

# LEGAL TRANSPARENCY IN DYNASTIC CHINA

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*The Legalist-Confucianist Debate and  
Good Governance in Chinese Tradition*

John W. Head  
and  
Xing Lijuan



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# PREFACE AND ACKNOWLEDGEMENTS

This book is designed to offer a general cross-cultural “survey-style” introduction to a topic of enormous contemporary interest, viewed from a temporal and ideological distance. The central *topic* is “legal transparency”, which we shall define as the book proceeds. The reference to a “temporal and ideological *distance*” reflects the fact that we explore here the debate over legal transparency (and its opposite, legal opaqueness<sup>1</sup>) as it unfolded in dynastic Chinese law, which began in the dark mists of history and ended formally just over a hundred years ago. Our approach is “*cross-cultural*” because we draw from our combined academic and practical experience with both Chinese and Western legal traditions and because we offer a bilingual perspective on some of the issues we address.

In undertaking this effort, we have relied heavily on the work of others. For that reason, we should offer acknowledgements and notes of appreciation at the very outset. Our largest debt as a substantive matter is owed to the many scholars and other observers who have studied in depth the two subjects that this book bridges—that is, transparency and Chinese law. In our Selected Bibliography we have identified a range of authorities in each of these two subject-areas.

Implicit (or sometimes explicit) in the works of the authors whom we have found most helpful is a rather simple proposition: An examination of any law-related topic benefits from a cross-cultural perspective. Indeed, we would assert that in many cases an examination of a law-related topic really cannot proceed legitimately *without* a cross-cultural perspective. So it is with our sub-

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1. As also noted below in Chapter One, we have intentionally opted for the term “opaqueness” rather than “opacity” for a cluster of reasons. Chief among them is the fact that the word “opacity” tends to carry more of a scientific shade of meaning (relating specifically to the blocking of light), a fact reflected in most dictionaries. See, e.g., The Free Dictionary, at <http://www.thefreedictionary.com/opaqueness>. The word “opaqueness”, however, seems to be used more widely to convey non-scientific connotations, such as incomprehensibility, obscurity, and elusiveness of meaning.

ject here. In exploring the concept of legal transparency, we believe that a distant perspective — that of dynastic China, where competing legal philosophies did battle and found compromise over two thousand years ago — can help in understanding what many people may assume is an issue of primarily *contemporary* relevance.

We would also add a word in these opening comments about *why* and *where* the issue of legal transparency (or rather the network of issues, for there are many) can be considered important. The reason *why* is, in a nutshell, that the role of governance in private and public life has expanded at all levels — local, national, and especially international — as a result of globalization and the technological revolution of recent decades. These developments both require and permit much more intense interaction between people who in earlier ages would have had no contact whatsoever with each other. Goods imported into Sweden from the USA, workplace conditions in a Nigerian factory owned by a Chinese company, contents of a blog posted by an Argentinian ridiculing Muslim beliefs — all these involve interactions that have expanded exponentially in frequency and impact. The responsibility to facilitate those interactions in a way that is safe, fair, and civilized often falls to governments.

As for the question of *where* issues of legal transparency can be considered important, we wish to be clear: In our view, the governments of the West have no monopoly on virtue or good performance in terms of legal transparency. Indeed, many of the liberal democracies — the USA comes to mind in particular — fall short in this respect, especially when confronted with large and difficult issues. While we do not intend to elaborate that point in this book, we raise it here in order to suggest that legal transparency is not simply a commodity to be “exported” from the West to other countries and cultures. Instead, it is a feature to which we believe all governments must give close attention.

We also believe that legal transparency should be regarded as a feature of two larger landscapes. The first is transparency in governance more generally — that is, looking beyond matters of *legal* transparency. The other is legal philosophy and ideology. As we hope to illustrate clearly in the pages that follow, Chinese legal history reveals important clashes in opinion about the nature of humans and their role in society. And we believe a study of those clashing opinions can prove instructive for contemporary observers trying to identify and prescribe the best form of legal transparency for a particular society or for the international legal system as a whole.

We wish to emphasize one more point about the approach we have taken in writing this book. It concerns the format and style of the book, and our efforts to keep it to a rather modest length. Unlike some of our other writings, we have envisioned this book as more like an extended essay than like an encyclopedic



research work. Naturally, we have provided footnote citations to authority where specific attribution is warranted, as in the case of quoted material. More generally in the book, however, we have tried to keep footnotes to a minimum in the hope of providing as clear and brisk a “story line” as possible. In particular, our presentation of details regarding Chinese legal history and legal philosophy is not intended to report new discoveries. Most of those details (and more) are easily available in the rich literature on Chinese dynastic law, and indeed might already be familiar to experienced students of Chinese history and culture. The contribution we wish to make will come, if at all, from the juxtaposition of those details to the specific topic of legal transparency as viewed from a more contemporary perspective. In short, our project in this book has been one of substance and analysis presented efficiently, not authorities and citations presented exhaustively.

