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**LAW AND ECONOMY IN  
TRADITIONAL CHINA: A "LEGAL  
ORIGIN" PERSPECTIVE ON THE  
GREAT DIVERGENCE**

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*DEVELOPMENT ECONOMICS and  
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# LAW AND ECONOMY IN TRADITIONAL CHINA: A "LEGAL ORIGIN" PERSPECTIVE ON THE GREAT DIVERGENCE

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## **ABSTRACT**

### **Law and Economy in Traditional China: A "Legal Origin" Perspective on the Great Divergence\***

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. This paper seeks to elucidate the fundamental feature of traditional Chinese legal system and the mechanism of dispute resolution within the framework of a disciplinary mode of administrative law within a bureaucratic hierarchy and intermediation within social-networks. By comparing the contrasting development of the legal professions in China and Western Europe, it reveals the importance of political institution, legal regime and the growth of jurisprudence that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories.

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# Law and Economy in Traditional China: A “Legal Origin” Perspective on the Great Divergence<sup>1</sup>

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Sept. 2010

**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. This paper seeks to elucidate the fundamental feature of traditional Chinese legal system and the mechanism of dispute resolution within the framework of a disciplinary mode of administrative law within a bureaucratic hierarchy and intermediation within social-networks. By comparing the contrasting development of the legal professions in China and Western Europe, it reveals the importance of political institution, legal regime and the growth of jurisprudence that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories.

Western law, with its unique features of legal formalism and rule of law, as argued by Max Weber, has laid the foundation of Western capitalism and the eventual predominance 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 general and well-specified rules and procedures. Substantive justice, on the other hand, aims for optimal realization of maximum justice and equity in each individual case, often with

due consideration to comprehensive factors, whether legal, moral, political, or other.

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 of the political authority. Legal rules were consciously fashioned and rule-making was relatively free of direct interference from religious influences and other sources of traditional values. Formal justice reduces the dependence of the individual upon the grace and power of the authorities, thus often making it repugnant to authoritarian powers and demagogues. Above all, the rule of law born out of the Western legal tradition supplied what Weber described as calculability and predictability, elements essential for explaining the rise of Western capitalism and its absence in other civilizations.<sup>2</sup>

The emphasis on a formal judicial system received new inspiration from the recent research in new institutional economics on recent on the importance of informal institution or relationships and community based mechanism to enforce property rights and contracts. As Greif and others argued, while informal mechanisms 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, it was when the scale, the extent, and frequency of exchange began to stretch across distances and time that the cost and risks tended to grow exponentially (Greif 2006). An independent formal legal system with replicable standards and enforceable rules is a powerful aid in the large scale of impersonal exchange and complex commercial and industrial organizations that characterized modern capitalism.

The Weberian synthesis permeated the thinking of generations of sinologists on the Chinese legal tradition. Edwin O. Reischauer and 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 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. Whereas Westerners have felt it safer to be ruled by impersonal laws rather than by personally fallible judges, the Chinese, presumably following

Mencius in his estimate of human nature, have felt it safer to be ruled by ethically-minded administrators rather than by impersonal and, in their estimate, purely arbitrary laws (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. He sees the Chinese legal tradition as originating in tribal wars, dominated by public law and official legal codes, collectivist, moralistic, singular and closed, founded on rule by man and the ideal of no litigation. On the other hand, Western law originated in clan conflicts, dominated by private law and legal jurisprudence, individualistic, religious, pluralistic and open, founded on the rule of law and justice (2006). These broad-brush characterizations, while useful to a certain extent, border on stereotypes about legal cultures that have become the target of criticism from recent revisionist scholarship. 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 its upholding of private property rights and enforcement of private contracts than previously recognized (see Philip Huang 1996, Zelin, Ocko and Gardella 2004). This is also in line with

another separate but influential argument advanced by Kenneth Pomeranz in his influential book, *Great Divergence*, which views property rights or the freedom to contract in traditional China as no less secure or flexible than in Western Europe. The in turn implies that the roots of economic divergence between China and Western Europe in the modern era need to be sought in areas other than ideological and institutional factors.<sup>3</sup>

