

State, Sovereignty, and the People: A Comparison of the “Rule of Law” in China and India

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This paper uses the concept of the “rule of law” to compare Qing China and British India. Rather than using the rule of law instrumentally, the paper embeds it in the histories of state power and sovereignty in China and India. Three themes, all framed by the rule of law and the rule of man as oppositional yet paradoxically intertwined notions, organize the paper’s comparisons: the role of a discourse of law in simultaneously legitimizing and constraining the political authority of the state; the role of law and legal procedures in shaping and defining society; and the role of law in defining an economic and social order based on contract, property, and rights. A fourth section considers the implications of these findings for the historical trajectories of China and India in the twentieth century. Taking law as an instrument of power and an imagined realm that nonetheless also transcended power and operated outside its ambit, the paper seeks to broaden the history of the “rule of law” beyond Euro-America.

The rule of law is a product of the imagination before it is a product of legislation or judicial acts.

—Paul W. Kahn, 1999

QING CHINA AND BRITISH India were both authoritarian empires that nonetheless used the rule of law to construct their sovereignty. In this paper, we use the “rule of law” as a concept to compare the two empires and to analyze the implications of their differing uses of the rule of law for their subsequent histories. In doing so, we also attempt to use a focus on the rule of law to raise larger comparative questions about the construction of sovereignty and rights in China and India within the larger global processes that shaped the nineteenth and twentieth centuries.

Questions concerning the rule of law (or lack thereof) in India and China have, of course, been the subject of considerable contemporary commentary. With respect to contemporary China in particular, scholarly analysis has focused on the problems associated with China’s “long march toward rule of law” (as one recent book title puts it), following its move from a collectivist to

a market economy (Peerenboom 2002, 202).¹ Most authors who have taken up this question have framed their analyses of the rule of law in largely instrumentalist terms, highlighting the relationships between law and market efficiency, democracy, and human rights. In this regard, the study of the rule of law in Asia has followed the dominant tendency in legal studies more generally—that is, it has focused on questions about how the operation of the law intersects with political and economic processes and serves as a site of contest between competing interests, whether of state power or individual rights, domination or equality, justice or market rationality. Certainly such instrumentalist views of the law have tended for many decades to dominate scholarship on the rule of law in the United States (for an analysis and critique, see Tamanaha 2006).

But to look at the rule of law in comparative and historical terms requires us first to step back from such an instrumentalist perspective, however relevant such questions may be to an understanding of the law's operations. A comparison of the rule of law in China and India in the nineteenth century must begin with an analysis of how the rule of law as a concept helped to define the foundational principles on which the Indian and Chinese states rested in the nineteenth century—and defined their relationship to the societies they ruled. In this sense, *rule of law* and *rule by law* are not the same thing; nor are they even, as Stephen Holmes suggests (following Rousseau), simply different forms on a single continuum, defined by the extent to which the law serves a broad rather than a narrow set of interests (2003, 49). Rather, the rule of law, as we treat it, is something in kind quite different—it is a key to understanding the ways that the state legitimized its authority, both in respect to the people and to the cosmos. In this process, the imagined linking of the law to foundations of sovereignty is crucial.

The importance of an imagined “rule of law” to the broad development of modern political theory has recently been persuasively argued by Paul W. Kahn in *The Cultural Study of Law* (1999). Kahn's work is firmly grounded in the Anglo-American tradition, but his arguments point to the ways that the rule of law came to be widely conceptualized in the nineteenth and twentieth centuries as the secular key to the definition of universal moral standards of ruling legitimacy in a world of particularistic states. The key to this is an understanding of what Kahn calls “legal time,” the mechanism by which, in Kahn's view, the law came to claim for itself a moral space standing outside both society and state. Though central to political processes and power relationships, the law came to be conceptualized in the Anglo-American legal tradition, in

¹Contrary to Randall Peerenboom's instrumentalist assertion that according to the “thin” theory of the rule of law, “laws must be enforced: the gap between the law on the books and law in practice should be narrow” (2002, 65), we argue that a gap between the letter of the law and the practice of the law tends to be a defining feature of the “rule of law” as we use the term—and critical to an understanding of its historical importance.

Kahn's argument, as a timeless dispensation rooted in the founding myths of a people's sovereignty—a dispensation that defined and legitimized both the British and American states. While it was a site for conflict among competing interests in the present, it also conceptually embodied a revolutionary past as a charter for the social contract linking state and people, a concept at once secular and yet drawing, by analogy, on older ideas of divine dispensation.² To focus on the “rule of law,” as Kahn thus argues, is not only to focus on a system of rules and structures of adjudication linking state and society, but also to focus on an idea central to the construction of modern sovereignty.

Neither India nor China, of course, can be seen as evolving concepts of the “rule of law” that fit fully into this Anglo-American tradition (however deeply India's experience of the rule of law was, in fact, shaped by its long connection with Britain). Yet the concept remains a critical one for contemporary historical comparison—and one that suffers from being wholly identified with a so-called Western paradigm. In both British India and Qing China, law was a concept central not only to the operation of power but also to the construction of sovereignty. Central to the operation of the rule of law (and a baseline for our definition of the concept) was a conceptual framing of the “rule of law” and the “rule of man” as oppositional notions, a paradoxical framing suggesting in both India and China that law somehow stood apart from the realm of everyday power. Yet law was deeply dependent on the state (staffed by men), and on the operation of state power. A comparative focus on this paradox provides us a window onto the relationship between state, sovereignty, and the people in both societies. It also allows us to examine the differences between the two regions and the tensions that the “rule of law” generated in both.

The tensions in the “rule of law” in both defining and limiting state authority have, of course, been the subject of considerable debate in broader historical and legal literatures. The terms of this debate were perhaps most clearly set thirty years ago in the arguments that followed on E. P. Thompson's work on the operation of the law in eighteenth-century England. In his book *Whigs and Hunters* (1975), Thompson shows decisively how the law was used in eighteenth-century England, in an instrumental sense, as a weapon of the ruling class. It played a critical role, Thompson argues, in constituting the authoritative power of the state in its incursion—in the interests of capitalism and elite power—into the realm of the local community. It was thus a central element in the definition of the intrusive power of the modern state. And yet, as Thompson also argues, the law carried critical meanings that transcended this instrumental usage, meanings rooted in its claims to a procedural formalism (and thus universalism) that existed as a moral ideal apart from the structure of power. It was such an ideal

²The notion that the secular “rule of law” draws on older theological concepts of sovereignty is, of course, not new. Carl Schmitt argued in the 1920s, for example, that “all significant concepts of the modern theory of the state are secularized theological concepts” (1985, 36).

that at least made possible the imagining of disinterested justice. As Lauren Benton puts it in summing up Thompson's argument, the creation of the *appearance* of impartiality meant "crafting a kind of formalism" that "generated occasional just outcomes, results that either frustrated ruling class objectives or protected commoners' interests in particular cases" (2002, 256). The law thus came to have meaning simultaneously as an instrument of power and as an imagined realm that transcended everyday power and operated outside its ambit.

Framing a comparison of the "rule of law" in China and India in the nineteenth century is, of course, complicated by the fact that in neither India nor China was the evolution of the law static during this era. India's legal system was fundamentally constituted by legal ideas imported from Britain, and these were in flux in response to changes in India and Britain as well as in response to the changing place of India within a worldwide imperial and capitalist order. For China as well, interpreting the impact of worldwide change in the nineteenth century, especially in its last quarter, is critical to understanding indigenous legal change. This paper will not attempt to review the whole range of legal transformations that shaped China and India in the nineteenth century, nor all their implications in the twentieth century. Rather, we will look comparatively at three areas that are critical to assessing the operation of the concept of the "rule of law" in the two regions, and that suggest the powerful yet paradoxical principles on which it was based. These are the role of a discourse of law in simultaneously legitimizing and constraining the political authority of the state; the role of law, and legal procedures, in shaping and defining society (and distinctions between state and society); and the role of the law in defining an economic and social order based on contract, property, and rights. We will then, in a final section, speculate on the political implications of China's and India's differences and similarities in these areas for an understanding of their different patterns of historical evolution in the twentieth century.

THE DISCOURSE OF LAW AND POLITICAL AUTHORITY

China

In 1730, the Yongzheng emperor delineated why the Qing truly held the Mandate of Heaven to rule. The Qing, he explained, had "assumed the vessels, rituals, and functions of the emperorship in China; the people were cared for; the natural processes facilitated, and the people of the earth were united in their awe of and love for the ruler" (Crossley 1999, 256).³ Perhaps because he

³Here, Pamela Kyle Crossley (1999) is summarizing an argument from the curious text "Great Righteousness Resolving Confusion," in which the Yongzheng emperor, as part of his effort to deal with a case of sedition, argues that the Qing deserved the Mandate of Heaven because they had been morally transformed. Jonathan Spence provides another account of this case in *Treason by the Book* (2001).

was not the dynastic founder, the emperor's litany notably omits any mention of law. However, law was indeed an important category defining imperial power and rule. Revising the preceding dynasty's laws or promulgating an entirely new code was one of the first steps in every new dynasty's program to restore social order. It was particularly important for a "barbarian," that is, an ethnically non-Chinese dynasty, for as the seventeenth-century thinker Wang Fuzhi put it, civilized people "form states and allow themselves to be governed by law and reason." "Barbaric" people "do not care for law" (Crossley 1999, 67–68). Arguably, then, when scholar-officials from the Han dynasty onward sought to restrain emperors by arguing that the law was not the emperor's alone but belonged to "all under heaven" (*tianxia*), they were articulating an implicit notion of a "people" to whom the law belonged, a people that was "civilized."

To demonstrate its commitment to restoring the "traditional values" that had become corrupted in the last years of the preceding Ming dynasty, the Qing took a number of steps, including revising the curriculum of the civil service examinations to base it even more firmly on a conservative interpretation of neo-Confucianism and recruiting distinguished literati to lead massive compilations of traditional scholarship. Yet, as important as these measures were in establishing the Qing's legitimacy in the eyes of the scholar-elite, they were insufficient to set society right, for unlike the literati, ordinary people, it was assumed, lacked adequate moral capacity to regulate themselves through self-cultivation and self-discipline. The Qing campaign of moral renovation, which was a central element in its claim to hold the mandate to rule, could not rely on ideology alone. It also required law.⁴ To correct the brigandry as well as the social inversions and perversions that ostensibly marked the last years of the Ming, names had to be rectified—that is, people (and officials) had to act according to the dictates of their place in the social hierarchy and be appropriately punished if they did not. As the Sacred Edict advised those who were supposed to lecture on it to villagers, "[E]xpound on the laws in order to warn the ignorant and obstinate" (De Bary and Lufrano 1999, 16). Here we have a clear notion of how, in spite of their conceptual opposition, the "rule of law" and the "rule of man" were closely intertwined.

But what was the nature of the law? Was it positive, man-made law, or natural law produced by the Way? How did it relate to the interested political imperatives of effective rule? Was it Confucian, Legalist, or an amalgam? It was in some respects all of these. It was positive, ruler-made law that advanced state interests by enforcing Confucian values (themselves a reflection of the natural hierarchical order of nature) with harsh, deterring punishments, the abuse of which could

⁴For the purposes of this paper, we will focus on the Qing Code and its application within China proper. Thus, we will not consider the extensive and intricate rules governing the operation of the banner system; nor will we look in detail at the operation of Muslim law, permitted by the Qing, in Xinjiang and other heavily Muslim areas, though we will refer to it in the section on the operation of the law.

destabilize cosmic harmony and lead to heaven's manifesting its displeasure through natural disasters. Thus, though sovereignty rested on the Mandate of Heaven, law was an essential manifestation of that sovereignty and a link to the founding of the dynasty.

By the time of the Qing, the dominant strain of Confucianism regarded the cosmos as having an inherently moral and hierarchical character. A well-ordered, stable society came from the leadership of men who, through learning and self-cultivation, comprehended these underlying principles, lived their lives according to the rules of propriety that embodied these principles, and transformed those around them through the power of their moral example. All under heaven stood somewhere in a set of nested hierarchies—gender (male over female), age (old over young), family relationship (parents over children, uncles over nephews, and so on), and moral character (peasant over beggar, good [*liang*] over mean or debased [*jian*])—which, if properly observed, produced social harmony. The law was thus highly particularistic and quick to treat egalitarian ideas and practices as heterodoxy and heteropraxy. Expectations of reciprocity in family relations somewhat restrained the demands of hierarchy. However, society accepted the notion that the family was the matrix of social and political order. To not sustain patriarchal authority not only undermined the legitimacy of the state in the eyes of the people, it also undermined the patrimonial position of the emperor.

