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Department of Law

The University of British Columbia
Vancouver, Canada

Date Oct. 28th, 2002
Abstract

This thesis brings forward a phenomenon and one question. The phenomenon is that, in China, laws are widely put aside. China has laws and terms used in these laws are quite familiar to western legal circles. The problem is that people do not give credit to the laws.

Why do people in China not abide by the law? The answer is provided through the analysis of the above phenomenon. I argue against two theories that analyze the phenomenon: ‘local resources’ theory and ‘language vagueness’ theory. The answer to the question does not lie on the fact that the language used in laws is somewhat vague, or on the proposal to establish a legal institution that is functionally compatible with traditional dispute resolution style that is acceptable to the public. Although the two theories are both important to change this phenomenon, the crux does not rely on either of them.

China has a long and almost uninterrupted history. This history has been heavily influenced by Confucianism that advocates public inequality. In the age of Confucius, the custom emerged that people did not respect the law. Instead, they respected the personal will of power wielders. Being obedient to the power was what Confucianism advocated. History continues. The motto still guides the administration in contemporary China.

Imperial Chinese governments educated people and made Confucianism infiltrate into every corner of the society and people’s minds. As an educational means employed by imperial Chinese government, foot binding disciplined people’s bodies so as to control people’s souls. People gradually became self-controlled slaves. The key to change this situation relies on education.
Education, a strong tool to mould people’s spirit, has not been given enough importance by the contemporary Chinese government. Jurisprudence, the science to establish people’s belief in justice, has been neglected. In China, the influence of legal theory on legal practice is mainly confined to commentary and argumentation.

China’s problem is that most people deeply believe that administrative power is superior to anything else. To change this belief, it is essential to establish power balance theory in China. Only when there are other powers examining the legality of executive powers, can liberties prescribed in the Constitution and laws be realized.
# Table of Content

<table>
<thead>
<tr>
<th>Chapter I</th>
<th>Introduction: Question and methodology</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The thesis</td>
<td>1</td>
</tr>
<tr>
<td>B</td>
<td>The phenomenon</td>
<td>6</td>
</tr>
<tr>
<td>C</td>
<td>The question</td>
<td>7</td>
</tr>
<tr>
<td>D</td>
<td>The methodology</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>1. Organizing technique</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>2. Two influential theories</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>3. About the title</td>
<td>17</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter II</th>
<th>‘The Leader Said That You Were Guilty’</th>
<th>18</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The case: “The leader said that you were guilty”</td>
<td>19</td>
</tr>
<tr>
<td>B</td>
<td>Legal analysis of the case</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>1. Questions internal to the case</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>2. Applicable laws</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>(a) The PRC Constitution</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>(b) The PRC Criminal Procedure Law</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>(c) The PRC Administrative Procedure Law</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>(d) The PRC Judge’s Law</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>3. Analyzing the questions according to the current laws</td>
<td>25</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter III</th>
<th>The Law with Two Faces</th>
<th>29</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The first face: law in books</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>1. Framework of foreign investment laws</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>2. Overall legal framework</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>3. Judicial activity</td>
<td>36</td>
</tr>
<tr>
<td>B</td>
<td>The second face: law in action</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>1. Typical examples of law violation</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>(a) Preventing the enforcement of judicial decisions by the courts of justice</td>
<td>40</td>
</tr>
<tr>
<td></td>
<td>(b) Law violation by the police</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>(c) Law violation by the administration</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>2. Comments on the Chinese legal system</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>(a) Comments from outside of China</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>(b) Comments from inside of China</td>
<td>53</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter IV</th>
<th>Seek the Crux</th>
<th>57</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>The historical cause—values of imperial China</td>
<td>58</td>
</tr>
<tr>
<td></td>
<td>1. Values upheld and suppressed in imperial China</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td>2. The same subject continued—the development of Confucianism: Li</td>
<td>62</td>
</tr>
<tr>
<td></td>
<td>3. The cost of these values</td>
<td>65</td>
</tr>
<tr>
<td>Chapter</td>
<td>Title</td>
<td>Pages</td>
</tr>
<tr>
<td>---------</td>
<td>-------</td>
<td>-------</td>
</tr>
<tr>
<td>V</td>
<td>Two Important Theories</td>
<td>77</td>
</tr>
<tr>
<td>A</td>
<td>The position of ‘local resources’ theory</td>
<td>78</td>
</tr>
<tr>
<td>B</td>
<td>The position of ‘language vagueness’ theory</td>
<td>82</td>
</tr>
<tr>
<td>C</td>
<td>The danger of both theories</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td>1. The danger of ‘local resources’ theory</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td>2. The danger of ‘language vagueness’ theory</td>
<td>86</td>
</tr>
<tr>
<td>VI</td>
<td>The Role of Education</td>
<td>88</td>
</tr>
<tr>
<td>A</td>
<td>Body and education</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>1. Body education</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>2. Body education and imperial Chinese government</td>
<td>91</td>
</tr>
<tr>
<td>B</td>
<td>The power of belief</td>
<td>95</td>
</tr>
<tr>
<td></td>
<td>1. Active belief</td>
<td>96</td>
</tr>
<tr>
<td></td>
<td>2. Acceptant belief</td>
<td>97</td>
</tr>
<tr>
<td></td>
<td>3. Passive belief</td>
<td>98</td>
</tr>
<tr>
<td>C</td>
<td>Necessities to change contemporary education</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>1. Problems in legal education of China</td>
<td>101</td>
</tr>
<tr>
<td></td>
<td>2. Obstacles to active belief</td>
<td>103</td>
</tr>
<tr>
<td>VII</td>
<td>Conclusions: Leading to active belief</td>
<td>106</td>
</tr>
<tr>
<td>A</td>
<td>The internal identification of judges</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>1. Judges' self-identification</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>2. Chinese judges' self-identification</td>
<td>110</td>
</tr>
<tr>
<td>B</td>
<td>The importance of Continuing legal education</td>
<td>110</td>
</tr>
<tr>
<td>C</td>
<td>Two other important elements</td>
<td>112</td>
</tr>
<tr>
<td>D</td>
<td>Establish the belief that administrative power should be in check</td>
<td>113</td>
</tr>
<tr>
<td>References</td>
<td></td>
<td>115</td>
</tr>
</tbody>
</table>
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Chapter I Introduction

—Question and methodology

In order to have this liberty\(^1\), it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; ... Again, there is no liberty, if the judiciary power be not separated from the legislative and executive...There would be an end of everything, were the same man or the same body, ... to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.\(^2\)

— Montesquieu

A. The thesis

In this thesis, I bring forward a phenomenon and one question. The phenomenon is that, in China, laws are widely put aside. The fact is that in China there are laws. Terms used in these laws are quite familiar to western legal circles. In spite of the laws, however, there is no judicial independence, few human rights, and low legal credit among the public\(^3\). This phenomenon is the main problem in China.

Through the analysis of the above phenomenon, I try to answer one question: why do people in China not abide by the law? I argue against two theories that analyze the phenomenon: ‘local


[Author’s note]


\(^{3}\) Chapter two provides a case to illustrate this phenomenon. Chapter three provides evidence for this argument.
resources' theory and 'language vagueness' theory. The answer to the question does not lie on the fact that the language used in laws is somewhat vague, or on the proposal to establish a legal institution that is functionally compatible with traditional dispute resolution style that is acceptable to the public. The two theories are both important to change this phenomenon. However, the crux does not rely on either of them.

China has a long and almost uninterrupted history. This history has been heavily influenced by Confucianism that advocates public inequality. Imperial Chinese laws were basically established under its principles. They over emphasized the right of higher social classes, the top of which was the monarch. The heads of family clans and political groups wielded the power granted by the monarch. In that time, the custom emerged that people did not respect the law. Instead, they respected the personal will of power wielders.

History continues. The old belief survives in every corner in the new China (China after 1949). After two revolutions, the 1911 revolution and the 1949 revolution, China remains a despotic or, at best, a transitional society—a quasi despotic society. It is almost common knowledge that a significant portion of top leadership posts, in both the Party and the state, in both central and provincial government, are occupied by graduates of Qinghua University, China’s leading engineering school. It is hard to say that graduates from engineering schools cannot make satisfactory leaders in a republic country. However, one obvious aspect of Qinghua graduates is that, since the mid-1950s, all Qinghua officials have been familiar with a motto, *tinghua chuhuo* (be obedient and productive). Being obedient to the power was what Confucianism

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advocated. The motto still guides the administration in contemporary China.

Why do some Confucianism values survive so long? One obvious reason is the education employed by imperial Chinese governments. Education made Confucianism infiltrate into every corner of the society and people's minds. I cite foot binding as an educational means employed by the Imperial China. It disciplined people's bodies, particularly, women's bodies. They chose the female's body because the female assumed the role as a mother. The mother is the first teacher of people. This educational means taught people to discipline themselves, to submit themselves and their children to the power, and to turn into self-controlled slaves. The history of foot binding is very long. As time passed, it became a widely accepted belief, almost a national belief: a passive belief in justice among the public. Foot binding, the educational means, died. Its effect survives. People still do not stand against state power holders' personal will. Whether or not the will is legal does not make much difference. In other words, the legality of anything is decided by the personal will of leaders. It is necessary to change people's basic value from being obedient to 'one man need not be afraid of another'. The key to this change relies on education.

Education, a strong tool to mould people's spirit, has not been given enough importance by the contemporary Chinese government. Or, it is possible that the Chinese government deliberately control the education so as to control the public spirit. It is reported that the Chinese central government had decided to speed up the development of education.\(^5\) In 1995, it announced a

\(^5\) Guo Nei (China Daily staff) *Vice Premier stresses role of science, technology and education (Xinhua)* at http://www.chinadaily.com.cn/edu/news/storydb/10/edu.html (Online news)
strategy to revitalize the country through education. Nevertheless, the government attaches more importance to the education of science and technology.\(^6\) In the following five years, it focused on promoting development through the integration of scientific and technological upgrades.

Humanities, particularly the science of law, have not received deserved attention. Jurisprudence, the science to establish people's belief in justice, has been purposely neglected. In China, the influence of legal theory on legal practice is mainly confined to commentary and argumentation. After a Constitution amendment or a new law is enacted, legal theories focus on arguing and commenting that the amendment or the law is the best one to date in China, or even in the world. The prestigious Beijing University Faculty of Law has not made much difference on this point.\(^7\) To some extent, in fact, education is wielded by the government as a method of controlling the soul. Higher education, including legal education, has been reduced purposely to career education.\(^8\)

To put administrative power in check, it is necessary to establish the belief that the administrative power should be in check. China's problem is that most people deeply believe that this power is superior to anything else in the world. To change this belief, it is essential to

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\(^6\) This is almost common sense in China. Also it has been reported in news. For example, see online news *Vice Premier stresses role of science, technology and education* (*Xinhua*), supra note 5.

\(^7\) Penn, *Thoughts on Peking University Legal Education*, at http://chinalawinfo.com/research/lgyd/details.asp?id=2059


By 'career education', the author means an education to train students to practice a career like a machine: only do it, do not think about it. [Author's note]
establish power balance theory in China. Only when there are other powers examining the legality of executive powers, can liberties prescribed in the Constitution and laws be realized. If there is no other power to put administrative powers in check, laws will remain in books, particularly those related to human rights.

Unfortunately, humanities textbooks in China criticize this theory. They dismiss it as a means ‘to cheat and suppress the public’. Legal theory books are heavily influenced by Marxism and Soviet communism. Consequently, they neglect the rationality of other theories. Even books published very recently hardly escape this doom. *The Realization of Law: A Sociological Analysis of Law* can be taken as an example. It is a book based on the author’s PhD dissertation. Among the 196 footnotes in the book, 68 are of Marxism and Soviet communism sources; accounting for more than thirty four percent; 64 are of all other countries’ sources except China, accounting for less than thirty three percent; and 64 are of Chinese sources. Taking into account the fact that those two sources influence other legal books in China, the 64 Chinese source footnotes add to the book’s Marxism and Soviet communism influence. It is a common characteristic for legal textbooks in China to debase Constitutions under power balance theory as ‘a means wielded by the ruling class for the purpose of class dominion’.

It is obvious that if the current situation does not change, and administrative power remains

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supreme, laws prescribing human rights and justice are merely empty chatter. I believe in Montesquieu’s theory. The government must be constituted so that ‘one man need not be afraid of another’. This theory can assist China to establish the public’s belief in justice and eventually change the present situation. China’s history and current situation testify that administrative power must have other powers as its balance. Otherwise human rights and liberty will remain only in books forever. The first step is to transform the image of power balance in textbooks. It is not a means employed by the bourgeois to cheat and suppress common people, but a thought that helps state power stay in balance. As a result, in the government ‘one man need not be afraid of another’. Penal sentences and police arrests will not be made under leaders’ personal will. Only then, can human rights, justice and liberty have a basic guarantee. This constitutes an on-going daunting task. The key to the task is education: to change judges’ self-image—judges are independent—and to educate political leaders to accept the fact that their power must not be absolute.

B. The phenomenon

“... theoretical deficiencies make the efficiency of law in action low. The phenomenon that some laws are almost completely put aside cannot be explained properly. Consequently, methods to deal with the phenomenon cannot be found. For example, a number of laws governing administration and bribes have been valid for some time, but there is still much government corruption. There are several laws regulating taxation and counterfeit products, but at the same time, there is prevailing tax evasion and counterfeit products. More seriously, people who know the facts refuse to be witnesses at court. Under the unified legal system, local administrative and judicial protectionism have grown out of

12 The two Italic words in this sentence are by the author. The purpose is to call to the readers’ attention the fact that a unified legal system and local protectionism are incompatible. [Author’s note]
control without any sign of reducing.\textsuperscript{13}

The research about these phenomena revealed a perplexing problem: it seems that the first phenomenon causes the second, and the second the third, and so on. And the final phenomenon causes the first one.\textsuperscript{14}

People complain that laws are put aside. They assume that the reason is that illegal actions are not found out and punished enough. As a result, the authority\textsuperscript{15} of law is reduced. The fact that illegal actions are not found out and punished enough is caused by inadequate state supervision that is supposed to be a result of relatively scarce social supervision and support.\textsuperscript{16} Finally, members of society are not willing to take part in social supervision and give support because illegal actions are not found out and punished enough. Thus, people do not trust the law, and the authority of law is discredited. Accordingly compliance of the law declines.\textsuperscript{17}

C. The question

\textsuperscript{13} Huang, Jianwu, \textit{The Realization of Law: A Sociological Analysis of Law}, supra note 10, pp.5, [Author’s translation]

\textsuperscript{14} Ibid.

\textsuperscript{15} This is a controversial concept, as Raz analyses in \textit{The Authority of Law: Essays on Law and Morality}. He proposes two different groups of authorities. The first group is ‘authority over people’ versus ‘authority to perform certain actions’. The second is ‘being an authority’ versus ‘having authority’. Among these concepts, the basic one is authority over people that he considers to be a species of normative power. (\textit{The Authority of Law: Essays on Law and Morality}, Clarendon Press, Oxford, New York, 1979, pp.21). If referred to a dictionary, the explanation is “a: power to influence or command thought, opinion, or behaviour”. (See on-line dictionary http://www.yourdictionary.com/cgi-bin/mw.cgi)

In my thesis, the word “authority” in the context of “authority of law” is closely related to power, particularly power over others.

\textsuperscript{16} Huang, Jianwu, \textit{The Realization of Law: A Sociological Analysis of Law}, supra note 10, pp. 5 [Author’s translation]

\textsuperscript{17} Ibid, [Author’s translation]
1. The question: why do people not abide by the law?

In England, the prerogative [crown] powers are the residue of the powers which it possessed in early times and which the courts of law recognized\(^\text{18}\). Despite the fact, the judicial control of governmental activities has evolved into an impressive legal character.\(^\text{19}\) History witnessed one of the most striking developments in English law during the last twenty-five years—the increased preparedness of the courts to intervene in order to control the exercise of governmental action. It does not matter whether the governmental activity in question is that of central government, or that of local government authorities.

In China, however, the case seems to be the opposite. There are no royal prerogative powers. Laws prescribe that people be equal before the law\(^\text{20}\). In reality, inequalities exist widely. Laws in action turn out to be the very opposite of what they prescribe in books.

The Revolution of 1911, led by Dr. Sun Yat-Sen, abolished the rule of the feudal monarchy and gave birth to the Republic of China.\(^\text{21}\) Feudalism was not overthrown by this Revolution according to the Constitution of the People’s Republic of China (PRC), but by the Communist Party led by Chairman Mao Zedong via the 1949 Revolution.\(^\text{22}\) Both revolutions claimed to establish a Republic of China, but the essence of feudalism survived both revolutions. The


\(^{19}\) Ibid. pp. 1.


\(^{21}\) Ibid, Preamble, paragraph 4.

\(^{22}\) Ibid. paragraph 5.
1949 Revolution claimed to build socialism. History however has not had any chance to see socialism in reality.

During the process of establishing socialism, particularly during the Great Cultural Revolution, there were virtually no published laws. Law schools were closed, the judicial system was dismantled, and members of the legal profession were re-educated to pursue other occupations. Social order was maintained by the structures of the Communist Party and rules and regulations were dictated by the party and administered by party committees. Though a legal system was re-established after the Great Cultural Revolution, the judiciary is not experienced and not formally trained in the law. As a result, the judiciary naturally maintains loyalties to where they came from—either a party function or the military. Law is policy in China, and throughout Chinese history law has always remained an instrument of centralized power, imposed from above rather than created from below. These facts have serious implications for the relationship between the judiciary and the government, making the curb of governmental power abuse harder.

To analyze this situation and make a good change, the Chinese legal academic circle initiates debates among which there are hot discussions about the ‘local resources’ theory. ‘Local

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24 Ibid. pp. 250.

resources' theory is an effort to explain and seek out a resolution for the 'perplexing cycle' phenomenon.\textsuperscript{26} It criticizes the 'law transplanting' theory and sets up its own thesis. That is, to make people rely on the formal law, it is important to establish a legal institution that can be compatible with traditional values.\textsuperscript{27} This theory gives a reason for its thesis that avoidance of the law is a product of an institution against a particular social background.\textsuperscript{28} To make people accept the law, it is necessary that the law be attuned to this particular social background. For this reason, other advocated methods such as improving common people's legal consciousness, and legal education, are of less importance.\textsuperscript{29}

Some authors criticize that there is vagueness and ambiguous authority in Chinese statutory language,\textsuperscript{30} assuming that these are the key problems of Chinese law\textsuperscript{31}. They say that for laws and regulations to serve as authority for the behavior of individuals and legal persons, statutes and regulations must be as clear, comprehensive and unambiguous as possible.\textsuperscript{32} If this character of laws and regulations cannot be realized, judges will construe the law unevenly or in accordance with their own interests\textsuperscript{33}. Consequently, the prospects for public and private enforcement will be reduced and uncertainty fostered.\textsuperscript{34} These authors' analyses are critical

\textsuperscript{26} For detailed analyses about 'local resources' theory, please refer to chapter five, \textit{infra}.

\textsuperscript{27} See generally Su Li \textit{Legal Reform, Rule of Law and Local Resources}, in Su Li \textit{The Rule of Law and Its Local Resources}, Press of China University of Political Science and Law, 1996, Beijing, pp. 3-22.

\textsuperscript{28} \textit{Ibid}, pp. 6.

\textsuperscript{29} \textit{Ibid}.


\textsuperscript{31} \textit{Ibid}. pp. 257.

\textsuperscript{32} \textit{Ibid}.

\textsuperscript{33} \textit{Ibid}.

\textsuperscript{34} \textit{Ibid}.
and important. However, Chinese statutory language is not unique with regard to ambiguity.\(^{35}\)

Ambiguity is inherent whenever a legislative body or other group reduces its purpose to a complex written document.\(^{36}\)

Based on the history and the current situation of China, I propose that the root reason why people do not abide by law relies on people's belief. The public does not have an active belief in justice. Instead, their belief in justice is passive.\(^{37}\) They blindly obey leaders' will. China's long tradition plays an important role in the formation of this passive belief. Consequently, the most important issue is not to perfect law in books, but to educate judges, government officials, and the public, so that an active belief in justice can be established.

2. An implied question: does China acquire the capacity to merge into WTO?

Through reviewing the relationship between the Chinese law in books and in action, this thesis tries to answer one question: Has China acquired the capability to comply with the WTO disciplines? This question is implied by the fact that people do not abide by law in China.

After China was accepted into the WTO fold on November 11\(^{th}\), 2001, Chinese law in action attracted more attention.\(^{38}\) China’s accession to the WTO was a big issue, not only for China, 

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\(^{35}\) Ibid. pp. 223.


\(^{37}\) I explain the two phrases—active belief in justice and passive belief in justice— in Chapter six, *infra*.