Having said that, it will become clear to a reader that we have taken seriously the need to offer as accurate a cross-cultural perspective as possible on some of the details of Confucianist and Legalist ideologies. Hence, we have included in some portions of the book—and especially in the later chapters, where we focus most closely on how those two grand ideologies (first individually and later in a hybrid form) address matters of legal transparency—a careful, sometimes bilingual narrative. That narrative includes not only (i) an English translation of key passages (from Confucius, for instance, or Shang Yang or Xun Zi) in which those ideologies are expressed, but also (ii) a *second* (alternative) English translation, where providing it would be instructive, and in many cases (iii) the original Chinese version of such passages as well. We would like to think that our ability to offer this range of perspectives on relevant law-related language brings a special value to this book.

In assembling the many resources necessary to undertake our analysis, we have relied on several assistants for purposes of research and editing. We greatly appreciate their help, and especially the most recent efforts of Ashly LoBurgio Basgall, Faculty Services Senior Researcher at the University of Kansas Wheat Law Library. Moreover, significant portions of Chapter Two draw from work done several years ago by Ms. Wang Yanping. As usual, support from the University of Kansas General Research Fund is also gratefully acknowledged.

## Notes on Language, Translation, Citations, and Conventions

### Matters Relating to Chinese Language and Translation

As noted above in the Preface and Acknowledgements, this book takes a cross-cultural approach; its subject-matter demands this sort of approach. Therefore, although the book assumes no knowledge of the Chinese language on the part of the reader, many of the concepts explored in the book were expressed originally in Chinese—and so, as authors, we have had to provide translations and explanations. The following points identify key elements in the approach we have taken in providing such translations and explanations.

- *Fundamental Chinese terms—pinyin versus Wade-Giles.* Certain Chinese words and phrases are so central to an understanding of Chinese law and culture that we have made liberal use of such words throughout this book. These include, for instance, *lǐ* and *fǎ* (roughly translated as “propriety” and “written law”, respectively). Most of those words appear in *pinyin* form—that is, by using the system of romanization adopted by the government of the PRC in 1970 for spelling Chinese characters in letters recognizable to Westerners. However, much of the literature on Chinese law and history uses the Wade-Giles system of romanization that prevailed in earlier years. When passages in this book quote from that literature, we have occasionally inserted [in brackets] the *pinyin* version for clarification—for example “Tung Chung-shu [Dong Zhongshu]”. In some instances we have done the reverse—placed the Wade-Giles version after the *pinyin* version.
- *Tones and characters.* In a few cases, the *pinyin* words we have included in the text also show tonal markings that signal how the character is spoken. In Mandarin,<sup>2</sup> which has four tones, the tonal markings (using the letter “i” as an example) are: *ī* = first tone (high and even); *í* = second tone (rising); *ǐ* = third tone (falling, then rising); *ì* = fourth tone (falling emphatically). We have indicated the appropriate tones for a few key terms, such as *lǐ* and *fǎ* (both are third tone) and *xíng* (second tone) and *yuè* (fourth tone); occasionally, we have provided tonal markings on a

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2. Europeans in the sixteenth century gave the name “Mandarin” to the language of the capital city of Beijing, which became the standard official spoken Chinese following the move of the capital from Nanjing to Beijing in the Ming dynasty. F.W. Mote, *IMPERIAL CHINA 900-1800* 620 (1999). Mandarin is also sometimes referred to as *putunghua*.

few other words and phrases, as in the case of *yǐ dé pèi tiān*. We have a specific reason for doing this (providing the tonal markings) in the case of *lǐ*: to distinguish between (i) *lǐ* (third tone), relating to rules of propriety that were so central to Confucian teaching, and (ii) *lì* (fourth tone), meaning “sub-statute” or “codified precedent”. The distinction between these two completely different words is clear, of course, in the Chinese characters used to express them: 礼 (*lǐ*) and 例 (*lì*). (We have not, however, added tonal marks, even to the word *li*, in those English-language sources that did not themselves include tonal marks.) Occasionally in this book we use the Chinese characters for especially important terms. (As noted immediately below, we also provide, in footnotes, full Chinese text of several passages.)