Rule of “moral” men thus remained a powerful ideal throughout the Qing (and indeed, well into the twentieth century), but in its very nature, the necessity of “rule by men” raised the specter of too much standardless, discretionary authority at lower levels. For this reason, the Qing, like nearly every dynasty before it, abided in the Legalist advice to keep the two handles of reward and punishment in the hands of the emperor and to constrain lesser officials by “rule of law.” Inevitably, argued Huang Zongxi, a seventeenth-century critic of imperial power, when laws were established “for the sake of one family,” that is, for the preservation of dynastic power, rather than for the “sake of all under heaven,” they proliferated. For the ruler, as lawmaker, feared that an initial rule would be ignored, so he would make another law to guard against evasion of the first (De Bary and Lufrano 1999, 11). Such was the paradox of juxtaposing the rule of law with the rule of man. Indeed, more than half of the provisions of the Qing Code are devoted to the regulation of “the official activities of government officials” (Jones 1994, 7).⁵ Yet this web of rules inevitably constrained the ruler as much as his officials. Although emperors had in theory absolute power and could wield it as capriciously as the Queen of Hearts in Alice in Wonderland, at least in the Qing, argues R. Kent Guy, they rarely attacked officials without reason. Discipline and punishment of civil officials might have been used at times to set a

⁵The Disciplinary Regulations of the Board of Civil Office (*chufen zeli*) dealt with official malfeasance and misfeasance that did not rise to the level of a “crime.”

political agenda, but it was always carried out through the language and procedures of “a centuries old legal idiom” (Guy 2000, 105–6). It was in this sense that the “rule of law” can be said to have been a key element in the construction of sovereignty under the Qing. If law belonged to all under heaven, then law theoretically stood apart from and could be used against the men who constituted the state.

Yet there was an inherent tension. Emperors saw the law—specifically, the codification and implementation of “heavenly principles”—as primarily, if not exclusively, their creature. The administration of the law was thus theoretically fraught with dangers. Emperors were particularly self-consciously aware of the importance of law to political legitimacy when they handled capital cases. Determining the proper punishment was the most fundamental task of the law, for an inappropriate punishment failed to properly redress not only the harm the crime inflicted on the human social order but also the perturbation it had caused in the cosmic order. Thus, officials constantly recounted to emperors the hoary tale of the three-year drought evoked by the unjust execution of a widow and reminded them that the law belonged not solely to the emperor but to “all under heaven.” If emperors ad hoc made the law harsher, the people would no longer trust it. Though Qing emperors had distinctive legal sensibilities and did not always filially allow themselves to be governed by their fathers’ decisions and precedents, they nonetheless understood the importance of consistency, fairness, and balance. As the early Qing Kangxi emperor put it, “for the people to be without injustice, adjudication must be impartial and sentencing fair” (WXTK 1963, 6704). Balance came from “treating like cases alike” (Huang 1821, 12b) and “leaving neither the living nor dead aggrieved” (Gang 1889, 53). Yet for all the emperors’ concerns about offending heaven and about balancing heavenly moral principles (*tianli*) against circumstances, emperors were not about to let heaven’s will undercut their own interests.

Whether the sentence was immediate execution or execution after review, Qing emperors thus retained the final say in capital cases. Only when confronted with parlous circumstances did they relinquish their absolute control and permit summary executions, in which the penalty was carried out by provincial or even lesser officials without imperial review. It is normally during “emergencies,” when the life of a nation is threatened, that states transcend or suspend the law.⁶ But for the Qing such action did not require only “emergencies.” When

⁶Some would see such emergencies as a challenge to the very notion that a “rule of law” existed in China. Schmitt (1985) calls attention to the importance of such emergencies, or exceptions, in pointing to ultimate sources of sovereignty that transcended law. We would see this rather as pointing to the intrinsic paradox defining the “rule of law” as a concept. Just as the conceptual juxtaposition of “rule of law” and “rule of man” as opposites represents a fundamental paradox, so the notion of the law operating independently of the state was (and is) irresolvably paradoxical. But this paradox, we would argue, does not undercut law’s theoretical foundation as an idealized source of sovereignty, any more than does the exception.

confronted with threats to their power and prestige from sedition, sorcery, or major corruption, some Qing emperors became personally involved in supervising the interrogation and punishment of offenders, at which times “pleasing the monarch” tended to become “a central part of administering law” (Kuhn 1990, 121). To be sure, the “rule of law” could not exist without the personal assertion of imperial authority. But the Qing did not “suspend the law” until the Taiping Rebellion.

Even in the context of challenges to normal order, however, the principles associated with the “rule of law” remained the subject of vital commentary. With that rebellion, but more importantly, with the banditry that accompanied and then followed it, Qing emperors ceded to lower-level officials, and even to informal organizations, substantial control over the power of life and death. Legal distinctions between principal and accomplice, between group and gang became elided as the law deteriorated, in the words of one censor, into something made for the convenience of officials. In their campaign against the chaotic and inconsistent use of summary executions, this censor and other critics invoked the risk of a heaven perturbed by unjust executions, a society weakened by the devaluation of human life, and most consistently, the threat to the dynasty’s legitimacy by the violations of substantive and procedural justice. Significantly, this last theme was also the one struck by the newspapers and “novels of exposure” that appeared in the last quarter of the nineteenth century. For the proponents of legal reform, these internal and external critiques would prove to be a useful lever in prying loose cooperation from the throne. Although the emperor’s and the law’s authority were in certain respects fused, the idea of law belonging as well to “all under heaven” remained critical. Such late Qing critiques highlighted the significance of the rule of law in Qing sovereignty, and of the tension between “rule of law” and “rule of men” as a defining feature of the system.

India

In nineteenth-century British India, perhaps even more than in China, the law provided a language of rule that defined for the British government a touchstone for legitimacy. The British imperium in India was, like the Qing, a conquest state. But in the case of British India, the history of the “rule of law” was bound up with an increasing British preoccupation in the eighteenth and nineteenth centuries with law as the particular foundation of their own political “genius” as a conquering power—a mark, in fact, of British political identity. The history of the rule of law in colonial India is in some ways inseparable from the history of the rule of law in the historical construction of state power in Britain itself. But that is not our focus here, for the history of law in India was shaped by its own distinctive characteristics.

Central to our comparison here is the critical importance of the conceptual distinction between “rule of law” and “rule of man” to the British as well. The importance of law to this conceptualization of the moral legitimacy of British

imperial rule in India has recently been argued clearly by Nasser Hussain. “Government by rules,” Hussain writes, “became the basis for the conceptualization of the ‘moral legitimacy’ of British colonial rule. The applicability of rules to all was understood as the distinguishing feature of British rule, and counterpoint to the ‘personal discretion’ found in a theory of precolonial sovereignty known [to the British] as Oriental Despotism” (2003, 4). Though framed somewhat differently, the juxtaposition of the rule of law and the rule of men was thus central also to British rule in India from the start. It was to mark off the British state from the “Oriental” states that had preceded it (most notably the Mughals) that the British stressed the importance of the “rule of law” as their distinguishing feature. History shows us, wrote Alexander Dow in the 1770s, “the deplorable condition of a people subjected to arbitrary sway; and of the instability of empire itself, when it is founded neither on law, nor upon the opinions and attachments of mankind” (quoted in Cohn 1996, 62–63).⁷ The principle of government by law was, in this sense, even more marked in colonial administration in India than it was in the structure of bureaucracy in Britain itself.

The conceptual juxtaposition of the “rule of law” with the “rule of man” thus defined, ironically, an official vision of the rule of law in British India that was in some ways strikingly similar to the vision of law in Qing China. It was, after all, for the British as much as the Qing, the law that separated civilized authority from that of the “barbarian other,” in this case, “Oriental despotism,” which was the quintessence of “rule by men.” And yet the very British emphasis on India itself as the historical home of such “despotism,” a despotism to which, as Dow put it (with little actual historical investigation), the people had yielded “without murmuring,” suggested to many British officials the critical need to adapt the law to Indian conditions. As in China, the relationship between the law and the perquisites of power was thus a very complex one for the state. While a discourse of law was from the late eighteenth century onward critical to the self-legitimation of British sovereignty in India, many British officials prided themselves also on adapting their rule to the distinctive “habits and inclinations” of the Indian people, who were seen as far different from the British. “Oriental despotism” was thus the “intimate other” against which the “rule of law” was defined; even as the rule of law was the antithesis of Oriental despotism, law was also the critical lever of rule-bound rationality necessary for the state to impose its will on a people whose own historical traditions required, as most British officials saw it, an authoritarian and personalized structure of power.⁸

⁷For a discussion of the centrality of (and variations on) the concept of “Oriental despotism” in early British constructions of the history of India, see Sudipta Sen (2002, 27–56).

⁸Though it is impossible to pursue this here, it would be interesting to explore the extent to which this paradoxical juxtaposition of rule-bound rationality with the authoritarian urge to control the people, which shaped the colonial development of the “rule of law,” came to define the meaning of the “rule of law” as a legitimizing foundation for “middle-class government” more broadly in Britain in the nineteenth and twentieth centuries.

The universalist language of law thus remained, from beginning to end, critical to the operation of British power in India, even as it defined a highly particularized form of power adapted to the reality of Indian conditions. The role of the “rule of law” in defining the connection between authority and morality was perhaps most clearly explicated in the nineteenth century by Sir James Fitzjames Stephen. For Stephen, who was the law member of the Viceroy’s Council in the early 1870s, the “rule of law” was critical to the efficiency of power, as it tempered the capricious operation of the rule of men, or personal power, through the discipline of rules. Law made the operation of power simple and transparent. Perhaps no British enactment illustrated this more clearly for Stephen than the enactment of Lord Macaulay’s Indian Penal Code, which was composed in the 1830s under Benthamite inspiration and promulgated in 1860 in the wake of the Great Revolt of 1857. Replacing the piecemeal structure of criminal law (based initially on Muslim law) that had grown up under the East India Company, Macaulay’s code was distinguished for men like Stephen by its straightforward simplicity. Such enactments made manifest for Stephen the critical importance of the “rule of law” to the operation of British rule: The law was an instrument simultaneously of morality (as it illustrated the importance of subordinating personal power and impulse to larger principles) and of power (as it was an instrument—perhaps the key instrument—for the projection of the state’s power, linked to the notion of the superiority of the British as moral rulers).⁹ Stephen never doubted the right of the British to adapt the universalizing principles of the law to the particular conditions that warranted their autocratic rule in India.

Nevertheless, in India as in China, the very universalism of the discourse of law had the potential to constrain the operation of the state, as rules existed apart from the immediate power calculations of the state. To suggest that the law *belonged* to the people of India is, of course, even less plausible for British India than it is for the Qing. One searches in vain for statements by British officials in India that even approximate the notion of the law belonging to “all under heaven.” But the very pretensions to universalism that were implicit in the appeal to the “rule of law” as a legitimizing *moral* system made it virtually impossible for colonial officials—from the government in London and the viceroy in Calcutta on

⁹Much of this discussion of Stephen is based on Nasser Hussain (2003, 66–68). Stephen is perhaps best known for his role in drafting the Evidence Act of 1872, which sought to standardize rules of evidence in Indian courts, at the same time solidifying a procedural realm quite separate from the usages of particular communities in India. Stephen was more widely known in England for his publication *Liberty, Equality, Fraternity* (1874), which argued, among other things, that the notion of liberty could only have meaning within the constraints of religion, morality, and law, an argument that suggests perhaps the interaction of the development of his ideas on the “rule of law” (and its morality) with respect to India and England. For discussions of the evolution of India’s criminal law in the era before the promulgation of Macaulay’s Indian Penal Code, see Radhika Singha (1998) and Jörg Fisch (1983).

down—to deny the applicability of law as a potential constraint on their own behavior. It was not heaven but a universalizing vision of moral rationality that dictated this. And this was particularly important as British India evolved—in sharp contrast to China—a structure of semi-independent courts, defined by their rational rules, in which the state and individuals could, in theory, be equal litigants.

The independence of these courts in nineteenth-century India can, of course, be easily overstated. At the local level, there was often little separation in the roles of district officials as both collectors and magistrates. Even the provincial high courts, which had the capacity to challenge the state through their appellate functions, rarely did so. And yet, as Hussain argues, the existence of a discourse of law focusing on the writ of habeas corpus, by which the courts could call the state to account for false imprisonment (or acting contrary to the law), played an important role in defining *symbolically* the independence of the courts, however uncommon it was that courts actually invoked it in defiance of state authority (2003, 69–97). When courts *did* challenge state actions, it was, of course, open to state authority to simply change the law—or to promulgate new laws limiting the jurisdiction of the courts.¹⁰ Of this there are many instances, including, but not limited to those in which the state, as in China, made reference to extraordinary threats—emergencies—challenging its own stability. But the manner in which British officials reacted to such challenges was telling. Rarely did officials challenge the concept of the “rule of law,” even as they asserted “reasons of state” that in *particular* circumstances transcended it.

