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<b>Author(s)</b>	<b>Long, Q</b>
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Relevancy between Corporations and Clans:  
Ideologies behind Comparative Law  
Qinglan Long<sup>1</sup>

**“No people can live without faith in the ultimate victory of something. So while theology slept, the laity betook itself to other sources of Last Thing”-- to the eschatology of Karl Marx, on the one hand, and of Friedrich Nietzsche, on the other—Rosenstock-Huessy.**

**For a man to give full realization to his heart is for him to understand his own nature, and a man who knows his own nature will know Heaven. By retaining his heart and nurturing his nature he is serving Heaven. Whether he is going to die young or to live to a ripe old age makes no difference to his steadfastness of purpose. It is through awaiting whatever is to befall him with a perfected character that he stands firm on his proper destiny.—Mencius**

### *I. Introduction.*

The main theme of this article is the relationship between ideology and institutions in comparative study of Western corporation and Chinese clan. It is only when persons become more sharply aware of themselves as individual that they need to reflect consciously on the community into which they form themselves. Understanding the history of Western and Chinese ideologies will not explain the whole story of the western corporation or Chinese clan; “but we shall never begin telling the story of either if we ignore such study.”<sup>2</sup>

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<sup>1</sup> Research Assistant Professor, University of Hong Kong, School of Law. My special thanks go to Professor Ellen Sward for her insightful remarks and caring guidance. I also wish to thank the Committee on Seed Funding for Basic Research of Hong Kong University to enable me make this writing. My work was much facilitated by the Hong Kong University library, Lui Che Woo Law Library and their librarians. Many friends have been keenly interested in this work and have provided much inspiration. I particularly appreciate the encouragements of Robert Scott, Dorothy Anderson.

<sup>2</sup> BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650, x (Cambridge University Press, 1982).

In his article: *Conceptualizing Corporations and Kinship*,<sup>3</sup> Professor Teemu Ruskola argued that the traditional Chinese clan was “corporation” in an economic sense; the clan was viewed as a profit-seeking corporation in the idiom of the family. “In terms of both their institutional organization and their activities, many ancestral trusts are usefully viewed as business corporations, rather than merely ritual properties of ‘natural’ extended families.”<sup>4</sup> He suggested that the “bottom line” of the ancestral trusts was the pursuit of material profit rather than the satisfaction of the needs of ancestral spirits. Clans were independent legal personalities because family collectives could sue and be sued as well as own and dispose of property in a corporate capacity. Their management was centralized: senior members constituted a council, analogous to a “board of directors,” and left the actual clan management to various “corporate officers.”<sup>5</sup>

Noting that monetary motivation and economic interests had been tangential and ambiguous areas of Confucian rhetoric and its interpretation, Ruskola sharply exposed the economic interests and monetary incentives within the traditional clans and Chinese Feudalism. Nevertheless, even if there were economic aspects in clan organizations which met most of the criteria of modern business corporations, can they be equated with clan corporations? Max Weber said: “Economic conditions have, as we have seen, everywhere played an important role in the development of society, but they have

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<sup>3</sup> Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *Stan. L. Rev.* 1599 (2000).

<sup>4</sup> *Id.* at 1634.

<sup>5</sup> *Id.* at 1635.

nowhere been decisive alone and by themselves ...”<sup>6</sup> Calling an institution a “corporation” automatically imports a set of largely invisible Western conceptual assumptions, which include freedom of contract; separation of ownership and managements and other western political, social and ideological values I will discuss later. These concepts are entirely foreign to the Chinese clan culture.<sup>7</sup> It is hard to believe that corporation and Chinese clan could be said to function in the same or similar way except on a purely technical level. Despite the promise to move away from the stereotype of studying Chinese law, the overall approach Ruskola applied falls squarely into the traditional comparative method--functionalism.

Instead of critiquing point by point Ruskola’s arguments, this article re-examines the historical and ideological background of Western corporation and Chinese clan. It explains that Western corporation, besides its economic functions, has its constitutional origins from the competition and cooperation, among ecclesiastical and secular powers after Papal Revolution; Chinese clan has its rootedness in the spiritual orientation of self-cultivation in Confucianism. Through exposing the two institutions to their extremely dense and complex social and ideological background, the article demonstrates comparative law should involve something called “cultural immersion approach”.<sup>8</sup> It requires comparatists to acknowledge that a legal system is not only an accumulation of

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<sup>6</sup> *Proceeding of the First Conference of German Sociologist*, 1910, quoted in Max Weber, *Economy and Society*, ed Guentler Roth and Clause Wittich (New York 1968), I, Ixiv

<sup>7</sup> The normative implications of the term “corporation” include: corporation is an instrument for economic growth and productive effort. It provides the major device for collection of capital and the later-scale of technical developments and market expansions. See general, ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY*, (2d ed. 1967).

<sup>8</sup> Vivan Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative law*, 46 *Am. J. Comp. L.* 43.

rules but a cultural phenomenon. In order to understand different legal cultures, comparatists must immerse into rich culture context even though they can be sure that they will never be quite sure. In painstakingly examining the political, economical, historical and psychological specificities of different culture, comparatists must focus on the ideologies behind physical makeups in different traditions, which molded the entire legal system. Part II of the article discusses the methodological struggles in comparative study, including linguistic and culture problems. It delineates how in its study of foreign legal cultures, comparative law runs the risk of superimposing its own values upon other legal cultures. Subsequently, Part III introduces the origin of Western corporation. It examines that the word “corporations” in its broad sense which has a more extensive meaning than just business institution. Further, in medieval and early modern history, the application of corporate principles to the state contributed to the development of constitutionalism and to the idea of popular sovereignty.<sup>9</sup> Part IV turns to the Chinese clan. It traces the clan tradition to Confusionism’s filial relation in the family and suggests that self-transformation through communal act is the ideology behind the tradition of Chinese clan. Part V concludes that Chinese clan and Western corporation are different institutions evolving from different historical, cultural and ideological contexts. This comparative study attempts to explain the difference, not explain it away.

## ***II. The Methodological Struggles***

Given that each society embraces a corresponding type of economy, political system, law, religion and artistic style, it is the integrated portrait of the structural elements and

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<sup>9</sup> BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650 82-84, (Cambridge University Press, 1982).

their interactions that constitute the historical experience of a society.<sup>10</sup> In order to comprehend any meanings of institutional and societal change fully, these components have to be analyzed together. The Western corporate growth was stimulated by the commercial revival of the Twelfth Century when freedom of contract and freedom of movement were prevalent and when market and fairs were common in cities and towns throughout Europe.<sup>11</sup> By viewing the Chinese clan organization as a profit-seeking business corporation in the guides of family, it assumed that Chinese ancient economy had experienced the same pattern of Western commercial transformation. One of the main features of functionalism is that it presupposes that law is asked to resolve the social problems of all countries and that these problems are similar; therefore, the solutions to these problems are the same. This assumption of similarity works reasonably well within the same cultural sphere. If, however, comparisons take place in cross cultural scenario, it becomes increasingly irrelevant. Like here, even as the commercial transactions emerged in cities and large numbers of traveling merchant participated in markets and fairs, the cities in China did not form the independent units.<sup>12</sup> The professional merchants as a new class never prospered in traditional China. Man depended on the soil for his living.<sup>13</sup> Migration or moving from countryside to cities, which were indispensable to the growth of commerce, was alien to the Confucian concern of “the

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<sup>10</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 538-558 (Harvard University Press 1983).

<sup>11</sup> Oliver Volckart & Antje Mangels, *Are the Roots of Modern Lex Mercatoria Really medieval?* *S. Econ. J.*, 427, 443 (1999)

<sup>12</sup> See MYRON L. COHEN, *KINSHIP, CONTRACT, COMMUNITY, AND STATE: ANTHROPOLOGICAL PERSPECTIVES ON CHINA* § I-3 (Stanford University Press 2005).

<sup>13</sup> MICHEL C. MASSON, *PHILOSOPHY AND TRADITION—THE INTERPRETATION OF CHINA’S PHILOSOPHIC PAST: FUNG YU-LAN 1939-1949* 37 (RICCI Institute 1985).

Great Harmony as the Way embraces the nature.”<sup>14</sup> Agriculture was paramount, but security and stability rather than economical growth were the supreme ideal of Chinese society. Hence large-scale economic activities were hardly able to ferment in this infertile commercial soil.

More troubling, the functional method is concerned with how to compare the legal functions of different institutions. By definition, functionalism is naturally interested in explaining things in terms of what happens afterward, not what came before. This general lack of causal explanations results in neglecting the ideological and historical developments in different legal systems. By ignoring these cultural elements, functionalists unwittingly separate law from its surrounding culture roots and lose the legal sensibility towards foreign legal system. Corporate law principles established Western concepts of limited government. These theories were borrowed from canon law that church was a corporation. And the corporation as a whole might limit papal authority. The works of these canonists inspired the secular political theorist who created the concepts of popular sovereignty to impose limitations on the secular governments.<sup>15</sup> By merely examining their similar functions, functionalist consider Chinese clan as the counterpart of Western corporation. If so, whether we can conclude that ancient Chinese clan institute also bore the idea of “limited government” with individual rights of self-

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<sup>14</sup> Yu-Kung Kao and Kang-isun Change, *Chinese lyric criticism in the six Dynasties*, American Council of Learned Societies Conference on Theories of the Arts in China (June 1979), included in *Theories of arts in China*, eds. Susan Bush and Christian Murck (Princeton, N.J. Princeton University Press, 1984).

<sup>15</sup> In history, the application of corporate law principles to the state contributed to the development of constitutionalism and to the idea of limited government. See general Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 Wash. U. J. L. & Pol’y 1 (2001).

determination. Evidently these notions have little relevance for the classical Chinese tradition.

