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The Conception of Law in Traditional China

1.1 The Legalist Idea of the Law and Instrumental Rationality

It has been argued that during the Western Zhou, Chinese monarchs adopted a multicentric governance model (Wu 2013, pp.137–57). The successive Spring and Autumn Period was a time marked by a collapse of rites and corruption of norms (礼崩乐坏), while the Warring States Period by great chaos of competing to be the hegemon. Both periods were characterized by a disruption of sociopolitical order *en masse* – a disruption so unsettling that Chinese history moved again toward the concentration of power and a unipolar model of political governance. Qinshi Huangdi, the emperor of Qin, unified China, ended its disunity, and created a highly centralized structure of political power. Lord Shang, a well-known minister in the unified Qin Empire, once suggested that "[o]nly when a sage rules the country will he strive for singleness of purpose."[1] The means to achieve this goal is by the law, with its guideline being a draconian legal system that is founded on strict reward and punishment. This effective control serves the purpose of building a sense of authority among the people. In the eyes of a legalist in ancient China, inasmuch as the monarch monopolizes power and uses it as an instrument for state governance, this can easily achieve its effectiveness. As Guanzi argued, "[m]ajesty cannot be wielded by two persons; government cannot have two gates. When a ruler uses laws to govern his country, he need only put them in place and that is all."[2] This practice of subjugating the law to political power has one archetype – Li Kui's *The Canon of Law* (法经).

[1] Shang (2014, ch.3) "Agriculture and War" (农战) – this English edition has no page number (in the form of epub).

[2] "On Making the Law Clear" (明法), this English translation is quoted from Guanzi (1998, ch.46, vol.2, pp.159–60).

Furthermore, Hanfeizi, in an attempt to redefine the relations between the state and its people and to reconstruct law and order, set as a goal of governance to register the number of people in each and every household in a precise manner. He also suggested that "the law be made to bring everyone to propriety."[3] Hanfeizi believed that human nature is evil. He also adopted an instrumental view of state–society relations, arguing that the people cannot be trusted. "It is hazardous for the ruler of men to trust others, for he who trusts others will be controlled by others."[4] In light of this argument, the legalists in ancient Qin advocated a theory of "bad guys" when it comes to law and order, assuming that human nature is not good, for which reason institutions are needed to prevent the origin and development of evil intentions. This suggestion is a radical version of legal positivism, emphasizing only a belief in state capacity to maintain effective and absolute control while disregarding a ruler's trust in the intentions of the ruled. For Hanfeizi, state governance is no more than "a design of profit and loss, to be made public to everyone."[5] For this very reason, there is no need to trust others when using them. By the same token, others can be manipulated to work for you out of necessity. In this scheme, there is no room for obeisance based on or induced by recognition and consensus. Neither is there any acknowledgment of the legitimacy of social values. According to this legalist conception, there exists nothing other than power in its purest form. And yet, we all know that a mere reliance upon power, unaided by a sense of authority, will not be sustained in the long run.

Chinese legalism shares certain opinions in common with Machiavelli and Hobbes. In terms of epistemic genealogy, what is commonly suggested is a sociopsychological deduction of how people will behave and the making of public choices. In this conception, practical rationality is construed instrumentally. For them, on the one hand, there is an innate "desire" to avert harm and pursue profit on the part of an individual; while on the other, they firmly believe in the capacity to maintain effective control through reward and punishment. A combination of these two elements can induce the behaviors expected and desired by

[3] Hanfeizi, the eighth of the "Eight Canons" (八经; ch.48) of governance, for the process and institutional arrangement of how to "bring everyone to par" in ancient Qin (see Du 1990).

[4] "Precautions within the Palace" (备内), from Hanfezi (1964, ch. 17, p.84).

[5] "Treacherous, Larcenous, Murderous Ministers" (姦劫弑臣), from Hanfeizi (2000, ch.14, p.283).

the ruler. It may even help to maximize the utility of public administration. When we examine and interpret history from an analytical frame offered by modern social sciences, it can be seen that legalism has placed an overwhelming amount of emphasis on instrumental rationality. Little or no attention is paid to morality. This shall indubitably lead to an increase in the cost of regulation and a decrease in the degree of trust. As a matter of fact, interpersonal interaction spans beyond a mere calculation of profit and loss. There exist also convergence and compliance with rules – both being the bases for the legitimation of law. This epistemic blind spot in the legalist understanding can be supplemented by Confucianism. For Confucius, "[f]or one day master the self and return to ritual, and the whole world will become humane. Being humane proceeds from you yourself. How could it proceed from others?" (*The Analects*, 12.1, in Confucius 2007, p.80). This in effect implies a proposition of "no moral regulation or self-reflection, no rational behavior."

