

## ADVERSARIAL LEGALISM AS CHINA'S PRIMARY EXTERNAL MODEL OF LEGALITY: WHAT DOES IT MEAN FOR CHINA'S FUTURE?

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With the rapid industrialization and globalization of the People's Republic of China (the "PRC" or "China") now taking place, Chinese law and society are changing quickly. Today we witness much dialogue, both within China and in the rest of the world, about China's looking to other countries for answers to the problems it faces. Chinese leaders look to industrialized countries with longstanding legal institutions, many in the West, for legal models in reforming or modernizing their own judicial system. Part of looking to the West seems to be a consequent shift toward adversarial legalism. Young, bright Chinese lawyers who are the future reformers of the Chinese system currently flock to western countries, especially to the United States, to study the adversarial legalism that is so central to western systems and to bring back their best points to China.<sup>2</sup> To date, many of the laws of the United States have evidently been accepted in China as the best example to follow.<sup>3</sup>

The significance of China's looking to adversarial legalism as its primary external model of legality is that a legal system developed in one context would be imposed on a different society, potentially with harmful results. On one hand, Chinese philosophies of law have deep roots going back thousands of years, including various schools of thought, some of which have parallels with Western legal philosophies. On the other hand, today's China is a very young and new country whose political developments have varied enormously from Western industrialized nations and whose legal and political workings are based on fundamentally different principles regarding the role of law in society. Even if done slowly over time, the implications of more adversarial legal practice in China could mean a great deal of confusion and, in fundamental respects, inappropriate dispute systems design: cutting back on mediation that is traditionally prevalent in China; insufficient protections of judicial review; a lack of individual rights to balance out collective interests, and others. As for the international significance of Western-style legal reforms, looking to adversarial legalism has implications for how China is viewed by the rest of the world: in the World Trade Organization and in the United Nations as well as by the United States, by multi-national corporations and by other influential actors on the world stage.

Perhaps most importantly, however, China's looking to western societies such as the

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<sup>2</sup> Of course, various other factors also influence the choice of Chinese students to attend American law schools, including a desire to work in parts of the world other than China. See Jodie Morse et al., *U.S. Law Becomes the Global Standard – And in Response, Foreign Students are Crowding Into American Law Schools*, TIME, June 1, 2001, available at <http://www.time.com/time/global/june/law.html>.

<sup>3</sup> The Legislative Affairs Office of the State Council, where all laws are prepared for consideration and adoption by the People's Congress, studies the laws of the United States as well as the laws of the United Kingdom, France, Germany and other western countries in order to select the best example to follow in many areas of law. For example, the PRC has adopted versions of the United States' Uniform Commercial Code, Federal Aviation Laws, and is currently considering the strict product liability laws of the United States. (Correspondence with George N. Tompkins Jr., Esq., January 23, 2007, on file with the author.)

United States has implications for the Chinese people's identity and self-perception: what China has been, how it relates to the rest of the world, and what it will be in terms of a legal culture with its own unique norms and practices, based in but not beholden to the past. Therefore, part of this inquiry into the implications of adversarial legalist reform for Chinese social values, concepts of justice and legal practice will involve considering the key philosophies and theories that have shaped a Chinese social consciousness over the course of history. The choice to examine ancient Chinese social theories in this article is based on the legal historicist proposition that historical study matters in order to understand the implications of present-day law and policy choices. Such an approach has its roots in such influential legal thinkers as Savigny, who posited that the authentic law of every nation is the law that has evolved from the nation's aboriginal "folk spirit" (*Volksgeist*) or common consciousness of the people, and therefore, historical study is required in order to recover and understand the authentic law. While in the case of Savigny, the starting point was Roman law principles in order to understand the common law of Europe and the *Ur* law of Germany in the nineteenth century,<sup>4</sup> in the case of Chinese legal reform, the starting point should be the social theories underlying Confucianism and Daoism, among other philosophies.

However, before examining the implications of a move toward adversarial legalism for Chinese legal thought and practice, it is crucial to define what is meant by adversarial legalism in the context of western and, especially, the American legal system. A recent treatment of this subject and discussion of the phrase itself is provided by Robert E. Kagan in *Adversarial Legalism: The American Way of Law*.<sup>5</sup> Kagan places adversarial legalism at the nexus of American law, policy and social relations in general. He describes it as "policy making, policy implementation, and dispute resolution by means of lawyer-dominated litigation." Works such as Kagan's emphasize that the central goal of adversarial legalism is not to bring about harmony, peace, or the resolution of disputes *per se*. Rather, the theme is of a constant struggle of competing entitlements: who is right and who is wrong and who's rights and behavioral norms will be treated as more important than others' rights and behavioral norms.

The struggle at the center of adversarial legalism that Kagan presents is premised on the belief that if all sides to a dispute are represented by competent counsel, the judge before whom the dispute is pending will be presented with briefings of law from counsel upon which the court will arrive at a just result. In other words, the judges rely on the ardent advocacy of the attorneys on all sides in any given case to present the law as it is or -- if change is in the wind -- as the law should be. The basic idea is that by weighing the opposing arguments, the judge can render a correct decision on the application of the law to the facts of the case before the court. This struggle, then, is at the core of legal systems such as that of the United States.