\(^{38}\) Before the date of November 11\(^{th}\), 2001, there were already some articles about the realization of Chinese law. For example, there is an article that reads "...the focus will move onto how China goes about making accession a reality and thereafter, the details of the deal and on how China goes about actually implementing the WTO Accord. The legislative and regulatory changes implicit within the WTO Accord, although agreed at the highest..."
but also for the whole world. Some authors have recognized the benefits for both the WTO and China: “Long-term interests of both the United States and the world will be best served if China becomes a WTO member. Over time, the integrity of the world trading system will be difficult to maintain if one of the largest trading countries in the world avoids complying with WTO disciplines.”

Some authors expressed the concern that new members might have some impact on the WTO with regard to its integrity. “The WTO's ability to manage the integration of new members while preserving the integrity of the WTO free trade principles, including resolution of inevitable disputes, will have a profound impact on the future of the WTO as a respected and effective world institution.”

Now that China has been admitted into the WTO trade system, the focus should be on the legal realization: is Chinese law in action consistent with that in books?

With regard to the inquiry raised by Montesquieu that, while inanimate things such as the stars and also animals obey “the law of their nature”, why man does not do so but falls into sin, Hart says “…laws may be broken and yet remain laws, because that merely means that human beings do not do what they are told to do…”

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Here the question arises of why do we have laws? Many authors have tried to analyze this question.\(^{42}\) Whatever the nature of law may be, if law remains only in books, can law still be law? We do not have laws to show off. Our purpose of laws is to shape society and predict reality. If laws do not live up to their functions to shape and predict reality, they fail to be laws.

This is, in fact, a problem of the effectiveness and validity of the law. Allott proposes a vocabulary for the purpose of analyzing clearly.\(^{43}\) He distinguishes between a valid norm and an effective norm. A valid norm, he proposes, is a norm which is formally correct, having been made in due form. An effective norm, however, is a valid norm that secures a high degree of compliance; i.e. one that is actually complied with.\(^{44}\) The validity of a norm does not depend on its efficacy or compliance.\(^{45}\) Valid norms and effective norms constitute two different and separate fields. In my thesis, phrases “valid norm” and “effective norm” are used as the same meaning.

"Laws exist, but enforcement lags"\(^{46}\) China has a legal culture in which administrative power prevails over any other powers. When the judiciary conflicts with the government power, there is a possibility that local government powers prevail over the Supreme Court. As a result, there


\(^{44}\) *Ibid*, pp.30.

\(^{45}\) *Ibid*.

are many valid norms, but there are not many effective norms. Lidong Huang reports that the judicial decisions of the Supreme People's Court were difficult to enforce because a local government interfered into the judicial process.\textsuperscript{47}

In short, why do people not abide by laws in China? Confucianism exerts a great influence on this phenomenon. China should change the whole educational system. Put more importance into humanities, particularly jurisprudence. Adjust the attitude to the power balance theory. Establish a more democratic relationship between the government and the judiciary.

D. The methodology

1. Organizing technique

This thesis has a prominent case study feature. Case studies, in this thesis, serve to make clear the picture of the 'law with two faces'. To some extent, the topic of this thesis is elusive. It is comparatively easy to research Chinese law in books. The laws exist in black and white. Some laws have official English translation.\textsuperscript{48} Terms employed in the law are quite familiar to western readers.\textsuperscript{49} This tends to leave a misleading impression to readers not familiar with the Chinese situation. They probably evaluate Chinese legal situation by formal Chinese law.

On the other hand, however, it is very difficult to study Chinese law in action for several\

\textsuperscript{47} Lidong Huang, \textit{Shanxi Local Court does not enforce the decision by the Supreme Court}, Legal Daily, January, 16, 2001, or refer website http://www.legaldaily.com.cn/gb/content/2001-01/16/content_12113.htm


\textsuperscript{49} For details, please refer to chapter three, section A: the first face: law in books. \textit{infra}. 

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reasons: the distance, the language gap, and so on. There are not many detailed investigations on Chinese law in action. Therefore, I will use case study as a main technique to organize this thesis. Several cases have been cited in different chapters to support the main idea of this thesis: there are laws in China, but the laws are widely set aside.

2. Two influential theories

In this thesis, I will attempt to combine Montesquieu's theory with case study to analyze China's law in action. According to Montesquieu's analysis on the forms of government and based on the facts of the cases, a conclusion can be reached that China, although claiming to be a people's republic, is in fact a despotic or a quasi-despotic society at best. Measured by many parameters such as the government's education, people's belief in justice and the relationship between administration and judiciary, China is not a republic. People do not believe administrative power can or should be in check. To change China's current legal situation, it is necessary to replace people's current ideas of power with Montesquieu's theory that 'one man need not be afraid of another'.

Another illuminating theory that gives me great inspiration is Richard Posner's Economic Analysis of Law. I do not use directly any principles of his theory, but his basic idea that economics is a powerful tool for analyzing legal interpretation and policy gave me great inspiration. Economics is a science to achieve an effect as good as possible with limited resources. The economic approach to law implies the principle that the limited nature of

50 ‘People’ includes common people, government officials, the police and judges.
resources must be taken into account when legal problems are analyzed.

With regard to China's case, this principle is of more importance. It has been recognized that people do not abide by law in China. Many authors try to analyze reasons and to propose solutions. Among them, there are 'local resources theory' and 'language vagueness theory'. These two theories are both important to change China's current situation.

From a theoretical viewpoint, it is the best road to improve everything at the same time: to make new laws to regulate the society; to perfect the language of existing laws so that they will be more clear; to educate people so that they will know law and abide by law, and so on. From a practical viewpoint, however, the limited resources do not permit the best road mentioned above. It is beyond argument that China has a huge population and relatively restricted material and human resources. With these limited resources, we cannot expect the best road. Instead, we should try a second-best way.

My proposal is to find the crux for the phenomenon and to put most of the resources into curing the crux. That is why I emphasize the importance of education. I am not arguing that China does not need to perfect its laws in books. On the contrary, I think that to improve laws in black and white is very important. Nevertheless, if taking into account limited usable resources, it is easy to see that perfecting laws is not the most important thing to do. If laws are improved continuously but the reality remains the same or is improved at a slower speed, the gap between law in books and law in action will become wider and wider. The effect will be opposite to what people are expecting: the law will be further discredited and it will be more
difficult to change people's belief in justice.

Based on the above consideration, it is of the first importance to change people’s belief so as to establish an active belief in justice in the whole society. The key to achieve this goal lies in education.

3. About the title

For this thesis, I went through several title changes. Yet, I was not satisfied with any of them until I read a non-academic book *Harry Potter and the Philosopher's Stone.* I always love to read fantasy books. I find them amusing, and they do tell some truth about the real world. When I almost finished it, a terrific title for this thesis suddenly presented itself into my mind.

“Harry felt as if Devil’s Snare was rooting him to the spot. He couldn’t move a muscle. Petrified, he watched as Quirrell reached up and began to unwrap his turban. What was going on? The turban fell away. Quirrell’s head looked strangely small without it. Then he turned slowly on the spot. Harry would have screamed, but he couldn’t make a sound. Where there should have been a back to Quirrell’s head, there was a face, the most terrible face Harry had ever seen. It was chalk-white with glaring red eyes and slits for nostrils, like a snake.”

The description, although describing an image in a fantastic world, explains vividly the main idea of this thesis. It is difficult to tell whether the second face of Chinese law is as horrible as Quirrell’s. One thing for sure is that they both are hidden somewhere elusive from the public’s eyes.

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53 *Ibid*, pp. 212
Chapter II  ‘The Leader Said That You Were Guilty’

“We must therefore suppose that there is a general belief on the part of those to whom the general orders apply that disobedience is likely to be followed by the execution of the threat not only on the first promulgation of the order, but continuously until the order is withdrawn or cancelled.”

—— Hart

“Article 5. In handling administrative cases, the people’s courts shall examine the legality of specific administrative acts.”

—— PRC Administrative Procedure Law

This chapter uses a case study to explain the phenomenon brought forward in the first chapter, to illustrate the extent of the fact that people do not abide by laws in China. The threat of laws, compared to leaders’ power, is almost equivalent to zero. Hart believes the threat to the disobedience of the law is a necessary part of laws. In China, leaders’ personal will has the capacity to dismiss the necessary part. This capacity makes people discredit laws and respect political power. Although the new Administrative Procedure Law prescribes the judicial examination over administrative power, this law does not have much influence in a society in which leaders’ will decides everything.

The new Administrative Procedure Law was considered a step in placing a check on the government’s power and was seen by many as a real effort by China to the rule of law.

55 Administrative Procedure Law of the People’s Republic of China, 1989, Article 5. [English translations courtesy of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the PRC]
However, when a de jure legal system has conflicts with a de facto legal system\textsuperscript{57}, the question arises as to which has the final say. Hart assumes that there must be an execution of the threat standing behind laws.\textsuperscript{58} Here we must emphasize the word “execution”. Only when the execution exists in the reality, will the threat be the real threat. Although Chinese laws provide punishment in case of a violation, enforcement lags,\textsuperscript{59} particularly when an administrative will is involved\textsuperscript{60}. Put in other words, because leaders personal will prevails over the law and its possible execution of the threat, the Administrative Procedure Law remains in books. The following case will illustrate this point.

A. The case: “The leader said that you were guilty”

This case is about a citizen of China who was sentenced to three years imprisonment because a political leader of the relevant local government assumed he was guilty.\textsuperscript{61}

\textsuperscript{57} A de facto legal system refers to Party and Government in China for the reason that administrative will can make quasi-judicial decisions that are sometimes even more enforceable for some complex reasons. (See Brown, Ronald C. Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics, supra note 56, Introduction to the Chinese Legal Process, pp. 7). Sun Guo-hua observes that, in some cases, regulations formally made do not embody people’s real actions. Sometimes they are mere theoretical ideals. In those cases, the law is, generally, the opposite of reality: law prescribes this, but people act according to something else. (See Sun Guohua Marxist Legal Theory: the Concept and Nature of Law, Chun-chong publishing house, Peking, 1996, pp. 394.) [Author’s translation]

\textsuperscript{58} H.L.A. Hart, The Concept of Law, supra note 41, pp. 23

\textsuperscript{59} Bullock, Jim E. Laws exist, but enforcement lags, supra note 46

\textsuperscript{60} Nanping Liu observes that, in China, it is Party policy, not the law, that regulates Chinese society, and that Party policy enjoys the respect of the citizens, including judges. Law is formalized policy. (See Liu, Nanping A Vulnerable Justice: Finality of Civil Judgements in China, infra note 195, 90. See also website http://web2.westlaw.com/search/default.wl?DB=TP%2DALL&RS=W1,W2,70&VR=2.0&SV=Split&FN= top &MT=Westlaw&RecreatePath=%2Fdirectory%2Fdefault%2Fw1). But here arises another question that is generally out of legal research, i.e., Party policy in some cases cannot be distinguished from Party leaders’ personal will.

\textsuperscript{61} Chen, Lu-min, The leader said that you were guilty, in Legal Daily, Nov. 04, 2001, or at http://www.legaldaily.com.cn/gb/content/2001-11/04/content_26717.htm
Zhang Chong-bo was the general engineer of He-nan Lu-shi Herb Group Company that was located in Lu-shi County of He-nan Province in China. Since 1997, he had written several essays to make public the Image Projects\(^\text{62}\) of Lu-shi County local government. The leaders of the government considered him a nuisance. As a result, a leader instructed the police to arrest Zhang. However, during the judicial process in court, the judges could not find any evidence to prove that Zhang was guilty of any crime or even minor illegal actions. When the dean of the County Court reported the case process to the secretary of the Communist Party of the county—Du Bao-gan, Du answered angrily: “You all are fools! Having been working on this case for almost eight months, you only worked out that he was not guilty. Sentence him to three years of prison! You must do it!” Then the dean passed on the instruction to the relevant judges. As a result, Zhang Chong-bo was sentenced to three years of prison.

The above case does not stand alone in contemporary China.\(^\text{64}\) Li Chang-he, the former Secretary of Politics and Law Committee of Ping-ding-shan City in He-nan Province,

\(^{62}\) *Image Projects* refers to projects invested by governments that are costly but give little benefit to local people. The purpose is generally to give leaders at higher levels an impression that the relevant government has done some good things for the local people. Thus they are generally called *Image Projects*. [Author’s interpretation]

\(^{63}\) According to the standard of political power, secretaries of Communist Party are considered main leaders of the state, virtually number one. [Author’s interpretation]

\(^{64}\) Because these kinds of cases can hardly be reported before leaders in question are finally found guilty and sentenced, one can deduce that there are probably other cases similar going on without being officially noticed. By “officially”, I mean that even common people know that fact, they fear to be proven guilty by merely the will of the leaders in question, so they pretend to be unknowing. There are some similar cases reported in China. Some are about political power interfering with the compliance of laws and regulations. For example, please refer to Congming, Zhang, *Too Many Benefits Keep Away Foreign Investors*, at http://www.chinafiw.com/2000news/010120/3.htm. Some are about local governmental power affecting the enforcement of judicial decisions. For example, please refer to Huang Lidong, *Shanxi Local Court does not enforce the decision by the Supreme Court*, supra note 46.
instructed the local police agency to arrest a citizen, Lü Jing-yi, because Lü reported to relevant agencies that Li was suspected of accepting bribes.65 After the police agency arrested Lü, Li requested that Lü be sentenced. The judges in charge, although knowing that Lü was not guilty, under political pressure, sentenced Lü to one year of imprisonment. When announcing the decision, the judges said to the defendant: “Lü, you were not guilty, but the leader said you were guilty. We cannot help. Please understand.”66

B. Legal analysis of the case

The judges in question simply took it naturally to obey a political leader’s arbitrary will. There is no law prescribing that during or after judicial process, judges in charge report the situation of the case to any political officials and obey the leaders’ instructions. On the contrary, the PRC Constitution prescribes that all citizens, legal persons and other organizations must act according to the Constitution and the law,67 and the PRC Administrative Procedure Law provides that the people’s courts examine the legality of specific administrative acts when deciding administrative cases.68 Despite the provisions, judges simply put the Constitution and the laws aside and submitted themselves and individuals’ human rights to political leaders’ will.

1. Questions internal to the case

65 Chen, Lu-min, The leader said that you were guilty, supra note 61.
66 Ibid.
68 PRC Administrative Procedure Law, 1989, article 5.
Around these cases, there are questions deserving serious attention.

1. Who gave the leaders in question the authority to order the police to arrest a citizen?

2. Should the dean report the judicial process where no laws existed that imposed upon him such an obligation?

3. What if he did not report?

4. Why did the words such as “You all are fools” not sound insulting to the judges, or put in another way, what gave a political official the right to use insulting words to a judge when the judge did nothing wrong or illegal?

5. What gave a political leader such a privilege to instruct judges?

6. Why did the judges in question obey the instructions where no laws gave any basis for those instructions?

7. What if the judges in charge did not obey the instructions?

8. In general, who decides whether a person is guilty or not of any crimes in China?

2. Applicable laws

Before analyzing these questions, relevant provisions of relevant laws deserve a review. There are four laws prescribing the relationship between the judiciary and the administration. They are the Constitution of the People’s Republic of China, the Criminal Law of the People’s Republic of China, the Administrative Procedure Law of the People’s Republic of China, and the Judge’s Law of the People’s Republic of China.

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72 Judge’s Law of the People’s Republic of China, 1995
(a) The PRC Constitution

The Constitution prescribes that all state agencies, the armed forces, all political parties, public organizations, all enterprises, and institutions must abide by the Constitution and the law.\textsuperscript{73} All acts in violation of the Constitution or the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law.

The constitution also provides that the people's courts exercise judicial power independently in accordance with the provisions of the law. They are not subject to interference by any administrative agencies, public organizations or individuals.\textsuperscript{74}

Combined together, the above two paragraphs provide that political leaders do not have any right to interfere with judicial process.

(b) The PRC Criminal Procedure Law

The Criminal Procedure Law provides that the public security agencies [the police] are the only agencies responsible for investigation, detention, execution of arrests and preliminary inquiry in criminal cases, the people's prosecuting agencies are the only agencies responsible for authorizing approval of arrests, conducting investigations and initiation of public prosecution of cases. And the People's Courts are the only agencies responsible for adjudication.\textsuperscript{75} Those provisions mandate that the People's Courts exercise judicial power

\textsuperscript{74} Ibid, article 126.
\textsuperscript{75} The PRC Criminal Procedure Law, 1979, as amended in 1996, article 3
independently; and that the people’s prosecuting agencies exercise prosecution independently. They should be free from interference by any administrative agencies, public organizations or individuals.

As for supervising judicial criminal proceedings, the Criminal Procedure Law provides that the people’s prosecuting agencies exercise legal supervision over criminal proceedings in accordance with the law.\(^{76}\) This means that judges are not obliged to report judicial processes to any political leaders.

The Criminal Procedure Law has a similar provision to the principle of being innocent until proven guilty. It says: “No person shall be found guilty without being judged as such by a People’s Court according to the law.”\(^{77}\)

\(c\) The PRC Administrative Procedure Law

With regard to administrative cases, the PRC Administrative Procedure Law prescribes that the people’s courts examine the legality of administrative acts.\(^{78}\) This provision provides the opposite of what is happening in the reality. The reality is that some administrative officials examine and overrule judicial activities.

\(d\) The PRC Judge’s Law

The goal of the PRC Judge’s Law is to ensure that the People’s Courts independently exercise

\(^{76}\) *Ibid*, article 8

\(^{77}\) The PRC Criminal Procedure Law, 1979, as amended in 1996, article 12.

judicial authority according to law and that judges perform their functions and duties according to law.\textsuperscript{79}

The law has a number of provisions to ensure judges' independence. Article 3 prescribes that judges implement the law and the Constitution loyally and honestly. Article 7 provides that judges are obliged to decide cases fairly on the basis of the fact and the law. They must not bend the law for the benefit of relatives or friends. They have the legal duty to protect the rights of participants in proceedings.

The law has a clear provision as to judges' independence in article 8. It says that judges must decide cases on the basis of the law, independent from the interference of administration, social organizations, or individuals.

3. Analyzing the questions according to the current laws

The first question is: who gave the leaders in question the authority to order the police to arrest a citizen? There is a clear answer according to currently applicable laws: nobody. Nothing gave the leaders the authority to order the police to arrest a citizen. The Constitution and the Criminal Procedure Law provide that the prosecuting agencies be the only agencies to authorize arrests; and they are to be free from any interference from any individuals including political leaders. The leaders in the cases violated the Constitution and the law.

As for the second and the third question—"should the dean report the judicial process where

\textsuperscript{79} The PRC Judge's Law, 1995, article 1.
no laws existed that imposed upon him such an obligation” and “what if he did not report”—an unquestionable answer is provided by the applicable laws. The dean did not have any obligations to report to any leaders. In the case that the judges should report, they should report to the prosecuting agencies because these agencies have the legal responsibility to supervise adjudication according to the Criminal Procedure Law.\(^8\) If they did not report to the leaders in question, they did not violate any laws. On the contrary, however, they actually violated the Criminal Procedure Law Article three, and the Constitution Article five and Article 126 by reporting the judicial process to relevant leaders. That fact means that their actions made the Court neglect the responsibility for adjudication provided by law.

Question four is: what gave a political official the right to use insulting words to a judge when the judge did nothing wrong or illegal? This question should be viewed against a legal culture background. Judges, a symbol of law, are in a situation of being insulted by political leaders. It is evidence that China has a legal culture in which law is not respected.\(^8\)

The answer to the fifth question is clear: no laws gave a political leader the privilege to instruct judges. Furthermore, the Constitution prescribes that no organization or individual be privileged to be beyond the Constitution or the law. The leaders’ action in the above cases violated the Constitution. The answer to the sixth question ‘why did the judges in question obey the instructions where no laws gave any basis for those instructions’ is: as long as the law is concerned, they must not obey any individuals’ instructions. The only thing they should

\(^8\) The PRC Criminal Procedure Law, 1979, as amended in 1996, article 8.

\(^8\) Chapter four gives a more detailed analysis on this question. Please refer to Chapter four, infra.
obey is the law. If the judges in question did not obey the leaders’ instructions, there would not be any legal punishment\(^{82}\) because there are no laws providing judges to obey other people with regard to a judicial decision. Article five of the *Criminal Procedure Law* prescribes that the People’s Courts exercise judicial power independently in accordance with law and be free from interference by any administrative agencies, public organizations or individuals. There was, and still is, no basis for judges to take any leaders’ instructions where the law provides the opposite.

If the judges in charge did not take the instructions, they applied the law. If they took the leader’s instruction, they submitted themselves and other humans’ rights to personal wills instead of the law. This is the answer to the seventh question ‘what if the judges in charge did not obey the instructions’.

Finally, question eight: “who decides whether a person is guilty or not of any crimes in China?” Article 12 of the Criminal Procedure Law prescribes that no person be found guilty without being judged as such by a People’s Court according to the law. In the above cases, however, the defendants were judged by a Court of Law according to leaders’ personal will, instead of according to the law. Article five of the PRC Administrative Procedure Law prescribes that the courts examine the legality of specific administrative acts when deciding administrative cases. But from the above cases, it seems that everything turns to the opposite:

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\(^{82}\) There can be some other punishment, for example, becoming another victim of ‘the leader said you were guilty’.
the administrative officials examine the "legality" of decisions of the courts. 83

As a result, both the leaders and the judges in the above cases violated currently applicable laws. They knew they were breaking the law. However, they went on to do so. They ignored law and human rights without feeling guilty. These cases prove that China does not have a legal culture in which people respect law. They illustrate the phenomenon described in the first chapter. The extent of the phenomenon that people do not abide by law is serious. Judges—people who are supposed to implement law—violate law without any shame. Administrative personnel violate law and insult judges ruthlessly.

