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China: A Comparative Perspective“***

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# **Law and Economic Change in Traditional China: A Comparative Perspective<sup>1</sup>**

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## **Abstract**

This article offers a critical review of recent literature on Chinese legal tradition and argues that some subtle but fundamental differences between the Western and Chinese legal traditions are highly relevant to our explanation of the economic divergence in the modern era. By elucidating the fundamental feature of traditional Chinese legal system within the framework of a disciplinary mode of administrative justice, this article highlights the contrasting growth patterns of legal professions and legal knowledge in China and Western Europe that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories. The paper concludes with some preliminary analysis on the inter-linkages between the historical evolution of political institution and legal regimes.

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Western law – its unique features of legal formalism and rule of law – as argued by Max Webster has laid the foundation of Western capitalism and the eventual of the West (Trubeck 1972). Crucial to the Western legal system is Weber’s distinction between formal and substantive justice. Under formal justice, legal adjudication and process for all individual legal disputes are bound by a set of generalised and well-specified rules and procedures. Substantive justice, on the other hand, seeks the optimal realisation of maximal justice and equity in each individual case, often with due consideration to comprehensive factors, whether legal, moral, political or otherwise. Formal justice tends to produce legal outcomes that are predictable and calculable, even though such outcomes may often clash with the substantive postulates of religious, ethical or political expediency in any individual case. Weber believed that formal justice is unique to the European legal system, with its highly differentiated, specialized and autonomous professional legal class, independent from the political authority. Legal rules were consciously fashioned and rulemaking was relatively free of direct interference from religious influences and other sources of traditional values. Formal justice reduces the dependency of the individual upon the grace and power of the authorities, thus rendering it often repugnant to authoritarian powers and demagoguery. Above all, the rule of law born out of the Western legal tradition supplied what Weber termed as calculability and predictability, elements essential for explaining the rise of Western capitalism and its absence in other civilizations.<sup>2</sup>

The Weberian synthesis permeated the thinking of generation of sinologists on the Chinese legal tradition. John King Fairbank remarked that “the concept of law is one of the glories of Western civilization, but in Chinese, attitude toward all laws has

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<sup>2</sup> Weber (1978), vol.II, p.812. Unger (1976) and Trubek (1972), p.721.

been a despised term for more than two thousand years. This is because the legalist concept of law fell far short of the Roman. Whereas Western law has been conceived of as a human embodiment of some higher order of God or nature, the law of the legalists (in China) represented only the ruler's fiat. China developed little or no civil law to protect the citizen; law remained largely administrative and penal, something the people attempted to avoid as much as possible" (1960, p.84).

These sentiments on the relative "backwardness" of Chinese legal tradition have entered into summary form in a recent book by Chinese legal scholar, Zhang Zhongqiu. The Chinese legal tradition, according to him, originated in tribal wars, was collectivist, dominated by public law, oriented towards ethical value, singular and closed, encapsulated in official legal codes, founded on the rule by man, and aimed for the ideal of no litigation, as contrasted with Western law which originated in clan conflicts, was individualistic, dominated by private law, oriented towards religious value, plural and open, expounded by jurisprudence, founded on the rule of law and aimed for justice (2006). These broad-brush characterizations, while useful to certain degrees, border on simplistic stereotypes of different legal cultures which have become the target of criticism from recent waves of revisionist scholarships. Contrary to the traditional Weberian synthesis, these recent works on Chinese legal tradition have argued that the Qing imperial legal system, long regarded as the epitome of arbitrary justice, was in fact far more rule-bound and predicable in their upholding of private property rights and enforcement of private contracts that previously recognized (see Philip Huang 1996, Zelin, Ocko and Gardella 2004). Interestingly, this is in line with another separate but influential argument advanced by Kenneth Pomeranz in his influential book, "Great Divergence" that views the property rights or the freedom to contract in traditional China as no less secure or flexible than in Western Europe. The implication of these

lines of argument that the roots of economic divergence between China and Western Europe in the modern era needs to be sought in areas other than ideological and institutional factors.<sup>3</sup>

This article offers a critical review of recent literature on Chinese legal tradition and argues that while the recent revisionist literature make significant contribution to a lively and timely re-examination of traditional Chinese legal system, it overlooks some subtle but fundamental differences between the Western and Chinese legal traditions that are crucial to the origin of the economic divergence in the modern era. By elucidating the fundamental feature of traditional Chinese legal system within the framework of a disciplinary mode of administrative justice, this article highlights the contrasting growth patterns of legal professions and legal knowledge in China and Western Europe that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories. The paper ends with some preliminary analysis on the inter-linkages between the historical evolution of political institution and legal regimes.

The rest of the article is divided into three sections followed by a conclusion. The first section reviews the major feature and the related debate on the nature of traditional Chinese legal system. The second section offers a comparative analysis on legal traditions between China and Western Europe. The third section offers some preliminary analysis on the linkage between political institutions and legal regimes in China and Europe.

