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CHAPTER FOUR

THE PRINCIPLE OF LEGALITY AND LEGAL RULES IN THE CHINESE LEGAL TRADITION

Jérôme Bourgon

Where does law fit in the much broader analysis of the relationship between democracy and Chinese tradition? The question has been asked regularly, and is asked even more frequently now that China has a legal system worthy of that name. In any case, it seems to need to be addressed head on, by discussing the place of law in the history of China, or better yet—or at least more fashionably—the rule of law (*État de droit*) and Chinese legal tradition. But for various reasons, I have limited my discussion to two fairly technical concepts that seem a bit austere: the principle of legality and legal rules.

For one thing, basing a historical inquiry on questions that are too contemporary is not good methodology. For example, the rule of law is a very recent concept in France, where the principle consisting of making the state subject to judgment by a tribunal of some kind, such as the *Conseil constitutionnel* (Constitutional Council), only began to take shape in the minds of the best specialists in the 1920s to 1930s. It was not really implemented there until after the Second World War, and the ordinary French citizen has been initiated only in the last twenty years. In fact, the principle inspires as many virtuous professions of faith as the practice provokes gnashing of teeth, for example when a law adopted by the people's representatives is blocked by a council of appointed judges who invoke mysterious constitutional principles. Is it pertinent to evaluate current Chinese law, much less the legal system of Imperial China, by reference to a category we have not completely assimilated? When Jean-Pierre Cabestan remarks that "China has laws, not the rule of law,"[1] I think this is not so bad. That is, it would not be so bad if China had a classical legal system such as France has had for the two centuries since the Revolution: a system

[1] See Jean-Pierre Cabestan, "Un État de lois sans État de droit," *Tiers monde*, t. XXXVII, no. 147 (special issue on China), July–September 1996, pp. 649–668.

based namely on the two less fashionable but still fundamental concepts of the principle of legality and legal (as opposed to moral or customary) rules.

In addition, before discussing the relationship between law and democracy in Chinese tradition, it is a good idea to make sure one knows what one is talking about. It seems well established among Sinologists that the very notion of law was foreign to Chinese thought, which was resistant to it.[2] An attentive reading of these authors quickly reveals, however, that this opinion is based, implicitly for the most part, on a definition of law that leads to a foregone conclusion: China does not meet this or that criterion; it therefore has no law. The criteria are so restrictive or arbitrary that they would eliminate Roman law, British common law and any other prestigious legal tradition. The problem is that there is no definition common to the various facets of the western legal tradition, and legal textbooks often begin with the authors' most eloquent admissions that they are incapable of defining the subject. From Dean Vedel, who confessed to his editor that he "went blank like a poor schoolboy and was afraid of turning in a blank page," to Lucien François, a Belgian jurist and member of the *Conseil d'État* (State Council) who, in 2001, published a fairly provocative book called *Le cap des tempêtes*,[3] the definition of law is just that: a stormy cape where legal doctrines sink. This was already the case in Flaubert's time, as the *Dictionnaire des idées reçues* (Dictionary of popular beliefs) illustrates: "Law: no one knows what it is."

Of course, jurists will protest. They prove they know what law is when they distinguish a fact of legal importance from other facts: they have a practical, intuitive understanding of law that is difficult to communicate to the uninitiated. Though genuine, this pragmatism is clearly corporatist, as it requires familiarity with the subject and excludes foreign law. Providing samples of the same practical, intuitive understanding by jurists of Imperial China produces the effect of foreign cuisine on an unprepared palate: "You call this law?" The most pragmatic at home become the most careful

[2] See among others Marcel Granet, *La pensée chinoise* (Paris: Albin Michel, 1999 [1934], pp. 479 ff.; Léon Vandermeersch, "An Enquiry into the Chinese Conception of the Law," in *The Scope of State Power in China*, ed. Stuart Schram (London: School of Oriental and African Studies/Hong Kong: The Chinese University Press, 1985), pp. 3–125; François Jullien, *Fonder la morale* (Paris: Grasset, 1995), pp. 77–78, 106.

[3] Lucien François, *Le cap des Tempêtes. Essai de microscopie du droit* (Brussels: Bruylant Paris: Librarie génerale de droit et de jurisprudence, 2001), esp. "Prolégomènes: le problème de la définition du droit," pp. 1–25.

with respect to definitions when confronted with foreign law. The dictionary of popular beliefs thus gains a new entry: "Law: China has none."

I will carefully avoid any metaphysical discussion on the nature of law and stick to more limited yet certain areas. The principle of legality and the concept of legal rules possess considerable advantages. First, both are at the heart of the French conception of law: for the ordinary citizen of any western country—except the United Kingdom, which is insular from this point of view as well—the law is, above all, laws, or legislation, and the rules judges are supposed to follow when applying them. Second, both concepts are limited and relatively easy to define, especially the principle of legality, which defines the scope of criminal law's application. Legal rules pose a more complicated problem, so I will reduce them to their simplest form, the goal being to discuss the relationship between "law, Chinese tradition and democracy" using the most limited and least esoteric terms possible.

Did the Chinese invent the principle of the legality of crimes and punishments?

My question purposefully highlights the resemblance between a conception of law that has become very familiar to westerners over the last two centuries and one that was current in the Chinese Empire at least since the Tang Dynasty—that is, during thirteen or fourteen centuries. The principle that founds the conception of modern law might well be one of the major institutional inventions of Chinese civilization. Was it reinvented later by Europeans drawing on their own legal tradition, or did the Chinese example exert some influence on Enlightenment reformers? While waiting for the documentary research necessary to answer this question, I will simply compare the principle of legality in both the Chinese and western traditions.