This chapter offers a critical review of recent literature on Chinese legal tradition, and argues that while recent revisionist literature makes significant contributions to a lively and timely re-examination of the 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 economic divergence in the modern era. By bringing in legal regimes into the Great Divergence debate, this chapter broadens the existing European focused “legal origin” literature to the wide Eurasian context. In particular, it makes a focused comparison of the contrasting patterns of the historical development the legal professions and jurisprudence as seen between the Chinese legal tradition disciplinary mode of administrative justice and the English common law tradition. It argues that the increasing control of an independent legal profession over the making and interpretation of legal rules in early modern England represented a

historical process of internal legal logic and reasoning triumphing over political or other expediencies, which continued to dominate the priority of a state-centered legal system in traditional China. This contrast is reflective of the much larger differences in long-term evolution of political power structure between Western Europe and China decisively shaped the origin and design of their legal regimes which ultimately structure their respective regimes of property rights, contract enforcement, as well as their long-term growth trajectories.

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

### **1. 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 the traditional Chinese legal regime as "disciplinary" versus the West's

“adjudicative” or “legal” emphasis. A disciplinary legal regime is akin to a military tribunal system whose overriding interest is the sanctioning of deviant behavior to ensure group solidarity and social order (p. 6). We can trace this disciplinary element in 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 documents do not distinguish between punishment and military conquest (兵刑不分), in contrast to the Latin etymology of law (“*jus*”), which specifically denotes rights (Liang, 2002, p. 37-38).

In traditional Chinese law (as in Roman law), the emperor is the source of all law. The traditional Chinese legal apparatus had been an integral part of the administrative system, with the bureaucracy within the hierarchy – from the county level to the emperor – acting as the arbiter in criminal cases. The Chinese penal code was very elaborate and systematic. The compilation of China’s first comprehensive legal code dated from 629 in the Tang dynasty (revised and completed in 737), only a hundred years after the Justinian code (drafted in 529 and promulgated in 533). Indeed, the early codification of formal Chinese legal codes had its parallel to that of Roman law where codification also followed the centralization of royal and imperial Roman power (Malmendier 2009). In the Qing legal system, almost all the court rulings on criminal

cases were required to cite specific official penal codes and statutes as support.

Reflecting the highly centralized and hierarchical structure of Chinese bureaucracy, all legal decisions on criminal cases would - irrespective of whether or not there were appeals - need mandatory review through the administrative hierarchy, with capital punishment personally examined by the emperor himself (Shiga et al. p. 9). In principle, bureaucrats were agents of the imperial government, and hence would face punishment if their rulings were found to be mistaken after review.

Despite the elaborateness and sophistication of this legal system, in the end it was a bureaucratic code designed for officials to mete 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).

If the emperor made decisions and rulings outside the purview of existing legal statutes or contravened existing codes, these decisions became new laws or sub-statutes, “Tianli” (条例), to be used as a legal basis for future cases (Shiga et al., pp.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 in China's formal legal system (Shiga et al., pp. 120-121, Su 2000, chapter 9). It is mistaken, however, to think that such a legal system would be at the arbitrary whim of the rulers, despite the fact there were no legal or constitutional constraints on the imperial power (apart from informal ones such as the much talked about "mandate of heaven"). As Jones pointed out, since no single person could run an empire as vast as China, the most effective way for the emperor to control his bureaucratic agents was by enacting relatively standard and stable rules. An emperor could override the bureaucracy, but he could not do it very often if he wanted to retain his system of government. This logic laid the foundation for a certain degree of consistency and transparency within the legal system (see Jones, p. 49 and Ocko and Gilmartin, p. 61).

