CHINESE JURISPRUDENCE AND HONG KONG LAW

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ACJS 45th Annual Meeting

"American Justice: Rhetoric or Reality?"

March 12, 2008

Cincinnati, OH  45202

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ABSTRACT

On July 1, 1997, Hong Kong, a colony (euphemistically called dependent territory) of Britain, was returned to the fold of the motherland, China, as a Special Administration Region (SAR), with a high degree of autonomy. Ten years on, we find that the common law system established by the British in Hong Kong, as guaranteed by the Basic law, survived and thrived. A cursory review of legal and social science literature shows that there is little scholarly discourse or public debate on the proper jurisprudential standards to be applied in the making and evaluating Hong Kong legislation. This research raises a most fundamental policy qua jurisprudential issue: should Hong Kong law be formulated, applied or evaluated with indigenous legal standards and local jurisprudential principles,\(^2\) based on Asian values,\(^3\) Chinese culture and/or Hong Kong ethos? In so doing, this article questions the appropriateness and challenges the legitimacy of adopting Western jurisprudential principles in shaping and evaluating Hong Kong legal system, especially after July 1, 1997.

\(^2\)“香港基本法委员会委员陈弘毅：人大决定重法、理、情”http://sports1.people.com.cn/GB/shizheng/1025/2473802.html
\(^3\) Old China jurists (Clark) and new Chinese law experts were more prepared to seek a balance between universalism vs. localism in discover rule of law in China. David Clark, “The Many Meanings of Rule of Law” (Constitutional principles and rule of law practices in East Asia followed many divergent developmental paths.)
“The fact of the matter is, when historical or contemporary Chinese evaluate the law, they do so with reference to *Qing, Li* standards.”

Huo Cunfu (2001)

**Introduction**

On July 1, 1997, Hong Kong, a colony (euphemistically called dependent territory) of Britain, was returned to the fold of the motherland, China, as a Special Administration Region (SAR), with a high degree of autonomy. “Under the Joint Declaration, Hong Kong will maintain her present freedoms and lifestyle as well as her own political, economic, social, cultural, legal, and judicial systems fundamentally different and separate from those of the rest of China.”

Ten years on, we find that the common law system established by the British in Hong Kong, as guaranteed by the Basic law, survived and thrived. This has been achieved without much consideration of Chinese culture and local values. For example, volumes of Hong Kong Law Reform Commission reports fail to take

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4 Huo Cunfu, “The cultural traits of traditional Chinese legal culture – the origination, development and prospect of *Qing-Li-Fa.*,” *Legal System and Society Development* Vol. 7(3) (2001) (The article traces the origin and development as it details the theory and practice of *QLF* as jurisprudential principles and cultural ideas in imperial China.) [http://www.legal-history.net/articleshow.asp?id=1824](http://www.legal-history.net/articleshow.asp?id=1824)


6 Danny Gittings, “Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR.” (“Despite all these troubling developments, by the end of the first decade of the HKSAR it was possible to be cautiously optimistic about the Hong Kong’s government’s commitment to the rule of law.”) [http://www.hkjournal.org/PDF/2007_fall/2.pdf](http://www.hkjournal.org/PDF/2007_fall/2.pdf)
Chinese jurisprudence into account. This raise a fundamental issue: what does “high degree of autonomy” mean in law and entail in practice.\(^7\) Does it mean for example, uncritical and complete embrace of Western law and jurisprudence?\(^8\)

A cursory review of legal and social science literature shows that there is little scholarly discourse or public debate on the proper jurisprudential standards to be applied in the making and evaluating Hong Kong legislation.\(^9\) This research raises a most fundamental policy qua jurisprudential issue: should Hong Kong law be formulated, applied or evaluated with indigenous legal standards and local jurisprudential principles,\(^10\) based on Asian values,\(^11\) Chinese culture and/or Hong Kong ethos?\(^12\)

This article it invites cross-cultural scholars to look at Hong Kong law from through the eyes of Hong Kong people, an approach long championed by critical


\(^10\) “香港基本法委员会委员陈弘毅：人大决定重法、理、情” http://sports1.people.com.cn/GB/shizheng/1025/2473802.html

\(^11\) Old China jurists (Clark) and new Chinese law experts were more prepared to seek a balance between universalism vs. localism in discover rule of law in China. David Clark, “The Many Meanings of Rule of Law” (Constitutional principles and rule of law practices in East Asia followed many divergent developmental paths.) http://www.lfip.org/lawe506/documents/lawe506davidclarke.pdf

Randall Peerenboom, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China,” Michigan Journal of International Law, Vol. 23, 2002 (The concept of rule of law should not incorporate liberal democracy model. Chinese people is entitled to their own ideas and ideal of rule of law.)

\(^12\) Lau Siu-kai and Kuan Hsin-chi, The Ethos of the Hong Kong Chinese (Hong Kong: Chinese University Press, 1988).
comparative jurists\textsuperscript{13} and visionary local scholars,\textsuperscript{14} but has long been deliberately ignored by the conservative\textsuperscript{15} Hong Kong government and conveniently side-stepped by the liberal\textsuperscript{16} local politicians. In so doing, this article questions the appropriateness and challenges the legitimacy of adopting Western jurisprudential principles in shaping and evaluating Hong Kong legal system, especially after July 1, 1997.

This investigation is anchored within a larger intellectual canvass,\textsuperscript{17} i.e., the

\begin{itemize}
  \item \textsuperscript{13}Perry Keller, “Sources of Order in Chinese Law, “ \textit{The American Journal of Comparative Law}, Vol. 42 (4): 711-759 (1994); Philip C. C. Huang, “Court Mediation in China, Past and Present,” \textit{Modern China}, Vol. 32 (3): 275-314 (2006) ( “For better or for worse, the contemporary Chinese approach to court mediation is predicated on an implicit epistemological method that contrasts sharply with the formalist ideal (which characterizes modern Western Continental law): instead of starting from universal premises about rights and then applying those by legal (deductive) logic to all fact situations, Chinese judges start instead from the nature of the fact situation and then decide to mediate or arbitrate or else adjudicate, as appropriate. In placing the concrete and the practical ahead of the abstract, they still share a good deal in legal reasoning with judges of the Qing.”)
  \item \textsuperscript{15}Conservatism in the context of post July 1, 1997 Hong Kong governance is for the Hong Kong government to maintain the pre 1997 status quo, i.e., British administrative rule and common law legal style.
  \item \textsuperscript{16}Liberalism in the context of post July 1, 10097 Hong Kong politics means that Hong Kong should transform herself into a Western democratic city-state as much and as soon as possible.
  \item \textsuperscript{17}There is a need to investigate into the Chinese law in Chinese society, interdependently and interactively (p. 2). “Future prospect of historical Chinese legal result: Overtaking the West, returning to indigenous roots.” In pp. 3-24 Xu Zhongming, \textit{Precedents, stories and judicial culture of Ming Qing dynasties} (Anli, Gushi yu Ming Qing shiqi de shifa wenhua) (Beijing: Falu Chubanshe, 2006) (China is a country of long history and rich culture. The West was successful in transforming
feasibility and utility of transplanting foreign legal institution to domestic soil, the problems and promises with indigenization of foreign laws and appropriateness and legitimacy of privileging Western rights in Asian societies.

The article is organized as follows. After this brief introduction, Section I (“Rationale”) details the reasons for undertaking this study. Philosophically, it argues against treating Western human rights standard as universal, dominant, as privileged and exclusive yardstick to evaluate Chinese – Hong Kong legal system and process. Intellectually, it observes that foreign observers are prone to view China through a Western lens. It ends with a proposition: the study and assessment of Chinese – Hong Kong legal system should be conducted with indigenous perspective and informed by empirical data. Section II (“Standards”) makes the case that QLF is a more appropriate evaluative paradigm for Hong Kong law. It then details the nature and characteristics, content and application, theory and practice of QLF as jurisprudential principles. Section III (“Comparison”) compares and contrast two jurisprudential traditions: rule of law vs. QLF. It observes that there are convergences between the

China through military domination, economic exploitation and cultural penetration, with the help of Chinese reformers and in the name of modernization. In the process Chinese jurisprudential thoughts and legal system was summarily dismissed and totally rejected as not compatible with modern and progressive (Western) ideas and ideal, standards and benchmark.) See also David A. Funk, “Traditional Chinese Jurisprudence: Justifying Li and Fa,” 17 S.U. L. REV. 1, 2 (1990); Hui Lo Pan, “A Study of Chinese Jurisprudence,” 6 Illinois Law Review, 457 (1911-12).

Western jurists deny the existence of Chinese law in theory or otherwise critical of Chinese law in practice because Chinese law does not fit with Western paradigm. William P. Alford, “Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law,” Modern China, Vol. 23, No. 4: 398-419 (1997) (Western Chinese scholars neglected or mischaracterized the impact of law on China (p. 398) Precedents, stories and judicial culture of Ming Qing dynasties, P. 11. (Western jurists observed that there was no law in China because there was no protection for individual and human rights.) Ho_hua (ed.), The transplantation and indigenization of law (Beijing: Falu Chubanshe, 2000).

two systems of thoughts; rule of law regime make allowance for extra-legal considerations, in the name of “equity” and “reasonableness”. Section VI ("Conclusion") provides for a brief summary of the findings of this research, Hong Kong law should be formulated, applied and assessed with reference to Chinese jurisprudential principles of Qing Li Fa.

I

Rationale

Philosophical imperative

Before 1997, Hong Kong was a colony (or dependent territory). It has to follow British laws. After 1997, Hong Kong sovereignty was reverted back to China. In the process, Hong Kong was given much power to regulate its internal business as a “highly autonomous” administrative region.

What jurisprudential principles should Hong Kong law makers and judges be following in making and applying Hong Kong law? Many people in and outside the SAR has called for the continue embrace of Western jurisprudential principles because such principles reflect and reinforce universal human rights principles. This article argues against as accepting Western jurisprudential principle as the most suitable ones to apply to Hong Kong community of Chinese.