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<sup>3</sup> For a summary of the California school, see Ma 2004b. See Pomeranz (2000) on the flexibility of traditional Chinese factor markets. See Philip Huang, Zelin et al for these revisionist studies on traditional Chinese legal system

## **I. Law and Legal System in Traditional China: Issues and Debates**

We start our review of the Chinese legal tradition with Thomas Stephens's useful classification of traditional Chinese legal regime as "disciplinary" versus "adjudicative" or "legal" in the West. A "disciplinary" legal regime is akin to a military tribunal system whose overriding interest is the sanctioning of deviant behaviour to ensure group solidarity and social order at large (p.6). We can trace this "disciplinary" element of traditional Chinese law to etymology. The Chinese word for law, "fa," (法) also means "punishment" (刑) (Liang 2002, p. 36, Su, p. 6). In fact, pre-modern Chinese legal text makes no distinction between punishment and military conquest (兵刑不分), a contrast to the Latin etymology of "law", "jus" which specifically denotes rights (Liang, 2002, p. 37-38).

In traditional Chinese law (as in Rome law), the emperor is the source of law. Traditional Chinese legal apparatus had been an integral part of the administrative system with bureaucracy within the hierarchy – from the county level to the emperor – acting as the arbiter in criminal cases. But there is a system of checks to ensure consistency. The Chinese penal code was highly elaborate and systematic. The compilation of China's first legal code dated to 629 in the Tang dynasty (revised and completed in 737), only a hundred years later than the Justinian code (drafted in 529 and promulgated in 533). As pointed out by Japanese scholar, Shuzuo Shiga, almost all the court rulings on criminal cases were required to cite specific official penal codes and statutes as support. Legal decisions on criminal cases, depending on the severity of punishments, would need to be reviewed through the administrative hierarchy with capital punishment reviewed and approved by the emperor himself (Shiga et al p.9). Officials at the lower level would face punishment if their rulings were found to be mistaken after review.

Despite the elaboration and sophistication of this legal system, this is in the end a bureaucratic law designed for the officials to meter out punishments proportionate to the extent of criminal violations for the purpose of social control. The official legal codes were structurally organized along the six ministerial divisions under the imperial bureaucracy: government, revenue, ceremony, justice, military and works (Liang, 1996, p.128-9). “More than half of the provisions of the Qing code, as pointed out by William Jones, are devoted to the regulation of ‘the official activities of government officials’” (cited in Ocko and Gilmartin, p.60). The meticulous and sophisticated juridical review process is carried out top-down within the administrative hierarchy.

In the case that the emperor made decisions and rulings outside the purview of extant legal statutes or contravened existing codes, these decisions became new laws or sub-statutes to be used as legal basis for future cases (Shiga et al, pp.11-12). In fact, as emphasized by Shiga and Terada, as the formal legal codes changed little over the dynasties, the emperor’s legal decisions on individual cases formed the single most important dynamic changes to China’s formal legal system (Shiga et al pp. 120-121). Although there are no formal legal or constitutional constraints on the imperial power (except the informal ones such as the much talked about “mandate of heaven”), the emperors recognize the value of consistency, fairness and balance in the legal system (Ocko and Gilmartin, p.61). So a “disciplinary” mode of justice may not necessarily lead to complete arbitrariness.

As the fundamentally penal nature of Chinese legal codes render it un-amenable to dispute resolution of a commercial and civil nature, this led to the long-held view of a complete absence of Chinese civil and commercial law. However, new research reveals that the county magistrates, the lowest level bureaucrats, handled and ruled on a vast amount of legal disputes of civil and commercial nature that did not entail any corporal

punishment. Is there an implicit or a functional civil and commercial law in traditional China?<sup>4</sup>

Shiga argues these county-level trials were something more akin to a process of ‘didactic conciliation’, a term he borrowed from the studies by Western scholars on the Tokugawa legal system in Japan. The decisions of the magistrates were not legal ‘adjudications’ as in the Western legal order. The magistrate’s ruling was effective and a legal case was considered as resolved or terminated only to the point that both litigants consented to the settlement and made no further attempts for appeals. Although not common, Shiga did point to cases where a legal dispute dragged on indefinitely when one of the litigating parties reneged – sometime repeatedly - and thus refused to fulfil his or her original commitment to the settlement. Thus, this kind of ruling lacked the kind of binding and terminal force as the legal adjudication in the modern sense

Shiga was also interested in the legal basis of magistrate’s rulings and found that although invoking general ethical, social or legal norms, they rarely relied on or cited any specific codes, customs or precedents. In accordance with its intermediation characteristics, the magistrate’s ruling showed less concern for the adoption of a reasonably uniform and consistent standard than the resolution of each individual case with full consideration to its own merits. Shiga made a general case that the magistrates often resorted to a combination of “situation, reason and law” (情, 理, 法) as tools of persuasion or threat where it becomes necessary (see Shiga et al 1998, Shiga 1996, 2002).

