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## Chinese Traditions Inimical to the Patent Law, The Symposium: Doing Business in China

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## ARTICLES

### The Chinese Traditions Inimical to the Patent Law

*Liwei Wang\**

China has had a great civilization for millennia. Until the 15th century, Chinese technological discoveries and inventions were often far in advance of those in Europe.<sup>1</sup> Francis Bacon (1561-1626) even maintained that Chinese “printing, gunpowder, and the magnet have changed the whole face and state of things throughout the world . . . no empire, no sect, no star seems to have exerted greater power and influence in human affairs than these mechanical discoveries.”<sup>2</sup> However, China has instigated no revolutions in science<sup>3</sup> in the recent past. Nowhere in the world has the clash between traditional culture and societal modernization been more powerful than in China.<sup>4</sup>

These phenomena remind us of a common view that China’s modernization of science and technology is “burdened by a number of constraints, primarily constraints in traditional culture and in the Marxist-

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<sup>1</sup> 1 JOSEPH NEEDHAM, *SCIENCE AND CIVILIZATION IN CHINA* 4 (1965).

<sup>2</sup> Francis Bacon, *The New Organon*, in *THE NEW ORGANON* 118 (F. Anderson ed., 1981).

<sup>3</sup> By “revolutions in science,” I mean the transition like that in the “exact sciences” between Galileo and Laplace (1741-1827) and its wider repercussions by 1800 in Europe. See Sivin, *Why the Scientific Revolution Did Not Take Place in China—Or Didn’t It?* 5 *CHINESE SCIENCE* 45 (1982).

<sup>4</sup> Nancy Besnkopf Tucker, *China and America: 1941-1991*, 1991 *FOREIGN AFF.* 75, 76.

Leninist one-party state.”<sup>5</sup> More specifically, in discussing the patent law of the People’s Republic of China (PRC), Beaumont claimed that the “two-fold problem in stimulating innovation” is “a residual mistrust of innovation as a result of years of foreign imperialistic colonization,” and of “finding ways to encourage and reward innovation which are congruent with Marxist thought.”<sup>6</sup> This article asserts that China’s traditional culture is probably as inimical to patent law as it is to the modernization of science and technology.

The PRC’s scientific and technological modernization is directly owed to Deng Xiaoping, the current leader in China. No sooner had Xiaoping risen to power at the end of the 1970’s, than “the Four Modernizations”—modernization of industry, agriculture, national defense, and science and technology—became the dominant goal of the Chinese Communist Party (CCP) and the PRC government.<sup>7</sup> Chinese leadership still takes science and technology as the key to realize the other three modernizations.<sup>8</sup> In response to this commitment, the Fourth Session of the Standing Committee of the Sixth National People’s Congress promulgated the Patent Law in 1984.<sup>9</sup> This law stimulates the Chinese people’s enthusiasm for inventions and protects foreign intellectual property rights in China.

Like its Western counterpart, the PRC’s Patent Law conceives of an invention or innovation as a creation which transcends the prior art of the relevant field of human knowledge. Article 22 provides that “[a]ny invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.”<sup>10</sup> This provision is similar to that of the United States Patent Act: the patentability of a subject matter depends on its “novelty,” “obviousness,” and “utility.”<sup>11</sup> The PRC’s Patent Law awards the patentees private property rights in their inventions and excludes, to a considerable extent, all others from using the inventions without the patentees’ permission for a certain number of years.<sup>12</sup> Consequently, this socialist patent law deepens

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<sup>5</sup> Goldman & Simon, *The Onset of China’s New Technological Revolution*, in SCIENCE AND TECHNOLOGY IN POST-MAO CHINA 4 (1989).

<sup>6</sup> William E. Beaumont, *The New Patent Law of the People’s Republic of China (PRC): Evidence of A Second Chinese “Renaissance”?* 27 IDEA 39, 43-44 (1986).

<sup>7</sup> *Communique of the Third Plenary Session of the 11th CCP Central Committee*, PEKING REV. 6-16 (Dec. 29, 1978).

<sup>8</sup> TONY SAICH, CHINA’S SCIENCE POLICY IN THE 80’S 1 (1989).

<sup>9</sup> *Patent Law of the PRC, March 12, 1984*, 5 WIS. INT’L L. J. 164 (1986).

<sup>10</sup> *Id.* at 167.

<sup>11</sup> *Graham v. John Deere Co.*, 383 U.S. 1 (1965).

<sup>12</sup> D. DONG, ZHONGGUO ZHUANLI ZHISHI JIANGZUO [A COURSE OF LECTURES ON THE CHINESE PATENT LAW] 43-46 (1987).

people's impulse for commercial profit.

Patent law is affected by people's understanding of, and approach to, the world. If a religious or metaphysical approach to the world prevails in a nation, a patent law could hardly spark modern science and technology. At the same time, patent law is affected by people's values such as the interest in science and technology, or the desire for commercial profit, which is the motivating force behind a patent. If people are indifferent to innovation and view commercial incentives as shameful, a patent law would mean little. If such traditions linger today, they must be inimical to the creation of a patent law. Specifically in China, then, what kinds of traditions—if any—are inimical to the PRC's Patent Law?

The main thesis of this essay is that there are some Chinese traditions inimical to a patent law, and that these traditions were utilized by Mao Zedong (1893-1976), the top leader in the PRC, because the socialist regime shared some irrationality with the monarchic regime. There are four parts in this essay. The first part attacks the opinion that the Patent Law is burdened by "a residual mistrust of innovation." The second part discusses the traditional Chinese cognitive methodologies for scientific inquiry, which, though undesirable, are insignificant in the PRC's Patent Law today. The third part attempts to prove that Chinese tradition ignored science and technology while stressing politics and the humanities, and that this tradition scorned commercial profit while insisting on Confucian morality. The socialist ideology inherited and carried forward these traditions inimical to a patent law. The final part concludes that it is the monarchic-like regime behind Maoism which should be changed in light of the Patent Law.

This essay is a comparative work. Western history does not necessarily provide a path which other nations must ineluctably follow.<sup>13</sup> Nor is the model of Western scientific and technological development the absolute criterion to measure development in other societies. On the other hand, the Western model of science is the most successful in history. If there are some factors universally essential to scientific and technological development, the Western model should contain them. Therefore, I will discuss some situations in the West to highlight the relevant issues in China. In addition, a comparison of China and the West is appropriate because people can hardly stand apart from their own culture and view

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<sup>13</sup> David M. Trubek, "Law and Development": *What We Know and What We Do Not Know*, in 1 SINO-AMERICAN ECONOMIC AND CIVIL LAW CONFERENCE 1, 40-41 (THE COMMITTEE ON LEGAL EDUCATION EXCHANGE WITH CHINA ed., 1989) (available in the Committee on Legal Education Exchange with China in Columbia Law School).

other societies in a completely impartial fashion.<sup>14</sup> A comparison will help people avoid "measuring others' corn by one's own bushel," as the proverb goes.

This essay is not meant as an exhaustive discussion on which Chinese traditions are inimical to the PRC's Patent Law, because such an inquiry encompasses too many issues. For example, "science and technology" is a modern phrase in China, though I use the phrase freely; in Chinese history, there was not even an equivalent concept of the English word "science." The current Chinese word "*kexue*" (science) was introduced from Japan at the end of last century.<sup>15</sup> I therefore confine myself mainly to those issues which I think are important to Chinese patent law and those issues which are controversial.

### I. "A RESIDUAL MISTRUST OF INNOVATION"?

In discussing the PRC's Patent Law, William Beaumont claims: [P]erhaps a more serious, and more pervasive, result of the Western predation, was the development of an enormous body of reactionary opinion which was hostile to Westerners, in particular, and to innovations, in general. Thus, the present Chinese leadership faces at least a two-fold problem in stimulating innovation. . . . The most basic problem relates to a residual mistrust of innovation as a result of years of foreign imperialistic colonization.<sup>16</sup>

This claim seems to be an overestimation of the historical facts. It is normally held that Western science and technology were first introduced into China in 1581 by an Italian missionary, Matthaeus Ricci (1552-1610), who was sent by the Society of Jesus. After Ricci came other missionaries, who brought advanced knowledge of astronomy, mathematics, etc. to China. Many of them became officials in the central government. But the emperors did not understand the significance of this knowledge and Chinese society remained apathetic toward it. On the other hand, the Chinese were not hostile to the Westerners, nor to their science, technology, or innovations.<sup>17</sup> An example illustrating Chinese attitudes arose in 1793, when the British government sent Lord Ma-

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<sup>14</sup> William P. Alford, *The Inscrutable Occidental? Implications of Robert Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 965 (1986).

<sup>15</sup> Fan, "Mr. Science" and the New Culture Movement: An Investigation from the Angle of Social History of Science, 3 LISHI YANJIU [HISTORY STUDIES] 36, 39-40 (1989).

<sup>16</sup> Beaumont, *supra* note 6, at 43.

<sup>17</sup> SHIRAN DU ET AL., ZHONGGUO KEXUE JISHU SHIGAO II [II THE DRAFT OF CHINESE SCIENCE AND TECHNOLOGY HISTORY] 197-98, 205 (1983). Between the 16th and 17th centuries, the missionaries who could be verified by their books numbered more than 70. Of the more than 370 kinds of books introduced into China, more than 120 were scientific ones. Ye, *Chinese Traditional Culture and the Influx of Western Learning*, 1 HISTORY STUDIES 7 (1983).

cartney to China to establish business and diplomatic relations. Macartney showed advanced firearms to a Chinese official but the otherwise open-minded official responded indifferently: "I may look at the firearms or not, whatever you wish. I don't think there is anything valuable or unique in them."<sup>18</sup>

Western predation of China began with the 1840 Opium War between Britain and China. After losing the War, the Chinese Celestial Empire was forced to sign a series of unequal treaties with Western Powers. The Chinese painfully experienced Western exploitation and oppression for the first time in history. However, the Chinese also considered the shortcomings of China and the strong points of the West. Some high-ranking officials thought that the only way out for China was to learn science and technology from the Western Powers.<sup>19</sup> To be sure, some Chinese, including certain ranking officials, tried to reject everything foreign and scorned innovation, but as they were a minority, they accomplished little.

Hence came the unprecedented Westernization Movement [*Yangwu Yundong*] in the 1860s, aimed at gaining wealth and strength through learning science and technology from the West. The Chinese government established many translation institutions, industrial enterprises, and modern schools; the government employed many foreign experts and sent many diplomatic delegations and students abroad to study.<sup>20</sup> The failure of the Sino-Japanese War of 1894-1895 doomed the Westernization Movement.<sup>21</sup> Still, on January 1, 1896, China's leading newspaper SHEN BAO proposed the Western patent system, holding that an important reason for the backwardness of Chinese science and technology was the absence of a patent system. On July 13, 1898, the government promulgated the first patent act in Chinese history, the Reward Regulations for Promoting Technology Development [*Zhenxing Gongyi Geiji-ang Zhangcheng*]. In the same year, Zishou Chen was awarded a patent for his spinning machine.<sup>22</sup>

At the end of the 19th century, China was partitioned by the Western Powers of Britain, Germany, and Russia.<sup>23</sup> In 1898, Chinese reform-

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<sup>18</sup> Ye, *Traditional Culture in Modern China*, 1 HISTORY STUDIES 84, 99 (1985).

<sup>19</sup> DU ET AL., *supra* note 17, at 233, 243.

<sup>20</sup> Ye, *supra* note 18, at 9-11.

<sup>21</sup> DU ET AL., *supra* note 17, at 289.

<sup>22</sup> Li, *The Trends of Scientific and Technological Modernization in the 1898 Reform Period*, 6 HISTORY STUDIES 123, 134-35 (1990).

<sup>23</sup> In 1887, the German troops occupied Jiaozhouwan Port, and the Russian troops occupied Lushun port; in 1899, the French set up a navy base in Guangzhouwan port. Britain, Japan, and the United States all tried to expand their forces in China.

ists waged the Reform Movement [*Wuxu Bianfa*], attempting to model China on the West in a more comprehensive way. Though the Movement lasted only 103 days, the policy of learning science and technology from the West by no means stopped. From 1900 to 1906, more than 10,000 students were sent abroad by the Chinese government.<sup>24</sup> In 1912, the newly established Republic of China promulgated the Provisional Regulations of the Reward for Handicraft [*Jiangli Gongyipin Zanzheng Zhangcheng*]. Although this government did not promulgate a patent law until 1945, it granted more than 600 patents from 1912 to 1944.<sup>25</sup>

At the beginning of this century the Chinese literati critically examined Chinese traditional culture and boldly explored the new culture from the West. In 1915, the first issue of SCIENCE [*Kexue*], a well-known magazine, declared that "in those powerful countries, democratic rights and national strength must have developed side by side with their science." New Youth [*Xinqinnian*], the magazine exerting the most tremendous influence on the Chinese, ardently advocated similar ideas.<sup>26</sup>

After World War I, the victorious nations drafted the Paris Peace Treaty, more or less treading Chinese sovereignty underfoot. On May 4, 1919, enraged university students demonstrated in Beijing opposing this Western imperialist treaty. Supported by workers and businessmen in the major cities, the demonstrations greatly stimulated the literati's patriotic enthusiasm. The May Fourth Movement held high two great banners—"Mr. Democracy" and "Mr. Science" borrowed from the West—as the means to criticize feudal traditions and as the goals to be realized in a new China. This movement became one of the most important events in Chinese modern history. Hu Shih (1891-1962), a leading scholar, commented in 1923: "For the past 30 years, a word has almost gained the highest dignity. No one, a conservative or a reformist, aware of the word or unaware, dares to show a scornful or teasing attitude openly to it. This word is no other but 'Science.'"<sup>27</sup>

It might be argued that even if the Chinese government and the literati had no mistrust of innovation, the masses, represented by the Yi Ho Tuan Movement or the Boxers in Hebei Province in 1900, did. In addition to fighting against Western troops, the Boxers killed many Western missionaries and demolished the railway and electric lines. Even those persons who smoked cigarettes, wore glasses, and held foreign umbrellas

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<sup>24</sup> DU ET AL., *supra* note 17, at 298-99.

<sup>25</sup> DONG, *supra* note 12, at 11-12.

<sup>26</sup> Duan, *Three Forms of the Development of a Scientific Outlook in Modern China*, 6 HISTORY STUDIES 111, 116-17 (1990).

<sup>27</sup> Fan, *supra* note 15, at 39, 47.

were killed.<sup>28</sup> The cause of this Movement is complicated, but the Chinese mistrust of, and even hostility toward, the innovation was unquestionably due to their hostility toward the Western colonists. Such "mistrust of innovation" is unlikely to linger today, for several reasons: (1) A nation's hostility to other nations does not necessarily cause its rejection of all things relevant to those nations. The history of Japan may prove this point.<sup>29</sup> (2) Compared with the West, the government and the literati in China enjoyed greater authority over the masses, so that the masses were more inclined to obey governmental policy and the literati's attitude. (3) Such "mistrust" was not in conformity with Chinese tradition, nor with Chinese people's interests. Though rampant in an area for a while, the "mistrust" could hardly reside in the Chinese nation for a century despite drastic changes in the society.

The Chinese did bear resentment against the predatory Western Powers after the 1840 Opium War. However, the main sentiment among the Chinese was a desire for science and technology to safeguard against the Western Powers. A "mistrust of innovation," existing only among the ignorant minority in the past, must be insignificant today if there is any residue at all. Therefore, it would be an exaggeration to claim "a residual mistrust of innovation" against the PRC's Patent Law. Consequently, we may dismiss this "problem."

## II. THE UNDERSTANDING AND APPROACH TO THE WORLD

The great scientist Albert Einstein (1879-1955) once said,

The development of Western science has been based on two great achievements, the invention of the formal logical system (in Euclidean geometry) by Greek philosophers, and the discovery of the possibility of finding out causal relationship by systematic experiment (at the Renaissance). In my opinion one need not be astonished that the Chinese sages did not make these steps. The astonishing thing is that these discoveries were made at all.<sup>30</sup>

Chinese scholars believe that experimental methodology, logical methodology and mathematical methodology are the three pillars supporting modern science.<sup>31</sup> The relationship between the appropriate methodologies and a patent law is obviously close: without appropriate methodologies guiding invention, a patent law would mean little. If no appropriate methodologies existed in the past and the same is true today, it will cer-

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<sup>28</sup> X. DAI, *YI HO TUAN YANJIU* [THE STUDY OF THE BOXERS] 91-92 (1963).

<sup>29</sup> Ding & Du, *An Elementary Analysis of the Factors in Capitalist Modernization in China and Japan during the 19th Century*, 1 HISTORY STUDIES 37, 37-53 (1983).