There is a need to revisit Western jurisprudential principles on human rights and privacy which are claimed to be absolute and universal, with critical theoretical examination and objective empirical validation. In context and as applied, is

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20 Orlando Patterson, Freedom in the Making of Western Culture (Basic Books, 1991) (The idea and ideal of freedom is not naturally derived but socially constructed. It is the existence and perpetuation of freedom in the West which requires explanation and not the lack thereof in non-Western countries should be justified. “Preface”)
Western concept of rights, freedom and democracy fit for Hong Kong? The central thesis here is that Western jurisprudential principles should not be applied to Hong Kong automatically and unreflectively, still less adhere to universally and absolute. Hong Kong legislators and courts should honor their constitutional duties in developing jurisprudential principles that best fit Hong Kong history and culture, in realizing Hong Kong people’s interest and welfare, needs and wants, sense and sensibilities, dreams and aspirations. More simply, what is good for the Hong Kong people.

Human right activists and democracy champions from the West talk about the importance of human rights, freedom and democracy as universal and fundamental moral principles. Many people from around the world have argued that human rights while important and deserving of our attention, should not remain our exclusive, or even dominant, concern. In our debate over human values, we also need to think about cultural exchange, and not simply imposition of one nation/people/culture values on other autonomous individuals or sovereign nations.

To start the debate, we need to observe that there are many values worthy of human pursuit; e.g., freedom from starvation, personal integrity, filial piety, social

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23 China championed negative rights, e.g., right to be free of hunger and exploitation while Singapore promoted Asian values.
24 This calls to mind President Bush’s insistent that only American conception of freedom and democracy is worth fighting for. ‘Freedom fighters’ from other nations are ipso facto terrorists.
responsibilities and loyalty to one’s country. 25 In this regard, there are four observations to be made. First, it is obviously true that not all values are created equal. For example, material goods pale alongside moral and spiritual ones. Second, it is also clear that no single value, moral principles included, is so fundamental as to absolutely overshadow others at all times, in all places, and in all situations. Even the taking of innocent human lives can at times be justified in the name of stopping a greater evil. Third, judging values in context goes well beyond merely determining which moral principles should apply in a given decision making frame. Many valves are involved. Most of them are in conflict and priorities must be set. The challenge is, given a set of ranked values, national priorities and limited resources, prioritizing. 26 Fourth, the ranking of values in the abstract is so loaded with conditions and disclaimers as to be of little use when applied to real-life situations. Indeed, they might create problems even in a theoretical multi-value matrix decision making set. Should I kill one to save the lives of many or possibly to improve the welfare of all? 27 If not, then what right do we have, as a civilized government, to build a highway which, after all, kills? Are the traffic fatalities not victims of a government’s conscious policy choice, to develop highways instead of airports? Do we not call them casualties of human progress? The complexities and difficulties in arriving at agreed values are best described thusly:

25 “Not so (respect for life as universal). In the classical Chinese tradition in which I was brought up, we are aught to respect for parents, respect for teachers, respect for ancestors and for duly constituted authority, but the conception of respect due to the individual human beings as such does not exist in that culture.” Basil Mitchell, “The Value of Human Life,” in Peter Byrne, Medicine, Medical Ethics and the Value of Life 34-47 (1990).

26 However, in Buddhist thought the principle of respect for life must be understood within the context of other aspects of Buddhism teaching as well as other percepts. Different traditions within Buddhism balance the concern for respect for life with concern with doing the “most compassionate action.” Kevin WM. Wildes, S.A., “Sanctity of Life: A Study in Ambiguity and Confusion,” in Japanese and Western Bioethics 89-101(Kazumasa Hoshino ed., 1997).

“Second: there is no shared set of value priorities. We make much of the fact that we share values and we frequently say that, well, basically humans want the same things so we ought to be able to work things out. Perhaps, at a survival level, but beyond that, and even there, there is not a shared set of priorities with regard to values. Instead, priorities change with circumstance, time, and group. Here are some examples where value priorities differ depending on the group and circumstance. Short term expedience versus long term prudent behavior and vice versa. Group identity versus individual identity. Individual responsibility versus societal responsibility. Freedom vs equality. Local claims versus larger claims for commitment. Universal rights versus local rights (that can repudiate universal rights; fundamentalisms, for example.) Human rights versus national interests (e.g., economic competition or nationalist terrorism). Public interest versus privacy (the encryption conflict, health information, whether private or not). First amendment limits (pornography, etc.). Seeking new knowledge and its potential benefits vs its potential costs. Who sets the rules of the game and who decides? These are all issues where the priority of values are in contention. There is no reliable set of priorities in place that can be used to choose decisively among actions toward the larger issues.”

The above are not arguments for value relativity, nor propositions for situational

28 Point: Observations Regarding a Missing Elephant by Donald N. Michael, Emeritus Professor of Planning and Public Policy, University of Michigan (http://www.panetics.org/)
ethics. It is a proposition for value pluralism.\footnote{Tom L. Beauchamp, “Comparative Studies: Japan and America,” in \textit{JAPANESE AND WESTERN BIOETHICS} 25-47 (Kazumasa Hoshino ed., 1997). I came to my observation here—similar values but differentially ranked (individually and in conjunction with others) and variously applied (taking up contextual importance)—quiet independent of Beauchamp’s work. But Beauchamp’s work—narrow morality (universal principles) and broad morality (differential application)—share one thing in common with mine, i.e., “the principles upon which men reason in morals are always the same; thought the conclusions which they draw are different.” \textit{Id.} at 27. For a discussion of moral objectivism and indeterminacy, see Russ Shafer-Landau, “Ethical Disagreement, Ethical Objectivism and Moral Indeterminacy,” 54 \textit{PHIL. \& PHENOMENOLOGICAL RES.} 331-44 (1994) (available at http://www.ku.edu/~philos/faculty/Shafer-Landau/DISAGREE.html).} Value pluralism simply mean that there are many more human values which give meaning to life and happiness to people than the principles of justice, freedom, equality and democracy. Put it in another way, a country can hold other enduring values—love for family, loyalty to friends, duty to society—and still deserve our admiration and respect. A benevolent dictator is better to many than starvation and chaos.

Human rights advocates argue that human rights are so fundamental that all other values pale in comparison. While this argument has surface appeal and is emotionally satisfying, a moment of critical reflection show that this does not conform to our understanding of how human values are formed, adopted, and evolved. First, human rights advocates deem it “self-evident” that human rights—life, liberty and the pursuit of happiness\footnote{The Declaration of Independence para.1 (U.S. 1776).}—are fundamental in nature, universal in application, and apparent to all. All human beings should and must subscribe to the same set of human rights values—in content, importance, and, when compared with other values, priority. There are no exceptions or deviations. Nothing could be further from the truth. Human values, as with beauty, are in the eyes of the beholder. Likewise, there are many ways to discover human values; as many as there are individuals on this earth.

On a theoretical plane, Kant’s categorical imperatives\footnote{Immanuel Kant, \textit{GROUNDWORK OF THE METAPHYSIC OF MORALS} (J.K. Patton trans.)} or Bentham’s
utilitarianism are good starting points in order for one to discover individual or social values, but these are not final. Ontological and teleological validation of value choices are not exhaustive.

In more practical terms, rational analysis and positive thinking are not the only, nor even the best, tools to determine the contour and correctness of human values. Indeed, I venture to guess rational analysis is ill-suited to the investigation of value matters which are, after all, more instinctual than cognitive, and more emotive than logical. We love humanity with our heart, and appreciate life with our soul, not with a computer and a brain. In the end, spiritual enlightenment, personal feelings, human experience and collective wisdom can all play a part in one’s endless value search.

Second, human rights belong to each and every individual, and are not monopolized by one ideological camp. Most certainly, values, of which human rights are an integral part, are not beholden to the intellectually bright, militarily strong, economically wealthy or culturally rich. As nations, as communities, as families, and

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32 “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.” JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 14 (Batoche Books, 2000)(1781).
as individuals, we all subscribe to a set of values. Each of us is equally capable of finding a set of values suited to our taste. All of us are equally endowed as moral agents. It is apparent that no one country—no matter how big, how strong, how rich, and how enlightened—can monopolize the creation of desirable values, much less be the net exporter of virtues.\textsuperscript{33}

Third, national values, as with one’s moral compass, do not come prepackaged. They are a combined and integrated product of personal make-up, cultural heritage, social consensus, economic circumstances, and even accidental events. In sum, values are a sum total of human existence; wants, needs, phobia, remembrance, dreams, and hopes. Once formed, they are a given fact of nationhood and are seldom right or wrong in the abstract or in total.

Fourth, values are formed experientially, experimentally, naturally, and incrementally, more so than cognitively, absolutely, positively and dramatically. Historical accidents and national happenstance have as much to do with a country’s value formation as do rational discourse and reflective policy. Much of the values Americans take for granted are rooted the manner by which the United States found liberation, independence, and an individuality as a result of rebellion against British rule. Conversely, the Chinese people have sought refuge in paternalism and collectivity because their historical embracing of the teachings of Confucius.

Given this “dynamic” and “dialectical” process of human value formation, it should come as no surprise to anyone to learn that human values never stop growing and evolving, changing in content and mix every minute and hour of the day. “We get wiser as we grow older” is as much a descriptive statement as it is an admonition to

the young who are eager to live all that life has to offer in one day. Viewed in this light, the search for human values is not a discovery process but a creative journey. An individual, a people, a community, a nation-state; all are searching for an illusive and transient identity; but never arrive at an ultimate destiny. It is the process of searching for, and not the ultimate finding of, human values, which gives meaning to life.

Lastly and most significantly, values are bound by time and space, and posited within certain places, and societies. Two very important observations flow from this postulate. First, values exist within a context of history, place, people, society, and culture. There is no ahistorical, asocial or acultural value. To appreciate why Chinese rulers, and, for that matter, many Asian leaders, adopt a paternalistic attitude towards their subjects, it is necessary to consider the importance and structure of the family within Chinese history and culture. A critique of the Chinese style of government is not just an attack on Chinese current leaders but also an indictment against China’s cultural heritage in general, and the role and functions of family in particular. With so much at stake, and such complexities involved, a country passing judgment on others should be more reflective, thoughtful and considerate. It is easy to be misinformed and misjudge.

Second, values are bundled goods. The meaning and importance of a value cannot be easily extracted from the collective of values of which it forms an integral part. The surgical removal and strategic implantation of values will certainly cause political disruption, such as the wholesale abandonment of communism in U.S.S.R., which led to social unrest and political chaos, and social rejection, such as the ban on U.S.-style adversarial journalism in Singapore.