What is the principle of legality? Formulated by Beccaria ("... only laws may set out the penalties for each offense"[4]) and reproduced in Article 8 of the French Declaration of the Rights of Man and of the Citizen of August 26, 1789 ("... no one may be punished except by virtue of a law established and promulgated prior to the offense and legally applied"), this principle was summarized by Anselm von Feuerbach (an Austrian

[4] Beccaria, *Traité des délits et des peines*, § III.

juris-consult and the father of Ludwig, the renowned Hegelian philosopher) in the now classic Latin phrase *"nullum crimen, nulla poena, sine lege."* No offense may be punished unless a prior statute defines it and sets out the penalty. Though the expression is Latin, it dates from 1799 and reflects a major innovation: a genuine revolution in the conception of law. Until then, neither feudal or classical Europe, nor the Roman Empire had had a codified legal system or adopted the rather unusual conception of justice that seeks to limit judges to being "the mouth that pronounces the sentence foreseen by the law," to quote Montesquieu.[5] The rule in France under the Ancien Régime, for example, was that "all punishment in the kingdom is arbitrary." In other words, judges were free to choose from a panoply of punishments, even to invent them on the spot (Foucault cites some spectacular examples).[6] Of course, simultaneously with the construction of European absolutisms a tendency developed to restrain judges through procedural rules. Charles V's "criminal constitution" (called *Caroline*) and Louis XIV's criminal ordinances constituted a first step towards systematizing punishment. But under the Ancien Régime there existed no graduated, uniform scale of legal punishments modulating them according to the gravity of offenses or limiting judges to ordering a particular punishment for a particular offense under the strict control of a superior authority. This is a specificity of modern legal systems. It is also a specificity of Imperial China.

What is the relationship between the legality principle and democracy? At first glance, laws, and even more so the system of physical constraints that ensure their enforcement, are at the opposite end of the spectrum from liberty and rights. This opposition is clear in modern usage: one enjoys rights and freedoms; one is subject to law and punishment. But one of the first principles of liberalism is that liberty must be based on legal constraint. In *A Theory of Justice*, the highly influential philosopher John Rawls includes a subchapter on the rule of law. According to Rawls, liberty and justice depend on the following conditions:

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[5] Montesquieu, *De l'esprit des lois*, XI, 6 *Œuvres complètes*, vol. 2 (Paris: NRF-Gallimard, Bibliothèque de la Pléiade), p. 404.

[6] See Michel Foucault, *Surveiller et punir. Naissance de la prison* (Tel Edition) (Paris: Gallimard, 2000), esp. the first chapter, "Le corps des condamnés." See also Pieter Spierenburg, *The Spectacle of Suffering. Executions and the Evolution of Repression: from a Preindustrial Metropolis to the Euro-experience* (Cambridge: Cambridge University Press, 1984), pp. 72 ff (providing other examples of the creativity of European judges).

> The precept that there is no offence without a law (*Nulla crimen sine lege*), and the requirements it implies, also follow from the idea of a legal system. Thus precept demands that laws be known and expressly promulgated, that their meaning be clearly defined,... that at least the most severe offenses be strictly construed, and that penal laws should not be retroactive to the disadvantage of those to whom they apply. These requirements are implicit in the notion of regulating behavior by public rules. For if, say, statutes are not clear in what they enjoin and forbid, the citizen does not know how he is to behave. [...]
>
> Now the connection of the rule of law with liberty is clear enough. Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere. But if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we have the liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain.[7]

Thus, for one of the major theoreticians of contemporary democratic systems, the first condition of democracy is regularity and impartiality in the administration of justice. A principle of criminal law—the legality of crimes and punishments—constitutes the foundation of what is commonly called civil liberty, or civil rights.

How does the passage from Rawls echo the Chinese legal tradition? It's fairly simple: the entire first part about the need to publish laws and for them to be clearly understood by the individuals subject to them conforms to the spirit of Chinese institutions. The second part on liberty and its uncertain boundaries does not echo at all, however, as the concepts of "liberty" and "rights" have no equivalent in Chinese tradition. In other words, the same fundamental legal principle exists, but the ideological discourse is different: rhetoric of liberty on the one hand, ties of subordination on the other. Popular opinion often regards proclaiming liberty and rights as the foundation of democracy and criminal laws as antagonistic to them. This is forgetting that the lyricism of liberty and rights gave way to the Reign of Terror (or total legal uncertainty), and has also maintained shady relations with what today is commonly called totalitarianism. In Imperial China, on the other hand, the fact that the concepts "liberty" and "rights" did not exist did not stop the exercise of justice from being certain, foreseeable, and generally moderate.

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7 John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1973), pp. 238–239.

Let us look more closely at Rawls's principal assertions. First, the most fundamental: "if... statutes are not clear in what they enjoin and forbid, the citizen does not know how he is to behave."[8] This is the most classic of Chinese precepts, as illustrated in Confucius's premise: "If punishments are not precisely adapted to offenses, the people will not know how to behave."[9] This precept has nourished numerous others, the most widespread of which is no doubt *Mingxing bijiao*, which appears in many prefaces to administrative treatises and which also serves as the title for various legal textbooks.[10] Translated literally it means: "Clear punishments underlie education." The character *bi* 弼 represents two bows that one can shape: for education to "keep behavior in shape" the "punishment" must be "clear, obvious." This is exactly what Rawls means when he refers to "regulating behavior by public rules."[11] Moreover, the European Court of Human Rights' concept of the "quality of law," developed since 1979, includes three conditions now common to both common-law and civil-law countries: accessibility, precision and foreseeability.[12]

In Imperial China, the requirement that punishment be clear was satisfied in many different ways. From rules stipulating in minute detail how corporal punishment was to be inflicted to procedural rules governing appeals and revisions, the collegial formation of some courts, and the "Autumn Assizes" dispensing imperial pardons, all were aimed at ensuring that punishment and pardons were public. There was also and above all the concern that *everyone*, from the highest public official to the lowliest private individual, *know the law*. Law was therefore public and published. Beyond official editions of the Penal Code sent to public agencies, private editions were abundant and available to anyone who could read: educated leading citizens first, but also merchants, master artisans, and a relatively large general public. The Code was of course a fat tome full of archaic language, but there were plenty of popularized versions, be they in abbreviated form, or translated into vernacular language, or even reduced to

[8] *Id.*, p. 238.