- *Selective use of original Chinese text.* Having said that this book does not assume that readers have a familiarity with the Chinese language, we hasten to add that for readers who *do* have such a familiarity, extensive Chinese (original) versions of passages are provided in footnotes, especially in the later chapters of the book. As noted above in the Preface and Acknowledgements, we have taken this approach partly in an effort to offer as accurate a cross-cultural perspective as possible.
- *Approach to translation.* Given the fact that much of the literature we draw on was written in Chinese, we have had to engage in a great deal of translation from Chinese to English. Almost the entire load of that effort has rested on Ms. Xing. With her fluency in English and Chinese, plus her background and practice in both US and Chinese law, Ms. Xing is particularly well-suited to offer translations that make sense to a native-English-speaking reader, particularly one who is generally familiar with Western law and culture. Mr. Head, for his part, has provided a different sort of ingredient to the translation process, since he is generally familiar with many of the concepts of dynastic Chinese law and philosophy. Hence, in each of the many translated passages appearing in the pages that follow, the two of us have combined our efforts in hopes of striking an appropriate balance between (i) being as true as possible to the original content and meaning intended by the author and (ii) using a formulation that a native English speaker would understand. Striking this balance has naturally involved the exercise of judgment on our part, as well as the use of certain techniques of presentation — particularly (a) inserting parenthetical phrases [in square brackets] intended to clarify the original text being translated and (b) inserting additional punctuation and indentations to highlight subsidiary quotations within excerpts. We are well aware of the fact that the result of this translation-and-pres-

entation effort is imperfect. It is partly for that reason that we have provided not only (i) an English translation of key passages (from Confucius, for instance, or Shang Yang or Xun Zi) in which those ideologies are expressed but also (ii) a *second* (alternative) English translation where doing so would be instructive, and in many cases (iii) the original Chinese version of such passages as well.

- *Ancient Chinese teachers and texts.* There can be some confusion as to the names of ancient Chinese authors and the books that are attributed to them (or that record their teachings, as compiled by others). For instance, “Xun Zi” is the name of a person — sometimes referred to in that fashion (“Xun Zi”) and sometimes referred to as “Xunzi” and sometimes referred to as “Xuntzu” (to reflect the Wade-Giles approach mentioned above) — who lived in the fourth and third centuries BCE. The same name is sometimes used as a title to the book of that person’s teachings. Likewise, “Meng Zi” (or “Mengzi” or “Meng Tzu”) can be used to refer both to a person and to the book attributed to him. Similarly, “Han Fei” (or “Han Fei Zi”) can be used to refer both to a person and to the book attributed to him. The word “Zi” (or “tzu”) in this context carries the same honorific meaning as “mister” or “master” or “teacher” in English — as a means of paying respect to a person of great knowledge and repute. Further variations have occurred in respect of some famous Chinese names through an effort at latinization — that is, changing the names to make them sound as if they came from Latin roots. This has occurred with the name “Mengzi”, which is often latinized as “Mencius”, and even with the name of Confucius himself (the non-latinized version is often given as Kung Fu Zi). In an effort to impose some certainty and consistency on this messy mix of practice, we have opted in this book, wherever possible, (1) to refer to the *person* by using the surname (and where it is commonly done in the literature, the honorific “Zi” as well), and occasionally also the person’s given name — and showing all such names in regular typeface — and (2) to refer to the *book* attributed to that person by using the title most commonly used for that book in the pertinent literature; and we place that title either in italics or in large-and-small capital letters, following the practice explained below in the bullet-point paragraph on “*Citations in general*”. Hence, for instance, references will be found in our text to the person “Xun Zi” (or occasionally to “Xun Kuang”, since his given name was “Kuang”) as well as to the book *Xun Zi* (italics) or XUN ZI (large-and-small capital letters), depending on whether the title appears in a sentence or in a formal citation. Likewise, references will be found to the person Han Fei and the book *Han Fei Zi* or HAN FEI

ZI—and to the person Guan Zi (or Guan Zhong, since his given name is Zhong) and the book *Guan Zi* or GUAN ZI. (Naturally, the spellings of any of these persons or books in quoted materials drawn from English-language texts have been left unchanged.)

## Other Matters of Usage, Spelling, Citations, and Conventions

Although this book is published in the USA and concentrates on legal topics, both its subject-matter and its intended audiences are by no means “USA-specific” or “law-specific”. Indeed, we hope it will prove of some interest to non-US readers—especially in China—and to readers from other disciplines than law, such as history, comparative politics, and Asian studies. This fact has some implications for the styles and usages found in the following pages. We have summarized below several of the specific approaches we have taken to matters of spelling, citation, punctuation, terminology, and formatting that reflect this perspective or that for other reasons we have considered appropriate for this book, and which might be unfamiliar to some readers.