The fundamentally penal nature of Chinese legal codes render it less amenable to dispute resolution of a commercial and civil nature, which led to the long-held view that there was a complete absence of Chinese civil and commercial law. New research, however, reveals that the county magistrates, the lowest level bureaucrats, handled and ruled on a vast number of civil and commercial disputes that did not entail any corporal

punishment. Was there then 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 to have been resolved or terminated only to the extent that both litigants consented to the settlement and made no further attempts at 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 fulfill his or her original commitment to the settlement. Thus, this kind of ruling lacked the kind of binding and terminal force that legal adjudication has in the modern sense.<sup>5</sup>

Shiga was also interested in the legal basis of magistrate’s rulings, and found that although they invoked 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 for the resolution of each

individual case, with full consideration for its own merits. Shiga generalized 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 the nineteenth century in Shandong 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 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 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 clearly shows that the magistrate's ruling went far beyond narrow legal spheres. In fact, he was much more interested in influencing the outcome of the case – rather than the rules – by bringing about what he viewed as 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 a legal basis. Shiga's particular interest in this case comes from the fact this was one of the few that specifically cited a local custom. But clearly, as Shiga points out, the customs cited here were nowhere implied as the legal basis of his ruling or as a binding social rule. In fact, Shiga pointed to other cases where local customs were simply ignored or even condemned (Shiga et al., pp. 57-59).

Clearly, legal rulings on civil cases by the magistrate's court often served multiple objectives, which sometimes included redistribution. Indeed, as stated by one of China's legendary iconoclastic late-Ming bureaucrats, Hairei (海瑞): "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>6</sup> This has led scholars to question the fundamental meaning of courts and contracts in traditional China. Instead of defending the terms of the contract, Terada argued that the magistrate's court more often served as a forum to renegotiate a new settlement to accommodate the changed conditions.

“Contract” in traditional China was merely a written proof of a mutual agreement that may or may not have binding power in 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, “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 relationships behind the contracts partly explains the motivation for litigation at the magistrate’s court. People filed complaints to enforce a contract and settle a debt, but also, by having a case accepted for hearing or getting a favorable ruling, they maneuvered the balance of power in favor of the litigants in the social networks, a process more aptly termed “liti-negotiation” (Ocko and Gilmartin, p. 71).

This largely Weberian re-interpretation of the traditional Chinese legal system is not without challenge. Based on Qing archival legal cases of civil disputes, Philip Huang concluded that the rulings of magistrates were far from arbitrary, but were rooted in formal legal codes and seemed legally binding for most of the cases. As pointed out in a series of rebuttals by Shiga and Terada, however, Huang’s somewhat contentious finding hinges on the very specific methodology 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 were 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 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, when Huang's criticism of Shiga is framed in this way, it actually brings him closer to Shiga's original position, in which he explicitly stated that the 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 were also partly formed through the codification of local customs and norms, which may well have reflected 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.

## **2. Convergent or divergent legal traditions: legal professions in China and England**

To appreciate the often subtle yet fundamental differences between the Chinese and Western legal traditions, let us start with Harold Berman's characterization of the fundamental features of the Western legal tradition traceable to the papal revolution of the Middle Ages that marked the beginning of the separation of church and state:

- There is a sharp distinction between legal institutions and other types of institutions. Custom, in the sense of habitual patterns of behavior, is distinguished from customary law, in the sense of customary norms of behavior that are legally binding.
- The administration of legal institutions is entrusted to a special corps of people, 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. .... (Harold Berman 1983, p. 7-8).

While Berman's characterization is structured within Western legal tradition, the somewhat peculiar historical development of the English common law regime makes it more interesting to compare with the Chinese legal system. Unlike the Continental civil law regime, which is often premised on abstract principles and logical deduction, the case-based method of reasoning in English common law seemed, at first sight, to share a common feature with Chinese magistrates' reasoning based on the "situation, reason, and law" of each civil case. Indeed, the casuistic nature of English common law led to Max Weber's famous criticism of its being "irrational," which itself is paradoxical to the whole Weberian thesis, given that England was the pioneering nation of modern capitalism (Li, Honghai 2003, pp. 352-357).

Yet, behind this seemingly shared "irrationality" between the two legal traditions lay a sharp distinction. As noted by Maitland, what allowed the English case-law system to develop independently from the Continental Civil Law regime, 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 period would be known as the third University of England (outside Cambridge and Oxford) (J.H. Baker 2002, p. 161).