<sup>30</sup> JOSEPH NEEDHAM, *THE GRAND TITRATION* 43 (1972).

<sup>31</sup> Li, *supra* note 22, at 126.



tainly be inimical to the PRC's Patent Law. Hence, we should see whether the Chinese sages failed to discover the methodologies and if the void still exists today. Since the role of "systematic experiment" is similar to that of a "logical system" in terms of its significance to scientific methodology, I shall discuss the "logical system" issue only.

#### A. The Absence of Methodologies for Scientific Inquiry

In traditional China, the Song Dynasty (960-1279) and the Yuan Dynasty (1271-1368) were the heyday of scientific and technological development. There were admirable achievements in astronomy, mathematics, agronomy, etc. Then came the stagnation.<sup>32</sup> The Chinese made innumerable discoveries and inventions in history, but their achievements were primarily techniques, not sciences.<sup>33</sup> The practice-oriented tradition of Chinese science and technology seemed influenced by what Kuang Xun (313-238 B.C.), a famous Confucian scholar, said: "When dealing with the various things in the universe, gentlemen do not strive to explain the causes [of events], but try to utilize the things wisely."<sup>34</sup>

Hu Shih maintained that during the Ming Dynasty (1368-1644) and the Qing Dynasty (1644-1911), Chinese scholars identified the ancient pronunciation of words by skillfully combining induction and deduction.<sup>35</sup> However, if there were a "spirit and method of 'exact and impartial inquiry,'" as Hu Shih claimed,<sup>36</sup> they were never applied to science and technology. One of the theories most closely connected with science and technology in traditional China is the two-force [*yin, yang*] and five-element [*wuxing*: metal, wood, water, fire, and earth] theory. Examining this theory, one may see the lack of methodologies for scientific inquiry.

Originally, the two-force and five-element theory was two separate theories. Philosopher Ran Zou (305?-240 BC) combined the two theories to interpret the replacement of one dynasty by another.<sup>37</sup> The famous

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<sup>32</sup> DU ET AL., *supra* note 17 at 314, 325.

<sup>33</sup> Y. Yu, *Viewing the Modern Significance of Chinese Culture in the Light of Values*, in ZHONGGUO SIXIANG CHUANTONG DE XIANDAI QUANSHI [THE MODERN INTERPRETATION OF CHINESE INTELLECTUAL TRADITION] 23 (1987).

<sup>34</sup> Chang, *The Doctrine of Man and Nature in Chinese Philosophy*, in 1987 ZHONGGUO WENHUA YU ZHONGGUO ZHIXUE 51 (1988) [CHINESE CULTURE AND CHINESE PHILOSOPHY]. Alone among Confucian scholars, Kuang Xun once raised the opposite idea, "Better to utilize the rules of the universe by controlling them than trust to luck through the eulogy of Heaven." It is doubtful if this idea was recognized by Chinese people.

<sup>35</sup> Hu Shih, *The Scientific Spirit and Method in Chinese Philosophy*, in THE CHINESE MIND: ESSENTIALS OF CHINESE PHILOSOPHY AND CULTURE 108, 126 (Charles A. Moore ed., 1967).

<sup>36</sup> *Id.* at 108.

<sup>37</sup> Liu, *Acceleration and Counteraction: the Two-Force and Five-Element Theory and Chinese Traditional S&T*, in GANGTAI JI HAIWAI XUEZHE LUN ZHONGGUO WENHA [II THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS] 472-79 (1988).

Confucian philosopher Zhongshu Dong (179-104 BC) expanded the "man is an integral part of the universe" theory [*Tianren Heyi*] with the two-force and five-element theory.<sup>38</sup> To Dong, the fundamental principles for prince and minister, for father and son, and for husband and wife, were all derived from the way of *yin* (inferior) and *yang* (superior).<sup>39</sup> This theory, which was originally used for politics, was later applied to everything in the world.

*Yin* and *yang* were described as being two complementary yet antagonistic concepts in a unit or in a thing, similar to the saying "There are two sides of a coin."<sup>40</sup> The five elements were five kinds of changes, or relations, or states of things, rather than five substantial elements of things. The five-element theory explained the acceleration and counteraction which occur in the development of things.<sup>41</sup> In short, *yin* and *yang* were the first principle of all things. "These two principles express themselves through the medium of the Five [Elements], with which all things in the world correspond."<sup>42</sup>

Joseph Needham, probably the most famous historian of Chinese science and technology, claimed that the two-force and five-element theory supported rather than undermined the development of scientific thought in China.<sup>43</sup> Although the two-force and five-element theory contained certain reasonable principles,<sup>44</sup> it was normally applied through analogy.<sup>45</sup> In fact, ancient Chinese scholars employed analogy extensively.<sup>46</sup> Needham asserts that "[e]ssentially the Chinese method was an-

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<sup>38</sup> Cai, *The Boundary of Heaven and Man*, in *TIANDAO YU RENDAO* [THE DOCTRINE OF HEAVEN AND THE DOCTRINE OF MAN] 292, 293 (1982).

<sup>39</sup> Wing-tsit Chan, *The Story of Chinese Philosophy*, in *THE CHINESE MIND: ESSENTIALS OF CHINESE PHILOSOPHY AND CULTURE*, *supra* note 35, at 51.

<sup>40</sup> Cf. Tang Chiin-i, *The Individual and the World in Chinese Methodology*, in *THE CHINESE MIND: ESSENTIALS OF CHINESE PHILOSOPHY AND CULTURE*, *supra* note 35, at 267.

<sup>41</sup> Liu, *Interrelation and Harmony: Factors Affecting Science and Technology Development*, in *II THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS*, *supra* note 37, at 518. See also B. HE & G. HE, *ZHONGGUO KEJISHI GAILUN* [THE SURVEY OF CHINESE SCIENCE AND TECHNOLOGY HISTORY] 14, 20 (1983).

<sup>42</sup> Chan, *supra* note 39, at 52.

<sup>43</sup> Sivin, *supra* note 3, at 56.

<sup>44</sup> Traditional Chinese medicine which has been based on this theory for millennia is still studied seriously by many peoples in the world today. In April, 1991, for example, more than 220 scholars from Japan, the United States, the Soviet Union, Italy, and Indonesia went to Nanyang County, China, for the Symposium on Jingzhong Zhang's theory. See Zhang, *The Sage of Medicine and the 21st Century*, *PEOPLE'S DAILY*, July 18, 1991, at 2 (overseas ed.). Jingzhong Zhang (150-219) was a traditional Chinese medical doctor.

<sup>45</sup> Liu, *supra* note 37, at 478-81, 486-87, 491, 493-94, 503. See also B. HE & G. HE, *supra* note 41, at 18-19, 26-28, 30-31, 152-55, 184-85; see also NEIJING JIANGYI [BEIJING INSTITUTE OF TRADITIONAL CHINESE MEDICINE, THE TEACHING MATERIAL OF INTERNAL CHANNELS] 3-20 (1966).

<sup>46</sup> ZHONGYUAN SUN, *ZHONGGUO LUOJI SHI* (XIANQIN) [A HISTORY OF CHINESE LOGIC (BEFORE QIN DYNASTY)] 58, 61 (1987). See also Liu, *supra* note 37, at 522; cf. *ZHONGGUO FALU*

alogical—like causes bring like effects, as it was then so it is now, and so it will be for ever. This faith was profound.”<sup>47</sup> However, the fruitfulness of analogy depends on whether any testable consequences can be deduced from the analogy. Without the tests, independent of the analogy, to support conclusions resulting from the analogy, the analogy is precarious. Let us see an example.

Kuo Shen (1032-1096) was a famous Chinese scientist. He summarized Chinese scientific and technological achievements in his book, *Talks with Pen at Dream Brook [Mengxi Bitan]*.<sup>48</sup> He was the first one in the world to observe and record the phenomenon that if we put iron into a solution of cupric sulfate and heat the solution, the solution will become ferric sulfate, and copper will deposit on the surface of the iron. Yet to explain the chemical reaction, he quoted a passage from an ancient medical book, *Internal Channels [Neijing]*: “According to the Chapter Yellow Emperor, Daily Life Questions [*Huangdi, Shuwen*], ‘There are five elements in the sky and five elements on the ground. The air of earth is damp in the sky. The earth can produce metal, so can the damp.’ Here [the copper produced from the solution] is the proof of this theory.” His full conviction of the five-element theory stopped him from probing into the essence of the chemical reaction.<sup>49</sup>

While it might be reasonable for the two-force and five-element theory to emphasize the interrelationship of things and view things in their totality, it is certainly unreasonable to de-emphasize the significance of exploring the individual parts or elements of things.<sup>50</sup> The two-force and five-element theory encouraged neither the procurement of scientific data nor the prediction of coming events; it mainly encouraged the interpretation of existing phenomena.<sup>51</sup> Moreover, it threw light on phenomena not in terms of specific physics, chemistry, etc., but in terms of the abstract two forces—*yin* and *yang*—and five elements—metal, wood, water, fire and earth. Conspicuously lacking in analytical method, this

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SIXIANG SHI [EDITING GROUP OF “A HISTORY OF CHINESE LEGAL THOUGHT,” EDITING DEPARTMENT OF THE LEGAL TEXTBOOK, A HISTORY OF CHINESE LEGAL THOUGHT] 167, 168 (G. Zhang ed., 1983); see also Cai, *supra* note 38, at 322.

<sup>47</sup> NEEDHAM, *supra* note 30, at 244.

<sup>48</sup> Qian, *The Outstanding Scientist in Song Dynasty, Kuo Shen*, in ZHONGGUO KEXUE GISHU FAMIN HE KEXUE GISHU RENWU LUNJI [SELECTED ESSAYS OF CHINESE SCIENTIFIC AND TECHNOLOGICAL INVENTIONS, SCIENTISTS, AND TECHNICIANS] 303 (1955).

<sup>49</sup> B. HE & G. HE, *supra* note 41, at 27.

<sup>50</sup> Liu, *supra* note 37, at 472, 503, 524. With the development of modern science in the West, the dualism of mind and matter, raised by Plato (427?- 347 BC) and completed by Descartes, has been challenged in this century. China was profoundly non-Cartesian. Joseph Needham puts forward the provocative idea that the ancient Chinese perspective on science may make a valuable contribution to the dualism problem facing advanced S&T today.

<sup>51</sup> Liu, *supra* note 37, at 472, 504.

theory is not suitable for modern science.<sup>52</sup>

## B. The Limited Role of the Methodologies

The lack of methodologies for scientific inquiry is apparently a direct reason for the absence of the revolution of science and technology in traditional China. Yet, in discussing the traditions which might be inimical to the PRC's Patent Law, we should also see that the significance of the inquiring method is limited.

Methodologies, instead of being independent of people's beliefs or ideas about a scientific issue, always change as the issue changes. There seems to be no sharp line between the content of science and the method of science. People's knowledge of some method alone can never guarantee an actual scientific inquiry.<sup>53</sup> For example, Westerners did not fully realize the significance of Euclid's *Elements* until the late Renaissance; it was the Arabic people who were more and earlier interested in this masterpiece (although no scientific revolution ever took place in Arabic society).<sup>54</sup> The method of scientific inquiry should be derived from, and adapted to, the specific subject matter of the science rather than borrowed from some rational discipline. Denis Diderot (1713-1784) stated that:

If one were to undertake to teach a child to speak by starting with the words that begin with A, then by proceeding to those that begin with B, etc., half a lifetime could go by before the child would finish the alphabet. Method is excellent in the realm of reasoning, but in my estimation it is detrimental in the case of natural history in general and in botany in particular.<sup>55</sup>

Moreover, the method of scientific inquiry presupposed notions of rationalizing the scientific work.<sup>56</sup> For one thing, a hypothesis is a prerequisite for collecting facts relevant to the scientific work, for the facts are always too numerous to collect. The most difficult part of scientific work is to frame the hypothesis, and there has never been a method by which a hypothesis could be induced.<sup>57</sup> In other words, the hypothesis, the first and the most difficult step in the course of scientific work, depends on people's beliefs or ideas of the issue to be proved, not people's knowledge of the method to be applied.

Indisputably, people who discover their theories through a "guess"

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<sup>52</sup> Liu, *supra* note 37, at 472.

<sup>53</sup> HILARY PUTNAM, REASON, TRUTH AND HISTORY 191-93 (1982).

<sup>54</sup> BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 212 (1945).

<sup>55</sup> ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 76-77 (1960).

<sup>56</sup> PUTNAM, *supra* note 53, at 195.

<sup>57</sup> RUSSELL, *supra* note 54, at 544-45.

or "hunch" present the theories to the public only after they have proved the theories with certain method. Still, by following the method of scientific inquiry, people might come to a number of conflicting conclusions from examining the same phenomenon. Which conclusion is to be chosen often depends on the person's prior experiences, beliefs, or ideas, which are not necessarily the results of any experiment.<sup>58</sup> Hence, "Being rational" does not necessarily mean "believing theories solely because they are supported by carefully performed experiments."<sup>59</sup>

Scientists may feel it is difficult, if not impossible, to name whatever method they actually followed in their work. Perhaps they often discover new theories by "hunch":<sup>60</sup> it is the "hunch," the tiptop faculty of mind, rather than "cold logic," which makes the best gamblers, the best detectives, the best lawyers, the best judges and the best scientists.<sup>61</sup> Ernst Mach (1838-1916), a scientist as well as a philosopher, maintained:

The mental operation by which one achieves new concepts and which one denotes generally by the inadequate name of induction is not a simple but rather a very complicated process. Above all, it is not a logical process although such processes can be inserted as intermediary and auxiliary links. The principal effort that leads to the discovery for new knowledge is due to abstraction and imagination.<sup>62</sup>

### C. Discredited Theories

In addition to the limited role of methodologies, we should see further that the traditional lack of methodologies is insignificant to the PRC's Patent Law today. In the 1890's, the trend of anti-traditionalism originated with the literati.<sup>63</sup> Also at the end of the turn of the century, methodologies for scientific inquiry were widely propagandized.<sup>64</sup> Fu Yan (1853-1921), an outstanding scholar, criticized traditional Chinese subjectivism and stood for the proposition that all truths were based on experiences. His translations of Thomas Huxley's *Evolution and Ethics* and John Mills' *A System of Logic* had deep repercussions in China.<sup>65</sup> In

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<sup>58</sup> Cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 3, 4 (1970).

<sup>59</sup> PUTNAM, *supra* note 53, at 196.

<sup>60</sup> Cf. P. FRANK, *PHILOSOPHY OF SCIENCE: THE LINK BETWEEN SCIENCE AND PHILOSOPHY* 318 (1957).

<sup>61</sup> Joseph C. Hutcheson, Jr., *The Judgment Intuitive: the Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 279 (1929).

<sup>62</sup> FRANK, *supra* note 60, at 319.

<sup>63</sup> Y. LIN, *The Anti-Traditionalism Thought of May Fourth Movement and Chinese Ideological Crisis*, in SIXIANG YU RENWU [THOUGHTS AND PERSONAGES] 125 (1985).

<sup>64</sup> Cf. Duan, *The Three Forms of the Development of A Scientific Outlook in Modern China*, 6 HISTORY STUDIES 111, 119, 120 (1990).

<sup>65</sup> *Id.* at 111, 113-16.

1911, with the collapse of the Qing Dynasty, traditional philosophies, like the two-force and the five-element theory, lost their political support.

In China, the May Fourth Movement is often considered to be a Chinese Renaissance or Enlightenment.<sup>66</sup> Advocated vigorously by New Youth and other magazines, anti-traditionalism became a strong tendency.<sup>67</sup> Anti-traditionalism has appeared in other countries and in other times, but in terms of the extension of its coverage, the May Fourth Movement's anti-traditionalism seems unique in world history.<sup>68</sup> The New Youth advocated materialism and atheism against superstition and asserted that science was the only approach to the cosmos.<sup>69</sup> The May Fourth Movement brought the spirit and the method of scientific inquiry into Chinese culture.<sup>70</sup> Hu Shih even propagated the slogans "Re-assessing the values of everything" and "Better to make mistakes because of doubt than because of belief."<sup>71</sup>

"Mr. Science" was idealized: it became the motivating force for the leading scholars to advocate a new culture.<sup>72</sup> Though the advocacy of "Mr. Science" might have been superficial, some musty ideas were swept away,<sup>73</sup> and Chinese science and technology entered a new period.<sup>74</sup> In the changed society, most people turned to modern sciences like mathematics and physics. Theories based on observable facts and positive data became required by commercial production and by science and technology. Today there might be some people who still believe the two-force and five-element theory, but such unscientific theories have been generally discredited.