[9] *Entretiens*, 13.3.6. Author's note: "are not adapted" is a rough translation of the Chinese *bu zhong*: "not hitting the target."

[10] See Pierre-Étienne Will, *Official Handbooks and Anthologies of Imperial China: A Descriptive and Critical Bibliography* (Leiden: Brill, forthcoming), e.g. entries on *Mingxing bijiao lu* (compiled in 1880 by Wang Zuyuan), *Bijiao lu* (by Wang Maozhong, 1900), *Mingxing tushuo* (by Tieshan, n.d.).

[11] Rawls, *A Theory of Justice*, p. 238.

[12] See Mireille Delmas-Marty, chapter 13 in this volume.

rhymes easy to memorize.[13] Another Chinese specialty was the conversion of legal texts and regulations into tables. The properties of ideographic writing facilitated summarizing the entire Penal Code in diagrams, which were published in small brochures or as giant wall murals. Punishment of a specific act could thus be situated in the overall punitive system.[14] In addition to this intense editorial activity, public, commentated readings of laws were held, as prescribed by the Code.[15] In sum, in the Ming and in the first century of the Qing the Chinese were probably the best informed citizens in the world on the functioning of their legal and judiciary system: Chinese novels, from which Van Gulik took his inspiration for his Judge Ti investigations, illustrate an extreme familiarity with the fine points of procedure, criminal ruses, prices to redeem punishments, and so forth, and give the impression that laws were omnipresent, though this of course does not necessarily mean that law and justice were.

This penetration of law into society flows logically from the principle of legality: ignorance of the law is no excuse; everyone must know what to expect if they commit a crime. Through education and dissuasion, laws *prevent* crime. Instruments of punishment (bamboo canes, irons, and so on) were hung at the entrance of the *yamen* to intimidate, and punishment was inflicted in public to act as an even more powerful deterrent.

Of course, the project of "making punishments clear" succeeded beyond hope, as "Chinese torture" became famous worldwide. I believe the cliché of "Chinese torture" rests on a misinterpretation: the over-exhibition of punishment was taken as a sign of refined cruelty, as institutional sadism. There is obviously something in Rawls other than simple dissuasion by terror or the idea of hanging a legal sword of Damocles over everyone's head. According to Rawls, for laws to be known and foreseeable, they must be placed in a "legal system"[16] within which they find their meaning in relation to each other. Laws are designed to create a system by establishing constant, necessary relationships, and this systematicity is supposed to enable an economy of penal means. Public punishment aims

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13 See Will, *Official Handbooks*, for many examples.

14 See Pierre-Étienne Will, "La réglementation administrative et le code pénal mis en tableaux," *Études chinoises*, vol. XXII (2003), pp. 93–157.

15 See *lü* 61: "Teaching and reading of laws and ordinances" (*Jiangdu lüling*). In this instance and hereafter, the *lü* are numbered in accordance with Xue Yunsheng, *Duli cunyi* (Persistent doubts after reading the articles [of the Penal Code]), ed. Huang Jingjia (Taipei: Chinese Materials and Research Aids Service Center, 1970), p. 207.

16 Rawls, *A Theory of Justice*, p. 238.

to create more order for the price of less suffering—in other words, the opposite of legal sadism.

This is how the Chinese understood it, and much earlier than European utilitarians: they instituted the first legal system in the modern sense of the word between the end of the third and the beginning of the seventh century.[17] It is what Max Weber outlined in his "ideal type" of systematized law; and the aspect I would like to discuss is that "[t]he objective law in force constitutes an faultless system of legal prescriptions, or latently contains one, or at least must be treated as such to be applied."[18] Indeed, since the Song Dynasty Chinese jurists have pursued the goal of constructing a faultless system, using among others the image of a "legal net" (*fawang*): should the net have smaller or larger holes? If they are too small, it catches everything and becomes unmanageable; if they are too big, even the "big fish" slip through. A true expert knows how to manipulate the "main cord" (*ti wang da gang*) to play with the layout and relative flexibility of the netting. Since at least the eleventh century the Chinese have conceived of law as a unified, coherent system of norms.[19]

This system is based on codes, the main one of which is devoted to the *lü*. The term *lü* originally referred to the pipes forming the musical scale, starting from a base note. Like the scale, an organized system of law is "a system of necessary and constant relationships and proportions,"[20] to paraphrase Montesquieu. The system's "base note," or main cord of the net, was the criminal scale called the Five Punishments: (1) strokes with a cane; (2) blows with a thicker slat; (3) penal servitude for a given time period; (4) banishment or exile for life; (5) death sentences. Each was divided into several degrees, totaling twenty or thirty degrees depending on the era, making it possible to achieve as perfect a match as possible between the crime's circumstances and its punishment.