It is most difficult, if not impossible, for a person or country to transcend its intellectual horizon and value space. Cultural myopia is the norm. China calls herself “Central Kingdom” and still acts that way. Intellectual provincialism is the rule. All rationality is bounded.

Marx’s critique of the capitalistic intellectual order, that the consciousness of the mass is conditioned, controlled and dominated by ideas emulating from the economic base, is flawed, less so because it is an overbroad observation than because it is not carried far enough. Marx failed to explain convincingly why he could liberate himself from such an all-embracing ideological confine to lead the charge against capitalism, while others could not. Rawls’ Theory of Justice suffered from a similar cultural straight jacket: the just society behind “the veil of ignorance” envisioned by Rawl looked more like twentieth century Boston than traditional Indonesia or contemporary Japan.

Is it surprising to see first the Romans, then the British and now the Americans preaching the virtues of their culture to the rest of the world; through persuasion if possible (BBC, VOA, CNN) and by force (extra-territoriality, Vietnam, Iraq) if necessary? Echoing Huffington, does it not appear odd that it takes the British a few hundred years to discover the essence of civilization while the Egyptians are still at a loss after 6000 years? Is it possible that the Americans find the best in government in 200 years while the Chinese keep missing them after 4,000 years?

The discovery of universal values has more to do with individual ego and national pride than any intrinsic merit associated with those values. The successful

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37 JOHN RAWLS, A THEORY OF JUSTICE (1971)
spread of values, from democracy to gay rights, reflects more upon a country’s economic strength and concomitant cultural domination, than on any inherent appeal and demonstrated goodness of certain moral principles.

Is it surprising that almost all participants of international conferences speak English, most with an U.S. accent, and wear ties and jackets? Cultural domination, abet in subtle form, is here to stay. Singapore’s senior statesman was right when he said that Asian values are as worthy of respect—because those values tell Asians who they are.  

*Intellectual provincialism*

Western studies of Chinese law and law enforcement have been afflicted with ethnocentrism and cultural ignorance; knowing too much (of self) and too little (of others) at the same time. For example, Michael R. Dutton wrote one of the only full length books on Chinese policing. The central question Dutton posed for himself and his readers is: How does traditional technology of policing fuse with the present social control framework (pp. 5-6). He observed that the PRC’s household registration system now is an extension, reproduction and sublimation of past practices, rather than a brand new invention. Specifically, China's present control method is a "remnant" of feudal past practices, albeit serving different governance purposes (p. 6).

In terms of method, Dutton employed Michel Foucault ‘genealogical method” to construct “histories of the present.” In the main, Dutton relied on secondary English materials to complete his study.

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In terms of theory, Dutton borrowed Foucault’s theoretical insight \(^ {42}\) to analyze China’s household registration regime, past and present, concluding that Chinese state control has moved away from inflicting pain on the body to marking of personal files. In this regard, Dutton observed that China is the first nation to use statistical records effectively to track and keep its people in place.

According to Dutton, in imperial China, the state controlled a person’s behavior by anchoring the person within an intricate web of relationship starting with the family. Individuals were kept in place by critical self-introspection, stern family discipline, and ubiquitous community surveillance. In contemporary China, the state regulates people with a comprehensive household registration system:

"[W]e may now see a regime which centers on work and production rather than on family and Confucian ethics, but the form of its policing, the modes of its regulation and the way it constitutes its disciplinary subjects all have resonance in the past." (p. 5)

As a critique,\(^ {43}\) Dutton’s book, notwithstanding the inviting title, bold assertions and erudite presentation, tells us more about social regulation than law enforcement, more about administrative regiment than policing strategy, and finally, more about what Dutton’s observation of China as an administrative state than what people in China think, feel, experience and understand policing to be. Radcliffe-

\(^ {42}\) *Discipline and Punishment: The Birth of Prison* (Peeregrine Books, Harmondsworth, 1979)

Brown has cautioned against such Western cultural imposition, sold as sociological imagination\textsuperscript{44}:

“In the primitive societies that are studied by social anthropology there are no historical records… Anthropologists, thinking of their study as a kind of historical study, fall back on conjecture and imagination, and invent "pseudo-historical" or "pseudo-casual" explanations.”\textsuperscript{45}

In essence where Dutton discovered clear and conclusive archeological evidences of historical continuity in a disciplinary state, Chinese found coincidental confluences of people, events, and circumstances vying for influence over the individual. Where Dutton privileged a grand design to explain state governance, the Chinese people favored human nature ("renxin")\textsuperscript{46} and heavenly providence ("tianming")\textsuperscript{47} to justify individual obedience. Thus observed, Dutton’s “theory of policing” is irrelevant to Chinese’s understanding of their personal conditions and collective fate.\textsuperscript{48} On a still larger intellectual compass, Westerners go about constructing history of China out of whole clothe and in accordance with a grand scheme of things, while Chinese people continue to weave their life course clothing one stitch at a time and in step with the

\textsuperscript{44} Mills, C. Wright, \textit{The Sociological Imagination}. (New York: Oxford University Press, 1959 [1976]) (Sociological imagination allows us to see mundane social facts in different light.)


\textsuperscript{48} This shifts the intellectual debate from what counts as a sound theory (i.e., validity issues) and accepted as good evidence (i.e., reliability problems) to what matters (i.e., policy concerns) and to whom (i.e., political consideration). The debate further implicates paradigmatic issues of positivism vs. post modernism.
particulars of the “way” (“dao”) life.\footnote{This line of critique finds empirical support in China law and society research. Theoretically, it has been observed that law in action is mediated by powerful social actors as driven by a convergence of social and cultural forces. In “The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work” \cite{Michelson2006} researcher Ethan Michelson found that that legal justice in China was subjected to and subverted by the lawyers who acted as gatekeepers to law and justice. Accessibility to the legal system of clients was dictated by professional interests (i.e., who can paid) and circumscribed by cultural values (i.e., who is deserving of help). Empirically, \textit{He, Xin} found in “Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepreneurs in Beijing,” \textit{Law & Society Review} Vol. 39 (3): 527-62 (2005) that in practice the “hukou” system did not comport with the administrators’ design or people’s expectations. Ultimately, the “hu kou” system did not serve to “discipline” the migrant’s (as intimated by Dutton) but was negotiated by all those who were affected by it (police, migrants, business) to serve their respective institutional or personal interests.}

If we find Dutton’s approach to China police studies wanting – sterile and irrelevant, how might we improve the studying and understanding of Chinese (Hong Kong) law? To this central issue we now turn.

\textit{Hong Kong law with Chinese characteristics}

Study of Chinese law should avoid cultural (pre-) disposition, as informed by received/hidden assumptions,\footnote{Harry Harding, “From China, with Disdain: New Trends in the Study of China,” \textit{Asian Survey (AS)} Vol. 22 (10): 934-958 (1982) (Established China scholars have observed that different perception and misperception of China has more to do with the investigators’ disposition or disciplinary paradigm towards China than reflecting true conditions and likely prospect of China reform. Sentiments about China ran from torrid love affair borne out of romantic attachment, if not involvement with Mao’s egalitarian and utopian quest, cir. 1970s (p. 396) to bitter resentment resulting from abject disappointment over China’s oppressive policy and repressive practices, cir. 1980 (p. 396). The reassessment resulted in part from “Changing Intellectual Assumptions” (p. 942): (1) The prevailing assumptions in the 1970s were that we have no right (at least not being fair) to judge China by Western standards or values, such as over freedom and human rights issues (p.943). (2) Economically, Chinese people are less developed and thus care more about economic survival than liberty.} driven by self-evidence/universal political
orientation^51 and fortified with embraced ignorance.^52 Taking this admonition to heart, we find that few if any existing social, criminological or jurisprudential theories, mostly developed in the West^53 can be easily made to fit China’s particularistic cultural pattern, multifaceted social conditions and complex political circumstances^44 without suffering from various minor inaccuracies^55 and/or gross distortions.^56 More significantly, there is not enough valid and reliable empirical data^57 to support any theory building. ^58

Culturally, Chinese people have no history and tradition of democracy, privacy and individualism. As such these rights mean very little in China. (3). In the 1970s we often judged China by the lofty goals espoused by the leaders and not their actual implementation or eventual success/failures at the grassroots.(p. 944).

By far the most established assumption shared by many who engaged in State and society research in China is the idea that there is a connection between economic development and demands for political liberation. Elizabeth J. Perry, "Trends in the Study of Chinese Politics: State-Society Relations," China Quarterly (CQ) No. 139: 704-713 (1994).
^51 For a trenchant critique of post modernist scholarship in rescuing the Chinese scholars from the pitfall of liberal critique of China, see Joseph W. Esherick, "Cherishing Sources from Afar," Modern China (MC) Vol. 24 (2): 135-161 (1998) (McCartney’s Hervin’s Cherishing Men from Afar (1995) provided a revisionist reading of China. His observations of China were based on mis-translation of primary sources and misinterpretation of secondary historical data, all the time being driven by personal bias and political ideology. See “Methodology and the Politics of Post-Colonial Scholarship) (pp. 153 – 159).
^52 Chinese legal scholars have adopted the view that China has no or non-functioning legal system when there were ample evidence suggesting otherwise, i.e., Qing dynasty has a sophisticated legal code and effective justice administration system. William P. Alford, “Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law,” MC Vol. 23 (4): 398-419 (1997).
^53 See “Theory, Method, and Data in Comparative Criminology” (2000).
^54 Kam C. Wong, “The Study of Criminology (犯罪學) in China.” (On file with author.)
^55 Lucian W. Pye, "Review: Social Science Theories in Search of Chinese Realities,” CQ No. 132: 1161-1170 (1992) (Career minded young Asian scholars wanting to establish themselves or seeking to secure tenure tried to force ill fitting Western theories in their respective disciplines to explain complex and complicated world of China.)
^56 See “3. Jingcha xue xueke yanjiu ben tu hua de wenti.” In Zhu Xudong, “Regarding
A different approach to the study of Chinese law is in order.