This can best be illustrated by a specific case used by Shiga:

A widow of over 70-years old, Mrs. Gao, living in 19<sup>th</sup> century Shandong

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<sup>4</sup> For the extent of average people utilising the county level civil trial system, see Susumu Fuma’s article in Shiga *et al.* and also Huang (1996).



province pawned land to her junior uncle and his two sons at 45,000 cash. Later, Mrs. Gao wanted her cousins to buy and take over the land by paying an additional 50,000 cash. The cousins refused and the disputes were taken to the court.

The magistrate started his ruling by declaring that the blood relations are far more important than money matters and the welfare of the old widow needs to be looked after by her extended family. As there is a local custom that usually sets the pawning price of land at half of the sale value of the land, the widow should ask for an additional 45,000 cash rather than 50,000 from the cousins. The magistrate further advised that the uncle and his two sons could share in their payment to the widow. The dispute seemed to be resolved with both parties agreeing to the magistrate's settlement (Shiga et al, p. 56).

The specific case shows clearly that the magistrate's ruling goes far beyond narrow legal spheres. In fact, he was much more interested in influencing the outcome – rather than the rules - of the game by bringing about what he viewed a socially ethical and harmonious outcome at the expense of the original terms of the agreement. His ruling relied on the power of persuasion more than legal basis. Shiga's particular interest in this case comes from the fact this is one of the few that specifically cited a local custom. But clearly, as Shiga points out, the customs cited here was nowhere implicated as the legal basis of his ruling or a binding social rule. In fact, Shiga pointed out other cases where local customs were simply ignored or even condemned (Shiga et al, pp. 57-59).

The flexibility with which magistrates made their rulings is also confirmed by Mio Kishimoto's careful case study of land sales (2003). In many regions, sellers of land often requested post-sales compensation from their buyers especially following the rise of land prices after sale. This practise led to widespread abuse with sellers

requesting compensation at amounts and duration far beyond the customary rule or the original terms of the agreement. Resorting to reasons of sickness, old age, hunger, bad harvest, and sometimes blatant extortion, some sellers turn this compensation request into annual affair (often around the Chinese New Year). In fact, as summarized by Kishimoto, there is a systematic tendency for magistrates' rule to lean towards requesting the relatively wealthy land buyers to compensate the poor in spite of the original agreement. The fact that that law or legal rulings were often mobilized for redistributive purpose can be substantiated by the statement from one of China's legendary iconoclastic late-Ming bureaucrat海瑞 (Hairei): "When in doubt during a litigation, my ruling would rather err on the side of the poor than the rich, on the side of the weak than the powerful"<sup>5</sup>

These features have led scholars to question the fundamental meaning of courts and contracts in traditional China. Terada argued that the magistrate's court more often served as a forum to renegotiate a settlement to replace the old one based on the changed conditions. "Contract" in traditional China was merely a written proof of a mutual agreement which may or may not have power binding the future (Terada 2003, p.95). Others echoed that "...regardless of subject matter, contracts and "documents of understanding" were more social than legal in nature because they were rooted in and protected by the social relationship of the parties;" or alternatively put, "the surest guarantee of one's rights seems to have been their acknowledgement by the local community" (by Myron Cohn and Ann Osborne respectively, cited in Ocko and Gilmartin, p. 74). Ironically, the importance of social relation behind contracts partly explains the motivation for litigation at the Magistrates' court. People filed complaints

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<sup>5</sup> Cited in Li Qin, 2005, p. 47. Liang Ziping also argued that the magistrate would not hesitate to issue rulings that could result in the alteration or simplification of the original agreements between the litigant parties if this would help "quiet both parties" Liang 1996, pp.134-140.

to enforce a contract and settle a debt and so on, but getting a case accepted for hearing also made use of courts to intimidate, coerce, and to turn the balance of social power in favour of the litigants within the social networks. Parties to private agreements utilized formal litigation as a means to gain advantages in a power relationship over private agreements, a process more aptly termed as “litinegotiation” (Ocko and Gilmartin, p. 71). As emphasized by Terada, disputes over properties and contracts were in the end resolved or regulated through the interplay of social norms, power, compromise and rational recognition of long-term benefit and cost.<sup>6</sup>

This largely Weberian interpretation of traditional Chinese legal system met vigorous challenge from China specialists, Philip Huang. Huang’s interpretation of Qing archival legal cases of civil disputes led him to conclude that the rulings of magistrates were far from being arbitrary but rather, rooted in formal legal codes and seemed legally binding for most of the cases. However, as pointed out in a series of rebuttals by Shiga and Terada, Huang’s somewhat contentious finding hinges on a very specific methodology that he adopted. Although there was no evidence to show that the original rulings by the magistrates cited any legal statutes or local customs as their legal basis, Huang matched the contents of the ruling with the what he deemed as the relevant codes in the formal Qing legal penal code (Shiga 1996 and Terada 1995).

