

## **Part I**

### **Introduction**

## Chapter One

### Law and Society in the People's Republic of China

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In today's China, law matters more than it ever has. Twenty five years of energetic legislating, both by the National People's Congress (NPC) and local congresses, has created new legal rights and institutions; the courts, the bar and legal education have been revived, and a framework for foreign investment has been fashioned. At the same time, the Chinese government has promoted a reform it often calls "legalization" (*fazhihua*). This initiative has brought legal institutions and discourses into countless areas of everyday life. Legalization, among other things, has provided the regime with a gloss of legitimacy and has enhanced predictability such that few believe China can once again be torn apart by the whims of a powerful ruler, as it was during the Cultural Revolution. Increased reliance on law has also affected how disputes are resolved. This is not unprecedented in Chinese history,<sup>1</sup> but as market reforms have deepened and social inequality has widened, legal forums — ranging from

#### Notes

<sup>1</sup> Kathryn Bernhardt and Philip C.C. Huang, *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994); Neil J. Diamant, "Conflict and Conflict Resolution in China: Beyond Mediation Centered Approaches," *Journal of Conflict Resolution*, Vol. 44, No. 4 (August 2000), pp 523-51.

mediation and arbitration commissions to courts — have come to play an increasingly prominent role in politics and society. As instrument of trade, legitimacy and social control, there is little doubt that law matters.

Compared to its past, China has more laws; more people have at least rudimentary legal knowledge, and law is becoming increasingly accessible. This volume thus does not focus on whether law matters. Nor does it chart the course of legal reform or systematically describe how Chinese legal institutions operate, since this has been done elsewhere.<sup>2</sup> Instead, we concentrate on questions of how, when, and to whom law matters and how we should go about studying the dynamic relationship between law and society.

These are questions of some import, not least because China is experiencing a market transition and an explosion in economic transactions. This transformation is affecting how people think about the law and is creating expectations and controversies that legal mechanisms can play a part in addressing. Yet, at the same time, for every Chinese businessperson who turns to a court or an arbitration commission to resolve a contract dispute, there are several other individuals who have been left behind. How will workers or villagers respond if growing inequality and corruption are not ameliorated by the legal system and cadres no longer fear Maoist-style campaigns?<sup>3</sup> Knowing that there are more rules that govern official conduct,<sup>4</sup> and

<sup>2</sup> Stanley Lubman, *Bird in a Cage: Chinese Legal Reform in China After Mao* (Stanford: Stanford University Press, 1999); J. Chen, *Chinese Law: Toward an Understanding of Chinese Law, Its Nature and Development* (The Hague: Kluwer Law International, 1999); Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (London: Routledge, 2001); Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002).

<sup>3</sup> Unchecked corruption has led to some nostalgia for campaigns in the countryside. See Kevin J. O'Brien and Lianjiang Li, "Campaign Nostalgia in the Chinese Countryside," *Asian Survey*, Vol. 39, No. 3 (1999), pp. 375-393.

<sup>4</sup> This is not altogether surprising, since liberalizing an economy often brings forth more state intervention. See Steven K. Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Democracies* (Ithaca: Cornell University Press, 1996).

that class background no longer impedes a person from gaining a hearing, does not mean that all Chinese have equal access to justice – something that even far more mature legal systems cannot boast. There may be hundreds of laws on the books, but many are not wholly or even partially enforced.<sup>5</sup> And, while it is true that more people are aware of laws that could benefit them, we cannot assume that such knowledge automatically translates into “rights consciousness” or an ability to seize on legal norms to defend one’s “lawful rights and interests” (*hefa quanyi*).

If law matters, then for whom does it matter most, and for what purposes is it used? At a time when both Chinese law and society are becoming increasingly multidimensional and complex, these questions can be profitably explored by relying on a methodology that 1) seeks to capture interactions between the two, and 2) is sensitive to history. One such approach, often referred to as scholarship in the “law and society” tradition, is particularly well-suited to study the extent to which law in China is becoming, in the words of Patricia Ewick and Susan Silbey, “a terrain for tactical encounters through which people marshal a variety of resources to achieve strategic goals.”<sup>6</sup>

We thus believe that research on socio-legal affairs in China could profit by drawing on insights from disciplines which, to date, have been somewhat peripheral to Chinese legal studies. Over the last decade, historians — including Mark Allee, Kathryn Bernhardt, Philip Huang, Melissa Macauley, Bradly Reed, and Matthew Sommer — have skillfully mined Qing, Ming, and Republican era archives to question much of what we thought we knew about the role of law

<sup>5</sup> See Donald C. Clarke, “The Execution of Civil Judgments in China,” *China Quarterly*, No. 141 (March 1995), pp. 65-81; Chen, *Chinese Law*, p. 119; Peerenboom, *China’s Long March*, p. 488.

<sup>6</sup> Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), p. 28.

in China.<sup>7</sup> Whereas earlier scholarship emphasized the irrelevance of civil law to ordinary Chinese and the obstacles to deploying it, we now know that courts were affordable and frequently used in conjunction with community mediation. Litigation masters (*songgun*) often assisted peasants in filing complaints, much to the consternation of local magistrates who fretted about society becoming overly litigious. Almost without exception, however, these path-breaking historical studies have not availed themselves of insights from work in comparative legal history and the social sciences (especially political science, legal anthropology, and the sociology of law). Nor has much of their research appeared in journals such as the *Law and Society Review*, *Journal of Legal Pluralism*, or *Law and Social Inquiry*. As a result, too many scholars of law and society remain unaware of the major changes that have occurred in our understanding of the role of law in Chinese society.

This lack of “importing” from other fields has also characterized the other main branch of Chinese legal studies. Most experts on Chinese law are themselves lawyers, teach in law schools, and/or have worked as intermediaries between Western and Chinese firms and governments. Both their training and professional role has inclined these scholars to focus more on law as centered in the state rather than law as practiced in society – the latter referring to law as an institution that draws in “numerous actors, involved in diverse projects, employing different legitimating discourses [and] material resources.”<sup>8</sup> Like students of Chinese legal history, the next generation of researchers on contemporary Chinese law could benefit from deeper integration with the bread and butter issues of the law and society field, such as the debate

<sup>7</sup> See for instance, Matthew H. Sommer, *Sex, Law, and Society in Late Imperial China* (Stanford: Stanford University Press, 2000); Bradly Reed, *Talons and Teeth: Clerks and Runners in the Qing Dynasty* (Stanford: Stanford University Press, 2000); Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford: Stanford University Press, 1998).

<sup>8</sup> Ewick and Silbey, p. 19.

between Michael McCann and Gerald Rosenberg on the role of courts in social change, Laura Nader's exploration of dispute resolution in non-Western societies, Charles Epp's comparative analysis of the conditions for "rights revolutions," Sally Engle Merry's ethnography of legal cultures in the United States, Ewick and Silbey's study of law in everyday life, and Joel Migdal's "state-in-society" approach to the study of political and legal institutions. One of the main objectives of this volume, accordingly, is to begin spanning the gap between fields that have a lot to offer each other, but have yet to really speak to one another.