The challenges and consequences of applying such an adversarial legalist paradigm to Chinese society are manifold. If we start by examining a Chinese collective consciousness which is the product of millennia of history and cultures in that part of the globe, it is clear that, on fundamental levels, adversarial legalism is at odds with basic aspects of several core thought systems at play. Confucianism and Daoism are perhaps foremost factors in this collective consciousness. These systems affected the development of legal codification in China in

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<sup>4</sup> FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW*, vol. 1, pp. 12-17 (William Holloway trans. 1867). For helpful discussion of historicist approaches to law, see Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUMBIA LAW REVIEW 681, 686-690 (1951).

<sup>5</sup> ROBERT E. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (Harvard University Press, 2001). [hereinafter Kagan].

profound and basic ways.<sup>6</sup> Confucianism is a 2400-year old philosophy of social order with a hierarchical structure, pointing to the Emperor as the supreme authority. The supreme authority must be obeyed. High priority is given to proper action and respect according to family roles in any given situation. Daoism is a 2600-year old philosophy based on the teachings of Lao Tzu and focuses on simplicity, honesty in life and noninterference with the course of natural events. The impact of these systems over millennia has survived into the judicial system of the modern People's Republic of China ("PRC") despite the official abrogation of the older regime.<sup>7</sup> One reason these thought systems have survived is that legal codes, even centuries-old, and civil servants, even ones trained only in the classical texts, were needed to quickly fill the gaps in the early PRC's institutions. In fact, these philosophies along with later ones that both resisted and incorporated aspects of them, have not only survived but are pervasive in Chinese law and social norms today.<sup>8</sup> These paradigms, then, coupled with the divergent path of China's government over the last century as compared to most western industrialized nations, make for conditions that possibly militate against adversarial legalism as one solution to China's current challenges. Consequently, any adversarial legalist reformers must carefully consider the influence of these systems and the likely responses to such reforms that these systems will engender in Chinese society.

To illustrate, the pervasiveness of legal struggle in American society may conflict strikingly with Lao Tzu's views of harmony and "the way."<sup>9</sup> Lao Tzu's paradigm is one in which institutions of law and the existence of crime are seen as interconnected: that is, they are seen as mutually reinforcing phenomena.<sup>10</sup> For those who have adopted this aspect of Lao Tzu's philosophy in the course of Chinese history, the conclusion that follows is that law itself should be minimized as an institution in society. Such an attitude may be contrasted with the picture that Kagan paints, of a relatively activist role of modern American government demanded by American citizens (even while always tempered by conservative voices). Such a role for

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<sup>6</sup> See SOURCES OF CHINESE TRADITION (compiled by Wm. Theodore de Bary and Irene Bloom, Columbia University Press 2d ed. Vol. I 1999), [hereinafter SOURCES OF CHINESE TRADITION], Chapter 3: Confucius and the Analects. In the modern period, the six legal codes of what was the Republic of China stemmed from the Chinese imperial conceptions of justice which in turn were deeply influenced by these core thought systems as they evolved over centuries. Although in the 20<sup>th</sup> century Mao Zedong, in his rise to power, swept aside these six legal codes in 1949, the codes are still in force in Taiwan and they influence the present legal system in the PRC much more than China's government will admit.

<sup>7</sup> To illustrate: Neo-Confucian traditions and heritage are central in the formation of Chinese policies on and responses to various forms of law in the emerging international legal order, such as intellectual property laws. See J. Lehman, *Intellectual Property Rights and Chinese Tradition, Section: Philosophical Foundations*, 69 JOURNAL OF BUSINESS ETHICS 1 (2006); see also Laurence Jacobs et al., *Confucian Roots in China: a Force for Today's Business*, 33 MANAGEMENT DECISION 29 (1995) (documents the influence of Confucianism in all sectors of Chinese life today including law, despite the government's official stance against it).

<sup>8</sup> Even ideas like "human rights" and "peaceful coexistence", so critical in today's international legal and political discourse, arguably have more of a link to the ancient Daoist as well as Confucian ideas of a common humanity and human dignity, than they do to any of the ideologies as practiced or promulgated by the state regimes of China over the last few decades. To be sure, China's leaders increasingly are turning to these ancient, entrenched thought systems in dealing with the disharmonies generated by China's current rapid economic growth and social changes. See Benjamin Robertson & Melinda Liu, *Can the Sage Save China?* NEWSWEEK INT'L ED., Mar. 20, 2006, (documenting that "Confucian values are being touted by Beijing's communist leaders as never before").

<sup>9</sup> For an introductory text on and relevant selections from Lao Tzu, see DE BARY, CHAN, & WATSON, *THE NATURAL WAY OF LAO TZU* (1960), especially §§ 56-74.

<sup>10</sup> While a comprehensive account of Lao Tzu, who is much more cunning than Wu Wei alone might make him seem, is beyond the scope of this article, the basic points made here are meant to point toward certain of Lao Tzu's most basic views of law.

government and rule of law is far beyond the “purposive inaction” (Wu Wei) envisioned for a ruler by Lao Tzu, which carries through to certain aspects of a Chinese social mentality today.