When we try to understand the nature of certain institutes in the society, we need to analyze them in the larger cultural context. Any institutional development can not take place in an intellectual void. Society's physical development is always interwoven with its ideological values. Failing to realize them, we would be able to comprehend neither their nature nor their functions. Clan organizations had their visible and functional side-- their assets, contracts, trading, but the rootedness of this institution may lie in its Confucian belief: the fiduciary community is an irreducible reality in ultimate self-transformation; appreciation of self can only be obtained through genuine communication with others.<sup>16</sup> There always exist the religious and ideological elements behind the institution structures.<sup>17</sup> In Octavio Paz's words, "[I]t is a society's visible side-- institutions, monuments, works, things, -- but it is especially its submerged, invisible side: belief, desires, fear, repressions, dream"<sup>18</sup>

For Western tradition, it is impossible to understand its growth unless we consider constantly its ecclesiology and sacred values. Christ as the representative of man had offered himself as a propitiation for man's sin.<sup>19</sup> Thus God has forgiven mankind its

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<sup>16</sup> See *Generally* TU WEI-MING, *CONFUCIAN THOUGHT: SELFHOOD AS CREATIVE TRANSFORMATION* ( State University of New York Press, 1985).

<sup>17</sup> BRIAN TIERNEY, *RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650*, IX (Cambridge University Press, 1982).

<sup>18</sup> *Quoted* by HAROLD J. BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 558, , (Harvard University Press 1983).

<sup>19</sup> "By His death on the Cross He satisfied the justice of God, freed us from sin, broke the power of Satan and restored us to grace. Heaven from that time on was opened for all. But to enter we must participate in the redemption . . ." ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, 3426, 3436, (Fathers of the English



state of sinfulness: the human race is absolved from the consequences of its inherited tendency toward greed, pride, power . . . God's honor was restored and he could be reconciled to man.<sup>20</sup> It is said "without the fear of purgatory and the hope of the Last Judgment, the western legal tradition could not have come into being."<sup>21</sup> But being religious to a Confucian means being engaged in the process of learning to be fully human. Each human being has sufficient insight to become the exemplar of humanity and thus assume a godlike statue in the pantheon of the virtuous. The "Profound person" in Confucianism is engaged in a continual process of self-transformation through the communal act as a "faithful dialogical response to the transcendent."<sup>22</sup> And "a society is no more an independent entity than is ceremony independent of the participants, the holy vessels, the altar, the incantations."<sup>23</sup>

Legal anthropologists have long struggled with the problem of choosing a proper vocabulary to describe Chinese laws. The interaction of different social elements, especially the ideological character in law, creates formidable difficulties in making cross-culture comparative law study. "In any language, individual words bear not only their primary meanings but also layers of nuance, slowly build up as a result of the

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Dominical Province trans., New York: Benziger Bros., 1947-1948); *See also* GEORGE H. WILLIAMS, ANSELM (St. Louis 1960).

<sup>20</sup> JAROSLAV JAN PELIKAN, CHRISTIAN TRADITION: A HISTORY OF DEVELOPMENT OF DOCTRINE, 183-198 (University Chicago Press 1971-1989); *see also* HAROLD. J BERMAN, LAW AND REVOLUTION 181-185.

<sup>21</sup> HAROLD. J BERMAN, LAW AND REVOLUTION 558 (1983).

<sup>22</sup> See Generally, TU WEI-MING, CENTRALITY AND COMMONALITY, 94-98 (State University of New York, 1989) (claiming that "ultimate self-transformation" implies that the process of leaning to be human never end. "Ultimate" refers to the greatest possible realization of that humanity.)

<sup>23</sup> HERBERT FINGARETTE, CONFUCIUS: THE SECULAR AS SACRED 77 (Waveland Press, Inc. 1972).

historical context in which the word has been used in the culture.”<sup>24</sup> In order to transport a single word without distortion, one would have to transport the entire language around it.<sup>25</sup> These difficulties are compounded by the linguistic symbolism of the Chinese language. Chinese linguistic symbols are directly observed forms or characters which denote the immediate experience with items. For example, the symbol for man in Chinese is 人, and the early symbol of house is 介. The idiographic symbolism of the Chinese language concentrated upon the all-embracing, immediately apprehended aesthetic continuum.<sup>26</sup> As a consequence, there was no alphabet. In contrast, western linguistic symbolism put together the number of symbols constituting the alphabet in different permutation.<sup>27</sup> Hence, Chinese language “automatically eliminates the logical whole-part relation between one symbol and another that occurs in the linguistic symbolism of the West”.<sup>28</sup> It is obvious, syntactically and semantically, that the translation of meaning of Chinese into an equivalent English, presents the slippage problem; but other rhetorical, sentimental, parataxis/syntactic and contextual complications make it even more formidable.<sup>29</sup>

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<sup>24</sup> Janet E. Ainsworth, *Categories and Culture: On the “Rectification of Names” in Comparative Law*, 82 Cornell L. Rev. 19, 26 (1996).

<sup>25</sup> The reason for such a translate technical is that the right English word is not one that merely expresses the Chinese concept in a particular text but one that can be used for the entire history of Chinese thought. See general, WING-TSIT CHAN, *NEO-CONFUCIAN TERMS EXPLAINED* xi (Columbia University Press, 1986).

<sup>26</sup> F.S.C.NOTHROP, *THE MEETING OF EAST AND WEST* 316 (The MacMillan Company, 1947).

<sup>27</sup> ACHILLES FANG, *SOME REFLECTIONS ON THE DIFFICULTY OF TRANSLATION*, IN *STUDIES IN CHINESE THOUGHT* 263, (Arthur F. Wright ED., 1953).

<sup>28</sup> NOTHROP, *supra* note 25.

<sup>29</sup> For an elaboration on linguistic problem in the philosophic sense, see generally WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (The M.I.T. Press, 1960).

The difficulty in linguistic translation is only one aspect of the problem with legal comparative study. The deeper disagreement concerns the uniqueness of each individual culture. Paul Bohannan assumes that every culture has a unique legal order, with distinctive legal institutions, practices and ideologies that evolve in the context of its overall social order.<sup>30</sup> All cultures are mixed –derived from imported structures, concepts and ideas but also emanating from different normative systems which are based on customs, religions and languages, habitat and natural resources, families, geography and climate, ideologies and other features.<sup>31</sup> In Clifford Geertz’s words, “Law . . . is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent-- vernacular characterizations of what happens connected to vernacular imaginings of what can.”<sup>32</sup> Man is tempted to see and hear what he expects to see and hear. In the legal comparative study, it would be insufficient to merely map Chinese legal practices and ideologies onto familiar Western conceptual territory.<sup>33</sup> If we impose the Western legal terminology on Chinese legal practice, we risk misunderstanding Chinese legal sensibility. There is no single that element provides a magic key to the complexity of comparative legal study. The ideological analysis of law is an instructive point in understanding distinctive legal cultures.<sup>34</sup> The stories of Western corporation

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<sup>30</sup> Janet E. Ainsworth, *Categories and Culture: On the “Rectification of Names” in Comparative Law*, 82 Cornell L. Rev. 19, 28 (1996).

<sup>31</sup> Nora V. Demleitner, *Combating Legal Ethnocentrism*, 31 Ariz. St. L. J. 737, 748 (1999).

<sup>32</sup> CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FACT AND LAW IN COMPARATIVE PERSPECTIVE, IN LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 215 (1983).

<sup>33</sup> Ainsworth, *supra* note 29, at 30.

<sup>34</sup> See generally Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 Law & Soc’y Rev. 11 (1985).

and Chinese clan would be hardly intelligible unless we become acquaintance with the different ideologies behind them.

### *III Corporations in Western Ideology*

The western legal tradition grew, in part, out of the structure of social, economic and religious interrelationships.<sup>35</sup> It is impossible to understand Western legal tradition without exploring its moral and religious dimension. Harold Berman, in his book “Law and Revolution”, traces the formation of western integrated and independent legal tradition to Papal Revolution in eleven and twelve centuries.

It may be useful to attempt to dispel some of the misunderstandings at this moment. The conventional historical perspective assumes that Western history is divided into three periods: Ancient, Medieval, and Modern. Ancient history is the history of Greece and Rome. The decline of Rome produced a medieval age, which lasted roughly from the fifth to the fifteenth century. Then modern time, starting with the Renaissance and Reformation, constituted the first great turning point in the history of the West. It is well recognized that the Renaissance and Reformation were the time when rediscoveries, reexaminations and receptions of Roman Law and Greek Law occurred and they became the sources of the Western legal tradition.<sup>36</sup> However, the best historical research of the last five decades has pushed the Dark Ages back from the period before

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<sup>35</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 556 (Harvard University Press 1983).

<sup>36</sup> Indeed, each of the ancient ingredients of Western culture was transformed by being mixed with the others. The Western Europe turning to the Greek and Roman and Hebrew texts for inspiration and transforming those texts in ways they wished to fit into their contemporary societies. "Israel," "Greece," and "Rome," became spiritual ancestors of the West not primarily by a process of survival but by a process of adoption.

1450-1500 to the period before 1050-1100.<sup>37</sup> Professor Berman in his book traces the Western legal tradition to a violent separation of the ecclesiastical polity from secular authority and to the formation within the church, canon law, of the first modern Western legal system.<sup>38</sup> The diverse political, economic, and cultural movements constitute the revolutionary character of the Papal Revolution. In Professor Berman view, the system of competition and cooperation among ecclesiastical and secular authorities which emerged from the Papal Revolution fostered to establish the modern Western legal system. The dualism of ecclesiastical and secular legal systems led to a pluralism of secular legal systems within the ecclesiastical legal order and to the concurrent jurisdiction of ecclesiastical and secular courts. Further, the systematization and rationalization of law were necessary in order to maintain the complex equilibrium of plural competing legal system.