The power of the professional legal body would have come to naught had it not been that the accreditations from the inns of court became the exclusive way to enter the legal profession of lawyers and judges in the common law court, and even the royal judiciary appointments. The gradual control by independently trained professionals of the power to interpret the law also sowed the seeds of judiciary independence from political or state control. By the seventeenth century, even as the supreme ruler of the land, King James I was famously admonished by his own royal chief justice, Edward Coke, 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 (Berman 1983, p. 464, Jones p. 46-47).

Legal professionals also became prominent in parliamentary representation and

other important political posts, allowing their influence to extend far beyond the legal sphere and bringing a legal mindset conducive to political changes that eventually saw the rise of an English Constitutional tradition rooted in the rule of law. Throughout the often bloody and violent political wrangling of the seventeenth century, the legal community sided with the parliamentarians to control the jurisdiction of the king's prerogative courts and eventually secure the independence of the English judiciary and the triumph of the common law courts after the Glorious Revolution of 1688 (Berman 1983, pp. 214-215, J.H. Baker 2002, pp. 166-8, Chen, chapter 6).

The triumph of legal and professional reasoning over the expedience of political logic and vested interests was essential for an autonomous legal community to emerge as a safeguard to consistency and predictability in legal outcomes derived from the case-law methods, even before the establishment of the strict doctrine of binding precedents by the nineteenth century (Duxbury, chapter 2). The autonomy of the legal profession also touched off a dynamic process in which judges and lawyers, through reasoning based on legal logic such as the extension of "legal fictions," gradually transformed what had started out as a mere set of royal civil remedies to a body of legal rules covering wide-ranging commercial and civil disputes (Berman 2003, chapter 9). Hence the growth of common law took on its own logic and course through a bottom-up

process of law-finding and law-making. This historical context possibly provides the missing link to resolving the so-called Weberian paradox of the English legal system and sheds new light on his enigmatic comment: “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 system presents a sharp contrast to the professionalization in England over time. Not only did the entire legal system continue to be 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 “laymen” (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 in 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 local knowledge of the county he was serving. As a magistrate could face demotion or even physical

punishment if his legal decisions were reviewed and determined to be mistaken by the upper level administrative hierarchy, or if the discontented litigants appealed to his superior (an extremely costly process) against his rulings, the effectiveness of his rulings to satisfy the review from the above became important.<sup>8</sup>

As a result, most magistrates came to rely heavily on the legal assistance of the so-called “mu-you” (幕友), the private legal secretaries hired at their “personal” expense. These legal secretaries were not allowed to be physically present at the court, and thus operated behind the scenes, basing their advice entirely on the written documentation. The magistrates’ dependence on their personal legal secretaries also led to 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. As their legal assistance tended to encourage legal suits that clearly clashed with the state objective of social stability, litigation master as a profession had long been stigmatized with various pejorative labels, was 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 in the late eighteenth century, related with pride how he handled these litigation pettifoggers after catching them: they would be physically tied to a column in

the magistrate's court and put on public display to witness the litigation 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 (see Chiu 2004, pp. 55-6).

With 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 operation of an informal legal profession either underground or behind the façade of a government bureaucrat in the magistrate's court room forms a sharp contrast to the trend towards formal institutionalization of an increasingly autonomous legal profession in England in the early modern era.

### **3. Legal regimes and political regimes**

The origin of this divergence in legal traditions can at least partly be traced to historical divergence in political structures between a centralized empire in China and political fragmentation and independent competing power groups within each polity in Western Europe.<sup>9</sup> The peculiar political structure that had fragmented the 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 interests. As argued by Greif (2008), the existence of elites with administrative powers in Europe constituted an essential precondition for the rise of constitutionalism. In England, the ability of parliamentarians to mobilize administrative and military counterweights against the king allowed the growth of independent corporate bodies such as the legal community.