Readers of this volume will perhaps notice that, with the exception of H.L. Fu, none of the authors has received formal legal training. Most are political scientists or sociologists, and their essays reflect the characteristic approaches (and perhaps blindspots!) of those fields. Readers will also notice that most of the chapters are the product of field work in the PRC and have made extensive use of newly available sources, whether these are archives (Diamant's), transcribed letters to "Letters and Petitions Offices" (Thireau and Hua), police handbooks (Tanner), the popular legal press (O'Brien and Li), participant observation (Mertha) or interviews (Frazier, Gallagher, Mertha, Tanner). Using such sources to study legal practice has a history in the China field.<sup>9</sup> Understanding the relationship between law and society in contemporary China, we feel, will be well-served by interdisciplinary research combined with

<sup>9</sup> In the 1960s, when foreign scholars could not travel to China, they relied, out of necessity, on émigré interviews to supplement more conventional academic research. See, for example, Jerome A. Cohen, *The Criminal Process in the People's Republic of China* (Cambridge, Mass.: Harvard University Press, 1968); Stanley Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China," *California Law Review*, Vol. 55, No. 5 (1967), pp. 1284-1359. More recently, Pitman Potter has been one of the few law-trained students of Chinese law to conduct survey research. See, for example, his "Civil Obligations in Shanghai: a Survey of the Getihu," *Canadian Journal of Law & Society*, Vol. 9, No. 2 (Fall 1994).

fieldwork, just as the study of law in the West has benefited from such methods.<sup>10</sup> Adopting a worm's-eye perspective can enable us to enrich our understanding of how law actually works in Chinese society, and how members of various social groups think about and use law.

This prescription alone, however, is far too vague to guide scholars embarking on the study of law and society in China: “interdisciplinary” can mean just about anything, and most China scholars today are frequent visitors to the PRC who recognize the limitations of working from legal texts. What we will do in the remainder of this introduction, therefore, is to underscore several perspectives that we think may be useful in illustrating how law and society interact, show how they were employed by various authors, and suggest how they might inform future projects. These approaches are by no means mutually exclusive, and we can foresee extending this list as more sources become available and legal scholarship on other parts of the world develops. For now, however, we simply highlight three broad concepts — mobilization of law, legal culture and formal legal institutions — and suggest that these are likely to be fruitful starting points for the disciplinary cross-fertilization that we envision.

### **Mobilizing the Law**

The Chinese government's view of law's role in society is highly instrumental, as a number of scholars have observed.<sup>11</sup> The present-day “legalization” program was not generated by a Chinese enlightenment based on a concept of natural, inalienable rights, nor was it the

<sup>10</sup> We note also that the essays in this volume were written by members of two growing groups of scholars who are increasingly influential in contemporary Chinese studies: younger Western academics who have spent considerable time studying and doing research in China and Western-trained Chinese researchers. See generally, Andrew G. Walder, “The Transformation of Contemporary China Studies, 1977-2002,” UCINAS [University of California International and Areas Studies Digital Collection] [http://repositories.cdlib.org/uciaspubs/edited\\_volumes/3/8](http://repositories.cdlib.org/uciaspubs/edited_volumes/3/8).

product of a compromise between central state and feudal or merchant élites, or the rise of a bourgeoisie. Rather, it echoes a longstanding tradition in late developers (Confucian and otherwise) which accorded the state a key, proactive role in political, economic and social development (other examples include Meiji Japan, Bismarck's Germany, and Atatürk's Turkey). In China, this statist orientation was apparent throughout the dynastic era and only intensified when the Leninist conception of a vanguard party was grafted onto an already authoritarian political tradition. Even thinkers commonly understood to be liberal in the Chinese context, men such as Liang Qichao, were reluctant to suggest that law and rights should empower commoners vis-à-vis the state.<sup>12</sup>

Several generations later, in a vastly different political system, this approach to law is still evident. In a time of rapid change in the absence of institutionalized means to express political preferences, one of the key functions of law is to provide an outlet for expressing grievances; it is not, by and large, conceived of as a precursor to democracy or a sign of liberalization. Intentionally or not, China's leaders have been astute students of Samuel Huntington, who, in his book *Political Order in Changing Societies* warned that social change without political institutionalization can easily lead to chaos (see Murray Scot Tanner's essay). As a conflict management tactic, the PRC's emphasis on law and legality has been fairly successful. Today we are witnessing an outpouring of grievances from, among others, people who lost money in the stock market, pensioners, veterans, unemployed laborers, disgruntled peasants and unhappy couples. Yet, only a small proportion of these complaints spread to other sectors, lead to violence, or threaten the existence of the regime. Institutions like courts, arbitration

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<sup>11</sup> See Lubman, *Bird in a Cage*, pp.130-135; Potter, *The Chinese Legal System*, pp. 10-12.

<sup>12</sup> See Andrew Nathan, *Chinese Democracy* (Berkeley: University of California Press, 1986), chapter 3.



commissions and mediators have all played a notable role in channeling social discontent into moderated forums. In the view of most PRC élites, law thus is essential because it contributes to a more orderly society. For citizens, the mere fact that their complaints are heard, or should be heard, helps make the regime a bit more palatable.

But how exactly do perceptions of injustice turn into legal disputes? Sociologists of law have identified a “disputing pyramid” (See Figure 1 below), in which the majority of people who feel they have experienced an “injurious experience,” do not seek outside assistance.<sup>13</sup> Instead, they tolerate it, particularly when the offender has higher social status than the aggrieved party or both have low status. According to Donald Black, toleration “is probably the most frequent response to conduct regarded as wrong, improper, injurious or otherwise deviant...most illegality is tolerated.”<sup>14</sup> Some experiences, however, become “claims”: people demand some form of remediation; they “name” and “blame” someone as responsible for their injurious experience. A “dispute” then arises when the parties cannot reach a settlement. Only at the top level of the pyramid do lawyers or other legal professional become involved, and persons reaching this stage will always be far less numerous than those who have grievances and are actively involved in disputes.<sup>15</sup> Third parties, when they become involved, can transform the nature of a dispute by questioning the legitimacy of either claim, or by supporting one party against the other.<sup>16</sup> In

<sup>13</sup> Richard L. Abel, “A Comparative Theory of Dispute Institutions in Society,” *Law and Society Review*, Vol. 8, No. 2 (Winter 1973), p. 228.

<sup>14</sup> Donald Black, *Sociological Justice* (New York: Oxford University Press, 1989), p. 76.

<sup>15</sup> William Felstiner, Richard Abel, and Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...,” *Law and Society Review*, Vol. 15, Nos. 3-4 (1980/1), pp. 631-54. It is also possible that by the time a dispute is aired, the original grievance might no longer be the object of the dispute. On this point, see Lynn Mather and Barbara Yngvesson, “Language, Audience and the Transformation of Disputes,” *Law and Society Review*, Vol. 15, Nos. 3-4 (1980-1), p. 776.

<sup>16</sup> During the Qing dynasty, for instance, magistrates’ comments on a plaint were sometimes enough to persuade a plaintiff to give up a claim or settle through village

many societies, such intervention occurs in regular patterns, what socio-legal scholars call a “dispute trajectory”— the “progress of a particular dispute over time through particular combinations of disputing areas, processes and outsiders towards particular outcomes.”<sup>17</sup> Still, this perspective emphasizes that most “action” in the legal realm occurs at the bottom rungs of the pyramid, well beyond the reach of formal legal institutions.

[Insert Figure 1: The Disputing Pyramid]

This perspective on how disputes are transformed — as beginning with often inchoate feelings of injustice that sometimes result in some form of third party intervention — has implications for how we study law in China. Legal anthropologists such as Laura Nader have long attempted to plumb how the moral, ethical and political universes of ordinary people produce predictable responses when legal norms and shared assumptions are violated.<sup>18</sup> Feelings of injury and injustice, after all, do not bubble up in a vacuum; they emerge, and can only be observed, in the context of expectations about what is ethical, fair, and just, and these, in turn, are often shaped by wider communities and individual experiences.<sup>19</sup> Studies of law and society

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mediation. See Philip C. C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996), p. 119.

<sup>17</sup> Jeffrey Fitzgerald and Richard Dickins, “Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law,” *Law and Society Review*, Vol. 15, Nos. 3-4 (1980/1), p. 691.

<sup>18</sup> Laura Nader, *Law in Culture and Society* (Chicago: Aldine, 1969); Laura Nader and Harry F. Todd (eds.), *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978); Laura Nader, “Up the Anthropologist: Perspectives Gained by Studying Up,” in Dell Hymes (ed.), *Reinventing Anthropology* (New York: Vintage Books, 1974), pp. 284-311.