One proposal is to have bi-cultural researchers who are at ease in two cultures. It is observed that intimate knowledge with culture and good facility with language allows a researcher to reach back into forgotten historical memory, dig deep into obscured cultural meaning and access to latent emotional feelings to provide a more complete and holistic picture of matters under investigation and materials to be interpreted.

certain issues regarding research on police studies’ (“Guanyu jingcha xuexi yanjiu zhong jige wenti de tantao”) PSUJ Vol. 101: 149 - 155 (2002) (“Ben tu hua” or “domestication” of foreign ideas and practices, privileged Western ideas over domestic ones. This resulted from an uncritical acceptance of positive science by the academic community in the 19th century, as championed by England, France, Germany, Italy and the United States. With the decline of European and United States’ influence in world affairs and the emergence of post modernism and multi-culturalism, the positive scientific model’s “objective” view of the world is increasingly being challenged by culturalists and ridiculed by the post-modernists. Since policing research is a local knowledge (“di fang sheng zhishi”) (C. Geerz), foreign and imported police ideas and practices must be subjected to local adaptation before used. Specifically, police studies must reflect and be informed by Chinese historical, social and cultural characteristics. Police research must focus on China problems and issues. Police research must be an independent exercise and be critical of status quo. Police research must make independent contribution to China policing and purge of foreign influences, entirely. (pp. 153-4).

In other areas of research, archives are opening up for inquisitive scholars, Philip C. C. Huang, "County Archives and the Study of Local Social History: Report on a Year's Research in China," MC Vol. 8: (1 )133-143 (1982).

Philip C. C. Huang, "Theory and the Study of Modern Chinese History: Four Traps and a Question," MC Vol. 24(2): 183-208. (Empirical historical research is better than theoretically driven one in understanding China. Theory might be too simplistic, ideological or ethnocentric to obscure in capturing true conditions in China.)


For a rejoinder see, Prasenjit Duara, "Response to Philip Huang's "Biculturality in Modern China and in Chinese Studies" MC Vol. 26 (1): 32-37 (2001) (Bi-cultural approach provides no escape from globalization of knowledge, universalization of culture, and commodization of ideas, especially when the underlying indigenous culture (China) (willingly or by force of circumstances, consciously or unconsciously) increasingly takes on a modernized look and feel.) In response to Duara, my sense is that the transformation of indigenous culture, while a distinct possibility, does not mean that local knowledge and indigenous understanding is no longer necessary for researcher. First, cultural transformation is an incremental, interactive, and intergenerational project. Japan today still enjoys a village like culture, in many respects. David Bayley, Forces of Order (University of California Press, 1991). Second, local memory is cumulative and become part of a bi-cultural person’s persona, once assimilated. All understanding of a culture will relate back to his/her exposure to a culture, especially when one is being brought up in a certain cultural milieu in time and place. The culture will change, but ones cultural identity and
While Huang made clear that his preference for bi-cultural researchers is not meant to exclude “foreign” researchers, it is also clear that Huang thought that researchers locally born and bred has a natural advantage over and above those who just learned about China by education and through emersion.

Another proposal is to supplement foreign view of China reform in general and legal reform in particular, counter-balancing them with internal perspectives, domestic voices and grass root understanding. This approach is what is sought here.


With an abiding faith in U.S. ideological exceptionalism (democracy, equality, rule of law) and an equally strong conviction in scientific universalism (rationality, objectivity, generalizability), American scholars have a tendency to examine societies everywhere under a microscope, in order to validate the absolute superiority of American theories or downplay the possible contribution of non-American paradigms. Lucian W. Pye, "Asia Studies and the Discipline,” PS: Political Science and Politics Vol. 34(4): 805 – 807 (2001). (“But does anyone believe that American practice can be treated as the norm for everyone? Or even for any other particular country. (p.805)

In 1999, the author started with other interested Asian police scholars from Taiwan, PRC, Hong Kong, Korea the Asian Association of Policing to bring indigenous voices to the study of Asian policing. “Closing Remark” (AAPS Presidency Inauguration Speech) AAPS Third Annual Conference: Asian Policing in the 21st Century, Open University, July 29, 2002. Co-sponsored by Center for Criminology, Hong Kong University, Open University, Chinese University of Hong Kong. Kam C. Wong, Asian Policing in the 21st Century (Proceedings) (Hong Kong: AAPS, 2002) (There is a need to study policing from a local perspective and with indigenous data, looking at policing from inside out and bottom up. Comparative policing should be taught with local content and within local context.) Many of the recent China political science and police studies research and writing are by first and second generation China scholars who are educated in the West, e.g., Wu Guoguan a Princeton political scientist from Victoria University was within the inner circle of PRC Premier Zhao Zhiyang before his demise and Fu Hualing who single handedly plowed the field of China police studies in Hong Kong University in the 1990s was educated at University of Toronto and a PRC police instructor in the 1980s. David Shambaugh, “Keeping Pace with a Changing China: CQ at 35,” CQ No. 143: 669-676 (1995)
II

Standards

Assessment of Hong Kong law requires the setting of benchmark, here jurisprudential standards. In order to understand the jurisprudence in Hong Kong, one must start with (legal) culture. Culture informs on the meaning of social intercourse and communal life. It tells us about what is good, bad or beautify.63

A culturalist approach

In attempting to lay out the various meanings attached to the word "culture," Clifford Geertz refers Clyde Kluckhohn's (Mirror for Man) in which the following meaning of culture: are suggested: "the total way of life of a people"; "the social legacy the individual acquires from his group"; "a way of thinking, feeling, and believing"; "an abstraction from behavior"; “a theory on the part of the anthropologist about the way in which a group of people in fact behave a "storehouse of pooled learning" "a set of standardized orientations to recurrent problems”; "learned behavior"; “a mechanism for the normative regulation of behavior”; “a set of techniques for adjusting both to the external environment and to other men”; “aprecipitate of history”; “a behavioral map, sieve, or matrix”.64

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63 It was Max Weber who taught that man is an animal suspended in webs of significance he himself has spun
64 There are many definitions of culture reflecting different approaches – historical, functional, symbolic etc – to the study of culture. In 1952 Alfred Kroeber and Clyde Kluckhohn, American anthropologists, published a list of 160 different definitions of culture. For example, some definitions of culture included: Historical: Culture is

(The China Quarterly now has outstanding contributions from mainland China emigrant who bring with them personal experience and nebu (internal) documents), connection within China and contacts inside institutions.)
Cultured is learned normative behavior, i.e., it tells people what to do or not do. As succinctly observed John H. Bodley:

“Culture involves at least three components: what people think, what they do, and the material products they produce. Thus, mental processes, beliefs, knowledge, and values are parts of culture. Some anthropologists would define culture entirely as mental rules guiding behavior, although often wide divergence exists between the acknowledged rules for correct behavior and what people actually do. Consequently, some researchers pay most attention to human behavior and its material products. Culture also has several properties: it is shared, learned, symbolic, transmitted cross-generationally, adaptive, and integrated.”

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*Chinese jurisprudential ideas and ideal: Qing Li Fa*

Social heritage, or tradition, that is passed on to future generations; Behavioral: Culture is shared, learned human behavior, a way of life; Normative: Culture is ideals, values, or rules for living; Functional: Culture is the way humans solve problems of adapting to the environment or living together; Mental: Culture is a complex of ideas, or learned habits, that inhibit impulses and distinguish people from animals; Structural: Culture consists of patterned and interrelated ideas, symbols, or behaviors; Symbolic: Culture is based on arbitrarily assigned meanings that are shared by a society. This indicates the diversity of the anthropological concept of culture. Indeed as early as 1872 the British Association for the Advancement of Science created the first inventory of cultural categories with 76 categories. In 1938 the "Outline of Cultural Materials" was published and still used as a guide for cataloging great masses of worldwide cultural data for cross-cultural surveys.

The legal concepts and jurisprudential principles of “Qing” “Li” “Fa” (情理法) or “ren qing” (“human nature/relation/compassion”) vs. “tian li” (“heavenly principles”) or “qing li” (“accepted code of conduct”) or “lun li” (ethical principles) vs. “guo fa” (“state law”) are dominate ideal and dominating ideas behind Chinese legal qua general culture.

QLF are embedded and inter-related cultural tenets, espoused and dynamic ethical percepts in imperial China which informed social practices and guided

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66 One of the major difficulties in comprehending, interpreting and applying QLF, as jurisprudential concepts is that “qing” and “li”, like justice and fairness, means different thing to different people. Furthermore the weighting, prioritizing and balancing of QLF in arriving at an optimal QLF decision is not something which everyone can agree upon. In fact, different mixes of QLF in various decisions can satisfy most people. Conversely, any imbalance of QLF, no matter how slight, might attract detractors and dissenters. It goes without saying that any change in findings or interpretation of facts might affect outcome.

67 What is deemed reasonable. PYCED, p. 676R.

68 What is deemed reasonable. PYCED, p. 556L.

69 PYCED p. 449L.

70 In the popular culture, QLF has often been routinely borrowed to justify ones’ action; oftentimes contrary to or deviation from what QLF truly entails or actually requires. In other circumstances, people have failed to grasp the true meaning of QLF. For example, QLF has been equated with human emotion – reasoning – law.

71 LF is inter-related in the following senses: (1) “qing” vs. “li” vs. “fa” are not independent from each other, conceptually, theoretically and operationally. For example, conceptually “qing” or “renqing” (human nature) while born to human is shaped by law of nature (tian li) and conditioned by rules of culture (li). (2) The formulation and content of “li” is less an arm chair contemplative product as it is a grounded intuitive, experiential and empirical exercise. In this regard, “li” must cater to natural forces, social conditions, human nature, life circumstances and situational factors. (3) In terms of application, what is proper “li” is never a stand alone ethical-principle derivative (as with categorical imperative of Kant) but very much a factual ethical product (much like determination of negligence).

72 QLF is dynamic in many ways. (1) QLF are not static concepts. The content and contour, meaning and feelings of QLF, individually and collectively, changes with time, people, place and issues. (2) QLF interacts with each others dialectically and continuously in shaping content and defining practice. (3) Outcome of QLF is contingent on the totality of material context and all aspects of prevailing circumstances. (4) Process of QLF is as important as standard of QLF in shaping outcome. Change in process leads to change in outcome. (5) There is no one correct or best QLF disposition, but many acceptable QLF outcome.
personal conduct. As jurisprudential principles, QLF considered independently and as a whole is central to the formulation of legislation, implementation of law and dispensation of justice, and indeed all life choices, in imperial China.