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 served the aim of political control and social stability, the political dominance of a unitary imperial rule rested on the elimination of any independent contending elites and was supported by a highly centralized bureaucratic machine, both of which limited the rise of autonomous civil bodies.<sup>10</sup> A formal and autonomous legal profession constitutes a potential threat to the imperial monopoly by contesting for the power to make and interpret the rules. Indeed, throughout the Qing, the emperors controlled the power to directly review legal cases submitted through the Ministry of Justice especially those involving capital punishment or against high level officials, sometimes affirming but other times overturning rulings made by ministry officials.

Wang Zhiqian's study reveals hardly any case in which ministry officials contested the emperors' opinions on individual cases in the Qing period, let alone their legitimacy for final judicial review, as justice Edward Coke famously did to King James I in England (Wang Zhiqian pp.204-205). In fact, as vividly revealed in Zhen Qin's quote, the official letter from the Ministry of Justice to Qianlong emperor's revision request to amend a legal decision in 1746 was one of immediate compliance accompanied by admissions of grave guilt, remorse and trepidation on the part of the officials (2003, p.76).

Ultimately, this imperial monopoly over the interpretation of legal and administrative rules gives the rulers the power to rule as dictated by the political needs of imperial governance. Indeed, as the traditional Chinese saying "*yindi zhiyi yinshi zhiyi*" (因地制宜 因时制宜) goes, legal enforcement should be adjusted to suit the time and place: laws could be implemented more harshly in times of lax discipline and more leniently in times of stability (Terada 2007, p. 82). The extent of this discretionary power over enforcement was allocated through the bureaucratic hierarchy in descending order, with the emperor sitting at the top. This is consistent with what Ch'u T'ung-tsu's classic study described as the hierarchical nature of the Chinese law, in that not only did the senior members in the society (whether defined by bureaucratic or patrilineal status) receive lesser punishments for the same crime than the junior ones, but also the

operating rules and procedures followed by officials at the lower level courts or administrative levels could not touch officials (or gentry with academic degrees) who ranked higher in the hierarchy.

The power of discretion represents a peculiar form of *de jure* total power in the sense that not only could the rulers choose when and where to exercise it, but also that, given the resource constraint of a traditional empire, they might opt not to use it in areas where no direct state interest was at stake. Indeed, the state's long-standing policies on civil and commercial disputes discouraged formal litigation and encouraged 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 with the condition that the state could exercise control over these groups or communities through a system of collective responsibility.<sup>11</sup> Meanwhile, the *de jure* total power gave the rulers a free hand to intervene where they saw fit in almost any aspect of Chinese society, public or private, criminal or civil. This led to a lack of distinction between legal and extra-legal, or what Liang Ziping termed as "ethicalization of law" and "legalization of ethics" (Liang 2002, chapters 10 and 11). Clearly, the overriding interest of this state-dominated legal system was in the *ex-post* outcome not the *ex-ante* rules.

Again, this *de jure* total power did not necessarily mean that that rulers had no

respect for consistency and regularity of rule, which continued to remain as the most effective way for the emperor to solve his agency problem in a vast empire. Indeed, as brilliantly demonstrated by Zheng Qin, when the somewhat paranoid but wily Yongzheng emperor (1722-1735) was bent on eliminating one of his powerful high-ranking official, he followed all the proper legal procedures to “allow” the Ministry of Justice to slap him with death penalty, being accused of having violated a shocking 95 Qing criminal statutes when in fact the gist of his offenses may be that he simply was getting too arrogant and irreverent. Zheng pointed to numerous other historical examples of legal procedures and rules being manipulated for political purpose (2003, pp.77-81). Hence, self-imposed respect for rules and procedures from the top down is a far cry from the rule of law which was institutionalized bottom-up.

In England and large parts of Western Europe, the legal systems had also reflected the interests of the ruling elites and their vested power structure in the early modern era. But a crucial difference is that the ruling elites there usually consisted of a coalition in the form of corporate groups such as cities and guilds and above all, parliament, who maintained a relatively independent existence to the royal or political power structure. As property and wealth defined membership status of the political and corporate elites, they gained an independent existence in and direct access to the formal

political structure through the institution of political representation, a uniquely Western institution Medieval in origin. Hence the clarification and defense of property rights became a defining feature in the evolution of the Western legal system. Accompanied by the rise of an autonomous professional legal class, this political structure made possible the emergence of the rule of law, first for the propertied elites, and later to other economic and social classes (North, Wallis and Weingast 2009, chapters 3 and 5).