In the early part of the Eleventh Century, belief in the Last Judgment acquired a new significance in the West through the development of Purgatory--an intermediate judgment upon individual souls at the moment of their death.<sup>39</sup> Last Judgment presupposes that "One's whole life on earth is something to be accounted for at the Last Judgment. But the accounting does not necessarily proceed according to an elaborate system of rules and standards. The idea of Purgatory, on the other hand, presupposes that

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<sup>37</sup> Professor Berman claimed that even the most conservative historians now distinguish sharply between the Low Middle Ages and the High Middle Ages.

<sup>38</sup> *See Generally* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 556 (Harvard University Press 1983).

<sup>39</sup> *See supra* note 37, at 169. Harold Berman also emphasizes that liturgy of All Souls' Day shared the same spiritual significance with Purgatory. It was a day to celebrate the community of all souls who had lived or would live. Christian souls on earth and in purgatory anticipated that day with their prayers for mercy.

the accounting does proceed according to an elaborate system of rules and standard . . . . Individual sins are to be weighed, and penalties in Purgatory are to be allocated according to the gravity of each sin.”<sup>40</sup> Therefore, sin had formerly been understood as a condition of alienation from God; it now came to be understood in legal terms as specific wrongful acts or thoughts for which various penalties must be paid in temporal suffering, of this life or the next.<sup>41</sup> The understanding of as a separation from God came to play a secondary role and eventually the “legalization” of life after death resulted in significant reduction of the Last Judgment itself.<sup>42</sup>

In this sense, man began to take the center of the stage. No longer was it assumed that “temporal life” must be a process of decay until the Last Judgment. On the contrary, it was assumed now that progress and reformation can be made in this world for the salvation in the next. This provided the base for the belief in the capacity of man to regenerate the world and the necessity for him to do so in order to fulfill his ultimate destiny.<sup>43</sup> “The sacred was used as standard to measure the secular order.”<sup>44</sup>

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<sup>40</sup> ORVILLE PRESCOTT, *LORDS OF ITALY: PORTRAITS FROM THE MIDDLE AGES* (New York 1972) (arguing that the church was considered to have jurisdiction over Purgatory; the time to be spent in Purgatory can be reduced by clerical decision.); *See also supra* note 24, at 171.

<sup>41</sup> *See* LAW AND REVOLUTION, *supra* note 37, at 171.

<sup>42</sup> *Id.* Berman interpreted the Last Judgment became a ministerial function. The implication was that all who were in Purgatory would in fact be purged of their guilt; having paid the full penalties, they could enter the kingdom of heaven.

<sup>43</sup> Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* 28 (Harvard University Press 1983).

<sup>44</sup> *Id.*

In 1075, Pope Gregory VII declared the political and legal supremacy of papacy over the entire church and the independence of clergy from secular control.<sup>45</sup> The system of competition and cooperation among ecclesiastical and secular powers which emerged from the Papal Revolution led to pluralism in ecclesiastical and secular legal systems.<sup>46</sup> “The church declared its freedom from secular control, having exclusive jurisdiction in some matters, and its concurrent jurisdiction in other matters. Laymen, though governed generally by secular law, were subject to ecclesiastical law . . . in matters of marriage and family relations, in heritance, spiritual crimes and a number of other matters as well. Conversely, the clergy, though governed generally by canon law, were subject to secular law with respect to certain types of property disputes, and the like. Secular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law and mercantile law.”<sup>47</sup> Law became a way to resolve the political and economic conflicts and legal pluralism became a source of freedom. The systematization and rationalization of law were necessary in order to maintain the complex equilibrium of plural competing legal systems.<sup>48</sup> Law “permits reconciliation of conflicting authorities

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<sup>45</sup> *Id.* at 87.

<sup>46</sup> See Grace Goodell, *From Status to Contract: The Significance of Agrarian Relations of Production in the West, Japan, and in “Asiatic” Persia*, *Eur. J.Sociology* 21, 1980, at 288-291.

<sup>47</sup> The same person could go to and also be subject to the ecclesiastical courts in one type of case, the king’s court in another, his lord’s court in a third, the manorial court in fourth, a merchants’ court in a fifth. Legal pluralism became a source of freedom. See also Berman, *Supra* note 37, at 10.

<sup>48</sup> The new sense of law was to control a widely dispersed population; to regulate relations between competing ecclesiastical and secular polities; to enable secular and church authorities to implement their respective missions in programmatic ways. See Berman, *Supra* note 24, 113-18.

on the basis of synthesizing principles: wherever possible, the contradictions were to be resolved without destruction of the elements they comprised.”<sup>49</sup>

The theory of legal pluralism and jurisdictional limitation upon authority became fundamental constitutional principles underlying the new system of canon in the Eleventh and Twelfth centuries.<sup>50</sup> Yet an analysis of such principles requires the consideration not of constitutional law but corporation law. The canonists created the constitutional ideas through their reflections on the corporation law.<sup>51</sup>

The term “corporation”( *universitas*) came from Roman law. Under Roman law, a corporation was conceived as a group that possessed a personality distinct from that of its particular members.<sup>52</sup> A debt owed by a corporation was not owed by the members as individuals.<sup>53</sup> During the twelfth century, the canonists developed these ideas to describe the whole church as a “mystical body.”<sup>54</sup> The church declared itself to be corporate legal entity – an *universitas*—independent of emperors and feudal lords. In the wake of Papal Revolution, the canonists modified and adapted the Roman law of corporation and used

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<sup>49</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 118 (Harvard University Press 1983).

<sup>50</sup> BRIAN TIERNEY: *RELIGION, LAW AND CONSTITUTIONAL THOUGHT*, 19 (Cambridge University Press, 1982).

<sup>51</sup> According to canonist, it was the church as a corporate legal entity that conferred power upon individual officers: pope, bishops, abbots; and it was the law of corporations that determined the limits of that power.

<sup>52</sup> W.W.BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 175, (Cambridge, The University Press 1932); *See also* PATRICK WILLIAM DUFF, *PERSONALITY IN ROMAN PRIVATE LAW* (Cambridge, The University Press 1938).

<sup>53</sup> See Walter Ullmann: *The Delictal responsibility of Medieval Corporations*, *Law Quarterly Review*, 64 77 (1948).

<sup>54</sup> St. Paul had called the church the body or corpus of Christ. It was accepted that all Christians everywhere formed a spiritual body and the church as a whole would always adhere to the true faith when it acted together, as a corporate entity.



their new doctrines to help define the institutions of the church state.<sup>55</sup> Two of these theories were of great importance in the evolution of later constitutionalism: first, the principle that a corporation has legal capacity to act through representatives, and second, the principle that the rights and duties of the corporation are distinct from those of its officers.

The word "representation" was borrowed from Roman law.<sup>56</sup> In Roman law, a group could appoint an agent to negotiate with a third party, but the result was to establish an obligation between the third and the agent, not directly between the third party and principle.<sup>57</sup> But the canonists gave new significance to this doctrine. In cannon law, when a corporate group established a representative with full power, the group was directly obliged by the representative's acts.<sup>58</sup> Thus, each corporation had to have a head, who was empowered to perform acts which bound corporation, and who also had rights distinct from those of corporation.<sup>59</sup> This new idea of representation acquired a constitutional significance when it was used to define the powers of representatives elected to the assemblies. In English history, before this new doctrine, each rural community sent a messenger to report on local affairs to a king or even to discuss the

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<sup>55</sup> See JOHN NEVILLE FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS* 14-15 (Cambridge, 1907). Figgis claim that at that era, Church was legally more state-like than the states of middle age. The Church had already developed the idea of sovereignty while individual kingdoms were governed through his personal feudal attachments.

<sup>56</sup> Roman terms *Plena potesta or plena auctoritas* (full power, full authority) were used to express the doctrine of representation.

<sup>57</sup> BRIAN TIERNEY: *RELIGION, LAW AND CONSTITUTIONAL THOUGHT*, 23 (Cambridge University Press, 1982).

<sup>58</sup> See generally GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT* (Princeton University Press, 1964).

<sup>59</sup> See Pierre Gillet, *La Personalite Juridique En Droit Ecclesiastique Sqecialement* 77 (Malines, 1927) cited by Berman, *Law and revolution*, 219.

affairs with a king. The canonistic idea of representation empowered a representative to bind a community by his decisions, thereby bridged the gap between sending a messenger to report and sending a representative to bind a community.<sup>60</sup> The term full power representation first appeared in an English writ of summons to Parliament in 1268 and it remained unchanged from 1294 to 1872.<sup>61</sup>

Another Roman doctrine-- “what touches all is to be approved by all” was adapted by the canonists to express a generalized doctrine of consent.<sup>62</sup> The canonist applied the doctrine to corporate constructions and explained the nature of general councils: a matter that touched a whole corporation/community could be approved by a representative assembly acting on behalf of all.<sup>63</sup> The philosophical position of this doctrine is that a group cannot have a personality or a will distinct from that of its members.<sup>64</sup> The main feature of the doctrine of “government by consent” is that legitimacy and obligations are derivative from the consent of those who create a government/community on voluntary act...<sup>65</sup> This philosophical basis raised a crucial legal question about the distribution of powers between the officers and the members of a corporation. An analysis of the

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<sup>60</sup> TIERNEY, RELIGION, LAW AND GROWTH OF CONSTITUTIONAL THOUGHT, at 24. In England, as early as 1068, spokesmen for each rural community gave information to the compilers of Domesday book.

<sup>61</sup> *Id.*

<sup>62</sup> Roman term *Quod omnes tangis ab omnibus approbetur*: what touches all is to be approved by all.