Such cold calculation of corporal punishment may seem incompatible with today's conception of law, but here again, if law is incompatible with torture, then Roman law and the various laws of the Ancien Régime all disappear, leaving only modern legislation and a definition of law that

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[17] On public punishment in China, see Jérôme Bourgon, "Chinese executions: visualizing their differences with European *supplices*," *European Journal of East Asian Studies*, 2. 1 (2003), pp. 151–182.

[18] Max Weber, *Sociologie du droit* (Paris: Presses Universitaires de France, 1986), p. 43.

[19] The Song Code (*Xingfa tongdian*, abbreviated *Xingtong*) was the subject of a series of rhymed commentaries that sought to bring out the legislation's systematicity. See entries on *Xingtong fu*, *Xingtong fujie*, and *Xingtong fushu* in Will, *Official Handbooks*.

[20] Montesquieu, Introduction to *De l'esprit des lois*.

is even more mysterious. If one accepts, as Hegel did, that a legal system's rationality resides in the gradation, not the nature, of punishment, in establishing a sentencing scale that enables modulation, then one must admit that adding up days in prison is no more or less rational than adding up swats with a cane.[21] Softer penalties have more to do with civilization and habits than with the rationality of law properly speaking; indeed, Chinese punishments compare favorably with those meted out in Europe until the end of the eighteenth century. But the sentencing scale was in fact merely the "main cord" of the legal net in Imperial China, and other systems of correspondences were combined with it. These comprised, in particular, methods for converting corporal punishments into fines, found in tables for redeeming punishments; or, conversely, there were tables for setting punishments according to the amount of damage caused, objects stolen, or funds misappropriated (the so-called *liuzang*). A last example is the "mourning tables," which indicated the degree of kinship—and thus the gravity of family crimes—by reference to the length and severity of mourning obligations. There was thus a set of grids, tables and scales for evaluating punishment with mathematical precision.[22] Still, these mathematical rules needed to be applied to offenses following an evaluation system that was qualitative and no longer quantitative.

Law's foundation, in Imperial China as well as in modern systems, is the art of qualification, of correctly naming things and acts. In Rawls's words, "precept demands that laws be known and expressly promulgated, that their meaning be clearly defined . . . that at least the most severe offenses be strictly construed."[23] These requirements were met in the law of Imperial China. All crimes had to be explicitly provided for by statute and judges had to observe texts strictly. Still, qualification went beyond simply labeling. It proceeded from principles and required breaking things down into classifications organized each in relation to the others. Chinese jurists were fond of illustrating the "spirit" or "intent" of laws (*lü yi*) by showing how the gravity of an act should not be considered in isolation, but relative to all the offenses defined in the Code. Similarly, the sentence was not limited to a literal citation; the punishment had to be weighed according to elements for appreciating guilt that were an integral part of penal

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[21] See Friedrich Hegel, *Philosophie du droit*, § 101, esp. the "Remarque."

[22] The tables of equivalents were placed at the beginning of the code, just after the table of contents, at the beginning of the general, introductory part entitled "definitions and rules" (*Mingli*).

[23] Rawls, *A Theory of Justice*, p. 238.

classifications. The various forms of homicide were classified very early on according to the degree of intent to commit the criminal act, from homicide during a brawl (French law's "blows unintentionally causing death"), during a game (when practicing martial arts) or by mistake, to murder (intentional homicide), then assassination (premeditated murder).[24] To each step of this ascending order of gravity corresponded a higher degree of punishment. Self-defense was also provided for, in terms fairly close to the French conception.[25] Similarly, in *L'esprit des lois*, Montesquieu distinguishes between "furtive theft" (*qiedao*), as the Chinese—and the Romans (*furtum*)—called it, and "forceful theft" (*qiangdao*), or armed robbery, the latter being punished more severely.[26]

In sum, the mathematical system for evaluating punishments was based on a taxonomy of human acts established according to criteria of individual responsibility and social dangerousness—rational criteria that seem commonplace to us because they have become part of today's systems, many centuries after being tried out in China.

Of course, this strict qualification of offenses had its limits. In a book that is still the bible of Chinese law for Anglophone students, Bodde and Morris make much of what they call "catch-all" statutes.[27] In reality, the two statutes concerned only 'catch small' fry. The first punishes the act of violating an order (or ordinance) by forty strokes with a cane;[28] the second punishes the misdemeanor of "undue conduct" (literally, "doing what ought not to be done")[29] by forty strokes with a cane or, in serious cases, eighty blows with a slat. These vague provisions do derogate from the principle of legality, but modern penal systems also contain vague incriminations, such as "disturbing public peace," "vagrancy," or "disobey-

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[24] See, in the "Homicides" (*renming*) section, *lü* 282: "Plotting to kill others" (*mousha ren*); *lü* 290: "Killing others in affrays or by intention" (*dou'ou ji gusha ren*); *lü* 292: "Killing or injuring others in play, by mistake, or by negligence" (*xisha wusha guoshi shashang ren*). Cf. *Duli cunyi*, pp. 775, 837–38, 849–50; Paul Louis Félix Philastre, trans., *Code annamite* (Taipei: Ch'eng-Wen Pub. Co., 1967), tome 2, pp. 164 ff., 209 ff., 222 ff.

[25] *Lü* 277: "Entering others' houses at night without reason" (*ye wugu ru jia*), *Duli cunyi*, p. 749; Philastre, *Code annamite*, tome 2, p. 138.

[26] Montesquieu, *L'esprit des lois*, VI.16: "De la juste proportion entre les peines et les crimes."

[27] Derk Bodde and Clarence Morris, *Law in Imperial China Exemplified by 190 Ch'ing Dynasty Cases* (Pennsylvania Paperback Edition, 1973 [1st ed. Harvard University Press, 1967]), pp. 178–179.