While there is much to be desired about Huang’s methodology of inserting legal codes ex post to back up legal rulings made by magistrates several centuries earlier, the

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<sup>6</sup> See Shiga et al, pp.191-279. One such case in point is recorded by a recent study of the commercial disputes in the highly commercialized Huzhou region of Anhui province in Ming and Qing. According to Han Xouyao, a serious and protracted land dispute between two large lineages in the area broke out and lasted across generation for a total of 128 years (from 1423 to 1551), and saw numerous trials and rulings by the county and prefecture courts and incidences of violent conflicts. In spite of the official ruling from the prefecture court, the disputes only ended with the drafting of a “truce” agreement signed by the two lineages and witnessed by middle men and village elder (pp. 93-117).

idea that magistrates ruled by some general moral and legal concepts and principles embedded in formal codes does merit attention.<sup>7</sup> In fact, Huang's criticism of Shiga thus framed actually takes him close to the original position of Shiga who explicitly stated that magistrate's ruling appealed to a wide set of moral and ethical values most of which could be embedded in formal penal codes. If so, are the legal traditions indeed as divergent as Weber may have made out to be? After all, Western legal rules also partly formed through the codification of local customs and norms which may be reflective of general ethical and moral values. In particular, the English Common law system exemplifies such a process of law-finding and law-making based on the incorporation of principles embedded in customs and norms.

## **II. Convergent or Divergent Legal Traditions?**

To appreciate the often subtle yet fundamental differences between the Chinese and Western legal traditions, we need to incorporate a much more systematic and historic perspective. It is useful for us to start with Harold Berman's following characterization of the fundamental features of Western legal tradition which can be traced back to the Papal Revolution of the Middle Ages, the starting point of the political separation between church and state and political fragmentation:

- There is a sharp distinction between legal institutions and other types of institutions. Custom, in the sense of habitual patterns of behaviour, is distinguished from customary law, in the sense of customary norms of behaviour that are legally binding;
- The administration of legal institution is entrusted to a special corps of people,

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<sup>7</sup> Zelin's argument on strong property rights and contract enforcement is also based on the fact that Qing's formal criminal code contains statutes relevant for civil and commercial matters. see Zelin 2004, p.19-23.

who engage in legal activities on a professional basis;

- The legal professionals are trained in a discrete body of higher learning identified as legal learning, with its own professional literature and in its own professional schools.
- There is a separate legal science, or a meta-law. Law includes not only legal institutions, legal commands, legal decisions and the like but also what legal scholars say about them;
- Law has a capacity to grow and the growth of law has an internal logic;
- The historicity of law is linked with the concept of its supremacy over the political authorities. The rulers (or the law-makers) are bound by it;
- Legal pluralism – the co-existence and competition within the same community of diverse jurisdictions and diverse legal systems – is most distinctive characteristics of the Western legal tradition (Harold Berman 1983, p. 7-8).

Although formal law especially in commercial affairs evolved slowly in the West partly because commercial disputes tended to be highly specialized and formal legal litigation and enforcement extremely costly, there occurred an evolution that led to the rise of an increasingly unified consistent body of laws based on the compilation of variously urban laws, guilds laws, in particular the well-known merchant law (*lex mercatorie*) centred in major trading centres under autonomous local government or independent city-states. The modern civil law in many ways formed through the amalgamation and standardization of traditional customary laws and commercial practices in different territories of jurisdiction. Major intellectual and political revolutions such as the Reformation and the Enlightenment movement, particularly the rise of modern nation-states became a major force that propelled the formation of

modern Civil Law.<sup>8</sup>

The most illustrative case of this bottom-up process of legal growth is the historical development of the English legal system as a system distinct from the Continental civil law regime. As noted by Maitland, what allowed the English case-law system to develop, was not just the Parliament or the jury system - as the former was widespread in Europe and the latter originated in France - but the rise of a professional legal guild of lawyers and judges organized under the system of inns of court and chancery and their related training methods based on the study of legal case reports (Li 2003, p.20). Originating in the Medieval era, the inns of court grew from a training institution to become the equivalent of a law school which by the Tudor times would be termed as the third University of England (outside Cambridge and Oxford) (J.H.Baker 2002, p. 161). Within this legal profession nurtured an independent jurisprudence that fostered the rise of an English legal tradition based on the commentaries and analysis of legal cases.