<sup>19</sup> Laura Stoker, “Interest and Ethics in Politics,” *American Political Science Review*, Vol. 86, No. 2 (June 1992), pp. 369-380.

in China, accordingly, might wish to pay more attention to the moral and ethical norms whose violation can lead to the emergence of disputes. Several papers in this volume suggest the payoffs of doing this. Neil Diamant's essay on veterans, for example, shows that demobilized soldiers initiated protests when local officials violated what they considered to be a sacrosanct moral and political "contract" made by the state when they joined the military: namely, that they would be taken care of after their service was over and treated with respect. Mark Frazier, Mary Gallagher, and Isabelle Thireau and Hua Linshan all touch upon workers who invoke the state's moral obligation (sometimes couched in Confucian or Maoist language) to guarantee their livelihood in the event of retirement or factory layoffs. Since it is probable that more and more groups will join the ranks of the discontented in the coming years, more researchers might want to focus on the understandings, assumptions and expectations these groups have prior to the appearance of a formal, observable, dispute.<sup>20</sup> Such studies would provide important, indeed essential, background for understanding which disputes emerge, their formal setting, and their eventual outcome.

In addition to highlighting preexisting norms and expectations, the notion of a disputing pyramid suggests other research topics. As Donald Black has argued, even though an individual or group might feel aggrieved and want to do something about it, few actually act upon these feelings. Between "naming and blaming" and actually "claiming" something in a legal form

<sup>20</sup> For examples of such work on one aggrieved population, see Ching Kwan Lee, "The 'Revenge of History': Collective Memories and Labor Protests in Northeastern China," *Ethnography*, Vol. 1, No. 2 (2000); Ching Kwan Lee, "From the Specter of Mao to the Spirit of the Law: Labor Insurgency in China," *Theory and Society*, Vol. 31, No. 2 (April 2002), pp. 189-228; Marc J. Blecher, "Hegemony and Workers' Politics in China," *China Quarterly*, No. 170 (June 2002), pp. 283-303; William Hurst and Kevin J. O'Brien, "China's Contentious Pensioners," *China Quarterly*, No. 170 (June 2002), pp. 345-60; Dorothy J. Solinger, "The Potential for Urban Unrest: Will the Fencers Stay on the Piste?", in David Shambaugh (ed.), *Is China Unstable* (Armonk, NY: M.E. Sharpe, 2000), pp. 79-94.

many things can intervene. In China there are untold numbers of disgruntled workers and peasants, but only a limited number of protests, petitions, and lawsuits (see Gallagher's essay). We should ask, therefore, how and why some grievances transformed into claims and others do not? How do groups mobilize to take advantage of certain laws and institutions? Collective mobilization is of course not new to China studies (although the extent of group petitioning might surprise those more familiar with Western cases). Still, studies of law in China have yet to integrate one of the more promising approaches to how law works in practice. This approach focuses less on legal substance and procedure — as pivotal as these are<sup>21</sup> — than on the ability of aggrieved parties to forge a group identity and engage in law-based contention. Law, in this perspective, is both a critical resource in collective action and the final destination in a dispute's trajectory.

By shifting the focus from law as text to issues surrounding legal mobilization we can broaden our horizons and speak in a vocabulary common to scholars in a number of fields. For instance, the collective action literature highlights the role played by "political entrepreneurs" in overcoming people's natural tendency to free-ride on the efforts of others.<sup>22</sup> Often, these individuals are, for whatever reason, particularly feisty and relatively immune to risk. In Diamant's essay, veterans were sometimes troublesome to the authorities because, having served in the military, they were often physically tough, more difficult to intimidate, and willing to bear the start-up costs of organizing to defend their benefits. Risk-takers, often with atypically forceful personalities, also play a role in O'Brien and Li's essay on the Administrative Litigation

<sup>21</sup> As, for instance, in class actions, Benjamin L. Liebman, "Note: Class Action Litigation in China," *Harvard Law Review*, Vol. 111, No. 6 (1998), pp. 1523-1541.

<sup>22</sup> In the Asian studies field this view is often associated with Samuel Popkin, *The Rational Peasant: The Political Economy of Rural Society in Vietnam* (Berkeley: University of California Press, 1979), especially Chapter 6.

Law (ALL), as well as other articles they have authored on popular resistance in rural China.<sup>23</sup>

While the source of individual assertiveness is often obscure, the role of such individuals in spearheading legal action needs to receive more attention, perhaps through a biographical approach to the study of legal contention, much as students of social movements have explored recruitment to high-risk activism, leadership dynamics, and the effects protest can have on a person's life course.<sup>24</sup> While this research strategy poses obvious challenges in China, it is worth considering since it has the potential to help us understand how and why only some feelings of injustice end up becoming formal claims. This approach has already been used to good effect by Ewick and Silbey in their *The Common Place of Law: Stories from Everyday Life*, which assesses Americans' understanding of law and legality (shared schemas and interpretative frames for understanding law) by focusing on the experiences of several individuals.

Highlighting how people take advantage of law is important not only because it calls attention to individuals who are willing to initiate petitions, lawsuits, and protests, but also because it emphasizes the role of resources — social as well as financial — in legal mobilization. For some aggrieved parties, law may not provide an effective tool to redress wrongs insofar as they lack leaders (e.g. the “peasant heroes” in O'Brien's and Li's account) willing to incur significant risks or because they cannot mobilize sufficient resources to exploit existing laws.

<sup>23</sup> Kevin J. O'Brien and Lianjiang Li, “The Politics of Lodging Complaints in Rural China,” *China Quarterly*, No. 143 (September 1995), pp. 756-783; Lianjiang Li and Kevin J. O'Brien, “Villagers and Popular Resistance in Contemporary China,” *Modern China*, Vol. 22, No. 1 (January 1996), pp. 28-61.

<sup>24</sup> See Doug McAdam, “Recruitment to High-Risk Activism: The Case of the Freedom Summer,” *American Journal of Sociology*, Vol. 92, No. 1 (1986); Ron Aminzade, Jack A. Goldstone, and Elizabeth J. Perry, “Leadership Dynamics and Dynamics of Contention,” in Ronald R. Aminzade et al., *Silence and Voice in the Study of Contentious Politics* (New York: Cambridge University Press, 2001), pp. 126-54; Doug McAdam, “The Biographical Impact of Activism,” in Marco Guigni, Doug McAdam, and Charles Tilly (eds.), *How Social Movements Matter* (Minneapolis: University of Minnesota Press, 1999), pp. 119-46.

An example of a study that explores this issue is Charles Epp's award-winning *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Epp examined the growth of individual rights in four countries (the US, Canada, Great Britain and India) and found that, given equally liberal laws and activist judiciaries, countries with a variety of interest groups, lobbies, foundations and right advocacy groups ready to provide financial resources to poor litigants experienced the greatest expansion of rights. "Successful rights litigation," he argues

usually consumes resources beyond the reach of individual plaintiffs —resources that can be provided only by an ongoing support structure...ordinary individuals typically do not have the time, money, or experience necessary to support a long-running lawsuit through several levels of the judicial system...A support structure can provide the consistent support that is needed to move case after case through the courts.<sup>25</sup>

Thus India, despite a well-respected Supreme Court and new laws expanding individual rights, experienced relatively little rights-based litigation. This arose because "the Indian interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively and the availability of resources for non-economic appellate litigation is limited."<sup>26</sup>

<sup>25</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), p. 95.

<sup>26</sup> *Ibid.*, pp. 18-19.