[28] *Lü* 385: "Violating an ordinance" (*weiling*); *Duli cunyi*, p. 1115; Philastre, *Code annamite*, tome 2, p. 571.

[29] *Lü* 386: "Doing what ought not to be done" (*bu ying wei*); *Duli cunyi*, p. 1115; Philastre, *Code annamite*, p. 272.

ing police regulations." Despite the name "catch-all," such statutes concern only minor infractions subject to light penalties, and indicate a concern for providing a framework for local police intervention when faced with minor disturbances that are not clearly defined in the Code. Such derogations can of course lead to abuses (which were denounced in China as well as in the West),[30] but that does not nullify the principle of legality, at least as it is understood by Rawls, who asserts that it requires "strict definitions" only for "the most serious" crimes.[31]

Let us turn now to Rawls's final requirement: "that penal laws should not be retroactive to the disadvantage of those to whom they apply."[32] The non-retroactivity of laws is the logical corollary of their publication and of the precept "ignorance of the law is no excuse." A law cannot be applied if it did not exist when the act was committed. More precisely, it cannot be applied retroactively if this is detrimental to the accused. For example, if someone commits a crime as defined by a statute and before he comes to trial that statute is replaced by a new, more lenient one, the new law will apply retroactively in his favor. Clearly, this principle distinguishes "good" legal regimes, those that show a certain benevolence, from "bad" ones that sentence people according to criteria concocted after the fact, arbitrarily, or even "made to order."

In which category does the imperial Chinese legal system fall from this perspective? A small subtlety here has occasionally caused misunderstandings. An article of the Qing Code provides that "[f]rom the day on which laws are promulgated, offenses committed before this promulgation shall also be judged according to the new laws."[33] If this article is taken literally, the laws of the Qing Code were retroactive. But the term "law" is misleading. The article concerns the *lü*, which are "framework laws" of a sort. The *lü* preserved the most permanent definitions, qualifications and penal classifications, which made up the structural framework of the legal system and were left undisturbed throughout each dynasty. In practice, the *lü*'s retroactivity would not have had any effect except when

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30 See the commentary of Philastre, *Code annamite*, p. 272, which ends: "Do not believe these articles were accepted without discussion or challenge by Chinese jurists, for under the Minh [Ming] Dynasty already, authoritative voices were vigorously raised against maintaining these articles, qualified as dangerous and accused of facilitating the sale of justice by employees and officials."

31 Rawls, *A Theory of Justice*, p. 238.

32 *Id.*, p. 239.

33 *Lü* 43: "Deciding penalties in accordance with newly promulgated laws" (*duanzui yi xinban lü*); *Duli cunyi*, p. 137; Philastre, *Code annamite*, tome 1, p. 275.

a new dynasty promulgated its code, once and for all for the duration of its entire "heavenly mandate." As this occurred generally after a period of civil war, new laws almost always ushered in a more lenient system. In fact, the *lü* provided only a general kind of framework into which fresh legislation was introduced in the form of substatutes (*li*) annexed to one *lü* or another. A statute concerning an important subject could be followed by several dozen substatutes that completely modified the ways it was applied. The rule was that a new law always took precedence over the older law; thus, in the case of a contradiction between a statute and a substatute, the latter was applied.

Retroactivity of the *lü* thus had no practical consequences, because they hardly varied between 1397, when the Ming Code was promulgated, and the end of the Qing Dynasty. What would have had practical importance is the retroactivity of the *li*, or substatutes, which contained the law actually in force. Thus, the same article continues: "If an offense was committed before a substatute (*li*) was promulgated, it shall be judged according to the statutes or substatutes already promulgated; . . . if the new substatute is less severe, this new substatute shall be followed."[34] In other words, the rule for applying substatutes was exactly the same as in today's French law: nonretroactivity, except when it benefits the accused. The jurists of Imperial China may thus be considered to have known and respected the principle of legality, which is one of the foundations of modern criminal law. There is therefore no reason why one should not suppose they transmitted it to the founders of eighteenth-century legal systems.

Foucault quotes the following lines from Lacretelle, written in 1784:

> A table must be composed of all the kinds of offenses found in different countries. After having been enumerated, the offenses must be divided into types. . . . This division must be such that each type is clearly distinct from the others, and each specific offense, considered in all its relationships, is placed between that which must precede it and that which must follow it, following the most just gradation; finally, this table must be such that it can be compared with another table, which will be prepared for punishments, so that they correspond exactly one to the other.[35]

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[34] *Duli cunyi*, p. 137; Philastre, *Code annamite*, vol. 1, p. 275. Philastre's enlightening commentary begins as follows: "It is clear that the reproach of the Annamite Code for accepting the retroactivity of punishments was ill founded."

[35] Foucault, *Surveiller et punir*, p. 118 (quoting from Pierre Louis de Lacretelle, *Réflexions sur la législation pénale*, 1784, p. 351).

Reading these lines, one can envision the tables in the Chinese code, their lines of equivalents between the *ming* (the names of the offenses) and the *xing* (the punishments divided into degrees), the total number of punishable offenses limited to "three thousand or so," and so forth. Foucault sees in this "double taxonomy of punishments and crimes" an imitation of the classifications established by the naturalist Linnaeus, with no other basis than simple resemblance. Is it not also possible to imagine it was influenced by the Chinese codes, or the various treatises that popularized them, at a time when Chinese institutions were a subject of Enlightenment reformers' keen interest?