In this way, the *universal* significance of the “rule of law” as a legitimizing discourse was almost never challenged by British Indian officials in the nineteenth and twentieth centuries, even in extraordinary circumstances. Though taking on meanings different from those in China, the “rule of law” thus remained in British India the dominant discourse of state legitimation—and one that entwined arguments of state power and morality, whatever the realities of state power that both mobilized and constrained it. In India, as in China, a defining feature of the “rule of law” was that it served simultaneously as an ideology of legitimation for authoritarian power—even as it defined a principle that potentially constrained it.

THE PROCEDURES OF LAW AND THE STRUCTURING OF STATE AND SOCIETY

But what, then, were the implications of the state’s reliance on the “rule of law” for defining the distinctive relationship in nineteenth-century India and

¹⁰Most provincial governments in British India had official legal advocates whose job it was, among other things, to frame government responses to litigation involving the state and to make recommendations for legislation needed to redress the impact of court decisions that were perceived to threaten state interests.

China between the state and society? It is in the realm of relations between state and society (indeed, in defining the meaning of “state” and “society”) that a study of the “rule of law” opens up perhaps the most critical windows for comparing nineteenth-century India and China. One might argue that in both the Indian and Chinese cases, law played a critical role in constituting an “official” vision of society, a vision embodied in legal codes and procedures. With both the British Indian and Qing states playing important roles through courts and magistrates in dispute settlement, these were visions that came to have real meaning in the structuring of popular thinking and social relations (Merry 1991). Laws in both societies embodied certain normative assumptions about how social relations ought to be structured. That these were always, in practice, open to negotiation was, of course, a characteristic of both legal systems. Nevertheless, the pervasive importance of structures of legal procedures in dispute settlement and the negotiation of status in both societies had profound—though, in the end, quite different—impacts on popular ideas and structures of identity.

India

In India, the impact of the law on the structuring of society was intimately related to the legitimizing framework in which the British invoked the “rule of law.” In this, of course, Anglo-Indian law fits into larger patterns of colonialism. It was a feature of colonial systems that they “typically endeavored to retain some aspects of ‘native’ law” in order to legitimize their authority, even as the rulers maintained their own legal culture (Merry 1991, 897; see also Benton 2002). As in many other colonial contexts, this led initially in India to the emergence of a dual legal system in which different laws, and different courts, existed for colonizers and colonized. But the significance of such separate courts declined over time.¹¹ More important in the long run in India, and most critical for comparison with China, was the development of a legal system with increasingly uniform and universalizable forms of legal *procedure*, theoretically applicable to all, that were juxtaposed against a *substantive law* that varied with particular communities. It was this structure of legal procedure that ultimately came to be most firmly associated by the British with their own vision of the colonial state’s bureaucratic rationality and fairness (and thus with an idealized definition of the “state” and its authority). In contrast, the particularism of various legal communities came to define a highly segmented British vision of Indian “society.” The Indian “people” (or “peoples”) in such a framing remained fragmented, separated from the British not only by race, but also by the universalizing structure of British procedure that encompassed India’s different, and now particularized, systems of personal law. In fact, the contrast between the claims

¹¹The history of different courts and criminal jurisdictions for Indians and the English in India is traced by Elizabeth Kolsky (2005), who also shows how this significantly shaped debates on the eventual promulgation of the Indian Penal Code.

to universality of the law's procedures and the particularism of the various forms of substantive law enforced in India justified the structure of authority that the British had created.¹²

The power of the state's claims to universal rationality was not, of course, contained wholly by notions of legal procedure, for substantive law played some part as well. As is indicated by Macaulay's Indian Penal Code, universal ideas defined the state's rationalized power to punish. This was reflected also in the development of property law, which we will discuss in the next section. But the importance of difference in the construction of India's civil law (and particularly in what was known as "personal law") was evident in the ways that even legal systematizers, such as Sir Henry Maine, saw the legal recognition of difference as central to the basic underpinnings of British rule. For Maine, who served as law member on the Viceroy's Council in the 1860s, the contrast between a state defined by clear, rational *procedures*, on the one hand, and a society composed of local communities, defined by *hierarchies of status*, on the other, was critical. The contrast, in fact, provided the underpinnings of his theory of social evolution from status to contract. But the law not only built on this distinction, it was also structured so as to maintain it as a critical legitimizing aspect of colonial rule. This was reflected in the development in certain parts of India (notably the Punjab) of what has been called "customary law." The recording of "customary law," which was strongly influenced by Maine's social evolutionary thinking, was intended to bring the status-based dynamics of village and tribal "custom" within the framework of British legal procedure. But the law was also intended to underscore the distinction between India's rational state and its status-based society.¹³

Perhaps most critical to this distinction was the general British reliance on what was called "Hindu law" and "Muslim law" (or, as they were sometimes called, Anglo-Hindu and Anglo-Muhammadan law) for the substantive adjudication of inheritance, family, and community matters. At the heart of this

¹²The importance of racial difference to this structure is emphasized by Kolsky (2005) in her discussion of the supposedly universalizing Code of Criminal Procedure. Race undoubtedly shaped much British thinking. But the *principle* of universality, which the British publicly asserted in Queen Victoria's proclamation of Crown rule in 1858, and which Indians frequently appealed to, was maintained by most legal officials even in the face of the practical appeal to race and difference. This tension between universality and difference was, of course, central to the ideology of British rule more generally (Metcalf 1994).

¹³It is not surprising in this context (if perhaps somewhat ironic) that British visions of Indian society as composed of status-based communities tended in practice to strongly influence the interpretation of the law in the late nineteenth century, so much so that they pushed the legal evolution of rural communities in precisely the opposite direction from Maine's famous formulation in order to fit colonialism's underlying legal project—that is, from contract to status. This can be seen perhaps most clearly in trends in the legal interpretation of "customary law" in the Punjab, particularly in the "agnatic theory," which in the late nineteenth century stressed patrilineal kinship as the overriding foundation for custom. For some discussion of the move from contract to status in the legal constitution of the village, see Richard Saumarez Smith (1996, 64–66).

development, as in the case of “customary law” (which was only enforced in preference to religious law in a few areas), was the effort to adapt forms of “traditional” and text-based law to the structure of British Indian legal procedure. That this practice had a transformative effect on the meaning of both “Hindu law” and “Muslim law” has been noted now by a wide range of academic commentators. For many years, the British East India Company relied on religious specialists who were attached to courts to aid British judges in interpreting this law. But increasingly in the nineteenth century, Hindu and Muslim law came to depend substantively on translations of key texts and on the precedents gradually established by the British Indian courts (and by imperial India’s apex court, the Privy Council in London). For both Hindus and Muslims, the effect of this practice was to encourage the notion that there existed a distinct, substantive religious “law” that could be abstracted from contextual issues of politics and procedure. And this encouraged, in turn, as Gregory C. Kozlowski (1985) has argued, the notion that Indian society was composed of distinct religious communities, defined by distinct sets of apolitical law (which focused on social and domestic matters), which were deeply rooted in fixed textual traditions.¹⁴ Lata Mani and others have described how, in the case of Hindus, such developments not only helped to encourage the spread of the idea (among the British and Indians alike) that there was a legal entity known as the “Hindu community” in India, but also helped to produce a highly textualized vision of Brahman authority (and of caste) as a defining feature of that community (Derrett 1970; Galanter 1989; Mani 1998).

The implications of these developments for the very meaning of “society” in British India (and subsequently) were, of course, substantial. As in other colonial contexts, one critical effect was to strengthen patriarchal authority within the family, the lineage, and the caste in the interests of social stability. This process produced a vision of the family and of patriarchal kinship (and a highly gendered vision of power) that was not dissimilar to that embodied in the Qing Code. However, in British India, the substantive operation of religious and customary law in the realm of family affairs was cast by the state not as a reflection of universal principles of hierarchy, defined by heaven and upheld by the state (as in China), but rather as evidence of a cultural and societal realm entirely separate from the procedural realm that defined the state as a rational, rule-bound entity. In practice, of course, as Rachel Sturman has argued, the predilections of British judges often had a significant influence on how “ancient” religious

¹⁴One might add that this also created a framework in which the touchstone of both religious law and community came to be seen as matters relating to family, particularly to the position of women. There is a large literature relating to the development of Anglo-Muhammadan Law. For a concise British account, see Roland Knyvet Wilson (1894). For a recent reinterpretation of these processes, see Scott Alan Kugle (2001).

texts were actually interpreted. Decisions based on Hindu or Muslim law were in practice open to modification according to judges' perceptions of "justice, equity, and good conscience," terms that were so malleable as to allow for considerable leeway (and ideological input) in the law's interpretation, and that led in many cases to new interpretations of caste and family authority often influenced by more universalizing European ideas (Derrett 1963; Sturman 2006). But the legitimacy of the law nevertheless derived, in the eyes of the British, primarily from the conceptual separation of a rational realm of procedure from a substantive law that *did* belong to the people themselves, but to the "people" as fragmented and divorced from universal principle.

The distinction between procedure and substance thus shaped not just the law in British India, but also distinctive images of "state" and "society" as defined by sharply opposing principles. One result of this—which, again, provides a sharp contrast with Qing China—was the emergence of a distinctive Indian legal profession whose position was defined, at least in part, by the tension between these images, and by their positions as mediators between them. The use of lawyers in court cases, a practice adapted from England, was a fundamental feature of the British Indian legal system from an early date. But increasingly in the second half of the nineteenth century, lawyers transcended their roles in the courts as they came also to be critical political intermediaries within the British colonial system as well, mediating between the distinctive images of state and society that the structure of the law defined.

Lawyers were, of course, hardly concerned exclusively with legal procedures, for training in the substance of the law was also an important part of legal education in both England and India (though considerably more research on the subject of British Indian legal training is needed; see Paul 1991, for example). But in the British Indian system, defined by the "rule of law," lawyers occupied a critical position. They could not be encapsulated as representatives of communities defined by status or religion because their expertise—and their very position—was defined through participation in a universalistic realm of legal rules and procedures. And yet they also stood apart from the official state apparatus. Their position, in fact, defined a critical place for them, standing between the universal pretensions of the law and the cultural particularism that, under the British Raj, had come to influence profoundly the meaning of "society." It is little surprise, in this context, that lawyers played extraordinarily important roles in the development of Indian politics and of the Indian National Congress in the twentieth century. In the larger scope of imperial history in British India, the structural position of lawyers may well help to illuminate the distinctive meanings that the concept of the "rule of law" came to have in colonial Indian politics—and also illustrate how the structure of the "rule of law" in British India came ultimately, as we shall see, to influence the twentieth-century trajectories of Indian politics and meanings of the Indian "people" more generally.

China

The situation in the Qing in this regard stood in sharp contrast to that in British India. If a theoretical commitment to procedural justice helped to define the conceptual opposition in India between a universalizing, rational, rule-bound state and a culturally particularistic, status-based society, in the Qing, such a sharp line between the realms of procedure and culture did not exist because law embodied a universal morality in both its procedure and substance. Yet there was a tension between the ostensibly moral exemplars who served as the agents of the state and those in need of exemplification who constituted society. In the context of this dichotomy between ought/ideal and is/reality, society was “the imperfect” in Qing China as much as it was in India.

In the Qing, moral order (*lijiao*) fused with the law, so the law could not be abstracted out as defined by formal procedure. There existed no independent judiciary, with magistrates serving executive, administrative, and judicial functions, and in all these capacities functioning as socially transformative moral exemplars. Law could thus not be separated from the rule of man. Yet the rule of man, even through moral exemplification, carried the risk that “doing justice” could be subverted by individual arbitrariness or capriciousness. Though substantive justice, making the punishment fit the crime, was central to maintaining the Mandate of Heaven, emperors themselves understood that universally applicable procedural rules constituted the best insurance against this risk.