In China, however, the route to power went in the opposite direction: property emanated from political power; properties or property rights were secondary or derivative to the social and political status of individual members within the power hierarchy. We can find this phenomenon in historical tales of once penniless civil service examination candidates who, by virtue of having obtained degrees after years of failures, found themselves quickly swarmed by the men of their village, with the poor offering themselves as domestic servants, the rich transferring part of their land deeds, and the money lenders offering interest-free loans – all in the hope of gaining favor and protection once the civil servant was in office (Ping-ti Ho, pp. 43-4). Of course, most of the capital and wealth may have been created and accumulated outside officialdom. But the massive investment of Chinese merchant lineage in their offspring's preparation for China's civil service examination or their purchase of official titles, as well as

concentration of wealth in the distinctively bureaucratic class of Chinese gentry, were all testimony to the predominance of political status or posts over property ownership.<sup>12</sup> This is what led to what Deng Jianpeng termed the fundamental dilemma of property rights in China: the weakness of formal legal protection led property owners to seek custody under political power, yet property thus generated through political power were fundamentally extra-legal (Deng, p. 69).

The dilemma of formal property rights could explain the wide gulf often observed between formal legal rules and private customs in early modern China. Deng Jianpeng, for example, pointed to the clear expressions of private property rights in various forms often found in the tens of thousands of private land sale contracts in traditional China. But there were few attempts at any systematic institutionalization or codification of these rights in the state legal system, whose overriding interest in private land transactions remained in the securing of land taxes.<sup>13</sup> The other illuminating example is the case of copyright in traditional China. Contrary to the contemporary image that there was no concept of intellectual property rights, Deng argued that the early invention and diffusion of printing led to rising demand and repeated attempts by publishers to assert and defend their property rights to 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 copyright was largely motivated by political censorship or the protection of state sponsored publications of Confucian classics (Deng, chapter 3).

The gap between state laws and private customs in China in fact led Shiga and Jerome Bourgon to question the translation of the Chinese word “*xiguan*” (习惯) as “custom,” which was not really the exact equivalent. “Custom” in the West was not only a sociological phenomenon but also a judicial artifact that was asserted by witnesses or appreciated by the jury, often with a clear territorial delimitation. In contrast, “custom” in China, according to Shiga and Bourgon, identifies only loose, largely unwritten social practices that had no territorial delineation. They did not harden into law.

For that matter, Shiga and others also questioned the appropriateness of translating the term “*lu-xue*” as “jurisprudence.” (Zhang Zhongqiu, chapter 6, Shiga et al., p.13-15). In fact, Shiga pointed out the etymology of the word “*lv*” (律): refers to musical notes, which implies that the Chinese “*lv-xue*” is all about finding the appropriate scale of punishments for crimes (Shiga et al., p.16). Legal literature did blossom in the form of technical guidebooks for the litigation master profession or legal secretaries and bureaucrats, as well as in the numerous well-known private compilations of legal cases tried and ruled on in the court (see Zheng 2003, pp.497-8, also see the

chapters by Kishimoto and Zurndorfer in this volume). 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. Furthermore, the fact that most of the so-called sub-statutes supplementing the formal Qing legal codes were derived from the judgment of actual legal cases led to the argument for an embryonic form of Chinese case-law. However, as emphatically pointed out by Su Yegong, the legal validity of these sub-statutes rested solely in the power of the Chinese emperors, as contrasted with the English common law regime where binding precedents were sent through professional judges (2000, 205-217). Likewise, the practice of ruling by analogy among bureaucrats was often discouraged for fear that officials might deviate too far from the formal codes or imperial instructions (Zheng 2003, p.501-2).