1.2 A Reciprocity-Based Authority

Confucianism pays more attention not to human "desires" but to their moral evaluation, namely whether such desires are proportionate to one's personality and the value orientation in his/her own identity. For this very reason, a Confucian litigation places special emphasis upon personality assessment, rendering nearly all lawsuits matters of personality disputes. In essence, every activity, both physical and mental, by all parties involved is construed through the lens of public power. Lawsuits are understood in a criminal manner and from the angle of public security. For this very reason, litigation in Confucian *weltanschauung* prioritizes obligation over rights. Furthermore, one acquires subjectivity in no other way than constantly questioning, reflecting on, and answering the imperative of personality assessment. Only through this will a moral regulation take shape, and rational behavior come into being free from external coercion. As is argued, "[g]uide them with government orders, regulate them with penalties, and the people will seek to evade the law and be without shame. Guide them with virtue, regulate them with ritual, and they will have a sense of shame and become upright" (*The Analects*, 2.3, in Confucius 2007, p.20). Conversely, good and evil, right and wrong, all of these are dependent upon individual intentions. For this very reason, "an intellectual serves no fixed minister" (Gu 1990, p.585). Under this circumstance, the law is not regarded as invested with the authority to bestow subjectivity upon individuals; instead, it plays the

role of restraining human desires. Thus, the law is regarded as primarily sanctioning criminality in nature. All authority is derived from morality alone. Individuals may lack a sense of belonging to the state. On the contrary, individuals derive their subjectivity from quotidian interactions with others and self-reflection.[6] For this very reason, subjectivity is relativized in interpersonal relations.

Therefore, for Confucianism, subjectivity is closely connected with one's moral persona and emotional well-being. To a certain extent this subjectivity is disconnected with, and sometimes even opposed to, the state order. Individuals are placed outside the state order, for which reason when the state announces its ordinance, decisions, and rules to an individual, the latter will surely incline toward constantly raising the question: "Why must I do this?" Such an act of questioning is grounded in one's moral and emotional conceptions. In other words, it is highly unlikely that one will unconditionally obey laws and regulations simply as they are. For this very reason, the law will need to have its moral quality enhanced, with its emphasis shifted toward the communication process of elucidating the lawmaker's intent in terms of the particularities and circumstances of any specific case. If judged from the perspective of modern jurisprudence, there exists a plethora of opportunities for discussions related to practical rationality. For a self-reflexive subject, the law can merely or mainly play a role of education. In reality, this educating cannot go on forever. It cannot become a language game that is founded on circular arguments. For considerations of the time and cost involved, such educating will need to terminate at a certain point, where disputing parties should reach an agreement. This role of persuasion and education forms a dialectical relation with the aforementioned traditional preference of criminal sanctions. Henceforth, in the Chinese context,

[6] Human nature can be inductively learned by examining one's self and interior being, from then on one may even proceed to learn the knowledge of nature and the universe. For this, Mencius once suggested that "[t]o fully develop the kindness of the heart is to understand human nature. To understand human nature is to understand the Mandate of Heaven . . . When you seek, you can get it, but when you let go, you will lose it. Then seeking helps towards obtaining it, as what is sought for is in yourself. But when seeking must be done in a particular way and it depends on destiny whether you can get it or not, then seeking is no help towards obtaining it, for what is sought for is something external, outside yourself . . . Everything is here in me. It is the greatest happiness for me to know, when examining myself, that I am true to myself. Always do unto others as you wish others to do unto you. This is the most direct way to benevolence" (*Mencius*, 13.1, 3, 4, in Mencius 1999, pp.291–3).

compromise replaces the consensus based on argumentative dialogs, which leads to a diminishing of legal interpretations.

Arguably, the conception of law in traditional China has certain nominalist propensity. The legitimacy of the law cannot be made independent of the evaluation and judgment of each law-user or -enforcer. It is not possible to be completely objective. To a certain extent, the law derives its legitimacy from the satisfaction of disputing parties or the society at large. As a matter of fact, each and every disputant, when confronted with the law applicable to his/her own lawsuit, will be compelled to evaluate and assess the appropriateness of such law and its enforcement in the particular context. It seems to be difficult for the Chinese to form or accept such a notion of law, with a legal order as a self-contained system, possessing a power binding all individuals within a given society. Generally speaking, in the subconsciousness of the Chinese, social exchange will not hold unless and until the condition proposed or the result accepted by the other party benefits one more than his own condition or result. In other words, one is unwilling to accept exchange on an equal basis. This is a point of utmost importance. For instance, if the exchange between water and a diamond can hold, it is not because these both are equivalent to each other in terms of their objective value. On the contrary, the reason lies in one's subjective, value-based judgment. Needless to say, one's own utility or value judgment defies quantification. For this very reason, whether a judgment benefits one, how much this benefit is, and the value-based ordering of profit and loss, are all subjective opinions and experiences that vary from one individual to another. It is not possible to offer an external, objective measurement, for which reason they become unpredictable in reality. Based on such conceptions, ideas of justice and fairness in China will indubitably have a bent toward subjective whimsies, nonequivalence, and value relativism. A mere reliance upon an individual-to-individual agreement will not produce a rule-of-law order in its modern sense.