The Qing legal process was not perfect and certainly did not define the state as a rational, rule-bound entity, but neither was it a “mere façade” (Alford 1984, 1244). However, what concerns us here is not the specifics of procedural justice, which was certainly valued, but the relationship of procedure to substance. Other than a few exceptions, such as summary execution, Qing procedure, like its British counterpart in India, was, in a sense, universal. Whether a trial involved Hakka boatmen in Guangdong, peasants in Jiangbei, or guest merchants in Chongqing, the process was the same.¹⁵ However, from another perspective, Qing legal procedure was particularistic, though not because it was rooted in the particularism of various legal communities of the sort found in India. Rather, this particularism was shaped by substantive notions of hierarchy (e.g., gender) that were rooted in a universal morality. These norms determined who could bring a suit against whom and who could personally submit a complaint. Sons could not sue fathers, wives were not supposed to sue husbands, and women were supposed to submit their complaints through male proxies.¹⁶ Interrogation of women, whether under torture or not, proceeded under

¹⁵Qing law did require that a translator be available to ensure that the magistrate could understand local dialects.

¹⁶Almost always at issue in complaints filed for women by proxies was whether the son was protecting his mother’s modesty and interests or whether he was being manipulated. Counter-complaints

different rules than those applied to men, and, as Matthew H. Sommer has shown, the law imposed such a high standard of proof on women who had been sexually assaulted that suicide was often their only certain proof of innocence (2000, 66–113). Finally, a seasonal particularism meant that outside the farming season, disputes over water and property would be accepted for hearing only on certain days every month. Complaints of injury could be heard at any time, and not surprisingly, many a minor squabble got exaggerated on paper into a violent confrontation in order to get a complaint heard.

However, substantive justice—that is, punishing offenses against society with condign penalties—was of paramount importance in Qing law. Two key elements in the Qing Code ensured that no act the state deemed socially disruptive went unpunished and that right outcomes were always achieved. The celebrated (or, depending on one’s legal sensibilities, the notorious) “catchall” provision permitted magistrates to impose corporal punishment for “doing what ought not to be done.” For example, though advising a neighbor to seek redress from the magistrate might fall short of the crime of “inciting litigation,” it was still something that “ought not to be done” and likely to result in a beating with the heavy bamboo. Similarly, the Qing Code provided an entire section on how to apply certain provisions analogically. That the purpose of this section was not to ensure that the analogy perfectly mapped a set of facts onto another statute but rather to guide one to find a punishment commensurate with the set of facts, underscores the overriding goal of the legal system: to have the punishment “fit the crime.”

Because of this emphasis on substantive justice, Qing trials, to which the public generally had access, served as didactic vehicles through which the state sought to disseminate its dominant moral discourse and inculcate it in society. Not surprisingly, however, the state never managed to monopolize the function of courts or the meaning of trials. To be sure, people filed complaints to win cases and to achieve concrete, material ends: to enforce a contract, to settle a debt, to claim an inheritance, to clarify a boundary, to affirm an ownership right, to terminate a relationship. Yet through a process that Marc Galanter calls “litigotiation” (2001, 596), litigants also tried to get cases accepted for a hearing merely in order to use the courts as a means to intimidate, coerce, or extort, all for the purpose of adjusting social and power relationships.

Qing courts were places in which local custom regarding inheritance, marriage, and even business got juxtaposed to and at times challenged the universal norms espoused by the state. But in most of China,¹⁷ these were not the customs

frequently charged that the plaintiff was not following the “wifely” or “women’s way” but was indulging in shrewish litigiousness.

¹⁷In parts of Xinjiang and other Muslim-majority areas, the Qing operated much like the British in India and permitted issues of personal law to be guided by the standards of the local religious community rather than by the code. Elsewhere, as Mark Allee (1994) has shown for Taiwan,

of particular ethnic or religious communities—indeed, revelations about a woman’s authority in a family or community might raise suspicions about sectarian religious influence—rather, they were local practices about such things as marriages of convenience, purchases of brides, or adoption of children that violated Confucian standards but reflected economically driven local practices. Significantly, they were often practices incorporated into agreements that sought to “contract around” universal norms. Indeed, one might say that society as opposed to the state was defined by the matters left to contract. (This point will be further developed in the next section.)

Whatever the law’s universalizing moral ideals, the courts’ effectiveness at using the law as a theater of morality to transmit the state’s vision of society depended on the extent to which the state’s agents, especially the magistrate, controlled the interpretation of the text constituted by the trial itself and the court’s judgments. The magistrate’s task was complicated by the presence of litigation masters and petition writers who served the interests of the parties to a case, first drafting a petition that would persuade the magistrate either to accept or reject a case, and then, if the case was accepted for hearing, drafting follow-up petitions and proffering advice on legal tactics and strategies. Yet the roles of such legal specialists were far different from those of lawyers in India. Petitions could not specifically invoke the law and thus stated only the facts, but in the course of advising clients, litigation masters inevitably, indeed, purposefully, educated them in the law. Critically important to the litigation master was to win for his client and to enhance his reputation, while hiding his hand from the magistrate. Until the appearance of legal secretaries (many of whom had previously been litigation masters) in the seventeenth century, magistrates, who had no special training in the law, lacked the legal expertise to deal with the litigation masters. In the view of legal historian Chiu Pengsheng (2004), controlling the outcome of litigation slowly became a competition between the litigation masters and the legal secretaries, with legal knowledge the weapon of choice.

Petition writers and litigation masters were as involved in the legal process as legal secretaries, but they were anathema to the state because they were perceived as agents of particular interests, who deployed procedure to impede the law’s implementation of universal morality. Their role was illicit and had to be concealed. Thus, although petition writers were more a part of society than the state, their marginal status and relatively narrow role as narrative advisors and procedural experts precluded their playing the role lawyers came to play in British India. There, lawyers created a social and institutional framework for a vision of law that was at once enforced by, yet separate from, the state. To the extent that one finds such a concept in the late Qing, it is located in the

the Qing used courts in an assimilationist manner by insisting that property disputes between settlers and indigenous people employ established legal norms rather than local customary practices.

new media and popular literature. But the newspapers, however acute their critiques, lacked the specialized knowledge and social standing that generated social power for legal professionals. Moreover, even after such men began to be trained in the second decade of the twentieth century, the idea of law as an objective, autonomous discourse mediating between state and society won little acceptance, and lawyers never became the political players that they did in either colonial or postcolonial India. Nor did law in the Qing ever set as clear a conceptual line between state and society as it did in colonial India.

State and society in China were, in fact, homologous to an extent inconceivable in colonial India. Underlying the absence in China of the sharp distinction between state and society that we saw in India was a concept of justice that transcended the distinction between substance and procedure, a concept clearest in criminal law. For both the people and the state, fair procedure mattered. But because justice was expressed through substantive results, officials could be forgiven (both in law and in popular thinking) for departures from “due process” so long as justice “was done.” That this forgiveness was conceptually contingent on the official acting without self-interest, of course, underscores the theme of men of superior moral cultivation transforming an always imperfect society. Ultimately, final responsibility for seeing that the law’s substantive results comported with the internalized norms of his people belonged to the emperor, the moral pivot linking heaven/cosmos and the people, who embodied the interlocking relationship between state and society, as well as that between rule of man and rule of law.

PROPERTY, CONTRACT, AND RIGHTS

In this section, we will look briefly at how the rule of law actually influenced conceptions of “rights,” and thus the way the rule of law defined the position of individuals within the larger political system. This is a huge area, which, if fully considered, would take us into the realm not only of economic structure and behavior, but also of popular ideas, social organization, and local conflict. These issues are beyond the scope of this paper. But one can at least briefly touch on this by looking at how the rule of law in Qing China and British India shaped the meaning of “property rights” in particular. In the eyes of many, the concepts of property and rights are central to any notion of the rule of law. But the meaning of “rights” was open to many questions in both regions. Moreover, while property rights played an important role in shaping social and economic change in China and India, their impact on defining the relationship of “rights” to conceptions of sovereignty was strikingly different.

China

In Anglo-American legal parlance, we often say that there are no “rights without redress,” and we further presume that redress is a function of

government action. Thus, in the framework of Wesley Hohfeld, whose writings are central to the concept of property as a “bundle of rights,” a right is an entitlement to have the government interfere on your behalf. As Chang Wejen notes, “there is no right unless others are willing to recognize the right claimed” (1998, 132). However, unlike “the West,” which looks at the world of rights from the viewpoint of the claimant, Chang continues, in China, the Confucian tradition framed the issue in terms of those who have to “accommodate” the claim. From this perspective, the Confucian tradition accepted that it was possible to claim as one’s “due,” but not as one’s “right,” “entitlement,” or “share” (*fen*). The *fen* is not “intrinsic to anyone.” Rather, it is “strictly a societal product” that represents the share of society’s total output that society “allows or assigns” to a claimant.

Applying Chang’s analysis to *property* rights produces inconsistent results. It would suggest that Chinese did not see property as “sole and despotic dominion,” a “simple and non-social relationship between a person and thing.” Yet archival evidence indicates that this *in rem* view of property was widespread among ordinary Chinese, who, like the twentieth-century New Englanders studied by Sally Engle Merry, saw it as giving them a sense of dignity and power against all others (Merry 1990, 44–47, 113). On the other hand, Chang’s analysis sheds light on the Qing Code’s acceptance of the notion that applying one’s labor to uncultivated land creates a presumptive claim of ownership. Moreover, it parallels in some ways the arguments of legal scholars such as Robert C. Ellickson (1991) who have argued that initial rights arise from norms produced by decentralized social processes, in particular by economic exchange, rather than from law. Indeed, in a recent edited volume on contract and property, Myron Cohen asserts that regardless of their subject matter, contracts and “documents of understanding” were more social than legal in nature because they were rooted in and protected by the social relationships of the parties (2004, 88). Or, as Anne Osborne writes in the same volume, “the surest guarantee of one’s rights seems to have been their acknowledgement by the local community” (2004, 156).

That rights may initially arise through decentralized social processes does not *ipso facto* mean that they arise outside the ambit of the state and its law. Perhaps the most difficult task facing those who are studying contract and property in the Qing is to determine whether the transactors whose documents we study shaped their deals in the “shadow of the law.” If they acted in ignorance of or disregard for the law, and thus could not use the law’s “threat points,” how could they create a presumption of compliance other than by relying on custom or community norms?¹⁸ Certainly, the state took property claims seriously, and the Qing Code had numerous provisions that embodied the state’s concerns. Drawing

¹⁸In a recent study on Manchuria, Christopher Mills Isett argues that because Chinese settlers had illegally created and secured land claims while avoiding detection by the authorities, they indeed could not use the law’s “threat points” (2007, 10, 24).

on David Wakefield's work on inheritance, Madeleine Zelin (2004) has properly focused our attention on the code's detailed rules on inheritance as evidence of the state's interest in protecting property rights. Jing Junjian (1994) has made a similar point with his litany of the code's prohibitions, particularly the rules against theft, multiple mortgages, and taking the product of another's labor without compensation. Finally, it seems clear that it would be well-nigh impossible for transactors not to have known that property properly registered on the tax rolls and whose exchange had been recorded with the county government received the strongest protection from the state. In this sense, property was a contract with the state. In exchange for the payment of taxes, the state protected the rights and interests of the payer. However, the significance of this exchange is questionable. Did property owners (corporate or individual) consider the degree of protection afforded worth the cost of the taxes and registration? Given that an increasing number of people in the eighteenth and nineteenth century did not register their land, the answer would seem to be no.