Therefore, 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). Because internalized and intuitive reasoning did not enter into a sphere of public knowledge that was subject to debate, reflection, analysis, or

synthesis, traditional China did not have one of the most important dynamic elements that Berman emphasized for European law: its historicity, or its capacity to grow with its own internal logic, or, as embedded in the common law regime, the institutional capacity of law-making and law-finding from the bottom up. In this sense, the formal institutionalization of an independent and autonomous legal profession and legal education marks an important step towards the rise of an impartial third party enforcement mechanism that distinguished the rule of law from the the rule of man, a point that could be lost in the type of *ex-post* “matching exercise” engaged in by recent Chinese legal revisionist scholarship.

## **Conclusion**

The argument for the relative economic efficiency of divergent legal traditions is not a value judgment against the relative merits of comparative civilizations or multiculturalism. Nor should it be viewed in a static perspective. 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 nineteenth and twentieth centuries, even before the clarification and reform of formal rules and institutions. The traditional preference for flexibility over fixed rules may have helped Chinese reforms 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.

These developments have led to reinterpretation of Chinese economic history that has taken to task the long-term stagnation thesis, instead, maintaining there was substantial economic and substantial progress and perhaps even demographic transition for early modern China. While both the post-WWII East Asian miracle and post 1980 Chinese miracle provided the important motivation for the revisionist impulse, it is often easy to forget how many political and institutional transformations transpired in the past one and half centuries to enable the modern economic growth achieved today. What probably distinguished East Asia from the rest of the developing world today, or what Max Weber failed to anticipate, was its learning capacity to absorb not only Western technology but also formal institutions — from legal system to state-building and monetary regimes.<sup>14</sup> In this light, the claim by the revisionists that, had the coal

deposits been located in the right spot, or had new territories been discovered and opened up, the 18th century China or East Asia-way before all the wrenching ideological and institutional revolutions under the nineteenth-twentieth century Western impact-could have engineered an industrial revolution all on their own, seems to be pressing its luck too hard.

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. The rise of an independent legal profession in England and Western Europe and its absence in traditional China was merely reflective of two contrasting political structures at the ends of Eurasian continent, that possibly bear greater explanatory power on their long-term economic divergences in the early modern era. To the extent that those institutional and epistemological elements that underpinned the legal revolution in the eleventh and twelfth centuries – the separation of church and state, the emergence of an independent territorial jurisdiction, the pursuit of transcendental, objective, and rectifiable standards – were also relevant for the rise of a scientific revolution in early modern Europe, as argued by Toby Huff, it is also important to take seriously the link between legal institutions and the origins of the industrial revolution.

It is easy to underestimate the dynamic implication of the growth of public

knowledge in the form of jurisprudence often associated with a formal and independent legal regime. Indeed, 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 juridical reasoning in many ways paralleled some methodological features that underpinned the early modern scientific revolution. Just as the growth of an autonomous scientific community in the form of incorporated universities or independent associations had been essential to the rise of the scientific revolution, the rise and growth of an independent legal community, 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 very relevant. The significance of the industrial revolution lies in its cumulative and sustainable effect on growth, which is distinguished from earlier growth spurts that petered out. What changed in eighteenth century Europe is what he termed an expanded epistemic base resulting 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 can generate scale economies. And through a

feedback loop between what he termed prescriptive and propositional knowledge, knowledge itself generates a learning process that creates new knowledge (Mokyr 2002).

While much has already been written in the areas of science and technology, future research should also explore the mechanism that ties together the role of political institutions, legal regime, and jurisprudence (as public knowledge) to long-term economic growth.<sup>16</sup> This thesis may also be very relevant for explaining the long-term economic and institutional trajectories in traditional China. The process of social and collective learning – a process that may be the key to cumulative long-term institutional change – would either falter or curtail if legal knowledge or legal and intellectual communities were driven underground as in traditional China. The resultant outcome of long-term stagnation in the development of political ideology and legal jurisprudence might well explain the recurrent phases of violent rebellions and revolutions throughout Chinese history that led to the rise of new regimes or dynasties that were often mere modified replicas of the old order that the rebellion had come to replace.