The import and impact of QLF in Chinese culture and social intercourse can be gauged by looking at popular culture practices. Chinese people then as now make evaluative social, economic, political or legal judgment of all kinds as “he qing he li” (compatible with human nature and reason) or “bu he qing li fa” (not being compatible with “QLF”).

The ultimate objective of law makers and judicial officials was to actualize

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73 A legitimate question is raised as to the content and viability, priority and mix, identification and subscription of QLF in modernized China, Westernized Hong Kong or globalized Taiwan. Like questions can, and should be raised about how QLF fare within diverse population in Hong Kong, e.g., Hong Kong belingers vs. new immigrants, Western educated vs. domestic breed, professionals vs. blue collars.

74 A key word search with “情理法” on yahoo.com turned up 23, 600 items. A search on Google – Scholar turned up 240 items.

75 “Qing li fa” in management” (“Guanli zhong de “qing li fa”” “管理中的“情 理 法””) (Modern business management can improve with “qing” “li” “fa”. Q is human sentiment and individual feelings. L is reasoning . Fa is fundamental principles adopted by the company)

76 Wu Qin-dian “Revelation about traditional Chinese law which accommodate qing li fa” (“Qing lif fa jian ron de zhongguo gudai falu ji qishi” (“Accommodating QLF, revelation of Chinese imperial law”))
QLF as a way of life, i.e., establishing a harmonious and peaceful world wherein the ideas and ideal Confucius hold sway. Everything should be found in its proper place and intercourse with each other should be conducted in a harmonious and well balanced manner without conflicts or disputes.

Chinese philosophers have long been interested in QLF as jurisprudential principles. This is particularly so with the publication of the book “Qing, Li, Fa and

77 Huang Yongmin, “Hexie shehui yujing xia de ‘zhifa ru shui’ linian ji qi shijian” (The concept and practice of “implementation of law like water” within the language of harmonious society) *Jiangcha Fengyun* (检察风云) 2007-03-05 12:04:15 (The vision of a socialist legal system is to achieve harmony. This lofty goal is made unattainable by litigation explosion. People are taught to fight for their legal rights at all costs. They also resort to court to resolve interpersonal problems as a first instead of last resort.) [http://www.cnjccn.com/article/2007/0305/article_329.html](http://www.cnjccn.com/article/2007/0305/article_329.html)


79 The Chinese character for “law” (“fa”) consisted of two radicals. The radical to the left represents water and the radical to the right represents wash way. The function of law is thus to wash away bad things with water and return to normality, tranquil and peaceful. Thus justice to Chinese is leveling of upheaval to a prior state of tranquility, much like the natural tendency of water. Water will return to flatness in due course. Huang Yongmin, Hexie shehui yujing xia de “zhifa ru shui” linian ji qi shijian” The concept and practice of “implementation of law like water” within the language of harmonious society” *Jiangcha Fengyun* 2007-03-05 12:04:15 Xu Zhongming, *Precedents, stories and judicial culture of Ming Qing dynasties* (Anli, Gushi yu Ming Qing shiqi de shifa wenhua) (Beijing: Falu Chubanshe, 2006), pp. 336-339.

80 Liang Zhiping, *Seeking harmony in natural order* (“Xuzhao zhiran zhixu zheg de hexie”) (Zhongguo zhengfa daxue chubanshe, 1997).

Research and publications to date has focused on the nature and characteristics, role and functions, theory and practice, conflict and resolution, impact and implications of QLF. However, notwithstanding importance QLC, there are very few occidental legal or jurisprudential publication on this subject matter. This lack of Western literature hampers our understanding of Chinese (Hong Kong) law in theory and practice.

**The supremacy of “qing” over “li”**

In imperial China, human conducts are judge by and regulate with “li” (rites) inculcated through “jiao” (education) and not with “fa” (law) enforced by means of “xing” (punishment). Law is established to supplement the rites, and brought into play as a last resort. Doctrinally, this is called the Confucianization of the law.

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83 Wu Qin-dian “Revelation about traditional Chinese law which accommodate qing li fa” (“Qing lif fa jian ron de zhonguo gudai falu ji qishi” [http://www.legalhistory.com.cn/] 2007-2-16 Updated Time : 2007-2-16 (Qing Li fa is revealing of the nature and characteristic of Chinese legal system, in culture and operations.)
84 “Implementation of law like mountain” (zhifa rushan) (that is called for by rule of law regime) is incompatible with “Implementation of law like water” (zhi fa ru shui) Huang Yongmin, “Hexie shehui yu jing xia de “zhifa ru shui” linian ji qishi” (“The concept and practice of “implementation of law like water” within the language of harmonious society”) *Jaingcha Fengyun* 2007-03-05 12:04:15 (The abstract, general, universal, and inflexible of the law cannot deal with every concrete, individualistic, particularistic and evolving life situations. The court must resort to negotiated justice and QLF to make litigants happy.)
85 Judges should take into account the effect of consequences of decision on litigations directly, other people indirectly and the society ultimately. For example what is the impact of judicial decision on relationship of parties or final settlement of disputes. *Id.*
Confucianization preached that rites provide the law with content and spirit. Law is used to promote Confucius ideas and ideal. In judicial practices, law is based on Confucius teachings and Confucius teachings are resorted to in interpreting and applying the law. This is called “jing yi jue yu” (deciding cases based on Confucius teachings).  

**QLF as legislative goal**

The Preface to *Tanglu Shuyi* (Commentary to Tang Code (653 AD) observed that: “Law is established at Tang, but it should represents the essence of human nature (‘tongji renqing’) and the dynamics of legal reasoning (‘fali zi bian’). (Tang) Law should not stop (evolving) with Tang?” In essence, Tang Code, as with all laws, should reflect and reinforced “renqing” (as human nature) and “fali” (as moral principles).

During the Ming dynasty (1368 – 1644), Liu Weiqian, a counselor to Zhu Yuanzhang, the first emperor of Ming Dynasty compiled the *Jing Ming Lu Biao* to advise Zhu on how to establish the Ta-Ming-Lu. Zhu observed: “Your honor considers matters broad and deep. Law should be made in accordance with principles of heaven above and compatible with human nature below. These standards should last for hundreds of years.”

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87 “Jing yi jue yu” is also refer to as “Chunqiu jue yu”. “Chunqui” (*Autumn and Spring Annals*) of course is one of the five classics (wujing) authored by Confucius to teach his followers. “Chunqiu jue yu” as with complete Confucianization of law was achieved in the Han dynasty (206 BC – 24 AD). The basic principles of “Chunqiu jue yu” is cases are decided upon with reference to Confucius doctrine, starting with determining the “heart” and “motive” of people, not just intent, act or harm. Ma Zuowu, *Chinese traditional legal culture* (Zhongguo gudai falu wenhua) (Jinan daixu chubanshje 1998), pp. 136 – 142.

88《〈唐律疏议〉序》云: “然则律虽定于唐，而所以通极乎人情、法理之变者，其可画唐而遽止哉?”

89明人刘惟谦等《进明律表》: “陛下圣虑渊深，上稽天理，下揆人情，成此百代之准绳。”
Finally, in the Preface to “Great Qing Code”, it was said: “The emperor…ordered officials to take the laws… and edited the same. Law should be made consistent with heaven’s principles and acceptable to human nature.”

As above legal text made clear, laws in imperial China must flow from natural law above (tien li) and derive from human nature below (renqing).

QLF as adjudication standards

“QLF” was first adopted to guide adjudication. Historical records made clear that the term “QL” started to be widely used in Song – Ming – Qing dynasties to decide cases.

Originally, “qing” refers to “anqing” (facts of case) or “shiqing” (cause of case) or “zhenqing” (truth of a case). In order to decide a case correctly, the judicial officers must ascertain the facts and circumstances of each case, i.e., “anqing”, with an eye towards establishing “zhenqing” or truth. With the ascertainment of “zhenqing” (truth), the “yuanqing” (ultimate cause) of a case can be established. With the discovery of truth and finding of cause of a case at hand, the case is ready of resolution, at its roots and once and for all.

Why is there a need for “quanqing” to be found? In imperial China, personal

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90 A number of misconceptions about Chinese legal system and judicial process need to be corrected. First, Chinese judicial process is an arbitrary one, not confined by ascertainable rules, informed by objective facts, and given to arbitrary decision, i.e.,, totally devoid of internal rationality and external accountability. Nothing can be further from the truth. Max Weber described Chinese justice as non-rational - Kadith justice. In fact, Chinese officials were closely supervised and tightly regulated in what they can and cannot do. Imperial China was an administrative state in pursuit of a heavenly mandate on earth by an absolute emperor. The emperor ruled by and through his officials. This is called “li zhi” or governing through officials. Under “li zhi” officials are strictly regulated by law and accountable to the emperor. The yushi functioned as the emperor personal envoy in checking on the officials.

91 “Zheng” means Marx real. “Qing” means circumstances or feelings. “Zheng Qing” thus mean “real situation” or “state of affairs” or “true feelings or sentiments”. PYCED.
conflicts were viewed as a social – structural problem, not just an inter-personal dispute. In order to satisfactorily resolve a dispute once and for all, the magistrate must find out all the pertinent facts: the immediate cause, the ultimate cause, all contributing factors and every mitigating and aggravating circumstances. This means that the imperial officials must not only look at immediate transactional facts of the case – who did what to whom and how, but also seek to understand the historical context, prevailing circumstances, situational dynamics, personal background, mental disposition attending the case before he could decide. In essence, the magistrate must discover the true facts and find the root cause of a case in front of him.

It is postulated that the discovery of (true) facts and (ultimate) cause contributes to real understanding which led to human compassion (“renqing”), the ultimate objective of adjudication. In this regard Confucius said in “Lunyu Zichang”: “If people up top lose the way, the people below will be in chaos. If people truly understand the situation they (officials) would feel sad instead of happy.” Ignorance of facts and circumstances of a case would likely results in the miscarriage of justice, e.g., blaming the exploited and punishing the oppressed citizens for government malfeasant.