<sup>63</sup> In 1214 pope Innocent III actually convoked a general council and to it summoned not only bishops but chosen representative of cathedral chapters because, he wrote, matters that concerned them were to be discussed. In the secular states, this maxim was accepted as constitutional law. Edward I first incorporated *quod omnes tangis* into English election writ in 1295.

<sup>64</sup> Tierney calls it a “moderate realist” position. He quotes the statement of the great jurist Bartolus: All philosophers and canonists believe that the whole does not differ really from its parts.

<sup>65</sup> P. Riley, *How Coherent is the Social Contract Tradition*, J.HIST. Ideas, 543 (1973).

powers of the head and members of corporation, led to the development in the twelfth and thirteenth centuries of legal theory of limitations upon the power of ecclesiastical and secular rulers to act alone, without the advice and consent of their members and subordinates.<sup>66</sup> In this way, The Roman corporation law was raised to the level of a constitutional principle: “What concerns everyone ought to be considered and approved by everyone.”<sup>67</sup>

However, constitutionalism requires not only consent to rulership but, more importantly, limitations on the powers of rulers. In Twelve and Thirteenth Centuries, the society was indeed saturated with consensual practices. Innumerable corporation groups-- guilds, colleges, towns, parishes-- chose their leaders by consent. Kings summoned assemblies to consent to taxation. Popes were chosen by election.<sup>68</sup> Papal authority, however, was limited based on the theory of corporate law.<sup>69</sup> The conciliar movement used general councils to limit papal control over the Church.<sup>70</sup> The conciliarists argued that the corporate body of the Church was superior to its head officer because the corporate body is the source of the officer’s power.<sup>71</sup> This popular sovereignty principle

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<sup>66</sup> Berman, at 221.

<sup>67</sup> GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT*, chap. 4, (Princeton University Press 1964) (asserting that the Romanists and canonists of the twelfth and thirteenth centuries put this rule together and applied to transactions involving a corporation, where the transactions was for the common utility . They concluded, the consent of all the members or a majority of them were required.)

<sup>68</sup> See general, TIERNEY, *RELIGION, LAW AND GROWTH OF CONSTITUTIONAL THOUGHT*, at 36.

<sup>69</sup> Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional government*, 6 Wash. U.J.L. & Pol’y 1 21 (2001).

<sup>70</sup> The Conciliar theory asserted the superiority, under certain circumstances, of church general councils over the papacy.

<sup>71</sup> *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350-C.1450* 576 (J.H. Burns ed., 1988)

rested on the presupposition that people delegated the authority to the ruler but the powers delegated were not permanently alienated from them. Then the ruler had to recognize the people's right to revoke or limit that power.<sup>72</sup> However, another problem rose: "How could the Pope (ruler) be set above the church as the governor and yet be subordinate to the people whom he ruled as head?"<sup>73</sup> The solution can be found in a distinction between the people as a corporate whole, an *universitas*, and the people as a collection of individuals.<sup>74</sup> The ruler had greater power than each individual so that each was subordinate to him, but he was not greater than the corporate whole from which his power was derived.<sup>75</sup> The works of these canonists inspired the secular political theorists like Mariana, Hooker, John Locke... and the theory of limited government came to be formulated. These theorists used the corporation model for the structures of the state. In general, they adopted the concepts of corporate-constitutionalism and created the theory of popular sovereignty to impose limitations on secular government and postulated the legal authority in the people themselves, independent of the government.<sup>76</sup>

As we discussed above, the emergency of modern corporation could not have occurred without flourishing of commerce in Europe. When Teemu Ruskola compared

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<sup>72</sup> *Supra* note 68, at 20.

<sup>73</sup> *Id.*

<sup>74</sup> P. Michaud-Quantin, *Universitas. Expressions du mouvement communautaire dans le moyen-age latin* (Paris, 1970). *Quoted in* TIERNEY BRIAN, *RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT*, 26.

<sup>75</sup> Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional government*, 6 Wash. U.J.L. & Pol'y 1 21.

<sup>76</sup> The corporation ideas, borrowed from cannon law are the groundwork for the conversion of the English king's personal right of dominion into a right delegated to an officer of the corporation of the realm. They also provide the foundation of the American theory of popular sovereignty.

Chinese clan with Western corporation, he was doing so in the economic and commercial sense. From the commercial point of view, incorporation was an instrument whereby the wealth of innumerable individuals has been concentrated for expanding economic activity. It allowed a group to make binding rules for its self-government, to function in law as a single person with right to held property and to sue and be sued and to persist after the lifetimes of its founding members. In the Eleventh , Twelfth and Thirteenth centuries, all over the Europe, separated individuals were coming together, swearing oaths to one another, covenanting together to form new corporations--guilds, universities; cities...<sup>77</sup> The whole society was made up of a concatenation of various corporations: “political, civil, religion, social and economical, in which the system itself was a great corporation, comprehending all others”.<sup>78</sup> In late Eleventh Century, a new type of business arrangement, the *commenda*, came into being in Italy and England, by which capital was mobilized for long-distance trade.<sup>79</sup> This partnership constituted a legal person which could own property, enter into contracts, and sue and be sued. The partners were empowered to act jointly in behalf of the partnership. Together they constituted a corporation whose personality was both transcendent and immanent, that is, both distinct from and linked with the persons of its members, which specially manifested the corporation personality.<sup>80</sup> However, the most important contribution of the *Commenda*

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<sup>77</sup> R.S. LOPEZ, THE BIRTH OF EUROPE 260-262, (London: Phoenix House, 1967).

<sup>78</sup> *Id.*

<sup>79</sup> The *commenda* was a partnership agreement for a round-trip voyage to the Middle East, Africa. One partner supplied the capital but stayed at home; other partner did the traveling. The traveling partner usually received one-fourth of the profits and the managing partner bore all risks and kept the rest of the profits. See general R.S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MEDDLE AGES (New York, 1976).

<sup>80</sup> WYNDHAM ANSTIS BEWES, THE ROMANCE OF THE LAW MERCHANT 77 (WM. W. GAUNT & SONS, Inc., 1988).

was that limited partnership. The liability of partners was limited to the amount of their initial investment. This innovation partly avoided the prohibition of usury and partly to protect the formant partner, who financed the caravan venture but who stayed at home and confided the expedition to the care of the acting partner.<sup>81</sup> The investors could also reduce their risks by dividing their money among several different *commendae* rather than putting it all in one venture. This limited liability fostered massive collectivization of property for further investigations.<sup>82</sup> It is safe to say, *commenda* took the character of the modern corporation.

Moreover, the invention of other legal devices in the Eleventh and Twelfth Century was also a crucial element for the growth of modern corporation. Western commercial law around that era grew in an integrated system of principles, concepts, rules and procedures.<sup>83</sup> Many distinctive commercial legal institutions created at that time were unique in the Western and had no counterparts in ancient China. One example: the invention of bills of exchange and promissory notes in eleventh and twelfth century. The buyer signed a document address to the seller, promising to pay him money either at a certain time or in the future. Such credit device reflected a strong confidence and trust in the integrity of the commercial community to which creditors and debtors belonged.<sup>84</sup>

Another example: the development of bankrupt law struck a balance of not being ruinous

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Olivier Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, S. ECON J. 427 (1999).

<sup>84</sup> ROBERT S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES* 72 (Cambridge University Press, 1976).

to debtors and protecting creditors.<sup>85</sup> All these commercial concepts and instruments were results of the enormous expansion of economic activity in Western Europe around the period of 1050 to 1200 and they were complete alien to classic Chinese tradition.

Among the characteristic development of mercantile law in the Eleventh to Twelfth Centuries was the rise of a merchant class, a necessary precondition for the development of modern corporations. New technologies of cultivation facilitated a rapid increase in agricultural productions and population in the eleventh century.<sup>86</sup> Many free peasants and lesser nobility began to leave the countryside and enter the cities to take up manufacturing or commerce. “There was a continuous creation of new opportunities. . . to climb from one class to another. . . Craftsmen became an entrepreneurs; peddlers made fortunes in commerce and money-lending . . . Expansion was simulated by constant immigration from the country . . .”<sup>87</sup> The city was a place of opportunity where one could move upward in the social-economic hierarchy. The city also accommodated large scale markets and fairs. Credit, banking and insurance developed in the city to facilitate commercial activity.<sup>88</sup> Meanwhile, the crusades, started in 1096, constituted not only

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<sup>85</sup> Berman, at 352.

<sup>86</sup> LYNN WHITE, *MEDIEVAL TECHNOLOGY AND SOCIAL CHANGE*, 57-69, (Oxford, Clarendon Press 1961). White pointed to the importance of the invention of the horse collar; the introduction of a spring planting and a triennial crop rotation, which made it possible substantially to increase the food supply. *See also* MARIE DOMINIQUE CHENU, *NATUR, MAN, AND SOCIETY IN THE TWELFTH CENTURY*, 43, (Jerome Taylor and Lester K. Little ed. and trans., University of Chicago, 1968). Chenu wrote that “the production of energy made enormous strides with the spread of machines to harness waterpower and to produce circular motion: mill wheels; hydraulic wheels; windmills, first used in Europe in 1105 . . . New means of transport and travel gave men increased freedom; the use of the keel and rudder dates from 1180 and the compass allowed long voyages by sea . . . The mechanical clock began to rationalize time . . .”

<sup>87</sup> ROBERT S. LOPEZ, *CAMBRIDGE ECONOMIC HISTORY OF EUROPE*, 297-298, (M.M Postan and H.J. Habakkuk ed., 1966-1989).