More importantly, with the Royal judiciary appointments being selected from among the most prominent members of this legal profession, the seeds of judiciary independent from political control had been sown. It was through the growing independence of an English judiciary, largely resolved through the political wrangling of the seventeenth century that laid the foundation for what was to become the hallmark of an English constitutional tradition rooted in the rule of law (J.H. Baker 2002, pp. 166-8, Li, chapter 6). The rise of an autonomous legal profession allowed the development of legal rule and procedure based a professional standard relatively free from extra-legal influences and thus ensured a sufficient degree of consistency and

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<sup>8</sup> See Berman 1983 for detailed description of this evolutionary process. See Grief 2006, chapter 10 for the evolution of impartial law in Medieval Europe.

predictability in legal outcomes based on the case-law methods even before the establishment of the strict doctrine of binding precedents by the nineteenth century (Duxbury, chapter 2). Or as Weber put it in the characteristically Weberian jargon: “while not rational this (common) law was calculable, and it made extensive contractual autonomy possible” (Weber 1951, p. 102).

The evolution of the Chinese legal regime presents a sharp contrast to the overtime professionalization in the West. Not only did the entire legal system continue to be a part of the administrative organ of the state, but also, as Shiga aptly put it, all parties involved in dispute resolution in traditional China, ranging from magistrates, third-party witnesses to guarantors and contracting parties remained distinctively “layman” like (Shiga 2002, chapters 4 and 5). The in-depth research by Chiu Pengsheng (2004) offers a vivid portrayal of a magistrate’s court in action during Ming and Qing China. The court session was open to the public, often thronged with various onlookers sometimes unrelated to any parties of the litigation. With an official qualification based on his success in a state examination system inculcated in Confucian classics, and appointed under a three-year country-wide rotating system of bureaucratic posting, the magistrate was often ill-prepared both in legal expertise and in local knowledge of the county he was serving. As a magistrate could face demotion or even physical punishment when his legal decisions were reviewed to be mistaken by the upper level administrative hierarchy or if the discontent litigants appealed to his superior (an extremely costly process) against his rulings, the effectiveness of his ruling to satisfy the review from the above and resolve disputes between litigants became important.<sup>9</sup>

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<sup>9</sup> See Ocko 1988 for the appeals procedure. For the very high costs of litigation at magistrate’s court, see Deng Jianpeng, chapter 2.

As a result, most magistrates came to rely heavily on the legal assistance of the so-called 幕友, the private legal secretaries hired at their “personal” expenses. These legal secretaries were not allowed to be physically present at the court and thus operated from behind the scene based entirely on the written documentation. The magistrates’ dependence on their personal legal secretaries also induced the rise of a profession equivalent to what would have been lawyers in the West, the so-called “litigation masters or pettifoggers”(讼师), who used their legal expertise to assist the litigating parties in legal proceedings. While these factors pushed for professionalization in the West, they took a different turn in the Chinese political context of a dominant state bureaucracy. As their legal assistance tended to encourage legal suits which clearly clashed with the state objective of social stability, litigation master as a profession had long been stigmatized with various pejorative labels, branded as illegal and subject to penal punishment. The memoir of Wang Zhuhui, an eminent legal secretary with a long and successful career serving various magistrates during the late 18<sup>th</sup> century, told with pride how he handled these litigation pettifoggers after catching them: they would be physically tied to a column in the magistrate’ court and set on public display to witness the litigation which they helped instigate; they would then be caned and made to repent in public the next day before being finally released. Indeed, a secret guidebook for the professional litigation masters specifically advised them not to turn up at the court to avoid being picked out from among the crowd (Chiu 2004, pp. 55-6). Despite the official ban, litigation pettifogging flourished as an underground profession that engaged in drafting legal suits as well as conniving with court runners or clerks to influence the legal outcome.

The rise of litigation pettifogging also induced a lively body of illegally published and circulated technical guidebooks for the profession under the general title



of “The Secret Handbook of the Litigation Masters” (讼师密本). If we add these to various privately published handbooks for the legal secretaries (such as Wang Zhuhui) and bureaucrats as well as numerous well-known private compilation of legal cases tried and ruled in the court, we have a substantial body of legal literature in traditional China (Zheng 2003, p.497-8). There is an official Chinese version of “jurisprudence” (Lu-Xue 律学) which almost exclusively focused on technical issues on the application, interpretation and exposition of official legal punishment. In fact, Shiga pointed out the etymology of the word 律 (Lu) refer to musical notes, which implies that the Chinese “Lu-Xue” is all about finding the appropriate scale of punishments for crimes (Shiga et al, p.16). Clearly, these legal publications in China differed significantly from the Western jurisprudence developed through the formal institutionalization of an independent and autonomous legal profession and legal education. For that matter, Shiga and others also questioned the appropriateness of transliterating the term “Lu-Xue” as “jurisprudence.” (Zhang Zhongqiu chapter 6, Shiga et al, p.13-15).

What is missing in the state-dominated legal regime is the institutional capacity to generate bottom-up process of law-finding and law-making. Indeed as pointed out by Zheng Qin, the published compilation of legal cases often led to the use of “rulings by analogy” (类比) by officials in their legal trial in order to achieve some form of consistency in their legal decisions, something of a precursor to a doctrine of precedent. However, in China, except for those rulings approved by the Imperial government, the practise of ruling by analogy was often discouraged for fear that officials may deviate too far from the formal codes or imperial instructions (Zheng, p.501-2).