Does the Chinese Communist Party (CCP) favor ideas such as the two-force and five-element theory? To be sure, there are some similarities between the two-force and five-element theory and Marxist dialectics. Both theories categorically assert that the world is governed by

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<sup>66</sup> Zhang, *The Difference between Chinese and Western Philosophy with Respect to the Principle of Subjectivity*, in ZHONGGUO WENHUA YU ZHONGGUO ZHIXUE [CHINESE CULTURE AND CHINESE PHILOSOPHY] 68 (Tang ed., 1988). See also Ting, *Chen Tu-hsiu and the "New Youth,"* 5 HISTORY STUDIES 37, 44 (1979).

<sup>67</sup> Lin, *Radical Iconoclasm in the May Fourth Period and the Future of Chinese Liberalism*, in SIXIANG YU RENWU [THOUGHTS AND PERSONAGES] 143 (1985).

<sup>68</sup> LIN, *supra* note 63, at 128.

<sup>69</sup> Ting, *supra* note 66, at 37, 41-42.

<sup>70</sup> Duan, *supra* note 64, at 111, 118-19.

<sup>71</sup> Geng, *Hu Shih's Role in the New Culture Movement*, 5 HISTORY STUDIES 59, 69.

<sup>72</sup> Duan, *supra*, note 64, at 111, 119.

<sup>73</sup> Fan, *supra* note 15, at 39, 46. See also Geng, *The Problems of the Eastern and the Western Culture Today*, in ZHONGGUO CHUANTONG WENHUA ZAIJIANTAO II [II THE RE-REFLECTIONS ON CHINESE TRADITIONAL CULTURE] 244 (FUDAN UNIVERSITY HISTORY DEPARTMENT ed., 1987).

<sup>74</sup> DU ET AL., *supra* note 17, at 304.

immutable laws. "The one employs the static formalism of *yin/yang* theory to explain cyclical flux; the other employs the dynamic formalism of the theory of contradictions to explain struggle and progression."<sup>75</sup> But, except for traditional Chinese medicine, the two-force and five-element theory is virtually meaningless to the modern science and technology wanted by the CCP. Nor could this discredited theory be used to oppose Western bourgeois philosophy. Consequently, this theory is normally taken as a feudal superstition to be discarded or criticized as the rotten ideology of the landlord class. Therefore, no matter how science and technology developed in the PRC, theories like *yin/yang* could hardly be counted as plural contributing factors.

It seems that the "traditional culture" commonly believed to be a burden on China's modernization of science and technology and, in turn, on the PRC's Patent Law, should not refer to the Chinese traditional scientific inquiry. It might mean what is contained in the discussion *infra*.

### III. THE TRADITIONS AND THE MONARCHIC REGIME

While the scientist Einstein emphasized the significance of the methodology for scientific inquiry, the historian Needham approached the issue of scientific and technological development differently:

All historians, no matter what their theoretical inclinations and prejudices, are necessarily constrained to admit that the rise of modern science occurred *pari passu* with the Renaissance, the Reformation and the rise of capitalism. It is the intimate connection between the social and economic changes on the one hand and the success of the 'new, or experiment' science on the other which are the most difficult to pin down.<sup>76</sup>

The situation in traditional China was different from that in the West, but consistent with Needham's comment. The stagnant situation of science and technology (here I mean the absence of a breakthrough from the ancient style to the modern) did historically go *pari passu* with the stagnant ideology (Confucianism as the dominating ideology), the politics (the centralized and bureaucratized monarchy), and the economy (the self-sufficient agricultural economy). The impact of traditions and the monarchic regime behind them appears to have been less direct upon innovation than it was upon scientific methodologies; however, the impact might have been even more profound. Moreover, this impact might linger today in a way and be inimical to the Patent Law.

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<sup>75</sup> Baum, *Science and Culture in Contemporary China: the Roots of Retarded Modernization*, 22:12 ASIAN SURVEY 1166, 1172 (1982).

<sup>76</sup> NEEDHAM, *supra* note 30, at 192.

## A. Traditions Ignored Science and Technology while Stressed Politics and the Humanities

As discussed above, science and technology became respectable at the beginning of this century in China. Even before Deng came to power, the PRC government under Mao Zedong paid certain attention to science and technology. Accordingly, the possible tradition of ignoring science and technology seems not very significant to the PRC's Patent Law. However, the socialist regime under Mao might have shared some fundamental characteristics with the monarchic regime, to the extent that the socialist regime might have ignored science and technology indirectly because it instead chose to stress politics. In order to understand the Chinese people's values with which the PRC's Patent Law is currently confronted, we should discuss these traditions.

### 1. "Bizarre Craft and Cunning Work" vs. the Official Career

In traditional China, the orthodoxy, Confucianism, was not hostile to science and technology.<sup>77</sup> On the other hand, science and technology never gained a respectable status either. It was generally believed that without politics or the humanities as the core of scholarship, study would lead to something vulgar, like technology and craftsmanship [*jìyì*], which were looked down upon by society.<sup>78</sup> Taoism, one of the major schools of thought in ancient China, asserted, "If people possess too many efficient instruments, the country will become fatuous; if people possess too many crafts, [ominous] peculiarities will multiply." Of all schools of thought in ancient China, Mohism favored science and technology most. But even this school maintained an extremely pragmatic viewpoint, so as to be unfavorable to the development of science and technology.<sup>79</sup>

While ignoring science and technology, the Chinese tradition stressed politics. Logic is essential to scientific and technological development. Let us take the study of logic as an example to see the politics-oriented values. *Mojing* was written in the 4th-3rd centuries B.C. by Mohists. The Mohists lay emphasis on the connotations of concepts, judgement and inferences rather than on the forms in logical structure.<sup>80</sup> To justify the killing of robbers, they raised the notorious inference: "To

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<sup>77</sup> YU, *supra* note 33, at 16-17.

<sup>78</sup> Cf. Qian, *Chinese Intellectuals*, in II THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS, *supra* note 37, at 443.

<sup>79</sup> Ye, *supra* note 18, at 88.

<sup>80</sup> Z. ZHU, *MOJINGZHONGDE LUOJI XUESHUO* [LOGICAL THEORIES IN MOST CLASSICS] 178, 182 (1988).



love robbers is not to love men. To dislike robbers is not to dislike men. To kill robbers is not to kill men.”<sup>81</sup> Mohists confused the biological meaning of “men” with the social meaning of “robbers.” Similarly, Kuang Xun, a famous Confucian scholar, and Han Fei (280-233 B.C.), a famous representative of the Legalist School, one of the major schools of thought then, confused their political opinions with their study of logic. So did the scholars of Eclectics, another contemporary school of thought.<sup>82</sup>

In Chinese intellectual history, the traditional culture has undergone drastic change twice: first, during the periods of Spring and Autumn (770-476 B.C.) and Warring States (475-221 B.C.) and second, during the 1919 May Fourth Movement period (as discussed, *supra*).<sup>83</sup> During the period of Spring and Autumn and Warring States, the monarchical structure was changing from an enfeoffment system to a centralized and bureaucratized system. Many schools of thought as well as many national states emerged, fighting against each other. However, even under such turbulent circumstances, there was the prevailing tendency—to subordinate academic studies to political doctrines.<sup>84</sup>

Among Needham’s comments on the tradition of stressing social sciences was that “it would really be true to say that in Chinese culture, history was the ‘queen of the sciences’, not theology or metaphysics of any kind, never physics or mathematics.”<sup>85</sup> In terms of academic approach, it seems to be true, as John Fairbank (1907-1991), the premier Sinologist in the United States, asserted, that of all peoples in the world, the Chinese people are most inclined to view themselves in a historical perspective.<sup>86</sup> In terms of the content of Chinese culture, it seems to be more impressive that the Chinese philosophy was primarily ethics-oriented and politics-oriented. Chinese philosophy meant little in developing transcendent theory, pure science, and logic, but it meant much in cultivating people’s social practice and guiding governmental activity.<sup>87</sup>

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<sup>81</sup> SUN, *supra* note 46, at 259, 261-62.

<sup>82</sup> SUN, *supra* note 46, at 355, 361, 402, 427. See also W. ZHUO, ZHONGGUO LUOJI SIXIANG SHIGAO [A DRAFT OF CHINESE LOGICAL THOUGHT HISTORY] 20, 24, 401, 427 (1979).

<sup>83</sup> J. HU, ZHONGGUO JINDAI JINGJI SIXIANGSHI DAGANG [A CONCISE MODERN HISTORY OF CHINESE ECONOMIC THOUGHT] 377 (1984).

<sup>84</sup> Cf. SUN, *supra* note 46, at 402, 427. See also ZHUO, *supra* note 82, at 11-12; Z. LI, ZHOUGHUA FAXI [I CHINESE LEGAL SYSTEM] 56-57 (1985).

<sup>85</sup> NEEDHAM, *supra* note 30, at 242.

<sup>86</sup> J. FAIRBANK & E. REISCHAUER, CHINA, TRADITION & TRANSFORMATION 2 (1978).

<sup>87</sup> Cheng, *The Characteristics of Chinese Philosophy*, in Gangtai Ji Haiwai Xuezhue Lun Zhongguo Wenhua 1 [I THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS] 286-87, 291 (1988).

Chinese rulers normally ignored technology and invention.<sup>88</sup> In Chinese history there were countless books dealing with politics or the humanities, but far less dealing with technology.<sup>89</sup> Scientists, technicians and artisans were often nameless, with their talents buried in oblivion.<sup>90</sup> Almost all scientific works were ignored.<sup>91</sup> Mainly in the hand of artisans, technology and inventions emerged of themselves and perished of themselves. With few scholars devoting themselves to science, few scientific rules were abstracted from the innumerable discoveries and inventions.<sup>92</sup>

Science and technology were derogatorily referred to as “bizarre craft and cunning work” [*qiji yinjiao*], particularly by the ruling class. This attitude seems nowhere better illustrated than by the story of Yingxing Song (1587-1667). Song wrote *Tiangong Kaiwu*, an encyclopedic work on the Chinese agriculture and handicraft industry, which symbolized an unprecedented zenith in the history of Chinese science and technology. No book in the world up to then could match this masterpiece in that field, and it was circulated in Japan and Europe. Darwin (1800-1882) called *Tiangong Kaiwu* the “authoritative work.” Needham calls Song “the Diderot of China.”

For all his intelligence, however, Song desired the official career that attracted many other Chinese scholars. From the age of 29 until he was 45 he took the imperial examinations—the way to an official career—five times. Having felt it was hopeless to pass the examination, he began, with much hesitation, to write *Tiangong Kaiwu* while working in an inferior office. In about 1780, the Qing government tried to collect all books in China for re-publication under censorship. The corpus of the publication is titled *Sikuquanshu*. Song’s *Tiangong Kaiwu*, published in 1637, was excluded from *Sikuquanshu* for suspected “anti-Qing Government ideas.” Since then, the work has not been reissued. At the beginning of this century, Chinese scholars had to rely on the 1771 Japanese edition of this work for study, because they could not find the original Chinese edition. At the beginning of the 1950’s, the sole extant copy of the original edition in Chinese was fortunately found. The location of

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<sup>88</sup> Zhang, *The Drawback of the Governmental Policy of Choosing the Talent in Traditional China*, PEOPLE’S DAILY, Dec. 25, 1986, at 2 (overseas ed.).

<sup>89</sup> J. PAN, YINGXING SONG, MINGDAI KEXUEJIA SONGYINGXING [THE SCIENTIST IN MING DYNASTY] 117 (1981).

<sup>90</sup> Mao, *Preface to ANCIENT CHINA’S TECHNOLOGY AND SCIENCE* 3 (The Institute of the History of Natural Science, Chinese Academy of Sciences ed., 1983).

<sup>91</sup> Hu, *The Book of ZHOU YI CAN TONG QI in the History of Science in China*, 14 ZHONGGUO ZHIXUE [CHINESE PHILOSOPHY] 87 (1988).

<sup>92</sup> Ye, *supra* note 18, at 88.

Song's tomb has remained unknown.<sup>93</sup> Since the tradition of ignoring science and technology was so strong, it is not surprising that in the preface of his *Tiangong Kaiwu*, Song emotionally wrote, "An ambitious scholar will undoubtedly toss this book onto his desk and give it no further thought: it is a work that is in no way concerned with the art of advancement in officialdom."<sup>94</sup>

## 2. The Monarchic Regime behind the Traditions

Although world-wide patent systems originated in Europe, Europeans were not as keen about science and technology in the Middle Ages as they are today. Until the 16th century, much like the situation in traditional China in a sense, in Europe there was "the predominance of the Schoolmen and dons, immersed in books, faced toward the past, and oriented toward human institutions rather than toward Nature."<sup>95</sup> It was the great Renaissance and the great Enlightenment which tremendously exalted the status of science and technology. Meanwhile, we have witnessed another kind of approval—the governmental involvement, without which there could hardly be a general interest and long-standing respect for innovation.

In the later Middle Ages when many rival national states co-existed, the individual centers of competing political power had a great deal to gain from introducing technological changes that promised commercial or industrial advantage and, hence, greater government revenues, and much to lose from allowing others to introduce them first. Once it was clear that one or another of the competing centers would always let the genie out of the bottle, the possibility of aligning political power with the economic status quo and against technological change more or less disappeared from the Western mind.<sup>96</sup>

Along with business, science and technology became respectable. The scientific research of Robert Boyle (1627-1691), for example, was indirectly supported by some merchants and industrialists. Even in the royal court of Great Britain, scientific and technological experiments were performed under the aegis of King Charles II (1630-1685): "the noise of mechanic instruments resounded in the Whitehall itself."<sup>97</sup>

Social need and the government policy were favorable to a patent

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<sup>93</sup> J. PAN, YINGXING SONG, MINGDAI KEXUEJIA SONGYINGXING [THE SCIENTIST IN MING DYNASTY] 41, 44, 54, 70-71, 100-01, 128, 133-48 (1981).

<sup>94</sup> SUNG YING-HSING, T'EN-KUNG K'AI-WU, CHINESE TECHNOLOGY IN THE SEVENTEENTH CENTURY XIV (E. Sun & S. Sun trans., 1966).

<sup>95</sup> Sivin, *supra* note 3, at 57.

<sup>96</sup> NATHAN ROSENBERG & LUTHER E. BIRDZELL, HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD 137-38 (1986).

<sup>97</sup> Needham, *supra* note 30, at 136-37.

law. Early in the reign of Edward III (1312-1377) in Britain, patents were granted to some Continental technicians to promote British industry. In 1474, the Venice Republic enacted a patent act. In the 16th century, the German and Swiss governments granted patents to inventors. In the 17th century, the British Parliament enacted a relatively comprehensive patent act. At the end of the 18th century, the United States and France enacted formal and comprehensive patent acts. Patent systems promoted the industrial development in those countries.<sup>98</sup>

No such situation emerged in traditional China. In the self-sufficient agricultural society, the Chinese did not necessarily want advanced science and technology. For most of her history, China was under a single monolithic government. The co-existence of two or more rival nation-states was rare, and even more rare was competition between rival nation-states spurring scientific and technological development. Although controlling, guiding, and even promoting the development of science and technology in various degrees,<sup>99</sup> the Chinese government did not show respect for science and technology. The countries around this Celestial Empire were less developed and the Chinese were proud of their culture as the center of the world.<sup>100</sup> The intrepid nomadic tribes in the north sometimes posed a serious threat to Chinese territory, but few Chinese thought to settle this problem through the employment of science and technology. Thus, the situation was not that the Chinese tried in vain to create a scientific and technological revolution, but that they simply did not bother about it.

Montesquieu (1689-1755) believed that "[t]he most natural, intermediate and subordinate power, is that of the nobility. This in some measure seems to be essential to a monarchy, whose fundamental maxim is, no monarch, no nobility; no nobility, no monarch; but there may be a despotic prince."<sup>101</sup> That was not the case in China. In Chinese history there were few emperors who were so tyrannical as Zheng Ying (259-210 B.C.), an emperor of the Qin Dynasty (221-207 B.C.). On the other hand, under the Qin Dynasty the enfeoffment system had been abolished. From that period forward, there were practically no feudal lords, no nobility. Powerful church and bourgeois classes were also absent. There was no real political faction in Chinese society opposing, or independent

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<sup>98</sup> DONG, *supra* note 12, at 1-5.

<sup>99</sup> DU ET AL., *supra* note 17, at 114, 319.

<sup>100</sup> Song, *The Traditional Society and the New Literati*, in ZHISHI FENZI YU ZHONGGUO [THE LITERATI AND CHINA] 91 (Zhou ed., 1987); see also Ding & Du, *An Elementary Analysis of the Factors in Capitalist Modernization in China and Japan during the Nineteenth Century*, 1 HISTORY STUDIES 44-45 (1983).

