Having laid the impressive groundwork, the authors might next consider exploring the repertoire of legal ideas that can articulate, protect and extend these historically strong socio-legal local institutions.

Response to Comments on Our Paper

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doi:10.1017/S002191180900014X

First, we want to thank the past and current editors of the *Journal of Asian Studies*, Kenneth M. George and Jeffrey Wasserstrom, for creating this symposium and for recruiting the commentators. We regret that space does not permit us to respond to each in turn and to address all the stimulating issues that they raise. Rather, we try to focus on points and themes that appear in more than one of the comments or with which we have fundamental differences. This approach unavoidably entails engaging more with some commentators than others.

How best to do comparative history is a question that appears one way or another in all of the responses. We are delighted to have elicited this reaction because the aim of John Richards, Bin Wong, and Ken Pomeranz, who organized the "Chindia" conference at which the earliest iteration of this paper was presented, was precisely to stimulate comparative discussions. Participants were paired—one China person, one India person—to "tell the stories" of nineteenth-and twentieth-century China and India around themes ranging from standard of living, to frontiers, to visual culture, to, in our case, the rule of law.

Thus, our aim in this paper was not to define the rule of law. As Randall Peerenboom observes, there is a veritable academic industry engaged in this task. Nor was our aim to argue that Qing China or British India met one or another of the various standards that have been proposed. Rather, we sought to see what sorts of comparative findings we could generate when we looked at the story of Qing China and British India through the frame of the rule of law, or more specifically, through the universal tension and fundamental paradox of the rule of law and the rule of man. While recognizing that our categories are culturally grounded and that law is in many ways "local knowledge not placeless principle,"[1] we intentionally chose for the purposes of this paper not to engage in Clifford Geertz's comparative approach of "cultural translation." Instead, we posited a comparative measure that would transcend specifics and provide a common ground for comparison. Rather than search for a definition of reified "characteristics," we have seen the "rule of law" as shorthand for understanding how India and China have dealt with one of the most basic tensions of rule.

[1]Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 218.

https://doi.org/10.1017/S002191180900014X Published online by Cambridge University Press

Of course, two of the commentators (Prasenjit Duara and Randall Peerenboom) take issue with our attempting to apply the rule of law to the case of Qing China, even within this loose framework, and Peerenboom is a bit suspicious of the term in the Indian case as well. It is a truism that what falls within and what falls outside a comparative frame will depend on the definitions one deploys. One could, no doubt, as many commentators have, define the "rule of law" in ways that would ground it fully in a Euro-American cultural context. We have chosen not to do so.

At the heart of our approach is an analysis of how the paradoxical relationship between the concepts of the "rule of law" and the "rule of man" defined the law's historical trajectory. Duara accepts that law was "practically important" in the Qing but argues that "rule by man" was "theoretically privileged over 'rule by law'" and that "law was not sovereign. It was a convenient way to govern." "To insist" that the social institutions that sustained customary law "depended on a 'rule of law' is," he concludes, "to drag us into a new Orientalism." First, we want to reiterate that our argument is about the inextricably linked relationship of the rule of man to the rule of law, not about one being privileged over the other. We see this relationship in both the fictional portrayals and administrative disciplining of "clear sky officials." Both kinds of materials offer ample evidence that "gentlemen" (*junzi*) indeed sometimes ignored the law and justified their "exceptions" in terms of their moral superiority. However, if their "rule of man" produced legal mistakes and injustice, they were punished for their "exceptions." Again, the point is that for the Qing, law was a marker of a civilized people. Law was far more than a convenient way to govern; it was a necessity. Without law, sovereignty was illegitimate.

Our comparative approach has, of course, led us to examine broad swaths of time and place rather than construct comparative histories based on multiple temporally and spatially micro-level case studies. Our choice of this macro-level approach should in no way be taken to mean that we do not welcome other approaches. Every "slice of life" tells us something different, just as does every close contextually based study of individual thinkers, whether Burke, Maine, or Wang Fuzhi. As Lauren Benton argues, her own work and that of historians such as P. J. Marshall and Robert Travers have shown the ways that constructions of sovereignty and of the meanings of the "rule of law" in British India were always historical works in progress, which changed over time. The same could, of course, be said about China. We acknowledged this in the article, and it is undoubtedly another conundrum of broad comparative approaches that we risk playing down conflicting strands within societies in the name of defining frameworks for broad cross-cultural comparison.