Corresponding to the traditional conceptions of the law, state governance inclines toward "no action" (无为) and "indirect administration." The advantage of such indirect administration is obvious – in that it can help to save institutional costs and reduce state interference in social life. For this very reason, the state will have to rely on spontaneity on the part of the society to organize itself, to weave individuals into networks of interpersonal relations, and to integrate into the legal order such rules as are generated out of interpersonal interactions and such a *guanxi* order as is the basis of effective state governance. In fact, during the Western

Han, through the interpretations by Confucian scholars, rites were introduced into the law, where government officials quoted Confucian classics to decide legal disputes. Through such efforts, the law that was previously highly instrumental and positivistic now coalesced with morality, rites, mores, and manners. The law was embedded in the interaction-based *guanxi* order. Qü argued that this was the Confucianization of the law (1981, p.303), while Yu called it the legalization of Confucianism (1976, p.31).

A network of particularized, long-term interpersonal relations, when intermingled with the law, can give rise to a series of distinct features of Chinese law in terms of its values and codes of conduct. Generally speaking, such a legal system lacks the notion of freedom, or that of contracts. Nevertheless, such a *guanxi* network does not fall short of egoistic rational behavior, or mutual interaction and exchange. Henceforth, to a varying extent we can discover Confucian individualism or personalism (de Bary 1983, ch.3, 1998, p.25). Between a private deed and a public contract, we can regard it as a continuum, where state institutions may emerge out of such exchange-based relations and practical experiences (Scogin 1994, pp.164–211; Terada 1998, pp.139–90; Ji 2003b, pp.126–47). As Ambrose King (1992, p.10) once argued,

> in Confucian social theory, arguably an individual is placed within a network of relations – an individual is a 'relational being' . . .In this network of relations, an individual is neither independent of nor dependent on others. Instead, they form an interdependency. For this very reason, an individual's self is not entirely submerged in various kinds of relations; instead, an individual has a wide social and mental space for autonomous actions. Indeed, apart from natural 'relations', such as the father-child 'relation' (in which case, one's action is more or less defined by a fixed status and its obligation), an individual enjoys a relatively wide range of freedom to decide whether s/he will enter into an artificial relation with others.

Nevertheless, with reciprocity as the most general way of regulating conduct, market transactions will thoroughly permeate every aspect of the social order, and market bargaining be applied to all aspects. There is a generalization of the contractual bond or relational connection between two parties. It goes without saying that the notion of "return" (报) in Chinese contains both a consideration of profits in the market sense and such noneconomic elements as face and favor (Hu 1944, pp.45–64; Yang 1957, pp.291–309; Huang 1988, pp.7–55), with greater emphasis on the latter to a certain extent. This can easily lead to a general social proclivity of setting as the benchmark for dispute resolution the satisfaction and

mutual trust between the parties involved. This will make it difficult to make a decision based on public choice, or to implement the rule of law. Conversely, the boundaries of individual rights and obligation are fluid, to the extent that it becomes difficult to define subjectivity in these egocentric interpersonal networks. In other words, no ultimate foundational value will take shape in Chinese society. Such concepts as categorical imperative will find no place; nor will it be possible to establish a legal subjectivity with an awareness of individual rights.

In this aforementioned frame, state power is still monistic, albeit with its scope of activity being restrained by the idea of "indirect regulation." For this very reason, it manifests certain characteristics of the Weberian notion of "unrefined administration." Through the principle of reciprocity, moral authority saturates interpersonal relations and intermingles with political power, rendering the boundaries between and among different spheres blurred and transmutable. Where power is centralized, and boundaries fluid, the wielding of power becomes whimsical, for which reason, the power will appear to be domineering (Wittfogel 1963, pp.78ff.). On the other hand, the use of power is dependent upon the order of *guanxi* and a geographically bound community, it is restrained by moral discourses. For this very reason, political power is indeed in a rather fragile state. As both Hsiao and King pointed out, although in traditional China the government attempted to control society by all means, it was relatively ineffective where state power failed to penetrate deep into the society (King 1988, pp.30ff.). Liang even argued that a state like the Chinese one, which combines rule by virtue (德治) and rule of the literati (文治) cannot be called a "state" in its sense of "no action" (无为) (Liang 1987, pp.162ff.; Slingerland 2003, 2014, ch.1). The state was, indeed, weak in effectuating its control of society, and it is precisely because of this that there emerged a strong tendency toward statism during the modernization of China, with its very purpose to strengthen the power of the government. Nevertheless, an overcentralized and whimsically wielded political power rendered the issue of how to constrain the government's power decisive. These conflicting observations and claims invariably reflected some aspect of the contorted historical process, attesting to the complexity of China's law and politics.