<sup>88</sup> The complete list of the invention of legal devices may be found in LEVIN GOLDSCHMIDT, *UNIVERSALGESCHICHTE DES HANDELSRECHTS*, 133, (Stuttgart 1891), *Quoted in* BERMAN, *LAW AND REVOLUTION*, 349,(1983).

military actions but also economic programs of Papal Revolution.<sup>89</sup> It expanded long-distance trade, both overseas and overland. Great international fairs were held in cities and towns throughout Europe. Concomitant with the growth of overseas and overland trades was the development of the business association such as *commenda*, with collective personality. They constituted a self-governing body, a community, whose personality was both separated from its members—most like the form of the modern business corporation.<sup>90</sup> In summary, according to R.W. Southern: “There was no single outstanding technical innovation behind this expansive movement, but a combination of many circumstances; growing accumulation of capital, rising population, the return of Mediterranean to Western control, the political decline of the Greek and Moslem empires, all helped to open up ever-enlarging prospects to the West.”<sup>91</sup>

Without further pursuit, we may state that corporation was a unique phenomenon in Western society. It was a consequence of Western’s social, religious and economical change and also was a constituent part of such change, and in that sense, a cause of that change. These revolutionary chain reactions, however, were absent in China’s ancient society, because China took a different path.

#### ***IV Chinese Clan in Confucianism***

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<sup>89</sup> From 1074 on, Pope Gregory VII promoted the idea of an army organized under the papacy that would free the Christians of the East from domination by the Turkish infidels. Nevertheless, the crusades were not only foreign wars but bore important domestic political results. They expanded trade and contributed to the development of great cities such as Venice, Genoa and Pisa. See CARL ERDMANN, *THE ORIGIN OF THE IDEA OF CRUSADE*, 149-153, 210-211, 285-287, 308-309, (Princeton University Press 1977).

<sup>90</sup> See generally BERMAN, *LAW AND REVOLUTION*, 352-354, (1983).

<sup>91</sup> R.W. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES*, 34-35, (Penguin Book, 1970).



F. W. Mote comments:

The basic point which outsiders have found so hard to detect is that the Chinese are apparently unique in having no creation myth; that is, they have regarded the world and man as uncreated, as constituting the central features of a spontaneously self-generating cosmos having no creator, God, ultimate cause, or will external to itself.<sup>92</sup>

However, the ancient Chinese were intensely concerned about the creation of the world. Chou Tun-i (1017-1073) says, "...the interaction of two *Ch'I* (Yin and Yang) engenders and transforms the myriad things. The myriad things produce and reproduce, resulting in an unending transformation."<sup>93</sup> Human beings are not the rulers of creation. If they intend to become guardians of the universe, they must earn this distinction through self-cultivation.<sup>94</sup> The profound person, "through a long and unceasing process of delving into his own ground of existence, discovers his true subjectivity not as an isolated selfhood but as a true source of creative transformation."<sup>95</sup> Thus, the Chinese conceive of the cosmos, like the self, as an open system. "As there is no temporal beginning to specify, no closure is ever contemplated. The cosmos is forever expanding; the great

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<sup>92</sup> FREDERICK F. MOTE, *INTELLECTUAL FOUNDATION OF CHINA*, 17-18, (New York: Alfred A. Knopf, 1971).

<sup>93</sup> TENG SHU-P'IN, *CHUNG-KWO WEN-HUA HSIN-LUN [NEW VIEWS ON CHINESE CULTURE]*, 253-304 (Taipei: Lien-ching 1983).

<sup>94</sup> According to Neo-Confucianism, "for at bottom Heaven, Earth and man form one body. The point at which this unity manifests in its most refined and excellent form is the innate knowledge of human mind. See general, *INQUIRY ON THE GREAT LEARNING* by WANG YANG-MING, *Translated* by WING-TSIT CHAN in *A SOURCE BOOK IN CHINESE PHILOSOPHY* 685 (Princeton University Press, 1969); See also TU WEI-MING, *CONFUCIAN THOUGHT—SELFHOOD AS CREATIVE TRANSFORMATION*, 44, (State University of New York Press 1985).

<sup>95</sup> The *Great Learning* states in its main text: "From the Son of Heave down to the common people, all must regard cultivation of the personal life as the root or foundation. SEE WING-TSIT CHAN, trans. and comp., *A SOURCE BOOK OF CHINESE PHILOSOPHY* (Princeton: Princeton University Press, 1969), TU WEI-MING, *CENTRALITY AND COMMONALITY*, 140, (State University of New York Press 1989).

transformation is unceasing.”<sup>96</sup> A human being is an active participant, a living witness of historical continuity; a recipient of the finest essences in the cosmos.<sup>97</sup> Inherent in the structure of the human is an infinite potential for growth and inexhaustible supply of resources for development.<sup>98</sup> “A person’s selfhood embodies the highest transcendence within its own reality; no external help is needed for the self to be fully realized. The realization of the self, in the ultimate sense, is tantamount to the realization of the complete unity between humanity and heaven.”<sup>99</sup> Mencius, in a suggestive passage, observes:

For a man to give full realization to his heart is for him to understand his own nature, and a man who knows his own nature will know Heaven. By retaining his heart and nurturing his nature he is serving Heaven. Whether he is going to die young or to live to a ripe old age makes no difference to his steadfastness of purpose. It is through awaiting whatever is to befall him with a perfected character that he stands firm on his proper destiny.<sup>100</sup>

Learning to become a good person—a human in the Confucian context means becoming refined, morally excellent and religiously profound, is the ultimate and

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<sup>96</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE*, 39 (Notre Dame, Ind: University of Notre Dame Press 1981)

<sup>97</sup> *See* A. MACINTYRE, *AFTER VIRTUE* (explaining that: the precondition for humans to participate in the internal resonance of the vital forces in nature is our own inner transformation. Unless we can first harmonize our own feelings and thoughts, we are not prepared for nature, let alone for an “interflow with the spirit of Heaven and Earth.” It is true that we are consanguineous with nature. But as humans, we must make ourselves worthy of such a relationship.); *See also* TU WEI-MING, *CONFUCIAN THOUGHT*, 60, (1985).

<sup>98</sup> Wang Ying-Ming said that “Our nature is the substance of the mind and Heaven is the source of our nature. ...Our clear intelligence is the master of heaven and earth and spiritual beings. IN *QUIREY ON THE GREAT LEARNING*. *See also* TU WEI-MING, *CONFUCIAN THOUGHT*, 60, (1985).

<sup>99</sup> *Id*; *See also* Wing-tsit Chan, *THE DOCTRINE OF THE MEAN*, 107-108 (arguing the reality of human is such that an eagerness to learn in order to give full realization to one’s heart, to know one’s own nature and to appreciate the meaning of humanity is the surest way to apprehend Heaven. Since our nature is conferred by Heaven, it is our human responsibility to participate in the cosmic transformation so that we can form a trinity with Heaven and Earth.)

<sup>100</sup> MENCIOUS, VIIA: 4

comprehensive concern.<sup>101</sup> Everydayness is not only the point of departure but also the eventual return of the significant spiritual journey.<sup>102</sup> The Confucian endorses the view that we can realize the ultimate meaning of life in ordinary human existence; what we normally do on a daily basis is the manifestation the highest excellence of itself. Thus, the transcending aspect in Confucian thought, always focuses on the lived world here and now. “We must learn to transcend what we existentially are so that we can become what we ontologically are destined to be.”<sup>103</sup> Because the Confucian “faith” in the intrinsic meaningfulness of humanity is a faith in the living person’s authentic possibility for self-transcendence, the conception of self is divine in its all-embracing fullness.<sup>104</sup> “To be religious, in the Confucian sense, is to be engaged in ultimate self-transformation as a communal act. Salvation means the full realization of the anthropocosmic reality inherent in our human nature.”<sup>105</sup> Selfhood, in this sense, is both immanent and transcendent.<sup>106</sup>

The enlightening self, in Confucian thought, is not an isolated and enclosed individual. On the contrary, self-cultivation is a precondition for harmonizing human

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<sup>101</sup> Mencius built his entire philosophy on the tenet that human nature is originally good. Since man is originally good, it follows that he possessed the innate knowledge of the good. If one develops his mind to the utmost, he can “serve heaven” and fulfill his destiny. See *Mencius* 7A:1.

<sup>102</sup> TU WEI-MING, *HUMANITY AND SELF-CULTIVATION: ESSAYS IN CONFUCIAN THOUGHT* 71-82 (Berkeley: Asian Humanities Press 1980) (arguing the real task in Neo-Confucians is to manifest the ultimate meaning of life in ordinary human existence.)

<sup>103</sup> TU WEI-MING, *CONFUCIAN THOUGHT: SELFHOOD AS RELATIVE TRANSFORMATION* 63 (State University of New York Press, 1985).

<sup>104</sup> See general TU WEI-MING, *CONFUCIAN THOUGHT*, Chap. III (1985).

<sup>105</sup> *Id.*, at 64.

<sup>106</sup> *Id.*, at 125.

relatedness.<sup>107</sup> “The experience that is considered truly personal is not at all private to the individual; self-knowledge is a form of inner experience precisely because it resonates with the inner experience of the other.”<sup>108</sup> Confucians maintain that one becomes fully human through continuous interaction with other human beings: A person who is not sensitive or responsive to the others around him is self-centered that leads him to a closed world.<sup>109</sup> The true self, on the contrary, is an open system--a system of broadening the self to embody an ever-expanding circle of human relatedness.<sup>110</sup> The Confucian dictum says: “in order to establish myself, I establish others; in order to enlarge myself, I enlarge others.”<sup>111</sup> This description is not only an altruistic idea but also symbolizes the human possibility for ethico-religious growth through communal acts.

Self-cultivation may mean different things to different people. That is why Confucians encourage a multiple way to pursue self-perfectibility. The Confucian Golden Rule is: “Do not do to others what you would not want others to do to you.”<sup>112</sup> It shows the awareness that the best way for me is not necessarily the best for my neighbor. This

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<sup>107</sup> *Id.* at 55.