But even while Lao Tzu’s Daoism had great historical impact on Chinese thought, it never rose to great prominence in terms of application to structuring Chinese governance. Perhaps, then, a more apt and immediately relevant connection between twenty-first century China and ancient thought systems would be provided by Confucianism, which became officially endorsed during the Han dynasty and afterward. However, in Confucian philosophy, despite all its stark differences with Daoism, there seems to be little that would welcome adversarial legalism either. While adversarial legalism celebrates law as a primary and regular form of expression of civil society, the Confucian tradition sees litigation as a last resort. While in adversarial legalism lawyers are the most dynamic actors in the courtroom, who bring to the fore the key issues of concern to the society as a whole, it was not so long ago that many Chinese courts did not even allow lawyers in the courtroom.

The essential gap between these legal traditions seems to be that whereas the adversarial legalistic worldview tends to focus on individual rights and welfare, the Confucian tradition tends to focus on the welfare of the collective or the community. Put another way, while the adversarial legalist tradition in the West strives to view all individuals equally (“justice is blind”) without regard to their social status, position or connections, the Confucian tradition in Chinese law judges individuals in terms of their “proper” roles, determined by their network of relationships within society.

What is the significance of the difference between these legal traditions? One manifestation of the difference in practice would be that, while western adversarial legalism is rooted in ideas of *individual* accountability to the state (e.g., Lockean and Kantian ethical and political notions), such ideas would clash with the Chinese legal tradition’s recurring notion of collective punishment, as seen for example in the codification of laws or in the 1780 case of *In Re Hsu Chung-Wei*.<sup>11</sup> Another manifestation of the gap in legal thinking is that, whereas the adversarial legalism of the United States stems from a culture of distrusting any concentration of power in the state and its agencies, Confucianism fosters a paternalistic view of the state (as well as the family and society in general) in which the state is in charge of making decisions for the people, who are likened to children. An illustration of this difference is provided by the one-child policy of China, a policy at least partially based in Confucian ideas of hierarchy. If American-style legal reforms were to be implemented in twenty-first century China, it is difficult to conceive of how such a policy of one child per nuclear family could escape severe scrutiny or not be overturned in a short period of time based on arguments for individual rights in civil society (even if the only sanctions for disobeying the policy are economic).

All of these differences imply disconnects with the adversarial legalist model and, in particular, the American model. These disconnects may manifest themselves as Chinese lawyers try to apply American legal thinking to their society. For example, we see already how Confucian currents clash with adversarial legalistic ones in regard to the enforcement of illegal contracts. Recently, contract cases in Chinese courts have shown (so far) a flexible but overall relatively stable consensus that a party may not refuse to perform a contract just because it was

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<sup>11</sup> In *Re Hsu Chung-wei, Bo’an Xinbian* [New Collection of Reversed Cases] (1780) (trans. By Harvard East Asian Legal Studies Group) 254-83. This is an opinion from an appellate judge panel in regard to a homicide case, in the year 1780. Significantly, instead of choosing to punish the father who had covered up the murder of his son, the court, instead, chose to punish the younger son, who had reported the case. The reasoning is based on family obligations and gratitude that a son owes a father.

illegal, whereas such a holding would plainly run counter to the American common law of contracts.<sup>12</sup> Arguably, the reasoning behind the Chinese position is connected to the Confucian notion that there are cases where rites (*li*),<sup>13</sup> a kind of ancient social norm in China, should take priority over law. How this deep-rooted tradition would interact with western or, specifically, American notions of rule of law as implemented in China is hard to predict since similar notions are not completely alien to American common law. But it is not hard to imagine the resulting discord given the stark differences in reasoning between these two legal traditions. While arguably any legal system needs to allow clashes to happen in order to move forward, the degree of the clash may be too large in this case for a revised Chinese legal system to work.

On the other hand, there is some evidence to argue the opposite: that Confucian paternalism is quite compatible with the high expectations of the public in adversarial legal systems such as the modern United States that the government must “take care” of its citizens.<sup>14</sup> Besides this, in looking at Confucian influence over the course of the Chinese legal tradition, one should also look at subsequent disciples and other influential thinkers who took Confucius’ ideas in other directions. Mencius, for example, saw the same sort of obligation on the part of the state to provide the conditions under which people may flourish<sup>15</sup> that Americans seem to demand of the state under adversarial legalism: “protection from serious harm, injustice, and environmental disasters”, as Kagan puts it.<sup>16</sup> In a way, Mencius restated and amplified the Confucian idea that with power comes responsibility. However, going beyond Confucius, Mencius also added a suggestion that a government which does not fulfill its responsibilities can and should be challenged as illegitimate. These ideas, in parallel, are powerful currents in the stream of American political thought going back at least to the Declaration of Independence.

One might add that, besides Confucianism, there are currents in Chinese thought that may be more welcoming of, and compatible with, a legalistic society (even if not an adversarial one). Perhaps the clearest example would be the Legalists, who saw law as a central institution of society rather than a last resort.<sup>17</sup> But while the Legalist tradition provides some evidence of support for something akin to adversarial legalism in Chinese thought, a basic distinction must be made: the Legalist tradition in Chinese thought is most supportive of a rule *by* law, not a rule *of* law. The Legalists saw law as strictly top-down and imposed by a static state apparatus, rather than a constant development driven by the people (bottom-up). Further, the Legalist current in Chinese thought is averse to uncertainty or unpredictability on the part of the powers that be or ambiguity about what are the “rules.” This aversion to dissent conflicts with the American common law system of fragmented courts, such as the federal circuit courts, in which the constant production of discrepancy and dispute in the application of statutes is the very engine of progress and ultimate determination of settled (though never completely binding) precedents regarding recurring legal dilemmas. While there is much regional variation in contemporary Chinese jurisprudence, one must keep in mind that it was largely for the purpose of assuring

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<sup>12</sup> Illegal agreements are generally unenforceable by American courts on grounds of public policy. For a detailed discussion and cases on this limitation on promissory liability in the American system, see EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 624-82 (4th ed. 1991).