1.3 The Coupling of *yin* and *yang* in the Social Order

What is noticeable in the revision of draconian laws lies in the fact that the imperative comes from not within the law but rather from without.

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Some sublime notion of governance is born, namely "the rule of virtue" (德治) and "benevolent governance" (仁政). As a result, the system of state norms is imprinted with a compound of dual tracks. The social order is characterized by a coupling of *yin* and *yang*. This can be seen in a series of governance techniques, with dialectical relations between them. Such techniques include but are not limited to: "the parallel operation of both rites and law" (礼法并行), "the intermingling of law and politics" (刑政相参), "the application of both emotional concerns and reason" (情理兼到), and "the simultaneous use of both virtue and punishment/law" (德刑并用). There also exists a structure of plural norms of *qing* (情; emotional considerations), *li* (理; reason), and *fa* (法; law). To put it in more accurate terms, for those norms that feature a coupling of *yin* and *yang*, in the adjudication of a particular case, through the exchange between parties and the mediation led by the judge, norms of different sorts will be invoked and fused upon the requests of reasonableness (*qingli*; 情理). Such a combination and mutual adjustment of the varying norms shall provide a series of options, of which the resolution accepted by all parties involved or achieving the largest consensus will become the judgment or legal decision. In the process of continuous disintegration, reintegration, and a ruthless search for the equilibrium point, the logic of confrontation is gradually replaced by that of continuity, with a vast gray area opening up between the black and white. We might as well refer to this as the "gray chain of interests." Thus, the so-called structure of plural norms refers to a process of compromising and combining antitheses, as well as the complexity of law as the result thereof.

Now, apparently the law maintains a distance from both *qing* and *li*. This distance determines the degree of grayness of the area of maneuvrability, which may be regarded as the basis of reclassifying the laws. These varying laws might constitute what can be referred to as the dual structure of the system of state laws, consisting of a cluster of main laws and subordinate ones. Here, the cluster of main laws refers to a group of formal rules with a stable structure (e.g., both the statutes and substatutes in imperial China), with an emphasis on universality and uniformity. By way of contrast, the cluster of subordinate laws contains the melange where formal and informal rules intersect and mingle (e.g., the rites, clauses, *qingli*, and local customs, mores, and manners). This cluster is characterized by its flexibility and adaptability, with an emphasis on particularity and emotionality. To a certain extent we might argue that a multilayered cluster of subordinate laws becomes the safety valve for the system of main laws. Through a combination that answers the needs

of one particular circumstance, the system of main laws thus acquires a structure of greater flexibility. The relations between the main and subordinate laws are arguably those between two well-known Chinese notions, namely *jing* (经; canons) and *quan* (权; flexibility).

From this it can be seen that the institutional design in traditional China has a feature of symmetry by coupling antitheses in one assemblage. Different from the institutional design of adversaries, confrontation, and conflict in modern Western Europe, the Chinese model presents an interesting contrast. To be more specific, the legalists built the architecture of political power, while the Confucians built a system of moral authority. Under the influence of both elements, the ideal type of Chinese law becomes discernible, notably a model of antitheses-in-one, which took shape from the Western Han (202 BC–8 AD). A series of symmetric concepts have emerged in the discourse of the legal system, for instance: a cruel officer (酷吏) and an exemplary one (循吏), governance by punishment/law (刑政) and moral persuasion (教化), five human relations (五伦) and five punishments (五刑), the rule by law (治法) and the rule by man (治人), a superficial treatment (治标) and a fundamental cure (治本), the leniency and gravity (轻重) of punishments, the magnanimity and harshness (宽严) of governance, and the closeness and remoteness (亲疏) of interpersonal relationships. To put in parallel and intermingle antitheses, to dialectically use the intermediary for dispute resolution, and to invent a symmetry in the normative discourse – all of these are the typical features of the mentality of law in traditional China, in which context there exists no ultimate foundation of legitimacy, or external, transcendental doctrines, but a generalized, cynicist discourse.

As a result, the law is embedded throughout with morality-based reflexive opportunities. The main aim of justice is not to pursue a determinate judgment but to counteract the arbitrariness of a set rules from an externalist point of view. The emphasis is placed upon endless coordination in ever-changing forms and ever-varying claims, in search for the most appropriate equilibrium through bargains and negotiations. Here, the basis to analyze the parties involved, together with their litigations and choices, is the satisfaction of the different portfolios of laws and individual wants. From the perspective of a modern Western legal science, satisfaction of this kind can be calculated and predicted through such parameters as legally defined rights and their recognition, and the elements of a due process of law. By way of contrast, for the Chinese conception of justice, there is no absolute criterion of right or wrong;