This is the most important problem: people do not respect law; do not abide by law, whether it is vague or clear in language. The first step for China to take is to change people's attitude on law.

83 This is a serious issue. While the law provides that the judiciary examines the administration, in fact, administrative officers examine judicial decisions. And the judiciary seems to have no objections to the administrative examination. Although it is common sense among Chinese officials and scholars that the law reflects the will of the ruling class, i.e., law is enacted in order to implement Party policy, (See Liu, Nanping A Vulnerable Justice: Finality of Civil Judgements in China, infra note 195, footnote 217) the difference between Party will and Party leaders' personal will deserves attention. In fact, due to some complex reasons, Party leaders' will is generally enforced in the name of Party policy.
Chapter III   The Law with Two Faces

We called this chapter ‘The Law Today’. It should rightly be called ‘There Is No Law’.

The same treacherous secrecy, the same fog of injustice, still hangs in our air, worse than the smoke of city chimneys.

For half a century and more the enormous state has towered over us, girded with hoops of steel. The hoops are still there. There is no law.\textsuperscript{84}

\begin{quote}
—A. Solzhenitsyn
\end{quote}

Law here, law there, law everywhere, but not a piece easy to use.\textsuperscript{85}

\begin{quote}
—A popular saying in China law schools
\end{quote}

In this chapter, I attempt to give a full picture of ‘the law with two faces’. The above two quotations serve to emphasize that in China there exists law, and what does not exist is the implementation of law. The first one is from a former Soviet author, Solzhenitsyn. It says that there was no law in reality although there were laws in books. I use this quotation not only because China and the former Soviet Union are both socialist countries, but also because the situations in the two countries are very similar with regard to this point. In China, there is the same thing: law exists, but realization of law lags. The second quotation is a topic initiated by some Chinese law school students. It points out there are laws in China, but for some complicated reasons they are almost unusable, if not at all.


\textsuperscript{85} Yu Yang, \textit{Law Here, Law There, But…} at website http://chinalawinfo.com/research/lgyl/details.asp?lid=470

This was a topic at the website of law belonging to the Faculty of Law, Peking University. They borrowed an American poem “Water here, water there, water everywhere, but not a drop to drink” to make an analogy for the situation of Chinese law in action. This generally means that, in China, there are laws, but at the same time, the laws are put aside.
As a matter of fact, this feature of Chinese law has been noticed. The purpose of this chapter is to draw a more detailed picture to attract more attention. The main job is to prove the thesis advanced in the first chapter: China's problem is not that people do not have laws, but that they do not credit laws. As for the second face—law in action—this chapter does not talk about law violation by common people. Instead, it focuses on law violation by state power holders. This will give readers a vivid image about the extent of law defiance in China, and the graveness of the phenomenon that laws are widely put aside.

A. The first face: law in books

1. Framework of foreign investment laws

Laws and regulations for foreign investment enterprises (FIEs) refer to total valid legal norms in China that govern the economic relationships of foreign investment in the process of establishment, alteration, termination, and management.

When China opened its door to foreign investment, the country "had almost nothing in the way of useful economic legislations" With the attempt to attract foreign investment, came the

86 Chinese foreign investment law consists of both domestic law and international law provisions. Because this thesis deals with the situation of Chinese domestic laws, here I only talk about Chinese domestic law. However, China has signed treaties with relevant countries in order to increase the investment security of foreign investors and protect the rights of enterprises. For example, the Chinese government has signed treaties with respect to mutual encouragement and protection of investment and avoidance of double taxation, such as, Agreement Between the Government of Canada and the Government of the PRC for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 1986. Another example is that on July 1992 the seventh NPC (National People's Congress) ratified the Convention on the Settlement of Investment Disputes between states and Nationals of Other States.

need for an effective legal system on FIEs in China. China's legislative campaign for the establishment of such a legal system began with the introduction of the law allowing foreign investment in China in the form of joint ventures. It continued with other legislation designed to further protect and regulate foreign investment in China. Now China has an apparently comprehensive domestic foreign investment law system. This system consists of the following categories: (a) laws and regulations exclusively applicable to FIEs and other foreign investment forms, such as the People's Republic of China (PRC) Chinese-Foreign Joint Ventures Law; (b) laws and regulations applicable to both domestically funded enterprises and foreign investment entities such as the PRC Contract Law and the PRC Company Law.

Domestic laws and regulations can be divided into the following five levels with diminishing binding force:

1. Constitutional level. In 1982, the Fifth Session of the Fifth National People's Congress (NPC) amended China's Constitution to explicitly protect foreign investors' "lawful rights and interests in the People's Republic of China."

2. National level. There are three major basic laws dealing directly with foreign

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91 PRC Contract Law, 1999
92 PRC Company Law, 1993
93 See also Lin Huawei, Legal Guide to Foreign Investment in China, supra note 89.
95 There are two categories at this level. The first is what is generally referred to as basic laws that are adopted by the NPC (National People's Congress); and the second is what is referred to as administrative regulations that are
investment on this level: The People's Republic of China (PRC) Chinese-Foreign Joint Ventures Law,\(^{97}\) the PRC Foreign-Funded Enterprise Law,\(^{98}\) and the PRC Chinese-Foreign Co-operative Enterprise Law.\(^{99}\) There are other laws dealing indirectly with foreign investment such as the new PRC Contract Law,\(^{100}\) The PRC Company Law\(^{101}\) and the PRC Foreign Trade Law, 1994.\(^{102}\)

(3) Provincial level PC (people's congress) regulations. According to the Constitution, the People's Congress and its Standing Committee at the provincial level have the authority to enact local regulations on the condition that the regulations must not violate the first two levels of laws.\(^{103}\) For example, the People's Congress of Beijing city enacted *Beijing Regulations of Foreign Funded Enterprises Clearance*.\(^{104}\)

(4) Local government and PC (People's Congresses) decrees. This level consists of two categories: (a) decrees adopted by the governments of provinces, autonomous regions and municipalities directly under the State Council; and (b) local regulations by the People's Congresses of the capitals of provinces, and the cities where the special economic zones are issued by the State Council. [According to article 58 of the PRC Constitution, NPC and its Standing Committee have the legislative authority; according to article 89 of the Constitution, the State Council has the authority to issue administrative laws and regulations on the basis of the Constitution and the basic laws.]

\(^{96}\) All are made and adopted by the NPC.


\(^{100}\) See *The PRC Contract Law*, 1999.

\(^{101}\) See *The PRC Company Law*, 1993.

\(^{102}\) See *The PRC Foreign Trade Law*, 1994.


\(^{104}\) Beijing Regulations of Foreign Funded Enterprises Clearance, 1993, or refer to website http://www.chinafiw.com/luntan/showlaw.asp?id=664
located.\textsuperscript{105} For example, the government of Guang-xi province has enacted a decree.\textsuperscript{106}

(5) Large city level\textsuperscript{107} government decrees. Governments of large cities specially approved by the State Council have the authority to enact decrees. While the laws at level four do not have to be submitted to the Standing Committee of the provincial People’s Congress for approval, the laws at this level must be submitted.\textsuperscript{108} An example of laws at this level can be \textit{Da-lian City Provisional Regulations on Foreign-funded Enterprises Complaining}\textsuperscript{109}.

China has correspondingly formulated a series of laws, regulations, rules and measures that constitute a comprehensive system of laws and regulations designed to protect the rights of domestic and foreign investors.\textsuperscript{110}

2. Overall legal framework\textsuperscript{111}

\textsuperscript{105} Article 60 of the \textit{Organization Law of the Local People’s Congresses and the Local People’s Governments} prescribes that the People’s Governments of Provinces, autonomous regions and municipalities directly under the central government may enact regulations based on the laws, administrative regulations and local regulations enacted by the corresponding People’s Congress. These local government decrees should be submitted to the State Council and the Standing Committee of the corresponding People’s Congress for record.


\textsuperscript{107} This level does not include the capitals where the governments of provinces, autonomous regions and municipalities directly under the State Council are located.


\textsuperscript{109} \textit{Da-lian City Provisional Regulations on Foreign-funded Enterprises Complaining}, 1993, by the government of Da-lian city, or refer to website http://www.chinafiw.com/luntan/showlaw.asp?id=695

\textsuperscript{110} If you go to the website http://www.chinafiw.com/luntan/laws20.asp, you can find hundreds or thousands of laws and regulations on foreign investment.

\textsuperscript{111} In fact, there are quite a few articles and books about the Chinese legal system and the recent legal reform, from different perspectives. For details about the Chinese legal system, please refer to relevant articles and books in the reference of this paper.
In the early 1980s, the Chinese legislature decided that it was time to speed up the steps for legislation and to provide legal guidance for all aspects of social life. In 1997, the Chinese Communist Party decided to run the state according to law, to construct a socialist rule-of-law state.\textsuperscript{112} The report reads:

"To run the state affairs according to law, means that the people administer state affairs and manage economic, cultural and social affairs under the leadership of the Party through various channels and in various ways in accordance with the law, so as to ensure all works of the state to be carried out on the basis of law, to realize step by step the socialist democracy by institution and law, and to make the institution and law not be changed with the shift of leaders as well as the shift of opinions and attentions of the leaders.\textsuperscript{113}

Xin Chunying, a Chinese legal scholar, summarizes one character of Chinese law after the 1980s. That is “to frame a legal system that provides guidance for all aspects of social life.”\textsuperscript{114}

Over the last two decades, the National People’s Congress has enacted foundational legislations to enable economic development. These include a Company Act\textsuperscript{115} that permits some forms of private ownership and enterprise, a Contract Act\textsuperscript{116} that offers a framework for business transactions more familiar to foreign interests, a Civil Procedure Law\textsuperscript{117} to provide, at least theoretically, a structure for enforcement of rights and obligations, Criminal laws,\textsuperscript{118} and a set of intellectual property laws\textsuperscript{119}. Taken as a whole, these laws reflect a careful move

\begin{itemize}
  \item \textsuperscript{112} Zemin Jiang, \textit{The Report on the 15\textsuperscript{th} Party’s Congress.} The Collection of Documents of the 15\textsuperscript{th} Party’s Congress. People’s Press, September 1997, pp. 31, \\
  \item \textsuperscript{113} Ibid. See also Xin Chunying, \textit{Chinese legal system & current legal reform}, infra note 114, pp.351. \\
  \item \textsuperscript{114} Xin Chunying, \textit{Chinese legal system & current legal reform (Zhong guo de Fa lü zhi du ji gai ge)}, Legal Press (Fa lü chu ban she), Beijing 1999, pp.349. \\
  \item \textsuperscript{115} Company Law of the People’s Republic of China, 1993 \\
  \item \textsuperscript{116} Contract Law of the People’s Republic of China, 1999 \\
  \item \textsuperscript{117} The PRC Civil Procedure Law, 1991. \\
  \item \textsuperscript{118} The PRC Criminal Law, 1979, as amended in 1997 and 2001; The PRC Criminal Procedure Law, 1979, as amended in 1996. \\
\end{itemize}
from a planned economy to some participation in a market economy\textsuperscript{120}. As a result, people argue that China has formed a legal system with regard to its legal institutions, contract law, property law, human rights law and laws involving foreign elements.\textsuperscript{121}

Some scholars consider that great achievements have been made in China since the resumption and strengthening of legislation from 1979.\textsuperscript{122} Guo Daohui observes,

Up to 1997, 328 laws and the decisions concerning these laws have been enacted by the NPC and its Standing Committee. More than 750 administrative decrees have been formulated by the local people’s congresses. More than 28,000 administrative regulations have been made by central and local governments. The basic system concerning legislation and legislative procedure has been set up. Good experience has been accumulated in the course of legislation, revision and abolishment of laws. A great number of staff work on legislation. The subjects on legislative affairs have been given out and some research institutions have been established in some universities. More than twenty books on legislation have been published.\textsuperscript{123}

Several websites provide details of Chinese law for free or for a nominal charge, giving researchers the most recent information about the legislation in China. One is http://chinalawinfo.com/FreeMulu/ShowFrame.asp. On this website, there are 109 categories including copyright law, company law, family and marriage law, and so on.\textsuperscript{124} There are between 38 and 1079 particular laws in each category.\textsuperscript{125} In the website http://search.law.com.cn/search?channelid=38303, the tool Legal Search Engine offers a total

\begin{itemize}
\item \textsuperscript{120} Sam Hanson, \textit{The Chinese Century: an American Judge’s Observations of the Chinese legal System}, supra note 23.
\item \textsuperscript{123} \textup{[Author’s translation]}
\item \textsuperscript{124} \textup{[Author’s translation]}
\item \textsuperscript{125} \textup{[Numbers in this paragraph were up-dated on October 2\textsuperscript{nd}, 2002.]}\end{itemize}
of 70453 laws and regulations. They include 528 National, 33461 local laws and regulations, 3351 judicial interpretations of the Supreme Court, 431 cases with legal analysis of the Supreme Court promulgated by the Supreme Court, and 3977 international treaties. Based on the above numbers, it is beyond argument that China does have a comparatively comprehensive legal system.

3. Judicial activity

China's judicial activity has increased to a large extent. In 1987, there were a total of 776 cases and all of them involved criminal matters. In 1999, the number increased to 6,229,512, around 8,000 times the number of 1987. These cases included criminal, civil, economic, administrative, maritime and so on. In 1999, the courts of justice of the whole country decided 6,232,302 cases. In the same year the courts in China received and resolved a total

126 See website http://search.law.com.cn/search?channelid=38303
127 See website http://search.law.com.cn/search?channelid=5466
128 See website http://search.law.com.cn/search?channelid=30117
129 According to the Provisions on Judicial Interpretation of the Supreme Court, 1997, judicial interpretations of the Supreme People's Court of China have legal binding force. Article one of the Provisions prescribes that the provisions are enacted on the basis of Organic Law of the People's Courts of the PRC (promulgated on July 01, 1979) and Resolution of the Standing Committee of the NPC Providing an Improved Interpretation of the Law (promulgated on Dec. 13, 1981); Article four provides that judicial interpretations of laws made and promulgated by the People's Supreme Court have legal binding force.
130 See website http://search.law.com.cn/search?channelid=13130
131 Although cases are formally not laws, cases analyses by the Supreme Court have great influence on lower courts.
133 See website http://search.law.com.cn/search?channelid=8935
135 Law Year Book of China, 2000, pp.121. [Author's translation]
136 Ibid. [Author's translation]
137 Ibid. [Author's translation]
of 10,691,048 people's visits and people's letters, 14.32 percent higher than the year before.\textsuperscript{138}

The changing roles of lawyers have been recognized.\textsuperscript{139} At the beginning of the Open Door Policy, the role of lawyers was actually static.\textsuperscript{140} The change accelerated during the mid 1990s. In 1996, China welcomed "the long-anticipated issuance of the new Lawyer's Law".\textsuperscript{141} Under the new Lawyer's Law\textsuperscript{142}, lawyers are protected for their rights and interests\textsuperscript{143} and also, they are held accountable for their malpractice.\textsuperscript{144}

According to the statistics of Judicial Administration, in the year of 1998, there were 8946 law firms in the country, 5.98 percent higher than the year before.\textsuperscript{145} These law firms housed 101,220 lawyers, 2.34 percent higher than the year before.\textsuperscript{146} Compared to the number of 1982\textsuperscript{147}, the increase was considerable. Although numbers are not everything, they are still significant. Those numbers illustrate that China has paid more attention to and has attached more importance to judicial activity.

\textsuperscript{138} Ibid. [Author's translation]
\textsuperscript{139} Ronald C. Brown, \textit{Understanding Chinese Courts and Legal Process}, supra note 56, pp.24
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid.
\textsuperscript{142} PRC Lawyer's Law, 1996, effective on Jan. 01, 1997.
\textsuperscript{143} Article three, paragraph four prescribes that lawful practice by lawyers are to be protected by law. (See PRC Lawyer's Law, 1996, article three, paragraph four.)
\textsuperscript{144} See PRC Lawyer's Law, 1996, article 49. It reads "When lawyers practice unlawfully or cause damage to interested parties due to their fault, the firms where they are affiliated shall bear the responsibility for the compensation. The law firms may claim such compensation from lawyers who have committed intentional or major negligent acts."
\textsuperscript{145} Statistics of the Judicial Administration 1999, in the 1999 Yearbook of the Judicial Administration of China, pp. 579. [Author's translation]
\textsuperscript{146} Ibid. [Author's translation]
\textsuperscript{147} In 1982, there were fewer than 10,000 lawyers while the population was nearly one billion. (See Ronald C. Brown, \textit{Understanding Chinese Courts and Legal Process}, supra note 56, pp. 25.)
Judges in China are undergoing changes too. On Feb. 28, 1995, the NPC adopted the Judges Law.\textsuperscript{148} The purpose of the law is stated in article one, which is to "ensure that the People’s Courts independently exercise judicial authority according to law, that judges perform their functions and duties according to law in order to enhance the quality of judges, and to realize the scientific administration of judges."\textsuperscript{149} In Oct. 2001, \textit{Provisional Regulations on the National Judicial Test} was promulgated\textsuperscript{150}. According to the regulations, one must pass a test to be qualified as an elementary judge, an elementary public prosecutor or a lawyer\textsuperscript{151}. It has been suggested that in the future, judges in China should be selected only from those who have passed the National Judicial Test.\textsuperscript{152} However, this proposal has not been formally passed by relevant legislation agencies.\textsuperscript{153} Despite the uncertainties around this new institution, it is considered a historical event in Chinese legal history.\textsuperscript{154}

\section*{B. The second face: law in action}

There is an American joke about lawyers that says a good lawyer should have only one hand, because if this were true, the lawyer could not say "on one hand" with one hand and "on the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} \textit{PRC Judge’s Law}, 1995.
\item \textsuperscript{149} \textit{PRC Judge’s Law}, 1995. Article one.
\item \textsuperscript{150} \textit{Provisional Regulations on the National Judicial Test}, promulgated on Oct. 31, 2001 by the People’s Supreme Court, the People’s Supreme Prosecutor and the Judicial Ministry. It came into effect on Jan. 01, 2002.
\item \textsuperscript{151} \textit{Provisional Regulations on the National Judicial Test}, 2001, article two.
\item \textsuperscript{152} Yuying Guan, \textit{Some Ideas about the National Judicial Test}. See website http://www.legaldaily.com.cn/gb/content/2002-01/13/content_30402.htm
\item \textsuperscript{153} \textit{Ibid}.
\item \textsuperscript{154} \textit{Ibid}.
\end{itemize}
\end{footnotesize}
other hand” with the other hand. However, one can accurately grasp Chinese law only if one takes into account both practice and statutory provisions. When people look at the Chinese law in action, a salient characteristic cannot slip away without notice. That is, the law is violated and avoided flagrantly.

Jerome A. Cohen concisely summarizes this characteristic of the Chinese laws: “If you go into the courts of China today, it can become political, where law is only one element. Who you know and how high you are on the hierarchy are key elements. There are still lots of cases like that. But there are also cases where the courts play it straight, without corruption and without bribery.”

1. Typical examples of law violation

When reading the second chapter of this thesis, readers might think that that is a particular case. This part will give an overview of law violation in China and will give justification for the proposal that the most important problem is to change people’s belief in justice.

156 Ibid.
157 If one refers to the newspaper Legal Daily of China, or goes to its website http://www.legaldaily.com.cn, he/she can see numerous news articles about the violation of laws, not by common people, but by people with power: judges of the courts of justice, officers of the government. And the fact is that there are cases going on which are not being reported publicly.
159 These examples are not the ones in which common people violate the law, but people with state power violating the law. In every state and society of the world, there are cases in which common people violate the law as well as people with state power. However, it is unusual that people with power violate the law in a large extent. This part illustrates the extent to which the Chinese officials violate the law.
160 See Chapter one of this thesis, supra.
(a) Preventing the enforcement of judicial decisions by the courts of justice.

There are typically two types of prevention: one is that higher courts of justice prevent the enforcement of judicial decisions by lower courts of justice\textsuperscript{161}; the other is that lower courts prevent the decisions of higher courts from being enforced\textsuperscript{162}.