Strikingly, the Qing actually knew very little about how much land and what kind of land was under cultivation and thus taxable. In the Qing, the "fish-scale register" (*Yulin ce*) served as the cadastre or land survey register in which the location, size, shape, value, and ownership of every surveyed piece of land was to be recorded. Regularly updated, such registers are enormously valuable for tax collection, but the cadastres in use in the Qing were to a large extent unchanged from the Ming, and some provinces lacked them entirely. It was not that the Qing did not recognize their utility. Rather, it feared the cost and trouble involved and thus never succeeded in completing an empirewide cadastral survey, which many administrative writers concluded was more trouble than it was worth. Local ones were attempted, especially in alluvial areas and regions heavily affected by the mid-nineteenth-century Taiping Rebellion, but in comparison with British India—this is an enormously important difference—there were far fewer relatively up-to-date cadastres at the local level. Thus, unlike in India, where lawyers might attach copies of these surveys to their briefs, property rights disputes in Qing China rarely included references to the cadastres. Indeed, references to tax registers were rare.¹⁹

This situation further illuminates the role of contracts as the dispositive piece of evidence in property rights disputes, though they were not formally recognized

¹⁹Moreover, many of these references seem to appear primarily in cases in which property rights disputes escalated into lethal violence. Because these cases were reviewed at the central government level, and in some cases by the emperor himself, perhaps magistrates felt that they needed to explicitly state that they had used the parties' record of tax payments as a factor in making their decision. One should also perhaps not, in comparison, overstate the role of state-generated revenue records in litigation in India (or, indeed, overstate popular understanding of these records). But some hint of their importance in disputes, even among nonelites, is found in Peter Robb's observation on "the eagerness of the raiyats [cultivators] by the late 1890s to pay for extracts from settlement rolls recording their rights and liabilities" (2007, 159).

as such until 1768 (Zhang 1998, 104–5).²⁰ Certainly, a “red contract” with the seal of the magistrate affirming that the transfer had been recorded and appropriate taxes and fees paid, or evidence of tax payment on the land in dispute, was the best proof of ownership. However, as anyone who has spent any time in the archives working on land dispute cases has discovered, the majority of the contracts were “white,” unsealed ones, marking transactions that were technically extralegal. Genealogies, grave sites, testimony by middlemen, and walking surveys by the magistrate were other types of evidence used by the magistrate either alone or in combination to settle disputes. Though magistrates could refuse to hear disputes involving white contracts, they rarely did so because they understood that unresolved property disputes all too quickly escalated into violence. And the higher the level of violence in their districts, the worse their annual evaluations would be. Moreover, taking such cases to court allowed the magistrate to register the land for taxation. So long as the Qing state got its taxes, it was willing to condone a huge array of property rights arrangements, ranging from the simple and clear, through multilayered, customary, and complex, to even illegal land use. Indeed, the higher the level of tax payments in the district, the better a magistrate’s evaluation would be. Thus, processing land disputes, regardless of how they arose or the nature of the evidence presented, was in the self-interest of the magistrate and the state.

If these private bargainers’ agreements created understandings and rules that stood apart from the state yet were clear to them, as well as reflective of and enforced by community norms, were the “rights” they created strong? And if they were “strong” independently of state action, why did they sometimes end up being adjudicated by an agent of the state? Like Zelin (2004) and Sucheta Mazumdar (2001), we would argue that mutual exchange and agreement created strong, though certainly not absolute, property rights.²¹ Otherwise, it is hard to explain the high rate of turnover in land and the rapid growth in commerce that characterized much of the Qing. However, this commerce in and commodification of land inevitably put stress on the common understandings that undergirded private bargainers’ agreements. As resources got reallocated, local customs, which shaped rental, water use, mortgage, conditional sale, right of preemption by family and neighbors, and supplementary payment practices, shifted to accommodate the

²⁰Isett cites this relatively late incorporation of this rule into the Qing Code as evidence against any intent by the Qing “to create a systematic and consistent body of property law” (2007, 79). Still, contracts played an utterly central role in property disputes, a point underscored by families retaining them for hundreds of years as proof of ownership.

²¹Contrast the less positive view of French scholar Jérôme Bourgon, who dismisses the argument that the concept of property rights can be found in the Qing Code’s prohibitions on theft, illegal sale, and seizure of someone else’s property. Asserting that only individual property rights create a bulwark against state power, he deprecates the significance of household possession. Finally, he argues that there could not have been strong property rights in China because they were undermined by “confusing” multilayered ownership systems and were not promoted by a “firm legal background in the Code” (2004, 92).

new circumstances. As once widely shared norms of behavior differentially benefited members of the community, some rights were strengthened while others were weakened or disappeared. Inevitably, disputes over how to adjust and accommodate old customs to new circumstances flared into violence. As the Qing's effort to regulate conditional property sales illustrates, these moments of inflection afforded the state an opportunity to reach into society in an attempt to forestall disruptions in public order arising from contested property rights.

That the state's primary concerns regarding property in China proper were collecting taxes and dampening social conflict underscores the Qing state's essentially hands-off attitude toward commoner land practices. When it took control in the mid-seventeenth century, the Qing took steps to break the power of the landed elites, and by the early eighteenth century, free-holding peasants largely controlled their own labor and secured various sorts of property rights through an open market in land. Using contracts whose form and substance were essentially universal in character, their iterative exchanges deeply embedded values regarding contract into society, largely independently of the actions of the state. Certainly diverse local practices existed, but they still found expression in contract, the province of society. And the expectations and predictability produced by the customary practices that informed property can be seen as constituting a system with its own internal logic that stood outside the state.²² Because the Qing state saw itself as bound to society by common moral norms, it condoned society operating independently as long as it maintained its own order. But when society failed and social disorder threatened, the state forcefully exerted its role as moral exemplar. While the state encouraged private conciliation of property and other minor disputes, it prohibited private conciliation of homicide (Xue 1970, 884–86 [300-00, 300-01]).

Thus, at the point at which state and society intersected in imperial China, adjudication and definition of property rights had far less to do with the definition of justice or the meaning of the rule of law as a moral concept than it did with the trial and punishment of crime. This is not to say that property rights were unimportant, for China was an agricultural society in which ownership of land not only provided sustenance but also facilitated the marriage of one's sons, generated social prestige, and provided the foundation for lineage building. Still, what shaped the popular consciousness about the rule of law was not how the legal system dealt with property disputes per se, but how it dealt with the violence arising from property rights disputes—indeed, how the law in general responded to crime and crimes of violence.

²²For a broad overview of Qing “customary law,” see Liang Zhiping (1997). Zhu Suli, dean of the Peking University Law School, has referred to such ideas as “indigenous sources of rule of law” (Su Li 1996, 8, 20; 1999, 229–38). Two recent Chinese dissertations that use newly available contracts and other documents to investigate the processing of civil disputes (*minshi jiu fen*) give considerable attention to the interplay of customary and codified law (Chun 2006; Deng 2004).

India

As in China, in British India, too, property law played a critical role in shaping local social and economic relationships, even as these relationships also shaped the development of property law. Yet its operation as a distinctive realm of law was also marked by a significant contrast with China, for it played a different role in defining relationships between society and the state, and in defining popular perceptions of the legal regime. In colonial India, the relationship between state-enforced criminal law and popular notions of justice seems to have been far more limited than in China. Spectacular criminal trials did at times engage widespread public attention, transforming the courts, and criminal procedure, into a focus for popular debates about justice and its meanings. Such debates were sometimes reflected in popular literature and plays in which the language of law and court procedure played prominent roles (Sarkar 1997). But in general, criminal law in India, which was adjudicated after 1860 under the alien, largely utilitarian-inspired Indian Penal Code, seems to have had far less resonance than in China with popular notions of justice. Unlike the situation in Qing China, colonial criminal law played little role in the popular imagination of an Indian “people” whose identity was rooted in shared notions of justice enforced by the courts.²³

Property law, on the other hand, came to resonate deeply in Indian society in ways that related not only to the distribution of wealth and resources in society, but also to a hegemonic framework that shaped popular conceptions of the relationship between the individual, indigenous communities, and the state in the construction of the political order. This is perhaps paradoxical because there is limited surviving evidence in India of the existence of a popular contract-based culture on the scale of that in China, generating large quantities of written documents independently of the state. But in terms of defining a frame for an emerging relationship between state and society, giving Indians a powerful stake in the colonial “rule of law,” property law (and the definition of “rights” linked to property in land) played a central role in India.

The historical meaning of “property” in India is, of course, complex and much debated. But for the British in India, property was widely conceptualized, at least in its origins, as a right emanating from the state. State power to define and adjudicate “proprietary right” hinged to a large degree on claims of conquest, which allowed the state to redistribute property as it thought best (even as it largely did so by inquiring into the claims and arrangements that had been left

²³Relatively little has been written on this, but see Singha (1998). Tanika Sarkar might take exception to this view, as she argues that the structure of Hindu personal law created an expectation that, even in cases under the Indian Penal Code, domestic Hindu behavior (such as a murder involving adultery) would be subject to the oversight of a Hindu public that did indeed engage with the courts—and used them to debate the meaning of justice (1997, 77–80). But if this was true in Bengal, it was probably true in India as a whole on a limited scale.

by previous states). As B. H. Baden-Powell put it in his great compendium of Indian land law at the end of the nineteenth century, “I think, on the whole, what was meant by the various declarations in the Regulations and elsewhere, was this; that the Government claimed to succeed to the *de facto* position of the preceding ruler, only so far as to use the position (not to its full logical extent but) as a *locus standi*, for re-distributing, conferring, and recognizing rights on a new basis” (1892, 234). The point was to establish for the colonial state an autonomous position from which it could construct its own, distinctive property order.

Yet from this position, property came to be fundamentally constructed in British India as a matter of contract between the state and individuals (or, less commonly, but also importantly, between the state and joint families or other corporate groups). Such contracts hinged on the state’s ability to survey and appropriate, through a vast record-keeping apparatus, the lands of British India’s imperial dominions. Through the operation of land “settlements,” state officials signed what were, in effect, contracts relating to all cultivated land in British India that bound the state to recognize “proprietary right” in the land in exchange for undertakings for the payment of land revenue. This was done on a scale far greater than any comparable efforts under the Qing. Such contracts by no means always recognized simple proprietary control over land, for they often recorded complex layerings of rights and revenue obligations. But they defined the power and meaning of the state as a rights-conferring authority, even as they simultaneously constituted on one level a “society” in India of individuals defined by land “rights” (a term commonly deployed in British records), which were in theory enforceable in the courts not only against competitors for land, but also (theoretically) against the state as well.²⁴

Property law in India thus theoretically defined a contract-based order linking the state and society in ways far more marked than in China. Yet it, too, was caught up in the tension between the universalist moral claims of procedural law and the particularism of cultural community and identity in substantive law that defined the “rule of law” in India more generally. This was evident, on one level, in the very ways that the state went about recording property “rights” at settlements. Proprietary rights were, of course, recorded at

²⁴This is not to say that the government could not extinguish property claims by claiming special circumstances, as it did when it passed special legislation in the early twentieth century to abort village common land claims in the Sind Sagar Doab, on the ground that state land was needed to justify the costs of canal construction. But there are also many cases in which property decisions went against the government. A good example is the famous Hajiwah Canal case of 1901, in which the Privy Council overturned on appeal an attempt by the Punjab government to seize (in the name of more efficient administration) the land on which a private canal was built. The Privy Council declared in its ruling that the state was bound by its initial recognition of the property rights of the canal owners in the land records (which created the presumption, as the court noted, that the owners would continue to enjoy the benefits of the property).

settlements at the full discretion of the state, thus making clear that the “rule of law” was rooted in the universal claims of state authority (and in the bureaucratic and record-keeping apparatus that defined it). But such rights were also commonly justified on particularistic historical and cultural grounds, that is, by reference to previous custom and usage, which came, in practice, to be one of the most common touchstones at settlement for the state’s recognition (or award) of certain property claims at the expense of others.²⁵ This was a trend that in fact increased as the nineteenth century progressed. If the definition of property rights was a mechanism through which the British recognized the legal rights-bearing individual as the bedrock of society, property law (particularly inheritance law) also recognized him (or her) as deeply embedded, through “personal law,” in particularistic communities linked to custom and past practice. Property cases were thus filled in the late nineteenth century with references to the distinctive usages of local communities, which were brought to bear in interpreting settlement records. Judges, of course, were not constrained from offering their own interpretations of these rights. However, there is much evidence to suggest that in popular thinking, custom and usage provided powerful idioms in which “rights” were often understood (and could thus be legitimately asserted both against others and against the state itself).²⁶

Property law thus became a frame within which status-based community identities were incorporated into a structure of state-recognized individual “rights.” It should come as little surprise in these circumstances that the actual motivations for litigants in property cases are not always easy to discern. While the extensive recording and adjudication of property claims created a class of property holders with class interests defined by their productive access to land, the structure of the property system seems to have encouraged litigation that was often as much about status (framed by the particularities of culture and community) as it was about enforcing contracts to protect the title to productively exploit land.²⁷ Though far more work needs to be done on this, the observations of Bernard S. Cohn on litigation in a North Indian village not too long after the British departure are telling: “The use of the courts for settlement of local disputes seems in most villages to be almost a minor one,” he wrote. “Courts

²⁵Recognition of proprietary rights during settlements was, in fact, often the result of negotiations. As David Washbrook notes, “[T]he British settlement of land rested upon a series of political deals, flexible and changeable, which offered and withdrew revenue privileges to intermediaries situated between itself and agrarian society” (1981, 664–65).

²⁶The importance of British theory in shaping the interpretations by judges of the meaning of caste and religiously based rights, and of custom and usage, particularly in the second half of the nineteenth century, is a large issue that is only beginning to be carefully studied (see, e.g., Sturman 2006). In the Punjab, where customary law was enforced, there was a strong tendency for judges to try to make sense of custom through recourse to social evolutionary theory, much of it shaped by Sir Henry Maine. The critical text for this is C. L. Tupper (1881).