Attaining ultimate truth (“yuan qing” “原情”) allows Chinese officials to pursue “yuan qing ding guo” or “finding liability based on facts and circumstances of a case”. Particularly, the determination of every case was made to turn on the

92 《论语·子张》: ‘上失其道，民散久矣。如得其情。
93 “Yuan” “ben yuan” the original root or source. Actually, “yuan” derived from the original words phrase “shui yuan” the source of river or stream. (In “shui yuan”, the word yuan has a radical of water on the left”). Hanyu Dacidian (Hanyudacidian chubanshe, 1986), Vol. 1, p. 927L. Yuan has been interpreted as “yuan ben” unprocessed or origin, not mediated, interpreted, or nowadays “spinner”. (928L). “Yuan Qing” thus mean the facts and circumstances of a case (“ben qing” or “qing you”) (933R).
94 P. 933 R.
subjective motivation ("dong ji"95) of a person and objective circumstances ("qingjie"96) in a case.

Yuang Zhang Yanghao (1270 – 1329) who has worked as a local magistrate, imperial censor (yushi) and Secretary of Board of Rite (Libu Shangshu) observed that people are basically good, they turned to criminality because of forced circumstances, e.g., lack or education or opportunity. “Who can resist temptation when they are poor and struggle for survival.” 97 For example, when parents are starving and not properly clothed, when family members are sick and hungry, and when wife are sad and despondent, the family head, husband or children are compelled to act, even if it is against the law. If that should be the case, the government should be showing magnanimous compassion to the people, instead of imposing draconian punishment on the offenders.

To be compassionate is to put ourselves in the shoes of the offenders – seeing things from their perspective and felling emotion as they did. This is where “renqing” (or “ren zhi chang qing” comes in).98 The underlying assumption is that people would not resort to crime unless they have to. The family bears responsibility for moral education, community bears responsibility for social supervision and state bears responsible for maintenance. Crime happens because failure in one or more these necessary components to good order and discipline in a community.99 In this regard, it was also said that:

95 PYCED, p. 161R. “motive” or “intention”. Reasoning behind action.
96 “Qing jie” 556L. Circumstance of a case.
97 Yuanzhang Yanghao (1270 – 1329)《Advise for Cultivating Citizenry》(Mu Min Zhong Gao). Zhang has worked as local magistrate, imperial censor (yushi) and Secretary of Board of Rite 元张养浩《牧民忠告》
98 “Ren” is human. “Zhi” is a possessive verb. “Chang” is routine or normal. “Qing” is condition. This “ren zhi chang qing” mean normally how things work out or how people behave. PYCED 573R.. 99 See “Crime Prevention” and pRC Comprehensive control. Chinese see the world as integrated and inte-depending.
“Common people are more likely to be alienated (易于散) because those above (authority) have failed to pursue an integrative policy. In cases of hunger and coldness, alienation result. In the case of too many drafts of services, alienation result. In cases of too much levy and taxation, alienation result. If people are alienated, there is no mutuality of feelings, without feelings there is no obligation, without obligation, there will be conflicts and litigations. People try to take advantage of each other. This is why officials should seek out the facts and circumstances before seeking punishment. Feeling sad and sorry, and happy. Sad because of misfortune of the downtrodden, Sorry because of the lack of knowledge of the offenders. Not happy and content with ability to control the people.\textsuperscript{100} The terms “qing you ke yuan” is best summed up as “guilty but excusable”.\textsuperscript{101}

As an illustrative example, it was recorded in “History of Sung. Criminal Law Notes”\textsuperscript{102} that during the rein of Song Emperor Zhenzhong\textsuperscript{103} there was a drought. People robbed the granary. This was a capital offense (弃市). A total of 318 Sazhou residents were sentenced to death. Emperor Zhenzhong remarked: “It is sad to rob rice. It is sick to harm and rob. Even though when done as a result of lack of food to survive.”\textsuperscript{104} Since then judicial officials were admonished to “jin qing” to decide

\textsuperscript{100}明邱濬《大学衍义补》卷一百O六.
\textsuperscript{101} The De
\textsuperscript{102} Sungshi Xinga Zhi《宋史·刑法志》
\textsuperscript{103} Song Zhengzhong (宋真宗) (968年~1022年)
\textsuperscript{104} 仁宗曰: ‘饥劫米可哀, 盗伤主可疾。虽然，无知迫于食不足耳。'}
cases, i.e., to be empathetic to the plights of the offenders.

Thus, in deciding cases, the judicial officials were to follow two rules: “tui ji yi yiwu” and “she zhuan yi tan qing.” “Tui ji yi yiwu” is to put oneself in the shoes of others, i.e., empathy. “She zhuan yi tan qing” is to look beyond the surface, i.e., seeking the truth. The first is a call for proper judicial disposition. If officials really care and understand the people, who are their boss, they must be share in their outlook (perspective) and be solicitous of their welfare (sensitivity). This disposition, once adopted, would make the officials see things the people’s way. In so doing, the officials would be advocates of people’s interests instead of overseers of people’s fault. The second is a judicial technique. It calls for investigating a case in depth and leaving no stone unturned. It also admonishes the magistrates to look into contextual matters, ultimate cause(s) and contributing factor(s) in helping with the understanding the case, in terms of what, why and how things happened.

What is “qing”?

“Qing” has diverse and rich cultural meanings. According Hanyu Dacidian, “qing” can mean any one of the following: First, “gan qing” (“emotion or feeling”). Xunzi (c. 213 BCE) observed that people have emotions and are given to “hao” (love), “e” (evilness), “xi” (pleasure), “nu” (anger), “ai” (sadness), “le” (happiness). Second, “benxing” (“natural characteristics/instinct/disposition”); Third, “yiyuan” (“aspiration/desire); Fourth “qingyu” (“sexual passion); Fifth,
“qingli” (“reasonable” or “accepted code of human conduct”). Sixth, “min xin” (“people’s aspiration/feelings”).

In Chinese agrarian society of old, “qing” is a most important consideration. According to folklore “qing” originates from the “heart” (xin) and afflicts everything we do. It is fair to say without “qing” social intercourse stops.

In the reading of imperial judicial decisions there were many ways the word “qing” was used, depending on context, circumstances and situations:

(1) **Qing as “an qing” “zhengqing” and “yuanqing”**. The first and foremost task of a judicial office is to “an qing” (facts of case) “zhengqing” (truth in case) and “yuanqing” (cause of case).

(2) **Qing as “renqing”**. The most common is to talk in terms of “renqing”. This refers to ordinary disposition of man (ping fan zi xin - 平凡人之心). To know about “ren qing” allows us to calculate what others would think and do in like circumstances. People can anticipate and make allowance for each if people understand each other. It also set forth a reasonable conduct code for people to follow.

(3) **Qing as qing yi**. The word “qing” also refers to good relationship between people, e.g., “qing yi” (friendly feeling), “qing mian” (consideration for others feelings). This is commonly refers to as “renqing” (human feelings, sensitivity, sympathy.). “Qing yi” is the basic of Confucius moral principles.

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115 Id. p. 556L
116 Id. p. 473.
117 Western culture, reinforced by jurisprudential principle, promote autonomous individualism. We are not expect to anticipate and make allowance of other people do. This is a reactive model, i.e., react to what other people do, instead of proactive model, i.e., anticipate what others do in adjusting our own actionism
118 **PYCED** 556R.
119 **PYCED** 556L.
120 **PYCED** 572R.
(4) *Qing as lun li* For most of the time the use of work “qing”, refers to the moral principles (lun li - 伦理) of “renqing” (人情), more generally “renqing shigu” (人情世故) or worldly wisdom, local conditions and custom (defang fengtu renqing 地方风土人情), custom and habits (fengsu xiguan - 风俗习惯). As a result “renqing” carries with it large Confucius influence. In some cases “qing li” reference to logical deduction (loji duili 逻辑推理) or common regulatory principles (guilu zheng de daoli - 普遍规律性的道理).

What is “li”

“Li” can be translated into “dao li” meaning reason; alternatively, justification for doing things, or “you dao li” (possessing of reason). Reason or justification of actions taken or things done is informed by culture, and follow bounded rationality. It goes without saying that what is reasonable in one place, with one person, at one moment, within one community, for one culture may or may not be reasonable for another.

“Li” is also called “qing li” or what we can expect from a person given his or her life circumstances, and situation factors. This recalls the “reasonable man” standard in tort law. “Qingli” can be two kinds:

First, “qingli” is what people would or would not do under like circumstances. What people would do depends entirely on what people are born with naturally or have been nurtured into. Thus it is reasonable to expect a son to conceal his father’s...

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121 *PYCED* 448L.
122 *PYCED* 572R
123 *PYCED* 572R
124 *PYCED* 203R
125 He Jian (何剑) “Giving due consideration to ‘qing, li, fa’, magistrate fulfill his duty in settling ‘human relations case’ (‘Jiangu ‘qing li fa’ yuanling bing gong banliao ‘renqing an’ (兼顾“情理法” 县令秉公办了“人情案”) *Fazhi wen bao* (法制晚报); 2006-8-5 4:38:03
http://www.oldbeijing.net/Article/200608/20060805043803.shtml
crime from the official. It is also reasonable for irate husband to kill wife who cheated on him. Loyalty to father and jealousy of wife are all human nature. Sometimes we called this “qing bu zhi jin” (one cannot resist ones nature).

Second, “qingli” also refers to collective feeling of groups on certain issue. Collective sentiments can be entrenched, as in customary norm, or they can be temporary, as in the case of public opinion. Thus, it is reasonable to expect a person to side with his clan against another feuding group.

Finally, “tian li” refers to heavenly way, i.e., natural law of how and why things work the way that they do. In the eyes of Confucius, “tianli” agrees with Confucius “lun li” (morality and ethics), based on structured relationship between people: emperor vs. officials, father vs. son, husband vs. wife; brother vs. sister, friend vs. friend, and ethics, “li” (rites), “ren” (benevolence) and “yi” (loyalty).