Similarly, as Jerome Bourgon pointed out that the direct transliteration of modern Western legal terms on traditional Chinese terms could sometime lead to misconception of the fundamental gap between the two legal traditions. Bourgon pointed out that there

is no equivalent legal term in Chinese that corresponds exactly to the Western terminology for “customs.” The direct transliteration of “custom” for the Chinese word “xiguan” (习惯) could be misleading. “Customs” in the West was not merely a sociological phenomenon but also a judicial artefact, asserted by witnesses, or appreciated by the jury, often with a clear territorial delimitation. In contrast, “customs” in China, according to Shiga and Bourgon, identifies only loose, mostly unwritten social practices without territorial delineation. They might at times serve as a reference but almost never formed the specific legal basis upon which the county magistrates made their decisions or the litigants made their claims. They do not “harden” into law.

This gulf between formal legal rules and private customs has been widely noted. Deng Jianpeng for example pointed to the clear expressions of private property rights in various forms could be found in the tens of thousands of private land sale contracts in traditional China. But there were few attempts of any systematic institutionalization or codification of these rights in the state legal system whose overriding interest in private land transactions had remained in the securing of land taxes.<sup>10</sup> The other illuminating example is the case of copy rights in traditional China. Contrary to the contemporary image of an absent tradition in intellectual property rights, Deng argued that the early invention and diffusion of printing had led to rising demand and repeated attempts by the publishers to assert and defend property rights of their printed editions, yet none of these attempts received any clear backing from the state or institutionalization in the formal legal system. Meanwhile, the state’s own heavy handed regulation of publication and copy rights were largely motivated by political censorship or the protection of state

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<sup>10</sup> See Deng Jianpeng, chapter 1 for various examples how property rights in land were often identified with the payment of state land taxes. Bourgon 2006 makes similar points. For some recent studies that reveal the highly sophisticated and rational features of private customary practices in land contracts in traditional China, see Long Denggao.

sponsored publications of Confucian classics (Deng, chapter 3).

So, in short, we need to distinguish a legal regime that has the capacity to transform disparate customs and norms into generalizable and positive legal rules or precedents as in the West from one that entrusted and embedded similar moral and ethical principles in the hearts and minds of individual bureaucrats or mediators as in the case of traditional China. As internalized and intuitive reasoning did not enter into a sphere of public knowledge subject to debate, reflection, analysis or synthesis, they did not possess one of the most important dynamic element that Berman emphasized for European law: its historicity, or its capacity to grow with its own internal logic. This may be the distinguishing hallmark between the rule of law and rule of man, a point that could be lost in the type of ex-post “matching exercise” conducted among recent Chinese legal revisionist scholarship.

### **III. Political Institutions, Legal Regimes and Public Knowledge**

To understand the roots of this divergence in legal traditions, we may need to go beyond mere intellectual sphere and venture into the larger historical context of political structures in a centralized empire in China versus political fragmentation and independent competing power groups within each polity in Western Europe.<sup>11</sup> The peculiar political structure that had fragmented Western European political landscape since the Medieval era not only made possible a regime of inter-state competition, but also created autonomous space within a single polity for independent corporate bodies that embodied commercial or propertied interest. As argued by Greif (2008), the

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<sup>11</sup> Shiga attributed the non-adjudicative legal regime in traditional China to the absence of “adversary” culture in traditional China as could be seen in ancient Greece. See Shiga 2002, p.368. This cultural explanation seems hard to square with the motto held by victory-driven litigation masters in Ming and Qing China: “to win one hundred legal suits out of one hundred” (Chiu, 2003).

existence of elites with administrative powers in Europe constituted an essential pre-condition for the rise of constitutionalism. In England, the ability of parliamentarians to mobilize administrative and military counterweight against the King created space for the growth of these independent corporate bodies such as the legal community. Indeed, the legal community sided with the parliamentarians to control the jurisdiction of the King's prerogative courts in the seventeenth century (Berman 1983, pp. 214-215). Even as the supreme ruler of the land, King James I was famously admonished by his own royal chief justice, Edward Coke, that that the power of adjudicating legal cases did not lie in his hands, but in those of professionally trained judges guided by the laws and customs of England (ibid p. 464).

In this regard, the precocious rise of a unitary political rule in imperial China offers a mirror case study. While early elaboration and "rationalization" of a bureaucratic law that served well the aim of political control and social stability, the political dominance of a unitary imperial rule founded on the elimination of any independent contending elites and supported by a highly centralized bureaucratic machine could have possibly stifled the growth of a civil society which were essential for the existence of an independent legal profession. Ultimately, a legal system embedded within this type of political structure remained dependent upon a power structure.<sup>12</sup> Often higher level officials and gentries with higher degrees were simply beyond the laws of the magistrate's court or courts of any bureaucracy at the lower hierarchy. Chinese law, as pointed out in Ch'u T'ung-tsu's classic study, is fundamentally hierarchical with the senior members in a society (whether defined by bureaucratic status, age or gender) entitled to lesser punishment to the same crime than

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<sup>12</sup> For a narrative on the political structure in traditional China and non-alignment of the imperial rulers and property class, see Ma 2009 and also Deng.

the junior ones.