<sup>108</sup> Taoist expresses this internality as “spiritual communion.” See TU WEI-MING, *CONFUCIAN THOUGHT*, at 23 (1985).

<sup>109</sup> WING-TSIT CHAN, *A SOURCE BOOK OF CHINESE PHILOSOPHY*, 530 (Princeton University Press 1969).

<sup>110</sup> Tu Wei-Ming suggested that Confucian self-cultivation is never the private possession of a single individual but a sharable experience that underlies common humanity. See *general* TU WEI-MING, *CONFUCIAN THOUGHT*, chap. III (1985).

<sup>111</sup> ANALECTS, VI:30.

<sup>112</sup> ANALECTS XV:24.

recognition is essential for the peaceful coexistence of different beliefs in a society. In

Mencius word:

All the ten thousand things are there in me. There is no greater joy for me than to find, on self-examination, that I am true to myself. Try your best to treat others as you wish to be treated yourself, and you will find that this is the shortest way to humanity.<sup>113</sup>

The reluctance to impose one's own way on others, however, must not prevent one from trying to experience with other human being as an integral part of one's own quest for self-knowledge.<sup>114</sup> Confucian selfhood is a dynamic process of spiritual development and an active participation in the living community—the family, the state and the world. When the personal life is cultivated, then the family life is regulated; when the family life is regulated, then the national life is orderly; and when the national life is orderly, then there is harmony in the world.<sup>115</sup>

Analects XX:8 states:

There are five universal ways [in human relations], and the way by which they are practiced is three. The five are those governing the relationship between ruler and minister, between father and son, between husband and wife, between elder and younger brothers, and those in the intercourse between friends. These five are universal paths in the world.

The five “universal ways” are more referred as the “five orders” or “five relationships” (Wu-lun). They represent basic human relations in the eyes of Confucian.

Filial piety in Confucian is considered to be prime virtue and the basis of its understanding (rules) of proper human relations. The father-son relationship is the

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<sup>113</sup> MENCIOUS, VIIA:4.

<sup>114</sup> Tu Wei-Ming, CONFUCIAN THOUGHT, at 26.

<sup>115</sup> F.S.C.NORTHPROP, THE MEETING OF EAST AND WEST 323 (New York, 1947).

central to Confucian symbolism. It is often suggested that filial piety, as a form of hierarchically defined obedience, provides the theoretical foundation for an autocratic polity.<sup>116</sup> However, the principle governing the father-son relationship is actually reciprocity. A filial son is not necessarily an obedient son. The son is morally obligated to see that his father acts in accord with the norms of fatherhood. If the father acts unfatherly, the son, for his own self-cultivation as well as for the well-being of his father, must assume the responsibility of improving the situation.<sup>117</sup> *Chung-Yung* characterizes the filial son in terms of his ability to “continue” (Chi) the “will” (chih) and to “transmit” (shu) the “work” (shih) of his father.<sup>118</sup>

As far as “continuation” is concerned, it involves an appreciation not only of the father’s existential situation but also of his ideal self-image.<sup>119</sup> The father’s ego-ideal, his wishes for himself as well as what he has created as standards for the family, is an integral part of the legacy that the son receives.<sup>120</sup>

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<sup>116</sup> The following statement, in ANALECTS, I:2, has often been cited to support this claim: “Few of those who are filial sons and respectful brothers will show disrespect to superiors, and there has never been a man who is not disrespectful to superiors and yet creates disorders. . . Filial piety and brotherly respect are the root of humanity (*jen*).” See TU WEI-MING, *CENTRALITY AND COMMONALITY*, 41 (State University of New York Press 1989).

<sup>117</sup> An obedient son follows the instructions of his father, but he must try to understand the general direction of his father’s inner thoughts as well as his expressed wishes. Therefore, the filial son is responsible both for what his father has actually said and for what he has left unsaid. See TU WEI-MING, *CULTURE AND SELF*, 231-251 (Anthony Marsella, George De Vos and Francis Hsu ed., London: Tavistock Press 1965); See also TU WEI-MING, *CENTRALITY AND COMMONALITY* 99-106 (State University of New York Press 1989).

<sup>118</sup> ANALECTS: XIX:2

<sup>119</sup> Confucius himself stressed: “Nowadays a filial son is just a man who keeps his parents in food. But even dogs or horses are given food. If there is no feeling of reverence, wherein lies the difference?” See ANALECTS, II 7.

<sup>120</sup> TU WEI-MING, *CONFUCIAN THOUGHT—SELFHOOD AS CREATIVE TRANSFORMATION* 119, (State University of New York Press 1985).

The idea of continuity must not be taken literally to mean the continuity of a biological line. The Confucian contends that a person cannot simply bypass his primordial ties in order to demonstrate a general love for mankind.<sup>121</sup> A son who is incapable of caring for his father and his close relatives can hardly be expected to understand universal love. So powerful is this idea that Chinese believe that any rites cannot hope to exhibit themselves in the wider relations of man to man in the community, if they are not first achieved in the more intimate and warmly affectionate, biologically and naturalistically grounded unit of the family.<sup>122</sup> In this sense, most organizations in China tended to be family business organizations, and the mentality of the Western business corporations, involving partnership of independent individual and separations of powers, is alien to Chinese culture.

The injunction that the son “transmits the work of his father” suggested the son was a “transmitter” not a “maker”.<sup>123</sup> Transmission involves a commitment to the continuous well-being of a chosen heritage.<sup>124</sup> To undertake such a commitment, one must have a sophisticated appreciation of the strength and limitation of that which is to be inherited.<sup>125</sup> Because of this Confucian choice, “transmission is more profound and more difficult than making, the person who transmits is not merely to adapt himself to his immediate environment but to see to it that the new world he attempts to shape is faithful

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<sup>121</sup> MENCIUS, IIB:9. This is part of the reason why Mencius criticizes Mo Tzu’s concept of “universal love.” Mencius insisted that the practice of love must start with the family and he opposed the universal love without distinctions. *See also* D.C. LAU, MENCIUS, 114 (Hong Kong, Chinese University Press 1970).

<sup>122</sup> F.S.C. NORTHROP, at 327.

<sup>123</sup> ANALECTS, VII:1.

<sup>124</sup> TU WEI-MING, CENTRALITY AND COMMONALITY, at 42.

<sup>125</sup> *Id.*

to the intentions of his forefathers.”<sup>126</sup> Analects, 7,1 states: “...reflection of the light of the men of old is a development of that light. They transmitted indeed, but their transmission was creation.”<sup>127</sup>

By the same token, the maintenance of an ancestral line is not merely the biological prolongation of the life of family. Rather, it signifies the continuation of a personality ideal exemplified by the forefathers of the ancestral line and the transmission of cultural values created by its outstanding members.<sup>128</sup> It is precisely for this reason that the worship of ancestors is so important. By putting up tablets which preserve the memory of the forefather’s full, rich and unique personalities and by carrying on ceremonies associated with one’s sense of indebtedness to them, a continuity of their full personality beyond the time of death be preserved.<sup>129</sup>

A clan is a descent group, organized mainly for ancestral worships. Such a group is patrilineageal, that is, it traces its origin to common male ancestor. For ancestral worship, *Chung-yung* describes the ceremonial acts of filial descendants as follows:

In spring and autumn they repaired their ancestral temple, displayed their ancestral vessels and exhibited the ancestral robes, and presented the appropriate offerings of the season. The ritual of the ancestral temple is in order to place the kindred on the left or on the right according to the order of descent. This order in rank is meant to distinguish the more honorable or humbler stations. Services in the temple are arranged in order so as to give distinction to the worthy. In the

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<sup>126</sup> See *id.*, at 43.

<sup>127</sup> ANALECTS, 7,1; See also MICHEL C. MASSON, PHILOSOPHY AND TRADITION: THE INTERPRETATION OF CHINA’S PHILOSOPHIC PAST: FUNG YU-LAN 1939-1949, 195 (Taipei: Institut Ricci 1985).

<sup>128</sup> TU WEI-MING, CENTRALITY AND COMMONALITY, 45, (State University of New York Press 1989).

<sup>129</sup> According to Northrop, Chinese culture pursues this all-embracing, immediately experienced, aesthetically vivid continuum common to all persons. It follows that individual personality is transitory and not immortality. Conversely, in the West, in which immortality of the individual personality in its unique differentiations is guaranteed by the Christian belief, the use of symbols and ceremonies to preserve their memory is not encouraged.



pledging rite the inferiors present their cups to their superiors, so that people of humble stations may have something to do. In the concluding feast, honored places were given people with white hair, so as to follow the order of seniority. To occupy places of their forefathers, to practice their rites, to perform their music, to reverence those whom they honored, to love those who were dear to them, to serve the dead as they were served while alive, and to serve the departed as they were served while still with us: this is the height of filial piety.<sup>130</sup>

An ancestral worship by filial descendents may be taken as the microcosm of an ideal society. Ceremonial acts in this worship symbolize desirable behavioral patterns. “To respect the old and to honor the dead is to show special concern for the common origin of all. The old are respected not only for their past service but also for the continual value of their wise guidance. The dead are honored because a loving memory of the forefathers brings forth communal identity and social solidarity.”<sup>131</sup>

An ancestral worship, however, cannot be artificially constructed; it must be formulated in according with the spiritual orientation of the rites in society. Confucius said, “Tz’u, you love the lamb, but I love the rite.”<sup>132</sup> The ceremony may be awkwardly performed for lack of serious purpose, commitment and skills. A beautiful and effective ceremony requires the personal presence to be fused with learned ceremonial skill-- this ideal fusion is true *li* as sacred rite.<sup>133</sup>

*Li* is rendered as “ceremony,” “rite,” “ritual,” “propriety,” in Confucian scripture. Social etiquette in general, the father-son, the brother-brother, the prince-subject, the friend-friend and the husband –wife relations — persons and their five relations are to be

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<sup>130</sup> ANALECTS, XIX:3-5.

