to provincial Governors to the Board of Punishments and other central organs) which administered the

10. *Id.*

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realm on behalf of the Emperor.

With regard to the first kind of control - social control - the formal legal system was an adjunct to a number of tested mechanisms: local custom, national customary procedures, *li yi*, philosophy, superstition, religious belief, art and representation, education and public education (verging on moral education), etc.[11] (As noted above, I take issue with accepted notions as to the degree to which these other extra-legal institutions functioned, *to the exclusion of the formal legal system*, in traditional China.) This diversity of norms and application of norms was a result of the equally diverse sources of authority, at least from the vantage point of the consumers of the governance system, ranging from the imperial dynasty, the subsidiary levels of the imperial government (to the magistrate), clan, family, tribe (for non-Han peoples), village, guild, etc. Indeed, many writers have discussed China's historical "legal pluralism," addressing both the multiplication of norms and norm-applying institutions, but also the continued use (at least in the Qing dynasty) of Manchu, Mongol, Central Asian, Tibetan, etc. legal systems and substantive law alongside the certifiably "Chinese" (Tang-origin, Han pedigree) legal system.[12] As noted above, and so often ignored in the literature, is the fact that there were abundant intersections between these overlaid systems - for example, where resolutions adjudicated in the clan or guild context could be appealed to the local magistrate, i.e., into the formal state system.[13]

Whatever our final view of the interaction of these multiple levels, we must understand the entirety of the Chinese legal system, and certainly its expression in the dynastic Codes and application of the Codes (and sub-statutes), as one dominated by its overwhelmingly central mission: social control. Accordingly, if we see the system as one dedicated to social control, it must then be a legal-*political* system - a system which uses the law and legality as instruments to administer, reduce and resolve contradictions, and

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11. Shen Daming, "DA QING LU LI" YU QINGDAI DE SHEHUI KONGZHI ["THE GREAT QING CODE" AND SOCIAL CONTROL IN THE QING DYNASTY] (Shanghai People's Press 2007).

12. Dorothea Heuschert, *Legal Pluralism in the Qing Empire: Manchu Legislation for the Mongols*, 20 INT'L HISTORY REV. 310, 310-24 (1998).

13. HU HSIEN-CHIN, THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS (Johnson Reprint Corp. 1964); SYBILLE VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS 80-111 (The Athalone Press 1997).

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aid the power and authority of those administering. This then is a top-down system, imposed and applied on the populace, mutable as political-administrative policy requires, and thus not likely to confer rights or powers on the subjects of the system. Thus, I say again that it is a "political-legal" system, and not solely a "legal" order, as exemplified by China's continuing appellation of the same - "*zhengfa*."[14] The negative corollary to this of course is that it diminishes the autonomy of the law, and the legal system, at least in the way it is separate, notionally or in application, from the political authority of the day. This dovetailed nicely with the post-1949 Chinese Communist-era understanding of law, deeply influenced by the (Russian) Soviet positivist theories of A. Y. Vyshinsky. Those theories of law hold that in the pre-Revolutionary circumstance, the law is but a normative expression of the will of the ruling class, and formulated in the interests of that class; conversely, under Socialism, the Communist Party represents the new rulers (the proletariat under traditional Marxism, "all of the people" under Chinese Communism) and should enjoy absolute control over the creation of positive law by the organs of the Party-controlled "state" (and the implementation of law by legal institutions also controlled by the Party).[15] The founders of the PRC hewed fairly closely to Vyshinsky's theoretical views, as mediated through pre-existing Chinese (imperial-era) assumptions and expectations, thereby depriving the PRC's law and legal system of any substantial autonomy, or - said another way - irrevocably linking the "legal" to the "political," and making the law almost wholly instrumental in the service of state administration.

This theoretical view was fully embodied in the rhetoric of Article 2 of the February 22, 1949, "Instruction of the Chinese Communist Party Central Committee Regarding Discarding of the Guomingdang's 'Six Codes' and Confirmation of Judicial Principles for Liberated Areas," which abolished (China's first) 1947 Constitution along with the departed Nationalist government's Criminal Code, Civil Code, Commercial Code, Civil Procedure Law, and Criminal Procedure Law:

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14. Law teaching institutions in China, formerly under the Ministry of Justice, are institutes (now in the two cases "universities") of "Politics and Law" (*zhengfa*), just as the internal committees which must pass on most adjudicated cases before the People's Courts are "political legal committees" (*zhengfawei*).

15. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. OF COMP. L. 711, 720 (1994).