<sup>101</sup> MONTESQUIEU, I THE SPIRIT OF LAWS 14 (T. Nugent trans., 1823).

from, the central governments.<sup>102</sup> Perhaps the Confucianism at bottom checked the later emperors, who might otherwise have been the "despotic prince[s]" as Montesquieu thought.<sup>103</sup> Still, compared with its Western counterpart, the bureaucratized and centralized Chinese government wielded far greater power over the society.<sup>104</sup> Naturally, in such a unified society, what the Chinese government wanted was not some advanced science and technology, nor some patent law, but loyal and dutiful subjects, upon whom it could base a stable position.<sup>105</sup>

Although Chinese society was highly unified, there was still a potential opponent to the government—the literati. It was feared that these individuals might refuse to be the government's "yes men," pursuing instead the ideal politics advocated by Confucius.<sup>106</sup> Therefore, one of the government's primary tasks was to control as well as to utilize the literati, either by open force, by instillation of the ideologized Confucianism, or by attractive official careers.<sup>107</sup>

In the West in the Middle Ages, Christianity, though occasionally supported by the secular government, was primarily an independent authority. There was no omnipresent ideology supporting the secular government as did Confucianism in China; nor was there a learning leading to an official career as did the learning of Confucian classics in China.<sup>108</sup> After the revision by Zhongshu Dong in the Western Han Dynasty (224-06 B.C.), Confucianism was characterized by an emphasis on authority and discipline.<sup>109</sup> Henceforth, the government tried to control people by Confucianism, which was later further ideologized. In particular, the government encouraged the literati to enter upon an official career through passing the imperial examination based on Confucian classics. The imperial examination system was established in the Sui Dynasty (581-618) and lasted until 1903. It is said that, looking at the scholars having passed the imperial examination walking in line, Shimin Li (597-649), the famous emperor of the Tang Dynasty (618-907), complacently

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<sup>102</sup> Cf. B. MOORE, *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 181 (1966).

<sup>103</sup> Cf. EDGAR BODENHEIMER, *JURISPRUDENCE, THE PHILOSOPHY AND METHOD OF THE LAW* 183 (1974).

<sup>104</sup> Wang, *Characteristics of Chinese Feudal Society*, 1 *HISTORY STUDIES* 8 (1985).

<sup>105</sup> Hu, *supra* note 91, at 86-87.

<sup>106</sup> Xu, *The Tragic Fate of The Chinese Literati under the Changing Situation*, in *THE LITERATI AND CHINA*, *supra* note 100, at 71-75.

<sup>107</sup> Mou, *The Fate of Chinese Literati*, in *THE LITERATI AND CHINA*, *supra* note 100, at 60-62. See also Li, *On the Literati*, in *THE LITERATI AND CHINA*, *supra* note 100, at 11-13.

<sup>108</sup> *THE MODERNIZATION OF CHINA* 195 (G. Rozman ed., 1981).

<sup>109</sup> Yu, *Anti-Intellectualism and the Chinese Political Tradition*, in *I THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS*, *supra* note 87, at 340-41.

said, "All the elite under heaven have fallen into my trap!"<sup>110</sup>

The people, particularly the literati, had few ways to acquire fame and wealth under a bureaucratized and centralized monarchy. Choosing an official career by studying Confucian classics and taking the imperial examination was the most honorable and most profitable way.<sup>111</sup> Although few could succeed in this process, the mere possibility convinced the public that the imperial examination system was justifiable.<sup>112</sup> While majoring in Confucian classics, some Chinese scholars also studied astronomy, geography, medicine, mathematics, and other subjects, for sometimes these subjects were still held to be valuable.<sup>113</sup> Nevertheless, though science and technology associated with service of the state or the community were respected, the public normally belittled those who made a living through these areas.<sup>114</sup> Land obviously meant status in traditional China, but, not having a primogeniture system for property, a wealthy family might decline in a few generations. The best way to make a family prosperous was still to make the son study Confucian classics and follow an official career.<sup>115</sup> That is precisely why an old and popular proverb admired Confucian classics: "In books there are golden houses. In books there is plenty of grain. In books there are beautiful women."

It is noteworthy that, compared with the West, science and technology developed much earlier in China. However, this earlier development was followed by a prolonged stagnation instead of modernization. This situation reminds us of what Max Weber (1864-1920), the famous sociologist, maintained: in the interest of dynastic continuity, a monarchy's primary goal was political stability, and the monarchic order "was the death of capitalist development and of everything dependent on it." (By "capitalist development," Weber meant the development with which the capital was the private acquisitive capital used for profit in an exchange economy.)<sup>116</sup> Weber's comment is particularly true in China, where the monarchy was far more powerful and stable than its Western counterpart.

It seems that the monarchic order is a fundamental cause of the Chinese traditions which ignored science and technology while stressing

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<sup>110</sup> Li, "Gouzhong" is not "Guzhong," ENLIGHTENMENT DAILY [GUANGMIA RIBAO], March 25, 1993, at 6.

<sup>111</sup> Song, *supra* note 100, at 100-01.

<sup>112</sup> THE MODERNIZATION OF CHINA, *supra* note 108, at 189.

<sup>113</sup> DU ET AL., *supra* note 17, at 318.

<sup>114</sup> THE MODERNIZATION OF CHINA, *supra* note 108, at 196.

<sup>115</sup> S. WANG & Y. XU, ZHONGGUO FAZHI SHIGANG [THE OUTLINE OF CHINESE LEGAL HISTORY] 114 (1986). See also MOORE, *supra* note 102, at 169-70.

<sup>116</sup> MAX WEBER, ECONOMY AND SOCIETY LIV. (G. Roth & C. Wittich ed., 1978).

politics and the humanities. If these traditions, or rather if the monar-chic order, lingers today, a significant role for the Patent Law is unlikely.

### B. The Traditions Scorning Commercial Profit while Insisting on Confucian Morality

Beaumont comments on the Chinese tradition relevant to the Patent Law, that "[T]he notions of commercial advantage and profitability have not only been absent in China, but they were and continue to be in contradiction with the whole humanist tradition of China."<sup>117</sup> That is a discouraging comment: commercial profit is crucial to a patent system, for patenting relies upon commercial profit gained from the exclusive rights in the invention. Weber had a somewhat different idea:

The notion that our rationalistic and capitalistic age is characterized by a stronger economic interest than other periods is childish; the moving spirit of modern capitalism is not possessed of a stronger economic impulse than, for example, an oriental trader.<sup>118</sup>

It is certain that the impulse to acquire goods and the pursuit of self interests through the accumulation of money are by no means unique to capitalism.<sup>119</sup> However, at different times and in different societies there might be different values or a different ethos affecting those impulses. As Weber pointed out, people might want to live simply as they were accustomed to live instead of making more money than necessary;<sup>120</sup> or, in the spirit of "Make tallow out of cattle and money out of men," people might want to make as much money as they could.<sup>121</sup> That is to say, the impulse to make money among different peoples and in different times might be weaker or stronger because of different values. Beaumont may well be correct that the notions of commercial advantage and profitability are incompatible with Chinese traditions.

#### 1. *The Impulse to Commercial Profit Smothered by Confucianism*

Until the later Spring and Autumn period (770-476 B.C.), the Chinese generally agreed that "Righteousness exists for profit."<sup>122</sup> Unlike the ancient Athenians, Chinese people thought much of commerce.<sup>123</sup>

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<sup>117</sup> Beaumont, *supra* note 6, at 44.

<sup>118</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 11.

<sup>119</sup> MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 17 (T. Parsons trans., 1952).

<sup>120</sup> *Id.* at 60.

<sup>121</sup> *Id.* at 51.

<sup>122</sup> EDITING GROUP OF 1 ZHONGGUO JINGJI SIXIANG JIANSHI [A CONCISE HISTORY OF CHINESE ECONOMIC THOUGHT] 26 (1984).

<sup>123</sup> J. HU, 1 ZHONGGUO JINGJI SIXIANG SHI [A HISTORY OF CHINESE ECONOMIC THOUGHT] 34 (1962).

Later, Confucius would say that, "the superior man is influenced by the love of rectitude, the mean man by the love of gain."<sup>124</sup> Mencius had a more radical attitude on this point. Once he came to King Hui of Liang State. The King said, "Venerable sir, since you have not counted it far to come here, a distance of hundreds of miles, may I presume that you are provided with counsels to profit my kingdom?" Mencius replied, "Why must your Majesty use that word 'profit'? What I am provided with are counsels to benevolence and righteousness, and these are my only topics."<sup>125</sup>

Confucianism, or the doctrine of Confucius and Mencius, was the orthodoxy in traditional China. The Confucian scholar Zhongshu Dong stood for anti-utilitarianism: "Uphold righteousness, but not to seek profit; clarify the [Confucian] doctrine, but not to calculate merits."<sup>126</sup> Another famous Confucian scholar, Xi Zhu (1130-1200), revised Confucianism with Buddhist asceticism. Zhu claimed, "In the field of the mind, if the righteousness doctrine exists, human desire disappears; if human desire wins, the righteousness doctrine disappears."<sup>127</sup> Such ideas were taken as the Confucianism to be studied by all in later dynasties.<sup>128</sup>

In China, as well as in the classical world, there was no spirit like "Make tallow out of cattle and money out of men."<sup>129</sup> From the Western Han Dynasty (206-24 B.C.) to the end of the Qing Dynasty (1644-1911), both the royal court and the literati constantly emphasized the significance of morality in the fields of politics, education, art, etc..<sup>130</sup> When estimating a person, the Chinese often emphasized his or her morality.<sup>131</sup> The achievements made or the social status acquired might be secondary.<sup>132</sup> Such a "moralized culture" is rare in world history.<sup>133</sup>

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<sup>124</sup> THE FOUR BOOKS 74, 76 (D. Collice trans., 1970) (THE FOUR BOOKS is the common reference to a compilation of classical Chinese works).

<sup>125</sup> MENCIUS, THE WORKS OF MENCIUS—THE CHINESE CLASSICS 125-26 (J. Legge trans., 1949).

<sup>126</sup> S. YE, 2 ZHONGGUO JINGJI SIXIANG JIANSHI [A CONCISE HISTORY OF CHINESE ECONOMIC THOUGHT] 46 (1983).

<sup>127</sup> LUNYU SHUZHENG [THE INTERPRETATION OF CONFUCIAN ANALECTS] 274 (S. Yang trans., 1986).

<sup>128</sup> D. CAO, ZHONGGUO CHUANTONG SIXIANG TANSUO [THE EXPLORATION OF CHINESE TRADITIONAL THOUGHT] 236, 376-77 (1988). Although Zhu did not deny people's natural desires absolutely, it was held in Chinese history that he did.

<sup>129</sup> WEBER, *supra* note 119, at 51-52.

<sup>130</sup> Song, *supra* note 100, at 89.

<sup>131</sup> Qian, *Historical Science and Literature in Chinese Cultural Tradition*, in II THE DISCUSSIONS OF CHINESE CULTURE BY SCHOLARS IN HONG KONG, TAIWAN, AND OVERSEAS, *supra* note 37, at 422, 433-44.

<sup>132</sup> Qian, *The Special Nature of Chinese Culture*, in 1987 CHINESE CULTURE AND CHINESE PHILOSOPHY, *supra* note 34, at 28.

<sup>133</sup> Z. WEI, ZHONGGUO WENHUA GAILUN [THE SURVEY OF CHINESE CULTURE] 61 (1968).



During the Middle Ages in the West, economic thought was closely tied to morality. Similarly, in traditional China, Confucianism held that commerce corroded morality and promoted avarice, so that commerce should be restricted.<sup>134</sup> Few scholars were free from the straitjacket of Confucian morality.<sup>135</sup> Even talking about commercial profit was deemed as degrading and improper behavior for a man of noble character.<sup>136</sup> In the Song Dynasty (960-1279), businessmen enjoyed an improved status as a result of the development of trade.<sup>137</sup> Still, the famous poet You Lu (1125-1210) felt that "the pursuit of profit by doing business" was "most shameful," and that wealthy businessmen were the same as corrupt officials. He admonished his descendants never "to do . . . like the Philistine."<sup>138</sup> After the 16th century, trade became more important in China; however, the tradition of looking down upon businessmen remained.<sup>139</sup>

Scholar Zhi Li (1527-1602) asserted, in one of his attacks on Confucianism, that, "There has never been such a thing that the ancient sage does not like wealth and high status." He believed that the values of "taking 'commercial profit' as a taboo" seriously obstructed China's economic development. Not surprisingly, he was charged with "unscrupulously advocating heterodoxy to mislead the public opinion and the people," and was sentenced to death in prison.<sup>140</sup> By the later 19th century, many modern enterprises had already been established in China and many scholars had already seriously criticized Confucian theory, which embraced righteousness but denigrated profit-seeking. Nonetheless, when investing in enterprises, bureaucrats, landlords, or businessmen still tried to keep their names secret for fear of the image of pursuing money.<sup>141</sup> Confucian theory lasted for 2000 years and contributed to the stagnation of the Chinese economy during that entire period.<sup>142</sup>

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<sup>134</sup> H. HOU, 2 ZHONGGUO JINDAI JINGJI SIXIANG SHIGAO [A HISTORY OF MODERN CHINESE ECONOMIC THOUGHT] 9 (1983).

<sup>135</sup> J. HU, 3 ZHONGGUO JINGJI SIXIANG SHI [A HISTORY OF CHINESE ECONOMIC THOUGHT] 705 (1962).

<sup>136</sup> J. ZHAO & M. YI, ZHONGGUO JINDAI JINGJI SHIXIANG SHI [A MODERN HISTORY OF CHINESE ECONOMIC THOUGHT] 13 (1980).

<sup>137</sup> Ye, *The Historical Transformation of the Concept of Commodity Economy—An Investigation with the Song Dynasty as the Standpoint*, 4 HISTORY STUDIES 139 (1989).

<sup>138</sup> Tan, *The Economical Elements in the Paternal Precepts in Ancient Time of China* 2 ZHONGGUOSHI YANJIU [CHINESE HISTORY STUDIES] 10 (1986).

<sup>139</sup> Y. YU, ZHONGGUO JINSHI ZONGJIAO LUNLI YU SHANGREN JINGSHEN [CHINESE MODERN RELIGIOUS ETHIC AND THE SPIRIT OF BUSINESSMEN] 57, 164 (1986).

<sup>140</sup> Hu, *supra* note 83, at 395-97.

<sup>141</sup> Ye, *supra* note 17, at 7, 16.

<sup>142</sup> Z. WEI, RUJIA YU XIANDAIHUA [CONFUCIUNISM AND THE MODERNIZATION] 104 (1986).

## 2. *The Lack of A Bourgeois Class*

In the West, since the later Middle Ages the orthodox views on commerce had been changing. St. Thomas Aquinas (1225-1274) admitted that commerce was an unavoidable evil in an imperfect world.<sup>143</sup> John Calvin (1509-1564) and other Protestant scholars, many of whom became businessmen, sanctioned the pursuit of commercial profit.<sup>144</sup> Long before Adam Smith (1723-1790), scattered groups in England's countryside began to take the doctrine of self-interest and economic freedom as the natural foundation of human society.<sup>145</sup> Gradually, the acquisition of money became the expression of socially admired personal ability.

The change in traditional values from scorning commercial profit to encouraging it was favored by the social circumstances and buttressed by the rising bourgeois class. The short-lived empire of Charlemagne (742-814) resulted in political pluralism, with power shared by a multitude of local barons. From the 10th century on, a large number of towns and cities emerged conformable to commercial development; urbanization both presupposed and created commercial expansion; political and religious control relaxed in every sphere of life: economy, science, art, literature, education and others.<sup>146</sup> It was the conflicts between the bourgeois class and the feudal lords, between the secular authority and the church, between kings and nobles, between rival religions, and between rival nation-states, which resulted in the general relaxation. The many-sided competition helped the bourgeois class to break through the crust of traditional society.<sup>147</sup> Under such circumstances, the bourgeois class grew more and more powerful and the tradition denigrating commercial profit was replaced by a new one advocating commercial activity.<sup>148</sup>

In China, the bureaucratized and centralized monarchy, along with ideologized Confucianism, existed despite the replacement of one dynasty by another. The monarchy actually became more autocratic in the last two—Ming (1368-1644) and Qing (1644-1911)—dynasties.<sup>149</sup> Justified by Confucian classics, the Chinese patriarchal family and hierarchi-

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<sup>143</sup> ERIC ROLL, *A HISTORY OF ECONOMIC THOUGHT* 45-47, 49 (1963).

<sup>144</sup> RUSSELL, *supra* note 54, at 187-88.

<sup>145</sup> MOORE, *supra* note 102, at 8.

<sup>146</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 24, 67, 79.