The concept of “support structure,” we believe, merits attention in studies of Chinese legal contention. Support can, for instance, come in the form of community solidarity.<sup>27</sup> Collective petitions (by groups of workers, peasant men, women, veterans etc.) to township, city or national authorities are a common feature of law in today’s China, but were not unknown even during the more restrictive Maoist era.<sup>28</sup> Building coalitions and creating solidarity is never an easy feat, and typically depends on the ability of leaders to recast grievances into a public discourse in such a way that persuades audiences, reassures those who might be alarmed by collective action, and generates a critical mass of followers.<sup>29</sup> The essays in this volume by Thireau and Hua, Frazier, Gallagher and Diamant all detail such efforts by a variety of social groups. In contemporary China, support can also appear in the form of media attention (radio, television, legal magazines, newspapers, letters to the editor, and so on). While press outlets remain subject to state control, increased editorial freedom and competitive pressures have given rise to a more market-oriented media in which muckraking reporters and daring magazines can draw huge audiences and high-level attention by exposing official wrongdoing. Petitioners know

<sup>27</sup> On winning community support for popular action, see Yongshun Cai, “The Resistance of Chinese Laid-off Workers in the Reform Period,” *China Quarterly*, No. 170 (June 2002), pp. 327-44; Xiaolin Guo, “Land Expropriation and Rural Conflicts in China,” *China Quarterly*, No. 166 (June 2001), pp. 431-35; O’Brien and Li, “The Politics of Lodging Complaints,” pp. 771-75.

<sup>28</sup> John P. Burns, *Political Participation in Rural China* (Berkeley: University of California Press, 1988); Victor C. Falkenheim, “Political Participation in China,” *Problems of Communism*, Vol. 27, No. 3 (May-June 1978), pp. 18-32; For groups of women petitioning for divorce in the Maoist period, see Neil J. Diamant, *Revolutionizing the Family: Politics, Love and Divorce in Urban and Rural China, 1949-1968* (Berkeley: University of California Press, 2000), chapters 3, 4, 6.

<sup>29</sup> Mather and Yngvesson, “Language, Audience, and the Transformation of Disputes,” p. 777; Pamela Oliver, Gerald Marwell and Ruy Teixeira, “A Theory of the Critical Mass I: Interdependence, Group Heterogeneity and the Production of Collective Action,” *American Journal of Sociology*, Vol. 91, No. 3 (November 1995), pp. 522-56; Gerald Marwell, Pamela Oliver and Ralph Prahl, “Social Networks and Collective Action: A Theory of the Critical Mass III,” *American Journal of Sociology*, Vol. 94, No. 3 (November 1988), pp. 502-34.

this and sometimes try to gain public and official sympathy for upholding existing laws and regulations by seeking media exposure. The media are thus a key legal actor in the contemporary scene, and individuals and groups that can locate champions for their appeals (see the essays by Frazier, and O'Brien and Li for examples) have a greater chance of elevating their feelings of injustice to the status of "claim."<sup>30</sup> Those groups that have difficulty ferreting out media allies, on the contrary, can find their entry to remedial institutions impeded. Diamant's veterans, for example, have long had direct access to the state through veteran committees as well as high level representation, but because their plight is underreported (for security reasons), their efforts to gain redress are hampered by a weak support structure. Most ordinary people assume, absent contrary information, that the state implements its own laws and is taking care of them.

Whether China will develop support structures for rights-based litigation is still an open question. But there are signs of change. Although Ethan Michelson has shown that urban lawyers do not take part in as much collective action as might be expected,<sup>31</sup> legal aid offices have sprung up in many villages, townships and counties, and foreign legal-aid schemes have supported domestic law-making and efforts to enhance legal knowledge among the populace (*pufa*). There is, however, still too little research on how aggrieved parties work to generate solidarity and a critical mass of supporters, a topic that will only grow in importance as social inequalities deepen.

<sup>30</sup> For an analysis of stories covered by China's most popular television program devoted to investigative journalism, see Alex Chan, "From Propaganda to Hegemony: *Jiaodian Fangtan* and China's Media Policy," *Journal of Contemporary China*, Vol. 11, No. 30 (February 2002).

<sup>31</sup> Ethan Michelson, "They Talk the Talk, But Can They Walk the Walk: Obstacles to Collective Action Among Chinese Lawyers," paper presented at the Conference on Law and Society in China, University of California, Berkeley, September 20-21, 2002.



Access to justice in China is thus likely to vary widely, often depending on people's willingness to take risks, generate solidarity, raise money, and create alliances with the media or intrepid lawyers. Yet, even if such efforts are successful, they do not guarantee entry to legal forums. First, in asserting claims (for unenforced rights or benefits) both individuals and groups have to learn how to couch their grievances in terms that will garner public and official support. This might be in the form of what Kevin O'Brien has termed "rightful resistance" (citing laws, policies, and other leadership commitments to combat local officials who are not implementing those laws, policies and commitments<sup>32</sup>) or evoking broader, moral themes, such as "fairness" in tax policy, "humanity" in supporting unemployed workers or retirees that resonate with agreed-upon norms for behavior.

A number of the essays in this volume offer examples of legal and moral claims-making at work. Thireau and Hua pay especially close attention to the role of legal norms and legally-valid claims in mobilization, insofar as they become resources people use to pursue or defend their interests, not only within courts, but outside of them. Whether out of cleverness, naiveté, optimism, wishful thinking or a "majestic" conception of law that places it outside of everyday life,<sup>33</sup> many people take the state at its word and profess little more than a desire to make the system live up to what it's supposed to be. Specific legal clauses are central in O'Brien and Li's account of the ALL, Gallagher's workers using the labor law, Thireau and Hua's workers using the Letters and Visits Office and Diamant's veterans. At the same time, however, we also need to investigate how legal norms are supplemented by larger, morally-based appeals for justice (see Gallagher's chapter), many of which do not explicitly emphasize individual rights but rather assert claims that are more palatable to key state officials. Such appeals might be thought of as

<sup>32</sup> Kevin J. O'Brien "Rightful Resistance," *World Politics*, Vol. 49, No. 1 (October 1996), pp. 31-55.

“counter hegemonic” in the Gramscian sense since they attempt to rework some elements of the prevailing hegemony (arguing, for instance, that “workers are the masters of state”) without trying to subvert them completely. This perspective recognizes that “all struggles commence on old grounds”<sup>34</sup> and today's legal claims share important similarities with a rules consciousness and sensitivity to government discourse that has been present in China for centuries.<sup>35</sup> Members of the popular classes, in other words, have long been adept at taking advantage of state commitments, professed ideals and legitimating myths, while seizing on official rhetoric (whether framed in terms of Confucianism, class struggle, or legal rights) to press their demands. How contemporary legal, often proactive, claims differ from appeals based on equity and fairness directed at dynastic officials who, for example, neglected proper tax collection procedures or employed biased conversion ratios deserves further research.

Second, and perhaps more important in an authoritarian state such as China, mobilization, whether as individuals or in groups, with or without a support structure, is likely to produce counter-mobilization from the state's coercive organs. The plaintiff-oriented dispute pyramid might thus be laid next to a parallel “defendant pyramid” in which agencies of the state take steps, sometimes of increasing harshness, to crush legal mobilization at its point of greatest vulnerability.<sup>36</sup> The authorities can (and often do) detain risk-taking legal entrepreneurs”; they attempt to suppress information about relevant laws, such as handbooks intended for plaintiffs;

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<sup>33</sup> Ewick and Silbey, *The Common Place of Law*, p. 28.

<sup>34</sup> Alan Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies,” *Journal of Law and Society*, Vol. 17, No. 3 (Fall 1990), pp. 313, 324.