Legal Rules: how to apply them; how to avoid them

As discussed above, law is not easily defined, which is why legal rules are more difficult to define than the principle of legality. Authors disagree as to whether or not law can be defined as a set of rules; whether or not these rules or norms are of a specific nature that distinguishes them from rules of morality or decency, for example; and whether and to what extent they emanate from social life, morals and customs, and so on. In short, one quickly gets lost in doctrinal subtleties. I have chosen the simplest and most standard definition I could find; it is also the most consistent with the preceding section since it is taken from Beccaria, one of the first advocates of the principle of legality:

> In the presence of any wrong, the judge must construct a perfect syllogism: the major premise must be the general law, the minor the act that complies with the law or not, the conclusion being acquittal or a guilty verdict. If, whether voluntarily or under constraint, the judge constructs even just two syllogisms instead of one, the door is open to uncertainty.[36]

Thus, legal rules boil down to a syllogism. This is a crystal clear, concise definition in the spirit of the Enlightenment. While few jurists are happy with it today because more complex, vague[37] concepts have developed, this highly geometrical conception is indeed what those who postulated

[36] Beccaria, Introduction to *Traité des délits et des peines*.

[37] See Mireille Delmas-Marty, *Le flou du droit. Du code pénal aux droits de l'homme* (Paris: Presses Universitaires de France, 2004 [1st ed. 1986]), following the path taken in the pioneering book by Dean Jean Carbonnier, *Flexible droit. Pour une sociologie du droit sans rigueur* (Paris: Librairie générale de droit et de jurisprudence, new ed. 2001 [1st ed. 1969]).

the inexistence of Chinese law had in mind. For example, Marcel Granet asserted that because Chinese thought was incapable of stating a dogmatic rule, it was impermeable to the concept of law.[38] And Jean Escarra, author in 1936 of the first general description of Chinese law, wrote that because the Chinese were condemned to a sort of conceptual stuttering—the sorites, or reasoning through recurrence—they were incapable of constructing a perfect syllogism.[39] Such speculations can be explained by the fact that these authors drew their conclusions from philosophical texts (or supposedly so) and were almost completely ignorant of Chinese legal practice. Not only could the Chinese conceive of the syllogistic rule, it was part and parcel of their judicial practice, as prescribed by statute in terms rather close to Beccaria's. Several laws from various parts of the code should be cited here, but I will limit myself to the *lü* concerning "Citing laws in deciding penalties" and one of its substatutes (*li*). The *lü* (statute) stipulates the following general rule: "All judicial court decisions shall completely cite a statute (*lü*) or a substatute (*li*), under penalty of thirty strokes with a cane. If the *lü* includes several facts in the same article, the court may limit the extract cited to the facts relative to the offense to be tried."[40] The substatute specifies the conditions for applying this rule:

> Every magistrate assigned to a case and responsible for pronouncing a sentence must follow only one statute (*lü*) or only one substatute (*li*); if he begins by citing a substatute and then says he is not following it to judge the crime but another, more severe one, and if he indicts mentioning "aggravating circumstances," he shall be subject to the punishment provided for "willfully wrongly indicting."[41]

Here then are two examples of the many rules promulgated so that judgments would conform to the facts and the law. Far from being an intellectual gymnastic inaccessible to the Chinese mind, constructing legal syllogisms constituted the daily routine of the courts and of the various organs of review. One has only to browse through the thousands of cases collected in the big compendia of judicial precedents to see that the exchanges between local magistrates and provincial and central authorities

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[38] Granet, *La pensée chinoise*, p. 479.

[39] Jean Escarra, *Le droit chinois* (Paris: Librairie générale de droit et de jurisprudence 1936), esp. pp. 67–68. A sorites is a chain of syllogisms in which the conclusion of the first becomes the major premise of the second, and so on. It therefore constitutes a sophisticated syllogism rather than an imperfect one.

[40] *Lü* 415 (*duanzui yin lüling*).

[41] *Li* 415–2, *Duli cunyi*, p. 1277; Philastre, *Code annnamite*, vol. 2, p. 711.

primarily concerned the approval or rejection of syllogisms.[42] And we also noted that Chinese judges were allowed only one syllogism, as Beccaria advises—they were forbidden to propose two of them and cite two laws.

In fact, because judges spent their days constructing syllogisms, doing so was not considered the ultimate proof of legal competence. According to Wang Huizu (1731–1807), one of the top Qing legal experts, it takes no more than a law clerk to label a set of facts as a particular crime; a real legal expert knows when *not to cite* a law (literally, "avoid it," *bi lü*)—that is, when to avoid mechanically applying the prescribed punishment because this would constitute an injustice.[43] Indeed, experts sought to loosen the legal syllogism's grip. Thus, in a fairly complicated inheritance case Wang mentions a little further on in his book, strict application of the code would have been disastrous for the family.[44] When the height of legality threatened to be the height of injustice, Chinese jurists (like their European colleagues) must be able to resort to equity. However, the principle of legality discussed above required that any bending of the rules be justified by reference to a higher authority. Jurists would therefore quote from some Confucian classic to show that the literal meaning of the relevant statute was not adjusted to this particular case and that either another law had to be cited or nothing done at all. One might cynically conclude that quintessential legal knowledge consisted in bending the law; in other words, ignoring the principle of legality. But a jurist such as Wang Huizu would have answered that he was subordinating the letter of the law to a higher principle.

This brings me to the problem of analogy. Like retroactivity, analogy has a bad reputation due to its use in totalitarian legislation. And like retroactivity, it is nonetheless tolerated in western criminal law, albeit within very strict limits—and these happen to be fairly comparable to those that were in place in Chinese law. In imperial China the use of analogy was governed by the statute "Deciding penalties without specific articles."[45] In

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[42] See for example the *Xing'an huilan* (Conspectus of criminal cases), the most widespread collection of judicial precedents in the second half of the nineteenth century. One hundred ninety cases have been translated and annotated by Bodde and Morris; see *Law in Imperial China*. In the third part of the book, Morris analyses various cases where the rule of law applies by virtue of syllogistic reasoning.