<sup>13</sup> *Li* is also sometimes translated as “ritual” or “etiquette.”

<sup>14</sup> Kagan, *supra* note 5, at 15-16.

<sup>15</sup> See, e.g., translated selections of Mencius, from *SOURCES OF CHINESE TRADITION* (1960), *supra* note 6, especially the selections on “Human Nature” and “Humane Government.”

<sup>16</sup> Kagan at 15.

<sup>17</sup> See *SOURCES OF CHINESE TRADITION*, *supra* note 6 at 122-29. The Legalist school, which became prominent in the 4<sup>th</sup> – 2<sup>nd</sup> centuries B.C.E., is represented by such thinkers as Han Fei Zi.

some basic uniformity in law that Chinese governments, upon examining western legal systems of prior decades and centuries, chose to adopt civil codes (as in continental Europe) rather than a common law system, and to adopt judge civil servant career tracks and exams rather than judgeship by political appointment. The stability of civil code systems is arguably greater as compared to the ambiguity, competition, complexity, and relatively less hierarchy as seen in an adversarial legal system.<sup>18</sup> On balance, then, one would think that the Confucian and Daoist views would be the most prominent ideological obstacles to western-style adversarial legalist reforms in China.

Such a disconnect may well limit the effectiveness of any adversarial legalistic reform as friction may develop between Confucian and Daoist currents and adversarial legalist reforms. One area where we already see such an opposition is with regard to China's long-standing tradition of mediation to resolve disputes, especially in rural areas of the country.<sup>19</sup> The mediation tradition may be linked to the Confucian respect for elders as decision-makers and the Daoist value of harmonious dispute resolution as a preferred alternative to the coercive apparatus of the state. While some, often western-educated, Chinese legal reformers argue that China should do away with mediation as part of a modernist break with the past, others point to mediation as a way to help ameliorate and deal with the widespread social disharmony brewing in the wake of China's rapid industrialization.

After all, unlike in the United States, the majority of Chinese people cannot afford a lawyer even in cases of dire need, and some of the problems of contemporary Chinese society are on a scale and of a nature with which the U.S. and Europe have never dealt. Such problems include extreme overpopulation in some urban areas, stresses on the family social unit through displacement of people (largely driven by rapid urbanization under the four modernizations of the late 1970s and building on the decentralized industrialization of the Great Leap Forward and after-effects of the Cultural Revolution), and the "4-2-1" family pattern resulting from the Chinese state's one-child policy, which has put enormous burdens on China's youngest generation. A move away from mediation and toward more litigation (driven by adversarial legalism) may result in a further weakening of the family and clan. Such weakening of basic social structures could happen if, for instance, there is an end to the historic relationship in rural areas whereby local government administrators refer disputes to the clan to be settled privately, rather than having a public trial. With respect to the mediation question, then, it is possible that modeling China's local dispute resolution on the model of the American system may incur unnecessarily dire societal costs for twenty-first century China without a greater benefit.

On the other hand, one could argue that an adversarial legal culture would immensely help China to deal with the disharmonies engendered by rapid growth. It would do so by

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<sup>18</sup> While this is a somewhat controversial subject (some would argue that the doctrine of *stare decisis* under common law systems provides just as much stability as civil codes) and depends largely on one's definition of stability, there is significant support for such a theory. Jury trials are for the most part unknown in civil law systems, providing for less randomness in outcomes of cases. Also, a civil code, according to some legal thinkers, would allow for less frequent a need or demand for repealing or suspending laws. Finally, according to the legal origins theories put forward by some lawyers and economists, civil law countries tend to emphasize social stability (more in line with Confucianism and Daoism), while common law countries focus on the rights of individuals. *But see* D. Berkowitz & K. Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 AM. L. & ECON. REV. 62-84 (2005), (examining the effect of initial legal traditions on constitutional stability in the American states and finding that civil law states have higher levels of constitutional instability at the end of the 20<sup>th</sup> century, speculating this is caused in part by the legacy of the civil law system).

<sup>19</sup> See Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211 (1992).

providing a voice to the disempowered through lawyers and the courts,<sup>20</sup> as is a key aspect of the legal system in the United States. For such a benefit to take root in China, however, there would need to be more reform than simply increasing the number of lawyers. That step has already occurred and continues: there has been a twenty-fold increase in the number of lawyers in China in the last two decades.<sup>21</sup> But as Kagan reminds us, setting up certain legal structures will “not completely determine how often conflicting parties actually use those institutions.”<sup>22</sup> The vast majority of Chinese lawyers live in the cities and do not choose to become social justice advocates, *pro bono* or otherwise. For an adversarial culture to serve the same purpose in China as it does in the United States with regard to helping particular groups such as juvenile delinquents or the mentally ill, a multitude of special “cause lawyers”<sup>23</sup> would have to live not in the cities but in the countryside, where the majority of Chinese live.<sup>24</sup> Currently, parties in dispute simply do not have the wherewithal in terms of money or modes of transport to get to the city to see a lawyer. In addition, the continued interference of the local PSB and government in the legal system in terms of social justice cases also has dissuaded many lawyers from assuming more activist roles. In other words, the courts may not be the avenue for cultivating a sense of social justice in China. A connection, then, between rural China and a rural adversarial legal system akin to that in rural parts of Western countries is both tenuous and idealistic.