But, in fact, Benton's focus here reflects on a larger point. Her concern is that our efforts to abstract the "rule of law" as a concept from these specificities tends to lead toward an analytical framework in which law is seen primarily as an ideology existing *prior to* legal institutions and legal practice, rather than as a contingent product of the historically embedded interaction between ideas and

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institutions. Our approach, she suggests, risks undercutting a view of law as developing at the "intersection of discourse and practice."

On one level, it is hard to disagree with Benton's perspective. To see the history of legal institutions or varying legal practices as irrelevant to the larger history of the "rule of law" as a concept, or as properly assigned only to an "instrumental" realm, would clearly be a mistake. Whether in the discussion of the changing roles of different classes of legal specialists, or of state record collection, or of contracts and property disputes,[2] or of the differential reasons that Indians and Chinese may have had recourse to the courts, we tried to indicate the undoubted importance of both discourse and practice to the differing ways the "rule of law" developed in India and China. In fact, our critique of "instrumentalism" was in no way intended to downplay the importance of an analysis of legal institutions and legal practices, but rather to critique a certain approach to the "rule of law" that has emphasized the importance of legal institutions in "governance," as if their histories and development could be separated from larger issues of sovereignty. We suspect we differ very little from Benton in this.

But her critique points to a larger issue, with respect to which our differences may be much more fundamental. Central to our argument is that the comparative study of the "rule of law" can proceed only if we recognize that, whatever the importance of legal practice and institutions in shaping legal systems (and in shaping contesting ideas about the law), the "rule of law" as a critical adjunct of sovereignty was profoundly constituted by the widely held *conception* that the law's power derived precisely from the fact that it stood outside the realms of worldly politics and institutional interactions that Benton emphasizes. This is the context for Paul Kahn's argument, in our opening quotation, that the law existed as a "product of the imagination" *before* it was a "product of legislation or judicial acts." At some level, the law's moral power, whether in India or China, rested on the fact that it was widely perceived as *morally and conceptually prior* to the contemporary working of legal institutions. This precedence lay at the heart of the relationship between law, legitimacy and justice. The *law*, as a source of legitimate authority, stood apart from the immediate and self-interested power relationships that constituted contemporary politics, as it was rooted in the founding myths of imperial rule.

[2]With respect to China, we should note here our disagreement with Prasenjit Duara's view, based on David Faure's work, that contracts played a limited role prior to the 1904 Company Law in raising and organizing capital. Madeleine Zelin's recent work on Zigong salt merchants shows that prior to this law and modern banking, large-scale industrial investment and development occurred; see *The Merchants of Zigong: Industrial Entrepreneurship in Early Modern China* (New York: Columbia University Press, 2005). With respect to contracts more generally, we were a bit surprised that none of the commentators responded to our tentative hypothesis that the somewhat different contract cultures China and India may have had in the period we have discussed are perhaps critical in understanding the working of the rule of law in the two regions.

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To emphasize this perspective, which is critical to our comparative frame, is in no way to deny the myriad ways that the operation and meanings of the law were negotiated in the specific and varied contexts that defined particular structures of power in imperial India and China. How could it have been otherwise? Without a focus on this issue, one could not begin, of course, to understand how the law *worked.* But without a concomitant emphasis on the "rule of law" as a concept, we would argue, an effective comparative approach to the "rule of law" is impossible. Indeed, as Benton points out, it is critical to our analytical use of the terms "state" and "society" that we see the imaginative meanings of these terms paralleling the paradoxical relationship between the concepts "rule of law" and the "rule of man" (and thus as intimately bound up with the structuring conceptions of the law). Often conceptually constituted as opposites, the "rule of law" and the "rule of man" are impossible to analyze except as deeply dependent on each other and paradoxically intertwined. Looking at tensions surrounding the "rule of law" is thus a key in our argument to seeing how "state" and "society" were imagined. As Peerenboom rightly points out, we assume the tension between "rule of law" and "rule of man" to have universal resonance, and thus to provide a critical frame for comparative analysis, even as it takes distinctive particular forms.

