"China's Spoiled Children!" Why and How Chinese Customary Trusts Became Law in the New Territories of Hong Kong

Steven Gallagher, Professional Consultant and Professor of Practice in Law, Faculty of Law, The Chinese University of Hong Kong

Austin Coates, British Special Magistrate for the New Territories (1950-1957), described the indigenous residents of the New Territories of Hong Kong as "China's spoiled children!" [1] Coates described them so because, shortly after the British took possession of the New Territories in 1899, the Colony had extended to the indigenous residents the privilege of the right to choose to have their issues settled according to the common law or according to "Chinese law and custom".

This was a privilege which resulted in their customs, in particular the Chinese customary trust, which had never been law in Qing China, and which has never been recognised or enforced in any other legal system, becoming law in British colonial Hong Kong, and remaining as law in Hong Kong today.

This paper considers the circumstances which gave rise to the inclusion and development of Chinese customary trusts in the common law of Hong Kong including the decision to lease rather than seize the New Territories, the subsequent opposition of the indigenous residents to British rule, the judicial and administrative interpretation of Chinese custom, often mistakenly, as law, and judicial construing of Chinese customary trusts within the common law. The paper concludes by considering the retention of these common law and Chinese custom hybrids in the law of Hong Kong as a Special Administrative Region, and their protection in the Basic Law in spite of their discriminatory nature.

[1] Austin Coates, *Myself a Mandarin: Memoirs of a Special Magistrate* (Hong Kong: Heinemann Educational Books (Asia) Ltd, 1976), p.62.

Ideology and the Historiographic License in Chinese Legal Scholarship

Samuli Seppänen, Associate Professor, Faculty of Law, The Chinese University of Hong Kong

Why do legal scholars find historical research a worthy pursuit? Focusing on Chinese legal history, this article argues that ideology is a necessary, but insufficient, element in understanding Chinese legal scholars' motivation for conducting historical research. Chinese legal historians certainly engage with historical materials in order to advance various ideological projects. At the same time, the historical genre itself appears to have advantages over other genres of legal scholarship. In China, the historical genre accommodates a wider variety of subversive ideological performances, including the articulation of heterodox social theoretical viewpoints, than other forms of legal scholarship. First, in the Chinese context, diachronic, historicized arguments appear more intuitively persuasive than the synchronic methods of reasoning, such as, sociological arguments about the "needs" of modern societies. Second, in contrast to legal theory and doctrinal law, the historical genre makes use of specific rhetorical strategies, such as metaphoric language, which enables legal historians to cope with China's political sensitivities. Third, the historical genre allows scholars to examine ideological doctrines, including China's state-sanctioned socialist ideology, in a historicized form. In this sense, historiographic scholarship has allowed Chinese scholars to express their sense of alienation from both Chinese traditional thought and new ideological inputs, such as Marxism and Liberalism, without outright rejecting these forms of thought.

Party Rules and State Law in the People's Republic of China: A Relationship Realigned?

Holly Snape, British Academy Postdoctoral Fellow, School of Social and Political Sciences, University of Glasgow, UK and
Weinan Wang, Doctoral Candidate, School of Social Development and Public Policy, Beijing Normal University; Affiliate Scholar, School of Social and Political Sciences, University of Glasgow

In 2014, at its Fourth Plenum, the 18th Central Committee of the Chinese Communist Party (CCP or Party) passed a resolution on 'governing the country according to law.' While ostensibly focusing on law formulated and enforced by the state this Party Resolution was unprecedentedly explicit in treating the 'Party intra-regulatory system' as integral to the system that it sought to build—the 'system of socialist rule of law with Chinese characteristics.' This foreshadowed subsequent steps by the current administration that reach right to the heart of the 'socialist legal system.' Notably, while historically the Constitution of the People's Republic of China has confined content on Party leadership to its preamble, in 2017 the state legislature passed an amendment that planted the Party squarely within its main text. This has been coupled with a crucial adaption to the notion of democratic centralism which underpins the system of Party rules and, in turn, the legal system. While it is no revelation that principles regulating the behaviour of officials in the Chinese Party-state are codified in both state law and Party rules, studies on Chinese contemporary politics often treat the latter as tangential. This paper is premised on two ideas: first, that engaging with the rich scholarship on Asian socialist legal history offers a valuable way of addressing this problem in studies of Chinese contemporary politics; and second, that to understand the implications of the current administration's adjustments to the 'socialist legal system' a historical perspective is vital. Hence, this paper examines what we understand to be a recent realignment between law and Party rules in light of the history of that relationship and the evolution of 'democratic centralism' in the course of PRC history.

Adaptation, Appropriation and Retroaction
——The Use of International Law in China Related to the Modification and Termination of Unequal Treaties in the Early 20th Century

Zhuo Zenghua, PhD student from Tsinghua University Law School

Recently, the study of international law has turned to history, intending to eliminate the influence of Eurocentrism. Many scholars shift their focus to non-European regions, arguing their critical role in the history of international law. For example, at the end of the nineteenth century, South American countries participated in the international law forum, fighting for equal status in the international society. In the same time period, Chinese diplomats and scholars of international law also fully engaged in the same field, using international law as a weapons of the weak to promote China's equal status. For China, the core issue at that time was the revision and abolition of unequal treaties. Therefore, Chinese intellectuals actively introduced, translated, reinterpreted, and appropriated theories and concepts of international law, especially the right to exist, *rebus sic stantibus* and the termination of treaties. Chinese diplomats and scholars also actively voiced their point of view on various international platforms, including the League of Nations, international legal journals, and international legal conferences, providing justification for China's diplomatic practices. Furthermore, China's practice also gave rise to intensive discussions and debates at the global international law forum, e.g., at the Annual Meeting of American Society of International Law and at the journal of British Year Book of International Law. Moreover, these discussions on unequal treaties further influenced the development of treaty law in the twentieth century. These influences could be detected in the Harvard Research In International Law and ILC's discussions on the law of treaties. In conclusion, the import of international law into China was not just a legal transplantation, but a process of culture translation and appropriation. Also, the retroaction on the development of international law shows that China is not just a silent bystander, but also plays a crucial role in the history of international law.