<sup>147</sup> MOORE, *supra* note 102, at 174; *see also* ROSENBERG & BIRDZELL, *supra* note 96, at 132.

<sup>148</sup> ROLL, *supra* note 143, at 58.

<sup>149</sup> EDITING GROUP OF "A HISTORY OF CHINESE LEGAL SYSTEM," EDITING DEPARTMENT OF THE LEGAL TEXTBOOK, *ZHONGGUO FAZHISHI* [A HISTORY OF THE CHINESE LEGAL SYSTEM] 3 (J. Zhang ed., 1982).

cal society were highly integrated and stabilized.<sup>150</sup> Accordingly, the Chinese communion of values and understandings was highly integrated and stabilized.<sup>151</sup> There was no general relaxation in ideological control like that in the West in the later Middle Ages, nor a movement revolutionizing traditional values like the Renaissance or the Enlightenment.

China was a self-sufficient agricultural society. The basic productive unit was the household. The typical economic activity was "the male farming while the female weaved" [*nanjing nuzhi*]. Although trade gradually played a more and more important role historically, the self-sufficient economy was apparently dominant until the 1840 Opium War. For example, produce rent was always the basic form of income for landlords, not money rent; produce and forced labor were always the major form of taxes for the government, not money taxes.<sup>152</sup> There was a conspicuous lack of an independent bourgeois class, who would otherwise have been the most powerful supporter of the pursuit of commercial profit.

In China, a large number of cities and towns emerged during the Spring and Autumn Period (770-476 B.C.) and the Warring States Period (475-221 B.C.). Though cities and towns might have served as centers of commercial circulation, their primary purpose was to function as a political and military center. All cities and towns were normally controlled by the central government. The concept of "borough" or of the autonomous city-state, like Venice or Genoa, was completely unknown. The cities, even in the Warring States period, might have been ten times larger in population than those in the West, but flourishing cities did not here imply a developed industry. Unlike the situation in the later Middle Ages in the West, in China the artisans and businessmen were the minority of the urban residents. The majority were government employees, officials, military personnel, landlords, beggars and other consumers. Economic activities in cities and towns were mainly commodity circulation rather than production. And commodities were primarily made by farmers rather than by professional handicraftsmen.<sup>153</sup> Generally, Chinese cities and towns were consumptive ones, not productive ones.<sup>154</sup>

In the West, no sooner had the large number of cities and towns emerged, than the guilds were established to protect the interests of

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<sup>150</sup> T. CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA 280-81 (1961).

<sup>151</sup> ROBERT M. UNGER, LAW IN MODERN SOCIETY 95 (1977).

<sup>152</sup> R. HU, ZHONGGUO FENGJIAN SHEHUI XINGTAI YANJIU [THE STUDIES OF CHINESE FEUDAL SOCIETY FORMS] 167-68, 173 (1979).

<sup>153</sup> *Id.* at 183, 245-55, 272.

<sup>154</sup> Li, *The Causes of the Stagnancy in the Structure of Chinese Feudal Society*, GUANGMING RIBAO [ENLIGHTENMENT DAILY], Jan. 9, 1985, at 3.

handicraftsmen and traders. The first guild in China was established during the Tang Dynasty (618-907), 1000 years after the emergence of a large number of cities and towns. Until the 17th century, the Chinese guilds were governmental tools to help supervise business and collect taxes, rather than private organizations looking out for their own interests.<sup>155</sup> These Chinese guilds were never strong. In the Song Dynasty (960-1279), wealthy traders cared little about the governmental officials,<sup>156</sup> but such things were rare in Chinese history. Consequently, in order to protect themselves and to acquire a decent social status, the Chinese traders generally had to gain support from the officials through gifts or bribery. The officials did not take the traders as fearful opponents, instead despising them and using them as servants.<sup>157</sup> Compared with the West, no urban commercial class nor manufacturing class existed in China, though at times some starts in this direction could be found.<sup>158</sup> The Chinese traders were simply too weak to bring about a spirit of entrepreneurship.

### 3. *The Legal System Behind the Traditions*

The legal system in traditional China is worth discussing, for among other factors affecting the traditional values, the legal system is the most relevant; in particular, it had a direct influence on the PRC's Patent Law. Let us see first how the Western legal system favored the impulse to commercial profit and, in turn, favored patent law, so that we may better understand how the Chinese legal system discouraged such an impulse in the past and how it contradicts an institution like the patent law today.

#### a. The Western Legal System

The Roman Law System (or Roman-Germanic Family of Law) was created in the 12th and 13th centuries. It was theoretically based upon the Roman *Corpus Juris Civilis*. European society, as it had done in the ancient Roman Empire, again recognized the significance of law for social order, security and progress. The idea that society must be founded on the law, an autonomy not to be confused with religion and morality, has ever since been characteristic of Western civilization. The Roman Law System and the Common Law System (or Anglo-American Legal System) share these basic principles and settle problems in substantially

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<sup>155</sup> HU, *supra* note 152, at 265-72.

<sup>156</sup> Ye, *supra* note 137, at 139.

<sup>157</sup> Yan, *On the Physiocracy and the Policy of Restraining Commercial Activity in Feudal China*, 4 HISTORY STUDIES 146 (1988).

<sup>158</sup> MOORE, *supra* note 102, at 174.

similar ways. The two systems are commonly called "one great family of Western Law."<sup>159</sup>

Western law not only gained unquestionable dignity, but also emphasized personal rights resulting from contracts. With respect to legal history, Henry Maine (1822-1888), the famous historian of law, observed, "[T]he movement of the progressive societies has hitherto been a movement from Status to Contract." This celebrated dictum may well be more suitable for property law than for others.<sup>160</sup> But Maine did point out the historical trend: social orders have been decided more and more by individuals' free contracts than by their preexistent status. This historical trend was incarnated, among others, by the famous 1804 French Civil Code, which reflected the principles of equality, liberalism, inviolability of private property, and the freedom of contract.<sup>161</sup> It may be maintained that Western law essentially means civil law regulating private relations between individuals; hence came the obligations, property, and the like. The relations between abstractions such as companies, government entities, and even the governments themselves, might be described by the framework for private relations.<sup>162</sup>

More importantly, Western law emphasizing personal rights resulting from contracts has been morally justifiable. Jeremy Bentham (1748-1832) viewed law as an autonomous field of study free from moral issues.<sup>163</sup> This utilitarian approach makes sense in a way. On the other hand, people's general observance of law should not be explained by compulsion or physical force. Some laws, like international law and constitutional principles, even lack proper sanctions.<sup>164</sup> The present-day positivists admit that the law is not only a command from authority, but that it also indicates certain values. The logical character of law does not necessarily exclude its moral character; on the contrary, "[w]hat language is to thought, norms are to values."<sup>165</sup>

Does the law just passively embody people's morality, or does it also have an active impact on people's morality? The answer is that law and morality are interrelated and interact upon each other complexly,<sup>166</sup> and the impact is not only one-way from morality to law. In other words, the

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<sup>159</sup> R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 25, 39, 51, (1985).

<sup>160</sup> HENRY MAINE, ANCIENT LAW 422-23 (F. Pollock Introduction & Notes, 1861).

<sup>161</sup> FAGUO MINFADIAN [FRENCH CIVIL CODE] iv-ix (Li, Wu & Sun trans., 1979).

<sup>162</sup> Jones, *An Approach to Chinese Law*, REV. SOC. LAW 3 (1978).

<sup>163</sup> DENNIS LLOYD, THE IDEA OF LAW 100 (1976).

<sup>164</sup> A.P. D'ENTREVES, NATURAL LAW 88 (1967).

<sup>165</sup> *Id.* at 79, 115.

<sup>166</sup> LLOYD, *supra* note 163, at 67.

development of law "from Status to Contract" was a response to the change in people's mores as commerce and industry expanded. In addition, the development of law simultaneously fostered the new mores which favored the pursuit of money. "The revival of Roman law was a powerful leaven in the transformation of the social and political structure of Europe."<sup>167</sup> It seems impossible that the revival of Roman law had nothing to do with the transformation of morality as well, although commercial law might have been the pioneer in doing so.

Early in the 11th century, merchant guilds were set up in some European cities. Independently from the government, they laid down rules to settle their business disputes. From that time on, the commercial law gradually took shape. The 13th century saw the famous *Charte D'oleron*, a selection of 12th century maritime cases, come into being.<sup>168</sup> In 1673, the first commercial act was enacted in France in the name of Louis XIV (1638-1715), with 112 articles regulating companies, bills of exchange, bankruptcy, etc. In the 18th century, the British common law court, which had already tried cases of law merchants, formally made the law merchant a part of the common law. Since the 19th century, commercial laws have been enacted in most countries in Europe.<sup>169</sup>

Commercial laws placed people in the dual position of debtor and creditor. However, the implementation of commercial laws could not depend merely upon coercive measures; it also required a moral system for the fulfillment of commitments. "Each sphere of activity in a plural society requires its own moral system."<sup>170</sup> With the expansion of the market, more and more people were involved in various businesses. The development of commerce preceded the general growth of the modern industry; the spread of commercial laws seems to have preceded the general justification of the modern ethic that it is moral to pursue the greatest possible amount of money. After all, "it was the practice that made the Ethics."<sup>171</sup>

#### b. The Chinese Legal System

In traditional China, the legal system took form in the Western Han

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<sup>167</sup> D'ENTREVES, *supra* note 164, at 22.

<sup>168</sup> WANG ET AL., *MINFA XINLUN* [THE NEW COMMENTS ON THE CIVIL LAW] 31 (1986); *see also* EDITING GROUP OF "A HISTORY OF FOREIGN LEGAL SYSTEM," EDITING DEPARTMENT OF THE LEGAL TEXTBOOK, *WAIGUO FAZHI SHI* [A HISTORY OF FOREIGN LEGAL SYSTEM] 93-94 (Chen ed., 1982).

<sup>169</sup> WANG ET AL., *supra* note 168, at 32; *see also* P. JIANG, *ZICHAN JIEJI MINSHANG FA* [THE CIVIL & COMMERCIAL LAW OF THE BOURGEOISIE] 3 (1981).

<sup>170</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 140.

<sup>171</sup> *Cf.* ROSENBERG & BIRDZELL, *supra* note 96, at 132.

Dynasty (224-06 B. C.) and came to its maturity in the Tang Dynasty (618-907). It then entered into a stagnant stage until the beginning of this century, when the royal court reluctantly conducted a Western style-oriented legal reform.<sup>172</sup> This reform meant the general collapse of the traditional system. The traditional Chinese legal system and the relevant philosophies were inimical to the impulse to commercial profit<sup>173</sup> for the three reasons that will be discussed below.

(1). Incalculability

China was ruled by man rather than by law, so that the Chinese legal system was incalculable or unpredictable, and, in turn, inimical to commercial activity. In traditional China, law was taken as merely one of the governmental tools to control society. The emperor was the supreme judge of any litigation<sup>174</sup> and the supreme lawmaker. The emperor's edict could change or abolish other laws. In the Western Han Dynasty, the Minister of Justice [*Tingwei*] Du Zhou tried cases according to the emperor's opinions only, paying no attention to statutes. Someone questioned him on that and Du Zhou's well-known reply goes, "Where does the law come from? What the former emperors approved is law, what the later emperor approved is law, too. Each [of the edicts] is for a certain time, so why must we follow the former?"<sup>175</sup>

Judicial power, instead of being separated from other powers, was checked by administrative power, particularly in the Ming and Qing Dynasties.<sup>176</sup> After the Tang Dynasty, judicial organs were set up at the provincial level, but they were checked by administrative officials at a higher level. At the provincial level, legal problems were in the charge of administrative officials.<sup>177</sup> The central government had judicial organs and important cases were tried by this judiciary or by the judiciary together with other ministers.<sup>178</sup> The two general trends in the judicial system's evolution were increasing administrative interference and increasing imperial interference.<sup>179</sup>

Rule by man, a characteristic of the Chinese legal system, partly

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<sup>172</sup> Cf. Wu, *The Status of the Individual in the Political and Legal Traditions of Old and New China*, in *THE CHINESE MIND*, *supra* note 35, at 344.

<sup>173</sup> *A HISTORY OF CHINESE LEGAL THOUGHT*, *supra* note 46, at 11-12.

<sup>174</sup> S. WANG & Y. XU, *ZHONGGUO FAZHI SHIGANG* [THE OUTLINE OF CHINESE LEGAL HISTORY] 141 (1986).

<sup>175</sup> *A HISTORY OF THE CHINESE LEGAL SYSTEM*, *supra* note 149, at 133-34.

<sup>176</sup> *A HISTORY OF THE CHINESE LEGAL SYSTEM*, *supra* note 149, at 3-4.

<sup>177</sup> *A HISTORY OF THE CHINESE LEGAL SYSTEM*, *supra* note 149, at 3.

<sup>178</sup> WANG & XU, *supra* note 174, at 147-48; *see also* *A HISTORY OF THE CHINESE LEGAL SYSTEM*, *supra* note 149, at 162-64.

<sup>179</sup> WANG & XU, *supra* note 174, at 162.

resulted from the significant role of morality. Legalism, a major school of thought in ancient China, relied on penal law and denied the role of morality, whereas Confucianism emphasized the role of morality in the society but did not absolutely reject law. In the Western Han Dynasty, the two schools combined together. After the gradual process of "Confucianization of law," the legal system was characterized by, among other things, Morality-Principal and Law-Subordinate [*Dezhu Xingfu*].<sup>180</sup> In the last three dynasties, the Yuan (1271-1368), the Ming (1368-1644), the Qing (1644-1911), the rulers maintained that he who knew the Confucian classics well was good at law.<sup>181</sup>

People apparently had much greater autonomy in the field of morality than the free volition allowed by law.<sup>182</sup> Therefore, in addition to various political or administrative considerations, "frequently, judicial judgments based on Confucian theory went beyond the article of the code, for the ancient Chinese system allowed for considerable freedom in interpreting and applying the law."<sup>183</sup> "Rule by man" did not mean that there was no law in traditional China, for in every dynasty the government enacted many laws. "Rule by man" instead meant that the law played a minor role and that the man applying the laws was the deciding factor.<sup>184</sup>

It is true that in the West there had been no distinct line between law and morality since ancient Greece, and it was not until the Enlightenment that the Natural Law school of thought paved the way for emancipating law from morality. It is also true that no legal system in the world could exclude the broad concepts carrying moral connotations.<sup>185</sup> However, that is not the point here. The point is that in the later Middle Ages, a large number of cities and towns emerged with the expansion of commerce; consequently, there was a need for a new social order based upon a system making the legal consequences of people's activities calculable and coherent. Roman law is characterized by a "formal, logical mode of juristic reasoning, ostensibly free from discretionary, ritualistic, religious, or magical considerations."<sup>186</sup> That is one of the reasons that Roman law revived, that the Roman Law System took form, and that the Roman *Corpus Juris Civilis*, the theoretical source of Roman law, became

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<sup>180</sup> CH'U, *supra* note 150, at 267-79.

<sup>181</sup> Z. WU & S. LI, FAXUE GAILUN [AN INTRODUCTION TO LAW] 4 (1987).

<sup>182</sup> BODENHEIMER, *supra* note 103, at 295.

<sup>183</sup> CH'U, *supra* note 150, at 275.

<sup>184</sup> Chan, *Chinese Theory and Practice, with Special Reference to Humanism, in THE CHINESE MIND*, *supra* note 35, at 22.

<sup>185</sup> BODENHEIMER, *supra* note 103, at 296, 299.

<sup>186</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 116.



the book, next to the Bible, having the most profound influence in human history.<sup>187</sup>

In traditional China, on the contrary, there was never the kind of social change which would require a new order based upon a legal system for the calculability and coherence of civil or commercial activities. The Chinese people took it for granted, as Confucius' held, that "[where there are] men, their government will flourish; but without the men, their government must cease."<sup>188</sup> Subordinating law to politics and morality conformed perfectly to Chinese traditional culture. Few Chinese people considered whether the law in such a subordinate position was calculable in the sense of a "formal, logical mode of juristic reasoning." Civil and, particularly, commercial activities require, among other things, a calculable system under which they could proceed as they were expected to beforehand. Very few Chinese people considered whether the incalculable law was inimical to trade, if they cared about the development of trade at all. Since the Chinese legal system did not lend itself to calculability, it inevitably discouraged people's impulse to commercial profit.<sup>189</sup>

## (2). The Underdeveloped Civil Law

Chinese civil law was even less developed than was Chinese commercial law. In the Tang Dynasty, Chinese law became unprecedentedly systematic and comprehensive, and became the model for some other Asian countries, like Japan, to follow. But Chinese law was underdeveloped compared with its Western counterparts, at least after the rise of the bourgeois class there. Instead of developing "from Status to Contract," traditional Chinese society was steadily based upon patriarchy and hierarchy. The Chinese legal system had failed to integrate such common principles as equality between individuals and freedom of contract, which are the requisites for the development of commerce. In all litigation, it was the litigant's status, family or social, which was given the first consideration. Only when the particular law concerning status could not be applied, was the general law used.<sup>190</sup> In a nation content with agriculture, as Montesquieu held, their laws were supposed to be less developed than that of a nation attached to commerce and navigation.<sup>191</sup>

What is worse, however, is that in Chinese law codes the rules deal-

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<sup>187</sup> D'ENTREVES, *supra* note 164, at 22.