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> The Six Codes are like most bourgeois laws, appearing with the face of a so-called "everyone is equal before the law;" but in fact there is no alignment of interests between the rulers and the ruled, the oppressors and the oppressed, the propertied and the property-less, or creditors and debtors, and accordingly there can be no real equal legal power (*faquan*). Thus, the entire lot of the Guomindang laws is only a tool to protect the rule of the landlord and compradore bureaucratic bourgeoisie; they are a weapon used to crush and bind the great masses. It is for just this reason that Chiang Kai-shek in the death cry on the eve of his extinction still asks that the false Constitution be kept. . . .[16]

So, as one PRC academic has written about China's tradition in constitutional law (but really about the state of rule by law in China):

> . . . [the Chinese tradition] has never bestowed much respect on the authority of the law, and the degree of respect given to law has been determined completely according to whether or not it aids the rulers in realizing their concrete aims. In this way, the use of and respect given to law was shaped entirely in accordance with specific circumstances and the individual preferences of those in power.[17]

Professor Xia means "the autonomy" of the legal order, rather than its "authority" - for even with an entirely instrumental use, its authority, in the right hands, is unchallenged. This has strong implications for the substantive aspects of the contemporary Chinese legal order, the institutions which implement it, and perceptions of it by its consumers (and perceptions that are different from the nightmare "*xing*" associations alluded to above).

On the second prong (control and management of the bureaucratic apparatus), the formal law and legal system was long threatened to be overcome and dominated by this use, leaving the functioning governance and social control system to rely upon other provinces of authority noted above. As Bill Jones wrote in the introduction to his translation of the 1740 version of the Qing Code

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16. ZHONGGUO XIANZHENG WENXIAN TONGBIAN (XIUDING BAN) [CHINA CONSTITUTIONAL DOCUMENTS COMPENDIUM (REV. ED.)] 279 (Wang Peiying ed., China Democratic Legal System Publishing House 2007).

17. JINDAI ZHONGGUO XIANFA YU XIANZHENG YANJIU [CONTEMPORARY CHINA: RESEARCH ON THE CONSTITUTION AND CONSTITUTIONAL GOVERNANCE] (Xia Xinhua ed., China Legal Publishing House 2007) at 27.

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(attempting to distinguish the imperial Chinese legal system from the development of Western Europe's "civil" law tradition):

> The polity of China consisted of a highly centralized government headed by an absolute ruler who ruled by means of a bureaucracy . . . . Consequently one would expect the imperial law or Code to take note of human activity only as it was perceived to affect imperial policies. It was natural that the primary focus of attention would be the activities of bureaucrats in the performance of their duties, not the activities of ordinary human beings in their private lives. As one of the Tang emperors, Li Shimin, is supposed to have remarked, The wise emperor governs his officials, he does not govern the people . . . . The [Qing] code's point of view is shown by the fact that over half its provisions are devoted to the regulation of the official activities of government officials . . . . The majority of the provisions were not only part of the code addressed to district magistrates to enforce among those who were in their jurisdiction as part of their administrative duties, they also concerned the behavior of officials on the job.[18]

Bill Jones is certainly correct in his overall characterization of the Qing Code, and its great pre-occupation with the governance of officials, not necessarily the governed. Nonetheless, we don't want to make too much of his emphasis, if only because we know that - as exemplified in the many case reports that can be reviewed and savored from the Ming and Qing dynasties - those officials did use the dynastic Penal Codes in relation to society and to vindicate or refuse the claims of non-official civil actors,[19] just as bureaucratic superiors (including the Emperor personally) used the Codes (and separate administrative statutes) to hold lower level officials accountable for misbegotten procedures, mis-application of the *lu* or *li*, negligent or corrupt behavior, and abuse of authority.

Finally, two accepted tropes regarding the traditional Chinese legal order hold that (i) there was a strong aversion to appearances in formal proceedings before the magistrate, and (ii) Chinese civil actors avoided written commitments (enforceable at law) in most dealings, preferring to seal and seek enforcement of various arrangements via extra-legal institutions, whether clan, guild, or temple, etc. I only say here that these are massive and perhaps

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18. WILLIAM C. JONES, THE GREAT QING CODE: A NEW TRANSLATION WITH INTRODUCTION 5-9 (Clarendon Press 1994).

19. PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING, LAW, SOCIETY, AND CULTURE IN CHINA (Stanford University Press 1996).

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obscuring over-generalizations and that there is now a great deal of evidence that individuals in imperial China did enter the magistrate's province seeking vindication of legal and moral rights and interests often based on *their* perceptions of the dictates of Chinese "law," although they were of course wise to avoid a presence required in connection with what we would call criminal proceedings. Again, Philip Huang's research from the late Qing demonstrates this,[20] as does the several hundred years of official railing against, and attempted regulation of, "litigation cudgels" (*songgun*).[21] The second assumption is also at variance with what we now know about a good deal of formal contracting over many aspects of civil and material life in imperial China, bargains and rights reduced to writing and as often as not enforced before the formal legal system (even if there was a prior "exhaustion of remedies" Chinese-style).[22] Accordingly, if we are looking to the traditional legal system in China as something which evidences popular fear and avoidance of formal legal proceedings, or enforceable bargains of significant value and importance sealed on a secret (family) handshake witnessed by a tribal elder, we are misinformed.