<sup>35</sup> On rules consciousness in dynastic China, see R. Bin Wong, *China Transformed* (Ithaca, NY: Cornell University Press, 1997), pp. 235-37; Lubman, *Bird in a Cage*, pp. 236-237, 307; also various selections in Merle Goldman and Elizabeth J. Perry (eds.), *Changing Meanings of Citizenship in Modern China* (Cambridge, MA: Harvard University Press, 2002). On competitive, reactive, and proactive claims in contemporary China, see Kevin J. O'Brien, “Collective Action in the Chinese Countryside,” *China Journal*, No. 48 (July 2002), pp. 142-46.

they refuse to confirm the existence of new rights, benefits, or regulations; and they limit access to or arrest enterprising lawyers and journalists. O'Brien and Li's essay on the ALL provides us with a blow-by-blow account of how the authorities can impede legal activism, and demonstrates that even when plaintiffs overcome the many hurdles to mobilization they may still encounter formidable obstacles. Similarly, Diamant's essay on veterans reveals how factory union officials and management launched counteroffensives against veterans who complained to higher levels about illegal, corrupt, or wasteful practices; Gallagher also finds that in state-owned enterprises the presence of a trade union has a demobilizing effect on workers, reflected in the relatively low rate of labor disputes lodged by workers. Frazier's account of pensions also examines how local governments push for more comprehensive and binding pension legislation in order to give them greater clout vis-à-vis enterprises that sometimes fail to fork over contractually agreed-upon pension contributions to retired or laid-off workers. In short, to the extent that individual and groups manage to overcome internal obstacles to legal action, they still face antagonists within the state apparatus who can respond with coercion and, in many cases, their own rhetorical and legal arsenal. From "injurious experience" to third party intervention a great deal can happen, and once intervention occurs, even the most resourceful plaintiffs can find themselves right back where they started.

Or so it may seem. Michael McCann, in his *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, argues persuasively that even though courts in the United States became increasingly reluctant to address pay equity complaints and employers developed successful counter-tactics, one byproduct of legal mobilization was an enhanced sense of collective identity among activists and greater understanding of law and the political process. He writes:

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<sup>36</sup> We thank Marc Galanter for raising this issue.

My primary finding was that the political advances in many contexts matched or exceeded wage gains. One important advance was at the level of rights consciousness. Interviews revealed that activists were deeply engaged with the basic terms of antidiscrimination law, which at once shaped their general understandings of social relations and in turn were refashioned into sophisticated instruments of reform action. Legal rights thus became increasingly meaningful both as a general moral discourse and as a strategic resource for ongoing challenges to status quo power relations... This newly developed solidaristic strength in many contexts quickly facilitated a variety of other successful struggles for new workplace rights and reforms.<sup>37</sup>

McCann's analysis lends support to the tried-and-true observation that in assessing how and when legal institutions are meaningful in China, it is best to take the long view. It also suggests how to go about understanding some of the forces that researchers witness at work. The very process of engaging the state's legal system, reaching out to different media, and acquiring and studying legal texts may or may not produce a favorable settlement. But, whatever the result, creative engagement with official "rights talk" can still be a transformative event for those involved. Legal entrepreneurs may peddle their expertise elsewhere; legal documents can be passed on to others, *guanxi* (connections) established with other legal actors may be called upon in future battles; and, most important, popular identities and aspirations may be altered as organizers, in particular, undergo a learning experience, become aware of new possibilities, and often end up more inclined to participate in larger struggles (on this last point, see the chapters

<sup>37</sup> Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), p. 281.

by Gallagher, Thireau and Hua, Diamant, and O'Brien and Li). All of this can happen in an authoritarian state that has an instrumentalist view of law because every political or legal act, irrespective of regime type, has both intended and unintended consequences, and one of the latter might well be an emergence of enterprising, assertive, litigation-hardened individuals who are willing to take a chance on inserting their grievances into the legal arena.

To be sure, McCann's notion of litigation-induced identity change is difficult to measure, but there is an emerging body of evidence suggesting that political and legal engagement can result in a notable thickening of skins. Some of O'Brien and Li's litigants under the ALL experienced these transformations and became important players in other suits. In the 1950s and 1960s, Diamant argues, veterans who felt empowered owing to their military background also displayed a readiness to articulate legal claims in villages and factories. Efforts to discredit and disrupt their actions scarred many litigants, but also led some to take their cases all the way to Beijing. In short, there was a feedback loop in the dispute trajectory in which third party intervention demobilized some claimants, but also strengthened the resolve of others. Finding the sources to trace disputes from their origins to intervention and back again will not be easy, but the potential payoffs could be large. In-depth interviews, participant observation, semi-structured biographies, ethnographies, and unpublished government and legal documents will probably yield far more of the data needed to do this than purely text-based accounts.

### **Law and Legal Culture**

Much like the legal mobilization literature, the second way in which this volume aims to build a bridge between studies of Chinese law and legal history and the social sciences also emerges from the law and society field, and focuses on the issues of rights. To understand how

law affects social practice in China, it helps to use the prism of rights, inasmuch as laws matter mainly when people see themselves as empowered by them. Changes in China over the last two decades have certainly provided enough grounds for debate. Scholars have asked whether Chinese are becoming more aware of their rights (often termed “rights consciousness”) or simply more knowledgeable about laws, rules and regulations promulgated by the government.<sup>38</sup> This exchange has been fueled both by findings that ordinary Chinese nowadays frequently cite rules, laws, and regulations when dealing with the state, as well as by a sense, among some, that enhanced rights consciousness may foreshadow the spread of citizenship practices, if not the appearance of citizenship as a secure, universally recognized status.<sup>39</sup>

While certainly thought-provoking, this debate is problematic for several reasons. First, the Anglo-American conception of “rights” (derived from Locke and Mills) is popularly associated with individuals, and is often linked with defying state or community authority. In China, however, rights are more commonly associated with collectivities and claims made to community membership rather than negative freedoms vis-à-vis the state.”<sup>40</sup> Interviewees who

<sup>38</sup> On the case for growing rights consciousness, see Benjamin L. Liebman, “Note: Class Action Litigation”; Kevin J. O’Brien, “Villagers, Elections and Citizenship in Contemporary China,” *Modern China*, Vol. 27, No. 4 (October 2001), pp. 407-35; David Zweig, “The ‘Externalities’ of Development: Can New Political Institutions Manage Rural Conflict,” in Elizabeth J. Perry and Mark Selden (eds.), *Chinese Society* (New York: Routledge, 2000), pp.120-42.

<sup>39</sup> O’Brien, “Villagers, Elections and Citizenship,” pp. 425-26.

<sup>40</sup> Wang Gungwu, *The Chineseness of China* (Hong Kong: Oxford University Press, 1991); Randle R. Edwards, Louis Henkin, and Andrew J. Nathan, *Human Rights in Contemporary China* (New York: Columbia University Press, 1986). According to Mirjan Damaška, in countries with legal systems such as China’s “claims flowing from state decrees, even though routinely designated ‘rights,’” should “not be equated with personal entitlements...the citizen of the activist state possesses no rights accorded by virtue of his being an end in himself”; “all rights are at least potentially subject to qualification or denial.” See his *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), p. 83.

are asked about “rights” might thus be thinking about something quite different.<sup>41</sup> Secondly, it is necessary to consider the effect of rights consciousness, rules awareness, or simply enhanced legal knowledge on how people interact with state institutions and how the latter respond to law-based claims. There is evidence that even in the Qing, Republican and Maoist eras citizens filed lawsuits and had some awareness of their rights, while judges often rendered verdicts much as their modern counterparts do — although their rulings had little impact on the overall nature of the regime.<sup>42</sup> Finally, as in any society, in China it is probable that, however one wants to label the practice of using state law to exploit the gap between rights promised and rights delivered, the skills and knowledge to do this will not be shared equally by all.

To capture the uneven distribution of legal consciousness, it is worthwhile to consider how researchers working in the law and society tradition have addressed the spread of legal knowledge. Although some legal scholars have considered Chinese legal culture,<sup>43</sup> law and society scholars have adopted a perspective on law and rights that is broader and more inclusive than most treatments of law in China. For instance, in his article “The Radiating Effects of

<sup>41</sup> Randall Peerenboom, “Rights, Interests, and the Interest of Rights in China,” *Stanford Journal of International Law*, Vol. 31, No. 2 (Summer 1995), pp. 359-86.