<sup>188</sup> CH'U, *supra* note 150, at 257.

<sup>189</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 116.

<sup>190</sup> CH'U, *supra* note 150, at 280.

<sup>191</sup> MONTESQUIEU, *supra* note 101, at 279.

ing with civil issues were less developed than those dealing with criminal and administrative issues.<sup>192</sup> Until the beginning of this century, civil law and criminal law, substantive law and procedural law, had been mixed together in Chinese codes.<sup>193</sup> It is not unique to the Chinese law codes, however, that all kinds of law were mixed together. The first written law in ancient Rome, the Twelve Tables (450-449 B.C.), for example, also evidenced this problem. The difference between Western law and Chinese law in the past, among other things, is that the Twelve Tables, the foundation of the later development of the Roman law, were mainly civil laws dealing with the possession of land, obligation, family, inheritance, etc.<sup>194</sup> In addition, civil issues were regulated less and less with physical penalty, and in the later Middle Ages an independent body of commercial law emerged.<sup>195</sup>

The first comparatively comprehensive written law in Chinese history, *Fajing*, was mainly comprised of criminal law and criminal procedure. It was enacted under Li Kui (455?-395 B.C.), the founder of Legalism. Legalism was a major school of thought in ancient China, notorious for its strict holding that the state was the end and all-important, while the people were the means to an end and individuals' rights were to be ignored.<sup>196</sup> Naturally, the guiding idea of *Fajing* was that "Nothing is more crucial for the monarchic government than [stopping] the violation of property rights and injury to the person." *Fajing*, which had a profound influence in the later development of Chinese law, had six parts which "were all rules dealing with crimes."<sup>197</sup> The Chinese code in each dynasty was mainly comprised of criminal laws, and until the beginning of this century, civil litigations accompanied physical penalty, and an independent commercial law never emerged.<sup>198</sup>

A fundamental reason for this characteristic of the Chinese legal system was that while the Chinese government was more powerful than its Western counterpart, the Chinese lawmakers were concerned about the emperor's authority or power over the society, and consequently, criminal law directly punished those who made a disturbance. With the omnipresent authority of the government, lawmakers did not need to cre-

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<sup>192</sup> FAIRBANK & REISHAUER, *supra* note 86, at 54.

<sup>193</sup> A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 340-41.

<sup>194</sup> A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 51; *see also* WAIGUO FAZHI SHIGANG [THE LEGAL HISTORY TEACHING AND RESEARCHING OFFICE OF CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW, A CONCISE HISTORY OF FOREIGN LEGAL SYSTEM] 28-29 (1988).

<sup>195</sup> Zhang, *On Some Issues in Ancient Chinese Civil Law Studies*, 11 FALU [LAW] 99-100 (1985).

<sup>196</sup> Wu, *supra* note 172, at 342.

<sup>197</sup> A HISTORY OF CHINESE LEGAL THOUGHT, *supra* note 46, at 77-78.

<sup>198</sup> Zhang, *supra* note 195, at 99-100.

ate a civil law dealing with private problems between individuals, because common people's private interests were taken as insignificant trifles [*xigu*].<sup>199</sup>

In traditional China, the emperor's authority was the link integrating the sociopolitical and the cultural-moral orders<sup>200</sup> for the hierarchy and the patriarchy. The authority of the emperor, which was of the greatest concern to lawmakers, was supported theoretically by the Three Cardinal Guides: "Ruler guides subject, father guides son, and husband guides wife." The Three Cardinal Guides constituted the fundamental Confucian doctrine. These were elaborated by Zhongshu Dong (179-104 B.C.) and upheld by the rulers in the dynasties that followed. Of these three guides, "ruler guides subject" was the most important.<sup>201</sup> Fairbank claimed that China's whole ethical system was not oriented toward the state,<sup>202</sup> but that claim seems incompatible with the Three Cardinal Guides accepted by the Chinese for 2000 years. In fact, Chinese scholars generally hold that after the Western Han Dynasty, ethics were combined with politics and called Political-Ethics [*Zhengzhi-lunli*], and this objectionable combination restrained the Chinese people's innovative spirit.<sup>203</sup>

The Three Cardinal Guides were not only the fundamental principles of Chinese ethics<sup>204</sup> but also the principles underlying the Chinese legal system.<sup>205</sup> Ironically, this famous Confucian doctrine was originally put forward by the famous Legalist Han Fei (280-233 B.C.). The Qin Dynasty (221-207), based upon Legalism, was the most tyrannical dynasty in Chinese history. This short-lived dynasty eventually discredited Legalism.<sup>206</sup> Nevertheless, from the Three Cardinal Guides, we could see that the Confucian scholar Zhongshu Dong (179-104 B.C.) covered the Legalist doctrine with Confucianism in a way and the Chinese legal system accepted the Legalist doctrine—"Exalting the ruler while humbling the subject [*Zunjun beicen*]." Another famous Confucian scholar, Xi Zhu (1130-1200), asserted, "The laws in Qin Dynasty were all for exalting the ruler while humbling the subject. . . . How could the later

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<sup>199</sup> Zhang, *supra* note 195, at 100.

<sup>200</sup> Y. LIN, THE CRISIS OF CHINESE CONSCIOUSNESS 16 (1979).

<sup>201</sup> A HISTORY OF CHINESE LEGAL THOUGHT, *supra* note 46, at 169-170.

<sup>202</sup> FAIRBANK & REISCHAUER, *supra* note 86, at 15.

<sup>203</sup> Song, *supra* note 100, at 93-97; see also Bao, *Confucian Ethics and the Asian Four Mini-Dragons* 1 MINGBAO YUKAN [MING PAO MONTHLY] 56-57 (1988); see also Liu, *Confucianism and Democracy* ZHONGYING RIBAO [CENTRAL DAILY NEWS], May 17, 1988, at 1 (International ed.).

<sup>204</sup> Liu, *China's Historical Humane Thought and Monarchal Power*, 4 NANKAI XUEBAO [NANKAI JOURNAL] 9-11 (1986).

<sup>205</sup> A HISTORY OF CHINESE LEGAL THOUGHT, *supra* note 46, at 5.

<sup>206</sup> WANG & XU, *supra* note 174, at 61.

[monarchy] change this doctrine willingly?"<sup>207</sup>

While stressing criminal law for the emperor's authority, the Chinese legal system ignored traders as well as trade in order to keep the monarchic order. Zhong Guan (730-645 B.C.), the prime minister of Qi State, raised the idea that the bachelor, which later came to refer to the literati loosely, the farmer, the artisan, and the trader [*shi, nong, gong, shang*] should live separately according to the occupation that they practiced. The purpose was to promote the development of each occupation. It is questionable whether this idea was ever realized,<sup>208</sup> but this hierarchic order, keeping the traders in the lowest social status, was followed in every dynasty.<sup>209</sup> Although trade was not generally excluded from the society, it was restricted by the government to maintain the self-sufficient agricultural economy.<sup>210</sup> The monarchic government, of course, would not tolerate any independent social force which might break the conventions of the highly unified society.

The traditional government policy—stressing agriculture while repressing trade [*zhongnong yishang*—levied heavy taxes on, and enforced insulting rules over, the traders,<sup>211</sup> so that they lacked the freedom of trade, a good environment for investment, and an independent personality. Traders' property could be requisitioned or confiscated with little difficulty by the state, by corrupt officials, or by military leaders. Hence the understandable saying among traders, "Seek wealth by the lowest occupation (trade), and maintain the wealthy by the principal occupation (agriculture)."<sup>212</sup> The monarchic government kept the trades and the handicraft industries at a level "neither flourishing nor declining" by policy and by law.<sup>213</sup>

In addition to the policy of stressing agriculture while repressing trade, since the Qin Dynasty (221-207 B.C.) the government had often monopolized some industries and trades relevant to salt, iron, tea, wine, silk fabrics, etc..<sup>214</sup> The most profitable businesses were run by the government.<sup>215</sup> In the Qing Dynasty (1644-1911), foreign trade and private mining industries were forbidden or strictly regulated; heavy taxes were levied on trades and manufacture; the products made by the state-owned

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<sup>207</sup> Yu, *supra* note 109, at 340-41, 348, 353.

<sup>208</sup> 1 A CONCISE HISTORY OF CHINESE ECONOMIC THOUGHT, *supra* note 122, at 22-24.

<sup>209</sup> HU, *supra* note 123, at 62.

<sup>210</sup> Bao, *supra* note 203, at 59.

<sup>211</sup> Yan, *supra* note 157, at 140-41.

<sup>212</sup> Lin, *Changes in the Social Status of Merchants during the Tang and Song Dynasties*, 1 HISTORY STUDIES 141 (1989).

<sup>213</sup> Ye, *supra* note 137, at 134, 146.

<sup>214</sup> Zhang, *supra* note 195, at 101.

<sup>215</sup> Lin, *supra* note 212, at 142.

workshops were tributes to the government, not circulating in the markets. Consequently, the civil laws were mainly about land, houses, crops; few were about trades and manufacture.<sup>216</sup>

The underdeveloped civil law in the Chinese codes also resulted from the significant role of domestic discipline [*jiafa*]<sup>217</sup>—the Confucian moral doctrine and customary law applied to family members. From the Western Zhou Dynasty (the 11th century-771 B.C.) to the last dynasty, the Qing Dynasty, domestic discipline not only existed but became increasingly socially important. After the Song Dynasty (960-1279), domestic discipline was formally recognized by the government as the supplement to the law codes. In the Ming (1368-1644) and Qing Dynasties (1644-1911), the government vested the patriarch with additional rights over family members.<sup>217</sup> Domestic discipline regulated the problems of property, inheritance, marriage, etc. within the household.<sup>218</sup> The patriarch or the head of a family was the supreme authority of the family to apply domestic discipline, with the exception of the power of life and death. The patriarch was also responsible to the state for the family members' behavior. The household functioned as the basic legal unit, with the result that many problems were settled without recourse to the law court.<sup>219</sup>

Accordingly, a Chinese seldom thought of himself or herself as an isolated entity.<sup>220</sup> Since the most admired value was loyalty to the emperor (the state) and filial piety to the parents, the interests or the value of an individual meant little. The individual interest or value was realized normally through the relations, family or social, which he or she was in.<sup>221</sup> The patriarchy as well as the hierarchy supported by the Three Cardinal Guides checked people's impulse to commercial profit, and obstructed the possible development of civil law, not to mention commercial law.

It should be realized that, in world history, China was not the only country where trade and handicraft industries were looked down upon. In ancient Greece, mercenary works were considered unworthy, and in the early Middle Ages, canon law provided that the sins of trades could not be forgiven. Even in the 13th century, bleaching, weaving, tanning, dyeing, and shoemaking were all considered dishonorable businesses for

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<sup>216</sup> A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 316-19.

<sup>217</sup> WANG & XU, *supra* note 174, at 103-04; *see also* Zhang, *supra* note 195, at 101, 109.

<sup>218</sup> Zhang, *supra* note 195, at 101; *see also* A HISTORY OF CHINESE LEGAL SYSTEM, *supra* note 149, at 3-4.

<sup>219</sup> CH'U, *supra* note 150, at 40.

<sup>220</sup> Wu, *supra* note 172, at 346.

<sup>221</sup> WEI, *supra* note 142, at 50-53.

clergymen, though there seemed to be no religious rules against farming.<sup>222</sup> The main difference between China and the West later on was that in China, the monarchic government was strong enough to keep a legal system characterized by stressing criminal law while ignoring civil law. Therefore, such a highly unified society excluded an independent bourgeois class. In the West, on the contrary, the much weaker governments were unable to control a powerful bourgeois class which rose in the pluralistic society with, among other things, the independent commercial law.

In the West, even after the Middle Ages, the most powerful king in Europe had to accept disobedience in his kingdom as perfectly normal. In England, landed gentry and nobility were independent from the royal court and their adoption of commercial agriculture partly in response to the growth of commerce and manufacture was one of the factors in the development of democracy there.<sup>223</sup>

[T]he Europe of the late medieval city-states and the early monarchies came to the age of discovery without a central authority strong enough to check the determination of its merchants to gain access to profitable trading opportunities, even though some satrap or other had forbidden such access or claimed it as a private preserve. The central authority which eventually emerged did not take the form of a single monolithic empire, but of a group of nation-states which continued, among themselves, the early city-state competition for trade.<sup>224</sup>

To be sure, one of the conspicuous differences in economic history between China and the West is that private ownership originated much earlier in China.<sup>225</sup> In China, the emperor-ownership (state-ownership) was described by a famous poem,

Under the wide heaven,  
All is King's Land.  
Within the sea-boundaries of the land,  
All are the King's servants.<sup>226</sup>

This situation has, of course, been dramatically changed since the Spring and Autumn Period (770-476 B.C.) and the Warring State (475-221 B.C.).<sup>227</sup> Yet, the idea that the emperor was the highest sovereign over the people remained deeply rooted in the Chinese mind during the

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<sup>222</sup> Wu, *The Relative Primacy of Agriculture and Commerce in World History*, 1 HISTORY STUDIES 5 (1984).

<sup>223</sup> MOORE, *supra* note 102, at 40, 59.

<sup>224</sup> ROSENBERG & BIRDZELL, *supra* note 96, at 60.

<sup>225</sup> Zhao, *The Origin and Development of Private Ownership in China*, 4 MINBAO ZHOUKAN [MING PAO MONTHLY] 15 (1988).

<sup>226</sup> THE BOOK OF POETRY—THE CHINESE CLASSICS 360 (J. Legge trans., 1966).

<sup>227</sup> A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 53-54.

following 2000 years,<sup>228</sup> which is why this poem was so famous in Chinese history. Under the powerful monarchic government and a legal system inimical to civil law, the earlier establishment of private ownership, like the earlier development of science and technology, was followed by prolonged stagnation, not an earlier revolutionary advance.

### (3). The Legal Philosophy

The traditional Chinese philosophy of law discouraged the pursuit of self-interest through the making of money. Before discussing this characteristic of Chinese tradition, it should be clarified that Chinese law could hardly have any positive influence on people's attitude toward commercial profit, though there were legal rules regulating civil issues in every dynasty. In the West, the Roman Law System germinated without any affirmation by a political power,<sup>229</sup> and the scholars on the European Continent enthusiastically studied Roman law generation after generation. The Common Law germinated with the support of the British royal court, and the authority of law could be seen from what Henry Bracton (?-1268) claimed, "[T]he king ought to be under God and the law."<sup>230</sup> Law was respected because law was the very basis of the "civil order."<sup>231</sup> With such an authority and dignity, the law would be able to have an active impact on people's morality.

In traditional China, in the Qin Dynasty (221-207 B.C.) when the rulers thought much of law, people could study legal rules from the officials, though private study or discussion was forbidden. In the Han Dynasty (206 B.C.-220 A.D.), Confucian scholars taught law based on Confucian classics emphasizing morality. In the Jin (265-420) and Tang (618-907) Dynasties, many scholars, Confucian scholars still studied and explained former law codes. But after the Tang Dynasty, very few scholars studied law codes. Many law codes and private comments on them were lost in history.<sup>232</sup> In the Qing Dynasty (1644-1911), the emperor Yong Zheng even criticized the local officials, for they often praised their knowledge of Confucian classics, poetry, chess, and art, with great enthusiasm, but they knew little of law, which was to have been studied seriously as their official duty.<sup>233</sup> Traditional China was ruled by men and

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<sup>228</sup> Liu, *supra* note 204, at 4-7.

<sup>229</sup> DAVID & BRIERLEY, *supra* note 159, at 40.

<sup>230</sup> LLOYD, *supra* note 163, at 31.

<sup>231</sup> DAVID & BRIERLEY, *supra* note 159, at 52.

<sup>232</sup> WANG & XU, *supra* note 174, at 58; *see also* A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 4.

<sup>233</sup> T. QU, ZHONGGUO FALU YU ZHONGGUO SHEHUI [CHINESE LAW AND CHINESE SOCIETY] 305-07 (1981).

the law was not taken as the very basis of the "civil order." Naturally, few people explored the philosophy of law in Chinese history.<sup>234</sup> Without the authority and the dignity, the law was by no means a powerful leaven to transform people's morality for commercial profit, not to mention the fact that there were few commercial rules in Chinese codes.