If higher courts prevent the enforcement of judicial decisions made by lower courts, they can employ several means, including requesting to review decisions for themselves,\textsuperscript{163} requesting the lower courts retry the case, or requesting the lower courts postpone the enforcement of the decision. For the above requests to be legal, the relevant courts must provide reasons for the requests.\textsuperscript{164} If the relevant courts at higher levels do not give reasons, the requests are illegal. As a result, the requests do not have binding force and the parties concerned have the right to refuse to execute. However, in China, in such cases, the parties concerned generally do not refuse to execute such requests by the higher courts.\textsuperscript{165}

\textsuperscript{161} Generally speaking, higher courts can legally prevent the enforcement of judicial decisions by lower courts. According to \textit{PRC Civil Procedure Law}, 1991, article 177, if the Supreme People's Court finds definite error in a legally effective judgement or written order of a local people's court at any level, or if a people's court at a higher level finds some definite error in a legally effective judgment or written order of a people's court at a lower level, it shall respectively have the power to bring the case up for trial by itself or direct the people's court at a lower level to conduct a retrial. (See the \textit{PRC Civil Procedure Law}, 1991, article 177. For English translation, please refer to website http://search.law.com.cn/detail?record=8&channelid=38303&presearchword=%C3%F1%CA%C2%CB%DF%CB%CF%B7%A8)

However, here I only talk about the higher courts illegally preventing judicial decisions of lower courts from being enforced.

\textsuperscript{162} In this case, local protectionism is generally involved.

\textsuperscript{163} According to the \textit{PRC Civil Procedure Law}, 1991, article 177

\textsuperscript{164} Although there is no provision that the higher level courts provide reasons for their requests, according to \textit{Some Points on the Proper Application of the PRC Civil Procedure Law by the Supreme Court}, article 200 (See \textit{Some Points on the Proper Application of the PRC Civil Procedure Law by the Supreme Court} 1992, article 200), the higher level courts should provide a written order. It is common sense and custommary in legal circles that in the written order, the relevant courts should provide reasons for the requests.

\textsuperscript{165} Legal Daily offers examples for this kind of situation.
There is one case illustrating this kind of prevention in *Legal Daily* Oct. 20, 2001. The case took place in Shan-dong Province, China. It was tried by the Ordinary Procedure of First Instance and the Procedure of Second Instance. In the first instance, the case was tried at a county level court of justice—Yun-cheng County court. The second instance procedure was at the intermediate level. Both the judicial decisions of the two procedures decided the complainant won. However, when the winning party applied for enforcement, the higher court of Shan-dong province prevented the enforcement. The means employed by the higher court were first requesting the county court postpone the enforcement, and then the intermediate court retry the case. After the case was retried and the decision of the retrial affirmed the original decision, the Shan-dong higher court still requested the intermediate court to postpone the enforcement. The higher court did not provide any basis for all its requests.

Another form of prevention of enforcement of judicial decisions comes from lower level courts. Protectionism is generally involved in this form of prevention. At present it is out of

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167 For example, see Lidong Huang, *Shanxi Local Court does not enforce the decision by the Supreme Court*, supra note 47.

This case is about a judicial decision of the Supreme People's Court that encountered great difficulty at the stage of enforcement. In 1996, Hui-li-da Company Limited (belonged to Shan-xi Province, hereinafter referred as Hui-li-da) and An-yang Civil Engineering Company (belonged to He-nan Province, hereinafter referred as An-yang) concluded a contract for constructing the Yin-chang-sheng Pub. The contract prescribed that An-yang construct the Pub with its own funds and then Hui-li-da pay An-yang the funds actually used when the construction project is finished by the completion date of August 1997. The funds turned out to be RMB 4,500,000. An-yang performed the obligation according to the contract, but Hui-li-da paid only RMB 1,200,000. In October 1997, An-yang filed the case at the Shan-xi Higher People's Court. The court decided for the plaintiff. Then Hui-li-da appealed to the Supreme People's Court of China. On August, 29, 1999, the Supreme Court made
question that the legal system of the state is unified and there is an international agreement demanding the unification of the legal system of the contracting parties.\textsuperscript{168}

\textit{(b) Law violation by the police.}

"People with power backed by the state can rob recklessly, publicly; they can do whatever as they wish, do as much as they wish, do as frequently as they wish... people being robbed do not have any defense force. It makes this kind of robbery more horrible...
People without power backed by the state are bandits if they conduct robbery. When people in police uniforms conduct robbery in the name of enforcing state laws, what should this kind of action be defined as? As a matter of fact, these two forms of robbery do not have any difference except that the latter is more abominable: it not only robs property, but also robs the state power. This kind of robbery is more dangerous and despicable."\textsuperscript{169}

The comments express people's concern of a not-uncommon phenomenon that the police violate the law using their power and in the name of enforcing the law. The blatant violation of law and the contempt of human rights by the police can be illustrated by the following case.\textsuperscript{170}

\begin{itemize}
\item[168] Article 24(12) of the GATT prescribes: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories." This article requires member states to take necessary measures to ensure compliance by local governments and authorities.
\item[169] Zhongjie Su, More Horrible Robbery, in Legal Daily, Jan. 14, 2002, or refer to website http://www.legaldaily.com.cn/gb/content/2002-01/14/content_30450.htm [Author's translation]
\item[170] Ibid.
\end{itemize}
The ecological environment of Heng-shan County, a county located in the north of Shuan-xi province, was degrading day by day. The reason for this was that the illegal underground oil exploration in this area was severe. Three farmers in this county applied for bank loans and then put an advertisement in a newspaper which called for social attention to this problem and suggested illegal underground oil exploration be prohibited in a real sense. This advertisement attracted great attention from the press. Journalists and reporters from several main newspaper offices and television stations came to report the news. With the help of the three farmers, the reports were successful. However, on Dec. 11, 2000, almost right after the news was reported, when the three farmers came home from appearing on a very famous program of China Central Television, they were beaten severely. To people's surprise, the attackers were not illegal oil exploiters, but the police of the county. Several police vans and civil vans stopped them. Dozens of policemen jumped out of the vans. (Note: dozens of policemen) They detained the three by handcuffs and beat them on site. Then they took the three farmers to the police bureau of the county and put them in detention for about twenty hours.

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171 PRC Constitution article 9 prescribes: “All mineral resources, waters, forests, mountains, grasslands, unexploited land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grasslands, unexploited land and beaches that are owned by collectives in accordance with the law. The state ensures the rational use of natural resources and protects rare animals and plants. Appropriation or damaging of natural resources by any organization or individual by whatever means is prohibited.” [Author's emphasis]

172 Original author's note. [The number was between 20 and 100]

173 This affair seems strange to readers outside of China. To Mainland Chinese readers, it is not surprising. There was another similar case reported: the police robbed postal vehicles (occurred in Dec. 2001.) After the relevant post office and the owner of the goods being delivered communicated with the police bureau in question, the police bureau released the goods in return for RMB40,000 in fines. Note: the relevant leaders of the police frankly expressed the ultimate purpose of this action—money. Policemen enforcing fines could get 10 percent of the fines as a bonus. (See Zhongjie Su, More Horrible Robbery, supra note 169)
Another new form\textsuperscript{174} of law violation by police deserves more attention. Generally speaking, this form of law violation by police is a combination of police and dark societies\textsuperscript{175}. In this combination, the police act as protectors\textsuperscript{176} for the dark societies; and the dark societies pay off the police with money for the protection. When the dark societies commit any crimes, the police ignore the crime in return for benefits (typically money) given by the members of the dark societies in question.\textsuperscript{177} This kind of law violation is considered very dangerous because in China the police are referred to as the public security agency. By that name, the meaning of the police is that they are guardians of public security, not the guardians of the dark societies. If the police or some policemen and police officers turn out to be corrupt, public security will be put in a danger to a great extent.

\textit{(c) Law violation by the administration}\textsuperscript{178}

The cases discussed in the second chapter are good examples for the law violation by the

\begin{itemize}
  \item \textsuperscript{174} It maybe is not new, but, at least, it is newly reported.
  \item \textsuperscript{175} This is a general name for all kinds of criminals in China, particularly those who convict very serious and dangerous crimes such as murder, deliberate physical injury, rape and so on. [Author's interpretation]
  \item \textsuperscript{176} According to both the law and the custom, the police are responsible for investigation, detention, execution of arrests and preliminary inquiry in criminal cases. (See The PRC Criminal Procedure Law, 1979, as amended in 1996, article 3)
  \item \textsuperscript{177} There is a public legal forum in \textit{Legal Daily} that is named 'Cracking Down the Dark and Eliminating the Bad'. (In Chinese, \textit{Da Hei Chu E}). Or refer to website \url{http://www.legaldailv.com.cn/gb/node/2002-02/03/node46.htm}. There are some news articles and essays published in this forum. For example, there is a piece of news in the \textit{Legal Daily} of Dec. 19, 2001. On Dec. 18, 2001, a case of this kind was tried at the Yan-an intermediate Court of Justice. One group of defendants were members of the dark society of this area that had been committing crimes for around nine years; another group of defendants were the former head of the police bureau of this area and two former heads of two offices of this police bureau. (See Shenghua Zhang, \textit{The gang and their protection all sentenced}, on \textit{Legal Daily} of Dec. 19, 2001, or refer to the website \url{http://www.legaldaily.com.cn/gb/content/2001-12/19/content_29167.htm})
  \item \textsuperscript{178} Here law violation included ignorance of the law, because the employees and officers of governmental administration are supposed to know the law. If they violate the law on the reason that they do not know the law, the very ignorance of the law is a form of law violation.
\end{itemize}
administration. Those cases illustrate the boldness of some government officers to flaunt the law. Besides, there are other types of law violation by the administration, for example, ignorance of the law.

The bombing of the Riverside Garden can be a good example of ignorance of the law.\textsuperscript{179} Riverside Garden was located on the riverside of the Chang-jiang River\textsuperscript{180} in Wu-han City, the capital of Hu-nan Province in China, which was designed to be an area of high-class residential buildings. The cost was around RMB200,000,000. The area was bombed because it was found out that the garden had illegal buildings violating the Flood Proof Law.\textsuperscript{181} Before being bombed, Riverside Garden had been a "paradigm project" after it was started in 1997. The buildings of the Garden were in the very area of the Chang-jiang River course. To people's surprise, as a "paradigm project" of the city, it had been through all the necessary procedures before it was finally started, such as the examination and approval of the Flood Proof Office of Wu-han City Government, the examination and approval of the City Planning Office of the government, and the examination and approval of Wu-han City Government. When the Flood Proof Law was promulgated, although all the procedures were completed, the real construction of the project had not been started. If the relevant agencies of the government knew the law (or took the law seriously) after the law was promulgated, the damage would not have been so great. The author correctly observes:

"...Apparently, the motive of the leaders in question was not bad. They merely hoped to do a 'good thing' for the local people. However, if examined in-depth,
you can see that some leaders were used to making decisions for granted. They
considered the law an object unnecessary, or merely something to bind others.
The law did not have anything to do with them. Even worse, in the mind of some
leaders, there is no law existing!\textsuperscript{182}

The above examples illustrate very well the mournful sigh of Montesquieu:

“Man, as a physical being, is like other bodies governed by invariable laws. As
an intelligent being, he incessantly transgresses the laws established by God, and
changes those of his own instituting. He is left to his private direction, though a
limited being, and subject, like all finite intelligences, to ignorance and error:
even his imperfect knowledge he loses; and as a sensible creature, he is hurried
away by a thousand impetuous passions...Such a being is liable every moment
to forget himself...”\textsuperscript{183}

In Chinese society, human beings, like any other finite intelligence, have the inclination to
ignore any laws established. Montesquieu has another observation that, because man is likely
to transgress the laws established by God and is formed to live in society, legislators make
laws to restrict him.\textsuperscript{184} This observation, however, does not have the same embodiment in
China. People do not take seriously the bounds established by law. Chinese political leaders, at
least some, routinely ignore everything designed to confine their arbitrary powers.

2. Comments on the Chinese legal system\textsuperscript{185}

\textsuperscript{182} Fenmian Zhou, \textit{Administration by Law Should Not Stay only in books}, supra note 179.
\textsuperscript{183} Montesquieu, Baron De \textit{The Sprit of Laws}, supra note 2, 1900, Vol. 1, pp.3, Book I, of Laws in General, 1. of
the relation of laws to different beings
\textsuperscript{184} Montesquieu, Baron De \textit{The Sprit of Laws}, supra note 2, Vol. 1, pp.3, Book I, of Laws in General, 1. of the
relation of laws to different beings
\textsuperscript{185} In this part, I will only provide commentaries on Chinese law in action. Foreign investors and lawyers are
disappointed about Chinese law in books, because it does have some elements that disappoint them. The new
PRC Contract Law can be taken as an example. The new Contract Law thrilled people interested in the Chinese
trade and legal system. However, it was referred to as a missed opportunity because it did not live up to the high
hopes of many foreign investors. (China Law and Practice, May 1999, \textit{A Missed Opportunity? China's New
Contract Law Fails to Address Foreign Technology Providers' Concerns}, pp.83) The law did not simplify the
contract law regime by bringing all of the various contracts laws and regulations under the new law; it failed to
Despite the fact that China has made some progress on establishing a legal system, scholars and lawyers outside of China are not very optimistic about the Chinese legal situation. On the other side, Chinese scholars have made more positive comments, although there are some criticizing observations.\(^{186}\)

(a) Comments from outside of China

In fact, China does not have a legal culture that values individual rights.\(^{187}\) The 1982 Constitution permits a significant number of limits on citizens' rights. All individual rights are qualified by Article fifty-one, which asserts the unequivocal priority of group interests over individual rights: "The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens."\(^{188}\)

Some authors criticize the PRC Constitution. For example, Garbesi says: "It is apparent that those who drafted this Constitution had no intention of creating in the judiciary a co-equal governmental authority. Even in the performance of the judicial function of dispute resolution there is scope for direct political interference, although there is latitude for argument on this point." (See Garbesi, Curt Judicial Independence in the People's Republic of China, infra note 240, pp.6)

\(^{186}\) This is an issue deserving analysis. Why are comments of Chinese scholars mostly flattering? Is it because they really think it is that good, or because they do not want to hang out their dirty laundry publicly, or they cannot under political pressure, or the scholarship air in China is mainly following the herd?


Attention has been put on the Chinese government’s instrumental approach to the law. This means that laws and regulations are enacted explicitly to achieve the immediate policy objective of the regime.\textsuperscript{189} Some authors express concerns about the instrumental character of Chinese law. “In China’s bureaucratic system, policy itself is law; or more precisely, law is a tool of policy.”\textsuperscript{190} The law in China continues to be characterized by an absence of an independent judiciary and a professional bar.\textsuperscript{191} An appellate structure of courts exists, but the judges are toothless without Party approval, and most often judges are Party members themselves.\textsuperscript{192} The conflict between the rule of law and the rule of the Communist Party exists in Chinese society.\textsuperscript{193}

Taken into account the Party’s control over the judiciary, there is a critical question whether a Chinese judgment is final\textsuperscript{194} if there is involvement from the Party.\textsuperscript{195} “This is uncertain, because the Party has no intent to create finality for a judicial decision. Thus, it is simply impossible to achieve genuine judicial finality in Communist China. Different cultural values and social or political structures have prevented Mainland China from having the Western type

\textsuperscript{189} Pitman B. Potter, \textit{The Chinese Legal System: Globalization and local legal culture}, supra note 121, pp.10
\textsuperscript{192} \textit{Ibid.}
\textsuperscript{193} \textit{Ibid.} pp. 69
\textsuperscript{194} “Final” here means having legal binding force and will be enforced. [Author’s interpretation]

Because currently the author is an Associate Professor at the Law Department of the University of Hong Kong, the comments are considered from outside China.
of judicial finality."\(^{196}\) If a judgment cannot be genuinely final, then what is the point of going to a court of law?\(^{197}\)

"The notion that China's leaders have finally recognized the importance of 'rights', whether economic or political, and of legal institutions to protect those 'rights', is a misguided conclusion..."\(^{198}\) This comment is incisive. At best, one can say that China has moved rapidly in creating a structure that incorporates Western norms, but has fallen short of legitimating the values that underlie those norms. The consideration for the next century is not whether China will affirm the universality of core Western values, but whether it will fill its newly-created Western legal structures with Chinese values\(^{199}\). According to LaKritz, Chinese values are guanxi, corruption, and nepotism, while western values are individuality, liberty, autonomy, and justice shaped by equality. History has shown us that China put its own spin on Buddhism, Marxism, and even Christianity. Capitalism, liberalism, and democracy may prove no more inviolate.

When Berring analyses the relationship of the state and the legal system, he compares the ideas of western commentators with those in China. Western commentators view the law as an independent bulwark between citizens and the state.\(^{200}\) The law is not an expression of state

\(^{196}\) Ibid.

\(^{197}\) This question was originally raised by Nanping Liu in A Vulnerable Justice: Finality of Civil Judgements in China, supra note 64. Further analysis is in Chapter Four of this thesis, infra.

\(^{198}\) Robb M. LaKritz, Taming a 5,000 Year-old Dragon: Toward a Theory of Legal Development in Post-Mao China, supra note 25

\(^{199}\) See generally Robb M. LaKritz, Taming a 5,000 Year-old Dragon: Toward a Theory of Legal Development in Post-Mao China, supra note 25

policy; instead, it is a check upon it. Concepts like an "independent judiciary" are based upon the separation between the law and political policy. The law has been a separate entity for centuries—a disentanglement from the kings, queens or state officials who enforce it. They view the law as a bulwark against the powers. A federal judge can defy the wishes of a President; indeed, the United States Supreme Court could order President Nixon to turn over his tapes. Law has been the amulet to protect the western public from oppression. The law stands as a shield between the citizenry and the power of the state. "None of these ideas play a significant role in China's development or social construct." China was ruled by one form of Emperor or another for millennia and the dynastic system saw all power centered on the Emperor. There were no checks and balances, no independent courts. The local magistrates in traditional China, who have been characterized as judges, were not judicial officers in a western sense, but stood in the place of the Emperor and enforce the Emperor's commands. There could be no checks upon such power. No lawyer class developed because in a system where the authority relationship between the government and the people was totally vertical, there could be no adversary system. The magistrate was the state. In contemporary China, judges implement administrative orders. They have almost the same functions as those of imperial magistrates.

201 Ibid.
202 Ibid.
203 Actually there was no check upon this power except from the power of the higher political levels. However, given the difficulty of information being promulgated in the past, it was hard for higher-level officers to know events happened at lower levels.
204 Robert C. Berring, Chinese Law, Trade and the New Century, supra note 200, pp.440
205 Ibid.
As for lawyers as a profession, there are critical comments. The 1996 new Lawyers’ Law announced China’s attempt to further professionalize the role of lawyers. Also, the fact has been recognized that there are so few lawyers (compared with the population size of China). Acknowledging this fact, the Minister of Justice, Xiao Yang, announced in January 1996 that the Ministry would attempt to double the number of lawyers. However, lawyers in China have long been discouraged from being "over-zealous" in defense of clients, and encouraged to argue for leniency rather than innocence. Because variation from this practice was, in the past, met with revocation of legal licenses by authorities, lawyers are still reluctant to provide adequate defense of criminal defendants. Meanwhile, the quality of lawyers is reprehensible. According to the Lawyer’s Law, to take the Bar Exam, one does not have to possess a law degree. This opens the Bar door to people without a law degree, or even worse, without any special legal training. Although China has demonstrated a desire to bring

208 Sam Hanson, The Chinese Century: an American Judge’s Observations of the Chinese Legal System, supra note 23.
210 Ibid.
211 Ibid.
212 To get the lawyer’s qualification, one must pass the National Judicial Test. People who hold a law degree or have four years university education have the right to write the test. Those who pass the test obtain the lawyer’s qualification.

In the areas where the application of the first paragraph encounters real difficulties, the judicial administration of the State Council examines and approves these areas to reduce the requirements of taking the National Judicial Test. In a fixed period, people who have college legal training education can take the National Judicial Test. (See article six of The People’s Republic of China Lawyer’s Law) [Generally speaking, high school students can directly enter a legal training college where they receive legal training for three years or less.]
its legal system up to speed with the international standards, the process is slow.\textsuperscript{213}

Frankie Fook-lun Leung comments on the legal practice in China as the following:

"... law as practiced and law as exists in the books is entirely different in China. Such a difference makes one cynical about knowing or learning Chinese laws and rules. One could detect such a prevalent sense of cynicism among Chinese lawyers themselves. It is no wonder that corruption and unethical practices among Chinese lawyers and judges have received official attention and the general public's disdain. Conflicts of interest, unconscionable fee charging, unauthorized disclosure of client's confidential information; \textit{ex parte} communications between judges and legal representatives are the major complaints. ... Litigation is another trap for the unwary. Particularly, since China's record of enforcement of judgments has been erratic and unsatisfactory."\textsuperscript{214}

China lacks a sufficient pool of professionally trained and qualified judicial personnel.\textsuperscript{215}

Court personnel generally are poorly educated and lack a formal legal education or experience.\textsuperscript{216} As of 1993, one-third of all judges lacked post-secondary training in any subject.\textsuperscript{217} Expansion of the legal system to handle the recent reforms has resulted in the appointment of many young judges, who lack the qualifications and experience necessary to tackle China's rapidly evolving legal issues.\textsuperscript{218} Most judges do not have a law degree, but have been appointed to their position from a post in the communist party or in the military.\textsuperscript{219} They

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\textsuperscript{213} Daphne Huang, \textit{The Right to a Fair Trial in China}, supra note 207  \\
\textsuperscript{214} Frankie Fook-lun Leung, \textit{Chinese Legal Changes upon Entry to World Trade Organization}, Mealey's International Arbitration Reports, May 2001, or refer to website [Website URL]  \\
\textsuperscript{216} \textit{Ibid.}  \\
\textsuperscript{217} \textit{Ibid.}  \\
\textsuperscript{218} \textit{Ibid.}  \\
\textsuperscript{219} Sam Hanson, \textit{The Chinese Century: an American Judge's Observations of the Chinese Legal System}, supra note 23. Even worse, there are some dancing women with only elementary education and some laid-off workers
\end{flushright}
generally are not lawyers and have received no formal legal training. Although recent legislative changes now require “professional legal knowledge” as a qualification for judges, and training in law for those appointed prior to the enactment of these new laws, the enforcement of this law is doubtful. While this practice is changing and the younger generation of judges and lawyers are either law school graduates or have legal training, there is still a significant number of existing judges who do not have a legal background. Moreover, judges may find their orders thwarted when relying on the generally less competent officials of execution offices.