<sup>131</sup> Tu Wei-Ming, CENTRALITY AND COMMONALITY, at 48.

<sup>132</sup> ANALECTS, III: 17. when Tzu Kung (Tz’u) proposed to do away with the sacrificial lamb offering at the announcement of each new moon, Confucius made the statement.

<sup>133</sup> HERBERT FINGARETTE, CONFUCIUS—THE SECULAR AS SACRED, 6-8, (Waveland Press, Inc., 1972).

seen as ultimately sanctified by virtue of their place in *li*.<sup>134</sup> The act of *li* entails the participation in with the others. The human relationships are symbolic kind, defined by tradition and convention, rooted in respect and appreciation. Each gesture, such as serving and eating, requires numerous practices before it takes the proper form. *Li* brings out forcefully not only the harmony and beauty of social forms but also the inherent and ultimate dignity of human intercourse.<sup>135</sup>

*Li* to Confucian still retains a very strong sacrificial component as we saw in our discussion of ancestral worship. “The meaning of *li* evolved from a proper act of offering sacrifice to an authentic way of establishing human-relatedness, which in the Mencian version actually involves the act of self-transformation.”<sup>136</sup> To act in ceremony in *li* is to be completely open to the other, for ceremony is public, shared and transparent.<sup>137</sup> In *Chung-yung*: “The ceremonies of sacrifices to Heaven and Earth are meant for the service of the Lord on High, and the ceremonies performed in the ancestral temple are meant for the service of ancestors.”<sup>138</sup> If we read *Chung-yung* carefully, we notice that the establishment and implementation of ceremonies depend not only on sagely efforts but also on the participation of the entire populace.<sup>139</sup> It is in this delightful shared and open participation with others and connection with forefathers who are ultimately like oneself

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<sup>134</sup> See *id*, at 75. Fingarette claimed that Confucius’s teaching is the use of imagery of *li* as a medium with which to talk about the entire body of the mores of the authentic tradition and reasonable conventions of society.

<sup>135</sup> *Id*, at 16.

<sup>136</sup> Tu Wei-Ming, *Li as Process of Humanization*, Philosophy East and West, Apr. 1972, at 194.

<sup>137</sup> Fingarette, *supra* note 96, at 16.

<sup>138</sup> ANALECTS, XIX:6.

<sup>139</sup> TU WEI-MING, CENTRALITY AND COMMONALITY 46 (1989).

that man realizes himself.<sup>140</sup> The rite is a proven ceremonial which all participants emerge with a sense of awe and purification.<sup>141</sup> The Confucian rite, *li*, becomes an ever-deepening and broadening awareness of the presence of the others in one's self-cultivation and the real way to appreciate the universal mandate of Heaven inherent in our human nature. "The idea of rite, which implies a dynamic process of self-cultivation in the spirit of filiality, brotherhood, friendship, discipleship and loyalty, seems to capture well this basic Confucian intention."<sup>142</sup>

### ***V. Two origins***

The poet-philosopher has been a striking characteristic of Chinese philosophical tradition. Since poetry is a free combination of similes and suggestions, it can express an infinite range of meanings with a few words; what the poet communicates is not "what he says, but what he does not."<sup>143</sup> Because of its "poetic modality", the language barrier for translation becomes even more formidable.<sup>144</sup> The gap between the two radically different epistemic areas between West and China, may remain forever wide and open.

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<sup>140</sup> Analects 12:2. *quoted in* HERBERT FINGARETTE, *CONFUCIUS—THE SECULAR AS SACRED*, 16 (1989).

<sup>141</sup> ERIK H. ERIKSON, *TOYS AND REASONS: STAGES IN THE RITUALIZATION OF EXPERIENCE* 78 (New York: W.W. Norton & Company 1977).

<sup>142</sup> TU WEI-MING, *CONFUCIAN THOUGHT* 114 (1985); *See also* ERIK H. ERIKSON, *TOYS AND REASONS: STAGES IN THE RITUALIZATION OF EXPERIENCE* (New York: W.W. Norton & Company 1977).

<sup>143</sup> MICHEL C. MASSON, *PHILOSOPHY AND TRADITION : THE INTERPRETATION OF CHINA'S PHILOSOPHIC PAST* : FUNG YU-LAN, 1939-1949, 197 (Taipei, Institut Ricci 1985).

<sup>144</sup> Fung Yu-Lan claimed that poetry character of Chinese philosophy is close to be the negative way and the suggestiveness of the sayings and writings of the Chinese philosophers is something that can hardly be translated.

Legal anthropologists have long struggled against overwhelming odds in order to reach an understanding, even though it still turned out to be partial and imperfect.<sup>145</sup>

Confucian self-transformation suggests that although we are not what we ought to be, we can reach the highest state of humanity through personal cultivation. The process of learning to be fully human entails not only communal participation but also a “faithful dialogical response to the transcendent.”<sup>146</sup> This opening up is a fulfillment of humanity as well as an answer to the Mandate of Heaven.<sup>147</sup>

However, this transcendence of Heaven is significantly different from the western concept of the transcendence of God. Confucian cosmological insight is a full realization of our minds can lead us to a comprehension of our nature and eventually to an understanding of Heaven. It is based on the belief that our selfhood is a necessary and sufficient condition for us to appreciate in total the subtle meaning of the Mandate of Heaven.<sup>148</sup> To translate into Christian terms, it means that humanity itself, without God’s grace, can fully realize its divinity.<sup>149</sup> The act of creation as a conscious design by a

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<sup>145</sup>Some, including Paul Bohannon, insisted on using native words for legal concepts as much as possible, because they believed that Western terminology was inescapably misleading in its connotations. Others, most notably Max Gluckman, thought that a universally applicable legal terminology, which might or might not happen to correspond with Western legal vocabulary, did exist and could adequately describe non-Western legal systems. See Janet E. Ainsworth, *Categories and Culture: on the “Rectification Name” of Comparative Law*, 82 Cornell L. Rev. 19, 27 (1996).

<sup>146</sup> WING-TSIT CHAN, REFLECTIONS ON THINGS AT HAND: THE NEO-CONFUCIAN ANTHOLOGY COMPILED BY CHU HIS AND LU TSU-CH’IEN, 181-182 (Columbia University Press 1967). (arguing Selfhood, our original nature, is endowed by Heaven.) See also CENTRALITY AND COMMONALITY, *supra* note 138, at 97.

<sup>147</sup> TU WEI-MING, CENTRALITY AND COMMONALITY, 97 (1989).

<sup>148</sup> TU WEI-MING, CONFUCIAN THOUGHT, 125 (1985).

<sup>149</sup> Tu wei-ming criticizes Confucian pelagianism which claims Confucian cosmological insight is the denial of original sin, the assertion that we are endowed with the freedom of will not to sin, and the avowal that we as human beings have the unassisted initiating power to appropriate the necessary grace for salvation. He claimed that the Confucian position does not even consider grace relevant to self-realization. See CONFUCIAN THOUGHT, *supra* note 147, at 125.

supernatural being is absolutely incompatible with Confucian selfhood. In this sense, a gap between Creator and creature seems to be almost inconceivable.<sup>150</sup>

In light of this ideological context, it becomes unthinkable that Chinese clans or ancestral trusts could be understood as commercial corporations driven by economic motivation, organized in “nexus of contracts,” in pursuit of profits. *Chung-yung* defines filial piety in terms of transmission and continuity.<sup>151</sup> The recognition that we come into existence not by accident but as part of a long and continuous line of transmission gives us a sense of rootedness,<sup>152</sup> which reminds us that we are responsible not only for those who brought about our existence(our ancestors) but also for those who are yet to come, who will transmit our hopes.<sup>153</sup> Confucians see that being filial to one’s ancestors is being reverent toward to Heaven; that “to nourish their will” in the ancestral worship ceremony is the sacred rite. In Tu Wei-Ming words, “they are . . . ecological principles humanly designed but heavenly inspired for the primary purpose of bringing peace and harmony to the universe.”<sup>154</sup>

As we discussed above, one cannot fully appreciate the overall Chinese cultural context without developing a sense of the Chinese legal sensibility in the larger social

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<sup>150</sup> The childlike belief in the euphonious continuum of Heaven, Earth, Man can be found in the *Cheng-meng*, I:2: [THE GREAT HARMONY AS THE WAY] embraces the nature which underlies all counter processes of floating and sinking, rising and falling, and motion and rest. It is the origin of the process of fusion and intermingling, of overcoming and being overcome, and of expansion and contraction. It is *ch’ien* (Heaven) that begins with the knowledge of Change, and *K’un* (Earth) that models after simplicity. See WING-TSIS CHAN, A SOURCE BOOK, 463.

<sup>151</sup> ANALECTS, XIX.

<sup>152</sup> TU WEI-MING, CENTRALITY AND COMMONALITY, 106 (1989).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

order. Imposing Western legal concepts upon Chinese legal tradition, risks asking the wrong questions or answering irrelevantly. At worst, it may lead to misinterpret the Chinese legal order. Geertz claims: "...to rely on Western polarization is now not just to distort the law elsewhere, it is to be left without anything, save mockery and lamentation, to say about it at all."<sup>155</sup> Each tradition has its own value and its own limits. How could the western legal tradition, in its search for faith and reason, reach the same essential questions as Chinese tradition in its search for wisdom and harmony? "Prose in the west, poetry in China,"<sup>156</sup> neither can supplant the other; both are necessary: not because their contents would be complementary, but because their modes of expression make them unexchangeable . . . we can never know which one is a commentator of the other.<sup>157</sup>

"The only reliable human universal may be human difference."<sup>158</sup> To compare such different traditions asks us to bring together incommensurable ideologies and dissimilar experience. The diversity of legal traditions and the diversity of ways of life in different cultures embody the human capacity for choice and self-creation. "Where difference is lacking, violence threaten."<sup>159</sup> As in ecosystem, biodiversity is the key to the sustainability.<sup>160</sup> Culture has to conform to this important principle of evolutionary

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<sup>155</sup> CLIFFORD GEERTZ, *LOCAL KNOWLEDGE*, 222 (Basic Books, Inc.1983)

<sup>156</sup> MICHEL C. MASSON, *supra* note 105, at 199.