- *Citations in general.* Citations to books, articles, and other legal materials appear in a less abbreviated style than that used by many US law journals and books. We believe the heavily abbreviated style used in US legal texts can be so unfamiliar to a general audience as to create confusion or uncertainty. In addition, in the case of books, we have departed from the practice of putting the authors’ names in all capital letters. Instead, authors’ names for all works—books and articles and other items—appear in regular upper case and lower case letters; then titles of books appear in large and small capitals and titles of other works appear in italics or, in a few cases depending on the nature of the work, in regular font with quotation marks.
- *Internet citations.* In the case of citations to sources found through the internet, we have not included details of “last updated” and “last visited”, on grounds that such information is likely to be of little use. Most of the citations to such sources were operational as of sometime in early 2012. However, it is not uncommon for a document on a website to change from one location to another within the website, so a reader wishing to retrieve such a document might wish to use the “search” function within that website in order to find the new location—bearing in mind that sometimes documents are in fact removed from the web entirely.
- *Internal citations.* Many of the passages that we have quoted from other authors included, in their original publication, citations to authority in the

form of footnotes or endnotes. Throughout this book, unless noted otherwise, we have omitted these citations without expressly indicating “(citations omitted)” or “(footnote omitted)”.

- *Wikipedia*. We also have omitted (in nearly all cases) citation to the authorities that support the factual accounts and explanations that we have occasionally drawn from Wikipedia. Although we are fully aware of the shortcomings of relying on Wikipedia for many types of research and analysis, we have felt comfortable drawing on such accounts and explanations if (i) they cite sources that, in our judgment, warrant confidence and (ii) they relate to general information that we are confident can be substantiated elsewhere if curiosity prompts someone to pursue the issue further.
- *Specific usages*.
  - We have used the abbreviation “CE”, for Common Era (or Current Era), to carry the same meaning as the increasingly outdated abbreviation “AD”, for *Anno Domini*; and we have used the corresponding abbreviation “BCE”, for “before Current Era”, instead of “BC”, for Before Christ.
  - In those few passages in which we have referred specifically to the modern political system of mainland China—that is, the People’s Republic of China—we have used the abbreviation “PRC”, rather than using the name “China”. This facilitates separate reference, when necessary, to (i) the Republic of China (“ROC”) on Taiwan or to (ii) China as a single social and political entity, especially in the years before 1911.
  - The acronym noun “USA” is often used in this book in preference to the commonly-used noun “United States”, inasmuch as there are other countries (such as Mexico) with the title “United States” in their official names. In that acronym USA, we have opted to omit the periods (as would appear in “U.S.A.”), as this seems to be the more modern trend and also follows the usage found in acronyms for other political entities such as the United Nations (UN) and the People’s Republic of China (PRC).
- *Punctuation with quotation marks*. We have followed the less-used but more logical convention of placing quotation marks inside all punctuation (unless of course the punctuation itself is included in the original material being quoted). Doing so allows the text to reflect more faithfully how the original material reads.<sup>3</sup>

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3. In defense of our decision to use this approach, we would refer readers to H. W. Fowler, *A DICTIONARY OF MODERN ENGLISH USAGE* 591-92 (2d ed., 1965):

Questions of order between inverted commas [quotation marks] and stops [periods] are much debated.... There are two schools of thought, which might be

- *Italicization.* We have used italicization in five main circumstances: (i) where we wish to add emphasis (or where emphasis was already inserted in material being quoted from other authors); (ii) in textual references to titles of books (such as *The Book of Lord Shang* or Lon Fuller's book *The Morality of Law*); (iii) in citing law journal articles or other works appearing within larger publications; (iv) to signify words or terms from languages other than English (mainly Latin, French, and of course Chinese); and (v) in certain "levels" of subsection headings, as a navigational aid to the reader. We assume the context will allow easy distinction between these various usages.

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called the conventional and the logical. The conventional prefers to put stops within the inverted commas, if it can be done without ambiguity, on the ground that this has a more pleasing appearance. The logical punctuates according to sense, and puts them outside except when they actually form part of the quotation.... The conventional system is more favored by editors' and publishers' rules. But there are important exceptions, and it is to be hoped that these will make their influence felt. The conventional system flouts common sense, and it is not easy for the plain man to see what merit it is supposed to have to outweigh that defect; even the more pleasing appearance claimed for it is not likely to go unquestioned.