(b) Comments from inside of China

Basically speaking, before the legal reform that started in late 1978, individuals were not the holders of rights, but the “Red Guards” of the “great leader”, and the instrument for an of SOE (state-owned-enterprises) who have been promoted to judicial positions. (See Ling Fei, Local Courts are a basket, in Legal Daily, 2001-10-30, http://www.legaldaily.com.cn/gb/content/2001-10/30/content_26457.htm) This feature of China’s judiciary offsets to some extent the increasing importance of the judicial activity mentioned above.


222 As demonstrated in previous chapters, the enforcement of laws in China is not satisfactory. As for the enforcement of Judge’s law, it is probably not satisfactory either. It has been reported that some dancing women with only elementary education and some laid-off workers of SOE have been promoted to judicial positions in very recent days. (See Ling Fei, Local Courts are a basket, supra note 219)

223 Daniel C.K. Chow, Enforcement Against Counterfeiting in the People’s Republic of China, supra note 220.


225 “Red Guard” existed roughly between 1966-1976; the “great leader” refers to Chairman Mao Ze-dong at that time. [Author’s interpretation]
abstract but great goal\textsuperscript{226}. For example, when the Vice-President of the State who was a major supporter of the first Constitution, was thrown into jail without any legal procedure, people did not ask questions.\textsuperscript{227} After more than two decades of legal reform endeavor, it is hard to say individuals enjoy as much rights as people in other countries such as the U.S. and Canada.

In an investigation on judges\textsuperscript{228}, one comment on the judges graduating from law schools or other universities\textsuperscript{229} after 1992 is: \textquote{These judges belong to the living type—they are heavily influenced by the common social practice and are good at ‘eating, drinking, playing and enjoying’\textsuperscript{230}. They do not hold a serious working attitude. They play with the law and have lost the belief in law. In a word, their working morality has been corrupted.}\textsuperscript{231}

In the same investigation, the comment on judges graduated as a post-secondary student between the 50s and 60s is: they generally have good career morality; they have the belief to serve the people; they are much better than younger judges. However, they apply the law too literately. Their fact investigation is more than their application of the law.\textsuperscript{232} As for judges

\textsuperscript{226} Xin Chunying, \textit{Chinese legal system & current legal reform}, supra note 114, pp.335. Here the goal means socialism and communism. [Author’s interpretation]
\textsuperscript{227} Ibid.
\textsuperscript{229} In China, people without formal law school training can be appointed to judge’s position. For detailed information, see \textit{Provisional Regulations on the National Judicial Test}, promulgated on Oct. 31, 2001
\textsuperscript{230} This is another name for bribery of Chinese officers. Generally speaking, eating refers to eat luxurious food in restaurants or hotels; drinking refers to drink expensive drinks or alcohol while eating; playing refers to all kinds of fashionable games including underground sexual service; and enjoying refers to all kinds of bribes. [Author’s interpretation]
\textsuperscript{231} Qiang Shigong, Zhao Xiaoli, \textit{Legal Interpretation Under Double Structuralization: Social Investigation on 10 Judges}, supra note 228.
\textsuperscript{232} Ibid.
starting their career between the 70s and 80s, they are considered the worst judge group. Their competence is very low. They do not have a serious working attitude. They are not only good at ‘eating, drinking, playing and enjoying’, but also the best trick players of law.\textsuperscript{233}

Meanwhile, there are opposite views in China about human rights protection and the realization of law.\textsuperscript{234} An article comments on this: “...the legality of human rights of our country\textsuperscript{235} means that human rights are protected by law on various dimensions, on numerous levels and by a number of forms. The protection lies not only in legislature, but also in judiciary; not only in constitution, but also in civil law, criminal law, administrative law, and procedure law.”\textsuperscript{236} These comments should be understood on the ground that they are based on laws in books, not in action. As for human rights protection in the real world, it is a different picture.

When examining the relationship between Communist Party policies and law, people still get confused about which is the basis of judicial decisions. There is a legal trend that the emphasis on the Communist Party policy is lessening and the emphasis on the law is growing\textsuperscript{237}. However, at the same time, “scholars often fall into a dilemma when studying the relationship

\textsuperscript{233} \textit{Ibid.}


\textsuperscript{235} “Our country” refers to China. [Author’s note]


between the law and the Party policies: which one should be the basis? 238 There are still some people regarding policies as the basis of actions and judicial decisions. These people hold the belief that policy is the spirit of the law.

On the basis of the above comments, even though China has established an apparently comprehensive legal system in books, it is arguable that China has a comprehensive legal system in reality. This is because Chinese legal culture, and the instrumental character of Chinese law, affects law in action. While the structures of legislative, administrative and dispute resolution institutions appear quite recognizable to foreign-trained lawyers, the practices of these institutions often depart quite significantly from the expectations of those familiar with a liberal legal system. 239 The reason is that people do not believe in law. They do not have any belief that state power can and should be checked by law. Judges, for some complex reasons, do not believe that they are subject only to law, not to state power holders.

Thus, it is important to consider the role of judges that they themselves understand 240 . It is also important to understand the root reason why they hold such a self-image.

238 Ibid, pp.17.
239 Pitman B. Potter, The Chinese Legal System: Globalization and local legal culture, supra note 121, pp.37
Chapter IV  Seek the Crux

The purpose of this chapter is to seek the root reason for the law with two faces. It stands on a historical ground so as to give readers a historical view. This chapter has a summary about the origin and development of the Confucianism—*Li*. During the process of its development, a feature gradually comes into being, i.e. utilizing common people and cheating the public. *Li* takes pains to prove that common people do not have the same fate awarded by heaven as that of state power holders. As a result, they should not have the same social status in the world. This value continued to exist after imperial China was overthrown. In short, China has a tradition of valuing the interests of the state, or put in another way, the interests of the state’s representatives.

The new China—China after 1949—claims to be the People’s Republic of China, but it is virtually a society controlled by state leaders, almost the same as the traditional society. Consequently, when the law conflicts with leaders’ personal will, the latter prevails. People do not believe in justice and equality. They believe that leaders’ power cannot be challenged, so their wills should be followed without any questions.

This is the primary reason that people do not give the law the credit it deserves. The problem is not that some people violate laws, but that the whole country discredits and avoids laws. To change this situation, it is necessary to change values held by the public—the blind obedience to the will of power holders.
A. The historical cause—values of imperial China\textsuperscript{241}

"Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present."\textsuperscript{242}

We are all brought up in a tradition that hems us in. It plays an important role without our being aware of it. China's long history, extending over more than three thousand years, has produced numerous philosophical ideas, among which Confucianism is very important. Although the theory of legislation in contemporary China certainly differs from the philosophies of Confucianism, it remains an underpinning part of Chinese political and legal theory.\textsuperscript{243} To completely understand the intricacies of the Chinese legal system, it is necessary to examine the historical and philosophical foundations of China's legal system.\textsuperscript{244}

As is often the case in attempting to understand the ways of China, one must begin with Confucius and his \textit{Li}.\textsuperscript{245} Some authors argue that the importance of a scientific study of

\textsuperscript{241} This section analyzes values in China during the period from the first empire to 1911 when the Revolution led by Dr. Sun Yat-sen overthrew the last emperor. For convenience, China of this period is referred as Imperial China.

\textsuperscript{242} Michel Foucault, \textit{Discipline and Punish: The Birth of the Prison}, translated by Alan Sheridan, Allen Lane, 1977, London, pp.30-31


\textsuperscript{244} Ibid.

Confucius can hardly be overstated.\textsuperscript{246} "He has been the national ideal of the Chinese people for about 2,500 years. He has occupied a unique place in Chinese history. Numerous books have been written about him, and numerous titles and honors have been conferred upon him."\textsuperscript{247}

Confucius sought to achieve a humane society not through publicly promulgated and impartially applied laws but through the persuasive force of exemplary moral figures guided by the $Li$ (rites).\textsuperscript{248} Actually, the original form\textsuperscript{249} of $Li$ came into being before Confucius.\textsuperscript{250} Later, Confucius and other Confucianism followers developed a systematic $Li$ (rules of rite). When Confucius' $Li$ was employed as a means to govern the state, it became a publicly accepted belief of inequality.\textsuperscript{251}

The basic principle of $Li$ (rites) is "$Li$ standing beyond common people, and criminal punishment being below the level of aristocrats."\textsuperscript{252} Specifically, the privileges that $Li$
awards to aristocrats cannot be shared by common people. The punishment imposed on aristocrats for the same crime is much lighter than that to common people. This principle had a far-reaching influence: the law in Imperial China protected a public inequality. The following case can illustrate the values upheld by Confucianism.

A Case of Imperial China

The facts of the case took place in the Spring and Autumn Period of the Jin Kingdom of China circa 543 B.C.-522 B.C. Xu Wufan's sister was very pretty. She had been engaged in Gongsun Chu whose officer title was Lower Daifu. However, Gongsun Hei whose officer title was Higher Daifu—forced Wufan to accept his engagement gift and wanted to marry Wufan's sister. Wufan was scared and went to see Zichan for help. Zichan said: "It is up to your sister to decide whom she will marry." So Wufan told the two competing men that they would be selected by his sister. The two men both agreed.

Then, Hei came to the contest in very beautiful clothes and with very expensive presents. Chu came in handsome hunting jackets. After shooting with his right and left hands, Chu jumped onto a horse cart and left. Wufan's sister watched in

255 As a matter of fact, the rhetoric employed by Imperial Chinese law-makers had tricky elements. The use of "respect" can be an example. See section B. of this chapter: The origin of defrauding the public in contemporary China, *infra.*
256 Wu Xinhao, *The Famous Cases through the Ages of China (Zhong Guo Li Dai Ming An),* Zhong Zhou Gu Ji Press, Henan, China, 1993, pp. 3-7. [Author's translation]
257 *Daifu* was official ranking title in Imperial China. Lower *Daifu* was lower than Higher *Daifu.* [Author's note]
258 *Zichan* was the highest imperial official at the time. (See Wu Xinhao, *The Famous Cases through the Ages of China, supra* note 266) Also, he was a famous representative of the political philosophy of "legalism" of Imperial China (Fa jia). Some authors argue that 'legalism' and 'Confucianism' in Imperial China stood against each other. (See Bary, Wm. Theodore De *The "Constitutional Tradition" in China, infra* note 391, 7-34, pp. 8, II.)
259 Author's emphasis mark. The purpose is to emphasize that although the two both agreed to compete fairly, when the party with higher social status lost, he could injure the other party by other means and the state power protected him.
her room and said: “Hei is beautiful yet Chu is mighty.” So she decided to marry Chu. Hei was very angry at the decision. He went to see Chu with a sword under his jacket hoping to kill Chu and seize his wife. Unfortunately, he was wounded by Chu. Hei was very angry about the result and went to sue Chu. The officers were all discussing this case. Zichan said: “The two parties are as liable as each other, so the younger one is guilty. That is, Chu is guilty.” Consequently, Chu was arrested. Zichan announced his crimes: “You have offended all the five main state rules: ‘respecting the authority of the monarch; obeying the orders of the emperor; respecting those who have higher social status than you; respecting those who are older than you; and supporting the relatives.’ You used arms while the emperor was in the capital. That proved you did not respect the authority of the monarch. Your offence is disobeying the orders of the emperor. Hei is Higher Daifu and you are Lower Daifu. The fact that you hurt him proves that you did not respect those who have higher social status than you. You are younger than Hei, so you did not respect those who are older than you. Hei is the son of your uncle. That belies you did not support your relatives.”

As a result, Chu was sentenced.

1, Values upheld and suppressed in imperial China

The above case illustrates values held by people in Imperial China. Those values are respecting the monarch; respecting elders; and respecting people with higher social status. One important aspect is, however, that here the word ‘respect’ goes beyond its general meaning. In the case that the monarch, or elders, or the people with higher social status tried to hurt or even kill younger people or people with lower social status, if the one being injured defended himself, that was not being respectful. Whether the means employed by them was legal or not did not make any difference. The point was that you did not have the right to defend yourself from any attacks from people with higher social status.

260 To some degree, the values are still held by modern China. See section C of this chapter: Continuance and discontinuance, infra.
261 ‘Respect’ as a verb is “1, to consider worthy of high regard; 2, to refrain from interfering with; and 3, to have reference to”. See online dictionary at http://www.yourdictionary.com/cgi-bin/mw.cgi.
Montesquieu observes that law in general is human reason.\textsuperscript{262} Laws should be in relation to the nature and principle of each government.\textsuperscript{263} He ascribes fear to despotic government of which the representative is the prince.\textsuperscript{264} The prince bestows his immense power entirely upon those whom he is pleased to entrust with the administration.\textsuperscript{265}

Based on Montesquieu’s analysis and the facts in the above case, it is beyond argument that Imperial China was a despotic government. It required subjects of emperors to be the most passive people, to be the most obedient servants, if not complete slaves. To justify their rule so that the rule could continue, the monarchy developed a comprehensive theory, i.e. Confucianism or \textit{Li} (rite)\textsuperscript{266}.

2. \textit{The same subject continued—the development of Confucianism: \textit{Li}}

In the 21\textsuperscript{st} year of Duke Hsiang 552 B.C., Shu Hsiang said, “The rules of proper conduct (\textit{Li}) are the vehicles of government... When \textit{Li} is dishonored, government is lost.”\textsuperscript{267}

In the 6\textsuperscript{th} year of Duke Chao, 536 B.C., Shu Hsiang expressed his preference of \textit{Li} to the written laws of punishment: “When people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to

\textsuperscript{262} Montesquieu, Baron De \textit{The Sprit of Laws}, Supra note 2, Vol. I, pp. 6, Book I, Of Laws in General, 3. of positive laws.
\textsuperscript{263} \textit{Ibid.}
\textsuperscript{265} \textit{Ibid.}
\textsuperscript{266} In Chinese, the character \textit{Li} means politeness, proper conduct or etiquette. [Author’s note]
\textsuperscript{267} Chen, Jingpan \textit{Confucius as A Teacher}, supra note 246, pp.266-267
the express words, hoping peradventure to be successful in their argument. They can no longer be managed...”

Then what is *Li*? According to Confucius, the rules of proper conduct, which regulate every person according to his social class, are called *Li*. Confucius gave this a special name: Rectification of Names.

One of the main principles of *Li* is Clan Head Power, another name, patriarchy. The ultimate purpose of the patriarchy is to assist the monarchy. *Li* advocates that children are almost property of parents, particularly, the father. Parents hold the supreme power over children, even their lives. In Imperial China, the power the patriarchy wielded was unbelievably large. In the Qing Dynasty, which ended in 1911, if children did not respect parents and parents killed them for their punishment, parents were not guilty by law. If parents killed children for any other reasons or no reason at all, the penal punishment was very light, for example, a fine of nearly half a cow.

Another main principle advocated by *Li* to uphold the monarchy is “Heaven Theory”. In

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268 Ibid, pp. 267
269 Ibid, pp. 272
270 By the Rectification of Names, he meant that everything should be in its proper order, and every man should be true to his name (social status and family status) and act accordingly. For example, a son should act as a son, a father as a father, a king as a king, and a minister as a minister. (See Chen, Jingpan *Confucius as A Teacher*, supra note 246, pp. 271-272)
271 Zhao Xiaogeng, *Conflicts and Harmonies between Li and Law*, in *Confucianism and Legal Culture*, ed. China Confucianism and Legal Culture Association, Fudan University Press, China, Shanghai, 1992, 217-223, pp.219 *Patriarchy, Father’s Power*
272 Ibid.
Imperial times, the Chinese deeply believed: “Heaven gave birth to mankind.” This belief was taken to fortify the power of the monarchy. Because Confucius did not really concern himself more with matters of heaven than the world of man, other Confucianism followers formalized this theory. One reason for this is that Heaven Theory could be used to defraud the common people and maintain the rule of public inequality.

In Han Dynasty, Jia Yi, a high imperial official and also an illustrious Confucianist, suggested that people with high social status and those with low social status do not have the same legal status because heaven awards them different fates. As a result, some cruel penal punishment did not apply to people with higher social status, but only to common people. Shortly after that, Dong Zhongshu, another high imperial official and illustrious Confucianist further formalized Heaven Theory:

“The emperor represents heaven which gives sunshine and rain; the subjects represent the earth who benefit from the sunshine and rain. Husbands represent the sun that gives life; wives represent the moon that helps to give life. Fathers represent the spring that gives birth; sons represent the summer that is founded on the spring.”

In his other books, Dong further advocated the inequality between people with high social status and low social status and between men and women: “The emperor is governed by

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273 The Book of Poetry, 3,3,1,1. See also Chen, Jingpan *Confucius as A Teacher, supra* note 256, 1993, pp. 255
274 In the *Lun Yu*, where Confucius’ sayings are collected, one can read that “Confucius spoke neither of marvels, nor of extraordinary force, not of disorder, nor of divinity.” When Zi Lu, a disciple of Confucius asked the master if one should serve the gods, Confucius replied “if I cannot yet serve men well, how shall I serve the gods?” Thus Confucius was clearly preoccupied with the world of man. (See Weng Li, *Philosophical Influences on Contemporary Chinese Law, supra* note 243, pp. 333)
275 Zhang Jinpan, ed. *General Legal History of China (Zhong Guo Fa Zhi Tong Shi), supra* note 250, Vol. 2, (the period of the Warring States, Qin Dynasty and Han Dynasty) pp. 205
Based on his Heaven Theory, Dong suggested that legislation be enacted according to the above Confucianism principles. His suggestion was accepted by the imperial mechanism. The legislation based on Confucianism ran throughout the Chinese feudal history. This discredits a popular point that Confucianism stands against the law. As a matter of fact, Confucianism imbued its spirit into Chinese imperial law. Put in another way, it is not that Confucianism stands against formal state law, but that Confucianism used ‘Heaven Theory’ to make formal state law.

3. The cost of these values

Tan Sitong criticized the law of Imperial China as “demoralizing to people’s spirits; suppressing their rights and interests; depressing their lives; and extinguishing their intelligence.” This commentary coincides with Montesquieu’s comments on the spirit of

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278 Ibid, pp. 207. Also see Dong Zhongshu, Something about Spring & Autumn: Follow the Fate.

279 Ibid. pp. 207

280 Ibid. pp. 207

281 For example, Bary says: “...a large sphere of social activity was to be governed by voluntary adherence to the traditional rites without the intervention of the state and its laws.” (Bary, Wm. Theodore De The “Constitutional Tradition” in China, infra note 391, 7-34, pp. 9)

282 In the Han Dynasty, more and more laws were enacted. These laws were permeated with the spirit of Confucianism. There were crime names such as ‘not respectful’ and ‘not loyal’. This proves that by then Confucianism had combined the function of laws to govern human behaviour. (See Zhang Jinpan, ed. General Legal History of China (Zhong Guo Fa Zhi Tong Shi), Vol. 2, supra note 250, pp. 207)

283 As an author has noted, this theory is no more religion than governance: “There is some mysticism in this theory, which reigned in the minds of all Chinese princes until the nineteenth century, but its main purpose is not so much to exact the religiosity of the prince as to encourage good government.” (See Weng Li, Philosophical Influences on Contemporary Chinese Law, supra note 243, pp. 333)

284 Tan Sitong was one member of the group that advocated law reform by the end of Qing Dynasty—China’s last dynasty. [Author’s note]

the principle of despotic government: "Persons capable of setting a value upon themselves would be likely to create disturbances. Fear must therefore depress their spirits, and extinguish even the least sense of ambition."\(^{286}\) As a result, they have no limitations or restrictions, no mediums, terms, equivalents, no rights, no change to propose. The subjects are creatures that blindly submit to the absolute will of the sovereign.\(^{287}\)

Based on historical research, Montesquieu points out that only in a despotic government, may the sovereign be judge.\(^{288}\) When in some cases the political interest prevails over the civil interest, the law must provide as much as possible the security of individuals in order to remedy the evil.\(^{289}\) The laws in China do have prescriptions that are supposed to provide individual security. However, the implementation of these laws has encountered great difficulties. Some individuals\(^{290}\) who hold sovereign power and represent political power make every effort to prevent the laws from being implemented. This turned the Chinese law into an entity with two faces and made it sophisticated. China is called 'the People's Republic of China'. In fact, however, it is not a republic. It is still a despotic government: 'republic' in

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\(^{287}\) *Ibid.* Vol. 1, pp.27. Book III of the principles of the three kinds of government, 10. difference of obedience in moderate and despotic governments  
\(^{289}\) *Ibid.*  
\(^{290}\) The absolute number and the percentage cannot be traced properly, due to many factors. For example, the investigation of these kinds of cases can hardly be conducted before the relevant political individuals are found out. These individuals may employ every means to conceal their illegal actions. 'The leader said you were guilty' acts as only one means, a very serious anti-law means.
books, and ‘despotict in action. Laws in books serve to deceive the public and international society so as to hide the despotic nature in reality. This is not new. Its roots extend to ancient times.