<sup>157</sup> *Id.*

<sup>158</sup> Vivian Grosswald Curran, *Dealing in Difference: Comparative law's Potential for Broadening Legal Perspectives*, 46 Am. J. Comp. L. 657, 667 (1998).

<sup>159</sup> "La ou la difference fit defaut, c'est la violence qi menace." REN GIRARD, *LA VIOLENCE ET LE SACRE* 89 (Paris Grasset, 1972).

<sup>160</sup> See general, LUISA MAFFI, *ON BIOCULTURAL DIVERSITY* (Washington DC: Smithsonian Institution, 2001).

biology: most change occurs to maintain the organism in its steady state.<sup>161</sup> Hence, Culture is a *plural tantum*: it exists only in the plural.<sup>162</sup> Law is a culture fabric. The comparative study of law is then seen as an exercise in intercultural transaction which requires historical dynamics and internal variation. The vitality of comparative law demands not the abolition of difference but the management of cultural heteronomies and the acceptance of the coexistence of non-harmonised particularities. To allow something to be seen for what it is; to allow a law to affirm itself in its difference is the only way to do justice to the profound diversity of legal experience across jurisdictions. But what is the true difference? As long as foreign legal cultures only look like or unlike us, and as long as they are treated as same or other, they do not speak for themselves. In doing that, we take ourselves as the yardstick or as the norm. Instead, we have to learn to accept that others have different truths. “We are faced with defining ourselves neither by distancing others nor by drawing them close to us as our facsimiles but by locating ourselves among them.”<sup>163</sup> This will require us to be open to all differences beneath the surface, and even in spite of surface similarities, as well as the possibility of differences at the most fundamental level.<sup>164</sup> “The search for non-difference is the strongest censorship”.<sup>165</sup>

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<sup>161</sup> Pierre Legrand: *The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure*, TUL. L. REV. 1033, 1049 (2001).

<sup>162</sup> See BHIKHU PAREKH: *RETHINKING MULTICULTURALISM*, 76-9 (Cambridge, Mass: Harvard University Press, 2000).

<sup>163</sup> CLIFFORDS GEETZ, *LOCAL KNOWLEDGE: FURTHER ESSAY IN INTERPRETIVE ANTHROPOLOGY* 186 (1983).

<sup>164</sup> *Id.*

<sup>165</sup> *C'est la censure law plus forte que cette recherché de la non-difference*. JEAN BOLLACK, *SENS CONTRE SENS* 179-80 (2000).

Moreover, comparisons involve a greater sensitivity to the relationship between the self and the other. The argument of self-understanding and other understanding are internally connected. Difference conditions identity.<sup>166</sup> Studying the relationship between the “West” and China is also a point of entry into studying the formation and meaning of Western or Chinese cultural practices themselves. In effect, identity requires difference in order to assume its being. One example, the first cannot be the first if there is not the second after it. Thus, the second is not just what comes after the first, but it is what allows the first to be the first. It is through the second that the first is first.<sup>167</sup> “Identity, because it is a relation, demands, as the condition of its very existence, the existence of a non-identity. Only the existence of non-identity allows identity to exist as identity, which is to say the identity owes its existence to non-identity.”<sup>168</sup> In that sense, I is the other.<sup>169</sup> Rather than seeing the others as not so much like us, we should see ourselves as very similar to others while acknowledging, accepting, embracing, and even admiring our differences.<sup>170</sup>

Still the question remains: whether focus on difference could connote isolationism. Difference needs not be viewed as divisive and impoverishing. It also can be experienced as an affirmation of being.<sup>171</sup> Comparative law as an exercise in cross-

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<sup>166</sup> PIERRE LENGRAUD, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITION*, at 263.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> RIMBAUD: Haldane Je est un autre.

<sup>170</sup> Nora V. Demleitner, *Combating Legal Ethnocentrism*, 31 *Ariz. St. L. J.* 737, 745(1999).

<sup>171</sup> LENGRAUD & MUNDAY, *supra* note 168, at 263.



cultural translation does not focus on difference for the sake of difference. Clifford Geertz draws a distinction between difference and dichotomy: “a difference is a comparison and it relates; a dichotomy is a severance and it isolates.”<sup>172</sup> Hence, Philip Larkin’s remark: “Insisting so on difference, made me welcome:/ Once that was recognized, we were in touch.”<sup>173</sup> To fully recognize other’s differences and uniqueness, will enhance the understandings and foster the tolerance. Comparative research, therefore, must develop an acute sensitivity to the peculiarities of the local, pushing against cultural barriers toward an ideal of mutual comprehension and building bridges among people. In contrast, a false conclusion of similarity avoids the complexity of truth and reduces the otherness by assimilating it to sameness. It pursues the sense of universality at the price of vibrate culture diversity. Spanish poet Antonio Machado stated: “...But the other refuses to disappear: it subsists, it persists; it is the hard bone on which reason breaks its teeth. There is what might be called the incurable otherness from which oneness must always suffer.”<sup>174</sup>

With repeated warning about the impossibility of understanding the others, should we give up communicating? Of course not. An awareness of “irreducible incomparables”,<sup>175</sup> does not mean to give up communications. It means that comparison demand “thick description”<sup>176</sup>, --rich, multilayered and detailed accounts of social

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<sup>172</sup> CLIFFORD GEERTZ, *AFTER THE FACT* 28 (Cambridge, Mass.: Harvard University Press, 1995).

<sup>173</sup> PHILIP LARKIN, *THE IMPORTANCE OF ELSEWHERE* IN *COLLECTED POEM* 104 (London: Faber & Faber, 1990).

<sup>174</sup> *Quoted* by PIERRE LENGEND, in *COMPARATIVE LEGAL STUDIES*, at 301.

<sup>175</sup> Vivian Curran, *Cultural Immersion, Difference and Categories in US Comparative Law*, 46 *Am. J. Com. L.* 43, 67 (1998).

<sup>176</sup> See Clifford Geertz, *The interpretation of cultures* 5-10 (New York: Basic Books, 1973).

experience to convey the complexity of cultural differences. Vivian Curran refers to this method as “immersion comparison”. It involves studying, not just legal rules, but also social values, beliefs, traditions and collective identities and emotions.<sup>177</sup> We also need to adjust to expecting the unexpected; cherish the irreducible difference with a striving to reach comprehension and a recognition that some distance will remain.

People occasionally do exchange their thoughts or share their difference. “Exciting and fruitful disagreement” is a heightening cultural and legal self-consciousness.<sup>178</sup> The world is a various place, various between China and America, various between Confucianism and Christianity, various between colonial thens and nationalist nows, various between little tradition and great, “much is to be gained . . . by confronting that grand actuality rather than wishing it away in a haze of forceless generalities and false comforts.”<sup>179</sup> Let us enjoy the stereophonic quality of the variations between one tradition and the other. In Mencius world: “Try your best to treat others as you wish to be treated yourself, and you will find that this is the shortest way to humanity.”<sup>180</sup>

## **VI. Conclusion**

Teemu Ruskola’s *Conceptualizing Corporations and Kinship* told us that many traditional Chinese clans were commercial enterprises organized in the idiom of the

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<sup>177</sup> *Supra* note 174.

<sup>178</sup> R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 318, (Princeton University Press 1979). The normal/abnormal discussions are at, *inter alia*, pp. 315-22, 357-65. *See also* THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, (University Chicago Press 1970); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* (Basic Books, Inc. 1983)

<sup>179</sup> *See* GEERTZ, *supra* note 117, at 234.

<sup>180</sup> MENCIUS, VIIA:3.

family. These “clan corporations” operated many functions that western corporate does today. Ruskola claimed even before the introduction of Western corporate law, China had already had indigenous tradition in corporate governance. In the attempt to challenge Orientalist myths of China, his article reads the properties of western corporation into Chinese clan which it never possessed. When Chinese or other traditions are “made familiar and are adjudicated on the basis of Western standard...they can only be an inferior variation on a Western theme.”<sup>181</sup> This mistaken conclusion of similarity ignored the overall cultural context of China in which evolve its distinctive legal habits, history, social relationships and ideologies. It assumed that Chinese clans occurred in a cultural vacuum. Thus, its output remained largely irrelevant to Chinese legal sensitivity. The erroneous analogy is just as great an obstacle to the adequate understanding of Chinese culture as is prejudice of one’s own superiority. Since any difference suggests a dimension unknown to the self, it becomes extremely challenging for comparatists to understand other legal culture according to that culture’s own perspective.<sup>182</sup> If the comparative study is to produce anything of value, it should develop the awareness to the complex ramification of each culture. After all, the effort to understand others heightens one’s awareness of his own heritage even as he seeks to explain another.

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<sup>181</sup> Lin TongQing, Henry Rosemont, Jr. & Roger T. Ames, *Chinese philosophy: a Philosophical Essay on the “State-of-the-Art”*, *Journal of Asian Studies*, no. 3,751 (1995)

<sup>182</sup> Vivian Grosswald Curran, *Cultural Immersion, difference and Categories in U.S. Comparative Law*, 46 *Am. J. Comp. L.* 43, 83(1998).