To underscore these points, it is worth turning briefly to the arguments surrounding the important work of E. P. Thompson that have been raised in several of the comments. Our reading of Thompson is much closer to that suggested by Vivienne Shue than by Benton. Thompson does, indeed, stress the importance of "lived experience" in shaping popular perceptions of both class and justice. But he also emphasizes the critical importance of popular visions of legitimacy (and justice) as residing in a realm standing outside the everyday experience of class politics and elite power. This point is nowhere clearer than in his discussion of a powerful "moral economy" shaping resistance to the new forms of political economy remaking class relations in late eighteenth-century England.[3] However important a close analysis of everyday social and economic relations is to Thompson's analysis (which it undoubtedly is), it is not simply a logic of "occasional just outcomes" that defines popular, imaginative engagement with the law, but the association of the law, as Shue notes, with "'the rhetoric and the rules' of a single society," with a vision of moral community, rooted in the laws of an earlier era, whose legitimacy, and whose evocation of reciprocity, transcend in popular imagination the immediacy of contemporary politics and class relations.

It is because we see the rule of law as closely bound up with state power and legitimacy that we have used the rule of law as a lens to speculate comparatively on the structure of twentieth-century politics in India and China. Here we have

[3]E. P. Thompson, "The Moral Economy of the English Crowd in the 18th Century," *Past and Present* 50, no. 1 (1971): 76–136.

https://doi.org/10.1017/S002191180900014X Published online by Cambridge University Press

relied heavily on Paul Kahn's insight that the rule of law as a legitimizer of power is tied closely to the ways that the people take the law "as their own." At the same time, we would slightly modify the terms in which Kahn suggests a comparison along the axes of justice and legitimacy: "in China, legitimacy absorbed justice; in India, justice absorbed legitimacy." Though suggestive, such a formulation cannot fully capture the distinctions we have stressed unless it also underscores the sharp contrast between a system in China that largely fused concepts of substantive and procedural justice and a system in India that radically separated them.

In the Indian case, as we have argued, the British relied heavily on adherence to procedural justice—an adherence shaped by their own sense of superior moral restraint and rationality—to legitimize their own rule. Unlike in China, this was a universalizing vision of legitimate moral order that transcended, as Kahn rightly notes, any notion of a particular people as a touchstone for legitimacy (however much it may have been undergirded by racist notions). But if we were to say, for India, that "justice subsumed legitimacy," we would have to add that this was true only to the extent that a British vision of *procedural* justice subsumed the legitimacy carried by the *substantive* law of India's various communities. In fact, we argue that the linking of the rule of law to an overarching concept of the "people" in modern India was, at least in part, an outcome of the ways the nationalist movement, and particularly Gandhi, drew on this structure.

Here it is worth restating our argument with respect to Gandhi, of which Duara is somewhat skeptical. Duara suggests, no doubt correctly, that for Gandhi "morality and spirituality is the source of the 'truth force' [*satyagraha*] over the violence of law." But the important point for us is that *satyagraha* was explicitly mobilized by Gandhi within the framework of the colonial structure of law. Our argument is that Gandhi built his campaigns of *satyagraha* on a morality of self restraint that paralleled the structural notion of procedural transcendence and restraint that defined the rhetorical claims of the British to legitimate state authority under the rule of law. The nonviolent *satyagrahi* was, after all, supposed to submit, in a spectacle of self-discipline, to the law's *procedures* (accepting the verdict of courts and going to prison), even as he (or she) repudiated the immorality of the law's *substance* and violence, which had been used to support a repressive colonialism.[4] It was through the moral structuring of the individual, and perhaps, of a national self, paralleling the structure of the law—and one steeped in a language of Indian moral tradition—that Gandhi thus made the structure of the "rule of law" India's own.