<sup>42</sup> Huang, *Civil Justice in China*; Diamant, *Revolutionizing the Family*. Although rights discourses were not in vogue during the Maoist era, borrowing slogans from the government arsenal to express heterodox views was a common tactic during both the Cultural Revolution and the Hundred Flowers Movement. See Elizabeth J. Perry, “‘To Rebel is Justified’: Maoist Influences on Popular Protest in Contemporary China,” paper presented at the Colloquium Series of the Program in Agrarian Studies, Yale University, 17 November 1995; Sebastian Heilmann, “Turning Away from the Cultural Revolution,” Occasional Paper 28, (1996), Center for Pacific Area Studies, Stockholm University.

<sup>43</sup> See Lubman, “Bird in a Cage,” pp. 37-38, 230-232, 305-305; Potter, *The Chinese Legal System*, pp. 12-13, 30-33, 52-55; Pitman B. Potter, “Guanxi and the PRC Legal System: From Contradiction to Complementarity,” in Thomas Gold, Doug Guthrie and David Wank (eds.), *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* (Cambridge: Cambridge University Press, 2002)

Courts,” Marc Galanter argues, following Clifford Geertz,<sup>44</sup> that law should be seen not only as a set of “operative controls,” but “as a system of cultural and symbolic meanings... it affects us primarily through communication of symbols — by providing threats, promises, models, persuasion, legitimacy, stigma and so on.”<sup>45</sup> In the Chinese case, it might seem that threats and persuasion overwhelm the other functions of law. However, what this scholarship emphasizes is that legal discourses do not exist above society or simply to control citizens, but instead are embedded in how people interact as legal conventions or cultures. According to Michael McCann, “legal knowledge...*prefigures* social activity; inherited legal conventions shape the very terms of citizen understanding, aspiration, and interaction with others.”<sup>46</sup> These legal conventions or cultures (for example, placing a chair where one has just shoveled snow to assert property rights), furthermore, are not shared by all members of a given society: different groups — be they social classes, ethnicities, or occupational groups — are likely to have inherited different legal cultures, and these are likely to change over time. In *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*, legal anthropologist Sally Engle Merry writes that law consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law. The law looks different, for example, to law professors, tax evaders, welfare recipients, blue-collar homeowners and burglars.<sup>47</sup> As Chinese society becomes more diverse and stratified, and legal discourses multiply, it strikes us that future research on law and society in China should reflect the *mélange* of legal cultures that is coming into being. Fortunately, we already have strong

<sup>44</sup> See his *Local Knowledge: Further Essays in Interpretative Anthropology* (N.Y. Basic Books, 1983)

<sup>45</sup> Marc Galanter, “The Radiating Effects of Courts,” in Keith Boyum and Lynn Mather (eds.), *Empirical Theories About Courts* (New York: Longman, 1983), p. 127.

<sup>46</sup> McCann, *Rights at Work*, p. 6. Emphasis ours.



historical foundations to build upon. Studies of law in the Ming and Qing have demonstrated that elite Confucian discourse was largely normative, but that it was also deployed in practice by ordinary people seeking justice in county yamens or from village elites.<sup>48</sup> Joseph Esherick and Mary Rankin's volume *Chinese Local Elites and Patterns of Dominance* includes several essays that show considerable regional disparity in the penetration of Confucian norms in core and peripheral areas and differences in how Northern, Southern, Southwestern, Lower Yangzi and other elites exercised domination.<sup>49</sup> In the Maoist period, Diamant's *Revolutionizing the Family* has argued that peasants and "rural educated" workers (particularly women and those who hailed from North China) had a far more vibrant legal culture than urban educated elites.

These accounts of diversity and pluralism, however, have yet to be replicated in the study of contemporary Chinese law. There is nothing comparable yet to Merry's study of working class legal cultures, or to Tom Tyler's *Why People Obey the Law*, a survey-based study of the importance of procedural versus distributive justice in the United States.<sup>50</sup> Of course, until recently researchers have been hobbled by limited access to much of the Chinese urban and rural population. Now, however, with improved field research opportunities, we are better placed to explore the many legal cultures extant in today's China. In this volume, for example, Thireau and Hua's analysis of migrant workers' letters reveals a legal culture formed both by experiences as outsiders in a city, Confucian norms, and an updated version of Maoist ideology. Diamant's veterans developed a highly adversarial legal culture in factories and villages, shaped by their military experiences, the cold reception they often received upon demobilization, and violence

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<sup>47</sup> Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (Chicago: University of Chicago Press, 1990), p. 5.

<sup>48</sup> Huang, *Civil Justice in China*, pp. 1-20.

<sup>49</sup> Essays by Edward McCord and Rubie Watson provide contrasting perspectives. See Esherick and Rankin (eds.), *Chinese Local Elites and Patterns of Dominance* (Berkeley: University of California Press, 1990).

that was nearly endemic in the North China villages from which they came. Gallagher likewise explores the extent to which disgruntled Chinese workers have become increasingly litigious and willing to demand rights enshrined in the 1995 Labor Law (especially provisions on safety, contracts, unemployment benefits, and settling disputes). Mertha shows that foreign actors are a new force to be dealt with in intellectual property disputes. All these efforts to mobilize rights claims have produced mixed results, but they do point to a certain irony: in China, workers and peasants are often surprisingly at the forefront of battles to realize “bourgeois rights.”<sup>51</sup> This can be seen both historically — in the 1950s few intellectuals were enthusiastic about the eminently bourgeois Marriage Law — and in the contemporary period: a great deal of middle and upper class wealth has arisen from cozy, corporatist arrangements with the state. In other words, the well-off and powerful may be well-placed to make use of legal institutions, but they may also choose to strengthen their privileged position at the expense of legality. Many entrepreneurs, for example, prefer to evade laws than to fight for their enforcement, and not a few intellectuals have distinctly elitist attitudes towards the popular classes.<sup>52</sup>

All of the essays in this volume share an important assumption. To understand how law matters in China, we have to unpack society and discover how different political, cultural, economic and personal experiences shape attitudes towards law, and lead to different forms of

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<sup>50</sup> Tom Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

<sup>51</sup> See Lee, “From the Specter of Mao,” p. 220; Minxin Pei, “Citizens v. Mandarins: Administrative Litigation in China,” *China Quarterly*, No. 152 (December 1997), pp. 832-62; Diamant, *Revolutionizing the Family*, chapter 8; Elizabeth J. Perry, “Casting a Chinese ‘Democracy’ Movement: The Roles of Students, Workers and Entrepreneurs,” in Elizabeth J. Perry and Jeffrey Wasserstrom (eds.) *Popular Protest and Political Culture in Modern China* (Boulder: Westview, 1994); O’Brien, “Rightful Resistance.”

<sup>52</sup> In the context of the 1989 protest movement, see Perry, “Casting a Chinese ‘Democracy’ Movement;” Daniel J. Kelliher, “Keeping Democracy Safe from the Masses: Intellectuals and Elitism in the Chinese Protest Movement,” *Comparative Politics*, Vol. 25, No. 4 (July 1993), pp. 379-96. But also cf. Teresa Wright, “State

legal and political action (see Thireau and Hua, and Mertha on this). Older workers in the Northeast facing unemployment, for instance, will inevitably see the Labor Law differently than workers in more vibrant private enterprises; veterans who were discharged at the rank of colonel experienced the state differently than those of lower rank; rural and urban women may come to different conclusions about the importance of the 1980 Marriage Law. Given China's diversity and a varied repertoire of popular contention (including litigation, petitions, strikes, parades, demonstrations, blocking roads, protests, riots, and so on) honed over centuries, a disaggregated, bottom-up perspective on legal culture, along with a similar approach to legal mobilization and counter-mobilization, is warranted. This implies the use of more anthropological, contextualized, and thickly-descriptive methods to capture the many ways the popular classes deploy the regime's laws as a weapon when combining legal tactics with collective action (or the threat of it) to defend their "lawful rights and interests."