Furthermore, it is far from clear what would be the Chinese court system’s tolerance of such lawyers becoming a common breed. As Kagan points out, the United States legal system does not have the kind of judge-dominated litigation that many other countries have.<sup>25</sup> China is closer in this regard to the European model, where judges ask the questions of witnesses and do most of the legal research and investigation themselves. In this way, China stands in stark contrast to the United States, where these tasks are performed by attorney-advocates. The Chinese system places relatively great confidence and trust in judges. Historically, Chinese judges were trained in the classics of Chinese literature (including Confucian texts, Daoist texts and the others mentioned above). They were expected to apply these ideas to cases of their day without undergoing much, if any, legal training *per se*. Grasping the original principles, the resolution of legal disputes and the formulation of specific laws was largely to proceed by deduction. Many and probably most Chinese judges today are not as well educated in “law” *per se* as western systems usually demand as a basis for judicial practice and effectively running an adversarial courtroom. In fact, thanks to China’s “cultural revolution” and the fact that most judges are selected based on their position in the Chinese Communist Party, one of the greatest challenges China would face in establishing a functioning legal system on an adversarial model

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<sup>20</sup> In the early 1980s, then leader of China, Deng Xiaoping, asserted that China would need one million lawyers. Proposals along the same lines have been put forward by prominent Chinese officials many times since then, but other scholars state that the country has too many lawyers, specifically judges. See RESEARCH ON JUDICIAL REFORM IN CHINA 95-96 (Tan Shigui ed., The Law Press 2000).

<sup>21</sup> See LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS (Human Rights First 1998). Summary (including assertion that in 1981 China had 5,500 lawyers and today it has over 110,000) available at [www.humanrightsfirst.org/pubs/descriptions/chinlaw.htm](http://www.humanrightsfirst.org/pubs/descriptions/chinlaw.htm). However, note that unlike Japan and South Korea, where American-style law schools have begun to proliferate, the beginnings of setting up American-style courts, law schools and other institutions has hardly begun in China, if at all.

<sup>22</sup> Kagan, *supra* note 5, at 13.

<sup>23</sup> Defined by Kagan, *supra* note 5, at 7.

<sup>24</sup> While there is a growing body of literature on “cause lawyering” in China legal aid of this sort is still mostly available in cities, if at all, and not accessible to poor people in the countryside. See, e.g., Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TX. INT’L L. J. 2 (1999),

<sup>25</sup> Kagan, *supra* note 5, at 3.

is a lack of educated legal judges to make sense of a complex and growing body of case law and to treat parties on all sides fairly. A system that would require such behavior of judges would be a novel introduction into the legal system and one which would most likely be resisted by local government. Today, of course, Chinese judges do not explicitly apply Confucian, Daoist, or other ancient texts in order to decide cases, as they once did, nor do they study such texts as the explicit basis of their practice of law, but rather, more modern texts. Nonetheless, with much less formal legal training than the training that most judges in the United States receive, and where the law inevitably has gaps, conflicts or ambiguities, the process of resolving cases is no doubt influenced by those “common sense”, basic social conceptions that, in judges’ minds, underlie the law. Wide leeway for subjectivity in interpretation follows. This leeway is a prerogative that Chinese judges are long-used to having. Shifting the legal process of handling cases to a system of lawyers arguing over not only the underlying concepts of what is fair and just, but also how these concepts should apply to such basic, unresolved and explosive modern issues such as the propriety of the death penalty, re-education through labor, and revisions to the criminal procedure law,<sup>26</sup> would be a drastic change that may run into firm resistance from the class of judges who are still very much in control of the system.

However, to the extent that such judges are not in complete control of Chinese legal reform, in addition to the problem of the judiciary itself, another source of resistance is the Communist Party, which controls all major legislative bodies in China. Whereas Kagan presents the concept of adversarial legalism with “economically advanced democracies” in mind, China does not fit such a model. Despite its rapid change, China is still a Communist country where the economy is arguably not “advanced” -- although this has become the subject of recurring debate within the World Trade Organization and other international bodies. Its path of advancement may not, and probably will not, follow the path of western economies of the past, much less the United States specifically. For example, is it possible to have a participatory democracy, a court system to uphold it, and a citizenry educated and sophisticated enough to keep democracy functioning, without the basic capitalist notion of private property rights? Neither the Chinese Communist Party, the National People’s Congress (NPC), nor the latter’s Standing Committee have clearly supported the idea of personal property rights. The notion of private property rights is objectionable under the Marxist and Leninist ideologies upon which China’s current regime is based. Although China now has billionaires and the legislature is now considering passage of a property law,<sup>27</sup> the government still appears entrenched in the communist rhetoric that refuses to recognize or embody the right of all its citizens to private property. This is a difficult but central issue that has sparked great controversy. One of the meanings of modeling a twenty-first century Chinese legal system at least in part after the American one is that China must answer this question for itself.