In this system, properties or property rights were only derivative to social and political status of individual members within the power hierarchy. The concentration of wealth in the distinctively bureaucratic class of Chinese gentry and the massive investment of Chinese merchant lineage in their offspring' preparation for China's Civil Service Examination are all testimony to the predominance of political posts over property ownership.<sup>13</sup> In the West, the political institution of representation, defined and endowed the property owners and wealthy elites with political power. In China, the channel of power went in the opposite direction: from political power emanated the property. Hence, Deng Jianpeng presented a case of a fundamental dilemma of property rights in China: the absence of formal legal protection sent property owners to seek custody under political power, yet property defined and acquired through political power lacked legality (Deng, p. 69).

This dilemma may not be paradoxical in the context of substantive justice as delineated by Weber. The lack of hard rules and objective standards, while posing risks for property rights and contracts, gives the authority discretionary power to influence the outcome of certain actions *ex-post* in an intended direction. The lack of distinction between legal and extra-legal, or what Liang Ziping termed as "ethicalization of law" and "legalization of ethics", gives the rulers a free hand to intervene where they saw fit in almost any aspect of Chinese society, public or private, criminal or civil (Liang 2002, chapters 10 and 11). Meanwhile, given the resource constraint of a traditional empire, it also gives the rulers the discretion to keep their hands free from areas where no direct state interest was at stake. Indeed, the states' long-standing policies on civil and

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<sup>13</sup> See Chang Chung-li for the enormous wealth accumulated by Chinese gentry bureaucrats. For widespread practise of buying official titles by wealthy families see Deng, p.68-69.

commercial disputes were to discourage formal litigation and encourage self-resolution. In many cases, the state found it expedient to “farm out” coercive violence or disciplinary duties to non-official elites as a means of social control.<sup>14</sup> In turn the state would impose a system of collective responsibility over the leaders of these groups and communities. Judged in this light, substantive justice is very cost-effective and distinctly rational.

It is important to note that this disciplinary mode of justice coupled with community sanctioning mechanism supported a high degree of market exchange and commercialization as we observed throughout Chinese history. Furthermore, even in the West, relationship and personal based mechanism of contract enforcement remained important and functional in the presence or “shadow” of formal justice. In fact, as pointed out by Greif and others, informal mechanism probably functioned well or even better than a formal legal system (which is expensive to set up) when the extent of exchange and the scale of operations remain small and local (Greif 2006 and John Li). It was when the scale, the extent and frequency of exchange began to stretch across space and time that the costs and risks tend to grow exponentially. An independent formal legal system with replicable standard and enforceable rule is a powerful aid to the large scale of impersonal exchange and complicated commercial and industrial organizations that had characterized modern capitalism. Indeed, Thomas Stephen’s characterization of Chinese legal system as a disciplinary mode of justice was constructed in the context of the treaty port of Shanghai where Western and traditional Chinese legal system came head to head. It was the rise of extraterritorial rights and a Western legal system that underpinned the rise of

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<sup>14</sup> Shiga, for example, documented in detail the sanctioning of the power of capital punishment to lineage leaders over their own members subject to official review (2002, chapter 2). For the power of corporeal punishment in villages and guilds, see Han 2004, chapter 2 and Weber 1951, chapters 4.

large-scale Western and Chinese enterprises to support the phenomenal rise of modern Shanghai in the early 20<sup>th</sup> century (see Ma 2008).

There is a dynamic advantage of a formal legal system associated with the growth of public knowledge in the form of jurisprudence. Indeed, as others have argued that the logic of legal growth through the derivation of transcendental rules from the study of practical legal cases and private customs based on jurisprudential reasoning in many ways paralleled some methodological features that underpinned early modern scientific revolution. Just as the growth of an autonomous science community had been essential to the rise of the scientific revolution, the rise and growth of an independent legal and academic community running from the apprenticeship based training legal guild to the higher institution of university law school also underpinned the basis of European legal revolutions.<sup>15</sup>

In this context, Joel Mokyr's recent resurrection of the role of the scientific revolution and industrial enlightenment to the industrial revolution in England is highly relevant. The significance of the industrial revolution lies in its cumulative and sustainable effect on growth which is distinguished from earlier growth spurts that usually peter out after a period. What changed in 18<sup>th</sup> century Europe is what he termed an expanded epistemic base resultant from the foundation of scientific revolution and industrial enlightenment. Key to this argument is that knowledge has the characteristics of a public good and acts as a fixed input that could generate scale economies. Furthermore, through a feedback loop between what he termed prescriptive and propositional knowledge, knowledge itself generates a learning process that creates

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<sup>15</sup> See again J.H. Baker (2002) for the case of English legal community and Berman (2002, pp. 265-9) for an argument on the methodological linkage between legal jurisprudence and scientific thought in the seventeenth century. Toby Huff (2003) represents a major proponent on the linkage between legal institution and scientific revolution in the West.

new knowledge (Mokyr 2002).