### **Disaggregating the State**

The passage of hundreds of laws and the expansion of judicial institutions since the late 1970s has not only provided ordinary citizens with more outlets for expressing their grievances; it has also increased the predictability of economic, political and social life, much as Max Weber predicted when contemplating the legal consequences of capitalism.<sup>53</sup> Mertha's paper on the enforcement of intellectual property laws, Frazier's on the drive for comprehensive pension legislation and Gallagher's and Thireau and Hua's essays on the Labor Law can all be viewed as

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Repression and Student Protest in Contemporary China," *China Quarterly*, No. 157 (March 1999), pp. 142-72.

<sup>53</sup> This is a bit of a simplification. According to Weber, the formal-rational legal system emerged while capitalist transformation was taking place; it was not a preceding condition or its direct consequence. For Weber's views, see David Trubek, "Max Weber

efforts to gauge the effect of various laws on predictability in the economy and society. It is too early to assess whether such legislation signals convergence between China and more mature capitalist economies (as Doug Guthrie and Edward Steinfeld have argued<sup>54</sup>), but even at this stage it is clear that a great deal has changed in how law and legal organizations (such as courts, the bar, arbitration commissions, and mediation committees) operate.

At the same time, few would claim that the growth of the state's legal apparatus stemmed from liberal impulses, or has resulted in a significant weakening of the discretion enjoyed by the state's coercive organs or the political character of many legal forums. Indeed, the essays by Tanner and Fu show how the state's disciplinary apparatus has grown (and profited) in tandem with heightened concerns about social unrest. Even as the private sector expands, formal legal institutions have yet to gain significant autonomy from the Communist Party. Judges are still on the payroll of local governments, their professionalism is limited, and the influence of "local protectionism" on courts is strong (as noted in Mertha's essay).<sup>55</sup> In these circumstances it is not surprising that invoking the ALL to sue cadres (see O'Brien and Li's chapter) remains a daunting undertaking. The embeddedness of law in politics suggests that even as we advocate greater attention to social pluralism in China and a range of legal forums, we still have to keep in mind that the party-state remains a strong presence in Chinese society, and that its officials work hard to create the impression that what it legislates, decides, and claims truly makes a difference.

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on Law and the Rise of Capitalism," *Wisconsin Law Review*, Vol. 1972, no. 3, pp. 720-753.

<sup>54</sup> Doug Guthrie, *Dragon in the Three-Pieced Suit: The Emergence of Capitalism in China* (Princeton: Princeton University Press, 1999); Edward S. Steinfeld, "Moving Beyond Transition in China: Financial Reform and the Political Economy of Declining Growth," *Comparative Politics*, Vol. 34, No. 4 (July 2002), pp. 379-98.

<sup>55</sup> See Peerenboom, *China's Long March*, pp. 310-312; Lubman, *Bird in a Cage*, pp. 263-269, chapter 9; J. Chen, *Chinese Law*, p. 162.

The growth of legal institutions, police forces and reform-through-labor camps, combined with the ritualistic excitement that accompanies new policies or legislation (in China one can walk into a bookstore and immediately be confronted with a rack of pamphlets on recent laws passed by the National People's Congress) can easily lead to several assumptions about the role of the state, law, and society in China. It is often tempting to assume that if the central Party-state decides on a course of action, its agencies act in a concerted fashion to carry it out. The round-up of Tiananmen protesters after 1989 and the "Strike Hard" campaigns against crime and the Falun Gong could be cited as evidence of precisely this. Such campaigns, coupled as they often are with gruesome testimony about what happens inside labor camps and prisons, can easily lead to skepticism about citizens' ability to "fight the power." "The very idea of granting citizens standing to pursue their self-interest in opposition to the state's interest," according to Damaška, "runs counter to fundamental premises of activist government."<sup>56</sup> Or, to use language from the literature on contentious politics, in powerful, one-party states such as China, it would appear that the political and discursive opportunity structures for contesting state power are quite narrow.

The existence of a powerful coercive apparatus and this state-cultivated image of "invincibility,"<sup>57</sup> however, need to be reconciled with findings that show many laws and policies are only partially or selectively implemented,<sup>58</sup> that state agencies often work at cross-purposes,

<sup>56</sup> Damaška, *The Faces of State Power*, p. 86.

<sup>57</sup> Joel S. Midgal, "The State in Society: An Approach to Struggles for Domination" in Joel Midgal, Atul Kohli and Vivienne Shue (eds.), *State Power and Social Forces: Domination and Transformation in the Third World* (Cambridge: Cambridge University Press, 1994), p. 14.

<sup>58</sup> Kevin J. O'Brien and Lianjiang Li, "Selective Policy Implementation in Rural China," *Comparative Politics*, Vol. 31, No. 2 (January 1999), pp. 167-86; Thomas P. Bernstein and Xiaobo Lü, *Taxation Without Representation in Contemporary Rural China* (New York: Cambridge University Press, 2003); but cf. Maria Edin, "State Capacity and Local

that citizens are becoming increasingly adept at engaging the state at multiple levels, and that the “state” is often difficult to differentiate from “society.” In this volume, Fu shows that guards in labor reform camps and inmates often collude to advance their interests, and guards’ salaries even depend on how hard inmates work. Meanwhile, Tanner discusses conflicts within the Public Security Bureau about how to deal with social unrest. Some police officers, he notes, have relatives and friends among the unemployed and are unsympathetic to factory owners who have amassed great wealth at workers’ expense. In Frazier’s chapter, Labor and Social Security officials often lambaste factory managers for not turning over revenue earmarked for the social security system, and are seeking national legislation to help them ensure that mandated pension funds are deposited. In Diamant’s essay on veterans, central authorities were often stymied by factory party secretaries, who would turn to courts to illegally prosecute “bothersome” veterans. Such conflicts between the central and local states can also be seen in the discussions of intellectual property, the labor law, and the ALL. These intra-state tussles are not particularly surprising to political scientists studying the Chinese scene and have been discussed elsewhere by Diamant, Perry, and O’Brien.<sup>59</sup> But, much like the law and society literature on legal

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Agent Control in China: CCP Cadre Management from a Township Perspective,” *China Quarterly*, No.173 (March 2003), pp. 35-52.

<sup>59</sup> Elizabeth J. Perry, “Trends in the Study of Chinese Politics: State-Society Relations,” *China Quarterly*, No. 139 (September 1994), pp. 704-13; Neil Diamant, “Making Love ‘Legible’ in China: Politics and Society During the Enforcement of Civil Marriage Registration, 1950-1966,” *Politics and Society*, Vol. 29, No. 3 (2001), pp. 447-489; Kevin J. O’Brien, “Neither Transgressive nor Contained: Boundary-Spanning Contention in China,” *Mobilization*, Vol. 8, No. 1 (February 2003), pp. 51-64. These conflicts are also reflected in treatments of “local protectionism.” On problems faced by Chinese courts in complying with obligations agreed to when China joined the World Trade Organization, see Donald C. Clarke, “China’s Legal System and the WTO: Prospects for Compliance,” *Washington University Global Studies Law Review*, Vol. 2, No. 1 (2003), pp. 97-118.

mobilization and legal culture, such a perspective on state power could be more fully incorporated in studies of Chinese law and legal history.<sup>60</sup>

The third opportunity for bridge-building between studies of Chinese law and the social sciences comes, thus, not from the law and society field but from political science. Reacting against scholarship which often reified and anthropomorphized the state (“Washington decided to adopt this policy”), scholars such as Joel Migdal have proposed an understanding of state power that emphasizes not internal cohesiveness but fragmentation and inability to speak in a single voice. This approach entails disaggregating the state by looking at interactions between governmental authorities at multiple levels and how they interact with assorted social groups. This “anthropology of the state” would have us pay as much attention to lower-level officials and field offices (regional and local bodies such as courts, military and police units) as the pinnacle of leadership in the capital. Agents of the state who work “in the trenches” and field offices, he suggests, may or may not share common ground, interests, and worldviews with those at the top. Methodologically, Migdal stresses the importance of field-work and participant observation, since government documents often try to create the impression that the state is a coherent organization that always succeeds in achieving its goals.<sup>61</sup> In short, the disaggregation of society in the study of legal cultures should be supplemented by an equally disaggregated approach to state and legal institutions, even in a one-party state such as China’s.