instead, there exists only a comparative judgment on which portfolio is more desirable for each and every individual. For this very reason, the judiciary will have to set up two antithetical poles as its fundamental frame, in the midst of which, through a process of trials and error, search for a better, more acceptable combination as its legal decision. In this process of fumbling, a game of symmetric law languages and terms can offer the parties involved or stakeholders a certain sense of fairness and peace of mind, or even a "patterned prediction" in general to a certain extent. Nevertheless, this might breed risks of increasing speculation and profit-seeking behaviors in the adjudication of particular cases. Although the cynicist discourse will to a large degree increase the probability of changes in the legal communication (with the benefit of finding new justifications), this may lead to circuitous rhetoric and the possibility of prolonged or repetitive litigation, or contradictions or self-disintegration of rules. For this very reason, the Confucian system of authority is pluralistic in nature and nonlegal. In the face of a predicament of integration, only a centralized, monistic power can come to its rescue. This can easily lead to a wrong placement of power and authority, to say nothing of the idea of designing a legal enmeshment of political power.

1.4 How to Escape the Trap of Legal Equilibrium?

The law of symmetry in the aforementioned discourse is closely tied with the golden rule of social order, namely the principle of reciprocity. Malinowski regards reciprocity as the foundation for social intercourse (1985). By the same token, Blau builds an institutional model of reciprocity (1986). Apparently, for both authors, social exchange has been widely acknowledged as the universal principle of social order that transcends cultural differences. In China's cultural traditions, reciprocity integrates with favor and face, forming the fundamental code of conduct in the so-called bao ("return") (King 1992, pp.17ff., 41ff.). This integration is also seen in the various forms of institutionalizing rites, and in the moral philosophy of regulating social relations. The principle of reciprocity has its essence manifested in symmetry, in adjusting a nonequilibrium relation into an equilibrium relation (which, indeed, will not be devoid of tensions and dynamics). This comes close to what Cardozo has termed "wise eclecticism" (1947, p.256).

Needless to say, negotiations within the legal framework shall have a bearing on the outcome of legal decisions. We might as well classify such bearings into two types: one being "the effect of rights," the other being

"the effect of reciprocity." Reciprocity essentially allows a compilation and selection of statutory texts, so as to multiply alternative resolutions to the dispute at hand. This process may also relativize the legal decision. In the case of reciprocity permeating every aspect of the system, legitimate rights may cease to have explicit connotation and extension, where everything shall depend on the negotiations, compromise, consensus-building, satisfaction, concrete bargains, and power play between the parties. There is no room for the absolute certainty of the law. Because of this, market tendencies lurk behind the whole judicial process, where rules or even the judgment itself may become an object for selling or auction. Under the sway of reciprocity, the boundaries of rights will invariably depend upon some favor mutually offered, the performance of certain obligations, or a win-win result acceptable to both parties – all these elements being subject to change during interpersonal interactions. As a result, the recognition and protection of rights-based claims will become volatile and indeterminate. Under this circumstance of extreme relativization, the discretionary power held by the decision-maker can be flexible and unrestrained. It becomes difficult to prevent an abuse of power. In other words, there is a gesture to "pacify" the parties in dispute by establishing a symmetry between them – a symmetry that can easily be rocked and turned \into asymmetrical. There is a constant need to create equilibrium anew, although it is difficult to maintain such newly achieved equilibrium(s) for long. This can go beyond our imagination. And yet, it has been proven that symmetry *ad infinitum* can result in chaos. This is what can be termed as the "trap of equilibrium," where a relativization of the reciprocity-based law results in a violation of legitimacy and justice.

In order to avoid this trap, and to prevent the adverse impact on adjudication by legal relativism, the answer for China's institutional design may lie in the guideline of "focusing on major issues while leaving minor ones unattended" (抓大放小). Here, the legal mentality is seemingly bifurcated. For major issues, it opts for determinism, while for minor ones, a probability-oriented approach. The deterministic mentality is to settle everything in one go. For instance, the Empire of Qin, after the legal reform carried out by the Lord of Shang, centralized its law-making power and established an office to offer uniform interpretations of the law. This action resembled what Carl Schmitt described as a sovereign turning the orderless into an orderliness (Schmitt 2004, pp.59–62). This authoritative interpretation or response are nothing but an announcement of legal decisions, excluding all other possible

interpretations. Contrary to this, the probability-oriented approach is to seek answers through the multitude of voices. For instance, in *The Enlightened Judgements* (McKnight and Liu 1999) – a collection of judgments in the Southern Song (1127–1279 AD) – many judges in handling civil disputes were similar to the Sphinx in Greek mythology, who pressed a passerby to solve a riddle about him/herself, in the sense that these judges were pressing the parties to search for better solutions outside the legal framework. Many such solutions were found by accident. This undesirable quality notwithstanding, as long as a result was accepted by all parties, the judge was willing to abdicate his decision-making power and remained an intermediary throughout. This method of dispute resolution demonstrates the impact on rules and their effects by a world of *qingli* (情理; reasonableness),[7] which might well be understood as a type of "concrete-order thinking" (Schmitt 2004, pp.47–58). This can enable a derivation of infinite individualization, particularization, and localization of legal rules. An accumulation at the micro level of social order can help to maintain its macro structure.