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<sup>26</sup> For example, the 1990 Administrative Procedure Law allows citizens to sue officials for abuse of authority or malfeasance. See *Zhongguorenmingongheguo Xingzheng Susongfa* [Administrative Procedure Law of the People’s Republic of China], available at <http://www.ccp.gov.cn/xgfg/xingzhengsusong.htm>. In addition, the criminal procedure laws were amended to introduce significant reforms encouraging the establishment of a more transparent, adversarial trial process. These changes, still just beginning to be implemented, are fundamental changes to the basic legal process in China.

<sup>27</sup> Jim Yardley, *China Nears Passage of Landmark Property Law*, N. Y. TIMES, March 9, 2007. Obstacles to passage of the new law include the problem of how the Communist government can account for and rectify past confiscations of land by the government often by corrupt officials. Such confiscations would be potentially legalized by the property law.

Furthermore, Chinese reformers need to ask themselves whether it makes sense to strive for the adversarial legalism of a “strong society, weak state” democracy that Kagan says characterizes the United States in contrast to other western powers.<sup>28</sup> That is the type of democracy in which adversarial legality has grown in the past. But modern China is perhaps best described as the very opposite: weak society and strong state. In order to strengthen its civil society, China would have to move quickly -- perhaps more quickly than is possible for such a huge population -- toward convincing and empowering its citizens to believe that the state will tolerate the challenging of the existing legal norms despite the brutal suppression of dissidents over the last few decades. After the violent crackdown by the government on peaceful protestors at Tiananmen Square and hundreds of less popularly known incidents of violent government discouragement of dissidence in the years since, it is unclear how quickly such a change in policy could happen, even in China’s urban areas.

As for tolerance of diverse political opinion in China’s countryside, an unlikely but fitting American image that may well represent the mentality in would-be reformers’ minds is “Save Freedom of Speech: Buy War Bonds,” one of Norman Rockwell’s classic “Four Freedoms” paintings. In Rockwell’s painting, an average-looking man has just stood up to speak at a town meeting with his neighbors eagerly looking on. While Rockwell’s famous image speaks of democracy for and empowerment of the common person and the wisdom of the uneducated laborer, the question that arises is whether that image could translate easily to a Chinese peasant farmer. In China, reforms tolerating difference of opinion and advocating one’s cause, while they have potential to succeed,<sup>29</sup> might just as well generate (1) a failure by rural farmers to embrace the call to speak up about civil and political rights because they simply *do not care* about such rights so much as they care about freedom from detention; or (2) a turn toward the violent abuse of this newfound freedom by rural farmers, resulting in the overthrow of what would be more vulnerable (“responsive”) local government institutions.

After all, it is not long ago that Mao Zedong perceived such a stirring in the countryside and seized upon the potential for it to become a revolution. If these are the sorts of considerations and realistic risks facing western-influenced and western-educated educated Chinese lawyers, officials and scholars who seek to transform their society through legal reform, then one should question whether Chinese elites might do better to suspend any speculation about how the American legal context may be comparable to China’s while they figure out what to do about the unprecedented disparities of wealth<sup>30</sup> and other social crises facing their society. From this perspective, “transplanting” any western law, including adversarial legalism, makes little sense in a China as vast and as different from the West as China is today.

Yet at the same time, it would seem that an inevitable implication of so many Chinese lawyers studying in the United States is that they are hoping to adopt an American legal model. One might argue, based on Kagan’s arguments, that the appropriate analogy is not “transplanting,” but rather, therapy.<sup>31</sup> That is to say, a process of meaningful, incremental changes to the Chinese system that is not planned out entirely in advance, but rather, adapts organically to the circumstances that arise over time, may well benefit from adversarial legalist

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<sup>28</sup> Kagan, *supra* note 5, at 15-16.

<sup>29</sup> See Kevin O’Brien & Lianjiang Li, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006) (discussing of some of the more promising popular democratic actions in the Chinese countryside).

<sup>30</sup> The definition of wealth used here is the standard tool of modern economists, the Gini coefficient. The truth of this statement about disparity will of course depend on the definition of wealth used.

<sup>31</sup> Kagan, *supra* note 5, at 5-6.

inputs. However, whether or not it is called transplanting, before any such change can succeed, a move toward seriously emulating American legal institutions would require reforming the governmental policymaking elite. To appreciate the complexity of such a change, we should consider the nature of this elite.

The Chinese intelligentsia is one that wrestles, often behind closed doors, with its own collective consciousness and notions of national identity. There are significant underlying historical implications of the application of the external model of the United States to the case of China. The United States especially and, in fact, most all western countries are perceived by many in the Chinese policymaking elite as former and perhaps continuing meddlers in Chinese affairs. This perception goes back to at least the Opium Wars in the Chinese political consciousness. The United States is currently the globally dominant military superpower. Among other things, the United States inherited much of its adversarial legal model from Great Britain, a former empire that competed in some respects with China itself, and the United States is still closely allied with Great Britain in a number of interventionist foreign policies around the globe. The uniqueness and the legal exceptionalism of the American legal model grew up over centuries in the peculiar historical circumstances of a new nation developing on an unknown frontier (the “Wild West”), fighting for its independence and eventually becoming the world’s only superpower. Among the results of America’s history on its legal and popular culture have been a distrust of government, a strong distaste for raising taxes even to support the most basic of programs,<sup>32</sup> a tolerance for diversity (being a nation of immigrants, former slaves and colonized peoples), and a popularly-based state vilification of communism, which is often publicly equated with totalitarianism. All of the above, notably, stand in stark contrast to the social narratives available in modern China.