So, to summarize, some of the things I perceive in the traditional Chinese legal system and view of legality, and which have some resonance today, are: the peculiar "moralized" character of formal "law" in China; the didactic, moral norm - enforcing, nature especially of criminal proceedings before the magistrate as "agent" of the Emperor; the top-down and usually coercive orientation of the legal order; the real, non-rhetorical, work done by lesser, subordinate - or non-*legal* norms unburdened by the aspirational, moralizing, requirements of apparently superior and formally-declared norms; the hybridity and pluralism of the Chinese

20. *Id.*

21. My preferred translation, but rendered "litigation tricksters" by most foreign writers. *See* Melissa Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820, in* CIVIL LAW IN QING AND REPUBLICAN CHINA 85-121 (Kathryn Bernhardt & Philip C.C. Huang eds., Stanford University Press 1994).

22. Myron L. Cohen, *Writs of Passage in Late Imperial China: The Documentation of Practical Understandings in Minong, Taiwan, in* CONTRACT AND PROPERTY IN EARLY MODERN CHINA 37-93 (Madeleine Zelin, Johnathan Ocko, & Robert Gardella eds., Stanford University Press 2004); MELISSA MACAULEY, SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA (Stanford University Press 1998).

legal order through successive dynasties (i.e., not just the non-Han Yuan and Qing dynasties), and the accommodation of different levels of application; the pretty complete subordination of the law and the legal system to political-administrative imperatives; the over-riding focus of the legal system on social control, and a subsidiary focus on bounding the discretion and making accountable subordinate levels of the bureaucracy; and finally a system that - contrary to a good deal of "orientalizing" (including sadly self-orientalizing) views of the matter - worked and engaged with civil actors without leaving them entirely to extra-legal institutions of clan, guild, village, etc. Of course there are many other characterizations we could make about the inherited Chinese legal order, but hopefully these will suffice in trying to determine how that order, in its present-day form, can interact with what this meeting calls "the West" (impossibly diverse, and equally difficult to generalize about!). And make no mistake, as demonstrated by He Weifang's recent public argument in favor of professionalized and autonomous courts, these are issues which the architects of China's new legal and political are concerned with this very day.

Is there something in *this* "Chinese" tradition of law for "the West?" Many would argue that "the West" has already absorbed the very best and useful aspect of the traditional Chinese "legal" order - the modern administrative law state, that infatuation of mid-eighteenth century French *philosophes* who saw in China's merit-selected and minutely regulated bureaucracy a perfect model for competent and accountable administration in pre-Revolutionary France. Yet - risking allegations of ethnocentrism and a particular affection for liberal democratic, rule *of* law, legal political establishments - I might hazard the view that the Chinese system should and will move more towards some of the broad principles which underlie "the West's" legal and political structures, rather than the other way around. This may be only because China is changing very profoundly, not to be just like "the West," but at least to reward the increasingly rich political, emotional and material expectations of its citizens. Sociologist C. K. Lee has studied recourse to the formal legal system (as opposed to the pre-existing Party or "*danwei*" system, or eventually into the streets in public protest) in China for the many people with labor grievances, whether in the sweatshops of Shenzhen and Dongguan, or those laid off with economic reform and disbanding of China's state-owned enterprises in the Northeast. Her data show a remarkable

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difference in the recourse (legal vs. political) sought between workers in the "Sunbelt" (the South) and the "Rustbelt" (Manchuria), which contrast is directly related to the difference in social, economic and political organization in those two areas. Overall, she perceives in China a slow but steady transformation from state and institutions based on an implicit (Socialist style (and imperial era-style)) "social contract" to a traditional (Western) social contract bounded by law, or "legal contract." The "social contract" instituted in the Socialist era might be recalled as something close to the imperial era's similar general and implicit exchange between the paternalistic state and a politically acquiescent populace, with "no legal document stipulating the terms of this socialist social contract, only shifting policies that varied greatly according to the political and economic needs of the state in different periods."[23] That former social contract is being replaced, at least in some areas of China, with a more explicitly *legalized* social contract, or a political relationship that mimics economic, market and property relationships in being defined by, and protected, by the legal order coming into being. Professor Lee's work reminds us that the context for China's legal order - both as proclaimed, and as lived - is shifting rapidly before our very eyes, and towards a notion of legality that is closer to a "Western" model than that ever before broadly relevant in the huge expanse of China. He Weifang, cited at the beginning of this writing, admits as much in describing the time required for real judicial *reform* in China's transitional circumstance: "Looking at this from the standpoint of history, China's introduction of a Western [legal] system and construction of its own modern legal order has only a century of history. Compared to our very long history of autocratic rule, this [century] is but the shortest of periods."[24] This, of course, is not the same thing as saying that China is moving towards an explicitly "Western" or "Anglo-American" "rule of law" or liberal democratic political order, much less a specifically identified "civil" or "common law" system. But it is an attempt to say that as China undergoes a civilization-altering reform which moves it towards greater engagement with "the West," it will probably take more of the underlying assumptions and specific mechanisms from "the West" than it, as a leading

23. CHING-KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT (University of California Press 2007).

24. He Weifang, *supra* note 3.

member of "the Rest," will donate the other way. In this regard, China's centuries-long experience with legal pluralism and accommodation of hybrid structures, not to mention a formalism which may in time prove face-saving, will serve it well as China develops an entirely new kind of social, political and *legal* contract.

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