1.5 The Law as a Complex System and Its Nonrandomization

The aforementioned two approaches to the law, namely determinism and a probability-oriented approach, run in parallel, intersect, and intermingle during adjudication in traditional China. This gives rise to a system of rules based on binary coding, constant differentiation, and infinite extension. It thus has the distinctive features of multiplicity and complexity. Here, facts, presuppositions, or results cannot be reduced and treated frictionlessly in the Kelsenian pure theory of law; instead, it manifests a myriad of schemas: for instance, the graphic model of "Diagram of the Great Ultimate" (太极图) as depicted by Zhu Xi (Chan 1989, pp.276–88), the sixty-four hexagrams of the order of the universe by Shao Yong (Liu 1990, pp.161ff.; Ryan 1996), the visual-spatial diagram by Wittgenstein (Hashizume 1985, p.22), and the "Feigenbaum Sequence" (Prigogine and Stengers 1984, pp.169–70). All these forms are nonlinear, albeit seemingly with a structure of a rhythmic, musical scale. Legal communication is far from an argumentative dialog, or rational deliberation focused on the same point of contention; on the contrary, it is the launching and repetition of a polyphonic language game.

[7] Cf. Lin (1936, p.85), Tsao (1962, pp.21–43), Wang, Zhiqiang (1998), Liu (2011), Lin (2011), MacCormack (2011).

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Intersubjectivity between the parties becomes the essence of the law, in which adjudication is more a learning process to discover relevant internal rules via the adjustment in one's relations with others. It is in the interactions between and among differences, contradictions, and transformations that the order takes shape, falls apart, reshapes, and renews. This is a continual process of the (de)generation of order(s).

In this process, the social milieu enters into a mirror relation with the legal system – a relation that repeats itself again and again. It can manifest a refraction effect that varies according to the particularity of a case, from which noticeably the room for choice-making can be extended and folded. If we describe this ephemeral choice-making space through a visual language, then we might assign a value of "Yes" or "No" to the adversary opinions by both parties, and the possibility of a compromise. The simplest scenario has four options: (1) Yes, Yes; (2) Yes, No; (3) No, Yes; and (4) No, No. For the Chinese, there is a notorious dislike of the zero-sum game of have-all or have-nothing. On the contrary, they are inclined toward a mutual adjustment of interests and a win-win game. For this very reason, in the actual process of making choices, it is possible to reassemble these four possible options through bilateral communication between the parties. The result might be that there are 16 options available to choose ($4^2 = 16$). If we include in this picture the involvement of the judge in negotiations and mediation, then a reassembling of these three variables shall avail us 64 options ($4^3 = 64$). It is immediately noticeable that such a choice-making space of assembling various options resembles the picture of 64 hexagrams in *The Taoist I Ching* (Cleary 1986)

For me, in understanding the conception of law in traditional China, the philosophy in *I Ching: Book of Change* (周易) plays a pivotal role. Some ideal legal orders may be an optimization of this philosophy. For instance, an ideal self-complete order, "from the beginning to the end, is in constant change, flows thoroughly to and from the four poles, and never departs from the equilibrium of the law." By the same token, an adaptive version of the law may operate smoothly in social contestations. If arguably the interpretation and operation of the law is a chameleon, then in China, its mechanism of effectuating changes is the structural transformation of this choice-making space. This resembles the playing of Go, the Rubik's Cube, or looking through a kaleidoscope, where the constitutive elements are simple, the form of architecture limited, and the rules of the game uncomplicated. Nevertheless, through adjustment and assemblage, the manifestations or symbolic meanings can vary

significantly or even become infinite. For a concrete operation, there is a famous passage in *Yinwenzi*:

> If it is insufficient to rule by *Dao*, then use publicised law (*fa*法); if it is insufficient to rule by *fa*, then use [administrative] techniques (*shu*术); if it is insufficient to rule by *shu*, then use [political] power (*quan*权); if it is insufficient to rule by *quan*, then use the manipulation of political purchase (*shi*势). Upon the exhaustion of the use of *shi*, then resort to *quan*; upon the exhaustion of the use of *quan*, then resort to *shu*; upon the exhaustion of the use of *shu*, then resort to *fa*; upon the exhaustion of the use of *fa*, then resort to *Dao*. To rule by *Dao*, [one] can achieve a state of non-action (无为) and society governing itself (自治).
>
> (Yinwenzi 1986, p.184)

Here the essence of justice lies in an all-encompassing approach to dispute resolution, where no single measure is singular in its meaning or determinate in its own sense. Similar to "pattern differentiation and treatment determination" (辨证论治) in traditional Chinese medicine (Scheid 2002, ch.7), the idea is rooted in a *gestalt* way of thinking, with its eye out for a comprehensive solution. Now that the legal system maintains such a complicated mirror relationship with the social milieu, the judge will have to peg his/her attention to a mutual adjustment between a series of binary codes (e.g., fact and norm, *qingli* and statutes, power and circumstance). There can be no room for the principle of judiciary independence.