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## Notes

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

<sup>3</sup> For a summary of the California school, see Ma 2004. See Pomeranz (2000) on the flexibility of traditional Chinese factor markets.

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

<sup>5</sup> For an illustration of this kind of ruling in action, see Terada's meticulous reproduction of a land dispute in a magistrate's court of late nineteenth-century Qing Taiwan based on 41 archival documents. It shows that the various rulings by different magistrates on this case became intertwined with the intervention of heads of lineage households, and the repeated appeals and maneuvering by the plaintiffs and defendants, including the use of private violence. It only came to an amicable end when both parties agreed to the proposed resolution a year and half later (Terada 2004b). Another more extreme case is recorded in a recent study of the commercial disputes in the highly commercialized Huizhou region of Anhui province in Ming and Qing. According to Han Xouyao, a serious protracted land dispute between two large lineages in the area broke out and lasted across generations for 128 years (from 1423 to 1551). There were 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 the village elder (pp. 93-117).

<sup>6</sup> Cited in Li Qin, 2005, p. 47. The redistributive impulse of legal ruling is well

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reflected in the magistrates' mindset on the local customs of land sales as studied by Mio Kishimoto (2003). In many regions, sellers of land often requested post-sales compensation from their buyers, especially after the rise in land prices after sales. This practice led to widespread abuse, with sellers requesting compensation at amounts and durations far beyond the customary rule or the original terms of the agreement.

Resorting to excuses of sickness, old age, hunger, bad harvest, and sometimes blatant extortion, some sellers turned this compensation request into an annual event (often around the Chinese New Year). In fact, as summarized by Kishimoto, there was a systematic tendency for magistrates' rulings to lean towards requesting the relatively wealthy land buyers to compensate the poor in spite of the original agreement.

<sup>7</sup> Zelin's argument of 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.

<sup>8</sup> See Ocko 1988 for the appeals procedure. For the very high cost of litigation at a magistrate's court, see Deng Jianpeng 2006, chapter 2.

<sup>9</sup> Shiga attributed the non-adjudicative legal regime in traditional China to the absence of an "adversary" culture in traditional China, unlike ancient Greece. See Shiga 2002, p.368. This cultural explanation seems difficult to reconcile with the motto held by

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victory-driven litigation masters in Ming and Qing China: “to win one hundred legal suits out of one hundred” (Chiu 2003).

<sup>10</sup> For a narrative on the political structure in traditional China and non-alignment of the imperial rulers and property class, see Ma 2010 and also Deng 2006.

<sup>11</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 corporal punishment in villages and guilds, see Han 2004, chapter 2 and Weber 1951, chapter 4.

<sup>12</sup> See Chang Chung-li for the enormous wealth accumulated by Chinese gentry bureaucrats. For the widespread practice of buying official titles by wealthy families, see Deng 2006, p.68-69. Zhang Haiyin’s study of merchant manuals also records the pervasive fear of bureaucrats in Qing China among merchants, pp. 237-8.

<sup>13</sup> See Deng 2006, chapter 1, for various examples of how property rights in land were often identified with the payment of state land taxes. Bourgon 2006 makes similar points. For an illustration of the nature of property rights in land, see Kishimoto (forthcoming).

<sup>14</sup> The introduction of a Western legal regime in East Asia started with the Meiji reform in Japan. In China, this was delayed until after the turn of the twentieth century, when

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the first set of civil and commercial codes were being compiled with the aid of Japanese legal specialists. It was also in the 1920s that a government sponsored massive survey of various private customs relating to private property rights and contracts was conducted with the aim of deriving formal legal rules from private customs. See Liang 1996 and Bergon. For the importance of the Western legal system in twentieth-century Shanghai, which experienced rapid economic growth, see Ma 2008. Indeed, Thomas Stephen's characterization of the 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 systems came head to head.

<sup>15</sup> See Berman (2002, pp. 265-9) for an argument on the methodological link between legal jurisprudence and scientific thought in the seventeenth century. Toby Huff (2003) represents a major proponent on the link between legal institutions and the scientific revolution in the West.

<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 the French Revolution, see Berman 2003, pp.13-16.