Unpacking law and political power might be particularly useful in China inasmuch as it could help us reconcile the often looming presence of the state with evidence that laws and policies are only partially enforced and social forces are adept at exploiting the many cracks in

<sup>60</sup> At the same time, judging by the contents of the *Law and Society Review* in recent years, the law and society literature, for its part, has become increasingly focused on legal norms and discourses and much less concerned with close analyses of state institutions and structures.

<sup>61</sup> Migdal, “The State in Society,” pp. 15-16.

the façade of elite unity. It also suggests that the “opportunity structure” for legal challenges (both individual and collective) may be more open than previously thought. For people disgruntled with employers, officials, and husbands or wives, the sheer variety of state and legal institutions authorized to deal with disputes offers at least statistical hope that one of them will lend a hand. Aggrieved individuals and groups are aware of this and search for effective ways to “frame” their demands while actively “venue shopping.”<sup>62</sup> They typically press their claims wherever they have the best chance of success; in one place this might be a civil affairs bureau, in another it might be a people’s congress, in a third it could be a discipline inspection committee, a higher court, or a procurator’s anti-corruption office. O’Brien and Li’s plaintiffs, for instance, frequently find it advisable to bypass their local adversaries, while searching for points of vulnerability and a sympathetic ear; Diamant’s veterans often appealed to Beijing or municipal people’s congresses for justice; Thireau’s and Hua’s workers write letters to arbitration committees and “Letters and Visits Bureaus.” Frazier’s retirees, even without a pension law, sometimes find advocates on labor arbitration committees. And Mertha’s foreign actors fan the flames of bureaucratic competition while searching for “white knights” willing to enforce anti-counterfeiting statutes. The proliferation of formal state institutions does not, of course, guarantee anyone justice: bureaucracies are often shielded from legal challenges under a sea of “protective umbrellas” (*baohu san*) and personal relations among judges, local officials and enterprise managers can prevent even the most egregious injustices from receiving a fair hearing. This reminds us that we should not exaggerate the likelihood of Chinese citizens “getting justice

<sup>62</sup> On “venue shopping,” see Thomas R. Rochon, *Culture Moves* (Princeton: Princeton University Press, 1998), p. 237. For a review of social movement research on “framing,” see Sidney Tarrow, *Power in Movement*, 2<sup>nd</sup> edition (New York: Cambridge University Press, 1998), chap. 7.



and getting even” (but then again, not a few students of US law have similar concerns<sup>63</sup>). The point we are making is less about outcomes than about *possibilities* for justice and methods.

Law and society research on China can benefit from peering into institutions that groups appeal to and exploring what strategies complainants use. One recurring pattern in China, for instance, entails seeking redress at high levels for abuses of power committed by local officials.<sup>64</sup> That this is so common suggests that many Chinese have a very different attitude toward central authorities than Americans, for whom “Washington” can often do no right and “local authorities” — being more in tune with local circumstances — are more legitimate.<sup>65</sup> There is also evidence that local, provincial and the National People’s Congresses are also becoming more willing to investigate appeals from the citizenry, though again with mixed results.<sup>66</sup> Such patterns of state-society interaction, we suggest, can best be explained if we stress diversity in both Chinese

<sup>63</sup> Marc Galanter, “Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review*, Vol. 9, no. 1 (Fall 1974), pp. 95-160. Galanter distinguishes between litigants who are “one-shotters” and “repeat players.” One-shotters are inexperienced with the legal system and focus primarily on short-term gain. Repeat players participate actively in the legal system, have many resources at their disposal (including organization, knowledge and money) and focus on long-term interests. One-shotters, he argued, are often at a disadvantage when litigating against repeat players. This article inspired a great deal of research on why repeat players enjoy advantages, whether such standing is different than simply having wealth or power, and the extent to which his findings can be replicated elsewhere. See the special issue of the *Law and Society Review* (vol. 33, no. 4, 1999), for articles that evaluate Galanter’s original paper. Although there are few “repeat players” currently in China, as the legal system develops and people gain greater access to courts, Galanter’s analysis may prove useful.

<sup>64</sup> This has a long history in China. See Jonathan K. Ocko, “I’ll Take It All the Way to Beijing: Capital Appeals in the Qing,” *Journal of Asian Studies*, Vol. 47, No. 2 (May 1988), pp. 291-315; Lee, “From the Specter of Mao,” p. 215; O’Brien, “Rightful Resistance;” Diamant, *Revolutionizing the Family*, chapter 8.

<sup>65</sup> On faith in higher levels and disdain for local authorities, see Lianjiang Li, “Political Trust in the Chinese Countryside,” *Modern China* (forthcoming).

<sup>66</sup> Young Nam Cho, “From ‘Rubber Stamps’ to ‘Iron Stamps’: The Emergence of Chinese Local People’s Congresses as Supervisory Powerhouses,” *China Quarterly*, No. 171 (September 2002), pp. 724-40; Kevin J. O’Brien, “Agents and Remonstrators:

society and the state. While the former will help us account for different support structures and legal cultures, the latter will help uncover opportunity structures that both constrain legal action and enable it to proceed.

## **Conclusion**

When we thought about organizing the Berkeley conference on Law and Society in China, we hoped to provide a forum for relatively young scholars who had recently conducted field work on law-related topics but whose disciplines and methodological eclecticism did not make for an easy fit within existing scholarship. As noted earlier, most of the conference participants were not trained in law schools, but more often arrived via a circuitous route to use law to study politics, political economy and social change. Our primary aim was to explore ways to open up the study of Chinese law, and we knew that our conclusions about law's role in society would inevitably be tentative. At the same time, we sought to draw on insights from the law and society literature, and were pleased that several leading figures in this field (Robert Kagan, Marc Galanter, and Philip Selznick) were able to participate in the conference. On the other hand, two long-time students of Chinese law, Stanley Lubman and William Alford, made sure we did not stray too far off course. This volume, therefore, is as much about themes, concepts, methodologies, and possibilities for law and society research in China as it is about any particular substantive issue. Consistent with this intent, neither we nor the authors of the chapters that follow have reached an overall assessment concerning how Chinese citizens "engage the law." So long as Chinese society and institutions of governance, legal and otherwise, are undergoing such profound changes, it is simply too early to foresee the trajectory

along which legal institutions will evolve, and the effect future developments will have on interactions between law and society.

Still, it is our hope that law and society scholars who have little familiarity with Chinese law will find chapters from this book grist for their comparative mill, and that students of Chinese law will read this volume not only to learn about the Labor Law, or the ALL, or intellectual property or veterans, but also to see how questions and approaches drawn from political science and the law and society field can inform research on Chinese law.

Bringing together scholars from several disciplines inevitably has some disadvantages. Those interested primarily in the details of particular laws or in the legislative process will probably be disappointed. However, by refracting the study of Chinese law through themes, concepts, and studies emphasized in the law and society literature — such as the disputing pyramid, disputing trajectories, legal mobilization and legal culture — as well as underscoring an approach to the state borrowed from political science, we are hopeful that the advantages of this enterprise will outweigh the disadvantages. Still, what we have presented here is only the tip of an iceberg. There remains much to be done to span the gap between Chinese legal studies as practiced by historians and scholars at law schools and their counterparts in the social sciences and the law and society community. It is our hope that some of the readers of this volume will take up this challenge.