Here we see the emergence of a mosaic of social order, where a myriad of elements is assembled together in one big picture, including: rites and punishments, virtue and the law, facts and norms, interpersonal relationships and ordinances, determinism and a probability-oriented approach. This mosaic gives rise to a dual structure within the legal system. At the grassroots level of the country, social exchange based on the principle of reciprocity (the ethics of *bao*), self-organized *communitas* (the logic of "clan/group"), and a governance model that emphasizes a full personality-based responsibility – all of these are the elements that define interpersonal exchange as embedded within *guanxi* networks. At the apex of the institutional pyramid, highly centralized power integrates or penetrates the holes or cracks between and among different constituents of such *guanxi* networks, on the basis of which to render judgments that will answer the needs of circumstances. Political power increases arithmetically, while *guanxi* networks exponentially. This demands that the political power adopt a strategy of "a big payoff for a small effort."

On the one hand, through a control of information and a physical coercion, it can create an advantage of asymmetry. On the other, it makes the best of the ordering mechanism inherent within *guanxi* networks, to achieve an accumulation at the microscopic level of social order. Through this, the whole and its parts are made homologous to each other. Taking into account this general cultural background, the adjudicator of one particular case will surely offer a balanced consideration of both the law and particular circumstances. This will necessarily involve a repeated coordination of various social relations within this symmetrical framework and in accordance with the principle of "grasping the major part while releasing the minor one." This is the very reason why judicial decisions are partly predictable and partly not. This way of governance can be expressed in a complex functional formula of $Z^2 + C$, while the legal order can be understood as a complex system (Ji 1999a, pp.63ff.).

Needless to say, society, in and of itself, is a complex system. According to Luhmann, one of the most eminent social theorists in contemporary Germany, the main function of the law is to reduce social complexity (Luhmann 1990, p.12, pp.270–1, 1986, pp.37–44, 150, 381). For this very reason, the law should be a system of simplicity. If the law has turned into a complex system, it will not be able to have a reductionist treatment of the relations between facts and norms. Neither will it be able to establish a hierarchy of effects and offer a conceptual computation or deduction. It may not even be possible to achieve "like case, like judgement." Nevertheless, in imperial China, where *qingli* and interpersonal relations were embedded in the state order, the legal system acquired the complexity of a fractal structure. For this very reason, during ceaseless negotiations and contestations, many elements may be included in the adjudication by accident, hence rendering the result thereof far from being predictable.

Closely related to this, the emphasis of this legal mentality is, indeed, not on the predictability of either the law or the whole system but on an attempt by the institutions to reflect and simulate the complexity of social reality. In Chinese, there is a saying, namely "Dao [the Way] models after the Nature" (道法自然). This guideline has, indeed, demonstrated the simulation of the social milieu by traditional institutional designs. The emphasis was on the transformation of institutions to adapt to social realities. Between the law as a complex system and the social milieu, there exists an infinite, repeated mirror relationship, which is thought to enhance the reflexive rationality and learning capability on the part of

the rules. By the same token, our understanding of facts is placed at the center of the legal mentality. The quest for rediscovering facts suppresses the growth of a willingness to abide by the law. For this very reason, the law in and of itself lacks a sufficient amount of authority. It will need to prove its utility to society with the aid of virtue (辅德) and the rectification of grievances (伸冤). This is an account of the law that has been constantly narrated out of the ceaseless interactions between and among the parties, the judge, the legal text, the general audience, and the world of *qingli* (情理). What connects together the various parts thereof is not a consistent logic or a consensus over the meanings but a monistic, centralized power that coercively breaks such barriers to discourse and mutual understanding as exist between and among different spheres as result of the lack of functional differentiation.

In the legalist system of political power, the law or statute acquires a prominent place, albeit possessing a value no more than a mere instrument for the ruler. In the Confucian system of moral authority, the law is marginalized and likewise regarded as merely a tool for achieving a sublime order. For this very reason, in traditional China, the way that political power is matched with authority was, indeed, a short-circuit nexus between governance coercion and consent in society. In Chinese history books, the first emperor of the Han Dynasty, namely Liu Bang, was said to "establish [with the people] a set of rules" (约法三章). From this it can be seen that the sovereign's order coexisted side by side with an agreement between the ruler and the ruled. This, as a matter of fact, constituted a predicament of the coexistence of rules of conflicting natures. It is precisely because of this predicament, together with its various derivations afterward, that political power became both highly centralized and weak at the same time. The ruler opted for a *laissez-faire* policy in terms of civic education, while at the same time, the citizens were very submissive to political power. Such a situation is somehow beyond our imagination. And yet, the social revolution of the twentieth century did take place under this general background. Henceforth, it occurred to the public all of a sudden that political power could seemingly become a medium for mass movements, while the masses, by the same token, had become a medium for the use of power. This was also the case with the economic reform after 1978. The market used political power as its medium and vice versa. A self-mediated polity can easily fall into chaos, which is, indeed, a dilemma confronting us today. From this it can be seen that the essential task for China's political reform is to reshape power and authority, with its entry point a reduction of the

complexity and uncertainty of the legal system. In other words, it will be the building of a modern rule-of-law order.