On the one hand, the Chinese legal system had little positive influence on the Chinese people's attitude toward commercial law; on the other, Confucian doctrine made litigation an unworthy activity. Confucian philosophy of law exalted the significance of morality and offered law a minor role, a regrettable necessity, in the society. However, traditional Chinese philosophy of law should be understood primarily from the ideologized Confucianism which was omnipresent. There was no legal jurisdiction independent from the administration, nor jurisprudence from Confucianism. John Keynes (1883-1946) once said,

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believed themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.<sup>235</sup>

That is particularly true in China, because, first, Confucius, though not an economist, enjoyed greater respect in traditional China than any scholar did in the West. Confucianism was accepted by the Chinese as the essential part of their culture. Second, and more significantly, Confucianism was forcefully supported for 2000 years as the official ideology by the governments.

Confucius once said, "If you lead the people by political measures and regulate them by penal laws, they will merely avoid transgressing them but will have no sense of honor. If you lead them by the practice of virtue and regulate them by the inculcation of good manners, they will not only keep their sense of honor but will also be thoroughly transformed."<sup>236</sup> This was the basic attitude of the Chinese people toward law.

Let us see two typical stories which reflect the attitude of Confucianism. Once two brothers sued each other for farms. Magistrate Su Ch'iung said, "The most precious thing in the world is brotherly affection, and the least precious is a piece of land. Why should you quarrel over the least precious at the expense of the most precious?" On hearing the sagacious admonition, the two brothers settled their ten-year dispute

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<sup>234</sup> A HISTORY OF THE CHINESE LEGAL SYSTEM, *supra* note 149, at 4.

<sup>235</sup> JOHN M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383 (1936).

<sup>236</sup> J. Wu, *Chinese Legal and Political Philosophy*, in THE CHINESE MIND, *supra* note 35, at 220-21.



by embracing each other. With neither a property law nor an elaboration on the merits, the Magistrate disposed of the case by way of "an irresistible charm."<sup>237</sup>

The second story begins with a Magistrate having found a thief on the top beam of his room. The Magistrate pretended not to notice the thief. Instead, he called his family members together and said, "Each of you must diligently attend to his duties. You should know that robbers and thieves are not bad by nature. They became such only through the habit of laziness. The gentleman on the top beam is a case in point." On hearing these words, the frightened thief fell down to the ground. The Magistrate spoke to the thief softly, "Judging by your appearance, you are not a bad man. I only hope you will correct your mistake and do good. Probably your wrong-doing is due to your poverty; I here give you two pieces of silk to help you start anew." So deeply moved was the thief that he became a reformed man. This story was known to the local people and there was neither thief nor robber in the district after that.<sup>238</sup>

Long before the days of Confucianism, the spirit of harmony had formed in China. It was believed that people's happiness depended on harmony. The Confucian principles of the Golden Mean [*Zhongyong*] and of Reciprocity [*Shudao*] are little more than the spirit of harmony. Showing his preference for social harmony, Confucius said, "in hearing lawsuits I act like other men, but it is necessary to put an end to litigation." If litigation could not be avoided, the Chinese people were always ready to come to terms by meeting the opponent halfway. This spirit was a decided contrast to the advice of Rudolf von Jhering (1818-1892), "Bring suit, cost what it may!"<sup>239</sup> The Chinese government attempted to enact laws for social harmony, by trying to dissolve rather than resolve disputes. Thus, the Western image of the blindfolded Themis holding the scales of justice would rarely have been given top priority by Chinese officials.<sup>240</sup> The philosophy supporting physical penalty, with which civil cases were settled, was that such cases violated social harmony.<sup>241</sup>

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<sup>237</sup> Wu, *supra* note 172, at 350.

<sup>238</sup> Wu, *supra* note 172, at 350-51.

<sup>239</sup> Cf. J. Wu, *Chinese Legal and Political Philosophy*, in *THE CHINESE MIND*, *supra* note 35, at 227. I use "Cf.", because I use Mr. David Collie's translation of the quotation from Confucius here instead of that of Mr. J. Wu.

<sup>240</sup> Even after the enactment of the General Principles of Civil Law in 1986 under Deng Xiaoping, the litigants "more often than not do not get a clear victory or defeat. In many, if not a majority, of the cases, the court works out a purported compromise. Even if it grants the plaintiff's main request it may turn down some subsidiary request." Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the PRC*, 28: 2 *HARV. INT'L L.J.* 96, 109 (1987).

<sup>241</sup> R. DeAngelis, *People's Republic of China*, in *LEGAL TRADITIONS & SYSTEMS* 251 (Katz ed., 1986).

A most unequivocal expression of the Western values and Western law about the pursuit of self-interest by the making of money comes from Justice Holmes (1841-1935): "A man has a right to set up a shop in a small village which can support but one of a kind, although he expects and intends to ruin a deserving widow who is established there already."<sup>242</sup> Such values and law were completely incompatible with Confucianism. The Chinese legal system emphasized personal duty, and the notion of personal rights was less developed than that in the Common Law and Roman Law.<sup>243</sup> This characteristic could be understood partly by "Confucianization of law." Under Confucianism, people were supposed to know the notions of propriety and concession as their duties to others. In order to be respectable, people should first fulfill their duties rather than claim their rights. If people could concede their rights rather than their duties in daily life, it was alleged, there would be no quarrels among people.<sup>244</sup>

If, on the other hand, people chose to go to courts of law to settle their disputes, "the enforcement of law by authority was a tacit admission that the cultivation of virtue through education had failed. Confucian gentlemen viewed the application of sanction as 'a regrettable necessity,' a last resort for vulgar people only."<sup>245</sup> The Chinese had the deep-rooted idea that it was shameful to go to court. Since there was the tradition of scorning commercial profit, as discussed above, it would be still more shameful to claim monetary rights against others in a court of law.

Weber held that unchaining economic impulses does not necessarily produce rational results in the world.<sup>246</sup> At the same time, however, Chinese history suggests that holding economic desires in check may produce even more irrational results. Irrational institutions, such as allowing people's capitalistic impulses to be realized only through studying Confucian classics, were not established in China after an unchaining of economic impulses; it was not that the Chinese tried in vain to find rational institutions after such an unchaining, but that the economic impulses were never unchained in the first place. If economic impulses are universal, rational institutions must require their unchaining as a concomitant condition, if not a prerequisite.

Weber also held, as mentioned above, that what the monarchy

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<sup>242</sup> Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894).

<sup>243</sup> Wu, *supra* note 172, at 219.

<sup>244</sup> Hsieh, *The Status of the Individual in Chinese Ethics*, in THE CHINESE MIND, *supra* note 35, at 314, 316.

<sup>245</sup> DeAngelis, *supra* note 241, at 251.

<sup>246</sup> ROSENBERG & BIRDZELL, *supra* note 96 at 11.

wanted most was political stability based upon subjects' loyalty, and the monarchic order was the death of everything necessary for the development of capitalism. Weber's comment was particularly apt for China, where the monarchy was far more highly bureaucratized and centralized than its Western counterpart. The Chinese monarchy brought peace to Chinese society and excluded some possible civil law or social turbulence.<sup>247</sup> The maintenance of the vast empire was, however, not without cost. The Chinese monarchy greatly contributed to the prolonged stagnation of the Chinese economy, though private ownership was established much earlier than in the West. The monarchic order also greatly contributed to the prolonged smothering of people's impulse to commercial profit, through the legal system as well as through the ideologized Confucianism.

Essentially, a patent law requires the unchaining of people's impulse to commercial profit, and the justification of the pursuit of commercial profit morally as well as legally. According to Western history, patent law, utilizing people's economic impulse as the incentive to science and technology, is a rational institution.<sup>248</sup> Hence, in the light of a patent law, the monarchic order is irrational. If the monarchic order, no matter under what guise, still lingers in China today, the relevant tradition must be inimical to the PRC's Patent Law, if not in fact reducing the law to impotence. What was the PRC's attitude towards this tradition of scorning commercial profit while insisting on Confucian morality under Mao? In other words, what was the CCP's attitude towards the monarchy, which was behind the tradition, before the patent law was enacted under Deng?

### C. The Traditions Utilized by Mao Zedong

Theoretically, the PRC is a democratic and republic state where all the power belongs to the people. Practically speaking, the PRC government is more highly bureaucratized and centralized than its predecessors.<sup>249</sup> Further, the CCP's "leadership is highly personalized and hardly institutionalized."<sup>250</sup> The feudal patriarchal style and the feudal

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<sup>247</sup> Cf. C. LIU & Q. YANG, *ZHONGGUO SHEHUI, CONG BUBIAN DAO JUBIAN* [CHINESE SOCIETY, FROM THE UNCHANGED TO THE DRASTICALLY CHANGED] 53 (1989).

<sup>248</sup> There have been different opinions about the advantages and the disadvantages of patents in the world. But, the general enactment of patent laws in the world may presume that it is taken as a rational institution.

<sup>249</sup> Li, *The Problem of China's Political Structure*, in *ZHONGGUO DE WEIJI YU SIKAO* [CHINA'S CRISIS AND CONSIDERATION] 335-38 (Li ed., 1989).

<sup>250</sup> Gong, *Political and Constitutional Change in China* 14:40 *ASIAN THOUGHT AND SOCIETY* 5 (1989).

autocratic style, as the Chinese openly admitted after Mao's death, were strong within the CCP and the government.<sup>251</sup> Karl Marx (1818-1883) held, "The bourgeoisie cannot exist without constantly revolutionizing the instruments of production."<sup>252</sup> The Chinese proletariat under Mao, however, exercised the dictatorship firmly over the people without revolutionizing the instruments of production for decades. As long as China remained a closed society, as it was in the past, the CCP might hold the reins of government with little development of science and technology.

The PRC government explicitly committed itself to the development of science and technology in the 1950's.<sup>253</sup> The leadership regarded science and technology as the means to achieve wealth, power, and status in the world. Under Mao, the Chinese exploded atom bombs, launched a man-made satellite, and made other breakthroughs in science and technology relevant to national defense. The achievements are admirable if the cost the Chinese people paid is not considered. The PRC's commitment to science and technology did not remain consistent, nor did it have any intention to enact a patent law. The most important thing for the CCP and the PRC was to make sure that "[T]he force at the core leading our cause forward is the Chinese Communist Party. The theoretical basis guiding our thinking is Marxism-Leninism."<sup>254</sup>

In particular, the CCP leadership, like the monarchical rulers, wanted to control the literati—the only potential opponent in the highly unified society. Early in 1951, the government leader Enlai Zhou taught the literati: you should learn "the ideology of the progressive elements of the working class, including the revolutionary theories of Mao Zedong and the actual practice of the Chinese revolution."<sup>255</sup> In 1957, Mao Zedong admonished the literati, "Both students and intellectuals should study hard. In addition to the study of their specialized subjects, they must make progress both ideologically and politically, which means that they should study Marxism-Leninism, current events and politics. Not to have a correct political point of view is like having no soul."<sup>256</sup> The literati were not counted as part of the glorious working class by the

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<sup>251</sup> The Commentator of Law Journal, *To Eliminate the Feudal Evil Legacy Is An Important Task on the Political and Legal Front*, PEOPLE'S DAILY, Nov. 28, 1980, at 5 (overseas ed.).

<sup>252</sup> KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO*, PRINCIPLES OF COMMUNISM, *THE COMMUNIST MANIFESTO AFTER 100 YEARS* 7 (1964).

<sup>253</sup> Goldman & Simon, *supra* note 5, at 7.

<sup>254</sup> QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 1 (A. Barnett introduction, 1967).

<sup>255</sup> Franz Michael, *Ideology, Reality and Human Rights*, in *HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA* 102, 107 (Yuan-Li Wu et. al. eds., 1988).

<sup>256</sup> QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG, *supra* note 254, at 79.

CCP. They had to study Mao's works to remodel their world outlook, which allegedly belonged to the bourgeoisie.

If people, particularly the literati, had some ideas suspected to be incompatible with Marxism-Leninism-Maoism, they might be persecuted ruthlessly.<sup>257</sup> Even the most accomplished scientists, like Weichang Qian, were by no means exempted.<sup>258</sup> The stagnant-minded literati was much more tightly controlled under Mao than during any other period in Chinese history.<sup>259</sup> During the Cultural Revolution (1966-1967), the literati became the notorious "Stinking Number Ninth" [*Choulaojiu*], the last of the nine groups of social outcasts of the regime.<sup>260</sup> The 1975 Constitution openly provided that "The proletariat must exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture."<sup>261</sup> Under such terrible pressure, the literati, as a whole, had little enthusiasm for science and technology.

Under Mao, people of all walks of life—science and technology, art, education, sports, cooking, etc.—had their ranks which were officially set up and controlled by the government. These rankings determined privilege, salary, housing, health care, travel, and the like, so that people desired a high rank.<sup>262</sup> Or rather, people were attracted by an official career, because the CCP and government cadres were given higher salaries and more privileges than were other professions.<sup>263</sup> "[I]n terms of the values rather than the practical achievements of the PRC, the first-class personages today are still the politicians, not the physicists, chemists,

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<sup>257</sup> Michael, *supra* note 255, at 106-113.

<sup>258</sup> Ruan, *The Trick Weichang Qian Used to Struggle against the Party for the Youth*, 15 ZHONGGUO QINGNIAN [THE CHINESE YOUTH] 7 (1957). It was openly asserted that "Since the machine of socialism can be operated only by the Communist Party, [which] is the only leader of the whole country, and [which] is the only vanguard of the working class able to keep the orientation forward, then, the works of science, culture and education, which are the gears and the screws of the machine, have to be headed by the Party." An, *The Party Can Lead the Works of Science, Culture and Education*, 13 THE CHINESE YOUTH 5 (1957).

<sup>259</sup> Hu, *Why Did I Write on Freedom of Speech*, in DALU ZHISHIFENZI LUN ZHENGZHI SHEHUI JINGJI [THE LITERATI FROM MAINLAND CHINA DISCUSSING POLITICS, SOCIETY, AND ECONOMY] 47 (1988); cf. Fei, *Respect Ideas before Respecting Knowledge and Talent*, PEOPLE'S DAILY, Jan. 19, 1988, at 8 (overseas ed.).

<sup>260</sup> Michael, *supra* note 255, at 107.

<sup>261</sup> William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L.Q. 707, 720 (1985).

<sup>262</sup> Chen, *A Preliminary Study of "The Standard of Governmental Official"*, PEOPLE'S DAILY, Aug. 3, 1988, at 2 (overseas ed.).

<sup>263</sup> Su, *The Political Structure Reform and Opposing the Feudalism Influence*, PEOPLE'S DAILY, Aug. 16, 1986, at 2 (overseas ed.); see also Xu, *On Salary Reform*, in DANGQIAN ZHONGGUO JINGJI WENTI TANSUO [THE EXPLORATION OF CONTEMPORARY ECONOMIC PROBLEMS IN CHINA] 156, 187, 195 (Marxism-Leninism Teaching & Researching Office of the Shijiazhuang Army School ed., 1985).

writers, nor entrepreneurs.”<sup>264</sup> This government policy supported the Maoist principle that “Politics always comes first” [*Tuchu zhengzhi*]. Historically, choosing an official career by studying Confucian classics was the most honorable and profitable way for the literati. The situation in the PRC was similar.

The tradition of scorning commercial profit while insisting on Confucian morality was utilized comprehensively by Mao, if we change “Confucian morality” into “communist morality.” In fact, this tradition had not been discredited seriously before the establishment of the PRC in 1949. It is true that traditional Chinese economic thought had collapsed by the 1919 May Fourth Movement. In China from 1919 to 1949, at least 2000 works of Western economics were published, including the translations. More than 100 modern economic journals had been established in addition to those published by universities and government. With more and more scholars returning from the West, the universities became dominated by various Western economics.<sup>265</sup>

Nevertheless, the bourgeoisie never grew into a strong class in China. Western notions like commercial profitability and the spirit of enterprise were never generally recognized in China.<sup>266</sup> While wanting Western wealth and democracy, Sun Yet-sen (1866-1925), the founder of the Republic of China, criticized the evil exploitation and class polarization of the West.<sup>267</sup> Yet-sen wanted to inherit and carry forward Confucian morality.<sup>268</sup>

After the 1917 Russian October Revolution, Marxism and Leninism were introduced into China. From 1920 to 1949, more than 222 Marxist economic works were translated into Chinese, opposing the economic theory of the bourgeoisie.<sup>269</sup> Even Sun Yet-sen seemed to prefer Marxist economic theory to that of Adam Smith.<sup>270</sup>

In the 1950s, the PRC set up its economic structure on the Soviet model. The economy was primarily state-owned, and the economic activities were primarily planned by the state.<sup>271</sup> The situation was just as

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<sup>264</sup> Y. YU, *Some Viewpoints on the Characteristics of Chinese History*, in LISHI YU SIXIANG [HISTORY AND THOUGHT] 281 (1976).