²⁷The overall “popularity” of the colonial courts is a matter of some debate, but for an overview of this issue, see Pamela G. Price (1992, 179–200).

were and are used as an arena in the competition for social status, and for political and economic dominance in the village” (1965, 105).²⁸ It was in the idiom of property that claims of status and identity were often contested, even when productive control of property was a minor issue. Such uses of official courts would have been extremely rare in China. The work of Pamela Price (1996) on South Indian landlord families has suggested the degree to which prominent Indians frequently used property disputes as a means to force the courts to rule, in effect, on status precedence within and among leading families, a role that the king had traditionally played in south Indian society.²⁹ This appears to have been far more important in such cases than the desire to make the courts enforce clear contracts or titles. Other work has suggested how property provided the critical lever through which Indians forced the state to rule substantively on issues that were, according to official doctrine, embedded in the particularities of Indian culture. Courts were thus frequently drawn, through the mechanism of property disputes, into ruling, for example, on the succession to authority in Sufi shrines (Eaton 1984) or in the administration of Hindu temples (Appadurai 1981), arenas of religion from which the state theoretically held itself aloof. It was the irony of these cases that property became, for all its contractual roots, less about clear titles than about precedence within systems in which control over land was hedged by status relationships and obligations.

This, of course, is not to suggest that litigation over the establishment of clear titles to land did not occur, but rather that the major focus of property law lay in a different direction. The economic implications of the structure of colonial property law have, in fact, been most explicitly addressed by David Washbrook. Though Washbrook argues clearly that the relationship between law and the agrarian economy of India changed over time, his analysis is predicated on the observation that “the Anglo-Indian legal system was distinctly Janus-faced and rested on two contradictory principles.” On the one hand, the law envisioned the individual as an independent agent capable of engaging in contracts, free to own property and to engage “in a world of amoral market relations.” On the other hand, the law’s concern to simultaneously embed the individual in the world of status relations served “to limit the sphere of ‘free’ activity by prescribing the moral and community obligations to which the individual was subject,” obligations that were defined not by statute or contract, but “by the ‘discovery’ of existing customary and religious norms.” This tension in property law arose, Washbrook argues, not because of any conflict between British (or “Western/capitalist”) and Indian norms, but because of the state’s particularistic interests as a colonial power. During the first century of British rule, the effect of

²⁸For a fuller discussion of this issue in the post-1947 period, see Robert Moog (1997, 100–102).

²⁹In fact, Price sees property disputes as a critical mechanism transforming the meaning of status by subjecting issues of royal precedence to the more universalistic standards of court procedures (1996, 29–76; see also Dirks 1986, 332).

British law was to severely limit the potentially destabilizing free exchange of property and to prevent the emergence of any effective independent subject. This situation changed somewhat in the second half of the nineteenth century as land markets and litigation accelerated, but even then, Washbrook contends, the contradictions in the “rule of law” prevented the law from moving “very far or fast to accommodate the social imperatives of market capitalism” (1981, 652–54, 675).

Washbrook’s work suggests the instrumental implications of the property system’s contradictory structure in British India, particularly as it related to potentialities for capitalist development (an important area for comparison with China). But his work underplays the critical role of property law in integrating the conflicting tendencies that shaped the colonial legal system (and the structure of sovereignty) more generally. Property law played an important role in conceptually defining the distinction in colonial India between state and society. But it did so by encompassing within one legal frame two potentially antagonistic visions of society, one defined by rights-bearing individuals (legally recognized by the state) and another defined by historically based, culturally laden communities. Property law itself provided an idiom within which these antagonistic principles were brought together. Within the framework of the “rule of law” and the structure of legal procedure, indigenous identities, whether based on religion or caste, were, in a sense, themselves individualized. In the discourse of property and “rights,” indigenous religious and customary identities came inevitably to be seen as inhering in individuals, defining their relationships to the legal system, and thus, perhaps, themselves becoming increasingly conceptualized as a form of individual property.³⁰ It was the “Janus-faced” structure of property law (and the idiom of “rights” it entailed) that thus became a critical arena in India not just for shaping access to productive resources, but also—far more than in China—for defining a vision of society, however fragmented, linking the individual and indigenous conceptions of identity (and culture) together. Though not all Indians engaged with property issues, of course, property law provided the model for notions of “rights” (subsuming cultural distinctions and particularities) that gave the distinctive form of the “rule of law” in India an important part of its long-term political significance.

³⁰For a discussion of this proprietary view of identity, see Lauren G. Leve (2003). This ultimately provided a framework for relating to the political system that could extend (at least in theory) beyond the formally propertied, as the development of politics surrounding “compensatory discrimination” for Scheduled Castes/Tribes and Other Backward Classes in contemporary India suggests. The intertwining of individual property rights with status-based identities may also be a reason why direct class-based identities (as conceptually distinguished from status-based identities of caste, ethnic or community types) have been relatively weak in India (or, to put it another way, have commonly become inseparably intertwined with these other forms of identities). Here again, we have a contrast with China.

TOWARD THE TWENTIETH CENTURY: LAW, SOVEREIGNTY, AND THE PEOPLE

The commonalities and differences in the operation of the rule of law thus point toward key differences in the relationship between state authority and the distinctive constitution of society in the two countries. This backdrop can also give us insights, we would argue, into the contrasting narratives of twentieth-century Indian and Chinese politics. Comparing the complex narratives of twentieth-century politics in India and China, of course, takes us well beyond the focus of this article, but we would argue that analysis of the tensions inherent in the differential operation of rule of law in India and China provides a vital clue to understanding the differing trajectories of the two countries' politics.

India

In India certain structural features of the distinctive form of the “rule of law” as an authoritative colonial ideology—in particular, the central distinction between procedure and substance—proved critical to the evolution of twentieth-century Indian politics. The critical impact of this can be seen clearly in the thinking of Mahatma Gandhi. Gandhi, who emerged as a critical figure in nationalist politics in 1919, was trained as a lawyer and deeply influenced by British ideas about law, and by the legal structures developed in India over the course of the nineteenth century. Gandhi was, in fact, one of many lawyers who played critical roles in the nationalist movement, reflecting their strategic place within the colonial political order. “But for lawyers,” Gandhi wrote, “who would have shown us the road to independence?” (1997, 58). Yet Gandhi, like many nationalist leaders, had extremely contradictory views on the law. Indeed, Gandhi’s critique of the law was at times scathing. “It is my confirmed belief,” Gandhi thus said in an article supporting noncooperation in 1920, “that every Government masks its brute force and maintains its control over the people through civil and criminal courts, for it is cheaper, simpler and more honourable for a ruler that, instead of controlling the people through naked force, they themselves, lured into slavery through courts, etc. submit to him of their own accord” (1987, 2:127). In such a view, the law, and the lawyers who made it work, were deeply complicit in colonialism’s autocratic structure and in the oppression that characterized British rule. “My firm opinion,” Gandhi wrote in *Hind Swaraj*, “is that lawyers have enslaved India” (1997, 58). The “rule of law,” Gandhi realized, was central to India’s colonial domination.

Yet Gandhi also recognized in the structure of the “rule of law” under the British a framework important to the mobilization of a nationalist identity.³¹

³¹In fact, Gandhi moved in the months after India’s independence to endorse the critical importance of the “rule of law.” “Liberty never meant the licence to do anything at will,” Gandhi declared in August 1947. “Independence meant the voluntary restraint and discipline, voluntary acceptance of the rule of law in the making of which the whole of India had its hand through its elected representatives” (2000, 299).

The key to the importance of the “rule of law” lay in the ways that the distinction in India’s law between procedure, with its universalistic presumptions, and the particularism of the law’s substance had defined the structure of the state’s power. The irony here lay, of course, in the fact that this was the very distinction that had provided a foundation for the British denial of a unified “people” in India, and for their recognition instead of a congeries of particularistic communities defined by distinctive substantive laws and held together only by a rationalized structure of British legal procedure and administration. Yet this legal structure also helped to frame a new unified vision of the Indian “people” built on the moral tensions that Gandhi saw in the definition of the emerging nationalist individual.

For Gandhi, it was individual self-control and self-discipline that made possible identification with the nation. Nothing was more emblematic of this self-discipline for Gandhi than a commitment to nonviolence, which drew on the tension between the everyday worlds of politics and state power, often underlain by violence, and the notion of a community, rooted in the commitment to ideals, which transcended such conflictual politics.³² Moral community was constructed by the willingness of those who had the power to inflict violence, to voluntarily abstain, in the name of higher principle, from exercising such power, a notion that, in Gandhi’s view, had deep roots in Indian traditions of moral sovereignty.³³ Critically, however, this was a vision of the nation that also mirrored the central structural—and moral—distinction between procedural universalism and substantive particularism that had marked the “rule of law” under the British. However much the adherence to procedural formalism may have helped to define a sphere for autocratic state power, it had also defined for the British a realm of higher principle juxtaposed against a realm of personal whim, self-interest, and passion (which the British, of course, had identified with “Oriental despotism”). The paradoxical relationship of the “rule of law” and the “rule of man” was thus assimilated in Gandhi’s thinking (though Gandhi, as far as we are aware, did not use these specific terms in juxtaposition) with the notion of a national community constructed around the tension between self-controlled commitment to principle (analogous to commitment to the “rule of law”) and the ever-present pull of self-interest and cultural particularism (analogous to the “rule of man”), both within the individual and within society.³⁴ The structure of the law thus provided an important template for morally imagining the nation.

³²In fact, Gandhi explicitly conflated nonviolence with the overarching sovereignty of a higher law. “The Eternal Law of Truth and Love,” as Gandhi put it in a 1944 letter, “I have translated as non-violence” (1987, 2:192–93).

³³The key to this was, of course, the connection between renunciation and moral sovereignty. For a discussion of the relationship between renunciation and legitimate authority in Gandhi’s self-presentation, see Susanne Hoeber Rudolph and Lloyd I. Rudolph (1983), and also, for the deep roots of such conceptions in Indian tradition, see J. C. Heesterman (1985).

³⁴Though Gandhi is often seen as a critic of liberalism (Skaria 2002), his views in some ways echoed those of nineteenth-century British officials such as Fitzjames Stephen in this, in spite of the

Gandhi's success in mobilizing such a vision of the Indian people depended, of course, on his also building a political movement based on it. Gandhi's technique of mobilization based on *satyagraha*, or nonviolent civil disobedience, lay at the heart of his political influence, and here, too, we see the same underlying structure in Gandhian thinking. Acceptance of the "rule of law," at least in the sense of self-disciplined acceptance of rules, was central to the practice of *satyagraha*, even as the moral vision of self-disciplined adherence to rules was juxtaposed against the *substance* of the unjust and divisive laws that had defined colonial rule and that were now opened to concerted moral challenge. For Gandhi, the term *swaraj*, or self-rule, the accomplishment of which was the aim of *satyagraha*, referred simultaneously to the self-rule of the individual (over his or her violent and particularistic inclinations) and to the self-rule, or independence, of the nation as a whole (Dalton 1993).³⁵ As a symbolic enactment of the "people," the conceptual structure of *satyagraha* thus mirrored in critical ways the moral polarities that marked an idealized vision of the "rule of law" as it had developed in colonial India—even as it used these polarities to shape a distinctive, and idealized, meaning for the nation itself.

Yet *satyagraha*, by itself, could hardly have succeeded, except on a symbolic level, in undercutting the structure of colonial control, rooted as this structure was in the state's control of violence, in its alliance with local elites, and in the pervasiveness of community divisions in India. It is thus important to see its operation in counterpoint to another critical development in twentieth-century Indian politics, the introduction by the British of elections into the structure of Indian politics. Elections were, in fact, gradually introduced by the British into India after 1919, largely for purposes of drawing in new political players and holding onto political power in the face of nationalist challenges. But however linked to the structure of colonial control, they, too, built in critical ways on the legal distinction between procedure and substance that defined the law.

This can be seen perhaps most clearly in the relationship between the law of elections in colonial India and the law of property. The right to vote in colonial elections hinged on ownership of property (just as had been the case in the gradual expansion of the franchise in nineteenth-century Britain). But perhaps

obvious, deep differences between them. Stephen saw the "rule of law" as largely a marker of the subordination of individual impulse and capriciousness (which characterized "Oriental despotism") to fixed rule and principle (a view related to his notion that "liberty" could only have meaning within the constraints of religion, morality, and law). In its essence, the "rule of law" represented a triumph, in such a view, of moral rationality over the particularistic self. For all Gandhi's critique of "Western civilization," he shared with Victorian liberals a strong belief in a universalist ideal of individual conscience that lay at the root of the "rule of law" concept.