The idea of China looking to imitate American law or institutions, therefore, has cultural undertones that may result, paradoxically, in serious disengagement in the near future, as Chinese leaders seek to rally political support by resisting the path seen as alien, western, and in some sense, resented. What the effect of that disengagement by the government would have is difficult to predict. Concretely, we can expect a buildup of an adversarial legal culture in China to conflict directly against the interests of the contemporary Communist Party. One way that such conflict would manifest itself is by challenging the Party’s use of law as a means to implement political, social or economic policies on such controversial matters as, for example, Hong Kong or Tibet. On issues like these, the Party’s interests are opposed to seeing the cultivation of law as transparent, democratic, and as an end in itself. Such a legal culture would be a huge break with the past, especially the most recent decades, and would reduce the ability of the Party to control and predict the impact of litigated policy on the population.

Secondly, we can expect some tension to arise over the issue of how independent China’s judiciary should be and what that independence really means in a Communist state. Why would the National People’s Congress give up its effective final authority over important or key cases? Why would the courts be allowed to interpret the Constitution? Even if these things come to pass as the issues are hotly debated, having a more American-style judiciary would inevitably mean less political concentration and monopoly of power by certain parties political fragmentation and less coordination between agencies of the government.<sup>33</sup> In turn, such a weakened concentration would mean fragmentation of the government as the courts look less to the National People’s Congress for advisory opinions as they develop their own independent

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<sup>32</sup> Kagan, *supra* note 5, at 4.

<sup>33</sup> Kagan, *supra* note 5, at 7.

culture, jurisprudential norms, and policies. All of the above would entail a break from past practice in ways that would make the Communist Party more vulnerable. Popular reforms that could be expected to follow might include, for example: allowing foreigners more access to many sorts of documents that are currently classified as state secrets; an end to dictating the future of the people of Hong Kong and Tibet; and an end to crushing domestic political movements or actions or dismissing mass justice claims en masse. The net result of such changes for the legal system would be a reduction in the currently excessive bureaucratic administration of China's government as more citizens are allowed to sue the government and thereby keep the people behind bureaucracies accountable. While not guaranteed, one might also predict the emergence of a stronger system for judicial review, more like the one enjoyed in the United States.<sup>34</sup> As the Chinese people become more empowered to use the legal system as a check on both corrupt local administrations and national and regional disregard of popular sentiment, this will lead to great demand for judicial review of cases decided unfairly or inconsistently with similar, past cases.

While such changes might be praised by most anyone, they are also radical changes for China. Certain factors pose barriers to such changes being successful. In order for judges in China to accomplish the sort of ombuds-role over the National People's Congress that judicial review entails, China would need to foster the sort of creativity in judges that we protect in the United States through granting them almost absolute immunity for their decisions. Such immunity is far from reliable in today's PRC. Yet we have already seen the beginning of such review in China, with such "Marbury moments"<sup>35</sup> as the 1999 "Right of Abode" cases,<sup>36</sup> where Hong Kong's Court of Final Appeals held firm on a decision based on judicial prerogative to deviate from 140 years of common law. Although the Right of Abode case is still subject to "interpretation" by the NPC, it represents what might be an early defining move toward judicial review. But in order for judges in China to accomplish the meaningful check over the actions of Congress which would characterize a functioning adversarial-legalist system, Chinese courts would need to press far beyond the Right of Abode cases, and grant judges the protection required for their decisions to be truly independent.<sup>37</sup> The problem is that doing this successfully means securing the cooperation of the NPC – a task easier said than done.

If successful, then, one would expect an expansion of judicial review in China to result in a reduction of seemingly arbitrary decision-making authority by the NPC. Such discretion, historically, has been vested in the NPC by laws that in the modern United States would likely be held either unconstitutional or voided for vagueness. Perhaps the most obvious example of such laws and the power to abuse them in China would be the discretion to divide the people into artificial classes such as "the people" and "the enemy," which was used so capriciously by

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<sup>34</sup> Kagan, *supra* note 5, at 7.

<sup>35</sup> "Marbury moments" refers to the landmark constitutional law case in the U.S. of *Marbury v. Madison*, 5 U.S. 137 (1803), which played a major role in establishing the legislative branch's power of judicial review, a question which has continued to spark controversy but which nonetheless has functioned as a continuous working principle of the United States court system.

<sup>36</sup> For a complete discussion of these cases, see Zhimin Wen, *The Right of Abode Cases: The Basic Law on Trial (Part I)*, PERSPECTIVES, Vol. 2, No. 3, available at [www.oycf.org/Perspectives/9\\_123100/right\\_of\\_abode\\_cases.htm](http://www.oycf.org/Perspectives/9_123100/right_of_abode_cases.htm).

<sup>37</sup> PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 90 (Yale University Press 1983). For a discussion of absolute immunities associated with the judicial process and exceptions thereto, see RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1123-24 (Foundation 5th ed. 2003).

Chairman Mao. Adversarial legalism in China could mean the curtailment of such government abuses<sup>38</sup> if the courts are vested with an ability to check the Congress by being as independent as they are in western, especially American, government.