[43] Wang Huizu, *Zuozhi yaoyan* (Prescriptions on aiding government), entry entitled *Dulü* (Studying the Code).

[44] *Ibid.*, entry entitled *Dushu* (Studying books [i.e., the classics]), which follows immediately on the one just cited.

[45] *Lü* 44 (*duanzui wu zhengtiao*); *Duli cunyi*, p. 138; Philastre, *Code annamite*, vol. 1, p. 276.

this case, the law required citing the "closest" article and submitting the sentence to the emperor, who had to give approval in a rescript. Many other articles regulated this practice; in particular those setting out the very strict rules the judges were to follow when ordering a more severe punishment.[46] These articles indicate that while legal analogy was permitted, judicial analogy was not. Legal analogy requires judges to refer to a precise article, and only one, and propose a punishment inspired by the one provided for in that article while specifying that the latter does not apply perfectly to the case. In contrast, judicial analogy allows judges to arbitrarily order punishment while claiming to follow the general intent of the law and other vague entities.

In French law, judicial analogy is prohibited, as it was in imperial China, and legal analogy is tolerated only if it works to the accused's advantage. Such tolerance was greater in China, however, because one could indict by analogy, but only in the fairly strict conditions indicated above. In cases of indictment by analogy, the rule was to grant a sort of "discount," or what might also be described as a set reduction of the punishment provided for. This was the meaning of the "eight characters" explained at the beginning of the Code. These were eight "empty words," syntax operators proper to classical Chinese that appeared fairly frequently in laws having a particular penal meaning. The first, *yi* 以, indicated that the sentence was pronounced "under" such and such statute: the facts fully corresponded to what the cited statute provided. In short, *yi* indicated a syllogistic application of the law. The second character, *zhun* 準, indicated that the punishment was ordered "according to the criteria of" such and such statute, despite the fact that there was a significant difference between the facts of the case and those defined in the statute. The character *zhun* was thus a grammatical indicator of analogies.[47]

For example, if I were to steal cattle, I would be sentenced under (*yi*) the law prohibiting theft and, depending on the value of the theft, that sentence could be to three years of penal servitude; I would also receive, as incidental punishment, one hundred strokes with a bamboo cane and my face would be branded. Now assume I dishonestly obtain an equivalent amount of money by embezzlement or fraud, but without stealing in

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[46] See *Lü* 36: "Principles for increasing and reducing punishment" (*jiajian zuili*); *Duli cunyi*, p. 136; Philastre, *Code annamite*, p. 258.

[47] On the "eight characters" and, more broadly, the issue of analogy, see Jérôme Bourgon, "Les vertus juridiques de l'exemple. Nature et fonction de la mise en exemple dans le droit de la Chine impériale," *Extrême-Orient, Extrême-Occident*, 19 (1997), pp. 7–44.

the literal sense or abusing my authority if I am a public official. I cannot be sentenced "under" the law on theft; only "according to the criteria of" it. I will therefore be sentenced to three years of penal servitude, but without the incidental punishments of beating and branding.

Judgments by analogy were thus not purely arbitrary. Very often they served to overcome highly restrictive details in a statute by making comparisons that were in no way shocking. And while it cannot be guaranteed that analogy was used only in the accused's favor, it was at least strictly regulated and led to more clement sentences than in cases where a statute applied directly.

Nonetheless (one might observe), there was a very important actor in imperial China who was subject to neither the principle of legality nor legal rules—the emperor. Does this mean we are dealing with an autocratic, despotic regime ruled by personal whim? This is fairly debatable, in fact. The emperor was formally the source of laws and the fountain of justice, but the exact relationship between sovereign will and the rules imposed by the legal system varied greatly depending on the case, the emperor, the era, etc.

I can provide only a few reference points, one of which is the right of reprieve. While it is often given as the typical example of royal prerogative, it was almost entirely formalized in a rigid system dominated by judicial and bureaucratic routines. The emperor intervened only in the final phase, playing the role of chance: his role was limited to checking with his vermilion brush the names of those prisoners sentenced to death who were actually to be executed. The others benefited from a stay of execution.

There are of course famous cases in which emperors used judicial authorities to avenge themselves, such as in the famous "literary inquisitions" of the eighteenth and nineteenth centuries, including the 1711–1713 trial (thoroughly analyzed by Pierre-Henri Durand)[48] of Dai Mingshi, who was accused by the Kangxi emperor of disloyalty to him and his dynasty. There were also the witch hunts against braid choppers and soulstealers recounted by Philip Kuhn, in which the Qianlong emperor terrorized his officials to oblige them to find guilty parties and force them to confess.[49] In extreme cases like these, the emperor's personal engagement of course was an encouragement to both denunciation and recantation, but it also

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48 See Pierre-Henri Durand, *Lettrés et pouvoirs: un procès littéraire dans la Chine impériale* (Paris: Éditions de l'EHESS, 1992).

49 See Philip A. Kuhn, *Soulstealers. The Chinese Sorcery Scare of 1768* (Cambridge, Mass.: Harvard University Press, 1989).

met with significant resistance from the bureaucracy, especially from officials having judicial functions.[50] It would be overstating things to say they exercised a check on the emperor's power, but in the long term, the legal system and those responsible for its operation certainly tempered the rigors of autocracy.