1.6 The Reversed Schema of Society and the Law

When the Qing court, under the challenge of Western powers, was awakened to the need to codify modern laws in the early twentieth century, the 100 years that ensued witnessed China becoming a laboratory for social revolution and institutional designs. There had emerged a plethora of institutions, phenomena, and trial-and-error experiences during this process: extraterritorial courts in foreign concessions, as well as the mixed law therein; constitutionalist movements; federalist autonomy at the provincial level; the introduction of the German Pandekten model (Ricks 1978, p.109); the building of order in revolutionary base regions and areas; Hong Kong's reception of the English common law system; the institutional design of Manchuria; the design of mass trial and laws; the legal experiment in special economic zones; a legal system targeting foreign transactions; and "one country, two systems" (一国两制). During the modernization of both society and the law, there are two issues that possess fundamental significance. One is disintegration, with its aim of breaking through the equilibrium trap as a result of the oversymmetry in the *ancien regime*, enabling a social revolution to take place. For this, we will have to opt for a reform strategy of nonsymmetry, negating the validity of such concepts as harmony and equilibrium, encouraging passion for struggle, and establishing new authority through ideology and revolutionary charisma. The other issue is organization, aimed at liberating individuals from the consanguinity- or geography-bound communities and reintegrating them into a new industrialized economic system. For this, the government's monistic power will need to be strengthened, enabling it to penetrate deeper into society and to effectively mobilize resources, for the purpose of achieving the policy goals of modernization. Upon the decline of ideology and the charm of revolutionary charisma, both disintegration and organization will have to depend upon the monistic, centralized power. As a result, there is an ostentatious use of political power everywhere.

It is precisely because of this strong, monistic, and centralized power that traditional state institutions, ideology, and *communitas*-based social relations were completely disintegrated and reconfigured. Indeed, Mao Zedong in his *An Investigation Report of the Peasant Movements in Hunan Province* (1927) had envisioned that peasant movements could

help to bring down the four pillars of the *ancien regime*, namely the political power, the clan, the ecclesiastic, and the patriarchy. In *Instructions on the Abolition of the Kuomintang's Six Laws and the Determination of the Judicial Principles of the Liberated Areas* (1949) (关于废除国民党的六法全书与确定解放区的司法原则的指示),[8] the Central Committee of the Communist Party of China announced that

> the judiciary should, more often than not, in a spirit of despising and criticising the Six Laws and the all the other Kuomintang reactionary laws and ordinances, as well as such laws and ordinances as are against the people in the capitalist countries of Europe, America and Japan, educate and reform judicial cadres, by a method to learn and grasp the notions on the state and law in Marxism-Leninism and the Mao Zedong Thoughts, as well as those New-Democratic policies, programmes, laws, orders, regulations and resolutions.

Nevertheless, the revolutionary order that ensued was far from a completely new creation. To a certain extent, it was merely a reversed schema of existing structures, or a partial reconfirmation of preexisting elements. For instance, at the grassroots society in traditional China, alternative, nonformal dispute resolutions permeated nearly all aspects of social life. These traditional forms of dispute resolutions surfaced to become a part of the official regime after 1949. Moreover, the role played previously by local customs, mores and manners were now played by the Party and government policies. This apparently was started by a thorough revolution, but ended without any substantial transformations in the mode of governance, which was referred to as neotraditionalism by Walder (1988, pp.1ff.).

During this process of reversal and reconfiguration, two phenomena have always persisted and continued to accrue. One is an interaction-based obeisance to the law, in that the parties will attempt all means to influence judicial officers and the government, so as to achieve a result advantageous to his/herself. The other is an experimental use of power, in that judicial officers and the government, on the one hand, tested the water by watching how society might respond while intervening into the social daily life in a top-down manner. Upon an understanding of government policies at the general, macro level, judicial officers will attempt to solve disputes, sometimes by persuasion while at other times via coercion. These two phenomena might manifest themselves in

[8] www.douban.com/note/152680813/, retrieved on April 1, 2021.

different forms, at various periods, and under diverse circumstances. Nevertheless, essentially both of them are a short-circuit connection between a mass opportunity and a power opportunity, consent, and coercion. These two phenomena are still by far the dominant forces of progress in China's institutional transformations.