While much has already been written in the sphere of science technology, future research should also explore the mechanism that ties together the role of political institution, legal regime and jurisprudence (as public knowledge) to long-term economic growth.<sup>16</sup> This thesis might also be highly relevant for explaining long-term economic and institutional trajectory in traditional China. The process of social and collective learning – a process which might be the key to cumulative long-term institutional change – would either falter or truncate when legal knowledge was driven to secret circulation or legal community turned underground as in traditional China. The lack or paucity of new ideas theories on political and legal regimes might well explain the frequent change of political regimes or dynasties marked by violent rebellions and revolutions throughout Chinese history often degenerated into mere modified replications of the old order that the rebellion had come to replace.

### **III Conclusion**

Our debate on the “Great Divergence” should integrate the divergent traditions in legal traditions and institutions between China and the West in the early modern period. To the extent that those institutional and epistemological elements that underpinned the legal revolution in the 11<sup>th</sup> and 12<sup>th</sup> century – the separation of Church and state, the emergence of an independent territorial jurisdiction, the pursuit of transcendental, objective and rectifiable standards – were also relevant, as argued by Toby Huff, for the rise of a scientific revolution in early modern Europe, one needs to take seriously the linkage between legal institutions and the origins of the industrial revolution.

It is important to note that the relative efficiency hypothesis of divergent legal

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<sup>16</sup> For a narrative on the feedback loop that runs from the ideas of John Locke, the French enlightenment thinkers and the American federalists and the political events of Glorious Revolution, American Independence and French revolution, see Berman 2003, pp.13-16.



traditions is a positive not a normative statement. Nor is it a verdict against the relative merits of comparative civilizations or multiculturalism. The Western experience shows that a private social order not only constitutes the evolutionary basis for public institutions but also continues to play an indispensable role even in modern economies. In China, the inherited cultural and institutional endowments are essential to the making of economic miracles. The long experience of social networks, communities and informal institutions accumulated in China helped reduce transaction costs and supplied trust to enable economic growth to occur in the 19<sup>th</sup> and 20<sup>th</sup> centuries even before the clarification and reform of formal rules and institutions. The traditional preference for flexibility over fixed rules may have helped Chinese reform in the early 1980s to successfully evade much of the ideological rigidities with little social tension. This may have contributed to the spontaneous emergence of institutional innovations of a highly experimental and often ad-hoc nature ranging from the household responsibility system, the township and village enterprise, to the overseas Chinese networks of FDI to China.

These developments have led to reinterpretation of Chinese economic history which has taken to task the long-term stagnation thesis and contend for a case of substantial progress in industrial and agricultural technologies, expansion of regional trade, growth in urbanization, and perhaps even demographic transition for early modern China. While both the post-WWII East Asian miracle and post 1980s China miracle provided the important motivation for the revisionist impulse, it is often too easy to forget how much political and institutional transformations had transpired in the last one and half century to enable modern economic growth as achieved today. What probably distinguished East Asia from the rest of the developing world today, or what Max Weber had failed to anticipate, is her learning capacity to absorb not only Western

technology but also formal institutions - from legal system to state-building and to monetary regimes. One of the pillars of the Meiji reform in Japan was the adaptive introduction of Western legal institutions ranging from the Constitution to commercial law, to modern accounting and joint stock corporations. In China, legal reform was delayed until after the turn of the 20<sup>th</sup> century when the first set of civil and commercial codes were being compiled with the aid of Japanese legal specialists.<sup>17</sup> But with the collapse of the Qing empire and the nation thrown into civil disorder after 1911, the implementation of legal and institutional reform was severely curtailed. As I argued elsewhere, much of the economic divergence in today's East Asia could be traced to the differential patterns of political and institutional response to the Western challenge in the mid-19<sup>th</sup> century (2004a).

Clearly, the administrative nature of Chinese traditional justice continues to exert a dominant influence on contemporary Chinese legal apparatus under the garb of a Western Civil Law regime. The fact that economic growth occurred largely in the absence of rule of law during the last two decades should not be viewed as a vindication of its irrelevance. On the contrary, Chinese economic reform borrowed and used ready-made institutions founded on those legal concepts that had taken centuries to evolve in Western Europe. Eventually to sustain the growth beyond the stage of institutional adaptation, a transition to the rule of law, one form or another, may become imperative for China.

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<sup>17</sup> It was also in the 1920s that a government sponsored massive survey of various private customs on private property rights and contracts were conducted with the aim of deriving formal legal rules from private customs. See Liang 1996.

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