In any case, one should not believe that autocratic whim harmed only innocent victims. China's great despots were often populist emperors who reserved their harshest blows for the privileged or beneficiaries of secure positions. Zhu Yuanzhang, the founder of the Ming Dynasty (r. 1368–1398), initiated legislation seeking to protect the "weak in status," including women, from the exactions of local tyrants and corrupt officials. Two great Qing emperors, Yongzheng (r. 1722–1735) and Qianlong (r. 1735–1795), infringed legal rules in certain cases they held up as examples, in particular in cases where parents or parents-in-law took advantage of the status the law gave them to oppress or kill their sons, daughters or daughters-in-law. In family crimes, the law decreased in severity as the criminal's degree of ascendance over the victim increased. A father or mother could therefore kill a child with almost complete impunity. But on their own authority these emperors occasionally overruled judgments that complied with legal rules and the principle of legality and ordered the criminal parents to be punished with extreme severity. Chinese jurists, far from taking offense at such disrespect for the law, considered these cases to be excellent precedents and sought to have them included in legislation.[51] They were aware that legal rules and the principle of legality are not all there is to law, but are at best tools one must not hesitate to drop when they become instruments of injustice.

Conclusion

While in the foregoing I may not have made the relationship between law, democracy and Chinese tradition clear, I hope I have at least provided a few examples useful to understanding the evolution of Chinese law and to comparing it more precisely and fairly with western legal history.

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[50] Such was the case of Wu Shaoshi and his son Wu Tan during the "soulstealers" repression under the Qianlong emperor. See *ibid.*, pp. 214–222.

[51] See the text by Yuan Bin, an expert jurist and the father of renowned poet Yuan Mei, quoted at the end of Jérôme Bourgon, "Un juriste nommé Yuan Mei. Son influence sur l'évolution du droit chinois," *Études chinoises*, vol. XIV, 2 (1995), pp. 43–151.

I chose two concepts on which our own understanding of law is based and which constitute the meeting point between the legal system and democratic principles. And what I tried to do regarding these two crucial concepts was to introduce a few elements that make it possible to establish with some degree of certainty that the publication of laws, the foreseeability of punishment, and the review of judicial decisions were for the most part better ensured in the Chinese legal system than in its equivalents in the European Ancien Régime. From the perspective of what is considered by eminent specialists as constituting the institutional foundations of democracy, China tended to be ahead of Europe until the end of the eighteenth century. Indeed British commentators were first to note certain of these advances.[52] My contribution to the inquiry undertaken in this volume is thus the following: if one wants to explain China's inaptitude or supposed lack of appetite for democracy, the causes must be sought elsewhere than in the alleged lack of a legal tradition or the deficiencies of the one that does, in fact, exist.

Or was the true deficiency of Chinese law the lack (or at least the weakness) of civil law—a legal domain that seems more intimately related to the citizen, thus to democracy, than is criminal law, which is considered more statist? I would certainly agree that China had not developed its own civil law prior to the arrival of western civil codes at the beginning of the twentieth century. But I do not believe civil, or private, law plays a decisive role in the transition to democracy, at least in the first stage. The French Civil Code of 1804 can legitimately be regarded as the conclusion of the bourgeois revolution: it did not spark or spur it. From the British Bill of Rights to the Declaration of Human Rights, the revolutionary ruptures that occurred dealt with penal issues. The first right of man—of the future citizen—is the right to security, to protection from the state's repressive machinery. From this point of view, the situation of the Chinese was rather uneven: it was more secure in prosperous periods when the judicial apparatus functioned well, but deteriorated quite rapidly, sometimes dramatically, when hierarchical checks were relaxed. Local government could then become a source of insecurity, not so much in itself as due to corrupt underlings. Judicial exactions fairly regularly sparked off local riots, not to speak of the bitter denunciations of virtuous scholars or

52. See in particular the preface to the first translation of the Qing Code in a European language: George Thomas Staunton, "Translator's Preface," in *Ta Tsing Leu Lee; Being the Fundamental Laws and a Selection of the Supplementary Statutes of the Penal Code of China*, 1810, new edition in facsimile (Taipei: Cheng-wen, 1966), p. xi.

vigilant censors. But it does not seem that the system as a whole was of such a nature as to polarize dissatisfaction, or nourish a reformist movement, as was the case in Enlightenment France.

It is thus high time to put an end to the myth of oriental despotism, which from Montesquieu to Wittfogel has made China into a sort of negative example, as the incarnation of a state permanently deprived of law, the foil to western states ruled by law. Overall, the Chinese legal tradition has not constituted an insurmountable obstacle to the advent of democracy any more than it has favored it. In the early years of the twentieth century the late-Qing legal reformers were able to extract elements common to western law from imperial law, thus making a non-negligible contribution to modern Chinese institutions. Yet the importation of a panoply of modern legislation did not lead Republican China to democracy any more than it did in pre-war imperial Japan. Modern democracy is always ready to invoke law, to the point of asserting exclusive rights over it. But it is a fact that worthy legal traditions have flourished under other regimes and were no less beneficial to those who lived under them.

In fact, rather than asking forever whether China has finally accepted or will soon accept to let herself be guided by the West, it might be more stimulating to reverse the question. The fact that the imperial Chinese system implemented principles of regulating by law such as one finds—better perfected, to be sure, but essentially comparable—in the legal systems of modern democracies should be of considerable interest for comparative history. Is this the result of borrowing pure and simple, or a more indirect influence, or simply a coincidence dictated by the necessities inherent to law's systemization? Even leaving it as an open question, the suggested influence of the Chinese legal tradition on the institutional foundations of modern Europe should not be ignored.