Along these lines, and perhaps to some extent already, reforms toward adversarial legalism might mean an enhancement of the political legitimacy of China's entire system of government, just as adversarial legalism serves that end in the United States.<sup>39</sup> In a sense, we can expect this result in any case vis-à-vis China's reputation on the world stage, whether or not China's efforts at cultivating a more western-style legal system are sincere. Whether or not corruption and arbitrary rulings are truly reduced in China by means of adversarial legalism, by paying lip service to Western adversarial legalism (in terms of visible efforts to at least "talk the talk" about "rule of law"), China historically has been able to reap various benefits such as most-favored nation status with the United States and the general attraction of outside investment under the "four modernizations" of the 1970s. It is during this time that China instituted western-style intellectual property laws, but the enforcement of such laws has been notoriously lacking, even under such basic documents as the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>40</sup>

This phenomenon of Chinese purported importation of foreign law, coupled with a lack of actual application, has occurred with imported aspects of western criminal law and procedure. Chinese innocents are regularly wrongfully detained with no compensation or review, and sent to between one and four years of "re-education through labor" by administrative decision, without being convicted of any crime. The fact that China's adopted criminal law and procedure in practice deviates widely from the sort of adversarial, individualistic and legalistic model that Kagan describes in America is further demonstrated by the fact that Chinese police officers and the public security bureau can arbitrarily, without established criteria, send people to prison labor for drug offenses and yet some offenders can escape detention if they have wealth or connections.<sup>41</sup>

On the other hand, one must weigh this dynamic of "talking the talk but not walking the walk" against the resentment factor mentioned above: an underlying historical current of antagonism occasioned by western state-sanctioned pressures on Chinese domestic affairs. Such western interventions stem back at least to the Opium Wars and the Treaty of Nanjing (seen by many Chinese as *void ab initio*) which resulted in British rule over Hong Kong until very recently. Emulating an American or western model of legal institutions, then, means surrender or giving in to the West's general challenge to the Chinese people's longstanding, deep-going view of themselves as at the top of a world order or at the center of world progress ("the Middle Kingdom,") rather than following someone else's lead (the West).

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<sup>38</sup> The 1994 criminal law amendments abolished the crime of "counter-revolutionary" activity. However, the true application and enforcement of these amendments is the subject of some controversy. Political dissidents are still sometimes charged on the grounds of subverting state security or publishing state secrets based on little or no evidence, substantive due process or procedural due process as provided in the new laws.

<sup>39</sup> Kagan, *supra* note 5, at 3.

<sup>40</sup> One way in which this has been manifested is in regard to transparency. See Cao Jianming, *WTO and the Rule of Law in China*, 16 TEMP. INT'L & COMP. L.J. 379, 387-8 (2002).

<sup>41</sup> See China report from 10<sup>th</sup> European Country of Origin Information Seminar, 1-2 December 2005, Budapest, published March 17, 2006, pages 13-15, available at <http://www.unhcr.org/home/RSDCOI/4451d8c64.pdf>; Naw Seng, *Drug Trade Booms at the China-Myanmar Border*, ASIA TIMES, March 31, 2004, available at [http://www.atimes.com/atimes/Southeast\\_Asia/FC31Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/FC31Ae01.html).

Even if an increasing number of Chinese legal scholars are educated in the United States, this current of thought will eventually manifest itself again. Prior instances of resistance against western-initiated and western-led legal movements are not too long ago. It was only 50 years ago that China refused to play a role in the General Agreement on Tariffs and Trade (GATT) and other post-WWII multilateral institutions because it did not see itself as having to, nor wanting to, negotiate with the “rich man’s club.” Before that, it was partially because Karl Marx and Vladimir Lenin were on the margins of, and largely rejected by, prominent European intelligentsia at the time, that their ideas appealed to Chinese leaders in the first place. Had communist ideas been more accepted or legitimate among the western intelligentsia at the time, China would likely be a very different place today, for such ideas would likely have been dismissed as western before they could be implemented on a large scale in China. Adopting an adversarial legal approach means that the Chinese must quite consciously face the pervasive view among the Chinese people regarding the United States, and the West more generally, as a historical menace, an imperial power at odds with China as the Middle Kingdom. Of course, there are many Chinese reformers who are also looking to the traditional Chinese practice of studying many foreign systems and then selecting what they see as appropriate to the Chinese context. It is not just a choice between the Middle Kingdom way or the western way. The idea of therapy, as opposed to a transplant of law, could play an important role in the way Chinese leaders navigate legal reforms going forward. In any case, such reforms will no doubt require continually revising and revisiting the historical relationship between the government’s “rule of law”, “rule by law” and the more general *role* of law in Chinese society, as well as the narratives used to describe and delimit the relationship between these ideas.

Surely the narratives that are used and exchanged in order to navigate that relationship present unique dilemmas in a twenty-first century China becoming more open to foreign ideas while keeping a strong connection to its ancient and profound social paradigms. Even more surely, whatever adversarial legalism is adopted in China’s emerging new legal system will have to be carefully applied in the context of a unique path of legal, cultural and economic development far different from any path trodden by the nations before it. Such a path, with all the contradictions and juxtapositions of past and present that it will involve, may one day create a new status quo and in fact revolutionize legal thinking well beyond China’s borders, challenging today’s generalizations about legal adversarialism and law in general as it has evolved in the West.