B. The origin of defrauding the public in contemporary China

Throughout the whole Chinese imperial history, the rich were getting richer and the poor poorer. In the age of Confucius and his immediate predecessors and successors, the gap between the rich and the poor was increasing. The aristocracy accumulated more and more property and left common people poorer and poorer. Governments became corrupt; there were “numerous cases of regicide, heavy taxation, suffering of the common people.” Two poems of those ages can be the witness:

“Some enjoy their ease and rest,
And some are worn out in serving the state!
Some lie and loll upon their couches,
And some never cease marching about”
(The Book of Poetry, Pt. 2, Bk. 6, 1)

“The flowers are now gone;
There are only the leaves full green.
Ah! Had I known it would be thus with me,
I had better not have been born.

Hunger has swollen the ewes’ heads;
There is nothing but the reflected stars in the fish-trap.
If some men have aught to eat,
Few can get their fill”
(The Book of Poetry, Pt. 2, Bk. 8, 9)

291 Jingpan Chen, Confucius as A Teacher, supra note 246, pp. 58
292 The Book of Poetry is a collection of poems in Imperial China, particularly of Imperial times before the Qin Dynasty—the first dynasty that unified China in 221 B.C. [Author’s note]
293 See also Confucius as A Teacher, by Chen, Jingpan, supra note 246, pp. 58.
At the same time as common people got more miserable, the power of the monarchy was increasing unceasingly.\(^{294}\) The legislature, administration, and judiciary were all founded on the will of the emperor.\(^{295}\) Otherwise it would be not ‘respectful’. The criminal punishments employed were numerous and highly cruel. The punishment administrated by the Qin Dynasty can be taken as an example.

“After its unification of China, Qin Dynasty continued to implement a principle of cruel penalty. It continuously adjusted and improved its legal system to suit the despotic power of feudalist monarchy. As a result, Qin established its complete and unbelievably cruel legal system. It is important to note that under the despotic power of feudalist monarchy, many crime names and the punishment for them stayed outside of the legal system. Their creation and use depended on emperors’ will. This fully embodied the nature of feudalist monarchy legal system.”\(^{296}\)

Almost all importance was attached to the monarchy. Nothing related to people’s rights was important. This made people greedy for power. Moreover, power and money had a close tie with each other. Because government officials had power, people were eager to be government officials. This greed made buying an official position a custom, and further degraded human rights and law.\(^{297}\) To obtain an official position, one must pay a heavy cost.\(^{298}\) After securing a position, they were generally in great debt. As a result, during their office terms they had to

\(^{294}\) Zhang Jinpan, ed. General Legal History of China (Zhong Guo Fa Zhi Tong Shi), supra note 250, Vol. 2, (the period of the Warring States, Qin Dynasty and Han Dynasty) pp.61-62. [Author’s translation]
\(^{295}\) Ibid, pp. 62. [Author’s translation]
\(^{296}\) Ibid, pp. 127. [Author’s translation]
\(^{297}\) For example, almost every business action of officials was paid with ‘gifts’ from lower level officials. Moreover, officials’ staff members must be paid enough attention through gifts if one wanted to be promoted or get a position. (See Gong Pi-xiang, Traditional Chinese Society and Law: an Analysis of Weber’s Theories, pp.273, infra note 298)
get back the money they invested. Obviously, the purpose of being a government official was to make money.  

Those conditions remained throughout the whole history of Imperial China and exerted a fatal consequence on all dynasties. All dynasties had the same fate without any exception. "They shut themselves up in a palace; their understanding was impaired; ...a lazy set of people that dwelt there ruined the industrious part of the nation; the emperor was killed or destroyed by a usurper, who founded a family, the third or fourth successor of which went and shut himself up in the very same palace." The power holders tried to maintain and increase their power, to disdain human rights and then justice. When one rule became too cruel to be bearable, people overthrew it and established a new one. The new one stepped into the same palace and fell into the same fate, because none of them valued human rights and justice.

The fact is obvious that justice did not exist in Imperial China, because justice cannot be developed under conditions that weaken the participants. In a society where there is no competition or minimum competition, there are no equal participants. 

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299 Ibid.
301 Ibid.
participants, justice cannot live. In Imperial China, political and private affairs were decided, directly or indirectly, by state power, which was controlled by a small group of people whose ultimate leader was the emperor. There was no competition, and hence no participants, but only a small group of the ruling and another group of the ruled. Consequently, there was no justice in Imperial China. It was a despotic government.

According to Montesquieu’s analysis, a despotic government does not allow its people to think. All it asks is to obey blindly rulers’ instructions. Imperial Chinese government did the same thing. It tried all means to prevent its subjects from thinking as normal human beings. Nevertheless, fear could not eliminate people’s thinking completely. Some people may not be good subjects to a despotic state because they were not suppressed by fear.

The question of those people was: being human beings, why some people get as much as they wish without any labor and others must work deadly hard and still suffer from hunger?

The government must employ something to justify a situation void of justice. The imperial governments made up Confucianism. This can explain why Confucianism lasted for such a long a time: it did serve as a powerful means to deceive the common people.

Confucianism was only one branch of philosophy before the Qin Dynasty. Confucius himself

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was no more than a teacher of this philosophy.\textsuperscript{305} He was often a target of laughter and was teased as ‘a homeless dog’.\textsuperscript{306} However, after the Qin Dynasty, Confucius and Confucianism gained superior status. Why? One main reason was that it advocated that humaneness could gain support of subjects and kindness could help to use subjects well.\textsuperscript{307} ‘Humaneness’ and ‘kindness’ here represent mild exploitation by the ruling class. Specifically speaking, it said that subjects did not protest against mild exploitation. If the exploitation was too harsh to stand, common people would overthrow the rule.

Although its main purpose was to help rulers to control subjects, it did also benefit common people at the time.\textsuperscript{308} It dissuaded rulers from treating them too cruelly. On this ground, it had benefits to common people’s life and production. Consequently, it helped the ruling class. “It is hard for common people to see through the cheating elements of this ruling ideology.”\textsuperscript{309} For this reason, Confucianism gained the support of both the ruling and the ruled.

\textbf{C. Continuance and discontinuance}

“The history discontinues, suspends or changes direction when important events happen. However, this phenomenon is only an appearance. If we examine carefully, it does not require much effort to discover that after the

\begin{footnotesize}
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\item[Zhang Guohua, Something about Confucius and his legal ideology (Lv lun Kongzi qi Fa lv Sixiang), in China Confucianism and Legal Culture Association, ed. Confucianism and Legal Culture, Fudan University Press, China, Shanghai, 1992, 8-18, pp. 16-17. [Author’s translation]\textsuperscript{305}
\item[Ibid. [Author’s translation]\textsuperscript{306}
\item[The exact meaning of the two ideas is: for governors (in Imperial China, emperors), the best way to continue their governance is to be kind and humane to their subjects.\textsuperscript{307}
\item[This should be viewed in a special background. In Imperial times, the rulers were generally very cruel to common people. (See supra note 296, laws in Qin Dynasty) As a result, this ideology was good to both the ruler and the ruled. [Author’s note]\textsuperscript{308}
\item[Zhang Guohua, Something about Confucius and his legal ideology, supra note 305, pp.17. [Author’s translation]\textsuperscript{309}
\end{itemize}
\end{footnotesize}
events—the discontinuance, some old habits continue. People hardly notice their control over us, which illustrates the fact that the control is powerful and indomitable. "..."  

The above statement is incisive. 'The history' was expected as a future of some people, and was thought as 'the present' by some other people. Now it has become 'the history' by which the present is being given birth. The present encompasses its history and predicts the possibility of its future. The history passed, but it never died. It still controls the present.

Right before the People's Republic of China was established, the revolution under the leadership of Mao Ze-dong, the first president of the People's Republic of China, was at its peak. The success of the revolution attracted some visitors from southern China. Huang Yanpei, one visitor at the time, made some remarkable observations to Mao. He said that it was relatively easy to uphold morality and integrity before winning victory. But it would be difficult to maintain the same integrity once in power. Eventually corruption would set in and the system would collapse. And as far as he knew, no organization and no government in China had ever avoided this fate. Mao answered Huang's challenge with confidence that the Chinese Communist Party had already found a new way to transcend that cycle. The new way was minzhu (democracy). Only by placing the government leaders under the supervision of the people, Mao said, would government leaders maintain their integrity.

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312 Ibid.
After the people's republic of China was established, the old belief—Confucianism—was criticized along with the old government. It was supposed that common people's life should become better and better. Ironically, however, history turned out to be the opposite of Mao's expectation. According to historical materials, soon after the establishment of the People's Republic of China, the fatal fate that Montesquieu attributes to Imperial China fell upon the supposed new China.

"Corruption and abuse of power became widespread among the rural Communist leaders soon after the CCP came to power. Of the 625 CCP cadres in Jidong (the eastern part of Jimo), 404, more than 64 percent, were found guilty of corruption charges during sanfan yundong (the campaign to oppose corruption, waste and bureaucracy) in 1951. In January 1953, Ji Chuanfu, the deputy militia chief of Jidong, beat up 288 people, forced 107 people to kneel down, and caused four suicides in 14 villages. Perhaps this was an extreme case. The question is how could this kind of outrageous case happen at all? After all, CCP cadres were supposed to be different from the old type of officials, they were supposed to be servants of the people."

It is true that the People's Republic of China was, and still is, supposed to be different from the old imperial dynasties. However, the most important feature of history is not its discontinuance, but its continuance. The historical custom can hardly be changed.

It was recorded that in the Great Leap Forward (1958-1959), many village leaders forced villagers to work twenty hours a day. The leaders were generally arbitrary and ruthless in managing village affairs and ruling people. To protect their authority, they enforced harsh and

313 China Communist Party [Author’s note]
315 *Ibid.* pp. 15
arbitrary rules in those villages. For example, during the food shortage of 1959-1960, village leaders made a rule that anybody caught stealing collective crops would be fined ten times the quantity he or she stole. “Of the 168 households in Xiaobu village, 84 households had been fined. Of the 84 households that were fined, 30 percent were reduced to begging outside of the village.”

Another author witnessed the obvious inequality between classes in the early 1980s. He gives many examples to prove his point, such as the following:  

“...as I was going along through a similar line-up, the young peasant woman ahead of me, I think not familiar with railways and not anticipating that she must show her ticket, held up the line, fumbling through her cloth bundle. This time, the ticket inspector, a woman of about the same age, simply shoved her aside, so rudely that she fell down... Again, nobody, including the peasant woman, seemed to find anything unusual. Nobody registered any objection—not even by frowning.”

‘The leader said you were guilty’ testifies that the situation does not change much in the start of the new millennia. The Chinese history did not discontinue suddenly after 1949. It did not turn into a completely new entity only because the new China simply claimed to be a people’s republic and a democratic country. Although much of the pre-existing social order was destroyed, Confucianism, the heart of ancient Chinese law remains influential today. The state power holders attempt to keep it for their own interests. Confucianism continues in every

316 Ibid. pp. 16
318 A line-up at a train station to show your ticket or something like that. [Author's note]
corner of the society: government officials, common people, and judges. The public continues to obey leaders' will blindly.

Tyranny and inequality exist in reality. The government must do something to hide the reality and to show the international society that it is a democratic country. Thus, the cheating nature of Imperial Chinese governments continues. The law serves as a means for both the purposes. As a result, the Constitution was enacted. It claims that people be the master of the country and hold the state power. It claims equality among the people. It also provides that the people's courts of law exercise judicial power independently. The PRC Administrative Procedure Law prescribes judicial examination over administrative power. The PRC Criminal Procedure Law provides that judges be free from interference by any administrative agency and individuals. Many other related laws came into being. These laws provide that administrative power should be in check; and these laws remain in books.

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320 Many authors have pointed out this view. For example, see Julia Cheng, China's Copyright System: Rising to the Spirit of Trips Requires an Internal Focus and WTO Membership, in Fordham International Law Journal, June 1998 pp. 1941-2013 and Miller, Serri E. The Posse Is Coming to Town...Maybe: the Role of United States Non-Governmental Organizations IN Software Anti-Piracy Initiatives as China Seeks WTO Accession, in ILSA Journal of International and Comparative Law, Fall, 2000 111-132. Or refer to website http://web2.westlaw.com/search/default.wl?DB=JLR&R=WLW2.75&VR=2.0&SV=Split&FN=_top&MT=W estlaw&RecreatePath%2Fdirectory%2Fdefault%2Ew1
322 Ibid, Preamble, paragraph 4. It says “...the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New-Democratic Revolution and founded the People's Republic of China. Since then the Chinese people have taken control of state power and become masters of the country.”
324 Ibid, article 5.
326 The PRC Criminal Procedure Law, 1979, as amended in 1996, article 8
327 Refer to Chapter two for details, supra.
History continues. What remains unsettled is how we might, appropriately, respectfully and wholesomely, characterize our inheritance of history to avoid unduly replicating injustice.\textsuperscript{328}

Before the Communist Party came to power, Mao Zedong proposed a new way—minzhu (democracy): only by placing the government leaders under the supervision of the people, would government leaders maintain their integrity.\textsuperscript{329} This is a practical way of keeping government power in check. The problem is how to realize democracy and put the government under the people's supervision. The critical point is that the old belief still controls people's mind. Without changing the basic value, the law will remain in books.

According to Montesquieu's design of the government, judiciary power, executive power and legislative power should be three parallel powers. No one should be afraid of another. If these three powers go to the same entity, justice and liberty will come to an end. Thus, the first step to change the current situation of China is to replace the old value with the following theory.

"... it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; ... Again, there is no liberty, if the judiciary power be not separated from the legislative and executive...There would be an end of everything, were the same man or the same body, ... to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."\textsuperscript{330}


\textsuperscript{329} Han, Dongping, *The Unknown Cultural Revolution: Educational Reforms and Their Impact on China's Rural Development*, supra note 311, pp. 13

\textsuperscript{330} Montesquieu, Baron De *The Spirit of Laws, supra* note 2, Vol. 1, pp. 151-152, Book XI Of the Laws Which Establish Political Liberty with Regard to the Constitution, 6. Of the constitution of England
Chapter V  Two Important Theories

Through the process of seeking an answer for the question, why people do not abide by the law, two proposals were brought forward: 'local resources' theory and 'language vagueness' theory.

'Local resources' theory is an effort to explain the phenomenon that people do not abide by the law in China. It criticizes the 'law transplanting' theory. Meanwhile, it sets up its own thesis: to make people rely on the formal law, it is important to establish a legal institution that can be compatible with traditional values.³³¹ This theory gives a reason for its thesis that avoidance of the law is a product of a legal institution against a particular social background.³³² To make people accept the law, it is necessary that the legal institution be attuned to this particular social background. For this reason, other methods advocated such as improving common people's legal consciousness, and legal education, are of less importance.³³³

'Language vagueness' theory holds that there is vagueness and ambiguous authority in Chinese statutory language.³³⁴ This theory assumes that these elements are the key problems of Chinese law³³⁵. It insists that for laws and regulations to serve as authority for the behavior of individuals and legal persons, they must be as clear, comprehensive, and unambiguous as

³³¹ See generally Su Li, Legal Reform, Rule of Law and Local Resources, supra note 27, pp. 3-22.
³³³ Ibid.
³³⁴ Claudia Ross & Lester Ross, Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language, supra note 30, pp. 221-270.
³³⁵ Ibid. pp. 257.
possible. If this character cannot be realized, judges will construe the law unevenly or in accordance with their own interests. Consequently the implementation of law will be reduced, and uncertainty fostered.

The above theories are critical and important. Although they are not the root reason for the phenomenon that laws are widely put aside in China, they are important to make the situation better.

A. The position of ‘local resources’ theory

Montesquieu gives many examples with regard to the importance of local situations. There is not a navigable river in Persia, he says, except in Kui, which is at the extremity of the empire. The ancient law of the Gours that prohibited sailing on rivers did not, therefore, cause any inconvenience in this country, though it would have ruined the trade of another. Another example is: frequent baths are extremely useful in hot climates. On this account they are ordained in Mahommedan law and in the Indian religion.

The above two examples serve to prove ‘the inconvenience of transplant’ from one country to another. An institution, whether of a religious nature or a legal nature, must take into account

336 Ibid.
337 Ibid.
338 Montesquieu, Baron De The Sprit of Laws, supra note 2, Vol. 2, pp. 43, Book XXIV Of Laws in Relation to Religion Considered in Itself, and in Its Doctrines, 25. The inconvenience of transplanting a religion from one country to another, 26. The same subject continued
339 Ibid.
340 Ibid.
the local situation. An inappropriate transplant possesses the potential danger to ruin the whole institution. This is what the ‘Local Resources’ theory upholds with regard to ‘law transplanting’.

In legal academic circles, there has been a hot debate about the ‘Local Resources’ theory. This theory has received much praise, such as, it “emphasizes the Chinese practical situation when understanding law and doing legal construction”\textsuperscript{341}; it “employs a multi-viewpoint to explain law and the rule of law.”\textsuperscript{342} People view this theory as an original attempt to analyse the Chinese legal situation. Su Li’s\textsuperscript{343} book *The Rule of Law and Its Local Resources*\textsuperscript{344} is representative of this theory. It has been listed in the best sellers list of legal books.\textsuperscript{345} Its influence, particularly on university students, is very powerful.\textsuperscript{346} This theory is an attempt to explain and resolve the ‘perplexing cycle’ phenomenon mentioned in the first chapter.

It criticizes the ‘Law Transplanting’ theory. “In China,” Su Li says: “to establish the rule of law, the first important step is to re-examine the law. The legal textbooks habitually define the law from a political perspective.”\textsuperscript{347} As a result, the law has been regarded almost only as the

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\textsuperscript{341} Xin Wang, *Thoughts from outside of local resources: a review of Su Li’s viewpoints*, at http://211.100.18.62/research/academy/details.asp?lid=3375 [Author’s translation]  
\textsuperscript{342} Ibid. [Author’s translation]  
\textsuperscript{343} Law professor in the Faculty of Law, Peking University, China.  
\textsuperscript{344} Su, Li *The Rule of Law and Local Resources*, Press of China University of Political Science and Law, 1996, Beijing  
\textsuperscript{346} Ibid.  
\textsuperscript{347} Su, Li *Legal Reform, Rule of Law and Local Resources*, in Su, Li *The Rule of Law and Its Local Resources*, supra note 27, pp. 3-22, pp. 6.
\end{flushleft}
will of the ruling class that has been promoted to the state will. If understood from a sociological standpoint however, the law has an important function—not to change the society, but to establish and maintain a predictable society, so that the people can decide their actions.

This is actually a critique of legal theory transplanting. The ‘law as the will of the ruling class’ theory is transplanted from legal thought in the *Manifesto of Communist Party*. Marx and Engels say in the *Manifesto*: “…just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.” In their opinion, the ruling class is driven by selfishness to transform the social forms springing from the mode of production and form of property into eternal laws of nature and of reason.

While criticizing law transplanting, Su Li sets up the main thesis of ‘Local Resources’ theory. He says: “Dislike of the law, as a social phenomenon, is not a product of ideas, but of an institution against a particular social background. [Against this social background,] it is a convenient means to avoid harm and earn interests.” According to Su Li, to change the

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349 *Ibid.* Then the author analyses further: “Why do we deposit our money into a bank? That is because we know that it can be withdrawn when we need it, that the money will not reduce its monetary value very fast, and so on. It is secure to say that any of our social actions are founded on the basis of a predicable society. The law and other tools possessing this function ensure us that the society does not change overnight to so great an extent that it discredits the meaning that we have put into it.” [Author’s translation]

350 Marx, Karl; Engels, Frederick *Manifesto of Communist Party*


wide scope of law avoidance so as to make people rely on the formal law, it is necessary to establish a legal institution that can be compatible with traditional values. Thus, this legal institution can gain the public’s support so that it is able to replace functionally traditional dispute resolution. Compared to this proposal, other methods advocated such as to improve common people’s legal consciousness, and legal education, are of less importance.

According to the facts and analysis provided in chapter two and chapter three, the ‘local resources’ theory correctly points out the fact that “the current Chinese formal law has disjointed with the Chinese social situation.”\(^{354}\) The Chinese practical situation has, to some degree, proved the rightness of ‘Local Resources’ theory. *Haixuan* (sea election) can be taken as an example.