³⁵It would be fascinating to write a history of India's independence movement that played on the intersection and tension between the two key words most often used to translate "independence," *azadi* (freedom) and *swaraj* (self-rule). Though in some ways synonyms, the inner meanings of these terms were also in significant tension.

more importantly, the structure of elections was built on essentially the same tensions embodied in the structuring of property law in British India. On the one hand, elections were constructed on the legal notion that each voter was a consent-bearing individual, capable, like each property owner, of entering into a contract with the state. Yet the law of elections (like property law) was built on the assumption that the individual voter came to elections (just as he or she came into court in property cases) bearing the cultural particularisms that shaped India's social structure.³⁶ The tensions embodied in elections were, in fact, played out in complex political dramas and, ultimately, in the conflicted politics that led to the partition of India and the creation of Pakistan. Yet structurally speaking, they provided a powerful institutional framework in which a vision of the "people" was defined, as in *satyagraha*, by the embedding of individuals in formal structures and procedures that transcended political passions and conflict, even as they subsumed them.

The impact of the discourse of the "rule of law" on twentieth-century Indian politics—and in defining a particular conception of the Indian "people," in the sense defined by Kahn—was thus substantial. Indeed, it was this discourse that shaped the Indian Constitution of 1950 and the structure of Indian politics after the British departure. As India's first prime minister, Jawaharlal Nehru, declared in a speech to the American Congress in 1949, "We have placed in the forefront of our Constitution those fundamental human rights to which all men who love liberty, equality and progress aspire—the freedom of the individual, the equality of men and the rule of law" (1992, 303). But the meaning of the "rule of law" also defined a set of ongoing tensions that have marked the Indian political system. Three aspects of this situation are worth noting.

First are the legacies of the conflicting definitions of the "people" that were implicit in the structuring of law in India. The "people," as imagined through the structure of law, were defined at the same time by individual rights (and at times by a transcendent vision of self-controlled moral individualism that underlay Gandhianism) and by the simultaneous substantive cultural identification with a range of particularistic communities. Though this tension was in some ways addressed by the creation in 1947 of a separate Pakistan, it continues to shape many aspects of politics in India, as, for example, in the tension between the constitutional ideal of a uniform civil code in India and the reality of the continuing particularisms in law marking different religious communities (a tension, one might add, written into the constitution itself). The same tension can be seen in popular ideas of justice. However closely the "rule of law" has come to be tied to the definition of the Indian "people," it continues to be associated far

³⁶For a discussion of the history of colonial election law in this vein, see David Gilmartin (2007). The importance of property law in framing the legal structure of electoral democracy (as introduced by the British in India) was suggested by the importance to both contract and election law of the concept of the consenting individual, whose status could be threatened by illegal "undue influence."

less with a vision of individual substantive justice than with an imagined morality of procedural transcendence that defines the overarching ideal of a single people. The association of the formal legal structure with substantive justice in popular Indian thinking, in fact, remains weak. Few look now to the court system, or to lawyers, as providing a compelling model for individual justice.³⁷ Public images of substantive justice in Indian culture have thus tended to focus instead on heroic figures such as the ideal king, Ram, in the popular Ramayana story, or on populist politicians, such as the film star and chief minister, M. G. Ramachandran (popularly known as MGR), in regional Tamil culture—or even Phulan Devi, the “bandit queen.” But while the images of justice associated with such figures have carried universalistic popular resonance, they have also tended to be identified at the same time with particularistic communities, whether regional or religious.³⁸ They have thus been the subjects of considerable cultural and political tension. Political movements such as that focusing on the “rescue” of Ram’s supposed birthplace at Ayodhya have provided evidence of this.

Yet this is balanced by a second aspect. A discourse of individual “rights” linked not only to property and voting but also to a community identity conceived of as inhering in individuals remains strong in India, as reflected, for example, in the central importance in Indian politics of the discourse of “rights” revolving around India’s caste-based compensatory discrimination schemes. But the importance of the “rule of law” in Indian politics has extended well beyond this, for it is now intimately bound up with a constitutional system that embodies—in theory, if not always in practice—a prominent cultural ideal of procedural formalism as one of the most basic embodiments of the people’s sovereignty, whether in the structure of elections (as run by the nominally apolitical National Election Commission) or in the positions of a sometimes activist (and sometimes quite conservative) Supreme Court. This ideal, a legacy of both British and Gandhian ideas, survives even as the state (like the British colonial state before it) cloaks a sometimes highly repressive use of state power, and a sometimes highly partisan favoritism, in the disinterested language of law. Perhaps the clearest illustration of the contradictions this generates is the contrast between the low level of popular respect for the lower courts in India (which are usually associated far more with corruption than with justice) and the relatively high level of respect for the Supreme Court and the National Election Commission, both as symbols of the “rule of law” as an ideal and for their

³⁷One illustration of this is the precipitous decline in the status of lawyers in India since independence. In colonial India, they occupied a critical strategic role between the particularisms of local communities and the state’s claims to a universalist, rationalist legitimacy. With the promulgation of the constitution and the opening of direct access to the state to many others, including those engaged in development activities, they have lost this role.

³⁸Here again, the contrast with China is marked, for in China the most popular justice hero figures, such as Judge Bao, are associated with a legal universalism, and not with the claims of particularistic communities.

sometime willingness to call those in power to account. These are today the most morally respected formal institutions in India.³⁹

Putting these together brings us to a third critical point, which should already be evident, namely that the prominence of the “rule of law” in shaping Indian identity—and the meaning of the Indian people—has left a huge and characteristic gap between ideals and realities. This was, of course, in the very nature of the “rule of law” as Thompson describes it in Britain, and it became a characteristic of the legal system in colonial India. It has come to characterize both the legal and political system in India more broadly since 1947. Yet the meanings of this gap are open to intense debate. For many it has been taken as evidence of the weakness of the “rule of law” in India, where the gap between the law’s ideals and the realities of legal enforcement and action is sometimes a chasm. But, as we have argued, the sustaining of this gap can be taken also as evidence of the critical role that the “rule of law” plays as an ideology, balancing ideals against the inescapable realities associated with the “rule of man.” Whatever its contradictions, there is little doubt that understanding the nature of the “rule of law,” not just as a system of ordering and adjudication but as a product of imagination central to the paradoxes of sovereignty, remains critical to the dynamics of Indian politics in the twentieth century.

China

The career of the rule of law in twentieth-century China’s politics has, of course, been quite different from its career in India’s. The reasons for this are various and include the extraordinary international pressures that called into question the very survival of the state in China in the years after the fall of the Qing in 1911. But our argument is that the trajectory of Chinese politics in the twentieth century was also profoundly influenced by the legacies of the structure of the “rule of law” that had existed under the Qing. Though the foundations for comparison with India in these years are many, much in the history of the rule of law in the twentieth century can be understood in terms of the central contrast between Qing China and British India that we have delineated. While the strong conceptual separation of the law’s procedure and substance influenced significantly the development of Indian nationalism, the fusing of procedure and substance in defining the law in China had equally significant long-term effects.

Given that the association of the “rule of law” with indigenous notions of sovereignty was far more powerful in nineteenth-century China than in British India—and more deeply ingrained in Chinese society—one would expect that prospects for building new forms of state authority linked to the “rule of law”

³⁹Some quantitative evidence on this comes from the National Election Survey. According to survey data, 75 percent think that the judiciary and the National Election Commission function in a commendable manner, which compares with far lower figures for other institutions, such as the bureaucracy and political parties (Alam 2004, 14).

would have been better in China than in India. After all, individuals, even commoners, in the Qing could advance claims about law “belonging to all under heaven” and could conceive of using the law effectively in their own interests because they had some knowledge not only about how the law operated in both procedure and substance, but also about the transcendent principles that ostensibly framed the law. Yet ironically, it was perhaps precisely because of this deeply rooted set of ideas that with the fall of the Qing, law’s prospects in China instead proved problematic. With the emperor no longer the moral pivot and Confucianism under attack, the law ceased to be shared by the people, society, and state. State legitimacy flowed not from delivering justice to the people but from success at obtaining justice for the Chinese nation in a hostile and changing international environment. And as parties competed for state power, there was little room for the law to stand in an autonomous space outside both state and society, defining an idealized notion of the “people” standing outside substantive contention. The party, not the law, defined “the people,” and the law served the interests of the party.⁴⁰ It was not until the last several decades of the twentieth century that discussion of the rule of law as an end in itself played a prominent role again in public discourse.

This trajectory had its roots in late Qing legal reforms. Arising out of long-term internal concerns about defects in the legal system, as well as a dynastic commitment to end extraterritoriality, proposals for legal reform focused on elimination of cruel punishments, revision of the criminal law, creation of a separate civil code, separation of justice from administration, and abolition of disparate legal treatment for Han Chinese and Manchus. By the fall of the dynasty, cruel punishments and ethnic discrimination had been ended, a new criminal law drafted, and a start made on the “separation of powers” with the Republic continuing the late Qing rule that judges should not be members of political parties. Though these reforms all had practical political roots, their significance lay in the fact that they were also grounded in a concern to separate the realm of law from its Confucian foundations—that is, to separate moral teaching (*lijiao*) from the judicial process.

But the key to this separation lay primarily in a concern to define new sources of sovereignty in order to legitimize the Chinese state in a world of hostile powers. Thus, as Henrietta Harrison has argued, even as China’s new (though generally ineffectual) consultative assemblies “gave institutional form to the new idea that the legitimacy of the state came from the ‘people’” (and not from the “emperor’s relationship with Heaven”) (2000, 9), the legal reforms that derived from such political reforms drew less on new ideas of “doing justice” than on securing international legitimacy for the Chinese state. This approach was evident not only in official writings but also in press coverage of

⁴⁰For a recent extended analysis of the primacy of the party over the state in twentieth-century China, see Zhu Suli (2007).

celebrated cases. Thus, in an early twentieth-century case involving a wife's attempted murder of her husband, an act that struck at core Confucian moral teachings, imperial officials used newspaper accounts of the trial not to discourse on *lijiao* but rather to impress on the throne how the case was adversely affecting foreign attitudes on extraterritoriality (Zhang 2005).

Even as the late Qing consultative assemblies marked the beginnings of a de-linking of justice from the Mandate of Heaven, the inescapable presence of foreign powers increasingly defined the terms of debate about the "rule of law" in China. The new concept of the citizen (*guomin*) focused on dynastic relations with the foreigners rather than on "ensuring the rights of individual citizens vis-à-vis the nation state." In this context, political rights were "construed as rights to act in the national rather than the personal interest" (Judge 2002, 42). This attitude did not prevent the Republic from attempting to borrow new legal institutions from Europe that recognized the fundamental importance to the legal order of a rights-bearing individual pursuing his or her self-interest before disinterested adjudicators in courts that were committed to formal procedure and, in theory, "above politics." Indeed, despite the apparent contradictions, between 1912 and the late 1920s, the new legal profession flourished in many of China's large coastal and riverine cities, thus suggesting to some that China was moving toward a new "rule of law" in which individual and group interests could be seen as legitimate as national ones. But this development was severely limited not only by continuing international pressures and internal instabilities, but also by contradictions in the relationship between state and society that these developments embodied.

At the very heart of these contradictions lay the changing meaning of the opposition between "rule of law" (*fazhi*) and "rule of man" (*renzhi*), a conceptual dichotomy central to the role of law and the very definition of a "rule of law" under the Qing. But in practice, as the comparison with India suggests, the grounding of the "rule of law" in a distinctively Chinese cultural milieu under the Qing had been associated not with complete opposition to the "rule of man," but rather with the projection of a particular type of authoritative man, capable of the self-cultivation and self-discipline necessary to subordinate individual self-interest to larger civilizational principle. This image was powerfully associated under the Qing with the Confucian gentleman, or *literatus*. But unlike in India, where Gandhi's projection of a particular type of self-controlled and self-disciplined man was central to conceptually grounding a statist, colonial "rule of law" in a nationalist (and indigenous) Indian moral idiom, China's rejection of Confucianism in the name of establishing for itself a new place in international order threw this association into confusion.