What is “fa” “Fa” means law in China. In traditional China “fa” is equated with and amount to “xing” or punishment, ranging from war like exterminiation (and associated enslavement) to torture to imprisonment. Since punishment can be inflicted by the emperor (by and through the officials) and used by the family (from head of family to chief of clan), “fa” refers to coercive punishment imposed by “guofa” and “jiagui”, incorporating “tianli” from heaven above (as reflecting natural/moral rules and as required by Confucius teachings) and “qingli” from earth below (as reflected in customary rules and as required by family expectations). Thus understood, “fa” encompasses positive rules (Tang Code, “jiagui”) as well as informal norms (Emperor’s decree, parental expectations), moral (Confucianism) and conventional (custom).
How judge apply qing li fa

What is being called for to be a QLF judge in imperial China?

When resolving disputes or rendering judgment, Chinese imperial officials started with a search for the truth before exercising discretion, as guided by law. Song Emperor Gao Zhong has called for “yuan qing ding zui” (determining guilt based on true facts): “Once a law is promulgated it will never change. However, facts and circumstances are always different. Since law is to forestall evil, (judges need to) ascertain all the facts before positing guilty. They need to get the truth of the matter.”

“Yuan qing ding zui” (deciding guilt based on true facts) requires the officials to discover the cause of the incident and motive of people, before passing judgment.

First, by understanding others (motives) we will have understanding of their action, and with that, naturally, have more identification with and compassion for their plight. This is the doctrine of “yuan qing shi you ke men”. In essence, the more we know the more we understanding, and the more we understand the more we will can identify - empathize and sympathize - with the offender.

Second, the more we know, the more we can see the person’s act as normal instead abnormal. People have their own reasons, in accessible to others and incomprehensible to society, in doing things the way they do. Epistemologically understanding requires knowing more, judging less.

Third, a person’s liability and punishment should be determined with reference to motive or what comes from the heart (“xin”). Well intended action should not be punished, or at least punished less. Evil intentions are punished with or without being

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126 Liu X Jun (馨珺), “A discussion on the use of ‘qing li fa’ in ‘prison litigations’ (Lun Songdai ‘yusong’ zhong ‘qing li fa’ de yuyong) (“論宋代「獄訟」中「情理法」的運用”). Professor Liu studied judicial opinions from Song dynasty to under the principles and application of QLF, inductively.

127 Imperial Chinese officials closest to the people are likely to be the local magistrates. The magistrates were called “fu wu guan” (father and mother official). Like parents they take care of all the needs, wants and problems for the people. In deciding cases, the magistrate do not only apply the law and decide right or wrong. Instead they try to resolve the disputes between the parties with an eye toward solving the problems once and for all. They are responsible for educating the people, making them better people with higher moral standing, making the society a better one in the process.

128 http://web.ncyu.edu.tw/~hsinchun/word/study/3.pdf, see text at note 22, at p. 5.

129 Id. 6.
manifested in action.

Fourth, in passing judgment the yardstick is “ren qing” and “tienli”. The issue here is: did the defendant do something a normal person would do in like situation,\textsuperscript{130} or what comes naturally to a person of similar status and under like circumstances.

Fifth, officials were required to apply law on the books to facts in the street; finding concrete individual justice with abstract general justice principles. This required the fitting of sterile, monolithic and inflexible laws to divergent contexts, moving events and dynamic situation. This requires officials to differentiate between people and determine the existence of mitigating and aggravating circumstances, that ultimately bears upon moral culpability, social accountability and criminal liability. Specifically, the officials should treat offenders lightly when circumstance dictate, i.e., “qing qing fa zhong” (literally “facts light and law serious”). In “qing zhong fa qing” cases (literally “facts serious and law light”), the officials were supposed to levy more punishment.\textsuperscript{131}

Finally, officials followed principle of compassion, i.e., “zui yi cong qing” (treat doubtful cases lightly). In essence, if in doubt, offenders should be spared heavy punishment.\textsuperscript{132}

\textit{Applying qing li fa: A demonstrative case}

A breach of marriage contract case in the Qing dynasty published recently in China help to demonstrate and make clear how “qing” “li” “fa” were applied to resolve a breach of marriage contract dispute. The case happened Qing dynasty, during the Emperor Daoguang rein (3 October 1820–25 February 1850). A young lady named Wang lived with her mother after his father’s death. She was engaged married to a young man in the same village. Soon after the engagement, Wang fell ill. The doctors in the village could not help her. Her mother was very worried for her health. One day, a young doctor named Pang came by the village. Pang treated Wang

\begin{itemize}
\item \textsuperscript{130} There is an issue as to whether “ren qing” as a reasonable person standard is to be set empirically (custom) or prescriptively (Confucius). \textit{Id.} p. 7.
\item \textsuperscript{131} \textit{Id.} 9.
\item \textsuperscript{132} \textit{Id.} p. 12.
\end{itemize}
and nurtured her to good health. Wang was grateful to Pang and felt in love with him. Since Wang’s family was poor, Wang’s mother arranged for Wang to marry Pang to settle the medical charged. In the meantime, Wang and Pang had consummated the marriage.

Wang’s fiancé found out about Wang and Pang’s relationship. He went to the local magistrate to content Wang – Pang’s illegitimate relationship. Wang threatened death if she was forced to marry her fiancé. The magistrate was confronted with a difficult case of qing li fa.

In law Wang has broken a marriage engagement. However, Wang and Pang were truly in love, unintended and by force of circumstances. They have also consummated the matrimony, all be it illegally. In essence, they are def facto husband and wife.

The magistrate decided the case as follows: Wang and Pang stayed married. Pang has to redeem himself from punishment by paying Wang’s fiancé 10,000 dollars. He also has to return to the finance the 3000 dollars of bride price had and received.

As explained in the commentary of the case, Pang, Wang and her mother have clearly violated the law by breaching an engagement, intentionally. Pang and Wang has engaged in immoral and illegal sexual activities while not married. The finance on the other hand had done nothing wrong. Legally, Wang/Pang should be punished and the finance should be made whole, i.e., getting Wang back. The moral and legal order must likewise be vindicated.

However, the magistrate must consider the facts and circumstances to take into the qing, li, fa considerations in the case. First, here is “ren qing” and “fa li” to be considered.
In terms of “ren qing”, it is most natural for Wang to fall in love with Pang who saved her life. Pang has given her a new lease on life. Wang was naturally appreciative of all the care and attention bestowed.

In terms of “qing li” and “tian li” it is both naturally reasonable and morally right for Wang to marry Pang to repay him personally and emotionally. Chinese culture promotes the idea of “bao”. It was also quite natural for the mother to repay the medical debt by marrying Pang off. Wang threatened death is a natural thing to do. Wang cannot love two persons at the same time. Her love with Pang is more real and deep. On the other hand Wang’s relationship with her fiancé was written on paper. Were Wang and finance forced to get marry they will end up with a broken family. Wang’s threat was also an honorable thing to do. Wang could not see herself having another husband. Wang and Pang was already married Pang. They were de facto husband and wife!

The best way to accommodate QLF was to punish Wang and Pang with a heavy punishment, monetary. The principles of the law must be vindicated. No one will be tempted to violate the law again. Pang has the benefit of Wang at the expense of the fiancé, he must stand ready to make the finance whole, by compensatory and punitive damages.

III

Comparison

In this section we compare the Chinese jurisprudential thoughts of QLF with that of Western rule of law practices. Specifically, we want to know whether ‘qing” and “li” are ever relevant considerations in Western judicial decision making process.

Conventional wisdom and learned jurists observed that rule of law regime requires applying transparent, predictable and general rule equally to all people and
situations, including the law giver and enforcer, with no exceptions. This formulation precludes considerations of extra-legal matters, such as that of “renqing” (human nature - sentiments) or “tianli” (natural law - morality). If this should be the case, an interesting question avails itself: to the extent that “qing” and “li” are common features in all human societies, what role do they and should they play in Western rule of law jurisprudence?

On closer inspection, a rule of law regime is not adverse to taking extra-legal – natural human sentiments and shared moral principles - into account. In fact, it is observed here that no dispute resolution system in the world can long survive without meeting basic human needs or reflecting fundamental moral values.\(^{133}\) As to the justification for the first observation, it was Holmes, the quintessential legal realistic, who once said, the life of law is experience, not logic. As to the foundation of the second, it was the Bible which observed that men do not live by bread alone. The Anglo-American legal system and process accommodate and give expression to basic (including debased\(^ {134}\) human instinct (Chinese "renqing") and moral (including amoral\(^ {135}\)) principles (Chinese “qingli (custom) "tien li” (natural law) in the following systemic and doctrinally ways:

*First, the common law tradition*, unlike the positive law invention,\(^ {136}\) is based on local custom and community conventions. The judges in hearing cases seek to

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\(^{134}\) Idea of revenge comes to mind

\(^{135}\) Communist comes to mind.

ascertain local community standards making up of public expectations and personal sentiments. Under traditional common law, the judges do not make law as much as they find law in the ways and means of the people, as registered in their hearts and mind, as reflecting in their values and dispositions, and as manifested in their taste and habits. When people’s ways and means changes, so does the case law.137

While both legal systems subscript to inductive norms based on local sentiments, the common law follows common – rational expectations of the people in establishing norms, and QLF make allowances for individual – personal differences, as exceptions. In this way, rule of law regime seeks to standardize human needs (that is what reasonable man is all away) while QLF embraces individual and individualized accountability (that is why motive is important). The other difference is that QLF is prepared to recognize the effective needs and emotional instinct of the individual, as natural and inevitable, whereas common law assumes that people can and should act rationally, notwithstanding such emotion and instinct.

Second, the equity branch of the law allows natural justice principles to come into play to challenge “unfair” legal process and void “unjust” outcome of the law. Historically, common law courts restricted litigants to pre-establish single write filing process, where only known legal cause of action and limited remedies are available. The Chancellor court provides equitable remedies for such and other manifested

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137 The common law has been used in Hong Kong to important Western values and universal rights.2 Am. U. J. Int’l L. & Pol’y 361 (1997). Daniel D. Bradlow, RECENT DEVELOPMENT: FOREWORD: American University Washington College of Law Hong Kong: Preserving Human Rights and the Rule of Law; A Conference Sponsored by The International Legal Studies Program of the Washington College of Law, Human Rights Watch/Asia, and the Lawyers Committee for Human Rights; March 18 - 19, 1997 (Both Christin Loh and Margret Ng has posited faith in common law tradition of Hong Kong to safeguard the right of Hong Kong people from arbitrary and abusive Chinese – Communist influence, though importation of human rights principles from abroad.)
injustice. In this way, the Chancellor’s jurisdiction and operations function very much like QLF, except that QLF operates routinely in applying integrated equity and legal principles and the Chancellor court intervenes, occasionally and exceptionally, when the legal system fails.