<sup>265</sup> HU, *supra* note 83, at 226-27, 380, 382-83.

<sup>266</sup> Cf. Beaumont, *supra* note 6, at 39, 44.

<sup>267</sup> Z. LI, *On Sun Yet-sen's Thought*, in ZHONGGUO JINDAI SIXIANGSHI LUN [ON MODERN CHINESE INTELLECTUAL HISTORY] 337-41 (1986).

<sup>268</sup> Q. FU, *ZHONGSHAN SIXIANG TIXI* [SUN YET-SEN'S IDEOLOGICAL SYSTEM] 24-27 (1986).

<sup>269</sup> HU, *supra* note 83, at 394-95, 433, 483.

<sup>270</sup> LI, *supra* note 267, at 341-42.

<sup>271</sup> Yang, *On the Issues of the Economic Structure Reform*, in THE EXPLORATION OF CONTEMPORARY ECONOMIC PROBLEMS IN CHINA, *supra* note 263, at 18-20; see also Hsu, *Changing Conceptions of the Socialist Enterprise in China, 1979-1988*, 15 MODERN CHINA 499, at 504 (1989).

Lenin (1870-1924) put it: "All citizens become employees and workers of a single nationwide state 'syndicate.' . . . The whole society will have become a single office and a single factory, with equality of labor and equality of pay."<sup>272</sup> The Chinese people generally owned no means of production, but only the means of livelihood. The insignificant private economy was limited to very small producers and peddlers, who were looked down upon socially as the remnants of the old society.

In 1957, Mao warned, "A dangerous tendency has shown itself. . . a concern for personal fame and gain."<sup>273</sup> The impulse toward acquisition or the pursuit of money was not merely something morally shameful, but something politically dangerous. This impulse might well prove that such people "could not withstand sugar-coated bullets" from the bourgeoisie.<sup>274</sup> Or, it might prove that they were the bourgeois elements originally. During the Cultural Revolution, even the pursuit of profit by the state-owned enterprises was called "Putting profit in command" [*Liren Guasuai*], a bourgeois idea to be criticized under Maoism.<sup>275</sup> On the other hand, before the Cultural Revolution few commercial activities existed and practically speaking, there were few legal ways for people to pursue money.

The Chinese people were also instructed repeatedly by the CCP with Mao's teaching, "We must all learn the spirit of absolute selflessness from [Norman Bethune]. With this spirit everyone can be very useful to the people. A man's ability may be great or small, but if he has this spirit, he is already noble-minded and pure, . . ."<sup>276</sup> The CCP often set up some "selfless" proletarian heroes and heroines for the Chinese to learn from. In 1963, all the top leaders of China called on the people to learn about Feng Lei, a driver in the army who became the "communist soldier" through studying Mao's works.<sup>277</sup> The Chinese people, particularly the literati, spent much time responding. During the Cultural Revolution, the literati were ordered by Mao to receive re-education from the workers, peasants, and soldiers.<sup>278</sup> Interwoven with political struggles, the criticism and self-criticism against the "bourgeois philosophy of life" became common and cruel.

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<sup>272</sup> Z. ZILE, IDEAS AND FORCES IN SOVIET LEGAL HISTORY 125 (1992).

<sup>273</sup> QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG, *supra* note 254, at 107.

<sup>274</sup> QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG, *supra* note 254, at 134.

<sup>275</sup> Yu, *On the Change of "Reform and Open Door" and the National Spirit*, PEOPLE'S DAILY, May 4, 1988, at 2 (overseas ed.).

<sup>276</sup> QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG, *supra* note 254, at 96.

<sup>277</sup> Mao, Zhou (inscriptions), 5-6 THE CHINESE YOUTH 1, 2 (1963); *see also* Liu, Zhou, Deng (inscriptions), 7 THE CHINESE YOUTH 1, 2, 3 (1963).

<sup>278</sup> The Commentator of People's Daily and HONGQI [RED FLAG], *On the Issue of Re-Educating the Intellectual*, 3 RED FLAG 2-4 (1968).

The revised tradition, "scorning commercial profit while insisting on communist morality," was supported by the PRC's legal system. In traditional China, people had no idea of "democracy" or "popular sovereignty." The emperor with the divine right was the master of the people.<sup>279</sup> Confucianism and Legalism were the two primary schools of thought, both took law as the government's instrument to control the people.<sup>280</sup> Similarly, Russian leader Lenin asserted that "The individual rights of citizens, of course, do not constrain Soviet power but are granted only for the development of the country's productive forces."<sup>281</sup> Lenin also stated that Russia's law embodied "The expression of the will of the classes, which have emerged victorious and hold the power of the state."<sup>282</sup> The CCP followed these Leninist principles as well as their own Chinese traditions: socialist law was viewed as a tool to realize the dictatorship of the proletariat,<sup>283</sup> and democracy was taken as the mere means to the end, not the end itself.<sup>284</sup> Even under Deng Xiaoping, law has still been the embodiment of the CCP's policy,<sup>285</sup> and rights flow from the state to the people as a gratuitous grant.<sup>286</sup>

The CCP established its legal system in the 1950's molded after that of the former Soviet Union. But under Mao no basic law codes, like criminal law, criminal procedure law, civil law, and civil procedure law, were enacted.<sup>287</sup> Political campaigns and personal power played an important role socially. Legal nihilism prevailed and the study of legal theory was replaced by politics or "class struggle" theory.<sup>288</sup> When problems arose, people normally turned to the persons in power—the CCP cadres.<sup>289</sup> Going to a court of law was still shameful and the last

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<sup>279</sup> Y. LIN, *On the Relationship between Democracy and Rule of Law*, in SIXIANG YU RENWU [THOUGHT AND FIGURE] 423-26 (1985).

<sup>280</sup> A HISTORY OF CHINESE LEGAL THOUGHT, *supra* note 46, at 53, 83, 122.

<sup>281</sup> ZILE, *supra* note 272, at 166.

<sup>282</sup> Vladimir Lenin, *The Agrarian Program of Social Democracy in the First Russian Revolution 1905-1907*, in 13 LENIN COLLECTED WORKS 327 (1962).

<sup>283</sup> Tang, *Socialist Law Is the Embodiment of the Will of the Working Class*, 1 FAXU YANJIU [STUDIES IN LAW] 44 (1980).

<sup>284</sup> Zheng, *Is Democracy the End?*, 15 THE CHINESE YOUTH 14 (1957).

<sup>285</sup> Z. WU & S. LI, FAXUE GAILUN [AN INTRODUCTION TO LAW] 37-38 (1987).

<sup>286</sup> R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 44 (1986).

<sup>287</sup> The Criminal Law and Law of Criminal Procedure were promulgated in 1979; the Law of Civil Procedure for Experimental Implementation in 1982; and the General Principles of Civil Law in 1986.

<sup>288</sup> Chen, *A Review of New China's Research in Law During the Past Thirty Years*, 1 STUDIES IN LAW 3-4 (1980).

<sup>289</sup> Even under Deng Xiaoping when the legal system became unprecedentedly significant, the General Office of the Central Committee of the CCP and the General Office of the State Council received more than 780,000 complaining letters and more than 5,000 batches of complainants in



resort.

In traditional China, as discussed above, civil law was less developed than criminal law. Similarly, in Soviet Union civil law was insignificant.<sup>290</sup> After the 1917 Russian October Revolution, almost all Marxists had a negative attitude toward the civil law, believing it was wanted by capitalism and rejected by socialism.<sup>291</sup> Although the civil code was promulgated in 1922 under pragmatic Lenin and revised in 1964,<sup>292</sup> the economic relations in the Soviet Union were generally regulated by the state plan and policy. In life,

Soviet society reacts with disapproval to the conduct of those citizens who only seek a material benefit for themselves and pursue mercenary goals in ordinary everyday interrelations. The taking of compensation for the temporary lending of articles of personal use, interest-bearing loans, the rendition of personal services for pay, etc.—all these are not infrequently regarded as departures from the rules of socialist community life.<sup>293</sup>

Under Mao, many Chinese people simply did not quite know what rights they could enjoy, such as the right to dispose their property by their testaments. Nor did they know their duties, such as the duty not to open others' letters freely.<sup>294</sup> People's rights and interests were commonly violated.<sup>295</sup> Private rights and interests had been ignored to such an extent that after Deng came to power, one of the most prestigious law journals carried an essay in 1981 discussing issues like "The Objective Necessity of the Existence of Our Citizens' Private Ownership," "Why Should the Citizens' Private Ownership Be Protected Legally?"<sup>296</sup>

To highlight the planned economy and the public ownership of the means of production, the Chinese repeated Lenin's idea as the Soviets did, "We do not recognize anything 'private,' and regard everything. . . as falling under public and not private law." This idea was re-emphasized even when the General Principles of Civil Law of the PRC were promul-

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1987. Liu & Hua, *There Were Obvious Less Complaining Letters and Complainants from Everywhere in the Country to the Central Government*, PEOPLE'S DAILY, Jan. 27, 1989, at 4 (overseas ed.).

<sup>290</sup> DAVID & BRIERLEY, *supra* note 229, at 233-34, 284.

<sup>291</sup> Wang, *The General Principles of the Civil Law of China, The Law Having Chinese Characteristics*, in 3 STUDIES IN LAW 7-8 (1986).

<sup>292</sup> Deng, *On the Economic Relations Regulated by the Civil Law of China*, 2 STUDIES IN LAW 37 (1984).

<sup>293</sup> ZILE, *supra* note 272, at 402.

<sup>294</sup> ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE JIANGHUA [THE CIVIL LAW TEACHING AND RESEARCHING OFFICE OF CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW, THE DISCUSSION OF THE GENERAL PRINCIPLES OF CIVIL LAW OF THE PRC] 3 (1986).

<sup>295</sup> Wang, *supra* note 291, at 11.

<sup>296</sup> He & Pan, *Brief Comment on the Protection of Ownership of Citizens*, 3 STUDIES IN LAW 7-10 (1981).

gated in 1986.<sup>297</sup> Under Mao and even under Deng, in times of conflict, the interests of the state come first, then that of the collectively owned units. Individual interests come last. "This proposition has been a consistent stand from Sun Yet-sen to Mao Zedong and has its historical background."<sup>298</sup>

In traditional China, "social success could not be reduced to vulgar enrichment, but implied above all the acquisition of honors and offices which gave access to political power and prestige. Chinese ethics preached devotion to the state, personal culture, self-enforcement and modesty."<sup>299</sup> These traditions lingered in, and were desired by, the PRC under Mao. Such traditions contributed greatly to the stagnation of the Chinese science and technology in the past. The inheritance of these traditions also contributed greatly to the fact that the PRC's science and technology had fallen further behind the West, and even behind certain developing countries of East Asia.<sup>300</sup>

Having examined the relevant traditions, we may turn back to patent law. Patent law stimulates people's enthusiasm for science and technology by awarding them the proprietary monopoly over their inventions, so that the patentees could pursue the greatest possible amount of commercial profit. Patent law is in many ways a quintessence of the assumptions of the Western society or of the values of the bourgeoisie. A philosophy supporting patent law in the West is that "individuals will realize the maximum welfare of the society through the pursuit of their own individual interests."<sup>301</sup> Apparently, this institution is compatible with neither the Chinese traditions nor Marxism-Leninism-Maoism. Therefore, it is natural that Article 23 of the Regulations on Awards for Inventions, issued on November 3, 1963 by the PRC government, provided that, "All inventions are the property of the state, and no one or unit may claim monopoly over them. All units throughout the country (including collectively owned units) may make use of the inventions essential to them."<sup>302</sup>

## CONCLUSION

### Traditional Chinese cognitive methodologies and the relevant theo-

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<sup>297</sup> Jiang, *On the Effectiveness and Scope of Application of the General Principles of the Civil Law of China* 3 STUDIES IN LAW 6 (1986); see also DAVID & BRIERLEY, *supra* note 229, at 286-87.

<sup>298</sup> Gong, *supra* note 250, at 3, 9.

<sup>299</sup> Beaumont, *supra* note 6, at 39, 44.

<sup>300</sup> Goldman & Simon, *supra* note 5, at 3.

<sup>301</sup> Tao-tai Hsia & Kathryn A. Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 38 LAW & CONTEMP. PROBS. 274, 276-77 (1973).

<sup>302</sup> *Id.* at 281.

ries, like the two-force and the five-element theory, are suitable to ancient science and technology but unsuitable to the modern. Wanted by nobody, they have naturally been falling into oblivion. When considering the Chinese traditional culture relevant to the PRC's Patent Law, we may dismiss them, just as we dismiss the specious claim of "a residual mistrust of innovation."

It is very interesting to observe certain fundamental similarities between an ancient Oriental ideology, Confucianism, and a modern Occidental ideology, Marxism-Leninism, and between the traditional Chinese monarchic regime and the current socialist regime. When some of these traditions were inherited and carried forward with socialist ideology by Mao, the revised traditional culture became more inimical to the PRC's Patent Law. Normally, people are not consciously aware of their culture, for culture hides itself most effectively from its own people.<sup>303</sup> When a new ideology is similar to the traditional values, this ideology may be accepted by the people more easily than the dissimilar, and the traditional values may be further strengthened by the new ideology, particularly when the ideology is an official one.

This is the case with traditions and Marxism-Leninism in modern China in many ways. A nation's millennia-old culture cannot be changed easily or quickly. However, it may still be changed when the interests of both the people and the government are incompatible with old traditions.

As an example, the strong sense of filial piety was a leading moral principle in China for millennia.<sup>304</sup> If a parent asked for the death penalty for an unfilial child, "the authorities might acquiesce, without giving any consideration to the grounds on which the suit was brought." If the father or the grandfather were alive, a son or grandson could not live elsewhere, nor could he hold property privately. A son or grandson who disobeyed this tenet would be sentenced to years of imprisonment.<sup>305</sup> Such old rules might well have been taken as right and proper in the past. Since 1912 when the Republic of China was established, however, such laws have been abolished.

The Chinese people's acceptance of the above harsh laws in the past and the acceptance of the laws' abolition could be explained partly because the omnipresence of Confucianism resulted from government coercion as well as from instillation, and not merely from people's willing

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<sup>303</sup> E. KEARNY ET AL., *THE AMERICAN WAY, AN INTRODUCTION TO AMERICAN CULTURE* 1, 10 (1984).

<sup>304</sup> Hsieh, *Filial Piety and Chinese Society*, in *THE CHINESE MIND*, *supra* note 35, at 167, 183.

<sup>305</sup> CH'U, *supra* note 150, at 26, 29-30.

observation. Actually, ideologized Confucianism was different even from the original theories of Confucius, Mencius, Zhongshu Dong and Xi Zhu. The ideologized Confucianism catered to the monarchic government, but twisted the Chinese people's natural feeling and desire to a considerable extent.<sup>306</sup> Therefore, at the beginning of this century, when the last monarchic dynasty (Qing) collapsed and the venerable Confucianism was criticized, people were unoffended, if not relaxed, by the abolition of the harsh laws.

A more concrete example of the changed traditional culture may be seen in Taiwan, one of the Four Mini-Dragons in Asia. It is well-known that the Taiwanese economy has developed rapidly for years.<sup>307</sup> In Taiwan, the current legal system and its managerial methods of economy have been introduced primarily from the West. Traditions such as scorning commercial profit while insisting on Confucian morality must have been changed generally. As a matter of fact,

[T]he rapidity with which the society was changing imparted a great flexibility even to unenacted, unwritten custom. Custom, to be valid and binding, certainly did not need to be immemorial. On the contrary, ten or twenty years usage was regarded as a "long custom," and forty years made it "age-old."<sup>308</sup>

The traditions referred to throughout this article were needed by bureaucratized and centralized monarchy based upon the self-sufficient agricultural economy. A similar ideology is currently needed by the more bureaucratized and centralized socialist regime based upon state-planned economy. Such traditions and ideologies oppose people's capitalistic desires. A nation's modernization requires rational institutions like patent law, and patent law requires the unchaining of economic impulses. Hence, in the light of patent law, such traditions and ideology are irrational. Without abandoning the irrational ideology, or rather, without changing the political and economical structure of the socialist regime, the PRC's Patent Law is doomed to remain insignificant.

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<sup>306</sup> Bao, *supra* note 203, at 57.

<sup>307</sup> DONG, *supra* note 98, at 33.

<sup>308</sup> LLOYD, *supra* note 163, at 244.