*Huaxuan* is a folk name for direct village elections and villager self-government. In 1991, *haixuan* was first introduced by villagers in *Lishu* county, *Jilin* province, China. *Haixuan* gives the right of nomination to each individual voter and breaks the monopoly of nomination of candidates by the township/town government and village Party branch. This is a creative application of the Organic Law on the Villager Committees of the People’s Republic of China\(^{355}\) (hereinafter the Organic Law).

*Haixuan* is a practical means to apply the Organic Law to the countryside world in China. Before it, this law could hardly be implemented. The impact of *Haixuan* is great. One can

\(^{354}\) *Ibid*, pp. 28. [Author’s translation]

barely exaggerate the influence of *Haixuan* on China’s countryside and its hundreds of millions of occupants. It makes possible in some countryside places to put the Organic Law into a real sense. “If the law is implemented in the real sense, the peasants indeed can be their own masters and decide their own affairs.”356

**B. The position of ‘language vagueness’ theory**

This theory holds that laws and regulations should be clear enough with as little space as possible for language vagueness. Authors of this theory assume that language is the crux for the phenomenon that laws are widely put aside in China.357 They believe that for laws and regulations to serve as authority for the behavior of individuals and legal persons, statutes and regulations must be as clear, comprehensive, and unambiguous as possible.358 If this character of laws and regulations cannot be realized, judges will construe the law unevenly or in accordance with their own interests. Consequently, the prospects for public and private enforcement will be reduced and uncertainty fostered.

For example, Immanuel Gebhardt and Matthias Mueller criticize that China’s new Government Procurement Law is not clear.359 They assume that this would make it possible that the application and effectiveness of the law change more easily than when the law is

358 Ibid.
clearer. Consequently, the authority of the law is uncertain and the compliance with the law is reduced.

C. The danger of both theories

Although both the theories are critical and important, they are not the root reason for the phenomenon that people do not abide by law in China. It is dangerous to take either of them as the crux to change the phenomenon.

1. The danger of 'local resources' theory

In my opinion, local resources are important, only when they serve local people. The ultimate purpose is to improve people's lives, whether by means of 'local resources' or of law transplanting or by a combination. The significance of the 'local resources' theory exists only when it can help people to live a more civilized life. By 'civilized life', I mean a life in a democratic and liberal society. Su Li rightly sees a main function of law—to establish and maintain a predictable society, so that the people can decide their actions\textsuperscript{360}. He also points out correctly the big gap between the law and the culture\textsuperscript{361}. However, 'local resources' theory goes beyond the due extent that the local situation deserves. This theory does not make any difference between usable resources and unusable resources. It does not recognize that many local resources are of the nature of the rule of man. They embody the tyranny of leaders'.

\textsuperscript{360} Su, Li \textit{The Rule of Law and Its Local Resources}, Press of China University of Political Science and Law, 1996, Beijing, pp. 6

\textsuperscript{361} Su Li wrote two articles specifically about this problem. (See \textit{Law Avoidance and Multi-law} and \textit{Again On Law Avoidance}, in Su, Li \textit{The Rule of Law and Its Local Resources}, Press of China University of Political Science and Law, 1996, Beijing)
personal will. Their existence can only make people’s life miserable, and turn contemporary legal life back to that of imperial China. For example, Su Li sympathizes with a village chief who used traditional but illegal and cruel punishment and caused a suicide. With regard to this case, Su Li says: “...in China, particularly in countryside areas, villagers solve their disputes on their own, except very serious disputes. Consequently, there are many local rules and customs. In this sense, there are local ‘laws’ existing in these areas. These local ‘laws’ might not be in accordance with the so-called objective truth, but they are not the tyranny of the rule of man.” He further comments that people who implement these local ‘laws’ might violate the formal state law, but their actions have support and approval from people living in the same areas. This is, their actions have legitimacy.

Su Li, a representative author of the ‘local resources’ theory, is actually advocating a legal reversion. The punishment on the woman by Shan-gang-ye was a typical punishment imposed by a clan chief on those who violated clan rules in imperial China. Su Li’s basis for his statement that the village chief’s action has ‘legitimacy’ is that this action gained support and approval from some people living in the same areas. This ground is questionable. The legitimacy of actions should not be based solely on whether they have support from their peers. The chief’s action represents a despotic will that undermines human rights. If these kinds of

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362 See Su Li, Qiu-ju’s Confusion and Shan-gang-ye’s Tragedy, in Su, Li The Rule of Law and Its Local Resources, supra note 353, pp. 33. Shan-gang-ye was a village chief. By Chinese traditional standards, he was a qualified village chief. There was a young housewife living in the same village. The woman abused her mother-in-law. The chief punished the woman in a traditional way. Specifically, he bound the woman’s arms and forced her to walk around the village under the watch of many villagers. Meanwhile, he made it public that she was the one who had badly abused her mother-in-law. By Chinese traditional value, this was a seriously insulting punishment. The woman could not bear it and then committed suicide. After this affair happened, the chief was arrested by the local police and was prosecuted under a violation of human rights. [Author’s translation]

363 Ibid, pp.31. [Author’s translation]
actions have legitimacy, China does not need any laws in a modern sense.

The success of Haixuan is evidence to prove the importance of local resources. Nevertheless, its success relies, by a great degree, on the Party’s support and endorsement. Without the Party’s support, the success of any local resources is impossible. Recently, there has been reported a case about the hardship of Haixuan. It was reported in this case that a villager in Liao-ning Province, China, was elected village chief three times. The election results were all cancelled illegally by the township government because it was not satisfied with the elected person (the three elections ended up with the same person being elected). After the three elections and cancellations, the township government appointed one person to be the village chief. The villagers refused the appointed chief and insisted upon their direct village elections. After 10 months of hardship, the villagers finally obtained their right to self-government. Yet, the final victory could not be reached without the support of a higher, city-level party.

The above example suggests that local resources are of less importance than people’s thoughts. If the leaders of the township government believed that they should abide by the law, and they did not have the right to cancel the results of the elections, Haixuan would not go through the hardship. Its final success was obtained mainly because the leaders of the city-level party believed that the authority of the law should be respected. Thus, the key is not to establish a legal institute compatible with local resources, but to establish a belief that administrative power should be in check, laws should be credited, and consequently justice can be realized.

364 Yanwei Liu, Guest Editor’s Introduction, for Village Elections in China, supra note 356.
365 Legal Daily Apr. 25, 2002 or refer to its website http://www.legaldailv.com.cn/gb/content/2002-04/25/content_35876.htm)
2. The danger of 'language vagueness' theory

The fact is that Chinese statutory language is ambiguous. With regard to this aspect, however, Chinese law is not unique.\textsuperscript{366} Ambiguity is inherent whenever a legislative body reduces its purpose to a complex written document.\textsuperscript{367} There are authors who argue that law is very commonly vague. Vagueness and resultant indeterminacies are virtually essential features of law.\textsuperscript{368} There are many books dedicated to make legal language clearer.\textsuperscript{369} This proves that language vagueness is not a characteristic unique to the Chinese law. As a result, it cannot explain the phenomenon that laws are widely put aside in China.

The danger of the both theories is that they can to conceal the real root reason for the phenomenon that people do not abide by the law in China. If the root reason cannot be recognized, it is impossible to change the phenomenon in a real sense. Imagine that a doctor is trying to cure a disease. Only when he/she finds the crux for the disease—the main virus or other damages, the disease can be treated properly and the patient can be cured.

The crux is that people do not believe in justice and equality. They believe that leaders' power
cannot be challenged, and that leaders' personal determination should be followed without question. Consequently, when the law conflicts with leaders' personal will, the latter prevails. The problem is not that some people violate laws, but that the whole country discredits and avoids laws. To change this situation, it is necessary to change values held by the public—the blind obedience to the will of power holders.

The key is in education. By education, an active belief in justice can be established. Government leaders will not presume to order judges; and judges will not submit themselves and human rights to a personal will.
Chapter VI  The Role of Education

The laws of education are the first impressions we receive; and as they prepare us for civil life, every private family ought to be governed by the plan of that great household which comprehends them all...The laws of education will be therefore different in each species of government...  

—Montesquieu

Montesquieu and Foucault both perceived educational importance. In his book Discipline and Punish: The Birth of the Prison, Foucault analyzes in depth body training as an educational means. Imperial China put much importance into education, among which foot binding is merely one means.

I propose that education is very important to every government. Nevertheless, the form of education to various forms of government should be different. Education is the path to change people’s belief. Belief influences people’s actions to a great extent. Currently, most Chinese people only have a passive belief in justice. An urgent step that should be taken in China is to lead the public to an active belief in justice, or at least, to establish judges’ active belief in justice. Judges’ internal identification is very important to the establishment of their active belief in justice. It must be recognized that there are a number of obstacles in the way to lead the public and judges to an active belief in justice.

371 Ibid.
A. Body and education

“But the body is also directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs. This political investment of the body is bound up, in accordance with complex reciprocal relations, with its economic use; it is largely as a force of production that the body is invested with relations of power and domination; ... That is to say, there may be a ‘knowledge’ of the body that is not exactly the science of its functioning, and a mastery of its forces that is more than the ability to conquer them: this knowledge and this mastery constitute what might be called the political technology of the body.”372

1. Body education

The body has been attached great educational importance by governments. Foucault analyzes this aspect of education in the last century. He says “A ‘soul’ inhabits him and brings him to existence, which is, itself, a factor in the mastery that power exercises over the body. The soul is the effect and instrument of a political anatomy; the soul is the prison of the body.”373 Power exerts discipline over the body to mould the soul. The soul, in return, makes a prison of the body. Political anatomy controls people’s soul through controlling their body.

In his texts, Foucault analyzes in-depth the fact that power exercises itself through body training. He points out that the aim of the various political, economic and penal institutions is to mold people into "normal" as opposed to "abnormal" forms, and to forge a process by which a culture encourages its people to achieve his or her own conformity with the established rules.374 The body was used as an object and target of power in the classical age. “It is easy

372 Michel Foucault, Discipline and Punish: The Birth of the Prison, supra note 242. pp. 25-26
373 Ibid. pp. 30
374 See generally Ibid, pp. 135-308
enough to find signs of the attention then paid to the body—to the body that is manipulated, shaped, trained, which obeys, responds, becomes skilful and increases its forces.” In every society, the body was in the grip of very strict powers, which imposed on it constraints, prohibitions or obligations. Manufacture, sovereignty and/or other means that turn natural humans into social humans are basically dependent on the manipulation of the body. To achieve this end, it is necessary to train the body, to repeat the training so that a docile body that may be subjected and used can be forged.

Some institutions are effective through the external forces, for example, forcing the slaves into labor. Some internalize the discipline—making people cultivate themselves, and improve themselves voluntarily. This ‘cultivation of the self’ can be briefly characterized by the fact that one must ‘take care of oneself’. “It is this principle of the care of the self that establishes its necessity, presides over its development, and organizes its practice.” It makes possible the implementation of every institution.

Although Foucault mainly talks about the past, he provides a new perspective, methodology and theoretical basis for the present. His purpose is not solely on the history, but also on the present. “We want historians to confirm our belief that the present rests upon profound intentions and immutable necessities. But the true historical sense confirms our existence

376 Ibid. Part three Discipline, 1, Docile bodies, pp.135-169
among countless lost events, without a landmark or a point of reference.” His aim is to analyze the present by pointing out and examining historical events, because the present is rooted in history.

2. Body education and imperial Chinese government

Imperial Chinese governments of each age did not overlook the powerful effect of body training among which foot binding is very notorious. “It was the custom when I was little for a woman to have tiny, tiny feet. Westerners call them bound feet, but we call them something so much prettier in China: new moon or lotus petals”. There is a noticeable name difference between what it is called by western people and by Imperial Chinese: bound feet versus new moon or lotus petals. Those are obviously bound feet, but why did Imperial Chinese call them new moon or lotus petals? Only for poetry purposes?

As a matter of fact, this was an educational means: a means to internalize the discipline—to make people cultivate themselves, and willingly discipline themselves, so that they could become the best subjects of the sovereign. It is beyond argument that Imperial China was a despotic government. According to Montesquieu’s analysis about different forms of government, a despotic government only accepts the most passive subjects. As a result, the

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379 Pang-Mei Natasha Chang, Bound Feet and Western Dress, Doubleday, New York, 1996, pp.20. This is part of a personal statement of Ms. Chang Yu-i to her great-niece Chang Pang-Mei Natasha. Ms. Chang Yu-i was born in 1900
best subjects for Imperial China were the most passive people. Foot binding served to promote discipline, to make people happily be the most passive subjects.

It is beyond argument that foot binding hurts. Based on historical materials, however, mothers voluntarily conducted this practice generation after generation. How could mothers bear the terrible cries of their daughters when foot binding was performed? To answer this question, it is useful to review the origin and development of foot binding. During the process in which the answer is revealed, the fact will be discovered that a belief can be so powerful that it influences people to hurt their children voluntarily.

Dorothy Ko researched on the origin of foot binding in her book *Every Step a Lotus.* She concludes, after finishing the historical material research, that foot binding was born of a male fantasy that turned women into objects of their amorous desires. She cites Yaoniang, a dancer of the last sovereign of the Southern Tang kingdom (937-78, r. 961-74)—Li Yü, as the most popular and convincing origin myth of foot binding.

“Yaoniang was a slender beauty who excelled in dancing. The last sovereign had a golden lotus built. The six-foot tall lotus was festooned with precious stones and fine ribbons on the inside, creating a magnificent blossom of variegated colors. He then had Yaoniang swaddle her feet with gauze cloth so that they were slender and small, curving upward in the shape of the new moon. Clad only in socks she danced in the clouds, swirling as if she were soaring into

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382 See generally Dorothy Ko, *Every Step a Lotus: Shoes for Bound Feet,* infra note 383, and Chang, Pang-Mei Natasha *Bound Feet and Western Dress,* supra note 379. Foot binding was voluntarily conducted by mothers to their daughters (between age 2 and 3).


384 Ibid. pp. 44. The author conducted a research including scholar Tao Zongyi’ (1320-1400) *Chuogeng lu* (Resting the plough), 10.16a-b, in Siku quanshu, Zi bu 12, and Ebrey’s Inner Quarters. (See Dorothy Ko, *Every Step a Lotus: Shoes for Bound Feet,* supra note 383, pp. 149 note 11.)
the sky... Many sought to imitate her, admiring as they did the slender arch. Another legend says that this tradition started from Tang Dynasty.

The fact is that there was no law stipulating that women’s feet should be bound. As said in Chang Yu-i’s statement, it was a ‘custom’. Still, however, people believed that women with natural feet could never get married, at least, by decent families. People do what they believe, despite what the law prescribes. Belief controls people. This is significant because the power can control the belief through controlling the body, and then ultimately control people. The relationship between the belief and the body is reciprocal: the belief controls the body, and the control of the body reinforces the belief.

Foot binding served a powerful body control means for the Imperial Chinese government. The object of foot binding is the female. It should start at a very early stage in a female’s age, at two or three, before a full personality starts. Because it hurts, the object must learn to tolerate the pain, to accept this fact, to submit herself to the superior power—her mother and/or other superior females in the family. From this point, the object starts at a very early age to learn to obey blindly, to accept passively, and to submit willingly. More importantly, the female is the

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385 Ibid. pp. 42.
386 It was said that this tradition started in this manner: “So beautiful a dancer was she that the Emperor had a larger-than-life lotus complete with pond of metal and jewels constructed for her, and, for his entertainment, asked her to wrap her feet in strips of silk cloth and dance among the petals of the lotus. Her graceful dance steps were like the new moon flitting among the clouds in the reflection of a lotus pond. The Emperor was so impressed that other women began to wrap their feet and bend their arches in the crescent shape of the new moon. That is how the tradition began.” (Chang, Pang-Mei Natasha Bound Feet and Western Dress, supra note 379, pp.20)
387 For example, Yu-i’s Mom worried that no man would marry her if she had natural feet. To Chinese women, a marriage meant almost the only means to continue their lives in Imperial times. (See generally Chang, Pang-Mei Natasha Bound Feet and Western Dress, supra note 379)
mother of human beings and the mother is always the first teacher. They transmit this passive submission and blind obedience to their children from generation to generation.

Confucius also noticed the importance of body control to political governance. He says: “If you try to lead the people by regulations and order them by punishments, the people will evade these and have no sense of shame [in doing so]. If you lead them by virtue and order them through the rites, they will have a sense of shame and will correct themselves.”

‘Rites’ in Chinese is Li. Li has many meanings besides ‘rites’, such as ‘manner’, ‘politeness’, ‘courtesy’, ‘graciousness’ and so on. These rites, originally religious in character, embodied the norms of conduct for the human body in a properly structured kinship system and were based upon long-standing customs and voluntary participation. Rites contain a set of rules governing body positions and body poses. When people performed rites, they were performing body discipline. By performing body discipline, rites made people accept voluntarily their social standing because certain body positions represented certain social status. For example, kneeling represented submission to superior power. Due to their internalizing effect, these body-control rites were given priority over laws. Consequently, a large sphere of social activity was to be governed by voluntary adherence to the traditional rites.

Confucius had a great faith in the power of virtuous example—the powerful tool to internalize

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388 Here ‘regulations’ means law. [Author’s note]
389 Confucius, Analects 2:3
390 All these meanings have a characteristic in common—body control. For example, kneeling down is an Imperial form of courtesy to show respect and submission.
discipline. He developed rites into a systematic set of rules to set up virtuous examples for people to follow, so as to govern people's body and soul. In the Analects generally, rites are placed a high value. Given the fact that Confucianism has been taken as one of the most fundamental human institutions, rites—the body discipline—represent a basic constitutional order.

B. The power of belief

Although people argue that a man's beliefs are not causes of his actions, it is undeniable that the two have a very close relationship. There exists a two-way influence. After being born, a human being gradually gains his/her beliefs by his/her own and other people's actions. His/her beliefs then direct his/her actions, and at the same time, the results of his/her actions correct his/her beliefs. No one can state that one's beliefs remain the same. Along the whole process of his/her life, the two-way influence continues to exist.

392 See generally Analects. Also see Bary, Wm. Theodore De The "Constitutional Tradition" in China, supra note 391, Chen, Jingpan Confucius as A Teacher, supra note 246.
393 Bary, Wm. Theodore De The "Constitutional Tradition" in China, supra note 391.
394 The word 'belief' is used here in a broad meaning. Some books relate 'belief' with religion. For example: see generally Wilfred Cantwell Smith, Belief and History, infra note 435. I do not use it in this way. When referred to a dictionary, we can see this word has the following meanings: 1, a state or habit of mind in which trust or confidence is placed in some person or thing; 2, something believed; especially a tenet or body of tenets held by a group; and 3, conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence (Online dictionary at http://www.yourdictionary.)
Philosophers categorize beliefs basically on the level of consciousness. In this thesis, however, categorization of belief is not based on this standard. The scope of belief in this thesis is limited to the belief in justice. The agent of the belief is confined within the public of China. In this background, there are three forms of belief in China: active belief, acceptant belief and passive belief. These three different forms of belief all exert great influence on the public's behavior.

1. Active belief

By 'active belief', I mean the agents of the belief do believe in justice. Under the motivation of this belief, the agents make every effort to realize it. The following excerpt can serve to illustrate the meaning.

Excerpt: An Example: ‘Yao Li-fa Phenomenon

Yao Li-fa is a people's representative in Qian-jiang City Hu-bei Province, China. He had been on the election contest for twelve years before he was finally elected. After being elected, he initiated investigations to root out many governmental crimes. Those cases include: illegal imprisonment of farmers, illegally interfering and preventing villagers' self-government, and the city finance government agency put in arrears teachers' payment for more than RMB100,000,000 Yuan (equivalent to $20,000,000 Canadian dollars). The success of these
investigations is considered as miracles. To realize his dream to be a People’s Representative, Yao had to agree with his former working unit to Ting-xin-liu-zhi. During the Ting-xin-liu-zhi term, he did not have any fixed income from his working unit and any other sources, but had to pay the Ting-xin-liu-zhi fee. However, this did not make him give up his belief. After being elected, he was still on Ting-xin-liu-zhi. The law prescribes that relevant government finance agencies should provide a subsidy to those People’s Representative who do not have a fixed income. Until Yao’s story was reported, he did not receive any subsidy from any government agencies.

This is a typical case of active belief. The active belief agents deeply believe in their beliefs. No matter what stands in their way to realize their beliefs, they do not change. Moreover, they do their best to overcome difficulties. Thanks to his active belief, Yao Li-fa was able to achieve his dream to be a People’s Representative and represent the People’s interests. The belief was so strong that he did not stop even after he lost his job.