"Rule by man" adherents drew on Confucian concepts but tried to avoid being seen as promoting Confucianism (Jenco 2006)—a formidable challenge because, in essence, their arguments reprised those used by the moral renovators who had opposed the statecraft school in the 1830s and asserted that

the virtuous activity of the individual, especially the exceptional individual (*renwu*), accomplished more than institutions. “Rule of law” advocates in these circumstances ranged across the political spectrum. Yuan Shikai, for example, who on the one hand vehemently opposed criminal law changes that diminished the role of *lijiao* and on the other attempted to assert a form of personalized authority in reestablishing the monarchy, could, nevertheless, in the context of denouncing arbitrary seizures of property, assert that “the Republic is based on the rule of law” (Jenco 2006). At the other end of the spectrum, Chen Duxiu, one of the founders of the Communist Party, denounced such forms of personalized “rule of man” as vulnerable to emotion and inferior to objective rule of law, even when embodied in a popular voice. Indeed, in a celebrated 1930s case involving a filial daughter’s assassination of her father’s murderer, the final court judgment made clear that law could not be held hostage to public sympathy or community sentiment. The judges rejected the accused’s emotional claims and calls on public sympathy and mitigated her punishment on legal reasons—which, however cramped, allowed them to proclaim the rule of law (Lean 2007, 108–9, 135, 137).⁴¹ Here was a clear assertion of the critical importance of moral rationality (configured in contrast to popular emotion) as a key to the operation of “rule of law.” But the relationship of this notion to a distinctive Chinese culture—or to the Chinese “people”—continued to be complicated by the concern to transcend Confucian ideals of self-cultivation in asserting new foundations for China’s international legitimacy.

Even as the dynamics of “rule of law” arguments in India focused on the adaptation of an authoritarian, statist order to a new, nationalist, self-disciplined self, with roots in older, moral visions of the constraints on state authority, the dynamics of “rule of law” arguments in China moved in a very different direction. This difference was all the more marked as the association of “national” interest came to be strongly associated with party in the context of the conflicts that marked the 1920s and 1930s. Once the Nationalists (GMD) and Communists (CCP) had formed their United Front in 1923, they agreed that national revolution took priority over social revolution, and thus over the cultivation of a new, reformist vision of autonomous self-cultivation. “If the social interest conflicted with the national interest, then the social [had] to yield to the national” (Fitzgerald 1996, 175). Not only was everyone to act as “national citizens” rather than as “social actors on behalf sectional interests,” but the state was to be subordinated to the Nationalist Party, which would “govern the state through the Party” (Fitzgerald 1996, 176, 185).

⁴¹However, Eugenia Lean’s broader point in her study of this case is that “public passions” in the 1930s created a politics of affect that could “shape judicial proceedings” (2007, 208). She argues that out of their determination to resist both the increasing interference of the Nationalist Party and “public passions,” the courts sought to use this case to “promote an agenda of due process” (135). Ultimately, The Nationalist Party pardoned the accused in response to public sympathy for her filial act of vengeance.

As Xu Xiaoqun has shown, by the mid-1920s, both the legal profession and the judiciary had been “partyized” (*danghua*) (2008, 84–112). The senior GMD leader Hu Hanmin explained that in the absence of specific legal provisions, judges should base their decisions on Sun Yat-sen’s writings (Van der Valk 1969, 45, *passim*). Gone was the rule that judges could not belong to political parties. (Both the GMD and later the CCP would, in fact, require party membership for judges.) The GMD explicitly stated that the purpose of the Criminal Code was to enforce party principles, while the aim of the Civil Code was to emphasize community and public interests over individual ones. At the same time, the Nationalist government passed an increasingly draconian set of laws for the punishment of banditry, laws that, like similar Qing statutes, combined suspension of normal due process with exceptionally harsh punishment. To be sure, all of this is not to say that there was nothing at all that suggested a continuing vision of a “rule of law” in China that belonged not just to the state (or the party) but to everyone. As the model briefs of outstanding lawyers and provincial high court decisions (held in the Number 2 Archives in Nanjing) illustrate, one could still find lawyers and judges who continued to operate as if law still constituted and occupied an autonomous procedural realm—but the wider environment of external and internal war, and especially of the substitution of party ideology for *lijiao*, could hardly be called conducive to their efforts.

When the CCP took power in 1949, it flatly rejected the possibility that any element of “bourgeois” GMD law was inheritable, but as we have argued earlier, the CCP’s view of the relationship between party and state, in particular between party and law, was at its core not that different from the GMD’s. Law did not belong to all under heaven, or even “the people” as constituted by Marxist ideology. Law was an instrument of party policy, as implemented through the party/state. As Peng Zhen, a party leader on issues of legal theory and institutions put it, law was “the authoritative articulation of the political, social and economic policies sanctioned by the Party and enforced by the state” (Potter 2003, 110). Nonetheless, Peng, always conscious of the party’s role as exemplar of good behavior, also argued that even as its dictatorship of the proletariat carried out class struggle, the party could not hide behind the shield of revolutionary struggle and that its members’ illegal acts had to be subject to the law and not simply party discipline. Law’s role, moreover, should have expanded as class struggle receded, but during class struggle, legal professionals and their rules had no standing at all.⁴² Still, for Peng and the others in the party who shared his views, the procedural formalism and general applicability of the law, even

⁴²During the 1957 Anti-Rightist movement, lawyers and judges who sought to provide trials for or raise procedural and substantive legal issues on behalf of the movement’s “struggle objects” soon found themselves victims of the movement and purged from their profession, which itself was utterly dismantled during the Cultural Revolution. When the People’s Republic of China began to rebuild its legal institutions in the early 1980s, it “reversed verdicts” and drew upon these “justice heroes” to help restore the legal profession.

in its mode as instrument of party power, represented the notion that everyone was “equal before the truth.” In theory—but, as they would learn, not in practice—it could also serve as a bulwark against the personalistic rule of man, especially the rule of one man, whether by Mao, who would make Peng one of his Cultural Revolution’s first victims, or later by Deng Xiaoping.

In the early 1980s, when Deng Xiaoping sought to move China toward a market economy, he urged “holding law in one hand and reform in the other.” However, the role of the “rule of law” was complicated by two factors. First, China had to teach its people about law and its appropriate role in society. The common knowledge of substance and procedure and its connection to social values that characterized the Qing was lacking in the People’s Republic of China. So, beginning in 1979, China initiated an effort to “popularize legal knowledge,” an effort that in 1985 became formalized with its own First Five-Year Plan. Legal “how to” books and “plain Chinese” explanations of statutes poured from publishers, and, strikingly, texts about imperial China’s “justice heroes” occupied pride of place next to tales about the CCP’s own “justice heroes” from the 1930s. If, as Kahn writes, “the rule of law is a product of the imagination before it is a product of legislation or judicial acts” (1999, 73), then China needed to reignite its people’s imagination. Second, and even more challenging, China had to confront the reality that a market-based economy, unlike a planned economy composed almost entirely of state and collectively owned entities, required a framework that fostered voluntary, horizontal relationships between a wide variety of “rights-bearing” actors. In some ways, the historical legacy of China’s vibrant social culture of contracts provided this framework. As a social reality, an economic world of contract had long been far more deeply embedded in Chinese social realities than was the case in India. But, as the vigorous debates surrounding the 1986 General Principles of Civil Law indicate (Ocko 1989), there was in China considerable anxiety that this new economic framework carried within it the seeds for ideas about a political order rooted in the notions of mutual consent embodied in property and contract—and in legal procedure. It is in this sense that the reintroduction of a “rule of law” has remained a problematic undertaking, for the very history of “rule of law” thinking that had facilitated it has also constrained its political adaptation to China’s new social order.

CONCLUSION

In both British India and Qing China—albeit it in somewhat different ways—the conceptual opposition between the rule of man and the rule of law was central to the definition of sovereignty. However, the dichotomy between the rule of man and the rule of law opened up an inescapable paradox. In practice, the rule of law could never, of course, be separated from the rule of man, because without human administration the law means nothing. Yet it was the conceptual

juxtaposition of the rule of law and the rule of man as opposing principles, based on the assumption that the law's principles somehow derived from sources external to the political structures of contemporaneous human society, that gave the rule of law its moral power as a political legitimizer. Examining the different forms of this tension is thus central to our comparative exploration of the "rule of law" as a functioning ideology.

As we have argued in the cases of both India and China, the "rule of law" is not inherently democratic. The appeal to law, in fact, defined in both imperial China and colonial India ideological foundations for profoundly authoritarian forms of governance. Yet it did so in different ways—and in each case provided powerful conceptual foundations for constraints on the exercise of political power, even as it justified elite rule. For both the Qing and the British, the rule of law depended not just on the definition of specific laws and legal procedures, but also on the assumption that the structure of the law itself embodied moral principles that were in tension with the structures of everyday power and desire that governed society. This was a central element in both cases in justifying authoritarian rule. Society was defined, in essence, by the moral rationality it lacked. The gap between the levels of rationality and moral cultivation that characterized the rulers (and the law) and those that characterized society in effect defined in both cases a critical distinction between society and state.

Despite these commonalities, the differences between the ways that the law constituted images of imperfect societies were also critical to understanding the distinctive historical meanings of the "rule of law" in the two cases. In China, the ideology of the "rule of law" was based on the notion that the capacity for moral rationality was universal, but unequally distributed, so that law must act differently on different status groups. Society was thus conceptualized as hierarchically differentiated but defined by common principles, exemplified in both the substance and procedure of the law, for which all should strive. An ideal society would embody the same principles that the rulers applied to themselves. But in colonial India, the structure of the law defined a conceptual wall of separation between state and society that was embodied in the distinction between substantive and procedural law. While the state's superior rationality was reflected in its professed commitment to procedural universality, the substance of the law was recognized as varying (at least in "personal" matters) with the different communities that composed Indian society. The image of society constructed by the law in British India was thus of a society that was not only imperfect but also culturally fragmented.

Such differences were embodied in, but also critically complicated by, the ways that property, contract, and rights came to define differently the structural relations between society and state. In some ways, the law of property and contracts seemed to reverse the images of China and India that we have just presented. In China, property rights rooted in the logic of contracts were far more deeply embedded in popular social relations than in India, thus defining a world of procedural norms in some ways independently of the state. Conversely,

the substantive law of private ownership was held up by many theorists in British India as a universal good, binding the values of society and state together. Yet in practice, these contrasts were in each case undercut by the political realities that underlay the law's operation. In China, it was the norms of substantive justice, far more than property, that mattered to heaven—and these norms bound society and state together. In colonial India, on the other hand, the law of property, whatever its universalism, was in practice hemmed in by the structures of cultural difference and societal diversity embodied in other aspects of the legal system—and this underscored the cultural separation of society and state. These contrasts proved critical to twentieth-century politics.

Central to the long-term implications of the rule of law in both India and China, however, was the relationship of the “rule of law” to the concept of “the people.” “The distinctive character of legal rule,” argues Kahn, is not reached “until we place an authoritative command within the historical narrative of the community of which we are part” (1999, 44). Though the British had used the structure of the rule of law to deny the existence of a unified people in India, their separation of procedure from substance had, in fact, facilitated Gandhi's assertion of an overarching moral narrative that recognized the tension between moral principle and everyday diversity as the key to a sense of national identity. This was subsequently embodied in India's constitutional tradition and today defines a society in which structures of law play significant roles in defining the nation, in spite of a wide gap between reality and principle. In China, the story was quite different. Under the Qing, the “rule of law” was far more central to a narrative of the people's identity than it was in British India, but with procedural and substantive law inextricably fused, law's relationship to national identity shifted dramatically in the twentieth century. With the substance of the law at the heart of the twentieth century's great revolutionary controversies regarding hierarchy, class, social equality, and state power, the law itself became deeply enmeshed in party politics, and there was little scope for an appeal to the law's procedures to stand above the fray of political competition and party organization as a symbol of Chinese unity.

Contrasting the trajectories of the “rule of law” in China and India in the nineteenth and twentieth century is thus important, we believe, for two reasons. First, however important some may view the “rule of law” for providing an instrumental foundation for democracy or for the operation of free markets in the modern world, it cannot simply be conceptualized as a “policy” to facilitate such ends. Rather, as we have attempted to show, the history of the “rule of law” only makes sense if it is embedded in larger histories of state power and sovereignty. To imagine that the “rule of law” can be established by simply building legal institutions makes little sense. But beyond this, we have undertaken this brief comparison for a second reason, which follows from the first. Though the larger history of the “rule of law” has usually been embedded in the particular history of Western Europe and Euro-America, its larger significance in the modern world is best understood if we move beyond this framework. We do not deny

the peculiar importance of Western European history to this story, or even that in the histories of India and China, the links to a larger world history are critical to this story. But we argue that the fundamental paradoxes of sovereignty that have shaped the history of the “rule of law” are in no way peculiar to Europe. We hope that this article may thus be part of a larger dialogue on this subject.

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