[4]The law's immoral substance, in this context, lay primarily in the many forms of colonial security legislation that the state relied on in these years. But this structure also reflected back, though perhaps more ambiguously, on the substance of Hindu and Muslim law as enforced in the colonial courts, which were, in this context, particularized and thus to some extent divorced from transcendent morality.

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This is, of course, not to argue that Gandhi's thinking in any way subsumed all the complex resonances and contradictions of the colonial "rule of law" as it shaped the nationalist movement—or the politics of independent India. In fact, we also stress the importance of the structure of India's property law in this process. Here, Duara does not get our argument quite right when he says that the British rule of law made the group rather than the individual the "chief rights-bearing entity" within the colonial legal order. Our argument is rather that colonial legal procedure *did* take the individual as the primary "rights-bearing entity." But individuals came into court marked by identities associated with the communities whose substantive law the courts attempted to apply. Here, once again, we have a model in which the complex separation of procedure and substance—not only in the law, but in the construction of the individual as simultaneously an autonomous bearer of rights and as a predetermined product of substantive cultural difference—shaped significantly the structure of Indian politics.

In China, the relationship of law to politics in the twentieth century was quite different, in large part because, in the Qing, the relationship between procedure and substance had been morally fused. This lack of separation between procedure and substance is one reason why some see difficulty in bringing Qing China within the comparative framework of the "rule of law." However, as we emphasized earlier, our touchstone for the "rule of law" is the existence of a moral source of law outside the structure of social relations and political power. In China, this was the Mandate of Heaven. Heaven was as concerned with substantive results as it was with proper procedure. As much as substantive justice was thus inevitably dependent on the "rule of men," and on the power and interests of the emperor as the ruler, there was always an independent court of moral appeal (or moral standard) that lay in the legitimacy accorded to heaven's mandate. Significantly, this was an idea that was deeply ingrained in popular consciousness as well as in the literati and the emperor, for whom it served as a kind of internal moral governor regulating the pull of political interest implicit in the "rule of man." It is in this sense that we can interpret Kahn's comment that in China "legitimacy absorbed justice."

But we would also stress, in reply to both Kahn and Duara, that the *contrast* between this situation and that under twentieth-century party rule is critical to delineating the trajectory of ideas on the rule of law in China. Despite complex arguments in the Republican period on the nature of law and sovereignty, the law became increasingly an instrument of party policy in the twentieth century, and the notion that law derived from a source outside politics largely disappeared. For the Communists, legitimacy came from implementing a theory of class relations in which law belonged not to all but to only one class (the "people"), which could wield law as its weapon. To claim, as the Communists did, to stand on the side of history, did not provide an autonomous source of legitimacy standing outside the substance of law and politics, for the theory of class relations that drove policy was immanent in political conflict. Thus, contrary

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to Kahn and Duara, we do not find significant continuity in the concepts of legitimacy on which the Qing and Chinese Communist Party (CCP) grounded their authority. Nor do we see that that for the CCP, as for the Qing, "legitimacy absorbed justice," that is, legitimacy conceptually preceded justice. Rather, we argue, doing justice, or, more precisely, undoing the historical injustices of old, interlinked class and property relations, preceded—indeed generated—the party's legitimacy, especially among the hundreds of millions of peasants. Some sixty years later, the problem for the party in post-Mao, reform China is whether now that class struggle is officially over, performance (in the sense of sustained economic growth) and nationalism (the dyad that Peerenboom sees as the bases for the party's legitimacy) will suffice or whether, even as the content of the law "becomes more just" (Kahn's debatable description), it will have to subject itself not only to "formal, legal, especially institutional, restraints" (Peerenboom) but also to ideological ones that stand outside, indeed, above the party.

In closing, we want to thank the commentators for their stimulating critiques. Doing comparative history (and jointly authored papers) is always built on endless argument among ourselves. Certainly, much remains to be said; we look forward to reading continuing debates in future issues of this journal.

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