2. **Acceptant belief**

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399 Because in present China, the most difficult thing is to conduct an investigation about a governmental official’s alleged criminal activity, Yao’s success is called a ‘miracle after many dangerous and difficult obstacles’ (See Jing-liang Zhao, Thoughts on ‘Yao Li-fa Phenomenon’, supra note 397)

400 In a fixed period, like, two years or five years, the person on Ting-xin-liu-zhi does not work and has to pay a fee to the working unit to reserve his/her position so that when the Ting-xin-liu-zhi term is over, he/she can resume the job. [Author’s note]

401 This is another case of human rights violations and laws being put aside in China. No laws in China prescribe that a People’s Representative candidate should Ting-xin-liu-zhi. In fact, most People’s Representatives have a fixed job. Ting-xin-liu-zhi was a means to prevent Yao to take part in the election.

402 The People’s Republic of China Law on Representatives of National and local level People’s Representative Congresses, 1992, article 32.

403 Jing-liang Zhao, Thoughts on ‘Yao Li-fa Phenomenon’, supra note 397
In chapter two, I cited two cases exemplifying the phenomenon that 'the leader said you were guilty'. Judges in these cases have an acceptant belief in justice. They believe that there is justice, but they do not believe they possess the capacity to enforce it. In Lü Jing-yi’s case, the statement that “Lü, you were not guilty, but the leader said you were guilty. We cannot help. Please understand” revealed three aspects in the judges’ belief. First, according to law and based on the fact, (i.e. justice and fairness) Lü Jing-yi should be considered innocent. Second, although there was such a thing as justice, judges accepted that something else had greater power. They acknowledged that the leader’s personal will had superior power to that of justice. Thirdly, judges, although they were supposed to decide cases independently according to law and facts, did not possess the capability to overcome the interference from leaders’ personal will.

Agents of the acceptant belief do believe in justice, but the depth and strength of their belief is far lower than that of active believers. As a result, when the agents encounter difficulties, other factors may prevail. In the above case, the judges in charge believed in justice to a limited extent. Thus, they finally left the pursuit of justice to other people’s concerns. That is, they simply avoided responsibilities by the statement that “we cannot help, please understand”.

3. Passive belief

404 Chapter Two of this thesis, Section A. ‘The leader said you were guilty’. Supra.

405 Although the law is not equal to justice and fairness, Chinese law does have provisions protecting human rights and equality. As a result, deciding cases according to law and based on facts is, at least, more just and more fair than doing so according to a leader’s personal will. For convenience purposes, here I say ‘justice and fairness’. After all, nothing can claim to be absolutely just and fair. There is only something being close to justice and fairness.

406 Chen, Lu-min, The leader said that you were guilty, supra note 61
The agents of passive belief do not believe, or do not know, whether there is justice in the world, or they do not think about it. What they really believe is ‘you cannot change it, so you have to obey.’ Body education performed by Imperial Chinese women is a case illustrating passive belief. Under this belief, mothers bound their daughters’ feet, ignoring their terrible cries because they believed, “It was a custom.” A custom means: (a) usage or practice common to many or to a particular place or class or habitual with an individual; (b) long-established practice considered as unwritten law; (c) repeated practice; and (d) the whole body of usages, practices, or conventions that regulate social life. People practiced foot binding because it was a custom, or put in another way, others practiced it. They never thought that there was a possibility that this custom should be changed, or after thinking about it, they did not believe it could be changed. This passive belief had such a big influence that it changed the nature of motherhood.

The vast dislike of litigation and law in China can also serve to illustrate passive belief. The Chinese public dislike confrontational litigation of disputes, particularly third party dispute resolution before a court or a tribunal. Instead, they have a preference for conflict avoidance mechanisms. Wong cites some Chinese proverbs to illustrate the Chinese public’s feeling about law and litigation: “it is better to be vexed to death than to bring a lawsuit;” and

407 Chang, Pang-Mei Natasha Bound Feet and Western Dress, pp.20 supra note 379
408 See online dictionary at http://www.yourdictionary.com/cgi-bin/mw.cgi
409 Authors have analysed this phenomenon. For instance, see Gillian Triggs, Confucius and Consensus: international law in the Asian Pacific, infra note 410, and Bobby K Y Wong, Traditional Chinese Philosophy and Dispute Resolution, infra note 411
“those who live do not want to go to the court; those who are dead do not want to go to hell.”

The dislike of the law and litigation is a typical example for passive belief.

C. Necessities to change contemporary education

In the previous chapters, it has been analyzed that Chinese laws and the Chinese constitution are actually unenforceable to some degree. Western commentators have seen the inherent unenforceability of the laws and constitution and assumed this is inherent. Ainsworth imputes this unenforceability to the Chinese political tradition. This view is correct, but not conclusive. Tradition does exert great influence on the effectiveness of laws and constitution. However, to change this situation, the key does not lie on the tradition itself, but on education. Lyndon Johnson said during the War on Poverty in the 1960s, "Poverty has many roots, but the tap root is ignorance." Ignorance is not only the taproot of poverty, but also many evils in the world. In a country where most people have no idea about democracy, justice and freedom, judicial independence can hardly be established. Cases like ‘the leader said you were guilty’ will continue to happen in the absence of an understanding of basic principles such as rule of


413 Ibid. Ainsworth says in this article: “The political grammar of late Imperial China was hortative and utopian in character; those interpretive practices continue to be expressed in Chinese foundational textual discourse today.”

414 Oscar Arias The Importance of Education for Development, Speech at GATE Annual Conference, San José, Costa Rica, October 8, 2001, refer to website http://www.arias.or.cr/fundador/speeches/GATE081001.htm
law. Education is essential to the creation of democracies, freedom and justice because it is a main road to change the external and internal identification of judges.

I. Problems in legal education of China

In law textbooks of China, it is almost a rule to claim that the Chinese Communist Party is the leadership core. Many textbooks take pains to justify this rule. For example, Constitution Textbook415 uses six pages to explain the necessity and possibility of the leadership of Chinese Communist Party. It says:

"The Chinese Communist Party does not have any special interests for it own except seeking and representing people's interests. All the Party has done and will do are done for people’s interests. The party has only one mission that is to serve the people. The people are the master of the country. All levels of the Party cadre are the people’s servants. The Party keeps a close relationship with the people all the time. It shares every happiness and hardship with the people."416

Another textbook says: "The Chinese Communist Party sticks to the truth and corrects errors. Thanks to its proper guide, China has obtained a great change and now has a new look. Basically speaking, there would be no China now without the Party’s leadership. This is a piece of proved truth."417 Legal theory textbooks have almost the same comments.418

It is not right or wrong whether the Chinese Communist Party takes the leadership core. The problem is who supervises the superior leadership. The new Party’s Charter prescribes that the party must act within the constraint of the law and the Constitution419. The question is who has

416 Ibid. pp. 89. [Author’s translation]
417 Ding-ren Wei, ed. Constitution Theory, supra note 9, pp. 375. [Author’s translation]
419 Jie Wu, ed. Constitution Textbook, supra note 415, pp.93. [Author’s translation]
the capacity to judge the Party’s actions. Moreover, it is very difficult to tell between the Party’s actions and a Party leader’s actions. In ‘the leader said that you were guilty’ cases, the judges were virtually under the Party leaders’ personal wills. When the leaders exert pressure on judges, because they hold some Party power—or in other words, some sovereign power—it is hard to say whether the pressure is political or individual. Most of the time, like ‘the leader said you were guilty’, they do represent their own interests, not the Party’s. They have the power to make judges yield to them, because they have sovereign power.

Moreover, they use their power to design and develop the educational methods to reinforce their rule. Their education preaches that “the Chinese Communist Party sticks to the truth and corrects errors” and “the Chinese Communist Party does not have any special interests of its own except seeking and representing the peoples’ interests.” In reality, the Party’s representatives employ the Party’s power to attain their individual interests. Whether the interests they achieve are legal is not of their concern, because they have the power to order judges, and to educate people so that their actions can be justified. This is a typical phenomenon for a despotic government or a quasi-despotic government. According to Montesquieu’s analysis about types of government, the present China is not a totally despotic government. China does have a Constitution and many laws, as demonstrated in the third chapter. By laws in books, China can almost claim to be a republic, but by laws in practice, it is a despotic state, or at best, a transitional society. One article points out that China is a transitional society: from a despotic society to a democratic one. (See Yi Xing, Education and Law in A Transitional Society, supra note 8)

420 Chen, Lu-min, The leader said that you were guilty, supra note 61
421 Ding-ren Wei, ed. Constitution Theory, supra note 9, pp.375 [Author’s translation]
422 Jie Wu, ed. Constitution Textbook, supra note 415, pp. 89 [Author’s translation]
423 Here I do not say they have the power to make law, because this is beyond the reach of this thesis. In fact, when ordering judges to change decisions, they are exercising de facto law-making power.
424 According to Montesquieu’s analysis about types of government, the present China is not a totally despotic government. China does have a Constitution and many laws, as demonstrated in the third chapter. By laws in books, China can almost claim to be a republic, but by laws in practice, it is a despotic state, or at best, a transitional society. One article points out that China is a transitional society: from a despotic society to a democratic one. (See Yi Xing, Education and Law in A Transitional Society, supra note 8)
governments, Montesquieu says, the only aim of education is “to debase” people’s minds.425 “It must necessarily be servile; even in power such an education will be an advantage, because every tyrant is at the same time a slave.”426 Judges in China—the products of this kind of education—do not, most of the time, deliberate, doubt or reason. They only obey orders under leaders’ pressure. Montesquieu points out that excessive obedience supposes ignorance in the person that obeys.427 De Dupin gives a note about excessive obedience. “By excessive obedience,” he says, “Montesquieu intends blind obedience.”428 When judges say: “we cannot help, please understand”, 429 it does not suppose their ignorance of the laws. It supposes that they do not have an active belief about justice. They do not believe they have the ability to bring about or enforce justice. As a result, the only thing they can do is to obey, to yield, and to submit themselves and their subjects’ human rights to leaders’ arbitrary wills.

2. Obstacles to active belief

Yi Xing says that contemporary societies have reduced higher education to a great extent (except keeping natural science that is useful to the state).430 The nominal higher education is merely a variation of career education431. In a contemporary society, career education has been imbued with nationalism. The state controls the ideology of universities. The essential purpose is to control people’s minds, so that their ability and actions can be confined so that they do not...
have any threat to the present ruling.

When sovereign power penetrates every place of the state, universities cannot be immune. In universities, executive offices\(^{432}\) serve as a specific place for administrative control. In the offices, the objective of state control is not students, but teachers. There is a Chinese proverb 'teachers are the engineers of people's souls.' The state controls people's souls by controlling the engineers—teachers. State ideology enters universities via the offices. Thus, universities become a link in the state administrative chain. "A despotic society turns ranking standards based on knowledge into those based on power."\(^{433}\) Control orders go through the whole body of universities via documents and conferences. Their feedback returns via the same way. Through this process, the state ideology completes the control over teachers. The control turns teachers, from independent agents that impart knowledge and inspire thinking, into executors dependent on the state administrative system.

Furthermore, the state tries to turn teacher-student relationships into a quasi-administrative relationship. The means employed to achieve the goal are student associations, the communist youth league and so on. These agencies exert two main functions: on one hand, they influence student ideology; on the other, they result in internal conflicts and struggles among students, which serve to help control them. The award institution\(^{434}\) merely assists the control. Moreover, the state controls the textbook censor. This is another powerful means to influence

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\(^{432}\) In China, there are generally one or more offices in each university or college. Staff in those offices has duties, among others, to study and implement Party's policies. Those offices are named 'executive' offices.

\(^{433}\) Yi Xing, *Education and Law in A Transitional Society*, supra note 8.

\(^{434}\) In universities and other schools in China, there are many awards based on students' obedience to Party policies or school policies, such as titles, or prizes.
student ideology. Tests, a conservative method to control student thought, continues in contemporary China. They play an important role in controlling matters.

Under this control, teachers are merely tools employed by the state ideology. At the same time, students are not rational agents that are capable of questioning and thinking. Instead, they are only receptors. Classrooms are special places to discipline students and practice rules.
Chapter VII Conclusions

—Leading to active belief

The situation analyzed in the last chapter is grave. Under this situation, the possibilities for people to step into an active belief in justice are limited. The problem is with the Chinese society as a whole, not only with one or more small groups. This is not a society of one man not being afraid of another. This society, with its long tradition, has seldom been attacked by other cultures. People’s belief is ingrained. Confucianism values still exist. From the top leaders of the government to common people, ‘being obedient to the power’ is customary. It is necessary to change people’s basic value from ‘being obedient’ to ‘one man need not be afraid of another’.

China’s problem is that most people deeply believe that administrative power is superior to anything else in the world. To change this belief, it is essential to establish power balance theory in people’s minds. Only when there are other powers examining the legality of executive powers, can liberties prescribed in the Constitution and laws be realized. If there is no other power to put administrative powers in check, laws will remain in books only, particularly those related to human rights. Education is the only road to establish the thought that the administrative power should be in check.

Regrettably, legal theory books are heavily influenced by Marxism and Soviet communism. Consequently, they neglect the rationality of other theories. These textbooks do not credit
power balance theory. They reduce it to be a means ‘to cheat and suppress the public’. It is a common characteristic for legal textbooks in China to debase Constitutions under power balance theory as ‘a means wielded by the ruling class for the purpose of class dominion’.

Education, a strong tool to mould people’s spirit, has been gauged deliberately to control the public spirit. Jurisprudence, the science to establish people’s belief in justice, has been purposely neglected. In China, the influence of legal theory on legal practice is mainly confined to commentary and argumentation. After a new law being enacted, legal theories focus on arguing and commenting that the law is the best one to date in China or even in the world. Higher education, including legal education, has been reduced to career education. To some extent, in fact, the education is wielded as a spirit control by the government.

If the current situation does not change and administrative power remains the number one power, any laws prescribing human rights and justice are empty words. China’s history and current situation testify that administrative power must have other powers as its balance. Otherwise human rights and liberty will remain in books forever.

The government must be constituted so that ‘one man need not be afraid of another’. This theory can assist China to establish the public’s belief in justice and eventually change the present situation. The first step is to transfer the image of power balance in textbooks.

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436 Li, Buyun ed. Constitution Comparative Analysis, supra note 11, Chapter one Nature of Constitution and Chapter two Classification of Constitution.
Unfortunately, China has an astonishingly large population. Any change in this society cannot be achieved in a short period. This is a daunting task. The key to the task is education. There are three aspects of education regarding this point. First, educate judges to change their self-image—judges are independent. One road to change their internal identification is continuing legal education. Nevertheless, it is not very certain whether the continuing education can change judges' internal identification and lead them to the active belief in justice, because, \textit{inter alia}, it depends on the educational design. Second, reeducate intellectuals and change the basic values that are being taught to children. Thirdly, establish in political leaders and the public the belief that administrative power must be in check.

\textbf{A. The internal identification of judges}

\textit{1. Judges' self-identification}

Judges' internal identification is very important to the establishment of an independent judiciary. It acts as the supporting institution of judicial independence. Without this support, judicial independence is simply impossible. This internal identification is to define them as being independent. In the absence of this self-identification, no institutional structure can produce independence. Judicial independence requires that judges possess this self-identification. It entails that judges stop believing they must serve any other external political parties, cliques and individuals. And more importantly, they must resist external wills that try to influence their judicial decisions. Judicial independence also calls for the precious belief to decide cases neutrally, and beyond any prejudice.
It is necessary for judges to embrace this belief: judges cannot act arbitrarily. They must be confined within the limitations of law and of their responsibilities. They must adhere to relevant procedures and defend justice fearlessly and altruistically. They must be able to write rational views, i.e., they must be a 'judge of justice'. Put another way, judges must restrain the passion to exercise discretion unduly to the degree that independence does not permit. They must be loyal to the law and nothing else. The most important aspect to being a judge is to pledge allegiance to the law.

Judicial independence and accountability are, both, the products of judges' self-identification. Judicial independence requires this belief—judges must be independent. In the same way, judicial accountability depends on whether judges accept judicial procedures aimed at limiting their discretion. People generally underestimate the importance of judges' internal identification and overestimate that of institutional structures. In fact, this internal discipline is indispensable.

My purpose here is not to exaggerate the importance of judges' self-identification. Human intelligence has some limitations. Institutional structures may strengthen or weaken judges' independence or accountability. There are some other elements to influence judicial independence, say, social environment (because judges have to live within the society and be influenced by the society). Like any other self-restraints in the human world, judges' self-identification is a product of culture and education. As a matter of fact, there is no judge who is not under the influence of his/her society. From this point of view, it is safe to say, there is no completely independent self-identification. Thus, it is very important to develop a
social environment to support judicial independence.

2. Chinese judges' self-identification

In the foregoing chapters, the fact is discovered that in China the law prescribes that judges be independent; but at the same time judges are totally not independent. To analyze this perplexing situation, it is useful to understand Chinese judges' internal identification. "...to understand persons ... one must recognize what they do and say as fully human". That is to understand judges' external legal prescription and their internal identification as well.

Judges were born as human beings. Right after they were born, they received a kind of education. This sort of education comes from parents, family, neighborhood, schools, and media. In short, it comes from society. The Chinese society has its own culture and this culture is imbued with Confucianism, of which one important principle is inequality and dependence. Judges cannot be immune to this principle. Chinese judges do not have an internal identification that they are independent. Continuing legal education can be a practical way to establish judges' independent self-identification.

B. The importance of continuing legal education

China is currently undergoing continuing education of its judges. This continuing education can be a solution to change judges' current self-identification to be both independent and

437 Wilfred Cantwell Smith, Belief and History, University Press of Virginia, Charlottesville, 1977, pp. 6
accountable. The immediate goal of education is to improve this current situation. Current problems cannot be simply pushed aside. Moreover, educational programs, if well planned, can reinforce the efforts to establish judicial independence. They can do more than merely improve judges' knowledge in some substantive fields. Educational programs can reinforce some specific elements of the judiciary, for instance, legal analysis techniques, procedural rules, and the desire for freedom and justice. Educational programs can encourage judges to think about the role of the judiciary and can help develop the professional image of judges. During the process of their decision-making techniques being improved, their internal identification of being independent is enhanced.

For the above reasons, it is important to reinforce continuing legal educational institutions. These institutions are established and operated by the judiciary itself. They can gather judges into a group to improve their professional techniques and cognition. Furthermore, these institutions function as an encouragement for judges to clarify their professional goals and perfect their professional skills.

We should not underestimate the limits of continuing education. Many judges, because they did not receive any professional legal training, do not possess formal legal knowledge. To these judges, continuing education has little effect. Under this situation, continuing education influences only some judges. One reason is that some judges in the program do not possess the minimum qualifications to be a judge. They should not be appointed to this position. This might adversely affect the establishment of judges' independent self-image. Another reason is that education itself does not change directly structural deficits. This hinders the ability of
even the best judges to perform their duties.

C. Two other important elements

It is important to change the Chinese passive belief in justice into an active one. There are two paths leading to the solution: the education of children and re-education of intellectuals. The vast majority of Chinese intellectuals rely upon the party-state for their socio-political status and material well-being. Educated elites are thus discouraged from challenging the Party. Even those with democratic aspirations have to rely upon patrons in the Party in order to gain political influence and protect themselves from persecution. Because intellectuals have close ties to the state and the Party, it is almost impossible for them to have an active belief in justice, when some Party leaders are against justice. This situation entails the re-education of intellectuals, and at the same time breaking up the close tie between intellectuals and the Party.

Another necessary path is to educate the children because children are the future. In China, people in their childhood are taught relatively non-democratic attitudes and values such as intolerance of dissent, hierarchy, and obedience to authority. This form of education can only foster their passive belief, or acceptant belief at the best. Consequently, to change people’s belief, it is necessary to change the education of their children.

438 Thomas Lum, Problems of Democratization in China, Garland, New York, 2000, pp. 120
439 Ibid.
440 Ibid.
441 Ibid. pp. 18
D. Establish the belief that administrative power should be in check

We have analyzed the influence of traditional ideas on contemporary Chinese people. This influence causes people not to credit the law. "The person who knows that it is useless to rely on the law will naturally ignore it." When this case becomes a general phenomenon, the formal legal educational method will become functionally weak or even impossible. By this way, the tradition is preserved. A gap exists between law and society. A gap exists between law and culture. This is the biggest difficulty of China.

To conquer this difficulty, it is important to perfect law in books. However, if the law is improved, but the realization of law remains the same, the situation will be worse. The gap between the law and the society will be enlarged. The law will be more discredited and democracy will be more difficult to establish. It is also important to recognize the importance of local resources. However, it does not mean to reserve all local traditional values. Some of those are against the spirit of justice, therefore, they must be changed. The influence of Confucianism still exists. Its values are against the spirit of equality, liberty and justice. By recognizing their existence, we are able to change them. The importance of realizing these values is not to preserve them, but to change them, to establish a totally different thought—administrative power must be in check.

Montesquieu’s theory can assist China to overcome the present difficulty and to eventually

establish an active belief in justice. This theory is not a means employed by the bourgeois to cheat and suppress common people. Instead, it is a thought that helps state power stay in balance. As a result, penal sentences and police arrests will not be made under leaders' personal will. Laws will function in the real world. Human rights, justice and liberty will have a basic guarantee. Thus, it is necessary to establish this theory, not only among judges, but also in political leaders and the whole society.
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116


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