Third, the jury system plays an important role in bringing people’s voice into the law and individual justice to the person. For example, in civil - tort cases, the jury play an important role is determining the normative standard of negligent, a factual – legal exercise. To do so the jury members have to consider the facts and circumstances of the case from the motive of the person to custom of the place to the conduct of the parties, and finally to a variety of mitigating and aggravating circumstances.

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139 Id. 129.
140 This amounted to an interjection of an extra-legal requirement of “reasonableness” in the approval process. “Negligence” or “reasonableness” is a Trojan horse of the law. It allows social morality to come into play in determining whether an act is legal. This conforms with traditional Chinese practice where the law adopted and incorporated social morality through a process called the Confucianization of the law. Kam C. Wong, “Confucianization of the Law: A Study if Speech Crime Prosecution in Imperial China.” In Western jurisprudence, the issue is most often raised under the rubric of a law vs. morality debate. See Martin P. Golding, Philosophy of Law (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975). The more pressing issue in the current context is whether social-moral principles could be used to interpret legal rules? In American tort law, the “standard of reasonable conduct” is a community standard and an ethico-legal judgment. See William Prosner, Law of Tort (West, 1971), p. 167.
Fourth, the substantive due process doctrine allows the judges to read into the Constitution what society considered to be fair and just to invalidate federal state and local criminal justice process and practices. The 14th Amendment of the U.S. Constitution reads: “Section. 1 … No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law ….” The Supreme Court of the U.S. has used the 14th Amendment to declare certain rights to be “fundamental” in nature and cannot be deprived, e.g., coercive interrogation practices such as sleep deprivation.142

Finally, mitigating and aggravating circumstances in sentencing, are considered at the penalty phase of a criminal trial, not liability phase. In civil litigation, mitigating and aggravating circumstances, such as contributory negligence, are foremost in the minds of the jury.

Confronting QLF: A case study

Western jurists likewise have to confront QLF issues of concern to Chinese jurists.143 For example, how should rational law deals with irrational people and jury to acquit if they believe that a particular law is oppressive, or if they believe that a law is fair, but to apply it in certain circumstances would be oppressive…” Id. We, The Jury, p. 59. The jury “nullification” doctrine clearly allows the jury to rise above the confines of the law in search of higher justice. In so doing, they imbue the legal process with moral and ethical considerations.


143 In making this observation, I am reaffirming that law is an instrument of social control. It was Donald Black who observed that “law is governmental social control. Donald Black, The Behavior of Law (N.Y.: Academic Press, 1976), p. 2. In fashioning effective social control measures, law makers/givers (an Austin or Pound) must take human nature (e.g., constitution (Herrnstein), disposition (Adam Smith), psychology (Freud) and spirituality (Bible), community aspirations (e.g., ideology and morality), social conditions (e.g., development (Maine), structure (Marx) and process) and nature’s providence into account, albeit in varying degrees and more or less in proportion. Thus observed, social controllers West and East are force to come to terms with (of necessity) and have to make allowance for (inevitably) for imperfect humans (e.g., immature juvenile or emotional conduct), dysfunctional society (e.g.,
emotional conduct? How could uniform and essentialistic law deals with the vulgarities of human personality, multiplicity of social conditions circumstances and interactive situational context in positing blame and imposing liabilities? Ultimately, oppressive class structure and conflictual process) and unpredictable nature (e.g., force of nature). More simply controllers have no control over the subject and context of control. But as make clear below, controllers do have ways of understanding (conceiving and perceiving), and in turn dealing with (receiving and disposing) the world as they see fit, as mediated by culture, as informed by philosophy, as driven by ideology. Social control scheme (as with and including law) differs -- in context China and West -- as a result of two factors: social control philosophy and strategy, or what is the nature of the problem and how to deal with social-behavioral problems of relationship rupture and personal deviance? In terms of philosophy, jurists East and West are both utopians, in search of a better world; a more virtuous world in China and a more just world in the West. Their difference lies in the fact that Chinese jurists are realists in their mental disposition and pragmatists in their action orientation. The Western jurists are idealists at heart and puritans in action. Thus, Confucius accept people as who they are, i.e., imperfect but perfectable, and the world as what is, i.e., corrupting but changeable, while Western jurists (Kant), are unwilling to (or perhaps incapable of) seeing and accepting the world -- flawed individuals (irrationality) and dysfunctional society (exploitative) -- as is, but insist on viewing and remaking the world as it ought to be -- rational people, just process, equality relations and fair society. When it comes to social control strategy and measures, the Chinese are more practical. They want to change the society and reform the people systematically, comprehensively, holistically, if incrementally, indirectly and slowly. Thus they prefer education over punishment, surveillance over imprisonment, thought control over conduct restrictions, ratification of culture over blaming of individual, improving political/social/material conditions in conjunction with individual/behavioral control. Conversely, the Western control regime is more punitive, retributive and deterring. They are more interested in making people pay for their indiscretion, repay society for violations and stop future misconduct, than transforming (criminogenic) society to reforming (criminolistic) individuals. Whether it is punitive sentence or retributive punishment, the purpose of social control is to return people and society to an “ideal” and “pure” state. The best way to sum up this brief description of East vs. West social control philosophy and strategy is to encapsulate and demonstrate the two different approaches with cultural fables. While the Western jurist is like Don Quixote (Miguel de Cervantes Saavedra, *El ingenioso hidalgo don Quijote de la Mancha* (“The Ingenious Hidalgo Don Quixote of La Mancha”)) (1605), who live in a world of make belief bent on conquering evil (the windmill) and recurring virtuous (the prostitute), the Chinese jurist recalls the old man who want to move a mountain one spoon at a time.

144 Western law is build upon the assumption that people are rational, at least capable of being rational. It also assumes that people have free will. To say that people are rational is to say that their conduct is driven by hedonistic calculus, and are able to be moved by punishment. Thus in drafting law, legislators should adopt Bentham’s utilitarianism (most happiness of most people) and Becerra’s deterrence (certainty, speed and proportionality).
what happen when the law fails in its essential purpose – in upholding morality, in delivering justice, in providing for security, in demonstrating reasonableness? In practical terms, the strict enforcement of law brings about unacceptable result; challenging the jurists to forgo law to confront QLF. Professor Lon Fuller put masterfully explore how Western civilization and legal culture have to say when the stricture of law contradicts human nature, natural law, practical reasoning, or simple QLF issues, in an imaginary cases designed to educate law students and practitioners about the limitations of the rule of law.145

The above brief discussion makes clear that the rule of law regime, based on a positive law theory and operating under a statutory law system, has accepted the need to better provide for human needs (realism) and moral principles (idealism) that are not adequately or properly dealt with by the zealous, fetish and blind application of the rule of law. The common law has to be saved from it works too perfectly and efficiently, a/k/a/ too mechanical in process and too uniform in outcome. For example, by allowing only certain writs to be plea, heard and proven, many worth litigants are

left without legal remedy for harm done. The legal process cannot set behavioral standards when they are abased on community values, contingent on totality of circumstances, and informed by ill defined and effervescence moral feelings. Finally, the Constitution, as a living compact, depends on people of the time to give it moral authority.

The different between rule of law and QLF is not that “qing” and “li” are considered as unimportant in Western jurisprudence. As intimated earlier, we can take the law from the people but the human instinct for right and wrong remains. As a result of historical development and social needs, the rule of law regime has chosen to privileged law as preferred instrumentality to discipline society, paying less attention to“li” and “qing” as ordering devices. With rule of law, the sanctity of the law (FLQ) comes first, in china, violence of the law comes last (QLF)

With rule of law, QL becomes irrelevant in most cases. The assumption is, as an ideology the positive law should, and should be, sufficient and adequate in capturing all “qing” and “li” considerations in the legislative process. In exceptional cases, the court would construct mechanism, e.g., jury, and doctrines, e.g., substantive due process, to breach the gap, between theory and practice, routine and exceptional. In the case of QLF, issues of QLF must be considered in their totality – integratively, interactively, inter-penetratingly, inter-dependently and holistically.

VI

Conclusion

The article is a first attempt to articulate and argue for the adoption of Chinese jurisprudential principles of Q-L-F in the formulation, application and evaluation of Hong Kong law. As intimated, there are two compelling reasons for doing so:

First, Hong Kong legal culture, judicial thinking and legislative reasoning, has
long been held captive by foreign (trained) jurists, Westernized politicians and progressive scholars. This fixation on Western ideas, liberal ideal and utopian ideology must be counter balanced by (more) local perspective as reflecting traditional thinking and grounded sentiments.¹⁴⁶

Second, British – Hong Kong Joint Declaration envisions an autonomous Hong Kong developing on its own terms, at its own pace, and more importantly, for its own good. The Hong Kong Basic Law in turns promises an independent and autonomous SAR, operated by and for Hong Kong people. Such a political settlement and constitutional regime requires indigenization of Hong Kong law, i.e., giving Hong Kong people a voice, in theory as well as practice, process and result.¹⁴⁷

Until and unless Hong Kong people adopt a Chinese approach of making and applying law, Hong Kong will not be fully in compliance with the Basic Law of Hong Kong in achieving its status of an autonomous region.

¹⁴⁶ It has been observed that Confucianism is less a set of philosophical principles dealing with abstract issues of good vs. bad morally than a collection of conduct norms catering to concrete problems of desirable vs. undesirable pragmatically. For example, every person in China has a prescribed title (ming) and status (fen), and with it role and functions because people desires know no bound, and would run amock if not properly delimited in advance.

¹⁴⁷ The are two interesting philosophical question that deserve pondering and await elaboration: (1) What does ‘autonomy’ mean? Does “autonomy” mean total and complete isolation from external influence(s)? Or, does it mean selective exercise of “autonomy”, i.e., incorporation of foreign ideas if and when deemed appropriate, including abdication of “autonomy”, with intent or by default? (2) If ‘autonomy” does not preclude external influence, in what way can it be said that the “domestication” of foreign ideas transform such ideas into “domestic” ones?